

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**

**BRIEF OF AMICUS CURIAE BASRAI FARMS IN
SUPPORT OF PETITIONERS**

Jeffrey S. Grimson
Counsel of Record
Kristin H. Mowry
Jill A. Cramer
Bryan P. Cenko
MOWRY & GRIMSON, PLLC
5335 Wisconsin Ave., NW,
Suite 810
Washington, DC 20015
(202) 688-3610
jsg@mowrygrimson.com

May 16, 2019

Counsel for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. Certiorari Is Warranted Where the Retaliatory Tariffs Extend the Effects of the President’s Actions Under Section 232 to Cover Virtually All of American Industry.....	5
II. The U.S. Agricultural Industry, Including Basrai Farms, Has Been Greatly Impacted by Retaliatory Tariffs	9
A. The U.S. Agricultural Industry Depends on Exports	9
B. Retaliatory Tariffs Target Both a Significant Proportion of Agricultural Exports and a Wide Array of Agricultural Products.....	11
C. Retaliatory Tariffs Have Significantly Decreased the Quantity and Price of U.S. Agricultural Exports	14
D. The Nut Industry, Including Walnuts, Has Suffered from Decreased Exports and Lower Prices Caused by Retaliatory Tariffs	18
E. The Decrease in Total Exports and Prices Has Irreparably Harmed the Agricultural Industry Including Basrai Farms	20

F. Efforts by the Executive Branch Are Not
Enough to Stem the Harm Inflicted by
Retaliatory Tariffs..... 22

G. The Harm Caused by Retaliatory Tariffs Is
Likely to Continue and Get Worse 24

III. The Gravity of the Harm Felt by the
Agricultural Industry Supports this Court
Granting Certiorari 26

CONCLUSION..... 27

Amicus Appendix:

Letter from Michelle McNeil Connelly, Exec. Dir.,
California Walnut Board to Don Hinman, U.S. Dept.
of Arig. (Aug. 9, 2018) Amicus App. 1

TABLE OF AUTHORITIES

Cases

<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935).....	6, 8
<i>Am. Inst. for Int’l Steel, Inc. v. United States</i> , No. 18-00152, 2019 Ct. Int’l. Trade LEXIS 36 (Mar. 25, 2019).....	1, 3, 7
<i>Clinton v. City of New York</i> , 524 U.S. 417 (1998).....	8
<i>Panama Refining Co. v. Ryan</i> , 293 U.S. 388 (1935).....	6, 8
<i>Yakus v. United States</i> , 321 U.S. 414 (1944).....	6

U.S. Constitution

U.S. CONST. Art. I, § 1.....	6
------------------------------	---

Statutes

19 U.S.C. § 1862.....	6
19 U.S.C. § 2411-14.....	12

Other Authorities

<i>Current Retaliatory Actions</i> , U.S. Dep’t of Commerce, https://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002094.asp (last visited May 10, 2019).....	13
<i>A Path Forward on Trade Retaliatory Tariffs and Agricultural</i> , NEBRASKA FARM BUREAU, https://nefb.org/images/FEDeration/PDFs/A-Path-Forward-On-Trade.pdf	17, 21
Adriana Barrera & Dave Graham, <i>Mexico Eyes Fresh U.S. Targets for Tariffs to Pressure Trump Over Steel</i> , REUTERS (Mar. 1, 2019, 5:30 PM),	

- <https://www.reuters.com/article/us-usa-trade-mexico/mexico-eyes-fresh-u-s-targets-for-tariffs-to-pressure-trump-over-steel-idUSKCN1QI5LV> 25
- Alexia Fernández Campbell, *US Farms Are Going Bankrupt at an Alarming Rate. Trump's Trade War is Partially to Blame.*, VOX (Nov. 28, 2018, 5:30 PM EST), <https://www.vox.com/policy-and-politics/2018/11/27/18114566/trump-trade-war-china-farm-bankruptcy> 24
- Allysia Finley, *California Farmers Are Trade-War Casualties*, THE WALL STREET JOURNAL (Sept. 19, 2018, 6:56 PM ET), <https://www.wsj.com/articles/california-farmers-are-trade-war-casualties-1537397773> 18
- Brock R. Williams et al., CONG. RESEARCH SERV., R45529, *Trump Administration Tariff Actions (Sections 201, 232, and 301): Frequently Asked Questions* (2019), *available at* <https://crsreports.congress.gov/product/pdf/R/R45529> 11
- Chris Alpers et al., *Opinion: Tariffs Threaten Michigan Apple Growers*, DETROIT NEWS (Mar. 25, 2019, 11:00 PM ET), <https://www.detroitnews.com/story/opinion/2019/03/26/opinion-tariffs-threaten-michigan-apple-growers/3266791002/> 15
- Comm'n from the Del'n of China, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards*, WTO Doc.

- G/L/1218 (Apr. 3, 2018), *available at* <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/L/1218.pdf> (last accessed Oct. 1, 2018)..... 19
- Comm’n from the Del’n of India, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards*, WTO Doc. G/L/1239 (May 18, 2018), *available at* <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/g/l/1239.pdf> (last accessed Oct. 1, 2018)..... 19
- Comm’n from the Del’n of Turkey, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards*, WTO Doc. G/L/1242 (May 21, 2018), *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=245261,245265,245263,245266,245272,245286,245267,245269,245282,245258&CurrentCatalogueIdIndex=4&FullTextHash=3 (last accessed Oct. 1, 2018)..... 19
- Daren Bakst et al., *How the U.S.-China Trade Dispute Affects U.S. Agriculture: What you Should Know*, THE HERITAGE FOUNDATION (Feb. 28, 2019), <https://www.heritage.org/sites/default/files/2019-02/BG3391.pdf>..... 16

- Edward J. Balistreri et al., *The Impact of the 2018 Trade Disruptions on the Iowa Economy*, CENTER FOR AGRICULTURAL AND RURAL DEVELOPMENT IOWA STATE UNIVERSITY 18-PB 25 (Sept. 2018), available at
<https://www.card.iastate.edu/products/publications/pdf/18pb25.pdf>..... 18
- Erika York et al., *Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions*, TAX FOUNDATION (June 22, 2018, last updated Sept. 18, 2018), https://taxfoundation.org/tracker-economic-impact-tariffs/?utm_content=buffer2ac7b&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer 25
- Farzad Taheripour and Wallace Tyner, *Impacts of Possible Chinese 25% Tariff on U.S. Soybeans and Other Agricultural Commodities*, CHOICES, QUARTER 2 (2018), <http://www.choicesmagazine.org/choices-magazine/theme-articles/us-china-trade-dispute-and-potential-impactstoagriculture/impacts-of-possible-chinese-25-tariff-on-us-soybeans-and-other-agricultural-commodities>..... 17
- Gary Clyde Huffbauer and Euijin Jung, *Steel Profits Gain, but Steel Users Pay, Under Trump's Protectionism*, PETERSON INSTITUTE FOR INT'L ECON. (Dec. 20, 2018, 10:45 AM), <https://piie.com/blogs/trade-investment-policy-watch/steel-profits-gain-steel-users-pay-under-trumps-protectionism> 21

