

No. 23-1891

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

**HMTX INDUSTRIES, LLC, HALSTEAD NEW ENGLAND CORP.,
METROFLOR CORPORATION, JASCO PRODUCTS COMPANY
LLC,**
Plaintiffs- Appellants

v.

**UNITED STATES, OFFICE OF THE UNITED STATES TRADE
REPRESENTATIVE, KATHERINE TAI, U.S. Trade
Representative, UNITED STATES CUSTOMS AND BORDER
PROTECTION, TROY MILLER, Acting Commissioner of U.S.
Customs and Border Protection,**
Defendants-Appellees

Appeal from the United States Court of International Trade in
No. 1:20-cv-00177-3JP, Chief Judge Mark A. Barnett, Judge
Claire R. Kelly, Judge Jennifer Choe-Groves

**CORRECTED OPENING BRIEF OF PLAINTIFFS-APPELLANTS
HMTX INDUSTRIES, HALSTEAD NEW ENGLAND CORP.,
METROFLOR CORPORATION, AND JASCO PRODUCTS
COMPANY**

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July 25, 2023

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 23-1891

Short Case Caption HMTX Industries LLC v. US

Filing Party/Entity Appellants HMTX Industries LLC; Halstead New England Corp.;
Metroflor Corp.; and Jasco Products Company LLC

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 05/25/2023

Signature: /s/ Pratik A. Shah

Name: Pratik A. Shah

FORM 9. Certificate of Interest

Form 9 (p. 2)
March 2023

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).	3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. <input checked="" type="checkbox"/> None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. <input type="checkbox"/> None/Not Applicable
HMTX Industries LLC		SMYNTH Trust; HMTX Acquisition LLC
Halstead New England Corp.		SMYNTH Trust; HMTX Acquisition LLC; HMTX Industries LLC
Metroflor Corp.		SMYNTH Trust; HMTX Acquisition LLC; HMTX Industries LLC
Jasco Products Company LLC		None

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

Sarah B. W. Kirwin, Akin Gump Strauss Hauer & Feld LLP		

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

Yes (file separate notice; see below) No N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

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STATEMENT OF RELATED CASES

This action challenges the third and fourth round of tariffs (“List 3” and “List 4A”) imposed on imports from China by the United States Trade Representative (“USTR”) under Section 301 *et seq.* of the Trade Act of 1974 (“Trade Act”), 19 U.S.C. § 2411 *et seq.* As explained in Plaintiffs’ Notice of Related Case Information (ECF No. 5), Plaintiffs understand that more than 4,100 similar actions have been filed in the U.S. Court of International Trade (“CIT”) challenging the List 3 and List 4A tariff actions.

The CIT ordered that this case (CIT Court No. 20-cv-00177) “shall serve as the sample case for purposes of the court’s initial consideration and resolution” of the claims. Appx09597. Merits briefing and the CIT’s opinions resolving this case were docketed under CIT Court No. 21-cv-00052, which was designated as the master case. *Id.* The CIT stayed the other actions pending resolution of this case. *Id.* As explained in Plaintiffs’ Notice of Related Case Information, it would not be practicable to set forth the case information for the more than 4,100 other separate cases.

JURISDICTIONAL STATEMENT

The CIT had jurisdiction under 28 U.S.C. § 1581(i)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1295(a)(5). After the CIT entered final judgment on March 17, 2023, Plaintiffs timely appealed on May 12, 2023. FED. R. APP. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the List 3 and 4A tariff actions exceeded Defendants' authority under Section 307 of the Trade Act.
2. Whether USTR's *post hoc* and conclusory submission on remand cured its failure to consider and respond to the most significant comments opposing the List 3 and 4A tariff actions in violation of the Administrative Procedure Act ("APA").

INTRODUCTION

This case presents a critical question: whether there are enforceable limits on USTR's ability to expand a tariff action under Section 301 of the Trade Act for however long, by whatever amount, and by whatever means it chooses. After imposing tariffs on \$50 billion of imports from China—an amount it deemed “commensurate” with the specific harms it investigated—USTR announced “supplemental” tariffs as purported “modifications” to cover another roughly \$500 billion of imports, *i.e.*, virtually the entirety of annual U.S. imports from China. That radical escalation of tariffs transgressed the statutory limits carefully delineated by Congress when delegating the exercise of its constitutional foreign-trade powers to USTR.

Section 301 of the Trade Act allows USTR, a federal agency, to investigate and take action to address a foreign country's unfair trade practices. The statute also permits USTR, via tailored provisions in Section 307, to "modify or terminate" a Section 301 action under specific circumstances. But Congress nowhere gave USTR the vast power to engage in an open-ended trade war.

Yet that is precisely what happened here. Following a seven-month investigation, USTR determined that four categories of China's practices related to intellectual property and technology transfer burdened U.S. commerce, and imposed "commensurate" tariffs on goods from China across two actions (Lists 1 and 2) covering \$50 billion worth of imports. Although amounting to one of the largest tariff actions in U.S. history, Lists 1 and 2 were arguably within the authority Congress delegated to USTR under Section 301.

What USTR did after that, however, was not. After China reacted with countermeasures of its own on \$50 billion worth of U.S. goods imported into China, USTR retaliated in extreme fashion: first imposing 10% duties (later increased to 25%) on an additional \$200 billion in Chinese imports ("List 3"), and then imposing duties of 7.5% on

approximately \$120 billion more (“List 4A”). Although dubbed “supplemental,” USTR multiplied more than *seven-fold* the Section 301 tariff response originally deemed “appropriate” to the discrete set of Chinese practices USTR investigated—levying a nearly \$75 billion annual tax on U.S. purchasers without Congressional action or imprimatur.

USTR’s List 3 and 4A tariff actions trample on the Trade Act’s clear limits. USTR made little secret that the primary reason for its extraordinary actions were China’s own retaliatory tariffs. But those actions do not reflect any corresponding increase in the \$50 billion burden on the U.S. economy from the investigated unfair practices, *i.e.*, the only statutorily permitted basis to raise tariffs without a new investigation. Nothing in the tailored “modification” provisions on which USTR relied permit the agency to increase its actions *at all*, let alone by several orders of magnitude, in retaliation for China’s tit-for-tat response to USTR’s initial Section 301 determination. And nothing in Section 307 permits the Administration to prosecute a limitless trade war.

USTR’s actions independently violated the APA. USTR received over 9,000 comments from concerned American consumers, businesses,

and groups in opposition to its proposed “modification.” But USTR never considered, let alone addressed, them in its rush to action. Although the CIT correctly recognized that USTR’s neglect constituted a procedural APA violation, it gave USTR another shot. On remand, however, USTR’s *post hoc* and conclusory responses to the most significant comments failed to cure its violation.

This Court should reverse.

STATEMENT OF THE CASE

I. LEGAL FRAMEWORK

The Constitution grants Congress the power to “lay and collect Taxes, Duties, Imposts and Excises,” as well as to “regulate Commerce with foreign Nations.” U.S. CONST. art. I, § 8. In the Trade Act, Congress delegated to USTR the power to exercise some of that authority, but only within specified constraints.

The Trade Act defines two types of USTR action, with different criteria: (1) “mandatory” action under Section 301(a) and (2) “discretionary” action under Section 301(b). This case involves Section 301(b), under which USTR has discretion to act upon a showing that “an act, policy, or practice of a foreign country” is “unreasonable or

discriminatory” and “burdens or restricts United States commerce.” 19 U.S.C. § 2411(b)(1). Congress imposed strict procedural requirements before USTR is permitted to take action, including: an investigation into the allegedly unreasonable activities (*id.* § 2412), consultation with the investigated foreign country (*id.* § 2413), factual findings in a written report (*id.* § 2414), and a twelve-month deadline to impose any “appropriate” action (*id.* § 2414(a)(2)(B)).

After an investigation, USTR must determine whether “action by the United States is appropriate.” 19 U.S.C. § 2411(b)(2). If USTR so determines, USTR may “take all appropriate and feasible action authorized under [Section 301(c)], subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain elimination of that act, policy, or practice.” *Id.* Among other responses, Section 301(c) authorizes USTR to “impose duties or other import restrictions on the goods of” the foreign country “for such time as the Trade Representative determines appropriate.” *Id.* § 2411(c)(1)(B).

Once a Section 301 action has been implemented, Section 307(a)(1) allows USTR to “modify or terminate” the action in specified circumstances:

The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under [Section 301] of this title if—

- (A) any of the conditions described in [Section 301(a)(2)] exist,
- (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or
- (C) such action is being taken under [Section 301(b)] and is no longer appropriate.

19 U.S.C. § 2417(a)(1). Before acting, USTR is obligated to consult with representatives of the domestic industry concerned, and to provide an opportunity for other affected parties to present their views “concerning the effects of the modification or termination and whether any modification or termination of the action is appropriate.” *Id.* § 2417(a)(2).

II. FACTS AND PROCEDURAL HISTORY

A. Section 301 Investigation

In August 2017, President Trump directed USTR to initiate a Section 301 investigation into China’s practices that “may be harming American intellectual property rights, innovation, or technology development.” Appx01538. USTR thereafter formally initiated an investigation into “whether actionable conduct exists under [S]ection 301(b),” the discretionary action provision. Appx01541.

In March 2018, USTR issued a report regarding the findings of its investigation. Appx01548-Appx01762. On April 6, 2018, USTR published in the Federal Register its determination under Sections 301(b) and 304(a) that four categories of Chinese government policies and actions “are unreasonable or discriminatory and burden or restrict U.S. commerce”: (1) forced technology transfer through foreign ownership restrictions; (2) administrative review and licensing processes; (3) technology regulations; and (4) IP theft through cyberintrusions into U.S. companies. Appx01770.

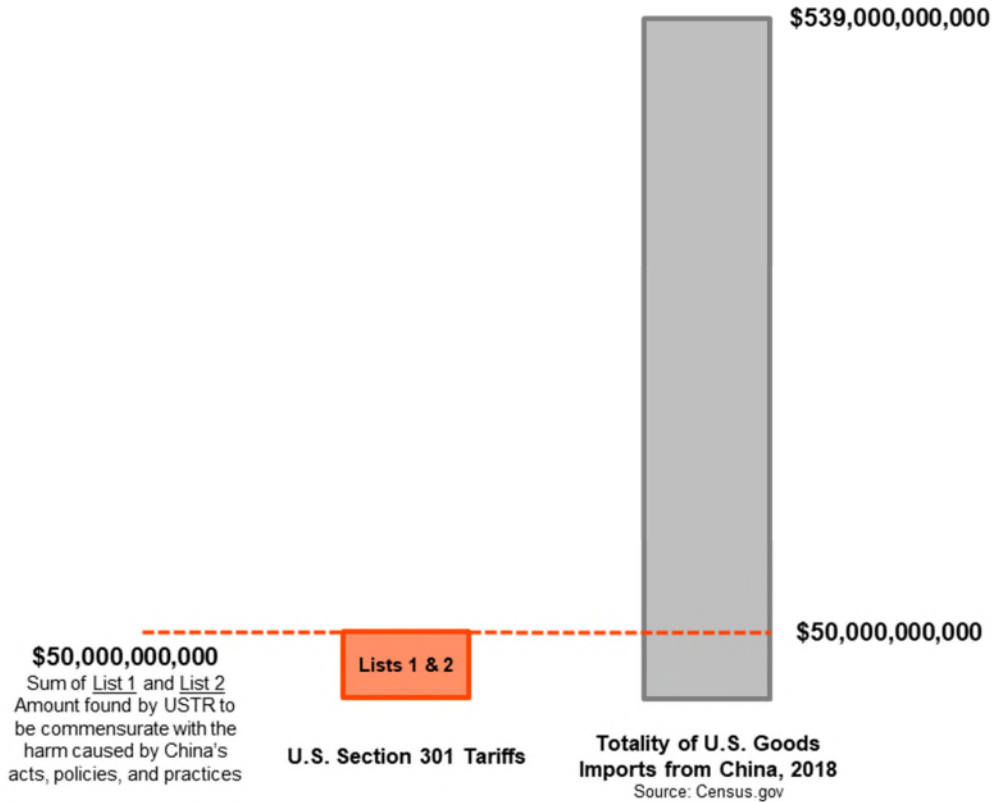
B. Lists 1 And 2

In its determination, USTR stated its intention to take action in the form of a “duty of 25 percent on a list of products of Chinese origin” on a proposed 1,333 Harmonized Tariff Schedule of the United States (“HTSUS”) subheadings with a total value of “\$50 billion in terms of estimated annual trade value for calendar year 2018.” Appx01771. USTR explained that \$50 billion was “commensurate with an economic analysis of the harm caused by China’s unreasonable technology transfer policies to the U.S. economy, as covered by USTR’s Section 301 investigation.” Press Release, Office of the U.S. Trade Representative, Under Section 301 Action, USTR Releases Proposed Tariff List on Chinese Products (Apr. 3, 2018) (“USTR April 3, 2018 Release”).¹ USTR invited comments on the proposed list and announced a public hearing. Appx01772.

On June 20, 2018, USTR published notice of its final “List 1” HTSUS items after “narrow[ing] the proposed list in the April 6, 2018 notice to 818 tariff subheadings, with an approximate annual trade value

¹ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/april/under-Section-301-action-ustr>.

of \$34 billion.” Appx01877. USTR simultaneously announced that it intended to impose a 25% duty on a proposed “List 2” of Chinese products to “maintain the effectiveness of [the] \$50 billion trade action” grounded in its Section 301 investigation. Appx01878. On August 16, 2018, USTR published notice of final List 2, imposing tariffs on goods with an annual trade value of \$16 billion. Appx02183. Plaintiffs do not challenge the imposition of duties on Lists 1 and 2 products in this action.



C. List 3

1. Proposed List 3 Tariffs

In response to Lists 1 and 2, China imposed 25% retaliatory duties on \$50 billion worth of imports from the United States. President Trump reacted by directing USTR, before List 2 was even finalized, to prepare for the imposition of additional duties on products from China with an estimated trade value of \$200 billion—an amount that, when combined with the tariffs imposed pursuant to Lists 1 and 2, encompassed roughly half of all U.S. trade with China. Appx01872. President Trump acknowledged that China’s retaliatory tariffs as well as the overall trade imbalance—not an increase in the burden from China’s investigated acts and policies related to technology transfer and intellectual property—motivated his request: “This latest action by China clearly indicates its determination to keep the United States at a permanent and unfair disadvantage, which is reflected in our massive \$376 billion trade imbalance in goods. This is unacceptable.” *Id.*; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (June 10, 2018, 9:17 PM EST) (“Why should I, as President of the United States, allow countries to continue to make Massive Trade Surpluses, as they have for decades, while our

Farmers, Workers & Taxpayers have such a big and unfair price to pay? Not fair to the PEOPLE of America! \$800 Billion Trade Deficit.”²

One month later, USTR published notice of its proposal to “modify the action in this investigation *** by taking a further, supplemental action”—specifically, “an additional 10 percent *ad valorem* duty on products [from] China *** [with] an annual trade value of approximately \$200 billion,” spanning 6,031 HTSUS tariff subheadings. Appx01925. As authority for its action, USTR invoked Section 307(a)(1)(C), under which USTR “may modify or terminate any action” taken under Section 301(b) when such action “is no longer appropriate.” *Id.* (quoting 19 U.S.C. § 2417(a)(1)(C)).

USTR relied explicitly on China’s imposition of “retaliatory duties” as a justification for its action. Appx01925; *see* Press Release, Office of the U.S. Trade Representative, Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action (July 10, 2018) (citing “China’s retaliation”).³ USTR further noted that “action at this level is

² <https://twitter.com/realDonaldTrump/status/1005982266496094209>.

³ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/statement-us-trade-representative>.

appropriate in light of the level of China’s announced retaliatory action (\$50 billion) and the level of Chinese goods imported into the United States (\$505 billion in 2017).” Appx01925. USTR did not identify any increased burdens or restrictions arising from the actions it originally investigated, *i.e.*, the intellectual property/technology-transfer acts, policies, or practices that USTR found actionable under Section 301.

Weeks later, USTR announced that, in light of China’s retaliatory duties, USTR would propose to increase the duty on List 3 from 10% to 25%. Again, rather than addressing the original conduct found actionable under Section 301, USTR premised the further increase in tariffs on China’s “illegal[] retaliat[ion] against U.S. workers, farmers, ranchers and businesses.” Press Release, Office of the U.S. Trade Representative, Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action (Aug. 1, 2018).⁴ Shortly thereafter, USTR formally proposed “raising the level of the additional duty in the proposed supplemental action from 10 percent to 25 percent.” Appx02153.

⁴ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/august/statement-us-trade-representative>.

Approximately 350 witnesses, representing a broad array of businesses, trade associations, consumer, and public interest groups, appeared at the hearings regarding the proposed List 3 tariffs, and over 6,000 comments were submitted. *See* Section 301 Docket.⁵ The overwhelming majority of the testimony and comments (~98%) revealed deep and widespread concern over the potentially devastating impact of the proposed tariffs on U.S. businesses and consumers. For example, the National Retail Federation (“NRF”) noted that List 3 “includes many consumer goods” that are “purchased by nearly every American household” and “account for relatively large shares of total household spending of lower-income households.” Appx05600. NRF further observed that businesses and consumers would be harmed by the disruption to supply chains, supply shortages, and price increases, and that the tariffs “would jeopardize U.S. jobs.” Appx05600-Appx05601. The American Chemistry Council stated that the proposed List 3 tariffs “would have a profound and negative ripple effect throughout the U.S. economy, increasing costs and causing deep and lasting harm to domestic

⁵ <https://www.regulations.gov/docket?D=USTR-2018-0026> (last visited July 13, 2023).

manufacturers, farmers, workers, and consumers.” Appx05420. SEMI, the trade association representing the semiconductor manufacturing industry, raised similar concerns regarding the impact of the proposed tariffs on jobs and global competitiveness. Appx02759, Appx02765.

Although the volume of the comments submitted and the importance of the issues raised gave USTR an enormous amount of information to process, the Administration suggested—even before the comment period ended—that USTR was ready to impose tariffs immediately. See Jennifer Jacobs, Shawn Donnan, Andrew Mayeda, & Saleha Mohsin, *Trump to Back \$200 Billion China Tariffs as Early as Next Week, Sources Say*, BLOOMBERG (Aug. 31, 2018).⁶ Indeed, less than 24 hours after the comment deadlines, President Trump added that more tariffs on an additional \$267 billion in Chinese goods were “ready to go *** if I want.” Shannon Pettypiece, *Trump Threatens Tariffs on \$267 Billion More of China Goods*, BLOOMBERG (Sept. 7, 2018).⁷

⁶ <https://www.bloomberg.com/news/articles/2018-08-30/trump-said-to-back-200-billion-china-tariffs-early-as-next-week>.

⁷ https://www.bloomberglaw.com/product/blaw/document/PEP4HH6S9728?criteria_id=836874428e044c184792e389f0587b76&searchGuid=578f467f-2a95-45ab-a12d-9efb1dbf9c92

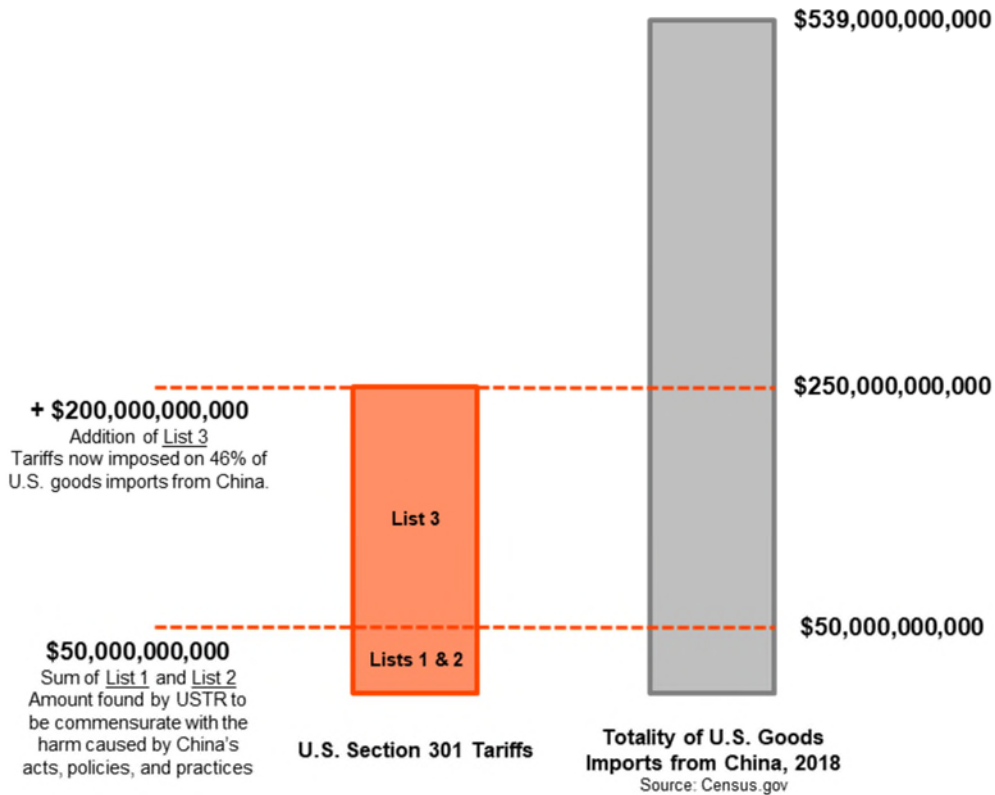
2. *Final Adoption of List 3*

Just eleven days after the deadline for the public to submit written comments, President Trump announced that USTR would “proceed with placing additional tariffs on roughly \$200 billion of imports from China.” APPX06166. Once again, the President made clear the additional tariffs were in response to China’s retaliation to the \$50 billion tariff action, as he promised to proceed with yet more tariffs “if China takes retaliatory action against our farmers or other industries.” *Id.*; see *White House Adviser Navarro On Why U.S. Hit China With More Tariffs*, NPR MORNING EDITION (Sept. 18, 2018) (“China retaliated. And so in response to that, the president directed the USTR to go through the process meticulously of preparing the additional tariffs.”).⁸

The next day, USTR published notice of final List 3. Appx06172-Appx06390. USTR announced that the additional 10% duty would apply to all listed products that entered the United States from China on or after September 24, 2018, and would rise automatically to 25% on January 1, 2019. Although USTR purported to “have carefully reviewed

⁸ <https://www.npr.org/2018/09/18/649089105/white-house-adviser-navarro-on-why-hit-china-with-more-tariffs>.

the public comments” and testimony, Appx06173—*i.e.*, the 6,000 written comments plus tens of thousands of transcript pages—USTR did not actually address any comments or testimony.



For legal authority, USTR this time relied on an additional provision that was not cited in the notice proposing List 3: Section 307(a)(1)(B). Appx06172. Parroting the statutory language, USTR stated, in conclusory fashion without citing any evidence or findings, that the relevant burden “continues to increase, including following the one-year investigation period.” *Id.* “Furthermore,” USTR added, “China’s unfair acts, policies, and practices include not just its specific technology

transfer and IP policies referenced in the notice of initiation in the investigation, but also China's subsequent defensive actions taken to maintain those policies." *Id.* USTR also again cited Section 307(a)(1)(C), arguing that China's response to the \$50 billion tariff action "has shown that the current action no longer is appropriate" because "China openly has responded to the current action by choosing to cause further harm to the U.S. economy, by increasing duties on U.S. exports to China." Appx06173.

In December 2018, the Administration announced its decision to delay the scheduled January 1, 2019 increase in rate from 10% to 25% for List 3 products, based on negotiations with China "with respect to North Korea" and China's apparent commitment "to purchase a not yet agreed upon, but very substantial, amount of agricultural, energy, industrial, and other product from the United States to reduce the trade imbalance between [the United States and China]." Appx06461-Appx06462; *see* Appx06474. The Administration later delayed the increase indefinitely in light of the progress of trade talks with China. Appx06484.

But after those negotiations fell apart, on May 9, 2019, USTR issued a Federal Register notice announcing its intention to raise tariffs on List 3 goods to 25%. Appx06496-Appx06497. The notice cited China’s decision to “retreat from specific commitments agreed to in earlier rounds” of negotiations as the sole basis for the increase in duties. Appx06496. “In light of the lack of progress in the additional rounds of negotiations since March 2019,” the Notice read, “the Trade Representative has determined that it is appropriate for the rate of additional duty under the September 2018 action to increase to 25 percent [for goods leaving China] on May 10, 2019.” Appx06497. USTR made no finding of any increased burden from China’s investigated trade practices.

D. List 4

1. Proposed List 4 Tariffs

Just eight days after announcing the increase in the List 3 duty rate to 25%, USTR announced its intention to proceed with List 4, which would subject an additional \$300 billion worth of products imported from China to up to 25% tariffs. Appx06504-Appx06579. USTR again declared that its proposed additional action was based on China’s

responsive actions, not any increased burdens or restrictions from the originally investigated acts and practices: “In light of China’s failure to meaningfully address the acts, policies, and practices that are subject to this investigation and its response to the current action being taken in this investigation,” USTR “propose[d] to modify the [Section 301] action” by increasing the value of products subject to tariffs to approximately \$500 billion total—*i.e.*, ten-fold above the initial action. Appx06504.

The public submitted nearly 3,000 additional comments outlining the expansive harms American businesses and consumers would suffer from the List 4 tariffs. The U.S. Chamber of Commerce noted that the List 4 tariffs “will dramatically expand the harm already done to American consumers, workers, businesses, and the economy,” especially considering that “U.S. tariffs on imports from China are already costing American households \$106 billion a year.” Appx06714. It also stressed that “American farmers have become some of the most severely affected targets of retaliation.” Appx06719. The Consumer Technology Association (“CTA”) noted that the tariffs will “stifle *** growth and market share, diminish U.S. product adoption, and undermine [CTA’s members’] ability to invest in continued innovation to drive the U.S.

industry and its global market share forward.” Appx07246. The National Association of Manufacturers warned that the List 4 tariffs, by sharply increasing the cost of “raw materials, intermediate goods or capital equipment from China,” will actually harm *domestic* manufacturing, by “mak[ing] it more expensive and less competitive to manufacture in the United States, undermining production, capital and R&D investment and jobs here at home while also forcing manufacturers to cede ground to their competitors overseas.” Appx06675. Similar to List 3, the List 4 hearings attracted over 300 witnesses who testified about the negative impact of the proposed tariffs.⁹

2. *Final Adoption of List 4*

On August 1, 2019, citing China’s failure to follow through on agricultural purchases and to reduce exports of fentanyl flowing into the United States, President Trump announced on Twitter that the List 4

⁹ USTR, Section 301 Tariffs Hearing Panel Schedule, <https://ustr.gov/sites/default/files/enforcement/301Investigations/Section%20301%20Hearing%20Schedule%20June%2017-June%2025%202019.pdf> (last visited July 13, 2023).

tariffs would become effective September 1 at a rate of 10%. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 1, 2019, 1:26 PM EST).¹⁰

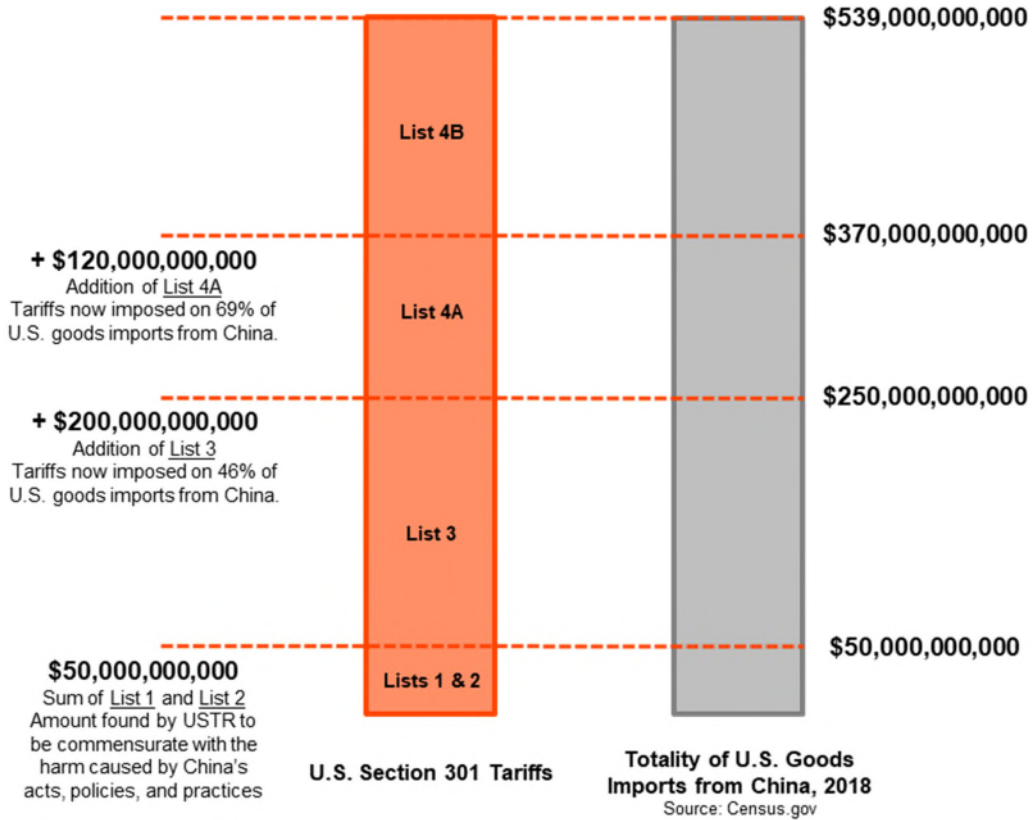
Later that month, USTR issued a final notice adopting List 4 in two tranches. Appx09153-09320. List 4A would impose a 10% duty on goods worth approximately \$120 billion, effective September 1, 2019. Appx09153. List 4B would impose a 10% duty on the remaining goods (with limited exclusions “based on health, safety, national security, and other factors”), effective December 15, 2019. Appx09154. Once again, USTR addressed none of the nearly 3,000 comments submitted or witness testimony, other than to claim that its determination “takes account of the public comments and the testimony.” *Id.*

As legal support for its action, USTR cited both Section 307(a)(1)(B) and (C), stating that it may “modify” its prior action taken pursuant to Section 301 if (1) “[t]he burden or restriction on United States commerce” imposed by the investigated foreign country practice “has increased or decreased,” or (2) “the action *** is no longer appropriate.” Appx09153. But instead of finding any increased burden on U.S. commerce from the

¹⁰ <https://twitter.com/realDonaldTrump/status/1156979446877962243?lang=en>

practices that were the subject of USTR’s investigation, USTR pointed to “China’s subsequent defensive actions taken to maintain those unfair acts, policies, and practices as determined in that investigation,” such as imposing retaliatory tariffs on U.S. imports, retreating from commitments during negotiations, and devaluing its currency. Appx09153-Appx09154.

