No.

In the Supreme Court of the United States

OMAN FASTENERS, LLC,
Petitioner,
v.
UNITED STATES, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 232 of the Trade Expansion Act of 1962 delegates Congress's constitutional power to set duties on foreign imports into the United States (or to otherwise limit them) when the Secretary of Commerce finds and the President agrees that imports "threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii), (d). The President must "determine the nature and duration of the action" that he will take "[w]ithin 90 days after receiving" a "report" from the Secretary of Commerce's "investigation." 19 U.S.C. § 1862(b), (c)(1)(A).

In 2018, President Trump invoked the Act to impose tariffs on imports of steel mill products—items like rods, tubes, and ingots of steel. More than two years later, he imposed new tariffs on certain products derived from steel (*e.g.*, nails and automotive parts) without any new investigation or report by the Secretary. The Federal Circuit upheld the derivative-product tariff by deferring to the President's interpretation of Section 232's procedural requirements.

The question presented is: Must a federal court defer to the President's interpretation of the Trade Expansion Act's procedural requirements for imposing tariffs unless the President's actions were clearly or explicitly unlawful?

PARTIES TO THE PROCEEDING

Petitioner Oman Fasteners, LLC was the plaintiff in the Court of International Trade and the appellee in the court of appeals.

Respondents the United States; Joseph R. Biden, Jr., President of the United States; United States Customs and Border Protection; Christopher Magnus, Commissioner of U.S. Customs and Border Protection; the United States Department of Commerce; and Gina M. Raimondo, Secretary of Commerce, were the defendants in the Court of International Trade and the appellants in the court of appeals.

Respondents PrimeSource Building Products, Inc., Huttig Building Products, Inc., and Huttig, Inc. were plaintiffs in a separate proceeding in the Court of International Trade and appellees in the consolidated action in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Oman Fasteners, LLC is an Omani manufacturer and U.S. importer of steel nails. Guerrero International LLC is petitioner's parent company, and no other publicly held company owns 10% or more interest.

RELATED PROCEEDINGS

Court of International Trade:

Oman Fasteners, LLC v. *United States*, No. 20-00037 (June 10, 2021)

United States Court of Appeals (Fed. Cir.):

PrimeSource Bldg. Prods., Inc. v. *United States*, Nos. 2021-2066 and 2021-2252 (Feb. 7, 2023), *reh'g denied* (June 22, 2023)

Supreme Court of the United States:

PrimeSource Building Products, Inc. v. *United States*, No. 23-69 (July 25, 2023) (pending petition for writ of certiorari)[1]

[1] PrimeSource's petition for a writ of certiorari is not "directly related" to this proceeding under this Court's Rule 14.1(b)(iii) because it did not "arise[ ] from the same trial court case as" Oman Fasteners' petition. But Oman Fasteners lists PrimeSource's proceeding before this Court—a proceeding in which Oman Fasteners is a respondent in support of petitioner—out of an abundance of caution and for the convenience of the Court. The Federal Circuit consolidated PrimeSource's case with Oman Fasteners' case, and PrimeSource and Oman Fasteners have separately petitioned for a writ of certiorari in connection with the Federal Circuit's consolidated judgment.

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PETITION FOR A WRIT OF CERTIORARI

Oman Fasteners, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–16a) is reported at 59 F.4th 1255. The decision of the Court of International Trade (App., *infra*, 35a–52a) is reported at 520 F. Supp 3d. 1332. The trade court's decision staying its judgment pending appeal (App., *infra*, 17a–34a) is reported at 542 F. Supp. 3d 1399.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2023. A petition for rehearing was denied on June 22, 2023 (App., *infra*, 53a–55a). On September 8, 2023, the Chief Justice extended the time to file a petition for a writ of certiorari to and including October 20, 2023.

Oman Fasteners invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 877, provides in relevant part at 19 U.S.C. § 1862:

…

(b) Investigations by Secretary of Commerce to determine effects on national security of imports of articles; consultation with Secretary of Defense and other officials; hearings; assessment of defense requirements; report to President; publication in Federal Register; promulgation of regulations

(1)(A) Upon request … the Secretary of Commerce … shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request … .

…

(3)(A) By no later than the date that is 270 days after the date on which an investigation is initiated …, the Secretary shall submit to the President a report on the findings of such investigation with respect to the effect of the importation of such article … .

…

(c) Adjustment of imports; determination by President; report to Congress; additional actions; publication in Federal Register

(1) (A) Within 90 days after receiving a report submitted under subsection (b)(3)(A), … the President shall—

(i) determine whether the President concurs with the finding of the Secretary, and

> **(ii)** if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.
>
> **(B)** If the President determines under subparagraph (A) to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).
>
> * * *

The full statutory provision is included in Appendix E to this petition. *See* App., *infra*, 56a–62a.

INTRODUCTION

When President Trump issued Proclamation 9980 imposing tariffs on the import of certain products derived from steel, he did not follow the plainly worded procedural requirements that Congress set out for issuing such tariffs. But the Federal Circuit nevertheless upheld Proclamation 9980 by applying a judicially created rule of deference to the President's interpretation of his own procedural obligations in the Trade Expansion Act. According to the Federal Circuit, a court must defer to the President's view of the tariff process unless he "clear[ly] misconstru[ed]" the statute or "violate[d] an explicit statutory mandate." App., *infra*, 10a–11a (citation omitted).

The Federal Circuit's extreme deference doctrine contradicts the statutory text and does violence to the separation of powers. The Constitution vests *Congress* with the authority to regulate foreign commerce, and Congress has delegated some of that responsibility to the President according to precise procedural constraints. Proclamation 9980 did not comply with those constraints, as the Court of International Trade found. But without further review from this Court, the Federal Circuit's deference doctrine will embolden future Presidents to flout Congress's conditions. The Federal Circuit's deference doctrine would also convert an already broad delegation of authority to set tariffs "in [the President's] judgment," 19 U.S.C. § 1862(c)(1)(A)(ii), into a virtually limitless delegation to impose whatever tariffs the President wants at any time.

