No. 18-

IN THE

Supreme Court of the United States

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC,

Petitioners,

v.

UNITED STATES and KEVIN K. MCALEENAN, COMMISSIONER, UNITED STATES CUSTOMS and BORDER PROTECTION,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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

Additional Counsel Listed on Inside Cover

April 15, 2019

Counsel for Petitioners

Donald B. Cameron
R. Will Planert
Julie C. Mendoza
Brady W. Mills
MORRIS MANNING & MARTIN LLP
1401 Eye Street, NW, Suite 600
Washington, D.C. 20005
(202) 216-4811
dcameron@mmmlaw.com

Gary N. Horlick
LAW OFFICES OF GARY N. HORLICK
1330 Connecticut Ave., NW, Suite 882
Washington, D.C. 20036
(202) 429-4790
gary.horlick@ghorlick.com

Timothy Meyer
VANDERBILT UNIVERSITY LAW SCHOOL
131 21st Avenue South
Nashville, TN 37203
(615) 936-8394
tim.meyer@law.vanderbilt.edu

Steve Charnovitz
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H Street, NW
Washington, D.C. 20052
(202) 994-7808
scharnovitz@law.gwu.edu

Counsel for Petitioners

QUESTIONS PRESENTED

This case presents a facial challenge to section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, and its use to impose more than $4.5 billion of tariffs on steel products, on the ground that section 232 unconstitutionally delegates legislative power to the President in violation of Article I, Section 1 of the U.S. Constitution and the principle of separation of powers. A three-judge panel of the Court of International Trade held that it was bound by this Court's decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), which rejected a statutory challenge to the President's order under section 232 and an undue delegation argument offered to bolster that challenge.

In the ordinary course, an appeal in this case would be heard by a second panel of three judges, this time from the Court of Appeals for the Federal Circuit, who would be presented with the identical question regarding the controlling effect of this Court's ruling in *Algonquin*. This petition in advance of judgment seeks to bypass that unnecessary and ultimately inconclusive step. Accordingly, the questions presented are:

1. Did the Court of International Trade erroneously conclude that *Algonquin* controls the outcome of this action by failing to distinguish this facial delegation challenge to section 232 from this Court's limited ruling in *Algonquin*, which considered only whether construing section 232 to permit the President to impose monetary

exactions would result in an unconstitutionally broad delegation?

2. Is section 232 facially unconstitutional on the ground that it lacks any intelligible principle and therefore constitutes an improper delegation of legislative authority and violates the principles of separation of powers and checks and balances established by the Constitution?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners, who were the plaintiffs below, are the American Institute for International Steel, Inc. ("AIIS"), a non-profit membership corporation that brought this action on behalf of its 120 members that includes petitioners Kurt Orban Partners, LLC, and Sim-Tex, LP. None of the petitioners has a parent corporation, no publicly held company owns 10% or more of stock of any of the petitioners, and none of the members of AIIS has any ownership interest in AIIS.

Respondents, who were defendants below, are the United States and Kevin K. McAleenan, the Commissioner of U.S. Customs and Border Protection, who was sued in his official capacity.

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American Institute for International Steel, Inc., Sim-Tex, LP, and Kurt Orban Partners, LLC respectfully petition for a writ of certiorari before judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinions of the United States Court of International Trade ("CIT") were issued on March 25, 2019. Pet. App. 1–19 & 19–36. They are the only relevant opinions or orders. They are not yet officially reported, but are available at 2019 WL 1354084.

STATEMENT OF JURISDICTION

Petitioners filed this case in the CIT, which has exclusive jurisdiction under 28 U.S.C. § 1581(i)(2) & (4). Pursuant to 28 U.S.C. § 255, a panel of three judges was convened to hear this constitutional challenge. On March 25, 2019, the court entered a final judgment granting the motion of respondents for judgment on the pleadings. Pet. App. 37–38. That same day, petitioners filed their notice of appeal to the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1295(a)(5). No petition for rehearing was filed. This petition before judgment is filed pursuant to 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(e), and Rule 11 of this Court.

RELEVANT CONSTITUTIONAL & STATUTORY PROVISIONS

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

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

Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, ("section 232") is set forth in full at Pet. App. 39–46. Section 232(c), which grants the President the power to impose the tariffs at issue in this case, provides that, if the President determines that the importation of an article of commerce may threaten to impair the national security, as broadly defined in section 232(d), the President may

> determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of [that] article and its derivatives so that such imports will not threaten to impair the national security.

STATEMENT OF THE CASE

On March 8, 2018, relying on section 232, the President imposed a 25% tariff on all imported

steel products. Pet. App. 47–55. Petitioners are an association of importers and users of imported steel products, and other entities and individuals who are adversely affected by that tariff. In the CIT, they argued that section 232 unconstitutionally delegates legislative power to the President and that therefore the tariffs are invalid. Their complaint seeks only declaratory and injunctive relief. If they prevail, some of the members of petitioner American Institute for International Steel, Inc. ("AIIS") will have claims for refunds, but many of the members of AIIS (such as longshoremen, railroads, ports, logistics suppliers, and other parts of the supply chain) have been and continue to be injured by the reduction in imports caused by the tariffs and have no claim for refunds or other damages.

