No. 19-1727

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

v.

UNITED STATES, KEVIN K. MCALEENAN, COMMISSIONER OF
U.S. CUSTOMS AND BORDER PROTECTION,
Defendants - Appellees

Appeal from the United States Court of International Trade in case no. 1:18-CV-00152-CRK-JCG-GSK, before a Three-Judge Panel, consisting of Judge Claire R. Kelly, Judge Jennifer Choe-Groves, and Judge Gary S. Katzmann

BRIEF OF AMICI CURIAE AMERICAN IRON AND STEEL INSTITUTE AND STEEL MANUFACTURERS ASSOCIATION IN SUPPORT OF APPELLEES

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September 25, 2019

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Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

American Institute for International Steel, Inc. **v.** United States

Case No. 19-1727

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

American Iron and Steel Institute

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
American Iron and Steel Institute	N/A	Nucor Corporation
		Cleveland-Cliffs Inc.
		AK Steel Corporation
		TimkenSteel Corporation

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

N/A

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

N/A

9/25/2019
Date

/s/ Alan H. Price
Signature of counsel

Please Note: All questions must be answered

Alan H. Price
Printed name of counsel

cc: _____

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

American Institute for International Steel, Inc. **v.** United States

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CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

Steel Manufacturers Association

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Steel Manufacturers Association	N/A	Commercial Metals Company, Inc.
		Nucor Corporation
		Steel Dynamics, Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

N/A

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STATEMENT OF IDENTITY, INTEREST, AUTHORITY, AUTHORSHIP, AND FINANCIAL CONTRIBUTION

Amici curiae the American Iron and Steel Institute ("AISI") and Steel Manufacturers Association ("SMA") represent the vast majority of the U.S. steel industry. AISI is comprised of 18 producer member companies in 41 states, including integrated and electric furnace steelmakers, and approximately 120 associate members who are suppliers or customers. SMA represents U.S. steelmakers that rely on electric arc furnace steel manufacturing, the dominant steelmaking technology used in America, and its members account for more than 75 percent of domestic steelmaking capacity.

As the representatives of U.S. producers, AISI, SMA, and their respective members have a substantial interest in the continued vitality of Section 232 of the Trade Expansion Act of 1962, assuring that it can be used to safeguard the Nation's security by redressing trade-related threats. AISI and SMA are uniquely positioned to speak to the substance of this appeal and provide insight into the impacts of the tariffs that animate Appellants' case.

Per Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state: (i) no party's counsel authored the brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

Per Federal Rule of Appellate Procedure 29(a) and Federal Circuit Rule 29, all parties have consented to this brief's filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents another attempt to challenge the action taken by the President to protect national security by imposing tariffs on imported steel pursuant to Section 232 of the Trade Expansion Act of 1962. A direct challenge to the implementation of these tariffs was rejected in 2018 by the Court of International Trade ("CIT"), so the Appellants here structure their claim as a facial challenge to Section 232 itself. But that claim too has already been litigated—more than forty years ago, the Supreme Court expressly held that Section 232 was a permissible delegation of authority, and that holding controls this case.

Section 232 authorizes the President to adjust imports of an article following an investigation and conclusion by the Secretary of Commerce that the level of imports threatens to impair national security. Pursuant to this statute, the President imposed a 25% tariff on steel imports following an investigation and report by the Secretary of Commerce making the requisite findings. An earlier case (*Severstal*) sought to challenge the tariff, but the CIT denied the plaintiffs' request for a temporary injunction on the grounds that plaintiffs were unlikely to succeed on the merits.

With an as-applied challenge foreclosed by *Severstal*, Appellants here attacked the statute itself, asserting that Section 232 unlawfully delegates authority from Congress to the Executive. Throughout this litigation, Appellants have attempted to cast aspersions on the President's steel tariff proclamation and use the facts surrounding its implementation to "illustrate" the unconstitutionality of that statute—a tactic that is both legally meritless and factually erroneous. The record demonstrates that the domestic steel industry was facing a global crisis that threatened national security, and that the resulting tariff has had measurable positive effects for the industry—in other words, the exercise of Presidential discretion that animated this case demonstrates precisely how Section 232 is supposed to work.

Appellants argue that the breadth of discretion granted by the President in Section 232 is "boundless" and cannot pass muster under the Supreme Court's nondelegation jurisprudence, which requires statutes to have an "intelligible principle" that guides executive exercise of legislatively-conferred authority. But this test is permissive; the Supreme Court has upheld a wide variety of broad delegations under this doctrine, has overturned a statute on nondelegation grounds only twice in its history, and has repeatedly affirmed that the nondelegation standard is even further relaxed in areas like national security where the President enjoys independent authority. Appellants made much of the Supreme Court's grant of *certiorari* in *United States v. Gundy*, which raised a nondelegation challenge to a sex

offender registration statute. However, the *Gundy* Court upheld the challenged statute and left the nondelegation doctrine undisturbed. A four-justice plurality affirmed the doctrine and its historical application, while even the three-justice dissent advocating for a more stringent test expressly affirmed that delegations can be broader in areas of independent presidential authority.

