No. 23-___

IN THE

Supreme Court of the United States

PRIMESOURCE BUILDING PRODUCTS, INC.,
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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QUESTIONS PRESENTED

The Trade Expansion Act of 1968 delegates Congress's constitutional power to set import duties and regulate foreign trade to the President whenever the President declares that imports "threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii), (d). The only real constraints on the delegation are procedural: the President can only act in response to a public investigation and report by the Secretary of Commerce, and he must "determine the nature and duration of the action" he will take "[w]ithin 90 days after receiving [that] report." *Id*. § 1862(b), (c)(1)(A), (c)(2), (d). In 2018, President Trump invoked the Act to impose tariffs on imports of "steel mill products" (such as steel plate and pipe). Two years later, he imposed tariffs on certain products made from steel (*e.g.*, nails) without undertaking any of the Act's required procedures. Applying a deferential standard of review, the Federal Circuit found the action lawful. The questions presented are:

1. Whether separation of powers principles require courts to resolve ambiguity in statutory limits on delegations of vast legislative power to the Executive in a way that constrains the delegation or, as the Federal Circuit holds, courts must uphold the President's actions absent "a clear misconstruction of the governing statute."

2. Whether, under the proper standard of review, the Trade Expansion Act of 1968 permitted the President to impose tariffs on steel derivatives without complying with the statute's procedural prerequisites.

PARTIES TO THE PROCEEDING

Petitioner PrimeSource Building Products, Inc., was the plaintiff in the Court of International Trade and appellee in the court of appeals.

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

Respondents Oman Fasteners, LLC, Huttig Building Products, Inc., and Huttig, Inc., were plaintiffs in the Court of International Trade and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner is owned by PriSo Acquisition Corporation and no other publicly held company owns 10 percent or more of stock in petitioner.

RELATED PROCEEDINGS

Petitioners' appeal in the Federal Circuit was consolidated with *Oman Fasteners, LLC, et al v. United States, et. al*, No. 21-2252 (Fed. Cir.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner PrimeSource Building Products, Inc. respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–18a) is reported at 59 F.4th 1255. The Court of International Trade's decisions (Pet. App. 19a–31a, 32a-150a) are reported at 505 F. Supp. 3d 1352 and 520 F. Supp. 3d 1332.

JURISDICTION

The Federal Circuit issued its decision on February 7, 2023. Pet. App. 1a. The court denied a timely petition for rehearing en banc on June 22, 2023. Pet. App. 152a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 1 of the Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, Section 8 of the Constitution provides in relevant part: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises" and to "regulate Commerce with foreign Nations . . . ."

The relevant portions of 19 U.S.C. § 1862 are reproduced in Appendix E to this petition (Pet. App. 154a-161a).

INTRODUCTION

The Constitution assigns Congress the power and responsibility to regulate trade with foreign nations and to set "Duties, Imposes and Excises" on foreign imports. U.S. Const. art. 1, § 8. The Trade Expansion Act of 1962 delegated a substantial portion of that power to the President to exercise largely as he sees fit in the name of protecting national security and economic welfare. *See* Pub. L. No. 87-794, 76 Stat. 872. In particular, the statute authorizes the President to take such "action that, in the judgment of the President, must be taken to adjust the imports" when he determines that those imports "threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii). The constraints on the President's delegated authority are procedural—the President can act only after receiving a report from the Secretary of Commerce finding a threat to national security and must "determine the nature and duration of the action" he will take to restrict imports "[w]ithin 90 days after receiving" that report. *Id*. § 1862(c)(1)(A).

In this case, the President followed that process before imposing tariffs on imports of "steel mill products," that is, raw steel as opposed to products *made from* raw steel, *i.e.*, steel derivatives such as nails or car parts. Two years later, without undertaking any of the statutory procedures, the President imposed tariffs on an assortment of steel derivatives as well. The Federal Circuit ultimately sustained the new tariffs, applying circuit precedent that required the court to uphold the President's exercise of his immense delegated authority unless "there has been a clear misconstruction of the statute."

Pet. App. 11a (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)).

This case presents the question whether that method of judicial review is consistent with bedrock separation of powers principles. Recognizing the risk to our constitutional order posed by congressional delegations of expansive legislative powers to the Executive, this Court has established interpretative principles, such as the major questions doctrine, designed to ensure that at the very least, extreme delegations of power are clearly intended by Congress. There can be no question that the President's exercise of delegated authority in this case warrants that kind of special separation of powers scrutiny — the statute delegates unprecedented power to the Executive, with virtually no guidance on how to use it. One might think that courts would strictly construe the statutory conditions on such extraordinary delegations lest the judiciary permit an even greater injury to separation of powers than Congress intended. But the Federal Circuit applies the opposite rule, deferring to the Executive's view of the statutory limits on its own authority unless it is clearly wrong.

This petition provides the Court an opportunity to take the next step in its major-questions and related separation of powers jurisprudence. The Court should use it to make unmistakably clear that when confronted by a statute delegating vast legislative power to the Executive, courts must resolve ambiguity in favor constraining the delegation, unless Congress clearly provided otherwise. *Cf. Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting denial of cert.) (noting the need for further

consideration of constitutional and "statutory interpretation doctrine" to limit on congressional delegation of "major national policy decisions" to the Executive); *cf. also Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (noting the "ongoing debate about [the] source and status" of the major questions doctrine); *id*. at 2378 (noting lack of clarity in Court's decisions).