This Court should grant the petition for a writ of certiorari and make clear that courts review the President's compliance with the Trade Expansion Act's requirements by applying traditional tools of statutory interpretation—not a special rule of deference to the very person whom those requirements bind.

STATEMENT

A. Statutory background

The Constitution vests in "The Congress" the power "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, § 8. Exercising that power, Congress enacted Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232"). Congress in Section 232 delegated to the President the power to "adjust the imports of [an] article and its derivatives" "in [his] judgment." 19 U.S.C. § 1862(c)(1)(A)(ii).

The President's authority to set tariffs in his judgment is substantively broad, but Congress imposed two important procedural restrictions. First, the President cannot act until after the Secretary of Commerce investigates a particular import article and makes specific findings. Section 232 provides that, in response to a request or on "his own motion," the Secretary must conduct an investigation "to determine the effects on the national security of imports of the article which is the subject of such request … or motion." 19 U.S.C. § 1862(b)(1)(A). (The statute defines national security broadly to include "the economic welfare of the Nation" and "individual domestic industries." 19 U.S.C. § 1862(d).) "[N]o later than" 270 days after that investigation "is initiated," the Secretary must send to the President a "report on the [investigation's] findings," including whether the investigated article "is being imported … in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(b)(3)(A). The Secretary must also provide "recommendations … for action or inaction." *Ibid.*

Second, Congress added in 1988 the requirement that the President must act within a specified time frame. "Within 90 days after receiving" a report in which the "Secretary finds … [a] threat[] to … the national secu-

rity," the "the President shall determine . . . whether [he] concurs with the finding of the Secretary" and "the nature and duration of the action that . . . must be taken" to resolve the threat. 19 U.S.C. § 1862(c)(1)(A)(ii). If the President determines that action must be taken to adjust imports of the investigated article, then "the President shall implement that action by no later than … 15 days after" deciding to act. 19 U.S.C. § 1862(c)(1)(B).

Congress's investigation requirement establishes when, how, and under what circumstances the President may begin to exercise his delegated tariff authority. And the timing requirement establishes when the President's authority to act ends. Together, these procedural safeguards ensure that the President acts swiftly and that tariffs address a genuine national-security threat based on well-sourced and recent information.

B. The present controversy

1. In April 2017, the Secretary began investigating the effects of imported steel on national security. *See* U.S. Dep't of Commerce, *Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19,205 (Apr. 26, 2017). As required by statute, that investigation resulted in a report to President Trump in January 2018. *See* U.S. Dep't of Commerce, *The Effect of Imports of Steel on the National Security*, 85 Fed. Reg. 40,202 (Jan. 11, 2018) ("Steel Report"). In that report, the Secretary explained that his investigation had covered "steel mill products"—primarily steel articles produced in a steel mill—in "five categories": "flat, long, semi-finished, pipe and tube, and stainless" steel. *Id.* at 40,202–40,204, 40,209. Based on his investigation, the Secretary found that importing primary steel articles from those five categories in "the present quantities and circum-

stances … 'weaken[ed] our internal economy' and threaten[ed] to impair the national security." *Id.* at 40,204. So the Secretary recommended that the President adjust "the level of these imports through quotas or tariffs." *Id.* at 40,204–40,205. The investigation did not analyze whether the import of secondary or "derivative" products made from the primary steel articles would have any adverse effect on the national economy, and the report did not mention any derivative products.

In response to the Secretary's Steel Report, President Trump issued Proclamation 9705 within the 90 days required by Section 232. Presidential Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Mar. 8, 2018). The President "concur[red] in the Secretary's finding" and imposed a 25% tariff on imports of "steel articles" from all countries except Canada and Mexico. *Id.* at 11,625–11,626. That tariff would take effect in 15 days, *id.* at 11,627–11,628, consistent with Section 232's requirement. The "steel articles" covered by Proclamation 9705 were the same five categories of primary steel articles referred to as "steel mill products" in the Secretary's Steel Report. *Id.* at 11,627, 11,689. Like the Steel Report, Proclamation 9705 did not mention any derivative steel products.

2. On January 24, 2020, more than two years after the Secretary had issued his report and twenty-one months after Proclamation 9705, the President issued Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, 85 Fed. Reg. 5,281 (Jan. 24, 2020). Proclamation 9980 introduced a new 25% tariff on imports of *derivative* steel products, specifically "nails, tacks (other than thumb tacks), drawing pins, corrugated nails, [most] staples … and similar articles"; automotive "bumper stampings of

steel"; and agricultural tractor "body stampings of steel." *Id.* at 5,291. The President did not claim that the Secretary had investigated the effect on the national economy of importing any of those derivative articles. He did not attempt to assert (implausibly) that the national market for slate and stainless steel rods, tubes, and ingots from steel mills is the same as the market for products made from steel like nails, staples, and automotive parts. And the President did not claim to rely on a new statutory investigation or report from the Secretary. The President instead simply invoked the Secretary's 2018 "investigation into the effect of imports of steel articles." *Id.* at 5,281–5,282.

The President tried to connect Proclamation 9980 to the Secretary's 2018 Steel Report by referencing informal discussions. He stated that "the Secretary ha[d] informed [him] that imports of … certain derivatives of steel articles ha[d] significantly increased since the imposition of the tariffs and quotas" to "circumvent the duties" on primary steel articles, and that "the increase of imports of these derivatives" had "erode[d] the customer base for U.S. producers of … steel." 85 Fed. Reg. at 5,282. The President did not explain the Secretary's basis for this conclusion, and he did not claim that the Secretary's analysis had been published as required by 19 U.S.C. § 1862(b)(3). But the President nevertheless maintained that his authority to regulate derivative steel products under "section 232" came from the Secretary's 2018 Steel Report. *Id.* at 5,281-5,283; *see also id.* at 5,282 ("As detailed in the Secretary's report[] … .").

