No.

# In the Supreme Court of the United States

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

*v.*

NATIONAL TPS ALLIANCE, ET AL.

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

**APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI**


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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25-5724

NATIONAL TPS ALLIANCE; MARIELA GONZALEZ; FREDDY ARAPE RIVAS; M.H.; CECILIA GONZALEZ HERRERA; ALBA PURICA HERNANDEZ; E. R.; HENDRINA VIVAS CASTILLO; VILES DORSAINVIL; A.C.A.; SHERIKA BLANC, PLAINTIFFS-APPELLEES

*v.*

KRISTI NOEM; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA, DEFENDANTS-APPELLANTS

Argued and Submitted: Jan. 14, 2026
Pasadena, California
Filed: Jan. 28, 2026

Appeal from the United States District Court
for the Northern District of California,
Edward M. Chen, District Judge, Presiding,
D.C. No. 3:25-cv-1766-EMC

**OPINION**

Before: KIM MCLANE WARDLAW, SALVADOR MENDOZA, JR., and ANTHONY D. JOHNSTONE, Circuit Judges.

Opinion by Judge WARDLAW;

Concurrence by Judge MENDOZA

WARDLAW, Circuit Judge:

We again consider the National TPS Alliance's and individual Temporary Protected Status ("TPS") beneficiaries' (collectively, Plaintiffs) challenge to Department of Homeland Security ("DHS") Secretary Kristi Noem's vacatur and termination of Venezuela's TPS designation. We also consider Plaintiffs' challenge to Secretary Noem's partial vacatur of Haiti's TPS designation. The district court held that the Secretary's actions exceeded her statutory authority under the TPS statute, 8 U.S.C. § 1254a, and that the Secretary acted in an arbitrary and capricious manner. The district court therefore set aside the Venezuelan vacatur and termination, and the Haitian partial vacatur. We affirm.

Congress created TPS to provide stability, predictability, and a brief reprieve from deportation to qualifying citizens of designated countries. The catch: that reprieve is guaranteed for no more than 18 months at a time. *See* 8 U.S.C. § 1254a(b)(2)(B), (b)(3)(C). The TPS statute grants the Secretary of Homeland Security significant discretion and authority in designating, extending, and terminating a country's TPS. But by its plain language, the statute does not grant the Secretary the power to vacate an existing TPS designation. Secretary Noem exceeded her statutory authority by vacating and terminating Venezuela's TPS designation, and by partially vacating Haiti's TPS designation.

The Secretary's unlawful actions have had real and significant consequences for the hundreds of thousands of Venezuelans and Haitians in the United States who rely on TPS. The record is replete with examples of hard-working, contributing members of society—who are mothers, fathers, wives, husbands, and partners of U.S. citizens, pay taxes, and have no criminal records—who have been deported or detained after losing their TPS. Other TPS beneficiaries have lost their jobs after the Secretary stripped them of their work authorization forms, leaving them with no ability to provide for their families. Some beneficiaries, unable to work legally, have now lost their homes, rendering them and their families homeless. The Secretary's actions affect physicians, artists, automotive mechanics, food service employees, construction workers, students, and thousands of others who "didn't come [to the United States] for hand-outs," but "to work hard." The Secretary's actions have left hundreds of thousands of people in a constant state of fear that they will be deported, detained, separated from their families, and returned to a country in which they were subjected to violence or any other number of harms.

The Secretary's actions fundamentally contradict Congress's statutory design, and her assertion of a raw, unchecked power to vacate a country's TPS is irreconcilable with the plain language of the statute. The district court correctly set aside the Secretary's unlawful actions.

## I. FACTUAL BACKGROUND

### A. History of Temporary Protected Status

The TPS statute was Congress's solution to the unprincipled and largely unchecked power that presidents enjoyed through the extended voluntary departure ("EVD") program. EVD was a discretionary power of the president to allow foreign nationals to remain in the

United States for humanitarian reasons. As we explained in *National TPS Alliance v. Noem*, 150 F.4th 1000, 1008 (9th Cir. 2025) ("*NTPSA I*"), in creating the TPS statutory program, "Congress designed a system of temporary status that was predictable, dependable, and insulated from electoral politics." In effect, Congress codified the executive branch's existing EVD powers, but added guardrails and provided guidance on the circumstances in which Congress deemed it appropriate to permit foreign nationals to remain in the United States. Once a country is designated for TPS, foreign nationals of that country may apply for immigration status, which, if granted, prevents them from being removed from the U.S. and enables them to obtain authorization to work during the period of designation. *See* 8 U.S.C. § 1254a(a)(1).[1]

The TPS statute did not replace EVD. In fact, after the TPS statute was enacted, President George H.W. Bush created Deferred Enforced Departure ("DED"), another extra-statutory discretionary power of the president to provide work authorization and protection from deportation to certain foreign nationals. *See NTPSA I*, 150 F.4th at 1009 (citing Andrew I. Schoenholtz, *The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven*, 15 NW. J. L. & SOC. POL'Y 1, 5 (2019)). DED protections have been authorized for several countries across multiple presidential administrations. *Id.* Unlike EVD and DED, however, Temporary Protected Status is, as its name suggests, temporary. *See* § 1254a(b)(2)(B), (c)(3)(C). TPS can be granted or

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[1] Unless otherwise specified, statutory citations are to Title 8 of the U.S. Code.

extended only when specified country conditions exist, such as armed conflict, natural disaster, significant instability, or other "extraordinary and temporary conditions in the foreign state." *See* § 1254a(b)(1). And TPS is constrained by procedural requirements that the Secretary must follow before designating, extending, or terminating a country's TPS. *See generally* § 1254a.

Since the TPS statute was enacted in 1990, more than twenty countries have received TPS designations. TPS has been used to address Ebola outbreaks in Guinea and Sierra Leone, genocide in Rwanda, and civil war in Somalia.[2] TPS designations have been extended for countries with persisting qualifying country conditions and terminated for countries in which conditions have improved.[3] In the thirty-five-year history of TPS, however, no presidential administration had ever asserted the power to vacate an existing TPS designation, until the Second Trump Administration did so in 2025.

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[2] *See* Designation of Guinea for Temporary Protected Status, 79 Fed. Reg. 69511 (Nov. 21, 2014); Designation of Sierra Leone for Temporary Protected Status, 79 Fed. Reg. 69506 (Nov. 21, 2014); Designation of Rwanda Under Temporary Protected Status Program, 59 Fed. Reg. 29440 (June 7, 1994); Designation of Nationals of Somalia for Temporary Protected Status, 56 Fed. Reg. 46804 (Sept. 16, 1991).

[3] *See, e.g.*, Extension of the Designation of Somalia for Temporary Protected Status, 83 Fed. Reg. 43695 (Aug. 27, 2018); Termination of the Designation of Angola Under the Temporary Protected Status Program, 68 Fed. Reg. 3896 (Jan. 27, 2003).

B. Venezuela's TPS Designation, Extension, Vacatur, and Termination

In March 2021, then-Secretary Mayorkas designated Venezuela for TPS ("2021 Designation"). 86 Fed. Reg. 13574 (Mar. 9, 2021). This designation was extended twice. *See* 87 Fed. Reg. 55024 (Sept. 8, 2022); 88 Fed. Reg. 68130 (Oct. 3, 2023). Secretary Mayorkas's second extension simultaneously re-designated Venezuela for TPS ("2023 Designation"), expanding the pool of Venezuelans eligible for protection. 88 Fed. Reg. 68130 (Oct. 3, 2023). The second extension of the 2021 Designation "allow[ed] existing TPS beneficiaries to retain TPS through" the expiration of the extension but required them to "re-register during the re-registration period." *Id.* at 68130. The eligibility criteria for TPS beneficiaries did not change. In other words, the population of Venezuelan citizens eligible for TPS under the 2021 Designation would also be eligible for TPS under the 2023 Designation. *Id.* However, as of October 2023, existing 2021 Designation beneficiaries re-registered for TPS separately from beneficiaries of the 2023 Designation. *Id.* The 2021 Designation, as extended, was set to expire on September 10, 2025, and the 2023 Designation was set to expire on April 2, 2025. *Id.* at 68134.

On January 17, 2025, Secretary Mayorkas extended the 2023 Designation by eighteen months, through October 2, 2026 ("2025 Extension").[4] 90 Fed. Reg. 5961 (Jan. 17, 2025). The extension was set to become effective on April 3, 2025. *Id.* at 5962. Because the 2021 and

[4] The 2021 Designation was not extended, but beneficiaries of the 2021 Designation could re-register under the 2025 Extension, and receive TPS through October 2, 2026, as a result. 90 Fed. Reg. at 5962.

2023 Designations had resulted in two distinct registration and filing processes, Secretary Mayorkas consolidated them. *Id.* at 5963. Secretary Mayorkas found that "[o]perational challenges in the identification and adjudication of Venezuela TPS filings and confusion among stakeholders exist because of the two separate TPS designations," and consolidated the filing processes to "decrease confusion[,] . . . ensure optimal operational processes, and maintain the same eligibility requirements." *Id.*

President Trump's second term began on January 20, 2025. His administration immediately began the process of vacating the 2025 Extension.

On January 24, 2025, DHS began drafting the decision to vacate the TPS extension. Secretary Noem was confirmed the next day. On January 25, 2025, DHS told lawyers who had been involved in the 2025 Extension that DHS was "not at all interested in revisiting the substance of whether [the vacatur] should go forward." The vacatur decision was finalized on January 27, 2025, and signed by Secretary Noem on January 28, 2025. The vacatur decision ("Venezuela Vacatur") was published in the Federal Register on February 3, 2025. 90 Fed. Reg. 8805.

The Venezuela Vacatur described the 2025 Extension as "novel[,] . . . thin and inadequately developed," and concluded that "vacatur is warranted to untangle the confusion, and provide an opportunity for informed determinations regarding the TPS designations and clear guidance." 90 Fed. Reg. at 8807. As support for its conclusion, the Venezuelan Vacatur cited President Trump's January 20, 2025, Executive Order entitled "Protecting the American People Against Invasion." *Id.*

at 8807 n.3 (citing Exec. Order No. 14159, *reprinted in* 90 Fed. Reg. 8443 (Jan. 29, 2025)). The vacatur did not include any analysis of country conditions evidence. *Id.*

On January 26, 2025, before the vacatur was finalized, DHS began drafting a termination of Venezuela's TPS. Secretary Rubio provided recommendations to Secretary Noem on January 31, 2025, in a one-and-a-half-page letter. The letter addressed only the United States' national interest in terminating TPS for Venezuela and did not discuss country conditions. United States Citizenship and Immigration Services ("USCIS") recommended termination that same day. Secretary Noem signed off on the termination on February 1, 2025, and the termination decision ("Venezuela Termination") was published in the Federal Register on February 5, 2025. 90 Fed. Reg. 9041-42. The Secretary terminated the 2023 Designation, which was set to expire on October 2, 2026, but not the 2021 Designation, which had only been extended to September 10, 2025. *Id.* at 9042, 9044.

The Venezuela Termination concluded that "it is contrary to the national interest to permit the Venezuelan nationals . . . to remain temporarily in the United States." 90 Fed. Reg. at 9042. The Termination stated that "there are notable improvements in several areas such as the economy, public health, and crime that allow for [Venezuelan] nationals to be safely returned to their home country." *Id.* However, it also stated that, "even assuming the relevant [country] conditions in Venezuela remain[ed] both 'extraordinary' and 'temporary,' termination of the 2023 Venezuela TPS designation [was] required" because the Secretary concluded that "it [was] contrary to the national interest to permit the Venezuelan nationals . . . to remain temporarily in the United

States." *Id.* Secretary Noem ultimately declined to make any factual findings as to the country conditions in Venezuela, explaining that she was "not required to make findings on issues the decision of which is unnecessary to the results [she] reach[ed]." *Id.* at 9042 n.3 (quoting *INS v. Bagamasbad*, 429 U.S. 24, 25, 97 S. Ct. 200, 50 L. Ed. 2d 190 (1976) (per curiam)). In other words, the Secretary confirmed that she was relying solely on the national interest ground for terminating Venezuela's TPS. *Id.*

C. Haiti's TPS Designation, Extension, and Partial Vacatur

Haiti has been designated for TPS for sixteen years. Haiti was initially designated for TPS in 2010, after a 7.0 magnitude earthquake "destroyed most of the capital city" and crippled its critical infrastructure. Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476, 3477 (Jan. 21, 2010). DHS concluded that "there clearly exist[ed] extraordinary and temporary conditions preventing Haitian nationals from returning to Haiti in safety" "[g]iven the size of the destruction and humanitarian challenges." *Id.*

Haiti's TPS was repeatedly extended due to ongoing complications caused by the earthquake, as well as a cholera epidemic. *See, e.g.*, 77 Fed. Reg. 59943, 59944 (Oct. 1, 2012) (extending Haiti's TPS due to continued extraordinary conditions caused by the earthquake, as well as a "deadly cholera outbreak"). The First Trump Administration extended Haiti's TPS designation once, for six months.[5] *See* Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. 23830 (May 24, 2017). The Administration then attempted to terminate Haiti's TPS designation, effective as of July 22, 2019. *See* Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2648 (Jan. 18, 2018). A district court enjoined that termination, *Saget*, 375 F. Supp. 3d at 379, and the new Biden Administration withdrew the Government's pending appeal of the order enjoining the termination, *see Saget v. Biden*, 2021 WL 12137584 (Oct. 5, 2021).

Haiti was designated again for TPS in August 2021. *See* Designation of Haiti for Temporary Protected Status, 86 Fed. Reg. 41863 (Aug. 3, 2021). Secretary Mayorkas extended and redesignated Haiti's TPS in 2023, *see* 88 Fed. Reg. 5022 (Jan. 26, 2023), and again in 2024, *see* 89 Fed. Reg. 54484 (July 1, 2024). The July 2024 re-designation and extension was set to expire on February 3, 2026. *Id.*

On February 7, 2025, DHS prepared and circulated a draft decision partially vacating Secretary Mayorkas' July 2024 extension. The draft decision was reviewed and signed off by DHS staff between February 14 and 17 and signed by Secretary Noem on February 18, 2025. DHS announced the vacatur in a press release on February 20, 2025, and it was published in the Federal Register on February 24, 2025 ("Haiti Partial Vacatur"). *See* Partial Vacatur of 2024 Temporary Protected Status Decision for Haiti, 90 Fed. Reg. 10511 (Feb. 24, 2025).

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[5] It was already clear as of the May 2017 extension that Haiti's TPS would soon be terminated. *See Saget v. Trump*, 375 F. Supp. 3d 280, 312 (E.D.N.Y. 2019).

The Haiti Partial Vacatur explained that it was shortening Haiti's TPS designation period "from 18 months to 12 months," such that the designation would expire on August 3, 2025, instead of February 3, 2026. *Id.* DHS offered three reasons for the Partial Vacatur of Secretary Mayorkas's extension: first, Secretary Mayorkas's July 1, 2024, notice failed to explain why an 18-month TPS period was selected instead of a 6- or 12-month period; second, the notice did not explain why permitting Haitians to remain in the United States was not contrary to the national interest of the United States; and third, the country conditions reports on which Secretary Mayorkas relied actually suggested "an improvement in conditions." *Id.* at 10513. Secretary Noem subsequently terminated Haiti's TPS, effective September 2, 2025 ("Haiti Termination").[6] *See* 90 Fed. Reg. 28760 (July 1, 2025).

**II. Procedural History**

Plaintiffs filed suit in the United States District Court for the Northern District of California on February 19, 2025. The district court granted Plaintiffs' motion to postpone the Venezuela Vacatur on March 31, 2025. *National TPS Alliance v. Noem*, 773 F. Supp. 3d 807 (N.D. Cal. 2025). The Government sought a stay of the district court's order from our court, which we denied. *National TPS Alliance v. Noem*, 2025 WL 1142444 (9th Cir. Apr. 18, 2025). The Government then turned to the Supreme Court, which granted the Government's emergency request to stay the district court's order on May 19, 2025. *National TPS Alliance v. Noem*, ––– U.S. ––––, 145 S. Ct. 2728, 221 L. Ed. 2d 981 (Mem.)

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[6] This appeal does not concern the Haiti Termination.

(2025). We affirmed the district court's postponement order on August 29, 2025. *NTPSA I*.

On September 5, 2025, the district court granted partial summary judgment to Plaintiffs on their Administrative Procedure Act ("APA") claims, and set aside both the Secretary's vacatur and termination of Venezuela's TPS designation, and the partial vacatur of Haiti's TPS designation under APA § 706. *National TPS Alliance v. Noem*, 798 F. Supp. 3d 1108 (N.D. Cal. 2025). We denied the Government's emergency stay request on September 17, 2025. *National TPS Alliance v. Noem*, 163 F.4th 1152 (9th Cir. 2025) ("*NTPSA II*"). The Supreme Court granted a stay of the district court's set aside order on October 3, 2025. *Noem v. National TPS Alliance*, 606 U.S. ——, 146 S. Ct. 23, 222 L. Ed. 2d 1241 (2025). The Government timely appealed the September 5, 2025, partial summary judgment order.

**III. Standard of Review**

"We review the district court's grant of summary judgment de novo, viewing the evidence and drawing all reasonable inferences in the light most favorable to the non-moving party." *Anthony v. Trax Int'l Corp.*, 955 F.3d 1123, 1127 (9th Cir. 2020) (quoting *Cohen v. City of Culver City*, 754 F.3d 690, 694 (9th Cir. 2014)).

**IV. Effect of the Supreme Court's Emergency Stay Orders**

At the outset, we address the Government's argument that we are bound by the Supreme Court's twice determination that the Government is likely to succeed on the merits. However, the Supreme Court's emergency stay orders did not expressly decide the issue of whether the Government was likely to succeed on the merits of this case, so we reject the Government's argument that the stay orders control our determination of this case. *See Noem v. National TPS Alliance*, 606 U.S. ——, 146 S. Ct. 23 (Mem.) (2025) ("Although the posture of the case has changed, the parties' legal arguments and relative harms generally have not. The same result that we reached in May is appropriate here.").

Unlike *NTPSA I* and *NTPSA II*, our opinion today for the first time addresses solely the merits of Plaintiffs' claims. Because "[w]e can only guess as to the Court's rationale when it provides none," we are wary of the possibility that the Court granted the Government's emergency stay application due to its assessment of the balance of the equities or the parties' respective irreparable harms, rather than its assessment of the merits. *NTPSA II*, 2025 WL 2661556, at *2-3.

The Supreme Court's unreasoned stay orders were "not conclusive as to the merits." *Trump v. Boyle*, 606 U.S. ——, 145 S. Ct. 2653, 2654, 222 L. Ed. 2d 1181 (2025). While they may have informed "how [we] should exercise [our] equitable discretion in like cases," in this appeal, we are confronted with legal questions, not equitable ones. *Id.*; *cf. Noem v. National TPS Alliance*, ––– U.S. ——, 146 S. Ct. 23, 26 (Jackson, J., dissenting) (arguing that the Court "misjudge[d] the irreparable harm and balance-of-the-equities factors," rather than addressing the merits). We therefore conclude that the Supreme Court's October 3, 2025, stay order is not controlling as to the outcome of this case.

**V. Structure of the TPS Statute**

Under the TPS statute, 8 U.S.C. § 1254a, the Secretary of Homeland Security may designate any foreign state for TPS, permitting qualifying foreign nationals of the designated state to apply for protection from removal and work authorization.[7] The statute sets forth the following procedure for designating a country for TPS:

(1) The [Secretary], after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if—

(A) the [Secretary] finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

(B) the [Secretary] finds that—

(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,

(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(iii) the foreign state officially has requested designation under this subparagraph; or

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[7] The TPS statute originally granted this authority to the Attorney General. *See generally* 8 U.S.C. § 1254a. The Attorney General subsequently delegated the responsibility for administering the statute to the Secretary of Homeland Security. *See Nat. TPS Alliance*, 798 F. Supp. 3d at 1117 n.1.

> (C) the [Secretary] finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the [Secretary] finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

§ 1254a(b)(1). Under the statute, the Secretary may designate a foreign state for TPS for a minimum of six months and a maximum of eighteen months. *Id.* Before the period of designation expires, the Secretary is required to follow the following procedures to determine whether the designation should be extended or terminated:

> (A) Periodic review
>
> At least 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state (or part thereof) under this section the [Secretary], after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and shall determine whether the conditions for such designation under this subsection continue to be met. The [Secretary] shall provide on a timely basis for the publication of notice of each such determination (including the basis for the determination, and, in the case of an affirmative determination, the period of extension of designation under subparagraph (C)) in the Federal Register.
>
> (B) Termination of designation

> If the [Secretary] determines under subparagraph (A) that a foreign state (or part of such foreign state) no longer continues to meet the conditions for designation under paragraph (1), the [Secretary] shall terminate the designation by publishing notice in the Federal Register of the determination under this subparagraph (including the basis for the determination). Such termination is effective in accordance with subsection (d)(3), but shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension under subparagraph (C).
>
> (C) Extension of designation
>
> If the [Secretary] does not determine under subparagraph (A) that a foreign state (or part of such foreign state) no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the [Secretary], a period of 12 or 18 months).

§ 1254a(b)(3). The statute also sets forth the procedure by which foreign nationals of TPS-designated states can qualify and apply for work authorization and protection from removal, as well as the Secretary's authority to withdraw a foreign national's TPS. *See* § 1254a(a)(1), (c)(1)-(3).

**VI. Venezuela Vacatur**

A. <u>8 U.S.C. § 1254a(b)(5)(A) – Judicial Review Bar</u>

Section 1254a(b)(5)(A) provides: "There is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state" for TPS. The Government argues that this subsection forecloses judicial review of all of Plaintiffs' APA challenges. We rejected this argument in *NTPSA I* and do so again here. 150 F.4th at 1016-1018.

We begin with the strong presumption "that Congress intends judicial review of administrative actions." *NTPSA I*, 150 F.4th at 1016 (citing *Hyatt v. Off. of Mgmt. & Budget*, 908 F.3d 1165, 1170-71 (9th Cir. 2018)). "This presumption can only be overcome by 'clear and convincing evidence of a contrary legislative intent.'" *Id.* (quoting *Hyatt*, 908 F.3d at 1171). We therefore ask whether "the congressional intent to preclude judicial review is fairly discernible in the statutory scheme." *Id.* (quoting *Hyatt*, 908 F.3d at 1171). As we explained in *NTPSA I*, the presumption of reviewability is particularly strong where the claim is that agency action was taken in excess of delegated authority. *Id.* "The assertion that a statute bars substantial statutory and constitutional claims is 'an extreme position.'" *Id.* (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 680-81, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986)).

"When interpreting a statute, we are guided by the fundamental canons of statutory construction and begin with the statutory text." *United States v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015). "We interpret statutory terms in accordance with their ordinary meaning, unless the statute clearly expresses an intention to the contrary." *Id.* "We must 'interpret the statute as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'" *Id.* (quoting *Boise Cascade Corp. v. United States E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991) (citation modified)). "Our analysis can begin and end with [the statutory] text." *Bottinelli v. Salazar*, 929 F.3d 1196, 1199 (9th Cir. 2019).

The Government argues that the plain text of the statute "forecloses judicial review of 'any' TPS 'determinations,' regardless of the kind of challenge to the determination." In the Government's view, the statute's use of "determination" means that *any* "decision" related to a TPS designation, extension, or termination by the Secretary is entirely unreviewable. As we explained in *NTPSA I*, however, the scope and "extent of statutory authority granted to the Secretary is a first order question that is not a 'determination . . . with respect to the designation, or termination or extension' of a country for TPS." 150 F.4th at 1017 (quoting § 1254a(b)(5)(A)). Thus, the plain language of the statute does not bar judicial review of challenges to the Secretary's statutory authority.

If Congress had intended the statute to preclude judicial review of all the Secretary's actions, it could have used broader language. In *McNary v. Haitian Refugee Center, Inc.*, the Supreme Court considered the scope of the judicial review bar in 8 U.S.C. § 1160(e)(1), a provision of the Immigration Reform and Control Act of 1986 ("IRCA") which provided that "[t]here shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 498 U.S. 479, 491-92, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991). The Court rejected the argument that the statute operated as a total bar, holding that "had Congress intended the limited review provisions . . . to encompass challenges to [Immigration and Naturalization Service] procedures and practices, it could easily have used broader statutory language," such as language precluding review of "all causes . . . arising" under the IRCA, or of "all questions of law and fact." *Id.* at 494, 111 S. Ct. 888.

Similarly, in *Reno v. Catholic Social Services, Inc.*, the Court addressed a challenge to the INS's narrow interpretation of a provision of the IRCA determining eligibility for a temporary resident to apply for permanent status. 509 U.S. 43, 47, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993) ("*CSS*"). The Court rejected the Government's argument that another judicial review bar in the IRCA, which precluded "judicial review of a determination respecting an application for adjustment of status," 8 U.S.C § 1255a(f)(1), precluded judicial review of plaintiffs' statutory interpretation claim, *id.* at 55, 113 S. Ct. 2485. In both *McNary* and *CSS*, the Court concluded that the judicial review bars did not apply to challenges to a "practice or procedure employed in making decisions." *CSS*, 509 U.S. at 56, 113 S. Ct. 2485 (quoting *McNary*, 498 U.S. at 492, 111 S. Ct. 888). Applying *McNary* and *CSS* to the case at hand, it is clear that § 1254a(b)(5)(A)'s bar on judicial review of "any determination . . . with respect to the designation, or termination or extension" cannot apply to a claim that the Secretary exceeded her statutory authority.[8]

Moreover, the Government's interpretation produces absurd results. *See United States v. LKAV*, 712 F.3d

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[8] Indeed, our holding is much more modest than *McNary* and *CSS*. We decide only that a challenge to the Secretary's statutory authority is reviewable. We save for another day whether other aspects of Plaintiffs' APA challenges would be reviewable under the TPS statute.

436, 440 (9th Cir. 2013) (the canon against absurdity provides that "[s]tatutory interpretations which would produce absurd results are to be avoided" (citation omitted)). As we explained in *NTPSA I*, "the TPS statute limits each TPS designation period to between six and eighteen months, but holding that we lack jurisdiction to review questions of statutory interpretation would make unreviewable a Secretary's decision to authorize a statutorily prohibited thirty-year TPS period." 150 F.4th at 1018 n.7 (internal citation omitted). When confronted with this reality at oral argument, the Government argued that "the review bar would cover" a challenge to a thirty-year TPS designation and that "Congress would have expected" the bar to apply in this manner. If that's true, then it's difficult to see why Congress bothered to limit the period of a designation at all, or why it included any of the statute's other procedural and substantive limits on the Secretary's authority. *See Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635, 132 S. Ct. 2034, 182 L. Ed. 2d 955 (2012) (the "canon against surplusage . . . favors that interpretation which *avoids* surplusage").

The Government characterizes the nature of Plaintiffs' APA claims at a high level of generality: because Plaintiffs challenge the Secretary's vacatur, they challenge a decision about a TPS designation; and because a decision about a TPS designation is the same as a "determination . . . with respect to the designation, or termination or extension of a designation, of a foreign state," the review bar applies. Yet there is no limiting principle to the Government's argument. For example, if a Secretary decided to sell TPS designations, that decision would be unreviewable under the Government's interpretation because that action could be characterized as a decision about a TPS designation. The same is true for a Secretary's decision to limit TPS designations to countries with perceived favored racial or ethnic populations. As we have explained, the TPS statute was designed to constrain executive authority by adding guardrails to the unchecked power of administrations over the EVD program. *See NTPSA I*, 150 F.4th at 1017-18. It was not meant to be a blank check.

Section 1254a(b)(5)(A) simply cannot bear the weight of the Government's expansive interpretation. And the Government's arguments are certainly insufficient to overcome the strong presumption of judicial reviewability that applies in this case. *See Hyatt*, 908 F.3d 1165, 1170-71. We hold that § 1254a(b)(5)(A) does not bar judicial review of a claim that the Secretary exceeded her statutory authority. Because we resolve this case on that basis alone, we need not decide whether other types of APA challenges would be subject to the statute's review bar.

B. 8 U.S.C. § 1252(f)(1) – Impermissible Restraint

8 U.S.C. § 1252(f)(1), as enacted in the Immigration and Naturalization Act,[9] provides that:

> In general. Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter

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[9] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Div. C, § 306(a)(2), 110 Stat. at 3009-611-12 (1996); *See NTPSA I*, 150 F.4th at 1018 n.8 (noting that "[w]e rely on the enacted text, which differs slightly from the U.S. Code version located at 8 U.S.C. § 1252").

> 4 of title II [8 U.S.C. §§ 1221 et seq.], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

The district court set aside the Secretary's vacatur under § 706 of the APA. Under that provision, a reviewing court may "hold unlawful and set aside agency action" where that action is "found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). On appeal, the Government argues that relief under § 706 "impermissibly restrains the Secretary from exercising her authority under the TPS statute, compels the expenditure of finite governmental resources implementing TPS designations that are contrary to the national interest, and precludes Executive officials from enforcing immigration laws in the way the Executive Branch deems appropriate," in violation of 8 U.S.C. § 1252(f)(1). We rejected an identical challenge to the district court's postponement of the Secretary's vacatur under § 705 of the APA in *NTPSA I*, 150 F.4th at 1018-19. For similar reasons, we conclude that set-aside relief under § 706 is not barred by 8 U.S.C. § 1252(f)(1).[10]

*i. Prior Authority*

We previously explained that two opinions of our court —*Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003) and *Rodri-*

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[10] While the principles of *Immigrant Defenders Law Center v. Noem*, 145 F.4th 972, 990-91 (9th Cir. 2025), counsel in favor of this holding, unlike in *NTPSA I*, we do not view *Immigrant Defenders* as controlling.

*guez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010)—supported our holding that § 1252(f)(1) does not bar courts from issuing relief under the APA. *NTPSA I*, 150 F.4th at 1018-19. *Ali v. Ashcroft* was subsequently vacated on unrelated grounds, *see Ali v. Gonzales*, 421 F.3d 795, 796 (9th Cir. 2005), but we adopt our reasoning that "[w]here . . . a petitioner seeks to enjoin conduct that . . . is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated." 346 F.3d at 886; *see also Rodriguez*, 591 F.3d at 1120 (reaffirming *Ali v. Ashcroft*'s holding).

The Government also argues that we erred in *NTPSA I* by relying on *Rodriguez*, because the Supreme Court remanded *Rodriguez* to "decide whether [we] continue[d] to have jurisdiction despite 8 U.S.C. § 1252(f)(1)." *See Jennings v. Rodriguez*, 583 U.S. 281, 312, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018). But the Government omits that the Supreme Court acknowledged and declined to overrule our holding that § 1252(f)(1) "did not affect [our] jurisdiction over . . . *statutory* claims because those claims did not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes.'" *Id.* at 313, 138 S. Ct. 830 (quoting *Rodriguez*, 591 F.3d at 1120). *Jennings* noted that "[t]his reasoning does not seem to apply to an order granting relief on *constitutional* grounds," and therefore remanded the case to consider "whether [we] may issue classwide injunctive relief based on [the] constitutional claims." *Id.* (emphasis added). The Court further acknowledged our power to issue declaratory relief, even as to the constitutional claims. *Id.*

This case is several steps removed from *Jennings*. In this appeal, we consider Plaintiffs' statutory claims, not their constitutional claims. We do not consider an injunction, but rather set-aside relief under the APA. We conclude, therefore, that *Rodriguez* remains good law on this question.

*ii. Plain Meaning*

Even if we were starting from scratch, we would still hold that set-aside relief under APA § 706 does not "enjoin" or "restrain" the Secretary's actions in violation of § 1252(f)(1). Set-aside relief under § 706 does not violate § 1252(f)(1) because the plain text of § 1252(f)(1)'s judicial review bar is limited to injunctive relief, and § 706 set asides are not injunctions. *See Trump v. CASA*, 606 U.S. 831, 847 n.10, 145 S. Ct. 2540, 222 L. Ed. 2d 930 (2025) (distinguishing between universal injunctions and relief under the APA, the latter of which the opinion expressly declined to reach); *id.* at 873, 145 S. Ct. 2540 (Kavanaugh, J., concurring) (noting that "setting aside or declining to set aside an agency rule under the APA" remained an available remedy to district courts in lieu of a universal injunction).

The plain meaning of § 1252(f)(1) confirms our reading. In *Garland v. Aleman Gonzalez*, the Supreme Court explained that the statute's use of "enjoin" refers to "an 'injunction,' which is a judicial order that 'tells someone what to do or not to do.'" 596 U.S. 543, 549, 142 S. Ct. 2057, 213 L. Ed. 2d 102 (2022) (quoting *Nken v. Holder*, 556 U.S. 418, 428, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)).[11] On the other hand, "'restrain' sometimes

[11] Although the clear holding of *Aleman Gonzalez* is that § 1252(f)(1) applies only to injunctions, the Court was careful not

has a 'broad meaning' that refers to judicial orders that 'inhibit' particular actions, and at other times it has a 'narrower meaning' that includes 'orders that stop (or perhaps compel)' such acts." *Id.* (quoting *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 12-13, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015)). Because the "object of the verbs 'enjoin or restrain' is the operation of certain provisions of federal immigration law" which "charge the Federal Government with the implementation and enforcement of the immigration laws governing the inspection, apprehension, examination, and removal of aliens," the Court concluded that § 1252(f)(1) is "best understood to refer to the Government's efforts to *enforce or implement*" these statutes. *Id.* at 549-50, 142 S. Ct. 2057 (citation modified). Accordingly, "§ 1252(f)(1) generally prohibits lower courts from entering injunctions that *order federal officials to take or to refrain from taking actions* to enforce, implement, or otherwise carry out the specified statutory provisions." *Id.* at 550, 142 S. Ct. 2057 (emphasis added); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481, 119

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to reach the issue of whether relief under APA § 705 and § 706 amounted to an injunction. *Id.* Concurring in part, Justice Sotomayor wrote that "the Court does not purport to hold that § 1252(f)(1) affects courts' ability to 'hold unlawful and set aside agency action, findings, and conclusions' under the Administrative Procedure Act." *Id.* at 571, 142 S. Ct. 2057 (quoting 5 U.S.C. § 706) (Sotomayor, J., concurring). Justice Barrett, joined by Justices Thomas, Alito, and Gorsuch, wrote just a few weeks later that the Court was "avoid[ing] a position on whether § 1252(f)(1) prevents a lower court from vacating or setting aside an agency action under the Administrative Procedure Act," which was a "complex" question that should be first addressed by the lower courts. *Biden v. Texas*, 597 U.S. 785, 839-40, 142 S. Ct. 2528, 213 L. Ed. 2d 956 (2022) (Barrett, J., dissenting).

S. Ct. 936, 142 L. Ed. 2d 940 (1999) ("By its plain terms, and even by its title, [§ 1252(f)(1)] is nothing more or less than a limit on injunctive relief.").

"When Congress enacted the APA in 1946, the phrase 'set aside' meant 'cancel, annul, or revoke.'" *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 829, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (Kavanaugh, J., concurring) (quoting Black's Law Dictionary 1612 (3d ed. 1933)). As Justice Kavanaugh explained, the vacatur or set aside of agency action under the APA is a distinct remedy from an injunction. *Id.* at 828, 144 S. Ct. 2440. Textually, it would be difficult to square the plain meaning of a "set aside"—to "cancel, annul, or revoke"—with the plain meaning of an injunction—"a judicial order that 'tells someone what to do or not to do.'" *Compare id.* at 829, 144 S. Ct. 2440 *with Aleman Gonzalez*, 596 U.S. at 549, 142 S. Ct. 2057 (quoting *Nken*, 556 U.S. at 428, 129 S. Ct. 1749).

Moreover, a set aside is functionally identical to a vacatur, which we have already held falls outside the scope of § 1252(f)(1). In *Immigrant Defenders*, 145 F.4th at 990, we agreed with the Fifth Circuit that unlike an injunction, vacatur "does nothing but re-establish the status quo absent the unlawful agency action," *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022). Most significantly, "[a]part from the constitutional or statutory basis on which the court invalidated an agency action, vacatur neither compels nor restrains further agency decision-making." *Texas*, 40 F.4th at 220. Because set asides and vacaturs operate in a functionally identical manner in this respect, set asides are no more like injunctions than are vacaturs. *See Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 28 n.8 (9th Cir. 2025) (acknowledging the similarity of a set aside and vacatur under the APA).

By its plain terms, a set aside does not affect the Government's future actions. It merely declares that a past agency action was unlawful and returns the world to the status quo, before that unlawful action. Here, Secretary Noem remains free to terminate TPS within the confines of the TPS statute. A set aside under § 706 of the APA does not enjoin or restrain the Secretary from doing anything. *Aleman Gonzalez*, 596 U.S. at 548-49, 142 S. Ct. 2057. Secretary Noem is free to "enforce, implement, or otherwise carry out" the TPS statute. *Id.* at 550, 142 S. Ct. 2057. By setting aside the Secretary's vacatur and termination of Venezuela's TPS, the district court did no more than return the country to the status quo. To hold that the narrow limitation of § 1252(f)(1), *see Biden v. Texas*, 597 U.S. at 798, 142 S. Ct. 2528, bars relief under § 706 would nullify the checks Congress placed on the Secretary's authority in the TPS statute. It would also leave no legal recourse for blatant violations of the TPS statute, such as a Secretary's decision to designate a country for TPS for 10 years. Congress did not intend such an absurd result. *See Aleman Gonzalez*, 596 U.S. at 571, 142 S. Ct. 2057 (Sotomayor, J., concurring in part). And, as we explained in *Immigrant Defenders*, "Congress knows . . . how to limit relief under the APA in other statutory schemes," and chose not to do so here. 145 F.4th at 990. Set aside relief under the APA is thus not barred by § 1252(f)(1).

### C. Inherent Vacatur Authority

Finding no support in the TPS statute for her claim of authority to vacate a prior designation or extension, Secretary Noem argues that she has the "inherent authority to reconsider and vacate the TPS extension[ ] for Venezuela." We reject the Secretary's arguments for three reasons. First, an agency may correct clerical or ministerial mistakes but cannot use this authority to smuggle in substantive policy changes. *See, e.g., Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145, 79 S. Ct. 170, 3 L. Ed. 2d 172 (1958). Second, we have been more likely to find inherent authority to reconsider or revoke past agency decisions where Congress has been silent as to the exercise of the authority that the agency purports to possess, *see, e.g., China Unicom (Ams.) Ops. Ltd. v. FCC (CUA)*, 124 F.4th 1128 (9th Cir. 2024), but here Congress spoke clearly as to the Secretary's power to designate, or extend or terminate a designation of, a foreign state for TPS. Third, the remaining authorities on which the Government relies are either readily distinguishable or outright favor the Plaintiffs. As we explained in *NTPSA I*, "the power to do does not necessarily encompass a power to undo. The structure and temporal limitations of the TPS statute protect the important reliance interests of individual TPS holders, and the Government must adhere to these statutory restraints." 150 F.4th at 1021.

*i.* Clerical Errors and Ministerial Mistakes

First, the Supreme Court has endorsed only a limited authority to reconsider or revoke an agency's past actions in the absence of express or implied statutory authority to do so. In *American Trucking*, the Supreme Court held that a "broad enabling statute . . . authorize[d] the correction of inadvertent ministerial errors," and that such power "has long been recognized." 358 U.S. at 145, 79 S. Ct. 170. The Court compared this administrative power to courts' inherent authority "to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake." *Id.* (citing *Gagnon v. United States*, 193 U.S. 451, 24 S. Ct. 510, 48 L. Ed. 745 (1904)). The Court was careful to clarify that "the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies." *Id.* at 146, 79 S. Ct. 170.

The *American Trucking* Court relied on *United States v. Seatrain Lines*, 329 U.S. 424, 67 S. Ct. 435, 91 L. Ed. 396 (1947) and *Watson Bros. Transp. Co. v. United States*, 132 F. Supp. 905 (D. Neb. 1955), *aff'd United States v. Watson Bros. Transp. Co.*, 350 U.S. 927, 76 S. Ct. 302, 100 L. Ed. 810 (1957). In *Seatrain Lines*, the Court held that the Interstate Commerce Commission ("ICC") lacked authority to reconsider a previously granted certificate to transport goods along two water routes where it was "apparent that" the reconsideration was initiated "not to correct a mere clerical error, but to execute [a] new policy." 329 U.S. at 429, 67 S. Ct. 435. Similarly, in *Watson Bros. Transp. Co.*, a three-judge panel of the district court enjoined an attempt by the ICC to limit the scope of a certificate which authorized the transportation of general commodities on certain routes. 132 F. Supp. at 909. The *Watson* court explained that even if the Commission had inherent authority "to correct clerical errors," the ICC had far exceeded that authority by attempting "to revoke and change a certificate duly issued." *Id.*

Relying on these authorities and the lack of any contrary language in the Interstate Commerce Act, the *American Trucking* Court held that the statute permitted "the correction of inadvertent errors," but "not the execution of a newly adopted policy." 358 U.S. at 146, 79 S. Ct. 170. *American Trucking* therefore articulates an exceedingly narrow inherent power: agencies may correct clerical mistakes, but not substantive ones, and may do so only if not prohibited by statute. *Id.*

The Venezuela Vacatur was, by its own terms, a substantive decision. Secretary Noem explained that she was vacating the 2025 Extension "to untangle the confusion" caused by consolidating the filing processes for TPS beneficiaries, and to "provide an opportunity for informed determinations regarding the TPS designations and clear guidance." 90 Fed. Reg. 8805, 8807 (Feb. 3, 2025). The Vacatur notice did not claim that the 2025 Extension contained any clerical error. Instead, the Vacatur was carried out to provide the Secretary the opportunity to "execute [a] new policy." *Seatrain Lines*, 329 U.S. at 429, 67 S. Ct. 435. The power the Secretary claims has no basis in Supreme Court precedent.

*ii.* Congressional Guidance

Second, an agency cannot claim the inherent authority to reconsider or revoke past actions where Congress has addressed the agency's power to do so in the underlying statute. *See NTPSA I*, 150 F.4th at 1019 ("[A]gencies lack the authority to undo their actions where, as here, Congress has spoken and said otherwise."). "Where Congress does not explicitly address the subject, agencies have some authority to reconsider prior decisions." *Id.*

The Government again argues that it has an "implied incidental authority to revoke" past decisions related to a TPS designation, extension, or termination. It analogizes this claimed authority to the implied revocation power we considered in *China Unicom (Americas) Operations Ltd. v. FCC*, 124 F.4th 1128 (9th Cir. 2024). But we have already rejected the Government's analogy to *China Unicom* in *NTPSA I*, and the Government offers no compelling argument for holding otherwise. 150 F.4th at 1019-20.

In *China Unicom*, we held that the Communication Act of 1934's silence on the Federal Communication Commission's ("FCC") ability to revoke telecommunications certificates, combined with the fact that the certificates were issued for an indefinite period, weighed in favor of finding an implied power of revocation. 124 F.4th at 1148. Significantly, we contrasted the unlimited duration of telecommunications certificates with the fixed, eight-year renewable period for broadcast licenses under the Act, finding that while the former situation supported a finding of inherent revocation authority, the latter did not. *Id.* ("The use of a fixed term is thus affirmatively inconsistent with positing an implied power to revoke a license at any time," while "[b]y contrast, . . . silence on the temporal duration of common-carrier certificates, which have traditionally been open-ended in length, is a factor that weighs in *favor* of an implied power of revocation."). Because the TPS statute permits designations for only a maximum of an 18-month period and provides an explicit process for terminating a designation, *China Unicom* hurts, rather than helps, the Government. *See* § 1254a(b)(2)(B).

The Government next points us to *Haig v. Agee*, in which the Supreme Court held that the Secretary of State had inherent authority to revoke a passport due to national security concerns where the Passport Act was silent on the Secretary's authority to revoke a passport.

453 U.S. 280, 290, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981). The Court relied on a presumption that "in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval." *Id.* at 291, 101 S. Ct. 2766. *Haig* answered only the narrow question of whether the Secretary of State could revoke a single individual's U.S. passport, while still providing "a statement of reasons and an opportunity for a prompt post-revocation hearing." *Id.* at 310, 101 S. Ct. 2766. And, just as in *China Unicom*, the key in *Haig* was Congress' silence on the matter.

Because Congress provided an explicit procedure for terminating a TPS designation, we cannot contravene Congressional intent by permitting the Secretary to exercise an unchecked and standardless vacatur power devoid of any of those statutory procedures. Congress provided the Secretary with two avenues if she disfavors a TPS designation. First, she can withdraw TPS status granted to an individual noncitizen for a variety of reasons, *see* § 1254a(c)(2)(B), including national security concerns, *see* § 1158(b)(2)(A). Second, because TPS designations are temporally limited, the Secretary can terminate a country's TPS, effective upon the expiration of the current TPS designation period. *See* § 1254a(b)(3)(B). Congress clearly knew how to authorize the Secretary to withdraw a prior designation or extension. Indeed, it authorized the Secretary to "withdraw temporary protected status granted to" individual foreign nationals under certain conditions. *See* § 1254a(c)(3). But it provided a different procedure for terminating a TPS designation.

The TPS statute is simply not silent as to the Secretary's remedies if she disfavors a TPS designation. The Secretary seeks to exercise authority that Congress chose not to grant her.[12] If the Secretary believes that she should be entitled to unchecked power in the administration of the TPS statute, it is Congress, not the courts, to whom that argument should be directed.

*iii.* Other Authority

Third, the Government argues, citing several out-of-circuit cases, that an "administrative agency has inherent or statutorily implicit authority to reconsider and change a decision if it does so within a reasonable period of time if Congress has not foreclosed this authority by

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[12] At oral argument, the Government insisted that it must have the inherent power to vacate a prior determination because otherwise, "a plainly erroneous assessment of country conditions . . . can't be fixed by the Secretary." The Government misses the purpose of the statute. TPS determinations were designed to "provide stability for those with temporary status by insulating them from shifting political winds." *NTPSA I*, 150 F.4th at 1023. As written, the TPS statute does not allow for the revocation of designations or extensions based on mere disagreements between administrations over the proper assessment of country conditions evidence. *Id.* Indeed, the statute provides that, upon finding certain conditions in a foreign state, the Secretary "*may* designate [the] foreign state" for TPS. § 1254a(b)(1) (emphasis added). Congress recognized and expressly allowed for the possibility that the Secretary might determine that a set of circumstances present the "extraordinary and temporary conditions" that justify designating a country for TPS, while a subsequent Secretary would draw the opposite conclusion. § 1254a(b)(1)(C). Such is the nature of discretion. The fact that a subsequent administration may have strong disagreements with its predecessor as to the proper assessment of country conditions, and therefore be stuck with a designation with which it disagrees, is a feature, not a bug, of the statute.

requiring other procedures." But none of these authorities suggest that such a power could be used to enact sweeping policy changes despite clear language in the statute to the contrary.

We previously concluded that *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014), favored the Plaintiffs' argument rather than the Government's. *See NTPSA I*, 150 F.4th at 1020. As then-Judge Kavanaugh explained, although "administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion," this "inherent reconsideration authority does not apply in cases where Congress has spoken." 767 F.3d at 86.

In *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977), the D.C. Circuit acknowledged an agency's power to reinstate an employee after concluding that the initial termination procedure violated the employee's procedural due process rights. In our view, however, the ability of an agency to reconsider the termination of a single employee due to an unconstitutional initial process is not analogous to the situation at hand. The Government does not argue that Secretary Mayorkas acted unconstitutionally with respect to the 2025 Extension determination.

In *Belville Mining Co. v. United States*, the Sixth Circuit suggested in dicta that the inherent "power to correct inadvertent ministerial errors," might permit the reconsideration of prior action that was affected by "serious procedural and substantive deficiencies." 999 F.2d 989, 998 (6th Cir. 1993). However, the Sixth Circuit specifically distinguished those circumstances from a situation in which the agency "was attempting to change existing policy rather than to correct [an] erroneous . . . determination[ ].” *Id.* Here, as we have explained, it is indisputable that the Secretary vacated the 2025 Extension in an attempt to change existing policy because of the Trump Administration’s immigration priorities.

The Government’s remaining authorities are similarly distinguishable. *Macktal v. Chao* held narrowly that an Administrative Law Judge’s (“ALJ”) order of attorney’s fees could be reconsidered where a party’s brief had been misaddressed and thus not considered by the ALJ. 286 F.3d 822, 824-25 (5th Cir. 2002). *Albertson v. F.C.C.* held that where a statutory right to file a motion to reconsider and appeal a decision of the agency existed, the agency had the implied power to reconsider its decision during the statutory appeal period of twenty days. 182 F.2d 397, 399 (D.C. Cir. 1950). Lastly, in *The Last Best Beef, LLC v. Dudas*, the Fourth Circuit held that the U.S. Patent and Trademark Office had the inherent authority to cancel trademarks for a phrase after a subsequent act of Congress prohibited the phrase from being trademarked. 506 F.3d 333, 340-41 (4th Cir. 2007). These cases are several steps removed from the facts at hand, and do not lend support to the Government’s argument.

At best, *Mazaleski*, *Ivy Sports Medicine*, *Belville*, *Macktal*, *Albertson*, and *Last Best Beef* support the proposition that administrative agencies have the inherent authority to revisit determinations as to individuals, but not as to broad policy decisions. For example, had the TPS statute not provided a mechanism for withdrawing TPS protections from individual foreign nationals, this line of authority, were we to adopt it, might support the Government's claim of inherent authority to do so. But there is simply no argument that the same authority can be read to permit broad policy changes to be smuggled in through vacatur when Congress has expressly declined to grant that authority to the Secretary. *Am. Trucking*, 358 U.S. at 146, 79 S. Ct. 170.

The Secretary lacks the inherent authority to revoke or reconsider a prior designation, or extension or termination of a designation, of TPS to a foreign state.

D. Venezuela Vacatur – Lack of Statutory Authority

Because the Secretary has no express, implied, or inherent power to vacate a prior TPS designation, or extension or termination of a designation, the district court correctly "[held] unlawful and set aside" the Vacatur on the grounds that it was "in excess of statutory . . . authority." 5 U.S.C. § 706(2).

The Government offers one final argument: because § 1254a(b)(3)(B), which defines the Secretary's authority to terminate a TPS designation, applies only to an active designation, the statute is silent as to the Secretary's authority to vacate an extension that has not yet taken effect. Specifically, the Government argues that because the 2025 Extension would cover a period from April 3, 2025, to October 2, 2026, but the TPS statute only provides a mechanism for canceling a currently effective designation, the Secretary's February 3, 2025, vacatur of the 2025 Extension was not contrary to Congress's intent. That argument fails for several reasons.[13]

[13] We express some reservations about the Government's interpretation of the statute. While § 1254a(b)(3)(A) requires the Government to "consult[ ] with appropriate agencies of the Govern-

First, as we have already explained, the 2025 Extension was effective as of January 17, 2025, because the reregistration period opened as of that date and the filing processes for the 2021 and 2023 Venezuela Designations were immediately consolidated. *See NTPSA I*, 150 F.4th at 1024 n.12. Indeed, the Secretary's vacatur notice acknowledged that the 2025 Extension "ha[d] been in effect" and that vacatur would "restore the status quo preceding [the] notice." 90 Fed. Reg. 8805, 8807 (Feb. 3, 2025).

Second, § 1254a(b)(2)(B) provides that a "designation of a foreign state . . . shall remain in effect until the effective date of the termination of the designation under paragraph (3)(B)." This language would not only be superfluous if the Secretary had the power to vacate a prior designation or extension of TPS, but such a power would also directly contradict this subparagraph.

Third, the TPS statute contemplates that an extension or termination of an existing designation will take effect during the period of designation preceding the extension or termination. In other words, because an extension must be published in the Federal Register while the "designation is in effect," and "[a]t least 60 days be-

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ment" and "review the conditions in the foreign state . . . for which a designation is in effect" before "determin[ing] whether the conditions for such designation . . . continue to be met," it is not clear that this review must occur during the most recent period of extension. Indeed, even if the Secretary determines that a condition for designation continues to be met, an extension of TPS is discretionary. As such, the Secretary might have been able to, after following the appropriate procedures, terminate Venezuela's TPS designation in February 2025, effective as of the expiration of the 2025 Extension (October 2026). Nevertheless, we decline to resolve this issue today.

fore end of the [current] period of designation," there will always be a period of time after the Secretary has announced an extension, but before the period of extension commences. § 1254a(b)(3)(A). Similarly, a termination cannot be "effective earlier than 60 days after . . . [publication in the Federal Register] or, if later, the expiration of the most recent previous extension." § 1254a(b)(3)(B). The Government's suggestion that it could change its mind during this period would contravene the entire purpose of such a notice period. *Id.*

We conclude that there is no explicit, implied, or inherent authority to vacate a prior TPS determination. The Secretary exceeded her authority under the TPS statute, and the district court properly set aside the Venezuela Vacatur. Because that conclusion resolves this claim, we decline to reach the remainder of Plaintiffs' APA challenge.

### VII. Venezuela Termination

A. <u>8 U.S.C. § 1254a(b)(5)(A) – Judicial Review Bar</u>

For the same reasons already stated, we hold that the judicial review bar in § 1254a(b)(5)(A) does not preclude us from reviewing Plaintiffs' claim that the Secretary acted in excess of her statutory authority by terminating the 2025 Extension.

B. <u>8 U.S.C. § 1252(f)(1) – Impermissible Restraint</u>

The district court set aside Secretary Noem's termination of the 2025 Extension under APA § 706. As we have already explained, § 1252(f)(1) does not apply to set aside relief.

C. Venezuela Termination – Lack of Statutory Authority

The TPS statute explicitly provides that a "designation of a foreign state . . . shall remain in effect until the effective date of the termination of the designation under paragraph (3)(B)." § 1254a(b)(2)(B). The statute sets forth a specific procedure that the Secretary must follow to terminate a TPS designation or extension. § 1254a(b)(3)(B). Importantly, even if all statutory procedures are followed, a termination cannot be effective earlier than "the expiration of the most recent previous extension." *Id.*

As of January 17, 2025, Venezuela's TPS was extended through October 2, 2026. Secretary Noem acted in excess of her statutory authority when she purported to vacate the 2025 Extension, and that Extension therefore remained in effect when she attempted to effectuate the Venezuela Termination. Congress could not have been clearer: the Secretary could terminate Venezuela's TPS with at least sixty days' notice and with an effective date no earlier than October 2026. *See NTPSA II*, at 1022 n.9 ("By codifying the TPS statute, Congress . . . balanced predictability and stability with temporal limits—TPS holders can rely on the security of their status but only for a limited period of time. And, the [Secretary] may terminate that status, but only with sixty days' notice and not prior to the expiration of the current designation."). That is the beginning and end of the inquiry.

We hold that Secretary Noem exceeded her authority under the TPS statute by attempting to terminate Venezuela's TPS, as extended by the 2025 Extension. Because the 2025 Extension remains in effect until October 2, 2026, Secretary Noem's attempt to terminate Venezuela's TPS with an effective date of April 7, 2025, violated the plain text of the TPS statute. *See* § 1254a(b)(3)(B) (a termination cannot be effective earlier than "the expiration of the most recent previous extension"). The Venezuela Termination was predicated on and inextricably intertwined with the Venezuela Vacatur; therefore, the illegality of the Vacatur must be fatal to the Termination. Because, again, that conclusion resolves this claim, we decline to reach the remainder of Plaintiffs' APA challenge.

**VIII. Haiti Partial Vacatur**

Plaintiffs' challenge to the Haiti Partial Vacatur overlaps substantially with their challenge to the Venezuela Vacatur. For the same reasons already stated, § 1254a(b)(5)(A) does not bar any aspect of our review of the Haiti Partial Vacatur. And, again for the same reasons stated, the district court's grant of set aside relief does not violate § 1252(f)(1).

As to the merits, Secretary Noem lacked the statutory authority to partially vacate Secretary Mayorkas's July 2024 extension of Haiti's TPS for the same reasons that she lacked the authority to entirely vacate Secretary Mayorkas's January 2025 extension of Venezuela's TPS. Although the Secretary has discretion to determine whether a foreign state's TPS should be extended for a period of six, twelve, or eighteen months, nothing in the statute permits the Secretary to reduce the period of extension at a later date. *See* § 1254a(b)(3)(C). As we have already explained, such a power would displace the carefully designed TPS termination procedures that Congress chose to proscribe in the statute. *See* § 1254a(b)(3)(B). It would defy logic to read such a significant loophole into the statute absent corresponding Congressional intent, and we decline to do so here.

Secretary Noem exceeded her statutory authority by partially vacating Haiti's TPS. Accordingly, the district court did not err by setting aside the Haiti Partial Vacatur. Because, again, that conclusion resolves this claim, we need not reach the remainder of Plaintiffs' APA challenge.

**IX. Universal Relief**

The Government argues that the district court abused its discretion by granting "universal vacatur extending to non-parties." We acknowledge that there are difficult and unanswered questions related to the limits of APA relief under *Trump v. CASA, Inc.*, 606 U.S. 831, 145 S. Ct. 2540, 222 L. Ed. 2d 930 (2025). *CASA* declined to reach these questions, though Justice Kavanaugh suggested that district courts retained the ability to "set aside an agency rule under the APA," even if such relief would be the "functional equivalent of a universal injunction." *Id.* at 873, 145 S. Ct. 2540 (Kavanaugh, J., concurring); *see also id.* at 847 n.10, 145 S. Ct. 2540 ("Nothing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action." (citing 5 U.S.C. § 706(2)). We need not resolve this question for our circuit.

As we have already twice explained, Plaintiffs complain of "injuries for which it is all but impossible for courts to craft relief that is complete *and* benefits only the named [P]laintiffs." *Id.* at 852 n.12, 145 S. Ct. 2540; *see also NTPSA II*, 2025 WL 2661556 at *6 ("[I]t is impossible to structure relief on an individual basis or to impose any relief short of nationwide set asides under

APA § 706 of Secretary Noem's vacatur and termination of Venezuela's [and Haiti's] TPS."); *NTPSA I*, 150 F.4th at 1028 (explaining that postponement was the "only remedy that provides complete relief to the parties before the court and complies with the TPS statute"). Relief cannot be limited to NTPSA's members because Plaintiffs do not simply challenge the application of the vacaturs or termination to them, they challenge the Secretary's very authority to act. *Id.* Because the Secretary lacked authority to act in the manner that she did, the proper remedy under APA § 706(2) is to set aside her actions and restore the status quo.

The Government proposes that we "limit [relief] to Plaintiffs and their members at the time their complaint was filed." The Government makes no attempt to explain how such an order could be enforced. The National TPS Alliance has more than 84,000 members in all fifty states and the District of Columbia. *NTPSA I*, 150 F.4th at 1028. Would members need to carry a National TPS Alliance membership card? Would they need to provide evidence that they joined the organization at the appropriate time? If so, how? By signing a declaration? Subjecting themselves to interrogation? The Government has no answer to these questions. It would be impossible to grant complete relief to the Plaintiffs short of a full set aside of the Secretary's unlawful Venezuela Vacatur, Venezuela Termination, and Haiti Partial Vacatur. *CASA*, 606 U.S. at 852, 145 S. Ct. 2540.

Lastly, we reject the Government's argument that "[t]he challenged order exemplifies the significant problem created when an organization—like Plaintiff NTPSA—litigates based on speculative harms or generalized grievances rather than *actual injury.*" The harms caused by the abrupt and unexpected vacaturs and termination are not speculative. As we have explained, foreign nationals with TPS who, absent the Secretary's unlawful actions, would be protected from deportation and could receive work authorization, have suffered immense harms that are both concrete and particularized. The record is replete with stories of mothers separated from their children (many of whom are U.S. citizens); families struggling to make ends meet after losing the support of the breadwinner; and hardworking people who become homeless or are left to live day-to-day after losing their jobs as preschool teachers, automotive mechanics, warehouse and grocery store employees, and day laborers.[14] Others have been detained for months or weeks in squalid, overcrowded facilities, where they are forced to sleep on the ground, aren't given enough water to drink, and are deprived of the ability to contact their family or attorney for days or weeks at a time. There are stories of detainees being moved repeatedly from facility to facility and eventually being deported, despite the attempts of their attorneys and families to advocate for them and the fact that they have pending asylum applications. Hundreds of thousands of TPS holders are living in a state of constant fear, wondering whether they will be next to be detained and deported to a place where the Government prom-

[14] Indeed, "[t]he real people affected by the Secretary's actions are spouses and parents of U.S. citizens, neighbors in our communities, and contributing members of society who have 'lower rates of criminality and higher rates of college education and workforce participation than the general population.'" *NTPSA II*, 2025 WL 2661556, at *1 (quoting *Nat'l TPS Alliance v. Noem*, 798 F. Supp. 3d at 1157-58).

ised—at least temporarily—it would not send them. If these are not actual injuries, what are?

The district court did not abuse its discretion by setting aside each of the Secretary's unlawful Venezuela Vacatur, Venezuela Termination, and Haiti Partial Vacatur in full.

### X. Conclusion

Congress designed the TPS statute, carefully and deliberately, to restrain the Secretary's authority to designate, or extend or terminate an existing designation of, a foreign nation for TPS. The statute contains numerous procedural safeguards that ensure individuals with TPS enjoy predictability and stability during periods of extraordinary and temporary conditions in their home country. But the statute contemplates that this stability would last only a short while: the protective guarantees of TPS are subject to termination at most every 18 months. At bottom, this case comes down to the Secretary's failure to conform to the strictures of the TPS statute. The Secretary attempted to exercise powers Congress simply did not provide under the statute. Because that conclusion resolves this case in full, we need not, and do not, reach any other aspects of Plaintiffs' claims.

**AFFIRMED.**[15]

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[15] Because of the exigencies presented by this case, the mandate shall issue seven days after the publication of this decision. *See* Fed. R. App. P. 41; 9th Cir. Gen. Ord. 4.6.

MENDOZA, Circuit Judge, with whom WARDLAW, Circuit Judge, joins as to Parts I and II, concurring:

I wholeheartedly agree with Judge Wardlaw's opinion and its conclusion that Secretary of Homeland Security Kristi Noem exceeded her authority under 8 U.S.C. § 1254a when she vacated and terminated Temporary Protected Status ("TPS") for Venezuela and Haiti. I believe Judge Wardlaw's explanation is sufficient to dispose of this case.

However, I write separately to underscore why we must not permit government agencies to justify their actions with pretext, especially when that pretext is cloaking animus on the basis of race or national origin. When decision-makers repeatedly broadcast their impermissible reasons for making a decision, we should heed the fitting words of Maya Angelou and "believe them the first time." Maya Angelou, Oprah Winfrey Show (Harpo Productions broadcast, June 18, 1997). And as the Supreme Court cautions, we cannot allow agencies to eschew their obligation to engage in reasoned decision-making and instead use administrative procedure to reach preordained outcomes. I therefore author this concurrence to explain why the Secretary's actions would not stand had we reached the merits of Plaintiffs' Administrative Procedure Act ("APA") claims.

I.

Although I focus on the inexplicable procedures, reasoning, and animus underlying the Secretary's vacatur actions, the question of judicial reviewability is foundational and must be resolved before reaching the merits of Plaintiffs' APA claims.

Contrary to the Government's assertion, neither 8 U.S.C. § 1254a(b)(5)(A) nor 8 U.S.C. § 1252(f)(1) bars judicial review of whether the Secretary's vacatur actions were arbitrary and capricious. Section 1254a(b)(5)(A) narrowly bars review of "determination[s] . . . with respect to the designation, or termination or extension of a designation, of a foreign state," *not* of a claimed vacatur power (which exceeds the Secretary's authority).[1] *See Nat'l TPS All. v. Noem*, 150 F.4th 1000, 1018-19 (9th Cir. 2025). To assume that § 1254a(b)(5)(A) would apply to even non-existent powers falling outside the scope of congressionally defined TPS procedures would lead to absurd outcomes whereby the Secretary would be free to disregard the binding text of the TPS statute while simultaneously being insulated from judicial review. *See* 8 U.S.C. § 1254a(b)(3)(B) (dictating that a termination of a TPS designation "*shall* not be effective earlier than 60 days after the date the notice is published or, *if later*, the expiration of the most recent previous extension under subparagraph (C)." (emphases added)).[2]

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[1] To further reiterate, even *if* the Secretary had some implied or inherent power to vacate a prior TPS designation (which she does not), I would find that her power falls outside the narrow bounds of the statutory bars on judicial review. In the context of the TPS statute, vacatur is *not* a "determination ... with respect to the designation, or termination or extension of a designation, of a foreign state." 8 U.S.C. § 1254a(b)(5)(A). We may therefore reach the merits of Plaintiffs' APA claims even *if* we assumed that the Secretary had an implied or inherent vacatur power.

[2] Imagine that the Secretary extended a TPS designation for 100 months, in contravention of § 1254a(b)(3)(C)'s mandate that TPS extensions will last "for an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months)." Would prospective plaintiffs be barred from raising an APA claim

Section 1252(f)(1) also does not bar courts from reviewing the Secretary's vacatur actions because that provision similarly does not apply to manufactured acts of vacatur that exceed the Secretary's authority. *Ali v. Ashcroft*, 346 F.3d 873, 886-87 (9th Cir. 2003), *opinion withdrawn on denial of reh'g sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005), *as amended on reh'g* (Oct. 20, 2005); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1119-21 (9th Cir. 2010) (narrowing the scope of the terms "enjoin or restrain" in light of other, more expansionary, phrases found in other statutes), *abrogated on other grounds by Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022).

And, as Judge Wardlaw explains, set-aside relief under § 706 does not violate § 1252(f)(1) because that bar is limited to *injunctive* relief. APA § 706 relief is distinct from injunctive relief and neither "enjoins" nor "restrains" the Secretary's actions. It simply restores the status quo ante to the time before the Secretary took her unlawful action. Though the Supreme Court has declined to reach this issue, *Garland v. Aleman Gonzalez*, 596 U.S. 543, 142 S. Ct. 2057, 213 L. Ed. 2d 102 (2022), logically supports the conclusion that APA § 706 set-asides are distinct from injunctions, and our sister circuits have essentially held as much. *See, e.g., Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022) ("[A] vacatur does nothing but reestablish the status quo absent the unlawful agency action. Apart from the constitutional or statutory basis on which the court invalidated

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against the Secretary's extension on the grounds that § 1254a(b)(5)(A) bars review of *all* TPS determinations, no matter how brashly those determinations flout the TPS statute?

an agency action, vacatur neither compels nor restrains further agency decision-making.").

Accordingly, the presumption of reviewability governs here, and nothing in these statutes insulates the Secretary's vacatur decisions from APA scrutiny. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 22, 139 S. Ct. 361, 202 L. Ed. 2d 269 (2018) ("The Administrative Procedure Act creates a 'basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" (alteration in original) (quoting *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967))). We are therefore empowered to review agency action for arbitrariness and capriciousness when an agency acts beyond the confines of bars on judicial review or in excess of its authority, as holding otherwise would defy the APA's presumption of reviewability and open the floodgates to unchecked agency action insulated from accountability. *See Salinas v. U.S. R.R. Ret. Bd.*, 592 U.S. 188, 197, 141 S. Ct. 691, 208 L. Ed. 2d 608 (2021) ("To the extent there is ambiguity in the meaning of 'any final decision,' it must be resolved . . . under the 'strong presumption favoring judicial review of administrative action.'" (internal citation omitted)).

