No. 24A1059

IN THE
Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, ET AL.,

Applicants,

v.

NATIONAL TPS ALLIANCE, ET AL.,

Respondents.

OPPOSITION TO APPLICATION TO STAY THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Jessica Karp Bansal
Lauren Michel Wilfong
NATIONAL DAY LABORER ORGANIZING NETWORK
1030 S. Arroyo Parkway, Suite 106
Pasadena, CA 91105

Eva L. Bitran
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017

Erik Crew
HAITIAN BRIDGE ALLIANCE
4560 Alvarado Canyon Rd., Suite 1H
San Diego, CA 92120

Cecillia D. Wang
Evelyn Danforth-Scott
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104

Ahilan T. Arulanantham
Counsel of Record
CENTER FOR IMMIGRATION LAW AND POLICY, UCLA SCHOOL OF LAW
385 Charles E. Young Dr. East
Los Angeles, CA 90095
(310) 825-1029
arulanantham@law.ucla.edu

Emilou MacLean
Michelle (Minju) Y. Cho
Amanda Young
Shilpi Agarwal
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Counsel for Respondents

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent National TPS Alliance ("NTPSA") states that it is a member-led organization. NTPSA is a project of the Central American Resource Center (CARECEN) of California, a non-profit organization. NTPSA has no parent corporation, nor has it issued any stock owned by a publicly held company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Regulations

Legislative History

Scholarly Authorities

Other Authorities

INTRODUCTION

This case is about whether a federal agency acted outside the scope of its delegated authority. It is not about whether courts can interfere in the Executive's negotiations with foreign powers, dictate the terms of military governance, or set national security policy. It should be uncontroversial that federal courts say what the law is. Yet the government's Application seeks emergency relief asserting that an agency's legal conclusions about the extent of its own power are entirely unreviewable, even if contrary to the plain text of its governing statute and settled agency practice. The emergency requiring this Court to establish that remarkable proposition has apparently arisen a month after the district court's order, two weeks after the court of appeals denied a stay, and even though oral argument is now set in that court for July 16.

This Court should reject the government's request for four reasons. *First*, the government must show harm from proceeding on the normal review schedule, but it argues only that the district court's order will delay implementation of its attempt to terminate TPS for Venezuela. A temporary pause in implementing a policy change is not irreparable harm. This Court has denied stays under similar circumstances. *See, e.g.*, *United States v. Texas*, 143 S. Ct. 51 (2022) (mem.) (denying stay); *Biden v. Texas*, 142 S. Ct. 926 (2021) (denying stay).

In contrast, staying the district court's order would cause far more harm than it would stop. It would radically shift the status quo, stripping Plaintiffs of their legal status and requiring them to return to a country the State Department still deems too dangerous even to visit. As the district court found, nearly 350,000 people would

immediately lose the right to live and work in this country. That vibrant community includes college students like Plaintiff Cecilia González Herrera, a political science major at the University of Central Florida; business professionals like Plaintiff Freddy Arape Rivas, an IT specialist with an energy and technology company in Texas; and parents like Plaintiff M.H., who cares for her two young children full-time while her U.S.-citizen husband works as an engineer for a government subcontractor. Local governments and businesses would also suffer billions of dollars in lost revenue. App. 38a–40a.

Second, the government is unlikely to prevail on the merits. Plaintiffs' first claim is that the Secretary's *legal conclusion* that she has unreviewable authority to vacate prior TPS extensions in any manner she sees fit—even though Congress has enacted specific procedures and timelines governing TPS extensions and terminations—is contrary to the TPS statute. Every court to consider the issue has concluded that 8 U.S.C. 1254a(b)(5)(A) does not bar judicial review of such pure legal questions. The government's reading is contrary to the statute's text and this Court's precedents construing the term "determination" in the immigration context.

Moreover, the government's reading of Section 1254a(b)(5)(A) would leave federal courts powerless to stop even blatantly lawless agency action—whether to restrict TPS or expand it. Future administrations could designate countries without regard to the time constraints and country conditions requirements Congress mandated. They could designate Mexico for fifty years to accomplish mass legalization, or China and India to sweeten a trade deal. The government believes

such blatantly unlawful actions would be unreviewable "determinations." The Court should not so radically expand the Secretary's powers, especially on the emergency docket.

On the merits of this claim, the government's position contravenes long-standing APA law. Agencies cannot unilaterally "vacate" decisions where, as here, Congress constrained both the timing and review processes for decisions. The statute speaks in mandatory terms: TPS "is extended" for the period the Secretary specifies in an extension notice. 8 U.S.C. 1254a(b)(3)(C). Terminations "shall not be effective [until] the expiration of the most recent previous extension." *Id.* 1254a(b)(3)(B). Yet the agency asserts implicit authority to disregard those rules and end extensions through a wholly discretionary "vacatur" power never mentioned in the statute. Recognizing the extraordinary authority the government seeks—which the agency has never before exercised in the thirty-five-year history of the TPS statute—would render the statute's timing and process constraints meaningless. The government is not likely to prevail on that claim in this Court or any other.

Plaintiffs' second APA claim is that the Secretary's order vacating the TPS extension for Venezuela was arbitrary and capricious because her rationale—disagreeing with her predecessor's approach to TPS registration processes—rested on legal error, ignored agency practice, and was a pretextual attempt to justify ending the TPS extension. The government entirely ignores this claim, as it did in the court of appeals, but it is an independent basis for the district court's order. App. 55a–59a. Section 1254a(b)(5)(A) clearly does not bar this claim, because it applies only to

matters within the scope of 1254a(b), whereas TPS registration is addressed in 1254a(c). Because this claim is a separate basis for the district court's conclusion that the Secretary's vacatur order was unlawful, the government's arguments against Plaintiffs' other claims are not outcome-determinative, and therefore do not warrant this Court's plenary consideration, much less emergency relief.

Third, the government has no serious basis for disputing the district court's jurisdiction to consider Plaintiffs' constitutional discrimination claim. App. 27a. Granting the Application on the merits would be particularly unjustified. The district court found, based on unrebutted evidence, that the discriminatory animus underlying these decisions justified interim relief under any governing standard, including rational basis review. App. 73a–74a, 82a. The Secretary explicitly relied on false, negative stereotypes—like the myth that Venezuela emptied its prisons to send migrants here—to justify both the vacatur and termination decisions. Her statements conflated Venezuelan TPS holders with "dirt bags," gang members, and dangerous criminals. Yet the unrebutted record evidence shows that Venezuelan TPS holders have lower crime rates and higher labor force participation rates than the general population, and Venezuela never emptied its prisons. This Court should not disturb the detailed findings of discrimination here, which need only be "plausible in light of the full record" to be upheld even on plenary review, *Cooper v. Harris*, 581 U.S. 285, 293 (2017)—particularly on a stay application.

Finally, the government's arguments against the scope of relief the district court ordered, if adopted, would radically restrict remedies under the APA. The

government concedes the district court's order was not a preliminary injunction, Gov. Br. 14 n.10, but instead a postponement of agency action under 5 U.S.C. 705, *i.e.*, a preliminary "set aside" under the APA. No authority limits APA relief in those circumstances to just the named parties. The sea change in APA doctrine the government has proposed should not be made in this setting.

The emergency docket is not a place to make new law with far-reaching consequences or to review alleged fact-bound errors on a record that exceeds 1,600 pages. Nor should the Court grant an "emergency" stay motion absent any showing of irreparable harm when the court of appeals is moving so quickly, and where the government is plainly wrong on the merits.