With the promulgation of Lists 3 and 4, USTR’s tariff actions under Section 301 expanded from covering roughly 10% of Chinese imports (with List 1 & 2) to covering nearly all imports from China (with Lists 3, 4A, & 4B).



Just ten days after publishing List 4, USTR published notice of its decision to increase the tariff rate applicable to goods covered by Lists 4A and 4B from 10% to 15%. Appx09338-Appx-09340. The cited basis for these actions was, once again, China’s retaliation as well as China’s retreat from its negotiation commitments and devaluation of its currency. Appx09339 (noting that “China responded [to List 4] by announcing further tariffs on U.S. goods”). USTR did not cite increased harms from the originally investigated practices.

On December 18, 2019, citing a recently negotiated limited trade deal with China, USTR published notice that it would “suspend indefinitely the imposition of additional duties” on List 4B. Appx09560. USTR also later halved the duty rate (to 7.5%) for List 4A, Appx09571, which, along with Lists 1, 2, and 3, remains in effect.

E. Procedural History

Plaintiffs filed suit at the CIT, seeking vacatur of the List 3 and 4A tariffs and refunds of any duties paid on grounds that they were issued without statutory authority and in violation of the APA. Appx00112-Appx00141. Over 4,100 additional actions were filed thereafter raising substantively similar claims. This action was selected as the “sample case,” and subsequent actions were stayed pending resolution of this action. Appx09597-Appx09601; Appx09572-Appx09576. Defendants moved to dismiss or, alternatively, for judgment on the agency record, while Plaintiffs cross-moved for judgment.¹¹

On April 1, 2022, the CIT issued its first decision. Appx00030-Appx00100 (“*First Opinion*”). At the outset, the CIT rejected Defendants’

¹¹ Because Defendants initially objected to refunding liquidated entries in the event Plaintiffs prevailed, Plaintiffs were forced to seek a

arguments that the claims were unreviewable because they supposedly challenged Presidential (rather than agency) action or raised political questions. Appx00048-Appx00057. Turning to the merits, the CIT addressed whether USTR exceeded its authority under Section 307(a)(1)(B) when it promulgated Lists 3 and 4A. Although the CIT agreed with Plaintiffs that the plain text of Section 307(a)(1)(B) allows USTR to modify its earlier action based only on an increased burden from the originally investigated acts, the CIT held that China's after-the-fact retaliation was sufficiently "link[ed]" to USTR's original investigation. Appx00065-Appx00070. The CIT did not reach the parties' arguments on whether Section 307(a)(1)(C) independently supported Lists 3 and 4A.

The CIT next assessed whether USTR complied with the APA. After rejecting Defendants' argument that the foreign-affairs-function

preliminary injunction limited to the suspension of liquidation. *See* Appx09805-Appx09833 (granting injunction); *see also* Appx09834-Appx09854 (Barnett, C.J., dissenting on the ground that no injunction was necessary because CIT unquestionably has the authority to order refunds). After the CIT granted that injunction on July 6, 2021, Defendants stipulated that, in the event Plaintiffs ultimately prevailed, Defendants would reliquidate and provide refunds for entries that were unliquidated as of the injunction date. Appx10306-Appx10322. The CIT so modified its injunction. Appx10339-Appx10340.

exception excused USTR from following the APA's notice-and-comment rulemaking requirements, Appx00071-Appx00073, the CIT concluded that USTR failed to consider adequately thousands of comments from interested parties. Appx00077-Appx00086. Instead of vacating, however, the CIT ordered USTR to reconsider or further explain its decisions to impose Lists 3 and 4A. Appx00086-Appx00090. But the CIT underscored that USTR could only "further explain the justifications it has given for the modifications," and that if it wished to provide new reasoning, it would need to "'deal with the problem afresh' by taking new agency action." Appx00090 (quoting *Department of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020)).

After taking 120 days (including an extension) to review the thousands of comments and thousands of pages of hearing testimony, Appx10544-Appx10550; Appx10557-Appx10559, USTR issued a 90-page remand determination. Appx10570-Appx10659. The CIT rejected Plaintiffs' arguments that the determination was conclusory and *post*

hoc, and entered judgment sustaining Lists 3 and 4A. Appx00001-Appx00002; Appx00003-Appx00029. Plaintiffs appealed.

SUMMARY OF THE ARGUMENT

USTR’s Lists 3 and 4A tariff actions on hundreds of billions of dollars of imported Chinese goods are *ultra vires* and procedurally infirm.

I. Section 307 of the Trade Act authorizes USTR to “modify or terminate” a discretionary Section 301(b) action in two circumstances—neither of which is present here. First, Section 307(a)(1)(B) allows USTR to modify an existing action where the burden on U.S. commerce “of the acts, policies, and practices[] that are the subject of” the Section 301 action has increased or decreased. That means only an increase in the burden on U.S. commerce from the investigated intellectual property practices themselves (*i.e.*, “the subject of” the Section 301 action)—not from any and all acts purportedly “linked” or “connected” to the original action—could justify an increase in the existing tariff action. The CIT erred by upholding USTR’s use of Section 307(a)(1)(B) to address retaliatory acts by China beyond the specific investigated practices found to justify the original Section 301(b) action. The CIT’s holding is contrary

to the plain text of the statute and ignores the targeted scope of USTR's original Section 301(b) investigation.

Second, Section 307(a)(1)(C) permits modification if USTR deems the original Section 301(b) action to be “no longer appropriate.” The statutory structure demonstrates that this provision allows USTR to reduce or terminate an existing action after mitigating circumstances undermine the original finding that certain responsive action was “appropriate.” Just as its counterpart section (Section 307(a)(1)(A)) undisputedly allows USTR only to terminate or ratchet down a *mandatory* action in light of changed circumstances, Section 307(a)(1)(C) authorizes USTR only to terminate or ratchet down a *discretionary* action when it is “no longer appropriate.” Past practice, legislative history, and the doctrine of constitutional avoidance confirm that construction.

If any doubt remains, the “major questions” doctrine provides additional reason to reject USTR's novel view that Section 307 confers expansive authority to escalate a highly circumscribed Section 301(b) action into an open-ended trade war. Congress would not have granted USTR authority to take action of such economic and political consequence

without a far clearer statement than the circumscribed grant of authority to “modify” a targeted trade action.

II. USTR failed to consider, let alone respond to, thousands of comments lodging significant objections to the proposed List 3 and 4A tariffs before finalizing those actions. The CIT acknowledged that USTR’s failures violated the APA. But instead of vacating the tariff actions, the CIT erred in giving USTR a do-over to provide the missing reasoning. The CIT erred again when it upheld the List 3 and 4A duties based on a remand determination offering conclusory and *post hoc* responses that ultimately rested on the President’s say-so rather than consideration of all the relevant statutory factors. That APA violation provides an independent basis to set aside Lists 3 and 4A.

STANDARD OF REVIEW

This Court “review[s] the grant of judgment on the agency record by the Court of International Trade without deference.” *Corus Staal BV v. Department of Com.*, 395 F.3d 1343, 1346 (Fed. Cir. 2005). Because this case arose under 28 U.S.C. § 1581(i), the “Administrative Procedure Act standard of review applies,” *Shakeproof Indus. Prods. Div. of Ill. Tool Works Inc. v. United States*, 104 F.3d 1309, 1313 (Fed. Cir. 1997), under

which this Court “hold[s] unlawful and set[s] aside agency action, findings, and conclusions found to be *** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(a).

Under that standard, “legal issues”—such as issues of statutory construction—are decided without deference to the Executive Branch. *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1318 (Fed. Cir. 2021) (“This appeal involves only legal issues, which we decide de novo.”); *GPX Int’l Tire Corp. v. United States*, 780 F.3d 1136, 1140 (Fed. Cir. 2015) (“We review questions of constitutional or statutory interpretation de novo.”). That is because the judiciary, not USTR or the President, “is the final authority on issues of statutory construction.” *Gilda Indus., Inc. v. United States*, 622 F.3d 1358, 1363 (Fed. Cir. 2010) (“*Gilda II*”) (citation omitted). Although this Court defers “to decisions of the Trade Representative implicating the discretionary authority of the President in matters of foreign relations,” it affords no similar deference to USTR’s interpretation of statutory mandates. *Id.*; see Appx00059 (this Court “distinguishe[s] matters implicating presidential discretion from those requiring statutory interpretation”) (citing *Gilda II*, 622 F.3d at 1363).

Instead, the Court determines the meaning of the statute for itself, examining “the statute’s text, structure, and legislative history,” while applying any “relevant canons of interpretation.” *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017).

ARGUMENT

I. USTR EXCEEDED ITS MODIFICATION AUTHORITY UNDER THE TRADE ACT

USTR exceeded its authority under Section 307 of the Trade Act when it imposed the List 3 and 4A tariffs on Chinese goods worth hundreds of billions of dollars—an amount orders of magnitude greater than the original \$50 billion Section 301 action that USTR had deemed “commensurate with an economic analysis of the harm caused by China’s unreasonable technology transfer policies to the U.S. economy.” USTR April 3, 2018 Release.

USTR’s sole statutory basis for Lists 3 and 4A is Section 307, the “modification” provision. Before the CIT, Defendants relied on two different subsections of Section 307, but USTR did not do so originally. In proposing List 3, USTR relied solely on Section 307(a)(1)(C), which allows USTR to “modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, *** if ***

such action is being taken under [S]ection 301(b) of this title and is no longer appropriate.” Appx01925 (second ellipsis in original) (quoting 19 U.S.C. § 2417(a)(1)(C)). Upon finalizing List 3, USTR for the first time cited Section 307(a)(1)(B), which permits modification where “the burden or restriction on United States commerce *** of the acts, policies, and practices, that are the subject of such action has increased or decreased.” Appx06172 (quoting 19 U.S.C. § 2417(a)(1)(B)).

As USTR’s evolving rationale suggests, neither provision supports List 3 or 4A. For starters, “statutory permission to ‘modify’ does not authorize ‘basic and fundamental changes in the scheme’ designed by Congress.” *Biden v. Nebraska*, 600 U.S. ---, No. 22-506, 2023 WL 4277210, at *9 (U.S. June 30, 2023) (quoting *MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)). Instead, in both ordinary and legal definitions, the word “carries ‘a connotation of increment or limitation,’ and must be read to mean ‘to change moderately or in minor fashion.’” *Id.* (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1952 (2002) & BLACK’S LAW DICTIONARY 1203 (11th ed. 2019)); *see also MCI Telecomms.*, 512 U.S. at 225-228 (relying on dictionaries published between 1987-1990, contemporaneous with

Section 307’s addition in the Trade Act of 1988). Just as “[t]he authority to ‘modify’ statutes and regulations allows [an agency] to make modest adjustments and additions to existing provisions,” the authority to “modify” tariff actions gives USTR the power to make modest adjustments to those tariffs, not the power to “transform them” into a trade war. *Biden*, 2023 WL 4277210, at *9. Yet USTR’s “modification” now represents nearly half of *all* U.S. tariffs currently in effect globally.

Beyond that threshold problem, Section 307’s “text and context, including purpose and history,” *Transpacific*, 4 F.4th at 1332, demonstrate that USTR exceeded its authority in promulgating the challenged duties.

A. USTR Exceeded Its Authority Under Section 307(a)(1)(B)

1. Section 307(a)(1)(B) Permits Modifications Only If USTR Finds Increased Harms From The Investigated Practices

Section 307(a)(1)(B) allows USTR to “modify or terminate” a Section 301 action if “the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased.” 19 U.S.C. § 2417(a)(1)(B). As those terms make plain, and as the CIT recognized, USTR may increase

tariffs “based on increased harm to U.S. commerce *from the acts, policies, and practices that constituted the subject of the original investigation.*”

Appx00064 (emphasis added). The question is whether USTR did so.

The answer is no. USTR’s initial \$50 billion Section 301(b) tariff action followed its “original investigation” into specific harmful acts, policies, and practices by China. USTR determined that “an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce,” and published its investigated findings in the Federal Register. 19 U.S.C. §§ 2411(b)(1), 2414(a)(1)(A)(ii), 2414(c). USTR described four discrete “categories” of acts, policies, or practices as “actionable under [S]ection 301(b) of the Trade Act”:

1. China uses foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from U.S. companies.
2. China’s regime of technology regulations forces U.S. companies seeking to license technologies to Chinese entities to do so on non-market based terms that favor Chinese recipients.
3. China directs and unfairly facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge

technologies and intellectual property and generate the transfer of technology to Chinese companies.

4. China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies to access their sensitive commercial information and trade secrets.

Appx01771; *see* Appx01770-Appx01771 (explaining that USTR previously asked for comments on “four categories” of conduct); Appx02183 (similar); Appx05919 (internal decision memorandum discussing how “investigation covered four categories of acts, policies, and practices”).

It is undisputed that USTR’s subsequent “supplemental action” (Appx01924-Appx02044), however, was not based on increased harms arising from any of those “four categories.” Instead, as the Federal Register notices make clear, USTR was taking action to address (among other disparate issues) China’s *retaliation* to the duties imposed on Chinese commerce via Lists 1 and 2, in the form of China’s own broadly applicable tariffs on U.S. goods. *See, e.g.*, Appx01925; Appx06172; Appx06504; Appx09153-Appx09154.

Because USTR never found any “increased harm to U.S. commerce *from the acts, policies, and practices that constituted the subject of the original investigation,*” Appx00064 (emphasis added), this should have

been an easy case. Section 307(a)(1)(B) did not authorize any “modif[cation]” to the original Section 301(b) tariff action, let alone the seven-fold increase that USTR ultimately levied.

2. *The CIT Erred In Concluding That USTR Could Rely On Subsection (B)*

Although USTR never made findings of increased harm from any of the four originally investigated practices—*i.e.*, “the subject of the [Section 301(b)] action”—the CIT upheld the List 3 and 4A “modifications.” It did so on the ground that “China’s defensive conduct, occurring subsequent to the original investigation” and distinct from the investigated practices, fell within “the subject of the [original] action.” Appx00064-Appx00065. That was error, for multiple reasons.

First, this is not a case where the retaliatory conduct took the form of an exacerbation of the investigated practices. There is no finding that China ramped up its IP/technology-transfer abuses against the United States. Rather, China’s “defensive conduct” took other forms, principally retaliatory tariffs against U.S. imports. As a matter of logic, such “subsequent” conduct—taken for the first time in response to the Section 301 action—could not have been the subject of the original investigation leading to the Section 301 action.

Second, the CIT found that the “link between the subject of the original section 301 action and China’s retaliation is plain on its face.” Appx00065. But the statutory inquiry is not whether USTR can point to some “link” or “connection” (Appx00067) between the two, but rather whether the economic burden from “the acts, policies, and practices, that are the subject of” the original action increased. 19 U.S.C. § 2417(a)(1)(B). USTR plainly did not find that *those* burdens increased. The CIT thus effectively revised the statute to add a new clause that would justify a modification whenever “the burden or restriction on United States commerce of *** the acts, policies, and practices, that are the subject of such action, or of any subsequent defensive measures taken in response to such action, has increased or decreased.” But the CIT’s task was “to apply the text, not to improve upon it.” *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126 (1989).

Third, it is not enough that China had retaliated to “maintain”—*i.e.*, to “keep in an existing state” or “preserve,” *Angus Chem. Co. v. Glendora Plantation, Inc.*, 782 F.3d 175, 184 (5th Cir. 2015) (citing common definitions)—the policies originally deemed actionable. Appx00069. A finding that China’s retaliation was “directed against the

effort to challenge its unfair acts, policies, [and] practices,” Appx00070, is not equivalent to a finding that the burden of the acts, policies, and practices *themselves* has increased. And it is immaterial whether “China’s retaliation also caused increased harm to U.S. commerce” generally, Appx00069-Appx00070, absent a finding of increased harm from the “subject” of the original action.

Fourth, the CIT was wrong to rely *sua sponte* on a few out-of-context uses of the word “retaliation” in the Section 301 report as a basis to conclude that USTR validly invoked Section 307(a)(1)(B). The report’s references to “retaliation” were, as the CIT itself acknowledged, related to potential retaliation by China against *U.S. companies* for complaining about the IP and technology practices. *See* Appx00069 (USTR’s “discussion of retaliation” relates to “why individual companies were unable and unwilling to pursue their own complaints against the underlying Chinese practices”); *see also* Appx01561-Appx01562 (describing general concern that U.S. companies might face retaliation if they complained about China’s unfair trade practices, which led USTR to self-initiate the investigation instead of relying on a petitioner); Appx01573 (describing general concern that Chinese regulatory

authorities may take action against individual companies for raising issues regarding forced technology transfer and IP)). Such fleeting and inapt mentions of the word “retaliation” in reference to individual U.S. companies are obviously not proof that the “subject” of the “original investigation” included the prospect of billions of dollars in retaliatory tariffs on a broad spectrum of U.S. imports.

Proving the point, Defendants did not even rely on such retaliation “findings” below, either in briefing or in promulgating Lists 3 and 4A. Indeed, USTR’s notices never claimed that potential “retaliation” by China had been the subject of investigation. Nor do the internal agency recommendation memoranda included as part of the administrative record. Appx05918-Appx05926; Appx08972-Appx09151. It is thus too late for Defendants to do so now. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (Courts “must judge the propriety of [administrative] action solely by the grounds invoked by the agency.”).

Finally, to the extent that CIT was concerned about restricting the ability of the United States to respond to retaliation by China, that policy concern was misplaced. “The question here is not whether something should be done; it is who has the authority to do it.” *Biden*, 2023 WL

4277210, at *12. Congress remains free to exercise its constitutional powers to “lay and collect Taxes, Duties, Imposts and Excises” directly. U.S. CONST. art. I, § 8. Beyond that, Congress gave USTR a variety of tools to respond to China’s actions. For example, USTR could have negotiated with China or filed additional cases against China before the World Trade Organization. *See* 19 U.S.C. §§ 2413, 3537.¹² USTR was also free to initiate a new Section 301 investigation, pursuant to the same statutory procedures under which it conducted its original investigation, which would have permitted a subsequent Section 301 action to address China’s retaliation.

To be sure, those routes would have required following the procedural safeguards that Congress put in place—which, for a new Section 301 action, would have required an investigation, consultations with China, and a new report. *See* 19 U.S.C. §§ 2411-2414. But that is what exercising Congress’s constitutionally delegated authority entails.

¹² USTR brought a WTO case against China in similar circumstances when China retaliated against U.S. imposition of Section 232 duties on imports of steel and aluminum. *See* USTR, Additional Duties on Certain Products from the U.S., <https://ustr.gov/node/10127> (last visited July 13, 2023).

The Executive Branch may exercise delegated authority only “subject to limitations which [Congress] imposes.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); see *United States v. Schmidt Pritchard & Co*, 47 C.C.P.A. 152, 162 (1960) (“It requires no elaborate argument to support the proposition that Congress in so delegating its powers may prescribe whatever procedures and limitations it sees fit to enact for limiting the exercise by its agents of such delegated powers.”). USTR should not have been permitted to override Congress’s clear limitation in Section 307(a)(1)(B) in order to arrogate trade-war powers that Congress never delegated.

B. USTR Exceeded Its Authority Under Section 307(a)(1)(C)

USTR also relied on Section 307(a)(1)(C) of the Trade Act as alternative authority for imposing the List 3 and 4A tariffs. Appx06172-Appx06173; Appx09153. Although the CIT did not reach that issue due to its finding on Section 307(a)(1)(B), Appx00070, it is a fully briefed question of law. Accordingly, this Court should hold that Section 307(a)(1)(C) does not authorize List 3 or 4A, either.

1. *Text and Context Show That Congress Authorized Only The Tapering Or Terminating Of Actions Deemed No Longer “Appropriate”*

Section 307(a)(1)(C) provides that the President may “modify or terminate” an action if “such action is being taken under [section 301(b)] and is no longer appropriate.” 19 U.S.C. § 2417(a)(1)(C). Contrary to Defendants’ argument, the text and structure of Sections 301 and 307 of the Trade Act demonstrate that Section 307(a)(1)(C) does not give USTR unlimited, unreviewable authority to *increase* trade actions no longer deemed “appropriate.”

As noted, Section 301(b) authorizes USTR to take discretionary action within one year if (1) a foreign country’s acts, policies, or practices are unreasonable or discriminatory and burden or restrict U.S. commerce; and (2) responsive action by the United States is “appropriate.” 19 U.S.C. § 2411(b). Section 307(a)(1)(C), in turn, permits *modification* of a discretionary action after USTR concludes that such an action is “*no longer* appropriate.” *Id.* § 2417(a)(1)(C) (emphasis added). Both sides agreed below that Sections 307(a)(1)(C) and Section 301(b) should be read in harmony with one another. *See, e.g.*, Appx09769-Appx09770; Appx10152-Appx10153.

Reading those sections together (as one must), Section 307(a)(1)(C) provides authority only to *reduce or terminate* a Section 301(b) action after changed circumstances undermine the original finding that taking responsive action was “appropriate.” Indeed, that is precisely how USTR has historically understood the relationship between the two provisions. *See, e.g., Termination of Action: Protection of Intellectual Property Rights by the Government of Honduras*, 63 Fed. Reg. 35,633, 35,633 (June 30, 1998) (“Section 307(a)(1)(C) of the Trade Act authorizes the USTR to *terminate* any action, subject to the specific direction, if any, of the President, if such action is being taken under Section 301(b) and is *no longer appropriate.*” (emphasis added)).

The neighboring prongs of Section 307(a)(1) reinforce the conclusion that Section 307(a)(1)(C) is a tool to taper, not expand, an existing remedial action. Section 307(a)(1)(A) permits USTR to modify or terminate a mandatory action taken under Section 301(a) when “any of the conditions described in section [301(a)(2)] exist.” 19 U.S.C. § 2417(a)(1)(A). Those “conditions” are the exceptions to mandatory action under Section 301(a), and reflect circumstances in which the foreign country is taking steps to remediate its offensive practices or

when a U.S. response to a foreign trade violation would “serious[ly] harm *** the national security” or “adverse[ly] impact *** the United States economy.” *Id.* § 2411(a)(2)(B)(i)-(v). By authorizing USTR to modify or terminate an action when those *exceptions* to mandatory action are present, Congress clearly did not authorize USTR to *increase* tariffs thereunder, as Defendants conceded below. *See* Appx10371 (acknowledging that section 307(a)(1)(A) operates as a tapering tool only, allowing USTR to terminate or decrease mandatory actions). On the contrary, Congress permitted USTR only to withdraw or curtail a mandatory action previously taken when later-developed conditions render that action undesirable.

Importantly, Sections 307(a)(1)(A) and (C) operate in parallel with respect to mandatory and discretionary actions, respectively. That is, whereas the former provision applies to *mandatory* action under Section 301(a), the latter applies to *discretionary* action under Section 301(b). *See* 19 U.S.C. § 2417(a)(1)(A), (C). Just as subsection (A) allows USTR to terminate or ratchet down a *mandatory* action when that action no longer makes sense in light of changed circumstances, subsection (C) likewise authorizes USTR to terminate or ratchet down a *discretionary* action

when USTR finds that it “is no longer appropriate.” *Id.* § 2417(a)(1)(C). Neither provision authorizes an escalation of a tariff action in response to changed circumstances.

Defendants argued below that nothing in subsection (C) explicitly prohibits USTR from increasing an action no longer deemed “appropriate.” But the same is true of subsection (A), and all parties agree (Appx10371) that it does not permit increases in a tariff action. Indeed, Defendants’ argument implies that USTR paradoxically has *less* authority to counteract retaliation in the context of international trade violations giving rise to *mandatory* actions.

If the modification authority under subsection (C) were broad enough to permit USTR to escalate a tariff action at its discretion, moreover, USTR would *always* rely on subsection (C) over (B)—and thus avoid making the factual determinations required by subsection (B) in every discretionary action case. In fact, USTR did just that in its notice of proposed List 3 action, before belatedly citing subsection (B) as well in subsequent notices. USTR also conceded below that, because section 307(a)(1)(C) “provided an independent basis” for its action, USTR was not actually required to make “*any* finding with respect to the burden on

United States commerce” before increasing the original \$50 billion tariff action seven-fold. Appx10392 (emphasis added). This Court should not adopt a reading that renders subsection (B) superfluous.

Allowing USTR to increase (in unlimited fashion) tariff actions under subsection (C) would be especially problematic because Congress permitted the imposition of tariffs under Section 301(b) only after USTR jumps through a series of congressionally imposed hoops, including investigation requirements (19 U.S.C. § 2412), consultation requirements (*id.* § 2413), factual findings (*id.* § 2414), and a twelve-month deadline to choose “appropriate” action (*id.* § 2414(a)(2)(B)). Subsection (C), by contrast, contains few procedural protections and requires no fact-finding on harm before taking sweeping action, as Defendants admit. Appx10392. The “supplemental” actions challenged here—a seven-fold escalation of the original Section 301 action, covering nearly every import from one of the U.S.’s largest trading partners—proves the point. *Cf. Biden*, 2023 WL 4277210, at *9 (“From a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country.”).

Take a hypothetical scenario under Defendants’ view of subsection (a)(1)(C): USTR could decide that imposing a \$1 *million* tariff action is “appropriate” based on a thorough investigation targeting discrete trade practices, and then “modify” that action as “no longer appropriate” to a \$1 *trillion* action covering the entire trade portfolio—just because the targeted nation responded with its own \$1 million tariff (or for virtually any other policy reason). That hypothetical differs from this case only in the precise numbers.

Congress would not have placed various procedural and substantive obstacles in the way of the Executive Branch’s authority to take discretionary action under Section 301(b), only to give it “unfettered discretion” to increase those actions exponentially through a “modification” provision. *Biden*, 2023 WL 4277210, at *9; see *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001) (Congress “does not *** hide elephants in mouseholes.”).

The only coherent reading is that, in light of the foreign policy concerns at stake, Congress left to the Executive Branch’s discretion actions to terminate or reduce an action (subsection (C)), but ensured that any *increases* in existing actions would need to be justified by an

increased burden on U.S. commerce from the investigated practices themselves (subsection (B))—or, failing that, a new investigation. That reading aligns perfectly with the notion that relieving trade penalties should be easier than imposing trade penalties—a concept widely reflected in other trade statutes and regulations as well. *See, e.g.*, 19 U.S.C. § 1337(j)(2) (public-interest exception to section 337 action); 48 C.F.R. § 25.202 (public-interest exception to Buy American restrictions). Indeed, the parity between establishing the initial action under Section 301 and increasing such action under Section 307(a)(1)(B) is obvious: although USTR is always free to reduce or terminate penalties, USTR cannot impose *new* penalties on a U.S. trading partner absent an investigation into its allegedly unfair practices.

2. *Historical Practice Confirms That Section 307(a)(1)(C) Permits Only Tapering or Terminating.*

In addition to statutory text and structure, “[p]ractice under” the modification provision in the three decades since modification authority was added in 1988 “provide[s] strong confirmation [as to] the proper meaning of the language at issue here.” *Transpacific*, 4 F.4th at 1326.

In promulgating List 3, USTR admitted in internal deliberations that its action was unprecedented: “[W]e are not aware of prior

investigations where a Trade Representative was called upon to use Section 307 modification authority to increase the level of trade action in order to achieve the statutory goal of obtaining the elimination of harmful policies covered by the investigation.” Appx05922. Defendants likewise conceded below that USTR has only “previously invoked section 307(a)(1)(C) to reduce, terminate or delay section 301 actions.” Appx09778 n.6.

Given the statutory structure, that is no surprise. USTR has invoked Section 307(a)(1)(C) on five occasions in the 35 years since its enactment (not including this investigation). In three of those instances, including in a prior action against China, USTR terminated the action completely. *See, e.g., Termination of Section 301 Investigation and Action Regarding the People’s Republic of China’s Protection of Intellectual Property and Provision and Market Access to Persons Who Rely on Intellectual Property Protection*, 60 Fed. Reg. 12,582, 12,583 (Mar. 7, 1995) (“Section 307(a)(1)(C) of the Trade Act authorizes the USTR to terminate any action *** if, inter alia, the USTR determines that the action being taken under section 301(b) of the Trade Act is no longer appropriate.”); *see also Results of Out-Of-Cycle Review Under Section 182*

and Termination of Action Under Section 301(b): Intellectual Property Laws and Practices of the Government of Ukraine, 71 Fed. Reg. 5,899 (Feb. 3, 2006); *Termination of Action: Protection of Intellectual Property Rights by the Government of Honduras*, 63 Fed. Reg. 35,633 (June 30, 1998). On another occasion, USTR decided to terminate in part a Section 301 action after “the Government of Ukraine *** addressed one of the two issues *** that were the basis of *** the Trade Representative’s finding that Ukraine’s inadequate IPR protections were actionable under Section 301(b).” *Modification of Action Under Section 301(b); Out-of-Cycle Review Under Section 182; and Request for Public Comment: Intellectual Property Laws and Practices of the Government of Ukraine*, 70 Fed. Reg. 53,410, 53,411 (Sept. 8, 2005). In the last instance, USTR delayed implementation of a Section 301(b) action to allow for completion of review under a trade agreement. *See Modification of Determination of Action Pursuant to Section 301 Concerning Canadian Exports of Softwood Lumber; Opportunity for Comment*, 57 Fed. Reg. 44,609 (Sept. 28, 1992).

What USTR has never done is rely on subsection (C) (or subsection (B)) to *expand* a tariff action—never mind by such a mind-boggling

magnitude. The Government's unbroken past practice is further confirmation that neither "mousehole" provides the "elephant"-size authorization for the List 3 and 4A tariff actions. *Whitman*, 531 U.S. at 468.

3. *Constitutional Avoidance Principles Require Interpreting Subsection (C) To Permit Only Tapering Or Terminating.*

To the extent any doubt remains regarding the appropriate interpretation of Section 307(a)(1)(C), principles of constitutional avoidance should eliminate it. *See, e.g., Gonzalez v. United States*, 553 U.S. 242, 251 (2008) ("[W]hen 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided,'" the court's "duty is to adopt the latter.") (citations omitted).

