No. 21-721

In The Supreme Court of the United States

TRANSPACIFIC STEEL LLC, BORUSAN MANNESMANN BORU SINAYI VE SICARET A.C., BORUSAN MANNESMAN 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 of United States Customs and Border Protection, DEPARTMENT OF COMMERCE, GINA M. RAIMONDO, in her Official Capacity as Secretary Of Commerce,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* MEMBERS OF THE UNITED STATES SENATE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of the United States Senate in the 117th United States Congress (a list of *Amici* is in the Appendix). As such, *Amici* are members of the branch of government given exclusive constitutional control over the power "[t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as to "[t]o regulate [c]ommerce with foreign [n]ations." U.S. Const. art. I, § 8. While Congress has delegated some of its authority to the executive branch, *Amici* specifically and Congress as a whole retain an interest in ensuring that the executive branch adheres to, and the courts enforce, the limits Congress places on its delegations.

SUMMARY OF THE ARGUMENT

The Federal Circuit's decision, if upheld, permits a President to breach statutory requirements and assume powers that are explicitly reserved to Congress. The Constitution gives Congress the exclusive authority "[t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as to "[t]o regulate [c]ommerce with foreign [n]ations." U.S. Const. art. I, § 8. While Congress may grant the executive branch

[1] In accordance with Supreme Court Rule 37.2, all parties received timely notice and consented to the filing of this brief. As required by Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund this brief.

certain authority to act on these matters, the Constitution itself, as well as Congress's ability to perform its role in our system of separated powers, mandate that Congress impose limits on such delegations. As relevant here, Congress expressly imposed two procedural limitations on the President's delegated power to "adjust the imports" of any product that he determines threatens to impair the national security under Section 232 of the Trade Expansion Act of 1962. First, before the President may act, the Secretary of Commerce must issue a report with a finding regarding whether the import of a specified product "threaten[s] to impair the national security." 19 U.S.C. § 1862(b)(3)(A). Second, Congress required that, "[w]ithin 90 days after receiving [the Secretary's] report . . . [,] the President shall . . . determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports" to eliminate the national security threat, 19 U.S.C. § 1862(c)(1)(A), and "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." 19 U.S.C. § 1862(c)(1)(B).

The limits on this delegation are plain in the text of the statute and core to the constitutionality of the statutory scheme. Section 232 contains relatively few substantive limitations on the President's authority to adjust imports. The President may choose any instrument (tariffs, quotas, license fees, etc.) he likes to adjust imports, and the statute does not explicitly limit for how long he may apply those instruments. Further,

Section 232 broadly construes the range of threats to national security that the President can evaluate and the economic and national security factors upon which the threat may be analyzed. 19 U.S.C. § 1862(d).

These procedural limits thus must be enforced both as part of the courts' duty to enforce the laws as Congress has written them and to ensure that Section 232 complies with this Court's interpretation of the nondelegation doctrine, which prohibits Congress from transferring to a coordinate branch of government power vested in Congress.

In this case, the President doubled existing tariffs on the imports of Turkish steel months after the expiration of the mandatory 90-day time period to select, and 15-day period to implement, an action. *Transpacific Steel LLC v. United States*, 415 F.Supp.3d 1267, 1271 (Ct. Int'l Trade 2019). A three-judge panel of the Court of International Trade unanimously and correctly ruled that this doubling of tariffs outside the statutory time limits for action exceeded what Congress had authorized. *Id.* at 1276. But in a 2-1 decision, the Federal Circuit ruled that the President may modify the actions taken to adjust imports outside of the window Congress prescribed so long as the President does so in accordance with "a plan of action" announced during the initial 90-day window. *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1319 (Fed. Cir. 2021). The decision has major consequences. As Judge Reyna correctly noted in dissent, if the Federal Circuit's decision stands, it will have "effectively accomplishe[d] what not even Congress can legitimately do,

reassign to the President its Constitutionally vested power over the Tariff." *Transpacific Steel LLC*, 4 F.4th at 1342 (Reyna, J., dissenting).

ARGUMENT

I. The Constitution Does Not Permit Congress to Delegate Congress's Exclusive Authority Over Taxes and Foreign Commerce Unless Congress Imposes Sufficient Limits to Ensure the Executive Branch Complies with the Will of Congress.

