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 Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit and On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF PROFESSOR ADITYA BAMZAI AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Amicus will address the following question:

Whether the International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, Tit. II, 91 Stat. 1626, authorizes the tariffs imposed by President Trump pursuant to the national emergencies declared or continued in Proclamation 10,886 and Executive Orders 14,157, 14,193, 14,194, 14,195, and 14,257, as amended.

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INTEREST OF *AMICUS CURIAE*[*]

Aditya Bamzai is a professor at the University of Virginia School of Law. He is the author of an article on the origins of the Trading with the Enemy Act, *see Sanctions and the Emergency Constitution*, 172 U. Pa. L. Rev. 1917 (2024) (hereinafter, "*Sanctions and the Emergency Constitution*"), and he has an interest in the sound development of the field.

SUMMARY OF ARGUMENT

Does the International Emergency Economic Powers Act—or the "IEEPA," 50 U.S.C. § 1701 *et seq*.—authorize the President to impose tariffs on the importation of goods from another country?

That question depends in principal part on the meaning of IEEPA's terms. The statute authorizes the President to take actions in response to a declared national emergency arising from an "unusual and extraordinary threat[ ] . . . to the national security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). Among the actions that the President may take is to "regulate . . . importation or exportation of . . . any property in which any foreign

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[*] No party or party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

country or a national thereof has any interest." *Id.* § 1702(a)(1)(B).

In other contexts, this Court has understood the term "regulate" to include the authority to impose taxes. *See, e.g.*, *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 428 (1940) ("The laying of a duty on imports, although an exercise of the taxing power, is also an exercise of the power to regulate foreign commerce."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824) (remarking that the "right to regulate commerce, even by the imposition of duties, was not controverted"). These cases are relevant to interpreting Congress's use of similar terms in other statutory schemes. But the meaning of the phrase "regulate . . . importation" as used in *IEEPA* cannot be gleaned in isolation from the statutory backdrop against which the statute was adopted. The relevant *context* in which Congress adopted the terms sheds light on their present-day meaning.

IEEPA is the successor statute to the Trading with the Enemy Act of 1917 ("TWEA"), ch. 106, 40 Stat. 411, with operative language "directly drawn" from its predecessor statute, *Dames & Moore v. Regan*, 453 U.S. 654, 671 (1981); *Regan v. Wald*, 468 U.S. 222, 228 (1984) (noting that IEEPA's powers are, with a few exceptions, "essentially the same as" those under TWEA). Congress adopted the TWEA during World War I as "strictly a war measure" "sanction[ed]" by congressional war powers. *See Stoehr v. Wallace*, 255 U.S. 239, 242 (1921). In turn, the TWEA sought to codify the English and American practices and laws of war that predated the statute.

Under those practices, a declaration of war resulted in an immediate prohibition of all

commercial intercourse between citizens of belligerent states, unless specifically authorized by the sovereign. A series of cases decided during the conflicts of the Nineteenth Century—principally, the War of 1812 and the Civil War—established that baseline proposition. Questions, however, arose over whether the power to prohibit trade entirely (what might be described as the "greater power") also allowed the executive branch to permit trade subject to conditions, such as payment of a fee or tax (what might be described as the "lesser power"). In the Mexican-American War and the Civil War, the executive branch's authority to impose a wartime "fee" or "tax" was disputed. This Court ultimately upheld the imposition of a four-cent-per-pound fee on the sale of cotton from Nashville during the Civil War as an appropriate use of "the war power of the United States government." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1875).

The TWEA sought to replicate these preexisting licensing frameworks, in particular the one established by President Lincoln and Secretary of the Treasury Chase during the Civil War. In its original 1917 incarnation, the TWEA included a section conferring broad authority on the President, when he found "the public safety so requires," to make it unlawful by proclamation "to import into the United States" from any "named" country any "mentioned" articles "except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe." § 11, 40 Stat. at 422–23. But like several other provisions of the TWEA, section 11 expired at the end of "the present war"—*i.e.*, World War I. *Id.* By contrast, the section of the TWEA relevant to this litigation—

section 5(b)—outlived the Great War. It authorized the President to "investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country . . ." § 5(b), 40 Stat. at 415. In its 1917 incarnation, it did not refer to "import[s]."

Congress later amended the TWEA in two significant, relevant respects. First, mere days after President Roosevelt declared a "Bank Holiday" during the Great Depression, Congress expanded the statute's reach to cover a "national emergency." Emergency Banking Relief Act, Pub. L. No. 73-1, § 2, 48 Stat. 1, 1 (1933). Second, mere days after the attack on Pearl Harbor, Congress added the term "importation" to the matters that the President could "regulate" under section 5(b). First War Powers Act of 1941, Pub. L. No. 77-354, § 301, 55 Stat. 838, 839.

