No. 21-721

In the

Supreme Court of the United States

TRANSPACIFIC STEEL LLC, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

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

Brief of Amici Curiae Oman Fasteners, LLC and Koki Holdings America, Ltd. in Support of Petitioner

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Introduction and Interest of Amici Curiae[1]

"The essential question posed by this [case] is whether Congress enacted [Section] 232[2] to grant the President un-checked authority . . . ." *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1336 (Fed. Cir. 2021) ("*Transpacific II*") (Reyna, J., dissenting). Congress did not. But by ignoring the plain text of the statute, the Federal Circuit revised Section 232 to do just that.

Over 35 years ago, this Court upheld the constitutionality of Section 232 because the statute does not simply authorize "[a]ny action the President might take, as long as it has even a remote impact on imports." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 571 (1976). Rather, Section 232 "establishes clear preconditions to Presidential action [i]nter alia, [a] finding by the Secretary of the Treasury[3] that an 'article is being imported into

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties were timely notified of proposed amici's intent to file this amicus brief. All parties have consented to the filing of this brief.

[2] Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862.

[3] Section 232 was later amended to refer to the Secretary of Commerce. *See infra* footnote 8.

the United States in such quantities or under such circumstances as to threaten to impair the national security.'" *Id.* at 559 (quoting Section 232(b)). In 1988 Congress amended Section 232 to further curb the president's discretion by introducing time limits reinforcing the link between the Secretary's finding and President's action in response. However, by rejecting the plain text of Section 232, the decision below effectively erased the 1988 amendments and gave the President carte blanche.

Proclamation 9772,[4] at issue in this case, marked the President's first test of Section 232's time limits, a tardy modification of one aspect of Proclamation 9705,[5] the general Section 232 steel tariff the President timely enacted a few months earlier. Exacerbating his disregard of clear statutory deadlines, the President issued Proclamation 9980 a year and a half later,[6] imposing 25 percent duties on a handful of derivative articles of steel whose only connection to Proclamation 9705 was presidential fiat. *Amici*—an importer and a purchaser of imported steel nails subject to Proclamation 9980—support Petitioners' request for certiorari and submit this brief to highlight the repercussions on pending and future

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[4] Proclamation No. 9772, 83 Fed. Reg. 40,429 (Aug. 10, 2018).

[5] Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018).

[6] Proclamation No. 9980, 85 Fed. Reg. 5,281 (Jan. 24, 2020).

Section 232 cases if this Court leaves the Federal Circuit's flawed opinion in force.

Oman Fasteners, LLC ("Oman Fasteners") is an Omani manufacturer and U.S. importer of steel nails, a substantial portion of which are subject to Proclamation 9980. Oman Fasteners successfully challenged Proclamation 9980 in the Court of International Trade and opposes the government's pending appeal of that decision to the Federal Circuit.[7] Should the government's appeal succeed, Oman Fasteners will owe the additional 25 percent duties on all past and future entries of steel nails subject to Proclamation 9980.

Koki Holdings America, Ltd. ("Koki") is a domestic reseller of steel nails it purchases from producer-importers such as Oman Fasteners, including substantial quantities subject to Proclamation 9980. Should the Court of International Trade's decisions striking down Proclamation 9980 be reversed on appeal, Koki will be forced to pay higher prices indefinitely.

In *Gundy v. United States*, members of this Court found fault with a congressional delegation of congressional power that gave an executive officer discretion to act without any limitation "'within a

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[7] *Oman Fasteners, LLC v. United States*, 520 F. Supp. 3d 1332 (Ct. Int'l Trade 2021), *appeal docketed and consolidated sub nom. PrimeSource Bldg. Prods., Inc. v. United States*, Appeal No. 21-2066 (Fed. Cir.).

certain time frame or by a date certain.'" *Gundy v. United States*, 139 S. Ct. 2116 (2019), 2132, *reh'g denied*, 140 S. Ct. 579 (2019) (Gorsuch, J., dissenting) (citation omitted). Justice Gorsuch noted that such temporally-unbounded discretion meant the Attorney General was "free to change his mind on any of these matters 'at any given time or over the course of different political administrations.'" *Id.* (citation omitted).

