No. 18-1317

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

## BRIEF OF *AMICUS CURIAE* NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

The National Foreign Trade Council (NFTC) is the premier business organization in the United States advocating a rules-based world economy to foster international trade, tax, and investment policies, and economic cooperation. Founded in 1914 to support the open world trade system against the escalating rivalries that erupted into World War I, the NFTC is today the oldest and largest U.S. association of businesses devoted to international trade matters.

The NFTC's mission is to promote efficient and fair global commerce by advocating public policies that foster an open international trade and investment regime. The NFTC's membership includes over 100 companies, representing most major sectors of the U.S. economy, including manufacturing, technology, energy, retail and agribusiness. The NFTC's membership consists primarily of U.S. firms engaged in all aspects of international business, trade, and investment. NFTC members account for over $4 trillion in global revenues with a third of that total in the U.S. market. They also represent over half of total U.S. exports and U.S. private foreign investment.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondent received timely notice, under Rule 37(2)(a), of *amicus*'s intent to file this brief. Petitioner has consented to this filing in a letter lodged with the Clerk of the Court; respondent has provided written consent.

This case presents the question whether the President can constitutionally exercise "virtually unbridled discretion" over trade. Pet. App. 34a (Katzmann, J., *dubitante*). Section 232 of the Trade Expansion Act lets the President erect massive trade barriers on a whim, causing untold disruption to the U.S. and world economies. The NFTC's members are suffering from the President's actions. More fundamentally, the unbounded authority of § 232 and the President's exercise of that authority breach this country's commitments to respect the laws of world trade, and create mistrust and tension that threaten to undermine carefully established norms and institutions of global trade. The NFTC and its members have a substantial interest in preserving the rules-based system this country has worked so hard to build.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 2018, the President exercised authority under § 232 of the Trade Expansion Act for the first time in almost 40 years. For the first time ever, the President used § 232 to restrict trade in goods other than petroleum (and its derivatives). The restrictions included tariffs of 25% on steel and 10% on aluminum; quotas on imports from certain countries; and tariffs of *50%* on steel from Turkey. Proclamation 9,704, 83 Fed. Reg. 11,619 (Mar. 15, 2018) (Aluminum Order); Proclamation 9,705, 83 Fed. Reg. 11,625 (Mar. 15, 2018) (Steel Order); Proclamation 9,772, 83 Fed. Reg. 40,429 (Aug. 15, 2018) (Turkish Order).

The President is considering whether to use § 232 to impose steep tariffs on automobiles and auto

parts. The Commerce Department gave the President its report on these industries on February 17, 2019. The report has not been made public, but the President has been vocal for months about his desire to use § 232 for the automotive sector.

The steel and aluminum restrictions are causing deep damage to the U.S. economy and to the foundations of the modern rules-based trade order. That § 232 could allow these actions illustrates the unbounded lawmaking authority this provision unconstitutionally delegates to the President. "National security," under § 232, encompasses the health and strength of the entire U.S. economy; and the statute lets the President take any action he deems justified to serve those considerations. This is truly the rare sort of unbridled delegation of authority that transgresses constitutional bounds.

The Court's previous decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), should not bar the Court from enforcing the separation of powers today. *Algonquin* arose in a far different context, in which Presidents had used § 232 to address a genuine, pressing national-security threat that originally motived the statute. The Court could not have anticipated the expansive way § 232 is used today. Nor can the government rest on the Court's acceptance of other statutes conferring trade authority on the President. Other statutes place significant bounds on the President's discretion, as § 232 does not.

The damage from the unconstitutional imposition of tariffs and quotas on steel and aluminum has been significant and continues to grow. The damage to our constitutional system of government could be

greater still. The Court should grant *certiorari* now, even in the unusual circumstance of a petition before the judgment of the court of appeals.

## ARGUMENT

### I. THE RECENT § 232 ACTIONS PROFOUNDLY DAMAGE U.S. NATIONAL INTERESTS.

The President's trade restrictions undermine domestic industries across the economy, and they risk destroying the world trade order that the United States and its trading partners built to support their economies. Section 232 purports to serve national security. In reality, and particularly given the extent of American involvement in global commerce, § 232 lets the President exercise broad authority over pricing, jobs, and allocation of resources across the entire U.S. economy, without congressional input.