- Gil Fullickson, *Canada Considers New Retaliatory Tariffs on U.S. Agricultural Products*, SUCCESSFUL FARMING (Apr. 9, 2019), <https://www.agriculture.com/news/business/canada-considers-new-retaliatory-tariffs-on-us-agricultural-products>..... 24
- Hope Kirwan, *Dairy Organizations Ask For More Aid From USDA As Retaliatory Tariffs Impact Profits*, WISCONSIN PUBLIC RADIO (Oct. 26, 2018, 2:50 PM), <https://www.wpr.org/dairy-organizations-ask-more-aid-usda-retaliatory-tariffs-impact-profits>. 17
- Hope Kirwan, *Trump Administration's Trade Policy Could Be A Factor In Wisconsin's US Senate Race*, WISCONSIN PUBLIC RADIO (Sept. 11, 2018, 6:10AM), <https://www.wpr.org/wisconsin-farmers-feel-impact-tariffs-worry-about-future-trade>..... 10
- Humeryra Pamuk, *'We Need it Now': U.S. Farm Country Pins Hopes on China Trade Deal*, REUTERS (Mar. 6, 2019, 7:12 AM), <https://www.reuters.com/article/us-usa-trade-farmers/we-need-it-now-us-farm-country-pins-hopes-on-china-trade-deal-idUSKCN1QN1F74>, 20
- Jeff Daniels, *Farmer Sentiment Takes Hit Amid Growing Worries Over Trade War*, CNBC (Mar. 5, 2019, 6:53 PM ET), <https://www.cnbc.com/2019/03/05/farmer-sentiment-takes-hit-amid-worries-over-trade-war-says-survey.html>..... 20
- Jenny Hopkinson, CONG. RESEARCH SERV. IN FOCUS, *China's Retaliatory Tariffs on U.S. Agricultural Products 1* (2019), *available at* <https://fas.org/sgp/crs/row/IF11085.pdf>.... 14, 15, 23

- Jenny Hopkinson, CONG. RESEARCH SERV., R45448, Profiles and Effects of Retaliatory Tariffs on U.S. Agricultural Exports at Summary (2018), *available at* <https://crsreports.congress.gov/product/pdf/R/R45448> passim
- Jesse Newman and Jacob Bunge, *This One Here Is Gonna Kick My Butt’—Farm Belt Bankruptcies Are Soaring*, WALL STREET JOURNAL (Feb. 6, 2019, 10:59 AM ET), <https://www.wsj.com/articles/this-one-here-is-gonna-kick-my-buttfarm-belt-bankruptcies-are-soaring-11549468759> 20
- Jesse Newman, *Farmers Say Aid Won’t Cover Tariff Damage*, THE WALL STREET JOURNAL (Sept. 27, 2018 5:56 AM), https://www.wsj.com/articles/farmers-say-aid-wont-cover-tariff-damage-1537974178?mod=hp_listb_pos1 23
- Joseph Parilla and Max Bouchet, *Which US communities are most affected by Chinese, EU, and NAFTA retaliatory tariffs?*, BROOKINGS Figure 3 (Oct. 2018), <https://www.brookings.edu/research/which-us-communities-are-most-affected-by-chinese-eu-and-nafta-retaliatory-tariffs/> 11
- Letter from Michel McNeil Connelly, Exec. Dir., California Walnut Board (“CWB”) to Don Hinman, U.S. Dept. of Arig. at 1 (Aug. 9, 2018) ..2, 18, 19, 20
- Maksym Chepeliev, Wallace E. Tyner and Dominique van der Mensbrugge, *How U.S. Agriculture Will Fare Under the USMCA and Retaliatory Tariffs*, FARM FOUNDATION AND GLOBAL TRADE ANALYSIS

PROJECT	18	(Oct. 2018),	
https://www.farmfoundation.org/wp-content/uploads/2018/10/Trade-Analysis-10-31-18-Final.pdf	15		
Megan Keller, <i>US Soybean Sales to China Down 94 Percent Amid Trump Tariffs: Report</i> , THE HILL (Nov. 5, 2018),			
https://thehill.com/policy/finance/415028-us-soybean-sales-to-china-down-94-after-tariffs	24		
<i>Notification from the European Union to the World Trade Organization</i> , WTO G/L/1237 (May 18, 2018), available at http://docs.dpaq.de/13629-eu-anmeldung_der_m_glichen_veregeltungsz_lle_bei_der_wto.pdf	14		
<i>Percentage of U.S. Agricultural Products Exported</i> , USDA (May 30, 2018),			
https://www.fas.usda.gov/data/percentage-us-agricultural-products-exported	9		
<i>Perspectives on U.S. Agricultural Trade: Hearing Before the S. Comm. on Agric.</i> , 115th Cong. 1 (2018) (statement of the American Farm Bureau Federation), https://www.fb.org/files/Trade-AFBF-Statement-9-12-18.pdf	9, 13, 16		
<i>Press Release No. 0167.18: USDA Announces Details of Assistance for Farmers Impacted by Unjustified Retaliation</i> , U.S. Dept. of Agric. (August 27, 2018), available at https://www.usda.gov/media/press-releases/2018/08/27/usda-announces-details-assistance-farmers-impacted-unjustified	22		

Rachel F. Fefer et al, CONG. RESEARCH SERV., R45249, Section 232 Investigations: Overview and Issues for Congress at 18 (Updated April 2, 2019), <i>available at</i> https://fas.org/sgp/crs/misc/R45249.pdf	12, 25
Ryan McCrimmon, <i>Trump Tariffs Lead to Bleak 2019</i> <i>Forecasts</i> , POLITICO (Oct. 23, 2018, 5:10 AM EDT), https://www.politico.com/story/2018/10/23/trump-tariffs-farmers-agriculture-866450	4, 20
Tara Golshan, <i>Trump: “Tariffs are the Greatest.” Also</i> <i>Farmers Need \$12 Billion in Aid Because of Tariffs.</i> , Vox (July 24, 2018, 1:00PM EDT), https://www.vox.com/2018/7/24/17607484/trump-tariff-farmers-emergency-aid	10

INTEREST OF AMICUS CURIAE¹

The American Institute for International Steel, Inc., Sim-Tex LP and Kurt Orban Partners, LLC (the “Petitioners”) seek a writ of certiorari to bypass the Federal Circuit’s review of the Court of International Trade’s judgment rejecting a facial challenge to Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 (“Section 232”), as an over-delegation of legislative power reserved to Congress. *Am. Inst. for Int’l Steel, Inc. v. United States*, No. 18-00152, 2019 Ct. Int’l. Trade LEXIS 36 (Mar. 25, 2019), *petition for cert. filed*, 2019 U.S. S. Ct. Briefs LEXIS 1460 (U.S. Apr. 15, 2019) (No. 18-1317) (“Pet. for Cert.”).

