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.*,
Respondent.

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 AMICI CURIAE VIKRAM DAVID AMAR AND MICKEY EDWARDS IN SUPPORT OF THE PETITIONERS IN 24-1287 AND THE RESPONDENTS IN 25-250

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INTEREST OF AMICI CURIAE[1]

Vikram David Amar is a legal scholar and historian who studies and writes about constitutional law, federal courts, and civil procedure. One branch of his scholarship has focused on the ways in which courts undermine constitutional values when they approve, especially in the absence of clear congressional authorization, broad delegations of policy-making power to the President, given that such delegations cannot easily be retrieved. Professor Amar has a general interest in assisting the courts in practicing principled constitutional decision-making and faithful originalism, and in minimizing the error costs of judicial decisions.

Mickey Edwards is a former member of Congress who served Oklahoma's 5th Congressional District from 1977 to 1993. As a member of Congress, Representative Edwards was committed to preserving the constitutional separation of powers and guarding against excessive concentration of power in the Oval Office, regardless of its occupant. After leaving Congress, Representative Edwards taught government and public policy for over 20 years at Harvard's Kennedy School of Government and Princeton's Woodrow Wilson School of Public and International Affairs. He has also been affiliated with the Aspen Institute, where he created and directed a bipartisan leadership program for elected officials and directed an initiative to restore Congress's constitutional powers.

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[1] Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part or made a monetary contribution toward its preparation and submission, nor did any other person contribute money intended to fund preparing or submitting this brief.

Based on their academic and practical experience, *Amici* have a shared interest in encouraging courts to exercise particular caution when construing capacious statutory delegations of power to the President. Caution is warranted because it is difficult for Congress to "retrieve" power that a court has erroneously concluded was conferred, and such difficulty directly implicates the Constitution's concern about delegations of legislative power. For this reason, the costs of an erroneous decision by the courts in this arena are asymmetrical. *Amici* therefore urge this Court to reject the President's broad reading of the International Emergency Economic Powers Act.

BACKGROUND

Between February and May 2025, President Trump singlehandedly imposed tariffs on nearly every good imported into the United States. These duties include a 10% baseline tariff on all imports, higher "reciprocal" tariffs derived from various country-specific trade deficits, and additional "trafficking" tariffs on goods from Mexico, Canada, and China. The President imposed these tariffs—unilaterally overhauling decades of United States trade policy—through a series of executive orders (the "Tariff Orders"), without any involvement from Congress, the branch of government imbued with the power to "regulate Commerce with foreign Nations" and to "lay and collect Taxes, Duties, Imposts and Excises." U.S. Const. art. I, § 8.[2]

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[2] *See* Executive Order 14193, 90 Fed. Reg. 9113, 9114 (Feb. 1, 2025); Executive Order 14194, 90 Fed. Reg. 9117, 9118 (Feb. 1, 2025); Executive Order 14195, 90 Fed. Reg. 9121, 9122 (Feb. 1, 2025); Executive Order 14228, 90 Fed. Reg. 11463, 11463 (Mar. 3, 2025); Executive Order 14257, 90 Fed. Reg. 15041, 15045 (Apr. 2, 2025); Executive Order 14259, 90 Fed. Reg. 15509, 15509 (Apr. 8, 2025);

The President claims authority for his Tariff Orders under the International Emergency Economic Powers Act ("IEEPA"), which confers on the President the power to "regulate … importation … of … any property in which any foreign country or a national thereof has any interest by any person … subject to the jurisdiction of the United States…." 50 U.S.C. § 1702(a)(1)(B). But the IEEPA expressly provides that this power "may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared … and may not be exercised for any other purpose." *Id*. § 1701(b). The President claims to have satisfied this statutory limitation by declaring a national emergency based on purported threats to the nation's security and economy posed by cross-border drug dealing, gang violence, human trafficking, and money laundering.[3]

The challengers in these cases are small businesses that manufacture products in countries subject to the new tariffs and have thus been adversely impacted by the President's unilateral and abrupt overhaul of national trade policy. In No. 25-250, Respondents challenged the Tariff Orders in the Court of International Trade, which granted their motion for summary judgment. The court held that the IEEPA does not delegate to the President the "unbounded tariff authority" he claims to impose worldwide baseline and retaliatory tariffs, and that any such delegation "would constitute an improper abdication of legislative power to another branch of government." *V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1370–72 (Ct. Int'l Trade 2025).

