Nos. 24-1287 & 25-250

In the
Supreme Court of the United States

LEARNING RESOURCES, INC., ET AL.,

Petitioners,

v.

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

Respondents.

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF AMICUS CURIAE CONSUMER WATCHDOG IN SUPPORT OF PETITIONERS IN 24-1287 AND RESPONDENTS IN 25-250

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INTEREST OF THE AMICUS CURIAE[1]

The amicus curiae Consumer Watchdog is a non-profit, non-partisan public interest organization dedicated to protecting consumers from economic harm caused by unfair market practices, corporate abuses, and improper governmental actions. Consumer Watchdog has a special interest in these cases because the challenged tariffs function as a regressive tax that disproportionately burdens working families and economically vulnerable consumers. Tariffs of the magnitude at issue here inevitably raise consumer prices and threaten the economic security of working families and small businesses. Amicus filed similar briefs to this brief in both courts below, focusing on the constitutional nondelegation issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

Despite the effort of the Solicitor General in his brief to debate the merits of the President's tariff policy, the question before this Court is not whether the tariffs are a good or bad idea, but whether any President has the legal authority to do what this President did. Amicus agrees with the courts below that the President lacks the statutory authority to impose the tariffs at issue here. It is submitting this brief to demonstrate that, even if

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[1] Pursuant to Rule 37.6, amicus states that no party, counsel for any party, or any person other than amicus and its counsel authored this brief or made any monetary contribution for its preparation or submission.

the President had the authority to issue tariffs under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1710 (IEEPA), these tariffs would still be invalid. This is because, as so construed, IEEPA would violate the constitutional prohibition in Article I on Congress delegating legislative authority to the Executive Branch. This serious constitutional question triggers the canon of constitutional avoidance (which the Government never mentions). "As between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the act." *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (brackets and citation omitted). Read that way, IEEPA excludes tariffs. If, however, the Court concludes that IEEPA grants the President the authority to impose the tariffs at issue in this case, then the Court should hold this to be an unconstitutional grant of legislative authority in violation of the nondelegation doctrine and the separation of powers established in the Constitution.

This Court has not struck down a statute on delegation grounds since 1935. But it also has never encountered a law like IEEPA as applied to the imposition of tariffs. Based only on the Government's framing, the reader would have no idea of the breadth of the delegation that Congress purportedly gave the President and the absence of any constraints on his authority under IEEPA:

- There is no investigation, report, or other process that the President or an agency

that reports to him must follow before the President decides to impose a tariff.

- There are no limits in terms of dollars or percentage increases for new or additional tariffs.

- Tariffs may be imposed on goods for which there are no tariffs or for which Congress already has fixed tariffs.

- There is no requirement for an expiration date for any tariff.

- Tariffs may be imposed on a single product or on as many products as the President desires, including products which the United States does not produce (*e.g.*, bananas and coconuts).

- The President may impose a tariff for any reason or no reason, as long as he asserts it is in response to a declared emergency.

- The President may turn a tariff off at any time and then turn it back on, solely within his discretion.

- The President may exempt whole countries entirely (as he has done for Russia) or exempt them from some tariffs and not others.

- The President may impose higher tariffs for the same products from some

countries than from others and may exempt some countries for a specific product only.

- The President may override the United States–Mexico–Canada Agreement that was approved by Congress in December 2019 and that was signed and negotiated by President Trump himself during his prior term as President.

- The President may set up an exception process by which importers may obtain exemptions or reduced tariffs based on criteria solely determined by the President or one of his agencies.[2]

- Tariffs may be made effective immediately even for those products for which contracts are already in place.

- There is no substantive judicial review of any of the foregoing determinations provided by any statute. And if there were, there is nothing in IEEPA that would enable a court to determine whether the President has complied with its non-existent directives or limitations.

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[2] For example, Section 2(b) of Executive Order 14245 (Mar. 24, 2025) authorizes the Secretary of State, in consultation with other Cabinet officers, to "determine in his discretion whether the tariff of 25 percent will be imposed on goods from any country that imports Venezuelan oil, directly or indirectly, on or after April 2, 2025."

Two other facts about these tariffs illustrate the immense power that the President claims that IEEPA silently gives him. As of September 23, 2025, according to the Trump administration itself, it has collected nearly $90 billion in tariffs.[3] With billions more coming in each month, the Congressional Budget Office estimates that the revenue "will reduce the national deficit by $4 trillion in upcoming years" (US Br. 11). Second, as the chart in the Addendum to this brief shows, as a result of the twenty-three separate Executive Orders issued between January 20, 2025 and September 30, 2025, these tariffs have come on and come off, and rates fluctuated up or down, with ever changing rationales and exceptions, with no ties to any limits or conditions in IEEPA – and everything determined by the unfettered choices of the President. That is not law in our constitutional system.

This Court's ruling in *FCC v. Consumers' Research*, 145 S. Ct. 2482 (2025), makes clear that IEEPA's unbounded grant of power to impose tariffs on any product, in any amount, for any duration, and with such exceptions as the President chooses, fails the "intelligible principle" test set forth in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), and is therefore unconstitutional. In determining whether the delegation to the FCC was lawful, the Court focused on three separate inquiries: (1) "the degree of agency discretion that is acceptable varies

[3] "Trade Statistics," U.S. Customs and Border Protection, available at https://www.cbp.gov/newsroom/stats/trade (last updated on Sept. 23, 2025).

according to the scope of the power congressionally conferred"; (2) whether there are "boundaries [on the] delegated authority"; and (3) whether "Congress has provided sufficient standards to enable both 'the courts and the public [to] ascertain whether the agency' has followed the law." *Consumers' Research* at 2497.

