No. 24-1287

In The
Supreme Court of the United States

LEARNING RESOURCES, INC., ET AL.,

Petitioners,

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondents' brief in opposition confirms why it is critical for the Court to review this case, at least alongside the cases recently argued in the Federal Circuit, to decide the legality of the tariffs imposed under the International Emergency Economic Powers Act ("IEEPA"). Respondents insist the Court of International Trade ("CIT") has exclusive jurisdiction over such challenges; the federal district court disagreed. The only way for this Court to ensure it has jurisdiction to resolve the question presented is to consider this case and the Federal Circuit cases concurrently.

Because the D.C. Circuit's schedule is two months behind the Federal Circuit's, it is very possible this Court will need to grant certiorari before judgment to hear the cases in tandem—as the Solicitor General himself has suggested. That is not unusual in circumstances such as these. Numerous times, this Court has granted certiorari in one case, and certiorari before judgment in another, to consider a full range of related issues. The need is particularly compelling here given the mutually exclusive nature of the jurisdictional issue: The Court will have jurisdiction to decide the merits in *either* this case *or* the Federal Circuit cases, so granting both cases for review together is the only sensible course.

Accordingly, in the event this Court grants certiorari in the Federal Circuit cases before the D.C. Circuit has issued its decision, the petition should be granted.

I. The Federal District Court, Not The CIT, Has Jurisdiction Over This Case

Far from an obstacle to certiorari, *contra* BIO 6, the question of subject-matter jurisdiction is a critical threshold issue this Court must decide before adjudicating the lawfulness of the IEEPA tariffs. *See K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182 (1988) (resolving split between D.C. Circuit and Federal Circuit over "both the jurisdictional" question and merits, and concluding jurisdiction lay in the district court rather than the CIT). Because Petitioners' case is a civil action that "arises out of" IEEPA—the only substantive law underlying each of Petitioners' claims and the only law a court must interpret to decide this case—and because IEEPA is *not* a law that provides for tariffs, the federal district courts, not the CIT, have jurisdiction over challenges to the IEEPA tariffs. *See* 28 U.S.C. § 1581(i)(1)(B) (CIT has jurisdiction only if action "arises out of any law of the United States providing for *** tariffs").

Respondents agreed in the district court that jurisdiction turned on IEEPA, but they have since changed tack. They now argue that, for purposes of the CIT's jurisdictional statute, this action "arises out of" the Harmonized Tariff Schedule of the United States ("HTSUS") and the challenged executive orders purporting to modify that schedule, which they claim are "law[s] of the United States." BIO 6-7. Respondents' new theory is wrong. This action does not "arise out of" the HTSUS and modifications thereto, which are not in any event "law[s] of the United States."

First, this action does not "arise[] out of" the HTSUS or the challenged orders purporting to modify it. The phrase "arises out of" refers to the "substantive law" that gives rise to Petitioners' claims, not the technical vehicle for implementing an unlawful action. *International Lab. Rights Fund v. Bush*, 357 F. Supp. 2d 204, 208 (D.D.C. 2004) (analyzing CIT jurisdiction based on "substantive law giving rise to [plaintiffs'] claims"); s*ee Corus Staal BV v. United States*, 493 F. Supp. 2d 1276, 1285 (Ct. Int'l Trade 2007) (analyzing § 1581(i) jurisdiction by looking to the "true nature" of the underlying claim). The analysis mimics the one performed under 28 U.S.C. § 1331, from which section 1581 "was apparently drawn." *American Air Parcel Forwarding Co. v. United States*, 515 F. Supp. 47, 51 (Ct. Int'l Trade 1981). The crucial question is thus which "law creates the cause of action asserted," *Gunn v. Minton*, 568 U.S. 251, 257 (2013)—or, as a shorthand, which law "requires *** interpretation and application," *Hansson v. Norton*, 411 F.3d 231, 235 (D.C. Cir. 2005); *see also Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002) (action "arises under" law that "creates the cause of action" or raises "a substantial question of *** law" on whose resolution "the plaintiff's right to relief necessarily depends").

