No. 19-1177

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 TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
JEANNE E. DAVIDSON
TARA K. HOGAN
ANN C. MOTTO
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is not published in the Federal Reporter but is available at 2020 WL 967925. The opinion of the United States Court of International Trade (Pet. App. 24-59) is reported at 376 F. Supp. 3d 1335.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2020. The petition for a writ of certiorari was filed on March 25, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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 United States Court of International Trade (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. 24-59. The court of appeals affirmed. *Id.* at 1-22.

1. Section 232 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). That 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).

If the Secretary's report contains a finding "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, 3 C.F.R. 431 (1971-1975 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. 70. 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 quotas or tariffs on steel imported into the United States. *Id.* at 71.

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. 72. To address that threat, the President issued a proclamation instituting a 25% tariff on imports of steel articles. *Id.* at 72-73. 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 39-40 n.8. The President also established an increased tariff for steel articles imported from Turkey. *Ibid.*

3. Petitioners brought this lawsuit in the CIT, alleging that Section 232 impermissibly delegates legislative power to the President. Pet. App. 25-26. A three-judge panel of the CIT denied petitioners' motion for summary judgment and granted respondents' motion for judgment on the pleadings. *Id.* at 25-42.

The CIT explained that, although Congress may not delegate its legislative powers to the executive, a grant of authority to the executive does not effect a delegation of legislative power if Congress sets out an "intelligible principle" to which the executive must conform. Pet. App. 30 (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.'" *Id.* at 31-32 (quoting *Algonquin*, 426 U.S. at 559).

Petitioners contended that *Algonquin* is no longer good law because that decision 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. 33-38. 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 36, 38.

In a separate *dubitante* opinion, Judge Katzmann agreed that the CIT was bound by *Algonquin* to reject petitioners' nondelegation challenge. Pet. App. 42-59. 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 decision. *Id.* at 59.

4. Petitioners appealed to the Federal Circuit. Petitioners also filed a petition for a writ of certiorari before judgment, which this Court denied. 139 S. Ct. 2748.

The court of appeals affirmed. Pet. App. 1-22. The court observed that, in *Algonquin*, this Court had held that the standards set out in Section 232 "are clearly sufficient to meet any delegation doctrine attack." *Id.* at 15 (quoting *Algonquin*, 426 U.S. 559). The court of appeals saw "no basis on which *Algonquin* can be properly distinguished" from this case, *id.* at 17, and it concluded that "*Algonquin* answers the question * * * presented here," *id.* at 16.

Petitioners renewed their contention that *Algonquin* is no longer good law because of changes in the availability of judicial review. The court of appeals rejected that argument. Pet. App. 20. The court explained that "[n]othing in *Algonquin's* analysis rests on a premise about judicial review that later Supreme Court decisions have changed." *Id.* at 20-21. The court also quoted this Court's admonition that, "[i]f a precedent of [this Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls." *Id.* at 18 (quoting *Rodriguez de Quijas* v. *Sherason/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

ARGUMENT

Petitioners contend (Pet. 17-35) that Section 232 of the Trade Expansion Act, 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. The Court denied review when petitioners presented the same question in their petition for a writ of certiorari before judgment, and it should follow the same course here.

1. Although Congress may not delegate legislative power to the executive, it may seek the executive's "assistance" "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 effects a permissible grant of discretion, not a "forbidden delegation of legislative power." *Id.* at 409. "Only twice in this country's history" has the Court "found a delegation excessive," and the Court has "over and over upheld even very broad delegations." *Gundy* v. *United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion).

In *Algonquin*, this Court held that Section 232 set forth an intelligible principle and thus complied with the Constitution. 426 U.S. at 558-560. That case arose after President Nixon 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.

2. Petitioners argue (Pet. 4) that this Court should "overrule" *Algonquin* or "limit it" to its facts. Under the doctrine of *stare decisis*, however, petitioners must identify a "special justification" for revisiting the question resolved in *Algonquin*. *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). Petitioners have not shown that *Algonquin* was wrongly decided, let alone identified a "special justification" for overruling it.

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 empowered executive agencies to regulate in the "public interest," see *National Broadcasting 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, 422 (1944); and to establish air-quality standards to "protect the public health," see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472-476 (2001). Here, in contrast, the statute empowers the President to act only upon a finding that 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 Export Corp.*, 299 U.S. 304, 324 (1936); see *Clinton* v. *City of New York*, 524 U.S. 417, 445 (1998); *Panama Refining*

Co. v. *Ryan*, 293 U.S. 388, 422 (1935); see also *Department of Transportation* v. *Association of Am. R.R.s*, 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. 41, § 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.

Third, this Court has explained that 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 co-ordination." *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).

3. Petitioners advance (Pet. 20-31) a series of arguments for overruling, limiting, or distinguishing *Algonquin*. Those arguments lack merit.

Petitioners argue (Pet. 31) that "*Algonquin* is not controlling here" because this case involves "a facial * * * challenge," whereas *Algonquin* did not. 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*.

Petitioners also contend (Pet. 20) that "Section 232 contains a uniquely broad delegation of power" because "Congress has expanded the definition of the term 'national security'" to encompass "economic impacts of an imported product 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. 32 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 551 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 that are 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 further contend (Pet. 21) 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." That argument is mistaken. Rather than authorizing the President to adjust imports whenever he pleases, Section 232 "estab-

lishes 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. 22).

Petitioners likewise argue (Pet. 15-16, 24-25) that *Algonquin* reflected the premise that presidential action under Section 232 was subject to judicial review, 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 shown that premise to be mistaken. In fact, the scope of judicial review of action under Section 232 is the same today as it was when the Court decided *Algonquin*. See Pet. App. 20. 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. 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 Central Telephone 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. 24 (acknowledging that "no decision of this Court has held that the availability of judicial review is a requirement of a constitutionally valid delegation").

Petitioners further argue (Pet. 33) that this Court's recent decision in *Gundy* undermines *Algonquin*. That is incorrect. In rejecting the particular delegation challenge before it, a plurality of the *Gundy* Court explained that "a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of his authority.'" 139 S. Ct. at 2129 (brackets and citation omitted); see also *id.* at 2130-2131 (Alito, J., concurring in the judgment). The dissenters, by contrast, would have held that the statute at issue there effected an impermissible delegation of legislative power. They acknowledged, however, that "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power,'" such as "foreign affairs." *Id.* at 2137 (Gorsuch, J., dissenting).

Section 232 complies with the standard applied by the plurality in *Gundy*: It sets forth both the policy the President must pursue and the boundaries of his authority. See pp. 7-8, *supra*. Section 232 also complies with the standard applied by the *Gundy* dissenters: It empowers the President to exercise discretion in fields (foreign affairs and foreign trade) that are already within the scope of executive power.

With respect to the doctrine of *stare decisis*, petitioners argue (Pet. 32-33) that this Court may properly overrule *Algonquin* because that decision "has been cited by this Court only a dozen times and only once in a case challenging a congressional delegation." No decision of this Court suggests, however, that "lack of sufficient citations" is a proper basis for overruling a precedent, or that "a holding of [this Court] expires if the case setting it forth is not periodically revalidated." *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Insurance Co.*, 559 U.S. 393, 413 n.12 (2010) (opinion of Scalia, J.). And as explained above, the opinions in *Gundy* confirm that the holding in *Algonquin* remains consistent with this Court's current nondelegation jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
JEANNE E. DAVIDSON
TARA K. HOGAN
ANN C. MOTTO
Attorneys

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