Nos. 24-1287 & 25-250

In the
Supreme Court of the United States

LEARNING RESOURCES, INC., ET AL., *Petitioners,*
v.
DONALD TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Respondents.*

DONALD TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners,*
v.
V.O.S. SELECTIONS, INC., ET AL., *Respondents.*

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

BRIEF FOR TAX LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS IN NO. 24-1287 AND RESPONDENTS IN NO. 25-250

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INTEREST OF *AMICI CURIAE*[1]

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SUMMARY OF ARGUMENT

The Constitution gives Congress, and not the President, the authority to "lay and collect Taxes, Duties, Imposts, and Excises." U.S. Const. art. I, § 8, cl. 1. The Constitution also mandates that revenue measures begin in the House of Representatives, requires that such measures be geographically uniform, and prohibits the states from imposing import duties without congressional consent. *Id.* § 7, cl. 1; *id.* § 9, cls. 5–6; *id.* § 10, cls. 2–3. Read together with Article I's vesting of "all legislative Powers" in Congress and the familiar requirements of bicameralism and presentment, these provisions reflect a recurring

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person or entity other than the *amici curiae* or their respective institutions has made a monetary contribution intended to fund the preparation or submission of this brief.

constitutional commitment: Tariffs are national and legislative—and thus to be determined by a representative Congress.

History bolsters these textual commitments. State conflict over import duties was perhaps the defining policy controversy under the Articles of Confederation. At the nation's Founding, the former colonies had just fought the Revolutionary War motivated in part by "taxation without representation." Everyone understood that duties on imports would need to serve as the country's primary source of revenue for decades to come—but state conflict rendered that option unavailable to the federal government. The lack of a federal impost crippled national finance and spurred the Constitutional Convention of 1787.

The Framers' solution to this problem was to place control over import duties in the hands of a representative Congress, which could appropriately weigh the powerful and divergent interests at stake. In exchange, the states gave up their concurrent tariff authority—a fact that distinguishes tariffs from taxes writ large and weighs heavily against unbounded delegations to the President. The Framers and ratifiers believed that Congress, and not the President, was the appropriate institution for balancing interests in a new federal power that the states themselves would no longer possess. Indeed, in no less an authority than *The Federalist No. 10*, James Madison listed the proper treatment of foreign goods as his go-to example of a factional interest that would be refined by "passing [it] through the medium of a chosen body of citizens." *The Federalist No. 10*, at 82 (James Madison) (Clinton Rossiter ed., 1961). That "chosen body" was Congress, not the President.

Post-ratification practice confirms this structural understanding. Starting just days after the very first Congress achieved a quorum, early Congresses enacted repeated, extensive, and detailed tariff schedules—delegating only limited administrative details to the Executive Branch. The Executive's role—which the Executive Branch itself understood—was confined to fact-finding and execution within these congressional boundaries. See Jennifer L. Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1398–1405 (2019) (describing this early history and concluding that early customs laws are "a key example of Congress legislating with specificity in the early years under the new Constitution").

Attaching a "foreign affairs" label to the tariffs at issue here makes no difference. Tariffs certainly carry diplomatic consequences. But that is nothing new. The founding generation understood it when they assigned the tariff authority to a representative Congress. The states understood it when they ceded their tariff authority in reliance on that power being wielded by a representative Congress. And the early Congresses understood it when they enacted extensive and detailed tariff legislation shot through with foreign affairs purpose and consequence.

The legislative delegation at issue in the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*—if read to encompass the sweeping tariffs at issue here—cannot be squared with the Constitution's textual allocation of authority, the original understanding of the tariff power, and post-ratification practice. This Court, moreover, has never upheld the boundless presidential authority that the Government now claims to draw from IEEPA. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S.

394, 404 (1928) (upholding delegation that empowered the President to adjust customs duties according to a preset statutory formula that was "perfectly clear and perfectly intelligible"); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672–73, 692–94 (1892) (upholding delegation that allowed the President to find facts imposing new duties when "Congress itself prescribed, in advance, the duties to be levied"). It should not break with more than two centuries of practice and understanding to do so for the first time here.

ARGUMENT

Pre-Ratification History, Constitutional Text, Constitutional Structure, and Early Practice All Confirm that Broad Tariff Delegations Should Be Viewed with Special Skepticism.