Each of Petitioners' causes of action turns on the "interpretation and application" of IEEPA: The tariffs are unlawful because IEEPA (a) does not authorize tariffs as a categorical matter, (b) does not authorize *these* tariffs, and (c) violates the Constitution. *See* App., *infra* 29a-30a (Count I); *id.* at 33a (Count II); *id.* at 39a-40a (Count III); *id.* at 42a (Count IV). By

contrast, neither the HTSUS nor the challenged orders create Petitioners' causes of action or require interpretation (and tellingly, neither the CIT nor district court interpreted them). Any modification to the HTSUS is only the incidental, downstream effect of the President's (unlawful) assumption of tariffing authority under IEEPA.

Second, because they were made without statutory authority, the challenged orders' modifications to the HTSUS are not "law[s] of the United States." It has long been understood that "Executive Orders issued without statutory authority providing for presidential implementation are generally held not to be 'laws' of the United States." *Dreyfus v. Von Finck*, 534 F.2d 24, 29 (2d Cir. 1976) (citing cases); *see also Chen v. I.N.S.*, 95 F.3d 801, 805 (9th Cir. 1996) ("Executive Order lacked the force and effect of law" because "Congress did not explicitly delegate the requisite authority"). More specifically, "modification[s] or change[s] made" to the HTSUS without "authority of law" are not considered "statutory provisions of law." 19 U.S.C. § 3004(c)(1); *contra* BIO 6-7. Accordingly, unless IEEPA provides legal "authority" for the challenged orders' HTSUS modifications, they are not "laws of the United States" under section 1581(i). The query again rises and falls with IEEPA.

Given such flaws, it should be no surprise that Respondents' HTSUS theory does not enjoy the judicial imprimatur they suggest. *See* BIO 7. Neither the Montana nor Florida district court decisions granting transfer to the CIT embraced Respondents'

HTSUS theory. *See Webber v. DHS*, No. 25-cv-26, 2025 WL 1207587 (D. Mont. Apr. 25, 2025), *appeal pending*, No. 25-2717 (9th Cir.); *Emily Ley Paper, Inc. v. Trump*, No. 25-cv-464, 2025 WL 1482771 (N.D. Fla. May 20, 2025). Though the CIT articulated the HTSUS theory—belatedly, in a stay order—it never explained why a challenge that requires no analysis of the HTSUS should be considered an action that "arises out of" the HTSUS or modifications thereto. *See* Order 3, V.O.S. Selections, No. 25-cv-66-3JP (Ct. Int'l Trade June 3, 2025), ECF No. 63.

Finally, Respondents argue that it would be "nonsensical" if the case arose out of IEEPA, as the jurisdictional and merits inquiries would overlap. BIO 8. But such overlap is in fact quite "common." *Garland v. Aleman Gonzalez*, 596 U.S. 543, 554 n.5 (2022). Courts may sometimes need to "decide some, or all, of the merits issues" to "answer the jurisdictional question." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 178 (2017). Nor does vesting jurisdiction in the district court upend Congress's jurisdictional scheme. *Contra* BIO 7-8. "Congress did not commit to the Court of International Trade's exclusive jurisdiction *every* suit against the Government challenging customs-related laws and regulations." *K Mart Corp.*, 485 U.S. at 188. If anything, it is the (unacknowledged) implications of Respondents' merits argument that would foment jurisdictional disarray. If IEEPA "provid[es] for *** tariffs," then every IEEPA case against the government belongs in the CIT. 28 U.S.C. § 1581(i)(1)(B). But while hundreds of district courts have cited IEEPA, Respondents do not identify a

single CIT case citing (much less interpreting) IEEPA—until the present challenges.

II. IEEPA Does Not Authorize Tariffs

Unlike the Federal Circuit cases, in which the CIT decided *only* that IEEPA did not authorize the specific tariffs at issue, this case directly tees up the broader merits question: whether IEEPA authorizes tariffs at all. As the district court correctly held, it does not. Pet. 18-26.

