Nos. 2021-2066 & 2021-2252

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 case nos. 20-00032, 20-00037, and 20-00045, Senior Judge Timothy C. Stanceu & Judge Jennifer Choe Groves (for the majority), and Judge M. Miller Baker (in dissent)

(CORRECTED) BRIEF OF OMAN FASTENERS, LLC, HUTTIG BUILDING PRODUCTS, INC., AND HUTTIG, INC.

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April 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-2066

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

Filing Party/Entity Oman Fasteners, LLC, Huttig Building Products, Inc. and Huttig, Inc.

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: 04/29/2022

Signature: /s Andrew Caridas

Name: Andrew Caridas

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
Oman Fasteners, LLC		Guerrero International LLC
Huttig Building Products, Inc.		None
Huttig, Inc.		Huttig Building Products, Inc.

☐ 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

PrimeSource Building Products, Inc. v. United States, Cons. Appeal No. 21-2066	Transpacific Steel LLC v. United States, 4 F.4th 1306 (Fed. Cir. 2021), petition for cert. filed, (U.S. Nov. 16, 2021) (No. 21-721)	USP Holdings, Inc. v. United States, Appeal No. 21-1726
Approx. 10 Ct. of Int'l Trade cases challenging Proclamation 9980, including the following:	J. Conrad LTD v. United States, Court No. 20-52 (Ct. Int'l Trade)	Metropolitan Staple Corp. v. United States, Court No. 20-53 (Ct. Int'l Trade)
Approx. 10 Ct. of Int'l Trade cases challenging Proclamation 9772, including the following:	Tata Metals (Am.) Ltd. v. United States, Court No. 20-19 (Ct. of lnt'l Trade)	Acemar Intermetal USA LLC v United States, Court No. 20-129 (Ct. Int'l Trade)

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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No appeal in or from the same civil actions has previously been before this or any other court. We are aware of approximately twelve cases stayed in the United States Court of International Trade ("Trade Court") pending this Court's decision in this consolidated appeal, which share a significant legal question—the legality of Proclamation 9980—with this consolidated appeal. *See* Certificate of Interest. We are not aware of any other case pending in this or any other court that may directly affect or be directly affected by this Court's decision in this consolidated appeal.

INTRODUCTION

When the President issued Proclamation 9980 on January 24, 2020, he clearly misconstrued the procedural bounds Congress imposed when delegating power to impose tariffs through Section 232. In Proclamation 9980, the President sought to impose 25 percent tariffs on steel nails and a handful of other derivative products made from steel based on a two-year-old report issued by the Secretary of Commerce. That report, which concluded that imports of steel produced in steel mills threatened to impair national security, never mentioned derivative products. Much less the *specific* derivative products covered by Proclamation 9980—which, in the aggregate, account for a negligible share of U.S. steel consumption.

Section 232's delegation of legislative power is remarkably broad in substance: in response to a report from the Secretary that finds that imports of an article threaten to impair the national security, the President can *agree or disagree* with the Secretary's finding, *take any action* with respect to that article (or its derivatives) she deems necessary to eliminate the threat, or take *no action at all*.

The only limits Section 232 imposes on this delegated *carte blanche* are procedural: the President can act only after receiving a report from the Secretary, must determine what action to take within 90 days of receiving the report and must implement any responsive action within 15 days thereafter. The President must also

inform Congress of the reasons for her determination within 30 days. These procedural limits are critical to the statutory scheme: they focus the President's attention on the immediate threat to national security identified by the Secretary and on the Secretary's specific recommendations for eliminating that threat—and they constrain the President from using Section 232 to advance unrelated policy objectives. And these procedural limits were deliberately included in the statutory scheme: Congress amended Section 232 in 1988 specifically to impose deadlines on the President's power to act to put an end to his dilatory approach to trade action.[1]

At bottom, the government asks this Court to nullify the 1988 Amendments and cede to the President unbounded legislative power to regulate foreign trade—to take *any* action, at *any* time, targeting *any* imported product, so long as at *any point* in the past, the Secretary made a threat determination regarding *either* the targeted product or any material used to make that product. The Trade Court correctly refused that invitation. Plaintiffs-appellees Oman Fasteners, LLC ("Oman Fasteners"), Huttig Building Products, Inc., and Huttig, Inc. ("Huttig")[2] respectfully ask this Court to do the same and affirm.

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[1] Omnibus Trade and Competitiveness Act of 1988, Pub. Law 100-418, 102 Stat. 1107 ("1988 Amendments").

[2] The separate cases filed by Oman Fasteners and Huttig were

(footnote continued on next page)

STATEMENT OF ISSUES

1. Section 232, which delegated with preconditions some of Congress's tariff power to the President, states that the President "shall" take certain actions by certain deadlines. The President relied on Section 232 to issue Proclamation 9980 more than a year and a half after the relevant deadlines. Should this Court affirm the Court of International Trade's decision to follow the plain meaning of Section 232 to hold Proclamation 9980 *ultra vires*?

2. In *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1310 (Fed. Cir. 2021) ("*Transpacific II*"), a split panel of this Court upheld a different proclamation issued under Section 232 and expressly limited that holding to those circumstances. Should this Court accept the government's invitation to extend its ruling in *Transpacific II* to the facts of this appeal, despite those facts being distinguishable on *Transpacific II*'s own terms?

3. The Constitution entrusts exclusive power to impose tariffs to Congress, and the President explicitly invoked the legislative power Congress delegated to him under Section 232 when issuing Proclamation 9980. He undisputedly

consolidated by the Trade Court below. References in this brief to Oman Fasteners also apply to Huttig.

did not follow the statutory process Congress prescribed for the exercise of that power, and his delay exceeds even the permissible timeline for an agency to reconsider its own action. Should this Court nevertheless hold that the President had inherent authority to issue Proclamation 9980 despite his non-compliance with Section 232?

STATEMENT OF THE CASE

A. Congress created Section 232 as a narrow carve-out from Congress's power to regulate commerce with foreign nations.

The Constitution vests in Congress all legislative powers. U.S. Const. art. I, § 1. Article I further provides that "The Congress shall have Power [t]o lay and collect Taxes, Duties, Imposts and Excises . . . [and t]o regulate Commerce with foreign Nations." U.S. Const. art. 1, § 8. Congress enacted Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232"), under that exclusive Article I, Section 8 power. Section 232 delegates to the President the power to "adjust the imports of [an] article and its derivatives" when that article is entering 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).

Congress imposed limitations on its delegation. Before the President can act, the Secretary of Commerce ("Secretary") must investigate "to determine the effects

on the national security of imports of the article" in question ("Section 232 Investigation"), and, no later than 270 days after initiation of the Section 232 Investigation, transmit to the President a "report on the findings of such investigation" in which, "based on such findings," the Secretary makes "recommendations . . . for action or inaction" by the President ("Section 232 Report"). *Id.* § 1862(b)(3)(A).

