No. 25-1084

IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,
Petitioners,

v.

FRITZ EMMANUEL LESLEY MIOT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

RESPONDENTS' BRIEF

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April 13, 2026

QUESTIONS PRESENTED

The questions presented are whether 8 U.S.C. 1254a(b)(5)(A) bars respondents' APA claims and, if not, whether respondents have shown a likelihood of success on the merits of their APA and constitutional claims.

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INTRODUCTION

The administration claims the right to violate Section 1254a(b)(3)(A)—and to do so unconstrained by judicial review. Its claim is both ironic and dangerous. Ironic, because Congress enacted the TPS statute to cabin executive discretion, not unleash it. Dangerous, because if accepted it would hand the Executive unbridled power to act free of legislative or judicial constraint.

On the government's theory, the administration could terminate a country's TPS designation based on the flip of a coin or the Secretary's preference for a particular flavor of ice cream. One might be excused for dismissing these far-fetched examples as caricature, but that is exactly what the government told the court below.

Neither the TPS statute nor this Court's precedent allows such a naked exercise of arbitrary administrative power—and certainly not when, as here, it is motivated at least in part by racially animated discriminatory intent.

A facially neutral statute that does not sanction unlawful discrimination, Section 1254a(b)(3)(A) limits the Secretary's authority to terminate a country's TPS designation. The statute requires the Secretary to consult with appropriate agencies of government; to review the conditions in the designated country; to determine, based on that country-specific assessment, whether the country's nationals can return in safety; and to then explain the basis of her determination in the Federal Register. Here, the Secretary did none of these things. She did not consult with the State Department; she ignored the evidence in the administrative record; she based the termination on U.S. national

interest, not the conditions in Haiti; and she offered only pretextual grounds for her determination.

These statutory failures violate the Administrative Procedure Act. But they indicate much more.

Rather than a good-faith result of the congressionally mandated review process, the termination of Haiti's TPS designation was a preordained outcome driven by racially animated discriminatory intent. Just months before his administration moved to terminate Haiti's TPS designation, President Trump slandered Haitian TPS holders, accusing them of eating the pets of American citizens, and vowed to end Haiti's TPS designation. Motivated at least in part by that discriminatory intent, the termination violates the Fifth Amendment's equal-protection guarantee.

The district court order postponing the termination pending a final resolution on the merits should be affirmed.

STATEMENT

Absent Temporary Protected Status (TPS), respondents face the risk of immediate deportation to Haiti. Without a functioning government, Haiti is a nation in chaos. Rape, kidnapping, and murder are rampant, while food, housing, and medical care are scarce.

> Since the assassination of President Jovenel Moïse in 2021, armed gangs have gained control over much of [Haiti's capital] Port-au-Prince, creating a power vacuum that has made governing a challenge and fueled further violence, homelessness and starvation. More than 5,600 people were killed and 1,400 were kidnapped amid gang conflicts last year, according to the United Nations. The violence has rendered 1 million people homeless in Haiti, forcing many

> into makeshift shelters and exacerbating the country's economic challenges.[1]

That was as of last March. Conditions have only gotten worse. Indeed, the Federal Register notice announcing the termination of Haiti's TPS designation reports that as of late August "1.3 million people—approximately 12% of Haiti's population—have been forced to flee their homes and are internally displaced due to escalating violence" that "has engulfed Port-au-Prince and spreads beyond." 90 Fed. Reg. 54733, 54735 (Nov. 28, 2025) (citation modified).

Recognizing this, the State Department has issued a Level 4 travel advisory warning that people should "not travel to Haiti for any reason" due to "kidnapping, crime, terrorist activity, civil unrest, and limited health care."[2] That warning applies to "all ... parts of Haiti." ECF 81-1 ¶ 20.[3] Indeed, Haiti is so dangerous that the State Department advises that if you do travel there, you should "[l]eave DNA samples with your medical provider and dental records with your family in case it is necessary for your family to access them to identify your remains."[4]

That respondents risk death upon their removal to Haiti is not speculative. In February, the decapitated

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[1] Fredlyn Pierre Louis, *Haitian immigrants grapple with uncertainty as TPS end date looms*, NBC NEWS (Mar. 8, 2025), https://bit.ly/3MVcSbK.

[2] Travel Advisory: Haiti, U.S. Dep't of State (July 15, 2025), https://bit.ly/48wRYs0 (last visited Mar. 9, 2026).

[3] All ECF references are to the docket in *Miot* v. *Trump*, No. 25-cv-2471 (D.D.C.).

[4] High Risk Areas, U.S. DEP'T OF STATE, https://perma.cc/8UXN-XTKF (last accessed Mar. 15, 2026).

bodies of four Haitian women deported from the U.S. several months earlier were found dumped in a river.[5]

A. Temporary Protected Status

When the Secretary designates a country for TPS, nationals of that country already present in the United States can lawfully live and work in the U.S. for the duration of the designation. A country may be designated for TPS if certain statutory conditions are met. 8 U.S.C. 1254a(b)(1)(A)-(C). When considering whether to designate a country because it is unsafe for its nationals to return home, the Secretary is allowed but not required to consider whether "permitting the [country's nationals] to remain temporarily in the United States is contrary to the national interest of the United States." *Id.* 1254a(b)(1)(C).

Once a country is designated for TPS, that country's nationals who are physically present in the United States may register as TPS holders unless they are ineligible to do so. TPS holders may not be deported and are authorized to work in the United States. 8 U.S.C. 1254a(a)(1)(A)-(B).

Individuals are ineligible for TPS if (1) they have been convicted of a felony or more than one misdemeanor; (2) they are known to have engaged in drug trafficking; (3) they belong to a terrorist organization; or (4) their presence in the United States would endanger U.S. national security or foreign policy. 8 U.S.C.

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[5] Héctor Ríos Morales, Four Haitian Women Were Deported from Puerto Rico; They Have Now Been Found Decapitated, LATIN TIMES (Feb. 4, 2026), https://perma.cc/XP2J-Y8EK. The gangs that control Haiti target people who return to the country after having lived in the United States, especially those who—like respondent Marlene Noble—came to the U.S. as young children and do not speak Creole,. See ECF 81-1 ¶ 146; ECF 81-4 ¶¶ 3-8, 17-18; J.A. 705.

1254a(c)(1)(A), (2)(A)-(B); *id.* 1182(a)(2)-(3). Recognizing that errors might be made or circumstances might change, the Secretary is required to withdraw TPS from anyone who has received TPS but is subsequently determined to be ineligible. *Id.* 1254a(c)(3).

A country's initial designation is for a "period ... of ... not more than 18 months." 8 U.S.C. 1254a(b)(2).

A TPS designation is subject to periodic review. At least 60 days before the designation is set to expire, the Secretary, "after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state ... and shall determine whether the conditions for such designation ... continue to be met." 8 U.S.C. 1254a(b)(3)(A). If the Secretary determines that the conditions are met, the designation is extended. *Ibid.* Conversely, if the Secretary determines that the conditions for designation are not met, the designation must be terminated. *Id.* 1254a(b)(3)(B). Regardless which, "notice of ... such determination" and its "basis" must be published "in the Federal Register." 8 U.S.C. 1254a(b)(3)(A). If the Secretary fails to make the mandated determination within the prescribed period, the designation is automatically extended. *Id.* 1254a(b)(3)(C). Congress placed no limit on how often a designation may be extended.

Thus, the only circumstance under which a designation may be lawfully terminated is if, as a result of the statutorily mandated periodic review, the Secretary affirmatively determines that a foreign state "no longer continues to meet the conditions for designation under [8 U.S.C. 1254a(b)(1)]" and then gives notice of "the basis for the determination." *Id.* 1254a(b)(3)(A)-(B).

B. Haiti's TPS designation

Haiti was first designated for TPS in January 2010, following a devastating earthquake. 75 Fed. Reg. 3476 (Jan. 21, 2010). Since then, Haiti's TPS designation has been extended—and the country has been redesignated—multiple times over multiple administrations.[6] The successive extensions were prompted by the enduring effects of the earthquake and subsequent natural disasters that devastated Haiti's infrastructure, leaving millions with inadequate food, shelter, and medical care. See 76 Fed. Reg. 29000 (May 19, 2011); 77 Fed. Reg. 59943 (Oct. 1, 2012); 79 Fed. Reg. 11808 (Mar. 3, 2014); 80 Fed. Reg. 51582 (Aug. 25, 2015); 86 Fed. Reg. 41863 (Aug. 3, 2021); 88 Fed. Reg. 5022 (Jan. 26, 2023); 89 Fed. Reg. 54484 (July 1, 2024).

The first Trump administration attempted to terminate Haiti's TPS designation in 2018. 83 Fed. Reg. 2648 (Jan. 18, 2018). That attempt was blocked by two courts, which determined that the termination of Haiti's TPS designation was "preordained," rested on "pretextual" grounds, and was "motivated by discriminatory animus." *Saget* v. *Trump*, 375 F. Supp. 3d 280, 346, 368 (E.D.N.Y. 2019); accord *Ramos* v. *Nielsen*, 336 F. Supp. 3d 1075, 1011 (N.D. Cal. 2018), vacated and remanded sub nom. by *Ramos* v. *Wolf*, 975 F.3d 872 (9th Cir. 2020), reh'g en banc granted, opinion vacated, 59 F.4th 1010 (9th Cir. 2023).

