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

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BRIEF OF AMICI CURIAE GEORGE F. ALLEN, JOSHUA A. CLAYBOURN, JOHN C. DANFORTH, RICHARD A. EPSTEIN, CHARLES T. HAGEL, HAROLD HONGJU KOH, GERARD N. MAGLIOCCA, MICHAEL B. MUKASEY, ALAN O. SYKES, JOHN DANIEL TINDER, ALEXANDER VOLOKH, PETER J. WALLISON, PHILIP ZELIKOW, AND ROBERT ZOELLICK IN SUPPORT OF THE PETITIONERS IN 24-1287 AND THE RESPONDENTS IN 25-250

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INTEREST OF AMICI CURIAE[1]

Amici are constitutional scholars, legal historians, public lawyers, a retired federal appellate judge, a former United States Attorney General, a former United States Trade Representative, and three former United States Senators united by a common conviction: the endurance of the American Republic depends not only on elections or policy outcomes, but on the faithful preservation of its constitutional structure.

Amici do not appear to defend or oppose any particular trade policy. They file this brief because they believe the Constitution draws bright lines between legislative and executive power—and that those lines are being blurred in ways that threaten democratic accountability itself.

SUMMARY OF ARGUMENT

The Constitution assigns tariff authority to Congress, not the President. From the founding, tariffs have been treated as taxes—duties and imposts—levied only by the people's representatives. This allocation was deliberate: taxation without representation was the grievance that sparked the Revolution. Tariffs, like all taxes, fall on Americans. The Framers therefore entrusted tariff decisions to

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[1] Pursuant to this Court's Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part. The Free to Choose Network contributed funding for the preparation of this brief. No entity or person, aside from amici curiae, their members, their counsel, or the Free to Choose Network, made any monetary contribution intended to fund the preparation or submission of this brief.

the legislative branch, and this Court has long recognized that no generalized executive "regulation" authority can supply what the Constitution withholds.

Throughout American history, Congress has guarded this power through a layered statutory framework for trade with friendly nations. Alongside it developed a separate tradition for dealing with America's enemies: embargoes, sanctions, and wartime restrictions. These two branches of law—one rooted in commerce, the other in conflict—balanced constitutional authority in different ways. For more than two centuries they coexisted without confusion, and neither Congress nor the White House imagined that a President could freely swap one for the other.

In 1971, the framework was tested but proved resilient. President Nixon, having decided to withdraw from the Bretton Woods financial system that tied the dollar's value to gold, feared a sudden depreciation of the dollar in the novel floating exchange rate environment. Confronting this new situation, the President ordered a "temporary" and modest import surcharge to mitigate the danger. In his order he expressly relied on trade laws for authority, not emergency powers.

When his surcharge was challenged in court, the government's lawyers invoked the Trading with the Enemy Act ("TWEA") even though no one had previously read that sanctions statute to include tariff power. Nixon's action, which had lasted only four months, was declared unconstitutional by a lower court in 1974; Congress meanwhile carefully plugged the apparent gap in its authorities: it enacted emergency authority, modeled on Nixon's stopgap, in

§ 122 of the Trade Act of 1974. The next year, in *United States v. Yoshida International, Inc.*, 526 F.2d 560 (C.C.P.A. 1975), the Court of Customs and Patent Appeals ("CCPA") upheld Nixon's original surcharge against plaintiffs who wanted reimbursements, but treated it as a one-time pass and stressed its decision was not precedent for open-ended presidential tariff authority.

Against this backdrop, the International Emergency Economic Powers Act of 1977 ("IEEPA") cannot bear the weight the government now places on it. IEEPA is a descendant of TWEA, targeting foreign enemies. Having already closed the gap in emergency powers in a tariff context in 1974, Congress enacted IEEPA to perform *other* work. IEEPA's text authorizes embargoes, asset freezes, and financial sanctions abroad—not taxation of Americans at home. President Carter described it as "largely procedural" and designed to restrain, not enlarge, emergency powers. The House and Senate Reports confirm that its purpose was to "revise and delimit" presidential authority. For nearly 50 years, practice bore this out: no previous President invoked IEEPA to impose tariffs.

Not even Nixon's 1971 surcharge challenged the foundational congressional tariff system, a system which took shape between 1919 and 1922. In 1919, the bipartisan United States Tariff Commission urged Congress to abandon the old patchwork of general tariff rates and discriminatory deals with particular countries. The new system enacted unconditional equal treatment of all countries that had normal trade relations—"most favored nation" status—and penalized countries that continued to

discriminate against us. Tariffs might be high or low, but they would be the same for all such nations. A pro-tariff Congress adopted this approach in the Fordney-McCumber Tariff of 1922 and reinforced it in Smoot-Hawley in 1930. It has defined the congressional tariff system ever since. Nixon's 1971 action did not touch those foundational principles. IEEPA, like TWEA before it, was meant to operate alongside these principles, not empower a President to overthrow them by whim and decree.

Three themes underscore why the government's contrary reading must fail. First, IEEPA's text and structure foreclose tariff authority: it never mentions duties; its verbs cover sanctions, not taxes. And in 1977, Congress kept the old language that had long coexisted with tariff laws—deliberately omitting tariff authority while narrowing presidential power. Second, IEEPA's requirement of an "unusual and extraordinary" threat cannot be read as a blank check for addressing chronic trade grievances or drug trafficking. The current tariffs address long-standing, ordinary concerns, not a sudden emergency. Third, foreign-affairs labels cannot expand executive power. Since the founding, tariff power has always intertwined domestic and international concerns. The founders made their choice clear: Congress holds the power to "regulate Commerce with foreign nations." From the start, Congress has exercised that authority carefully, imposing limits whenever it delegates it. Beyond matters of war or national defense, the President has no independent power to regulate foreign commerce.

To read IEEPA as authorizing tariffs would collapse the distinction between foreign sanctions and

domestic taxes, nullify Congress's carefully tailored trade statutes, and raise grave nondelegation concerns. It would permit taxation by proclamation—the very evil the Framers fought to end. It would give the President his own power of the purse.