On cross-motions for summary judgment, there were no material facts in dispute and defendants raised no standing or other objections to deciding the merits. The court did not reach the merits of petitioners' constitutional claim, although two judges noted that section 232 "seem[s] to invite the President to regulate commerce by way of means reserved for Congress," Pet. App. 18, and the third wrote separately that "it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers." Pet. App. 35 (Katzmann, J., dubitante). Instead, the court concluded that it was bound by this Court's decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) ("*Algonquin*"), rejecting a limited nondelegation

argument with respect to section 232 and, therefore, granted judgment on the pleadings for defendants. For the reasons set forth below, petitioners contend that *Algonquin* is distinguishable, or should be limited or overruled, and that this Court should rule that section 232 is an unconstitutional delegation of legislative power to the President.

Operation of Section 232

Section 232 was enacted pursuant to the power granted exclusively to Congress in Article I, Section 8 of the Constitution "[t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as its authority "[t]o regulate [c]ommerce with foreign [n]ations." Section 232(b) directs the Secretary of Commerce (the "Secretary") on the application of any department or agency, the request of an interested party, or on his own initiative, to undertake an investigation to determine the effects of imports of a particular article of commerce on the national security. Pet. App. 39. Within 270 days of initiating the investigation, the Secretary is required to submit a report to the President, which includes his findings on whether that article is "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," and his recommendations for action by the President. Pet. App. 40–41. Under section 232(c), the President has 90 days to determine whether to concur with the findings of the Secretary, and if he concurs, to "determine the nature and duration of the action that, in the judgment of the President, must be

taken to adjust the imports of [that] article and its derivatives so that such imports will not threaten to impair the national security." Pet. App. 41.

Although the determination by the Secretary under section 232(b) and the President's action under section 232(c) are tied to "national security," section 232(d) includes an essentially unlimited definition of national security—one that departs from an ordinary understanding of national security as related to national defense and foreign relations:

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

Pet. App. 44 (emphasis added). As a result, section 232(d) effectively allows the President to impose any remedies he chooses to "adjust" imports under section 232(c) if he concludes that

any imported article may adversely affect any aspect of the Nation's economy.[1]

Indeed, section 232 provides no limit or guidance on which types of import adjustments the President may impose. The President may increase existing tariffs by any amount and may impose unlimited new tariffs on goods that Congress has previously determined are duty-free. The President may also impose quotas—whether or not there are existing quotas—with no limit on the extent of the reduction from any existing quota or import levels. In addition, the President could choose to impose licensing fees for the subject article, either in lieu of or in addition to any tariff or quota already in place. And for all these changes in the law, the President may select the duration of each such change without any limits on his choice—or make the duration indefinite—and he may make any changes with no advance notice or delay in implementation.

Under section 232(c) the President has an unlimited range of other choices in determining what adjustments to imports he wishes to make, with no guidance from Congress as to how to make them. For example, there is no guidance in section 232 as to whether or when the President should treat imports from various foreign countries on a nondiscriminatory basis, nor any guidance on whether or when to exempt some

[1] To underscore the expansive reach of section 232, the quotation from section 232(d) in text is less than half the length of that provision which is produced in full in the appendix to this petition. Pet. App. 43–44.

countries, or some segments of an industry, but not others from an otherwise applicable tariff or quota. Similarly, although the imported articles subject to a section 232 investigation may vary widely in their uses, quality, specifications, availability in the United States, and thus in their relation to national security—as they do for imported steel, *see infra* at 24–25—the President is permitted to disregard those differences, or take them into account, in his unfettered discretion.

There is also no requirement that the President must or must not take into account adverse consequences on downstream industries and U.S. consumers from a proposed tariff or other adjustment, nor is there any guidance as to how to do so if he chooses to take into account some or all such consequences. Those consequences include: (1) raising the prices of domestic products made using the imported article; (2) causing American workers to lose their jobs or work fewer hours; (3) favoring imported finished products that contain or are produced from the imported article and that can be sold at lower prices in the United States because the tariff does not apply to them; or (4) reducing foreign markets for U.S. exports as a result of higher domestic input prices or retaliatory foreign tariffs, as foreign countries have imposed here. The President is, in effect, empowered to make the kinds of distributional and policy choices that the Constitution assigns to Congress.

Section 232 also lacks procedural protections that might limit the unbridled discretion that it confers on the President. Thus, although the

President may order a remedy under section 232 only if he concurs with a finding by the Secretary that imports of the subject article may threaten to impair the national security, the President is not bound in any way by other recommendations of the Secretary, and he is not required to base his decision on the Secretary's report or on the information provided to the Secretary through any public hearing or submission of public comments.

Section 232 does not provide for judicial review of orders by the President under it, and because the President is not an agency under 5 U.S.C. § 551(1), judicial review is not available under the Administrative Procedure Act, 5 U.S.C. § 706. Furthermore, the Department of Justice, on behalf of the United States, has taken the position, with which petitioners agree, that once

> the President received the report that constitutes the single precondition for his exercise of discretion under Section 232(c), concurred in its findings, and took the action to adjust imports that was appropriate "in the judgment of the President." 19 U.S.C. § 1862(c). [The] decision to take action was the President's to make, and his exercise of discretion is not subject to challenge [in court].