Having concluded that no statutory bar on judicial review would shield the Secretary's vacatur actions from our scrutiny, I turn to why those actions would not survive the APA's requirement of reasoned and non-arbitrary decision-making.

## II.

Secretary Noem's vacatur actions would fail on the independent ground that they were arbitrary and capricious in contravention of the APA, as even a cursory review of the record indicates that her decisions were both preordained and rooted in pretext. Courts must be wary of situations in which the record "reveal[s] a significant mismatch between the decision the Secretary [makes] and the rationale [she] provide[s]." *Dep't of Com. v. New York*, 588 U.S. 752, 783, 139 S. Ct. 2551, 204 L. Ed. 2d 978 (2019). In particular, where "the evidence tells a story that does not match the explanation the Secretary [gives] for [her] decision," such that the "stated reason" for a policy change "seems to have been contrived," courts may set aside such action under the APA. *Id.* at 784, 139 S. Ct. 2551.

The APA "instructs reviewing courts to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 771, 139 S. Ct. 2551 (citation omitted). "In order to permit meaningful judicial review, an agency must disclose the basis of its action." *Id.* at 780, 139 S. Ct. 2551 (internal quotation marks and citation omitted). In short, "[o]ur task is simply to ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (internal quotation marks and citation omitted).

The APA's reasoned-explanation requirement exists to "ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Dep't of Com.*, 588 U.S. at 785, 139 S. Ct. 2551. "Accepting contrived reasons" or post hoc rationalizations "would defeat the purpose of the enterprise" of administrative review. *Id.* So while our review of agency action is typically deferential, we are "not required to exhibit a naiveté from which ordinary citizens are free." *Id.* (internal citation omitted). Therefore, when "the evidence tells a story that does not match the explanation the Secretary gave for [her] decision," we must demand "something better than the explanation offered." *Id.* at 784-85, 139 S. Ct. 2551.

This foundational principle of administrative law obliges us to look beyond an agency's purported rationale when that rationale is pretext or a cloak for improper motive. And although judicial review ordinarily focuses exclusively on an agency's contemporaneous record and explanation, it is well established that a court may inquire into the "mental processes of administrative decisionmakers" upon a "strong showing of bad faith or improper behavior." *Id.* at 781, 139 S. Ct. 2551 (citation omitted). In sum, while the APA *does not* license courts to second-guess policy judgments duly entrusted to the executive branch, it *does* require us to police the bounds of reasoned agency decision-making and to set aside actions founded on implausible and illegitimate justifications.

The district court's thorough findings detail multiple, serious defects in the process behind the Secretary's TPS vacatur and termination. First, the Secretary's primary vacatur rationale was unsupported and affirmatively contradicted by Plaintiffs' evidence of past practice. An agency acts arbitrarily and capriciously when it "offer[s] 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." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm*

*Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983).

The Secretary's assertion that the prior administration's 2023 TPS consolidation was "novel," "confus[ing]," or unlawful was based on a fundamental misreading of prior agency action and does not align with the sweeping action taken. As the district court observed, there was nothing novel about streamlining dual TPS extension tracks for the same country, as similar procedures had been used for other countries. As a legal matter, TPS beneficiaries under the 2021 designation were *necessarily* TPS beneficiaries under the 2023 designation. And streamlining tracks tended to eliminate confusion, since it would otherwise be difficult for employers to distinguish between TPS beneficiaries with varying employment authorization document end dates. The Secretary's mischaracterization of the prior TPS consolidation and extension as irregular and confusing was therefore not only entirely unsupported but was affirmatively contradicted by Plaintiffs' evidence of past practice.

Second, the district court correctly determined that the Secretary failed to consider reasonable alternatives or more moderate approaches before resorting to the unprecedented step of vacatur. Agencies must consider feasible alternatives and articulate a rational connection between the facts found and the choice made. *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020) ("*Regents*") ("[W]hen an agency rescinds a prior policy its reasoned analysis must consider the alternative[s] that are within the ambit of the existing [policy]." (alterations in original) (internal quotation marks and citation omitted)).

Here, the Secretary provided no explanation for why simply de-consolidating the prior administration's dual-track filing procedure would not have addressed her concerns of administrative confusion, as opposed to completely nullifying the TPS extensions altogether. Similarly, with respect to her claims that criminals are abusing the TPS system, it is worth noting that the Secretary could have considered simply revoking TPS status for individuals who have committed crimes rather than wiping away thousands of lawful TPS holders' protections. *See* § 1254a(c)(2)(B) (noting that an individual is ineligible for TPS if they have "been convicted of any felony or 2 or more misdemeanors committed in the United States"); § 1254a(c)(3). The complete absence of any consideration of less disruptive options underscores the preordained and pretextual character of the Secretary's decision and the disingenuity of her official reasoning.

Third, as the district court noted, the Secretary ignored the reliance interests of TPS beneficiaries and their families, who have structured their livelihoods around the continuation of TPS under the prior designations and extensions. When an agency changes course and alters a policy on which regulated parties have depended, it is required to at least assess the existence and strength of any serious reliance interests and weigh those interests in its decision. *See Regents*, 591 U.S. at 30, 140 S. Ct. 1891 ("When an agency changes course, as DHS did here, it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" (citation omitted));

*Nat'l TPS All.*, 150 F.4th at 1021 ("The structure and temporal limitations of the TPS statute protect the important reliance interests of individual TPS holders.").

Judge Wardlaw's opinion compellingly describes the devastating impact of the Secretary's unprecedented action on TPS holders. And, as the district court explained, by "canceling TPS documentation that had already issued" under the prior extension without first addressing the hardship it would inflict, the Secretary "failed to consider [the] reliance interests" of people who had been assured of protection until the original TPS end date. Far from accounting for such reliance interests, the Secretary perfunctorily dismissed those whose very livelihoods depend on TPS as having "negligible" reliance interests. This conclusory statement does not satisfy the agency's duty of providing a "*reasoned* explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221, 136 S. Ct. 2117, 195 L. Ed. 2d 382 (2016) (emphasis added); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009) (noting that an agency must meaningfully engage with the reliance interests engendered by prior policy in providing an explanation for agency action). This is particularly so given the profound disruption that stripping TPS protections would visit upon thousands of immigrants.[3]

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[3] Though the Government does not appeal the district court's decision "to the extent that it preserved '[Employment Authorization Documents], Forms I-797, Notices of Action, and Forms I-94 issued with October 2, 2026 expiration dates' through February 5, 2025—the effective date of Secretary Noem's Venezuela vacatur," we may still view the Secretary's failure to consider these reliance interests as evidence of pretext. Additionally, the Secretary's

The abrupt policy changes at issue in this case "radiate outward to [TPS beneficiaries'] families, including their . . . U.S.-citizen children, to the schools where [they] study and teach, and to the employers who have invested time and money in training them." *Regents*, 591 U.S. at 31, 140 S. Ct. 1891. Additionally, "excluding [TPS beneficiaries] from the lawful labor force may . . . result in the loss of . . . economic activity and . . . tax revenue." *Id.* In sum, "DHS may determine . . . that other interests and policy concerns outweigh any reliance interests. Making that difficult decision was the agency's job, but the agency failed to do it." *Id.* at 32, 140 S. Ct. 1891. By failing to consider these concerns, the Secretary disregarded her obligation to consider the significant reliance interests of those impacted.

Fourth, the Secretary's decisionmaking process deviated dramatically from established Department of Homeland Security ("DHS") norms and procedures for TPS determinations, without any coherent explanation. Under the TPS statute and longstanding practice, decisions to extend or terminate a country's TPS designation are informed by inter-agency consultation and review of up-to-date country conditions by expert staff. *See* § 1254a(b)(3)(A)-(C). A 2020 Government Accountability Office report documenting DHS's standard TPS decision-making practices explains that DHS typically collects (1) a country conditions report compiled by U.S. Citizenship and Immigration Services ("USCIS"); (2) a memorandum with a recommendation from the USCIS

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bare-bones vacatur order does not meaningfully consider the reliance interests of *all* TPS holders (including those who had not yet received documentation) and certainly does not provide any reasoned explanation for why vacatur was necessary despite those interests. *Fox Television Stations*, 556 U.S. at 515, 129 S. Ct. 1800.

Director to the Secretary; (3) a country conditions report compiled by the State Department; and (4) a letter with a recommendation from the Secretary of State to the Secretary of Homeland Security.

Here, the Secretary hastily ordered the vacatur and prepared to terminate TPS without first seeking meaningful input from the State Department or other agencies, and without obtaining any new TPS country conditions analysis from her own department. In fact, the administrative record for the Secretary's vacatur contained only a report from August 2024 that was prepared during the prior administration to affirmatively *support* Secretary Mayorkas's TPS extension. It defies logic that Secretary Noem could point to the *very same* country conditions report, without explanation, as somehow justifying her decision to vacate and terminate that TPS designation. *See Fox Television Stations*, 556 U.S. at 515, 129 S. Ct. 1800 ("[W]hen . . . [an agency's] new policy rests upon factual findings that contradict those which underlay its prior policy," "the agency [must] provide a more detailed justification.").

Then-acting USCIS Director Jennifer Higgins did *eventually* circulate a memorandum recommending that the TPS designation be terminated, but this was *after* the vacatur decision was prepared and circulated. Notably, USCIS officials have indicated that they ordinarily begin the review process for an existing TPS designation about six months to a year *before* the end date of the country's current designation. Here, USCIS sent its recommendation just eleven days after President Trump took office. DHS also belatedly reached out to the State Department, which provided a one-and-a-half- page letter that contained no information on country conditions in Venezuela.

An agency acts arbitrarily when it "depart[s] from a prior policy *sub silentio* or simply disregard[s] rules that are still on the books" without acknowledgment or explanation. *Id.* The issue before us is not whether we normatively agree with Secretary Noem's departure from TPS decisionmaking policy—the problem is that Secretary Noem did not provide *any* reasoned explanation for departing from the normal fact-gathering process. The record here indicates that the Secretary's TPS procedures were exactly such an inexplicable departure from DHS's established process.

Finally, the record supports the district court's conclusion that the Secretary's vacatur and termination of TPS were predetermined well in advance and that the official justifications given in the Federal Register were therefore merely a pretext for her true motives. The timeline is strikingly suspicious: DHS began drafting the Venezuela TPS vacatur within days of President Trump's inauguration, and a draft termination notice was prepared even *before* the vacatur decision was made. The same day Secretary Noem approved the vacatur, DHS staff were directed to "focus on any improvements in Venezuela"—effectively manufacturing an after-the-fact termination rationale—and a sense of urgency was conveyed to finalize the termination decision immediately.

Indeed, the termination was formally approved just *three days* after the vacatur, with the entire process from vacatur drafting to termination completion spanning only a few days. Such haste and sequencing are unprecedented for TPS decisionmaking, and they belie any notion that the Secretary engaged in or relied on a genuine reassessment of country conditions or policy analysis. Instead, as the district court found, the Secretary's vacatur was a means to the preordained end of blanketly terminating TPS designations and extensions for Venezuela as quickly as possible.

In sum, the district court rightly identified a litany of APA defects, each of which render the Secretary's actions arbitrary and capricious. Taken together, these deficiencies paint a picture of agency action that was not the product of reasoned decision-making, but of a rushed and pre-determined agenda masked by pretext.

III.

But even this should not be the end of our analysis. I find it necessary to address the ample evidence of racial and national origin animus in the record, which reinforces the district court's conclusion that the Secretary's actions were preordained and her reasoning pretextual. This case presents one of the rare situations where the strong showing of bad faith needed to look beyond the administrative record is easily met.

We cannot ignore the backdrop of extraordinary statements by direct decisionmakers when assessing whether the agency's proffered rationale was genuine or merely a pretext for an ulterior (and impermissible) motive. The record is replete with public statements by Secretary Noem and President Donald Trump that evince a hostility toward, and desire to rid the country of, TPS holders who are Venezuelan and Haitian. And these were not generalized statements about immigration policy toward Venezuela and Haiti or national security concerns to which the Executive is owed deference.

Instead, these statements were overtly founded on racist stereotyping based on country of origin.

Stereotyping on the basis of race or country of origin can never form the basis of "reasoned decision making" nor can it provide a "rational connection between the facts found and the choice made" necessary to survive review under the APA. *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 493 (9th Cir. 2023) (internal quotation marks and citations omitted) ("The touchstone of 'arbitrary and capricious' review under the APA is reasoned decisionmaking." (alterations and internal quotation marks omitted) (quoting *Altera Corp. & Subsidiaries v. Comm'r*, 926 F.3d 1061, 1080 (9th Cir. 2019))).

Animus based on race or national origin can *never* qualify as a "political consideration[ ]" or "Administration priorit[y]" that falls beyond a court's scrutiny of agency decision-making. *Dep't of Com.*, 588 U.S. at 781, 139 S. Ct. 2551; *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) ("[I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.").

Here, the Secretary's statements are neither isolated nor stray. They are numerous, specific, and closely tied to the agency action at issue. *Cf. Trump v. Hawaii*, 585 U.S. 667, 701-02, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018). Many of the assertions were made within days or hours of the Secretary's decision to vacate TPS for Venezuela and Haiti. Here, the Secretary's and President's statements of ethnic hostility and prejudice toward TPS holders who are Venezuelan and Haitian reveals the ugly truth of bad faith and impermissible animus.[4]

For example, on January 15, 2025, during Secretary Noem's confirmation hearing, she stated that "the program was intended to be temporary. **This extension [of TPS] of over 600,000 Venezuelans . . . is alarming when you look at what we've seen in different States, including Colorado with gangs doing damage and harming the individuals and the people that live there**." *Nomination of Hon. Kristi Noem: Hearing Before the Comm. on Homeland Security and Governmental Affairs*, 119th Cong. 37 (2025) (emphasis added); *see also* Homeland Security Secretary Nominee Governor Kristi Noem Testifies at Confirmation Hearing, at 1:52:01 (Jan. 27, 2025), https://www.c-span.org/program/senate-committee/homeland-security-secretary-nominee-governor-kristi-noem-testifies-at-confirmation-hearing/654484.

On January 29, 2025, Secretary Noem explained in a nationally televised interview that she was vacating Secretary Mayorkas's extension of TPS status because his extension "**meant [Venezuelan TPS holders] were going**

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[4] The Government has argued that these extra-record statements should not be considered in evaluating whether the Secretary's actions were arbitrary or capricious. However, as explained *infra*, the district court correctly granted Plaintiffs' Motion to Consider Extra-Record Evidence, which included these statements. Although the district court relied on these statements to deny the Government's motion for summary judgment as to Plaintiffs' equal protection claims, these statements are also relevant to the merits of Plaintiffs' APA claims.

**to be able to stay here and violate our laws for another eighteen months**." Kristi Noem, *Fox and Friends*, (Fox News television broadcast, Jan. 29, 2025) (emphasis added), https://www.instagram.com/reel/DFaf8JTxU-o. Secretary Noem announced that she had signed an executive order directing DHS not to "follow through" on the prior administration's TPS extension for Venezuelans, vowing instead to "evaluate all of these individuals that are in our country" because "**the people of this country want these dirtbags out**" and "want their communities to be safe." *Id.* (emphasis added). She explicitly described ending TPS for Venezuelans as part of the new administration's plan to "make sure that we're protecting America, keeping it safe again, just like President Trump promised." *Id.*

On February 2, 2025, Secretary Noem stated in a "Meet the Press" interview that "the TPP [sic] program has been abused, and it doesn't have integrity right now." Kristi Noem, *Meet the Press* (NBC television broadcast, Feb. 2, 2025), https://www.nbcnews.com/meet-the-press/meet-pressfebruary-2-2025-n1311457. Secretary Noem went on to state that "**folks from Venezuela that have come into this country are members of [Tren de Aragua]. And remember, Venezuela purposely emptied out their prisons, emptied out their mental health facilities and sent them to the United States of America. So we are ending that extension of that [TPS] program, adding some integrity back into it. And this administration's evaluating all of our programs to make sure that they truly are something that's to the benefit of the United States, so**

**they're not for the benefit of criminals**." *Id.* (emphasis added).[5]

President Trump's statements echoed and amplified the same animus toward TPS holders who are Venezuelan and Haitian. In a December 16, 2023, campaign speech, President Trump stated that "**[illegal immigrants] are poisoning the blood of our country**." Donald Trump, Campaign Speech in Durham, New Hampshire, at 0:14 (Dec. 16, 2023) (emphasis added), https://www.c-span.org/clip/campaign-2024/donald-trump-on-illegal-immigrants-poisoning-the-blood-of-our-country/5098439. At an October 11, 2024, rally, he accused his political opponent of having "**decided to empty the slums and prison cells of Caracas**" and other places into the United States, forcing Americans to "**live with these animals**"—a situation he promised would not last long. Donald Trump, Campaign Speech in Aurora, Colorado, at 41:06, 41:55 (Oct. 11, 2024) (emphases added), https://www.youtube.com/watch?v=xguaneoZ5A. And in a televised interview just one week into his second term, President Trump claimed that "jails and mental institutions from other countries and gang members . . . are being brought to the United States . . . and emptied out into our coun-

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[5] This statement is perhaps the most damning for the Secretary. It is unclear how one could view this statement as anything other than stating that the Secretary decided to end TPS for Venezuela *because of* her belief that "Venezuela purposely emptied out their prisons, emptied out their mental health facilities and sent them to the United States of America." Generalizing hundreds of thousands of TPS holders as criminals and mentally unwell *on the basis of* their country of origin is a textbook example of animus-ridden stereotyping. A reliance on animus can never be viewed as "reasonable" decision-making. *See Nw. Ecosystem All.*, 475 F.3d at 1140.

try." Donald Trump, *Fox News*, at 18:26 (Fox News television broadcast, Jan. 22, 2025), https://www.youtube.com/watch?v=mQUmy6gkwWg.

Even if we examined only the statements that *specifically* reference TPS designations and extensions for Venezuelans and Haitians, those statements would be sufficient in demonstrating a clear "bad faith" motive to eliminate TPS protections in order to facilitate the removal of people from two countries whom the decisionmakers openly generalized as undesirable "criminals" and as coming from "mental health facilities."[6] These pronouncements alone, many of which were delivered contemporaneously with the TPS policy moves, leave no doubt as to the bad faith mindset and objectives

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[6] *See Stereotype*, Britannica Dictionary, https://www.britannica.com/dictionary/stereotype (last visited Jan. 23, 2025), ("[A]n often unfair and untrue belief that many people have about all people or things with a particular characteristic."); *see also Nat'l TPS All. v. Noem*, 798 F. Supp. 3d 1108, 1157 (N.D. Cal. 2025) ("Secretary Noem's generalization of the alleged acts of a few (for which there is little or no evidence) to the entire population of Venezuelan TPS holders who have lower rates of criminality and higher rates of college education and workforce participation than the general population is a classic form of racism."); Ran Abramitzky et al., *Law Abiding Immigrants: The Incarceration Gap Between Immigrants and the US-Born, 1870-2020* (2023, *revised* 2024), https://www.nber.org/system/files/working papers/w31440/w31440.pdf, (finding that immigrants have consistently had lower incarceration rates compared to U.S.-born individuals—a trend that has held true for 150 years); Michael Light et al., *Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas* (2020), https://pmc.ncbi.nlm.nih.gov/articles/PMC7768760/pdf/pnas.202014704.pdf, (finding that undocumented immigrants are roughly half as likely to be arrested for violent and property crimes than people born in the United States).

motivating the administration's rush to vacate and terminate TPS for Venezuela and Haiti.

But we must not view each statement in a silo. To do so would require an astonishing level of naiveté. Many of the TPS-related statements were made against a broader backdrop of rhetoric expressing animus toward Venezuelan and Haitian immigrants based on their country of origin. And unlike in *Regents*, 591 U.S. at 35, 140 S. Ct. 1891, where the Supreme Court gave little weight to generalized statements that were untethered to specific government action, this case is unique in that the decision-makers were explicit in explaining their actual motives for vacating TPS extensions for Venezuela. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982) ("[O]fficials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority."); *Cook County v. Wolf*, 461 F. Supp. 3d 779, 794 (N.D. Ill. 2020) ("Most people know by now that the quiet part should not be said out loud.").

The Secretary's decision expressly rested on the administration's perception of TPS holders from Venezuela as being "criminals" or coming from "mental health facilities." To ignore the obvious relationship between the Secretary's and President's collective statements demonstrating animus toward Venezuelans and Haitians and the Secretary's rushed and abnormal process of vacating TPS extensions for those very same individuals would be to bury our heads in the sand. Many commentators and stakeholders have similarly pointed out the clear connection between the statements made and action taken.[7]

When decision-makers so brazenly broadcast their racially charged reasons for reaching a decision, we should take them at their word. To insist otherwise is to render judicial review of agency action a nullity. Under the APA, courts have a duty to scrutinize the agency's stated rationale where there is evidence that the official justification may conceal an unlawful purpose. And this skepticism should be heightened when it appears that the outcomes are driven by invidious motives such as ra-

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[7] *See, e.g.*, *Mass Deportation: Analyzing the Trump Administration's Attacks on Immigrants, Democracy, and America*, American Immigration Council (July 23, 2025), https://www.americanimmigrationcouncil.org/report/mass-deportation-trump-democracy/ (noting that the Trump administration has "invent[ed] millions of nonexistent migrants and accus[ed] them of inherent criminality," and that "while the federal government cannot turn immigrants into bad people just by saying they are, it does have the power to strip legal status from individuals" through ending the TPS program); Elliot Young, *Racism and Classism at the Heart of Rescission of Venezuelan TPS*, Border Criminologies, University of Oxford (May 5, 2025), https://blogs.law.ox.ac.uk/border-criminologies-blog/blogpost/2025/05/racism-and-classism-heart-rescission-venezuelan-tps ("The irresponsible and unfounded comments by politicians and other officials about Venezuelan immigrant criminality should not be used as an excuse to rescind TPS protections for Venezuelans. Rather, they should be understood within the context of a long history of racist and classist tropes characterizing immigrants as diseased, mentally ill, and criminals."); Dominique Espinoza, *Trump Administration's Heartless Termination of TPS for Venezuelans Sparks Legal Showdown*, Coalition on Human Needs (Apr. 8, 2025), https://www.chn.org/voices/trump-administrations-heartless-termination-of-tps-for-venezuelans-sparks-legal-showdown; Amnesty International (@amnestyusa), X (Feb. 2, 2025, 11:12 a.m. PST) ("This [TPS] decision reeks of President Trump's racism towards Venezuelans.").

cial or national origin animus. It is clear that the Secretary's vacatur actions were not actually grounded in substantive policy considerations or genuine differences with respect to the prior administration's TPS procedures, but were instead rooted in a stereotype-based diagnosis of immigrants from Venezuela and Haiti as dangerous criminals or mentally unwell. The American public is able to see the true reason behind the Secretary's vacatur of TPS protections for Venezuelans and Haitians. We should too.

In sum, had we reached the merits of whether the Secretary's actions were arbitrary and capricious, I would have found that the Secretary's and President's remarks provide ample compelling evidence of pretextual reasoning and a preordained outcome. Though the district court primarily considered these statements within the context of its equal protection analysis, we may consider the statements as an additional evidentiary basis on which to affirm the district court's grant of summary judgment on Plaintiffs' APA claims, too. *See McSherry v. City of Long Beach*, 584 F.3d 1129, 1131 (9th Cir. 2009) ("We may affirm the district court's grant of summary judgment on any basis supported by the record." (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1030 (9th Cir. 2004))).

Under settled administrative law principles, a strong showing of bad faith or improper motive can warrant probing behind an agency's stated reasons. *Dep't of Com.*, 588 U.S. at 781-85, 139 S. Ct. 2551; *Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). The Supreme Court has been clear that the "bad faith" standard is met when there is evidence that the "official" rationale in the administrative record was not the agency's actual basis for acting. *Dep't of Com.*, 588 U.S. at 781-85, 139 S. Ct. 2551.

Accordingly, the APA's deferential standard does not require courts to cover their eyes to clear indicia of pretext. *Id.* at 785, 139 S. Ct. 2551. In light of the evidence that Secretary Noem's official reasons for vacating TPS extensions for Venezuela and Haiti were not the true motivations behind her actions, there is ample evidence of bad faith and pretext to justify an examination of Secretary Noem's extra-record statements. This case is not a difficult one where the decision-makers were at least aware that the "quiet part should not be said out loud." *Cook County*, 461 F. Supp. 3d at 783. Instead, the decision-maker herself repeatedly expressed that "[f]olks from Venezuela that have come into this country are members of [Tren de Aragua]" and that "Venezuela purposely emptied out their prisons, emptied out their mental health facilities and sent them to the United States of America . . . ***so*** we are ending that extension of that [TPS] program." Kristi Noem, *Meet the Press* (NBC television broadcast, Feb. 2, 2025) (emphasis added), https:/www.nbcnews.com/meet-the-press/meet-press-february-2-2025-n1311457.

At oral argument, the Government repeatedly asserted that we should disregard or discount the above statements of animus because some (though not all) were made before the Secretary and President assumed office or are otherwise outside the four corners of the agency's formal decision record. It relies on *Trump v. Hawaii* and *Regents* to contend that courts are barred from considering pre-office or extra-record remarks. But those cases are readily distinguishable, and the Government's argument is unavailing.

*Trump v. Hawaii* did not establish any brightline rule forbidding courts from considering such statements in an APA context. In that case, Plaintiffs brought an Immigration and Nationality Act and First Amendment Establishment Clause challenge to a presidential proclamation that barred nationals from certain countries from entering the United States. *Trump*, 585 U.S. at 673-76, 138 S. Ct. 2392. The Supreme Court upheld the policy after applying a form of rational-basis review that examined whether the policy could be upheld on its stated national-security justification, despite the President's history of anti-Muslim statements. *Id.* at 706-10, 138 S. Ct. 2392.

Crucially, the Court did *not* hold that a decisionmaker's inflammatory statements were entirely irrelevant to its analysis; to the contrary, the Court recounted the President's statements and declined to lay down a rule insulating them from scrutiny. Instead, the Court proceeded to note that "the issue before us is not whether to denounce the statements," but rather "the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility." *Id.* at 701-02, 138 S. Ct. 2392. The key to *Trump v. Hawaii*'s result was that, even *accounting* for the troubling statements, the policy on its face was supported by a lengthy interagency review and satisfied the deferential standard applicable to the exclusion of foreign nationals in the national-security realm and under the Establishment Clause. Not so here. *Trump v. Hawaii* is also distinguishable because it did not involve any agency decision-making and was instead a direct challenge to the Executive itself. *Id.* at 701-05, 138 S. Ct. 2392. And despite the *Trump v. Hawaii* plaintiffs' claims that the ban targeted Muslims specifically, the Supreme Court noted that the policy impacted only a small fraction of the world's Muslim population and that not all of the countries included were majority-Muslim. *Id.* at 706, 138 S. Ct. 2392.

In sum, *Trump v. Hawaii* was decided in an entirely different legal and factual context from this case, and largely stands for the unrelated proposition in the Establishment Clause context that a facially neutral executive policy will not be set aside as unconstitutional *solely* due to a leader's generalized rhetoric, so long as the policy can otherwise pass a legitimate-purpose test. It does not insulate government agencies from all inquiry into impermissible motive when the APA's standard of review demands a genuine, non-pretextual justification for the action.

Likewise, the Supreme Court in *Regents* did not categorically bar consideration of extra-record statements. The majority declined to invalidate the rescission of Deferred Action for Childhood Arrivals ("DACA") based on an equal protection claim, reasoning that the plaintiffs had not plausibly connected President Trump's generalized remarks about Mexicans to the agency's decision, especially given that the rescission was ostensibly based on the Attorney General's legal determination about DACA's unlawfulness. *Regents*, 591 U.S. at 35, 140 S. Ct. 1891. The Court noted that there was "nothing irregular" about the history or process leading to the DACA rescission and that the decision-makers' actions could be explained without attributing them to animus. *Id.* at 34, 140 S. Ct. 1891.

Importantly, the *Regents* Court did *not* hold that such statements are flatly irrelevant to a court's analysis. Even the majority did not avoid consideration of the statements; it expressly reviewed the remarks made by the President but characterized them as being largely irrelevant in *time* and *context* to the specific action taken *in that case. Id.* at 34-35, 140 S. Ct. 1891. Here, unlike in *Regents*, the administrative process was highly irregular and devoid of a consistent non-discriminatory rationale, and the nexus between the leadership's animus-laden statements and the challenged action is uniquely direct and specific.

Secretary Noem's own remarks show that, from day one, she set out to end TPS for Venezuela and Haiti specifically because she stereotyped TPS holders *from those countries* as dangerous, criminals, and otherwise undesirable. This was a view she expressed repeatedly and tied explicitly to her TPS decisions. These statements were made by the official exercising the agency's power, as well as by the President who influenced and directed the policy, and many of the statements concerned the very subject matter of the decision in question.

Taken together, the agency's rushed and abnormal procedure, coupled with the Secretary's and President's bad faith statements of animus toward TPS holders who are Venezuelan and Haitian, make clear that the official concerns cited by the Secretary were not the driving forces behind her actions. Rather, those reasons were pretextual. Simply put, "the evidence tells a story that does not match the explanation the Secretary gave for [her] decision." *Dep't of Com.*, 588 U.S. at 784, 139 S. Ct. 2551.

The true impetus for the Secretary's actions was the illegitimate one of vacating TPS protections for disfavored groups that were stereotyped as criminals, mentally unwell, and gang members based on their country of origin. The APA does not tolerate such an overt deception of the judicial and public audience. As the Supreme Court has observed, the "evidence showed that the Secretary was determined" to reach a particular result from the time she entered office, and only later "adopted [a] rationale" to justify it; allowing an agency to proceed in such a manner would reduce judicial review to an "empty ritual" and undermine the rule of law. *Id.* at 782-83, 785, 139 S. Ct. 2551.

In my view, to ignore this evidence would be to ignore what is obvious. Nothing in *Trump v. Hawaii* or *Regents* mandates judicial blindness in the face of clear pretext. To the contrary, our case law demands that we consider an official's bad faith statements when they strongly suggest that the official reason given is not the true motive behind the action taken. The APA does not permit us to uphold agency action on the basis of post hoc or contrived justifications.[8]

[8] It is worth repeating that the statutory bars on judicial review do not apply under these circumstances. Specifically, § 1254a(b)(5)(A) should be viewed as barring only determinations with respect to the Secretary's actual assessment of "whether the conditions for [a country's] designation" are met given "the conditions in the foreign state." § 1254a(b)(3)(A); *see also* § 1254a(b)(3)(B). It does not shield the Secretary from judicial scrutiny where, as here, Plaintiffs allege that she acted unlawfully by vacating a designation midstream, departed from required procedures, and offered a rationale that was patently pretextual. To interpret § 1254a(b)(5)(A) as foreclosing all APA review of TPS-related actions—no matter how procedurally irregular or facially implausible—would yield outcomes Congress could not have intended. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982)

A court cannot shirk its duty to conduct judicial review of agency action under the APA. *Cf. Cohens v. State of Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821) ("With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); *see also Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L. Ed. 60 (1803). For judicial review of agency action to be meaningful, we must consider evidence that suggests agency action is contrived. To recall the Supreme Court, "we are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com.*, 588 U.S. at 785, 139 S. Ct. 2551 (internal quotation marks and citation omitted). And here, there is a compelling record showing that the Secretary's justification was pretextual and that the TPS vacaturs were driven by impermissible animus and preconceived outcomes. I therefore believe that, in addition to grossly exceeding her statutory authority, the Secretary's actions were arbitrary and capricious under the APA.

In reaching this conclusion, I do not probe the wisdom of the Secretary's or President's broader immigra-

("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Imagine, for example, a decision-maker publicly announcing that she would rescind a TPS designation for a country solely on account of those TPS holders' race, then listing a transparently inconsistent or baseless rationale as the official justification. On the Secretary's reading of § 1254a(b)(5)(A), courts would be powerless to intervene under the APA. That reading not only defies logic but erases the judiciary's essential role under the APA in ensuring reasoned and lawful agency action.

tion policy preferences or the correctness of their beliefs on immigration or the conditions in Venezuela or Haiti. After all, "[i]t is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy." *Id.* at 783, 139 S. Ct. 2551. Rather, in this instance, we are enforcing the basic point that an agency must exercise its decisionmaking process in a reasoned manner and in accordance with the law, not for preordained reasons infected by pretext, prejudice, or false expediency. The record here reveals that the reasoning listed by the Secretary was not her true motivation and does not align with the sweeping action taken. Instead, the Secretary was motivated by stereotypes of individuals on the basis of their country of origin in order to vacate TPS designations for those countries.[9]

In reviewing agency action, courts ensure that agency decisions are the result of reasoned decision-making and prevent agencies from using administrative procedure as a cloak to pursue impermissible objectives. Ju-

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[9] I do not dispute that TPS determinations necessarily involve country-specific evaluations—indeed, that is what the statute requires. A prospective plaintiff could not simply allege animus on the basis that a TPS determination as to a specific country has the impact of affecting persons who are from that country. But there is a fundamental difference between terminating TPS for a country based on objective, evidence-based assessments of conditions on the ground, and doing so *because of* generalized and derogatory stereotypes about *the people* who have emigrated from that country. The former is entirely lawful and expected, while the latter is unlawful and antithetical to the principles of reasoned decision-making required by the TPS statute and APA.

dicial review maintains the integrity of administrative governance and the trust of the public. And while a reviewing court should not lightly impute bad faith to agency officials, the evidence in this case is as stark as any in recent memory. Indeed, if the APA's mandate of genuine, non-arbitrary decision-making means anything, it surely means that an agency cannot openly express stereotype-based animus toward a group of immigrants from certain countries and a predetermined intent to sweep away their protections, and then expect a court to blindly accept a post hoc rationalization that its decision was actually the product of a technical administrative concern. We as the judiciary should not pretend to be blind to what the American public can easily observe for themselves.

Because Judge Wardlaw's opinion resolves the appeal solely on the basis that the Secretary exceeded her authority, reaching the merits of the APA issues is not necessary to the judgment. However, we are free to affirm the district court's summary judgment on any ground supported by the record, and I believe it important to make clear that the outcome in this case would be independently justified by the APA's arbitrary-and-capricious standard, too. *See McSherry*, 584 F.3d at 1131. In my view, the administrative record of procedural abnormalities, augmented by permissible extra-record evidence of bad faith and racial and national origin animus, demonstrates that the Secretary's stated reasons were not the true motivating factors behind her vacatur of TPS for Venezuela and Haiti, and that her vacatur was impermissibly preordained. Therefore, the Secretary's actions cannot withstand even the deferential scrutiny applied under the APA's arbitrary-and-capricious framework.

At its core, the APA enshrines a fundamental principle: agencies of the federal government "must pursue their goals reasonably" and in a manner that is transparent to the people they serve. *Dep't of Com.*, 588 U.S. at 785, 139 S. Ct. 2551. When executive officials short-circuit statutory guardrails or base decisions on hidden motives, it is not a mere technical lapse but an affront to the rule of law. Judicial vigilance in these circumstances is essential to ensure that regulatory power remains tethered to law and reason, not the whims of hidden motives or prejudice.

In sum, while the Executive may certainly shape an agency's policy within the scope granted by Congress, it may not do so by subverting the APA's requirements or by smuggling racial or national origin animus into the administrative process. Animus is never a legitimate basis for agency action and will always constitute arbitrary and capricious decision-making.

The law's promise of accountability demands no less than candor and reasoned decision-making from those entrusted with immense regulatory powers. Here, that promise was betrayed, and it is our duty to say what is already plainly known to the public.

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 25-cv-01766-EMC

NATIONAL TPS ALLIANCE, ET AL., PLAINTIFFS

*v.*

KRISTI NOEM, ET AL., DEFENDANTS

Signed: Sept. 5, 2025

**ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND DENYING DEFENDANTS' MOTIONS TO DISMISS**

EDWARD M. CHEN, United States District Judge

At issue in this case are the rights of hundreds of thousands of nationals from Venezuela and Haiti who temporarily reside legally in the United States under a law passed by Congress in 1990. That law, the Temporary Protected Status ("TPS") statute, affords temporary relief to nationals from designated countries who cannot safely return to their home countries due to extraordinary and temporary conditions such as armed conflict, earthquakes, floods, drought, and epidemics. For 35 years, the TPS statute has been faithfully executed by presidential administrations from both parties, affording relief based on the best available information obtained by the Department of Homeland Security ("DHS") in consultation with the State Department and other agencies, a process that involves careful study and analysis. Until now. This case arose from action taken post haste by the current DHS Secretary, Kristi Noem, to revoke the legal status of Venezuelen and Haitian TPS holders, sending them back to conditions that are so dangerous that even the State Department advises against travel to their home countries. The Secretary's action in revoking TPS was not only unprecedented in the manner and speed in which it was taken but also violates the law. For the reasons explained below, the Court find that the Secretary's actions in vacating the orders of the prior administration and terminating TPS exceeded the Secretary's statutory authority and was arbitrary and capricious, and thus must be set aside under the Administrative Procedure Act ("APA").

## I. INTRODUCTION

In 1990, Congress enacted the TPS statute, codified at 8 U.S.C. § 1254a, to bring coherence, discipline, and predictability to the extended voluntary departure process that existed prior to 1990. *See National TPS Alliance v. Noem*, No. 25-2120, 150 F.4th 1000, 1008-10 (9th Cir. Aug. 29, 2025) [hereinafter *NTPSA*] (emphasizing that "Congress designed a system of temporary status that was predictable, dependable, and insulated from electoral politics"). Prior to 1990, extended voluntary departure was "the primary mechanism by which the federal government allowed groups of nationals to remain in the United States for humanitarian reasons." *Ramos v. Wolf*, 975 F.3d 872, 879 (9th Cir. 2020), *vacated for rehearing en banc*, 59 F.4th 1010 (9th Cir. 2023); *see* *also NTPSA*, at 1009 (noting that, for about three decades before the enactment of the TPS statute, "presidential administrations exercised prosecutorial discretion to grant protection from deportation to certain groups of noncitizens on an ad hoc basis," which was called extended voluntary departure). "Because administrations granted [extended voluntary departure] on an *ad hoc* basis without 'any specific criterion or criteria,' the practice led to arbitrary results and drew widespread criticism." *Ramos*, 975 F.3d at 879. Accordingly, Congress prescribed in the TPS statute the criteria and the process that the Secretary of DHS is to follow in deciding whether to designate a country for TPS, thus allowing residents of such country to remain temporarily in the United States.[1] Congress specified the kind of country conditions severe enough to warrant a designation under the statute. *See* 8 U.S.C. § 1254a(b)(1). It also prescribed the specific time frame for any such designation. *See id.* § 1254a(b)(2). And it prescribed with specificity the process for periodic review of a TPS designation, *i.e.*, whether to terminate or extend such a designation. *See id.* § 1254a(b)(3). Significantly, in both the original designation and periodic review process, Congress expressly required the Secretary of DHS to engage in "consultation with appropriate agencies." *Id.* § 1254a(b)(1); *id.* § 1254a(b)(3)(A).

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[1] The TPS statute "originally provided the Attorney General with this authority," but, "[w]ith the Homeland Security Act of 2002, the former Immigration and Naturalization Service was transferred to the Department of Homeland Security, and the responsibiltiy for administering the TPS was transferred from the Attorney General to the Secretary of DHS." *Ramos*, 975 F.3d at 879 n.1.

In view of the gravity of TPS decisions—which profoundly affect the lives of non-U.S. citizens faced with the risk of dangerous or extraordinary conditions were they to return to their home countries—past administrations have for years engaged in a methodical process to carry out the TPS program. This process, consistent with the express directive of the statute, has long included consultation with agencies that have information and expertise on country conditions which inform the designation criteria under the statute—agencies such the Department of State. As described in a 2020 report prepared by the U.S. Government Accountability Office, which was tasked with reviewing the TPS decisionmaking process, *see* MacLean Decl., Ex. 16 (GAO TPS Rpt. at 18) (in reviewing the collection of information by DHS, taking into account "26 TPS decisions for . . . eight selected countries"), DHS collects country conditions information from both USCIS (an internal DHS agency) and the Department of State. The State Department process for collecting information in turn involves getting input from the relevant regional bureau of the Bureau of Population, Refugees, and Migration, as well as from the relevant overseas post, which has "on-the-ground" information on the country at issue. As is evident from this brief description, this process is deliberative and takes time. *Cf.* 8 U.S.C. § 1254a(b)(3) (providing that the Secretary shall conduct the periodic review "at least 60 days before end of the initial period of designation, and any extended period of designation," which is "*after* consultation with appropriate agencies") (emphasis added).

For the first time in the 35-year history of the TPS program, the Trump Administration and DHS Secretary Noem took the extraordinary and unusual act of vacating TPS extensions that had already been granted – specifically, extensions given by the prior administration to Venezuela and Haiti. *See NTPSA*, at 1027 (emphasizing that "the Government has never, in the thirty-five-year history of TPS, sought to vacate a prior extension of TPS"). They did so even though this action is not, as the Ninth Circuit has strongly indicated, statutorily authorized. *See id.* at 1020-21 (stating that "Plaintiffs are likely to succeed in their claim that Congress has displaced any inherent revocation authority by explicitly providing the procedure by which a TPS designation is terminated"). And they did so so that they could then terminate the TPS designations on an unprecedentedly rapid timeline. The decisionmaking process was highly truncated and condensed, taking place over a short period of time (in the case of Venezuela, just days) and, apparently, without the consultation of the appropriate agencies.

Specifically:

- In January 2025, days after the second Trump Administration took over, Secretary Noem vacated a TPS extension for Venezuela that had been given by her predecessor, Secretary Alejandro Mayorkas of the Biden Administration. As discussed below, the decision to vacate the extension was made and steps towards implementation were put in place even before Secretary Noem took office. No meaningful review process took place. Days later, Secretary Noem terminated Venezuela's TPS designation.

- In February 2025, following on the heels of the Venezuela termination decision, Secretary Noem partially vacated a TPS extension/redesignation

> for Haiti that had been given by Secretary Mayorkas —shortening the TPS period from 18 to 12 months. As discussed below, this decision appeared to be pre-ordained without any real review of whether there was a basis for vacatur. Subsequently, in July 2025, Secretary Noem terminated the TPS designation for Haiti.

Plaintiffs have filed suit challenging each of the above decisions by Secretary Noem. Plaintiffs allege that, in issuing her decisions, the Secretary violated both the APA and the Equal Protection Clause of the U.S. Constitution.

Now pending before the Court are several motions: (1) two motions to dismiss filed by the government; (2) Plaintiffs' motion for summary judgment on the APA claims only; and (3) the government's motion for summary judgment on both the APA and Equal Protection claims. In addition, in conjunction with their summary judgment briefs, Plaintiffs have filed a motion to consider extra-record evidence. Having considered the papers submitted as well as the oral argument of counsel, the Court hereby **GRANTS** Plaintiffs' motion to consider extra-record evidence; **GRANTS** Plaintiffs' motion for summary judgment on the APA claims; **DENIES** the government's motion for summary judgment on the APA and Equal Protection claims; and **DENIES** the government's motions to dismiss.

## II. BACKGROUND ON TPS

As part of the Immigration Act of 1990, Congress created the TPS program. The TPS program is a humanitarian program. The governing statute is codified at 8 U.S.C. § 1254a. Under § 1254a,

> [t]he [DHS Secretary], after consultation with the appropriate agencies of the Government, may designate any foreign state [for TPS] only if
>
> (A) the [Secretary] finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;
>
> (B) the [Secretary] finds that—
>
> (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,
>
> (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
>
> (iii) the foreign state officially has requested designation under this subparagraph; or
>
> (C) the [Secretary] finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the [Secretary] finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

8 U.S.C. § 1254a(b)(1). The initial period of a TPS designation "is the period, specified by the [Secretary], of

not less than 6 months and not more than 18 months." *Id.* § 1254a(b)(2).

Once a foreign country is designated for TPS, individuals from that country may apply for immigration status. If granted, they may not be removed from the United States; in addition, they are given authorization to work in the United States. *See id.* § 1254a(a)(1).

For individuals to become TPS holders, there are specific requirements that must be met. For example, an individual must have "been continuously physically present in the United States since the effective date of the most recent designation of that [foreign] state." *Id.* § 1254a(c)(1)(A)(i). In addition, an individual must be "admissible as an immigrant." *Id.* § 1254a(c)(1)(A)(iii). An individual is not admissible if, *e.g.*, they have been convicted of certain crimes (such as a crime involving moral turpitude or drugs) or are a member of a terrorist organization. *See id.* § 1182(a)(2)-(3). Moreover, an individual is expressly deemed ineligible for TPS if they have "been convicted of any felony or 2 or more misdemeanors committed in the United States." *Id.* § 1254a(c)(2)(B). The Secretary "shall withdraw [TPS] granted to an alien . . . if [the Secretary] finds that the alien was not in fact eligible for such status." *Id.* § 1254a(c)(3)(A).

After a foreign country has been designated for TPS, that designation is subject to periodic review to determine if the designation should be terminated or extended. The TPS statute provides as follows with respect to periodic review.

(A) Periodic review

> At least 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state . . . under this section the [Secretary of DHS], after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state . . . for which a designation is in effect under this subsection and shall determine whether the conditions for such designation under this subsection continue to be met.

*Id.* § 1254a(b)(3).

The options of termination and extension are then described in the TPS statute as follows:

(B) Termination of designation

> If the [Secretary of DHS] determines under subparagraph (A) that a foreign state . . . no longer continues to meet the conditions for designation under [§ 1254a(b)(1)], the [Secretary] shall terminate the designation by publishing notice in the Federal Register of the determination under this subparagraph (including the basis for the determination). Such termination is effective in accordance with [§ 1254a(d)(3)[2]],

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[2] Section 1254a(d)(3) provides:

> If the [DHS Secretary] terminates the designation of a foreign state . . . under [§ 1254a(b)(3)(B)], such termination shall only apply to documentation and authorization issued or renewed after the effective date of the publication of notice of the determination under that subsection (or, at the [Secretary's] option, after such period after the effective date of the determination as the [Secretary] determines to be appropriate in order to provide for an orderly transition).

8 U.S.C. § 1254a(d)(3).

> but shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension under [§ 1254a(b)(3)(C)].
>
> (C) Extension of designation
>
> If the Attorney General does not determine under [§ 1254a(b)(3)(A)] that a foreign state . . . no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months).

*Id.*

There is no dispute that a country may be given more than one TPS designation. A TPS designation for a country that is already designated for TPS is called a redesignation. When a redesignation is given, that "'generally has the effect of expanding the pool of potential beneficiaries to include individuals who came to the United States after the country was first designated for TPS.'" Docket No. 93 (Order at 5).

There is also no dispute about the general process that DHS has long followed when a TPS designation is subject to periodic review. In or about 2020, the U.S. Government Accountability Office ("GAO") was asked to review the TPS decisionmaking process and, after reviewing documentation and data related to TPS decisions and interviewing agency officials, published a report titled "Temporary Protected Status, Steps taken to Inform and Communicate Secretary of Homeland Security's Decisions." *See* MacLean Decl., Ex. 6 (GAO TPS Rpt.). As explained in the GAO TPS Report, DHS's practice is to collect four documents to inform each TPS decision (whether the initial designation or review of an existing designation):

(1) a country conditions report compiled by USCIS (an agency within DHS);

(2) a memo with a recommendation from the USCIS Director to the DHS Secretary;

(3) a country conditions report compiled by the State Department; and

(4) a letter with a recommendation from the Secretary of State to the Secretary of DHS.

*See* GAO TPS Rpt. at 18.[3] Each document is generally compiled as follows:

- *USCIS country conditions report.* The Office of Policy & Strategy ("OP&S") (a division within USCIS) reaches out to the Refugee, Asylum, and International Operations Directorate ("RAIO") (another division in USCIS) to get input on country conditions. RAIO prepares a country conditions report after collecting information from, *e.g.*, other U.S. agencies, foreign governments, international organizations, nongovernmental organizations, and news articles. The country conditions

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[3] *See also Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1082 (N.D. Cal. 2018) (describing the same general process). The government provides no evidence suggesting the GAO TPS Report or *Ramos* was inaccurate. It cites no instance, prior to the current Administration taking office, where the general procedure of reviewing TPS deviated in any substantial way from that described by the GAO.

report is then given to OP&S. *See* GAO TPS Rpt. at 20-22.

- *State Department country conditions report and recommendation from the Secretary of State to the DHS Secretary.* USCIS reaches out to the State Department's Bureau of Population, Refugees, and Migration ("PRM"). *See* GAO TPS Rpt. at 21. PRM asks the relevant regional bureau to communicate with the overseas post to get information about country conditions. The regional bureau has a questionnaire on country conditions for the post to fill out, and the post provides responses to the questionnaire, plus a recommendation, to the regional bureau. Other agencies represented at the overseas post (*e.g.*, the U.S. Agency for International Development) may also provide information to the post to include as part of its input on country conditions. After the regional bureau gets the information from the post, it drafts a country conditions report and recommendation and then works with PRM to compile a joint action memo. PRM provides the joint action memo, which includes a country conditions report, to the Secretary of State. After the Secretary of State determines what the State Department will recommend, a final country conditions report and recommendation letter is provided to the DHS Secretary and OP&S. *See* GAO TPS Rpt. at 22-23.

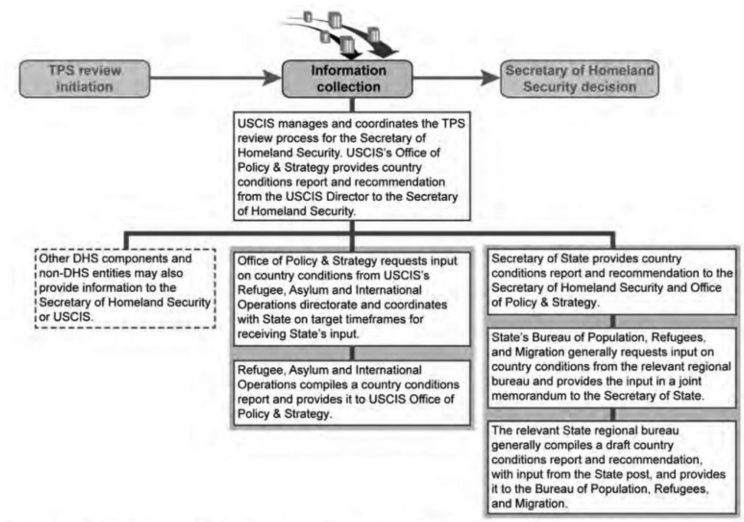
- *USCIS recommendation to the DHS Secretary.* After USCIS receives the input from both RAIO and the State Department, USCIS finalizes its country conditions report and prepares a recommendation memo for the DHS Secretary. *See* GAO TPS Rpt. at 21.

Before the four documents above are given to the DHS Secretary, the documents are reviewed by other components within DHS as part of the standard departmental clearance process. This includes the Office of Strategy, Policy, and Plans; the Office of the General Counsel; and the Management Directorate. *See* GAO TPS Rpt. at 26. In addition, input from other agencies or other entities may be provided to the Secretary or USCIS. *See* GAO TPS Rpt. at 25 (providing as examples U.S. Customs and Border Protection, the Department of Defense, the Centers for Disease Control and Prevention, members of Congress, foreign government officials, and nongovernmental organizations).

Before making a final decision, the DHS Secretary may hold briefings or meetings on TPS reviews, both internally and externally (*e.g.*, with White House officials, foreign government officials, nongovernmental organizations, and advocacy groups). *See* GAO TPS Rpt. at 25-26.

Below is a flow chart from the GAO TPS Report that summarizes the above process.

**Figure 6: Information Collected for the Secretary of Homeland Security's Review for Initial or Existing Designation of Temporary Protected Status (TPS)**




GAO TPS Rpt. at 20.

Finally, there is no dispute that a "key factor motivating Congress at the time of the passage of the TPS was the shortcomings of the Extended Voluntary Departure program," which "allowed the Executive to use its discretion to grant administrative stays of removal for nationals of designated countries." *Nat'l TPS Alliance v. Noem*, No. C-25-5687 TLT (N.D. Cal.) (Docket No. 73) (Order at 9); *see also NTPSA*, at 1009 (taking note of legislators' concern "about granting unbridled deference to the Executive branch in determining the country designations and time periods for relief" and the TPS statute's "explicit guidelines, specific procedural steps, and time limitations" that replaced the "prior ad hoc framework"); *Ramos*, 975 F.3d at 879 (noting that "[t]he impetus for the establishment of the TPS program stemmed from concerns with the 'extended voluntary departure' (EVD) process, which was the primary mechanism by which the federal government allowed groups of nationals to remain in the United States for humanitarian reasons prior to TPS"). "Because administrations granted EVD on an *ad hoc* basis without 'any specific criterion or criteria,' the practice led to arbitrary results and drew widespread criticism." *Id.*; *see also NTPSA v. Noem*, No. C-25-5687 TLT (Docket No. 73) (Order at 9) (noting that "members of Congress were unhappy with the wide discretion EVD gave to the executive and the arguably arbitrary standards for which EVD designation could be withheld"). The point of the TPS statute was to bring coherence and discipline to the previous process which was ad hoc and undisciplined.

## III. VACATUR AND TERMINATION DECISIONS FOR VENEZUELA

As noted above, Plaintiffs challenge two decisions made by Secretary Noem with respect to Venezuela's TPS designation: (1) a decision to vacate and (2) a decision to terminate. As demonstrated below, these decisions were made with incredible haste and without any meaningful consultation with appropriate agencies. The relevant events leading up to those decisions are as follows.

In **March 2021**, Secretary Mayorkas first designated Venezuela for TPS (the "2021 TPS Designation" or "2021 Designation"). See Docket No. 93 (Order at 5). The 2021 Designation was extended two times. The second extension gave TPS holders under the 2021 Designation legal status and work authorization through September 10, 2025. *See* Docket No. 93 (Order at 5-6).

In **October 2023**, Secretary Mayorkas redesignated Venezuela for TPS (the "2023 TPS Designation" or

"2023 Designation"). *See* Docket No. 93 (Order at 6). The redesignation gave TPS holders under the 2023 Designation legal status and work authorization through April 2, 2025. "While the 2021 Designation allowed individuals who had been in the United States since March 2021 to apply, [the 2023] [D]esignation . . . allowed individuals to apply if they had continuously resided in the United States since July 31, 2023, and had continuously been physically present since October 3, 2023." Docket No. 93 (Order at 6).

On **January 17, 2025**, shortly before the second Trump Administration was to begin, Secretary Mayorkas extended the 2023 Designation by 18 months, through October 2, 2026. *See* Docket No. 93 (Order at 7). In the extension, Secretary Mayorkas also streamlined the filing processes for the 2021 and 2023 Designations by consolidating them. This meant that 2021 TPS holders also had the opportunity to register and get the benefit of the same October 2, 2026, date. *See* Docket No. 93 (Order at 7-8).

On **January 20, 2025**, President Trump began his second administration. *See* Docket No. 93 (Order at 8).

Just four days later, on **January 24, 2025**, DHS began drafting the decision to vacate the TPS extension that had been given by Secretary Mayorkas. *See* Bansal Reply Decl., Ex. 1 (email) ("We are drafting the TPS vacatur notice [for Venezuela] this evening. We need some input from you, especially operational matters related to TPS. [¶] . . . Joseph Mazzara asked that we submit the document to him by 1pm on Sunday [i.e., within two days].")[4] The draft of the vacatur decision was begun before Secretary Noem was confirmed as the DHS Secretary.

On **January 25, 2025**, Secretary Noem was confirmed. That same day, the Office of General Counsel within DHS stated that it was "not at all interested in revisiting the substance of whether [the vacatur] should go forward." Bansal Reply Decl., Ex. 2 (email). In effect, the decision to vacate was already made.

The following day, **January 26, 2025**, DHS began to prepare and/or circulate the decision to *terminate* Venezuela's TPS. *See* MacLean Decl., Ex. 5 (privilege log) (NTPSA-DHS 211); *see also* Bansal Reply Decl., Ex. 7 11 (email, dated 1/27/2025) ("I created a shell for a termination notice. Can you start drafting? (I'm going to work on the memo for the vacatur notice.)"). In other words, even before the decision to vacate was finalized, DHS was preparing to terminate Venezuela's TPS. Furthermore, the draft on the termination decision was being prepared before any country conditions analysis was conducted. *See* Bansal Reply Decl., Ex. 15 (email) (providing the "DOS [Department of State] country report" for Venezuela – one prepared in September 2024 during the Biden Administration – on January 29, 2025, *i.e.*, three days after the above email).

On **January 27, 2025**, the vacatur decision was put into final form. *See* MacLean Decl., Ex. 2 (email).

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[4] The email was from Christina McDonald, who appears to be part of the Office of General Counsel to, *inter alia*, Joseph Edlow. At the time, Mr. Edlow was a Senior Advisor (nominated to be, and as of mid-July 2025, USCIS Director). *See* Docket No. 132-1.

On **January 28, 2025**, Secretary Noem signed off on the vacatur decision. *See* Docket No. 103-1 (ECF Page 5) (administrative record for vacatur); MacLean Decl., Ex. 3 (email); *see also* MacLean Decl., Ex. 4 (DHS Clearance Record). *That same day*, DHS staff was asked to "focus on any improvements in Venezuela," implicitly to advance and support termination of Venezuela's TPS. *See* Bansal Reply Decl., Ex. 17 (email).

On **January 30, 2025**, DHS staff exchanged email indicating that it was urgent to finalize the termination decision. *See* MacLean Decl., Ex. 9 (email)[5]; *see also* Bansal Reply Decl., Ex. 14 (email) (in response to email noting upcoming publication of the vacatur notice in the Federal Register, stating: "Great. Where are we with [Venezuela] termination?").

On **January 31, 2025**, Secretary of State Rubio sent a one-and-a-half page letter to Secretary Noem, recommending termination of TPS for Venezuela on the basis that "permitting nationals of Venezuela to remain temporarily in the United States under 8 U.S.C. 1254a is contrary to the national interest of the United States." Docket No. 104-4 (ECF Page 75) (administrative record for termination). The letter stated in relevant part:

> Under Executive Order 14150, "the foreign policy of the United States shall champion core American interests and always put America and American citizens first." Designating Venezuela under 8 U.S.C. 1254a(b)(1) does not champion core American inter-

[5] The title of the email was: "VZ Draft FRN – Due by 3pm TODAY [*i.e.*, January 30, 2025]." One email, timestamped 4:21 p.m., stated: "For your viz, here is the version I am submitting to OGC now."

> ests or put America and American citizens first, therefore it is contrary to the foreign policy and the national interest of the United States.
>
> In particular, I have determined that the first priority of the foreign policy of the United States is that "we must curb mass migration and secure our borders. The State Department will no longer undertake any activities that facilitate or encourage mass migration. Our diplomatic relations with other countries, particularly in the Western Hemisphere, will prioritize securing America's borders, stopping illegal and destabilizing migration, and negotiating the repatriation of illegal immigrants."
>
> The designation of Venezuela under 8 U.S.C. 1254a(b)(1) facilitates and encourages mass migration because it causes more than 600,000 Venezuelan beneficiaries to remain in the United States. Moreover, organizations like the Venezuelan transnational criminal organization Tren De Aragua commit "campaigns of violence and terror in the United States and internationally" that "are extraordinarily violent, vicious," and "threaten the stability of the international order in the Western Hemisphere." Under Executive Order 14157, Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists, "it is the policy of the United States to ensure the total elimination of these organizations' presence in the United States and their ability to threaten the territory, safety, and security of the United States."

Docket No. 104-4 (ECF Pages 75-76). Secretary Rubio's letter did *not* address country conditions, nor did the

State Department provide any country conditions report to USCIS.

Also on **January 31, 2025**, USCIS recommended termination to Secretary Noem. *See* Dichter Decl., Ex. 2 (memo). The memo stated in relevant part as follows:

> Conditions in Venezuela remain challenging, but notable improvements indicate that the conditions that precipitated the initial TPS designation no longer continue. Venezuela no longer continues to meet the statutory requirements for its TPS designation. As such, the statute requires that the TPS designation be terminated. Additionally, USCIS believes that it may be contrary to the national interest of the United States to permit Venezuelan TPS beneficiaries to remain in the United States. This determination differs from the [Department of State] recommendation [provided in September 2024, during the Biden Administration]. Given the noted criminal activity of some Venezuelan nationals, we recommend the Secretary terminate the TPS designation of Venezuela.

Dichter Decl., Ex. 2 (Memo at 5). The memo did *not* explain how USCIS could rely on the Biden Administration country conditions report—which led Secretary Mayorkas to *extend* TPS for Venezuela—to conclude that conditions had improved to such an extent that TPS should be terminated.

On **February 1, 2025** – just three days after Secretary Noem signed off on the vacatur decision – Secretary Noem signed off on the termination decision. *See* Docket No. 104-1 (administrative record for termination) (ECF Page 6).

On **February 3, 2025**, the vacatur decision was published in the Federal Register. *See* 90 Fed. Reg. 8805 (Feb. 3, 2025).

On **February 5, 2025**, the termination decision was published in the Federal Register. *See* 90 Fed. Reg. 9040 (Feb. 5, 2025). As a formal matter, only the 2023 Designation for Venezuela was terminated – specifically, as of April 7, 2025. The 2021 Designation was not terminated but will expire on September 10, 2025. As noted above, the termination of the 2023 Designation was possible at that time only because Secretary Noem had vacated the extension given by Secretary Mayorkas.

The reason for the vacatur of the extension was stated in the Federal Register as follows: "The Mayorkas Notice adopted a novel approach of implicitly negating the 2021 Venezuela TPS designation by effectively subsuming it within the 2023 Venezuela TPS designation." 90 Fed. Reg. at 8807.

> The Mayorkas Notice did not acknowledge the novelty of its approach or explain how it is consistent with the TPS statute. *See* INA 244(b)(2)(B), 8 U.S.C. 1254a(b)(2)(B) (providing that a TPS country designation "shall remain in effect until the effective date of the termination of the designation under [INA 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B)]"). This novel approach has included multiple notices, overlapping populations, overlapping dates, and sometimes multiple actions happening in a single document. While the Mayorkas Notice may have made attempts to address these overlapping populations, the explanations in the Mayorkas Notice, particularly the explanation for operational impacts, are thin and inadequately developed. Given these deficiencies and lack

> of clarity, vacatur is warranted to untangle the confusion, and provide an opportunity for informed determinations regarding the TPS designations and clear guidance.

*Id.*

As for the termination of the 2023 Designation, the reason therefor was stated in the Federal Register as follows: "Overall, certain conditions for the 2023 TPS designation of Venezuela may continue; however, there are notable improvements in several areas such as the economy, public health, and crime that allow for these nationals to be safely returned to their home country." 90 Fed. Reg. at 9042. But, "even assuming the relevant conditions in Venezuela remain both 'extraordinary' and 'temporary,' termination of the 2023 Venezuela TPS designation is required because it is contrary to the national interest to permit the Venezuelan nationals . . . to remain temporarily in the United States." *Id.*

> [First,] TPS has allowed a significant population of inadmissible or illegal aliens without a path to lawful immigration status to settle in the interior of the United States, and the sheer numbers have resulted in associated difficulties in local communities where local resources have been inadequate to meet the demands caused by increased numbers. Among these Venezuelan nationals who have crossed into the United States are members of the Venezuelan gang known as Tren de Aragua. Tren de Aragua has been blamed for sex trafficking, drug smuggling, police shootings, kidnappings, and the exploitation of migrants. The United States has sanctioned the gang and placed it on a list of transnational criminal organizations. In Executive Order 14157, Designating

Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists, the President determined that Tren de Aragua's campaign of violence and terror poses threats to the United States. The Secretary accordingly has considered these important immigration and national interests in terminating the Venezuela parole process.

Second, President Trump observed, referring to CHNV [the parole program known as the "Processes for Cubans, Haitians, Nicaraguans, and Venezuelans"] and other policies and processes, that "[o]ver the last 4 years, the prior administration invited, administered, and oversaw an unprecedented flood of illegal immigration into the United States," including millions who crossed U.S. borders or were allowed to fly to a U.S. airport of entry and allowed to settle in American communities. The prolonged presence of these aliens in the United States "has cost taxpayers billions of dollars at the Federal, State, and local levels." For example, over 180,000 illegal aliens have settled in New York City, approximating that this will cost the city $10.6 billion through the summer of 2025. Additionally, although mayors from cities across the United States are attempting to accommodate Venezuelan illegal aliens, city shelters, police stations, and aid services are at a maximum capacity. . . . .

Third, President Trump declared a national emergency at the southern border. As the Attorney General and DHS have long understood, the potential "magnet effect" of a TPS determination is a permissible factor under the TPS statute, especially with re-

> spect to a redesignation. The same is true for Venezuela. . . . Fourth, as the President directed in Executive Order 14150, "the foreign policy of the United States shall champion core American interests and always put America and American citizens first." Continuing to permit Venezuelans under the 2023 TPS designation to remain in the United States does not champion core American interests or put American interests first. U.S. foreign policy interests, particularly in the Western Hemisphere, are best served and protected by curtailing policies that facilitate or encourage illegal and destabilizing migration.

*Id.* at 9042-43.

The government has not submitted any evidence substantiating "there are notable improvements in several areas such as the economy, public health, and crime that allow for these nationals to be safely returned to their home country." And, as this Court found in its postponement order, the government failed to provide any evidence that Venezuelan TPS holders constitute a threat to national security. *See* Docket No. 93 (Order at 41-44); *see also NTPSA*, at 1026 n.13 (in affirming postponement order, taking note of the absence of evidence to support the government's claimed national security concerns). Since that order, the government has submitted zero additional evidence in this regard.

## IV. VACATUR AND TERMINATION DECISIONS FOR HAITI

As with Venezuela's TPS, Plaintiffs challenge two decisions made by Secretary Noem with respect to Haiti's TPS: (1) a decision to partially vacate and (2) a decision to terminate. The relevant events leading up to those decisions are as follows.

In **January 2010**, Haiti was first designated for TPS (based on an earthquake). *See* 75 Fed. Reg. 3476 (Jan. 21, 2010).

Thereafter, through 2018, Haiti's TPS was extended or there was a redesignation of its TPS. *See* Opp'n at 5 n.9 (identifying notices published in the Federal Register).

In **January 2018**, the first Trump Administration terminated the TPS designation for Haiti. *See* 83 Fed. Reg. 2648 (Jan. 18, 2018). However, the termination did not take effect because of litigation that was brought thereafter challenging the termination.

In **August 2021**, following the assassination of the Haitian President, Haiti was given a new TPS designation by the Biden Administration. *See* 86 Fed. Reg. 41863 (Aug. 3, 2021).

In **January 2023**, Secretary Mayorkas extended and redesignated TPS for Haiti. *See* 88 Fed. Reg. 5022 (Jan. 26, 2023).

