IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE, Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE, Defendant.	)	Civil Action No. 19-CA-778 (CJN)

BRIEF OF AMICI CURIAE SENATOR PAT TOOMEY AND MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFF

Daniel Prywes (D.C. Bar No. 342394)
Donald B. Cameron (D.C. Bar No. 260844)
R. Will Planert (D.C. Bar No. 412145)
MORRIS, MANNING & MARTIN, LLP
1401 Eye Street, NW, Suite 600
Washington, D.C. 20005
(202) 971-4182
dprywes@mmmlaw.com

Kathleen Claussen (N.Y. Bar No. 4954194)
University of Miami School of Law
1311 Miller Drive
Coral Gables, FL 33146
(305) 284-6646
kclaussen@law.miami.edu

Timothy Meyer (Cal. Bar No. 252828)
Vanderbilt Law School
131 21st Avenue South
Nashville, TN 37203
(615) 936-8394
tim.meyer@law.vanderbilt.edu

Dated: March 6, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

U.S. Constitution

Statutes

Session Laws

Regulations

Other Authorities

*Pursuant to LCvR 7(a), authorities denoted with a (*) are chiefly relied on in this brief.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION INSTITUTE, Plaintiff, v. UNITED STATES DEPARTMENT OF COMMERCE, Defendant.	)	Civil Action No. 19-CA-778 (CJN)

BRIEF OF AMICI CURIAE SENATOR PAT TOOMEY AND MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFF

INTERESTS OF AMICI CURIAE

Amici are members of the 116th Congress (a list of *Amici* is in the Appendix). *Amici* support the release of the Secretary of Commerce's report regarding the Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts ("the Report"). Section 232 of the Trade Expansion Act of 1962, *as amended*, 19 U.S.C. § 1862, itself requires publication of the Report in the Federal Register; the Department of Commerce's own regulations require the Report's release; and the Freedom of Information Act, 5 U.S.C. § 552, also compels disclosure of the Report upon request as Plaintiff has done in this case. In short, not one, not two, but three different sources of authority compelled the Department of Commerce to release the Report—and yet it refused. Against this backdrop, the 116th Congress decided to end the Department of Commerce's recalcitrant conduct by passing the Consolidated Appropriations Act, 2020, which required the Secretary of Commerce to release the Report by no later than thirty days after its enactment: January 19, 2020. Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 112, 133 Stat. 2317, 2395 (2019). Access to the Report is critical to the proper and constitutional operation of the Section 232 statute, and for

Amici's ability to perform their constitutionally-assigned legislative duties and oversight role. In particular, Defendant's refusal to release the Report as required by law hinders *Amici*'s efforts to exercise Congress's exclusive constitutional authority over tariffs and foreign commerce under Article I, Section 8 of the U.S. Constitution with respect to the subject matter of the Report.[1]

SUMMARY OF THE ARGUMENT

The Constitution gives Congress the exclusive authority "[t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as to "[t]o regulate [c]ommerce with foreign [n]ations." U.S. Const. art. I, § 8. While Congress may delegate that authority to the executive branch, the Constitution itself, as well as Congress's ability to perform its role in our system of separated powers, mandate that Congress impose limits on such delegations. Here, Congress expressly provided in Section 232 of the Trade Expansion Act of 1962 that one of those limits was a requirement that the Secretary of Commerce issue a public report with a finding regarding whether the import of a specified product "threaten[s] to impair the national security." 19 U.S.C. § 1862(b)(3)(A). To fulfill the Constitution's requirement that any law delegating legislative power must allow Congress, the courts, and the public to "ascertain whether the will of Congress has been obeyed," *Yakus v. United States*, 321 U. S. 414, 426 (1944), and to allow Congress to exercise effectively its legislative and oversight powers, Congress also required that the report "shall be published in the Federal Register." 19 U.S.C. § 1862(b)(3)(B). In the case of the report at issue in this litigation, Congress supplemented Section 232's publication requirement by

[1] The Court granted *Amici*'s motion for leave to file this brief in the Court's Minute Order of March 2, 2020. As required by LCvR 7(o)(5) and Fed. R. of App. P. 29(a)(4)(E), *Amici* hereby declare that no party's counsel has authored, in whole or in part, this brief; no party, nor a party's counsel, contributed money that was intended to fund preparing or submitting the brief; and no person—other than the *amici* or their counsel—contributed money that was intended to fund preparing or submitting the brief.

explicitly mandating that the Secretary of Commerce shall publish the Report in the Federal Register by January 19, 2020. Consolidated Appropriations Act, 2020, § 112, 133 Stat. at 2395. The Report contains a statutorily-required finding that is a predicate to the exercise of delegated power. It is not a privileged presidential communication or an internal deliberative document, nor does its publication interfere with the executive's diplomatic powers. Even if the Report does qualify for consideration of privilege, these constitutional and congressional interests outweigh whatever interest the executive may have in withholding publication of the Report.

