No. 19-1177

IN THE
Supreme Court of the United States

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC
Petitioners,
v.

UNITED STATES and MARK A. MORGAN, ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Federal Circuit

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Is section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, facially unconstitutional on the ground that it lacks any boundaries that confine the President's discretion to impose tariffs on imported goods and, therefore, constitutes an improper delegation of legislative authority and a violation of the principle of separation of powers established by the Constitution?

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonprofit, non-partisan civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days prior to filing this brief, NCLA notified counsel for the parties of its intent to file. All parties have consented to the filing.

Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, authorizes the President to determine whether imports of an article are impairing the national security and, if so, to make any adjustments in imports that, in the judgment of the President, should be taken "so that such imports will not threaten to impair the national security." § 232(c)(1)(A). The Act defines "national security" (§ 232(d)) in an all-encompassing manner that enables the President to classify the import of *any* article as an impairment of national security—and thereby delegates to the Executive Branch unchecked legislative authority to increase tariffs on imports. NCLA is concerned that if the courts reject claims that § 232 is an unconstitutional delegation of Congress's legislative power, then Article I's grant of "[a]ll legislative Powers" to Congress and Congress alone will be rendered a nullity. NCLA takes no position on the proper level of steel tariffs.

STATEMENT OF THE CASE

In March 2018, President Trump, invoking his authority under § 232, imposed a 25% tariff on all imported steel articles from all countries except Canada and Mexico. Those tariffs are in addition to other existing tariffs on imported steel—including 164 remedial tariffs issued under antidumping and countervailing duty laws. The President later made several country-by-country adjustments to the § 232 tariffs, exempting several additional countries (without explaining why steel imports from those countries threaten national security less than imports from other countries) and temporarily setting the tariff on steel articles from Turkey at 50%.

Petitioners American Institute for International Steel, *et al.* (collectively, AIIS) filed a facial challenge to the tariff in the U.S. Court of International Trade. AIIS argued that § 232 constitutes an improper delegation of legislative authority, in violation of Article I, § 1 of the U.S. Constitution.

A three-judge panel of that court rejected the challenge. Pet. App. 24-59. Rather than conducting its own independent review of the statute's constitutionality, the court held that it was "bound by *Algonquin*" to reject AIIS's challenge. *Id.* at 32 (citing *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976)). The court nonetheless recognized that "the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." *Id.* at 39-41. The court added:

> [I]dentifying the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress could be elusive. ... Nevertheless, such concerns are beyond this court's power to address, given the Supreme Court's decision in *Algonquin*.

Id. at 41-42.

Judge Katzmann issued an opinion *dubitante*, concurring in the judgment. He stated, "[I]t is difficult to escape the conclusion that [§ 232] has permitted the transfer of power to the President in violation of the

separation of powers." Pet. App. 58. He determined that § 232 "provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress," noting that the statute provides "no guidance ... on the expansive definition of 'national security' in the statute—a definition so broad that it not only includes national defense but also encompasses the entire national economy." *Id.* at 57. He nonetheless concluded, "[W]e are bound by *Algonquin*, and thus I am constrained to join the judgment entered today." *Id.* at 59.

The Federal Circuit affirmed. Pet. App. 1-22. The court stated that this Court's constitutional ruling in *Algonquin* was "binding precedent" because *Algonquin*'s "rejection of the nondelegation-doctrine challenge to section 232 was a necessary step in the Court's rationale for ultimately construing the statute as it did." *Id.* at 16. The court also suggested that the President's authority to impose the 25% tariff arguably was strengthened by his "independent" constitutional authority over foreign affairs and by Congress's evident support of his right to exercise such authority (as demonstrated by its adoption of § 232). *Id.* at 19.