At the outset, the sweeping scope of the executive branch's claim—which the Federal Circuit majority adopted—bears emphasis. The executive branch has claimed, across a series of cases, that the Secretary of Commerce has such broad authority to find that even the import of peanut butter threatens national security, and can make recommendations so the President can take action against this national security threat, such as levying tariffs. Transcript of Oral Argument at 24, 33–34, 44, 51, *American Inst. for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade Mar. 25, 2019), ECF No. 46; *see also American Inst. Int'l Steel, Inc. v. United States*, 806 Fed. Appx. 982 (Fed. Cir. 2020) (cert. denied, *American Inst. Int'l Steel, Inc. v. United States* 141 S. Ct. 133 (2020); *Universal Steel Products, Inc. v. United States*, 495 F.Supp.3d 1336 (Ct. Int'l Trade 2021) (appeal pending *sub nom. USP Holdings, Inc. v. United States*); *Cause of Action Inst. v. U.S. Dep't of Commerce*, 513 F.Supp.3d 116 (D.D.C. 2021). If this

was not striking enough, the Federal Circuit in this case says the President can then—despite blowing past explicit time frames in the statute—change his mind and come up with new remedies against even new products. This can't be right.

A three-judge panel of the U.S. Court of International Trade recognized that at least the latter scenario wasn't. It struck down the action at issue in this case, finding that the Supreme Court held Section 232 constitutional only because Congress constrained the President from assuming Congress's power through mechanisms such as time limits. *Transpacific Steel LLC*, 415 F.Supp.3d at 1275–76. That is what this case concerns at its core; will the Supreme Court continue to let presidents take Congress's powers?

The powers "[t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as to "[t]o regulate [c]ommerce with foreign [n]ations" are legislative powers vested in Congress per Article I, Section 8 of the Constitution. U.S. Const. Art. I, § 8; *see also Gibbons v. Ogden*, 22 U.S. 1, 197 (1824) ("the power over commerce with foreign nations, and among the several States, is vested in Congress. . . ."). This Court has held that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825); *see also Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) ("Through the Constitution, after all, the people had vested the power to prescribe rules limiting their

liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement.") Rather, the constitutionality of congressional delegations to the executive branch is contingent upon Congress imposing appropriate constraints on the use of the delegated authority. *Gundy*, 139 S. Ct. at 2123 ("[W]e have held, time and again, that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.") (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)) (brackets in original).

Likewise, "[i]t is not [this Court's] function to rewrite a constitutionally valid text. . . ." *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018). Courts must "interpret the law Congress has enacted and decide whether it is consistent with the Constitution." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018). Ignoring the limits Congress places on delegated power compounds one constitutional error—courts rewriting Congress's words—with a second, conferring the legislative power vested in Congress on the executive branch.

Ignoring textually clear limits on delegated authority is a particularly pernicious form of error in statutory interpretation. This Court has held that *stare decisis* has "special force" in the context of statutory decisions because "Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989). If courts read statutory limits on executive authority too strictly, this presumption

operates because Congress and the President can work together to amend the scope of the delegation. But in cases of interbranch conflict over authority—such as cases in which the executive branch tests the limits of Congress's delegations—that freedom is substantially circumscribed. Reimposing limits on delegated authority that the courts have read out of statutes requires either that the President agree to limit his own power or that Congress muster super-majorities to override a Presidential veto. U.S. Const. art. I, § 7. Because of this concern, courts must pay special attention not to give away authority that Congress itself has not granted the executive branch.

II. Section 232 Contains Clear Textual Limits on the President's Delegated Authority.

Strictly enforcing the limits on congressional delegations is especially important where, as in the case of Section 232 of the Trade Expansion Act, the discretion of the executive branch is effectively unbridled. The Secretary of Commerce, who serves at the pleasure of the President, is granted extremely broad discretion to find that the importation of a good affects "national security." Other trade statutes impose a range of limits on presidential authority, such as statutory maximums on the length of tariffs, 19 U.S.C. § 2253(e) (imposing a four-year maximum on safeguard measures), or a judicially-reviewable methodology to determine the size of duties on imports, 19 U.S.C. § 1671-77n (establishing methodologies for calculating and imposing antidumping and countervailing duties).