This Court writes for the ages. Upholding this unprecedented assertion of power would overthrow the congressional tariff system established more than a century ago, enabling any President to recast U.S. trade policy unilaterally, without time limit, without standards, and without congressional consent. To accept such a theory would replace the rule of law with the rule of a man.

The Court should reaffirm the basic principle that Congress, not the President, holds the power to tax and to make major trade policy. Emergencies do not erase that principle, and the government cannot through the back door smuggle tariff authority into a statute that deliberately does not authorize it by invoking "foreign affairs" or imagining the power to "regulate" as including the power to tax.

ARGUMENT

I. Congress, not the President, is vested with the power to impose tariffs.

The power to impose tariffs—like the power to levy taxes—belongs exclusively to Congress. This is no formality. The nation was born of the slogan "no taxation without representation," which means that the authority to tax, raise revenue, and shape the public's economic obligations is a law-making power, not an executive function. It must rest with the people's elected representatives.

The Constitution is explicit. Article I, Section 8, grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises" and separately the power "[t]o regulate Commerce with foreign Nations[.]" U.S. Const. art. I, § 8, cls. 1, 3. That the Framers enumerated these powers distinctly underscores their understanding that regulating enemy trade is not the same as the power to tax Americans. Measures like embargoes or quotas could regulate commerce. Only the taxing power permits raising revenue from the people's imports. The Framers deliberately vested both powers in Congress alone. As James Madison wrote in *The Federalist No. 58*, vesting control of taxation in the legislature served as a deliberate check on executive power, born of colonial resistance to Crown-imposed duties levied without consent. That structural safeguard ensures that only a geographically diverse and representative Congress—not the Executive—may impose economic burdens.

Tariffs fall squarely within this constitutional design. If the Framers had merely used the term "taxes," that term would have encompassed tariffs (which are taxes). But the Framers went out of their way to list "duties" and "imposts" as within the legislative domain. And no wonder: the Framers expected that the "impost" (tariffs) would generate sufficient revenue to pay for most of the ordinary operations of the federal government in peacetime.

Congress historically guarded this authority with care. The Tariff Act of 1789—among the first laws passed under the new Constitution—imposed duties across a broad range of imported goods. It was introduced in the House, debated in both chambers,

amended, and enacted through the full machinery of legislative deliberation. For more than a century, tariff policy was central to congressional politics and national elections. Tariffs were the centerpiece of Henry Clay's "American System," and the so-called "Tariff of Abominations" was the impetus for the Nullification Crisis of 1832–33. Whether popular or unpopular, it was Congress—not the President—that decided which goods to tax, at what rates, and for what ends.

In the twentieth century, Congress refined this authority into a coherent tariff system founded on principles of equal tariff treatment of friendly foreign countries (also called non-discrimination) and "most favored nation" treatment. Influenced by the U.S. Tariff Commission's landmark 1919 report, Congress abandoned the old patchwork of country-by-country deals and embraced reciprocal equal treatment. The Fordney–McCumber Tariff of 1922, together with President Harding's 1923 instructions to diplomats issued with congressional approval, and the Smoot–Hawley Tariff of 1930 all reflected a bipartisan understanding: tariff rates might rise or fall, but they applied equally to all nations, and only Congress could set them. Douglas A. Irwin, *Clashing Over Commerce: A History of U.S. Trade Policy*, 362–66 (2017). Between 1934 and 1974, presidential authority over tariffs reached its high tide—rooted in broad congressional delegations and exercised through presidential proclamation—but even then, the principle of unconditional equal treatment remained for all countries with established trade relations.

Sanctions authority—targeting foreign adversaries rather than taxing Americans—was a separate authority of the Congress (to regulate commerce) that was delegated to the President in separate legislation, as in TWEA, enacted in 1917 as America entered the First World War. These distinct legislative prerogatives coexisted easily. For decades, nobody thought that the prolonged congressional battles over tariffs were unnecessary because TWEA had given the President the authority to levy them.

In 1971, President Nixon imposed an emergency import surcharge, invoking only his authority to terminate prior presidential tariff proclamations under the 1930 and 1962 trade laws. As explained in Part II below, Congress responded by resetting the entire framework and reasserting its primacy: it required both specific authorization to negotiate trade agreements and separate congressional action to implement them, abandoning the presidential-proclamation model. Alan Wm. Wolff, *Evolution of the Executive-Legislative Relationship in the Trade Act of 1974*, 19 SAIS Review (1956-1989), no. 4, 1975, at 16–23. (The author drafted Nixon's 1971 executive order and served as the executive branch's lead trade lawyer during the 1974 legislative process.). The episode demonstrated that tariff power belongs to Congress alone—after that crisis, Congress tightened the reins.

The Framers' original separation of the regulation-of-commerce power from the taxing power remains firmly entrenched. Tariffs, as instruments of taxation, may be employed only with Congress's consent and within Congress's bounds. That allocation ensures not only fidelity to constitutional

structure, but also the predictability essential for farmers, merchants, and investors. As Madison warned in *The Federalist No. 62*, unpredictable government policy undermines the confidence of merchants and farmers and discourages long-term investment. So, too, today: it is not an argument for any particular tariff policy over another to observe the wisdom of the Constitution's assignment of these powers to the branch most likely to pursue a consistent and predictable course.

II. IEEPA does not authorize tariffs.

IEEPA must be understood against the backdrop of TWEA, the World War I-era statute it partly reenacted and narrowed in 1977. And TWEA must be understood within the context of twentieth century laws dealing with wartime commerce and sanctions on the one hand, and tariffs on the other.

TWEA and related emergency powers may implicate the President's Article II authority over war and national defense—but only when the context involves actual or imminent conflict with foreign adversaries. During the Cold War, for example, when the President invoked emergency powers to prevent a Cuban national from transferring U.S. funds to Cuba, the Second Circuit upheld the action by treating it as a wartime measure. The court observed, "We are not formally at war with Cuba but only in a technical sense are we at peace." *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 111 (2d Cir. 1966).