SUMMARY OF ARGUMENT

The Petition raises issues of exceptional importance. The Court has long recognized that the delegation doctrine—that Congress may not delegate its legislative powers to the President or anyone else—"is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall*

Field & Co. v. Clark, 143 U.S. 649, 692 (1892). Yet despite congressional adoption of numerous statutes that confer vast decision-making authority on the Executive Branch, not a single federal statute has been invalidated under the delegation doctrine in 85 years.[2]

The absence of successful challenges is largely attributable to the highly deferential review standard routinely applied by federal courts in delegation cases since the late 1940s. Under that standard, a federal statute is not deemed to delegate legislative authority so long as it contains an "intelligible principle" to guide the conduct of those authorized to administer the law. Over time, an "intelligible principle" has come to be understood as including virtually any statutory language that directs administrators to consider one or more factors when determining how to carry out their duties, even when administrators are afforded unconstrained discretion to determine what role those factors should play in their ultimate decisions.

NCLA urges the Court to grant review to consider replacing the "intelligible principle" standard with one that puts more teeth into the delegation

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[2] NCLA refers to the "delegation doctrine" to conform to the terminology used by the parties and the courts. NCLA nonetheless considers that term a misnomer and urges its eventual abandonment. Congress's transfer of lawmaking powers to the Executive Branch is not accurately described as a "delegation" of authority because the powers transferred by statute are not easily reclaimed. And statutes that divest Congress of legislative powers violate the Constitution itself, not a mere judicial "doctrine." *See* Art. I, § 1 ("All legislative Powers herein granted shall be *vested* in a Congress of the United States") (emphasis added) (hereinafter, the "Vesting Clause").

doctrine and thereby protects the Constitution's separation-of-powers principles. For example, the Court should consider adopting a standard it articulated in 1944: whether "there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). What § 232 creates is an absolute transfer of Congress's tariff power to the Executive Branch; the Court must give such expansive transfers of power a hard look.

The Petition is an excellent vehicle for considering whether to jettison the "intelligible principle" test. Federal courts have had little difficulty concluding that § 232 passes constitutional muster under the lax "intelligible principle" standard. After all, § 232(d) sets out a broad array of factors that the President is directed to take into account in determining whether to impose supplemental tariffs under § 232. But no standard should allow such a result; under any standard faithful to the Constitution, the statute should be understood to delegate legislative power to the President because it grants the President free rein to adopt *any* tariffs he deems appropriate. Under the test articulated in *Yakus*, § 232 is inconsistent with the delegation doctrine because the United States has been unable to identify any tariffs that (under the all-encompassing standards set out in § 232(d)) could not be classified as necessary to prevent impairment of national security.

Adopting the *Yakus* standard will not hamper the ability of government to operate effectively. Many

of the Court's delegation cases likely would have reached the same result if decided under that standard instead of the intelligible-principle standard.

The delegation doctrine has never been understood to bar Congress from conferring discretionary authority on administrators to determine how a statute should be executed. Congress could still delegate fill-up-the-details decision-making and fact-finding responsibilities—so long as Congress makes clear in advance the policy determinations that will flow from specific factual findings. But by granting review to consider abandoning the intelligible-principle standard, the Court will have the opportunity to consider how best to ensure that the courts begin to effectively police the Article I requirement that Congress—and Congress alone—exercises *all* the federal government's legislative powers.

The Petition is a particularly good vehicle for reconsidering the approach to delegation-doctrine claims because § 232 is not susceptible of a saving construction that would permit this case to be resolved without addressing the constitutional claims. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Court construed the statute at issue as imposing strict limits on the Attorney General's authority with respect to registration of convicted sex offenders—and thus avoided any need to determine precisely when statutes granting authority to Executive Branch officials cross the line into unconstitutional delegation of legislative powers. 139 S. Ct. at 2123-24 (plurality). The United States has not suggested any similar limiting construction of § 232, and none exists.

The Court's previous consideration of § 232 in its 1976 *Algonquin* decision is not a reason to decline review of this case. Whether § 232 violated the delegation doctrine was not one of the questions presented in *Algonquin*. The plaintiffs did not facially challenge the constitutionality of § 232; rather, they argued that the President's remedial powers under the statute were limited to imposing quotas (not tariffs) on imports. So there is reason to doubt that *Algonquin*'s statements regarding the delegation doctrine were part of the Court's holding.

