No. 18-1317

IN THE

Supreme Court of the United States

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC,

Petitioners,

v.

UNITED STATES and KEVIN K. MCALEENAN, COMMISSIONER, UNITED STATES CUSTOMS and BORDER PROTECTION,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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ARGUMENT

Respondents raise two sets of objections to the petition: (1) the petition is premature and the case should continue before the Federal Circuit, and (2) the constitutional question presented is not worthy of review because the decision below is correct and consistent with other decisions of this Court regarding delegations of legislative power.

The Petition is Not Premature

Petitioners acknowledge that this Court should ordinarily await the judgment of the Court of Appeals before granting review, especially when the petition presents a challenge to the constitutionality of a federal statute. But this is not an ordinary case.

First, this case is not one where percolation through the lower courts can be expected to produce any insights that will assist this Court. This case was heard below by a panel of three Article III judges of the Court of International Trade ("CIT"), which has exclusive jurisdiction over this claim under 28 U.S.C. § 1581(i)(2) & (4). Respondents contended below that that this Court's decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), foreclosed this challenge. Petitioners argued that the context in which *Algonquin* arose was so different from this case that *Algonquin* was not a barrier to reaching the merits, but the panel disagreed.

In the ordinary course, this case would be heard by a three judge panel of the Federal

Circuit, which has jurisdiction over all appeals from the CIT. 28 U.S.C. § 1295(a)(5). However, because the principal question on such an appeal would be the extent to which *Algonquin* controls this case, this Court is likely to gain very little from a decision of three additional judges on an issue that only this Court can resolve. Moreover, because exclusive appellate jurisdiction over cases raising the *Algonquin* issue is in the Federal Circuit, this Court will never obtain the benefit of the views of multiple circuit courts on that question.

For that reason, the petition urged this Court to take on that question directly, and either distinguish *Algonquin*, or limit its holding to the claims raised there (in which case *stare decisis* would be irrelevant), or, as a last resort, to overrule the delegation portion of that opinion. In the end, only this Court can definitely rule on the application of *Algonquin* to this case

Second, requiring the case to proceed through the Federal Circuit will continue to cause billions of dollars of harm, as long as these tariffs remain in place, Moreover, many members of petitioner American Institute for International Steel ("AIIS") and the public who do not pay the tariffs, but are harmed by their impact on the level of steel imports, will continue to sustain irreparable harm for at least another year. And those injuries do not include the massive harms suffered by agriculture and other industries from the retaliation by other countries against U.S. exports on account of the tariffs imposed on steel and aluminum imports.

In support of their argument that the time is not right for this Court to intervene, respondents cite the impending decision in *Gundy v. United States,* No. 17-6086 (argued Oct, 2, 2018), as one that "may shed light on nondelegation principles generally, and thus on the proper analysis of petitioners' challenge to Section 232." Opp. 14. Petitioners agree that the decision in *Gundy* may be relevant on the merits, but one thing is clear: because *Gundy* arises under a very different statute, and because neither party cited *Algonquin* in any of the briefs in that case, the decision in *Gundy* will have nothing to say about the applicability of *Algonquin* to petitioners' claim. Because the CIT's decision rested on the precedential effect of *Algonquin*, not on a substantive analysis of petitioners' constitutional claim, that would be the main question before the Federal Circuit if the Court were to deny certiorari.

In summary, remitting this case to the Federal Circuit will produce no ruling that will assist this Court in deciding what one of its own decisions means or the extent to which it is applicable to this case. Nor is there any likelihood that another case from the lower courts or *Gundy* will shed light on that question. If, as we now show, the delegation question is worthy of review on the merits, the public interest would be better served by this Court's review now.

The Constitutionality of Section 232 Presents an Important Question

Respondents offer two principal reasons why the Court should not decide the merits of petitioners' constitutional claim: (1) *Algonquin* definitively resolved petitioners' claim, and (2) section 232 is a routine delegation of the kind that this Court has upheld on many occasions. Neither reason is valid, and this reply will deal with each in turn.

1. "Context matters" in cases under the Equal Protection Clause, *Grutter v. Bollinger,* 539 U.S. 306, 327 (2003), or in construing statutes, *King v. Burwell,* 135 S. Ct. 2480, 2489, 2490, 2492 (2015); *id.* at 2497 ("Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them") (Scalia, J., dissenting). And it matters here. This case resembles *Algonquin* mainly because both involve challenges to section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862. But the plaintiffs in *Algonquin* challenged only the President's decision to utilize licensing fees, instead of quotas, to limit the importation of oil, a product plainly related to national security in the 1970s. Before this Court, they raised a delegation challenge to support their argument that the Court should narrowly construe the remedial portion of section 232 as permitting quotas only, thereby avoiding the argument that the statute contained an unconstitutionally broad delegation of legislative power. They accepted that the control of imports under section 232 was valid and did not, as

petitioners do here, urge this Court to find that the entire statute is unconstitutional as an excessive delegation of legislative power.

