Consol. Nos. 2021-2066 & 2252

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PRIMESOURCE BUILDING PRODUCTS, INC.,
Plaintiff-Appellee

v.

UNITED STATES, JOSEPH R. BIDEN, JR., President of the United States, GINA M. RAIMONDO, Secretary of Commerce, CHRISTOPHER MAGNUS, Commissioner of U.S. Customs and Border Protection, UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE,
Defendants-Appellants

OMAN FASTENERS, LLC, HUTTIG BUILDING PRODUCTS, INC., HUTTIG, INC.,
Plaintiffs-Appellees

v.

UNITED STATES, JOSEPH R. BIDEN, JR., President of the United States, UNITED STATES CUSTOMS AND BORDER PROTECTION, CHRISTOPHER MAGNUS, Commissioner of U.S. Customs and Border Protection, DEPARTMENT OF COMMERCE, GINA M. RAIMONDO, Secretary of Commerce,
Defendants-Appellants

Appeals from the United States Court of International Trade in Nos. 1:20-cv-00032-TCS-JCG-MMB and 1:20-cv-00037-TCS-JCG-MMB, Chief Judge Timothy C. Stanceu, Judge Jennifer Choe-Groves, and Judge M. Miller Baker.

CORRECTED BRIEF OF THE AMERICAN STEEL NAIL COALITION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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Dated: February 1, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-2066; 21-2252

Short Case Caption PrimeSource Building Products, Inc. et al., v. United States

Filing Party/Entity The American Steel Nail Coalition

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 02/01/2022

Signature: /s/ Adam H. Gordon

Name: Adam H. Gordon

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
The American Steel Nail Coalition	Mid Continent Steel & Wire, Inc.	
	KYOCERA SENCO Industrial Tools, Inc.	
	Tree Island Wire (USA) Inc.	
	Specialty Nail Company	
	American Fasteners Co., Ltd.	
	The Pneufast Co.	
	Maze Nails	
	MAR-MAC Industries, Inc.	
	Anvil Acquisition Corp.	
	Legacy Fasteners, LLC	

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

Nine cases pending before the United States Court of International Trade (the "Trade Court") will be indirectly affected by the Court's decision in this appeal: *Astrotech Steels Private Ltd. v. United States*, CIT Ct. No. 20-00046; *Trinity Steel Private Ltd. v. United States*, CIT Ct. No. 20-00047; *New Supplies Co., Inc., et al., v. United States*, CIT Ct. No. 20-00048; *Aslanbas Nail & Wire Co., et al., v. United States*, CIT Ct. No. 20-00049; *J Conrad Ltd. v. United States*, CIT Ct. No. 20-00052; *Metropolitan Staple Corp. v. United States*, CIT Ct. No. 20-00053; *SouthernCarlson, Inc., et al., v. United States*, CIT Ct. No. 20-00056; *Tempo Global Resources, LLC v. United States*, CIT Ct. No. 20-00066; and *Farrier Product Distribution, Inc. v. United States*, CIT Ct. No. 20-00098. Like the instant appeal, these nine cases challenge the validity of Proclamation 9980. Further, all nine cases before the Trade Court are stayed pending appeal of cases currently before the Court. Specifically, in seven of the nine cases, the Trade Court has granted motions to stay pending appeal of the instant case, and in two of the nine cases, has granted motions to stay pending appeal of *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), *reh'g and reh'g en banc*

denied (Fed. Cir. 2021), *petition for cert. filed*, (U.S. Nov. 16, 2021) (No. 21-721). If, in the instant appeal, the Court rules in favor of Defendants-Appellants and upholds Proclamation 9980 as a lawful exercise of presidential authority, these nines cases may be rendered moot.

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

Amicus curiae the American Steel Nail Coalition (the "Coalition"[1]) files this brief in support of Defendants-Appellants the United States, *et al.* (the "Government"), requesting that the decision of the Trade Court to invalidate Proclamation 9980 be reversed.

The Coalition — which represents the vast majority of the U.S. steel nail industry — is composed of American producers that employ hundreds of workers in some of the most economically sensitive regions of the United States. Various types of steel nails are among the derivative products covered by Proclamation 9980. The Coalition was formed specifically to represent the interests of its members with respect to the claims involving the validity and purpose of Proclamation 9980.

[1] The members of the Coalition are: Mid Continent Steel & Wire, Inc.; KYOCERA SENCO Industrial Tools, Inc.; Tree Island Wire (USA) Inc.; Specialty Nail Company; Legacy Fasteners, LLC; American Fasteners Co., Ltd.; The Pneufast Co.; Maze Nails; MAR-MAC Industries, Inc.; and Anvil Acquisition Corp.

The Coalition and its respective members have a substantial interest in the President's ability to ensure the effectiveness of Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 ("Section 232"), particularly when relief is undermined or stymied by circumvention. Over the last 45 years and continuing today, members of the Coalition have made concerted and consistent efforts to defend their industry from repeated surges of unfairly-traded imports, and to ensure that U.S. trade laws are enforced by preventing circumvention of antidumping and countervailing duty orders. Enforcement of U.S. trade laws is vital to the Coalition, as demonstrated by actions taken and significant resources expended by its members to combat unfair trade. Indeed, the history of efforts by the U.S. steel nails industry to defend itself from unfairly-traded imports reflects highly analogous behaviors to the circumvention addressed by Proclamation 9980.

