No. 23-432

In the Supreme Court of the United States

OMAN FASTENERS, LLC, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General
PATRICIA M. MCCARTHY
TARA K. HOGAN
STEPHEN C. TOSINI
Attorneys

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

QUESTION PRESENTED

Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 877 (19 U.S.C. 1862), as amended, empowers the President to take action to adjust imports that threaten to impair the national security. The question presented is as follows:

Whether Presidential Proclamation 9980, which imposed tariffs on certain steel derivatives, was issued in accordance with Section 232's procedural requirements.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 14

TABLE OF AUTHORITIES

Cases: Page

American Inst. for Int'l Steel, Inc. v. *United States*:
141 S. Ct. 133 (2020) 7
139 S. Ct. 2748 (2019) 7
Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 10
Case & Co. v. *Board of Trade*,
523 F.2d 355 (7th Cir. 1975) 7
Dalton v. *Specter*, 511 U.S. 462 (1994) 13
Federal Energy Admin. v. *Algonquin SNG, Inc.*,
426 U.S. 548 (1976) 11, 12
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 13
Maple Leaf Fish Co. v. *United States*,
762 F.2d 86 (Fed. Cir. 1985) 12, 14
Nielsen v. *Preap*, 139 S. Ct. 954 (2019) 10
North American Fund Mgmt. Corp. v. *FDIC*,
991 F.2d 873 (D.C. Cir.), cert. denied,
510 U.S. 959 (1993) 7
Norwegian Nitrogen Co. v. *United States*,
288 U.S. 294 (1933) 13
PrimeSource Bldg. Prods., Inc. v. *United States*:
497 F. Supp. 3d 1333 (Ct. Int'l Trade 2021),
cert. denied, No. 23-69 2023 WL 7117030
(Oct. 30, 2023) 8
No. 23-69, 2023 WL 7117030 (Oct. 30, 2023) 6, 14

Cases—Continued: Page

Transpacific Steel LLC v. *United States*:
4 F.4th 1306 (Fed. Cir. 2021), cert. denied,
142 S. Ct. 1414 (2021) 5, 8-10

USP Holdings, Inc. v. *United States*,
143 S. Ct. 1056 (2023) 7

United States v. *James Daniel Good Real Prop.*,
510 U.S. 43 (1993) 10

United States v. *Montalvo-Murillo*,
495 U.S. 711 (1990).......... 10

United States v. *O'Brien*, 560 U.S. 218 (2010) 9

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. 551, *et seq.* 13

Telecommunications Trade Act of 1988,
Pub. L. No. 100-418, Tit. I, Subtit. E,
§ 1501, 102 Stat. 1257-1260 9

Trade Expansion Act of 1962, Pub. L. No. 87-794,
76 Stat. 872 (19 U.S.C. 1801 *et seq.*):

§232, 96 Stat. 877 (19 U.S.C. 1862) 2, 3, 5-12

19 U.S.C. 1862(b) (1970 Supp. IV) 12

19 U.S.C. 1862(b)(1)(A) 2

19 U.S.C. 1862(b)(2)(A) 2

19 U.S.C. 1862(b)(3) 2

19 U.S.C. 1862(c) 7

19 U.S.C. 1862(c)(1)(A) 11

19 U.S.C. 1862(c)(1)(A)(i) 2, 5

19 U.S.C. 1862(c)(1)(A)(ii) 2, 3, 9, 10, 12

19 U.S.C. 1862(c)(1)(B) 3, 5, 9, 10

19 U.S.C. 1862(d) 3

Regulation—Continued: Page

Proclamation No. 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5281 (Jan. 24, 2020) 4-6, 10

Miscellaneous:

Proclamation No. 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Mar. 8, 2018) 4

Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3d ed. 2011) 7

Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962, 6 Op. O.L.C. 557 (1982) 8

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 (July 6, 2020) 4

Restriction of Oil Imports, 43 Op. Att'y Gen. 20 (1975) 8

In the Supreme Court of the United States

No. 23-432

OMAN FASTENERS, LLC, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 59 F.4th 1255. An opinion of the Court of International Trade (Pet. App. 35a-52a) is reported at 520 F. Supp. 3d 1332. An additional opinion of the Court of International Trade (Pet. App. 17a-34a) is reported at 542 F. Supp. 3d 1399.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2023. A petition for rehearing was denied on June 22, 2023 (Pet. App. 53a-55a). On September 13, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 20, 2023, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 877 (19 U.S.C. 1862), as amended, the President established tariffs on certain imports of steel derivatives. Petitioner filed suit in the Court of International Trade (CIT) to challenge the tariffs on various grounds. The CIT granted summary judgment for petitioner. Pet. App. 35a-52a. The Federal Circuit reversed and remanded. *Id.* at 1a-16a.

