Nos. 24-1287, 25-250

IN THE

Supreme Court of the United States

LEARNING RESOURCES, INC., *et al.*,

Petitioners,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

V.O.S. SELECTIONS, INC., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND FEDERAL CIRCUITS

BRIEF *AMICUS CURIAE* FOR THE AMERICA FIRST POLICY INSTITUTE IN SUPPORT OF RESPONDENTS IN NO. 24-1287 AND PETITIONERS IN NO. 25-250

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BRIEF *AMICUS CURIAE* FOR THE AMERICA FIRST POLICY INSTITUTE IN SUPPORT OF RESPONDENTS IN NO. 24-1287 AND OF PETITIONERS IN NO. 25-250

Statement of Interest of Amicus Curiae

The America First Policy Institute (AFPI) is a non-profit, non-partisan research institute dedicated to putting the American people first. Its guiding principles include liberty, free enterprise, national greatness, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities. AFPI has a profound interest in this case. The tariffs enjoined below are a pillar of the America-first policies of the current Administration, and AFPI has expressed in print its strong support for them. *See, e.g.*, AMERICAN FIRST POLICY INSTITUTE, *Rethinking Tariffs*, May 9, 2025, www.americafirstpolicy.com/issues/rethinking-tariffs-as-bold-tools-for-american-security-global-fairness.

AFPI respectfully submits this brief to fill a significant gap in the arguments made to this Court. As explained below, a statute that the courts below did not consider—the Tariff Act of 1930—expressly authorizes the President of the United States to impose tariffs of exactly the kind at issue here.[1]

[1] No party or party's counsel authored this brief in whole or in part, and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the preparing or submission hereof.

Summary of Argument

The stakes of this case are enormous. The rulings below threaten to eviscerate the foreign policy of the President of the United States and cause chaos in the nation's foreign affairs. They also threaten to subject the United States to a hundred-billion-dollar damages liability and to deprive the country of perhaps trillions of dollars in current and future revenue.

Past decisions of this Court confronting so monumental a judicial intrusion into a president's foreign policy are exceedingly rare. Perhaps the last such case was *Dames and Moore v. Regan*, 453 U.S. 654 (1981), in which a federal district had enjoined certain executive measures dealing with Iranian assets in the United States in response to the embassy hostage crisis of 1979-81. Granting expedited review, this Court reversed, refusing to intervene into a president's "resolution of a major foreign policy dispute" without a clear congressional mandate. *Id*. at 688. For over two hundred years, this Court has "taken care to avoid 'the danger of unwarranted judicial interference in the conduct of foreign policy,' and declined to 'run interference in [the] delicate field of international relations' without 'the affirmative intention of the Congress clearly expressed.'" *Biden v. Texas*, 597 U.S. 785, 805 (2022) (citation omitted).

Accordingly, before the judiciary renders a final decision in a case as consequential as this, it is essential that all relevant statutes be considered, to ensure that Congress's intentions have been accurately and comprehensively assessed. That did not happen here. In fact, the single most relevant federal statute was not considered at all.

The District Court for the District of Columbia enjoined the tariffs at issue here on the ground that those tariffs were not authorized by the International Emergency Economic Powers Act ("IEEPA"). The Federal Circuit so ruled as well. But a different statute not considered by the lower courts, the Tariff Act of 1930, does authorize these tariffs, and it does so expressly.

Section 338 of the Tariff Act of 1930 confers directly on the President the power to impose tariffs on any country in any amount up to 50%, "whenever the President shall find as a fact that any foreign country places any burden or disadvantage" on United States commerce "directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, … charge, exaction, classification, regulation, condition, restriction, or prohibition." 19 U.S.C. § 1338 (a), (d). Though rarely invoked, Section 338 is fully operative today, and all or nearly all of President Trump's worldwide and reciprocal tariffs—enjoined by the courts below—fit Section 338 like a glove.