In 1787, the authority to impose duties on imports was the single most important fiscal power that the Founders contemplated for the new federal government.[2] Under the Articles of Confederation, Congress struggled to service the massive Revolutionary War

[2] The constitutional terms "imposts" and "duties" overlap with (and are broader than) tariffs, with "duties" being the broadest term. As a matter of historical usage, "the impost" referred to a uniform import duty on foreign goods. 2 *The Records of the Federal Conventions of 1787*, at 305 (Aug. 16, 1787) (Max Farrand ed., 1911) ("[D]uties are applicable to many objects to which the word imposts does not relate. The latter are appropriated to commerce; the former extend to a variety of objects.") (statement of James Wilson); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 437–38 (1827) (Marshall, C.J.) ("An impost, or duty on imports is a custom or a tax levied on articles brought into a country."). The term "tariffs" generally refers to a varied schedule of duties on imports. Noah Webster, *An American Dictionary of the English Language*, *s.v.* "tarif" (1828) (defining the verb as "to make a list of duties on goods").

debt, and viewed a national impost as the only reliable revenue source—a far more important source than so-called "internal" taxation. Yet Congress twice failed to secure a federal impost because a single state vetoed national action. See, *e.g.*, 23 *Journals of the Continental Congress 1774–1789,* at 769–72 (Dec. 6, 1782), 788–790 (Dec. 12, 1782) (Gaillard Hunt ed., 1914) (Rhode Island blocking the 1781 impost proposal); 30 *Journals of the Continental Congress 1774–1789,* at 70–76 (Feb. 15, 1786), 439–44 (Jul. 27, 1786) (John C. Fitzpatrick ed., 1934) (New York blocking the 1783 impost proposal). Congress's inability to enact a federal impost and reduce the national debt was a key catalyst for constitutional reform.

The states, however, valued their independent power over imports. The state economies were distinct and varied, and the states feared that national tariffs (even uniform ones) would advantage certain states at the expense of others. See, *e.g.*, 2 *The Records of the Federal Convention of 1787*, at 449–55, 631 (Max Farrand ed., 1911); David Schizer & Steven Calabresi, *Wealth Taxes Under the Constitution: An Originalist Analysis*, 77 Fla. L. Rev. 1402, 1468–70 (2025). The delegates at the Philadelphia Convention made clear that the states would not accept a system that deprived them of influence over foreign duties. See, *e.g.*, 2 *The Records of the Federal Convention of 1787*, at 2–12, 83, 183–85, 441–42 (Max Farrand ed., 1911).

The Convention produced a framework that reflected the importance of tariffs both generally and to the states. The Constitution gave Congress the power "to lay and collect Taxes, Duties, Imposts and Excises," subject to a national uniformity requirement—a rough requirement of interstate equality. U.S. Const. art. I, § 8, cl. 1. The states ceded authority to

impose their own import duties without congressional consent. In short, Congress gained exclusive control over the single most important funding tool—the import duties that had obvious national and international implications. And the states gave up their own authority over import taxes on the assumption that they would retain input through Congress—not a President who would come from a single state. Meanwhile, Congress and the states retained concurrent authority over the far less important internal taxes.

Early practice reflected this understanding. Congress closely guarded its tariff authority, drafting reticulated tariff statutes, and delegating only appropriately cabined discretion to the Executive Branch. The Treasury, under the leadership of Alexander Hamilton, initially took an advisory approach to tariffs, providing recommendations to Congress on how it should update tariff schedules. And Congress and the Treasury behaved this way despite universal recognition that tariffs were an instrument of foreign policy.

Constitutional text, structure, and history all matter for understanding the scope of permissible tariff delegations at the founding. Because tariffs were and are subject to distinctive Article I safeguards—and a distinctive practice of legislative control in the early decades of the Republic—delegations of the tariff authority should be viewed skeptically.

A. The Impost Debate of the 1780s Was a Major Policy Issue that Led to the Constitutional Convention.

The inability of the pre-Constitution federal government to pay the Revolutionary War debt and other national expenses was a key catalyst for constitutional reform. The possibility of creating a congressional

power over import duties was a central debate in the 1780s. Proceedings of Commissioners to Remedy Defects of the Federal Government (Annapolis, Sept. 14, 1786), in 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 116–18 (Jonathan Elliot ed., 2d ed. 1836); see *e.g.*, *The Federalist Nos. 7, 11* (Alexander Hamilton) (Clinton Rossiter ed., 1961). Founding-era commentators universally considered duties on imports to be the most important and enduring source of federal revenue. See *The Federalist No. 12*, at 93 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (identifying the impost as the most practicable federal revenue source); *Brutus VII* (Jan. 3, 1788), reprinted in Herbert J. Storing, *The Anti-Federalist: An Abridgment of The Complete Anti-Federalist* 145 (Murray Dry ed., Univ. of Chicago Press 1985).