This Court should grant certiorari because far more is at stake than Proclamation 9772's temporary discrimination against Turkish steel. The Federal Circuit's misinterpretation of Section 232 in this case turns Section 232 into precisely the kind of unbounded delegation the dissenting Justices found problematic in *Gundy*, vitiating the procedural safeguards that limit Congress's delegation of power to the President. This invites precisely the presidential overreach embodied in Proclamation 9980, and worse.

Summary of Argument

In Section 232 Congress delegated to the President significant power to restrain trade in the interest of national security—broadly defined to include both physical and economic security—limited only by the deliberate procedure Congress made predicate to presidential action. From the start, Section 232 has conditioned presidential action on an investigation and determination by the relevant executive officer 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."[8]

In 1988 Congress amended Section 232 to reinforce the connection between the investigation and any presidential action under the statute—circumscribing the delegation of authority to the President by tethering temporally the conclusion of the investigation and President's power to act. Section 232 now requires the President to determine what action to take within 90 days of receiving the Secretary's report identifying imports that pose a threat to national security and to implement that action within

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[8] Pub. L. 87-794, Title II, § 232, Oct. 11, 1962, 76 Stat. 877. As originally enacted, the responsible official was the Director of the Office of Emergency Planning. Section 232 was subsequently amended to transfer responsibility to the Secretary of Treasury in 1975, Pub. L. 93-618, Title I, § 127(d), Jan. 3, 1975, 88 Stat. 1993, and finally to the Secretary of Commerce ("Secretary")—where it still rests—in 1988, Pub. L. 100-418, Title I, § 1501(a), (b)(1), Aug. 23, 1988, 102 Stat. 1257, 1259.

15 days thereafter. Congress thereby sought to ensure the President would take swift action to fully address a threat to national security based on the Secretary's concurrent assessment.

The Federal Circuit effectively eliminates the 1988 amendments to Section 232. By ignoring the plain statutory text, it topples the most significant guardrails Congress enacted to cabin its otherwise expansive delegation of international commerce power to the President.

The decision below "diverge[s] from [the statute's] plain language," ignoring what Congress *said* in the straightforward text of Section 232 in favor of a convoluted, and ultimately flawed, analysis of what Congress *must have meant*. *Transpacific II*, 4 F.4th at 1336 (Reyna, J., dissenting). Section 232's time limits are both clear and clearly mandatory, and constitute an essential component of the broader statutory framework. Moreover, the Federal Circuit's misapplication of this Court's precedent in *Brock v. Pierce County*, 476 U.S. 253 (1986), does not warrant ignoring the unambiguous text of Section 232.

Sweeping aside the procedural safeguards established by Congress leads directly to flagrant abuses of the President's Section 232 powers like Proclamation 9980. What results is either a limitless delegation of Congress's international commerce power to the President or an invitation to the courts to

supplant the will of Congress with their own standards for presidential action under Section 232.

Argument

I. The decision below vitiates critical constraints on presidential action that cabin Congress's delegation of power in Section 232.

"The [Federal Circuit] majority's malleable interpretation of § 232 opens the door to modifications of prior presidential actions" in perpetuity, untethered from the time limits in Section 232 that maintain the nexus between the Secretary's investigation and any action taken by the President. *Transpacific II*, 4 F.4th at 1342 (Reyna, J., dissenting).

Behind the door now opened by the Federal Circuit lies another misuse of Section 232: Proclamation 9980. Like Proclamation 9772, the Court of International Trade declared it unlawful. *See PrimeSource Bldg. Prods. v. United States*, 505 F. Supp. 3d 1352 (2021). The Federal Circuit's decision in *Transpacific II* now similarly throws that ruling into question, demonstrating the foreseeable consequences of the Federal Circuit's unwarranted redaction of Section 232.