Basrai Farms, located in Yuba City, California, grows both walnuts and prunes. In 1959, Sawarn Singh Basrai established Basrai Farms when he immigrated from Punjab, India to join his younger brother Parmjit in Yuba City. The brothers realized the dream of their father, Aujagar, of establishing a family farm in the United States. Today, Basrai Farms grows over 300 acres of walnuts and prunes. Overall, Californian walnut farmers produce approximately 99 percent of the total domestic production of walnuts in the United States and walnuts are the 4th largest agricultural export from

¹ As required by Supreme Court Rule 37.2, timely notice of intent was given. This brief is accompanied by the written consent of all parties. Counsel for the Petitioners lodged a blanket consent letter with the Court and counsel for the Respondents have consented in writing. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

the state. See Letter from Michelle McNeil Connelly, Exec. Dir., California Walnut Board (“CWB”) to Don Hinman, U.S. Dept. of Agric. (Aug. 9, 2018) (on file with amicus), Amicus App. 1.

Basrai Farms has a substantial interest in the petition for certiorari because foreign countries have implemented retaliatory tariffs in response to the President’s decision to impose tariffs on steel and aluminum imports under Section 232. These tariffs directly target U.S. farms, factories and other enterprises, extending the impact of the President’s actions under Section 232 far beyond the steel and aluminum industries. Section 232, however, does not set forth how the President is supposed to weigh these concerns and conflicts between industries when deciding to implement tariffs. *See* Pet. for Cert. at 25. The retaliatory tariffs have had a direct impact on Basrai Farms. Basrai Farms submits this amicus brief to provide the Court with context surrounding the effects of the retaliatory tariffs imposed against the agricultural industry following the President’s imposition of Section 232 duties. The gravity of harm caused by the retaliatory tariffs supports Petitioners’ argument that this Court should decide this issue now to prevent further irreparable injury to our nation’s agricultural sector.

INTRODUCTION AND SUMAMRY OF ARGUMENT

The very foundation of our government, the principle of separation of powers, is at stake in this case. The lower court, the Court of International Trade, denied Petitioners’ motion for summary

judgment seeking a declaration that Section 232 constitutes an impermissible delegation of legislative authority to the President. *Am. Inst. for Int'l Steel, Inc. v. United States*, No. 18-00152, 2019 Ct. Intl. Trade LEXIS 36 (Mar. 25, 2019). The lower court found itself bound by this Court's decision in *Federal Energy Administration v. Algonquin SNG Inc.*, 426 U.S. 548, 558-60 (1976) and only briefly addressed the underlying question on the merits in *dicta*. See *Am. Inst. for Int'l Steel*, 2019 Ct. Intl. Trade Lexis 36, at *15-17. Section 232 violates the non-delegation doctrine by failing to set forth an intelligible principle for the President to follow. Specifically, it does not provide guidelines for the President to ascertain the will of Congress or set forth a sufficient policy goal to cure the lack of such guidelines.

Retaliatory tariffs enforced by other countries in response to the President's implementation of Section 232 tariffs were specifically designed to target the agricultural industry, including walnut famers like Basrai Farms. The significant impact on the agricultural industry extends the effects of the Section 232 tariffs to virtually the entire American economy. Section 232 provides no guidance on how the President is to weigh these adverse financial consequences and national security concerns against any potential benefit to the steel and aluminum industries.

The gravity of the harm caused to the agricultural industry, and the fact that said harm is likely to continue, strengthen the Petitioners' claim that Section 232 is an unconstitutional delegation of legislative authority and illustrate why this case represents an exceptional circumstance justifying the

extraordinary step of granting certiorari before judgment. Only this Court can decide the applicability of *Algonquin* as it relates to the underlying question on the merits of whether Section 232 is constitutional. And this Court should do so before further delay cripples our country's agricultural industry beyond repair.

ARGUMENT

Basrai Farms is one of many farms suffering immense harm from the effects of the President's decision to implement tariffs on imports of steel and aluminum under Section 232. For example, Bill Gordon, the owner of a 2,000-acre family farm in Minnesota, was forced to take out equity to cover an estimated loss of \$100,000 in 2018 resulting directly from the retaliatory tariffs. *See* Ryan McCrimmon, *Trump Tariffs Lead to Bleak 2019 Forecasts*, POLITICO (Oct. 23, 2018, 5:10 AM EDT), <https://www.politico.com/story/2018/10/23/trump-tariffs-farmers-agriculture-866450>. Similarly, retaliatory tariffs have forced Lorenda Overman, a corn and soybean farmer from North Carolina, to sell her crops below cost and she has been unable to pay her workers. *See* Humeryra Pamuk, "We Need it Now": U.S. Farm Country Pins Hopes on China Trade Deal, REUTERS (Mar. 6, 2019, 7:12 AM), <https://www.reuters.com/article/us-usa-trade-farmers/we-need-it-now-us-farm-country-pins-hopes-on-china-trade-deal-idUSKCN1QN1F7>. And these are just two of many examples of an entire agricultural industry suffering from the effects of retaliatory tariffs.

As detailed below, this Court should grant certiorari to address the underlying question on the merits: whether Section 232 represents an unconstitutional delegation of legislative authority to the President. Although an examination of the plain language of Section 232 is enough to prove that the statute represents an over-delegation of constitutional authority, retaliatory measures further illustrate the unconstitutional breadth of the President's actions under Section 232 by extending their impact to the entire United States economy. An examination of the effects of retaliatory tariffs on the U.S. agricultural industry not only strengthens Petitioners' strong improper delegation claim but also provides further reason for this Court to grant certiorari now before appellate court judgment to prevent imminent additional irreparable harm to an already suffering agricultural industry.

I. Certiorari Is Warranted Where the Retaliatory Tariffs Extend the Effects of the President's Actions Under Section 232 to Cover Virtually All of American Industry

This Court should grant certiorari to address the unconstitutionally broad delegation of authority granted to the President by Section 232. The failure of the President to address, or even consider, the predictable impact of the retaliatory tariffs strengthens Petitioners' over-delegation claim and warrants this Court granting certiorari prior to appellate judgment to address an issue impacting virtually the entirety of American industry.

The Constitution specifies that “{a}ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. CONST. Art. I, § 1. Although Congress must have some flexibility to delegate some of its authority to function, there are nonetheless firm limits on this flexibility to maintain the boundaries of our constitutional system. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (explaining that Congress “is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested”). In analyzing constitutional non-delegation claims, Courts look to the statute to see if Congress “has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935). The intelligible principle standard ensures that the public and, more relevant to the case at bar, *the judiciary* can “ascertain whether the will of Congress has been obeyed.” *Yakus v. United States*, 321 U.S. 414, 425-26 (1944).

Section 232(d) dictates that President “shall” adjust imports “in light of the requirements of national security,” and grants the President the authority to consider any element of the economy touched by the “displacement of any domestic products by excessive imports.” 19 U.S.C. § 1862(c)-(d). This expansive grant of authority fails to set forth sufficient guidelines by which the public, or this Court, can judge whether the President is executing the law, or, is instead creating the law in violation of

the separation of powers principle that is the backbone of the Constitution. Section 232's unconstitutionally broad delegation of authority warrants granting certiorari in the present action. *See* Pet. for Cert. at 23-32 (setting forth that Section 232 "is a uniquely expansive delegation of power from Congress").