#### A. Businesses That Use Steel or Aluminum Face a Triple Threat.

Steel and aluminum are inputs for a wide variety of products, including autos, machinery and equipment, chemicals, energy, construction, medical devices, food products, and household goods. They are critical far beyond industries that incorporate them directly into products. For example, they are used in pipelines, storage facilities and export platforms to transport oil and natural gas. The food and beverage industries use aluminum cans and tin-plated steel extensively in packaging. The tariffs have significantly increased the prices of these inputs—for both imports and domestically produced material. The beverage industry alone paid about $250 million extra for aluminum in the nine months to the end of

2018.[2] The steel tariffs have led to price increases of about 15%, costing users an extra $5.6 billion in 2018. *See* Cary Clyde Hufbauer, Euijin Jung, *Steel Profits Gain, but Steel Users Pay, under Trump's Protectionism* (Dec. 20, 2018) (Hufbauer);[3] Chad P. Bown, Euijin Jung, Eva Zhang, *Trump's Steel Tariffs Have Hit Smaller and Poorer Countries the Hardest* (Nov. 15, 2018).[4]

A domestic company that uses steel or aluminum is at an additional disadvantage because its foreign competitors have access to cheaper inputs. The United States is one of the largest markets for steel and aluminum. When this country reduces its imports by placing tariffs on those products, the rejected capacity must go elsewhere. The inevitable consequence is downward pressure on prices outside the United States. This effect reinforces the harm to manufacturers of cars, heavy equipment, cans, aircraft, machinery parts, and other intermediate steel and aluminum products, which face substantially higher material costs than their foreign competitors. When those foreign products are imported they are generally not subject to U.S. import restrictions.

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[2] Harbor Aluminum, *Tariffs Paid by U.S. Beverage Industry in 2018*, available at http://www.beerinstitute.org/wp-content/uploads/2019/03/Tariffs-Paid-by-US-Beverage-Industry-in-2018.pdf.

[3] Available at https://piie.com/blogs/trade-investment-policy-watch/steel-profits-gain-steel-users-pay-under-trumps-protectionism.

[4] Available at https://piie.com/blogs/trade-investment-policy-watch/trumps-steel-tariffs-have-hit-smaller-and-poorer-countries.

On top of these direct effects, the President's actions have led to significant retaliation. Countries including Canada, the European Union countries, Japan, and South Korea—in ordinary times our strongest allies in both military matters and in support of rules-based trade—have subjected U.S. products such as soybeans, motorcycles, and whiskey to tariffs. The retaliation to the steel and aluminum restrictions covers $120 billion of U.S. exports. Mary Amiti, Stephen J. Redding, David Weinstein, *The Impact of the 2018 Trade War on U.S. Prices and Welfare* 4 (Centre for Economic Policy Research, Discussion Paper No. DP13564, 2019) (Amiti). Economists estimate that each 10% increase in tariffs reduces U.S. exports by almost 40%. *Id.* at 15.

These three consequences—increased production costs, competition from comparable products produced with cheaper inputs, and retaliation against U.S. exports—reverberate throughout the U.S. economy, far beyond the steel and aluminum industries. The number of companies adversely impacted by price increases dwarfs the number and size of the companies receiving protection under § 232. For example, the auto industry has over 4 million direct and indirect employees, and the construction industry has nearly 8 million, compared to less than 300,000 employees in the U.S. steel and aluminum industries combined. All told, for each job that has been preserved or added in the steel or aluminum industry thanks to the § 232 actions, U.S. consumers and businesses are paying more than $650,000 per year. *See* Hufbauer.

### B. The Tariffs Threaten to Unravel the Global Trade Regime.

Before World War II, the international trade system was built on a short-sighted mercantilism—countries viewed trade as a zero-sum game. That dangerous system led to commercial rivalries that blossomed into military rivalries and subsequent devastating wars.