The U.S. steel nails industry has been forced to defend itself from unfairly-traded imports for over 45 years, seeking relief as long ago as 1977. Since 2007, members of the Coalition have been forced to file multiple trade cases in response to surges of imports prompted by foreign producers and importers shifting production to circumvent intended relief. Three sets of cases have resulted in eight AD and CVD orders on seven countries. *See* Steel Nails from Korea, Malaysia, Oman, Taiwan, and Vietnam, Inv. Nos. 701-TA-521 and 731-TA-1252-1255 and

1257, USITC Pub. 5200 (May 2021) (Review), at I-14. Each time an order was imposed, foreign producers and importers shifted production away from the subject countries in an effort to circumvent the remedial relief intended. Indeed, as recently as December 29, 2021, the industry filed yet another set of trade cases in an effort to curb injurious imports from new sources. *See* https://usitc.gov/investigations/701731/2020/steel_nails_india_oman_sri_lanka_thailand_and/preliminary.htm.

The history of trade-related litigation concerning imports of steel nails paints a clear picture of behavior by importers to circumvent measures taken by the U.S. government intended to protect U.S. manufacturing and workers, and to ensure that the industry is able to operate at healthy levels of capacity utilization and earn a reasonable return. The need of the industry to repeatedly file trade cases in response to actions by foreign producers and importers to circumvent the intended relief of existing AD and CVD orders is directly analogous to the imposition of Proclamation 9980 in the face of, and to curb, circumvention of Proclamations 9704 and 9705. The behavior that led the President to issue Proclamation 9980 did not occur in a vacuum, but was part and parcel of the long-standing pattern of behavior by foreign producers and importers seeking to avoid lawfully-imposed relief intended to assist U.S. industries. Therefore, with respect to Section 232

specifically, the Coalition is uniquely positioned to provide industry-specific insight regarding the impacts of the tariffs that are the subject of this appeal.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this case authored any part of this brief, and that no person other than the Coalition contributed funding for the preparation or submission of this brief.

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Rule 29 of the Rules of the United States Court of Appeals for the Federal Circuit, this brief is submitted pursuant to the Coalition's contemporaneous motion for leave to appear as *amicus curiae* in this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal involves presidential authority to protect national security and to ensure the effectiveness of Section 232.

Before the Trade Court, Plaintiffs-Appellees PrimeSource Building Products, Inc. ("PrimeSource"), Oman Fasteners, LLC ("Oman Fasteners"), and Huttig Building Products, Inc./Huttig, Inc. ("Huttig") challenged Proclamation 9980 as unconstitutional and in violation of Section 232.[2] The Trade Court denied

[2] PrimeSource is an importer and distributor of derivative steel products subject to Proclamation 9980. Oman Fasteners is a foreign manufacturer and importer of derivative steel products subject to Proclamation 9980. Huttig is an importer of derivative steel products subject to Proclamation 9980.

all but one claim, finding that Proclamation 9980 violated Section 232's timeline requirement. The Court should reverse the Trade Court's decision and find that Proclamation 9980 is a lawful exercise of presidential authority.

First, as intended, Proclamation 9980 has had a positive impact on the domestic steel nails industry, and thus, on American steel production and capacity utilization generally. After Proclamation 9980 took effect, imports of steel derivatives into the United States have decreased, with 2020 import volumes 16 percent below 2019 volumes, thereby achieving Proclamation 9980's purpose of addressing circumvention of Proclamations 9704 and 9705. While import volumes in 2021 are on track to increase materially, they will likely remain below 2019 levels.

The experience of members of the Coalition also reflects Proclamation 9980's success. Since issuance of Proclamation 9980, members of the Coalition have experienced much needed relief due to overall reductions in import volumes, particularly from 2019 to 2020.

Second, recent precedent of the Court rejects the central legal basis of the Trade Court's decision to invalidate Proclamation 9980. Plaintiffs-Appellees' claims focus on the President's authority to announce a continuing course of action within the statutory time period (here, through two earlier proclamations imposing Section 232 tariffs on certain aluminum and steel products), and then to modify the

initial steps by adding restrictions on imports to achieve the stated objective. This issue has now been resolved by *Transpacific*, where the Court held that the President did not violate Section 232 when issuing a proclamation beyond the 105-day timeframe for the initial action set forth by the statute.

Third, Proclamation 9980 is not subject to judicial review because Section 232 commits actions to prevent threats to national security, including circumvention of such actions, to the discretion of the President. Even if Proclamation 9980 is judicially reviewable, it is a manifestation of the core constitutional and statutory authorities and duties of the President as a necessary enforcement measure to prevent circumvention of duties and undermining of national security interests sought to be protected by Proclamations 9704 and 9705.

For these reasons, the Court should reverse the Trade Court's decision, and find that the President did not violate Section 232 in issuing Proclamation 9980.