These statutory terms from the TWEA made their way into the IEEPA. Considering the twists and turns that the statutory text has taken—including two critical amendments adopted mere days after national crises—the meaning of the modern statute cannot be entirely free from doubt. Nevertheless, *Amicus* respectfully submits that, under the best reading of the statute, the term "regulate . . . importation" reflects the law-of-war backdrop against which the TWEA was enacted. For reasons explained

in greater detail below, the use of a "tax" or "fee" was an appropriate method to regulate trade with the enemy under the classic laws of war. And despite the complications presented by the various amendments and alterations to the statutory framework, the use of such a "tax" or "fee" remains an appropriate method by which the executive branch may "regulate . . . importation" under the IEEPA today.

BACKGROUND

A. The Origins and Scope of the Trading-with-the-Enemy Principle

Under the classic perspective of the law of nations, a declaration of war, by itself, suspended all commercial intercourse between citizens of belligerent nations. In the American system of separated powers, a declaration of war, as a default, delegated to the executive branch the authority to embargo and to confiscate goods belonging to the citizens of the belligerent nation, subject to limits derived from the law of nations. But Congress could, and did, statutorily change those default limits.

Consider, for example, the articulation of these principles in American cases arising out of the War of 1812. In *The Rapid*, 12 U.S. (8 Cranch) 155 (1814), an American citizen had purchased English goods in England and deposited them, before the declaration of the War of 1812, in English territory on the border between Nova Scotia and the United States. *See id.* at 159. After the outbreak of war, the American citizen sought to hire a vessel (The Rapid) to retrieve the goods, but a privateer captured and claimed as prize the vessel. *See id.* The Court held that this activity came within the scope of "trading with an

enemy" under international law, which barred "*[i]ntercourse* inconsistent with actual *hostility*." *Id.* at 163 (explaining that "the right to capture property thus offending, grows out of the state of war" and does not require any further implementing legislation); *see The Julia*, 12 U.S. (8 Cranch) 181, 195 (1814) (Story, J.) (reasoning that "intercourse through the medium of a neutral port" was "as strictly prohibited" as "direct intercourse between the enemy countries"). English precedents had earlier established this principle. *See, e.g.*, *The Hoop* [1799] 165 Eng. Rep. 147 (holding that there was "a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted"). (For a reference to *The Hoop* during the 1917 debates over the TWEA, *see* 55 Cong. Rec. 4804, 4841 (1917) (statement of Rep. Montague) (describing *The Hoop* as "the leading English case").)

For its part, Congress during the War of 1812 regulated, and authorized certain forms of, trading with the enemy by statute. *See* Enemy Trade Act of 1812, ch. 129, § 6, 2 Stat. 778, 780 (authorizing the president to grant passports for the property of British subjects within the limits of the United States and protecting British packets with dispatches from capture). Much like later approaches taken by Congress (including in the TWEA), this "passport" system effectively allowed the President to permit certain trade with British subjects, notwithstanding the background default prohibition on trading with the enemy.

Cases arising out of the Civil War said much the same. For example, in *United States v. Lane*, 75 U.S.

(8 Wall.) 185 (1868), the Court held that a contract for the purchase of cotton "was unauthorized, and had no power to bind the government," because of the "universally recognized principle of public law" that "commercial intercourse between states at war with reach other, is interdicted." *Id.* at 195. Years after the Civil War's conclusion, the Court reiterated, in the context of a dispute over an insurance policy that the Civil War, like all wars, had "suspend[ed] all commercial intercourse between the citizens of two belligerent countries or States." *Insurance Company v. Davis*, 95 U.S. 425, 429 (1877); *see also Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 535 (1868) (reasoning that a declaration of war "imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country" and that "it is the established rule in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation"); *Coppell v. Hall*, 74 U.S. (7 Wall.) 542, 554 (1869).

B. The Question Whether the President Could Condition Trade with the Enemy on Payment of a Fee or Tax

The question whether the authority to bar trade with the enemy *altogether* authorized the President to permit such trade *on conditions*—and in particular, on the condition of a payment of a "tax" or "fee"—arose in three separate conflicts.

In a nutshell, the debate revolved around whether the greater power (to prohibit trade altogether) included the lesser power (to allow trade on certain conditions, including payment of a tax or

fee). Although the question was disputed and litigated, the prevailing position was that a declaration of war delegated to the president the authority to condition trade with an enemy on payment of a fee or tax.