If there is tariff-granting authority in IEEPA, it does not come close to satisfying any of these tests. As to the scope of the power claimed, the Government's brief clearly lays out the magnitude of the impact of these tariffs and fully justifies President Trump's description of them as an "economic revolution."[4] Second, IEEPA, as the Government construes it, supplies (1) no ex-ante standards limiting who or what may be tariffed, (2) no temporal constraints, and (3) no reviewable benchmarks for courts to enforce. The statute's silence on rate, base, duration, and discrimination is total. Third, there is no judicial review provision in IEEPA or elsewhere, and if there were, the courts would have nothing to review because there are no limits in the statute that a President could be found to have violated.

Two other facts about the decision in *Consumers' Research* make its impact on these cases even more compelling. In the course of defending the statute at issue there, the Trump Administration supported the majority's three

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[4] Donald Trump (@realDonaldTrump), Truth Social (Apr. 5, 2025, 8:34 A.M.), https://truthsocial.com/@realDonaldTrump/posts/114285375813275308.

conditions as necessary to save the statute from a claim of unconstitutional delegation to the FCC. The Government did this most clearly in its reply brief and at oral argument in *Consumers' Research*.

Second, even the three dissenting Justices did not disagree with the majority's formulation of the three conditions. Rather, they concluded that the FCC statute, which had many more limitations than does IEEPA and expressly provided for judicial review of the challenged actions, did not satisfy the constitutional requirements.

ARGUMENT

I. THE COURT SHOULD HOLD THAT, IF IEEPA ALLOWS THE PRESIDENT TO IMPOSE TARIFFS, THE STATUTE UNCONSTITUTIONALLY DELEGATES LEGISLATIVE AUTHORITY TO THE PRESIDENT.

There are two questions presented in these cases: whether IEEPA allows the President to impose tariffs, and if so, whether Congress has sufficiently set the boundaries for those tariffs. The fact that there is a serious question about the President's statutory authority, with eleven out of fifteen federal judges agreeing that he does not have it, distinguishes this case from every other nondelegation challenge in this Court where the power to act was clear, and the only issue was whether Congress had included sufficient guardrails to cabin that power. The necessity to address the first question should serve as a flashing signal that Congress has not met the

intelligible principle test established by the Court because, with no clear grant of authority, there is virtually no chance that the unstated authority will be limited as the Constitution requires.

A. *Consumers' Research* Applies Fully to These Tariffs.

In an effort to avoid the clear requirements of *Consumers' Research*, the Government argues that the nondelegation doctrine does not apply, or that it applies with less rigor, where the President's powers relating to foreign affairs are challenged. (US Br. 5, 22). Whatever force that argument may have in other circumstances, it cannot save this delegation.

First and foremost, this is not an instance in which the President is exercising his Article II foreign affairs powers. Article I, Section 8 of the Constitution assigns "the Power To lay and collect Taxes, Duties, Imposts and Excises" to Congress, not the President. Therefore, this is not a situation in which Congress has granted "the President broad powers to supplement his Article II authority" (US Br. 21) for the President has no authority to impose tariffs. Repeated assertions that the President has "independent Article II authority" to impose tariffs (US Br. 44) do not alter the Constitution.

The Government argues that "constitutional 'limitations' on Congress's authority to delegate are thus 'less stringent in cases where the entity exercising the delegated authority itself possesses independent authority

over the subject matter.'" (US Br. 44) (quoting *United States v. Mazurie*, 419 U.S. 544, 556-557 (1975)) (delegation to tribal authority). But any greater leeway in delegations to the President must be limited to areas where the Constitution specifically assigns the President the responsibility to carry out the covered function, such as his role as Commander in Chief. *Loving v. United States,* 517 U.S. 748, 768-69, 772-74 (1996).

Similarly, a more relaxed standard might be appropriate if, as in *Zivotofsky v. Kerry,* 576 U.S. 1, 5, 32 (2015), the foreign affairs power was truly at issue (there the treatment of Jerusalem by the United States) and it belonged *exclusively* to the Executive Branch. As Justice Kavanaugh observed in his *Consumers' Research* concurrence, any greater leeway on delegations to the President should apply where he has "independent Article II authority" or "at least some independent constitutional power to act even without congressional authorization." 145 S. Ct. at 2516. In any event, a less rigorous review of a power delegated to the President does not mean *no* review, and as shown below the delegation here does not come close to the standard set forth in *Consumers' Research.*

The dissent below agreed with the Government, contending that "the tariffs involve the President's role and responsibilities in foreign affairs (including national security) which has constitutional foundations (in Article II)." Petition for Writ of Certiorari, *Donald J. Trump v. V.O.S. Selections Inc.* (No. 25-250), at Appendix A 127a ("App."). According to the dissent, the role of

Congress is to "furnish[] the President with tools, such as criminal prohibitions and tariff impositions" using its Article I powers. *Id.* at 127a-128a. The dissent, however, has it precisely backwards. The Constitution assigns the tariff creating power to Congress in Article I, Section 8 and directs the President to implement the laws creating tariffs as required by the "Take Care" clause in Article II, Section 3.

