

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 PROFESSORS JULIAN ARATO,
RACHEL BREWSTER, HARLAN GRANT
COHEN, DAVID SINGH GREWAL, J. BENTON
HEATH, TIMOTHY MEYER, GREGORY
SHAFFER, AND CHANTAL THOMAS AS *AMICI
CURIAE* IN SUPPORT OF PETITIONERS IN
NO. 24-1287 AND RESPONDENTS IN NO. 25-250**

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CHANTAL THOMAS AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS IN NO. 24-1287
AND RESPONDENTS IN NO. 25-250**

INTEREST OF THE *AMICI CURIAE*

Amici are professors at leading U.S. law schools with expertise in U.S. trade law, constitutional law, and statutory interpretation. (A List of *Amici* and their affiliations is in the Appendix.) *Amici* have each individually studied and published extensively on U.S. trade law and have an interest in the sound development of that law.¹

SUMMARY OF ARGUMENT

The text and original meaning of the U.S. Constitution, as well as the history of the exercise of the power to tax imports, establish two propositions. First, the power to impose taxes on imports is an exclusively congressional prerogative governed by Article I of the Constitution, not a foreign affairs issue subject to or interpreted in light of Article II. The Framers of the Constitution did not treat foreign commerce delegations, including delegations to establish tariff rates, differently from other kinds of economic delegations, even where foreign affairs

¹ Pursuant to Rule 37.6, *amici* affirm that 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. No person or entity other than the *amici curiae* have made a monetary contribution intended to fund the preparation or submission of this brief.

matters were involved. Second, in the exercise of that power, Congress has delegated to the executive branch substantial authority to set the tax rates applicable to imports—i.e., to set tariff or duty rates—in dozens of statutes over the years, but such delegations have always been explicit and limited. This history strongly suggest that the International Emergency Economic Powers Act (“IEEPA”), which does not mention tariffs or duties, does not authorize them.

ARGUMENT

Article I, § 8 of the U.S. Constitution provides that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises [and] . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The text of the Constitution does not suggest any reason to think that delegations of the taxing and foreign commerce powers should be interpreted differently from other economic delegations. The Taxing Clause of Article I, § 8, cl. 1 covers all taxes, and the Commerce Clause in cl. 3 is textually a single power to regulate foreign and interstate commerce.

The history around the drafting of this text demonstrates that the Framers of the Constitution did not intend the President to wield any constitutional power over foreign commerce or taxation of imports simply because those issues were tied to international affairs. The Framers drafted the Constitution against the backdrop of a British legal system in which it was well-established that the Crown had no power to impose tariffs (i.e., duties or taxes on imports) absent Parliamentary approval and no power to implement foreign commercial rules

in domestic law, even when doing so pursuant to a treaty. Moreover, the drafting of the Constitution itself showed a fixation on how the foreign commerce power would be distributed among legislatures in the new nation; no one seems to have thought the executive had any role to play.

Finally, the history from the Founding to the present demonstrates that Congress has always delegated the tariff power explicitly and with limits. Today, the President enjoys enormous statutory power to set tariff rates, considerably more than Founding Era presidents enjoyed. Nevertheless, like delegations throughout our history, today's statutory scheme is explicit both about granting the President the power to impose duties and the limits attached to those delegations.

I. The President Has No Constitutional Role in Setting Tariffs or Regulating Foreign Commerce Under the Constitution's Original Meaning

A. The Framers Drafted the Constitution Against the Backdrop of British Law Under Which Parliament Controlled Tariffs, Even Where War and Peace Were Concerned

The Framers of the Constitution did not write against a blank slate. Rather, they drafted the Constitution against the backdrop of “the history against which that text was enacted.” *Consumer Fin. Prot. Bureau v. Comm. Fin. Svcs. Assoc. of America*, 601 U.S. 416, 426 (2024). Under British law at the time of the Founding, it was clear that the Crown lacked any power to set tariff rates without Parliamentary authorization.

Two examples highlight this point. The first is the struggle with the Stuart kings that culminated in the Glorious Revolution and the 1689 Bill of Rights. *Cf. Consumer Fin. Prot. Bureau*, 601 U.S. at 448-49 (“In England, Parliament had won the power over the purse only after centuries of struggle with the Crown. Steeped in English constitutional history, the Framers placed the Appropriations Clause in the Constitution to protect this hard-won legislative power.”)(Alito, J., dissenting). From the fifteenth century on, Parliament had given each successive English monarch a life grant of tonnage and poundage, a form of customs duty. But when Charles I ascended the throne in 1625, the House of Commons approved tonnage and poundage for only a single year. T. Taswell-Langmead, *ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME* 532 (3d ed. 1886). Among other predations, Charles resorted to collecting tonnage and poundage without parliamentary authority.

