No. 25-250

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

V.O.S. SELECTIONS, INC., ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PRINCESS AWESOME ET AL.'s BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS IN NO. 25-250

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QUESTIONS PRESENTED

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

2. If IEEPA authorizes the tariffs, whether the statute unconstitutionally delegates legislative authority to the President.

3. Whether the district court in No. 24-1287 lacked subject-matter jurisdiction.

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INTEREST OF AMICI CURIAE[1]

Princess Awesome, LLC; Stonemaier, LLC; 300 Below, Inc.; Upward Glance, LLC d/b/a Quent Cordair Fine Art; KingSeal Corporation d/b/a Wesco Enterprises, Inc.; Mischief, LLC d/b/a Mischief Toy Store; Spielcraft Games, LLC; Rookie Mage Games, LLC; XYZ Game Labs, Inc.; Tinkerhouse, Inc.; and Reclamation Studio, LLC d/b/a WitsEnd Mosaic (Amici) are small American businesses in various fields—clothing, board games, arts and crafts, toys, foodservice products, and mechanical services.

All but one Amici directly import goods from abroad—from Argentina, Bangladesh, China, India, Italy, Peru, Taiwan, and Turkey—and all are suffering significant harm because of the tariffs imposed by the President, purportedly pursuant to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-10 (IEEPA). All but one Amici have paid these tariffs or, to import their products, were obligated to pay. And because of the arbitrary and ever-changing tariffs, exemptions, and reversals, Amici find it all but impossible to plan for the future.

Accordingly, Amici filed their own challenge to the IEEPA tariffs in the U.S. Court of International Trade (CIT). *Princess Awesome, LLC v. U.S. Customs and Border Protection*, No. 25-00078 (Ct. Int'l Trade). The CIT, after entering its judgments in *V.O.S. Selections, Inc. v. United States*, No. 25-00066, and *Oregon v. U.S. Dep't of Homeland Security*, No. 25-00077, granted the government's motion for a stay of Amici's case pending

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[1] This amicus brief was not authored in whole or in part by counsel for any party. No party or counsel for a party, and no person other than Amici or their counsel, contributed money to fund this brief's preparation or submission.

a final, unappealable judgment in those cases, which are the subject of the Writ of Certiorari in Case No. 25-250 here. Paperless Order, *Princess Awesome*, No. 25-00078 (June 16, 2025) Dkt. No. 21.

In Amici's lawsuit, the government stipulated that it will not oppose the CIT's authority to order reliquidation of Amici's entries subject to the challenged IEEPA tariffs and will refund any IEEPA duties found to have been unlawfully collected after such an order. Joint Stipulation, *Princess Awesome*, No. 25-00078 (May 28, 2025) Dkt. No. 17. Amici are thus directly interested in—and their recovery will almost certainly be affected by—the Court's decision in this case. Accordingly, Amici file this brief in support of the *V.O.S. Selections, Inc.* Respondents to emphasize IEEPA's constitutionally impermissible transfer of legislative power to the President.

INTRODUCTION AND SUMMARY OF ARGUMENT

IEEPA unconstitutionally delegates Congress's tariff and foreign-commerce regulation powers to the President. The statute provides no policy to guide the President's exercise of its sweeping authorities and contains no meaningful limits on that exercise or standards by which courts can determine whether the President is acting within the statutory grant.

The government's attempt to escape judicial scrutiny for any actions that implicate foreign affairs is unsupported in the Constitution and contrary to the Court's precedents, which instead reflect this institution's centuries-old willingness to defend and apply the Constitution's separation-of-powers principles in myriad contexts, including international trade, foreign affairs, and even war. The Court's "intelligible principle" formulation itself comes from a tariff case. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

Accordingly, if the Court concludes that the President was within IEEPA's delegation of authority in imposing the tariffs at issue, it should nevertheless hold that such actions were taken pursuant to an unconstitutional transfer of Congress's power and affirm the judgement below on that ground.

ARGUMENT

I. IEEPA Unconstitutionally Transfers Legislative Power To The President.

If the Court concludes that IEEPA authorizes the President's tariffs (though it does not, for the reasons explained in the challengers' briefs), the President's imposition of tariffs in reliance on IEEPA authority

cannot be upheld because the statute unconstitutionally transfers legislative power to the President.

A. The Constitution requires Congress to establish a general policy and impose boundaries when it confers authority.

The Constitution vests in Congress "all legislative Powers herein granted[,]" including the power to lay taxes, duties, imposts, and excises, and the power to regulate commerce with foreign nations. U.S. Const. art. I, §§ 1, 8. This Court has made clear that the Constitution "permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). "Legislative power," the Court has held, "belongs to the legislative branch, and to no other." *FCC v. Consumers' Rsch.*, 145 S.Ct. 2482, 2496 (2025).

