Consol. Nos. 2021-2066 & 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., and 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 and -00037, Judges Timothy C. Stanceu, Jennifer Choe-Groves, and M. Miller Baker

RESPONSE BRIEF OF PLAINTIFF-APPELLEE PRIMESOURCE BUILDING PRODUCTS, INC.

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April 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-2066

Short Case Caption PrimeSource Building Products, Inc. v. US

Filing Party/Entity PrimeSource Building Products, 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/ Jeffrey S. Grimson

Name: Jeffrey S. Grimson

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
PrimeSource Building Products, Inc.	N/A	PriSo Acquisition Corporation

☐ 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

James C. Beaty Curtis, Mallet-Prevost, Colt & Mosle LLP 1717 Pennsylvania Avenue NW #1300, Washington, DC 20006		

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

Oman Fasteners, LLC v. United States, Cons. Appeal No. 21-2066 (Fed. Cir.)	USP Holdings, Inc. v. United States, Appeal No. 21-1726 (Fed. Cir.)	
Approx. 12 Ct. of Int'l Trade cases challenging Proclamation 9980, including the following:	Astrotech Steels Private Ltd. v. United States, No. 20-46 (Ct. Int'l Trade)	Trinity Steel Private Ltd. v. United States, No. 20-47 (Ct. Int'l Trade)
New Supplies Co., Inc., et al., v. United States, No. 20-48 (Ct. Int'l Trade)	Aslanbas Nail & Wire Co., et al., v. United States, No. 20-49 (Ct. Int'l Trade)	J. Conrad LTD v. United States, Court No. 20-52 (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).

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☐ None/Not Applicable ☑ Additional pages attached

Metropolitan Staple Corp. v. United States, Court No. 20-53 (Ct. Int'l Trade)	SouthernCarlson, Inc., et al., v. United States, No. 20-56 (Ct. Int'l Trade)	Tempo Global Resources, LLC v. United States, No. 20-66 (Ct. Int'l Trade)
Farrier Product Distribution, Inc. v. United States, No. 20-98 (Ct. Int'l Trade)	Geekay Wires Ltd. v. United States, No. 20-118 (Ct. Int'l Trade)	Hilti, Inc. v. United States, No. 21-216 (Ct. Int'l Trade)
Home Depot USA, Inc. v. United States, No. 22-14 (Ct. Int'l Trade)	Approx. 3 Ct. of Int'l Trade cases challenging Proclamation 9772, including the following:	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).

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☐ None/Not Applicable ☐ Additional pages attached

ME Global, Inc. v. United States, No. 20-130 (Ct. Int'l Trade)	Intermetal Rebar LLC v. United States, No. 20-167 (Ct. Int'l Trade)	

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☐ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5(a), counsel for Plaintiff-Appellee PrimeSource Building Products, Inc. ("PrimeSource") is not aware of any other appeal in or from these same civil actions or proceedings that previously were before this Court or any other appellate court under the same or similar title, or of any action. Counsel is aware of approximately fifteen cases either stayed or pending in the United States Court of International Trade ("Trade Court"), that will directly affect or be directly affected by this Court's decision in this consolidated appeal. See Certificate of Interest. Additionally, counsel is aware of one case pending in this Court that that could affect this this Court's decision if that case is decided before the instant appeal: USP Holdings, Inc. v. United States, Appeal No. 21-1726.

STATEMENT OF ISSUES

Whether the Trade Court erred in holding that Proclamation 9980 was invalid as contrary to law because the President committed a significant procedural violation and acted outside of the authority delegated to him by Congress in issuing Proclamation 9980 beyond certain time constraints set forth in 19 U.S.C. § 1862 ("Section 232").

STATEMENT OF THE CASE

Proclamation 9980 is invalid and contrary to law because the President committed a significant procedural violation and acted outside of his delegated

authority by extending Section 232 duties to steel derivative products. A Section 232 investigation may only begin on a request from "the head of any department or agency, upon application of an interested party" or on the "own motion" of the Secretary of Commerce ("Secretary"). 19 U.S.C. § 1862(b)(1)(A). The Secretary must then immediately initiate an investigation "to determine the effects on the national security of imports of {an} article." Id. During such an investigation, the Secretary shall "if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." Id. § 1862(b)(2)(A)(iii). The Secretary then has 270 days from initiation to submit a report to the President. See id. § 1862(b)(3)(A). While Section 232 does not explicitly define "national security," it does provide a non-exhaustive list of factors that the Secretary and President must consider. See id. § 1862(d). The final report must contain "the findings" and "the recommendations of the Secretary for action or inaction under th{e} section." Id. § 1862(b)(3)(A).

There are also enumerated procedural requirements the President must follow. On receipt of the Secretary's report, the President has ninety days to both "determine whether the President concurs with the finding of the Secretary" and, 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. § 1862(c)(1)(A)(i)-(ii). After reaching a determination, the President has fifteen days to implement the chosen action. See id. § 1862(c)(1)(B).

On April 19, 2017, the Secretary initiated a Section 232 investigation into the effects of aluminum and steel imports on the national security of the United States. See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205 (Dep't Commerce Apr. 26, 2017) ("Req. for Public Comments"), First Am. Compl. at Ex. 3, No. 20-0032 (Ct. Int'l Trade Feb. 11, 2020), ECF No. 22. ("PrimeSource Am. Compl."), Appx765-767. On April 26, 2017, the Secretary published a notice of the investigation and invited public comment on "imports of steel." See id. The notice did not mention steel nails specifically, or any derivative articles generally. See id.

On January 11, 2018, the Secretary transmitted a report to the President detailing his findings and recommendations regarding steel imports. See U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC., The Effect of Imports of Steel on the National Security (2018) ("Steel Report"), PrimeSource Am. Compl. at Ex. 4, 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. Id. at 21-22, Appx793-794 (omitting any reference

to steel nails). The Secretary found that "{d}omestic steel production is essential for national security applications" and that the "present quantities and circumstances of steel imports are 'weakening our internal economy' and threaten to impair the national security as defined in Section 232." Id. at 2, 5, Appx774, Appx777.

The Secretary ultimately recommended that the President take immediate action to adjust the level of steel imports through quotas or tariffs. See id. at 58-61, Appx830-833. Such recommendations are required by both the statute and regulation. See 19 U.S.C. § 1862(b)(3)(A); 15 C.F.R. § 705.10(b) (2022). Commerce then proposed three actions, including a recommendation of a global tariff of twenty-four percent, that was intended to enable the U.S. steel industry to operate at an average capacity utilization rate of eighty percent or better. See Steel Report at 59-60, Appx831-832.

On March 8, 2018, the President issued Proclamation 9705, which concurred with the Secretary's findings, and subjected imports of steel articles to twenty-five percent ad valorem tariffs, respectively, "to address the threat that imports of steel articles pose to the national security . . . so that such imports will not threaten to impair the national security." Proclamation No. 9705, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 11,625 (Mar. 15, 2018), PrimeSource Am. Compl. at Ex. 8, Appx686-691. Neither nails nor any other derivative steel article

was listed in the annexes of steel articles covered by that action. See id. at 11,629, Appx690.

On January 24, 2020, nearly two years after the initial proclamations imposing tariffs on steel, without notice, the President issued Proclamation 9980, imposing additional tariffs of 25 percent on certain steel derivative products. See Proclamation 9980, Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5,281 (Jan. 29, 2020), PrimeSource Am. Compl. at Ex. 1, Appx748-760. The President claimed that "domestic steel producers' utilization ha{d} not stabilized for an extended period of time at or above the 80 percent capacity utilization level" as the reason for imposing additional tariffs on imports of certain steel derivative products. See id. at 5,281, Appx748. On January 29, 2020, the Executive Office of the President published Annexes in the Federal Register listing the products covered by Proclamation 9980. See id. at 5,290-93, Appx757-760. The covered products included steel nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar derivative steel articles. See id.

Paragraph 1 of Proclamation 9980 cited as legal authority the Commerce's investigation in 2017 that led to the Secretary's January 11, 2018 Steel Report. See Proclamation 9980, 85 Fed. Reg. at 5,281, Appx748. As noted, however, that investigation and Report did not include nails or any derivative steel product.

Neither the President nor the Secretary solicited public comment from interested parties regarding whether derivative steel products impacted national security, as was done for steel articles during the 2017 investigation. Instead, the President's basis for expanding the initial Section 232 tariffs was that the Secretary "informed" him that "certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas" and the "net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of aluminum and steel and undermine 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 (emphasis added), Appx749. Further, Proclamation 9980 referred to an "assessment" by the Secretary of Commerce that an increase in imports of derivative items was the result of purposeful circumvention of the existing Section 232 tariffs. See id. Not one of the legal or procedural requirements of Section 232 was met by the Secretary in investigating new articles not covered by the initial Section 232 investigation or by the President in issuing Proclamation 9980.