Left without a revived nondelegation doctrine upon which to base the claim, Appellants have run out of options. The decision of the CIT denying Appellants' challenge to Section 232 must be affirmed.

BACKGROUND

Section 232 authorizes the President to take actions to adjust imports in the interest of safeguarding national security, once a number of procedural requirements have been satisfied. First, the statute requires the Secretary of Commerce to conclude, following an investigation, "that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A). If the President concurs with the Secretary's finding, the President is required to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." *Id*. § 1862(c)(1)(A)(ii). The President and the Secretary must consider a series of factors when carrying out their obligations under

the statute, which imposes other conditions on the investigation and subsequent presidential action, including timing requirements and interagency consultation obligations. *Id*. § 1862(b)-(d).

In March 2018, the President issued a Presidential Proclamation entitled "Adjusting Imports of Steel Into the United States." 83 Fed. Reg. 11,625 (Mar. 8, 2018) ("Proclamation 9705"). The proclamation followed a nine-month investigation which produced a robust record and a report by the Secretary of Commerce concluding that "the displacement of domestic steel products by excessive imports . . . along with the circumstance of global excess capacity in steel, are 'weakening our internal economy' and therefore 'threaten to impair' the national security as defined in Section 232." U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, *The Effect of Imports of steel on the National Security,* at 11 (Jan. 11, 2018), https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf (last visited Sept. 19, 2019). The Proclamation stated the President's "concur[rence] in the Secretary's finding that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States." 83 Fed. Reg. at 11,626. In order

to address these national security concerns, Proclamation 9705 announced a 25 percent tariff on steel articles.

A Russian steel manufacturer immediately challenged Proclamation 9705 in the CIT, seeking a declaratory judgment that Proclamation 9705 was unlawful and a preliminary injunction to prevent its enforcement. Compl., *Severstal Exp. GMBH v. United States*, No. 18-00057, Dkt. No. 5 at 13 (Ct. Int'l Trade Mar. 22, 2018). The CIT denied the injunction, finding that the plaintiffs had not presented "a credible case that the President has clearly misconstrued his authority under [Section 232]." Opinion, *Severstal*, *Exp. GMBH v. United States*, No. 18-00057, Dkt. No. 41 at 23 (Ct. Int'l Trade Apr. 5, 2018). The case was dismissed with prejudice. Order Granting Joint Stipulation of Dismissal, No. 18-00057, Dkt. No. 46 (Ct. Int'l Trade May 3, 2018).

Unwilling to relitigate the claims rejected in *Severstal*, Appellants here filed suit claiming that Section 232—and accordingly Proclamation 9705—is unconstitutional on its face because it improperly delegates authority from Congress to the Executive. But Appellants' claim suffers from an inescapable flaw: nearly forty-five years earlier, in *FEA v. Algonquin*, the Supreme Court specifically held that the statute "easily fulfills" the test for evaluating a nondelegation challenge under *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). *Algonquin*, 426 U.S. 548, 559 (1976). Indeed, the plaintiffs in *Severstal* had refrained from

challenging the legality of Section 232 itself, recognizing that such a claim would be barred by the Supreme Court's controlling decision. *See* Op., *Severstal,* at 15.

Appellants made a number of arguments below that their challenge was distinct from *Algonquin* (many of which they repeat in their brief before this Court). The also relied, in part, on the theory that the Supreme Court had signaled renewed interest in the nondelegation doctrine by granting *certiorari* in a case called *United States v. Gundy*, and that their challenge should be seen as the next step in what they asserted was an incipient wave of reconsideration of precedent on this topic. The CIT rejected the Appellants' attempts to distinguish the Supreme Court's holding, though, finding that because "the Supreme Court squarely confronted the nondelegation challenge [to Section 232] in response to the arguments put forth by parties in their briefs," the court below held it was "bound by *Algonquin*." *Am. Inst. For Int'l Steel, Inc. v. United States,* 376 F. Supp. 3d 1335, 1340-41 (Ct. Int'l Trade 2019) ("*AIIS*"). Accordingly, the court below denied Appellants' motion for summary judgment and granted judgment on the pleadings to the Government. *Id*. at 1352. Appellants appealed to this Court, and also filed a petition for writ of *certiorari* before judgment, which the Supreme Court denied four days after rendering its decision in *Gundy*, which rejected the nondelegation challenge there. Notice of Order Denying Petition, Dkt. No. 27. On appeal, Appellants maintain that

Algonquin does not control this case, and that Section 232 is an unconstitutional delegation of authority to the President. App. Br. at 21, 30-31, Dkt. No. 32.