BACKGROUND

A. Congress's Statutory Scheme for TPS

Congress created TPS in response to unconstrained executive discretion in humanitarian relief programs. Prior to 1990, the executive used "extended voluntary departure" (EVD) to confer blanket nationality-based humanitarian relief. *See* Lynda J. Oswald, Note, *Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 Mich. L. Rev. 152, 157–60 (1986). However, this practice lacked "any specific … criteria." *Id.* at 178 n.153 (quoting Letter from Att'y Gen. W.F. Smith to Rep. L.J. Smith (July 19, 1983)). Arbitrary, overtly political results ensued, creating congressional pressure to reform the system, particularly in the wake of the Attorney General's refusal to grant EVD for Salvadoran refugees. *See Hotel & Rest. Emps. Union v. Smith*, 846 F.2d 1499, 1510–11 (D.C. Cir. 1988) (separate opinion of Mikva, J.).

Congress designed TPS to ensure future decisions would be based on "identifiable conditions" rather than "the vagaries of our domestic politics," 101 Cong. Rec. H25811, 25838 (daily ed. Oct. 25, 1989) (statement of Rep. Sander Levine) (debating Central American Studies and Temporary Relief Act of 1989, immediate precursor to the TPS statute); replace the "ad hoc, haphazard ... procedures" that existed before, *id.* at 25837 (statement of Rep. Richardson); and provide beneficiaries with certainty about "what [their] rights are, how the Justice Department determines what countries merit EVD status [and] how long they will be able to stay," *id*. Congress also statutorily designated El Salvador for TPS, Pub. L. 101-649, Title III, § 303 (1990), effectively overruling *Smith* while also establishing criteria to govern blanket humanitarian protection, which Executive Branch officials had refused to do.

The TPS statute gives the Secretary of Homeland Security authority to provide nationality-based humanitarian relief to certain citizens of countries stricken by war, natural disaster, or other catastrophe, if they are already in the United States. 8 U.S.C. 1254a. While a country is designated for TPS, beneficiaries receive employment authorization and protection from immigration detention and removal. *Id.* 1254a(a)(1), (d)(4). The statute affords protection to qualifying individuals regardless of whether they meet the requirements for asylum or other immigration relief. *Id.* 1254a(b)(1).

Congress established a clear statutory framework to govern the process of TPS decisionmaking. The Secretary must consult with "appropriate" agencies, after which she "may designate" a country based on armed conflict, environmental disaster, or

other extraordinary conditions. 8 U.S.C. 1254a(b)(1). Designations can last only 6, 12, or 18 months, effective upon notice in the Federal Register. *Id.* 1254a(b)(2). The Secretary also has discretion, commonly exercised, to *re*designate countries for TPS to allow later-arriving nationals to apply. GAO, *Temporary Protected Status: Steps Taken to Inform and Communicate Secretary of Homeland Security's Decisions* 5, 9, 12 (Apr. 2020) ("GAO Report") (cited in Gov. Br. 6 n.3). The Secretary has substantial discretion over initial designations. So long as she determines certain country conditions exist, she may choose whether and when to designate a country for TPS.

In contrast, the statute strictly limits agency discretion *after* a country is designated, both as to the timing of the review process and what criteria the Secretary must use in deciding whether to extend or instead terminate TPS protection. *See* GAO Report 16–18, 27 (differentiating between discretion afforded before and after initial designation). "At least 60 days before" the end of a designation, "after consultation with appropriate agencies," the Secretary "shall review the conditions in the foreign state" and "determine whether the conditions for such designation … continue to be met." 8 U.S.C. 1254a(b)(3)(A). The review process typically begins months before the 60-day deadline. GAO Report 20–21. Both USCIS and the State Department prepare country conditions memoranda and recommendations for the Secretary. *Id.* 15–16; *see also Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1082 (N.D. Cal. 2018) (describing process).

Unless the Secretary determines the country "no longer continues to meet the conditions for designation," the designation "is extended" automatically for 6 months

or "in [her] discretion ... a period of 12 or 18 months." 8 U.S.C. 1254a(b)(3)(C). The statute "essentially provides extension as a default." App. 53a. If the Secretary determines conditions for designation are no longer met, she "shall terminate the designation." 8 U.S.C. 1254a(b)(3)(B). As to timing, the "effect [of an extension] can be immediate," but the statute "builds in some delay before termination of TPS becomes effective." App. 53a. Termination "shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension." 8 U.S.C. 1254a(b)(3)(B).

Nowhere does the statute grant the Secretary authority to vacate or rescind an extension. Secretary Noem's vacatur of Secretary Mayorkas's January 17, 2025 extension of TPS for Venezuela is the first vacatur of an extension in the statute's history. Her partial vacatur of Secretary Mayorkas's July 1, 2024 extension of TPS for Haiti is the second. Secretary Mayorkas's June 21, 2023 rescissions of the first Trump administration's TPS terminations were the first rescissions of any kind in the program's history. Those terminations had been enjoined by court orders before they ever took effect. 88 Fed. Reg. 40,282, 40,294, 40,304, 40,317 (June 21, 2023). *See Ramos v. Nielsen,* 709 F. Supp. 3d 871, 876–80 (N.D. Cal 2023) (describing history of *Ramos* litigation challenging TPS terminations during the first Trump administration).

When a country is designated, the statute requires DHS to make individualized determinations about applicants' eligibility. Applicants must show they have "been continuously physically present in the United States since the

effective date of the most recent designation," and are ineligible if they have been "convicted of any felony or 2 or more misdemeanors" or could reasonably be regarded as a danger to the security of the United States. 8 U.S.C. 1254a(c)(1), (c)(2). If a TPS recipient becomes ineligible after approval, the Secretary "shall withdraw" their status. *Id.* 1254a(c)(3). All beneficiaries must register "to the extent and in a manner which the [Secretary] establishes." *Id.* 1254a(c)(1)(A)(iv).

B. The TPS Designation for Venezuela

On the last day of his first term, President Trump designated Venezuela for Deferred Enforced Departure,[1] citing "the worst humanitarian crisis in the Western Hemisphere." 86 Fed. Reg. 6,845 (Jan. 25, 2021). On March 9, 2021, Secretary Mayorkas designated Venezuela for TPS. 86 Fed. Reg. 13,574 (Mar. 9, 2021). On September 8, 2022, he extended the designation for 18 months. 87 Fed. Reg. 55,024 (Sept. 8, 2022).

On October 3, 2023, Secretary Mayorkas again extended Venezuela's designation, and also redesignated Venezuela, expanding eligibility to Venezuelans in the United States since October 3, 2023. 88 Fed. Reg. 68,130 (Oct. 3, 2023). Because beneficiaries of the 2021 designation necessarily were in the United States as of that later date, they were also eligible under the 2023 designation. The Secretary established two registration tracks: one for those who already had TPS, and one for new applicants. *Id.* at 68,130.

[1] DED, a successor to EVD, is (unlike TPS) a form of discretionary executive action not specifically governed by statute. Cong. Rsch. Serv., *Temporary Protected Status and Deferred Enforced Departure* 4 (Sept. 23, 2024), https://sgp.fas.org/crs/homesec/RS20844.pdf.

Venezuela's 2023 designation was set to expire April 2, 2025. *Id.* Secretary Mayorkas announced an extension on January 10, Press Release, DHS, *DHS to Extend Temporary Protected Status for Venezuela* (Jan. 10, 2025), https://www.dhs.gov/archive/news/2025/01/10/dhs-extend-temporary-protected-status-venezuela, and published it on January 17—75 days before April 2. 90 Fed. Reg. 5,961 (Jan. 17, 2025). This was consistent with the statute and well within the normal timeframe for TPS decisionmaking. *See, e.g.,* 73 Fed. Reg. 57,128 (Oct. 1, 2008) (extension published 159 days before expiration); 78 Fed. Reg. 32,418 (May 30, 2013) (102 days). The Secretary set an extension period of 18 months, which is the most common period the agency sets. App. Ct. Dkt. 11.1 at 14 & Table A. He established a consolidated re-registration process for all beneficiaries, regardless of whether they registered initially in 2021 or 2023, given that "a TPS beneficiary under the 2021 Designation was necessarily a TPS beneficiary under the 2023 Designation." App. 56a. "[A]s a factual matter" consolidating re-registration "was not 'novel,'" but rather standard agency practice. App. 57a.