During the next administration, Haiti's TPS designation was extended three times by then-Secretary Mayorkas who, upon completing the statutorily mandated review process, concluded each time that the

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[6] An extension of a TPS designation applies only to those who already hold TPS. The redesignation of country for TPS enables individuals who were not present in the U.S. at the time of the prior designation to register for TPS.

statutory conditions for designation continued to be met. See 86 Fed. Reg. at 41863; 88 Fed. Reg. at 5022; 89 Fed. Reg. at 54484. In 2021, Secretary Mayorkas concluded that "Haiti is grappling with," among other things, "a deteriorating political crisis, violence, and a staggering increase in human rights abuses" in addition to "rising food insecurity" and "a severe lack of healthcare services." 86 Fed. Reg. at 41864-41867.

In 2023, Secretary Mayorkas determined once again that "Haiti is experiencing economic, security, political, and health crises simultaneously." 88 Fed. Reg. at 5025. Finally, in July 2024, Secretary Mayorkas—citing political corruption, human-rights abuses, escalating gang violence, limited health care, food insecurity, and the continuing impact of a destructive 2021 earthquake that was quickly followed by a severe tropical storm—"determined" again "that an 18-month TPS extension is warranted because the extraordinary and temporary conditions supporting Haiti's TPS designation remain." 89 Fed. Reg. at 54487. The extension extended Haiti's TPS designation through February 3, 2026. *Id.* at 54485.

C. The termination of Haiti's TPS designation

Shortly before regaining office, President Trump—who infamously claimed that Haitian TPS holders in Springfield, Ohio were "eating the pets of the people" there[7]—vowed to "revoke" Haiti's TPS designation and send Haitian TPS holders "back to their country."[8] He has made good on that threat.

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[7] Riley Hoffman, *READ: Harris-Trump presidential debate transcript*, ABC (Sept. 10, 2024), https://perma.cc/EJ6E-C62L.

[8] Maggie Astor, Trump Says He Would Try Again to Revoke Haitian Immigrants' Protections, N.Y. TIMES (Oct. 3, 2024), https://perma.cc/9JW7-4HF7.

The Trump administration's latest attempt to terminate Haiti's TPS designation has been a three-step process. On February 24, then-Secretary of Homeland Security, Kristi Noem, issued a "partial vacatur" purporting to prematurely terminate Haiti's TPS designation effective August 3, 2025. 90 Fed. Reg. 10511 (Feb. 24, 2025). On July 1, the partial vacatur was held "unlawful" and set aside under 5 U.S.C. 706 because the Secretary did "not have statutory or inherent authority to partially vacate a country's TPS designation." *Haitian Evangelical Clergy Ass'n* v. *Trump*, 789 F. Supp. 3d 255, 273 (E.D.N.Y. 2025) (*HECA*). The same day, Secretary Noem, without having made any determination whether Haitian TPS holders could return to Haiti in safety, issued a termination notice that purported to terminate Haiti's designation effective September 2, 2025. 90 Fed. Reg. 28760 (July 1, 2025). Then, on November 28, three months after respondents had challenged the July 1 termination notice on constitutional and statutory grounds, Secretary Noem issued a superseding termination notice purporting to terminate Haiti's TPS designation effective February 3, 2026. 90 Fed. Reg. 54733 (Nov. 28, 2025). The operative complaint, respondents' second amended complaint, challenges the November 28 notice. ECF 90.

Secretary Noem issued the termination notice in "furtherance of" Executive Order 14159 (Jan. 20, 2025). 90 Fed. Reg. at 54736. Issued by President Trump within hours of regaining office, the order decries what it characterizes as an "unprecedented flood of illegal immigration into the United States." 90 Fed. Reg. 8443, 8443 (Jan. 29, 2025). Directing each to "align any and all departmental activities with the policies set out by this order," the order instructs the DHS Secretary and other officials to "promptly" take action

"to rescind the policy decisions of the previous administration" that "led to the increased or continued presence of illegal aliens in the United States." *Id.* at 8446.

Although TPS holders are not "illegal aliens"—because the TPS designation itself makes their presence lawful—the order states that the officials' "action should include ... ensuring that" TPS designations are "limited in scope and made for only so long as may be necessary to fulfill the textual requirements of that statute." 90 Fed. Reg. at 8446.

The Secretary gave two reasons for terminating Haiti's TPS designation. First, despite acknowledging that "1.3 million people—approximately 12% of Haiti's population—have been forced to flee their homes and are internally displaced due to escalating violence" that "has engulfed Port-au-Prince and spreads beyond," she "determined that there are no extraordinary and temporary conditions in Haiti that prevent Haitian nationals ... from returning in safety." 90 Fed. Reg. at 54735 (citation modified). Second, relying largely on purported criminality, she determined that

> even if ... there existed conditions that were extraordinary and temporary that prevented Haitian nationals ... from returning in safety, termination of Temporary Protected Status of Haiti is still required because it is contrary to the national interest of the United States to permit Haitian nationals ... to remain temporarily in the United States.

Id.

D. The termination of all TPS designations

Since President Trump returned to office, TPS designations for thirteen countries have been up for periodic review. The administration has terminated, sometimes in multiple steps, the designations for all thirteen. See 91 Fed. Reg. 10402 (Mar. 3, 2026) (Yemen); 91 Fed. Reg. 1547 (Jan. 14, 2026) (Somalia); 90 Fed. Reg. 58028 (Dec. 15, 2025) (Ethiopia); 90 Fed. Reg. 54733 (Nov. 28, 2025) (Haiti); 90 Fed. Reg. 53378 (Nov. 25, 2025) (Burma); 90 Fed. Reg. 50484 (Nov. 6, 2025) (South Sudan); 90 Fed. Reg. 45398 (Sept. 22, 2025) (Syria); 90 Fed. Reg. 43225 (Sept. 8, 2025) (Venezuela); 90 Fed. Reg. 30089 (July 8, 2025) (Honduras); 90 Fed. Reg. 30086 (July 8, 2025) (Nicaragua); 90 Fed. Reg. 28760 (July 1, 2025) (Haiti); 90 Fed. Reg. 24151 (June 6, 2025) (Nepal); 90 Fed. Reg. 23697 (June 4, 2025) (Cameroon); 90 Fed. Reg. 20309 (May 13, 2025) (Afghanistan); 90 Fed. Reg. 10511 (Feb. 24, 2025) (Haiti); 90 Fed. Reg. 9040 (Feb. 5, 2025) (Venezuela); 90 Fed. Reg. 8805 (Feb. 3, 2025) (Venezuela).

The terminations share at least two commonalities. First, each country whose designation was terminated is a majority non-white country. Second, in each instance in which, like Haiti, the initial designation was based on Section1254a(b)(1)(C), the Secretary concluded that "it is contrary to the national interest of the United States to permit" TPS holders "to remain ... in the United States." See, *e.g.*, 90 Fed. Reg. at 54735.

E. Proceedings below

Alleging that the termination of Haiti's TPS designation was a procedurally defective, predetermined outcome motivated at least in part by racially animated discriminatory intent, respondents assert

claims under the Administrative Procedure Act and the Fifth Amendment. ECF 90.

Because the litigation could not be completed before February 3, the day that the termination was to take effect, respondents sought interim relief under 5 U.S.C. 705, asking that termination be postponed until a final resolution on the merits. ECF 81.

The government moved to dismiss, contending, *inter alia*, that 8 U.S.C. 1254a(b)(5)(A) deprived the district court of jurisdiction and that respondents' claims failed on the merits. ECF 80.

Following a two-day hearing (J.A. 861-1382), the court denied the government's motion to dismiss and granted respondents' motion to postpone. J.A. 632-714.

The court rejected the government's contention that 1254a(b)(5)(A) bars review of respondents' claims, recognizing that respondents do not challenge the Secretary's substantive determination but instead the process by which she arrived at it. J.A. 651.

The court held that respondents are likely to succeed on the merits of their APA claims, finding sufficient evidence in the administrative record and the administration's across-the-board termination of all TPS designations to conclude that the termination of Haiti's designation was not only arbitrary and capricious but the preordained result of a pattern and practice of terminating TPS designations without adherence to the statutorily mandated periodic review process. J.A. 672-695.

The court also concluded that respondents are likely to succeed on the merits of their equal-protection claim, finding sufficient evidence that the termination

was motivated, at least in part, by racial animus. J.A. 695-704.

The district court and then the D.C. Circuit denied the government's successive stay applications. J.A. 715-718; J.A. 719-731.

SUMMARY OF ARGUMENT

The district court correctly held that it had jurisdiction to review respondents' claims and that respondents are likely to succeed on the merits of those claims.

I. Section 1254a(b)(5)(A) does not bar review of respondents' claims. The provision bars review only of a "determination" with respect to a TPS designation, extension, or termination. As used in the statute, "determination" refers to the Secretary's substantive conclusion as to the existence or non-existence of the criteria for designation. Respondents do not challenge any determination by the Secretary. Rather, they challenge the procedure by which, and the policy under which, she made her determination. If respondents prevail, the Secretary would be free to terminate Haiti's TPS designation so long as he complied with the requirements imposed by Section 1254a(b)(3)(A). Respondents' practice-and-policy claims are therefore cognizable under *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).

The government's arguments to the contrary are unavailing. The government disregards statutory text; mischaracterizes *McNary*'s holding; inverts congressional intent; and adopts an extreme position that would insulate flagrantly unlawful executive action from judicial review.

II. Even without full discovery, respondents have shown that they are likely to succeed on the merits.

Respondents are likely to prevail on their APA claims because the Secretary failed to comply with the periodic review process prescribed by Section 1254a(b)(3)(A). She did not fulfill her obligation to consult with other agencies; she based the termination of Haiti's TPS designation on criteria not allowed by the statute; she departed from past practice without explanation; she disregarded the evidence in the administrative record; she justified her action on pretextual grounds; and she reached a preordained outcome.