Nor does the dicta in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936), help the Government on the question of whether the standard for Congress's delegation to the President in the field of tariffs is less demanding. As this Court observed in *Zivotofsky, supra,* 576 U.S. at 21, in response to the claim that *Curtiss-Wright* always supported the President whenever foreign affairs was at issue, "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." And to the extent that the Executive Branch contends that *Curtiss-Wright* suggests that the President has vast powers to which the courts must defer, *Zivotofsky* made clear that *Curtiss-Wright* should not be read that broadly. *Id.* at 20-21.

Moreover, the constitutional flaw in nondelegation cases depends on what Congress did, or more precisely, did not do. Here, it failed to provide guardrails to limit the ability of the President to impose whatever tariffs he pleases. That is the clear rule from Justice Scalia's opinion in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001): "In a delegation

challenge, the constitutional question is whether the statute has delegated legislative power to the agency," not what the agency did under the statute.

Nor does it matter in most cases who has been delegated the authority because, as Justice Kavanaugh observed in his concurring opinion in *Consumers' Research,* "delegations to executive officers and agencies, in my view, are not analytically distinct for present purposes from delegations to the President because the President controls, supervises, and directs those executive officers and agencies." 145 S. Ct. at 2512, n.1; *see also* note 7 *infra* (citing cases from this Court applying the intelligible principle test to delegations to the President). Even the dissent below agreed: "the nondelegation doctrine polices *what* Congress has delegated to another branch, not to *whom* it has delegated the authority." App. 125a (citing *Gundy v. United* States, 588 U.S. 128, 132 (2019) (plurality opinion)) (emphasis in original).

That conclusion is firmly supported by other decisions of this Court. In *Skinner v. Mid-America Pipeline Co.,* 490 U.S. 212, 222-23 (1989), this Court rejected the contention that the subject matter of the delegation affected the standard of review:

> We find no support, then, for Mid–America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary

> authority to the Executive under its taxing power.

And, most recently, *Consumers' Research* turned aside a claim that the level of discretion accorded by Congress varied depending on whether the charges were labeled a fee or a tax. 145 S. Ct. at 2497-98.

Accordingly, the delegation here must be assessed under the standards set forth in *Consumers' Research.*

B. IEEPA Fails the Intelligible Principle Test Set Forth in *Consumers' Research.*

The applicable constitutional nondelegation test is whether the statute at issue contains an "intelligible principle" that guides and limits the President or agency in implementing the statute. This Court's decision last term in *Consumers' Research* spelled out the three requirements for Congress to satisfy that test, and IEEPA falls short on all three. 145 S. Ct. at 2497.

First, quoting *Whitman, supra,* at 475, the Court stated that "'the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,'" adding that the "'guidance' needed is greater . . . when an agency action will 'affect the entire national economy' than when it addresses a narrow, technical issue (*e.g.*, the definition of 'country [grain] elevators')." 145 S. Ct. at 2497. Given the magnitude of the impact of these tariffs, and the

President's characterization of them as an "economic revolution," the guidance required for IEEPA must be at the maximum level, whereas it has none.

Second, "we have generally assessed whether Congress has made clear *both* 'the general policy' that the agency must pursue and 'the boundaries of [its] delegated authority.'" *Id.* (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)) (emphasis added). As for the general policy of imposing tariffs under IEEPA, the statute fails even that quite open-ended requirement because it does not mention tariffs. More significantly, IEEPA fails the "boundaries" requirement because there are no substantive limits of any kind, as amicus showed above.

Third, the Court recognized the importance of judicial review: "we have asked if Congress has provided sufficient standards to enable both 'the courts and the public [to] ascertain whether the agency' has followed the law." *Id.* at 2497 (quoting *OPP Cotton Mills, Inc. v. Administrator of Wage and Hour Div., Dept. of Labor*, 312 U.S. 126, 144 (1941)). All aspects of the FCC program at issue in *Consumers' Research* were fully reviewable under 47 U.S.C. § 402. But there is no provision for judicial review in IEEPA, and the Administrative Procedure Act (APA) is unavailable because the President is not an agency subject to the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800-801 (1992).

Perhaps more significantly, even if the APA authorized judicial review of whether the

President's actions conformed to the law, that task would be impossible to perform because there is no "law," *i.e.*, boundaries or limits, in IEEPA that tell the President either what he must do or what he may not do. Judicial review is not a constitutional requirement *per se*, but rather a means of assuring that the statutory limits are followed. By doing that, the courts can satisfy themselves that Congress has adhered to the principle behind the nondelegation doctrine: Article I vests the legislative power in Congress and "that assignment of power to Congress is a bar on its further delegation: Legislative power, we have held, belongs to the legislative branch, and to no other." *Consumers' Research*, 145 S. Ct. at 2496.

In his concurring opinion, Justice Kavanaugh made the same point about judicial review, quoting from *INS v. Chadha,* 462 U.S. 919, 953-54, n.16 (1983): "'Executive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.'" *Consumers' Research*, 145 S. Ct at 2513, n.3.