In **July 2024**, Secretary Mayorkas again extended and redesignated TPS for Haiti. Under that decision, Haiti's TPS designation would last for 18 months, *i.e.*, until February 3, 2026. *See* 89 Fed. Reg. 54484 (July 1, 2024).

Approximately six months later, on **January 20, 2025**, President Trump began his second administration.

On **January 25, 2025**, Secretary Noem was confirmed as DHS Secretary.

On **February 7, 2025** – just two days after the Venezuela termination was published in the Federal Register – DHS prepared and/or circulated a draft decision partially vacating Secretary Mayorkas's most recent extension/redesignation of TPS for Haiti. See MacLean Decl., Ex. 6 (privilege log) (NTPSA-DHS 2112).

Approximately a week later, from **February 14-17, 2025**, high-level staff within DHS signed off on the partial vacatur. *See* Docket No. 110-3 (ECF Page 27) (administrative record for partial vacatur) (DHS Clearance Record).

On **February 18, 2025**, Secretary Noem approved the partial vacatur. *See* Docket No. 110-2 (ECF Page 6) (administrative record for partial vacatur).

On **February 20, 2025,** DHS issued a press release announcing the partial vacatur. *See* MacLean Decl. ¶ 16 & Ex. 15 (press release). The language in the press release implicitly pointed to an anticipated termination of Haiti's TPS, stating, *e.g.*, that the partial vacatur was "part of President Trump's promise to rescind policies that were magnets for illegal immigration and inconsistent with the law"; that, "[f]or decades the TPS system has been exploited and abused"; and that, "[l]ast month, Secretary Noem similarly rescinded the previous administration's Venezuela TPS extension." MacLean Decl., Ex. 15.

On **February 24, 2025**, the partial vacatur decision was published in the Federal Register. Under the decision, the length of Haiti's TPS designation was shortened from 18 months to 12 months; *i.e.*, the designation would now expire on August 3, 2025, instead of February 3, 2026. *See* 90 Fed. Reg. 10511 (Feb. 24, 2025). Secretary Noem did not have the option of shortening the designation to 6 months because that would have put the expiration date on February 3, 2025 – a date that had already passed.

On **July 1, 2025**, Secretary Noem terminated the TPS designation for Haiti. *See* 90 Fed. Reg. 28760 (July 1, 2025). Under that decision, Haiti's TPS designation will terminate on September 2, 2025.

The reason for the partial vacatur of Secretary Mayorkas's extension/redesignation was stated in the Federal Register as follows:

> First, there is no discussion in the July 1, 2024, Federal Register notice of why the 18-month period was selected in lieu of a 6- or 12-month period. Nor does the administrative record underlying the June 3, 2024, decision and July 1, 2024, notice bear any discussion of why the 18-month period was chosen. Allowing aliens from a given country, including aliens who entered the United States illegally or overstayed their authorized period of admission, to remain in the United States temporarily with employment authorization is an extraordinary act. Congress recognized the gravity of such action under the TPS statute by setting the default extension period at 6 months, underscoring the uniqueness of this authority, and limiting its own authority to enact legislation allowing TPS recipients to adjust to lawful permanent resident status. Accordingly, determinations of how long a new designation should remain in effect and whether to depart from the default six-month period for an extension of an existing designation should take into account important considerations relating to the purpose of the statute and specific country and country conditions at issue and should not rest alone on administrative convenience. Here, there was no explanation whatsoever of why the 18-month period was selected.

Second, and similarly, the July 1, 2024, notice is bereft of any justification of why permitting the ever-increasing population of Haitian TPS recipients, particularly those who entered the country unlawfully, to remain temporarily in the United States is not contrary to the U.S. national interest. The notice simply states that "it is not contrary to the national interest of the United States." The administrative record underlying Secretary Mayorkas' June 4, 2024, decision likewise lacks any discussion of the critical national interest criterion. Such conclusory determinations do not accord with the gravity of TPS decisions under the INA. "National interest" is an expansive standard that may encompass an array of broad considerations, including foreign policy, public safety (e.g., potential nexus to criminal gang membership), national security, migration factors (e.g., pull factors), immigration policy (e.g., enforcement prerogatives), and economic considerations (e.g., adverse effects on U.S. workers, impact on U.S. communities). Determining whether permitting a class of aliens to remain temporarily in the United States is contrary to the U.S. national interest therefore calls upon the Secretary's expertise and discretionary judgment, informed by her consultations with appropriate U.S. Government agencies.

Third, although the July 1, 2024, notice cites some country conditions reports that are relatively proximate to the June 4, 2024, decision, several others date back to early 2023, 2022, or even earlier. And certain sources upon which DHS relied indicated that significant developments were taking place in 2024 that might result in an improvement in conditions. For example, as stated in the July 1, 2024, Federal Register notice, the United Nations had recently authorized a Multinational Security Support (MSS) mission to deploy in Haiti in 2024 and support the Haitian National Police in capacity building, combatting gang violence, and provide security for critical infrastructure. The Department of State likewise underscored that significant development. Thus, both DHS and the Department of State contemplated the real possibility of an improvement in conditions with the deployment of the United Nations MSS mission, yet that important development was not expressly factored into the determination of the length of the extension and designation period.

Eighteen months is the maximum period of designation or extension authorized under the TPS statute. Neither the 2021 new designation, the 2023 extension and new designation, nor the 2024 extension and new designation contained any discussion of national interest considerations or why the 18-month (vs. 6 or 12-month) periods were granted. Given the protracted duration of the "extraordinary and temporary conditions"-based designation for Haiti, the absence of any meaningful appraisal of national interest factors or justification for the 18-month extension, and the fact that eligible Haitians were able to register for TPS under the July 1, 2024, notice for over seven months, the Secretary has determined that a 12-month period is warranted. Abbreviating the period from 18 to 12 months will allow for a fresh review of country conditions in Haiti and of whether such conditions remain both "extraordinary" and "temporary," whether Haitian may return in safety, and whether it is contrary to the U.S. national interest to

> continue to permit the Haitian nationals to remain temporarily in the United States.

90 Fed. Reg. at 10513-14. Other than this notice contained in the Federal Register, the government has submitted no evidence about the "real possibility of an improvement in conditions with the deployment of the United Nations MSS mission," or what has transpired in Haiti since that deployment described nearly a year before, in July 2024.

As for the termination of Haiti's TPS, the reason given in the Federal Register was as follows:

> President Trump clearly articulated policy imperatives bearing upon the national interest in his immigration and border-related executive orders and proclamations. In Proclamation 10888 "Guaranteeing the States Protection Against Invasion," President Trump emphasized that Congress has established a complex and comprehensive framework under the INA to regulate the entry and exit of aliens and goods across U.S. borders. Under normal conditions, this framework supports national sovereignty by enabling the admission of aliens whose presence serves the national interest and excluding those who may pose risks to public health, safety, or national security. However, in a high-volume border environment – particularly when the system is overwhelmed – this screening process can become ineffective. Limited access to critical information and significant processing delays hinder the ability of federal officials to reliably assess the criminal histories or national security threats posed by aliens attempting to enter the U.S. illegally. As a result, public safety and national

security risks are significantly heightened in such conditions.

In Executive Order (E.O.) 14161 "Protecting the United States From Foreign Terrorists and Other National Security and Public Safety Threats," President Trump instructed the Secretary of State, Attorney General, Secretary of Homeland Security, and Director of National Intelligence to jointly submit to the President a report that identified countries throughout the world "for which vetting and screening information is so deficient as to warrant a partial or full suspension on the admission of nationals from those countries." In Proclamation "Restricting the Entry of Foreign Nationals to Protect the United States from Foreign Terrorists and Other National Security and Public Safety Threats," President Trump determined to fully restrict and limit the entry of nationals from Haiti following his review of the requested report. In support of this decision, President Trump outlined that "according to the overstay report, Haiti had a B-1/B-2 visa overstay rate of 31.38 percent and an F, M, and J visa overstay rate of 25.05 percent . . . as is widely known, Haiti lacks a central authority with sufficient availability and dissemination of law enforcement information necessary to ensure its nationals do not undermine the national security of the United States."

. . . .

Prior to FY2025, U.S. Border Patrol recorded a consistent year-over-year increase in encounters with Haitian nationals: 56,596 in FY2022, 163,781 in FY2023, and 220,798 in FY2024. . . . [A] report states: "the continuation of a devastating political,

> environmental, social, and economic situation . . . in Haiti guarantees an unbroken chain migration, particularly to the United States and Canada; and when combined with already heavy backlogs in processing resident status changes, a large and growing flow of Haitians will persist." This pattern of large-scale irregular migration as a result of "pull factors" has continued for years. . . .

90 Fed. Reg. at 28762.

In addition to the above, the Secretary claimed that, per DHS records, "there are Haitian nationals who are TPS recipients who have been the subject of administrative investigations for fraud, public safety, and national security." *Id.* The Secretary called out gang members in particular.

> Widespread gang violence in Haiti is sustained by the country's lack of functional government authority. This breakdown in governance directly impacts U.S. national security interests, particularly in the context of uncontrolled migration. As previously outlined, when immigration flows exceed our capacity to properly vet aliens at the border, the risks are compounded by the inability to access reliable law enforcement or security information from the alien's country of origin. The joint assessment by the Secretary of State, Secretary of Homeland Security, and Director of National Intelligence has found that Haiti lacks a functioning central authority capable of maintaining or sharing such critical information. Coupled with the serious threat posed by Haitian gangs – such as those designated by the State Department as Foreign Terrorist Organizations – continuing TPS for Haiti is not in the national interest. This lack of gov-

> ernment control has not only destabilized Haiti internally but has also had direct consequences for U.S. public safety. Haitian gang members have already been identified among those who have entered the United States and, in some cases, have been apprehended by law enforcement for committing serious and violent crimes.

*Id.* Again, other that the notice itself, there is nothing else in the public record supporting its stated reasons.

## V. PROCEDURAL BACKGROUND

Plaintiffs initiated this lawsuit on February 19, 2025. *See* Docket No. 1 (complaint). At the time, Plaintiffs challenged only the vacatur and termination decisions that Secretary Noem had made with respect to Venezuela. (The Secretary had not yet made her vacatur and termination decisions on Haiti.) The following day, Plaintiffs moved to postpone the decisions on Venezuela pursuant to § 705 of the APA. *See* 5 U.S.C. § 705 ("On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.").

On March 31, 2025, this Court granted Plaintiffs' motion to postpone. *See* Docket No. 93 (order). The government promptly appealed the postponement order to the Ninth Circuit. *See* Docket No. 94 (notice of appeal). After the Court denied the government's motion to stay the postponement order pending appeal, *see* Docket No. 102 (order), the government sought a stay from the Ninth Circuit. The appellate court denied the request for a stay. *See* Docket No. 113 (Order at 1) ("Appellants have not demonstrated that they will suffer irreparable harm absent a stay.").

The government then sought relief from the Supreme Court. On May 19, 2025, the Supreme Court granted the government's request for a stay of the postponement order. The Supreme Court did not provide any specific rationale for its decision but did state that

> [t]his order is without prejudice to any challenge to Secretary Noem's February 3, 2025 vacatur notice [on Venezuela] insofar as it purports to invalidate EADs [employment authorization documents], Forms I-797, Notices of Action, and Forms I-94 issued with October 2, 2026 expiration dates [*i.e.*, the date provided for by Secretary Mayorkas's extension]. *See* 8 U.S.C. § 1254a(d)(3).[[6]]

Based on the paragraph above, Plaintiffs filed with this Court a motion to preserve status and rights for certain Venezuelan TPS holders pursuant to § 705. The Court granted in part and denied in part the motion to preserve. The Court held that the Secretary had exceeded her authority when, on February 3, 2025 (as part of the vacatur decision), she effectively canceled TPS-related documentation that had *already* been issued based on Secretary Mayorkas's extension of Venezuela's TPS to October 2, 2026. *See* 90 Fed. Reg. 8805 (Feb. 3, 2025) (vacatur decision for Venezuela). The Court granted relief for "those Venezuelan TPS holders who

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[6] Section 1254a(d)(3) provides in relevant part as follows: "If the [Secretary] terminates the designation of a foreign state . . . under subsection (b)(3)(B), such termination shall only apply to documentation and authorization issued or renewed *after* the effective date of the publication of notice of the determination under that subsection . . . ." 8 U.S.C. § 1254a(d)(3) (emphasis added).

received TPS-related documentation based on the Mayorkas extension anytime up to and including February 5, 2025—when the Secretary published notice that the 2023 TPS Designation was being terminated." Docket No. 162 (Order at 10).

Meanwhile, on March 20, 2025, Plaintiffs had amended their complaint to include the partial vacatur decision on Haiti. *See* Docket No. 74 (FAC). This was about a week after a case was filed in the Eastern District of New York, also challenging the partial vacatur decision for Haiti. Several months later, on July 1, 2025, the New York court granted the plaintiffs' motions for summary judgment and for postponement of agency action. The court addressed only part of the plaintiffs' APA claims – *i.e.*, that the Secretary lacked the authority to vacate Secretary Mayorkas's extension/redesignation. The court did not adjudicate the constitutional claims asserted by the plaintiffs (based on the Due Process and Equal Protection Clauses). *See Haitian Evangelical Clergy Ass'n v. Trump*, No. 25-cv-1464 (BMC), 789 F. Supp. 3d 255 (E.D.N.Y. July 1, 2025). Subsequently, the New York court entered a final judgment in favor of the plaintiffs, thus staying the partial vacatur decision on Haiti. *See Haitian Evang.*, No. 25-cv-1464 (BMC) (Docket No. 65) (final judgment).

On July 8, 2025, Plaintiffs filed an amended/supplemental complaint. This complaint added allegations and claims challenging Secretary Noem's decision to terminate Haiti's TPS.

Now pending before the Court are (1) two 12(b)(6) motions filed by the government and (2) two motions for summary judgment, one filed by each party. Both the motions to dismiss and the motions for summary judgment address the Venezuela vacatur and termination decisions. Both the motions to dismiss and the motions for summary judgment also address the Haiti partial vacatur decision. Only one motion to dismiss addresses the Haiti termination decision.

The Court held a hearing on the above motions on August 1, 2025. Subsequently, the Court temporarily stayed adjudication of the motions because of the pending appeal of the postponement order before the Ninth Circuit. *See* Docket No. 276 (order). On August 29, 2025, the Ninth Circuit issued its decision. The Ninth Circuit affirmed the Court's postponement order, holding, *inter alia*, that it had jurisdiction to hear the appeal and that Plaintiffs were likely to succeed on their claim that Secretary Noem lacked the authority to issue the Venezuela vacatur. *See generally NTPSA*, 150 F.4th 1000.

## VI. JURISDICTION

As noted above, pending before the Court are two motions to dismiss filed by the government and two summary judgment motions, one filed by each party. In both the 12(b)(6) and summary judgment motions, the government argues that the Court lacks jurisdiction to consider Plaintiffs' claims, whether brought under the APA or the Equal Protection Clause. As it did before (when opposing Plaintiffs' motion to postpone under § 705), the government argues there are several jurisdictional bars to Plaintiffs' suit, including 8 U.S.C. § 1254a(b)(5)(A) and § 1252(f)(1). The government also adds a new jurisdictional argument based on § 701(a)(2) of the APA. For the reasons stated below, the Court rejects each of the government's contentions that jurisdiction is lacking.

**A. <u>Section 1254a(b)(5)(A)</u>**

Section 1254a(b)(5)(A) is part of the TPS statute. It provides as follows: "There is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection." 8 U.S.C. § 1254a(b)(5)(A). The government argues that the vacatur and termination decisions, both for Venezuela and Haiti, are subject to § 1254a(b)(5)(A).

The Court addressed this issue in its postponement order, holding that § 1254a(b)(5)(A) is not a bar to either Plaintiffs' APA claims or their Equal Protection claims.[7] The Court's views remain the same, particularly in light of the Ninth Circuit's ruling affirming the postponement order.

First, as the panel herein held, there is a strong presumption of judicial review of agency action. *See NTPSA*, at 1016 (stating that "Courts strongly presume that Congress intends judicial review of administrative actions"; also stating that the government's claim that § 1254a(b)(5)(A) bars "substantial statutory and constitution claims is . . . extreme") (internal quotation marks omitted); *see also* Docket No. 93 (Order at 24) (citing, *inter alia*, *KOLA, Inc. v. United States*, 882 F.2d 361, 363 (9th Cir. 1989), and *Abbott Labs. v. Gardner*, 387 U.S. 136, 141, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). This presumption applies whether Plaintiffs have sought relief under the APA or the Constitution. As the panel

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[7] The Court's postponement order technically addressed only the vacatur and termination decisions for Venezuela. However, the jurisdictional analysis is the same, whether Venezuela or Haiti is at issue.

decision herein noted, the presumption of judicial review is particularly strong "[w]here, as here, [there is a] claim . . . that 'agency action [was] taken in *excess* of delegated authority." *NTPSA*, at 1016 (emphasis added). Indeed, the panel underscored that barring judicial review where there is a claim that the Secretary exceeded her authority would lead to absurd results. *See id.* at 1018 n.7 ("[H]olding that we lack jurisdiction to review questions of statutory interpretation would make unreviewable a Secretary's decision to authorize a statutorily prohibited thirty-year TPS period.").

Second, even if Secretary Noem did not exceed her statutory authority in deciding to vacate, her decisions to vacate are still subject to judicial review because § 1254(a)(b)(A) bars judicial review of substantive TPS decisions only. As this Court noted in its postponement order, "§ 1254a(b)(5)(A) was narrowly designed to bar judicial review of substantive country-specific conditions in service of TPS designations, terminations, or extensions of a foreign state—not [*e.g.*] judicial review of general procedures or collateral practices related to such." Docket No. 93 (Order at 25) (citing, *inter alia, McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991)) (individual denials on the merits were not challenged but rather the process under which denials were determined). Courts have consistently held such, including the panel in *Ramos*, 975 F.3d at 872, *vacated for rehearing en banc*, 59 F.4th at 1010, and multiple district courts. *See* Docket No. 93 (Order at 25-26) (citing decisions). Judge Cogan of the Eastern District of New York recently held the same as well. *See Haitian Evangelical Clergy Ass'n*, No. 25-cv-1464 (BMC), 789 F. Supp. 3d at 269 (holding that § 1254a(b)(5)(A) "does not prevent courts from reviewing and setting aside agency action that is procedurally deficient[;] . . . 'it is clear from context that the judicial review provision in the TPS statute refers to an individual designation, termination, or extension of a designation with respect to a particular country, not to Defendants' determination practices or adoption of general policies or practices employed in making such determinations'"). The challenge here is directed in the first instance to procedural actions taken by the Secretary in vacating orders issued by the prior administration.

That is, Plaintiffs' challenge to the Secretary's vacatur decisions is based solely on procedural arguments: that the Secretary did not have the authority, statutory or otherwise, to vacate a prior extension of TPS and that her vacatur decision was arbitrary and capricious for procedural reasons, *e.g.*, in failing to consult with the appropriate agencies. These are matters which are entirely collateral to the substantive decision to designate, extend, or terminate a particular country's TPS based on statutory conditions. *See* Docket No. 93 (Order at 24) (noting that, even in the panel decision in *Ramos*, the Ninth Circuit held that "the scope of § 1254a(b)(5)(A)'s bar on judicial review was limited to 'inquiring into the underlying considerations and reasoning employed by the Secretary in reach[ing] her country-specific TPS determinations'[;] [i]t does not apply to, *e.g.*, a pattern or practice that is 'collateral to and distinct from the specific [country] TPS decisions and their underlying rationale'"). Moreover, it is worth noting that Secretary Noem's vacatur decisions themselves were based purely on procedural concerns: for Venezuela, Secretary Noem criticized Secretary Mayorkas for, *e.g.*, taking a novel approach and causing confusion, *see* Docket No. 93 (Order at 26); for Haiti, she criticized Secretary Mayorkas for, *e.g.*, not explaining why he extended TPS for 18 months (as opposed to 6 or 12), not explaining why it was not contrary to the U.S. national interest to give an extension, and not explaining why he could rely on older country conditions reports.[8]

Third, the Secretary's termination decisions are subject to judicial review because Plaintiffs are not challenging the *substance* of those decisions (based, *e.g.*, on an assessment of country conditions) *per se*, but rather the *procedure* by which those decisions were reached. For example, Plaintiffs contend that the terminations were predicated on unlawful vacaturs; that, per the text of the TPS statute, "national interest" is a consideration only at the time of the initial TPS designation and not on periodic review; and that the Secretary failed to consult, meaningfully or otherwise, with government agencies or conduct a meaningful country conditions review.

In its papers, the government largely makes the same arguments that it did previously in conjunction with the postponement proceedings. There is, in the motions now pending, one slight variation. Instead of focusing solely on the use of the word "any" in § 1254a(b)(5)(A), the government now points to the use of the phrase "with respect to." *See* 8 U.S.C. § 1254a(b)(5)(A) ("There is no judicial review of any determination of the Attorney General *with respect to* the designation, or termination or extension of a designation, of a foreign state under this subsection.") (emphasis added). The government emphasizes that the phrase

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[8] As the Court stated in its postponement order, it is also clear that Plaintiffs' challenge to the vacatur decisions is collateral in nature based on the factors identified in *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994). *See* Docket No. 93 (Order at 26-27).

"with respect to" has an expansive meaning, similar to "related to." *See, e.g., Lamar, Archer & Cofrin LLP v. Appling*, 584 U.S. 709, 716-17, 138 S. Ct. 1752, 201 L. Ed. 2d 102 (2018) (considering the use of the term "respecting" in a bankruptcy statute; noting that, "[a]s a matter of ordinary usage, 'respecting' means 'in view of: considering; with regard or relation to: regarding; concerning,'" and "[u]se of the word 'respecting' in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject"). According to the government, a vacatur is literally a determination "with respect to"—*i.e.*, related to—an extension or designation since in this case, it is a procedural predicate thereto. The government notes that Congress could have used narrower language in § 1254a(b)(5)(A)—*e.g.*, "[t]here is no judicial review of a determination to designate, or terminate or extend"—but it did not. *See* Docket No. 190 (Reply at 4) (omitting use of the phrase "with respect to").

The government's position gives short shrift to how the word "determination" or "determine" is used in the TPS statute. When "determination" or "determine" is used in connection with periodic review, the term describes the *substantive assessment of country conditions in reaching a decision on whether to extend or terminate TPS.* For example:

- The provision on periodic review provides as follows: "Periodic review. At least 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state (or part thereof) under this section the [Secretary], after consultation with appropriate agencies of the

Government, shall review the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and shall **determine** whether the conditions for such designation under this subsection continue to be met. The [Secretary] shall provide on a timely basis for the publication of notice of each such **determination** (including the basis for the determination, and, in the case of an affirmative determination, the period of extension of designation under subparagraph (C)) in the Federal Register." 8 U.S.C. § 1254a(b)(3)(A) (emphasis added).

- The provision on termination states: "Termination of designation. If the [Secretary] **determines** under subparagraph (A) that a foreign state (or part of such foreign state) no longer continues to meet the conditions for designation under paragraph (1), the [Secretary] shall terminate the designation by publishing notice in the Federal Register of the **determination** under this subparagraph (including the basis for the determination). Such termination is effective in accordance with subsection (d)(3), but shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension under subparagraph (C). *Id.* § 1254a(b)(3)(B) (emphasis added).

- And the provision on extension states: "Extension of designation. If the [Secretary] does not **determine** under subparagraph (A) that a foreign state (or part of such foreign state) no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the [Secretary], a period of 12 or 18 months)." *Id.* § 1254a(b)(3)(C) (emphasis added).

- Finally, the provision on the effective date of a termination provides: "Effective date of terminations. If the [Secretary] terminates the designation of a foreign state (or part of such foreign state) under subsection (b)(3)(B), such termination shall only apply to documentation and authorization issued or renewed after the effective date of the publication of notice of the **determination** under that subsection (or, at the [Secretary's] option, after such period after the effective date of the **determination** as the [Secretary] determines to be appropriate in order to provide for an orderly transition." *Id.* § 1254a(d)(3) (emphasis added),

As reflected by the above, the term "determination" is used repeatedly to describe the substantive TPS decision on the status of a given country based on the statutory criteria. *See also Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1102 (N.D. Cal. 2018) ("The statute does not define 'determination,' but it is evident from the statutory context that this provision refers to the designation, termination, or extension of a country for TPS. The statute uses the word 'determines' or 'determination in connection with the Secretary's initial designation, periodic review, and termination of a TPS foreign-state designation."). So understood, the vacaturs at issue here are not covered by § 1254a(b)(5)(A) because they did not render substantive TPS decisions based on country conditions. A "decision to vacate is, literally and textually, not a 'designation, or termination or extension of a designation, of a foreign state.'" Docket No. 93 (Order at 25) (quoting § 1254a(b)(5)(A)). As noted above, the Secretary's vacaturs were based on *procedural* concerns (allegedly, a use of a novel and confusing process or an insufficiently explained extension by the prior administration).

The government suggests that this interpretation of "determination" makes the phrase "with respect to" redundant. However, given context, it is clear that "with respect to" is simply a connector—*i.e.*, the phrase simply points to what is being "determined." *See* 8 U.S.C. § 1254a(b)(5)(A) ("There is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.").

The distinction between the propriety of judicial review of the Secretary's substantive assessment of country conditions and judicial review of procedural errors makes common sense and accords with the purpose and structure of the TPS statute. To shield any procedural nonconformity from any judicial review would undermine the purpose of the statute of imposing coherence and discipline to the process. Furthermore, under the government's position, there could be no judicial review even if the government were to blatantly violate the statute, *e.g.*, by granting an extension exceeding 18 months or failing to provide the minimum 60 days' notice of a termination decision. Each of these violations would, in the government's view, be "with respect to" an extension of termination decision. The government's interpretation of "with respect to" is thus too sweeping. In short, the purpose of § 1254a(b)(5)(A) is "not to render all aspects of the TPS program unreviewable." *NTPSA*, at 1018.

Finally, the Court notes that, to the extent Plaintiffs are asserting constitutional violations, the presumption of judicial review is particularly strong. *See* Docket No. 93 (Order at 27) (citing *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 317 (D. Md. 2018)).

For the reasons previously stated in the postponement order and herein, § 1254a(b)(5)(A) does not preclude judicial review of Plaintiffs' claims herein.

B. Section 1252(f)(1)

Section 1252 is titled "Judicial review of orders of removal." Section 1252(f) specifically is titled "Limit on injunctive relief." It provides in relevant part as follows:

> In general. Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, *no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II [8 U.S.C. §§ 1221 et seq.], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

8 U.S.C. § 1252(f)(1) (emphasis added).

In its papers, the government makes some of the same arguments that it did previously. The government, however, now spends more time arguing that a vacatur order under § 706 of the APA would *functionally* be equivalent to an injunction is subject to § 1252(f)(1).

*See* Mot. at 13 ("Regardless of how Plaintiffs frame the relief sought, an order that would have the effect of enjoining or restraining DHS's implementation of the TPS provisions in § 1254a, is jurisdictionally barred under § 1252(f)(1)."); Docket No. 262 (Mot. at 14) (same).

The Court's postponement order addressed the government's attempt to equate an injunction with an APA vacatur (*i.e.*, setting aside of agency action). *See* Docket No. 93 (Order at 16-22). The Court rejected the government's position, noting first that there is a strong presumption of judicial review of agency action. *See* Docket No. 93 (Order at 17). The Court then pointed out that every court to consider the issue (including the Fifth Circuit and multiple district courts) had also rejected the government's position. *See* Docket No. 93 (Order at 16, 18). The Court expressed agreement with the Fifth Circuit's analysis that invalidation of agency action is a less drastic remedy than an injunction because it does not compel nor restrain further agency decision making. *See* Docket No. 93 (Order at 18). The Court also pointed out other differences between a vacatur and an injunction: among other things, "[w]hile a court may only enter a vacatur to reestablish the status quo absent the unlawful agency action, it has 'broad latitude in fashioning equitable relief [through an injunction] when necessary to remedy an established wrong.'" Docket No. 93 (Order at 19). Also, injunctions may apply not just to parties but also nonparties (specifically, those who act in concert with parties), and both parties and nonparties may be held in contempt for violating an injunction. *See* Docket No. 93 (Order at 19). Furthermore, injunctions may prohibit lawful conduct (not just unlawful conduct) and may evolve and change over time. *See* Docket No.

93 (Order at 20). In short, there are material differences between APA vacaturs and conventional injunctions.

Since the Court issued its postponement order, both the Supreme Court and Ninth Circuit have issued decisions supporting the conclusion that there is a difference between injunctions and vacaturs of agency action under the APA. In *Trump v. CASA, Inc.*, 606 U.S. 831, 145 S. Ct. 2540, 222 L. Ed. 2d 930 (2025), the Supreme Court indicated in a footnote that its holding on nationwide or universal injunctions did not resolve the distinct question of whether the APA authorizes courts to vacate federal agency action. *See id.* at 2554 n.10 (stating that "[n]othing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action"; citing 5 U.S.C. § 706(2) which authorizes courts to "'hold unlawful and set aside agency action'"); *see also Haitian Evangelical*, 789 F. Supp. 3d 255, 271-72 (taking note of the same).

Following *Trump v. CASA*, the Ninth Circuit held in *Immigrant Defenders Law Center v. Noem*, 145 F.4th 972 (9th Cir. 2025) [hereinafter *IDL*], that § 1252(f)(1) does not bar a court from staying agency action under § 705 of the APA. The Ninth Circuit pointed out that, in *Biden v. Texas*, 597 U.S. 785, 142 S. Ct. 2528, 213 L. Ed. 2d 956 (2022), the Supreme Court stated that § 1252(f)(1) is narrow in scope. *See IDL*, 145 F.4th at 990. Furthermore, the court noted that the Supreme Court has "distinguished stays from injunctive relief":

> "When a court employs 'the extraordinary remedy of injunction,' it directs the conduct of a party, and does so with the backing of its full coercive powers." . . . A stay, by contrast, "achieves this result by tempo-

> rarily suspending the source of authority to act—the order or judgment in question—not by directing an actor's conduct." A stay "simply suspend[s] judicial alteration of the status quo.'"

*Id.* at 990 (also noting the Fifth Circuit's comment in *Texas v. United States*, 40 F.4th 205 (5th Cir. 2022), that vacatur is a less drastic remedy compared to an injunction). The court also took into account that § 1252(f)(1) refers to injunctive relief only and

> makes no mention of stays nor other forms of relief under the APA. Congress knows . . . how to limit relief under the APA in other statutory schemes such as the Magnuson-Stevens Act and the Clean Air Act. *See Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 668 n.4 (D.C. Cir. 2016) ("The review provision of the Magnuson-Stevens Act also expressly makes § 705 of the APA 'not applicable.'") (quoting 16 U.S.C. § 1855(f)(1)(A)); *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 562 n.1 (D.C. Cir. 2015) (Kavanaugh, J., dissenting in part) ("The Clean Air Act expressly provides that several provisions of the APA—5 U.S.C. § 553-557 and 706—'shall not, except as expressly provided in this subsection, apply. . . .'") (quoting 42 U.S.C. § 7607(d)(1)). Congress made no mentioning of limiting APA claims in § 1252(f)(1) and instead only explicitly limits injunctive relief.

*Id.* at 990.[9]

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[9] In this regard, it is worth noting that § 1252(f)(1) was enacted well after § 706 of the APA, which provides for the setting aside of agency action. *See Garland v. Gonzalez*, 596 U.S. 543, 562, 142 S. Ct. 2057, 213 L. Ed. 2d 102 (2022) (noting that Congress enacted § 1252(f)(1) in 1996); 80 Stat. 378, 392-93 (1966) reflecting addition

Should there be any doubt, the Ninth Circuit, in its recent decision affirming this Court's postponement order, reaffirmed its holding in *IDL*. *See NTPSA*, at 1018 (pointing out that, in *IDL*, the Ninth Circuit "held that section 1252(f)(1) does not prohibit relief in the form of a stay or postponement of agency action under the APA").

Though *IDL* technically addressed a stay of agency action under § 705, such a ruling as to stays under § 705 applies equally, and indeed with even more force, to a final judgment of vacatur setting aside agency action (whether under § 706 of the APA or another statute or law). As discussed in greater detail below, a vacatur under § 706 is, if anything, less akin than postponement under § 705 to the equitable remedy of a preliminary injunction. Hence, the holding of *IDL* and the Ninth Circuit's decision in this case that § 1252(f)(1) does not bar relief applies *a fortiorari* to vacaturs. In sum, *IDL* and *NTPSA* constitute binding precedent on this Court – a point that the government conceded at the hearing with respect to *IDL*.[10] Accordingly, the Court holds that

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of § 706 of the APA in 1966). If Congress had intended § 1252(f) to bar a vacatur of agency action under § 706, it could easily have used language to that effect, but it did not do so, instead limiting the reach of the statute to injunctive relief only.

[10] In its papers, the government cited to *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procs.*, 422 U.S. 289, 95 S. Ct. 2336, 45 L. Ed. 2d 191 (1975), in support of its position, but that case is distinguishable. There, the issue was whether the Supreme Court had jurisdiction over an appeal based on 28 U.S.C. § 1253, which allows for an appeal of a preliminary or permanent injunction. The Supreme Court found that the lower court had issued an injunction because the agency (the Interstate Commerce Commission) had been directed to perform certain acts. *See id.* at 307-08, 95 S. Ct. 2336. That is not the situation here. Although

§ 1252(f)(1), which limits injunctive relief in some circumstances,[11] does not preclude this Court from ordering a vacatur setting aside of agency action under the APA.

Even if a court were to disagree with *IDL* and find that § 1252(f)(1) could limit review of actions under §§ 705 and 706 of the APA, § 1252(f)(1)'s reach would not bar Plaintiffs' suit in its entirety. Rather, as recognized

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there was language in *Aberdeen* that suggested the Supreme Court read § 1253 broadly to afford appellate jurisdiction, *see id.* at 308 n.11, 95 S. Ct. 2336, § 1253 is not at issue in the case at bar. More on point is the more recent decision in *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010), which this Court cited in its postponement order. There, the Supreme Court stated that

> [a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (*such as partial or complete vacatur* of APHIS's deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted.

*Id.* at 165-66, 130 S. Ct. 2743 (emphasis added). *Monsanto* thus makes a distinction between an injunction and a vacatur (or set aside), a distinction now crystalized in the Ninth Circuit's decision in *IDL*.

[11] Notably, Section 1252(f)(1) focuses on *individual* orders of removal, as indicated by the title of § 1252 ("Judicial review of orders of removal."). It appears to bar judicial review of other *individualized* determinations such as (1) cancellation of removal and adjustment of status for a noncitizen who is determined to be of good moral character and for whom removal would pose an exceptional and extremely unusual hardship, *see* 8 U.S.C. § 1229b(b); and (2) voluntary departure for a noncitizen of good moral character. *See id.* §§ 1229c(b). TPS differs from such individualized determinations; it is a broader systemic decision, similar to a regulation. Plaintiffs also advance additional arguments as to why § 1252(f)(1) does not apply here, arguments the Court need not reach.

by the Ninth Circuit in its recent decision affirming this Court's postponement order, § 1252(f)(1) has no impact on Plaintiffs' claim that the Secretary's actions exceeded her statutory authority. *See NTPSA*, at 1018 (stating that, "even if the district court's [postponement] order does 'enjoin or restrain,' it is not barred by section 1252(f)(1) if it affects only agency actions that exceed the agency's statutory authority").

C. Section 701(a)(2)

In moving for summary judgment, the government makes a new jurisdictional argument based on § 701(a)(2) of the APA. The full text of § 701(a) is as follows:

> This chapter applies, according to the provisions thereof, except to the extent that –
>
> (1) statutes preclude judicial review; or
>
> (2) *agency action is committed to agency discretion by law.*

5 U.S.C. § 701(a) (emphasis added).

Here, the government invokes § 701(a)(2). The Supreme Court has commented on that provision as follows:

> The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," 5 U.S.C. § 702, and we have read the APA as embodying a "basic presumption of judicial review," *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). This is "just" a presumption, however, *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 104 S. Ct.

> 2450, 81 L. Ed. 2d 270 (1984), and under § 701(a)(2) agency action is not subject to judicial review "to the extent that" such action "is committed to agency discretion by law." As we explained in *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985), § 701(a)(2) makes it clear that "review is not to be had" in those *rare* circumstances where the relevant statute "is drawn so that a court would have *no meaningful standard against which to judge the agency's exercise of discretion*." *See also Webster v. Doe*, 486 U.S. 592, 599-600, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Heckler, supra*, at 830, 105 S. Ct. 1649.

*Lincoln v. Vigil*, 508 U.S. 182, 190-91, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993) (emphasis added).

According to the government, § 701(a)(2) precludes judicial review of the Secretary's decisions on Venezuela and Haiti's TPS inasmuch as those decisions were predicated on what was in the "national interest" of the United States.[12] *See* 8 U.S.C. § 1254(b)(1)(C) (providing that a country may be given TPS if the Secretary "finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the [Secretary] finds that permitting the aliens to remain temporarily in the United States is contrary to the

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[12] *See* Docket No. 12 (Mot. at 12) ("The determination of 'national interest' is one that calls upon the Secretary's 'expertise and judgment' and is not a manageable legal standard.").

national interest of the United States"). The government asserts that "[t]he determination of 'national interest' is one that calls upon the Secretary's 'expertise and judgment' and is not a manageable legal standard." Mot. at 12.

In support, the government cites, *inter alia*, *Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019), where the Ninth Circuit stated that "the invocation of the 'national interest' is a core example of a consideration that lacks a judicially manageable standard of review." *Id.* at 871; *see also Webster v. Doe*, 486 U.S. 592, 600, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (noting that § 102(c) of the National Security Act "allows termination of an Agency employee whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States,' not simply when the dismissal *is* necessary or advisable to those interests[;] [t]his standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review") (emphasis in original).

There are several problems with the government's argument. First, § 701(a)(2) would at most apply to Plaintiffs' APA claims; it would not apply to their Equal Protection claims.[13] *See San Francisco Unified Sch. Dist. v. AmeriCorps*, No. 25-cv-02425-EMC, 784 F. Supp. 3d 1280, 1290 (N.D. Cal. Apr. 23, 2025) (stating that, "absent clear congressional intent to preclude re-

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[13] And, at most, it would only apply to the extent the termination decisions were at issue, as the Secretary invoked national interest in those decisions alone, and not in the vacatur decisions. As discussed below, the infirmity of the Secretary's decision to terminate TPS for Venezuela does not hinge on the correctness of her determination of national interest.

view of a constitutional claim, § 701(a)(2) does not bar review of colorable constitutional claims arising from agency actions 'committed to agency discretion by law'"; citing *Webster* in support); *see also Webster*, 486 U.S. at 601, 603, 108 S. Ct. 2047 (stating that "the language and structure of § 102(c) [of the National Security Act] indicate that Congress meant to commit individual employee discharges to the Director's discretion, and that § 701(a)(2) accordingly precludes judicial review of these decisions under the APA"; but then going on to state that "[w]e do not think § 102(c) may be read to exclude review of constitutional claims").

Second, as to the APA claims, Plaintiffs have not asserted that the Secretary made an erroneous finding that the national interest weighed against extending TPS. Rather, Plaintiffs have made legal or procedural arguments—*e.g.*, that "national interest" is a factor that may be considered only at the time of initial designation, and not as part of the periodic review used to determine whether to extend or terminate TPS. *See* Opp'n at 7 (arguing that "[t]he APA's provision limiting review of discretionary decisions does not bar claims that challenge the agency's failure to apply the proper statutory criteria"); *cf.* Docket No. 93 (Order at 24) (concluding that § 1254a(b)(5)(A) "does not apply to, *e.g.*, a pattern or practice that is 'collateral to and distinct from the specific [country] TPS decisions and their underlying rationale'"). In other words, Plaintiffs have brought legal challenges to the Secretary's action that are independent of the Secretary's assertion of national interest in justifying her termination decisions. Moreover, the Secretary has not asserted national interest whatsoever in justifying her vacatur decisions.

Therefore, § 701(a)(2) is not a bar to judicial review of the claims asserted here.

## VII. MOTIONS FOR SUMMARY JUDGMENT

Having rejected the government's jurisdictional arguments, the Court now turns to the merits of Plaintiffs' case. The Court first addresses the parties' motions for summary judgment. Plaintiffs have moved for summary judgment on their APA claims only. The government has moved for summary judgment on both the APA claims and the Equal Protection claims.[14]

### A. Legal Standard

Federal Rule of Civil Procedure 56 provides that a "court shall grant summary judgment [to a moving party] if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue of fact is genuine only if there is sufficient evidence for a reasonable jury to find for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

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[14] The Court acknowledges that the government has filed two 12(b)(6) motions. In a typical case, the Court would address a motion to dismiss before a motion for summary judgment. In this case, however, the motions to dismiss largely overlap with the motions for summary judgment, with one notable exception. Specifically, the second motion to dismiss discusses the Haiti termination; the other motions do not because, at the time they were filed, the Secretary had not yet terminated Haiti's TPS. Given the significant overlap between the motions to dismiss and the motions for summary judgment, to the Court evaluates the merits of Plaintiffs' case through the lens of summary judgment, at least for the vacatur and termination decisions for Venezuela and the partial vacatur decision for Haiti.

"The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Id.* at 252, 106 S. Ct. 2505. At the summary judgment stage, evidence must be viewed in the light most favorable to the nonmoving party and all justifiable inferences are to be drawn in the nonmovant's favor. *See id.* at 255, 106 S. Ct. 2505.

Where a plaintiff moves for summary judgment on claims that it has brought (*i.e.*, for which it has the burden of proof), it "must prove each element essential of the claims . . . by undisputed facts." *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 607 (N.D. Cal. 1992); *see also Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (stating that, "if the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor") (emphasis omitted).

Where a defendant moves for summary judgment based on a claim for which the plaintiff bears the burden of proof, the defendant need only point to the plaintiff's failure "to make a showing sufficient to establish the existence of an element essential to [the plaintiff's] case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

B. Motion to Consider Extra-Record Evidence

In conjunction with summary judgment, Plaintiffs have filed a motion asking that the Court extra-record evidence. In the motion, Plaintiffs implicitly acknowledge that an APA claim is usually adjudicated based on the administrative record. *See Cty. of Amador v. United*

*States DOI*, 872 F.3d 1012, 1020 (9th Cir. 2017) ("'In general, a court reviewing agency action under the APA must limit its review to the administrative record.'"). However, Plaintiffs contend, it is appropriate to consider evidence outside the administrative record because (1) they have made a showing of bad faith on the part of DHS/Secretary Noem and (2) such evidence is necessary to determine whether DHS/the Secretary considered all relevant factors and explained the TPS decisions. *See Lands Council v. Powell*, 395 F.3d 1019, 1029-30 (9th Cir. 2005) (noting that there are "narrow exceptions" to the "general rule that courts reviewing an agency decision are limited to the administrative record"; "district courts are permitted to admit extra-record evidence: (1) if admission is necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,' (2) if 'the agency has relied on documents not in the record,' (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter,' or (4) 'when plaintiffs make a showing of agency bad faith'").

As Plaintiffs point out, this Court previously allowed Plaintiffs to take extra-record discovery precisely because of the *Lands Council* standard and Plaintiffs' "significant evidence that the [TPS] decisions were made in bad faith, including repeated discriminatory statements by Secretary Noem and President Trump, the short timeframe in which decisions were made, the lack of legal and/or evidentiary support for the decisions, and the unprecedented nature of the decisions." Docket No. 129 (Order at 5); *see also* Docket No. 129 (Order at 4) ("If any extra-record evidence is admissible under the circumstances [identified in *Lands Council*], then extra-record discovery should be permitted under the same circumstances."); Docket No. 135 (Order at 5) ("In the Court's prior order, it did not categorically bar extra-record discovery for Plaintiffs' APA claim precisely because there was a factual basis for Plaintiffs' assertion that Secretary Noem had acted in bad faith and/or with a discriminatory animus.").

The extra-record evidence that Plaintiffs seek to introduce here falls within this scope. The Court, therefore, does not limit Plaintiffs to the administrative record in evaluating the APA claims. This is especially true given that the government did not file a formal opposition to Plaintiffs' motion, simply stating in its cross-motion for summary judgment that "Plaintiffs' reliance on the Court-ordered extra-record discovery is unavailing, as the existing administrative record already makes clear that the agency acted within its legal authority." Opp'n at 2.

Relevant evidence outside the administrative record is admissible to assess the Equal Protection claims.

C. APA Claim – Venezuela Vacatur

Plaintiffs have asserted APA claims challenging the Secretary's vacatur and termination decisions for both Venezuela and Haiti. The Court addresses first the APA claim related to the vacatur decision for Venezuela.

For this decision, Plaintiffs argue that (1) Secretary Noem did not have the authority to vacate the extension that had been given by Secretary Mayorkas; (2) even if she did, she exceeded her authority to vacate; and (3) even if she did have the authority to vacate and did not exceed her authority to vacate, her decision was arbitrary and capricious.

1. Lack of Authority to Vacate

In her decision vacating Secretary Mayorkas's extension of the 2023 Designation, Secretary Noem asserted that she had the authority to vacate. *See* 90 Fed. Reg. at 8806. Plaintiffs argue that the Secretary lacked the authority. In its decision upholding this Court's issuance of the postponement order, the Ninth Circuit held that Plaintiffs were likely to succeed on the merits of this claim. *See generally NTPSA*, 150 F.4th 1000. This Court is guided by the Ninth Circuit's analysis and reaffirms its reasoning in its postponement order.

"It is well settled that an agency may only act within the authority granted to it by statute. This principle is a recognition of the nature of an administrative agency as a 'creature of statute, having no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.'" *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018) (emphasis omitted). Where an agency is given the power to decide, that power is "*normally* accompanied by the power to reconsider," *NRDC v. Regan*, 67 F.4th 397, 401 (D.C. Cir. 2023) (emphasis added); that is, generally speaking, "administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely manner." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014). However, "'Congress . . . undoubtedly can limit an agency's discretion to reverse itself.'" *NRDC*, 67 F.4th at 401. "[W]here Congress has spoken as to the proper procedure for reversing a decision, agencies lack the inherent authority to circumvent the statute." *NTPSA*, at 1020; *see also Ivy Sports*, 767 F.3d at 86 (noting that "an agency may not rely on inherent reconsideration authority 'when Congress has provided a mechanism [in the governing statute that is] capable of rectifying mistaken actions'").

Whether an agency has the power to reconsider and revoke prior agency action turns on what the governing statute provides, either expressly or implicitly; this is a matter of statutory construction. Or, as the Court stated in its postponement order, "[t]o determine whether an agency has the statutorily implicit authority to reconsider an earlier action depends on the statute and whether such legislative intent to confer such authority can be inferred." Docket No. 93 (Order at 47).

Here, Secretary Noem's contention that she has the implicit authority to reconsider a TPS decision lacks merit. As the Ninth Circuit indicated in its decision affirming the postponement order herein,

> Congress has displaced any inherent revocation authority by explicitly providing the procedure by which a TPS designation is terminated. The Secretary's assertion of such a power is, as the district court noted, "at odds with the structure of the TPS statute." The TPS statute specifically addresses the time frame within which a TPS designation may be terminated. Section 1254a(b)(3)(B) provides that a termination "shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension." It expressly provides that the termination of a TPS designation can be no earlier than the expiration of the most recent extension. The statute does not permit the Secretary to terminate a designation "midstream," but that is exactly what the Secretary purports to do here. And while the statute expressly

> sets forth in detail procedures for "designation," "extension," and "termination," it nowhere mentions a process for "vacatur," which, in this case, has the practical effect of a "termination" of a TPS designation.

*NTPSA*, at 1020-21; *see also* Docket No. 93 (Order at 50-51) (providing the same reasoning). "A reading of the [TPS] statute that allows for vacatur would render [the above] terms – and Congress's design – meaningless." *NTPSA*, at 1009; *see also id.* at 1021 (explaining that "allowing rescission or vacatur of the TPS designation here, would empower the agency to indirectly take three separate actions that are prohibited by statute: designating countries for TPS for a time period under six months, 8 U.S.C. § 1254a(b)(2)(B), (b)(3)(C), terminating TPS before the expiration of the last extension, § 1254a(b)(3)(B), and terminating TPS with less than sixty days' notice").

The Ninth Circuit's decision in *China Unicom (Ams.) Ops. Ltd. v. FCC*, 124 F.4th 1128 (9th Cir. 2024) [hereinafter *CUA*], underscores that the Secretary does not have the inherent authority to vacate here. In *CUA*, the Ninth Circuit emphasized that, where a statute provides for a right or benefit for a fixed term, such as a license, "[t]he use of a fixed term is . . . *affirmatively inconsistent* with positing an implied power to revoke [that] license at any time." *Id.* at 1147-48 (emphasis added). Here, the TPS statute has "clear stated terms for extensions and terminations of TPS designations," which are "likewise 'affirmatively inconsistent with positing an implied power to revoke . . . at any time.'" Docket No. 93 (Order at 51); *see also Haitian Evangelical*, 789 F. Supp. 3d 255, 273 (noting that the TPS statute "provides specific instructions for how to reconsider a TPS designation, and it provides a timeline for doing so"). Furthermore, "[t]o permit the Secretary unconstrained discretion to revoke, at any time, a prior TPS designation would not be consistent with Congress's general intent to cabin such discretion." Docket No. 93 (Order at 52); *see also Ramos*, 975 F.3d at 890 (stating that "Congress enacted the TPS statute to curb and control the executive's previously unconstrained discretion under the [extended voluntary departure] process"); *Nat'l TPS Alliance v. Noem*, No. C-25-5687 TLT (N.D. Cal.) (Docket No. 73) (Order at 9) (taking note of "congressional dissatisfaction with EVD"—*e.g.*, "members of Congress were unhappy with the wide discretion EVD gave to the executive and the arguably arbitrary standards for which EVID designation could be withheld").

In its papers, the government suggests that the statutory scheme implicitly gives the Secretary broad discretion to act (which would include the ability to reconsider) because the TPS statute gives her discretion in (1) deciding how long an extension/designation should last and (2) deciding when to conduct the periodic review (so long as it is done at least 60 days in advance of the expiration of the designation). The government's argument is not convincing. These facts underscore that the Secretary does have discretion, but only in limited areas. That the Secretary has discretion on these limited matters – in deciding prospectively the length of an extension and whether to make that decision (but not actual termination) earlier than 60 days in advance of the current expiration date – does not say anything about whether the Secretary has the authority to revoke an existing TPS designation or extension, a much more significant act. Inferring broader authority based on the limited discretion would be inconsistent with the statute's express directive, and would have a retrospective effect, potentially upsetting reliance interests of those affected. Indeed, the panel decision in the instant case expressly noted that "[t]he structure and temporal limitations of the TPS statute protect the important reliance interests of individual TPS holders." *NTPSA*, at 1021.

The Court thus holds, consistent with the Ninth Circuit's decision in *NTPSA* upholding the postponement order, that Secretary Noem lacked the statutory authority to vacate Secretary Mayorkas's extension.[15]

2. Exceeding Statutory Authority to Vacate as to Documents Already Issued

As to the subset of Venezuelan TPS beneficiaries who were issued documentation under the Mayorkas extension, Secretary Noem clearly exceeded the scope of her authority. This Court so held in its preservation order. *See generally* Docket No. 162 (order).

As previously explained, in her decision to vacate issued on February 3, 2025, Secretary Noem stated that "USCIS will invalidate EADs [employment authorization documents]; Forms I-797, Notice of Action (Approval Notice); and Forms I-94, Arrival/Departure Record (collectively known as TPS-related documentation) that have been issued with October 2, 2026 expiration

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[15] In upholding this Court's postponement order, the Ninth Circuit analyzed only the claim that the Secretary lacked authority to vacate and did not address Plaintiffs' other arguments. This Court does address many of Plaintiffs' arguments placed at issue by the cross-motions for summary judgment, particularly because it is now evaluating whether Plaintiffs are entitled to permanent relief.

dates under the Mayorkas Notice [issued on January 17, 2025].” 90 Fed. Reg. at 8805. But the TPS statute does not contain any provision allowing the Secretary to invalidate already-issued TPS documentation. In fact, “§ 1254a(d)(3), the provision in the TPS statute cited by the Supreme Court in its stay order, underscores that such action is not permissible because the provision recognizes that TPS holders have reliance interests when issued TPS-related documentation.” Docket No. 162 (Order at 4); *cf. NTPSA*, at 1021 (“The structure and temporal limitations of the TPS statute protect the important reliance interests of individual TPS holders, and the Government must adhere to these statutory constraints.”); *id.* at 1023 (“TPS holders began to rely upon the extension of their protected status at the opening of this registration period, giving rise to the strong reliance interests here at stake.”).

Therefore, even if Secretary Noem had some implicit authority to vacate, she clearly exceeded the scope of any such authority by effectively canceling TPS documentation that had already issued under the Mayorkas extension. *See also* Docket No. 162 (Order at 6) (holding that the cancelation of already-issued TPS documentation was also arbitrary and capricious: TPS holders “had a protectible reliance interest or vested right”). That being said, only a subset of Venezuelan TPS holders were so affected by the Secretary’s unlawful conduct in this regard. *See* Docket No. 162 (Order at 10) (“grant[ing] relief to those Venezuelan TPS holders who received TPS-related documentation based on the Mayorkas extension up to and including February 5, 2025 – when the Secretary published notice that the 2023 TPS Designation was being terminated").[16]

3. Arbitrary and Capricious

Finally, Plaintiffs challenge the Venezuela vacatur decision on the ground that, even assuming arguendo the Secretary had the authority to vacate and did not exceed her statutory authority to vacate, her decision was still arbitrary and capricious under the APA. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020) (stating that the APA "requires agencies to engaged in 'reasoned decisionmaking' and directs that agency actions be 'set aside' if they are 'arbitrary' or 'capricious'").

a. Asserted Novelty, Confusion, and "Thin" Explanation

Plaintiffs assert that Secretary Noem's vacatur decision was not reasoned decision making. When Secretary Mayorkas extended the 2023 Designation for Venezuela, he also streamlined the filing processes for the 2021 and

[16] The Court acknowledges that Plaintiffs have offered a separate argument as to how the Secretary exceeded any authority she had under the TPS statute. Specifically, Plaintiffs contend that the Secretary exceeded her authority because reconsideration is not permitted simply because a new administration wants to adopt new policies. *See Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 145-46, 79 S. Ct. 170, 3 L. Ed. 2d 172 (1958) (stating that "the power to correct ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies"). Ultimately, the Court views this argument as a variant of Plaintiffs' arguments that the Secretary lacked the implicit authority to vacate and/or that she did not engage in reasoned decisionmaking.

2023 Designations by consolidating them. This meant that 2021 TPS holders, not just 2023 TPS holders, could get the benefit of the October 2, 2026, extension date. In her decision vacating the Mayorkas extension, Secretary Noem characterized the extension as "novel" because of the consolidation. According to Secretary Noem, Secretary Mayorkas had "implicitly negat[ed] the 2021 Venezuela designation by effectively subsuming it within the 2023 Venezuela TPS designation." 90 Fed. Reg. at 8807. Secretary Noem maintained that

> [t]he Mayorkas Notice did not acknowledge the novelty of its approach or explain how it is consistent with the TPS statute. *See* INA 244(b)(2)(B), 8 U.S.C. 1254a(b)(2)(B) (providing that a TPS country designation "shall remain in effect until the effective date of the termination of the designation under [INA 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B)]"). This novel approach has included multiple notices, overlapping populations, overlapping dates, and sometimes multiple actions happening in a single document. While the Mayorkas Notice may have made attempts to address these overlapping populations, the explanations in the Mayorkas Notice, particularly the explanation for operational impacts, are thin and inadequately developed. Given these deficiencies and lack of clarity, vacatur is warranted to untangle the confusion, and provide an opportunity for informed determinations regarding the TPS designations and clear guidance.

*Id.*

Plaintiffs assert that the Secretary's decision was arbitrary and capricious because the Mayorkas extension, which included the consolidation of the 2021 and 2023

Designation filing processes, was not novel, did not engender confusion, and was not "thin" in explanation. For the reasons stated in its postponement order, the Court agrees.

First, "[a]s a factual matter, it was not 'novel' for different tracks to be streamlined as part of a TPS process. Plaintiffs have pointed out that there has been similar streamlining for both the Sudan and Haiti TPS designations." Docket No. 93 (Order at 57).

Second, as a legal matter, consolidation was not novel because – as Secretary Noem failed to recognize –

> a TPS beneficiary under the 2021 Designation was necessarily a TPS beneficiary under the 2023 Designation.
>
> [E]very earlier designation is "subsum[ed]" by a later one because redesignation expands the pool of potential beneficiaries to include not only those who qualified under an earlier designation, but also those who arrived after their country was first designated.

Docket No. 93 (Order at 56) (emphasis omitted).

Third, "streamlining the two tracks for the two designations into one . . . would tend to eliminate, not create, confusion – *i.e.*, confusion that could arise based on the fact that there are two tracks." Docket No. 93 (Order at 57). Notably, the panel decision affirming this Court's postponement order agreed with this Court on this very point. As it explained, "Secretary Noem 'failed to recognize that a TPS beneficiary under the 2021 Designation was necessarily a TPS beneficiary under the 2023 Designation.' Secretary Mayorkas's extension thereof consolidated the two designations, combining the two tracks, thus lessening confusion rather than 'creating' confusion as Secretary Noem apparently believed." *NTPSA*, at 1024 n.12. Indeed, evidence that the *government* submitted in conjunction with the summary judgment proceedings demonstrates that the Biden Administration consolidated the process for the 2021 and 2023 TPS holders precisely to *avoid* confusion. *See* Opp'n, Ex. 1 (Biden Administration's "Options for Venezuela TPS Extension and Redesignation – September 23, 2023") (in "Option 1 – Concurrent Extension/Redesignation Date," noting as a "pro" in favor of the option, that it would be "[l]ess confusing for employers in that they will not have to try to distinguish between TPS beneficiaries with varying EAD end dates"; and, in "Option 2 – Two different designation dates for Venezuela TPS," noting as a "con" that "[i]t will be difficult to operationalize differentiating these two groups of Venezuela TPS beneficiaries in our existing systems" which "may lead to confusion").

Fourth, although Secretary Noem criticized "the explanations in the Mayorkas Notice, particularly the explanation for operational impacts, [as] thin and inadequately developed," 90 Fed. Reg. at 8807, that criticism is rooted in Secretary Noem's failure to recognize that 2021 TPS holders were necessarily 2023 TPS holders and that consolidation would thereby tend to avoid confusion and streamline the filing process.

Hence, there is no factual or legal support for the Secretary's asserted reason for the vacatur. *See Lands Council*, 395 F.3d at 1026 ("An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, or if the agency's decision is contrary to the governing law.").

b. Failure to Consider Alternatives

Moreover, as the Court held in its postponement order, the Secretary failed to consider alternatives short of vacatur when she revoked the Mayorkas extension. *See* Docket No. 93 (Order at 58). "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change," *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221, 136 S. Ct. 2117, 195 L. Ed. 2d 382 (2016), but "when an agency rescinds a prior policy[,] its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020). Here, Secretary Noem considered no alternatives to complete vacatur. And the context demonstrates she had no interest in doing so: "if Secretary Noem was truly concerned about confusion arising from Secretary Mayorkas's decision to allow 2021 TPS holders to register as 2023 TPS holders, she easily could have chosen to 'deconsolidate' the registration process and keep the 2021 and 2023 Designations on two different tracks – with the 2021 Designation ending in September 2025 and with the 2023 Designation still ending in October 2026." Docket No. 93 (Order at 59). That the Secretary did not do so "effectively demonstrat[es] that confusion was not her concern so much as the desire to totally undo Secretary Mayorkas's decision." Docket No. 93 (Order at 59). This is also substantiated by the timing of the vacatur and the termination decisions: most notably, the termination decision was drafted even before the vacatur decision was finalized, and then was formally issued within days of the publication of the vacatur decision.

c. Failure to Consider Reliance Interests

Plaintiffs further argue that the Secretary's vacatur decision was arbitrary and capricious because, as part of that decision, she invalidated (*i.e.*, canceled) TPS-related documentation that had already been issued pursuant to the Mayorkas extension. According to Plaintiffs, this action was arbitrary and capricious because the Secretary failed to consider reliance interests, interests which the panel in this case recognized. The Court agrees. This is particularly true of those who had already been issued the TPS documentation based on the extension. The analysis in Part VII.C.2, *supra*, is largely applicable here.

d. Failure to Consult with Government Agencies or Review Country Conditions

According to Plaintiffs, the Secretary also acted arbitrarily and capriciously because she made the decision to vacate the Mayorkas extension without first consulting with government agencies or reviewing country conditions.[17] *Cf.* 8 U.S.C. § 1254a(b)(3)(A) (providing that, on periodic review, the Secretary, "*after consultation with appropriate agencies of the Government*, shall re-

[17] The administrative record for the vacatur decision contains no contemporaneous country conditions report – *i.e.*, a report prepared in conjunction with the vacatur decision made by Secretary Noem. Instead, the administrative record includes only a country conditions report from the Biden era (dated August 2024), which supported the Mayorkas extension. *See* Docket No. 103-5 (ECF Pages 162-92) (RAIO report).

view the conditions in the foreign state . . . for which a designation is in effect under this subsection and shall determine whether the conditions for such designation continue to be met") (emphasis added). In response, the government argues that interagency consultation and review of country conditions is required only where the Secretary is making a decision on an extension or termination: "The vacatur was neither." Opp'n at 16. For purposes of this decision, the Court need not resolve this dispute. Even if the government's position has some merit, the Secretary's failure to consult is still relevant to Plaintiffs' pretext argument which is addressed below.

e. Vacatur Decision Based on Pretext

Finally, the Secretary's decision to vacate was arbitrary and capricious because it was pretextual – *i.e.*, it was not animated by a concern about, *e.g.*, novelty or confusion as professed, nor was it otherwise the result of reasoned agency decision making. Instead, the Secretary – acting with unprecedented haste and in an unprecedented manner – issued the vacatur for the preordained purpose of expediting termination of Venezuela's TPS.

DHS began drafting the decision to vacate within days after President Trump began his second administration. There is no indication that the Secretary or DHS consulted any other government agencies or conducted an internal evaluation as part of this process. In fact, just two days after a draft of the vacatur decision was prepared and/or circulated, *see* MacLean Decl., Ex. 1 (email), a draft of the termination decision was prepared and/or circulated. *See* MacLean Decl., Ex. 5 (privilege log) (NTPSA-DHS 211). Vacatur (and termination) was a *fait accompli* from the outset. The draft of the termination notice was prepared even *before* the vacatur decision was finalized. The same day that Secretary Noem signed off on the vacatur decision, DHS staff was asked to "focus on any improvements in Venezuela," implicitly to advance and support termination of Venezuela's TPS. *See* Bansal Reply Decl., Ex. 17 (email). Within days of the Secretary's approval of the vacatur decision, DHS staff indicated that it was urgent to finalize the termination decision. The termination decision was approved just three days after the vacatur approval. Altogether, the decision making process for the vacatur through the termination took place over a span of days. *Cf. Dep't of Commerce v. N.Y.*, 588 U.S. 752, 782-83, 139 S. Ct. 2551, 204 L. Ed. 2d 978 (2019) ("The evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process.").

The pretextual nature of Secretary's asserted rationale for the vacatur is demonstrated by the fact that her criticism of Secretary Mayorkas's extension and the alleged confusion it caused was entirely baseless as noted above. And there is no evidence of any reasoned decision making behind Secretary Noem's vacatur. The failure to consult with agencies in regard to the termination decision which ensued immediately after the vacatur – a failure which was highly unusual and unprecedented (as discussed below) – further evinces the pretextual nature of Secretary Noem's purported rationale for the vacatur.

4. Summary

As a matter of law, the Secretary lacked the implicit authority to vacate. Even if she had such authority, there is no genuine dispute that she exceeded that authority. Furthermore, even if the Secretary had the authority to vacate, there is no genuine dispute that her decision to vacate was arbitrary and capricious for several reasons as set forth above. Accordingly, the Court grants Plaintiffs' motion for summary judgment on the APA claim related to the Venezuela vacatur decision, and denies the government's cross-motion.

D. APA Claim – Venezuela Termination

Plaintiffs' second APA claim focuses on the termination decision for Venezuela. According to Plaintiffs, the decision to terminate TPS for Venezuela was unlawful because it was predicated on the unlawful vacatur. Plaintiffs further argue that the termination decision was arbitrary and capricious because it was based on an assessment of the national interest, but national interest is a factor that may be considered only at the time of the original TPS designation, and not on periodic review. Finally, Plaintiffs contend that the termination decision was arbitrary and capricious because the decision was made without any meaningful consultation with other government agencies, nor was there a meaningful review of country conditions.

1. Predicated on Unlawful Vacatur

Plaintiffs' first argument has merit. As noted above, the vacatur and termination decisions essentially went hand in hand: Secretary Noem made the decision to vacate in order to advance her ability to terminate. Because termination was predicated on vacatur of the existing extension, Plaintiffs are entitled to relief from the termination decision.

2. Failure to Consult with Government Agencies or Review Country Conditions

Plaintiffs are entitled to relief from the termination decision for an additional reason. Secretary Noem failed to comply with the statutory directive to consult with appropriate agencies in deciding whether to terminate Venezuela's TPS. As noted above, the TPS statute expressly requires that the DHS Secretary "consult[ ] with appropriate agencies of the Government" as part of the periodic review and that consultation implicitly includes review of country conditions. It provides: "[T]he [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. § 1254(b)(3)(A). Moreover, the requirement to consult is not an empty obligation; rather, a consultation required by a statute means that there must be a "meaningful exchange of information." *Cal. Wilderness Coalition v. U.S. DOE*, 631 F.3d 1072, 1086 (9th Cir. 2011); *see also id.* at 1088 (characterizing a statutory requirement to consult as an "'affirmative duty'" and stating that the consultation must be "meaningful").

As an initial matter, the Court finds that the Secretary violated the TPS statute because she effectively made the decision to terminate *before* consultation with any government agency. As noted above, the TPS statute requires that a decision be made only *after* consultation – *i.e.*, the consultation is designed to inform the Secretary's decision-making. But here, the day after Secretary Noem was confirmed, DHS began to draft the decision to terminate. *See* MacLean Decl., Ex. 5 (privilege log) (NTPSA-DHS 211); *see also* Bansal Reply Decl., Ex. 7 11 (email, dated 1/27/2025) ("I created a shell for a termination notice. Can you start drafting? (I'm going to work on the memo for the vacatur notice.)"). There is no evidence that there was any consultation with, *e.g.*, the State Department prior to the initial drafting of the termination decision.

Moreover, as reflected by the evidence of record, even though DHS belatedly sought input from the State Department and assuming *arguendo* the final decision had not already been made prior to seeking that input, there was no meaningful consultation with the State Department or, for that matter, any other government agency. There is no dispute that the consultation required by the TPS statute typically involves at least the State Department. That has been the practice of DHS, as demonstrated by the GAO TPS Report discussed above. Furthermore, the State Department is the government agency that conducts foreign policy and thus is one of the agencies most likely to have information about conditions in a foreign country. Here, although DHS did reach out to the State Department to get its input (belatedly), the Secretary of State simply provided a one-and-a-half page letter; importantly, the analysis therein failed to include *any* information on country conditions in Venezuela. Instead, it focused solely on the national interests of the United States.