Accordingly, Congress may not vest any implementing discretion unless it "clear[ly]" shows "both" [1] "'the general policy'" that the Executive Branch "must pursue and [2] 'the boundaries of its delegated authority.'" *Consumers' Rsch.*, 145 S.Ct. at 2497 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (brackets removed). And Congress must provide "sufficient standards to enable both 'the courts and the public [to] ascertain whether the [government]' has followed the law." *Ibid.* (quoting *OPP Cotton Mills, Inc. v. Adm'r of Wage & Hour Div., Dept. of Lab.*, 312 U.S. 126, 144 (1941)).[2]

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[2] The "essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . ." *Yakus v. United States*, 321 U.S. 414, 424 (1944). If a statute does not provide "the objective to be sought," *id.* at 423, or if "there is an absence of standards for the guidance" of the President, "so that

Key to this determination is "the character of the power given," which requires an "inquir[y] into its extent." *Wayman v. Southard*, 23 U.S. 1, 43 (1825). This is so because the "degree" of "acceptable" discretion "varies according to the scope of the power congressionally conferred." *Consumers' Rsch.*, 145 S.Ct. at 2496-97 (quoting *Whitman*, 531 U.S. at 475). Here, because the President's actions "affect the entire national economy," Congress must provide "substantial guidance." *Whitman*, 531 U.S. at 475. For the Constitution demands that the "important subjects" "be entirely regulated by the legislature itself." *Wayman*, 23 U.S. at 43.

Accordingly, as discussed next, if the Court concludes that IEEPA authorizes the President to "tax Americans' import purchases at any rate, for any good, from any place, for any length of time," V.O.S. Br. 47, based on unreviewable "emergency" declarations, then IEEPA unlawfully delegates legislative powers to the President.

B. IEEPA delegates vast legislative power without a policy objective or limits.

1. IEEPA confers sweeping—and, according to the government, unreviewable—authority on the President. Granting him prerogatives at the core of Congress's power to regulate foreign commerce, IEEPA authorizes the President to, among other things, "investigate, regulate, or prohibit" "*any* transactions in foreign exchange," bank transfers "involv[ing] *any* interest of *any* foreign country or a national[,]" "by *any*

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it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed," then the statute has not imposed either the policy guidance or the limiting standards required to survive a non-delegation challenge. *Id.* at 426.

person, or with respect to *any* property, subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1)(A) (emphasis added).

It also allows the President to investigate, block, regulate, direct, compel, nullify, void, prevent, or prohibit:

> *any* acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising *any* right, power, or privilege with respect to, or transactions involving, *any* property in which *any* foreign country or a national thereof has *any* interest by *any* person, or with respect to *any* property, subject to the jurisdiction of the United States.

Id. § 1702(a)(1)(B) (emphasis added).

Critically, under the government's reading, IEEPA authorizes the President to impose tariffs of any amount on imports from any country in the world for any reason, for any amount of time, so long as the President identifies an "emergency." *See* U.S. Br. at 14 ("Congress placed only procedural, not substantive, limits on national-emergency declarations, giving itself principal oversight authority.").

The government acknowledges—indeed, it insists—that the scope of power conferred by IEEPA is immense. *See, e.g.*, U.S. Br. at 25 (describing IEEPA's authority grants as "nine intentionally capacious verbs" that reflect a "broad and overlapping panoply of authorities"); *id.* at 29 ("IEEPA covers the waterfront: from 'compel' to 'prohibit' and everything in between ('regulate')—the common quality being their breadth.").

The government goes even further, acknowledging that IEEPA may authorize unconstitutional actions. U.S. Br. at 30-31. Its position appears to be, rather than "rob[bing] IEEPA of its intended breadth," U.S. Br. at 31, the law should be read as permissibly granting the President unlimited authority, leaving it to executive restraint or judicial intervention to identify and preclude the unconstitutional applications. *But see Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("Members of Congress could not . . . vote all power to the President and adjourn *sine die*.").

2. IEEPA sets forth no policy objective to be achieved through its delegated authorities—and it fails to provide "sufficient standards to enable both 'the courts and the public [to] ascertain whether the [government]' has followed the law." *Consumers' Rsch.*, 145 S.Ct. at 2497 (citation omitted). In *Consumers' Research*, the Court's most recent non-delegation precedent, it determined that the "policy [the statute] expresses is clear and limiting. If . . . a substantial majority of Americans has access to a communications service that is both affordable and essential to modern life, then other Americans should have access to that service too." *Consumers' Rsch.*, 145 S.Ct. at 2507. That discernible policy stands in stark contrast with IEEPA, which contains no articulation of any policy goal to guide the President's use of its powers. International Emergency Economic Powers Act, Pub. L. No. 95-223, Tit. II (1977).

The government attempts to locate a policy objective in IEEPA, suggesting it is "to deal with certain foreign threats that constitute an emergency." U.S. Br. at 22; *see also id.* at 46. That is unpersuasive at best, disingenuous at worst. Telling the President to

"deal with" something is not a policy objective that the executive "must pursue." *Consumers' Rsch.*, 145 S.Ct. at 2497. It's a legislative abdication—inviting the executive to establish policy.

