UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE CLAIRE R. KELLY
THE HONORABLE JOSEPH A. LAROSKI, JR.
THE HONORABLE KARA M. WESTERCAMP

GELLERT GLOBAL GROUP CORP., **Plaintiff,** **v.** **DONALD J. TRUMP, in his official capacity as President of the United States, et al.,** **Defendants.**	**Case No. 26-cv-04636-3JP**

BRIEF OF PHILIP ZELIKOW AND ROBERT ZOELLICK AS AMICI CURIAE IN SUPPORT OF PLAINTIFF

Richard F. O'Neill
NEVILLE PETERSON LLP
701 Fifth Ave., Ste. 4200-2159
Seattle, WA 98104-4089
(206) 905-3648
roneill@npwny.com

John M. Peterson
Patrick B. Klein
NEVILLE PETERSON LLP
One Exchange Plaza
55 Broadway, Suite 2602
New York, NY 10006
(212) 635-2730
pklein@npwny.com

Counsel for Proposed Amici Curiae,
Philip Zelikow and
Robert Zoellick

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INTEREST OF AMICI CURIAE

Amici are historians, lawyers, and former officials with long experience in U.S. foreign, trade, and commercial diplomacy around the world. They do not appear to defend or oppose any particular trade policy. They file this brief to help preserve the basic allocation of power under the Constitution for the regulation of commerce with foreign nations.

This brief is submitted with amici curiae's Motion for Leave to File under USCIT Rules 7 and 76. That motion identifies amici's interest and also states the reasons why the participation of amici curiae is desirable in this matter. Biographical information for each amicus appears in the Appendix.

SUMMARY OF ARGUMENT

The Constitution assigns tariff authority to Congress, not the President. The Canada tariffs again present the question of whether a President may set aside the framework Congress built for authorizing tariffs. This case goes back to the very foundation of the modern framework, in the Tariff Acts of 1922 and 1930. Understanding that history, especially from 1922 to 1930, provides the key to this case.

Though these are remembered as tariff bills, this was the time when Congress adopted the principle of unconditional reciprocal equal treatment and "most-favored-nation" (MFN) status as the core of how the United States would regulate commerce with foreign nations. From 1778 to 1922 the U.S. signed treaties with conditional MFN, where a partner gets a trade concession made to a third state only by paying the equivalent price that state paid. With unconditional MFN, the partner automatically gets every concession given to third countries.

In 1922 the Congress, with administration support, decided to seek such unconditional MFN deals for the United States. To encourage other countries to make such deals with the United

States, Section 317 of this tariff bill, known as the Fordney-McCumber tariff, delegated broad presidential authority to set tariffs of up to 50% on countries that discriminated against American commerce. The administration, following up in 1923, began concluding new unconditional MFN trade treaties or agreements which simply accepted and reciprocated the U.S. treatment in the 1922 Act, so that in all cases Congress had approved the rates.

All at the time understood, explicitly, that if a country concluded an unconditional MFN deal with the U.S., that deal guaranteed equal treatment. That meant no discrimination, with any exceptions to that included in the deal. If a country inside such an agreement later claimed discrimination, that claim would be dealt with under the terms of that agreement.

The whole point of the structure was both to encourage deals and strictly limit the delegation of presidential tariff power. Once a country made an unconditional MFN deal, that agreement set the terms of trade with that country, including the mechanisms to resolve disputes. From then on, as long as the agreement remained in effect, the president no longer had delegated power to threaten tariffs against such a country.

As the U.S. successfully accumulated new commercial agreements between 1922 and 1930, the new tariff bill in 1930, known as Smoot-Hawley, kept the 1922 leverage. It reenacted the old Section 317, as Section 338. As before, Section 338 only applied to countries that had no unconditional MFN agreement with the United States that promised reciprocal equal treatment. The terminology of "discrimination" was always understood to apply to a baseline set by the negotiated agreement, with disputes under that agreement governed by the agreement's terms. Thus, as before, Section 338's delegation of presidential tariff authority would not apply to any country that had an existing MFN commercial agreement.

