No. 24A1106

In the Supreme Court of the United States

DONALD J. TRUMP, President of the United States, et al., APPLICANTS

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, et al.

On Application to Stay the Order Issued by the
United States District Court for the Northern District of California

BRIEF AMICI CURIAE OF FORMER GOVERNMENT OFFICIALS AND ADVISORS IN OPPOSITION TO APPLICATION TO STAY

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May 20, 2025

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INTRODUCTION

Amici curiae file this brief[1] in opposition to the government's[2] application to stay the district court's temporary restraining order enjoining the ongoing implementation of Executive Order No. 14210, 90 Fed. Reg. 9669 (Feb. 11, 2025). That executive order contemplates "a critical transformation of the Federal bureaucracy." 90 Fed. Reg. at 9669. It directs the restructuring of entire federal agencies, the elimination of government programs and functions, and the drastic reduction of the number of employees within every agency.

The district court properly held that this sweeping reworking of federal agencies cannot be accomplished by Presidential fiat alone. The agencies of the executive branch are not the President's possessions to be reshaped or discarded as he sees fit. The agencies were created by Congress pursuant to its sweeping legislative powers; their fundamental reworking therefore requires Congressional authorization.

The district court's temporary restraining order recognizes this basic principle, and thus finds support in the Constitution, federal statutes, and applicable case law. In this brief, *amici* highlight how the President's wide-ranging executive order violates the separation of powers and the carefully constructed

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[1] No counsel for a party authored this brief in whole or in part. No such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No one, other than the *amici curiae* or their counsel, made such a monetary contribution to the preparation or submission of the brief.

[2] This brief uses "government" to refer to Applicants. It uses "plaintiffs" to refer to the plaintiffs in the district court proceedings.

checks and balances that are foundational to our system of government and clearly established in the law.

The government's application to stay should be denied.

INTEREST OF *AMICI CURIAE*

Amici curiae are conservatives and include former public officials who were elected as Republicans, appointed by Republicans, or served in Republican administrations. *Amici* and their backgrounds[3] are as follows:

- Donald B. Ayer, Deputy Attorney General in the George H.W. Bush Administration from 1989 to 1990; Principal Deputy Solicitor General in the Reagan Administration from 1986 to 1988; United States Attorney for the Eastern District of California from 1981 to 1986 in the Reagan Administration.
- Ty Cobb, Special Counsel to the President in the Trump Administration from 2017 to 2018.
- Barbara Comstock, Representative of the 10th Congressional District of Virginia from 2015 to 2019 (R).
- Mickey Edwards, Representative of the 5th Congressional District of Oklahoma from 1977 to 1993 (R).

[3] *Amici* are listed in alphabetical order by last name. All former affiliations are listed for identification purposes only. The *amici* join this brief in their individual capacities, and not on behalf of any current or former affiliated agencies or organizations.

- Philip Lacovara, Counsel to the Special Prosecutor, Watergate Special Prosecutor's Office in the Nixon Administration from 1973 to 1974; Deputy Solicitor General of the United States in the Nixon administration from 1972 to 1973.
- Michael Luttig, Circuit Judge, United States Court of Appeals appointed by George H.W. Bush from 1991 to 2006; Assistant Attorney General, Office of Legal Counsel and Counselor to the Attorney General in the Bush Administration from 1990 to 1991; Assistant Counsel to the President in the Reagan Administration from 1981 to 1982.
- Carter Phillips, Assistant to the Solicitor General in the Reagan Administration from 1981 to 1984.
- Trevor Potter, General Counsel to John McCain's Presidential Campaigns in 2000 and 2008; Special Assistant, Office of Legal Policy, Department of Justice, from 1982 to 1984.
- Alan Charles Raul, Associate Counsel to the President in the Reagan Administration from 1986 to 1988; General Counsel to Office of Management and Budget from 1988 to 1989 in the Reagan and George H.W. Bush Administrations; General Counsel to U.S. Department of Agriculture from 1989 to 1993 in the George H.W. Bush Administration; Vice Chairman of the Privacy and Civil Liberties

Oversight Board from 2006 to 2008 in the George W. Bush Administration.

- Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security in the George W. Bush Administration from 2005 to 2009.
- Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel in the Reagan Administration from 1981 to 1984.
- Fern Smith, Judge of the U.S. District Court for the Northern District of California appointed by President Reagan from 1988 to 2005.
- William Joseph Walsh, Representative of the 8th Congressional District of Illinois from 2011 to 2013 (R).
- Christine Todd Whitman, Governor of New Jersey from 1994 to 2001 (R); Administrator of the Environmental Protection Agency in the George W. Bush Administration from 2001 to 2003.

These *amici* have collectively spent decades in public service in the federal government and state governments. They share a commitment to limited government and the rule of law. They write out of concern that the separation of powers and checks and balances built into our Constitution are under threat because of the government's conduct.

SUMMARY OF ARGUMENT

The President's executive order is an unauthorized incursion into the power of Congress. First, the Constitution vests all legislative power in Congress,

including the power to create and organize the offices and departments of the federal government. Second, Congress has not authorized the "critical transformation of the Federal bureaucracy" contemplated by Executive Order 14210; Congress last authorized the President to transmit reorganization plans to it over forty years ago, and even when it authorized such transmittal, to take effect the plans had to be approved by Congress. Because the President issued Executive Order 14210 without authority, the district court's finding that the plaintiffs are likely to succeed on their claims is correct.

ARGUMENT

The constitutional genius of America is the establishment of three branches of government that must cooperate with each other, and check and balance each other's actions, to govern the country. In discussing "the necessary partition of power among the several departments," the Framers contemplated an "interior structure of the government" that would provide "the means of keeping each other in their proper places." THE FEDERALIST NO. 51 (James Madison). They understood that the branches' functions were not designed to be "wholly unconnected" and "should not be so far separated as to have no constitutional control over each other." THE FEDERALIST NO. 48 (James Madison).

Unchecked presidential power is not what the Framers had in mind.[4] Although the Constitution vests the President with all executive authority, it vests

[4] Alan Charles Raul, Opinion, *Trump Cannot Remake the Government with the Stroke of a Sharpie,* WASH. POST, May 5, 2025, https://wapo.st/4ja6F69.

Congress with all legislative authority, including, significantly, the power to set fundamental policies and procedures for the executive branch. By proclaiming and implementing Executive Order 14210, the President has usurped for himself the power to restructure entire federal agencies, which can only be accomplished through the constitutionally mandated collaboration between the President and Congress.

I. The Constitution does not authorize Executive Order 14210.

"The President's power, if any, to issue [an executive] order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585 (1952). President Trump lacked any such authority to issue Executive Order 14210.

The President's constitutional authority is set forth in Article II. U.S. CONST. art. II, § 1, cl. 1. The President has no constitutional legislative authority. *INS v. Chadha,* 462 U.S. 919, 951, 956–59 (1983); *Youngstown,* 343 U.S. at 655 (Jackson, J., concurring). And none of the President's enumerated powers in the Constitution entitle the President to unilaterally initiate and carry out a massive restructuring of the executive branch. *See* Paul J. Larkin & John-Michael Seibler, *The President's Reorganization Authority,* Heritage Found. Legal Memorandum No. 210, at 3 (July 12, 2017).[5]

[5] https://www.heritage.org/sites/default/files/2017-07/LM-210_0.pdf.

The Constitution instead grants *Congress* the authority to "make all Laws which shall be necessary and proper for carrying into Execution" not just the Article I legislative powers, but also any necessary and proper laws for "all other Powers vested by this Constitution in the Government of the United States . . . ." U.S. CONST. art. I, § 8, cl. 18. Since the nation's founding, federal courts therefore have recognized that the Constitution gives the legislative power to create, regulate, and restructure federal agencies to Congress. *Myers v. United States,* 272 U.S. 52, 129 (1926).

Thus, under the scheme adopted by the Founders in the Constitution, Congress—not the President—creates and organizes the offices and departments of the federal government by virtue of the Necessary and Proper Clause. Indeed, "among Congress's first acts were establishing executive departments and staffs . . . ." Gary Lawson, *Necessary and Proper Clause,* THE HERITAGE GUIDE TO THE CONSTITUTION (2d ed. 2014).[6]

The President, pursuant to his executive powers, can direct the offices and departments of the federal government to carry out—to "execute"—the laws that Congress has enacted. But he cannot cripple those agencies or so transform them that they are unable to carry out the purposes for which Congress created them. He lacks the power to reshape the entire federal bureaucracy because he does not like the tools that Congress has given him.