STATEMENT OF THE CASE

I. Legal Background

Section 232 of the Trade Expansion Act provides that if the President determines that "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," he shall "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." 19 U.S.C. § 1862(c)(1)(A). The phrase "national security" is broadly defined to include not only "national defense requirements" but also the "economic welfare of the Nation." *Id*. § 1862(d). In considering the nation's economic welfare, the President is directed to take into account a variety of factors that tend to expand what counts as an import threatening national security: "the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic

products by excessive imports." *Ibid*. The President's national security determination is not subject to judicial review. *See* Pet. App. 16a-17a.

Section 232 includes little guidance on what the President should do in response to the threat posed by imports. Instead, Congress enacted important procedural constraints on the delegation. Section 232 permits the President to take action only after the Secretary of Commerce conducts an investigation and submits a formal report on the imports' effects on national security. 19 U.S.C. § 1862(c)(1). In conducting the investigation, the Secretary must consult with the Secretary of Defense and "appropriate officers of the United States." *Id*. § 1862(b)(2). If "appropriate," the Secretary must "hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." *Ibid*.

The Act contemplates the investigation will be a serious undertaking, giving the Secretary 270 days to complete it. *Id*. § 1862(b)(3)(A). By that deadline, the Secretary must publish a report in the Federal Register describing his findings "with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction." *Ibid*.

The President's authority to exercise his delegated powers is contingent on the Secretary conducting this investigation and finding a national security threat. *Id*. § 1862(c)(1)(A). The statute

further limits the time in which the President may exercise those powers, providing that "[w]ithin 90 days after receiving [the] report" finding a security threat, "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.

Ibid. The statute then requires that if the President determines to take action, he "shall implement that action" within 15 days of his determination. *Id*. § 1865(c)(1)(B). And within 30 days of the determination, he "shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action." *Id*. § 1865(c)(2).

Section 232 then identifies a single circumstance in which the President can take a *different* action than the one he chose within the 90-day deadline without a new investigation from Commerce. Paragraph 3 of subsection (c) provides that if the "action taken by the President . . . is the negotiation of an agreement" to limit imports, and either "no such agreement is entered into" within 180 days or an agreement is reached but "is not being carried out or is ineffective," then the President "shall take such *other* actions as the President deems necessary." *Id*. § 1865(c)(3)(A) (emphasis added). If that happens, then the

"President shall publish in the Federal Register notice of any *additional* actions being taken under this section by reason of this subparagraph." *Ibid*. (emphasis added).

Beyond this provision, nothing in the Act authorizes the President to take any actions other than the ones decided upon within the 90-day period and reported to Congress. However, if other or additional action seems appropriate, nothing in the statute prevents the President from requesting the Secretary to conduct a renewed, expedited investigation that would authorize the President to determine whether the risk to national security still exists and what actions would be appropriate in light of the updated data and advice from the Secretary of Defense.

II. Factual Background

A. President Trump's Initial Steel Tariffs

1. In the Spring of 2017, the Secretary of Commerce opened an investigation into steel imports.[1] In its response to the investigation, the Department of Defense informed the Secretary that "U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production."[2] Therefore, the Department of Defense did not believe that the levels of foreign steel and aluminum imports

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[1] *See* Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205 (Dep't Com. Apr. 26, 2017).

[2] *Am. Inst. for Int'l Steel, Inc. v. United States*, 806 F. App'x. 982, 985-86 (Fed. Cir. 2020) (quoting letter).

documented by the Secretary "impact the ability of DoD programs to acquire steel or aluminum necessary to meet national defense requirements." *Ibid*. The Secretary of Defense further stressed his "concern[] about the negative impact" of the measures being contemplated "on our key allies." *Ibid*.

On January 11, 2018, the Secretary issued a report finding that imports of "steel mill products," such as flat steel, steel pipe, and steel slabs threatened national security. *See* U.S. Dep't Commerce, Bureau of Indus. & Sec., The Effects of Imports of Steel on the National Security, 85 Fed. Reg. 40,202, 40,203-40,204, 40,209, 40,224 (2018). The Report explained that regardless of any impact those imports may have on military readiness, they "have adversely impacted the steel industry" and thereby "are weakening our internal economy." *Id*. at 40,204. The Secretary then recommended that the President impose measures sufficient to "reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity." *Ibid*.

Throughout the report the Secretary examined only the effect of imports of "steel mill products," not the effect of imports of derivative products made from steel, such as nails, wire, or auto parts. *See id.* at 40,203. Thus, the initial request for public comments did not mention derivatives or request any information about the quantity of derivative imports

or their effect on domestic steel production.[3] Virtually none of the more than 1,500 pages of public comments addressed the question either.[4] The Report itself conducted no analysis, and made no findings, regarding the effects of derivatives on the domestic steel industry. *See* 85 Fed. Reg. at 40,203-40,226. And although the statute expressly authorizes the President to take action to "adjust the imports of the article *and its derivatives*," the Secretary did not propose any actions to reduce imports of steel derivatives. *See* 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added); 85 Fed. Reg. at 40,226. Unsurprisingly, then, when the President issued Proclamation 9705 accepting the report's findings on March 8, 2018, he imposed tariffs only on imports of steel mill products and did not exercise his authority to also limit imports of steel derivatives. *See*

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[3] *See* Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg at 19,205-07.