Further, the majority opinion in the lower court ruling, *American Institute for International Steel*, recognized that the statute "allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth." *Am. Inst. for Int'l Steel*, 2019 Ct. Intl. Trade LEXIS 36, at *17. Nonetheless, the lower court found that such concerns were "beyond {its} power to address, given the Supreme Court's decision in *Algonquin*, 426 U.S. at 558-60." *Id.* As the petition sets forth, the current challenge is different than that decided in *Algonquin* and the availability of judicial review has changed since *Algonquin* was decided. *See* Pet. for Cert at 20-22. Nonetheless, the Federal Circuit will likely feel similarly bound, and, thus, this Court should grant certiorari because it alone can resolve the applicability of *Algonquin* as it relates to the Petitioners' strong delegation claim that even the lower court recognized.

While an examination of the plain language of Section 232 is sufficient to prove that the statute violates the non-delegation doctrine, *see id.* at 22-32, the collateral consequences of the President's actions under Section 232 only strengthen the argument for

granting certiorari for this Court to address now the underlying delegation claim. This Court has twice found that Congress violated the non-delegation doctrine. *See Panama*, 293 U.S. at 433; *Schechter*, 295 U.S. at 551. Justice Breyer in his dissent in *Clinton v. City of New York*, 524 U.S. 417 (1998) (Breyer, J. dissenting), explained that later cases where the Supreme Court found that certain statutes did not violate the delegation doctrine could be differentiated from *Schechter* because there the applicable statute “contained not simply a broad standard” but a standard that applied to “virtually all of American industry.” *Clinton*, 524 U.S. at 486 (Breyer, J. dissenting). In distinguishing the facts in *Clinton* from *Schechter*, Justice Breyer detailed that the Line Item Veto Act impacted a “particular set of expenditures within the federal budget” and “not the entire economy.” *Id.* at 487 (Breyer, J. dissenting). Similarly, although these tariffs are designed to target imports of steel and aluminum, the President’s actions have provoked retaliatory tariffs or other trade actions by U.S. trading partners against U.S. exports, extending the effects of the President’s actions to the entire economy. *See* Pet. for Cert. at 33. Section 232, like the relevant statutes in *Panama* and *Schechter*, therefore, represents an unconstitutional grant of legislative authority by Congress. As Judge Katzman details in his dubitante opinion, “{i}f the delegation permitted by section 232 . . . does not constitute excessive delegation in violation of the Constitution, what would?” *Am. Inst. for Int’l Steel*, 2019 Ct. Intl. Trade LEXIS 36, at *35 (Katzmann, dubitante).

II. The U.S. Agricultural Industry, Including Basrai Farms, Has Been Greatly Impacted by Retaliatory Tariffs

An examination of the grave impact of the retaliatory tariffs on the agricultural industry, as detailed below, supports Petitioners' argument related to the unconstitutional expansive powers granted to the President under Section 232. Specifically, the harm detailed in this section illustrates how the President's decision to enact Section 232 tariffs extends beyond the steel and aluminum industries to cover to the entire U.S. economy as set forth above.

A. The U.S. Agricultural Industry Depends on Exports

The President's 232 tariffs have led to massive retaliatory actions by other nations against U.S. exports. The retaliatory actions have had a significant impact on industries that depend to an outsized degree on exports, including the U.S. agricultural industry, which exports more than 20 percent of its total production. *See Percentage of U.S. Agricultural Products Exported*, USDA (May 30, 2018), <https://www.fas.usda.gov/data/percentage-us-agricultural-products-exported> (last visited May 10, 2019).² Overall, the United States exports more agricultural products than it imports. *See Hope Kirwan, Trump Administration's Trade Policy Could*

² The American Farm Bureau Federation estimates this percentage to be even higher at 25 percent. *See Perspectives on U.S. Agricultural Trade: Hearing Before the S. Comm. on Agric.*, 115th Cong. 1 (2018) (statement of the American Farm Bureau Federation), <https://www.fb.org/files/Trade-AFBB-Statement-9-12-18.pdf> ("AFBF Cong. Statement").

Be A Factor In Wisconsin's US Senate Race, WISCONSIN PUBLIC RADIO (Sept. 11, 2018, 6:10AM), <https://www.wpr.org/wisconsin-farmers-feel-impact-tariffs-worry-about-future-trade>.

In selecting retaliatory measures, foreign countries specifically selected agricultural commodities because they are heavily dependent on exports. See Tara Golshan, *Trump: "Tariffs are the Greatest." Also Farmers Need \$12 Billion in Aid Because of Tariffs.*, Vox (July 24, 2018, 1:00PM EDT), <https://www.vox.com/2018/7/24/17607484/trump-tariff-farmers-emergency-aid> (quoting Chart Hart, "a crop market specialist with Iowa State University," who explains that "{agricultural products are} one of the few areas that the US has a surplus; it makes sense they would target that"). In other words, it is not by mistake that export-dependent agricultural commodities make up 37 percent of U.S. exports facing retaliatory tariffs. See Manuela Tobias, *Retaliatory Tariffs Take Heavy Toll on U.S. Farmers*, POLITIFACT (Aug. 9, 2018, 10:19 AM), <https://www.politifact.com/truth-ometer/statements/2018/aug/09/sonny-perdue/retaliatory-tariffs-take-heavy-toll-farmers>; see also Jenny Hopkinson, CONG. RESEARCH SERV., R45448, Profiles and Effects of Retaliatory Tariffs on U.S. Agricultural Exports Summary (2018), available at <https://crsreports.congress.gov/product/pdf/R/R45448> ("CRS Retaliatory Tariffs Report") ("Commodities for which US. exports to the retaliating countries represent 30% or more of its total exports include soybeans, sorghum, pork, cheese, apples, cherries, seafood, ginseng, whiskey, and some processed foods"); Joseph Parilla and Max Bouchet, *Which US*

communities are most affected by Chinese, EU, and NAFTA retaliatory tariffs?, BROOKINGS Figure 3 (Oct. 2018), <https://www.brookings.edu/research/which-us-communities-are-most-affected-by-chinese-eu-and-nafta-retaliatory-tariffs/> (detailing that regional economies that specialize in agricultural and metals have “the highest share of exports in tariff-affected industries”). Overall, the United States food and beverage industry is the second-largest group affected by retaliatory tariffs. See Brock R. Williams et al., CONG. RESEARCH SERV., R45529, Trump Administration Tariff Actions (Sections 201, 232, and 301): Frequently Asked Questions 15-16, Figure 7 (2019), *available at* <https://crsreports.congress.gov/product/pdf/R/R45529>.

B. Retaliatory Tariffs Target Both a Significant Proportion of Agricultural Exports and a Wide Array of Agricultural Products

Foreign countries designed retaliatory duties to target a significant portion of agricultural exports both in terms of overall percentage of exports impacted and the number of commodities targeted.

In terms of overall percentages, using 2017 as an estimate, the commodities subject to retaliation had an export value of \$26.9 billion³ in that year, constituting 18 percent of all U.S. agricultural exports. CRS Retaliatory Tariffs Report at 1. The

³ The United States Trade Representative (“USTR”) and USDA have estimated the total amount of U.S. agricultural products subject to retaliatory tariffs at even larger amount, totaling \$29.7 billion in 2017. CRS Retaliatory Tariffs Report at 1.

total amount of retaliatory tariffs imposed on U.S. exports in 2018 was slightly lower at \$23.2 billion. See Rachel F. Fefer et al, CONG. RESEARCH SERV., R45249, Section 232 Investigations: Overview and Issues for Congress 18 (Updated April 2, 2019), *available at* <https://fas.org/sgp/crs/misc/R45249.pdf> (“CRS Overview for Congress”). The overall impact of retaliatory tariffs is still unknown as they remain in effect.