The President issued Proclamation 9980 on January 24, 2020, more than two years after the Secretary issued the steel investigation report from which Proclamation 9980 purports to draw authority, and

thus more than 21 months after the deadline for the President to declare his response to the report. *See* 85 Fed. Reg. 5,281. The delay is unsurprising if Proclamation 9980's tether to that steel report was mere pretext for tariffs on a handful of derivative articles for reasons unrelated to national security. Indeed, Proclamation 9980's claim that curbing imports of these derivative articles would raise "domestic steel producers' capacity utilization" crumbles under the slightest scrutiny. *See id.*

But these substantive and temporal abuses of Section 232 will go on unchecked if *Transpacific II* is not reversed. There, the Federal Circuit neutered Section 232's primary check against such abuse—"[t]he procedural safeguards" that act as "constraints on power." *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1275 (Ct. Int'l Trade 2019) ("*Transpacific I*"). Section 232's time limits are effective constraints both because they focus the President's attention on a specific *present* threat to national security and because they facilitate judicial review of Presidential action under Section 232. Deadlines demand attention, and Congress rationally concluded that adding time limits to Section 232 would ensure the President's prompt comprehensive action to address a legitimate import threat identified by the Secretary, while limiting mission creep from the President's unrelated policy objectives. Conversely, "[i]f the President could act beyond the prescribed time limits, the [Secretary's investigation] would become [a] mere formalit[y] detached from presidential action." *Id.* at 1276.

This Court has long held that Section 232 does not simply authorize "[a]ny action the President might take, as long as it has even a remote impact on imports." *Algonquin*, 426 U.S. at 571. The Court, however, has also refused to scrutinize the merits of the President's exercise of tariff discretion, on the basis that "the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review . . . than if Congress itself had exercised that judgment." *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940).

More recently, the Federal Circuit, affirming the decision of the Court of International Trade, rejected the "availability of judicial review of the factual or discretionary presidential determinations under section 232." *Am. Inst. for Int'l Steel, Inc. v. United States*, 806 F. App'x 982, 991 (Fed. Cir. 2020) *cert. denied*, 141 S. Ct. 133 (2020) ("*AIIS II*") (citing *George S. Bush & Co.*, 310 U.S. at 380). In the underlying decision, the Court of International Trade explained the difficulties inherent in judicial review of presidential action under Section 232:

> To be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as action in excess of the President's section 232 authority. However, identifying the line between regulation of trade in furtherance of national security and an

> impermissible encroachment into the role of Congress could be elusive in some cases because judicial review would allow neither an inquiry into the President's motives nor a review of his fact-finding. One might argue that the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth. Nevertheless, such concerns are beyond this court's power to address, given the Supreme Court's decision in *Algonquin*, 426 U.S. at 558–60, 96 S.Ct. 2295.

Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1344–45 (Ct. Int'l Trade 2019) (internal citations omitted).

In *Algonquin*, this Court upheld the constitutionality of Section 232 because Section 232 "establishes clear preconditions to [p]residential action [i]nter alia, [a] finding by the Secretary of [Commerce] 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 (quoting Section 232(b)). In 1988 Congress amended Section 232 precisely because, in Congress's estimation, the procedures in place at the

time were insufficient to limit the President's discretion. Congress therefore strengthened the Section 232 process by enacting time limits to cement the nexus between the Secretary's finding and President's action in response.

Deadlines set unambiguous limits on the President's use of Section 232 that cabin the otherwise broad delegation. This Court has recognized that procedural safeguards can save an otherwise broad delegation from unconstitutionality. For example, in *Touby v. United States*, 500 U.S. 160 (1991), the Court held that the statute at issue created a lawful delegation because the "procedural requirements" it imposed "meaningfully constrained the Attorney General's discretion to define criminal conduct." *Id.* at 166. Notably, those key procedural safeguards included a finding that action was "necessary to avoid an imminent hazard to the public safety," consideration of "three factors" to make that finding, publication of a "30-day notice of the proposed scheduling [of the substance] in the federal register," and giving notice to and consulting with the Secretary of Health and Human Services. *Id.* at 166–67. Those requirements mirror the procedure—including time limits—of Section 232. Similarly, in *Panama Refining Co. v. Ryan*, the Court considered "whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition." 293 U.S. 388, 415 (1935). In concluding that the delegation was unlawful, the Court noted that the statute "d[id] not require any finding by the [P]resident as a condition of his action." *Id.*