To the extent the government points to a State Department country conditions report from September 2024, that report was prepared by the Biden Administration, in conjunction with Secretary Mayorkas's TPS decision to *extend* TPS. *See* Docket No. 104-4 (ECF

Pages 53-74) (letter from Secretary of State Blinken). Here, the new administration failed to provide a country conditions report from the State Department that was prepared contemporaneously in conjunction with Secretary Noem's termination decision. Nor did the administration obtain any contemporaneous country conditions report from RAIO. Instead, it appears that the Secretary could have relied at most on a RAIO country conditions report from the Biden era. *See* Docket No. 104-9 (ECF Pages 45-75) (RAIO report, dated August 2024, from the Biden era). Given the RAIO report was part of the Biden administration's decision to *extend* TPS for Venezuela, it seems ironic, if not disingenuous, for Secretary Noem to now rely on that report to *terminate* TPS. In fact, she cited nothing specific in the report from the Biden administration to justify her decision to vacate and terminate Venezuela's TPS.

The above demonstrates not only a failure to engage in a meaningful consultation with government agencies but also a failure to conduct a meaningful country conditions review, a rudimentary element of the consultation contemplated by the statute. This not only violates the TPS statute, but also constitutes arbitrary and capricious action by the Secretary. *See Lands Council*, 395 F.3d at 1026 ("An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise, or if the agency's decision is contrary to the governing law.").

Furthermore, Secretary Noem's decision-making was arbitrary and capricious because it reversed DHS's established practices for TPS decision-making, as described in the 2020 GAO TPS Report,[18] without providing any explanation for that reversal. *See generally* MacLean Decl., Ex. 16 (GAO TPS Rpt.). As discussed above, the GAO TPS Report reviews the four documents that DHS typically collects for TPS decision-making:

(1) a country conditions report compiled by USCIS (an agency within DHS);

(2) a memo with a recommendation from the USCIS Director to the DHS Secretary;

(3) a country conditions report compiled by the State Department; and

(4) a letter with a recommendation from the Secretary of State to the Secretary of DHS.

DHS did not obtain a contemporaneous or updated country conditions report from the State Department, nor did it obtain a contemporaneous country conditions report from USCIS (including RAIO, a division within USCIS). A contemporaneous and updated report from the State Department would have been included input from the relevant regional bureau for PRM and the relevant overseas post – which implicitly would have had concrete, reliable on-the-ground information about country conditions. The failure to do so represented a

[18] As indicated above, there is no dispute about what this process entails. The government has not objected to the GAO TPS Report, nor has it argued that the report's description of the TPS decision-making process is incorrect.

reversal in practice and procedure long followed by previous administrations in enforcing the TPS statute.

Although "[a]gencies are free to change their existing policies," they must "provide a reasoned explanation for the change." *Encino Motorcars*, 579 U.S. at 221, 136 S. Ct. 2117; *see also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009) (stating that "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position[;] [a]n agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books," and "the agency must show that there are good reasons for the new policy") (emphasis in original); *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1089 (N.D. Cal. 2018) (in TPS case involving terminations of TPS for multiple countries, stating that "[t]he APA constrains an agency's ability to change its practices or policies without acknowledging the change or providing an explanation"), *vacated by Ramos*, 975 F.3d at 872, *vacated for rehearing en banc*, 59 F.4th at 1010; *cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. St. Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (stating that an agency must "examine the relevant data and articulate a satisfactory explanation for its action"). Here, Secretary Noem has not provided any explanation for her reversal of established practices on TPS decision-making.

Given the Court's rulings above, it need not reach Plaintiffs' additional argument that the termination decision was unlawful because it was predicated on an assessment of national interest, which is a factor to be considered only at the time of initial designation, and not as part of a periodic review. Plaintiffs' argument is based on a textual reading of the TPS statute which presents a closer call.

3. Summary

As a matter of law, the Secretary's decision to terminate the 2023 Designation was unlawful because it was based on the unlawful decision to vacate. Even if the Secretary had the authority to vacate the Mayorkas extension, did not exceed her statutory authority in vacating, and engaged in reasoned decisionmaking with respect to the vacatur of the Mayorkas extension, there is no genuine dispute that her subsequent decision to terminate was unlawful and/or arbitrary and capricious because the Secretary failed to engage in a meaningful consultation with government agencies or explain her reversal of well-established agency practice.

The Court thus grants Plaintiff's motion for summary judgment on the APA claim based on the Venezuela termination decision, and denies the government's cross-motion.

E. APA Claim – Haiti Partial Vacatur

Plaintiffs' third APA claim concerns the partial vacatur of Haiti's TPS designation – pursuant to which Secretary Noem shortened the extension/redesignation given by Secretary Mayorkas from 18 to 12 months. Plaintiffs' challenge to the partial vacatur for Haiti overlaps in part with their challenge to the vacatur for Venezuela.

1. Lack of Authority to Vacate and Exceeding Authority to Vacate

The Court agrees with Plaintiffs that the partial vacatur was unlawful because Secretary Noem lacked the implicit authority to partially revoke the Mayorkas extension/redesignation. *See* Part VII.C.1, *supra.* Furthermore, even if the Secretary had such authority, she exceeded the scope of that authority by invalidating TPS-related documentation that had *already* issued based on the February 3, 2026, date given by the Mayorkas extension/redesignation. *See* Part VII.C.2, *supra.* The analysis of these issues on the Venezuela vacatur decision is equally applicable here.[19]

2. Arbitrary and Capricious

Even if the Secretary had the implicit authority to partially vacate, and did not exceed her authority to vacate, the vacatur decision is nonetheless problematic, because it was arbitrary and capricious.

The reasons given for the partial vacatur were stated in the Federal Register as follows:

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[19] Plaintiffs also argue that the Secretary exceeded her authority because "the Secretary's timing for the partial vacatur contravenes the statutory mandate that the Secretary 'shall' decide whether to extend or terminate a TPS designation '[a]t least 60 days *before*' the end of the previous period of designation." Mot. at 21 (emphasis added). It is not altogether clear what Plaintiffs' contention is here. If Plaintiffs' point is that Secretary Mayorkas properly made his decision to extend/redesignate *before* the August 3, 2024, expiration date for Haiti's TPS, but Secretary Noem did not (*i.e.*, because her vacatur decision was made months later on February 18, 2025), the Court agrees that Secretary Noem failed to comply with the timing provided for in the TPS statute.

First, there is no discussion in the July 1, 2024, Federal Register notice of why the 18-month period was selected in lieu of a 6- or 12-month period. Nor does the administrative record underlying the June 3, 2024, decision and July 1, 2024, notice bear any discussion of why the 18-month period was chosen. Allowing aliens from a given country, including aliens who entered the United States illegally or overstayed their authorized period of admission, to remain in the United States temporarily with employment authorization is an extraordinary act. Congress recognized the gravity of such action under the TPS statute by setting the default extension period at 6 months, underscoring the uniqueness of this authority, and limiting its own authority to enact legislation allowing TPS recipients to adjust to lawful permanent resident status. Accordingly, determinations of how long a new designation should remain in effect and whether to depart from the default six-month period for an extension of an existing designation should take into account important considerations relating to the purpose of the statute and specific country and country conditions at issue and should not rest alone on administrative convenience. Here, there was no explanation whatsoever of why the 18-month period was selected.

Second, and similarly, the July 1, 2024, notice is bereft of any justification of why permitting the ever-increasing population of Haitian TPS recipients, particularly those who entered the country unlawfully, to remain temporarily in the United States is not contrary to the U.S. national interest. The notice simply states that "it is not contrary to the national interest of the United States." The administrative record underlying Secretary Mayorkas' June 4, 2024, decision likewise lacks any discussion of the critical national interest criterion. Such conclusory determinations do not accord with the gravity of TPS decisions under the INA. "National interest" is an expansive standard that may encompass an array of broad considerations, including foreign policy, public safety (e.g., potential nexus to criminal gang membership), national security, migration factors (e.g., pull factors), immigration policy (e.g., enforcement prerogatives), and economic considerations (e.g., adverse effects on U.S. workers, impact on U.S. communities). Determining whether permitting a class of aliens to remain temporarily in the United States is contrary to the U.S. national interest therefore calls upon the Secretary's expertise and discretionary judgment, informed by her consultations with appropriate U.S. Government agencies.

Third, although the July 1, 2024, notice cites some country conditions reports that are relatively proximate to the June 4, 2024, decision, several others date back to early 2023, 2022, or even earlier. And certain sources upon which DHS relied indicated that significant developments were taking place in 2024 that might result in an improvement in conditions. For example, as stated in the July 1, 2024, Federal Register notice, the United Nations had recently authorized a Multinational Security Support (MSS) mission to deploy in Haiti in 2024 and support the Haitian National Police in capacity building, combatting gang violence, and provide security for critical infrastructure. The Department of State likewise underscored that significant development. Thus, both DHS and the Department of State contemplated the real pos-

> sibility of an improvement in conditions with the deployment of the United Nations MSS mission, yet that important development was not expressly factored into the determination of the length of the extension and designation period.
>
> Eighteen months is the maximum period of designation or extension authorized under the TPS statute. Neither the 2021 new designation, the 2023 extension and new designation, nor the 2024 extension and new designation contained any discussion of national interest considerations or why the 18-month (vs. 6 or 12-month) periods were granted. Given the protracted duration of the "extraordinary and temporary conditions"-based designation for Haiti, the absence of any meaningful appraisal of national interest factors or justification for the 18-month extension, and the fact that eligible Haitians were able to register for TPS under the July 1, 2024, notice for over seven months, the Secretary has determined that a 12-month period is warranted. Abbreviating the period from 18 to 12 months will allow for a fresh review of country conditions in Haiti and of whether such conditions remain both "extraordinary" and "temporary," whether Haitian may return in safety, and whether it is contrary to the U.S. national interest to continue to permit the Haitian nationals to remain temporarily in the United States.

90 Fed. Reg. at 10513-14.

None of these reasons reflect reasoned agency decision making. For example, the Secretary claimed that the Mayorkas extension/redesignation should have given specific reasons why the period was set at 18 months, particularly when the default was only 6 months. But 6 months is the default only if the Secretary does *not* affirmatively make a decision on whether to extend or terminate. *See* 8 U.S.C. § 1254a(b)(3)(C) ("If the [Secretary] does not determine under subparagraph (A) that a foreign state (or part of such foreign state) no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months)."). That was not the situation here: Secretary Mayorkas did make an affirmative decision – *i.e.*, to extend. Furthermore, Secretary Noem failed to acknowledge that, in prior TPS decision making spanning the course of the 35 years, there typically has been no explanation as to why a certain period of time was chosen. *See* MacLean Decl. ¶ 30 (testifying that TPS decisions over the course of 35 years were reviewed, and, "in virtually all instances where a DHS Secretary announced the length of a TPS designation or extension, they did so without elaborating their reasons for choosing that duration and not another duration length[;] [t]here are only exceedingly rare instances where Secretaries have provided any explanation for the duration of a designation or extension"). The government has provided no evidence to the contrary. Thus, there is nothing in the record that suggests the absence of a specific justification for the length of an extension, once the decision to extend has been made, is unusual or impermissible.

Secretary Noem's criticism that the Mayorkas extension/redesignation failed to explain why it was not contrary to national interest to extend TPS suffers from the same basic flaw. That is, in prior TPS decision making, DHS Secretaries typically have not given explanations as to why allowing TPS holders to remain in the

United States is not contrary to the national interest. *See* MacLean Decl. ¶ 30 ("Secretaries have never explained their conclusion that 'permitting [TPS beneficiaries] to remain temporarily in the United States' is not 'contrary to the national interest.'").[20] The government presents no evidence that the Mayorkas decision was contrary to established practice.

In addition to the above, the partial vacatur decision arbitrary and capricious because (like the vacatur decision for Venezuela) it was preordained without any meaning analysis and review. It was, *inter alia*, made without consultation with government agencies or country conditions review. As with the administrative record for the Venezuela vacatur, there was no contemporaneous country conditions report in the administrative record for the Haiti partial vacatur. Rather, there was only a country conditions report from the Biden era that *supported* the Mayorkas extension/redesignation. *See* Docket No. 110-5 (RAIO report, dated January 2024) (ECF Pages 29-43). As in the case of Venezuela, it is ironic, if not disingenuous, for Secretary Noem to rely on a report which supported the Mayorkas extension/redesignation to *vacate* that extension/ redesignation. She has cited nothing specific in those reports to support her decision to vacate, with a single exception: reference to that fact that the United Nations had authorized a Multinational Security Support (MSS) mission to deploy in Haiti in 2024. But Secretary Noem cited no evidence on the status of the deployment and if so whether by 2025 it has had any real impact on the crime and lawlessness which had plagued Hait in recent years. There is no evidence

[20] Plaintiffs also fairly note that this would require a Secretary to prove a negative.

that she obtained or even requested a current update on the MSS mission. Simply put, in deciding to partially vacate the TPS extension, Secretary Noem had no regard for the facts and actual conditions.

Instead, like her decision to vacate Venezuela's TPS, the Secretary's decision to partially vacate was simply driven by her predetermined desire to terminate Haiti's TPS on a hastened timeline. DHS began to draft the vacatur decision within days of the Venezuela termination. The decision to vacate was made approximately two weeks later. A press release, dated February 20, 2025, announcing the partial vacatur included statements that the vacatur was "part of President Trump's promise to *rescind* policies that were magnets for illegal immigration and inconsistent with the law" – effectively noting that termination would be forthcoming. MacLean Decl., Ex. 15 (press release) (emphasis added; also asserting that, "[f]or decades the TPS system has been exploited and abused" and pointing out that, "[l]ast month, Secretary Norm similarly rescinded the previous administration's Venezuela TPS extension").

To be sure, the timeline for Haiti is, on its face, not as stark as that for Venezuela – *i.e.*, it does not appear as compressed; this might suggest that there was less of an urgency to terminate than in the case of Venezuela. However, a closer look establishes that the path laid out for Haiti was not materially different from that carried out for Venezuela. Secretary Noem was able to effectuate a full vacatur of the Mayorkas extension for Venezuela only because the period for the extension had not yet begun. (The period for the extension would have run from April 2025 to October 2026. Secretary Noem vacated the extension in February 2025.) The full vacatur is what enabled the Secretary to then immediately terminate. In contrast, Secretary Noem was not able to do a full vacatur of the Mayorkas extension/redesignation for Haiti because the period for that extension/redesignation had already begun (starting in August 2024) by the time she made the decision to vacate in February 2025. Nor did Secretary Noem have the option of shortening the extension/redesignation to 6 months (instead of 12) for the partial vacatur because that deadline had already passed as well. Thus, Secretary Noem was effectively forced to do a partial vacatur that shortened the extension/redesignation period to 12 months (instead of 18, as provided for by Secretary Mayorkas). Once that 12-month period was soon due to expire, Secretary Noem did not waste time in proceeding with the termination of Haiti's TPS.

3. Summary

The Court grants Plaintiffs' motion for summary judgment on the APA claim related to the partial vacatur for Haiti, and denies the government's cross-motion. The Secretary lacked the authority to partially vacate and/or exceeded her authority to vacate. Even if she had statutory authority to vacate, the decision to partially vacate was arbitrary and capricious.

F. Equal Protection Claims

Only the government has moved for summary judgment on the Equal Protection claims; Plaintiffs have not.[21] The Court denies the government's motion for

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[21] Although the APA provides that a court shall set aside agency action that is "contrary to constitutional right," 5 U.S.C. § 706(2)(B), Plaintiffs' complaint does not appear to expressly allege a violation of the APA predicated on a constitutional violation. Rather, Plain-

summary judgment because, consistent with its postponement order, it holds that *Trump v. Hawaii*, 585 U.S. 667, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018), does not provide the governing standard. *See* Docket No. 93 (Order at 60-61) (distinguishing *Trump v. Hawaii* because it dealt with the admission and exclusion of foreign nationals whereas TPS holders are already present in the United States; adding that the *Ramos* panel invoked similar reasoning).

Under the applicable analytical framework set forth in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), the Court finds that there is a genuine dispute of material fact as to whether the decisions to vacate and terminate were based on racial, ethnic, and/or national origin animus. Such animus can reasonably be inferred from the discriminatory statements made by Secretary Noem and/or President Trump alone. *See* Docket No. 93 (Order at 64-69) (surveying some of the discriminatory statements – *e.g.*, statements by Secretary Noem that "Venezuela didn't send us their best" but rather sent "criminals" and that the TPS program resulted in Venezuelan gang members being present in the United States); *see also* Docket No. 93 (Order at 70-71) (noting that President Trump influenced TPS policy and/or decision-making). Notably, at least some of these statements were made when the Secretary or President was discussing TPS, either expressly or implicitly.

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tiffs seem to have asserted constitutional claims separate from and independent of the APA claims.

For example, during a January 29, 2025, interview on Fox, when Secretary Noem announced the vacatur decision for Venezuela, the Secretary stated:

> [F]or 18 months, they were going to extend this protection to people that are in temporary protected status, which meant they were going to be able to stay here and violate our laws for another 18 months, and we stopped that. Today we signed an executive order within the Department of Homeland Security in a direction that we were not going to follow through on what he did to tie our hands, that we are going to follow the process, evaluate all of these individuals that are in our country, including the Venezuelans that are here and members of [TdA]. Listen, I was in New York City yesterday and the people of this country want these dirt bags out.

MacLean Decl., Ex. 18 (transcript). As noted in the Court's postponement order, Secretary Noem's generalization of the alleged acts of a few (for which there is little or no evidence) to the entire population of Venezuelan TPS holders who have lower rates of criminality and higher rates of college education and workforce participation than the general population is a classic form of racism. *Cf. Hirabayashi v. United States*, 320 U.S. 81, 96-99, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943) (describing why Japanese Americans as a group, despite the fact that most were American citizens, were susceptible to disloyalty and thus constitute a security threat, relying on assumed stereotypes); *Korematsu v. United States*, 323 U.S. 214, 233, 235, 65 S. Ct. 193, 89 L. Ed. 194 (1944) (Murphy, J., dissenting) (characterizing the majority decision upholding the mass internment of Japanese Americans as falling into the "ugly abyss of racism";

noting that the "forced exclusion [of Japanese Americans] was the result in good measure of the erroneous assumption of racial guilt . . . "). The government has suggested that the Secretary was simply calling the members of the TdA gang members "dirt bags," but there is at the very least ambiguity as to whether she was calling only gang members dirt bags, or instead referring to the larger Venezuelan TPS population in the United States. *See* Docket No. 93 (Order at 65 n.26). In any event, even if the government were right, a reasonable jury could still infer racial animus from the Secretary's statement because she was choosing to strip legal status from all Venezuelan TPS holders – numbering in the hundreds of thousands – based off her assessment of a limited number of individuals, and with no proof that any alleged gang member was a TPS holder.

As for President Trump, his comments included derogatory and baseless claims that Haitian immigrants in Springfield, Ohio – TPS holders – were eating people's pets. *See* Docket No. 129 (Order at 5); *see also* MacLean, Decl., Ex. 19 (article, dated October 2024; Docket No. 93 (Order at 67). Also, during his first administration – when there were also a number of attempts to terminate TPS – there was a discussion about protecting immigrants from Haiti, El Salvador and African countries, and President Trump asked: "Why are we having all these people from shithole countries come here?" Docket No. 93 (Order at 66) (internal quotation marks omitted). He then suggested that the "United States should instead bring more people from countries such as Norway. . . . " Docket No. 93 (Order at 66) (internal quotation marks omitted).

To be clear, the record from which a reasonable inference of animus can be made consists of more than just the discriminatory statements of Secretary Noem and President Trump, some of which were proximate in time to the decisions challenged herein. As discussed in the Court's postponement order, a number of other *Arlington Heights* factors suggest animus including "the anomalous procedures followed (the highly compressed time in which the decisions to vacate and then terminate were made and the precedential and unique nature of the decisions made), and the lack of bona fides for the decisions to vacate and then terminate." Docket No. 93 (Order at 75).

The government's motion for summary judgment on the Equal Protection Claims is denied.

## VIII. MOTIONS TO DISMISS

### A. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), a plaintiff's "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014). The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal quotation marks omitted).

B. Termination of Haiti's TPS

The government has filed two motions to dismiss. The original motion to dismiss and briefing related thereto were all completed before the Secretary terminated Haiti's TPS. After Haiti's TPS was terminated, the parties stipulated that Plaintiffs could file an amended/supplemental complaint to include the termination. Plaintiffs did so, after which the government filed a new motion to dismiss. The new motion to dismiss is largely the same as the original motion to dismiss, except that it also addresses the Haiti termination.

As an initial matter, Plaintiffs argue that their filing of a supplemental complaint did not moot out the original motion to dismiss. Practically speaking, this procedural issue is not material. Plaintiffs do not argue that the government should be barred from moving to dismiss with respect to the Haiti termination. Thus, the Court can consider the government's arguments in favor of dismissal, whether in the original motion to dismiss or in the new one.

As for those arguments, those related to the Venezuela vacatur, Venezuela termination, and Haiti partial vacatur lack merit for the reasons discussed in the Court's summary judgment analysis.

Turning to the Haiti termination, the government's arguments in favor of dismissal also lack merit. Indeed, because the Court has found the Haiti partial vacatur unlawful, the Haiti termination – which was possible only because of the vacatur – is necessarily unlawful too. Plaintiffs' APA and Equal Protection claims related to the Haiti termination are also plausible as there are allegations in the operative complaint suggesting pretext. For example, Plaintiffs have alleged that, on June 7, 2025, DHS announced in a press release that Haiti's TPS would be terminated, *both* because country conditions had improved and because allowing Haitians to remain temporarily in the United States was against national interest. *See* FASC ¶ 106. However, on July 1, 2025, when the decision to terminate was published in the Federal Register, no mention was made of improved conditions; the decision rested on a national interest assessment alone. *See* FASC ¶ 107. Country conditions were referenced only indirectly in the context of the Secretary's national interest findings – and here there was no mention of any improved conditions; rather, the clear suggestion that there was significant instability in the country. *See, e.g.*, 90 Fed. Reg. at 28763 (stating that "[g]ang violence in Haiti persists as armed groups operate with impunity, enabled by a weak or effectively absent central government"; "[w]idespread gang violence in Haiti is sustained by the country's lack of functional government authority"); *id.* at 28762 (stating that "'Haiti lacks a central authority with sufficient availability and dissemination of law enforcement information necessary to ensure its nationals do not undermine the national security of the United States'"). As Plaintiffs argue, "Defendants' simultaneous promulgation of two directly contradictory explanations for the Haiti termination suffices to demonstrate, at least for purposes of a motion to dismiss, that the reasons given were pretextual." Docket No. 264 (Opp'n at 3). Pretext may further be inferred from the facts discussed above in regard to the partial vacatur.

The motions to dismiss are, therefore, denied.

## IX. SCOPE OF RELIEF

Because the Court has granted Plaintiffs' summary judgment motion on the APA claims related to the Venezuela vacatur, the Venezuela termination, and the Haiti partial vacatur, the Court must also consider the to which relief Plaintiffs are entitled. Section 706 of the APA specifies that a court "shall . . . hold unlawful and set aside agency action . . . found to be," *e.g.*, arbitrary or capricious, not in accordance with the law, in excess of statutory authority, and without observance of procedure required by law. 5 U.S.C. § 706(2). Based on this statutory language, the Court sets aside, or vacates, each of the above decisions made by Secretary Noem.

The Court first rejects the government's contention that relief as a legal matter should categorically be limited in scope to only Plaintiffs – *i.e.*, the individual plaintiffs and the members of the National TPS Alliance ("NTPSA"). As noted above, in *Trump v. CASA*, where the Supreme Court addressed the viability of nationwide or universal injunctions, it expressly stated its holding therein did not "resolve[ ] the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action." *Trump v. CASA*, 145 S. Ct. at 2554 n.10. The government has also cited no authority to suggest that § 706 of the APA incorporates equitable principles, which were the basis of the Supreme Court's holding in *Trump v. CASA*. In fact, the Fifth Circuit has stated that

> vacatur under § 706 is, as we have repeatedly described it, the "default" remedy for unlawful agency action. Thus, contrary to what the Government and the amici represent, we do not read our precedent to require consideration of the various equities at stake before determining whether a party is entitled to vacatur.

*Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 952 (5th Cir. 2024), *rev'd and remanded on other grounds sub nom. Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 145 S. Ct. 2427, 222 L. Ed. 2d 867 (2025); *see also Cabrera v. U.S. DOL*, No. 25-cv-1909 (DLF), 792 F. Supp. 3d 91, 106 (D.D.C. July 25, 2025) (noting that, "[i]n non-APA cases, 'background equitable principles may control' because 'Congress has rarely authorized courts to act directly on federal statutes or to prohibit their enforcement against nonparties,'" but "the APA permits courts to act directly on agency actions"); *Ksanka Kupaqa XA v. U.S. Fish & Wildlife Serv.*, 534 F. Supp. 3d 1261, 1273 (D. Mont. 2021) (rejecting defendant's argument that plaintiff had to show irreparable harm: "[t]hat argument misses the mark" because "the APA directs that the 'reviewing court shall . . . set aside agency action, findings, and conclusions found to be' arbitrary, capricious, or contrary to law").

Furthermore, the Court finds persuasive Justice Kavanaugh's concurrence in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024). There, Justice Kavanaugh rejected the government's contention that "the APA's authorization to 'set aside' agency action [under § 706] does not allow vacatur, but instead permits a court only to enjoin an agency from enforcing a rule against the plaintiff." *Id.* at 827, 144 S. Ct. 2440 (Kavanaugh, J., concurring). Justice Kavanaugh characterized that argument as "far-reaching," "novel," and "wrong. It 'disregards a lot of history and a lot of law.'" *Id.* He then explained that the APA does in fact authorize vacatur of unlawful agency action, including agency rules, based on "the text and history of the APA, the longstanding and settled precedent adhering to that text and history, and the radical consequences for administrative law and individual liberty that would ensue if vacatur were suddenly no longer available." *Id.* at 829, 144 S. Ct. 2440. In short, it is hard to imagine, textually and logically, how a singular rule or order issued by an agency which has uniform national application can be "held unlawful and set aside" under § 706 only as to some and not others equally subject to and affected by such unlawful rule or order.

At the hearing in the instant case, the government argued for the first time that § 703 defines the authority of the court to issue relief, and not § 706. That argument was not raised in the government's papers and therefore has been waived. In any event, on the merits, the argument is without merit for the reasons stated in Justice Kavanaugh's concurrence in *Corner Post.*

> Section 703 determines the "form of proceeding" for suits under the APA and identifies the federal actors against whom an "action for judicial review may be brought." But "no court has ever held that Section 703 implicitly delimits the kinds of remedies available in an APA suit. For good reason: As explained

> above, the ordinary meaning of "set aside" in § 706(2) has long been understood to refer to the remedy of vacatur. The conclusion that § 706 governs remedies is also supported by § 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed" – unmistakably a remedy. By contrast, the text of § 703 "speaks to venue and forms of proceedings, not to remedies, and regardless, its listing of the available forms of proceedings is nonexhaustive."

*Id.* at 838-39, 144 S. Ct. 2440.[22]

The government contends that the Ninth Circuit's recent decision in *IDL*, 145 F.4th 972, precludes this Court from setting aside the Secretary's orders in their entirety and requires the Court to limit relief to Plaintiffs

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[22] A number of lower courts have agreed with Justice Kavanaugh, whether explicitly or implicitly. *See, e.g., N.Y. Legal Assistance Grp. v. Cardona*, No. 20 Civ. 1414 (LGS), 2025 WL 871371 at *3, 2025 U.S. Dist. LEXIS 51632 at *10 (S.D.N.Y. Mar. 20, 2025) (citing, *inter alia*, Justice Kavanaugh's concurrence in rejecting defendant's interpretation of §§ 706 and 703); *Refugee & Immigrant Ctr. for Educ. & Legal Servs. v. Noem*, No. CV 25-306 (RDM), 793 F. Supp. 3d 19, 104 (D.D.C. July 2, 2025) (stating that "[t]he D.C. Circuit has 'made clear that "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed"' "). Nevertheless, the Court acknowledges that not all Justices on the Supreme Court are in agreement with Justice Kavanaugh. Justice Gorsuch, for example, seems to agree with the government's position. *See United States v. Texas*, 599 U.S. 670, 696-98, 143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023) (Gorsuch, J., concurring) (asserting that "[t]here are many reasons to think § 706(2) uses 'set aside' to mean 'disregard' rather than 'vacate' "; also asserting that § 703 "is where the APA most clearly discusses remedies" and it does not provide for vacatur).

herein. The Court disagrees. The plaintiffs in *IDL* filed suit challenging the implementation of the Trump Administration's "Remain in Mexico" policy (also known as the Migrant Protection Protocols or MPP). Under the policy, persons from Mexico seeking asylum in the United States had to remain in Mexico pending adjudication of their asylum proceedings – even though this made it difficult for the individuals to access counsel to represent them in their asylum proceedings. The plaintiffs moved for a stay of the implementation of the policy pending the conclusion of the litigation. The district court granted a nationwide stay pursuant to 5 U.S.C. § 705. The government appealed that decision.

On appeal, the government argued, *inter alia*, that the stay should be limited to only the organizational plaintiff's clients. The Ninth Circuit agreed with the government, stating that, "*at this stage in the litigation*, . . . limiting the district court's order to [IDF]'s current and future clients is the more equitable approach 'to preserve status [and] rights pending conclusion of the review proceedings.'" *Id.* at 995 (emphasis added; quoting § 705). The Ninth Circuit acknowledged that, in *Trump v. CASA, Inc.*, 606 U.S. 831, 145 S. Ct. 2540, 222 L. Ed. 2d 930 (2025), the Supreme Court expressly stated that "[n]othing we say today resolves the distinct question whether the Administrative Procedure Act authorizes federal courts to vacate federal agency action." *Id.* at 945 n.10 (citing § 706). However, the Ninth Circuit stated that *Trump v. CASA* still provided some guidance in the context of that case "because the factors used to determine whether to issue a § 705 stay under the APA are the same equitable factors used to consider whether to issue a preliminary injunction." *IDL*, 145 F.4th at 995.

*IDL* does not require that relief in this case – a final judgment under § 706, not an interim postponement order under § 705 – be limited to the individual plaintiffs and members of the plaintiff National TPS Alliance. *IDL*'s holding was clearly informed by the procedural posture of that case, where the plaintiffs were seeking *preliminary* relief to preserve the status quo under § 705. *IDL*'s ruling applies to preliminary relief where such relief is predicated on equitable considerations similar to that which apply to preliminary injunctions under *Winter v. NRDC*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008); *see also Colorado v. United States EPA*, 989 F.3d 874, 883 (10th Cir. 2021) (stating that the preliminary injunction "factors also determine when a court should grant a stay of agency action under section 705 of the APA"); *Cook Cnty. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020) (stating that the standard for a stay under § 705 is "the same" as the standard for a preliminary injunction); *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 529 (N.D. Cal. 2020) (stating that factors considered in determining whether to postpone pursuant to § 705 "'substantially overlap with the . . . factors for a preliminary injunction'"). That similarity makes *CASA* apposite to stays under § 705, but inapposite to the instant case where final relief under § 706 is not anchored to the equitable *Winter* factors. Section 706 directs that the court "must" "[h]old unlawful and set aside agency actions" if they are unlawful for the reasons set forth in § 706(2). *Trump v. CASA*, informed by historic equitable remedies, does not apply to § 706 of the APA which contains a clear statutory directive.

Even if, as a legal matter, *Trump v. CASA*'s restriction on the scope of relief were to guide the scope of relief under § 706, the Ninth Circuit – in affirming this

Court's postponement order – indicated that relief should be nationwide in scope *in this case* because (1) full relief for the NTPSA and its tens of thousands of members who reside in all fifty states and the District of Columbia could not be obtained otherwise and (2) limiting relief as proposed by the government was not a workable solution under the TPS statute. *See NTPSA*, at 62-63. The court stated as follows:

> Plaintiffs have demonstrated that a postponement of the Vacatur Notice, effective nationwide, is the only remedy that provides complete relief to the parties before the court and complies with the TPS statute. First, Plaintiff NTPSA, a membership organization, brings this challenge on behalf of its more than 84,000 members who are Venezuelan TPS holders in all fifty states and the District of Columbia. As the district court reasoned, "[f]ull relief for the NTPSA and its members cannot be obtained absent application to all fifty states and the District of Columbia." Second, limiting the relief to individual plaintiffs and NTPSA members is not a workable solution under the TPS statute. Plaintiffs challenge a single act: Secretary Noem's vacatur of the prior extension of Venezuelan TPS. They do not challenge the eligibility determination for any particular TPS holder. Limiting Secretary Noem's decision to affect only certain individuals would effectively mean rewriting it in a way that does not comply with the TPS statute. Although the TPS statute contemplates only a single binary determination for each country's TPS designation, we would be replacing Secretary Mayorkas's positive determination, and Secretary Noem's negative determination, with a judicially created patchwork.

These statutory constraints distinguish this appeal from those arising in otherwise similar contexts. In *Immigrant Defenders*, the plaintiff organization challenged the enrollment of asylum seekers in the "Remain in Mexico" program. There, we limited the scope of the order postponing the implementation of the "Remain in Mexico" program to the organization's individual clients, as doing so awarded the plaintiffs complete relief. The statute at issue in *Immigrant Defenders* stated that the Secretary of Homeland Security "may return the [noncitizen]" to Mexico pending removal proceedings. Thus, the statute did not prohibit the Secretary from adopting a piecemeal approach by returning some, but not all, noncitizens to Mexico. Indeed, the statute specifically contemplated separate actions for each individual asylum seeker, so the piecemeal approach was consistent with the statute's design and purpose. Similarly, the challenge in *East Bay v. Barr* was to a rule limiting the eligibility of certain noncitizens for asylum. We held that the "nationwide scope" of the injunction was "not supported by the record" at that stage in the litigation because the district court failed to discuss why nationwide relief was necessary to remedy Plaintiffs' harm. Again, since the rule at issue dealt with asylum eligibility, it was possible to apply the rule to asylum applicants in some areas but not others, because each person's asylum eligibility is an individual determination.

"Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown." Here, relief cannot be structured on an individual basis. Postponing the rule for just some individuals would require rewriting the statute

> itself, and a narrower construction is not possible. TPS does not allow for partial determinations; no Secretary has the authority to designate a country for TPS when it comes to California residents, but not for Pennsylvania residents. And we do not claim the authority to do so judicially.

*Id.* at 1028-29. The Ninth Circuit's analysis is dispositive as to the scope of properly relief herein.

The Court further notes that limiting relief to the individual plaintiffs and the members of NTPSA only would be highly problematic for additional reasons. For example, limiting relief to the members of the organization would require that identification of the members be provided to DHS which would raise serious concerns about privacy and associational rights. *Cf. NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) (noting that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action"). Moreover, there may also be insurmountable practical problems given that NTPSA has members numbering in the tens of thousands, if not in the hundreds of thousands, throughout the country. At the time of the Court's postponement order, NTPSA's members included over 84,000 Venezuelan TPS holders alone. *See* Docket No. 93 (Order at 2). Contacting all members in a short time span within which their rights must be protected may be impossible as a practical matter.

## X. CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' motion for summary judgment on the APA claims related to the Venezuela vacatur, the Venezuela termination, and the Haiti partial vacatur. It finds those decision of Secretary Noem are unlawful and sets aside each of those agency actions. The Court denies the government's motion for summary judgment on the same APA claims. It further denies the government's motion for summary judgment on the Equal Protection claims and its motion to dismiss on the APA claims related to the Haiti termination.

In addition, given the likelihood of an appeal to the Ninth Circuit and possibly the Supreme Court, and the significant rights of the Venezuelan and Haitian TPS holders who have lost or will lose status in the absence of relief and the consequential need for expeditious final adjudication, the Court directs entry of a final judgment under Rule 54(b) on the APA claims for which the Court has granted summary judgment in favor of Plaintiffs. There is no just reason for delay. *See* Fed. R. Civ. P. 54(b) ("When an action presents more than one claim for relief . . . , the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."). **The Clerk of the Court is directed to enter a final judgment in favor of Plaintiffs on the APA claims related to (1) the Venezuela vacatur, (2) the Venezuela termination, and (3) the Haiti vacatur.**[23]

As for the remaining claims – *i.e.*, (4) the APA claim related to the Haiti termination, (5) the Equal Protec-

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[23] The Court acknowledges the Supreme Court's order staying enforcement of the postponement order. However, the Supreme Court's order only concerns the preliminary relief ordered by this Court in postponing agency action. The Supreme Court's order did not bar this Court from adjudicating the case on the merits and entering a final judgment issuing relief under § 706 of the APA.

tion claim related to the Venezuela TPS decisions, and (6) the Equal Protection claim related to the Haiti TPS decisions – the Court temporarily stays continued litigation. Given the prior proceedings in this case, it seems likely that the government will appeal this order. A temporary stay will help conserve judicial and party resources and further will allow the appellate courts to adjudicate most of the statutory claims before the constitutional ones.[24] *Cf. Califano v. Yamasaki*, 442 U.S. 682, 692, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979) (stating that "[a] court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question").

This order disposes of Docket Nos. 122, 165, 199, 172, and 262.

**IT IS SO ORDERED.**

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[24] The APA claim based on the Haiti termination is not a constitutional claim, but, as discussed above, the Haiti termination will be unlawful if the Haiti vacatur is deemed unlawful.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25-2120

NATIONAL TPS ALLIANCE; MARIELA GONZALEZ; FREDDY ARAPE RIVAS; M.H.; CECILIA GONZALEZ HERRERA; ALBA PURICA HERNANDEZ; E. R.; HENDRINA VIVAS CASTILLO; VILES DORSAINVIL; A.C.A.; SHERIKA BLANC, PLAINTIFFS - APPELLEES

*v.*

KRISTI NOEM, IN HER OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA, DEFENDANTS - APPELLANTS

Argued and Submitted: July 16, 2025
Pasadena, California
Aug. 29, 2025

Appeal from the United States District Court for the Northern District of California, Edward M. Chen, District Judge, Presiding, D.C. No. 3:25-cv-1766-EMC

**OPINION**

Before: KIM MCLANE WARDLAW, SALVADOR MENDOZA, JR., and ANTHONY D. JOHNSTONE, Circuit Judges.

WARDLAW, Circuit Judge

Since 2021, over 600,000 Venezuelan citizens living in the United States have received immigration status under the Temporary Protected Status ("TPS") program. This status provides eligible Venezuelans with work authorization and temporary protection from deportation. 8 U.S.C. § 1254a(a)(1). While their home country experienced "the worst humanitarian crisis in the Western Hemisphere in recent memory," Deferred Enforced Departure for Certain Venezuelans, 86 Fed. Reg. 6845, 6845 (Jan. 19, 2021), Venezuelan TPS holders were given protection to build their lives in the United States for renewable periods of six to eighteen months, 8 U.S.C. § 1254a(b)(2)-(3). Some hoped to return to Venezuela after the crisis subsided. Others awaited the adjudication of their applications for asylum or for other long-term immigration status in the United States. Each discrete extension of TPS allowed them to take jobs, sign leases, enroll in schools, and raise their families with the knowledge that although their status was temporary, they were authorized to remain in the United States until the expiration of their lawful status.

On January 17, 2025, then-Secretary of the Department of Homeland Security ("DHS") Alejandro Mayorkas announced an extension, effective immediately, of Venezuelan TPS through October 2, 2026. Extension of the 2023 Designation of Venezuela for Temporary Protected Status, 90 Fed. Reg. 5961, 5961 (Jan. 17, 2025). Secretary Mayorkas cited Venezuela's ongoing "complex, serious and multidimensional humanitarian crisis" marked by the collapse of its healthcare system and the disruption of its basic services, and he concluded that the "extraordinary and temporary conditions supporting Venezuela's TPS designation remain." *Id.* at 5963 (citation omitted). Seventeen days later, newly confirmed DHS Secretary Kristi Noem took the unprecedented action[1] of purporting to vacate this prior extension of TPS. Vacatur of 2025 Temporary Protected Status Decision for Venezuela, 90 Fed. Reg. 8805, 8806 (Feb. 3, 2025) ("Vacatur Notice"). Two days after that, she moved to terminate TPS for one group of Venezuelan TPS holders. Termination of the October 3, 2023 Designation of Venezuela for Temporary Protected Status, 90 Fed. Reg. 9040, 9040 (Feb. 5, 2025) ("Termination Notice"). The Secretary explained this reversal by invoking concerns about "confusion" caused by the prior extension, asserting that there were "notable improvements" in the conditions in Venezuela, and concluding that "[c]ontinuing to permit Venezuelans [with TPS] to remain in the United States does not champion core American interests." Vacatur Notice, 90 Fed. Reg. 8805, 8807; Termination Notice, 90 Fed. Reg. 9040, 9042-43.

TPS beneficiaries were suddenly faced with the fear of prematurely losing their status within a matter of weeks or months. For many, this meant the loss of their jobs, and the possibility of deportation to a country that had been declared unsafe just one month earlier, and, for others, the real possibility of family separation from their relatives with more permanent status. Hundreds of thousands of TPS holders, who had been living in the United States and relying on their legal immigration

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[1] No administration has attempted to vacate an existing temporary protection status designation in the thirty-five years in which the program has existed.

status for years, could become targets for detention and deportation.

Plaintiffs, the National TPS Alliance ("NTPSA"), an organization with members in all 50 states, and seven individual TPS holders, sued to restore the January 2025 extension of Venezuelan TPS. They claimed that the DHS Secretary lacks vacatur authority under 8 U.S.C. § 1254a ("TPS statute") and that Secretary Noem's actions otherwise violated the Administrative Procedure Act ("APA") and the Equal Protection Clause of the U.S. Constitution. On March 31, 2025, the U.S. District Court for the Northern District of California granted preliminary relief, postponing the effective dates of Secretary Noem's vacatur and termination notices under APA section 705. The Government now appeals.

We hold that Plaintiffs are likely to succeed on their claim that the vacatur of a prior extension of TPS is not permitted by the governing statutory framework. In enacting the TPS statute, Congress designed a system of temporary status that was predictable, dependable, and insulated from electoral politics. Congress rejected the prior system of deferred action based on "the vagaries of our domestic politics," 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Meldon Edises Levine), and instead enacted fixed terms of protected status of between six and eighteen months, 8 U.S.C. § 1254a(b)(2), (3)(C). A reading of the statute that allows for vacatur would render these terms—and Congress's design—meaningless. Plaintiffs are therefore likely to succeed on the merits of their first APA claim. Moreover, Plaintiffs have demonstrated that they face irreparable harm to their lives, families, and livelihood, that the balance of equities favors a grant of preliminary relief, and that nationwide relief is appropriate. Accordingly, we affirm the district court's order postponing the vacatur and termination of Venezuelan TPS.

## I. FACTUAL AND LEGAL BACKGROUND

### A. History of Temporary Protection

For about three decades before the enactment of the statute authorizing TPS, presidential administrations exercised prosecutorial discretion to grant protection from deportation to certain groups of noncitizens on an ad hoc basis. H.R. Rep. No. 100-627, at 6 (1988) ("[E]very Administration since and including that of President Eisenhower has permitted one or more groups of otherwise deportable aliens to remain temporarily in the United States out of concern that . . . forced repatriation . . . could endanger their lives or safety."). This type of humanitarian protection—which the Executive premised on its authority to enforce the immigration laws—was termed Extended Voluntary Departure ("EVD"). Andorra Bruno et al., Cong. Rsch. Serv., RS75700, Analysis of June 15, 2012 DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, at 9 (2012). *see* 8 U.S.C. § 1229a, *id.* § 1229c. Noncitizens protected under EVD received a work authorization and a stay of deportation. Andrew I. Schoenholtz, *The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven*, 15 Nw. J. L. & Soc. Pol'y. 1, 5 (2019). From 1960 to 1989, the Attorney General granted EVD to nationals from at least fourteen different countries. *Id.* Beginning in 1990, President George H.W. Bush began granting Deferred Enforced Departure ("DED"), which effectively provides the same relief as EVD: protection from deportation and the ability to apply for an accompanying work permit. *Id.* at 6. This action, too, is not specifically authorized by statute, rather the Executive has cited its general enforcement authority under the Immigration and Nationality Act ("INA"), *see* 8 U.S.C. §§ 1229a, 1229c, to exercise this discretion. Bruno, *supra*, at 9.

In the late 1980s, Congress considered multiple proposals for alternative mechanisms for granting humanitarian relief to groups of non-U.S. citizens. For instance, the Temporary Safe Haven Act of 1988, a proposed amendment to the INA, was intended to create a "more formal and orderly mechanism for the selection, processing and registration" of foreign citizens in the United States whose countries of nationality were experiencing ongoing armed conflict, natural disaster, or other extraordinary and temporary conditions. H.R. Rep. No. 100-627, at 4 (1988). Several legislators spoke about the need for a statutory EVD- or DED-like procedure, but they voiced concerns about granting unbridled deference to the Executive branch in determining the country designations and time periods for relief. *See, e.g.*, 133 Cong. Rec. 19560 (1987) (statement of Rep. Romano Mazzoli) ("[T]he process by which EVD grants are made, extended, or terminated is utterly mysterious, since there exist no statutory criteria to guide the administration."); 133 Cong. Rec. 19559 (1987) (Statement of Rep. Hamilton Fish, Jr.) (decrying the lack of criteria for granting EVD and explaining the need to fill the statutory gap for those who seek temporary refuge in the United States). In discussions about another TPS precursor bill, legislators expressed the same concerns. *See, e.g.*, 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. William Blaine Richardson) (speaking in favor of the establishment of a systematic procedure for temporary protected status "because we need to replace the current ad hoc, haphazard regulations and procedures that exist today"). Representative Levine stressed the importance of constraining Executive authority and insulating vulnerable noncitizens from politics: "Refugees, spawned by the sad and tragic forces of warfare, should not be subject to the vagaries of our domestic politics as well." 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Meldon Edises Levine).

One year later, in 1990, Congress passed, and President George H.W. Bush signed, the Immigration Act of 1990, Pub. L. No. 101-649. This law amended the INA to create the TPS program, which has largely replaced the Executive's prior ad hoc framework for providing relief to nationals of certain designated countries. The law provided a new statutory basis for the temporary protection of certain nationals of foreign countries, now with explicit guidelines, specific procedural steps, and time limitations.

B. TPS Statutory Framework

Pursuant to the TPS statute, 8 U.S.C. § 1254a, the DHS Secretary may designate a foreign state for TPS when nationals of that state cannot return there safely due to armed conflict, natural disaster, or other "extraordinary and temporary conditions," unless the Secretary "finds that permitting the [noncitizens] to remain temporarily in the United States is contrary to the national interest of the United States." 8 U.S.C. § 1254a(b)(1)(C); *see also* 8 U.S.C. § 1103(a); 6 U.S.C. § 557 (transferring responsibility for TPS administration from the Attorney General to the Secretary of Homeland Security). A foreign state's initial TPS designation is for a set period of between six and eighteen months, as selected by the Secretary. 8 U.S.C. § 1254a(b)(2). Such a designation permits certain nationals of the foreign state, who have continuously resided in the United States since the effective date of the designation, to register for employment authorization and protection from deportation for the duration of the TPS period. *Id.* § 1254a(a)(1), (b)(2). Other restrictions apply: applicants must be "admissible" under the immigration laws, *id.* § 1254a(c)(1)(A)(iii); they must not have been "convicted of any felony or 2 or more misdemeanors committed in the United States," *id.* § 1254a(c)(2)(B)(i); and they risk revocation of status if the Secretary "finds that the [noncitizen] was not in fact eligible for such status," *id.* § 1254a(c)(3)(A). TPS does not provide beneficiaries with a pathway to permanent resident status, nor does it include any right to petition for visas on behalf of family members in the United States or abroad.

At least sixty days before the end of the designated TPS period, the Secretary, "after consultation with appropriate agencies of the Government," reviews the designation and determines "whether the conditions for such designation under this subsection continue to be met." *Id.* § 1254a(b)(3)(A). If the foreign state no longer meets the conditions for TPS designation, the Secretary "shall terminate the designation." *Id.* § 1254a(b)(3)(B). Otherwise, the Secretary may extend the designation for an additional period of six, twelve, or eighteen months. *Id.* § 1254a(b)(3)(C). The statute provides that "[t]here is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection." *Id.* § 1254a(b)(5)(A).

C. Venezuelan TPS

On January 19, 2021, the last day of his first term, President Donald Trump designated Venezuela for DED, explaining that Venezuela was experiencing the "worst humanitarian crisis in the Western Hemisphere in recent memory." Deferred Enforced Departure for Certain Venezuelans, 86 Fed. Reg. 6845, 6845 (Jan. 19, 2021). President Trump directed the Secretary of Homeland Security to "take appropriate measures to authorize employment" for certain Venezuelans citizens who were present in the United States as of January 20, 2021. *Id.* On March 9, 2021, DHS Secretary Alejandro Mayorkas designated Venezuela for an 18-month period of TPS, effective March 9, 2021 through September 9, 2022. Designation of Venezuela for Temporary Protected Status and Implementation of Employment Authorization for Venezuelans Covered by Deferred Enforced Departure, 86 Fed. Reg. 13574, 13574 (Mar. 9, 2021) ("2021 Designation"). In the Federal Register notice, Secretary Mayorkas cited Venezuela's "severe political and economic crisis" marked by "[e]conomic contraction," "deepening poverty," "a collapse in basic services," and "human rights abuses and repression." *Id.* at 13576. Approximately 323,000 Venezuelan nationals who had continuously resided in the United States since March 8, 2021 or earlier became eligible to apply for TPS. *Id.* at 13575.

On September 8, 2022, one day before the expiration of Venezuela's 2021 TPS designation, Secretary Mayorkas announced the extension of Venezuelan TPS for an additional eighteen months, from September 10, 2022 through March 10, 2024. Extension of the Designation of Venezuela for Temporary Protected Status, 87 Fed. Reg. 55024, 55024 (Sept. 8, 2022). This extension permitted existing beneficiaries of the 2021 TPS designation to extend their work authorization and protection from removal.[2] *Id.* In the Federal Register notice, Secretary Mayorkas explained that the 18-month extension was warranted because "Venezuela remain[ed] in a humanitarian emergency due to economic and political crises," with "limited access to food, basic services, and adequate healthcare, and the deterioration of the rule of law and protection of human rights." *Id.* at 55026. He concluded that "it is not contrary to the national interest of the United States to permit Venezuelan TPS beneficiaries to remain in the United States temporarily." *Id.* at 55027.

On October 3, 2023, Secretary Mayorkas issued a Federal Register notice in which he took two actions: first, he announced a second 18-month extension of the 2021 Venezuela TPS designation; and second, he redesignated Venezuela for TPS. Extension and Redesignation of Venezuela for Temporary Protected Status, 88 Fed. Reg. 68130, 68130 (Oct. 3, 2023). The redesignation of Venezuela for TPS allowed eligible Venezuelans who had continuously resided in the United States since July 31, 2023 to apply for TPS for the first time. *Id.* Secre-

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[2] Because it was an extension of the existing Venezuela TPS designation, no new TPS applicants could receive status through this notice. Only current TPS beneficiaries who had been continuously present in the United States since March 9, 2021, the date of the initial TPS designation, could seek an extension of status. Thus, any Venezuelans who arrived in the United States on or after March 10, 2021 were unaffected by this extension and remained ineligible for TPS.

tary Mayorkas reasoned that both extending and redesignating Venezuelan TPS was warranted "because extraordinary and temporary conditions continue to prevent Venezuelan nationals from returning in safety." *Id.* at 68132. Based on this notice, beneficiaries of the 2021 Venezuelan TPS designation could extend their status through September 10, 2025. *Id.* at 68130. Registration for the 2023 Venezuela TPS redesignation began on October 3, 2023, and the status continued through April 2, 2025. *Id.* Approximately 472,000 additional people became potentially eligible for this second Venezuela designation. *Id.* at 68134. This created a two-track system, with different TPS periods for the 2021 and 2023 registrants ending on two different dates.

Secretary Mayorkas addressed this two-track system on January 17, 2025 by extending the 2023 Venezuelan TPS designation. Extension of the 2023 Designation of Venezuela for Temporary Protected Status, 90 Fed. Reg. 5961 (Jan. 17, 2025). Through this notice, Secretary Mayorkas allowed existing beneficiaries of either the 2021 or 2023 TPS designation to seek an 18-month extension of status through October 2, 2026. *Id.* at 5962. Secretary Mayorkas explained that there would no longer be two separate filing processes for the 2021 and 2023 TPS designations for Venezuela. *Id.* at 5963. Instead, based on a U.S. Citizenship and Immigration Services ("USCIS") evaluation of "the operational feasibility and resulting impact on stakeholders of having two separate filing processes," including confusion among applicants and adjudicators, the Secretary determined that it was appropriate to consolidate the two filing processes. *Id.* Secretary Mayorkas justified the extension of Venezuelan TPS by citing the Department of Homeland Security's review of Venezuelan country conditions, "including input received from [the] Department of State" and other agencies. *Id.* He further determined that "it is not contrary to the national interest of the United States to permit Venezuelan TPS beneficiaries to remain in the United States temporarily." *Id.*

Upon taking office on January 20, 2025, President Trump issued Executive Order ("EO") No. 14159, entitled "Protecting the American People Against Invasion," in which he tasked the Secretary of State, the Attorney General, and the Secretary of Homeland Security with "promptly tak[ing] all appropriate action, consistent with law, to rescind the policy decisions of the previous administration that led to the increased or continued presence of illegal aliens in the United States. . . . " Exec. Order No. 14159, § 16 (Jan. 20, 2025), 90 Fed. Reg. 8443, 8446 (Jan. 29, 2025). Specifically, he charged these officials with "ensuring that designations of Temporary Protected Status are consistent with . . . 8 U.S.C. § 1254a[ ], and that such designations are appropriately limited in scope and made for only so long as may be necessary to fulfill the textual requirements of that statute." *Id.* § 16(b).

On February 3, 2025, newly confirmed DHS Secretary Kristi Noem issued a notice purporting to vacate former Secretary Mayorkas's extension of the 2023 designation and the accompanying consolidation of the two Venezuelan TPS filing systems. Vacatur Notice, 90 Fed. Reg. 8805, 8806. Secretary Noem opined that "[t]he Mayorkas Notice adopted a novel approach of implicitly negating the 2021 Venezuela TPS designation by effectively subsuming it within the 2023 Venezuela TPS designation," without "acknowledg[ing] the novelty of its approach or explain[ing] how it is consistent with the

TPS statute." *Id.* at 8807. The Secretary explained that Secretary Mayorkas's approach "included multiple notices, overlapping populations, overlapping dates, and sometimes multiple actions happening in a single document." *Id.* The Vacatur Notice described Secretary Mayorkas's explanations for his "attempts to address" confusion as "thin and inadequately developed." *Id.* Thus, Secretary Noem decided that "[g]iven these deficiencies and lack of clarity, vacatur is warranted to untangle the confusion, and provide an opportunity for informed determinations regarding the TPS designations and clear guidance." *Id.* Without the extensions provided for by Secretary Mayorkas's extension notice, TPS for 2023 registrants was set to expire on April 2, 2025, and TPS for 2021 registrants was set to expire on September 10, 2025. *Id.* at 8806.

Two days later, on February 5, 2025, Secretary Noem issued another notice, this time announcing the termination of the 2023 TPS designation of Venezuela, which, by statute, would be effective 60 days later. Termination Notice, 90 Fed. Reg. at 9040. The Termination Notice stated that "[a]fter reviewing country conditions . . . in consultation with the appropriate U.S. Government agencies," and "determin[ing] it is contrary to the national interest" to extend Venezuelan TPS, the Secretary concluded that Venezuela no longer met the conditions for TPS designation. *Id.* at 9040-41. The Secretary defined the term "national interest" as an "expansive standard," and she provided several reasons for her determination that an extension of TPS would be contrary to the national interest: the "sheer numbers" of TPS holders strained resources in local communities and "cost taxpayers billions of dollars"; the Venezuelan gang "Tren de Aragua" posed a threat to the United States;

there was a potential "magnet effect" caused by TPS determinations; and "[c]ontinuing to permit Venezuelans under the 2023 TPS designation to remain in the United States does not champion core American interests or put American interests first." *Id.* at 9042-43 (footnotes and citations omitted). Secretary Noem cited EO 14159 as a justification for "reapprais[ing] the national interest factors and giv[ing] strong consideration to the serious national security, border enforcement, public safety, immigration policy, and economic and public welfare concerns engendered by illegal immigration of Venezuelans." *Id.* at 9043. Because the termination of TPS may not take effect earlier than 60 days after the Federal Register notice is published, 8 U.S.C. § 1254a(b)(3)(B), the effective date of the termination of the 2023 designation of Venezuela for TPS was set for April 7, 2025.

D. Procedural History

On February 19, 2025, the National TPS Alliance, a member-led organization, and seven individual TPS holders (collectively, "Plaintiffs"), sued Secretary Noem and the United States Government ("the Government") in the U.S. District Court for the Northern District of California on behalf of themselves and all NTPSA members. Plaintiffs asked the court to postpone and invalidate the Vacatur and Termination Notices issued by Secretary Noem, and to restore the prior extension of the 2021 and 2023 TPS designations through October 2, 2026.

On March 31, 2025, the district court granted Plaintiffs' motion for preliminary relief by postponing the Vacatur and Termination Notices. Applying the *Winter* test for the grant of preliminary relief, the district court held that (1) Plaintiffs established a likelihood of success on the merits; (2) TPS beneficiaries will "suffer irreparable injury" if relief is not granted; and (3) the public interest and balance of equities "tip[ ] sharply" in favor of postponement. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The district court postponed the agency's Vacatur and Termination Notices nationwide. On April 2, 2025, the Government appealed.[3]

## II. JURISDICTION – CARSON

28 U.S.C. § 1292(a)(1) grants appellate jurisdiction over "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions." Here, the district court ordered preliminary relief in the form of a postponement of agency action under APA section 705. We may review such a postponement only if the appellant satisfies the three-part test established in *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981). *Imm. Defs. Law Ctr. v. Noem*, 145 F.4th 972, 983-84 (9th Cir. 2025). "[T]he appealing party must show that the order (1) has the practical effect of the grant or denial of an injunction; (2) has serious, perhaps irreparable consequences; and (3) can be effectively challenged only by

[3] The Government sought a stay of the district court's order pending appeal, which the district court denied. On April 4, 2025, the Government sought a stay in the Ninth Circuit of the district court judge's order pending appeal, which a motions panel of our court denied. On May 1, 2025, Appellants sought a stay from the United States Supreme Court. Dkt. 1, *Noem v. Nat. TPS All.*, No. 24A1059 (May 1, 2025). On May 19, 2025, the Supreme Court granted a stay pending both the disposition of the instant appeal and the disposition of a petition for a writ of certiorari, if any. *Noem v. Nat. TPS All.*, ––– U.S. ––––, 145 S. Ct. 2728, 221 L. Ed. 2d 981 (2025).

immediate appeal." *United States v. El Dorado County*, 704 F.3d 1261, 1263 (9th Cir. 2013) (quotation marks omitted) (quoting *Thompson v. Enomoto*, 815 F.2d 1323, 1326-27 (9th Cir. 1987)).

First, we have recently held that a section 705 postponement has the practical effect of a preliminary injunction because it "pauses the [ ]implementation of" agency action. *Imm. Defs.*, 145 F.4th at 983. We have similarly treated a temporary restraining order as an injunction "where an adversarial hearing has been held and the district court's basis for issuing the order is strongly challenged." *Id.* As in *Immigrant Defenders*, the district court here held a contested hearing on Plaintiffs' motion to postpone, and the Government strongly challenged the postponement order, including by securing a stay on the Supreme Court's emergency docket. *Id.* The first prong of the *Carson* test is satisfied.[4]

The second *Carson* factor is the risk of "serious, perhaps irreparable, consequence[s]" to the appellant. 450 U.S. at 84, 101 S. Ct. 993 (citation omitted). "It is well established that the mere existence of the Executive Branch's desire to enact a policy is not sufficient to satisfy the irreparable harm prong." *Imm. Defs.*, 145 F.4th at 985. However, here, the Government has satisfied this requirement. Because the Supreme Court granted a stay in favor of the Government, the Court necessarily held that the Government would face irreparable harm if the district court's postponement order were to remain in effect. *See Hollingsworth v. Perry*, 558 U.S. 183,

[4] In *Immigrant Defenders*, we noted that both the Supreme Court and our circuits "have not hesitated to hear interlocutory appeals of orders labeled as 5 U.S.C. § 705 stays." *Imm. Defs.*, 145 F.4th at 984 n.6.

190, 130 S. Ct. 705, 175 L. Ed. 2d 657 (2010) (per curiam) (enumerating the threshold requirement that a party seeking a stay must demonstrate "a likelihood that irreparable harm will result from the denial of a stay"); *Noem v. Nat'l TPS All.*, ––– U.S. ––––, 145 S. Ct. 2728, 221 L. Ed. 2d 981 (2025) (granting the Government's stay request). Thus, the second *Carson* factor is also satisfied.

Finally, the third *Carson* factor requires that the order under appeal can "be effectually challenged only by immediate appeal." 450 U.S. at 84, 101 S. Ct. 993 (citations and quotation marks omitted). Impeding "the government's [ ]ability to fully enact an immigration policy of its choice," can in some situations "compound the harm to the government over time" and thereby satisfy the third *Carson* factor. *Imm. Defs.*, 145 F.4th at 985. Plaintiffs correctly note that the Government can challenge the postponement order before the district court at the summary judgment stage of litigation. However, TPS presents a unique context because of its temporary nature; it is conceivable that the postponement order, if left in place, would remain in effect throughout much of the challenged extension period.[5] Even a slight delay to

[5] Indeed, we have already encountered such a situation. In *Ramos v. Wolf*, we considered the Government's appeal of a district court's 2018 preliminary injunction barring the implementation of the terminations of four TPS country designations. 975 F.3d 872, 878 (9th Cir. 2020). After a panel of our court vacated the preliminary injunction, *id.* at 900, we granted en banc rehearing and vacated the panel opinion, *Ramos v. Wolf*, 59 F.4th 1010 (9th Cir. 2023). Then, nearly five years after the district court issued its preliminary injunction, a new presidential administration took office and changed course. The new administration redesignated two of the relevant countries for TPS and rescinded the terminations

allow the district court to rule on summary judgment could prevent the litigants from receiving meaningful appellate review. Accordingly, the Government has made a sufficient showing that the district court's postponement order under section 705 can be effectively challenged only by immediate appeal.

Because the Government has satisfied the three-part *Carson* test, we have jurisdiction to consider this appeal. We therefore proceed to examine the likelihood of success as to the merits of Plaintiffs' challenge to DHS's action.

## III. STANDARD OF REVIEW

The Government appeals the grant of temporary relief under 5 U.S.C. § 705 of the APA. Section 705 provides:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

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of TPS for the two others, and we granted the Government's motion for voluntary dismissal. *Ramos v. Mayorkas*, No. 18-16981, 2023 WL 4363667, at *1 (9th Cir. June 29, 2023). Due to the temporary nature of TPS and the change in administrations, we never conclusively resolved the merits of the preliminary injunction, much less the final merits determination.

The postponement of agency action under the APA is governed by the preliminary injunction factors. *Imm. Defs.*, 145 F.4th at 985-86. Under that framework, "[a] plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 668 (9th Cir. 2021) (citation omitted). Where, as here, the Government is a party, the last two factors merge. *Id.* The factors are evaluated on a sliding scale, so "a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

We review the district court's factual findings for clear error, legal determinations de novo, and ultimate resolution of the preliminary injunction factors for abuse of discretion. *Washington v. Trump*, 145 F.4th 1013, 1022-23 (9th Cir. 2025). We review the "district court's choice of equitable remedy" for abuse of discretion. *Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 50 (9th Cir. 2025).

**IV. FIRST APA CLAIM – JURISDICTION**

The Government argues that we lack judicial power to review Plaintiffs' first APA claim, which challenges the DHS Secretary's statutory authority to vacate a prior extension of TPS. The Government relies on two statutes: the TPS statute itself, 8 U.S.C. § 1254a; and a provision of the INA restricting courts from "enjoin[ing] or restrain[ing]" the operation of certain immigration statutes, 8 U.S.C. § 1252(f)(1). However, neither statute prevents us from reaching the merits of this claim.

A. The TPS Statutory Bar, 8 U.S.C. § 1254a

The TPS statute, 8 U.S.C. § 1254a, provides that:

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

*Id.* § 1254a(b)(5) "Review" (A) "Designations."

Courts strongly presume that Congress intends judicial review of administrative actions. *Hyatt v. Off. of Mgmt. & Budget*, 908 F.3d 1165, 1170-71 (9th Cir. 2018). This presumption can only be overcome by "clear and convincing evidence of a contrary legislative intent." *Id.* at 1171 (quoting *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718 (9th Cir. 2011)). In determining whether the presumption has been overcome, the Supreme Court has noted that "'the clear and convincing evidence standard is not a rigid evidentiary test,' and 'the presumption favoring judicial review [is] overcome, whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.'" *Id.* (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350-51, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984)) (alterations in original).

Where, as here, the claim is that "agency action [was] taken in excess of delegated authority," this presumption of reviewability is "particularly strong." *Amgen, Inc. v. Smith*, 357 F.3d 103, 111 (D.C. Cir. 2004) (citing *Leedom v. Kyne*, 358 U.S. 184, 190, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958)); *Leedom*, 358 U.S. at 190, 79 S. Ct. 180 (Courts "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers"). The assertion that a statute bars substantial statutory and constitutional claims is "an extreme position." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 680-81, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986).

Courts look to a statute's "express language[,] . . . the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Hyatt*, 908 F.3d at 1171 (quoting *Block*, 467 U.S. at 345, 104 S. Ct. 2450). We begin, and can end, with the "natural meaning of the text." *Patel v. Garland*, 596 U.S. 328, 340, 142 S. Ct. 1614, 212 L. Ed. 2d 685 (2022). If this inquiry reveals clear and convincing evidence that the claim is covered by the jurisdiction-stripping statute, then the jurisdiction-stripping provision applies. *See Amgen*, 357 F.3d at 111. If the jurisdiction-stripping provision does not clearly apply or is ambiguous, we apply the APA's presumption of reviewability. *See Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229, 140 S. Ct. 1062, 206 L. Ed. 2d 271 (2020) ("We have consistently applied the presumption of reviewability to immigration statutes." (citation and quotation marks omitted)).