BACKGROUND

I. STATUTORY FRAMEWORK

If the Secretary of Commerce (the "Secretary") determines that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President may take actions that, "in the judgment of the President," will "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).

The Secretary must, on request or upon his or her own initiative, commence an "investigation to determine the effects on the national security of imports of {an} article." *Id.* at § 1862(b)(1)(A). Following this investigation, the Secretary will provide to the President "a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security," and "recommendations . . . for {presidential} action or inaction." *Id*. at § 1862(b)(3)(A). The statute also requires the Secretary to consult with the Secretary of Defense and other appropriate U.S. officials. *See id.* at § 1862(b)(2)(A).

Within 90 days after receiving a report finding that an article is being imported in such quantities or under such circumstances as to threaten to impair national security, Section 232 authorizes the President to (1) "determine whether the President concurs with the finding of the Secretary," and (2) "if the President concurs, 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*. at § 1862(c)(1)(A). If the President decides to take action, he or she must implement that response within 15 days. *See id*. at § 1862(c)(1)(B).

Section 232(d) identifies a non-exclusive list of factors that the Secretary and the President must consider in making the findings and determinations described above. These considerations include the "domestic production needed for projected national defense requirements," "the capacity of domestic industries to meet such {national defense} requirements," and "the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth." *Id.* at § 1862(d).

Section 232(d) also requires the Secretary and the President to recognize "the close relation of the economic welfare of the Nation to our national security," and to consider "the impact of foreign competition on the economic welfare of individual domestic industries," and "any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports" as well as whether "weakening of our internal economy may impair the national security." *Id*.

II. PROCLAMATION 9704 AND PROCLAMATION 9705

On April 19, 2017, the Secretary initiated a Section 232 investigation to determine the effect of steel imports on national security, and notified the Secretary of Defense. *See generally* U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, The Effect of Imports of Steel on the Nat'l Security

(Jan. 11, 2018). The Department of Defense responded to the Secretary's request on May 8, 2017. *See id.* at 18 & App. A. The Secretary issued his report and recommendation to the President on January 11, 2018. *See id.* at 18.

In March 2018, the President issued Proclamation 9704 and Proclamation 9705, imposing Section 232 tariffs of 10 percent and 25 percent on certain aluminum and steel products, respectively. *See Proclamation 9704 of March 8, 2018, Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Mar. 15, 2018); *Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018). The Proclamations noted the President's review of the Secretary's findings and recommendations, as well as the Secretary's conclusion that certain identified risks "threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended." 83 Fed. Reg. at 11,619; 83 Fed. Reg. at 11,625. The President concurred with the Secretary's findings. 83 Fed. Reg. at 11,619; 83 Fed. Reg. at 11,626.

The President directed the Secretary to continue to monitor imports of aluminum and steel articles and to review the status of such imports with respect to national security. *See* 83 Fed. Reg. at 11,621–22; 83 Fed. Reg. at 11,628. Further, the President instructed the Secretary to inform him of any circumstances "that in the Secretary's opinion might indicate the need for further action by the President

under Section 232," or of any circumstance "that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary." *Id.*

III. PROCLAMATION 9980

On January 24, 2020, the President issued Proclamation 9980 "to address circumvention that is undermining the effectiveness of the adjustment of imports made in Proclamation 9704 and Proclamation 9705, as amended, and to remove the threatened impairment of the national security of the United States found in those proclamations." *Proclamation 9980 of January 24, 2020, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281, 5,283 (Jan. 24, 2020).

Proclamation 9980 states that the Secretary informed the President of a significant increase of imports of certain derivatives of aluminum articles and certain derivatives of steel articles since the imposition of the tariffs and quotas. *See id.* at 5,281–82. The increase of imports of such products "erode{s} the customer base for U.S. producers of aluminum and steel and undermine{s} the purpose of the proclamations adjusting imports of aluminum and steel articles to remove the threatened impairment of the national security." *Id.* at 5,282.

Proclamation 9980 analyzes three criteria to determine whether an article should be considered "derivative" and thus covered by the duties: (a) the

aluminum article or steel article represents, on average, two-thirds or more of the total cost of materials of the derivative article; (b) import volumes of such derivative article increased year-to-year since June 1, 2018, compared to import volumes of such derivative article during the two preceding years; and (c) import volumes of such derivative article following the imposition of the tariffs exceeded the four percent average increase in the total volume of goods imported into the United States during the same period since June 1, 2018. *See id.* These criteria have not been challenged.

Evaluating these criteria using official U.S. import data, the Secretary determined that imports of certain aluminum and steel derivatives had increased dramatically since the issuance of Proclamations 9704 and 9705. The Secretary assessed that the increase of imports was the result of efforts by foreign producers to "increase{} shipments of such articles to the United States to circumvent the duties on aluminum articles and steel articles imposed in Proclamation 9704 and Proclamation 9705." *Id.* The Secretary further determined that imports of these derivatives "threaten to undermine the actions taken to address the risk to the national security of the United States found in Proclamation 9704 and Proclamation 9705." *Id.*

The Secretary concluded that reduction of imports of these derivative products "would reduce circumvention and facilitate the adjustment of imports that

Proclamation 9704 and Proclamation 9705, as amended, made to increase domestic capacity utilization to address the threatened impairment of the national security of the United States." *Id.* Based on this, the President issued Proclamation 9980 as "necessary and appropriate in light of our national security interests to adjust the tariffs imposed by previous proclamations." *Id.* at 5,283.