For the past 70 years, the United States has led the world in building a rules-based system governing international trade. Other countries have agreed to open their markets to U.S. exports in exchange for access to U.S. markets. Critically, the system is built on rules-based relationships and dispute settlement mechanisms. Each country can participate confidently because trading partners, and especially the United States, have committed to refraining from arbitrary and damaging restraints on trade.

This system has hugely benefited the global economy and the United States. Tariff rates on products have decreased by an average of 15%, around the world, over the past 20 years.[5] Trade has enabled millions to raise their socio-economic level and has allowed the United States to sell products to the 95% of the world's consumers living outside its borders.

The recent § 232 actions threaten to destroy that regime, because they represent exactly the sort of arbitrary restriction that the United States and its

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[5] World Trade Org., *Trade and Tariffs*, at 3 (2018), available at https://www.wto.org/english/thewto_e/20y_e/wto_20_brochure_e.pdf.

trading partners promised not to impose. The scope and size of the retaliation show how seriously our trading partners take this breach. The § 232 actions, by violating so shockingly the norms and processes of international trade, have undermined the processes themselves. These disputes—initiated by the § 232 restrictions—are exactly the sort of harmful, counterproductive downward spiral of economic relationships that cost the world so much in the first half of the 20th Century, and that the United States has sought for decades to prevent.

### C. These Harmful Consequences Result Because § 232 Gives the President Unlimited Authority Over Broad Economic Policy.

The § 232 actions (and foreign countermeasures) restrict $60 billion in trade. Trade Partnership Worldwide, LLC, *Estimated Impact of Tariffs on the U.S. Economy and Workers* 3 (2019). Even more is at stake. Global trade represents 27% of U.S. economic activity directly[6] and even more through the interlinking of supply chains. The President asserts the authority to reshape all of this economic activity on his sole decision, with no input from the Congress to which the Constitution committed the power to regulate commerce. U.S. Const., Art. I § 8.

To be sure, the President has substantial discretion regarding foreign policy and national defense. But to accept that this can extend to the entirety of the economy "would destroy the basic constitutional

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[6] The World Bank, Trade (% of GDP), available at https://data.worldbank.org/indicator/ne.trd.gnfs.zs.

distinction between domestic and foreign powers," *Bond v. United States*, 572 U.S. 844, 883 (2014) (THOMAS, J., concurring in judgment). Section 232 is about national security in name only. The breath-taking scope of what a President could do using this statute goes far beyond any ordinary understanding of foreign policy or national defense. "National security," as described in § 232, addresses the health of the "internal economy," 19 U.S.C. § 232(d). Its scope is so broad as to encompass the public welfare writ large, draining all meaning from the only term that might constrain § 232 within constitutional bounds.

Within that enormous sphere of influence, § 232 provides no limits. The President is authorized simply to "take action." The President has used § 232 to establish quotas; impose tariffs, both broad-based and country-specific (such as the 50% tariff on Turkish steel); allow and discontinue exemptions; and more. Carrying out § 232 instructions, the Commerce Department established, almost overnight, a massive bureaucratic process to review over 100,000 applications for exclusions from the § 232 restrictions. *See* 83 Fed. Reg. 46,026 (Sept. 11, 2018). And the President used § 232 to disallow refunds (called "drawback")[7] when imported steel and aluminum are incorporated into exported products. Proclamation 9,739, 83 Fed. Reg. 20,677, 20,679

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[7] "Upon the exportation ... of articles manufactured … with the use of imported merchandise, ... an amount calculated pursuant to regulations ... shall be refunded as drawback." 19 U.S.C. § 1313(a). "The regulations ... shall provide for a refund of … the duties, taxes, and fees ..., imposed under Federal law upon entry or importation …." *Id.* § 1313(*l*).

(May 7, 2018) (aluminum); Proclamation 9,740, 83 Fed. Reg. 20,683, 20,685 (May 7, 2018) (steel).