In the years that followed, parliamentary leaders cited among their list of grievances against Charles “the taking of Tonnage and Poundage without grant from Parliament.” *PROCEEDINGS OF THE SHORT PARLIAMENT OF 1640*, CAMDEN SOCIETY FOURTH SERIES, vol. 19, at 152-153 (Esther Cope, ed., 1977). On June 22, 1641, Parliament made it unambiguously unlawful to collect tonnage and poundage without parliamentary consent. The Tonnage and Poundage Act of June 22, 1641 § VI, June 22, 1641, 17 Car. I. cap. 8. *Statutes of the Realm*, vol. 104. Ultimately, the struggle between the Crown and Parliament over the power of the purse, including the power to impose tariffs without parliamentary approval, “reinforc[ed] a vicious cycle

that led to the Civil War and, ultimately, to Charles's beheading. *Consumer Fin. Prot. Bureau*, 601 U.S. at 456 (Alito, J., dissenting) (quoting Joshua Chafetz, CONGRESS'S CONSTITUTION 47 (2017)). The 1688 Glorious Revolution and the resulting 1689 Bill of Rights further solidified parliamentary control over taxation. Article 4 of the 1689 Bill of Rights provided "[t]hat levying Money for or to the Use of the Crowne by pretence of Prerogative, without Grant of Parlyament for longer time or in other manner than the same is or shall be granted is Illegall." In short, the tariff power, like the tax power of which it is part, rested squarely with Parliament.

As the second example demonstrates, the intersection of foreign commerce with national security and broader foreign relations considerations did not alter Parliamentary supremacy. The 1713 Peace of Utrecht comprised a series of treaties that ended the War of the Spanish Succession—one of the early pan-European conflicts. As part of the Peace of Utrecht, Britain and France concluded a treaty of peace and friendship and a treaty of commerce. Treaty of Utrecht, March 31, 1713, in A COLLECTION OF ALL THE TREATIES OF PEACE, ALLIANCE, AND COMMERCE BETWEEN GREAT BRITAIN AND OTHER POWERS, FROM THE REVOLUTION IN 1688, TO THE PRESENT TIME, VOL. 1 107 *et seq* (1772). While it was generally accepted that the peace treaty itself fell within the royal prerogative "and so could be presented to Parliament as a *fait accompli*, implementation of the commerce treaty's principal provisions required legislation." Kevin Douglas Tufnell, 'A SAFE AND HONOURABLE PEACE': BRITISH POLITICAL DISCOURSE, POLITICS AND POLICY FORMATION IN THE MAKING OF THE TREATY OF UTRECHT, 1708 To 1713, 213 (2022). More

specifically, articles 8 and 9 of the commerce treaty would have extended most-favored-nation status to France and would have eliminated the increased duties that Britain had imposed on France over the course of the preceding decades. See W.O. Henderson, *The Anglo-French Commercial Treaty of 1786*, 10 ECON. HIST. REV. 104, 104-5 & n.5 (1957). The House of Commons rejected that legislation on June 18, 1713. Doohwan Ahn, *The Anglo-French Treaty of Commerce of 1713: Tory Trade Politics and the Question of Dutch Decline*, 36 HIST. EURO. IDEAS 167, 169 (2010). As a consequence, the British government was unable to ratify those central provisions of the treaty. *Id.* at 168. The fact that the Crown was engaged in international negotiations to end an armed conflict did not confer on the Crown any additional power to change the domestic tax rates applicable to imported products.

B. The Drafting History of the Constitution Reveals a Concern over How the Tariff and Foreign Commerce Powers Would be Allocated among Legislative Bodies

In light of this history, the central concern of the Framers of the Constitution was not the role that the executive branch should play in the administration of foreign commerce. It was how to divide authority over foreign commerce among the new nation's legislative bodies. See Kathleen Claussen & Timothy Meyer, *The Foreign Commerce Power*, 114 CALIF. L. REV. __, *24 (forthcoming 2026), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5403782.

The Articles of Confederation resolved this issue by reserving the regulation of foreign commerce for the states. Articles of Confederation Art. IX, § 1

(authorizing Congress to enter into treaties “provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subject to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.”). The exception to this reservation of authority to the States was for treaties the Congress had “already proposed” with France and Spain. Articles of Confederation, Art. VI, § 3.

It quickly became clear that this system was unworkable. As Professor Irwin describes it:

In the 1780s there were extensive difficulties in regulating tariffs across those different states in relation to the federal government’s needs. These related in part to revenue but also to formulating a national response to the foreign commercial policies of other nations. Douglas A. Irwin, *CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY* 56-57 (2017)

In 1784, Congress appointed a committee, headed by future president James Monroe, to assess how to respond to this problem. In 1785, the committee recommended “that Congress had the sole and exclusive authority of regulating trade of the states as well as with foreign nations as with each other and of laying such imposts and duties upon imports and exports as might be necessary for the purpose.” *Id.* Although no action was taken on this recommendation immediately, it became virtually a consensus view heading into the Constitutional Convention. Claussen & Meyer, *The Foreign Commerce Power*, 114 CALIF. L. REV. at *26.

At the Constitutional Convention, debates over the commerce power turned on issues of federalism and in particular tensions between Northern and Southern states over how foreign commerce would be regulated. Madison recounts how some delegates sought to give Congress “unlimited power” over all these subjects; some sought a qualification of power excepting exports and slaves; some wanted to exempt exports alone; and, some demanded a two-thirds majority in both houses over the commerce power. See Jack N. Rakove, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 26 (1997) (citing letter to Jefferson). As Professor Delahunty describes it:

The debate at the Philadelphia Convention [was] over whether a bare majority or a supermajority of each House was required to enact foreign commerce regulations[, which] demonstrates that the Framers intended such regulation to be made by a legislative body, rather than an executive or judicial one. Robert Delahunty, *Federalism Beyond the Water’s Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN. J. INT’L L. 1, 25 (2001).

