

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

**BRIEF OF AMICI CURIAE GOLDWATER
INSTITUTE, DALLAS MARKET CENTER,
AND THE JOHN LOCKE FOUNDATION IN
SUPPORT OF PETITIONERS IN 24-1287
AND RESPONDENTS IN 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.

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IDENTITY AND INTEREST OF AMICI CURIAE¹

The Goldwater Institute is a public policy foundation devoted to individual freedom and limited government. Through its Scharf-Norton Center for Constitutional Litigation, Goldwater litigates and files amicus briefs when it or its clients' objectives are implicated. It has appeared in numerous courts to vindicate constitutional restraints on the executive branch. *See, e.g., Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *Kennedy v. Braidwood Mgmt., Inc.*, 145 S. Ct. 2427 (2025); *Flytenow, Inc. v. FAA*, 808 F.3d 882 (D.C. Cir. 2015). Goldwater appeared as amicus below.

Dallas Market Center ("DMC") is a global business-to-business trade center and the leading wholesale marketplace in North America. DMC owns and operates a 5.5 million square foot center in Dallas, showcasing 27,000 brands of gift, home, lighting, floral/holiday, and other products. The tariffs at issue affect every industry DMC serves. While many companies have moved production out of China, most are still affected in some way, by increasing the cost of tooling, molds, or raw materials. Many companies have cancelled or reduced autumn orders, have laid off staff and/or frozen pay in consequence. DMC was also amicus below.

The John Locke Foundation is a nonprofit public policy organization which advocates market-based policies

1. Pursuant to Rule 37, counsel for amici affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than amici, their members, or counsel, made any monetary contribution toward its preparation or submission.

to encourage competition and innovation for the benefit of North Carolinians. To that end, it commissions polls, publishes research, hosts events, and files briefs in cases affecting these important values. It appeared in *Diamond Alternative Energy, LLC v. EPA*, 145 S. Ct. 2121 (2025); *Expressions Hair Design v. Schneiderman*, 581 U.S. 37 (2017); and *Kelo v. New London*, 545 U.S. 469 (2005), among others.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whatever powers IEEPA gives the President, there must be an emergency before they go into effect. 50 U.S.C. § 1701. But the President has no power to declare an emergency when there is none in reality. This Court has both the authority and the duty to determine independently whether there actually is an emergency. None exists here. An emergency is a situation so urgent that the ordinary lawmaking process cannot be effectuated. But “trade deficits” and drug-smuggling are chronic conditions Congress can address (and has addressed in the past) through normal legislative means.

Even if there were an emergency, however, IEEPA lacks any clear statement that it was intended to vest the President with the power to impose taxes. Because vesting the Executive Branch with power to tax at will would be an extraordinary departure from constitutional norms, a clear statement rule is proper—and IEEPA fails that test.

IEEPA also fails the “intelligible principle” test because it contains no guidelines limiting executive power, unlike other tariff statutes. Indeed, other tariff statutes

give the Executive Branch only an on/off switch, while otherwise specifying how tariffs are to be calculated. That IEEPA contains no such formulae, and isn't an on/off switch, can be best explained by the fact that it wasn't designed to empower the President to impose tariffs.

ARGUMENT

I. There simply is no emergency.

The existence of an emergency, like any other mixed question of law and fact, is subject to judicial determination. It cannot be the case that the President, in his sole and unreviewable discretion, can declare the existence of an illusory emergency and thereby evade the Constitution's lawmaking procedures.

A. Whether an emergency exists is not a political question—or a matter of Presidential *ipse dixit*.

The existence *vel non* of an emergency is a question courts are competent to decide. They often do so, in many contexts.² Just as the government cannot declare

2. In addition to those cited in the text, *see, e.g., BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 611–12 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 890 (2022); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442 (1934); *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547–49 (1924); *Washington Suburban Sanitary Comm'n v. Buckley*, 78 A.2d 638, 642 (Md. App. 1951); *Matter of Cohen v. Starke*, 269 A.D. 256, 262 (N.Y. App. Div. 1945); *Murphy v. Town of W. New York*, 32 A.2d 850, 851 (N.J. 1943); *Jaarda v. Van Ommen*, 252 N.W. 485, 488 (Mich. 1934). *Cf. Allen v. Cnty. of Lake*, 71 F. Supp.3d 1044, 1052 (N.D. Cal. 2014) (“mere declaration of an immediate threat does not make it so.”).

something a nuisance when in fact it's not a nuisance,³ so, too, “the mere declaration of the existence of an emergency does not make it so but ... the courts may determine this issue.” *Town of Burnsville v. City of Bloomington*, 128 N.W.2d 97, 101 (Minn. 1964).

In *United States v. Garbish*, 222 U.S. 257 (1911), this Court found that there was no emergency caused merely by high water on the Mississippi River. That case involved a statute regulating hours of labor. It included an emergency exception, and the defendant argued that “the building of levees on the Mississippi ... *at all times* presents an extraordinary emergency.” *Id.* at 259 (emphasis added). The Court said no. Rejecting an argument for deference, the Court found that “no mere requirement of business convenience or pecuniary advantage is an extraordinary emergency”—and that no emergency actually existed. *Id.* at 261. *See also Ellis v. United States*, 206 U.S. 246, 256–57 (1907) (finding no emergency); *cf. United States v. S. Pac. Co.*, 209 F. 562, 566 (8th Cir. 1913) (“the facts as they appear in the record warranted the court in deciding that an emergency, within the means of the statute, existed.”).