But review is warranted even if, as the lower courts believed, *Algonquin*'s holding includes those statements. While *stare decisis* considerations often counsel against overruling previous Court decisions, those considerations are at a particularly low ebb in this case. *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (*stare decisis* is at its weakest when the Court is interpreting the Constitution). The other factors the Court has traditionally considered in deciding whether to revisit a precedent—the quality of the decision's reasoning, its consistency with related decisions, and reliance on the decision—also point against mechanical adherence to precedent. *Algonquin*'s reasoning was extremely truncated (perhaps because a delegation-doctrine claim was not included among the questions presented), it mechanically applied the intelligible-principle standard to uphold the statute, and there is little evidence that the government has relied on the decision in the ensuing 44 years.

Moreover, *Algonquin* cautioned that its holding was "a limited one," and it suggested that there might be other limitations on the President's § 232 authority.

426 U.S. at 571. But later cases have not identified any such limitations; the lower courts' decisions in this case demonstrate that they view *Algonquin* as granting the President virtually unlimited authority to impose any tariff that furthers his conception of national security. Review of that determination is warranted; given the Federal Circuit's exclusive jurisdiction over tariff issues, there is no reason to delay review to permit further percolation in the lower courts.

REASONS FOR GRANTING THE PETITION

Five justices have expressed a willingness to reconsider the Court's standard for reviewing delegation-doctrine claims. *See Gundy*, 139 S. Ct. at 2131-32 (Alito, J., concurring in the judgment); *id.* at 2132-48 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari). The Petition provides an extremely attractive vehicle for doing so.

I. THE COURT SHOULD REVISIT THE REVIEW STANDARDS IT APPLIES TO CLAIMS ARISING UNDER THE DELEGATION DOCTRINE

A. The Prohibition Against Delegation of Legislative Power Is Universally Recognized, yet Adherence to the "Intelligible Principle" Standard Renders the Prohibition Unenforceable

The Constitution mandates that only the people's elected representatives may adopt new federal

laws restricting individual liberty. U.S. Const., Art. I, § 1 ("*All* legislative Powers herein granted shall be vested in a Congress of the United States[.]") (emphasis added). The grant of "[a]ll legislative Powers" to Congress means that Congress may not transfer to others "powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). And the power to impose tariffs is inherently legislative. U.S. Const., Art. I, § 8 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts, and Excises"); Decl. of Independence (accusing King George, an executive-branch official, of tyranny for "cutting off our Trade with all parts of the world").

The Court has repeatedly stressed the importance of this Article I Vesting Clause in maintaining the proper separation of powers among the three branches of government. *Marshall Field*, 143 U.S. at 692; *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) ("in carrying out that constitutional division into three branches it is a breach of the fundamental law if Congress gives up its legislative power and transfers it to the President"); *Gundy*, 139 S. Ct. at 2123 (plurality). Despite that understanding, the Court has not invoked the delegation doctrine to strike down a federal statute for 85 years. *See A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

The absence of such decisions is not the result of a lack of opportunity; Congress has adopted many statutes that convey vast decision-making authority to the Executive Branch. Rather, it is a reflection of the

deferential review standard that the Court has applied to delegation-doctrine claims. The Court rejects such claims so long as "Congress has supplied an intelligible principle to guide the delegee's use of discretion," *Gundy*, 139 S. Ct. at 2123 (plurality), and the Court broadly construes the term "intelligible principle." This lax standard renders the Vesting Clause unenforceable, in apparent dereliction of the Court's duty to uphold the Constitution's structure.

The Court first employed the term "intelligible principle" in 1928 in *Hampton*. In rejecting a delegation-doctrine challenge to the Tariff Act of 1922, Chief Justice Taft explained for the Court that "if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Hampton*, 276 U.S. at 409.