Under the Articles of Confederation, Congress possessed no independent authority to levy duties on imports or impose other taxes. Instead, national expenses were paid from a "common treasury . . . supplied by the several states," with quotas "laid and levied by the authority and direction of the legislatures of the several states." Articles of Confederation of 1781, art. VIII. State participation was voluntary. As Hamilton later put it, this system of requisitions, dependent on optional state compliance, was an inherent "defect" that left Congress fiscally impotent. *The Federalist No. 30*, at 185–92 (Clinton Rossiter ed., 1961); see also *The Federalist No. 15*, at 103–10 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing this "imbecility" of the Confederation).

A national impost was the key idea for fixing this key defect of the Articles. Twice, the Confederation

Congress sought to impose a uniform national impost—and, twice, a single state defeated it.

In 1781, Congress proposed a five percent *ad valorem* duty at the ports to fund the war debt, but Rhode Island—"depending almost wholly on commerce"—refused consent, dooming the plan. Letter from Alexander Hamilton to George Clinton (May 14, 1783), in 3 *The Papers of Alexander Hamilton*, at 354–56 (Harold C. Syrett ed., 1962); see also 23 *Journals of the Continental Congress 1774–1789,* at 769–72 (Dec. 6, 1782), 788–790 (Dec. 12, 1782). Thomas Paine, writing in the *Providence Gazette*, in an unsuccessful attempt to persuade the Rhode Island legislature to approve the national impost, acknowledged some of the political-economy issues at stake. See Thomas Paine, Six Letters to Rhode Island (1782–1783), *reprinted in* Harry H. Clarke, *Six New Letters of Thomas Paine: Being Pieces on the Five Per Cent Duty Addressed to the Citizens of Rhode Island* (Univ. of Wisc. Press, 1939). Presaging future congressional debates over uneven tariff incidence across the states, Paine went on to argue that a port state (like Rhode Island) would only pay a small portion of the duty because it consumed so little. *Id.*

Congress tried again in 1783, but this time New York was the stumbling block. 30 *Journals of the Continental Congress 1774–1789*, at 70–76 (Feb. 15, 1786), 439–44 (Jul. 27, 1786) (John C. Fitzpatrick ed. 1934). New York again rejected impost bills in 1784 and 1785, and in 1786 it insisted that any duties be collected by state officers—a move aimed at maintaining state control over a premier Atlantic port. See Inhabitants of the City of New York to the Legislature of New York State [Jan.–Mar. 1786], in 3 *The Papers of*

Alexander Hamilton 647, 647–52 (Harold C. Syrett ed., 1962).

British navigation and tariff measures constricted American markets and compounded the fiscal crisis produced by the failure of the impost plan. Madison complained in 1785 that such measures had "robbed us of our trade with the West Indies" and left American commerce in a "deplorable condition." Letter from James Madison to Richard Henry Lee (July 7, 1785), in 8 *The Papers of James Madison: 10 March 1784–28 March 1786*, at 314–16 (Robert A. Rutland & William M. E. Rachal eds., 1973). From London, John Adams reported to John Jay that "nothing but retaliation, reciprocal prohibitions, and imposts and putting ourselves in a posture of defense will have any effect." Letter from John Adams to John Jay (Aug. 30, 1785), in 17 *The Adams Papers: April–November 1785*, at 374–78 (Gregg L. Lint et al. eds., 2014).

By 1786, it was clear that the only solution was a reconstituted federal Congress with independent authority over imports. That year, the delegates at the Annapolis Convention—gathered to discuss the financial and commercial failures of the Articles of Confederation—issued a report (drafted largely by Hamilton) urging a general convention to remedy the more general "defects of the federal government." *Report on the Annapolis Convention* (Sept. 14, 1786) in 9 *The Papers of James Madison* 127 (Robert A. Rutland & William Rachal eds., Univ. Chicago Press 1975). The emerging consensus what that only an empowered national legislature could settle contests over revenue and commerce that the Confederation could not.

B. The Constitution's Text and Structure Specifically and Repeatedly Reserve the Tariff Power to a Representative Congress.