The whole framework was meant to encourage foreign trade partners to cut an MFN deal under congressional authority. The historic irony of this case is that the administration now uses the leverage designed for countries that chose to spurn our MFN framework against a country, Canada, that chose to accept it.

Over the years since 1930, broad extension of MFN status became common and multilateralized. By 1998 this core had become so commonplace that the terminology of "most-favored nation" felt out of date. Congress changed the usage to "normal trade relations." From 1930 to 2026 Section 338 had never been applied in practice. The original relation of Section 338's delegated authority only to situations where there was no negotiated MFN agreement was forgotten.[1]

Canada is inside the MFN system. It concluded a succession of agreements that created "free trade agreements," an allowed deviation to gain even better-than-MFN status. It has agreed to unconditional equal treatment and claims about discrimination are handled under that agreement. Section 338 of the 1930 Act does not apply to such a country. The administration's proclamations do not claim that Canada has denied the United States the treatment Canada agreed to extend.

Instead, the proclamations compare Canada's treatment of American goods, sector by sector, with its treatment of goods from countries that had not levied new tariffs against Canada or had negotiated different trade agreements with Canada. The theory implied by the administration's claims is that the United States is entitled to the best treatment Canada gives any country, under any agreement, no matter what the United States itself does to cause the disparate treatment. No

[1] Amici take no position on whether Section 338 has been impliedly repealed.

MFN agreement, including any MFN agreement the United States has made, has ever granted such an entitlement.

By using Section 338 against Canada, the administration turns the law on its head, using a law that was always meant to encourage a trade deal to punish a country that made one. But the issue in this case goes far beyond Canada. The administration's interpretation of Section 338 would overthrow the entire congressional design that has regulated commerce with foreign nations for more than a hundred years. It would create a world in which all deals are ad hoc and discriminatory practically by definition. This anarchy would be regulated only by presidential whim. That is not the congressional or constitutional design in this country.

ARGUMENT

I. Section 338 Continued Congress's Design to Encourage Agreements with Reciprocal Equal Treatment.

Section 338 of the Tariff Act of 1930, 19 U.S.C. § 1338, was the reenactment of Section 317 of the Tariff Act of 1922. It is therefore necessary to understand the origin and character of its predecessor, Section 317.

Until after the First World War, Congress set American tariff rates by statute. Commercial treaties were negotiated country by country, usually on the conditional form of most-favored-nation treatment. After the war, American leaders wanted to update the way they concluded trade deals with friendly countries. The patchwork of customized individual trade deals invited discrimination. Importers of French wine might pay one rate; importers of Spanish wine another. The victim, France or Spain, might retaliate by discriminating against importers of American goods. In 1919 the Republicans were a pro-tariff party. The Democrats were against tariffs. Leaders in both parties agreed, however, that the incoherent patchwork of tariff rates and country-by-country trade agreements had become too unworkable for the advanced America of 1919.

Influenced by a landmark report of the bipartisan U.S. Tariff Commission, leaders in both parties agreed to choose a new approach. The Commission had argued that:

> …it can not be too much emphasized that any policy adopted by the United States should have for its object, on the one hand, the prevention of discrimination and the securing of equality of treatment for American commerce and for American citizens, and, on the other hand, the frank offer of the same equality of treatment to all countries that reciprocate in the same spirit and to the same effect. The United States should ask no special favors and should grant no special favors. It should exercise its powers and should impose its penalties, not for the purpose of securing discrimination in its favor, but to prevent discrimination to its disadvantage.

U.S. Tariff Comm'n, *Reciprocity and Commercial Treaties* 18 (1919).

The Fordney-McCumber Tariff Act of 1922 set up this approach by delegating presidential authority to impose duties of up to 50 percent ad valorem or even exclude imports altogether. This was the sanction to encourage agreement. In February 1923 President Harding and congressional leaders, notably Senator Henry Cabot Lodge who chaired the Senate committee that would review any trade deals, agreed that in the future, following the Congress's lead, the U.S. would negotiate or renegotiate its trade treaties with unconditional equal treatment in agreed rates. America would adopt the "most favored nation" principle and practice. *See* the exchanges from December 1922 to March 1923 in 1 U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States, 1923*, at 121–30 (1938).

