No. 21-

IN THE

Supreme Court of the United States

OLEG DERIPASKA,

Petitioner,

v.

JANET L. YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, THE UNITED STATES DEPARTMENT OF THE TREASURY, ANDREA M. GACKI, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF FOREIGN ASSETS CONTROL, AND THE UNITED STATES DEPARTMENT OF THE TREASURY'S OFFICE OF FOREIGN ASSETS CONTROL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2018, the United States Department of the Treasury's Office of Foreign Assets Control designated Oleg Deripaska under Executive Orders 13661 and 13662. According to its press release announcing the designation, the United States Department of the Treasury stated that it undertook the designation action "in response to [Russia's] worldwide malign activity." However, Russia's "worldwide malign activity" does not constitute the threat for which a national emergency has been declared for purposes of Executive Orders 13661 and 13662.

The question presented is whether the United States Department of the Treasury's Office of Foreign Assets Control acted beyond the scope of its statutory authority under the International Emergency Economic Powers Act, 50 U.S.C. § 1701 *et seq.*, when it utilized the authorities set forth in Executive Orders 13661 and 13662 to impose sanctions on Oleg Deripaska in response to a threat for which no national emergency had been declared.

PARTIES TO THE PROCEEDING

Oleg Deripaska, petitioner on review, was the plaintiff-appellant below.

Janet L. Yellen, in her official capacity as Secretary of the United States Department of the Treasury; the United States Department of the Treasury; Andrea M. Gacki, in her official capacity as Director of the Office of Foreign Assets Control; and the United States Department of the Treasury's Office of Foreign Assets Control, respondents on review, were the defendants-appellees below.

RELATED PROCEEDINGS

Deripaska v. Yellen, No. 19-cv-0727, U.S. District Court for the District of Columbia. Judgment entered June 13, 2021.

Deripaska v. Yellen, No. 21-5157, U.S. Court of Appeals for the District of Columbia. Judgment entered March 29, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Oleg Deripaska respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-8a) is unreported (available at 2022 WL 986220). The opinion of the district court (App., 9a-52a) is unreported (available at 2021 WL 2417425).

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the appendix to the petition. App., *infra*, 53a-85a. The statutory and regulatory provisions are:

International Emergency Economic Powers Act,
50 U.S.C. § 1701 et seq. 53a-64a
5 U.S.C. § 706 . . . . . 65a-66a
50 U.S.C. § 1621 . . . . . 67a
50 U.S.C. § 1622 . . . . . 68a-71a
50 U.S.C. § 1631 . . . . . 72a
50 U.S.C. § 1641 . . . . . 73a-74a
Executive Order 13661 . . . . . 74a-80a
Executive Order 13662 . . . . . 80a-85a

STATEMENT

A. THE DECISION BELOW IS IN ERROR

When the United States Department of the Treasury's Office of Foreign Assets Control ("OFAC") designated Oleg Deripaska under Executive Order ("E.O.") 13661 and E.O. 13662, it did so pursuant to an undeclared national emergency—violating one of the key limitations imposed on the presidential exercise of emergency powers under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq.* The consequences of this action have import far surpassing the substantial and ongoing negative impact on Deripaska himself. Indeed, by repurposing the sanctions authorities of Executive orders issued under IEEPA to address threats for which no national emergency had been declared, OFAC effectively staked new claim to vast (and perhaps unlimited) power, all the while evading the watchful eye of the Congress.

Both the United States Court of Appeals for the District of Columbia and the United States District Court for the District of Columbia evaded the core issue at stake and erred in underestimating the import of OFAC's press release announcing Deripaska's designation—a press release which constitutes the sole public notice by the agency as to the reasons for acting against Deripaska. Instead of addressing whether the President can utilize IEEPA's authorities in response to a threat for which no national emergency had been declared, both courts held that OFAC's press release—which constitutes the sole document identifying the threat to which its designation action is responsive—cannot displace the administrative record. OFAC's reasoning in that record, however, is silent

with respect to the threat to which its designation actions were responsive. As a result, both courts avoided the core issue at stake in the litigation.

This avoidance, though, has significant, and perhaps potentially irreparable, costs. Specifically, the D.C. Circuit's resolution of the matter did not merely leave OFAC's action in place but provided grounds for OFAC to undertake similar action in the future. Indeed, so long as the administrative record is devoid of any indication that a particular designation action was undertaken in response to a particular threat, the agency would appear able to re-purpose the authorities of a lawfully-promulgated Executive order issued under IEEPA to address any purported threat—regardless of whether the agency publicly announced motivations outside of that record. Were the D.C. Circuit's holding to stand, absent a clear expression of unlawful motivation in the administrative record itself, any OFAC sanctions action would *per se* be a lawful exercise of their authority under IEEPA. In other words, the Executive would be able to use IEEPA to address any issue at any time, so long as they did not identify in their administrative record what the exercise of that authority was in response to.

Considering the scope of presidential authorities under IEEPA in tandem with the substantial evolution in the use, effect, and manner of U.S. sanctions, this casting-aside of statutorily-mandated limitations on Executive power poses substantial risks to legal order; risks that, if realized, would impart to the Executive Branch unlimited power to impose sanctions and eviscerate congressional oversight.

B. THE INTERNATIONAL EMERGENCY ECONOMIC POWER ACT

Under IEEPA, the Executive Branch may impose economic sanctions on foreign countries and persons, which can have the effect of severing targeted countries and persons from the global financial system and isolating them locally, regionally, and globally. *See* 50 U.S.C. § 1702 (setting forth the authorities granted the President to impose sanctions); Press Release, U.S. Dep't of Treasury, Office of Foreign Assets Control, U.S. Government Sanctions Organizations and Individuals in Connection with an Iranian Defense Entity Linked to Iran's Previous Nuclear Weapons Effort (March 22, 2019) (noting that U.S. sanctions cause "professional, personal, and financial isolation" for their targets); Examining Treasury's Role in Combatting Terrorist Financing Five Years After 9/11, Hearing Before the Comm. on Banking, Housing, and Urban Affairs, 109th Cong., S. Hrg. 109-1073 (statement of Adam J. Szubin) (stating that U.S. sanctions act as "force multipliers," as "international financial institutions frequently implement sanctions voluntarily" by blacklisting targets from their services).

In passing IEEPA, Congress imposed critical limitations on presidential exercise of its authorities. Prime among these, IEEPA conditions the President's exercise of the authorities to the declaration of a national emergency "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States . . ." 50 U.S.C. § 1701(a).

To ward against liberties in interpretation, IEEPA expressly states that the authorities granted to the President pursuant to 50 U.S.C. § 1702 "*may only be exercised* to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared . . . and *may not be exercised for any other purpose*." 50 U.S.C. § 1702(b) (emphasis added). IEEPA further states that "[a]ny exercise of [its] authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to that threat." *Id.*

C. REFORM OF THE TRADING WITH THE ENEMY ACT

IEEPA—which was enacted in 1977—was part of a broad congressional response to perceived Executive overreach during the prior decade. *See* The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power, Harvard L. Rev. 96:5, 1102-1120 (March 1983) (noting that IEEPA was "[o]ne result of th[e] effort . . . to limit presidential power and reclaim supposedly usurped authority.").

IEEPA's predecessor statute—the Trading With the Enemy Act ("TWEA")—had provided almost unhindered economic powers to the President during peacetime. One of the key aims of Congressional reform to TWEA's statutory scheme was to address the "'extensive use by Presidents of emergency authority . . . to regulate both domestic and international transactions *unrelated to a declared state of emergency*.'" The International Emergency Economic Powers Act: A Congressional

Attempt to Control Presidential Emergency Power, Harvard L. Rev. 96:5, 1105 (March 1983) (quoting S. Rep. No. 466, 95th Cong., 1st Sess. 2, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4540, 4541) (emphasis added).

In addressing this issue, IEEPA required the President to declare a national emergency with respect to a threat to the national security, foreign policy, or economy of the United States prior to utilizing IEEPA's authorities. In requiring a national emergency declaration, Congress asserted its legislative prerogatives, establishing oversight over the President's use of IEEPA's authorities.

D. THE EVOLUTION OF SANCTIONS UNDER IEEPA

For more than four decades, successive presidents have utilized their economic powers under IEEPA solely in response to declared national emergencies. Challenges have focused not on whether a particular exercise of IEEPA's authorities was undertaken pursuant to a national emergency other than the one declared, but rather whether a specific targeting action was in furtherance of the declared national emergency. *See, e.g.*, *United States v. Tajideen*, 319 F. Supp. 3d 445 (D.D.C. 2018) ("[D]efendant contends that the OFAC's 'designation of Hizballah as [an SDN], and the subsidiary designation of [himself], cannot meaningfully be said to address the same 'threat' that motivated Executive Order 13,224.'"). This provides at least some evidence that the Executive Branch has been rather conspicuous in its observance of IEEPA's procedural limits.

The past few decades have also witnessed an explosion in the scope, manner, and impact of U.S. economic sanctions imposed under IEEPA. In 1977, at the time of IEEPA's enactment, there existed three national emergency declarations invoking TWEA's authorities. The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power, Harvard L. Rev. 96:5, 1104 (March 1983). As of July 2020, there were 33 ongoing national emergencies invoking IEEPA's authorities. Cong. Research Service, The International Emergency Economic Powers Act: Origins, Evolution, and Use at *1 (July 14, 2020). Many of these declared national emergencies under IEEPA have existed for a decade or longer, indicating the relative ease by which successive presidents have declared, and maintained, states of national emergency for purposes of IEEPA.[1]

The surge in IEEPA's use has coincided with significant developments in how sanctions are used. At the time of IEEPA's inception, it was used primarily to impose trade embargoes, limits on exports or imports, prohibitions on credit or financing, and blocking prohibitions on foreign countries or regimes. *See, e.g.*, Richard N. Haass, Economic Sanctions: Too Much of a Bad Thing, Brookings Institution (June 1, 1998) (noting that sanctions "take the form of arms embargoes, foreign assistance reductions and cut-offs, export and import limitations, asset freezes, tariff

1. For instance, the declared national emergency by which the United States government has imposed a trade embargo with Iran has been in existence since 1995. *See* Notice, Continuation of the National Emergency With Respect to Iran, 87 Fed. Reg. 12555 (March 7, 2022) (continuing the national emergency first declared on May 6, 1995).

increases, revocation of most favored nation trade status, negative votes in international financial institutions, . . . and prohibitions on credit, financing, and investment."). In each case, sanctions utilized under IEEPA were targeted at U.S. person transactions or dealings with targeted countries, regimes, or parties.

Over the past two decades, though, the U.S. government—recognizing its clout in the international financial system—has used sanctions not just to bar U.S. persons from dealing with sanctioned parties, but also to impose substantial costs on foreign persons that engage in economic or other dealings with those sanctioned targets. This has been accomplished primarily by the advent, and accelerated use, of what are commonly known as secondary sanctions—i.e., sanctions that aim to inhibit foreign person dealings with a target. *See* Jason Bartlett and Megan Ophel, Sanctions by the Numbers: Secondary Sanctions, Center for New American Security (Aug. 26, 2021) (noting the dramatic escalation in the use of secondary sanctions since 2010 and the stark choice presented to foreign parties by their use: "do business with the United States or with the sanctioned target, but not both."). Secondary sanctions, combined with the centrality of the U.S. financial system to global finance and trade, have the substantial effect of causing the virtually complete isolation of a target from local, regional, and global markets. In contrast to decades prior, to be sanctioned by the United States today typically means the loss of employment, the closure of one's foreign bank accounts, the inability to conduct basic cross-border trade, and severe difficulties maintaining the basic features of economic and social life. The legality and legitimacy of secondary sanctions continue to be

contested in the international sphere even amongst U.S. allies and partners. Sec. of Treasury Jacob J. Lew, On the Evolution of Sanctions and Lessons for the Future, Carnegie Endowment for Int'l Peace (March 30, 2016) (noting that secondary sanctions "are viewed, even by some of our closest allies as extra-territorial attempts to apply U.S. foreign policy to the rest of the world.").

These developments—the increased use of IEEPA's authorities in tandem with substantive changes in the manner of sanctions use—has resulted in sanctions having a substantially deepened impact on the sanctions target and the broader regional and global economies in which such target is situated. Most recently, U.S. sanctions targeting the Russian Federation have been alleged to be exacerbating the food crisis in the developing world. *See, e.g.*, Daniel Michaels, Russia Swift Sanctions Impeding Food Payments, African Union Tells EU, Wall Street Journal (May 31, 2022) (last updated at 10:10 ET) (noting that "[p]aying for Russian food exports has become harder since the U.S., EU and their allies removed most big Russian banks from the Swift payment system."); Colum Lynch, Who's to Blame for the Global Hunger Crisis?, Foreign Policy (April 25, 2022 at 6:16 p.m. EST) ("Western financial sanctions and other measures imposed on Russia and its key ally Belarus have limited food exports . . . Western financial sanctions have exacerbated humanitarian crises in other countries, particularly in Yemen, deterring international traders from importing food, fuel, and medicines . . ."). Human rights groups in particular have warned of the substantial humanitarian consequences of U.S. sanctions, which have led to shortages in food and medicine for the most vulnerable populations in target states. *See* Human Rights Watch,

'Maximum Pressure': U.S. Economic Sanctions Harm Iranians' Right to Health, Oct. 29, 2019; Fionnuala Ni Aolain, Afghanistan: The Humanitarian Catastrophe is the Security Threat, Just Security (Jan. 3, 2022) (where the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism notes that an "estimated 1 million children's lives [are] immediately threatened by famine and 22.8 million people fac[e] life-threatening food insecurity," partially as a result of U.S. sanctions).

Due to deepened linkages between nations and peoples as a result of globalizing trends these past few decades, IEEPA's authorities risk subjecting even domestic transactions to regulation. Cong. Research Service, The International Emergency Economic Powers Act: Origins, Evolution, and Use (July 14, 2020) (noting that "[t]he interconnectedness of the modern global economy has left few major transactions in which a foreign interest is not involved" and that some scholars have warned that IEEPA's "exemption of purely domestic transactions from the President's transaction controls [may be] a limitation without substance."). Intended as a means of ensuring that the President has the tools and discretion to deal with peacetime national emergencies arising outside the United States, IEEPA may prove a source of legislative authority for the Executive Branch of a scope so broad as to be unimagined by Congress.

E. PROCEDURAL HISTORY

E.O. 13661 and E.O. 13662 are promulgated pursuant to the President's authorities under IEEPA and upon the national emergency declared in response to the actions

and policies of the Government of the Russian Federation with respect to Ukraine. Exec. Order 13661, Preamble (March 16, 2014); Exec. Order 13662, Preamble (March 20, 2014).