[4] The public comments are collected online at https://www.bis.doc.gov/index.php/documents/section-232-investigations/1726-merged-public-comments/file. A handful of comments advocated for duties on specific derivative products – flanges, transmission and windmill towers, and circular steel sawblades with diamond tips – without providing any analysis. *See* Public Comments at 300, 397, 1359, 1594 (cites to pagination in pdf file). None of those products was included in the eventual order imposing tariffs on some steel derivatives. *See* Proclamation 9980, Annex II.

Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018).

The tariffs the President did impose were substantial—25% on all imported steel mill articles from every country except Canada and Mexico, for which he proposed to continue ongoing trade negotiations. *See id*. at 11,626. As required by the statute, the President's proclamation was published in the Federal Register and delivered to Congress. *See ibid*.

2. Certain steel importers challenged the tariffs in the Court of International Trade (CIT), arguing that the Trade Expansion Act effected an unconstitutional delegation of power to the President. *Am. Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d. 1335 (Ct. Int'l Trade 2019), *aff'd*, 806 F. App'x 982 (Fed. Cir. 2020) (*AIIS*). The CIT rejected the facial challenge, finding itself bound by this Court's 1976 decision in *Federal Energy Administration. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). In that case, this Court concluded that a prior version of the Act provided an adequate "intelligible principle to which the President is directed to conform," pointing to, among other things, the statutory "preconditions to Presidential action." *See* 426 U.S. at 559.

The CIT expressed some discomfort with that result, noting that the statute "seem[s] to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." *AIIS*, at 1344. Judge Katzmann wrote separately to voice his "grave doubts" about the constitutionality of the Act in its present form and

under this Court's modern precedents. *Id*. at 1347. He noted that although this Court has sometimes upheld statutes conferring significant trade authority on the President, those statutes all "provided ascertainable standards to guide the President." *Id*. at 1351-52. "What we have come to learn is that section 232, however, provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress." *Id*. at 1352. He urged this Court to "revisit [the] assumptions" underpinning *Algonquin*. *Ibid*. "If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution," he asked, "what would?" *Ibid*.

The Federal Circuit affirmed, agreeing that *Algonquin* precluded the plaintiffs' facial challenge. *See AIIS*, 806 F. App'x 982, 989 (Fed. Cir.), *cert. denied* 141 S. Ct. 133 (2020). The court acknowledged, however, that "[f]ive members of the Court have recently expressed interest in at least exploring a reconsideration of" the "intelligible principle" standard. *Id*. at 990.

B. The President's Ad-Hoc Alteration Of Tariff Levels Outside The Statutory Process

Although the statute required the President to identify the "nature and duration of the action" he would take in a written determination issued within 90-days of receiving the Secretary's report, President Trump repeatedly and dramatically changed his response to steel imports long after the statutory 90-day period expired.

1. Throughout 2018 and 2019, the President issued a series of proclamations, altering or eliminating the tariffs for particular countries and products already subject to the actions. *See Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1314-15 (2021), *cert. denied*, 142 S. Ct. 1414 (2022).

For example, on August 10, 2018, the President doubled the tariffs on steel and aluminum imports from Turkey. *See* Proclamation 9772, 83 Fed. Reg. 40,429 (2018). The Proclamation gave no reason for singling out Turkey for increased tariffs, *see ibid*., but in a tweet, the President implied that it was in retaliation for Turkey allowing its currency to "slide[] rapidly downward against our very strong Dollar! . . . . Our relations with Turkey are not good at this time!"[5]

In none of these cases did the Secretary of Commerce conduct a renewed investigation, solicit public comment, or issue a formal report.[6] Moreover, as far as was publicly disclosed, neither the Secretary nor the President consulted with the Department of Defense or any other agencies or officials. *Cf.* 19 U.S.C. § 1862(b)(2)(A).

2. In 2020, the CIT invalidated the Proclamation singling out Turkey for increased tariffs. *See*

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[5] Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 10, 2018, 5:47 A.M.), http://twitter.com/realdonaldtrump/status/1027899286586109955.

[6] Some Proclamations asserted that "the Secretary has informed" the President of certain facts. *See, e.g.*, Proclamation 9772, 83 Fed. Reg. at 40,429; Proclamation 9980, 85 Fed. Reg. at 5281. But to the extent those representations were made in writing, those documents have never been made public.

Transpacific Steel LLC v. United States, 466 F. Supp. 3d 1246 (CIT 2020). The court majority explained that "the temporal restrictions on the President's power to take action pursuant to a report and recommendation by the Secretary is not a mere discretionary guideline, but a restriction that requires strict adherence." *Id*. at 1252.

A divided panel of the Federal Circuit reversed. *Transpacific*, 4 F.4th at 1310. The majority concluded that all the President must do within the statutory 90-day period is adopt a "plan of action or course of action," with "choices to impose particular burdens in the carrying out of the plan permissibly made later in time." *Id*. at 1321. The court acknowledged that the "timing provisions were meant to prevent the President from acting on stale information." *Id*. at 1332. But it believed that "[c]oncerns about staleness of findings are better treated in individual applications of the statute," suggesting courts would develop their own time limits independent of those Congress enacted. *Ibid*. The court found no staleness problem in the case before it, however, because the increased duties on Turkish steel were imposed "only months after the initial announcement." *Ibid*.