Section 232, by contrast, contains comparatively few limitations, and some of the core limitations are procedural. Section 232 grants the President broad discretion in selecting the type of trade measure, 19 U.S.C. § 1862(c)(1)(A)(ii), and the length of time for which he will impose it, 19 U.S.C. § 1862(c)(1)(A)(ii). It also authorizes the President to consider a broad range of economic factors—including but not limited to "the economic welfare of the Nation . . . the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects, 19 U.S.C. § 1862(d)—in assessing whether a threat to the "national security" exists and how to eliminate it.

This broad discretion is cabined by a series of procedural limitations on the President's delegated power under Section 232: the Secretary must make a preliminary finding that imports of a product threaten to impair the national security; the Secretary must publish that report for Congress and the public's inspection; and the President must decide how to address the Secretary's finding within a prescribed period of time. If the courts read out these requirements, as the lower courts have done, then, as Judge Reyna wrote in dissent in this case, the courts have "effectively accomplishe[d] what not even Congress can legitimately do, reassign to the President its Constitutionally vested power of the Tariff." *Transpacific Steel LLC*, 4 F.4th at 1342 (Reyna, J., dissenting).

A. The Federal Circuit Dismantled the Clear Textual Limits on Congress's Delegation By Making Section 232's Time Limits Optional.

Section 232 of the Trade Expansion Act of 1962 delegates to the President the power "to adjust the imports of [a product] and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii). As the Constitution requires, though, Congress imposed several limitations on the President's ability to "adjust the imports" of products. Two procedural limitations are relevant here. First, the President may only adjust the imports of a product if the Secretary of Commerce first conducts an investigation and finds that a product is "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(b)(3)(A). Second, Congress imposed a time limit on the President's ability to act after the Secretary makes such a finding:

> (A) Within 90 days after receiving [the Secretary's] report . . . 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.
>
> (B) If the President determines under subparagraph (A) 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 under subparagraph (A). 19 U.S.C. § 1862(c)(1).

As the Court of International Trade recognized in this case:

> The procedural safeguards in section 232 do not merely roadmap action; they are constraints on power. The Supreme Court has made clear that section 232 avoids running afoul of the non-delegation doctrine because it establishes "clear preconditions to Presidential action." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976).

Transpacific Steel LLC, 415 F.Supp.3d at 1275. For this reason, the Court of International Trade correctly ruled that the President's decision to raise tariffs on steel and aluminum imports from Turkey seven months after he received the Secretary's report exceeded the limits of what Congress authorized in Section 232.

Yet despite the plain language of Section 232 requiring that the President "shall," within 90 days, "determine the nature and duration of *the action*"

(emphasis added) necessary to address the threat to national security, and then "shall implement *that action*" (emphasis added) within 15 days, the Federal Circuit ruled that "the authority of the President includes authority to adopt and carry out a *plan of action* that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time. *Transpacific Steel LLC*, 4 F.4th at 1319 (emphasis added). Under the Federal Circuit's interpretation, once the Secretary makes a finding of a threat to the national security from the import of a product, the President may raise barriers to imports of that product at any time thereafter so long as he reserved the right to do so within 90 days. *Id*. at 1341 ("The majority provides no persuasive reason why a 'plan of action' is inherently free of time limits, requiring infinite time for completion of the plan.") (Reyna, J., dissenting). This reading renders superfluous the requirement that the President implement his action within 15 days of choosing it. 19 U.S.C. § 1862(c)(1)(B); *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (warning against statutory interpretations that render superfluous other provisions of the same law). Worse, by reading in words not present in Section 232, the Federal Circuit has given the President, rather than Congress, the "[p]ower to lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as to "[t]o regulate [c]ommerce with foreign [n]ations." U.S. Constitution, Art. I, § 8.