On April 6, 2018, OFAC designated Oleg Deripaska pursuant to E.O. 13661 and E.O. 13662 for, respectively, having acted or purported to act for or on behalf of, directly or indirectly, a senior official of the Government of the Russian Federation and operating in the energy sector of the Russian Federation economy. 83 FED. REG. 19138 (May 1, 2018).

Simultaneous with this action, OFAC issued a press release announcing the imposition of sanctions on Oleg Deripaska and companies under his ownership and control. C.A. Appx. 239-246. This press release was titled: "Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity." C.A. Appx. 239.

In this press release, the Secretary of the Treasury explained the rationale for the sanctions on Deripaska, stating:

> The Russian government engages in a range of malign activity around the globe, including continuing to occupy Crimea and instigate violence in eastern Ukraine, supplying the Assad regime with material and weaponry as they bomb their own civilians, attempting to subvert Western democracies, and malicious cyber activities. Russian oligarchs and elites who profit from this corrupt system will no

> longer be insulated from the consequences of their government's destabilizing activities.

C.A. Appx. 239. OFAC's press release also noted that the designation action "targets a number of the individuals listed in the Section 241 report, including those who benefit from the Putin regime and play a key role in advancing Russia's malign activities." *Id.* 21.

In addition, OFAC's press release set forth certain allegations regarding Deripaska that were entirely untethered from the national emergency underlying E.O. 13661 and E.O. 13662, as well those Executive orders' designation criteria. C.A. Appx. A239-A246. Indeed, none of the allegations regarding Deripaska set forth in the press release had any connection to Russian actions or policies in Ukraine.

Deripaska filed a lawsuit challenging OFAC's designation on the grounds that, *inter alia*, OFAC had repurposed E.O. 13661 and E.O. 13662's authorities to impose sanctions on Deripaska with respect to a threat for which no national emergency had been declared. Specifically, Deripaska argued that the President had not declared a national emergency with respect to Russia's "global malign activities," yet—based on OFAC's press release announcing the designation—OFAC's designation action was clearly undertaken in response to such "global malign activities," not in response to Russia's actions and policies with respect to Ukraine. C.A. Appx. A61-A62. According to Deripaska, this violated the APA's ban on arbitrary and capricious agency decision-making, as well as the prohibition

on agency action in excess of statutory jurisdiction, authority, or limitations. *Id.* at C.A. Appx. 82-83, 85-86.

The district court rejected Deripaska's claim, holding that "[t]he record substantiates that OFAC sanctioned Deripaska pursuant to the authority granted in E.O. 13661 and E.O. 13662, and not for some improper purpose." Pet. App. 21a. According to the district court, OFAC's press release "does not change that conclusion" for two reasons. Pet. App. 23a. First, the district court stated that "the press release establishes that OFAC acted within the scope of the Executive Orders" and "never purported to identify 'malign activit[ies]' as either the source of sanctioning authority or a catch-all reason for imposing sanctions." Pet. App. 23a. Second, the district court stated that the press release could not "supplant OFAC's officially stated reasons for sanctioning [Deripaska], which are set forth in the [e]videntiary [m]emoranda." Pet. App. 23a.

Deripaska appealed, and the D.C. Circuit upheld the district court's decision. According to the D.C. Circuit, "it is OFAC's evidentiary submission and not its press release that provides the basis for the sanctions," and while Deripaska argues that the press release reveals OFAC's motivations for imposing sanctions on Deripaska, "nothing about the press release displaces the usual rule that 'a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons' or motivations . . ." Pet. App. 3a. Moreover, the D.C. Circuit found that the press release's "reference to Russia's 'worldwide malign activities' is not . . .

a reference to any distinct, 'undeclared' emergency, but a catch-all for the spate of announced sanctions across two geopolitical crises." Pet. App. 5a. The D.C. Circuit also held that "neither executive order requires a showing of how the particular sanction bears on the declared emergency; rather, the orders reflect the President's judgment that the covered actions contribute to the situation in Ukraine." Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED REMAINS OF EXCEPTIONAL IMPORTANCE TO IEEPA'S STATUTORY SCHEME

The requirement that—prior to utilizing IEEPA's authorities—the President must declare a national emergency with respect to a threat to the national security, foreign policy, or economy of the United States (and may only use IEEPA's authorities with respect to that threat) is one of the few limitations on the authority to impose economic sanctions. Because OFAC repurposed the authorities set forth in E.O. 13661 and E.O. 13662 to address a purported threat for which no national emergency had been declared, upholding OFAC's designation of Deripaska threatens to undo this limitation and leave the Executive unhindered in its use of IEEPA's authorities. This would betray the animating principle of IEEPA and ensure unfettered Executive power in imposing economic sanctions.

A. OFAC's Press Release Identified a Threat for Which No National Emergency Had Been Declared

OFAC's press release announcing Deripaska's designation pursuant to E.O. 13661 and E.O. 13662 clearly identified the threat to which the designation action responded. Indeed, the press release's very title provides that evidence, declaring: "Treasury Designates Russian Oligarchs, Officials, and Entities in Response to Worldwide Malign Activity." C.A. Appx. A239-A246. The Secretary of the Treasury's quote in the press release, which follows immediately from the initial paragraph's notice of the substance of the designation action, reads as follows:

> The Russian government operates for the disproportionate benefit of oligarchs and government elites. The Russian government engages in a range of malign activity around the globe, including continuing to occupy Crimea and instigate violence in eastern Ukraine, supplying the Assad regime with material and weaponry as they bomb their own civilians, attempting to subvert Western democracies, and malicious cyber activities. Russian oligarchs and elites who profit from this corrupt system will no longer be insulated from the consequences of their government's destabilizing activities.

C.A. Appx. A239.

By a plain reading of OFAC's press release, the designation action was not undertaken in response to the specific threat identified in E.O. 13661 and E.O. 13662. Instead, the designation action was undertaken in response to Russia's "worldwide malign activity," which—while it includes Russia's occupation of Crimea and activities in eastern Ukraine—extends just as well to Russia's support for the Assad regime, its efforts to subvert Western democracies, and its malicious cyber activities. C.A. Appx. A239.

OFAC's allegations regarding Deripaska, as identified in the press release, have no connection whatsoever to Russia's actions and policies with respect to Ukraine. Indeed, those allegations are the following: (1) Deripaska "has [] acknowledged possessing a Russian diplomatic passport"; (2) Deripaska "claims to have represented the Russian government in other countries"; (3) Deripaska "has been investigated for money laundering, and has been accused of threatening the lives of business rivals, illegally wiretapping a government official, and taking part in extortion and racketeering; and (4) Deripaska has been alleged to have "bribed a government official, ordered the murder of a businessman, and had links to a Russian organized crime group." C.A. Appx. 240. No reasonable reading of these allegations would connect this alleged conduct to the national emergencies underlying E.O. 13661 and E.O. 13662 (nor the designation criteria of E.O. 13661 or E.O. 13662). Accordingly, this press release evidences that OFAC's designation of Deripaska was in response to purported activities entirely unrelated to Russia's actions and policies with respect to Ukraine.

As OFAC's public notice regarding the designation is properly understood to constitute or, at a minimum, summarize the reasons for the designation action, then it is clear that OFAC's April 6, 2018 designation action was undertaken in response to a threat for which no national emergency had been declared. In other words, OFAC utilized two lawfully-promulgated Executive orders—E.O. 13661 and E.O. 13662—and repurposed their sanctions authorities to address a threat other than Russia's actions or policies with respect to Ukraine.

In doing so, OFAC evaded IEEPA's requirement that its authorities not be used until and unless a national emergency has been declared with respect to a threat to the U.S. national security, foreign policy, or economy that arises, in whole or substantial part, outside the United States. 50 U.S.C. § 1701(a). Indeed, as IEEPA expressly states, its authorities "may *only* be exercised to deal with" a threat for which a national emergency has been declared "and *may not be exercised for any other purpose*." 50 U.S.C. § 1702(b) (emphasis added). Per IEEPA, "[a]ny exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat." *Id.* Finally, there is nothing in IEEPA itself, nor its legislative history, that suggests the exercise of such authority is solely with respect to issuance of Executive orders setting forth sanctions designation criteria, and not with respect to particular actions taken pursuant to those Orders under IEEPA's authority.

B. IEEPA's Statutory Scheme

OFAC's designation of Deripaska, as evidenced by its press release, constitutes an evasion of the very deliberate statutory scheme Congress created to limit the Executive's powers under IEEPA. By repurposing the sanctions authorities of E.O. 13661 and E.O. 13662 to address a threat for which no national emergency had been declared, OFAC effectively did an end-run around the key limitation on presidential authority set forth in IEEPA.

Notably, IEEPA's origins arise from Congress's desire to reassert its prerogatives and impose certain limitations on presidential exercise of emergency authorities (all the while keeping intact the necessary discretion to allow the President to respond to peacetime emergencies abroad). Key to IEEPA's reform of its predecessor statute—the Trading With the Enemy Act—was ensuring that the President was limited to utilizing emergency economic powers solely in cases of a declared national emergency, which would be reported to, and policed by, Congress. Indeed, Congress—at the time of IEEPA's enactment—was very sensitive to the fact that successive presidents had utilized the broad emergency powers set forth in TWEA without oversight and in the absence of a true national emergency.

To remedy this problem, IEEPA sought to more stringently define those situations in which the President could utilize its emergency economic powers. First, IEEPA stated that the President could only declare a national emergency with respect to an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign

policy, or economy of the United States." The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power, Harvard L. Rev. 96:5, 1115 (March 1983). Second, IEEPA required the President to *declare* a national emergency with respect to any such threat. *Id*. And, finally, IEEPA held that its emergency powers could only be employed for the sole purpose of dealing with the threat for which a national emergency had been declared. *Id*. Utilization of these authorities thus extends the limitations of IEEPA to both the conduct targeted by IEEPA-based sanctions, as well as to the orders defining those sanctions. Therefore, in both cases, the use of IEEPA must be connected to a threat for which a national emergency has been declared.

By means of this statutory scheme, Congress established a measure of oversight with respect to IEEPA's emergency powers. That the President's delegees failed to adhere to these important limitations set forth in IEEPA underscores the extreme nature of the agency action at issue and the dangers of allowing it to stand.

C. OFAC's Action Contradicts IEEPA's Statutory Scheme

While the President has declared a national emergency in regard to the actions and policies of the Russian government with respect to Ukraine, *see* Exec. Order 13661, Preamble (March 14, 2014) and Exec. Order 13661, Preamble (March 20, 2014), no national emergency had been declared at that time with respect to Russia's "worldwide malign activity," inclusive of Russia's support for the Assad regime, its efforts to subvert Western

democracies, and its malicious cyber activities.[2] OFAC had thus taken action against Deripaska with respect to a threat for which no national emergency had been declared in violation of IEEPA's clear command otherwise.

Similarly, by utilizing the authorities set forth in E.O. 13661 and E.O. 13662 to designate Deripaska in response to Russia's "worldwide malign activity," OFAC had likewise betrayed IEEPA's command that its authorities only be used to deal with the declared threat and not for any other purpose. 50 U.S.C. § 1702(b). As noted above, IEEPA had sought to ward against its authorities being repurposed to deal with purported national emergencies undeclared by the President. Thus, by designating Deripaska, OFAC transgressed this limitation.

By breaching these clear textual limitations, OFAC acted contrary to IEEPA's statutory scheme. Absent pushback, this threatens to serve as a template for the Executive Branch to assert its emergency powers without adhering to the few limitations set forth in IEEPA.

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2. More than three years after OFAC's designation of Deripaska, E.O. 14024 was issued under the authority of IEEPA in response to "specified harmful foreign activities of the Government of the Russian Federation," including "efforts to undermine the conduct of free and fair democratic elections and democratic institutions in the United States and its allies and partners [and] to engage in and facilitate malicious cyber-enabled activities against the United States." Exec. Order 14024, Preamble (April 15, 2021). The declaration of this national emergency three years after the designation at issue provides clear indication that no national emergency had been declared with respect to the Russia's "worldwide malign activity" as of April 6, 2018.

Considering the broad emergency powers granted by IEEPA, there is a substantial risk that, if left unchecked, the Executive Branch will marry its substantial authorities under IEEPA with unfettered discretion to act contrary to the very constitutional foundations on which our nation rests.

II. THE QUESTION PRESENTED IS ALSO OF EXCEPTIONAL IMPORTANCE TO LIMITING EXECUTIVE AUTHORITY

Because IEEPA's statutory scheme was designed to impose limits on the presidential exercise of emergency powers, ensure congressional oversight, and provide the President with the flexibility to respond to peacetime emergencies, any disturbance to this carefully tailored statutory scheme threatens to undo restraints on the Executive. That, in turn, would permit the unlimited wielding of emergency economic powers targeting both domestic and foreign parties alike—the very dangers that IEEPA sought to ward against. It is for this reason that OFAC's action in excess of its statutory authorities under IEEPA is of such central importance to restraining unbridled Executive power.

A. The President Has Vast Emergency Powers Under IEEPA

IEEPA provides the President with vast emergency economic powers. Under 50 U.S.C. § 1702, the President is authorized to, *inter alia*:

> (A) Investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities,

by any person, or with respect to any property, subject to the jurisdiction of the United States;

(B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

Over the past two decades, these substantial authorities have been used in ever more powerful ways. In targeting foreign nations, successive presidents have

utilized IEEPA's authorities to limit, if not foreclose, the target country's access to the global financial system or its ability to undertake the normal functions of cross-border trade. This has been accomplished through financial sanctions that maximize the leverage offered by the U.S. financial system's central position in the global economy, as well as sectoral sanctions that target the major productive sectors of a foreign nation's economy. These newly-developed sanctions tools—many of which are exercised under IEEPA's authority—are powerful enough to effect a virtual blockade of a foreign nation, risking all that may come with doing so, up to and including the outbreak of military hostilities.

In targeting individuals and entities, IEEPA's authorities have been used ever more broadly—OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN List") now identifying thousands of parties as subject to U.S. sanctions—and with dramatically intensified effect. In prior decades, the most common sanction—what is referred to as a "blocking sanction"—would have the limited effect of imposing a "freeze" on the assets of a targeted individual and entity that were or came within U.S. jurisdiction. Nowadays, due to increased compliance on the part of U.S. and foreign financial institutions, companies, and individuals, these sanctions act as "force multipliers," as "international financial institutions frequently implement the sanctions voluntarily, even when they are under no legal obligation to do so," by blacklisting sanctioned parties from using their services. Examining Treasury's Role in Combating Terrorist Financing Five Years After 9/11, Hearing Before the Comm. on Banking, Housing and Urban Affairs, 109th Cong., S. Hrg. 109-1073 (statement of Adam

J. Szubin). Such compliance has the effect of causing the "professional, personal, and financial isolation" of sanctioned persons, as OFAC itself has lauded. Press Release, U.S. Dep't of Treasury, Office of Foreign Assets Control, U.S. Government Sanctions Organizations and Individuals in Connection with an Iranian Defense Entity Linked to Iran's Previous Nuclear Weapons Effort (March 22, 2019). Without any practical recourse, sanctioned parties are effectively resigned to a kind of social death—their professional life in ruins, their finances undone, and their social existence in tatters.