The extension took effect immediately. 90 Fed. Reg. at 5,962. *See also* 8 U.S.C. 1254a(b)(3)(C) (designation "is extended" if periodic review does not result in termination); App. 53a. The re-registration period began January 17. Applicants who filed, including Plaintiff Freddy Jose Arape Rivas, received a Notice of Action confirming their work authorization was extended through October 2, 2026. D. Ct. Dkt. 18 ¶ 12. The Federal Register notice also "automatically extend[ed] [certain work

permits] ... without any further action,"advising employers to "accept" the notice and facially expired permits as proof of work authorization. 90 Fed. Reg. at 5,967–70.

On January 15, then-Governor Noem testified at her confirmation hearing that the "extension [of TPS] of over 600,000 Venezuelans" was "alarming" due to alleged gang activity by individuals in Colorado, even though local law enforcement officials had already debunked the Colorado gang takeover myth. D. Ct. Dkt. 37-12 at 104:17–105:2; D. Ct. Dkt. 74 ¶ 131. She was confirmed on January 25. Three days later, she made the decision to vacate Secretary Mayorkas's TPS extension for Venezuela.

In the Federal Register, Secretary Noem justified her vacatur decision solely based on concerns about the registration process. 90 Fed. Reg. 8,805, 8,807 (Feb. 3, 2025). She described the process established by the January 17 extension as "novel" and possibly not "consistent with the TPS statute." *Id.* at 8,807. The government now concedes the registration was neither novel nor contrary to statute. Supp. App., *infra,* 69a–70a ("Plaintiffs are correct that these overlapping registrations … [are] within the discretion of the Secretary…."). The decision does not refer to conditions in Venezuela, national interests, national security, or foreign-policy concerns.

Secretary Noem also directed USCIS to undo the immediate effects of the extension. 90 Fed. Reg. at 8,807 ("USCIS will invalidate" TPS-related documents "that *have been issued* with October 2, 2026 expiration dates" and vacate "the EADs that *were extended*") (emphases added). Finally, she noted that, because of her vacatur of Secretary Mayorkas's extension, she would have to "determine, by

February 1, 2025, whether to extend or terminate the 2023 Venezuela TPS designation." *Id.*

Secretary Noem communicated the basis for the vacatur decision the day after issuing it, announcing in an exclusive interview on Fox and Friends: "[W]e were not going to follow through on what [Secretary Mayorkas] did to tie our hands .... [W]e are going to ... evaluate all of these individuals that are in our country, including the Venezuelans that are here and members of [Tren de Aragua] .... [T]he people of this country want these dirt bags out." App. 65a.

Three days later, on February 1, she made the decision to terminate TPS for the 2023 beneficiaries, finding that "even assuming" conditions in Venezuela warranted it, extension was "contrary to the national interest." 90 Fed. Reg. 9,040, 9,042 (Feb. 5, 2025).

She appeared on Meet the Press the next day and explained her decision, saying: "[R]emember, Venezuela purposely emptied out their prisons, emptied out their mental health facilities and sent them to the United States of America. So we are ending that extension of [the TPS] program." App. 65a.

C. Procedural History

Plaintiffs filed suit challenging the government's vacatur and subsequent termination of the prior administration's extension of TPS for Venezuela, and moved for an order postponing the vacatur under 5 U.S.C. 705 of the APA.[2]

[2] Plaintiffs' complaint brought both APA and constitutional discrimination claims against both the vacatur and termination decisions, as the district court clearly explained. App. 13a–14a. However,

The district court held that 8 U.S.C. 1254a(b)(5)(A) does not preclude judicial review of purely legal or collateral questions, such as those challenged here, based on this Court's cases construing the word "determination," and consistent with its own prior opinion (and those of the three other district courts to reach the question) during the first Trump administration and the now-vacated Ninth Circuit panel decision in *Ramos*. App. 23a–27a.

The court found Plaintiffs would be irreparably harmed absent an order preserving the status quo, finding many Venezuelan TPS holders have no other protection from deportation, that tens of thousands of American children would be separated from their parents by the government's action, and that Venezuela remains extremely dangerous according to the State Department and other experts. App. 31a–36a. The district court also credited economists' estimates that termination would cause several billion dollars in economic losses and hundreds of millions in lost tax revenue. App. 38a–40a. The Court further found the government's assertions that Venezuelan TPS holders are dangerous "entirely unsubstantiated." App. 41a–43a.

On the merits, the court ruled for Plaintiffs on both of their APA claims against the Secretary's vacatur order. App. 44a–55a (Secretary lacked vacatur authority); 55a–59a (reasons "founded on legal error," failed to consider obvious alternatives, and pretextual). The district court also held that the government violated equal protection

---

Plaintiffs' postponement motion raised APA claims only against the vacatur, which rested on reasons entirely distinct from those the Secretary later gave for the termination. Because the vacatur "was an essential prerequisite" of the termination, Gov. Br. 18 n.12, postponing the vacatur rendered the termination inoperative. App. 14a. The motion's discrimination claim challenged both the vacatur and termination.

under any standard. App. 59a–75a. Finally, it determined that "consistent with the text of section 705," the relief should run nationwide. App. 75a–76a.

The government sought a stay from the Ninth Circuit, App. 84a, and requested a ruling by April 15. The Ninth Circuit denied the stay on April 18. The government filed this Application on May 1.

ARGUMENT

A party seeking a stay from this Court carries "an especially heavy burden" when it seeks emergency relief after both courts below already "denied a motion for a stay." *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers). "Respect" for those lower court decisions is particularly appropriate when, as here, "th[e] court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers). Here, the "emergency" appeared on this Court's docket nearly two full weeks after the court of appeals denied the government's stay motion.

The government fails to carry its burden. Because the "point" of a stay is "to minimize harm while an appellate court deliberates," *United States v. Texas*, 144 S. Ct. 797, 798 (2024) (mem.) (Barrett, J., concurring in denial of stay application), irreparable injury is the touchstone. *Cf. Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Here, a stay would cause far more harm than it would prevent, inflicting massive injury on Plaintiffs through lost employment and widespread deportations to an unsafe country. The government faces no comparable injuries. The government is also unlikely to succeed on its jurisdictional arguments or on the merits—both of which will be adjudicated soon enough under the Ninth Circuit's

expedited schedule. The Court should not wade into the fray now, on "a short fuse without benefit of full briefing and oral argument." *Does 1–3 v. Mills*, No. 21A90, slip op. (Barrett, J., concurring).

I. The Government Still Demonstrates No Harms, Even Though the District Court's Order Has Been in Effect for Over One Month.

This Court should deny the Application for lack of irreparable harm. If the Court denies a stay now but the government later prevails, Plaintiffs would have retained TPS for a few more months during expedited litigation. The government has offered no evidence that this delay has caused or will cause any irreparable harm. In contrast, a stay would strip work authorization from nearly 350,000 people living in the U.S., expose them to deportation to an unsafe country, and cost billions in economic losses nationwide. The resulting harms would be irreparable even if Plaintiffs ultimately prevail. App. 3a, 79a–80a.