Section 232's language is neither hortatory nor optional. It is a directive ("shall") to the President to act

within a certain amount of time. Indeed, as Judge Reyna recognized in his dissent below, "[b]ecause § 232 is [a delegation of constitutional power] extra care should be taken to avoid unduly expanding that delegation—as the majority does now—lest we reweigh the careful balances drawn by both the Founders and Congress." *Transpacific Steel LLC*, 4 F.4th at 1340 (Reyna, J., dissenting); *see also Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("[I]t is a cardinal principle" of statutory interpretation, however, that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.")(internal quotations omitted); *Transpacific Steel LLC*, 415 F.Supp.3d at 1276 ("The broad discretion granted to the President and the limits on judicial review only reinforce the importance of the procedural safeguards Congress provided, and which the President appears to have ignored.").

This is reinforced by the structure of Section 232 and its historical context. Congress at certain points in the statute granted the President authority to act outside of the 90-day window under limited and explicit circumstances. Section 232 contemplates that the President might need to adjust course after the first 90 days when negotiating an international agreement. If the President selects that action, Section 232 provides that, either after 180 days without concluding an agreement or at such later date as the President determines the agreement is "ineffective in eliminating the threat to the national security . . . , the

President shall take such other actions as the President deems necessary. . . .” 19 U.S.C. § 1862(c)(3). Congress chose not to similarly authorize such actions after the initial time period of 90 days in all other cases, and the courts should not reverse that judgment.

Furthermore, Congress previously amended Section 232 to impose the 90- and 15-day limits directly in response to the President’s practice of modifying actions under a previous version of the statute. *Transpacific Steel LLC*, 415 F.Supp.3d at 1275.

The original version of Section 232 provided that the President “shall take such action, and for such time, as he deems necessary.” Trade Expansion Act of 1962, § 232(b), Pub. L. No. 87-794, 76 Stat. 872. The 1988 amendments introduced the current limits, namely that within 90 days after receiving the Secretary’s report, “the President shall . . . determine the nature and duration of the action that . . . must be taken,” 19 U.S.C. § 1862(c)(1)(A), and that he “shall implement that action” within 15 days thereafter. 19 U.S.C. § 1862(c)(1)(B). These amendments thus explicitly imposed a 90-day decision window and a 15-day implementation period on the President. To hold that any modification authority survives these changes to the text is simply to ignore Congress’s efforts to amend Section 232 to rein in the scope of the delegation.

B. Section 232's Time Limits Are Critical to Ensure that Congress Makes the Major Policy Decisions Regarding the Regulation of Foreign Commerce.

Section 232's clear time limits serve two functions in the statutory scheme. The first is to reserve to Congress the power to make any permanent changes to the nation's import barriers. The second is to ensure that any temporary import barriers the President imposes are based on recent information.

By requiring the President to announce the nature and duration of any action within 90 days after receiving the Secretary's report, and to implement that action within 15 days thereafter, Congress has ensured that action outside the combined 105-day window requires legislation. That would, of course, include action that goes beyond the nature and duration of the action the President selected during the 90-day window. For instance, if the President determines that he should impose a 25% tariff on steel imports for one year, he may not simply extend the tariffs a year later. That power lies with Congress. Likewise, if the President is unable to decide what action to take within 90 days, the problem becomes one for Congress to address.

This division of labor is permissible. Although the executive branch lacks the deliberativeness and broad-based representativeness of Congress, it may in certain instances be able to act more expeditiously, including with respect to making factual determinations. This approach comports with the constitutionally

approved approach of Congress setting policy that requires the executive branch to establish certain facts as a prerequisite to action. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892) If the President is unable to act within the combined 105 days Congress has given him (on top of the 270 days that the Secretary has to conduct the investigation), that suggests that the problem is not one where the executive branch's functional advantages help. Instead, it is a problem for which Congress has responsibility under the Constitution.

Furthermore, the President retains the ability to act after the combined 105 days expire. To do so, he must seek a new report from the Commerce Secretary. But that alternative is itself an important limitation on the President's delegated authority. First, it reinforces that the executive branch plays the role of a fact-finder, executing the principles laid down in Section 232, rather than lawmaker. The combined 105-day time limit also ensures that the President's decisions are made with the benefit of recently-determined facts. Once the President's decisions become divorced in time from the Secretary's report, by contrast, his decision rests either on out-of-date information, or on the President's inclinations regarding how best to tax and regulate foreign commerce.

