

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARKWAYNE MULLIN, SECRETARY,)

4 DEPARTMENT OF HOMELAND SECURITY,)

5 ET AL.,)

6 Petitioners,)

7 v.) No. 25-1083

8 DAHLIA DOE, ET AL.,)

9 Respondents.)

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11 DONALD J. TRUMP, PRESIDENT)

12 OF THE UNITED STATES, ET AL.,)

13 Petitioners,)

14 V.) No. 25-1084

15 FRITZ EMMANUEL LESLY MIOT, ET AL.,)

16 Respondents.)

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19 Washington, D.C.

20 Wednesday, April 29, 2026

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22 The above-entitled matter came on for
23 oral argument before the Supreme Court of the
24 United States at 10:35 a.m.

25

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P R O C E E D I N G S

(10:35 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 25-1083, Mullin versus Doe, and the consolidated case. General Sauer.

ORAL ARGUMENT OF GEN. D. JOHN SAUER
ON BEHALF OF THE PETITIONERS

GENERAL SAUER: Mr. Chief Justice, and may it please the Court:

Respondents here seek judicial review of the Secretary's decisions to terminate Temporary Protected Status for Syria and Haiti. Yet Section 1254a(b)(5)(A) provides that 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 Temporary Protected Status.

That provision means what it says. "Determination" is hardly a rarely used word that broadly includes the Secretary's decisions, conclusions, or opinions. Both "any" and "with respect to" have an expansive meaning and a broadening effect. The provision thus bars judicial review of both the

1 Secretary's ultimate decision whether to
2 designate, extend, or terminate and of each
3 antecedent step along the way to that
4 determination.

5 Respondents' attempts to carve out
6 exceptions to the review bar would eviscerate
7 it because virtually any substantive challenge
8 could be recast as a procedural claim, as their
9 own claims demonstrate.

10 Moreover, their claims plainly cannot
11 be raised without referring to or relying on
12 the termination decisions, and they challenge
13 the very kind of foreign-policy-laden judgments
14 that are traditionally entrusted to the
15 political branches.

16 Even if their claims are not barred,
17 they are meritless. The statute does not
18 micromanage the degree of consultation with
19 other agencies. Paragraph (b)(3) requires the
20 Secretary to consider the national interest in
21 reviewing designations made under (b)(1)(C)
22 because it requires her to determine whether
23 the foreign state continues to meet the
24 conditions for designation under paragraph (1).

25 Far from demonstrating pretext, the

1 fact that the Secretary exercised her
2 discretion consistently is a virtue, not a
3 vice. And the Miot Respondents' constitutional
4 claim is meritless under any standard of
5 review.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: What was the practice
8 before the -- this statute was adopted?

9 GENERAL SAUER: That was the EVD
10 practice --

11 JUSTICE THOMAS: Yeah.

12 GENERAL SAUER: -- that's discussed in
13 the Smith -- the en banc Smith decision from
14 the D.C. Circuit. And that was, I think,
15 properly characterized by Judge Silberman in
16 his opinion as essentially a forbearance policy
17 that fell within the heartland of Heckler
18 against Cheney.

19 So one of the points we make is that
20 the historical background of this statute is a
21 statute where there was limited, if any,
22 judicial review of executive discretion in that
23 case. And it's telling that President Bush, in
24 his signing statement, objected to Congress
25 moving into this area and entrenching on what

1 he viewed as the executive's traditionally
2 unreviewable discretion. So it's unsurprising
3 in that context that Congress passed a judicial
4 review bar that at least partially accommodated
5 the executive's constitutional objection to the
6 sort of imposition of these kinds of
7 regulations in that particular area.

8 JUSTICE THOMAS: If the President or
9 the executive branch has constitutional
10 authority to do this in a discretionary way,
11 can Congress limit that?

12 GENERAL SAUER: We don't dispute that
13 here. President Bush obviously objected on
14 that ground. But we don't dispute that
15 Congress can move in here. And what -- and
16 what they've done, as we envision it, they have
17 moved into an area that was really kind of a
18 forbearance or an enforcement policy regime,
19 and they've elevated it to a particular status
20 and said here are the criteria for regulating
21 that status. And we don't dispute that
22 Congress has the authority to do that.