ARGUMENT

I. THE TARIFFS THAT APPELLANTS SEEK TO INVALIDATE THROUGH THIS PURPORTED FACIAL CHALLENGE HAVE HAD POSITIVE IMPACTS ON THE DOMESTIC STEEL INDUSTRY AND NATIONAL SECURITY.

A. Appellants Continue to Pursue an As-Applied Challenge to the Steel Tariffs Masquerading as a Facial Challenge to Section 232.

Despite the posture of this case as a facial challenge, Appellants' true motivation is clear—they seek to invalidate Proclamation 9705 and the accompanying imposition of tariffs on imported steel. Appellants repeatedly emphasize the facts surrounding the President's 2018 imposition of tariffs on steel to "demonstrate" the unconstitutionality of Section 232, thereby improperly couching an (already rejected) as-applied claim as a facial challenge and distorting the question before this Court. *See, e.g.,* App.'s Motion for Summary Judgment, Case No. 18-152, Dkt. No. 20, at 19-20 (Ct. Int'l Trade July 19, 2018); App. Br. at 26; *id*. at 39. *Amicus curiae* Basrai similarly asserts that "[t]he impact of . . . retaliatory tariffs on the agricultural industry strengthens appellants' argument that . . . there is no limit [on] the President's authority to act under Section 232." Basrai Farms Br., Dkt No. 40, at 30-31.

To succeed on a facial challenge, however, Appellants cannot simply assert that Section 232 has been misapplied in a particular case. Instead, they must show

that the statute is wholly unconstitutional no matter how it is applied. Pointing to a particular circumstance where Appellants believe that Section 232 was misapplied is not enough to show that Section 232 is invalid. The factual allegations made by Appellants and by *amicus* Basrai Farms have no place in a facial challenge to Section 232 and should have no bearing on the Court's legal analysis.

B. Appellants' Narrative on the President's Steel Tariffs Is Factually Inaccurate.

The factual narrative of Appellants and *amicus curiae* is not only irrelevant, it is erroneous. In fact, Proclamation 9705 and its implementation represent a measured approach to a real problem facing the domestic steel industry and our national security, which has had the desired effect without producing any of the harms that opponents have insisted would result. Far from being an exemplar of unchecked Presidential authority, the facts surrounding Proclamation 9705 show just how targeted, limited, and effective Section 232 can be when used to address particularized national security threats.

The record before the Secretary of Commerce demonstrated that the domestic steel industry was facing unprecedented challenges from global overcapacity and that the global dangers to the domestic industry threatened national security. This is not a crisis invented by the Trump administration—in 2017, the entire G20 recognized that "[t]he imbalance between supply and demand is a global challenge that has led to a collapse in the fortunes of steel industries in all regions of the world,"

and that this puts "at risk the viability of an industry that produces a material which is vital for the functioning of economies and societies." Global Forum on Steel Excess Capacity, Report (Nov. 30, 2017). By the time of the Secretary's investigation, overcapacity in the steel industry had reached 700 million metric tons, which is more than seven times the total U.S. crude steel production. *See* Comments of Nucor Corp. re: *Section 232 National Security Investigation of Imports of Steel*, at 10 (Dep't Commerce May 31, 2017). The share of the U.S. market captured by steel imports increased steadily from 22.7 percent in 2009 to more than 30 percent in 2016, and the effects were felt across all major steel product lines. *Id*. at 11. These persistently high import volumes significantly eroded the domestic industry's performance across all metrics. U.S. crude steel production fell by more than 11 million tons between 2012 and 2016. *Id*. The industry suffered negative net income in four of the six years from 2010 to 2015, including a net loss of $1.7 billion in 2015. *Id*. at 12. And because of declining investment, the industry lost more than 14,000 jobs in 2015 and 2016 alone. *Id*. These trends were poised to render the United States dependent on steel imports from a relatively small number of sources, threatening to leave the United States without adequate sources of steel products in a time of crisis. *Id*. at 19.