The challengers in *Consumers' Research* argued that, because there were no numerical limits on the amount that the FCC could require the affected entities and ultimately consumers to pay, the statute violated the nondelegation doctrine. *Id.* at 2495. The Court rejected that argument and instead concluded, after a detailed analysis of the statute's many express conditions

and limitations, that Congress had "sufficiently" confined the agency's discretion to meet the constitutional delegation standards. *Id.* at 2492. No similar defense would be possible for IEEPA. It has none of the features of the FCC statute, 47 U.S.C. § 254, that persuaded the majority in *Consumers' Research* to uphold the law where it concluded that section 254 provided the meaningful "boundaries" necessary to prevent an unconstitutional delegation of legislative power to the FCC: "Congress made clear the parameters of the programs, and the FCC has operated within them." *Consumers' Research*, 145 S. Ct. at 2505. In the course of that discussion, the Court brought in its judicial review point: "the Commission's [statutory] mandate is to raise what it takes to pay for universal-service programs; if the Commission raises much beyond, as if it raises much below, it violates the statute." *Id.* at 2502.

The importance of boundaries and judicial review in *Consumers' Research* was not resisted by the Government. To the contrary, the Government agreed that the intelligible principle doctrine places real limits on the authority that Congress may confer on the executive branch. "[D]istinguishing lawful conferrals of discretion from unlawful delegations requires more than just asking 'in the abstract whether there is an 'intelligible principle.' Congress must delineate both the 'general policy' that the agency must pursue and the 'boundaries of th[e] delegated authority.'" Reply Brief of Federal Petitioners at 3, *FCC v. Consumers' Research*, 145 S. Ct. 2485 (2025) (citations omitted) ("Reply Br.").

At oral argument, the Acting Solicitor General, in response to a question from Justice Gorsuch asking whether, "in distinguishing between lawful . . . delegations, that . . . requires more than asking in the abstract whether there is an intelligible principle," replied affirmatively: "We think . . . to the extent the Court is interested in looking to past precedents to tighten their reins, the better approach is not just say, you know, there is kind of mush for the intelligible principle, look to past cases, but to look at the parameters I talked about." Transcript of Oral Argument at 21-22, *FCC v. Consumers' Research*, 145 S. Ct. 2482 (2025) ("*Consumers' Research* Tr.").

The problem with the intelligible principle doctrine standing alone is that it can always be met at a sufficiently high level of generality. For example, in *Mistretta v. United States*, 488 U.S. 361 (1989), the decision to shift from a system in which judges decided the appropriate sentence on their own, to one with mandatory guidelines, constituted an "intelligible principle." But the Court did not end its discussion there, and without the other limitations in the law, discussed *infra* at 27, Congress would have authorized the Sentencing Commission, not Congress, to make scores of policy decisions with no guard posts to restrain it.

The Government was even more specific on the need for statutory limits where the Government is requiring payments from others. The opening to its reply brief in *Consumers' Research* answered the respondents' charge that the law created "'[u]nbounded' power to levy taxes, subject at most to 'precatory' standards and

'aspirational' principles": "If the Universal Service Fund really worked that way, the government would not defend its constitutionality. *Congress may not vest federal agencies with an unbounded taxing power*." Reply Br. at 1–2 (emphasis added). In response to respondents' allegation that the FCC statute is "too 'hazy' or 'contentless,'" the FCC replied: "Were these provisions contentless, the government would not defend their constitutionality." *Id.* at 11. This was followed by the Government's detailed refutation of the claim that the statute lacks boundaries, in which it pointed to the many specific ways in which the agency's ability to levy assessments was constrained. *Id.* at 12–15.

At oral argument, counsel emphasized this point over and over, referring to various provisions as "a real limit," *Consumers' Research* Tr. at 7, and asserting that "we are not arguing for a no limits at all approach where you can just raise whatever revenue we feel like . . . there are qualitative limits that are baked into the statutory scheme, not raise whatever amount of money; you know, a trillion dollars." *Id.* at 8. The Acting Solicitor General did not argue that the nondelegation doctrine requires rigid lines because "obviously there is a judgment line on how much discretion is too much, but at a minimum Congress is obviously having to provide parameters that you can tell, yes or no, did the agency transgress the boundaries?" *Id.* at 61.

Perhaps most significant of all, the Government recognized the constitutional significance of judicial review in the nondelegation analysis. After reiterating the importance of

statutory guidance to the agency, it stated that "the guidance must be 'sufficiently definite' to permit meaningful judicial review of agency action. *Gundy* [*v. United States*, 588 U.S. 128, 158 (2019)] (Gorsuch, J., dissenting) (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944))." Reply Br. at 4. And in defending the delegation in the FCC statute, the Government emphasized that "Courts have invalidated FCC action that violates those requirements." *Id.* at 13. As Government counsel explained, "one of the most important" parameters to comply with the nondelegation doctrine asks: 'is there sufficiently definite and precise language in the statute to enable Congress, *the courts,* and the public to ascertain whether Congress's rules are followed?'" *Consumers' Research* Tr. at 22 (emphasis added).

Justice Gorsuch followed up by asking whether judicial review is "possible," to which counsel replied "Absolutely." *Id.* at 23. Later on, Justice Gorsuch returned to the same point, asking if there was judicial review where a party objected to the use of money as unauthorized by the statute, and the Government's response was that "would be something that someone could challenge." *Id.* at 42–43. And if someone objected to the way that the FCC is interpreting the statute, "you can bring a challenge to exceeding the scope of the statutory authority." *Id.* at 43.

