No. 21-

IN THE

Supreme Court of the United States

TRANSPACIFIC STEEL LLC, BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN PIPE U.S. INC., AND THE JORDAN INTERNATIONAL COMPANY,

Petitioners,

v.

UNITED STATES, JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, IN HIS OFFICIAL CAPACITY AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA M. RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JULIE C. MENDOZA
Counsel of Record
MORRIS MANNING & MARTIN LLP
1401 EYE STREET, NW, SUITE 600
WASHINGTON, D.C. 20005
(202) 216-4817
jmendoza@mmmlaw.com

Additional Counsel Listed on Inside Cover

November 12, 2021
Counsel for Petitioners

R. WILL PLANERT
DONALD B. CAMERON
BRADY W. MILLS
MORRIS MANNING & MARTIN LLP
1401 EYE STREET, NW, SUITE 600
WASHINGTON, D.C. 20005
(202) 216-4819
wplanert@mmmlaw.com

JAMES H. HULME
MATTHEW M. NOLAN
NANCY A. NOONAN
DIANA DIMITRIUC QUAIA
LEAH SCARPELLI
AMAN KAKAR
ARENT FOX LLP
1717 K STREET, NW
WASHINGTON, D.C. 20006-5344
(202) 857-6013
Matthew.Nolan@arentfox.com

ALAN B. MORRISON
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H STREET, NW
WASHINGTON, D.C. 20052
(202) 994-7120
abmorrison@law.gwu.edu

LEWIS E. LEIBOWITZ
THE LAW OFFICE OF LEWIS E. LEIBOWITZ
1400 16TH STREET, NW.
SUITE 350
WASHINGTON, D.C. 20036
(202) 776-1142
lewis.leibowitz@lellawoffice.com

Counsel for Petitioners

QUESTIONS PRESENTED

Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, ("section 232"), authorizes the President to "adjust imports" that he determines threaten national security. The statute directs that the President "shall" determine whether to take action within ninety days of receiving a report from the Secretary of Commerce. If he determines to take action, he "shall implement that action" within 15 days. This case challenges actions taken by the President pursuant to section 232 to double the tariffs only on imported steel products from the Republic of Turkey more than 120 days after the two express deadlines in section 232.

It is undisputed that the President's action to impose the 50 percent tariff on imports of steel from Turkey alone was taken well after both deadlines expired. Despite this, a panel of the Court of Appeals for the Federal Circuit, by a 2-1 vote, reversed the Court of International Trade and upheld the imposition of the additional tariff, finding that the mandatory "shall" language in section 232 was merely permissive. Accordingly, this petition presents the following questions:

1. Whether the President acted outside of the scope of the statutory authority Congress granted under section 232 by doubling the tariff on steel imports from Turkey after the expiration of the statutory periods for presidential action specified in section 232(c)(1)?

2. Whether section 232, as construed by the Federal Circuit majority in this case to eliminate

mandatory deadlines for presidential action, is inconsistent with this Court's ruling in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), and is therefore an unconstitutional delegation of legislative power to the President in violation of Article I, section 8 of the Constitution and principle of separation of powers because it cedes to the President the virtually unbounded power to tax and otherwise regulate imports?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners, who were the plaintiffs below, are Transpacific Steel LLC ("Transpacific"), a U.S. importer of steel products from several countries, including Turkey, Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. ("BMB"), a Turkish producer and exporter of steel pipe and tube products and also a non-resident U.S. importer of steel pipe and tube products, Borusan Mannesmann Pipe U.S. ("BMP"), a domestic producer and U.S. importer of steel pipe and tube products, and The Jordan International Company ("TJI"), a U.S. importer of galvanized and cold rolled steel coils manufactured in Turkey. Transpacific is owned and operated by Egoli Resources Unit Trust Bateleur Ventures LTD. BMB is the parent company of BMP, and BMB does not have a parent company. TJI does not have a parent company. No publicly held company owns 10 percent or more of stock in any of the Petitioners.

Respondents, who were defendants below, are the United States, Joseph R. Biden, Jr., in his official capacity as President of the United States, United States Customs and Border Protection, Troy Miller, in his official capacity as Senior Official Performing the Duties of the Commissioner for United States Customs and Border Protection, Department of Commerce, and Gina M. Raimondo, in her official capacity as Secretary of Commerce.

RELATED CASES

American Institute for International Steel v. United States, No 18-00152, United States Court of International Trade. Judgment entered March 25, 2019.

American Institute for International Steel v. United States, No. 18-1317, United States Supreme Court. Judgment entered June 24, 2019.

American Institute for International Steel v. United States, No. 2019-1727, United State Court of Appeals for the Federal Circuit. Judgment entered February 28, 2020.

American Institute for International Steel v. United States, No. 19-1177, United States Supreme Court. Judgment entered June 22, 2020.

Universal Steel Products, Inc. v. United States, No. 19-00209, United States Court of International Trade. Partial judgment entered February 26, 2021. Appeal docketed in the United State Court of Appeals for the Federal Circuit, *sub nom.*, *USP Holdings, Inc. v. United States*, No. 21-1726.

Primesource Building Products, Inc. v. United States, No. 20-00032, United States Court of International Trade. Judgment entered April 5, 2021. Appeal docketed in the United State Court of Appeals for the Federal Circuit, No. 21-2066.

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The opinions of the United States Court of Appeals for the Federal Circuit were issued on July 13, 2021, Pet. App. 1–65 and 66–81, and are reported at 4 F.4th 1306. The opinion of the United States Court of International Trade ("CIT") granting Petitioners' motion for judgment on the agency record was issued on July 14, 2020, Pet. App. 87–113, and is reported at 466 F. Supp. 3d 1246. The opinions of the CIT denying Respondents' motion to dismiss were issued on November 15, 2019, Pet. App. 116–133 and 133–136, and are reported at 415 F. Supp. 3d 1267.