By the time of the Constitutional Convention, it was evident to all that the federal government needed a power to raise revenue from imports. The Committee of Detail's draft of the Taxing Clause carried forward without recorded controversy. 2 *The Records of the Federal Convention of 1787*, at 143, 393–94, 456 (Max Farrand ed., 1911); *cf. id.* at 307–09 (Aug. 16, 1787). And ratification-era writings across the political spectrum reflect the consensus that "external" duties would be the new government's principal source of revenue. Hamilton observed that the new government would "depend for the means of revenue chiefly on such duties," *The Federalist No. 12*, at 93 (Clinton Rossiter ed., 1961), while leading Anti-Federalists conceded the point even as they sought to reserve "internal" taxes to the States. See *Brutus VII*, *supra*, 149 ("There is one source of revenue, which it is agreed, the general government ought to have the sole controul of. This is an impost upon all goods imported from foreign countries."); see also A Plebeian*, An Address to the People of New-York* (1788), in *Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787–1788*, at 102 (Paul Leicester Ford ed., 1888) (accepting necessity of the "general government" to lay "imposts and duties" for the purpose of raising revenue); The Federal Farmer*, Letter III* (Oct. 10, 1787), in *Ford's Pamphlets*, at 294–309 (recognizing national "external" taxes as proper, while urging state control of internal taxes).

As every student of the Constitution knows, the Taxing Clause gives Congress the power to collect

duties on foreign imports: "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises," subject to a uniformity requirement. U.S. Const. art. I, § 8, cl. 1. But—recognizing that tariffs would both raise revenue and generate unique regional burdens—the Framers subjected tariff-making to additional structural constraints. These additional requirements underscore that tariffs are the core domain of a nationally representative Congress.

Several affirmative and negative features of Article I make this apparent. Revenue bills must originate in the House, U.S. Const. art. I, § 7, cl. 1, emphasizing that the power of the purse should be tied to a popularly accountable but geographically diverse body. Madison would describe the Origination Clause as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." *The Federalist No. 58*, at 359 (Clinton Rossiter ed., 1961). Congress is also forbidden from taxing exports or preferring the ports of one State over another. U.S. Const. art. I, § 9, cls. 5–6. These additional restrictions underscored, and were meant to assuage, the familiar Founding-era anxiety that the new federal powers might be used to privilege one state's economy at the expense of another.

Perhaps most crucially, the powers denied to the states by Article I section 10 also stress the importance of congressional control over imports: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports," and any consented-to imposts remain "subject to the Revision and Control of the Congress." U.S. Const. art. I, § 10, cl. 2. States are likewise barred from laying "any Duty of Tonnage." *Id.* cl. 3.

The states' abdication of their sovereign power over imports to the new federal government distinguishes tariffs from the "internal" objects of the taxing power. As Hamilton stressed in *The Federalist No. 32*, those less-important powers would remain concurrent authorities of both the federal and state governments. With the sole exception of duties on imports and exports—where the Constitution both grants the impost power to Congress and "expressly" denies it to the States—Hamilton concluded that the States "retain that authority in the most absolute and unqualified sense," and that any further federal restriction would be "a violent assumption of power, unwarranted by any article or clause of its Constitution." *The Federalist No. 32*, at 198 (Clinton Rossiter ed., 1961).

States would not have relinquished their concurrent authority to impose tariffs without a general expectation of congressional control at the federal level. Profound regional differences in state imports and exports made representation through a geographically diverse body important. Under the Articles of Confederation, states used imposts to advance parochial interests. Twice, as described above, a single state vetoed the Continental Congress's attempts to implement a national impost. See pp. 7–8, *supra*. These episodes were a testament to the failures of the Articles and illustrate why the states needed to cede their tariff authority to Congress. But they also emphasize the depth of the states' protectiveness of their own control over trade. For example, just a month after Rhode Island's rejection of the 1781 impost, Virginia also withdrew its consent for the impost with a vivid statement: "permitting any power, other than the general assembly of this commonwealth, to levy duties or taxes upon the citizens of this state within the same," the

assembly wrote, "is injurious to its sovereignty, may prove destructive of the rights and liberty of the people, and . . . contravene[s] the spirit of the confederation." 11 *The Statutes at Large: Being a Collection of All the Laws of Virginia* 171 (William Waller Hening ed., 1823).

This backdrop illustrates the relationship between the new federal taxing power and representation. As Hamilton warned, the states might always descend into "competitions of commerce," breeding "rivalships" and "dissensions." *The Federalist No. 6*, at 54 (Clinton Rossiter ed., 1961). Given the dramatic differences between state economies, national uniformity was only slight consolation. See, *e.g.*, pp. 7–8, *supra*.