Executive Order 14266, 90 Fed. Reg. 15625, 15626 (Apr. 9, 2025); Executive Order 14298, 90 Fed. Reg. 21831, 21831 (May 12, 2025).

[3] *See supra*, n.2.

On appeal, the *en banc* Federal Circuit agreed that the "IEEPA's grant of presidential authority to 'regulate' imports does not authorize the tariffs" at issue, and that authorizing such "unlimited tariffs" would "run[] afoul of the major questions doctrine." Pet.App.3a, 34a. Four judges concurred, explaining that the President's overbroad reading "would render IEEPA unconstitutional" as "a functionally limitless delegation of Congressional taxation authority." Pet.App.57a-58a.

In No. 24-1287, Petitioners challenged the Tariff Orders in the U.S. District Court for the District of Columbia, which granted their motion for a preliminary injunction. The court held that the IEEPA does not permit the President "to unilaterally impose, revoke, pause, reinstate, and adjust tariffs to reorder the global economy," because "Congress did not intend for the language 'regulate ... importation' to delegate the authority to impose tariffs" to the President. *Learning Res., Inc. v. Trump*, 2025 WL 1525376, at *1, 12 (D.D.C. May 29, 2025). After the President appealed to the D.C. Circuit, this Court granted certiorari before judgment and consolidated these cases for argument.

Before this Court, the President presses his expansive reading of the IEEPA's text, starting from the premise that Congress "has long granted the President broad authority to employ tariffs to address emergencies." Opening Br. at 3. Claiming that the IEEPA "is *all about* major questions," the President argues this Court should not "jeopardize [his] efforts to deal with major national emergencies." *Id.* at 3-4, 35-36. According to the President, Congress has delegated him "broad authority" and "large discretion" to impose tariffs whenever they are, in his view, related to "national security and foreign policy." *Id.* at 44-45.

SUMMARY OF THE ARGUMENT

Because the Constitution expressly assigns to Congress the powers "[t]o lay and collect Taxes, Duties, Imposts and Excises," and "[t]o regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, the President's unilateral Tariff Orders can withstand constitutional scrutiny only if they were issued pursuant to authority properly conferred by Congress.[4] The President claims that Congress gave him the requisite authority in the IEEPA. On the contrary, the IEEPA's text and history show that it was enacted to *rein in* presidential overreach and *limit* the President's power to adjust tariffs. Pet.App.26a-33a.

There are many reasons, grounded in ordinary principles of statutory construction, to support the decisions below. *See id.* But even if this were a closer question—that is, even if there were genuine doubt about whether Congress intended to delegate such broad tariff power

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[4] The President does not, nor could he plausibly, claim any inherent authority to set tariffs. He does contend that the IEEPA's supposedly "broad congressional delegation[]" of tariff power is constitutionally permissible because, "in the national security and foreign policy realms, the nondelegation doctrine … [plays a] more limited role in light of the President's constitutional responsibilities and independent Article II authority." Opening Br. at 44 (quoting *FCC v. Consumers' Rsch.*, 145 S. Ct. 2482, 2516 (2025) (Kavanaugh, J., concurring)). But this argument proves too much. If the President can simply usurp legislative power by insisting that national-security or foreign-policy interests are implicated, then there is nothing stopping him from nationalizing steel mills to "avert a national catastrophe." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952). Tariffs, of course, are taxes levied on imports (and paid by importers) for the purpose of raising revenue. As Justice Jackson observed in his *Youngstown* concurrence, even in wartime, "Congress alone controls the raising of revenues." *Id.* at 643.

to the President—the Court should still err on the side of caution and read the IEEPA's delegation of power narrowly. The need for caution is grounded in both constitutional and related practical concerns.