1. The Mexican-American War.

In 1847, during the Mexican-American War, President James K. Polk raised the existing blockades of Mexican ports. Message to Congress, Mar. 31, 1847, Exec. Doc. No. 1, 30th Cong., 1st Sess. 561 (1847). In his message to Congress, he also announced that he was permitting trade with these ports subject to duties levied and collected by the U.S. military. As he put it, the United States would levy "military contributions" to "defray[] the expenses of the war." *Id.*

A narrow Whig majority in the House of Representatives requested a legal justification for the "tariff of duties in the ports of the Mexican republic." Journal of the House of Representatives of the United States: Being the Second Session of the Thirtieth Congress 114 (1848). Polk responded by claiming that Congress' declaration of war against Mexico conferred on the executive branch, without further legislation, all the belligerent rights ordinarily possessed by a nation at war. *See* James K. Polk, *To the House of Representatives of the United States* (Jan. 2, 1849), *reprinted in* 6A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2522, 2525 (James D. Richardson ed., New York, Bureau of Nat'l Literature, Inc. 1897). He further contended that those belligerent rights included the authority to impose duties and to spend them on the conduct of the war. *See id.* His response expressly invoked the principle

that the greater power includes the lesser. He claimed that he "entertain[ed] no doubt that the military right to exclude commerce altogether from the ports of the enemy, in our military occupation *included* the minor right of admitting it under prescribed conditions." *Id.* at 2523 (emphasis added). Put differently, Polk contended that allowing trade subject to prescribed conditions (including payment of duties) was a lesser power—a "minor right"—plainly included in the authority to embargo a port.

Anti-Polk forces in the House convened a special committee. Led by the Georgian Whig Robert Toombs—an opponent of the Mexican-American War and, later, briefly the Secretary of State of the Confederacy—a House select committee issued a report on February 28, 1849. ROBERT TOOMBS, MILITARY CONTRIBUTIONS, H.R. REP. NO. 119, at 1, 7 (1849). Responding to Polk's greater-includes-the-lesser reasoning, the committee distinguished the use of taxes from a blockade. The committee reasoned that a "[b]lockade is a usual, ordinary means of executing the law declaring war." *Id.* at 5. By contrast, according to the committee, "[l]evying duties or imposts is exercising the power to make laws"—an outgrowth of the taxing power and a function that required congressional action. *Id.* In the view of the committee majority, Polk's reasoning improperly "compress[ed] these sovereign powers into mere incidents to the right of blockade," even though "one is a sovereign power, the other an executive duty." *Id.*

In addition, the committee contended that, even if the taxes had been properly collected, they had been improperly spent. That was because, as soon as the taxes had been levied and collected, they "became the

property of the United States," which meant that Congress had to pass an appropriations law authorizing their expenditure. *Id.* at 6.

The committee's report drew a dissent by two House members who embraced Polk's greater-includes-the-lesser argument. The dissenting members reasoned that, because the "President had competent authority to enforce either a strict or modified blockade," he "was equally authorized . . . to admit commerce upon terms—upon the payment of duties." *Id.* at 11.

In sum, although the members of the committee also appeared to disagree on Polk's power to blockade ports or to set conditions for the blockade generally, *see id.* at 3, 10, 30, the heart of the dispute concerned Polk's levying of tariffs and spending of the money that the army raised without congressional authorization. Shortly after the issuance of the report, Congress placed limits on the ability of the executive branch to spend money raised through such taxes without authorization in the Miscellaneous Receipts Act. *See* Miscellaneous Receipts Act, ch. 110, 9 Stat. 398 (1849) (requiring moneys received by federal agents to be paid immediately into the Treasury).

By contrast, Polk's decision to levy taxes appeared to be vindicated when the issue reached this Court. In *Fleming v. Page*, 50 U.S. 603 (1850), the Court simply noted that the President had authorized a custom-house "in an enemy's country, as one of the weapons of war" and as "a mode of exacting contributions from the enemy to support our army." *Id.* at 616. A few years later, in *Cross v. Harrison*, 57 U.S. 164 (1853), the Court elaborated that "[n]o one

can doubt" that Polk's decision "to impose duties on imports and tonnage as military contributions for the support of the government" was consistent with the "general principles in respect to war and peace between nations." *Id.* at 190.

2. The Civil War

The very same question—whether the President could condition trade with the enemy on payment of fees—arose in the Civil War.

During the Civil War, Congress passed a complex web of statutes governing trade with (as well as the seizure of the property of) the citizens of the rebellious states. *See Sanctions and the Emergency Constitution* 1936–41 (describing, among other measures, the First and Second Confiscation Acts and the Captured and Abandoned Property Act). Of relevance here, in the Act of July 13, 1861, Congress authorized the President to declare by proclamation that States (or parts thereof) were in a state of insurrection. § 5, 12 Stat. 255, 257. On such proclamation, "all commercial intercourse" with such States or their citizens became unlawful during hostilities, unless the President "in his discretion" issued a "license" and thereby "permit[ted] commercial intercourse." *Id.* As the Court later explained, "[c]ommercial intercourse between the inhabitants of territory in insurrection and those of territory not in insurrection, except under the license of the President . . . was entirely prohibited." *In re Ouachita Cotton*, 73 U.S. (6 Wall.) 521, 531 (1867).