In short, the Constitutional Convention that produced Article I, § 8’s commitment of the tax and foreign commerce powers to Congress did not envision a constitutional role for the President. Indeed, the Framers appear not to have considered foreign commerce as a foreign affairs issue insofar as the separation of powers within the federal government was concerned. Rather, debates about and the design of the foreign commerce power, like the interstate commerce power, were primarily a

function of federalism concerns. Claussen & Meyer, *The Foreign Commerce Power*, 114 CALIF. L. REV. at *27.

II. While Congress Has Delegated Substantial Authority to Set Tariff Rates, Historical Practice Reveals that It Has Always Done So Explicitly and With Limits

A. Early Tariff and Foreign Commerce Delegations Were Explicit and Generally Limited the President to a Fact-Finding Role

From the earliest days of the Republic, Congress has delegated to the executive branch responsibility for the administration of the tariff system it created. *See generally* Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845, 855 *et seq.* (2021). But those first delegations did not involve authority to establish new tariff rates. *See* Act of July 4, 1789, ch. 2, 1 Stat. 24; Act of July 20, 1789, ch. 3, 1 Stat. 27. Rather, they involved the collection, implementation, and enforcement of the tariff system that Congress itself established by statute. *See e.g.*, Act of July 31, 1789, ch. 5, 1 Stat. 29 (creating the Customs Service to collect tariffs at ports of entry); Act of Aug. 7, 1789, ch. 9, 1 Stat. 53 (assigning the Customs Service responsibility for constructing and managing lighthouses in customs districts); Act of Aug. 4, 1790, ch. 35, §§ 62–64, 1 Stat. 145 (authorizing the Customs Service to enforce customs laws in U.S. waters). To the extent that the President played a role in setting tariff rates in the earliest days of the Republic, he did so only through his roles in the lawmaking process, either under the

Presentment Clause in Article I, § 7 in conjunction with the full Congress or under the Treaty Clause in Article II, § 2 in conjunction with the Senate. For example, Treaties of Friendship, Commerce, and Navigation, negotiated by the President with the advice and consent of the Senate, granted U.S. trading partners preferential tariff treatment, among other privileges. *See* John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 307 (2013).

By the early nineteenth century, Congress had begun to delegate to the President some authority to determine basic facts that triggered the application of tariff rate determinations made by Congress. *See* Claussen, *Trade Administration*, 107 VA. L. REV. at 859. For example, in an Act of March 3, 1815, Congress itself directly repealed certain duties on ship tonnage, merchandise, and wares. Congress made the repeal effective, however, only upon the President's determination "that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished." Act of Mar. 3, 1815, ch. 77, 3 Stat. 224; *see also* Act of Mar. 3, 1817, ch. 39, 3 Stat. 361 (creating a substantially similar delegation); Act of Jan. 7, 1824, ch. 4, § 4, 4 Stat. 2 (same); Act of May 24, 1828, ch 111, § 1, 4 Stat. 308 (same); Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425 (same); Act of June 26, 1884, ch. 121, § 14, 23 Stat. 53 (same).

These early delegations all have similar features. First, Congress itself established and repealed duty rates, but when expedient Congress made the timing of the implementation of those rates contingent on presidential fact-finding. *See Gundy v. United States*,

588 U.S. 128, 158-59 (2019)(“[O]nce Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”)(Gorsuch, J., dissenting). Second, these statutes explicitly refer to “duties” or “taxes,” leaving no ambiguity that Congress intended to delegate some portion of its power to tax. Third, some of these delegations authorized and assigned to the executive branch specific non-legislative duties necessary to the implementation of the tariff scheme Congress had established. *Id.* at 159 (Gorsuch, J., dissenting)(“Congress may assign the executive and judicial branches certain non-legislative responsibilities.”).

Significantly, Congress and the President followed this Founding Era practice of explicit and limited delegations of the power even when setting more general foreign commercial policies that overlapped with matters of national security and foreign policy. *See generally* Claussen & Meyer, *The Foreign Commerce Power*, 114 CALIF. L. REV. at *29-34. During the Napoleonic Wars, Congress imposed and repealed a series of embargoes against European nations based on their conduct toward American shipping. *See* Embargo Act of 1807, ch. 5, 2 Stat. 451; Non-Intercourse Act of 1809, ch. 24, 2 Stat. 528; *see also* Claussen & Meyer, *The Foreign Commerce Power*, 114 CALIF. L. REV. AT *34. As with tariff-setting, Congress itself made the relevant policy choice, directly imposing or repealing an embargo. *See* Embargo Act of 1807, 2. Stat. at 451-52 (providing that “an embargo be, and hereby is, laid on all ships and vessels in the ports and places within the limits or jurisdiction of the United States”); Non-Intercourse Act of 1809, §1, 12 (providing that “the entrance of the harbors and

waters of the United States . . . is hereby interdicted to all public ships and vessels belonging to Great Britain or France” and repealing existing embargoes). In the 1809 Non-intercourse Act, Congress delegated to the President a fact-finding role upon which the embargo’s repeal with respect to Britain and France depended. *Id.* § 11 (authorizing the President to lift the embargo on Britain or France if either “shall so revoke or modify her edicts, as that they shall cease to violate the neutral commerce of the United States.”).