The Court has approved delegations to regulate "in the 'public interest' " or other such terms. But always with real limitations. For example, the "public interest" standard in the Federal Communications Act "is [not] a mere general reference to public welfare without any standard to guide determinations," *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 226 (1943); the Court had interpreted "public interest" to refer to specific considerations based on "the nature of radio transmission," *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 285 (1933). By contrast, in *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935), the Court invalidated a statute that "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001). Section 232(c) confers authority to regulate at least 20% of the economy, with "no more precise a standard."

## II. THE RECENT § 232 ACTIONS ARE BEYOND ANYTHING THE *ALGONQUIN* COURT IMAGINED.

The chief barrier to lower courts' consideration of petitioners' nondelegation arguments is *Algonquin*, 426 U.S. 548, in which this Court held § 232 allowed 10% license fees on imported oil. But the *Algonquin* Court could not have appreciated the vast reach of authority that the current President would assert. The current situation is fundamentally different, and

*Algonquin* should neither guide this Court nor bar petitioners' claim.

### A. *Algonquin* Involved Oil, a Natural Resource at the Heart of the Original Purpose of § 232.

Oil is a natural resource, finite in quantity, and available only in certain geographical areas. Modern militaries cannot function without huge supplies of oil. Consequently, international disputes have recurred about access to oil, often erupting into war. The strategies of World War II combatants involved obtaining or denying access to oil fields. The global competition between the United States and the Soviet Union was especially heated in the Middle East because countries there have vast sources of easily-recovered oil. U.S. national-security strategies have consistently recognized that relying on a few foreign suppliers for this critical resource is dangerous. *See, e.g.*, *The National Security Strategy of the United States of America*, 28-29 (Mar. 2006); *National Security Strategy*, 30 (May 2010); *National Security Strategy of the United States of America*, 22-23 (Dec. 2017).

Congress enacted § 232(c) to address precisely that concern. *See Algonquin SNG, Inc. v. Fed. Energy Admin.*, 518 F.2d 1051, 1056-57 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 548 (noting U.S. reliance on oil imports had "originally prompted" Congress to enact predecessor to § 232). As the Cold War intensified, the United States had become a net importer of several commodity resources. The predecessor to § 232 was meant "to prevent overdependence on imports of oil and other strategic re-

sources."[8] Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT'L BUS. L. 235, 242 (1990). President Eisenhower then (followed by President Kennedy and then later President Johnson) implemented a system of licenses and quotas on oil imports. *See, e.g.*, 24 Fed. Reg. 1,781 (Mar. 12, 1959). In September 1960, four Middle Eastern countries and Venezuela formed the Organization of Petroleum Exporting Countries (OPEC) to assert control over the oil market. And then in 1962, as part of an even broader trade facilitation statute, Congress re-enacted § 232.

In 1967, OPEC countries halted oil shipments to the United States. U.S. oil producers largely compensated by increasing domestic production. But by 1973, domestic producers were operating at full capacity, while OPEC had ample spare capacity that it could use to control oil markets. *Factors Affecting U.S. Oil & Gas Outlook, A Report of the National Petroleum Council* 15-17 (1987).[9] Meanwhile, smaller shocks, as one or another country cut production, demonstrated the threat. *See* William D. Smith,

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[8] Steel and aluminum are not strategic resources. The underlying resources—chiefly iron ore and bauxite (the main aluminum ore)—present no national-security concern. *See* U.S. Dep't of Commerce Bureau of Industry and Security, *The Effect of Imports of Steel on the National Security* 17 n.22 (Jan. 11, 2018) (Steel Report) (excluding iron ore from analysis); U.S. Dep't of Commerce Bureau of Industry and Security, *The Effect of Imports of Aluminum on the National Security* 20 (Jan. 11, 2018) (Aluminum Report) (same for bauxite).

[9] Available at https://www.npc.org/reports/reports_pdf/1987-Factors_Affecting_US_Oil_n_Gas_Outlook.pdf.

*U.S. Oil Industry Regrets It Was Right*, N.Y. TIMES (July 26, 1970). Then, in 1973, tensions grew to the point of war between Israel, a key U.S. ally, and a number of the major oil-producing countries, to the point that those countries halted U.S. oil shipments. Gasoline prices spiked by 40%, and widespread panic ensued.