TWEA was a sanctions law targeting commerce with foreign enemies, never thought to include tariff power that taxed Americans who engaged in normal trade with friends. As explained below, even in 1971

President Nixon did not rely on TWEA to justify his surcharge. By then, Congress was already addressing the issue in the Trade Act of 1974. And when Congress subsequently enacted IEEPA, it deliberately preserved TWEA's sanctions language while excluding any authority over tariffs.

This sequence matters. If TWEA itself was never understood to authorize tariffs, and if Congress in 1974 enacted a narrow tariff statute to fill the seeming gap exposed by the financial crisis in 1971, then IEEPA—enacted in 1977 with no mention of tariffs—cannot be read as a roving grant of taxing power. To hold otherwise would impute to Congress an intent to override its own recent handiwork—the Trade Act of 1974—something the statute's text, history, and structure all foreclose.

A. Congress built the tariff system around equal treatment and most-favored-nation status.

The Constitution vests tariff power in Congress. Congress in turn developed a tariff system during the twentieth century that was organized around nondiscrimination and equal treatment. After World War I, the bipartisan U.S. Tariff Commission concluded in 1919 that discriminatory, country-by-country tariff deals were untenable in a modern economy. It urged the United States to pursue reciprocal equality of treatment: "The United States should ask no special favors and should grant no special favors. It should exercise its powers and should impose its penalties, not for the purpose of securing discrimination in its favor, but to prevent discrimination to its disadvantage." U.S. Tariff

Commission, *Reciprocity and Commercial Treaties* 13 (1919).

Congress embraced this approach. The Fordney–McCumber Tariff Act of 1922 established a general tariff schedule and, in Section 317, delegated to the President authority to impose penalties—tariffs up to 50 percent—on any nation that denied equal treatment or discriminated against the United States. Congress reaffirmed the same principle eight years later in Section 338 of the Smoot–Hawley Tariff Act of 1930.

In 1923, President Harding and congressional leaders, including Senator Henry Cabot Lodge, who chaired the committee overseeing any new trade deals, agreed that future United States treaties would be negotiated or revised on the basis of unconditional equal treatment in agreed rates. The United States thus adopted the "most-favored-nation" principle and practice. Charles Evans Hughes explained this policy in guidance sent to American diplomats. *Department of State, Foreign Relations of the United States, 1923*, vol. 1, 131–32 (1938).

That congressionally mandated framework has governed foreign commerce with friendly nations for more than a hundred years, until the current presidential attempt to overthrow it in 2025. Even pro-tariff Republicans who drafted Fordney-McCumber and Smoot-Hawley, engaged in prolonged legislative battles, never suggested that Presidents could avoid all this trouble, bypass Congress, and invoke TWEA to impose tariffs. Tariffs were understood to be taxes, set by Congress and applied uniformly. Sanctions, by contrast, targeted foreign

adversaries and drew on the President's independent defense powers.

B. Congress never understood TWEA to grant tariff authority, as its response to the novel 1971 balance-of-payments emergency and Nixon's surcharge reflects.

TWEA, enacted in 1917, was a wartime sanctions statute. It gave the President power to regulate economic transactions with foreign enemies during declared wars. It said nothing about tariffs and for more than half a century after its enactment no President used it to impose tariffs. Rightly so: tariffs are taxes, not sanctions.

This firmament was tested in 1971. The U.S. had long managed international finance either under the gold standard or a standard linked to gold. The U.S. withdrawal from Bretton Woods in 1971 and the move to floating exchange rates created a real danger of a run on the dollar and rapid depreciation of the currency. The situation was unprecedented; Congress had never enacted authority for such a contingency.

President Nixon responded by declaring a national emergency and imposing what his order said would only be a temporary, nondiscriminatory 10% surcharge on imports. It applied equally to all countries, preserving the principle of most-favored-nation treatment that had governed U.S. tariff policy since 1922. His order said it would apply only to negotiated tariff rates since 1962, not the "statutory" tariff rates in column 2 of the tariff register. President Nixon did not invoke TWEA in his order. Rather, he relied upon the Tariff Act of 1930 and the Trade

Expansion Act of 1962. *See Yoshida*, 526 F.2d at 568. That system was eliminated in 1974.

When President Nixon's temporary surcharge was later challenged in court by claimants seeking refunds, the government—searching for better authority—invoked TWEA as an additional source of presidential authority, on grounds it authorized the president "to regulate imports . . . by means of instructions, licenses, or otherwise." *Yoshida Int'l, Inc. v. United States*, 378 F. Supp. 1155, 1169 (Cust. Ct. 1974), *rev'd*, 526 F.2d 560. The Customs Court swiftly concluded that Nixon's surcharge was unlawful on all grounds. *Id.*

In that context, Congress acted. While *Yoshida* was on appeal, Congress replaced the old system for authorizing and implementing trade deals with the Trade Act of 1974, Pub. L. No. 93-618, § 122, 88 Stat. 1978, 1988–89 (1975) (codified at 19 U.S.C. § 2132). That Act also for the first time gave the President explicit authority to revise tariffs in response to balance-of-payments problems that threatened the value of the dollar, subject to strict substantive and procedural guardrails. The Trade Act allowed the President to increase tariffs through an emergency import surcharge, but capped such surcharges at 15% and permitted them to last no more than 150 days in the absence of affirmative authorization by Congress. *Id.* Moreover, the Act required specific findings of unfair trade practices by the nations subject to the surcharges. Congress thus made clear that if a President is to have any emergency tariff power, he would have to make detailed findings and any modest tariffs would be short-lived.

Although the CCPA subsequently reversed the trial court's holding that TWEA did not authorize presidential tariff increases, that decision cannot help the government here. First, in identifying a "duty . . . to effectuate the intent of Congress" as its interpretive north star and thus inferring tariff power from the vague phrase "regulate imports," *Yoshida*, 526 F.2d at 573–78, the CCPA employed reasoning from a "bygone era of statutory construction." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 437 (2019); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 392 (2012) (referring to congressional intent as "pure fiction"). The CCPA collapsed the Constitution's distinction between the regulation of commerce and the taxation of imports, while dismissing the nondelegation concern raised by the challengers as a "rusted concept." As noted in Part IV, the delegation concerns that animated decisions by this Court nearly a century ago remain every bit as applicable in modern times, if not more so. *Accord FCC v. Consumers' Rsch.*, 606 U.S. ----, 145 S. Ct. 2482 (2025); *Gundy v. United States*, 588 U.S. 128 (2019).