Following the issuance of Proclamation 9980, PrimeSource filed an appeal challenging the legality of the President's imposition of tariffs on imports of steel derivative products. See PrimeSource Bldg. Prods. v. United States, 497 F. Supp. 3d 1333, 1339 (Ct. Int'l Trade 2021) ("PrimeSource I"), Appx11. The Trade Court,

upon the consent of both parties, "entered a preliminary injunction that prohibited defendants from collecting 25% cash deposits on PrimeSource's entries of merchandise within the scope of Proclamation 9980 and prohibited the liquidation of the affected entries." PrimeSource Bldg. Prods. v. United States, 535 F. Supp. 3d 1327, 1330 (Ct. Int'l Trade 2021) ("PrimeSource III"), Appx68. In its lawsuit, PrimeSource alleged, among other issues, that Proclamation 9980 was unlawful because the President acted on imports of steel derivative products outside of the time limits specified in Section 232. PrimeSource I, 497 F. Supp. 3d at 1340-41, Appx12-13. Following briefing, in denying the Government's motion to dismiss, the Trade Court concluded that there is "no ambiguity" in the time limits imposed by Section 232. Id. at 1351, Appx23. The Trade Court, however, determined that "there remain{ed} genuine issues of material fact precluding {it} from granting plaintiff's motion for summary judgment." Id. at 1361, Appx33. Specifically, the Trade Court noted that although the "Secretary of Commerce undertook certain preparation prior to the President's {imposition of tariffs under Proclamation 9980}," the record was unclear whether these assessments met the requirements under Section 232(b)(3)(A) for a report by the Secretary. Id. at 1360, Appx32. The Court held that it was clear that Proclamation 9980 "was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the Steel Report," but the assessments by the Secretary, if they constituted a full report, may have

restarted the clock for Presidential action. Id. at 1360-61, Appx32-33. The Trade Court ordered that the parties consult on a "scheduling order that will govern the remainder of this litigation." Id. at 1361, Appx33.

Pursuant to the Trade Court's order, the parties filed a joint status report where "Defendants informed the Court that their 'position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705, a position that the majority has already rejected.'" PrimeSource Bldg. Prods. v. United States, 505 F. Supp. 3d 1352, 1355 (Ct. Int'l Trade 2021) ("PrimeSource II"), Appx64. In light of the Government's admission that the assessments of the Secretary relied on by the President in Proclamation 9980 were not "the functional equivalent of a Section 232(b)(3)(A) report," the Trade Court entered judgment as a matter of law for PrimeSource. Id. at 1356-57, Appx65-66. The Trade Court held the President committed a significant procedural violation of Section 232 by issuing Proclamation 9980 after the 105-day window of "congressionally-delegated authority to adjust imports of the products addressed in that proclamation had expired." Id. at 1357, Appx66. The Trade Court then declared that Proclamation 9980 was "invalid as contrary to law." Id.

The Government appealed the Trade Court's judgment and order to this Court. See PrimeSource III, 535 F. Supp. 3d 1327, Appx68-73. The Government also

sought a stay in the Trade Court to maintain the suspension of liquidation of PrimeSource's entries pending appeal. See id. The Trade Court granted the Government's motion and ordered the suspension of liquidation of the entries affected by this litigation noting that a decision by the Court in Transpacific Steel LLC v. United States, 4. F.4th 1306 (Fed. Cir. 2021), caused it to conclude that "defendants have made a sufficiently strong showing that they will succeed on the merits on appeal." PrimeSource III, 535 F. Supp. 3d at 1331, Appx69. The Trade Court, however, noted that this case was distinguishable from Transpacific. See id. at 1332-33, Appx70.

SUMMARY OF THE ARGUMENT

The Trade Court properly held that the Proclamation 9980 was invalid as contrary to law. The President committed a significant procedural violation and acted outside the authority delegated to him by Congress when he imposed tariffs on steel derivative products outside of the time constraints for him to act after receiving the Secretary's report finding that steel imports threatened the national security of the United States. This Court has jurisdiction to hear this case consistent with its jurisdictional determination in Transpacific. But the common jurisdictional basis is where the factual and legal similarities to the instant action on derivative steel products ends. This case fits within the staleness and "other reasons" exceptions identified by the Court in Transpacific where the Court noted that the statutory

purpose of Section 232 may not permit presidential action outside of the time constraints set forth in the statute. The holding in Transpacific, therefore, is not controlling on this matter. Both legislative history and separation-of-powers concerns mandate that there is an outer boundary on the authority delegated to the President by Congress to act outside of the time constraints in Section 232. The President committed a significant procedural violation and consequently acted outside the authority delegated to him by Congress, in imposing tariffs on steel derivative products because he relied on stale information relevant to a separate group of products distinct from derivatives. The President's decision to act outside of the time constraints set forth in Section 232 represented a significant procedural violation because the untimeliness of Proclamation 9980 in effect resulted in the President acting without a predicate finding by the Secretary of a threat to national security.

ARGUMENT

I. This Court Has Jurisdiction to Hear this Case

The Trade Court possessed jurisdiction pursuant to 28 U.S.C. § 1581(i), which gives that court "exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." Id. § 1581(i)(1)(B). This

appeal is from a final judgment that disposes of all parties' claims. See PrimeSource II, 505 F. Supp. 3d at 1352, Appx61-67. The Trade Court entered judgment on August 2, 2021. Accordingly, this Court possesses jurisdiction pursuant to 28 U.S.C. § 1295(a)(5), which provides that this Court "shall have exclusive jurisdiction — of an appeal from a final decision of the {Trade Court}." Id. The Government has not raised a jurisdictional challenge relevant to the statutory claim at the Trade Court or here. See Br. of Defs.-Appellants at 2 (Jan. 3, 2022), ECF No. 24 ("Appellants' Br."); see also PrimeSource I, 497 F. Supp. 3d at 1365 (Baker, J., dissenting), Appx37 (noting that the Government "has not questioned our jurisdiction to enter relief against the President").

The amicus curiae argues that this Court lacks jurisdiction over this action on the grounds that Proclamation 9980 relates to issues of discretionary action by the President and the President's inherent authority over matters of national security, which are not reviewable by a court. See Br. of the American Steel Nail Coalition as Amicus Curiae in Supp. of Defs.-Appellants at 25-32 (Jan. 10, 2022), ECF No. 10 ("Amicus Br."). This argument is completely incongruous with the overarching focus of amicus curiae's brief that the Trade Court's holding is "invalid in light of the Court's recent decision in Transpacific." Id. at 22. Amicus curiae asserted that the "jurisdictional issue was not raised in Transpacific, and hence was not addressed." Id. at 27 (citing Transpacific, 4 F. F.4th at 1318 n. 5). The Court in

Transpacific, however, concluded that it "h{ad} jurisdiction under 28 U.S.C. § 1295(a)(5)." 4 F.4th at 1318. The Court noted that 28 U.S.C. § 1581(i) "clearly covers this case" with the "one possible, limited exception . . . whether the claim against the President comes within this provision." Id. at 1318 n.5. The Court, nonetheless, found that it "need not address that question because jurisdiction existed over the claims against the other defendants and jurisdiction exists here to review the Trade Court's judgment." Id. Here too, this Court need not address the issue of jurisdiction because this action was commenced against other defendants, much like in Transpacific, including the United States, U.S. Customs and Border Protection and the Department of Commerce.

II. The Court's Holding in Transpacific Does Not Mandate a Finding that the President Possesses Limitless Authority to Act Outside the Time Constraints Set Forth in Section 232

Despite the Government's claims to the contrary, the Court's holding in Transpacific addressed a different factual scenario than presented in this action. The Court in Transpacific, therefore, was not called on to address the legal issue here, i.e., whether by not acting within the time constraints set forth in Section 232, the President committed a "significant procedural violation" and acted "outside {his} delegated authority" by relying on stale information relevant to a separate group of products distinct from derivatives that was too far removed from the Secretary's factual finding concerning the threat posed by steel imports to national security. See

Maple Leaf Fish Co. v. United States, 762 F.2d 86, 89 (Fed. Cir. 1985) (holding that an action by the President may be set aside if it involves "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority"); see also Appellants' Br. at 1 (claiming that Transpacific "controls and compels reversal"). Indeed, the Court in Transpacific recognized that it had "no occasion to rule on other circumstances" including whether the President acted on stale information. 4 F.4th at 1323. Following its substantive opinion, in a procedural order on the Government's motion to stay, the Trade Court correctly recognized that this action is distinguishable from Transpacific on two factual bases: 1) the length of time between the President receiving the report from the Secretary and the implementation of his action was far more significant than in Transpacific; and 2) the President in Transpacific merely adjusted his initial action on a set of products compared to here where the President acted on new (i.e., "derivative") products without any finding from the Secretary on these products. See PrimeSource III, 535 F. Supp. 3d at 1332-33, Appx70. Both factual bases removed the nexus between the President's imposition of tariffs on steel derivative products and the Secretary's earlier finding that the threat to national security posed by steel imports would only be eliminated once domestic capacity operated at an 80 percent capacity-utilization threshold. See Proclamation 9705, 83 Fed. Reg. at 11,625, Appx686; Proclamation 9980, 85 Fed. Reg. at 5,281, Appx748. By disregarding the time constraints set forth

in Section 232, unlike in Transpacific, the President in effect acted without the required predicate finding of threat by the Secretary because there was no evidence on the record or otherwise that his imposition of tariffs on derivative steel products could stabilize domestic capacity utilization. See 19 U.S.C. § 1862(c)(1)(A) (setting forth that the President can only act if he concurs with the Secretary's finding). Because this case is both factually and legally distinguishable from Transpacific, the Court's holding in that case does not dictate the outcome of this matter.

