No. 25-1012

In The
Supreme Court of the United States

HMTX INDUSTRIES, LLC, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS

Pratik A. Shah
Counsel of Record
James E. Tysse
Matthew R. Nicely
Devin S. Sikes
Daniel M. Witkowski
Haley S. Gorman
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K Street NW
Washington, DC 20006
202-887-4000
pshah@akingump.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

REPLY BRIEF

To its credit, the government does not contest the incontestable. It does not deny that USTR's Section 307 "modifications"—imposing tariffs on up to $500 billion in goods covering virtually the entire U.S.-China trade portfolio—far exceed "moderate" or "minor" changes to USTR's initial $50 billion Section 301 action. Nor does the government dispute that, under its interpretation, USTR may freely "modify" an initial $1 *million* action into a $1 *trillion* action, without abiding by any of Section 301's rigorous procedural safeguards.

Instead, the government argues that the Federal Circuit was right to bless that conception of unbounded—and assertedly unreviewable—authority. But the government cannot escape the ordinary meaning of "modify"—a term twice confirmed by this Court to exclude "extensive" changes. And the guise of a "modification" cannot mask that the unprecedented tariff escalation at issue satisfies all the hallmarks of this Court's major questions doctrine.

The Court's decision in *Learning Resources, Inc. v. Trump*, 146 S. Ct. 628 (2026), handed down the same day Petitioners filed the present petition, reinforces the problems with the Federal Circuit's decision. Yet the government barely mentions *Learning Resources*. That is presumably because the government cannot reconcile its interpretation of Section 307 with what this Court three months ago observed Congress has never done: Delegate "the extraordinary power to unilaterally impose tariffs of unlimited amount, duration, and scope," *id.* at 646 (maj. op.), "unlock[ed]" by a determination of

appropriateness "the [g]overnment asserts is unreviewable," *id.* at 640 (opinion of Roberts, C.J.).

Because the increasingly important question presented by this case deserves to be heard on the merits, the Court should grant certiorari.

I. USTR Exceeded Its Authority To "Modify" The Initial Section 301 Action.

This Court's precedents resolve the question presented as a matter of "ordinary" statutory interpretation. *Learning Res.*, 146 S. Ct. at 674 (Kagan, J., concurring in part and concurring in the judgment). The government never contends USTR's List 3 and 4A actions "change[d]" its initial Section 301 action "moderately or in minor fashion." *Biden v. Nebraska*, 600 U.S. 477, 494 (2023) (internal quotation marks omitted). So USTR's actions cannot be justified as "modifications" under Section 307(a)(1)(C). None of the government's attempts to avoid that conclusion pass inspection.

1. Start with the straightforward meaning of "modify." The government contends that "the term *** can be read to encompass larger changes or alterations, so long as they are not radically transformative." Br. 6. Grasping for examples, it points to agreements to "modify" contracts and a quotation from the Federalist Papers. *Ibid.* But those far-afield uses only underscore that the government "cannot identify any *statute* in which the power to [modify] includes the power to" make dramatic changes in degree or kind. *Learning Res.*, 146 S. Ct. at 643 (maj. op.) (emphasis added). That is because, as *Biden* and *MCI* have twice confirmed, Congress

simply does not use modify "in that way." *Id.* at 675 (Kagan, J.).

In all events, the List 3 and 4A tariffs fall short even against the government's yardstick. *Biden* is instructive. There, preexisting statutory and regulatory provisions already allowed for student loan forgiveness in "a few narrowly delineated situations." 600 U.S. at 496. But the Court recognized that the Secretary's expansion of those provisions to "98.5% of all borrowers" "created a novel and fundamentally different loan forgiveness program." *Id.* In other words, an agency's dramatic expansion of something it is already doing can be transformative.

The same is true here. The government, echoing the Federal Circuit, contends there are *no* limits on the magnitude of its modification authority. *See* Br. 13 ("Nothing in the Act limits the magnitude of a modification under Section 307."); *see also* Pet. App. 21a (holding that "modify" in Section 307 is entirely "indifferent to degrees of change and contains no inherent limitations"). Given the ten-fold tariff increase, however, USTR's actions can only be understood as a "radical transformation": Blowing up a targeted $50 billion action covering a narrow slice of Chinese imports into a $550 billion one covering nearly the entire U.S.-China trade portfolio. American consumers and business owners can attest that such a seismic shift is, in fact, "radically transformative." *See, e.g.*, Br. for Am. Apparel & Footwear Ass'n 9-12 (describing economic impact).