Second, and in any event, the CCPA ruled only *after* Congress had passed the Trade Act of 1974 and reset the executive-legislative balance of authorities, in direct response to Nixon's actions. The CCPA's reasoning was driven less by constitutional fidelity than by reluctance to impose massive refunds years after the surcharge had expired. The court itself stressed that legislation "providing procedures" for such an emergency would supersede its decision. *Yoshida*, 526 F.2d at 570, 578. And Congress had passed just such legislation.

What matters for present purposes is that even in the tumult of Nixon's novel emergency, the underlying congressional tariff framework remained intact. The surcharge was temporary, nondiscriminatory, and treated as an aberration. Congress's legislative response confirms that tariff authority rests with it alone, and that extraordinary episodes like 1971 are to be handled by specific, limited statutes—not by open-ended readings of emergency powers.

At the same time, Congress addressed other contingencies with distinct provisions. Section 201 provided emergency relief for sudden surges of imports. Trade Act of 1974, Pub. L. No. 93-618, § 201, 88 Stat. 1978, 2011–14 (codified at 19 U.S.C. §§ 2251–2255). Section 232 of the Trade Expansion Act of 1962 already authorized tariff adjustments where imports threatened national security. Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (codified at 19 U.S.C. § 1862). Section 301 targeted unfair foreign trade practices. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (codified at 19 U.S.C. §§ 2411–2420). Together with § 122, these provisions closed the loopholes and gave Presidents limited, context-specific tools—always within substantive and temporal limits.

This response underscores the implausibility of the government's reading of IEEPA. If Congress in 1974 enacted § 122 to address balance-of-payments crises, and in the same Act codified § 201 and § 301, it could not have believed that an all-purpose emergency statute already conferred plenary tariff power. The *Yoshida* court recognized as much, noting that § 122 kneecapped the notion that a general

statute like TWEA could serve as a tariff vehicle. 526 F.2d at 582 n.33.

The significance of § 122 and the broader statutory scheme that cabins presidential tariff powers is paramount. The dissenting judges on the Federal Circuit defended an expansive view of IEEPA by positing that a national emergency might justify tariffs to protect American manufacturing or agriculture—essentially treating IEEPA as a catch-all trade weapon in the name of "national security." *E.g.*, No. 25-250 Pet.App. 91a, 116a. But that reasoning overlooks Congress's deliberate choices. If an influx of imports threatens national security by hollowing out key industries (steel, aluminum, technology, or even the agricultural base), Congress has already provided a remedy in Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862). Section 232 explicitly empowers the President to adjust imports, including through tariffs, to safeguard industries critical to national security. Likewise, other statutes address unfair foreign trade practices (Section 301 of the Trade Act of 1974) and surges of imports that injure domestic industries (the safeguard provisions of the Trade Act, 19 U.S.C. § 2253).

In enacting these laws—alongside § 122's balance-of-payments authority—Congress deliberately circumscribed the President's role in setting tariffs to specific contexts and with specific limits. The government's advocacy in this case only underscores the point: the Solicitor General has argued that the IEEPA tariffs are curing "decades of unfair and asymmetric trade policies that have gutted our manufacturing capacity and military readiness,"

No. 25-250 Pet. 3—essentially an admission that the tariffs are aimed at problems Congress already addresses through targeted trade statutes, not some unforeseen gap. The proper course in such circumstances is to use the specific tools Congress provided, or else seek new legislation, not to seize upon an all-purpose emergency power to override the very *limits* Congress placed on tariff authority.

Congress's design was deliberate. When it wished to delegate tariff power, it spoke clearly, imposed guardrails, and preserved its ultimate control. IEEPA, enacted just three years later, must be read in that context. Its silence on tariffs was natural. With the problem caused by the withdrawal from a gold-dollar standard solved, IEEPA could reenact the language from TWEA and have no more effect on tariff power than had been the case with TWEA between 1917 and the *Yoshida* litigation in 1974-75.

To be sure, although it correctly affirmed the Court of International Trade's invalidation of the IEEPA tariffs, the *en banc* majority of the Federal Circuit accepted the government's position *arguendo* that the term "regulate … importation" might permit some tariffs, akin to the one sustained in *Yoshida*. No. 25-250 Pet.App. 42a. Accepting that limited reading, the court nonetheless concluded that the contested IEEPA tariffs were "unbounded" in scope, amount, and duration and therefore beyond the authority delegated by IEEPA. *Id.*

Even that analysis indulges the President too much. IEEPA came after Congress had closed the door on unilateral tariffs: § 122 of the Trade Act and other statutes provide specific, time-limited remedies, and each includes precise limits and procedures.

When Congress carried forward TWEA's list of sanctions into IEEPA, it replaced them with authorities "more limited in scope than those of [TWEA] section 5(b)" and made them subject to additional procedures. H.R. Rep. No. 95-459, at 2 (1977). The statute never mentions duties, tariffs, or taxes. If the only tariff ever intimated under TWEA spurred Congress to enact a narrow, temporary surcharge statute (§ 122), then IEEPA's silence means exactly that: no tariff power resides there. Reading IEEPA to permit even modest surcharges would blur the line between sanctions on foreigners and taxes on Americans and undo the careful limits the Constitution and the Congress have imposed on the President's trade authority. *See* H.R. Rep. No. 95-459, at 2–3; S. Rep. No. 95-466, at 2 (1977). The better reading is that of the district court in *Learning Resources*, which laid it out plainly: "IEEPA does not authorize the President to impose tariffs." No. 24-1287 Pet.App. 36a.