1. Section 232 establishes a procedure through which the President may "adjust the imports" of an article in order to protect "national security." 19 U.S.C. 1862(c)(1)(A)(ii). Under that procedure, the Secretary of Commerce (Secretary) first investigates the effects on national security of imports of the article. 19 U.S.C. 1862(b)(1)(A). During the investigation, the Secretary must consult with the Secretary of Defense and other federal officers and must, if "appropriate," hold public hearings or otherwise give interested parties an opportunity to present information. 19 U.S.C. 1862(b)(2)(A). After the investigation, the Secretary must submit to the President a report containing his findings and recommendations. 19 U.S.C. 1862(b)(3).

If the Secretary finds that imports of the article "threaten to impair the national security," the President must, within 90 days, "determine whether [he] concurs with the finding." 19 U.S.C. 1862(c)(1)(A)(i). If the President concurs, he must, within the 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 na-

tional security." 19 U.S.C. 1862(c)(1)(A)(ii). If the President "determines * * * to take action," he must "implement" that action within 15 days of the determination. 19 U.S.C. 1862(c)(1)(B).

Congress has identified several factors that the President and Secretary must consider when acting under Section 232. Those factors include: (1) the "domestic production needed for projected national defense requirements"; (2) "the capacity of domestic industries to meet such requirements"; (3) "existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense"; (4) "the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth"; and (5) "the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements." 19 U.S.C. 1862(d). Congress also has directed the President and Secretary to "recognize the close relation of the economic welfare of the Nation to our national security." *Ibid.* More specifically, the President and Secretary must consider "the impact of foreign competition on the economic welfare of individual domestic industries," as well as "any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports." *Ibid.*

2. In April 2017, the Secretary initiated an investigation to determine the effect of imports of steel on the national security. In a report submitted to the President on January 11, 2018, the Secretary found that the

present quantities and circumstances of steel imports "threaten[ed] to impair the national security" of the United States. *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, 40,224 (July 6, 2020). The Secretary explained that steel imports were "'weakening our internal economy'" and undermining our "ability to meet national security production requirements in a national emergency." *Id.* at 40,222, 40,224. He recommended that the President address this threat by adjusting the level of imports through global quotas or tariffs on steel imported into the United States. *Id.* at 40,205.

On March 8, 2018, in Proclamation 9705, the President concurred in the Secretary's finding that "steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security." *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625, 11,626 (Mar. 8, 2018). Proclamation 9705 accordingly instituted a 25% tariff on most imports of steel articles. *Ibid.* The proclamation explained that the President "may remove or modify" his actions "and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require." *Ibid.*

In January 2020, the President issued Proclamation 9980, which adjusted the tariff to cover not only steel articles but also certain steel derivatives. See Proclamation No. 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5281 (Jan. 24, 2020). The Secretary had found that "imports of certain deriva-

tives of steel articles ha[d] significantly increased since the imposition of the tariffs." *Id.* at 5282. The Secretary explained that such imports were "circumvent[ing]" the tariffs imposed by Proclamation 9705 and were "undermin[ing] the actions taken to address the risk to the national security" identified in Proclamation 9705. *Ibid.* Accepting the Secretary's findings, the President extended the tariff imposed by Proclamation 9705 to steel derivatives such as nails, staples, and tacks. See Pet. App. 8a-9a.

3. Petitioner, a domestic importer of nails, filed this suit in the CIT to challenge the lawfulness of Proclamation 9980. See Pet. App. 37a. As relevant here, petitioner argued that Proclamation 9980 violated Section 232's requirements that the President determine within 90 days of the Secretary's report whether he concurs in the Secretary's finding, see 19 U.S.C. 1862(c)(1)(A)(i), and that the President implement his action with 15 days of that determination, see 19 U.S.C. 1862(c)(1)(B). Pet. App. 37a.

The CIT granted summary judgment for petitioner on that claim, but dismissed other claims that are not at issue here. See Pet. App. 35a-52a. The court accepted petitioner's argument that Proclamation 9980 violated Section 232's 90-day and 15-day timing requirements. See *id.* at 45a-47a.