2. The government next turns to 19 U.S.C. § 2481(6), which provides that "[t]he term

'modification' *** includes the elimination of any duty or other import restriction." Though the government never relied on that provision below, it now calls Section 2481(6) "virtually conclusive." Br. 6. That is wrong twice over. For one, as Petitioners have explained, applying that definition to Section 307 would render "terminate" in "modify or terminate" superfluous. *See* Pet. 20. The government responds that "terminate" would still do "meaningful work" with respect to non-duty actions such as "suspending trade-agreement concessions" or "entering into binding agreements." Br. 7. But those actions are "import restriction[s]" within the meaning of Section 2481(6), too. *See* 19 U.S.C. § 2481(2) ("The term 'other import restriction' includes a *limitation* *** *imposed for the regulation of importation*.") (emphasis added).

For another, incorporating Section 2481(6)'s definition of "modification" into Section 307 ("modify or terminate") undermines rather than helps the government's position. Section 2481(6) did not purport to redefine "modification" from its ordinary meaning, except to "include[] the elimination of any duty or other import restriction." That Congress explicitly included one action ("elimination") that "modification" otherwise would not encompass means that it must not have intended to include *other* "basic and fundamental changes" outside the term's ordinary sweep. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 225 (1994). That reading comports with Petitioners' understanding of Section 307: It permits "moderate[]"

or "minor" changes to, alongside the elimination of, existing Section 301 actions. *Ibid.*[1]

That is all readily understandable after "applying a modicum of common sense about how Congress typically delegates." *Learning Res.*, 146 S. Ct. at 674 (Kagan, J.) (internal quotation marks omitted). Although Congress jealously guards against encroachment on its authority to impose tariffs, *id.* at 639-640 (opinion of Roberts, C.J.), the "elimination" of a tariff previously levied—especially one imposed by the Executive Branch—does not raise similar separation-of-powers concerns.

3. The government's attempt to distinguish *Biden* and *MCI* fares no better. On its view, the Court's holdings were confined to "basic and fundamental changes in the scheme designed by Congress." Br. 8 (internal quotation marks omitted). Because USTR modified its initial Section 301 action, not "the [Trade] Act's scheme," the government asserts that *Biden* and *MCI* just don't apply. *Ibid.* *Biden* and *MCI*, however, spoke of major changes to "the scheme designed by Congress" because the object to which "modify" was addressed in both cases was the statutory scheme itself. *See* 512 U.S. at 220 ("[Section] 203(b) authorizes the Commission to 'modify' any requirement of § 203."); 600 U.S. at 494 ("Secretary [may] 'waive or

---

[1] It also comports with how the Federal Circuit had earlier construed the same statutory definition. *See Solar Energy Indus. Ass'n. v. United States*, 86 F.4th 885, 896, 901 (Fed. Cir. 2023) ("On any reading, a 'modification' must be a relatively minor adjustment; expansion of a 1% duty to a 50% duty is obviously not a minor change.").

modify any statutory *** provision applicable to *** [Title VII].”). That those changes could not be “basic [or] fundamental” came from the “ordinar[y]” meaning of “modify,” without reference to its object. *Biden*, 600 U.S. at 494-495.

In any event, USTR’s end-run around Section 301’s “demanding procedural prerequisites,” *Learning Res.*, 146 S. Ct. at 639 (opinion of Roberts, C.J.), *does* entail a fundamental change to the Trade Act’s scheme. *See* Pet. 18, 29-30. Throughout this litigation, the government has contended that USTR’s appropriateness determinations are unreviewable, rendering any “limit[]” to Section 307 modifications illusory. Br. 8. And it cannot seriously ask this Court to believe a $550 billion action would have been “appropriate” in the first instance to eliminate a narrow band of intellectual property practices when USTR initially determined a $50 billion action would be “commensurate.” Pet. 8. Based on the investigation conducted and findings made, a $550 billion action could not have passed muster under Section 301’s more robust procedures and standards.[2]

The government is similarly unconvincing in waving away the differences between Section 301’s stringent safeguards and the lax requirements under Section 307. Contrary to the government’s contention

---

[2] Petitioners never conceded that USTR’s massive $500 billion List 3 and 4 tariff actions “would have been permissible in the first instance under Section 301(b).” Br. 8. After all, the government never previously made that argument. *Cf.* Pet. 2 (acknowledging only that the $50 billion *Lists 1 and 2* actions were “arguably within” USTR’s authority).