The absence of a policy objective in IEEPA is highlighted by the government's own description of its actions. In this Court, it says that "the imposition of tariffs under" IEEPA is "*the Administration*'s [not Congress's] most significant economic and foreign-*policy initiative*." U.S. Pet. at 2 (emphasis added). Below, the government stated that the IEEPA tariffs were imposed by the President because "*in his judgment* they are necessary and appropriate to address *what he has determined* are grave threats to the United States's national security and economy." Opening Br. for Appellants, *V.O.S. Selections, Inc. v. Trump*, Nos. 2025-1812, -1813, Dkt. No. 61-1 at 2 (emphasis added). Further emphasizing that the policy decisions here were the President's, not Congress's, the government stressed that "*the President's plan* to impose such tariffs . . . was *a key component of his successful campaign* for office." *Id.* at 2-3 (emphasis added). The President's imposition of tariffs pursuant to IEEPA thus cannot be characterized as the mere execution of congressional policy decisions (found in IEEPA or any other law). Whether to impose tariffs is itself the policy decision, the "important subjects." *Wayman*, 23 U.S. at 43. As such, Congress may not abandon them to the President.

Finally, in its merits brief here, the government states that "*the President and his Cabinet officials* have determined that the tariffs are promoting peace and unprecedented economic prosperity . . . ." U.S. Br. at 11. Peace and economic prosperity are laudable

policy objectives, but they are not found in IEEPA (because no policy objective can be found in IEEPA). Even if such policy goals were included, they would not establish a general policy sufficient to survive a non-delegation challenge because the myriad trade-offs achieving such amorphous results would require precisely the legislative decisions that Congress alone must make. *See, e.g.*, *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."); *see also Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 382 (2023) (emphasizing that it is the role of lawmakers to weigh "competing" "incommensurable" values).

3. Even if IEEPA "clear[ly]" identified a policy that the President "must pursue," *Consumers' Rsch.*, 145 S.Ct. at 2497—though it does not—it still runs afoul of the non-delegation doctrine because it imposes no meaningful constraints on the exercise of the delegated authorities.

At the outset, the government's position is that *none* of IEEPA's substantive limitations—i.e., limiting the exercise of its authorities only "to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared," 50 U.S.C. § 1701(b)—are meaningful enough to be justiciable. *See* U.S. Br. at 21 (describing the President's determinations as "essentially judicially unreviewable"); *id.* at 40 (asserting that whether a given action "deals with" an identified threat or emergency "resists meaningful judicial review because of its discretion-laden nature and the lack of judicially manageable standards"); *id.* at 42 (stating that whether a threat is unusual and extraordinary is "not amenable to judicial review").

Curiously, the government appears to have retreated from its assertion below that these substantive constraints present nonjusticiable political questions, favoring the weaker formulations quoted above. But the essence of its position is still the political-question argument it made in the Court of International Trade. *See, e.g.*, Defs.' Resp. in Opp'n to Appl. for a TRO, *V.O.S. Selections, Inc. v. Trump*, No. 25-00066, Dkt. No. 12 at 39 ("[A]ny challenge to the legitimacy of the emergency at issue—particularly the claim that the emergency is not 'unusual' or 'extraordinary' enough, in plaintiffs' view—is a nonjusticiable political question that this Court lacks jurisdiction to consider."). That argument was consistent with the position the government took with respect to IEEPA just last year, when it asserted that the statute "sets forth no standards from which the Court could judge the President's selection of designation criteria [for sanctioned individuals] or determine whether specific criteria effectively address an unusual and extraordinary threat to the United States' interests." Mem. in Supp. of Defs.' Mot. to Dismiss at 13, *Vassiliades v. Blinken*, No. 1:24-cv-01952 (D.D.C. Sept. 17, 2024), Dkt. No. 15-1; *see also id.* at 10-18 ("Plaintiffs' Claim Presents a Political Question.").

Regardless of whether the government acknowledges that its reviewability argument is grounded in the political-question doctrine, statutory constraints on the exercise of statutorily granted authority cannot be rendered meaningless by Congress's insufficient precision. *See, e.g.*, *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 855-56 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("[P]laintiffs allege that the Executive Branch violated congressionally en-

acted statutes that purportedly constrain the Executive. . . . Importantly, the Supreme Court has invoked the political question doctrine only in cases alleging violations of the Constitution. This is a statutory case. The Supreme Court has never applied the political question doctrine in a case involving alleged *statutory* violations. Never."); *see also Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (stating that despite the "interplay" between a statute and "the conduct of this Nation's foreign relations" the judiciary "cannot shirk [its] responsibility" to interpret statutes).