Since the implementation of the steel tariffs, the domestic industry has seen significant improvements. Between April 2018 and July 2019, data collected by

AISI shows that steel imports and finished steel imports decreased 19.4% and 35.9%, respectively. AISI Apparent Supply Report, Dec. 2018, Jul. 2019. These decreases in imports were met with significant increases in investment and output in the domestic industry. Since the proclamation went into effect, U.S. steel producers have announced billions in new investments that include building new facilities, expanding existing facilities, and restarting operations that had been idled.[1] AISI data demonstrate that U.S. steel shipments increased 4.1% between April 2018 and July 2019, and imports' share of the U.S. steel market decreased 9.5% during that same period. AISI Apparent Supply Report, Dec. 2018, Jul. 2019. Nor has the domestic steel industry's recovery and the decrease in imports disrupted prices:

[1] *See, e.g.*, Liberty House Group, *Restart of South Carolina steel mill, Liberty Steel Georgetown, heralds $5bn investment in USA by global GFG Alliance* (June 25, 2018), http://www.libertyhousegroup.com/news/restart-of-south-carolina-steel-mill-liberty-steel-georgetown/ (announcing the restart of a South Carolina wire rod steel mill with a production capacity of 750,000 tons/year, resulting in 125 new jobs immediately and expected to create hundreds more jobs in the near future); Nucor Corporation, *Nucor Announces Plans to Expand Sheet Mill in Kentucky* (Sept. 7, 2018), https://nucor.com/news-release#item=10356 (announcing a $650 million investment to expand a flat-rolled sheet steel mill in Kentucky, thereby increasing production capacity from 1.6 million to 3 million tons per year and creating 70 new full time jobs); Steel Dynamics, Inc., *Steel Dynamics Announces a New Organic Flat Roll Steel Mill Investment* (Nov. 26, 2018), http://ir.steeldynamics.com/profiles/investor/ResLibraryView.asp?ResLibraryID=89224&BzID=2197&g=681&Nav=0&LangID=1&s=0 (announcing a $1.7 billion investment to construct a new flat roll steel mill in the southwestern United States, which will include a galvanizing line with an annual capacity of 450,000 tons and a point line with an annual coating capacity of 250,000 tons, and is expected to create 600 jobs).

prices of basic steel inputs such as hot-rolled steel have actually *decreased* since the tariff went into effect. *See, e.g.*, SteelBenchmarker, *Price History* (Sept. 9, 2019), http://steelbenchmarker.com/files/history.pdf. Although the industry's recovery is far from complete, the improvements following the issuance of Proclamation 9705 are a promising start.

The recovery the domestic steel industry has seen since the imposition of the tariffs demonstrates that in this instance, Section 232 worked just as intended. The Secretary of Commerce concluded after a lengthy investigation that steel imports threaten to impair national security, and the President concurred with this finding and took decisive action to impose tariffs that have made measurable improvements to the industry.

II. THE DECISION BELOW MUST BE AFFIRMED BECAUSE *ALGONQUIN* CONTROLS THIS CASE.

The CIT was correct in concluding that *FEA v. Algonquin* dictates the result in this case. In 1976, the Supreme Court was presented with the very issue raised here, and held that the statute "easily fulfills [the] test" set forth in *J. W. Hampton, Jr. & Co. v. United States* governing congressional delegations. *Algonquin* 426 U.S. at 559 (citing *J.W. Hampton*, 276 U.S. 394, 409 (1928)). Accordingly, the court below properly rejected this challenge, holding that it was "bound by *Algonquin*," a case in which the Supreme Court "squarely confronted the nondelegation challenge" to Section 232 and decided to uphold the statute. *AIIS*, 376 F. Supp. 3d at 1340-41.

Appellants assert that "*Algonquin* is not a barrier to reaching the merits of this delegation challenge." App. Br. at 16. Appellants suggest both that the context in which the nondelegation challenge was raised in *Algonquin* as well as the way the *Algonquin* Court analyzed that challenge somehow preclude its applicability in this case, particularly following the Supreme Court's recent decision in *United States v. Gundy*. These arguments lack merit.

A. The Context in which Nondelegation Was Raised in *Algonquin* Does Not Affect the Supreme Court's Holding.

Appellants accuse the CIT of being confused about *Algonquin*, asserting that "it is understandable that the CIT believed it was bound by *Algonquin*," but that the court's decision was "[u]nderstandable, yes, but correct, no." *Id*. at 25. In so doing, Appellants attempt to draw distinctions between the circumstances under which the nondelegation argument was raised in *Algonquin* and the way in which it has arisen here, including the nature of the *Algonquin* plaintiffs' claim, the amount of briefing dedicated to nondelegation, and the history of Section 232's application prior to the decision. None of these distinctions casts any doubt on the *Algonquin* Court's holding that Section 232 is constitutional.