In this case, however, the Government's position on the importance of the availability of judicial review is rather different. The President and his lawyers contend that his decisions under both IEEPA and other trade statutes are not

subject to judicial review because they are discretionary, and the President is not bound by the applicable statute: "the President's determinations in this area are not amenable to judicial review." US Br. 41-42. Instead, according to the Government, "IEEPA provides that Congress and the political process, not the judiciary, serve as the principal monitor and check on the President's exercise of IEEPA authority." *Id.* at 4. Leaving it to Congress to cure nondelegation problems is no solution since it was Congress's failure to provide limits that caused the problem in the first place. Indeed, assuming that the Government is correct that these determinations by the President are not subject to judicial review, that is a near fatal blow to its effort to save IEEPA from a nondelegation challenge.

The Government has a further hurdle to overcome from *Consumers' Research*: the dissent written by Justice Gorsuch and joined by Justices Thomas and Alito. *See* 145 S. Ct. at 2519-39. That dissent reprised and amplified Justice Gorsuch's dissent in *Gundy*, which Chief Justice Roberts joined. *Gundy, supra,* 588 U.S. at 149. The *Consumers' Research* dissenters have a stricter, not a looser, view of nondelegation than the majority. They would draw a firm line under which a law imposing a tax would violate the nondelegation doctrine unless it "prescribed the tax rate" or "instead opted to cap the total sum the Executive may collect," 145 S. Ct. at 2526, and IEEPA does neither. *See also id.* at 2532 ("Though the Constitution does not require Congress to make every decision, there are some choices that belong

to Congress alone—including setting a tax's rate or, at least, capping receipts.").

The dissent then devoted three pages to reviewing the FCC statute in what eventually concluded was an unsuccessful effort to locate some limitations on the agency's power to tax. That task would be much simplified here as there is not a word of limitation, that is, no limiting standards in IEEPA, on what the President must or must not do regarding the rate or amount of tariffs, let alone their duration, the conditions (beyond national emergency) that trigger the power to use them, or any permission to discriminate against countries or products for any reason the President fancies. If the dissenters in *Consumers' Research* are correct "that there are some abdications of congressional authority . . . that the present majority isn't prepared to stomach," *id.* at 2519, then the claimed delegation to impose tariffs under IEEPA is surely one of them.

Neither the Government nor the dissent in the Federal Circuit comes to grips with the decision in *Consumers' Research.* While paying lip service to the mandate there, their focus is on the aspects of IEEPA that do not speak to the delegation deficiencies raised by the plaintiffs below. Instead, this is how the Government contends the nondelegation has been satisfied:

> IEEPA also erects sufficient boundaries, even if not in the form of numerical limits on rate or duration: the President

> may exercise his authorities only "to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared," and may not exercise those authorities to "regulate or prohibit, directly or indirectly," an enumerated list of items, such as "informational materials." In addition, national emergencies have a one year time limit and other boundaries. Congress itself extensively oversees the President's exercise of authority in this area.

US Br. 46 (citations omitted). It repeats the same point on pages 20-21, 22, 23, 26 & 32. The dissent below relied on the same factors, but it described them as "substantive constraints on the exercise of the delegated power," which it found sufficient to satisfy the nondelegation doctrine. App. 127a. The flaw in that conclusion is that those preceding conditions may tell the President what he must do before he may impose a tariff, but they say nothing about what he may and may not do thereafter. For that reason, they set no limits on whatever tariffs the President chooses to prescribe.[5]

There are also certain statutory exclusions to IEEPA (that do not include tariffs), but the

[5] The congressionally terminated national emergency cited by the Government related to Covid-19. US Br. 32 (citing Act of Apr. 10, 2023, Pub. L. No. 118-3, 137 Stat. 6; 85 Fed. Reg. 15,337 (Mar. 20, 2020)).

dissent did not suggest that they confined the President's discretion in any way over the scope, amount, or duration of the tariffs that he chooses to impose. App. 98a, n.7. The dissent also noted certain "procedural limitations" that it described as "the demanding new requirements for close involvement of Congress," App. 78a, although Congress has a similar continuing role for every other law that it enacts. That supposed guardrail conveniently overlooks the near certainty that the President would veto any law Congress passed that might shut down his tariff authority. But eventually even the dissent was persuaded not to "rely on the merely procedural requirements, such as declaring a national emergency and complying with the requirements of keeping Congress informed, as themselves sufficient to meet the understandable-boundaries element of that standard."[6] App. 126a-127a.

What is remarkable about the dissent and the Government's brief is that they never address the total discretion that the President has to impose whatever tariffs he pleases on his choices of products, countries, amounts, durations, and exceptions, with no possibility that any court will have the authority to hold that the President has exceeded the boundaries of the law—because, of course, there are no limits at all in IEEPA. Indeed,

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[6] In the original version of IEEPA, Congress could prevent the President from acting by passing a concurrent resolution. After that device was invalidated by *INS v. Chadha*, 462 U.S. 919 (1983), the law was amended to require a joint resolution. Pub. L. No. 99-93, Sec. 801 (1985).

in the course of upholding a reading of IEEPA that permits the President to use it to create tariffs, the dissent embraced what it called Congress's "eyes-open choice of a broad standard . . . evident in the language and history of IEEPA . . . confirmed by the fact that Congress took pains to impose exacting requirements for the President to involve Congress in the exercise of IEEPA authorities." App. 112a-113a. But the absence of any boundaries means that, under Article I and this Court's decision in *Consumers' Research,* IEEPA cannot provide a constitutional basis to support the tariffs challenged in these cases.