STATEMENT OF JURISDICTION

Petitioners filed this case in the CIT, which has exclusive jurisdiction under 28 U.S.C. § 1581(i)(1)(B) & (D). Pursuant to 28 U.S.C. § 255, a panel of three judges was convened to hear Petitioners' challenge to the lawfulness of the President's doubling of the tariff on steel imports from Turkey and demand for a refund of the millions of dollars that they paid in unlawfully imposed tariffs. On July 14, 2020, the court granted Petitioners' motion for judgment on the agency record. Pet. App. 87–113. Respondents appealed the CIT's judgment to the Federal Circuit pursuant to 28 U.S.C. § 1295(a)(5). The judgment of the Federal Circuit was entered on July 13, 2021. The Federal Circuit denied Petitioners' motion for rehearing and rehearing *en banc* on September 24, 2021. Pet. App. 85. This petition is filed pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

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

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

Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, ("section 232"), is set forth in full at Pet. App. 137–144. Section 232(c)(1) provides that:

> Within 90 days after receiving a report . . . in which the Secretary [of Commerce] finds 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 shall (i) determine whether the President concurs with the finding of the Secretary, and (ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

> If the President determines . . . to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action . . . .

STATEMENT OF THE CASE

On March 8, 2018, acting pursuant to the statutory authority afforded him under section 232, the President issued Proclamation 9705, imposing a 25 percent tariff on all imported steel products exported from all countries other than Canada and Mexico, including the Republic of Turkey. 83 Fed. Reg. 11,625 (Mar. 15, 2018), Pet. App. 148–156. The President's action was based on a January 11, 2018 finding and report issued by the Secretary of Commerce ("Secretary") concluding that imports of steel products threatened to impair national security. *Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended*, 85 Fed. Reg. 40,202 (Bureau of Indus. & Sec. July 6, 2020) ("Steel Report"). On August 10, 2018, the President issued Proclamation 9772 increasing to 50 percent the tariff applicable to steel imports from Turkey alone. 83 Fed. Reg. 40,429 (Aug. 15, 2018), Pet. App. 157–163.

Petitioners are Turkish producers and U.S. importers of steel products from Turkey that have been subjected to the 50 percent tariff imposed in Proclamation 9772. They filed suit at the CIT alleging that Proclamation 9772 was unlawful and

in excess of statutory authority because it was issued outside the time limits set by Congress in section 232(c)(1).

The CIT heard the case in a three-judge panel pursuant to 28 U.S.C. § 255. In *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019) ("*Transpacific I*"), the CIT panel unanimously denied Respondents' motion to dismiss. Pet. App. 116–136. The CIT held that Petitioners had stated a claim for relief because the timing requirements in section 232 were mandatory and had not been followed in issuing Proclamation 9772. The court held that the time limits set forth in section 232(c)(1) are not merely a procedural roadmap for action, but constitute a substantive constraint on the President's power to act. Pet. App. 128–132.

Following briefing on the merits, the CIT reaffirmed that holding in *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246 (Ct. Int'l Trade 2020) ("*Transpacific II*"). Pet. App. 87–113. The court held that the statutory language in section 232 is clear and that any action by the President to adjust imports under section 232 must comply with the timing requirements of section 232(c)(1).

The Respondents appealed to the Federal Circuit, which reversed the CIT, holding that section 232 authorizes the President to announce a "plan of action" that my be modified over time without further investigations or findings by the Secretary. Pet. App. 32.

Operation Of Section 232

Section 232 was enacted pursuant to the power granted exclusively to Congress in Article I, Section 8 of the Constitution "To lay and collect Taxes, Duties, Imposts and Excises" as well as its authority "To regulate Commerce with foreign Nations."

Section 232 authorizes a process by which the President may "adjust imports" of an article to eliminate a threat posed by such imports to national security. Section 232(b) directs the Secretary to undertake an investigation to determine the effects of imports of a particular article of commerce on the national security. Pet App. 137–139. The Secretary must consult with the Secretary of Defense and "appropriate officers of the United States," and "hold public hearings or otherwise afford interested parties an opportunity to present information and advice" as appropriate. The Secretary of Defense, upon the request of the Secretary, must provide "an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section."

Within 270 days of initiating an investigation, the Secretary must report the findings of the investigation and recommendations for action or inaction. 19 U.S.C. § 1862(b)(3), Pet. App. 138. The Secretary's affirmative report confers authority on the President to act under the statute. Within ninety days, the President must "determine whether the President concurs with the finding of the Secretary." *Id.* § 1862(c)(1), Pet. App. 139. If

the President concurs with the Secretary that imports pose a threat to national security, the President must within that same 90-day period "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(1)(A)(ii), Pet. App. 139. If the President determines that action must be taken, the President "shall implement" that action within fifteen days. *Id.* § 1862(c)(1)(B), Pet. App. 140. Finally, within thirty days of making his decision on whether to take action, the President must submit a written statement to Congress of the reasons why the President has decided to act or declined to act. *Id.* § 1862(c)(2), Pet. App. 140.

Apart from the requirement to obtain a report from the Secretary and to announce and implement any actions within the specified deadlines, section 232 places virtually no other limitations on the President's power to "adjust imports." Section 232 provides an expansive (and non-exclusive) list of factors that the President must consider, including—

> domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services

> including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use . . . .

Id. § 1862(d), Pet. App. 141–142. The statute provides no guidance, however, as to how these factors are to be weighed. Furthermore, section 232(d) includes an essentially unlimited definition of "national security" that encompasses economic and defense considerations:

> the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries[,] . . . without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

Id. Section 232 provides no limit or guidance on the type and scope of import adjustments the President may impose. The President may tax imports by increasing existing tariffs by any amount and may impose unlimited new tariffs on goods that Congress has not previously subjected to import duties. The President may also impose quotas—whether or not there are already existing quotas—with no limit on the extent of the reduction from any existing quota or import levels. In addition, the President may impose licensing

fees for the subject article, either in lieu of, or in addition to, any tariff or quota already in place.