First, as a matter of constitutional law and theory, courts should construe purportedly broad statutory conferrals of power to the President narrowly, both to avoid unconstitutional delegations of concentrated power to the Executive Branch and to ensure that permissibly conferred power is exercised consistent with the intent of the delegators. Courts must be especially vigilant when capacious policy-making power is purportedly delegated to the President and agencies he controls because power given to the President by Congress cannot be easily retrieved, on account of the President's power to veto subsequent congressional retrieval attempts. Indeed, this "retrieval problem" lies at the heart of the so-called nondelegation doctrine.

The retrieval problem has been borne out by history, giving rise to the practical reason for narrowly construing delegations of power to the President that might stray into the legislative realm. Power conferred to the President has historically been a one-way ratchet. The President (any President) has an institutional interest in preserving his power while he is in office and is inclined, therefore, to veto any legislative attempt to retrieve power that has already been delegated. It thus requires a two-thirds majority of both houses of Congress to override a veto and retrieve legislative power that may already have been inappropriately delegated. Such overrides have been historically rare feats.

By contrast, if Congress wants to confer with clarity additional power on the President, it may do so with

a simple majority. It is, in short, much easier for Congress to undo a judicial decision that construes a delegation of power too narrowly than to override a veto of legislation seeking to correct a judicial decision construing the delegation too broadly. The costs of an erroneous judicial decision, therefore, are asymmetrical.[5] And it makes eminent sense for courts interpreting statutes that purportedly delegate broad powers to the Executive to do so with that asymmetry in mind.[6]

Given these constitutional and practical concerns, courts should generally construe purportedly broad delegations of power to the President narrowly whenever the statutory text allows. Doing so reduces the chances

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[5] An "erroneous" judicial decision, in this context, is not necessarily one that is poorly reasoned, but simply a decision that "misperceive[s] the political will," as evidenced Congress's desire to override it through corrective legislation. *United Steelworkers of America v. Weber*, 443 U.S. 193, 216 (1970) (Blackmun, J., concurring). The cost of an erroneous decision endorsing an overbroad delegation of power to the President is greater than an erroneously narrow decision not only because it is harder to "correct" in this sense, but also because the consequence of the error may offend the separation of powers by allowing legislative powers to have been delegated in a way that cannot, as a practical matter, be retrieved.

[6] Indeed, as a prudential matter, it may be wise for courts to construe *all* statutes conferring any power on the President narrowly, given the asymmetrical costs of error. *See generally* Einer Elhauge, STATUTORY DEFAULT RULES 154 (2008) (arguing that courts should follow a default rule of narrow construction in all cases conferring any power to the President. But *Amici*'s argument focuses on the *special* problems that arise when—as here—the President claims that a statute has conferred on him *broad* powers that might cross the hard-to-define but important-to-respect line between executive and legislative authority. In cases like this one, it is thus not only statutory prudence, but constitutional jurisprudence, that demands a narrow construction.

of an irretrievable (and therefore constitutionally offensive) delegation of lawmaking powers and increases the chances of Congress, the embodiment of legislative power, correcting any perceived error through a legislative override.

Here, a fair but not unduly broad reading of the IEEPA plainly shows that Congress did not delegate to the President the power to unilaterally impose and adjust foreign tariffs. The lower courts were correct to hold that the Tariff Orders are *ultra vires* and invalid. This Court should therefore affirm.

ARGUMENT

I. Broad delegations of policymaking authority to the Executive Branch pose unique constitutional concerns because it is difficult for Congress to retrieve such power once delegated.

To prevent the concentration of power and preserve individual liberty, the Framers devised a constitutional system that divides power among three distinct and coequal branches of government. As Justice Thomas has observed, "[t]o the framers, the separation of powers and checks and balances were more than just theories. They were the practical and real protections for individual liberty in the new Constitution." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring). This core constitutional concern is particularly pronounced when legislative power is concentrated in the Executive Branch, because that power cannot easily be retrieved by the Legislative Branch.