To be sure, the *Algonquin* Court used very broad language to express its conclusion that the *Algonquin* plaintiffs did not demonstrate an unconstitutional delegation in section 232. Reasonably read, that language should not encompass the much broader claim made by petitioners: that section 232 as a whole and not just its provisions governing the manner of adjusting imports—license fees or quotas—is so open-ended as to allow the President to do virtually anything he chooses and still be within section 232. Although lower federal courts could, quite reasonably, conclude that they should not attempt to distinguish *Algonquin,* or limit it to its facts, there is nothing in *Algonquin* that would require this Court to overrule it in order to reach the merits of petitioners' delegation claim.

Another important aspect of *Algonquin* supports the conclusion that it is nowhere near as preclusive as respondents argue. After rejecting the delegation argument, the *Algonquin* Court found against plaintiffs on their statutory claim that the President was required to use quotas instead of licensing fees as a remedy under section 232. Petitioners differ with respondents (and the CIT) as to whether the law on judicial review of decisions by the President involving section 232 has changed since *Algonquin* was decided in 1976. However, there is no doubt that, if a plaintiff who paid these tariffs on imported steel alleged, for example, the lack of a connection between steel

imports and national security, or objected to the levels of tariffs imposed on different imports or from different countries, or to the exclusion of some countries, but not others from the tariffs, respondents would take the position that all of those determinations are matters committed to the discretion of the President and hence are outside the province of any federal court.

Petitioners demonstrated in the petition that the lack of meaningful judicial review is a significant part of the reason why section 232 is unconstitutional. That there was full review by the *Algonquin* Court of the only specific claim in that case is a further and significant basis why *Algonquin* need not be overruled to decide the merits of the claim presented here by petitioners.

In their Opposition (7-8), respondents quote the Court in *Algonquin* as seeing "no looming problem of improper delegation." Forty-three years later, a "looming problem" has materialized in the form of a new presidential policy to transform section 232 into a general tariff adjustment authority. Before, during, and after *Algonquin*, no President ever used section 232 to impose or revise tariffs – until 2018. Nor had any previous federal law before section 232 (and its immediate predecessor) given the President authority to impose tariffs on a particular product or an entire industry based on his own "judgment" that imports "may threaten to impair" our economy, and that, as a remedy, tariffs or other

protections may be ordered to protect a domestic industry.

2. Respondents characterize the delegation challenge to section 232 as if that provision were a routine delegation to an administrative agency to fill in the details of a plan that Congress had carefully laid out. However, as the petition spells out (Pet. 4-8), section 232 essentially turns over to the President the entirety of Congress's constitutional power to impose tariffs and other restrictions on imports. On the front end, the Secretary of Commerce must find that imports may threaten to impair "national security," but that term is defined to include any impact on the domestic economy or any segment thereof, here the steel industry, with a final Presidential decision on imports of all automobiles and parts pending. Once the President concurs in that finding, he may choose to impose tariffs, quotas, licensing fees, embargoes, or any combination he prefers, with no limit as to their amount or duration, or any guidance on when to treat similar imports from different countries the same or differently, or whether to treat different products differently or the same.

Last month, the President demonstrated once again the breadth of his powers under section 232. Initially, he had imposed the same 25% tariff on steel imports from all countries, except a few that he chose to exclude. Last August he doubled the tariff on steel imports from Turkey, but from no other country, to 50% (Pet. App. 82-88). And then last month, he re-set the double-tariff on Turkish

steel back to 25%, and also set aside the tariffs for Mexico and Canada, while reserving the right to "revisit this determination as appropriate." *See* Proclamation No. 9886, 84 Fed. Reg. 23,421 (May 21, 2019); Proclamation No. 9894, 84 Fed. Reg. 23,987 (May 23, 2019). Petitioners do not ask the Court to determine whether those various decisions were rational or justified under section 232 because they are all within the President's discretionary powers under it, and they are not subject to judicial review by any court. They confirm what the petition demonstrated – that section 232 imposes no limit on the President's power over imports.

Respondents defend section 232 by citing phrases from other opinions dealing with other statutes. Once again context matters, this time because the application of the delegation doctrine must be assessed on a statute by statute basis. Other than *Algonquin,* the statutes at issue in the cases relied on by respondents are fundamentally different from section 232. A closer examination of those statutes shows the vast gulf between them and section 232, which is uniquely broad in the combined discretion it affords the President to make the determination that triggers his authority, the breadth of his authority once it is engaged, and the lack of judicial review. The cases cited by respondents therefore provide no basis for the Court to deny review on the theory that no significant constitutional is issue presented here.