1. In this posture, the government must show it faces irreparable harm from waiting to secure possible relief through the regular (expedited) course of appellate review. But if the government truly faced irreparable harm from any delay, it would not have waited two weeks to submit this Application. More than a month has passed since the district court's decision on March 31, and the government still points to no harm it has suffered or will suffer between now and when the Ninth Circuit decides its appeal, which is set for argument on July 16. *See Dep't of Educ. v. Louisiana*, 603 U.S. 866, 868 (2024) (denying government's motion for stay where "the Sixth Circuit has already expedited its consideration of the case and scheduled oral argument"); *N. Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1308 (1984) (Rehnquist,

J.) (denying stay despite finding error in district court order because "such an exercise should be reserved for the unusual case"). The government says it suffers irreparable harm whenever it cannot implement its immigration policies, or perhaps any policies at all. Gov. Br. 36. But this Court has denied the government's stay requests in similar circumstances. *See, e.g.*, *Biden v. Texas*, 142 S. Ct. 926 (2021) (agency policy governing border processing); *United States v. Texas*, 143 S. Ct. 51 (2022) (Secretary's enforcement priorities guidance); *cf. Biden v. Missouri*, 145 S. Ct. 109 (2024) (mem.) (student loan program); *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 759 (2021) (lifting stay for eviction moratorium).[3]

None of the authorities on which the government relies counsel otherwise. *Heckler v. Lopez*, 463 U.S. 1328, 1333–34 (1983) (Rehnquist, J., in chambers) stayed an injunction forcing an agency to take affirmative steps to pay certain benefits, not an order "merely freez[ing] the positions of the parties," as the district court did here. *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1305–06 (1993) (O'Connor, J., in chambers), concluded the balance of harms weighed in the government's favor in part because its order did not "prevent[] those aliens ... possibly eligible for relief ... from suing in their own right." And *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.), is a one-paragraph order staying a *permanent* injunction because, among other unspecified reasons, "the Government ha[d] made a sufficient showing at this stage that the plaintiffs ha[d] no cause of action."

[3] The government implies for the first time that the district court's order might somehow set back "complex negotiations with Venezuela." Gov. Br. 25, 37. This unexplained argument is waived and also unsupported by any record evidence.

2. As proof of harms in the district court, the government offered only the Secretary's bare assertions from the Federal Register. It explicitly was "not seeking to introduce any evidence" supporting its allegations about TPS holders harming the economy or public safety. Supp. App., *infra*, 8a. No record evidence establishes that *any* TPS holder is a gang member. *See* 90 Fed. Reg. 8,805–07 (vacatur notice) (not mentioning gangs); 90 Fed. Reg. 9,042 (termination notice stating that "[a]mong these Venezuelan nationals who have crossed into the United States are members of the Venezuelan gang known as Tren de Aragua," but not saying any TPS holders are members). Nor did the government dispute that existing law permits it to withdraw TPS from individuals who become ineligible due to criminal history or security threat. 8 U.S.C. 1254a(c)(2)(B), (3)(A).

3. Plaintiffs, by contrast, would suffer significant and irreversible injury from a stay. The Application asserts the district court relied on "its own policy views" to evaluate the Plaintiffs' injuries. Gov. Br. 37. That is wrong. The district court relied on seven expert declarations, amicus briefs by state and local governments documenting the harm they would suffer, and declarations by individual plaintiffs and others—all unrebutted by the government. App. 31a–44a, 64a, 73a–74a ("billions" of economic losses, including Social Security and other tax revenue). Indeed, the government conceded that it had "no sort of counter-declarations." Supp. App., *infra*, 8a.

The government contends Plaintiffs are not harmed by the sudden vacatur because TPS is "inherently" temporary. Gov. Br. 37. But in addition to failing the

common-sense test, this ignores Congress's purpose to regularize TPS decisionmaking and prevent Executive Branch decisions based on arbitrary, political reasons. *See supra* Background A; App. 51a–52a. The government also ignores the harm Plaintiffs would face if forced to return to Venezuela while it remains unsafe by the government's own account. App. 1a (citing State Department advisory as of March 2025). The government suggests Plaintiffs could obtain other immigration status, but (aside from the fact that the economic impact of lost employment authorization would be immediate), the undisputed record evidence shows "only a small minority" would actually be able to obtain other status. App. 32a. "In short, time matters, even if that time is limited." App. 37a.

II. Plaintiffs' APA Claims Are Subject to Judicial Review.

Plaintiffs assert two distinct APA claims, both of which challenge only Secretary Noem's vacatur order, not her separate termination. First, Plaintiffs raise a question of pure statutory interpretation: whether the Secretary has implicit power to vacate a TPS extension, even though the statute provides fixed time limits and procedures for terminating TPS. The statute's plain text and structure reject such authority, and the federal courts undoubtedly can decide the question. Second, Plaintiffs claim the Secretary's reasons for vacating the extension—based on alleged defects in its registration process—were arbitrary and capricious. The government entirely ignores this second claim, even though it is obviously not barred by Section 1254a(b)(5)(A), and despite the district court addressing it at length.

The government argues Section 1254a(b)(5)(A) bars Plaintiffs' first claim—that the agency has no authority to vacate a TPS extension—but engages only selectively with the statute's text. Section 1254a(b)(5)(A) provides:

> There is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection [i.e., subsection (b)].

Review of *the rest of* "this subsection," i.e., 1254a(b), makes clear that "determination" in this provision refers to the Secretary's conclusion that a nation satisfies certain country conditions requirements relevant to TPS decisionmaking. "Determination" does *not* refer to predicate legal judgments such as whether the agency has inherent authority to vacate prior extensions. Nor does "determination … under *this* subsection" in Section 1254a(b)(5)(A) refer to issues addressed in *other* subsections, such as TPS registration processes—which are discussed in subsection (c) rather than (b).

The TPS statute uses "determine" and "determination" in several other provisions, none of which the government analyzes. Most important, the sub-provisions that immediately precede Section 1254a(b)(5)(A) require the Secretary to "determine" that country conditions meet the requirements for designation, extension, or termination of its TPS status. During the periodic review process, the Secretary must:

> "*determine* whether the conditions for … designation … continue to be met" and publish "*such determination* (including the basis for *the determination*, and, in the case of *an affirmative determination*, the period of extension of designation …."

8 U.S.C. 1254a(b)(3)(A) (emphases added). The provision authorizing termination also uses "determination" to refer to an assessment of country conditions, as does the provision requiring extensions. *See* 8 U.S.C. 1254a(b)(3)(B) (referring to "*the determination*" that a country no longer meets conditions for designation); 8 U.S.C. 1254a(b)(3)(A) (mandating extension if Secretary "does not *determine*" that country no longer meets conditions for designation). *See also* 8 U.S.C. 1254a(d)(3) (referring to "the *determination*" that country conditions require termination).[4]

In contrast, nowhere does the TPS statute use "determination" to refer to predicate legal judgments about the scope of the Secretary's statutory authority. Indeed, none of the many other actions, decisions, and judgments the Secretary can take with respect to TPS constitute "determinations" under this statute; if Congress thought they did, it would have called them that. While "determination" theoretically could, in other statutes, refer broadly to any kind of decision or judgment, in Section 1254a(b) it refers to the Secretary's country conditions assessments. Thus, the Secretary's legal conclusion that she had authority to vacate an extension is not a "determination[]" under 1254a(b)(5)(A). *See Richards v. United States*, 369 U.S. 1, 11

[4] The statute refers to "determination[s]" (or the act of "determin[ing]") in two other contexts *not* in subsection (b) (and therefore not covered by Section 1254a(b)(5)(A)), both of which confirm Congress used the term to refer to the ultimate conclusion to grant or deny some status or benefit the statute provides. The Secretary makes a "determination" that an individual is (or is not) eligible for TPS benefits under subsections (a) and (c), *see* 8 U.S.C. 1254a(a)(4)(B), (c)(2)(A); and that certain individuals may use their time living with TPS status to count for purposes of other immigration benefits, 8 U.S.C. 1254a(e).