Respondents are also likely to prevail on their equal-protection claim. Sounding in racial discrimination, the claim is subject to strict scrutiny. It is governed by *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), not *Trump* v. *Hawaii*, 585 U.S. 667 (2018), both because respondents are physically present in the United States and therefore covered by the Fifth Amendment's equal-protection guarantee, and because the TPS statute is a facially neutral statute directing a subordinate officer to apply specified criteria using a prescribed process. But the termination fails even rational-basis scrutiny because respondents are likely to establish that the termination reflects a bare desire to harm Haitians. See *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 536-537 (1973).

ARGUMENT

I. SECTION 1254a(b)(5)(A) DOES NOT BAR RESPONDENTS' APA CLAIMS.

According to the government (Gov't Br. 19-36), respondents' APA claims are barred by 8 U.S.C. 1254a(b)(5)(A), which precludes "judicial review of any determination ... with respect to the designation, or termination or extension of a [TPS] designation." But

Section 1254a(b)(5)(A) does not bar respondents' APA claims.[9]

A. Administrative actions are presumptively reviewable.

There is a "strong presumption that Congress intends judicial review of administrative action." *Bowen* v. *Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). "Under that 'well-settled' and 'strong presumption,' when a statutory provision 'is reasonably susceptible to divergent interpretation,'" this Court "'adopt[s] the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.'" *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 229 (2020) (quoting *McNary*, 498 U.S. at 496, 498; *Kucana* v. *Holder*, 558 U.S. 233, 251 (2010)). As *McNary*, *Kucana*, and *Guerrero-Lasprilla* illustrate, "the presumption of judicial review applies to 'statutes that may limit *or* preclude review.'" *McLaughlin Chiropractic Assocs., Inc.* v. *McKesson Corp.*, 606 U.S. 146, 156 n.4 (2025) (quoting *Cuozzo Speed Techs., LLC* v. *Lee*, 579 U.S. 261, 273 (2016)).

And as *McNary*, *Kucana*, and *Guerrero-Lasprilla* also illustrate, this Court has "'consistently applied' the presumption of reviewability to immigration stat-

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[9] The government tacitly concedes that Section 1254a(b)(5)(A) does not bar respondents' constitutional claims. Gov't Br. 2, 4, 24, 28. Similarly, the government challenges neither the district court's finding that respondents would face irreparable harm were the termination of Haiti's TPS designation not postponed during the pendency of this ongoing litigation, nor the court's finding that the balance of equities and the public interest favor postponement until a final resolution on the merits. Cf. J.A. 704-713.

utes" (*Guerrero-Lasprilla*, 589 U.S. at 229), "particularly to questions concerning the preservation of federal-court jurisdiction." *Kucana*, 558 U.S. at 251.

The presumption of reviewability is especially strong as to constitutional claims. This is "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen*, 476 U.S. at 681 n.12).

Because it is so well established, the Court "assumes that Congress legislates with knowledge of the presumption" *Kucana*, 558 U.S. at 252 (citation modified). "It therefore takes 'clear and convincing evidence' to dislodge the presumption." *Ibid.* (quoting *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)). There is no such evidence here.

B. Respondents' claims are reviewable.

1. Section 1254a bars review of determinations, not procedures.

The district court rightly concluded that although Section 1254a(b)(5)(A) divests courts of jurisdiction to "review ... any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state" for TPS, the provision does not bar review of respondents' claims.[10] As the court explained, respondents do not challenge the Secretary's "*determination*" as to conditions in Haiti or her assessment of the U.S. national interest. J.A. 651. "They challenge instead *how* the Secretary went about

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[10] Respondents argued below that 5 U.S.C. 559 renders Section 1254a(b)(5)(A) inapplicable to APA claims. ECF 100 at 1-3. The district court did not reach the issue and respondents do not press it here.

making her determination." *Ibid.* The distinction is dispositive because—as every court to have reached the issue on the merits has concluded[11]—Section 1254a(b)(5)(A) "does not prevent courts from reviewing and setting aside agency action that is procedurally deficient." *HECA*, 789 F. Supp. 3d at 269.

This consensus is rooted in *McNary*, a case in which the Court interpreted a provision analogous to Section 1254a(b)(5)(A). See, *e.g.*, *National TPS All.* v. *Noem*, 166 F.4th 739, 757 (9th Cir. 2026) (citing *McNary*), aff'g 798 F. Supp. 3d 1108, 1133 (N.D. Cal. 2025) (same); accord *African Cmtys. Together* v. *Noem*, 2026 WL 395732, at *5-8 (D. Mass. 2026), appeal docketed, No. 26-1254 (1st Cir. Mar. 13, 2026); *HECA*, 789 F. Supp. 3d at 269, appeal docketed, No. 25-2372 (2d Cir. Sept. 26, 2025); *Saget*, 375 F. Supp. 3d at 331-333; *CASA de Md., Inc.* v. *Trump*, 355 F. Supp. 3d 307, 317-321 (D. Md. 2018); *Centro Presente* v. *DHS*, 332 F. Supp. 3d 393, 408-409 (D. Mass. 2018).

McNary involved 8 U.S.C. 1160, which established a procedure for undocumented foreign agricultural workers to apply for an adjustment of their immigration status. The statute directed the Attorney General to adjust an applicant's status if he determined that the applicant was eligible under the specified criteria. See 8 U.S.C. 1160(a) Individuals whose applications were denied sued, claiming that the process that he used to make his eligibility determinations "was conducted in an arbitrary fashion that deprived applicants of the due process guaranteed by the Fifth

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[11] The Ninth Circuit has suggested to the contrary in an unpublished stay order, *National TPS All.* v. *Noem*, No. 26-199, 2026 BL 42675 (9th Cir. Feb. 9, 2026), and in a subsequently vacated panel decision, *Ramos* v. *Wolf*, 975 F.3d 872 (9th Cir. 2020), reh'g en banc granted, opinion vacated, 59 F.4th 1010 (9th Cir. 2023).

Amendment to the Constitution." *McNary*, 498 U.S. at 487. The question in *McNary* was whether the plaintiffs' claims were barred by Section 1160(e)(1), which declared that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section." *Id.* at 486 n.6. Resisting judicial review, the government argued that courts lacked jurisdiction to hear the plaintiffs' suit because, said the government, it was "an action seeking 'judicial review of a determination respecting an application for adjustment of status'" and was "therefore barred by the plain language" of Section 1160(e)(1). *Id*. at 491.

Rejecting the government's argument, the Court held that Section 1160(e) did not preclude the plaintiffs' claims. The Court began by explaining that the provision's "reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions." *McNary*, 498 U.S. at 492. Thus, said the Court, Section 1160(e)'s preclusion of claims arising from "a determination" did not bar "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Ibid.*

The Court's analysis of Section 1160(e) in *McNary* applies equally here. Using language that is materially indistinguishable from that in Section 1160(e), Section 1254a(b)(5)(A) only bars judicial review of a "*determination* of the [Secretary] with respect to the designation, or termination or extension of a [TPS] designation." Thus, Section 1254a(b)(5)(A) "is best read as barring judicial review of the merits of the determination itself, but not whether the determination" was the result of unlawful "'practices and policies.'" *CASA*, 355 F. Supp. 3d at 320.

2. Respondents' claims are procedural, not substantive.

Respondents do not challenge the substantive correctness of the Secretary's determination with respect to country conditions in Haiti or her assessment of the U.S. national interest. Rather, they challenge the procedures by which, and the policies under which, she made that determination and assessment.

1. That respondents' claims are procedural rather than substantive is evident from the relief that they request. Respondents "do not seek a substantive declaration that they are entitled to [TPS]." *McNary*, 498 U.S. at 495. And their "success in this case would not compel [the Secretary] to extend Haiti's TPS designation." *Saget*, 375 F. Supp. 3d at 332. Rather, if respondents prevail, the Secretary would simply have "to make a new, good faith, fact- and evidence-based determination" applying "lawful criteria" before terminating Haiti's TPS designation. *Ibid.* Since a court can "at most ... order the Secretary to restart the periodic review process under lawful criteria, not to arrive at a particular substantive outcome" (J.A. 653), a ruling in respondents' favor would "not dictate how the Secretary should ultimately rule on a TPS designation, termination, or extension." *National TPS All.* v. *Noem*, 773 F. Supp. 3d 807, 832 (N.D. Cal.), aff'd, 150 F.4th 1000 (9th Cir. 2025).

Because respondents "do not seek a substantive declaration that they are entitled to" an extension of Haiti's TPS designation, their challenge to the termination of Haiti's TPS designation is "collateral" to the Secretary's determination regarding conditions in

Haiti and her assessment of the U.S. national interest. *McNary*, 498 U.S. at 495.[12]

2. Respondents allege that the administration's termination of "every TPS designation that it has reviewed despite the disparate conditions in those countries is evidence that the administration is terminating TPS designations, including Haiti's TPS designation, based on a predetermined agenda rather than a good-faith, fact-based, country-specific review as required by 8 U.S.C. 1254a(b)(3)(A)." J.A. 846; see also J.A. 678 (respondents allege a "*de facto* policy" of terminating all TPS designations "across the board"). This claim—which challenges a "pattern or practice" that impacts "a group of decisions" (498 U.S. at 483, 492)—falls squarely within the universe of claims allowed under *McNary*.