23 JUSTICE THOMAS: Are there -- are
24 there any examples of that discretionary
25 authority being challenged?

1 GENERAL SAUER: You mean in this
2 particular case or more generally?

3 JUSTICE THOMAS: More generally.

4 GENERAL SAUER: Well, there is the
5 DED -- I'm not sure if this is responsive to
6 the question, but there is the DED policy
7 that's kind of a -- as I understand it, a -- a
8 successor of the EVD. I won't call it a -- I
9 guess program, you could call it, from -- from
10 the 1980s.

11 So there are situations where the
12 executive exercises enforcement discretion
13 here. When it comes to TPS, Congress has
14 entered the area, has created it as a
15 particular immigration status, and we don't --
16 we don't dispute that Congress can do that
17 here.

18 JUSTICE JACKSON: Counsel, do you --

19 JUSTICE SOTOMAYOR: General --

20 CHIEF JUSTICE ROBERTS: You rely on
21 Trump versus Hawaii in -- in your argument, but
22 that involved the President and entry
23 restrictions. Here, we're concerned with the
24 Secretary and -- and aliens that are already
25 present -- present. Your argument is a

1 significant expansion of Trump versus Hawaii,
2 isn't it?

3 GENERAL SAUER: Well, I point to what
4 the Court said in the particular paragraph
5 where it discusses why rational basis review
6 would apply here as opposed to a more stringent
7 review under Arlington Heights. The Court
8 pointed to features like this is neutral on its
9 face, which we have here; it's within the core
10 of the executive responsibility, which we also
11 have here; it's freighted with foreign
12 relations concerns and national security
13 concerns.

14 Those kinds of criteria are all
15 present here. Obviously, as the Court
16 correctly -- as you point -- correctly point
17 out, the President was involved, and it was an
18 exclusion as opposed to people who are already
19 here under a -- under a kind of status.

20 However, the Court did go on to say
21 that -- that Trump versus Hawaii applies across
22 different contexts and constitutional claims.
23 And the cases that it cited, like Kleindienst
24 against Mandel and -- and the other -- Mathews
25 against Diaz and other cases that are cited

1 there are also cases that weren't -- didn't
2 have those particular features of it.

3 So, for those reasons, we think Trump
4 against Hawaii provides the proper, the
5 rational basis standard for their
6 constitutional claim. However, if the Court
7 goes the other way, we also claim that, as I
8 said before, that's meritless under any
9 standard of review.

10 JUSTICE JACKSON: Can I take you back
11 to the EVD discussion that you had with Justice
12 Thomas? Although President Bush may have
13 objected to the restrictions and the intent to
14 cabin the Secretary's discretion, wasn't it
15 Congress's view that the EVD program was
16 seriously flawed -- in fact, I'm quoting now
17 from the legislative history -- "seriously
18 flawed and in urgent need of reform"?

19 GENERAL SAUER: That certainly may
20 have been the views of some legislators. What
21 we know is that Congress --

22 JUSTICE JACKSON: No, I'm talking
23 about the House report, that the reason why the
24 TPS came into being and we still don't have the
25 EVD unregulated scheme was because Congress was

1 concerned about the fact that, for example,
2 "the conditions under which safe haven may be
3 granted, extended, or terminated do not appear
4 in any regulation," that it appeared as though
5 the executive was exercising its discretion in
6 an unregulated fashion, and so Congress created
7 this statute in order to restrict the
8 executive, and wasn't that the reason why
9 President Bush was objecting to it?

10 GENERAL SAUER: Well, I can't speak
11 for President Bush. I don't dispute most of
12 what you said. We do believe Congress moved
13 into an area where there was really, you know,
14 a perception at least of kind of unfettered
15 discretion, unregulation, set forth sort of
16 broad and highly discretionary criteria in
17 which the --

18 JUSTICE JACKSON: All right. So are
19 those reviewable in your view? Now we have a
20 statute in which Congress has clearly required
21 the Secretary to take certain statutory steps,
22 to include, for example, consultation. Are
23 those reviewable in your view?

24 GENERAL SAUER: What is not reviewable
25 is any determination with respect to --

1 JUSTICE JACKSON: I'm asking you what
2 is reviewable. Is it reviewable for a person
3 to allege that the Secretary made this
4 determination without following the statutory
5 steps?

6 GENERAL SAUER: Certainly not.

7 JUSTICE JACKSON: Not?

8 GENERAL SAUER: That would be a
9 determination with respect to a -- for example,
10 here, a -- a -- a termination of --

11 JUSTICE JACKSON: So what was the
12 point of Congress putting this statute into
13 being and having requirements for the Secretary
14 if there was no ability for anyone to challenge
15 the Secretary's compliance?