Appellants first assert that the *Algonquin* plaintiffs' "limited" claim—which challenged the imposition of license fees and was made in the context of a constitutional avoidance argument—somehow bears on the scope of the Court's decision. *Id*. at 21-25. But this is a distinction without a difference. The *Algonquin*

plaintiffs argued that reading Section 232 to allow the President to impose license fees would result in an unconstitutional delegation, App. Br. at 23, and as a result they encouraged the Court to read the statute narrowly, so as to prevent the President from imposing these fees and avoid the supposed concerns about delegation. The Court rejected this argument out of hand, finding that even a reading of the statute that gave the President full authority to impose license fees did not raise delegation concerns. *Algonquin*, 426 U.S. at 559-60. As Appellants acknowledge, the Court cited relevant precedent, including *J.W. Hampton*, reviewed the characteristics of Section 232 that render the statute "far from unbounded," and concluded both that the statute "easily fulfills" the *J.W. Hampton* test and that there was no "looming problem of improper delegation." *Id.* Accordingly, this Court must similarly conclude that Section 232 is a lawful delegation, as the "[Federal Circuit's] job is to follow the [Supreme Court's] holding . . . not to confine it to its facts." *Beer v. United States*, 696 F.3d 1174, 1191 (Fed. Cir. 2012).

The *Algonquin* Court could potentially have decided that case on different grounds, such as by holding only that the *particular* exercise of Presidential authority in that case passed Constitutional and statutory muster, without commenting more generally on the language of the statute. But that is not what the Court did. Instead, it chose to resolve the question by deciding that the statute raised no delegation issues. This court must take the Supreme Court at its word, and follow

its clear and simple holding. *See id.* ("[A] Court of Appeals must not 'confus[e] the factual contours of [Supreme Court precedent] for its unmistakable holding' in an effort to reach a 'novel interpretation' of that precedent." (quoting *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983)) (alterations Federal Circuit's)); *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1347 (Fed. Cir. 2010) (en banc) ("As a subordinate federal court, we may not so easily dismiss [the Supreme Court's] statements as dicta but are bound to follow them.").

Appellants next suggest that the limited extent of briefing and the question for which certiorari was granted in *Algonquin* somehow diminish the Court's holding. App. Br. at 21. But Appellants cannot claim that these issues were not fully litigated. As Appellants' own brief demonstrates, the issue was raised multiple times in the Supreme Court briefing. *Id*. at 22-24 (explaining that the Government asserted in its brief that Section 232 need not be read narrowly to avoid a nondelegation problem; that the plaintiffs responded in four pages of briefing; and that the Government responded in four pages of reply briefing). Whether a court's holding is binding on an issue of law does not turn on the number of pages spent briefing the issue; so long as the question was raised and disposed of by the court, it does not matter if the parties spent a day or a week arguing the matter.

Similarly, Appellants' claim that the delegation issue was not contained in the *Algonquin* question presented has no bearing on the Court's holding. *Id.* at 16. The

Court disposed of the *Algonquin* plaintiffs' nondelegation avoidance argument by assessing the validity of the statute under the nondelegation doctrine and determining that there was no "avoidance" necessary because the statute did not present a concern under the standards for delegation of authority. Because of the way that the *Algonquin* plaintiffs structured their arguments, resolution of this issue was necessary for the Court to determine, pursuant to the issue on which *certiorari* was granted, whether Section 232 lawfully permits the assessment of license fees. *See* SUP. CT. R. 14.1 ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein."); *City of Sherrill, N.Y. v. Oneida Indian Nation*, 544 U.S. 197, 214 n.8 (2005) ("Questions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented." (quotation and citation omitted)); *Ballard v. Commissioner*, 544 U.S. 40, 46–47 & n.2 (2005) (evaluating "a question anterior" to the "questions the parties raised"); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 (2009) (same). The nondelegation issue was presented to the Court and, as the CIT correctly found, the "Court squarely addressed it." *AIIS*, 376 F. Supp. 3d at 340.

Finally, Appellants suggest that the relative infrequency of use of Section 232 at the time of the *Algonquin* Court's ruling casts doubt on the holding. App. Br. at

26. "[T]here is no way," Appellants assert, "that the *Algonquin* Court could have envisioned the use to which section 232 was put in this case and how its lack of boundaries would enable the President to do what he did here." *Id*. But the role of a court evaluating a facial constitutional challenge to a statute is to assess whether the statute comports with the Constitution, and the statute may be "put to use" in any number of ways that are consistent with that ruling. The court need not "envision" every way that the statute may be applied—it instead decides that in all cases, the statute (or an aspect thereof) comports with constitutional principles. Here again, Appellants attempt to transform their facial challenge into an as-applied one, and such attempts should be rejected.