Finally, section 232 does not provide for judicial review of orders by the President under it, and because the President is not an agency under 5 U.S.C. § 551(1), judicial review is not available under the Administrative Procedure Act, 5 U.S.C. § 706. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). Consequently, the President's actions under section 232 are not reviewable for rationality, findings of fact, or abuse of discretion. *Id.* The only judicial review available of the President's actions under section 232 is for constitutionality and for action in excess of statutorily granted authority. *See infra* pp.28–29.

The President's 232 Tariff On Steel From Turkey

On April 19, 2017, the Secretary initiated an action under section 232 by opening an investigation with respect to steel imports. *See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19,205 (Bureau of Indus. & Sec. Apr. 26, 2017). On January 11, 2018, the Secretary submitted a report to the President containing his findings and recommendations. *See generally*, Steel Report. The Secretary explained that he had analyzed the impact of steel imports using a broad definition of "national security," to include not only the term "national defense" but also "the 'general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements,

which are critical to minimum operations of the economy and government.'" *Id.* at 40,203.

The Steel Report concluded that "the present quantities and circumstance of steel imports are 'weakening our internal economy' and threaten to impair the national security as defined in Section 232." *Id.* at 40,204. The report identified global excess steel capacity as a circumstance that contributes to the "weakening of our internal economy" and "threaten[s] to impair" the national security. *Id.* at 40,223–25.

The Secretary recommended that the President take immediate action to adjust the level of these imports, *id.* at 40,205–06, 40,226, through any of three alternative actions, each of which had the stated objective of enabling the U.S. steel industry to operate at an 80 percent or better average capacity utilization rate: (1) the imposition of a global quota on steel imports at the equivalent of 63 percent of the 2017 import level; (2) a 24 percent tariff on all imported steel products; or (3) a 53 percent tariff on all imported steel products from twelve specific countries (Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia, and Costa Rica), with quotas imposed on all other countries in amounts equal to their 2017 import volumes, *id.*

The Secretary of Defense advised the Secretary of his view that circumstances detailed in the Steel Report do not adversely "impact the ability of [Department of Defense] programs to acquire the steel or aluminum necessary to meet national defense requirements." Pet. App. 145–147. The

Secretary of Defense also stated that he "continues to be concerned about the negative impact on our key allies [of] the recommended options within the reports." *Id.*

On March 8, 2018, the President issued Proclamation 9705, in which he "concur[red] 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 of the United States" and "decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles . . . imported from all countries except Canada and Mexico." Pet. App. 150. The President further directed the Secretary to "continue to monitor imports of steel articles" and "from time to time . . . review the status of such imports with respect to national security. The Secretary shall inform the President of any circumstances that . . . might indicate the need for further action by the President" or "that the increase in duty rate provided for in this proclamation is no longer necessary." Pet. App. 155–156.

On August 10, 2018, the President made the following announcement on Twitter:

> I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar! Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!

Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 10, 2018, 5:47 A.M.), http://twitter.com/realdonaldtrump/status/1027899286586109955 [https://web.archive.org/web/20180810125229/https://twitter.com/realDonaldTrump/status/1027899286586109955]. The same day, the President issued Proclamation 9772, which implemented an adjustment to imports with respect to Turkey alone by doubling the previously announced section 232 tariff on steel article imports from Turkey to 50 percent. Pet. App. 157–163.

Proclamation 9772 was not based on an investigation or a new report by the Secretary analyzing whether imports of steel from Turkey threatened national security. Rather, the President linked the action against Turkey to the January 2018 Steel Report: "while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level the Secretary recommended in his report." Pet. App. 158. The President announced that it was "necessary and appropriate in light of our national security interests to adjust the tariff[s] imposed by previous proclamations." Pet. App. 158. The President further stated that the "Secretary has advised" that by taking action against Turkey alone "this adjustment will be a significant step toward ensuring the viability of the domestic steel industry." Pet. App. 159. The President also asserted that this action was in line with Proclamation 9705, wherein the President had "directed the Secretary to monitor imports of steel articles and inform [him] of any

circumstances that in the Secretary's opinion might indicate the need for further action under section 232 with respect to such imports." Pet. App. 158. The 50 percent tariff on imports from Turkey remained in effect until May 21, 2019, when the President effectively revoked it via Proclamation 9886, which restored Turkey to the 25 percent tariff rate established in Proclamation 9705. 84 Fed. Reg. 23,421 (May 21, 2019), Pet. App. 164–170.

This Litigation

Petitioners are Transpacific Steel LLC ("Transpacific"); Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. ("BMB") and Borusan Mannesmann Pipe U.S. ("BMP") (collectively, "Borusan"); and The Jordan International Company ("TJI"). Transpacific filed the complaint in this action at the CIT on January 17, 2019, and amended the complaint on April 2, 2019. Pet. App. 171–205. Transpacific requested a three-judge panel pursuant to 28 U.S.C. § 255 on February 5, 2019. Borusan and TJI were granted status as plaintiff-intervenors by the CIT on December 10, 2019 and December 13, 2019, respectively. Petitioners' amended complaint alleged that Proclamation 9772 was unlawful as in excess of statutory authority and sought refunds of the additional section 232 duties paid on their imports of steel products from Turkey. Pet. App. 197–205.

The Respondents are the United States, the President of the United States (in his official capacity), the Secretary of Commerce, and the Acting Commissioner of U.S. Customs and Border

Protection, who is responsible for collecting the payments made on account of the tariffs imposed by the President under section 232.

Petitioner Transpacific is a U.S. importer of steel products from several countries, including Turkey. Petitioner BMB is a steel pipe producer and exporter in Turkey and also a non-resident U.S. importer of steel pipe and tube products from Turkey. Petitioner BMP is a U.S. producer of steel pipe and tube products and an importer of steel pipe products produced by its parent BMB in Turkey. Petitioner TJI is an importer of galvanized and cold rolled steel coils manufactured in Turkey.