That respondents ultimately seek to set aside the termination of "a specific TPS designation"—namely, Haiti's TPS designation—is immaterial. Gov't Br. 19.[13] There is no reason why a pattern-and-practice claim must challenge more than one termination. Unlawful policies and practices can infect a single termination, as they did here. See J.A. 653 ("the APA claim that the Secretary engaged in a 'general pattern and practice' of unlawful terminations is 'not unique to the Secretary's decision on [Haiti's] status'") (quoting *Doe* v. *Noem*, 2026 WL 184544, at *8-*9 (N.D. Ill. 2026)). That the Secretary's unlawful policies and practices have also infected other terminations is immaterial. While

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[12] Contrary to what the government suggests (Gov't Br. 31-33), the holding in *McNary* extends to both "constitutional and statutory claims." 498 U.S. at 484, 497.

[13] Nor is it significant that a particular TPS designation, *i.e.*, Haiti's designation, would be postponed if respondents prevail. In *McNary* too the results of individual cases were vacated. 498 U.S. at 489 n.10.

the other terminations corroborate respondents' allegations, respondents need not challenge each termination to state a cognizable claim.[14]

3. The government argues that judicial review of respondents' claims will result in "courts substitut[ing] their own views for the Secretary's conclusions." Gov't Br. 17. But respondents' claims do not depend in any way on the Secretary's substantive determination with respect to conditions in Haiti or her assessment of the U.S. national interest.

Respondents claim, for example, that the termination of Haiti's TPS designation is "arbitrary [and] capricious" (5 U.S.C. 706(2)(A)) inasmuch as it rests on unexplained departures from past practice—including, the Secretary's failure to meaningfully consult with the State Department and her reliance on national interest, purported criminality, and the supposedly "temporary" nature of TPS as grounds for termination. J.A. 829-830, 838, 848. Contrary to the government's suggestion that Section 1254a(b)(5)(A) bars all arbitrary-and-capricious claims because such claims inevitably challenge the Secretary's "underlying" determination (Gov't Br. 21 (quoting *DCH Reg'l Med. Ctr.* v. *Azar*, 925 F.3d 503, 506 (D.C. Cir. 2019)), claims predicated on the Secretary's departure from past practice are wholly collateral to the Secretary's determination that TPS holders can return to Haiti in safety and her assessment that allowing TPS holders to remain in the U.S. is contrary to the national interest.

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[14] Indeed, if respondents had challenged other TPS terminations, the government would surely have argued that respondents lacked standing to do so.

To resolve a claim based on an unexplained departure from past practice, a court need only compare current practice to prior practice. For example, judging whether the Secretary's reliance on national interest as a basis for termination constitutes an unexplained departure from past practice requires nothing more than a comparison of the November 28 termination notice with earlier termination notices. Similarly, evaluating whether the Secretary's purported consultation with the State Department is a departure from past practice demands nothing more than a comparison of the lone email at issue here with the copious memoranda prepared under previous administrations. Neither inquiry requires delving into the bases for or the correctness of the Secretary's determination with respect to country conditions or her assessment of the national interest.

Claims that the Secretary failed to "observ[e] … procedure required by law" (5 U.S.C. 706(2)(D)) are likewise susceptible to adjudication without "second-guessing" the Secretary's substantive determination. Gov't Br. 41. Under Section 1254a(b)(3)(A), the Secretary may reach her substantive determination only "*after* consultation with appropriate agencies." J.A. 847. Thus, the statutorily mandated consultation is necessarily antecedent to, rather than a component of, the Secretary's determination. A court can therefore evaluate the legal sufficiency of a purported consultation without passing judgment on the Secretary's subsequent determination.

Allegations that the Secretary acted "in excess of statutory ... authority" (5 U.S.C. 706(2)(C)) can also be resolved without examining the accuracy of the Secretary's substantive determination. It is, for example, a pure question of law whether Section 1254a(b)(3)(A) allows the Secretary to terminate a TPS designation

based on U.S. national interest. Cf. ECF 108 at 8; ECF 93 at 27. That legal question can be decided without probing the Secretary's definition of the national interest. Contra Gov't Br. 25.

4. The district court held that the Secretary's determination that TPS holders can return to Haiti in safety is contrary to the data in the administrative record (J.A. 680)—a holding which the government characterizes as improper judicial "second-guess[ing]" of the Secretary's determination regarding conditions in Haiti. Gov't Br. 41. But again, respondents do not challenge the Secretary's determination. They do not claim that they are entitled to a determination that it is not safe to return. Rather, respondents cite the discrepancy between the Secretary's determination and the data in the administrative record as evidence of a procedurally defective process: The yawning chasm between the Secretary's determination and the facts in the administrative record is strong evidence that the termination of Haiti's TPS designation was a predetermined result "based on a pretextual rationale." *Department of Com.* v. *New York*, 588 U.S. 752, 766 (2019).

3. The government's counterarguments are unavailing and extreme.

The arguments made by the government in opposition to judicial review are both wrong and dangerous.

1. Section 1254a(b)(5)(A) bars "judicial review of any determination ... with respect to the designation, or termination or extension of a [TPS] designation." The government seeks to insulate the Secretary's actions from scrutiny by adopting an overly expansive definition of "determination."

On the government's reading, "determination" includes not only the Secretary's substantive conclusion

as to the continued existence of the statutorily enumerated conditions for designation but also "the procedures" by which she reached that conclusion. Gov't Br. 18; accord, *e.g.*, *id.* at 33. Thus, according to the government, Section 1254a(b)(5)(A) "insulates the whole decisionmaking process" from review. Gov't Br. 22; accord, *e.g.*, *id.* at 4.

The government's sweeping interpretation rips the term "determination" from its statutory context. Section 1254a(b)(3), which governs the periodic review of TPS designations, requires the Secretary to "review the conditions" in the designated country and "determine whether the conditions for ... designation ... continue to be met." 8 U.S.C. 1254a(b)(3)(A).[15] It further requires the Secretary to "publi[sh] ... notice of each such determination[,] including the basis for the determination ... in the Federal Register." *Ibid.* Thus, it is plain on the face of the statute that "determination" as used in Section 1254a(b)(5)(A) refers only to the Secretary's substantive conclusion as to existence or non-existence of the statutory conditions for designation.

That "determination" refers only to the Secretary's substantive conclusion rather than the process by which she reaches it is confirmed by the statutorily prescribed periodic review process, which requires the Secretary to first "consult[]" with other agencies, then "review" the conditions in the designated country, next

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[15] The provision's other subsections are to the same effect. See 8 U.S.C. 1254a(b)(3)(B) (requiring Secretary to terminate TPS designation "[i]f [she] determines under [1254a(b)(3)(A)] that a foreign state … no longer continues to meet the conditions for designation"); *id.* 1254a(b)(3)(C) (automatically extending TPS designation "[i]f the [Secretary] does not determine under [1254a(b)(3)(A)] that a foreign state … no longer meets the conditions for designation").

"determine" based on that review whether those conditions meet the statutory criteria for designation, and finally "publi[sh] … the basis for the determination." 8 U.S.C. 1254a(b)(3)(A). That Congress distinguished the Secretary's "determination" from the antecedent obligations to "consult[]" and "review" and the subsequent obligation to "publi[sh]" leaves no doubt that "determination" as used in Section 1254a(b)(5)(A) refers only to the Secretary's substantive conclusion as to the conditions for designation.

The government tries to evade the statutory text through rhetorical sleight of hand. It first substitutes the broad and generic word "decision" in place of the statutorily cabined term "determination" and then says that Section 1254a(b)(5)(A) "bars review of the Secretary's ultimate decisions to 'designat[e], or terminat[e] or extend' TPS designations." Gov't Br. 16; accord, *e.g.*, *id.* at 19. In this way, the government attempts to expand "determination" to encompass not only to the Secretary's substantive conclusion as to the continued existence of the statutory grounds for designation but also subsume her "decisionmaking process." *Id.* at 25; accord *id.* at 30. But that is not what the statute says. Section 1254a(b)(5)(A) only review bars of the Secretary's substantive determination as to the continued existence of the conditions for designation, not the process by which she arrives at her determination.

Contrary to what the government suggests, the Secretary does not "decide" to extend or terminate a TPS designation. Rather, she "determine[s]" whether the statutory conditions for designation continue to exist. 8 U.S.C. 1254a(b)(3)(A). If she determines that the conditions are satisfied, the designation is extended by operation of statute; if she determines that they are not, she must terminate the designation. *Id.*

1254a(b)(3)(A)-(B). Thus, the Secretary's determination is distinct from not only the process by which she makes that determination but also the ministerial consequence of that determination—*i.e.*, the termination notice, which is the final agency action at issue.

That Section 1254a(b)(5)(A) refers to "any determination" is immaterial. While "any has an expansive meaning" (Gov't Br. 20 (quoting *Patel* v. *Garland*, 596 U.S. 328, 338 (2022) (citation modified)), "it cannot expand the reach of the noun it modifies." *City & Cnty. of San Francisco* v. *EPA*, 604 U.S. 334, 348 (2025). Here, "any" modifies "determination," which as explained above, refers only to the Secretary's substantive conclusion as to the existence or non-existence of the statutory conditions for designation. In context, "any determination" refers to a determination as to the existence of the statutory conditions for designation specified in any part of Section 1254a(b)(1), regardless whether subsection (b)(1)(A), (b)(1)(B), or (b)(1)(C).

