No. 22-565

In the Supreme Court of the United States

USP HOLDINGS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. 1862, empowers the President, after receiving a report from the Secretary of Commerce, to take action to adjust imports that threaten to impair the national security. The question presented is as follows:

Whether the findings in the Secretary's report are subject to arbitrary-and-capricious review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

RELATED PROCEEDINGS

United States Court of International Trade:

Universal Steel Products, Inc. v. *United States*, No. 19-209 (Feb. 26, 2021)

United States Court of Appeals (Fed. Cir.):

USP Holdings, Inc. v. *United States*, No. 21-1726 (June 9, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 36 F.4th 1359. The memorandum and order of the Court of International Trade (Pet. App. 30a-35a) is reported at 497 F. Supp. 3d 1406. An additional memorandum and order of the Court of International Trade (Pet. App. 36a-87a) is reported at 495 F. Supp. 3d 1336.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2022. A petition for rehearing was denied on August 18, 2022 (Pet. App. 88a-89a). On November 7, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 16, 2022. The petition was filed on December

13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Pursuant to Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. 1862, the President established tariffs on certain imports of steel articles. Petitioners challenged the tariffs on various grounds in the Court of International Trade (CIT). The CIT entered judgment on the pleadings in favor of the United States. Pet. App. 36a-87a. The court of appeals affirmed. *Id.* at 1a-29a.

1. Section 232 establishes a procedure through which the President may "adjust the imports" of articles in order to protect "national security." 19 U.S.C. 1862(c)(1)(A)(ii). That procedure begins with an "investigation" conducted by the Secretary of Commerce (Secretary) "to determine the effects on the national security of imports of [an] article." 19 U.S.C. 1862(b)(1)(A). After the investigation, the Secretary must submit to the President a report containing his findings "with respect to the effect of the importation of such article * * * upon the national security," as well as his "recommendations" for presidential "action or inaction." 19 U.S.C. 1862(b)(3)(A).

If the Secretary's report contains a finding "that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President must "determine whether [he] concurs with the finding of the Secretary." 19 U.S.C. 1862(c)(1)(A)(i). "[I]f the President concurs," he must "determine" and "implement" the action that, in his judgment, "must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. 1862(c)(1)(A)(ii) and (B).

2. In April 2017, the Secretary began an investigation to determine the effect of imports of steel on the national security. After the investigation, the Secretary submitted a report advising the President that the present quantities and circumstances of steel imports "threaten to impair the national security" of the United States. *Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended*, 85 Fed. Reg. 40,202, 40,224 (July 6, 2020). The Secretary found that steel plays a critical role in our national defense, *id.* at 40,209-40,210; that steel imports were causing domestic steel facilities to close, *id.* at 40,210-40,217; and that such consequences were "weakening our internal economy" and undermining our "ability to meet national security production requirements in a national emergency," *id.* at 40,222, 40,224. He recommended that the President address that threat to the national security by imposing quotas or tariffs on steel imports. *Id.* at 40,205.

The President concurred in the Secretary's finding that imports of steel articles posed a threat to national security. See Proclamation No. 9705, *Adjusting Imports of Steel Into the United States*, 3 C.F.R. 46 (2018 Comp.). To address that threat, the President issued a proclamation instituting a 25% tariff on imports of most steel articles. *Id.* at 47.

3. Petitioners, who are domestic importers of steel products, challenged the tariffs in the CIT. See Pet. App. 37a. The CIT granted the United States judgment on the pleadings. See *id.* at 36a-87a.

As relevant here, the CIT rejected petitioner's claim that the Secretary's report was arbitrary and capricious, holding that the report was not subject to review

under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because it did not constitute final agency action. Pet. App. 46a-52a. The CIT observed that, to be final, an agency action must "mark the 'consummation' of the agency's decision-making process" and "be one by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Id.* at 46a (quoting *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997)). The CIT determined that a Section 232 report does not satisfy the second of those conditions because it is purely advisory; the President retains the "discretion to disagree with the Secretary's recommendation and not take any action." *Id.* at 50a.

The CIT also rejected petitioners' claim that a threat to national security can support presidential action under Section 232 only if that threat is sufficiently imminent or "impending." Pet. App. 53a. The CIT explained that the statute simply uses the word "threaten," and that courts lack the power to second-guess the President's judgment that imports of an article "threaten" national security. *Ibid.* (citations omitted); see *id.* at 53a-55a.

Judge Katzmann, joined by Judge Gordon, issued a concurring opinion addressing a different claim that is not at issue here. Pet. App. 73a-83a. Judge Baker issued an opinion concurring in part and dissenting in part, likewise addressing issues that are not presented here. *Id.* at 84a-87a.

The CIT's decision did not fully resolve all the claims that petitioners had brought. See Pet. App. 31a. But pursuant to Federal Rule of Civil Procedure 54(b), the CIT entered partial final judgment on the claims at issue here, enabling immediate appeal with respect to those claims. See Pet. App. 30a-35a.