Respondents properly note the Court's "intelligible principle" standard from *J.W.*

Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). However, they fail to mention the very significant distinctions between that case and this one that were delineated in the petition at 23, 25. In particular, the statute at issue there could be used only to "equalize the . . . differences in costs of production in the United States and the principal competing country" for the product at issue, and the remedy was limited to increasing existing duties, by no more than 50%, to offset the production cost advantages of the other country. 276 U.S. at 401.

The other cases cited by respondents fare no better in terms of their similarity to this one. Respondents are correct that the Court in *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943), upheld a statute that allowed the FCC to regulate "in the public interest," but the provision at issue applied only to broadcasting chains. Similarly, in *Yakus* v. *United States*, 321 U.S. 414, 420 (1944), the Court rejected a delegation challenge to a statute designed to stabilize prices during wartime that allowed "fair and equitable" increases tied to a base period, but that was subject to specified factors as the basis of any adjustments. Finally, respondents cite *Whitman* v. *American Trucking Ass'n*, 531 U.S. 457, 472-476 (2001), where the statute required the agency to "protect the public health," but they fail to mention the many other significant limitations in that statute on the exercise of that power.

There is one other important feature in each of the cases cited by respondents that distinguishes

them from this one. In each, full judicial review was available and exercised, often preceded by significant administrative proceedings in which interested parties had specific proposed actions on which they could focus their submissions. Respondents note the many factors that the Secretary of Commerce and the President are supposed to consider (Opp. 2-4), but they fail to note that the President is not bound by any of them, and no court can overturn his decisions if he does not adhere to them. This Court observed in *Yakus,* 321 U.S. at 420, 426, that in order to avoid having a statute found to be an unconstitutional delegation of legislative power, it must have "boundaries." *See also United States v. Lopez,* 514 U.S. 549 (1995), in which the Court set aside the statute at issue there because its application would have eliminated all boundaries on the Commerce Clause. As the facts of this case demonstrate, there are no boundaries in section 232. The President may impose any restrictions on imports that he sees fit once he concludes that imports have an adverse impact on the national economy or any portion of it. In this context, the absence of judicial review further underscores this lack of boundaries.

Respondents argue that it would be "unreasonable and impracticable" to require Congress to be more specific than it has been in section 232. Opp. 10-11. However, it is not the responsibility of members of the public to draft legislation, or for the Court to give advisory opinions about what degree of specificity would satisfy the delegation doctrine. But several clear

options come to mind: placing some limits on the amount of tariffs (or other fiscal measures) that can be imposed without obtaining congressional approval; including limits on the duration of measures imposed under section 232; requiring that imports from all countries be treated equally, absent a reason for different treatment set forth in the statute; or mandating consideration of the impact of the proposed measures on consumers and other parts of the economy. And with such specific boundaries, the addition of judicial review could assure that the President followed the will of Congress.

Respondents also seek to justify the imposition of these tariffs by claiming that they were done as an exercise of the President's powers over foreign affairs, citing *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) (Opp. 9). The government appears to argue not only that section 232 satisfies the constitutional requirement that Congress not delegate its legislative power; it also suggests that whenever the words "national security"—no matter how expansively defined—are invoked, Congress is freed from the need to make choices about how its constitutional powers, here over tariffs and foreign commerce, are exercised. The President's action, however, was based solely on section 232 and does not purport to exercise any foreign affairs power. This Court, moreover, has recently downgraded the dicta in *Curtiss-Wright* on which respondents rely, *Zivotofsky v. Kerry,* 135 S. Ct. 2076, 2089 (2015). This Court has also rejected the notion that the application of the delegation doctrine depends on

the subject of the statute, holding "that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater [or lesser in the case of foreign affairs] than that we have applied to other nondelegation challenges." *Skinner v. Mid-America Pipeline Co.,* 490 U.S. 212, 223 (1989).

Finally, petitioners note what is *not* contained in respondents' opposition. They do not contend that Congress may constitutionally delegate powers in section 232 without including some boundaries, but they fail to identify any such boundaries that impose any kind of meaningful restraints on the "judgment of the President" in his use of section 232. Nor do they argue that judicial review is not a significant restraint on a delegated power, and they do not suggest that the courts have any role in imposing limits on presidential power under 232. Their principal reliance in this Court, as it was below, is on *Algonquin.* Petitioners acknowledge that there is language in that opinion that tends to support respondents, but only if taken out of the context in which that case arose. Section 232 turns over to the President the authority to do whatever he thinks best regarding imports. That is not an assignment that the Constitution permits Congress to delegate. Accordingly, this Court should grant the petition, and declare section 232 unconstitutional as a violation of Article I and the principles of separation of powers.

CONCLUSION

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

Respectfully submitted,

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