Deadlines are also restrictions on power that the courts can readily enforce. The availability of effective "judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge," *United States v. Garfinkel*, 29 F.3d 451, 459 (8th Cir. 1994) (quoting *United States v. Bozarov*, 974 F.2d 1037, 1042 (9th Cir.1992) (citing *Skinner v. Mid–America Pipeline Co.*, 490 U.S. 212, 218 (1989); *American Power & Light v. S.E.C.*, 329 U.S. 90, 105 (1946); *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

The decision below trivialized the time limits' importance, with unwarranted optimism that future cases could avoid "permitting *any* presidential imposition after the [time limits], even an imposition that makes no sense except on premises that depart from the Secretary's finding, whether because the finding is simply too stale . . . or for other reasons." *Transpacific II*, 4 F.4th at 1323. But having swept aside Congress's judgment as to when the "Secretary's finding" becomes "too stale," it is unclear how—or why—the Federal Circuit should substitute its own, to say nothing of how the Federal Circuit could adjudicate "other reasons" for finding the President's action unlawful.

"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." *Transpacific I*, 415 F. Supp. 3d at 1276. The Court of International Trade saw clearly what

the Federal Circuit did not: courts are ill-equipped to second-guess either Congress or the President on questions of trade policy and therefore ill-advised to ignore the statutory framework Congress enacted to constrain the President.

II. The Federal Circuit improperly rejected the plain text of Section 232.

Section 232's lodestar is prompt action to address the identified threat to national security.

The statutory procedure begins with the Secretary's investigation "to determine the effects on the national security of imports of the article" in question, which the Secretary "*shall immediately* initiate" once requested by "an interested party." 19 U.S.C. § 1862(b)(1)(A) (emphasis added). The Secretary must "immediately provide notice to the Secretary of Defense" and "consult with the Secretary of Defense regarding the methodological and policy questions raised in any investigation" and, as appropriate "hold public hearings or otherwise afford interested parties an opportunity to present information and advice." *Id.* § 1862(b)(1)(A), (B). "By no later than the date that is 270 days after" initiating a Section 232 Investigation, the Secretary of Commerce "shall submit to the President" and publish in the Federal Register a Section 232 Report "on the findings of such investigation with respect to the effect of the importation of such article . . . upon the national security and, based on such findings, the

recommendations of the Secretary for action or inaction under [Section 232]." *Id.* § 1862(b)(1)(A).

"*Within 90 days* after receiving a report . . . in which the Secretary 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* . . . determine the nature and duration of the action that . . . 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) (emphases added). "[T]he President *shall* implement that action *by no later than . . . 15 days after* . . . [he] determines to take action . . . ." *Id.* (emphases added).

A. The Federal Circuit ignored the plain text of Section 232.

The decision below renders these clear time limits meaningless by conjuring ambiguity into the actions Congress required of the President. The Federal Circuit essentially transforms subparagraph (c)(1)(A)'s requirement that "the President shall determine . . . the nature and duration of the action" into "the President shall make initial determinations regarding the nature and duration of the action, which the President may modify at will," and subparagraph (c)(1)(B)'s requirement that "the President shall implement that action" into "the President shall begin to implement some portions of that

action." The statutory text permits no such expansion.

Congress used clear language, and imposed clear time limits, because Congress was dissatisfied with how the President had previously abused power delegated under Section 232.[9] Congress, therefore, narrowed its delegation of authority: it instructed the President to act swiftly (within 90 and then 15 days) and comprehensively (to remove the entire threat to national security), not dole out incremental action at times of his choosing.