(1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act ....").[5]

Plaintiffs' second APA claim challenges the vacatur order because the Secretary's rationale—that her predecessor's procedures for TPS registration under his extension order were somehow improper—was arbitrary and capricious. That claim, too, is not barred by Section 1254a(b)(5)(A), albeit for different reasons. Section 1254a(b)(5)(A) does not bar this claim because the Secretary's registration authority is addressed in subsection 1254a(c) of the statute. *See* 8 U.S.C. 1254a(c)(1)(A)(iv), (B). But Section 1254a(b)(5)(A) withdraws jurisdiction only over determinations under "*this* subsection," i.e., subsection 1254a(b) (emphasis added). Thus, even if Section 1254a(b)(5)(A) barred review of all decisions, actions, and judgments under subsection (b), and even if all of the Secretary's conclusions about alleged registration defects constituted "determinations"—neither of which is true—Plaintiffs' claim still would not be barred because Section 1254a(b)(5)(A) reaches only determinations under subsection (b), not (c).

Plaintiffs' interpretation comports with this Court's cases construing "determination" in other immigration statutes that withdraw Article III jurisdiction—cases the government never cites. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991), considered whether a claim alleging unconstitutional agency practices in processing legalization applications was barred by a provision stating

[5] Contrary to the government's assertion, Gov. Br. 18 n.12, the reviewability of the Secretary's conclusion does not turn on whether it was set forth in the termination notice or the vacatur notice, but rather on whether that conclusion constitutes a "determination … under [subsection (b)]."

"[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section." *Id*. at 491–92 (citing 8 U.S.C. 1160(e)). This Court held the claim not barred because "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions," and because the phrase "respecting an application" refers to "an individual application." *Id*. Congress "could easily have used broader statutory language" had it wanted to bar review of "all causes ... arising under" the statute, or "all questions of law and fact" in such suits, rather than merely review of a "determination." *Id.* at 492–94. It did not. Two years later, *Reno v. Catholic Social Services*, 509 U.S. 43, 56 (1993) ("CSS"), applied *McNary* to find a similar provision did not bar review of a claim challenging the agency's interpretation of a statutory phrase—like the first APA claim here.

Congress has since enacted and amended various jurisdictional provisions, sometimes using *McNary*'s language. *See* 8 U.S.C. 1252(a)(2)(A)(i) (barring review of "any individual determination" or "any other cause or claim"); 1252(a)(2)(B) ("any judgment … or any other decision or action"); 1252(b)(9) (channeling review of "all questions of law or fact"). But it has left Section 1254a(b)(5)(A) untouched.

McNary, *CSS*, and Congress's subsequent amendments to jurisdictional provisions of the immigration code confirm what Section 1254a(b)(5)(A) says. Like the statutes in *McNary* and *CSS*, it refers to a precise set of "determination[s]," rather than a broader set of actions, decisions, or judgments. The agency's determination—a single decision that conditions in a particular country warrant designation,

extension, or termination—is analogous to the determination to deny a benefits application in *McNary* or *CSS*. The agency's unlawful assertion of novel authority to vacate TPS extensions is akin to the unlawful practices and interpretive rules challenged in those cases. As in *McNary*, Plaintiffs here "do not seek a substantive declaration that they are entitled to [TPS] status," 498 U.S. at 495, but rather a legal ruling about the Secretary's vacatur authority. Later statutes barring review over broader agency decisionmaking, such as its "judgment[s]," "actions," "decisions," or "all questions of law and fact" arising from them, confirm Congress meant for Section 1254a(b)(5)(A) to be narrow in scope.

No court has ever accepted the government's extraordinarily broad interpretation of Section 1254a(b)(5)(A). To the contrary, in prior litigation on this issue, a Ninth Circuit panel, though divided as to the claim in that case, agreed that Section 1254a(b)(5)(A) does not bar review of statutory claims. *Ramos v. Wolf*, 975 F.3d 872, 895 (9th Cir. 2020), *vacated upon reh'g en banc*, 59 F.4th 1010 (9th Cir. 2023) (citing *McNary*) ("a claim that an agency has adopted an erroneous interpretation of a governing statute would be reviewable … particularly because the court's resolution of these sorts of challenges turns on a review of the law itself, rather than a review of the merits of any specific agency determinations"); *id.* at 907 (Christen, J., dissenting) (finding claim reviewable because "Plaintiffs did not ask the district court to reweigh the factors the Secretary considered when she terminated TPS … nor did they seek a ruling that [their countries] are entitled to TPS designations"). And government counsel conceded the point at argument. App. 23a.

The government never explains what it believes the term "determination" means, and never cites *McNary* or *CSS*. Instead, it presumes "determination" refers broadly to some unspecified set of decisions, actions, and judgments, and then rests its textual argument on the statute's use of the terms "any" and "with respect to." Gov. Br. 16–17.

But those terms also have clear meanings when understood within the statute. The statute uses "any" to refer to the various determinations within its scope—including country conditions assessments required for any of the three possible bases for a TPS designation and corresponding determinations supporting extensions or terminations. *See generally* 8 U.S.C. 1254a(b)(1) (describing different bases for designation); 1254a(b)(3)(A), (B), (C) (setting forth detailed criteria and procedures for TPS status review for each discrete decision). And "with respect to" distinguishes determinations that pertain to designation, extension, and termination under subsection (b) from determinations that concern eligibility for benefits and physical presence, which are addressed under different subsections—and therefore beyond the scope of Section 1254a(b)(5)(A)'s bar. *See* 8 U.S.C. 1254a(a)(4)(B), 1254a(c)(2)(A), 1254a(e) (all referring to other "determinations").[6]

The government also seeks support from *Patel v. Garland*, 596 U.S. 328 (2022), which read "any" and "with respect to" to have a "broadening effect," Gov. Br. 16, but reading them as broadly as the government urges here ignores that Congress only barred review of "determination[s]" "under [subsection (b)]." In contrast, the statute

[6] The statutes in *McNary* and *CSS* used "respecting" much as this statute uses "with respect to," but neither case read it to preclude collateral statutory authority claims like the one raised here.

in *Patel* referred to "judgment," not "determination," *id*. at 339, found review barred for *factual* claims, not legal ones, *id*. at 347, and relied on other context clues not present here. 596 U.S. at 339 (citing history of 8 U.S.C. 1252(a)(2)(D)); *cf. Wilkinson v. Garland*, 601 U.S. 209, 221 (2024) (finding reviewable a question of law otherwise subject to the same stripping provision).

None of the cases the government cites reads a jurisdiction-stripping provision to bar review of a pure *legal* claim, let alone a pure legal claim that the agency has exceeded its statutory authority. *Amgen, Inc. v. Smith*, 357 F.3d 103, 112–13 (D.C. Cir. 2004), held the opposite, reading the statute to preserve review of agency authority claims. *DCH Reg'l Med. Ctr. v. Azar*, 925 F.3d 503, 506 (D.C. Cir. 2019), barred review of a claim about the methodology for estimating costs, but only because in the context of that particular statutory scheme it "unavoidably" encompassed "a challenge to the estimates themselves," which was barred. Here, in contrast, the question whether the agency has free-standing vacatur authority is conceptually distinct from whether country conditions support designation, extension, or termination in any given instance. *See also United States v. Tohono O'odham Nation*, 563 U.S. 307, 316 (2011) (relief available in either of two courts, just not both); *Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala,* 80 F.3d 379, 386 (9th Cir. 1996) (finding challenge to classification decision barred, but not challenge to agency "regulations or procedures"); *Delgado v. Quarantillo*, 643 F.3d 52, 54 (2d Cir. 2011) (per curiam) (no jurisdiction where claim was previously reviewed in challenge to removal order).