The reason the courts below did not apply Section 338 is understandable: the pertinent Executive Orders did not cite the Tariff Act of 1930. But those Orders invoked the President's powers under all "the laws of the United States," and as will be shown below, it is well established that an Executive Order may be upheld under a statute not specifically cited in the Order itself. This Court has done so, as has the Federal Circuit's predecessor, the Court of Customs and Patent Appeals, in a case also involving presidentially-imposed tariffs.

Thus in addition to the IEEPA, Section 338 of the Tariff Act of 1930, which expressly authorizes the

President to impose tariffs of exactly the kind at issue in this case, must be considered before the judiciary enters final judgment here. Under Section 338, AFPI respectfully submits that this Court should either uphold the challenged tariffs or, at a minimum, vacate and remand for further review below.

ARGUMENT

In the Executive Orders relevant to these cases, President Trump invoked "the authority vested in me as President by the Constitution ***and the laws of the United States*** of America, ***including*** the International Emergency Economic Powers Act."[2] Despite the fact that the reference to the IEEPA was expressly non-exclusive, these cases have proceeded as if the IEEPA were the only relevant source of statutory authority for the challenged tariffs. But (1) it is well established that an Executive Order can be upheld by the judiciary under a statute the Order itself did not cite; and (2) the tariffs at issue here are expressly authorized by the Tariff Act of 1930.

I. It Is Well Established that an Executive Order Can Be Sustained Under a Statute the Order Did Not Cite.

Courts frequently uphold Executive Orders under a statute the Orders did not cite. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 304-05 &

[2] *See, e.g.*, Executive Order 14257, Regulating Imports With a Reciprocal Tariff to Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits, 90 Fed. Reg. 15041, 15041 (Apr. 2, 2025) (emphasis added).

nn.33-36 (1979) (discussing executive orders citing no specific statutory authority upheld under a variety of statutes); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 189 (1999) ("Because the Removal Act did not authorize the 1850 [executive] order, we must look elsewhere for a constitutional or statutory authorization for the order."); *AFL-CIO v. Kahn*, 618 F.2d 784, 790-91 & nn.32-33 (D.C. Cir. 1979).

Accordingly, when an Executive Order cites as authority a statute later deemed inapplicable, courts may uphold the Order under a different statute. In a case closely analogous to this one, the Federal Circuit's predecessor, the Court of Customs and Patent Appeals, did exactly that. *See United States v. Yoshida Int'l, Inc.*, 526 F.2d 560 (C.C.P.A. 1975).

Yoshida upheld under the Trading With the Enemy Act of 1917 ("TWEA") certain tariffs imposed by President Richard Nixon's Executive Proclamation 4074, *see id.* at 584, but that Proclamation had *not* invoked or cited TWEA. As correctly stated by the D.C. District Court in its opinion below:

> In issuing Proclamation 4074, President Nixon instead invoked the Tariff Act of 1930 and the Trade Expansion Act of 1962…. H.R. Rep. No. 95-459, at 5 (1977) ("[TWEA] was not among the statutes cited in the President's proclamation as authority for the surcharge."). TWEA was first cited "later by the Government in response to a suit brought in Customs Court by Yoshida International"—i.e., in *Yoshida*. H.R. Rep. No. 95-459, at 5.

Learning Res., Inc. v. Trump, 2025 U.S. Dist. LEXIS 103492, at *32 n.10 (citations omitted).

The lower court in *Yoshida*, known at that time as the Customs Court, first ruled that the two statutes expressly invoked by Proclamation 4074 did not authorize the tariffs at issue. *See Yoshida Int'l, Inc. v. United States*, 378 F. Supp. 1155, 1168 (Cust. Ct. 1974). The Customs Court then held it could consider TWEA notwithstanding the fact that the Proclamation had not cited that statute:

> With respect to defendant's contention that the Trading with the Enemy Act … serves as further authority for the validity of Presidential Proclamation 4074, the plaintiff submits that no consideration should be given thereto inasmuch as the Proclamation does not specifically refer to this Act as a part of its statutory authority…. To sustain the plaintiff's contention would be to place an unwarranted limitation upon judicial review….