In asserting that the President may order the Report to be withheld from Congress and the public, the Department of Justice's Office of Legal Counsel ("OLC") argued that Congress "may have a legitimate interest in ultimately reviewing the [Section 232] report," after the President has taken whatever action he deems appropriate. *Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security*, 44 Op. O.L.C. 1, 2 (2020) [hereinafter "OLC Opinion"]. However, OLC asserted that "Congress has not demonstrated an adequate justification for requiring the disclosure of the report *now*." *Id*. at 20 (emphasis added). Neither the text of the Constitution, nor the text of the Section 232 statute, nor the Consolidated Appropriations Act, 2020 supports these arguments.

Contrary to OLC's arguments, Congress's entitlement is not limited to learning after the fact how U.S. trade policy was conducted, or to some opportunity to try to prove its case to the executive branch about participating in its conduct. Congress has exclusive authority over international trade and, accordingly, the executive branch answers to Congress regarding its conduct—because it must under our constitutional design. Thus, to the extent any President may take an action concerning international trade, including under Section 232 of the Trade Expansion Act of 1962, then that action must comport with whatever strictures Congress has established. In

this case, those strictures, as reflected in duly enacted statutes, include the public release of the Report.

OLC does not—because it cannot—point to any specific text in the Constitution or a statute that allows the executive branch to simply nullify those aspects of a trade statute it finds inconvenient. Instead, OLC falls back to claiming disclosure would implicate "foreign affairs and national security." OLC Opinion at 12. But the Constitution does not give the President exclusive authority over those fields, and indeed Article I, Section 8—which gives Congress exclusive authority over tariffs and foreign commerce—is just one of the instances that illustrates this point. Indeed, to accept OLC's arguments is to upset the entire statutory scheme multiple congresses have established to regulate international trade. For example, so-called Trade Promotion Authority laws, or "fast-track" laws, that allow for the United States to enter into free trade agreements are predicated upon consultation and disclosure to Congress, and indeed the public at large. *See, e.g.*, 19 U.S.C. § 4203 (setting forth consultations with Congress and the public over potential trade agreements). Put plainly, abstract allusions to foreign affairs and national security do not supplant constitutional and statutory commands. Thus, when it comes to trade, Congress can require the executive branch to consult with Congress and the public; it did so here by requiring disclosure of the Report; and the Court should accordingly compel the executive branch to do so.

ARGUMENT

I. Publication Of The Report Is The Means Through Which Congress Oversees Executive Compliance With Section 232.

As the Supreme Court has confirmed consistently in its non-delegation jurisprudence, congressional delegation of authority to the executive branch is contingent upon Congress imposing appropriate constraints on the use of that authority. With respect to Section 232 of the Trade Expansion Act of 1962, those constraints include certain procedural requirements as a

precondition for the exercise of that authority. As recognized by the U.S. Court of International Trade:

> The procedural safeguards in section 232 do not merely roadmap action; they are constraints on power. The Supreme Court has made clear that section 232 avoids running afoul of the non-delegation doctrine because it establishes "clear preconditions to Presidential action." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976).

Transpacific Steel LLC v. United States, 415 F. Supp. 3d 1267, 1275-76 (Ct. Int'l Trade 2019). In *Transpacific Steel*, the government has argued that one set of procedural safeguards in Section 232 does not apply—the requirement to act within certain specified time periods. *See id.* at 1274-75. In this case, the government argues that the other does not apply as well—the requirement for a public report laying out the Secretary of Commerce's findings. OLC Opinion at 19-20. If the government's position from these cases is accepted, then essentially the President, instead of Congress, has the "[p]ower to lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as to "[t]o regulate [c]ommerce with foreign [n]ations." U.S. Const. art. 1, § 8. This proposition cannot stand, which is why the statute does not provide for it, and should not be construed as argued by the government.