Simultaneous with these developments, OFAC has also adopted an expansive view of its enforcement prerogatives. The breadth of U.S. jurisdiction is understood to encompass even foreign persons who cause effects in the United States—e.g., the transfer of funds originating outside the United States and intended for a recipient outside the United States falls within the scope of U.S. jurisdiction if the transfer is processed through a foreign branch of a U.S. financial institution. Foreign persons originating such a funds transfer risk being held civilly liable, even if they had no intention or knowledge that the funds would be processed through a foreign branch of a U.S. financial institution. To the extent that the U.S. government could impute prior knowledge to such foreign persons, there is the additional risk of criminal penalties. This expanded concept of U.S. jurisdiction is likewise of recent vintage—the U.S. government having increasingly prosecuted foreign nationals for causing U.S. persons to violate sanctions prohibitions in recent years.

Each of these developments indicates the broad sweep of Executive power provided by IEEPA and the danger of

undoing the limited constraints on that power. Today, the President has the statutory authority to impose a veritable stranglehold on foreign economies, risking the outbreak of war; bankrupting global financial institutions and large multinational companies; and devastating an individual's personal, professional, and social life. Even more troubling is that these emergency powers can be targeted at U.S. citizens and legal permanent residents in the same manner as foreign countries, regimes, and nationals.

B. The Question Presented Decides Whether the Executive Will Be Allowed to Break Free from Statutory Restrain

The question presented is thus a key determinant to whether the President will have unbridled discretion to utilize IEEPA's authorities. Indeed, if it is determined that OFAC lawfully designated Deripaska in response to a threat for which no national emergency has been declared, then IEEPA's conditioning of the President's emergency powers on the declaration of a national emergency with respect to an identified threat to the U.S. national security, foreign policy, or economy will be undone. In that scenario, the President will be able to wield the substantial emergency powers granted by IEEPA without the need to consult with, or be overseen by, Congress.

But, denial of the instant petition—for all practical purposes—would have the same effect. Even though the district court and the D.C. Circuit upheld OFAC's action against Deripaska on grounds unrelated to the question presented herein, the courts' evasion of that question provided effective authorization for OFAC to proceed in like manner in the future. In short, so long

as OFAC's administrative record does not evidence unlawful motivation, then OFAC has a loophole by which it can utilize their sanctions authorities to respond to perceived threats for which no national emergency has been declared. Indeed, absent reprimand from the courts, there is nothing to deter OFAC—or the Executive Branch more broadly—from boosting its claim to unfettered discretion to use its IEEPA-based authorities in response to any circumstances they wish.

The key danger in this is that the balance of power between Congress and the Executive—as legislated by Congress and adhered to for more than four decades—risks being entirely upset in the Executive's favor. Considering the substantial power granted to the President by IEEPA—including authority to impose sanctions on U.S. citizens and legal permanent residents and subject them to civil and criminal penalties—this disturbance to the balance of power risks providing the Executive with near-unlimited powers over U.S. and foreign persons alike.

III. THE QUESTION MERITS RENEWED CONSIDERATION

In litigating this matter, Deripaska alleged first that OFAC had violated the APA's bar on arbitrary and capricious agency decision-making by impermissibly exercising its authorities under IEEPA and designating him in response to a threat for which no national emergency had been declared. C.A. Appx. A82-A83, A85. Second, Deripaska alleged that OFAC had violated the APA's prohibition on agency action in excess of statutory jurisdiction, authority, or limitations for substantially the

same reasons. C.A. Appx. A83, A86. These claims posed the same question presented here: whether OFAC acted within the scope of its statutory authorities under IEEPA when it designated Deripaska in response to a threat for which no national emergency had been declared.

Yet, both the district court and the D.C. Circuit evaded this key issue and resolved the matter on tangential grounds of dubious merit. Instead of taking OFAC's press release at face value—i.e., insofar as it is the sole public notice provided by the agency regarding the basis for its action—the lower courts held that the press release paled in significance compared to the administrative record, which allegedly provided the necessary support for OFAC's action. Indeed, both courts stated that OFAC's press release could not even be considered as it was not part of the administrative record and could not displace the stated basis for the agency's action as identified in that record. Pet. App. 3a-5a; 21a-24a. As noted above, however, the administrative record identifies no substantive motivation, reason, or purpose for its utilization of E.O. 13661 and E.O. 13662 to target Deripaska, much less one that contradicts its clearly expressed reasoning declared in the press release announcing Deripaska's designation. Due to the lower courts' evasion of the question presented here, the matter merits renewed consideration.

A. Review Under the Administrative Procedure Act

The APA empowers courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action." 5 U.S.C. § 706. Under

the APA, reviewing courts shall "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 . . . [or] in excess of statutory jurisdiction, authority, or limitations . . ." 5 U.S.C. § 706(2)(A), (C). In conducting its review, the APA requires courts to "review the whole record . . ." 5 U.S.C. § 706.

With respect to agency action in excess of statutory jurisdiction, "[i]t is 'central to the real meaning of 'rule of law,' [and] not particularly controversial' that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so." *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 621 (D.C. Cir. 1992) (holding that "[a]gency actions beyond delegated authority are 'ultra vires,' and courts must invalidate them."). Indeed, "an agency's power is no greater than that delegated to it by Congress." *Lyng v. Payne*, 476 U.S. 926, 937 (1986). Accordingly, it is a court's "essential function" when reviewing agency action to "determin[e] whether an agency acted within the scope of its authority." *Copar Pumice Co., Inc. v. Tidwell*, 603 F.3d 780, 801 (10th Cir. 2010) (quoting *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994)).

B. The President's Emergency Powers Will Undergo *De Facto* Expansion Absent Renewed Consideration

Here, the key question is whether the President's delegees—specifically, OFAC and its Director—acted within the scope of the authority granted by IEEPA

when designating Deripaska pursuant to E.O. 13661 and E.O. 13662 in response to a threat for which no national emergency had been declared. If it is determined that OFAC acted beyond the scope of its authority, then the APA directs the court to set aside and hold unlawful OFAC's designation of Deripaska as arbitrary and capricious agency decision-making and agency action exceeding the scope of statutory jurisdiction, authority, and limitations.

Both the district court and the D.C. Circuit evaded this key question by holding that OFAC's press release cannot displace the reasons for the designation stated in the administrative record—and, in particular, the evidentiary memorandum. *See* Pet. App. 3a-4a, 23a-24a. Yet, OFAC's press release is, in fact, included in the administrative record, C.A. Appx. A239-246. Further, it defies common-sense for the sole public notice issued by an agency with respect to its action to be entirely cast aside in deference to a "record" that is entirely devoid of any information regarding the basis and motivation for the agency's action. Indeed, as Deripaska argued on appeal before the D.C. Circuit, nothing in OFAC's evidentiary memorandum contradicts the reasons for the designation set forth in the press release, as nowhere in the record does OFAC identify the national emergency for which it reasons that the sanctions being imposed on Deripaska are responsive. Notably, the administrative record is also devoid of any information tying Deripaska to alleged conducted related to Russia's activities in Ukraine, or to any threat contained in E.O. 13661 or E.O. 13662 for which a national emergency has been declared.

More critically, the district court and the D.C. Circuit's apparent resolution of this matter does not merely leave OFAC's action intact but provides grounds for OFAC to undertake like action in the future. Based on the lower courts' holdings, the lesson thus far for OFAC is that it may continue to undertake designation actions in response to threats for which no national emergency is declared so long as OFAC (1) utilizes the authorities of a lawfully promulgated Executive order; and (2) does not, within its administrative record, express the threat to which its designation action responds, nor make any reference to purported activities which relate to the threat identified in such orders. This lesson provides the grounds for a significant expansion in presidential emergency economic powers and a loss of congressional oversight over the exercise of those powers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED MARCH 29, 2022

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5157

September Term, 2021

OLEG DERIPASKA,

Appellant,

v.

JANET L. YELLEN, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, *et al.*,

Appellees.

March 29, 2022, Filed

Appeal from the United States District Court for the District of Columbia (No. 1:19-cv-00727).

Before: MILLETT, PILLARD and KATSAS, *Circuit Judges.*

JUDGMENT

Appendix A

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. R. 34(j). The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the following reasons, it is

ORDERED AND ADJUDGED that the judgment of the district court be **AFFIRMED**.

Oleg Deripaska, a politically influential Russian billionaire, appeals a district court judgment dismissing his claims that the Office of Foreign Assets Control (OFAC) unlawfully placed him under sanction in 2018. App. 275-308. OFAC imposed those sanctions under a set of executive orders President Obama issued in 2014 in response to Russia's deployment of military force to, and then purported annexation of, the Crimea region of Ukraine. The President's authority is spelled out in the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*, authorizing declarations of emergencies regarding foreign threats and the imposition of sanctions on persons and states in response to those emergencies. The two Ukraine-related orders at issue—both titled "Blocking Property of Additional Persons Contributing to the Situation in Ukraine"—are E.O. 13661, which authorizes sanctions against persons determined to have acted on behalf of senior Russian officials (App. 127-29), and E.O. 13662, which authorizes sanctions against persons acting in specified sectors of the Russian economy, including the energy sector (App. 130-32).

Appendix A

Deripaska does not challenge Executive Orders 13661 and 13662 but makes three arguments that the sanctions imposed on him were unlawful. None has merit, and we affirm the district court.

First, Deripaska argues that the sanctions exceed OFAC's statutory authority because, he says, they respond not to the threat Russia poses to Ukraine but to a generalized "undeclared national emergency" concerning Russia's "worldwide malign activities." Appellant Br. at 28 (formatting in second quotation altered); *see generally* Appellant Br. at 25-37. Deripaska's only support for that contention is OFAC's April 6, 2018, press release announcing sanctions against him and numerous other actors. App. 239-46. He reads that press release to imply that an undeclared emergency concerning perceived Russian malign activities broader than the Ukraine crisis "may have motivated the agency to undertake the action." Appellant Br. at 29; *see also* Appellant Br. at 30-31. And he asserts that none of his conduct cited in support of the sanctions relates to Russian activities regarding Ukraine. Appellant Br. at 18-19.

This challenge fails for two reasons, as the district court correctly held. *See* App. 285-86. First, it is OFAC's evidentiary submission and not its press release that provides the basis for the sanctions. Deripaska seems to suggest that the press release shows that OFAC's official documentation of the sanctions, *see* App. 118-23, 152-60, was a pretext for other, invalid motivations. But nothing about the press release displaces the usual rule that "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons" or motivations, including those stated

only after the agency's decision. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573, 204 L. Ed. 2d 978 (2019).

Second, the press release appropriately reflects how the executive orders apply to Deripaska by summarizing the extensive justifications OFAC gave in its evidentiary memoranda. Here is what the press release says about Deripaska:

> Oleg Deripaska is being designated pursuant to E.O. 13661 for having acted or purported to act for or on behalf of, directly or indirectly, a senior official of the Government of the Russian Federation, as well as pursuant to E.O. 13662 for operating in the energy sector of the Russian Federation economy. Deripaska has said that he does not separate himself from the Russian state. He has also acknowledged possessing a Russian diplomatic passport, and claims to have represented the Russian government in other countries. Deripaska has been investigated for money laundering, and has been accused of threatening the lives of business rivals, illegally wiretapping a government official, and taking part in extortion and racketeering. There are also allegations that Deripaska bribed a government official, ordered the murder of a businessman, and had links to a Russian organized crime group.

App. 240. That the press release also places Deripaska's conduct in the context of Russia's other global malign activities does not contradict the basis of the sanctions. The same press release announced sanctions on dozens of

persons and entities, some pursuant to the two executive orders at issue in this case, and some pursuant to Executive Order 13582 targeting transactions beneficial to the Syrian government. App. 239. In total, the press release announced sanctions across seven Russian individuals, seventeen Russian government officials, twelve Russian companies, and two state-owned Russian firms. App. 239-46. Its reference to Russia's "worldwide malign activities" is not, as Deripaska would have it, a reference to any distinct, "undeclared" emergency, but a catch-all for the spate of announced sanctions across two geopolitical crises. Nothing about the more encompassing references in the press release contradicts or belies the far more specific reasons OFAC gave in its evidentiary memos for sanctioning Deripaska.

In short, there is no evidence that the government acted for reasons other than those it provided, much less that its stated reasons were contrived. *See Dep't of Commerce*, 139 S. Ct. at 2575-76. And, contrary to Deripaska's suggestions, *see* Appellant Br. at 20, 29-32, neither executive order requires a showing of how the particular sanction bears on the declared emergency; rather, the orders reflect the President's judgment that the covered actions contribute to the situation in Ukraine. The two cited executive orders plainly cover the types of actions OFAC attributes to Deripaska.

Second, Deripaska argues OFAC acted arbitrarily and capriciously by sanctioning him under E.O. 13661. He contends in particular that OFAC lacked authority to sanction him for conduct that predated the E.O.'s effective date. *See* Appellant Br. at 38-49. But we need not consider questions of the retroactive reach of the IEEPA and E.O.

13661 because the evidence of Deripaska's post-order conduct suffices to support the sanctions. OFAC cites substantial evidence that Deripaska acted on behalf of Russian officials after the President issued E.O. 13661 in 2014. *See* App. 108 (noting that, in the years following the President's E.O., Deripaska laundered money on behalf of President Putin). To the extent there is any ambiguity in the unclassified record regarding the timing of Deripaska's sanctioned conduct, *see* Reply Br. at 15, our review of the classified record confirms that OFAC had sufficient evidence for sanctions based on Deripaska's conduct that post-dated E.O. 13661.

Indeed, we can fairly read OFAC's submissions as describing a long-running pattern of behavior which continued after the executive order issued. Especially in the absence of any evidence that the behavior had ceased, OFAC may rely on past conduct in describing an enduring course of conduct persisting until the sanctions are imposed. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162, 357 U.S. App. D.C. 35 (D.C. Cir. 2003) (holding government could sanction private foundation based partly on evidence tying foundation to terrorist organization before the organization's terrorist designation, because "[t]here was no plausible evidence presented which showed that these ties had been severed"); *see also* Appellee Br. at 32 n.2, 33. The evidence of Deripaska's post-order activities suffices to support the sanctions, and Deripaska makes no objection specifically to contextualizing that evidence by reference to pre-order conduct. Even were he correct that the government could not sanction him for pre-order conduct alone, that is not what happened here.