Pursuant to the judgment of the CIT invalidating Proclamation 9772, all of the Petitioners have received refunds from U.S. Customs and Border Protection on their imports of steel products from Turkey equal to the difference between the 50 percent tariff imposed by Proclamation 9772 and the 25 percent tariff under Proclamation 9705. Unless this Court reverses the judgment of the Federal Circuit, Petitioners will be required to repay these duties, which collectively exceed $54 million, to the United States.

Proceedings Below

In *Transpacific I*, the CIT panel unanimously denied Respondents' motion to dismiss. Pet. App. 118. In an opinion by Judge Kelly, the CIT concluded that Petitioners' complaint stated a claim that the President failed to follow the procedure set forth by Congress in section 232 by issuing Proclamation 9772 "far beyond the 90 days permitted" by statute to decide the action that

should be taken to adjust imports, and the further fifteen days for implementing his decision. Pet. App. 126. Then, after full briefing on the merits, the CIT reaffirmed this view in *Transpacific II*, in an opinion by Judge Restani, which granted Petitioners' motion for judgment on the agency record, holding that Proclamation 9772 was unlawful and in violation of statutory procedures. Pet. App. 87–113.

The CIT rejected Respondents' argument that, having issued Proclamation 9705 within the prescribed time periods, the President thereafter retained the authority to modify the action announced therein without conducting a new investigation and securing a new report by the Secretary:

> Section 232 requires that the President not merely address a threat to national security; he must do all, that in his judgment, will eliminate it. Although the statute grants the President great discretion in deciding what action to take, it cabins the President's power both substantively, by requiring the action to eliminate threats to national security caused by imports, and procedurally, by setting the time in which to act.

Transpacific I, Pet. App. 128 (citations omitted); *Transpacific II*, Pet. App. 96 ("[T]he temporal restrictions on the President's power to take action pursuant to a report and recommendation by the Secretary is not a mere directory guideline, but a restriction that requires strict adherence."). The

court went on to note that Congress had amended section 232 in 1988 to add the specific time limits provided in section 232(c)(1). The court read the legislative history of the 1988 amendments to clarify that, in adding those time limits, Congress wanted the President to do all he thought necessary as soon as possible. *Transpacific I*, Pet. App. 129–130; *Transpacific II*, Pet. App. 96–97. The court acknowledged that, prior to 1988, presidents had issued modifications of section 232 actions without obtaining a new investigation and report from the Secretary. However, the CIT held that the 1988 amendments had altered the statutory scheme and must be given effect. *Transpacific I*, Pet. App. 129–130, 129 n.13; *Transpacific II*, Pet. App. 98–99.

Further, the CIT held that the time limits in section 232 constituted express limitations conditioning the President's delegated authority that must be enforced in order to avoid violating the constitutional non-delegation doctrine. The court observed that in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), "[t]he Supreme Court has made clear that section 232 avoids running afoul of the non-delegation doctrine because it establishes 'clear preconditions to Presidential action.'" Thus, the CIT concluded, the procedural safeguards in section 232 "do not merely roadmap action; they are constraints on power." *Transpacific I*, Pet. App. 131. The CIT concluded that reading the statute to permit the President to act beyond the statutory time limits would reduce the investigative and consultive provisions in section 232 to "mere

formalities detached from Presidential action" in violation of Congress's intent. *Transpacific I*, Pet. App. 131; *Transpacific II*, Pet. App. 99. Finally, the CIT found that the broad discretion afforded the President under section 232 regarding the scope of action that may be imposed further reinforces the importance of the procedural safeguards, including the timing requirements, that Congress has enacted. *Transpacific I*, Pet. App. 131–132; *Transpacific II*, Pet. App. 99.

Judge Katzmann issued a concurring opinion in *Transpacific I*, in which he questioned whether section 232 violates Article I, Section 8 of the Constitution, which assigns to Congress the power to "lay and collect Taxes, Duties, Imposts and Excises" and to regulate international commerce. Pet. App. 133–136. While noting that the CIT was bound by this Court's holding in *Algonquin*, Judge Katzmann renewed the suggestion, previously articulated in his *dubitante* opinion in *American Institute for International Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1345–52 (Ct. Int'l Trade 2019), *aff'd*, 806 Fed. App'x 982 (Fed. Cir.), *cert. denied*, 141 S. Ct. 133 (2020) ("*AIIS*"), that section 232 lacks "ascertainable standards" for Presidential action and "provides virtually unbridled discretion to the President" over the regulation of international trade in violation of the constitutional separation of powers. Pet. App. 135.

By a 2-1 vote, the Federal Circuit reversed the holding of the CIT in an opinion by Judge Taranto. Judge Reyna issued a dissenting opinion. The majority held that the term "action" in section 232(c)(1) is properly interpreted as including a

"plan of action" or "a continuing course of action" that then may be modified over time by taking additional actions to adjust imports in order to accomplish the announced objective. Pet. App. 25. The Federal Circuit concluded that the President's decision to double the tariff on imports from Turkey alone constituted a lawful exercise of the President's authority under section 232 to modify the initial "plan" to adjust imports, which was consistent with the stated objective of increasing the capacity utilization of the domestic steel industry to 80 percent. Pet. App. 36.

The majority relied on this Court's decisions in *Brock v. Pierce County*, 476 U.S. 253 (1986), and *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), for the proposition that the use of the word "shall" in a statute is not sufficient to remove an official's authority to act after a time deadline. Pet. App. 29–30. The majority then cited dictionary definitions of the terms "action" and "implement" to support the proposition that section 232(c)'s direction that the President determine the "the action that . . . must be taken to adjust . . . imports" can encompass "a plan implemented over time, including options for contingency-dependent choices that are a commonplace feature of plans of action." Pet. App. 31–32.