Section 232 provides that the President's authority to "adjust the imports" of a product is activated, if at all, by the Secretary of Commerce's finding that such imports "threaten to impair the national security" in light of certain enumerated factors. 19 U.S.C. § 1862(c)(1); *id.* § 1862(d). The Secretary must put that finding into a report that Congress directed the Secretary to publish in the Federal Register. The Department of Commerce's own regulations also require that "[c]opies of the full report" be made "available for public inspection and copying." 15 C.F.R. § 705.10(c). Absent such publication, neither Congress, the courts, nor the public can determine whether the President and the Secretary have complied with Congress's will as expressed in Section 232. The

Supreme Court has held repeatedly that the ability to make this determination is critical for Congress's delegations to be consistent with the Constitution.

A. The Constitution only permits Congress to delegate Congress's exclusive authority over taxes and foreign commerce if Congress imposes sufficient limits to ensure the executive complies with the will of Congress.

The powers "[t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as to "[t]o regulate [c]ommerce with foreign [n]ations" are legislative powers vested in Congress per Article I, Section 8 of the Constitution. *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824) ("[T]he power over commerce with foreign nations, and among the several States, is vested in Congress . . .").

As the Supreme Court has espoused through the non-delegation doctrine, Congress may not divest itself of its legislative authority. Rather, Congress "must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed." *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)). To that end, courts examine whether the legislative action "lay[s] down . . . an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* at 2123 (majority opinion, alterations in original) (quoting *Mistretta v. United States*, 488 U. S. 361, 372 (1989)); *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring in the judgment) ("[The non-delegation] doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.").

B. Publication of the Report is a valid limit of Congress's delegation under Section 232.

The publication requirement is an essential mechanism by which Congress has conditioned its delegation: it ensures that the Secretary's determination, which is a predicate for presidential

action, complied with Congress's instructions. Specifically, in conducting a Section 232 investigation, Congress has prescribed an extensive list of factors that "the Secretary . . . shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to." 19 U.S.C. § 1862(d). These factors include "domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense." *Id*. In essence, the Secretary is engaged in fact-finding. This comports with a long history of Congress setting policy but applying it contingent upon facts established by the executive branch. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892) (concluding that Congress could delegate power to the President to execute after a fact-finding because such a delegation "left the hands of congress . . . full and complete in themselves"). In doing so, Congress ensures that it has not abdicated its legislative powers.

If Congress is conditioning its delegation on fact-finding, then the logical corollary is that Congress may ensure that the fact-finding actually took place by compelling the Secretary to publish in the Federal Register any portion of the Report that does not contain classified or proprietary information, 19 U.S.C. § 1862(b)(3)(B), and to ensure that any proprietary or classified information is shared with members of Congress, and congressional staff with security clearances, as Section 112 of the Consolidated Appropriations Act, 2020 requires. 133 Stat. at 2395-96. These requirements ensure that the Secretary has carried out the investigation in accordance with Section 232's procedural requirements, and also allow Congress to examine the substance of the investigation and its conclusions in light of the factors Congress has directed the Secretary to consider.

The Supreme Court itself has made clear the constitutional significance of the Secretary's finding under Section 232. In *Fed. Energy Admin. SNG v. Algonquin*, 426 U.S. 548, 559 (1976), the Supreme Court held that the Secretary's finding is a "clear precondition[] to Presidential action." In other words, absent the Secretary's determination, the President is powerless to act under Section 232. There is no indication, though, that Congress wanted to render itself powerless, or even diminish that power. But that is precisely what happens if the determination exists, and is only known to the President. Absent an understanding of the Secretary's findings, Congress faces an asymmetry of information—as it does now—and cannot assess them or take responsive action, as is its right under Article I, Section 8 of the Constitution. Moreover, Congress, as the institution closest to the people, is entitled to know the Secretary's findings and share that information with its respective constituents. Accordingly, publication of the Report helps to establish "the boundaries" of the President's authority. *Gundy*, 139 S. Ct. at 2129 (internal quotations omitted).[2]

Indeed, in a different case recently decided by the U.S. Court of Appeals for the Federal Circuit, the government asserted that the Secretary's determination is a key limit on the President's power that prevents Section 232 from being an unconstitutional delegation of authority. *Am. Inst. for Int'l Steel v. United States*, No. 19-1727, 2020 WL 967925 (Fed. Cir. Feb. 28, 2020). In that case, the government argued that Section 232 contains the constitutionally-required intelligible principle necessary to cabin the President's discretion under Section 232 in part because "the President may only act at the conclusion of the Secretary's investigation and only if he concurs with the Secretary's affirmative finding." Br. of Def.-Appellee at 17, *Am. Inst. For Int'l Steel v.*

[2] Additionally, unlike, for instance, Section 201 of the Trade Act of 1974, 19 U.S.C. § 2251, which makes the President's delegated authority dependent on a determination by the independent International Trade Commission, the President's power under Section 232 depends on a finding by an officer, the Secretary of Commerce, who serves at the pleasure of the President.