2. Seeking to avoid review of not only the Secretary's substantive determination but also the process by which she arrived at that determination, the government argues that "[n]othing in *McNary* supports slicing the 'single act' of designating a country or terminating or extending its designation thereafter away from the antecedent choices leading up to that final action." Gov't Br. 31-32 (first quoting J.A. 652, then quoting *McNary*, 498 U.S. at 492) (citation modified). But such "slicing" is exactly what *McNary* authorizes. It held that a provision, like Section 1254a(b)(5)(A), precluding judicial review of "a determination" did not bar "general collateral challenges" to the "practices and policies used by the agency in" arriving at that determination. 498 U.S. at 492.

The government ignores not only the holding of *McNary* but the historical context in which Congress

drafted Section 1254a(b)(5)(A). *McNary*'s central holding finds its immediate progenitor in *Bowen*. Decided five years earlier, in 1986, *Bowen* held that a statute analogous to Section 1254a(b)(5)(A), one that "limit[ed] ... review of 'any determination" of entitlement to certain Medicare benefits, did not preclude "challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves." 476 U.S. at 675 (quoting 42 U.S.C. 1395ff(b)(1)(C) (1982 ed., Supp. II)). Congress adopted Section 1254a(b)(5)(A) in 1990, just four years after *Bowen* was decided. "[T]his Court presumes that in enacting" a subsequent law "Congress adopted 'the interpretation federal courts had given the words earlier Congresses had used.'" *Medical Marijuana, Inc.* v. *Horn*, 604 U.S. 593, 632 (2025) (Kavanaugh, J., dissenting) (quoting *Holmes* v. *Securities Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992)). Thus, Section 1254a(b)(5)(A) is to be presumptively understood as allowing challenges to how the Secretary made her substantive determination with respect to country conditions in Haiti and assessment of the U.S. national interest.

That presumption is confirmed here by subsequent events. In *McNary*, this Court observed that Congress "could easily have used broader statutory language" had it wished to preclude collateral claims—for example, a provision that barred judicial review of "'all questions of law and fact'" or "'all causes ... arising under'" the statute. 498 U.S. at 494. Taking the hint, Congress amended several provisions of the Immigration and Nationality Act in 1996 to include precisely such language. See, *e.g.*, 8 U.S.C. 1252(a)(2)(A)(iv) ("Notwithstanding any other provision of law ... no court shall have jurisdiction to review ... *procedures and policies* adopted ... to implement the provisions of section 1225(b)(1)") (emphasis added) (codifying Pub. L. 104-

208 § 242, 110 Stat. 3009 (Sept. 30, 1996); *id.* 1252(a)(2)(A)(i) ("Notwithstanding any other provision of law ... no court shall have jurisdiction to review ... any ... determination *or to entertain any other cause or claim* arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)") (emphasis added) (same). But Congress chose not to amend Section 1254a(b)(5)(A) following *McNary*. Under the circumstances, that choice must be deemed deliberate. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) (citation modified).

3. Next, the government says that this case is unlike *McNary* because there the Court relied on the challengers "apparent inability to bring ... constitutional claims within the limited review scheme for individual amnesty application." Gov't Br. 33. But so too here, where respondents would, effectively if not formally, be unable to assert their statutory and constitutional claims unless allowed to do so in the district court. See J.A. 657.

Neither an Immigration Judge nor the Board of Immigration Appeals "can enter an order voiding an alien's deportation in response to a constitutional objection." *Dastmalchi* v. *INS*, 660 F.2d 880, 886 (3d Cir. 1981); accord *Wojciechowicz* v. *Garland*, 77 F.4th 511, 518 (7th Cir. 2023) (Board of Immigration Appeals "lacks jurisdiction to consider" claims "rooted in constitutional principles of equal protection"); *In re Salazar-Regino*, 23 I&N Dec. 223, 231 (BIA 2002) ("[W]e lack authority to rule on the constitutionality of the statutes we administer.").

Nevertheless, the government told the district court that respondents "may be able to receive review in removal proceedings" that "culminate in Article III review by way of a petition for review" in the court of appeals. ECF 103 at 5-6. But this Court rejected that very argument in *McNary*, explaining (with respect to the immigration status at issue there) that "even in the context of a deportation proceeding, it is unlikely that a court of appeals would be in a position to provide meaningful review of the type of claims raised in this litigation" because to establish their claims respondents would have to "adduce[] a substantial amount of evidence, most of which would have been irrelevant" to, and thus inadmissible in, a removal proceeding. 498 U.S. at 497. "Not only would a court of appeals reviewing an individual" TPS holder's removal order "therefore most likely not have an adequate record as to the pattern of [the Secretary's] allegedly unconstitutional practices, but it also would lack the factfinding and record-developing capabilities of a federal district court." *Ibid*. Simply put, if respondents cannot raise their claims now, "meaningful judicial review of their statutory and constitutional claims would be foreclosed." *Id.* at 484; see also *id.* at 493, 497.

4. Relying on three lower-court cases involving Medicare benefits, the government argues that Section 1254a(b)(5)(A) bars respondents' arbitrary-and-capricious claim in particular because, "[i]f a no-review provision shields particular types of administrative action, a court may not inquire whether a challenged agency decision is arbitrary, capricious, or procedurally defective." Gov't Br. 21 (quoting *Amgen Inc.* v. *Smith*, 357 F.3d 103, 113 (D.C. Cir. 2004)). But *Amgen* and the other cases—*DCH Regional Medical Center* v. *Azar*, 925 F.3d 503 (D.C. Cir. 2019), and *Skagit County Public Hospital District No. 2* v. *Shalala*, 80 F.3d 379

(9th Cir. 1996)—stand simply for the "unsurprising" rule that the Medicare statute bars "piecemeal review" of "individual" payment calculations made by the Secretary of Health and Human Services when administering the Medicare payment systems. *Amgen*, 357 F.3d at 112. That principle has no application here.[16]

4. According to the government, the TPS statute was intended to "preserve[] Executive Branch discretion throughout." Gov't Br. 23. Not so. The TPS statute was designed to constrain, not enshrine, executive discretion. See *Amici Curiae* Br. of Immigration Law Scholars.

Before Congress enacted the TPS statute, administrations had for decades "exercised," without specific statutory authority, "prosecutorial discretion to grant protection from deportation to certain groups of noncitizens on an ad hoc basis" if the administration then in office believed that repatriation would put their lives at risk. *National TPS All.* v. *Noem*, 150 F.4th 1000, 1009 (2025) (citing H.R. Rep. No. 100-627, at 6 (1988)). Because "Congress ha[d] not seen fit to limit the agency's discretion" when choosing to grant or deny such relief and had thus provided "no meaningful standard against which to judge the agency's exercise of discretion," the decision to grant or withhold relief was considered "unreviewable." *Hotel & Rest. Emps. Union, Loc. 25* v. *Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (Mikva, J., separate opinion) (cited at Gov't Br. 23).

That changed with enactment of the TPS statute. Seeking to formalize such humanitarian relief but

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[16] Nevertheless, *Amgen* is instructive in one regard. It recognizes "the presumption that Congress rarely intends to foreclose review of action exceeding agency authority," such as occurred here. 357 F.3d at 112.

"concern[ed] about granting unbridled deference to the Executive branch in determining the country designations and time periods for relief," Congress enacted the TPS statute to impose "explicit guidelines, specific procedural steps, and time limitations." *NTPSA*, 150 F.4th at 1009, 1010. In short, the TPS statute establishes meaningful standards against which to measure executive action.

The government cites *Bouarfa* v. *Mayorkas*, 604 U.S. 6, 13-15 (2024), for the proposition that "[h]ere as elsewhere, Congress effectively insulated discretion-laden judgments from judicial review." Gov't Br. 23. But *Bouarfa* demonstrates the opposite. The statute at issue there, 8 U.S.C. 1155, says that the Secretary "may, at any time," revoke a visa "for what he deems to be good and sufficient cause." Section 1254a(b)(3)(A), by contrast, states that the Secretary "shall determine" whether the statutory "conditions for ... designation" continue to exist "after consultation with appropriate agencies" and a "review [of] the conditions in the foreign state." Declaring that the Secretary "shall determine" something based on a "review" of facts ascertained through a prescribed procedure cabins her authority in a way that giving her unfettered discretion to "deem" something without any process or enumerated criteria does not. Cf. *Biden* v. *Texas*, 597 U.S. 785, 802 (2022) ("may does not just suggest discretion, it *clearly* connotes it").

The statutory constraints imposed on the Secretary by the TPS statute are no less binding merely because they involve immigration. Cf. Gov't Br. 22. This Court has repeatedly entertained APA claims in the immigration context. See, *e.g.*, *Texas*, 597 U.S. at 814; *DHS* v. *Regents of Univ. of Cal.*, 591 U.S. 1, 16-17 (2020); *Judulang* v. *Holder*, 565 U.S. 42, 52-53 (2011); see also *Texas*, 597 U.S. at 830 (Alito, J., dissenting) (endorsing

consideration of APA claim because "the Constitution gives Congress broad authority to set immigration policy" and the Executive "does not have the authority to override immigration laws enacted by Congress"). In short, this Court has "'consistently applied' the presumption of reviewability to immigration statutes." *Guerrero-Lasprilla*, 589 U.S. at 229.

5. The government's position is extreme—and dangerous. On the government's view, the administration can flagrantly violate the constraints imposed by Congress and "nothing can be done about it" because "[n]o court may even hear the case." *Patel*, 596 U.S. at 347-348 (Gorsuch, J., dissenting).