Defs.' Mot. to Dismiss at 16–17, *Severstal Export GMBH, et al. v. United States*, No. 18-00057 (Ct. Int'l Trade May 3, 2018), 2018 WL 1779351; *id.* at 19 ("the President's exercise of discretion pursuant to Section 232 is nonjusticiable").

The President's 25% Tariff

On April 19, 2017, the Secretary opened an investigation into the impact of steel imports under section 232. As part of that investigation, the Secretary held a public hearing on May 24, 2017, and provided for the submission of written statements by interested persons. On January 11, 2018, the Secretary sent the President a report entitled, "The Effect of Imports of Steel on the National Security" (hereinafter, the "Steel Report"). Pls.' Statement of Undisputed Facts at Ex. 5, *Am. Inst. for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade Mar. 25, 2019), ECF No. 20. The Steel Report recommended a range of alternative actions, including global tariffs, each of which had the stated objective of maintaining 80% capacity utilization for the U.S. steel industry, but with no explanation as to how a particular trade barrier would accomplish that result. Steel Report at 58–61. At the same time, the Secretary issued a report with similar conclusions regarding imports of aluminum.

As a statute purporting to be based on national security concerns, section 232(b) requires the Secretary to consult with the Secretary of Defense, but the President is not bound by what the Defense Department recommends. In this case, the Secretary of Defense sent a memorandum to the Secretary stating that his Department "does not believe that the findings in the reports [on steel and aluminum] impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements." Pet. App. 117.

Despite this response from the Defense Department, the President issued Proclamation No. 9705 on March 8, 2018, Pet. App. 47–55, which imposed the 25% tariff at issue in this action, applicable to all imported steel articles from all countries except Canada and Mexico, effective March 23, 2018. On the same date, the President imposed a similar tariff, but in the lesser amount of 10%, on aluminum imports, also based on section 232. Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 15, 2018).

The President subsequently amended the order based on Proclamation No. 9705 in a series of proclamations to provide for country-based exclusions, some for limited durations and others indefinite. *See* Proclamation No. 9711, 83 Fed. Reg. 13,361 (Mar. 28, 2018), Pet. App. 56–65; Proclamation No. 9740, 83 Fed. Reg. 20,683 (May 7, 2018), Pet. App. 66–74; and Proclamation No. 9759, 83 Fed. Reg. 25,857 (June 5, 2018), Pet. App. 75–81. As a result, Argentina, Brazil, and South Korea are exempt from the 25% tariff without an end date, but are subject to absolute quotas on steel imports. Pet. App. 123 ¶ 9. Australian imports are not subject to either the 25% tariff or quotas. The imports from all other countries, including Canada, Mexico, and the members of the European Union, are subject to the 25% tariff. Finally, on August 10, 2018, President Trump issued Proclamation No. 9772, Pet. App. 82–88, which doubled the tariff on steel imported from Turkey—and no other country—from 25% to 50%.

The 25% tariff imposed under section 232, and the exemptions and quotas for certain countries, are not based on any showing of illegal trade practices by steel producers in the less-favored countries. Those practices are already the basis of separate remedial tariffs issued under the antidumping and countervailing duty laws of the United States. According to the Steel Report, as of January 11, 2018, for the steel industry alone, there were 164 such orders in effect, and there were an additional 20 publicly announced investigations underway. Steel Report at App. K, pp.1–4. Thus, the tariffs at issue here are in addition to any duties already imposed on imports of particular steel articles under these unfair trade statutes.

This Litigation

The complaint was filed on June 27, 2018, along with a motion under 28 U.S.C. § 255 to designate a three-judge panel of the CIT to hear and determine the constitutional issues presented by petitioners. The defendants are the United States and Kevin K. McAleenan, the Commissioner of U.S. Customs and Border Protection, who is responsible for collecting the payments made on account of the tariffs imposed by the President under section 232.

Petitioner AIIS is a non-profit membership corporation that brought this action on behalf of its 120 members. AIIS's members, which include petitioners Sim-Tex, LP ("Sim-Tex") and Kurt Orban Partners, LLC ("Orban"), have various business connections with the imported steel

products that are subject to the 25% tariff challenged in this action. They include companies that use imported steel in the manufacture of their own products, traders in steel, importers, exporters, freight forwarders, stevedores, shippers, railroads, port authorities, unions, and other logistics companies, all of which have been and will continue to be adversely affected by the 25% tariff on imported steel products. Together, AIIS's members handle, import, ship, transport, or store approximately 80% of all imported basic steel products in the United States. Pet. App. 126–127.

Petitioner Sim-Tex is a Texas importer of steel products. It is also the leading wholesaler in the United States of oil country tubular goods (OCTG) casing and tubing, which are carbon and alloy steel pipe and tube products used in the production and distribution of oil and gas. Sim-Tex imports directly, as the importer of record, and indirectly, through traders, approximately 40,000–45,000 tons per month from Korea, Taiwan, Brazil, Germany, Italy and other sources. Pet. App. 132–134.