State courts often address this question, especially where constitutional provisions limit how the legislature operates, but include exceptions for emergencies. Legislatures sometimes try to exploit these exceptions by falsely declaring emergencies. In *Town of Burnsville*, for example, a city adopted an ordinance annexing a nearby

3. *See, e.g., Olympic Drive-In Theatre, Inc. v. City of Pagedale*, 441 S.W.2d 5, 9 (Mo. 1969); *City of Decatur v. Kushmer*, 253 N.E.2d 425, 427 (Ill. 1969); *Scranton v. Wheeler*, 179 U.S. 141, 157–58 (1900).

town. State law imposed limits on annexation ordinances, but allowed for “emergency” exceptions. So the city declared an emergency, and when challenged in court, said this declaration was conclusive. 128 N.W.2d at 101. The court disagreed, because it was “sounder to adopt a rule of law under which a city council cannot evade the usual mode of [lawmaking] by simply declaring the existence of an emergency when none in fact exists” than to accept the notion that a city “could, whenever it saw fit, evade the [state law].” *Id.* Preserving the force of statutory limits on annexation made it “necessary that the court be permitted to determine what the facts are and to declare ineffective an ordinance improperly adopted.” *Id.*

Washington State provides many other examples. Its constitution entitles voters to hold referenda on laws passed by the legislature, and postpones the effective date of most laws, to provide time for organizing referenda.⁴ But emergency laws go into effect immediately. Thus, the legislature has sometimes tried to declare things emergencies that aren’t, in order to prevent any referendum. Washington courts have not allowed this. *See, e.g., State ex rel. Brislawn v. Meath*, 147 P. 11 (Wash. 1915); *State ex rel. Short v. Hinkle*, 198 P. 535 (Wash. 1921); *State ex rel. Satterthwaite v. Hinkle*, 277 P. 837 (Wash. 1929).

In *State ex rel. Robinson v. Reeves*, 135 P.2d 75 (Wash. 1943), the legislature adopted a bill relating to public utilities regulation, and declared it an emergency law designed to provide interim funding for the government. The court found the emergency declaration false, because the act actually created “a long-range program for the

4. Wash. Const. art. II § 1(B), (C).

acquisition of existing electric utility properties,” instead of providing urgent government funding. *See id.* at 78–79. Blindly deferring to emergency declarations “would destroy the referendum and would permit the legislature ... to [evade the referendum rule] in any instance where it is seen fit to attach to an act a declaration of emergency.” *Id.* at 79.

Likewise, in *State ex rel. McLeod v. Reeves*, 157 P.2d 718 (Wash. 1945), and *State ex rel. Kennedy v. Reeves*, 157 P.2d 721 (Wash. 1945), the legislature created new programs and proclaimed them to be emergencies, even though no emergencies actually existed. The court found these invalid, remarking with dismay on “the custom of attaching emergency clauses to all sorts of bills, many of which cannot by any stretch of the imagination be regarded as actually emergent,” a custom which, if indulged in, would “deliberately ... infringe upon a constitutional right.” *Id.* at 724.

The Government’s contention here that the existence *vel non* of an emergency is “not amenable to judicial review” is therefore plainly false. Opening Br. at 42.⁵ On

5. The Government cites no authority to support its assertion. Amicus American Center for Law and Justice cites three cases for this assertion—*Dalton v. Specter*, 511 U.S. 462 (1994); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); and *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940)—but none had anything to do with emergency declarations. *Regan v. Wald*, 468 U.S. 222 (1984), cited by amici Darrell Issa, et al., also didn’t say courts can’t determine whether emergencies exist. Instead, the Court deferred to the executive regarding a foreign affairs determination that *wasn’t* predicated on an emergency. *See id.* at 243. And *United States v. Spawr Optical Rsch., Inc.*,

the contrary, as the Washington court put it in *Meath*, 147 P. at 13, “judicial aversion” to reviewing declarations of emergency is just as baseless as aversion to judicial determinations of constitutionality. There’s “no more reason for saying that a bill is an emergent measure, when upon its face it is not ... just because the Legislature has said it is so” than there would be for declaring a law constitutional just because the legislature says so. *Id.* “[C]ourts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things.” *Id.* at 15 (citation omitted). *Cf. Trump v. United States*, 603 U.S. 593, 631 (2024) (“[t]he Constitution deals with substance, not shadows.” (citation omitted)).

If it were otherwise—if the executive branch has limitless power to deem things “emergencies”—then it would have an overwhelming incentive to do so in order to bypass the normal lawmaking process. History is replete with dismal examples, from Sulla to Yoon Suk Yeol. Our constitutional tradition, of course, is to the contrary.⁶

685 F.2d 1076 (9th Cir. 1982), also cited by Issa amici, expressly chose *not* to resolve the question. *See id.* at 1080 (“in the absence of a compelling reason to address the difficult questions ... we decline to do so.”).

6. When, for example, some Virginians suggested during the American Revolution that Governor Patrick Henry be made dictator to deal with the British invasion, the idea was greeted with horror and quietly dropped. Tyler, *Patrick Henry* 286–87 (1898). “One who entered into this contest from a pure love of liberty,” wrote Thomas Jefferson, “must stand confounded and dismayed when he is told, that a considerable portion of [the legislators] had meditated the surrender of them into a single hand, and, in lieu of a limited monarch, to deliver him over to a despotic one!” *Jefferson: Writings* 252 (Peterson, ed., 1984).