The government says: that the Secretary is "not required" to review conditions in the designated country even though Section 1254a(b)(3)(A) states that she "shall review" them (J.A. 898); that the Secretary's view of the national interest "trumps" all other considerations, including whether TPS holders can return to their home countries in safety (J.A. 873-874); that the Secretary may decide whether allowing TPS holders to remain in the U.S. is in the national interest by flipping a coin and finding "heads, it's in the national interest, tails, it's not" (J.A. 1310-1311); and that the Secretary may justify terminating a TPS designation on the ground that she "do[es]n't like vanilla ice cream" (J.A. 1030-1031).

And says the government, none of this would be subject to judicial review. Fortunately, for the reasons explained above, the government is wrong.

II. RESPONDENTS ARE LIKELY TO SUCCEED ON THE MERITS.

Discovery is still under way but respondents have already shown that they are likely to succeed on the merits of their claims.

A. Respondents are likely to succeed on their pattern-and-practice claims.

1. The congressionally mandated periodic review process requires the Secretary to "consult[] with appropriate agencies of the Government" before terminating a TPS designation. 8 U.S.C. 1254a(b)(3)(A). Here, the government has admitted that the only supposed consultation was a three-sentence email exchange between a DHS staffer and a State Department staffer. J.A. 673-674 (citing J.A. 763-764, 879-880).

In that exchange, the DHS staffer, Robert Law, informed the State Department staffer, Spencer Chretien, that DHS was "re-reviewing country conditions in Haiti" and asked Chretien for "State's views on the matter." J.A. 763.[17] Less than an hour later, Chretien responded with a non-sequitur. Rather than address conditions in Haiti, he told Law that "there would be no foreign policy concerns with respect to a change in the TPS status of Haiti." *Ibid.*

That cursory exchange did not satisfy the Secretary's statutory obligation to "consult[] with appropriate agencies" before determining whether the conditions for designation still exist. 8 U.S.C. 1254a(b)(3)(A). Although the statute does not specify the exact nature of that consultation (Gov't Br. 36), it must be "meaningful," not perfunctory. *California Wilderness Coal.* v. *U.S. Dep't of Energy*, 631 F.3d 1072, 1086 (9th Cir. 2011); accord, *e.g.*, *Friends of Animals* v. *U.S. Bureau of Land Mgmt.*, 728 F. Supp. 3d 45, 78 (D.D.C. 2024); *Coalition on Sensible Transp. Inc.* v. *Dole*, 642 F. Supp. 573, 599 (D.D.C. 1986), aff'd, 826 F.2d 60 (D.C. Cir.

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[17] Law is the staffer who was found to have manipulated data to justify termination of Haiti's TPS designation during the first Trump administration. *Saget*, 375 F. Supp. 3d at 351-352, 372.

1987). A lone, three-sentence email exchange devoid of substantive analysis does not constitute "meaningful" consultation.

Law asked Chretien for the State Department's view on conditions in Haiti. J.A. 763. That Chretien failed to provide them (*ibid.*) is irrelevant, says the government, because "shortcomings in other agencies' responses is not a failure to consult." Gov't Br. 37. But that assertion is contrary to the government's admission that Section 1254a(b)(3)(A) "requires that DHS solicit *and receive* other agencies' views." *Id.* at 36 (emphasis added). It is also contrary to the government's admission that in May 2025 South Sudan's TPS designation was automatically extended by operation of law "because" at the time "the Secretary 'only had a noncurrent record from [the] Department of State' regarding the country conditions" and that, as result, she could not terminate the designation until six months later, "[o]nly *after receiving* and considering the information." *Id.* at 45 (citing 90 Fed. Reg. 19217, 19218 (May 6, 2025); 90 Fed. Reg. 50484 (Nov. 6, 2025)) (emphasis added).[18]

The district court therefore was right to conclude that respondents "are likely to succeed on their claim that Secretary Noem acted contrary to law and in excess of her statutory authority by failing to consult appropriate agencies as required by the TPS statute." J.A. 672.

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[18] The government's suggestion that asking for information without receiving it constitutes "consultation" is also contrary to common usage. No one would say that an emergency room doctor who pages a neurologist but then treats the patient without having received a response "consulted" with the neurologist before providing treatment.

Regardless, the perfunctory email exchange stands in sharp contrast to the practice of every prior administration, including the first Trump administration, all of which based periodic reviews on a series of vetted State Department memos that compiled and analyzed information gathered from the department's relevant experts and culminated in a formal recommendation to the Secretary of State. See *Saget*, 375 F. Supp. 3d at 298-300; accord U.S. Gov't Accountability Off., GAO 20-134, Temporary Protected Status 15-28 (2020), https://gao.gov/assets/gao-20-134.pdf (cited at Gov't Br. 7); see also *Amicus* Br. of Former Senior Gov't Officials.

The unexplained divergence from past practice not only "puts the inadequacy of the email exchange here into stark relief" (J.A. 676) but is itself a violation of the APA because "an agency's unexplained departure from precedent is arbitrary and capricious." *ABM Onsite Servs.-W., Inc.* v. *NLRB*, 849 F.3d 1137, 1142 (D.C. Cir. 2017); see also *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221 (2016) (agencies may change their policies "as long as they provide a reasoned explanation for the change").

2. Agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, the Secretary impermissibly relied on "national interest" as justification for terminating Haiti's TPS designation. That is contrary to Section 1254a(b)(3)(A), which directs the Secretary to "review the conditions in the [designated] foreign state" and "determine whether the conditions for such designation ... continue to be met." Because U.S. national interest is not a condition "in" a foreign state, it has no part in the periodic review process and is not

a permissible basis on which to terminate a TPS designation. See ECF 108 at 8; ECF 93 at 27.

That the Secretary may in certain cases consider national interest when deciding whether to designate a country in the first instance (compare 8 U.S.C. 1254a(b)(1)(C) with *id.* 1254a(b)(1)(A)-(B)) is immaterial. Cf. Gov't Br. 39. It makes sense that Congress would give the Secretary discretion when making an initial designation but limit her discretion to terminate an existing designation. This Court "has ... recognized that immigration programs, even if temporary in nature, can confer legally cognizable reliance interests on beneficiaries of those programs." *HECA*, 789 F. Supp. 3d at 267 (citing *Regents*, 591 U.S. 1 (2020)). "Where a TPS extension is given, it creates important reliance interests." *Ibid.* (quoting *NTPSA*, 773 F. Supp. 3d at 850). "Indeed, the TPS statute itself implicitly recognizes the importance of such reliance interests because it ... builds in some delay before termination of TPS becomes effective: termination does not take effect until the later of 60 days from the date of notice or the expiration of the most recent previous extension." *Ibid.* (quoting *NTPSA*, 773 F. Supp. 3d at 850-851 (citing Section 1254a(b)(3)(B)). Congressional concern with reliance interests is also reflected in Section 1254a(b)(3)(C), pursuant to which a TPS designation is automatically extended should the Secretary fail to make the determination required by Section 1254a(b)(3)(A).

Reflecting the reliance interests created by—and the humanitarian purpose of—a TPS designation, Section 1254a(b)(3)(A) limits the grounds on which a designation may be terminated to a determination that TPS holders can return to their home country in safety. The Secretary acted "in excess of statutory ... authority" and "without observance of procedure required by law"

(5 U.S.C. 706(2)(C)-(D)) when she terminated Haiti's TPS designation based on national interest.

Indeed, the Secretary's reliance on national interest to terminate Haiti's TPS designation was both "arbitrary [and] capricious" and "an abuse of discretion" (5 U.S.C. 706(2)(A)) even if one assumes that national interest is a permissible consideration during the periodic review process.

The Secretary cited alleged criminality as a reason why allowing Haitian TPS holders to remain in the U.S. is contrary to the national interest. *Cf.* 90 Fed. Reg. at 54737. But Congress created a specific mechanism to address potential criminality—the withdrawal of TPS from individuals convicted of a felony or two misdemeanors. Cf. 8 U.S.C. 1254a(c)(3). The Secretary may not define the national interest in a way, as she has, that renders the statute's individualized withdrawal mechanism meaningless. Cf. *Moreno*, 413 U.S. at 536-537) (discriminatory provision not justified by anti-fraud rationale when statute already addresses potential fraud).

Regardless, even if Section 1254a(b)(3)(A) allowed the Secretary to terminate Haiti's TPS designation based on national interest, doing so was an abrupt departure from past practice. As the government admitted below, "there is no precedent in prior administrations for terminating a designation based on an adverse national interest determination." ECF 92 at 14; see also ECF 81-7 ¶ 28 ("Until 2025, no Attorney General or Secretary has ... ever justified a termination on national interest grounds"). This unexplained departure from past practice too renders the termination of Haiti's TPS designation arbitrary and capricious. *Encino Motorcars,* 579 U.S. at 221; *ABM*, 849 F.3d at 1142.

3. Agency action is "arbitrary and capricious if the agency has ... offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. The Secretary's termination of Haiti's TPS designation is arbitrary and capricious under each of these standards.

Start with her determination that Haitian TPS holders can "return[]" to Haiti "in safety" 90 Fed. Reg. at 54735. There is no support for that assertion in the administrative record. To the contrary:

> The Certified Administrative Record contains over 1,450 pages, and it speaks with remarkable consistency. Every document describing conditions in Haiti in 2025 describes the country as a nation deep in crisis.

J.A. 680-685 (cataloging evidence in the administrative that Haiti is an extraordinarily dangerous place where millions—without adequate food, shelter, or health care—have been displaced by armed gangs who rape and murder with impunity).

