No. 24A1174

In the Supreme Court of the United States

DONALD J. TRUMP, President of the United States, et al., APPLICANTS

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, et al.

On Application to Stay the Order Issued by the
United States District Court for the Northern District of California

BRIEF AMICI CURIAE OF FORMER GOVERNMENT OFFICIALS AND ADVISORS IN OPPOSITION TO APPLICATION TO STAY

Michael S. Kwun
Counsel of Record
Kate E. Lazarus
Amy Le
KWUN BHANSALI LAZARUS LLP
555 Montgomery Street, Suite 750
San Francisco, CA 94111
mkwun@kblfirm.com
(415) 630-2350

Carey R. Dunne
Mark Pomerantz
Kevin Trowel
Zack Goldberg
Martha Reiser
FREE AND FAIR LITIGATION GROUP, INC.
266 W. 37th St., 20th Floor
New York, NY 10018

Joseph T. Baio
JOSEPH T. BAIO LLC
240 Centre Street
New York, NY 10013

Counsel for Amici Curiae Donald B. Ayer, Ty Cobb, Barbara Comstock, Mickey Edwards, Philip Lacovara, Michael Luttig, Carter Phillips, Trevor Potter, Alan Charles Raul, Paul Rosenzweig, Nicholas Rostow, Robert Shanks, Fern Smith, Peter Smith, William Joseph Walsh, and Christine Todd Whitman

June 6, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Legislative Materials

Executive Materials

Other Materials

INTRODUCTION

Amici curiae file this brief[1] in opposition to the government's[2] application to stay the district court's preliminary injunction halting the implementation of Executive Order No. 14210, 90 Fed. Reg. 9669 (Feb. 11, 2025). That executive order contemplates "a critical transformation of the Federal bureaucracy." 90 Fed. Reg. at 9669. It directs the restructuring of entire federal agencies, the elimination of government programs and functions, and the drastic reduction of the number of employees within every agency.

The district court properly held that this sweeping reworking of federal agencies cannot be accomplished by Presidential fiat alone. App. 43a–44a. The agencies of the executive branch are not the President's possessions to be reshaped or discarded as he sees fit. The agencies were created by Congress pursuant to its expansive legislative powers; their fundamental reworking therefore requires Congressional authorization.

The district court's preliminary injunction recognizes this basic principle, and thus finds support in the Constitution, federal statutes, and applicable case law. In this brief, *amici* highlight how the President's wide-ranging executive order violates

---

[1] No counsel for a party authored this brief in whole or in part. No such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No one, other than the *amici curiae* or their counsel, made such a monetary contribution to the preparation or submission of the brief.

[2] This brief uses "government" to refer to Applicants. It uses "plaintiffs" to refer to the plaintiffs in the district court proceedings. Citations herein to "Appl." and "App." are to the government's application, and the appendix to that application, respectively.

the separation of powers and ignores checks and balances that are foundational to our system of government and clearly established in the law.

The government's application to stay should be denied.

INTEREST OF *AMICI CURIAE*

Amici curiae are conservatives and include former public officials who were elected as Republicans, appointed by Republicans, or served in Republican administrations. *Amici* and their backgrounds[3] are as follows:

- Donald B. Ayer, Deputy Attorney General in the George H.W. Bush Administration from 1989 to 1990; Principal Deputy Solicitor General in the Reagan Administration from 1986 to 1988; United States Attorney for the Eastern District of California from 1981 to 1986 in the Reagan Administration.
- Ty Cobb, Special Counsel to the President in the Trump Administration from 2017 to 2018.
- Barbara Comstock, Representative of the 10th Congressional District of Virginia from 2015 to 2019 (R).
- Mickey Edwards, Representative of the 5th Congressional District of Oklahoma from 1977 to 1993 (R).

[3] *Amici* are listed in alphabetical order by last name. All former affiliations are listed for identification purposes only. The *amici* join this brief in their individual capacities, and not on behalf of any current or former affiliated agencies or organizations.

