No. 18-1317

In the Supreme Court of the United States

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. 1862, which empowers the President to take action to adjust imports that threaten to impair the national security, impermissibly delegates legislative power to the President.

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OPINION BELOW

The opinion of the Court of International Trade (Pet. App. 1-36) is unreported.

JURISDICTION

The judgment of the Court of International Trade (CIT) was entered on March 25, 2019. Petitioners filed a notice of appeal on the same day, and the appeal remains pending. The petition for a writ of certiorari before judgment was filed on April 15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

Pursuant to Section 232 of the Trade Expansion Act of 1962 (Act), 19 U.S.C. 1862, the President established tariffs on certain imports of steel articles. Petitioners challenged the tariffs in the CIT, arguing that Section

232 impermissibly delegates legislative power to the President. Relying on this Court's decision in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976), the CIT rejected that challenge. Pet. App. 1-36. Petitioners appealed to the Federal Circuit and now seek a writ of certiorari before judgment.

1. Section 232 of the Act establishes a procedure through which the President may "adjust the imports" of articles in order to protect "national security." 19 U.S.C. 1862(c)(1)(A)(ii). This procedure begins with an "investigation" conducted by the Secretary of Commerce (Secretary) "to determine the effects on the national security of imports of [an] article." 19 U.S.C. 1862(b)(1)(A). In the course of the investigation, the Secretary must (1) consult with the Secretary of Defense on "methodological and policy questions," (2) consult with other "appropriate officers of the United States," and (3) if "appropriate," hold "public hearings" or otherwise give interested parties an opportunity "to present information and advice." 19 U.S.C. 1862(b)(2)(A). After the investigation, the Secretary must submit to the President a report containing his findings "with respect to the effect of the importation of such article * * * upon the national security," as well as his "recommendations" for presidential "action or inaction." 19 U.S.C. 1862(b)(3)(A).

If the Secretary's report contains a "find[ing] 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," the President must "determine whether [he] concurs with the finding of the Secretary." 19 U.S.C. 1862(c)(1)(A)(i). "[I]f the President concurs," he must "determine"—and then "implement"—"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)(ii) and (B).

Congress has identified several factors that the President and Secretary must consider when acting under Section 232. Those factors include: (1) the "domestic production needed for projected national defense requirements," (2) "the capacity of domestic industries to meet such requirements," (3) "existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense," (4) "the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth," and (5) "the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements." 19 U.S.C. 1862(d). Congress also has directed the President and Secretary to "recognize the close relation of the economic welfare of the Nation to our national security." *Ibid.* More specifically, the President and Secretary must consider "the impact of foreign competition on the economic welfare of individual domestic industries," as well as "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.*

Before the investigation that is at issue in this case, Presidents had invoked their Section 232 authority to adjust imports on five occasions. See Proclamation No.

4210, 3 C.F.R. 31 (1974) (license fee for petroleum imports); Proclamation No. 4341, 3A C.F.R. 2 (1975 comp.) (license fee for petroleum imports); Proclamation No. 4702, 3 C.F.R. 82 (1979 comp.) (embargo on petroleum imports from Iran); Proclamation No. 4744, 3 C.F.R. 38 (1980 comp.) (license fee for petroleum imports); Proclamation No. 4907, 3 C.F.R. 21 (1982 comp.) (embargo on petroleum imports from Libya).

2. In April 2017, the Secretary commenced an investigation to determine the effect of imports of steel on the national security. The Secretary found that the present quantities and circumstances of steel imports "threaten to impair the national security of the United States." Pet. App. 47. He found that these imports are "weakening our internal economy" and undermining our "ability to meet national security production requirements in a national emergency." *Ibid.* The Secretary recommended that the President address this threat to the national security by imposing tariffs on steel imported into the United States. *Id.* at 48.

The President concurred in the Secretary's finding that "steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security." Pet. App. 49. To address that threat, the President issued a proclamation instituting a 25% tariff on imports of steel articles. *Id.* at 49-50. In the proclamation and subsequent amendments, the President established exemptions from the tariff for imports from certain countries, such as Canada and Mexico. *Id.* at 17-18 & n.8.

3. Petitioners brought this lawsuit in the CIT, alleging that Section 232 impermissibly delegates legislative power to the President. Pet. App. 2-3. Petitioners requested a three-judge panel under 28 U.S.C. 255, which

authorizes the Chief Judge of the CIT to designate three judges to hear a case that "(1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws." 28 U.S.C. 255(a). The Chief Judge granted petitioners' request. See Pet. App. 1-19.