Petitioner Orban is a specialized steel trader that purchases globally from leading carbon, alloy, and stainless and high nickel alloy manufacturers and sells to manufacturers in the United States. It purchases between 200,000 and 250,000 tons of imported steel per year, all of which is subject to the 25% tariff. As the importer of record on most of these purchases, it is directly responsible for paying all tariffs, including the 25% tariff. Pet. App. 135–138.

For petitioners Sim-Tex and Orban and other members of petitioner AIIS that purchase imported steel or products that contain imported steel, the 25% tariff has already and will continue to increase the cost of imported steel. Consequently, unless those members are able to increase their sales prices, the added tariff costs will reduce their profits. Alternatively, those members can attempt to maintain their profit margins by raising the prices they charge, which will likely reduce their sales in the United States and abroad, and may require them to lay off workers or reduce their wages.

If the 25% tariff is held unconstitutional, those members of petitioner AIIS that actually pay the 25% tariff may be able to obtain refunds of those tariff payments from the United States, but they will not be able to recover their lost profits from reduced sales or lower profit margins and their workers will not be able to recover lost wages resulting from reduced hours of work. Moreover, many AIIS members do not themselves purchase imported steel, but their businesses are involved in various phases of the transportation of imported steel.

The 25% tariff was intended to, has had, and will continue to have the effect of reducing the total volume of imported steel. As a result, the revenue of those entities will be reduced (and possibly jobs will be lost) for: (a) those members that transport imported steel that are paid by the volume of imported steel that they transport; (b) the workers whose union locals are members of AIIS and who are paid, in part, by the volume of

imported steel that they handle in moving that steel from one location to another; and (c) the port authorities, customs brokers, insurance companies, and logistics companies that are members of AIIS and that derive significant portions of their revenue from their handling of imported steel. Because none of these members of AIIS will have paid the 25% tariff, directly or indirectly, they will have no claim for monetary damages from the United States even if the 25% tariff is held to be unconstitutional, and hence the harms that they have sustained and will continue to sustain are irreparable.

Proceedings Below

With their complaint, petitioners filed a request to have the case heard by a panel of three judges. Pet. App. 90. Three weeks later, they filed their motion for summary judgment, with a Statement of Undisputed Facts. Pet. App. 120. Respondents filed their cross-motion for judgment on the pleadings on September 14, 2018, agreeing that there were no disputed issues of fact and that at least one petitioner had standing. After further briefing, the three-judge panel heard oral argument on December 19, 2018, and issued its decision on March 25, 2019.

Respondents' principal defense was that this Court's decision in *Algonquin* is controlling on the delegation question. Petitioners argued that *Algonquin* is distinguishable on two grounds.

First, the petitioners in *Algonquin*, who were government agencies and officials, confined the question presented to this Court to a statutory

question based on the narrow factual circumstances underlying the plaintiffs' challenge in that case:

> Whether Section 232(b) of the Trade Expansion Act of 1962 authorizes the President-upon a finding that oil is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security-to adjust the imports of oil by imposing a system of license fees on such imports.

Brief for Petitioners, Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (No. 75-382), 1976 WL 181331, at *2.[2] In response, the *Algonquin* respondents, the plaintiffs in that case, did not present this Court with a facial or even a direct delegation challenge to section 232. Instead, the *Algonquin* plaintiffs argued that the "adjustment" to imports permitted by the law extended only to the imposition of quotas and did not permit the President to impose the import licensing fees at issue there.

The *Algonquin* plaintiffs buttressed their narrow statutory claim with the argument that, to construe section 232 to permit the imposition of licensing fees, would render the statute unconstitutional as an undue delegation of legislative power. It was only in that narrow context that this Court considered the

[2] As the CIT noted, Pet. App. 8 n.4, what was section 232(b) in 1976, is now section 232(c), but the substance of the law remains unchanged.

constitutional delegation issue with respect to section 232. The Court concluded that interpreting the statute as permitting the President to impose licensing fees did not constitute a violation of the nondelegation doctrine under the "intelligible principle" standard laid down in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928): "Even if 232(b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." *Algonquin*, 426 U.S. at 559. The Court then proceeded to decide the statutory construction issue presented by the plaintiffs and found in favor of the Government.

Second, petitioners argued, it is now undisputed that any substantive challenge to a President's exercise of discretion under section 232 would be precluded by the post-*Algonquin* decisions in *Franklin v. Massachusetts*, 505 U.S. 788 (1992) and *Dalton v. Specter*, 511 U.S. 462 (1994). That preclusion of any meaningful judicial review, on top of the unbounded powers to pick whatever remedy the President decided was appropriate, removed the final check to guard against this unlimited delegation by Congress.