B. The *Algonquin* Court's Mode of Analysis Likewise Has No Bearing on the Validity of the Court's Holding.

Appellants also incorrectly suggest that the Court's analytical process in its recent plurality opinion in *Gundy v. United States* undermines the Court's holding in *Algonquin*. Appellants lean heavily on the *Gundy* plurality's observation that "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation." *Gundy*, 139 S. Ct. at 2123. The plurality analyzed the sex offender registration at issue in the case, found that it imposed certain limitations on the Attorney General's conduct, and found that if the petitioner's broader interpretation were accurate, the court "would face a nondelegation question." *Id*. Appellants attempt to use the *Gundy* plurality's analysis to undermine the *Algonquin* court's

holding, asserting that "if the Court in *Algonquin* had first decided that Congress had authorized both licensing fees and quotas [in Section 232], . . . that ruling would have had no impact on this very different challenge." App. Br. at 28.

However, the anodyne observation in *Gundy* that the analysis begins and often ends with statutory interpretation does nothing to undermine the force of the holding in *Algonquin*. The *Gundy* Court's reference to statutory interpretation as the first step in the nondelegation analysis refers to a court's evaluation of a statute to determine whether it supplies sufficient guidance to the delegee. Indeed, in the next sentence, the plurality explains: "The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides." *Gundy*, 139 S. Ct. at 2123. The *Algonquin* Court did just that – it evaluated both the "clear preconditions to Presidential action" as well as the "far from unbounded" leeway on presidential discretion to conclude that Section 232 contains the requisite intelligible principle. *Algonquin*, 426 U.S. at 559.

The *Algonquin* Court did not need to decide whether the statute permits license fees before rendering a decision on nondelegation because under either interpretation of the statute, Section 232 "easily fulfills" the test for providing an intelligible principle. If anything, the Court's ability to decide nondelegation before determining which statutory interpretation was correct strengthens the notion that

Section 232 is a lawful delegation. In *Algonquin*, the Court read the statute, and irrespective of the plaintiffs' claims that certain remedies were not permitted by the text, found that, in the words of the *Gundy* plurality, "the constitutional question all but answers itself." *Gundy*, 139 S. Ct. at 2123.

III. INDEPENDENT OF *ALGONQUIN*, SECTION 232 IS A LAWFUL DELEGATION OF AUTHORITY.

Regardless of *Algonquin*, Section 232 is a lawful delegation of authority that provides appropriate guidance for (and boundaries on) presidential discretion. That is particularly so given that the President possesses independent authority over national security matters.

Appellants are correct that "in the law[,] '[c]ontext matters.'" App. Br. at 25 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)) (additional citations omitted). But Appellants seek to take *J.W. Hampton* out of context and divorce it from a nearly-hundred-year-old Supreme Court jurisprudence. They would also take Justice Gorsuch's skepticism of the nondelegation doctrine from his dissent in *Gundy* out of context and apply it in an area where the President possesses independent Article II authority—an action Justice Gorsuch himself agreed would be inappropriate. Appellants' attempts to spin the law in their favor or ride potentially shifting legal tides to an improbable conclusion should be rejected: under any version of the nondelegation doctrine in existence or on the horizon, Section 232 passes muster.

A. Section 232 Is Consistent with the Lengthy History of Nondelegation Jurisprudence.

As the Supreme Court observed in *J.W. Hampton*, "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." 276 U.S. at 410. Pursuant to this standard, the Court has repeatedly affirmed that delegations are "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quotation omitted).

Section 232 meets that standard. The statute directs the President to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of . . . article[s] and [their] derivatives so that such imports will not threaten to impair the national security," and implement such an action no later than 15 days after the determination. 19 U.S.C. § 1862(c)(1)(A)(ii), (B). The President can make this determination only if the Secretary of Commerce, after an investigation in consultation with the Secretary of Defense and other appropriate officers (and after holding public hearings where appropriate), produces a report finding that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," and the President concurs with this finding within 90 days of

receiving the report. *Id.* § 1862(b)(3)(A), (c)(1)(A). Finally, although the statute does not define "national security," it enumerates a series of factors and considerations that the President and Secretary must take into account, thus giving the President meaningful guidance on what Congress meant. *See id.* § 1862(d).

Appellants nonetheless assert that the President's actions are "unmoored from any statutory limits" and that presidential discretion is "unfettered." App. Br. at 36-37. In so doing, Appellants focus heavily on *J.W. Hampton* itself, drawing distinctions between the circumstances under which the President could impose tariffs under the statute at issue there and the circumstances under which the President may act under Section 232. *See id.* at 30-34, 36. But Appellants overlook two key points.