Although the Secretary found that "parts of the country are suitable to return to" (90 Fed. Reg. at 54735), she "cited no data to support this proposition and failed to identify a single safe location." J.A. 685. Indeed, the only justification offered by the government in support of the Secretary's conclusion is that the internal displacement of 1.3 million Haitians "indicat[es] that Haitian residents found areas in Haiti that could be suitable for return." J.A. 686 (quoting ECF 119 at 3). But even if that inference were reasonable, the statutory standard is not "suitability" but whether TPS holders can return "in safety" (8 U.S.C.

1254a(b)(1)(C)), and even the State Department recognizes that the threat of violence extends to "all ... parts of Haiti." ECF 81-1 ¶ 20.

The Secretary's conclusion that allowing Haitian TPS holders to remain in the United States is contrary to the national interest rests in significant part on the assertion that Haitians are criminals "pull[ed]' to this country by the prospect of receiving TPS. 90 Fed. Reg. at 54736-54737. But there is no "'rational connection between the facts found and the choice'" to terminate Haiti's TPS designation. *State Farm*, 463 U.S. at 43.

Documents produced in the *NTPSA* litigation confirm that the Secretary's reliance on criminality is pretextual. By statute, individuals who commit the types of crimes described in the termination notice are ineligible to receive or retain TPS. See 8 U.S.C. 1254a(c)(2)(B), (3)(A); *Saget*, 375 F. Supp. 3d at 300. And indeed, "DHS data" show that only "0.06%" of the "Haiti Temporary Protected Status population ... had public safety records, and none were associated with Known or Suspected Terrorist records." Bates No. NTPSA2__009164. And because "there are no [Known or Suspected Terrorist] hits for Haiti," a DHS supervisor "removed" reference to that fact from USCIS's country-conditions analysis "because he did not feel that a null result supported the termination argument." Bates No. NTPSA2__009742.

Another document confirms that the Secretary's reliance on TPS as a supposed "pull" factor is likewise pretextual. In it, a USCIS researcher reported that her supervisor was "forcing" her "to include a section" in "the Haiti country considerations report" "on how TPS is a pull factor" for unlawful migration. Bates No. NTPSA2__009741. She told a superior that she "would be fine with including that, if we had any empirical evidence to support that claim, but the citations that

have been included do not mention TPS at all as a pull factor (and are 3-4 years old)." *Ibid.* She said that she was "obeying his command as [her] supervisor" but that she wanted to "go on record that [she was] concerned" about "making such claims without empirical support." *Ibid.*[19]

"[B]ased on a pretextual rationale," the termination of Haiti's TPS designation is "arbitrary and capricious," and thus unlawful under the APA. *Department of Com.*, 588 U.S. at 766.

4. By statute, any decision to terminate a TPS designation must be based on the Secretary's review of "conditions in the [designated] state." 8 U.S.C. 1254a(b)(3)(A). A termination must therefore be based on a country-specific review. But, as noted (*supra* at 10), the current administration has terminated every TPS designation that has come up for review despite the fact that each country's designation rested on different facts and the respective countries' current conditions are different. As the district court found, this "strongly suggests that the Secretary engaged in a pattern and practice of terminating all TPS designations without the country specific statutorily-mandated periodic review." J.A. 677; accord, *e.g.*, *African Cmtys. Together*, 2026 WL 395732, at *12; *Doe*, 2026 WL 184544, at *14.

Terminating all TPS designations, as the Secretary has, because she believes that TPS designations are categorically contrary to the national interest is tantamount to repealing the TPS statute, something that

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[19] Extension of a TPS designation cannot be a pull factor inducing additional migration because TPS is available only to individuals already present in the U.S. when the designation first takes effect. 8 U.S.C. 1254a(c)(1)(A)(i). It is therefore unsurprising that administrative record "disproves any migration pull." J.A. 691.

lies beyond her—and the President's—"constitutional ... power." 5 U.S.C. 706(2)(B). Cf. *Clinton* v. *City of New York*, 524 U.S. 417, 438 (1998) ("There is no provision in the Constitution that authorizes the President to ... repeal statutes.")

5. Even on the limited record developed thus far, respondents have made a strong showing that they "are likely to succeed in their claim that the Secretary's decision to terminate Haiti's TPS designation was preordained." J.A. 694. The evidence shows, *inter alia*, that:

- President Trump attempted to unlawfully terminate Haiti's TPS designation during his first term in office (J.A. 640-642; J.A. 849-851);
- President Trump announced that if he were elected a second time there would be "large deportations in Springfield, Ohio," where he knew many Haitian TPS holders reside (J.A. 796);
- President Trump's denigrated TPS as a "little trick" just three months before returning to office (J.A. 699; J.A. 803);
- President Trump declared a few days later that he "[a]bsolutely [would] revoke" Haiti's TPS designation if elected again (J.A. 644; J.A. 796);
- Secretary Noem stated in her confirmation hearing that the previous administration's purported "abuse[]" of TPS "will no longer be allowed" (J.A. 797);
- Secretary Noem stated shortly after her confirmation that "[w]hen the President gives a directive" regarding TPS, "the

Department of Homeland Security will follow it" (J.A. 702; J.A. 797);

- Secretary Noem attempted, without statutory authority, to unlawfully vacate Haiti's TPS designation on February 24, barely a month after assuming office (J.A. 644-645; J.A. 812-815);
- Secretary Noem, without purporting to have determined whether Haitian TPS holders could return to Haiti in safety, attempted to unlawfully terminate Haiti's TPS designation on July 1, the same day that her attempted vacatur was held unlawful (J.A. 644; J.A. 815-828);
- Secretary Noem's November 28 termination notice rests on pretextual and other impermissible bases (J.A. 697; J.A. 829-845); and,
- Secretary Noem terminated every TPS designation that she reviewed despite the disparate conditions in the respective countries (J.A. 678-679; J.A. 845-846).

These facts are more than sufficient to support the district court's finding (J.A. 694) that the termination of Haiti's TPS designation was likely a "preordained" outcome rather than the result of a good-faith, fact-based, country-specific review as required by 8 U.S.C. 1254a(b)(3)(A). *Saget*, 375 F. Supp. 3d at 346.

B. Respondents are likely to succeed on their equal-protection claim.

The district court correctly held that respondents' equal-protection claim is subject to strict scrutiny un-

der *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), rather than rational-basis review under *Trump* v. *Hawaii*, 585 U.S. 667 (2018). See J.A. 696. The court also correctly found that respondents' claim is likely to succeed under either standard. *Ibid.* The government's arguments to the contrary fail. Cf. Gov't Br. 45-51.

1. *Hawaii* is inapplicable.

Every decision resolving an equal-protection challenge to the termination of a TPS designation—including the vacated decision in *Ramos* on which the government otherwise relies—has held that such claims are governed by *Arlington Heights* rather than *Hawaii*. See, *e.g.*, *Ramos*, 975 F.3d at 896; *National TPS All.* v. *Noem*, 2025 WL 4058572, at *16 (N.D. Cal. 2025), appeal docketed, No. 26-199 (9th Cir. Jan. 9, 2026); *CASA, Inc.* v. *Noem*, 2025 WL 3514378, at *3 (D. Md. 2025); *Saget*, 375 F. Supp. 3d at 368; *Centro Presente*, 332 F. Supp. 3d at 410-411; *NAACP* v. *DHS*, 364 F. Supp. 3d 568, 576 (D. Md. 2019). *Hawaii* is inapplicable for multiple reasons.

1. This case involves individuals with lawful immigration status who are already in the U.S. whereas *Hawaii* involved "application of … entry restrictions to certain aliens abroad." 585 U.S. at 675. Although "a circumscribed inquiry applies to any constitutional claim *concerning the entry* of foreign nationals" (*id.* at 705 n.5 (emphasis added)), foreign nationals already present receive full equal protection, because "the Due Process Clause applies to all 'persons' *within the United States*, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (emphasis added). That is why *Regents* applied *Arlington Heights*, not *Hawaii*, to a discrimination claim

brought by undocumented youths challenging the rescission of DACA, which—like TPS—extended work authorization and protection from removal to certain foreign nationals. 591 U.S. at 34-35 (plurality opinion).

2. *Hawaii* differs from this case in yet another way: It arose under 8 U.S.C. 1182(f), pursuant to which "the President ... may by proclamation ... suspend the entry of ... any class of aliens" whenever he finds that their "entry ... would be detrimental to the interests of the United States." That provision, which explicitly allows different classes of aliens to be treated differently, "exudes deference to the President in every clause" and confers upon him "sweeping authority." *Hawaii*, 585 U.S. at 684, 693.

That is nothing like Section 1254a(b)(3)(A), which confers no authority on the President but instead directs a subordinate officer, who lacks the President's inherent powers, to execute a facially neutral statute applying enumerated criteria through a prescribed process. *Hawaii*'s deferential standard is therefore inapplicable.

3. Resisting these distinctions, the government relies (Gov't Br. 48-49) on five cases: *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972); *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952); *Mathews* v. *Diaz*, 426 U.S. 67 (1976); *Rajah* v. *Mukasey*, 544 F.3d 427 (2d Cir. 2008); and *Fiallo* v. *Bell*, 430 U.S. 787 (1977). None supports the government's position.

As in *Hawaii*, two involved foreign nationals seeking entry to the U.S. See *Mandel*, 408 U.S. at 754 (plaintiffs challenged the "refus[al] to allow an alien scholar to enter the country"); *Fiallo*, 430 U.S. at 788-790 (plaintiffs challenged statute that "allowed the entry" of legitimate but not illegitimate children).