3. Oman Fasteners imports steel nails (among other products) to the United States. Oman Fasteners and other importers of the derivative steel products challenged Proclamation 9980 in the Court of International

Trade in separate cases. Oman Fasteners argued that Proclamation 9980 exceeded the President's delegated authority under Section 232 because he had issued the proclamation for the derivative products more than 90 days after the Secretary's 2018 Steel Report on the steel articles. Oman Fasteners argued in the alternative that, if Section 232 were interpreted broadly enough to permit Proclamation 9980, then it is an unconstitutional delegation of constitutional legislative authority without a meaningful limit. *See* App., *infra*, 39a.

After Oman Fasteners sued, the trade court held in another case involving a different presidential proclamation that the President must adhere to the time limits in Section 232 if he wishes to impose tariffs. *See Transpacific Steel LLC* v. *United States*, 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019). In that case, Transpacific Steel challenged Presidential Proclamation 9772, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 40,429 (Aug. 10, 2018), which was issued seven months after the Secretary's 2018 Steel Report and which increased Proclamation 9705's 25% tariff on primary steel articles to 50% if those primary articles were imported "from the Republic of Turkey." *Transpacific*, 415 F. Supp. 3d at 1269. The trade court invalidated Proclamation 9772 because it was issued beyond Section 232's 90-day deadline for presidential action. *Id.* at 1275–1276.

The trade court thereafter relied on similar reasoning to conclude that "the untimeliness of Proclamation 9980"—the proclamation affecting Oman Fasteners and others that import steel-derivative products—made that Proclamation "invalid as contrary to law." *PrimeSource Bldg. Prods., Inc.* v. *United States*, 505 F. Supp. 3d 1352, 1357 (Ct. Int'l Trade 2021), *rev'd and remanded*, 59 F.4th 1255 (Fed. Cir. 2023). In light of the trade court's rulings

in *Transpacific* and *PrimeSource*, Oman Fasteners moved for summary judgment on its claims challenging Proclamation 9980 as contrary to the statutory text. *See* App., *infra*, 39a, 43a–44a. The court granted that motion, *id.* at 36a–52a, holding that Proclamation 9980 violated the statute because the President had failed to honor the requirements, including the specific deadlines, of Section 232. *Id.* at 46a–47a.

4. The United States appealed all three losses to the court of appeals.

a. The Federal Circuit reviewed *Transpacific* first, and a divided panel reversed the trade court's conclusion that the President's failure to adhere to the timing requirement of Section 232 doomed his subsequent expansion of the tariffs on steel products in Proclamation 9772. *Transpacific Steel LLC* v. *United States*, 4 F.4th 1306, 1310 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 1414 (2022).

The *Transpacific* majority upheld Proclamation 9772 by reading "action" in Section 232 to include a "plan of action" or "course of action" that, the court said, need only be "announce[d] … within the statutory time periods." 4 F.4th at 1316, 1318–1319, 1321–1322. Reading the statute that way, the majority held that Proclamation 9772 was not untimely because it was part of "a continuing course of action [initiated by Proclamation 9705] within the statutory time period." *Id.* at 1318–1319.

The *Transpacific* majority recognized that it was severely undermining Section 232's clear textual timing constraints, and the court also recognized that *some* limits on presidential action were necessary. So the majority held that subsequent presidential action could be unlawful (1) if a court determines that the President's action "makes no sense except on premises that depart from the Secretary's finding"; (2) if the subsequent action came so

late that "the finding is simply too stale to be a basis for" that action; or (3) "for other reasons." 4 F.4th at 1323. The majority did not explain what a President would have to do for his late actions to "make no sense," how late the action would have to be for the findings to become "too stale," or what "other reasons" would justify striking down presidential action when departing from the statute's plain language. The panel also claimed that *Transpacific* would not control challenges involving any "other issues about presidential authority to adjust initially taken actions without securing a new report with a new threat finding from the Secretary." *Id.* at 1310.

b. The Federal Circuit thereafter consolidated the remaining two appeals—the ones involving Proclamation 9980's tariffs on steel-*derivative* products—under the heading *PrimeSource Building Products, Inc.* v. *United States*, Nos. 2021-2066 and 2021-2252. The Federal Circuit again reversed the trade court and upheld Proclamation 9980, this time relying on a judicially created rule of deference to the President's interpretation of Section 232's procedural requirements that the court had first announced in *Maple Leaf Fish Co.* v. *United States*, 762 F.2d 86 (Fed. Cir. 1985). *See* App., *infra*, 1a–16a.

According to the Federal Circuit, judicial review of a President's "asserted statutory violation" in making international-trade policy is "available, but … limited." App., *infra*, 10a. The Federal Circuit held that courts must defer to presidential action unless there is "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Ibid.* (quoting *Maple Leaf Fish*, 762 F.2d at 89). In other words, the President must "clearly misconstrue[] his statutory authority" or "violate[] an explicit statutory mandate" before the Federal Circuit will invalidate his

action for failure to comply with the Trade Expansion Act. *Id.* at 11a (quoting *USP Holdings, Inc.* v. *United States*, 36 F.4th 1359, 1365–1366 & n.3 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 1056 (2023)).