- Philip Lacovara, Counsel to the Special Prosecutor, Watergate Special Prosecutor's Office in the Nixon Administration from 1973 to 1974; Deputy Solicitor General of the United States in the Nixon Administration from 1972 to 1973.
- Michael Luttig, Circuit Judge, United States Court of Appeals appointed by George H.W. Bush from 1991 to 2006; Assistant Attorney General, Office of Legal Counsel and Counselor to the Attorney General in the Bush Administration from 1990 to 1991; Assistant Counsel to the President in the Reagan Administration from 1981 to 1982.
- Carter Phillips, Assistant to the Solicitor General in the Reagan Administration from 1981 to 1984.
- Trevor Potter, General Counsel to John McCain's Presidential Campaigns in 2000 and 2008; Special Assistant, Office of Legal Policy, Department of Justice, from 1982 to 1984.
- Alan Charles Raul, Associate Counsel to the President in the Reagan Administration from 1986 to 1988; General Counsel to Office of Management and Budget from 1988 to 1989 in the Reagan and George H.W. Bush Administrations; General Counsel to U.S. Department of Agriculture from 1989 to 1993 in the George H.W. Bush Administration; Vice Chairman of the Privacy and Civil Liberties Oversight Board from 2006 to 2008 in the George W. Bush Administration.

- Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security in the George W. Bush Administration from 2005 to 2009.
- Nicholas Rostow, Special Assistant to the President for National Security Affairs and Legal Adviser to the National Security Council under Reagan and George H.W. Bush Administrations from 1987 to 1993; Special Assistant to the Legal Adviser, U.S. Department of State from 1985 to 1987; Senior Research Scholar at Yale Law School.
- Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel in the Reagan Administration from 1981 to 1984.
- Fern Smith, Judge of the U.S. District Court for the Northern District of California appointed by President Reagan from 1988 to 2005.
- Peter Smith, Representative-at-Large of Vermont from 1989 to 1991 (R).
- William Joseph Walsh, Representative of the 8th Congressional District of Illinois from 2011 to 2013 (R).
- Christine Todd Whitman, Governor of New Jersey from 1994 to 2001 (R); Administrator of the Environmental Protection Agency in the George W. Bush Administration from 2001 to 2003.

These *amici* have collectively spent decades in public service in the federal government and state governments. They share a commitment to limited government and the rule of law. They write out of concern that the separation of

powers and checks and balances built into our Constitution are under threat because of the government's conduct.

SUMMARY OF ARGUMENT

The President's executive order is an unauthorized incursion into the power of Congress. The Constitution vests all legislative power in Congress, including the power to create and organize the offices and departments of the federal government. Congress has not authorized the "critical transformation of the Federal bureaucracy" contemplated by Executive Order 14210; Congress last authorized the President to transmit reorganization plans to it over forty years ago, and even then the President's plans still had to be approved by Congress. Because the President issued Executive Order 14210 without authority and in violation of separation of powers principles, the district court's finding (later endorsed by the Court of Appeals for the Ninth Circuit) that the plaintiffs are likely to succeed on their claims is correct.

ARGUMENT

The constitutional genius of America is the establishment of three branches of government that must cooperate with each other, and check and balance each other's actions, to govern the country. In discussing "the necessary partition of power among the several departments," the Framers contemplated an "interior structure of the government" that would provide "the means of keeping each other in their proper places." THE FEDERALIST NO. 51 (James Madison). They understood that the branches' functions were not designed to be "wholly unconnected" and

"should not be so far separated as to have no constitutional control over each other." THE FEDERALIST NO. 48 (James Madison).

Unchecked presidential power is not what the Framers had in mind.[4] Although the Constitution vests the President with all executive authority, it vests Congress with all legislative authority, including, significantly, the power to set fundamental policies and procedures for the executive branch. By proclaiming and implementing Executive Order 14210, the President has usurped for himself the power to restructure entire federal agencies, which can be accomplished only through the constitutionally mandated collaboration between the President and Congress.