C. The 1977 IEEPA reenacted TWEA's sanctions language while leaving Congress's tariff system intact.

By 1977, the statutory landscape was complete. The balance-of-payments problem that had prompted Nixon's surcharge was addressed in § 122 of the Trade Act of 1974. Other contingencies were covered by § 201 (surge relief), § 232 (national security), and § 301 (unfair trade practices). Having stitched up the seams, Congress turned to modernizing sanctions authority.

IEEPA, enacted in 1977, carried forward TWEA's general language authorizing the President to "regulate" imports, but deliberately omitted any

reference to tariffs or duties. IEEPA was designed to regulate financial transactions, block foreign assets, and impose embargoes in response to "unusual and extraordinary threat[s]." 50 U.S.C. §§ 1701–1702. These are classic sanctions tools—measures aimed at foreign adversaries. Having just enacted an explicit, and tightly limited, tariff authority through the Trade Act, Congress did not incorporate any tariff language into IEEPA.

Congress employed seven different verbs to capture the intended types of economic sanction: Section 1702(a)(1)(B) permits the President to "investigate, … regulate, direct and compel, nullify, void, prevent or prohibit" the acquisition, use, or transfer of property owned by a foreign nation or individual. Notably, Congress did not include the term "tax" or any of its synonyms: imposts, excises, duties, etc. If Congress had intended to delegate the power of taxing ordinary commerce, it would have said *something*. Congress had already "provid[ed] procedures" for tariffs in the 1974 Act. *Yoshida*, 526 F.2d at 578. IEEPA does not render the Trade Act of 1974 into irrelevance.

The legislative history confirms this understanding. The House Report emphasized that IEEPA was to provide "a new set of authorities for use in time of national emergency which are *both more limited in scope than those of [TWEA] and subject to various procedural limitations*[.]" H.R. Rep. No. 95-459, at 2 (emphasis added). The Report expressed Congress's view that President Nixon's tariffs had been upheld under the TWEA for purposes "which would not be contemplated in normal times." *Id.* at 5. The Senate Report likewise stated that "the purpose

of" IEEPA was "to revise and delimit the President's authority" in response to earlier presidential uses of TWEA. S. Rep. No. 95-466, at 2.

President Carter's own description of IEEPA at the time of signing confirms this understanding. He emphasized that "[t]he bill is largely procedural. It places additional constraints on use of the President's emergency economic powers in future national emergencies[.]"[2]

Nothing in IEEPA's legislative history suggests that Congress intended to give the President tariff-making power. The House Report accompanying the bill identified the key powers carried over from TWEA that were deemed necessary for emergencies: controls on foreign exchange transactions, banking transfers, and securities; regulation of property in which foreign nationals have an interest; vesting (seizing) foreign-owned property; and handling or liquidating such property for the United States' benefit. *See* H.R. Rep. No. 95-459, at 1–2. Notably absent from that list is any power to raise import duties or impose new tariffs. In fact, tariffs are only addressed in a historical discussion of past uses of TWEA, not as a contemplated feature of IEEPA. *See id.* at 5–6.

For nearly 50 years, practice bore out this design. Despite laying limited tariffs under the Trade Act and other authorities, no President attempted to invoke IEEPA to impose tariffs. The statute was consistently applied to freeze assets, block payments, and embargo

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[2] Jimmy Carter, Statement on Signing H.R. 7738 Into Law (Dec. 28, 1977), https://www.presidency.ucsb.edu/documents/presidential-war-powers-bill-statement-signing-hr-7738-into-law.

transactions with foreign enemies—not to restructure the domestic tax system. The Solicitor General's theory in this case would invert that record, smuggling into IEEPA a sweeping tariff power Congress had just debated and handled in ways that increased congressional power.

That reading cannot be reconciled with constitutional principle or with the major questions doctrine. As this Court has emphasized, "Congress could not have intended to delegate a decision of such economic and political significance . . . in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Tariffs are taxes. They require explicit authorization from Congress. Congress provided such authorization only in tightly confined statutes, and never in IEEPA.

III. The "unusual and extraordinary" requirement is not met here.

IEEPA requires that any presidential action under its authority be taken only to deal with an "unusual and extraordinary threat" to the national security, foreign policy, or economy of the United States, and only after the President formally declares a national emergency with respect to that threat. 50 U.S.C. § 1701(a). This statutory threshold has two components. First, the threat must be genuinely out of the ordinary—a significant departure from normal conditions, not a longstanding or routine problem. Second, the situation must be so urgent that immediate executive action is necessary, such that waiting for the ordinary legislative process would be impractical.

In short, IEEPA is for true emergencies, not a shortcut for policy preferences or chronic issues Congress can address. The term "emergency," by definition, does not extend to every problem that is serious or threatening, but only to those that are "sudden, unexpected, or impending." Black's Law Dictionary (2d ed.). A persistent condition that has prevailed for years or decades is the opposite of "unusual," and it cannot be characterized as an "impending" crisis requiring immediate unilateral action by the Executive.

The tariffs at issue here do not come close to meeting the strict statutory threshold. The President's own justification for the tariffs makes clear that no sudden or extraordinary precipitating event occurred. On the contrary, the proclamations and accompanying White House fact sheets describe a long-term economic policy agenda responding to chronic trade issues. The President declared a national emergency over "the large and persistent trade deficit" of the United States and the alleged unfair trade practices of other nations that have "[f]or generations" disadvantaged American industry.[3] The fact sheet cites the loss of "around 5 million manufacturing jobs" from 1997 to 2024—a decline spanning nearly three decades. *Id.* It even references

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[3] *See Fact Sheet: President Donald J. Trump Declares National Emergency to Increase Our Competitive Edge, Protect Our Sovereignty, and Strengthen Our National and Economic Security*, The White House (Apr. 2, 2025), https://www.whitehouse.gov/fact-sheets/2025/04/fact-sheet-president-donald-j-trump-declares-national-emergency-to-increase-our-competitive-edge-protect-our-sovereignty-and-strengthen-our-national-and-economic-security/.

