No. 19-1727

In the

United States Court of Appeals

for the

Federal Circuit

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

Plaintiffs-Appellants,

– v. –

UNITED STATES AND KEVIN K. MCALEENAN, Commissioner of U.S. Customs and Border Protection,

Defendants-Appellees.

On appeal from the United States Court of International Trade

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No. 18-cv-00152, Judges Jennifer Choe-Groves, Gary S. Katzmann, and Claire R. Kelly

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BRIEF OF UNITED STATES STEEL CORP. AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

Case No. 19-1727

CERTIFICATE OF INTEREST

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

Charles Rothfeld

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
United States Steel Corp.	None	None

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:

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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).

None

9/25/2019
Date

[s] Charles Rothfeld
Signature of counsel

Please Note: All questions must be answered

Charles Rothfeld
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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1901, United States Steel Corporation ("U.S. Steel") is the largest U.S.-headquartered integrated producer of semi-finished, flat-rolled, and tubular steel products. U.S. Steel has blast furnaces and integrated processing operations in Illinois, Indiana, Michigan, and Pennsylvania; iron mines in Minnesota; and finishing operations in Alabama, Arkansas, California, Mississippi, Ohio, and Texas. U.S. Steel employs approximately 17,500 hardworking Americans.

This case involves a facial challenge to the constitutionality of Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 232, which establishes a procedure under which the President may "adjust the imports" of articles to protect "national security." The statute sets out a number of procedural requirements that the Executive Branch must follow, the substantive standard that must govern the President's decision, and the considerations that the President must take into account in making this determination. Invoking his Section 232 authority, the President determined that steel imports threaten to impair the national security. He responded by taking steps to adjust those imports, imposing

[1] Pursuant to Federal Rule of Appellate Procedure 29, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. The parties have consented to the filing of this brief.

tariffs on specified imports of steel articles. The President's authority to impose those tariffs is threatened in this litigation.

As a U.S.-headquartered producer of steel products that has substantial domestic U.S. operations, U.S. Steel has a direct interest in the subject matter of this litigation. Accordingly, U.S. Steel submits this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

A. Plaintiffs are incorrect in arguing that the Supreme Court's decision in *Gundy v. United States,* 139 S. Ct. 2116 (2019), calls into question the constitutionality of Section 232. Plaintiffs maintain that the plurality opinion in *Gundy* established a new requirement for the resolution of delegation challenges, mandating that a court first settle the meaning of the challenged statute before turning to the question whether the statutory delegation is unconstitutional. But the *Gundy* plurality stated no such rule; it ***necessarily*** first resolved the meaning of the statute challenged in that case (the Sex Offender Registration and Notification Act (SORNA)), because that meaning was disputed and the constitutionality of the statutory delegation arguably depended on which reading was selected.

Plaintiffs are wrong when they assert that this analysis calls into question the correctness of *Federal Energy Administration v. Algonquin SNG Inc.*, 426 U.S. 548 (1976), which upheld Section 232 against a

delegation attack very much like the one launched in this case. Plaintiffs contend that *Algonquin* is inconsistent with *Gundy* because the *Algonquin* court first addressed delegation and then turned to statutory construction. But the Court took that approach because it found that Section 232 would be constitutional on even the broadest reading of the statute; there was no threshold question of statutory construction to resolve in *Algonquin*, as there was in *Gundy*.

Nor does Justice Gorsuch's dissenting opinion in *Gundy*, which opined that the delegation at issue in that case was unconstitutional, raise doubts about Section 232. Section 232 is different from SORNA in every material respect. SORNA (as construed by Justice Gorsuch) placed ***no*** limits on the executive; Section 232, in contrast, imposes substantial substantive and procedural checks on the President's exercise of discretion. SORNA authorized the Attorney General to promulgate what amounted to a criminal code, an area where the executive gets very limited discretion; Section 232, in contrast, addresses issues of national security and foreign affairs, where the President has substantial independent authority under the Constitution. And the delegation effected by Section 232, unlike that in SORNA, was not conferred because Congress was unable to achieve consensus on what standard to apply. Accordingly, there is reason to believe that Justice Gorsuch would find a statute like Section 232 to be constitutional.