A. The concentration of policymaking power in the Executive Branch implicates fundamental separation of powers concerns.

While the design of the Constitution permits a practical degree of interdependence and power-sharing among the political branches, *see generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), the Supreme Court has nevertheless cautioned against the "gradual concentration of the several powers in the same department." *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting The Federalist No. 51, at 321 (Madison)). The gradual concentration of power in the Executive Branch is accelerated by broad statutory conferrals of power, which pose two distinct but related dangers.

First, the concentration of too much authority in the hands of a single person—and this Court has increasingly recognized that the Executive Branch is controlled by a single person, *see, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau,* 591 U.S. 197 (2020)—risks converting constitutional democracy into soft dictatorship. A wholesale statutory conferral of "the judicial power" of the United States to the President, for example, would impermissibly concentrate governmental powers in one branch. The Supreme Court's decisions striking down New Deal programs under the so-called nondelegation doctrine were rooted in this precise concern, which was anything but abstract in the years leading up to World War II. *See, e.g., Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

The second danger is at once more common and more insidious: It is all too easy for a statutory conferral of policy-making power to the Executive to

be exercised by subsequent presidential administrations in a manner inconsistent with the intent of the original actors—House, Senate, and signing President—who, pursuant to the Constitution's design, were required to join together to confer the power in the first place. Our Constitution contemplates that federal law and policy can be changed only by a process involving both chambers of the legislature and the President (or, in the absence of presidential assent, a supermajority of the legislature). *See* U.S. Const. art. I, § 7.

In this way, the separation of powers is not merely a negative check on the concentration of power in one department but also a positive requirement that lawmaking involve both political branches. Once broad policy-making power is conferred on the President, however, there is little Congress can do to prevent that power from being exercised in ways not contemplated by the original delegators. Future presidential administrations may test whatever boundaries the lawmakers attempted to set, resulting in the Executive Branch unilaterally reshaping federal law and policy without the involvement of the Legislative Branch.

The nondelegation doctrine has long been invoked to address these concerns. As the Supreme Court put it a century ago, "it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also, e.g.*, *Field v. Clark*, 143 U.S. 649, 692 (1892) (Harlan, *J.*) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."). Though the Court has only twice employed the nondelegation doctrine to strike down legislation expressly delegating

power to the Executive, it has more frequently invoked related nondelegation *canons* to ensure that statutory conferrals of power are read narrowly to avoid and safeguard against constitutional concerns. *See generally* Cass Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000). Those concerns are at their zenith when the Court addresses delegations of power to the Executive that cannot easily be retracted by Congress.

B. Delegations of power to the Executive pose the greatest constitutional concern when they are difficult to reclaim.

The nondelegation principle embodied in the Constitution obviously cannot be understood as forbidding *all* delegations of vested power. After all, Article II provides that "[t]he executive Power shall be vested in *a President* of the United States of America" (emphasis added), yet no one finds it constitutionally problematic for the President to transfer substantial executive authority to his subordinates in the Executive Branch. *See Myers v. United States*, 272 U.S. 52, 117 (1926) ("[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."); Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 81 (2007) ("The earliest commentators shared and perpetuated the Federalist's understanding of a federal office as involving the wielding of delegated sovereign authority.").[7]

But the primary reason the Constitution so readily permits broad delegations of power *within* the Executive Branch is that, under unitary-executive notions, the

[7] For example, a President doesn't criminally prosecute defendants himself; he relies on officers in the Department of Justice to discharge this core executive power.

President is generally free to oversee, override, and reclaim any authority that he has delegated. *See generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994). This key feature of *intra*-branch delegation helps illuminate what is so deeply problematic about broad *inter*-branch delegations of power from Congress to the President: Once delegated, that legislative power cannot readily be reclaimed by Congress. Simply put, under the Constitution, delegations of power are not problematic *per se*, but instead are constitutionally offensive when delegated power is *hard to reclaim* after it has been delegated.

