Nos. 25-1083 & 25-1084

In the Supreme Court of the United States

MARKWAYNE MULLIN, SECRETARY, DEPARTMENT OF HOMELAND SECURITY, ET AL., PETITIONERS

v.

DAHLIA DOE, ET AL., RESPONDENTS

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

FRITZ EMMANUEL LESLY MIOT, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR ADMINISTRATIVE LAW PROFESSORS ADAM B. COX, RODERICK M. HILLS, JR., AND EMMA KAUFMAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Adam B. Cox, Roderick M. Hills, Jr., and Emma Kaufman are professors of constitutional and administrative law at New York University School of Law. *Amici* have a longstanding, scholarly interest in the historical allocation of authority between agencies and courts, the development of the presumption of reviewability, and the proper construction of review-limiting statutes. They submit this brief to provide historical background on the presumption of reviewability and on the essential judicial role in deciding questions of law.

SUMMARY OF ARGUMENT

Judicial review of administrative action has changed form over time, but one feature has remained constant: courts have always engaged in judicial oversight to ensure that executive officials exercise only legal authority that is properly theirs. That oversight derives from a core separation-of-powers principle—that executive officers should not have the final say in defining their own authority. As a result, this Court has long presumed a right to judicial review of legal questions arising from agency action. Only a clear statement from Congress can override that presumption.

All parties here agree that Congress has not clearly foreclosed all judicial review in 8 U.S.C. § 1254a. The government concedes that constitutional claims remain reviewable, and respondents acknowledge that courts

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission. S. Ct. Rule 37.6.

may not second-guess the Secretary of Homeland Security's determinations about the factual or policy basis for temporary protected status ("TPS") programs. The question is therefore not *whether* Section 1254a allows for judicial review—it does—but rather what the *scope* of that review is.

Amici submit that the most natural understanding of Section 1254a is that it preserves the historical allocation of power between the Judiciary and the Executive in matters of agency action. That means, at minimum, questions of law regarding the authority of the Secretary of Homeland Security, the meaning of the statute, and the Secretary's compliance with statutory prerequisites are committed to the courts. Some of respondents' claims plainly fall within the scope of reviewability.

ARGUMENT

I. The Presumption of Reviewability Preserves Judicial Supervision of the Lawfulness of Agency Action.

The presumption of reviewability rests on a basic separation-of-powers principle: executive officers do not determine the legal limits of their own authority. That principle, which long predates the Administrative Procedure Act ("APA"), helped shape the modern form of judicial review of agency action. Agencies make decisions in the first instance based on agency-made records, and courts then review those decisions for legal

error, fair procedure, and substantial evidentiary support.

A. Judicial Review Has Always Reserved Essential Legal Questions for the Courts.

1. Well before the APA, courts recognized the need for judicial oversight of executive action. As Chief Justice Marshall observed, "[i]t would excite some surprise if, in a government of laws and of principle, . . . a ministerial officer might, at his discretion, issue this powerful process . . . leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust." *United States* v. *Nourse*, 34 U.S. (9 Pet.) 8, 28–29 (1835). In modern terms, it "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington* v. *FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting).

To protect against overreach by the Executive, courts early on reviewed executive action to ensure that officers exercised only the powers they were authorized to wield under the applicable law and did not undertake to finally resolve matters that belonged to the courts, requiring judicial process. *See, e.g.*, *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840) (affirming the Court's duty "to interpret the act of Congress" to determine its jurisdiction, "in order to ascertain the rights of the parties"); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 612 (1838) (for a right "having been ascertained and fixed by law; the enforcement of that right falls properly within judicial cognizance"); *Murray's Lessee* v. *Hoboken Land & Improvement*, 59 U.S. 272, 284 (1856) (explaining that some matters cannot be "with-

draw[n] from judicial cognizance"); *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) (examining the historical limits on non-Article III adjudication and the distinction between matters Congress could entrust to executive adjudication and those requiring Article III courts).