The Federal Circuit undid those unambiguous instructions by conceptualizing a "compound command" whereby the President's "violation of the temporal obligation imposed by" Congress "does not necessarily negate" his authority to act, reasoning further that "[m]ost people would understand the directive 'return the car by 11 p.m.' to require the return of the car even after 11 p.m." *Transpacific II*, 4 F.4th at 1320. But this grammatical exercise misses the mark because it ignores the expansive delegation of power that Congress gave to the President. Section 232 gives the President the virtually unfettered discretion to determine *whether* to take action and *what* action to take.

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[9] *See Transpacific II*, 4 F.4th at 1330 ("There is no material dispute that the background to the 1988 amendments was a perceived problem of inaction, including by delay.").

To extend the Federal Circuit's metaphor, Congress wanted to ensure that if the United States needed a car to maintain the national security, the car would be swiftly procured. Thus, Congress provided that should the Secretary determine that national security necessitates a car, the President would have *an appropriation to purchase* and promptly tender the entire car. However, if the President misused that appropriation—if he tried to provide axles today and perhaps the engine a year from now, *the appropriation would lapse*. Surely most people would understand the directive "I need a car within 90 days, here is the money to buy one," as a requirement to either promptly purchase the car *or return the money*, not as a license to purchase auto parts in perpetuity.

B. The plain text reading of Section 232 is compelled by the broader statutory scheme.

The Federal Circuit's misreading of Section 232 also extends to its belief that the limited circumstances in which Section 232 *does* authorize presidential action outside the general 90-day time limit (and additional 15-day limit for implementation) "bolsters . . . that the President is not barred" from acting outside the time limits generally. *Transpacific II*, 4 F.4th at 1322. Section 232 authorizes action outside the general time limits in precisely one circumstance. Subparagraph (c)(3)(A) of Section 232 provides:

> If—
>
> **(i)** the action taken by the President … is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and
>
> **(ii)** either—
>
> > **(I)** no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination . . . to take such action, or
> >
> > **(II)** such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article,
>
> the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security.

19 U.S.C. § 1862(c)(3)(A). In other words, subparagraph (c)(3)(A) recognizes that the "action" the President may "declare" within the 90-day time limit may be negotiations with foreign countries, and that

negotiations can fail. In that unitary circumstance, Section 232 allows the President to "take such other actions as . . . necessary" to replace the failed negotiation, notwithstanding the passage of time. *Id*.

The Federal Circuit reasoned that subparagraph (c)(3)(A) specifically bolsters the understanding that the President is not barred, by [the 90-day and 15-day time limits set forth in [p]aragraph (c)(1)], from adopting, outside the 15-day period for implementation, specific new burden-imposing measures not decided on and adopted within the period. *Transpacific II*, 4 F.4th at 1322. But subparagraph (c)(3)(A) indicts, rather than bolsters, the Federal Circuit's reading of the statute. The very fact that Congress felt the need to specify an exception to its statutory deadlines suggests that it believed that such action would otherwise fall outside the general delegation of power in paragraph (c)(1). See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) ("The expression of one thing implies the exclusion of others."). Had Congress authorized the President to act outside the statutory time limits *in general*, there would be no need to exempt failed negotiations from those time limits. The Federal Circuit improperly "render[s subparagraph (c)(3)(A)] superfluous, nonsensical, and useless." *Transpacific II*, 4 F.4th at 1340 (Reyna, J., dissenting).

C. The decision below misapplied this Court's precedent in *Brock*.

The Federal Circuit justified its revision of Section 232 on a misapplication of this Court's precedent in *Brock v. Pierce County*. The decision below explained that:

> The Supreme Court has recognized this linguistic point in the context of statutory commands to executive officers to take action within a specified time. It has made clear that such a command does not, without more, entail lack of authority, or of obligation, to take the action after that date has passed, even though the obligation to act by the specified time has been violated.

Transpacific II, 4 F.4th at 1320–21.