Indeed, this insight fundamentally informed the earliest articulations of the nondelegation principle. As Professors Patrick W. Duff and Horace E. Whiteside demonstrated nearly 100 years ago, the original iterations of the common-law maxim *delegata potestas non potest delegari* (generally translated as "delegated power may not be redelegated") were framed in anti-alienation terms. *See* Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 Cornell L. Rev. 168 (1929).[8] Specifically, power cannot "be so delegated, *that the primary (or regulating) power does not remain with the King himself.*" *Id.* at 173 (emphasis added). As Professors Duff and Whiteside concluded, the original nondelegation concern was that the "King's power not [be] *diminished* by its delegation to others." *Id*. (emphasis added).

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[8] The *delegata potestas* canon originated in agency law, but later found "wider application in the construction of our federal and state Constitutions than it has in private law." *Hampton*, 276 U.S. at 405–06.

This historically grounded reformulation focuses attention on a key aspect of the delegation problem: "that delegation is more problematic *when it is harder to reclaim*." Vikram Amar, *Indirect Effect of Direct Election*: *A Structural Examination of the Seventeenth Amendment*, 49 Vand. L. Rev. 1347, 1378 (1996) (emphasis added). Even scholars who have suggested that the Framers were not particularly troubled by the delegation of legislative power have acknowledged the special concerns raised by "legislatures' *permanent alienation* of legislative power *without right of reversion or control*." Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 307 (2021) (emphases added). Alienation—*i.e.*, permanent dispossession—is another way of describing something that has been given in such a way that it can't be controlled or retrieved.

The Court itself appeared to seize upon this distinction in *Currin v. Wallace*, 306 U.S. 1 (1939), fresh off the nondelegation doctrine's "one good year." Sunstein, *supra*, at 322. Rebuffing a nondelegation challenge to the Tobacco Inspection Act of 1935, the Court stressed that "[t]his is *not* a case where Congress has attempted to *abdicate or transfer to others* the essential legislative functions with which it is vested by the Constitution." *Currin*, 306 U.S. at 15 (emphasis added). Concerns over "abdication" and "transfer" would seem to reflect embrace of an anti-alienation principle. Then-Solicitor General Robert Jackson expounded on this distinction in his brief defending the Act: "It would appear elementary that no department can *divest* itself of the power thus vested in it. In other words, there can be no alienation of power. [But] [d]elegation . . . that is *at all times subject to recall and supervision by Congress* . . . is in no sense a *divesting* or *alienation* of its power." Brief

for the United States, 1938 WL 63974, at 44–65 (1938) (emphases added).

Thus, while many congressional delegations (say, to state governments via the prospective incorporation of state law as federal law) can be defended from constitutional challenge on the ground that Congress has not truly divested or abdicated its legislative power because after the Seventeenth Amendment states have no means of blocking efforts by Congress and the President to reclaim the power by subsequent legislation, *see* Amar, *Indirect Effect of Direct Election, supra*, at 1380–85, irretrievable delegations of policymaking power are far more problematic. And, in light of the President's veto power, many delegations of policymaking power to the Executive are effectively irretrievable. *See infra* at 14–22.

C. The President's veto power makes it difficult for Congress to reclaim policymaking power once delegated.

When a President (as opposed to a State, for example) exercises delegated power in a way that diverges from the understandings and expectations of the empowering Congress, and thus essentially embarks on new unilateral lawmaking, the House and Senate majorities that initially assented to the delegation cannot easily retrieve the delegated power. Should Congress attempt to claw back a broad delegation of power to the President (or agencies over which he exercises complete dominion), the President enjoying that delegated power can simply veto the proposed repeal law, requiring a supermajority of both houses to overcome. For reasons rooted in constitutional structure and political and practical reality, this effectively means that broad legislative power, once delegated (or deemed delegated) to the President, is alienated.