Yoshida, 378 F. Supp. at 1168. On appeal, the Court of Customs and Patent Appeals upheld the contested tariffs under TWEA even though the Proclamation had failed to cite that statute. *Yoshida*, 526 F.2d at 584. Thus the fact that the Executive Orders in this case do not cite the Tariff Act of 1930 in no way prevents this Court from upholding those Orders thereunder.

Similarly, the fact that the Government's briefs have not argued the applicability of Section 338 is no bar to this Court's consideration thereof. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 300 (1989) (deciding case based on argument "raised only in an *amicus* brief"); *Mapp* v. *Ohio*, 367 U.S. 643, 646 n.3 (1961) (applying exclusionary rule to the States even although such a course of action was urged only by amicus curiae).

Even for reasons of mere "judicial economy," this Court always has authority to "determine the applicability" of a statute "not argued below." *Allen v. State Bd. of Elections*, 393 U.S. 544, 554 (1969). A fortiori, in a case of this magnitude, to avoid both error and unwarranted constitutional conflict with the Executive, the Court may unquestionably take notice of a directly-applicable but uncited statute. Indeed, because of this Court's commitment not to "'run interference in [the] delicate field of international relations' ***without 'the affirmative intention of the Congress clearly expressed***,'" *Biden v. Texas*, 597 U.S. at 805 (emphasis added), it is imperative for the Court to take notice here of Section 338, in which the "affirmative intention of the Congress" is "clearly expressed." *See also, e.g. United Natural Foods, Inc. v. NLRB*, 66 F.4th 536, 556 (5th Cir. 2023) (Oldham, J., dissenting) ("Does anyone think that, when a party presents [a] legal question … in federal court, a federal judge is somehow disabled from reading any … statute … or other authority not cited in the party's brief? Of course not. We are duty-bound to understand the legal questions presented to us."), *majority opinion vacated*, 144 S. Ct. 2708 (2024).

II. Section 338 Authorizes the Tariffs at Issue Here.

A. Section 338 confers on the President a "comprehensive" tariff-setting power to respond to any discriminatory "burden or disadvantage" other countries place on U.S. commerce.

Section 338 of the Tariff Act of 1930 directly

confers on the President the power to impose tariffs on any country in any amount up to 50%, "whenever the President shall find as a fact that any foreign country places any burden or disadvantage" on United States commerce "directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition." 19 U.S.C. § 1338(a), (d).

Legislative history confirms that Section 338 was intended to grant the President a "comprehensive" tariff-setting authority to respond to all forms of discrimination against U.S. commerce. Section 338 was a recodification of—its text is substantially identical to—Section 317 of the Tariff Act of 1922, which, as the United States Tariff Commission stated decades ago, dealt with discrimination against U.S. commerce "in a comprehensive manner,"[3] "cover[ing] discriminations of all varieties," whether the cause of disadvantage to U.S. commerce lay in "customs duties or other charges, or in classifications, prohibitions, restrictions, or regulations of any kind."[4] Legislative history suggests that Congress delegated this power to the President to ensure that American tariffs could be adjusted rapidly and frequently (which is difficult if not impossible for Congress itself to do) in response to changing circumstances.[5]

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[3] Eleventh Annual Report of the United States Tariff Commission, at 2 (1926–1927).

[4] Thirteenth Annual Report of the United States Tariff Commission, at 46 (1928–1929).

[5] Section 317 of the Tariff Act of 1922 was enacted after then-President Harding sent a message to Congress warning that "[a] rate may be just to-day and entirely out of proportion six months

Section 338 authorizes tariffs of two kinds. Under paragraphs (a)(1) and (e), the President may impose tariffs for most-favored-nation violations—i.e., when he finds that a foreign country has placed a "limitation" on U.S. commerce not placed on any "third country." 19 U.S.C. § 1338(a)(1), (e). Under paragraphs (a)(2) and (d), the President may impose tariffs when he finds that a country is using tariffs or any other measure to "place the commerce of the United States at a disadvantage" vis-à-vis that country's own commerce (or any other nation's commerce). 19 U.S.C. § 1338(a)(2), (d). As the D.C. District Court put it, "Section 338 of the Tariff Act of 1930 grants the President the authority to 'declare … duties' of up to 50 percent on countries that have imposed … limitations that are 'not equally enforced upon the like articles of every foreign country,'"—i.e., most-favored-nation violations—"***or*** that have '[d]iscriminate[d] in fact against the commerce of the United States,'" including by disadvantaging U.S. commerce vis-à-vis their own commerce. *Learning Res., Inc. v. Trump*, No. 25-1248, 2025 U.S. Dist. LEXIS 103492, at *25 (D.D.C. May 29, 2025) (emphasis added).

