

No. 26-48

IN THE
Supreme Court of the United States

MARKWAYNE MULLIN, SECRETARY, DEPARTMENT OF
HOMELAND SECURITY, ET AL., *Petitioners*,

v.

NATIONAL TPS ALLIANCE, ET AL., *Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**Brief *Amicus Curiae* of
America's Future,
Citizens United,
Citizens United Foundation, and
Conservative Legal Defense and Education
Fund in Support of Petitioners**

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INTEREST OF THE *AMICI CURIAE*¹

America's Future, Citizens United, Citizens United Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* filed *amicus* briefs in this case both in this Court and in the court below. *See Noem v. National TPS Alliance*, Sp. Ct. No. 24A1059, Brief Amicus Curiae of America's Future, et al. (May 8, 2025) and *National TPS Alliance v. Noem*, 9th Cir. No. 25-2120, Brief Amicus Curiae of America's Future, et al. (May 20, 2025). Some of these *amici* also filed an *amicus* brief in another TPS case which this Court recently decided in *Mullin v. Doe*, 146 S. Ct. 2121 (2026). *See Brief Amicus Curiae of America's Future, et al.* (Mar. 30, 2026).

¹ It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

Congress established the Temporary Protected Status (“TPS”) program in the Immigration Act of 1990. *See* 8 U.S.C. § 1254a. The TPS program authorizes the Secretary of the Department of Homeland Security (“DHS”) to designate a foreign country for TPS “to provide short-term humanitarian relief for aliens who cannot safely return to their home countries due to events such as armed conflict or natural disaster.” *Mullin v. Doe*, 146 S. Ct. 2121, 2128 (2026). “Once a country receives a TPS designation, certain nationals of that country living in the United States without another lawful immigration status qualify for work authorization and immunity from removal.” *Id.* at 2129. TPS designations are temporary, but can be extended for a maximum of 18 months at a time, and the Secretary is required to review each designation at least once every 18 months. *Id.* at 2129-30. TPS designations are automatically extended until the Secretary publishes a termination notice in the *Federal Register*.

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....” 8 U.S.C. § 1254a(b)(5)(A) (emphasis added).

On March 9, 2021, shortly after President Biden took office, then-DHS Secretary Alejandro Mayorkas designated Venezuela for TPS status. *See National TPS Alliance v. Noem*, 166 F.4th 739, 750 (9th Cir.

2026). “This designation was extended twice,” on September 8, 2022 and then on October 3, 2023. *Id.*

On January 17, 2025, just days before President Trump was sworn in, Mayorkas sought to tie the hands of the new administration by issuing an order to become effective on April 3, 2025 — after the end of the Biden Administration — extending his Venezuela TPS status for the maximum 18 months, until October 2, 2026. *See id.* at 751.

On January 28, 2025, DHS Secretary Kristi Noem vacated Mayorkas’ January 17, 2025 order to extend the 2023 designation by publishing notice of the vacatur on February 3, 2025. *See* 90 *Fed. Reg.* 8805 (Feb. 3, 2025). On February 1, 2025, Noem terminated the 2023 designation, effective in April 2025 (*i.e.*, 60 days after publication of the termination notice) with a notice published on February 5, 2025. *See* 90 *Fed. Reg.* 9040 (Feb. 5, 2025).

The National TPS Alliance and several individual Venezuelan and Haitian plaintiffs filed suit in the Northern District of California against then-Secretary Noem, principally arguing that her decisions violated the Administrative Procedure Act (“APA”). On March 31, 2025, the district court granted what was styled as plaintiffs’ “motion to postpone” Noem’s determinations. The court imposed its determination nationwide. *National TPS Alliance* at 753.

The district court on April 4, 2025, denied the government’s motion to stay its order. *Nat’l TPS All. v. Noem*, 2025 U.S. Dist. LEXIS 65363 (N.D. Cal.

2025). This Court granted a stay of the district court order on May 19, 2025, allowing the TPS terminations to proceed.

The district court granted summary judgment to the plaintiffs on September 5, 2025. A panel of the Ninth Circuit refused to stay the order, and on October 3, 2025, this Court granted the government’s second application for a stay. *Noem v. National TPS Alliance*, 146 S. Ct. 23 (2025). The Ninth Circuit affirmed on January 28, 2026, and denied rehearing en banc on March 11, 2026. *National TPS Alliance v. Noem*, 169 F.4th 796 (9th Cir. 2026). This led to the government’s present Petition for Certiorari.