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[6] http://www.heritage.org/constitution/#!/articles/1/essays/59/necessary-and-proper-clause.

II. Congress did not authorize Executive Order 14210.

Neither has Congress exercised its power to authorize the President to implement Executive Order 14210. At times, Congress has authorized the President to transmit executive reorganization plans to it. But Congress last did so over forty years ago, and that authorization expired in 1984. And even that now-expired authorization required that Congress approve any such plans prior to them taking effect.

In 1966, Congress enacted title 5 of the United States Code as positive law. *See* Pub. L. No. 89-554, 80 Stat. 378 (1966). Chapter 9 of title 5 addressed Executive Reorganization. *See* 80 Stat. at 393. It provided that the President should, from time to time, "examine the organization of all agencies" to determine any changes necessary to, in essence, improve their functioning. *See id.* at 394; *see also* 5 U.S.C. § 901(d). Congress also authorized the President to submit reorganization plans to Congress under certain circumstances. *See* 80 Stat. at 394–95; *see also* 5 U.S.C. § 903. Section 905(b) of title 5 provided that any such reorganization plan had to be "transmitted to Congress before December 31, 1968." 80 Stat. at 396. Congress amended the deadline for the President to transmit reorganization plans several times—most recently in 1984, when it amended section 905(b) to allow the President to transmit reorganization plans to Congress "on or before December 31, 1984." Pub. L. No. 98-614, 98 Stat. 3192, 3192 (1984); 5 U.S.C. § 905(b).

In February of this year, Rep. James Comer (R-Kentucky) introduced the Reorganizing Government Act of 2025. H.R. 1295, 119th Cong. (2025). The bill

would allow "Congress to fast-track President Trump's government reorganization plans by renewing a key tool to approve them swiftly in Congress." Press Release, H. Comm. on Oversight & Gov't Reform, Chairman Comer and Senator Lee Introduce Bill to Fast-Track President Trump's Government Reorganization Plans (Feb. 13, 2025).[7] Among other things, the bill proposes to amend 5 U.S.C. § 905(b) to authorize the President to transmit reorganization plans to Congress on or before December 31, 2026. H.R. 1295 § 2. Congress has not passed that bill, so it cannot provide authority for the President's executive order. Moreover, even were Congress to renew the President's authority to submit reorganization plans to Congress, a reorganization plan could take effect only if adopted by Congress. *See* 5 U.S.C. § 906(a).

III. Executive Order 14210 usurps Congress's legislative powers.

The Constitution requires that the President "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. If the President disagrees with the legislative choices made by Congress—if he believes, for example, that the government is bloated, spending is out of control, or that programs and policies are poorly conceived—under our Constitutional scheme, he may recommend to Congress corrective measures that he deems "necessary and expedient." *Id.* But the President cannot take unilateral action to implement his desired measures without Congressional action.

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[7] https://oversight.house.gov/release/chairman-comer-and-senator-lee-introduce-bill-to-fast-track-president-trumps-government-reorganization-plans/.

The Court's decision in *Youngstown* illustrates the limitations on the President's powers. There, the Court struck down President Truman's executive order taking possession of most of the nation's steel mills, which President Truman claimed was necessary to prevent a nationwide strike that would jeopardize national security. 343 U.S. at 583. The Court held, however, that the executive order usurped legislative power, and was impermissible in the absence of a law from Congress or a clear authorization in the Constitution itself. *Id.* at 588–89. Because Executive Order 14210 is not grounded in any such authorization, it—like President Truman's executive order—improperly usurps Congress's legislative power.

CONCLUSION

The wisdom of the Founders in creating a system of checks and balances, and the separation of power principles underlying *Youngstown,* should guide the Court in considering whether the government has made a strong showing that it is likely to succeed on the merits. *Nken v. Holder,* 556 U.S. 418, 434 (2009). The President's actions are based in radical claims of powers that do not exist. For the foregoing reasons, *amici* respectfully request that the Court deny the government's application to stay.

Respectfully submitted,

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