Third, Deripaska argues OFAC acted arbitrarily and capriciously by sanctioning him but not his energy companies under E.O. 13662. Specifically, Deripaska claims that OFAC chose to lift sanctions from two major Russian energy companies—En+ and EuroSibEnergo—on the basis that Deripaska no longer "own[ed]" them, even as it maintains that Deripaska continues to "operate" in Russia's energy sector. *See* Appellant Br. at 49-58. Seeing a contradiction, Deripaska argues he cannot be operating in the energy sector both because he no longer owns those energy companies, retaining only non-controlling stakes, and because the companies are themselves no longer subject to OFAC sanctions. *See* Appellant Br. at 56. But the district court correctly held that "[o]wnership and operation are two distinct concepts, with the latter conveying a far broader scope of conduct." App. 294. In fact, the record reflects Deripaska's continuing and extensive operation in the sector: OFAC found, among other things, that Deripaska "owns 44.95 percent of En+, votes 35 percent of En+ shares, and appoints four of 12 board members to the En+ board of directors," thereby verifying his substantial operation in the sector. App. 157; *see* App. 155-58. And that OFAC may list and delist energy companies at its discretion to further the President's geopolitical goals does not mean that a delisted company no longer "operates" in the energy sector, nor does it change the facts of Deripaska's ongoing role in those energy companies. *See* Appellee Br. 49-52.

OFAC further found that Deripaska operated in the Russian energy sector by representing the Russian state and Russian energy companies at energy conferences and on international councils—roles which both count

as operation in the sector and confirm that Deripaska's somewhat diminished roles in En+ and EuroSibEnergo contributed to such operation. *See, e.g.*, App. 155 (finding these activities "constitute operation in the energy sector of the Russian Federation economy" sufficient for sanctions). Deripaska does not dispute his substantial international role representing Russia and its energy industry, which is an independently sufficient basis supporting OFAC's sanction under E.O. 13662. Deripaska also briefly raises in his Reply Brief an argument that the Russian energy sector does not encompass electricity production, Reply Br. at 31 n.2; he did not raise that argument in his opening brief, and it is accordingly forfeited.

For those reasons we affirm the district court's judgment.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

So ordered.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JUNE 13, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 19-cv-00727 (APM)

OLEG DERIPASKA,

Plaintiff,

v.

JANET L. YELLEN[1] *et al.*,

Defendants.

June 13, 2021, Decided;
June 13, 2021, Filed

MEMORANDUM OPINION

I. INTRODUCTION

In response to Russia's annexation of the Crimean Peninsula from Ukraine in 2014, President Barack Obama declared a series of escalating national emergencies and authorized the Department of the Treasury to sanction

1. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the court substitutes the current Secretary of the Treasury as a defendant in this case.

Russian individuals and entities that met specified criteria. Plaintiff Oleg Deripaska, a Russian businessman with ties to the Kremlin, was among those sanctioned. Deripaska now challenges those designations as arbitrary and capricious and violative of his Fifth Amendment rights. Defendants have moved to dismiss or, in the alternative, for summary judgment, and Deripaska has cross-moved for summary judgment. For the reasons that follow, the court grants Defendants' motion and denies Deripaska's cross-motion.

II. BACKGROUND

A. Statutory Background

1. International Emergency Economic Powers Act

Pursuant to the International Emergency Economic Powers Act ("IEEPA"), the President possesses the authority to impose sanctions to "deal with an unusual and extraordinary threat with respect to which a national emergency has been declared." 50 U.S.C. § 1701(b). Upon declaring a national emergency, the President can block "any right, power, or privilege" in "any property in which any foreign country or a national thereof has any interest by any person." *Id.* § 1702(a)(1)(B).

In Executive Order 13660, issued in 2014, President Obama declared a national emergency in response to Russia's assertion of "governmental authority in the Crimean region without the authorization of the

Government of Ukraine." Exec. Order No. 13660, Blocking Property of Certain Persons Contributing to the Situation in Ukraine, 79 Fed. Reg. 13,493, 13,493 (Mar. 6, 2014). Executive Order 13660 authorized sanctions against, among others, persons "responsible for or complicit in" the Russian annexation of Crimea. *Id.*

The President quickly followed that declaration with two additional executive orders that permitted sanctions against an even broader swath of individuals. First, he issued Executive Order 13661 ("E.O. 13661"), which "expand[ed] the scope of the national emergency declared in Executive Order 13660" in response to "the actions and policies of the Government of the Russian Federation with respect to Ukraine, including the recent deployment of Russian Federation military forces in the Crimea region of Ukraine." Exec. Order No. 13661, Blocking Property of Additional Persons Contributing to the Situation in Ukraine, 79 Fed. Reg. 15,535, 15,535 (Mar. 16, 2014). As relevant to this case, E.O. 13661 authorizes the Department of the Treasury to block the property and interests of "persons determined by the Secretary of the Treasury, in consultation with the Secretary of State[,] . . . to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly[,] . . . a senior official of the Government of the Russian Federation." *Id.* at 15,535, § 1(a)(ii)(C)(1). The term "person" was defined to mean "an individual or entity." *Id.* at 15,536, § 6(a).

Four days later, President Obama again "expand[ed] the scope of the national emergency declared in Executive

Order 13660" in response to Russia's "purported annexation of Crimea and its use of force in Ukraine." Exec. Order No. 13662, Blocking Property of Additional Persons Contributing to the Situation in Ukraine, 79 Fed. Reg. 16,169, 16,169 (Mar. 20, 2014). As relevant here, Executive Order 13662 ("E.O. 13662") permitted the blocking of property and interests of "any person determined by the Secretary of the Treasury, in consultation with the Secretary of State[,] . . . to operate in such sectors of the Russian Federation economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, such as financial services, energy, metals and mining, engineering, and defense and related materiel." *Id.* at 16,169, § 1(a)(i). The Secretary of the Treasury later determined that E.O. 13662 should "apply to the financial services and energy sectors of the Russian Federation economy." A.R. at 21.[2]

2. Countering America's Adversaries Through Sanctions Act

This case also implicates a different act of Congress: the Countering America's Adversaries Through Sanctions Act ("CAATSA"), which, among other things, imposed new sanctions on Iran, Russia, and North Korea. *See* Pub. L. No. 115-44, 131 Stat. 886 (Aug. 2, 2017). As pertinent here, Section 241 of CAATSA requires "the Secretary of the Treasury, in consultation with the Director of National Intelligence and the Secretary of State," to submit "a

2. Citations to the unclassified Administrative Record ("A.R.") can be found in the Joint Appendix, ECF No. 43.

detailed report" to congressional committees on "[s]enior foreign political figures and oligarchs in the Russian Federation" ("Section 241 Report"). *Id.* § 241(a)(1). Such report shall identify "the most significant senior foreign political figures and oligarchs in the Russian Federation, as determined by their closeness to the Russian regime and their net worth." *Id.* § 241(a)(1)(A).

B. Factual Background

1. CAATSA

On January 29, 2018, the Secretary of the Treasury produced the Section 241 Report. *See* Dep't of Treasury, Report to Congress Pursuant to Section 241 of the Countering America's Adversaries Through Sanctions Act of 2017 Regarding Senior Foreign Political Figures and Oligarchs in the Russian Federation and Russian Parastatal Entities (Jan. 29, 2018), http://prod-upp-image-read.ft.com/40911a30-057c-11e8-9650-9c0ad2d7c5b5 [hereinafter Section 241 Report]. The Section 241 Report listed senior foreign political figures and oligarchs in the Russian Federation "based on objective criteria related to individuals' official position[s] in the case of senior political figures, or a net worth of $1 billion or more for oligarchs." *Id.* at 1. The Secretary further stated that the Section 241 Report was "not a sanctions list, and the inclusion of individuals or entities in th[e] report . . . does not and in no way should be interpreted to impose sanctions on those individuals or entities." *Id.* at 2. An individual's inclusion in the Report likewise did not mean that the individual met "the criteria for designation under any

sanctions program," nor did it "give rise to, or create any other restrictions, prohibitions, or limitations on dealings with such persons by either U.S. or foreign persons." *Id.* Instead, the list was "prepared and provided exclusively in response to Section 241 of CAATSA." *Id.* Plaintiff Oleg Deripaska appeared on the list of oligarchs. *Id.* at 7.

2. Deripaska's Listing Under E.O. 13661 and E.O. 13662

a. The initial listing

Months later, on April 6, 2018, the Office of Foreign Assets Control ("OFAC") announced that Deripaska would be sanctioned because he met "one or more of the criteria for designation set forth in" E.O. 13661 and E.O. 13662. A.R. at 1. Additionally, several Deripaska-related entities, including En+ Group PLC ("En+"), Gaz Group ("Gaz"), JSC Eurosibenergo ("ESE"), and United Company Rusal PLC ("Rusal"), simultaneously were blocked because of their affiliation with Deripaska. *Id.* at 2-3.

OFAC prepared an Evidentiary Memorandum, dated April 5, 2018, explaining the bases for sanctioning Deripaska under E.O. 13661 and E.O. 13662. *Id.* at 6-11. The Evidentiary Memorandum explained that OFAC had blocked Deripaska under E.O. 13661 because he had "acted or purported to act for or on behalf of, directly or indirectly, a senior official of the Government of the Russian Federation"—namely, Russian President Vladimir Putin. *See id.* at 8. Most of the bases for designating Deripaska due to his actions on behalf of Putin contain classified

information and therefore are not disclosed to Deripaska or the public.[3] A redacted, unclassified version of the Memorandum, however, mentions public reports that Deripaska bought an aluminum plant in Montenegro in 2005 at Putin's behest so that the Kremlin could develop "an area of influence in the Mediterranean." *Id.* (internal quotation marks omitted).

Because of the heavy redactions to the Evidentiary Memorandum, OFAC provided Deripaska with an unclassified summary of the bases for his designation. *See* Second Am. Compl., ECF No. 26 [hereinafter SAC], Ex. C, ECF No. 26-3 [hereinafter Unclassified Summary], at 3. The unclassified summary identified six bases for Deripaska's designation. These bases included that (1) Putin "reportedly compelled" Deripaska to make an $800 million investment in the 2014 Sochi Olympics, and that, (2) as of late January 2018, Deripaska financed projects upon the request of Putin and senior Russian officials. *Id.* Additionally, (3) Deripaska "reportedly once cancelled an IPO of his company, Gaz, to hide Russian President Vladimir Putin's money laundering through the company, as recently as September 2017," and (4) "[i]n December 2016, Deripaska was reportedly identified as one of the individuals holding assets and laundering funds on behalf of Russian President Vladimir Putin." *Id.* Moreover, (5) "Deripaska's business activity was reportedly used, on at least one occasion, as a cover to facilitate the transfer of funds for the personal use of

3. The court has reviewed *in camera* a classified administrative record submitted by Defendants.

then Russian Prime Minister Vladimir Putin" in July 2011. *Id.* And, finally, (6) "Deripaska reportedly acted on verbal instructions from President Vladimir Putin in a high-level bilateral meeting between Russian and Kyrgyz representatives." *Id.*

With respect to Deripaska's designation under E.O. 13662, the Evidentiary Memorandum explains that Deripaska was sanctioned for operating in the energy sector of the Russian Federation economy. A.R. at 9. That designation stemmed primarily from two sources: Deripaska's work with the World Economic Forum and his ownership of private power companies. *See id.* at 9-10. OFAC explained that Deripaska's website touted his role in World Economic Forum energy-related projects, including projects titled "New Energy Architecture" and "Interaction between the Power Industry and Society." *Id.* at 9. He also served as a representative on the Asia-Pacific Economic Cooperation Business Advisory Council, "focus[ing] on multiple issues including energy efficiency and energy security."[4] *Id.* at 10. OFAC further pointed to Deripaska's ownership interests in En+ and ESE as evidence of his operation in Russia's energy sector. *Id.*

4. The Asia-Pacific Economic Cooperation ("APEC") Business Advisory Council "advise[s]" the heads of state for Asia-Pacific countries "on issues of interest to business," "presents recommendations," and identifies "business-sector priorities and concerns." Asia-Pac. Econ. Coop., APEC Business Advisory Council (last updated Jan. 2021), https://www.apec.org/Groups/Other-Groups/APEC-Business-Advisory-Council. Members of the Council "are appointed by their respective economic leaders and represent a range of business sectors." *Id.*

The Evidentiary Memorandum described En+, of which Deripaska was the majority shareholder, as "a leading international vertically integrated aluminum and power producer with core assets located in Russia." *Id.* at 10 & n. 12 (internal quotation marks omitted). En+ in turn owns 100% of ESE, "the largest private power company in Russia, [which] produces around 9 percent of Russia's total electricity generation." *Id.* ESE and En+ were both blocked as a result of Deripaska's designation. *See id.* at 3.

In December 2018, Deripaska and OFAC agreed to a Terms of Removal Agreement that resulted in the delisting of En+, ESE, and another En+-affiliated entity, Rusal. *See id.* at 212. The agreement, among other things, required Deripaska to reduce his majority ownership in En+ to no more than 45% of shares, "prohibited [him] from voting more than 35% of En+ shares," and limited him to nominating four of En+'s twelve directors. *Id.* at 213-14. The Removal Agreement also imposed various other restrictions that limited Deripaska's direct ownership and control of ESE and Rusal. *See id.* at 216-18. These conditions are to "remain in place for as long as Deripaska remains on the [Specially Designated Nationals and Blocked Persons] List." *Id.* at 218.

b. Deripaska's delisting request

Deripaska later submitted a petition to OFAC seeking delisting under E.O. 13662. He asserted that his original designation "was both factually and legally insufficient" and that his reduced ownership in En+ constituted "a change in circumstances." *Id.* at 160. Deripaska argued

that his initial designation was without basis because his work for the World Economic Forum did not relate to *Russia's* energy sector and that the "energy sector," for purposes of E.O. 13662, does not include power generation activities. *See id.* at 160-61. OFAC rejected both of these arguments in March 2020.

First, it explained that Deripaska's work for the World Economic Forum constituted operation in Russia's energy sector because (1) Deripaska "participated in these projects as part of his work in the En+ Group," which operates in the Russian economy, and (2) he participated in other projects "as the appointee of the Russian Federation government and to represent a business sector of the Russian Federation economy." *Id.* at 161. OFAC further stated that the term "energy sector" was undefined in E.O. 13662 and that the narrower definitions Deripaska proffered for "energy sector" were inapplicable to the Ukraine sanctions program. *Id.* at 162. Finally, OFAC rejected Deripaska's argument that his divestment of his ownership stake in En+ required his delisting. OFAC concluded that Deripaska's "continued ownership in En+ and ESE," although reduced, nonetheless constituted "evidence of [his] continued operation in the energy sector of the Russian Federation economy." *Id.* at 163-64. OFAC therefore denied Deripaska's delisting petition. *Id.* at 158.