Applying that deference doctrine here, the Federal Circuit upheld Proclamation 9980's tariffs on derivative steel products, reasoning that the proclamation had been issued "in pursuit of the same goal first articulated in Proclamation 9705" when President Trump imposed tariffs on steel articles. App., *infra*, 14a–15a. The court of appeals rejected Oman Fasteners' argument that the Secretary's two-year-old finding was too stale to be the basis for Proclamation 9980. *Ibid.* Indeed, the court refused to give *any* meaningful consideration to the multiple years that had passed between the Secretary's 2018 Steel Report and the new presidential action. Instead, the court asked whether the Secretary's finding "ha[d] become *substantively* stale." App., *infra*, 14a (emphasis added). The Federal Circuit answered no, because, in its view, the only constraint on the President's power to issue Proclamation 9980 was whether that proclamation "was issued in pursuit of the same goal first articulated in Proclamation 9705," which was issued within the statutory timeframe. App., *infra*, 6a, 14a–15a.

c. The Federal Circuit denied rehearing en banc in June 2023. App., *infra*, 53a–55a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's rule of extreme deference to the President's interpretation of the procedural requirements that constrain *him* threatens to destroy the careful balance of authority that Congress designed for making international-trade policy. Overturning that rule and instructing the lower courts to evaluate Section 232 by applying the usual tools of statutory interpretation is

exceptionally important to preserving the separation of powers. And the issue cannot arise in any other court of appeals because the Federal Circuit has exclusive jurisdiction over Section 232.

The Federal Circuit's deference doctrine shields the President from Congress's mandates when exercising a constitutional responsibility that Congress delegated. Here, that shield has allowed the President to regulate the import of far-downstream commercial products merely because the President previously regulated the material that is the source of those products (steel). The Federal Circuit's deference rule would permit the President to impose those regulations without investigating the imports of those secondary articles or finding that their import would meaningfully affect the U.S. economy. And according to the Federal Circuit, the President may regulate no matter how long ago the Secretary of Commerce studied related articles.

The Federal Circuit's rule conflicts with the plain text of the statute, and it creates an unlawful delegation of legislative power with no meaningful limitations. This Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand with instructions to consider Oman Fasteners' Section 232 challenge without a thumb on the scale in favor of the President.

In the alternative, because the court of appeals' rule of deference to the Executive closely resembles deference to administrative agencies under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court should hold the petition for a writ of certiorari pending its forthcoming decisions in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451, and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219.

A. The Federal Circuit's decision is exceptionally important.

"The history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.). Congress delegated some of its constitutional power to regulate foreign commerce to the President, but it did so on the condition that he adhere to specific procedural requirements. Faithful adherence to those procedures is essential to ensure that the President's international-trade restrictions do not burden the Nation's economy rather than aid it. Yet the Federal Circuit's deference rule allows the Executive to flout those constraints, as the decision below powerfully illustrates.

1. The Federal Circuit applies an atextual deference rule that disregards Congress's procedural requirements for setting tariffs.

Instead of analyzing Section 232's terms according to the usual tools of statutory interpretation, the Federal Circuit applies an atextual rule of deference to the President's understanding of the procedural requirements that Congress imposed *on him*. The Federal Circuit's deference rule would enable the President to regulate the import of virtually any product at any future time.

a. According to the Federal Circuit, in "international trade controversies," *Maple Leaf Fish*, 762 F.2d at 89, review of a President's "statutory violation" is available but "very limited," *ibid.*; *see* App., *infra*, 10a. Courts must defer to presidential action unless there is "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." App., *infra*, 10a (quoting *Maple Leaf Fish*, 762 F.2d at 89). The President must "clearly misconstrue[] his statutory authority" or "violate[] an explicit statutory mandate" for

the Federal Circuit to require his compliance with duly enacted statutes. App., *infra*, 11a (quoting *USP Holdings*, 36 F.4th at 1365–1366 & n.3); *see also Maple Leaf Fish*, 762 F.2d at 90 (rejecting presidential action requires a "substantial showing of a misreading" the statute).

The Federal Circuit has acknowledged that this deference rule has no basis in statutory text or this Court's precedent. *See Maple Leaf Fish*, 762 F.2d at 89–90; App., *infra*, 10a–11a. So it is no answer for the government to assert, as it has in another case in this Court arising from the decision below, that "Congress *may* leave the exercise of the power" "affecting foreign relations" to the President's "unrestricted judgment," or that "Congress *may* invest the President with large discretion in matters arising out of the execution of statues relating to trade and commerce with other nations." Federal Respondents' Brief in Opposition 13, *PrimeSource* v. *United States*, No. 23-69 (Sept. 22, 2023) (quotation marks and citations omitted) (emphasis added). Congress has not conferred *procedural* discretion on the President in Section 232.

When it comes to legislative power, the Executive branch has only the authority that "Congress in fact meant to confer" on it. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2608 (2022); *see City of Arlington* v. *FCC*, 569 U.S. 290, 312, 317 (2013) (Roberts, C.J., dissenting) ("Courts defer" to the Executive Branch's "interpretation of law" only "when and because Congress has conferred" that "interpretive authority over the question at issue."). Congress did not confer any interpretive authority here. Rather, the Federal Circuit created this deference rule despite a lack of congressional authorization to the President to re-interpret his procedural obligations. For justification, the court pointed merely to generalized considerations like the fact that the legislation "involves the

President and his close relationship to foreign affairs, our nation's connections with other countries, and the external ramifications of international trade." *Maple Leaf Fish*, 762 F.2d at 89; *see* App., *infra*, 10a–11a (citing *Maple Leaf Fish*); *see also Transpacific*, 4 F.4th at 1319, 1323. Those general considerations do not suggest that Congress wanted the President to be free to ignore clear procedural directions.

b. The Federal Circuit applied its deference doctrine in the decision below to allow the President to ignore the procedural safeguards that Congress provided in in the statute's text. *See* Federal Respondents' Brief in Opposition 16, *PrimeSource*, No. 23-69 (acknowledging that the Federal Circuit applied *Maple Leaf Fish* deference here).