Amici agree with Justice Kavanaugh that statutory constraints must be reviewable, even if substantial deference is given to the President's fact-findings and determinations. But if a statute's constraints on the grant of authority do not appear to provide judicially manageable standards—and the government makes a compelling case that IEEPA's constraints do not (U.S. Br. at 41-42)—the Court should conclude that the delegation is not meaningfully limited at all.[3] And even if the Court agrees with the government that the only substantive constraints on IEEPA's grant of power are not justiciable (as political questions or otherwise), that conclusion should be fatal to the delegation analysis. Such a determination would itself confirm that IEEPA does not contain "sufficiently definite and precise" standards "to enable Congress, the courts and the public to ascertain whether the" President has conformed to the law. *Yakus*, 321 U.S. at 426; *cf. United States v. Bozarov,* 974 F.2d

[3] And if there are no standards the courts can apply to assess whether the President's actions are within a statutory authorization, the President is presumably similarly unguided.

1037, 1042 (9th Cir. 1992) (finding that this Court's precedents "clearly suggest that the availability of judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge"). Were that not the case, Congress could transfer all policy questions to the executive branch by using "discretion-laden" language, U.S. Br. at 40, such that any exercise of the authority conferred would be unreviewable, thereby leapfrogging the non-delegation doctrine's separation of powers boundaries.[4]

4. The government's halfhearted attempt to defend IEEPA's constitutionality fails under its own construction of the law.[5] Remarkably, after its initial assertions as to the breadth of the power conferred, and the lack of a judicially manageable standard applicable to IEEPA's substantive constraints (U.S. Br. at 23-43), the government nevertheless claims in Part II of its brief (at 43-47) that IEEPA "easily pass[es] muster" under the non-delegation doctrine because "Congress at most committed something to the discretion of the Executive." U.S. Br. at 45 (cleaned up). It then

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[4] That is not to say that—outside of examining whether Congress has constitutionally delegated power—courts must review the merits of presidential exercises of discretion. *Compare Trump v. Hawaii*, 585 U.S. 667, 686 (2018) (declining to scrutinize policy justification for President's permissible method of action) *with Trump v. J. G. G.*, 604 U.S. 670, 672 (2025) (per curium) (holding that even where judicial review is limited courts can still review "questions of interpretation and constitutionality").

[5] The Court recently expressed frustration that "at every turn" the party challenging a statutory delegation read the statutory provision "extravagantly, the better to create a constitutional problem." *Consumers' Rsch.*, 145 S.Ct. at 2507. Here, by contrast, Amici simply repeat the government's own assertions as to the scope of IEEPA's authorization.

contends, stunningly, that "both the courts and the public can ascertain whether the executive has followed the law," *id.* at 46 (cleaned up), because the delegated authorities are permitted only to deal with an unusual and extraordinary threat: the very constraint it argued just pages before was *not* amenable to judicial review.

The government also points to various administrative requirements to assert that Congress "gave itself, not federal courts, primary oversight over the President's exercise of IEEPA powers. *Id.* at 23. Such an assertion is, frankly, preposterous. With respect to requirements in the National Emergencies Act (NEA), the government itself concedes that it provides no meaningful standards for Congress to oversee. U.S. Br. at 14 (The NEA "placed only procedural, not substantive, limits on national-emergency declarations."); *see also Ctr. for Bio. Diversity v. Trump*, 453 F. Supp. 3d 11, 32 (D.D.C. 2020) (stating that the NEA "simply allows the President to declare an emergency to activate special emergency powers created by Congress. Nothing else guides how the President should make this decision"). [6]

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[6] Because the NEA itself grants no powers and provides only a process for a presidential *declaration* of a national emergency (that serves to unlock authorities in other statutes), the declaration is at least arguably not amenable to, nor intended for, review. The NEA can be contrasted, however, with statutory provisions that necessitate an ascertainable—however contestable—state of affairs, like IEEPA's requirement that there actually exist an "unusual and extraordinary threat" to invoke its authorities. 50 U.S.C. § 1701.

The government put to rest any debate about the scope of its reading when it declined to contest Amici's (then Plaintiffs') contention that the President could declare a national emergency

And any significant power the NEA reserved to Congress when it was passed (initially allowing Congress to terminate declared emergencies through a concurrent resolution, which does not require a presidential signature) was removed by amendment after the legal effect of that process was called into doubt by *INS v. Chadha*, 462 U.S. 919 (1983).[7] Now, under the NEA, a declared emergency may be terminated only through a joint resolution—which requires either the President's signature or approval by a two-thirds vote of each chamber. Pub. L. No. 99-93, 99 Stat. 405, 407, 448 (1985). Accordingly, any "congressional oversight" over NEA declarations consists of no more reserved power to police the President's exercise of emergency powers than any other authorizing statute.[8]

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over a hangnail. Pls.' Mot. for Summ. J., *Princess Awesome v. U.S. Customs & Border Protection*, No. 25-00078 (Ct. Int'l Trade May 21, 2025) Dkt. No. 14 at 42. Instead, the government contested only whether such a delegation violated the Constitution. Defs.' Resp. in Opp'n to Mot. for Summ. J., *Princess Awesome v. U.S. Customs & Border Protection*, No. 25-00078 (Ct. Int'l Trade May 23, 2025) Dkt. No. 16 at 40-45.