"Within 90 days after receiving" a Section 232 Report in which the "Secretary finds . . . [a] threat[] to . . . the national security," the "the President shall determine . . . whether [she] concurs with the finding of the Secretary," and "determine the nature and duration of the action that . . . must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(1)(A)(ii). If the President determines that action must be taken to adjust imports or derivatives of the article, "the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action." *Id.* § 1862(c)(1)(B). In addition, "no later than the date that is 30 days after" making her determination on whether to take action, "the President shall submit to the Congress a written statement of the reasons" for her chosen action or inaction. *Id.* § 1862(c)(2).

The time limits in the statute did not exist until 1988. In 1988, Congress amended Section 232 to reinforce the connection between the investigation and any

presidential action under the statute—circumscribing the delegated authority by tethering temporally the President's power to act to her receipt of the Section 232 Report. As set forth above, Section 232 now requires the President to determine the "nature and duration of the action" she shall take within 90 days of receiving the Section 232 Report and to implement that action within 15 days thereafter. Congress thereby sought to ensure the President would take swift action to fully address a threat to national security based on the Secretary's contemporaneous assessment.

B. In January 2018, the Secretary issued the Steel Report.

In April 2017 the Secretary initiated a Section 232 Investigation to determine the effect of the importation of steel on national security.[3] As required by statute, this investigation resulted in a Section 232 Report: the Steel Report of January 11, 2018, which reflected the Secretary's finding that the articles of steel under investigation were being imported in such quantities and circumstances as to threaten national security.[4]

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[3] *See Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19,205 (April 26, 2017), Appx765-767.

[4] *See* U.S. Department of Commerce, Bureau of Industry and Security, Office of Technology Evaluation, *The Effect Of Imports Of Steel On The National Security: An Investigation Conducted Under Section 232 Of The Trade Expansion Act Of 1962, As Amended* (Jan. 11, 2018) ("Steel Report"), Appx769-1031.

The Steel Report identified the scope of its investigation as covering "steel mill products" falling into five categories: flat products, long products, pipe and tube products, semi-finished products (such as billets, slabs and ingots) and stainless products—in other words, *primary* articles of steel. Steel Report at 21-22, Appx793-794. The Steel Report also identified these in-scope primary articles of steel by their six-digit Harmonized System codes. *Id.* The Steel Report did not include steel nails or any other any *derivative* articles of steel, *i.e.*, downstream articles manufactured from the primary steel produced in steel mills. The Steel Report did not discuss steel nails or any other derivative products. In fact, the word "derivative" appears only once in the 61-page Steel Report, when the Steel Report quotes verbatim paragraph (c)(1)(A) of Section 232. *Id.* at 13, Appx785. The Steel Report recommended that the President take action to adjust the level of steel imports through either quotas or tariffs. *See id.* at 58-61, Appx830-833. It proposed three alternative actions: (1) a "global" quota "on all imported steel products at a specified percent of the 2017 import level," with a recommended "specified percent" of 63 percent; (2) a "global" tariff "on all imported steel products," with a recommended tariff rate of 24 percent; or (3) "tariffs on a subset of countries" which would apply to "all imported steel products from Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica," with a recommended tariff rate of 53

percent. Steel Report at 59-60, Appx831-832. The Steel Report concluded that any one of these alternatives would "enable an increase in domestic production to achieve an 80 percent capacity utilization rate." *Id.* at 60, Appx832. The Steel Report also explained that "[i]t is possible to provide exemptions from either the quota or tariff and still meet the necessary objective of increasing U.S. steel capacity utilization to a financially viable target of 80 percent," but "to do so would require a reduction in the quota or increase in the tariff applied to the remaining countries to offset the effect of the exempted import tonnage." *Id.* at 61, Appx833.

C. In March 2018 the President issued Proclamation 9705, imposing a tariff on *primary* steel articles.

In response to the Steel Report, the President issued Proclamation 9705[5] in March 2018, within the 90 days prescribed by Section 232. Therein, the President determined that he "concur[red] in the Secretary's finding that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States," and "considered [the Secretary's] recommendations," in particular the recommendation of "a global tariff of 24 percent on imports of steel articles." *Id.* at 11,625. Appx686.

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[5] Presidential Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Mar. 8, 2018) ("Proclamation 9705") Appx686-691.

The President further determined that he would take action to adjust imports of the articles of steel falling within the scope of the Steel Report by imposing a (nearly) global tariff of 25 percent on imports of those articles from all countries except Canada and Mexico. *Id.* 11,625-26, Appx686-87. The President explained that "Canada and Mexico present a special case" and that the President would instead "continue ongoing discussions with these countries" with respect to imports of steel articles. *Id.* at 11,626, Appx687.

The President also "recognize[d] that our Nation has important security relationships with some countries" other than Canada and Mexico "whose exports of steel articles to the United States weaken our internal economy." *Id.* Accordingly, he "welcome[d]" any such country "to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country." *Id.* "Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that . . . imports from that country no longer threaten to impair the national security," the President explained that he "may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require." *Id.*

The "steel articles" included in Proclamation 9705 are identical to the "steel mill products" in the scope of the Steel Report. *Id.* at 11,627, Appx688. Like the Steel Report, Proclamation 9705 does not contemplate steel nails or any other derivative articles of steel. Like in the Steel Report, the word "derivative" appears only once in Proclamation 9705, in a summary of Section 232. *Id.* at 11,626, Appx687.

D. In January 2020, more than two years after the Steel Report, the President issued Proclamation 9980, imposing new tariffs on *derivative* steel articles.

On January 24, 2020, more than two years after the Steel Report and twenty-one months after Proclamation 9705, the President—without any prior notice, investigation or consultation—issued Proclamation 9980,[6] imposing 25 percent tariffs on a variety of different derivative articles made of steel. The derivative steel articles identified in Proclamation 9980 included a handful of downstream steel articles: "nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar articles"; automotive "bumper stampings of steel"; and agricultural tractor "body stampings of steel." *Id.* at 5,291, Appx758. Of the included derivative steel articles, the Peterson Institute for International

[6] Presidential Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, 85 Fed. Reg. 5,281 (Jan. 29, 2020) ("Proclamation 9980"), Appx748-760.

Economics calculated that steel nails represented the largest volume of trade: $231 million in 2017.[7] The aggregate volume of trade affected by Proclamation 9980 was "less than 1 percent of the amount of trade" that Proclamation 9705 and the President's parallel action regarding aluminum imports in Proclamation 9704,[8] had subjected to duties two years earlier. *Id.*

The President ordered these new tariffs to be implemented on February 8, 2020. 85 Fed. Reg. at 5,283, Appx750. In issuing Proclamation 9980, the President claimed a continuing authority to adjust imports of additional products in response to the Steel Report, even though the Steel Report had addressed the impact of imports of primary steel articles only, and was by then more than two years old. *See id.* He stated that "the Secretary ha[d] informed [him] that imports of . . . certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas," and that "[t]he net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of . . . steel." *Id.* at 5,282, Appx749. The President made no reference to any Section 232 Report, or any other

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[7] *See* Chad P. Bown, *Trump's steel and aluminum tariffs are cascading out of control* (PIIE Feb. 4, 2020) *available at* https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-steel-and-aluminum-tariffs-are-cascading-out-control.