C. Procedural Background

On March 15, 2019, Deripaska filed the Complaint in this matter, challenging his designations under E.O. 13661 and E.O. 13662, as well as his identification in the

Section 241 Report. *See* Compl., ECF No. 1. Thereafter, Deripaska sought administrative reconsideration of his E.O. 13662 designation and amended his Complaint to drop his challenges relating to E.O. 13662. *See* Am. Compl., ECF No. 7, ¶ 6. After OFAC denied his reconsideration request, A.R. at 158, Deripaska filed the operative Second Amended Complaint, in which he once again challenges his designation under E.O. 13661 and E.O. 13662. *See* SAC. He also launches new challenges to OFAC's refusal to delist him under E.O. 13662 and his inclusion in the Section 241 Report. *See id.* Defendants have moved to dismiss or, in the alternative, for summary judgment, Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J., ECF No. 27 [hereinafter Defs.' Mot.], and Deripaska has cross-moved for summary judgment, Pl.'s Cross-Mot. for Summ. J., ECF No. 31 [hereinafter Pl.'s Mot.].

After briefing on the parties' cross-motions was complete, Deripaska moved to supplement the administrative record. *See* Pl.'s Mot. to Suppl. the Administrative R., ECF No. 36. The court denied that motion on December 29, 2020. *See Deripaska v. Mnuchin*, No. 19-cv-727 (APM), 2020 U.S. Dist. LEXIS 245081, 2020 WL 7828783 (D.D.C. Dec. 29, 2020).

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face." *Sickle v. Torres Advanced Enter. Sols., LLC*, 884 F.3d 338, 344-45, 434 U.S. App. D.C. 363 (D.C. Cir. 2018) (alteration omitted) (quoting

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

"[S]ummary judgment is the mechanism for deciding whether as a matter of law an agency action is supported by the administrative record and is otherwise consistent with the [Administrative Procedure Act ('APA')] standard of review." *Louisiana v. Salazar*, 170 F. Supp. 3d 75, 83 (D.D.C. 2016). In reviewing an agency action under the APA, "the district judge sits as an appellate tribunal," and "[t]he entire case on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083, 348 U.S. App. D.C. 77 (D.C. Cir. 2001) (internal quotation marks omitted). The court's analysis must be confined to the administrative record and should involve "neither more nor less information than" was before "the agency when it made its decision." *CTS Corp. v. EPA*, 759 F.3d 52, 64, 411 U.S. App. D.C. 243 (D.C. Cir. 2014) (internal quotation marks omitted). The district court's "review is 'narrow' and [it] will 'not substitute [its] judgment for that of the agency.'" *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 605, 424 U.S. App. D.C. 319 (D.C. Cir. 2016) (alterations omitted) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.* (*State Farm*), 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)).

III. DISCUSSION

Deripaska asserts numerous claims challenging (1) his designation under E.O. 13661 and E.O. 13662,

(2) the denial of his delisting petition under E.O. 13662, and (3) his inclusion in the Section 241 Report. The court turns first to Deripaska's arguments regarding his designations and delisting request and then takes up his arguments regarding his inclusion in the Section 241 Report.

A. Designations in Excess of Statutory Authority

Deripaska argues that OFAC exceeded its statutory authority when it designated him for sanctions under both Executive Orders. *See* Pl.'s Mot., Mem. of P. & A. in Supp. of Pl.'s Cross-Mot. for Summ. J. & in Opp'n to Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J., ECF No. 31-1 [hereinafter Pl.'s Br.], at 18-23. Central to his argument is the Treasury Department's press release announcing his listing. A.R. at 413 (announcing sanctions against "seven Russian oligarchs and 12 companies they own or control, 17 senior Russian government officials, and a state-owned Russian weapons trading company and its subsidiary, a Russian bank"). According to Deripaska, the press release reveals that he was not sanctioned on the grounds specified in E.O. 13661 or E.O. 13662, but instead was improperly penalized "in response to an undeclared national emergency—i.e., Russia's worldwide malign activities." Pl.'s Br. at 19 (internal quotation marks omitted).

The record substantiates that OFAC sanctioned Deripaska pursuant to the authority granted in E.O. 13661 and E.O. 13662, and not for some improper purpose. "[O]nce the President has declared a national emergency, the IEEPA authorizes the blocking of property to protect against that threat." *Islamic Am. Relief Agency v.*

Gonzales, 477 F.3d 728, 735, 375 U.S. App. D.C. 93 (D.C. Cir. 2007); *see also Regan v. Wald*, 468 U.S. 222, 228, 104 S. Ct. 3026, 82 L. Ed. 2d 171 (1984). President Obama issued E.O. 13661 and E.O. 13662 after "declar[ing] a national emergency to deal" with the "unusual and extraordinary threat to the national security and foreign policy of the United States" caused by Russia's invasion of Crimea. *See* 79 Fed. Reg. at 13,493; 79 Fed. Reg. at 15,535 (issued to deal with and expand the "national emergency declared in Executive Order 13660"); 79 Fed. Reg. at 16,169 (same). E.O. 13661 authorized the sanctioning of "persons [determined] . . to have acted or purported to act for or on behalf of, directly or indirectly[,] . . . a senior official of the Government of the Russian Federation." 79 Fed. Reg. at 15,535, § 1(a)(ii)(C)(1). And E.O. 13662 permitted the blocking of property and interests of persons in certain sectors of the Russian economy, which the Secretary later defined to include the "energy sector[]." A.R. at 21. OFAC has since produced Evidentiary Memoranda substantiating its sanctioning of Deripaska pursuant to both Executive Orders. *See id.* at 6-11 (Evidentiary Memorandum designating under E.O. 13661 and E.O. 13662); *id.* at 158-66 (Evidentiary Memorandum denying delisting petition under E.O. 13662). Specifically, those Memoranda explain that OFAC sanctioned Deripaska because it had "reason to believe" that he both "has acted or purported to act for or on behalf of, directly or indirectly, a senior official of the Government of the Russian Federation, and operates in the energy sector of the Russian Federation economy." *Id.* at 7 (citation omitted). The Evidentiary Memoranda nowhere generically offer Russia's "malign activities" as grounds for Deripaska's designation. Thus, the record

reflects that the President declared a national emergency and identified criteria pursuant to which individuals may be sanctioned, and OFAC determined Deripaska met those criteria for sanctions. OFAC therefore acted within its authority in sanctioning Deripaska.

The press release on which Deripaska relies does not change that conclusion for two reasons. First, on its own terms, the press release establishes that OFAC acted within the scope of the Executive Orders. It expressly announces that "[t]oday's actions are pursuant to authority provided under Executive Order (E.O.) 13661 and E.O. 13662." A.R. at 413. To be sure, the press release quotes the Secretary as saying that "[t]he Russian government engages in a range of malign activity around the globe," but the Secretary never purported to identify "malign activit[ies]" as either the source of sanctioning authority or a catch-all reason for imposing sanctions. *See id.* (internal quotation marks omitted). In any event, the Secretary identified Russia's "continuing to occupy Crimea and instigate violence in eastern Ukraine" as among the "malign activit[ies]" that justified sanctions. *Id.* (internal quotation marks omitted). It is for those very activities that E.O. 13661 and E.O. 13662 authorized the Secretary to designate Deripaska.

Second, Deripaska cites no authority for the proposition that statements in a press release can supplant OFAC's officially stated reasons for sanctioning him, which are set forth in the Evidentiary Memoranda. As discussed, the Evidentiary Memoranda clearly identify the sanctions criteria and explain why Deripaska satisfies them. The

court must presume that OFAC prepared the Evidentiary Memoranda in good faith, absent contrary evidence. *See Friedman v. FAA*, 841 F.3d 537, 541 n.1, 426 U.S. App. D.C. 349 (D.C. Cir. 2016). Deripaska presents no such evidence here.

B. Arbitrary and Capricious Review

Deripaska next argues that his designations violate the APA because Defendants acted arbitrarily and capriciously when they sanctioned him under E.O. 13661 and rejected his delisting petition under E.O. 13662 . Pl.'s Br. at 23-32. The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's decision is arbitrary and capricious if the agency relies "on factors which Congress has not intended it to consider, entirely fail[s] to consider an important aspect of the problem, offer[s] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. This review is deferential, and it is not for the court to "reweigh the conflicting evidence or otherwise to substitute [its] judgment for that of the [agency]." *Ind. Mun. Power Agency v. F.E.R.C.*, 56 F.3d 247, 254, 312 U.S. App. D.C. 283 (D.C. Cir. 1995). The court's review is particularly deferential in this case because the issues at hand implicate national security, foreign policy, and administrative law. *See Islamic Am. Relief Agency*, 477 F.3d at 734 ("[W]e reiterate that our

review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential."); *see also Rakhimov v. Gacki*, No. 19-cv-2554 (JEB), 2020 U.S. Dist. LEXIS 68764, 2020 WL 1911561, at *6 (D.D.C. Apr. 20, 2020) ("The D.C. Circuit . . . has urged courts to be particularly deferential to executive blocking orders, decisions 'at the intersection of national security, foreign policy, and administrative law.'" (quoting *Islamic Am. Relief Agency*, 477 F.3d at 734)).

1. E.O. 13661

Deripaska first argues that Defendants' decision to designate him pursuant to E.O. 13661 was arbitrary and capricious because OFAC was required to identify a principal-agent relationship between Deripaska and a senior official of the Russian government before it could sanction him. Pl.'s Br. at 24-26. According to Deripaska, E.O. 13661's reference to persons who are "owned or controlled by" or who "act[] or purport[] to act for or on behalf of, directly or indirectly" a senior Russian official, 79 Fed. Reg. at 15,535, § 1(a)(ii)(C)(1), mirrors the definition of an "agent" in the Foreign Terrorist Organization Sanctions Regulations, 31 C.F.R. § 597.301. Pl.'s Br. at 24. Those regulations define an "agent" to include: "(1) Any person owned or controlled by a foreign terrorist organization; or (2) Any person to the extent that such person is, or has been, . . . acting or purporting to act directly or indirectly on behalf of a foreign terrorist organization." 31 C.F.R. § 597.301. The court rejects Deripaska's argument for two reasons.

First, E.O. 13661 on its face does not anywhere use the term "agent" or cross-reference any existing definition of "agent," let alone the definition found in 31 C.F.R. § 597.301. Had the President wanted to incorporate agency principles into E.O. 13661, he would not have done so silently. What's more, as Defendants point out, the definitional terms used in the Foreign Terrorist Organization Sanctions Regulations are applicable solely to that sanctions regime. Those regulations specifically state that "[d]iffering statutory authority and foreign policy and national security contexts may result in differing interpretations of similar language among" the other sanctions regimes that OFAC enforces, *id.* § 597.101(a). Defs.' Consolidated Reply in Supp. of Mot. to Dismiss, or in the Alternative, for Summ. J. & Opp'n to Pl.'s Cross-Mot. for Summ. J., ECF No. 32 [hereinafter Defs.' Reply], at 3-4. The Terrorist Organization Sanctions Regulations' definitions are thus expressly limited to that sanctions regime.

Second, even if E.O. 13661 requires Deripaska to have entered a formal "agency" relationship with a senior Russian official, the unclassified summary provided to Deripaska unquestionably establishes that he acted in such capacity. Specifically, the unclassified summary states that Deripaska "was reported to have financed projects *upon request of* Vladimir Putin and senior Russian officials"; that he was "identified as one of the individuals holding assets and laundering funds *on behalf of* Russian President Vladimir Putin"; that his "business activity was reportedly used . . . as a cover to facilitate the transfer of funds for the *personal use* of then Russian

Prime Minister Vladimir Putin"; and that he "acted on *verbal instructions* from President Vladimir Putin in a high-level bilateral meeting between Russian and Kyrgyz representatives." Unclassified Summary at 3 (emphasis added). The classified administrative record also contains evidence supporting these factual findings and OFAC's determination. *See* 50 U.S.C. § 1702(c) (permitting the court to consider the classified administrative record *ex parte* and *in camera*). These findings suggest that Deripaska's relationship with Putin exceeded the provision of mere material support and instead establish that Putin was directing Deripaska to take actions on his behalf and Deripaska complied. Thus, even if OFAC was required to find that Deripaska acted as Putin's agent as a legal matter, it did so and supported that finding with adequate evidence.

Deripaska appears to concede that OFAC's unclassified description of his conduct qualified him as an agent of Putin. *See* Pl.'s Br. at 25-26 (acknowledging that allegations of money laundering are acts "undertaken for Putin himself" or "for Putin's personal use"). To avoid this conclusion, he points to a heading in the Evidentiary Memorandum that states "DERIPASKA Has Acted in Support of Russian President Vladimir Putin's *Projects*." *Id.* at 24 (emphasis added) (citing A.R. at 8). Deripaska fixates on the term "Putin's Projects" and contends that OFAC concluded that Deripaska acted on behalf of only "Putin's Projects," and not Putin himself, as E.O. 13661 requires. *See id.* at 24-25 ("OFAC determined that Deripaska acts for or on behalf of a senior Russian official following its conclusion that Deripaska acted in support [of] Putin's

projects, not that Deripaska engaged in conduct for or [on] behalf of Putin himself."). But Deripaska's parsing of the Evidentiary Memorandum is not at all convincing. For one, the Memorandum's classified portions make plain that OFAC determined that Deripaska acted on behalf of Putin personally, not just to advance various "[p]rojects." A.R. at 9 (classified header and supporting evidence). Moreover, by emphasizing the term "Projects," Deripaska makes a distinction that E.O. 13661 itself does not make. The Executive Order qualifies a person for sanctions if he "acted or purported to act for or on behalf of" a senior Russian government official. That text easily reaches someone, like Deripaska, who furthers projects, like the Sochi Olympic Games, advocated by Putin.