Section 232 requires an investigation and report for each action, requires that the action be taken by a specified deadline, and requires the President to subject each action to congressional oversight. Specifically, the President "shall," within 90 days of receiving the Secretary's report, determine whether to take action in response and the "nature and duration of the action." 19 U.S.C. § 1862(c)(1)(A)(ii). If the President decides to act, he "shall implement that action" within 15 days of determining that the action is warranted. *Id.* § 1862(c)(1)(B). The President "shall" also submit to Congress, within 30 days of determining whether to act, a written statement of the reasons for the chosen action or inaction. *Id.* § 1862(c)(2).

The President did not comply with those textual directives when he issued Proclamation 9980, as the Court of International Trade explained. He issued Proclamation 9980 *more than two years* after the report. *See* Proclamation 9980, 85 Fed. Reg. at 5,281. The Secretary never studied and published a report on the derivative articles that are the subject of Proclamation 9980. The record lacks

any indication that the President ever determined the "duration" of Proclamation 9980. And the President never "submit[ted] to the Congress" a written statement of his reasons for Proclamation 9980 within 30 days.

The Federal Circuit did not conclude that Proclamation 9980 is consistent with Section 232 by applying the usual tools of statutory interpretation to that provision. No such conclusion would have been possible, as the President unambiguously failed to comply with the statutory requirements for the reasons explained above. Instead, the Federal Circuit upheld the proclamation only by applying its rule of deference to the President and requiring Oman Fasteners to demonstrate the President's process was *clearly* deficient. App., *infra*, 10a–11a (citing *Maple Leaf Fish*).

c. The Federal Circuit's rule—which starts with deference to the President's international-trade judgments rather than the statutory text—is incompatible with the judiciary's "duty to police the boundary between the Legislature and the Executive." *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting). When interpreting a statute, a court's role is not "to *strain* statutory text to advance a particular value" but to "appl[y] the ordinary tools of statutory interpretation" to "give[] Congress's words their" "most natural" and "best reading." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2376–2377, 2384 (2023) (Barrett, J., concurring); *see also id.* at 2385 (Kagan, J., dissenting) (criticizing "read[ing] statutes unnaturally," which leads to "substitut[ing] [courts] for Congress"). A court should apply a rule of deference—if ever—only "after [it] has resorted to all the standard tools of interpretation." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2414 (2019); *id.* at 2448 (Kavanaugh, J., concurring) ("[i]f a reviewing court employs all of the traditional tools of construction, the court will

almost always reach a conclusion about the best interpretation" before resorting to deference). The Federal Circuit's rule, by contrast, "introduce[s] into judicial proceedings a systematic bias toward … the federal government." *Buffington* v. *McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting). That rule also "unit[es] powers the Constitution deliberately separated and den[ies] the people their right to an independent judicial determination of the law's meaning." *Kisor*, 139 S. Ct. at 2441 (Gorsuch, J., concurring).

Beyond the Federal Circuit's departure from the proper judicial role, the consequences of its deference rule are extraordinarily significant to the proper functioning of the Nation's international-trade policy. Because of that rule, and especially in combination with the Federal Circuit's refusal to enforce Section 232's timing requirements, the President can now take virtually any action at any time on any imported product so long as, at some point in the past, the Secretary investigated a loosely related product and the President acted on it. Each Presidential action under Section 232 becomes a new blank check available to every future administration.

At bottom, the Federal Circuit's atextual deference rule enables the President to exercise vast powers over foreign commerce in stark contrast to the more-limited power that Congress conferred. The President can now impose tariffs on or completely ban any article previously adjusted or any product made from those articles. It is even possible that the President could ban a completely different article as long as the action was "in pursuit of the same goal first articulated in" a prior action, App., *infra*, 14a–15a, all contrary to the statute's plain language.

2. The Federal Circuit's rule will govern nationwide without this Court's intervention.

The Federal Circuit has exclusive jurisdiction over appeals under the Trade Expansion Act, 28 U.S.C. §§ 1295(a)(5), 1581(i). So its rule of deference on these important issues will govern nationwide, and a circuit split is impossible. This Court has routinely granted certiorari in other cases where the Federal Circuit is charged with exclusive review. *See, e.g.*, *Kingdomware Techs., Inc.* v. *United States*, 576 U.S. 1034 (2015) (government contracts); *United States* v. *Haggar Apparel Co.*, 524 U.S. 981 (1998) (international trade); *United States* v. *U.S. Shoe Corp.*, 522 U.S. 944 (1997) (international trade).

What is more, further review in the Federal Circuit is futile. For nearly forty years, the Federal Circuit "has repeatedly relied on" its deference doctrine to limit "review of" statutory and other "non-constitutional challenges to presidential action." App., *infra*, 10a–11a. The issues raised here have come before the Federal Circuit twice in recent years. *Transpacific*, 4 F.4th 1306; App., *infra*, 1a–16a. Both times, the court issued published opinions ruling in favor of nearly unfettered Executive control over foreign commerce by applying its deference rule. *Transpacific*, 4 F.4th at 1319, 1323; App., *infra*, 10a–11a. And the court refused to reconsider either of those binding opinions en banc. *Transpacific Steel* v. *United States*, No. 20-2157, Doc. 76 (Sept. 24, 2021); App., *infra*, 53a–55a.

Unless this Court steps in, the Federal Circuit's deference rule will apply nationwide and enable any future President to regulate the import of virtually any product without seriously evaluating the need for those regulations or their effect on the national economy.

B. The Federal Circuit's decision is wrong.

The decision below is wrong for two principal reasons. First, the atextual deference rule that it applied contradicts the plain text of Section 232. The statute requires an investigation and report for each action, requires that the action be taken by a specified deadline, and requires the President to subject each action to congressional oversight. Proclamation 9980 met none of these requirements, but the Federal Circuit upheld it anyway. Second, the Federal Circuit's application of this deference rule produces an unconstitutional delegation of legislative power because it removes the only meaningful constraint on the President's action.