4. The court of appeals affirmed. Pet. App. 1a-29a.

The court of appeals rejected the CIT's holding that the Secretary's report did not constitute final agency action. See Pet. App. 8a-13a. It concluded that, under its decision in *Corus Group PLC* v. *International Trade Commission*, 352 F.3d 1351 (Fed. Cir. 2003), an agency's recommendation to the President constitutes final agency action if (as here) it "is the consummation of the agency's decisionmaking process" and is a "precondition to presidential action." Pet. App. 11a-12a.

The court of appeals nonetheless affirmed the CIT's entry of partial final judgment on the alternative ground that the Secretary's report was not subject to arbitrary-and-capricious review. See Pet. App. 15a. The court observed that "the standard governing the Secretary's action is the same as for the President's action (i.e., the existence of a 'threat')." *Ibid.* The court concluded that, in such circumstances, this Court's decision in *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940), permits a court to review the agency action only for "compliance with the statute," not for arbitrariness. Pet. App. 15a.

Like the CIT, the court of appeals also rejected petitioners' contention that Section 232 imposes an "imminence requirement." Pet. App. 14a. The court observed that the "factors that the President and Secretary are directed to consider in making their determinations do not mention imminence but focus instead on long term health of and adverse effects on the relevant domestic industry." *Ibid.*

Judge Chen issued a concurring opinion. Pet. App. 23a-29a. He expressed the view that, under this Court's precedents, the Secretary's report likely did not constitute final agency action. *Id.* at 23a-26a. He acknowl-

edged that the court of appeals was bound by its contrary precedent in *Corus Group*, but suggested that *Corsus Group* may have been "incorrectly decided." *Id.* at 29a.

ARGUMENT

Petitioners contend (Pet. 17-30) that the Secretary's finding of a threat to national security was arbitrary and capricious and therefore should be set aside under the APA. That argument fails for three independent reasons. First, the Secretary's report is not subject to APA review because the report is not final agency action. Second, even if the report could be reviewed for compliance with the Constitution and federal statutes, it could not be reviewed for arbitrariness. Third, the Secretarial finding that petitioners challenge was not arbitrary and capricious. The decision below does not conflict with any precedent of this Court. Further review is not warranted.

1. The APA authorizes judicial review of "final agency action." 5 U.S.C. 704. Agency action is final only if (1) "the agency has completed its decisionmaking process" and (2) "the result of that process is one that will directly affect the parties." *Dalton* v. *Specter*, 511 U.S. 462, 470 (1994) (citation omitted).

Applying that standard, this Court has held that an agency's advisory report to the President does not constitute final agency action, even if the report provides the predicate for later action by the President. In *Specter*, for example, the Court held that the Base Closure and Realignment Commission's report recommending the closure of certain military bases did not constitute final agency action. 511 U.S. at 470-471. The Court emphasized that the President retained the "discretion to approve or disapprove the Commission's report" and

that "'the President, not the Commission, * * * takes the final action that affects'" the military bases. *Ibid.* (brackets and citation omitted). Similarly in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), the Court held that the Secretary of Commerce's submission of a census report to the President did not constitute final agency action. *Id.* at 796-801. The Court emphasized that "the Secretary's report to the President has no direct effect on reapportionment" and that "[t]he President, not the Secretary, takes the final action that affects the States." *Id.* at 799.

Under *Specter* and *Franklin*, the Secretary's report under Section 232 is not final agency action. Such a report does not "directly affect the parties"; it does not change tariff rates and does not otherwise adjust imports. *Specter*, 511 U.S. at 470 (citation omitted). It simply constitutes a recommendation, which the President has the "discretion to approve or disapprove." *Ibid.* It is accordingly the "President, not the Secretary," who "takes the final action that affects" parties such as petitioners. *Franklin*, 505 U.S. at 799.

The Federal Circuit deemed the Secretary's report final based primarily on the court's prior holding in *Corus Group PLC* v. *International Trade Commission*, 352 F.3d 1351, 1356 (2003). See Pet. App. 10a-13a. The court in *Corus* held that, even when the President is free to reject a recommendation reflected in an agency report, the report and recommendation still constitute final agency action if the recommendation is a legal prerequisite to the President's taking particular action. See *id.* at 11a, 12a (discussing *Corus*, 352 F.3d at 1359). The court in this case concluded that the Secretary's finding and recommendation here were final agency action subject to APA review because "here as in *Corus*,

the President is not compelled to act upon the recommendation of the Secretary, but an affirmative threat finding is a predicate to the President's authority to act under the statute." *Id.* at 12a.

As Judge Chen explained, the Federal Circuit's holdings in *Corus* and in this case are "inconsistent with Supreme Court precedents on the non-finality of a Secretary's or Commission's tentative report and recommendation to the President." Pet. App. 23a. In particular, the statutory scheme at issue in *Specter* required the President to approve or disapprove, "in their entirety," base-closing recommendations prepared by the Defense Base Closure and Realignment Commission. *Id.* at 24a. Although the statutory scheme precluded the President from closing bases except in accordance with the Commission's recommendations, the Court held that the Commission's report was not final agency action because the President retained discretion either to approve or disapprove the report. See *id.* at 25a.