The backdrop of the Revolutionary War matters here too. That taxation without representation might "prove destructive of the rights and liberty of the people" was familiar to Americans. 11 *Laws of Virginia*, *supra*, at 171. In 1767, just 14 years earlier, Britain implemented the Townshend Acts, imposing duties on goods imported to America, including glass, paper, paint, and (most infamously) tea. The Revenue Act 1767, 7 Geo. 3. c. 46 (Eng.). Our Declaration of Independence complained that these acts "impos[ed] Taxes on us without our Consent," and in violation of English law. The Declaration of Independence para. 19 (U.S. 1776); see also Bill of Rights of 1688, 1 W. & M. c. 2 (Eng.) (declaring "[t]hat levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament . . . is illegal"). The Townshend Acts were also used to strip away local colonial influence: the funds were intended to move colonial judges off the colonies' payroll and onto Britain's. The Revenue Act 1767, *supra*; see also Samuel Adams & James Otis, Massachusetts Circular Letter (Feb. 11, 1768), in

Speeches of the Governors of Massachusetts, at 134–36 (Bradford ed., 1818) (urging colonies to unite in protest).

The background of war and regional factionalism helps explain the Founders' expectation that a representative Congress—bicameral, geographically diverse, and constrained by presentment and uniformity—would control import duties and mediate sectional conflict. The states were exiting the Articles of Confederation, under which they all came to appreciate the intensity of regional economic disputes. And these former colonies had just fought a war of independence because a sovereign had imposed tariffs without providing representation. It is difficult to imagine the new states giving up their impost power in a manner that would allow the President to turn around and impose tariffs without the involvement of those states' elected representatives.

Indeed, some of the most influential Founders spoke in exactly these terms. In his magisterial *Federalist No. 10*—concerning faction and its solutions—Madison listed taxation and foreign imports as examples of policy questions that would provoke strong factional response: "Shall domestic manufactures be encouraged, and in what degree," Madison asked, "by restrictions on foreign manufactures?" at 80 (Clinton Rossiter ed., 1961). There is, he continued, "no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice" than the proper "apportionment of taxes." *Id.* The Constitution's design, in Madison's telling, is to ensure that such divisive questions would be settled by a large, representative, and deliberative legislature—not by a single Executive.

Madison was hardly alone. In *The Federalist No. 35*, Hamilton defended the capacity of a representative Congress, rather than the Executive, to deliberate intelligently about taxation and trade. During the Pennsylvania ratification debates, meanwhile, James Wilson assured delegates that the new states should have confidence that Congress would not impose oppressive tariffs because all such laws would need to go through both the House and Senate. See 2 *Elliot's Debates* 453, 467 (Dec. 4, 1787). And Thomas Jefferson reported his fondness for a tax power that required origination in the House. Its members might (he suspected) be "very illy qualified to legislate for the Union [and] for foreign nations," he conceded. "[Y]et this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed but by representatives chosen immediately by themselves." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 *The Papers of Thomas Jefferson* 438–44 (Julian P. Boyd ed., 1955).

C. Early Federal Practice Confirms Congressional Control Over Tariffs.

Early practice confirms that tariffs were Congress's domain. "Contemporaneous legislative exposition of the Constitution when the founders of our government and Framers of our Constitution were actively participating in public affairs" constitutes powerful evidence to "fix[ ] the construction to be given its provisions." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 412 (1928); see also *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (noting that the action of the First Congress "provides contemporaneous and weighty evidence of the Constitution's meaning" (internal quotation marks omitted)).

In 1789, the new Congress immediately and repeatedly exercised its newfound power to lay tariffs. As the Founders expected, tariffs were by far the most important source of public finance immediately after the ratification of the Constitution and for many decades afterwards. Robin Einhorn, *American Taxation, American Slavery* 117 (2006) ("Before the Civil War, federal taxation was almost completely synonymous with the tariff."). Given the extensive debates of the 1780s, Congress's initial reliance on tariffs for revenue was largely uncontroversial, and was seen as inevitable. James Wilson predicted that "the great revenue of the United States must, and always will be raised by impost"—a method of raising revenue at once "less obnoxious, and more productive" than the alternatives. State House Yard Speech (October 6, 1787), reprinted in 1 *Collected Works of James Wilson* 171, 171–72 (Kermit L. Hall & Mark David Hall eds., 2007); see also Dall W. Forsythe, *Taxation and Political Change in the Young Nation 1781–1833*, at 68 (1977) (noting that the first American tariff "was not a public issue at all").