Textually, Plaintiffs' first APA claim—challenging the Secretary's statutory authority to vacate a prior TPS extension—falls outside the scope of this jurisdiction-stripping provision.[6] The extent of statutory authority

[6] The district court noted that the Government conceded in the evidentiary hearing before it that § 1254a(b)(5)(A) does not bar the court from determining whether the Secretary acted beyond the scope of her authority when she vacated the extension of the 2023 Designation. But, "[p]arties 'cannot waive . . . a court's lack of subject matter jurisdiction,'" and "'[r]egardless of the parties' con-

granted to the Secretary is a first order question that is not a "determination . . . with respect to the designation, or termination or extension" of a country for TPS. Nothing here indicates that Congress's language restricting review of the Secretary's "determination[s]" of whether to grant TPS in a particular situation also extends to her conclusion as to the extent of her power under the TPS statute. *See* 8 U.S.C. § 1254a(b)(5)(A).

*Block v. Community Nutrition Institute* is instructive. There, the Supreme Court considered whether the Agricultural Marketing Agreement Act of 1937, which granted the Secretary of Agriculture authority to promulgate "milk market orders," stripped courts of jurisdiction to review challenges to milk market orders brought by persons *other than* "dairy handlers." 467 U.S. at 346, 104 S. Ct. 2450. The Court, reasoning that "[i]t is clear that Congress did not intend to strip the judiciary of *all* authority to review the ... orders" because "Congress added a mechanism by which dairy handlers could obtain review of the Secretary's market orders," concluded that "[t]he remainder of the statutory scheme . . . makes equally clear Congress' intention to limit the classes entitled to participate in" challenges to market orders. *Id.* (emphasis added). The Court therefore held that "[t]he restriction of the administrative remedy to handlers strongly suggests that Congress intended a

cessions, therefore, we must satisfy ourselves' of our subject matter jurisdiction." *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1219 (9th Cir. 2009) (quoting *Stock W., Inc. v. Confederated Tribes of the Colville Rsrv.*, 873 F.2d 1221, 1228 (9th Cir. 1989)); *see also Richardson v. United States*, 943 F.2d 1107, 1113 (9th Cir. 1991) ("Subject matter jurisdiction cannot be conferred upon the courts by the actions of the parties and [the] principle[ ] of ... waiver do[es] not apply.").

similar restriction of judicial review of market orders." *Id.* at 347, 104 S. Ct. 2450. Here, the text of the TPS statute counsels in favor of drawing the same type of inference—Congress's decision to explicitly carve out from judicial review the Secretary's decisions related to "determination[s] . . . with respect to the designation, or termination or extension" of a country for TPS "strongly suggests" that we may review the Secretary's interpretations of her *authority* under the TPS statute. *Id.*

The legislative history of the TPS statute confirms our understanding that Congress intended to constrain the authority of the Executive, not to render all aspects of the TPS program unreviewable. *Hyatt*, 908 F.3d at 1171. Moreover, we typically do not understand jurisdiction-stripping statutes to bar review of the question of the scope of statutory authority.[7] *See, e.g., Amgen*, 357 F.3d at 113-14 (collecting cases) ("Where, as here, we find that the Commission has acted outside the scope of its statutory mandate, we also find that we have jurisdiction to review the Commission's action." (citation omitted)). Thus, the plain text of the statute, its legislative history, and the strong presumption that the scope of agency authority is reviewable all confirm that we are empowered to answer the question of whether the Secretary has the statutory authority to vacate a prior extension of TPS.

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[7] As Plaintiffs point out, holding otherwise would produce absurd results. For instance, the TPS statute limits each TPS designation period to between six and eighteen months, 8 U.S.C. § 1254a(b)(2), but holding that we lack jurisdiction to review questions of statutory interpretation would make unreviewable a Secretary's decision to authorize a statutorily prohibited thirty-year TPS period.

### B. Judicial Review Under the Immigration and Nationality Act, 8 U.S.C. § 1252(f)(1)

The Government contends that we lack jurisdiction to provide injunctive relief under the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, otherwise known as the Immigration & Naturalization Act ("INA"), 8 U.S.C. § 1252(f)(1) (U.S. Code version).[8] The parties' dispute centers on whether the district court's postponement order in fact "enjoin[ed] or restrain[ed] the operation" of the TPS statute, and therefore whether the district court lacked jurisdiction to grant injunctive relief in the form of a postponement of agency action.

The INA states, in a section entitled "Judicial Review of Orders of Removal," under the heading "Limit on injunctive relief":

> IN GENERAL.—Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II, as amended . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

Pub. L. No. 104-208, Div. C, § 306(a)(2), 110 Stat. at 3009-611 (1996).

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[8] We rely on the enacted text, which differs slightly from the U.S. Code version located at 8 U.S.C. § 1252. *See Galvez v. Jaddou*, 52 F.4th 821, 829-30 (9th Cir. 2022). References in this opinion to 8 U.S.C. § 1252 refer to the enacted text of the statute, as rendered above.

The district court concluded, and we agree for slightly different reasons, that section 1252(f)(1) does not bar Plaintiffs' first APA claim. First, after the district court's March 31, 2025 postponement, our court held that section 1252(f)(1) does not prohibit relief in the form of a stay or postponement of agency action under the APA. *Imm. Defs.*, 145 F.4th at 990-91. Second, even if the district court's order does "enjoin or restrain," it is not barred by section 1252(f)(1) if it affects only agency actions that exceed the agency's statutory authority. In *Ali v. Ashcroft*, we held that:

> [Section] 1252(f)(1) limits the district court's authority to enjoin the INS from carrying out legitimate removal orders. Where, however, a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated.

346 F.3d 873, 886 (9th Cir. 2003), *vacated on unrelated grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005). We reaffirmed *Ali v. Ashcroft* in *Rodriguez v. Hayes*, in which we held that the petitioner could "enjoin conduct . . . not authorized by the statutes" despite the restrictions of section 1252(f)(1). 591 F.3d 1105, 1120-21 (9th Cir. 2010), *rev'd on other grounds, Jennings v. Rodriguez*, 583 U.S. 281, 313, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018) (acknowledging our holding that this provision did not affect our jurisdiction over statutory claims (citing *Rodriguez*, 591 F.3d at 1120)).

As such, section 1252(f)(1)'s bar on injunctive relief for claims does not affect challenges to actions that fall outside of a statutory grant of authority. We therefore have jurisdiction to consider Plaintiffs' APA claim that the Secretary exceeded her statutory authority in vacating the 2023 extension.

## V. FIRST APA CLAIM – EXCEEDED AUTHORITY

Plaintiffs argue that Secretary Noem's vacatur was not authorized by the TPS statute because the TPS statute authorizes only the designation, extension, or termination of TPS, and not the vacatur of an extension. *See* 5 U.S.C. § 706(2)(C) (permitting courts to "hold unlawful and set aside agency action" found "in excess of statutory jurisdiction, authority, or limitations"). The Government counters that because the statute grants the DHS Secretary the authority to designate TPS, she must also have the inherent authority to vacate it. However, agencies lack the authority to undo their actions where, as here, Congress has spoken and said otherwise. Plaintiffs are therefore likely to succeed on the merits of this claim.

Where Congress does not explicitly address the subject, agencies have some authority to reconsider prior decisions. In *China Unicom (Ams.) Ops. Ltd. v. FCC* (*CUA*), 124 F.4th 1128 (9th Cir. 2024), we considered whether the Federal Communications Commission ("FCC") could revoke a certificate issued to China Unicom (Americas) Operations Limited ("CUA") allowing it to provide telecommunications services in the United States. *Id.* at 1132. The relevant statute required those "acquir[ing] or operat[ing] any line" to first obtain a certificate from the FCC, which the FCC could condition on "such terms and conditions as in its judgment the public convenience and necessity may require." *Id.* at 1133-34 (citations omitted). The statute was silent, however, as to whether or how the FCC could revoke previously issued certificates. *Id.* The FCC had issued CUA's certificate in 2002, but by 2020 the national security environment had changed. *Id.* at 1136-39. After giving CUA an opportunity to respond to its concerns, the FCC revoked the certificate in 2022. *Id.* at 1140-41. We held that the FCC had this revocation power based on the statute's grant of authority to issue certificates, its silence as to revocations, and its language giving the FCC the power to "perform any and all acts" and "issue such orders, . . . as may be necessary in the execution of its functions." *Id.* at 1143-44 (citation omitted). We characterized the latter provision as "in effect, a 'necessary and proper' clause that enables the FCC to carry out its statutory authorities," which allowed it to revoke a certificate for rule violations or when the public interest so required. *Id.* at 1134.

We compared the provisions authorizing these telecommunications certificates to the statutory language regarding broadcast licenses. *Id.* at 1148. We noted that "broadcast licenses are generally issued for *fixed*, renewable terms of up to eight years," and "[t]he use of a fixed term is thus affirmatively inconsistent with positing an implied power to revoke a license at any time." *Id.* (emphasis in original). "By contrast," the statutory framework for the issuance of telecommunications certificates, which provides no time limitation at all, "is a factor that weighs in *favor* of an implied power of revocation." *Id.* (emphasis in original).

However, where Congress has spoken as to the proper procedure for reversing a decision, agencies lack the inherent authority to circumvent the statute. For instance, in *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81 (D.C. Cir. 2014), the D.C. Circuit considered whether the FDA had the inherent authority to reconsider its regulation of a medical device. *Id.* at 82. The court noted that "administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion." *Id.* at 86. But the court clarified that "any inherent reconsideration authority does not apply in cases where Congress has spoken." *Id.* "Put more simply, our cases assume that Congress intends to displace an administrative agency's inherent reconsideration authority when it provides statutory authority to rectify the agency's mistakes." *Id.* In *Ivy*, the D.C. Circuit rejected the FDA's claim of inherent authority because Congress specified the statutory mechanism by which the FDA could reclassify the medical device and thereby correct its prior error. *Id.* at 87. The FDA "could not rely on a claimed inherent reconsideration authority to short-circuit that statutory process and revoke its prior . . . determination to achieve th[e] same result." *Id.* The FDA's complaints that the statutory reclassification process took longer, required greater process, and did not achieve an identical result did not change the court's determination that Congress had displaced the FDA's inherent reconsideration authority by providing a separate mechanism for doing so. *Id.* at 87-88.

Similarly, in *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000) (en banc), we considered whether the Attorney General's statutory authority to naturalize new U.S. citizens under 8 U.S.C. § 1421(a) necessarily conferred on her the power to reopen or vacate prior naturalizations. *Id.* at 1089-90. Congress had explicitly allocated the denaturalization power to the federal judiciary, stating that denaturalization proceedings may be brought "in any district court." *Id.* at 1093-94 (quoting 8 U.S.C. § 1451(a)). Because Congress had spoken on the issue, we rejected the Attorney General's assertion of revocation power, explaining:

> There is no general principle that what one can do, one can undo . . . . But there is no statutory confirmation of any inherent power the [Attorney General] may have to vacate [her] judgments, except for [her] narrow authority to cancel certificates without affecting citizenship . . . Whether the Attorney General can undo what she has the power to do, naturalize citizens, depends on whether Congress said she could.

*Id.* at 1095. Although we recognized that "[p]ossibly the agency has authority to correct clerical errors shortly after they are made," we held that it lacked statutory authorization to rewrite the Congressional allocation of the denaturalization power to the judiciary. *Id.* at 1098.

In the TPS context, Plaintiffs are likely to succeed in their claim that Congress has displaced any inherent revocation authority by explicitly providing the procedure by which a TPS designation is terminated. The Secretary's assertion of such a power is, as the district court noted, "at odds with the structure of the TPS statute." The TPS statute specifically addresses the time frame within which a TPS designation may be terminated. Section 1254a(b)(3)(B) provides that a termination "shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension." It expressly provides that the termination of a TPS designation can be no earlier than the expiration of the most recent extension. The statute does not permit the Secretary to terminate a designation "midstream," but that is exactly what the Secretary purports to do here. And while the statute expressly sets forth in detail procedures for "designation," "extension," and "termination," it nowhere mentions a process for "vacatur," which, in this case, has the practical effect of a "termination" of a TPS designation. Thus, if the Secretary wished to end TPS status for Venezuelans, she is statutorily required to follow the procedures for termination that Congress enacted.

Like in *Ivy* and *Gorbach*, Congress has provided mechanisms for designating, extending, and terminating TPS, and the agency is not free to disregard them by relying on a vague invocation of "inherent authority." Congress has provided a means for the Secretary to account for changes in country conditions or political priorities: she can terminate TPS within the confines of the statute. Holding otherwise, and allowing rescission or vacatur of the TPS designation here, would empower the agency to indirectly take three separate actions that are prohibited by statute: designating countries for TPS for a time period under six months, 8 U.S.C. § 1254a(b)(2)(B), (b)(3)(C), terminating TPS before the expiration of the last extension, § 1254a(b)(3)(B), and terminating TPS with less than sixty days' notice, *id.* Such a dodge of statutory language is impermissible. *See Civ. Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 328, 81 S. Ct. 1611, 6 L. Ed. 2d 869 (1961) (rejecting agency's assertion of "the power to do indirectly what it cannot do directly"). We may not render the statute a "dead letter" by allowing the agency to act "without complying with the procedural requirements" set forth by Congress. *Ivy*, 767 F.3d at 87.

Thus, our precedent recognizes that the power to do does not necessarily encompass a power to undo. The structure and temporal limitations of the TPS statute protect the important reliance interests of individual TPS holders, and the Government must adhere to these statutory constraints. The Government's arguments to the contrary lack merit.

First, the Government points to Secretary Mayorkas's 2023 reconsideration and rescission of the termination of Salvadoran TPS and argues that this rescission substantiates the existence of vacatur authority. *See* Reconsideration and Rescission of Termination of the Designation of El Salvador for Temporary Protected Status; Extension of the Temporary Protected Status Designation for El Salvador, 88 Fed. Reg. 40282 (June 21, 2023). The prior administration's 2018 termination of Salvadoran TPS had been enjoined for five years and thus had never gone into effect. *Id.* at 40284. Secretary Mayorkas rescinded the termination and extended Salvadoran TPS. *Id.* at 40283. But this rescission does not affect Secretary Noem's statutory vacatur authority. For one, a prior violation of statutory authority does not excuse subsequent violations, nor does it affect the Congressionally-enacted scope of agency authority. *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("[P]revious statutory violations cannot excuse the one now before the court."). Additionally, as Plaintiffs argue, the agency may have the authority to reverse a nonfinal action where that action is prevented from taking effect by a reviewing court. *United Gas Imp. Co. v. Callery Props., Inc.*, 382 U.S. 223, 229, 86 S. Ct. 360, 15 L. Ed. 2d 284 (1965). This consideration is not present here.

Second, the Government expresses a concern that restricting the Secretary's TPS authority "leads to absurd and extreme results—no Secretary would be empowered to vacate a designation or extension of a designation no matter how grave the threat to national security, U.S. foreign policy, or border security interests." However, this argument ignores that TPS is, by its nature, temporary. And Congress expressly contemplated such situations: the statute renders individuals convicted of certain crimes ineligible for TPS and provides for the withdrawal of status of others. 8 U.S.C. § 1254a(c)(2)(B), (c)(3). Moreover, concerns about a designated country that no longer meets the conditions for TPS can be addressed within, at most, eighteen months by terminating the designation upon its expiration. *Id.* § 1254a(b)(2), (3)(C). These restrictions on the Secretary's authority are supported by the legislative history of the TPS statute, which demonstrates that Congress sought to limit the previously unfettered executive discretion inherent in the EVD and DED procedures. If, instead, Congress had intended to retain broad executive discretion to designate and terminate countries at will, it is difficult to imagine why it would have enacted the TPS statute in the form that it did, which provides specific timelines and mechanisms for these actions.[9] *See also CUA*, 124

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[9] The existence of DED at all strongly indicates that Congress intended to provide predictability and certainty to noncitizens relying on TPS status. DED designations are granted pursuant to the executive's constitutional authority to conduct the foreign relations of the United States, *see, e.g.*, 89 Fed. Reg. 26167 (granting DED status to certain Palestinians until August 13, 2025), and are not subject to the same statutory guardrails as are TPS designations. By codifying the TPS statute, Congress provided a different system which balanced predictability and stability with temporal limits—TPS holders can rely on the security of their status but only for a limited period of time. And, the Attorney General may terminate that status, but only with sixty days' notice and not prior to the expiration of the current designation.

F.4th at 1148 (noting that the "[t]he use of a fixed term" in the statute is "affirmatively inconsistent with positing an implied power to revoke a license at any time").

These Congressional limitations on the Secretary's authority are further supported by the reliance issues at play here. *See Gorbach*, 219 F.3d at 1097 (considering the "importance of citizenship and the safeguards against taking it away" in support of the conclusion that the agency lacked denaturalization power); *Ivy*, 767 F.3d at 87 (rejecting agency's attempt to avoid the "procedural hoops" because of, in part, the importance of "ensur[ing] that regulated parties receive fair treatment"). Congress's time limitations are meaningful to the regulated parties here—people who use this guaranteed time with "enough stability to work" and "a decent standard of living" to obtain employment, seek educational opportunities, and find long-term housing.[10] This was Congress's design when it enacted TPS: to constrain Executive authority and to provide stability for those with temporary status by insulating them from shifting political winds. *See* 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Meldon Edises Levine).

Third, the Government's argument that an agency can correct its own errors falls flat. Although agencies

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[10] Indeed, one TPS holder received notice of the 2023 Designation extension, and one day afterwards, submitted his renewal application, received a receipt confirming a 540-day extension of his work authorization, provided that information to his employer, and renewed the lease on his home. Another TPS holder, who leased an apartment, got a job as a child-care provider at a daycare, and is studying to get her GED, submitted her application for renewal a day after the Secretary purported to revoke TPS and is awaiting the adjudication of her application.

may typically correct clerical or typographical errors in a timely manner, even if they otherwise do not have rescission or vacatur authority, they are not empowered to substantively re-decide issues under this authority. We acknowledged as much in *Gorbach*, where we squarely rejected the Attorney General's claimed denaturalization power, although we noted that the agency could likely correct typographical errors on naturalization certificates. 219 F.3d at 1098. The Government is correct that this power to correct small errors can exist "even though the applicable statute and regulations do not expressly provide for such reconsideration." *Gun S., Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989). But agencies may not change course on a substantive policy decision under this error-correcting authority. *See Am. Trucking Ass'ns v. Frisco Transp. Co.*, 358 U.S. 133, 146, 79 S. Ct. 170, 3 L. Ed. 2d 172 (1958) ("Of course, the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.").[11]

[11] The Government citation of *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001), for the proposition that an agency can request remand in a court proceeding to reconsider its prior erroneous decision is inapt. *Id.* at 1029-30. In *SKF*, the Federal Circuit explained in some instances, an "agency may request a remand (without confessing error) in order to reconsider its previous position." *Id.* at 1029. In those circumstances, "the reviewing court has discretion over whether to remand," though doing so is usually appropriate when "the agency's concern is substantial and legitimate." *Id.* However, if the remand is requested for the agency to substantively change a policy decision involving "an issue as to whether the agency is either compelled or forbidden by the governing statute to reach a different result," courts have discretion over whether to decide the statutory question or order a remand.

Finally, the Government argues that the TPS statute's limitations did not prevent vacatur here because Secretary Mayorkas's extension of TPS had not yet taken effect. This is factually incorrect: the extension did take effect, and the reregistration period began on January 17, 2025. 90 Fed. Reg. 5961, 5962. TPS holders began applying to extend their status, as the Supreme Court recognized in its stay order in this case, which exempted from that order challenges to the Secretary's attempt to invalidate already-issued documents under the extension. *Noem v. Nat. TPS All.*, ––– U.S. at ––––, 145 S. Ct. 2728. TPS holders began to rely upon the extension of their protected status at the opening of this registration period, giving rise to the strong reliance interests here at stake. *See Dept. of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30-31, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020) (cataloguing the reliance interests of Deferred Action for Childhood Arrivals (DACA) recipients). The Government provides no support for its contention that this period is somehow exempt from the statutory restriction on terminating TPS before "the expiration of the most recent previous extension." 8 U.S.C. § 1254a(b)(3)(B).

In sum, Plaintiffs make out a strong case on the merits on their APA claim challenging the Secretary's putative vacatur authority. "Where Congress itself has significantly limited executive discretion by establishing a detailed scheme that the Executive must follow in dealing with [noncitizens], the [Executive] may not abandon that scheme because he thinks it is not working well."

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*Id.* This case involves such a question of statutory authority. Moreover, here, DHS is not seeking remand, and its own vacatur of a prior TPS extension is the error subject to review.

*E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 774 (9th Cir. 2018) (quoting *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 368, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005)) (quotation marks and alterations omitted). Congress created such a detailed scheme when it enacted the TPS statute, and the Government must follow it. Because the TPS statute does not authorize the vacatur of a prior grant of TPS, Plaintiffs are likely to succeed on the merits of this claim.

* * *

We need not proceed to Plaintiffs' additional claims. Our holding that the Secretary lacks vacatur authority under the statute moots Plaintiffs' claims challenging the particular means by which the Secretary reached the vacatur decision.[12] We likewise decline to reach

[12] We note that the district court correctly held that the basis for the vacatur was predicated on the Secretary's factual and legal misapprehension as to the operation of the TPS statute. Secretary Noem "failed to recognize that a TPS beneficiary under the 2021 Designation was necessarily a TPS beneficiary under the 2023 Designation." Secretary Mayorkas's extension thereof consolidated the two designations, combining the two tracks, thus lessening confusion rather than "creating" confusion as Secretary Noem apparently believed. Indeed, as the district court noted, DHS addressed this exact concern. *See* 90 Fed. Reg. 5961, 5963, (Jan. 17, 2025) (Question: "Will there continue to be two separate filing processes for TPS designations for Venezuela?"; Answer: "No. USCIS has evaluated the operational feasibility and resulting impact on stakeholders of having two separate filing processes. Operational challenges in the identification and adjudication of Venezuela TPS filings and confusion among stakeholders exist because of the two separate TPS designations. To date, USCIS has created operational measures to process Venezuela TPS cases for both designations; however, it can most efficiently process these cases by consolidating the filing processes for the two Venezuela TPS popula-

Plaintiffs' Equal Protection Clause challenge to the Termination Notice. If the vacatur is postponed, and the prior extension is restored, the termination cannot go into effect. *See* 8 U.S.C. § 1254a(b)(3)(B) (prohibiting the termination of TPS before "the expiration of the most recent previous extension"). And "[a] court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question." *Califano v. Yamasaki*, 442 U.S. 682, 692, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979) (citation omitted).

**VI. REMAINING WINTER FACTORS**

We now turn to our review of the remaining factors underlying the district court's grant of preliminary relief under APA section 705: irreparable harm to the party seeking relief, the balance of equities (including the public interest), and the proper scope of relief. 5 U.S.C. § 705 (permitting postponement of agency action "to the extent necessary to prevent irreparable injury"); *see Imm. Defs.*, 145 F.4th at 985-86 (applying *Winter* factors to APA section 705 postponement action) (citing *Winter*, 555 U.S. at 20, 129 S. Ct. 365).

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tions. To decrease confusion among stakeholders, ensure optimal operational processes, and maintain the same eligibility requirements, upon publication of this Notice, individuals registered under either the March 9, 2021 TPS designation or the October 3, 2023 TPS designation will be allowed to re-register under this extension. This would not, however, require that a beneficiary registered under the March 9, 2021 designation to re-register at this time. Rather, it would provide such individuals with the option of doing so. Venezuela TPS beneficiaries who appropriately apply for TPS or re-register under this Notice and are approved by USCIS will obtain TPS through the same extension date of October 2, 2026.").

### A. Irreparable Harm

We begin by considering whether Plaintiffs will be irreparably harmed absent a postponement of agency action. "Irreparable harm is harm for which there is no adequate legal remedy, such as an award for damages." *See E. Bay v. Biden*, 993 F.3d at 677 (quotation marks and citation omitted). The district court found, based on Plaintiffs' unrebutted evidence, that Secretary Noem's actions vacating the prior TPS extension and terminating Venezuelan TPS was likely to "inflict irreparable harm on hundreds of thousands of persons whose lives, families, and livelihoods will be severely disrupted." Having reviewed the evidentiary record, we conclude that the district court did not abuse its discretion in determining that Plaintiffs established a likelihood of irreparable harm absent a postponement of agency action.

For many Venezuelan TPS holders, the termination of their status exposes them to the risk of deportation. Wrongful removal is a relevant factor in the irreparable harm analysis. *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (concluding that travel prohibitions which prevented certain noncitizens from traveling to the United States harmed employees and students of state universities, separated families, and stranded states' residents abroad, which constituted "substantial injuries and even irreparable harms" to the states); *see also Nken v. Holder*, 556 U.S. 418, 435-36, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009) (holding that, although the harm of removal is not sufficient by itself to demonstrate irreparable harm, "there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm"). Here, the harm of removal is present, because many TPS holders lack any other form of immigration status. And these harms go beyond the removal of individuals from the United States. TPS holders also face a substantial likelihood of family separation: the district court found that, as of 2022, even before the second TPS designation for Venezuela, approximately 54,000 U.S. citizen children and 80,000 U.S. citizen adults lived with a Venezuelan TPS holder. The record is replete with examples of such mixed-status families whose life together depends on TPS, and who must now plan for whether they will remain together or be forced to separate.

Moreover, TPS holders' potential deportation to Venezuela poses independent risks of harm. Venezuela is rated by the U.S. State Department as a "Level 4: Do Not Travel" country because of the "high risk of wrongful detentions, terrorism, kidnapping, the arbitrary enforcement of local laws, crime, civil unrest, [and] poor health infrastructure." Many of Plaintiffs' declarations recite the harms they experienced in Venezuela, and that they fear experiencing again if deported: kidnappings, beatings, threats, robbery, harassment, and the inability to make enough money to support themselves or their families.

For those who will remain in the United States without documentation, the loss of legal status presents additional harms. Many newly undocumented former TPS holders will lose their jobs, educational opportunities, and driver's licenses. Others, who have additional forms of temporary immigration status, like a pending asylum application, will lose the stability and reliability of TPS. A pending asylum application only provides a noncitizen with work authorization until that application is adjudicated, whereas TPS provides a discrete and durable form of status for the full designation period.

The Government counters that the temporary nature of TPS is what causes these injuries, not the Vacatur and Termination Notices. By its reasoning, the potential for deportation and the loss of legal status is always present at the end of a given TPS period, so shortening that period of protection does not change the ultimate result. But the district court was correct to reject this argument, reasoning: "[T]ime matters, even if that time is limited. Certainly, anyone who, for instance, has experienced the loss of a loved one to a terminal illness understands the preciousness of time, even if short." This time—in the United States, with their families, and with immigration status—is valuable to TPS holders, and the loss of it can be irreparable. Plaintiffs have made a sufficient showing of irreparable harm.

B. The Balance of Equities and the Public Interest

The final two factors of the preliminary relief standard —the balance of equities and the public interest—merge when the Government is a party. *E. Bay v. Biden*, 993 F.3d at 668. In this analysis, we consider the harm to the Government and the public, the promotion of the efficient administration of our immigration laws, the value of compliance with the APA, the public interest in preventing harm to and the wrongful removal of noncitizens, and the importance of preserving congressional intent. *Id.* at 678. The district court found that "the balance of hardships (including consideration of the public interest) tips sharply in Plaintiffs' favor." Reviewing the district court's factual findings for clear error, we agree. *See Washington v. Trump*, 145 F.4th at 1021-22.

First, both sides contend that the public is injured by the improper application of the laws. The public's interest in the proper enforcement of the laws effectively tracks the merits analysis here. *See E. Bay v. Biden*, 993 F.3d at 678-79 ("[T]he public has an interest in ensuring that the statutes enacted by [their] representatives are not imperiled by executive fiat." (quotation marks and citation omitted)). Because Plaintiffs have shown a likelihood of success on the merits, this portion of the analysis favors Plaintiffs.

The district court also determined that stripping work authorization from Venezuelans in the United States negatively affects the economy and public safety for several reasons. The district court specifically found that Venezuelan TPS holders "work in frontline jobs" and, and it relied on expert witness declarations to conclude that Venezuelans "make significant economic contributions to their communities" and to the overall U.S. economy. The district court also found that the loss of legal status for Venezuelans will also increase the number of people relying on public benefits and publicly funded health care. Finally, the district court held that the vacatur and termination of Venezuelan TPS will impede law enforcement because noncitizens without legal status are less likely to report crimes or to testify in court.

The Government contends that public hospitals and police stations are overrun, so eliminating Venezuelan TPS is in the public interest.[13] In Secretary Noem's

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[13] Although the Government also cites national security concerns, the Government submitted no evidence that any TPS holder is a member of the Venezuelan gang Tren de Aragua, nor did it rebut the district court's finding that immigrants, and particularly TPS

Termination Notice, she cited a report by the Center for Strategic and International Studies which states that "city shelters, police stations, and aid services are at a maximum capacity." 90 Fed. Reg. 9040, 9043 & n.13 (citation omitted). However, the district court, relying on multiple expert witness declarations and amici, found that terminating Venezuelan TPS would only exacerbate these problems. Public assistance programs and public healthcare would face increased demand from former TPS holders who had lost their employment authorization and employer-sponsored health insurance. Indeed, the report cited by Secretary Noem rejects the idea that terminating Venezuelan TPS would solve these problems. Instead, the report suggests that "longer-term solutions" include "expediting mechanisms to grant work authorizations so that migrants can escape informal labor[ ] and advocating for a more permanent extension of temporary protective status for all Venezuelans." Betilde Muñoz-Pogossian & Alexandra Winkler, *The Persistence of the Venezuelan Migrant and*

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holders, are much less likely to commit crimes than U.S.-born Americans are. And as discussed above, Congress authorized the Government to address public safety concerns by withdrawing TPS from recipients who are ineligible due to convictions for crime or are regarded as a danger to national security. 8 U.S.C. § 1254a(c)(2)(B), (c)(3). But the Government did not identify anyone subject to such a withdrawal for these reasons at argument. Absent any evidence that current or former TPS holders implicate national security concerns, the Government's asserted national security concerns do not tip the public interest in the Government's favor *See Washington v. Trump*, 847 F.3d at 1168-69, 1168 n.7 (explaining that while the "public has a powerful interest in national security," that interest can be outweighed, especially when "the Government has not offered any evidence or even an explanation" of its "national security concerns").

*Refugee Crisis*, Center for Strategic & International Studies (Nov. 27, 2023).

Finally, we note that the Government has never, in the thirty-five-year history of TPS, sought to vacate a prior extension of TPS. The Government's assertion that such a vacatur is necessary now is undermined by the fact that it has never attempted to take such an action before.

Accordingly, we find no clear error in the district court's factual findings, nor do we find an abuse of discretion in its weighing of the balance of equities. Thus, because Plaintiffs demonstrated that all four *Winter* factors are aligned in favor of the postponement of Secretary Noem's Vacatur Notice, we hold that district court did not abuse its discretion by granting preliminary relief.

C. Scope of Relief

Our final consideration is the proper scope of relief. Preliminary relief "must be narrowly tailored to remedy the specific harm shown." *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019) (quotation marks and citation omitted). Broad nationwide injunctions must have "an articulated connection to a plaintiff's particular harm." *Id.* Here, the district court postponed the Vacatur and Termination Notices nationwide based on section 705 of the APA, which allows courts to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. The Government asks us to limit the scope of relief to the individual plaintiffs.

Although the Supreme Court explicitly declined to address the proper scope of APA relief in its recent *Trump v. CASA, Inc.* decision, 606 U.S. 831, 145 S. Ct. 2540, 2554 n.10, 222 L. Ed. 2d 930 (2025), we have understood the Court's "complete-relief principle for crafting injunctive relief" to "provide[ ] some useful guidance for crafting interim equitable relief" in the APA context. *Imm. Defs.*, 145 F.4th at 995-96. "Under this [complete-relief] principle, the question is not whether an injunction offers complete relief to *everyone* potentially affected by an allegedly unlawful act; it is whether an injunction will offer complete relief *to the plaintiffs before the court.*" *Id.* (citing *CASA*, 145 S. Ct. at 2557). There is no rule, however, that nonparties must remain unaffected by the court's order. *See City & County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) ("[A]n injunction is not necessarily made overbroad by extending benefit or protection to persons other than the prevailing parties in the lawsuit . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled." (citation omitted)).

Here, Plaintiffs have demonstrated that a postponement of the Vacatur Notice, effective nationwide, is the only remedy that provides complete relief to the parties before the court and complies with the TPS statute. First, Plaintiff NTPSA, a membership organization, brings this challenge on behalf of its more than 84,000 members who are Venezuelan TPS holders in all fifty states and the District of Columbia. *See Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) ("[A]n association may have standing solely as the representative of its members."). As the district court reasoned, "[f]ull relief for the NTPSA and its members cannot be obtained absent application to all fifty states and the District of Columbia."

Second, limiting the relief to individual plaintiffs and NTPSA members is not a workable solution under the TPS statute. Plaintiffs challenge a single act: Secretary Noem's vacatur of the prior extension of Venezuelan TPS. They do not challenge the eligibility determination for any particular TPS holder. Limiting Secretary Noem's decision to affect only certain individuals would effectively mean rewriting it in a way that does not comply with the TPS statute. Although the TPS statute contemplates only a single binary determination for each country's TPS designation, we would be replacing Secretary Mayorkas's positive determination, and Secretary Noem's negative determination, with a judicially created patchwork. *See E. Bay v. Biden*, 993 F.3d at 681 ("Our typical response is to vacate the rule and remand to the agency; we ordinarily do not attempt, even with the assistance of agency counsel, to fashion a valid regulation from the remnants of the old rule." (quotation marks and citation omitted)); *see also Washington v. Trump*, 847 F.3d at 1167 ("[E]ven if the TRO might be overbroad in some respects, it is not our role to try, in effect, to rewrite the Executive Order.").

These statutory constraints distinguish this appeal from those arising in otherwise similar contexts. In *Immigrant Defenders*, the plaintiff organization challenged the enrollment of asylum seekers in the "Remain in Mexico" program. 145 F.4th at 980-81. There, we limited the scope of the order postponing the implementation of the "Remain in Mexico" program to the organization's individual clients, as doing so awarded the plaintiffs complete relief. *Id.* at 995-96. The statute at issue in *Immigrant Defenders* stated that the Secretary of Homeland Security "may return the [noncitizen]" to Mexico pending removal proceedings. 145 F.4th at 980 (citing 8 U.S.C. § 1225(b)(2)(C)). Thus, the statute did not prohibit the Secretary from adopting a piecemeal approach by returning some, but not all, noncitizens to Mexico. Indeed, the statute specifically contemplated separate actions for each individual asylum seeker, so the piecemeal approach was consistent with the statute's design and purpose. Similarly, the challenge in *East Bay v. Barr* was to a rule limiting the eligibility of certain noncitizens for asylum. 934 F.3d at 1028. We held that the "nationwide scope" of the injunction was "not supported by the record" at that stage in the litigation because the district court failed to discuss why nationwide relief was necessary to remedy Plaintiffs' harm. *Id.* at 1028-29. Again, since the rule at issue dealt with asylum eligibility, it was possible to apply the rule to asylum applicants in some areas but not others, because each person's asylum eligibility is an individual determination. *See* Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019).

"Where relief can be structured on an individual basis, it must be narrowly tailored to remedy the specific harm shown." *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987). Here, relief cannot be structured on an individual basis. Postponing the rule for just some individuals would require rewriting the statute itself, and a narrower construction is not possible. TPS does not allow for partial determinations; no Secretary has the authority to designate a country for TPS when it comes to California residents, but not for Pennsylvania residents. And we do not claim the authority to do so judicially.

Thus, the district court did not abuse its discretion in determining that a postponement of agency action under the APA, effective nationwide, was both permissible and necessary to provide complete relief to Plaintiffs. *See E. Bay v. Biden*, 993 F.3d at 680 ("The equitable relief granted by the district court is acceptable where it is 'necessary to give prevailing parties the relief to which they are entitled.'" (citation omitted)).

## VII. CONCLUSION

We have jurisdiction to consider this appeal from the district court's postponement order under APA section 705. Neither the TPS statute nor 8 U.S.C. § 1252(f)(1) precludes our power to review the merits of Plaintiffs' claim that the Secretary exceeded her statutory authority when she purported to vacate TPS status for Venezuelans. And we hold that Plaintiffs are likely to succeed on the merits of that claim. Moreover, the district court did not abuse its discretion by determining that Plaintiffs face irreparable harm based on the vacatur of the extension of Venezuelan TPS, and that the balance of equities and the public interest favor Plaintiffs. Finally, anything short of a nationwide postponement is incongruent with the TPS statute, and it would not provide Plaintiffs with the complete relief they seek. The district court did not abuse its discretion by postponing the Vacatur and Termination Notices.

* * *

The TPS statute is designed to constrain the Executive, creating predictable periods of safety and legal status for TPS beneficiaries. Sudden reversals of prior decisions contravene the statute's plain language and purpose. Here, hundreds of thousands of people have been stripped of status and plunged into uncertainty. The stability of TPS has been replaced by fears of family separation, detention, and deportation. Congress did not contemplate this, and the ongoing irreparable harm to Plaintiffs warrants a remedy pending a final adjudication on the merits.

**AFFIRMED.**[14]

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[14] Plaintiff-Appellees' unopposed motion for judicial notice is granted. *See* Dkt. 49.

## APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Case No. 25-cv-01766-EMC

NATIONAL TPS ALLIANCE, ET AL., PLAINTIFFS

*v.*

KRISTI NOEM, ET AL., DEFENDANTS

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Signed: Mar. 31, 2025

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**ORDER GRANTING PLAINTIFFS' MOTION TO POSTPONE**

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EDWARD M. CHEN, United States District Judge

### I. INTRODUCTION

At issue is whether this Court should temporarily postpone actions by Kristi Noem, Secretary of the Department of Homeland Security, taken against over 600,000 Venezuelan nationals who have legal status to reside and work temporarily in the United States. The Secretary's actions will shortly strip nearly 350,000 of these residents of their protection under the Temporary Protected Status ("TPS") program, subjecting them to possible imminent deportation back to Venezuela, a country so rife with economic and political upheaval and danger that the State Department has categorized Venezuela as a "Level 4: Do Not Travel" country "due to the high risk of wrongful detentions, terrorism, kidnapping, the arbitrary enforcement of local laws, crime, civil unrest, poor health infrastructure." https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/venezuela-travel-advisory.html (last visited 3/30/2025). The unprecedented action of vacating existing TPS (a step never taken by any previous administration in the 35 years of the TPS program), initiated just three days after Secretary Noem took office, reverses actions taken by the Biden administration to extend temporary protection of Venezuelan nationals that have been in place since 2021. Although the Secretary's actions appear predicated on negative stereotypes casting class-wide aspersions on their character (insinuating they were released from Venezuelan prisons and mental health facilities and imposed huge financial burdens on local communities), the undisputed record establishes that Venezuelan TPS beneficiaries, in fact, have higher education attainment than most U.S. citizens (40-54% have bachelor degrees), have high labor participation rates (80-96%), earn nearly all their personal income (96%), and annually contribute billions of dollars to the U.S. economy and pay hundreds of millions, if not billions, in social security taxes. They also have lower rates of criminality than the general U.S. population.

Following Secretary Noem's actions, Plaintiffs filed the instant action. Plaintiffs are seven individuals from Venezuela who are TPS holders, plus the National TPS Alliance ("NTPSA"). The NTPSA is "a member-led organization representing Temporary Protected Status ('TPS') holders across the country." Compl. ¶ 2. NTPSA's members include over 84,000 Venezuelan TPS holders living in all fifty states and the District of Columbia. *See* Jimenez Decl. ¶ 13. Among other things, NTPSA "engages in advocacy to defend TPS and win a path to permanent status for TPS holders."[1] Jimenez Decl. ¶ 21.

Having considered the parties' briefs and accompanying submissions, the oral argument of counsel, and the views of Amici (a collection of various states, cities, and counties throughout the United States),[2] the Court hereby **GRANTS** Plaintiffs' motion. For the reasons stated below, the Court finds that the Secretary's action threatens to: inflict irreparable harm on hundreds of thousands of persons whose lives, families, and livelihoods will be severely disrupted, cost the United States

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[1] NTPSA has submitted a declaration from Jose A. Palma Jimenez, the Co-Coordinator of the organization. In his declaration, Mr. Jimenez explains that NTPSA also

> organizes actions to raise public awareness about TPS and the contributions TPS holders make to this country; facilitates community and civic engagement by TPS holders; and provides access to timely and accurate TPS-related information and services to its members.

Jimenez Decl. ¶ 21. The government has not contested NTPSA's standing to bring suit. *See Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 199, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023) (noting that, "where the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways[:] [e]ither the organization can claim that it suffered an injury in its own right or, alternatively, it can assert 'standing solely as the representative of its members' ").

[2] There are two sets of Amici: (1) the Amici States and (2) the Amici Cities and Counties. The Amici States are California, New York, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia. The Amici Cities and Counties are Denver, San Francisco, Hartford, Cambridge, San Diego, Chicago, Iowa City, Minneapolis, Saint Paul, Boston, and Santa Clara. Both Amici have submitted briefs in support of Plaintiffs' motion.

billions in economic activity, and injure public health and safety in communities throughout the United States. At the same time, the government has failed to identify any real countervailing harm in continuing TPS for Venezuelan beneficiaries. Plaintiffs have also shown they will likely succeed in demonstrating that the actions taken by the Secretary are unauthorized by law, arbitrary and capricious, and motivated by unconstitutional animus. For these reasons, the Court grants Plaintiffs' request to postpone the challenged actions pending final adjudication of the merits of this case.

## II. FACTUAL & PROCEDURAL BACKGROUND

### A. Background on TPS

As part of the Immigration Act of 1990, Congress created the TPS program. The TPS program is a humanitarian program; the governing statute is codified at 8 U.S.C. § 1254a.

Under § 1254a, the Secretary of DHS may **designate** a foreign country for TPS when individuals from that country cannot safely return due to armed conflict, natural disaster, or other extraordinary and temporary circumstances. *See* 8 U.S.C. § 1254a(b). The initial designation lasts for 6, 12, or 18 months, at the Secretary's discretion. *See id.* § 1254a(b)(2).

Once a foreign country is given a TPS designation, individuals from that country may apply for immigration status. If granted, they may not be removed from the United States; furthermore, they are given authorization to work in the United States. *See id.* § 1254a(a)(1).

For individuals to become TPS holders, there are specific requirements that must be met. For example, an individual must have "been continuously physically present in the United States since the effective date of the most recent designation of that [foreign] state." *Id.* § 1254a(c)(1)(A)(i). In addition, an individual must be "admissible as an immigrant." *Id.* § 1254a(c)(1)(A)(iii). An individual is inadmissible if, *e.g.*, they have been convicted of certain crimes (such as a crime involving moral turpitude or drugs) or are a member of a terrorist organization.[3] *See id.* § 1182(a)(2)-(3). Moreover, an individual is expressly deemed ineligible for TPS if they have "been convicted of any felony or 2 or more misdemeanors committed in the United States." *Id.* § 1254a(c)(2)(B). The Secretary "shall withdraw [TPS] granted to an alien . . . if [the Secretary] finds that the alien was not in fact eligible for such status." *Id.* § 1254a(c)(3)(A).

After a foreign country has been given a TPS designation, that designation is subject to periodic review to determine if the TPS designation should be **terminated** or **extended**.

> At least 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state (or part thereof) under this section the [Secretary of DHS[4]], after consultation with appropriate agencies of the Government, shall review

[3] The TPS statute bars the Secretary from waiving certain inadmissibility grounds. *See* 8 U.S.C. § 1254a(c)(2)(A)(iii).

[4] The TPS statute "originally provided the Attorney General with this authority" but, "[w]ith the Homeland Security Act of 2002 (Pub. L. No. 107-296, 116 Stat. 2135), the former Immigration and Naturalization Service was transferred to the Department of Homeland Security, and the responsibility for administering the TPS was transferred from the Attorney General to the Secretary of DHS." *Ramos v. Wolf*, 975 F.3d 872, 879 n.1 (9th Cir. 2020), *vacated for rehearing en banc*, 59 F.4th 1010 (9th Cir. 2023).

> the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and shall determine whether the conditions for such designation under this subsection continue to be met.

*Id.* § 1254a(b)(3)(A).

- "If the [Secretary] determines . . . that a foreign state (or part of such foreign state) no longer continues to meet the conditions for designation under paragraph (1), the [Secretary] shall terminate the designation . . . ." *Id.* § 1254a(b)(3)(B).
- "If the [Secretary] does not determine . . . that a foreign state (or part of such foreign state) no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the [Secretary], a period of 12 or 18 months)." *Id.* 1254a(b)(3)(C).

In addition, it is possible for a country to be given more than one TPS designation. As explained by Plaintiffs (with no dispute by the government),

> [a] TPS designation for a country that is already designated for TPS is called a "**redesignation**." When DHS redesignates a country for TPS, it generally has the effect of expanding the pool of potential beneficiaries to include individuals who came to the United States after the country was first designated for TPS.

Compl. ¶ 26 n.4 (emphasis added).

B. TPS Designation for Venezuela

1. 2021 TPS Designation

In March 2021, Secretary Mayorkas (the Secretary of DHS under the Biden administration) first designated Venezuela for TPS – specifically, for 18 months, from March 9, 2021, through September 9, 2022. *See* 86 Fed. Reg. 13574, 13577 (Mar. 9, 2021). The designation allowed those "who have continuously resided in the United States since March 8, 2021, and have been continuously physically present in the United States since March 9, 2021, to apply for TPS." *Id.* at 13575. U.S. Citizenship and Immigration Services ("USCIS") estimated that "approximately 323,000 individuals are eligible to file applications for TPS under the designation of Venezuela." *Id.*

The basis for the designation was stated as follows:

> Venezuela is currently facing a severe humanitarian emergency. Under Nicolás Maduro's influence, the country "has been in the midst of a severe political and economic crisis for several years." Venezuela's crisis has been marked by a wide range of factors, including: Economic contraction; inflation and hyperinflation; deepening poverty; high levels of unemployment; reduced access to and shortages of food and medicine; a severely weakened medical system; the reappearance or increased incidence of certain communicable diseases; a collapse in basic services; water, electricity, and fuel shortages; political polarization; institutional and political tensions; human rights abuses and repression; crime and violence; corruption; increased human mobility and displacement (including internal migration, emigration, and

> return); and the impact of the COVID-19 pandemic, among other factors.

*Id.* at 13576.

The parties refer to this designation as the "2021 Designation."

2. First and Second Extensions of the 2021 Designation

The 2021 Designation was set to expire, as noted above, in September 2022. However, on September 8, 2022, before expiration, DHS **extended** the 2021 Designation for 18 months – *i.e.*, from September 10, 2022, through March 10, 2024. *See* 87 Fed. Reg. 55024, 55027 (Sept. 8, 2022). The basis for the extension was as follows: "Extraordinary and temporary conditions that prevent Venezuelan nationals from returning in safety include severe economic and political crises ongoing within Venezuela, which have an impact across sectors, including limited access to food, basic services, and adequate healthcare, and the deterioration of the rule of law and protection of human rights." *Id.* at 55026. As Plaintiffs point out, "because the decision [here] was only an extension, and not also a re-designation, it did not provide protection to Venezuelans who had arrived in the U.S. *after* March 9, 2021 [*i.e.*, the date of the 2021 Designation]." Compl. ¶ 42 (emphasis added).

DHS **extended** the 2021 Designation a second time on October 3, 2023, for another 18 months. The extension ran from March 11, 2024 (when the first extension above would end) to September 10, 2025. *See* 88 Fed. Reg. 68130, 68131 (Oct. 3, 2023).

3. <u>2023 TPS Designation</u>

At the same time as the second extension of the 2021 Designation, DHS also **redesignated** Venezuela for TPS. *See id.* The redesignation covered an 18-month period, from October 3, 2023, through April 2, 2025. *See id.* While the 2021 Designation allowed individuals who had been in the United States since March 2021 to apply, this designation – which the parties refer to as the "2023 Designation" – allowed individuals to apply if they had continuously resided in the United States since July 31, 2023, and had continuously been physically present since October 3, 2023. *See id.* DHS estimated that "approximately 472,000 additional individuals may be eligible for TPS under the redesignation of Venezuela." *Id.* at 68134.

For both (1) the second extension of the 2021 Designation and (2) the 2023 Designation, the basis was the same:

> Venezuela continues to face a severe humanitarian emergency due to a political and economic crisis, as well as human rights violations and abuses and high levels of crime and violence, that impacts access to food, medicine, healthcare, water, electricity, and fuel, and has led to high levels of poverty. Additionally, Venezuela has recently experienced heavy rainfall in the spring and summer of 2023 which triggered flooding and landslides. Given the current conditions in Venezuela, these issues contribute to the country's existing challenges.
>
> Venezuela is experiencing "an unprecedented political, economic, and humanitarian crisis." "Venezuela is suffering one of the worst humanitarian crises in the history of the Western Hemisphere," which has

> been characterized by "[h]igh levels of poverty, food insecurity, malnutrition, and infant mortality, together with frequent electricity outages and the collapse of health infrastructure." Though there were some positive developments in Venezuela in 2022 "as the economy stabilized and showed signs of economic growth," the effects of these changes were not felt across the Venezuelan population and did not offset the impact of the large-scale economic contraction which resulted in significant humanitarian challenges that continue today and will take time to address.

*Id.* at 68132.

4. Extension of the 2023 Designation

On January 17, 2025, shortly before the second Trump administration was to begin, Secretary Mayorkas **extended** the 2023 Designation by 18 months, through October 2, 2026. *See* 90 Fed. Reg. 5961 (Jan. 17, 2025). As indicated above, without an extension, the 2023 Designation would end on April 2, 2025. The basis for the extension was as follows:

> Venezuela is experiencing "a complex, serious and multidimensional humanitarian crisis." The crisis has reportedly disrupted every aspect of life in Venezuela. "Basic services like electricity, internet access, and water are patchy; malnutrition is on the rise; the healthcare system has collapsed; and children receive poor or no education. Inflation rates are also among the highest in the world." Venezuela's "complex crisis" has pushed Venezuelans into "poverty, hunger, poor health, crime, desperation and migration." Moreover, Nicolás Maduro's declaration of victory in the July 28, 2024 presidential election – which has been contested as fraudulent by the

> opposition – "has been followed by yet another sweeping crackdown on dissent."

*Id.* at 5963.

In the extension, DHS also clarified the relationship between the two designations for Venezuela – (1) the 2021 Designation and (2) the 2023 Designation – both of which had been subject to extensions. DHS addressed the following question:

> **Will there continue to be two separate filing processes for TPS designations for Venezuela?**
>
> No. USCIS has evaluated the operational feasibility and resulting impact on stakeholders of having two separate filing processes. Operational challenges in the identification and adjudication of Venezuela TPS filings and confusion among stakeholders exist because of the two separate TPS designations. To date, USCIS has created operational measures to process Venezuela TPS cases for both designations; however, it can most efficiently process these cases by consolidating the filing processes for the two Venezuela TPS populations. To decrease confusion among stakeholders, ensure optimal operational processes, and maintain the same eligibility requirements, upon publication of this Notice, **individuals registered under either the March 9, 2021 TPS designation or the October 3, 2023 TPS designation will be allowed to re-register under this extension**. This would not, however, require that a beneficiary registered under the March 9, 2021 designation to reregister at this time. Rather, it would provide such individuals with the option of doing so. **Venezuela TPS beneficiaries who appropriately apply for TPS or re-register under this No-**

> **tice and are approved by USCIS will obtain TPS through the same extension date of October 2, 2026.**

*Id.* at 5964 (some emphasis added).

5. Vacatur of the Extension of the 2023 Designation

On January 20, 2025, President Trump began his second administration. That same day, President Trump issued an Executive Order titled "Protecting the American People Against Invasion." *See* https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-peopleagainst-invasion/ (last visited 3/30/2025). Section 16 of the Executive Order states as follows:

> Addressing Actions by the Previous Administration. The Secretary of State, the Attorney General, and the Secretary of Homeland Security shall promptly take all appropriate action, consistent with law, to rescind the policy decisions of the previous administration that led to the increased or continued presence of illegal aliens in the United States, and align any and all departmental activities with the policies set out by this order and the immigration laws. Such action should include, but is not limited to:
>
> . . . .
>
> (b) ensuring that designations of Temporary Protected Status are consistent with the provisions of section 244 of the INA (8 U.S.C. 1254a), and that such designations are appropriately limited in scope and made for only so long as may be necessary to fulfill the textual requirements of that statute . . .

*Id.*

Secretary Noem was sworn in as Secretary of DHS on January 25, 2025. Three days later, on January 28, 2025, the Secretary vacated the extension of the 2023 Designation. DHS formally published notice of the vacatur on February 3, 2025. *See* 90 Fed. Reg. 8805 (Feb. 3, 2025). This is the first time – in TPS's thirty-five-year history – that an extension of a TPS designation has ever been vacated.

The notice began by stating that:

> The Venezuela 2023 TPS designation expires on April 2, 2025, and the Secretary must make a decision by February 1, 2025 [*i.e.*, 60 days in advance]. The Venezuela 2021 TPS designation expires on September 10, 2025, and the Secretary must make a decision by July 12, 2025. Notwithstanding the fact that these are both decisions that would lie with new Secretary of Homeland Security Kristi Noem, Secretary Mayorkas [the DHS Secretary under the Biden administration] took action with respect to both designations.
>
> On January 17, 2025, Secretary Mayorkas issued a notice extending the 2023 designation of Venezuela for TPS for 18 months (Mayorkas Notice). The notice was based on Secretary Mayorkas' January 10, 2025, determination that the conditions for the designation continued to be met. *See* INA 244(b)(3)(A), 8 U.S.C. 1254a(b)(3)(A). In the Mayorkas Notice, Secretary Mayorkas did not expressly extend or terminate the 2021 designation. Instead, the notice allowed for a consolidation of filing processes such that all eligible Venezuela TPS beneficiaries (whether under the 2021 or 2023 designations) could obtain TPS through the same extension date of October 2, 2026. *See* Ex-

> tension of the 2023 Designation of Venezuela for Temporary Protected Status, 90 FR 5961 (Jan. 17, 2025). The notice also extended certain EADs [employment authorization documents]. The effect of Secretary Mayorkas' actions, however, resulted in an extension of the 2021 Venezuela TPS designation.

*Id.* at 8806.

The notice then stated that the extension given by Secretary Mayorkas was vacated:

> The Secretary of Homeland Security is vacating the January 10, 2025 decision of Secretary Mayorkas which (1) extended the 2023 Venezuela TPS designation and (2) allowed the consolidation of filing processes for both designations, which had the effect of extending the 2021 Venezuela TPS designation, and (3) extended certain EADs. An agency has inherent (that is, statutorily implicit) authority to revisit its prior decisions unless Congress has expressly limited that authority. The TPS statute does not limit the Secretary's inherent authority under the INA to reconsider any TPS-related determination, and upon reconsideration, to vacate or amend the determination.

*Id.*

The reason for the vacatur was stated as follows: "The Mayorkas Notice adopted a novel approach of implicitly negating the 2021 Venezuela TPS designation by effectively subsuming it within the 2023 Venezuela TPS designation." *Id.* at 8807.

> The Mayorkas Notice did not acknowledge the novelty of its approach or explain how it is consistent with the TPS statute. *See* INA 244(b)(2)(B), 8 U.S.C.

> 1254a(b)(2)(B) (providing that a TPS country designation "shall remain in effect until the effective date of the termination of the designation under [INA 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B)]"). This novel approach has included multiple notices, overlapping populations, overlapping dates, and sometimes multiple actions happening in a single document. While the Mayorkas Notice may have made attempts to address these overlapping populations, the explanations in the Mayorkas Notice, particularly the explanation for operational impacts, are thin and inadequately developed. Given these deficiencies and lack of clarity, vacatur is warranted to untangle the confusion, and provide an opportunity for informed determinations regarding the TPS designations and clear guidance.

*Id.*

The effect of the vacatur was stated as follows:

> As a result of the vacatur, the 2021 Venezuela TPS designation and the 2023 Venezuela designation remain in effect and their associated statutory deadlines remain in effect. The statutory deadline for each of those designations is as follows: The Secretary (1) must determine, by February 1, 2025, whether to extend or terminate the 2023 Venezuela TPS designation and (2) must determine, by July 12, 2025, whether to extend or terminate the 2021 Venezuela TPS designation.

*Id.* In its papers, the government characterizes the vacatur as a "restor[ation] [of] the status quo." Opp'n at 6.

6. Termination of the 2023 Designation

On February 1, 2025 (*i.e.*, just three days after the vacatur was first announced), Secretary Noem decided to terminate the 2023 Designation, effective in April 2025 (*i.e.*, 60 days after publication of the termination notice). DHS formally published noticed on February 5, 2025. *See* 90 Fed. Reg. 9040 (Feb. 5, 2025).

In explaining the basis for the termination, DHS began by stating as follows:

> Consistent with section 244(b)(3)(A) of the INA, 8 U.S.C. 1254a(b)(3)(A), after consulting with appropriate U.S. Government agencies, DHS reviewed conditions in Venezuela and considered whether permitting the Venezuelan nationals to remain temporarily in the United States is contrary to the national interest of the United States.
>
> The Department, in consultation with the Department of State, has reviewed conditions in Venezuela and has considered whether permitting Venezuelan nationals to remain temporarily in the United States is contrary to the U.S. national interest. Overall, certain conditions for the 2023 TPS designation of Venezuela may continue; however, there are notable improvements in several areas such as the economy, public health, and crime that allow for these nationals to be safely returned to their home country.

*Id.* at 9042. Although DHS referred to a consultation with other agencies and suggested there was review of a country conditions report, the government failed to provide any evidence in conjunction with the pending motion to support such claims. *See Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1082 (N.D. Cal. 2018) (noting that the general process for a TPS designation (on periodic review) includes the following: RAIO (a division within USCIS) provides a Country Conditions Memo, OPS (another division within USCIS) drafts a Decision Memo, and the State Department provides further input). It is difficult to imagine how such a considered process could have been accomplished in such a short period.

DHS continued its explanation for the termination as follows:

> Based on the Department's review, the Secretary has determined that, even assuming the relevant conditions in Venezuela remain both "extraordinary" and "temporary," termination of the 2023 Venezuela TPS designation is required because it is contrary to the national interest to permit the Venezuelan nationals (or aliens having no nationality who last habitually resided in Venezuela) to remain temporarily in the United States.
>
> In the TPS statute, Congress expressly prohibits the Secretary from designating a country for TPS or extending a TPS designation if she finds that "permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States." INA 244(b)(1), 8 U.S.C. 1254a(b)(1) . . . .

*Id.* at 9042.

The notice continued in relevant part:

> "National interest" is an expansive standard that may encompass an array of broad considerations, including foreign policy, public safety (e.g., potential nexus to criminal gang membership), national security, migration factors (e.g., pull factors), immigra-

tion policy (e.g., enforcement prerogatives), and economic considerations (e.g., adverse effects on U.S. workers, impact on U.S. communities). Determining whether permitting a class of aliens to remain temporarily in the United States is contrary to the U.S. national interest therefore calls upon the Secretary's expertise and discretionary judgment, informed by her consultations with appropriate U.S. Government agencies.

. . . .

[First,] TPS has allowed a significant population of inadmissible or illegal aliens without a path to lawful immigration status to settle in the interior of the United States, and the sheer numbers have resulted in associated difficulties in local communities where local resources have been inadequate to meet the demands caused by increased numbers. Among these Venezuelan nationals who have crossed into the United States are members of the Venezuelan gang known as Tren de Aragua. Tren de Aragua has been blamed for sex trafficking, drug smuggling, police shootings, kidnappings, and the exploitation of migrants. The United States has sanctioned the gang and placed it on a list of transnational criminal organizations. In Executive Order 14157, Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists, the President determined that Tren de Aragua's campaign of violence and terror poses threats to the United States. The Secretary accordingly has considered these important immigration and national interests in terminating the Venezuela parole process.

Second, President Trump observed, referring to CHNV [the parole program known as the "Processes for Cubans, Haitians, Nicaraguans, and Venezuelans"] and other policies and processes, that "[o]ver the last 4 years, the prior administration invited, administered, and oversaw an unprecedented flood of illegal immigration into the United States," including millions who crossed U.S. borders or were allowed to fly to a U.S. airport of entry and allowed to settle in American communities. The prolonged presence of these aliens in the United States "has cost taxpayers billions of dollars at the Federal, State, and local levels." For example, over 180,000 illegal aliens have settled in New York City, approximating that this will cost the city $10.6 billion through the summer of 2025. Additionally, although mayors from cities across the United States are attempting to accommodate Venezuelan illegal aliens, city shelters, police stations, and aid services are at a maximum capacity. . . . .

Third, President Trump declared a national emergency at the southern border. As the Attorney General and DHS have long understood, the potential "magnet effect" of a TPS determination is a permissible factor under the TPS statute, especially with respect to a redesignation. The same is true for Venezuela. . . .

Fourth, as the President directed in Executive Order 14150, "the foreign policy of the United States shall champion core American interests and always put America and American citizens first." Continuing to permit Venezuelans under the 2023 TPS designation to remain in the United States does not champion

> core American interests or put American interests first. U.S. foreign policy interests, particularly in the Western Hemisphere, are best served and protected by curtailing policies that facilitate or encourage illegal and destabilizing migration.

*Id.* at 9042-43.

The notice concluded with the statement that "DHS is terminating only the October 3, 2023 Venezuela TPS designation. The 2021 Venezuela TPS designation remains in effect until September 10, 2025." *Id.* at 9044. Because of the decision to terminate (which was possible only because of the decision to vacate Secretary Mayorkas's extension in the first place), the 2023 Designation will end on April 7, 2025. *See id.*

C. Causes of Action

Following the vacatur and termination decisions made by Secretary Noem, Plaintiffs filed suit. In their complaint, Plaintiffs assert three claims for relief:

(1) The government violated the APA because the Secretary's decision to vacate the extension of the 2023 Designation was arbitrary and capricious. Most fundamentally, the Secretary did not have inherent authority to reconsider the prior Secretary's extension. "The TPS statute carefully regulates the length of TPS extensions, the conditions under which they may be terminated, and the timetable for doing so. Defendants had no authority to annul a TPS extension under the timetable and procedures they utilized here." Compl. ¶ 149(a). In addition, the Secretary "objected to the . . . extension for allowing 2021 TPS holders to re-register under the 2023

extension, but failed to consider that 2021 TPS holders were necessarily eligible for TPS under the 2023 designation as well." Compl. ¶ 149(b).

(2) The government further violated the APA because the Secretary's decision to terminate the 2023 Designation was arbitrary and capricious. For example, the decision assumed that TPS designations are illegal, and "[t]he research, consultation, and review process leading up to the decision deviated dramatically from past practice without explanation." Compl. ¶ 153(a), (c).

(3) The government violated the Equal Protection Clause because the "decisions to vacate the . . . TPS extension for Venezuela, and to terminate the 2023 Venezuela Designation . . . were motivated, at least in part, by intentional discrimination based on race, ethnicity, or national origin." Compl. ¶ 157.

In the pending motion, Plaintiffs largely focus on the first and third claims above. To be clear, however, the relief Plaintiffs seek would result in postponement of both (1) Secretary Noem's decision to vacate the extension of the 2023 Designation and (2) the decision to terminate the 2023 Designation.

### III. DISCUSSION

As indicated by the above, Plaintiffs' case is founded in large part on the APA. The APA provides in relevant part that a court shall "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (B) contrary to constitutional right, power, privilege or immunity . . . .

5 U.S.C. § 706(2)." 5 U.S.C. § 706(2). Plaintiffs' present motion seeks temporary relief pursuant to § 705 of the APA. Section 705 provides as follows:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705.

A. Jurisdiction

Although § 705 expressly authorizes a court to postpone the effective date of any agency action, or to preserve status or rights pending judicial review, the government contends that the Court lacks jurisdiction to grant the relief sought by Plaintiffs. The government raises two jurisdictional arguments, one based on 8 U.S.C. § 1252(f)(1) and the other based on § 1254a(b)(5)(A).

1. Section 1252(f)(1)

According to the government, Plaintiffs are effectively seeking "classwide" injunctive relief in their motion, and thus their motion must be denied pursuant to § 1252(f)(1) which prohibits such relief. Section 1252(f)(1) provides as follows:

(f) Limit on injunctive relief.

(1) In general. Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ["IIRIRA"], other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

8 U.S.C. § 1252(f)(1). As the Supreme Court has explained, § 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550, 142 S. Ct. 2057, 213 L. Ed. 2d 102 (2022).

The government maintains that the TPS statute (§ 1254a) is one of the specified provisions to which § 1252(f)(1) applies – *i.e.*, that the TPS statute falls within "part IV of this subchapter." 8 U.S.C. § 1252(f)(1). The government acknowledges that the U.S. Code places the TPS statute within part V, not part IV, which is consistent with the statements by a number of courts that part IV covers only §§ 1221-32.[5] No court

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[5] *See, e.g., Gonzalez v. U.S. Immigration & Customs Enf't*, 975 F.3d 788, 812 (9th Cir. 2020) (stating that "'Part IV' [as used in § 1252(f)(1)] is a reference to the provisions titled 'Inspection, Apprehension, Examination, Exclusion, and Removal,' which cur-

has yet to hold that § 1252(f)(1) applies to § 1254a, which, as a facial matter, is reasonable given that § 1252 is titled "Judicial review of orders of removal" and TPS does not directly involve orders of removal. *Cf. Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 529, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947) (noting that "the title of a statute and the heading of a section cannot limit the plain meaning of the text" but they can be of use "when they shed light on some ambiguous word or phrase").

Nevertheless, the government argues that the U.S. Code contains an error; that the IIRIRA, when it amended the INA in 1996, designated the TPS statute, among other sections, under part IV, *see* 110 Stat. 3009, at 3009-548, 614-15 (Sept. 30, 1996) (in § 308 of the IIRIRA, amending the table of contents); and that "the text of the United States Code 'cannot prevail over the Statutes at Large [*i.e.*, the IIRIRA/INA] when the two are inconsistent.'" *Galvez v. Jaddou*, 52 F.4th 821, 830 (9th Cir. 2022). Yet, it appears that the codification of § 1254a into part V may well have been consistent with IIRIRA and the INA. Part IV is titled "Inspection, Apprehension, Examination, Exclusion, and Removal" whereas Part V is titled "Adjustment and Change of Status." TPS is more akin to an adjustment of status (albeit temporary) than a deportation proceeding.

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rently include 8 U.S.C. §§ 1221-1232 of the INA"); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) (stating that § 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231"); *Biden v. Texas*, 597 U.S. 785, 798, 142 S. Ct. 2528, 213 L. Ed. 2d 956 (2022) (discussing § 1252(f)(1) and its impact on a court's power to hear claims "brought under sections 1221 through 1232").