The CIT denied petitioners' motion for summary judgment and granted respondents' motion for judgment on the pleadings. Pet. App. 2-19. The court explained that, although Congress may not delegate legislative power to the executive, a grant of authority to the executive does not amount to an impermissible delegation of legislative power if Congress sets out an "intelligible principle" to which the executive must conform. *Id.* at 7 (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928)). The court further explained that, in *Algonquin*, *supra*, this Court had held that Section 232 "easily" satisfied the intelligible-principle test because the statute "establishe[d] clear preconditions to Presidential action," including "a finding by the Secretary * * * 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." Pet. App. 8 (quoting *Algonquin*, 426 U.S. at 559) (brackets omitted).

Petitioners contended that *Algonquin* is no longer good law because it rested on the premise that presidential action under Section 232 would be subject to judicial review, and later legal developments have shown that such review is unavailable. The CIT rejected that argument. Pet. App. 10-19. The court explained that the scope of judicial review of presidential action under

Section 232 was the same both "before and after *Algonquin*": courts could review presidential action "for being unconstitutional or in excess of statutorily granted authority," but not for "abuse of discretion." *Id.* at 12-13.

In a separate "*dubitante*" opinion, Judge Katzmann agreed that the CIT was bound by *Algonquin* to reject petitioners' nondelegation challenge. Pet. App. 19-36. Judge Katzmann questioned *Algonquin*'s correctness, however, and he suggested that the President's steel-tariff decisions under Section 232 might justify "revisit[ing]" that precedent. *Id.* at 36.

ARGUMENT

Petitioners contend (Pet. 18-34) that Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. 1862, impermissibly delegates legislative power to the President. In *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976), this Court rejected a similar challenge, holding that Section 232 sets forth an intelligible principle to guide the President's adjustment of imports and therefore is constitutional. *Algonquin* was correctly decided, and it is consistent with this Court's more recent nondelegation precedents. In any event, certiorari before judgment is an exceptional procedure, and petitioners identify no sound reason for this Court to deviate from its usual practice of deferring any review until after the court of appeals has issued its decision. The petition therefore should be denied.

1. The CIT correctly rejected petitioners' contention that Section 232 delegates legislative power to the President.

a. Although Congress may not delegate legislative power to the executive, it may seek the "assistance" of the executive "by vesting discretion in [executive] officers to make public regulations interpreting a statute

and directing the details of its execution." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928). Under this Court's precedents, if a statute sets forth an "intelligible principle to which the person or body authorized to [act] is directed to conform," the statute amounts to a permissible grant of discretion, not a "forbidden delegation of legislative power." *Id.* at 409.

In *Algonquin*, this Court held that Section 232 sets forth an intelligible principle and thus complies with the Constitution. 426 U.S. at 558-560. That case arose after the President invoked Section 232 to establish license fees for certain imports of petroleum. *Id.* at 556. In the course of upholding the license fees, the Court rejected the contention that Section 232 raised "'a serious question of unconstitutional delegation of legislative power,'" holding instead that the statute "easily fulfills" the intelligible-principle requirement. *Id.* at 559 (citation omitted). The Court observed that Section 232 "establishes clear preconditions to Presidential action," including a finding by the Secretary 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.'" *Ibid.* The Court also emphasized that "the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded," since "[t]he President can act only to the extent 'he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.'" *Ibid.* Finally, the Court noted that Section 232 "articulates a series of specific factors to be considered by the President in exercising his authority." *Ibid.* For these reasons, the Court

"s[aw] no looming problem of improper delegation." *Id.* at 560.

b. Petitioners argue (Pet. 22) that this Court should "overrule" *Algonquin* or "limit it to its facts." Petitioners, however, offer no "special justification" for revisiting *Algonquin*. *United States* v. *International Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). Indeed, petitioners altogether "fail to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall* v. *Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment). "Such an incomplete presentation is reason enough to refuse [petitioners'] invitation to reexamine [*Algonquin*]." *Ibid.*

In any event, whatever the outer boundaries of the nondelegation doctrine, *Algonquin* falls well within them. First, the President's discretion under the statute is far more constrained than in other purely *domestic* cases in which this Court has rejected nondelegation challenges. For example, the Court has upheld statutes that empower executive agencies to regulate in the "public interest," see *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943); to set prices that are "fair and equitable," see *Yakus* v. *United States*, 321 U.S. 414, 420 (1944); and to establish air-quality standards to "protect the public health," see *Whitman* v. *American Trucking Ass'n*, 531 U.S. 457, 472-476 (2001). Here, in contrast, the statute empowers the President to act only upon a finding that the imports of an article "threaten to impair the national security." 19 U.S.C. 1862(c)(1)(A). It authorizes only such action as "must be taken to adjust the imports * * * so that such imports will not threaten to impair the national

security." 19 U.S.C. 1862(c)(1)(A)(ii); see 19 U.S.C. 1862(c)(3)(A) ("such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security"). And it requires the President and Secretary to consider a series of specific factors, such as "domestic production needed for projected national defense requirements" and "existing and anticipated availabilities of * * * supplies and services essential to the national defense." 19 U.S.C. 1862(d).