IV. PROCEDURAL POSTURE

On February 4, 7, and 18, 2020, Plaintiffs-Appellees commenced actions before the Trade Court seeking a declaratory judgment that Proclamation 9980 was unlawful, and an injunction to prevent its enforcement. *See PrimeSource Bldg. Prods., Inc. v. United States*, CIT Ct. No. 20-00032 ("*PrimeSource*"), ECF Nos. 1, 9; *Oman Fasteners, LLC v. United States*, CIT Ct. No. 20-00037 ("*Oman Fasteners*"), ECF Nos. 1, 2; *Huttig Building Products, Inc., et al. v. United States*, CIT Ct. No. 20-00045 ("*Huttig*"), ECF Nos. 1, 5.[3]

On February 13, February 21, and March 4, 2020, the Trade Court granted consent motions enjoining U.S. Customs and Border Protection ("CBP") from collecting duties ordered by Proclamation 9980 on imports by PrimeSource, Oman Fasteners, and Huttig, respectively. *See PrimeSource* at ECF No. 40; *Oman Fasteners* at ECF No. 35; *Huttig* at ECF No. 30.

[3] On March 16, 2020, the Trade Court consolidated the *Oman Fasteners* and *Huttig* cases. *See Oman Fasteners* at ECF No. 54; *Huttig* at ECF No. 34.

On January 27, 2021, a divided three-judge panel of the Trade Court dismissed all of PrimeSource's claims except for one count regarding the timeliness of Proclamation 9980, and denied PrimeSource's Motion for Summary Judgment as it related to that remaining claim. *See PrimeSource Bldg. Prods., Inc. v. United States*, 497 F. Supp. 3d 1333, 1361 (Ct. Int'l Trade 2021) ("*PrimeSource I*"). The Trade Court ordered the parties to consult regarding any factual information demonstrating that the timeline requirements of Section 232 had been met (*e.g.*, communications from the Secretary not presented to the Trade Court), and to submit a schedule governing the remainder of the litigation. *See id.*

Judge M. Miller Baker dissented as to the remaining claim, stating that all claims against the President should be dismissed for lack of jurisdiction, and that the President has the authority to take steps — such as the issuance of Proclamation 9980 — in response to developments following the initial imposition of a remedy in a Section 232 investigation. *See id.* at 1365–66, 1373.

On March 5, 2021, the parties submitted a joint status report, whereby the Government, maintaining that the procedural requirements of Section 232 had been met, declined to provide additional information, and stated that there was no reason for the Trade Court to delay final entry of judgment. *See PrimeSource* at ECF No. 108; *see also Oman Fasteners* at ECF 105 (providing the same joint status report).

On April 5, 2021, a divided three-judge panel of the Trade Court granted summary judgment in favor of PrimeSource as to the remaining claim. *PrimeSource Bldg. Prods., Inc. v. United States*, 505 F. Supp. 3d 1352, 1357 (Ct. Int'l Trade 2021) ("*PrimeSource II*"). The Trade Court declared Proclamation 9980 invalid, directing that affected entries be liquidated without assessment of Proclamation 9980 duties, entries that had been liquidated with the Proclamation 9980 duties be reliquidated, and any duties paid or deposited be refunded (with interest as provided by law). *See id.* at 1357–58. Judge Baker dissented for the same reasons provided in his January 27, 2021, opinion. *See id.* at 1353 n.1.

On June 10, 2021, the same (divided) three-judge panel of the Trade Court issued an analogous decision in *Oman Fasteners*, relying on reasoning identical to that in *PrimeSource II*. *See Oman Fasteners, LLC v. United States*, 520 F. Supp. 3d 1332 (Ct. Int'l Trade 2021).

On June 4, 2021, the Government appealed *PrimeSource II*. *See PrimeSource* at ECF No. 112. On June 9, 2021, the Government filed a motion to (1) stay liquidation of PrimeSource's entries without assessment of Section 232 duties, (2) reinstate suspension of liquidation of PrimeSource's imports of subject merchandise, and (3) reinstate the requirement that PrimeSource monitor its imports that are covered by Proclamation 9980, and to maintain a sufficient continuous entry bond. *See id.* at ECF No. 114. On June 25, 2021, PrimeSource

filed its opposition to the motion to stay. *See id.* at ECF No. 116. On August 2, 2021, the Trade Court granted the Government's motion, finding all four criteria for a stay had been met. *See id.* at ECF No. 118.

On August 7, 2021, the Government filed a notice of an appeal of *Oman Fasteners*. *See Oman Fasteners* at ECF No. 110. On August 9, 2021, the Government filed a motion to stay pending appeal, citing the same reasons provided in the motion to stay pending appeal of *PrimeSource II*. *See id.* at ECF No. 114. On August 30, 2021, Oman Fasteners filed an opposition to the motion to stay. *See id.* at ECF No. 116. On October 15, 2021, the Trade Court granted the Government's motion finding all four criteria for a stay had been met. *See id.* at ECF No. 120.