If Section 307 delegated to USTR the authority to use a single investigation targeting a narrow set of unfair IP and technology transfer policies (which warranted a "commensurate" \$50 billion action) to justify an unlimited trade war against the entire volume of trade with China, simply because USTR found the original action "no longer appropriate," that would present a serious non-delegation problem. The Supreme

Court has long required Congress to “lay down by legislative act an intelligible principle to which the person or body *** is directed to conform.” *See Panama Refin. Co. v. Ryan*, 293 U.S. 388, 429-430 (1935) (citation omitted); *see Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (“The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee’s use of discretion.”). If USTR is correct, there is no intelligible principle guiding USTR’s (apparently unbounded) discretion.

Defendants below admitted the premise of that non-delegation doctrine problem in making the startling argument that “whether maintaining a prior action is ‘no longer appropriate’ *** presents a judicially unmanageable standard.” Appx09771. As noted, USTR takes the position that it could convert a \$1 *million* tariff action issued (after the completion of a full investigation) into a \$1 *trillion* action for any policy reason that, in USTR’s unilateral view, rendered the initial action “no longer appropriate”—with no judicial review. Of course, a more sensible (and constitutional) conclusion exists: Congress, consistent with the terms and structure of Section 307 as a whole, designed Section

307(a)(1)(C) to permit only *reducing or terminating* a Section 301(b) action when that action is “no longer appropriate.”

Importantly, this Court need not actually find the delegation unconstitutional. “[E]ven if a *serious doubt* of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (emphasis added). The avoidance canon, moreover, applies to an “administrative interpretation of a statute [that] invokes the outer limits of Congress’ power” without “a clear indication that Congress intended that result.” *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172-173 (2001) (canon rests on “assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limits of congressional authority”).

Given the non-delegation doctrine concern over whether Congress intended to delegate unlimited, unreviewable authority to USTR to increase a Section 301 action, the Court should adopt Plaintiffs’ interpretation, which avoids that constitutional concern. Because Plaintiffs’ interpretation is at least “plausible”—in fact, it is

unambiguously correct—this court’s “plain duty” is to adopt it. *National Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012).

C. The “Major Questions” Doctrine Confirms That Lists 3 And 4A Exceed USTR’s Authority

The “major questions” doctrine, as recently articulated by the Supreme Court, further undercuts USTR’s claim of expansive authority under Section 307’s “modification” provision to engage in an open-ended trade war.

That doctrine implicates “cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer” sweeping authority on an agency. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (alteration in original) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000)). In those cases, “something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.” *Id.* at 2609 (internal quotation marks omitted). This is because “[e]xtraordinary grants of regulatory authority are rarely accomplished through ‘modest words,’ ‘vague terms,’

or ‘subtle device[s].’” *Id.* (alteration in original) (quoting *Whitman*, 531 U.S. at 468). Courts should presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.” *Id.*

This is a classic example of a “major questions” case. As in *West Virginia v. EPA*, USTR (1) “claim[ed] to discover in a long-extant statute an unheralded power representing a transformative expansion in [its] regulatory authority,” (2) “located that newfound power in the vague language of an ancillary provision[] of the Act” that “had rarely been used in the preceding decades,” and (3) took action of “vast economic and political significance.” 142 S. Ct. at 2605, 2610-2613 (alterations in original) (internal quotation marks and citations omitted).

First, although USTR claimed below that the power to increase duties and prosecute a trade war was critical to trade policy, USTR had invoked its Section 307(a)(1)(C) modification authority only five other times in the provision’s 35-year-history—always to terminate, reduce, or delay an action, never to expand it. Appx09778 n.6; see pp. 50-51, *supra*. And USTR had invoked Section 307(a)(1)(B) just once—to *terminate* duties. See *Implementation of the U.S.-EC Beef Hormones Memorandum of Understanding*, 74 Fed. Reg. 48,808 (Sep. 24, 2009); cf. *Biden*, 2023

WL 4277210, at *12 (noting that “[t]he Act has been used only once before” in a like manner).

Second, as USTR admitted in internal deliberations, its “supplemental” tariff actions here are unprecedented: “[W]e are not aware of prior investigations where a Trade Representative was called upon to use Section 307 modification authority to increase the level of trade action in order to achieve the statutory goal of obtaining the elimination of harmful policies covered by the investigation.” Appx05922. USTR has never relied on Section 307 to increase tariffs by any amount, much less by multiples of the original Section 301 action and by hundreds of billions of dollars. As in *Biden*, the agency “has never previously claimed powers of this magnitude.” 2023 WL 4277210, at *12.

Third, USTR’s List 3 and 4A actions undeniably are of vast economic and political significance. USTR initially investigated and identified four specific categories of IP/technology-transfer acts, policies, or practices that, in USTR’s expert view, warranted imposition of tariffs on \$50 billion of annual imports from China as “commensurate” with the harm to U.S. economic interests. USTR then “modified” that action to impose tariffs on essentially all trade with China representing *several*

hundred billion dollars of imported Chinese goods annually—effectively taxing all U.S. consumers and businesses. *See, e.g.,* Erica York, *Tracking The Economic Impact of U.S. Tariffs and Retaliatory Actions*, TAX FOUND. ACTIONS (last updated July 7, 2023), <https://taxfoundation.org/tariffs-trump-trade-war/> (estimating that Section 301 action cost over \$50 billion in U.S. GDP, 160,000 full time equivalent jobs, as well as over \$8 billion in GDP and 26,000 jobs as a result of China’s retaliation).¹³ The action has other serious political ramifications (domestic and foreign) as well. Over 9,000 comments from consumers, businesses, farmers, and groups, representing every facet of the American economy, made their opposition to the actions clear. “A decision of such magnitude and consequence on a matter of earnest and profound debate across the country must rest with Congress itself, or an agency acting pursuant to

¹³ *See also, e.g.,* Inu Manak, et al., *The Cost of Trump’s Trade War With China Is Still Adding Up*, COUNCIL ON FOREIGN RELS. (Apr. 18, 2023 12:08 pm), <https://www.cfr.org/blog/cost-trumps-trade-war-china-still-adding> (citing economic analyses on the impact of the tariffs); USITC Pub. 5405, ECONOMIC IMPACT OF SECTION 232 AND 301 TARIFFS ON U.S. INDUSTRIES at 20, 23 (Mar. 2023, corrected May 2023) (estimating that Section 301 tariffs “resulted in a nearly one-to-one increase in prices of U.S. imports,” meaning that U.S. importers and consumers have borne almost the full burden of the tariffs), *available at* <https://www.usitc.gov/publications/332/pub5405.pdf>.

a clear delegation from that representative body.” *Biden*, 2023 WL 4277210, at *13 (internal quotation marks and alteration omitted).

Even if USTR could identify a “plausible textual basis” in Section 307 for Lists 3 and 4A, it falls far short of a “clear statement” that USTR can piggyback on a targeted Section 301 investigation resulting in tariffs on \$50 billion of imports to then impose tariffs on hundreds of billions of dollars in additional imports to address a range of trade issues beyond the originally investigated practices. *West Virginia*, 142 S. Ct. at 2609. As noted, Section 307(a)(1) gives USTR the power to “modify or terminate” Section 301 actions—*i.e.*, “change [them] moderately or in minor fashion”—not “transform them.” *Biden*, 2023 WL 4277210, at *9. The Supreme Court has repeatedly refused to defer to an agency interpretation relying on “modify” to make a major change. *See id.*; *MCI Telecomms.*, 512 U.S. at 229. Although USTR claims unbridled (and unreviewable) authority, “the word ‘modify’ simply cannot bear that load.” *Biden*, 2023 WL 4277210, at *10. In sum, the Trade Act “provides no authorization for [USTR’s] plan even when examined using the ordinary tools of statutory interpretation—let alone [the] ‘clear

congressional authorization” needed to sustain Lists 3 and 4A. *Id.* at *15.

II. USTR VIOLATED THE APA BY FAILING TO CONSIDER AND RESPOND TO COMMENTS ADEQUATELY

In addition to exceeding its statutory authority, USTR committed a serious procedural violation of the APA by failing to consider significant comments the first time around and then failing to offer more than conclusory responses (primarily invoking the President’s say-so) the second time around after the CIT’s remand. That violation constitutes an independent basis (twice-over) to vacate the List 3 and 4A tariffs.

A. The CIT Correctly Held That USTR Failed To Respond To Comments In The Final List 3 and 4 Notices

Before promulgating Lists 3 and 4, USTR solicited comments on “*any aspect* of the proposed supplemental action,” including “[t]he level of the increase, if any, in the rate of duty” and “[t]he appropriate aggregate level of trade to be covered by additional duties.” Appx01925 (emphasis added); Appx00082-Appx00084 (recognizing that USTR solicited comments on “a broad range of issues,” including the “wisdom of the enterprise” itself). In response, USTR received over 6,000 comments on proposed List 3, nearly 3,000 comments on proposed List 4, and

testimony from hundreds of witnesses on each proposed List. The public raised deep concerns over the potentially devastating impact of the “supplemental” tariffs on U.S. interests, cast doubt on whether the tariffs’ benefits outweighed their costs, and proposed viable alternatives.

Yet in promulgating final List 3 (just 11 days after the comments deadline), USTR stated only that, based on its “careful[] review[,] *** the Trade Representative, at the direction of the President, has determined not to include certain tariff subheadings.” Appx06173. USTR took a similar bare-bones approach in finalizing List 4 (just six weeks after the deadline for post-hearing submissions), stating in a single conclusory sentence that it had “take[n] account of the public comments and the testimony.” Appx09154.

As the CIT confirmed in the *First Opinion*, those perfunctory responses violated the APA. See Appx00077-Appx00087. The APA obligated USTR to have “examined ‘the relevant data’ and articulated ‘a satisfactory explanation’ for [its] decision, ‘including a rational connection between the facts found and the choice made.’” *Department of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,

43 (1983)); *see In re Sang Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002) (agency “must present a full and reasoned explanation of its decision,” by “set[ting] forth its findings and the grounds thereof, as supported by the agency record”); *see also* 19 U.S.C. § 2417(a)(2) (imposing similar requirements for considering public input before modifying Section 301 actions). An agency flunks that test when it offers mere “[c]onclusory explanations” for its choices, *International Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) (citation omitted), or when it fails to respond “in a reasoned manner[] to any comments received by the agency that raise significant issues with respect to a proposed rule,” *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1379 n.11 (Fed. Cir. 2017) (citation omitted). That is because such a failure “generally demonstrates that the agency’s decision was not based on a consideration of the relevant factors.” *Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (internal quotation marks and citation omitted).

As the CIT recognized, USTR utterly “fail[ed] to provide a response to the comments it solicited when providing the rationale for its final determinations.” Appx00084. In particular,

USTR’s statements *** fail to apprise the court how the USTR came to its decision to act and the manner in which it chose to act, taking account of the opposition and support for the increased duties and the inclusion or exclusion of particular subheadings, the concerns raised about the impact of the duties on the U.S. economy, and the potential availability of alternative courses of action, within the context of the specific direction provided by the President.

Appx00082. Although USTR had “noted” the President’s direction, it “did not treat that direction as dispositive in light of [its] solicitation of comments on a broad range of issues that could—and, indeed, did—result in comments at odds with the President’s direction.” Appx00083-Appx00084. Thus, “while the President’s direction is statutorily significant, the USTR’s invocation of the President’s direction does not obviate the USTR’s obligation to respond to significant issues raised in the comments.” Appx00083.

B. The CIT Should Have Vacated Lists 3 And 4A Rather Than Remand Without Vacatur

Instead of vacating List 3 and List 4A in light of that violation, over Plaintiffs’ objections the CIT remanded to the agency without vacatur to

“elaborate” on why it had rejected key comments before promulgating the final lists. Appx00051-Appx00061 & n.10; Appx10461.

That was error. The APA *requires* courts to “hold unlawful and set aside agency action” that is “not in accordance with law.” 5 U.S.C. § 706(2)(a). “Section 706(2)(A) provides that a ‘reviewing court’ faced with an arbitrary and capricious agency decision ‘shall’ – **not may** – ‘hold unlawful and set aside’ the agency action”—and “[s]etting aside means vacating.” *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (separate opinion of Randolph, J.). As the Supreme Court has held:

We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must ‘stand or fall on the propriety of that finding[.] *** If that finding is not sustainable on the administrative record made, then the [agency’s] decision *must be vacated* and the matter remanded to [it] for further consideration.”

Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) (emphasis added).

Even assuming the text affords a court discretion to remand without vacatur, at a minimum “vacatur is the normal remedy when [the court is] faced with unsustainable agency action.” *Environmental Def. Fund v. FERC*, 2 F.4th 953, 976 (D.C. Cir. 2021) (alteration, internal

quotation marks, and citation omitted). After correctly holding that USTR's action could not be sustained on the basis of the "contemporaneous explanation" it had offered, the CIT should have followed the "normal" course and vacated Lists 3 and 4A. *See Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 798 n.2 (D.C. Cir. 1983) (vacatur appropriate when "the required explanation of the agency's action is totally absent, or 'palpably inadequate'").

Instead, the CIT maintained List 3 and 4A because it "weigh[ed] heavily the disruptive consequences of (potentially interim) vacatur." Appx00088. In the CIT's view, vacating the Lists "would disrupt a complex and evolving process that was designed by Congress to allow for ongoing negotiations." *Id.* But if a court confronts "a total explanatory void" because the agency has not offered "one word" of reasoning, such that the agency's reasons for its action "are non-existent," the agency has committed unsustainable action. *Brotherhood of Locomotive Eng'rs & Trainmen v. Federal R.R. Admin.*, 972 F.3d 83, 117 (D.C. Cir. 2020). Based on USTR's "fail[ure] to provide a response to the comments it solicited," the CIT should have vacated List 3 and List 4A. Appx00084.

C. USTR Failed To Cure Its APA Violations On Remand

1. *The USTR's Remand Determination Offered Post Hoc, Conclusory, And Otherwise Insufficient Rationales*

The CIT compounded its error by sustaining, in the *Second Opinion*, USTR's conclusory and *post hoc* remand rationales. Appx0008-Appx00026.

As a legal matter, USTR was permitted to defend Lists 3 and 4A only on the basis of contemporaneous reasoning found in the administrative record. *See Regents*, 140 S. Ct. at 1907-1909 (It is a “foundational principle of administrative law” that “[a]n agency must defend its actions based on the reasons it gave when it acted,” not “belated justifications.”). “When an agency’s initial explanation ‘indicate[s] the determinative reason for the final action taken,’ the agency may elaborate later on that reason (or reasons) but may not provide new ones.” *Id.* at 1908 (alteration in original) (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)). The agency’s “explanation,” moreover, “must be *viewed critically* to ensure that the [action] is not upheld on the basis of impermissible *post hoc* rationalization.” *Id.* (internal quotation marks omitted and first emphasis added). That rule “promotes agency accountability,” “ensur[es] that parties and the public

can respond fully and in a timely manner to an agency’s exercise of authority,” and “instills confidence” in the agency’s work. *Id.* at 1909 (internal quotation marks and citations omitted). Thus, “USTR had a duty to respond to the comments” so that interested parties, the public at large, and reviewing courts could understand why USTR reacted to the comments in the manner it did. Appx00084; *see Department of Com.*, 139 S. Ct. at 2575-2576 (responses to comments ought to “be scrutinized by courts and the interested public”).

When promulgating Lists 3 and 4A, however, USTR offered *no response whatsoever*—whether public or private—to the public’s most significant comments regarding such fundamental topics as the appropriate tariff level, potential alternatives, and even the wisdom of the enterprise as a whole. *See* Appx06173 (stating only that, based on its “careful[] review[,] *** the Trade Representative, at the direction of the President, has determined not to include certain tariff subheadings” in List 3); Appx09154 (stating only that it had “take[n] account of the public comments and the testimony”). Having limited its reasoning at the time to mere assertions that it had “reviewed” public input, USTR on remand could “not provide new” explanations absent from the administrative

record. *Regents*, 140 S. Ct. at 1908; see *Department of Com.*, 139 S. Ct. at 2573 (“[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record.”). Absent a contemporaneous explanation of how it weighed the most significant comments, USTR’s recourse was to “deal with the problem afresh by taking *new* agency action,” where it could provide new reasons for its actions. *Regents*, 140 S. Ct. at 1908 (internal quotation marks and citation omitted).

USTR’s Remand Determination failed those standards. The vast majority of the Remand Determination focuses on immaterial issues such as why USTR *removed* certain products from the lists. Appx10591-Appx10650. In fact, of the approximately 90 pages of explanation the agency promulgated on remand, USTR crammed into the final eight pages its consideration of (i) the wisdom of the enterprise, (ii) the appropriate tariff level, and (iii) potential alternative courses of action. But even then, USTR offers zero contemporaneous evidence, from the administrative record or otherwise, that it meaningfully grappled with those substantial comments *at the time* it developed Lists 3 and 4A. Appx10650-Appx10658. Indeed, given the short amount of time between

when the comment periods for the two Lists closed and when USTR announced its decision (as few as eleven days), it is readily apparent that USTR did not even have time to read, let alone give reasoned consideration to, the thousands of submitted comments—especially compared to the *120 days* (including an extension) the CIT took to review the same comments and testimony on remand. *See* p. 27, *supra*. USTR’s submission does not weigh the costs and benefits to the U.S. economy, businesses, and consumers (even in the most qualitative fashion); evaluate whether the tariffs would be effective; or meaningfully consider alternative measures. *See* Appx10650-Appx10658. USTR’s *post hoc*, litigation-driven efforts to gin up adequate reasoning falls far short of what the APA requires.

That leaves only USTR’s reliance on Presidential direction. On remand, USTR claimed little room to maneuver due to the President’s directives. *See, e.g.*, Appx10646 (“The President’s direction was a key element in the Trade Representative’s determination of the level of duty increase.”); Appx10649 (“[T]he President’s direction was central to the Trade Representative’s determination of the appropriate aggregate level of the trade action.”); *see also* Appx10596, Appx10623, Appx10642-

Appx10643. Indeed, the *only* rationale offered for USTR’s lack of responsiveness to the List 4 comments addressing specific products is that USTR had “limited flexibility” to remove additional tariff subheadings “[c]onsidering that the value of the proposed modification was approximately \$300 billion, and the specific direction of the President to place tariffs on goods of China with a value of approximately \$300 billion.” Appx10642.

That excuse is not good enough—as a matter of law. Because “Congress delegated to the USTR authority over modifications to section 301 actions,” USTR—not the President—is the one “acting for purposes of the APA.” Appx00050-Appx00051 & n.10. USTR further “indicated its willingness to consider factors other than the President’s direction in the respective NPRMs.” Appx00084; *see* Appx00083 n.27 (recognizing that “USTR treated the imposition of increased duties at the NPRM stage as an open question, and not one that was predetermined based on the direction of the President”). Thus, the “statutory factors relevant to the USTR’s determination of whether and how to modify its action include” not only “the President’s specific direction, if any,” but also independently “ensuring that *appropriate* action is taken to eliminate discriminatory

and burdensome acts.” Appx00079 (emphasis added) (citing 19 U.S.C. §§ 2417(a)(1)(B), (C), 2411(b)). The word “appropriate,” moreover, is a broad term, requiring consideration of all relevant factors, including “at least some attention to cost.” *Michigan v. EPA*, 576 U.S. 743, 752 (2015). Furthermore, “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.” *Id.*

Yet, despite the “broad range of issues” on which USTR solicited comments, Appx00082-Appx00084, the Remand Determination confirms that USTR treated presidential direction as *dispositive*. Although USTR claims in conclusory fashion that it found presidential direction “appropriate” or “needed,” Appx10649-Appx10650, it neither explains why it did so nor points to a single piece of record evidence (contemporaneous or otherwise) supporting those conclusions. Such conclusory and *post hoc* responses flunk APA requirements.

2. *The CIT Erred In Concluding That The Remand Determination Cured The APA Violations*

In holding that USTR cured its APA violations on remand, the CIT made several critical errors. *First*, although it had originally acknowledged that USTR “may not identify reasons that were not previously given,” Appx00090 (quoting *Regents*, 140 S. Ct. at 1908), the

CIT excused that error on the ground that some other “courts have ordered remands for agencies to respond to significant comments.” Appx0012 (citations omitted). But not one of the cited decisions even mentions, much less discusses, the Supreme Court’s decision in *Regents*.

Second, the CIT took USTR at its word that it had considered the nearly 9,000 comments and testimony from hundreds of witnesses when promulgating Lists 3 and 4A, such that USTR had room to “provide an ‘amplified articulation’ of a prior ‘conclusory’ rationale.” Appx00013 (quoting *Regents*, 140 S. Ct. at 1908); see Appx00013-Appx00015. But in doing so, the CIT ignored that it would have been impossible for USTR to “carefully review[]” approximately 6,000 comments, and thousands of pages of transcript testimony, in the 11-day period from the List 3 comment deadline and the final List 3 (or to review the List 4 comments and testimony in another condensed timeframe). The CIT further ignored that USTR did not provide even a “conclusory” explanation for rejecting the comments, either in the Federal Register notices or in any other record documents. For example, USTR failed to point to any contemporaneous analysis of how it determined that additional tariffs outweighed the harms (correctly) predicted by thousands of commenters.

And USTR effectively conceded that it never considered alternatives to Section 301 when it argued instead that USTR had not actually intended to solicit comments about potential alternatives to further action under Section 301 (despite having requested comments on “any aspect” of the proposed List 3 and List 4A tariffs). *See* Appx10743. Such examples demonstrate not only that USTR’s failure to respond to comments was an APA violation in its own right, but that its “decision was not based on a consideration of the relevant factors.” *Lilliputian Sys.*, 741 F.3d at 1312 (internal quotation marks and citation omitted).

Third, the CIT erred in holding that USTR’s addition or subtraction of particular subheadings to Lists 3 and 4A, as well as USTR’s announcement of an exclusion process for List 4A, amounted to sufficient consideration of the significant comments on the wisdom of the enterprise, the appropriate tariff level, and potential alternative courses of action. *See* Appx00015 (“USTR further explained the removal or retention of certain tariff subheadings. *** In so doing, USTR responded to significant concerns within the context of China’s actionable conduct and the specific direction of the President.”); Appx00019 (similar). USTR’s explanations regarding its decisions on a small subset of requests

to remove specific tariff lines from the Lists do not show that it grappled with the cumulative harms of imposing tariffs on hundreds of billions of dollars of imports—*i.e.*, the critical comments regarding the wisdom of the enterprise. Appx10596-Appx10643.

USTR does not explain in the Remand Determination, and certainly did not explain at the time it issued List 4A, how *temporary* product exclusions that *might* be issued at some indefinite point in the future—pursuant to procedures that were not even announced until two months after List 4A was finalized¹⁴—constituted sufficient consideration of public comments. Nor can the exclusion process for *List 4A* act as a sufficient response to the comments submitted with respect to *List 3*; as the CIT itself concluded in the *First Opinion*, List 3 lacked any reference to an exclusion process and thus could not satisfy USTR’s APA obligations. Appx00085.

Fourth, the CIT attacked a strawman when it concluded that Plaintiffs “effectively take issue with the conclusions that USTR

¹⁴ See *Procedures for Requests To Exclude Particular Products From the August 2019 Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 57,144 (Oct. 24, 2019).

reached,” or that Plaintiffs’ “[m]ere disagreement with USTR’s actions is not a basis for the court to overturn them.” Appx00022-Appx00023 (citation omitted). That badly misses the point: Plaintiffs challenge the conclusory and *post hoc* nature of USTR’s remand response, not whether USTR reached the right result.¹⁵ In fact, if such *post hoc* explanations were upheld because they (eventually) got to the “right” answer, USTR and other agencies would have free rein to ignore significant comments whenever convenient to do so, and then get a “do-over” years later, without consequence. But courts have long “discourage[d] the attitude of ‘act now, make up reasons later’” by “[h]olding a decision maker to [its] contemporaneous statement of reasons.” *Levesque v. Block*, 723 F.2d 175, 180 (1st Cir. 1983). There is no question that USTR, which offered no contemporaneous response to comments at all, fails that standard.

Finally, the CIT’s embrace of USTR’s reliance on Presidential direction (in conflict with its *First Opinion*) cannot salvage the Remand

¹⁵ This characterization was especially anomalous given that the *Second Opinion* elsewhere recognizes that Plaintiffs were not contesting USTR’s “subjective determination[s] of what is ‘appropriate’ (or any other discretionary determination[s]).” Appx00020 n.17 (alterations in original).

Determination. The CIT held that USTR adequately “explained that the judgments reflected in the construction of *Final List 3* and *Final List 4A* were its own.” Appx00018 (citing Appx10649-Appx10650). But everything the CIT cited is wholly conclusory. As quoted by the CIT itself, USTR asserted—without more—that “covering a substantial percentage of U.S. goods exported from China [via List 3] *was appropriate* to obtain the elimination of China’s harmful acts, policies, and practices.” Appx00018-Appx00019 (emphasis added) (citing Appx10649). USTR also asserted—again without more—that the level of trade in List 4 “reflected the judgment that covering essentially all products not covered by previous actions *was needed* to obtain the elimination of China’s acts, policies and practices.” Appx00019 (emphasis added) (citing Appx10650); *see also id.* (quoting USTR as believing it struck “the appropriate balance”).

Remarkably, the CIT felt that such “explanations” could be favorably “contrast[ed] to the conclusory treatment of comments in *Final List 3* and *Final List 4.*” Appx00020. In reality, those “explanations” are equally “conclusory”; they are certainly not the record-grounded explanations of USTR’s contemporaneous consideration that were

required. The CIT just assumed that USTR exercised independent judgment in deciding whether to proceed with the tariffs, at what rates, and in what amounts, *apart from* presidential direction. That will not do. Even following the remand determination, the record remains devoid of any reasoned explanation as to how USTR arrived at the conclusion that the List 3 and 4A actions overall were “appropriate”—and thus “raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner.” *Regents*, 140 S. Ct. at 1916.

CONCLUSION

For the foregoing reasons, the Court should reverse the CIT’s judgment and vacate the List 3 and List 4A tariff actions.

Respectfully submitted,

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July 25, 2023

ADDENDUM

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UNITED STATES COURT OF INTERNATIONAL TRADE

HMTX INDUS. LLC, HALSTEAD NEW ENGLAND CORP., METROFLOR CORP., AND JASCO PRODS. CO. LLC,

Plaintiffs,

v.

UNITED STATES OF AMERICA, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ROBERT E. LIGHTHIZER, U.S. TRADE REPRESENTATIVE, U.S. CUSTOMS AND BORDER PROTECTION, AND MARK A. MORGAN, U.S. CUSTOMS AND BORDER PROTECTION ACTING COMMISSIONER,

Defendants.

Before: Mark A. Barnett, Claire R. Kelly, and Jennifer Choe-Groves, Judges
Court No. 20-00177

JUDGMENT

This case having been duly submitted for decision, and the court, after due deliberation, having rendered a decision; now therefore, in conformity with said decision, it is hereby

ORDERED that the tariff actions imposed by the Office of the United States Trade Representative and styled as *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018), and *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 43,304 (Aug. 20, 2019), as amended on remand by Further Explanation of the Final List 3 and Final

Court No. 20-00177

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List 4 Modifications in the Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Pursuant to Court Remand Order, ECF No. 467, are **SUSTAINED**.

/s/ Mark A. Barnett
Mark A. Barnett, Chief Judge

/s/ Claire R. Kelly
Claire R. Kelly, Judge

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

Dated: March 17, 2023
New York, New York

Slip Op. 23-35

UNITED STATES COURT OF INTERNATIONAL TRADE

IN RE SECTION 301 CASES

Before: Mark A. Barnett,
Claire R. Kelly, and
Jennifer Choe-Groves, Judges
Court No. 21-00052-3JP

OPINION AND ORDER

[Sustaining *Final List 3* and *Final List 4* as amended on remand by the Office of the United States Trade Representative; granting Defendants' second motion to correct the administrative record.]

Dated: March 17, 2023

Pratik Shah, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for Plaintiffs HMTX Industries LLC, et al. With him on the brief were Matthew R. Nicely, James E. Tysse, Devin S. Sikes, Daniel M. Witkowski, and Sarah B. W. Kirwin.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendants United States, et al. With her on the brief were Brian M. Boynton, Principal Deputy Assistant Attorney General, Patricia M. McCarthy, Director, L. Misha Preheim, Assistant Director, Justin R. Miller, Attorney-In-Charge, International Trade Field Office, Sosun Bae, Senior Trial Counsel, and Jamie L. Shookman, Trial Attorney. Of Counsel on the brief were Megan Grimball, Associate General Counsel, Philip Butler, Associate General Counsel, and Edward Marcus, Assistant General Counsel, Office of General Counsel, Office of the U.S. Trade Representative, of Washington, DC, and Paula Smith, Assistant Chief Counsel, Edward Maurer, Deputy Assistant Chief Counsel, and Valerie Sorensen-Clark, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

Alexander W. Koff, Venable LLP, of Baltimore, MD, argued for Amici Curiae VeriFone, Inc., et al. With him on the brief were Ashleigh J. F. Lynn and Nicholas M. DePalma, Venable LLP, of Tysons Corner, VA.

Joseph R. Palmore and Adam L. Sorensen, Morrison & Foerster LLP, of Washington, DC, for Amici Curiae Retail Litigation Center, et al.

Barnett, Chief Judge: Plaintiffs HMTX Industries LLC, Halstead New England Corporation, Metroflor Corporation, and Jasco Products Company LLC commenced the first of approximately 3,600 cases¹ (“the Section 301 Cases”) contesting the imposition of a third and fourth round of tariffs by the Office of the United States Trade Representative (“USTR” or “the Trade Representative”) pursuant to section 307 of the Trade Act of 1974 (“the Trade Act”), 19 U.S.C. § 2417 (2018).² See generally Am. Compl., *HMTX Indus. LLC v. United States*, No. 20-cv-177 (CIT Sept. 21, 2020), ECF No. 12 (“20-177 Am. Compl.”). USTR imposed the contested duties, referred to herein as “List 3” and “List 4A,” in September 2018 and August 2019, respectively. See *Notice*

¹ This figure reflects the approximate number of cases assigned to this panel. Cases raising similar claims filed on or after April 1, 2021, are stayed without an order of assignment. See U.S. Ct. of Int’l Trade Admin. Order 21-02.

² Citations to the United States Code are to the 2018 version, unless otherwise specified. Section 307 provides, *inter alia*:

(a) In general

(1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—

- (A) any of the conditions described in section 2411(a)(2) of this title exist,
- (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or
- (C) such action is being taken under section 2411(b) of this title and is no longer appropriate.