A. The President's Decision to Act Outside of the Time Limits in Section 232 Resulted in Reliance on Stale Information and Constituted a Significant Procedural Violation

In Transpacific, the Federal Circuit reversed the judgment of the Trade Court holding that an increase on the tariff rate of steel imports from Turkey "was unlawful because the President violated statutory timing constraint of § 1862 and because singling out importers of Turkish steel products denied them the constitutionally guaranteed equal protection of laws." 4 F.4th at 1317. Although the Government notes that the Federal Circuit found that Section 232 provides the President with the authority to "adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing imports restrictions" outside of the time constraints set forth in the statute, it fails to provide the full factual context surrounding the Court's holding. Id. at 1319; see also Appellants' Br. at 28. The majority in Transpacific recognized that the Court's holding did not address

instances where the President's failure to follow the time constraints set forth in Section 232 resulted in the President acting based on stale information from the Secretary. See 4 F.4th at 1332. The Federal Circuit does not have to gaze far into the future for such a scenario because that case is before it now. See id. at 1342 (Reyna, J., dissenting) ("{W}hat is at stake here is not only this case but future readings of this provision."). Here, the President acted on stale information that divorced his action from the underlying threat to national security identified in the Secretary's report. This case, therefore, falls into the narrow exception set forth Transpacific.

1. The Court in Transpacific Recognized that Presidential Action to Adjust Imports Outside of the Time Constraints Set Forth in Section 232 May Not be Appropriate in All Circumstances

In Transpacific, the President raised the tariff rate on steel imports from Turkey just five months after the President initially imposed tariffs on these same imports. See id. at 1315. This raised rate of "50% ad valorem tariff on Turkish steel remained in place for just under nine months—until May 21, 2019—when it returned to 25%." Id. at 1316. Although the Court reversed the Trade Court's holding that the President could not further act to adjust imports outside of the 105-day window, the Court nonetheless recognized that "the statutory purpose" may not permit "any presidential imposition after the 15-day period." Id. at 1323. The Court expressly indicated that its holding did not address the question whether "the statutory purpose

is furthered" by permitting the President to act outside the 105-day window in instances where the President's action "depart{s} form the Secretary's finding . . . because the finding is simply too stale to be a basis for the new imposition or for other reasons." Id. The Court, however, concluded that the Secretary's finding related to the "need for a certain capacity utilization level" and there was "no indication of staleness of that finding." Id. The Court found that its "{c}oncerns about staleness are better treated in individual applications of the statute, where they can be given their due after a focused analysis of the proper role of those concerns and the particular finding of threat at issue." Id. at 1332.

In short, the Court in Transpacific, recognized that its holding may not be applicable where the President's decision to act outside of the 105-day window resulted in action based on stale information that may no longer be relevant to the threat to national security identified by the Secretary. The instant action now presents that very question.

2. The President's Reliance on Stale Information Removed His Action from the Underlying Threat Identified by the Secretary

Section 232 requires that the President act on the most up-to-date information. The Court's holding in Transpacific is not controlling here because, contrary to the procedural requirements of Section 232, the President's reliance on stale information

when imposing tariffs on steel derivative products disassociated his selected action from the Secretary's initial finding regarding the threat to national security.

Congress mandated that any presidential action taken under Section 232 must be predicated on 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." 19 U.S.C. § 1862(c)(1)(A); see also Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559 (1976) (finding that Section 232 "establishes clear preconditions to Presidential action - inter alia, a finding by the Secretary of the Treasury 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'").[1] The inclusion of procedural requirements can prevent a statute from suffering from a delegation problem by limiting the authority delegated by Congress to an executive official. See Touby v. United States, 500 U.S. 160, 166 (1991) (holding that "procedural requirements," including a time requirement, created a lawful delegation because they "meaningfully constrain{ed} the Attorney General's discretion"). The importance of the procedural requirement that the President can only act to adjust imports after an affirmative threat finding by the Secretary cannot be ignored because Section 232 contains relatively few limitations on the President's

[1] An earlier version of Section 232 delegated the authority to conduct the initial investigation to the Secretary of Treasury before transferring this authority to the Secretary of Commerce. See Algonquin, 426 U.S. at 550.

power. The requirement that the Secretary must make an affirmative threat finding before the President can act by imposing increased tariffs was one of the main reasons that the Supreme Court concluded that Section 232 did not suffer from the "problem of improper delegation" by setting forth an "intelligible principle" for the President to follow. Algonquin, 426 U.S. at 559-60. Tethering Presidential action to a finding by the Secretary helps to check abuses of the President's near unbridled authority to act to adjust imports under Section 232 by creating a nexus between the President's chosen action and the threat to national security identified by the Secretary.

The President's reliance on stale information to adjust imports through further trade restrictions on uninvestigated imports untethered his action from the Secretary's finding. In determining whether imports pose a threat to national security, the Secretary is charged with considering several factors including the "domestic production needed for projected national defense requirements" and "the capacity of domestic industries to meet such requirements." 19 U.S.C. § 1862(d). Further, the Secretary and the President must recognize the "close relation of the economic welfare of the Nation to our national security" and consider such economic factors as "substantial unemployment" and "loss of skills or investment." Id. As Judge Reyna explained in his dissent in Transpacific, based on these factors "{t}he 'evidence' examined is therefore trade data and economic statistics and any other

circumstances involving the production, commercialization, and importation of the good subject to investigation." Transpacific, 4 F.4th at 1338 (Reyna, J., dissenting) (emphasis added). These trade data and economic statistics are in constant fluctuation. An action by the President outside of the time constraints increases the chances that the President relied on stale information, resulting in the removal of the nexus between the threat to national security identified by the Secretary and the President's chosen action. The President's reliance on stale information, therefore, can render unlawful an adjustment to an initial action because the President failed to follow the procedural requirement that the Secretary must find that imports posed a threat to national security before the President can act. See Silfab Solar, Inc. v. United States, 892 F.3d 1340, 1346 (Fed. Cir. 2018). In sum, the time constraints in Section 232 ensure that "the President act{s} with a current report and thus ward{s} off continuing modifications based on stale information or based on a changed purpose, such as a purpose or reasons not relating to the subject importation's effect on national security." Transpacific, 4 F.4th at 1342 (Reyna, J., dissenting).

The President's decision to impose tariffs, both initially on imports of steel and later on steel derivative products, relied heavily on trade data and economic statistics. In acting to adjust imports of steel into the United States, the President noted that the "{Secretary} transmitted to {him} a report on his investigation into the effect of steel mill articles (steel articles) on the national security of the United

States." Proclamation 9705, 83 Fed. Reg. at 11,625, Appx686. The President referenced that the Secretary found that steel imports were "'weakening our internal economy,' resulting in in the persistent threat of further closures of domestic steel production facilities." Id. Specifically, the President noted that the Secretary relied on the following in his conclusion that steel imports threatened national security: "increased level of global excess capacity, the increased level of imports, the reduction in basic oxygen furnace facilities, the number of idled facilities despite increased demand for steel in critical industries, and the potential impact of further plant closures on capacity needed in a national emergency." Id. In reaching his conclusion, the Secretary relied on detailed statistics from a variety of sources. For instance, in recommending a global tariff, the Secretary used the Global Trade Analysis Project Model that forecasted that a "24 percent tariff on all steel imports would be expected to reduce imports by 37 percent (i.e. a reduction of 13.3 million metric tons from 2017 levels of 36.0 million metric tons)." Steel Report at 8, Appx780 (emphasis added). Importantly, this source noted that the proposed tariff rate "will enable an 80 percent capacity utilization rate at 2017 demand levels." Id. (emphasis added). The Secretary's report also examined import levels and U.S. Steel Mill capacity utilization rates from the American Iron Steel Institute from 2011-2016 and 2017. See id. at 7, Appx779. In short, all of the figures relied on by the Secretary were elicited prior to 2017.