Judge Reyna dissented. In his view, the majority's interpretation "expands Congress's narrow delegation of authority, vitiating Congress's own express limits, and thereby effectively reassigns to the Executive Branch the constitutional power vested in Congress to manage and regulate the Tariff." *Id.* at 1336. (citing U.S. Const. art. I, § 8).

C. The President's Imposition Of Tariffs On Steel Derivatives

On January 24, 2020—more than two years after the Secretary's Steel Report—the President went a significant step further, imposing a 25% tariff on certain steel derivatives. *See* Proclamation 9980, 85 Fed. Reg. 5281 (2020). The Proclamation did not purport to be based on the original Steel Report findings (which, as noted, said nothing about steel derivatives' effect on national security and was based on market data from 2017). *See id*. at 5281-82.[7] To the contrary, the President justified the new tariffs on developments occurring after the tariffs on steel mill products went into effect. *See id*. at 5281.

In particular, the President reported that the "Secretary has informed me that . . . imports of certain derivatives of steel articles have significantly increased since imposition of the tariffs and quotas" and that these imports were "erod[ing] the customer base for U.S. producers" of steel. *Id*. at 5282. In response, the Secretary recommended reducing imports of an eclectic mix of seven steel derivatives: "nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than of heading 8305) and similar articles," as well as "bumper stampings of steel" used in certain vehicles and "for tractors suitable for agricultural use" (but not bumper

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[7] In the courts below, the Government disavowed any argument that the Secretary's informal findings and recommendations relating to steel derivatives could satisfy the "essential requirements of . . . 19 U.S.C. § 1862(B)(2)(A)." Pet. App. 25a (citation omitted).

stampings for other kinds of tractors or construction equipment). 85 Fed. Reg. at 5285. The proposal omitted the vast majority of steel derivative products, such as home appliances, factory equipment, and most car parts. *See ibid*.

Although the Secretary made representations about the amount and effects of derivative imports, those findings were not the result of the statutory investigative process and were made without the benefit of any public input. There was no notice of the investigation, no request for public comment, and no public hearings. Moreover, for all that can be told, there was no interagency consultation or input from the Department of Defense. In addition, because the Secretary's findings were not memorialized in any public report, its details were not subject to public or congressional scrutiny. Accordingly, it is impossible to tell, for example, whether the Secretary even considered whether imports of this ad-hoc subset of steel derivatives comprised a sufficient portion of the demand for U.S. steel to make any meaningful difference to the domestic steel industry. *See id*. at 5282; *cf.* United States Trade Commission, *Economic Impact of Section 232 and 301 Tariffs on U.S. Industries* 21-22 (March 2023) ("*Economic Impact*") (finding that the "defined derivative products represent a small share of total imports," accounting for 2.3 percent of steel imports by value in 2021).[8]

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[8] A*vailable at* https://www.usitc.gov/publications/332/pub5405.pdf.

Nonetheless, the President accepted the Secretary's recommendation and imposed 25% tariffs on the steel derivates the Secretary identified. *Id*. at 5283.

III. Procedural History

1. Petitioner is an importer and reseller of steel derivatives such as steel nails and fasteners for the homebuilding industry. Petitioner and others filed suit challenging the validity of the steel derivative tariffs in cases later consolidated before the CIT. Pet. App. 3a-4a. In 2021, that court held the tariffs unauthorized by statute because they were imposed without compliance with Section 232's process and deadlines. *Id*. 4a.

2. The United States appealed, and the Federal Circuit reversed. *Id*. 5a.

The court explained that under circuit precedent, review of the President's compliance with the Trade Expansion Act is "available, but it is limited." *Id*. 11a. Specifically, "[f]or a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Ibid*. (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)). The panel emphasized that "[t]his court has repeatedly relied on the *Maple Leaf* formulation to indicate the 'limited' scope of review of non-constitutional challenges to presidential action." *Ibid*. (collecting examples).

The panel then upheld the President's interpretation of the statute, relying in large part on its prior decision in *Transpacific*. The panel again

held that the only instance in which the President requires an investigation and report from the Secretary of Commerce is when he first announces his decision to take some kind of action; after that, he can make "adjustments of specific measures. . . in carrying out the plan over time." Pet. App. 12a (quoting *Transpacific*, 4 F.4th at 1319). The court further concluded that the original study and proclamation's failure to "address the effect of imports of derivatives is immaterial." *Id*. 15a. It was sufficient that applying the tariff to these derivatives was "*in line* with the announced plan of action . . . . to achieve the stated implementation objective," something the President "*could have* used in the initial set of measures." *Id*. 14a (emphasis added, citation omitted). Allowing the President to make such alterations outside the statutory process, the panel believed, "serv[es] the 'evident purpose' of § 232." *Ibid*. (quoting *Transpacific*, 4 F.4th at 1323).

The court again recognized that refusing to apply the statutory time limits to new actions could risk the President acting on stale information. *Id*. 14a. And it did not dispute that in this case, the new action in 2020 occurred more than two years after the conclusion of the Secretary's investigation, and nearly two years after the President's initial action against steel mill products, far longer than the several months the court found acceptable in *Transpacific*. *See id*. at 9a-10a. It nonetheless concluded that there was no staleness problem here because the new action was taken "in pursuit of the same goal first articulated in Proclamation 9705" and because it purported to be "in response to the 'current information' provided to the

President by the Secretary." *Id*. at 16a. The court acknowledged that the Government "declin[ed] to put into the record the updated data the Secretary conveyed to the President," which remains undisclosed to the public to this day. *Ibid*. But the panel concluded that nothing in the statute required the President to base his decision on information gathered through the statutory process or to disclose the details of the information he was acting on or how it was gathered. *Id*. at 18a.