This distinction between fact-finding and legislating is replete through the Court's treatment of the nation's trade laws. For instance, in *J. W. Hampton, Jr. & Co. v. United States*, this Court upheld the Tariff Act of 1922's delegation of authority to the President to set

and impose customs following an investigation into production costs with the goal of equalizing those costs as between imports and domestic products. 276 U.S. 394, 409 (1928). In *Field v. Clark*, the Supreme Court noted more than a dozen delegations dating to 1794 to the executive structured this way, empowering the President with discretion to act within clearly delineated conditions. *See generally* 143 U.S. 649 (1892).

Other trade statutes also adopt the structure of delegating authority to act conditional on first finding certain facts. For example, section 201 of the Trade Act of 1974 authorizes the President to "take all appropriate and feasible action . . . [to] facilitate efforts by the domestic industry to make a positive adjustment to import competition" if, and only if, the International Trade Commission first determines that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof," to a domestic industry. 19 U.S.C. § 2251. This structure is a core feature of the modern administrative state across a wide range of issue areas, not merely trade policy. *See, e.g.*, *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) ("once Congress prescribes the rule governing private conduct, it may make application of that rule depend on executive fact-finding"); *see also* Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825 (2019) (providing extensive examples where presidential authority hinges on first making a factual determination). To allow the President to subvert this structure by ignoring the requirements that tether his actions to

fact-finding is to allow the President to seize the ability to legislate.

Tethering the President's decisions in time to the Secretary's finding also imposes an important check against abuse. Section 232(d) directs the Secretary and the President to consider a broad range of factors in applying section 232, including not only traditional "national security" considerations but also a wide range of economic factors such as the "economic welfare of individual domestic industries . . . unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects. . . ." 19 U.S.C. § 1862(d). This definition, though broad, excludes a wide range of foreign policy considerations, such as diplomatic matters unconnected to the factors listed in Section 232.

Limiting the President's window to act, mitigates against the risk that a President could pretextually invoke an existing Section 232 finding to achieve objectives unrelated to the statutory factors. The President might, for instance, raise tariffs in order to increase his negotiating leverage with a foreign country over an unrelated or statutorily impermissible factor. *See Severstal Exports GMBH v. United States*, 2018 WL 1705298, *9 (Ct. Int'l Trade 2018) (noting that if the President used trade restrictions on a product imposed under 232 to negotiate concessions on an unrelated product or industry, it "would raise a credible question as to whether the President misapprehended the authority granted by" Section 232). Time limits offer a bright-line rule that ties the President's decision to the

underlying justification in the Secretary's report, and provides courts with a clear basis on which to determine the lawfulness of the action, even on challenging questions of national security. All the remains is for courts to do so.

III. The Court Should Accept This Case to Reverse Lower Courts' Pattern of Removing the Limits Congress Has Imposed on Section 232.

Unfortunately, the Federal Circuit's decision in this case is not an outlier, which renders this case all the more important in terms of the need to granting certiorari. The lower courts have consistently—and wrongly—read out of Section 232 the procedural limits Congress wrote into the law. The courts should not continue to find that the words in Congress's statutes providing the President authority must be unconditionally respected, and those imposing constraints can be conveniently ignored. Without corrective action from this Court, Congress's constitutional prerogatives will continue to be eroded.

Tariffs imposed under Section 232 have been the subject of extensive litigation in recent years. In *Am. Inst. Int'l Steel, Inc. v. United States*, the Federal Circuit affirmed the Court of International Trade's holding that Section 232 does not violate the nondelegation doctrine. 806 Fed. Appx. 982 (Fed. Cir. 2020) (cert. denied, *American Inst. Int'l Steel, Inc. v. United States*, 141 S. Ct. 133 (2020)). Both the Court of International

Trade and the Federal Circuit relied on this Court's opinion in *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). That case presented a statutory question: does Section 232 authorize the President to impose license fees (a form of monetary exaction) or may he only impose quotas on imports? *Id.* at 551–52 ("What we must decide is whether [Section] 232(b) also authorizes the President to control such imports by imposing on them a system of monetary exactions in the form of license fees."). In answering that question, the Court first concluded that it did not need to read Section 232 narrowly to avoid nondelegation concerns. *Id*. at 558–59. Section 232, the Court concluded, contained sufficient procedural prerequisites to Presidential action to satisfy the nondelegation doctrine even if the substantive grant of power to the President is broadly construed. *Id*. at 559. The lower courts felt bound by this holding even when expressing doubts about Section 232's constitutionality. *Am. Inst. Int'l Steel v. United States*, 376 F.Supp.3d 1335, 1352 (Ct. Int'l Trade 2019) ("If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?") (Katzmann, J., dubitante)