Breaking down the overall impact of retaliatory tariffs on a country-by-country basis, China, Mexico, Turkey and the European Union have all implemented tariffs against the United States in retaliation to the Section 232 tariffs against their own exports. The total value of exports subject to retaliation, using the same commodities exported to the United States in 2017 as a comparison period, are as follows:

- The products subject to Chinese retaliatory tariffs imposed in response to both the Section 232 and Section 301 tariffs⁴ “were worth about \$20.6 billion.”
- The products subject to Canadian and Mexican retaliatory tariffs “accounted for approximately \$2.6 billion and \$2.5 billion in exports to reach respective country.”
- The products subject to European Union and Turkish retaliatory tariffs are “valued {at} about \$1 billion and \$250 million, respectively.”

⁴ The significant harm imposed by Section 232 retaliatory measured was worsened by additional retaliation taken by China following the President’s enforcement of tariffs under Section 301 of the Trade Act of 1974, as amended 19 U.S.C. § 2411-14.

CRS Retaliatory Tariffs Report at 5-10. In addition, effective May 2, 2019, India imposed retaliatory tariffs ranging from 10 to 50 percent. *Current Retaliatory Actions*, U.S. Dep't of Commerce, https://www.trade.gov/mas/ian/tradedisputes-enforcement/retaliations/tg_ian_002094.asp (last visited May 10, 2019).

The impact of retaliatory tariffs is further exacerbated because the countries engaging in retaliation are major export markets for U.S. agricultural products. In terms of value, Mexico, Canada, China and the European Union are in the top five export markets for U.S. agricultural products. See CRS Retaliatory Tariffs Report at 1. Between 2014 and 2016, China alone “accounted for more than 16 percent of U.S. agricultural exports.” AFBF Cong. Statement at 1, *supra*. Indeed, the list of retaliatory tariffs by foreign countries is significant enough that the U.S. Department of Commerce has set up its own website to track various measures. See *Current Retaliatory Actions, supra*.

Besides having an impact on a significant percentage of total exports, retaliatory tariffs also cover a wide breadth of agricultural commodities, affecting “more than 800 U.S. agricultural and food products, including meats, grains, dairy products, specialty and horticultural crops, seafood, and alcohol.” CRS Retaliatory Tariffs Report at 1. And the number of Harmonized Tariff Codes (“HTS”) targeted by each country is significant:

- China initially implemented retaliatory tariffs on approximately 90 HTS codes in response to

Section 232 tariffs. *See* Jenny Hopkinson, CONG. RESEARCH SERV. IN FOCUS, China's Retaliatory Tariffs on U.S. Agricultural Products 1 (2019), *available at* <https://fas.org/sgp/crs/row/IF11085.pdf> ("CRS China's Retaliatory Tariffs"). China subsequently implemented tariffs on roughly 870 additional HTS codes in response to later Section 301 tariffs imposed by the President. *See* CRS Retaliatory Tariffs at 2, Table I.

- Canada and Mexico imposed retaliatory tariffs on approximately 24 and 16 HTS codes respectively. CRS Retaliatory Tariffs Report at 2, Table I.
- The European Union placed retaliatory tariffs on approximately 40 individual agricultural tariff subheadings. *See id.* at 3, Table I.
- Turkey targeted approximately 40 individual agricultural tariff subheadings for retaliation. *See id.*

C. Retaliatory Tariffs Have Significantly Decreased the Quantity and Price of U.S. Agricultural Exports

Retaliatory tariffs have significantly decreased the quantity and prices of U.S. agricultural exports. These tariffs targeted certain agricultural sectors and states, specifically those states whose economies depend on agriculture.

Analyzing the impact of retaliatory tariffs on the total amount of U.S. agricultural exports, the USDA forecasted a decrease of \$1.9 billion in agricultural exports between FY2018 and FY2019.

See CRS Retaliatory Tariffs Report at 4. Retaliatory tariffs by Mexico and Canada alone will decrease agricultural exports by an estimated \$1.77 billion. See Maksym Chepeliev, Wallace E. Tyner and Dominique van der Mensbrugghe, *How U.S. Agriculture Will Fare Under the USMCA and Retaliatory Tariffs*, FARM FOUNDATION AND GLOBAL TRADE ANALYSIS PROJECT 18 (Oct. 2018), <https://www.farmfoundation.org/wp-content/uploads/2018/10/Trade-Analysis-10-31-18-Final.pdf>.

The decrease in U.S. agricultural exports has had a permanent effect on existing supply chains. Many foreign countries are replacing U.S. exports with the same commodities produced in other countries. *See* CRS Retaliatory Tariffs Report at 4. For example, although the United States is a large exporter of soybeans, China can easily turn to other export sources such as Brazil, Argentina and Paraguay. *Id.*; *see also* CRS China's Retaliatory Tariffs at 1 (explaining China has already turned to other countries like Brazil). As a result, U.S. products that were previously exported to foreign countries are now flooding domestic markets. For instance, U.S.-grown apples that were previously intended for export markets are now rapidly entering the domestic Michigan market and depressing prices. *See* Chris Alpers et al., *Opinion: Tariffs Threaten Michigan Apple Growers*, DETROIT NEWS (Mar. 25, 2019, 11:00 PM ET), <https://www.detroitnews.com/story/opinion/2019/03/26/opinion-tariffs-threaten-michigan-apple-growers/3266791002/>.

The impact has been particularly hard for U.S. pork, sorghum, soybean and dairy producers, among others. For example:

- Exports of U.S. pork products to China decreased by 58 percent in volume between September 2017 and September 2018. See AFBF Cong. Statement at 3, *supra*.
- Between July and October 2018, U.S. cheese exports to China decreased by 51 percent in value as compared to the same period in 2017. Daren Bakst et al., *How the U.S.-China Trade Dispute Affects U.S. Agriculture: What you Should Know*, THE HERITAGE FOUNDATION 6 (Feb. 28, 2019), <https://www.heritage.org/sites/default/files/2019-02/BG3391.pdf>.
- U.S. sorghum exports to China are forecast to decline from \$759 million to \$500 million between FY2018 and FY2019. *Id.*
- U.S. soybean exports to China were 63 percent lower in volume from January through October 2018 as compared to the same period in 2017. *Id.* And prices have decreased by 20 percent since the implementation of retaliatory tariffs. See CRS China's Retaliatory Tariffs at 1-2. Overall, the implementation of a 25 percent retaliatory tariff on soybeans will decrease U.S. exports between an estimated 24 and 34 percent. Farzad Taheripour and Wallace Tyner, *Impacts of Possible Chinese 25% Tariff on U.S. Soybeans and Other Agricultural Commodities*, CHOICES, QUARTER 2 Table 1 (2018),

http://www.choicesmagazine.org/UserFiles/file/cmsarticle_638.pdf.