[7] The *Chadha* Court, notably, held the one-House legislative veto unconstitutional despite its use in matters of foreign affairs and the war powers. To decline to similarly police the executive would have obvious consequences for the balance of power between the branches.

[8] Nor do the NEA's requirements that the President tell Congress about a declared national emergency, or that such a declaration terminates if the President declines to renew the declaration, U.S. Br. at 14, reflect any increased oversight responsibility for Congress. And, of course, the requirement to meet within six months to consider terminating the emergency is simply an exercise of each chamber's power to set its own (internally waivable and externally unenforceable) rules. *See* Michael

The government's position that IEEPA "expanded [Congress's] oversight authority beyond the NEA baseline" by requiring the President to "consult regularly with Congress" and update Congress on the emergency every six months, U.S. Br. at 16, similarly fails to mitigate the constitutional defects.[9] In any event, procedural (not to mention unenforceable) statutory limits cannot save an otherwise unconstitutional delegation.[10] *See United States v. Rock Royal*

Greene, Congressional Research Service, *National Emergencies Act: Expedited Procedures in the House and Senate*, 6 (updated Feb. 3, 2025) ("Because Article 1, Section 5, of the Constitution provides that 'Each House may determine the Rules of its Proceedings,' so too can the House and Senate choose to modify or ignore the statutory rules of the NEA.").

[9] The government makes much of IEEPA's "enumerated list of exceptions" in 50 U.S.C. § 1702(b)(1)-(4), U.S. Br. at 16, but a closer look shows they cannot bear that weight. The first and third exceptions encompass First Amendment protected speech, *see, e.g.*, H.R. Conf. Rep. No. 103-482, at 239 (1994) (clarifying that IEEPA was amended to establish "that no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment"), and the fourth exception protects individuals' liberty and property rights, presumably also required by the Constitution. *See* U.S. Const. amend. V. The second exception for donations is as impotent as the rest of the law because it can be vitiated by any one of three presidential determinations (themselves presumably unreviewable under the government's view), including that the donation "would seriously impair [the President's] ability to deal with any national emergency." 50 U.S.C. § 1702(b)(2).

[10] The government lists a string of these limits and protests that are not, in fact, "toothless." U.S. Br. at 32. But the only judicial precedent it cites for that assertion concerns an application of one of IEEPA's limited exceptions. *See Marland v. Trump*, 498 F. Supp. 3d 624, 641 (E.D. Pa. 2020) (finding plaintiff was likely to succeed on claim that executive action contravened

Co-op, 307 U.S. 533, 576 (1939) ("[P]rocedural safeguards cannot validate an unconstitutional delegation;" they can only "furnish protection against an arbitrary use of properly delegated authority.").[11]

If the legislative branch need not make the policy decisions on important subjects and the courts may not interpret the legislature's laws or police the bounds of our constitutional structure, then we don't have a unitary executive, we have a unitary government. It may be that "[j]udges lack the institutional competence to determine when foreign affairs pose an unusual and extraordinary threat that requires an emergency response." U.S. Br. at 42. But the Court should use its institutional competency to say what the law is and hold that in enacting IEEPA Congress failed to exert its own institutional competencies. And because IEEPA's delegation is singular in its dearth of policy guidance or ascertainable constraint, the

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IEEPA's prohibition on the regulation of personal communications). It also cites Congress's termination of the COVID national emergency, which was signed by the President. U.S. Br. at 32 (citing Act of Apr. 10, 2023, Pub. L. No. 118-3, 137 Stat. 6). Congress is no more empowered under the NEA or IEEPA to restrain the use of the powers granted or to take them back than it is under to any other law.

[11] The government's logic as to congressional oversight is also backward. The legislative branch has the least need to parse whether the executive is complying with a policy or constraint set forth in IEEPA or any other law. If members of Congress disagree with the President's exercise of power—whether he is acting in compliance with a statutory authority or not—they can change the law or use Congress's fiscal and investigative powers to compel a change of course. It is the American people and the courts who must be able to discern whether the executive is acting within the scope of its legal authority. *Cf. Yakus*, 321 U.S. at 427.

Court need confirm only that the non-delegation doctrine exists to invalidate IEEPA pursuant to it.