The first such treaty was signed with Germany in December 1923. More followed. In 1926 the State Department reminded its diplomats that the unconditional MFN treaty policy "was inaugurated pursuant to the principles underlying Section 317 of the Tariff Act of 1922." Instruction No. 332 from the Sec'y of State to the Minister in Para. (Aug. 26, 1926), *in* 2 U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States, 1926*, at 871 (1941). These treaties guaranteed reciprocal unconditional equal treatment, but with negotiated carve-outs

allowing discrimination of certain kinds as part of the overall bargain—for instance with the U.S. making a carve-out to allow the special treatment it then gave Cuba.

Words in a statute are read "in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). The design was straightforward. Section 317 was the inducement. A subsequent trade agreement then addressed how to handle any further disputes about alleged trade discrimination, as will be further detailed below. When the 1922 Act was being revised in 1929, as Congress convened in special session to work on what would become the Smoot-Hawley bill of 1930, the State Department's Treaty Division analyzed whether a new tariff bill would affect its MFN treaties. The analysis was written by Wallace McClure, who had already published the main existing study of Section 317.[2]

No, McClure answered. In fact the MFN program should be accelerated. He explained that "[t]he effect of agreeing with another country to accord most-favored-nation treatment to its commerce is to prevent this Government from levying tariff duties which discriminate against such country's commerce." In fact, Secretary of State Kellogg had already asked the bill's co-sponsor, Representative Willis Hawley, to repeal certain tariff provisions that were still on the books, since they could not be enforced against countries covered by MFN agreements and even enforcement only against non-MFN countries might create awkward situations of unequal treatment with the MFN countries in ways inconsistent "with the general policy of equality of treatment envisaged in Section 317." Memorandum by the Assistant Chief of the Treaty Division (McClure) (Apr. 15, 1929), *in* 1 U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States,*

[2] This was Wallace McClure, *A New American Commercial Policy, as Evidenced by Section 317 of the Tariff Act of 1922* (1924).

1929, at 993 (1943); Letter from Sec'y of State Kellogg to Rep. Willis C. Hawley (Feb. 26, 1929), *in id.* at 987.

Section 338 then reenacted Section 317 with minor changes. Senator Reed Smoot, a principal co-sponsor, had long been a supporter of the equal treatment principle. Later congressional actions added other limited presidential authorities to induce countries to conclude MFN agreements with reciprocal equal treatment. The process was multilateralized after 1947. The means changed over the decades, but the principle did not. When Congress renamed MFN treatment as "normal trade relations" in 1998, it found that the principle of nondiscrimination "has been a cornerstone of United States trade policy." Pub. L. No. 105-206, § 5003(a)(1)(A), 112 Stat. 685, 789 (codified at 19 U.S.C. § 2481 note). Congress has never chosen to remove that cornerstone.

II. Section 338 Has Never Authorized Tariff Action Against a Partner That Accepts Reciprocal MFN.

Section 338(a)(2) asks whether a foreign country "[d]iscriminates in fact against the commerce of the United States, directly or indirectly, … in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country." 19 U.S.C. § 1338(a)(2). Discrimination is a comparison to a baseline. For a country with no trade agreement with the United States, the baseline is its ordinary treatment of others. For a trade partner, however, the baseline is what the countries have agreed, including exceptions they have accepted. Until the early 1960s the U.S., for example, usually wrote in an exception allowing its trade preferences for Cuba. The trading system has always contained extensive discrimination that is lawful under agreed exceptions to MFN, including customs unions, free-trade areas, and preferences for developing countries.