16 GENERAL SAUER: Congress may presume,
17 as this Court frequently does, that the
18 executive would -- would be presumed to act
19 within the bounds of -- that it set forth, and
20 Congress provided for ongoing congressional
21 oversight. So there's an annual reporting
22 requirement. There is a six- to 18-month
23 situation.

24 So, in a sense, judicial review is
25 kind of a misfit with this particular statute

1 because the Secretary has to go back every 18
2 months and reconsider and reconsider, and
3 judicial review, as we see here --

4 JUSTICE JACKSON: What -- what do you
5 do -- what do you do with the precedents of
6 this Court -- and I'm thinking about Bowen and
7 I'm thinking about -- gosh, there was another
8 one -- in which we don't agree that a
9 determination is what you're saying it is?

10 In other words, you know, in Bowen, we
11 specifically indicated that -- and it used very
12 similar language -- and we said, let's see --
13 Bowen used the language any determination of
14 the amount of benefits under the Medicare
15 statute was in the judicial review bar. And we
16 said that provision "simply does not speak to
17 the" -- "to challenges mounted against the
18 method by which such amounts are to be
19 determined rather than the determinations
20 themselves."

21 We drew a clear distinction that
22 included the word and concept of determination.
23 So how do you distinguish that from this?

24 GENERAL SAUER: As to Bowen, the
25 statute in Bowen actually had an affirmative

1 grant of the power to judicial review, so as to
2 the Part A Medicare benefits that were at issue
3 there, the stat -- the statute said we are
4 affirmatively granting judicial review of those
5 to an extent.

6 And then, in a prior case, this Court
7 in Erica had said we infer -- we -- we -- we --
8 we sort of imply from that that there is no
9 judicial review of Part B. Then, when it came
10 to Bowen, the Court said we're not going to
11 take that negative inference and hold that
12 that, you know --

13 JUSTICE SOTOMAYOR: General, can I --

14 GENERAL SAUER: -- satisfied the
15 traditional review.

16 JUSTICE SOTOMAYOR: Your position
17 seems to be, and you said it in your opening,
18 any step in the process is not subject to
19 judicial review. If the Secretary posted a
20 notice on X saying, "I hereby terminate Syria's
21 TPS effect" -- "TPS program effective
22 tomorrow," you would say that there's no
23 judicial review of that decision, correct?

24 GENERAL SAUER: Correct.

25 JUSTICE SOTOMAYOR: That means that

1 even though the statutory requirements required
2 her to post this not on X but on the Federal
3 Register, it requires that TPS holders be given
4 60 days' notice of the termination, it requires
5 that she consult with department agencies, and
6 she doesn't -- let's assume it, all right --
7 that none of those procedural steps required by
8 the statute are reviewable? That's your
9 position?

10 GENERAL SAUER: Correct. And we
11 would -- or I would venture that it's
12 procedural, yeah.

13 JUSTICE SOTOMAYOR: All right. So the
14 agency could have said the -- Congress could
15 have said any termination of TPS status is
16 unreviewable. But it didn't. It did a
17 different formulation. It did determination of
18 termination.

19 That seems to me very close to McNary,
20 where we said you can't challenge the
21 substantive conclusion, but you can challenge
22 the procedural or policies underlying that
23 choice. I don't see how you differentiate
24 McNary.

25 GENERAL SAUER: I would say -- I would

1 point to three things to distinguish McNary.
2 And keep in mind, our position is that there is
3 no McNary exception here at all, but if there
4 is, the Court disagrees, they don't fit within
5 that.

6 JUSTICE SOTOMAYOR: Well, but -- but
7 what you're -- what -- what you're basically
8 saying is Congress wrote a statute for no
9 purpose because it set forth procedural steps
10 that had to be followed, and the Constitution,
11 as we have said, due process applies to any
12 alien who lives in the United States. It
13 applies to all people living here -- I know you
14 have said unlawfully, but at least these
15 people, until the termination, are here
16 lawfully and with permission. They're entitled
17 to due process.

18 And now Congress has given them a
19 process. It may not be a court process, but
20 that's okay. It's a process. And you're
21 saying that the President -- it's unreviewable
22 whether the President has followed that
23 process.