Obviously genuine emergencies occur, and Presidents have acted swiftly to deal with them. But even then, the existence of an emergency has never been a mere matter of presidential dictate. When President Lincoln suspended *habeas corpus*, for example, he submitted to Congress that the outbreak of war was a “dangerous emergency” because Congress was out of session and could not be “called together” to deliberate in time. *Abraham Lincoln: Speeches and Writings 1859-1865* at 253 (Fehrenbacher, ed., 1989). He then asked Congress to ratify his actions, which it did. 12 Stat 326, ch 63, § 3 (Aug 6, 1861). That was a true emergency, not an *ipse dixit* assertion seeking end-run around the constitutional checks-and-balances system.

This Court has recognized that an emergency must exist *in fact*—it isn’t a matter of Presidential say-so. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court even said that the proposition that officials can simply declare an emergency and thereby suspend the normal lawmaking process was the most “pernicious” idea “ever invented by the wit of man.” *Id.* at 121. It would “lead[] directly to anarchy or despotism.” *Id.* Nor is such a doctrine necessary, because the Constitution provides adequate means to deal with both chronic *and* acute problems. *See id.* at 120.

B. If Congress can act, it’s not an emergency.

The word “emergency” means “pressing necessity” or “perplexing contingency.” *Black’s Law Dictionary* 615 (4th ed. 1968). Although emergencies are usually unexpected, “unexpectedness” is not essential; a foreseen condition can still be an emergency if it’s of such character

that action must be taken with a speed incompatible with ordinary deliberation.

As the Missouri Supreme Court has explained, the question “is not one of foreseeability.... Rather, the test is whether the factual situation is such that there is actually a crisis or emergency which requires immediate or quick ... action for the preservation of the public peace, property, health, safety or morals.” *State ex rel. Tyler v. Davis*, 443 S.W.2d 625, 631 (Mo. 1969). *See also S. Pac. Transp. Co. v. St. Charles Par. Police Jury*, 569 F. Supp. 1174, 1179–80 (E.D. La. 1983) (defining emergency as “a sudden occurrence or exigency, implying imminent danger *which leaves no time for deliberation*, or a sudden or unexpected necessity ... which creates a temporarily dangerous condition usually *necessitating immediate or quick action*.” (emphasis added; citation omitted)).

In other words, an emergency is an acute, as opposed to a chronic, condition. *Malibu W. Swimming Club v. Flournoy*, 131 Cal. Rptr. 279, 282 (Cal. App. 1976) (“[T]he vital element is not official prescience or its lack but rather the acuteness of the threat.”). As this Court put it in *Garbish*, “the phrase ‘continuing extraordinary emergency’ is self-contradictory.” 222 U.S. at 261 (cleaned up). Yes, chronic situations can become emergencies, but any crisis—no matter how severe—in which the authorities *can* convene to deliberate over a course of action in accordance with constitutional procedures is by definition *not* an emergency.

That’s why *BST Holdings, supra*, found that an agency’s mask- and vaccine-mandates could not be justified as emergency powers. “[A] purported ‘emergency’ that

the entire globe has now endured for nearly two years, and which [the agency] itself spent nearly two months responding to” was an “unavailing” argument for such power. 17 F.4th at 611.

Most importantly, “emergency does not mean expediency, convenience, or best interest.” *Hinkle*, 277 P. at 838; *accord*, *Garbish*, 222 U.S. at 261.

Thus, contrary to the Government’s claim, the existence of an emergency isn’t a “political question” any more than the existence of a nuisance, *Anderson v. Sager*, 173 F.2d 794, 798 (8th Cir. 1949), or of genocide, *Al-Tamimi v. Adelson*, 916 F.3d 1, 10–13 (D.C. Cir. 2019), or of an act of war. *See Kaplan v. Cent. Bank of Iran*, 896 F.3d 501, 514 (D.C. Cir. 2018).

C. Trade imbalances and drug smuggling aren’t emergencies.

Executive Order 14257 asserts that “a lack of reciprocity in our bilateral trade relationships,” as evidenced by “persistent annual U.S. goods trade deficits,” is a “national emergency.” It’s not.⁷

The United States has run a “trade deficit” since 1976. Obstfeld, *The U.S. Trade Deficit: Myths and Realities*, Brookings Inst. (Mar. 26, 2025).⁸ The Order itself refers

7. Note that the Government’s brief cites *no* authority to support the Presidential assertion of an emergency except the say-so of the President and his deputies.

8. <https://www.brookings.edu/articles/the-us-trade-deficit-myths-and-realities/>.

to “trade deficits” as “persistent.” And public deliberation over their significance, and the costs and benefits of restricting international trade, have been ubiquitous in American political life since at least 1976. It’s been the subject of multiple federal laws, from the Trade Agreements Act of 1979 to the Trade Act of 2002. In other words, there’s no reason the ordinary deliberative process cannot take place. That alone proves no emergency exists. Again, “the phrase ‘continuing extraordinary emergency’ is self-contradictory.” *Garbish*, 222 U.S. at 261 (cleaned up).

The same is true of drug smuggling, which Order 14257 also cites as proving the existence of an emergency. Illicit drugs have come across our borders for well over a century and that’s been the topic of multiple federal statutes since 1937. *See Histories of Drug Trafficking in Twentieth-Century Mexico* 44 (Smith & Pansters, eds., 2022).

In other words, “trade deficits” and drug-smuggling aren’t “unusual” or “extraordinary” threats for purposes of IEEPA. 50 U.S.C. § 1701. They are, on the contrary, *usual and ordinary*. *See Walker v. Metro Mach. Corp.*, 50 F. App’x 104, 106 n.1 (4th Cir. 2002) (definition “usual” as “most often seen, heard, used, etc.; common; ordinary; customary.”); *Daniel v. Smoot*, 287 F. Supp.3d 74, 83 (D.D.C. 2018) (“ordinary” means “in the regular course of events; normal; usual.” (citation omitted)). And they’re for the legislature, not the executive, to address.