The majority found that this expansive reading of the President's authority under section 232 is reinforced by the statutory context. It declared that the "evident purpose" of the statute is to enable the President to effectively alleviate threats to national security from imports, and that this

purpose could be frustrated if the President were prevented from taking additional actions after the deadlines established by Congress. Pet. App. 34–35. The majority also found support for its reading in the fact that section 232(c)(3) expressly permits the President to take "other actions" after the 90-day deadline in cases where the President's selected action is the negotiation of an agreement to limit imports and either no agreement has been entered into within 180 days, or an agreement proves ineffective. Pet. App. 32–34.

The majority then turned to what it characterized as the "legal and historical backdrop" of section 232, reviewing the history of revisions to the language of section 232 and its predecessor statutes from 1955 through 1988. It noted that, under the prior versions of the statute, "Presidents frequently adjusted imports, including by increasing impositions so as to restrict imports, without seeking or obtaining a new formal investigation and report after the initial one," and it highlighted one instance in which an action was initially adopted in 1959 and modified twenty-six times over sixteen years. Pet. App. 44–45. The majority interpreted this history and practice as establishing that the term "action" as used in the statute by 1988 had a "settled meaning" as including a plan or continuing course of action, which should be presumed to have continued after Congress's 1988 amendments. Pet. App. 48–49. In the majority's view, the 1988 amendments establishing time limits within which the President is to act "ha[d] the evident purpose of producing more action, not less" and therefore

should not be construed as denying the President the authority to act outside of the time periods set by Congress. Pet. App. 51.

Judge Reyna's dissent identified three principal grounds of disagreement with the majority. First, the dissent emphasized the context of section 232 as a delegation to the President of Congress's sole constitutional authority over international trade. Because the procedures and remedy authorized by section 232 are focused on international trade, "the subject matter of § 232 flows directly [from] Congress's constitutional power over the Tariff." Pet. App. 73. Thus, the dissent concluded, "[t]he real question is whether Congress has delegated to the President authority to act to adjust imports outside § 232's time limits." By reading out of the statute the time limits for Presidential action added by Congress in 1988,

> [t]he majority expands Congress's narrow delegation of authority, vitiating Congress's own express limits, and thereby effectively reassigns to the Executive Branch the constitutional power vested in Congress to manage and regulate the Tariff.

Pet. App. 68.

Second, the dissent found that the plain language of section 232 is clear and argued that the obligation of the court was therefore to enforce the statute according to its terms. Relying upon case law of this Court holding that the term "shall" is normally construed as mandatory and thus "creates an obligation impervious to judicial discretion," the dissent objected that here instead

"the majority decides that 'shall' means 'may.'" Pet. App. 74.

The dissent argued that the majority's reading of the statute rendered superfluous the requirements in section 232 that the President determine and announce the "'duration' of '*the action*' chosen," and that the President provide Congress with a statement of the reasons for the chosen action or inaction. Pet. App. 76. Further, the dissent concluded, "[t]he majority . . . reduces the statutory deadlines themselves to mere optional suggestions," and argued that even if the term "action" could be read to encompass a plan of action, section 232 nevertheless "requires the President to implement *the plan*, not a part of the plan" by the deadline established in section 232(c)(1)(B). Pet. App. 77.

Third, the dissent argued that the history of the 1988 amendments to section 232 demonstrates that Congress intended to put an end to the practice of previous perpetual modifications of Presidential actions without a new investigation and report by the Secretary and without reporting to Congress. The dissent viewed the 1988 amendments as a "'clear indication from Congress of a change in policy' that overcomes the implication of continuity." Pet. App. 79. The dissent noted that, in addition to the time limits themselves, Congress also revised the operative language of section 232. Prior to 1988, the statute provided that the President "shall take such action, and for such time, as he deems necessary." Congress amended that language to provide the President "shall *determine the nature and*

duration of the action that, in the judgment of the President, must be taken." Pet. App. 78–79. The majority found this change in language to be merely stylistic. Pet. App. 50. However, the dissent determined that the revision demonstrated Congress's intention that "the President may no longer act for such time as he deems necessary," under section 232 and instead "must set a duration for his action, carry out that action, and report to Congress, all within specific deadlines." Pet. App. 79–80.

REASONS FOR GRANTING THE WRIT

In *Algonquin*, this Court held that section 232 is not an unconstitutional delegation of legislative power to the President because the statute

> establishes clear preconditions to Presidential action—*inter alia*, a finding by the Secretary of the Treasury 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."

426 U.S. at 559. The decision of the Federal Circuit in this case is fundamentally at odds with this view of section 232. By reading out of the law the express limitation that the President may determine to take action to adjust imports only within ninety days after receiving the Secretary's findings and recommendations, and must implement that action within fifteen days, the Federal Circuit majority has eroded the significance of the Secretary's investigation and report to the degree that it can no longer plausibly

be said to serve as a meaningful limitation on the President's otherwise nearly unfettered discretion to set tariffs and impose other import restrictions under section 232.

As interpreted by the Federal Circuit majority, a single investigation and report may serve as the basis for an indefinite series of tariff increases and other impositions by the President for an unlimited time period, the precise circumstance that Congress sought to foreclose when it amended section 232 in 1988 to set fixed time limits on the President's action. Given the absence in the statute of any meaningful substantive standards regarding either the trigger for action (a threat to "national security") or the scope and duration of the remedial measures that may be imposed, and given the unavailability of judicial review of the President's actions with regard to findings of fact, rationality, or abuse of discretion, the removal of the express temporal limits on taking action effectively converts section 232 into an unbounded transfer to the President of Congress's power to impose tariffs and regulate international commerce, thereby creating precisely the constitutional delegation problem that this Court considered unlikely in *Algonquin*. *See id.* at 560 ("[W]e see no looming problem of improper delegation.").