On the merits, petitioners pointed to the fact that section 232(d) expanded the national security trigger for invoking section 232(c) to include any significant impact on the national economy or any segment thereof, as well as the unlimited choices of remedies if the requisite injury from imports was found. The heart of petitioners' claim was

that section 232 contained no "boundaries," as required by *Yakus v. United States*, 321 U.S. 414, 423, 426 (1944). This lack of congressionally imposed boundaries is evidenced by the fact that respondents were unable to identify any action regarding imports that the President could not take under section 232. In that respect, petitioners argued, section 232 is like the law at issue in *United States v. Lopez*, 514 U.S. 549 (1995) where the Court rejected the Government's Commerce Clause argument because the Government could not identify any actual or hypothetical federal law that could not be upheld on the theory that it offered.

The CIT did not accept the *Algonquin* distinctions proposed by petitioners. Instead, it concluded that it was "bound by *Algonquin*." Pet. App. 9, 13 n.6, & 36. Although the court differed from petitioners on whether the status of judicial review today differs from what it was at the time of *Algonquin*, Pet. App. 10–13, the court agreed that "the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." *Id.* at 16–18. Moreover, the court agreed that the scope of judicial review under section 232 is constitutionally problematic: "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." *Id.* at 19.

Nevertheless, the court held that "such concerns are beyond this court's power to address, given the Supreme Court's decision in *Algonquin*." *Id.*

Judge Katzmann filed an opinion dubitante. Pet. App. 19–36. He did not disagree to the point of dissent on whether the panel had the authority under *Algonquin* to reach the merits of petitioners' constitutional claim, but he expressed grave concerns about the breadth of the delegation here, concluding, "[i]f the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?" *Id.* at 36.

REASONS FOR GRANTING THE WRIT

In most cases in which a three-judge court had passed on the constitutionality of a federal statute, direct review by appeal would be available in this Court under 28 U.S.C. § 1253. However, that statute applies only when the case is "required by any Act of Congress to be heard and determined by a district court of three judges." Section 255 of Title 28 of the United States Code permitted, but did not require this case to be heard by three CIT judges. In addition, although the judges of the CIT are Article III judges, like district court judges, 28 U.S.C. § 1585 arguably treats the CIT as an entity different from a district court: "The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." Accordingly, in order to avoid a jurisdictional dispute, while achieving the congressionally-sanctioned objective

of having constitutional challenges that were heard by three-judge courts bypass the courts of appeals, petitioners are following the clear jurisdictional path by seeking certiorari in advance of judgment under 28 U.S.C. § 1254(1).

Granting certiorari before judgment is an extraordinary step, warranted in only the most exceptional of circumstances. There are three such circumstances that warrant bypassing the Federal Circuit in this case.

First, mandatory jurisdiction for this constitutional challenge was in the CIT, where it was heard by a panel of three Article III judges. Having a second three-judge panel hear the same case is a waste of judicial resources, especially because the decision of the CIT as to the scope of the ruling in *Algonquin* can only be authoritatively determined by this Court.

Second, the Constitution provides that Congress shall make the laws, but as demonstrated above, there are no meaningful limits on what the President can do under section 232. For that reason, this case is the separation of powers analog to *Lopez* where this Court held that the Commerce Clause could not be used to uphold a federal statute that banned possession of a firearm within 1,000 feet of a school because doing so would have eviscerated the limits on federal power enshrined in the basic principles of federalism on which our Constitution is founded. So too here. If this delegation is upheld, Congress will be permitted to assign the President the unchecked power to make any laws regarding

taxation and regulation of foreign commerce, as he sees fit, in violation of the fundamental principle of separation of powers.

Third, as of March 28, 2019, the steel tariffs collected have exceeded $4.5 billion, plus another $1.5 billion for aluminum on which there is a 10% tariff. RACHEL F. FEFER, et al., CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS at 12 (2019), *available at* https://crsreports.congress.gov/product/pdf/R/R45249. However, the $4.5 billion figure significantly understates the irreparable and ongoing harm to petitioner AIIS's members and to countless other companies and individuals who have sustained losses from the reduction in imports of steel products and domestic price increases resulting from the order. In addition, the President is currently deciding whether to impose a similar tariff on automobiles and auto parts, also under section 232. It is therefore essential for everyone—the President, Congress, and every person whose livelihood is dependent on imports of these products—to know whether section 232 is constitutional.

A. Only This Court Can Authoritatively Resolve the Applicability of *Algonquin*.

Petitioners recognize that the applicability of *Algonquin* to this case is an issue that must be decided before a court can reach the merits of their claim. Before the CIT, they argued that the court below should address the merits, notwithstanding *Algonquin*. First, they pointed

out that this case is a facial undue delegation challenge to section 232, and if they succeeded, it would preclude the President from relying on section 232 at all. By contrast, the *Algonquin* plaintiffs' only objection was that the remedy that the President chose to impose was not authorized by section 232. It was in that limited context that the *Algonquin* plaintiffs raised what amounted to an as-applied delegation argument. They did not urge this Court to strike down the statute as a whole, but only to narrow the remedial power of the President to imposing quotas, which they preferred, and not the licensing fees that the President had employed.