D. Actually, trade “deficits” aren’t a *threat* at all.

America has run a “trade deficit” for 50 years, yet the standard of living is *far* higher now than it was in the

1970s. The median household income in 1975 was \$68,170; it's now about \$98,680 in inflation-adjusted dollars.⁹ And the cost of virtually every good has fallen, too. In 1972, coffee cost the equivalent of \$4.57 per pound in today's dollars, and milk the equivalent of \$6.25 per gallon.¹⁰ Purchasing power has increased by more than 60% in this half century. *Comparing the Costs of Generations*, Consumer Affairs (July 3, 2025).¹¹ Perhaps the single most important factor in this improvement in the standard of living has been the reduction of trade barriers. Griswold & Packard, *How Trade Agreements Have Enhanced the Freedom and Prosperity of Americans*, Cato Inst. (Aug. 27, 2024).¹²

The Government's contention that "[w]ith tariffs, we are a rich nation; without tariffs, we are a poor nation," Opening Br. at 2, is so contrary to the well-settled principles of economics as understood since *Wealth of Nations* was published¹³—and as agreed by, in effect,

9. *Real Median Family Income in the United States*, Federal Reserve Bank of St. Louis (Sept. 9, 2025), <https://fred.stlouisfed.org/series/MEFAINUSA672N>.

10. Waggoner, *50 Years of Inflation: What Things Cost in 1972*, AARP (July 7, 2022), <https://www.aarp.org/money/personal-finance/prices-compared-to-50-years-ago/>.

11. <https://www.consumeraffairs.com/finance/comparing-the-costs-of-generations.html>.

12. <https://www.cato.org/publications/how-trade-agreements-have-enhanced-freedom-prosperity-americans>.

13. Amicus America's Future (at 29) quotes Vattel to argue that nations have legal authority to restrict commerce with other nations. That's not in dispute. Yet Vattel went on to observe that

the entire economics profession today—that it fails the rational basis test. *See, generally*, Br. Amicus Curiae of Scott Lincicome, et al.

The very concept of “trade deficit” is economically senseless. As Thomas Sowell has written, “[i]f the goods and services available to the American people are greater as a result of international trade, then Americans are wealthier, not poorer, regardless of whether there is a ‘deficit’ or a ‘surplus’ in the international balance of trade.” *Basic Economics* 477 (5th ed. 2015). Freer trade makes nations more prosperous because it enables them to specialize according to comparative advantage. That’s why, contrary to the claims of critics, “the number of American jobs **increased** after [NAFTA was adopted].” *Id.* at 475 (emphasis original).

Actually, “trade deficits” are proof of “strong domestic investment or fiscal expansion, financed by global savings at a relatively low borrowing cost.... [They are] explained by deeper structural forces [such as] ... strong relative productivity growth, global savings imbalances and the U.S. dollar’s role as the dominant reserve currency.”

blocking international trade is an extremely grave step—indeed, he characterized it as a “refus[al] to comply with the general duties of humanity,” because he saw trade as morally obligatory. “Men are obliged mutually to assist each other as much as possible ... [so] it became a duty to sell to each other at a fair price what the possessor himself has no occasion for and what is necessary to others.” *The Law of Nations* bk. I §§ 88, 94. In any event, Vattel wrote two decades before Smith earned immortality by refuting the mercantilist fallacies under which Vattel labored. *See Bruhlmeier, New Essays on the Political Thought of the Huguenots of the Refuge* 69 (Laursen, ed., 1995).

Garcia & Yi, *Are Trade Deficits Good or Bad, and Can Tariffs Reduce Them?*, Dallas Federal Reserve (Sept. 4, 2025).¹⁴

More simply, a “trade deficit” occurs because Americans are wealthy enough to buy products from overseas manufacturers rather than being forced to make those products themselves. Americans could cease *all* international trade tomorrow, and force themselves to manufacture all of their own goods. That would make them poorer, not richer.

Worse still, the calculations respecting the alleged “trade deficit” only take into consideration the buying and selling of *products* and ignore the buying and selling of *services*. Yet as our standard of living has risen, and Americans have emerged as the leaders of technological innovation and the ideas industry, we have tended to trade our *services* for *goods* from abroad. This isn’t a “deficit” of any sort, but a testament to the advancement of the American economy. See Klein, *Does International Trade Hurt the United States?*, EconoFact (Apr. 15, 2025).¹⁵

Thus, the word “deficit” is inapposite. Buyers get what they pay for and pay for what they get, so there’s no actual deficit. Instead, the word is used as a dysphemism: an exploitation of scary-sounding language to make something seem threatening when it isn’t. As Sowell

14. <https://www.dallasfed.org/research/economics/2025/0904>.

15. <https://econofact.org/does-international-trade-hurt-the-united-states>.

observes, “[s]lippery words can make bad news look like good news and vice versa.” *Supra* at 477.

It’s often said that “trade deficits” represent a national security danger because if manufacturing occurs outside the United States, then in the event of international conflict—if, say, an overseas factory is seized by a hostile government—Americans would lack the wherewithal to shift supply lines and manufacture needed items domestically. But this, if true, is the fault of *domestic* barriers to entry. If it’s cheaper to buy, say, microchips from Taiwan than the United States, industry will do so, and if the People’s Republic were then to invade Taiwan, there’s nothing to prevent industry from shifting operations to the United States *except our own restrictions on the economy*. The solution, then, is to reduce our domestic regulatory burden—not to restrict Americans’ freedom to trade.