Pursuant to this authority, President Lincoln declared the inhabitants of certain States, including Tennessee, to be in insurrection and thus made

unlawful commercial intercourse between them and the United States. *See* Proclamation of August 16, 1861, 12 Stat. 1262. President Lincoln's proclamation excepted, among other regions, parts of the listed States maintaining loyalty to the Union, *see id.*, but a later proclamation abrogated in part and modified in part these exceptions, *see* Proclamation of April 2, 1863, 13 Stat. 731; *see The Venice*, 69 U.S. (2 Wall.) 258, 278 (1864) (observing that "[t]his revocation merely brought all parts of the insurgent States under the special licensing power of the President").

By February 28, 1862, conditions had improved enough to allow President Lincoln to order a "partial restoration of commercial intercourse" between the Union and "those parts of the United States heretofore declared to be in insurrection." Order Relating to Commercial Intercourse, *reprinted in* 6 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 109, 109 (James D. Richardson ed., New York, Bureau of Nat'l Literature, Inc. 1897); *see, e.g.*, ULYSSES S. GRANT, 1 PERSONAL MEMOIRS OF U.S. GRANT 294–329 (1885) (describing the capture of Fort Donelson and occupation of Nashville, Tennessee, both in the month of February 1862). President Lincoln accordingly "license[d] and permit[ted] such commercial intercourse" subject to the Secretary of the Treasury's rules and regulations. Order Relating to Commercial Intercourse, *supra*, at 109. In turn, Secretary of the Treasury Salmon P. Chase (later, Chief Justice of the Court) issued a series of regulations governing the trade licensed by the President. *See Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 77 (1875) (describing regulations from February 1862 to September 1863). Under the rules issued on September 11, 1863, Chase allowed the

transportation of goods from insurrectionary States, but only subject to permits granted upon the payment of prescribed fees. *See id.* Among the fees appended to the regulations was the following: "'For each permit to purchase cotton in any insurrectionary district, and to transport the same to a loyal State, per pound . . . four cents.'" *Id.* (quoting the regulation).

After the Civil War, the Court addressed the lawfulness of the cotton fee in *Hamilton v. Dillin*. In *Hamilton*, various sellers of cotton sued Dillin, the acting surveyor of customs at Nashville, to recover the payment of the four-cent fee. *See* 88 U.S. at 78–79. Representing the plaintiffs, William Evarts—a former Attorney General and a counsel to President Andrew Johnson in his impeachment trial—argued in part that the fee was "illegal[]" if "levied for revenue purposes," because the Constitution conferred on Congress the "'power to lay and collect taxes, duties, imposts, and excises'" and such "power cannot be delegated." *Id.* at 81 (argument of counsel) (quoting U.S. Const. art. I, § 8, cl. 1). Evarts also argued that the statutory authority to make "'rules and regulations'" was "distinct" from "the power to levy taxes." *Id.* at 81–82.

The Court held that the imposition of the four-cent-per-pound fee for a permit to purchase cotton was a proper use of "the war power of the United States government." *Id.* at 87; *see also id.* at 90–91 (speculating that, although the "actual motive is not material," Secretary Chase might have adopted the fee "to counterbalance, in favor of our government, any benefit which the enemy might derive from a sale of the cotton instead of its destruction"). The Court noted the background rule that "war was itself a

suspension of commercial intercourse between the opposing sections of the country." *Id.* at 87. If commercial intercourse "were to be permitted at all," the Court continued, "it would necessarily be upon such conditions as the government chose to prescribe." *Id.* Moreover, the Court reasoned that "the imposition of the bonus of four cents per pound" was properly understood as a "'*rule*' or a '*regulation*' within the fair meaning" of the 1861 statute. *Id.* at 92.

Although the Court noted that the imposition of taxes had occurred with the express statutory authorization of Congress, it said that such express authorization was unnecessary. *See id.* at 87 (noting that it was "not . . . necessary to decide" "[w]hether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone"). Relying on *Cross v. Harrison*, the Court reasoned that "little doubt could be raised on the subject" even if there had been no such statute. *Id.* (observing that *Cross* blessed the President's imposition of "duties on imports and tonnage").