I. The Constitution does not authorize Executive Order 14210.

"The President's power, if any, to issue [an executive] order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585 (1952). President Trump lacked any such authority to issue Executive Order 14210.

The President's constitutional authority is set forth in article II. U.S. CONST. art. II, § 1, cl. 1. The President has no constitutional legislative authority. *INS v. Chadha,* 462 U.S. 919, 951, 956–59 (1983); *Youngstown,* 343 U.S. at 655 (Jackson, J., concurring). And none of the President's enumerated powers in the Constitution entitle the President unilaterally to initiate and carry out a massive restructuring of the executive agencies that Congress has created through legislation. *See* Paul J.

[4] Alan Charles Raul, Opinion, Trump Cannot Remake the Government with the Stroke of a Sharpie, WASH. POST, May 5, 2025, https://wapo.st/4ja6F69.

Larkin & John-Michael Seibler, *The President's Reorganization Authority,* Heritage Found. Legal Memorandum No. 210, at 3 (July 12, 2017).[5]

The Constitution instead grants *Congress* the authority to "make all Laws which shall be necessary and proper for carrying into Execution" not just the article I legislative powers, but also any necessary and proper laws for "all other Powers vested by this Constitution in the Government of the United States . . . ." U.S. CONST. art. I, § 8, cl. 18. Since the nation's founding, federal courts therefore have recognized that the Constitution gives the legislative power to create, regulate, and restructure federal agencies to Congress. *Myers v. United States,* 272 U.S. 52, 129 (1926).

Under the scheme adopted by the Founders in the Constitution, Congress—not the President—creates and organizes the offices and departments of the federal government by virtue of the Necessary and Proper Clause. Indeed, "among Congress's first acts were establishing executive departments and staffs . . . ." Gary Lawson, *Necessary and Proper Clause,* THE HERITAGE GUIDE TO THE CONSTITUTION (2d ed. 2014).[6]

The President, pursuant to his executive powers, can direct the offices and departments of the federal government to carry out—to "execute"—the laws that Congress has enacted. But he cannot cripple those agencies or so transform them

---

[5] https://www.heritage.org/sites/default/files/2017-07/LM-210_0.pdf.

[6] http://www.heritage.org/constitution/#!/articles/1/essays/59/necessary-and-proper-clause.

that they are unable to carry out the purposes for which Congress created them. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477, 500 (2010) ("Congress has plenary control over the salary, duties, and even existence of executive offices."). He lacks the power to reshape the entire federal bureaucracy because he does not like the tools that Congress has given him.

II. Congress did not authorize Executive Order 14210.

Neither has Congress exercised its power to authorize the President to implement Executive Order 14210. At times, Congress has authorized the President to transmit executive reorganization plans to it. But Congress's last such authorization expired in 1984—over forty years ago. Moreover, even that now-expired authorization required that Congress approve any such plans prior to them taking effect.

In 1966, Congress enacted title 5 of the United States Code as positive law. *See* Pub. L. No. 89-554, 80 Stat. 378 (1966). Chapter 9 of title 5 addressed Executive Reorganization and followed a series of prior Reorganization Acts. *See* 80 Stat. at 393; Henry B. Hogue, Cong. Rsch. Serv., R42852, *Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress* 1–23 (2012).[7]

The 1966 act provided that the President should, from time to time, "examine the organization of all agencies" to determine any changes necessary to improve their functioning. *See* 80 Stat. at 394; *see also* 5 U.S.C. § 901(d). Congress also

[7] https://sgp.fas.org/crs/misc/R42852.pdf.

authorized the President to submit reorganization plans to Congress under certain circumstances. *See* 80 Stat. at 394–95; *see also* 5 U.S.C. § 903. Section 905(b) of title 5 provided that any such reorganization plan had to be "transmitted to Congress before December 31, 1968." 80 Stat. at 396.