ARGUMENT

I. PROCLAMATION 9980 HAS GENERATED IMPORTANT AND INTENDED BENEFITS FOR THE U.S. STEEL AND STEEL DERIVATIVES INDUSTRIES

Proclamation 9980 seeks to decrease imports of steel derivative articles in order to reduce circumvention and facilitate the adjustment of imports under Proclamation 9704 and Proclamation 9705, thereby "increas{ing} domestic capacity utilization to address the threatened impairment of the national security of the United States." 85 Fed. Reg. at 5,282. Proclamation 9980 represents a measured approach to achieving that purpose. Indeed, Proclamation 9980 has

curtailed imports of subject merchandise into the United States and has provided certain benefits for the domestic steel nail industry, as intended.

As the Secretary determined, imports of certain steel nails, tacks, drawing pins, corrugated nails, staples, and similar derivative articles experienced a dramatic increase since the issuance of Proclamation 9705: 33 percent from June 2018 to May 2019, as compared to June 2017 to May 2018; 29 percent, as compared to June 2016 to May 2017; and 23 percent from January 2019 to November 2019, as compared to the same period in 2017. *See id.* at 5,282. Import volumes of bumper and body stampings of aluminum and steel for motor vehicles and tractors increased by 38 percent from June 2018 to May 2019 as compared to June 2017 to May 2018, by 56 percent as compared to June 2016 to May 2017, and by 37 percent from January 2019 to November 2019 as compared to the same period in 2017. *See id.* This surge of imports into the United States — which the Secretary found to be the result of efforts by foreign producers to circumvent duties on steel articles imposed in Proclamation 9705 (*see id.*) — had detrimental effects on the economic performance of members of the Coalition.

Since the implementation of Proclamation 9980, imports of steel nails, tacks, drawing pins, corrugated nails, staples, and similar derivative articles decreased by 9 percent from the 21-month comparison period of February 2020 to October 2021

as compared to the prior 21-month period of May 2018 to January 2020.[4] Imports of bumper and body stampings of aluminum and steel for motor vehicles and tractors decreased by 27 percent during the same comparison period.[5]

Notably, these reductions undoubtedly are not as significant as they should be, due to consent agreements at the Trade Court that have allowed three of the largest importers of steel nails — PrimeSource, Oman Fasteners, and Huttig — to avoid paying the Section 232 duties and instead to merely secure their potential duty liabilities using continuous entry bonds. *See PrimeSource* at ECF No. 40; *Oman Fasteners* at ECF No. 35; *Huttig* at ECF No. 30.

Indeed, the Government recently acknowledged the detrimental effect these agreements have had on Proclamation 9980. In a declaration from CBP's Acting Executive Director for Trade Policy and Programs, attached to its motion to stay judgment pending appeal before the Trade Court, CBP states that "PrimeSource continues to import substantial volumes of subject imports," and that "the United States stands to lose potentially millions of dollars in lawful revenue should the

[4] Calculated from compiled official U.S. import statistics using HTSUS reporting numbers 7317.00.3000, 7317.00.5503, 7317.00.5505, 7317.00.5507, 7317.00.5560, 7317.00.5580, and 7317.00.6560, as cited in Annex II(A) and (B) of Proclamation 9980, accessed December 8, 2021.

[5] Calculated from compiled official U.S. import statistics using HTSUS reporting numbers 8708.10.3010, 8708.10.3020, 8708.10.3030, 8708.10.3040, 8708.10.3050, 8708.29.2100, 8708.29.2120, 8708.29.2130, and 8708.29.2140, as cited in Annex II(C) and (D) of Proclamation 9980, accessed December 8, 2021.

Government ultimately prevail in this action." *PrimeSource* at ECF No. 114-1; *see also Oman Fasteners* at ECF No. 112-2 at 6, 8 (stating the same as to Oman Fasteners and Huttig). Even though Proclamation 9980 has been undermined by these consent orders, official data show that imports of certain derivative steel articles identified by Proclamation 9980 have decreased significantly during the comparison period.

Moreover, the imposition of Section 232 duties on steel derivative products has had important (and intended) economic benefits for Coalition members. Since Proclamation 9980 went into effect, Coalition members have experienced much needed relief due to overall reductions in import volumes, particularly from 2019 to 2020.. As Coalition members purchase steel wire rod and wire— the main raw materials for their steel derivative products — from U.S. steel producers, the resulting improved conditions have led to increased purchases of American basic steel products. *See, e.g.*, *PrimeSource* at ECF No. 67 at Ex. 1 (Declarations from Coalition members); *Oman Fasteners* at ECF No. 64 at Ex. 1 (same). In other words, these improvements demonstrate that Proclamation 9980 is working.