II. Foreign Policy Implications Arising From The Exercise Of Delegated Powers Do Not Change The Constitutional Analysis.

The government asserts, without further precision, that delegation limits have "little or no force in the foreign-affairs context." U.S. Br. at 22.[12] To the extent that statement accurately reflects the Court's precedents, its applicability depends on how broadly or narrowly the "foreign affairs context" is defined. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). If the transferred power is constitutionally vested in Congress, separation of powers boundaries like the non-delegation doctrine require that policy direction and enforceable standards cabin another branch's exercise of that power. On the other side of the line, if the President has independent authority to act under the Constitution, then courts must ensure that Congress does not impermissibly *intrude* on that power, even under the mistaken belief it is constraining a delegation. Accordingly, the category of authorizations "in the foreign affairs context" that do not unconstitutionally restrict the President but delegate

[12] Even outside the foreign affairs context, the Court has stated that its delegation standard is "not demanding" and observed that it has "over and over upheld even very broad delegations." *Gundy v. United States*, 588 U.S. 128, 146 (2019). It is accordingly uncertain whether the government believes there is *any* limit on Congress's ability to transfer the entirety of its foreign commerce power to the President.

powers on which no limits can be imposed, is likely far narrower than the government contends.

A. This Court's non-delegation precedents confirm the doctrine's viability and importance in the foreign policy context.

The government mischaracterizes precedent in contending that the Supreme Court "has thus long approved broad congressional delegations to the President to regulate international trade, including through tariffs." U.S. Br. at 45. To the contrary, this Court's precedents reflect centuries' worth of thoughtful and nuanced grappling with the constitutional limits on delegation in the context of trade and foreign commerce. Consequently, if the government is correct that IEEPA is a permissible delegation, those precedents were largely wasted ink because the Constitution imposed no limits on such delegations at all. Amici submit, however, that rather than bolstering the government's position (U.S. Br. at 12), the history provides a useful contrast between permissible authorizations and IEEPA's abdication of power.

One of the Supreme Court's first delegation precedents, for instance, considered a challenge to a law providing that an embargo against goods from Great Britain or France would be revived upon a presidential proclamation that one nation had "cease[d] to violate the neutral commerce of the United States" while the other had not. *Cargo of the Brig Aurora v. United States*, 11 U.S. 382, 384 (1813). The appellant argued that "to make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of a law." *Id.* at 386. The Court held that laws could be made conditionally effective and Congress could make a law "depend upon a future

event, and direct that event to be made known by proclamation." *Id.* at 387. In doing so, the "legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect." *Ibid.*

Nearly 80 years later the Court considered a statute that required the President to suspend duty-free treatment of specified products and impose a statutorily specified duty on those imports, if he found that a foreign country "imposes duties or other exactions upon . . . products of the United States, which . . . he may deem to be reciprocally unequal and unreasonable[.]" *Marshall Field & Co. v. Clark*, 143 U.S. 649, 680 (1892). The Court reviewed the country's 100-year history of statutes authorizing the president to impose an embargo (or suspend an embargo or statutory duty) upon making statutorily required findings, but affirmed that the principle "[t]hat congress cannot delegate legislative power to the president" was "universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Id.* at 692. Indeed, the statute under review withstood challenge because "the suspension was *absolutely required* when the president ascertained the existence of a particular fact," and, accordingly, "it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws." *Id.* at 693 (emphasis added). The Court noted that "[h]alf the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for execut-

ing them." *Id.* at 694 (quoting *Moers v. City of Reading*, 21 Pa. 188, 202 (1853)). Of course, under no reading does IEEPA present such an if/then framework, providing for alternative actions contingent on specific events or fact-findings.

In *J.W. Hampton*, the Court considered a law *requiring* the President to modify import classifications and rates of duty (capped at 50%) if, after investigation, the President determined that the statutory duties did not equalize the differences in costs of production in the United States and the principal competing country. 276 U.S. at 401-02. The Court held that Congress "describ[ed] with clearness what its policy and plan was and then authoriz[ed] a member of the executive branch to carry out its policy and plan and to find the changing difference . . . necessary to conform the duties to the standard underlying that policy and plan." *Id.* at 405. To be sure, the "President's fact-finding responsibility may have required intricate calculations, but it could be argued that Congress had made all the relevant policy decisions." *Gundy*, 588 U.S. at 163 (Gorsuch, J., dissenting).

Finally, in perhaps this Court's most significant—albeit only briefly addressed—delegation step in a trade case, the Court upheld a challenge to Section 232 of the Trade Expansion Act of 1962, which provides that the President may "take such action, and for such time, as he deems necessary to adjust the imports of" articles that the Secretary of the Treasury—after investigation and consultation with the Secretary of Defense and others—reports are being imported in quantities or under circumstances that threaten or impair national security. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 550, n.1 (1976). While the Court upheld Section 232, it did so

having concluded that the statute "establishe[d] clear preconditions to Presidential action" and having characterized as "far from unbounded" the President's leeway to take actions in the event those preconditions were met. *Id.* at 559. The Court also emphasized the statute's "articulation of standards to guide the President in making the decision whether to act" pursuant to a "limited authorization." *Id.* at 550 n.10.

The consideration the Court gave these cases merits its pause because, if IEEPA's delegation is constitutional, it will be hard to avoid the conclusion that the Justices who labored over them were engaged in an unnecessary and irrelevant effort to discern constitutional limits and weigh statutory distinctions. The Court should decline the government's implicit invitation to render their work for nought.