Nor did Congress's passage of statutes imposing taxes on various goods, including cotton, "revoke by implication, any power given to the Executive Department of imposing such regulations as it might see fit for the carrying on of trade with insurrectionary districts." *Id.* at 93. The imposition of the fee was "not inconsistent with or repugnant to the internal revenue law," because it was "not imposed in the exercise of the taxing power, but of the war power of the government." *Id.* at 94. In other words, "the power of the government to open and regulate trade with the enemy . . . included the power

to impose such conditions as the President and Secretary should see fit." *Id.* at 93; *see also id.* at 97 (describing it as "undoubted" that the government could "impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit . . . as incident to the power to declare war" and declaring that "the regulations in question" were "nothing more than the exercise of this power").

3. The Spanish-American War

Similar principles were at issue during the Spanish-American War. As in the past, the war interrupted commercial intercourse between United States nationals and Spanish nationals. *See, e.g.*, *Copyrights-Cuba, Puerto Rico, The Philippine Islands*, 22 Op. Att'ys Gen. 268, 269-70 (1898) (declaring that citizens of hostile nations could not "claim the privilege of copyright" because "that right at present is subject to the well-known rule that hostilities between two nations suspend intercourse and deprive citizens of the hostile nations of rights of an international character previously enjoyed").

Moreover, by an order dated July 12, 1898, President McKinley declared that certain duties would be levied and collected "'as a military contribution'" "'upon the occupation of any forts and places in the Philippine Islands.'" *Lincoln v. United States*, 197 U.S. 419, 428 (1905) (quoting the order). *Lincoln* characterized this regulation as for "an existing war," *id.*, and held that (absent further congressional action) the authority to impose the duty as a wartime measure expired on the treaty of peace.

C. The Passage of the TWEA

1. The reasons for enacting the TWEA.

Enacted during the First World War, the TWEA sought to convert the preexisting common-law trading-with-the-enemy regime into a statute. According to the Senate's report, the statute sought "to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on." S. Rep. No. 65-111, at 1 (1917). That was no doubt in part due to the intertwined nature of the early-twentieth-century German and American economies, which raised the possibility that the federal government might have to suspend German patents, halt pensions to American citizens living in Germany, and stop the operations of German fire and life insurance companies doing business in the United States. *Trading with the Enemy*: *Hearing on H.R. 4704 Before the Comm. on Interstate and Foreign Com.*, 65th Cong., 1st Sess. 8–10, 26–28 (1917). One of the principal authors of the TWEA—Assistant Attorney General Charles Warren—argued that it was "highly necessary" that Congress modify the trading-with-the-enemy principles "laid down by [U.S.] courts a century ago," because of "[c]hanges in economic, commercial, financial, military, naval, and political conditions." *Trading with the Enemy*: *Hearing on H.R. 4960 Before the Subcomm. of the Comm. on Com.*, 65th Cong., 1st Sess. 130 (1917).

Thus, rather than authorize a complete suspension of trade with belligerents during World War I, the TWEA presumptively barred some of that trade, while allowing the President to permit it

through a system of licensing. § 3(a), 40 Stat. at 412; *see Ex parte Kumezo Kawato*, 317 U.S. 69, 76 (1942).

The link between the TWEA and the preexisting law-of-wars regime was direct and unmistakable. For one thing, the statute's title—the "Trading with the Enemy Act"—was directly borrowed from the law-of-war principle of the same name. For another, in a 1917 memorandum submitted to Congress to establish the proposed bill's legality, Charles Warren expressly relied on law-of-war precedents. *See* Charles Warren, *Memorandum of American Cases and Recent English Cases on the Law of Trading with the Enemy*, S. Rep. No. 65-111 app. B, at 15 (1917) (hereinafter, "*Warren Memorandum*") (citing, among other cases, *The Rapid* and *The Julia* for the proposition that that "[e]very species of intercourse with the enemy is illegal"). Moreover, in testimony, Warren referred to the "trade with enemy acts which have already been enacted in this country in the past," beginning with the statute enacted during the War of 1812. *See House TWEA Hearings* 26 (citing Enemy Trade Act of 1812, 2 Stat. 778, as well as Civil War precedents).

In Warren's view, absent congressional action, Supreme Court precedents conferred on the President authority "to issue a license or to modify the general principles of law." *Id.* at 33. Warren thus explained that the TWEA, "so far from interfering with any innocent acts of American citizens, was really a modification of the present law." *Id.* at 31. Without the TWEA, "the general principles of law, which were so clearly laid down by the Supreme Court during the cases which arose after [the] Civil War" would apply. *Id*. (citing *Insurance Company v. Davis*, 95 U.S. 425,

429 (1877)) (reasoning that "war suspends all commercial intercourse between the citizens of two belligerent countries or States, except so far as may be allowed by the sovereign authority" such that "it must follow that no active business can be maintained . . . by the citizens of one belligerent with the citizens of another"). Warren was not alone in highlighting the links between the TWEA and trading-with-the-enemy precedents. For example, Representative Andrew Montague of Virginia, one of the TWEA's floor managers, opened the debate over the bill in the House by canvassing the leading precedents on the topic. Montague claimed that "from the outbreak of this war all commercial intercourse, with negligible exceptions, between American citizens and German subjects has been abruptly suspended or revoked." 55 Cong. Rec. 4841 (1917) (citing the "leading case" of *The Rapid*).