United States, No. 19-1727 (Fed. Cir. Feb. 28, 2020), ECF No. 49. This point is misplaced. The non-delegation concerns are not remedied simply because a Cabinet secretary—who serves at the pleasure of the President—possesses unbridled discretion. The issue is whether that discretion comports with the fact-finding that Congress requires in Section 232—and that Congress accordingly demanded be public. Moreover, the government cannot have it both ways. If the Secretary's report containing his determination regarding the threat of impairment to national security saves Section 232 from unconstitutionality, the government cannot then evade that limit by refusing to allow Congress or the public to see the Report.

Within 90 days of receiving the Secretary's report, the President must determine whether he concurs with the Secretary's affirmative finding. 19 U.S.C. § 1862(c)(1)(A)(i). If he does concur, the President must then take whatever action is necessary, in his judgment, to "adjust the imports" of the product in question and its derivatives. *Id.* § 1862(c)(1)(A)(ii). Significantly, the President's determinations are not subject to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, because the President is not an agency, *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994), nor does Section 232 itself provide for judicial review of the President's actions. The Secretary's finding, and review thereof via the publication requirement, is thus the primary means of accountability under Section 232. *Transpacific Steel*, 415 F. Supp. 3d. at 1276 ("The broad discretion granted to the President and the limits on judicial review only reinforce the importance of the procedural safeguards Congress provided, and which the President appears to have ignored.")

C. Congress reiterated its authority to review the Secretary's findings when it required the Report's publication by January 19, 2020.

On December 20, 2019, Congress enacted the Consolidated Appropriations Act, 2020. Section 112 of the Act provides:

> Not later than thirty days after the date of the enactment of this Act, using amounts appropriated or otherwise made available in this title for the Bureau of Industry and Security for operations and administration, the Secretary of Commerce shall—
>
> (1) publish in the Federal Register the report on the findings of the investigation into the effect on national security of imports of automobiles and automotive parts that the Secretary initiated on May 23, 2018, under section 232(b) of the Trade Expansion Act of 1962 (19 U.S.C. 1862(b)), as required under paragraph (3)(B) of that section; and
>
> (2) submit to Congress any portion of the report that contains classified information, which may be viewed only by Members of Congress and their staff with appropriate security clearances.

133 Stat. at 2395-96.

Section 112 makes two things clear. First, it imposes a deadline of January 19, 2020 for the Secretary to publish the Report, eliminating any alleged ambiguity regarding discretion that the Secretary might have had with respect to the timing of publication under 19 U.S.C. § 1862(b)(3)(B).[3] Second, it reflects Congress's determination to uphold the constitutional scheme. By passing Section 112, Congress has clarified both its desire and its intention to conduct its constitutionally-appointed role to "[t]o lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as to "[t]o regulate [c]ommerce with foreign [n]ations." U.S. Const. art. I, § 8.

[3] In its response to the Court's order that the government submit the Report for *in camera* review, the government indicated that it had withheld information from the Court under 50 U.S.C. § 4555(d), which authorizes the President to withhold disclosure of "[i]nformation *obtained under this section* which the President deems confidential." (emphasis added). Section 4555(d) provides no basis for withholding the Report or information contained therein. By its express terms, 50 U.S.C. § 4555(d) only applies to information obtained "under this section," *i.e.*, under an investigation conducted pursuant to 50 U.S.C. § 4555. The investigation leading to the Report, however, was conducted under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, not 50 U.S.C. § 4555. *See, e.g.*, *Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts*, 83 Fed. Reg. 24,735 (Dep't Commerce May 30, 2018) ("On May 23, 2018, the Secretary of Commerce initiated an investigation to determine the effects on the national security of imports of automobiles, including cars, SUVs, vans and light trucks, and automotive parts. This investigation has been initiated under section 232 of the Trade Expansion Act of 1962, as amended.").