(Br. 10), Section 301's procedural hurdles are not addressed solely to determining whether predicate unfair trade practices exist, but also to "what action, if any [USTR] should take." 19 U.S.C. § 2414(a)(1)(B); *see also id.* §§ 2414(b)(1)(C) (USTR may request views on the "probable impact" of proposed action); 2415(a)(1) (USTR "shall implement the action *[it] determines under section 2414(a)(1)(B) *** to take*.") (emphasis added). Permitting USTR to take actions of unlimited amount, duration, and scope—as "modifications" in response to subsequent foreign actions discussed nowhere in the investigative record—would allow USTR to bypass those strictures completely.

4. The government suggests that Petitioners would "constrain[] the USTR to respond to large increases or decreases in the burdens caused by [targeted practices] with only small modifications that would be inadequate" to obtain their elimination. Br. 11. That is a red herring. Putting aside whether the List 3 and List 4 modifications target the same "acts, policies, and practices, that are the subject of" the original investigation, 19 U.S.C. § 2417(a)(1)(B)—an issue the Federal Circuit expressly declined to reach, Pet. App. 20a ("[W]e affirm USTR's modified actions on alternate grounds, with reference only to [§ 2417(a)(1)(C)].")—the term "modify" means what it means. And it is hardly anomalous that Congress would have wanted transformative increases in the size of a discretionary action to first go through an additional round of investigation, consultation, and deliberation, rather than invite those actions in through a Section 307 backdoor. *See Learning Res.*,

146 S. Ct. at 639 (opinion of Roberts, C.J.) (highlighting the "strict limits" and "demanding procedural prerequisites" found in 19 U.S.C. §§ 2411-2414).

Once the government's attempts to redefine "modify"—and to distinguish *Biden* and *MCI*—are stripped away, the implausibility of its position becomes clear. USTR can take a $1 million initial action, then once it is "unconstrained by *** significant procedural limitations," make an "unreviewable" "declaration" that a $1 trillion modification is in fact appropriate. *Learning Res.,* 146 S. Ct. at 640 (opinion of Roberts, C.J.). But Congress has never delegated—and this Court has never countenanced—such "unilateral[]" power, let alone under Section 307's modest "modification" power. *Ibid.*

II. The Major Questions Doctrine Confirms USTR Lacks The Unbounded Authority It Claims.

The major questions doctrine adds to the government's problems. The government does not seriously dispute that each of this Court's major-questions indicators is present here. *See* Pet. 23-26.

Consider first what the government (understandably) does not challenge: "[T]he authority [USTR] has asserted" carries with it massive "economic and political significance." *Learning Res.*, 146 S. Ct. at 641 (opinion of Roberts, C.J.). That alone provides this Court "reason to hesitate before concluding that Congress meant to confer such authority." *Ibid.* (internal quotation marks omitted).

Then consider what *Learning Resources* puts beyond doubt: Reading Section 307 to grant USTR "power to unilaterally impose unbounded tariffs, *** unconstrained by *** significant procedural limitations"—or meaningful judicial oversight—"would represent a transformative expansion of the [Executive Branch's] authority over tariff policy." 146 S. Ct. at 640 (internal quotation marks omitted).

The weaknesses of the government's remaining arguments reveal the rest. The government contests (feebly) that USTR's actions were located in an "unheralded" or "little-used" provision. Br. 14 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014), and *West Virginia v. EPA*, 597 U.S. 697, 730 (2022)). But it cannot deny that the "few occasions" in which "USTR has invoked Section 307 in the past," *id.*—only to reduce or eliminate initial actions, rather than to explode them—involved actions of a "very different kind." *West Virginia*, 597 U.S. at 728 (comparing prior invocations of Section 111 with Clean Power Plan); *see also, e.g., Biden*, 600 U.S. at 495-496 (explaining that, in "previous invocations of the HEROES Act *** 'modifications' *** implemented only minor changes," unlike "[t]he Secretary's new 'modifications'"). And even cursory comparison of the authorities granted by Sections 301 and 307 establishes the latter's "ancillary" role. *West Virginia*, 597 U.S. at 724; *compare* 19 U.S.C. § 2411(b)(2) ("all appropriate and feasible action"), *with id.* § 2417(a) ("modify or terminate").