These effects will be eliminated, however, if the Court invalidates Proclamation 9980. Consequently, the Coalition will suffer immediate and irreparable harm in the form of lost sales and cancelled orders, which in turn will result in reductions in employment, as workers hired in response to the intended

effects of Proclamation 9980 will be terminated. This also will cause Coalition members to reduce purchases of basic steel products made in response to the significant increase in demand following the issuance of Proclamation 9980.

In sum, Proclamation 9980 has had measurable positive effects for the members of the Coalition, which in turn facilitates the goals of Proclamations 9704 and 9705. In fact, official U.S. import data and the experience of the domestic steel nails industry demonstrate that Proclamation 9980 has worked, notwithstanding the ability of large importers to continue importing without paying the duties.

II. RECENT PRECEDENT REJECTS THE PRINCIPAL LEGAL BASIS OF THE TRADE COURT'S DECISION TO INVALIDATE PROCLAMATION 9980

The Court's decision in *Transpacific* rejects the central legal predicate of the Trade Court's decision to invalidate Proclamation 9980, *i.e.*, that the text of Section 232 limits the President's ability to take actions only within the 105-day timeframe.

A. Proclamation 9772, Which Was Issued Outside of the 105-Day Statutory Timeframe, Does Not Violate Section 232

On July 13, 2021, the Court issued a decision in the appeal of the Section 232 tariff increase from 25 percent to 50 percent on Turkish steel under Proclamation 9772. *See generally Transpacific*, 4 F.4th 1306. The Court reversed the Trade Court, holding that: (1) "the President did not violate § 1862 in issuing

Proclamation 9772," which was issued beyond the 105-day timeframe for (initial) action set out in the statute; and (2) the President did not "violate Transpacific's equal-protection rights in issuing Proclamation 9772." *Id.* at 1310.

Specifically, the Court found that the text of Section 232, "understood in context and in light of the evident purpose of the statute and the history of predecessor enactments and their implementation," includes authority for the President "to adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time." *Id.* at 1319. In other words, as long as the subsequent Section 232 import restrictions continue to support the original purpose of Proclamation 9705, the President has the authority to increase (or decrease) those restrictions outside of the 105-day timeframe. Further, the Court stated that the 1988 amendments, whereby the 105-day timeframe was added to Section 232, demonstrated Congress' intent to "spur," and not limit, the President's authority to take action. *Id.* at 1320.

Of course, such presidential authority is not unlimited; modifications to a course of action under Section 232 cannot be "too stale," and must relate to the underlying reasons for implementing the tariffs in the first place. *Id.* at 1323. The Court declined to define these limits or "staleness" in terms of such actions. Instead, staleness should be evaluated on a case-by-case basis. *See id.* at 1332.

The Court also reversed the Trade Court's decision that the increase in tariffs amounted to an equal protection violation, holding that the policy behind Proclamation 9772 was "'plausibly related to the Government's stated objective to protect' national security." *Id.* at 1333 (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018)).

B. Like Proclamation 9772, Proclamation 9980's Issuance Outside of the 105-Day Statutory Period Does Not Render It Unlawful

The Trade Court invalidated Proclamation 9980 on the basis that it was issued after the time allowed by law for the President to take action. *See PrimeSource II*, 505 F. Supp. 3d at 1357; *Oman Fasteners, LLC*, 520 F. Supp. 3d at 1338–39. That basis is legally invalid in light of the Court's recent decision in *Transpacific*.[6]

As the Court recognized in *Transpacific*, Section 232 includes authority for the President "to adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time." *Transpacific*, 4 F.4th at 1319 (emphasis added). Indeed, Section

[6] Of note, in support of its decision in *Transpacific*, the Court referenced the dissenting opinion of Judge Baker in *PrimeSource I*, which found that the President has the authority to take steps — such as the issuance of Proclamation 9980 — in response to developments following the initial imposition of a remedy in a Section 232 investigation. *See, e.g.*, *Transpacific*, 4 F.4th at 1328–29 (citing *PrimeSource I*, 497 F. Supp. 3d at 1375–76, 1378, 1386–88 (Baker, J. concurring in part and dissenting in part)).

232, Proclamation 9704, and Proclamation 9705 explicitly authorize the President to "adjust the imports of an article and its derivatives that are 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) (emphases added); 83 Fed. Reg. at 11,619 (emphases added); 83 Fed. Reg. at 11,626 (emphases added).

Here, Proclamation 9980 does just that, by modifying Proclamation 9704 and Proclamation 9705 to include certain derivative articles — as specifically defined by Commerce — in order to "carry out the plan" implemented by Proclamation 9704 and Proclamation 9705 in 2018. *See generally* 85 Fed. Reg. 5,281.

Additionally, the circumstances leading to Proclamation 9980 support a determination that the two-year period between the issuance of Proclamations 9704 and 9705 and Proclamation 9980 does not render Commerce's initial findings stale. In determining that Proclamation 9772 (issued several months after the initial Proclamation 9705) was not based on stale information, the Court stated that the "initial announcement . . . itself provided for just such a possible change in the future, and rested on a determination by the Secretary — about needed domestic-plant capacity utilization — as to which no substantial case of staleness has been made." *Transpacific*, 4 F.4th at 1332 (emphasis added).