4. The court of appeals reversed. Pet. App. 1a-16a. The court observed that, in *Transpacific Steel LLC* v. *United States*, 4 F.4th 1306 (Fed. Cir. 2021), cert. denied, 142 S. Ct. 1414 (2022), it had held that Section 232 does not preclude the President from modifying his initial action after the statute's 90-day and 15-day deadlines have expired. See Pet. App. 12a-13a. The court stated that "Proclamation 9980 comes within the inter-

pretation of § 232 [the Federal Circuit had] adopted in *Transpacific*." *Id.* at 12a. The court further explained that "imposition [of a tariff] on imports of derivatives of the articles that were the subject of the Secretary's threat finding is expressly authorized as an available remedy by § 232(c). In acting to close a loophole exploited by steel-derivatives importers, the President was * * * adding use of a tool that he could have used in the initial set of measures and later found important to address a specific form of circumvention." *Id.* at 13a.

The court of appeals also concluded that "[r]eading § 232 to permit the President to modify an initial plan of action to include derivatives, as he did here, does not render it an unconstitutional delegation." Pet. App. 15a. The court explained that this Court had previously "rejected a delegation-doctrine challenge to § 232 (in an earlier form)," and that intervening statutory amendments have "further defined the congressional delegation of authority to the President." *Id.* at 15a, 16a.*

ARGUMENT

Petitioner contends (Pet. 20-24) that Proclamation 9980 violated Section 232's procedural requirements. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Earlier this Term, this Court denied a petition for a writ of certiorari that arose from an appeal that had been consolidated with this case and that raised substantially the same question that is presented here. See *PrimeSource*

---

* The court of appeals consolidated this case with another appeal. See Pet. App. 1a-2a. This Court has denied a petition for a writ of certiorari in a consolidated case. See *PrimeSource Bldg. Prods. Inc* v. *United States*, No. 23-69, 2023 WL 7117030 (Oct. 30, 2023).

Bldg. Prods., Inc. v. *United States*, No. 23-69, 2023 WL 7117030 (Oct. 30, 2023). The Court also has denied four other petitions that have challenged the lawfulness of the steel tariffs. See *USP Holdings, Inc.* v. *United States*, 143 S. Ct. 1056 (2023) (No. 22-565); *Transpacific Steel LLC* v. *United States*, 142 S. Ct. 1414 (2022) (No. 21-721); *American Inst. for Int'l Steel, Inc.* v. *United States*, 141 S. Ct. 133 (2020) (No. 19-1177); *American Inst. for Int'l Steel, Inc.* v. *United States*, 139 S. Ct. 2748 (2019) (No. 18-1317). The Court should likewise deny the petition for a writ of certiorari in this case.

1. Section 232 empowers the President to take "action" to adjust imports. 19 U.S.C. 1862(c). "*[A]ction* suggests a process—the many discrete events that make up a bit of behavior—whereas *act* is unitary." Bryan A. Garner, *Garner's Dictionary of Legal Usage* 18 (3d ed. 2011). Section 232 thus empowers the President to perform a course of acts, not just a single act, to adjust imports.

Under Section 232, the President retains authority to modify that course of acts as necessary in light of changed circumstances or new information. In general, the power to take regulatory action carries with it the power to amend that action. See, *e.g.*, *North American Fund Mgmt. Corp.* v. *FDIC*, 991 F.2d 873, 875 (D.C. Cir.) ("[T]he agency is the source of the regulations and also has the power to amend them."), cert. denied, 510 U.S. 959 (1993); *Case & Co.* v. *Board of Trade*, 523 F.2d 355, 363 (7th Cir. 1975) ("The power to adopt regulations includes the power to amend them."). It would have been especially odd in the present statutory context for Congress to foreclose the President from responding to changed circumstances or new information. Section 232 deals with foreign policy and national secu-

rity, settings in which flexibility to address changed circumstances and new information is especially vital.