19 U.S.C. § 2417(a)(1). The Section 301 Cases are named in recognition of the fact that claims raised therein contest modifications of tariffs initially imposed pursuant to section 301 of the Trade Act, 19 U.S.C. § 2411.

of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47,974 (Sept. 21, 2018) ("Final List 3"); Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43,304 (Aug. 20, 2019) ("Final List 4").³ Plaintiffs alleged that USTR exceeded its statutory authority and violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), when it promulgated List 3 and List 4A. 20-177 Am. Compl. ¶¶ 63–75.

In *In Re Section 301 Cases*, 46 CIT ___, 570 F. Supp. 3d 1306 (2022), the court rejected Defendants' ("the Government") argument that Plaintiffs' claims were non-justiciable and addressed Plaintiffs' substantive and procedural challenges.⁴ Although the court sustained USTR's statutory authority to impose the tariffs pursuant to section 307(a)(1)(b) of the Trade Act, *id.* at 1323–35, the court remanded the matter for USTR

³ Within *Final List 4*, USTR segregated the tariff subheadings into List 4A and List 4B with staggered effective dates (September 1, 2019, and December 15, 2019, respectively). 84 Fed. Reg. at 43,305. USTR promulgated List 3 and List 4A as modifications of two prior rounds of tariffs, referred to herein as "List 1" and "List 2." See *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 83 Fed. Reg. 28,710 (June 20, 2018) (promulgating List 1); *Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 83 Fed. Reg. 40,823 (Aug. 16, 2018) (promulgating List 2).

⁴ The court presumes familiarity with *In Re Section 301 Cases*, which sets forth in detail background on the imposition of List 3 and List 4A duties, and the case management procedures the court employed to handle the Section 301 Cases.

to comply with the APA requirement for a reasoned response to comments submitted during the List 3 and List 4A rulemaking proceedings. *Id.* at 1335–45.⁵

This matter is now before the court following USTR’s filing of its remand redetermination. See Further Explanation of the Final List 3 and Final List 4 Modifications in the Section 301 Action: China’s Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation, Pursuant to Ct. Remand Order (“Remand Results”), ECF No. 467. In the Remand Results, USTR (1) identified the documents underlying its response to comments; (2) provided additional explanation supporting the removal or retention of certain tariff subheadings from List 3 and List 4A; (3) addressed comments concerning the level of duties to be imposed and the aggregate level of trade subject to the duties; and (4) addressed comments concerning potential harm to the domestic economy, the legality and efficacy of the tariffs, and suggested alternative measures. See *id.* at 23–89.

Plaintiffs and *Amici*⁶ filed comments opposing the Remand Results and seeking vacatur of List 3 and List 4A. See Pls.’ Cmts. on the [USTR’s Remand Results] (“Pls.’ Cmts.”), ECF No. 474; Pls.’ Reply Regarding the Remand Determination (“Pls.’ Reply Cmts.”), ECF No. 482; Br. of Amici Curiae Retail Litig. Ctr., Inc., Nat’l Retail Fed’n, Am. Apparel and Footwear Assoc., Consumer Tech. Assoc., Footwear Distributors and

⁵ Finding authority pursuant to section 307(a)(1)(B), the court declined to address USTR’s authority pursuant to section 307(a)(1)(C). *In Re Section 301 Cases*, 570 F. Supp. 3d at 1334–35. The court rejected Plaintiffs’ remaining APA claims and granted in part the Government’s motion to correct the record. *Id.* at 1345–49.

⁶ The court authorized additional plaintiffs in the Section 301 Cases to participate in this litigation as *amici curiae*. Std. Procedural Order 21-02 at 4, ECF No. 82.

Retailers of Am., Juvenile Prods. Mfrs. Assoc., and Toy Assoc. (“RLC’s Br.”), ECF No. 472; Br. of Amici Curiae Verifone, Drone Nerds, and Specialized in Supp. of Pls.’ Cmts. on the [Remand Results] (“Verifone’s Br.”), ECF No. 471-2. The Government filed responsive comments in support of the Remand Results. See Defs.’ Resp. to Cmts. on the [Remand Results] (“Defs.’ Resp. Cmts.”), ECF No. 479. The Government also filed its second motion to correct the record. Defs.’ Second Mot. to Correct the R. (“2nd Mot. Correct R.”), ECF Nos. 466, 466-1. The court heard oral argument on February 7, 2023. Docket Entry, ECF No. 488.

For the following reasons, the court sustains *Final List 3* and *Final List 4* as amended by the Remand Results and grants the Government’s second motion to correct the record.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B) (2018 & Supp. II 2020), which grants the court “exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.”

The APA directs the court to “hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . . (C) in excess of statutory . . . authority; [or] . . . (E) unsupported by substantial evidence.” 5 U.S.C. § 706(2).

DISCUSSION

Plaintiffs and *Amici* challenge the Remand Results on two grounds. They first assert that USTR's Remand Results constitute impermissible *post hoc* reasoning pursuant to *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020). Next, to the extent that USTR's Remand Results survive *Regents*, Plaintiffs challenge the substantive adequacy of USTR's response to certain comments. Following disposition of these issues, the court addresses the Government's second motion to correct the record.

I. The Rule Against *Post Hoc* Rationalization

A. Parties' Contentions

Plaintiffs contend that USTR contravened the court's remand order by undertaking a new review and analysis of the comments. Pls.' Cmts. at 9–10. Plaintiffs argue that, instead, judicial precedent limits USTR to elaborating on a "prior response to comments" located somewhere in the administrative record. *Id.* at 10; *see also id.* at 13–14 (arguing that USTR failed to demonstrate consideration of comments contemporaneous with the issuance of *Final List 3* and *Final List 4* upon which it now seeks to elaborate). Having failed to do so, Plaintiffs assert that vacatur is merited. Pls.' Reply Cmts. at 2–4.

The Government contends that Plaintiffs' view of the permissible limits of the remand finds no support in *Regents* or subsequent cases remanding actions for an agency to respond to comments. Defs.' Resp. Cmts. at 10; *see also id.* at 11–12 (citing *Bloomberg L.P. v. SEC*, 45 F.4th 462, 477 (D.C. Cir. 2022); *Env't Health Trust v. FCC*, 9

F.4th 893, 909, 914 (D.C. Cir. 2021)). The Government further contends that taking Plaintiffs' argument to its logical conclusion would require any agency that fails to address significant comments to undertake a new agency action on remand. *Id.* at 11. Instead, the Government maintains that USTR's Remand Results constitute permissible elaboration on the underlying justifications for the actions taken, namely, "the President's direction and [the Trade Representative's] predictive judgment that the tariffs were 'appropriate' within the meaning of the statute." *Id.* at 12; *see also id.* at 20.

B. USTR's Response to Comments is Not Impermissibly *Post Hoc*

The APA requires agencies conducting notice and comment rulemaking to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). "The basis and purpose statement is inextricably intertwined with the receipt of comments." *Action on Smoking & Health v. Civ. Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (footnote citation omitted). An agency "must respond in a reasoned manner to those [comments] that raise significant problems." *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003) (quotations and citation omitted). "Significant comments are those 'which, if true, raise points relevant to the agency's decision *and which, if adopted, would require a change in an agency's proposed rule.*'" *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)).

The court previously found that "USTR's statements of basis and purpose . . . indicate why the USTR deemed China's ongoing and retaliatory conduct actionable," namely, "China's unfair practices" and "the specific direction of the President." *In Re*

Section 301 Cases, 570 F. Supp. 3d at 1340 (citing *Final List 3*, 83 Fed. Reg. at 47,974–75; *Final List 4*, 84 Fed. Reg. at 43,304–05). The court further found, however, that although USTR’s notices of proposed rulemaking (“NPRMs”)⁷ indicated the Trade Representative’s “willingness to consider factors other than the President’s direction,” the contested final actions “do not explain whether or why the President’s direction constituted the only relevant consideration nor do those determinations address the relationship between significant issues raised in the comments and the President’s direction.” *Id.* at 1341.⁸ In explaining its decision to remand without vacatur, the court observed that “*Regents* . . . constitutes a warning to agencies regarding the impermissibility of *post hoc* reasoning as much as it constrains the court’s review of such reasoning provided pursuant to a remand.” *Id.* at 1344 (citing *Regents*, 140 S. Ct. at 1908).

When “reviewing agency action, a court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record.”

⁷ For the NPRMs, see *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 83 Fed. Reg. 33,608 (July 17, 2018) (“*List 3 NPRM*”), and *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 84 Fed. Reg. 22,564 (May 17, 2019) (“*List 4 NPRM*”).

⁸ *Final List 3* referenced the removal of tariff subheadings in response to comments. 83 Fed. Reg. at 47,975 (noting that USTR, “at the direction of the President, has determined not to include certain tariff subheadings listed in the Annex to the [List 3 NPRM]”). *Final List 4* asserted that “The Trade Representative’s determination takes account of the public comments and the testimony from the seven-day public hearing, as well as the advice of the interagency Section 301 committee and appropriate advisory committees.” 84 Fed. Reg. at 43,305.

Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019). When the grounds invoked by an agency “are inadequate, a court may remand for the agency” to pursue one of two options. *Regents*, 140 S. Ct. at 1907.⁹ Option one permits the agency to provide “a fuller explanation of the agency’s reasoning *at the time of the agency action*.” *Id.* (quoting *Pension Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)). Option one “has important limitations,” such that “[w]hen an agency’s initial explanation ‘indicate[s] the determinative reason for the final action taken,’ the agency may elaborate later on that reason (or reasons) but may not provide new ones.” *Id.* at 1908 (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)) (second alteration in original). Option two permits an agency to “‘deal with the problem afresh’ by taking *new agency action*.” *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947)). An agency acting in accordance with option two “is not limited to its prior reasons but must comply with the procedural requirements for new agency action.” *Id.*

Plaintiffs argue that USTR’s response to comments is impermissibly *post hoc* pursuant to *Regents* insofar as USTR undertook a new review and analysis of the

⁹ *Regents* concerns the U.S. Department of Homeland Security’s (“DHS”) rationale for rescinding the program referred to as “Deferred Action for Childhood Arrivals,” or “DACA.” 140 S. Ct. at 1901. DHS did not engage in “notice and comment” rulemaking pursuant to 5 U.S.C. § 553(b)–(c). Instead, DHS attempted to rescind DACA through the issuance of two consecutive executive memoranda. *Id.* at 1901, 1903–04. After the D.C. District Court held that the first memorandum, issued by DHS Acting Secretary Elaine C. Duke, was too “conclusory . . . to explain the change in [DHS’s] view of DACA’s lawfulness,” the Acting Secretary’s “successor, Secretary Kirstjen M. Nielsen,” issued a new memorandum purporting to elaborate on the reasoning provided in Acting Secretary Duke’s Memorandum. *Id.* at 1904. Despite this characterization, the Court held that “Secretary Nielsen’s reasoning bears little relationship to that of her predecessor” and was instead “impermissible post hoc rationalization[].” *Id.* at 1908–09.

comments on remand and failed to identify analysis of the comments contemporaneous with the issuance of *Final List 3* and *Final List 4*. See, e.g., Pls.' Cmts. at 9–11. USTR's analysis of the comments, Plaintiffs contend, required a new rulemaking. See Pls.' Reply Cmts. at 1 ("If USTR wishes to assess and address the significant comments, evaluate the costs of further tariff actions, and then impose the List 3 and List 4A tariffs going forward, it may take new action."). Plaintiffs seek to distinguish an agency's failure to address comments, which they assert can be remedied by further explanation on remand (i.e., *Regents'* option one), from an agency's failure to analyze or consider comments, which they assert cannot be remedied without a new rulemaking (i.e., *Regents'* option two). Oral Arg. (Feb. 7, 2023) at 59:30–1:00:50 (time stamp from the recording), available at <https://www.cit.uscourts.gov/sites/cit/files/020723-21-00052-3JP.mp3>.

Plaintiffs' distinction is unsupported. Since *Regents*, as in this case, courts have ordered remands for agencies to respond to significant comments. See, e.g., *Bloomberg*, 45 F.4th at 477–78; *Env't Health*, 9 F.4th at 909, 914; *AT&T Servs., Inc. v. FCC*, 21 F.4th 841, 843, 853 (D.C. Cir. 2021). Such cases do not distinguish between failures of explanation and failures of consideration. See, e.g., *AT&T Servs.*, 21 F.4th at 853 ("The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a *consideration* of the relevant factors.") (citation omitted) (emphasis added); see also *W. Coal Traffic League v. Surface Transp. Bd.*, 998 F.3d 945, 954 (D.C. Cir. 2021) (likening the failure to respond to comments to the "fail[ure] to consider an important aspect of the problem") (quoting *Motor Vehicle*

Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

Accordingly, USTR's Remand Results are not impermissibly *post hoc* simply because USTR analyzed and addressed the comments on remand. *Cf. FBME Bank Ltd. v. Mnuchin*, 249 F. Supp. 3d 215, 223 (D.D.C. 2017) (reviewing an agency's response to comments on remand). Nevertheless, the court must reconcile USTR's response to comments with *Regents* and the rule against *post hoc* rationalization.

To begin with, the court remanded the matter for USTR to respond to the comments it had already received. *See In Re Section 301 Cases*, 570 F. Supp. 3d at 1338–43.¹⁰ In discussing the limits of option one, *Regents* cites to an opinion from the U.S. Court of Appeals for the D.C. Circuit for the proposition that an agency may provide an “amplified articulation” of a prior “conclusory” rationale. *Regents*, 140 S. Ct. at 1908 (quoting *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 5–6 (D.C. Cir. 2006)). Consistent with this notion, although USTR's reasons for agreeing or disagreeing with certain

¹⁰ In this respect, the underlying case is different from *Regents*. In the context of this case, taking new agency action would require USTR to issue new NPRMs, which would appear to be an inefficient mechanism for responding to comments USTR already received. Other courts have likewise grappled with *Regents'* formulation of the rule against *post hoc* rationalization and its application in circumstances dissimilar from those before the *Regents* court. In *Doe v. Lieberman*, 2022 WL 3576211 (D.D.C. Aug. 11, 2022), the D.C. District Court addressed whether an agency's explanation on remand for an earlier evidentiary determination survived *Regents'* rule against *post hoc* rationalization. *Id.* at *1, 5. The court found that *Regents* did not apply because although *Regents* cabins an agency's reasoning on remand to its initial determinative reason(s), there, the agency did not provide a determinative reason for its evidentiary decision in its initial determination. *Id.* at *5. Further, in addressing the plaintiff's arguments, the court explained that requiring the agency to reconsider the termination afresh based on a conclusory evidentiary ruling did not make sense “in the context of evidentiary rulings in agency adjudications.” *Id.* at *6.

comments are more expansive than what it previously offered, USTR does not offer new determinative reasons for its actions.¹¹

Since *Regents*, some courts have questioned *Alpharma*'s formulation of the rule; in particular, its apparent focus on the author rather than the timing of the supplemental explanation. See *Doe*, 2022 WL 3576211, at *5; *United Food and Com. Workers Union, Local No. 663 v. U.S. Dep't of Ag.*, 532 F. Supp. 3d 741, 779 (D. Minn. 2021); cf. *IAP Worldwide Servs., Inc. v. United States*, 160 Fed. Cl. 57, 76–77 (2022) (rejecting similar language from a pre-*Alpharma* case). However, as indicated by the *Regents* court's citation, *Alpharma* remains good law to the extent that it requires any supplemental decision to be prepared by the appropriate decisionmaker and tethered to the original justification for the action.

Moreover, while *Alpharma* does not involve an agency's response to comments,¹² it is analogous to the extent that it discusses judicial review of an agency's

¹¹ In explaining USTR's decision to remove certain critical inputs for manufactured goods from List 3, USTR stated that, "[t]hrough the interagency process the Department of Commerce recommended USTR remove eight tariff subheadings." Remand Results at 51. Plaintiffs argue that "[t]his is the first time that detail has been revealed publicly" and that "Commerce's recommendation and underlying reasoning are nowhere in the record." Pls.' Cmts. at 13. The confidential administrative record ("CR") index provided to the court indicates that CR-1 constitutes a "Confidential Summary of Confidential Advisory Committee Advice," the production of which is "subject to 19 U.S.C. § 2155(g)." ECF No. 298 at 4. Following oral argument on the remand determination, the Government provided a redacted version of CR-1, which was previously included in the public administrative record ("PR") as PR-9057. See Defs.' Notice of Filing Doc. Referenced During Oral Arg., ECF Nos. 489, 489-1. Even accepting Plaintiffs' premise that this input is newly shared, it does not suggest a new determinative reason for USTR's decision.

¹² *Alpharma* addresses the U.S. Food and Drug Administration's adjudication of a petition to revoke the agency's approval of a generic animal drug. 460 F.3d at 4.

response, on remand, to concerns raised on the record during the adjudication and prior to the final agency action at issue. See 460 F.3d at 5–7.¹³ Here, as in *Alpharma*, USTR’s Remand Results provide an “amplified articulation” of the grounds for its actions. USTR further explained the removal or retention of certain tariff subheadings, its decision to set the level of duties on the specified aggregate level of trade notwithstanding the stated concerns, and its decision to proceed despite the proffered alternatives. In so doing, USTR responded to significant concerns within the context of China’s actionable conduct and the specific direction of the President. Thus, while USTR provided a fuller explanation of its reasoning, it was “a fuller explanation of [its] reasoning *at the time of the agency action.*” *Regents*, 140 S. Ct. at 1907–08 (quoting *Pension Benefit Guar. Corp.*, 496 U.S. at 654).¹⁴ Without anything new to propose in new NPRMs, the court is not convinced by Plaintiffs’ arguments to require USTR to conduct new notice-and-comment rulemakings.

¹³ This court previously recognized the instructiveness of “judicial precedent from the D.C. Circuit . . . in light of the court’s expertise in the area of administrative law.” *In Re Section 301 Cases*, 570 F. Supp. 3d at 1324 n.7.

¹⁴ Plaintiffs cite two cases supporting their view that “courts regularly have held that an agency failed to provide non-conclusory, non-*post hoc* reasoning sufficient to sustain agency action—even after remanding to give the agency a second chance to cure its APA violation.” Pls.’ Reply Cmts. at 3 (citing *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009); *Tex Tin Corp. v. EPA*, 992 F.2d 353, 355 (D.C. Cir. 1993)). Neither case is analogous. In *Comcast*, the D.C. Circuit vacated a rule when the agency had failed to consider important concerns the court raised in prior litigation involving an earlier iteration of the same rule. 579 F.3d at 8–10. In *Tex Tin*, the court held that an agency impermissibly based its decision on remand “on a new theory.” *Id.* at 355 (citing *Anne Arundel Cty., Md. v. EPA*, 963 F.2d 412, 418 (D.C. Cir.1992)). As discussed above, USTR did not do so here.

II. USTR's Response to Comments

The court previously held that “[h]aving requested comments on a range of issues, USTR had a duty to respond to the comments in a manner that enables the court to understand ‘why the agency reacted to them as it did.’” *In Re Section 301 Cases*, 570 F. Supp. 3d at 1341 (quoting *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). The court now turns to the question whether, through the Remand Results, USTR has fulfilled that requirement.

A. Parties' Contentions

Plaintiffs contend that USTR's reliance on Presidential direction to explain its lack of discretion is legally insufficient given the breadth of USTR's request for comments. Pls.' Cmts. at 12–13; Pls.' Reply Cmts. at 5. Plaintiffs fault USTR for failing to explain why it agreed with the President's direction or how it arrived at the conclusion that the actions were “appropriate” within the meaning of the statute. Pls.' Reply Cmts. at 4–5.

Plaintiffs further contend that USTR responded to major policy concerns raised in the comments in an inadequate and conclusory manner. Pls.' Cmts. at 15–17. Plaintiffs assert that USTR failed to explain why the benefits of the actions outweighed their costs in terms of economic harm. *Id.* at 17; Pls.' Reply Cmts. at 7–8. Plaintiffs also argue that USTR failed to address concerns about the perceived ineffectiveness of the tariffs or proposed alternatives to the increased tariffs. Pls.' Cmts. at 18–20; Pls.'

Reply Cmts. at 8–9. *Amici* advance similar arguments. See RLC’s Br. at 5–10; Verifone’s Br. at 2–5.¹⁵

The Government contends that USTR adequately explained the role that Presidential direction played in its decision-making. Defs.’ Resp. Cmts. at 17–19. The Government also argues that the entirety of the Remand Results—not just the final few pages—reflects USTR’s consideration of the potential for disproportionate economic harm. *Id.* at 21–22. The Government further asserts that Plaintiffs’ additional arguments “amount to mere disagreement” with USTR’s explanation, *id.* at 22–23, and USTR was not required to consider each alternative because USTR tailored its NPRMs specifically to modifying the original section 301 actions, *id.* at 23–24.

B. USTR’s Response to Comments Meets APA Requirements

The standard that an agency’s response to comments must meet “is not particularly demanding.” *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997) (per curiam) (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)). For “judicial review . . . to be meaningful,” the agency’s explanation must enable the court “to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.” *Auto. Parts & Accessories Ass’n*, 407 F.2d at 338. The court will “uphold a decision of less than ideal

¹⁵ Verifone’s arguments appear to digress into complaints about USTR’s decisions regarding specific exclusions. See Verifone’s Br. at 6–7 (discussing USTR’s decisions to grant, but not thereafter to reinstate, certain exclusions). Specific exclusion decisions are not, however, at issue in this case.

clarity if the agency's path may reasonably be discerned." *Nat'l Mining Ass'n*, 116 F.3d at 549 (quoting *State Farm*, 463 U.S. at 43). With these principles in mind, the court considers the matters it required USTR to address on remand.

1. Presidential Direction

The court previously held that the imposition of List 3 and List 4A duties constituted agency—not Presidential—action. *In Re Section 301 Cases*, 570 F. Supp. 3d at 1323–26. The court also recognized, however, that “the President’s specific direction, if any, is a statutory consideration for which the agency must account.” *Id.* at 1339. The court faulted USTR for relying on Presidential direction without explaining “the relationship between significant issues raised in the comments and the President’s direction.” *Id.* at 1341.

The Remand Results demonstrate USTR’s adherence to the specific direction of the President in terms of the level of duty increase and the aggregate level of trade affected by the actions. See Remand Results at 27–28, 74, 77. While it is clear from the Remand Results that USTR did not interpret the statute to accord USTR much discretion to deviate from the President’s direction, see *id.* at 77–78, USTR also explained that the judgments reflected in the construction of *Final List 3* and *Final List 4A* were its own, see *id.* at 80–81.

USTR explained that “[t]he aggregate level of trade included in the President’s directive and reflected in *Final List 3* . . . reflected the need to cover a substantial percentage of U.S. imports from China,” *id.* at 80, and that “[t]he Trade Representative determined that covering a substantial percentage of U.S. goods exported from China

was appropriate to obtain the elimination of China's harmful acts, policies, and practices," *id.* at 81. Likewise, USTR stated that "*Final List 4* reflected the judgment that covering essentially all products not covered by previous actions was needed to obtain the elimination of China's acts, policies and practices." *Id.* USTR explained that the levels of duties imposed reflected its judgment regarding "the appropriate balance" to strike "between exerting an appropriate amount of pressure on China to eliminate its harmful practices, while encouraging China to meaningfully engage in negotiations, against comments suggesting additional duties would result in severe economic harm to U.S. consumers and industries." *Id.* at 77. USTR also explained its exercise of discretion to determine the tariff subheadings that would be subject to List 3 and List 4A duties and establish an exclusion process for products subject to List 4A duties. *See id.* at 77–78.¹⁶

Plaintiffs fail to persuade the court that USTR was required to provide additional explanation regarding its reasons for agreeing with the President that the chosen actions were "appropriate." Pls.' Reply Cmts. at 5. The court discusses USTR's response to comments raising policy concerns below and considers this explanation responsive to the question of whether the actions were appropriate. Moreover, the court recognizes that USTR's consideration of significant comments must account for

¹⁶ While USTR ultimately established an exclusion process for products subject to List 3 duties, *see Procs. for Requests to Exclude Particular Prods. From the Sept. 2018 Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 84 Fed. Reg. 29,576 (June 24, 2019), it did not do so initially because USTR "had greater flexibility" to exempt products from the outset, Remand Results at 78.

“section 301’s statutory purpose to eliminate the burden on U.S. commerce from China’s unfair acts, policies, and practices” and any “specific direction [from] the President.” *In Re Section 301 Cases*, 570 F. Supp. 3d at 1340. In remanding *Final List 3* and *Final List 4*, the court admonished USTR for its failure to respond to comments “within the context of the specific direction provided by the President.” *Id.* at 1340–41. The court did not order USTR to analyze the President’s directives.¹⁷ In contrast to the conclusory treatment of comments in *Final List 3* and *Final List 4*, the Remand Results reflect USTR’s conclusion that statutory language linking any modification to the specific direction of the President constrained USTR’s ability to depart from that direction and explained USTR’s position vis-à-vis the President’s direction. Nothing more was required.

2. Harm to the U.S. Economy

Plaintiffs assert that the Remand Results reflect no weighing of the costs of the actions, identifying such concerns as “increased costs on U.S. businesses,” additional “Chinese retaliation,” and impacts on U.S. businesses that export inputs or technology

¹⁷ Plaintiffs previously conceded that they do not contest “subjective determination[s] of what is ‘appropriate’ (or any other discretionary determination[s]).” Pls.’ Mem. in Supp. of Pls.’ Cross-Mot. for J. on the Agency R. and Resp. to Defs.’ Mot. to Dismiss/Mot. for J. on the Agency R. at 51, ECF No. 358; see also Oral Arg. (Feb. 1, 2022) at 1:17:50–1:18:12, available at <https://www.cit.uscourts.gov/sites/cit/files/020122-21-00052-3JP.mp3> (during the first hearing on the merits, Plaintiffs explained that they do not seek to challenge “the dollar amount” of tariffs and that USTR retains “vast discretion” regarding such determinations). The court is therefore circumspect in requiring further explanation from USTR regarding such discretionary matters that are likely not judicially reviewable. *Cf. Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (explaining that the political question doctrine precludes judicial review of “policy choices” committed to the Executive Branch).

to China. Pls.' Cmts. at 17.¹⁸ While USTR must explain how it “resolved any significant problems raised by the comments,” it “need not respond to every comment.” *Action on Smoking*, 699 F.2d at 1216. In the Remand Results, the court readily discerns USTR’s attempts to balance commenters’ concerns about economic harm with the specific direction it had received from the President and the ongoing need to respond to China’s acts, policies and practices burdening U.S. commerce.

In responding to such comments, USTR explained that it “shared the view that mitigating harm to U.S. consumers was an important consideration in developing and finalizing lists of products that would be subject to additional duties.” Remand Results at 82. USTR pointed to prior tariff actions (i.e., List 1 and List 2) in which USTR sought to avoid consumer impact. *Id.* For List 3, USTR noted that “the selection process” considered “likely impacts on U.S. consumers, and involved the removal of subheadings identified by analysts as likely to cause disruptions to the U.S. economy.” *Id.* at 83 (citing *List 3 NPRM*, 83 Fed. Reg. at 33,609). USTR further noted that concerns about economic harm prompted USTR “to initially set the duties at 10 percent for three months.” *Id.* at 77 (citing *Final List 3*, 83 Fed. Reg. at 47,975).

USTR acknowledged that List 4A resulted in additional “duties on essentially all remaining imports from China, thus necessitating the need for USTR to include consumer products.” *Id.* at 83. USTR noted, however, that by segregating certain

¹⁸ Plaintiffs also fault USTR for relying on documents that predate the imposition of List 3 and List 4 duties. Pls.' Cmts. at 16. USTR did not cite such documents as evidence of its contemporaneous response to comments. Rather, USTR cited such documents as evidence of USTR’s ongoing consideration of harm. See Remand Results at 82–84.

goods into List 4B, it “would delay additional duties for products where China’s share of imports from the world is 75 percent or greater to ‘provide a longer adjustment period.’” *Id.* (quoting *Final List 4*, 84 Fed. Reg. at 43,305). USTR also pointed to the announcement of an exclusion process as responsive to these concerns. *Id.* at 84 (citing *Final List 4*, 84 Fed. Reg. at 43,305).

In addition to these broader considerations, USTR’s decisions at the subheading level reflect USTR’s weighing of economic harm. See, e.g., Remand Results at 27–28 (discussing USTR’s requirement for a “clear showing” of ineffectiveness or harm to remove subheadings from List 3 in order to retain the \$250 billion aggregate level of trade directed by the President); *id.* at 31 (weighing costs and benefits of including rare earths and critical minerals and deciding to remove those subheadings); *id.* at 33 (same for U.S.-caught seafood); *id.* at 62–63 (same for child safety seats).

While framing the issue as a procedural failure to explain, Plaintiffs effectively take issue with the conclusions USTR reached. See Pls.’ Reply Cmts. at 7 (arguing that “the fundamental point commenters raised was that USTR’s proposed cure for China’s unfair acts was worse than the disease” and that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good”) (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).¹⁹ Mere disagreement with USTR’s actions is not a basis for the court to

¹⁹ *Michigan* addressed a provision in the Clean Air Act that “instructed EPA to add power plants to [a] program if (but only if) the Agency finds regulation ‘appropriate and necessary.’” *Michigan*, 576 U.S. at 752. Citing administrative practice when deciding whether to regulate such matters, the *Michigan* Court considered cost “an important aspect of the problem” that EPA had to address in the context of that case. *Id.* at 752–

overturn them. See *Rodriguez-Jimenez v. Garland*, 20 F.4th 434, 439 (9th Cir. 2021) (“[W]e cannot overturn the agency’s decision based on mere disagreement.”). It is not the court’s role to reweigh the evidence or opine on USTR’s (or the President’s) policy choices, such as the appropriate “cure” for China’s conduct. See *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015). As discussed above, USTR accounted for concerns regarding the potential for economic harm within the context of the statutory factors it was required to consider and adequately explained how it did so.²⁰

3. Efficacy of the Tariffs

USTR explained that it was not persuaded by “comments which suggested that negotiations alone could be successful in obtaining the elimination of the harmful practices without accompanying economic pressure through additional tariffs.” Remand Results at 86–87. USTR acknowledged “that previous actions were not sufficient to encourage China to change its acts, policies, and practices” but nevertheless found

53. The Court acknowledged, however, that “the phrase ‘appropriate and necessary’ does not [always] encompass cost.” *Id.* at 752.