This Court's decision in *Specter* thus "reaffirmed that a report or recommendation to the President is not a final agency action if no direct consequences occur without the President's action and if the President has discretion in whether to take action." Pet. App. 25a (additional views of Chen, J.). And while the court of appeals did not rely on the final-agency-action requirement in rejecting petitioners' claim, the government, as the prevailing party, is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by * * * the Court of Appeals." *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). The threshold question whether the Secretary's report constitutes final agency

action makes this case a poor vehicle for reviewing petitioner's contentions.

2. This Court has long held that, although federal courts in appropriate circumstance may review presidential actions for compliance with the Constitution and federal statutes, such actions are not subject to review for arbitrariness or abuse of discretion. See, *e.g.*, *Specter*, 511 U.S. at 476; *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948); *Dakota Cent. Tel. Co.* v. *South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919).

In *United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940), this Court held that courts likewise may not review for arbitrariness an agency recommendation that underlies a presidential action. The statute in that case had the same structure as the statute in this case: It empowered the United States Tariff Commission to investigate the facts and to submit a report to the President, and it authorized the President to adjust tariff rates based on the report's findings. See *id.* at 376-377; see also *id.* at 379 ("[T]he Commission * * * act[s] as an adviser[.] * * * [I]t is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative."). The Court held that neither the President's decision nor the Commission's recommendation was reviewable for arbitrariness. See *id.* at 380. "For the judiciary to probe the reasoning which underlies" the President's decision, the Court explained, "would amount to a clear invasion" of the President's authority. *Ibid.*

As the court of appeals recognized, *George S. Bush* resolves this case. See Pet. App. 15a. The Secretary here, like the Tariff Commission in *George S. Bush*, is

simply an "adviser" who "submits the facts and [his] recommendations to the President"; it is the President who ultimately decides what action to take on those facts. 310 U.S. at 379. Although a court may review the President's actions for compliance with the statute, it may not review the persuasiveness of the "reasoning which underlies" those actions. *Id.* at 380. The responsibility for evaluating the soundness of the Secretary's findings ultimately belongs to the President himself, not to the courts. See *ibid.*

Petitioners' contrary arguments lack merit. Petitioners emphasize (Pet. 20) that *George S. Bush* "predated the passage of the APA by six years." But the APA was "understood when enacted to 'restate the present law as to the scope of judicial review.'" *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2419 (2019) (opinion of Kagan, J.) (brackets omitted). This Court has therefore "interpreted the APA not to 'significantly alter the common law of judicial review of agency action.'" *Id.* at 2419-2420 (citation omitted); see, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985). Petitioners also predict (Pet. 22) that the court of appeals' decision will lead to "dire" consequences. But petitioners overstate the practical effects of the decision below, under which courts can still review any tariffs or quotas that the President imposes under Section 232 for compliance with the Constitution and with the statute.

Judicial review for arbitrariness would be especially untoward in the present statutory setting. Under petitioners' position, federal courts could review the Secretary's judgments about whether imports of particular articles threaten national security. But decisions about national security are "confided by our Constitution" to the political branches. *Chicago & Southern*, 333 U.S. at

111. "They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." *Ibid.*; see, *e.g.*, *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2420 (2018) ("[O]ur inquiry into matters of * * * national security is highly constrained."); *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.").

3. Petitioners also argue (Pet. 29-30) that the Secretary's report rests on a misinterpretation of Section 232. Petitioners explain that they raise that argument only as a subsidiary part of their arbitrary-and-capricious challenge. See Pet. 29 ("In the course of arbitrary and capricious review, proper statutory construction is crucial."); Pet. 30 ("[T]hese questions of construction will be raised in the context of APA review under the arbitrary and capricious standard."). Because the Secretary's report is not final agency action and is not subject to arbitrary-and-capricious review in the first place, this case presents no occasion for reaching any subsidiary questions of statutory interpretation.

In any event, the Secretary's report did not reflect a misconstruction of Section 232. Although petitioners assert (Pet. 29) that the Secretary disregarded limiting statutory language, they do not clearly identify the limits that the Secretary supposedly transgressed. To the extent that petitioners reassert the argument that they made below—that Section 232 empowers the President to act only in response to an *imminent* threat to national security—that argument lacks merit.

The statutory text "imposes no imminence requirement." Pet. App. 14a. And "[t]he factors that the President and Secretary are directed to consider in making their determinations do not mention imminence but fo-

cus instead on long term health of and adverse effects on the relevant domestic industry." *Ibid.*; see 19 U.S.C. 1862(d) (directing the President and Secretary to consider factors such as "domestic production needed for projected national defense requirements," "the capacity of domestic industries to meet such requirements," "the requirements of growth of such industries," and "development necessary to assure such growth"). "The identification of such factors in [the statute] is inconsistent with the notion that the threat must be imminent." Pet. App. 14a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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