This outcome—ceding to the President the virtually unbounded power to tax and regulate imports—is not an inevitable consequence of the statutory scheme. It can be avoided simply by giving effect to the words of section 232 as Congress drafted it. As explained in the dissenting opinion

below, and in the opinions of the CIT, section 232 uses plain, unambiguous language. It mandates that within ninety days after receiving the report, the President "shall" determine "the nature and duration of *the action*" to adjust imports that in the President's judgment is needed to eliminate the threat to national security identified in the Secretary's report, and that the president "shall" implement that action "*by no later than* the date that is 15 days after the day" on which he announces the action. 19 U.S.C. § 1862(c), Pet. App. 139–140 (emphasis added).

As this Court has repeatedly held, "[w]hen the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (first citing *Rubin v. United States*, 449 U.S. 424, 430 (1981); and then citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)); *see also Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020).

This Court should grant review in order to give effect to this express and judicially enforceable limitation set by Congress on the President's delegated authority. Unless this Court intervenes, the majority opinion below will be the final word on the construction of section 232. The CIT has exclusive jurisdiction over matters involving tariffs, and the Federal Circuit has exclusive jurisdiction over appeals from that court. On the other hand, if the Court agrees with the Federal Circuit that section 232 permits the President to act outside of the statutorily prescribed time limits, then this Court should grant review to consider

whether, as so interpreted, section 232 constitutes an unconstitutional delegation of legislative authority to the President.

A. The Decision Below Fails To Give Effect To Congress's Express Limits On The President's Delegated Authority Under Section 232

Section 232 lays out a detailed timetable for the President's exercise of his delegated authority to adjust imports. Each time limit is expressed in clearly mandatory language:

- As a pre-condition to any Presidential action, the Secretary "shall" conduct an investigation and issue a report and recommendations. 19 U.S.C. § 1862(b)(1)(A), Pet. App. 137;

- The Secretary's recommendations "shall" be submitted to the President "no later than" 270 days after the date of initiation of the investigation. *Id.* § 1862(b)(3)(A), Pet. App. 138;

- "Within 90 days" of receiving the Secretary's report, the President "shall" determine whether he concurs with the findings. *Id.* § 1862(c)(1)(A), Pet. App. 139;

- If the President concurs, he "shall . . . determine the *nature and duration* of the action" that must be taken so that the imports will no longer "threaten to impair the national security." *Id.* § 1862(c)(1)(A)(ii), Pet. App. 139 (emphasis added);

- The President shall implement any action "no later than the date that is 15 days after" the date of the President's determination. *Id.* § 1862(c)(1)(B), Pet. App. 140.

- The President shall submit to Congress a written statement of reasons for the action or inaction "no later than the date that is 30 days after the date" of the President's determination. *Id.* § 1862(c)(2), Pet. App. 140.

Section 232 thus conditions Congress's delegation of authority to impose import restrictions on adherence to specific procedures, of which the 90- and 15-day time limits for action are essential elements. As the dissenting opinion below explained, these conditions are consistent with other limited congressional delegations of trade regulation and tariff-setting authority to the President. Pet. App. 69–70. Moreover, if the President could continue to make changes for the indefinite future, it would undercut Congress's additional requirement that the President provide it with a written statement of reasons for his actions within thirty days of the President's decision to take action.

The Federal Circuit majority, however, effectively renders nugatory the limits set by Congress by holding that "the action" authorized by section 232(c)(1) can include a "plan of action" or "continuing course of action" that may then be modified at the President's discretion for an indefinite period. Pet. App. 24–25. This

interpretation not only does violence to the statutory language itself (Congress, used the singular form of "action," not "plan of action," and refers to taking an action, and plans cannot be taken, *see* dissent, Pet. App. 75), but it also distorts the history and context underlying Congress's 1988 amendments to section 232, which added the time limits at issue.

The majority opinion relied on pre-1988 practice and a 1975 opinion of the Attorney General for the proposition that the term "action" by 1988 had a "settled" meaning as including plans of action that could be continually modified and revised without the need for a fresh investigation or report by the Secretary. The court then concluded that, because the 1988 amendments did not remove the term "action" from the statute while making other changes to section 232, this "settled meaning" should be presumed to carry over to the amended statute absent "a clear indication from Congress of a change in policy." Pet. App. 48–49.

This tendentious reasoning ignores the obvious point that, having amended the statute to include express and unambiguous time limits in which the President must take "the action" that in his judgment is necessary so that the imports will not threaten national security, there was no conceivable reason for Congress to have removed from the statute the term "action" or to have otherwise indicated an intent to change the meaning of that word. Indeed, it was precisely the history of dilatory and drawn-out measures by previous Presidents under section 232 referenced by the Federal Circuit majority that Congress

meant to end by setting deadlines for Presidential action. Faced with the problem of inadequate Presidential action (or no action at all) under section 232, Congress opted not to further define the scope of the term "action," but instead set express deadlines so that, in the words of the CIT, the President is required "to do all that he [thinks] necessary as soon as possible." Pet. App. 129; *see* H.R. REP. NO. 100-40, pt. 1, at 175 (1987) ("The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible."). Viewed in the proper historical context, it is evident that by inserting mandatory deadlines for action into the statute, Congress could hardly have given a clearer indication "of a change in policy" from what had gone before.

The Federal Circuit majority's remaining reasons for disregarding the express statutory deadlines in section 232 are no more persuasive. First, it found support from the fact that section 232(c)(3) authorizes the President to act outside the 90- and 15-day deadlines where the action determined by the President is to negotiate an agreement to restrict imports and no agreement has been entered into after 180 days, or an agreement has not been carried out or has proven ineffective. In such cases, the President is authorized to "take such other actions as the President deems necessary" to adjust imports to eliminate the threat to national security. Pet. App. 140–141. Far from supporting the majority decision, however this provision further undermines it. If the President already had the

authority to take "other actions" under section 232(c)(1) and (2) outside of the time limits therein, there would be no reason to expressly provide for it in section 232(c)(3) and then to make the exception to apply only to negotiated actions, which this is not.