First, *J.W. Hampton* is only one of the many cases within the Supreme Court's nondelegation jurisprudence. In the nearly 100 years since *J.W. Hampton* was decided, the Supreme Court has upheld broad delegations of authority in various contexts, including a statute that authorized a presidential appointee to fix maximum prices of commodities and rents "when, in his judgment, their prices 'have risen or threaten to rise to an extent in a manner inconsistent with the purposes of [the] Act'" subject to the constraint that such action "in his judgment will be generally fair and equitable," *Yakus v. United States*, 321 U.S. 414, 420 (1944); a statute that authorized the President to suspend the free entry of certain imported goods

"whenever, and so often as the President shall be satisfied that the government of any [exporting] country … imposes duties or other exactions … he may deem to be reciprocally unequal and unreasonable," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 680 (1892)); and a statute which permitted an agency to promulgate regulations "in the public interest," *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943). And when the Court has upheld delegations, it has explained that challenged statutes fall "well within" the range of permissible delegation, *see, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001), indicating the wide berth the nondelegation doctrine provides to Congress in crafting legislation to enable Congress to "do its job . . . in our increasingly complex society." *Mistretta*, 488 U.S. at 372.

Section 232 is also readily distinguishable from the only two cases in which the Supreme Court found an unlawful delegation. Both were decided more than 80 years ago, and neither statute provided *any* guidance as to how the granted authority should be exercised or procedures to ensure that the President possessed the requisite information to exercise that discretion. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 522-23 (1935).

Second, the statute at issue in *J.W. Hampton* did not delegate authority in an area where the President possesses separate authority. The stated purpose of the

statute at issue in *J.W. Hampton* was to enable the President to "regulate the foreign commerce of the United States," a power reserved expressly and exclusively to Congress under Article I of the Constitution. *See J.W. Hampton*, 276 U.S. at 401; U.S. Const. art. I, § 8. By contrast, Section 232 authorized the President to take certain actions in the interest of safeguarding national security—an area over which the President retains independent authority. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Consistent with this principle, "[t]he Supreme Court has repeatedly underscored that the intelligible principle standard is relaxed for delegations in fields in which the Executive has traditionally wielded its own power." *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 671 F.3d 881, 897-98 (9th Cir. 2011) (citing *Loving v. United States*, 517 U.S. 748, 772 (1996)) (military affairs); *see also United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 324, (1936) (foreign relations); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438 (9th Cir. 1996) (same)).

B. Section 232 Is Lawful after *Gundy*, under Both the Plurality and Dissent's View of the Nondelegation Doctrine.

Appellants launched this case in the express belief that the Supreme Court's grant of *certiorari* in *Gundy* signaled a sea change in delegation jurisprudence. But the Court rejected the claim that the legislation in *Gundy* was an improper delegation of authority and declined to upend decades of nondelegation precedent. Appellants gamely assert that *Gundy* strengthens their argument, but the opinions are to the contrary. Under the plurality opinion, which reaffirms the nondelegation doctrine as it has been consistently applied by the Supreme Court, Section 232 remains a valid delegation. Further, Section 232 is likewise consistent with the dissent, which, although advocating for a more exacting standard for nondelegation challenges, reaffirms the principle that lawful delegations may be far broader in areas where the President retains independent authority.

Section 232 plainly continues to be lawful after the actual decision in *Gundy*, which upheld Section 20913 of the Sexual Offender Registration and Notification Act ("SORNA") and left the nondelegation doctrine untouched. Writing for a plurality of justices (Justice Alito joined the decision to uphold SORNA but declined to join the plurality opinion), Justice Kagan explained that "the delegation in SORNA easily passes muster" under the long and well-established nondelegation jurisprudence, pursuant to which "a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his]

authority.'" *Gundy*, 139 S. Ct. at 2117, 2129 (quoting *Am. Power & Light*, 329 U.S. at 105) (alterations Supreme Court's). "Those standards, the Court has made clear, are not demanding." *Id.* at 2129. The plurality further observed that "[o]nly twice in this country's history has the Court found a delegation excessive, in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion." *Id*. at 2117 (quoting *Mistretta*, 488 U.S. at 373 n.3) (emphasis in original) (additional citations omitted).

Appellants emphasize that although "[n]o court has set aside a federal statute on delegation grounds since the Supreme Court did so almost 85 years ago in [*Panama Refining Company* and *A.L.A. Schecter Poultry Corp.*]," "three Justices would have done so in *Gundy*, and a fourth expressed his willingness to re-consider the application of the doctrine in an appropriate case."[2] App. Br. at 45.