SUMMARY OF ARGUMENT

It could be said that the Ninth Circuit’s decision below puts that circuit at odds with all three branches of the federal government. First, the Respondents and the courts below evaded Congress’s “judicial-review bar by creative pleading [and] clever lawyering.” *Mullin v. Doe* at 2136. Then, the courts below blocked the Executive’s decision on TPS. Finally, the courts below ignored this Court’s decisions staying lower court orders against this Administration’s TPS decisions. As this Court determined only weeks ago, “the TPS statute’s judicial-review bar applies to all non-constitutional claims.” *Id.* at 2137.

These *amici* urge that the Ninth Circuit should be denied any opportunity to repeat its history of “narrowing from below,” and thus, these *amici* believe the proper course is not just to remand the case for

reconsideration in light of *Mullin v. Doe*, but rather to order the lower courts to dismiss the case forthwith.

Alternatively, the Court should grant the Petition and schedule its consideration of the merits expeditiously. The history of the TPS cases has demonstrated that immigration plaintiffs engage in “lawfare” and use the judiciary to delay lawful decisions by the duly elected President to “run out the clock,” waiting until a subsequent administration can reverse the current President’s decisions. This issue should be resolved by this Court without delay.

ARGUMENT

I. DISTRICT COURTS HAVE NO AUTHORITY WHATSOEVER TO REVIEW THE SECRETARY’S TPS DETERMINATIONS.

A. The Courts Below Implicitly Rejected the Authority of Congress to Limit Federal Court Jurisdiction.

In crafting the Immigration Act of 1990, Congress erected a complete bar to any judicial review of any aspect of the DHS Secretary’s decisions relating to TPS designation:

There is **no** judicial review of **any determination** of the [Secretary] **with respect to** the designation, or **termination** or extension of a designation, of a foreign state under this subsection [TPS]. [8 U.S.C. § 1254a(b)(5)(A) (emphasis added).]

The courts below purported to reject the statutory authority of the Secretary to reach his or her decision to terminate TPS. In reality, the decision to set aside the DHS Secretary's actions constituted nothing less than a judicial usurpation of the unreviewable authority Congress granted to the Executive Branch in 8 U.S.C. § 1254a(b)(5)(A).

Congress could not have been more plain. As this Court recently explained, the jurisdictional bar statute "is clear, and its plain meaning is very broad." *Mullin* at 2133. The statute did not say there is no judicial review "except" or "but" or "unless" or any other qualifier. There is no judicial review, period. There is no review "with respect to" "any" such "determination." Thus, as properly applied here, the statute provides that the lower courts had "no" authority and "no" jurisdiction to hear and rule on "any" challenge brought by Respondents to the Secretary's decision.

Thus, Respondents' challenge should have been dismissed out-of-hand by the courts below. With the lower courts having failed to honor the "no judicial review" statute, and blithely dismissing this Court's rulings granting stays in this case, this Court should grant the petition. The risk of such *ultra vires* rulings might be minimized by an unequivocal declaration from this Court that 8 U.S.C. § 1254a(b)(5)(A) renders **all** aspects of any TPS termination wholly unreviewable by the judiciary.

The problem with the lower courts' decisions was the belief that they can somehow review the "statutory authority" behind the Secretary's decisions, and

declare that those decisions cannot stand because an unauthorized action was taken, and still somehow engage in “**no** judicial review of **any** determination of the [Secretary]....” 8 U.S.C. § 1254a(b)(5)(A) (emphasis added). However, because the distinction is a false one, the courts should have declined to exercise jurisdiction.

In an effort to justify its faux distinction between the statutory authority and the decision, the Ninth Circuit explained:

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.” Thus, the plain language of the statute does not bar judicial review of challenges to the Secretary’s statutory authority. [*National TPS Alliance v. Noem* at 756 (citations omitted).]

The circuit court’s explanation is unpersuasive. This Court recently decided a different set of TPS court decisions. In *Mullin*, the Court rejected an effort to view the judicial review bar of “determinations” narrowly, as the Ninth Circuit did here. In *Mullin*, it was argued that “determinations” included only final determinations and not determinations made along the way, which the plaintiffs claimed were subject to review. But the Court concluded that “determination is a commonly used term, and therefore [the] respondents bear the burden of showing that, as used

in § 1254a(b)(5)(A), it carries a technical, TPS-specific meaning.” *Mullin* at 2136.