First, the *Brock* principle has no place in a statute like Section 232, where time limits are a critical component of the procedural safeguards that cabin Congress's delegation of power to the President. *Brock* and its progeny involved lower executive officials performing fundamentally executive functions, not the President's exercise of the kind of broad delegation of legislative power at issue here. *Brock* involved audit determinations by the Department of Labor, *see* 476 U.S. at 253, and more recent cases have involved prosecution of *in rem* actions, *United States v. James Daniel Good Real Prop.*, 510 U.S. 43

(1993), and assignment of mine workers to pension plans, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003).

Moreover, those cases were founded on the principle that lower executive officers are answerable to both their superiors and the courts. "*When . . . there are less drastic remedies available* for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." *Brock*, 476 U.S. at 260 (emphasis added). The Court specifically noted that deeming a time limit "directory" would not affect the rights of aggrieved parties under the APA whenever an agency fails to abide by that time limit. *Id.* at 260 n.7. The President, however, is not subject to the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). There is no "less drastic remedy" available: either Section 232's time limits mean what they say, or the President has free reign, rendering the deadlines meaningless.

Similarly, in *James Daniel Good*, the Court explained that when Congress enacts a statute prescribing agency action, "failure to specify a consequence for noncompliance" can "impl[y] that Congress intended the responsible officials administering the Act to have discretion to determine what disciplinary measures are appropriate when their subordinates fail to discharge their statutory duties." 510 U.S. at 44–45. But the President has no superior responsible official to discipline him. In the absence of mandatory time limits, the President would answer to no one.

Second, the Federal Circuit failed to heed that a proper application of *Brock* focuses on Congressional intent. *Brock* itself noted that the only reference to the time limits in the legislative history of the Comprehensive Employment and Training Act (CETA) "was a brief colloquy on the House floor between . . . one of the bill's sponsors, and [the member] who offered the amendment that added the 120-day deadline," wherein the latter stated that the time limit was not intended to deprive the agency of jurisdiction to act beyond the limit. *See* 476 U.S. at 263. And in *James Daniel Good* the relevant customs law "set forth various timing requirements," including a five-year statute of limitations, with which the government had complied, as well as "a series of internal requirements relating to the timing of forfeitures," one of which the government had failed to heed. 510 U.S. at 63. The Court reasoned that "[b]ecause [the law] contains a statute of limitations—the usual legal protection against stale claims—we doubt Congress intended to require dismissal of a forfeiture action for noncompliance with the internal timing requirements . . . ." *Id.* at 65.

By comparison, the time limits introduced by the 1988 amendments to Section 232 were the principal feature of those amendments and the subject of significant debate in the legislative history showing Congress's intent to cabin the President's discretion. It is also significant that Section 232's time limits were enacted through amendment. Had Congress set the time limits when enacting Section 232, it might plausibly be argued that these simply

reflected Congress's general sense of how long the President's determination and implementation should take, along with Congress's general intent to "spur" the President. However, when those time limits form the centerpiece of legislation to *amend* the prior statute and are specifically and vigorously debated in the legislative history of that amendment, the time limits cannot be dismissed as merely "directory."

For example, Senator Byrd, one of the principal architects of the 1988 amendments, described them thus:

> [T]he legislation establishes a *time certain* for presidential action. Within 90 days of the time the Secretary . . . report[s his] determination to the President, *he must act*, or state why he has refused to act . . . . Under present law, there is no time limit. . . .
>
> *American companies deserve the certainty of a response* . . . . Once an industry is gone, it is too late.

Threat of Certain Imports to National Security: Hearing on S. 1871 Before the Comm. on Fin., 99th Cong. 37 (1986) ("*Hearing on S. 1871*") (emphasis added). Senator Byrd's proximate reference to "the President's *final determination*" removes the possibility he referred to merely some initial, partial action by the President. *Id.* at 25 (emphasis added).

In the House, Rep. Daniel Rostenkowski, Chair of the Committee on Ways and Means, stated:

> The basic need for the amendment arises from the lengthy period under present law—one year for investigations and no time limit for *decisions* by the President—before actions are required to *remove a threat* posed by imports . . . . The Committee believes that if the national security is being affected or threatened, this should be *determined and acted upon as quickly as possible*.