A. Legislative history: No "discrimination" except outside of a reciprocal MFN treaty

When the bill containing Section 317 was debated in the Senate, the exact question arose about how it would affect trade relations with countries that had MFN treaties with third countries or with the United States. First, the bill managers made it clear that a reciprocal agreement for equal treatment would allow, as part of the negotiated baseline, any special favors countries had agreed to allow. Even if other countries had cut deals with each other as part of a reciprocal agreement, that would not be treated as discrimination against the United States. So, McCumber explained, "whereby one for due consideration receives special favors from another and pays for them in granting special favors, is not in conflict with the favored-nation clauses" and so, "where reciprocity treaties have been made between nations it would not be a discrimination against the United States." Senator Lodge agreed: "It is not a discrimination if a reciprocity treaty exists." 62 Cong. Rec. 11,246 (1922) (statement of Sen. McCumber); *id.* at 11,247 (statement of Sen. Lodge).

Second, Senator Thomas Walsh of Montana had pointed out that, once a country signed a reciprocal treaty with the U.S., Section 317 could no longer grant any authority for presidential tariff action at all. A country with such an MFN treaty with the U.S., Walsh explained, could be open to such penalties only if it was "going either to violate the treaty or else that she has not such a treaty with us." McCumber agreed. "If it is not a discrimination, of course, then it will not come under the rule which we lay down." 62 Cong. Rec. 11,246 (1922) (statements of Sens. Walsh and McCumber).

B. In executive practice, Section 338 presidential tariffs were considered permissible only if there was no MFN agreement.

In practice, a U.S. trade partner that kept its guarantee of reciprocal and unconditional equal treatment gave no basis for a presidential claim of discrimination, even if the agreement had

included exceptions as part of the negotiated baseline. If a partner broke its guarantee it could be treated as a party in breach of the agreement and the U.S. could suspend its own performance in response. During the 1920s the State Department routinely resolved cases of other countries extending special trade preferences to third countries by securing an agreement for reciprocal treatment with the U.S.

The same pattern continued after Section 338 replaced Section 317. The Supreme Court has affirmed that interpretations "issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024).

Threatened with 338 penalties in 1932 over French import quotas, France ended the dispute with a deal in which France promised unconditional MFN treatment in all matters related to quotas and imports. John K. Veroneau & Catherine H. Gibson, *Presidential Tariff Authority*, 111 Am. J. Int'l L. 957, 966 & n.69 (2017). Veroneau and Gibson use this and other examples to argue that Section 338 was used against discrimination. In the French case that was true, but the threat could only be wielded against a country, France, that had no MFN agreement with the U.S. The remedy to the threat, in that case, was for France to accept such an MFN agreement.

Veroneau and Gibson also argue that Section 338 was used in 1935 to punish discrimination by two countries that did have MFN agreements with the U.S. They misunderstood what happened. In those 1935 cases, as their source points out, the U.S. did not use Section 338. The remedy was to deny Germany and Australia the MFN concessions that were granted to other countries under the Reciprocal Trade Agreements Act of 1934. No action was taken under Section 338; no presidential tariffs were imposed. *Compare* Veroneau & Gibson, *supra*, at 965 & n.61 *with* U.S. Tariff Comm'n, *Twentieth Annual Report* 47 (1936).

If a country was inside the MFN system with the U.S., disputes were handled by withholding concessions inside their agreement, not by turning to Section 338. In the case of Germany, the end result in June 1935 was a U.S.-German agreement to terminate the MFN portions of their 1923 commercial treaty. The U.S. then did not impose presidential tariffs, though once the agreement was terminated that might have been lawful.

Similarly, when the U.S. complained of Japanese trade discrimination in 1939, the State Department's legal adviser concluded that, before the U.S. could impose retaliatory tariffs under Section 338, it would first have to take the preliminary step "to get rid of the [MFN-style commercial] treaty of 1911 as a preliminary step to resorting to Section 338 of the Tariff Act of 1930." Memorandum by the Legal Adviser (Hackworth) to the Sec'y of State (May 26, 1939), *in* 3 U.S. Dep't of State, *Foreign Relations of the United States: Diplomatic Papers, 1939*, at 537 (1955). The U.S. did just that later in 1939, and believed this would now allow the possible use of Section 338 against Japan. Here again, Veroneau & Gibson discuss the possible applicability of Section 338 against Japan. *See* Veroneau & Gibson, *supra*, at 966–67 & n.74. But they omit Hackworth's advice, which was accepted, that Section 338 could not be used until the U.S. first withdrew from its trade treaty with Japan.