Blocking international trade in order to protect domestic manufacturers against legitimate competition actually *undermines* American readiness. Protectionism “endangers U.S. domestic and global security interests,” not only because it “sets a poor example for [other] governments,” but because it “impose[s] costly procurement requirements on the U.S. Armed Forces and preclude[s] purchase of the best products, technologies, and services.” Cronin, ed., *America’s Security Role in a Changing World* 31 (2009). *See also* Griswold & Freytag, *supra* at 10 (“a trade surplus can actually betray weakness in an economy to the extent that it shows an inability to import crucial goods and commodities.”). Meanwhile, our domestic manufacturing sector, grown flabby by being shielded from market competition, becomes *less* fit for any

confrontation against foreign enemies. *See* Henderson, *Does National Security Justify Trade Restrictions?*, Hoover Inst. (Dec. 5, 2024).¹⁶

II. The power to tax versus the power to regulate.

A. This case is most easily resolved by using a clear-statement rule.

The government says tariffs can qualify as a kind of regulation. Opening Br. at 20. Maybe, but that’s not the question. The question is whether Congress, in passing IEEPA, gave the President a limitless power to declare emergencies and thereby impose taxes on Americans in whatever amount he decides for as long as he wants. Given the profound constitutional implications of answering yes, this Court should at least require a clear statement to that effect in the statute.

“In traditionally sensitive areas ... the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *United States v. Bass*, 404 U.S. 336, 349 (1971). Clear statement rules are appropriate where one possible interpretation of a statute would cause such an “extraordinary” departure from constitutional norms that “one would normally expect it to be explicitly decreed rather than offhandedly implied.” Scalia, *A Matter of Interpretation* 29 (1997).¹⁷

16. <https://www.hoover.org/research/does-national-security-justify-trade-restrictions>.

17. Justice Barrett noted the difference between a clear statement rule and the major questions doctrine in *Biden v.*

This Court should decline to interpret IEEPA as granting the President a power so constitutionally offensive as the power to tax at will, absent a clear statement to that effect. The framers would have reacted with horror at the idea of taxation imposed unilaterally by Presidential dictate. It runs contrary to everything they held dear.

Consider the background against which they worked: the imposition of taxes by the Stuart kings without Parliament’s input was a leading cause of the English Civil War and the Glorious Revolution. John Hampden—the MP who refused to pay “ship money” on the grounds that a tax imposed by the king rather than Parliament was invalid—was put on trial in the famous *Ship-Money Case*, 3 St. Tr. 825 (Exch. 1637), and although he lost, became a hero to America’s founders. See Graber, *Ship-Money: The Case That Time and Whittington Forgot*, 35 Const. Comm. 47 (2020).

The Stuarts persisted in imposing unilateral taxes, leading to such unrest that Parliament eventually deposed James II in 1689 and replaced him with William and Mary, on the condition that they agree to a Bill of Rights that

Nebraska, 600 U.S. 477, 507 (2023) (Barrett, J., concurring). The Government’s argument that the latter doesn’t apply to the foreign policy realm, Opening Br. at 34–35, begs the question. That argument rests on the assumption that imposing tariffs is part of the President’s inherent Article II power. But the President *does not* “enjoy concurrent constitutional authority” regarding tariffs. *Id.* at 34. On the contrary, *Congress and Congress alone* has power “to lay and collect taxes, duties, imposts, and excises,” as well as to “regulate commerce with foreign nations,” U.S. Const. art. I § 8, so there’s no “presumption” to “flip[.]” Opening Br. at 34.

reiterated that the taxing power belongs to Parliament, not the king. Ackroyd, *Rebellion 168–69*, 372 (2014). Less well known is that unilateral taxes were also imposed on the American colonies during this period, when Charles II dispatched the dictator Edmond Andros to rule over New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, and New Jersey. He imposed quit-rents without legislative input—and in 1689, angry colonists overthrew him for “rais[ing] taxes as he pleased” without “any liberty for an assembly.” Byfield, *An Account of the Late Revolution in New England* 7–19 (1689).

America’s founders knew this history. When Parliament began taxing them, they protested that this violated the basic principle that taxes are a matter for *the people’s elected representatives*. “We have always understood it to be a grand and fundamental principle of the [British] Constitution, that no freeman should be subjected to any tax, to which he has not given his own consent, in person or by proxy,” wrote John Adams. *John Adams: Revolutionary Writings 1755–1775* at 126 (Wood, ed., 2011). John Dickinson agreed:

No free people ever existed, or can ever exist, without keeping, to use a common, but strong expression, “the purse strings” in their own hands. Where this is the case, they have a constitutional check upon the administration.... But where such a power is not lodged in the people, oppression proceeds uncontrolled in its career.

The American Revolution: Writings from the Pamphlet Debate 456 (Wood, ed., 2015) (emphasis eliminated).

As for delegation, even Parliament seems never to have contemplated empowering the king to unilaterally impose taxes. But in early 1774, when Parliament punished Boston for the Tea Party by closing its harbor, it did delegate to the king the authority to determine whether and when to reopen parts of the harbor. *See* Boston Port Act, 14 Geo. 3 c. 19 § 7. This struck colonists as an outrageous violation of the separation of powers. It had been “thrown in for no other purpose than that of setting a precedent for investing his majesty with legislative powers,” wrote Thomas Jefferson. “If the pulse of his people shall beat calmly under this experiment, another and another will be tried, till the measure of despotism be filled up.” *A Summary View of the Rights of British America* (1774), reprinted in *Jefferson: Writings*, *supra* at 113.