Petitioners also argued that a change of circumstances further undermined the applicability of *Algonquin*. At that time, there was full judicial review of the statutory claim raised in *Algonquin*, whereas now the parties agree that the courts are precluded from reviewing the substantive choices made by the President. At the time *Algonquin* was decided, this Court had not yet held that the President is not an agency under the Administrative Procedure Act, precluding review of the President's actions under that statute. Now, however, the parties agree that the courts are barred from questioning the remedies that the President has imposed and his conclusion that the importation of a particular product may threaten to impair the national security as expansively defined in section 232. Although respondents agree with petitioners that the courts have no authority to question whether the President

exceeded his authority in invoking section 232 in this case, or abused his discretion in his choice of remedial measures, respondents believe that this preclusion was present when *Algonquin* was decided. But what respondents cannot dispute is that, in *Algonquin*, the Government itself urged the Court to rule that the President's order complied with the statute, that the Court met the issue head on and agreed with the Government on the merits, and that the Court never indicated that it would decline to rule on other objections to the order there, had they been presented.

There are three ways that the applicability of *Algonquin* might be decided, but only this Court can conclusively choose among them: (a) *Algonquin* is distinguishable and the Court will decide the merits; (b) *Algonquin* is indistinguishable, but the Court will limit it to its facts or overrule the delegation portion of the opinion; or (c) *Algonquin* is indistinguishable and will be followed. Asking a three-judge panel of the Federal Circuit to spend a year or more analyzing the scope of this Court's decision in *Algonquin*, after a three-judge panel of the CIT has already done so, is a waste of judicial resources and will only delay the resolution of this threshold issue. On top of that inefficient use of judicial resources, waiting for the Federal Circuit to rule will allow these tariffs to continue to inflict irreparable harm on AIIS's members and everyone else in the U.S. economy that relies on imports of steel products.

B. Petitioners Present an Unusually Strong Delegation Claim.

Section 232 is a uniquely expansive delegation of power from Congress in three respects. First, although the President may invoke section 232 based on a finding that imports of a particular article of commerce may threaten to impair the national security, Congress has expanded the definition of the term "national security" in section 232(d) to sweep within it *all* adverse economic impacts of the imports on the domestic economy or any segment thereof. In this sense, section 232 is equivalent to the statutes at issue in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) which contained "literally no guidance for the exercise of discretion." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). Here, the factors the executive may consider in exercising its discretion are so expansive that they similarly preclude a holding that the President's finding of injury to the "national security" is limited in any way. By contrast, in *Hampton*, which enunciated the "intelligible principle" test and has become the touchstone of subsequent delegation decisions, duties could be imposed only in order to "equalize the . . . differences in costs of production in the United States and the principal competing country" for the product at issue. *Hampton*, 276 U.S. at 401 (quoting section 315 of title 3 of the Tariff Act of September 21, 1922). Production costs are an objectively verifiable fact, which provide a concrete limit on when duties can be increased, unlike section 232 with its highly expansive "may threaten to impair" the national

(economic) security of the United States standard. Indeed, as Judge Katzmann noted in his opinion below, this Court's nondelegation cases involving trade statutes—other than *Algonquin*—have all uniformly contained limitations on the President's exercise of authority. But, he continued: "What we have come to learn is that section 232, however, provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress." Pet. App. 34.

Second, under section 232, the President may not only choose among imposing tariffs, quotas, embargoes or the licensing fees permitted in *Algonquin*—or a combination of them—but there are no limits on the scope, duration, or amount of any remedy, nor is there a requirement that it be tied to any factual finding. Thus here, the choice of a 25% tariff for most countries, combined with quotas and exemptions for other countries, was entirely the product of the President's inclinations, untethered to any statutory factor, or any upper or lower boundaries. The unlimited scope of the President's discretion is confirmed by his decision, five months into the program, to double the tariff on steel imports from Turkey alone, which he was able to do because section 232 left him completely unconstrained in deciding what tariffs rates to apply, how to apply them, or that some countries should, and other countries should not, be subject to this tariff at all. In addition, he was permitted to choose whether to treat all steel imports, which range from flat-rolled steel to pipes and tubes to structural

beams, as a single "imported article" subject to the same tariff, or as 177 distinct articles, as Commerce recognized in the Steel Report (at 21–22). His decision in favor of uniform treatment is particularly significant because the Secretary received comments that many steel products have no defense use, that domestic producers already supply all defense needs, and that some imported products are not available domestically in needed specifications. *See generally* Pls.' Statement of Undisputed Facts at Exs. 6 & 7, *Am. Inst. for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade Mar. 25, 2019), ECF No. 20.

Moreover, the President was not required to take into account, nor was he forbidden from considering, the impact that these tariffs had on users of imported steel products, consumers of those products, workers in industries that will be adversely affected by the tariffs, or the likelihood that other nations will retaliate against U.S. exports, thereby harming those domestic producers. Congress left entirely up to the President what to do about any or all of these factors and how to resolve conflicts among them. By contrast, again in *Hampton*, the remedy there was limited to increasing existing duties to offset the production cost advantages of the other country, and even then the increase could be no more than 50% of that duty. *Hampton*, 276 U.S. at 401.