Respondents agree that the only possible textual hook in IEEPA for the challenged tariffs is its reference to "regulate *** importation or exportation." 50 U.S.C. § 1702(a)(1)(B); *see* BIO 8. But because taxation operates by "rais[ing] revenue," *FCC v. Consumers' Rsch.*, 145 S. Ct. 2482, 2497 (2025), it is a categorically different power from regulation generally. Indeed, Congress is jealously protective of its "power over the purse"—"the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people"—as the Founders were wary of its use by the President given the history of colonial resistance to Crown-imposed duties levied without consent. THE FEDERALIST NO. 58 (James Madison). Congress thus does not silently and expansively delegate away that "power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431 (1819). Instead, Congress has always used unmistakable language to grant tariff authority (in Title 19) accompanied by specified limitations—it has not done so via the bare power to "regulate." Pet. 21.

Respondents cannot identify a single statute where "regulate" has been understood as authority to

tax or tariff. Pet. 20-21. When statutes do grant both powers, they do so distinctly. Consider the Communications Act of 1934, which gives the FCC the power to "regulat[e]" communication carriers, on the one hand, and impose taxes on such carriers in support of a "universal service" fund, on the other. *Compare* 47 U.S.C. § 201(b), *with* 47 U.S.C. § 254(d). If the power to "regulat[e]" were to encompass the power to tax, the FCC would be able to ignore key "limiting principles" found solely in the latter provision that circumscribe its power to raise revenue—principles this Court just found crucial to uphold the Act against a non-delegation challenge. *Consumers' Rsch.*, 145 S. Ct. at 2507; *see* 47 U.S.C. § 254(b)(5), (d), (e).

Nothing suggests IEEPA was where Congress chose to expand, for the first and only time, the meaning of "regulate" to include the power to tax. Quite the opposite: IEEPA grants the power to "regulate *** importation *or exportation,*" 50 U.S.C. § 1702(a)(1)(B) (emphasis added), within the same clause—even though the Constitution *prohibits taxes on exports*, U.S. CONST. art. I, § 9, cl. 5. There is no indication that Congress meant to embed IEEPA with such an obvious constitutional defect. And there is significant indication to the contrary, including that none of the surrounding seven verbs in IEEPA's detailed scheme deals with the power to raise revenue. Tellingly, it remains undisputed that no President has relied on IEEPA in its nearly 50-year history for tariffing power. Pet. 22-24.

Respondents barely respond to these textual indications, leaning instead on decades-old cases

interpreting different statutes. BIO 9-10. Respondents turn first to this Court's decision in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), which interpreted very different language from section 232 of the Trade Expansion Act of 1962. Unlike IEEPA, section 232 expressly addresses presidential changes to an import "duty" and refers only to adjusting "imports" (not "imports *and exports*"). 19 U.S.C. § 1862(a), (c). Beyond that, this Court's analysis from 1976 focused almost entirely on legislative history and purpose. *See Algonquin*, 426 U.S. at 561-564. But courts today start "with the text of the statute," *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023), as "ambiguous legislative history [cannot] muddy clear statutory language," *Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019). Regardless, the difference in respective histories is stark. Section 232's legislative history is replete with references to "duties," "tariffs," "import taxes," and "fees" on imports, 426 U.S. at 562-569, while Respondents cannot locate a single reference in IEEPA's history to any monetary exactions whatsoever.

Respondents next insist that in enacting IEEPA, Congress must have intended to ratify a single decades-old decision from the United States Court of Customs and Patent Appeals ("CCPA") interpreting the Trading with the Enemies Act. *See United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975). But for all the (unrebutted) reasons explained in the petition, ratification is an especially thin reed here. *See* Pet. 25-26.

Continuing to avoid IEEPA's text, Respondents spend pages rebutting the major questions and non-delegation doctrines. *See* BIO 10-13. Respondents claim the doctrines do not apply to foreign-policy matters. But at issue here is a distinctly Article I (not Article II) tariffing power imposed on Americans. When the President assumes powers "the Constitution has expressly confided to the Congress and not to the President," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952), deference is afforded only so long as the President acts pursuant to the "authorization of Congress," *id.* at 635-636 (Jackson, J., concurring). That is so even if there are obvious foreign-policy implications—as there were when this Court invalidated the President's seizure of steel mills during the Korean War.