Deripaska next argues that his designation under E.O. 13661 was arbitrary and capricious because it depended upon "conduct that purportedly occurred and . . . ceased prior to the issuance of E.O. 13661." Pl.'s Br. at 26. He argues that his past actions cannot form the basis for sanctions because those actions "were not sanctionable at the time which they purportedly occurred." *Id.* Not so. E.O. 13661 permits OFAC to sanction any individual it finds to "*have acted* or purported to act for or on behalf of, directly or indirectly[,] . . . a senior official of the Government of the Russian Federation." 79 Fed. Reg. at 15,535, § 1(a)(ii)(C)(1) (emphasis added). Courts in this District have previously interpreted similar language to permit OFAC to consider past conduct when issuing sanctions. For example, in *Olenga v. Gacki*, the court held that an executive order permitting OFAC to sanction certain individuals involved in the conflict in the Democratic Republic of the Congo

permitted OFAC to designate someone "based on his past conduct." No. 19-cv-1135 (RDM), 507 F. Supp. 3d 260, 2020 U.S. Dist. LEXIS 225084, 2020 WL 7024206, at *15 (D.D.C. Nov. 30, 2020). The executive order at issue in *Olenga* empowered OFAC to designate "individuals deemed 'to be responsible for or complicit in, or to *have engaged in*, directly or indirectly . . . actions or policies that undermine democratic processes or institutions in the Democratic Republic of the Congo.'" *Id.* (alteration in original) (quoting E.O. 13671, 79 Fed. Reg. 39,949 (July 8, 2014)). Recognizing that the President has "broad authority under IEEPA" to "reasonably conclude that the deterrence of international bad actors, at least at times, requires the imposition of sanctions on those who have retired or moved on to other pursuits," the court reasoned that "[s]omeone can be found 'to have engaged in, directly or indirectly' an action they took in the past" and thus a designation can be "based on . . . past conduct." *Id.*; *see also Pejcic v. Gacki*, No. 19-cv-2437 (APM), 2021 U.S. Dist. LEXIS 60927, 2021 WL 1209299, at *7 (D.D.C. Mar. 30, 2021) (finding similar language "permit[ted] OFAC to base a designation or a refusal to delist on past conduct"). E.O. 13661's application to individuals who "have acted" on behalf of a senior official likewise permits OFAC to consider an individual's past conduct in issuing sanctions. Defendants' decision to sanction Deripaska under E.O. 13661 for past conduct therefore did not violate the APA.

2. E.O. 13662

Deripaska also contends that Defendants' decision to deny his petition for delisting under E.O. 13662 was

arbitrary and capricious for three reasons. Pl.'s Br. at 28-31. None is persuasive.

First, he argues that Defendants erroneously relied on his involvement in World Economic Forum projects without establishing that such involvement constituted participation in *Russia*'s energy sector. *Id.* at 28-29. But the evidence on which Defendants relied connects Deripaska's work for the World Economic Forum to Russia's energy sector. Specifically, the Evidentiary Memorandum cites to a page from Deripaska's website that discusses his work for the World Economic Forum to substantiate its findings. A.R. at 429; *id.* at 433. That website, which is attached as an exhibit to the Evidentiary Memorandum, features a quote from Deripaska stating, "Without a significant change of thinking and better understanding of the opportunities that integration with Asia *can bring to Russia*, development will be limited." *Id.* at 511 (emphasis added). Thus, by emphasizing what Asian economies "can bring to Russia," Deripaska himself described his work with the World Economic Forum as intended to support Russia. That conclusion is bolstered by the website's description of Deripaska's work for the World Economic Forum. It highlights the role that Deripaska-related entities Rusal and En+ Group have played in the Forum's Mining and Metals Group and the Energy, Utilities, and Technology Group, as well as Deripaska's involvement in those Groups. *See id.* OFAC reasonably concluded from such evidence that Deripaska participated in World Economic Forum "projects as part of his work in the En+ Group," which again is a power-producing company with core assets in Russia. *Id.* at 161.

OFAC therefore rooted its conclusion that Deripaska's participation in the World Economic Forum was related to Russia's energy sector in record facts, and its conclusion is supported by substantial evidence.

Second, Deripaska argues that OFAC acted arbitrarily and capriciously by defining Russia's "energy sector" to include the "production of electricity." Pl.'s Br. at 29-30. According to Deripaska, OFAC has not traditionally defined the energy sector to include electricity production, and its decision to do so for purposes of the Ukraine sanctions program constitutes arbitrary, ad hoc decisionmaking. *Id.* Before the agency, Deripaska specifically noted that sanctions targeting the energy industry in the Ukraine Freedom Support Act of 2014 and in the sanctions regime against Iran exclusively applied to oil, petroleum, natural gas, and nuclear development. *See* A.R. at 199. OFAC rejected these arguments. It explained that its interpretations of terms like "energy sector" in different sanctions regimes were driven by the unique foreign policy and national security circumstances at play in each sanctions regime and therefore "an interpretation in one program is not determinative of an interpretation in other programs." *Id.* at 162. Further, OFAC explained that it had never "defined the term 'energy sector' to exclude power generation or electricity production," and it had "designated at least one other individual" for operating in power generation in Russia. *Id.* Finally, OFAC responded that neither Congress nor OFAC has defined "energy sector" as it applies in this context. *Id.* at 162-63.

Deripaska asks this court to second guess OFAC where its expertise, and thus its authority, is at its zenith. The court declines to do so. Again, the court emphasizes that its review in this "area at the intersection of national security, foreign policy, and administrative law[] is extremely deferential." *Islamic Am. Relief Agency*, 477 F.3d at 734. Here, the President expressly delegated to the Secretary of the Treasury, in consultation with the Secretary of State, the decision of which economic sectors should be subject to sanctions. E.O. 13661, 79 Fed. Reg. at 16,169, § 1(a)(i) (authorizing sanctions against individuals who "operate in such sectors of the Russian Federation economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State"). It is therefore firmly within the agency's purview to apply its expertise in determining which sectors are subject to sanction and the scope of those sectors. Where, as here, the definition of such a sector is otherwise undefined, so long as that definition is reasonable, the court will not disturb the agency's decision. *See Humanitarian L. Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000) (explaining in the context of sanctions for terrorist activities that "the Secretary must have reasonable grounds to believe that an organization has engaged in terrorist acts" but that, "because the regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context"); *see also Islamic Am. Relief Agency*, 477 F.3d at 734 (citing *Humanitarian Law Project* for a similar proposition).

And it appears to the court eminently reasonable to define the "energy" sector to include power generation.

Defendants have offered what appears to be a common sense proposition—that the production of electricity and power is a part of the energy sector. *See* Energy, Merriam-Webster, https://www.merriam-webster.com/dictionary/energy (last visited June 13, 2021) (defining "energy" to mean, among other things, "usable power (such as heat or electricity)"). Indeed, none of Deripaska's arguments suggest that it is unreasonable as a general matter for the energy sector to include power generation activities; instead he merely argues that *OFAC* has not typically considered power generation activities as part of the energy sector and thus it made an "*ad hoc*" decision as to Deripaska. *See* Pl.'s Br. at 30. But the court is not persuaded that OFAC has engaged in "*ad hoc*" decisionmaking. The Ukraine sanctions program explicitly warns that "[d]iffering foreign policy and national security circumstances may result in differing interpretations of similar language among the parts of this chapter," which includes other sanctions programs. 31 C.F.R. § 589.101. Thus, OFAC's interpretation of the scope of the energy sector in other sanctions programs does not necessarily correlate to its interpretation of the scope of the energy sector with respect to the Ukraine sanctions program. And within the Ukraine sanctions program, there is evidence that OFAC has at least once before applied the term "energy sector" to include power generation. *See* A.R. at 162 & n.2 (noting OFAC designated Viktor Vekselberg "for operating in the energy sector of the Russian Federation economy pursuant to E.O. 13662"). Deripaska thus has not identified any inconsistencies in OFAC's designations.

Third and finally, Deripaska argues that it was arbitrary and capricious for OFAC to continue to designate him for operating in the energy sector on the basis of his now minority shareholdings in En+ and ESE. Pl.'s Br. at 30-32. He points out that OFAC recently delisted En+ and ESE after he divested his control in the entities and argues that designation "solely by virtue of his remaining interests in En+" is "counter to the evidence before the agency." *Id.* at 31-32.

Deripaska's argument overlooks important distinctions between the sanctions that led to the listing of En+ and ESE and the sanctions that led to his individual listing. En+ and ESE were originally blocked because Deripaska "own[ed], directly or indirectly, a 50 percent or greater interest" in the entities. 31 C.F.R. § 589.406; *see* Pl.'s Br. at 7. By contrast, the regulation under which Deripaska was designated does not turn on an individual's *ownership* of entities that operate in the Russian energy sector. Rather, it applies to all persons who "operate in" the energy sector. *See* 79 Fed. Reg. at 16,169, § 1(a)(i); A.R. at 21. Ownership and operation are two distinct concepts, with the latter conveying a far broader scope of conduct.

To that end, OFAC considered Deripaska's argument that his divestiture of his majority interests in En+ and ESE meant he no longer "operated" in the energy sector and offered a reasonable rejection of that argument. OFAC explained that despite his reduced ownership stake, Deripaska "maintains a 44.95 percent ownership interest in En+, which in turn, maintains a 100 percent ownership interest in ESE." A.R. at 163. In addition, Deripaska votes

35% of En+'s shares and appoints four of twelve members to the En+ board. *Id.* OFAC concluded that this "continued ownership interest . . . [is] evidence of his continued operation in the energy sector of the Russian Federation economy." *Id.* OFAC thus has again cited specific evidence demonstrating Deripaska's continued operation in the energy sector, and its conclusion that Deripaska operates in the energy sector is reasonable.

C. Due Process

Deripaska next argues that Defendants violated his Fifth Amendment due process rights by relying on undisclosed classified information and failing to provide him with adequately detailed unclassified summaries of that information. *See* Pl.'s Br. at 32-37. Defendants counter that Deripaska is not entitled to due process protections because he is a non-resident alien who lacks sufficient contact with the United States. Defs.' Mot., Mem. in Supp. of Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J., ECF No. 27-1 [hereinafter Defs.' Br.], at 27-29. Defendants alternatively contend that, even if Deripaska enjoys the Fifth Amendment's protection, he received all the process he was due. *See id.* at 16.

The court first considers Defendants' threshold argument that Deripaska lacks standing to bring a due process challenge. "The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." *Jifry v. F.A.A.*, 370 F.3d 1174, 1182, 361 U.S. App. D.C. 450 (D.C. Cir. 2004); *People's Mojahedin Org.*

of Iran v. U.S. Dep't of State, 182 F.3d 17, 22, 337 U.S. App. D.C. 106 (D.C. Cir. 1999) ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."). "Exceptions," however, "may arise where aliens have come within the territory of the United States and established 'substantial connections' with this country or 'accepted some societal obligations.'" *Jifry*, 370 F.3d at 1182-83 (citation omitted) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 273, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990)).

"The D.C. Circuit has not explicitly addressed what criteria this Court should apply in considering whether a foreign national residing outside the United States can satisfy the 'substantial connection' test to raise rights under the U.S. Constitution related to the blocking or freezing of his assets." *Kadi v. Geithner*, 42 F. Supp. 3d 1, 25 (D.D.C. 2012); *see also Rakhimov*, 2020 U.S. Dist. LEXIS 68764, 2020 WL 1911561, at *5. The Circuit has, however, decided several cases regarding the due process rights of organizations designated as terrorist organizations that shed light on the inquiry. In *National Council of Resistance of Iran v. Department of State*, the D.C. Circuit found that the National Council of Resistance of Iran had substantial connections with the United States and therefore was entitled to due process protections where the organization "ha[d] an overt presence within the National Press Building in Washington, D.C.," and "claim[ed] an interest in a small bank account."[5] 251

5. The court noted that it was also relying on "classified material" in finding that the organization had "come within the territory of the United States and developed substantial

F.3d 192, 201-02, 346 U.S. App. D.C. 131 (D.C. Cir. 2001). In contrast, in *32 County Sovereignty Committee v. Department of State*, the Circuit found that due process protections did not apply where two organizations could "demonstrate only that some of their American 'members' personally rented post office boxes and utilized a bank account to transmit funds and information" to the organizations. 292 F.3d 797, 799, 352 U.S. App. D.C. 93 (D.C. Cir. 2002). The court held that the plaintiffs did "not aver that either organization possessed any controlling interest in property located within the United States," nor did they "demonstrate any other form of presence here." *Id.* Accordingly, no "particular process" was due before the organizations were designated. *Id.*

Here, Deripaska alleges that "[a]t the time of his designations," he held "an ownership interest in Basic Element, Inc.," a Delaware corporation, and held "a beneficial ownership interest in RUSAL America Corp., which had offices in 660 Madison Ave., New York, NY." SAC ¶¶ 111-112. He also alleges that, prior to his designations, he was "regularly invited to speak at D.C.-based think tanks." *Id.* ¶ 105.

Deripaska, however, is not permitted to rest on the allegations in the Second Amended Complaint to establish his entitlement to due process. Each element of a plaintiff's standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *see also Humane*

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connections with th[e] country." *Nat'l Council of Resistance of Iran*, 251 F.3d at 202.

Soc'y of the U.S. v. Perdue, 935 F.3d 598, 602, 443 U.S. App. D.C. 171 (D.C. Cir. 2019) ("[O]n summary judgment, the plaintiffs must prove injury in fact with specific facts in the record." (internal quotation marks omitted)). At summary judgment, "the plaintiff can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts, which for the purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561. (cleaned up). Even in cases in which an administrative record exists, if the record is insufficient to establish standing, the plaintiff "must supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review." *Sierra Club v. E.P.A.*, 292 F.3d 895, 900, 352 U.S. App. D.C. 191 (D.C. Cir. 2002).

Deripaska points to no evidence substantiating his property interests in the United States and instead invites the court to provide an additional "opportunity for the parties to address the facts in dispute" concerning his U.S. property interests. Pl.'s Reply Mem. in Supp. of Cross-Mot. for Summ. J., ECF No. 34 [hereinafter Pl.'s Reply], at 17. The D.C. Circuit, however, has made clear that Deripaska was obligated to "establish [his] standing by the submission of [his] arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding." *Sierra Club*, 292 F.3d at 900. Deripaska's belated request for a do-over in his reply brief simply comes too late. *See id.* Accordingly, the court concludes that, on this record, Deripaska lacks standing to pursue his due process challenge to his designations.

Even if the court were to consider Deripaska's due process claim on the merits, it would reject it. Deripaska has primarily argued that Defendants violated his due process rights by redacting classified information and providing him with insufficiently detailed summaries of some of the classified information that they relied on. *See* Pl.'s Br. at 34-37. The IEEPA, however, expressly contemplates that OFAC may rely on classified information and provides that it may submit that information "to the reviewing court ex parte and in camera." 50 U.S.C. § 1702(c). In light of the competing national security interests at play with classified information, the D.C. Circuit has squarely held that "due process require[s] the disclosure of *only* the unclassified portions of the administrative record."[6] *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164, 357 U.S. App. D.C. 35 (D.C. Cir. 2003) (internal quotation marks omitted). Because Defendants provided Deripaska with the unclassified record *and* a summary of the classified record, due process would not have required OFAC to disclose any further information to Deripaska. *See Olenga*, 2020

6. Deripaska reads the Ninth Circuit's decision in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of Treasury*, 686 F.3d 965, 986 (9th Cir. 2012), to require OFAC to fully disclose each of the reasons for his designation. Consistent with the D.C. Circuit, however, the Ninth Circuit has "recognize[d] that disclosure may not always be possible" and that, "in some cases, the subject matter itself may be classified and cannot be revealed without implicating national security." *Id.* at 983; *People's Mojahedin Org. of Iran*, 327 F.3d at 1242 ("[D]ue process require[s] the disclosure of *only* the unclassified portions of the administrative record.").

