No. 24A1059

IN THE SUPREME COURT OF THE UNITED STATES

Kristi Noem, Secretary, Department of Homeland Security, et al.,

Applicants,

v.

National TPS Alliance, et al.

Respondents.

BRIEF OF IMMIGRATION REFORM LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPLICATION FOR STAY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

A. Secretary Noem's 2025 Vacatur and 2025 Termination were exercises of presidential authority and are unreviewable under the APA 4

B. This Court should harmonize the TPS statute with the President's inherent constitutional authority 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

Ariz. Dream Act Coalition v. Brewer,
855 F.3d 957 (9th Cir. 2017).....1

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,
333 U.S. 103 (1948).....3

Crowell v. Benson,
285 U.S. 22 (1932).....7

Dalton v. Specter,
511 U.S. 462 (1994)..... 4, 5, 6

Detroit Int'l Bridge Co. v. Gov't of Can.,
189 F. Supp. 3d 85 (D.D.C. 2016)..... 5

Jennings v. Rodriguez,
583 U.S. 281 (2018).....6

Nishimura Ekiu v. United States,
142 U.S. 651 (1892).....2

Matter of Silva-Trevino,
26 I. & N. Dec. 826 (B.I.A. 2016).....1

Trump v. Hawaii,
585 U.S. 667 (2018).....1

Tulare Cty. v. Bush,
185 F. Supp. 2d 18 (D.D.C. 2001).....5

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950).....3

United States v. Hansen,
599 U.S. 762 (2023).....6

United States v. Texas,
599 U.S. 670 (2023) 1

Wash. All. Tech Workers v. U.S. Dep't of Homeland Sec.,
50 F.4th 164 (D.C. Cir. 2022) 1

STATUTES

8 U.S.C. § 1182(f) 3

8 U.S.C. § 1254a 4

MISCELLANEOUS

Executive Order 14159, "Protecting the American People Against Invasion,"
90 Fed. Reg. 8443 (Jan. 29, 2025) 4

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 585 U.S. 667 (2018); *United States v. Texas*, 599 U.S. 670 (2023); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Wash. All. Tech Workers v. U.S. Dep't of Homeland Sec.*, 50 F.4th 164 (D.C. Cir. 2022); and *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016).[1]

SUMMARY OF ARGUMENT

Secretary Noem's vacatur of the extension of temporary protected status (TPS) for Venezuela (2025 Vacatur) and her termination of Venezuela's 2023 designation (2025 Termination) were exercises of inherent Executive power under Article II of the Constitution and were not dependent upon a delegation of power from Congress through the TPS statute. Indeed, her actions were directed by the President, and because Secretary Noem's actions were at the

[1] No counsel for any party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

behest of the President, her actions are unreviewable under the Administrative Procedure Act (APA).

Furthermore, the district court's reading of the statute introduces a conflict between it and the President's inherent authority. The district court read the TPS statute to preclude the Executive Branch from reconsidering its prior determinations, but that reading intrudes upon the President's inherent and independent authority to oversee foreign affairs and immigration policy. And, as the government shows, another reading of the statute is, at the very least, permissible, according to which the statute does permit reconsideration of prior agency decisions. Accordingly, to avoid constitutional conflict, this Court should harmonize the TPS statute with Secretary Noem's exercise of inherent Executive authority by adopting the government's interpretation.

ARGUMENT

There is no question that the United States has a right inherent in its sovereignty to defend itself from foreign dangers by controlling the admission of aliens. "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892). It is well-established that the President has independent authority in the areas of

foreign policy and national security. *See e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("The President . . . possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950) ("The exclusion of aliens is a fundamental act of sovereignty . . . inherent in [both Congress and] the executive department of the sovereign"); *see also id.* at 542 ("When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing *an inherent executive power*.") (emphasis added). Indeed, Congress has acknowledged the President's inherent authority to exclude aliens in the nation's interest. *See* 8 U.S.C. § 1182(f) (implementing the President's authority, in the interests of the United States, to "suspend the entry of all aliens or any class of aliens" or "impose on the entry of aliens any restrictions he may deem to be appropriate"). And, granted the president's inherent constitutional power, as Commander-in-Chief, to exclude aliens, it cannot be a nullity even if exercised outside of the precise form of its implementation by Congress in 8 U.S.C. § 1182(f).

By reason of this power, as explained below, Respondents are unlikely to succeed on the merits of their action, and this Court accordingly should stay the district court's order postponing agency action.