Mathews did not apply deferential review to a claim alleging racially discriminatory application of a facially neutral statute such as Section 1254a(b)(3)(A). Indeed, it recognizes that the Fifth Amendment's equal-protection guarantee "protects" even foreign nationals who presence is "unlawful." 426 U.S. at 77. Rather than apply deferential review to application of a facially neutral statute, *Mathews* applied deferential review to legislation that differentiated between classes of immigrants based on their length of residence. *Id.* at 82-83.

Rajah does not help the government either. There, the Attorney General, using his authority to require "the natives of any one or more foreign states, or any class or group thereof, ... to ... furnish such additional information as the Attorney General may require" (8 U.S.C. 1305(b)), directed nationals of certain countries to appear for interviews and provide certain biometric information. 544 F.3d at 436. Then, exercising prosecutorial discretion in the national security context, he ordered the removal of those found to be in the country unlawfully. Given the statutory scheme, the court treated the claims asserted as selective-enforcement claims, which are traditionally subject to highly deferential review. Nothing in *Rajah* sanctions discriminatory application of a facially neutral law. To the contrary, the court emphasized that race-based "selective prosecution" of immigrants "would call for some remedy" notwithstanding "the jurisdiction stripping provisions in 8 U.S.C. § 1252(g)." *Id.* at 438 (citing *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999)). As the Second Circuit, the court that issued *Rajah*, subsequently explained, "there is no general rule that federal immigration laws challenged for violating the Constitution should receive rational

basis review." *United States v. Suquilanda*, 116 F.4th 129, 140 (2d Cir. 2024).

Harisiades relied (342 U.S. at 589 n.16, 591 n.17) on *Korematsu v. United States*, 323 U.S. 214 (1944), which this Court repudiated in *Hawaii*. See 585 U.S. at 710. And *Harisiades* did not involve a racial discrimination claim. It involved application of the Alien Registration Act, a statute that, like the statutes at issue in *Mathews* and *Rajah*, explicitly allowed discrimination between classes of foreign nationals. Cf. Alien Registration Act of 1940, Pub. L. No. 76-670, § 23, 54 Stat. 670, 673. Thus, *Harisiades* does not authorize deferential review of a claim alleging discriminatory application of a facially neutral statute like Section 1254a(b)(3)(A).

2. *Arlington Heights* governs.

Because this case involves a subordinate officer's racially discriminatory application of a facially neutral statute, it is governed by *Arlington Heights*, under which a plaintiff need only prove that "a discriminatory purpose [was] a motivating factor" for the challenged action." 429 U.S. at 265-266.

Arlington Heights requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Although courts may consider other factors, they must consider "[t]he historical background of the [challenged] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; the legislative history of the decision; and "whether it 'bears more heavily on one race than another.'" *Id*. at 266-268. Discriminatory purpose may "be inferred from the totality of the relevant facts." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976).

Under *Arlington Heights*, a plaintiff need not show that the challenged action was "motivated solely by" racial animus, nor even that racial animus "was the 'dominant' or 'primary'" motivation. 429 U.S. at 265. They need only show that it was "a" motivation, which respondents have amply shown is likely the case here.

3. Respondents are likely to prevail under either standard.

Despite not having the benefit of full discovery, respondents have also shown that they are likely to prevail on their equal-protection claim even if it is reviewed under the rational-basis test adopted in *Hawaii* and *Moreno*.[20]

As the district court found, respondents have adduced ample evidence that "anti-black and anti-Haitian animus motivated Secretary Noem's decision to terminate Haiti's TPS designation." J.A. 698.

President Trump's own words and actions are the best evidence of discriminatory intent. For years he has slandered non-white immigrants in general and Haitians in particular. See generally J.A. 640, 698-701; J.A. 798-812.[21] Echoing the racist trope of na-

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[20] The government suggests that respondents' equal-protection claim must fail because the termination of a TPS designation implicates "national security and foreign policy." Gov't Br. 48. But "courts must not uncritically defer to such national security claims" or else "national security will become a talisman summoned by the government to avoid scrutiny of infringements of constitutional rights." *Elhady* v. *Kable*, 993 F.3d 208, 228 (4th Cir. 2021); accord *Ziglar* v. *Abbasi*, 582 U.S. 120, 143 (2017).

[21] President Trump's statements and actions during his first administration—including his attempted termination of Haiti's TPS

(continued . . .)

tional purity, he has declared that "illegal immigrants"—the category to which he assigns Haitian TPS holders despite their lawful immigration status—are "poisoning the blood" of America. J.A. 801, 803.

And he has long expressed disdain toward Haitians in particular. In October 2024, during his most recent campaign, for example, he claimed that Haitian TPS holders were "eating the pets of the people" in Springfield, Ohio. J.A. 644, 698, 776.[22] Days later, he promised to "revoke" Haiti's TPS designation and send Haitian TPS holders "back to their country." J.A. 644. On February 22, 2024—just two days before the partial vacatur of Haiti's TPS designation was announced—President Trump bragged that he had followed through on his promise, declaring that "I . . . cancelled Temporary Protected Status for migrants from Haiti." J.A. 702. Then, in December 2025—almost a year into his presidency and less than two weeks after the final termination of Haiti's TPS designation—President Trump publicly declared that Haitian immigrants are

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designation on "pretextual" grounds "motivated by discriminatory animus" (*Saget*, 375 F. Supp. 3d at 346, 368)—mirror his recent statements and actions and are part of "[t]he historical background" to his latest termination of Haiti's TPS designation. *Arlington Heights*, 429 U.S. at 267.

[22] Citing *Hawaii*, the government argues that the President's statements must be ignored as "extrinsic campaign statements." Gov't Br. 46. But in *Hawaii* there was a disconnect between the President's campaign statements, which targeted Muslims generally, and the action taken, which affected only certain Muslims. Here, by contrast, the President's statements, which targeted Haitian TPS holders specifically, correspond perfectly to the action taken—the termination of Haiti's TPS designation. Moreover, President Trump has reiterated his disdain for Haitians numerous times after taking office. His statements here are thus materially different than those at issue in *Hawaii*.

undesirable because they come from a "filthy, dirty, [and] disgusting" "shithole country." J.A. 609.

Although the government dismisses these statements as "out-of-context quotations" that fail to "raise any plausible inference that racial animus motivated" the termination of Haiti's TPS designation (Gov't Br. 45-46), the statements are recent in time, explicitly tied to the termination of Haiti's TPS designation, and evince a profound antipathy toward Haitian TPS holders.

That the President did not explicitly "invoke race" (Gov't Br. 49) is immaterial. "Outright admissions of impermissible racial motivation" by government officials "are infrequent." *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999); accord, *e.g.*, *Aman* v. *Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) ("while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind"). "[R]elevant for what they reveal," namely, "the intent of the speaker" (*id.* at 1083), "[r]acially charged code words may provide evidence of discriminatory intent by sending a clear message and carrying the distinct tone of racial motivations and implications." *Mhany Mgmt., Inc.* v. *County of Nassau*, 819 F.3d 581, 606-608 (2d Cir. 2016); see also *Amicus* Br. of the Civil Rights Clinic at Howard Univ. School of Law.

The President's statements about and actions toward Haitians and other non-white immigrants stand in sharp contrast to his statements about and actions toward white immigrants. In the same December 2025 speech in which he denigrated Haitians as undesirable, he asked "why can't we have some people from Norway [and] Sweden" before wishing that Denmark would "send us some nice people." JA. 808. The President has translated his stated preference for white im-

migrants into policy, terminating the TPS designations of majority non-white countries (see *supra* at 10) while simultaneously establishing a resettlement program for white—and only white—Afrikaners. J.A. 806-807.[23]

Seeking to sidestep these words and deeds, the government argues the district court "erred by focusing on the *President's* statements to evaluate a determination by the *Secretary*." Gov't Br. 51. But the Secretary too repeatedly expressed hostility toward Haitians and other non-white immigrants, describing them as (among other things) "leeches," "entitlement junkies," and "foreign invaders" who "suck dry our hard-earned tax dollars" before declaring: "WE DON'T WANT THEM. NOT ONE." J.A. 809. And she tied that hostility to TPS, promising that TPS "will no longer be allowed extensions going forward." J.A. 808.

The government's attempt to distance the Secretary from the President is futile. Not only does the termination notice state that Haiti's TPS designation was terminated in "furtherance" of the President's executive orders (90 Fed. Reg. at 54736) but the government has admitted that "[t]here was an in-person conversation that occurred between the Secretary and the President or his senior officials" concerning Haiti's TPS designation. J.A. 918; see also ECF 98 at 3 (conceding that there were "communications" and "meetings" with the White House regarding the termination of Haiti's TPS designation).

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[23] The official who confirmed that the resettlement program "was intended for white people" was Spencer Chretien, the State Department staffer on one end of the email exchange that the government says constituted the statutorily mandated "consultation" J.A. 807; see also *supra* at 32.

These facts and those detailed above (*see supra* at 32-41) are ample evidence that the termination likely cannot survive either strict scrutiny or rational-basis review.[24] Thus, as the district court found, respondents "are likely to prevail on their Equal Protection claim." J.A. 704.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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[24] When, as here, the government "appears to have targeted a disfavored group," this Court is "less tolerant of post hoc rationalizations and of a poor fit between the [policy] and its supposed purpose" and "has gone beyond speculating about the plausibility of possible interests and insisted upon evidence that the purported interest was real and … actually was of concern." Steven Menashi, Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 NYU J.L. & LIBERTY 1055, 1067-1068 (2014).