C. The conserved museum piece

By the 1970s, Section 338 seemed to be a dead-letter. Considering the bill that would become the Trade Act of 1974, the Senate Finance Committee staff observed that section 338 "has never been invoked at all." Staff of S. Comm. on Fin., 92d Cong., *Foreign Trade: A Survey of Current Issues To Be Studied by the Subcommittee on International Trade* 15 (Comm. Print 1971). In 1973, however, the Treasury Department asked the Ways and Means Committee not to repeal the section, calling it a "useful authority against foreign countries which discriminate." *Trade*

Reform Act of 1973: Hearing Before the H. Comm. on Ways & Means, 93d Cong. 2144–2241 (1973) (statement of the Office of the Secretary of the Treasury), *quoted in* U.S. Int'l Trade Comm'n, Request for Comments Regarding Implementation of 19 U.S.C. 1338(g), Inv. No. MISC-053, 91 Fed. Reg. 57,387, 57,388 n.iv (Sept. 9, 2026).

By 1973 many, but not all, of America's trading partners were covered by agreed MFN treatment under the GATT. But there were still a number of countries out in the wilderness, including about a dozen communist countries that did not receive U.S. MFN treatment. *See* Trade Act of 1974, Pub. L. No. 93-618, §§ 401–402, 88 Stat. 1978, 2056 (1975) (codified as amended at 19 U.S.C. §§ 2431–2432); U.S. Int'l Trade Comm'n, USITC Pub. No. 735, *Report to the Congress and the East-West Foreign Trade Board on Trade Between the United States and the Nonmarket Economy Countries* 1–2 (1975) (reporting that, of the twelve nonmarket economy countries covered, only Poland and Yugoslavia then received MFN treatment from the United States). That provides the context for Treasury's caution. Nothing in the record suggests that the Treasury or Congress thought that Section 338 could be used against the existing MFN treaty partners whose agreements were still in force.

A fair summary of the situation in 1979 from the International Trade Commission was that Section 338 had become "an obscure and never-used provision of the law" now "*overshadowed* by more recent enactments." U.S. Int'l Trade Comm'n, *MTN Studies*, Inv. No. 332-101, S. Comm. Print No. 96-27, at 48 (1979), *quoted in* Veroneau & Gibson, *supra*, at 968 & nn.85–86 (emphasis added). "Overshadowed" is the right word. Even if Section 338 had some remaining relevance, what it did not reach, as the legislative history and administrative practice make clear, is a partner that continued to extend agreed equal treatment to the United States.

III. Canada has never abandoned reciprocal MFN and equal treatment.

Canada has not withdrawn equal treatment from the United States, and the administration has not claimed that it has.

A. What Canada extends to the United States.

As a member of the World Trade Organization, Canada applies its most-favored-nation tariff to American goods. Canada had earlier concluded MFN agreements with the U.S. under the older Reciprocal Trade Agreements Act (RTAA) of 1934. *See* Act of June 12, 1934, ch. 474, 48 Stat. 943; Reciprocal Trade Agreement, Can.-U.S., Nov. 15, 1935, 49 Stat. 3960; Reciprocal Trade Agreement, Can.-U.S., Nov. 17, 1938, E.A.S. No. 149. To American goods that qualify under the USMCA's rules of origin it applies the lower, generally duty-free, rates of that agreement. American goods therefore receive treatment at least as favorable as the goods of any country outside a Canadian free-trade agreement and, if qualified under the USMCA, preferential treatment.

Like the United States, Canada has concluded other FTAs, including CETA with the European Union. Their terms differ from the USMCA's terms, just as U.S. FTAs differ from one another. Differences of that kind have long been permitted and even in the 1920s constituted part of the baseline in a negotiated commercial agreement, and were therefore not regarded as "discrimination" among the legislators crafting the original Section 317. The principle was codified in Article XXIV of the General Agreement, specifically allowing for free-trade areas and customs unions, like the USMCA and CETA.