The government also claims judicial review must be especially limited in the "immigration context," but this Court's immigration cases disprove that claim. *Biden v. Texas*, 597 U.S. 785, 806–07 (2022), rejected the government's justiciability arguments, deciding both a statutory interpretation claim and other APA claims against DHS's border policies. The Court acknowledged the obvious "foreign affairs consequences" at issue, but nonetheless held that "under the APA, DHS's exercise of discretion within [immigration law's] statutory framework must be reasonable and reasonably explained." *Id*. at 805–07. Two years earlier, this Court found jurisdiction over an APA claim challenging another agency decision affecting several hundred thousand immigrants. *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (reversing DACA rescission for failure to consider alternatives). Like the claims in those cases, Plaintiffs' APA claims concern whether an administrative agency has acted in excess of authority conferred by Congress—which is also a "political department," Gov. Br. 17; and whether the agency acted rationally when exercising its vast power. This Court has consistently recognized federal court authority to adjudicate such claims, and has declined to stay lower court orders enforcing the APA's constraints in this context. *See Biden*, 142 S. Ct. at 926 (denying stay of lower court order enjoining agency policy governing border processing on APA grounds).

Finally, two background principles justify rejecting the government's view. First, reading Section 1254a(b)(5)(A) to bar review over any TPS-related decision of any kind would leave a wide range of lawless agency behavior entirely unreviewable. For example, if the government were correct, a decision granting TPS to Mexico for

fifty years explicitly to accomplish mass legalization would be an unreviewable "determination" to designate TPS. Though such a grant would be contrary to the statute's terms—because TPS designations cannot last longer than 18 months or be made for reasons not specified in the statute—no court could review it.

That is not what any rational Congress could intend, let alone one enacting a statute to *constrain* executive discretion. When faced with results "no sensible person could have intended," this Court has eschewed "uncritical literalism" and instead read jurisdiction-limiting statutes more narrowly, both in the immigration code and elsewhere. *Jennings v. Rodriguez*, 583 U.S. 281, 293–94 (2018) (plurality) (construing "arising from" narrowly, citing cases construing "affecting," "related to," and "in connection with" narrowly in jurisdictional statutes).

Second, Congress drafts legislation against a "strong presumption" favoring "judicial review of administrative action." *Smith v. Berryhill*, 587 U.S. 471, 483 (2019). Thus, courts need not "guess" whether a statute was designed to "divest district courts of jurisdiction." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 207 (2023) (Gorsuch, J., concurring). Where Congress "holds that view," it "simply tells us" through an unequivocal plain-text command. *Id.* at 208. *See also Leedom v. Kyne,* 358 U.S. 184, 190 (1958) (presumption particularly strong where claim alleges agency acted in excess of delegated authority).

III. The Government Is Unlikely to Prevail on the Merits of Plaintiffs' APA Claims.

A. Secretary Noem's Vacatur Order Contravened the Plain Terms of the TPS Statute, Which Specifies Time Limits and Procedures for Terminations and Extensions.

Plaintiffs' first APA claim presents a question of pure statutory construction concerning agency power: Does the Secretary have implicit authority to vacate a TPS extension and replace it with a termination shortly thereafter, even though the statute sets fixed time limits and procedures for terminating TPS? Under the statute's plain text and structure, the answer must be "no." The statute never mentions this vacatur authority, and the agency has never previously exercised it.

The government's assertion of "inherent" agency authority to undo prior decisions contravenes this Court's precedent. "[T]he determinative question" in assessing agency reconsideration authority "is not what the [agency] thinks it should do but what Congress has said it can do." *Civ. Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322–25 (1961) (holding agency lacked authority to rescind certificate and cautioning that "specific instructions set out in the statute should not be modified by resort to such generalities as 'administrative flexibility' and 'implied powers'"); *see also United States v. Seatrain Lines*, 329 U.S. 424, 429 (1947) (holding agency lacked authority to alter certificate under new agency policy, and that question turned on "whether the Act authorizes such alterations").[7]

[7] *See generally* Daniel Bress, Note, *Administrative Reconsideration*, 91 Va. L. Rev. 1737, 1774–83 (2005) (collecting Supreme Court cases on implied reconsideration authority and concluding that "with the possible exception of reconsiderations that address clerical error or perhaps fraud, agencies may not reconsider their decisions in the absence of express statutory or regulatory authorization.").

The government relies on *Ivy Sports Medicine v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (Kavanaugh, J.), Gov. Br. 20, but that case supports Plaintiffs. The court *rejected* the FDA's assertion of inherent authority to rescind its determination that a medical device was substantially equivalent to others on the market. It held that "[b]ecause Congress created a procedure for FDA to reclassify medical devices, FDA may not short-circuit that process through what it calls its inherent authority to reverse its substantial equivalence determinations for those devices." *Ivy Sports Med.*, 767 F.3d at 87. The other cases on which the government relies also offer no support. *Macktal v. Chao* recognized agency reconsideration authority only "in the absence of a specific statutory limitation." 286 F.3d 822, 825–26 (5th Cir. 2002). And neither side contested the point in *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C. Cir. 1977).

Here, as in *Ivy Sports Medicine,* "Congress created a procedure" for DHS to revisit TPS designations. DHS may not "short-circuit that process through what it calls its inherent authority." 767 F.3d at 89; *see supra* Background A. Once a country is designated, the Secretary "shall" review the designation no later than 60 days before it ends. 8 U.S.C. 1254a(b)(3)(A). If, after the mandated consultation and review, she finds the country no longer "meet[s] the conditions for designation," she "shall terminate." 8 U.S.C. 1254a(b)(3)(A), (B). Otherwise, the designation "is extended." *Id.* 1254a(b)(3)(C). This "specific statutory process for altering an agency's grant of … authorization" "foreclose[s]" any implied reconsideration authority. *China Unicom (Am.) Operations Ltd. v. FCC*, 124 F.4th 1128, 1149 (9th Cir. 2024) (Collins,

J.). *See also Gorbach v. Reno*, 219 F.3d 1087, 1098 (9th Cir. 2000) (en banc) (Kleinfeld, J.) (Attorney General lacked implied authority to revoke naturalization because the "statutory denaturalization procedure exhausts the field").

Crucially, the TPS statute also strictly constrains the timing of a termination. Termination "*shall not* be effective earlier than 60 days after the date the notice is published or, *if later, the expiration of the most recent previous extension* …." 8 U.S.C. 1254a(b)(3)(B) (emphases added). This "use of a fixed term is … affirmatively inconsistent with positing an implied power to revoke a [designation] at any time." *China Unicom*, 124 F.4th at 1148. If the Secretary could just vacate "the most recent previous extension," 8 U.S.C. 1254a(b)(3)(B), and then terminate a designation before its expiration, Section 1254a(b)(3)(B)'s timing rules would be meaningless. Indeed, "the power the [Secretary] asks for in this case seems nothing more or less than the power to do indirectly what [she] cannot do directly." *Civil Aeronautics Bd.*, 367 U.S. at 328. To grant it would be to provide "the lever for nullify(ing) an express provision of the Act." *Id.* (quotation marks omitted) (alteration in original).

The government asserts the Executive Branch "has long understood the Secretary's power to implement the TPS statute to include the power to reconsider decisions," Gov. Br. 21, but it points to no evidence of that understanding. The agency has never before vacated a TPS extension. The first recissions of any kind were in 2023, when Secretary Mayorkas rescinded *terminations* that, critically, had already been enjoined by court order for five years. *See supra* Background A; *Ramos,* 709 F. Supp. 3d at 876–80; *cf. United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S.

223, 229–30 (1965) (agency had power to "undo what is wrongfully done" when original decision was overturned on judicial review). And because the terminations had never been in effect, they also engendered no reliance interests. *Cf. McAllister v. United States*, 3 Cl. Ct. 394, 398 (1983) (agency lacked implied reconsideration authority to change decision plaintiff relied on). Of course, even a consistent prior agency practice of vacatur could not render a vacatur lawful if it violates express statutory requirements, but there is no such practice here.