3. On June 22, 2023, the Federal Circuit denied the challengers' joint petition for rehearing en banc. Pet. App. 151a.

REASONS FOR GRANTING THE PETITION

The Constitution addresses the power to regulate foreign commerce and set import duties with unusual precision, assigning both responsibilities to Congress, not the President. U.S. Const. art. 1, § 8. Yet, the Trade Expansion Act delegates the entirety of that legislative power to the Executive whenever the President declares that action "must be taken" to ensure that "imports will not threaten to impair national security." 19 U.S.C. § 1862(c)(1)(A)(ii). If there is an intelligible principle for the President to apply in making those determinations, it could hardly be less constraining. The statute defines "national security" with surpassing breadth and malleability. *See id*. § 1862(d). And Congress provided essentially no guidance at all regarding what actions the President should take in response to a threat. The constraints on the delegation are procedural requirements designed to ensure that the President

acts on the basis of a public investigation and informed advice from relevant government officials.

In *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), this Court pointed to those procedural prerequisites as essential to the statute's constitutionality. *See id*. at 559. Yet, the Federal Circuit has now held that once the Executive goes through the statutory process once, for years thereafter the President may take any "action that, in the judgment of the President, must be taken to adjust imports" without any statutory constraint. 19 U.S.C. § 1862(c)(1)(A). This now includes the power to dramatically change the amount of duties imposed,[9] to abandon import duties altogether in favor of a completely different response,[10] to change the countries subject to the action,[11] and to extend the restrictions to products that were not the subject of the initial investigation and Presidential action.[12]

In reaching these conclusions, the Federal Circuit has resolved every potential ambiguity in the statute in favor of broadening the delegation and minimizing the statutory limits on the Executive's exercise of legislative powers. This case provides the Court an opportunity to make clear that separation of powers principles require the opposite approach, one that resolves ambiguity in favor of restraint. And because the Federal Circuit's interpretation of the Act cannot

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[9] *See Transpacific*, 4 F.4th at 1310.

[10] *See id*. at 1314-15.

[11] *See id*. at 1315

[12] Pet. App. 14a-15a.

be upheld under that standard, the Court should reverse and hold that the steel derivatives tariff is unlawful.[13]

I. The Court Should Grant Certiorari To Make Clear That Courts Must Resolve Ambiguity In Statutes Delegating Vast Legislative Power To The Executive In Favor Of Restraining The Delegation.

The Federal Circuit applies an interpretive standard that resolves ambiguity in favor of expanding delegation of legislative trade powers to the President. As the panel explained below, the Federal Circuit only grudgingly permits *any* review of the President's compliance with the statutory limits on his delegated trade powers. Pet. App. 11a (explaining such review is "available, but it is limited"). What review is provided defers to the President's interpretation of his own authority: "For a court to interpose, there has to be a *clear misconstruction of the governing statute*, a *significant* procedural violation, or action outside delegated authority." *Ibid*. (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)) (emphasis added).

That standard cannot be reconciled with the family of doctrines this Court has adopted to protect the Constitution's division of authority between the branches. *See generally*, Cass R. Sunstein,

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[13] Because the Federal Circuit has exclusive jurisdiction over appeals under the Trade Expansion Act, a circuit split on the proper construction of that Act could not arise. *See* 28 U.S.C. §§ 1295(a)(5), 1581(i).

Nondelegation Canons, 67 U. Chi. L. Rev. 315 (2000). In the most extreme cases, a transfer of legislative power to the Executive may be so expansive and unguided that the courts are compelled to directly declare it an unconstitutional delegation. *See, e.g.*, *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Courts also must construe statutory delegations "narrowly in order to avoid a serious question of unconstitutional delegation of legislative power." *Algonquin*, 426 U.S. at 558-59 (internal quotation marks and citation omitted).

More recently, the Court has applied the "major questions" doctrine to cases "in which the history and the breadth of the authority that [the Executive] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (cleaned up). In those "extraordinary cases," the Executive's claim of power can prevail only if it can "point to clear congressional authorization." *Id*. at 2608-09.

Thus far, the Court has applied the major questions doctrine principally to decide whether Congress has delegated to the Executive power to regulate a particular subject matter at all—*e.g.*, student loan forgiveness, cigarettes, greenhouse gases, assisted suicide, etc. Here, there is no doubt that Congress intended to delegate the President power to regulate international trade. The interpretative question, instead, concerns the *scope* of that power and, in particular, the meaning of the

statutory restrictions placed on the Executive's exercise of that authority.