Throughout the 1970s, Congress reacted to this urgent concern alongside the President. In 1974, Congress established the Federal Energy Administration (FEA) to develop comprehensive energy policies to achieve long-term energy security. Pub. L. No. 93-275, § 5(b), 88 Stat. 99. A year later, Congress instructed the FEA to build a Strategic Petroleum Reserve, precisely in order to "diminish the vulnerability of the United States to the effects of a severe energy supply interruption." Pub. L. No. 94-163, §§ 151(a), 154, 89 Stat. 881-882.

### B. The Steel and Aluminum Restrictions Are Far Removed From the Statute's Core Concerns.

Steel and aluminum stand in sharp contrast. Foreign suppliers are diverse, with most supply coming from long-time U.S. allies such as Canada, Germany, South Korea, and Japan. *See, e.g.*, Int'l Trade Admin., *Steel Imports Report: United States*, GLOBAL STEEL TRADE MONITOR 1 (2019) (ITA Steel Report). And, critically, the Department of Defense "does not believe" that imports "impact the ability of DoD pro-

grams to acquire the steel or aluminum necessary to meet national defense requirements."[10]

The President has been quite explicit that the "national security" threat is mainly lost jobs and commerce. "Economic challenges at home," he has said, "demand that we understand economic prosperity as a pillar of national security." *National Security Strategy of the United States of America*, 18 (Dec. 2017). Accordingly, the President describes his broad policy agenda across the entire economy—"reduc[ing] regulatory burdens," "promot[ing] tax reform," "improv[ing] American infrastructure," "fiscal responsibility," and "support[ing] education and apprenticeship programs"—as *national security* measures. *Id.* at 18-19. Similarly, the Commerce Department's § 232 reports on steel and aluminum "determined that 'national security' for purposes of Section 232 includes the "general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements." Aluminum Report, *supra* n.8, at 1; Steel Report, *supra* n.8, at 1. And the President explained: "Our Steel and Aluminum industries … have been decimated by decades of unfair trade and bad policy …. We want free, fair and SMART TRADE!"[11]

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[10] Memo. from Sec'y of Def. to Sec'y of Comm., 1 (2018), available at https://www.commerce.gov/sites/default/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf.

[11] Donald J. Trump (@realDonaldTrump), Twitter (Mar. 1, 2018, 4:12 AM), https://twitter.com/realDonaldTrump/status/969183644756660224.

Granted, the President has also framed the national-security threat as a need to ensure domestic supplies of steel and aluminum for "critical industries." But the "critical industries" encompass vast swaths of the economy: "commercial facilities," "communications," "financial services," "healthcare," "transportation systems," "food and agriculture," and more. *See* Presidential Policy Directive 21 (Feb. 12, 2013); Steel Report at 23-24 (relying on PPD-21 to delineate "critical industries"). The President described § 232 as covering the "economic welfare of the Nation," Steel Order ¶ 1, and evidently § 232 is available to adjust economic policy with respect to any of these broad, vaguely defined categories. The categories themselves, of course, arise solely from presidential policymaking, and can be expanded at any time. Thus, even this justification is in line with the sweeping concept of national security that the President laid out in his National Security Strategy.

The steel and aluminum restrictions expose the breathtaking scope of what a President could do using § 232. *Algonquin* described the list of economic considerations in § 232(d) as a "series of specific factors to be considered by the President," guiding the President's exercise of § 232 authority. 426 U.S. at 559. In reality, § 232(d) serves exactly the opposite function: It expands the concept of "national security" to encompass everything in the economy.

### C. *Algonquin* Reviewed an Incremental Adjustment to Existing Restrictions; the Recent Tariffs Were Sudden and Disruptive.

The *Algonquin* license fees merely adjusted an existing restriction, as part of a long-term, comprehensive strategy to mitigate the risk of dependency on a few dominant foreign sources of oil. The steel and aluminum restrictions, by contrast, are an arbitrary and isolated disruption.