H.R. Rep. No. 99-581, at 135 (1986) (emphasis added). Similarly, Rep. Barbara Kennelly stressed the need to "set[ ] a *deadline* for Presidential action in section 232 cases" and her "pleas[ure] that the draft" under consideration by Ways and Means "*sets a deadline* . . . for *deciding* future or pending cases." *Trade Reform Legislation: Hearings Before the Subcommittee on Trade of H. Comm. On Ways & Means*, 99th Cong., 2d Sess. 1282 (1986) (emphasis added).

On the other side of the debate, the Reagan Administration argued strenuously against the constraints that the mandatory time limits imposed on the President's discretion, but lost. While testifying before Congress on behalf of the Reagan Administration, U.S. Trade Representative Clayton Yeutter stated:

> The Subcommittee's discussion draft would *establish a time limit* for Presidential determination under section 232, and require a report to Congress on such determinations. The Administration opposes this proposal.
>
> . . . .
>
> The President must have the flexibility to control the timing of his actions under Section 232 . . . .

Id. at 355.

The same sentiments appear in the testimony of Dr. Paul Freedberg, the Assistant Secretary of Commerce for Trade Administration, before the Senate Finance Committee. He noted that the "major proposed revision[ ]" to Section 232 was "to impose a 90-day limit for a Presidential determination after the Secretary of Commerce submits the investigation report." *Hearing on S. 1871* at 72. Addressing the time limit, Assistant Secretary Freedberg complained that "[i]mposing a time limit on the President would constrain his flexibility to adjust the timing and substance of his decision in response to national security considerations," *id.* at 81, and therefore "[t]o impose a 90-day deadline would run the risk that . . . some security concerns would suffer solely due to the timing of a Section 232 decision," *id.* at 85.

As such, the legislative history elucidates what should already be clear from the plain text: Congress intended to enact meaningful temporal limits on the President's authority to act.

Third, *Brock* has no application where the statute contains no "coercive sanction." *Brock* embodies "the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'" 476 U.S. at 260 (quoting *United States v. Nashville, C. & St. L.R. Co.*, 118 U.S. 120, 125 (1886)). The Court was "most reluctant" to accept that an agency's oversight would permanently bar agency action and looked instead for "less drastic remedies." *Id.* A contrary holding in *Brock* would have meant that the Department of Labor could never investigate the alleged misuse of public funds. *See id.* at 257. Similarly, *James Daniel Good* explained that the relevant statutory "directives help to ensure that the Government is prompt in obtaining revenue from forfeited property. It would make little sense to interpret directives designed to ensure the expeditious collection of revenues in a way that renders the Government unable, in certain circumstances, to obtain its revenues at all." 510 U.S. at 65.

As the Court of International Trade panel unanimously held below:

> To require adherence to the statutory scheme does not amount to a sanction,

> but simply ensures that the deadlines are given meaning and that the President is acting on up-to-date national security guidance. The President is, of course, free to return to the Secretary and obtain an updated report pursuant to the statute.

Transpacific I, 466 F. Supp. 3d at 1252. Rather than imposing a sanction, the mandatory time limits protect the nexus between national security and action by the President in restraint of trade.

Presidential action far removed in time from the Section 232 investigation is much less likely to address a legitimate threat to national security. Moreover, if the President may simply ignore the time limits, the statutory scheme collapses. Requiring a Section 232 investigation serves little purpose if the President can take action years later, based on allegedly changed circumstances. The interlocking deadlines for the investigation, presidential determination and implementation, and reporting to Congress are meaningless if each may be ignored at the President's will. And as go the deadlines, so goes the opportunity for meaningful review by Congress.

Conclusion

By eschewing statutory text and failing to effectuate the will of Congress, the decision below would either grant the President unfettered discretion over an area the Constitution entrusted to Congress or

else force the courts, in short order, to devise their own limits on presidential discretion. This Court must grant certiorari to forestall that outcome. The limits Congress imposed on a delegation of its power to the President are both constitutionally sacrosanct and inherently preferable to any that a court might devise.

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Respectfully submitted,

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