II. Release Of The Report Is Necessary To Allow Congress As A Whole And *Amici* Individually To Exercise Their Constitutional Duties.

Congress as a whole and *Amici* individually have an interest in the publication of the Report in light of Congress's exclusive constitutional authority over tariffs and foreign commerce. Congress retains the right to legislate directly on matters contained in the Secretary's Report. Congress might, for instance, choose to legislate when the President has not acted. Likewise, Congress might choose to overturn presidential action through legislation. Individual members of Congress, such as *Amici*, might hold hearings on the subject of the Secretary's Report or introduce legislation regarding its content. Members of the public might lobby members of Congress, such as *Amici*, for action. Injured members of the public might challenge the Secretary's Report under the APA, as has been done for the Secretary's Section 232 report on imports of steel. *See, e.g.*, *Universal Steel Products, Inc. v. United States*, No. 19-cv-00209 (Ct. Int'l Trade 2020). More generally, Congress may direct and rescind authority delegated to the Secretary of Commerce and to the President over the regulation of trade, as well as with respect to any conditions on such authority.

In this case, Congress delegated to the Secretary of Commerce a fact-finding responsibility and a reporting responsibility. Congress does not need to demonstrate a justification for requiring the disclosure of the Report at any particular point in time, as the government has suggested. OLC Opinion at 20-21 (arguing that Congress has not presented a legitimate justification for immediate publication of the Report). Rather, Congress has a legitimate interest in the Report because it provides the statutory predicate for any trade restrictions the President may impose pursuant to the powers delegated to him by Congress. Here, the Secretary found that automobiles and certain auto parts are being imported "in such quantities and under such circumstances as to threaten to impair the national security." Presidential Proclamation 9888, 84 Fed. Reg. 23,433 (May 17, 2019) (citing

and quoting the Secretary's Report). Congress as a whole and *Amici* individually have an interest in knowing the foundation for the Secretary's finding so that they too may consider legislating regarding the import of autos and auto parts or amending delegations of trade authority.

A. Congress retains the constitutional right and responsibility to legislate on the import of autos and auto parts, as well as to reform Section 232 in its entirety.

In the 116th Congress, several bills have been introduced that would amend Section 232. While a number of *Amici* have drafted, introduced, or co-sponsored such legislation, *Amici* hold diverse views on how, or even whether, Section 232 should be amended. These legislative drafts consider the role of reporting, consulting, and publishing requirements, among other institutional designs, for the management of trade and national security concerns. *See, e.g.*, Trade Security Act of 2019, S. 365, 116th Cong., § 2 (2019) (redesigning the investigation process to include consultations with congressional committees, holding public hearings, and creating a congressional disapproval process); Bicameral Congressional Trade Authority Act of 2019, S. 287, 116th Cong., § 2 (2019) (amending Section 232 to provide Congress with a report including proposed actions for approval, including the Secretary of Defense in the investigation process, and adding reporting requirements for the International Trade Commission); Reclaiming Congressional Trade Authority Act of 2019, H.R. 3477, 116th Cong., § 2 (2019) (requiring the President to report to Congress to request authorization to modify duty rates and adding reports from the Secretary of Defense and International Trade Commission). For Congress and for *Amici* to effectively debate, design, and possibly enact these legislative reforms—acts central to Congress's exercise of its constitutional authority—they must have access to the executive's statutorily-required fact-finding. Absent such information, Congress cannot know how the executive is making use of its delegated authority and thus how best to approach efforts to reforming that delegation.

Congress also retains the power to override, via ordinary legislation, any specific action the President might take pursuant to Section 232—including *inaction* by the President in response to the Secretary's finding that an import poses a national security threat. Legislative action to overturn the President's decision under Section 232 has historical precedent. In 1980, following action by the President to adjust the imports of petroleum and petroleum products under Section 232, Congress amended Section 232 to establish an expedited process for congressional action disapproving such action. *See* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 402, 94 Stat. 229, 301. More generally, Congress regularly enacts legislation establishing specific tariff rates or otherwise regulating importation. *See, e.g.*, Miscellaneous Tariff Bill Act of 2018, Pub. L. No. 115-239, 132 Stat. 2451 (temporarily suspending duties on a range of chemical and other products). There, as here, Congress's ability to enact trade legislation effectively depends on facts provided to it by executive branch agencies pursuant to statute. Congress has proceeded this way for more than a century, relying on the executive branch for the collection of trade-related information to inform Congress's lawmaking.