²⁰ Although commenters objecting to the tariffs based on economic harm may have been guided by their respective experiences with List 1 and List 2 duties, concerns about the future impact of the List 3 and List 4A duties were, to some extent, speculative. USTR therefore had a limited record with which to balance such harm against the harm caused by China’s ongoing unfair trade practices. It is also worth noting that the statute accounts for economic harm caused by section 301 tariffs in the context of USTR’s four-year review of necessity. When deciding whether to continue a section 301 action beyond the specified four-year timeframe, the statute requires USTR to consider the effectiveness of the action, alternatives to such action, and “the effects of such actions on the United States economy, including consumers.” 19 U.S.C. § 2417(c)(3).

“that more substantial trade actions were needed to encourage negotiations” with China. *Id.* at 87. USTR also accounted for concerns of inefficacy in its decisions regarding inclusion or omission of certain subheadings. *See, e.g., id.* at 29, 33, 34, 55; *cf. List 3 NPRM*, 83 Fed. Reg. at 33,609 (seeking comments on “whether imposing increased duties *on a particular product* would be practicable *or effective* to obtain the elimination of China’s acts, policies, and practices”) (emphasis added).

Plaintiffs accuse USTR of “deflect[ing]” by contextualizing the choice as one “between ‘negotiations alone’” and “placing tariffs on virtually all of Chinese trade.” Pls.’ Cmts. at 18. That is not an accurate summation of USTR’s response. USTR’s statements were responsive to commenters seeking to dissuade USTR from imposing *any* increased duties and instead to persuade USTR to adopt other courses of action, including negotiations with China. *See Remand Results* at 86.

Plaintiffs further argue that USTR effectively admitted that prior section 301 actions were ineffective and still failed to respond to concerns that List 3 and List 4A duties would likewise be ineffective. Pls.’ Cmts. at 19; Pls.’ Reply Cmts. at 8. It is unclear, however, what more USTR could state on this point. Absent contrary record evidence, USTR was not bound to agree with commenters characterizing tariffs as an ineffective option simply because List 1 and List 2 duties were deemed insufficient. Section 307(a) authorizes USTR to modify prior actions precisely when they have been ineffective in reducing “the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action.” 19 U.S.C. § 2417(a)(1)(B).

4. Alternatives to the Tariffs

On remand, USTR pointed, by way of example, to comments suggesting alternative action under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337. Remand Results at 88. USTR responded to such comments by explaining that section 337 could not address the “broader set of issues” identified as the basis for the underlying section 301 investigation. *Id.* USTR further explained that it “did not intend to invite comments on alternative measures” because the President directed USTR to act under sections 301 and 307 of the Trade Act. *Id.* at 89.

Plaintiffs argue that USTR engaged with just one of many proposed alternatives, which is insufficient given the invitation for “comments on ‘any aspect’ of its proposed actions.” Pls.’ Cmts. at 20. Considering alternatives, Plaintiffs argue, was also necessary for USTR to determine whether additional action was “appropriate.” *Id.*

As USTR explained, however, it was pursuing additional courses of action, such as initiating a dispute at the World Trade Organization, requesting consultations with China, and proceeding with negotiations. *See, e.g.,* Remand Results at 6 n.2, 87. Moreover, in the NPRMs, USTR did not seek comments generally on how to respond to China’s acts, policies and practices, but instead requested comments on “any aspect of the proposed supplemental action,” and provided comment topics relevant to such action. *List 3 NPRM*, 83 Fed. Reg. at 33,609 (emphasis added); *cf. List 4 NPRM*, 84 Fed. Reg. at 22,565. Thus, while USTR’s request was broad to the extent that it requested comments on “any aspect” of the proposal, it was also more limited in scope than Plaintiffs suggest. Accordingly, USTR adequately explained its disinclination to

consider each alternative. *Cf. Nat'l Mining Ass'n*, 116 F.3d at 549 (finding adequate an agency's brief dismissal of certain proposed safety standards as "outside the scope of this rulemaking" based on the court's understanding "that the agency was choosing to impose some standards without addressing 'everything that could be thought to pose any sort of problem'") (citation omitted).²¹

In view of the foregoing, the court finds that USTR has complied with the court's remand order and has supplied the necessary explanation supporting the imposition of duties pursuant to *Final List 3* and *Final List 4*.

III. Defendants' Second Motion to Correct the Record

The Government moves to correct the record to include several *Federal Register* notices, USTR press releases, and one Presidential memorandum, all marked as Exhibits C through K, respectively. 2nd Mot. Correct R. at 1–2, Exs. C–K.²² "Plaintiffs [took] no position on the motion, on the understanding that the Government has forfeited reliance on documents not cited in its previous merits briefing to this Court." *Id.* at 2.²³

²¹ Actions under section 337 rest with the U.S. International Trade Commission, not the Trade Representative. See 19 U.S.C. § 1337(a)(1), (b)(1). Thus, Plaintiffs' reliance on cases concerning an agency's failure to consider options within its purview is misplaced. See Pls.' Reply Cmts. at 8–9 (citing *Spirit Airlines, Inc. v. U.S. Dep't of Trans. and FAA*, 997 F.3d 1247, 1255 (D.C. Cir. 2021); *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005)).

²² There were no Exhibits A or B attached to the motion, presumably because two prior documents USTR sought to include in the record were labeled as such. See Defs.' Mot. to Correct the R., Exs. A–B, ECF No. 441.

²³ To the extent that Plaintiffs' position is based on their arguments concerning *post hoc* rationalization, the court disagrees with Plaintiffs' position for the reasons stated above. *Supra*, Discussion Section I.B.

For purposes of APA review, the administrative record consists of “all documents and materials directly or indirectly considered by agency decisionmakers.” *Ammex, Inc. v. United States*, 23 CIT 549, 556, 62 F. Supp. 2d 1148, 1156 (1999) (quoting *Thompson v. U. S. Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). Additionally, CIT Rule 73.3(a)(1) requires an agency to file, *inter alia*, “[a] copy of the contested determination and the findings or report on which such determination was based.”

Exhibits C, E, G and H constitute *Federal Register* notices regarding the initial investigation, determination, and actions taken with respect to List 1 and List 2. 2nd Mot. Correct R. at 3, Exs. C, E, G, H. Exhibit D constitutes a Presidential memorandum issued in conjunction with USTR’s section 301 investigation findings. *Id.* at 3, Ex. D. Exhibit F is a USTR press release concerning List 1 and List 2. *Id.* at 3, Ex. F. These documents all predate USTR’s issuance of *Final List 3* and “were indirectly considered.” *Id.* at 4. Exhibit J is a conforming amendment published in the *Federal Register* regarding List 3 previously included in the record in an unpublished form as PR 5. *Id.* at 3, 5, Ex. J. Inclusion of these documents is appropriate.

Exhibits I and K constitute press releases published a few days prior to USTR’s publication of *Final List 3* and *Final List 4*, respectively. *Id.* at 3, Exs. I, K. The Government argues that the press releases are properly before the court pursuant to CIT Rule 73.3(a)(1) because they were “issued in conjunction with” *Final List 3* and *Final List 4*. *Id.* at 4–5. Consistent with the Government’s representations regarding the relationship of these documents to the contested determinations, and their contemporaneous preparation with those determinations, the court finds that the

documents are part of the record and will allow the Government to amend the record accordingly.

Accordingly, the Government's second motion to correct the record will be granted.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that the tariff actions imposed by the Office of the United States Trade Representative and styled as *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018), and *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 43,304 (Aug. 20, 2019), as amended on remand by Further Explanation of the Final List 3 and Final List 4 Modifications in the Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Pursuant to Court Remand Order, ECF No. 467, are **SUSTAINED**; and it is further

ORDERED that Defendants' second motion to correct the record, ECF No. 466, is **GRANTED**; and it is further

ORDERED that, on or before March 27, 2023, the Government shall file updated administrative record indices reflecting corrections granted herein and in Slip Op. 22-32.

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The court will enter judgment in *HMTX Indus. LLC v. United States*, No. 20-cv-177, accordingly.

/s/ Mark A. Barnett
Mark A. Barnett, Chief Judge

/s/ Claire R. Kelly
Claire R. Kelly, Judge

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

Dated: March 17, 2023
New York, New York

Slip Op. 22-32

UNITED STATES COURT OF INTERNATIONAL TRADE

IN RE SECTION 301 CASES

Before: Mark A. Barnett,
Claire R. Kelly, and
Jennifer Choe-Groves, Judges
Court No. 21-00052-3JP

OPINION AND ORDER

[Remanding the Office of the United States Trade Representative’s determinations with respect to List 3 and List 4A; granting in part and denying in part Defendants’ Motion to Correct the Administrative Record.]

Dated: April 1, 2022

Pratik Shah, Akin Gump Strauss Hauer & Feld LLP, of Washington, D.C., argued for Plaintiffs HMTX Indus. LLC, Halstead New England Corp., Metroflor Corp., and Jasco Prods. Co. LLC. With him on the brief were Matthew R. Nicely, James E. Tysse, Devin S. Sikes, Daniel M. Witkowski, and Sarah B. W. Kirwin.

Justin R. Miller, Attorney-In-Charge, International Trade Field Office, Elizabeth A. Speck, Trial Attorney, and Jamie L. Shookman, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendants. With them on the brief were Brian M. Boynton, Acting Assistant Attorney General, Patricia M. McCarthy, Director, L. Misha Preheim, Assistant Director, Sosun Bae, Senior Trial Counsel, and Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. Of Counsel on the brief were Megan Grimball, Associate General Counsel, Philip Butler, Associate General Counsel, and Edward Marcus, Assistant General Counsel, Office of General Counsel, Office of the U.S. Trade Representative, of Washington, D.C., and Paula Smith, Assistant Chief Counsel, Edward Maurer, Deputy Assistant Chief Counsel, and Valerie Sorensen-Clark, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

Joseph R. Palmore, Morrison & Foerster LLP, of Washington, D.C., argued for Amici Curiae Retail Litigation Center, *et al.* With him on the brief was Adam L. Sorensen.

Christine M. Streatfeild, Baker McKenzie LLP, of Washington, D.C., argued for Amici Curiae Am. Trailer World Corp., *et al.* With her on the brief was Kevin M. O’Brien, as well as Nancy A. Noonan and Angela M. Santos, Arent Fox LLP, of Washington, D.C.

George W. Thompson, Thompson & Associates, PLLC, of Washington, D.C., for Amici Curiae Ecolab Inc., *et al.*

Barnett, Chief Judge: Plaintiffs HMTX Industries LLC, Halstead New England Corporation, Metroflor Corporation, and Jasco Products Company LLC commenced the first of approximately 3,600 cases (the “Section 301 Cases”)¹ contesting the imposition of a third and fourth round of tariffs by the Office of the United States Trade Representative (“the USTR” or “the Trade Representative”) pursuant to section 301 of the Trade Act of 1974 (“the Trade Act”), 19 U.S.C. § 2411, *et seq.* See generally Am. Compl., HMTX Indus. LLC v. United States, Court No. 20-cv-00177 (CIT Sept. 21, 2020), ECF No. 12 (“20-177 Am. Compl.”).

Defendants United States, *et al.* (“the Government”) move to dismiss Plaintiffs’ claims as non-justiciable pursuant to U.S. Court of International Trade (“USCIT”) Rule 12(b)(6) or, alternatively, for judgment on the agency record pursuant to USCIT Rule 56.1. Defs.’ Mot. to Dismiss or, Alternatively, Mot. for J. on the Agency R. (“Defs.’ Mot.”), ECF No. 314. Plaintiffs cross-move for judgment on the agency record. Pls.’ Cross-Mot. for J. on the Agency R., and accompanying Mem. in Supp. of Pls.’ Cross-Mot. for J. on the Agency R. and Resp. to Defs.’ Mot. to Dismiss/Mot. for J. on the Agency R. (“Pls.’ Cross-Mot. & Resp.”), ECF No. 358.

The Government also moves to correct the administrative record. Defs.’ Mot. to Correct the R. (“Defs.’ Mot. Correct R.”), ECF No. 441. Plaintiffs oppose that motion, in

¹ This figure reflects the approximate number of cases assigned to this panel. As of March 31, 2022, there are approximately 318 unassigned cases raising similar claims that are stayed pursuant to Administrative Order 21-02.

part. Pls.' Partial Opp'n to Defs.' Mot. to Correct the Agency R. ("Pls.' Opp'n Correct R."), ECF No. 442.

For the following reasons, the court remands the contested USTR determinations and grants in part and denies in part the Government's motion to correct the record.

BACKGROUND

I. Legal Framework

Article I, Section 8 of the U.S. Constitution vests Congress with the "Power To lay and collect Taxes, Duties, Imposts and Excises" and to "regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 1, 3. Section 301 of the Trade Act, which governs actions taken in response to a foreign country's violation of a trade agreement or conduct that is otherwise harmful to U.S. commerce, constitutes a congressional delegation of some of that authority to the Executive Branch. See 19 U.S.C. § 2411 (2018).² Specifically, section 301 sets out the circumstances under which action by the USTR is mandatory (subject to certain exceptions), see *id.* § 2411 (a)(1)–(2),³ and when such action is discretionary, see *id.* § 2411(b).

This case concerns the latter scenario. Pursuant to section 301(b), the USTR has discretion to act when it determines that "(1) an act, policy, or practice of a foreign

² Citations to the United States Code are to the 2018 version, unless otherwise specified.

³ When the USTR finds that "the rights of the United States under any trade agreement are being denied" or that "an act, policy, or practice of a foreign country--(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce," the USTR "shall take action," 19 U.S.C. § 2411(a)(1), unless an exception exists pursuant to section 301(a)(2), *id.* § 2411(a)(2).

country is unreasonable or discriminatory and burdens or restricts United States commerce, and (2) action by the United States is appropriate.” *Id.* When both conditions are met, the USTR

shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

Id. § 2411(b)(2).

Subsection (c) describes the actions the USTR may take in order to implement mandatory or discretionary actions under subsections (a) and (b). *Id.* § 2411(c). For investigations not involving a trade agreement, the USTR must make its determination as to whether conduct is actionable under section 301(a) or (b) and, if so, what action to take, no later than “12 months after the date on which the investigation [was] initiated.”

Id. § 2414(a)(2)(B). Generally, such actions must then be implemented within 30 days of the date of the determination. *Id.* § 2415(a)(1).

Central to this litigation, section 307 of the Trade Act governs the modification or termination of the USTR’s actions taken pursuant to section 301. *See generally id.*

§ 2417. The statute provides, *inter alia*:

(a) In general

(1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—

- (A) any of the conditions described in section 2411(a)(2) of this title exist,
- (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or
- (C) such action is being taken under section 2411(b) of this title and is no longer appropriate.

Id. § 2417(a)(1).

II. Factual Background

On August 14, 2017, the President of the United States issued a memorandum instructing the USTR to consider, consistent with section 302(b) of the Trade Act, initiating an investigation addressing the Government of the People's Republic of China's ("China") "laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development." *Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39,007, 39,007 (Aug. 17, 2017). The USTR initiated such an investigation on August 18, 2017. *Initiation of Section 301 Investigation; Hearing; and Request for Public Comment: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 82 Fed. Reg. 40,213 (Aug. 24, 2017) ("*Initiation Notice*").

On March 22, 2018, the USTR published a report announcing the results of the investigation. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY

TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018) (“USTR Report” or “the Report”), [https://ustr.gov/sites/default/files/Section 301 FINAL.PDF](https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF). The Report summarizes the ways in which China’s conduct in the areas subject to the investigation was unreasonable and burdened U.S. commerce. See *id.* Also on March 22, 2018, the President issued a memorandum directing the USTR, *inter alia*, to “take all appropriate action” pursuant to section 301 “to address the acts, policies, and practices of China that are unreasonable or discriminatory and that burden or restrict U.S. commerce” and to “consider whether such action should include increased tariffs on goods from China.” *Actions by the United States Related to the Section 301 Investigation of China’s Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 13,099, 13,100 (Mar. 27, 2018). In that memorandum, the President further instructed the USTR to “publish a proposed list of products and any intended tariff increases within 15 days of the date of this memorandum,” subject to notice and comment pursuant to section 304(b), and, “after consultation with appropriate agencies and committees,” to “publish a final list of products and tariff increases, if any, and implement any such tariffs.” *Id.*

On April 6, 2018, the USTR published notice of its determination “that the acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation covered in the investigation are unreasonable or discriminatory and burden or restrict U.S. commerce.” *Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer,*

Intellectual Property, and Innovation, 83 Fed. Reg. 14,906, 14,906 (Apr. 6, 2018) (“*USTR Determination*”). Accordingly, the USTR proposed tariffs on products worth “approximately \$50 billion in terms of estimated annual trade value” in 2018. *Id.* at 14,907. The USTR considered the size of the action to be “appropriate both in light of the estimated harm to the U.S. economy, and to obtain elimination of China’s harmful acts, policies, and practices.” *Id.*

On June 20, 2018, the USTR published notice of a final list of products “with an approximate annual trade value of \$34 billion” that would be subject to an additional duty of 25 percent *ad valorem*, referred to as “List 1.” *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 28,710, 27,711 (June 20, 2018) (“*Final List 1*”). On August 16, 2018, the USTR published notice of an additional list of products with an approximate annual trade value of \$16 billion that would be subject to an additional duty of 25 percent *ad valorem*, referred to as “List 2.” *Notice of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 40,823, 40,823–24 (Aug. 16, 2018).

During the time between the USTR’s finalization of List 1 and List 2, the President directed the USTR to identify \$200 billion worth of Chinese goods on which to impose an additional duty of 10 percent *ad valorem* “after the legal process is complete” if China refused to change its practices. Statement from the President Regarding Trade with China (June 18, 2018) (“June 2018 Presidential Statement”), ECF No. 441-1; see

also USTR Robert Lighthizer Statement on the President's Additional China Trade Action (June 18, 2018), PR 27.⁴ In accordance with that direction, the USTR identified 6,031 tariff subheadings comprising goods imported from China, referred to as "List 3." *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 33,608, 33,608–09 (July 17, 2018) ("*List 3 NPRM*"). In proposing the additional duties, the USTR relied on its authority to modify the action pursuant to section 307(a)(1)(C) of the Trade Act. *Id.* at 33,609. The USTR explained that China had responded "to the initial U.S. action in the investigation by imposing retaliatory tariffs on U.S. goods[] instead of addressing U.S. concerns" regarding the unfair practices identified in the investigation. *Id.* at 33,608. The USTR also explained that "a supplemental \$200 billion action is appropriate" because China had failed to respond favorably to the \$50 billion action and instead imposed "retaliatory duties" in the amount of \$50 billion on U.S. products. *Id.* at 33,609.

The USTR later extended the public comment period concerning the List 3 duties after the President directed the USTR "to consider increasing the proposed level of the additional duty from 10 percent to 25 percent." *Extension of Public Comment Period*

⁴ The administrative record associated with the contested List 3 and List 4A duties is divided into a Public Administrative Record ("PR"), ECF No. 297, and a Confidential Administrative Record ("CR"), ECF No. 298. For record documents available online, the indices contain hyperlinks to their location. See PR; CR. The Government also filed an appendix of record documents provided to the court in advance of oral argument. See [Partial] Index to the Admin. R., ECF Nos. 447, 447-1 (PR 1–12), 447-2 (PR 13–20), 447-3 (PR 21–25), 447-4 (PR 26–36).

Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 38,760, 38,760–61 (Aug. 7, 2018) (“*List 3 Cmt. Extension*”).

On September 17, 2018, the President directed the USTR to impose an additional duty of 10 percent *ad valorem* on \$200 billion worth of Chinese goods, to take effect on September 24, 2018, and to increase the additional duty to 25 percent *ad valorem* on January 1, 2019. Statement from the President (Sept. 17, 2018) (“Sept. 2018 Presidential Statement”), PR 4. On September 21, 2018, the USTR published final notice of List 3 duties at a rate of 10 percent *ad valorem* with an effective date of September 24, 2018. *Notice of Modification of Action Pursuant to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018) (“*Final List 3*”). In accordance with the President’s direction, the rate of additional duty on products covered by List 3 was set to increase to 25 percent *ad valorem* on January 1, 2019. *Id.* at 47,974.

As authority for the List 3 duties, the USTR relied on section 307(a)(1)(B) and (C). *See id.* at 47,974–75. The USTR explained that “the burden or restriction on United States commerce of the acts, policies, and practices that are the subject of the Section 301 action continues to increase” and, further, that “China’s unfair acts, policies, and practices include not just its specific technology transfer and IP polices [*sic*] referenced in the notice of initiation in the investigation, but also China’s subsequent defensive actions taken to maintain those policies.” *Id.* at 47,974. The USTR noted that

China had “impose[d] approximately \$50 billion in tariffs on U.S. goods” to persuade the United States to end the section 301 action and to protect the investigated practices, which led to “increased harm to the U.S. economy.” *Id.*

With respect to subsection (C), the USTR explained that “[t]he term ‘appropriate’” used in that provision links to section 301(b), which authorizes the USTR to “take all appropriate and feasible action” in order “to obtain the elimination of [the] act, policy, or practice.” *Id.* (quoting 19 U.S.C. § 2411(b)). According to the USTR, the action that will achieve that aim “is a matter of predictive judgment, to be exercised by the [USTR], subject to any specific direction of the President.” *Id.* at 47,974–75. While the USTR previously judged that “a \$50 billion action would be effective in obtaining the elimination of China’s policies[,] China’s response . . . ha[d] shown that the current action no longer [was] appropriate.” *Id.* at 47,975.

The USTR also explained that, during the public comment period, it had received more than 6,000 written submissions and held a six-day public hearing. *Id.* at 47,974. The USTR stated that it had “carefully reviewed the public comments and the testimony from the six-day public hearing” and, consequently, removed “certain tariff subheadings” from the list. *Id.* at 47,975. The final list identified “5,745 full and partial tariff subheadings.” *Id.*

After several extensions of the effective date of the increase in List 3 duties issued in connection with ongoing trade negotiations, List 3 duties increased to 25 percent *ad valorem* in May or June of 2019, based on the date of export. *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to*

Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 20,459 (May 9, 2019); *Implementing Modification to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 21,892 (May 15, 2019); *Additional Implementing Modification to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 26,930 (June 10, 2019).

After the List 3 duties increased to 25 percent, the USTR established an exclusion process pursuant to which importers could request exclusion of their products from List 3 duties. *Procedures for Requests to Exclude Particular Products From the September 2018 Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 29,576 (June 24, 2019). Plaintiffs obtained exclusions for certain of their imports, effective September 24, 2018, through August 7, 2020. See, e.g., *Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 61,674, 61,675–76. (Nov. 13, 2019); 20-177 Am. Compl. ¶¶ 49–50.

On May 17, 2019, the USTR announced its intent, at the direction of the President, to modify again the section 301 action by imposing additional duties of up to 25 percent *ad valorem* on products from China covered by 3,805 additional tariff subheadings, referred to as “List 4.” *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg.

22,564 (May 17, 2019) (“*List 4 NPRM*”); see also Statement by U.S. Trade Representative Robert Lighthizer on Section 301 Action (May 10, 2019), PR 30. The USTR explained that the United States and China had engaged in several rounds of negotiation regarding issues covered by the section 301 investigation, but that China had “retreated from specific commitments made in previous rounds” and “announced further retaliatory action against U.S. commerce.” *List 4 NPRM*, 84 Fed. Reg. at 22,564. The USTR proposed modifying the action pursuant to section 307(a)(1)(B) and (C). *Id.*

On August 20, 2019, the USTR published final notice of the List 4 duties in the amount of 10 percent *ad valorem* on certain products identified in *List 4 NPRM*. *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 43,304 (Aug. 20, 2019) (“*Final List 4*”). Within *Final List 4*, the tariff subheadings were segregated into List 4A and List 4B with separate effective dates (September 1, 2019 and December 15, 2019, respectively). *Id.* at 43,305.

Referencing the language of section 307(a)(1)(B), the USTR explained that “[t]he burden or restriction on United States commerce of the acts, policies, and practices that are the subject of the Section 301 action continues to increase.” *Id.* at 43,304. The USTR also explained that “China’s unfair acts, policies, and practices include not just its technology transfer and IP polices [*sic*] referenced in the notice of initiation in the investigation, but also China’s subsequent defensive actions taken to maintain those unfair acts, policies, and practices.” *Id.* (referencing China’s retaliatory imposition of

“tariffs on approximately \$110 billion worth of U.S. goods” and other “non-tariff measures”).

In reference to section 307(a)(1)(C), the USTR stated that “China’s response has shown that the current action no longer is appropriate.” *Id.* The USTR noted China’s retreat from certain negotiated commitments, retaliatory actions, and currency devaluation. *Id.* at 43,305.

Lastly, the USTR stated that it had considered “the public comments” it had received “and the testimony from the seven-day public hearing, as well as the advice of the interagency Section 301 committee and appropriate advisory committees.” *Id.* In response to that information, the USTR removed “[c]ertain tariff subheadings” from the final List 4 duties “based on health, safety, national security, and other factors,” and staggered the effective dates for the List 4A and List 4B duties. *Id.* Thereafter, the USTR provided notice of its intent to increase the additional duty rate applicable to List 4A and List 4B from 10 percent *ad valorem* to 15 percent *ad valorem*. *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 45,821 (Aug. 30, 2019).

On December 18, 2019, the USTR indefinitely suspended the additional duties of 15 percent *ad valorem* on List 4B, but not List 4A, “[i]n light of progress in the negotiations with China.” *Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 69,447, 69,447 (Dec. 18, 2019).

On January 22, 2020, the USTR halved the additional duty on products covered by List 4A from 15 percent *ad valorem* to 7.5 percent *ad valorem*. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 85 Fed. Reg. 3741 (Jan. 22, 2020).

III. Procedural History

On September 10, 2020, Plaintiffs commenced an action challenging the section 301 duties imposed pursuant to List 3 and List 4A. Summons, Compl., *HMTX Indus. LLC v. United States*, Court No. 20-cv-00177 (CIT Sept. 10, 2020), ECF Nos. 1, 2. Count one alleges that the USTR exceeded its authority pursuant to section 307 of the Trade Act when it imposed the duties and seeks a declaratory judgment to that effect. 20-177 Am. Compl. ¶¶ 63–70. Count two alleges violations of the Administrative Procedure Act (“APA”). *Id.* ¶¶ 71–75. Specifically, Plaintiffs allege that USTR exceeded its authority “in promulgating List 3 and List 4A,” *id.* ¶ 73, and “promulgated List 3 and List 4A in an arbitrary and capricious manner,” *id.* ¶ 75.

On February 5, 2021, Plaintiffs’ action, among others, was assigned to this panel. *See, e.g., Order, HMTX Indus. LLC v. United States*, Court No. 20-cv-00177 (CIT Feb. 5, 2021), ECF No. 43. On February 10, 2021, the panel designated a “master case” under the name “*In Re* Section 301 Cases” to function as the primary vehicle by which the court would manage the litigation of the Section 301 Cases. Std. Procedural Order No. 21-01 (Feb. 10, 2021), ECF No. 1. After receiving input from the Parties, on March 31, 2021, the court designated Plaintiffs’ case as “the sample case for purposes of the court’s initial consideration and resolution of Plaintiffs’ claims.” Std. Procedural Order

21-04 (Mar. 31, 2021), ECF No. 267. The court stayed all other Section 301 Cases and appointed a Plaintiffs' Steering Committee to aid the court's adoption of case management procedures and coordinate the preparation of consolidated briefs and court submissions. *Id.*; see also Std. Procedural Order 21-02 (Feb. 16, 2021), ECF No. 82 (explaining the duties of the steering committee). On April 12, 2021, the Parties filed a Joint Status Report with a proposed briefing schedule governing disposition of the merits of the sample case. Joint Status Report (Apr. 12, 2021), ECF No. 274. The following day, the court entered a Scheduling Order. See Scheduling Order (Apr. 13, 2021), ECF No. 275.⁵

On June 1, 2021, the Government filed its opening motion. Defs.' Mot. On August 2, 2021, Plaintiffs filed their cross-motion and response to the Government's motion. Pls.' Cross-Mot. & Resp. On August 9, 2021, several interested parties that are plaintiffs in actions that were stayed behind this sample action filed an *amicus* brief on whether any potential relief is limited to an importer of record. Amicus Br. of Interested Parties ("Interested Parties' Br."), ECF No. 362. On August 31, 2021, the

⁵ On July 6, 2021, a divided panel granted Plaintiffs' motion for a preliminary injunction suspending liquidation of unliquidated entries subject to the contested tariffs. *In re Section 301 Cases*, 45 CIT __, __, 524 F. Supp. 3d 1355, 1357–72 (2021); see also *id.* at 1372–83 (Barnett, C.J., dissenting); Order (July 6, 2021), ECF No. 330 (temporarily restraining liquidation; establishing a process for implementing the preliminary injunction; and allowing the Government to instead "stipulate to refund any duties found to have been illegally collected"). On September 8, 2021, the court acknowledged the Government's acceptance of "the option to stipulate" to a refund of unlawfully collected duties "without prejudice to the issue of whether . . . refunds will be limited to [importers of record]" and ordered Defendants to liquidate subject entries "in the ordinary course." Order (Sept. 8, 2021) at 1–2, ECF No. 408.

court granted two additional motions for leave to file an *amicus* brief. Order (Aug. 31, 2021), ECF No. 396; Order (Aug. 31, 2021), ECF No. 397; *see also* Proposed Br. of Amici Curiae Retail Litigation Center, Inc., *et al.* (“RLC’s Br.”), ECF No. 373-2; Br. of Proposed Amici Curiae Ecolab Inc., *et al.* in Supp. of the Cross-Mot. for J. on the Agency R. Submitted by Pls.’ HMTX Indus. LLC *et al.* (“Ecolab’s Br.”), ECF No. 374. On October 1, 2021, the Government filed its joint response to Plaintiffs’ cross-motion and the *amicus* briefs and a reply in support of its opening motion. Defs.’ Reply in Supp. of Their Mot. to Dismiss, Resp. to Pls.’ Cross-Mot. for J. on the Agency R., and Resp. to *Amicus Curiae* Supporting Brs. (“Defs.’ Resp. & Reply”), ECF No. 412.⁶ On November 15, 2021, Plaintiffs filed their reply. Pls.’ Reply in Supp. of Their Cross-Mot. for J. on the Agency R. (“Pls’ Reply”), ECF No. 425. The court heard oral argument on February 1, 2021. Docket Entry, ECF No. 440.