1. The Federal Circuit's deference rule contradicts the plain text of Section 232.

Section 232 sets out detailed timing and procedural prerequisites for the President's exercise of Congress's authority to adjust imports, repeatedly using the word "shall." But the Federal Circuit deployed its deference doctrine to delete those requirements, as explained above. *See* pp. 16–17, *supra*.

a. Despite the President's unambiguous failure to the ordinary meaning of Section 232's requirements, the Federal Circuit upheld Proclamation 9980. App., *infra*, 11a–13a. The court agreed that "shall" imposes a mandatory obligation on the President. *See id.* at 5a. But the court held that the President did not "clearly misconstrue his statutory authority" or "violate an explicit statutory mandate" because Section 232, purportedly "permits the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective." App., *infra*, 10a–13a.

Said differently, the court of appeals held that "the action" or "that action" in Section 232, means "a plan of action" that need only be "announce[d] … within the statutory time period." App., *infra*, 13a. (citation omitted). And despite the statute's mandate that the President determine the "duration" of the "action" (or even "[plan of] action" under the court's reading), the Federal Circuit determined that the statute "allows [for] adjustments of specific measures" to "carry[] out the plan over time." *Id.* at 11a–13a (citation omitted). Under the Federal Circuit's reading of Section 232, Proclamation 9705 was the announcement of the plan of action and Proclamation 9980 is simply an adjustment.

b. The Federal Circuit's deferential interpretation conflicts with the plain language of the statute in multiple ways.

First, "the action" and "that action" do not mean "series of actions" or "plan of action." This Court does not assume that Congress meant something that it did not say, especially "when Congress has shown elsewhere in the same statute that it knows how to" say it. *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489, 510 (2014) (citation omitted). Congress has shown that it is perfectly capable of authorizing presidential "actions" in the plural under Section 232. If, for example, the President decides to "negotiat[e] … an agreement" with foreign sovereigns in response to the Secretary's report, 19 U.S.C. § 1862(c)(3)(A), and either no agreement is reached or the agreement becomes "ineffective," then Congress authorized the President to "take such other *actions*" he "deems necessary" and to publish "notice of any additional *actions* being taken" in the Federal Register, *ibid.* (emphasis added). Congress authorized the President to take a single "action" when responding to the

Secretary's report. *Ibid.* But if negotiations with a foreign sovereign fall through or are fruitless, then Congress permitted the president to take "other *actions*" and "additional *actions*." *Ibid.* Congress knew how to authorize the President to take a series of actions and chose not to use that language for the President's initial "action" in response to the Secretary's report.

The government relies on a single definition from *Garner's Dictionary of Legal Usage* to defend the Federal Circuit's interpretation. It argues that "[*a*]*ction* suggests a process—the many discrete events that make up a bit of behavior—whereas *act* is unitary." Federal Respondents' Brief in Opposition 7, *PrimeSource*, No. 23-69 (quoting Bryan A. Garner, *Garner's Dictionary of Legal Usage* 18 (3d ed. 2011)). Therefore, the government concludes, Section 232 "empowers the President to perform a course of acts, not just a single act, to adjust imports." *Ibid.* But Garner limited that definition of "action" to "typical[]" usage: for example, when someone "spring[s] into action." Bryan A. Garner, *Garner's Modern English Usage* 17 (4th ed. 2016). That is not how Congress used "action" in Section 232. Congress authorized the President to adjust imports under Section 1862(c)(1)(A), and under that subsection, "action" is always modified by a definite article: "the" or "that." 19 U.S.C. § 1862(c)(1)(A); *see* 19 U.S.C. § 1862(c)(3)(A) ("the action taken by the President"). Subsequent references point the reader back to subsection (c)(1)(A) by modifying "action" with "under paragraph (1)," "under paragraph (1)(A)," or "under subparagraph (A)." 19 U.S.C. § 1862(c)(1)(B)–(3)(B). Congress clearly intended to authorize only a single, "unitary" action.

The Federal Circuit's interpretation of Section 232 also requires finding "elephants in mouseholes." *Sackett* v. *EPA*, 598 U.S. 651, 677 (2023) (citation omitted). Section

232 sets up a straightforward system by which the President may use congressional power to regulate imports. The Secretary investigates, makes findings, and reports those findings and his recommendations to the President. The President reviews those findings, decides whether he agrees, and takes remedial action "in his judgment." Along with this simple order of operations, Congress provided time limits at each stage: 270 days for the Secretary to investigate and report, 90 days for the President to review the Secretary's report and to decide whether to act, 15 days to implement that action, and 15 more days to explain to Congress. The Federal Circuit misreads and overreads a single, simple word—"action"—to complicate everything. *See* App., *infra*, 11a–13a. Congress did not intend to transform a linear and limited program into a launching pad for unlimited Presidential actions, extending infinitely into the future.

The consequences of the Federal Circuit's tortured reasoning were not lost it. By doing away with Congress's chosen constraints on its delegation, the court did such violence to the plain text of the statute that it felt the need to impose new, atextual limitations. *Transpacific*, 4 F.4th at 1323. A "staleness" inquiry appears nowhere in the statute. And why would it? If courts enforce the statute as written, the President's decision to act would never be based on a report that was more than 90-days old. 19 U.S.C. § 1862(c). The fact that it was necessary for the Federal Circuit to rewrite the statute rather than interpret its text is a sure sign that the court's analysis went seriously astray. *Cf. Jennings* v. *Rodriguez*, 138 S. Ct. 830, 836 (2018) (Courts "must *interpret* the statute, not rewrite it.").