Similarly, the Federal Circuit's reliance on *Brock* and *Barnhart* is misplaced. In both cases, the Court declined to hold that a federal agency that missed a statutory deadline would automatically be barred from taking the required action after the deadline, especially when the consequences of doing so would impose severe burdens on innocent third parties. *Brock*, 476 U.S. at 259–61, 260 n.7; *Barnhart*, 537 U.S. at 158–60. The fact that "shall" does not always mean "must," with no exceptions, does not justify a ruling that "shall" may be disregarded here.

In *Algonquin*, this Court recognized that section 232 afforded extensive discretion to the President but held that there were discernable limits on that discretion. This Court's final paragraph warned that its conclusion that "the imposition of a license fee is authorized by § 232(b) in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized." 426 U.S. at 571. That warning is based on the assumption that the courts would step in if the President exceeds his delegated authority under the statute. As noted, judicial review of the substance of the President's actions under section 232 is unavailable for rationality, findings of fact, or abuse of discretion. *United States v. George S. Bush & Co.*, 310 U.S.

371, 379–80 (1940); *Franklin*, 505 U.S. at 800–01; *Dalton v. Specter*, 511 U.S. 462, 469–70 (1994). Judicial review is thus limited to constitutionality and to whether the President has acted in excess of statutory authority. Here, Congress has placed express temporal limits on that statutory authority. *Algonquin* teaches that those limits must be enforced. Accordingly, the Court should grant certiorari and reverse the Court of Appeals and hold Proclamation 9772 unlawful as in excess of the President's authority under section 232.

B. As Interpreted By The Federal Circuit, Section 232 Is An Unconstitutional Delegation Of Legislative Power

As construed by the Federal Circuit majority, section 232 is transformed from an expansive, but arguably still limited, delegation of authority to address threats to national security from excessive imports, into an entirely unbounded transfer to the President of the power to impose tariffs and to regulate international trade. And, as so construed, section 232 should be struck down by this Court as an unconstitutional delegation of power in violation of Article I, Section 8 of the Constitution and of the principal of Separation of Powers.

In *AIIS*, the Federal Circuit rejected a facial challenge to the constitutionality of section 232 on non-delegation grounds, holding that *Algonquin* precluded such a challenge. 806 F. App'x at 989. Before the Federal Circuit in this case, Petitioners argued the constitutional non-delegation issue in the alternative, while acknowledging that the holding in *AIIS* is controlling. The Federal Circuit

here did not address the facial delegation issue on the merits, but acknowledged that Petitioners had preserved it for appeal. Pet. App. 23.

As interpreted by the Federal Circuit, section 232 is now clearly revealed, contrary to the Court's understanding in *Algonquin*, as lacking an "intelligible principle" to limit the President's power to tax or otherwise restrict imports. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

The Federal Circuit's holding means that the one prerequisite for action under section 232 that is not in the sole discretion of the President—the requirement to announce and implement the action he deems necessary within a fixed time period after receiving a report and recommendation from the Secretary—does not meaningfully cabin the President's power. That Court concluded that a single report by the Secretary confers on the President the power, for an unlimited period, to impose additional measures taxing or otherwise restricting imports under the rubric of continuing to carry out an infinitely malleable "plan of action."

Those additional measures could include, as in this case, substantial increases in the initially established section 232 tariff rates on imports from only designated exporting countries. But there is no reason to conclude that the President's power stops there. According to the Federal Circuit, as long as the President asserts that he is acting in furtherance of the objective of obtaining or maintaining a satisfactory level of capacity utilization of the domestic steel industry, section

232 gives the President *carte blanche* to increase the tariff rates in any amount he chooses, or to impose quotas, license fees, or even outright embargos affecting some or all steel products from some or all supplier countries, including countries previously exempted from the 25 percent tariff. These additional measures could be announced tomorrow, or in ten years, at the President's sole discretion and without undertaking any of the procedural steps Congress mandated in section 232.

Nor does the power conferred by the Federal Circuit stop there. Although the action challenged in this case involved the imposition of additional measures after having initially announced and implemented *some* action within the deadlines established under section 232(c)(1), the court's holding is not so limited. To the contrary, under the court's rationale, the President's power under section 232 is not limited by any of the other timing directives in subsection (c)(1), such as the 270 days within which the Secretary must issue a report, or the ninety days for the President to decide on his response to the report.

For example, on April 14, 2019, the Secretary transmitted a report to the President concluding that imports of uranium threatened the national security, and on November 29, 2019, the Secretary transmitted a report finding imports of titanium sponge threatened national security. *See Publication of a Report on the Effect of Imports of Uranium on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended*, 86 Fed.

Reg. 41,540 (Bureau of Indus. & Sec. Aug. 2, 2021); *Publication of a Report on the Effect of Imports of Titanium Sponge on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended*, 86 Fed. Reg. 59,115 (Bureau of Indus. & Sec. Oct. 26, 2021). Both reports were withheld from public release by the previous administration and made public only earlier this year. In the case of uranium, the President did not concur with the Secretary's finding that imports of uranium threatened national security. Letter to Congressional Leaders on the Effect of Uranium Imports on the National Securityand Establishment of the United States Nuclear Fuel Working Group, Daily Comp. Pres. Docs., 2019 DCPD No. 201900545 (Aug. 8, 2019). In the case of titanium sponge, the President concurred with the Secretary's findings but elected not to take any actions to adjust imports "at that time." Letter to Congressional Leaders on the Effect of Titanium Sponge Imports on the National Security, Daily Comp. Pres. Docs., 2020 DCPD No. 202000205 (Mar. 28, 2020). In both cases, the President instead appointed working groups within the Executive Branch to address the issues.