Even with respect to matters properly committed to the Executive, courts assessed whether the officer had acted within the authority Congress gave and in the manner the law required. *See, e.g.*, *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660, 662–64 (1892) (Congress could make an immigration inspector the "sole and exclusive judge" of admissibility facts, but on habeas review the Court examined whether his appointment and the proceedings used to detain an alien conformed with the underlying statute); *Vance* v. *Burbank*, 101 U.S. 514, 519 (1879) (factual determinations by land office officials could not be reconsidered in later federal-court litigation over the property in question); *see also* Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 YALE L.J. 329, 367–68 n.136 (2024) (discussing these cases). Failure as to either sufficient authority or proper process was, in essence, considered a jurisdictional defect rendering the challenged action void. *See* Adam B. Cox & Emma Kaufman, *From Power to Rights in Public Law*, 101 N.Y.U. L. REV. (forthcoming 2026) (explaining the broad scope of "jurisdictional" review of executive action during the nineteenth century).

When Congress began in the late nineteenth century to regulate immigration, courts applied the same approach to judicial review of executive branch decisions. Courts concluded, for example, that Congress could lawfully empower executive officers to conclusively resolve

an immigrant's admissibility into the United States; judicial process was not required for such a determination because, courts held, the decision to exclude an immigrant was an executive matter rather than an exercise of judicial power. *See Nishimura Ekiu*, 142 U.S. at 659–64 (paraphrasing *Murray's Lessee* in sustaining the "conclusive" nature of exclusion decisions by the executive); *cf. Chae Chan Ping* v. *United States*, 130 U.S. 581, 609 (1889) (holding that Congress had authority to cancel an immigrant's certificate of return because it did not constitute a vested right that could be taken only through judicial process). So long as the officer acted within authority conferred on him by Congress, his decision was final. Even in this early period, however, courts asserted authority to review whether the officer had in fact been lawfully authorized to make such a determination, and whether he followed the requisite statutory framework and procedures in doing so. *See, e.g., Nishimura Ekiu*, 142 U.S. at 660, 662–64 (holding that the appointment of an immigration inspector and proceedings used to detain an alien conformed with the underlying statute). While some matters properly belonged to the Executive, then, courts never relinquished their authority to review whether immigration decisions complied with the law.

2. Around the turn of the twentieth century, courts began to transform judicial review of agency action. But while the vocabulary of judicial oversight changed—giving rise to the modern appellate model of administrative law—the traditional focus on core separation-of-powers principles remained. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953–65 (2011).

Under the approach to judicial review that emerged at the turn of the twentieth century, courts began to review a broader array of administrative decisions and began to conceptualize review as "appellate" oversight of agency action. This new theory of judicial review left agencies to create the record and make administrative determinations, resolving questions of fact and evidence in the first instance. Courts would then review those decisions to ensure that the administrative officials had acted in conformity with Congress's statutory requirements, had provided a fair hearing, and had reached a decision for which there was some factual support. *Id.* at 941–43, 953–65, 994–95. Thus, while certain features of judicial review shifted in the early twentieth century, the basic fact of judicial oversight of the legality, procedural regularity, and constitutionality of executive action remained constant.

The Court laid the groundwork for this new, twentieth century approach to judicial review in cases like *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902).[2] In *McAnnulty*, the Court reviewed a challenge to an order by the Postmaster General ceasing the delivery of mail to a recipient on the ground that the recipient was engaged in a fraudulent business. *Id.* at 103–04. The Court "conced[ed] the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his

[2] There are numerous instructive cases from this era. In *United States ex rel. Bernardin* v. *Duell*, 172 U.S. 576, 588–89 (1899), for instance, the Court retreated from its earlier suggestion in *United States* v. *Ritchie*, 58 U.S. 525 (1854), that an Article III court's review of a decision by an executive officer was violative of the separation of powers.

department." *Id.* at 107. But the Court nonetheless examined for itself whether those determinations of fact were sufficient to render the challenged conduct fraudulent within the meaning of the statute and whether the Postmaster General in fact had the power to impose such a sanction. *Id.* at 107–08 ("The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.").