The Presentment Clause of the Constitution explicitly gives the President authority to veto legislation, subject to override by two-thirds vote of both houses of Congress. *See* U.S. Const. art. I, § 7, cl. 2. Today, that means at least 67 Senators and 290 Representatives must agree to override a veto. It should go without saying that getting 357 members of Congress to agree on something is no small feat. What's more, by convention, if one house fails to override a veto, the other will not take a vote (even if more than two-thirds of that chamber's members wish to override). *See* CRS Report RS21750, *The Presidential Veto and Congressional Procedure* at 2 (Feb. 27, 2004), *available at* https://www.archives.gov/files/legislative/resources/education/veto/veto-procedure.pdf. Therefore, if the legislation originated in the Senate, it is theoretically possible that just 34 Senators could prevent a veto override favored by the other 501 members of Congress, frustrating the will of the people as expressed by 93% of their representatives.

It is no surprise, then, that veto overrides have been historically rare. Since 1789, there have only been 112 veto overrides, compared to 1531 "regular" vetoes (about 7%). *See* U.S. Senate, *Summary of Bills Vetoed, 1789–Present*, at https://www.senate.gov/legislative/vetoes/vetoCounts.htm. The problem is compounded by the President's (contested) ability to issue a "pocket veto" by returning a bill to Congress while it is adjourned. *See* U.S. Const. art. I, § 7, cl. 2 ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, *unless the Congress by their Adjournment prevent its Return, in which case it shall not be a Law.*") (emphasis added); *see generally* CRS Report RL30909, *The Pocket Veto: Its Current*

Status (Mar. 30, 2001). When pocket vetoes are included, Congress has overridden less than 5% of presidential vetoes since 1789. *See* U.S. Senate, *Summary of Bills Vetoed,* 1789–Present, *supra.*[9]

The Presentment Clause, while an important safeguard against congressional encroachment on executive power, has tended to exacerbate the "one-way ratchet" effect of the expansion of presidential power over time. *See generally* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 126 (1994) ("[T]he presidential veto has served not only to prevent legislation the President deems unconstitutional or unwise, but also to entrench the President's own acts of lawmaking."). Simply put, a majority of Congress can (within broad constitutional limitations) easily give the President *more* power (because he will generally be glad to sign laws conferring it), but it requires an historically rare supermajority to retract any of that power, once given.

For these reasons, delegated power that required only a bare majority of both houses of Congress to create will, in theory and in practice, usually require a supermajority to reclaim. The fact that the President wears two hats—as recipient of delegated power and as decisionmaker (via the veto) in attempts to rein in

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[9] Even this figure does not fully account for the scope of the veto power, for the mere threat of a veto can often have the same effect as a veto itself. *See, e.g.*, Charles M. Cameron, BARGAINING AND PRESIDENTIAL POWER, IN PRESIDENTIAL POWER: FORGING THE PRESIDENCY FOR THE TWENTY-FIRST CENTURY 47, 61 (Robert Shapiro et al., eds., 2000) ("Broadly speaking, veto threats often enhance presidential power … because they help the president and Congress strike bargains that they might not otherwise forge, for want of congressional concessions.").

that power—means that legislative delegations of power to the President are particularly troublesome.

II. To minimize the costs of error, courts should consider constitutional retrieval concerns when construing statutes that purportedly confer broad powers to the President.

The Supreme Court has not invoked nondelegation principles directly to invalidate conferrals of power to the Executive Branch very often, or very recently, in large part due to practical line-drawing problems. *See generally* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Penn. L. Rev. 379 (2017). Drawing substantive lines between permissible conferral of executive implementation power and impermissible delegation of legislative power is obviously hard, if not impossible, for courts to do without appearing to be *ad hoc* and result-oriented, especially because permissible executive implementation power will almost always need to involve some discretion. As the Court explained in its most recent discussion on the subject, "we have recognized that Congress may 'seek assistance' from its coordinate branches to secure the 'effect intended by its acts of legislation,'" and that it "may 'vest[] discretion' in executive agencies to implement and apply the laws it has enacted—for example, by deciding on 'the details of their execution.'" *Consumers' Rsch.*, 145 S. Ct. at 2496–97 (quoting *Hampton,* 276 U.S. at 406 and *Wayman v. Southard*, 10 Wheat. 1, 46 (1925)).