As discussed above, the United States had maintained oil quotas since 1959, with adjustments by successive Presidents. When President Nixon adopted license fees, the transition from quotas was gradual. The fees increased over months, and an importer was exempt from fees for the amount of its prior quota. Proclamation 4,210, 38 Fed. Reg. 9,645 (Apr. 19, 1973). President Ford then gradually increased the fees further. Proclamation 4,341, 40 Fed. Reg. 3,965 (Jan. 27, 1975).

By contrast, the recent tariffs constitute the first use of § 232 in over thirty years, and the first ever for steel or aluminum. The restrictions are onerous and have delivered a sudden shock to markets. The tariffs took effect immediately, for every amount of covered imports. An importer that faced no tariffs when the ship left harbor faced a 25% imposition when it arrived. *See Severstal Exp. GMBH v. United States*, No. 18-00057, 2018 Ct. Intl. Trade LEXIS 38, *10 (Ct. Int'l Trade Apr. 5, 2018) (payment had to be renegotiated for shipments "already on the water").

### D. The *Algonquin* Fees Responded to an Actual, Ongoing Threat.

As discussed above, dependence on a few foreign sources of oil was a national-security risk that, by the time of the license fees and especially when the Court decided *Algonquin*, had manifested in a real and painful way. Oil-exporting countries had tried to exploit the nation's reliance on imported oil to retaliate for wartime support provided to an ally, and to use oil to coerce the United States into changing its foreign policy.

The recent § 232 actions are responding to no such provocation. No country has tried to manipulate steel or aluminum markets to harm the United States or to influence its foreign policy. Such attempts would likely be futile, because a main source for imported steel and aluminum is Canada, one of the country's strongest allies.[12] Rejecting the value of our close strategic alliance with Canada, the Commerce Department asserted that a § 232 action can be appropriate even absent an actual threat to steel or aluminum supplies. "[T]he fact that some or all of the imports causing the harm are from reliable sources does not compel a finding that those imports do not threaten to impair national security." Steel Report at 17. The President evidently reached the same conclusion. *See* Steel Order ¶ 8; Aluminum Order ¶ 8.

Tariffs imposed on Turkish steel starkly illustrate the irrelevance of an actual threat. In August

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[12] *See* ITA Steel Report at 3 (19% of U.S. steel imports in 2018); U.S. Geological Survey, *Mineral Commodity Summaries* 20 (2019) (51% of U.S. aluminum imports in 2014-2017).

2018, the President doubled the tariff on Turkish steel. *See* Turkish Order ¶¶ 5-6. There has been no finding that Turkish imports posed a greater threat to national security than any other; that anything had changed in steel markets warranting an extra imposition for Turkish steel; or that a further restriction on Turkish imports would do any more to help protect U.S. producers. After all, Turkey represents only 3% of U.S. steel imports. ITA Steel Report at 3.

Instead, the President explained that he raised the tariffs on Turkish imports to gain leverage in a routine diplomatic dispute: "I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar! Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!"[13]

This situation is thus the opposite of the oil crisis. In 1973-1975, the President was responding to a clear and present threat, in which foreign powers used oil as an economic weapon to force changes in U.S. national-security strategy and foreign policy. Now, the President openly maintains that he can take § 232 action regardless of whether there is an actual threat to the national security of the United States.

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[13] Donald J. Trump (@realDonaldTrump), Twitter (Aug. 10, 2018, 5:47 AM), https://twitter.com/realDonaldTrump/status/1027899286586109955.

### E. Unlike the *Algonquin* Restrictions, the Recent § 232 Actions Likely Violate U.S. International Obligations.

Since 1947, the United States has been party to the General Agreement on Tariffs and Trade (GATT), now subsumed by the World Trade Organization (WTO), along with other trade agreements. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, as incorporated in General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, 1867 U.N.T.S. 187. Under the GATT, the United States cannot simply increase tariffs on steel or aluminum without complying with our WTO obligations.