Cases concerning the Interstate Commerce Commission ("ICC") helped to crystallize the scope of judicial review, combining courts' *de novo* review for errors of law with deferential factual review. *See* Merrill, *supra*, at 961–62, 967–69. In *ICC* v. *Illinois Central Railroad Co.*, the Court held that while courts cannot "usurp merely administrative functions" by substituting their own policy judgment for the agency's, review *was* appropriate as to "all relevant questions of constitutional power or right," including whether the action was "within the scope of the delegated authority." 215 U.S. 452, 470–71 (1910). In a later case, the Court confirmed that the Judiciary may review "mixed questions of law and fact," but only insofar as asking whether the agency's findings were "supported by [substantial evidence]." *ICC* v. *Union Pac. R.R. Co.*, 222 U.S. 541, 547–48 (1912); *see also FTC* v. *Gratz*, 253 U.S. 421, 427–29 (1920) (agency's factual findings were conclusive, but whether the conduct amounted to an "unfair method of competition" remained a question of law for the courts).

This refined approach to judicial review applied in the immigration context as well. *See* Cox, *supra*, at 416. Courts reviewed agency decisions in the immigration context to: ensure a fair administrative hearing occurred, correct legal errors, and require that the record

contain some evidentiary basis for exclusion or deportation. *See, e.g.*, *Kaoru Yamataya* v. *Fisher*, 189 U.S. 86, 99–101 (1903) (fair-hearing requirement before administrative officers); *Gonzales* v. *Williams*, 192 U.S. 1, 12–16 (1904) (statutory misinterpretation); *Gegiow* v. *Uhl*, 239 U.S. 3, 9–10 (1915) (forbidden criterion); *Kwock Jan Fat* v. *White*, 253 U.S. 454, 457–58 (1920) (decision "final" unless proceedings were unfair or record failed to support result); *United States ex rel. Vajtauer* v. *Comm'r of Immigr.*, 273 U.S. 103, 106–11 (1927) (requiring some evidence and lawful procedure).

B. Modern Doctrine Preserves Judicial Review of the Lawfulness of Agency Action.

Congress has repeatedly legislated consistently with this framework for judicial review, and this Court has reinforced that tradition via the presumption in favor of reviewability.

1. When Congress enacted the APA, it codified the judicial review practices that had crystallized in the decades prior to the APA's enactment. *See* Emily S. Bremer, *Vacatur Within the Appellate Model of Judicial Review*, 136 YALE L.J. (forthcoming 2026); Merrill, *supra*, at 942–43 ("The appellate review model . . . continues to be the cornerstone of administrative law today."). Reinforcing the traditional separation-of-powers view that judicial review is essential to ensuring that executive action remains within its lawful bounds, the APA mandates the availability of judicial review of agency action, except where a statute clearly precludes it or commits a matter to agency discretion. 5 U.S.C. §§ 701(a)(1)–(2), 704. And the APA provides that the "reviewing court shall decide all relevant questions of law" and must set aside actions that are "not in accordance with law," "in

excess of statutory jurisdiction," or "unsupported by substantial evidence." *Id.* § 706(2)(A), (C), (E).[3]

In myriad subsequent statutory schemes, Congress has expressly provided for the sort of judicial review required by the traditional model and the APA, even when otherwise limiting the scope of judicial review. In *INS* v. *St. Cyr*, the Court held that Congress had not clearly eliminated an immigration detainee's right to habeas relief in federal court. 533 U.S. 289, 313–14 (2001). In response, Congress amended the statute to clearly eliminate habeas review of final removal orders, but in doing so, expressly preserved review of "constitutional claims or questions of law" in petitions for review filed in the courts of appeals. 8 U.S.C. § 1252(a)(2)(D), (a)(5). Thus, even in acting to restrain judicial review, Congress recognized the essential role of the courts in deciding issues of law.