Madison introduced the first bill to impose duties on imports on April 8, 1789, just two days after Congress achieved an initial quorum. Douglas Irwin, *Clashing Over Commerce: A History of U.S. Trade Policy* 73 (2017). He urged Congress to act immediately to adopt the five percent general impost that had been the primary focus of proposal and debate in the 1780s. After some debate, Congress adopted the first federal tariff on July 4, 1789—now commonly known as the Tariff of 1789—levying duties on a wide range of imported goods. Act of July 4, 1789, ch. 2, 1 Stat. 24. This initial law imposing customs duties was the second enacted by the new Congress—preceded only by the law

governing the time and manner of oaths of office. Mascott, *supra*, at 1393; see also Act of June 1, 1789, ch. 1, 1 Stat. 23 (regulating "the time and manner of administering certain oaths").

Related lawmaking occupied an impressive share of Congress's early work. Jennifer Mascott has observed that "six of the 26 statutes enacted in that first session of the First Congress involved customs operations, and 37 of the 96 days of recorded legislative business in the session involved debate on customs laws." Mascott, *supra*, at 1393. Indeed, the First Congress devoted a great deal of its legislative output to such laws. *Id.*

The First Congress also drafted early tariffs with specificity that left limited discretion to Executive Branch officers in the field. *Id.* at 1394–1403. In its first session, for example, Congress enacted a comprehensive impost schedule, a separate tonnage duty, and a bespoke collection framework—before it even created the Department of the Treasury. See Act of July 4, 1789, ch. 2, 1 Stat. 24 (impost schedule); Act of July 20, 1789, ch. 3, 1 Stat. 27 (tonnage duties); Act of July 31, 1789, ch. 5, 1 Stat. 29 (collection of duties); Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 (establishing the Department of the Treasury). Congress then revisited and refined those schemes the next year, reenacting and expanding collection and rate provisions at great length. See Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (comprehensive customs and collection law); Act of Aug. 10, 1790, ch. 39, 2 Stat. 180 (supplemental rates).

Even after the creation of the Department of the Treasury, early Congresses did not delegate the authority to set tariff rates; Hamilton's reports on customs matters were simply proposals for further legislative action. See, *e.g.*, Act of Sept. 2, 1789, ch. 12, 1

Stat. 65 ("[I]t shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue."); Alexander Hamilton, *Money Received from, or Paid to, the States* (1790), in 5 *American State Papers: Finance 1789–1815*, at 52 (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1832). When ambiguities were discovered in the tariff schedules, Hamilton asked Congress to provide clarification through further legislation. See, *e.g.*, Alexander Hamilton, *Operation of the Act Laying Duties on Imports* (1790), in 5 *American State Papers: Finance*, *supra*, at 45–52.[3]

Subsequent Congresses retained control over tariff schedules, revising them repeatedly in the succeeding sessions. Forsythe, *supra*, at 67 (observing that "the tariff schedule was revised by Congress twelve times between 1789 and the War of 1812"). *Amici* are aware of no instance of any of the early Congresses ever giving the Executive Branch anything like the broad authority over tariff-making that the current administration claims to find in IEEPA.

To be sure, as in all areas of law, early customs statutes sometimes allowed executive flexibility to

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[3] Then-Professor Mascott provides a helpful example of this dynamic:

> [T]he Tariff Act expressly imposed specific tariff rates on hemp and cotton starting December 1, 1790. But the act had also expressly exempted cotton from a catchall five percent *ad valorem* duty effective on all unenumerated goods as of August 1, 1789. Secretary Hamilton pointed out that the combination of the two provisions suggested that, unlike cotton, hemp was nonexempt from the five-percent duty during the 1789–1790 time period. But Secretary Hamilton inquired of Congress whether that was the correct interpretation.

Mascott, *supra*, at 1444 (citations omitted).

solve administrative problems—proof measurement, entry timing, appraisals, and the like. But those cabined delegations never authorized the Executive to independently determine which goods would be subject to duties, or to impose or alter the rates of duties. See, *e.g.*, Act of Aug. 4, 1790, ch. 35, §§ 12–37, 1 Stat. 145, 157–66 (collection procedures, appraisals, warehousing). And, when revenue administration grew complex—and more delegations of Executive authority were necessary, as in the Direct Tax of 1798—the early Congresses still limited that discretion by outlining the taxable base and rates, and only authorizing executive officers to administer and implement the rules set forth by statute. See, *e.g.*, Act of July 9, 1798, ch. 75, 1 Stat. 597, 598 (creating assessors and collectors but fixing taxable base and rates by statute).