Congress amended the deadline for the President to transmit reorganization plans several times. But it last did so in 1984, amending section 905(b) to allow the President to transmit reorganization plans to Congress "on or before December 31, 1984." Pub. L. No. 98-614, 98 Stat. 3192, 3192 (1984); 5 U.S.C. § 905(b).

In February of this year, Rep. James Comer (R-Kentucky) introduced the Reorganizing Government Act of 2025. H.R. 1295, 119th Cong. (2025). The bill would allow "Congress to fast-track President Trump's government reorganization plans by renewing a key tool to approve them swiftly in Congress." Press Release, H. Comm. on Oversight & Gov't Reform, Chairman Comer and Senator Lee Introduce Bill to Fast-Track President Trump's Government Reorganization Plans (Feb. 13, 2025).[8] Among other things, it would amend 5 U.S.C. § 905(b) to authorize the President to transmit reorganization plans to Congress on or before December 31, 2026. H.R. 1295 § 2. But Congress has not passed Rep. Comer's bill. And, even were Congress to renew the President's authority to submit reorganization plans to it, a reorganization plan could take effect only if adopted by Congress. *See* 5 U.S.C. § 906(a).

---

[8] https://oversight.house.gov/release/chairman-comer-and-senator-lee-introduce-bill-to-fast-track-president-trumps-government-reorganization-plans/.

The government argues that the executive order merely directs agencies to exercise existing statutory authority. Appl. 22–24. The government, however, has not identified a clear statutory statement that would authorize the agencies to engage in such far-reaching wholesale reorganizations of themselves. The Court should not presume that Congress delegated such major policy decisions to agencies in the absence of a specific grant of such authority—it should be wary of presuming that Congress intended to grant agencies the authority to rework themselves fundamentally. *See West Virginia v. EPA,* 597 U.S. 697, 723 (2022); *see also id.* at 739 (Gorsuch, J., concurring, joined by Alito, J.) ("Permitting Congress to divest its legislative power to the Executive Branch would 'dash [this] whole scheme.' Legislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him." (citation omitted)).

III. Executive Order 14210 usurps Congress's legislative powers.

The Constitution requires that the President "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. If the President disagrees with the legislative choices made by Congress—if he believes, for example, that the government is bloated, spending is out of control, or that programs and policies are poorly conceived—under our Constitutional scheme, he may recommend to Congress corrective measures that he deems "necessary and expedient." *Id.* But the President cannot take unilateral action to implement his desired measures without encroaching on Congress's legislative authority.

The Court's decision in *Youngstown* illustrates the limitations on the President's powers. There, the Court struck down President Truman's executive order taking possession of most of the nation's steel mills, which President Truman claimed was necessary to prevent a nationwide strike that would jeopardize national security. 343 U.S. at 583. The Court held, however, that the executive order usurped legislative power, and was impermissible in the absence of a law from Congress or a clear authorization in the Constitution itself. *Id.* at 588–89. Because Executive Order 14210 is not grounded in any such authorization, it—like President Truman's executive order—improperly usurps Congress's legislative power.

IV. The government cannot recast a constitutional violation as a labor dispute.

In arguing that it has established a likelihood of success on the merits, the government treats the executive order as implementing some garden-variety personnel measures. It claims that, "[a]t bottom, this case is a dispute concerning 'employee relations in the federal sector' and 'federal labor-management relations' . . . ." Appl. 17. But the executive order contemplates far more than a routine discharge of nonessential personnel. Executive Order 14210 states, in its title, that it is implementing the President's Department of Government Efficiency initiative. 90 Fed. Reg. at 9669. A subsequent executive order explicitly states that that the Department of Government Efficiency initiative seeks "to commence the deconstruction of the overbearing and burdensome administrative state." Exec. Order No. 14219 § 1, 90 Fed. Reg. 10583, 10583 (Feb. 19, 2025) (Ensuring Lawful

Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative). Put otherwise, according to the record made in the district court, the President seeks not merely to "prune" the executive branch of government, but to cut it down with a chainsaw.