Longstanding executive practice confirms that reading of Section 232. In 1959, President Eisenhower took action to adjust crude oil imports after receiving a report from the Secretary; over the next 16 years, different Presidents modified that initial action at least 26 times, without receiving any new reports from the Secretary. See *Transpacific Steel LLC* v. *United States*, 4 F.4th 1306, 1327 (Fed. Cir. 2021), cert. denied, 142 S. Ct. 1414 (2022). On several occasions during the 1970s and 1980s, Presidents modified other Section 232 actions without receiving new reports. See *PrimeSource Bldg. Prods., Inc.* v. *United States*, 497 F. Supp. 3d 1333, 1387-1388 (Ct. Int'l Trade 2021) (Baker, J., concurring in part and dissenting in part) (collecting examples), cert. denied, No. 23-69, 2023 WL 717030 (Oct. 20, 2023). The Attorney General has explained that Section 232 "contemplates a continuing process of monitoring, and modifying the import restrictions, as their limitations become apparent and their effects change." *Restriction of Oil Imports*, 43 Op. Att'y Gen. 20, 21 (1975). And the Office of Legal Counsel has explained that Section 232 "contemplate[s] a continuing course of action, with the possibility of future modifications." *Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962*, 6 Op. O.L.C. 557, 562 (1982).

Section 232's deadlines do not restrict the President's power to adopt such amendments. The relevant provisions set deadlines for "the adoption and initiation of a plan of action or course of action," not for "each individual discrete imposition on imports." *Transpacific*, 4 F.4th at 1321. The first provision on which petitioner

relies (Pet. 16) states that, within 90 days after receiving the Secretary's report, the President must "determine the nature and duration of the action" that must be taken. 19 U.S.C. 1862(c)(1)(A)(ii). The phrase "nature and duration" indicates that, within the initial 90-day interval, the President need only determine the general character of his plan; he need not identify, in advance, each measure that he will undertake. The other provision on which petitioner relies (Pet. 16) states that the President must "implement that action" within 15 days after making the determination. 19 U.S.C. 1862(c)(1)(B). But the phrase "implement that action" means only that the President must put his plan into effect within 15 days, not that each step in the plan must be completed within that period.

The statutory history of the time limits confirms that point. The current time limits were not part of Section 232 as originally enacted in 1958. Rather, those limits were added to the statute in 1988. See *Transpacific*, 4 F.4th at 1324-1326; Telecommunications Trade Act of 1988, Pub. L. No. 100-418, Tit. I, Subtit. E, § 1501, 102 Stat. 1257-1260. By the time of that amendment, Presidents had for three decades been exercising the power to modify initial actions under Section 232. See p. 8, *supra*. A court should not infer that Congress disturbed that long-settled understanding in the absence of a "clear indication from Congress of a change in policy." *United States* v. *O'Brien*, 560 U.S. 218, 231 (2010) (citation omitted). Neither the text nor the history of the 1988 amendment to Section 232 provides any clear indication that Congress intended to deprive the President of his longstanding authority to modify initial actions in response to changed circumstances and new information.

Furthermore, even if the President misses the deadlines set forth in Section 232, his power to take the steps set forth in that provision does not evaporate. See *Transpacific*, 4 F.4th at 1320-1321. This Court's precedents recognize that "duties are better carried out late than never," and that "a statutory rule that officials '"shall" act within a specified time' does not by itself 'preclude action later.'" *Nielsen* v. *Preap*, 139 S. Ct. 954, 967 (2019) (opinion of Alito, J.) (brackets and citation omitted); see, *e.g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 (2003) ("[W]e do not readily infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time."); *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."); *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 718 (1990) ("[T]he sanction for breach [of a time limit] is not loss of all later powers to act."). Section 232 directs that the President "shall" determine the nature and duration of the action within the 90-day deadline, 19 U.S.C. 1862(c)(1)(A)(ii), and "shall" implement the action within the 15-day deadline, 19 U.S.C. 1862(c)(1)(B). A failure to comply with those time limits would not preclude the President from fulfilling his substantive obligations at a later time.

Petitioner objects (Pet. 26) that Proclamation 9980 addressed steel *derivatives*, even though the Secretary's original report addressed only steel articles. But the Act provides that, if the President concurs in the Secretary's finding that "*an article* is being imported into the United States in such quantities or under such

circumstances as to threaten to impair the national security," the President must "determine the nature and duration of the action that * * * must be taken to adjust the imports of *the article and its derivatives*." 19 U.S.C. 1862(c)(1)(A) (emphases added). The Act thus directs the President to take action with respect to both articles and derivatives, even though the Secretary's original report concerns only articles.

2. Petitioner argues (Pet. 25-26) that courts should read Section 232 narrowly in order to avoid a violation of the nondelegation doctrine. This Court rejected the same argument in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976).