B. Section 338 has not been implicitly repealed.

Evidently concerned that Section 338 fatally

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from to-day. If our tariffs are to be made equitable and not necessarily burden our imports and hinder our trade abroad, frequent adjustment will be necessary for years to come." Sixth Annual Report of the United States Tariff Commission, at 1–2 (1921–1922) (quoting president's message to Congress of December 6, 1921).

undermines their position, the VOS Plaintiffs and an amicus brief supporting them (the "Allen brief") argued in the Federal Circuit (in response to AFPI's amicus brief) that Section 338, although currently codified at 19 U.S.C. § 1338, had been implicitly "repealed" by later-enacted provisions, specifically Section 252 of the Trade Expansion Act of 1962 and 19 U.S.C. § 2411, which codifies Section 301 of the Trade Act of 1974. (CAFC ECF No. 92 at 28; CAFC ECF No. 90 at 23-24.) But not a single case has ever so held, or even so hinted. On the contrary, the notion that Section 338 has been implicitly repealed flies in the face of controlling law and is squarely contradicted by numerous judicial opinions, legislative bills, and non-partisan congressional reports all recognizing that Section 338 remains fully in effect today.

As this Court has repeatedly held, implicit repeals are strongly disfavored:

> "[R]epeals by implication are not favored" and are a "rarity." Presented with two statutes, the Court will "regard each as effective" unless Congress' intention to repeal is "clear and manifest," or the two laws are "irreconcilable." ***"[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."***

Maine Community Health Options v. United States, 590 U.S. 296, 315 (2020) (citations omitted) (emphasis added). "[C]onfronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments.'" *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (citation omitted). Instead, a "party

seeking to suggest that … one displaces the other … bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow. The intention must be 'clear and manifest.'" *Id*. (citations omitted).

Far from expressing a "clear and manifest" intent to repeal Section 338, the 1962 and 1974 acts both express a clear intent ***not*** to repeal it. Both acts contain a section entitled "Relation to Other Laws" expressly stating which prior statutory provisions are being repealed.[6] Included in these repealed provisions are several sections from the Tariff Act of 1930, but Section 338 is not among them.

In other words, Congress knew exactly how to repeal provisions from the Tariff Act of 1930 and other prior tariff statutes when it passed the 1962 and 1974 acts, and it did repeal numerous such provisions. But it did not repeal Section 338, conclusively refuting any notion that there was a "clear and manifest" intention to repeal that section.

Without mentioning these plain expressions of Congress's intent not to repeal Section 338, the Allen brief argued that Section 252 of the 1962 act and 19 U.S.C. § 2411 "'cover[] the whole subject'" of Section 338 and hence effected an implicit repeal under *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497 (1936). (CAFC ECF No. 90 at 23 (quoting *Posadas*, 296 U.S. at 503).) This contention is baseless.

To begin with, neither Section 252 nor 19 U.S.C. § 2411 remotely "covers the whole subject" of Section 338. Section 252 permitted the President to impose tariffs on countries that maintained "import

[6] *See* Trade Expansion Act of 1962, Pub. L. No. 87-794, § 257, 76 Stat. 872, 881-82 (1962); Trade Act of 1974, Pub. L. No. 93-618, § 602, 88 Stat. 1978, 2072-73 (1975).

restrictions against United States agricultural products," while 19 U.S.C. § 2411 lays out procedures through which the U.S. Trade Representative can impose tariffs in designated circumstances. By contrast, Section 338 arms the President himself with tariffing power over all imports from any foreign country whenever he finds that a country, "directly or indirectly, … by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction or prohibition … place[s] the commerce of the United States at a disadvantage." Thus neither Section 252 nor 19 U.S.C. § 2411 comes close to covering Section 338's whole subject matter. On the contrary, Section 338 is fully "capable of co-existence" with both later-enacted provisions and hence, under *Maine Community*, "it is the duty of the courts … to regard [it] as effective." 590 U.S. at 315.