The wisdom, as a policy choice, of this assault on the "administrative state" is not for the judicial branch to consider. But the Court should recognize that the Administration seeks what it has termed "a critical transformation of Federal bureaucracy," 90 Fed. Reg. at 9669—something that the President views as "'The Manhattan Project' of our time."[9] To that end, the agencies targeted by the executive order are required to submit reorganization plans reflecting required reductions in force and to contemplate their own eradication by assessing "whether the agency or any of its subcomponents should be *eliminated or consolidated*." Exec. Order 14210 § 3(e), 90 Fed. Reg. at 9670 (emphasis added). This case, in other words, is not simply an employment dispute; it is about a presidential effort to diminish, eviscerate, or eliminate agencies and their sub-units that were created by Congress pursuant to its legislative powers.

As the district court explained, the plaintiffs made a preliminary factual record, through declarations and documents, indicating that the executive order

---

[9] Statement by President-Elect Donald J. Trump (Nov. 12, 2024), https://truthsocial.com/@realDonaldTrump/posts/113472884874740859; *see also* Exec. Order No. 14217 § 1, 90 Fed. Reg. 10577, 10577 (Feb. 19, 2025) (Commencing the Reduction of the Federal Bureaucracy) ("It is the policy of my Administration to dramatically reduce the size of the Federal Government, while increasing its accountability to the American people.").

would prevent various agencies from fulfilling functions and tasks assigned to them by statute. *See* App. 50a (discussing record evidence that raises "significant questions about some agencies' or sub-agencies' capacities to fulfill their statutory missions"). The government made no attempt to rebut this factual showing, submitting no contrary evidence; the Ninth Circuit noted as much in declining to stay the district court's preliminary injunction. App. 81a ("Defendants have not produced any evidence showing that the forty planned RIFs across seventeen agencies would not essentially eliminate Congressionally created agencies or prevent them from fulfilling their statutory duties."). The President cannot simply jettison the policy choices that Congress put into place by firing all the people assigned to carry them out.

Under article II of the Constitution, the President does not have the authority to override the laws that established the executive agencies and designated their tasks. As Justice Scalia has explained:

> Congress *may* make laws necessary and proper for carrying into execution the President's powers, Art. I, § 8, cl. 18, but the President *must* "take Care" that Congress's legislation "be faithfully executed," Art. II, § 3. And Acts of Congress made in pursuance of the Constitution are the "supreme Law of the Land"; acts of the President (apart from treaties) are not. Art. VI, cl. 2.

Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 83–84 (2015) (Scalia, J. dissenting, joined by Roberts, C.J., and Alito, J.) (emphases in original).[10]

---

[10] The government also argues that "[w]hen the federal government is the employer, practically any employment or labor-management-relations claim can be dressed up in constitutional garb." Appl. 19. This argument, however, has it

V. The courts are responsible for protecting the balance of powers established by the Constitution.

At bottom, the government's argument rests on the premise that the President may unilaterally hobble agencies created by Congress free from Congressional participation. And, according to the government, courts have no authority to review the constitutionality of Executive Order 14210 except through piecemeal employment cases that arise from the Merit Systems Protection Board. App. 72a–75a (rejecting the government's argument that the plaintiffs' claims should be filed as individual administrative grievances). This contention has no merit.

The Constitution's core, government-structuring provisions "reflect the founding generation's deep conviction that 'checks and balances were the foundation of a structure of government that would protect liberty.'" *NLRB v. Noel Canning,* 573 U.S. 513, 571 (2014) (Scalia, J., concurring in judgment, joined by Roberts, C.J., and Thomas and Alito, JJ.) (quoting *Bowsher v. Synar*, 478 U.S. 714, 722 (1986)). The Founders believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison). For this reason, "they did not entrust either the President or Congress with sole power to adopt uncontradictable policies about *any* subject . . . ." *Zivotofsky ex rel. Zivotofsky v. Kerry,* 576 U.S. at 85 (Scalia, J., dissenting, joined by Roberts, C.J., and Alito, J.) (emphasis in original).