B. Judicial review of the President's exercise of discretionary authority is not necessary to save the constitutionality of a delegation like the one in Section 232. As the Court of International Trade recognized, such discretionary decisions may be reviewed for constitutionality and to restrain action taken by the President ***outside*** of his statutory authority. This is the traditional degree of review accorded matters committed to presidential discretion, and serves as a significant limit on presidential conduct.

But courts never have held that delegation to the Executive Branch must be cabined by judicial review of decisions that are within the President's discretionary authority and committed to his discretion. To the contrary, both this Court and the Supreme Court have held repeatedly that review of such decisions, far from being required, is improper. This rule on the nonreviewability of discretionary decisions does not abandon all constraints on presidential power; as the Supreme Court has recognized, the substantive and procedural limits imposed by statutes like Section 232 (and by Section 232 itself) serve as a meaningful restraint on presidential authority. The attempt by one of plaintiffs' *amici* to supplement those statutory limits with an "attenuated" judicial review is unavailing; that standard appears nowhere in the delegation decisions of this Court or the Supreme Court, and would be unmanageable if adopted.

ARGUMENT

The United States demonstrates in its brief that Section 232 is a constitutional delegation that is consistent with the standard applied by both the Supreme Court and this Court. US. Br. 9-29. Plaintiffs (referred to below in the aggregate as "AIIS") and their *amici* nevertheless insist that Section 232 gives the President too much discretion, while setting impermissibly imprecise standards to direct his judgment. But as the United States shows, Section 232 gives the President more than adequate direction and imposes meaningful restraints on his decision-making. *Id.* at 16-27. The United States also explains that the courts regularly have upheld statutes offering ***less*** guidance to the Executive Branch than does Section 232—and that the Supreme Court has upheld ***this*** statute against delegation-doctrine attack. *Id*. at 9-15. In this facial challenge, where AIIS contests the constitutionality of Section 232, those holdings dispose of the case.

Rather than repeat the government's arguments, we here focus on two particular contentions advanced by AIIS and its *amicus* Cato Institute: (1) AIIS's assertion that the Supreme Court's recent decision in *Gundy v. United States,* 139 S. Ct. 2116 (2019), changed the delegation doctrine in a manner that undermines the CIT's decision; and (2) the

argument advanced by both AIIS and Cato that judicial review of the exercise of presidential discretion like that conferred in Section 232 must be available for a congressional delegation of decision-making authority to the President to be constitutional. As we explain below, both of these contentions are wrong. Neither the plurality opinion nor the dissent in *Gundy* calls the constitutionality of Section 232 into question. And far from finding judicial review necessary, both the Supreme Court and this Court have held unequivocally that review of the President's discretionary decisions is ***improper***. Accordingly, the CIT's decision should be affirmed.

A. Nothing in *Gundy* calls the CIT's decision into question.

Gundy involved a challenge to the constitutionality of SORNA, which delegated to the Attorney General the authority to specify the "applicability" of SORNA's sex-offender registration requirements to persons who committed their offenses prior to SORNA's enactment; failure to register as required by the Attorney General is a criminal offense. *See generally Gundy*, 139 S. Ct. at 2121 (plurality opinion). By its bare language, SORNA set ***no*** terms to govern exercise of the Attorney General's judgment. *See id.* at 2132 (Gorsuch, J., dissenting). But the *Gundy* plurality read SORNA's delegation provision as, in context, extending the Attorney General's discretion "only to considering and

addressing feasibility issues," and on that reading the plurality found SORNA to be constitutional. *Id.* at 2124 (plurality opinion). Justice Alito concurred in the judgment without expressing a view of the meaning of SORNA's delegation provision, simply opining that the statute contains "a discernable standard that is adequate under the approach this Court has taken for many years." *Id.* at 2131. And Justice Gorsuch (joined by two other Justices) dissented, suggesting that the Court's existing doctrine has gone too far in permitting delegations of legislative authority; taking issue with the plurality's reading of SORNA; and concluding that, on his broader reading of the statute, SORNA effected an unconstitutional delegation. *Id.* at 2131-2149.[2]

1. Gundy *did not change the order in which issues must be decided in delegation cases.*

Against this background, AIIS begins its *Gundy* argument by contending that the plurality opinion, by first addressing the scope of SORNA and then resolving the delegation challenge, changed the required approach for resolving delegation cases, directing that the scope of the statute be determined before the delegation issue is addressed. AIIS claims that the Supreme Court's decision in *Federal Energy*

[2] Justice Kavanaugh did not participate in the decision. *Gundy*, 139 S. Ct. at 2117.

Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976), upholding the constitutionality of Section 232 should be disregarded because *Algonquin* addressed those questions in the reverse order. AIIS Br. 27-30.

This contention is insubstantial. Where the meaning of the statute at issue is in doubt, it will be necessary to settle that meaning before determining whether a statutory delegation is proper. That is the evident reason why the *Gundy* plurality resolved the case as it did. The plurality first addressed the scope of SORNA because the dispute in *Gundy* hinged on what Congress actually had authorized the Attorney General to do in that statute; applying delegation principles to the statute was impossible without first settling that question, with the outcome of the delegation question possibly turning on what the statute meant.[3] There was no need to resolve the issues in the same order in *Algonquin* because the situation there was quite different: the Court regarded it as plain that the delegation would be constitutional no matter how the statute was read. *See* 426 U.S. at 559.

[3] As the plurality noted, if SORNA actually did grant the Attorney General "plenary power" to set penalties, "we would face a nondelegation question." 139 S. Ct. at 2123. That made it necessary to "construe the challenged statute to figure out what task it delegates and what instructions it provides." *Id.*

AIIS therefore is incorrect in arguing that *Algonquin*'s delegation holding "must be read in light of the narrow statutory issue before the Court" in that case. AIIS Br. 29. To the contrary, the *Algonquin* Court stated expressly that, "[e]ven if [§]232(b) is read [more broadly], the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." 426 U.S. at 559. AIIS therefore turns *Algonquin* on its head in arguing that the decision should be read narrowly; in fact, the Court was unambiguous in finding that Section 232 is constitutional even on the broadest reading.[4]

Moreover, under the reasoning of the *Gundy* plurality opinion, which restates current law, Section 232 is constitutional. The plurality carefully described the scope of the delegation doctrine, explaining that "the Court has stated that a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'" 139 S. Ct. at 2129 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). And for the reasons laid out in the United States' brief (at 15-29), Section 232 falls well within the boundaries of existing doctrine.

[4] Here, all agree on the scope of the Section 232 delegation. The only question, in this facial challenge to Section 232, is the constitutionality of that delegation. *See* U.S. Br. 15 n. 1.

2. Justice Gorsuch's Gundy *dissent does not call into question the constitutionality of Section 232.*

AIIS is equally wrong in its suggestion that Justice Gorsuch's dissent in *Gundy* calls into question the correctness of the CIT decision. AIIS Br. 34-35. Even leaving aside that the *Gundy* dissent is just that—a dissent—Justice Gorsuch's opinion, on its own terms, offers no reason to doubt the constitutionality of Section 232, for several reasons.

To begin with, in questioning the constitutionality of SORNA, Justice Gorsuch noted that, on his reading of the statute, it ***literally*** "supplies no standards" for the Attorney General to follow in setting retroactive criminal liability. 139 S. Ct. at 2148 (Gorsuch, J. dissenting). The operative terms of SORNA simply provided, baldly, that the Attorney General "shall have the authority to specify the applicability of the requirements of this subchapter" and "to prescribe rules for the registration of any such sex offender." 34 U.S.C. § 20913(d). As Justice Gorsuch emphasized, SORNA "thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country" (139 S. Ct. at 2132); offered him unfettered discretion" (*id.* at 2143); contained not "a single policy decision concerning pre-Act offenders on which Congress even tried to speak" (*id.*); and therefore cannot "be

described as an example of conditional legislation subject to executive fact-finding." *Id.*

Section 232 is materially different in every respect. As the United States shows in its brief (at 16-27), Section 232 sets a meaningful standard for the President to implement, requiring him to "determine" and then "implement" 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." 19 U.S.C. §§ 1862(c)(1)(A)(ii) and 1862(c)(2). It establishes procedural requirements that the Executive Branch must follow, including specific required consultations by the Secretary of Commerce with the Secretary of Defense and other appropriate government officials, and the preparation of a report that contains the findings and recommendation of the Commerce Secretary. *Id.*, § 1862(b)(2)A). And it offers a detailed list of considerations that the President must take into account in making his decision, including the domestic production of the article in question that is needed for defense requirements, the capacity of domestic industries to meet those requirements, existing and anticipated availability of resources and raw materials that are essential to the national defense, requirements of growth of such industries, and the importation of goods as they affect such

industries and "the capacity of the United States to meet national security requirements." *Id.*, § 1862(d). Section 232 therefore does not pose the problem of a delegation that literally "supplies no standards" for the President to follow.