The government concedes the TPS statute "provides a mechanism for" terminating a designation, but argues the Secretary was not required to use it because the extension was not yet "in effect."[8] Gov. Br. 22. But the extension was in effect. Congress provided for extensions to take immediate effect. Plaintiffs and others received notices pursuant to the extension and relied upon them. *See supra* Background B (Plaintiff Freddy Jose Arape Rivas and others received notices extending their work permits through October 2, 2026, and employers relied on Federal Register extension notice to confirm employees' work authorization). That is why Secretary Noem directed the agency to invalidate already-issued documents after she vacated the extension. *Id.* The cases the government relies on, Gov. Br. 22, involve rules withdrawn *before* publication. *See Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996) (discussing benefits of allowing agency

[8] The government suggests the vacatur authority asserted here is limited because it occurred shortly after the extension, but the Secretary has already exceeded those bounds. In February she "partially vacate[d]" the July 1, 2024 extension of Haiti's TPS designation *seven months* after its publication. *See* 35 Fed. Reg. 10,511 (Feb. 24, 2025). The government never explains how one might discern when it is too late to vacate an extension under its countertextual interpretation of the statute.

to withdraw rule before publication); *Chen v. INS*, 95 F.3d 801, 805 (9th Cir. 1996) (holding rule that "was to become effective only on the date of publication in the Federal Register" and was never published "has no legal effect.").

The government also argues the statutory termination process is not "capable of rectifying [a] mistaken" extension announcement. Gov. Br. 22 (citing *Ivy Sports Med.*, 767 F.3d at 86). Here, of course, the Secretary was not looking to correct a mistake, but to make a new policy.[9] In any event, there is no dispute that the statute plainly permits the Secretary to terminate Venezuela's TPS designation *after the next periodic review process*, if she determines conditions for designation are no longer met. However, the statute does *not* permit her to terminate the designation *before* "the expiration of the most recent previous extension." 8 U.S.C. 1254a(b)(3)(B). The statute's plain terms show that "Congress did not create a process for [DHS] to withdraw [an extension at any time] because it seemingly did not want [DHS] to have the power to do so." *Nat. Res. Def. Council v. Regan*, 67 F.4th 397, 404 (D.C. Cir. 2023). Rather, Congress provided TPS beneficiaries and their families with certainty about how long protections would last. *See supra* Background A. This Secretary may prefer to have an "inherent power to reconsider," Gov. Br. 21, but that is contrary to the statute Congress wrote. *See Ivy Sports Med.*, 767 F.3d at 87–88 (statutory

[9] The Secretary has authority to correct inadvertent clerical errors. *See, e.g.*, *Extension and Redesignation of Venezuela for Temporary Protected Status—Correction*, 88 Fed. Reg. 80,327–28 (Nov. 17, 2023) (correcting "a technical error" that resulted in "two incorrect references"). But "the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies." *Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958).

reclassification process, "while somewhat burdensome, serve[s] important purposes, both generally and in [the governing] statute").

B. The Secretary's Vacatur Was Arbitrary and Capricious Because Her Reasoning, Based on Her Predecessor's Registration Procedures, Was Contrary to the TPS Statute.

Plaintiffs' second claim is that the Secretary's vacatur was arbitrary and capricious because her reasoning—that her predecessor's decision to consolidate registration processes somehow justified vacating a TPS extension for 600,000 Venezuelan refugees—rested on legal error and was irrational. The district court addressed this claim at length, App. 55a–59a, but the government entirely ignored it when seeking relief at the Ninth Circuit and scarcely addresses it here. In fact, this claim is plainly not barred by Section 1254a(b)(5)(A), *see supra* Section II, and provides a strong, separate basis on which to reject the government's Application.

The district court acted well within its discretion to find that, even if the Secretary had vacatur authority, *this* vacatur was arbitrary. First, it rests on legal error. Secretary Noem asserted the extension's consolidated registration process, under which beneficiaries of the 2021 designation could re-register under the 2023 extension, was "novel" and "not consistent with the TPS statute." 90 Fed. Reg. at 8,807. But "the Secretary failed to recognize that a TPS beneficiary under the 2021 Designation was necessarily a TPS beneficiary under the 2023 Designation"; that streamlining registration is typical; and that Secretary Mayorkas's registration process "was entirely consistent and compliant with the TPS statute." App. 55a–58a.

Second, the Secretary failed to consider whether her objections to consolidating the registration process could be resolved by just deconsolidating it, leaving other

aspects of the extension undisturbed. The district court correctly held that oversight alone rendered her decision arbitrary under *Regents*. *See* App. 58a–59a (citing 591 U.S. at 30 ("[W]hen an agency rescinds a prior policy its reasoned analysis must consider the alternatives that are within the ambit of the existing policy ...."). Third, *the government conceded* the real reason for the Secretary's decision was not the registration process: "[C]onfusion was not [the Secretary's] concern so much as the desire to totally undo Secretary Mayorkas's decision." App. 59a. The APA forbids such pretextual decisionmaking. *Cf. Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019) ("[W]e cannot ignore the disconnect between the decision made and the explanation given .... The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions.").

Because the government failed to address this aspect of the district court's well-reasoned decision, both here and in the court of appeals, this Court should not grant it relief on the emergency docket.

IV. The District Court's Factual Findings of Unconstitutional Animus Are Not Clearly Erroneous.

The government suggests there is no review of Plaintiffs' constitutional claim. Gov. Br. 16. This Court should reject that extreme position. App. 27a.

The government fails to show the district court clearly erred on the merits. The district court found animus was a motivating factor in Secretary Noem's vacatur and termination actions. App. 63a–66a. The court also found Plaintiffs entitled to interim relief even under *Trump v. Hawai'i*, 585 U.S. 667 (2018), because the voluminous "record evidence ... raised at least a serious question whether, in fact, the Secretary's

actions are plausibly related to her stated objective." App. 82a. The government requests a "fair reading" and a "common-sense understanding" of the evidence; these are thinly veiled requests to disregard the standard of review. Gov. Br. 26, 28. A district court's factual findings of racial discrimination "warrant[] significant deference" and are "subject to review only for clear error." *Cooper*, 581 U.S. at 293. "Under that standard, [a court] may not reverse just because [it] 'would have decided the [matter] differently.'" *Id.* If the factfinder's finding is "plausible," "even if another is equally or more so," it "must govern." *Id.*

The district court's finding should not be reversed, particularly on the emergency docket. The government did not offer "persuasive evidence" to support the Secretary's decisions at this preliminary stage. *Cf. Hawai'i*, 585 U.S. at 706. Instead, the district court found, as a matter of fact, that the record plainly contradicts her stated rationales.[10] App. 56a–58a, 64a, 73a–74a.

The district court's finding was amply supported by record evidence. *See* D. Ct. Dkt. 67-1. The government implies that the court's order rests on statements made by President Trump during his first term. Not so. The district court found Secretary Noem's statements—and in particular her contemporaneous justifications for her TPS decisions in 2025—sufficient to support its finding. App. 71a ("even without consideration of [President Trump's] statements … Plaintiffs have sufficiently established animus"). The Secretary repeatedly, and without a factual basis, asserted

[10] The district court did *not* hold the Secretary must provide personal testimony, Gov. Br. 28, but rather noted that she had not done so to refute the "reasonable inference" drawn from her repeated derogatory statements. App. 65a n.26.

a stereotype that Venezuelans in the U.S., as a category, are responsible for criminal and gang activity, and falsely stated that Venezuelan government officials deliberately sent prisoners and psychiatric patients to the United States. On January 15, the Secretary testified at her confirmation hearing before Congress that

> this extension [of TPS] of over 600,000 Venezuelans ... is alarming when you look at what we've seen in different states, including Colorado with gangs doing damage and harming the individuals and the people that live there.

App. 65a. *See also* Background B (Colorado gang claim debunked). She vacated the extension for Venezuela two weeks later. Describing her decision on television the next day, she conflated Venezuelan TPS holders with gang members to justify it:

> [Biden administration officials] were going to extend … temporary protected status … for another 18 months and we stopped that. Today we signed an executive order [to] evaluate all of these individuals that are in our country, including the Venezuelans that are here and members of [Tren de Aragua]. … [T]he people of this country want these dirt bags out.