The Ninth Circuit made a similar mistake to that which was rejected in *Mullin*. It claimed that the exercise of TPS authority was a “first order question” and that “[i]f Congress had intended the statute to preclude judicial review of all the Secretary’s actions, it could have used broader language.” *National TPS Alliance* at 756. The Ninth Circuit relied on this Court’s 1991 *McNary*² decision to claim that Congress could have used broader language to bar review of all actions. But in *Mullin*, albeit issued after the Ninth Circuit panel’s decision, this Court stated that the judicial-review bar at issue here “is clear, and its plain meaning is very broad.” *Id.* at 2133. It also distinguished and rejected application of *McNary*, explaining that it “turned on the specific wording of the provision at issue. It did not adopt the broad principle that the term ‘determination’ applies only to substantive matters.” *Id.* at 2134.

Although the Ninth Circuit’s decision was issued prior to this Court’s *Mullin* decision, the Ninth Circuit should have known better. *Mullin* did not break new ground. Indeed, nine judges dissented from the denial of rehearing en banc and reached a decision essentially endorsed by *Mullin* (and which *Mullin* cited). The Petition should be granted to correct the Ninth Circuit’s deviation.

² *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991)

**B. The Courts Below Impermissibly
Rejected the Constitution’s Placement of
Immigration Policy Choices in the Hands
of the Political Branches.**

The Ninth Circuit overrode the Constitution’s entrustment of immigration policy to the American people acting through the political branches. This Court has denied a superior role for the judiciary in asserting: “your guess is *better* than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives. They are entitled to weigh the relevant political and economic costs and benefits for themselves, ... and try novel social and economic experiments if they wish....” This Court explained “Judges cannot displace the cost-benefit analyses embodied in democratically adopted legislation guided by nothing more than their own faith....” *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 382 (2023) (internal quotations omitted). And as this Court recently noted, quoting from Judge Bumatay’s dissent from the denial of rehearing en banc below, “Sometimes Congress decides that the political process is the proper forum for remedying improper conduct,” if any. *Mullin* at 2137.

As a further protection of the rights of the People to make the laws under which they live, the Framers allowed Congress power to limit the jurisdiction of the federal courts:

Congress’ greater power to create lower federal courts includes its lesser power to “limit the

jurisdiction of those Courts.” So long as Congress does not violate other constitutional provisions, its “control over the jurisdiction of the federal courts” is “plenary.” Thus, when Congress strips federal courts of jurisdiction, it exercises a valid legislative power no less than when it lays taxes, coins money, declares war, or invokes any other power that the Constitution grants it. [*Patchak v. Zinke*, 583 U.S. 244, 252-53 (2018) (internal citations omitted).]

The federal courts must respect limitations put on them by Congress:

The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct.... Congress [has] power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command.... [T]he only concern of courts is to ascertain whether the will of Congress has been obeyed. [*Yakus v. United States*, 321 U.S. 414, 424-25 (1944).]

Rather than deferring to the political branches, the courts below entertained the Respondents’ “creative pleading” and “clever lawyering” in order to circumvent — rather than respect — Congress’s bar of judicial review of TPS determination. In the end, the

Ninth Circuit imposed its policy preferences over those of Congress and Congress's delegated agent, the Secretary. The court's opinion was not an effort to discern and follow the purpose of this statute.

II. THE DISTRICT COURT AND THE NINTH CIRCUIT CANNOT BE TRUSTED TO GET IT RIGHT.

The Petition requests the Court to grant, vacate, and remand in light of *Mullin*. Pet. at 10. This may be the normal procedure, but these *amici* believe this case calls for a different approach.

The decision issued by the district court cannot properly be viewed in isolation, but rather as the latest chapter in a war being waged — largely successfully — by one district court judge to prevent both the first and second Trump Administrations from lawfully exercising the discretion given by Congress to the Executive Branch to administer the TPS program. These circumstances are extraordinary, date back over an eight-year period, and if they are ignored by this Court, they will contribute mightily to the diminishing lack of public confidence in the federal judiciary.

Within the first year of President Trump's first term (between September 2017 and January 2018), the DHS Secretary terminated TPS status for Haiti, Sudan, Nicaragua, and El Salvador. *See Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1082-85 (N.D. Cal.

2018) (“*Ramos I*”).³ On October 3, 2018, former ACLU immigration lawyer, District Judge Chen, granted plaintiffs’ Motion for Preliminary Injunction, enjoining these four termination orders, summarizing his reasons as follows:

[T]he Acting Secretary or Secretary of DHS, in deciding to terminate the TPS status of Haiti, El Salvador, Nicaragua and Sudan, **changed the criteria applied by the prior administrations**, and did so without any explanation or justification in violation of the Administrative Procedure Act. There is also evidence that this may have been done in order to implement and justify a **preordained result desired by the White House**. Plaintiffs have also raised **serious questions** whether the actions taken by the Acting Secretary or Secretary was **influenced by the White House and based on animus against non-white, non-European immigrants** in violation of **Equal Protection** guaranteed by the Constitution. The issues are at least serious enough to preserve the status quo. [*Ramos I* at 1080-81 (emphasis added).]

