No. 23-69

IN THE

Supreme Court of the United States

PRIMESOURCE BUILDING PRODUCTS, INC.,
Petitioner,

v.

UNITED STATES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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As the petition explained, the Trade Expansion Act transfers Congress's legislative power over tariffs to the President, to exercise as he sees fit, whenever he declares that imports threaten "national security," subject only to certain procedural requirements intended to ensure that the President acts on the basis of current information and informed advice. The United States acknowledges that the President did not undergo that deliberative statutory process before imposing significant tariffs on steel derivatives. And it also acknowledges that the Federal Circuit upheld the President's decision to forgo that process by applying its *Maple Leaf* standard of review, which requires courts to accept the President's construction of statutory limits on his delegated power, absent a "'clear misconstruction of the governing statute.'" BIO 16 (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 85, 89 (Fed. Cir. 1985)). Instead, consistent with its defense of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, No. 22-451, the Government insists that allowing the Executive to exercise both Congress's legislative powers and the judiciary's interpretive responsibilities in this way is fully consistent with our constitutional structure. BIO 10-15.

If this Court is uncomfortable with that position, this case presents a clear opportunity to do something about it. Contrary to the Government's arguments (BIO 10-14), the Court need not declare the Trade Expansion Act unconstitutional or overrule any of its prior precedents to take an important step toward restoring the constitutional balance. The Court need

only grant the petition and hold that judges (rather than Presidents) are charged with construing the statutory limits on delegations of vast legislative powers to the Executive and that courts should construe ambiguity in such limitations in favor of constraining the delegation. The Court should then apply those principles here and reverse the Federal Circuit's interpretation of the Trade Expansion Act.[1]

I. The Court Should Grant Certiorari To Decide How Separation-Of-Powers Principles Apply To The Interpretation Of Statutes Delegating Vast Legislative Powers To The Executive.

1. The opposition spends much of its time defending the Act from a constitutional non-delegation challenge petitioner does not make. BIO 10-14. Nor does petitioner argue that the Act must be construed "narrowly in order to avoid a violation of the nondelegation doctrine," *id*. 10, or that the Court should overrule *Federal Energy Administration v. Algonquin SNG, Inc*., 426 U.S. 548 (1976), *contra* BIO 12-14. Instead, petitioner argues that *even when* Congress does not exceed the constitutional limits on delegation, separation-of-powers principles *still* preclude courts from deferring to the Executive's interpretation of the limits on that delegation and require resolving ambiguities in those limits in favor of constraining the delegation. *See* Pet. 20-25.

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[1] The Court may wish to hold this petition for consideration with the forthcoming petition in *Oman Fasteners, LLC v. United States*, No. 23A237, which was consolidated with this case below.

The Government acknowledges that separation-of-powers principles have a role to play in the interpretation of statutes even when a narrow construction would not otherwise be required by constitutional avoidance principles. BIO 14. It admits, for example, that when "determining the substantive scope of the power that a statutory provision has granted to the Executive Branch," this Court has applied a separation-of-powers presumption against construing the law to provide '[e]xtraordinary grants of regulatory authority.'" *ibid*. (quoting *W. Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022)). This case involves a somewhat different interpretive question, one about the meaning of statutory limits on an expansive delegation of legislative power. But in the end, "the scope of the substantive power that a statutory provision has granted to the Executive Branch," BIO 14, is a product of both the statutory language affirmatively granting that power *and* the text placing limits on its exercise. A court concerned about the Executive exercising more legislative power than Congress intended must construe both kinds of provisions with restraint.

The Government's brief itself makes the case for petitioner's interpretive rule. It emphasizes that in its present form, the non-delegation doctrine places almost no meaningful limit on Congress's ability to bestow naked legislative power on the Executive Branch. *See* BIO 12-13 (giving examples of cases upholding statues requiring President to make laws that are "fair and equitable" or consistent with the "public interest" or "national security") (citations omitted). Until that interpretation of the Constitution

is changed, the only real limits on such delegations must come from Congress. And yet, the Federal Circuit's *Maple Leaf* standard of review has the necessary effect of watering down those limitations and expanding the delegation by deferring to the Executive's interpretation of the limits on its own powers absent "a 'clear misconstruction of the governing statute.'" BIO 16 (quoting *Maple Leaf*, 762 F.2d at 89). Indeed, the United States stresses that the Federal Circuit's *Maple Leaf* doctrine provides a "'very limited' scope of judicial review" that treats the President's decisions—including how to comply with the Act's limitations on his authority—as "'highly discretionary.'" *Ibid*.

Accordingly, the Government's observation (BIO 14-15) that this Court has not yet applied the major-questions doctrine to construe the statutory *limits* on a delegation of vast legislative powers is a reason to *grant* review, not deny it. Unless this Court does so, the Federal Circuit will continue to apply its *Maple Leaf* rule to construe ambiguous limitations in favor of expanding legislative delegations.