Third, there is no judicial review of the President's compliance with even those nearly standardless provisions in section 232. To be sure, no decision of this Court has held that the

availability of judicial review is a requirement of a constitutionally valid delegation, perhaps because it has been available, and in most cases been exercised, in all of the delegation cases in this Court since *Hampton*. *See Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 479–480 (2001). However, this Court has emphasized that the absence of judicial review and other procedural protections heightens nondelegation concerns. *See Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218–219 (1989) (reaffirming "our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could ' "ascertain whether the will of Congress has been obeyed," ' no delegation of legislative authority trenching on the principle of separation of powers has occurred") (quoting *Mistretta v. United States*, 488 U.S. 361, 379 (1989)). As then-Justice Rehnquist said in his concurring opinion in *Indus. Union Dep't AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980), the intelligible principle requirement "ensures that courts . . . reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards." *See also Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 759–60 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (emphasizing importance of judicial review in context of nondelegation claims as providing "some measure against which to judge the official action that has been challenged") (quoting *Arizona v. California*, 373 U.S. 546, 626 (1963)); *Yakus*, 321 U.S. at 425–426 (noting the importance of

judicial review as a means to enable Congress, the courts and the public "to ascertain whether the will of Congress has been obeyed"); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) ("Private rights are protected by access to the courts to test the application of the policy in light of these legislative declarations").

The absence of a judicial review provision applicable to section 232 is relevant for another reason. A provision for judicial review strongly implies that Congress has included standards or limits, which it expects the courts to enforce. Conversely, when Congress does not provide for judicial review, it suggests that there will be no role for the courts because there are no standards or limits to enforce, which is the case here. In short, instead of a judicial check, section 232 is "a blank check for the President" which this Court has been understandably reluctant to uphold. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *cf. Lopez*, 514 U.S. at 602 (Commerce Clause is not a "blank check" for Congress) (Thomas, J., concurring).

Petitioners acknowledge that this Court has not set aside a federal statute on delegation grounds since *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). On the other hand, the conclusion that a statute meets the intelligible principle test is based on the specifics of each statute, and none of the cases from this Court cited by respondents below, even tariff cases like *Hampton*, had open-ended triggers like the national security-economic

security provision in section 232. Nor did they allow the President or a federal agency a limitless choice of remedies, with no restrictions on which ones may be used in which circumstances, which is what section 232(c) permits. And finally, on top of these expansive delegations, there is no check through judicial review, which has been available in the other cases in which delegations have been upheld.[3]

In the court below, petitioners challenged the Government to explain how section 232 met the *Yakus* requirement that a constitutional delegation must have some "boundaries," which they understand to require that there must be *something* that section 232 precludes the President from doing regarding imported articles of commerce. Yet, at no time in briefing or at oral argument did respondents point to any limitation in section 232 (other than the requirement that the Secretary make a finding and that the President concur within 90 days, Defs.' Reply in Supp. of Mot. for J. on the Pleadings at 6, *Am. Inst. for Int'l Steel v. United States*, No. 18-00152

[3] During oral argument in the CIT, Judge Kelly asked whether the President could impose an embargo on the importation of peanut butter under section 232 and whether that could be challenged in court. In a series of exchanges with both counsel, Transcript of Oral Argument at 24, 33–34, 44, 51, *Am. Inst. for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade Mar. 25, 2019), ECF No. 46, counsel for the Government did not answer the question of whether such an order would be lawful, but was firm in the position that "in terms of can the Court look behind the President's national security determination, that's not subject to judicial review, and it has never been that case." *Id.* at 34.

(Ct. Int'l Trade Mar. 25, 2019), ECF No. 44) that restricted the President in any way in deciding how to reduce the perceived threat to the economy. Under *Yakus*, if there are no such boundaries, then the President is acting just the way that Congress would if faced with this situation, which means he is exercising legislative, not executive, power, in violation of Article I, Section 1 and the principle of separation of powers.

The absence of boundaries here is comparable to the absence of limits on the reach of the Commerce Clause that was fatal to the statute at issue in *Lopez*. In so concluding, this Court made the connection between the limits under federalism at issue there and those under separation of powers at issue here:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Lopez, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Like this case, this Court, prior to *Lopez*, had not sustained a Commerce Clause challenge to a federal law in almost 60 years. Like this case, *Lopez* was about boundaries: are there any limits on what Congress can sweep within its Commerce Clause powers? In concluding that the statute at

issue in *Lopez* exceeded Congress's admittedly extensive power under the Commerce Clause, the Court repeatedly emphasized the failure by the dissent and the United States to identify an argument for upholding the statute that would still result in limits:

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power . . . if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.
>
> Although Justice BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not.

Lopez, 514 U.S. at 564.