Economic statistics such as those relied on by the Secretary capture a particular time period. In the Steel Report, the Secretary implicitly acknowledged that his findings are highly dependent upon the time period examined by reversing a prior finding that certain imports did not threaten national security based on updated information. See id. at 16, Appx788. The Steel Report released by the Secretary in 2018 notes that a prior 2001 report compiled by Government concluded that "iron ore and semi-finished steel, imports would not threaten to impair national security." Id. The Secretary then concluded that a "recommendation different from the one adopted in the 2001 report" was appropriate given "the broader scope of the investigation, the level of global excess capacity, the level of imports, the reduction in basic oxygen furnace facilities since 2001, and the potential impact of further plant closures on capacity needed in a national emergency." Id. at 17, Appx789. The Secretary thereby reversed the prior 2001 finding by the Government that steel imports do not pose a threat to national security by relying on the updated data.

In Proclamation 9705, the President noted that the Secretary relied on these 2011-2017 trade statistics in proposing a couple of solutions that "would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity." Proclamation 9705, 83 Fed. Reg. at 11,625, Appx686. The President concurred with the Secretary's finding that steel imports threatened national security and "decided to adjust the imports of steel articles by imposing a

25 percent ad valorem tariff on steel articles." Id. at 11,626, Appx687. Almost two years later, the President acted to adjust his initial action on steel imports to impose entirely new tariffs on steel derivative products. Compare id. at 11,625 (dated Mar. 15, 2018), Appx686, with Proclamation 9980, 85 Fed. Reg. at 5,281 (dated Jan. 29, 2020), Appx748. The President noted that he placed tariffs on the derivative products based on the Secretary informing him that imports of these products had "increased since the imposition of the tariffs and quotas" and "domestic steel producers' capacity utilization ha{d} not stabilized for an extended period time at or above the 80 percent capacity utilization level identified in {the Secretary's initial} report." Proclamation 9980, 85 Fed. Reg. at 5,281-82, Appx748-749.[2]

The record contains no evidence that supports the President's statement that the Secretary had provided him with updated data. The Government alleges that the "President acted within his authority when he issued Proclamation 9980" because he anticipated that adjustments may need to be made and, accordingly, ordered the Secretary to "monitor imports of steel articles" and "inform the President of any circumstances that in the Secretary's opinion might indicate the need for further

[2] The Secretary states that imports volumes of steel derivative products increased by 33 percent from June 2018 to May 2019 compared to June 2017 to May 2018, and increased by 29 percent, compared to June 2016 to May 2017. See Proclamation 9980, 85 Fed. Reg. at 5,282, Appx749. Although Proclamation 9980 states that the Secretary informed the President of these statistics, there is no citation that could support these percentages similar to the data included in the Steel Report. See id.

action by the President." Appellants' Br. at 26-27 (quoting Proclamation 9705, 83 Fed. Reg. at 11,628, Appx165); see also Amicus Br. at 24 (noting that the President imposed tariffs on steel derivative products in response to increased shipments of these imports). According to the Government, the President merely implemented that plan because he tied back the tariffs on steel derivative products to the original goal of "maintaining an 80 percent capacity utilization." Appellants' Br. at 29-30; see also Amicus Br. at 23 (claiming that Proclamation 9980 merely "carr{ied} out the plan' implemented by Proclamation 9704 and Proclamation 9705 in 2018" (citation omitted)). What the Government conveniently ignores is that there is no evidence to support the Secretary's conclusion that imports of steel derivatives had increased or that capacity utilization levels had not met the eighty percent threshold identified in the prior investigation.

During the proceedings below, in denying the PrimeSource's motion for summary judgment, the Trade Court found that the record was unclear whether the subsequent assessments by the Secretary "identified in Proclamation 9980 validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report." PrimeSource I, 497 F. Supp. 3d at 1360-61, Appx32-33. The Trade Court further observed that "{n}or do we know what form of inquiry or investigation, if any, the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, any such inquiry or

investigation satisfied the essential requirements of Section 232(b)(2)(A)." Id. at 1361, Appx33. Based on the order from the Trade Court directing the parties to consult on the next steps in the litigation, the Government informed the Trade Court that it did not plan to submit any additional information concerning the Secretary's assessments relied on by the President in imposing tariffs on steel derivative products. See PrimeSource I, Joint Status Report (Mar. 5, 2021), ECF No. 108 ("Joint Status Report"), Appx1748-1751. The Government did not so much as hint that such "assessments" exist in writing. The Government instead stated that it did not intend to "pursue that argument" that the Secretary's assessments met the "essential requirements of Section 232(b)(2)(A)" but "that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's Steel Report." Id. at 2-3, Appx1749-1750. In entering summary judgment in favor of PrimeSource, the Trade Court found that "defendants waive any defense they might base on a showing that the 'essential requirements of Section 232(b)(2)(A) . . .' were met" and "did not file an answer to plaintiff's complaint or amended complaint." PrimeSource II, 505 F. Supp. 3d at 1356, Appx65. At the conclusion of the litigation before the Trade Court, therefore, the record only contained the information set forth in the Steel Report and no further information on the facts that the President relied on in imposing tariffs on steel derivative products. The Government cannot reasonably claim that the President merely implemented a continuing plan of action given that

there is no record evidence to support the President's assertion that the action on steel derivative products was designed to reach the much earlier goal identified by the Secretary of meeting an eighty percent domestic capacity threshold. Given that the only data the President could have relied on in making his determination comes from the Steel Report, as the Government itself acknowledged in its Status Report filed at the Trade Court, the President's imposition of tariffs on steel derivative products relied on stale information that was almost two years out of date.

The President's reliance on stale information in issuing Proclamation 9980 untethers his chosen action from the Secretary's finding set forth in Proclamation 9705. The Government argues that "there is no genuine concern about staleness" in this action. Appellants' Br. at 29 (quoting Transpacific, 4 F.4th at 1332); see also Amicus Br. at 23. In Transpacific, the President's decision to increase the tariff rate on steel imports from Turkey occurred "just over five months" after the President initially imposed tariffs on steel imports from Turkey. 4 F.4th at 1315. The Trade Court recognized that this action differs from the situation underlying Transpacific based on "the length of time that transpired between the receipt of a Section 232(b)(3)(A) report from the Secretary of Commerce and the President's taking implementing action." PrimeSource III, 535 F. Supp. 3d at 1333, Appx70. The President's imposition of tariffs on steel derivative products occurred almost two years after the President's initial action on steel in Proclamation 9705. The

President's action relied on outdated data given that the Steel Report itself cited statistics from 2011-2017. See, e.g., Steel Report at 8, Appx780. The Secretary himself recognized that the trade statistics are constantly changing in distinguishing his 2017 recommendations in the Steel Report from the Government's prior findings in 2001. See id. at 16-17, Appx788-789. Given the changing nature of trade statistics, such as those capturing domestic capacity utilization levels, and the fact that the Government waived any argument that the President relied on updated data other than that presented in the Steel Report, it was unreasonable for the Government to argue that the Secretary's "conclusions regarding capacity utilization . . . remain unchanged." Appellants' Br. at 30. Instead, the only reasonable conclusion is that the President's imposition of tariffs on steel derivative products was entirely divorced from the Secretary's earlier finding that steel imports posed a threat to national security and that further action by the President was necessary to reach domestic capacity utilization levels.

In sum, the legal question presented in this action falls into the precise exception recognized by the Court Transpacific that the President can exceed the authority delegated to him by Congress by acting outside the 105-day window if his action is based on stale information. The Secretary's finding that steel imports threatened national security was based on trade statistics that capture only a particular snapshot in time. The Government waived the opportunity to provide any

additional information on the "assessments" from the Secretary that the President subsequently claims to have relied on in imposing tariffs on steel derivative products. The Government's claim before this Court that the President's actions were lawful based on the Steel Report must, therefore, be rejected. The President's failure to abide by the time constraints in Section 232 caused him to overstep the authority delegated to him by Congress in Section 232 because, in relying on stale information, he committed a significant procedural violation by imposing tariffs on steel derivative products without the required prior threat finding by the Secretary.

B. The President's Imposition of Tariffs on Steel Derivative Products Was Not Based on the Underlying Threat to National Security and Was Thus a Significant Procedural Violation

A further flaw in Proclamation 9980, which makes the holding in Transpacific inapposite, is that there was no evidence on the record or otherwise that the imposition of tariffs on steel derivative products will address the threat to national security identified by the Secretary. The Court in Transpacific noted that Presidential action could be unlawful due to staleness "or for other reasons." 4 F.4th at 1323. Although Transpacific addressed the timeliness of the President's modification to a tariff rate previously imposed on an investigated product, this case presents the situation where not only was the modification even later than considered in Transpacific, but also includes "other reasons" for why the President's action was unlawful. Regarding steel derivative products, the President applied duties for the

first time to an entirely different set of products not previously subject to the original Section 232 investigation thereby bypassing the public comment requirement and other procedural steps. As set forth below, there is no evidence on the record or otherwise that steel derivative products had a detrimental effect on the domestic market or that tariffs on these products will help the President reach his stated goal of a domestic capacity utilization rate at the "80 percent . . . level identified in {the Secretary's initial} report." Proclamation 9980, 85 Fed. Reg. at 5,281, Appx748. The imposition of tariffs on these products, therefore, cannot be connected to further the Secretary's stated goal.