[8] Presidential Proclamation 9704, *Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Mar. 8, 2018) ("Proclamation 9704").

official investigation or report, as the basis for the information provided by the Secretary. The President also did not claim any other basis for his authority to issue Proclamation 9980.

E. The Trade Court held that the President did not have authority to issue Proclamation 9980.

Importers of these derivative steel articles, including Oman Fasteners and PrimeSource Building Products, Inc. ("PrimeSource"), brought more than ten separate lawsuits in the Trade Court to challenge the legality of Proclamation 9980. Oman Fasteners raised three claims: (1) that Proclamation 9980 exceeded the President's delegated power under Section 232; (2) that Proclamation 9980 violated equal protection of the laws as guaranteed under the Constitution; and (3) that Section 232, if broad enough to permit Proclamation 9980, was an unconstitutional delegation. Appx168.

After Oman Fasteners filed suit, the Trade Court held in another case that Section 232's time limits should be strictly enforced. *Transpacific Steel LLC v. United States* ("*Transpacific I*"), 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019). There, Transpacific Steel challenged Proclamation 9772,[9] which was issued seven months after the

[9] Presidential Proclamation 9772, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 40,429 (Aug. 10, 2018) ("Proclamation 9772").

Steel Report and increased Proclamation 9705's 25 percent "global" tariff on primary steel products to 50 percent on such primary steel products imported "from the Republic of Turkey." 415 F. Supp. 3d at 1269. Because Proclamation 9772 was issued outside Section 232's deadline for presidential action, the Trade Court held it invalid as *ultra vires*. *Id.* at 1275–76.

In light of *Transpacific I* and the Trade Court's subsequent decision in *PrimeSource Bldg. Prods. v. United States*, 505 F. Supp. 3d 1352 (Ct. Int'l Trade 2021), holding Proclamation 9980 *ultra vires* and granting summary judgment in favor of PrimeSource, Oman Fasteners voluntarily dismissed its claims 2 and 3 without prejudice and moved for summary judgment on claim 1. Appx87. The Trade Court granted that motion, holding that Proclamation 9980 was *ultra vires* because the President issued it without adherence to the statutory procedural requirements, including the specific deadlines of Section 232. Appx84-86.

F. This Court reversed *Transpacific I*, and the Trade Court stayed its judgment below.

The United States appealed *Transpacific I* to this Court. A split panel reversed the Trade Court and held that "[t]he President did not violate [Section 232] in issuing Proclamation 9772." *Transpacific Steel LLC v. United States* ("*Transpacific II*"), 4 F.4th 1306, 1310 (Fed. Cir. 2021). The majority concluded that Proclamation 9772 was not illegal despite being issued after the statutory deadlines because it was part

of "a continuing course of action [initiated by Proclamation 9705] within the statutory time period." *Id.* at 1318–19. But the majority noted that its opinion was narrow: "We do not address other circumstances that would present other issues about presidential authority to adjust initially taken actions without securing a new report with a new threat finding from the Secretary." *Id.* at 1310. The Supreme Court denied a petition for a writ of certiorari in *Transpacific II*. *Transpacific Steel LLC v. United States*, 142 S.Ct. 1414 (Mar. 28, 2022) (denying certiorari).

The Trade Court stayed its judgment pending this appeal in light of *Transpacific II*. *Oman Fasteners, LLC v. United States*, 542 F. Supp. 3d 1399, 1403-1405, 1408-09 (Ct. Int'l Trade 2021), Appx3.

SUMMARY OF ARGUMENT

Section 232 is clear: the President "shall," within 90 days of receiving the Secretary's report, determine whether he agrees with the report and determine the nature and duration of the action necessary to avoid the threatened impairment to national security. 19 U.S.C. § 1862(c)(1)(A). If the President determines to act, he "shall" implement the action within 15 days of determining that action is warranted. *Id.* § 1862(c)(1)(B). Here, the President waited two years after receiving the Secretary's report before issuing Proclamation 9980. This delay violates Section 232 and

invalidates the Proclamation. The government's contrary reading of the statute would create an unconstitutional unbounded delegation of legislative power.

This Court's ruling in *Transpacific II* does not preclude this panel from affirming the Trade Court's decision. *Transpacific II* is distinguishable on its own terms on at least three grounds. First, unlike in Proclamation 9772 at issue in *Transpacific II*, Proclamation 9980 is not part of the "plan of action" initiated by Proclamation 9705. Second, unlike Proclamation 9772, Proclamation 9980 departs from key findings in the Secretary's Section 232 Reports. Third, Proclamation 9980 came a year and half later than Proclamation 9772 and thus raises staleness concerns not implicated in *Transpacific II*.

Nor can the government rescue the President's *ultra vires* action by post-hoc invocation of the President's "inherent authority." The President explicitly stated in Proclamation 9980 that he relied on Section 232 to impose the new tariffs, and Section 232 is a delegation of exclusive *legislative* power. In addition, cases discussing an agency's inherent authority to reconsider regulations are inapplicable to the President's issuance of Proclamation 9980.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 232 REQUIRES AFFIRMING THE TOWER COURT'S HOLDING THAT PROCLAMATION 9980 WAS *ULTRA VIRES*.

A. The text of Section 232 imposes a clear deadline on the President's exercise of delegated legislative power.

Section 232 lays out a detailed timetable for the President to exercise the delegated authority to adjust imports.

The plain text of the statute is clear: the President "shall," within 90 days of receiving the Secretary's report, determine whether he agrees with the report and determine the nature and duration of any action necessary "so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii). If the President decides to act, he "shall implement that action" within 15 days of determining that the action is warranted. *Id.* § 1862(c)(1)(B). The President "shall" also, within 30 days of determining whether to act, submit to Congress a written statement of the reasons for the chosen action or inaction. *Id.* § 1862(c)(2).

As the Supreme Court has repeatedly held, the word "shall" imposes a mandatory obligation. *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (citing cases). Indeed, no one disputes that Section 232's use of "shall" imposes various mandatory obligations on the President if he wants to use (and in

some cases if he chooses not to use) the power Congress delegated him. Namely, after receiving a report from the Secretary finding that imports of an article threaten to impair national security, the President must (1) "determine the nature and the duration of the action to take," (2) implement any action he decides to take, and (3) must submit a written statement of his reasons for action or inaction to Congress.