Second, this Court has repeatedly held that, in "authorizing action by the President in respect of subjects affecting foreign relations," Congress may "leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 324 (1936); see *Clinton* v. *City of New York*, 524 U.S. 417, 445 (1998); *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388, 422 (1935); see also *Department of Transp.* v. *Association of Am. R.Rs.*, 135 S. Ct. 1225, 1248 n.5 (2015) (Thomas, J., concurring in the judgment). In particular, Congress may "invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." *Field* v. *Clark*, 143 U.S. 649, 691 (1892). These principles reflect "the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day." *Curtiss-Wright*, 299 U.S. at 322. Early statutes authorized the President to lay an embargo whenever "the public safety shall so require," Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372; to permit the exportation of arms "in

cases connected with the security of the commercial interest of the United States," Act of Mar. 3, 1795, ch. 53, 1 Stat. 444; to suspend certain statutory restrictions on foreign commerce "if he shall deem it expedient and consistent with the interest of the United States," Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 615; to "permit or interdict at pleasure" the entry of armed foreign vessels into the waters and harbors of the United States, Act of Mar. 3, 1805, ch. 40, § 4, 2 Stat. 341; and to suspend a statutory embargo if the President judged that American commerce was "sufficiently safe," Act of Apr. 22, 1808, ch. 52, 2 Stat. 490.

Because Section 232 empowers the President to act in the fields of foreign affairs and foreign trade, it would be constitutional even if it established "a standard far more general than that which has always been considered requisite with regard to domestic affairs." *Curtiss-Wright*, 299 U.S. at 324. In fact, as shown above (see pp. 8-9, *supra*), Section 232 provides standards that are more *specific* than some of the standards that this Court has sustained in the domestic context. Section 232's standards also are more specific than the criteria set out in embargo and trade legislation enacted during the 1790s and 1800s.

The line between a permissible grant of discretion to the executive and an impermissible delegation of legislative power "must be fixed according to common sense and the inherent necessities of the governmental coordination." *J.W. Hampton*, 276 U.S. at 406. If there is any area in which common sense and the inherent necessities of governmental coordination support a grant of discretion to the President, it is the area in which Section 232 operates: "national security." 19 U.S.C. 1862(b) and (c). It would be "unreasonable and impracticable to

compel Congress to prescribe detailed rules," beyond those set out in Section 232, to constrain the President's power to adjust imports that threaten to impair the national security. *Algonquin*, 426 U.S. at 560 (citation omitted).

c. Petitioners present (Pet. 20-32) a series of arguments for overruling, limiting, or distinguishing *Algonquin*. Those arguments lack merit.

Petitioners contend (Pet. 24) that Section 232 does not require presidential action to "be tied to any factual finding," and that it sets "no limits on the scope, duration, or amount of any remedy." Petitioners' argument rests on a mistaken premise. Rather than authorizing the President to adjust imports whenever he pleases, Section 232 "establishes clear preconditions to Presidential action," including a finding by the Secretary 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.'" *Algonquin*, 426 U.S. at 559. And rather than granting the President unlimited power to take any action he pleases, Section 232 authorizes the President to act only with respect to the article investigated by the Secretary and that article's derivatives, and "only to the extent 'he deems necessary to adjust the imports * * * so that such imports will not threaten to impair the national security.'" *Ibid.* Thus, while Section 232 grants the President discretion, that discretion is not "unlimited" (Pet. 6).

Petitioners contend (Pet. 23) that "Section 232 is a uniquely expansive delegation of power" because "Congress has expanded the definition of the term 'national security'" to encompass "economic impacts of the imports on the domestic economy." But while Congress

has amended the statute in some respects since *Algonquin* was decided, "Section 232, substantively, remains the same in relevant part" today as in 1976. Pet. App. 9 n.4. In particular, the statute that the *Algonquin* Court upheld against a nondelegation challenge, like the statute in its current form, directed the President to "recognize the close relation of the economic welfare of the Nation to our national security" and to consider economic effects when taking action under the statute. *Algonquin*, 426 U.S. at 550 n.1 (quoting 19 U.S.C. 1862(c) (Supp. IV 1974)). Neither then nor now, however, has the statute authorized the President to adjust imports for economic reasons unrelated to national security. Rather, the President may consider economic effects, not for their own sake, but in the course of "determining whether [a] weakening of our internal economy may impair the national security." 19 U.S.C. 1862(d).