In addition to the President relying on stale information, the Trade Court also concluded imposing tariffs on steel derivative products was distinguishable from the facts underpinning Transpacific because the "products, identified in Proclamation 9980 as "Derivatives of Steel Articles," . . . were different than the steel articles affected by the earlier Presidential proclamation, Proclamation 9705." PrimeSource III, 535 F. Supp. 3d at 1332, Appx70. The Government maintains that the facts that the products examined in the initial action were different is irrelevant to this challenge because the President is "lawfully authorized to take action against derivative products" under Section 232. Appellants' Br. at 27. The Government is mistaken that it is not "persuasive to ascribe any significance to the fact that the President did not initially adjust imports of derivative products." Id. at 28.

The President imposed tariffs on derivative products on the basis 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." Proclamation 9980, 85 Fed. Reg. at 5,282, Appx749; see also Amicus Br. at 17. As the Government admitted in the proceedings below, the basis for the President's actions under Proclamation 9980 was the Secretary's findings in the Steel Report. See supra Part II. Because the initial investigation did not consider derivative products, the record does not support the President's conclusion that imports of steel derivative products had increased since the imposition of tariffs on steel articles. The question of whether the initial investigation considered derivative products, therefore, is highly relevant because the answer to this question dictates whether the President's determination to impose tariffs on the steel derivative products was connected to the Secretary's predicate finding on threat.

There is no indication that the Secretary considered derivative articles in the initial investigation. The notice that Secretary published in the Federal Register that invited public comments on "imports of steel" did not mention steel nails specifically, or any derivative articles generally. Req. for Public Comments, 82 Fed. Reg. at 19,205-07, Appx765-767. There was no analysis of the amount of domestic steel production dedicated to the production of downstream articles containing steel.

See id. Nor did any of the comments submitted during the public-comment period specifically advocate for the tariff to be applied to imported steel nails. See Steel Report, Appx769-1031. The term "nails" appears only once in the 262-page Report, in a list of civilian articles made from cold finished steel bar. Id. at App. F, p.134, Appx977. Part V of the Report, the "Findings," refers to antidumping/countervailing duty actions on "unfairly traded steel products." Id. at 28, Appx258. Appendix K lists the antidumping and countervailing duty cases on "steel" but noticeably omits any of the numerous antidumping/countervailing duty cases on nails. Id. at App. K, pp. 1-4, Appx1018-1021. Further, the word "nails" does not appear anywhere in the public hearing transcript held on May 24, 2017. See U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC., Steel 232 Investigation Public Hr'g (May 24, 2017), https://www.bis.doc.gov/index.php/documents/section-232-investigations/232-steel-public-comments/1927-steel-232-investigation-public-hearing-transcript/file. PrimeSource Am. Compl. at Ex. 5, Appx490-674. Simply put, there is no evidence that the Secretary considered steel derivative products in making his initial finding. Instead, the only pertinent evidence demonstrates that curbing imports of steel nails would do little to raise domestic steels capacity utilization. The derivative articles "subject to Proclamation 9980 represent a negligible portion of overall U.S. imports of derivative articles of steel and aluminum and a negligible portion of the overall U.S. market for derivative articles of steel and aluminum." Compl. at ¶ 76, Oman

Fasteners v. United States, No. 20-00037 (Ct. Int'l Trade Feb. 7, 2020), ECF No. 2, Appx1772. Such an insignificant proportion cannot have a substantial impact on domestic capacity utilization, i.e., the threshold that the Secretary identified as necessary to eliminate the threat to national security.

Because the Secretary did not consider steel derivative products in his initial investigation, or, even more generally, assess the domestic capacity dedicated to the production of downstream steel articles, no reasonable reading of the record can support the President's conclusion that the "net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of aluminum and steel and undermine the purpose of the proclamations adjusting imports of aluminum and steel articles to remove the threatened impairment of the national security." Proclamation 9980, 85 Fed. Reg. at 5,282, Appx749. Nor did the Secretary or the President explain why these specific "derivative" articles impaired national security more than other products made with steel, such as motor vehicles, construction equipment, consumer goods, etc., that individually or collectively may contain more steel content than nails. Once again, unlike in Transpacific, the President's action in adjusting imports on steel derivative products is removed from the Secretary's findings and recommendations based on a stated goal of reaching a capacity utilization threshold. The Government's reading of the statute would confer limitless authority on the President to impose duties on any

product, at any time, without any analysis, assessment or public procedure. The Court must avoid such a construction of the statute and instead find that, even if the President can act outside of the 105-day window set forth in the statute in certain circumstances, Section 232 does provide the President with a blank check to impose duties on anything at any time. See 19 U.S.C. § 1862(c)(1)(A)(ii).

C. Conclusion

In sum, the Court's holding in Transpacific is not binding because the facts and legal question presented here are distinguishable. This case represents the factual exception identified by the Court in Transpacific where the Court found that Presidential action outside of the 105-day window may not be appropriate – namely, where the President acted upon stale information as the result of a substantial gap in time between the Secretary's report and the President's action to adjust imports. Not only does this case fall in the primary staleness exception, but it also falls within the "other reasons" exception identified by the Court in Transpacific. See 4 F.4th at 1323. Regarding steel derivatives, the President imposed duties on products not subject to the Steel Report and without the required procedures by which the earlier Steel Report was adopted by the Secretary following public comment and other procedural requirements. The Government has already conceded that there is no such analysis of the threat to national security posed by steel derivative products. The President's reliance on stale information on a separate set of products resulted

in a disconnect between the President's imposition of tariffs on steel derivative products and the Secretary's much earlier finding that the threat to national security posed by steel imports could be eliminated by adjusting imports of steel derivatives to obtain a domestic capacity utilization threshold of eighty percent. The imposition of Section 232 tariffs on steel derivatives, therefore, was not addressed by the holding in Transpacific because the Court was not called on to examine the legal question at issue here. In this case, as set forth below, the answer to the relevant legal question under the particular facts of this case is that the President's reliance on stale information on a separate set of products untethered his action from Secretary's finding of threat, thereby resulting in the President committing a significant procedural violation and acting outside of the authority delegated to him by Congress.

III. The Trade Court Correctly Held the Untimeliness of Proclamation 9980 Constituted a Significant Procedural Violation of the Authority Delegated to the President

The Trade Court correctly held that the "untimeliness of Proclamation 9980" constituted "a significant procedural violation." PrimeSource II, 505 F. Supp. 3d at 1357, Appx66. The Government's argument that the Trade Court erred in finding that Section 232 did not provide the President with continuing authority to act outside of the 105-day window in all instances fails considering the facts of this case. See Appellants' Br. at 16. The Trade Court correctly held that the plain language of

Section 232 sets forth that the President cannot act outside of mandatory 105-day window without seeking an additional report from the Secretary. See id. PrimeSource recognizes that the Court in Transpacific held that the time constraints in Section 232, "standing alone," cannot "automatically equat{e} to the expiration of the President's authority to take further burden-increasing steps." 4 F.4th at 1321. But there is an important distinction that the Government misses. Here, the statutory time limits do not stand alone. Instead, they must be viewed in light of the vastly longer period, i.e., a mere five months, between the President's action in increasing tariffs on Turkey as was at issue in Transpacific, as compared to almost two years between President's action in imposing tariffs on steel derivatives products. The Court in Transpacific recognized that the "statutory purpose" of Section 232 is not furthered by any action outside of the time constraints in the statute. Id. at 1323. A re-examination by this Court of the whether the President's authority to act outside of the statutory time constraints is truly unbridled is warranted here given that this case falls within the exceptions identified by the Court in Transpacific.

The legislative history of Section 232 demonstrates that the President's authority to act outside of the time constraints set forth in statute is far from unbounded. As discussed below, this Court must place outer boundaries on the President's authority to act outside of the time constraints set forth in Section 232 to avoid violating the principle of separation of powers. Further, the adherence to the

time constraints mandated by the statute would not lead to a draconian result because the President could have acted against derivative products if he had sought an additional report from the Secretary. Given that the President's authority to act outside the time constraints in Section 232 is far from unbounded, the President committed a significant procedural violation and acted outside of the authority delegated to him under Section 232 by failing to follow the procedural requirements set forth in the statute. The President's determination to adjust imports of steel derivative products outside of the time constraints set forth in Section 232 resulted in the President relying on stale information relating to a completely separate set of products, which consequently removed his chosen action from the Sectary's underlying finding that steel imports threatened national security.