For these reasons, the Constitution’s authors gave the taxing power exclusively to Congress—indeed, primarily to the House of Representatives, which was considered closest to the people. The idea of this power being held by one single individual was anathema. This Court was therefore on solid historical ground when it said that “[t]axation is a legislative function, and Congress ... is the sole organ for levying taxes.... It would be ... a sharp break with our traditions to conclude that Congress had bestowed on [the executive branch] the taxing power.” *Nat’l Cable Television Ass’n, v. United States*, 415 U.S. 336, 340–41 (1974).

Letting the President impose taxes of whatever amount whenever he wants for as long as he wants is such a sharp break with constitutional practice that it well warrants a clear-statement requirement. No clear statement exists here. As the court below noted, every

other law giving the President power to impose tariffs uses that word, but IEEPA doesn't—nor does it contain any guidelines or limitations regarding how such a power is to be used. *V.O.S. Selections, Inc. v. Trump*, 149 F.4th 1312, 1332 (Fed. Cir. 2025). That's not a clear statement.

B. The “greater includes the lesser” argument doesn't work.

One potential pitfall in examining this question is the “greater-includes-the-lesser” argument: supporters of the tariffs sometimes contend that because the President can impose an embargo on a country for national security purposes, he must be able to take the lesser step of imposing tariffs. *Cf.* Opening Br. at 29. This reasoning is fallacious.

The “greater-includes-the-lesser” rule only applies where the purported “lesser” is a *subset* of the “greater.” If all As are also Bs, then A is a subset of B. But if some As are *not* Bs, then A is *not* a subset of B, and lesser/greater mischaracterizes their relationship entirely. In other words, the “greater-includes-the-lesser” rule is *quantitative* in nature; if there's a *qualitative* distinction between As and Bs, the approach falls apart, leading to faulty conclusions.

In *The Right to Work for the State*, 16 Colum. L. Rev. 99 (1916), Thomas Reid Powell explained this using an apt example. Consider the purported syllogism:

Major premise: There's a class of businesses A which the state can wholly exclude from operation.

Minor premise: The X corporation is an A business.

Conclusion: Therefore, the state can impose *any burden it chooses* on the X corporation.

See *id.* at 110. As Powell noted, this commits “the fallacy of four terms,” because the conclusion contains a predicate differing from that in the major premise. *Id.* at 111. “Logically a thing which may be *absolutely excluded* is not the same as a thing which may be subjected to burdens of a *different* kind, even though such burdens would be regarded by all as less onerous than the burden of absolute exclusion.” *Id.* (emphasis added).

Tariffs are *not* a subset of embargoes. An embargo is “a governmentally imposed quantitative restriction—of zero—on the importation of merchandise.” *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 185 (1988). It blocks people from engaging in transactions.¹⁸ It doesn’t raise revenue, except by accident; its goal is to bar trade. Tariffs, on the other hand, are taxes, which don’t forbid trade, but

18. Thus the statute in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), empowered the President to issue a “proclamation [that] ... it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war” to combatants in the Spanish Civil War. *Id.* at 312. Could Roosevelt instead have required arms dealers to pay a \$1 tax for every gun sold? Such an interpretation would have been absurd. Embargoes traditionally include an “exceptions” clause, but this is to permit limited *licensing* exceptions—not as a back door allowing taxation. Cf. *United States v. Hassanzadeh*, 271 F.3d 574, 582 (4th Cir. 2001) (“The need for such a license ... demonstrate[s] the breadth of the core ban.”).

increase costs to buyers and generate revenue for the government. *Pac. S. S. Co. v. Cackette*, 8 F.2d 259, 261 (9th Cir. 1925) (“a system of rates and charges.”).

Tariffs create a different set of incentives than embargoes do, both for consumers and the government. Consumers can still buy, although their cost/benefit analysis is changed by the rate, and the government receives income, which it must decide whether and how to spend, and it must calculate the political and social costs of raising or lowering the amount. These calculations are, of course, the kind of “basic and consequential tradeoffs” involved in any tax policy—tradeoffs our constitutional system expects Congress, not the President, to sort out. *Biden*, 600 U.S. at 506 (citation omitted). In other words, taxes on imports raise a slew of distinct legal and policy concerns that *qualitatively* differentiate tariffs from embargoes.

The Government’s assertion that IEEPA gives it the gamut of power “from ‘compel’ to ‘prohibit’ and everything in between,” therefore commits a fallacy. Opening Br. at 29. Not “everything” falls “between” these two poles. The President could not, for example, rely on the embargo power to order all importers to emblazon his picture on all their packaging, or forbid them from selling to members of a particular minority group, or allow imports in exchange for a direct deposit into his personal checking account. The reason is that such things would *not* be “lesser” to the category of embargoes. They wouldn’t be “between” “compelling” and “forbidding.” Import taxes are also not between those poles.¹⁹

19. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), on which the Government relies, is not to the contrary.

In short, it's a *non sequitur* to say that because the President can impose embargoes as part of his foreign policy power, he can also implement revenue-generating tariffs on every country in the world under that same power. An embargo can be analogized to an arrest of a suspect by a police officer—whereas a tariff is more analogous to the establishment of a criminal statute which the police are expected to enforce throughout the community. Even if the former is an executive power, the latter is qualitatively legislative.

III. The “intelligible principle” test shows why IEEPA doesn’t delegate the taxing power.

A. Special considerations apply when the “intelligible principle” test is used in this context.

Courts have long accepted legislative delegations of *rulemaking* power to agencies (within limits), but the taxing power differs from rulemaking in ways that make delegation of this power uniquely dangerous and warrants an especially careful attention to constitutional principles.²⁰

There, the statute satisfied the clear-statement requirement; it explicitly empowered the President to “adjust the imports of (an) article and its derivatives,” which “clearly” included the power to impose fees. *Id.* at 561. No such language appears in IEEPA, which is about banning, not adjusting. That statute also included “standards to guide the President in making the decision whether to act,” which isn’t true of IEEPA. *Id.* at 559 n.10. *Algonquin* did not rest on a “greater includes the lesser” argument, but on the statute’s plain language.