Section 232 also differs from SORNA in another notable respect: it addresses U.S. national security, economic regulation of foreign commerce, and the raising of revenue, while SORNA allowed the Attorney General essentially to promulgate criminal punishments that applied in the United States. This, too, led to stricter scrutiny of SORNA by Justice Gorsuch in *Gundy*. As he explained, "while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code." 139 S. Ct. at 2148 (Gorsuch, J., dissenting). Section 232, in contrast, addresses not individual liberty but economic regulation.

And unlike disapproval of the novel delegation of criminal law-making authority that Justice Gorsuch perceived in SORNA, invalidation of national security and economic regulatory delegations like that effected by Section 232 would work a fundamental change in the mechanics of federal regulation. From the nation's earliest days, Congress has thought

it essential to the ordinary operations of government that it be able to delegate to the President the authority to make determinations (within prescribed standards) regarding satisfaction of particular statutory requirements. The Supreme Court repeatedly has upheld those delegations, on the understanding that "the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a [given action] is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment." *United States v. George S. Bush & Co., Inc.*, 310 U.S. 371, 379-80 (1940). That understanding applies with full force to Section 232.

In fact, given the contrasts between Section 232 and SORNA , the concerns expressed by Justice Gorsuch in *Gundy* actually ***support*** the conclusion that Section 232 is constitutional. That is so for several reasons. ***First***, as noted above, Justice Gorsuch relied on his view that SORNA does not offer ***any*** standards, even while explaining that Congress in SORNA could permissibly have employed a delegation that "set criteria" for the Attorney General to use. 139 S. Ct. at 2143 (Gorsuch, J., dissenting). In contrast, Section 232 ***does*** establish meaningful standards and sets the criteria that the President must apply in making his decision. *See* U.S. Br. 1-3, 16-27.

Second, Justice Gorsuch noted that SORNA "does not involve an area of overlapping authority with the executive." 139 S. Ct. at 2143 (Gorsuch, J., dissenting). But as the United States explains in its brief (at 27-29), Section 232, although addressing trade and tariffs, does so in the specific context of national security and foreign affairs, areas where the President has substantial independent authority. That is why, when "the subject matter of [the challenged statute] involves foreign affairs, … broad grants by Congress of discretion to the Executive are common"—even when tariffs and other trade regulations are at issue. *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984). *See*, *e.g.*, *George W. Bush & Co.,* 310 U.S. 371; *Motions Systems Corp. v. Bush*, 437 F.3d 1356, 1359-1362 (Fed. Cir. 2006).

Third, Justice Gorsuch thought it especially notable that Congress delegated broad standard-setting authority to the President in SORNA because members of Congress could not themselves reach the consensus necessary to legislate those standards. He therefore believed that SORNA "sounds all the alarms the founders left for us. Because Congress [in SORNA] could not achieve the consensus necessary to resolve the hard problems associated with SORNA's application to pre-Act offenders, it passed the potato to the Attorney General." 139 S. Ct. at 2144 (Gorsuch J.,

dissenting). This both abdicated legislative responsibility and posed a "question of accountability. In passing [SORNA], Congress was able to claim credit for 'comprehensively' addressing the problem of the entire existing population of sex offenders (who can object to that?), while in fact leaving the Attorney General to sort it out." *Id*.

Section 232 is decisively different. It does ***not*** address an area where Congress was unable to achieve consensus (*see Algonquin*, 426 U.S. at 562-571 (setting out Section 232's legislative history)); it ***does*** set the broad governing policy; and it ***necessarily*** leaves specific application of that policy to the President, given that "Congress does not ordinarily bind the President's hands so tightly that he cannot respond promptly to changing conditions or the fluctuating demands of foreign policy." *Florsheim Shoe*, 744 F.2d at 795 (citation omitted). That understanding of the need to give the President broad discretion in making decisions that have a bearing on foreign policy repeatedly has been effectuated by the courts. *See* U.S. Br. 27-29 (citing cases).