B. Access to the Report is critical to allowing Congress to perform its oversight function.

Congress oversees the implementation of its delegations to the executive in numerous ways apart from maintaining its legislative authority to amend, rescind, or amplify existing delegations. Congress regularly requires members of the executive branch to report directly to Congress, to consult with members of Congress, to appear before congressional committees, and to follow statutory timelines, among other delegation disciplines. For this reason, Section 232 prescribes at all points in the decision-making process that the executive branch's decision will be communicated to Congress or to the public or both. For example, apart from the publication of the Report, Section 232 provides that the Secretary shall, if appropriate, hold public hearings in

the course of an investigation, 19 U.S.C. § 1862(b)(2)(A)(iii); the President shall submit to Congress a written statement regarding his determinations, *id.* § 1862(c)(2); and, the President shall publish in the Federal Register notice of additional actions being taken in relation to the negotiation of any agreement into which he enters on the matter, *id.* § 1862(c)(3)(A)(ii).

Further, Section 232 facilitates action under the supervision of Congress. Pursuant to the statute, the Secretary implements a program that Congress developed to inform the implementation of a policy Congress selected. It would be nonsensical for Congress not to have access to the information that it requires before any action be taken, which action can be modified at any time. To deny Congress and the public access to statutorily-required information would be as if to invite Congress to act without consulting with its own staff or committees preparing research for the purpose of lawmaking.

III. Publishing The Report Would Not Impair The President's Constitutional Or Deliberative Prerogatives, Nor Would It Impair Diplomatic Or National Security Concerns.

The government has taken the position that, notwithstanding Section 112, the President may direct the Secretary not to publish the Report because the report "falls within the scope of executive privilege and its disclosure would risk impairing ongoing diplomatic efforts to address a national-security threat and would risk interfering with executive branch deliberations over what additional actions, if any, may be necessary to address the threat." OLC Opinion at 1; *see also Statement by the President*, WHITE HOUSE (Dec. 20, 2019), *available at* https://www.whitehouse.gov/briefings-statements/statement-by-the-president-33/ (noting the government will treat Section 112's requirement that the Report be published by January 19, 2020, "consistent with the President's constitutional authority to control information"). Notably, this position only became apparent to the government after this litigation had been in progress for

nearly a year. Common sense does not require the Court to accept this gamesmanship—and the Constitution forbids it.

The Report does not fall within the scope of executive privilege. The Report is not a presidential communication nor is it a deliberative document. It contains a statutorily-required finding, intended for consumption by Congress and the public, that is a condition precedent to the exercise of delegated authority. Holding that it qualifies as a presidential communication or a deliberative document would allow the President to withhold as privileged any agency findings required by law and submitted to the President, as well as presidential findings that are a predicate to the exercise of delegated authority. Nor does publication interfere in any way with the President's ability to receive advice from executive officers on how to exercise his substantial discretion under Section 232.

Even if the Report were to qualify as a presidential communication or a deliberative document, which it does not, the President's claim of privilege must be weighed against the interests of other branches and the public in disclosure. *See United States v. Nixon*, 418 U.S. 683, 707 (1974) ("Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch."); *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 389 (2004) ("Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives."). Given the weighty constitutional and congressional interests described above, and the fact that the Report does not constitute either a presidential communication or a deliberative document, the government's claim of privilege should be rejected.

A. The Report is neither a presidential communication nor a deliberative document. It is a statutorily-required agency finding that is a condition precedent to the exercise of delegated power.

Contrary to the government's position, this case does not raise the broad question of whether documents that advise the President as to how to exercise delegated discretion may be privileged. OLC Opinion at 8 ("This conclusion [that the Report is shielded by executive privilege] is not affected by the fact that the report reflects the exercise of statutory authority delegated to the President pursuant to Congress's constitutional powers to impose 'Taxes, Duties, Imposts and Excises' and to 'regulate Commerce with foreign Nations.' U.S. Const. art. I, § 8, cls. 1, 3."). Rather, this case raises the narrow question of whether a report containing a statutorily-required agency finding that is a condition precedent to the exercise of delegated authority can be withheld when Congress has specifically directed its release.