Moreover, even assuming arguendo that the later-enacted provisions "covered the whole subject" of Section 338—which they emphatically do not—the *Posadas* Court expressly stated that "cover[ing] the whole subject" of a previous enactment does ***not*** suffice to effect an implicit repeal: "It is not sufficient … 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." *Posadas*, 296 U.S. at 504 (citation omitted). "[T]he mere fact that the latter act covers the whole subject" does ***not*** "demonstrate[] an intention completely to substitute the latter act for the first." *Id.* at 503-04. Rather, to effect a disfavored implicit repeal, the later statute must "'cover[] the whole ground occupied by the earlier … ***and the intention of the legislature to repeal must be clear and***

manifest.'" *Id.* at 504 (emphasis added) (citation omitted); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (*Posadas* test not satisfied unless "the intention of the legislature to repeal [is] clear and manifest"). But as just shown above, far from expressing a "clear and manifest" intention to repeal Section 338, both the 1962 and 1974 acts indicated a clear intention ***not*** to repeal it.

From the 1970s to the present day, numerous courts, Congressmen, and congressional publications have consistently recognized Section 338 as operative and in-effect. For example:

- In 1971, the Federal Circuit's predecessor court recognized as operative "the provision in section 338, Tariff Act of 1930, 19 U.S.C. § 1338, for retaliatory duties." *United States v. Hammond Lead Products, Inc.*, 440 F.2d 1024, 1029 (C.C.P.A. 1971).
- In 1980, the Ninth Circuit cited Section 338, 19 U.S.C. § 1338, as a currently operative statute conferring tariff-setting powers on the President. *See Cornet Stores v. Morton*, 632 F.2d 96, 100 n.3 (9th Cir. 1980).
- In 1982, a Senate committee report described Section 338 as currently operative. *See* S. Rep. No. 97-564, 97th Cong. 2d Session, H.R. 4566 (Sept. 21, 1982) ("Under section 338 the President is authorized to impose additional duties ….").
- In 2016, the non-partisan Congressional Research Service included Section 338 in a "list of sample statutory provisions that delegate some authority to the President to take trade-related action." *See* CONGRESSIONAL RESEARCH SERVICE, Presidential Authority over Trade:

Imposing Tariffs and Duties 3-4 (Dec. 9, 2016), https://www.congress.gov/crs-product/R44707.

- In March 2025, a bill was introduced in the House of Representatives (but not passed) to repeal Section 338. *See* Repealing Outdated and Unilateral Tariff Authorities Act, 119 H.R. 2464 (Mar. 25, 2025). Indeed no fewer than 10 (failed) bills to repeal or amend Section 338 have been introduced in the House and Senate over the last eight years. *See, e.g.*, 119 H.R. 2842 (Apr. 10, 2025); 119 S. 348 (Jan. 30, 2025); 118 H.R. 2549 (Apr. 10, 2023); 118 S. 1060 (Mar. 29, 2023); 117 H.R. 2618 (Apr. 16, 2021); 117 S. 691 (Mar. 10, 2021); 116 H.R. 723 (Jan. 23, 2019); 115 H.R. 5760 (May 10, 2018); 115 H.R. 5281 (Mar. 14, 2018); 115 S. 177 (Jan. 20, 2017). Every such bill testifies to legislators' continuing understanding that Section 338 remains operative.
- In April of this year, the Congressional Research Service published another report recognizing Section 338 as one of several statutes "***currently in effect***" conferring tariff-setting powers on the President. CONGRESSIONAL RESEARCH SERVICE, Congressional and Presidential Authority To Impose Import Tariffs 1, 19-20 (Apr. 23, 2025) (emphasis added), https://www.congress.gov/crs-product/R48435.
- In its opinion below, the District Court for the District of Columbia stated that "Section 338 of the Tariff Act of 1930 grants the President the authority to 'declare new or additional duties' of up to 50 percent." *Learning Res., Inc.*, 2025 U.S. Dist. LEXIS

103492, at *25. The court did not say that Section 338 "granted" the President tariff-setting power; the court said that Section 338 "***grants***" him that power.