2. The Government's attempts to defend the *Maple Leaf* standard on the merits are unconvincing.

First, it says the only question in this case is whether the President, having already imposed tariffs on steel mill products, can extend those tariffs to new products "at a later date in light of new information." BIO 15. Deferring to the President's view on that question, the opposition claims, "cannot reasonably be described as 'delegating vast legislative power to the Executive.'" *Ibid.* (quoting Pet. 3). That response

misses the point. Special scrutiny is required because the Act's procedural prerequisites are the *only* meaningful limit on what is otherwise a nearly unfettered delegation of the entirety of Congress's constitutional power and obligation to set tariffs and regulate international trade in this context. It is an odd conception of separation of powers to require careful scrutiny of whether Congress intended the Executive to wield extraordinary legislative powers yet exercise no special care in ensuring the Executive adheres to the statutory limits on exercising those vast and unusual powers.

The argument also fails on its own terms. Even if the United States views the Act's procedural requirements as of only minor importance, Congress plainly thought otherwise. As the petition explained, the point of the statutory process is to ensure that the President acts on the basis of timely data, informed advice from relevant officials (including those in the Department of Defense), and public input. Pet. 4. That attempt to replicate at least some part of the deliberative process the Constitution usually requires for enacting law is undeniably important. *See id*. 24-25. The time constraints also ensure that the President's actions maintain a relationship to the threat identified through that process—unlike in this case, where the President imposed new tariffs on new products never identified in the investigation required by statute, years after the initial process.

The United States also suggests that the *Maple Leaf* standard is appropriate in light of the "highly discretionary" decisions the Act authorizes the President to make. BIO 16. But petitioner does not

challenge any discretionary decision, only the President's compliance with the Act's procedural prerequisites, which even the Government cannot claim are discretionary. The case thus presents a straight-forward question of law (not discretion) that falls within the judicial (not executive) power.

Quoting *Tanzin v. Tanvir*, 141 S. Ct. 486, 493 (2020), the Government also insists (BIO 15) that this Court is "not at liberty" to "manufacture a new presumption now and retroactively impose it on a Congress that acted [35] years ago." But *Tanzin*—which rejected the Government's request for "a new policy-based presumption against damages against individual officials," *ibid*.—has no application to rules of construction founded in the constitutional order rather than the Government's policy preferences. For example, this Court has never considered the date of enactment in applying the major questions doctrine. *See, e.g.*, *W. Virginia v. EPA*, 142 S. Ct. at 2609 (explaining that the major questions doctrine "developed over a series of significant cases" starting in 1994); *id*. at 2599, 2609 (applying doctrine to construe a provision of the Clean Air Act Amendments of 1970); *Gonzalez v. Oregon*, 546 U.S. 243, 250, 267 (2006) (applying doctrine to Controlled Substances Act of 1970); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146 (2000) (same for Food and Drug Act of 1938).

Finally, nothing in the Government's non-delegation arguments supports a contrary conclusion. Even if it "would be 'unreasonable and impracticable to compel Congress to prescribe detailed rules,' beyond those set out in Section 232, to constrain the

President's power," BIO 14 (citation omitted), it is *eminently* reasonable and practicable for courts to take a conservative approach to enforcing the rules Congress *has* prescribed. And even if Congress has greater leeway to provide broad delegations of legislative power in the foreign-relations context, *see id*. 13, that has no bearing on Congress's authority to impose limits on that delegation or the courts' obligation to ensure those limits are respected.

II. The Government's Defense Of The Decision Below Confirms The Need For Review.

The Government's defense of the decision below only highlights how squarely this case presents the question of the appropriate standard of review and the damage the *Maple Leaf* standard inflicts on separation of powers.

What little the opposition has to say about the statutory language is unconvincing. The Government acknowledges that the statute requires the President to determine the "action" he will take within 90 days of receiving a report from the Secretary of Commerce. BIO 2-3. And it does not deny that in his initial 90-day order here, the President took no action against steel derivatives, whose impact on national security had not been the subject of any investigation or recommendation by the Secretary. *Compare* Pet. 8-10 *with* BIO 3-5. The opposition's only textual argument about why the President's initial "action" nonetheless included tariffs on steel derivatives is that the word "action" includes "a course of acts, not just a single act." BIO 7. No doubt. But that just raises the question whether the decision to impose tariffs on

steel derivatives was part of the "course of acts" the President decided upon within 90 days of receiving the report. It clearly was not—the order never mentioned derivatives, much less included actions regarding them as part of the "course of acts" the President determined to take.

The Government responds that the statute does not require the President to select the *specific* "course of acts" he will impose, only that he "determine the *general character* of his plan." BIO 9. But the Act requires the President to declare the "nature and duration" of the "action" and to "implement" the action within 15 days. 19 U.S.C. § 1862(c)(1)(A)(ii), (B). He can do none of those things if he hasn't even decided yet which imports will be the subject of his actions. Nor can the President determine whether his "action" will "adjust imports . . . so that such imports will not threaten to impair national security," *id*. § 1862(c)(1)(A)(ii), without having decided which imports will be subject to what measures.