- In 2018, the National Milk Producers Federation estimates that retaliatory tariffs cost dairy farmers more than \$1 billion in lost income. Hope Kirwan, *Dairy Organizations Ask For More Aid From USDA As Retaliatory Tariffs Impact Profits*, WISCONSIN PUBLIC RADIO (Oct. 26, 2018, 2:50 PM), <https://www.wpr.org/dairy-organizations-ask-more-aid-usda-retaliatory-tariffs-impact-profits>.

These supply chain changes will not be easy to reverse even if foreign countries remove their retaliatory tariffs. As one “third-generation corn, soybean and hog farmer from Le Mars, Iowa” explained, “it’s going to be a long time before we gain some of those markets back.” Pamuk, *supra*.

Retaliatory tariffs have been especially damaging to states whose economies depend upon agriculture. Retaliatory tariffs decreased Nebraskan farm revenue between approximately \$700 million and \$1 billion dollars in 2018. *A Path Forward on Trade: Retaliatory Tariffs and Nebraska Agriculture*, NEBRASKA FARM BUREAU Table 2, <https://nefb.org/images/FEDeration/PDFs/A-Path-Forward-On-Trade.pdf> (“*Nebraska Path Forward Report*”). Prices for Nebraskan agricultural products decreased between \$0.14-\$0.21 per corn bushel, \$0.95-\$1.54 per soy bushel and \$17.81-\$18.80 per head of pork in 2018 alone. *Id.* at 2-3. Meanwhile, Iowa’s loss in gross state product from retaliatory tariffs currently measures between \$1to 2 billion. Edward J. Balistreri et al., *The Impact of the 2018*

Trade Disruptions on the Iowa Economy, CENTER FOR AGRICULTURAL AND RURAL DEVELOPMENT IOWA STATE UNIVERSITY 18-PB 25 (Sept. 2018), available at <https://www.card.iastate.edu/products/publications/pdf/18pb25.pdf> (“*CARD Study*”).

D. The Nut Industry, Including Walnuts, Has Suffered from Decreased Exports and Lower Prices Caused by Retaliatory Tariffs

Like most other agricultural industries, the retaliatory tariffs have had a direct impact on the U.S. nut industry. China accounts for approximately 12 percent of U.S. almond exports, and following the imposition of retaliatory tariffs, export shipments of U.S. almonds fell by nearly half in 2018. Allysia Finley, *California Farmers Are Trade-War Casualties*, THE WALL STREET JOURNAL (Sept. 19, 2018, 6:56 PM ET), <https://www.wsj.com/articles/california-farmers-are-trade-war-casualties-1537397773>. Similarly, China accounts for 40 percent of U.S. pistachio exports and farmers report that pistachio prices have fallen to the break-even point depending on crop size. *Id.*

Retaliatory tariffs have greatly harmed walnuts because walnut producers rely on exports. Californian walnut producers exported an estimated 70 percent of their total production during the 2017-2018 season. Amicus App. 1. The walnut sector alone is facing retaliatory tariffs ranging from 15 to 100 percent from China, India and Turkey.⁵ These three

⁵ See Commc’n from the Delegation of China, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards*

markets accounted for 27.77 percent, totaling \$343.9 million, of export shipments during the 2016-2017 crop year. Amicus App. 2. The U.S. walnut industry has been hit hard by Turkey's retaliatory tariffs, which are the direct result of the 232 duties. Turkey is a major market for U.S. walnut producers. In 2017, it imported 23 percent of the total U.S. unshelled walnut exports, totaling approximately \$115 million. CRS Retaliatory Tariffs Report at 11. The USDA projected that U.S. agricultural imports to Turkey will decline approximately \$200 million from FY2019 to FY2018. *Id.* Like much of the agricultural industry, it will take U.S. producers years to reclaim

to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards, WTO Doc. G/L/1218 (Apr. 3, 2018), available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/L/1218.pdf> (last visited May 12, 2019); Comm'n from the Delegation of Turkey, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards*, WTO Doc. G/L/1242 (May 21, 2018), available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=245261,245265,245263,245266,245272,245286,245267,245269,245282,245258&CurrentCatalogueIdIndex=4&FullTextHash=3 (last visited May 12, 2019); Comm'n from the Delegation of India, *Immediate Notification Under Article 12.5 of the Agreement on Safeguards to the Council for Trade in Goods of Proposed Suspension of Concessions and Other Obligations Referred to in Paragraph 2 of Article 8 of the Agreement on Safeguards*, WTO Doc. G/L/1239 (May 18, 2018), available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/g/l/1239.pdf> (last visited May 12, 2019).

these lost markets. Meanwhile, with nowhere to go, walnuts flood the domestic market, depressing prices further.

Altogether, the CWB estimated that retaliatory tariffs will result in a net loss for the walnut industry of greater than \$600 million. Amicus App. 3.

E. The Decrease in Total Exports and Prices Has Irreparably Harmed the Agricultural Industry Including Basrai Farms

The decrease in U.S. agricultural exports as a result of retaliatory tariffs caused irreparable harm to an already fragile agricultural industry.

In 2018, the USDA estimated that net farm income decreased by 13 percent. *See* McCrimmon, *supra*. This correlates with Chapter 12 bankruptcy filings by U.S. farmers being at their highest level in the last decade. *See* Pamuk, *supra*; *see also* Jesse Newman and Jacob Bunge, *This One Here Is Gonna Kick My Butt’—Farm Belt Bankruptcies Are Soaring*, WALL STREET JOURNAL (Feb. 6, 2019, 10:59 AM ET), <https://www.wsj.com/articles/this-one-here-is-gonna-kick-my-buttfarm-belt-bankruptcies-are-soaring-11549468759>. And farm loan delinquencies have reached a “near nine-year high.” Jeff Daniels, *Farmer Sentiment Takes Hit Amid Growing Worries Over Trade War*, CNBC (Mar. 5, 2019, 6:53 PM ET), <https://www.cnbc.com/2019/03/05/farmer-sentiment-takes-hit-amid-worries-over-trade-war-says-survey.html>.

Further, unemployment has rapidly increased in the agricultural sector. One study conducted by

Purdue University found that the decrease in agricultural exports could “result in the reallocation of 45,000 farm, ranch, and processing workers.” CRS Retaliatory Tariffs Report at 4. In Nebraska, retaliatory tariffs have cost between \$164 million and \$242 million in lost labor income and between 4,068 and 5,997 jobs. *Nebraska Path Forward Report* at Table 2. In Iowa, labor income declined from “\$366 to \$484 without federal offsets and \$245 to \$364 million with federal offsets.” *Card Study* at 1. By comparison, every job created as a result of the Section 232 tariffs has cost steel users approximately \$650,000. Gary Clyde Huffbauer and Euijin Jung, *Steel Profits Gain, but Steel Users Pay, Under Trump’s Protectionism*, PETERSON INSTITUTE FOR INT’L ECON. (Dec. 20, 2018, 10:45 AM), <https://piie.com/blogs/trade-investment-policy-watch/steel-profits-gain-steel-users-pay-under-trumps-protectionism>. Thus, the costs of retaliatory tariffs greatly outweigh any alleged benefits from the Section 232 tariffs.