The earliest tariff statutes reflect this basic division of taxing authority between Congress and the Executive Branch. For example, when Congress laid *ad valorem* duties—under which the tax base was measured by the value of the dutiable goods—it necessarily delegated greater discretion to customs officials in establishing and adjusting the goods' value. See, *e.g.*, Act of July 31, 1789, ch. 5, § 16, 1 Stat. 29, 41 (providing for the appointment of officers to appraise and value goods damaged during shipment or that are missing the "invoice of their cost").[4] But Congress still

[4] In key respects, the modern income tax still reflects this same basic division of taxing authority. Congress typically defines the taxable base and the applicable rates, and delegates to Treasury authority to interpret and administer the rules set forth by statute. See, *e.g.*, 26 U.S.C. §§ 1 (applicable rates on taxable income), 61 (statutory definition of gross income), 7805(a) (authorizing Treasury generally to "prescribe all needful rules and

identified the goods subject to tax and the theory by which duties would be imposed. The early *Statutes at Large* contain no tariff law remotely like IEEPA.

D. That Tariffs Are Adjacent to Foreign Policy Does Not Change the Founding-Era Story of Congressional Control.

The Government contends that nondelegation principles apply with less force when Congress merely supplements the Executive Branch's independent constitutional authority—supposedly here the President's constitutional authority over foreign affairs. See Gov't Br. 5, 35, 44. But the history of early taxes and tariffs provides little support for the notion that delegations of tariff authority are subject to a lower constitutional bar merely because they are adjacent to foreign affairs.[5] The Founders understood that import duties were about much more than raising revenue, yet nevertheless assigned the tariff power to Congress.

Early legislative practice reinforces this conclusion. American public policy debates have always treated tariffs as more than a revenue tool. The debates over tariffs in the 1780s were also debates about foreign policy. In 1783, the British imposed stiff duties on America for a mix of foreign policy reasons,

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regulations for the enforcement of this title"). See also *FCC v. Consumers' Research*, 145 S. Ct. 2482, 2501–02 (2025) (reasoning that a delegation of the taxing authority can be constrained through qualitative as well as quantitative limits on the level of taxation).

[5] While not central to this brief, *amici* also do not read the reasoning of the two major cases in which this Court has considered tariff delegations—*Field v. Clark* and *J.W. Hampton*—to turn on the law's adjacency to foreign affairs. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 690–695 (1892); *J.W. Hampton, Jr., & Co. v. U.S.*, 276 U.S. 394, 404–406 (1928).

including strengthening British maritime control, protecting British manufacturing, and retaliating against the United States. See Irwin, *supra*, at 49. As noted above, see p. 9, *supra*, John Adams's 1785 reports from Britain underscored the limits of an American diplomacy that lacked the credible leverage of tariffs—highlighting how tariff policy and foreign policy were already linked. See Irwin, *supra,* at 52.

Commentary in *The Federalist Papers* and elsewhere likewise reveals a common view that tariffs would serve foreign policy goals. In *The Federalist No. 10*, as noted above, Madison uses restrictions on "foreign manufactures" as his preferred example of the kind of important policy question that different factional interests would answer differently. *The Federalist No. 10*, at 83 (Clinton Rossiter ed., 1961); see p. 14, *supra*. Hamilton also acknowledges the foreign policy implications of duties on imports at several points. In a 1782 essay, he notes that giving Congress power over foreign trade "necessary for the purposes of commerce"—that is, the promotion of American trade interests—"as of revenue." The Continentalist No. V (Apr. 18, 1782), in 3 *The Papers of Alexander Hamilton* 75, 76 (Harold C. Syrett ed., Columbia Univ. Press 1962). And, in *Federalist No. 11*, Hamilton gives one of the clearest early statements that commercial regulations like tariffs are not simply instruments of domestic finance but also tools of foreign policy, noting that national "prohibitory regulations," can counteract the policies of other nations, and force them to "bid against each other, for the privileges of our markets," allowing the United State to "dictate the terms of the connection between the old and the new world!" *The Federalist No. 11*, at 85 (Clinton Rossiter ed., 1961).