While the precise question may be different, the underlying constitutional considerations are the same. The President's attempts to legislate the terms of international trade in a product deemed essential to national security is a question of "vast economic and political significance." *Util. Air Regul. Grp v. EPA*, 573 U.S. 302, 324 (2014). The scope of the delegation is enormous, allowing the President to respond to the perceived threat with whatever "action that, in the judgment of the President, must be taken to adjust imports." 19 U.S.C. § 1862(c)(1)(A)(ii); *see Biden v. Nebraska*, 143 S. Ct. at 2373 (invoking major questions doctrine where agency claimed "virtually unlimited power to rewrite the Education Act"); *Ala. Assoc. of Realtors v. DHS*, 141 S. Ct. 2485, 2489 (2021) (calling Government's claim of authority "breathtaking" where only limit was that an agency "deem a measure 'necessary'"). There can be no claim that Congress made the principal policy decisions itself, leaving it to the President to "fill up the details." *Wayman v. Southard*, 23 U.S. 1, 31 (1825). The only choice Congress made was to direct the President to make the relevant policy decisions.

Under the Act, then, significant matters of national trade law are "nothing more than the will of the current President." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting); *see also Gonzalez v. Oregon*, 546 U.S. 243, 262 (2006) (applying major-questions doctrine where Attorney General claimed power to prohibit drug uses "he deems illegitimate"). That is the opposite of the liberty-preserve process Congress

ordained for the creation of law. *See Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

To be sure, in the 1970s, this Court found no delegation problem with a prior version of the Trade Act. *See Algonquin*, 426 U.S. at 559. But the Court's premise — that the statute "establishes clear preconditions to the Presidential action," such as the prerequisite report from the Secretary's investigation, *ibid.* — has been undermined by the Federal Circuit's repeated untethering of the President's action from those procedural prerequisites. *See AIIS*, 376 F. Supp. 3d at 1351-52 (Katzmann, J., concurring). As now construed, the President may legislate tariffs against goods that were not the subject of any investigation or recommendation by the Secretary, years after the initial investigation, through whatever deliberative process he chooses.

Moreover, in more recent times, members of this Court have drawn precedents like *Algonquin* into question, expressing a willingness to "reconsider the approach we have taken for the past 84 years" in an appropriate case. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment); *see also ibid*. (Gorsuch, J., joined by Robert, C.J., and Thomas, J., dissenting) (calling Court's modern non-delegation approach "an understanding of the Constitution at war with its text and history"); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").

The Court should use this case to begin reconsidering its approach to nondelegation. It need not overrule *Algonoquin* in order to recognize that the Act raises separation of powers concerns sufficient to require that courts find clear congressional authorization before construing the statute in ways that expand the scope of the President's delegated authority. Both "separation of powers principles and a practical understanding of legislative intent" suggest that when Congress delegates broad, unguided legislative power to the Executive, it intends for the conditions on that authority to be strictly construed and enforced. *West Virginia*, 142 S. Ct. at 2609. Only that approach is consistent with constitutional avoidance principles and the judiciary's obligation to view the Executive's claims of "extravagant statutory power over the national economy" with "skepticism." *West Virginia v. EPA*, 142 S. Ctr. 2587, 2609 (2022) (cleaned up).

Accordingly, the President's claimed authority to legislate tariffs on steel derivatives in this case should not have been accepted absent "clear congressional authorization." *Ibid*. That includes clear authorization to excuse the President from complying with the statutory procedures for taking actions to reduce imports. Strict enforcement of the Trade Act's procedural requirements is particularly important to maintaining the constitutional order. *See Touby v. United States*, 500 U.S. 160, 166 (1991) (holding that "procedural requirements," including a time requirement, created a lawful delegation because they "meaningfully constrain[ed] the Attorney General's discretion"). The Constitution assigns legislative

power to Congress in part because "Article I's detailed process of new laws were . . . designed to promote deliberation." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). The procedural requirements of the Trade Act are designed to replicate at least some portion of that deliberation when trade policy is made by the Executive rather than Congress. Courts should be especially hesitant before adopting an interpretation of the statute that eliminates those safeguards.

II. The Federal Circuit Could Not Have Upheld The President's Actions Applying Appropriate Separation Of Powers Principles.

The Federal Circuit could not have reached its expansive interpretation of the President's powers if it had applied the proper interpretative standard.

1. The plain text of the statute is clear and straightforward: the President is empowered to take a trade "action" only if, "[w]ithin 90 days after receiving a report" from the Secretary of Commerce, he "determines the nature and duration of the action" he proposes to take." 19 U.S.C. § 1862(c)(1)(A), (B)(2). He is then required to implement that "action" within 15 days of his determination and to report to Congress within 30 days why he decided to take that "action." *Id*. 19 U.S.C. § 1862(c)(1)(B), (2).

The Federal Circuit countenanced the President's claimed authority to impose measures other than those determined through this statutory process by giving the word "action" an extraordinarily expansive reading. An "action," it held, can consist of nothing more than "a plan of action that allows adjustments to

specific measures . . . in carrying out the plan over time." Pet. App. 12a (citation omitted). The court thus defined an "action" as the equivalent of a general "plan" and used words like "measures" and "implementing steps" to describe specific actions like imposing tariffs, erecting import quotas, or negotiating a trade agreement. *Id*. at 1261. Even that gloss uses the word "plan" loosely. There was no argument, for example, that the President's initial plan included contingencies to extend tariffs to derivatives on certain conditions. *Cf. id.* at 1321 (stating that an "action" might include "options for contingency-dependent choices"). Indeed, neither the investigation, the Secretary's report, nor the President's Proclamation even mentioned derivatives. *See supra at* 14-15. The only way to claim that the original "plan of action" included steel derivatives would be if the plan were simply to "fix the problem somehow" or "impose these initial measures and see how it goes."