C. Prior Delegation Statutes Contained Concrete Limits Absent Here.

Unable to point to any words in IEEPA that place guardrails around what the President may do, the Government cites cases that are readily distinguishable, or, as discussed below for *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), no longer good law. The decision in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 401 (1928), which enunciated the "intelligible principle" test, demonstrates how different this case is from any existing authority. Like this case, *Hampton* involved the imposition of import duties by the President. However, the statute there placed signficant limits on the President's authority. Duties could be imposed only in order to "equalize the . . . differences in costs of production in the United States and the principal competing country" for the product at issue. *Id.*

Production costs are a verifiable fact, which provide a clear, objective limit on when duties may be increased under the statute. And even then, additional duties could be imposed only to "equalize" those costs, not in any amount that the President chose.

Moreover, those duties could be applied only with respect to imports from "the principal competing country" to the United States, which further limited the statute's reach. Most significantly, the law also expressly provided that any increase may not exceed "50 per centum of the rates specified in" existing law. *Id.* Further, those requirements were enforceable through judicial review in the United States Customs Court and eventually in this Court. Based on those significant limits, the Court concluded that Congress had provided an intelligible principle to guide the executive. IEEPA contains no remotely similar constraints on the President.

In another case relied on by the Government, *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), the statute at issue was applicable only to countries that produced one of five enumerated duty-free products. *Id.* at 680. Even then, the law was applicable only if the country imposed "duties or other exactions upon the agricultural or other products of the United States," and the President concluded that those duties were "reciprocally unequal and unreasonable." *Id.* If the President made the requisite findings, he was required to suspend the duty-free status of the imported products from the

offending country. *Id*. That is, he was empowered to re-impose the previously suspended duties, but he could not impose new or additional duties on his own. *Id*. at 693.[7]

Not discussed in *Consumers' Research* or *Gundy*, but relied on by the Government and the Federal Circuit dissenters, is the decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). At issue in *Algonquin* was whether Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, which gave the President power to "adjust imports" (of petroleum) when the national security of the United States was threatened by such imports, allowed only import quotas, not per barrel license fees. To support that limitation, Algonquin argued that if Section 232 were read to permit the use of license fees to replace existing tariffs, it would be an unconstitutional delegation of legislative authority. *Algonquin*, 426 U.S. at 558-59. In that posture, with no other claim of excess presidential discretion, this Court upheld Section 232 as providing the necessary intelligible principle and rejected the limited challenge made there.

To answer the nondelegation question in *Algonquin,* the Court focused solely on the choice of remedies that the President had made, which was quite limited, not on whether Section 232 included any limits on the license fees or tariffs that the

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[7] The statutes in both *Hampton* and *Marshall Field* assigned the tariff-setting authority to the President, and this Court never suggested that a different nondelegation standard applied to delegations to him rather than to a federal agency.

President might impose. That focus was erroneous as is clear from this Court's decision in *Whitman, supra,* 531 U.S. at 472-73:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. . . . The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.

The same erroneous reasoning that applied in *Algonquin* was also adopted by the court in *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 577 (C.C.P.A. 1975) ("presidential actions must be judged in the light of what the President actually did, not in the light of what he could have done"). With the flaws in *Algonquin* and *Yoshida* corrected, the unbounded tariffs in Section 232 would be subject to the same nondelegation analysis as the tariffs here. *See Am. Inst. for Int'l Steel v. United States*, 806 Fed. Appx. 982 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020) (challenge to Section 232 rejected because of *Algonquin*), and

the lower court opinion of Judge Katzmann, stating that he would have found Section 232 to be unconstitutional but for *Algonquin*. 376 F. Supp. 3d 1335, 1345–52 (Ct. Int'l Trade 2019).

Other significant delegation cases from this Court are also consistent with the conclusion that any delegation to impose tariffs in IEEPA is unconstitutional. At issue in *Mistretta v. United States*, 488 U.S. 361 (1989) was the constitutionality of the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3586, in which Congress assigned the Sentencing Commission the responsibility to create guidelines that district judges would be required to follow in imposing sentences for persons found guilty of federal crimes. The Court rejected a dual challenge on delegation and separation of powers grounds.

The most legally significant boundaries in that act were the statutory maximums (and in some cases minimums) that Congress had enacted and continued to enact for every federal crime. In addition to those limits and the fact that the guidelines applied only to those convicted of a federal crime, the Court summarized in over four pages in the U.S. Reports the many other prohibitions and requirements that Congress included in the statute. *See Mistretta*, 488 U.S. at 374–77. Although those provisions did not eliminate the Commission's discretion, the resulting guidelines, which are now only advisory, would survive *Consumers' Research* because, unlike IEEPA, there were significant limits on what the Commission could do there.

Similarly unhelpful for the Government is the Court's decision in *Whitman, supra*. The Clean Air Act at issue there directed "the EPA to set 'ambient air quality standards . . . which in the judgment of the Administrator, based on [the] criteria [documents of § 108] and allowing an adequate margin of safety, are requisite to protect the public health'" 531 U.S. at 472 (quoting 42 U.S.C. § 7409(b)(1)). Those standards, which had to be reviewed every five years, could only be issued for air pollutants found on a public list promulgated by the agency under 42 U.S.C. § 7408. *Id.* at 462.