There is reason to believe that Justice Gorsuch would find such a statute constitutional. As he explained, "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'" 139 S. Ct. at 2136. And "once Congress

prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding." *Id*. That is just what Congress did in Section 232.

For these reasons, even if the Supreme Court ultimately revisits the scope of the delegation doctrine, this would not be a suitable case in which to do so. Section 232 involves an area (national security) where the President has independent authority, and it contains both substantive standards and procedural constraints that restrict and govern executive action. If the delegation doctrine is to be reconsidered, that should be done in a closer case.

B. Judicial review for constitutionality and *ultra vires* actions is available under Section 232, but further review of the President's exercise of his discretion is unnecessary to establish the constitutionality of Section 232.

Both AIIS and Cato also make a different argument: they insist that some sort of judicial review of the President's discretionary decisions is necessary to save the constitutionality of a delegation like the one effected by Section 232. *See* AIIS Br. 41-45; Cato Br. 10. But this contention is premised on a misreading of the CIT's decision and is wrong as a matter of law.

1. Cato misstates the scope of the CIT's holding.

To begin with, Cato is incorrect in its foundational assumption that the CIT's decision wholly precluded judicial review of Section 232 decisions. *See* Cato Br. 6. In fact, the CIT recognized the availability of review both "for constitutionality and [for] action beyond presidential authority." Appx13. This is the traditional degree of review accorded matters committed to presidential discretion, and is a significant limit on presidential authority. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

Constitutional review, for example, would allow a court to set aside presidential Section 232 orders that are issued to punish the President's political opponents, that draw partisan distinctions, or that have some other constitutionally impermissible basis. *See also Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding delegated presidential act unconstitutional under the delegation doctrine).

Review to set aside actions that are *ultra vires* or otherwise outside the scope of presidential authority also offers a significant check on presidential authority: Although a court may not review the exercise of discretion within the constraints set by Congress, it may set aside presidential action taken ***outside*** those constraints. That is just the sort of

review conducted in *Algonquin*. The Court there addressed on the merits, and rejected on the merits, the argument that a presidential order was improper because the particular import restriction imposed by the President was not within the category of presidential actions authorized by Section 232. *See* 426 U.S. at 561-71.

In some cases, courts have found that the President ***did*** act in excess of his authority by taking steps that exceeded the legislative authorization. One of the decisions relied upon by Cato in support of its argument that courts must be permitted to second-guess the exercise of the President's discretion, *Independent Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614 (D.D.C. 1980), actually falls within the category of cases where the court found that the President acted outside the bounds authorized by the statute. *See* Cato Br. 8. The court there held that a particular license-fee regime imposed pursuant to Section 232 exceeded the statutory authorization because it was structured so that "the cost of the fee would eventually be paid by consumers of both domestic and imported gasoline." *Independent Gasoline Marketers Council*, 492 F. Supp. at 617. That restriction was improper, the court held, because Section 232 "does not authorize the President to impose general controls on

domestically produced goods. … The statute provides for regulation of imports." *Id.* at 618.

There may be some cases that are close to the line between determining whether the President acted within the scope of the statutory delegation (which is reviewable) and determining whether the President properly exercised that delegated discretion (which is not)—where, for example, it is not clear whether a particular limitation actually "adjust[s] … imports" within the meaning of Section 232. *Independent Gasoline Marketer's Council* was such a case. Similarly, as the Supreme Court noted in *Algonquin*, its holding in that case "in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized." 426 U.S. at 571.

But this is not a case that calls for such review. AIIS does not argue that the President's actions regarding the steel tariffs fall outside the statutory terms.[5] Instead, its argument is that Section 232 is facially unconstitutional because the statute's delegation of authority to the President is excessive and judicial review of the President's discretionary

[5] Such a contention would, in any event, be incorrect. Here, the President's orders fall squarely within the plain terms of the statutory delegation. And the impact of the orders on the subject the President has been authorized to address—the adjustment of imports—is hardly attenuated or remote.

exercise of that authority is unavailable. As we show below (at 21-25, *infra*), that contention is incorrect.