That definition of "action" cannot be squared with the rest of the text. For one thing, the statute requires the President to "implement that action" within 15 days of the determination, making clear that an "action" is concrete and specific, something that can actually be implemented, not just a general "plan of action" whose "implementing steps" will be decided later. Pet. App. 12a.

Likewise, requiring the President to determine, and report to Congress, "the *nature* and *duration* of the action," confirms that an "action" is something more concrete than a simple resolution to suppress imports in some unspecified way over some

indeterminate period of time. *Id.* § 1862(c)(1)(A)(ii) (emphasis added). After all, the statute separately requires the President to "determine" whether he "concurs with the finding of the Secretary" that imports are threatening to impair national security. *Id.* § 1862(c)(1)(A)(i). There would be no point in requiring him, in the next subparagraph, to also "determine the nature and duration of the action" if all that required was reiterating his view that imports posed a threat that needed to be dealt with through "specific measures" that would be determined later and changed at will for years on end.

Nor would there be any point in requiring the President to determine that his "action" will "adjust the imports . . . so that such imports will not threaten to impair national security," if by "action," Congress simply meant a general "plan of action" that contained no specific measures whose efficacy could be predicted.

If that were not enough, paragraph 3 of subsection (c) specifically contemplates the possibility that the President might decide later that some "*other* actions" or "*additional* actions" are needed to achieve his objectives, *id.* § 1862(c)(3)(A), yet authorizes him to do so without undertaking the statutory process in only one limited circumstance: if the "action taken by the President under paragraph (1)" – that is, the action determined within 90 days of the Secretary's report – "is the negotiation of an agreement which limits or restricts" imports or exports, and either no agreement is achieved within 180 days or the agreement "is not being carried out or is ineffective." *Id.* § 1862(c)(3)(A). In those circumstances, the statute requires the President to "take such other actions as the President

deems necessary" and to "publish in the Federal Register notice of any additional actions being taken." *Ibid*.

By expressly providing for one circumstance in which the President is not required to repeat the investigation before imposing an alternative action, Congress made clear it contemplated no other exception. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Moreover, paragraph 3 would have been unnecessary if, as the Federal Circuit insists, the President's initial "action" included any "additional impositions on imports" he later determined necessary "to achieve the stated implementation objective." *Transpacific*, 4 F.4th at 1319. Nor would this provision's use of the phrases "other actions" and "additional actions" make any sense if "action" meant a general "plan of action" sufficiently broad to encompass any other or additional action the President might take in response to a failed negotiation.

The Federal Circuit's interpretation of "action" also makes inexplicable Congress's requirement that the President publish a notice of his decision to take other action when negotiations failed, but not when he changes course for any other reason (*e.g.*, because initial import quotas proved ineffective). The Federal Circuit could not explain why Congress would have expressly authorized and regulated alternative actions when the initial action was a negotiation, but not when the initial action was something else.

Unable to convincingly account for the text, the Federal Circuit has resorted to general statutory purposes and an incomplete reading of the legislative history. For example, the panel believed that freeing the President from the procedural conditions "furthers [the Act's] evident purpose," which is to "enable and obligate the President . . . to effectively alleviate the threat to national security." 4 F.4th at 1323. In *Transpacific*, the court also found support in prior instances of Presidents modifying their responses under the Trade Expansion Act without a new investigation or report from the Secretary of Commerce. *Transpacific*, 4 F.4th at 1326-1329.[14] The panel majority recognized that its historical examples largely predated Congress' material revision of the statute in 1988 which, among other things, added the 90-day time limit for the President to determine the "nature and duration" of his proposed action and convey that decision to Congress. *Id*. at 1329. But the court brushed the amendments aside, refusing to

[14] Although this Court noted that practice in *Algonquin*, it did not pass on its consistency with the statute, perhaps because the specific modification before it was the product of a renewed formal investigation by the Secretary of Commerce. 426 U.S. at 553-54. Nor did the Court consider the circumstances under which the President can extend tariffs to a new category of products, such as derivatives. *Cf. id*. at 552 (noting that presidential orders regarding oil imports had always addressed both "crude oil and the principal crude oil derivatives"). Instead, the only question before the Court was whether the Act allowed the President to control oil imports "by imposing on them a system of monetary exactions in the form of licensing fees" as opposed, for example, to "imposing quotas on such imports." *Id*. at 551-52.

construe them as enacting significant constraints on presidential authority absent a "clear indication from Congress of a change in policy," which it found lacking based principally on its reading of the legislative history. *Transpacific*, *id*. at 1329-31.

As Judge Reyna explained in his *Transpacific* dissent, this reasoning fails on its own terms. *See id*. at 1341-42. But more importantly, every aspect of that analysis — the reliance on generalized legislative purpose, the debatable inferences drawn from executive practice and congressional silence, the refusal to construe the 1988 amendments as effecting "a withdrawal of previously existing presidential power" absent "a clear indication from Congress," *id*. at 1329 — is incompatible with the proper standard for interpreting a statute delegating vast legislative powers to the Executive. None of it constitutes the "clear congressional authorization" that separation of powers principles require. *West Virginia*, 142 S. Ct. at 2609.