OLC's Opinion cites no cases in which such a legally-required finding has been deemed privileged when Congress has required its release by law. *United States v. Nixon*, 418 U.S. 683 (1974), which rejected the claim of privilege, concerned records of conversations between the President and his advisers, not statutorily-mandated agency findings. *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004), dealt with records of meetings of a task force established by the President via executive order, not by Congress via statute. In *Loving v. Dep't of Def.*, 550 F.3d 32 (D.C. Cir. 2008), the D.C. Circuit upheld a claim of privilege in part because Congress had not required the release of the documents in question. *Id.* at 38 (distinguishing *Dep't of Justice v. Julian*, 486 U.S. 1 (1988), in which the Supreme Court rejected a claim of privilege with respect to presentence reports, on the grounds that in *Julian* "Congress has strongly intimated, if it has not actually provided, that no such privilege should exist." (quoting 486 U.S. at 13)). Moreover, the documents at issue in *Loving* primarily conveyed recommendations to the President as to how he should exercise authority under the Uniform Code

of Military Justice. 550 F.3d at 36. They were not the primary findings which provided the legal basis for the President's action in the first place, as in this case. *Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895 (D.C. Cir. 2015), likewise involved a plaintiff seeking access to a document that "was merely a recommendation to a supervisor." *Id.* at 899. The document was not an underlying agency finding without which the agency was powerless to act.

To hold that an agency finding can be privileged as a presidential communication or a deliberative document merely because the finding serves as a legally-required predicate to presidential action—including under authority delegated by Congress—would have far-reaching implications. Just as in Section 232, Congress regularly requires agency findings as a predicate to executive branch action. For instance, in *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), the Supreme Court upheld the Tariff Act of 1922's delegation of authority to the President to set and impose customs duties by proclamation. In *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), the Supreme Court noted at least a dozen delegations dating to 1794 to the executive structured this way, empowering the President with discretion to act within clearly delineated conditions. Section 201 of the Trade Act of 1974 authorizes the President to "take all appropriate and feasible action . . . [to] facilitate efforts by the domestic industry to make a positive adjustment to import competition" if, and only if, the International Trade Commission first determines that "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof," to a domestic industry. 19 U.S.C. § 2251; *see also* 19 U.S.C. §§ 1337, 2414.

Such a structure is a core feature of the modern administrative state across a wide range of issue areas, not merely trade policy. *See, e.g.*, *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) ("[O]nce Congress prescribes the rule governing private conduct, it may make application of that

rule depend on executive fact-finding"); *see also* Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825 (2019) (providing extensive examples where presidential authority hinges on first making a factual determination). To allow the President to withhold findings that Congress has required precisely to limit the President's use of delegated authority would transform limited congressional delegations into unlimited and unreviewable ones. If Congress, the courts, and the public cannot evaluate an agency's legally-required finding that is a condition precedent to the exercise of delegated authority, they cannot possibly know whether the executive branch is obeying the law. Nor can Congress effectively determine whether its statutorily prescribed delegation scheme is working effectively or instead needs refinement.

B. The President is free to solicit privileged advice from any executive officer on how to exercise his discretion under Section 232.

Holding that executive privilege does not shield the Report in no way interferes with the President's ability to seek advice from the Secretary or any executive officer as to how he should use his substantial discretion under Section 232. From the time he receives an affirmative finding of a threat to the national security, the President has 90 days to decide whether he concurs with the Secretary's determination, and if so, what action to take. 19 U.S.C. § 1862(c)(1)(A). He then has an additional 15 days to implement his decision. *Id.* § 1862(c)(1)(B). If the President opts to negotiate with foreign governments to address the threat, he has 180 days to conduct such negotiations. *Id.* § 1862(c)(3). Throughout this period—which is subsequent to the delivery to the President of the Secretary's report—the President may solicit advice, including sensitive political advice, from any executive officer he wishes. Such advice might very well qualify as a presidential communication or deliberative document, thus making it eligible for a claim of executive privilege. Moreover, such advice can be communicated independent of the Secretary's report.

C. Publishing the Report would not impair diplomatic or national security concerns.

Finally, this case does not implicate the President's ability to protect the national security or to engage in diplomacy. Given that the Report predates any relevant diplomatic engagements and is independent of them, publishing the Report does not interfere with diplomatic efforts of the executive branch, the details of which the President may keep confidential. Further, to the extent the Report contains any classified or proprietary information, Section 232 provides for the removal of such information prior to publication. 19 U.S.C. § 1862(b)(3)(B). Any diplomatic engagement into which the President enters pursuant to Section 232 is in furtherance of executing Congress's chosen economic policy. Congress can require the publication of the information on which such policy choices are premised.