Using that principle for America's (and Canada's) benefit, Canada has in fact offered better treatment to the U.S. than it generally offers to others. It did so under the U.S.-Canada Free Trade Agreement of 1988, the North American Free Trade Agreement of 1994 and the current USMCA

of 2020, all of which Congress approved and implemented by statute. *See* United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851; North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993); United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020). Those agreements contained extensive procedures to settle disputes. The administration therefore is trying to override specific congressional terms of trade granting much better access than MFN and subject to carefully approved processes for handling disputes. The administration's position would be an extraordinary usurpation of Congress's power under the Constitution.

B. The administration does not claim otherwise.

The proclamations could have alleged that Canada had abandoned MFN treatment. They do not. Instead, the proclamations compare the provincial removal of U.S. alcohol while continuing to buy alcohol from other foreign countries. They contrast the Canadian surtax on American vehicles with the treatment of vehicles from other countries. They compare USMCA and CETA cheese quotas.

In the first two cases the comparisons are to countries that had not imposed duties on Canada and triggered retaliation. In the third case the comparison is between the terms of two FTAs. This is not a theory of Canada denying equal treatment. It is a theory that the United States is entitled to the best treatment Canada gives any country, no matter what the United States does to Canada. No MFN agreement the United States has ever made has entitled a party to the preferences its partner grants under a separate FTA.

If the government's brief argues that Canada has abandoned MFN treatment of the United States, the argument will not be found in the findings on which the new tariffs rest. The U.S. is

defending a concept of discrimination that is not measured against the agreed baseline, but instead acts as if there was no MFN agreement at all.

C. Countermeasures are part of reciprocity, not a departure from it.

Every Canadian measure the proclamations cite is either a response to American duties or a term negotiated under an FTA. Neither is "discrimination" as intended in the original Section 317 or the current Section 338. The United States departed from mutual equal treatment and has no legal basis for objecting to a separate FTA.

Moreover, Canada withdrew its retaliation for the IEEPA duties before the Supreme Court ruled them invalid. It kept only the duties that respond to the U.S. Section 232 tariffs. The vehicle surtax mirrors the Section 232 automobile tariffs. Canada has lawfully challenged the Section 232 tariffs in the forum the two countries had agreed to use, the World Trade Organization. *See* Order Amending and Repealing Certain Orders Made Under the Customs Tariff (United States Surtax), SOR/2025-181, ss. 5, 19(1) (Can.) (repealing the United States Surtax Order (2025-1), SOR/2025-66, effective Sept. 1, 2025); Kyla H. Kitamura, Cong. Rsch. Serv., IF12595, *U.S.-Canada Trade Relations* (updated Sept. 16, 2026).

A party that departs from agreed terms cannot complain that its partner abandoned the bargain. Under the GATT, a party affected by another's emergency safeguard action may suspend equivalent concessions. American law takes the same view. For example, Section 125(d) of the Trade Act of 1974, 19 U.S.C. § 2135(d), authorizes the President, when a partner withdraws trade agreement benefits without proper compensation, to withdraw "substantially equivalent" trade benefits. This is a measure inside the MFN system.

IV. The President is attempting to scrap the reciprocal MFN design of U.S. trade relations without authority from Congress.

A. Congress considered the constitutional context for Section 317 and Section 338.

After the First World War, acting entirely within its primary Constitutional powers, Congress built a foundation for when and how it would "lay and collect Taxes, Duties, Imposts and Excises" and "regulate Commerce with foreign Nations[.]" U.S. Const. art. I, § 8, cls. 1, 3. The basic design had five elements:

- reciprocal equal treatment as the basic goal;
- inducements to convince countries to accept this goal (the negative inducements in Section 317, then 338; followed by the positive inducements in the oft-renewed RTAA and its successors);
- temporary, bounded delegations of presidential authority to negotiate and proclaim;
- congressional approval or authorization of agreements; and
- specific, conditioned remedies to address problems with partners in trade agreements.