III. This Case Presents An Ideal Vehicle For Resolving Questions Of Great Doctrinal And Practical Significance.

Accordingly, this case presents the Court an ideal vehicle for deciding the proper rules for resolving ambiguities in statutes delegating expansive legislative power to the Executive Branch — the

question is squarely posed by the case and its answer is outcome determinative.[15]

The question is also undeniably important. For the reasons already discussed, the proper standard of review is of vital doctrinal significance. The major question doctrine can protect against agencies making unwarranted claims of extravagant delegated powers, but it does not directly address what should happen when Congress clearly intends to give away broad swaths of its constitutional responsibilities to the Executive branch, often with limited substantive or procedural conditions attached. As this case shows, how courts interpret those limitations is of great significance to maintaining the constitutional plan.

The scope of the President's authority under the Trade Expansion Act is also of immense practical consequence. Almost by definition, the statute governs imports of products that are vital to our economy, steel and steel derivatives being a prime example. Any tariff on such a product necessarily has radiating effects throughout the economy. Here, the steel tariffs have dramatically increased the price of imported steel and steel derivatives by approximately

[15] Petitioner also adequately preserved the argument below. *See, e.g.*, Pet'r. C.A. Br. 27 (Heading III.B: "Outer Boundaries on the President's Authority to Act Outside the Time Constraints in Section 232 Are Necessary to Avoid Separation-of-Powers Concerns"). To be sure, petitioner did not directly ask the panel to overrule the Circuit's deferential standard of review under *Maple Leaf Fish*. But the panel had no authority to grant such a request, so petitioner's failure to make it is no impediment to review. *See, e.g.*, *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 n.7 (2013).

$3 billion per year.[16] They also allow domestic manufacturers to raise their prices, with domestic consumers bearing the brunt of the price increases.[17] As a consequence, steel prices in the United States are up to "40 percent higher even than in high-cost Western Europe."[18] Unsurprisingly, then, downstream industries that rely on steel inputs— which "employ 46 times more people and add 35 times more to GDP than do steel producers"[19]—saw an "average annual decrease in production values" of "$3.4 billion during 2018-21"[20] and the loss of approximately 75,000 jobs (compared to the estimated 1,000 jobs created or saved in the steel industry) in the first few years of the tariffs.[21]

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[16] Https://taxfoundation.org/tariffs-trump-trade-war/#:~:text=Tariffs%20on%20steel%20and%20aluminum%20and%20derivative%20goods%20currently%20remain,based%20on%202018%20import%20values.

[17] *See Economic Impact*, *supra*, at 21-22.

[18] *See* Dan Pearson*, Ending tariffs would curb inflation — but why ignore the main benefits?*, The Hill (July 18, 2022), *available at* https://thehill.com/opinion/international/3563911-ending-tariffs-would-curb-inflation-but-why-ignore-the-main-benefits/.

[19] *Ibid*.

[20] *Id*. at 22.

[21] Kadee Russ & Lydia Cox, *Steel Tariffs and U.S. Jobs Revisited*, https://econofact.org/steel-tariffs-and-u-s-jobs-revisited (Feb. 6, 2020) (citing study by researchers at the Federal Reserve Board of Governors).

The resulting higher prices have propagated through the economy, contributing to inflation.[22] The result has been an increase in costs of materials essential to a variety of domestic industries, including homebuilding. By one estimate, the additional cost to the economy has been approximately $11.5 billion a year, working out to over $900,000 for every job saved or created in the steel industry.[23]

Ordinarily, those bearing the brunt of the tariffs could turn to their local members of Congress to seek relief. But because the tariffs were imposed by presidential proclamation rather than through the constitutional process for imposing taxes and regulating international commerce, Congress has excused itself from the debate and escaped political accountability for the pain the tariffs have inflicted. *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting).

This Court should intervene to restore the constitutional balance. The Federal Circuit has steadfastly refused to provide a significant check on the President's exercise of his delegated powers. No other circuit has jurisdiction to do so. *See supra* n.13.

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[22] *See, e.g.*, Megan Hogan & Yilin Wang, To fight inflation, cutting tariffs on China is only the start, Peterson Institute for International Economics (June 3, 2022), https://www.piie.com/blogs/realtime-economic-issues-watch/fight-inflation-cutting-tariffs-china-only-start.

[23] Https://www.washingtonpost.com/business/2019/05/07/trumps-steel-tariffs-cost-us-consumers-every-job-created-experts-say/.

And there is no indication that the tariffs will be lifted anytime soon.

IV. At The Very Least, This Petition Should Be Held For *Loper*.

At the very least, the Court should hold this case pending its decision in *Loper Bright Enterprises v. Raimondo*, No. 22-451. There, the Court will consider the appropriate standard for deferring to an executive agency's interpretation of its own statutory powers, in the process deciding whether to modify or overrule *Chevron v. NRDC*, 467 U.S. 837 (1984). Here, the Federal Circuit invoked its particularly robust form of *Chevron*-style deference for reviewing the Executive's claimed power under the Trade Expansion Act. Pet. App. 11a. The Court's decision in *Loper* could shed important light on whether that standard is consistent with the Constitution's division of powers among the branches. *See, e.g.*, U.S. BIO 7, *Yang v. United States*, No. 02-136 (Solicitor General explaining that a hold is appropriate when the Court's decision in a pending case "could affect the analysis of [the] question" presented by the petition or if "it is possible that the Court's resolution of the question presented in [the pending case] could have a bearing on the analysis of petitioner's argument," even if the cases do "not involve precisely the same question").

CONCLUSION

The petition for certiorari should be granted.

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