B. The President has no independent Article II authority to impose tariffs.

1. The government's claim that a different delegation analysis applies "in the foreign affairs context," can be correct only to the extent the President has some independent constitutional authority to act. *See, e.g.*, *Consumers' Rsch.*, 145 S.Ct. at 2516 (Kavanaugh, J., concurring) (observing that the doctrine has been limited "in the national security and foreign policy realms . . . *in light of the President's constitutional responsibilities and independent Article II authority*") (emphasis added); *cf. United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (Limitations on Congress's authority to delegate its power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.").

But there is no independent Article II authority to impose tariffs—as part of the conduct of foreign affairs or otherwise. Whether the tariffs are employed to raise revenue, to regulate foreign commerce, or as a tool to gain leverage in negotiations with foreign states, the government does not and cannot claim that the IEEPA tariffs should be upheld under any inherent constitutional authority.[13] The tariff power is undisputedly Congress's, not the President's. U.S. Const. art. I, § 8, cl. 1.

The government attempts to muddy separation-of-powers principles by characterizing IEEPA and past tariff-authorizing statutes as "supplement[ing]" the President's constitutional power over foreign affairs and national security. U.S. Br. at 12, 22. But even if the President's power in those broadly articulated realms were exclusive—and it is not, *see, e.g., Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015) ("The Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue.")—our constitutional structure does not establish a Legislative Branch simply to augment the powers of a more "primary" actor established in Article II. *See* U.S. Br. at 22, 35 (designating the President "the most important person in government").[14] We would not,

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[13] The government does make the puzzling assertion that congressional authorizations to impose tariffs "should *eliminate* doubts about the President's authority, not create them," U.S. Br. at 35, suggesting that such statutes might merely confirm some inherent tariff authority. Because the government does not pursue that claim elsewhere, and because it is manifestly incorrect, the Court should decline to consider it further.

[14] The government's assertions make prescient Thomas Jefferson's concern that, while "[t]he tyranny of the legislatures

for example, describe Congress's exercise of its power to declare war, U.S. Const. art. I, § 8, as "supplementing" the President's constitutional responsibilities as commander-in-chief, *id.* art. II, § 2. "In foreign affairs, as in the domestic realm, the Constitution 'enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" *Zivotofsky*, 576 U.S. at 16 (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

It may be that, as a general statement of constitutional responsibilities, "Congress and the President enjoy concurrent constitutional authority" in the national security or foreign policy contexts. U.S. Br. at 34. But that 30,000-foot view provides no basis for allowing an impermissible delegation of specific, enumerated congressional powers (tariffs and foreign commerce regulation) that are not constitutionally shared, any more than it suggests that the *President*'s specific power to "receive Ambassadors and other public Ministers," U.S. Const. art. II, § 3, is concurrently enjoyed by Congress despite its probable implications for the regulation of foreign commerce.

Importantly, then, holding that IEEPA is an impermissible delegation would effect no reduction of the President's actual foreign affairs and national security powers. He could still negotiate trade deals, build alliances, sign all manner of executive agreements, and speak with the force of the presidency's inherent

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is the most formidable dread at present," "[t]hat of the executive will come in it's turn[.]" Thomas Jefferson to James Madison, 15 March 1789, *Founders Online*, National Archives, https://tinyurl.com/n96hpntr.

and properly delegated authority behind him.[15] What the government resists is the denial (*but see* n.15) of a power that belongs to Congress and is no more concurrently shared than Congress's power to borrow money or establish a uniform rule of naturalization, U.S. Const. art. I, § 8, both of which undoubtedly have foreign affairs and national security implications. Accordingly, the conclusion that Congress improperly transferred its legislative power in IEEPA would not intrude on the President's constitutional authorities, because he does not have a constitutional tariff authority. *Cf. Zivotofsky*, 576 U.S. at 67 (Scalia, J., dissenting) ("[T]he law of England entrusted the King with the exclusive care of his kingdom's foreign affairs. . . . The People of the United States had other ideas when they organized our Government. They considered a sound structure of balanced powers essential to the preservation of just government, and international relations formed no exception to that principle.").

2. Nevertheless, the government's reliance on this Court's facially broad statements about the President's power in foreign affairs merits a rebuttal. As it does in lower courts around the country nearly every

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[15] In a genuine emergency the President could presumably defend against national security threats by exercising powers included in IEEPA (for example, embargoes) with or without that law's express statutory authority. *See, e.g.*, *Prize Cases*, 67 U.S. 635, 671 (1862) (upholding President Lincoln's Civil War blockade of ports in rebel states despite the lack of concurrent congressional authorization); *id.* at 668 ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.").

day, the government here quotes the Court's statement in *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 320 (1936), regarding the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." U.S. Br. at 44. The government rarely, if ever, acknowledges the Court's subsequent observation that *Curtiss-Wright*'s broad description of presidential power "was not necessary to the holding." *Zivotofsky*, 576 U.S. at 21.