Following oral argument, on February 15, 2022, the Government filed a partial consent motion to correct the administrative record. Defs.’ Mot. Correct R. On February 16, 2022, Plaintiffs filed their response. Pls.’ Opp’n Correct R.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B) (2018 & Supp. II 2020), which grants the court “exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing

⁶ On October 18, 2021, the court granted the Government’s motion to correct citation errors in their opening and reply briefs. Order (Oct. 18, 2021), ECF No. 415; *see also* Defs.’ Consent Mot. to Correct Minor Citation Errors, Ex. B, ECF No. 413-2 (corrected pages).

for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.”

The court may properly dismiss a claim pursuant to USCIT Rule 12(b)(6) when the plaintiff’s factual allegations, assumed to be true, fail to raise a legally cognizable claim. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327 (Fed. Cir. 2006). USCIT Rule 56.1 provides for judgment on the agency record in an action that is before the court pursuant to 28 U.S.C. § 1581(i). The APA directs the court to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706; see also 28 U.S.C. § 2640(e). Additionally, the “court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be--(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] . . . (C) in excess of statutory . . . authority; [or] . . . (E) unsupported by substantial evidence.” 5 U.S.C. § 706(2).

DISCUSSION

The court first considers the Government’s motion to dismiss Plaintiffs’ claims based on non-justiciability. As discussed below, because the court finds that the claims are reviewable, the court turns next to the cross-motions concerning the USTR’s authority pursuant to section 307 of the Trade Act and alleged procedural violations. Lastly, the court considers the Government’s partial consent motion to correct the administrative record.

I. Reviewability of Plaintiffs' Claims

1. Whether List 3 and List 4A Constitute Unreviewable Presidential Action

a. Parties' Contentions

The Government contends that Plaintiffs seek to challenge presidential—as opposed to agency—action because at each step in the modification process, “the USTR acted at ‘the specific direction . . . of the President.’” Defs.’ Mot. at 22 (quoting 19 U.S.C. § 2417(a)(1)). When the President “exercise[s] his discretion to direct action” pursuant to section 307(a)(1), the Government contends, “the action constitutes presidential action.” Defs.’ Resp. & Reply at 5. Thus, the Government contends, Plaintiffs’ claims arising out of the APA must fail “because the President is not an ‘agency’ within the meaning of the APA.” Defs.’ Mot. at 22 (citing, *inter alia*, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992)).

Plaintiffs contend that the promulgation of List 3 and List 4A constitute final agency action because sections 301 and 307 of the Trade Act authorize the USTR—not the President—to act, and relevant *Federal Register* notices reflect the USTR’s determination to take the specified actions. Pls.’ Cross-Mot. & Resp. at 47 (citing *Final List 3*, 83 Fed. Reg. at 47,974, and *Final List 4*, 84 Fed. Reg. at 43,304). Plaintiffs also point to legislative history accompanying the 1988 amendments to the Trade Act that transferred authority from the President to the USTR. *Id.* (citing H.R. REP. NO. 100-576 at 511 (1988) (conf. report)). Plaintiffs further contend that judicial precedent supports reviewing the USTR’s actions even when taken pursuant to Presidential direction. *Id.* at 48–49 (citing, *inter alia*, *Invenergy Renewables LLC v. United States*, 43 CIT __, __,

422 F. Supp. 3d 1255, 1282–83, 1294 (2019), and *Gilda Indus., Inc. v. United States* (“*Gilda II*”), 622 F.3d 1358, 1363 (Fed. Cir. 2010)).

b. List 3 and List 4A Implicate Agency Actions That Are Judicially Reviewable

While “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review,” 5 U.S.C. § 704, presidential action is non-reviewable under the APA, *Franklin*, 505 U.S. at 800–01. The Government’s arguments for dismissal raise the question whether agency action taken in accordance with presidential direction pursuant to section 307 constitutes non-reviewable presidential action.

For purposes of this case, the answer to that question is “no.” *Franklin* held that the APA did not apply to a challenge to reapportionment because the President, not the Secretary of Commerce, sent the final apportionment to Congress and thus took the final step “affecting the States.” 505 U.S. at 796–801. Accordingly, *Franklin*’s bar on judicial review generally is “limited to those cases in which the President has final constitutional or statutory responsibility for the *final step* necessary for the agency action directly to affect the parties.” *Pub. Citizen v. USTR*, 5 F.3d 549, 552 (D.C. Cir. 1993) (emphasis added)⁷ (declining APA review over a challenge to the North American Free

⁷ The opinions of the U.S. Court of Appeals for the D.C. Circuit are not binding on this court. However, the court finds judicial precedent from the D.C. Circuit instructive in light of the court’s expertise in the area of administrative law. See, e.g., *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 535 n.14 (1978) (observing that “the vast majority of challenges to administrative agency action are brought to the [D.C. Circuit]”); see generally Richard J. Pierce, Jr., *The Special*

Trade Agreement (“NAFTA”) because Congress gave the President “the discretion to renegotiate NAFTA before submitting to Congress or to refuse to submit it at all” and it was, therefore, the President’s action, not the USTR’s, that affected members of the plaintiff-organization).⁸

Here, the Government extends *Franklin* beyond its holding when it argues, in effect, that *antecedent* presidential direction lacking any direct effect on relevant parties renders List 3 and List 4A non-reviewable presidential actions. The Government cites no authority to support such a broad reading. Indeed, in an analogous context, courts review agency action taken to implement Presidential proclamations and Executive orders—each of which are forms of presidential direction—pursuant to the APA. See, e.g., *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012) (conducting APA review over agency action taken to implement an Executive order); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1326–27 (D.C. Cir. 1996) (surmising that agency regulations based on an Executive order issued by the President would be reviewable

Contributions of the D.C. Circuit to Administrative Law, 90 GEO. L.J. 779 (2002). The U.S. Court of Appeals for the Federal Circuit has also relied on D.C. Circuit precedent. See *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affs.*, 260 F.3d 1365, 1379–81 (Fed. Cir. 2001) (“NOVA”) (following *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 151 (D.C. Cir. 1993)).

⁸ In *Franklin*, the Court considered the importance of the President’s role in the “integrity of the [reapportionment] process” in reaching its decision. 505 U.S. at 800. Likewise, in *Public Citizen*, the appellate court noted that the President was considered “essential to the integrity of international trade negotiations” as evidenced by “the requirement that the President, and not [the USTR], initiate trade negotiations and submit trade agreements and their implementing legislation to Congress.” 5 F.3d at 552. The D.C. Circuit left open the possibility that “APA review of otherwise final agency actions may well be available” when “the President’s role is not essential to the integrity of the process.” *Id.*

under the APA had plaintiffs brought such a claim); *Tate v. Pompeo*, 513 F. Supp. 3d 132 (D.D.C. 2021) (reviewing agency action taken to implement a Presidential proclamation). Thus, although “actions involving discretionary authority delegated by Congress to the President” may be non-reviewable under the APA, such cases are distinct from those “involving authority delegated by Congress to an agency.” See *Detroit Int’l Bridge Co. v. Gov’t of Can.*, 189 F. Supp. 3d 85, 98–105 (D.D.C. 2016).⁹

This case concerns the latter circumstance. Congress delegated to the USTR authority over modifications to section 301 actions. See 19 U.S.C. § 2417(a)(1); H.R. REP. No. 100-576 at 551 (recognizing the USTR’s authority to decide and implement section 301 actions and noting that “[t]he President would not retain separate authority

⁹ The *Detroit International* court declined to review the U.S. Department of State’s (“USDS”) issuance of a permit to build a bridge across an international boundary because Congress had vested discretionary authority over bridge approvals in the President, who had, in turn, delegated certain ministerial responsibilities to USDS by Executive Order). 189 F. Supp. 3d 85, 98–105. In noting the significance of the recipient of Congress’ delegation, however, the court explained that “an unreviewable presidential action must involve the exercise of discretionary authority *vested in the President*; an agency acting on behalf of the President is not sufficient by itself” to avoid APA review. 189 F. Supp. 3d at 104 (emphasis added). For this proposition, the court cited Justice Elena Kagan, then Visiting Professor at Harvard Law School, who wrote:

When the challenge is to an action delegated to an agency head but directed by the President, . . . the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency’s action should govern. Nothing in *Franklin’s* interpretation of the APA or in its—or any other case’s—underlying discussion of separation of powers issues is to the contrary.

Id. (quoting Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2351 (2001)).

to take action”).¹⁰ Consistent with the statute, the USTR engaged in a rulemaking process, the results of which—List 3 and List 4A—“directly affect[ed] the parties.” *Franklin*, 505 U.S. at 797.

¹⁰ When Congress transferred authority over section 301 actions from the President to the USTR in the 1988 amendments to the Trade Act and gave the USTR the authority to modify section 301 actions, Congress gave some indication of its reasons for preserving a role for the President. Addressing the phrase “subject to the direction, if any, of the President,” which did not include the term “specific” as ultimately enacted, the House Ways and Means Committee Report recognized “that the President could provide broad policy direction or endorse the USTR decision,” but that the “details of particular actions would remain with the USTR, including modification and termination of prior retaliatory action.” H.R. REP. NO. 100-40 at 59 (1987). Additionally, the Committee Report “recognize[d] that if there is a policy issue of major magnitude, the President could direct the USTR to take a different course of action.” *Id.* at 59–60. However, “[t]he Committee expect[ed] that the interagency committee advisory process prior to the decision by the USTR [would] virtually eliminate the instances in which any specific direction from the President would be appropriate.” *Id.* at 59–60. Thus, although Congress envisioned the President retaining a role with respect to broad policy direction or directing the USTR to take action relating to issues of extraordinary importance, see *id.*, Congress generally gave the USTR authority over the detailed decision-making process required by statute, see 19 U.S.C. § 2411, *et seq.*

Of course, what Congress envisioned is not as important as what the statute allows. At least in this case, however, and with respect to List 3, the evidence of record is consistent with the legislative history (the record lacks evidence of presidential direction with respect to List 4A beyond the USTR’s assertions in the relevant notices). While the President offered “broad policy direction,” and specifically directed the USTR regarding the size of the modification, the level of tariffs, and the date of implementation and directed the USTR to take the final action, see June 2018 Presidential Statement; Sept. 2018 Presidential Statement, at the hearing, the Government acknowledged that the record does not contain evidence that the President had final authority in the process of approving the final list of tariff subheadings covered by the determinations, Oral Arg. 7:50–9:40, available at <https://www.cit.uscourts.gov/sites/cit/files/020122-21-00052-3JP.mp3> (time stamp from the recording). Thus, while the USTR’s modification authority is subject to the specific direction of the President, it is still the USTR that is acting for purposes of the APA.

The court thus concludes that Plaintiffs' claims are not non-reviewable pursuant to the APA by virtue of the President's involvement.¹¹ Accordingly, the court denies the Government's motion to dismiss Plaintiffs' claims on this basis.

2. Political Question Doctrine

a. Parties' Contentions

The Government contends that Plaintiffs' claims are non-justiciable pursuant to the political question doctrine because they implicate the President's discretionary determinations that modification of the original section 301 action was merited. Defs.' Mot. at 25. Specifically, the Government contends, Plaintiffs seek to challenge the President's determinations (1) that the original action "was 'no longer appropriate'" and "whether new tariffs [are] 'appropriate'"; and (2) that China's retaliatory conduct "increased the burden on the United States economy." *Id.* at 26–27 (citations omitted). According to the Government, the "highly discretionary nature of what is 'appropriate'" under the circumstances means that "the statute lacks a 'judicially discoverable and manageable standard[.]'" *Id.* at 27 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (alteration in original); see also *id.* at 28 (discussing *Almond Bros. Lumber Co. v. United States*, 721 F.3d 1320, 1326–27 (Fed. Cir. 2013)); Defs.' Resp. & Reply at 9–10. The

¹¹ While the Parties dispute the applicability of *Gilda II*, that case is not dispositive of the issues raised by the Government. *Gilda II* addressed the automatic termination provision set forth in section 307(c)(1). 622 F.3d at 1362–67. That provision does not preserve a role for presidential direction. See 19 U.S.C. § 2417(c)(1). Further, in that case, the appellate court addressed the effect on section 307(c)(1) of the USTR's *failure to act* in accordance with the notice requirement set forth in section 307(c)(2). *Gilda II*, 622 F.3d at 1364–65. The court did not address whether any action by the USTR, had it occurred, would be subject to the APA.

Government also contends that “prudential considerations” disfavor judicial review. Defs.’ Mot. at 29. To that end, the Government contends that “[P]laintiffs invite competing policies and statements regarding United States trade policy from the Judicial Branch, potentially disrupting the conduct of United States foreign relations,” such as ongoing trade negotiations with China. *Id.*

Plaintiffs contend that their claims implicate matters of statutory interpretation and compliance with the APA, both of which present judicially manageable standards. Pls.’ Cross-Mot. & Resp. at 50–51. Thus, Plaintiffs contend, their claims neither “challenge discretionary determinations committed to the Executive Branch,” *id.* at 51, nor seek judicial pronouncements on trade policy, *id.* at 52. Plaintiffs rely on *Almond Brothers* to contend that the court may resolve arguments regarding statutory interpretation while declining to address discretionary USTR determinations. *Id.* (citing *Almond Bros.*, 721 F.3d at 1326–27).

b. Plaintiffs’ Claims Do Not Implicate a Non-Justiciable Political Question

A controversy may involve a political question when there is:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. While the doctrine precludes judicial review of “controversies which revolve around policy choices and value determinations constitutionally committed” to the Legislative or Executive Branches, “it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.” *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986). The court may not “shirk [its] responsibility” to ascertain the proper interpretation of a statute “merely because [its] decision may have significant political overtones.” *Id.*; see also *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (explaining that resolution of the plaintiff’s claim did not turn on “the courts’ own unmoored determination of what United States policy toward Jerusalem should be,” but instead on the “familiar judicial exercise” of deciding whether the plaintiff’s “interpretation of the statute is correct, and whether the statute is constitutional,” such that the political question doctrine did not apply).

The “decision that a question is nonjusticiable is not one courts should make lightly.” *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362 (Fed. Cir. 2004). Here, however, the court readily concludes that Plaintiffs’ claims do not raise non-justiciable political questions.

Plaintiffs allege, *inter alia*, that the USTR exceeded the authority provided by section 307(a)(1)(B) and (C) of the Trade Act when it promulgated List 3 and List 4A. 20-177 Am. Compl. ¶¶ 68–70, 73. It is clear from the court’s discussion, *infra*, that such claims require the court to engage in the “familiar judicial exercise” of statutory interpretation in order to ascertain whether the factual predicate for the modifications fell

within the purview of subsection (B), and whether subsection (C) is limited to reductions in, or termination of, trade actions. See *Zivotofsky*, 566 U.S. at 196.

The court is not questioning the USTR's determination that China's subsequent defensive conduct increased the burden on U.S. commerce, Defs.' Mot. at 27–28, indeed, Plaintiffs concede that it did, Pls.' Cross-Mot. & Resp. at 31. Instead, the issue before the court is whether that conduct increased the burden on U.S. commerce *in a legally relevant way*. That inquiry requires the court to interpret the meaning of the statutory terms, “the acts, policies, and practices[] that are the subject of such action,” in relation to this modification action. 19 U.S.C. § 2417(a)(1)(B). Likewise, the court is not reviewing the USTR's discretionary decisions regarding the appropriateness of certain actions pursuant to subsection (C). See Defs.' Mot. at 26.

For these reasons, the Government's reliance on *Almond Brothers* is misplaced. Resolution of that case turned on the appellate court's application of the APA's narrow exception to judicial review for “agency action [that] is committed to agency discretion by law,” 5 U.S.C. § 701(a)(2), to the plaintiff's challenges to the terms of an agreement the USTR entered into with Canada, see *Almond Bros.*, 721 F.3d at 1322, 1325–27. While finding the substance of the terms of the agreement to fall within the USTR's discretionary authority such that there was “no law to apply,” *id.* at 1327 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)), the court nevertheless considered, and rejected, the plaintiff's argument that the agreement failed to meet other applicable statutory requirements, *id.*

The Government's motion does not discuss the political question doctrine in relation to Plaintiffs' claims concerning the USTR's compliance with the procedural requirements set forth in the APA. See Defs.' Mot. at 25–30; 20-177 Am. Compl. ¶¶ 74–75. In its reply brief, the Government asserts that, “[i]f a case presents an unreviewable political question, then *no* review of those claims is available under the APA.” Defs.' Resp. & Reply at 10 (citing *Heckler v. Chaney*, 470 U.S. 821, 828 (1985), and *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 97 (D.D.C. 2016)) (emphasis added). The cited cases are inapposite because each addressed the unavailability of APA review of substantive—as opposed to procedural—claims. See *Heckler*, 470 U.S. at 837–38 (finding that an agency's discretionary decision not to undertake an enforcement action was not subject to judicial review pursuant to 5 U.S.C. § 701(a)(2)); *Mobarez*, 187 F. Supp. 3d at 92 (declining to undertake APA review of the plaintiff's claim that the U.S. government failed to fulfill its alleged duty to evacuate U.S. citizens from Yemen and distinguishing such claims from reviewable “garden-variety” claims requiring statutory interpretation).

Simply put, the policy-laden questions to which the USTR directed its discretionary authority are not before the court. See Defs.' Mot. at 29 (arguing that “plaintiffs invite competing policies and statements regarding United States trade policy from the Judicial Branch”). Matters of statutory interpretation and compliance with procedural requirements are independent questions the court is well-equipped to answer. Thus, the court is not risking “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369

U.S. at 217. Accordingly, the court denies the Government's motion to dismiss Plaintiffs' claims based on purported non-justiciability and now turns to the merits of those claims.

II. Whether the USTR Exceeded its Modification Authority Pursuant to Section 307 of the Trade Act

1. Standard of Review

a. Parties' Contentions

The Government contends that, even if the contested actions are those of the USTR, a heightened standard of review applies, namely, whether there has been "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." Defs.' Mot. at 30–31 (quoting *Gilda II*, 622 F.3d at 1363). The Government asserts that the USTR conducts "[a]ll functions . . . under the direction of the President," *id.* at 30,¹² meaning that the court must "afford[] substantial deference to decisions of the [USTR] implicating the discretionary authority of the President in matters of foreign relations," *id.* (quoting *Gilda II*, 622 F.2d at 1363).

Plaintiffs contend that the court "is the final authority on issues of statutory construction," Pls.' Cross-Mot. & Resp. at 39 (quoting *Gilda II*, 622 F.3d at 1363), and resolving this case requires applying the *Chevron* framework, *id.* at 39–40 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984)).

¹² The Government identifies 19 U.S.C. § 2171(a) as the source for this quotation, but the phrase is instead found in *Reorganization Plan No. 3 of 1979*, 44 Fed. Reg. 69,273, 69,274 (1979) (reorganization of functions relating to international trade, section 1(b)(4)).

Plaintiffs further contend that the statute is unambiguous, but that even if it were not, the USTR's interpretation merits no deference. *Id.* at 41–42. Plaintiffs also contend that the Government has misconstrued the authorities upon which it seeks to rely. Pls.' Reply at 3–5.

b. Analysis

In cases arising under the court's jurisdiction pursuant to 28 U.S.C. § 1581(i), the court applies the standard of review set forth in the APA. 28 U.S.C. § 2640(e). The “court must ‘decide all relevant questions of law, interpret constitutional and statutory provisions,’ and ‘hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Gilda II*, 622 F.3d at 1363 (quoting 5 U.S.C. § 706) (alteration in original).

While the Government seeks to distinguish *Gilda II* based on the underlying statute at issue,¹³ see Defs.' Resp. & Reply at 6, that distinction is inapposite here. *Gilda II* recognizes that although the “court affords substantial deference to decisions of the Trade Representative implicating the *discretionary authority* of the President in matters of foreign relations,” *id.* (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (emphasis added), “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary

¹³ *Gilda II* addressed the USTR's interpretation of 19 U.S.C. § 2417(c)(1), the statutory provision governing automatic termination of retaliatory duties. 622 F.3d at 1362. That provision does not involve presidential direction.

to clear congressional intent,” *id.* (quoting *Chevron*, 467 U.S. at 843 n.9 (1984)) (alteration in original). Thus, when “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* (quoting *Chevron*, 467 U.S. at 842–43).

Accordingly, the appellate court distinguished matters implicating presidential discretion from those requiring statutory interpretation. See *Gilda II*, 622 F.3d at 1363.

Here, resolving Plaintiffs’ substantive claims requires the court first to interpret the relevant statutory provisions; thus, the court “must first carefully investigate the matter to determine whether Congress’s purpose and intent on the question at issue is judicially ascertainable.” *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). Accordingly, the court turns to its examination of “the statute’s text, structure, and legislative history,” applying, if necessary, “the relevant canons of interpretation.” *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (quoting *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012)).¹⁴

¹⁴ The Government’s reliance on *Maple Leaf Fish Co.*, 762 F.2d 86, *Silfab Solar, Inc. v. United States*, 892 F.3d 1340 (Fed. Cir. 2018), and *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), *cert. denied*, 2022 WL 892108 (U.S. Mar. 28, 2022), is also unpersuasive. See Defs.’ Mot. at 30–31; Defs.’ Resp. & Reply at 11–13. *Silfab Solar* and *Maple Leaf Fish Co.* address, respectively, the extent to which the court may review findings of fact by the President or the U.S. International Trade Commission in preparation for presidential action. *Silfab Solar*, 892 F.3d at 1349; *Maple Leaf Fish Co.*, 762 F.2d at 89–90. In *Transpacific*, the appellate court addressed the timeliness of presidential action pursuant to section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862. 4 F.4th at 1318–19. That inquiry required the court to interpret the meaning of the term “action” pursuant to 19 U.S.C. § 1862(c)(1)(B). *Id.* at 1322. In so doing, the court considered the statute’s ordinary meaning, *id.* at 1319–22, “relevant statutory context,” *id.* at 1322, and the statute’s “legal and historical backdrop,”

Because the court finds that the statute is unambiguous, the court need not and does not address what, if any, deference the USTR's interpretation of the statute would be given if the statute was ambiguous.

2. The USTR's Authority Pursuant to Section 307(a)(1)(B)

a. Parties' Contentions

The Government contends that "China's subsequent actions"—retaliatory tariffs and other measures such as currency devaluation—"were not separate and distinct from their unfair trade practices investigated under section 301" but "were directly related" to the investigation and intended to permit and defend the continuation of the investigated practices. Defs.' Mot. at 32.¹⁵ The Government further contends that Plaintiffs' interpretation of the statute would prevent the President and the USTR from "respond[ing] to a trading partner's refusal to eliminate its unfair trade practices" and retaliatory actions. *Id.* at 33. Such an interpretation, the Government contends, is inconsistent with both the USTR's authority to take "all 'appropriate and feasible action' within the power of the President" to eliminate the unfair practices pursuant to section

id. at 1324 (citation omitted), before concluding that Congress' intent was plain with respect to the operative term. These cases thus lend support for the distinction between review of discretionary decisions and statutory interpretation recognized in *Gilda II*.

¹⁵ Indeed, the Government contends that China's defensive actions permitted the USTR to modify the section 301 action under both subsections (B) and (C). Defs.' Mot. at 33. The Government asserts, and Plaintiffs agree, that each subsection—(B) and (C)—constitutes "an independent basis for action" and failure as to one is not a basis to overturn the action. Defs.' Mot. at 36 n.6; Oral Arg. 1:55:10–1:55:30 (colloquy with Plaintiffs during which they agreed that each statutory basis provides independent authority for the modifications).

301(b)(2), *id.*, and legislative history surrounding the 1988 amendments to section 301 indicating congressional desire for vigorous action in response to unfair trade practices, *id.* at 37–38.

Drawing a temporal line in the sand, Plaintiffs contend that the phrase “the subject of such action” in subsection (B) cannot encompass China’s defensive actions “because those actions had not yet transpired when the investigation was initiated or when USTR determined that remedial action was ‘appropriate.’” Pls.’ Cross-Mot. & Resp. at 31. Thus, Plaintiffs contend, “[t]he increased burden cannot come from other subsequent ‘defensive’ actions.” *Id.* at 32; *cf.* Ecolab’s Br. at 8–12 (advancing similar arguments). Plaintiffs contend that any congressional intent to permit the USTR “to prosecute a limitless trade war” would have been stated in clearer terms, “not through the tailored language of Section 307(a)(1)(B).” Pls.’ Cross-Mot. & Resp. at 31–32. Plaintiffs also contend that the existence of explicit retaliation authority pursuant to section 306(b)(2) disfavors interpreting subsection (B) to allow the USTR to retaliate against a trading partner’s actions under the guise of modification. *See id.* at 32–33.

The Government counters that the USTR “made the required finding that the burden on U.S. commerce had increased as a result of China’s unfair trade practices, *and* its ‘subsequent defensive actions taken to maintain’ those practices.” Defs.’ Resp. & Reply at 14 (citing *Final List 3*, 83 Fed. Reg. at 47,974, and *Final List 4*, 84 Fed. Reg.

at 43,304) (emphasis added).¹⁶ The Government contends that the court should reject Plaintiffs' characterization of the initial investigation as "limited and discrete," *id.* at 16, because the investigated practices covered "China's massive 'top-down national strategy[]' unfairly to acquire U.S. technology," which required "the mobilization and participation of all sectors of [Chinese] society," *id.* at 15–16 & n.4 (quoting USTR Report at 11). The Government also contends that section 306(b)(2) applies in different circumstances and "is irrelevant here." *Id.* at 16. While recognizing that resort to legislative history is unnecessary when a statute is plain, Defs.' Mot. at 5 n.2, the Government contends that the legislative history behind the 1988 amendments to the Trade Act supports interpreting subsection (B) to allow the USTR to respond to defensive conduct, Defs.' Resp. & Reply at 18 (citing 133 CONG. REC. 20,486 (1987) (statement of Sen. Lautenberg); S. REP. NO. 100-71 (1987), at 73–74).

In their Reply, Plaintiffs contend that the Government's assertions of an increased burden on U.S. commerce from the investigated practices are conclusory and unavailing. Pls.' Reply at 7–8. Plaintiffs contend that the Government's "true argument" for reliance on subsection (B) remains China's subsequent defensive conduct that is distinct from the "the four discrete categories of intellectual property and technology transfer conduct that USTR actually investigated." *Id.* at 8. Plaintiffs further contend that the Government's reliance on the USTR Report constitutes a *post hoc*

¹⁶ In that regard, the Government also points to a statement regarding China's acquisition of hybrid vehicle technology from Toyota. Defs.' Resp. & Reply at 15 (quoting Mem. from USTR General Counsel Stephen Vaughn to USTR Robert Lighthizer (Sept. 17, 2018) ("Sept. 2018 Vaughn Mem.") at 6, PR 1).

rationalization for the USTR's action. *Id.* at 10. Lastly, Plaintiffs contend that the Government's dismissal of the relevance of section 306 misses the point. *Id.* at 10 n.3. Plaintiffs argue that the existence of "section 306 shows that Congress understood how to authorize 'retaliation' explicitly against another country's response to trade proceedings or actions where it wanted to." *Id.*

b. In Promulgating List 3 and List 4A, the USTR Properly Exercised Its Authority Pursuant to Section 307(a)(1)(B)

The court begins with the language of the statute. The statute permits the USTR to "modify or terminate *any action*, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if— . . . the *burden or restriction* on United States commerce . . . of the *acts, policies, and practices*, that are the *subject of such action* has increased or decreased." 19 U.S.C. § 2417(a)(1)(B) (emphasis added). This case requires the court first to interpret the meaning of the phrase, "the subject of such action," because the Parties disagree about whether retaliatory actions taken by China can be the source of burden from the acts, policies, and practices that were the subject of the original action.

Plaintiffs contend that the relevant phrase refers to the subject of the original investigation. Pls.' Cross-Mot. & Resp. at 32; Pls.' Reply at 7–9. The plain meaning of the terms supports that interpretation. Black's Law Dictionary¹⁷ defines "subject," when used as a noun, as "[t]he matter of concern over which something is created; something

¹⁷ Courts have long considered dictionary definitions to discern the ordinary meaning of a term. See, e.g., *Nix v. Hedden*, 149 U.S. 304, 306–07 (1893); *Gumpenberger v. Wilkie*, 973 F.3d 1379, 1382 (Fed. Cir. 2020).

about which thought or the constructive faculty is employed,” for example, “the subject of the statute.” Black’s Law Dictionary at 1465 (8th Ed. 2004); *cf.* Subject (noun), The Oxford English Dictionary, Vol. XVII at 29 (2nd Ed. 1989) (“A thing affording matter for action of a specified kind; a ground motive or cause.”). The phrase “such action,” when read in context, refers to the “action” referenced in the introductory clause of section 307(a)(1). See 19 U.S.C. § 2417(a)(1)(B); *cf. Solar Energy Indus. Ass’n v. United States*, Slip Op. 21-154, 2021 WL 5320790, at *9 (Nov. 16, 2021) (stating that the term “‘such’ is typically read to ‘refer[] back to something indicated earlier in the text’”) (citation omitted) (alteration in original). The term “action,” in the introductory clause, constitutes a reference to the action taken pursuant to section 301, i.e., the initial action. See 19 U.S.C. § 2417(a)(1) (cross-referencing 19 U.S.C. § 2411). Thus, to rely on the authority provided by subsection (B), the USTR must act based on increased harm to U.S. commerce from the acts, policies, and practices that constituted the subject of the original investigation. Indeed, the Government does not present a different textual view of the provision. The court thus finds the text of the statute plain with respect to subsection (B) and need not resort to legislative history or other tools of statutory interpretation.

Interpreting the meaning of the phrase does not, however, end the inquiry. Instead, the Parties dispute what was the subject of the action and whether China’s defensive conduct, occurring subsequent to the original investigation, can properly be considered the basis for an increase in the harm stemming from the subject of the action. See, e.g., Pls.’ Cross-Mot. & Resp. at 32; Defs.’ Resp. & Reply at 15–16.

Plaintiffs argue that the subject of the action must be limited to “the investigated intellectual property practices themselves.” Pls.’ Cross-Mot. & Resp. at 25 (emphasis omitted); see *a/so* Pls.’ Reply at 8 (distinguishing China’s retaliation from the conduct “that USTR actually investigated”). The Government argues that China’s retaliatory conduct was “not separate and distinct from” the investigated acts and was instead “directly related” to the acts, policies, and practices that were the subject of the investigation. Defs.’ Mot. at 32; Defs.’ Resp. & Reply at 15.