On April 19, 1809, after receiving assurances that Britain would cease targeting U.S. commerce, President Madison issued a proclamation lifting the embargo as to Britain, relying only on “the 11th. Section of the Act of Congress entitled ‘An Act to interdict the Commercial Intercourse between the United States and Great Britain and France, and their dependencies; and for other purposes’.” James Madison, *A Proclamation* (Apr. 19, 1809). When Britain did not cease targeting U.S. commerce, President Madison repealed his prior factual finding and placed the trade governed by his proclamation “under the operation of the several acts by which such trade was suspended.” James Madison, *Proclamation—Renewal of Prohibition of Trade Between the United States and Great Britain* (Aug. 9, 1809).

These presidential proclamations simply applied Congress’s chosen policy based on facts that Congress decided should determine whether the embargo continued. The Embargo Acts thus reflected the same basic structure as the tariff-setting delegations. Congress determined the specific policy to be applied and made certain aspects of the

implementation depend upon fact-finding by the President. *Cf. Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting).

During the Founding Era, the Supreme Court itself repeatedly recognized the primacy of Congress over the President when commercial regulation overlapped with foreign affairs. In *Cargo of the Brig Aurora v. United States*, the Supreme Court upheld the Non-Intercourse Act's imposition of an embargo conditional on presidential fact-finding, recognizing that—notwithstanding the President's fact-finding role—it was Congress “exercis[ing] its discretion in reviving” a previously-imposed embargo. 11 U.S. 382, 388 (1813). In *Little v. Barreme*, 6 U.S. 170 (1804), the Supreme Court upheld the primacy of congressional legislation of foreign commerce even when that legislation conflicted with military orders given in a time of hostilities. That decision arose during the context of the Quasi-War between France and the United States from 1798 to 1800. During the conflict, Congress annually passed statutes that aimed to cut off commercial relations with France during the hostilities. Act of June 13, 1798, ch. 53, 1 Stat. 565; Act of Feb. 9, 1799, ch. 2, § 5, 1 Stat. 613. The 1799 statute authorized the president to seize any vessel that, upon a search, was determined to be “bound or sailing to any place within the territory of the French Republic or her dependencies.” *Id.* § 5. The Secretary of the Navy, however, ordered naval captains to seize ships sailing to or from a French port. *Little*, 6 U.S. at 178. Captain Little of the Boston seized the Flying Fish, a Danish vessel sailing from a French port, and sailed it to Boston where it was condemned as a prize. The question the Court faced was whether Captain Little could seek shelter from liability because he was following

military orders, even though those orders conflicted with the terms of Congress's statute. Writing for the Court, Chief Justice Marshall held that Captain Little could not escape liability. The terms imposed by Congress took precedence over military orders, even when those orders were followed in good faith. *Id.* at 179.

Even when the War of 1812 commenced—the first declared war in the young nation's history—President Madison did not rely on any purported Art. II powers to impose a general embargo. Instead, President Madison requested that Congress impose an embargo itself. James Madison, *Message to Congress* (Dec. 9, 1813). Congress complied, passing the Embargo Act of 1813, ch. 1, 3 Stat. 88. When Napoleon was defeated the following year, undermining the efficacy of the embargo, Congress then lifted the embargo. Act of Apr. 14, 1814, ch. 66, 3 Stat. 123.

This history strongly suggests that the Founding Generation did not understand the President to have any constitutional power to set tariffs or otherwise impose general regulations on foreign commerce, even when such actions arose in the context of war. Two sets of episodes might call into question this conclusion.

The first is President Washington's 1793 Neutrality Proclamation and subsequent legislation aimed at keeping the United States neutral in the European wars growing out of the French Revolution. The power of the President to issue the Proclamation was hotly contested, including most notably in a series of essays by James Madison and Alexander Hamilton. See THE PACIFICUS-HELVIDIUS DEBATES OF 1793-94: TOWARD THE COMPLETION OF

THE AMERICAN FOUNDING (Morton J. Firsch, ed., 2007). The Proclamation provided that U.S. citizens “will not receive the protection of the United States, against such punishment or forfeiture” as might arise from, in relevant part, “carrying to any [belligerent nation] those articles, which are deemed contraband by the modern usage of nations,” and instructed executive branch officials to prosecute U.S. citizens for such acts under existing criminal laws. George Washington, *Proclamation of Neutrality* (Apr. 22, 1793).

As Professors Prakash and Ramsey have concluded, debates over the constitutionality of the Neutrality Proclamation turned “on the (fairly academic) question of whether the President could by his declaration bind Congress’s subsequent ability to decide to enter the war.” Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 335 (2001). Critically, President Washington did not purport to claim any authority to create new domestic law, including for the regulation of foreign commerce with the belligerents. *Id.* at 341-43. He merely determined that the executive branch would not protect citizens that violated the laws of nations and threatened prosecutions against the same.

The Neutrality Proclamation thus did not impose an embargo. That authority came in the Neutrality Act of 1794, which authorized the President to impose an embargo “whenever, in his opinion, the public safety shall so require,” provided that “[t]he authority aforesaid shall not be exercised, while the Congress of the United States shall be in session” and any presidential embargo would automatically expire fifteen days after Congress reconvened. Act of

June 4, 1794, ch. 41, 1 Stat. 372. In other words, the neutrality episode demonstrates a President who recognized that he could not create binding U.S. law regarding foreign commerce with belligerents and a Congress that reserved for itself that power, delegating to the President the power to act only when, and for so long as, Congress was not in session.