Petitioners also argue (Pet. 21-22, 25-28) that *Algonquin* rests on the premise that presidential action under Section 232 was subject to "full judicial review," Pet. 21, but that later legal developments, such as this Court's holding that presidential action is not reviewable under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*, have revealed that the President's implementation of Section 232 is subject to "no judicial review" at all, Pet. 25. In fact, the scope of judicial review of action under Section 232 is the same today as it was when this Court decided *Algonquin*. Thus, as when the Court decided *Algonquin*, a court today may determine whether the President has exceeded his "constitutional and statutory authority." *Algonquin*, 426 U.S. at 556; see Pet. App. 12-13. But "where a claim 'concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear

that it involves considerations which are beyond the reach of judicial power.'" *Dalton* v. *Specter*, 511 U.S. 462, 474 (1994) (quoting *Dakota Cent. Tel. Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919)) (brackets in original). The rule that courts may not review presidential action for abuse of discretion is longstanding, and this Court has never held that the unavailability of such review transforms a permissible grant of executive authority into an impermissible delegation of legislative power. See Pet. 25-26 (acknowledging that "no decision of this Court has held that the availability of judicial review is a requirement of a constitutionally valid delegation").

Finally, petitioners assert (Pet. 21) that the *Algonquin* Court rejected only an "as-applied delegation argument," whereas this case raises "a facial undue delegation challenge." The Court in *Algonquin*, however, did not limit its holding to a particular application of Section 232. Rather, the Court held that "the standards that [Section 232] provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." 426 U.S. at 559. In any event, "[a] facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1127 (2019). Even if the Court in *Algonquin* had upheld only a single application of Section 232, that decision would preclude any contention that Section 232 "is unconstitutional in all its applications." *Ibid.*

2. For additional reasons independent of the merits, this Court should deny the petition for a writ of certiorari before judgment. This Court is authorized to review a case "before judgment has been rendered in the court of appeals," 28 U.S.C. 2101(e), but such review is

appropriate only where "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11; see, *e.g.*, *Department of Commerce* v. *New York*, 139 S. Ct. 953 (2019). Here, however, petitioners have not demonstrated that such a deviation from ordinary appellate procedures is either necessary or appropriate.

Petitioners contend (Pet. 22) that review in the Federal Circuit would "waste * * * judicial resources," and that "the scope of the ruling in *Algonquin* can only be authoritatively determined by this Court." Even where a litigant seeks to challenge one of this Court's precedents, however, the Court ordinarily awaits the completion of the appellate process rather than granting certiorari before judgment. And while only this Court can overrule one of its precedents, the courts of appeals can and do "determine the proper scope of [the precedent's] application." *National Paint & Coatings Ass'n* v. *City of Chicago*, 45 F.3d 1124, 1130 (7th Cir.), cert. denied, 515 U.S. 1143 (1995). Here, as in the mine run of cases, the court of appeals' analysis may assist this Court both in assessing the merits of petitioners' challenge and in determining whether the Court's review is warranted.

In this regard, it is potentially relevant that *Gundy* v. *United States*, No. 17-6086 (argued Oct. 2, 2018), is currently pending before the Court. *Gundy* presents a nondelegation challenge to the Sex Offender Registration and Notification Act provisions that authorize the Attorney General to issue regulations under 34 U.S.C. 20913(d). The Court's decision in that case may shed light on nondelegation principles generally, and thus on the proper analysis of petitioners' challenge to Section 232. Denying the petition for a writ of certiorari before

judgment will allow the court of appeals to consider in the first instance how *Gundy* affects the nondelegation analysis in this case, in keeping with this Court's usual role as a "court of review, not of first view." *Frank* v. *Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam) (citation omitted).

Petitioners also argue (Pet. 19-20) that the Court should grant certiorari before judgment because this case "is the separation of powers analog" to *United States* v. *Lopez*, 514 U.S. 549 (1995)—in other words, because Section 232 violates "the fundamental principle of separation of powers" in the same way that the statute in *Lopez* "eviscerated * * * the basic principles of federalism." Petitioners' analogy is inapt. Far from subverting the fundamental principle of separation of powers, Section 232 is consistent with more than a century of this Court's precedents and more than two centuries of congressional practice. In any event, petitioners' analogy does not support their request for this Court's immediate review, since the Court granted certiorari in *Lopez* only after the court of appeals had rendered its judgment. See *id.* at 552.

Finally, petitioners observe (Pet. 20) that, "as of March 28, 2019, the steel tariffs collected have exceeded $4.5 billion," and they contend that petitioners and others are suffering "irreparable and ongoing harm" as a result. This Court ordinarily defers review until the court of appeals has ruled, however, even when large sums of money are at stake. See, *e.g.*, *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2486 (2018) ("billions of dollars" in union dues); *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) ("billions of dollars in spending"). Neither the magnitude of the tariffs, nor the fact that those tariffs affect

importers and consumers, creates an exigent circumstance warranting the Court's immediate intervention.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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