24 GENERAL SAUER: The Secretary. And
25 what Congress says there is --

1 JUSTICE SOTOMAYOR: Well, I mean --

2 CHIEF JUSTICE ROBERTS: Counsel,
3 you -- excuse me. You said a moment ago that
4 there were three points in response to the --
5 my colleague's question. Could you just
6 briefly mention those?

7 GENERAL SAUER: Sure. Yeah. Two
8 buckets and the first has three points. So the
9 first bucket is we say there is no McNary
10 exception that's implied by this statute. And
11 McNary differs in text, there's textual
12 differences in the statute. There's the
13 subject matter, the sort of decision that is
14 exempt here with judicial review, as I said at
15 the beginning, is the sort of thing that is
16 traditionally, you know, entrusted to the
17 political branches. And then there's the
18 historical background that we -- we -- we -- I
19 discussed with Justice Thomas in the beginning.

20 So, if you look at the textual
21 differences, a determination where both McNary
22 and Reno said that determination is used in a
23 specialized sense --

24 CHIEF JUSTICE ROBERTS: Thank you.

25 GENERAL SAUER: -- in that particular

1 statute is different than any determination
2 with respect to.

3 CHIEF JUSTICE ROBERTS: Thank you.

4 GENERAL SAUER: Yes.

5 CHIEF JUSTICE ROBERTS: Got it.

6 JUSTICE SOTOMAYOR: So I'm not quite
7 sure, and not so long ago you came in and said
8 that every executive officer has to be
9 answerable to the President. So the
10 President's statements have to be attributable
11 to its executive officers, to the Secretary.

12 I don't see how you can take both
13 positions.

14 GENERAL SAUER: I --

15 JUSTICE SOTOMAYOR: Either an
16 executive follows the President's orders or it
17 doesn't.

18 GENERAL SAUER: I -- I would point to
19 what the Court said or at least the Chief
20 Justice's opinion in Regents discussed this and
21 said the President's at a certain remove from
22 this decision. The statute places this,
23 invests this decision in the Secretary, and the
24 Secretary is --

25 JUSTICE SOTOMAYOR: But the Secretary

1 here, Noem, said she was following the
2 President's policy. That's what she announced
3 when she was reviewing these items.

4 GENERAL SAUER: I think --

5 JUSTICE SOTOMAYOR: So I don't know
6 how we can't attribute what the President had
7 said his policy is when she herself says she's
8 following it.

9 GENERAL SAUER: We know what the
10 President directed her to do because it's in
11 the executive order, 14159, the invasion
12 proclamation, where the President said
13 specifically in respect to TPS that she should
14 ensure that, or he now, but she should --

15 JUSTICE SOTOMAYOR: But that
16 doesn't -- but that doesn't give her a right to
17 do what I started with, which is to announce
18 the termination of this policy in contravention
19 of every procedural step, which was the
20 hypothetical I gave you.

21 You're saying that's not reviewable.

22 GENERAL SAUER: But baked into the
23 very concept of a judicial review bar is the
24 possibility that the -- the decision that's not
25 subject to judicial review might be based --

1 totally baseless, arbitrary, you know, wrongly
2 decided, or -- or -- or really crazy.

3 JUSTICE KAGAN: Well, that's true,
4 General --

5 JUSTICE BARRETT: General --

6 JUSTICE KAGAN: -- but -- but I guess
7 the question is in what? I -- I mean, this
8 judicial review bar is a broad one, means
9 something.

10 If -- if there's a completely
11 arbitrary understanding of what the country
12 conditions are, there's nothing a court can do
13 about that, right? So, you know, basically,
14 Congress has said this can be the weirdest,
15 strangest, most arbitrary conclusion as to
16 country conditions, and the courts still can't
17 do anything.

18 So point taken there. But that's a
19 different thing than to say that all the things
20 that the statute says that the Secretary is
21 supposed to do in order to determine country
22 conditions are themselves unreviewable. I'm
23 sorry, I'm losing my voice.

24 Because what the statute says is,
25 look, she shall review country conditions after

1 consultation, and if she decides I don't feel
2 like consulting and, more to the point, I don't
3 even feel like reviewing country conditions, I
4 want to do some completely different kind of
5 analysis to determine whether to make this
6 designation, is it really feasible that
7 Congress meant for those decisions to be
8 unreviewable?