The second set of episodes, raised by Professor Aditya Bamzai in his *amicus* brief in this case, involve three post-Founding conflicts in which Professor Bamzai claims that declarations of war or authorizations for the use of military force were understood to carry with them an implicit delegation to impose duties or other fees on commerce. Brief of Professor Aditya Bamzai as *Amicus Curiae* in Support of Neither Party. He claims that the Trading with the Enemy Act of 1917 incorporated this implicit understanding of what it means to “regulate . . . importation” during times of war. *Id.* at 26. That meaning, Professor Bamzai claims, was then carried forward into IEEPA. *Id.* at 28.

Professor Bamzai’s historical examples are misplaced, however. The question in this case is whether “regulate . . . importation” as used in IEEPA authorizes the imposition of taxes within the United States. While the U.S. tax code does contain tax provisions applicable to foreign activities, *see, e.g.*, 26 U.S.C. § 862 (providing that certain revenue “shall be treated in full as taxable income from sources without the United States”), tariffs are not foreign taxes. They are collected within the United States as a result of an act—importation—that occurs at the U.S. border. 19 C.F.R. § 181.1(d)(defining a “customs duty” as “a charge of any kind imposed in connection

with the importation of a good, including any form of surtax or surcharge in connection with such importation.”); *J. Conrad LTD v. United States*, 457 F.Supp.3d 1365, 1370 (CIT 2020) (“A customs duty is a tariff or tax that may be imposed, in various circumstances and for various purposes, upon imported goods entering the United States.”). Thus, for Professor Bamzai’s historical examples to shed light on the power delegated by IEEPA, they would at a minimum have to show that declarations of war or authorizations for the use of military force confer the power to impose taxes within the United States.

But none of Professor Bamzai’s examples involve the President imposing import duties within the United States. Two of his examples involve presidents imposing duties on imports into foreign ports that were being occupied by U.S. troops during times of war. On March 31, 1847, President Polk ordered U.S. forces in Mexico to “to levy and collect a military contribution upon all vessels and merchandise which might enter *any of the ports of Mexico* in our military occupation.” (emphasis added). James K. Polk, *Message to Congress* (Dec. 7, 1847). In 1898, during the Spanish-American War, 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).

In *Fleming v. Page*, 50 U.S. 603 (1850), this Court rejected the framing of duties assessed in occupied foreign ports as equivalent to duties assessed within the territory of the United States. That case presented the question whether duties paid to occupying U.S. troops at the Mexican port of

Tampico were sufficient to satisfy duties owed on goods imported into the United States. This Court answered that question in the negative, holding that the military regime imposed in occupied foreign territory had no effect on the duties owed upon import into the territory of the United States. *Id.* at 616. As this Court put it:

there was no act of Congress establishing a custom house at Tampico, nor authorizing the appointment of a collector, and consequently there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo in the manner directed by law where the voyage is from one port of the United States to another. . . . The permit and coasting manifest granted by an officer thus appointed [pursuant to the commander-in-chief's power], and thus controlled by military authority, could not be recognized in any port of the United States . . . *Id.*

Professor Bamzai's third example does not involve duties, tariffs, or implied authority. As Professor Bamzai explains, during the Civil War Congress prohibited commerce with states engaged in insurrection except upon a "license" from the President and pursuant to the rules and regulations issued by the Secretary of the Treasury. Act of July 13, 1861, §5, 12 Stat. 255, 257; Brief of Professor Aditya Bamzai at 11. Eventually, the Lincoln Administration issued licenses permitting the trade of cotton between insurrectionist states and Loyal states subject to certain regulations, including the payment of a four cents per pound licensing fee. *Id.* at 12-13. This Court upheld that licensing scheme,

including the imposition of licensing fees, as authorized by the Act of July 13, 1861. *Hamilton v. Dillin*, 88 U.S. 73, 92 (1874). *Hamilton* thus stands for the proposition that the explicit authorization to regulate trade via license includes the possibility of imposing licensing fees.

This holding, however, has no bearing on the question of whether “regulate . . . importation” authorizes duties or tariffs. IEEPA explicitly empowers the President to regulate “by means of instructions, licenses, or otherwise.” 50 U.S.C. § 1702(a). IEEPA thus explicitly incorporates the power to license trade conferred on President Lincoln by the Act of July 13, 1861.

But licenses, including license fees, are legally distinct from tariffs or duties. The Constitution provides that “[n]o Tax or Duty shall be laid on Articles exported from any State.” U.S. Const., Art. I, § 9. If the license fees imposed by President Lincoln on trade between states were duties or tariffs in foreign trade, they would have therefore been unconstitutional. So too would modern export license fees imposed by the government, such as the 15% license fee President Trump has imposed on the export of certain computer chips to China. Ilya Somin, *Trump’s Unconstitutional Export Tax Is Probably Here to Stay*, BULWARK (AUG. 15, 2025). Put simply, while *Hamilton* stands for the proposition that the power to license trade includes the power to assess fees, this case does not ask the Court to address the legality of licensing fees, and equating license fees with duties or tariffs would cast doubt upon the constitutionality of a range of governmental conduct not currently before the Court.