That statement was unexceptionable; it made clear, in compliance with prior case law, that the requisite intelligible principle had to spell out rules to which the administrator must "conform." And the tariff statute upheld by the Court imposed strict limits on the Tariff Commission's authority to impose supplemental tariffs. It permitted such tariffs only if the Commission made a factual finding that costs of producing the article in the United States were greater than in the exporting country; provided guidance on how to determine costs of production; and permitted supplemental tariffs only in an amount necessary to compensate for the difference in production costs (and in no event greater than 50% of the tariffs already imposed by the statute). *Id.* at 401. *Hampton*'s

reference to an "intelligible principle" was "just another way to describe the traditional rule that Congress may leave the executive the responsibility to find facts and fill up details." *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

Starting in the late 1940s, however, "intelligible principle" became the Court's principal standard governing delegation-doctrine challenges. *See, e.g., Lichter v. United States*, 334 U.S. 742, 785 (1948). Moreover, the phrase's meaning was gradually watered down—so that "intelligible principle" has come to be understood as encompassing virtually any statutory language that directs administrators to consider one or more factors when determining how to carry out their duties, even when administrators are afforded unconstrained discretion to determine what role those factors should play in their ultimate decisions. *See, e.g., Algonquin*, 426 U.S. at 559; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1231 (1985) ("[T]he [intelligible-principle] test has become so ephemeral and elastic as to lose its meaning").

B. Review Is Warranted to Consider Adopting a Standard that Focuses on Whether a Statute Enables Courts to Test Executive-Branch Conduct Against Ascertainable Standards

Given the importance of the Article I, § 1 Vesting Clause to "the integrity and maintenance of the system of government ordained by the [C]onstitution," *Marshall Field*, 143 U.S. at 692, the Court's toothless intelligible-principle standard warrants re-

examination. It may not always be easy to distinguish between statutes that (on the one hand) authorize agencies to merely "fill up the details" of legislation, *Wayman*, 23 U.S. at 31, or engage in factfinding, *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883), and (on the other hand) those that delegate Congress's legislative authority to agencies. But the intelligible-principle doctrine as currently understood abandons any real effort to make that distinction. It simply defers to congressional determinations that statutory authorizations are constitutionally permissible. Congress has abandoned its powers to the Executive; this Court should not similarly abandon its constitutional duties.

One test that would assist the Court in making those distinctions is one first articulated in 1944 in *Yakus*: whether "there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. The Court has approvingly cited the *Yakus* language in several later cases. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 379 (1989); *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting); *see also, Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring in the judgment) (delegation doctrine ensures that courts reviewing an exercise of administrative action "will be able to test that exercise against ascertainable standards").

The *Yakus* standard is a significant improvement over the intelligible-principle standard because it would require the government to explain

which actions are authorized under the challenged statute and which are not. Significantly, the United States has been unable to point to *any* tariff that would be unauthorized under § 232. That is, under the all-encompassing standards set out in § 232(d), *any* set of facts is sufficient to justify a presidential finding that a tariff is necessary to prevent impairment of national security. Accordingly, § 232 is facially unconstitutional under the *Yakus* test because the statute provides no constraints on Executive Branch action and thus no way to tell "whether the will of Congress has been obeyed." 321 U.S. at 426.

In contrast, § 232 passes the intelligible-principle test with flying colors. *Algonquin* stated that the statute "easily fulfills that test," pointing to "a series of specific factors to be considered by the President in exercising his authority"—without considering whether those factors impose any constraints on the President's choice of tariffs. 426 U.S. at 559. Indeed, the Court of International Trade invoked the intelligible-principle standard and *Algonquin* to reject AIIS's challenge, despite acknowledging the absence of any such constraints. Pet. App. 39-41; *see id.* at 58 (Katzman, J., concurring in the judgment) (stating that § 232 "provides virtually unbridled discretion to the President with respect to the power over trade" and provides "no guidance ... on the expansive definition of 'national security'").