2. **The Conferral of Authority over Imports**

The original TWEA prohibited trade with the enemy "except with the license of the President." § 3(a), 40 Stat. at 412.

Section 5(b) of the statute provided that "the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country . . ." § 5(b), 40 Stat. at 415.

Section 5(b), as originally drafted, did not include any authority to "regulate" imports. For that reason, Secretary of the Treasury William McAdoo brought to the attention of Congress that "[i]t may be necessary to regulate the importation of nonessentials of commerce" and that "[i]t is probable that in the adjustment of trade relations, now so profoundly affected by war conditions, better results could be obtained than are now possible if the Government had control of these matters when dealing with governments that have imposed restrictions upon the exports of raw materials needed by our war industries." Letter from Treasury Secretary William G. McAdoo to Senator Joseph E. Ransdell (Sept. 11, 1917), 55 Cong. Rec. 7013 (1917).

In response, Congress included a separate provision authorizing the President, when he found "the public safety so requires," to make it unlawful by proclamation "to import into the United States" from any "named" country any "mentioned" articles "except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe." § 11, 40 Stat. at 422–23. Like several other provisions of the TWEA, however, section 11 was limited to "the present war." *Id.* With one minor exception, *see* H. J. Res. 269, 41 Stat. 361 (1919), the authority under section 11 lapsed at the end of World War I. By contrast, authority under section 5 did not terminate at the end of the War. *See Markham v. Cabell*, 326 U.S. 404 (1945).

D. Later Amendments and Applications

1. Amendments

Two later amendments to the TWEA bear on the legal issue in this case.

First, on March 6, 1933, during the crisis of the Great Depression, President Roosevelt proclaimed a "Bank Holiday"—a national closure of all banks to stop runs and restore confidence in banks. To do so, he did not cite any inherent constitutional powers of the President, but rather "expressly and solely relied upon" section 5(b) of the TWEA. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 n.16 (1952) (Jackson, J., concurring in the judgment). Although President Roosevelt's invocation of the TWEA might have been questionable, Congress effectively ratified his action three days later. It expanded the TWEA by authorizing the President to deploy the power to "investigate, regulate, or prohibit" foreign transactions not just in "war," but also during "any other period of national emergency." Emergency Banking Relief Act, Pub. L. No. 73-1, § 2, 48 Stat. 1, 1 (1933). By the same Act, Congress conferred on the President the power to regulate "by means of licenses or otherwise . . . transfers of credit between or payments by banking institutions." *Id.*

Second, in the First War Powers Act of 1941, enacted just one week after the attack on Pearl Harbor, Congress further broadened presidential authority under the TWEA. It did so by adding the phrase "importation or exportation" to the list of transactions involving foreign property that the President may "investigate, regulate, or . . . prohibit" under section 5(b). § 301, Pub. L. No. 77-354, 55 Stat.

838, 839–40. In addition, the First War Powers Act amended the TWEA to authorize the President to seize, not merely to freeze, alien property. *See id.*

Taken together, these two amendments (1) expanded TWEA's reach to the non-wartime context of a declared "national emergency" and (2) expanded section 5(b)'s reach to authorize the President to "regulate . . . importation." Thus, an early interpretation of the TWEA by this Court referred to the statute as "strictly a war measure" that found "its sanction" in congressional war powers, *see Stoehr v. Wallace*, 255 U.S. 239, 242 (1921); *see id.* at 245 (declaring "not debatable" that Congress "in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned"). But subsequent applications of the TWEA would occur in a variety of non-wartime contexts.

2. Applications

Two episodes in the following decades—before the passage of the IEEPA—illustrate how Presidents used the TWEA.