A. The Legislative History of Section 232 Demonstrates that Congress Intended to Limit the President's Authority to Act

In 1988, Congress amended Section 232 to impose "time limits on the exercise of discretion by the President." PrimeSource I, 497 F. Supp. at 1350, Appx22. The Trade Court correctly found that the legislative history surrounding the 1998 amendments to Section 232 demonstrated that the time constraints added to the statute removed the prior authority granted to the President to act beyond these constraints in all circumstances. See id. Although the legislative history demonstrates, as the Trade Court found, that Congress intended the time constraints in Section 232 to be mandatory, the Court in Transpacific reached a different reading

based on the different factual scenario presented. See 4 F.4th at 1329 (finding that the legislative history "implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps"). Nevertheless, the Court's interpretation of the legislative history of Section 232 recognized that the President's authority was not unbounded as it reasoned that the 1988 amendments did not "impl{y} a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary." Id. (emphasis added). Implicit in this reasoning is the understanding that Congress did not intend to provide the President with continuing authority if his chosen action did not relate to the underlying threat found by the Secretary. The fact that this case falls within the exceptions identified by the Court in Transpacific, therefore, paves the way for this Court to reexamine the statute in light of the differing facts presented here. While Congress may have not intended to remove "any authority to take action outside of {the} time limit{s}," id. at 1330, Congress did not intend 1988 amendments to allow for the President's continuing authority to adjust imports at any time in all instances.

1. Congress Amended the Statute to Include Express Time Constraints on Presidential Action

Courts are obligated to "interpret the words of . . . statutes in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rts. Org., 441 U.S. 600, 608 (1979). Congress amended Section 232 in 1988 to include express

time constraints with the intended purpose to check the limited authority it delegated to the President to act against imports.

On its face, the amended language to Section 232 shows that Congress did not intend to provide the President with a blank check to act at any time after receiving a report from the Secretary. In addition to adding time constraints to ("within 90 days" and "no later than . . . 15 days"), the 1988 amendments removed the language that previously provided that the President "shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives" and replaced it with "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." Compare PrimeSource I, 497 F. Supp. 3d at 1348 (emphasis added) (quoting Pub. L. No. 85-686, § 8(a), 72 Stat. 673, 678 (1958)), Appx20; Transpacific, 497 F. Supp. 3d at 1341 (emphasis added) (quoting Trade Agreement Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962)), with 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added). The Trade Court found that this change evidenced Congress's intent to limit the President's authority to act to adjust imports. See PrimeSource I, 497 F. Supp. 3d at 1350, Appx22.

Although the Government is correct that the President had broad authority to modify a prior action before Congress amended the statute in 1988, it is mistaken that "'the change from 'for such time' to 'the duration' was purely stylistic."

Appellants' Br. at 23 (quoting PrimeSource I, 497 F. Supp 3d at 1378 (Baker, J., dissenting), Appx50); see also Transpacific, 4 F.4th at 1328. The Government ignores the basic principle of statutory interpretation that "{w}hen Congress acts to amend a statute, we presume it intends its amendment to have a real and substantial effect." Stone v. INS, 514 U.S. 386, 397 (1995); see also Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 168 n.16 (1993) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded."). Having amended the statute to include express time limits, and removing the ongoing reference to "for such time," the only reading that gives the 1988 amendments a "real and substantial effect" is that Congress did not intend for the phrase "nature and duration of the action" to bestow on the President the authority to act outside of the time constraints present in Section 232 based on two-year-old information pertaining to a separate set of products.

Further, the Government incorrectly downplays the importance of the legislative history surrounding the 1988 amendments in arguing that "at the time of the 1988 amendments, then, practice under and executive interpretation of the statute provided a settled meaning of 'action' as including a 'plan' or a 'continuing course of action.'" Appellants' Br. at 23 (quoting Transpacific, 4 F.4th at 1328); see also Amicus Br. at 21. In support of this conclusion, the Government cites to an Attorney

General opinion from 1975, which found that the President's authority stemmed from the words "'such action,' not 'for such time.'" Appellants' Br. at 22 (quoting 43 Op. Att'y Gen. No. 20, 2 (1975) ("1975 AG Opinion")). According to the Government, the Attorney General's opinion remains relevant because Section 232 still includes its reference to "action" after it was amended in 1988. See Appellants' Br. at 23. But the Attorney General's opinion is not applicable for two reasons. First, the Attorney General's conclusion was based on the phrase "such action," Transpacific, 4 F.4th at 1327 (citing 1975 AG Opinion at 21), and the amended language now merely refers to "the action." 19 U.S.C. § 1862(c)(1)(A)(ii). The term "such" is defined as "of the character, quality, or extent previously indicated or implied" or "of the same class, type, or sort." Such, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/such (last visited Apr. 29, 2022). "Such" refers to a either a past action or a group of actions. Congress's decision to amend this phrase to "the action" in the singular was a deliberate choice by Congress to remove the President's continuing authority to act against imports at any time following his receipt of a report from the Secretary. Given Congress's decision to remove the word "such,' there was no reason for Congress to also remove Section 232's reference to "action." Second, the Attorney General concluded that the President possessed continuing authority to adjust an initial action under Section 232 because this delegated authority "has been sanctioned by the Congress's failure to

object to the President's proceeding on that basis repeatedly during the past 15 years." 1975 AG Opinion at 22. The Attorney General's opinion, however, was issued prior to the 1988 amendments. The legislative history, as discussed in detail below, makes clear that "Congress endeavored in the 1988 amendments to Section 232 to impose new controls, through time limitations and reporting requirements, on the exercise of Presidential discretion." PrimeSource I, 497 F. Supp. 3d at 1358, Appx30.

2. The Legislative History Behind the 1988 Amendments Demonstrates that Congress Intended to Check the President's Authority to Act Against Imports

A general principle of the President's inherent authority to act outside of time constraints set forth in a statute must bow in the face of Congressional intent. See United States v. Midwest Oil Co., 236 U.S. 459, 473 (1915) (setting forth that the executive cannot do "more than ha{s} been authorized by Congress" nor can the Executive "by his course of action create a power"). Although the 1988 amendments may not have removed the President's continuing authority to act beyond the time constraints set forth in Section 232 in all circumstances, the legislative history makes clear that these time constraints were intended to limit the President's authority to act under certain circumstances like the facts presented here.

The 1988 amendments, as the Government recognizes, were a direct response by Congress to President Reagan's delayed action in the machine-tools case in

imposing voluntary restraints almost three years after the Secretary initiated an investigation. See Appellants' Br. at 21; see also H.R. REP. NO. 100-40, at 175 (1987) (recommending a time limit under which the President can act, noting that in the "machine tools case, the President waited over 2 ½ years before taking any action to assist the domestic industry"). Congressional reports reveal that Congress "believe{ed} that if the national security is being affected or threatened, this should be determined and acted on as quickly as possible." H.R. REP. NO. 100-40, at 175 (1987); H.R. REP. NO. 99-581, at 135 (1986). To ensure that the President acted in a timely fashion, Congress amended Section 232 to include time constraints. This conclusion is evidenced by the House Report, which in summarizing the proposed amendments to Section 232, states that the "{p}resent law provides no time limit . . . for the President's decision on the appropriate action to take." H.R. REP. NO. 100-576, at 711 (1988). The House Report expressly stated that the bill "requires the President to decide whether to take action within 90 days after receiving the Secretary's report, and to proclaim such action within 15 days." Id. (emphasis added). "'Proclaim' is the verb form of the noun 'proclamation,' and 'proclaim *such action*' is inconsistent with an interpretation under which Congress intended the President to have authority to proclaim additional 'actions' indefinitely (through subsequent proclamations), after the time period had passed." PrimeSource I, 497 F. Supp. 3d at 1354-55, Appx26-27. The legislative history, therefore, makes clear

that Congress amended Section 232 to remove the President's continuing authority to act in all circumstances. Indeed, the Government implicitly acknowledges this reading when it notes that "Congress intended the President modify Section 232 import measures as circumstances warrant." Appellants' Br. at 23 (emphasis added). Taken to its conclusion, the inverse of the Government's recognition is that there may be circumstances where Presidential action is not appropriate and, therefore, was not intended by Congress.

The Government and amicus curiae both maintain that the 1988 amendments were intended to "spur" action by the President and not limit the President's authority to act. Appellants' Br. at 21; Amicus Br. at 21. A Congressional intent to prevent undue delay by the President in no way precludes Congress from also limiting the President's continuing authority to modify an action in all circumstances. Importantly, the 1988 amendments did not alter a time-constraint for the President but instead imposed them. A broader Senate amendment "requir{ing} the President to decide to take action within 90 days after receiving the Secretary's report" was rejected in favor of the additional fifteen-day implementation requirement in the House's bill. H.R. REP. NO. 100-576, at 712 (1988). The addition of the fifteen-day implementation deadline contradicts the arguments by the Government and amicus curiae that Congress was only concerned with ensuring prompt initial action by the President, and not with limiting the President's

continuing authority act indefinitely, given that the House specifically put in a timeframe for the President to implement his chosen action.