In any event, because Plaintiffs opted at this juncture not to focus on this aspect of the government's argument, the Court shall turn to and analyze in greater depth Plaintiffs' assertion that § 1252(f)(1) has no application where a court is simply called upon to vacate an agency action as opposed to issue an "injunction" that would, *inter alia*, govern the conduct of a government official. *See Aleman Gonzalez*, 596 U.S. at 548, 142 S. Ct. 2057 (noting that "[t]he term 'to enjoin' ordinarily means to 'require,' 'command,' or 'positively direct' an action or to 'require a person to perform, . . . or to abstain or desist from, some act'[;] [w]hen a court 'enjoins' conduct, it issues an 'injunction,' which is a judicial order that 'tells someone what to do or not to do'"). In other words, according to Plaintiffs, there is a material distinction between vacatur of a specific agency action under § 706 (and likewise postponement of such action under § 705) and an injunction under Federal Rule of Civil Procedure 65. Plaintiffs emphasize that "[e]very court to consider the question – including the Fifth Circuit and at least five district courts – has rejected [the government's] view that APA relief is functionally an injunction barred by Section 1252(f)(1)." Reply at 2.

In assessing Plaintiffs' position, the Court must begin with the "strong presumption . . . that the actions of federal agencies are reviewable in federal court." *KOLA, Inc. v. United States*, 882 F.2d 361, 363 (9th Cir. 1989); *see also Sackett v. E.P.A.*, 566 U.S. 120, 128, 132 S. Ct. 1367, 182 L. Ed. 2d 367 (2012) (stating that "[t]he APA . . . creates a presumption favoring judicial review of administrative action"). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S.

136, 141, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). Moreover, where there is no other forum for a litigant to raise their claim, that should also factor into a court's determination as to whether judicial review is available. *Cf. Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1034-35 (9th Cir. 2012) (noting that, "because [a veterans organization] cannot bring its suit in the Veterans Court, that court cannot claim exclusive jurisdiction over the suit," and, "[b]ecause [the organization] would be unable to assert its claim in the review scheme established by the [Veterans' Judicial Review Act], that scheme does not operate to divest us of jurisdiction").

The Court also bears in mind that the Supreme Court has, to date, declined to address the issue of whether § 1252(f)(1) is a bar to a court issuing relief pursuant to the APA. For example, in *Aleman Gonzalez*, the Supreme Court held that § 1252(f)(1) barred a lower court from entering an injunction requiring the government to provide bond hearings for not only plaintiffs but also all other class members (all of whom had been detained under 8 U.S.C. § 1231(a)(6)). But, as Justice Sotomayor pointed out in her concurrence/dissent, the majority decision did

> not purport to hold that § 1252(f)(1) affects courts' ability to "hold unlawful and set aside agency action, findings, and conclusions" under the Administrative Procedure Act. 5 U. S. C. § 706(2). . . . In addition, the Court rightly does not embrace the Government's eleventh-hour suggestion at oral argument to hold that § 1252(f)(1) bars even classwide declaratory relief, a suggestion that would (if accepted) leave many noncitizens with no practical remedy whatsoever against clear violations by the Executive Branch.

*Aleman Gonzalez*, 596 U.S. at 571-72, 142 S. Ct. 2057 (Sotomayor, J., concurring in part and dissenting in part). Justice Barrett made the same point as part of her dissent in *Biden v. Texas*, 597 U.S. at 785, 142 S. Ct. 2528 (where the Supreme Court held that § 1252(f)(1) did not deprive lower courts of all subject matter jurisdiction but rather simply withdrew the authority to grant a particular form of relief). Specifically, she noted that the majority "reserves the question whether § 1252(f)(1) bars declaratory relief, an issue on which there are conflicting views" and further "avoids a position on whether § 1252(f)(1) prevents a lower court from vacating or setting aside an agency action under the Administrative Procedure Act." *Id.* 839, 142 S. Ct. 2528 (Barrett, J., dissenting). The Supreme Court, therefore, has not adopted any view of § 1252(f)(1) that would preclude Plaintiffs from obtaining relief. *See also Biden v. Texas*, 597 U.S. at 801 n.4, 142 S. Ct. 2528 ("At our request, the parties briefed several additional questions regarding the operation of section 1252(f)(1), namely, whether its limitation on 'jurisdiction or authority' is subject to forfeiture and whether that limitation extends to other specific remedies, such as declaratory relief and relief under section 706 of the APA. We express no view on those questions.").

No court has adopted the construction of § 1252(f)(1) advanced by the government. Rather, all courts that have addressed the issue have rejected the government's construction of the statute. For example, in a decision issued after *Aleman Gonzalez* and *Biden v. Texas*, the Fifth Circuit rejected DHS's contention that vacatur of an agency action is a de facto enjoining or restraining of an agency enforcement decision. The Fifth Circuit explained:

> There are meaningful differences between an injunction, which is a "drastic and extraordinary remedy," and vacatur, which is "a less drastic remedy." The Supreme Court has indicated that § 1252(f) is to be interpreted relatively narrowly. Indeed, the Court described § 1252(f) as "nothing more or less than a limit on injunctive relief."

*Texas v. United States*, 40 F.4th 205, 219 (5th Cir. 2022) (addressing DHS's memoranda regarding immigration guidance for the apprehension and removal of noncitizens). The Fifth Circuit added:

> [A] vacatur does nothing but re-establish the status quo absent the unlawful agency action. Apart from the constitutional or statutory basis on which the court invalidated an agency action, vacatur neither compels nor restrains further agency decision-making. We decline to extend *Aleman Gonzalez* to such judicial orders, especially when doing so would be contrary to the "strong presumption favoring judicial review of administrative action."

*Id.* at 220; *see also Texas v. United States*, 126 F.4th 392, 419 n.40 (5th Cir. 2025) (reaffirming the same); *Florida v. United States*, 660 F. Supp. 3d 1239, 1284-85 (N.D. Fla. 2023) (stating that "[v]acatur is 'a less drastic remedy' than an injunction, and the Fifth Circuit concluded in the opinion currently on review at the Supreme Court that § 1252(f)(1) does not preclude vacatur under the APA because vacatur 'does nothing but re-establish the status quo absent the unlawful agency action' and 'neither compels nor restrains further agency decision-making'").

Notably, the Fifth Circuit's holding is directly supported by the Supreme Court's decision in *Monsanto*

*Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010). There, the Supreme Court noted that

> [a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course. If a less drastic remedy (**such as partial or complete vacatur of APHIS's deregulation decision**) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted.

*Id.* at 165-66, 130 S. Ct. 2743 (emphasis added).

Furthermore, while *Monsanto* itself did not explain why a vacatur is a less drastic remedy, it is clear that there are material differences between a vacatur and an injunction. While a court may only enter a vacatur to reestablish the status quo absent the unlawful agency action, *see Texas v. United States*, 40 F.4th at 220, it has "broad latitude in fashioning equitable relief [through an injunction] when necessary to remedy an established wrong." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (collecting cases). Injunctions may apply to parties and nonparties who act "in concert with" named parties. *See, e.g., SEC v. Wencke*, 622 F.2d 1363, 1368 (9th Cir. 1980) ("[Federal Rule of Civil Procedure 65 is] binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."); *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987) ("[A]n injunction is not necessarily made over-broad by extending benefit or protection to persons other than prevailing parties in the lawsuit – even if it is not a class action – *if such* *breadth is necessary to give prevailing parties the relief to which they are entitled.*") (emphasis in original). Courts may hold both parties and nonparties in contempt for violating an injunction. *See Portland Feminist Women's Health Ctr. v. Advocs. for Life, Inc.*, 877 F.2d 787, 788-89 (9th Cir. 1989) (affirming a lower court's imposition of sanctions on a nonparty held "in civil contempt for disobeying the injunction by acting in concert with the named defendants"); *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 949-50 (9th Cir. 2014) (affirming courts may hold nonparties in contempt for "aiding and abetting violations" of the injunction, and courts may also hold parties in contempt for "giving a non-party the means to violate an injunction"). Injunctions may be mandatory, compelling a wide range of affirmative conduct. *See Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (affirming lower court's injunction that required affirmative conduct by drug manufacturer to continue providing drug to participants after clinical trial). Injunctions may compel or restrain further agency decision-making. *See Kidd v. Mayorkas*, 734 F. Supp. 3d 967, 987 (C.D. Cal. 2024) (noting that although a vacatur or injunction would strike down ICE's "knock and talk" policy, "only an injunction would restrain Defendants from, in the future, attempting to institute a modified or amended version of the "knock and talk" policy that complies with constitutional limitations."). Injunctions may prohibit "otherwise lawful conduct" as well as unlawful conduct. *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 307 (7th Cir. 2010) ("The district court may even enjoin certain otherwise lawful conduct when the defendant's conduct has demonstrated that prohibiting only unlawful conduct would not effectively protect the plaintiff's rights against future encroachment."). And injunctions may evolve and morph over time. *See Brown v. Plata*, 563 U.S. 493, 542-43, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011) ("The three-judge court . . . retains the authority, and the responsibility, to make further amendments to the existing order or any modified decree it may enter as warranted by the exercise of its sound discretion. ... A court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has the continuing duty and responsibility to assess the efficacy and consequences of its order."). Conversely, none of the above is true of a court's vacatur of unlawful agency action under § 706(2) involved here. *See, e.g., Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 954-55 (N.D. Cal. 2010) (finding that a vacatur was more appropriate as to an injunction, but noting that the court's "[o]rder is without prejudice to Plaintiffs seeking further redress if, after the deregulation decision is vacated, Plaintiffs can demonstrate that Defendant-Intervenors or other third parties have in fact violated the vacatur").

In addition, as Plaintiffs argued at the hearing, the Supreme Court's decision in *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009), lends further support. In *Nken*, the plaintiff asked the Supreme Court to stay his removal pending an adjudication of his petition for a review of a BIA order. The government argued that the plaintiff could not obtain a stay of removal because of 8 U.S.C. § 1252(f)(2), which provides that "no court shall *enjoin* the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. § 1252(f)(2) (emphasis added). The Supreme Court did not agree with the government, explaining that a stay and an injunction cannot be equated with one another.

> An injunction and a stay have typically been understood to serve different purposes. The former is a means by which a court tells someone what to do or not to do. When a court employs "the extraordinary remedy of injunction," it directs the conduct of a party, and does so with the backing of its full coercive powers. It is true that "'[i]n a general sense, every order of a court which commands or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam.*'" This is so whether the injunction is preliminary or final; in both contexts, the order is directed at someone, and governs that party's conduct.
>
> By contrast, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability.
>
> A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one. Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act – the order or judgment in question – not by directing an actor's conduct. A stay "simply suspend[s] judicial alteration of the status quo," while injunctive relief "grants judicial intervention that has been withheld by lower courts."

*Nken*, 556 U.S. at 428-49, 129 S. Ct. 1749. Although the instant case concerns § 1252(f)(1), while *Nken* considered § 1252(f)(2), the point that the *Nken* Court made has force in the case at bar: to wit, an injunction has a specific legal meaning, and the fact that a different procedural mechanism can achieve the same result as an injunction does not mean that the two should be deemed the same. A material distinction still obtains. The fact that the title of Section 1252(f)(1) is a "limit on *injunctive* relief" (emphasis added) specifically suggests the distinction between an injunction and a vacatur is material. *Cf. Bhd. of R.R. Trainmen*, 331 U.S. at 529, 67 S. Ct. 1387 (noting that "the title of a statute and the heading of a section cannot limit the plain meaning of the text" but they can be of use "when they shed light on some ambiguous word or phrase"). Moreover, the operative language of § 1252(f)(1) limiting a court's authority "to enjoin or restrain" operations tracks Federal Rule of Civil Procedure 65 which governs preliminary *injunctions* and temporary *restraining* orders. It does not track §§ 705 and 706(2) of the APA which only grant courts the authority to "set aside" (*i.e.*, vacate) and "postpone" agency action.

Finally, the Court takes note that, under binding Ninth Circuit law, § 1252(f)(1)'s bar on classwide injunctive relief does not preclude a court from issuing declaratory relief. *See Al Otro Lado v. Exec. Off. for Immigr. Review*, 120 F.4th 606, 625 (9th Cir. 2024) (stating that "§ 1252(f)(1) does not 'bar classwide declaratory relief'"); *see also Kidd v. Mayorkas*, 734 F. Supp. 3d 967, 986 (C.D. Cal. 2024) (stating that "the Court can issue declaratory relief – which is not precluded by § 1252(f)"); *Immigrant Defenders Law Ctr. v. Mayorkas*, No. CV 20-9893 JGB(SHKx), 2023 U.S. Dist. LEXIS 75206, at

*40 (C.D. Cal. Mar. 15, 2023) (stating that "[t]he best reading of *Biden v. Texas* and *Aleman Gonzalez* is that district courts like this one retain jurisdiction to award declaratory relief in immigration class actions").[6] Here, Plaintiffs do seek declaratory relief. *See* Compl., Prayer ¶¶ 1-3; FAC, Prayer ¶¶ 1-3. Thus, if the Court were to deny Plaintiffs' motion to postpone based on § 1252(f)(1) – as the government requests – that would effectively render any declaratory relief moot. The TPS of the 2023 Designation beneficiaries, if the Secretary's vacatur is not postponed, will expire in early April 2025, long before any final judgment ordering declaratory relief could be obtained herein.

Accordingly, the Court rejects the government's contention that § 1252(f)(1) is a bar to Plaintiffs' request for relief.

2. <u>Section 1254a(b)(5)(A)</u>

The government argues that, even if § 1252(f)(1) is not a bar to Plaintiffs' case, there is another jurisdictional hurdle – specifically, § 1254a(b)(5)(A). Section

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[6] The Supreme Court has not yet addressed this issue. *See Aleman Gonzalez*, 596 U.S. at 551 n.2, 142 S. Ct. 2057 ("At oral argument, the Government suggested that § 1252(f)(1) not only bars class-wide injunctive relief but also prohibits any other form of relief that is 'practically similar to an injunction,' including class-wide declaratory relief. . . . Because only injunctive relief was entered here, we have no occasion to address this argument."); *Biden v. Texas*, 597 U.S. at 801 n.4, 142 S. Ct. 2528 ("At our request, the parties briefed several additional questions regarding the operation of section 1252(f)(1), namely, whether its limitation on 'jurisdiction or authority' is subject to forfeiture and whether that limitation extends to other specific remedies, such as declaratory relief and relief under section 706 of the APA. We express no view on those questions.").

1254a(b)(5)(A) is part of the TPS statute. It provides that "[t]here is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection." 8 U.S.C. § 1254a(b)(5)(A).

In assessing the government's argument based on § 1254a(b)(5)(A), the Court must first separate out the challenges being made by Plaintiffs in the case at bar. Plaintiffs are contesting (1) Secretary Noem's decision to vacate the extension of the 2023 Designation and (2) her decision to terminate the 2023 Designation. With respect to (1), Plaintiffs have multiple arguments: (a) the Secretary lacked the inherent authority to vacate the extension; (b) even if she had the authority, the rationale to vacate the extension was arbitrary and capricious; and (c) even if she had the authority, the decision to vacate was motivated at least in part by unconstitutional animus based on race, ethnicity, and/or national origin. With respect to (2), Plaintiffs assert, *inter alia*, that the decision to terminate (like the decision to vacate) was infected by unconstitutional animus.

At the hearing, the government explicitly conceded that § 1254a(b)(5)(A) does *not* bar the Court from entertaining Plaintiffs' contention that the Secretary lacked the inherent authority to vacate the extension of the 2023 Designation. The government acknowledged that whether the Secretary had such authority is purely a matter of statutory construction (*i.e.*, of the TPS statute) and is not a "determination" with respect to a TPS designation, termination, or extension.

The government, however, contends that § 1254a(b)(5)(A) bars the other claims asserted by Plaintiffs (*i.e.*, whether the vacatur was arbitrary and capricious and/or whether the vacatur or termination was unconstitutionally motivated). The Court does not agree. The Court previously addressed the scope of § 1254a(b)(5)(A) in *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. 2018), another case that involved TPS terminations but during the first Trump administration. When *Ramos* was appealed, the Ninth Circuit panel also addressed the scope of § 1254a(b)(5)(A), *see Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020). However, the panel decision was later vacated so that the matter could be reheard en banc. *See Ramos v. Wolf*, 59 F.4th 1010 (9th Cir. 2023). Ultimately, the en banc hearing did not take place because the government, having transitioned to the Biden administration, made new decisions regarding the TPS designations and terminations at issue. *See Ramos v. Nielsen*, 709 F. Supp. 3d 871, 876 (N.D. Cal. 2023) (reviewing history of proceedings).

Because the *Ramos* panel decision was vacated and no en banc ruling ever issued, this Court's decision in *Ramos* has not been overturned. Moreover, although the Ninth Circuit panel in *Ramos* ultimately held that § 1254a(b)(5)(A) did bar Plaintiffs from proceeding based on the particular nature of the claims asserted, the panel basically agreed with this Court that the scope of § 1254a(b)(5)(A)'s bar on judicial review was limited to "inquiring into the underlying considerations and reasoning employed by the Secretary in reach her country-specific TPS determinations." *Ramos*, 975 F.3d at 891. It does not apply to, *e.g.*, a pattern or practice that is "collateral to and distinct from the specific [country]

TPS decisions and their underlying rationale."[7] *Id.* at 891-92.

Given these circumstances, the Court adheres to its prior views on the scope of § 1254a(b)(5)(A). Nothing in the government's papers or oral arguments presented in the case at bar persuade the Court that § 1252a(b)(5)(A) should be construed differently.[8] Thus, here, the government's argument that § 1254a(b)(5)(A) is a jurisdictional bar lacks merit for several reasons.

a. Presumption of Judicial Review

First, as noted above, there is a "strong presumption . . . that the actions of federal agencies are reviewable in federal court," *KOLA*, 882 F.2d at 363, and "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 141, 87 S. Ct. 1507.

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[7] In her dissent in *Ramos*, Judge Christen agreed that § 1254a(b)(5)(A) "bars review of TPS determinations only, not collateral challenges," *Ramos*, 975 F.3d at 911, but she disagreed with the majority that the plaintiffs' claims constituted direct challenges instead of collateral ones.

[8] For example, the government argues that, because § 1254a(b)(5)(A) refers to "any determination" and "any" is a word with an expansive meaning, *see* Opp'n at 12 (citing *Patel v. Garland*, 596 U.S. 328, 338, 142 S. Ct. 1614, 212 L. Ed. 2d 685 (2022)), § 1254a(b)(5)(A) must be construed broadly. But the word "any" cannot overcome the fact that, as discussed below, § 1254a(b)(5)(A) refers to "any determination . . . with respect to the designation, or termination or extension of a designation." 8 U.S.C. § 1254a(b)(5)(A). The key is what constitutes "determination."

b. Applicability to Plaintiffs' APA Claim

Second, Plaintiffs' claim that the Secretary's decision to vacate was arbitrary and capricious does not fall within the scope of § 1254a(b)(5)(A) because the statute bars judicial review of determinations made with respect to TPS designations, terminations, or extensions only. A decision to vacate (a matter not expressly authorized by the TPS statute) is, literally and textually, not a "designation, or termination or extension of a designation, of a foreign state under this subsection." 5 U.S.C. § 1254a(b)(5)(A).

Furthermore, as the Court held in *Ramos*, § 1254a(b)(5)(A) was designed to bar judicial review of substantive country-specific conditions in service of TPS designations, terminations, or extensions of a foreign state – not judicial review of general procedures or collateral practices related to such. *See Ramos*, 321 F. Supp. 3d at 1102 (taking note of Supreme Court cases holding that "similar statutes which preclude review of a 'determination' of immigration status did not preclude review of collateral practices and policies"; citing, *e.g.*, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991) (individual denials on the merits were not challenged but rather the process under which denials were determined)). This holding is consistent with the panel decision in *Ramos*. *See Ramos*, 975 F.3d at 891-92 ("[A court] may still have jurisdiction over a broad challenge to the agency's procedures or practices. To the extent a claim purports to challenge an agency pattern or practice rather than a specific TPS determination, we may review it only if the challenged pattern or practice is indeed collateral to, and distinct from, the specific TPS decisions and their underlying rationale, which the statute shields from judicial scrutiny.") (internal quotation marks omitted). It is also consistent with the understanding of multiple district courts who have addressed TPS cases. *See, e.g., Saget v. Trump*, 375 F. Supp. 3d 280, 330-32 (E.D.N.Y. 2019) (stating that "the jurisdiction-stripping provision proscribes only direct review of individual TPS determinations" but does not block challenges based on deficiencies in the process employed to terminate TPS); *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 317-21 (D. Md. 2018) (concluding that the TPS jurisdiction-stripping provision "is best read as barring judicial review of the merits of the determination itself, but not whether the determination was made through 'unconstitutional practices and policies'"; adding that "Plaintiffs' constitutional and APA claims do not threaten the 'agency's primacy over its core statutory function'"); *Centro Presente v. United States Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 404-09 (D. Mass. 2018) (noting that plaintiffs' "constitutional and statutory claims [are] frame[d] as challenges to Defendants' process of adjudication rather than the content of any particular adjudication").

In the case at bar, Plaintiffs' contention that the decision to vacate was arbitrary or capricious – and thus should be set aside – does not dictate how the Secretary should ultimately rule on a TPS designation, termination, or extension. Indeed, Secretary Noem's vacatur decision was based purely on procedural concerns (*e.g.*, whether Secretary Mayorkas had taken a "novel approach" or caused confusion) and did not turn, *e.g.*, on country conditions in Venezuela or a concern about U.S. interests. Therefore, Plaintiffs are simply making a collateral challenge, not a direct one, and § 1254a(b)(5)(A) is not implicated.

That Plaintiffs' challenge to the vacatur decision is collateral in nature is underscored by *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994), where the Ninth Circuit considered the following factors in determining whether a challenge is direct or collateral: (1) whether the plaintiff's claims are based on the "merits of his individual situation" or, instead, a "broad challenge to allegedly [improper agency] practices"; (2) whether the administrative record "for a single [decision] would have . . . relevance" to the plaintiff's claims; and (3) whether the claims raised matters "peculiarly within the agency's 'special expertise'" or "an integral part of its 'institutional competence.'" *Id.* at 859; *see also Ramos*, 975 F.3d at 892 (panel decision) (considering the above factors); *id.* at 912-13 (Christen, J., dissenting) (same). *City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865 (9th Cir. 2009), added a fourth consideration: whether there is another forum where a plaintiff's claim may be heard. *See id.* at 874 (taking note that, in a prior decision, "we rejected jurisdiction over the plaintiffs' claim in part because we held that the claim 'can be effectively advanced in the context of an appeal from an individual order of deportation'"); *see also Ramos*, 975 F.3d at 913 (stating that "*City of Rialto* teaches that we must consider whether another forum exists where plaintiffs' claim may be heard").

In the case at bar, the first factor points to a collateral challenge for the reasons stated above. The second factor also weighs in favor of a collateral challenge; for instance, whether Secretary Mayorkas had taken a "novel approach," as claimed by Secretary Noem when she vacated the extension, will likely require consideration of matters outside the administrative record. The same is true for the third factor – *e.g.*, whether Secretary Mayorkas's decision engendered confusion was not something particularly within DHS's expertise. Finally, there does not appear to be any other forum where Secretary Noem's decision to vacate could be challenged. *Cf. Ramos*, 975 F.3d at 894 (panel decision) ("recogniz[ing] that Plaintiffs cannot raise their APA challenge in another forum or at a different stage in the proceedings"); *id.* at 913 (Christen, J., dissenting) (noting that "[t]he TPS statute includes an administrative review process for challenging denials of individual noncitizen TPS applications, but it does not include a path for challenging the termination of a foreign state's TPS designation").

The Court, therefore, holds that § 1254a(b)(5)(A) does not bar judicial review of Plaintiffs' challenge to the Secretary's decision to vacate.

c. Applicability to Plaintiffs' Equal Protection Claim

Finally, § 1254a(b)(5)(A) does not preclude judicial review of Plaintiffs' separate claim for violation of equal protection, whether based on the decision to vacate or the decision to terminate. "The presumption in favor of judicial review [of agency action] is particularly important in regards to constitutional claims." *CASA de Md.*, 355 F. Supp. 3d at 317. Here, "there is no 'clear and convincing' evidence that Congress intended to preclude the Court from reviewing constitutional challenges of the nature alleged. Indeed, as Plaintiffs point out, where Congress otherwise intended to preclude review of all constitutional claims in the INA, it said so explicitly." *Ramos*, 321 F. Supp. 3d at 1105. As above, the panel decision in *Ramos* is in accord. *See Ramos*, 975 F.3d at 895 (entertaining the equal protection claim on the merits – *i.e.*, not applying a jurisdictional bar under § 1254a(b)(5)(A)). It is also notable that the APA expressly provides that agency action shall be set aside if unconstitutional. *See* 5 U.S.C. § 706(2)(B) (providing that a court shall "hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity").

The Court, therefore, rejects the government's contention that jurisdiction is lacking based on § 1254a(b)(5)(A) for both Plaintiffs' APA claim and their equal protection claim.

B. Section 705 of the APA

According to the government, even if there is no jurisdictional bar to Plaintiffs' suit, § 705 of the APA still cannot provide them with any relief because the statute "by its own terms does not authorize relief [where] the challenged actions *have already taken effect*." Opp'n at 9 (emphasis added). The government's position here seems to be that, because the Secretary's vacatur decision took effect *immediately* (as reflected in the Federal Register notice), *see* 90 Fed. Reg. at 8807 (stating that "[t]he vacatur is effective immediately"), it is impossible to postpone the effective date of the vacatur pursuant to § 705. *See* 5 U.S.C. § 705 (providing that "the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings").

There are several problems with the government's position.

First, although Plaintiffs may technically be asking for postponement of the effective date of the vacatur decision (which enabled the termination decision), what they are ultimately seeking is postponement of the *impact* of the vacatur decision – *i.e.*, the actual termination of the 2023 TPS Designation. As the actual termination of the 2023 Designation has not yet gone into effect, since the challenged actions have yet not changed the status of TPS beneficiaries, Plaintiffs should be able to seek postponement.[9]

Second, the government's reliance on *Center for Biological Diversity v. Regan*, 597 F. Supp. 3d 173 (D.D.C. 2022), in support of its position is flawed because that case focused on when an *agency* – and not a *court* – can postpone agency action (*i.e.*, pending judicial review). *See id.* at 204 ("The D.C. Circuit has declared – albeit in a non-precedential order – that Section 705 'permits an *agency* to postpone the effective date of a not yet effective rule, pending judicial review,' but 'it does not permit the agency to suspend without notice and comment a promulgated rule.'") (emphasis added). To be sure, § 705 of the APA does address both postponement by an agency and postponement by a court.[10] However,

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[9] Ironically, at the hearing, the government argued that Secretary Noem had the authority to reconsider the extension of the 2023 Designation because that extension had not yet gone into effect.

[10] As stated above, the full text of § 705 is as follows:

> When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may

that does not mean that postponement by an agency and postponement by a court are treated the same under § 705.

The district court in *Texas v. Biden*, 646 F. Supp. 3d 753 (N.D. Tex. 2022), made this very point.[11] In *Texas v. Biden*, as here, the government argued that "Section 705 may only remedy an agency action that has *yet* to take effect." *Id.* at 769 (emphasis added). The court disagreed, stating that "[w]hether the effective date of the [DHS's] October 29 Memoranda [which terminated an immigration program] has passed is irrelevant to this *Court's* ability to issue a Section 705 stay. Courts – including the Supreme Court – routinely stay *already-effective* agency action under Section 705." *Id.* at 770 (emphasis added).

The *Texas v. Biden* court pointed out that

> [t]he cases Defendants cite [including *Center for Biological Diversity*] preclude *agencies* – not *courts* – from staying the effective date of agency actions after the effective date. [This was reasonable because] [a]uthorizing an agency to stay an already-taken action would allow the agency to evade notice-and-comment requirements. An agency's "order delaying [a] rule's effective date ... [is] tantamount to amending or revoking a rule." The APA "mandate[s] that agencies use the same procedures when they

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> issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705.

[11] The case was ultimately appealed the Supreme Court, *see Biden v. Texas*, 597 U.S. at 785, 142 S. Ct. 2528, but the matter at issue here was not presented as part of the appeal.

> amend or repeal a rule as they used to issue the rule in the first instance." This includes the general requirement that rules be subject to notice-and-comment procedures.
>
> The limitation on agencies contrasts with courts' inherent authority to stay agency action to facilitate judicial review.

*Id.* at 770-71 (emphasis added). *See, e.g., GB Int'l, Inc. v. Crandall*, No. 19-35866, 2020 U.S. App. LEXIS 20008 at *1 (9th Cir. June 25, 2020) ("The renewed motion to postpone the effective date of agency action is granted. *See* 5 U.S.C. § 705. The effective date of the USCIS' denial of appellants' adjustment of status applications is postponed pending resolution of this appeal.").

Finally, the government gives short shrift to the fact,

> [w]hereas an agency may only "postpone the effective date of action taken by it, pending judicial review," a federal court has broader power to "issue all necessary and appropriate process to postpone the effective date of an agency action *or to preserve status or rights pending conclusion of the review proceedings.*" 5 U.S.C. § 705 (emphasis added). The greater limitation on agencies exists because "agencies are creatures of statute" and, thus, "possess only the authority that Congress has provided."

*Id.* at 770 (emphasis in original). In its opposition, the government contends that the latter provision still cannot save Plaintiffs' case because "[a]n order staying a policy after it has already gone into effect . . . does not preserve the status quo, but rather, *alters* it." Opp'n at 10 (emphasis in original). This argument, however, is without merit because, traditionally, "[t]he 'status quo' to be restored is 'the last peaceable uncontested status existing between the parties *before* the dispute developed.'" *Texas v. Biden*, 646 F. Supp. 3d at 771 (emphasis added); *cf. Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (stating that "[t]he 'purpose of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits,'" and " '[s]tatus quo ante litem' refers to 'the last uncontested status which *preceded* the pending controversy' ") (emphasis added). Here, the last uncontested status that preceded the pending controversy was the state of the TPS designations at the time Secretary Mayorkas extended the 2023 Designation in January 2025 – *i.e., before* Secretary Noem took the contested action of vacating the extension and then terminated the 2023 Designation.

C. Section 705 Factors in Determining Postponement

Having addressed the government's procedural challenges to Plaintiffs' motion to postpone, the Court may now turn to the merits of the motion. The factors considered in determining whether to postpone pursuant to § 705 " 'substantially overlap with the . . . factors for a preliminary injunction.'" *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 529 (N.D. Cal. 2020); *see also Colorado v. United States EPA*, 989 F.3d 874, 883 (10th Cir. 2021) (stating that the preliminary injunction "factors also determine when a court should grant a stay of agency action under section 705 of the APA"); *Cook Cnty. v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020) (stating that the standard for a stay under § 705 is "the same" as the standard for a preliminary injunction).

The Ninth Circuit has explained the standard for a preliminary injunction as follows:

> A party seeking a preliminary injunction must meet one of two variants of the same standard. Under the original *Winter* standard, a party must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Under the "sliding scale" variant of the *Winter* standard, "if a plaintiff can only show that there are 'serious questions going to the merits' – a lesser showing than likelihood of success on the merits – then a preliminary injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied."

*All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017). Neither party disputed that this framework would also apply to a motion brought pursuant to § 705 of the APA.

1. Irreparable Injury

The Court considers first the factor of irreparable injury. Irreparable injury is particularly important as § 705 explicitly invokes it as a basis to issue relief. Plaintiffs have submitted a number of declarations establishing that, without postponement of the agency actions, TPS beneficiaries will suffer irreparable injury. The declarations have been submitted by, *e.g.*, TPS holders (including the named Plaintiffs), experts, and leaders of community organizations.

The declarations reflect that TPS beneficiaries feel stuck between a rock and a hard place because of DHS's actions. Absent relief from the Court, TPS beneficiaries will no longer have authorization to work in the United States and thus will lose their jobs – which in turn imperils their livelihoods, housing, and health care. Absent relief from the Court, they will no longer have legal status, which means not only loss of, *e.g.*, driver's licenses and educational opportunities, but also – and most significantly – the prospect of removal from the United States.

Removal is a concrete reality because, for many TPS holders, TPS is their only avenue for legal status in the United States. For example, those with asylum cases have been waiting for years for their adjudications. *See* Watson & Veuger Decl. ¶ 11 (Senior Fellow at the Brookings Institution in Economic Studies and Senior Fellow in economic policy studies at American Enterprise Institute) (testifying that, "[a]s of 2024[,] it was estimated that 132,272 Venezuelans had filed asylum cases which had not yet been adjudicated, consistent with the well-documented backlogs in the immigration system"). Even if an individual could obtain asylum – or even parole – these legal mechanisms do not provide the same protections as TPS. *See* Tolchin Decl. ¶ 11 (immigration attorney) (testifying that, "[a]lthough many Venezuelan TPS holders may . . . be eligible for protection from removal and work authorization through other avenues [*e.g.*, asylum and parole], only a small minority will actually receive relief, and it is very likely that many Venezuelans TPS holders would *not* be protected to the same degree by any other statute") (emphasis in original).

Removal presents significant hardship for several reasons. First, removal would mean separation from family, friends, and communities. *See Washington v.*

*Trump*, 847 F.3d 1151, 1168-69 (9th Cir. 2017) (recognizing the separation of families as "substantial injuries and even irreparable harms").[12] Some TPS holders have been in the United States for years; some TPS holders who are children have known or remembered only the United States as their home. *See, e.g.*, M.R. Decl. ¶¶ 3, 7, 18 (arrived in 2015 with her then two-year-old daughter, both of whom have TPS). Furthermore, separation is particularly complicated because many TPS holders live in mixed-status families – *i.e.*, some family members, including partners and/or some children, are U.S. citizens. *See* Docket No. 62 (Amicus Br. at 4) (noting that, "[i]n 2022, approximately 54,000 U.S. citizen children and 80,000 U.S. citizen adults lived with a Venezuelan TPS holder"). Decisions, therefore, would have to be made about whether families should stay together or split apart. Decisions would also have to be made how to provide for families in either scenario, both in terms of economic and emotional support. *Cf.* Docket No. 62 (Amicus Br. at 6) (noting that "parental deportation is a

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[12] In *Washington v. Trump*, the district court temporarily enjoined an executive order that banned entry into the United States of individuals from seven countries. The government moved for an emergency stay of the district court decision pending appeal. In evaluating, *inter alia*, the balance of hardships and the public interest, the Ninth Circuit noted:

> the States have offered ample evidence that if the Executive Order were reinstated even temporarily, it would substantially injure the States and multiple "other parties interested in the proceeding." When the Executive Order was in effect, the States contend that the travel prohibitions harmed the States' university employees and students, separated families, and stranded the States' residents abroad. These are substantial injuries and even irreparable harms.

*Washington v. Trump*, 847 F.3d at 1168-69.

deeply traumatic and disruptive event, linked to extreme psychological distress, anxiety, depression, post-traumatic stress disorder (PTSD), externalizing behaviors (such as aggression), and difficulties sleeping").

Second, removal presents a great deal of uncertainty because it is not clear where TPS holders stripped of their legal status in the United States can go. Removal could mean a return to Venezuela which has been in the throes of a political and economic crisis for years, *see, e.g.*, Young Decl. ¶¶ 3, 13-18 (opining that "the political and economic crisis that Venezuela has been experiencing for the last decade continues to this day"; discussing, *inter alia*, political repression in Venezuela throughout the Hugo Chávez and Nicolás Maduro regimes, fraudulent election in July 2024, and mismanaged economy and U.S. economic sanctions that have left over 80% of Venezuelans in poverty and over 50% in extreme poverty); Watson & Veuger Decl. ¶¶ 8-9 (describing economic crisis that began under Hugo Chávez and worsened under Nicolás Maduro, Nicolás Maduro's use of anti-democratic means to maintain power, and fraudulent election in 2024) – and which is still classified by the U.S. State Department as a "Level 4: Do Not Travel" country.[13] *See* https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/venezuela-travel-advisory.html (Venezuela travel advisory reissued in September 2024) (designating Venezuela a Level 4 country and stating: "Do not travel to Venezuela due to the high risk of wrongful

[13] The Watson & Veuger Declaration fairly points out that it is not clear how TPS holders could return to Venezuela given that this would "require cooperation with the Maduro regime," which the United States does not recognize and on which the United States has imposed sanctions. Watson & Veuger Decl. ¶ 24.

detentions, terrorism, kidnapping, the arbitrary enforcement of local laws, crime, civil unrest, poor health infrastructure"). Removal to a different country is not a readily available option because there is no Venezuelan consulate in the United States where to update or get passports. *See* Ferro Decl. ¶ 16 (Executive Director of Venezuelan American Caucus). And even if there were such an option, the prospect of rebuilding in a new place – finding a job, health care, basic necessities – is no easy task.

The declarations detailing hardships are compelling. For example, Plaintiff M.H. and her seven-year-old daughter are TPS beneficiaries from Venezuela. *See* M.H. Decl. ¶ 2. TPS is their only form of legal status because of long waits and delays in the asylum and green card processes. *See id.* ¶¶ 11-16. M.H.'s Venezuelan passport is expired, and she has no way to renew it because the U.S. severed diplomatic relations with Venezuela, so she cannot travel to another country. *See id.* ¶ 24. Her husband and two-year-old son are U.S. citizens. *See id.* ¶ 2. M.H. left Venezuela because of political repression for working with an opposition party, including facing a warrant for her arrest. *See id.* ¶¶ 5, 6. Currently, the family lives in Tennessee, where M.H. cares for the children full-time and volunteers at a local health clinic, while her husband works a full-time job to provide for the family and is gone all day at work. *See id.* ¶ 7. Both roles require M.H. to have a driver's license (which is dependent on her having legal status) to drive her severely asthmatic son to the hospital, her daughter to school, and herself to the clinic to volunteer. *See id.* ¶¶ 7, 8. The son requires M.H.'s daily care because of the risk of asthma attacks. *See id.* ¶ 18. Her family in Venezuela tells her about the ongoing political and economic crisis in the country, including facing shortages of basic necessities and water and power shut offs. *See id.* ¶ 10. These family members rely on remittances from M.H. to survive. *See id.* Without postponement, the DHS actions would result in her TPS expiring on April 7, 2025. *See id.* ¶ 2. This prospect has brought M.H. fear and sadness of being separated from her family and traumatizing her children. *See id.* ¶¶ 19-23. M.H. would lose her driver's license, crucial to her caring for her son's asthma attacks. *See id.* ¶ 18. If removed to Venezuela with her daughter, she fears political persecution, hunger, and facing a lack of housing, healthcare, and basic goods. *See id.* ¶¶ 19-23. The family would be forced to make the difficult decision of separating or all moving to Venezuela, a country that lacks 34 the medical infrastructure to meet the son's needs. *See id.* If the husband remains in the United States, he will have to leave his job to care for the son, leaving both sides of the family without income and health insurance. *See id.*

Plaintiff Freddy Jose Arape Rivas has lived in the U.S. since January 2023 and registered for TPS pursuant to the 2023 Designation. *See* Rivas Decl. ¶ 2. TPS is his sole legal authorization to remain and work in the U.S. *See id.* ¶ 14. In Venezuela, he studied computer science in college but was forced to flee Venezuela due to repression for supporting the opposition party and inability to obtain necessities. *See id.* ¶¶ 5-7. In the United States, he has worked an IT job for an energy and technology company in Texas, and the company is so pleased with his performance that they sponsored him for an H1B visa application, which is still pending. *See id.* ¶ 8. He has filed a tax return for each year he has lived in the U.S. *See id.* ¶ 9. He is the sole source of economic support for his parents, who have chronic health conditions, and other family members still in Venezuela. *See id.* ¶ 10. Based on the extension of the 2023 Designation (in January 2025), he renewed his lease for his house and extended his employment. *See id.* ¶ 11. Without TPS, Mr. Rivas would lose his job, home, and driver's license; live under constant fear of deportation, particularly to Venezuela where he could be tortured for his prior political opposition; and would no longer be able to provide for his parents and family in Venezuela, including paying for life-saving medications. *Id.* ¶¶ 15-17, 19. Mr. Rivas also has many family members in Texas who are TPS holders themselves, including a cousin who works at a hospital and has a seven-year-old child protected by TPS and two young U.S.-born children. For the child who has TPS, the United States is the only country she remembers. *See id.* ¶ 13.

Plaintiff Cecilia Daniela González Herrera has lived her entire adult life in the U.S. and relies on TPS for legal status because her family's asylum application has been pending for eight years. *See* Gonzalez Herrera Decl. ¶ 2. She and her parents fled political persecution in Venezuela in 2017. *See id.* ¶¶ 4-6. She attends university and works as a voting rights advocacy coordinator. *See id.* ¶ 9. TPS allows her to pay in-state tuition and be eligible for scholarships; without TPS, she would likely be forced to abandon her studies. *See id.* ¶ 10. Ms. Herrera feels scared to go outside for fear of being racially profiled and detained by ICE, and a decline in mental health has caused an inability to focus on schoolwork. *See id.* ¶¶ 14-16. She has no family or home in Venezuela and fears returning to Venezuela and facing violence or harm from the government. *See id.* ¶ 17.

The Executive Director of the Venezuelan American Caucus takes note of even more hardships faced by numerous Venezuelan TPS holders to whom she has spoken:

> small business owners unsure whether to sell their businesses or close their doors; employees who will lose their employment authorization, and their livelihood, in a matter of weeks; students fearful of the loss of financial aid which guarantees their ability to pursue their education; individuals terrified that they will be deported without this essential legal status, and trying to determine whether to stay or flee to avoid this outcome; business owners with employees unsure whether to lay them off in preparation for closure; Venezuelans who have taken out significant loans from banks to start businesses or buy homes and properties, now unable to sleep at night, wondering what to do and how to resolve these matters; and Venezuelans who honestly know they have no grounds to apply for political asylum, and who, wanting to do things the right way, have turned to TPS while they wait for a real solution to the political and humanitarian crisis caused by the dictatorship of Nicolás Maduro, especially after the largest electoral fraud ever perpetrated in the region in July 2024.

Ferro Decl. ¶ 13.

Notably, the government offers no evidence to counter Plaintiffs' showing of irreparable injury. The government conceded at the hearing that it had no counter-evidence and no basis to doubt the bona fides of the factual declarations filed herein. Its main assertion at the hearing was that most of these facts are not relevant, an assertion the Court rejects. They are indeed relevant to the issue of irreparable injury, the public interest, and the balance of hardships.

At best, the government makes a passing claim that conditions have improved in Venezuela, *see* 90 Fed. Reg. at 9042 (in decision to terminate the 2023 Designation, stating that there was "consultation with the Department of the State," that conditions in Venezuela were reviewed, and that "[o]verall, certain conditions for the 2023 TPS designation of Venezuela may continue; however, there are notable improvements in several areas such as the economy, public health, and crime that allow for these nationals to be safely returned to their home country"), but there is no evidence – not even a country conditions report – to support that claim.[14] The claim is also squarely contradicted by the expert declarations submitted by Plaintiffs, *see, e.g.*, Young Decl. ¶ 3 (opining that "the political and economic crisis that Venezuela has been experiencing for the last decade continues to this day"), and the U.S. State Department's classification of Venezuela as a "Level 4: Do Not Travel" country because of its dangerous conditions.

The government also tenders a legal argument – to wit, that the harms identified by Plaintiffs are not cognizable because they are inherent to the temporary na-

[14] To be clear, the government represents that Secretary Noem found there to be improvements after examining DHS's "review of country conditions," Opp'n at 6, but no country conditions report has been provided to the Court in conjunction with the pending motion. To the extent the government suggested at the hearing that Secretary Mayorkas found improved conditions when he extended the 2023 Designation, that is not accurate. The Federal Register notice for the extension stated: "Recently, Venezuela's economy has shown some signs of recovery; however, it is still in a precarious condition." 88 Fed. Reg. at 68133.

ture of TPS. *See* Opp'n at 22-23 (arguing that, "[w]hile Plaintiffs heavily focus on the burden that TPS beneficiaries will face should the termination be permitted to go into effect, the underlying cause of this harm flows from the statute ('temporary' protected status) itself" – *i.e.*, "the alleged harms would exist with or without the termination at issue" because "a country's TPS designation must be reviewed at least every 18 months, and there is no guarantee of renewal"). The Court previously rejected this argument in *Ramos, see Ramos*, 336 F. Supp. 3d at 1087 (noting that, "[a]lthough the TPS program is temporary in nature, that does not mean that Plaintiffs' injuries claimed herein are the purely result of the temporary nature of the program as opposed to the government's actions"), and it fares no better here. Although the TPS designations for Venezuela are only temporary, they still afford TPS holders with concrete, meaningful relief: for a fixed period of time, TPS holders have both the right to work and the right to be free from removal, which give not only stability but also security in their lives and time with their families otherwise threatened by Secretary Noem's actions. In short, time matters, even if that time is limited. Certainly, anyone who, for instance, has experienced the loss of a loved one to a terminal illness understands the preciousness of time, even if short.[15]

[15] At the hearing, Plaintiffs also pointed out that time matters in practical terms because some TPS holders have, *e.g.*, asylum applications pending which would provide for longer-term relief. It is possible that adjudications on such applications could be made during the time TPS holders are still present in the United States, *i.e.*, if the Court postpones the agency actions pending judicial review. Removal before the application is acted upon could impact the application, if only as a practical matter.

Faced with the above, the government's remaining argument is that the interests of TPS holders are outweighed by other interests – in particular, the public interest in national security. The public interest factor is addressed below. To the extent the government argues the Secretary has an interest in having her actions enforced, that would only be if her actions were lawful. As discussed below, the Plaintiffs have made a showing that the Secretary has acted unlawfully.

2. Public Interest

Contrary to what the government argues, the public interest weighs in favor of, not against, postponement of the agency actions.

a. Economic Impacts

As reflected in the declarations submitted by Plaintiffs and the two Amici briefs (representing the views of a number of states, cities, and counties), Venezuelan TPS holders are integrated into the U.S. communities in which they live. Many are married to, or are parents of, U.S. citizens. A great number work – and in diverse settings. *See also* Morten Decl. ¶ 4 (Professor of Economics at Stanford University) (noting that employment rates associated with TPS holders generally is estimated to be between 81 and 96%); Ferro Decl. ¶ 11 (noting that, "[i]n the United States, TPS holders work in frontline jobs, hospitality, delivery, customer service, retail, restaurants, transportation, construction, factories, and manufacturing, among many other professional fields").

By virtue of their work alone, Venezuelan TPS holders make significant economic contributions to their communities. For example, if one were to consider only the 360,000 Venezuelans who arrived in the United States between 2021 and 2023 (the two TPS designations for Venezuela), "there were approximately 195,000 people age 16 and over who had earnings in the United States in the year before they were interviewed in the [2023 American Community Survey]," and "[t]heir average earnings were $17,981 per person. Termination of their TPS status would result in an estimated 3.5 billion dollar annual loss to the U.S. economy, and an annual loss of 434.8 million dollars in Social Security taxes." Card Decl. ¶ 9(i) (emphasis omitted); *cf.* Watson & Veuger Decl. ¶ 20 ("Economists largely agree that immigration is good for the U.S. economy overall, promoting GDP growth and if anything raising wages for the average U.S. born worker."). If one were to consider the additional 320,000 Venezuelans who were present in the United States in 2023 and who arrived in the country between 2013 (when Nicolás Maduro assumed power) and 2020, there were approximately 230,000 people age 16 and over who had earnings in the United States, and

> [t]heir average earnings were $37,161 per person. Assuming a fraction **x** of this group would lose TPS status as a result of the proposed termination, there would be an estimated 8.55x billion dollar[ ] annual loss to the U.S. economy, and an annual loss of 1.06x billion dollars in Social Security taxes.

Card Decl. ¶ 9(ii).[16]

[16] In his declaration, Professor Card also explains that Venezuelan TPS holders who work do not pose a "significant threat to the labor market opportunities of native workers" (*i.e.*, because they "have about the same education as natives" do). Card Decl. ¶ 9(iv).

The two Amici briefs underscore the economic contributions made by TPS holders generally, and Venezuelan TPS holders specifically, because they work, spend, and pay taxes. *See, e.g.*, Docket No. 62 (Amici Br. at 8) ("California TPS households earned $2.1 billion in income, paid $291.2 million in federal taxes, $226.5 million in state and local taxes, and contributed $1.6 billion in spending power. In New York, TPS households earned $2.3 billion in income, paid $348.9 million in federal taxes, $305.5 million in state and local taxes, and also contributed $1.6 billion in spending power. Moreover, at least 41 percent of TPS households are homeowners and pay taxes on property having a total value of approximately $19 billion."); Docket No. 71 (Amici Br. at 6) ("It is . . . reasonable to estimate that the 344,335 Venezuelans with approved TPS in 2024 had spending power of approximately $8 billion, if not more given their higher participation in the work force and higher percentage of educational attainment relative to other populations.").

The evidence above on the economic contributions of Venezuelan TPS holders is consistent with evidence that Venezuelan TPS holders have a relatively high level of educational attainment and receive only modest public assistance benefits. *See* Card Decl. ¶ 9(iv) (noting that, with respect to 366,000 Venezuelans who arrived in the United States between 2021 and 2023, 40% have bachelor's degrees and that, with respect to 320,000 additional Venezuelans who arrived between 2013 and 2020, 54% have bachelor's degrees); Card Decl. ¶ 9(vi) (testifying that Venezuelans who arrived in the United States between 2021 and 2023 "received an average of $56.9 in public assistance payments over the previous 12 months" and, "[o]n average, over 96% of their personal income was attributable to their own earnings").

If TPS holders from Venezuela lose their work authorization under the TPS program, there would be additional economic impacts on the United States and the communities where the TPS holders currently live. The cost to companies to replace laid-off TPS employees could be as high as $1.3 billion, *see* Morten Decl. ¶ 7(a) (citing in support a 2017 report from the Immigration Legal Resource Center), and "[e]nding TPS would also impose costs on the government due to deportation expenses. . . . Deporting approximately 350,000 Venezuelan TPS holders could . . . cost taxpayers an estimated $4.8 billion." Morten Decl. ¶ 7(b). Moreover, if TPS holders no longer have jobs, they or their families may need to seek public assistance. *See* Watson & Veuger Decl. ¶ 27 ("Terminating TPS will increase, not decrease, the burden on localities by preventing TPS holders from working in the formal sector, thus increasing the number of people needing assistance (*e.g.*, the U.S.-citizen children of deported TPS holders and TPS holders who lose their work permit but are not yet removed)."). Without jobs, TPS holders and their families would also lose employer-sponsored health insurance, which would likely increase health care expenditures for local governments. *See* Docket No. 62 (Amici Br. at 9) (explaining that health care expenditures for Amici States would increase "both by increasing the proportion of Venezuelan immigrants who are on public health insurance . . . and by increasing public expenditures on emergency care provided to uninsured patients").

b. Public Safety

Termination of the Venezuelan TPS designations would also have more than just an economic impact on the United States and the local communities where TPS holders live. Public safety would also be implicated. Fears of detention and deportation cause undocumented immigrants to forego medical care, such as diagnostic testing and vaccinations, which increases health risks to the broader community. *See, e.g.*, Watson & Veuger Decl. ¶ 16 (stating that public health would suffer from terminating TPS for Venezuelans because immigrants without legal status forego healthcare for fear of being apprehended at medical facilities); Docket No. 62 (Amici Br. at 10-11). In addition, immigrants without legal status are less likely to report crimes or testify in court, reducing public safety and making effective law enforcement more difficult. *See* Docket No. 62 (Amici Br. at 12); Docket No. 71 (Amici Br. at 7-8).

c. National Security

Similar to above, the government has offered no evidence to counter that provided by Plaintiffs and Amici. The government conceded, at the hearing, that they had no counter-evidence.[17] Instead, the government simply contends that the public interest weighs against postponement of the agency actions because of national security interests. But the government's assertion that Venezuelan TPS holders pose some kind of danger to

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[17] At the hearing, the government appeared to refer to the Federal Register notice for the termination of the 2023 Designation, which stated that "over 180,000 illegal aliens have settled in New York City, [which will] cost the city [approximately] $10.6 billion through the summer of 2025." 90 Fed. Reg. at 9043. But TPS holders are not in the United States illegally.

the country or the communities where they live is entirely unsubstantiated. In fact, an individual must be "admissible as an immigrant," 8 U.S.C. § 1254a(c)(1)(A)(iii), in order to be eligible for TPS, which means, *inter alia*, they cannot have been convicted of certain crimes (*e.g.*, a crime involving moral turpitude or drugs) or a member of a terrorist organization. *See id.* § 1182(a)(2)-(3). In addition, an individual is expressly deemed ineligible for TPS if they have "been convicted of any felony or 2 or more misdemeanors committed in the United States." *Id.* § 1254a(c)(2)(B). It is not surprising, therefore, that Amici state and local jurisdictions from across the United States expressly state they have not faced any "crime wave" because of Venezuelan TPS holders. *See* Docket No. 62 (Amici Br. at 13); *see also* Perez Decl. ¶ 7 (noting that "immigrants have had lower incarceration rates than the U.S.-born throughout American history (including lower incarceration rates than U.S. born whites)" and that "immigrants' relative incarceration rates have actually declined since the 1960s in the U.S.") (emphasis omitted). The government's attempt to cast Venezuelan TPS holders as criminals is also in tension with record evidence reflecting that Venezuelan TPS holders are largely employed and have relatively high education levels. It is a form of group defamation.

To the extent the government contends that there is a threat from the Venezuelan gang Tren de Aragua ("TdA"), it has made no showing that any Venezuelan TPS holders are members of the gang or otherwise have ties to the gang. In fact, Plaintiffs have submitted evidence that, although the TdA gang is "a powerful criminal organization in Venezuela and some other parts of South America, there is no evidence of a structured or operational presence in the United States." Dudley

Decl. ¶ 16 (Co-Director of InSight Crime). According to the Co-Director of InSight Crime, a think tank that specializes in investigating and analyzing organized crime in the Americas and assessing state efforts to combat these organizations, *see* Dudley Decl. ¶ 4, "local police we have spoken to in the United States have not asserted that [TdA] has any significant criminal operations in the country," and "[t]he few crimes attributed to alleged [TdA] members in the United States appear to have no connection with the larger group or its leadership in Venezuela." Dudley Decl. ¶ 16; *see also id.* ¶ 20 (stating that "[i]t is rare – indeed, practically unheard of – for foreign street and prison gangs from Latin America to gain a significant foothold in the United States in light of a complex array of factors"). InSight Crime also reports that, "[i]n March 2024, a review of all federal and state court databases found only two criminal cases which even mentioned [TdA]," and,

> [b]y February 18, 2025, we had identified only five federal cases of an alleged [TdA] connection. However, none of these cases appeared to be connected to each other or the international structure of the gang outside of the U.S. What's more, the details of the cases do not suggest any sophisticated criminal operations or modus operandi, and there was no discernable pattern of criminal behavior or indications these individuals were seeking to regroup with [TdA] members or other gangs.

*Id.* ¶ 19.

Finally, even assuming a legitimate concern about the presence of TdA gang members in the United States, the government has failed to show that it cannot deal with that specific problem through other means. As noted above, anyone who is convicted of a felony or two misdemeanors or an act of terrorism will be ineligible for TPS status. The government has made no showing the traditional law enforcement and immigration measures cannot handle criminal problems that might be caused by the TdA and that *en masse* action stripping all Venezuelan nationals of TPS status is necessary. In addition, the government has shown no basis for attributing criminality to the entire population of Venezuelans or Venezuelan TPS holders in the United States and seeking their exclusion wholesale instead of focusing on specific TdA gang members. *Cf. Korematsu v. United States*, 323 U.S. 214, 218-19, 65 S. Ct. 193, 89 L. Ed. 194 (1944) (stating that "exclusion of those of Japanese origin [from the West Coast war area] was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country"), *abrogated by Trump v. Hawaii*, 585 U.S. 667, 710, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018) (stating that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution'").

Indeed, there is uncontradicted evidence in the record that stripping Venezuelan beneficiaries of TPS protection would impede law enforcement and threaten public safety. As noted above, immigrants without legal status are less likely to report crimes or testify in court, reducing public safety and making effective law enforcement more difficult. *See* Docket No. 62 (Amici Br. at 12); Docket No. 71 (Amici Br. at 7-8).

Finally, the government's interest in national security is unclear. Terminating TPS could actually have adverse ramifications to national security (in addition to impeding domestic prosecutions) because "deporting Venezuelan TPS holders will require cooperation with the Maduro regime." Watson & Veuger Decl. ¶ 24. Since taking office in January 2025, the Trump administration has made an agreement with the Maduro government to resume deportations to Venezuela. *See id.* And yet, this action would seem to contradict U.S. foreign policies that have refused to recognize Nicolás Maduro as the legitimate president of Venezuela since 2019. *See id.* ¶¶ 8, 24. Indeed, the U.S. is still offering a $25 million reward for information leading to Nicolás Maduro's arrest and/or conviction. *See id.* ¶ 8. Therefore, it would seem that normalizing relations with Nicolás Maduro to deport immigrants "to a place known for human rights abuses may also weaken the standing of the United States in the international community and adversely affect national security." *See id.* ¶ 24. It is hard to discern precisely what the U.S. interest is in this instance.

3. Balance of Hardships

As discussed above, Plaintiffs have provided significant evidence that TPS holders and their families would suffer irreparable harm if they are not afforded temporary relief, and the public interest also weighs in favor of Plaintiffs because of the substantial economic, public safety, and humanitarian ramifications. In contrast, the government's contention that the public interest weighs in its favor is not convincing because the government lacks any evidence of national security harms. Accordingly, the balance of hardships (including consideration of the public interest) tips sharply in Plaintiffs' favor.

4. Likelihood of Success on the Merits

Because the balance of hardships tips sharply in their favor, Plaintiffs need only show serious questions going to the merits of their claims. *See All. for the Wild Rockies*, 865 F.3d at 1217. But as discussed below, Plaintiffs have not only shown that there are such serious questions; they have also established a likelihood of success on the merits, thus entitling them to postponement of the Secretary's vacatur and termination even without the benefit of the sliding scale test.

a. Authority to Vacate Extension of 2023 Designation

The threshold question is whether Secretary Noem lacked the authority to vacate the extension of the 2023 Designation.[18] Plaintiffs are likely to succeed on the merits of this issue. As noted above, this is the first time that an extension of a TPS designation has ever been vacated in the statute's history. While the Secretary has the ultimate authority to terminate a TPS designation and can "change her mind," she may do so only under the terms and timeframe set forth in the TPS statute.

i. Notice of Vacatur

In the notice of vacatur, the Secretary stated: "An agency has inherent (that is, statutorily implicit) authority to revisit its prior decisions unless Congress has expressly limited that authority. The TPS statute does not limit the Secretary's inherent authority under the INA to reconsider any TPS-related determination, and upon reconsideration, to vacate or amend the determination."

[18] As noted above, the government has conceded that § 1254a(b)(5)(A) does not preclude judicial review of Plaintiffs' claim that the Secretary lacked the inherent authority to vacate the extension of the 2023 Designation.

90 Fed. Reg. at 8806. In a footnote, she cited the following:

> *See* INA 103(a), 244(b)(3), (b)(5)(A); 8 U.S.C. 1103(a), 1254a(b)(3), (b)(5)(A); Reconsideration and Rescission of Termination of the Designation of El Salvador for Temporary Protected Status; Extension of the Temporary Protected Status Designation for El Salvador, 88 FR 40282, 40285 (June 21, 2023) ("An agency has inherent (that is, statutorily implicit) authority to revisit its prior decisions unless Congress has expressly limited that authority. The TPS statute does not limit the Secretary's inherent authority to reconsider any TPS-related determination, and upon reconsideration, to change the determination."); *see also, e.g., Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (Kavanaugh, J.) ("[A]dministrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion. . . . "[I]nherent authority for timely administrative reconsideration is premised on the notion that the power to reconsider is inherent in the power to decide." (quotation marks and citations omitted)); *Macktal v. Chao*, 286 F.3d 822, 825-26 (5th Cir. 2002) ("It is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions.") (collecting cases); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) ("We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time."); *cf. Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 340 (4th Cir. 2007) (agencies

> possess especially "broad authority to correct their prior errors").

*Id.* at 8806 n.2.

ii. Authorities Cited by the Secretary

As an initial matter, the Court takes note that the statutes cited by the Secretary do not give her the authority to vacate.

- 8 U.S.C. § 1103(a)(1) is simply a general provision stating that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens. . . . "
- 8 U.S.C. § 1254a(b)(3) is about periodic review, terminations, and extensions of TPS.
- 8 U.S.C. § 1254a(b)(5) is the jurisdictional provision – stating that "[t]here is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection."

Thus, ultimately, the Secretary's claim for authority to vacate rests on the concept of inherent authority to reconsider.

As a general matter, the government is correct that "administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014). But

> the term "inherent" is misleading because "it is 'axiomatic' that 'administrative agencies may act only pursuant to authority delegated to them by Congress.'" Thus, "the more accurate label" for the power EPA describes "is '**statutorily implicit**.'" And although the power to decide is **normally** accompanied by the power to reconsider, "**Congress . . . undoubtedly can limit an agency's discretion to reverse itself**."

*NRDC v. Regan*, 67 F.4th 397, 401 (D.C. Cir. 2023) (emphasis added); *see also Ivy Sports*, 767 F.3d at 86 (stating that "any inherent reconsideration authority does not apply in cases where Congress has spoken"). Thus, the power to reconsider and revoke prior agency decision is not universally inherent, but is "statutorily inherent"—it turns on construction of the governing statute. For instance, "an agency may not rely on inherent reconsideration authority 'when Congress has provided a mechanism capable of rectifying mistaken actions.'" *Id.*; *see also id.* at 87 (stating that "it would be unreasonable under [the] statutory scheme to infer that FDA retains inherent authority to short-circuit or end-run **the carefully prescribed statutory reclassification process** [for a medical device] in order to correct the same mistake") (emphasis added).

Ninth Circuit authority is consistent with that of the D.C. Circuit. To determine whether an agency has the statutorily implicit authority to reconsider an earlier agency decision depends on the statute and whether such legislative intent to confer such authority can be inferred. For example, in *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000) (en banc), the Ninth Circuit considered whether the Attorney General's "power to confer citizenship through the process of naturalization necessarily includes the power to revoke that citizenship." *Id.* at 1089. The Ninth Circuit noted that, "[b]ecause 'an agency may not confer power upon itself,' the Attorney General needs some statutory authority to have the power to take away an individual's American citizenship." *Id.* at 1092-93. The court reviewed the "established and carefully constructed statutory scheme" which provided, *inter alia*, that U.S. attorneys could institute actions to revoke naturalization in federal court and that the Attorney General could cancel "certificates of citizenship"[19] but such cancellations affected only the document and not the citizenship status itself. The Ninth Circuit held that "implying authority for the Attorney General to take away people's citizenship administratively would gravely upset this carefully constructed legislative arrangement." *Id.* at 1094.

Notably, the court recognized the "heart" of the government's argument was that "the power to denaturalize is 'inherent' in the power to naturalize" but it explicitly rejected that contention. *Id.* at 1095.

> The formula the government urges, that what one can do, one can undo, is sometimes true, sometimes not. A person can give a gift, but cannot take it back. A minister, priest, or rabbi can marry people, but cannot grant divorces and annulments for civil purposes. A jury can acquit, but cannot revoke its ac-

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[19] "The certificate of naturalization is issued by the Commissioner of Immigration and Naturalization. It says, 'the Attorney General having found that' the person is entitled to citizenship and has met the requirements and taken the oath of allegiance, 'such person is admitted as a citizen of the United States of America.'" *Gorbach*, 219 F.3d at 1090.

> quittal and convict. Whether the Attorney General can undo what she has the power to do, naturalize citizens, depends on whether Congress said she could.

*Id.* at 1095. The agency power to revoke prior action was sufficiently circumscribed to preclude an inference of statutorily implicit power to reconsider the grant of citizenship.

In *China Unicom (Ams.) Ops. Ltd. v. FCC*, 124 F.4th 1128 (9th Cir. 2024) [hereinafter *CUA*], the Ninth Circuit held that the agency *did* have the implicit authority to reconsider the decision at issue but, again, only after reviewing the statutory scheme to determine what was Congress's intent. *See, e.g., id.* at 1149 (noting that, "[w]here Congress has provided a particular mechanism, with specified procedures, for an agency to make such alterations, 'it is not reasonable to infer' an implied authority that would allow an agency to circumvent those statutory procedural protections"). CUA, the plaintiff in the case, was a California company but ultimately owned by the Chinese government. It "was authorized to provide domestic and international telecommunications services pursuant to certificates granted to it many years ago" by the FCC under § 214 of the Communications Act of 1934. *Id.* at 1132. In 2020, the FCC "issued an order directing CUA to show cause why the FCC should not revoke its § 214 certificates" based on "national security concerns," as articulated during proceedings in which the agency had denied an application for a § 214 authorization submitted by a *different* Chinese government-owned carrier. *Id.*; *see also id.* at 1136 (noting that the other proceedings raised concerns about "the susceptibility of Chinese state-owned enterprises, including subsidiaries, to Chinese government influence, control, and exploitation"). Ultimately, in 2022, the FCC revoked CUA's certificates "on the grounds that CUA's retention of them presented an unreasonable national security risk and, separately, that CUA had exhibited a lack of candor and trustworthiness over the course of the proceedings." *Id.* at 1132; *see also id.* at 1141.

Before the Ninth Circuit, CUA argued that, "as a matter of law, the FCC lacks any statutory authority [including implicit] to revoke a § 214 certificate, except as a penalty imposed in connection with adjudicated violations of applicable law." *Id.* at 1142. The court disagreed after reviewing the statutory text and structure. The Ninth Circuit acknowledged that, in a different title in the Communications Act that dealt with radio licensing, there was an express provision that empowered the FCC to revoke any station license for a variety of reasons. But,

> [i]n our view, no negative inference can be drawn from the fact that the "radio" licensing provisions in Title III of the Communications Act contain an express revocation provision, while the common-carrier certificate provisions in Title II do not. As the Supreme Court has noted, the two distinct regulatory systems established under Title II and Title III are very different, because, in "contradistinction" to wire-telecommunications carriers, the Act recognizes that "broadcasters are not common carriers and are not to be dealt with as such." *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474, 60 S. Ct. 693, 84 L. Ed. 1037 (1940) (footnote omitted). . . . **Indeed, given that broadcast licenses are generally issued for fixed, renewable terms of up to eight years, *see* 47**

> **U.S.C. § 307(c)(1), the statute reflects a clear temporal expectation that, absent contrary indication in the statutory text, such a license will endure for the length of that term. The use of a fixed term is thus affirmatively inconsistent with positing an implied power to revoke a license at any time, and it is therefore unsurprising that Title III contains a provision expressly recognizing an agency power of revocation**. By contrast, as noted earlier, Title II's silence on the temporal duration of common-carrier certificates, which have traditionally been open-ended in length, is a factor that weighs in favor of an implied power of revocation.

*Id.* at 1147-48 (emphasis added). The court thus held that

> the FCC possesses statutory authority to revoke a § 214(a) certificate by invoking grounds that it may properly consider in denying issuance of such a certificate as an original matter. Of course, any actual exercise of such authority must consider the relevant constraints that may be placed upon that action by the Constitution, other statutes, or applicable principles of administrative law. In some cases, such as ones involving substantial reliance interests, those constraints may be significant and may preclude a particular exercise of such authority.