The government has argued that the tariffs are unreviewable under an exception in the GATT for "any action which [a country] considers necessary for the protection of its essential security interests taken in time of ... emergency in international relations." GATT, art. XXI(b). This argument is surely incorrect. As a panel of the WTO's Dispute Settlement Body recently observed, "[a]n emergency in international relations ... refer[s] generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state." Panel Report, *Russia—Measures Concerning Traffic in Transit*, WT/DS512/R, ¶ 7.76 (Apr. 5, 2019), *adopted by* Dispute Settlement Body, WT/DS512/7 (Apr. 29, 2019) (DSB Report). The panel identified a recent emergency in relations between Russia and Ukraine, based on an existing armed conflict, and a "deterio-

rat[ion]" of relations so grave as to be "a matter of concern to the international community." *Id.* ¶ 7.5.5.

Ironically, when reviewing the history of Article XXI of the GATT, the panel noted that the proposal for an "emergency" exception came from the United States itself, in the original 1947 negotiations. The exception was intentionally narrow because, the U.S. representative explained, a country should not be allowed to cite "security" as a justification for protectionist trade measures. "[T]oo wide an exception"—such as allowing trade barriers "relating to a Member's security interests"—"would permit anything under the sun." DSB Report ¶ 7.92 (citation omitted). The United States representative further explained that the exception was meant to protect "real essential security interests" and not "protection for maintaining industries." *Id.*

Obviously, there is no "emergency in international relations," under Article XXI, involving the United States and its steel and aluminum industries. The President has used § 232 to engage in protection of these industries, in the absence of "real essential security interests," exactly as the United States promised—in a binding international agreement—not to do.

Troubling as that is, the fundamental problem is that § 232, on its face, allows the President to take such action. There is no "essential security interests" or "emergency" limitation in § 232; instead, the President is allowed to take into consideration any aspect of the U.S. economy that concerns him. Really, there is no apparent limit at all.

## III. SECTION 232 IS FAR LESS BOUNDED THAN MANY OTHER PROVISIONS AUTHORIZING TRADE ADJUSTMENTS.

Section 232 purports to authorize the President to take any action he deems appropriate, in response to any concern about weakening of the U.S. economy. This blanket grant—unconstrained in scope, lacking principles to guide the action, and without limit on the actions authorized—is an outlier among statutes conferring authority on executive-branch officials, and in particular among trade statutes. This Court has long accepted that the President can be delegated some discretion in trade matters. *See United States v. George S. Bush & Co.*, 310 U.S. 371, 379-80 (1940). But ordinarily Congress provides guardrails and guidelines—the law that the President executes. The President's use of § 232 highlights its lack of those boundaries; he has taken advantage of § 232 to avoid the restrictions in other trade statutes.

### A. The President Sidestepped the Ordinary Statutory Means for Relieving Industries Harmed by Trade.

Section 201 of the Trade Act—enacted amid the oil crisis—is the mechanism Congress established to enable relief for a domestic industry suffering from a surge of imports. Section 201 is this country's form of "safeguards," a GATT-consistent remedy; and it therefore includes limits when, how, and to what degree the President can adjust trade to help a domestic industry. Those restrictions would not have permitted the recent indefinite steel and aluminum restrictions.

Under § 201, the President cannot act unless and until the International Trade Commission (ITC) (an independent agency with six commissioners) has determined, after a public hearing and the receipt of evidence, that a particular product is being imported "in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry" producing a competing product. 19 U.S.C. § 2252(a). The ITC must consider whether other factors besides imports are causing the injury. *Id.* § 2252(c)(2). A "threat" is "serious injury that is clearly imminent." *Id.* § 2252(c)(6)(D).

Section 201 authorizes only specific actions, including tariffs, quotas, and allocation of imports among domestic purchasers. 19 U.S.C. § 2253(a)(3). Suspending drawback—as the President has done under § 232, *see supra* 9-10—is not listed.

The President must also account for, among other factors, "the short- and long-term economic costs" of his action, "the impact on United States industries and firms as a result of international obligations regarding compensation," and whether the action will effectively facilitate positive adjustment. 19 U.S.C. § 2253(a)(2). The disproportionate economic harm from the steel and aluminum restrictions, and the retaliatory tariffs that the United States has suffered, would be mandatory considerations under § 201.