- In the Federal Circuit proceedings below, an amicus brief submitted to by 191 Members of Congress recognized Section 338 as currently in effect. (*See* CAFC ECF No. 103 at 9 ("President is authorized" to set tariffs under Section 338).)
- As of July 4, 2025, Congress has compiled a complete, as-amended, currently-in-effect version of the Tariff Act of 1930, with notations as to which former provisions have been repealed. *See* Tariff Act of 1930 As Amended Through P.L. 119–21, Enacted July 4, 2025, https://www.govinfo.gov/content/pkg/COMPS-8183/uslm/COMPS-8183.xml. The compilation shows some thirty sections of the Tariff Act of 1930 as having been "repealed," but Section 338 is shown unrepealed, unamended, and fully effective. *See id*.
- Finally, the en banc Federal Circuit itself, in its opinion below, stated that "section 338 of the Tariff Act of 1930 permits the President to 'specify and declare new or additional duties.' 19 U.S.C. § 1338(a)." (Pet. App. 27a (cleaned up).) Again, the Federal Circuit did not say that Section 338 "permitted" the President to impose tariffs; the court said it "***permits***" him to do so.

As stated above, implicit repeal cannot be found in the absence of a "clear and manifest" congressional intent to repeal. *Maine Community*, 590 U.S. at 315.

It would be absurd to assert the existence of a "clear and manifest" congressional intent to repeal Section 338 when no one has ever been aware of this intent, when the supposedly repealing statutes indicate an intention ***not*** to repeal Section 338, and when courts, Congressmen, and authoritative congressional reporters all believe Section 338 is still in force.

C. Under Section 338, the President was not required to publish or recite any factual findings in his Executive Orders.

Although (as explained below) the Executive Orders at issue here did in fact set forth the findings necessary to trigger the President's tariff-setting power under Section 338, that provision did not require him to do so. Section 338 authorizes the President to set tariffs "whenever he finds as a fact" that foreign countries are placing "burdens" or "disadvantages" on U.S. commerce; it does *not* require him to proclaim those findings, to recite them in his Executive Order, to publish them in any way, or to disclose the basis thereof.

This omission was no accident. On the contrary, to protect the confidentiality of the President's foreign policy decisionmaking, Section 338 investigations into other countries' discrimination against U.S. commerce were historically "conducted under cover of secrecy."[7] As the U.S. Tariff Commission reported, "[h]earings are neither required nor contemplated by

[7] 19 C.F.R. § 201.1 (1961).

section 338,"[8] and fact-finding under that provision was not "ma[d]e public."[9]

Where (as here) a statute requires the President to make certain findings as a precondition for taking action, without expressly obliging the President to make those findings public, the President is *not* required to "aver the facts" that trigger his authority or to include his findings in his Executive Order. *See, e.g.*, *Martin v. Mott*, 25 U.S. 19, 33 (1827) (rejecting argument that "it is necessary to aver the facts which bring the exercise [of power] within the purview of the statute"). As this Court stated over a century ago, citing *Martin v. Mott*:

> in all [cases] in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.

Japanese Immigrant Case, 189 U.S. 86, 98 (1903) (citation omitted); *see also, e.g.*, *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (upholding tariff set by presidential proclamation under another provision of the Tariff Act of 1930) ("For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress,

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[8] Fifteenth Annual Report of the United States Tariff Commission, at 111 (1930–1931).

[9] Twenty-fifth Annual Report of the United States Tariff Commission, at 43 (1940–1941).

or those to whom it delegates authority, to determine what tariffs shall be imposed.").