By granting the Petition, the Court will have the opportunity to consider whether adopting a more stringent test to replace the intelligible-principle standard would better protect separation-of-powers principles, by enabling courts to guard against

divestment of Congress's tariff-setting responsibilities, a core legislative power. NCLA submits that the intelligible-principle standard "has earned its retirement" and "is best forgotten." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

C. Reviving Judicial Review of Delegation-Doctrine Claims Will Not Hamper Government's Ability to Operate Effectively

Those opposed to strengthening delegation-doctrine enforcement often contend that modern governments could not operate effectively if Congress were barred from authorizing Executive Branch officials to make policy. That contention not only ignores important separation-of-powers concerns, *see Gundy*, 139 S. Ct. at 2133-35 (Gorsuch, J., dissenting), but also fails to appreciate that adherence to the Vesting Clause does not preclude efficient day-to-day government operations.

The Court has long recognized Congress's authority to delegate the task of "fill[ing] up the details," so long as Congress itself establishes the overriding policies. *Yakus* explained:

> [T]he Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to

> be prerequisites to the application of the legislative policy to particular facts and circumstances impossible for Congress itself to properly investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.

Yakus, 321 U.S. at 424.

Hampton cited the statute establishing the Interstate Commerce Commission as an example of permissible legislation that complied with the Vesting Clause. Adopted pursuant to Congress's Article I authority to regulate interstate commerce, the statute directed the federal government to establish permissible rates to be charged by interstate carriers of passengers and freight. Because there were thousands of carriers, "[i]f Congress were to be required to fix every rate, it would be impossible to exercise the power at all." *Hampton*, 276 U.S. at 407. The Court explained that Congress could authorize ratemaking by the commission so long as the commission operated under rules "laid down by Congress" that specified in detail how rates were to be set. *Id.* at 408.

As *Hampton* and *Marshall Field* demonstrate, there is no reason why similar rate-setting procedures cannot work effectively with tariffs. Indeed, until the early 20th century, tariff-setting was performed almost exclusively by Congress, which routinely adopted extremely detailed tariff acts. *See* George Bronz, *The Tariff Commission as a Regulatory Agency*, 61 Colum.

L. Rev. 463, 464 (1961). Even today Congress routinely adopts extremely detailed lists of tariff exemptions. *See, e.g.,* 19 U.S.C. § 3203(b) (specifying lengthy categories of products designated as either eligible or ineligible for duty-free import from certain South American countries).

Nor would adopting a more exacting standard of review require overruling Court precedents, many of which would have reached the same result even if they had not applied the lax intelligible-principle standard. For example, the war-time price-control statute challenged in *Yakus* contained detailed specifications regarding how government administrators were to establish prices. 321 U.S. at 419-23. *Mistretta* rejected a delegation-doctrine challenge to the Sentencing Reform Act of 1984 because the Act "sets forth more than merely an 'intelligible principle'"; it "explains what the [Sentencing] Commission should do and how it should do it, and sets out specific directives to govern particular situations." 488 U.S. at 658 (citation omitted). When it so chooses, Congress has no difficulty addressing the complexity of modern government while fully complying with the Vesting Clause.

II. THE PETITION IS A PARTICULARLY ATTRACTIVE VEHICLE FOR RECONSIDERING THE DELEGATION DOCTRINE

The Petition provides the Court with an excellent vehicle for considering whether to jettison the intelligible-principle standard. The choice of review standards is almost certainly outcome-determinative in this case. Federal courts have had little difficulty

concluding that § 232 passes constitutional muster under the intelligible-principle standard, yet the statute would likely be found to violate the Vesting Clause if examined under a more exacting standard.

On the one hand, § 232(d) lists numerous factors that the President and Secretary of Commerce must consider in deciding whether to impose tariffs. They are to consider those factors "in light of the requirements of national security and without excluding other relevant factors." The statute provides a detailed and expansive definition of "national security":

> In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(d). The numerous factors that the Executive Branch is directed to consider certainly qualify as "intelligible."