A. Secretary Noem's 2025 Vacatur and 2025 Termination were exercises of presidential authority and are unreviewable under the APA

On January 20, 2025, President Trump directed Secretary Noem to "rescind the policy decisions of the previous administration that led to the increased or continued presence of illegal aliens in the United States," including "ensuring that designations of Temporary Protected Status are consistent with the provisions of section 244 of the INA (8 U.S.C. 1254a), and that such designations are appropriately *limited in scope* and *made for only so long as may be necessary* to fulfill the textual requirements of that statute." Executive Order 14159 at § 16, "Protecting the American People Against Invasion," 90 Fed. Reg. 8443, 8446 (Jan. 29, 2025) (emphasis added).

Because Presidents must always act through subordinates, whether an action is that of the President or the head of an agency, for purposes of APA reviewability, hinges not on whether agency personnel help perform a given action, but on whether the authority to take that action is presidential or delegated by Congress to an agency. *See, a fortiori, Dalton v. Specter,* 511 U.S. 462, 477 (1994) ("Where a statute … commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."). Here, authority for Secretary Noem's action came directly from the President in the exercise of his inherent constitutional authority over foreign affairs and immigration policy, and she issued the 2025 Vacatur and 2025 Termination

pursuant to his executive order. As the U.S. District Court for the District of Columbia has explained:

> [A]n unreviewable presidential action must involve the exercise of discretionary authority vested in the President; an agency acting on behalf of the President is not sufficient by itself. Since the Constitution vests the powers of the Executive Branch in one unitary chief executive officer, *i.e.*, the President, an agency always acts on behalf of the President. Nonetheless, there is a difference between actions involving discretionary authority delegated by Congress to the President and actions involving authority delegated by Congress to an agency. Courts lack jurisdiction to review an APA challenge in the former circumstances, regardless of whether the President or the agency takes the final action. However, "[w]hen the challenge is to an action delegated to an agency head but directed by the President, a different situation obtains: then, the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency's action should govern." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2351 (2001).

Detroit Int'l Bridge Co. v. Gov't of Can., 189 F. Supp. 3d 85, 101-04 (D.D.C. 2016). *See also, e.g., Tulare Cty. v. Bush,* 185 F. Supp. 2d 18, 28 (D.D.C. 2001) ("A court has subject-matter jurisdiction to review an agency action under the APA only when a final agency action exists. Because the President is not a federal agency within the meaning of the APA, presidential actions are not subject to review pursuant to the APA.") (citing *Dalton,* 511 U.S. at 470) (other internal citations omitted).

Here, Secretary Noem acted at the direction of the President and implemented his executive order when she reconsidered and vacated Secretary Mayorkas's 2025 Extension and terminated the 2023 Designation.

Accordingly, the district court lacked jurisdiction to review her actions under the APA. *Dalton,* 511 U.S. at 477. It is, of course, not to the prejudice of the un-reviewability of the secretary's action that it was pursuant to an order that the President had inherent constitutional authority to issue. Obviously, if actions committed to the President's discretion by a statute are unreviewable under the APA, actions he takes pursuant to his authority under the Constitution are at least equally so.

B. This Court should harmonize the TPS statute with the President's inherent constitutional authority

In any event, the district court's reading of the TPS statute to preclude the Executive from reconsidering its prior determination intrudes on the President's inherent and independent authority to oversee foreign affairs and immigration policy. A reviewing court should seek to harmonize Congress's enactments with the President's inherent constitutional authority to terminate TPS designations. *See United States v. Hansen*, 599 U.S. 762, 781 (2023) ("When legislation and the Constitution brush up against each other, our task is to seek harmony, not to manufacture conflict."). "When 'a serious doubt' is raised about the constitutionality of an Act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Jennings v.*

Rodriguez, 583 U.S. 281, 296 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

Of course, the "canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Id.* (internal quotation omitted). Here, the government has persuasively established one such permissible construction—that the TPS statute implicitly permits the Executive Branch to reconsider its prior determinations. *See* Application for Stay at 20-23. Thus, to avoid the conflict between the TPS statute, as interpreted by the district court, and the Executive's inherent constitutional authority to protect the nation from foreign threats, this Court should construe the statute as permitting reconsideration of prior agency decisions.

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CONCLUSION

For the foregoing reasons, the Court should grant the Application for Stay.

Dated: May 7, 2025

Respectfully submitted,

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