*Id.* at 1150-51; *see also id.* at 1160-61 (Bea, J., dissenting) (noting that carriers may develop reliance interests in their § 214 certificates).[20]

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[20] As indicated above, Judge Bea issued a dissent in *CUA*. Judge Bea stated that "the specificity of § 214's provision of authority to the FCC to grant a certificate to start, to modify, to change, or to

Hence, the critical question in the instant case is whether there is anything in the statutory scheme of the INA suggesting that the Secretary does or does not have the inherent authority to vacate a TPS designation or extension.

iii. Statutory Analysis

Plaintiffs argue that the Secretary does not have the implicit authority because the TPS statute lays out specific timelines and processes for TPS designations, extensions, and terminations.

> The fixed terms of TPS designations, extensions, and terminations, and the statutorily prescribed processes governing how the Secretary must proceed after an initial TPS designation, are inconsistent with implicit vacatur authority. Unless otherwise speci-

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end services only upon a telecommunications carrier's application would normally imply Congress intended not to grant the FCC the authority to take a different course of action with respect to such certificates." *CUA*, 124 F.4th at 1158. He also rejected

> the premise that the power to refuse certification is the functional equivalent of the power to revoke certification . . . because it ignores the reliance interests carriers may develop in their § 214 certificates.
>
> A business that is refused a certificate can decide to expend no further capital – money – for its proposed enterprise. But a business that has been granted a certificate is likely to have invested further capital, time, and resources into existing infrastructure in reasonable reliance on the vested right to build a telecommunications line pursuant to its duly granted § 214 certificate. Simply put, there is a material difference between the power to refuse and the power to revoke. It is not reasonable to assume that the power to grant, to refuse, or to condition a grant also encapsulates the power to revoke.

*Id.* at 1161 (citing *Gorbach*).

> fied in the original notice, an initial designation "take[s] effect upon the date of publication of the designation" and "shall remain in effect until the effective date of the termination of the designation." 8 U.S.C. § 1254a(b)(2). The same is true of extensions. 8 U.S.C. § 1254a(b)(3)(C). "At least 60 days before the end of the initial period of designation, and any extended period of designation," 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 under this subsection continue to be met." 8 U.S.C. § 1254a(b)(3)(A). The Secretary must "provide on a timely basis for the publication of notice of such determination . . . in the Federal Register." *Id.* If the Secretary determines "that a foreign state . . . no longer continues to meet the conditions for designation" the Secretary "shall terminate the designation by publishing a notice in the Federal Register." 8 U.S.C. § 1254a(b)(3)(B). Without such a determination, the designation "is extended." 8 U.S.C. § 1254a(b)(3)(A) & (C). Extensions take effect immediately, and last for the length of time specified in the notice, up to 18 months. *Id.* In contrast, a termination "shall not be effective earlier than 60 days after the date the notice is published *or, if later, the expiration of the most recent previous extension*." 8 U.S.C. § 1254a(b)(3)(B) (emphasis added).

Mot. at 6 (italics in original).

Plaintiffs' analysis is compelling. Secretary Noem's claim that she had the inherent right to vacate the extension of the 2023 Designation effectively gave her the power to countermand Secretary Mayorkas's decision and in practical terms terminate the TPS designation given to Venezuela is at odds with the structure of the TPS statute. The TPS statute is specifically prescriptive as to the time frame within which a TPS designation may be terminated. *See* 8 U.S.C. § 1254a(b)(3)(B) (providing that a termination "shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension"). It expressly provides that termination of TPS designation can be *no earlier* than the *expiration* of the most recent extension. It does not permit the Secretary to terminate a TPS designation "midstream" during the term of the prior designation. Yet, the upshot of the Secretary's action herein does just that. And while the statute carefully and expressly sets forth in detail the process of "designation," "extension," and "termination," it says *nothing* about vacatur.

The Ninth Circuit's *CUA* decision is particularly instructive here. As noted above, in *CUA*, the Ninth Circuit reasoned that,

> **given that broadcast licenses are generally issued for fixed, renewable terms of up to eight years, *see* 47 U.S.C. § 307(c)(1), the statute reflects a clear temporal expectation that, absent contrary indication in the statutory text, such a license will endure for the length of that term. The use of a fixed term is thus affirmatively inconsistent with positing an implied power to revoke a license at any time, and it is therefore unsurprising that Title III [addressing radio licensing] contains a provision expressly recognizing an agency power of revocation**. By contrast, as noted earlier, Title II's silence on the temporal duration of common-carrier certificates, which have traditionally been

> open-ended in length, is a factor that weighs in favor of an implied power of revocation.

*CUA*, 124 F.4th at 1148 (emphasis added). Here, "clear temporal expectations" are reflected in the TPS statute, and the clear stated terms for extensions and terminations of TPS designations are likewise "affirmatively inconsistent with the positing an implied power to revoke" or vacate a prior designation (or extension). *Id.*

It is also worth noting that, in the vacated *Ramos* decision, the panel noted that "Congress enacted the TPS statute to curb and control the executive's **previously unconstrained** discretion under the [extended voluntary departure] process. . . ." *Ramos*, 975 F.3d at 890 (emphasis added); *cf. NRDC v. Regan*, 67 F.4th at 401-02 (noting that, "[i]n 2011, EPA determined that perchlorate satisfied the statutory criteria for regulating," and, therefore, "[u]nder the statute, . . . EPA has one authorized course of action: it 'shall' propose and promulgate the MCLG and regulations, and it 'shall' do so by the statutory deadlines"; "[t]o read into the statute another course of action – one that allows EPA to withdraw its regulatory determination entirely and decide that it 'shall not' regulate – would be to contravene the statute's clear language and structure and 'nullif[y] textually applicable provisions **meant to limit [EPA's] discretion**'") (emphasis added). To permit the Secretary unconstrained discretion to revoke, at any time, a prior TPS designation would not be consistent with Congress's general intent to cabin such discretion.[21]

[21] To be sure, the *Ramos* panel also stated that, "to the extent the TPS statute places constraints on the Secretary's discretion, it does so in favor of limiting unwarranted designations or extensions

To the extent the government relies on a prior claim by the Biden administration of the implicit authority to reconsider – specifically, when dealing with the TPS designation for El Salvador, *see* 88 Fed. Reg. 40282, 40285 (June 21, 2023) – that reliance is misplaced for several reasons. First, prior agency practice is not dispositive. *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("[P]revious statutory violations cannot excuse the one now before the court. '[W]e do not see how merely applying an unreasonable statutory interpretation for several years can transform it into a reasonable interpretation.'"). Simply put, the legality of the action by the Biden administration was not tested in court.

Second, assuming the action of the Biden administration was legally authorized, the Biden administration reconsidered a decision to *terminate* a TPS designation, not a decision to *extend* a TPS designation. This difference is significant. Where a TPS extension is given, it creates important reliance interests.[22] *See, e.g.*, Rivas Decl. ¶ 12 (testifying that, the day the extension of the 2023 Designation was given, he submitted his renewal application, he thereafter received a receipt that confirmed his work authorization was extended for 540

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of TPS." *Ramos*, 975 F.3d at 891. Nevertheless, the limitations that Congress established by setting forth the specific circumstances under which designations, extensions, *or* terminations evidence a more general intent to constrain discretion.

[22] *Cf. CUA*, 124 F.4th at 1150-51 (recognizing that, "[i]n some cases, such as ones involving substantial reliance interests, . . . constraints [on an agency's authority to revoke] may be significant and may preclude a particular exercise of such authority [to revoke]"); *id.* at 1160-61 (Bea, J., dissenting) (noting that carriers may develop reliance interests in their § 214 certificates).

days, he provided that information to his employer so he could continue to work, and, "[w]ith that assurance, [he] renewed [his] lease on [his] home").[23] Indeed, the TPS statute itself implicitly recognizes the importance of such reliance interests because it provides that, during periodic review of a TPS designation, if the Secretary does not make an express decision that the foreign country "no longer meets the conditions for designation . . . , the period of designation of the foreign [country] is extended for an additional period of 6 months (or, in the discretion of the [Secretary], a period of 12 to 18 months)." 8 U.S.C. § 1254a(b)(3)(C). It essentially provides extension as a default and its effect can be immediate. In contrast, the TPS statute partially 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. *See* 8 U.S.C. § 1254a(b)(3)(B). Thus, given the difference in reliance interests (between extensions and terminations) and the structure of the statute, even if there is room to argue that the Secretary has the implicit authority to vacate a decision to terminate, the same cannot necessarily be said for a decision to extend.

Third, as Plaintiffs point out, it is notable that the Biden administration reconsidered terminations only after they had already been

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[23] The government has suggested that there cannot be any real reliance interests in the instant case because Secretary Noem vacated Secretary Mayorkas's extension shortly after it was given. The Rivas Declaration is but one example of why that argument lacks merit.

> *enjoined for five years*; [the terminations] never took effect. Agencies have flexibility to undo decisions already found unlawful by courts. *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229-30, 86 S. Ct. 360, 15 L. Ed. 2d 284 (1965) (agency had power to "undo what is wrongfully done" when original decision never became final and was overturned on judicial review).

Mot. at 7 (emphasis in original).

Ultimately, the government's main response to Plaintiffs' position is that it is extreme – *i.e.*, under Plaintiffs' position, "no Secretary of Homeland Security could ever vacate a designation or extension of a designation, no matter the type of national security threat posed or the seriousness of the error or legal defect in the prior determination" (unless the specific timeline under the TPS statute allowed for a new determination to be made). Opp'n at 15. The government's argument may have some surface appeal, but it is ultimately unpersuasive.

First, Secretary Noem's decision to vacate the extension of the 2023 Designation was not based on any claimed national security interest. While this rationale may have been one basis of her subsequent decision to terminate (a basis which, as discussed below, is unsupported by any evidence), her decision to vacate the extension was based on her purported belief that Secretary Mayorkas's decision was novel, possibly in violation of the TPS statute, and engendered confusion regarding registration process. It was not based on any claim of national security.

Second, "[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (internal quotation marks omitted). Thus, as Plaintiffs point out, in spite of possible national security interests, the Secretary does not have the ability, *e.g.*, to "revoke en masse green cards, H-1B visas, or student visas; such authority resides with Congress." Reply at 7. Congress did not create a national security exception to the framework it prescribed for the termination of TPS status. Instead, under the TPS statute, national security is an explicit consideration in one circumstance: when granting TPS to a foreign country on the basis of extraordinary and temporary conditions. *See* 8 U.S.C. § 1254a(b)(1)(C) (providing for TPS designation if the Secretary "finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the [Secretary] finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States").

Third, to the extent concern for national security comes into play, the TPS statute accounts for that in several ways: (a) TPS is temporary, not permanent, in nature; (b) the Secretary is to consult with other government agencies before making a decision on TPS designations, terminations, or extensions, and, presumably, the agencies would alert her to any potential for concern; and (c) if there are any concerns, the Secretary can issue a TPS designation of short duration (*e.g.*, 6 months instead of 18).

Perhaps more to the point, the Secretary maintains the authority to *withdraw* a TPS holder's status if a beneficiary presents a danger to national security: the Secretary "shall withdraw [TPS] granted to an alien . . . if [the Secretary] finds that the alien was not in fact eligible for such status," 8 U.S.C. § 1254a(c)(3)(A), and ineligibility includes, *e.g.*, committing a crime involving moral turpitude, committing a felony, or being a member of a terrorist organization. Moreover, the government, of course, has law enforcement resources to address any such threat posed by an individual or group of individuals. Indeed, the government has already attempted to employ extraordinary means against putative TdA gang members. *See generally J.G.G. v. Trump*, No. 25-766 (JEB) (D.D.C.) (addressing claim brought by Venezuelan noncitizens fearing removal pursuant to the Alien Enemies Act of 1798 instead of the INA). Revocation/vacatur of TPS status en masse because of the suspect acts of a few would be statutory overkill. Nothing in the TPS statute indicates there is an exception to its statutorily imposed temporal limitations and expectations that would implicitly permit the Secretary to vacate at will, in midstream, a TPS designation still in effect.

Accordingly, the Court concludes that Plaintiffs have established a likelihood of success on the merits for their claim that Secretary Noem lacked the inherent authority to vacate the extension of the 2023 Designation. And if Secretary Noem lacked the authority to vacate the extension, she necessarily did not have the authority to terminate the 2023 Designation thereafter, which Secretary Mayorkas had extended to October 2026.

b. Arbitrary and Capricious – Legal Error

Given the Secretary did not have the legal right to vacate the 2023 extension, the Plaintiffs have established a likelihood of success on the merits. But even if, contrary to the above analysis, the Secretary had the implicit authority to reconsider and vacate the extension of the 2023 Designation (*i.e.*, could supplant Secretary Mayorkas's decision on whether to terminate or extend with her own), Plaintiffs would still be entitled to relief. This is because, as Plaintiffs argue, even if the Secretary had the authority to vacate the extension, her vacatur was founded on legal error and thus was arbitrary and capricious. *See* 5 U.S.C. § 706(2).

In vacating the extension of the 2023 Designation, the Secretary claimed that the extension did not simply extend the 2023 Designation to October 2026 but also, in effect, extended the 2021 Designation to the same 2026 date. *See* Opp'n at 16 ("By consolidating the registration processes for both the 2021 and 2023 TPS designations, the notice had the practical effect of extending the 2021 Designation by up to 13 months and allowing for employment authorization for that period as well."). She characterized this as a "novel approach." 90 Fed. Reg. at 8807 ("The Mayorkas Notice adopted a novel approach of implicitly negating the 2021 Venezuela TPS designation by effectively subsuming it within the 2023 Venezuela TPS designation.").

> The Mayorkas Notice did not acknowledge the novelty of its approach or explain how it is consistent with the TPS statute. *See* INA 244(b)(2)(B), 8 U.S.C. 1254a(b)(2)(B) (providing that a TPS country designation "shall remain in effect until the effective date of the termination of the designation under [INA 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B)]"). This novel approach has included multiple notices, overlapping populations, overlapping dates, and sometimes mul-

> tiple actions happening in a single document. While the Mayorkas Notice may have made attempts to address these overlapping populations, the explanations in the Mayorkas Notice, particularly the explanation for operational impacts, are thin and inadequately developed. Given these deficiencies and lack of clarity, vacatur is warranted to untangle the confusion, and provide an opportunity for informed determinations regarding the TPS designations and clear guidance.

*Id.*

But Secretary Noem's stated rationale was legally erroneous. As Plaintiffs argued in their papers and at the hearing, the Secretary failed to recognize that a TPS beneficiary under the 2021 Designation was necessarily a TPS beneficiary under the 2023 Designation.

> [E]very earlier designation is "subsum[ed]" by a later one because redesignation expands the pool of potential beneficiaries **to include not only those who qualified under an earlier designation, but also those who arrived after their country was first designated**. *See* 8 U.S.C. § 1254a(c)(1)(A)(i) (TPS applicants must have been "continuously physically present in the United States since the effective date of the most recent designation of [their country]"). Thus, TPS holders who initially registered for TPS under Venezuela's 2021 designation had to prove they remained continuously present since March 9, 2021. 86 Fed. Reg. 13575. Accordingly, they **necessarily** also satisfied the later continuous presence requirement in Venezuela's 2023 re-designation."

Mot. at 9 (emphasis added). When Secretary Mayorkas extended the 2023 Designation, he simply recognized that a TPS holder under the 2021 Designation could choose to register as a TPS holder under the 2023 Designation:

> **Will there continue to be two separate filing processes for TPS designations for Venezuela?**
>
> No. USCIS has evaluated the operational feasibility and resulting impact on stakeholders of having two separate filing processes. Operational challenges in the identification and adjudication of Venezuela TPS filings and confusion among stakeholders exist because of the two separate TPS designations. To date, USCIS has created operational measures to process Venezuela TPS cases for both designations; however, it can most efficiently process these cases by consolidating the filing processes for the two Venezuela TPS populations. To decrease confusion among stakeholders, ensure optimal operational processes, and maintain the same eligibility requirements, upon publication of this Notice, **individuals registered under either the March 9, 2021 TPS designation or the October 3, 2023 TPS designation will be allowed to re-register under this extension**. This would not, however, require that a beneficiary registered under the March 9, 2021 designation to reregister at this time. Rather, it would provide such individuals with the option of doing so. **Venezuela TPS beneficiaries who appropriately apply for TPS or re-register under this Notice and are approved by USCIS will obtain TPS through the same extension date of October 2, 2026.**

*Id.* at 5964 (some emphasis added).

Contrary to what Secretary Noem suggested, streamlining the two tracks for the two designations into one (so long as a TPS holder under the 2021 Designation was willing to register under the 2023 Designation) would tend to eliminate, not create, confusion – *i.e.*, confusion that could arise based on the fact that there are two tracks. Moreover, contrary to what Secretary Noem suggested, as a factual matter, it was not "novel" for different tracks to be streamlined as part of a TPS process. Plaintiffs have pointed out that there has been similar streamlining for both the Sudan and Haiti TPS designations. *See, e.g.*, 79 Fed. Reg. 52027, at 52028-29 (Sept. 2, 2014) (extending Sudan's TPS designation and establishing one process for re-registration, regardless of which designation individual initially registered under); 88 Fed. Reg. 5022, at 5028 (Jan. 26, 2023) (permitting "[i]ndividuals who [initially registered for TPS under Haiti's 2010 or 2011 designation and] currently retain their TPS [through June 30, 2024] under the *Ramos* injunction" to "reregister" under a later redesignation to receive TPS through August 3, 2024).

Furthermore, nothing in the TPS statute prevents the Secretary from extending TPS designation of a country well in advance of the natural expiration date of the prior designation. The statute only requires that the Secretary review the designation at least 60 days in advance of the expiration. *See* 5 U.S.C. § 1254a(b)(3)(A) ("*At least* 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state (or part thereof) under this section the Attorney General, after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and shall determine whether the conditions for such designation under this subsection continue to be met.") (emphasis added). It does not place a limit on how far in advance the extension may be considered and granted. Thus, to the extent the extension of the 2023 Designation had the independent effect of extending the status of the 2021 Designation 8 months in advance of the September 2025 expiration date, it was entirely consistent with the TPS statute.

Thus, the practical operation of the extension of the 2023 Designation was not "novel," did not engender undue confusion as to registration, and was entirely consistent and compliant with the TPS statute. The Court therefore concludes that Plaintiffs are likely to succeed on their claim that the decision to vacate (assuming the Secretary had implicit authority to vacate) was arbitrary and capricious because it was based on legal (as well as factual) error.

c. Arbitrary and Capricious – Failure to Consider Alternatives Short of Termination

Even if vacatur were permitted and not founded on any legal error, the vacatur was still arbitrary and capricious because, in revoking prior action, the Secretary failed to consider alternatives short of termination.

As a general matter, "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221, 136 S. Ct. 2117, 195 L. Ed. 2d 382 (2016). But "when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020).

Here, there were alternatives within the ambit of the existing policy that the Secretary failed to consider. Most notably, if Secretary Noem was truly concerned about confusion arising from Secretary Mayorkas's decision to allow 2021 TPS holders to register as 2023 TPS holders, she easily could have chosen to "deconsolidate" the registration process and keep the 2021 and 2023 Designations on two different tracks – with the 2021 Designation ending in September 2025 and with the 2023 Designation still ending in October 2026. But Secretary Noem did not so act – effectively demonstrating that confusion was not her concern so much as the desire to totally undo Secretary Mayorkas's decision.

The government admitted as much at the hearing. The government conceded the Secretary's ultimate goal extended beyond minimizing registration confusion; it was to revisit and undo Secretary's Mayorkas's decision to extend the TPS designation for Venezuela to October 2026. The government also effectively conceded as much in its papers. In the opposition brief, the government asserted:

> In issuing the Vacatur, Secretary Noem indicated that the decision to vacate provided "an opportunity for informed determinations regarding the TPS designations and clear guidance." 2025 Vacatur, 90 Fed. Reg. at 8807 (citing Exec. Order No. 14159, Protecting the American People Against Invasion, § 16(b), 90 Fed. Reg. 8443 (Jan. 20, 2025)). Thus, the alternative of simply deconsolidating the re-registration periods would not meet the stated reasons for the 2025 Vacatur and is neither arbitrary and capricious nor an impermissible decision.

Opp'n at 17. The failure to consider the alternative action to address the stated reasons for the vacatur further renders the vacatur arbitrary and capricious.

d. Equal Protection – APA and Constitutional Claims

Finally, Plaintiffs contend that they are likely to succeed on their equal protection claim[24] – *i.e.*, that the Secretary's decisions to vacate and terminate TPS for Venezuelans are unconstitutional because they were motivated at least in part by animus based on race, ethnicity, or national origin. Based on the extensive record provided by Plaintiffs, the Court finds that Plaintiffs have raised a substantial claim of unconstitutional animus.

"As a general matter, where an equal protection claim is based on membership in a suspect class such as race [or ethnicity or national origin] or the burdening of a fundamental right, then strict scrutiny is applied; otherwise there is only rational review." *Litmon v. Brown*, No. C-10-3894 EMC, 2012 WL 243330 at *2, 2012 U.S. Dist. LEXIS 8381 at *4-5 (N.D. Cal. Jan. 25, 2012); *see also Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277-78 (9th Cir. 2004) (stating that, "[w]hen no suspect class is involved and no fundamental right is burdened, we apply a rational basis test to determine the legitimacy of the classifications").

In spite of this general principle, the government argues that a deferential review should still apply in the

[24] Plaintiffs' complaint could suggest that the equal protection claim is a constitutional claim alone but, as Plaintiffs noted at the hearing, an APA claim can also be based on a constitutional violation. *See* 5 U.S.C. § 706(2) (providing that a court may hold unlawful and set aside agency action "contrary to constitutional right, power, privilege, or immunity").

instant case because the DHS's actions were based on national security interests. In support, it cites *Trump v. Hawaii*, 585 U.S. 667, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018). This Court, however, rejected application of *Trump v. Hawaii* in the *Ramos* case, and so did the Ninth Circuit (vacated) panel decision. Central to the Court's reasoning was that

> the TPS-beneficiaries here, unlike those affected by the Proclamation in *Trump [v. Hawaii]*, are already in the United States. They are not aliens abroad seeking entry or admission who "have no constitutional right of entry"; TPS-beneficiaries have been admitted to the United States. As Plaintiffs currently reside lawfully in the United States, this case is unlike *Trump [v. Hawaii]*; it does not implicate "the admission and exclusion of foreign nationals," who have "no constitutional rights regarding [their] application" in light of the "sovereign prerogative" "to admit or exclude aliens." Hence, the basis for invoking broad judicial deference to executive action in excluding aliens does not apply.

*Ramos*, 321 F. Supp. 3d at 1129; *see also id.* (adding that "aliens *within* the United States have greater constitutional protections than those *outside* who are seeking admission for the first time") (emphasis added). The Court also noted that

> the executive order at issue in *Trump [v. Hawaii]* was issued pursuant to a very broad grant of statutory discretion: Section 1182(f) "exudes deference to the President in every clause" by "entrust[ing] to the President the decisions whether and when to suspend entry . . . ; whose entry to suspend . . . ; for how long . . . ; and on what conditions." In contrast, Con-

> gress has not given the Secretary *carte blanche* to terminate TPS for any reason whatsoever. Rather, the TPS statute empowers the Secretary of Homeland Security discretion to initiate, extend, and terminate TPS in specific enumerated circumstances. Even though the statute circumscribes judicial review, Congress prescribed the discretion of the Secretary in administering TPS.

*Id.* at 1130. The Ninth Circuit panel in *Ramos* invoked similar reasoning, stating that "the level of deference that courts owe to the President in his executive decision to exclude foreign nationals who have not yet entered the United States may be greater than the deference to an agency in its administration of a humanitarian relief program established by Congress for foreign nationals who have lawfully resided in the United States for some time." *Ramos*, 975 F.3d at 896.

To be sure, in *Ramos*, there was a further confluence of the fact that the government had asserted "to a lesser extent" national security and foreign policy reasons as a basis to terminate TPS. *Ramos*, 975 F.3d at 896; *cf. Ramos*, 321 F. Supp. 3d at 1129. Here, the government does assert, perhaps more strenuously than in *Ramos*, that the Secretary's decisions in vacating the extension of the 2023 Designation and in terminating the designation were informed by these additional concerns.

However, as noted above, the decision to vacate the extension did not cite national security as a rationale therefor. Nor did it cite an interest in effecting foreign relations in connection with the vacatur decision. Thus, the deferential standard of *Trump v. Hawaii* does not apply to Secretary Noem's vacatur decision.

As to Secretary's Noem's second decision – to terminate the 2023 Designation – the invocation of national security and foreign relations is insufficient to implicate *Trump v. Hawaii*'s deferential standard.[25] The government does not get a free pass to deferential review under *Trump v. Hawaii* simply because it makes an *ipse dixit* assertion that there is a national security interest. There must be some basis for such a claim, but, as the Court has discussed above, the government's claim of a national security interest is not supported by any concrete evidence. The government has referred to the TdA gang, but (1) "the danger of criminal conduct by an alien is [not] automatically a matter of national security," *Thai v. Ashcroft*, 366 F.3d 790, 796 (9th Cir. 2004), and (2) even if the TdA is a foreign terrorist organization that poses a national security threat (as claimed by President Trump in Executive Order 14157 (*see* 90 Fed. Reg. at 9042-93)), there is no evidence to tie TPS holders to TdA or even to establish that TdA has a substantial presence in the United States. *See generally* Dudley Decl. ¶ 16. Nor has the government demonstrated that its employment of law enforcement resources cannot handle the criminal threat posed by members of the TdA. *See* page 851-52, *supra.*

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[25] As discussed above, § 1254a(b)(5)(A) does not bar judicial review of Plaintiffs' equal protection claim because "there is no 'clear and convincing' evidence that Congress intended to preclude the Court from reviewing constitutional challenges of the nature alleged." *Ramos*, 321 F. Supp. 3d at 1105; *see also Ramos*, 975 F.3d at 895 (panel decision entertaining the equal protection claim on the merits); *accord* 5 U.S.C. § 706(2)(B) (providing that a court shall "hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity").

Nor is there any basis to the government's claim that the vacatur and termination of Venezuelan TPS status effected relations with Venezuela. The government suggests that there is a "magnet effect" associated with a TPS designation, but that assertion does not address how there is a magnet effect for an *extension* of TPS (not a designation or redesignation) which does not make more people eligible for TPS. *See* Watson & Veuger Decl. ¶ 26 ("We do not see any reason that the extension of an existing TPS designation would act as an immigration magnet. TPS status is not available to those arriving after the 2023 designation.").

The government also seems to suggest that there can be no equal protection violation because Secretary Noem's actions were focused on the nation of Venezuela, and not the race of its people, and "[n]ational origin is inherently part of TPS." Opp'n at 21. This argument misses the point. The point is not that a person has been treated on the basis of national origin, which as the government asserts, is inherent in the TPS decisions which are made on a country-by-country basis. Rather, the claim here is that the decisions made against Venezuelan TPS beneficiaries are driven by animus and generalized stereotypes directed against them. Plaintiffs also claim that the decisions made by Secretary Noem are infected by racial animus. Moreover, courts must be mindful of the fact that there can be overlap between national origin and race. *See, e.g., St. Francis College v. Al-Khazraji*, 481 U.S. 604, 614, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (1987) (Brennan, J., concurring) (noting that "the line between discrimination based on 'ancestry or ethnic characteristics,' and discrimination based on 'place or nation of . . . origin,' is not a bright one"); *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003) (stating that "race and national origin discrimination claims may substantially overlap or even be indistinguishable depending on the specific facts of a case" – *e.g.*, "[r]ace and national origin discrimination may present identical factual issues when a victim is 'born in a nation whose primary stock is one's own ethnic group'"); *Krowel v. Palm Beach Cnty.*, No. 22-cv-81958, 2023 WL 3157429 at *3, 2023 U.S. Dist. LEXIS 76203 at *7-8 (S.D. Fla. Apr. 27, 2023) (stating that, as recognized by other courts, "discrimination based on national origin often overlaps with other forms of racial discrimination").

Animus and stereotypes based on national origin and/or race trigger strict scrutiny. *See Valeria v. Davis*, 320 F.3d 1014, 1020 (9th Cir. 2003) ("[D]iscriminatory intent, by itself, triggers strict scrutiny. . . . "). Strict scrutiny applies if such discriminatory purpose is a motivating factor. *Cf. Cal. v. U.S. Dep't of Homeland Sec.*, 476 F. Supp. 3d 994, 1023 (N.D. Cal. 2020). The framework for discerning whether a discriminatory purpose was a motivating factor is set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (stating that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); *id.* at 265-66, 97 S. Ct. 555 (noting that a plaintiff does not have to "prove that the challenged action rested solely on racially discriminatory purposes" or that such was a dominant or primary purpose). That is, *Arlington Heights* provides a methodology for determining whether a discriminatory purpose was a motivating factor.

In *Arlington Heights*, the Supreme Court indicated that there could be either direct or circumstantial evidence of a discriminatory purpose and further provided examples of what evidence would support a discriminatory purpose – *e.g.*:

- "The impact of the official action – whether it 'bears more heavily on one race than another.'" *Id.* at 266, 97 S. Ct. 555.
- "The historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267, 97 S. Ct. 555.
- "The specific sequence of events leading up to the challenged decision," including "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.*
- "The legislative or administrative history . . . , especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 268, 97 S. Ct. 555.

In the instant case, there is evidence of discriminatory animus by the decisionmaker at issue, Secretary Noem. There is also evidence of discriminatory animus by President Trump and that his intent and actions bore a direct nexus to the actions taken by Secretary Noem in the instant case.

i. <u>Discriminatory Statements by Secretary Noem</u>

Plaintiffs have catalogued a number of discriminatory statements made by Secretary Noem, beginning as early as February 2024 as part of the 2024 presidential race and continuing through early 2025, when she issued her decisions to vacate the extension of the 2023 Designation and then terminate the designation. *See, e.g.*, MacLean Decl. ¶¶ 2-7, 12, 14-15. In many of these comments, the Secretary equated Venezuelan immigrants and/or TPS holders with gang members, criminals, mentally unstable persons, and the like. Such statements play on "longstanding tropes or stereotypes that certain races have inherently immoral traits." MacLean Decl., Ex. 20, at 19 (2020 article titled "The Racialization of Crimes Involving Moral Turpitude); *see also* Young Decl. ¶ 3 (noting that "characterizing Venezuelan TPS holders as dangerous criminals who harm the U.S. economy is a false narrative, and one reflecting racist tropes that have long been wielded against immigrants to the United States"); *cf. United States v. Taveras*, 585 F. Supp. 2d 327, 338 (E.D.N.Y. 2008) (stating that, "'[w]hen government officials are permitted to use race [or ethnicity and national origin] as a proxy for gang membership and violence . . . society as a whole suffers'"). Furthermore, as discussed above, there is no evidence that Venezuelan TPS holders are tied to gangs or are criminals. Indeed, "[i]t is well documented that immigrants are much less likely to commit crimes than U.S.-born Americans, and TPS recipients in particular have passed a criminal background check and have a clear incentive to stay out of legal trouble to maintain their status." Watson & Veuger Decl. ¶ 15.

Examples of discriminatory statements by Secretary Noem include the following.

- MacLean Decl. ¶ 3 & Ex. 2. A social media post from February 28, 2024, that stated: "Venezuela didn't send us their best. They emptied their prisons and sent criminals to America. [¶] Deportations need to start on DAY ONE of [President Trump's] term' in office."

- MacLean Decl. ¶ 13 & Ex. 12 (Tr. At 104-05). Testimony during her January 15, 2025, confirmation hearing such as: "[The TPS] program has been abused and manipulated by the Biden administration and that will no longer be allowed to allow that and these extensions going forward the way that they are, the program was intended to be temporary and this extension of over 600,000 Venezuelans as well is alarming when you look at what we've seen in different states, including Colorado with gangs doing damage and harming the individuals and the people that live there."
- MacLean Decl. ¶ 15 & Ex. 14 (Tr. At 3). A statement during a January 29, 2025, interview on Fox that: "Today we signed an executive order within the Department of Homeland Security in a direction that we were not going to follow through on what he did to tie our hands, that we are going to follow the process, evaluate all of these individuals that are in our country, including the Venezuelans that are here and members of [TdA]. Listen, I was in New York City yesterday and the people of this country want these dirt bags out." This statement is particularly notable because, as Plaintiffs point out, "Secretary Noem called Venezuelans 'dirt bags' when announcing [her] very decision [to va-

cate the extension of the 2023 Designation].” Reply at 1.[26]

- MacLean Decl. ¶ 16 & Ex. 15 (Tr. At 18-19). A statement during a February 2, 2025, interview on Meet the Press that: “[T]he TPP program has been abused, and it doesn’t have integrity right now. And folks from Venezuela that have come into this country are members of [TdA]. And remember, Venezuela purposely emptied out their prisons, emptied out their mental health facilities and sent them to the United States of America. So we are ending that extension of that program, adding some integrity back to it. And this administration’s evaluating all of our programs to make sure they truly are something that’s to the benefit of the United States, so that they’re not to benefit of criminals.” Similar to above, this statement is notable because it was effectively made contemporaneously with the decision to terminate the 2023 Designation.

It is evident that the Secretary made sweeping negative generalizations about Venezuelan TPS beneficiaries *in toto*. This is evident not only in what she said, but also in the fact that she decided to take *en masse* actions against all Venezuelan TPS beneficiaries, who number in the hundreds of thousands. Acting on the basis of a negative group stereotype and generalizing such stere-

[26] Though the government claims this statement was taken out of context and that Secretary Noem was referring to the TdA, not to Venezuelan TPS beneficiaries generally, there is a reasonable inference that her reference was not so narrowly confined. The Secretary has not submitted any declaration under oath elucidating her intended message.

otype to the entire group is the classic example of racism. *Cf. Hirabayashi v. United States*, 320 U.S. 81, 96-99, 63 S. Ct. 1375, 87 L. Ed. 1774 (1943) (describing why Japanese Americans as a group, despite the fact that most were American citizens, were susceptible to disloyalty and thus constitute a security threat, relying on assumed stereotypes); *Korematsu*, 323 U.S. at 233, 235, 65 S. Ct. 193 (Murphy, J., dissenting) (characterizing the majority decision upholding the mass internment of Japanese Americans as falling into the "ugly abyss of racism"; noting that the "forced exclusion [of Japanese Americans] was the result in good measure of the erroneous assumption of racial guilt . . . ").

ii. <u>Discriminatory Statements by President Trump</u>

Like Secretary Noem, President Trump also made a number of discriminatory statements – and not only about Venezuelan immigrants and/or TPS holders specifically, but also about non-white immigrants and/or TPS holders generally. President Trump's statements span years, starting with his first administration when he terminated the TPS designations of Sudan, Haiti, Nicaragua, El Salvador, Honduras, and Nepal, and continuing through the start of his second administration where one of the first actions he endorsed was ending TPS designations to put "America first."

Examples of discriminatory statements by President Trump targeting non-white immigrants generally include the following.

- MacLean Decl. ¶ 17 & Ex. 16. A Washington Post article from January 12, 2018, indicating that, during a discussion about "protecting immigrants from Haiti, El Salvador and African countries," President Trump stated: "'Why are we having all these people from shithole countries come here?'" He "then suggested that the United States should instead bring more people from countries such as Norway . . . ."

- MacLean Decl. ¶ 19 & Ex. 18. A New York Times article from May 16, 2018, indicating that President Trump claimed "dangerous people were clamoring to breach the country's borders and brand[ed] such people 'animals.'"
- MacLean Decl. ¶ 25 & Ex. 24. A New York Times article from April 7, 2024, reflecting that President Trump stated that "people were not immigrating to the United States from 'nice' countries like 'Denmark'" as well as Switzerland and Norway. President Trump also stated with respect to immigrants from the Southern border that "'[t]hese are people coming in from prisons and jails. They're coming in from just unbelievable places and countries, countries that are a disaster.'"
- MacLean Decl. ¶ 9 & Ex. 8 (Tr. At 29, 34-35). Statements during the presidential debate on September 10, 2024, that Haitian immigrants – TPS holders – living in Springfield, Ohio, are "eating the dogs," "eating the cats," and "eating the pets of the people that live' in Springfield, Ohio." President Trump also stated: "They allowed people to come in, drug dealers, to come into our country, and they're now in the United States. And told by their countries like Venezuela don't ever come back or we're going to kill you. Do you know that crime in Venezuela and crime in countries all over the world is way down? You know why? Because they've taken their criminals off the street, and

> they've given them to her to put into our country. . . . [T]hey're destroying the fabric of our country by what they've done. There's never been anything done like this at all. They've destroyed the fabric of our country. Millions of people let in."

Examples of discriminatory statements by President Trump targeting Venezuelan noncitizens specifically include the following.

- MacLean Decl. ¶ 10 & Ex. 9 (Tr. At 32-33). Statements during a campaign speech held on October 11, 2024, that: "[E]very day, Americans . . . are living in fear all because Kamala Harris decided to empty the slums and prison cells of Caracas [Venezuela] and many other places happening all over the world. . . . [¶] You know, prison populations all over the world are down. Crime all over the world is down because they take the world's criminals, gang members, drug dealers, and they deposit them into the United States bus after bus after bus. In Venezuela, their crime rate went down 72 percent. You know why? Because they took the criminals out of Caracas and they put them along your border and they said, 'If you ever come back, we're going to kill you.' [¶] Think of that. And we have to live with these animals, but we're not going to live with them for long, you watch."
- MacLean Decl. ¶ 11 & Ex. 10 (Tr. At 6, 12-13). Statements during a campaign speech held on October 27, 2024, that the Venezuelan gang TdA is "savage." President Trump also stated: "The United States is now an occupied country, but it will soon be an occupied country no longer. Not

going to be happening. Not going to be happening. November 5th, 2024, nine days from now will be Liberation Day in America. It's going to be Liberation Day. [¶] On day one, I will launch the largest deportation program in American history to get these criminals out. I will rescue every city and town that has been invaded and conquered, and we will put these vicious and bloodthirsty criminals in jail. We're going to kick them the hell out of our country as fast as possible."

- President Trump's Executive Order, issued on the first day of his second administration, which claimed that Americans needed protection from an immigrant "invasion," stated that "[t]he American people deserve a Federal Government that puts their interests first," and specifically identified the TPS program as a problem. https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-american-people-against-invasion; *cf. Ramos*, 336 F. Supp. 3d at 1104 (where plaintiffs argued that "America first" was "a code word for removal of immigrants who are non-white and/or non-European, and counsel for the government could not articulate a "clear and direct response" to what "'an America first view of the TPS decision'" meant).

The Court also takes note of an article from Axios, dated October 2024, that analyzed 109 of President Trump's speeches, interviews, debates, and rallies from September 1, 2023, to October 2, 2024, and found that he called Venezuelan migrants "criminals" at least 70 times. *See* MacLean Decl. ¶ 33 & Ex. 32.

Significantly, the vacated panel decision in *Ramos* declined to find that President Trump's statements made in 2018 were not evidence of racial discrimination. Instead, the panel found there was an insufficient showing of a nexus between President Trump's statements and intent and the specific TPS decisions made by the Secretary of DHS. *See Ramos*, 975 F.3d at 897 (stating that "Plaintiffs' EPC claim fails predominantly due to the glaring lack of evidence tying the President's alleged discriminatory intent to the specific TPS terminations – such as evidence that the President personally sought to influence the TPS terminations, or that any administration officials involved in the TPS decision-making process were themselves motivated by animus against 'non-white, non-European' countries").

Relying on the vacated panel decision in *Ramos*, the government suggests that President Trump's statements cited here should likewise not be given any consideration because (1) the statements were not sufficiently tied or linked to TPS policy or decision-making specifically; (2) there is insufficient evidence that "the President personally sought to influence the TPS terminations"; and (3) even if so, "[t]he mere fact that the White House exerted pressure on the Secretaries' TPS decisions does not in itself support the conclusion that the President's alleged racial animus was a motivating factor in the TPS decisions" because "[i]t is expected – perhaps even critical to the functioning of government – for executive officials to conform their decisions to the administration's policies." *Id.* at 897-98.

None of these arguments is convincing. First, contrary to what the government suggests, some of President Trump's statements *did* relate to TPS policy or decisionmaking (*e.g.*, statements about Haitian immigrants present in Springfield because of the TPS program, statements in the Executive Order about an "invasion" and targeting, *inter alia*, the TPS program). Furthermore, even if other statements did not directly relate to TPS policy or decisionmaking, there is no principled reason to hold that these statements should thereby be ignored, especially when the discriminatory statements still addressed the issue of immigration and, further, were not isolated occurrences but rather comments made repeatedly over time – including in the several months immediately preceding Secretary Noem's decisions to vacate and then terminate.[27] The length of time over which discriminatory statements were made, including those in close temporal proximity to Secretary Noem's actions, differentiate this case from *Ramos.*

More than that, there is evidence *in this case* that President Trump directly influenced TPS policy and/or decision-making at issue. This is apparent from both his Executive Order addressed above *and* Secretary

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[27] The Ninth Circuit panel in *Ramos* suggested that there must be a close nexus between a discriminatory statement and the challenged action, citing in support *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1261 (9th Cir. 2016) (stating that, even if "offensive quotes about Mexican nationals attributed to Sheriff Arpaio and published in newspapers" were admissible, "they do not mention the Restraint Policy and do not otherwise lead to any inference that Sheriff Arpaio's 2006 Restraint Policy was promulgated to discriminate against Mexican nationals"). But *Mendiola-Martinez* is distinguishable because, there, the Restraint Policy at issue was facially neutral, "mandat[ing] that . . . officers restrain all inmates during transport, including those who are 'sick or injured.' " *Id.* at 1245; *see also id.* at 1261 (acknowledging that the Restraint Policy was "a facially neutral policy"). Here, the TPS-related decisions were not facially neutral as they specifically targeted Venezuelan TPS holders.

Noem's decision to terminate, which expressly took note of President Trump's

> recent, immigration and border-related executive orders and proclamations [which] clearly articulated an array of policy imperatives bearing upon the national interest. . . .
>
> [A]s the President directed in Executive Order 14150, "the foreign policy of the United States shall champion core American interests and always put America and American citizens first." Continuing to permit Venezuelans under the 2023 TPS designation to remain in the United States does not champion core American interests or put American interests first. U.S. foreign policy interests, particularly in the Western Hemisphere, are best served and protected by curtailing policies that facilitate or encourage illegal and destabilizing migration.

90 Fed. Reg. at 9042 (also stating that "President Trump in his recent, immigration and border-related executive orders and proclamations clearly articulated an array of policy imperatives bearing upon the national interest"). The challenged actions by Secretary Noem were instituted shortly after issuance of the Executive Order and almost immediately upon her taking office. The inference of a nexus here between President Trump and the TPS vacatur and termination, is, more so than in *Ramos*, compelling. Thus, the *Ramos* panel's rejection of the "cat's paw" theory, *see Ramos*, 975 F.3d at 897-98, applies with far less force to the case at bar. And notably, numerous district courts that considered TPS designations and terminations during the first Trump administration still applied the cat's paw theory and found the plaintiffs' equal protection claims viable. *See, e.g., Saget*

*v. Trump*, 375 F. Supp. 3d 280, 368-69 (E.D.N.Y. 2019) (in TPS case, noting that "the evidence suggests the Secretary was influenced by the White House and White House policy to ignore statutory guidelines, contort data, and disregard objective reason to reach a predetermined decision to terminate TPS and abate the presence of non-white immigrants in the country"); *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 326 (D. Md. 2018) (in TPS case, noting that President Trump made racially discriminatory statements about Latino immigrants and he was allegedly "involved in the decision to terminate TPS for El Salvador"; adding that, "if, as alleged, the President influenced the decision to terminate El Salvador's TPS, the discriminatory motivation cannot be laundered through the Secretary"); *Centro Presente v. United States Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 414, 416 (D. Mass. 2018) (in TPS case, stating that "'liability for discrimination will lie when a biased individual manipulates a non-biased decision-maker into taking discriminatory action'"; "find[ing] that the combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy sufficient to allege plausibly that a discriminatory purpose was a motivating factor in a decision").

Accordingly, the Court rejects the government's attempt to avoid consideration of President Trump's statements. That being said, the Court emphasizes that, even without consideration of these statements, Plaintiffs have sufficiently established animus based on, *inter alia*, Secretary Noem's discriminatory statements. That Secretary Noem – the clear decision-maker on the vacatur and termination – made discriminatory comments herself (some contemporaneously with her decisions to vacate and terminate) further distinguishes the instant case from *Ramos*. *See Ramos*, 975 F.3d at 897 (stating there was no evidence that "any administration officials involved in the TPS decision-making process were themselves motivated by animus against 'non-white, non-European' countries").

iii. Historical Background

Consistent with the above, the Court also considers the historical background of the first Trump administration and its termination of TPS for non-white, non-European TPS holders from Sudan, Haiti, Nicaragua, El Salvador, Honduras, and Nepal. As the Court held in *Ramos*, there was "sufficient evidence to raise serious questions as to whether a discriminatory purpose was a motivating factor in the decisions to terminate [these] TPS designations" based on, *e.g.*, President Trump's discriminatory statements, irregular decision making, and departures from prior practice. *See Ramos*, 336 F. Supp. 3d at 1098-105. *But see Ramos*, 975 F.3d at 896-99 (vacated panel decision disagreeing with this Court's equal protection analysis). Secretary Noem's decision here to vacate the extension of the 2023 Designation and then terminate the designation continues a pattern of the Trump administration's targeting of non-white, non-European TPS holders.

iv. Sequence of Events

Even putting aside the general historical background, the sequence of events related to Secretary Noem's decision-making on the TPS designations here is clearly anomalous. As Plaintiffs note, the decisionmaking process for the vacatur and termination "took place over a week, at most" and at the very outset of the second Trump administration. Opp'n at 14. The Secretary vacated the extension of the 2023 Designation only three days after she was confirmed. Then just a few days later, she terminated the TPS designation for Venezuela (even though, under the TPS statute, she was required to, *e.g.*, consult with other government agencies before making a decision). This was a clear departure from longstanding prior practice which included obtaining the considered analysis from constituent agencies and the State Department before reaching a decision on TPS status of a particular country. *See, e.g., Ramos*, 336 F. Supp. 3d at 1082 (taking note that the parties agreed on the general process for a TPS designation (on periodic review): "RAIO (a division within USCIS) provides a Country Conditions Memo [for the Secretary]" while "OP&S (another division within USCIS) drafts a Decision Memo that contains USCIS's recommendation on what to do about the TPS designation"; "[t]he State Department provides further input (e.g., country conditions, recommendations" and, "[a]t times input can also come from other government sources"). Moreover, as noted above, Secretary Noem's vacatur was the first-ever vacatur of an extension of TPS over the TPS program's thirty-five-year history.

v. <u>Lack of Support for Both the Vacatur of the Extension and for the Termination of the 2023 Designation</u>

The lack of support for the vacatur – both legal and evidentiary – has already been discussed above. In addition, the lack of evidentiary support for the termination of the 2023 Designation further indicates that the termination was motivated at least in part by animus. In the Federal Register, Secretary Noem justified the termination of the 2023 Designation on the following grounds: (1) members of the Venezuelan TdA gang have crossed into the United States; (1) the resources of local communities have not been adequate to "meet the demands" of the Venezuelan TPS holders, and their presence has cost local communities billions of dollars; (3) a TPS designation has a potential "magnet effect" – *i.e.*, it is a "pull factor[ ] driving Venezuelan nationals to the United States"; and (4) an extension of the TPS designation is contrary to the Trump administration's policy of "America first" as it "facilitate[s] or encourage[s] illegal and destabilizing migration." 90 Fed. Reg. at 9042-43.

As discussed in other parts of this order, the Secretary's rationale is entirely lacking in evidentiary support. For example, there is no evidence that Venezuelan TPS holders are members of the TdA gang, have connections to the gang, and/or commit crimes. Venezuelan TPS holders have lower rates of criminality than the general population. Generalization of criminality to the Venezuelan TPS population as a whole is baseless and smacks of racism predicated on generalized false stereotypes. Moreover, Venezuelan TPS holders are critical contributors to both the national and local economies: they work, spend money, and pay taxes. Barring these TPS beneficiaries from the labor market in which they enjoy higher rates of participation than the general population, *see* Docket No. 71 (Amici Br. at 5), will cost the United States billions in taxes. *See*, Card Decl. ¶ 9(i) (stating that termination of TPS for just those Venezuelans who arrived in the U.S. between 2021 and 2023 would result in an estimated $3.5 billion annual loss to the U.S. economy and a $434.8 million annual loss in social security taxes); *see also* Docket No. 62 (Amici Br. at

7) (noting that, "[i]n 2023, TPS holders from all countries paid $3.1 billion in federal taxes, contributing to programs like Social Security and Medicare, and paid $2.1 billion in state and local taxes"); Docket No. 71 (Amici Br. at 6) (noting that, "[i]n 2021, the approximately 354,000 TPS holders in the United States from all countries paid an estimated $966.5 million in state and local taxes"). Far from being a burden, a number of jurisdictions – states, cities, and counties – have emphasized the value that Venezuelan TPS holders bring to their communities. They have documented the adverse impact on the economy, public health, and public safety of terminating TPS status of these beneficiaries. *See generally* Docket No. 62 (Amici Br.); Docket No. 71 (Amici Br.). And as noted above, the purported "magnet effect" of TPS designation makes no sense because a mere *extension* of TPS (not a designation or redesignation) does not make more people eligible for TPS. *See* Watson & Veuger Decl. ¶ 26 ("We do not see any reason that the extension of an existing TPS designation would act as an immigration magnet. TPS status is not available to those arriving after the 2023 designation. The current administration's termination of the parole program makes it clear it is not interested in facilitating additional migration from Venezuela, and a reasonable migrant would not believe that a TPS designation for new Venezuelan immigrants is likely to be issued by this administration. TPS status does not allow individuals to sponsor relatives for migration."). Finally, the Trump administration's invocation of "America first" raises a further inference of animus given the historical connotation of that phrase. *See Ramos*, 336 F. Supp. 3d at 1104 (noting that the government could not articulate a "clear and direct response" to what "'an America first

view of the TPS decision'" meant). The lack of bona fides of purported justifications gives rise to an inference of pretext. *See Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1168 (10th Cir. 2007) (in Title VII case, noting that "'the fact of pretext alone may allow the inference of discrimination'").

vi. Disparate Impact of Agency's Action

Finally, it is clear that the agency's action has a disparate impact, bearing more heavily on one race/ethnicity/national origin than others. *See, e.g., Saget*, 375 F. Supp. 3d at 367 (stating that "it is axiomatic the decision to terminate TPS for Haitians impacts one race, namely non-white Haitians, more than another"). To be sure, this factor is less probative where, by definition, a TPS decision by country will have an inherent disparate impact based on national origin. Any relevance of disparate impact in this context is instead rooted in the racially charged historical context discussed above – the invocation of a pattern of adverse TPS decision directed at nonwhites – those from so-called "shithole countries."

vii. Summary

Taking into account the *Arlington Height* factors, including but not limited to the direct animus of Secretary Noem, the animus of President Trump that appears to have directly influenced the Secretary's decision making, the anomalous procedures followed (the highly compressed time in which the decisions to vacate and then terminate were made and the precedential and unique nature of the decisions made), and the lack of bona fides for the decisions to vacate and then terminate, the Court concludes that Plaintiffs have established a likelihood of success on their equal protection claim directed against both the decision to vacate and the decision to terminate.

D. Nationwide Relief

Because the § 705 factors weigh strongly in Plaintiffs' favor, the Court holds that Plaintiffs are entitled to relief. Although § 705 expressly states that relief that may be afforded is postponement of the effective date of agency action, without limitation, the government asserts that the Court should nevertheless restrict the relief given – specifically, to only the named individual Plaintiffs. The government takes the position that "universal relief benefitting non-parties" is "broader than necessary to remedy actual harm shown by specific Plaintiffs." Opp'n at 25.

The government's position lacks merit. As a preliminary matter, its position is predicated on criticisms made of nationwide injunctions but, as discussed above, Plaintiffs are seeking to postpone or set aside agency actions, and vacatur of agency action is not the same thing as an injunction. More importantly, where agency action is challenged as a violation of the APA, nationwide relief is commonplace. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 680-81 (9th Cir. 2021) (in APA case, noting that there is "'no general requirement that an injunction affect only the parties in suit'" and, "'[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed'"); *see also Cook Cnty. v. Wolf*, 498 F. Supp. 3d 999, 1006-07 (N.D. Ill. 2020) (noting that "vacatur will prevent DHS from enforcing the Rule against nonparties," but "that is a consequence not of the court's choice to grant relief that is broader than necessary, but of the APA's mandate that flawed agency action must be 'h[e]ld unlawful and set aside'").

Nationwide relief is also warranted because the agency actions here have had a uniform and nationwide impact on all Venezuelan TPS holders located across the United States. And here, NTPSA – the named organizational plaintiff – advocates for Venezuelan TPS holders nationwide and has more than 84,000 members who are Venezuelan TPS holders *in all fifty states, plus the District of Columbia. See* Jimenez Decl. ¶ 13; *cf. City & Cnty. Of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2018) (indicating that, to support a nationwide injunction, record must be sufficiently developed on nationwide impact of challenged actions); *E. Bay Sanctuary*, 993 F.3d at 680 (noting that organizational plaintiffs did "'not operate in a fashion that permits neat geographic boundaries'"). Full relief for the NTPSA and its members cannot be obtained absent application to all fifty states and the District of Columbia. Nor has the government explained how, as a practical matter, relief could be afforded to some subset of all Venezuelan TPS holders, particularly given that NTPSA has tens of thousands of members located across the country. *See id.* at 680-81 (criticizing the government for failing to propose a workable alternative form of injunction).

Finally, there is an interest in uniformity in the immigration system. *See id.* at 681 (noting that, "in immigration cases, we 'consistently recognize[ ] the authority of the district courts to enjoin unlawful policies on a universal basis'"); *Texas v. United States*, 40 F.4th at 229 n.18 ("reject[ing] DHS's contention that the nationwide vacatur is overbroad[;] [i]n the context of immigration law, broad relief is appropriate to ensure uniformity and consistent in enforcement").

Accordingly, consistent with the text of section 705, the Court grants Plaintiffs' motion to postpone the agency actions at issue, and the relief afforded here is nationwide in scope. The Court acknowledges that there are at least three other recent TPS cases that have been filed against the Trump administration, with at least two related to Venezuela specifically. *See Casa, Inc. v. Noem*, No. C-25-0525 GLR (D. Md.); *Haitian Ams. United Inc. v. Trump*, No. C-25-10498 RGS (D. Mass.). How the courts in those cases should proceed in light of the relief that the Court orders here will be up to those courts to decide; the Court is confident these sister courts are aware of the various proceedings and will be mindful of the issues.

E. Motion to Shorten Time to Confer

Finally, the Court addresses a motion that Plaintiffs filed shortly before the hearing on their motion to postpone. In the new motion, Plaintiffs ask that the Court shorten the deadline for the parties to begin their Rule 26(f) conference and/or open discovery now. The Court holds as follows. (Some of the rulings were made during the hearing on the motion to postpone.)

- Given the Court's ruling on the jurisdictional arguments raised by the government, there is no reason to delay production of the administrative record, even if the government intends to file a motion to dismiss. The parties shall meet and confer regarding production of the administrative record (to the extent they have not already) and the record shall be produced by the government within one week of the date of this order. There is an interest in moving this case forward promptly.

- At this time, the Court does not opine on what discovery, if any, Plaintiffs may be entitled to beyond the administrative record. The administrative record should be produced in the first instance. What the administrative record does or does not reveal will likely inform whether additional discovery is warranted. The Court does not bar Plaintiffs from serving discovery requests on the government now, but the government is not required at this point to respond to those requests.
- Although the Court is not requiring the government to respond to any discovery requests at this juncture, the parties shall meet and confer (if they have not already) and reach agreement on a stipulated document preservation order.

## IV. CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' motion to postpone the actions taken by Secretary Noem, specifically, her decisions to vacate the extension of the 2023 Designation and to terminate the 2023 Designation.

Within one week of the date of this order, the parties shall file a joint status report (after meeting and conferring), addressing (1) whether the government intends to appeal this Court's order; (2) whether Plaintiffs will be filing a motion to postpone with respect to agency action related to Haiti's TPS designation (which is within the scope of the newly filed amended complaint); and (3) a proposed date for the initial case management conference in which the Court and the parties will discuss ways in which adjudication of the merits of this case can be expedited.

This order disposes of Docket Nos. 16 and 79.

**IT IS SO ORDERED**.

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 25-5724
D.C. No. 3:25-cv-01766-EMC,
Northern District of California, San Francisco

NATIONAL TPS ALLIANCE; MARIELA GONZALEZ; FREDDY ARAPE RIVAS; M.H.; CECILIA GONZALEZ HERRERA; ALBA PURICA HERNANDEZ; E. R.; HENDRINA VIVAS CASTILLO; VILES DORSAINVIL; A.C.A.; SHERIKA BLANC, PLAINTIFFS - APPELLEES

*v.*

KRISTI NOEM; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA, DEFENDANTS - APPELLANTS

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Filed: Mar. 11, 2026

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**ORDER**

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Before: KIM MCLANE WARDLAW, SALVADOR MENDOZA, JR., and ANTHONY D. JOHNSTONE, Circuit Judges.

Concurrence by Judge WARDLAW

Dissent by Judge BUMATAY

Concurrence by Judge MENDOZA

Dissent by Judge R. NELSON

Judges Wardlaw, Mendoza, and Johnstone voted to deny the petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 40. The Petition for Rehearing En Banc is **DENIED**. An Amended Order with separate writings may be filed on Friday, March 13, 2026. If an Amended Order is filed, the mandate shall issue forthwith upon the filing of the Amended Order.[1] *See* Fed. R. App. P. 41(b). If an Amended Order is not filed on Friday, March 13, 2026, the mandate shall issue on that date at 11:59 P.M. *Id.*

WARDLAW, J., joined by MENDOZA, J., and JOHNSTONE, J., concurring in the denial of rehearing en banc:

This concurrence in the denial of rehearing en banc briefly reiterates that we have jurisdiction to entertain this case and that we properly set aside former Department of Homeland Security Secretary Kristi Noem's unlawful actions. I also call attention to the continuing harms at issue.

1. In this case we held that 8 U.S.C. § 1254a(b)(5)(A) does not bar judicial review of Plaintiffs' claim that Secretary Noem exceeded her statutory authority by vacating Haiti's and Venezuela's Temporary Protected Status ("TPS") and terminating Venezuela's TPS.[1] *NTPSA III*,

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[1] The portion of our February 4, 2026, Order, *see* Dkt. No. 77, indicating that the mandate would issue immediately upon the denial of the petition for rehearing en banc is **VACATED**.

[1] As we explained, "[t]he Venezuela Termination was predicated on and inextricably intertwined with the Venezuela Vacatur; there-

166 F.4th at 755-58. This holding comports with the plain meaning of the statute, reflects Congress's stated intent to provide "a system of temporary status that was predictable, dependable, and insulated from electoral politics," *Nat'l TPS All. v. Noem*, 150 F.4th 1000, 1008 (9th Cir. 2026), and conforms with the holdings of every other court to have addressed the issue.[2]

Congress did not immunize *ultra vires* acts of the Secretary from judicial review. Our dissenting colleagues suggest that the Secretary's vacatur—a power expressly *not* granted to the Secretary in the TPS statute, 8 U.S.C. § 1254a—of a TPS designation or extension is a "determination with respect to the designation, or termination or extension of a designation, of a foreign state['s]" TPS, *id.* § 1254a(b)(5)(A). As we have already explained, the "strong presumption" of judicial review,

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fore, the illegality of the Vacatur must be fatal to the Termination." *Nat. TPS All. v. Noem*, 166 F.4th 739, 766 (9th Cir. 2026) ("*NTPSA III*"). We therefore refer primarily to the Secretary's Vacatur in discussing the scope of the judicial review bar.

[2] *See, e.g.*, *Miot v. Trump*, No. 26-5050, 2026 WL 659420 (D.C. Cir. March 6, 2026), *denying stay pending appeal of* No. 25-cv-02471, 818 F. Supp. 3d 126 (D.D.C. Feb. 2, 2026); *Doe v. Noem*, No. 25-2995, 2026 WL 544631 (2d Cir. Feb. 17, 2026), *denying stay pending appeal of* No. 25-CV-8686, 2025 WL 4477179 (S.D.N.Y. Nov. 19, 2025); *Afr. Communities Together v. Noem*, 820 F. Supp. 3d 48 (D. Mass. Feb. 12, 2026); *Doe v. Noem*, 2026 WL 184544 (N.D. Ill. Jan. 23, 2026); *Nat'l TPS All. v. Noem*, 820 F. Supp. 3d 48 (N.D. Cal. Dec. 31, 2025); *CASA, Inc. v. Noem*, 792 F. Supp. 3d 576 (D. Md. 2025); *Haitian Evangelical Clergy Ass'n v. Trump*, 789 F. Supp. 3d 255 (E.D.N.Y. 2025); *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. 2019); *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307 (D. Md. 2018); *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. 2018); *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393 (D. Mass. 2018).

combined with the Supreme Court's interpretation of strikingly similar judicial review provisions in *McNary v. Haitian Refugee Center*, 498 U.S. 479, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991), and *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993), undermine the dissents' entirely-atextual reading of the statute. *NTPSA III*, 166 F.4th at 755-57.

Moreover, as in *McNary* and *Reno*, our holding does not rest on any fact unique to the Secretary's vacatur of Venezuela or Haiti's TPS. A plain reading of the statute demonstrates that the Secretary lacks the express, implied, or inherent power to vacate a TPS designation regardless of the country. This case is not about the Secretary's "determination with respect to" a specific designation or extension. 8 U.S.C. § 1254a(b)(5)(A). It is about "the scope and extent of statutory authority granted to the Secretary," which is "a first order question." *NTPSA III*, 166 F.4th at 756 (internal quotation marks and citation omitted). We have no doubt that the judicial review bar precludes a wide variety of challenges to the Secretary's actions. For example, courts may not second-guess the Secretary's procedurally proper assessment of country conditions to substitute their own judgment as to the appropriate TPS determination based on that evidence. But Congress chose not to use "'broader statutory language,' such as language precluding review of 'all causes . . . arising' under [the TPS statute], or of 'all questions of law and fact'" arising thereunder. *NTPSA III*, 166 F.4th at 756 (quoting *McNary*, 498 U.S. at 494, 111 S. Ct. 888). Thus, the strong presumption of judicial review is not overcome in this case, and we may review the plain text of the statute to determine whether the Secretary exceeded her authority in vacating TPS designations for Venezuela and Haiti.

2. To the extent that our dissenting colleagues believe that the Supreme Court has hinted that we lack jurisdiction, they are mistaken. The Supreme Court has explained that its unreasoned stay orders are "not conclusive as to the merits" but merely "inform how [we] should exercise [our] equitable discretion in like cases." *Trump v. Boyle*, 606 U.S. ——, 145 S. Ct. 2653, 2654, 222 L. Ed. 2d 1181 (2025). As we explained in *NTPSA III*, the two stay orders that lack explicit reasoning in this case may have rested on the Court's "assessment of the balance of the equities or the parties' respective irreparable harms, rather than its assessment of the merits." 166 F.4th at 754. Indeed, the Court acknowledged in granting its second stay that the "relative harms generally ha[d] not" "changed," which would be irrelevant if the Court believed it, and we, lacked jurisdiction to review Plaintiffs' challenge. *See Noem v. Nat'l TPS All.*, ––– U.S. ——, 146 S. Ct. 23, 24, 222 L. Ed. 2d 1241 (2025) (Mem.). Justice Jackson's dissent to the stay order further suggests that the Court was concerned with the equities, not our jurisdiction. *Id.* at 26 (Jackson, J., dissenting) (arguing that the Court "misjudge[d] the irreparable harm and balance-of-the-equities factors," rather than addressing the merits). We do not know how the Supreme Court will ultimately resolve the merits in this case. But by now, at least a dozen courts have had the opportunity to consider some or all of the issues that our decision determined, and none has adopted the Government's and our dissenting colleagues' atextual interpretation of the TPS statute's judicial review bar. *Supra* n.2. In the absence of further guidance from the Su-

preme Court, we do not read its stay orders to suggest that we lack jurisdiction.

3. As to the merits, our opinion has been only strengthened in the month since it was published. As the Supreme Court recently explained, "[t]he omission" of a particular power in a statute "is notable in light of the significant but specific powers Congress [*does*] go to the trouble of naming." *Learning Resources v. Trump*, 607 U.S. ——, ——, 146 S. Ct. 628, 224 L. Ed. 2d 51 (2026). "It stands to reason that had Congress intended to convey the distinct and extraordinary power to" vacate a prior lawful designation or extension, "it would have done so expressly." *Id.*

To hold to the contrary would reduce the TPS statute's procedural requirements to a nullity. Why would Congress explicitly require that a termination "shall not be effective earlier than 60 days after the date the notice is published [in the Federal Register] or, if later, the expiration of the most recent previous extension," if it simultaneously empowered a Secretary to simply vacate a prior extension whenever she wanted instead of waiting to terminate it? 8 U.S.C. § 1254a(b)(3)(B). We do not think Congress gave such unconstrained authority to the Secretary.

4. In these circumstances, 5 U.S.C. § 706 of the Administrative Procedure Act ("APA") provided a clear remedy: we set aside the Secretary's unlawful action. *NTPSA III*, 166 F.4th at 767-68. We did not enjoin the Secretary from terminating any country's TPS in accordance with the statutory guardrails prescribed by Congress in the TPS statute. *See id.*; 8 U.S.C. § 1254a(b)(3). We did not require her to do or proscribe her from doing anything. *NPTSA III*, 166 F.4th at 767-68. *Trump v.*

*CASA, Inc.*, expressly declined to alter lower courts' ability to set aside administrative action under the APA. 606 U.S. 831, 847 n.10, 145 S. Ct. 2540, 222 L. Ed. 2d 930 (2025). And, as our dissenting colleagues acknowledge, set aside relief has been afforded under the APA for decades. *See, e.g., Corner Post Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 603 U.S. 799, 826-27, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024) (Kavanaugh, J., concurring). Our opinion is consistent with decades of administrative law precedent, and *CASA* did nothing to change that. 606 U.S. at 847 n.10, 145 S. Ct. 2540.

5. Our ruling in *NTPSA III* clarified the rights of hundreds of thousands of people, and every day that this case lingers unnecessarily in our court is another day that one of those people may have been wrongfully "detained and deported to a place where the Government promised—at least temporarily—it would not send them."[3] *NTPSA III*, 166 F.4th at 768. We should not sanction further delay.