Basrai Farms has itself felt the repercussions of the President’s Section 232 tariffs. Basrai Farms’ processor/handler sells its walnuts exclusively to international markets. As noted, following the imposition of Section 232 duties, walnuts were targeted by China, India and Turkey for retaliatory tariffs ranging from 15 to 100 percent. This hurt Basrai Farms badly. In 2017, Basrai Farms produced a total of 737,200 lbs of walnuts. The gross-per-pound value ranged from \$1.25 to \$1.33 depending on the nut variety. Basrai Farms’ entire 2017 walnut crop was valued at \$935,151. The total crop for 2018 was 772,140 lbs. Today’s disrupted market means the

anticipated price, however, is only in the \$.65-\$.70 per-pound range. At this price, Basrai Farm's expects gross revenue for its 2018 walnut crop to be only \$518,192. This amount will barely cover farm operational expenses. Global price declines have and will continue to cause significant economic loss. Disregarding the effects of retaliatory tariffs, Basrai Farms' expected gross revenue for the 2018 crop would have been approximately \$996,878, representing an anticipated profit loss of \$478,686. While the harm to Basrai Farms, an exporter, has been direct, as walnuts have been shut out of foreign markets, an oversupply in the domestic market caused further price declines, affecting even farmers who do not export.

F. Efforts by the Executive Branch Are Not Enough to Stem the Harm Inflicted by Retaliatory Tariffs

The executive branch has acknowledged the precarious position of its agricultural industry by attempting to ameliorate the economic harm caused by the President's decision to impose Section 232 tariffs. The USDA authorized up to \$12 billion to "assist agricultural producers to meet the costs of disrupted markets." *Press Release No. 0167.18: USDA Announces Details of Assistance for Farmers Impacted by Unjustified Retaliation*, U.S. Dept. of Agric. (August 27, 2018), available at <https://www.usda.gov/media/press-releases/2018/08/27/usda-announces-details-assistance-farmers-impacted-unjustified>.

Many trade groups, however, have publicly acknowledged that this package is not enough to cover

the damage caused by retaliatory tariffs. For example, the Western Growers, “an association that represents specialty crop producers, has stated that the \$12 billion plan falls ‘substantially short’ of what many producers affected by the retaliatory tariffs need.” CRS Retaliatory Tariffs Report at 19 (internal citation omitted). The AFBF, the “largest general farm organization,” explained that the relief provided by the USDA would “only help producers through a few months.” *Id.* And the American Soybean Association has urged the USDA, to focus on expanding access for U.S. exports to the Chinese market and to also increase its efforts to identify new markets in other countries. CRS China’s Retaliatory Tariffs at 2.

Individual farmers have similarly stated that these payments will not solve the problem. Mike Paustian, an Iowa pork producer, asserted that “the payment {would not} save anybody’s life” and will only “soften the blow a little bit.” Jesse Newman, *Farmers Say Aid Won’t Cover Tariff Damage*, THE WALL STREET JOURNAL (Sept. 27, 2018 5:56 AM), https://www.wsj.com/articles/farmers-say-aid-wont-cover-tariff-damage-1537974178?mod=hp_listb_pos1. Mike Haag, an Illinois hog farmer, estimated that the money he will receive from the USDA will only cover a few weeks of animal feed and a tractor payment. *Id.* Finally, Tom Giessel, a wheat farmer, said he will receive \$5,000 from USDA, which is only 10 percent of the cost to fertilize his crops next year. *Id.*

Banks have also noted that these payouts are not enough, expressing concerns that farmers are simply too far behind on loan payments. Alexia

Fernández Campbell, *US Farms Are Going Bankrupt at an Alarming Rate. Trump's Trade War is Partially to Blame.*, VOX (Nov. 28, 2018, 5:30 PM EST), <https://www.vox.com/policy-and-politics/2018/11/27/18114566/trump-trade-war-china-farm-bankruptcy>.

In sum, trade groups, individual farmers, and even the banks themselves are all in agreement that the payments authorized by USDA cannot fully remediate the significant harm caused by retaliatory tariffs. Even if these payments were enough, Secretary of Agriculture Sonny Perdue stated that the USDA's aid package will not extend into 2019. Megan Keller, *US Soybean Sales to China Down 94 Percent Amid Trump Tariffs: Report*, THE HILL (Nov. 5, 2018, 4:56 PM EST), <https://thehill.com/policy/finance/415028-us-soybean-sales-to-china-down-94-after-tariffs>.

G. The Harm Caused by Retaliatory Tariffs Is Likely to Continue and Get Worse

Not only are government efforts to combat retaliatory tariff damage ineffective, but further retaliation is highly likely. Both Canada and Mexico have threatened to institute new retaliatory tariffs on U.S. agricultural products including apples, pork and ethanol. Gil Fullickson, *Canada Considers New Retaliatory Tariffs on U.S. Agricultural Products*, SUCCESSFUL FARMING (Apr. 9, 2019), <https://www.agriculture.com/news/business/canada-considers-new-retaliatory-tariffs-on-us-agricultural-products>; Adriana Barrera & Dave Graham, *Mexico Eyes Fresh U.S. Targets for Tariffs to Pressure Trump*

Over Steel, REUTERS (Mar. 1, 2019, 5:03 PM), <https://www.reuters.com/article/us-usa-trade-mexico/mexico-eyes-fresh-u-s-targets-for-tariffs-to-pressure-trump-over-steel-idUSKCN1QI5LV>.

Further, the United States currently has two ongoing Section 232 investigations on motor vehicles and uranium, which could lead to additional retaliation measures if the United States moves forward with tariffs. The value of automobiles and parts potentially subject to these tariffs is significantly larger than U.S. imports of steel and aluminum. CRS Overview for Congress at 25. To illustrate, in 2018, the United States imported \$50 billion of motor vehicles and parts from the European Union, which has threatened to implement equal retaliatory measures against U.S. exports if additional Section 232 tariffs are imposed. *Id.* at 20. If additional Section 232 tariffs are placed on automobiles, one study estimated that GDP would “fall by an additional 0.45 percent (\$112 billion), resulting in 0.29 percent lower wages and 347,988 fewer full-time equivalent jobs.” Erika York et al., *Tracking the Economic Impact of U.S. Tariffs and Retaliatory Actions*, TAX FOUNDATION (June 22, 2018, last updated May 10, 2019), <https://taxfoundation.org/trade-china-tariffs-economic-impact/>.

Foreign countries have introduced retaliatory tariffs against the U.S. agricultural sector, an industry heavily dependent on exports, in response to the President’s implementation of Section 232 tariffs. These retaliatory tariffs have significantly decreased

the total amount and price of U.S. agricultural exports, including walnuts. As a result, net farm income has decreased while unemployment has increased. Basrai Farms in particular has suffered severe price costs. Efforts by the USDA are insufficient to alleviate the harm caused by retaliatory tariffs, which is only likely to continue as countries may introduce additional retaliatory measures.