First, in 1950, President Truman, taking note of "recent events in Korea and elsewhere," proclaimed the existence of a "national emergency" with respect to "the increasing menace of the forces of communist aggression." Proclaiming the Existence of a National Emergency, 64 Stat. A454 (1950). The executive branch then took a series of steps under the TWEA to implement this proclamation, including regulations prohibiting transfers outside of the United States of property owned by Cuban nationals. In *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106 (2d

Cir. 1966), a Cuban national residing in Havana with a savings account in a New York bank challenged the Cuban Assets Control Regulations on both nondelegation and due process grounds. *See id.* at 108. Writing for the Second Circuit, Judge Friendly rejected these challenges. *See id.* at 110 (rejecting the nondelegation challenge by relying on *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936), and noting that Sardino's due process claim presented a "substantial contention"). In reaching these conclusions, Judge Friendly observed that the United States was "not formally at war with Cuba." *Id.* at 111. But he contended that the TWEA could, consistent with the Constitution, be used in some similar ways in the non-wartime context. *See id.* at 111–13.

Sardino thus indicated how the executive branch interpreted the TWEA to authorize a complete prohibition on trade with an embargoed nation. See 31 C.F.R. § 515.204 (prohibiting import of merchandise of Cuban origin unless specifically authorized by the Secretary of the Treasury). The case also demonstrated how the statute raised complex constitutional questions about whether and how the wartime justifications for the TWEA extended to the non-wartime context of the Cuban embargo.

Second, in 1971, President Nixon issued a proclamation imposing a surcharge in the form of a supplemental duty of 10 percent on many articles imported into the United States. *See* Presidential Proclamation 4074, 85 Stat. 926 (1971). The Customs Court held that the TWEA did not authorize such a tariff. *See Yoshida International, Inc. v. United*

States, 378 F. Supp. 1155 (Cust. Ct. 1974). But the Court of Customs and Patent Appeals reversed that holding and upheld the use of TWEA to impose the tariffs. *See United States v. Yoshida International, Inc.*, 526 F.2d 560, 575–76 (C.C.P.A. 1975).

3. The Passage of the IEEPA

In 1976 and 1977, Congress modified the TWEA. First, in the National Emergencies Act, Pub. L. No., 94-412, 90 Stat. 1255, Congress "authorized" the President "to declare [a] national emergency" "[w]ith respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power." 50 U.S.C. § 1621(a). Congress placed a variety of procedural limits on the declaration of a national emergency. *See id.* §§ 1621, 1622, 1641(a)-(c).

When Congress passed the IEEPA in 1977, it sought to narrow the authority that the executive branch had exercised under the TWEA in some ways. Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. § 1701 *et seq.*). Critically, IEEPA applies in the non-wartime context, *see* 50 U.S.C. § 1701 *et seq.*, whereas the TWEA remains on the statute books for any future declared war, *see id.* § 4301 *et seq*.

Moreover, Congress narrowed the substantive authority conferred on the President by IEEPA when compared to the preexisting authority under the TWEA. For instance, IEEPA permits the executive branch to "freeze" transactions, but not to "vest" property. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 228 & n.8 (1984) (observing that "[t]he authorities granted to the President by [the relevant section] of IEEPA are

essentially the same as those in" TWEA, with "some differences," such as that "[t]he grant of authorities in IEEPA does not include the power to vest (i.e., to take title to) foreign assets, to regulate purely domestic transactions, to regulate gold or bullion, or to seize records"); *cf.* 50 U.S.C. § 1702(a)(1)(C) (authorizing confiscation during "armed hostilities"). Second, Congress limited IEEPA's application to "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national, security, foreign policy, or economy of the United States." 50 U.S.C. § 1701(a). Third, IEEPA listed exceptions to its grant of authority. *See* 50 U.S.C. §§ 1702(b)(1)–(4).

In contrast with these changes, Congress did not amend the operative language in the TWEA authorizing the President to "regulate . . . importation." 50 U.S.C. § 1702(a)(1)(B).

ARGUMENT

The IEEPA's Use of the Phrase "Regulate . . . Importation" Should Be Understood to Incorporate the Pre-1917 Laws of War

A. Before the passage of the IEEPA—even before the passage of its predecessor, the TWEA—the uncodified laws of war governed the questions of whether and how one nation might engage in economic warfare against another. Under those law-of-war precedents, upon a declaration of war, the executive branch was authorized to exercise all traditional belligerent rights, absent further congressional action. Blockades, embargoes, and suspension of all commercial intercourse between

nationals of the two warring nations fell within those traditional belligerent rights. *See, e.g.*, *The Rapid*, 12 U.S. (8 Cranch) 155, 163 (1814); *The Julia*, 12 U.S. (8 Cranch) 181, 195 (1814); *United States v. Lane*, 75 U.S. (8 Wall.) 185, 195 (1868); *Insurance Company v. Davis*, 95 U.S. 425, 429 (1877).