A § 201 action is limited to four years (extendable for another four years if the ITC determines that is necessary), and any action for over one year must be phased down gradually. *Id.* § 2253(e). The statute imposes quantitative restrictions on various actions like tariffs. The President cannot increase a

tariff more than 50% beyond the pre-existing rate (the § 232 tariff on steel far exceeds that limit); and the "cumulative effect" of the remedy cannot "exceed the amount necessary to prevent or remedy the serious injury." *Id.* § 2253(e). The President's freedom of action is also considerably constrained; if he does not choose the specific action the ITC recommends, Congress can impose that action by means of a joint resolution. 19 U.S.C. § 2253(c), (d).

Congress required these conditions to be met before the President may restrict trade to help an industry adjust to import competition. The President has used § 232 to achieve that goal without respecting Congress's conditions.

### B. The President Has Other Statutory Means to Address Unfair Trade Practices.

Section 301 of the Trade Act of 1974 permits retaliatory trade restrictions to combat unfair trade practices from other countries. Section 301, too, provides important limiting principles.

First, the U.S. Trade Representative (USTR) must identify either a specific "trade agreement" violation or a specific problematic practice by a specific country. Section 301 defines the relevant terms, such as "unreasonable," "unjustifiable," and "discriminatory," in concrete ways. *See* 19 U.S.C. § 2411(d).

Even after a finding that action is warranted, § 301 meaningfully circumscribes what the USTR may do. For example, § 301 not only provides an exclusive list of allowed remedies, such as suspending a trade agreement with the country involved, imposing duties on imports from that country, or negotiating

further trade agreements with the country that remedy the problem. 19 U.S.C. § 2411(c).[14] It also constrains, in a quantitative fashion, the implementation of remedies from that list. Any action to retaliate against a problematic practice must "affect the foreign country in an *amount* ... equivalent in value to the burden imposed by that country on United States commerce." *See id.* § 2411(a)(3) (emphasis added). It must also be either "nondiscriminatory" or "solely against the foreign country" in question. *Id.* § 2411(c)(3). The 50% tariffs solely against Turkish steel presumably would not qualify.

## IV. THE COURT SHOULD HEAR THIS CASE NOW, RATHER THAN WAITING FOR THE FEDERAL CIRCUIT.

The Court would gain little by waiting for the Federal Circuit to consider the case. Pet. Br. 33-34. The Court of International Trade considers itself constrained by *Algonquin*, and there is little prospect the Federal Circuit would analyze the question any differently.

Moreover, the true national emergency is the President's use of unconstitutional power to remake domestic steel and aluminum markets. The unguided, unconstrained decision of the President is causing severe economic damage within the United States. The costs of the § 232 actions have already been astronomical. The Court should not let those

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[14] Section 301 also allows the USTR to take other actions that are within the President's authority from other sources and that the President directs. 19 U.S.C. § 2411(a). But that does not expand or add to the President's authority.

costs mount while the Federal Circuit considers the case.

As discussed above, the steel and aluminum tariffs are raising prices for domestic manufacturers and making their products substantially less competitive. Roughly $165 billion a year of trade has been redirected as a result of the tariffs. Amiti at 16. Businesses had presumably arranged their supply chains to be as efficient and economical as possible, so this shift represents a massive cost, as businesses are forced into less efficient supply arrangements to cope with the tariffs.[15] The economy is also suffering from "deadweight" loss—higher prices mean consumers and businesses buy less than they would prefer. This cost has been about $7 billion a year, and it continues to rise. *Id.* at 22.

These aggregate numbers translate into real and direct harm for U.S. businesses, workers and consumers. Economists calculate that the U.S. economy has lost almost 1 million jobs because of the tariffs imposed by the President in the past year. *Id.* The steel and aluminum industries have gained jobs, but the rest of the economy has lost far more because of the increased prices of steel and aluminum and decreased competitiveness. U.S. households are facing an annual cost—due to lost wages and higher prices of goods—of $770 per year, over 1 percent of median household income. *Id.*

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[15] The estimates presented in this section generally include also a collection of tariffs that the President imposed under other authorities. But the steel and aluminum tariffs alone have a major impact.

## CONCLUSION

The petition should be granted.

Respectfully submitted.

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