The opinion for the Court, written by Justice Scalia, who had dissented in *Mistretta*, read the statute to require that these standards must "reflect the latest scientific knowledge," that "EPA must establish uniform national standards," and that the agency must set them "at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air," where requisite "mean[s] sufficient, but not more than necessary," with judicial review available to enforce these limitations. *Id.* at 473. In upholding the delegation, the Court concluded that "we interpret [the law] as requiring the EPA to set air quality standards at the level that is 'requisite' that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety," and that, as so construed, the Clean Air Act "fits comfortably within the scope of discretion permitted by our precedent." *Id.* at 475–76.

The other cases cited to support the IEEPA delegation are equally unavailing. The order

challenged in *Curtiss-Wright*, *supra*, was taken almost word for word from the authorizing statute, which eliminates its value as a nondelegation precedent. In addition, the *Curtiss-Wright* dicta on the power of the President over all foreign relations was substantially undercut by this Court in *Zivotofsky, supra,* 576 U.S. at 20-21.

In *Zemel v. Rusk,* 381 U.S. 1, 7-13 (1965), the Court first rejected a statutory argument that the passport restriction was not authorized, whereas here there is no comparable judicial review provision available to determine whether the non-existent tariff limits in IEEPA have been followed.

As for *Cargo of Brig Aurora v. United States*, 7 Cranch 382 (1813), it did no more than allow the President to reverse a prior determination on whether England or France were violating the neutral commerce of the United States and thereby alter the legal status of goods from those countries that were sought to be imported into this country.

Finally, of the lower court nondelegation tariff cases relied on by the Government, US Br. 46-47, only *Yoshida* arose under IEEPA, and all of them pre-date *Consumers' Research.*

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This Court has not set aside a federal statute on nondelegation grounds in the ninety years since *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Similarly, the Court had not set aside a federal statute that relied on

the Commerce Clause in almost 60 years until it did so in *United States v. Lopez*, 514 U.S. 549 (1995), where the Court made the connection between the limits under federalism at issue there and those under separation of powers at issue here:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Id. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

Part of the Court's rationale for concluding that Congress had gone too far in *Lopez* was that

> Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power . . . if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 564. So here, if the complete absence of any limits in IEEPA on the President's power to impose tariffs on any country, on any product, in any amount, for any duration, or for any reason or no reason at all, does not constitute an

unconstitutional delegation of legislative power in violation of Article I, then nothing will.

CONCLUSION

For the foregoing reasons, the Court should hold that the President lacked the authority to impose the tariffs at issue in these cases.

Respectfully Submitted,

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ADDENDUM

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Presidential Actions Taken Pursuant to the International Emergency Economic Powers Act from January 20, 2025 to September 30, 2025

Date	Exec. Order No.	Amount of Tariff	Rationale	Exclusions
2/1/2025	14193 (Canada)	25% on Canadian Goods 10% on Canadian Energy/Energy Resources	Reduce the flow of imported drugs from cartels through the Northern border.	Products described in 50 U.S.C. § 1702(b).
2/1/2025	14194 (Mexico)	25% on Mexican Goods	Reduce the flow of imported drugs from cartels through the Southern border.	Products described in 50 U.S.C. § 1702(b).
2/1/2025	14195 (China)	10% on all Chinese Goods	National emergency posed by "failure of the PRC to" stop the flow of illicit precursors of illegal drugs.	Products described in 50 U.S.C. § 1702(b).
2/5/2025	14200 (Amends 14195 and allows for de minimis treatment)	Allows for de minimis treatment	No independent rationale given for change.	None

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3/2/2025	14226 (Canada) (Amends 14193 and allows for de minimis treatment)	Amends EO 14193 to allow for de minimis treatment	None given.	None
3/2/2025	14227 (Mexico) (Amends 14143 and allows for de minimis treatment)	Amends EO 14194 to allow for de minimis treatment	None given.	None
3/3/2025	14228 (Amends 14195 to 20% from 10%)	20% on all Chinese Goods	National emergency posed by "failure of the PRC to" stop the flow of illicit precursors of illegal drugs.	Products described in 50 U.S.C. § 1702(b).

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3/6/2025	14231 (Canada)	Reduction to 0% tariff from 25% for all products of Canada which meet the USMCA's rules of origin Reduction to 10% tariff from 25% for non-USMCA compliant potash	Automotive industry is critical to American economic and national security. No potash rationale included.	None
3/6/2025	14232 (Mexico)	Reduction to 0% tariff from 25% for all products of Mexico which meet the USMCA's rules of origin Reduction to 10% tariff from 25% for non-USMCA compliant potash	Automotive industry is critical to American economic and national security. No rationale included for lower tariffs on potash.	None
3/24/2025	14245 (Venezuela)	25% on all goods from countries importing Venezuelan Oil that Sec'y State (in consultation with Sec	National Security threat posed by Venezuelan regime and international	None