The government does not contest that "shall" is mandatory with respect to these Presidential actions yet argues that the same "shall" is not mandatory with respect to the accompanying statutory deadlines. There is no principled reason to read "shall" as mandatory when applied to the President's actions but not to the time limits for performing those actions. The same word in the same sentence cannot mean two different things. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019); *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012); *Rainey v. Merit Sys. Prot. Bd.*, 824 F.3d 1359, 1362 (Fed. Cir. 2016), *overturned on other grounds due to legislative action* (June 14, 2017). Thus, the President must act, and must act within the deadlines provided by the statute. If he misses the window, he must obtain a new report from the Secretary. "'Without any indication that [§ 232] allows the government to lessen its obligation, [courts] must give effect to [§ 232's] plain command.'" *Transpacific II*,

4 F.4th at 1339 (Reyna, J. dissenting) (*quoting Maine Cmty. Health Options*, 140 S. Ct. at 1321) (cleaned up).

For example, imagine a statute that says: "Government employees may use government cars to do their work. Such employees shall check-out the car out by 8 a.m. and return the car by 6 p.m. the same day." It is true that the failure to return the car by 6 p.m. does not mean that the employee need never return it. *See Transpacific II*, 4 F.4th at 1320. But it is equally true that an employee may not use a car if it was not checked out before 8 a.m. and that any use of the car after 6 p.m. is unauthorized. So too with the power delegated to the President under Section 232.

Also, "the action" and "that action" do not mean "series of actions" or "plan of action." Congress was perfectly capable of using the plural in Section 232 when appropriate. Specifically, under circumstances indisputably not present here—and under *only* those circumstances—paragraph (c)(3) of the statute authorizes the President to take "such other *actions* as the President deems necessary." 19 U.S.C. § 1862(c)(3)(A) (emphasis added).[10] Interpreting "the action" to encompass an unlimited number of actions renders superfluous the requirement that the President

[10] Specifically, Congress delegated to the President this power only when "the President selects negotiations with foreign nations as the appropriate measure, and those negotiations are unsuccessful or ineffective." Opening Br. at 6.

determine both the "nature" and especially the "duration" of "the action" chosen. *Id.* § 1862(c)(1)(A)(ii). Interpreting "the action" to encompass an unlimited number of actions also renders meaningless the requirement that the President provide Congress a statement of the reasons for the chosen action or inaction within 30 days of determining whether to act. *Id.* § 1862(c)(2). Congressional review of those reasons would be meaningless if the President could add on various unrelated and previously uncontemplated actions at any time after his initial decision to act. Finally, interpreting "the action" to encompass an unlimited number of actions also renders superfluous Congress's limited delegation of power for the President to take subsequent "actions" in paragraph (c)(3). *Id.* § 1862(c)(3).

Here, it is undisputed that the President issued Proclamation 9980 two years after the Secretary's report. To hold that Section 232 permits Proclamation 9980 is to rewrite (i) subparagraph (c)(1)(A)'s requirement that "the President shall determine . . . the nature and duration of the action" to mean instead "the President shall make initial determinations regarding the nature and duration of the action, which the President may modify at will," and (ii) subparagraph (c)(1)(B)'s requirement that "the President shall implement that action" as "the President shall begin to implement some portions of that action." There is no authority for such interpretive largesse. The text is clear.

To the extent legislative history is relevant, it also supports interpreting Section 232's deadlines as mandatory. The legislative history of the 1988 Amendments shows that Congress, frustrated with then-President Reagan's sluggish approach to trade policy, intended to impose strict time limits to require "the President to do all that he thought necessary" to eliminate any threat to national security identified by the Secretary "as soon as possible." *Transpacific I*, 415 F. Supp. 3d at 1275. Indeed, both sides of the debate surrounding the 1988 Amendments—members of Congress who endorsed the amendments and the Reagan Administration officials who testified before Congress in an attempt to prevent the amendments from passing—recognized that they would impose time limits on the President's power to act and require the President to take final action within those deadlines.[11]

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[11] *See, e.g.* Statement of Rep. Barbara Kennelly, *Hearings Before the Subcommittee on Trade of H. Comm. On Ways & Means*, 99th Cong., 2d Sess. 1282 (1986) ("I introduced legislation [ ] to close this loophole by setting a **deadline** for Presidential action in section 232 cases."); Statement of Senator Robert Byrd, *Threat of Certain Imports to National Security: Hearing Before the Committee on Finance on S. 1871*, 99th Congr. 37 (1986) ("[T]he legislation establishes a **time certain** for presidential action . . . . Under present law, there is no **time limit**."); Statement of Rep. Daniel Rostenkowski, Chair of the Committee on Ways and Means, H.R. Rep. No. 99-581 at 135 (1986) ("need for the amendment arises from the lengthy period under present law . . . and no **time limit** for decisions by the President"); Statement of U.S. Trade Representative Clayton Yeutter, *Trade Reform Legislation: Hearings before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 99th Cong., 2d Sess. 355 ("The Subcommittee's discussion draft would establish a **time limit** for Presidential

(footnote continued on next page)

Indeed, as this Court has acknowledged, nothing "spurs" a party to action like a deadline. *See Transpacific II*, 4 F.4th at 1329. But a deadline can spur action only if it has teeth. If, as the government argues, the purpose of the 1988 Amendments was to "produc[e] more action, not less," *see* Opening Br. at 6 (quoting *Transpacific II*, 4 F.4th at 1329), Congress must have intended to hold the President to those deadlines. If Section 232 did not *restrain* the President from acting belatedly, how could it *compel* him to act promptly? In other words, allowing the President to take no or only partial action within the deadlines—and then supplement, abridge, or modify that action in perpetuity—is inconsistent with Congress's desire for swift and decisive action and its resulting express command that the President determine within 90 days what action will eliminate the threat to national security and implement that action within 15 days.[12]

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determination under section 232"); Statement of Assistant Secretary of Commerce Paul Freedberg, *Threat of Certain Imports to National Security: Hearing Before the Committee on Finance on S. 1871*, 99th Cong. 2d Sess. 3 (1986) ("Imposing a **time limit** on the President would constrain his flexibility to adjust the timing and substance of his decision") (emphases added throughout).

[12] Adopting the government's contrary reading of Section 232 also makes the heated debate between Congress and the Reagan Administration surrounding the 1988 Amendments appear pointless. Why would the Reagan Administration have railed against the imposition of time limits on presidential action pursuant to Section 232 if the President remained free to ignore those limits?

The cases the government cite to support its contrary reading of Section 232 are inapposite. None of them applies to a statute like Section 232, where time limits are a critical component of the procedural safeguards that cabin Congress's delegation of power to the President, *see infra* Part I.B. *Brock* and its progeny involved lower executive officials performing quintessentially executive functions, and embody "the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'" *Brock v. Pierce County*, 476 U.S. 253, 260 (1986) (quoting *United States v. Nashville, C. & St. L.R. Co.*, 118 U.S. 120, 125 (1886)).

Brock itself involved audit determinations by the Department of Labor. *Id.* at 253. A contrary holding in *Brock* would have meant that the Department of Labor could never investigate the alleged misuse of public funds. *Id.* at 257, 259–61. *Barnhart* concerned the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9706(a), which provides that the Commissioner of Social Security "shall, before October 1, 1993," assign each eligible coal industry retiree to an entity responsible for funding the benefits. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 152 (2003). Although the Commissioner missed the deadline, the Court held that the tardy assignment of retirees bound the entities responsible for paying the pension benefits. *Id.* A

contrary interpretation would have allowed an untimely ministerial act to permanently determine the substantive rights and obligations of third parties. And *Nielsen* involved a federal immigration statute that directed the Secretary of Homeland Security to detain aliens who had committed certain crimes or had connections to terrorist acts when "released" from custody on criminal charges. *Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019). The Court concluded that the failure to detain such aliens immediately upon release from custody did not terminate the government's authority to do so later.