U.S. Dist. LEXIS 225084, 2020 WL 7024206, at *11 ("OFAC has disclosed the unclassified portions of the administrative record and unclassified summaries of the classified information, while submitting the classified portions for the Court's *ex parte* and *in camera* review . . . . Under *Holy Land*, that is all—and, indeed, more than—IEEPA and the Constitution require.").

D. Notice Under the APA

Deripaska similarly claims that Defendants' redaction of portions of the Evidentiary Memorandum violates the APA's notice requirements. Pl.'s Br. at 41-42. The APA requires that an agency provide "a brief statement of the grounds" for its decision. 5 U.S.C. § 555(e). As the D.C. Circuit has explained, "nothing more than a 'brief statement' is necessary," and "the core requirement is that the agency explain why it chose to do what it did." *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737, 347 U.S. App. D.C. 262 (D.C. Cir. 2001) (internal quotation marks omitted). "The requirement of § 555(e) is modest," *Roelofs v. Sec'y of Air Force*, 628 F.2d 594, 601, 202 U.S. App. D.C. 307 (D.C. Cir. 1980), but a statement of reasoning "is indispensable to sound judicial review," *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350, 410 U.S. App. D.C. 176 (D.C. Cir. 2014).

The court has little difficulty finding that Defendants have satisfied their minimal burden of providing Deripaska with a brief statement of the grounds for their decision to block his assets and deny his delisting petition. With respect to Deripaska's designation under E.O. 13661,

OFAC issued on April 6, 2018, the Special Designation and Blocking Memorandum, which identified Deripaska as an individual who met "one or more of the criteria for designation set forth in" E.O. 13661 and E.O. 13662. A.R. at 1. Defendants then produced an Evidentiary Memorandum supporting Deripaska's designation, which set forth OFAC's conclusions and identified evidence justifying the determination that Deripaska "has acted or purported to act for or on behalf of, directly or indirectly, a senior official of the Government of the Russian Federation, and operates in the energy sector of the Russian Federation economy." *Id.* at 7 (citations omitted). While classified portions of that Evidentiary Memorandum are redacted, Defendants also provided Deripaska with an unclassified summary of those findings. *See* Unclassified Summary. Plainly, Defendants have communicated the reasons for their decision to Deripaska in numerous ways.

Deripaska objects that OFAC must disclose the unclassified portions of the Evidentiary Memorandum, but it is telling that he has not marshalled a single case in support of this argument. As the court explained with respect to Deripaska's due process challenge, OFAC may rely on classified information and may submit that information "to the reviewing court ex parte and in camera." 50 U.S.C. § 1702(c). "The statute does not require OFAC to provide [Deripaska] the classified or law enforcement-privileged information supporting" its conclusion. *Sulemane v. Mnuchin*, No. 16-cv-1822 (TJK), 2019 U.S. Dist. LEXIS 5, 2019 WL 77428, at *7 (D.D.C. Jan. 2, 2019).

With respect to Deripaska's delisting petition, Defendants provided Deripaska with an eleven-page Evidentiary Memorandum that explained the bases for its conclusion that he continued to meet the standard for designation. *See* A.R. at 158-69. The Evidentiary Memorandum responded to arguments Deripaska made in support of his delisting petition and explained why OFAC nonetheless considered designation to be appropriate. *See id.* The court is satisfied that Defendants have sufficiently explained their decision to Deripaska to meet the APA's notice requirement.

E. Section 241 Report

Finally, Deripaska challenges his inclusion in a list of oligarchs in the Section 241 Report. In the Section 241 Report, the Secretary of the Treasury identified individuals as oligarchs if, "according to reliable public sources," they had "an estimated net worth of $1 billion or more." Section 241 Report at 1. The Secretary concluded that Deripaska satisfied that criterion. While Deripaska appeared in the Section 241 Report and was subsequently designated under E.O. 13661 and E.O. 13662, the Report explicitly states that it is "not a sanctions list, and the inclusion of individuals or entities in th[e] report . . . does not and in no way should be interpreted to impose sanctions on those individuals or entities." *Id.* at 2. Moreover, the Section 241 Report was expressly not a determination that the listed individuals met the criteria for sanctions, nor did it "imply, give rise to, or create any other restrictions, prohibitions, or limitations on dealings with such persons by either U.S. or foreign persons." *Id.*

Deripaska raises three challenges to his inclusion in the Section 241 Report.[7] First, he argues that the Secretary acted arbitrarily and capriciously by erroneously defining the term "oligarch" to focus solely on an individual's net worth as opposed to the individual's net worth *and* political ties to the Kremlin. Pl.'s Br. at 42-46. Second, he argues that Defendants violated the APA by failing to provide him with adequate notice of their decision to include him in the Section 241 Report. *Id.* at 53-55. Third and finally, Deripaska contends that the Section 241 Report violates his Fifth Amendment due process rights because he was not provided adequate notice of the reasons for his inclusion in the Section 241 Report or an opportunity to challenge his inclusion. *Id.* at 50-53.

1. Arbitrary and Capricious Challenge

a. Standing

Turning first to Deripaska's challenge that his inclusion in the Section 241 Report was arbitrary and capricious, the court must determine whether Deripaska has standing to bring such a claim. Defendants argue that Deripaska lacks standing to assert such a challenge because the Report did not cause his alleged injury. *See* Defs.' Reply at 30-33. The court agrees.

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7. In addition, the parties dispute whether Deripaska's objections to the Section 241 Report are justiciable because, according to Defendants, the Report is a nonreviewable congressional report. *See* Defs.' Reply at 28-30. Because the court concludes that Deripaska's challenges fail for other reasons, it does not reach this argument.

Deripaska alleges that he has been injured because "foreign financial institutions terminated accounts held on behalf of Deripaska and his companies" due to his inclusion in the Section 241 Report and the banks' concomitant concern that he subsequently would be sanctioned. *See* Pl.'s Reply at 21-22. This injury "depend[s] on the conduct of a third party not before the court." *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 381, 449 U.S. App. D.C. 134 (D.C. Cir. 2020). While "standing is not precluded" where a party's injury depends on the conduct of a third party, "it is ordinarily substantially more difficult to establish." *Lujan*, 504 U.S. at 562 (internal quotation marks omitted). "The party invoking [the court's] jurisdiction must show that the third party will act in such manner as to produce causation and permit redressability of injury." *Competitive Enter. Inst.*, 970 F.3d at 381 (internal quotation marks omitted). Such a "theory of standing . . . '[can]not rest on mere speculation about the decisions of third parties"; it must "rel[y] instead on the predictable effect of Government action on the decisions of third parties.'" *Id.* (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566, 204 L. Ed. 2d 978 (2019)); *see also Renal Physicians Ass'n v. United States HHS*, 489 F.3d 1267, 1275, 376 U.S. App. D.C. 431 (D.C. Cir. 2007) ("[S]tanding has been found where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress." (internal quotation marks omitted)).

Deripaska cannot satisfy this standard because he has failed to produce any evidence that the third-party banks'

decisions to terminate his accounts were a "predictable effect," *Competitive Enter. Inst.*, 970 F.3d at 381 (internal quotation marks omitted), of his inclusion in the Section 241 Report. The Section 241 Report repeatedly disclaims that "[i]nclusion in this report . . . does not constitute the determination by any agency that any of those individuals or entities meet the criteria for designation under any sanctions program" and clarifies that mere designation as an oligarch does not "indicate that the U.S. Government has information about the individual's involvement in malign activities." Section 241 Report at 2. It further states that it should not be read to "imply, give rise to, or create any other restrictions, prohibitions, or limitations on dealings with such persons by either U.S. or foreign persons." *Id.* In light of such conspicuous disclaimers that inclusion in the Section 241 Report did not portend sanctions against an individual, Deripaska must come forth with evidence that it was predictable that financial institutions would nonetheless presume that individuals listed in the Section 241 Report would be sanctioned forthwith. But Deripaska has not done so. In fact, he has presented no evidence at all to support such a causal connection. The court is therefore left to speculate as to how financial institutions can be expected to respond to an individual's appearance on the Section 241 Report. This is insufficient to establish standing.

What's more, Deripaska has given the court no basis on which to conclude that his injury is redressable—that is, that the financial institutions would re-open his accounts if his name were removed from the Section 241 Report. *See Nat'l Wrestling Coaches Ass'n v. Dep't of*

Educ., 366 F.3d 930, 939, 361 U.S. App. D.C. 257 (D.C. Cir. 2004) (finding plaintiffs lacked standing where they "offer[ed] nothing to substantiate their assertion that a decision from the court vacating" agency action would alter the behavior of third parties), *abrogated on other grounds by Trudeau v. FTC*, 456 F.3d 178, 372 U.S. App. D.C. 335 (D.C. Cir. 2006). In fact, there is every reason to believe that the financial institutions would not re-open Deripaska's bank accounts: regardless of whether he is expunged from the Section 241 Report, Deripaska's assets have been blocked pursuant to E.O. 13661 and E.O. 13662.

Because Deripaska's claimed injury resulted from third parties as to whom he has provided no evidence to support causation or redressability, he lacks standing to challenge his inclusion in the Section 241 Report.

b. Final agency action

Defendants also argue that even if Deripaska did have standing to challenge his inclusion in the Section 241 Report, the court could not review his challenge because the Section 241 Report does not constitute final agency action. Defs.' Br. at 38-39. The court agrees.

"An agency action is deemed final if it is definitive and has a direct and immediate effect on the day-to-day business of the party challenging the agency action." *Reliable Auto. Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731, 355 U.S. App. D.C. 346 (D.C. Cir. 2003) (cleaned up). Final agency "action must be one by which rights or obligations have been determined, or

from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (internal quotation marks omitted).

Deripaska has failed to show that the Section 241 Report determined any rights or obligations or had any legal consequences. He argues that the Section 241 Report had legal consequences because it identified him as an oligarch and ultimately led to his designation under E.O. 13661. Pl.'s Br. at 48-51. Yet the Section 241 Report disclaims any such effects. First, appearing on the list itself had no legal consequences: the Section 241 Report states, "[T]he inclusion of individuals or entities in this report, its appendices, or its classified annexes does not, in and of itself, imply, give rise to, or create any other restrictions, prohibitions, or limitations on dealings with such persons by either U.S. or foreign persons." Section 241 Report at 2. Second, the Section 241 Report was patently "not a sanctions list," and an individual's inclusion in the Report did "not and in no way should be interpreted to impose sanctions" on that individual. *Id.*

Deripaska urges the court to blur the line between the Section 241 Report and sanctions pursuant to E.O. 13661, arguing that the Section 241 Report effectively was a sanctions list because both Congress and the Secretary viewed the Section 241 Report as a precursor to formal sanctions and the Secretary expressly referred to the Report when announcing sanctions under the executive orders. *See* Pl.'s Br. at 50. But Deripaska's effort to muddle these different regimes cannot overcome the fact that the Section 241 Report explicitly stated that it was not

a determination that any individual met "the criteria for designation under any sanctions program." Section 241 Report at 2. Indeed, Defendants represent that of the more than 100 individuals and entities appearing on the Section 241 Report, only a "small number of other individuals" were subsequently designated pursuant to E.O. 13661 and E.O. 13662. Defs.' Reply at 32. This suggests that there was not a one-to-one relationship between an individual appearing on the Section 241 Report and being designated for sanctions. Accordingly, the court concludes that the Section 241 Report did not constitute final agency action, and thus is not reviewable. *See Franklin v. Massachusetts*, 505 U.S. 788, 798, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992) (finding census report was not final agency action because it "carrie[d] no direct consequences" and "serve[d] more like a tentative recommendation than a final and binding determination").

2. APA Notice Requirements

Deripaska also challenges his listing in the Section 241 Report under the APA on the procedural ground that he was not provided adequate notice of the reasons for his inclusion or an opportunity to challenge it. Pl.'s Br. at 51-53. Once again, however, Deripaska lacks standing to bring such a challenge.

Deripaska asserts a procedural injury, as to which the "imminence and redressability requirements" are "relax[ed]." *Ctr. for L. & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1159, 364 U.S. App. D.C. 416 (D.C. Cir. 2005). Nonetheless, a "procedural-rights plaintiff must still

satisfy the general requirements of the constitutional standards of particularized injury and causation." *Id.* The plaintiff must then demonstrate that the "challenged act is substantially probable to cause the demonstrated particularized injury." *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 666, 320 U.S. App. D.C. 324 (D.C. Cir. 1996); *see also WildEarth Guardians v. Jewell*, 738 F.3d 298, 305, 407 U.S. App. D.C. 309 (D.C. Cir. 2013) ("A procedural injury claim therefore must be tethered to some concrete interest adversely affected by the procedural deprivation.").

Assuming for argument's sake that Deripaska has a procedural right that has been violated, he has not adequately proven that Defendants' violation of his procedural rights caused his particularized injury. Recall that Deripaska asserts as his concrete injury the closure of his bank accounts by third-party financial institutions. Deripaska asks this court to presume that, even though the Section 241 Report expressly does not have any bearing on an individual's qualification for sanctions, third-party financial institutions would understand the Section 241 Report to constitute evidence that the individual will be imminently sanctioned and thus would necessarily terminate the individual's bank accounts. The problem with that causal chain is that Deripaska has not offered *any* facts or evidence to "bridge the uncertain ground found in [this] causal path," which "rests on the independent acts of third parties," *Fla. Audubon Soc'y*, 94 F.3d at 670. Particularly at the summary judgment stage, this is fatal to Deripaska's showing of standing.

3. Due Process Challenge

Finally, Deripaska argues that his inclusion in the Section 241 Report violates his due process rights because he was not provided notice and an opportunity to challenge his inclusion in the Report. Pl.'s Br. at 51-53. Deripaska claims that this resulted in not only harm to his reputation, but also "immediate harm to his economic interests, as banks closed his or his companies' accounts in direct response to his identification in the Section 241 Report." *Id.* at 53.

As the court has already held, Deripaska has not established sufficient contacts with the United States to invoke the protections of the Due Process Clause. *See supra* section III.C. But even if Deripaska did have due process rights, his claim would fail because the reputational harms and closure of his bank accounts purportedly caused by his inclusion in the Section 241 Report are not the type of deprivations that fall within the Clause's coverage.