Cato also misreads the import of the CIT's statement that "[o]ne might argue that the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth." Appx.15. Cato takes this statement to mean that the CIT's holding allows the President to act "*outside the Constitution*." Cato Br. 4. But read in context, the CIT did not suggest that the President may act in an unconstitutional manner. Instead, the court appears to have had in mind circumstances where the President acted within the scope of the delegating statute but exceeded the discretion conferred by Congress. That circumstance does not involve either the President or Congress acting unconstitutionally; so long as the delegation is permissible and President's action is within his delegated statutory authority, that action was not constitutionally reserved for Congress. Nothing in that observation by the CIT either gave "away the lawmaking function to the executive branch" or "ducked [the court's] duty 'to say what the law is.'" Cato Br. 4

2. Judicial review of the President's exercise of his discretion is not constitutionally required in this case.

Cato and AIIS also are incorrect in contending that judicial review of the Executive Branch's exercise of discretion has always been, and must be, allowed if a delegation like that effected by Section 232 is to be constitutional—that there is, in Cato's words, an "obvious and essential relationship between the nondelegation principle and the availability of meaningful judicial review." Cato Br. 10; *see also* AIIS Br. 41-45. In fact, there are many circumstances in which both the Supreme Court and this Court have recognized that discretionary decisions may be committed to the President's discretion. This Court's language on the point in *Florsheim Shoe* is worth quoting in full:

> Both Supreme Court and Court of Customs and Patent Appeals precedent have established that the Executive's decisions in the sphere of international trade are reviewable only to determine whether the President's action falls within his delegated authority, whether the statutory language has been properly construed, and whether the President's action conforms with the relevant procedural requirements. The President's findings of fact and the motivations for his action are not subject to review.

Florsheim Shoe, 744 F.2d at 795. Necessarily, then, a statute is not rendered unconstitutional in the circumstances here by the unavailability of review of discretionary executive decisions.

This point is well settled. Almost 60 years ago, the Supreme Court noted that "[i]t has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review." *George S. Bush & Co.*, 310 U.S. at 380. Far from there being a constitutional requirement of judicial review, in such circumstances, "[f]or the judiciary to probe the reasoning which underlies the [presidential act] would amount to a clear invasion of the legislative and executive domain." *Id.* And that remains the law today: As the Supreme Court has recognized, "[s]eparation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own process." *Loving v. United States*, 517 U.S. 748, 773 (1996).

In arguing to the contrary, Cato points to Judge Gajarsa's opinion in *Motions System*, 437 F.3d at 1362 (Gajarsa, J., concurring in part and concurring in the judgment). But that opinion was, in relevant part, a concurrence in the judgment. The en banc majority took the ***opposite*** approach: In a suit involving the denial of import relief, the Court held

that "[n]o right of judicial review exists to challenge" the discretionary acts of the President (*id.* at 1359), who is "insulated … from judicial review for abuse of discretion despite the presence of some statutory restrictions on the President's discretion." *Id.* at 1361. That holding governs here: So long as the President is acting within the bounds of the congressional delegation—in the sense that he is not acting *ultra vires*, a requirement that ***may*** be tested in court—the lack of judicial review of discretionary decisions does not invalidate a statute that commits discretion to the President.

Cato also is incorrect in its claim that judicial review is necessary for there to be any realistic constraint on the exercise of presidential power once Congress has delegated decision-making authority to the executive. So long as Congress has given the President an intelligible standard to implement, the statutory criteria that accompany the delegation themselves impose meaningful limits on the President. That is just what the Supreme Court recognized regarding Section 232 in *Algonquin*, where it unanimously upheld that statute against delegation attack, cataloguing the guidance provided to the President by Section 232 and finding the delegation question a simple one: The standards in Section 232 "are

clearly sufficient to meet any delegation doctrine attack" and the statute "easily fulfills" the intelligible principle test. 426 U.S. at 559.

As the Court there explained, Section 232's limits on presidential decision-making are meaningful. The statute's standard is not "open-ended," instead offering the President a "limited authorization … to act only to the extent necessary to eliminate a threat of impairment to the national security." *Algonquin,* 426 U.S. at 559 n.10. The Court noted "clear preconditions to Presidential action," including the required finding by the Secretary of Commerce that imports of the item in question threaten to impair the national security. *Id*. at 559. "Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded," as "[t]he President can act only to the extent" he deems it necessary to adjust imports of the article in question so as to avoid impairment of national security. *Id.* And Section 232 "articulates a series of specific factors to be considered by the President in exercising his authority under [the statute]." *Id. See* pages-11-12, *supra*.[6]