Upon review of the record of the agency’s proceedings and the arguments of the Parties, the court finds that the link between the subject of the original section 301 action and China’s retaliation is plain on its face. The USTR’s initial determination was statutorily required to be designed to lead to the elimination of the unfair acts, policies, and practices, but without any requirement for the action to be focused on the same or similar industries. See 19 U.S.C. § 2411(b)(2). Thus, by imposing duties on \$50 billion in trade, the USTR intended to disrupt the trade flow into the United States in such amount necessary to lead to the elimination of China’s unfair practices. By directly offsetting the duties on the \$50 billion in trade with its own duties on \$50 billion in trade from the United States, China directly connected its retaliation to the U.S. action and to its own acts, policies, and practices that the U.S. action was designed to eliminate. See *Final List 3*, 83 Fed. Reg. at 47,974; *cf. Final List 4*, 84 Fed. Reg. at 43,304 (noting China’s decision to impose tariffs on \$110 billion worth of U.S. goods).

Plaintiffs’ arguments that China’s retaliatory conduct cannot be part of “the subject of” the action because that conduct post-dates the initial investigation and

determination are not persuasive. Pls.' Cross-Mot. & Resp. at 31; see *also* Pls.' Reply at 8 ("As a temporal and logical matter, the 'subject of' the section 301 action does not encompass all 'subsequent defensive measures' China might take in retaliation for U.S. tariffs."). Modifications are based on activity increasing (or decreasing) the burden on U.S. commerce after the initial determination. 19 U.S.C. § 2417(a)(1)(B). Plaintiffs' argument thus turns on whether the USTR found that China's retaliatory conduct caused an increased burden on U.S. commerce from the acts, policies, and practices that constituted the subject of the action. Because, as discussed below, the court concludes that it did, Plaintiffs' timing-based argument must fail.¹⁸

In determining whether the USTR reasonably considered China's retaliatory actions to be within the purview of the "subject of the action," the court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Nevertheless, the

¹⁸ Plaintiffs also argue that "[t]he magnitude of the responsive List 3 and List 4A actions . . . underscores their distinct nature." Pls.' Reply at 8. According to Plaintiffs, the USTR deemed \$50 billion "commensurate" to the harms" resulting from the "investigated practices." *Id.* The USTR explained that a \$50 billion action was initially "appropriate both in light of the estimated harm to the U.S. economy, and to obtain elimination of China's harmful acts, policies, and practices." *USTR Determination*, 83 Fed. Reg. at 14,907. The USTR is not, however, statutorily required to quantify any increase in burden or otherwise show that the increase in tariffs is commensurate to the increased harm. See 19 U.S.C. § 2417(a)(1)(B); *compare id.* § 2411(a)(3) (stating that mandatory actions taken pursuant to section 301(a)(1) "shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce"), *with id.* § 2411(b) (governing discretionary actions taken pursuant to section 301(b), which does not contain any such limitation).

court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

Beyond the clear connection between the defensive, retaliatory actions and the acts, policies, and practices they seek to defend, List 3 and List 4A reference the USTR’s prior determinations concerning the investigation and subsequent actions. See *Final List 3*, 83 Fed. Reg. at 47,974; *Final List 4*, 84 Fed. Reg. at 43,304. Given that List 3 and List 4A constitute modifications to those actions, the court also looked to the cited determinations to consider further the USTR’s position regarding the scope of the subject of the original action. The USTR broadly defined the investigation as addressing “China’s Acts, Policies, and Practices *Related to* Technology Transfer, Intellectual Property, and Innovation.” *Initiation Notice*, 82 Fed. Reg. at 40,213 (emphasis added). Thus, the investigation covered China’s conduct *related to* the identified matters and not simply, as Plaintiffs contend, the acts *constituting* the identified matters. See *id.* Additionally, while the USTR specified four categories of acts, policies, and practices that it deemed actionable in its initial determination, the USTR described the Report as a “comprehensive” account of “the acts, policies, and practices under investigation.” *USTR Determination*, 83 Fed. Reg. at 14,907. The Report, which is both public and contemporaneous with the USTR’s initial section 301 determination, may also be considered. See *United States v. Sci. Applications Int’l Corp.*, 502 F. Supp. 2d 75, 78 (D.D.C. 2007) (“Generally, ‘when a document incorporates outside material by reference, the subject matter to which it refers

becomes a part of the incorporating document just as if it were set out in full.”) (quoting *Air Line Pilots Ass’n, Int’l v. Delta Air Lines*, 863 F.2d 87, 94 (D.C. Cir. 1988)).

In addition to summarizing the specific acts, policies, and practices related to technology transfer, intellectual property, and innovation under investigation, the USTR Report provided the historical context in which those actions arose. The Report explained that “[c]oncerns about a wide range of unfair practices of the Chinese government . . . related to [those matters] are longstanding.” USTR Report at 4. The Report noted that the investigation covered the Chinese government’s use of “a variety of tools, including opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, procurements, *and other mechanisms* to regulate or intervene in U.S. companies’ operations in China, in order to require or pressure the transfer of technologies and intellectual property to Chinese companies.” *Id.* at 5 (emphasis added). Indeed, as noted by the Government, China’s “top-down national strategy” for acquiring technology “requires the mobilization and participation of all sectors of [Chinese] society.” *Id.* at 11.

In addition to these concerns, the Report specifically explained the reluctance among U.S. companies to “complain about China’s unfair trade practices” because of concerns about “Chinese retaliation.” *Id.* at 9. “Other mechanisms” used to regulate U.S. companies’ operations in China thus included the lack of “effective recourse” for U.S. companies wanting to report “informal pressures for fear of retaliation and the potential loss of business opportunities.” *Id.* at 21. According to the USTR, “concerns

about retaliation have enabled China's technology transfer regime to persist for more than a decade." *Id.*; *see also id.* at 21 n.106.

The foregoing discussion of retaliation in the USTR Report provides context and explanation regarding the reasons why individual companies were unable and unwilling to pursue their own complaints against the underlying Chinese practices. This recognition of the challenges faced by individual companies led the USTR, consistent with the direction of the President, to initiate the section 301 action in order to protect U.S. companies without them filing their own petitions and incurring the consequences of targeted retaliation. *See id.* at 10. Thus, even if the retaliatory actions by China were not otherwise clearly related to the acts, policies, and practices that China sought to defend from the USTR's section 301 action, the USTR Report provides a basis for regarding China's retaliatory actions as within the scope of the acts, policies, and practices that were the subject of the original action.

The USTR's rationale for List 3 and List 4A reflects this understanding of the agency's authority pursuant to subsection (B). As the USTR explained, China's retaliation against the initial imposition constitutes conduct that is related to the specified unfair trade policies because it is intended to "maintain those policies." *Final List 3*, 83 Fed. Reg. at 47,974; *see also Final List 4*, 84 Fed. Reg. at 43,304. That retaliation consisted of China's imposition of tariffs on \$50 billion worth of U.S. goods, *Final List 3*, 83 Fed. Reg. at 47,974, later increased to \$110 billion worth of U.S. goods, *Final List 4*, 84 Fed. Reg. at 43,304, and "non-tariff measures," *id.*, including devaluing China's currency, *id.* at 43,305. China's retaliation also caused increased harm to U.S.

commerce; a point that Plaintiffs concede. See, e.g., Pls.' Cross-Mot. & Resp. at 31. Together, these notices reflect the USTR's recognition that Chinese retaliation was similarly directed against the effort to challenge its unfair acts, policies, practices, just as the threats to retaliate against individual companies were directed at maintaining those same practices. Accordingly, the USTR properly found an increased burden on U.S. commerce arising from the acts that formed part of the subject of the original action.¹⁹

For these reasons, the court finds that the USTR exercised its authority consistent with section 307(a)(1)(B) when it promulgated List 3 and List 4A. Because subsections (B) and (C) each provided an independent basis for the determinations, the court need not and does not reach the Parties' arguments concerning the USTR's authority to issue the determinations pursuant to section 307(a)(1)(C).

III. Procedural Claims Pursuant to the APA

The court first addresses the Government's arguments that the promulgation of List 3 and List 4A is exempt from the APA's procedural requirements and, finding those arguments non-meritorious, next addresses Plaintiffs' APA claims.

1. Foreign Affairs Exemption

a. Parties' Contentions

The Government contends that the promulgation of List 3 and List 4A falls under the foreign affairs exception to the APA because they "were part of the negotiation of an

¹⁹ For the same reasons, the court rejects Plaintiffs' argument that the USTR violated the substantive provisions of the APA by failing to point to evidence of an "increased burden" from the investigated practices. See Pls.' Reply at 23–24.

international trade agreement” and “relate[d] to the President’s ‘overall political agenda concerning relations with another country.’” Defs.’ Mot. at 42–43 (quoting *Am. Ass’n of Exps. & Imps. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985)).

Plaintiffs contend that the promulgation of List 3 and List 4A does not fall under the foreign affairs exception because “the public rulemaking” process “would [not] ‘provoke definitively undesirable international consequences.’” Pls.’ Cross-Mot. & Resp. at 61–62.

b. The Foreign Affairs Exemption Does Not Apply

The APA exempts a rulemaking from notice and comment procedures when the agency action involves a “foreign affairs function of the United States.” 5 U.S.C. § 553(a)(1) (stating that section 553 applies, “except to the extent that” a foreign affairs function “is involved”).²⁰ In other words, the foreign affairs exemption is intended to allow an agency to “*dispense with* [the] notice-and-comment procedures” set forth in section 553. *E.B. v. U.S. Dep’t of State*, 2022 WL 343505, at *4 (D.D.C. 2022) (emphasis added); see also H.R. REP. NO. 79-1980 at 257 (1946) (foreign affairs functions are “exempt[] from *all* of the requirements” set forth in section 553) (emphasis added).

When invoked, the exemption “will be construed narrowly and granted reluctantly,” and “only to the extent that the excepted subject matter is clearly and

²⁰ The Government concedes that, in the event the court finds the promulgation of List 3 and List 4A to constitute agency action, the USTR’s actions are subject to informal rulemaking procedures set forth in 5 U.S.C. § 553(b)–(c) unless the court finds that the foreign affairs exception applies. Defs.’ Mot. at 39.

directly involved in a foreign affairs function.” *Mast Indus., Inc. v. Regan*, 8 CIT 214, 231, 596 F. Supp. 1567, 1582 (1984) (quotations and citation omitted). “The purpose of the exemption [is] to allow more cautious and sensitive consideration of those matters which ‘so affect relations with other Governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences.’” *Am. Ass’n of Exps. & Imps.*, 751 F.2d at 1249 (quoting H.R. REP. NO. 79-1980 at 257).²¹

In this case, the USTR did not invoke the foreign affairs exemption to relieve the agency from any rulemaking procedures that may apply in addition to the requirements of section 307.²² See *Final List 3*, 83 Fed. Reg. at 47,974–75; *Final List 4*, 84 Fed. Reg. at 43,304–05. Indeed, at each step in the processes that resulted in List 3 and List 4A, the USTR, generally consistent with both 19 U.S.C. § 2417(a)(2)–(b) and 5 U.S.C.

²¹ Consistent with its use as an example, meeting the “definitely undesirable international consequences” standard may be enough to invoke the foreign affairs exemption but is not necessary. See *Mast*, 8 CIT at 230, 596 F. Supp. 2d at 1581 (noting that such a finding “has not been considered necessary by courts” and, if it were, “would render the ‘military or foreign affairs function’ superfluous since the ‘good cause’ exception [set forth in section] 553(b)(B), would apply”).

²² The foreign affairs exemption “[does] not relieve an agency from any requirements imposed by law apart from this bill. H.R. REP. NO. 79-1980 at 257. Section 307(a)(2) and (b) require the USTR to “consult with the petitioner, if any, and with representatives of the domestic industry concerned” and to “provide [an] opportunity for the presentation of views by other interested persons affected by the proposed modification or termination” before publishing “the reasons [for]” any modification in the *Federal Register* and providing a report to Congress. 19 U.S.C. § 2417(a)(2)–(b). At the hearing, the Government suggested that the only additional requirement found in the APA as compared to section 307 is the requirement for a reasoned explanation, such that applying the foreign affairs exemption would relieve the court from analyzing the sufficiency of the USTR’s response to public comments. Oral Arg. 59:15–1:01:00. In other words, the Government appears to interpret section 307 to provide at least some opportunity for public comment without requiring the USTR to engage with the comments it receives to the extent required by the APA.

§ 553(b)–(c), published notices of its intended actions, accepted comments from the public, and held public hearings prior to publishing its determinations. *See supra* Background Sec. II. Thus, the Government’s invocation of the exemption is entirely *post hoc* and inconsistent with the manner in which the USTR conducted the modification processes.²³

While the statute does not explicitly require an agency to invoke the foreign affairs exemption in a final rule, the USTR’s failure to make such an invocation combined with the manner in which the USTR conducted these processes suggests that the USTR did not intend to invoke the exemption and, at best, provides the court with an unclear record as to whether the USTR in fact intended to invoke the exemption. *Cf., e.g., Mast*, 8 CIT at 229, 596 F. Supp. at 1580 (documenting explicit invocation of the foreign affairs exemption). The court, however, need not decide whether the foreign affairs exemption may properly be invoked solely by counsel *post hoc*, because the court finds unconvincing the Government’s argument that USTR’s actions “fall squarely within the foreign affairs . . . exception.” Defs.’ Mot. at 44. Unlike in *Mast*, for example, on which the Government seeks to rely in connection with the implementation of international agreements, the United States and China did not enter into any trade

²³ Plaintiffs do not allege facial non-compliance with section 553 but, rather, deficiencies with respect to the USTR’s notice-and-comment procedures. *See* 20-177 Am. Compl. ¶¶ 74–75.

agreement until after the USTR promulgated *Final List 3* and *Final List 4*. See Defs.' Mot. at 41 (citing *Mast*, 8 CIT at 232, 596 F. Supp. 3d at 1582).²⁴

Moreover, courts have recognized that the foreign affairs exemption does not apply simply because a rule relates to ongoing negotiations. See, e.g., *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 776 (9th Cir. 2018) (holding that the foreign affairs exemption did not apply to an interim rule suspending asylum for certain persons when the government claimed that the rule "directly related to ongoing negotiations with Mexico" absent any explanation why immediate publication of the rule furthered the negotiations). This is particularly true when, as here, some form of notice, opportunity to comment, and explanation is otherwise required. See 19 U.S.C. § 2417(a)(2)–(b). The Government has failed to explain how the foreign affairs exemption would "allow more cautious and sensitive consideration of [the] matters" addressed in the contested determinations. See *Am. Ass'n of Exps. & Imps.*, 751 F.2d at 1249.

While the court recognizes the circuit split as to whether an agency action must have "definitely undesirable international consequences" to qualify for the foreign affairs exemption, see *Mast*, 8 CIT at 230 & n.20, 596 F. Supp. at 1581 & n.20, the court is bound by Federal Circuit precedent, which at least considers whether an action would

²⁴ While *Mast* states that "the negotiation of agreements with foreign governments . . . 'clearly and directly' involve[d] a 'foreign affairs function,'" that statement was made in the context of negotiations under section 204 of the Agricultural Act of 1956, which expressly granted the President power to issue regulations in conjunction with the negotiation of international agreements limiting certain imports. 8 CIT at 217, 232, 596 F. Supp. at 1570, 1582.

have such consequences in determining whether the foreign affairs exception should apply, see *Am. Ass'n of Exps. & Imps.*, 751 F.2d at 1249. The Government has not pointed to any such consequences, which would prove difficult given the considerable public airing of the proceedings.²⁵ See *supra* Background Sec. II; *Zhang v. Slattery*, 55 F.3d 732, 744–745 (2d Cir. 1995) (holding that the foreign affairs exemption did not apply to an interim immigration rule because the record lacked evidence that subjecting the rule to notice and comment would have undesirable international consequences and because the focus of the rule had been at the center of a national debate for more than six months prior to the issuance of the rule).

Accordingly, the court turns to the merits of Plaintiffs' APA claims.

2. Response to Comments

a. Parties' Contentions

Plaintiffs contend that the USTR failed to respond to comments in a reasoned manner using two lines of argument. See Pls.' Cross-Mot. & Resp. at 59–60; Pls.' Reply at 25–27. First, Plaintiffs assert that the USTR's failure to address the “overwhelming[]” opposition” to the imposition of List 3 and List 4A was arbitrary and capricious. Pls.' Reply at 26 (quoting Defs.' Resp. & Reply at 38) (alteration in original). Second, Plaintiffs fault the USTR for failing to explain “which comments, and what

²⁵ At the hearing, the Government argued that responding to each of the thousands of comments would provoke undesirable international consequences but did not explain why or specify the nature of the consequences. Oral Arg. 1:00:30–1:01:00. As discussed below, however, a “comment-by-comment” response is not the standard required by the APA.

concerns raised in those comments, caused it to withdraw certain tariff headings and products but not others.” Pls.’ Cross-Mot. & Resp. at 59–60.

Amici Curiae Retail Litigation Center, Inc. and others (collectively, “RLC”) likewise contend that the USTR neither considered, nor took sufficient time to consider, substantial objections to the modifications. RLC’s Br. at 12–15. While framing its arguments in terms of the APA, RLC contends that the USTR’s actions are more troubling given the statutory requirement to provide opportunity for the public to comment. *Id.* at 13–14 (citing 19 U.S.C. § 2417(a)(2)). RLC argues that the USTR failed to engage meaningfully with comments expressing concerns that the modification actions would harm the U.S. economy, “act[] as a hidden tax for consumers on everyday products,” *id.* at 14, and disrupt “the supply chains of U.S. retailers, manufacturers, and producers,” *id.* at 15.

The Government contends that the USTR considered the factors relevant to the statutory determinations pursuant to section 307(a)(1)(B) and (C). Defs.’ Mot. at 46–47, 58–59. The Government further contends that the *Federal Register* notices associated with List 3 reflect the USTR’s consideration of comments in its determinations to omit certain tariff subheadings, delay the onset of the increase in the level of List 3 duties from 10 percent to 25 percent, and establish an exclusion process. *Id.* at 58–59. With respect to List 4A, the Government contends that the USTR responded to comments by stating the bases upon which it removed certain tariff subheadings, separating the subheadings into two lists and staggering the effective date of List 4B, and establishing an exclusion process. *Id.* at 59; see also Defs.’ Resp. & Reply at 41. The Government

also contends that policy issues raised by RLC fail to provide a basis to “overturn[] the tariffs.” Defs.’ Resp. & Reply at 42.

b. The USTR Failed to Respond Adequately to Comments

The APA requires agencies conducting notice and comment rulemaking to “incorporate in the rules adopted a concise general statement of their basis and purpose.” 5 U.S.C. § 553(c). An agency’s explanation of the basis and purpose for its action must demonstrate a “consideration of the relevant factors,” *State Farm*, 463 U.S. at 43 (citation omitted), and “must offer a rational connection between the facts found and the choice made,” *id.* at 52 (quotations and citation omitted). The standard that an agency’s response must meet “is not particularly demanding.” *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997) (per curiam) (quotations and citation omitted). A court will not, however, undertake a “laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution.” *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). For “judicial review . . . to be meaningful,” the agency’s explanation must enable the court “to see *what major issues of policy were ventilated* by the informal proceedings and why the agency reacted to them as it did.” *Id.* (emphasis added). Conclusory statements that do not explain how a determination was reached are therefore insufficient. *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010).

The enabling statute informs the court’s examination of an agency’s basis and purpose statement and the relevance of comments received by an agency. Agency

action through notice and comment rulemaking must be tethered to the statute. See, e.g., *State Farm*, 463 U.S. at 43 (explaining that an agency cannot rely on factors “which Congress has not intended it to consider”). Additionally, “[t]he basis and purpose statement is inextricably intertwined with the receipt of comments.” *Action on Smoking & Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (footnote citation omitted). An agency “must respond in a reasoned manner to those [comments] that raise significant problems.” *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003) (quotations and citation omitted). “Significant comments are those ‘which, if true, raise points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule.’” *City of Portland, Oregon v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)). “[F]ailure to respond to comments is significant only insofar as it demonstrates that the agency’s decision was not based on a consideration of the relevant factors.” *Sherley*, 689 F.3d at 784 (quotations and citations omitted). “[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.” *Id.* (quotations and citation omitted).

The statute permits the USTR to “modify or terminate any action” that is being taken pursuant to section 301 “subject to the specific direction, if any, of the President.” 19 U.S.C. § 2417(a)(1). Thus, in accordance with *State Farm*, 463 U.S. at 43, the President’s specific direction, if any, is a statutory consideration for which the agency must account. The statute also requires the USTR to consider whether the burden on U.S. commerce for which action was taken pursuant to section 301 has increased or

decreased, or whether the prior action taken pursuant to section 301(b) is no longer appropriate. See 19 U.S.C. § 2417(a)(1)(B), (C). Relatedly, section 301(b) informs the agency's rationale by providing that the USTR is to exercise its discretionary authority to take all "appropriate and feasible action" when a foreign country is engaging in "an act, policy, or practice" that is "unreasonable or discriminatory and burdens or restricts United States commerce" with the aim of obtaining the elimination of the unfair act, policy, or practice. *Id.* § 2411(b). Thus, statutory factors relevant to the USTR's determination of whether and how to modify its action include ensuring that appropriate action is taken to eliminate discriminatory and burdensome acts and the President's specific direction, if any.

The notices of proposed rulemaking ("NPRM(s)") reflected these considerations. In *List 3 NPRM*, the USTR explained that the proposed supplemental action accorded with the President's direction as reflected in his statement "direct[ing] the United States Trade Representative to identify \$200 billion worth of Chinese goods for additional tariffs at a rate of 10 percent" that would "go into effect" following completion of "the legal process." 83 Fed. Reg. at 33,609 (citing June 2018 Presidential Statement). The notice also requested public comments:

with respect to *any* aspect of the proposed supplemental action, including

- The specific tariff subheadings to be subject to increased duties, including whether the subheadings listed in the Annex should be retained or removed, or whether subheadings not currently on the list should be added.
- The level of the increase, *if any*, in the rate of duty.
- The appropriate *aggregate level* of trade to be covered by additional duties.

Id. (emphases added); see also *List 3 Cmt. Extension*, 83 Fed. Reg. at 38,761 (extending comment period following President’s direction to consider increasing the tariff rate to 25 percent and specifically seeking comment on “the possible increase in the rate of additional duty”). In *List 4 NPRM*, the USTR likewise explained that the proposed supplemental action accorded with the President’s direction and requested public comments on “any aspect” of the proposal, including the abovementioned points. 84 Fed. Reg. at 22,564–65.

Consistent with the NPRMs, submitted comments raised concerns regarding the legality and efficacy of the tariffs, the potential for damage to the U.S. economy, and whether alternative measures would be more effective. See, e.g., Pls.’ Cross-Mot. & Resp. at 14–15, 20–21 (citing comments); RLC’s Br. at 14–16 (same); Comments of Nat’l Foreign Trade Council, USTR-2018-0026-1843 (Aug. 22, 2018), PR 1891 (arguing that the tariffs will not be effective and will “create a new status-quo of higher trade barriers”);²⁶ Comments of U.S. Chamber of Com., USTR-2018-0026-1391 (Aug. 20, 2018), PR 1439; Comments of HP Inc., USTR-2019-0004-1701 (June 17, 2019), PR 7877 (citing section 337 of the Tariff Act of 1930 as an alternative tool for accomplishing the administration’s goals without the economic costs of section 301 tariffs).

Some comments also argued that certain products should be added to or removed from the proposed lists. See, e.g., Comments of Ams. for Free Trade Coal.,

²⁶ The court cites the date of the record document, which is not necessarily the same as the date the USTR associates with the document on the administrative record indices filed with the court.

USTR-2018-0026-6132 (Sept. 26, 2018), PR 6163 (noting that List 3 needed an exclusion process and that “the criteria for inclusion or removal from the final list were not made public”); Comments of Rheem Mfr’g Co., USTR-2018-0026-3884 (Sept. 5, 2018), PR 3930 (supporting the retention of subheadings for air conditioners on List 3 while urging the USTR to add a subheading covering “parts” under which the indoor and outdoor components of air conditioners enter when shipped separately, even if fully assembled); Comments of Retail Indus. Leaders Ass’n, USTR-2018-0026-5887 (Sept. 6, 2018), PR 5924 (urging the removal of parts used in U.S. manufacturing); Comments of U.S. Steel Corp. USTR-2018-0026-5447 (undated), PR 5492 (arguing for the inclusion of advanced steel products (tin mill plate) as an appropriate response to the cyber-hacking covered by the USTR Report, including of U.S. Steel itself).

Other comments requested no increased duties on imported parts and inputs while supporting the duties on finished goods that compete with domestically manufactured goods. *See, e.g.*, Comments of Whirlpool Corp., USTR-2018-0026-3867 (Sept. 5, 2018), PR 3913 (requesting the removal of several subheadings for parts that it uses in its U.S. manufacturing operations and the addition of a subheading for completed dishwashers competing with Whirlpool’s products).

The statute, the NPRMs, and the comments responsive to the NPRMs frame this court’s review of the USTR’s concise statements of basis and purpose. While “[a]n agency need not respond to every comment,” it must explain how it “resolved any significant problems raised by the comments.” *Action on Smoking*, 699 F.2d at 1216. Thus, the USTR was required to address comments regarding any duties to be

imposed, the aggregate level of trade subject to the proposed duties, and the products covered by the modifications, all in light of section 301's statutory purpose to eliminate the burden on U.S. commerce from China's unfair acts, policies, and practices and subject to the specific direction of the President, if any.

With respect to the "wisdom of the enterprise," i.e., whether to proceed with any increase in duties, the USTR explained its decisions by way of reference to China's unfair practices and stated that the increase in duties and level of trade affected by the modifications are consistent with the specific direction of the President. *See Final List 3*, 83 Fed. Reg. at 47,974–75; *Final List 4*, 84 Fed. Reg. at 43,304–05. The September 2018 Presidential Statement, in turn, provided relevant context, stating that China's unfair policies and practices relating to U.S. technology and intellectual property "plainly constitute a grave threat to the long-term health and prosperity of the United States economy." Sept. 2018 Presidential Statement.

The USTR's statements of basis and purpose thus indicate why the USTR deemed China's ongoing and retaliatory conduct actionable; however, those statements fail to apprise the court how the USTR came to its decision to act and the manner in which it chose to act, taking account of the opposition and support for the increased duties and the inclusion or exclusion of particular subheadings, the concerns raised about the impact of the duties on the U.S. economy, and the potential availability of alternative courses of action, within the context of the specific direction provided by the President.

While the USTR pointed to the specific direction of the President in September 2018 in *Final List 3* and the specific direction of the President more generally in *Final List 4*, and, while the President's direction is statutorily significant, the USTR's invocation of the President's direction does not obviate the USTR's obligation to respond to significant issues raised in the comments. *Cf. Sherley*, 689 F.3d at 784–85.²⁷ In *List 3 NPRM*, for example, the USTR noted the President's desire for a 10 percent tariff on \$200 billion worth of Chinese imports, 83 Fed. Reg. at 33,609 (citing June 2018 Presidential Statement), but did not treat that direction as dispositive in light of the USTR's solicitation of comments on a broad range of issues that could—and,

²⁷ *Sherley* involved a challenge to the National Institutes of Health's ("NIH") issuance of guidelines concerning embryonic stem-cell ("ESC") research and its failure to address comments objecting to ESC research. 689 F.3d at 784. The D.C. Circuit held that because the guidelines implemented an Executive Order with the primary purpose of removing limitations on funding human ESC research, it was not arbitrary and capricious for the NIH not to respond to comments "diametrically opposed to the direction of the Executive Order." *Id.* at 784–785. *Sherley* is, however, distinguishable. There, the NIH explicitly stated its overarching position that comments "advocating a blanket ban on all funding for [human ESC] research" were "not relevant" to the issuance of the guidelines. *Id.* at 790 (Brown, J., concurring). The NIH's dismissal of such comments was consistent with its notice of proposed rulemaking, which requested comments specific to the guidelines' implementation of the Executive order, not the wisdom of human ESC research generally. *See Draft [NIH] Guidelines for Human Stem Cell Research Notice*, 74 Fed. Reg. 18,578 (Apr. 23, 2009). Thus, the NIH did not arbitrarily ignore comments that attempted to "reopen a debate that, as a practical matter, has been foreclosed for more than a decade." *Sherley*, 689 F.3d at 790 (Brown, J., concurring). Here, however, the NPRMs characterized the imposition of List 3 and List 4 tariffs as "propos[als]" and expressly invited comments on "any aspect of the proposed supplemental action," including several points that arguably go to whether to impose additional duties at all. *List 3 NPRM*, 83 Fed. Reg. at 33,609; *List 4 NPRM*, 84 Fed. Reg. 22,564. Thus, the USTR treated the imposition of increased duties at the NPRM stage as an open question, and not one that was predetermined based on the direction of the President. *See id.*

indeed, did—result in comments at odds with the President’s direction, see *id.*; cf. *List 4 NPRM*, 84 Fed. Reg. at 22,564–65. In other words, although the USTR indicated its willingness to consider factors other than the President’s direction in the respective NPRMs, the final determinations do not explain whether or why the President’s direction constituted the only relevant consideration nor do those determinations address the relationship between significant issues raised in the comments and the President’s direction.²⁸ Having requested comments on a range of issues, the USTR had a duty to respond to the comments in a manner that enables the court to understand “why the agency reacted to them as it did.” *Auto. Parts & Accessories Ass’n*, 407 F.2d at 338. The USTR could have explained its rationale with respect the comments in light of the specific Presidential directives it was given. What the USTR could not do was fail to provide a response to the comments it solicited when providing the rationale for its final determinations.

With respect to List 3, the USTR indicated that it chose the products subject to the tariffs at the direction of the President. *Final List 3*, 83 Fed. Reg. at 47,975 (noting that the USTR, “at the direction of the President, has determined not to include certain tariff subheadings listed in the Annex to the [List 3 NPRM]”). At Oral Argument, however, the Government acknowledged that the record does not reflect the President’s

²⁸ Indeed, it would be anomalous to find that *Final List 3* and *Final List 4A* constitute agency actions subject to the APA’s procedural requirements while finding that references invoking the President’s direction, without more, satisfy the APA’s requirement for a concise statement of basis and purpose.

final approval of the list of products covered by the determinations. Oral Arg. 7:50–9:40. The Government argues that the USTR’s response to comments also is evidenced by the USTR’s subsequent decisions to delay the List 3 increase from 10 percent to 25 percent and to establish an exclusion process. Defs.’ Mot. at 58–59. Those arguments cannot prevail, however, because neither of the referenced decisions are contained in *Final List 3*, which constitutes the “final agency action” at issue in this case. See 5 U.S.C. § 704; *Final List 3*, 83 Fed. Reg. at 47,974–95 (stating a definitive date for the increase to 25 percent and providing no indication of an exclusion process).²⁹ The USTR’s assertion that it removed certain products from List 3 following its review of the comments and hearing testimony fails to apprise the court of the rationale for the product selection and how that rationale is responsive to the comments.