On the other hand, § 232 almost certainly flunks the test articulated in *Yakus*, a test that asks: whether standards articulated in § 232 would enable a reviewing court to determine if a tariff imposed by the President complies with policy directives specified by Congress. Courts cannot make that determination because § 232(d) establishes an unbounded definition of "national security"—so that a President who states that he is acting to protect the national security as defined by the statute cannot be proven wrong. As interpreted by *Yakus*, the Vesting Clause prohibits statutes that authorize the Executive Branch to engage in such open-ended policy-making.

There are no procedural barriers to the Court's consideration of AIIS's claims. AIIS raised its delegation-doctrine claim at all stages of the litigation, and a facial challenge to § 232 raises no material issues of disputed fact.

Nor is § 232 susceptible of a saving construction that would permit AIIS's claims to be resolved without addressing the proper standard for evaluating delegation-doctrine claims.[3] Section 232(d) makes crystal clear that there are virtually no facts that the President may not rely on in determining that the import of an article represents a threat to "national

[3] In that respect, the Petition differs sharply from *Gundy*. In *Gundy,* the Court construed the statute at issue as imposing strict limits on the Attorney General's authority with respect to registration of convicted sex offenders—and thus avoided any need to determine precisely when statutes granting authority to Executive Branch officials cross the line into unconstitutional delegations of legislative powers. 139 S. Ct. at 2123-24 (plurality).

security." The statute states that "the economic welfare of the Nation" and "the economic welfare of individual domestic industries" are largely synonymous with "national security." Thus a President is authorized to determine that steel imports are a threat to national security if he determines that increased competition would hurt the domestic steel industry. But the President is similarly authorized to determine that steel imports are *not* a threat to national security (and instead to determine that tariffs on steel imports would be a threat to national security) if he determines that the automobile industry is helped by increased steel supply and lower steel prices.

III. *ALGONQUIN* IS NOT A BARRIER TO GRANTING REVIEW

In opposing AIIS's efforts to persuade the Court to hear this case, the United States has relied almost entirely on the Court's 1976 *Algonquin* decision. The United States argues that *Algonquin* was correctly decided, that "it is consistent with this Court's more recent nondelegation precedents," and that *stare decisis* considerations weigh against granting review. *American Inst. for Int'l Steel, Inc. v. United States*, No. 18-1317, *cert denied*, 139 S. Ct. 2748 (2019) (Brief for the United States in Opposition).[4] Those arguments are unpersuasive; *Algonquin* is not a barrier to the Court's consideration of AIIS's claims.

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[4] Following the Court of International Trade's decision, AIIS filed a certiorari petition seeking review before judgment by the Federal Circuit. This Court denied the petition.

NCLA notes initially that AIIS argues persuasively that *Algonquin*'s holding is quite narrow—and that the Court's statements that § 232 did not violate the Vesting Clause should not be deemed a part of the Court's holding. The delegation doctrine was not an issue *Algonquin* agreed to review, nor did the petition raise the claim.[5]

Rather than challenging § 232 on its face, the plaintiffs argued that it should be construed to permit imposition of import quotas but not tariffs. The plaintiffs raised a constitutional-avoidance argument in support of their statutory claim, asserting that the statute would violate the Vesting Clause if it were construed as authorizing the President to impose tariffs. In the course of denying the plaintiffs' statutory claim, the Court rejected the constitutional-avoidance argument—and included statements indicating that the statute was not subject to a delegation-doctrine challenge. *Algonquin*, 426 U.S. at 558-60. The Court's holding should not be deemed to include those observations regarding constitutional law, given that they were made in support of a ruling on a statutory-construction issue, and the Court never indicated that it would have construed the statute more narrowly in the absence of those observations.

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[5]*Algonquin* arose in the aftermath of the 1973 Arab oil embargo, which led to severe gasoline shortages throughout the United States and increased concern that over-reliance on oil imports threatened national security by making the entire economy vulnerable to embargoes orchestrated by foreign governments. Presidents Nixon and Ford responded by invoking § 232 to impose tariffs on imported oil; previously, the statute had only been used to impose *quotas* on oil imports.

See, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996).

But review is warranted even if *Algonquin*'s "holding" is properly interpreted as including its statements on the constitutionality of § 232. *Stare decisis* considerations are not a barrier to granting review; for a variety of reasons, *stare decisis* should not deter the Court from overruling *Algonquin* if it decides that case was wrongly decided.

The Court has identified several factors to consider in deciding whether to overrule past decisions. The *stare decisis* doctrine—which weighs in favor of adhering to a decision despite its errors—is at its weakest when, as in *Algonquin*, the Court interprets the Constitution, because a mistaken constitutional interpretation is "practically impossible" to correct through other means. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Other factors the Court has considered include the quality of the precedent's reasoning, the workability of the rule it established, and reliance on the decision. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019). Each of these factors counsels in favor of overruling *Algonquin*.

Algonquin was wrongly decided, for all the reasons cited above. More importantly, its discussion of the delegation doctrine was extremely truncated (perhaps because a delegation-doctrine claim was not included among the questions presented), and the quality of its reasoning was exceptionally weak. It stated, "we see no looming problem of improper delegation," explaining:

> [T]he leeway that the statute gives the President in deciding what action to take in the event that the preconditions are fulfilled is far from unbounded. The President can act only to the extent "he deems necessary to adjust the imports of such articles and its derivatives so that such imports will not threaten to impair the national security." And § 232(c) [now § 232(d)] articulates a series of factors to be considered by the President in exercising his authority.

Id. at 559-60. But the Court failed to explain *how* the statute imposed any constraints on the President's decision-making—a particularly glaring omission given the statute's expansive definition of "national security" and given that § 232(d)'s "series of factors to be considered" is so broad that it grants the President unlimited discretion.

The "unworkability" of the rule established by *Algonquin* also counsels against adherence to the decision. Given the paramount importance of the Vesting Clause to the separation-of-powers principles at the heart of the Constitution's design, a rule governing such constitutional claims ought to provide courts with a clear and judicially administrable method of distinguishing legislation that violates the Vesting Clause from legislation that does not. *Algonquin* provides no such clarity. The only lesson to be drawn from reading the decision is that because "necessities" often make it "unreasonable and impracticable to compel Congress to prescribe detailed

rules," *id*. at 560 (citation omitted), the Court prefers to stay out of Vesting Clause disputes.

Finally, there is little evidence that anyone has ever relied on *Algonquin*. It is rarely cited. The United States has invoked § 232 to impose restrictions on imports no more than five times since its enactment, and never between the early 1980s and the 2018 steel-import restrictions imposed in this case. Other regularly utilized federal statutes authorize tariffs on steel and other imports, so a decision striking down § 232 would not leave the United States without means of addressing trade concerns. Besides, the most important reliance considerations at issue here are "the reliance interests of the American people" in the enforcement of the U.S. Constitution. *Ramos v. Louisiana*, 590 U.S. ___, 2020 WL 1906545 at *14 (Apr. 20, 2020). The cost of adhering to *Algonquin* is denial to the American people in perpetuity of the constitutional protections afforded to them by the Founders when they adopted the Vesting Clause. And that is far too high a price to pay.

CONCLUSION

The Framers believed that "the new federal government's most dangerous power was the power to enact laws restricting the people's liberty, *Gundy*, 139 S. Ct. at 2135 (Gorsuch, dissenting), and that "there can be no liberty where the legislative and executive powers are united in the same person." *The Federalist* No. 47, p. 302 (C. Rossiter ed. 1961) (Madison). To guard against the unification of those powers, the Framers vested *all* of the legislative power in Congress, and they vested executive power in a

President who is not part of the legislative branch. U.S. Const., Arts. I & II. But "[t]he framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). Unless the federal courts are willing to carefully examine claims that Congress has improperly delegated its legislative power, there will be no one to safeguard our constitutional structure.

The Court should grant the Petition.

Respectfully submitted,

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