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		Commerce, Sec Homeland Security, and US Trade Representative) determines should have the tariff applied to. The only criteria is a finding from Sec'y Commerce that a country imports the oil, then Sec'y State can apply this tariff to that country. There is no finding required on the part of Sec'y State. It is "at his discretion" whether to apply the tariff.	criminal organizations.	
4/2/205	14256	Eliminated de minimis exemption from EO 14200. Applies tariff to Chinese goods sent through postal network.	Close de minimis exemption and to impose tariffs on postal shipments because "many shippers based in the	None

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			People's Republic of China (PRC) . . . often avoid detection due to administration of the de minimis exemption."	
4/2/2025	14257	10% tariff on all imports except Canada and Mexico with higher rates for certain countries listed in Annex I. China is 34% in Annex I. Other countries in Annex I include South Korea (25%), Zimbabwe (18%), Botswana (37%), Thailand (36%), and the European Union (20%)	Threat posed by other countries' disparate tariff rates and non-tariff barriers, domestic economic policies, and the "large and persistent annual U.S. goods trade deficits" that result.	Exceptions: - All goods listed in Annex II (including copper, pharmaceuticals, semiconductors, lumber articles, critical minerals, and energy and energy products) - 50 USC 1702(b) - Steel/aluminum and derivative articles subject to Section 232 duties - Automobiles and automotive parts

Presidential Actions Taken Pursuant to the International Emergency Economic Powers Act from January 20, 2025 to September 30, 2025

				subject to Section 232 duties - All products which may become subject to Section 232 duties - Goods from Canada/Mexico
4/8/2025	14259 (China)	Increases tariff on Chinese imports to 84% from 34%	Response to retaliatory tariff imposed by China in response to EO 14257.	Exceptions - Same as EO 14257
4/9/2025	14266	Increases tariff on Chinese imports to 125% from 84% Lowers country-specific tariff rates in Annex I EO 14257 to 10% for a period of 90 days (except for China)	Chinese tariff increased in response to Chinese retaliation. Suspension of higher country specific tariffs for 90 days implemented to encourage countries to engage in direct	Exceptions - Same as EO 14257

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			negotiation with the administration.	
4/29/2025	14289	Attempts to clarify how multiple tariffs on the same good apply	Rationale is that stacking tariffs results in a cumulative tariff that exceeds what is "necessary to achieve the intended policy goals."	None
5/12/2025	14298 (China)	Lowers China-specific tariff rate to 10% for a period of 90 days	The United States has entered into discussions with China, which marks a significant step by China toward remedying non-reciprocal trade arrangements and addressing the concerns of the United States relating to	None

Presidential Actions Taken Pursuant to the International Emergency Economic Powers Act from January 20, 2025 to September 30, 2025

			economic and national security matters.	
7/7/2025	14316	Extends the 90-day pause for the higher tariff rates in Annex I of Executive Order 14257 by another 23 days till August 1, 2025	The status of discussions with trading partners.	None
7/30/2025	14323 (Brazil)	Imposing an additional 40% tariff on products from Brazil	Recent policies, practices, and actions of the Government of Brazil threaten the national security, foreign policy, and economy of the United States.	Products described in 50 U.S.C. § 1702(b). Goods listed in Annex I of the Executive Order, including orange juice, certain silicon metal, pig iron, civil aircraft and parts and components thereof, metallurgical grade alumina, tin ore, wood pulp, precious metals, energy and

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				energy products, and fertilizers.
7/30/2025	14324	Suspends duty-free de minimis treatment for all countries	To ensure that the tariffs imposed by previous Executive Orders are effective in addressing the previously declared national emergencies declared in Executive Orders 14193, 14194, 14195, and 14257 and not undermined.	None.
7/31/2025	14325 (Canada)	Increasing tariffs on imports from Canada from 25% to 35% and imposing an additional 40% tariff on articles of Canada that are determined to have been transshipped to evade applicable duties	Canada's lack of cooperation in stemming the flood of fentanyl and other illicit drugs across our northern border—including its failure to devote satisfactory resources to arrest,	Products described in 50 U.S.C. § 1702(b). Goods from Canada which qualify as originating under the U.S.-Mexico-Canada Agreement

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			seize, detain, or otherwise intercept drug trafficking organizations, other drug or human traffickers, criminals at large, and illicit drugs—and Canada's efforts to retaliate against the United States in response to Executive Order 14193.	
7/31/2025	14326	Modifying the reciprocal tariff rates for dozens of countries. For most countries, the new reciprocal tariff rate was set at 15%.	The continued lack of reciprocity in the United States' bilateral trade relationships and the impact of foreign trading partners' disparate tariff rates and non-tariff barriers on U.S. exports, the domestic manufacturing base.	Same exclusions as provided in Executive Order 14257

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			critical supply chains, and the defense industrial base. In addition, the President also noted the status of trade negotiations, efforts to retaliate against the United States for its actions to address the emergency declared in Executive Order 14257, and efforts to align with the United States on economic and national security matters.	
8/11/2025	14334 (China)	Extending the 90-day tariff pause established in Executive Order 14298 by another 90 days	Ongoing discussions with the Government of the People's Republic of China.	None.

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9/5/2025	14346	Modifying the list of products that are excluded from the reciprocal tariffs and establishing a new list of products for which the Administration may consider reducing the reciprocal tariff rate depending on a trading partner's commitments to the United States in its agreement on reciprocal trade and other considerations.	Ongoing negotiations with trading partners, monitoring, and recommendations from Administration officials.	None.