B. Today, the President Has Extensive Statutory Power to Impose Tariffs So Long As He Follows the Constitutionally Required-Limits Imposed in Those Delegations

Beginning with the McKinley Tariff Act of 1890, Congress began delegating to the President tariff-setting power predicated less on fact-finding and more on the President's policy judgments. Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567. Section 3 of the McKinley Tariff Act established that certain products would be admitted duty-free, but it also authorized to President to impose congressionally-specified duty rates if he determined that foreign countries were imposing "unequal and unreasonable" duties on U.S. commodities. *Id.* § 3. The Paine-Aldrich Tariff Act of 1909 authorized the President to proclaim that goods may enter at the "minimum tariff" prescribed by law if he first determined that the country of origin did not "unduly discriminate" against U.S. commerce. Payne-Aldrich Tariff Act of 1909, ch. 6, § 2, 36 Stat. 11, 82–83. The Fordney-McCumber Act of 1922 authorized the President to investigate "differences in costs of production of articles" from the United States and the "like" articles from foreign countries and to proclaim "increases or decreases in any rate of duty provided in this Act" in order to "equalize" the production costs. Fordney-McCumber Act of 1922 § 315, Pub. L. No. 67-318, ch. 356, 42 Stat. 858, 941–43.

This Court's modern nondelegation jurisprudence arises in large part from these tariff delegations. In *Field v. Clark*, the Supreme Court upheld the McKinley Tariff Act's delegation to the President, holding that Congress may "delegate a

power to determine some fact or state of things upon which the law makes, or intends to make, [Congress's] action depend." 143 U.S. 649, 694 (1892). In *J.W. Hampton, Jr. & Co. v. United States*, this Court upheld § 315 of the Fordney-McCumber Tariff Act, announcing the modern "intelligible principle" test for nondelegation cases:

The same principle that permits Congress to exercise its rate-making power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. 276 U.S. 394, 409 (1928).

The second sentence of this passage is oft-quoted for its announcement of the "intelligible principle" standard, but the first sentence is equally, if not more, important to this case. In interpreting the scope and constitutionality of the delegation, this Court held that tariff delegations are governed by "the same principle that permits Congress to exercise its rate-making power in interstate commerce." *Id.* In other words, the President's Article II powers are no more relevant to interpreting tariff delegations than they are to the regulation of interstate commerce.

With tariff delegations firmly established as ordinary economic delegations, subject to the same

interpretive methods and constitutional limitations as other economic delegations, Congress set about building the modern trade apparatus. Like the rest of the administrative state, over the course of the 20th century Congress delegated to the executive branch substantial authority to establish trade policy generally and to set tariff rates specifically. But those delegations have always been explicit and have come with at some limits. The limits vary from statute to statute, but every statute contains at least one, and often more than one, of the following: 1) a limit on the duration of the delegation; 2) a limit on the duration of the executive branch's action; 3) required fact-finding before the executive branch may act; 4) limits on the action the government can take or the amount of increase or decrease in the rate of duty, 5) congressional approval, and 6) judicial review provisions.

1. Establishing Baseline Tariff Rates

As noted above, from the Founding until the 1930s, Congress itself directly established tariff rates. Even statutes like the McKinley Tariff Act and the Fordney-McCumber Tariff Act and ultimately the Tariff Act of 1930 (also known as the Smoot-Hawley Tariff) contained lengthy schedules establishing duty rates for products directly. *See* Smoot-Hawley Tariff Act of 1930, § 1, Pub. L. No. 71-361, ch. 497, 46 Stat. 590, 590-685. Beginning with the 1934 Reciprocal Trade Agreements Act ("RTAA"), however, Congress began delegating to the President the authority to reduce tariff rates more broadly. The RTAA and successor statutes actually consist of two delegations: the power 1) "[t]o enter into foreign trade agreements," and 2) "[t]o proclaim such modifications of existing duties and other import restrictions, or

such additional import restrictions” as required by those agreements. Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, ch. 474, 48 Stat. 943. Although sometimes conflated, these two powers are importantly different. The first involves the Congress’s approval of agreements made on the international plane, what are called congressional-executive agreements. *Restatement (Third) of the Law - Foreign Relations* § 303(2) (“the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution”). The second is a delegation to set tariff rates as a matter of U.S. law. The RTAA and its successor statutes also imposed both time limits on the President’s authority and limits on the extent to which he could proclaim tariff reductions. *Id.* (“No proclamation shall be made increasing or decreasing by more than 50 percentum any existing rate of duty or transferring any article between the dutiable and free lists.”).

In the Trade Act of 1974, Congress again modified the scheme applicable to the negotiation of trade agreements. While continuing to renew the authority to negotiate tariff-reduction agreements first found in the RTAA, Congress also established a procedure through which it would approve and implement agreements that addressed both tariff and so-called non-tariff barriers to trade. Trade Act of 1974, § 151-52, Pub. L. No. 93-618, 19 U.S.C. §§ 2191-92. Under that procedure, Congress first authorizes the President to negotiate trade agreements for a limited period of time. *Id.* §§101-102. If the President negotiates according to Congress’s objectives and follows certain procedural requirements, Congress agrees to vote on legislation

approving the agreement's entry into force on the international plane and implementing it as a matter of domestic law on an expedited timeline. *Id.* §§ 151-52.