Proclamation 9980 similarly references capacity utilization concerns, stating that "domestic steel producers' capacity utilization has not stabilized for an extended period of time at or above the 80 percent capacity utilization level identified in {the Secretary's} report as necessary to remove the threatened impairment of the national security." 85 Fed. Reg. at 5,281–82. Thus, the rationale on which Proclamation 9980 rests reflects the same reasoning discussed in Commerce's initial findings.

Moreover, Proclamation 9980 includes language that sufficiently links its purpose to those of Proclamation 9704 and Proclamation 9705. In particular, Proclamation 9980 states that foreign producers of the included derivative articles have increased shipments to the United States "to circumvent the duties on aluminum articles and steel articles imposed in Proclamation 9704 and Proclamation 9705," and thereby "threaten to undermine the actions taken to address the risk to the national security of the United States found in Proclamation 9704 and Proclamation 9705." *Id.* at 5,283. This language demonstrates that the reasoning underlying Proclamation 9980 relies on the rationale and concerns underlying Proclamation 9704 and Proclamation 9705.

Further, the Trade Court itself has recognized the likely impact of the *Transpacific* decision on the instant appeal. In a recent order granting the

Government's motion to stay judgment pending appeal, the Trade Court found that:

> {a} recent decision by the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Transpacific Steel LLC v. United States*, No. 2020-2157, 2021 WL 2932512 (Fed. Cir. 2021) ("*Transpacific II*") causes us to conclude that defendants have made a sufficiently strong showing that they will succeed on the merits on appeal, so as to satisfy the first factor in our analysis.

PrimeSource Bldg. Prods., Inc. v. United States, Ct. No. 20-00032, 2021 WL 3293567, at *4 (Ct. Int'l Trade Aug. 2, 2021). In particular, the Trade Court stated that "the discussion in *Transpacific II* of the 'continuing' nature of Presidential Section 232 authority is expressed in broad terms," and that, accordingly, "defendants have made a sufficiently strong showing that they will succeed on the merits on appeal" to satisfy that requirement for a stay pending appeal. *Id.* at *2.

In sum, as the Court has recently determined, Section 232 does not limit the President's ability to take actions only within the 105-day timeframe. Therefore, Plaintiffs-Appellees' challenge to Proclamation 9980 on this basis has no merit. Accordingly, the Trade Court's decision should be reversed.

III. PROCLAMATION 9980 IS NOT SUBJECT TO JUDICIAL REVIEW AND DOES NOT VIOLATE SECTION 232

Plaintiffs-Appellees' challenge of Proclamation 9980 fails for at least two other reasons: (1) judicial review of presidential action is unavailable when the statute in question commits the action to the discretion of the President; and

(2) even if such action is judicially reviewable, Proclamation 9980 is a manifestation of the core functions of the President as a necessary enforcement measure to prevent the circumvention of duties imposed by Proclamation 9704 and Proclamation 9705, and the undermining of important national security interests those proclamations seek to protect.

A. Judicial Review of Presidential Action Is Unavailable When the Statute Commits the Decision to the Discretion of the President

"{T}here are limited circumstances when a presidential action may be set aside if the President acts beyond his statutory authority, but such relief is only rarely available." *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) (internal citations omitted). Moreover, "longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President." *Dalton v. Specter*, 511 U.S. 462, 474 (1994). Indeed, courts have repeatedly refused to review presidential determinations made under the purview of various statutes. *See, e.g.*, *United States v. George S. Bush & Co*., 310 U.S. 371, 379–80 (1940); *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (en banc); *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 87–90 (Fed. Cir. 1985).

Here, Section 232 authorizes 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 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). This language "seems clearly to grant {the President} a measure of discretion in determining the method to be used to adjust imports." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 528, 561 (1978). Such discretion is not subject to judicial review.

Moreover, as discussed above, the President did not act outside the bounds of his statutory authority under Section 232 by issuing Proclamation 9980 after the 105-day timeframe for initial action had elapsed. *See supra* at 20–21 (discussing *Transpacific*, 4 F.4th at 1310, 1319–20). Thus, the "limited circumstances" where the Court may set aside presidential action taken beyond his statutory authority do not exist here. *Silfab Solar, Inc.*, 892 F.3d at 1346 (internal citations omitted).[7]

For these reasons, Proclamation 9980 is not subject to judicial review.

B. Proclamation 9980 Falls Within Broad Presidential Discretion and Enforcement Authority Concerning National Security

Putting aside the availability of judicial review, Proclamation 9980 does not violate Section 232. To the contrary, Proclamation 9980 constitutes a decisive

[7] In the proceedings before the Trade Court, Judge Baker noted that courts "cannot grant injunctive relief against the President in the performance of his official duties," and that the Trade Court cannot "issue even declaratory relief against the President." *PrimeSource I*, 497 F. Supp. at 1368–69 (Baker, J., concurring in part and dissenting in part). In light of this, Judge Baker opined that all claims against the President should be dismissed for lack of jurisdiction. *See id.* As the Court noted, this jurisdictional issue was not raised in *Transpacific*, and hence was not addressed. *See Transpacific*, 4 F.4th at 1318 n.5.

action to enforce Proclamations 9704 and 9705, which reflects the constitutional and statutory authority (and duty) of the President.