20. *FCC v. Consumers’ Rsch.*, 145 S. Ct. 2482, 2498 (2025), held that Congress need not set a “numeric cap or tax rate”

First, rules differ from taxes. *Cf. NFIB v. Sebelius*, 567 U.S. 519, 546–74 (2012). Rules establish standards for behavior that’s allowed or forbidden. Taxes, by contrast, impose revenue-raising charges on permissible behavior. “[T]axes are ... usually motivated by revenue-raising, rather than punitive, purposes.” *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779–80 (1994).

That makes taxes quintessentially *matters for deliberation and compromise*—i.e., legislative determination—because they involve complicated cost-benefit analyses and tradeoffs—which isn’t necessarily true of rules. In *Missouri v. Jenkins*, 495 U.S. 33 (1990), the Court observed that it’s inappropriate for courts to impose taxes because “[t]he very complexity of the problems of financing ... suggests that there will be more than one constitutionally permissible method of solving them, and that ... the legislature’s efforts to tackle the problems should be entitled to respect.” *Id.* at 52 (cleaned up). For the same reasons, taxation is a quintessentially *legislative* matter, depending on input from multiple stakeholders—and unsuited to unilateral executive action.

when empowering agencies to raise revenue. But it emphasized the statutory limits on the agency’s revenue-raising power. The agency could only charge “to support the universal-service programs Congress has told it to implement.” *Id.* at 2501. IEPA, by contrast, contains no instructions and creates no program that could limit the revenue-gathering either qualitatively or quantitatively. *Consumers’ Rsch.* acknowledged that a law lacking such standards—for example, one that “authorize[s] the President to approve ‘codes of fair competition’ ... ‘throughout the country,’ yet impose[s] ‘few restrictions’ and ‘set[s] up no standards’ aside from a ‘statement of the general aims’”—would be unconstitutional. *Id.* at 2503 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–22 (1935)). This case is much more like *Schechter Poultry* than like *Consumers’ Rsch.*

Second, although delegation of rulemaking authority to the executive has long been accepted, that's because it's subject to limits—limits that don't port over easily into the tax context. The “intelligible principle” rule holds that Congressional authorization of rulemaking authority isn't the giving away of legislative power as long as Congress limits it by prescribing guidelines to cabin the executive branch in carrying out that power. “Intelligible principles” can be broad—they've included such terms as “just and reasonable,” *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 431 (1930), or “in the public interest,” *New York Central Securities Corp. v. United States*, 287 U.S. 12, 21 (1932)—although other legal doctrines such as the major questions doctrine also help ensure that agency actions are within the scope of statutorily delegated authority. Bressman, *Schechter Poultry at the Millennium*, 109 Yale L.J. 1399, 1408–09 (2000). These limits prevent the wholesale giving away of legislative power to the executive.

But it's unimaginable that Congress could, say, repeal all taxes tomorrow and replace them with a single-sentence statute allowing the President to levy whatever taxes he believes are “just and reasonable” or “in the public interest.” *Tagg Bros.*, 280 U.S. at 431; *N.Y. Cent. Sec. Corp.*, 287 U.S. at 21.

Simply put, a principle that's intelligible in one context might not be intelligible in another context. One purpose of the test is to make it possible “in a proper proceeding to ascertain whether the will of Congress has been obeyed.” *Yakus v. United States*, 321 U.S. 414, 426 (1944). But if Congress were to give the President power to tax “for the good of the public,” it would be impossible to make that determination. *Cf. Consumers' Rsch. v. FCC*, 109 F.4th 743,

761 (5th Cir., en banc 2024), *rev'd*, 145 S. Ct. 2482 (2025) (“it remains a mystery how we are supposed to ‘ascertain whether the will of Congress has been obeyed.’”)

It would be equally impossible to determine whether a delegation of the taxing power to the President would be a “major question,” as opposed to a minor one. Would a three-penny tax on tea, imposed by the President without Congressional involvement, be one of “those important subjects, which must be entirely regulated by the legislature itself,” or merely a “fill[ing] up [of] the details”? *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

Presumably, all taxes are “major questions.”

True, Congress sometimes adopts statutes that give the executive power to apply or not apply tax laws in *specific instances*, see, e.g., *New Orleans Waterworks Co. v. Louisiana Sugar-Refin. Co.*, 125 U.S. 18, 31 (1888), or to exempt specific items from taxation, *Marshall Field Co. v. Clark*, 143 U.S. 649 (1892), but in so doing, it hasn’t purported to give the President discretion to decide *what* taxes to impose or *how much*. Rather, these instances involve Congress giving the President an “on/off switch,” or a “trigger for effectiveness,”²¹ which is *not* what’s happening here.

Marshall Field involved a statute²² imposing tariffs on a variety of goods, which then exempted a list of

21. Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 364 (2002).