Algonquin arose after the President invoked Section 232 to establish license fees for certain imports of petroleum. 426 U.S. at 556. In the course of upholding the license fees, the Court rejected the contention that a court "must construe [Section 232] narrowly in order to avoid 'a serious question of unconstitutional delegation of legislative power.'" *Id.* at 558-559 (citation omitted). The Court instead held that the statute "easily fulfills" the test set forth in the Court's nondelegation cases: It provides "'an intelligible principle'" to guide the President's exercise of discretion. *Id.* at 559 (citation omitted). The Court observed that Section 232 "establishes clear preconditions to Presidential action," including a finding by the Secretary that an "'article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.'" *Ibid.* (citation omitted). The Court also emphasized that "the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded," since "[t]he President can act only to the ex-

tent 'he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security.'" *Ibid.* (citation omitted). Finally, the Court noted that Section 232 "articulates a series of specific factors to be considered by the President in exercising his authority." *Ibid.* For those reasons, the Court "s[aw] no looming problem of improper delegation." *Id.* at 560.

Petitioner suggests (Pet. 26) that the court of appeals' interpretation of Section 232 has created a nondelegation problem that did not exist when *Algonquin* was decided. But when this Court decided *Algonquin*, Section 232 did not impose any time limits at all. See p. 9, *supra*. And then as now, Section 232 directed the President to adjust imports of both articles and derivatives based on the Secretary's reports concerning articles. Compare 19 U.S.C. 1862(b) (1970 Supp. IV) with 19 U.S.C. 1862(c)(1)(A)(ii). The *Algonquin* Court still rejected the nondelegation challenge, emphasizing the other constraints imposed by the statute: the requirement of a finding that the imports threaten to impair national security, the requirement that the President take action only to the extent necessary to address that threat, and the list of specific factors that the President must consider when exercising his authority. See 426 U.S. at 559. If those constraints sufficed to defeat the nondelegation challenge in *Algonquin*, they suffice to defeat any nondelegation challenge here, regardless of how a court interprets the statute's time limits or provisions relating to derivatives.

3. Finally, petitioner argues (Pet. 14-18) that the court of appeals improperly granted the President a form of deference when it stated that, under its decision in *Maple Leaf Fish Co.* v. *United States*, 762 F.2d 86

(Fed. Cir. 1985), it could hold Proclamation 9980 invalid only if there was a "clear misconstruction of the governing statute." Pet. App. 10a (citation omitted). Petitioner argues (Pet. 13) that "the court of appeals' rule of deference to the Executive closely resembles deference to administrative agencies under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." It contends (*ibid.*) that this Court should either grant the petition for a writ of certiorari in order to review that purported rule of deference, or hold the petition pending the resolution of *Loper Bright Enterprises* v. *Raimondo*, cert. granted, No. 22-451 (May 1, 2023), and *Relentless, Inc.* v. *Department of Commerce*, cert. granted, No. 22-1219 (Oct. 13, 2023).

Petitioner misreads the court of appeals' opinion. Because the President is not an "agency" within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, his actions are not subject to judicial review under that statute. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992); 5 U.S.C. 706. They are instead subject only to a narrow form of review "outside the framework of the APA," and even that review "is not available when the statute in question commits the decision to the discretion of the President." *Dalton* v. *Specter*, 511 U.S. 462, 474 (1994); see, *e.g.*, *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 318 (1933) ("Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed.").

The standard that the Federal Circuit set out in *Maple Leaf* and applied in this case reflects the "very limited" scope of judicial review when "the President"

makes "highly discretionary" decisions. 762 F.2d at 89. Indeed, the Federal Circuit has "repeatedly relied on the *Maple Leaf* formulation to indicate the 'limited' scope of review of nonconstitutional challenges to presidential action." Pet. App. 10a-11a (citation omitted). Contrary to petitioner's suggestion (Pet. 13), the *Maple Leaf* standard does not reflect a form of *Chevron*-style deference. And the decision below would not be affected by this Court's decisions in *Loper Bright* and *Relentless*, which do not involve challenges to actions taken by the President.

The petitioner in *PrimeSource*, the case that the court of appeals had consolidated with this case, similarly challenged the court's application of the *Maple Leaf* standard and similarly asked this Court to hold its petition for a writ of certiorari pending the resolution of *Loper Bright*. See Pet. at 2-3, 20-25, 34, *PrimeSource*, *supra* (No. 23-69). This Court, however, denied that petition. See 2023 WL 7117030. There is no sound basis for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
PATRICIA M. MCCARTHY
TARA K. HOGAN
STEPHEN C. TOSINI
Attorneys

NOVEMBER 2023