With respect to List 4A, the USTR stated that “[c]ertain tariff subheadings proposed in the [List 4 NPRM] have been removed from the final list of tariff subheadings subject to additional duties, based on health, safety, national security, and other factors.” *Final List 4*, 84 Fed. Reg. at 43,305. The USTR also segregated the tariff subheadings into two lists with staggered effective dates and indicated that an exclusion process would be forthcoming. See *id.* While the USTR explained that it separated the tariffs based on “China’s share of U.S. imports,” *id.*, that statement does

²⁹ While the USTR stated that it is “maintaining the prior action,” *Final List 3*, 86 Fed. Reg. at 47,975, when read in context, that statement appears to mean that it is imposing the additional duties while maintaining the List 1 and List 2 duties already in place. That statement does not clearly indicate to the public or the court that the USTR will establish an exclusion process specific to the List 3 duties.

not address the composition of the list of subheadings in the first place. As with List 3, the USTR also failed to connect the removal of subheadings to the comments or address comments that, for example, urged the USTR to distinguish between parts and finished goods.³⁰

Thus, *Final List 3* and *Final List 4* require reconsideration or further explanation regarding the USTR's rationale for imposing the tariffs and, as necessary, the USTR's reasons for placing products on the lists or removing products therefrom.³¹

³⁰ The Government also argued that the USTR's rationale for modifying the section 301 action can be ascertained by examination of certain internal memoranda between USTR General Counsel and USTR Lighthizer. See Defs.' Mot. at 58–59 (citing Mem. from USTR General Counsel Joseph Barloon to USTR Robert Lighthizer (Aug. 14, 2019) at 1, 5–6, PR 9; Mem. from USTR General Counsel Joseph Barloon to USTR Robert Lighthizer (May 7, 2019) at 2, PR 8; Mem. from USTR General Counsel Stephen Vaughn to USTR Robert Lighthizer (Dec. 14, 2018) at 2, PR 6; and Sept. 2018 Vaughn Mem. at 7–9); see also Oral Arg. 2:45:00–2:50:00. The APA requires the USTR to “incorporate *in the rules adopted* a concise general statement of their basis and purpose.” 5 U.S.C. § 553(c) (emphasis added). While the statute does not preclude the court from reviewing an agency's explanation that is external to the *Federal Register* notice, see, e.g., *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 711 (D.C. Cir. 1977) (explaining that “[t]he enquiry must be whether the rules and statement are published close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes the rules”), the USTR did not incorporate by reference the cited memoranda in the contested determinations and the public was not alerted to the reasoning offered therein given the nonpublic nature of the memoranda. If, on remand, the USTR seeks to rely on the contents of the memoranda as evidence of the USTR's reasons for acting when and how it did such that a future rationale is not *post hoc*, the USTR must explain why that reliance is justified in light of *Invenergy Renewables LLC v. United States*, 44 CIT ___, ___, 476 F. Supp. 3d 1323, 1347 (2020) (holding that a contemporaneous but nonpublic memorandum “cannot be considered as part of the grounds invoked by the [USTR] when it acted” because “adequate explanation of the agency's decision has to be made public somewhere or in some manner allowing interested parties to review and scrutinize it”).

³¹ To the extent the USTR decides, on remand, that certain products should have been added to or omitted from the determinations from the beginning, the USTR should also establish and describe a lawful process for implementing that decision.

c. Remedy

During the hearing, Plaintiffs opined that the Government has waived any request for a remand instead of outright vacatur, a position with which the Government disagreed. Oral Arg. 2:36:30–2:37:00, 2:38:53–2:43:43, 2:46:42–2:46:59. For their part, Plaintiffs did not present arguments for vacatur until filing a notice of supplemental authority and, even then, only summarily discussed vacatur in reference to a prior court opinion. See Pls.’ Suppl. Authority at 2 (discussing *Invenergy Renewables LLC v. United States*, 45 CIT __, __, 552 F. Supp. 3d 1382, 1400, 1404 (2021)). The Government, in turn, sought to distinguish that case and, in so doing, argued for a different outcome. See Defs.’ Resp. Suppl. Authority at 2–3. In a case arising under the APA, the court may—and regularly will—remand for reconsideration deficient agency action when further explanation is required. See 5 U.S.C. § 706(2)(A); see also, e.g., *NOVA*, 260 F.3d at 1379–80. Thus, the court declines to find that the doctrine of waiver precludes remand here.

The court turns next to the question whether vacatur is merited in the interim notwithstanding remand to the USTR. In certain circumstances, the court may remand agency action for further consideration while allowing the action to remain in effect. See *NOVA*, 260 F.3d at 1367–68, 1379–81. In *NOVA*, the Federal Circuit adopted the standard first set forth by the D.C. Circuit as to whether agency action should remain in effect when the action is remanded for further consideration. *id.* at 1380 (“[A]n inadequately supported rule . . . need not necessarily be vacated.”) (second alteration in original) (quoting *Allied-Signal*, 988 F.2d at 151). In deciding whether to vacate, the

court considers “the seriousness of the [rule’s] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” *Allied-Signal*, 988 F.2d at 150–51 (quotations and citation omitted); see also *NOVA*, 260 F.3d at 1380 (declining to vacate when the “validity” of the contested action was “open to question” and given the “disruptive consequences” of vacatur).

While the USTR’s failure to explain its rationale in the context of the comments it received leaves room for doubt as to the legality of its chosen courses of action, as in *NOVA*, the court weighs heavily the disruptive consequences of (potentially interim) vacatur. *Final List 3* and *Final List 4* constitute modifications of a prior section 301 action taken to exert leverage on China to cease unfair trade actions burdening U.S. commerce and to do so in a manner that China may no longer attempt to offset that leverage with retaliatory measures of its own. Thus, they are part of a continuum of actions taken in conjunction with ongoing negotiations with China. In addition to impacting the United States’ ability to impose and retain List 3 and List 4A duties, vacating the determinations would disrupt a complex and evolving process that was designed by Congress to allow for ongoing negotiations. For now, the court declines to try to unscramble this egg. *Cf. Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002) (declining to vacate unlawful agency action when it was possible for the relevant agency to cure the defect).

At the hearing, Plaintiffs invoked *Dep’t of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), to argue that the court must vacate

USTR's List 3 and List 4 determinations. Oral Arg. 2:38:53–2:43:43; 2:51:15–2:51:37. In *Regents*, the U.S. Supreme Court held that the Department of Homeland Security's ("DHS") Acting Secretary Duke's explanation of her decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program relied only on the Attorney General's explanation that DACA's provision of entitlement benefits to certain categories of aliens was unlawful; however, that explanation was insufficient to justify DHS's rescission of DACA's grant of forbearance of enforcement of removal proceedings against the covered classes of persons.³² 140 S. Ct. at 1912–14. The twin prongs of DACA, i.e., benefits and forbearance, were established by DHS's implementation of DACA, and, therefore, in rescinding DACA, DHS had to address both prongs. See *id.* at 1913. The Court refused to consider subsequent reasoning provided by Acting Secretary Duke's successor, Secretary Nielsen, after concluding that the Secretary's reasoning was almost entirely *post hoc*. See *id.* at 1908–09. While Acting Secretary Duke's contemporaneous explanation rested solely upon illegality, Secretary Nielsen pointed to the need to foster confidence in the rule of law by rejecting "legally *questionable*" policies and a preference for legislative solutions in addition to DACA's illegality. See *id.* at 1908.

³² The Supreme Court declined to address the adequacy of DHS's explanation that it relied on the Attorney General's decision that DACA was unlawful because Acting Secretary Duke was statutorily bound by that decision. See *Regents*, 140 S. Ct. at 1910–11. Instead, the Supreme Court found that Duke failed to address the portion of DACA's legality (forbearance) that was within Duke's discretion. See *id.*

Regents, like *State Farm*, requires the court to review the USTR's statements of basis and purpose to ensure that important policy issues are ventilated and to understand the USTR's determinative reasons for its actions. *Regents* also constitutes a warning to agencies regarding the impermissibility of *post hoc* reasoning as much as it constrains the court's review of such reasoning provided pursuant to a remand. 140 S. Ct. at 1908 (citing *Overton Park*, 401 U.S. at 420, for the proposition that a subsequent explanation "must be viewed critically" for impermissible *post hoc* reasoning and noting that, for example, while "[l]egal uncertainty is, of course, related to illegality[,] . . . the two justifications are meaningfully distinct"). "When an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason (or reasons) but may not provide new ones." *Id.* (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)). Thus, while we may remand to the USTR to further explain its determinations, *Regents* cautions that the USTR may only further explain the justifications it has given for the modifications. See *id.* It may not identify reasons that were not previously given unless it wishes to "deal with the problem afresh" by taking new agency action. *Id.* (quoting *Chenery*, 332 U.S. at 201).³³

³³ Plaintiffs also argue that the USTR failed to consider factors relevant to the statute when it based List 3 and List 4A on China's retaliatory conduct. Pls.' Cross-Mot. & Resp. at 60–61. Because the court finds that China's conduct was relevant to the USTR's determinations pursuant to section 307(a)(1)(B), see *supra*, Plaintiffs' related procedural argument must fail.

3. Plaintiffs' Remaining Arguments³⁴

Plaintiffs also raise arguments regarding the extent of notice provided with respect to List 3, the deadlines set for the submission of comments and the permissible scope of those comments, and the amount of time the USTR allowed interested parties to testify at the hearings. None of these arguments present additional grounds for remand or vacatur.

a. Notice of the Legal Basis for List 3

Plaintiffs first argue that the USTR failed to provide adequate notice of the legal basis for List 3 because although the NPRM cited to section 307(a)(1)(C) exclusively, the USTR ultimately relied on section 307(a)(1)(B) and (C). Pls.' Cross-Mot. & Resp. at 55–56; Pls.' Reply at 24–25. The Government argues that the NPRM for List 3 complied with statutory requirements. Defs.' Resp. & Reply at 35–37.

Section 553(b) requires an agency engaged in rulemaking to publish in the *Federal Register* a “reference to the legal authority under which the rule is proposed” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(2)–(3).³⁵ This notice “need not specify every

³⁴ Because the court is remanding *Final List 3* and *Final List 4*, the court need not further address the issue of remedy in relation to Plaintiffs or *Amici Curiae* at this time. See generally Interested Parties' Br. (arguing that non-importer plaintiffs in other cases that bore the cost of the section 301 duties have both constitutional and statutory standing to challenge the USTR's actions and the court's authority to provide relief is not limited to importers of record).

³⁵ Plaintiffs do not specify the precise subsection of section 553(b) they believe the USTR violated. Because the NPRM contained a “reference to the legal authority under which the rule is proposed,” i.e., section 307(a)(1)(C), Plaintiffs appear to argue that the

precise proposal” that an agency “may ultimately adopt,” but must “fairly apprise interested parties of the issues involved.” *Mid Continent Nails Corp. v. United States*, 846 F.3d 1364, 1373 (Fed. Cir. 2017) (quotations and citations omitted). Notice is deemed adequate for purposes of the APA if “an agency’s final rule is a ‘logical outgrowth’” of the agency’s notice of proposed rulemaking. *Id.* (citation omitted). “A final rule is a logical outgrowth of [a] proposed rule ‘only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.’” *Veteran Justice Grp., LLC v. Sec’y of Veterans Affairs*, 818 F.3d 1336, 1344 (Fed. Cir. 2016) (citation omitted) (alteration in original).

The USTR’s failure to cite to section 307(a)(1)(B) in *List 3 NPRM* as an additional or alternative authority for the modification is not fatal to its rulemaking. The notice is clear that the USTR proposed to modify the section 301 action by setting increased duties on additional specified imports from China and requested comments on various aspects of the proposal. See *List 3 NPRM*, 83 Fed. Reg. at 33,609. In explaining the basis for the modification, the USTR also explained that China had failed to “address[] U.S. concerns with the unfair practices found in the investigation,” *id.* at 33,608, and “refus[ed] to change its acts, policies, and practices,” such that “it ha[d] become apparent that U.S. action at this level is not sufficient to obtain the elimination of China’s acts, policies, and practices covered in the investigation,” *id.* at 33,609. Anyone wanting

USTR’s failure to cite section 307(a)(1)(B) rendered the NPRM deficient pursuant to section 553(b)(3).

to comment on such findings, either to support or rebut the notion that China's unfair practices continued to burden U.S. commerce, and whether such burden continued apace or had increased or decreased relative to the investigation, had notice of the opportunity to do so.

Thus, Plaintiffs argument that the "USTR's defective notice . . . left a record-vacuum" rings hollow. See Pls.' Cross-Mot. & Resp. at 56. The USTR "fairly apprise[d] interested parties of the issues involved," and the USTR's reliance on subsection (B) in addition to subsection (C) in the final rule constituted a "logical outgrowth" of the proposed rule. See *Mid Continent*, 846 F.3d at 1373.

b. Comment Deadlines and Time to Testify

Plaintiffs next argue that the USTR failed to provide meaningful opportunity to comment on List 3 by setting a simultaneous deadline for written and post-hearing rebuttal comments and limiting testimony at the public hearings to five minutes per person. See Pls.' Cross-Mot. & Resp. at 56–57. Plaintiffs raise similar arguments with respect to List 4A, while noting that, for that proceeding, post-hearing rebuttal comments were due one week after the hearing. See *id.*; cf. RLC's Br. at 10–12 (advancing similar arguments). Plaintiffs also argue that, by explicitly limiting rebuttal comments to "rebutting or supplementing testimony at the hearing" in the NPRM for List 4A, the USTR arbitrarily departed from its practice with respect to List 1, List 2, and List

3. Pls.' Cross-Mot. & Resp. at 57–58 (citation omitted); see also *List 4 NPRM*, 84 Fed. Reg. at 22,565.

The Government argues that the simultaneous deadlines with respect to List 3 resulted from the USTR providing an extension of time for all comments, Defs.' Mot. at 52 (citing *List 3 Cmt. Extension*, 83 Fed. Reg. at 38,761), and the USTR intended the post-hearing rebuttal comments to be responsive to arguments raised at the hearing, not the written submissions, Defs.' Mot. at 53; Defs.' Resp. & Reply at 38. In any event, the Government contends, the APA does not require any opportunity for the submission of rebuttal comments or an in-person hearing during informal rulemaking proceedings; thus, the USTR's procedures in that regard could not have violated the APA. Defs.' Mot. at 53–54.

Plaintiffs' arguments lack merit. The APA did not require the USTR to provide interested parties with an opportunity to submit rebuttal comments. See 5 U.S.C. § 553(c). More importantly, the NPRM for List 3 clearly limited rebuttal comments to "post-hearing rebuttal comments." *List 3 NPRM*, 83 Fed. Reg. at 33,609. Thus, the USTR was within its discretion to set simultaneous deadlines for "written" and "post-hearing rebuttal comments" when it extended the deadlines for all List 3 comments. See *Vt. Yankee*, 435 U.S. at 543 ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (quotations and citations omitted).

The USTR's decision to limit oral testimony to five minutes per person also did not violate the APA, which gives agencies discretion as to whether a rulemaking will involve an "opportunity for oral presentation." 5 U.S.C. § 553(c). Absent a statutory directive, the amount of time allowed for each person to testify is the type of line-drawing exercise best left to the USTR. *See, e.g., Vt. Yankee*, 435 U.S. at 543. The public hearings for List 3 and List 4 ran for six and seven days, respectively, demonstrating ample opportunity for public participation. *See Final List 3*, 83 Fed. Reg. at 47,975; *Final List 4*, 84 Fed. Reg. at 43,304.

The USTR also did not arbitrarily depart from past practice when it cautioned that post-hearing rebuttal comments for List 4 "should be limited to rebutting or supplementing" hearing testimony. *List 4 NPRM*, 84 Fed. Reg. at 22,565. The *Federal Register* notices for List 1, List 2, and List 3 likewise provided for "post-hearing rebuttal comments" and, thus, did not explicitly provide for replies to written comments. *See List 3 NPRM*, 83 Fed. Reg. at 33,609; *Final List 1*, 83 Fed. Reg. at 28,712; *USTR Determination*, 83 Fed. Reg. at 14,908. Indeed, with respect to List 3, given the simultaneous deadlines for written and post-hearing rebuttal comments, there was no need for the USTR to have articulated such a limitation. *See List 3 Cmt. Extension*, 83 Fed. Reg. at 38,761.

Accordingly, the USTR did not have an established practice of allowing replies to written comments that it departed from with respect to List 4. *See Ranchers–Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999) (explaining that identification of an "agency practice" is predicated upon the

existence of “a uniform and established procedure . . . that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the established practice or procedure”). Even if the USTR had such a practice, the USTR’s cautionary language used nonmandatory terms. See *List 4 NPRM*, 84 Fed. Reg. 22,565 (post-hearing rebuttal comments for List 4 “*should be* limited to rebutting or supplementing” hearing testimony) (emphasis added); see also *AT&T v. United States*, 307 F.3d 1374, 1379–80 (Fed. Cir. 2002) (stating that “[a] caution, however, is not a prohibition”). Thus, interested parties were not explicitly precluded from responding to another party’s written submission.

Courts, recognizing that “[w]ith more time most parties could improve the quality of their comments,” ask whether there is evidence that a party would provide more meaningful comments if given more time or opportunity. *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1886, 1892, 466 F. Supp. 2d 1323, 1328 (2006); see also *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (finding that seven-day comment period did not violate APA where plaintiff “failed to identify any substantive challenges it would have made had it been given additional time”). Plaintiffs have pointed to no such evidence in connection with the foregoing arguments. Indeed, as the Government asserts, Plaintiffs fail to “explain *why* they would need to rebut any of the initial written comments (or, for that matter anything discussed at the hearing), when, as the administrative record demonstrates, the written commenters and hearing

participants overwhelmingly *agreed* with the plaintiffs' position, that the tariffs should not go into effect." Defs.' Resp. & Reply at 38.³⁶

Thus, for the reasons discussed above, Plaintiffs' additional procedural arguments do not provide any further basis to remand or vacate the USTR's determinations.

IV. The Government's Motion to Correct the Administrative Record

The Government seeks to correct the administrative record by adding two documents (and provide an accompanying certification): The June 2018 Presidential Statement and a supplemental section 301 report titled UPDATE CONCERNING CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION (2018) ("Supplemental 301 Report"). Defs.' Mot. Correct R. at 1, Ex. B. The Government contends that "[t]he U.S. Trade Representative was aware of the contents of both of these documents and they would have been considered when making the challenged decisions." *Id.* at 2–3.³⁷ Plaintiffs "take no position on the motion with respect to [the June 2018 Presidential Statement]" given the Parties' and the USTR's respective references to that document. Pls.' Opp'n Correct R. at 1.

³⁶ Because the court finds that Plaintiffs' arguments lack merit, the court does not reach the Government's argument that the court should account for the asserted "urgent need for action" when examining the adequacy of the USTR's procedures. See Defs.' Mot. at 55; Defs.' Resp. & Reply at 39–40.

³⁷ The Government also states that "the USTR considered . . . the facts contained in the [Supplemental 301 Report]," Defs.' Mot. Correct R. at 3, but that assertion goes further than the declaration attached to the Government's motion, which asserts that the USTR "was aware of the contents of [the Supplemental 301 Report]" and it "would have been considered" by the USTR. Decl. by Megan Grimball ¶ 6 (Feb. 15, 2022), ECF No. 441-3.

Plaintiffs contend that the court should deny the motion with respect to the Supplemental 301 Report because it post-dates the USTR's consideration of the List 3 duties, was not cited by the USTR in the contested determinations or by the Parties in their litigation briefs, and the Government failed to demonstrate the USTR's consideration of the document. *Id.* at 1–2.

The court will grant the Government's motion with respect to the June 2018 Presidential Statement and the accompanying certification but will deny the motion with respect to the Supplemental 301 Report.

For purposes of APA review, the administrative record consists of “all documents and materials directly or indirectly considered by agency decisionmakers.” *Ammex, Inc. v. United States*, 23 CIT 549, 555, 62 F. Supp. 2d 1148, 1156 (1999) (quoting *Thompson v. U. S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). The obvious corollary to this rule is that “materials that were neither directly *nor* indirectly considered by agency decisionmakers,” even if relevant, “should not be included” in the record. *Id.* (citation omitted). To correct the record, the movant must “show that the documents to be included were before the agency decisionmaker.” *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006). That showing requires the movant to “put forth concrete evidence and identify reasonable, non-speculative grounds for [its] belief that the documents were considered by the agency.” *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 9 (D.D.C. 2018) (quotations and citation omitted) (alteration in original) (granting motion to correct the record to include 39 documents indirectly considered by an agency when the

documents were referenced in a letter directly considered by the agency in reaching its final decision).

The Supplemental 301 Report could not have been directly or indirectly considered by the USTR in reaching its decision to issue *Final List 3* because the document did not exist at the time. The Government argues instead, with respect to both List 3 and List 4A, that the “contents” of the Supplemental 301 Report “*would have been considered*” by the USTR. Defs.’ Mot. Correct R. at 1–2 (emphasis added). The Government offers no authority for including in the record a document that was not, itself, directly or indirectly considered by the USTR, even if its “contents” were, in some unexplained fashion, considered. On that point, however, the Government makes no showing that the contents of the Supplemental 301 Report *were* considered by the USTR; the Government merely surmises that they “would have been.”³⁸

Thus, the court will grant the Government’s motion with respect to the June 2018 Presidential Statement and the accompanying certification and deny the Government’s motion with respect to the Supplemental 301 Report.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that the Government’s motion to dismiss (ECF No. 314) is **DENIED**; it is further

³⁸ That the Supplemental 301 Report was published on the USTR’s website in November 2018, see Defs.’ Mot. Correct R. at 2, alone does not demonstrate the USTR’s direct or indirect consideration of the facts contained therein when deciding whether to impose the List 3 or List 4A duties.

ORDERED that the Government’s motion for judgment on the agency record (ECF No. 314) and Plaintiffs’ cross-motion for judgment on the agency record (ECF No. 358) are each **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that *Final List 3* and *Final List 4* are remanded to the USTR for reconsideration or further explanation consistent with this opinion; it is further

ORDERED that the USTR shall file its remand results on or before June 30, 2022; it is further

ORDERED that, within 14 days of the USTR’s filing of the remand results, the Parties shall file a joint status report and proposed schedule for the further disposition of this litigation; and it is further

ORDERED that the Government’s partial consent motion to correct the administrative record (ECF No. 441) is **GRANTED IN PART** and **DENIED IN PART**.

/s/ Mark A. Barnett
Mark A. Barnett, Chief Judge

/s/ Claire R. Kelly
Claire R. Kelly, Judge

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

Dated: April 1, 2022
New York, New York

STATUTORY ADDENDUM

**STATUTORY ADDENDUM
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Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices

§ 2411. Actions by United States Trade Representative

(a) Mandatory action

(1) If the United States Trade Representative determines under section 2414(a)(1) of this title that--

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country--

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representative shall take action authorized in subsection (c), subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain the elimination of such act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

(2) The Trade Representative is not required to take action under paragraph (1) in any case in which--

(A) the Dispute Settlement Body (as defined in section 3531(5) of this title) has adopted a report, or a ruling issued under the formal dispute settlement proceeding provided under any other trade agreement finds, that--

(i) the rights of the United States under a trade agreement are not being denied, or

(ii) the act, policy, or practice--

(I) is not a violation of, or inconsistent with, the rights of the United States, or

(II) does not deny, nullify, or impair benefits to the United States under any trade agreement; or

(B) the Trade Representative finds that--

(i) the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement,

(ii) the foreign country has--

(I) agreed to eliminate or phase out the act, policy, or practice, or

(II) agreed to an imminent solution to the burden or restriction on United States commerce that is satisfactory to the Trade Representative,

(iii) it is impossible for the foreign country to achieve the results described in clause (i) or (ii), as appropriate, but the foreign country agrees to provide to the United States compensatory trade benefits that are satisfactory to the Trade Representative,

(iv) in extraordinary cases, where the taking of action under this subsection would have an adverse impact on the United States economy substantially out of

proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions of this subchapter, or

(v) the taking of action under this subsection would cause serious harm to the national security of the United States.

(3) Any action taken under paragraph (1) to eliminate an act, policy, or practice shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce.

(b) Discretionary action

If the Trade Representative determines under section 2414(a)(1) of this title that--

(1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and

(2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

* * * * *

United States Code

Title 19. Customs Duties

Chapter 18. Trade Act of 1974

Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices

§ 2414. Determinations by Trade Representative

(a) In general

(1) On the basis of the investigation initiated under section 2412 of this title and the consultations (and the proceedings, if applicable) under section 2413 of this title, the Trade Representative shall--

(A) determine whether--

(i) the rights to which the United States is entitled under any trade agreement are being denied, or

(ii) any act, policy, or practice described in subsection (a)(1)(B) or (b)(1) of section 2411 of this title exists, and

(B) if the determination made under subparagraph (A) is affirmative, determine what action, if any, the Trade Representative should take under subsection (a) or (b) of section 2411 of this title.

(2) The Trade Representative shall make the determinations required under paragraph (1) on or before--

(A) in the case of an investigation involving a trade agreement, except an investigation initiated pursuant to section 2412(b)(2)(A) of this title involving rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (referred to in section 3511(d)(15) of this title) or the GATT 1994 (as defined in section 3501(1)(B) of this title) relating to products subject to intellectual property protection, the earlier of--

(i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or

(ii) the date that is 18 months after the date on which the investigation is initiated, or

(B) in all cases not described in subparagraph (A) or paragraph (3), the date that is 12 months after the date on which the investigation is initiated.

(3)(A) If an investigation is initiated under this subchapter by reason of section 2412(b)(2) of this title and--

(i) the Trade Representative considers that rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights or the GATT 1994 relating to products subject to intellectual property protection are involved, the Trade Representative shall make the determination required under paragraph (1) not later than 30 days after the date on which the dispute settlement procedure is concluded; or

(ii) the Trade Representative does not consider that a trade agreement, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, is involved or does not make a determination described in subparagraph (B) with respect to such investigation, the Trade Representative shall make the determinations required under paragraph (1) with respect to such investigation not later than the date that is 6 months after the date on which such investigation is initiated.

(B) If the Trade Representative determines with respect to an investigation initiated by reason of section 2412(b)(2) of this title (other than an investigation involving a trade agreement) that--

(i) complex or complicated issues are involved in the investigation that require additional time,

(ii) the foreign country involved in the investigation is making substantial progress in drafting or implementing legislative or administrative measures that will provide adequate and effective protection of intellectual property rights, or

(iii) such foreign country is undertaking enforcement measures to provide adequate and effective protection of intellectual property rights,

the Trade Representative shall publish in the Federal Register notice of such determination and shall make the determinations required under paragraph (1) with respect to such investigation by no later than the date that is 9 months after the date on which such investigation is initiated.

(4) In any case in which a dispute is not resolved before the close of the minimum dispute settlement period provided for in a trade agreement, the Trade Representative, within 15 days after the close of such dispute settlement period, shall submit a report to Congress setting forth the reasons why the dispute was not resolved within the minimum dispute settlement period, the status of the case at the close of the period, and the prospects for resolution. For purposes of this paragraph, the minimum dispute settlement period provided for under any such trade agreement is the total period of time that results if all stages of the formal dispute settlement procedures are carried out within the time limitations specified in the agreement, but computed without regard to any extension authorized under the agreement at any stage.

(b) Consultation before determinations

(1) Before making the determinations required under subsection (a)(1), the Trade Representative, unless expeditious action is required--

(A) shall provide an opportunity (after giving not less than 30 days notice thereof) for the presentation of views by interested persons, including a public hearing if requested by any interested person,

(B) shall obtain advice from the appropriate committees established pursuant to section 2155 of this title, and

(C) may request the views of the United States International Trade Commission regarding the probable impact on the economy of the United States of the taking of action with respect to any goods or service.

(2) If the Trade Representative does not comply with the requirements of subparagraphs (A) and (B) of paragraph (1) because expeditious action is required, the Trade Representative shall, after making the determinations under subsection (a)(1), comply with such subparagraphs.

(c) Publication

The Trade Representative shall publish in the Federal Register any determination made under subsection (a)(1), together with a description of the facts on which such determination is based.

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Title 19. Customs Duties

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Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices

§ 2417. Modification and termination of actions

(a) In general

(1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if-

-

(A) any of the conditions described in section 2411(a)(2) of this title exist,

(B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or

(C) such action is being taken under section 2411(b) of this title and is no longer appropriate.

(2) Before taking any action under paragraph (1) to modify or terminate any action taken under section 2411 of this title, the Trade Representative shall consult with the petitioner, if any, and with representatives of the domestic industry concerned, and shall provide opportunity for the presentation of views by other interested persons affected by the proposed modification or termination concerning the effects of the modification or termination and whether any modification or termination of the action is appropriate.

(b) Notice; report to Congress

The Trade Representative shall promptly publish in the Federal Register notice of, and report in writing to the Congress with respect to, any modification or termination of any action taken under section 2411 of this title and the reasons therefor.

(c) Review of necessity

(1) If--

(A) a particular action has been taken under section 2411 of this title during any 4-year period, and

(B) neither the petitioner nor any representative of the domestic industry which benefits from such action has submitted to the Trade Representative during the last 60 days of such 4-year period a written request for the continuation of such action,

such action shall terminate at the close of such 4-year period.

(2) The Trade Representative shall notify by mail the petitioner and representatives of the domestic industry described in paragraph (1)(B) of any termination of action by reason of paragraph (1) at least 60 days before the date of such termination.

(3) If a request is submitted to the Trade Representative under paragraph (1)(B) to continue taking a particular action under section 2411 of this title, or if a request is submitted to the Trade Representative under section 2416(c)(2) of this title to reinstate action, the Trade Representative shall conduct a review of--

(A) the effectiveness in achieving the objectives of section 2411 of this title of--

(i) such action, and

(ii) other actions that could be taken (including actions against other products or services), and

(B) the effects of such actions on the United States economy, including consumers.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Circuit Rule 32(a). The brief contains 13,763 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style.

July 25, 2023

/s/ Pratik A. Shah
Pratik A. Shah

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court of the United States Court of the Federal Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

July 25, 2023

/s/ Pratik A. Shah
Pratik A. Shah