Second, the Federal Circuit's deferential interpretation undermines Congress's requirement that the Presi-

dent keep it timely apprised of his action or inaction following the Secretary's reports. The statute says that the President "shall," within 30 days of determining whether to act, submit to Congress a written statement of the reasons for the chosen action or inaction. 19 U.S.C. § 1862(c)(2). Because the President must "implement" his chosen action within 15 days of deciding to act, 19 U.S.C. § 1862(c)(1)(B), Congress should hear from the President no later than 120 days after the Secretary's report or within 30 days of the 90-day deadline for presidential action. (Similarly, the statute requires the President to publish in the Federal Register "any additional actions" taken after negotiations failed. 19 U.S.C. § 1862(c)(3)(A).)

The Federal Circuit's interpretation of "the action" to mean an unlimited number of actions allows the President to evade congressional oversight. As the Federal Circuit sees it, the President was not required to tell Congress why he used his congressionally delegated powers in Proclamation 9980 to adjust *new* imports not contemplated by the Secretary's report two years after the fact. Nothing in the statute permits such an arrangement. Indeed, the only time Congress explicitly authorized the President to take new or additional actions outside the 90-day window—when negotiations with foreign sovereigns fail—it also specifically required public disclosure. 19 U.S.C. § 1862(c)(3)(A).

In short, applying the usual tools of statutory interpretation without the Federal Circuit's judge-made deference rule requires that Proclamation 9980 be set aside for failure to adhere to the essential procedural requirements established by Congress.

2. The Federal Circuit's rule of extreme deference produces an unconstitutional delegation of legislative power.

The decision below is wrong for the additional reason that it would remove all guardrails on the Executive's exercise of Congress's foreign commerce power.

Section 232 does not substantively limit the President's power to act. The substantive standard is "the judgment of the President." 19 U.S.C. § 1862(c)(1)(A)(ii). And such substantive delegations are "not subject to review." *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 380, (1940) ("It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.") The *only* constraints on the President's exercise of Congress's constitutional legislative power under Section 232 are procedural. He cannot regulate an import until the Secretary investigates and reports on it. 19 U.S.C. § 1862(b)–(c). Then the President must decide to act within 90 days and implement that action within 15 more days. 19 U.S.C. § 1862(c).

This Court previously rejected a non-delegation challenge to a predecessor Section 232 action because it found that the statute's procedural requirements sufficiently cabined Congress's delegation. *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976). The Court held that Section 232 lawfully delegated authority to the President to impose license fees on petroleum and petroleum-related imports because the statute "establishe[d] clear preconditions to Presidential action." *Ibid.* Specifically, the requirement that the Secretary find and the President agree that imports of "an article" threaten

national security. *Ibid.* (Congress had not yet enacted the 90- and 15-day deadlines. *See* App., *infra*, 16a.).

But the Federal Circuit has since read those preconditions out of the statute. Here, the Secretary did not find that imports of derivative products—those made from steel, like nails—threatened national security. 85 Fed. Reg. at 40,202-40,204. The Secretary did not investigate derivative steel products at all, and his report did not mention them. So the President never agreed that the derivative products regulated by Proclamation 9980 threatened national security. Yet the court upheld the President's action. The Federal Circuit's deference doctrine thus abrogated the precise procedural safeguard this Court relied on to uphold Section 232.

No meaningful procedural or substantive safeguards remain after the decision below. *See* App., *infra*, 10a–16a. The only purported limitation left is whether the new action is "in pursuit of the same goal first articulated" in the original action. App., *infra*, 14a-15a. *Transpacific* suggested that presidential action under Section 232 could violate the statute if it came so late after the report as to be "stale" or lacked a nexus with the Secretary's findings. 4 F.4th at 1323, 1332. But the decision below collapsed *Transpacific*'s two limitations into its "in pursuit of the same goal" inquiry. In the decision below, the Federal Circuit disregarded any examination of how much time had passed between the Secretary's report and the Presidential action and instead asked only whether Proclamation 9980 was issued "in pursuit of the same goal first articulated in Proclamation 9705." App., *infra*, 14a–15a.

Under this new standard, the President could—tomorrow—impose tariffs on or even ban crude oil and petroleum products from any country by simply pointing to the 1982 presidential proclamation and asserting that

the action is necessary "to eliminate the dependence of the Unites States on [the importing country] as a source of crude oil." *Imports of Petroleum*, 47 Fed. Reg. 10507 (Mar. 11, 1982).[2] Or a President elected 20 years from now could rely on Proclamation 9705 to impose tariffs on or ban imports of *any* product made with steel. Despite the statutory language, the Federal Circuit would allow the President to take these actions without a new investigation, a new report, or any explanation to Congress.

The President's ability to arbitrarily exhume ancient proclamations as a basis for new action creates the "looming problem of improper delegation" that *Algonquin* was concerned about. 426 U.S. at 560. It also trespasses on the constitutional principle that the use of legislative power to "impose current burdens" must "be justified by current needs." *Shelby County* v. *Holder*, 570 U.S. 529, 542 (2013) (quoting *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 203 (2009)). Without the time limits and a threat determination as to the article being regulated, there are no longer any "clear preconditions" to presidential action.

This Court has recognized that a lack of procedural safeguards can doom broad delegations of congressional power like Section 232. In *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), the Court held a delegation unconstitutional because it did not "set up a standard for the President's action" or "require[] any finding by the President in the exercise of the" delegated authority. *Id.* at 415. On the other hand, procedural requirements can save an otherwise overbroad delegation from unconstitutionality. In *Touby* v. *United States*, 500 U.S. 160 (1991), the statute at issue created a lawful delegation because the "procedural

[2] https://shorturl.at/copPT.

requirements" it imposed "meaningfully constrain[ed] the Attorney General's discretion to define criminal conduct." *Id.* at 166. Notably, those key procedural safeguards included a finding that action was "necessary to avoid an imminent hazard to the public safety," consideration of "three factors" to make that finding, publication of a "30-day notice of the proposed scheduling [of the substance] in the Federal Register," and giving notice to and consulting with the Secretary of Health and Human Services. *Id.* at 166–167. Those requirements closely track the procedural requirements—including the time limits—of Section 232.