But the question in this case is not whether Congress in fact *impermissibly* delegated legislative power to the President; no one is asking the Court to invalidate the IEEPA because it falls on the wrong side of a hard-to-draw line between executive and legislative power.

The question instead is whether the expansive power the President has *claimed* in imposing the Tariff Orders was in fact delegated to him at all; or whether, instead, the Tariff Orders exceed the authority delegated by the IEEPA. This is a question of statutory interpretation to be sure, but one that the Court should address with nondelegation and alienation considerations in mind.

Amici's core contention is that the fundamental constitutional concerns undergirding the nondelegation principle counsel against reading statutes to confer upon the Executive broad powers that Congress may not have intended, because once the Court deems power to have been so delegated, it will be nearly impossible for Congress to retrieve. Thus, when interpreting the IEEPA's conferral on the President of the limited power to "regulate" the "importation" of "any property in which any foreign country or a national thereof has any interest" only when necessary "to deal with an unusual and extraordinary threat," 50 U.S.C. § 1702(a)(1)(B), the Court should be cognizant of the constitutional peril of stamping its imprimatur on a broad and irretrievable delegation of policymaking power.

In short, while the separation-of-powers principles animating the nondelegation doctrine ought to be in the forefront of the judicial mind, those principles do not require the *direct* application of the nondelegation doctrine, as generally discussed, so much as they call for a narrow reading of the IEEPA. As the Court of International Trade put it in its construction of the IEEPA:

> Both the nondelegation and the major questions doctrines, even if not directly applied to strike down a statute as unconstitutional,

> provide useful tools for the court to interpret statutes so as to avoid constitutional problems.

V.O.S. Selections, 772 F. Supp. 3d at 1371–72.

This Court has invoked the nondelegation doctrine in just this manner, as a reason to read a statute narrowly so as to avoid constitutional concerns. *See Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 342 (1974) ("Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems."); *see generally* Sunstein, *Nondelegation Canons, supra*. As the Court of International Trade observed, the "major questions" doctrine that this Court has discussed in recent terms can likewise be seen as a variation on this practice—*i.e.*, requiring a clear statement before assuming that Congress intended to delegate matters of enormous economic and political significance to executive agencies. *See Consumers' Rsch.*, 145 S. Ct. at 2491 (Kavanaugh, J., concurring) ("[W]hen interpreting a statute and determining the limits of the statutory text, courts presume that Congress, in the domestic sphere, has not delegated authority to the President to issue major rules—that is, rules of great political and economic significance—unless Congress clearly says as much."); *Biden v. Nebraska,* 600 U.S. 477, 504 (2023) ("A decision of such magnitude and consequence on a matter of earnest and profound debate across the country must rest with Congress itself. Or an agency acting pursuant to a clear delegation from that representative body.").[10]

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[10] A helpful analogy can be found in the Court's invocation of federalism concerns when interpreting statutes. *See, e.g. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to

This prudential practice of construing allegedly broad statutory conferrals of power to the President narrowly—notwithstanding the President's insistence that broad power has been delegated—has the constitutionally salutary effect of minimizing irretrievable delegations of power and the practically salutary effect of minimizing the ordinary costs of judicial error. *See supra* n.5. As discussed above, in cases involving statutory delegations of power, the President is unlikely to cooperate in overriding a judicial decision that erroneously grants him *more* power than Congress desires. Thus, by narrowly construing allegedly broad delegations of power to the President, courts protect against potentially unconstitutional delegations of power while preserving Congress's ability to calibrate (within constitutional limits) the power it does intend to confer.