[6] Cato maintains that *Algonquin* "implicitly acknowledged that the statute's intelligible principles amount to judicially testable standards when observing that the 'broad' phrase '"national interest" … stands in stark contrast with [Section 232's] narrower criterion of "national security."'" Cato Br. 11 (quoting *Algonquin*, 426 U.S. at 569). But that

It must be presumed that these limits and standards will have a real effect on the exercise of presidential authority. As a general matter, the executive's actions are entitled to a "presumption of regularity." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). "This presumption reflects respect for a coordinate branch of government whose officers not only take an oath to support the Constitution, as [judges] do, Art. VI, but also are charged with 'faithfully execut[ing]' our laws, Art. II, § 3." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2579-80 (2019) (Thomas, J., concurring in part and dissenting in part).[7] For that reason, a court may not suppose that the executive is willfully departing from the standards set by Congress, and "the courts may not go behind the Executive Orders to search for the 'actual' basis for the President's Act." *Florsheim Shoe*, 744 F.2d at 797.

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simply is not so. The Court's recognition that the statutory standards have meaning and impose real restraints on executive action shows that Section 232 makes use of an intelligible principle; it does nothing to suggest that the President's exercise of those standards must be tested in court.

[7] The Court in that case took the extraordinary step of allowing a court to look behind an agency's stated rationale for its decision. *See* 139 S. Ct. at 2572-76. But that case involved review of an agency decision under the APA; and "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the President is immune to such APA review. *Franklin*, 505 U.S. at 800-801.

3. Cato's proposed "attenuated" judicial review is insupportable.

Ultimately, Cato itself recognizes that courts "might be reluctant to review presidential decision making, out of concern over comparative institutional competencies" (Cato Br. 12), and it acknowledges that the Supreme Court has "foreclosed 'hard look' review of the president's statutory powers." *Id.* at 13. But Cato nevertheless insists that an "attenuated review of presidential regulation" is constitutionally required. *Id.* at 14. In Cato's view, this "attenuated review" would require the President to "set forth the grounds on which [he] acted," to explain any "'departure from prior norms,'" and not to rely on factors Congress did not intend him to consider. *Id.*

But this standard is invented. It nowhere appears in the delegation or reviewability decisions of the Supreme Court or of this Court, which have been unequivocal in holding that, "[a]fter it is decided that the President has congressional authority for his action, 'his motives, his reasoning, his findings of fact requiring the action, and his judgment, are immune from judicial scrutiny." *Florsheim Shoe*, 744 F.2d at 796 (citation omitted). *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473-76 (2001).

Cato's regime of "attenuated" review also would be one that is standardless and unmanageable. Consider the example of the steel tariffs, where the President ***has*** set out his findings and rationale (*see* U.S. Br. 3-4); it is not clear why Cato thinks that explanation insufficient—and if it is insufficient, it is not clear how much more of an explanation would be enough to satisfy the attenuated review standard. At the same time, it is not evident how Cato imagines factual review would proceed in this setting, given that the President is not subject to the APA and that, as a consequence, his decisions are not supported by a formal administrative record. Inevitably, then, even Cato's "attenuated review" would lead to second-guessing of presidential decisions in a manner that is inconsistent with the reason for Section 232 delegation—the need to give the President a free hand in responding to fluid international events—that led Congress to enact the statute and the *Algonquin* Court to permit such delegation in the first place.

As the *Gundy* plurality noted, "[i]t is wisdom and humility alike that this Court has always upheld such 'necessities of government.'" 139 S. Ct. at 2130 (quoting *Mistretta v. United States*, 466 U.S. 361, 416 (1989) (Scalia, J., dissenting)). The plurality continued, again quoting Justice Scalia:

> Since Congress is no less equipped with common sense than we are, and better equipped to inform itself of the "necessities" of government; and since the factors bearing on those necessities are both multifarious and (in the nonpartisan sense) highly political … it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.

Id. And the fact is, "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. The CIT's application of that principle in this case faithfully applied settled law.

CONCLUSION

The decision of the United States Court of International Trade should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for *Amicus Curiae* certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B), because it contains 5969 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: September 25 2019

/s/ *Charles Rothfeld*
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CERTIFICATE OF SERVICE

I hereby certify that that on September 25, 2019 the foregoing brief was served electronically via the Court's CM/ECF system upon all counsel of record.

Dated: September 25, 2019

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