Chinese industrial policies "[b]etween 2001 and 2018" that purportedly contributed to U.S. job losses. *Id.*

In other words, the supposed "threat" motivating these tariffs consists of broad economic trends and grievances that have existed at least since the 1970s, exacerbated at the turn of the current century, or narcotics trafficking, all of which have evolved over many years. However serious such long-term issues may be, they are plainly neither unusual in the sense of a sharp deviation from the status quo, nor extraordinary in the sense of an abrupt crisis. They are the opposite: at this point they are usual and ordinary challenges of the kind that are regularly the subject of legislation and policy debate.

IEEPA's history and purpose confirm that it was never intended to empower the President to use emergency powers to redress normal policy problems. Congress enacted IEEPA in 1977 to rein in, not expand, executive emergency economic powers.

To read IEEPA as the Administration urges would effectively allow any President to bypass Congress's Article I control over tariffs at will—simply by uttering the word "emergency." That cannot be squared with the statute's text or with basic constitutional design. As Justice Jackson cautioned, emergency powers with "no beginning or . . . no end" that "submit to no legal restraint" are incompatible with our constitutional order (even aside from the statute's limits). *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653–54 (1952) (Jackson, J., concurring). And as this Court has emphatically held, even measures that appear "efficient, convenient, and useful" cannot override the separation of powers; "[c]onvenience and efficiency are not the primary

objectives—or the hallmarks—of democratic government[.]" *INS v. Chadha*, 462 U.S. 919, 944 (1983). In creating IEEPA, Congress insisted on an extraordinary-threat trigger as a critical safeguard to ensure that the President's emergency economic powers do not swallow the rule proving that taxing and tariff powers belong to the legislature.

Crucially, the tariff program launched by the President betrays a *lack* of any genuine urgency. These tariffs were not conceived as a temporary stop-gap to stave off an impending calamity while Congress regains the ability to act. Quite the opposite: the President described the tariffs as a long-term or even permanent policy shift—a strategic "rebalance[ing]" of trade relationships that will remain in effect "until such a time as [he] determines that the threat posed by the trade deficit and underlying nonreciprocal treatment is satisfied, resolved, or mitigated." *See supra* n.3.

In other words, the President has declared a permanent emergency. That means the "emergency" tariffs have no end point; they could persist indefinitely, contingent on open-ended policy goals and the behavior of foreign governments. Measures of this character are meant to be enacted by Congress.

Because the predicate "unusual and extraordinary" threat is absent, the President's proclamation of a national emergency and the tariffs that followed exceed the authority that Congress delegated in IEEPA. The Administration's reliance on fentanyl trafficking and cross-border drug concerns to justify sweeping tariffs only underscores the mismatch, since taxing ordinary imports from China or Mexico has no logical nexus to stopping narcotics.

The mismatch between the harms claimed and the measures taken underscores that the "emergency" is merely a pretextual hook for broad economic policy. When an across-the-board import tax is rationalized by pointing to fentanyl overdoses, it is difficult to imagine a limit to what could count as an IEEPA "threat." This Court should reject such attempts to stretch the statute beyond recognition.

Congress required a true "unusual and extraordinary" emergency as the price of unilateral executive economic action; in the absence of such an emergency, the action here is *ultra vires* and must be struck down.

IV. The major questions and nondelegation doctrines preclude finding tariff authority in IEEPA.

In matters of vast political and economic consequence, this Court insists on unmistakable legislative authority before allowing the Executive Branch to act. The reason is straightforward: it is improbable (and constitutionally dubious to assume) that Congress would intend to transfer vast swaths of its constitutional power without saying so directly.

The President has proclaimed a fundamental reordering of U.S. trade policy without new legislation or specific congressional approval. The asserted authority rests on statutory language not enacted for this purpose and never before used in this way. Under binding precedent, that is not enough.

In *Brown & Williamson*, the Court rejected the FDA's attempt to regulate tobacco under broad statutory language, noting that Congress had

legislated extensively in the area without granting that power. "Congress could not have intended to delegate a decision of such economic and political significance . . . in so cryptic a fashion." 529 U.S. at 160. The Court refused to assume that Congress had granted sweeping authority without saying so. As the Court warned elsewhere, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The Court has applied the same reasoning in more recent cases. In *Alabama Association of Realtors v. DHHS*, 594 U.S. 758 (2021), it struck down the CDC's attempt to extend a nationwide eviction moratorium under general public health authority. The relevant statute permitted measures to prevent disease transmission, but none of the enumerated measures resembled a moratorium on evictions. That mattered. Sweeping economic actions require unmistakable legislative approval—particularly where Congress has considered and declined to extend the policy itself. Reliance on broad statutory language was not enough.

Likewise, in *NFIB v. DOL*, 595 U.S. 109 (2022), the Court invalidated OSHA's nationwide vaccine-or-test mandate, holding that such a consequential policy required explicit congressional authorization. Though OSHA invoked its general authority to regulate workplace safety, the Court concluded that sweeping measures could not rest on generalized statutory terms. The Executive may not transform a broad statute into a blank check for nationwide regulation—particularly when fundamental personal and economic rights are at stake.

If a "national emergency" backdrop to Executive action were determinative of (or even relevant to) the authority claimed, one might expect those COVID-era cases to have been decided differently. But statutory text governs, and the courts owe the Executive no deference on its meaning. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

The situation here is analogous to those recent cases. The Administration relies on a few generalized words—"regulate" and "importation"—in a statute designed for targeted, temporary financial sanctions to justify a dramatic, long-term restructuring of the national economy. And as in *Alabama Association of Realtors*, Congress has not merely failed to speak clearly—it has expressly declined to authorize the action now claimed. *Cf. Sawyer*, 343 U.S. at 586 (noting that Congress had considered and declined to grant the President authority to seize private property in response to labor disputes).

The novelty of the President's assertions of tariff power matters. The Court has repeatedly stressed that unprecedented assertions of executive power trigger the major questions doctrine, especially where Congress has legislated extensively with specific statutes.