Permitting the President to claim as privileged a report containing a congressionally-mandated agency finding whenever he subsequently engages in diplomacy on the same topic would also have perverse results that would undermine the constitutional structure. It would allow the President to ignore Congress's command in myriad circumstances simply by directing an executive officer to try to engage with a foreign trading partner on the subject. Diplomatic engagement, or even the possibility thereof, would become a way to circumvent the limits Congress imposes on delegated authority.

In sum, publishing the Report does not impede the President's ability to receive confidential advice. The Secretary has a variety of different means of communicating with the President. Many of those means could be subject to executive privilege. But the particular means by which Congress has required the Secretary to disclose the predicate for presidential action in Section 232 is not one of these. Nor does requiring disclosure of the Report constrain the

President's ability to conduct the nation's diplomatic affairs. Holding otherwise would neuter the ability of Congress to use agency findings to limit the use of delegated authority.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to the Plaintiff and direct the release of the Report.

Respectfully submitted,

Daniel I. Prywes (D.C. Bar No. 342394)
Donald B. Cameron (D.C. Bar No. 260844)
R. Will Planert (D.C. Bar No. 412145)
MORRIS MANNING & MARTIN LLP
1401 Eye Street, NW, Suite 600
Washington, D.C. 20005
(202) 971-4182
dprywes@mmmlaw.com

/s/Kathleen Claussen
Kathleen Claussen (N.Y. Bar No. 4954194)
University of Miami School of Law
1311 Miller Drive
Coral Gables, FL 33146
(305) 284-6646
kclaussen@law.miami.edu

/s/Timothy Meyer
Timothy Meyer (Cal. Bar No. 252828)
Vanderbilt Law School
131 21st Avenue South
Nashville, TN 37203
(615) 936-8394
tim.meyer@law.vanderbilt.edu

Counsel to Amici

Dated: March 6, 2020

APPENDIX—LIST OF *AMICI CURIAE*

Senator Charles E. Grassley* (R-IA), Chairman of U.S. Senate Committee on Finance

Senator Ron Wyden* (D-OR), Ranking Member of U.S. Senate Committee on Finance

Senator Bill Cassidy, M.D.* (R-LA)

Senator Ron Johnson (R-WI)

Senator Mike Lee (R-UT)

Senator Ben Sasse* (R-NE)

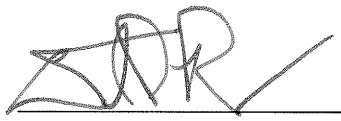
Senator Pat Toomey* (R-PA)

Senator Mark Warner* (D-VA)

* Member of U.S. Senate Committee on Finance

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the Court's Minute Order of March 2, 2020, LCvR 7(o)(4), and Fed. R. of App. P. 29(a)(4)(E) in that it is not longer than 20 pages and contains 6,229 words including text, footnotes, and headings and excluding the table of contents, table of authorities and counsel's signature block, according to the word count function of Microsoft Word 2010 used to prepare this brief.



Daniel I. Prywes

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2020, I caused the foregoing Brief of Amici Curiae Senator Pat Toomey and Members of Congress In Support of Plaintiff to be served upon the following by electronic delivery through the Court's ECF program:

Lee A. Steven
Cause Of Action Institute
1310 N. Courthouse Road
Suite 700
Arlington, VA 22201-2961

Attorney for Plaintiff

Ryan Patrick Mulvey
Cause Of Action Institute
1310 N. Courthouse Road
Suite 700
Arlington, VA 22201-2961

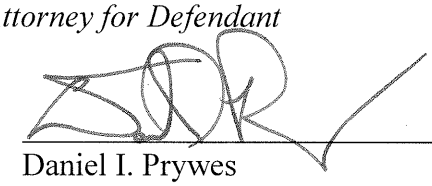
Attorney for Plaintiff

Russel James Valvo, III
Cause Of Action Institute
1310 N. Courthouse Road
Suite 700
Arlington, VA 22201-2961

Attorney for Plaintiff

John Moustakas
U.S. Attorney's Office For The District Of Columbia
555 Fourth Street, NW
Washington, DC 20530

Attorney for Defendant



Daniel I. Prywes