Even in an ordinary case, "[t]he lack of historical precedent for" USTR's actions, "coupled with the

breadth of authority" USTR now claims, would be a "telling indication" that the List 3 and 4A tariffs "extend beyond the [agency's] legitimate reach." *Learning Res.*, 146 S. Ct. at 641 (opinion of Roberts, C.J.) (internal quotation marks omitted). But "[t]hese considerations apply with particular force where, as here, the purported delegation involves the core congressional power of the purse." *Id.* at 639. Indeed, this petition presents an even more straightforward invocation of the major questions doctrine than did *Learning Resources*: Section 307 delegates authority to an agency, rather than the President, and this Court has twice interpreted the statutory term at issue—"modify"—*not* to grant the sort of extravagant power now asserted.

The government's response reveals a fundamental misunderstanding of the major questions doctrine. No one suggests these considerations provide a "basis to invalidate an otherwise clearly authorized agency action." Br. 13. Instead, they "counsel[] skepticism" that the asserted authority is clearly authorized in the first place. *Learning Res.*, 146 S. Ct. at 639 (opinion of Roberts, C.J.) (internal quotation marks omitted). Here, where USTR's claimed authority is doubtful even as "a matter of definitional possibilit[y]," *ibid.*, no amount of insistence can render Section 307 "clear" enough to authorize USTR's massive tariff escalations. Section 307 does not "free [USTR] to issue a dizzying array of modifications at will." *Id.* at 640.

The nondelegation concerns lurking in the government's reading of Section 307 only reinforce the

point. *See Learning Res.*, 146 S. Ct. at 658 (Gorsuch, J., concurring) (major questions doctrine reflects "substantive norm about delegated powers"). Tying Section 307 modifications back to Section 301's direction to take "appropriate" action to eliminate targeted practices, Br. 14-15, does not remedy the problem. The government's position on the unreviewability of that determination leaves virtually no "boundaries" from which courts might "ascertain whether the agency has followed the law." *FCC v. Consumers' Rsch.*, 606 U.S. 656, 673 (2025). That matters for nondelegation purposes—not as "a constitutional requirement *per se*, but rather a means of assuring that there are statutory limits and that they are followed." Br. for Consumer Watchdog 12.

III. USTR's Recent Actions Underscore The Pressing Need For Review.

As Petitioners have argued (Pet. 30-31), the sheer magnitude of the challenged tariffs—which remain in effect at rates of 7.5% to 25% on the great majority of Chinese imports, imposing billions of dollars in annual taxes on Americans—independently justifies a grant of certiorari. The government's actions since filing of the petition have made the question presented more important—and the need for its resolution more pressing—than ever.

The government reacted to *Learning Resources* by vowing to "replace" the IEEPA tariffs using Section 301 (alongside time-limited actions under Section 122). Br. for Am. Apparel & Footwear Ass'n 24. It promised to pursue Section 301 actions against "most major trading partners" and to complete the required

investigations "within five months." *Ibid.* It then initiated over 75 Section 301 investigations in the span of two days, *id.* at 25—compared to 130 *total* in the first 46 years of its existence, *see* Andres B. Schwarzenberg, R46604, CONG. RSCH. SERV., SECTION 301 OF THE TRADE ACT OF 1974: ORIGIN, EVOLUTION, AND USE (2020).[3]

Once USTR takes action under Section 301, the government's manifest desire to "replace the longstanding executive-legislative collaboration over trade policy with unchecked Presidential policymaking," *Learning Res.*, 146 S. Ct. at 640, makes its use of the Section 307 loophole created by the Federal Circuit all but inevitable.

To be sure, the Court could accept the government's invitation to wait until a challenge to one of those future "modifications" requires it to address this question in the coming months—likely in an emergency posture, with all the "difficulty" that entails. *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 928 (2024) (Kavanaugh, J., concurring in the grant of stay). In the meantime, no percolation will bring further clarity, as every one of the challenges to come will be filed in the Court of International Trade and reviewed in the Federal Circuit.

Or the Court can grant certiorari now and decide the same question in this specially selected test case, on a record developed over six years, with the benefit of three fully reasoned lower court decisions, and with briefing and argument in the normal course. The

[3] https://www.everycrsreport.com/reports/R46604.html.

Court should take that opportunity to provide much needed guidance—including for the plaintiffs in the approximately 4,200 suits that have brought identical challenges in the Court of International Trade—on the bounds of USTR's "modification" authority. At minimum, the Court should grant certiorari, vacate the decision below, and remand for the Federal Circuit to reconsider its holding in light of *Learning Resources*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Pratik A. Shah
Counsel of Record
James E. Tysse
Matthew R. Nicely
Devin S. Sikes
Daniel M. Witkowski
Haley S. Gorman
AKIN GUMP STRAUSS
HAUER & FELD LLP

Counsel for Petitioners

May 26, 2026