Deripaska has asserted a "consequential" injury—that is, his injury does not result from Defendants "extinguishing or modifying a right recognized by state law," but instead arises from a claim that Defendants' actions have so stigmatized him as to deprive him of a property interest. *See GE v. Jackson*, 610 F.3d 110, 119-20, 391 U.S. App. D.C. 299 (D.C. Cir. 2010) (cleaned up). As a rule, harm to "reputation alone, apart from some more tangible interests," is not "by itself sufficient to invoke the procedural protection of the Due Process Clause."

Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). In addition to establishing that he faces a stigma from the Section 241 Report, Deripaska must prove that either "(1) the government has deprived [him] of some benefit to which [he has] a legal right . . . or (2) the government-imposed stigma is so severe that it broadly precludes" him from pursuing his chosen business. *Gen. Elec. Co.*, 610 F.3d at 121. Put differently, Deripaska must establish that the government-imposed stigma "involve[d] some tangible change of status vis-à-vis the government." *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1108-09, 243 U.S. App. D.C. 354 (D.C. Cir. 1985).

He fails to do so. Deripaska has not shown that he had a protected right to maintain the bank accounts he alleges were closed or that he is precluded from pursuing his chosen business or banking relationships as a result of his Section 241 Report listing. *See Gen. Elec. Co.*, 610 F.3d at 121. Deripaska thus has not identified a sufficient tangible interest protected by the Due Process Clause. His due process claim therefore fails.

V. CONCLUSION

For the foregoing reasons, the court grants Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, ECF No. 27, and denies Deripaska's Cross-Motion for Summary Judgment, ECF No. 31.

A separate, final appealable Order accompanies this Memorandum Opinion.

Appendix B

Dated: June 13, 2021

/s/ Amit P. Mehta
Amit P. Mehta
United States District Court Judge

APPENDIX C — STATUTORY AND REGULATORY PROVISIONS

50 U.S.C. § 1701 – Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

50 U.S.C. § 1702 – Presidential authorities

(a) In general

(1) At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities,

by any person, or with respect to any property, subject to the jurisdiction of the United States;

(B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and

(C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States,

of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.

(2) In exercising the authorities granted by paragraph (1), the President may require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in paragraph (1) either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of such paragraph. In any case in which a report by a person could be required under this paragraph, the President may require the production of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(3) Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.

(b) EXCEPTIONS TO GRANT OF AUTHORITY.

The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly—

(1) any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value;

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances; or

(3) the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 4604 [3] of this title, or under section 4605 [3] of this title to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18; or

(4) any transactions ordinarily incident to travel to or from any country, including importation of accompanied baggage for personal use, maintenance within any country including payment of living expenses and acquisition of goods or services for personal use, and arrangement or facilitation of such travel including nonscheduled air, sea, or land voyages.

(c) CLASSIFIED INFORMATION.

In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court ex parte and in camera. This subsection does not confer or imply any right to judicial review.

Appendix C

50 U.S.C. § 1703 – Consultation and reports

(a) Consultation with Congress.

The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Report to Congress upon exercise of Presidential authorities.

Whenever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying—

(1) the circumstances which necessitate such exercise of authority;

(2) why the President believes those circumstances constitute an unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States;

(3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;

(4) why the President believes such actions are necessary to deal with those circumstances; and

(5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

(c) PERIODIC FOLLOW-UP REPORTS.

At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) with respect to an exercise of authorities under this chapter, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b).

(d) SUPPLEMENTAL REQUIREMENTS.

The requirements of this section are supplemental to those contained in title IV of the National Emergencies Act [50 U.S.C. 1641].

Appendix C

50 U.S.C. § 1704 – Authority to issue regulations

The President may issue such regulations, including regulations prescribing definitions, as may be necessary for the exercise of the authorities granted by this chapter.

Appendix C

50 U.S.C. § 1705 -- Penalties

(a) UNLAWFUL ACTS.

It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter.

(b) CIVIL PENALTY.

A civil penalty may be imposed on any person who commits an unlawful act described in subsection (a) in an amount not to exceed the greater of—

(1) $250,000; or

(2) an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

(c) CRIMINAL PENALTY.

A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) shall, upon conviction, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than 20 years, or both.

Appendix C

50 U.S.C. § 1706 – Savings provisions

(a) Termination of national emergencies pursuant to National Emergencies Act.

(1) Except as provided in subsection (b), notwithstanding the termination pursuant to the National Emergencies Act [50 U.S.C. 1601 et seq.] of a national emergency declared for purposes of this chapter, any authorities granted by this chapter, which are exercised on the date of such termination on the basis of such national emergency to prohibit transactions involving property in which a foreign country or national thereof has any interest, may continue to be so exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(2) Notwithstanding the termination of the authorities described in section 101(b) of this Act, any such authorities, which are exercised with respect to a country on the date of such termination to prohibit transactions involving any property in which such country or any national thereof has any interest, may continue to be exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(b) Congressional termination of national emergencies by concurrent resolution.

The authorities described in subsection (a)(1) may not continue to be exercised under this section if the

national emergency is terminated by the Congress by concurrent resolution pursuant to section 202 of the National Emergencies Act [50 U.S.C. 1622] and if the Congress specifies in such concurrent resolution that such authorities may not continue to be exercised under this section.

(c) SUPPLEMENTAL SAVINGS PROVISIONS; SUPERSEDURE OF INCONSISTENT PROVISIONS.

(1) The provisions of this section are supplemental to the savings provisions of paragraphs (1), (2), and (3) of section 101(a) [50 U.S.C. 1601(a)(1), (2), (3)] and of paragraphs (A), (B), and (C) of section 202(a) [50 U.S.C. 1622(a)(A), (B), and (C)] of the National Emergencies Act.

(2) The provisions of this section supersede the termination provisions of section 101(a) [50 U.S.C. 1601(a)] and of title II [50 U.S.C. 1621 et seq.] of the National Emergencies Act to the extent that the provisions of this section are inconsistent with these provisions.

(d) PERIODIC REPORTS TO CONGRESS.

If the President uses the authority of this section to continue prohibitions on transactions involving foreign property interests, he shall report to the Congress every six months on the use of such authority.

Appendix C

50 U.S.C. § 1707 – Multinational economic embargoes against governments in armed conflict with the United States

(a) Policy on the establishment of embargoes.

It is the policy of the United States, that upon the use of the Armed Forces of the United States to engage in hostilities against any foreign country, the President shall, as appropriate—

(1) seek the establishment of a multinational economic embargo against such country; and

(2) seek the seizure of its foreign financial assets.

(b) Reports to Congress.

Not later than 20 days after the first day of the engagement of the United States in hostilities described in subsection (a), the President shall, if the armed conflict has continued for 14 days, submit to Congress a report setting forth—

(1) the specific steps the United States has taken and will continue to take to establish a multinational economic embargo and to initiate financial asset seizure pursuant to subsection (a); and

(2) any foreign sources of trade or revenue that directly or indirectly support the ability of the adversarial government to sustain a military conflict against the United States.

* * *

Appendix C

5 U.S.C. § 706 – Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) 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;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * *

Appendix C

50 U.S.C. § 1621 – Declaration of national emergency by President; publication in Federal Register; effect on other laws; superseding legislation

(a) With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.

(b) Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this chapter. No law enacted after September 14, 1976, shall supersede this subchapter unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter.

Appendix C

50 U.S.C. § 1622 – Termination of national emergencies

(a) TERMINATION METHODS

Any national emergency declared by the President in accordance with this subchapter shall terminate if—

(1) there is enacted into law a joint resolution terminating the emergency; or

(2) the President issues a proclamation terminating the emergency.

Any national emergency declared by the President shall be terminated on the date specified in any joint resolution referred to in clause (1) or on the date specified in a proclamation by the President terminating the emergency as provided in clause (2) of this subsection, whichever date is earlier, and any powers or authorities exercised by reason of said emergency shall cease to be exercised after such specified date, except that such termination shall not affect—

(A) any action taken or proceeding pending not finally concluded or determined on such date;

(B) any action or proceeding based on any act committed prior to such date; or

(C) any rights or duties that matured or penalties that were incurred prior to such date.

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(b) Termination review of national emergencies by Congress

Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.

(c) Joint resolution; referral to Congressional committees; conference committee in event of disagreement; filing of report; termination procedure deemed part of rules of House and Senate

(1) A joint resolution to terminate a national emergency declared by the President shall be referred to the appropriate committee of the House of Representatives or the Senate, as the case may be. One such joint resolution shall be reported out by such committee together with its recommendations within fifteen calendar days after the day on which such resolution is referred to such committee, unless such House shall otherwise determine by the yeas and nays.

(2) Any joint resolution so reported shall become the pending business of the House in question (in the case of the Senatethe time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days after the day on which such resolution is reported, unless

such House shall otherwise determine by yeas and nays.

(3) Such a joint resolution passed by one House shall be referred to the appropriate committee of the other House and shall be reported out by such committee together with its recommendations within fifteen calendar days after the day on which such resolution is referred to such committee and shall thereupon become the pending business of such House and shall be voted upon within three calendar days after the day on which such resolution is reported, unless such House shall otherwise determine by yeas and nays.

(4) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such joint resolution within six calendar days after the day on which managers on the part of the Senate and the House have been appointed. Notwithstanding any rule in either House concerning the printing of conference reports or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed in the House in which such report is filed first. In the event the conferees are unable to agree within forty-eight hours, they shall report back to their respective Houses in disagreement.

(5) Paragraphs (1)–(4) of this subsection, subsection (b) of this section, and section 1651(b) of this title are enacted by Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in the House in the case of resolutions described by this subsection; and they supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(d) AUTOMATIC TERMINATION OF NATIONAL EMERGENCY; CONTINUATION NOTICE FROM PRESIDENT TO CONGRESS; PUBLICATION IN FEDERAL REGISTER

Any national emergency declared by the President in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary.

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50 U.S.C. § 1631 – Declaration of national emergency by Executive order; authority; publication in Federal Register; transmittal to Congress

When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. Such specification may be made either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress.

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50 U.S.C. § 1641 – Accountability and reporting requirements of President

(a) Maintenance of file and index of Presidential orders, rules and regulations during national emergency

When the President declares a national emergency, or Congress declares war, the President shall be responsible for maintaining a file and index of all significant orders of the President, including Executive orders and proclamations, and each Executive agency shall maintain a file and index of all rules and regulations, issued during such emergency or war issued pursuant to such declarations.

(b) Presidential orders, rules and regulations; transmittal to Congress

All such significant orders of the President, including Executive orders, and such rules and regulations shall be transmitted to the Congress promptly under means to assure confidentiality where appropriate.

(c) Expenditures during national emergency; Presidential reports to Congress

When the President declares a national emergency or Congress declares war, the President shall transmit to Congress, within ninety days after the end of each six-month period after such declaration, a report on the total expenditures incurred by the United States

Government during such six-month period which are directly attributable to the exercise of powers and authorities conferred by such declaration. Not later than ninety days after the termination of each such emergency or war, the President shall transmit a final report on all such expenditures.

* * *

Executive Order 13661 of March 16, 2014

Blocking Property of Additional Persons Contributing to the Situation in Ukraine

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,

I, BARACK OBAMA, President of the United States of America, hereby expand the scope of the national emergency declared in Executive Order 13660 of March 6, 2014, finding that the actions and policies of the Government of the Russian Federation with respect to Ukraine—including the recent deployment of Russian Federation military forces in the Crimea region of Ukraine—undermine democratic processes and institutions in Ukraine; threaten its peace, security,

stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets, and thereby constitute an unusual and extraordinary threat to the national security and foreign policy of the United States. Accordingly, I hereby order:

Section 1.

(a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person (including any foreign branch) of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order; and

(ii) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(A) to be an official of the Government of the Russian Federation;

(B) to operate in the arms or related materiel sector in the Russian Federation;

(C) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly:

(1) a senior official of the Government of the Russian Federation; or

(2) a person whose property and interests in property are blocked pursuant to this order; or

(D) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of:

(1) a senior official of the Government of the Russian Federation; or

(2) a person whose property and interests in property are blocked pursuant to this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

Sec. 2.

I hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1(a) of this order would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants or nonimmigrants, of

such persons. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

Sec. 3.

I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 1 of this order would seriously impair my ability to deal with the national emergency declared in Executive Order 13660, and I hereby prohibit such donations as provided by section 1 of this order.

Sec. 4.

The prohibitions in section 1 of this order include but are not limited to:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

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Sec. 5.

(a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 6.

For the purposes of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States; and

(d) the term the "Government of the Russian Federation" means the Government of the Russian Federation, any political subdivision, agency, or instrumentality thereof, including the Central Bank of the Government of the Russian Federation, and any person owned or controlled by, or acting for or on behalf of, the Government of the Russian Federation.

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Sec. 7.

For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 13660, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

Sec. 8.

The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government consistent with applicable law. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 9.

The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to determine

that circumstances no longer warrant the blocking of the property and interests in property of a person listed in the Annex to this order, and to take necessary action to give effect to that determination.

Sec. 10.

This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 11.

This order is effective at 12:01 a.m. eastern daylight time on March 17, 2014.

Executive Order 13662 of March 20, 2014

Blocking Property of Additional Persons Contributing to the Situation in Ukraine

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,

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I, BARACK OBAMA, President of the United States of America, hereby expand the scope of the national emergency declared in Executive Order 13660 of March 6, 2014, and expanded by Executive Order 13661 of March 16, 2014, finding that the actions and policies of the Government of the Russian Federation, including its purported annexation of Crimea and its use of force in Ukraine, continue to undermine democratic processes and institutions in Ukraine; threaten its peace, security, stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets, and thereby constitute an unusual and extraordinary threat to the national security and foreign policy of the United States. Accordingly, I hereby order:

Section 1.

(a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person (including any foreign branch) of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to operate in such sectors of the Russian Federation economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, such as financial services, energy, metals and mining, engineering, and defense and related materiel;

(ii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked pursuant to this order; or

(iii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

Sec. 2.

I hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1(a) of this order would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants or nonimmigrants, of such persons. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

Appendix C

Sec. 3.

I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 1 of this order would seriously impair my ability to deal with the national emergency declared in Executive Order 13660, and expanded in Executive Order 13661 and this order, and I hereby prohibit such donations as provided by section 1 of this order.

Sec. 4.

The prohibitions in section 1 of this order include but are not limited to:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 5.

(a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 6.

For the purposes of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States; and

(d) the term the "Government of the Russian Federation" means the Government of the Russian Federation, any political subdivision, agency, or instrumentality thereof, including the Central Bank of the Russian Federation, and any person owned or controlled by, or acting for or on behalf of, the Government of the Russian Federation.

Sec. 7.

For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I

find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 13660, and expanded in Executive Order 13661 and this order, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

Sec. 8.

Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government consistent with applicable law. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 9.

This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.