One of the government's amici, citing *Yoshida*, insists this moment is not unprecedented. *See* Br. of Prof. Chad Squitieri at 34. That claim ignores the history recounted above. President Nixon did not originally invoke TWEA in 1971. By the time government lawyers tried out this argument Congress was enacting § 122 of the Trade Act of 1974—granting a specific, time-limited surcharge authority capped at 15 percent for 150 days. Reliance

on *Yoshida* also disregards this Court's modern approach: that court's interpretive method bears little resemblance to the standard of textual fidelity that governs today. *See* No. 24-1287 Pet.App. 33a (district court observing of *Yoshida*: "That is no longer how courts approach statutory interpretation").

In any event, when Congress enacted IEEPA in 1977, it stayed with the TWEA language that had long coexisted alongside separate lawmaking authority for setting tariffs. To construe IEEPA as a roving tariff statute would render most chapters of Title 19 of the U.S. Code superfluous and gut the separation of powers.

As then-Professor Amy Coney Barrett has explained, the Constitution demands that Congress itself make the threshold decision whether the conditions for extraordinary delegations—such as the Suspension Clause's rebellion-or-invasion predicate—are satisfied. Congress may not abdicate that judgment to the Executive in advance. *See* Amy Coney Barrett, *Suspension & Delegation*, 99 Cornell L. Rev. 251, 254–55 (2014). The same separation-of-powers principle applies here: Congress cannot silently transfer its exclusive taxing power to the President under the guise of emergency authority.

Finally, interpreting IEEPA to authorize tariffs would raise a grave nondelegation problem. The statute supplies no intelligible principle to guide the President in determining when, how, or to what extent duties should be imposed—the on-again, off-again nature of the tariffs as part of trade negotiations proves the point. It also proves the peril: if construed to allow tariffs without meaningful limits or standards, IEEPA would amount to an open-ended

delegation of legislative power—precisely what the nondelegation doctrine forbids. In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), the Court upheld a tariff delegation only because it was governed by an intelligible principle and confined to narrow bounds. As *Whitman* reiterated, Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." 531 U.S. at 472 (citation omitted). That principle is entirely absent here.

V. Foreign affairs is not an escape hatch.

There is nothing new about the significance of tariffs for foreign affairs. Congress has always used tariffs not only to raise revenue and protect budding American industries, but also as leverage in foreign affairs. In 1787, the Constitution vested in Congress the powers to "lay and collect Taxes, Duties, Imposts and Excises" and separately to "regulate Commerce with foreign Nations[.]" U.S. Const. art. I, § 8, cls. 1, 3. This dual structure reflected the Framers' recognition that tariff policy would inevitably serve both domestic and international purposes—and that both aspects must remain subject to legislative control. As James Madison explained in *The Federalist No. 58*, vesting the power of taxation and trade in the legislature was a deliberate check against unilateral executive control, born of the colonists' resistance to Crown-imposed duties without representation.

History confirms the point. In the nineteenth century, Congress structured tariff bargaining through statutes authorizing reciprocal trade arrangements, with the President permitted only to carry out the retaliatory or reciprocal terms that

Congress had fixed. *See, e.g.*, Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612 (1890) (authorizing reciprocal duties on countries imposing "reciprocally unequal and unreasonable" tariffs on U.S. products). This Court upheld such statutes precisely because Congress made the fundamental policy choice while leaving the Executive only the task of execution. *See Marshall Field Co. v. Clark*, 143 U.S. 649, 692–94 (1892). When Congress later expanded reciprocal trade authority in the 1930s, it again did so by statute, delegating power in tightly defined ways and retaining oversight. At no point did the President possess independent authority to adjust tariffs as a matter of foreign policy discretion.

When Congress has delegated tariff power, it has always imposed strict conditions, especially rules of non-discrimination and procedural safeguards. The principle of unconditional equal treatment of friendly countries (non-discrimination) in tariff rates has been maintained throughout. Section 232 of the Trade Expansion Act of 1962 authorizes the President to adjust imports that threaten national security, but only after an investigation by the Secretary of Commerce and formal findings of a security threat. 19 U.S.C. § 1862(b), (c). Section 301 of the Trade Act of 1974 authorizes duties to respond to unfair trade practices, but only after the United States Trade Representative investigates and makes findings. 19 U.S.C. § 2411. And when Congress addressed balance-of-payments crises, it enacted § 122 of the Trade Act of 1974, granting the President authority to impose temporary surcharges capped at 15 percent and lasting no more than 150 days absent further congressional approval. Pub. L. No. 93-618, § 122, 88 Stat. 1978, 1988–89 (codified at 19 U.S.C. § 2132). In

each case, Congress supplied substantive standards and temporal limits. These guardrails reflect a consistent constitutional understanding: tariff authority, even when intertwined with foreign affairs, is Congress's power to delegate only with explicit limits.

Nor does the label "foreign affairs" exempt executive action from constitutional scrutiny. The government clings to selectively sourced comments from the Court and individual justices in contending that the major questions doctrine and the nondelegation doctrine are not implicated where the delegation is to the President and within the President's inherent Article II authorities. *See* Govt Br. at 34, 44. But this strained argument conflates two different legal traditions. The power to tax and tariff is, expressly, an authority granted *solely* to Congress under Article I. There is no shared responsibility here, and no shared authority to regulate normal commerce with foreign nations.

The President's Article II authority arises in the context of war and the duties of the Commander-in-Chief. That authority may overlap with Congress's wartime commerce power, but not with ordinary trade. The power to impose tariffs is wholly distinct—and belongs to Congress alone. It is not a sanction power. Whatever may be the powers IEEPA grants to the President that overlap with his inherent authority under Article II, the power to set tariffs is not one of them.