Instructive here is *American Federation of Gov't Emps., AFL-CIO v. Reagan*, 870 F.2d 723 (D.C. Cir. 1989). In *American Federation*, relying on this Court's decision in *Martin v Mott*, the D.C. Circuit expressly rejected a claim that an Executive Order was "legally ineffective because it ***does not show facially and affirmatively that the President made the determinations upon which exercise of the power is conditioned.***" 870 F.2d at 724 (emphasis added). The district court in that case had so held, but the D.C. Circuit reversed, stating, "The Act does not itself require or even suggest that any finding be reproduced in the order." *Id.* at 728. In persuasive language directly applicable here, the appellate court explained:

> Section 7103(b)(1) makes clear that the President may [take action] whenever he "determines" that the conditions statutorily specified exist. ***That section does not expressly call upon the President to insert written findings into an … order, or indeed to utilize any particular format for … an order. The District Court, by mandating a presidential demonstration of compliance with the section, engrafted just such a demand onto the statute***.

Id. at 727 (emphasis added).

By contrast to Section 338, many statutes do expressly require the President to proclaim the requisite findings and/or to explain his findings to Congress. *See, e.g.*, 7 U.S.C. § 624(d) (authorizing President to take certain actions "whenever he finds ***and proclaims***" specified facts) (emphasis added); 15

U.S.C. § 715c ("[w]henever the President finds [certain facts], he ***shall by proclamation declare such facts***") (emphasis added); 19 U.S.C. § 1862(c)(2) (requiring President to submit to Congress "a written statement of the reasons why the President has decided to take action").

Section 338 contains no such requirements. Thus under *Martin v. Mott* and the numerous other decisions cited above, Section 338 does not require the President to "aver" or include in his Executive Orders any predicate facts. *See also, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (upholding executive action made without formal findings where statute authorized executive action only on certain conditions); *Philadelphia & T. Ry. v. Stimpson*, 39 U.S. (14 Pet.) 448, 458 (1840) (where statute required certain conditions to be met before corrected patent could issue, patent signed by President was valid despite absence of recitals so indicating on face of patent).

D. The challenged tariffs are expressly authorized by Section 338, and the Executive Orders at issue here did in fact sufficiently set forth the relevant findings.

All or almost all of the tariffs enjoined below fit Section 338 like a glove. Those tariffs were adopted to counter what the President determined to be significant burdens, disadvantages, and discriminations imposed on U.S. commerce by other countries' tariffs and non-tariff actions. Although, as just shown, the President was not required to include in his Executive Orders any findings of burden,

disadvantage, and discrimination against U.S. commerce, he did in fact do so.

1. *The worldwide and reciprocal tariffs are squarely covered by Section 338.*

On April 2, 2025, the President issued Executive Order 14257, announcing a 10 percent tariff on "all imports from all trading partners," and additional "reciprocal" tariffs for 57 countries ranging from 11 percent to 50 percent.[10] These worldwide and reciprocal tariffs are squarely covered by Section 338.

Executive Order 14257 expressly declares that tariffs are necessary because "disparate tariff rates and non-tariff barriers" placed on U.S. goods by the affected countries "make it harder for U.S. manufacturers to sell their products in foreign markets," "while artificially increasing the competitiveness of the [targeted countries'] goods in global markets."[11] The Order discusses in detail WTO data for countries around the world showing much higher tariffs being imposed against U.S. goods than the U.S. charges against foreign goods. In addition, the Order further cites the "2025 National Trade Estimate Report on Foreign Trade Barriers," which (as the Order correctly states) "details a great number

[10] Executive Order 14257, Regulating Imports With a Reciprocal Tariff to Rectify Trade Practices That Contribute to Large and Persistent Annual United States Goods Trade Deficits, 90 Fed. Reg. 15041, 15045 (Apr. 2, 2025).
[11] *Id*. at 15042.

of non-tariff barriers to U.S. exports around the world on a trading-partner by trading-partner basis."[12]