Section 232 is fundamentally different. It does not direct any federal agency to do anything. Rather, it delegates authority to the President to take the action he determines is necessary to adjust imports in the interest of national security. The President is not obligated to act.[13] In addition, unlike *Brock*, *Barnhart*, and *Nielsen*, the failure to take some particular action to adjust imports within the statutory

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[13] This is another reason the *Transpacific* majority's analogy about a borrower's obligation to return a car even after a stipulated deadline has passed misses the mark. *See Transpacific II*, 4 F.4th at 1320. The individual who borrowed the car has an obligation to return the car, whereas the President has no obligation to act here. If the President chooses to act, however, he must act within Congress's specified time limits. More apt is an analogy where the borrower may elect to keep the car for a second day, but only if she communicates her written request to the lender prior to a specified deadline. Should she miss that deadline, she may not claim she is nevertheless authorized to retain the car.

deadline does not forever preclude taking that action: the President retains the power to take new action in response to changed circumstances upon obtaining a new, up-to-date report from the Secretary. Finally, Proclamation 9980 is not the result of the President's "negligence" in failing to impose duties on certain derivative articles of steel two years earlier. *Cf. Brock*, 476 U.S. at 260. It is an independent action the President took years after he did all he deemed necessary to address the threat from imported primary steel products identified by the Secretary in the Steel Report.

B. The government's proposed reading of the statute creates an unconstitutional delegation of legislative power.

Section 232 represents an enormous substantive delegation of power to the President, which is why Section 232's time limits must be enforced. Without the procedural constraints Congress imposed, a single Section 232 Investigation and Section 232 Report could justify an unending series of tariff increases. The President would have virtually unbounded power to tax and regulate imports, making Section 232 an unconstitutional delegation of legislative power. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (discussing canon of constitutional avoidance).

It is undisputed that Section 232 does not substantively limit the President's power to act. The statute contains no meaningful substantive standards regarding

the threshold for action or the potential remedial measures that the President can impose. Although Section 232 nominally limits the President's power to adjust imports to instances in which the President concludes that a particular article of commerce threatens "to impair the national security," section 232(d) defines "national security" broadly, to include domestic economic impacts. 19 U.S.C. § 1862(d). In addition, judicial review of the President's actions is effectively unavailable. Despite the Supreme Court's statement that Section 232 does not simply authorize "[a]ny action the President might take, as long as it has even a remote impact on imports," *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 571 (1976), the Court has refused to scrutinize the President's exercise of tariff discretion, *see United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940). In that regard, *Transpacific II* may have expressed unwarranted optimism that a court would prohibit presidential action that "ma[d]e no sense except on premises that depart from the Secretary's finding" because the finding was "too stale" or "for other reasons." 4 F.4th at 1323. *Transpacific II* did not mention what those "other reasons" could be, and, *Transpacific II* itself swept aside Congress's judgment as to when the "Secretary's finding" becomes "too stale."

Section 232's time limits are effective constraints both because they focus the President's attention on a specific present threat to national security and because

they facilitate judicial review of Presidential action under Section 232. Deadlines demand attention, and Congress rationally concluded that adding deadlines to Section 232 would ensure the President's prompt comprehensive action to address an extant threat to national security identified by the Secretary, while limiting mission creep from the President's unrelated policy objectives. If "the President could act beyond the prescribed time limits, the [Secretary's investigation] would become [a] mere formalit[y] detached from presidential action." *Transpacific I*, 415 F. Supp. 3d at 1276.

The Supreme Court has recognized that procedural safeguards can save an otherwise broad delegation from unconstitutionality. For example, the Court held in *Touby v. United States* that the statute at issue created a lawful delegation because the "procedural requirements" it imposed "meaningfully constrained the Attorney General's discretion to define criminal conduct." 500 U.S. 160, 166 (1991). Notably, those key procedural safeguards included a finding that action was "necessary to avoid an imminent hazard to the public safety," consideration of "three factors" to make that finding, publication of a "30-day notice of the proposed scheduling [of the substance] in the federal register," and giving notice to and consulting with the Secretary of Health and Human Services. *Id.* at 166–67. Those requirements mirror the procedure—including time limits—of Section 232.

Similarly, in *Panama Refining Co. v. Ryan*, the Court considered "whether the Congress has required any finding by the President in the exercise of the authority to enact the [delegated] prohibition." 293 U.S. 388, 415 (1935). In concluding that the delegation was unlawful, the Court noted that the statute "d[id] not require any finding by the [P]resident as a condition of his action." *Id.*

Algonquin does not fix this nondelegation problem. In rejecting a nondelegation doctrine challenge to an earlier version of Section 232, the Supreme Court noted that Section 232 "establishes clear preconditions to Presidential action—*inter alia*, a finding by the Secretary 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.'" *Algonquin*, 426 U.S. at 559 (quoting Section 232). Removing Congress's deadlines—allowing presidential action at any time—untethers presidential action from that crucial "clear precondition[ ]" in *Algonquin*. Under the government's approach, a President could arbitrarily exhume a decades-old Section 232 Report to justify new action, trespassing on the constitutional principle that the use of legislative power to "impose current burdens" must "be justified by current needs." *Shelby Cty. v. Holder*, 570 U.S. 529, 542 (2013) (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)). Without the time limits, the Secretary's finding is no longer a "clear precondition" and becomes a mere formality

detached from presidential action. This creates the "looming problem of improper delegation," 426 U.S. at 548, that *Algonquin* did not anticipate or consider.[14]

By reading Congress's deadlines out of the statute, this Court would effectively convert section 232 into an unbounded transfer of Congress's power to impose tariffs and regulate international commerce. Ceding to the President the virtually unbounded power to tax and regulate imports is not an inevitable consequence of the statutory scheme. This Court can avoid that outcome simply by giving effect to the words of Section 232 as Congress drafted it.

Moreover, the unconstitutional delegation concerns raised by Proclamation 9980 far exceed those in *Transpacific II*. As discussed in Part II, *infra*, the *Transpacific II* majority concluded that Section 232 could countenance Proclamation 9772 as a mere continuation of the "plan of action" the President determined and implemented within the statutory deadlines. No such interpretation is possible with regards to Proclamation 9980, which imposed new duties on products never

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[14] At the time *Algonquin* was decided, Section 232 did not contain time limits for presidential action following a Section 232 Report. However, President Ford issued the proclamation challenged in *Algonquin* a mere *nine days* after receiving the Section 232 Report, so the *Algonquin* Court had no reason to consider the non-delegation doctrine implications of substantially delayed presidential action. *Id.* at 554.

considered by or mentioned in the Steel Report or any prior action by the President in response to the Steel Report.