---

backwards, attempting to transform a constitutional challenge involving the separation of powers and the checks and balances established in our Constitution into a routine employment or labor-management-relations dispute.

The Constitutional structure of our nation's government is not merely aspirational. "The Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights." *Noel Canning,* 573 U.S. at 570–71 (Scalia, J., concurring in judgment, joined by Roberts, C.J., and Thomas and Alito, JJ.). And policing the "enduring structure" of constitutional government when the political branches fail to do so is "one of the most vital functions of this Court." *Public Citizen v. Dep't of Justice,* 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment, joined by Rehnquist, C.J., and O'Connor, J.).

Indeed, "[w]hen questions involving the Constitution's government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch '"to say what the law is."'" *Noel Canning,* 573 U.S. at 571 (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 196 (2012) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803))). Courts, exercising *their* role in our Constitutional order, have "not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Mistretta v. United States,* 488 U.S. 361, 382 (1989). They have done so recognizing that "[t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Public Citizen,* 491 U.S. at 468 (Kennedy, J., concurring in judgment,

joined by Rehnquist, C.J., and O'Connor, J.) (quoting *Youngstown,* 343 U.S. at 594 (Frankfurter, J., concurring)).

It now falls to this Court to vindicate its role in our Constitutional order. It should reject the "Presidential claim to a power at once so conclusive and preclusive" that it jeopardizes the "equilibrium established by our constitutional system." *Youngstown,* 343 U.S. at 638 (Jackson, J., concurring). It should heed Justice Scalia's exhortation to

> affirm the primacy of the Constitution's enduring principles over the politics of the moment. [The] failure to do so today will resonate well beyond the particular dispute at hand . . . and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.

Noel Canning, 573 U.S. at 615 (concurring in judgment). It should, in other words, protect the very "constitutional structure of our Government that," in turn, "protects individual liberty." *Bond v. United States,* 564 U.S. 211, 223 (2011); *see also Public Citizen,* 491 U.S. at 468 ("When structure fails, liberty is always in peril.") (Kennedy, J., concurring in judgment, joined by Rehnquist, C.J., and O'Connor, J.).

CONCLUSION

The wisdom of the Founders in creating a system of checks and balances, and the separation of power principles underlying *Youngstown,* should guide the Court in considering the government's application. *Amici* believe that the President's actions are based in radical claims of powers that do not exist. *Amici* therefore respectfully request that the Court deny the government's application to stay.

Respectfully submitted,

June 6, 2025

/s/ Michael S. Kwun

Michael S. Kwun
Counsel of Record
Kate E. Lazarus
Amy Le
KWUN BHANSALI LAZARUS LLP
555 Montgomery Street, Suite 750
San Francisco, CA 94111
mkwun@kblfirm.com
(415) 630-2350

Carey R. Dunne
Mark Pomerantz
Kevin Trowel
Zack Goldberg
Martha Reiser
FREE AND FAIR LITIGATION GROUP, INC.
266 W. 37th St., 20th Floor
New York, NY 10018

Joseph T. Baio
JOSEPH T. BAIO LLC
240 Centre Street
New York, NY 10013

Counsel for Amici Curiae Donald B. Ayer, Ty Cobb, Barbara Comstock, Mickey Edwards, Philip Lacovara, Michael Luttig, Carter Phillips, Trevor Potter, Alan Charles Raul, Paul Rosenzweig, Nicholas Rostow, Robert Shanks, Fern Smith, Peter Smith, William Joseph Walsh, and Christine Todd Whitman