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[3] In addition to the extraordinary harms described in *NTPSA III*, we have seen many other examples of the detention of TPS holders after their TPS was terminated. *See, e.g., Colina-Rojas v. Noem*, 2026 WL 412138, at *1 (W.D. Ky. Feb. 13, 2026) (Colina-Rojas, a native and citizen of Venezuela and TPS holder, was arrested on December 2, 2025, two weeks after having her TPS terminated, as part of Operation Metro Surge. Immigrations and Customs Enforcement ("ICE") officers pulled her out of her car and broke her nose during her arrest. She was detained for more than two months before her detention was ruled unlawful.); *Segundo Sangronis v. Unknown Party*, 2026 WL 362790, at *2 (W.D. Mich. Feb. 10, 2026) (Segundo Sangronis, a native and citizen of Venezuela and TPS holder, was arrested at a scheduled ICE check-in appointment on September 9, 2025, before he lost his TPS on November 20, 2025. He spent five months in custody before his detention was ruled unlawful.); *Quintero v. Francis*, 2026 WL

The exceptionally important issues in this case will likely be litigated at the Supreme Court in the coming months. In the interim, our Government's promise not to detain and deport hundreds of thousands of Venezuelan and Haitian TPS holders will continue to ring hollow. Many will lose their jobs, suffer detention under poor, if not brutal conditions, and face deportation to a country where they have suffered violence, poverty, instability, or other extraordinary humanitarian crises. Our duty is to say what the law requires and to not look away from the devastating consequences when the law is ignored. That is precisely what we have done here.

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265921, at *2-3 (S.D.N.Y. Feb. 2, 2026) (Quintero, a native and citizen of Venezuela and TPS holder, was arrested two weeks after her TPS was terminated on November 21, 2025. She alleged that she suffers from diabetic kidney disease, among other health conditions, and has been denied treatment while detained. She remains in custody.); *see also Reyes Medina v. Raycraft*, 2026 WL 591844 (W.D. Mich. Mar. 3, 2026); *Osorio Ortega v. Chestnut*, 2026 WL 539377 (E.D. Cal. Feb. 26, 2026).

BUMATAY, Circuit Judge, joined by

CALLAHAN, BENNETT, R. NELSON, COLLINS, LEE, BRESS, VANDYKE, and TUNG, Circuit Judges, dissenting from the denial of rehearing en banc:

Federal courts are not all powerful. Under our Constitution, Congress has the authority to preclude judicial review of certain matters and lower courts are bound to follow Congress's will. *See Patchak v. Zinke*, 583 U.S. 244, 252, 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (plurality opinion). Judges may not serve as "Platonic Guardians" of our nation's immigration policies. *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 687 (9th Cir. 2021) (Bumatay, J., dissenting from the denial of rehearing en banc) (quoting L. Hand, The Bill of Rights 73 (1958)). So when Congress entrusts an immigration matter to the Executive and tells the Judiciary to restrain itself, we ought to listen.

With this understanding in mind, this case should have been an easy one. Congress enacted a broad jurisdiction-stripping provision in the Temporary Protected Status ("TPS") statute. TPS protects certain aliens from removal if the Secretary of Homeland Security designates a foreign state for protection under the program. Congress straightforwardly commanded that "[t]here is no judicial review of any determination of the [Secretary of Homeland Security] with respect to the designation, or termination or extension of a designation, of a foreign state" for TPS. 8 U.S.C. § 1254a(b)(5)(A). In this case, the Secretary decided to (1) vacate an extension of TPS designation for Venezuela, (2) terminate the TPS designation of Venezuela, and (3) shorten the extension of TPS designation for Haiti. Ordinary users of the English language understand that all these decisions were "determination[s] . . . with respect to the . . . termination or extension of a designation." 8 U.S.C. § 1254a(b)(5)(A). So under a plain reading of the statute, we should have dismissed the plaintiffs' claims challenging these determinations. Federal courts simply lack jurisdiction over them.

But that's not what the panel did. Instead, it created a loophole to the sweeping judicial-review bar, claiming that challenges to "the scope and extent of statutory authority granted to the Secretary" under the TPS statute are immune from the jurisdiction-stripping provision. *Nat'l TPS All. v. Noem*, 166 F.4th 739, 756 (9th Cir. 2026) (simplified). So in the panel's view, all TPS determinations are reviewable by federal courts so long as plaintiffs also challenge the "Secretary's statutory authority." *Id.* This exception appears nowhere in the text of the statute. In short, the panel made it up. Even more, this loophole will swallow the § 1254a(b)(5)(A) rule, allowing all TPS challenges to go forward with simple pleading. I understand this issue may elicit strong reactions. *See, e.g., Nat'l TPS All.*, 166 F.4th at 769 (Mendoza, J., concurring) (quoting Maya Angelou's appearance on daytime T.V. to establish that the Secretary's decisions were "inexplicable" and "cloak[ed with] animus on the basis of race or national origin"). But that's no excuse to sidestep the plain meaning of a limit on our authority.

What's worse, the panel has ignored strong hints from the Supreme Court that we've gotten this wrong. Twice now, the Supreme Court has intervened and effectively reversed the Ninth Circuit *in this very case* by granting stays that this court had denied. *See Noem v. Nat'l TPS All.*, ––– U.S. ––––, 145 S. Ct. 2728, 2728-29, 221 L. Ed. 2d 981 (2025); *Noem v. Nat'l TPS All.*, ––– U.S. ––––, 146 S. Ct. 23, 24, 222 L. Ed. 2d 1241 (2025). The panel should have seen the writing on the wall. *See Miot v. Trump*, 2026 WL 659420, at *5 (D.C. Cir. Mar. 6, 2026) (Walker, J., dissenting) (explaining that the judicial-review bar tips the equities in the government's favor). Instead, it turned a blind eye.

Because the panel made itself the Platonic Guardian of our immigration laws rather than neutral interpreters of the law, I respectfully dissent from the denial of rehearing en banc.

**I.**

**Background**

**A.**

Congress was very clear about the limits of judicial review over the TPS program. Under the program, the government may grant aliens from designated "foreign state[s]" work authorization and protection from removal. 8 U.S.C. § 1254a(a)(1)(A)-(B). To grant this benefit, the government must determine that the aliens cannot safely return to the foreign state because of "ongoing armed conflict," natural disaster, or other "extraordinary and temporary conditions." *Id.* § 1254a(b)(1), (A)-(C).

Before it can designate a foreign state for TPS, the government must publish notice in the Federal Register. *Id.* § 1254a(b)(1)(C). For the "initial period of designation," the government can specify a period of "not less than 6 months and not more than 18 months." *Id.* § 1254a(b)(2)(B). At least 60 days before the end of the initial designation period, the government must review country conditions in the designated foreign state and either terminate or extend the TPS designation. *Id.* § 1254a(b)(3). The Secretary of Homeland Security has responsibility for the TPS program. *See* 8 U.S.C. § 1103(a), 6 U.S.C. § 557.

Congress then directed that "[t]here is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection." 8 U.S.C. § 1254a(b)(5)(A).

**B.**

***Venezuela***—During the Biden Administration, in March 2021, then-Department of Homeland Security ("DHS") Secretary Alejandro Mayorkas designated Venezuela for TPS. *Nat'l TPS All.*, 166 F.4th at 750. Secretary Mayorkas extended this 2021 Designation twice, with the second extension set to expire on September 10, 2025. *Id.* at 750-51.

In 2023, Secretary Mayorkas separately "re-designated" Venezuela for TPS, which "expand[ed] the pool of Venezuelans eligible for protection." *Id.* at 750. This 2023 Venezuela Designation was set to expire on April 2, 2025. *Id.* at 751. Three days before the end of the Biden Administration, on January 17, 2025, then-Secretary Mayorkas extended the 2023 Venezuela Designation again. *Id.* This 2025 Venezuela Extension would begin on April 3, 2025, and run through October 2, 2026. *Id.* (citing 90 Fed. Reg. 5961, 5962 (Jan. 17, 2025)). Secretary Mayorkas did not expressly extend or terminate the 2021 Designation and instead allowed all eligible Venezuela TPS beneficiaries under either the 2021 or 2023 Designations to obtain TPS through the 2025 Extension. 90 Fed. Reg. 9040, 9041 (Feb. 5, 2025).

President Donald J. Trump took office on January 20, 2025. On February 3, 2025, DHS Secretary Kristi Noem announced in the Federal Register that she was vacating the 2025 Venezuela Extension. *See Nat'l TPS All.*, 166 F.4th at 751 (citing 90 Fed. Reg. 8805 (Feb. 3, 2025)). And then on February 5, 2025, Secretary Noem filed notice that she was terminating the 2023 Venezuela Designation, which would have taken effect 60 days later. *Id.* at 751-52 (citing 90 Fed. Reg. 9040, 9041-42).

***Haiti***—Although Haiti was first designated for TPS in 2010 after a major earthquake, the Biden Administration newly designated Haiti for TPS in 2021. *Id.* at 752. Then-Secretary Mayorkas extended and re-designated Haiti for TPS in 2023 and 2024. *Id.* This 2024 Haiti Extension was an 18-month extension set to expire on February 3, 2026. *Id.* On February 24, 2025, Secretary Noem issued a notice partially vacating the 2024 Haiti Extension. *Id.* at 752-53. The order shortened the TPS extension from 18 months to 12 months, meaning that Haiti's TPS designation would expire on August 3, 2025, rather than February 3, 2026. *Id.* at 753 (citing 90 Fed. Reg. 10511 (Feb. 24, 2025)). On July 1, 2025, Secretary Noem terminated Haiti's TPS designation, effective September 2, 2025. *Id.*

**C.**

National TPS Alliance and several individual TPS beneficiaries (collectively, "Plaintiffs") sued the Trump Administration in February 2025. *Id.* at 748, 753. They alleged that Secretary Noem lacked vacatur authority under the TPS statute and that her Venezuela and Haiti decisions violated the Administrative Procedure Act ("APA") and the Constitution's Equal Protection Clause. *Nat'l TPS All. v. Noem*, 798 F. Supp. 3d 1108, 1118 (N.D. Cal. 2025); *see id.* at 1143, 1150, 1153. On March 31, 2025, the district court granted Plaintiffs' motion to postpone the vacatur of the 2025 Venezuela Extension and the termination of the 2023 Venezuela Designation. *See Nat'l TPS All.*, 166 F.4th at 753. The Ninth Circuit then denied a motion to stay the district court's March 31 order pending appeal. *Id.* The Supreme Court intervened and granted the government's emergency application for a stay. *Nat'l TPS All.*, 145 S. Ct. at 2728-29.

The case then returned to the district court. On September 5, 2025, the district court granted Plaintiffs summary judgment on their APA claims and set aside the Venezuela vacatur, the Venezuela termination, and the Haiti partial vacatur. *Nat'l TPS All.*, 798 F. Supp. 3d at 1164. The district court left Plaintiffs' Equal Protection claims undecided and stayed proceedings while the government appealed the APA claims. *Id.* The government then sought a stay pending appeal of the order setting aside the Venezuela TPS decisions. *Nat'l TPS All.*, 166 F.4th at 753. Once again, this court denied the government's request. *Id.* And once again, the Supreme Court granted the government's emergency stay application. *Nat'l TPS All.*, 146 S. Ct. at 24.

The government then appealed the district court's summary judgment order. *Nat'l TPS All.*, 166 F.4th at 753. The panel affirmed. *Id.* at 769. It held that the TPS statute's judicial-review bar did not apply to Plaintiffs' APA claims because Plaintiffs were challenging the Secretary's authority to issue the vacaturs and termination. *Id.* at 756-57. On the merits, the panel held that Plaintiffs were entitled to summary judgment because

Secretary Noem lacked statutory authority to issue the vacaturs and termination. *Id.* at 766-67.

## II.

## Congress Bars Judicial Review of TPS Determinations

Federal courts cannot act without jurisdiction. A faithful reading of the TPS statute's judicial-review bar makes clear that we lack jurisdiction here. The panel's conclusion that the judicial-review bar did not apply is egregiously wrong and should have been corrected en banc.

### A.

Congress enacted a sweeping jurisdiction-stripping provision in the TPS statute. It instructed that there would be "no judicial review of *any determination* . . . *with respect to* the designation, or termination or extension of a designation[.]" 8 U.S.C. § 1254a(b)(5)(A) (emphasis added). "[A]ny," "determination," and "with respect to" are capacious terms that signal Congress's desire to completely exclude federal courts from second-guessing the Secretary's decision to "designat[e]," "terminat[e]," or "exten[d]" TPS. In other words, Congress sent a clear message to federal courts: "Stay out."

First, the term "any" has an "expansive meaning" that applies to determinations "of whatever kind." *Patel v. Garland*, 596 U.S. 328, 338, 142 S. Ct. 1614, 212 L. Ed. 2d 685 (2022) (quoting Webster's Third New International Dictionary (1993)); *see also* Merriam-Webster's Collegiate Dictionary 53 (10th ed. 2000) ("Merriam-Webster's") (defining "any" as "one or more indiscriminately of whatever kind"); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 419, 423 (2012) (classifying Merriam-Webster's as among "the most useful and authoritative [dictionaries] for the English language" in the early 1990s). So "Congress' use of 'any' to modify ['determination'] is most naturally read to mean [determinations] of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008). Thus, the "provision does not restrict itself to certain kinds of decisions," *Patel*, 596 U.S. at 338, 142 S. Ct. 1614, and instead applies to *all* decisions of whatever kind regarding the designation, termination, or extension of TPS.

Second, the term "determination" itself could be read broadly. It refers to "a single act . . . in making decisions." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492, 111 S. Ct. 888, 112 L. Ed. 2d 1005 (1991). It is "[t]o settle or decide by choice of alternatives or possibilities." *Black's Law Dictionary* (6th ed. 1990); *see also* Merriam-Webster's at 315 ("the act of deciding definitively and firmly"). So the term "determination" could apply to any "single act" that "firmly" decides an issue.

Finally, "with respect to" is another all-embracing phrase. It only requires "relation to," Merriam-Webster's at 995, or "reference to," *see* The Concise Oxford Dictionary of Current English 1025 (8th ed. 1990), the subject—not just the subject itself. Courts thus typically read the phrase "expansively." *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717, 138 S. Ct. 1752, 201 L. Ed. 2d 102 (2018) (interpreting the term "respecting"). So "in a legal context," the phrase "generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Id.* It does not encompass only the ultimate determination to designate, extend, or terminate, but also any determination "*relating to*" the designating, extending, or terminating of TPS. *See Patel*, 596 U.S. at 339, 142 S. Ct. 1614.

Together, then, the plain text of § 1254a(b)(5)(A) bars judicial review of any definitive decision of the Secretary—of whatever kind—that relates to a TPS "designation," "extension," or "termination." The challenged actions here easily fall within this category of determinations barred from judicial review. First, the Secretary's decision to vacate the 2025 Venezuela Extension constitutes a "determination" related to the "extension" of TPS. Second, the Secretary's decision to terminate the 2023 Venezuela Designation is a "determination" related to the "termination" of TPS. Finally, the Secretary's decision to shorten the 2024 Haiti Extension was another "determination" related to the "extension" of TPS. Thus, all these decisions fall within § 1254a(b)(5)(A)'s bar.

So we have no jurisdiction to review any of Plaintiffs' APA claims—the only claims on appeal. Indeed, the APA doesn't apply where, as here, "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). This should have been an open-and-shut case. The panel simply had no business second-guessing the Secretary's decisions.

Even more, the 2024 Haiti Extension expired on February 3, 2026—a few days after the panel rushed to release its opinion on January 28, 2026. *See* Termination of Designation of Haiti for Temporary Protected Status, 90 Fed. Reg. 54733 (Nov. 28, 2025). Despite the panel's rush, the mandate has not issued, so its decision to enjoin the shortening of the 2024 Haiti Extension is now moot. That's yet another reason we should have taken this case en banc—to vacate the panel's decision on the moot claim. *See In re Pattullo*, 271 F.3d 898, 900-01 (9th

Cir. 2001) ("Even after an appellate court has issued its decision, if it has not yet issued its mandate and the case becomes moot, the court will vacate its decision and dismiss the appeal as moot.").

**B.**

The panel thwarted Congress's clear command in three steps. First, it used a creative textual analysis to create a carveout to § 1254a(b)(5)(A)'s sweeping judicial-review bar. Second, the panel misread precedent to justify its atextual interpretation. Finally, it introduced a parade of horribles to avoid a plain reading of the text. None of these moves are convincing.

**1.**

The panel evaded Congress's jurisdiction-stripping provision by inventing a non-existent carveout from its scope. It began by invoking what it called a "strong presumption" of "judicial review of administrative actions." *Nat'l TPS All.*, 166 F.4th at 755 (simplified). Whatever the strength of that presumption, it is easily overcome with § 1254a(b)(5)(A)'s clear language. The presumption is defeated when "specific language" in the statutory scheme shows Congress's intent to preclude judicial review. *Traynor v. Turnage*, 485 U.S. 535, 542, 108 S. Ct. 1372, 99 L. Ed. 2d 618 (1988) (simplified); *see also* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 Harv. L. Rev. 1285, 1290 (2014) (noting that the presumption of judicial review doesn't apply when Congress has "foreclosed" judicial review in "explicit terms"). One struggles to think of more "specific language" than Congress saying: "[t]here is no judicial review of any determination . . . with respect to" a TPS termination, extension, or designation. 8 U.S.C. § 1254a(b)(5)(A).

And the presumption can't be used to justify the tortured reading of the plain text the panel employed. Recall that Plaintiffs expressly asked the district court to "[s]et aside" the order vacating the 2025 Venezuela Extension, the order terminating the 2023 Venezuela Designation, and the order shortening the 2024 Haiti Extension. As stated earlier, the panel should have easily found that these APA claims challenge a "determination . . . with respect to . . . the termination or extension" of TPS and disclaimed jurisdiction. Instead, the panel manufactured a loophole to the jurisdictional bar—it claimed that "the scope and extent of statutory authority granted to the Secretary is a first order question that is not a determination with respect to the designation, or termination or extension of a country for TPS." *Nat'l TPS All.*, 166 F.4th at 756 (simplified). According to the panel, then, § 1254a(b)(5)(A)'s text somehow doesn't extend to any claims that include challenges to "the scope and extent" of the Secretary's statutory authority. And because Plaintiffs asserted that the "Secretary exceeded her statutory authority," the panel felt free to ignore the jurisdiction-stripping provision. *Id.* at 757. Ironically, despite § 1254a(b)(5)(A)'s sweeping language, the panel concluded that Congress needed to use "broader language" for the judicial-review bar to mean what it says. *Id.* at 756.

But the panel's reasoning can't be squared with § 1254a(b)(5)(A)'s text. It applies broadly to "any determination . . . with respect to" the termination or extension of TPS—no matter the theory of why those determinations should be set aside. It doesn't exempt claims from the jurisdiction-stripping provision simply because Plaintiffs believe that the "Secretary exceeded her statutory authority." Nor does it exempt so-called "first order question[s]" that relate to TPS determinations. So even if we were to read "determination" narrowly to mean only specific country TPS "determination[s]" under § 1254a(b), these claims would still fall within the judicial-review bar. At bottom, Plaintiffs are challenging specific determinations with respect to the "extension" and "termination" of specific TPS designations. The alleged reasons *why* these "determinations" are unlawful doesn't remove them from § 1254a(b)(5)(A)'s scope. Indeed, even if the Secretary did exceed her statutory authority in vacating the extensions early, such acts are still "determinations . . . with respect to" an extension and termination. Had Congress intended to exclude "first order question[s]"—whatever that means —from § 1254a(b)(5)(A)'s broad sweep, Congress could have done so by, for example, excepting "challenges to the Secretary's authority." "But Congress did not use such narrow language." *Lamar, Archer & Cofrin, LLP*, 584 U.S. at 719, 138 S. Ct. 1752.

In the end, the panel created a roadmap for the complete evasion of § 1254a(b)(5)(A). Going forward in the Ninth Circuit, all a plaintiff must do is use the password —"the Secretary exceeded her authority"—and the plaintiff will receive an automatic ticket into federal court. All contrary to Congress's will.

**2.**

Precedent is even less useful to the panel's position. The panel relied on *McNary*, 498 U.S. 479, 111 S. Ct. 888, 112 L. Ed. 2d 1005, and *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993) to justify its atextual carveout. But neither *McNary* nor *Reno* dealt with specific individual determinations by the Secretary, as here, and so they don't support the panel's reading.

Rather than a challenge to an individual agency determination, *McNary* addressed a constitutional claim against an agency's practices. *McNary* considered an immigration statute that prohibited "judicial review of a determination respecting an application for adjustment of status[.]" 498 U.S. at 491, 111 S. Ct. 888 (citing 8 U.S.C. § 1160(e)(1)). "[T]he only question" for *McNary* was whether the judicial-review bar applied to a class action "alleging a pattern or practice of procedural due process violations by the Immigration and Naturalization Service (INS) in its administration of" an INS program. *Id.* at 483, 111 S. Ct. 888. *McNary* emphasized several times that the class action didn't challenge any "individual determination" under the program. *See id.* at 488, 491-92, 111 S. Ct. 888. Given this, *McNary* concluded that the judicial-review bar didn't apply because the class action involved "general collateral challenges to unconstitutional practices and policies used by the agency[.]" *Id.* at 492, 111 S. Ct. 888. *McNary*, however, made clear that federal courts would have no jurisdiction over "the denial of an individual application" under the statute. *Id.* So *McNary* merely recognizes that a challenge to an agency's pattern or practice—divorced from an "individual determination"—was not covered by the jurisdiction-stripping provision. But Plaintiffs are challenging three "individual determination[s]" here—(1) the order vacating the 2025 Venezuela Extension, (2) the order terminating the 2023 Venezuela Designation, and (3) the order shortening the 2024 Haiti Extension. Thus, *McNary* doesn't help the panel.

*Reno* is similar. It too considered a statute prohibiting judicial review of "determination[s] respecting an application for adjustment of status[.]" *Reno*, 509 U.S. at 54, 113 S. Ct. 2485 (citing 8 U.S.C. § 1255a(f)(1)). Drawing on *McNary, Reno* concluded that the judicial-review provision didn't prohibit suits "challenging the legality of a regulation without referring to or relying on the denial of any individual application." *Id.* at 56, 113 S. Ct. 2485. Because the challenges there had nothing to do with "any individual application," the jurisdiction-stripping provision didn't apply. *Id. Reno* is thus limited to claims *unrelated* to a specific application. But unlike in *Reno*, Plaintiffs' APA claims "refer[] to" and "rely[ ] on" three specific determinations of the Secretary—her determinations to shorten or terminate the Venezuela and Haiti TPS designations. *See id.*

3.

Because text and precedent do not support its view, the panel resorts to sensationalism. We can't follow the text's plain meaning, according to the panel, because doing so invites a parade of sensational and "absurd" horribles. *See Nat'l TPS All.*, 166 F.4th at 757. Say the Secretary authorized a 30-year TPS period! *Id.* Or what if the Secretary sold TPS designations? *Id.* Imagine that the Secretary made TPS determinations based on "perceived favored racial or ethnic populations." *Id.* Because these hypotheticals are all decisions about a TPS designation, the panel feared that they would be unreviewable under the plain meaning of § 1254a(b)(5)(A). Because this scenario would be "absurd" in the panel's eyes, the panel concluded that we must read § 1254a(b)(5)(A) contrary to its ordinary meaning. *See id.* ("Section

1254a(b)(5)(A) simply cannot bear the weight of the Government's expansive interpretation.").

But the panel's argument fails for two reasons. First, it proves too much. Even under the panel's atextual reading of § 1254a(b)(5)(A), some of these examples would be unreviewable. Take the hypothetical that the Secretary could "limit TPS designations to countries with perceived favored racial or ethnic populations." *Id.* Even if the Secretary did select a country for TPS based on some sort of bias, that is simply a "determination . . . with respect" to a designation. It has nothing to do with "first order question[s]" or questions about "the scope and extent of statutory authority granted to the Secretary[.]" *Id.* at 756 (simplified). Thus, under the panel's own interpretation, this "absurd" result is unreviewable. Indeed, at an earlier stage, the panel admitted that § 1254a(b)(5)(A) "restrict[s] review of the Secretary's determinations of whether to grant TPS in a particular situation[.]" *Nat'l TPS All. v. Noem*, 150 F.4th 1000, 1017 (9th Cir. 2025) (simplified). So it makes no sense to disregard the most natural reading of § 1254a(b)(5)(A) because of a hypothetical that even the panel agreed falls within its scope.

Second, the parade of horribles only matters if one accepts the panel's flawed view of the judicial role. Simply, the federal judiciary doesn't exist to remedy every wrong. Lower courts are courts of limited jurisdiction. We only decide cases and controversies *over which Congress has given us jurisdiction.* And we must faithfully adhere to the limits Congress places on us. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L. Ed. 1147 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies."); *see generally* Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 307-314 (7th ed. 2015) (canvassing authorities on Congress's jurisdiction-stripping power).

The panel was right in one respect—the TPS statute "was not meant to be a blank check." *Nat'l TPS All.*, 166 F.4th at 757. But lower courts aren't the bank—policing every transaction. Sometimes Congress decides that the political process is the proper forum for remedying improper conduct. For example, if the Secretary were to sell TPS designations, the political branches have several remedies: (1) she could be charged with bribery, *see* 18 U.S.C. § 201; (2) Congress could impeach her, U.S. Const. art. II, § 4; or (3) Congress could refuse to fund the agency she leads, *id.* art. I, § 9, cl. 7. Faithful adherence to the plain meaning of our jurisdictional limits is not absurd—it's our job. After all, the absurdity canon "does not license courts to improve statutes . . . substantively, so that their outcomes accord more closely with judicial beliefs about how matters ought to be resolved." Caleb Nelson, Statutory Interpretation 96 (2d ed. 2024) (quoting *Jaskolski v. Daniels*, 427 F.3d 456, 461 (7th Cir. 2005) (Easterbrook, J.)).

**III.**

Creative textual analysis, off-point precedent, and sensational hypotheticals cannot defeat the plain meaning of the words that survived bicameralism and presentment. Try as it might, the panel cannot avoid the clear results: vacating an extension is a determination with respect to that extension, and terminating a designation is a determination with respect to a termination. The panel's conclusion to the contrary "strains credulity for even the most casual user of words." *McDonald v. City of Chicago*, 561 U.S. 742, 811, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (Thomas, J., concurring in part and concurring in the judgment).

Because the panel opinion strikes a blow to Congress's authority over federal courts and to "speaker[s] of ordinary English," *Mass. Lobstermen's Ass'n v. Raimondo*, ––– U.S. ––––, 141 S. Ct. 979, 980, 209 L. Ed. 2d 486 (2021) (Roberts, C.J., respecting the denial of certiorari), I respectfully dissent from the denial of rehearing en banc.

MENDOZA, J., joined by WARDLAW, J., concurring in the denial of rehearing en banc:

I.

We write only to address the arguments contained within Part II of Judge Nelson's dissent from the denial of rehearing en banc ("dissental").[1] At the outset, we make one thing clear: Judge Nelson's sweeping characterizations of the concurrence and its reach are his alone. He does not speak for us. We stand only by what is written in the panel opinion, the concurrence, and this statement. What the concurrence did was straightforward. It acknowledged what the record plainly revealed. The Administrative Procedure Act does not require courts to shut their eyes and ears to unreasoned and pretextual explanations. And it certainly does not require courts to ignore evidence that bad faith animus was the driving factor behind an agency's decision. Judge Nelson would prefer a rule of deliberate blindness to decisions even when driven by racism and national origin animus. We decline to adopt it.

II.

Judge Nelson's dissental rests on a curious premise: although he publicly maintains that the concurrence is nonbinding and therefore does not control future cases, he nonetheless spends a great deal of time evaluating its

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[1] We do not address the arguments contained in Part I of Judge Nelson's dissental given that they are addressed in Judge Wardlaw's statement concurring in the denial of rehearing en banc. Additionally, Judge Wardlaw takes no position with respect to the concurrence's Part III's arguments, because she did not join the discussion of animus.

analysis as part of his broader justification for en banc review.[2]

Those positions cannot be reconciled. If, as the dissental asserts, the concurrence carries no precedential effect and the panel opinion alone resolves the case, then there is nothing for the en banc court to "correct" as to the concurrence. En banc review is neither a vehicle for litigating personal grievances with the nonbinding reasoning of another judge nor a means of issuing sweeping advisory opinions on issues entirely unnecessary to the disposition. And if the concurrence carries binding precedential weight, that would not aid the dissental either, because the analysis it criticizes reflects nothing more than an application of settled Administrative Procedure Act principles. Either way, Judge Nelson's position identified no error warranting rehearing.

The dissental's merits critique fares no better. According to Judge Nelson, the concurrence improperly "commingled doctrines" by considering several *State Farm* deficiencies to determine that the Secretary's explanation was pretextual and that the decision-making process reflected a preordained outcome. But the concurrence did nothing of the sort; nowhere in the concurrence is there a finding that only when considering the

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[2] If *this* concurrence is as plainly nonbinding as Judge Nelson publicly maintains, it is unclear why *this* case would be an appropriate vehicle on which to expend the Court's en banc resources. Perhaps it is because Judge Nelson actually believes that the concurrence carries precedential weight. Judge Nelson further suggests that we do not object to his characterization of the concurrence's precedential force. Because the dissental repeatedly misconstrues the opinion and the concurrence, we reiterate that we have only agreed to what is stated in the opinion, concurrence, and this statement—nothing else.

pretext and preordained evidence "together" does the Secretary's actions amount to a violation of the APA.[3] Instead, we applied the familiar framework articulated in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983), and reaffirmed in *Department of Commerce v. New York*, 588 U.S. 752, 139 S. Ct. 2551, 204 L. Ed. 2d 978 (2019). Those cases both stand for the proposition that courts must set aside agency action where the agency fails to consider important aspects of the problem, offers explanations that run counter to the evidence before it, or provides rationales so implausible that they cannot be attributed to agency expertise.

When multiple such evidentiary indicators appear in the administrative record, it is neither novel nor improper for a court to evaluate them collectively in assessing whether the agency's stated rationale is pretextual. The Supreme Court in *Department of Commerce* undertook precisely that holistic inquiry, examining the "evidence as a whole" and concluding that "[s]everal points, taken together, reveal a significant

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[3] Judge Nelson misconstrues the words "[t]aken together" in our concurrence to suggest that we were "comminglI[ing] doctrines." But he should read the full paragraph to understand that we were discussing the evidence that, "[t]aken together," reveals pretext:

> In sum, the district court rightly identified a litany of APA defects, ***each of which*** render the Secretary's actions arbitrary and capricious. Taken together, these deficiencies paint a picture of agency action that was not the product of reasoned decision-making, but of a rushed and pre-determined agenda masked by pretext.

*Nat'l TPS All. v. Noem*, 166 F.4th 739, 774 (9th Cir. 2026) (Mendoza, J., joined by Wardlaw, J., concurring) (emphasis added).

mismatch between the Secretary's decision and the rationale he provided." 588 U.S. at 783, 139 S. Ct. 2551.[4] And *Department of Commerce* never imposed any sort of categorical sequencing rule requiring courts to isolate each *State Farm* deficiency before considering whether the record as a whole reveals pretext. In any event, the administrative record in this case did not support the Secretary's stated rationale.

Beyond the concurrence, Judge Nelson fundamentally misunderstands pretext and preordained decision-making as siloed doctrines that must never be considered in tandem. That is not how APA review operates. Instead, pretext and preordained decision-making are both evidence of the same thing: arbitrariness and capriciousness. Where there is evidence that a decision-maker is hiding their true reasons for taking action behind a faulty explanation, that is pretext. And where there is evidence that an agency decided to take action prior to any reasoned and official decision-making process, that is preordained reasoning. Evidence of preordained outcomes is *itself* evidence that an agency's post-factum official reason for taking action was not the driving motive, and vice versa. Judge Nelson's conceptualization of arbitrary and capricious review would allow for agencies to sprinkle in just enough (but not too much!) pretext and just enough (but not too much!) preordained decision-making to skirt the APA's reasoned decision-making requirement.

[4] *See also Dep't of Com.*, 588 U.S. at 782, 139 S. Ct. 2551 ("We accordingly review the District Court's ruling on pretext in light of all the evidence in the record before the court, including the extra-record discovery.").

Judge Nelson also accuses the concurrence of substituting its policy judgment for that of the agency. To the contrary, the concurrence repeatedly emphasized that courts may not second-guess policy choices entrusted to the Executive. *See, e.g., Nat'l TPS All.*, 166 F.4th at 781 (Mendoza, J., concurring). The defect identified was not the Secretary's national security or policy preferences, but the absence of a reasoned explanation connecting those preferences to the statutory criteria and the agency's own decision-making processes. Recognizing that an agency decision may be both "preordained" *and* unsupported by the rationale offered does not expand arbitrary-and-capricious review; it simply acknowledges the commonsense principle that courts need not accept explanations that the record itself patently undermines. *See Dep't of Com.*, 588 U.S. at 785, 139 S. Ct. 2551 ("Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.").[5]

Judge Nelson's criticism of the concurrence's discussion of extra-record evidence is similarly futile. First,

[5] Judge Nelson's accusation that "[t]he Majority Concurrence used its pretext finding as a license to disregard the agency's valid rationale" stands in contrast to what the concurrence actually does. The concurrence expressly provides that it does not evaluate the merits of the Secretary's policy preferences and it instead concludes that the Secretary's stated reasons for vacating TPS designations for Venezuela and Haiti do not amount to "a satisfactory explanation" for its action in light of plethora of nonsensical contradictions contained in the record. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009).

we reiterate that the concurrence evaluated the administrative record itself and concluded that the Secretary's stated rationale failed under the ordinary *State Farm* framework on that record alone. *See, e.g., Nat'l TPS All.*, 166 F.4th at 771 (Mendoza, J., joined by Wardlaw, J., concurring). The additional discussion addressed whether Secretary Noem's statements reflecting discriminatory animus could illuminate the context of the agency's decision-making, a question the Supreme Court has repeatedly recognized may arise when there is a "strong showing of bad faith or improper behavior." *Dep't of Com.* 588 U.S. at 781, 139 S. Ct. 2551 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)).

The dissental's suggestion that courts must categorically ignore such damning evidence whenever a decision-maker throws out the words "national security" with no further explanation misreads that precedent. *Department of Commerce* did not require courts to blind themselves to clear evidence of improper motive; it only cautioned that inquiry into decision-makers' mental processes should not occur lightly. *See id.* The concurrence expressly noted that understandable reluctance but also recognized that caution does not mean courts must pretend that plainly relevant extra-record evidence does not exist. *Nat'l TPS All.*, 166 F.4th at 771 (Mendoza, J., joined by Wardlaw, J., concurring).

The rule the dissental appears to propose would lead to an absurd result: courts would be required to accept a proffered rationale at face value even where the surrounding record and the decision-maker's own extra-record public statements clearly undermine its authenticity. This would eviscerate the fundamental precepts of judicial review of agency decision-making, notwithstanding its inherently deferential review. *See Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) ("Our task is simply to ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made.") (internal quotation marks and citation omitted); *Cook County v. Wolf*, 461 F. Supp. 3d 779, 794 (N.D. Ill. 2020) ("Most people know by now that the quiet part should not be said out loud."). Administrative law has never demanded such studied naiveté.

Indeed, Judge Nelson does not object to the fact that the Secretary's statements directly tied her decision to vacate TPS status for Venezuela to racist stereotypes surrounding TPS holders' nation of origin. Nor does he object to the fact that the Secretary publicly categorized all Venezuelan TPS holders as criminals and mentally unwell and stated that those stereotypes were the basis of her decision to vacate TPS status for Venezuela. Instead, the dissental appears to contend that the extrarecord statements here just weren't enough to show "bad faith." *Cf.* Kristi Noem, Meet the Press (NBC television broadcast, Feb. 2, 2025) ("Folks from Venezuela that have come into this country are members of [Tren de Aragua]. And remember, Venezuela purposely emptied out their prisons, emptied out their mental health facilities and sent them to the United States of America. So we are ending that extension of that [TPS] program, adding some integrity back into it. And this administration's evaluating all of our programs to make sure that they truly are something that's to the benefit of the United States, so they're not for the benefit of criminals."). There could not possibly be a stronger showing of "bad faith" and "improper behavior" to consider these extra-record statements. *Dep't of Com.*, 588 U.S. at 781, 139 S. Ct. 2551. The relevance of this evidence arises not from its political ramifications or character but from its obvious bearing on whether the agency's stated rationale reflects reasoned decisionmaking.

III.

Judicial review under the APA requires courts to ensure that agencies offer genuine explanations for their actions, not contrived ones. Judge Nelson's reasoning, by contrast, would require the judiciary to cover its ears even where decision-makers brazenly say "the quiet part" out loud and publicly announce their animus-laden reasons for taking an action against a specific subset of immigrants. The denial of rehearing en banc reaffirms that Judge Nelson's approach is one that we are unwilling to follow.

R. NELSON, Circuit Judge, dissenting from the denial of rehearing en banc:

When reviewing the Executive's Temporary Protected Status (TPS) decisions, the judicial role is highly constrained. The first constraint is jurisdictional. Judge Bumatay correctly explains why 8 U.S.C. § 1254a(b)(5)(A) bars judicial review of Plaintiffs' Administrative Procedure Act (APA) claims. I fully join Judge Bumatay's dissent from the denial of rehearing en banc. Congress unambiguously precluded review of "any determination" of the Secretary "with respect to the designation, or termination or extension of a designation." § 1254a(b)(5)(A). This forecloses Plaintiffs' APA challenge to the Secretary's TPS decisions. *See Ramos v. Wolf*, 975 F.3d 872, 891-900 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 59 F.4th 1010 (9th Cir. 2023).

While our court lacked statutory jurisdiction to decide this case, because the panel reached the merits, I address those errors as well. First, the panel granted universal relief without properly analyzing the legal authority to do so. In *Trump v. CASA, Inc.*, 606 U.S. 831, 145 S. Ct. 2540, 222 L. Ed. 2d 930 (2025), the Supreme Court restricted universal relief to prevent enforcement of governmental policies to three potential circumstances: (1) class actions; (2) complete relief for injuries to state plaintiffs; or (3) statutory "set aside" relief under 5 U.S.C. § 706(2). Although the Court reserved the question, Justices disagreed about whether the third option is authorized by statute. The Ninth Circuit has not decided this question, either. And the panel did not take up the open question. Instead, the panel conflated the doctrines, invoking the equitable "complete relief" principle (option two) while purporting to act under statutory "set aside" authority (option three). The panel thus revived arguments for equitable remedial powers foreclosed in *CASA*. The panel should have picked a lane. Its refusal gives future courts a roadmap around *CASA*'s limits.

Second, given the other en banc-worthy questions in this case, we should have decided whether a majority concurrence is binding precedent to avoid any future confusion. By its terms, however, the Majority Concurrence in this case is not binding. Still, the Majority Concurrence concluded that the Venezuela Vacatur was arbitrary and capricious by substituting its own policy judgment for the agency's reasoning. It improperly disregarded the agency's stated rationale as "pretext." But the administrative record falls well short of what *Department of Commerce v. New York*, 588 U.S. 752, 139 S. Ct. 2551, 204 L. Ed. 2d 978 (2019), demands for this finding.

I

The panel's grant of universal relief flouts the Supreme Court's decision in *CASA*. The panel conflated options open after *CASA*. Only the "set aside" option could be relevant to universal relief. But rather than decide that issue, the panel concluded that "the proper remedy under APA § 706(2) is to set aside [the Secretary's] actions and restore the status quo." *Nat'l TPS All. v. Noem*, 166 F.4th 739, 767 (9th Cir. 2026). While the panel perhaps could have granted relief under § 706(2), it never analyzed whether the phrase "set aside" grants that power. *See id.* It even disclaims deciding the question—while exercising power under the very provision it refuses to interpret. *See id.* ("We need not resolve this question for our circuit.").

Worse, the panel invokes the need for "complete relief"—an equitable concept. *See id.* Granting enforceable equitable relief to nonparties is generally outside the inherent powers of the federal courts. *See CASA*, 606 U.S. at 841, 145 S. Ct. 2540. By grafting equitable considerations onto a statutory "set aside" question, the panel skirted both theories. The result is analytically incoherent and opens the floodgates for future courts to grant universal injunctions in situations foreclosed by *CASA*.

An equitable injunction is a precise concept. Courts issue prohibitory injunctive relief through an order preventing a government officer from enforcing a statute or administrative decision against a plaintiff. *See, e.g., id.* at 853, 145 S. Ct. 2540; *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). The statute or rule remains legally in effect and may even be enforced if the court dissolves the injunction. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 987 (2018).

A universal injunction goes a step further by enjoining the government from enforcing the statute or rule against anyone, even nonparties. This is "relief that extend[s] beyond the parties." *CASA*, 606 U.S. at 843, 145 S. Ct. 2540. Such relief was unheard of at equity and is not part of the courts' equitable powers. *Id.* at 847, 145 S. Ct. 2540. Thus, the Supreme Court held in *CASA* that Congress did not grant the Judiciary the power to impose universal injunctions when it gave the Judiciary equitable powers in the Judiciary Act of 1789. *See id.* at 841 & n.4, 145 S. Ct. 2540.

The Court left open the possibility that some other statute may authorize relief that prevents the government from enforcing a statute or rule against nonparties. *See id.* at 841, 855-56, 145 S. Ct. 2540. The most likely candidate is § 706(2). *See id.* at 847 n.10, 145 S. Ct. 2540. That provision provides that the reviewing court may "hold unlawful and set aside agency action, findings, and conclusions found to be" arbitrary, capricious, or an abuse of discretion. § 706(2).

But setting aside a rule is not an equitable injunction. Many courts have suggested that "set aside" means the courts can vacate agency action itself. *See, e.g., Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97-98 (D.C. Cir. 2002). For decades, the D.C. Circuit has used § 706(2) to strip agency rules of legal effect, without enjoining agency officials from enforcing the vacated rule. *See Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 831, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024) (Kavanaugh, J., concurring) (citing *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). "[V]acatur neither compels nor restrains further agency decision-making." *Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022). The relief does not carry the threat of contempt and does not require the courts to maintain continuing jurisdiction to ensure compliance. *See, e.g., Horne v. Flores*, 557 U.S. 433, 447-48, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009); *see also Mi Familia Vota v. Petersen*, 152 F.4th 1153, 1156 (9th Cir. 2025) (R. Nelson, J., dissenting from the denial of rehearing en banc).

Had the panel explained why the phrase "set aside" supports this kind of relief, its conclusion may have been defensible. Still, Justices have questioned that conclusion, and the panel never analyzed the issue. *Compare United States v. Texas*, 599 U.S. 670, 695, 143 S. Ct. 1964, 216 L. Ed. 2d 624 (2023) (Gorsuch, J., concurring in the judgment) (expressing skepticism that § 706(2) authorizes universal set aside relief), *with Corner Post*, 603 U.S. at 826, 144 S. Ct. 2440 (Kavanaugh, J., concurring) (defending the D.C. Circuit's practice of setting aside rules under the APA).

Rather than answer the textual question, the panel asserted that universal relief was necessary to give Plaintiffs "complete relief." But complete relief "is not a guarantee"—it is "the maximum a court can provide" under its inherent equitable powers. *CASA*, 606 U.S. at 854, 145 S. Ct. 2540. Complete relief is not an automatic indicator of what Congress authorized with the statutory phrase "set aside" agency action. The answer to that question can come only from the text. The panel's failure to determine what the text authorizes warrants en banc review.[1]

The panel's extended discussion of "complete relief" is more problematic for an additional reason. The panel did not provide injunctive relief. *See* Panel Concurrence at 809-10. But that highlights the potential confusion its analysis of equitable considerations will cause for future courts purporting to act under § 706(2). *See Nat'l TPS All.*, 166 F.4th at 767-68. Carefully recognizing the differences between these remedies is important for our court and the lower courts.

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[1] I express no view whether decisions finding statutory authority are correctly decided after *CASA*—only that the conclusion must be analytically defensible.

The concept of complete relief is a "principle" of what a "court of equity may fashion." *CASA*, 606 U.S. at 850, 145 S. Ct. 2540. The panel invokes equitable relief each time it references "complete relief." But injunctive relief imposed against the government is inherently disruptive. "[I]njunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances . . . that warrant reexamination of the original judgment." *Horne*, 557 U.S. at 447-48, 129 S. Ct. 2579. Once a permanent injunction is entered, a federal court may shape policy outcomes for decades, either through direct orders or through governmental officials' caution to avoid possible sanctions. *See id.* at 448, 129 S. Ct. 2579. *CASA* sought to correct this dynamic.

With the advent of forum-shopping, plaintiffs could rush to a single favorable district court and obtain an injunction affecting national policy. And the odds were stacked against the government: "A plaintiff must win just one suit to secure sweeping relief," but "the Government must win everywhere." *See* 606 U.S. at 855, 145 S. Ct. 2540. This gave a single district court judge unilateral ability to shape and control policy set by the political branches. The only recourse was emergency stays, forcing us and the Supreme Court to resolve issues of national importance on expedited briefing and truncated schedules. *See id.* at 870, 145 S. Ct. 2540 (Kavanaugh, J., concurring). By collapsing vacatur and equitable relief principles into a single "complete relief" rationale, the panel reopens a door *CASA* closed.

While "set aside" relief under the APA may be the "functional equivalent of a universal injunction" from a plaintiff's perspective, *Nat'l TPS All.*, 166 F.4th at 767 (quoting *CASA*, 606 U.S. at 873, 145 S. Ct. 2540 (Kavanaugh, J., concurring)), it is not from the courts' perspective. Requiring "district courts to follow proper legal procedures when awarding such relief" means courts must look to Congress for the legal authorization. *CASA*, 606 U.S. at 869, 145 S. Ct. 2540 (Kavanaugh, J., concurring). This restores some power to Congress, who can strip jurisdiction from overbearing courts. *See, e.g., Patchak v. Zinke*, 583 U.S. 244, 253, 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (plurality opinion).

Vacating an agency rule is also less intrusive than enjoining the government from enforcing it. Set aside relief acts against the unlawful agency action itself, not the agency's decision maker. *See Corner Post*, 603 U.S. at 838, 144 S. Ct. 2440 (Kavanaugh, J., concurring) (citing Mitchell, *supra*, at 1012). This "does nothing but re-establish the status quo absent the unlawful agency action." *Texas*, 40 F.4th at 220. Agency decision makers are thus free to implement new policies.

The upshot is that if we enter set aside relief under § 706(2) (assuming support in the text), courts must not do so based on equitable principles. By giving future courts the potential to use § 706(2) to consider equitable principles, the panel garbled the Supreme Court's decision in *CASA*. We should have corrected that error.

II

Part II of the Majority Concurrence is also nonbinding and wrong.

A

We should have clarified whether a majority concurrence—a relatively rare occurrence—is binding. Some members of our court have noted this potential issue. *See Truth v. Kent Sch. Dist.*, 551 F.3d 850, 851 n.1 (9th Cir. 2008) (Bea, J., dissenting from the denial of rehearing en banc) ("This is no standard concurrence . . . because two of the three members of the panel concur in it."). Given the other en banc worthy questions in this case, we should have clarified this issue to avoid any future confusion.

By its own terms, the Majority Concurrence is not binding. Indeed, the Majority Concurrence addressed an issue that the unanimous panel "decline[d] to reach" —"the remainder of Plaintiffs' APA challenge." *Nat'l TPS All.*, 166 F.4th at 766. The unanimous panel thus does not adopt the analysis of the Majority Concurrence. And the concurrence expressly noted that the panel's "explanation is sufficient to dispose of this case" and that it only addressed the APA claims "had we reached the merits." *Nat'l TPS All.*, 166 F.4th at 769 (Mendoza, J., concurring). By its own terms—which my colleagues stand by, *see* Majority En Banc Concurrence at 800—the Majority Concurrence never purports to be binding. And the Majority En Banc Denial Concurrence does not provide any reason to conclude otherwise. As a result, the Majority Concurrence is nonbinding; it does not control future district court and panel decisions.

B

Because the Majority Concurrence addresses a recurring issue in our court, it is worth noting that it is wrong in any event. It concluded that Secretary Noem's vacatur of the Venezuela designation was "arbitrary and capricious in contravention of the APA." *Nat'l TPS All.*, 166 F.4th at 771 (Mendoza, J., and Wardlaw, J., concurring). Under the APA's "narrow" "arbitrary and capricious" standard, courts may only set aside agency action when the agency fails to examine "the relevant data" or cannot give "a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (internal quotation marks omitted). A court may not "substitute its judgment for that of the agency." *Id.*

But the Majority Concurrence dismissed the agency's rationale—not because the administrative record contradicts or fails to support the rationale—but because the Majority Concurrence found that the Secretary's "decisions were both preordained and rooted in pretext." *Nat'l TPS All.*, 166 F.4th at 771 (Mendoza, J., and Wardlaw, J., concurring). The Majority Concurrence never found support from a single doctrine to justify its finding but claimed commingled doctrines may be "[t]aken together" to find agency action was "masked by pretext." *Id.* at 774. Indeed, the Majority Concurrence repeatedly reviewed standard *State Farm* principles and then used them to support its pretext finding. *See, e.g., id.* at 771 ("[A] cursory review of the record indicates that her decisions were both preordained and rooted in pretext."); *id.* at 772 (a review of the agency's consideration of alternatives "underscores the preordained and pretextual character of the Secretary's decision"); *id.* at 773 n.3 ("[W]e may still view the Secretary's failure to consider these reliance interests as evidence of pretext.").

No court has aggregated individual *State Farm* deficiencies in this way to support a pretext finding. "[A] court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com.*, 588 U.S. at 780, 139

S. Ct. 2551 (citing *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978)). This principle "reflects the recognition that further judicial inquiry into 'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided." *Id.* at 780-81, 139 S. Ct. 2551 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)); *see also Ramos*, 975 F.3d at 900 (R. Nelson, J., concurring) ("[T]he record-review requirement is not just a meaningless procedural hurdle to overcome, but a fundamental constitutional protection to government agency action.").

The corollary is that courts must generally accept the rationale provided by the agency so long as it is supported by the administrative record. That rule applies with added force when the agency is acting "within the core of executive responsibility." *Trump v. Hawaii*, 585 U.S. 667, 701-02, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018). Only on a strong evidentiary showing of bad faith may the courts disregard the valid, stated reason. *Dep't of Com.*, 588 U.S. at 780, 139 S. Ct. 2551.

By commingling doctrines, the Majority Concurrence improperly expanded the exceptions. *Nat'l TPS All.*, 166 F.4th at 771. *Department of Commerce* does not support this approach. There, the Supreme Court reviewed emails showing that the rationale offered by the agency was adopted "late in the process," because a leading member of the project knew "the Secretary wished to reinstate the question," and "saw it as his task to 'find the best rationale.'" 588 U.S. at 783, 139 S. Ct. 2551.[2]

The closest the Majority Concurrence came to evidence of pretext is its assertion that the "timeline is strikingly suspicious." *Nat'l TPS All.*, 166 F.4th at 774. But it "is hardly improper for an agency head to come into office with policy preferences and ideas." *Dep't of Com.*, 588 U.S. at 783, 139 S. Ct. 2551. Presidents are elected with mandates to implement their own policy preferences, *see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010) (citing 1 Annals of Cong., at 499 (J. Madison)), and the rush to implement those preferences is not arbitrary or capricious.

The Majority Concurrence used its pretext finding as license to disregard the agency's valid rationale. The agency stated the vacatur was "warranted to untangle the confusion and provide an opportunity for informed determinations regarding the TPS designations and

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[2] Unlike the Majority En Banc Concurrence's characterization of *Department of Commerce* (Op. at 801), the Supreme Court did not use *State Farm* discrepancies to disregard the valid rationale supported by the administrative record. Instead, the Court found that the agency stated a valid rationale under ordinary arbitrary or capricious review. *Dep't of Com.*, 588 U.S. at 777, 139 S. Ct. 2551. The Court disregarded that valid rationale only after reviewing evidence of bad faith in an expanded administrative record. *Id.* at 783-84, 139 S. Ct. 2551. And because the Court disregarded the "sole stated reason," it found the action was arbitrary or capricious. *Id.* at 784, 139 S. Ct. 2551. The Court never suggests that some evidence of political or ulterior motivations mixed with valid stated reasons is grounds to find that an agency action is arbitrary or capricious. The Majority Concurrence never relies on the type of evidence that *Department of Commerce* cited as a prerequisite.

clear guidance," after Secretary Mayorkas's prior decision caused internal agency confusion. Vacatur of 2025 Temporary Protected Status Decision for Venezuela, 90 Fed. Reg. 8805, 8807 (Feb. 3, 2025). The Majority Concurrence glossed over these concerns because, in its view, "streamlining tracks tend[s] to eliminate confusion." *Nat'l TPS All.*, 166 F.4th at 772. So too for the Majority Concurrence's conclusion that Secretary Noem should have considered "de-consolidat[ion]" or individually revoking designations for beneficiaries. *Id.* Every time, the Majority Concurrence substituted its own judgment of how to run an agency.

Finally, the Majority Concurrence found that the "Secretary's decision-making process deviated dramatically from established" agency "norms and procedures" based on a Government Accountability Office (GAO) report. *Nat'l TPS All.*, 166 F.4th at 773. The GAO report does not appear in the administrative record, and the Government opposed its consideration on appeal. The Majority Concurrence considered the GAO report without a threshold finding of bad faith under *Department of Commerce*. *See* 588 U.S. at 780, 139 S. Ct. 2551.

The Majority Concurrence's pretext finding stretched *Department of Commerce* beyond its breaking point.[3] The Secretary stated valid national security concerns

[3] The sole concurrence highlights the danger in extending *Department of Commerce* to "inquire into the 'mental processes of administrative decisionmakers.'" *Nat'l TPS All.*, 166 F.4th at 771 (Mendoza, J., and Wardlaw, J., concurring) (quoting *Dep't of Com.*, 588 U.S. at 781, 139 S. Ct. 2551). The sole concurrence wrongly looked to extra-record evidence and, along with the other errors, would have benefitted from en banc review. *Cf. Ramos*, 975 F.3d at 900-02 (R. Nelson, J., concurring).

which the Majority Concurrence disregarded. *See Ramos*, 975 F.3d at 896 (maj. op.). We should have corrected that error en banc.

III

Our role is to say what the law is. The panel opinion and the Majority Concurrence (nonbinding as it is) commingle and misconstrue Supreme Court precedent to invite judicial interference in the Executive's decisions about national security. I respectfully dissent from the denial of rehearing en banc.

## APPENDIX F

8 U.S.C. 1254a provides:

**Temporary protected status**

**(a) Granting of status**

**(1) In general**

In the case of an alien who is a national of a foreign state designated under subsection (b) (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state) and who meets the requirements of subsection (c), the Attorney General, in accordance with this section—

(A) may grant the alien temporary protected status in the United States and shall not remove the alien from the United States during the period in which such status is in effect, and

(B) shall authorize the alien to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.

**(2) Duration of work authorization**

Work authorization provided under this section shall be effective throughout the period the alien is in temporary protected status under this section.

**(3) Notice**

(A) Upon the granting of temporary protected status under this section, the Attorney General shall provide the alien with information concerning such status under this section.

(B) If, at the time of initiation of a removal proceeding against an alien, the foreign state (of which the alien is a national) is designated under subsection (b), the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.

(C) If, at the time of designation of a foreign state under subsection (b), an alien (who is a national of such state) is in a removal proceeding under this subchapter, the Attorney General shall promptly notify the alien of the temporary protected status that may be available under this section.

(D) Notices under this paragraph shall be provided in a form and language that the alien can understand.

**(4) Temporary treatment for eligible aliens**

(A) In the case of an alien who can establish a prima facie case of eligibility for benefits under paragraph (1), but for the fact that the period of registration under subsection (c)(1)(A)(iv) has not begun, until the alien has had a reasonable opportunity to register during the first 30 days of such period, the Attorney General shall provide for the benefits of paragraph (1).

(B) In the case of an alien who establishes a prima facie case of eligibility for benefits under paragraph (1), until a final determination with respect to the alien's eligibility for such benefits under paragraph (1) has been made, the alien shall be provided such benefits.

**(5) Clarification**

Nothing in this section shall be construed as authorizing the Attorney General to deny temporary protected status to an alien based on the alien's immigration status or to require any alien, as a condition of being granted such status, either to relinquish nonimmigrant or other status the alien may have or to execute any waiver of other rights under this chapter. The granting of temporary protected status under this section shall not be considered to be inconsistent with the granting of nonimmigrant status under this chapter.

**(b) Designations**

**(1) In general**

The Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state (or any part of such foreign state) under this subsection only if—

(A) the Attorney General finds that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;

(B) the Attorney General finds that—

(i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,

(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and

(iii) the foreign state officially has requested designation under this subparagraph; or

(C) the Attorney General finds that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, unless the Attorney General finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States.

A designation of a foreign state (or part of such foreign state) under this paragraph shall not become effective unless notice of the designation (including a statement of the findings under this paragraph and the effective date of the designation) is published in the Federal Register. In such notice, the Attorney General shall also state an estimate of the number of nationals of the foreign state designated who are (or within the effective period of the designation are likely to become) eligible for temporary protected status under this section and their immigration status in the United States.

**(2) Effective period of designation for foreign states**

The designation of a foreign state (or part of such foreign state) under paragraph (1) shall—

(A) take effect upon the date of publication of the designation under such paragraph, or such later date as the Attorney General may specify in the notice published under such paragraph, and

(B) shall remain in effect until the effective date of the termination of the designation under paragraph (3)(B).

For purposes of this section, the initial period of designation of a foreign state (or part thereof) under paragraph (1) is the period, specified by the Attorney General, of not less than 6 months and not more than 18 months.

**(3) Periodic review, terminations, and extensions of designations**

**(A) Periodic review**

At least 60 days before end of the initial period of designation, and any extended period of designation, of a foreign state (or part thereof) under this section the Attorney General, after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and shall determine whether the conditions for such designation under this subsection continue to be met. The Attorney General shall provide on a timely basis for the publication of notice of each such determination (including the basis for the determination, and, in the case of an affirmative determination, the period of extension of designation under subparagraph (C)) in the Federal Register.

**(B) Termination of designation**

If the Attorney General determines under subparagraph (A) that a foreign state (or part of such foreign state) no longer continues to meet the conditions for designation under paragraph (1), the

Attorney General shall terminate the designation by publishing notice in the Federal Register of the determination under this subparagraph (including the basis for the determination). Such termination is effective in accordance with subsection (d)(3), but shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most recent previous extension under subparagraph (C).

**(C) Extension of designation**

If the Attorney General does not determine under subparagraph (A) that a foreign state (or part of such foreign state) no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is extended for an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months).

**(4) Information concerning protected status at time of designations**

At the time of a designation of a foreign state under this subsection, the Attorney General shall make available information respecting the temporary protected status made available to aliens who are nationals of such designated foreign state.

**(5) Review**

**(A) Designations**

There is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.

**(B) Application to individuals**

The Attorney General shall establish an administrative procedure for the review of the denial of benefits to aliens under this subsection. Such procedure shall not prevent an alien from asserting protection under this section in removal proceedings if the alien demonstrates that the alien is a national of a state designated under paragraph (1).

**(c) Aliens eligible for temporary protected status**

**(1) In general**

**(A) Nationals of designated foreign states**

Subject to paragraph (3), an alien, who is a national of a state designated under subsection (b)(1) (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state), meets the requirements of this paragraph only if—

(i) the alien has been continuously physically present in the United States since the effective date of the most recent designation of that state;

(ii) the alien has continuously resided in the United States since such date as the Attorney General may designate;

(iii) the alien is admissible as an immigrant, except as otherwise provided under paragraph (2)(A), and is not ineligible for temporary protected status under paragraph (2)(B); and

(iv) to the extent and in a manner which the Attorney General establishes, the alien registers for the temporary protected status under this section during a registration period of not less than 180 days.

**(B) Registration fee**

**(i) In general**

The Attorney General may require payment of a reasonable fee as a condition of registering an alien under subparagraph (A)(iv) (including providing an alien with an "employment authorized" endorsement or other appropriate work permit under this section). The amount of any such fee shall not exceed $500, subject to the adjustments required under clause (ii). In the case of aliens registered pursuant to a designation under this section made after July 17, 1991, the Attorney General may impose a separate, additional fee for providing an alien with documentation of work authorization. Notwithstanding section 3302 of title 31, all fees collected under this subparagraph shall be credited to the appropriation to be used in carrying out this section.

**(ii) Annual adjustments for inflation**

During fiscal year 2026, and during each subsequent fiscal year, the maximum amount of the fee authorized under clause (i) shall be equal to the sum of—

(I) the maximum amount of the fee authorized under this subparagraph for the most recently concluded fiscal year; and

(II) the product resulting from the multiplication of the amount referred to in subclause (I) by the percentage (if any) by which the Consumer Price Index for All Urban Consumers for the month of July preceding the date on which such adjustment takes effect exceeds the Consumer Price Index for All Urban Consumers for the same month of the preceding calendar year, rounded to the next lowest multiple of $10.

**(iii) Disposition of temporary protected status fees**

All of the fees collected pursuant to this subparagraph shall be deposited into the general fund of the Treasury.

**(iv) No fee waiver**

Fees required to be paid under this subparagraph shall not be waived or reduced.

**(2) Eligibility standards**

**(A) Waiver of certain grounds for inadmissibility**

In the determination of an alien's admissibility for purposes of subparagraph (A)(iii) of paragraph (1)—

(i) the provisions of paragraphs (5) and (7)(A) of section 1182(a) of this title shall not apply;

(ii) except as provided in clause (iii), the Attorney General may waive any other provision of section 1182(a) of this title in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest; but

(iii) the Attorney General may not waive—

(I) paragraphs (2)(A) and (2)(B) (relating to criminals) of such section,

(II) paragraph (2)(C) of such section (relating to drug offenses), except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marijuana, or

(III) paragraphs (3)(A), (3)(B), (3)(C), and (3)(E) of such section (relating to national security and participation in the Nazi persecutions or those who have engaged in genocide).

**(B) Aliens ineligible**

An alien shall not be eligible for temporary protected status under this section if the Attorney General finds that—

(i) the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States, or

(ii) the alien is described in section 1158(b)(2)(A) of this title.

**(3) Withdrawal of temporary protected status**

The Attorney General shall withdraw temporary protected status granted to an alien under this section if—

(A) the Attorney General finds that the alien was not in fact eligible for such status under this section,

(B) except as provided in paragraph (4) and permitted in subsection (f)(3), the alien has not remained continuously physically present in the United States from the date the alien first was granted temporary protected status under this section, or

(C) the alien fails, without good cause, to register with the Attorney General annually, at the end of each 12-month period after the granting of such status, in a form and manner specified by the Attorney General.

**(4) Treatment of brief, casual, and innocent departures and certain other absences**

(A) For purposes of paragraphs (1)(A)(i) and (3)(B), an alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences from the United States, without regard to whether such absences were authorized by the Attorney General.

(B) For purposes of paragraph (1)(A)(ii), an alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence described in subparagraph (A) or due merely to a brief temporary trip abroad required by emergency or extenuating circumstances outside the control of the alien.

**(5) Construction**

Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for temporary protected status under this section.

**(6) Confidentiality of information**

The Attorney General shall establish procedures to protect the confidentiality of information provided by aliens under this section.

**(d) Documentation**

**(1) Initial issuance**

Upon the granting of temporary protected status to an alien under this section, the Attorney General shall provide for the issuance of such temporary documentation and authorization as may be necessary to carry out the purposes of this section.

**(2) Period of validity**

Subject to paragraph (3), such documentation shall be valid during the initial period of designation of the foreign state (or part thereof) involved and any extension of such period. The Attorney General may stagger the periods of validity of the documentation and authorization in order to provide for an orderly renewal of such documentation and authorization and for an orderly transition (under paragraph (3)) upon the termination of a designation of a foreign state (or any part of such foreign state).

**(3) Effective date of terminations**

If the Attorney General terminates the designation of a foreign state (or part of such foreign state) under subsection (b)(3)(B), such termination shall only apply to documentation and authorization issued or renewed after the effective date of the publication of notice of the determination under that subsection (or, at the Attorney General's option, after such period after the effective date of the determination as the Attorney General determines to be appropriate in order to provide for an orderly transition).

**(4) Detention of alien**

An alien provided temporary protected status under this section shall not be detained by the Attorney General on the basis of the alien's immigration status in the United States.

**(e) Relation of period of temporary protected status to cancellation of removal**

With respect to an alien granted temporary protected status under this section, the period of such status shall not be counted as a period of physical presence in the United States for purposes of section 1229b(a) of this title, unless the Attorney General determines that extreme hardship exists. Such period shall not cause a break in the continuity of residence of the period before and after such period for purposes of such section.

**(f) Benefits and status during period of temporary protected status**

During a period in which an alien is granted temporary protected status under this section—

(1) the alien shall not be considered to be permanently residing in the United States under color of law;

(2) the alien may be deemed ineligible for public assistance by a State (as defined in section 1101(a)(36) of this title) or any political subdivision thereof which furnishes such assistance;

(3) the alien may travel abroad with the prior consent of the Attorney General; and

(4) for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant.

**(g) Exclusive remedy**

Except as otherwise specifically provided, this section shall constitute the exclusive authority of the Attorney General under law to permit aliens who are or may become otherwise deportable or have been paroled into the United States to remain in the United States temporarily because of their particular nationality or region of foreign state of nationality.

**(h) Limitation on consideration in Senate of legislation adjusting status**

**(1) In general**

Except as provided in paragraph (2), it shall not be in order in the Senate to consider any bill, resolution, or amendment that—

(A) provides for adjustment to lawful temporary or permanent resident alien status for any alien receiving temporary protected status under this section, or

(B) has the effect of amending this subsection or limiting the application of this subsection.

**(2) Supermajority required**

Paragraph (1) may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members duly chosen and sworn. An affirmative vote of three-fifths of the Members of the Senate duly chosen and sworn shall be required in the Senate to sustain an appeal of the ruling of the Chair on a point of order raised under paragraph (1).

**(3) Rules**

Paragraphs (1) and (2) are enacted—

(A) as an exercise of the rulemaking power of the Senate and as such they are deemed a part of the rules of the Senate, but applicable only with respect to the matters described in paragraph (1) and supersede other rules of the Senate only to the extent that such paragraphs are inconsistent therewith; and

(B) with full recognition of the constitutional right of the Senate to change such rules at any time, in the same manner as in the case of any other rule of the Senate.

**(i) Annual report and review**

**(1) Annual report**

Not later than March 1 of each year (beginning with 1992), the Attorney General, after consultation with the appropriate agencies of the Government, shall submit a report to the Committees on the Judiciary of the House of Representatives and of the Senate on the operation of this section during the previous year. Each report shall include—

(A) a listing of the foreign states or parts thereof designated under this section,

(B) the number of nationals of each such state who have been granted temporary protected status under this section and their immigration status before being granted such status, and

(C) an explanation of the reasons why foreign states or parts thereof were designated under subsection (b)(1) and, with respect to foreign states or parts thereof previously designated, why the designation was terminated or extended under subsection (b)(3).

**(2) Committee report**

No later than 180 days after the date of receipt of such a report, the Committee on the Judiciary of each House of Congress shall report to its respective House such oversight findings and legislation as it deems appropriate.