II. *TRANSPACIFIC II* IS DISTINGUISHABLE ON ITS OWN TERMS.

The government argues at length that *Transpacific II* is dispositive of this case. Opening Br. at 16–30. While Appellees believe *Transpacific II* was wrongly decided, they recognize that this panel cannot overrule its precedent on points of law, *Preminger v. Sec'y of Veterans Affs.*, 517 F.3d 1299, 1309 (Fed. Cir. 2008). This Court can affirm the Trade Court's decision in this case without overturning *Transpacific II* because it is readily distinguishable. Indeed, reversing the Trade Court's decision would require dramatically broadening the scope of *Transpacific II* far beyond what the majority envisioned, or what the majority's reasoning would allow.

Transpacific II's holding that "[t]he President did not violate [Section 232] in issuing Proclamation 9772," was expressly limited to "the[ ] circumstance" of that case. 4 F.4th at 1310. The majority was clear that they "d[id] not address other circumstances that would present other issues about presidential authority to adjust initially taken actions without securing a new report with a new threat finding from the Secretary." *Id.* Proclamation 9980 falls squarely within those "other circumstances."

A. Proclamation 9980 is not part of any "plan of action" announced by the President in Proclamation 9705.

Transpacific II concluded that Proclamation 9772 did not violate Section 232 because Proclamation 9772 was part of "a continuing course of action [initiated] within the statutory time period." *Id.* at 1318–19. Proclamation 9705 was issued "well within the [statutory deadline]," and announced a plan of action "to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles." *Id.* at 1314. This "plan of action" "imposed some tariffs immediately, announced negotiations with specified nations in lieu of immediate tariffs, invited negotiations more broadly, and stated that the immediate measures might be adjusted as necessary." *Id.* at 1310. Issued shortly thereafter, Proclamation 9772 merely "modif[ied] the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective." *Id.* at 1319.

If, as the *Transpacific II* majority concluded, Proclamation 9705 permissibly initiated a plan of action "to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles," *id.* at 1314, each of the subsequent proclamations analyzed in *Transpacific II* merely "adjusted" that tariff—whether by modifying the amount of the tariff or the countries to which the tariff applied—and generally did so in conjunction with "negotiations with specified nations." *Id.* at 1314–16.

These were exactly the kind of subsequent actions contemplated by the "plan of action" announced in Proclamation 9705.

So viewed, Proclamation 9772 arguably finds support in the text of Section 232. Paragraph (c)(3) of the statute explicitly allows the president—when (1) the action the President initially determines to take is the "negotiation of an agreement which limits or restricts the importation . . . of the article that threatens to impair national security," and (2) "such an agreement . . . is ineffective in eliminating the threat to the national security"—to "take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(3)(A). That subparagraph arguably covers the initial action taken in Proclamation 9705. Proclamation 9705 expressed the President's "willingness to negotiate with 'any country' that ha[d] 'a security relationship with the United States in order to discuss 'alternative ways to address the threatened impairment of national security caused by imports from that country." *Transpacific II*, 4 F.4th at 1314. Proclamation 9705 also contemplated that such negotiations make it "necessary" to "adjust" the tariffs imposed on certain countries. *Id.* at 1310. Specifically, Proclamation 9705 explained:

> Should the United States and any . . . country arrive at a satisfactory alternative means to address the threat to the national security . . . , [the President] may remove or modify the restriction on steel articles imports from that country

> and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

83 Fed. Reg. at 11,626, Appx687.

In the same light, Proclamation 9772 was also broadly consistent with the Secretary's findings and recommendations in the Steel Report. As Proclamation 9772 later recognized, the Steel Report specifically "recommended that [the President] consider applying a higher tariff to a list of specific countries should [he] determine that all countries should not be subject to the same tariff." 83 Fed. Reg. at 40,429. Specifically, the Steel Report presented the President with two alternate tariff proposals: a "global tariff" with a "recommended" level of "24% . . . on all steel imports," or a "53% tariff on all steel imports from" a subset of countries including Turkey. *Transpacific II*, 4 F.4th at 1313.

> For every option, the Secretary noted that "the President could determine that specific countries should be exempted from the proposed" . . . tariff. But if the President determined that certain countries should be exempt, the "Secretary recommend[ed] that any such determination should be made at the outset and a *corresponding adjustment be made to the final . . . tariff imposed on the remaining countries*."

Id. (quoting Steel Report) (emphasis added).

As *Transpacific II* noted, many of the proclamations issued after Proclamation 9705 involved negotiations with foreign countries that resulted in their exemption

from the global 25 percent tariff imposed by Proclamation 9705. 4 F.4th at 1314–15 (discussing Proclamations 9711, 9740, and 9759). And it was because the President determined through those negotiations that "all countries should not be subject to the same tariff" that he issued Proclamation 9772 and doubled the tariff on Turkish steel. *Id.* at 1315–16.

Proclamation 9980 does *not* continue Proclamation 9705's plan of action. It does not "adjust" the tariff imposed by Proclamation 9705 on *primary* steel articles. It instead imposes a completely new 25 percent tariff on *derivative* steel articles. 85 Fed. Reg. at 5,283, Appx750. These derivative articles were not discussed in Proclamation 9705 or any of the subsequent proclamations analyzed in *Transpacific II*. Thus, "[r]ather than upwardly adjust the tariffs imposed by a previous Section 232 proclamation, the action contested here imposed, for the first time, tariffs of 25% on a previously unaffected group of products." *PrimeSource Bldg. Prod., Inc. v. United States*, 535 F. Supp. 3d 1327, 1332 (Ct. Int'l Trade 2021), Appx70.

Derivative articles were also not discussed in the Steel Report. The word "derivatives" appears in the Steel Report exactly once, when the Steel Report quotes the text of Section 232. *See* Steel Report at 13, Appx785. In discussing the "scope" of the Section 232 Investigation, the Steel Report mentions only specific "steel mill products." *Id.* at 21-22. In response to the Steel Report, and well within the 90-day

statutory deadline, President Trump issued Proclamation 9705, which imposed duties on the exact same primary steel products—down to the specific six-digit Harmonized System code—as the products included in the "scope" of the Secretary's investigation. *See* 83 Fed. Reg. 11,629, Appx1232. The subsequent proclamations analyzed in *Transpacific II* modified the duties imposed by Proclamation 9705 on these same products. In other words, there was a direct and evident connection between the Steel Report, Proclamation 9705 and every subsequent proclamation considered by the majority in *Transpacific II*. In contrast, Proclamation 9980 emerged from the ether, with no connection to the Steel Report beyond presidential fiat in Proclamation 9980's text.

Similarly, Proclamation 9980 cannot be justified by relying on the President's authority in paragraph (c)(3) of Section 232 to later take "other actions" in response to negotiations with one or more countries. 19 U.S.C. § 1862(c)(3)(A). First, paragraph (c)(3) provides authority to take additional actions only "to adjust the imports of [the] article" that is the subject of the negotiations. *Id.* Unlike the broader, but time-limited, authority to act granted by paragraph (c)(1), paragraph (c)(3) does *not* authorize action "to adjust imports of the article *and its derivatives*." The United States engaged in no negotiations regarding derivative articles of steel prior to Proclamation 9980, and no such negotiations are mentioned in its text. Second, as

explained above, the possibility that tariffs might later be imposed on derivative articles was contemplated in neither Proclamation 9705 nor the Steel Report.