22. 26 Stat. 567 (1890).

specified goods, and then let the President suspend that exemption if, in his judgment, another country set its import restrictions in ways that were “unreasonable.” *Id.* at 680. The Court upheld this because Congress had not delegated any power regarding “the expediency or the just operation” of the taxes. *Id.* at 693. Instead, the statute established a formula for the President to follow when turning the on/off switch; he “had no discretion ... except in respect to the duration of the suspension,” the Court said. “[T]he suspension was absolutely required when the president ascertained the existence of a particular fact.” *Id.*

Likewise, in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), the Court upheld the constitutionality of a statute²³ allowing the President to decide when to impose certain tariffs. That, too, was not giving away the taxing power; instead, Congress specified the terms of the tax, but then “[felt] itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because [it was] dependent on future conditions.” *Id.* at 407. So it let the White House determine when the triggering event had occurred. In other words, it, too, was an “on/off switch.”²⁴ The act in question

did not in any real sense invest the President with the power of legislation, because nothing

23. 42 Stat. 858 (1922).

24. Even the First Non-Intercourse Act during the Washington Administration, took this form, prohibiting trade, but then empowering the President to turn off that prohibition on certain conditions—not to impose a schedule of taxes. 1 Stat. 565, 566 (1798).

involving the expediency or just operation of such legislation was left to the determination of the President.... What the President was required to do was merely in execution of the act of Congress.... He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect.

Id. at 410–11.

Exactly the opposite is true here. IEEPA contains none of the detailed features of the laws at issue in *Field* or *J.W. Hampton*. Instead, the Executive Branch has asserted power to create tariffs that did not previously exist, to impose them on items that may or may not have been subject to tariffs, and to levy them in amounts, or pursuant to formulae, established entirely by the White House. That’s not an “on/off switch.” That’s tax-creation.

B. IEEPA fails the “intelligible principle” test.

Compare IEEPA with the statute in *J.W. Hampton*. That law set forth a “dutiabale list,” declaring that “there shall be levied, collected, and paid” certain duties on a variety of imports. 42 Stat. at 858. The list was highly detailed, including everything from oxide of antimony, taxed at 2 cents per pound, *id.* at 859, to “earthenware and crockery ware composed of a nonvitrified absorbent body,” taxed at 45 percent ad valorem, *id.* at 870. The same is true of the statute in *Field*, which was even more detailed. It specified that penknives and pocket-knives were taxed at 50 cents per dozen, leaf tobacco suitable for cigar-wrappers at \$2 per pound, and that wools of the

third class were taxed at thirteen cents per pound. 26 Stat. at 585, 595.

IEEPA and the other statutes cited in the Executive Orders, by contrast, contain *no* list of dutiable items, valuations, or other directives regarding amounts to be charged.²⁵ And where the statutes in *J.W. Hampton* and *Field* set out specific rates on specific items, leaving it to the President to turn an on/off switch, neither IEEPA nor any of the other statutes contains any switch at all.

IEEPA lets the President “regulate,” 50 U.S.C. § 1702(a)(1)(A), but it sets forth no formulae, rates, or amounts of taxation; specifies no items to be taxed; is silent respecting countries of origin; and provides no standard by which the President can “ascertain[] the existence of [any] particular fact”—all factors *Field* found decisive. 143 U.S. at 693. Instead, IEEPA is a broad grant of emergency power to regulate for purposes of temporary national emergencies. It contains no indicia that it was designed as a tax or tariff statute.

Whatever intelligible principles IEEPA contains were intended to serve the statute’s *actual* purpose of authorizing embargo and confiscation powers in case

25. IEEPA did once refer to the Harmonized Tariff Schedule of the United States (HTSUS), when Congress amended IEEPA to ban the importation of gemstones from Burma—while allowing the President to end that ban in certain circumstances. 122 Stat. 2632. That law (now lapsed) defined the terms “rubies” and “jadeite” by reference to HTSUS. *See id.* at 2639. This shows that Congress knows how to incorporate the tariff schedule into a statute empowering the President to impose sanctions when it wants to. It hasn’t done so here.

of *actual* emergency, not the unanticipated purpose of international trade regulation for which it is now being utilized. That’s why *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093 (4th Cir. 1993), is unhelpful. It said IEEPA satisfied the intelligible principle test because it “defines the specific circumstances in which the President may act and to what extent,” and in particular because “[t]he powers granted to the President are explicitly defined and circumscribed.” *Id.* But *Arch Trading* involved an order forbidding travel to Iraq and the sale of goods there during the First Gulf War, which was plainly the purpose for which IEEPA was designed. That bears little resemblance to this case, where the statute is being twisted into a license for central planning of the economy.

So, while *Arch Trading* found the “explicit[]” limits on Presidential power in IEEPA (or, in the synonymous phrase from *Consumers’ Rsch.*, IEEPA’s “qualitative limits,” 145 S. Ct. at 2501) adequate, those limits don’t bear on *taxation*. They aren’t “intelligible” in that context. Tax laws usually provide formulae for calculating levies. None is present in IEEPA—which contains neither quantitative nor “qualitative” limits. *Id.* And what limits it *does* contain can’t be applied to taxes.

For example, Section 1702(a)(1)(A) lets the President “investigate, regulate, or prohibit.” But these verbs don’t fit with “tax.” Tax and tariff statutes virtually always use verbs such as “levy,” “collect,” or “assess,” instead—and these don’t appear in IEEPA. Likewise, Section 1702(a)(3) says all persons are immune from liability “with respect to anything done or omitted in good faith in connection with the administration of ... any regulation, instruction, or direction issued under this chapter”—which is hard

to square with taxation, where liability doesn't turn on questions of good faith. And Section 1702(b)(3) bars the President from "regulat[ing] or prohibit[ing] ... the importation ... of any information," when *information* can't be taxed.

The bottom line is that applying the intelligible principle test helps show why IEEPA doesn't delegate taxing power to begin with—and, if it does, it fails that test.

CONCLUSION

The decision should be *affirmed*.

Respectfully submitted,

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