9 GENERAL SAUER: I think --

10 JUSTICE KAGAN: I'm really sorry. Go
11 ahead. And, you know, your -- the likelihood
12 of my asking a follow-up is very --

13 (Laughter.)

14 JUSTICE KAGAN: -- is very diminished.

15 GENERAL SAUER: Congress said any --
16 any determination with respect to designation,
17 extension, or termination is not subject to
18 judicial review. In EPA against Calumet, this
19 Court talked about --

20 JUSTICE KAGAN: Right. But the
21 determination -- you see, I'm already going.

22 (Laughter.)

23 JUSTICE KAGAN: I mean, the
24 determination can refer straight back to what
25 the Secretary is supposed to determine, which

1 is whether the conditions for designation
2 continue to be met.

3 Okay. That's it.

4 GENERAL SAUER: I mean, they make an
5 argument like this. They say determination is
6 used in a specialized sense in the statute. I
7 just think that textually is baseless. I mean,
8 by my count, "determination" is used in this --
9 this one statutory section in five different
10 senses. It talks about things about your
11 eligibility for benefits. That's a
12 determination. Admissibility, that's a
13 determination. Whether there's extreme
14 hardship, that's a determination.

15 JUSTICE JACKSON: But does that hurt
16 you or help you? I mean, I'll -- I'll pick up
17 where Justice Kagan left off.

18 You know, we -- we have specific
19 things in the statute that Congress says the
20 Secretary has discretion to determine. And
21 then Congress also has parts of the statute
22 that directs the Secretary specifically with
23 respect to the steps that she is to take in
24 order to make those determinations.

25 So I -- I just think you're kind of

1 struggling against what seems to be the most
2 obvious way and the most straightforward way to
3 understand this statute, which is that when the
4 judicial review bar says that the courts cannot
5 review the determinations of the Secretary, it
6 is referencing the things, the substantive
7 conclusions that the Secretary must make under
8 the statute.

9 And some of them are, you know, not
10 the ultimate. Some of them are findings. For
11 example, the Secretary has to make certain
12 findings, says the statute. And I could see
13 how those could be determinations. So it's not
14 that we're just looking for the word
15 "determination" in the statute, but we're
16 understanding that Congress has directed this
17 Secretary in this statute, in contrast with the
18 prior regime, to make certain findings, make
19 certain determinations, and here is how you go
20 about doing it.

21 And so my question is, when someone
22 says the Secretary has not followed those
23 steps, they didn't -- she didn't consult, she
24 didn't put it in the right place in terms of
25 notice -- this is Justice Sotomayor's

1 example -- it's very hard, I think, to say that
2 the judicial review bar, which speaks only to
3 the determinations of the Secretary, precludes
4 that kind of claim.

5 GENERAL SAUER: Two points.

6 "Determination" is a broad term, as the Court
7 held in EPA against Calumet, that encompasses
8 any decision, opinion, or conclusion. So --

9 JUSTICE JACKSON: Including the
10 decision not to follow the steps? That's your
11 point?

12 GENERAL SAUER: Right. When it says
13 "any" -- I'd say two things about that. When
14 it says "any determination with respect to,"
15 here, a termination decision --

16 JUSTICE JACKSON: It means any --

17 GENERAL SAUER: -- the --

18 JUSTICE JACKSON: -- decision not to
19 follow the steps that we've put in the statute?

20 GENERAL SAUER: So, if there is a
21 determination that, oh, I don't think there are
22 any appropriate agencies to consult with here
23 and, therefore, I'm not to consult, that's a
24 determination within the plain meaning of that
25 term.

1 But, more fundamentally, it -- it bars
2 judicial review -- certainly, everyone concedes
3 it bars judicial review of that final
4 determination. And look at it in the context
5 of this case, where both sets of plaintiffs
6 have filed complaints saying --

7 JUSTICE JACKSON: Yes, we can see
8 that, but that's -- they're saying that's not
9 all the kinds of claims we'd like to make. And
10 we're just now focusing on the kinds of claims
11 that aren't the final determination.

12 There, the Secretary's decision -- and
13 I had a hypothetical -- to pull out a Ouija
14 board. The Secretary says, you know how I'm
15 going to figure this out? I'm going to --
16 another example -- put Syria in a hat and, you
17 know, Haiti in a hat on a slip of paper and all
18 the countries, and I'll pull out the ones that
19 get TPS and I -- that's not following the
20 statutory steps. She's made a determination to
21 do that, and your view would be that no
22 judicial review of that -- of that claim?