Because Proclamation 9980 was not part of "a continuing course of action [initiated] within the statutory time period," *id.* at 1318–19, *Transpacific II* does not dictate this Court's decision here.

B. Unlike Proclamation 9772, Proclamation 9980 departs from the "key findings" in the Steel Report.

Transpacific II also upheld Proclamation 9772 because of its "adherence to the [Steel Report's] key finding of a need for a certain capacity-utilization level" and "excess of imports overall, from numerous countries, that left domestic capacity utilized less than [that] identified, plant-sustaining level." *Id.* at 1323.

> As the President struck deals with some countries as contemplated by Proclamation 9705, the agreed-to imports from those countries would logically affect—most relevantly, could *reduce*—the volume of imports from other countries . . . that could be allowed if the stated goal of overall-imports reduction was still to be met. . . .
>
> To prevent the President from increasing the impositions on non-agreement countries after the initial plan announcement would be to impede the President's ability to be effective in solving the specific problem found by the Secretary.

Id. This justification does not permit subsequent proclamations "that make[ ] no sense except on premises that depart from the Secretary's finding." *Id.* Proclamation 9980 is just such a subsequent proclamation.

As noted, Proclamation 9980 involves derivative articles of steel that were not even considered in the Secretary's Section 232 Investigation and the resulting Steel Report. The Steel Report did not recommend taking any action with respect to derivatives, or even examine whether imports of any derivative steel articles—much less the specific derivative articles listed in Proclamation 9980—had any effect on the capacity utilization of the domestic steel industry. Proclamation 9980 acknowledges the limited focus of the Steel Report, *see* 85 Fed. Reg. at 5,281, Appx748 (noting that the Secretary's investigation only covered "the effects of imports of steel articles"), and explicitly based the President's new determination to take action against derivatives not on the Steel Report itself, but on a purported informal update from the Secretary, *id.* at 5,281–82, Appx748-749 ("The Secretary has informed me . . . .").

To the extent Proclamation 9980 claims any connection to the Steel Report, that connection is not borne out by any official factfinding by the Secretary. Proclamation 9980 states that, "the Secretary has informed [the President] that . . . imports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas." 85 Fed. Reg. at 5,281, Appx748. It then states that "the net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of . . . steel and undermine the purpose of the proclamation[ ] adjusting imports . . . steel articles." *Id.*

As explained *supra*, the Steel Report contains no findings or analysis regarding the effect of *any* derivative articles on the "customer base for U.S. producers of steel," much less the effect of the narrow categories of derivatives included in Proclamation 9980. In addition, the Trade Court gave the government the opportunity to enter into the record any subsequent factfinding by the Secretary that would support Proclamation 9980. The government expressly declined.

Specifically, the court initially refused to grant summary judgment for plaintiffs-appellees, because "factual information pertaining to the Secretary's communicat[ions with] the President" with respect to "the derivative articles would be required in order for us to examine whether, and to what extent, there was or was not compliance by the President with the procedural requirements of Section 232." *PrimeSource Bldg. Prod., Inc. v. United States*, 497 F. Supp. 3d 1333, 1361 (Ct. Int'l Trade 2021), Appx33. However, the government "expressly . . . declined to pursue the opportunity to present additional evidence to demonstrate the existence of" factfinding by the Secretary regarding the effect of imports of derivative articles on domestic steel capacity utilization. *PrimeSource Bldg. Prod., Inc. v. United States*, 505 F. Supp. 3d 1352, 1356 (Ct. Int'l Trade 2021). In so doing, the government "waive[d] any defense" that the Secretary's factfinding met the "essential requirements of Section 232." *Id.*

We doubt that factfinding by the Secretary conducted outside of a Section 232 Investigation—and communicated to the President outside a Section 232 Report—could ever authorize the President to act under Section 232. But on the record of this case, the Secretary did not undertake even that limited level of factfinding.[15] Thus Proclamation 9980's purported connection between imports of certain derivative articles and domestic capacity utilization is a naked assertion without any of the "clear preconditions to Presidential action" that Section 232 "establishes." *Algonquin*, 426 U.S. at 559.

Because Proclamation 9980 does not "rest[ ] on a determination by the Secretary," made in the course of a Section 232 investigation, *Transpacific II* does not compel this panel to reverse the Court of International Trade. *See* 4 F.4th at 1332. If anything, *Transpacific II* indicates that the decision below is correct. Proclamation 9980

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[15] The lack of factfinding is particularly problematic because, as plaintiffs-appellees explained to the Trade Court, it is highly unlikely that imports of the derivative articles included in Proclamation 9980 would have any perceptible effect on domestic steel capacity utilization. *See* Complaint, ECF No. 2, *Oman Fasteners, LLC v. United States*, No. 20-37 (Ct. Int'l Trade), Appx1752 ("the derivative articles of steel included in Proclamation 9980 . . . account for approximately 1 percent (calculated by value) of imports of all derivative articles of steel"); Chad P. Bown, *Trump's steel and aluminum tariffs are cascading out of control* (PIIE Feb. 4, 2020) *available at* https://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-steel-and-aluminum-tariffs-are-cascading-out-control (noting that the total volume of trade affected by Proclamation 9980's new tariffs was less than one percent of the volume of trade affected by the tariffs imposed by Proclamations 9705 and 9704).

does not relate back to the Steel Report, and thereby violates even the broadened reading of Section 232 adopted by the *Transpacific II* majority. It is plainly *ultra vires*.

C. Proclamation 9980 was issued more than two years after the Steel Report, raising concerns about "staleness."

The *Transpacific II* majority also acknowledged that its opinion did not cover a proclamation issued so long after the supporting report that the report was "too stale to be a basis for the new imposition." *See* 4 F.4th at 1323. Proclamation 9772 gave "no indication of staleness" because it "came only months after the initial announcement." *Id.* at 1332. That is not true for Proclamation 9980.

Proclamation 9980 was issued more than two years after the Steel Report, and more than twenty-one months after the statutory deadline. *See* 19 U.S.C. § 1862(c)(1)(A). Proclamation 9772, on the other hand, was issued seven months after the Steel Report and only four months after the statutory deadline. Thus, the majority in *Transpacific II* had "no genuine concern about staleness" because "Proclamation 9772, the challenged proclamation, came only months after the initial announcement [in Proclamation 9705], which itself provided for just such a possible change in the future." 4 F.4th at 1332.

Give that an additional year and a half passed between Proclamation 9772 and Proclamation 9980, if any case can raise "genuine concern[s] about staleness,"

this one must. At a minimum, the additional delay distinguishes Proclamation 9980 from the situation in *Transpacific II*.