Thus Executive Order 14257 incorporated by reference the findings set forth in the WTO's detailed tariff data and in the NTE's almost 400-page country-by-country description of non-tariff barriers to U.S. commerce. At the same time, with respect to European nations, President Trump has stated, "The European Union, which was formed for the primary purpose of taking advantage of the United States on TRADE, has been very difficult to deal with. Their powerful trade barriers, VAT taxes, ridiculous corporate penalties, non-monetary trade barriers, monetary manipulations, unfair and unjustified lawsuits against Americans companies, and more, have led to a trade deficit with the U.S. of more than $250,000,000."[13]

Accordingly, the worldwide and reciprocal tariffs announced in Executive Order 14257 are based on presidential findings of exactly the kind specified by Section 338 of the Tariff Act of 1930—i.e., findings that the affected countries are imposing "burdens" and "disadvantages" on U.S. commerce through discriminatory tariff and non-tariff restrictions, regulations, and practices.

While the President briefly imposed on China tariffs higher than 50% (in excess of the duties permitted by Section 338), those higher tariffs are not currently in effect, and the worldwide, reciprocal

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[12] *Id*. at 15042-43.

[13] *Trump Agrees to Extend Deadline After Threatening E.U. With 50% Tariff, With Talks Set to 'Begin Rapidly'*, Time, May 25, 2025, https://time.com/7288483/trump-european-union-tariff-threat-trade-war-concerns.

tariffs are all within the Section 338 limit. In addition, while Section 338 refers to a 30-day period between proclamation and collection of tariffs, *see* 19 U.S.C. § 1338(d), all of President Trump's worldwide country-specific reciprocal tariffs (except those on China) were paused for at least 30 days. *See V.O.S. Selections, Inc. v. United States*, No. 25-00066, 2025 Ct. Intl. Trade LEXIS 67, at *18 (C.I.T. May 28, 2025).

2. *The trafficking tariffs are also covered by Section 338.*

On February 1, 2025, President Trump issued three Executive Orders announcing tariffs on goods from (respectively) Canada, Mexico, and China, in response to those countries' practices enabling and assisting the trafficking of illegal narcotics into the United States.[14] Currently these "trafficking tariffs" (enjoined by the court below) are set at 25 percent for most Mexican and Canadian products and 20 percent for Chinese products. *V.O.S. Selections*, 2025 Ct. Intl. Trade LEXIS 67, at *17.

All three Executive Orders explain that tariffs are needed because the cross-border drug traffic at issue—enabled or promoted by the countries in question—is causing widespread fatalities in the U.S. population and "putting a severe strain on [America's]

[14] Executive Order 14193, Imposing Duties to Address the Flow of Illicit Drugs Across Our Northern Border, 90 Fed. Reg. 9113, 9114 (Feb. 1, 2025) (Canada); Executive Order 14194, Imposing Duties to Address the Situation at Our Southern Border, 90 Fed. Reg. 9117, 9118 (Feb. 1, 2025) (Mexico); Executive Order 14195, Imposing Duties to Address the Synthetic Opioid Supply Chain in the People's Republic of China, 90 Fed. Reg. 9121, 9122 (Feb. 1, 2025).

healthcare system." Needless to say, drug-caused deaths and severe strain on the healthcare system impose serious burdens on U.S. commerce. As stated above, Section 338 empowers the President to impose tariffs not only in response to another country's customs duties, but also when the President determines "that any foreign country places any burden … on United States commerce" "directly *or indirectly*, by law or administrative regulation *or practice*, by or *in respect to any … prohibition*." 19 U.S.C. § 1338(a), (d) (emphasis added). Because the trafficking tariffs target countries the President has found to be "indirectly" causing a "burden" on U.S. commerce, those tariffs also fall within the ambit of Section 338.

Conclusion

For the foregoing reasons, Amicus respectfully urges the Court to carefully consider Section 338 of the Tariff Act of 1930, 19 U.S.C. § 1338, and to uphold the challenged tariffs thereunder or to vacate and remand with instructions to determine which of the challenged tariffs are covered by Section 338.

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Respectfully submitted,

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