The question presented by this case is not, as the government suggests, whether the Constitution "'compel[s] Congress to prescribe detailed rules,' beyond those set out in Section 232, to constrain the President's power to adjust imports." *Contra* Federal Respondents' Brief in Opposition 14, *PrimeSource*, No. 23-69 (quoting *Algonquin*, 426 U.S. at 560). There is no dispute that under current law the procedural safeguards Congress enacted in Section 232 are sufficient to lawfully cabin the legislative delegation to the President. But the Federal Circuit has effectively stricken those safeguards based on its deference doctrine. So the question is now whether the Federal Circuit's destruction of all meaningful procedural safeguards creates an unconstitutional delegation of legislative power under Section 232. It does. To remedy that violation, this Court need not "compel Congress" to set any "detailed rules," *contra ibid.*; it need only enforce the statute as written.

C. This case is an ideal vehicle for reviewing the question presented.

This case presents an excellent opportunity to decide whether the Federal Circuit's rule of deference to the

President's interpretation of his procedural obligations is consistent with the Trade Expansion Act. That issue is squarely presented and outcome determinative, as shown by the Court of International Trade's opinion in Oman Fasteners' favor.

Oman Fasteners properly preserved its arguments below that Proclamation 9980 conflicts with Section 232 and, if upheld, would result in an impermissible delegation. *See* Pet'r C.A. Br. 16–29 (making both statutory and non-delegation arguments). Oman Fasteners is also making its arguments that the Federal Circuit's deference doctrine should be overturned at the first reasonable opportunity. Petitioner had no reason to address the deference doctrine below because the Court of International Trade had ruled in Petitioner's favor, and the Federal Circuit panel lacked the authority to overrule *Maple Leaf Fish* and other binding precedent, *Schroeder* v. *West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000). So the question presented is adequately preserved. *See US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 101 n.7 (2013).

Finally, this case is a better vehicle than other Section 232 cases that this Court has previously declined to review. *See USP Holdings, Inc.* v. *United States*, 143 S. Ct. 1056 (2023); *Transpacific Steel LLC* v. *United States*, 142 S. Ct. 1414 (2022); *American. Inst. for Int'l Steel, Inc.* v. *United States*, 141 S. Ct. 133 (2020); *American Inst. for Int'l Steel, Inc.* v. *United States*, 139 S. Ct. 2748 (2019). None of those cases sought review of the Federal Circuit's *Maple Leaf Fish* deference doctrine. *See* Petition for a Writ of Certiorari at i, *USP Holdings*, No. 22-565; Petition for a Writ of Certiorari at i, *Transpacific*, No. 21-721; Petition for a Writ of Certiorari at i, *American Institute*, No. 19-1177; Petition for a Writ of Certiorari at i, *American Institute*, No. 18-1317.

The facts here are also markedly more egregious. In *Transpacific*, the President's subsequent action was late by only a few months, not nearly two years. The subsequent action regulated the same article the Secretary had investigated and reported on—primary steel—rather than the uninvestigated derivative products at issue here. And *Transpacific* maintained some constraints on the President's power to act beyond Congress's prescribed deadlines, *see* pp. 10–11, *supra*—constraints that the decision below and its dramatic application of the deference doctrine have since eliminated.

D. If the Court does not grant the petition, then it should hold the petition pending its re-examination of *Chevron*.

If this Court is not inclined to grant the petition for a writ of certiorari, then it should at least hold it. The Court is presently considering whether judges should continue to defer to the Executive Branch's interpretations of Congress's statutes under *Chevron*, 467 U.S. at 837. *See Loper Bright Enters.* v. *Raimondo*, No. 22-451; *Relentless, Inc. v. Dep't of Commerce*, No. 22-1219. This Court's decisions in *Loper Bright* and *Relentless* will very likely inform whether the Federal Circuit was correct in this case to defer to the Executive's interpretation of Section 232. And this Court routinely holds petitions "until a decision is reached … in a pending case raising identical or similar issues." Stephen M. Shapiro et al., *Supreme Court Practice* 5-31 (11th ed. 2019).

The government has asserted that "the word 'deference' appears nowhere in the [court of appeals'] opinion" below, and so that ruling purportedly "would not be affected by this Court's decision[s] in *Loper Bright*" and *Relentless*. Federal Respondents' Brief in Opposition 16–17, *PrimeSource*, No. 23-69. That misses the point. The Fed-

eral Circuit may not have used the word "deference," but its opinion unambiguously applied a *rule* of deference: the *Maple Leaf Fish* rule. That rule "place[s] a finger on the scales of justice in favor of … the federal government" just like *Chevron* does. *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting). And like *Chevron*, *Maple Leaf Fish* requires courts to accept (and enforce) something less than the best reading of the law, App., *infra*, 10a–11a (*Maple Leaf Fish* requires accepting the President's interpretation of "the governing statute" unless he "clearly misconstrue[s]" it). The government itself reads *Maple Leaf Fish* as authorizing the President to "make[] 'highly discretionary' decisions" regarding tariffs, Federal Respondents' Brief in Opposition 16, *PrimeSource*, No. 23-69 (citation omitted), despite the lack of any statutory basis for such discretion in the tariff procedure.

If the Court does not grant this petition, then it should hold the petition pending its forthcoming decisions in *Loper Bright* and *Relentless*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 20, 2023