Testimony gathered by Congress both for and against the time limits on presidential action further proves that Congress was keenly aware that amending Section 232 to include time-constraints would limit the President's continuing authority to act in all instances. See, e.g., InterDigital Communications, LLC v. ITC, 707 F.3d 1295, 1301-04 (Fed. Cir. 2013) (citing hearing testimony as evidence of the "clear intent of Congress and the most natural reading of the 1988 amendment" in its interpretation of a particular provision in a statute). For instance, testimony from the U.S. Trade Representative ("USTR") emphasized that "{t}he President must have the flexibility to control the timing of his actions under Section 232." Hr'gs. Before the Subcomm. on Trade of H. Comm. on Ways & Means, 99th Cong. 2, pt. 1, at 355 (1986) (statement of Clayton Yeutter, Ambassador, USTR). The same sentiments appear in the testimony of Dr. Paul Freedberg, the Assistant Secretary of Commerce for Trade Administration before the Senate Finance Committee. He noted that the "major proposed revision{}" to Section 232 was "to impose a 90-day limit for a Presidential determination after the Secretary of Commerce submits the investigation report." Hr'g Before the S. Comm. on Finance, 99th Cong. 2, at 72 (1986). Addressing the time limit, Assistant Secretary Freedberg complained that "{i}mposing a time limit on the President would constrain his

flexibility to adjust the timing and substance of his decision in response to national security considerations," id., and therefore "{t}o impose a 90-day deadline would run the risk that . . . some security concerns would suffer solely due to the timing of a Section 232 decision," id. at 85.

Congress also considered contrary arguments. The Congressional record is replete with testimony addressing the need to limit the timeframe for Presidential action. For example, in a hearing on trade reform legislation serving as a precursor to the 1988 amendments, Representative Barbara Kennelly explained that the fact that there is "no deadline for Presidential action" is a "loophole big enough to drive a tank through." Trade Reform Legislation: Hr'gs Before the Subcomm. on Trade of the H. Comm. on Ways & Means, 99th Cong. 2, pt. 2, at 1282 (1986) (statement of Rep. Barbara B. Kennelly, Connecticut). Representative Kennelly introduced "legislation . . . to close this loophole by setting a deadline for Presidential action." Id. Expressing similar views, in hearings before the Senate Finance Committee, Senator Robert Byrd testified as follows:

> First, the legislation establishes a time certain for the Department of Commerce in which to submit its report . . . And then, the President within 90 days of the time that the Secretary of Commerce and under this legislation the Secretary of Defense will report their determination to the President, the President must act or state why he has refused to act, on a matter that could impact upon the national security.
>
> . . . .

> American industries deserve the certainty of a response—and we all need to know whether the national security is threatened as a result of import.

Hr'gs Before the S. Comm. on Finance, 99th Cong. 2, at 24 (1986) (statement of Sen. Robert C. Byrd, West Virginia) (emphasis added). The fact that Congress was keenly aware of competing considerations regarding whether to include time constraints in the statute establishes that Congress purposefully intended to remove its prior delegation to the President to act against imports at any time following the receipt of a report from the Secretary.

In sum, a complete review of the legislative history reveals that in adopting proposals to include time-constraints in the 1988 amendments, Congress expressly intended to limit the President's authority to act in certain circumstances. Such circumstances exist here where the President's decision to act outside of the time limits set forth in Section 232 resulted in him acting on stale information on a separate set of products that was entirely divorced from the Secretary's underlying finding that steel imports threatened national security.

B. Outer Boundaries on the President's Authority to Act Outside the Time Constraints in Section 232 Are Necessary to Avoid Separation-of-Powers Concerns

Because Section 232 is a trade statute, this Court must recognize there are outer boundaries on the President's authority to act against imports. "Statutory interpretation turns on 'the language itself, the specific context in which that

language is used, and the broader context of the statute as a whole.'" FCC v. AT&T Inc., 562 U.S. 397, 407 (2011) (emphasis added) (citation omitted). The Government maintains that the Trade Court "fail{ed} to account for the President's inherent authority to reconsider his actions." Appellants' Br. at 24. As Judge Reyna noted in his dissent in Transpacific, "{t}he essential question posed by this appeal is whether Congress enacted § 232 to grant the President unchecked authority over the Tariff." 4 F.4th at 1336 (Reyna, J., dissenting). By ignoring the context of the statute, i.e., "the procedures set forth in § 232 are trade focused," the Government and the Court in Transpacific "answer{ed} the wrong question." Id. at 1338 (citing King v. Burwell, 576 U.S. 473, 492 (2015)). Because the President relied on outdated information that had no relevance to steel derivative products, the issue presented in this case requires that this Court place outer boundaries on the President's authority to act following an affirmative threat finding by the Secretary to avoid creating an undue expansion into the powers reserved to Congress.

The Constitution confers on Congress the power to lay and collect duties and regulate commerce with foreign nations. See PrimeSource I, 497 F. Supp. 3d at 1357 (citing to U.S. CONST. art I, §8, cl. 1 & cl. 3), Appx29. Separation-of-powers principles dictate that the President cannot extend his authority to claim the legislative powers reserved for Congress. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952) ("{T}he Constitution is neither silent nor

equivocal about who shall make laws which the President is to execute . . . '{a}ll legislative Powers herein granted shall be vested in a Congress of the United States.'" (citation omitted)). While Congress can delegate this authority to the President, courts must be "wary of any undue expansion, whether or by the Executive or the Judicial branch, of the President's delegated authority." Transpacific, 4 F.4th at 1337-38 (Reyna, J., dissenting). "Only Congress, therefore, has power derived from the Constitution to establish, revise, assess, collect, and enforce tariffs (which may include duties, taxes and imports) that are assessed and collected upon the importation of goods." Id. at 1337.

Courts have "not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." Mistretta v. United Sates, 488 U.S. 361, 382 (1989). As a trade action, this case implicates Congress's legislative authority over taxation and foreign commerce.[3] Under Section 232, "Congress has delegated to the Executive Branch

[3] Section 232's focus on trade is evidenced by the plain language of the statute itself, that requires the President and Secretary to "recognize the close relation of the economic welfare of the Nation to our national security." 19 U.S.C § 1862(d). The factors that the President and Secretary must consider in applying Section 232 focus on economic considerations and do not list broader foreign policy considerations such as diplomatic matters. See id. By contrast, the cases relied upon by the Government concerning the President's inherent authority relate to issues of foreign policy and international relations. See Dames & Moore v. Regan, 453 U.S. 654, 661-63 (1981) (noting that action involved the President's authority as the "sole

certain narrow authority over trade—an area over which Congress has sole constitutional authority—for the purpose of safeguarding national security." Transpacific, 4 F.4th at 1336 (Reyna, J., dissenting). Although extraordinary conditions, such as national security, do come with heightened deference, these concerns "do not create or enlarge constitutional power." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528 (1935); see also Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) ("{W}hether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law."). As Chief Justice Hughes explained in Schecter, "those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary." Schecter, 295 U.S. at 528. The procedures set forth in a statute matter, especially where they govern the delegation of an enumerated power of Congress.

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organ of the federal government in the field of international relations" relating to the President's decision to transfer property in response seizure of the American embassy in Tehran, Iran); Haig v. Agee, 453 U.S. 280, 295 (1981) (addressing the revocation of a passport and finding that the legislative history supported the ongoing authority of the President and Secretary to "withhold passports on national security and foreign policy grounds"). Further, the Government's reliance on Erwin Hymer Grp. N. Am. v. United States, 930 F.3d 1370 (Fed. Cir. 2019) and Gratehouse v. United States, 206 Ct. Cl. 288 (1975), is unconvincing because both cases are distinguishable in that they involve actions by an agency and not the President. See Erwin, 930 F.3d at 1376 (noting that "{a}dministrative agencies" possess inherent authority to reconsider their decisions" (citation omitted) (internal quotation marks omitted)); Gratehouse, 206 Ct. Cl. at 298 (pertaining to an administrative agency).

The President's imposition of tariffs on steel derivative products outside of the 105-day window set forth in the statute combines one constitutional problem, i.e., disregarding Congressional will that the President cannot take action without a prior threat determination by the Secretary, with an additional one, in that the President engaged in a law-making function reserved to Congress, thereby "tear(ing} at the legal framework established by the Founders and Congress." Transpacific, 4 F.4th at 1337 (Reyna, J., dissenting).[4] The procedural limitations in Section 232 are all the more important given that "the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1344 (Ct Int'l Trade 2019).