In 1922, Congress very much regarded itself as fully in charge of setting the terms of trade with countries with which America was not at war. In the debate on Section 317 (the predecessor to Section 338) the major issue was whether such a delegation of presidential tariff power was constitutionally consistent with Congress's responsibility. Senator McCumber, the floor manager, acknowledged that, "I am willing to say that I think in section 317 we are pressing closer to the twilight zone of uncertainty as to the constitutionality of the provision than in any other section that has been discussed." 62 Cong. Rec. 11,245 (1922).

For Congress, the saving grace was that Section 317 would only apply in the legal wilderness where there was no reciprocity treaty. Once Congress had approved a reciprocity treaty,

it had set the terms for how to regulate commerce with that nation. All further regulation would then be governed by that agreement.

Shortly after McCumber made his comment, Senator Lodge made the point perfectly clear. Section 317, he explained, "does not interfere with reciprocity treaties, and of course we can not interfere with the treaty-making power." Moments later Lodge reiterated the point that "discrimination" was defined against a baseline that accepted existing treaty bargains, including with third countries: "We can not undertake to interfere with reciprocity treaties, of course. We have them ourselves." That was then the context for Senator Walsh's affirmation that in dealing with a country with an MFN treaty, the proposed Section 317 "assumes that she is going either to violate the treaty or else that she has not such a treaty with us." 62 Cong. Rec. 11,245–46 (1922). No one contradicted his framing of the issue.

B. The administration's interpretation of Section 338 would overthrow the entire congressional design.

Since Section 338, like Section 317 before it, was meant to delegate presidential authority to act against countries wandering in the wilderness ungoverned by a congressionally authorized commercial agreement, the administration's interpretation would create a vast new plenary power that could apply to any U.S. trading relation in the world. Reciprocity treaties and MFN status would become irrelevant. In this strange new world every trade deal would be made on a case by case basis, discrimination would reign, and the anarchy would be governed only by presidential whim.

Such an interpretation would overthrow an immensely carefully crafted and layered congressional design extending for more than a hundred years. It would also overthrow the basic allocation of power in the Constitution. The remedies elaborated in the Trade Act of 1974 would become irrelevant. The language of the USMCA Implementation Act would become irrelevant.

That is not a hypothetical concern. Before it used dairy quotas in its current proclamation of tariffs against Canada under Section 338, the U.S. government took its complaints about Canada's dairy quota allocation to USMCA dispute panels and, after Canada revised its measures, lost. *See* Panel Report, *Canada—Dairy TRQ Allocation Measures*, at 50, CDA-USA-2021-31-010 (Dec. 20, 2021); Panel Report, *Canada—Dairy Tariff-Rate Quota Allocation Measures 2023*, ¶¶ 308–12, CDA-USA-2023-31-01 (Nov. 10, 2023).

Congress added Section 301 to the Trade Act of 1974, with its special procedural requirements, so that the Executive could counter unfair practices. There would be no need to do this if the Executive could just use Section 338 against any claimed discrimination. *See* Trade Act of 1974 § 301, 88 Stat. at 2041–43 (codified as amended at 19 U.S.C. §§ 2411–2420).

Whether or not Section 338 retains any force, it was deliberately written for a world in which many nations (like France) inhabited the legal wilderness, ungoverned by congressionally authorized commercial agreements. Today, thankfully, few nations still live in such bleak conditions.

The Supreme Court has held that a comprehensive later scheme can govern the operation of an earlier statute, because "a precisely drawn, detailed statute pre-empts more general remedies." *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976). The Supreme Court plurality's reasoning in *Learning Resources*, that Congress writes tariff delegations with prerequisites and limits, points the same way. *Learning Res., Inc. v. Trump*, 607 U.S. 229, 243–44 (2026) (opinion of Roberts, C.J.).