App. 65a; D. Ct. Dkt. 37-14 at 3. Three days later, she issued the termination decision. Again, the next day, she explained it on national television:

> [T]he TPP [*sic*] program has been abused, and it doesn't have integrity right now. And folks from Venezuela that have come into this country are members of [Tren de Aragua]. And remember, Venezuela purposely emptied out their prisons, emptied out their mental health facilities and sent them to the United States of America. So we are ending that extension of [the TPS] program, adding some integrity back to it."

App. 65a; *id.* at 66a (further insinuating TPS is "to [the] benefit of criminals").[11]

The government failed to rebut the record evidence that the Secretary justified

[11] The record shows this too is a myth. "[T]here is no evidence" that Venezuela emptied its prisons and mental institutions to send their occupants here. *See* D. Ct. Dkt. 37-26 (reporting on assessment of "[e]xperts in and out of Venezuela"). Yet Secretary Noem and President Trump have repeated it for months.

her TPS decisions by relying on baseless stereotypes.[12] The government never contests, even now, the district court's findings based on unrebutted expert testimony, that Venezuelan TPS holders are not tied to gangs or criminal activity, have lower rates of criminal activity than the general population, have higher levels of educational attainment, "high labor participation rates," and "annually contribute billions of dollars to the U.S. economy." App. 2a, 64a. Nor does it dispute that the agency can withdraw TPS from individuals with disqualifying convictions or who present security threats. Also undisputed is record evidence and expert testimony connecting false claims of criminality, including the myth about emptying prisons and jails, to "longstanding tropes or stereotypes that certain races have inherently immoral traits." App. 64a; *see also* App. 41a–42a, 73a.

The district court did not clearly err in finding the Secretary "made sweeping negative generalizations about Venezuelan TPS beneficiaries *in toto*," and, relying on those generalizations, took "*en masse* actions against all Venezuelan TPS beneficiaries, who number in the hundreds of thousands." App. 66a. As the court explained: "[a]cting on the basis of a negative group stereotype and generalizing such stereotype to the entire group is the classic example of racism." *Id.* This Court should not substitute its own reading of the record on the emergency docket.

Nor should this Court decide whether the deferential standard in *Trump v. Hawai'i* applies here, 585 U.S. at 667, because the district court found Plaintiffs likely

[12] The government acknowledges only the "dirtbags" smear, but asserts it was out of context. Gov. Br. 27. The full transcript belies the government's assertion, particularly because the Secretary used it to explain the vacatur. App. 65a; *see* D. Ct. Dkt. 37-14 at 3.

to succeed even on rational basis review.[13] And in any event, this Court did not hold in *Hawai'i* that "rational-basis review governs constitutional challenges to Executive Branch immigration policies." Gov. Br. 24. To the contrary, a plurality of this Court applied *Arlington Heights* to the race discrimination claim brought by undocumented immigrants in *Regents*, 591 U.S. at 34. And every judge to consider discrimination challenges in TPS cases—including in the vacated *Ramos* decision—held *Arlington Heights* governs. *See, e.g.*, *Ramos*, 975 F.3d at 896 (vacated panel majority); *id.* at 925 (Christen, J., dissenting); App. 60a–61a.

V. The District Court Did Not Abuse Its Discretion in Crafting a Remedy Under APA Section 705.

The government contends the district court erred in "granting universal relief" that extends "nationwide." Gov. Br. 31. Accepting its arguments would require radical changes to law that should not be effectuated on the emergency docket.

First, the government argues remedies under Section 705 must be limited to the parties, but it cites only cases involving injunctions. Gov. Br. 32 (citing *Hawai'i*, 585 U.S. at 713 (Thomas, J., concurring) and *DHS v. New York*, 140 S. Ct. 599, 599–601 (2020) (mem.) (Gorsuch, J., concurring in the grant of stay)).[14] The district court held that the remedy it ordered—"postponing" agency action under Section 705—is not injunctive in nature. It is merely a preliminary form of "set aside" relief under

[13] To grant this emergency Application, in contrast, the Court would have to either decide that question or find the district court committed clear error when considering all the evidence under *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

[14] The government also refers to arguments it has now made in the birthright citizenship cases, but those, too, concern injunctions, not APA postponements or set-asides. Gov. Br. 32. The other cases it cites do not involve the APA at all. *See Starbucks Corp. v. McKinney*, 602 U.S. 339 (2024) (National Labor Relations Act); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (constitutional claims).

Section 706. *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 549, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting on other grounds) ("Section 705 of the APA authorizes courts to stay agency rules *pending judicial review*"); *D.C. v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 48 (D.D.C. 2020) ("the APA's § 705 must be read to authorize relief from agency action for any person otherwise subject to the action, not just as to plaintiffs"); *Career Colls. & Schs. of Tex. v. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024) ("Nothing in the text of Section 705, nor of Section 706, suggests that either preliminary or ultimate relief under the APA needs to be limited to [the associational plaintiff] or its members."), *cert. granted in part,* 145 S. Ct. 1039 (2025); App. 18a–22a. Because the government has disclaimed any challenge to the district court's holding that its relief was not injunctive in nature, Gov. Br. 14 n.10, and because this Court has explicitly reserved decision on the issue, *Biden*, 597 U.S. at 824 n.4 (2022), the government cannot prevail on this theory on the emergency docket.

The government also argues this Court should limit the scope of relief awarded by the district court to those NTPSA members "named in the complaint." Gov. Br. 33–34. As explained above, that is contrary to the prevailing practice in APA cases. It is also contrary to existing standing doctrine. "Where … an organization has identified members and represents them in good faith … [it] complies with the standing requirements demanded of organizational plaintiffs." *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 201 (2023). When such associations have prevailed, this Court has never limited relief to "named members." *See id.* at 230; *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546

(1996) ("'[I]ndividual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members."); *id.* at 554–58 (describing constitutional basis for associational standing doctrine); *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 399 (2024) (Thomas, J., concurring) ("If a single member of an association has suffered an injury, our doctrine permits that association to seek relief for its entire membership …."). The Court should reject the request to upend associational standing doctrine on the emergency docket.

Even if the Court is inclined to revisit its associational standing doctrine, this should not be the case in which to do it. Plaintiff NTPSA has more than 84,000 Venezuelan TPS holder members in all fifty states and the District of Columbia. App. 76a. And there is a particular need for uniformity in the TPS context, where the statute contemplates only one country conditions determination per nation, App. 76a (finding the agency's actions had a "uniform and nationwide impact on all Venezuelan TPS holders located across the United States"), and because the government's TPS decisions necessarily impact private employers and state administrative agencies. App. 31a. If relief were limited to NTPSA members, both DHS and state and private decisionmakers throughout the nation would have to somehow track which TPS holders are members, rather than simply consulting the DHS website that announces a uniform rule for all TPS holders from a given country.

CONCLUSION

The Court should deny the government's Application.

Respectfully submitted,

Jessica Karp Bansal
Lauren Michel Wilfong
NATIONAL DAY LABORER ORGANIZING NETWORK
1030 S. Arroyo Parkway, Suite 106
Pasadena, CA 91105

Eva L. Bitran
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017

Erik Crew
HAITIAN BRIDGE ALLIANCE
4560 Alvarado Canyon Rd., Suite 1H
San Diego, CA 92120

Cecillia D. Wang
Evelyn Danforth-Scott
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104

Ahilan T. Arulanantham
Counsel of Record
CENTER FOR IMMIGRATION LAW AND POLICY, UCLA SCHOOL OF LAW
385 Charles E. Young Dr. East
Los Angeles, CA 90095
(310) 825-1029
arulanantham@law.ucla.edu

Emilou MacLean
Michelle (Minju) Y. Cho
Amanda Young
Shilpi Agarwal
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111-4805

Counsel for Respondents

Dated: May 8, 2025