For these reasons, the costs of an erroneous decision approving the President's assumption and exercise of legislative power are greater than the costs of an erroneous decision finding that the President has exceeded his delegated authority. If the Court "misperceive[s] the political will" by construing a statute to confer *less* power on the President than Congress desires, there is a relatively easy fix: Congress can pass a new bill by simple majority and

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alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") This plain-statement rule was adopted even after (and in a real sense because) the Court determined that, like a substantive nondelegation line, a substantive line between state "traditional government functions" into which the federal government could interfere, on the one hand, and state activities the federal government could regulate, on the other, was "unworkable in practice." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985).

the President will almost certainly sign it into law.[11] But if the Court errs by construing a statutory delegation to give *more* power to the President than Congress intended (or more powers than the Constitution tolerates), such an error is nigh-impossible to fix, because the President has the ability and incentive to veto any legislation seeking to retrieve that power, and thereby diminish his own.

Given these asymmetrical costs of error, courts should generally resolve any doubts about the scope of a delegation of power against the President. That way, the risk of creating an unintentionally delegated and irretrievable new presidential power in violation of nondelegation principles is reduced, and the opportunity for Congress to correct any "error" of statutory construction is facilitated. To be clear, this is not an argument forbidding all conferrals of power to the President, or even all broad conferrals of power. It is an argument in favor of ensuring that broad delegations of power are in fact intended and guided by Congress before they are assumed and exercised by the President.

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[11] If Congress insists on conferring to the President broad policymaking powers that actually run afoul of the rule that legislative power should not be alienated, there is no way to redress that without courts drawing the difficult, if not impossible, substantive lines discussed above. *See supra* at 17–18. But the canon of constitutional avoidance—and common sense—dictates that a court should not cross that constitutional bridge unless and until Congress makes it unavoidable. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

Because of the retrieval problems and asymmetrical error costs that arise in cases of statutory delegations to the President, courts should generally require explicit language demonstrating both Congress's intent to delegate broad authority and the intelligible principles that will guide and constrain the President's exercise of such delegated power. As the lower courts correctly observed below, that sort of language is lacking in the IEEPA. *See, e.g., Learning Res.*, 2025 WL 1525376, at *8–9 (noting that the IEEPA does not include "the words 'tariffs' or 'duties,' their synonyms, or any other similar terms," nor does it contain "language setting limits on any potential tariff-setting power").

III. The lower courts correctly construed the IEEPA's delegation of power.

Truth be told, the question of statutory interpretation in this case likely cuts against the President in any event. As ably explained by challengers and multiple lower courts, the IEEPA does not by the fair reading of its terms provide the President with the expansive breadth of authority he claimed in issuing the Tariff Orders. *See* Pet.App.27a (finding it "anomalous, to say the least, for Congress to have so painstakingly described the President's limited authority on tariffs in other statutes, but to have given him, just by implication, nearly unlimited tariffing authority in IEEPA"); *Learning Res.*, 2025 WL 1525376, at *13 ("[H]istorical practice, as well as Congress's actions … confirm that the statute is not so capacious.").

But even if it were a closer call, the lower courts here took the constitutionally proper and responsible course in interpreting the IEEPA narrowly, in light of the constitutional concerns and asymmetrical costs of error described above.

This Court is presented with two competing interpretations of the IEEPA—one that would dramatically expand the President's power over tariffs, as understood for decades, and one that would not. To the extent the statute's text and history does not decisively resolve which interpretation is superior, the Court should adopt the narrower interpretation, as that is the one less likely to run afoul of constitutional principles and the one that Congress could more easily correct in the event that "the Court has misperceived the political will." *Weber*, 443 U.S. at 216.

CONCLUSION

The Court should adopt the lower courts' narrow reading of the IEEPA not only because it is the most natural reading, but because, in the absence of explicit direction from Congress, it is the reading that best respects the Framers' concerns about irretrievable delegations of broad policymaking power. If Congress disagrees, it can easily pass a new law—which the President would undoubtedly sign—expressly delegating to the President the expansive power over federal trade policy that he seeks to exercise. But, if Congress instead believes that the Framers were wise to reserve basic decisions about international trade to the legislative branch, rather than to the "final arbitrary action of one person," *INS v. Chadha*, 462 U.S. 919, 951 (1983), it won't be hamstrung in its constitutionally protected ability to claim that power for itself.

Respectfully submitted,

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