The Harmonized Tariff Schedule of the United States ("HTSUS") is derived from this process. The HTSUS consists, at its most basic, of two columns, Column 1 and Column 2, that set tariff rates for individual products. Column 2 rates are the rates imposed directly by Congress on imports from countries that do not enjoy "normal trading relations" with the United States. Column 1 are preferential rates that apply to countries that do enjoy "normal trading relations" with the United States.

Prior to 1974, many countries were subject to the baseline Column 2 rates. Because Column 2 rates are directly enacted by Congress, President Nixon could not exceed those rates when he proclaimed a 10% surcharge on imports in 1971. *See United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 577 (CCPA 1975). Today, though, only a handful of countries are subject to Column 2 rates. Most countries enjoy normal trading relations with the United States by virtue of membership in the World Trade Organization, which Congress approved in the Uruguay Round Agreements Act in 1994, Pub. L. No. 103-465, 19 U.S.C. ch. 22, § 3501 *et seq.* Other countries, like Mexico and Canada, enjoy preferential treatment under trade agreements like the United States-Mexico-Canada Agreement ("USMCA") that grant duty-free entry to most products. *See USMCA Implementation Act*, Pub. L. No. 116-113, 19 U.S.C. ch. 29, § 4501 *et seq.*

The system of U.S. tariffs, as they existed in January 2025, was thus created in partnership between the President and Congress pursuant to this system that Congress devised. Congress authorized the President to negotiate trade agreements reducing tariffs, Congress approved those agreements before they came into force, and Congress either delegated to the President the power to implement those agreements as a matter of U.S. law by proclamation or directly implemented those agreements itself via legislation.

2. Increasing Tariffs

Alongside this system for negotiating and implementing tariff rates in the HTSUS, Congress has also delegated to the executive branch substantial authority to increase tariffs or duties above generally-applicable levels.

The most commonly used of these authorities are the power to impose antidumping and countervailing duties under the Tariff Act of 1930. 19 U.S.C. §§ 1671-1671h (countervailing duties); 19 U.S.C. §§ 1673-1673i (antidumping duties). These duties are imposed in response to the “dumping” of products into the U.S. market, defined as the sale of products at less than “normal value”, 19 U.S.C. § 1673, or the import into the United States of products subsidized in their home markets, 19 U.S.C. § 1671. In order to impose antidumping and countervailing duties, the Commerce Department and the International Trade Commission (“ITC”) conduct parallel investigations. Duties may only be imposed after the Commerce Department finds that either dumping or subsidization has occurred, and the ITC concludes that the dumping or subsidization has caused injury to U.S. industry. 19 U.S.C. §§ 1671b-e, 1673b-e.

Those investigations and any resulting duty orders can then be challenged before the U.S. Court of International Trade. 28 U.S.C. § 1581. Even where duties are imposed and, if challenged in court, upheld, the Commerce Department must periodically review them to ensure that the duties are based on current factual findings. 19 U.S.C. § 1675.

Section 201 of the Trade Act of 1974 directs the President to take “all appropriate and feasible action within his power . . . [to] facilitate efforts by the domestic industry to make a positive adjustment to import competition.” 19 U.S.C. § 2251. Before the President may act, the ITC must first conclude, following an investigation, that “an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.” *Id.* If that condition is met, the statute confers upon the President a range of powers, including the power to “proclaim an increase in, or the imposition of, any duty on the imported article.” *Id.* § 2253(a)(3)(A). The duration of the President’s action is limited to four years but may be extended. *Id.* § 2253(e).

Section 301 of the Trade Act of 1974 requires the U.S. Trade Representative to take action if a foreign government’s policy denies U.S. rights under any trade agreement, violates a trade agreement, or is “unjustifiable and burdens or restricts U.S. commerce.” 19 U.S.C. § 2411(a). It also authorizes action if a foreign government’s policy is “unreasonable or discriminatory and burdens or restricts U.S. commerce.” *Id.* § 2411(b). In these circumstances, Congress has authorized the Trade

Representative to “impose duties or other import restrictions on the goods of . . . such foreign country for such time as the Trade Representative determines appropriate.” *Id.* § 2241(c)(1)(B). Among other procedural requirements, Section 301 procedures require an investigation by the Trade Representative, *id.* § 2412, and a review of any action taken after four years, *id.* § 2417(c)(1)(A).

Section 232 of the Trade Expansion Act of 1962 authorizes the President to “adjust the imports of [any] article and its derivatives” that have been found following an investigation to “threaten to impair the national security.” 19 U.S.C. § 1862(c)(1)(A)(ii). The President may only act after the Secretary of Commerce has concluded, following an investigation, that the imports in question threaten to impair the national security, *id.* § 1862(b), and the President concurs in that determination, *id.* 1862(c)(1)(A)(i). Although Congress did not explicitly define what measures the President may use to “adjust the imports” of a product, Section 232 uses the phrase “dut[ies] or other import restrictions” elsewhere when limiting, for national security reasons, the President’s ability to reduce trade barriers. *Id.* § 1862(a). Significantly, even though Section 232 explicitly applies to the intersection of national security and foreign commerce, this Court held that Section 232 does not violate the nondelegation doctrine because the procedures antecedent to presidential action satisfy the ordinary intelligible principle test from *Hampton. Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976). The Court thus continued to treat foreign commerce delegations as ordinary economic delegations for purposes of judicial review.