But even if the view of the nondelegation doctrine provided in the dissent were to carry the day in the future, it still would not invalidate Section 232. The dissent advocates for a standard whereby "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'" *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). Under the

[2] Justice Kavanaugh took no part in the case. Justice Alito did not join the legal reasoning of the plurality and explained in his concurrence that he would "support [an] effort" to "reconsider the approach [the Court] ha[s] taken [to nondelegation] for the past 84 years," but did not endorse the legal reasoning in the dissent. *Gundy*, 139 S. Ct. at 2131.

dissent's view, the "intelligible principle" language in *J.W. Hampton* was an attempt by the Court to articulate that "traditional rule," but the language "has been abused to permit delegations of legislative power that should be held unconstitutional." *Id*. at 2139-40.

At the same time, the dissent acknowledges that "the scope of the problem [with the intelligible principle test] can be overstated," that some delegations that have been upheld "may be consistent" with the "traditional" test, and—critically for the statute at issue here—that "[s]ome delegations have, at least arguably, implicated the president's inherent Article II authority." *Id*. at 2140. Indeed, Justice Gorsuch reiterates that delegations of authority in areas where the President retains independent constitutional authority have been, and rightly are, held to a different standard. "While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch." *Id*. at 2137. Accordingly, "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'" *Id*. (quoting David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance? 83 Mich. L. Rev. 1223, 1260 (1985)). Consistent with this separate standard for delegations in areas of Article II authority, in evaluating SORNA the dissent notes that the delegation there

did not "involve[] an area of overlapping authority with the executive," reiterating that "Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers," but that "SORNA stands far afield of that." *Gundy*, 139 S. Ct. at 2143-44 (Gorsuch, J., dissenting).

Finally, it is worth noting that the Court was already presented with the opportunity to hear this case, and declined to do so. As Appellants concede, the Court denied Appellants' petition for *certiorari* before judgment mere days after *Gundy* came down. App. Br. at 16.

C. The Fact that Section 232 Remedies Are Committed to Presidential Discretion Has No Impact on the Delegation Inquiry.

Appellants' last attempt to invalidate Section 232—the fact that exercises of presidential discretion under the statute are nonjusticiable—has no basis in law whatsoever. Appellants assert that "[t]he failure of Congress to provide any judicial review of the President's compliance with section 232 removes even the theoretical possibility that a court could find an intelligible principle guiding or limiting the President's choices," and the absence of such review "underscores the total transfer of legislative power from Congress to the Executive[.]" App. Br. at 43. However, Appellants answer their own argument when they concede that "no Supreme Court decision has held that the availability of judicial review is a requirement of a constitutionally valid delegation[.]" *Id*. at 42.

Appellants claim that the Supreme Court has "emphasized that the absence of judicial review and other procedural protections heightens nondelegation concerns." *Id*. However, the case law they cite does not support this assertion. Although these cases either frame the nondelegation test in terms of how a court may review the statute if the court were to have jurisdiction to do so, *see, e.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-19 (1989) (describing the nondelegation doctrine as requiring Congress to provide "standards guiding its actions *such that a court could* ascertain whether the will of Congress has been obeyed") (quotation marks and citations omitted), or recognize that a benefit of the nondelegation doctrine is to enable judicial review where such review is available, *Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) ("The safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers."), none of them support the converse proposition: that absent the availability of judicial review, an otherwise lawful delegation becomes unlawful.

Appellants cannot point to any such precedent because that notion is inconsistent with the nondelegation doctrine, which asks whether Congress has supplied adequate guidance to aid and cabin the exercise of executive discretion. Amici "fail to see how the availability of judicial review has anything to do with that question." *Dep't of Interior v. S. Dakota*, 519 U.S. 919, 922 (1996)

(Scalia, J., dissenting). Accordingly, Appellants' claim on this point, that "[a] provision for judicial review strongly implies that Congress has included standards or limits," and that "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," finds no basis in logic. App. Br. at 44. Because the nondelegation doctrine and the principles it requires exist to guide Congress, and not the courts, how Congress deals with judicial review in legislation has no bearing on whether Congress has included sufficient limitations on executive discretion. Put simply, Congress is free to delegate to the Executive without having to involve the Judiciary.[3]

CONCLUSION

In light of the foregoing, the judgment of the CIT should be affirmed.

[3] *Amicus* Cato Institute argues that this decision of the President must be reviewable, though perhaps held to a different standard than the typical agency review case. Cato Institute Br., Dkt. No. 35, at 6-10. For the reasons set forth above, the Cato Institute is wrong—there is no provision for review in the statute, and the precedent on the lack of review of Presidential discretionary action is clear. But to the extent Cato is correct, that would undercut one of the central pillars of Appellants' arguments.

Respectfully Submitted,

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