Members of the political branches debated the question whether the authority to prohibit commercial intercourse also included the authority to allow such trade, subject to conditions such as the imposition of a tax. During the Mexican-American War, President Polk contended that the declaration of war authorized him to condition trade with the enemy on payment of a tax. *See supra* Part B.1. Some members of Congress disagreed, *see id.*, but this Court ultimately appeared to approve Polk's actions. *See, e.g.*, *Cross v. Harrison*, 57 U.S. 164, 190 (1853) (explaining that "[n]o one can doubt" that Polk's decision "to impose duties on imports and tonnage as military contributions for the support of the government" was consistent with the "general principles in respect to war and peace between nations").

During the Civil War, Congress passed a statute authorizing the President, upon proclamation, to declare unlawful "all commercial intercourse" with insurrectionary States or their citizens during hostilities, unless the President "in his discretion" issued a "license" and thereby "permit[ted] commercial intercourse." Act of July 13, 1861, § 5, 12 Stat. 255, 257. After the Lincoln Administration used this authority to impose a four-cent-per-pound fee on imports of cotton, various challengers claimed that the fee was an unlawful exercise of Congress's taxing

authority. In *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73 (1875), the Court held that the imposition of the four-cent-per-pound fee for a permit to purchase cotton was a proper use of "the war power of the United States government." *Id.* at 87. *Hamilton* also held that "the imposition of the bonus of four cents per pound" was a "'*rule*' or a '*regulation*' within the fair meaning" of the 1861 statute. *Id.* at 92.

Taken together, these cases show how the background understanding of the laws of war in the pre-TWEA era embraced the notion that the greater authority (to prohibit trade altogether) included the lesser authority (to allow trade subject to taxes or fees).

B. The authors of the TWEA had these precedents in mind when they crafted the statute in 1917 during World War I. One of the statute's principal authors, Charles Warren, wrote a memorandum justifying the TWEA's legality based on these law-of-war precedents. *See* Warren Memorandum 15. The TWEA, however, did not originally include power to "regulate" imports, which prompted the Secretary of the Treasury to seek such authority. *See* Letter from Treasury Secretary William G. McAdoo to Senator Joseph E. Ransdell (Sept. 11, 1917), 55 Cong. Rec. 7013 (1917). Congress then enacted a separate provision authorizing the President, by proclamation, to render unlawful "import into the United States" from any "named" country any "mentioned" articles "except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe." § 11, 40 Stat. at 422–23.

On its face, section 11 expired at the end of World War I. *See id.* But the TWEA's section 5(b) did not expire; it allowed the President to "investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country . . ." § 5(b), 40 Stat. at 415.

C. Two amendments to the TWEA significantly affected its scope. First, Congress extended its application to a "period of national emergency" in the Emergency Banking Relief Act, Pub. L. No. 73-1, § 2, 48 Stat. 1, 1 (1933). But although that amendment severed the TWEA from its direct law-of-war antecedents (which had required a formal declaration of a war), it did not change the statute's operative provisions.

Rather, those provisions should continue to be understood to have retained their original scope, such that the meaning of the term "regulate" was unaffected by the amendment. In light of the amendment, those provisions applied both in times of war and in times of emergency. *Cf. Yoshida*, 526 F.2d at 573 n.17 (rejecting the argument "the TWEA is limited to importations of property having an 'enemy taint' as "foreclosed by the statutory reference to 'any' property of 'any' foreign country or national thereof")

Second, Congress inserted the reference to "importation or exportation" in section 5(b) days after

the Pearl Harbor Attack. *See* First War Powers Act of 1941, § 301, Pub. L. No. 77-354, 55 Stat. 838, 839–40. Understandably, Congress did not fully explain its reasons for adding the term "importation" to section 5(b) as opposed to reenacting a version of the expired section 11 of the original TWEA. But the most plausible interpretation is that the addition sought to reintroduce the authority that had expired along with section 11 at the end of World War I. The use of the word "import" recalls the authority previously lodged in section 11. And the introduction of the term in section 5(b) seems most plausibly to have been an attempt to streamline and simplify the statute, rather than introduce an entirely new section.

D. When Congress enacted the IEEPA in 1977, it limited various aspects of the President's authority. But notably, the IEEPA did not change the operative language, "regulate . . . importation." Accordingly, that language is best read to have the same meaning that it had when used in the TWEA before the passage of the IEEPA. In turn, the TWEA is best understood to retain the meaning of "regulate . . . importation" given by the law-of-war precedents before its passage.

* * *

Amicus does not address other issues relevant to this case. For instance, *amicus* takes no position on whether this Court may police the boundaries of a presidential declaration of "national emergency." Nor does amicus address whether the IEEPA, as construed, violates the nondelegation doctrine. *Cf. Marshall Field & Co. v. Clark*, 143 U.S. 649, 680 (1892); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 401–02 (1928).

CONCLUSION

Respectfully, the Court should decide this case consistent with the principles described in this *amicus* brief.

Respectfully submitted.

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