The antidumping and countervailing duty provisions of the Tariff Act of 1930, Sections 201 and 301 of the Trade Act of 1974, and Section 232 of the Trade Expansion Act are the primary vehicles upon which the executive branch relies to impose tariffs. But other rarely-used authorities exist as well. Section 122 of the Trade Act of 1974 authorizes the President to impose “a temporary import surcharge, not to exceed 15 percent ad valorem, in the form of duties,” not to last longer than 150 days, in response to “fundamental international payments problems.” 19 U.S.C. § 2132(a). Section 125 of the same statute authorizes the President “to proclaim increased duties or other import restrictions, to the extent, at such times, and for such periods as he deems necessary or appropriate” whenever the United States “withdraws, suspends, or modifies any obligation with respect to the trade of any foreign country” pursuant to certain other statutory authorities. 19 U.S.C. § 2135(c). Section 338 of the Tariff Act of 1930 authorizes the President “by proclamation [to] specify and declare such new or additional rate or rates of duty . . . not to exceed 50 per centum ad valorem or its equivalent” to offset any “any unreasonable charge, exaction, regulation, or limitation [upon U.S. products] which is not equally enforced upon the like articles of every foreign country” and “discriminat[es] in fact against the commerce of the United States.” 19 U.S.C. § 1338(a)&(d).

As a consequence of these broad authorities, holding that IEEPA does not authorize tariffs still leaves the executive branch ample (delegated) powers over trade policy. Prior to 2025, no President had ever relied on IEEPA to impose tariffs, so the lower courts’ decisions do not impose any new

constraints on the President. At the same time, Congress has provided the President with ample authority to use tariffs, and nothing stops the President from returning to Congress to seek more authority, as his predecessors have done. *See* William Howard Taft, *Inaugural Address* (Mar. 4, 1909), in 1 PRESIDENTIAL ADDRESSES AND STATE PAPERS OF WILLIAM HOWARD TAFT: FROM MARCH 4, 1909 TO MARCH 4, 1910, at 53, 55 (1910) (“It is imperatively necessary, therefore, that a tariff bill be drawn . . . I venture this as a suggestion only, for the course to be taken by Congress, upon the call of the Executive, is wholly within its discretion.”)

III. Holding that IEEPA Authorizes These Tariffs Would Render Congress’s Statutory Scheme a Dead Letter and Sanction the Regulation of Domestic Economic Affairs Through International Emergency Powers

By contrast, a holding that IEEPA authorizes tariffs would render the congressionally-designed scheme above irrelevant. IEEPA contains none of the limitations on tariff-rate setting found in delegations throughout the nation’s history. If interpreted to permit duties, it does not contain a time limit on those duties, a maximum amount of those duties, an investigation or fact-finding requirement prior to the imposition of duties (apart from the bare declaration of a national emergency), or a mandatory review period to assess the effectiveness of the duties—all hallmarks of Congress’s tariff delegations. Given the lack of any limits in IEEPA, there would be no reason for future Presidents to ever rely on any of the authorities described above if tariffs are available under IEEPA. Likewise, the generally-

applicable tariffs on most imports into the United States, approved and implemented by Congress following decades of negotiations by presidents of both parties, could be swept aside with the stroke of a pen.

Nor can the effect of reading IEEPA broadly by characterizing it as a foreign affairs delegation be neatly cabined. Many ordinary domestic matters are the subject of international negotiations and treaties. To take but one example, income taxes are the subject of substantial international negotiation. The United States is party to dozens of bilateral tax treaties that affect how the United States collects income taxes. *See U.S. Tax Treaties*, U.S. Treasury Dep't, Internal Rev. Serv., Publication 901 (Rev. Sept. 2024)(listing U.S. tax treaties). Over the last decade, the United States and other nations have conducted multilateral negotiations with an eye toward overhauling corporate income taxes on a multilateral basis. *See* Organization for Economic Co-operation and Development, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (Oct. 8, 2021).

If statutes like IEEPA that do not mention taxes can be read to include the power to set tax rates whenever there is an international dimension, then the implementation of income tax treaties via broad readings of statutory delegations may soon become the norm. In 2021 and again in 2022, U.S. Treasury Secretary Yellen suggested in testimony before the Senate that there are “a number of ways” other than Senate advice and consent to a treaty through which the administration could implement its internationally-negotiated changes to the U.S. tax

code. Hearing before the Comm. On Finance of the U.S. Senate, S. Hrg. 117-428, 92-93 (June 7, 2022).

The Framers of the Constitution understood that economic matters, and in particular taxation, could not be cleanly divided between foreign and domestic. They gave the entirety of the power to levy duties and taxes and regulate commerce, both interstate and foreign, to Congress. Article I, § 8, cl. 1 & 3. This Court should respect that allocation of authority by interpreting IEEPA without any foreign affairs gloss and in light of the long history and tradition of explicit and limited congressional delegations of the power to establish tariff rates.

CONCLUSION

Respectfully, the Court should decide this case consistent with the principles described in this *amici* brief and affirm the judgments of the Federal Circuit and the District Court for the District of Columbia.

Respectfully submitted,

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OCTOBER 24, 2025

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