³ *Ramos I* was reversed by *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020) (“*Ramos II*”), which was vacated by grant of rehearing *en banc*, *Ramos v. Wolf*, 59 F.4th 1010 (9th Cir. 2023). That appeal was voluntarily dismissed after President Biden took office. See *Ramos v. Mayorkas*, 2023 U.S. App. LEXIS 16518 (9th Cir. 2023).

To summarize, Judge Chen objected to the Trump Administration (i) changing the policies of the Obama Administration (ii) in order to carry out the policies of President Trump. Judge Chen grounded his decision on the “equal protection component” of the Fifth Amendment based on his perceived “serious questions” that someone in the Trump Administration harbored “animus against non-white, non-European immigrants.” A Ninth Circuit panel reversed Judge Chen’s injunction, but that decision was vacated when en banc review was ordered, allowing the injunction to stay in effect, which “ran out the clock” until President Biden was able to take over from President Trump. Thus, Judge Chen’s injunction prevented the Trump Administration from changing these TPS policies during the President’s entire first four-year term.⁴

Judge Chen essentially recycled his opinion in *Ramos*, including his circumvention of the statute which provided for “no judicial review” of TPS orders, and imputations of animus to the Trump Administration to keep in place the Biden Administration’s policies, as he previously had acted to keep in place the Obama Administration’s policies. *See National TPS Alliance v. Noem*, 798 F. Supp. 3d 1108 (N.D. Cal. 2025). This Court’s intervention is required to ensure that elements of the federal judiciary are not working to “run out the clock” to

⁴ In the *Ramos* case, the government — unlike here — stipulated to leaving the TPS designations in effect during the appeal of the district court’s injunction. *See Ramos II* at 887 n.11.

block the very changes that the American People elected President Trump to implement.⁵

Likewise, the Ninth Circuit has a demonstrated history of resisting this Court’s precedents on topics on which it does not agree. Despite this Court’s two stays in this case, the Ninth Circuit distinguished them in order to rule the way it desired on TPS.

This is very similar to the Ninth Circuit’s record on Second Amendment issues, especially since *D.C. v. Heller*, 554 U.S. 570 (2008). Judge VanDyke expressed his frustration, stating, “[c]ome hell or high water, *Heller* or *Bruen*, our court will find a way to uphold any weapons restriction.... And the Supreme Court’s occasional grant of certiorari and reversal has done *nothing* — and I mean that literally — to change our court’s behavior.” *Knife Rts., Inc. v. Bonta*, 2026 U.S. App. LEXIS 20960, at *82 (9th Cir. 2026) (VanDyke, J., dissenting from denial of rehearing en banc). Judge VanDyke believes that this Court “should consider summarily reversing some of [the Ninth Circuit’s] wayward Second Amendment decisions. To put it more colloquially, it’s time for some benchslaps.” *Id.*

The Ninth Circuit should not be trusted with a remand “in light of *Mullin*.” It can be expected to view *Mullin* as narrowly as it viewed the judicial-review

⁵ It is no secret that the American People are losing confidence in courts. See Benedict Vigers & Lydia Saad, “Americans Pass Judgment on Their Courts: Sharp decline in confidence in judiciary is among the largest Gallup has ever measured,” *Gallup* (Dec. 16, 2024).

bar. As Justice Thomas’s concurrence noted, “[t]he Court does not decide whether the ... respondents’ equal protection claim is barred as well.” *Mullin* at 2140 (Thomas, J., concurring). Thomas noted that “[t]he statutory text does not distinguish statutory and constitutional claims; it bars all ‘judicial review.’” *Id.*

Just as the Ninth Circuit was able to reach the decision it desired even with the “clear” and “very broad” judicial-review bar, it will be able to read *Mullin* in a way that allows it to reaffirm its prior decision and thwart change for as long as it can.

Thus, *amici* urge this Court to grant the petition, not with just a remand for the courts below to reconsider its opinion in view of *Mullin*, but instead with a clear directive to the lower courts to dismiss the challenges forthwith.

Alternatively, these *amici* urge this Court to grant review and consider the case on the merits expeditiously and issue clear direction to the courts below that the judiciary is not to be used as a platform for political resistance to the will of the American people as expressed in a Presidential election.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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