Respondents also wrongly contend that presidential action is exempt from the major questions doctrine. BIO 11. Every appellate decision on the books has said otherwise. *See Kentucky v. Biden*, 23 F.4th 585, 606-608 (6th Cir. 2022); *Louisiana v. Biden*, 55 F.4th 1017, 1029 (5th Cir. 2022); *Georgia v. President of the U.S.*, 46 F.4th 1283, 1295-1296 (11th Cir. 2022); *see also Nebraska v. Su*, 121 F.4th 1, 17-22 (9th Cir. 2024) (Nelson, J., concurring) (closely analyzing whether "major questions doctrine" applies to presidential delegations and concluding that "nothing excuses the President from its commands"). That is no surprise. The major questions doctrine is fundamentally concerned with the delegation of legislative powers to the executive branch, controlled by the President. *See West Virginia v. Environmental Prot. Agency*, 597 U.S. 697, 737 (2022) (Gorsuch, J.,

concurring) ("The major questions doctrine works *** to protect the Constitution's separation of powers."); *see also Consumers' Rsch.*, 145 S. Ct. at 2516 (Kavanaugh, J., concurring) ("Congress does not usually 'hide elephants in mouseholes' when granting authority to the *President*." (emphasis added)).

III. The Court Should Review This Case Concurrently With The Federal Circuit Cases

Respondents do not dispute the paramount importance of challenges to the IEEPA tariffs. *See* Pet. 26-28. But the only way for this Court to ensure it has jurisdiction to resolve the merits—and to consider the full range of merits arguments—is to grant certiorari in both this case and the Federal Circuit cases in tandem.

The cases are not, however, proceeding on the same timeline. The Federal Circuit—which has proceeded more quickly—already heard argument on July 31. Argument in the D.C. Circuit, meanwhile, is not scheduled until September 30. It appears very possible the Federal Circuit will issue an opinion before the D.C. Circuit even hears argument, and that the losing parties there will quickly seek review in this Court. If this Court grants certiorari in the Federal Circuit cases, it should grant certiorari before judgment in this one.

That is not an unusual course for this Court to take. *Contra* BIO 5. This Court on many occasions has granted certiorari before judgment when the same or similar question was before it in another case. *See, e.g., Students for Fair Admissions, Inc. v. President &*

Fellows of Harvard Coll., 600 U.S. 181, 198 (2023); *United States v. Booker*, 543 U.S. 220, 229 (2005); *Gratz v. Bollinger*, 539 U.S. 244, 259-260 (2003); *see also* STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE § 4.20 & n.17 (11th ed. 2019) (collecting cases).

In fact, Respondents have endorsed such an approach in this very case. The Solicitor General opposed Petitioners' motion to expedite in this Court by arguing that "[i]f the Court ultimately grants review in the Federal Circuit case, *** it could grant review in this case *at that time* (either before or after the D.C. Circuit has issued its judgment)." Resp. to Mot. to Expedite 6 (emphasis added). Respondents told the D.C. Circuit the same thing when opposing Petitioners' motion to align the appeal schedule with that in the Federal Circuit cases. *See* C.A. Resp. Mot. to Govern 4-5, No. 25-5202 (D.C. Cir. June 13, 2025). Having defeated those motions, Respondents now appear to pivot: this Court should "simply address the jurisdictional question in [the Federal Circuit] case or grant review in this case *after* the D.C. Circuit has issued its judgment." BIO 14 (emphasis added). But CIT jurisdiction remains undisputed among the parties in the Federal Circuit cases, so the Court would lack any adversarial presentation on that issue. And Respondents offer no justification for denying certiorari before judgment that would facilitate concurrent review in both sets of cases—the only way this Court can ensure prompt and final resolution of the exceptionally pressing merits questions.

Respondents further object that certiorari before judgment is unwarranted because Petitioners won in the district court and can receive refunds if they prevail. The former plainly presents no bar to this Court granting review. *See* pp. 10-11, *supra*; Pet. 31-32; Reply on Mot. to Expedite 2-3 (discussing Court's grant of Solicitor General's petition for certiorari before judgment in *Biden v. Nebraska*). And the latter overlooks the fact that Petitioners cannot get refunds when the challenged tariffs are so high as to effectively prevent importation—causing serious unrecoverable damage to their small businesses. *See* Pet. 28-29; Reply on Mot. to Expedite 3-4.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted. In the event the Federal Circuit has not decided the parallel CIT cases as of the conference date, the petition should be held until those cases are ripe for review.

Respectfully submitted.

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