The Court should not limit its review of Proclamation 9980 to the statutory authority granted pursuant to 19 U.S.C. § 1862. In fact, Proclamation 9980 itself cites multiple bases of authority for the action that was taken:

> NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows. . . .

85 Fed. Reg. at 5,283 (emphasis added). Therefore, the Constitutional bases for the President's authority to act in this circumstance should be considered.

It has been long recognized it is "essential" for the President to have "broad discretion" to make determinations regarding national security. *Kaplan v. Conyers*, 733 F.3d 1148, 1155 (Fed. Cir. 2013) (citing *Dep't of Navy v. Egan*, 484 U.S. 518 (1988)). Part of the rationale behind granting the President such authority relates to the structural advantages of the Executive Branch, which affords the President flexibility to quickly "respond to changing world conditions" such as those that implicate national security interests. *Hawaii*, 138 S. Ct. at 2419–20 (internal quotation marks and citation omitted).

For this reason, among others, "courts have shown deference to what the Executive Branch 'has determined . . . is essential to national security.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Winters v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 26 (2008) (internal quotation mark omitted)). In fact, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530 (internal citations omitted); *see also Hawaii*, 138 S. Ct. at 2419–20 ("'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained") (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)); *Kaplan*, 733 F.3d at 1155 ("The Court has consistently articulated that matters touching upon foreign policy and national security fall within an area of presidential action in which courts have long been hesitant to intrude absent congressional authorization") (internal quotation marks and citations omitted).

Furthermore, it has been clearly established that the role of the executive is to enforce the law. *See Springer v. Gov. of Philippine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."). This responsibility is

derived from the "Take Care Clause" of the Constitution, which requires that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; *see also, e.g.*, *Hillcrest Prop. LLP v. Pasco Cnty.*, 915 F.3d 1292, 1302 (11th Cir. 2019) (citing the Constitution as the basis of the role of the President "to apply, or to enforce, statutes") (internal citations omitted); *K & R Ltd. P'ship v. Massachusetts*, 154 F. Supp. 2d 19, 25 (D.D.C. 2001) ("Art. II, § 3 . . . entrusts the power to enforce the laws of the United States in the hands of the Executive Branch.") (internal citations omitted).

Proclamation 9980 reflects these functions by eliminating a threat to national security through actions to ensure the efficacy of Proclamation 9704 and Proclamation 9705. Proclamation 9980 states, in relevant part:

> It is the Secretary's assessment that foreign producers of these derivative articles have increased shipments of such articles to the United States to circumvent the duties on aluminum articles and steel articles imposed in Proclamation 9704 and Proclamation 9705, and that imports of these derivative articles threaten to undermine the actions taken to address the risk to the national security of the United States found in Proclamation 9704 and Proclamation 9705.

85 Fed. Reg. at 5,282. In short, as Proclamation 9980 explicitly states, circumvention has undermined and impeded the actions taken through Proclamations 9704 and 9705, and hence, important national security interests.

Moreover, in addition to the President's authority "to adopt and carry out a plan of action that allows for adjustments of specific measures," as discussed in *Transpacific*, 4 F.4th at 1319, acting to address and prevent circumvention falls squarely within the President's well-established enforcement authority. Indeed, in the context of antidumping and countervailing duty determinations, the Department of Commerce (an executive agency) "has a certain amount of discretion {to act} . . . with the purpose in mind of preventing the intentional evasion of circumvention of the antidumping duty law." *Mitsubishi Elec. Corp. v. United States*, 1700 F. Supp. 538, 555 (Ct. Int'l Trade 1988), *aff'd*, 898 F.2d 1577 (Fed. Cir. 1990); *see also Tung Mung Dev. Co. v. United States*, 219 F. Supp. 2d 1333, 1343 (Ct. Int'l Trade 2002), *aff'd*, 354 F.3d 1371 (Fed. Cir. 2004) (same); *Hontex Enters. Inc. v. United States*, 248 F. Supp. 2d 1323, 1342 (Ct. Int'l Trade 2003) (finding that the Department of Commerce has the "responsibility to prevent circumvention of the antidumping law.") (internal citations and quotation marks omitted).

In sum, in the context of Proclamation 9980, the President has — and must have — the ability to act to protect the integrity and effectiveness of its actions to protect national security. Of all matters vested to presidential discretion, safeguarding national security must rank among the highest. To hold that the President lacks the ability to defend prior presidential actions taken to protect our

Nation's security — here in the form of properly issued Proclamations — would significantly undermine Section 232 and threaten to emasculate the President's ability to carry out the letter and spirit of the law when foreign producers circumvent and evade measures imposed to protect vital national security interests.

CONCLUSION

For the reasons discussed above, the Coalition respectfully submits that this Court should reverse the Trade Court's decision, and uphold Proclamation 9980 as a lawful exercise of presidential authority.

Respectfully submitted,

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Dated: February 1, 2022

FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 21-2066; 21-2252

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2022, a copy of the foregoing brief was served on the following parties via the Court's CM/ECF system:

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