[4] Wars, revolts and decapitations in England were keenly on the minds of the Founding Fathers when they sought to retain the power to tax within the legislative branch. Article I, Section Eight emerged from our country's revolution from British rule in response to tariffs and taxes that had been enacted by legislative bodies for which the colonists could not vote. The imposition of taxes without Parliamentary assent by James I, and his son, Charles II, led to a bloody civil war from 1642-50, the decapitation of Charles I in 1649, and the overthrow of James II in 1689 by William and Mary only after they agreed to the 1689 Bill of Rights. See generally Proposed Constitutional Amendments to Balance the Federal Budget: H'rg Before the Comm. on the Budget, 103d Cong. 1336 (1994). That Bill of Rights established "that levying money for or to use of the crown by pretense or prerogative, without grant of Parliament for longer time or in other manner than the same is or shall be granted, is illegal." Id. at 1347. Much of that 1689 Bill of Rights was carried over into our 1776 Declaration of Independence and then our Constitution, notably Article I, Section Eight.

The President's reliance on outdated information unrelated to derivative products untethered his action from the Secretary's initial finding concerning the threat to national security. The 105-day deadline in Section 232 ensures that Congress has not delegated its full authority over foreign commerce to the President by providing a guidepost to ensure that the President's action connects to the Secretary's finding on threat. Separation-of-powers concerns, thus, warrant an application of outer boundaries on the President's continuing authority to adjust imports to ensure that the President is acting within the strict realm of the authority delegated to him by Congress.

The dissent in Transpacific succinctly summarized the result if this Court determines that there are no boundaries on the President's authority to act outside the time constraints present in Section 232: "I fear that the majority effectively accomplishes what not even Congress can legitimately do, reassign to the President its Constitutionally vested power over the Tariff." 4 F.4th at 1342 (Reyna, J., dissenting). Judge Reyna's words ring true. If the time constraints are read as discretionary in all circumstances, including under the facts presented here, the President has almost unbridled authority over a tariff power that is reserved to Congress by the Constitution.

C. Outer Boundaries on the President's Authority to Adjust Imports Do Not Infringe on the President's Ability to Address National Security Concerns

The Government argues that a strict reading of the time constraints, even under the exceptional circumstances here, would inhibit the President's ability to respond to national security concerns. See Appellants' Br. at 28-29. The Government's reliance on Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003) illustrates the fallacy in such a claim. See Appellants' Br. at 19. Here, unlike in Barnhardt, there was another less drastic option available to the President to adjust imports of steel derivative products – the President could have sought an additional report from the Secretary.

This case is distinguishable from Barnhardt. In Barnhardt, the relevant statute set forth that the Secretary of Labor must assign certain annual premium obligations related to retiree benefits prior to a set deadline. Id. at 155-56. The purpose of the statute at issue in that case was to ensure that "the number of unassigned beneficiaries is kept to an absolute minimum" and the Court determined that goal was best met by allowing for the tardy assignment of premium obligations. Id. at 166. The Court found that if the statutory deadlines were read as mandatory, there would have been a severe burden on innocent third parties. See id. at 158-60. The Government contends that the President's need to adjust imports of derivative articles "may not arise . . . until after implementation of the President's initial

adjustment of imports of the article, well after day 105." Appellants' Br. at 28. Contrary to the assertions of the Government, an adherence to the statutory deadlines to ensure that the President acted on updated information, would not have been overly burdensome on the President's ability to address changing threats to national security posed by steel derivative products. See id. If the President sought to act outside of the 105-day window, all he needed was another report from the Secretary. See Transpacific, 4 F.4th at 1339 (Reyna, J., dissenting) ("The result is not draconian: If the President does not act in time, he must obtain a new report from the Secretary . . . —which may be the same as or similar to the previous report—in order to be authorized again to take action to avoid impairment of national security.").

Nothing in the statute forbids an abbreviated and fast-tracked report. See id. The requirement that the President seek a report from the Secretary, therefore, does not impose a severe burden on an innocent third party because the President is still free to act at a later date.[5] Here, when given a chance before the Trade Court to

[5] This action is further distinguishable from Barnhardt for two reasons. First, the Court in Barnhardt noted that there was "little legislative history" concerning the statutory deadlines and the history that did exist assumed that the executive official would act by the deadline set forth in the statute. Barnhardt, 537 U.S. at 164-65. As set forth above, the legislative history here demonstrates that Congress did not intend to grant the President continuing authority to adjust imports at any time. Second, unlike in Barhardt, as the Trade Court properly found, this appeal does not touch upon the President's inherent authority in realm of foreign policy but instead focuses on the President's delegated authority by Congress over the collection of duties and

assert that some analysis or document – any document (even the Secretary's "assessment") – constituted the necessary factual and procedural predicate for imposing duties on steel derivative products years later, the Government elected to rest entirely on the Steel Report and to waive any argument that any analysis linking steel derivative imports to national security exists at all.

In short, the President could have timely addressed concerns surrounding national security by seeking an updated report from the Secretary if it had chosen that path, which he explicitly declined to do here. Any delay resulting from seeking an updated report from the Secretary ensures that the President acts on the most up-to-date information and thereby ensures the nexus between his selected action and the threat to national security. Otherwise, the President will have committed a significant procedural violation and acted outside his delegated authority by imposing tariffs on steel derivative products without a predicate threat finding by the Secretary.

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the regulation of commerce. See PrimeSource I, 497 F. Supp. 3d at 1357, Appx29 (noting that relevant statute in Barnhardt did not involve "an express limitation Congress imposed on the delegation to the Executive Branch of a legislative power the Constitution vested in the Congress").

D. The President Committed a Significant Procedural Violation and Acted Outside His Delegated Authority by Imposing Tariffs Beyond the Mandatory Time Constraints Set Forth in the Statute

This Court must sustain the Trade Court's holding that Proclamation 9980 was invalid as contrary to law. The untimeliness of Proclamation 9980 resulted in the President committing a significant procedural violation and acting outside of his delegated authority because his imposition of tariffs on steel derivative products was divorced from the Secretary's finding concerning the threat to national security, both in time and substance.

"To declare Proclamation 9980 invalid, we must find 'a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.'" PrimeSource II, 505 F. Supp. 3d at 1357 (quoting Maple Leaf, 762 F.2d at 89), Appx66. The Trade Court properly held that the "untimeliness of Proclamation 9980" constituted "a significant procedural violation." Id. Specifically, the Trade Court found that PrimeSource was "entitled to a declaratory judgment that Proclamation 9980 is invalid as contrary to law" because Proclamation 9980 was issued "after the congressionally-delegated authority to adjust imports of the products addressed in that proclamation had expired." Id. After the Trade Court reached its judgment, the Court subsequently found that the statutory constraints "alone" did not remove the President's continuing authority to adjust imports. Transpacific, 4 F.4th at 1321. As discussed, however, the instant

case falls within the exceptions set forth in Transpacific. See supra Part II. While the President may possess continuing authority outside of the 105-day window for presidential action set forth in Section 232, the Court in Transpacific did not hold that this authority extends to all circumstances. See supra Part II.A. Indeed, the legislative history dictates that Congress did not intend to condone all actions by the President outside of the time constraints. See supra Part III.B. Such a broad reading of the President's authority also runs afoul of the narrow authority delegated to the President in tariff matters. See supra Part III.C. In sum, the Court in Transpacific recognized that certain circumstances mandate a closer review of whether the President committed a significant procedural violation of Section 232 by acting outside of the time constraints set forth in Section 232. See Transpacific, 4 F.4th at 1332.

Such circumstances exist in the imposition of tariffs on steel derivative products. Although this Court may not concur with the Trade Court's reason for finding that the President committed a "significant procedural violation," i.e., the President cannot beyond the 105-day window set forth in Section 232 without seeking a separate report from the Secretary, the Trade Court's underlying holding that the "untimeliness of Proclamation 9980" resulted in "a significant procedural violation" nonetheless stands and must be sustained by this Court. See PrimeSource II, 505 F. Supp. 3d at 1357, Appx66. Here, as set forth above, the President's failure

to act to adjust imports on steel derivatives within the time constraints set forth in Section 232 resulted in the President acting on stale information on a completely different set of products. See supra Part I. Given that the President relied on outdated information in the Steel Report that was unrelated to steel derivative products, there could logically be no evidence on the record or otherwise that the President's actions on steel derivative products related to the Secretary's underlying finding that the threat posed by steel imports could only be eliminated once domestic capacity reached an eighty percent threshold. See id. Section 232 requires that any presidential action must be predicated by an affirmative finding of threat by the Secretary. See 19 U.S.C. § 1862(c)(1); see also Algonquin, 426 U.S. at 561. The President unlawfully committed a significant procedural violation and acted outside his delegated authority under Section 232 because the untimeliness of Proclamation 9980 in effect resulted in the President acting without a predicate finding of threat to national security by the Secretary. Proclamation 9980, therefore, was invalid as contrary to law.

CONCLUSION

For the reasons discussed above, PrimeSource respectfully requests that this Court affirm the judgment of the Trade Court.

Dated: April 29, 2022

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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

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