III. The Gravity of the Harm Felt by the Agricultural Industry Supports this Court Granting Certiorari

The harm inflicted by retaliatory tariffs on the U.S. agricultural industry, as detailed above, illustrates the expansive unconstitutional authority granted to the President under Section 232. The statute grants the President the authority to favor particular industries, in this case the steel and aluminum industries, to the detriment of any and all others. But the statute provides no guidance on how the President is to weigh these trade-offs. *See* Pet. for Cert. at 25 (explaining that “Congress left {it} entirely up to the President” what to do about retaliatory tariffs and how to weigh this harm against any potential benefit to the steel and aluminum industries). By failing to require that the President assess the likelihood of collateral damage caused by retaliatory measures imposed on U.S. exports, especially agricultural exports, Section 232 unconstitutionally extends the President’s authority to adjust imports over the entire economy regardless of any impact on “national security.” In the lower court, the Government could not articulate a limit to the President’s power under Section 232. *Id.* at 28.

The impact of the President's implementation of Section 232 tariffs on the entire economy illustrates that, besides certain procedural requirements, there is no limit the President's authority to act under Section 232.

The gravity of the harm to the agricultural industry not only highlights the unconstitutional delegation claim presented in the petition but also justifies granting certiorari now prior to judgment to prevent further irreparable harm to an already suffering industry. Only this Court can authoritatively resolve the underlying constitutional question. *See id.* at 20-22 (maintaining that only this Court can address the applicability of *Algonquin* to then examine the underlying merits of the constitutional question). Requiring an opinion by the Federal Circuit is, therefore, unnecessary and a waste of judicial resources. *Id.* at 22. This Court should grant certiorari to address the constitutional question before the U.S. agricultural industry, including walnut farmers like Basrai Farms, experiences further irrevocable damage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in advance of judgment should be granted and the case set down for prompt briefing and argument.

28

Respectfully submitted,

Jeffrey S. Grimson

Counsel of Record

Kristin H. Mowry

Jill A. Cramer

Bryan P. Cenko

MOWRY & GRIMSON, PLLC

5335 Wisconsin Ave., NW

Suite 810

Washington, DC 20015

(202) 688-3610

jsg@mowrygrimson.com

May 16, 2019

APPENDIX

Amicus App. 1

California Walnut Board

101 Parkshore Drive, Suite 250

Folsom, CA 95630-4726

(916) 932-7070

An Equal Opportunity

Employer and Provider



August 9, 2018

Don Hinman

U.S. Department of Agriculture/AMS 1400

Independence Ave, SW, Room 1406

Washington, DC 20250

Dear Mr. Hinman,

I am writing in response to your request of potential USDA support for the California walnut industry related to tariff impacts. The California Walnut Board (CWB) is a federal marketing order representing over 4,800 walnut growers and 98 handlers who process and ship walnuts to customers around the world. California walnuts represent 99% of U.S. production of walnuts and are the 4th leading agricultural export from the state. In 2017/18 California production reached 627,798 short tons on 335,000 bearing acres. California exported 67% of total shipments in the 2016/17 season and anticipates exports to reach 70% for the current season 2017/18.

Retaliatory tariffs have been imposed in several of our key export markets including China, India and Turkey which threaten the stability of our industry,

Amicus App. 2

our producers and our competitiveness in the global market. These three markets combined accounted for 27.77% of all export shipments (118,251MT) with a collective wholesale value of \$343.9 million during the most recent 2016/17 crop year. To date the market effect has not been fully realized as the harvest is pending in the next 45 days. However; the global walnut market is currently constrained, with excess global supply putting downward pressure on the market with great uncertainty surrounding all markets, particularly those tariff effected markets.

Country	Base Rate 1/1/18	Base Rate Change	Additional 232 Rate
China (inshell)	25%	NA	15%
China (shelled)	20%	NA	15%
India	30.9%	100% (5/23/18)	20% (9/16/18)
Turkey	15%	NA	10%
Country	Applied Rate	Additional 301 Rate	New Applied Rate
China (inshell)	40%	25%	65%
China (shelled)	35%	25%	60%
India	120%	NA	120%
Turkey	25%	NA	25%

Amicus App. 3

The 2018/19 crop will be estimated by USDA National Agricultural Statistics Service (NASS) on August 31, 2018. Production has continued to grow, doubling in the last decade with acreage expanding annually therefore, we anticipate a crop of no less than 650,000 short tons, of which 122,850 short tons are at risk from tariff effected markets. Moreover, the overall market effect will result in net loss for the industry greater than **\$600 MM**, impacting all producers with the potential to put small producers out of business. Therefore; the CWB requests the USDA purchase no less than **40,000 short tons** (80 MM lbs.) of shelled California walnuts over the December 2018 to December, 2019 period with three quarters of the volume (60,000 pounds) being purchased prior to August 31, 2019.

China, India and Turkey purchase inshell and shelled walnuts, with the predominance being inshell. Inshell walnuts are not the preference of the U.S. market, which largely utilizes shelled walnuts for their convenience in snacking, cooking and baking. Hence, shelled walnuts are well suited to the needs of U.S. feeding programs. The USDA grade of **light amber** is the preferable product type in the **USDA specs of pieces & halves, pieces and small pieces**. The current average market price is approximately **\$2.60/lb.** for these specifications however; with harvest pending this price is subject to change in the next 45 days. Average delivery is typically an additional **10 cents per pound**. The industry offers a variety of standard package sizes including: 25lb., 10lb., and 5lb. cases however; the industry is able to provide

Amicus App. 4

package sizes that fulfill the needs of USDA feeding programs including 1-lb. and 2- lb. packages.

Product	USDA Spec/Size	Volume
Light Amber	Pieces & Halves	24 MM lbs.
Light Amber	Pieces	40 MM lbs.
Light Amber	Small Pieces	16 MM lbs.

Product	Truckloads*
Light Amber	Approx. 571
Light Amber	Approx. 952
Light Amber	Approx. 381

- *Assumes 40ft. container holding 42,000 shelled pounds.*

USDA specifications are established for shelled walnuts in the Commodity Specification for Shelled Nuts (August, 2014). The CWB proposed amendments to the standard in 2017 which recommended the following enhancements to maintain optimal product quality:

- Chemical testing:
 - Peroxide value (PV) - 1.5 meq/kg. max
 - Free fatty acids (FFA) – 1.25% max.
- Replace “store in a cool dry place” with “keep under refrigeration at 35° to 45°”.

Amicus App. 5

Walnut harvest begins in September and continues through November. Walnuts are stored in optimal conditions and/or cold storage pre/post processing. In order to maintain optimal product quality refrigeration is recommended for transit and storage. For the period of December 2018 to December, 2019 the optimal delivery period should be no less than 60 days as follows

<u>Tender</u>
October, 2018
March, 2019
June, 2019
October, 2019

<u>Delivery Window</u>
Dec 15 – Feb 15
April 15 – June 15
July 15 – September 15
December

Thank you for your consideration of the California walnut industry's request. While the industry is optimistic for swift resolution to the ongoing tariff issues, we look forward to working with the USDA in providing some interim relief to our producers and processors.

If there is any additional detail I can provide in assisting with this request, please let me know.

Amicus App. 6

Sincerely,

/s/ Michelle McNeil Connelly
Executive Director
cc: CWB/CWC Members & Alternates
Dan Haley, Haley & Associates