These varied goals and effects of tariffs were also apparent in debates over U.S. law after ratification. Section 1 of the Tariff of 1789—our first national tariff—made clear that it was about revenue ("for the discharge of the debts of the United States") as well as other policy goals: "the encouragement and protection of manufactures." See 1 Stat. 24; pp. 15–19, *supra*. While the first tariff was viewed as only "moderately protectionist," the debates over it raised many of these same foreign policy themes and leave no doubt that the foreign policy implications of tariffs were on the minds of the Founding generation. See, *e.g.*, Einhorn, *supra*, at 71.

The Tonnage Act—the 1789 law that imposed duties based on the carrying capacity of ships entering U.S. ports—had foreign policy front and center. Madison called for discriminating against nations that did not adopt favorable terms with the United States. Max Edling, *A Hercules in the Cradle* 71 (2014). He argued that he was "well satisfied that there are good and substantial reasons" for "discriminating between nations in commercial alliance with the United States, and those with whom no treaties exist." *Tonnage Duties* (Apr. 21, 1789), in 12 *The Papers of James Madison* 97 (Charles F. Hobson & Robert A. Rutland eds., 1979). Madison posited that "if America were to leave her ports perfectly free, and to make no discrimination between vessels owned by citizens and those owned by foreigners, while other nations make such discrimination, such a policy would go to exclude American shipping from foreign ports, and we should be materially affected in one of our most important interests." *Duties on Imports* (Apr. 9, 1789), 1 Annals of Cong. 117 (Joseph Gales ed., 1834).

While Congress did not fully adopt Madison's proposal, it accepted some discrimination—for example, considerably lower duties on American-owned and -built vessels than others. Act of July 20, 1789, ch. 3, 1 Stat. 27 (an act "imposing Duties on Tonnage"); see also Edling, *supra*, at 72; Forsythe, *supra*, at 64–65. And the foreign-policy implications of legislative tariffs were also explicit in other early laws, many of which discriminated against specific countries or in favor of U.S.-owned ships. See, *e.g.*, Act of July 1, 1812, ch. 112, 2 Stat. 768 (an act "imposing additional duties upon all goods, wares, and merchandise imported from any foreign port or place," but imposing higher rates on imports from foreign vessels); see also Mascott, *supra*, at 1401–02 (summarizing these foreign policy details). In other words, early practice supports the notion that tariffs both had foreign policy relevance and were reserved to Congress.

Other early materials suggest a corollary: the fact that the tariff legislation is enacted for more than mere revenue generation does not mean that Congress's ability to impose tariffs flows from a source other than the Taxing Clause. For example, Hamilton's *Report on Manufactures* proposed that Congress impose import duties to "enable the National Manufacturers to undersell all their foreign Competitors." 10 *The Papers of Alexander Hamilton: December 1791–January 1782*, at 230, 296 (Harold C. Syrett ed., Columbia Univ. Press, 1966). When addressing the constitutional basis for such duties, Hamilton explicitly cited Congress's taxing power as the source of that power: "A Question has been made concerning the Constitutional right of the Government of the United States to apply this species of encouragement," he noted. But, he continued, "there is certainly no good

foundation for such a question," since it would flow from the "express authority 'To lay and Collect taxes, duties, imposts and excises.'" *Id.* at 302.[6]

In the context of the Article II Treaty Power, the early treatise writer William Rawle offered a similar theory. In his view, a treaty ratified by the Senate may overrule inconsistent statutes by force of the Constitution. But if money is needed to execute that treaty "the immediate operation of the treaty" cannot bypass Article I: "it is still revenue, and congress alone can raise it, and the bill can only originate in the house of representatives," so it "cannot be done by the president and senate." William Rawle, *A View of the Constitution of the United States of America* 71 (2d ed. 1829); see also *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 441–47 (1827) (holding that a state licensing fee on importers is a duty on imports—a tax—whether aimed at commerce, revenue, or retaliation).

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The Framers and Ratifiers, early Congresses, and early officials of the Executive Branch all understood that the power to impose tariffs was a core *congressional* power—critical to raise revenue for the nascent Federal Government and closely controlled by the Legislative Branch. This reflected a fundamental

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[6] Modern doctrine also recognizes that non-revenue purposes do not by themselves render an instrument something other than a tax. See, *e.g.*, *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) ("Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect; and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.").

understanding of how the constitutional structure ought to function. The broad reading of IEEPA advanced by the Government is out of step with this constitutional scheme of firm congressional control.

CONCLUSION

The Court should decide these cases consistent with the principles laid out in this brief.

Respectfully submitted.

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