Moreover, the Government offers *no response* to the statute's specific provision of one (and only one) circumstance in which the President can select "other actions" or "additional actions" outside the 90-day period based on changed circumstances. 19 U.S.C. § 1862(c)(3)(A)(ii)(II). As the petition explained, the provision and those phrases make no sense if the statute *already* allowed the President to take additional or other steps in response to a failed negotiation. Pet. 27-28. Nor does the Government attempt to explain why Congress would have required the President to report the reasons for imposing other or additional actions in response to a failed

negotiation, but not when he acts in response to perceived "circumvention" of the original order. BIO 6.

Instead of answering those textual points, the Government pivots to a variety of unconvincing arguments from purpose, policy, and legislative history. It says, for example, that in "general, the power to take regulatory action carries with it the power to amend that action" and that it would be unreasonable to read the statute to "foreclose the President from responding to changed circumstances or new information." BIO 7. But no one is arguing that the President is precluded from changing his chosen action; petitioner simply argues that Congress required the President to take the same care, and undergo the same procedures, to select a new action as he did to take the initial action. There's nothing unusual about that. *See, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95 (2015) (APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance").

For similar reasons, the Government's better-late-than-never argument (BIO 9-10) misses the point that the problem here isn't simply timing, but the President's failure to make his proposed changes through the deliberative process Congress required.

The Government argues that Presidents have been modifying their actions under the Act without undertaking new consultations since the 1950s. BIO 8. But as the opposition admits (*id*. 9), all of the cited examples occurred before Congress amended the

statute to add the present 90-day requirement and the related text discussed above.[2] The Government's insistence that the amendments be narrowly construed depends on a serious mischaracterization of *United States v. O'Brien*, 560 U.S. 218 (2010), which requires clear evidence that Congress intended to alter *this Court*'s interpretation of a statute, not that clear evidence is required before a statute will be read to impinge on the Executive's aggrandized views of its own authority. *Compare id*. at 231 with BIO 9.

The Government's *O'Brien* argument does, however, nicely demonstrate that this case starkly presents the question whether separation-of-powers principles allow courts to resolve statutory ambiguity through interpretive standards that defer to the Executive's view of the limits on its own delegated authority and thereby expand, rather than constrain, already vast delegations of legislative power to the Executive.

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The Government provides no other reason to deny the petition. It does not dispute that no other circuit has jurisdiction to hear tariff cases, *see* Pet. 20 n.13, so

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[2] The Government also cites no evidence that even before the amendment, any court approved the practice or that Congress endorsed it. *See ibid*. (citing, instead, the Attorney General's unsurprising endorsement of the President's claim to broad authority). Moreover, as the petition explained, President Ford obtained a new report prior to modifying the petroleum restrictions that led to the *Algonquin* litigation. Pet. at 29, n.14. Nor did the oil tariff modifications extend actions to derivatives, which were included from the beginning. *See ibid*.

there is no point in waiting for a circuit conflict that will never develop. The United States also does not dispute that the question was adequately pressed and passed upon below, *see* Pet. 31 n.15, and does not raise any other vehicle objection.

III. The Court Should At Least Hold The Petition For *Loper*.

The Government resists holding this case for *Loper Bright Enterprises v. Raimondo*, No. 22-451, on the ground that the Federal Circuit did not give the Executive's interpretation of the Trade Expansion Act *Chevron* deference, but instead applied the Circuit's even *more* deferential *Maple Leaf* doctrine. BIO 16-17. The question, however, is not whether the two cases "involve precisely the same question," but whether the Court's decision in *Loper* "could have a bearing on the analysis of petitioner's argument." U.S. BIO 7, *Yang v. United States*, No. 02-136 (explaining standard for a hold). And here, the arguments leveled against *Chevron* in *Loper* closely parallel petitioner's arguments against *Maple Leaf* in this case.

Loper's principal contention is that "*Chevron* is at odds with the basic division of labor in the first three Articles of the Constitution." Pet'r Br. at 23, *Loper Bright Enters v. Raimondo*, No. 22-451 (July 17, 2023). *Chevron* allows the Executive to usurp the judiciary's Article III responsibility to "say what the law is." *Id.* at 24 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). It also contravenes Article I by allowing agencies to resolve ambiguity in statutes in furtherance of the Executive's policy judgments. *Id*. at 26. Loper argues that "affirmatively delegating the

power to make legislative policy to the executive branch" is not "consistent with our constitutional scheme, let alone something to be encouraged or facilitated via judicial deference." *Ibid*. Deferring to the Executive's policy-based resolution of statutory ambiguity is particularly problematic, Loper argues, so long as the Court struggles to find "a workable test for identifying impermissible delegations." *Id*. 45.

None of these arguments turns on the differences the Government identifies between *Chevron* and *Maple Leaf*. *See* BIO 15-17. Excessive deference to the Executive Branch's interpretation of a statute is no less damaging to the constitutional structure when legislative and judicial responsibilities are handed over to the President rather than the agencies he oversees. *Contra id*. 16. Nor does it make any difference whether that deference is accorded while reviewing agency action under the APA or through some other means of review. *Contra ibid*.

Accordingly, were this Court to agree with Loper's separation-of-powers arguments, its decision would provide a significant basis for the Federal Circuit to reconsider *Maple Leaf*.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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