This Court subsequently confirmed the essential nature of the courts' role by interpreting that statutory amendment to allow for review of mixed questions of fact and law. *See Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 227 (2020) (holding that the limiting provision in § 1252(a)(2)(D) does not bar courts from reviewing "application of a legal standard to undisputed or established facts"); *Wilkinson* v. *Garland*, 601 U.S. 209, 222 (2024) (citing *Guerrero-Lasprilla* to explain that "[a] mixed question that requires close engagement with the

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[3] *See* Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 380–82, 404–06, 414–18 (2021) (the APA "codified—but did not create—adjudication's staged structure," under which agencies resolve most matters informally, formal hearings and a record occur when needed, and judicial review follows).

facts is still a mixed question, and [it is] therefore a 'questio[n] of law' [that is] reviewable under § 1252(a)(2)(D)").

2. Consistent with the common law and statutory allocation of responsibility, this Court has held that judicial review of agency action is presumptively available absent clear language from Congress. *See Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140–41 (1967) (need "clear and convincing" indication to overcome presumption). In *Bowen* v. *Michigan Academy of Family Physicians*, the Court traced the origins of that presumption back to *Marbury* v. *Madison*, detailing the long history of judicial review of agency action. 476 U.S. 667, 670–73 (1986). The Court ultimately held that judicial review of certain Medicare-related regulations was available, even though the statutory language appeared to sweep more broadly. *Id.* at 675–81.

The Court has applied this presumption of reviewability in the immigration context as well, reaffirming the Judiciary's role in construing the law. In *McNary* v. *Haitian Refugee Center*, for example, the statute provided that review of "a determination" on an individual Special Agricultural Workers application (providing lawful status to farmworkers based on certain admissibility requirements) had to occur in the court of appeals, on the administrative record, if and when the person was in deportation proceedings. 498 U.S. 479, 491–94 (1991). The Court held, however, that this channel for individual case-by-case denials did not preclude pattern-or-practice claims alleging systemic procedural defects in how such applications were processed. *Ibid.* Likewise, in *Guerrero-Lasprilla*, the Court invoked the presumption to hold that a provision allowing for judicial review of "questions of law"

included review of the "application of law to established facts." 589 U.S. at 229–30. And there are other examples. *See, e.g.*, *Reno* v. *Cath. Soc. Servs., Inc.*, 509 U.S. 43, 55–56 (1993) (Section 245A(f)(1) does not preclude general collateral challenges to unlawful agency policies and procedures); *Kucana* v. *Holder*, 558 U.S. 233, 251 (2010) (declining to extend review bars beyond what Congress clearly specified).

II. There Is No Indication Congress Abandoned This Historical Framework in Section 1254a.

The government acknowledges that Section 1254a(b)(5)(A) does not bar all judicial review—it concedes that courts may consider constitutional claims. U.S. Br. 4, 24. And at the same time, respondents acknowledge that judicial review of certain crucial factual determinations—such as whether a country remains unsafe—is barred. The question for this Court therefore is what *kinds* of agency determinations are reviewable under Section 1254a(b)(5)(A).

As the above shows, history helps answer that question. The earliest sources confirm that executive officers should not have the final say as to their own authority, because allowing otherwise would offend separation of powers. The emergence of the appellate model of administrative law reinforced and strengthened the role of the Judiciary in deciding questions of law and guarding against Executive overreach. And both Congress and this Court in the modern era have carried forward that long tradition.

Given the parties' agreement that some amount of judicial review is available under Section 1254a, there is no reason to read that review-limiting provision to reject the longstanding traditions governing judicial

review. *See Nat'l Archives & Recs. Admin.* v. *Favish*, 541 U.S. 157, 169 (2004) ("Congress legislate[s] against this background of law, scholarship, and history when it enact[s] [statutes]."). Indeed, it is hard to contrive any reading of the statute in which constitutional claims are reviewable but other questions of law are not. Instead, the statute is most naturally read to limit courts' ability to encroach on the Executive's authority to make factual and policy determinations, while preserving the Judiciary's power to ensure that executive action is consistent with the law. Within that framework, at least three of respondents' claims fall within the traditional scope of judicial review.