In 1930, Section 338 reenacted Section 317 of the 1922 Act with one extension, to goods carried in the vessels of a discriminating country. It said nothing about the unconditional MFN agreements that had been concluded between 1922 and 1930, twenty-one of which were in force

when the 1930 Act was enacted. Seven of those were treaties. *See* U.S. Tariff Comm'n, *Tariff Bargaining Under Most-Favored-Nation Treaties*, S. Doc. No. 73-7, at 3, 14-16 (1933) (listing agreements in force Apr. 1, 1933, with dates of entry into force). The 1930 Act had no effect on them or on the fourteen executive agreements also in place, a point that—as mentioned earlier—Congress and the executive understood at the time. A statute's scope is fixed at enactment.

In his current term of office President Trump has had no legal authority to make any new trade deals at all. The last general congressional grant of trade agreement authority was in 2015. It provided expressly that "[n]o proclamation may be made" that "increases any rate of duty above the rate that applied on June 29, 2015." That authority to enter into a new trade agreement ended on July 1, 2021. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, tit. I, § 103(a)(1)(A), (a)(3)(C), 129 Stat. 319, 333 (codified at 19 U.S.C. § 4202(a)(1)(A), (a)(3)(C)).

CONCLUSION

For nearly a century, Congress has used Section 338 and its predecessor as a sanction against countries outside the system of reciprocal, unconditional most-favored-nation treatment, not against partners that extend that treatment to the United States. Canada is such a partner. Its treatment of American goods rests on agreements that Congress itself approved, and nothing in the challenged proclamations finds that Canada has abandoned that treatment. For these reasons, amici respectfully submit that the Court should hold that Section 338 does not authorize the challenged proclamations, and should grant Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

/s/ Richard F. O'Neill
Richard F. O'Neill
NEVILLE PETERSON LLP
701 Fifth Ave., Ste. 4200-2159
Seattle, WA 98104-4089
(206) 905-3648
roneill@npwny.com

John M. Peterson
Patrick B. Klein
NEVILLE PETERSON LLP
One Exchange Plaza
55 Broadway, Suite 2602
New York, NY 10006
(212) 635-2730
pklein@npwny.com

Counsel for Proposed Amici Curiae,
Philip Zelikow and
Robert Zoellick

Dated: November 13, 2026

APPENDIX

LIST OF AMICI CURIAE

Philip Zelikow is the Botha-Chan Senior Fellow at Stanford University's Hoover Institution. He formerly held a chaired professorship in history at the University of Virginia, where he directed the nation's foremost center for the study of the presidency. An attorney and former career diplomat, he served as Counselor of the U.S. Department of State under President George W. Bush, was a member of the National Security Council staff during the George H.W. Bush administration, and directed the 9/11 Commission. He also served on the President's Intelligence Advisory Board under both Presidents George W. Bush and Barack Obama.

Robert Zoellick served from 1985 to 1993 at the Treasury Department, State Department, and the White House and was deeply involved in the negotiation of the U.S.-Canada FTA, the NAFTA, and the Uruguay Round of the GATT that created the WTO. He was the U.S. Trade Representative from 2001 to 2005 and was Deputy Secretary of State from 2005 to 2006. From 2007 to 2012, he was the 11th president of the World Bank Group. He has published a history of U.S. foreign policy and now serves as a senior fellow at Harvard University's Belfer Center for Science and International Affairs.

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE CLAIRE R. KELLY
THE HONORABLE JOSEPH A. LAROSKI, JR.
THE HONORABLE KARA M. WESTERCAMP

GELLERT GLOBAL GROUP CORP.,	:	
Plaintiff,	:	
v.	:	**Case No. 26-cv-04636-3JP**
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	:	
Defendants.	:	

CERTIFICATE OF COMPLIANCE

I, Richard F. O'Neill, of Neville Peterson LLP, counsel responsible for the foregoing Brief, certify that the Brief complies with the word limitations set forth in the Court's Standard Chambers Procedures and contains 5,473 words, excluding the parts of the Brief exempted by the Court's Standard Chambers Procedures, as measured by the word-count function of the word processing program used to prepare it.

/s/ Richard F. O'Neill
Richard F. O'Neill
Neville Peterson LLP

Counsel for Proposed Amici Curiae,
Philip Zelikow and
Robert Zoellick