Since then, however, the Federal Circuit and the Court of International Trade have consistently read out the procedural limitations in Section 232. In *Universal Steel Products, Inc. v. United States*, the Court of International Trade ignored Section 232's requirement that the President "determine the duration" of any corrective action, accepting that the President could

simply proclaim that the tariffs would remain in place "unless such actions are expressly reduced, modified or terminated," 495 F.Supp.3d 1336, 1349–50 (Ct. Int'l Trade 2021) (quoting Presidential Proclamation 9705) (appeal pending *sub nom. USP Holdings, Inc. v. United States*). In the same case, the Court of International Trade held that the report is not reviewable under the Administrative Procedure Act. *Id*. at 1343. The Court of International Trade so held even though the President cannot act under Section 232 unless the Commerce Secretary first issues a report finding a threat to national security from imports. *See Bennett v. Spear*, 520 U.S. 154, 177–79 (1997) (holding that agency action is final for purposes of reviewability if it "alter[s] the legal regime to which the action agency is subject").

Courts have also permitted the President to ignore the Section 232 requirement that the Secretary publish any unclassified and nonproprietary portions of his report in the Federal Register. 19 U.S.C. § 1862(b)(3)(B). In *Cause of Action Inst. v. U.S. Dep't of Commerce*, 513 F.Supp.3d 116 (D.D.C. 2021), the District of Columbia held that Congress may not require such publication over the President's objection. That case arose out of an investigation into whether the import of autos and auto parts constitute a threat to national security. In May 2018, the President "instructed" the Sectary to "consider" initiating an investigation into whether the imports of autos and auto parts threatened the national security. *Cause of Action Inst.*, 513 F.Supp.3d at 121. The Secretary did so that same month and in February 2019 submitted a report to the President finding

that such imports did threaten to impair the national security, a conclusion with which the President ultimately agreed. Proclamation No. 988, 84 Fed. Reg. 23,433, 23,434 (May 21, 2019). When the Secretary declined to publish the report as required by Section 232, Congress passed the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019). Section 112 of that Act required publication of the report within 30 days, or by January 19, 2020. On January 17, 2020, the Justice Department's Office of Legal Counsel released a memo advising the President that he could ignore the statutorily-mandated publication requirement. Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security (Slip Opinion), ECF No. 31. The District Court agreed, reasoning that the Secretary should be able to make his findings and recommendations to the President privately. *Cause of Action Inst.* 513 F.Supp.3d at 129–30.[2] The District Court so found despite the fact that the Secretary's report is a statutorily-required precondition to Presidential action pursuant to delegated authority that two separate laws required be made public.

Collectively, these cases show lower courts unwilling to enforce clear textual limits on presidential authority under Section 232. Although Section 232 provides that "[w]ithin 90 days after receiving [the Secretary's] report . . . the President shall . . . determine

[2] Ultimately, Commerce Secretary Raimondo released the report in July 2021.

the nature and duration of the action" he deems necessary to address the national security threat and "shall implement" that action within 15 days thereafter, 19 U.S.C. § 1862(c)(1), the courts have only required the President, within 90 days, to announce that he reserves a right Congress has not granted him—the power to select the duration and nature of the actions at some future date. Although the Commerce Secretary must find a threat to national security before the President is empowered to act, 19 U.S.C. § 1862(c)(1), the courts have said that the Commerce Secretary's report is not reviewable under the Administrative Procedure Act. Although Section 232 provides that unclassified and nonproprietary portions of the Secretary's report "shall be published in the Federal Register," 19 U.S.C. § 1862(b)(3)(B), the courts have held that the executive branch need not comply even when Congress adds a date certain to the requirement.

Absent action by this Court to direct the lower courts to read Section 232 as it is written, the President will continue to act outside the delegation bounds of authority granted by Section 232.

CONCLUSION

For these reasons, this Court should grant certiorari and reverse the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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