First, whether Section 1254a permits the Department of Homeland Security ("DHS") to treat "national interest" as an independent criterion at termination is a pure question of statutory law properly committed to the courts. The statute directs the Secretary, when considering the termination of a TPS program, to review "the conditions in the foreign state" and decide whether "the conditions for such designation under this subsection continue to be met." 8 U.S.C. § 1254a(b)(3)(A), (B). The phrase "national interest" appears only in the provision relating to TPS *designation*, and only in connection with one ground for designation. *Id.* § 1254a(b)(1)(C) (authorizing designation for "extraordinary and temporary conditions" unless contrary to the national interest). Respondents have therefore challenged whether the Secretary may import a factor from one provision of the statute to another—effectively giving the Secretary carte blanche to terminate any TPS designation under the banner of "national interest"—which is a question of law, properly subject to judicial review.

This Court routinely sets aside agency action that rests on statutory misinterpretation, while leaving subsidiary determinations of fact undisturbed. *See Gegiow*, 239 U.S. at 9–10 (reversing reliance on a factor the statute did not permit); *Gonzales*, 192 U.S. at 12–16 (correcting statutory misinterpretation); *Gratz*, 253 U.S. at 427–29 (ultimate statutory classification is a question of law); *Ill. Cent. R.R. Co.*, 215 U.S. at 470–71 (courts decide whether an order is "within the scope of the delegated authority"). Indeed, this Court recently emphasized the unique role of the Judiciary in interpreting statutes, dispensing with *Chevron* deference and confirming that executive agencies' interpretations of statutes are entitled to no special solicitude. *See Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 394–402 (2024).

Second, whether DHS satisfied Section 1254a(b)(3)(B)'s consultation requirement raises a threshold issue of law. The statute makes termination contingent on a determination made "after consultation with appropriate agencies." 8 U.S.C. § 1254a(b)(3)(B). Courts can enforce such mandatory decisional steps. *See, e.g.*, *Mach Mining*, *LLC* v. *EEOC*, 575 U.S. 480, 481 (2015) ("Congress imposed a mandatory duty on the EEOC to attempt conciliation and . . . [s]uch compulsory prerequisites are routinely enforced by courts in Title VII litigation"; thus, "EEOC's statutory obligation to give the employer notice and an opportunity to achieve voluntary compliance" was within the "appropriate scope of judicial review"). And in this case, where there is no dispute about what communications took place between the Secretary and other agencies, courts need only apply the law to the undisputed facts of what the agency did in order to determine whether the

"consultation" requirement was met. *See Guerrero-Lasprilla*, 589 U.S. at 233–34 ("'questions of law' includes the application of a legal standard to established facts").

Third, whether DHS actually undertook—and based its decision on—the requisite review of country conditions is a distinct legal question. Section 1254a(b)(3)(B) directs the Secretary to "review the conditions in the foreign state" and to decide whether "the conditions for such designation continue to be met." *See* 8 U.S.C. § 1254a(b)(3)(A), (B). While courts cannot second-guess the Secretary's factual determination about the conditions in the foreign state or other matters relevant to termination, they can assess whether the required review actually occurred and whether the decision rests on the criteria the statute makes relevant. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943) ("Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding."); *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) ("The agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'"). And courts may ask whether the agency's proffered rationale for the challenged action is pretextual. *See Dep't of Com.* v. *New York*, 588 U.S. 752, 785 (2019) (where "an explanation for agency action [] is incongruent with what the record reveals about the agency's priorities and decisionmaking," the district court properly rejected

that explanation to prevent judicial review from becoming "an empty ritual").

Read this way, Section 1254a(b)(5)(A) fits both the long history of judicial review and the statute Congress wrote. It preserves the Secretary's role in determining facts and deciding policy, while ensuring that courts retain their essential mandate to define the legal boundaries of agency action, absent a clear congressional statement to the contrary.

CONCLUSION

The judgments should be affirmed.

Respectfully submitted.

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