Moreover, this Court has repeatedly held that actions implicating foreign relations remain subject to separation-of-powers limits. Not "every case or controversy which touches foreign relations lies

beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). In *Sawyer*, the Court rejected President Truman's assertion that wartime exigency justified seizing steel mills without statutory authorization, underscoring that even grave foreign crises do not expand executive power beyond the Constitution or statute. 343 U.S. at 585–89. More recently, this Court has emphasized that structural doctrines apply fully to assertions of broad executive authority with significant domestic impact, regardless of foreign-affairs overtones. *See Whitman*, 531 U.S. at 472; *Brown & Williamson*, 529 U.S. at 159–60; *Ala. Ass'n of Realtors*, 594 U.S. at 764–65; *NFIB*, 595 U.S. at 118–19. The President himself has described the tariffs as a tool to raise "trillions and trillions of dollars" for domestic programs, including childcare, underscoring that they function not as targeted foreign sanctions but as a new form of taxation.[4] This Court has made clear that it "typically greet[s]" such assertions of "extravagant statutory power over the national economy" with skepticism. *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

Thus, even if IEEPA is read to implicate foreign commerce, it cannot evade the requirements of the nondelegation doctrine and the major questions doctrine. Congress cannot delegate its taxing and tariff powers without providing an "intelligible principle" to guide the Executive. *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409. And under the major questions doctrine, Congress must clearly authorize executive action of vast "economic and political significance[.]"

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[4] TIME, Transcript of President Trump's Address to a Joint Session of Congress (Mar. 5, 2025 4:30 AM ET), https://time.com/7264688/trump-speech-congress-2025-transcript.

Brown & Williamson, 529 U.S. at 160. The imposition of sweeping tariffs on nearly all imports is precisely such an action. To construe a statute that does not even mention "tariffs" or "duties" (50 U.S.C. §§ 1701–1702) as conferring open-ended tariff authority would nullify Congress's careful limits in the trade statutes and upend the Constitution's allocation of taxing power.

Foreign-affairs considerations cannot supply what the Constitution withholds; tariff authority remains legislative. If Congress wishes to delegate it, it must do so expressly and within limits. The "foreign affairs" gloss cannot transform IEEPA into a license for taxation by proclamation.

CONCLUSION

The Court should hold that IEEPA does not authorize the President to impose tariffs.

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APPENDIX

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APPENDIX
LIST OF *AMICI CURIAE*

The following amici join this brief in their individual capacities. They do not represent any party to this matter. Institutional affiliations are provided for identification only and do not reflect the views or endorsements of their employers.

George F. Allen served as Governor of Virginia from 1994 to 1998 and as a United States Senator from 2001 to 2007. Earlier in his career, he represented Virginia in the U.S. House of Representatives and served in the Virginia House of Delegates.

Joshua A. Claybourn is an attorney whose practice focuses on advising public-sector clients, including state and local legislative bodies, on constitutional, administrative, and regulatory law. He is also an Adjunct Scholar with the Cato Institute, where his research and writings address constitutional governance, individual liberties, and limited government principles.

John C. Danforth served as a United States Senator from Missouri and as U.S. Ambassador to the United Nations. Prior to his Senate tenure, he was Attorney General of Missouri for eight years. He currently serves on the national advisory board of the John C. Danforth Center on Religion and Politics at Washington University.

Richard A. Epstein is the Laurence A. Tisch Professor of Law at New York University School of Law, the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution at Stanford University, and

the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer at the University of Chicago Law School.

Charles T. Hagel represented Nebraska in the United States Senate from 1997 to 2009, where he served on the Foreign Relations and Intelligence Committees. He served as the 24th United States Secretary of Defense from 2013 to 2015 and as co-chairman of the President's Intelligence Advisory Board from 2009 to 2013.

Harold Hongju Koh is Sterling Professor of International Law and former Dean at Yale Law School. From 2009 to 2013, he served as Legal Adviser to the United States Department of State, and from 1998-2001, he served as Assistant Secretary of State for Democracy, Human Rights and Labor.

Gerard N. Magliocca is a Distinguished Professor and the Lawrence A. Jegen III Professor at the Indiana University Robert H. McKinney School of Law. A leading scholar of constitutional law and constitutional history, he is the author of five books and dozens of articles exploring the evolution of American constitutional thought, with a focus on the Founding era and Reconstruction.

Michael B. Mukasey was Attorney General of the United States from 2007 to 2009. Earlier, he sat on the U.S. District Court for the Southern District of New York from 1988 to 2006, serving the last six years as Chief Judge. Before joining the bench, he tried complex cases as an Assistant U.S. Attorney in that district and later handled commercial litigation in private practice. Today he advises clients and

speaks and writes on national-security and constitutional law.

Alan O. Sykes is a Professor at Stanford Law School, where he serves as Director of the LL.M. Program in International Economic Law, Business and Policy. He is also a Senior Fellow at the Stanford Institute for Economic Policy Research. He is co-author of Legal Problems of International Economic Relations (7th ed. 2021), a leading casebook in the field.

Judge John Daniel Tinder (Ret.) served as a judge on the United States Court of Appeals for the Seventh Circuit from 2007 to 2015, and on the United States District Court for the Southern District of Indiana from 1987 to 2007. Prior to his judicial service, he was the United States Attorney for the Southern District of Indiana from 1984 to 1987.

Alexander "Sasha" Volokh is professor of law at Emory University School of Law. He teaches, writes, and blogs about constitutional law, administrative law, and related legal issues, and he has an interest in the sound development of these fields.

Peter J. Wallison is a Senior Fellow Emeritus at the American Enterprise Institute. He previously served as General Counsel of the U.S. Department of the Treasury and as White House Counsel to President Ronald Reagan.

Philip Zelikow is the Botha-Chan Senior Fellow at Stanford University's Hoover Institution and formerly held a chaired professorship in history at the University of Virginia, where he directed the nation's foremost center for the study of the presidency. He

served as Counselor of the U.S. Department of State under President George W. Bush, was a member of the National Security Council staff during the George H.W. Bush administration, and directed the 9/11 Commission. He also served on the President's Intelligence Advisory Board under both Presidents George W. Bush and Barack Obama.

Robert Zoellick served as U.S. Trade Representative from 2001 to 2005 and as Deputy Secretary of State from 2005 to 2006. From 2007 to 2012, he was the 11th president of the World Bank Group. He now serves as a senior fellow at Harvard University's Belfer Center for Science and International Affairs.