And recognizing that the "President does have a unique role in *communicating* with foreign governments," the Court confirmed that "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." *Id.* at 21; *see also id.* at 66 (Roberts, C.J., dissenting) (noting that while *Curtiss-Wright*'s "expansive language . . . certainly has attraction for members of the Executive Branch," "our precedents have never accepted such a sweeping understanding of executive power"). The Court should take the opportunity to further clarify the limits of that statement. *See id.* at 19-20 ("declining to acknowledge" any "unbounded [presidential] power" in foreign affairs put forward by the government in reliance on *Curtiss-Wright*).

The government's reliance on other out-of-context statements from this Court is similarly misplaced and should be affirmatively rejected as statements of law. For instance, the government quotes *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003), to assert that "Article II gives the President the 'lead role in foreign policy'." U.S. Br. at 44. But *Garamendi* concerned the preemption of *state* law interfering with foreign affairs. As to separation of powers at the national level the Court observed simply

that "[w]hile Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has *a degree of independent authority* to act." *Id.* at 414; *see also id.* at 422 n.12 ("The Constitution expressly grants Congress, not the President, the power to regulate Commerce with foreign Nations.") (internal quotation marks and citation omitted).[16]

Critically, while prior opinions have suggested that "Congress may assign the President broad authority

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[16] The government also relies, U.S. Br. at 22, 45, on the Court's statement in *Zemel v. Rusk* that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." 381 U.S. 1, 17 (1965). But the Court emphasized that "[t]his does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice." *Ibid.* As in other cases raising non-delegation challenges, the Court was at pains to avoid such a holding, construing the statute narrowly "to contain[] no such [unrestricted] grant." *Id.* at 17-18 (reaffirming prior precedent holding that the statute "must take its content from history: it authorizes only those passport refusals and restrictions which it could fairly be argued were adopted by Congress in light of prior administrative practice") (citation omitted). *Cf. Consumers' Rsch.*, 145 S.Ct. at 2507 (concluding that "[p]roperly understood," the universal service statute expresses a "clear and limiting" policy); *Gundy*, 588 U.S. at 136 (relying on a prior interpretation of statute to import limit on executive discretion but noting that, if the statute *did* "grant[] the Attorney General plenary power . . . to change her policy for any reason and at any time," "we *would* face a nondelegation question") (emphasis added).

Amici would welcome this Court's decision that IEEPA does not authorize the President's tariffs, postponing the need to rule on IEEPA's constitutionality. But if the Court reaches the non-delegation question, it will find no such limiting constructions reasonably at hand.

regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers," *Gundy*, 588 U.S. at 170-71 (Gorsuch, J., dissenting), such circumstances may be quite limited for the simple reason that, if the President already has inherent Article II authority, even congressional efforts to "supplement" that power—to use the government's term—could impermissibly intrude on or limit the President's exercise of that power. *See, e.g.*, *Zivotofsky*, 576 U.S. at 32 (holding that the President's power to recognize foreign power is limited but exclusive, and concluding that "[t]o allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself"); *El-Shifa Pharm.*, 607 F.3d at 855 (Kavanaugh, J., concurring) ("[T]he proper separation of powers question in this sort of statutory case is whether the statute as applied infringes on the President's exclusive, preclusive authority under Article II of the Constitution. . . . That is a weighty question—and one that must be confronted directly through careful analysis of Article II, not resolved *sub silentio* in favor of the Executive through use of the political question doctrine.").

Conversely, whatever the scope of the President's inherent power to act in foreign affairs—a power his branch will no doubt zealously assert and defend—it cannot include powers that have been explicitly vested in another branch. *See Zivotofsky*, 576 U.S. at 33 (Thomas, J., concurring in part and dissenting in part) (stating that the Constitution vests only "residual foreign affairs powers" in the President, i.e., those foreign affairs powers not explicitly given to Congress). This Court recognized just ten years ago that "[i]n a

world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected. For it is Congress that makes laws, and in countless ways its laws will and should shape the Nation's course." *Zivotofsky*, 576 U.S. at 21.

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If this Court concludes that IEEPA satisfies constitutional constraints, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function." *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935). As in 1935, the "question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government." *Id.*

Even under this Court's not-demanding precedent, "[a]t some point the responsibilities assigned [to the President] can become so extensive and so unconstrained that Congress has in effect delegated its legislative power." *Loving v. United States*, 517 U.S. 748, 777 (1996) (Scalia, J., concurring in part and concurring in judgment). If a non-delegation limit exists, IEEPA crosses it by transferring to the President a near-total legislative power—decisions about the "important subjects"—explicitly vested in Congress by the People. The Court should say so.

CONCLUSION

For the foregoing reasons, Amici urge the Court to affirm the judgment of the court of appeals in No. 25-250.

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