As interpreted by the Federal Circuit, nothing in section 232 prevents the current President—or some future President—from relying on these affirmative reports by the previous Secretary to impose tariffs or other import restrictions on those imported articles at some future date. The majority opinion suggests that its holding does not authorize the President to act outside of the statutory time periods if that action "makes no

sense except on premises that depart from the Secretary's finding" or where there are concerns about the staleness of that finding. Pet. App. 35, 56–57. But the government also insists that the President is not bound by the Secretary's findings (and the courts cannot review that question), which undermines the first "exception." As for the second, the majority pointedly declined to address whether and how the President's actions would be reviewable under these standards, given the general non-reviewability of the President's exercise of discretion under section 232.

If the temporal limits on the President's power set by Congress are to be viewed as mere "suggestions," Pet. App. 77, then the Court's holding in *Algonquin* that the standards that section 232 provides "are clearly sufficient to meet any delegation doctrine attack," 426 U.S. at 559, requires reconsideration. Such a reconsideration is further compelled by two other features of section 232 that present a particularly strong non-delegation claim. These features may not have been evident given the narrow context in which the delegation was presented in *Algonquin*, where the sole argument presented was that the President's authority to "adjust imports" under section 232 was limited to quotas and did not extend to license fees. 426 U.S. at 571.

First, although section 232 nominally limits the President's power to adjust imports only to instances where the President concludes that a particular article of commerce threatens "to impair the national security," the definition of the term "national security" in section 232(d) extends well

beyond the realm of national defense and includes adverse economic impacts of an imported product on the domestic economy or any segment thereof. In this sense, section 232 is equivalent to the statute struck down by the Court in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), which contained "literally no guidance for the exercise of discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). The factors the President may consider under the statute are so expansive that there is nothing that limits his ability to make a "national security" finding under section 232.

By contrast, in *Hampton*, which first enunciated the "intelligible principle" test and has become the touchstone of subsequent delegation decisions, duties could be imposed only in order to "equalize the . . . differences in costs of production in the United States and the principal competing country" for the product at issue. 276 U.S. at 401 (quoting section 315 of title 3 of the Tariff Act of September 21, 1922). Production costs are an objectively verifiable fact, which provide a concrete limit on when duties can be increased, unlike section 232 with its highly expansive "threaten to impair" the national (economic) security of the United States standard. Similarly, the air quality standards in *Whitman* could only be issued for air pollutants on a public list promulgated by the agency under 42 U.S.C. § 7408. 531 U.S. at 462. And the sentencing guidelines at issue in *Mistretta v. United States*, 488 U.S. 361 (1989), only applied to persons first found guilty of a federal offense. Thus, the intelligible principle that the Court identified in each of these statutes was one that

placed significant substantive limits on the finding that had to be made before any action could be taken, in contrast to the conclusion here that "national security," as capaciously defined in section 232, may be impaired.

Second, section 232 places no limits on the means by which the President may adjust imports. He may choose among imposing tariffs, quotas, embargoes, or the licensing fees permitted in *Algonquin*—or any combination thereof, and there are no limits on the scope, duration, or amount of any remedy he chooses. Nor is there a requirement that the President's choices be tied to any factual finding. Thus, here, the choice of a 25 percent tariff for most countries, combined with quotas and exemptions for other countries, was entirely the product of presidential fiat, untethered to any statutory factor, or any upper or lower boundaries. The only meaningful constraint, which the Federal Circuit majority read out of the statute, is that the President must determine and implement "the action" he judges to be necessary within the timeframe provided. 19 U.S.C. § 1862(c)(1), Pet. App. 139–140.

Similarly, section 232 offers the President no guidance on whether or how to consider the impact that these tariffs have on users of imported products, consumers of those products, workers in industries that will be adversely affected by the tariffs, or domestic producers of other exported products that are likely to be subject to foreign retaliation in response to section 232 tariffs. Congress left it entirely up to the President to decide what to do about any or all of these factors

and how to balance them. Article I, however, assigns that job to Congress, not the President. By contrast, again in *Hampton*, the remedy there was limited to increasing existing duties to offset the production cost advantages of the other country. Even then, the increase, which was mandatory and not discretionary if the costs were unequal, could not exceed 50 percent of the existing duty, and duties could not be imposed on duty-free products. *Hampton*, 276 U.S. at 401.

Given the absence of any language in section 232 that places meaningful limitations on either the trigger for action (a threat to "national security") or on the remedy that may be imposed, and in view of the Federal Circuit's holding that even the express time limits that are in the statute do not preclude the President from acting outside those limits, the Court should grant review to determine whether section 232 is constitutional in light of the dissents and concurrence in *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting) and the statement of Justice Kavanaugh in respect of the denial of certiorari in *Paul v. United States*, 140 S. Ct. 342 (2019).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Julie C. Mendoza
Counsel of Record
R. Will Planert
Donald B. Cameron
Brady W. Mills
MORRIS MANNING & MARTIN LLP
1401 Eye Street, NW
Suite 600
Washington, D.C. 20005
(202) 216-4817
jmendoza@mmmlaw.com

Alan B. Morrison
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H Street, NW
Washington, D.C. 20052
(202) 994-7120
Abmorrison@law.gwu.edu

James H. Hulme
Matthew M. Nolan
Nancy A. Noonan
Diana Dimitriuc Quaia
Leah Scarpelli
Aman Kakar
ARENT FOX LLP
1717 K Street, NW
Washington, D.C. 20006-5344
(202) 857-6013
Matthew.Nolan@arentfox.com

Lewis E. Leibowitz
THE LAW OFFICE OF LEWIS E. LEIBOWITZ
1400 16th Street, NW
Suite 350
Washington, D.C. 20036
(202) 776-1142
lewis.leibowitz@lellawoffice.com

Counsel for Petitioners

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