Admittedly, it is somewhat strange to posit whether the Secretary's findings in the Steel Report had become stale by the time the President issued Proclamation 9980, given that none of those findings addressed the imposition of tariffs on derivative articles of steel *at all*. Nevertheless, because the President purported to derive his authority to issue Proclamation 9980 from the Steel Report, this Court must enforce bounds on how long the President may rely on a lapsed Section 232 Report and hold that the two-year delay here exceeded those bounds.

III. THE GOVERNMENT CANNOT RELY ON "INHERENT AUTHORITY" TO JUSTIFY PROCLAMATION 9980.

A. The President has no inherent authority regarding tariffs.

The Constitution vests in Congress sole power over import tariffs. Congress has the power "To lay and collect Taxes, Duties, Imposts, and Excises" and "To regulate Commerce with foreign Nations." U.S. Const. art. I, § 8. Congress enacted Section 232 under this constitutional authority. "Because the procedures set forth in § 232 are trade focused, and the relief provided is trade specific, the subject matter of § 232 flows directly Congress's constitutional power over the Tariff." *Transpacific II*, 4 F.4th at 1338 (Reyna, J., dissenting). Section 232 is a "a narrow delegation of

authority to the President to take trade-related action when necessary to safeguard national security." *Id.* at 1337.

Contrary to the government's assertion, the President did not exercise "powers that are quintessentially executive in nature" when he issued Proclamation 9980 just because the statute mentions "national security." *See* Opening Br. at 24–25. The President issued Proclamation 9980 pursuant to Section 232, a trade-relief statute. Tellingly, Proclamation 9980 mentions only the powers delegated in Section 232, not any Article II powers. Trade is a quintessentially legislative realm.

When acting under Section 232, the President is not exercising "independent constitutional authority," Opening Br. at 25, that would justify a "less restrictive" delegation of power. The President had no express or implied powers to do what he did here: impose tariffs on hundreds of millions of dollars in steel derivative imports. This case instead concerns "an authority vested in the President [only] by an exertion of legislative power," not the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936). The tariff is not a "matter[ ] already within the scope of executive power." *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

Once again, the government's cases are inapposite. *Haig v. Agee*, 453 U.S. 280 (1981), involved the Secretary of State's power to revoke a passport. Although the Passport Act did not explicitly give the Secretary of State power to revoke a passport, it was "beyond dispute that the Secretary ha[d] the power to deny a passport for reasons not specified in the statute." *Id.* at 290. And "[t]he history of passport controls since the earliest days of the Republic shows congressional recognition of Executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy." *Id.* at 293. There is no such history here, and the President does not have any authority to "adjust the imports of [an] article and its derivatives," 19 U.S.C. § 1862(c)(1)(A)(ii), outside of Section 232.

Dames & Moore v. Regan, 453 U.S. 654 (1981), involved the President's authority to settle by executive agreement a U.S. national's claims against Iran. As in *Haig*, there was "a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate," and "[c]rucial[ly]," "Congress ha[d] implicitly approved the practice of claim settlement by executive agreement." *Id.* at 680-682. There is no "longstanding practice" of the President exceeding the statutory deadlines in Section 232 here, and Congress has not implicitly approved of that practice. To the contrary, Congress specifically passed the 1988 Amendments to compel the President to act within specified deadlines.

No case holds that the President may exceed explicit statutory time limits in the domain of commerce with foreign nations. Congress may "invest the president with large discretion in matters arising out of the *execution* of statutes relating to trade and commerce with other nations," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (emphasis added), but *violating* statutes relating to trade and commerce with other nations is not executing them.

B. Any inherent authority to reconsider regulatory action does not justify Proclamation 9980.

The government argues that courts should not assume that an official lacks authority to take further action "even when a statute does not specify how and when an official may reconsider or modify" that action. Opening Br. at 24. But a court *should* assume that an official lacks authority to take further action when the official acts outside of the statutory process Congress specified. Section 232 specifies *how and when* the President may respond to changed circumstances or new information: by securing a new report from the Secretary of Commerce. Upon receiving new information, the President can direct the Secretary to prepare a supplemental report advising whether previously assessed or newly identified imports presently pose a threat to national security, and if so, recommending new presidential action. The government does not demonstrate that following the procedural requirements in 19

U.S.C. § 1862(b) and (c) would have prevented the President from taking further actions to remedy any threat to national security from steel or steel derivative imports.

None of the cases cited in the Opening Brief suggests that the President has any inherent power to do what he did here. The government cites *Erwin Hymer*, which held that Customs and Border Protection could have reconsidered a decision *within the statutory timeframe* for the agency to make the initial decision. *Erwin Hymer Grp. N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019) (Customs had the statutory authority to allow or deny a protest within two years, 19 U.S.C. § 1515(a), so Customs could have allowed protest and then moved it to suspended status, as Hymer requested, within two years.). There was no statutory time limit for the agency to act in *Gratehouse v. United States*, 512 F.2d 1104, 1109 (Ct. Cl. 1975). Even so, the court limited the agency's power to reconsider to "within a reasonable period of time." *Id.* "[A]bsent unusual circumstances, the time period [to reconsider] would be measured in weeks, not years," so the agency's decision to rectify an alleged procedural error "2 years after . . . was far too late to qualify as reconsideration." *Id.* at 1110. Here, the President exceeded the statutory timeframe *and* any hypothetical "reasonable period of time" to reconsider his initial action via Proclamation 9980.

Finally, cases addressing agencies' authority to amend their own regulations, *N. Am. Fund Mgmt. Corp. v. F.D.I.C.*, 991 F.2d 873, 875 (D.C. Cir. 1993), *Case & Co.*

v. Bd. of Trade of City of Chicago, 523 F.2d 355, 363 (7th Cir. 1975), are irrelevant. If, as here, a statute barred an agency from amending its own regulation or provided that amendment must occur within a timeframe that had already elapsed, the agency would lack authority to amend. *Cf. N. Am. Fund Mgmt.*, 991 F.2d at 875.

CONCLUSION

Enforcing the plain language of Section 232 does not *impede* the President from promptly determining and implementing appropriate action to eliminate a legitimate threat to national security. To the contrary, enforcing the plain language *ensures* that President will do so promptly—just as the drafters of the 1988 Amendments intended. Enforcing the plain language of Section 232 links the President's action as closely as possible to the findings of the Section 232 Investigation and recommendations of the Section 232 Report, increasing the likelihood that the President's action will be timely, targeted, and effective. The collateral benefit: enforcing the plain language also decreases the opportunity for the President to misuse Section 232 by imposing trade restrictions unrelated to national security. Trade restrictions like Proclamation 9980.

For the reasons stated, the Trade Court correctly chose to enforce the explicit limits on Congress's delegation of power to the President over ceding to the President unlimited authority within a sphere constitutionally reserved for Congress.

Nothing in *Transpacific II*, a narrow decision limited to very different facts, requires or counsels a different result. Accordingly, the Trade Court's grant of summary judgment should be affirmed.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(b). Excluding the portions exempted by rule, the brief contains 10,502 words as counted by the word-processing software used to prepare it.

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