Two other cases that were not decided on delegation grounds point up related constitutional concerns that support petitioners' claim here. The first of these, *Clinton v. City of New York*, 524 U.S. 417 (1998), involved a situation similar to this in many respects. There, the Line Item Veto Act, which delegated broad powers to the President, was struck down, albeit not on delegation grounds. Everyone agreed that under Article I, Section 7 of the Constitution an explicit line item veto would be unconstitutional, and the Act was an effort to accomplish the same end by

alternative means. Formal doctrines aside, the Line Item Veto was held unconstitutional for the same basic reason that petitioners urge this Court to strike down section 232: both statutes attempt to transfer to the President the authority to make law and not just implement it because, in both cases, Congress surrendered essential policymaking functions to the President without intelligible principles to reign in his unbridled discretion.

The other decision of this Court relevant to nondelegation is *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). In a series of recent opinions, this Court has found the residual clauses in a number of criminal sentencing statutes unconstitutional on the ground that they were void for vagueness. *Dimaya* involved a similar residual clause in an immigration statute which the Court struck down as unconstitutionally vague. In doing so, the Court noted that the vagueness doctrine "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Id.* at 1212.

In his concurring opinion, Justice Gorsuch made this additional connection between the void for vagueness and the separation of powers flaws: in both, Congress has abdicated its responsibility to make the law, in the vagueness cases by asking the courts to cure the deficiency, and in the delegation cases, by transferring to the President or others in the Executive Branch the power to do what Congress failed to do.

> It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. . . . That power does not license judges to craft new laws to govern future conduct, but only to "discer[n] the course prescribed by law" as it currently exists and to "follow it" in resolving disputes between the people over past events.

Dimaya, 138 S. Ct. at 1227 (Gorsuch, J., concurring). Justice Thomas's dissent made the same connection between the two legal doctrines: "perhaps the vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation. See Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1806 (2012) ('Vague statutes have the effect of delegating lawmaking authority to the executive')." 138 S. Ct. at 1248 (Thomas, J., dissenting).

Because the principal issue now before this Court is whether to hear this case at this time, petitioners here seek only to demonstrate that they have raised a substantial question on the merits and that, as the prior section argued, there is no reason to have the Federal Circuit consider the *Algonquin* issue which was the basis of the decision below. And, as we now demonstrate, the interests of all interested parties would be best served by having this Court resolve the delegation issue raised by section 232 now and not a year or more in the future.

C. The Court Should Decide the Questions Presented Now.

In the year since the steel tariffs were imposed, the Government collected in excess of $4.5 billion, plus the $1.5 billion from the 10% tariff on aluminum imports. This case does not seek refunds of the amounts paid, but future cases may. However, the bigger problem for most of the businesses, individuals, and other entities injured by these tariffs is that they have no claims for refunds because they did not pay these tariffs, which makes them irreparable.

The claim in this case does not depend on proof of these additional injuries, but they are real. Tariffs add to the price of the steel imports, which may reduce the profit of the importer, reduce the number of sales because of the higher price, or may be passed on to the ultimate consumer. One of the impacts of higher tariffs is to reduce the level of imports, which means reduced business for various companies in the supply chain, which may also impact the wages of workers who are employed for fewer hours as a result. Other adverse effects of reduced imports on members of AIIS are less business at a number of ports, reduced shipments of steel imports for various transportation-related members, and loss of work for employees all along the line. And that does not include the farmers and many other businesses that have been the targets of retaliatory tariffs by other countries on U.S. exports in response to those imposed by the United States on steel and aluminum.

To date, the President has applied section 232 only to imports of steel and aluminum, but on May 23, 2018, the Secretary, at the request of the President, commenced an investigation into whether imports of automobiles, including SUVs, vans, light trucks, and automotive parts, threaten to impair the national security. Press Release, *U.S. Department of Commerce Initiates Section 232 Investigation into Auto Imports*, U.S. DEP'T OF COMMERCE (May 23, 2018), *available at* https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports (last visited Apr. 8, 2019). That investigation has been completed, and the President could impose new tariffs, quotas, or other restrictions on imports of automobiles at any time.

Finally, there is no reason to wait for another lower court to consider the issue. The CIT has exclusive jurisdiction over matters involving tariffs, and it has spoken. The Federal Circuit has exclusive jurisdiction over appeals from that court, but the substantial delay in waiting for a decision from a three-judge panel of the Federal Circuit is unlikely to be offset by any additional benefits from its analysis beyond that contained in the two opinions from the three-judge panel of the CIT. If this Court grants this petition, petitioners are prepared to meet whatever schedule the Court orders so that this issue can be promptly and definitively resolved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in advance of judgment should be granted and the case set down for prompt briefing and argument.

Respectfully submitted,

Donald B. Cameron
R. Will Planert
Julie C. Mendoza
Brady W. Mills
MORRIS MANNING & MARTIN LLP
1401 Eye Street, NW
Suite 600
Washington, D.C. 20005
(202) 216-4811

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

Timothy Meyer
VANDERBILT UNIVERSITY LAW SCHOOL
131 21st Ave. South
Nashville, TN 37203
(615) 936-8394

Gary N. Horlick
LAW OFFICES OF GARY N. HORLICK
1330 Connecticut Ave., NW
Suite 882
Washington, D.C. 20036
(202) 429-4790

Steve Charnovitz
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H Street, NW
Washington, D.C. 20052
(202) 994-7808

Counsel for Petitioners

APRIL 2019