23 GENERAL SAUER: And any exception that
24 the Court would craft here would be something
25 that a truck could be driven through. And

1 that's what we see in the lower courts, and
2 that's what we see in the briefing in this
3 case.

4 JUSTICE JACKSON: All right. Okay.

5 GENERAL SAUER: I mean, look, for
6 example, at --

7 JUSTICE BARRETT: General, can I ask
8 you a question? You seem to concede that the
9 constitutional claims are not barred by this
10 very same provision. Is that right? And, if
11 so, why?

12 GENERAL SAUER: We are -- under
13 Webster against Doe, Demore against Kim, and so
14 forth, we have disputed that there be -- may be
15 a little extra clear statement that would be
16 required to exclude constitutional claims. We
17 just haven't disputed that in this case. We're
18 not asking the Court to revisit Webster, for
19 example, in this case.

20 JUSTICE BARRETT: So you think Webster
21 is on all fours with this?

22 GENERAL SAUER: I don't know if it's
23 on all fours. We think Webster and Demore are
24 strong enough to indicate that under those
25 cases, we'd have to be fighting with those

1 cases, so to speak, to argue that there's no
2 judicial review of the constitutional claims
3 here. And, here, of course, we think the
4 constitutional claims -- it's not -- not a
5 close call, basically.

6 But we have not disputed that. We --
7 we -- we don't argue that the judicial review
8 bar extends to the constitutional claim.

9 JUSTICE SOTOMAYOR: So, counsel, let's
10 go back to the Chief's question on Hawaii.
11 Assume that I disagree with you and that
12 Arlington Heights applies because Hawaii and
13 all of the cases that you cited supporting it
14 involve aliens coming into the United States,
15 not aliens in the United States.

16 So let's assume that I believe that
17 due process requires some process for aliens
18 who are here to be removed. Then we can argue
19 about what that process is and -- and how
20 binding it is or not.

21 But, if it's Arlington Heights, a
22 discriminatory purpose just needs to be a
23 reason, not the only reason for acting,
24 correct?

25 GENERAL SAUER: A motivating factor, I

1 think, is what it says.

2 JUSTICE SOTOMAYOR: Motivating factor.

3 Now this Court has explained an
4 additional purpose to discriminate against poor
5 whites would not render nugatory the purpose to
6 discriminate against all blacks.

7 Now we have a President saying at one
8 point that Haiti is a "filthy, dirty, and
9 disgusting s-hole country" -- I'm quoting
10 him -- and where he complained that the United
11 States takes people from such countries instead
12 of people from Norway, Sweden, or Denmark,
13 where he declared illegal -- where he declared
14 illegal immigrants, which he associated with
15 TPS, as poisoning the blood of America.

16 I don't see how that one statement is
17 not a prime example of the Arlington example at
18 work and showing that a discriminatory purpose
19 may have played a part in this decision.

20 GENERAL SAUER: All the statements
21 that they cite as to the Secretary and as to
22 the President -- and, obviously, there's an
23 issue there about which one you're going to
24 weigh more heavily -- none of them, not a
25 single one of them, mentions race or relates to

1 race in any way.

2 JUSTICE SOTOMAYOR: Well, it -- it
3 certainly does when you're saying we're taking
4 the -- we're taking people from these
5 countries' TPS program which are all non-white,
6 but, instead, we should be taking people from
7 Norway, Sweden, or Denmark. It -- it seems to
8 me that that's as close to the Arlington
9 example as you can get.

10 GENERAL SAUER: All those statements
11 in context refer to problems like crime,
12 poverty, welfare dependence, drugs, drug
13 importation.

14 JUSTICE SOTOMAYOR: Well, but the --
15 the Arlington example is, yes, I don't want
16 poor people. But not all people from Norway,
17 Sweden, or Denmark are necessarily rich, but
18 they are all virtually white.

19 GENERAL SAUER: The Chief Justice's
20 opinion in Regents, for example, refers to
21 actually some of the very same statements that
22 they allege here, statements that are now nine,
23 10 years sold.

24 JUSTICE SOTOMAYOR: But Regents --
25 Regents applied a very different standard of

1 review because of the nature of the applicant.
2 This is a very different question. This is
3 whether a race-based classification could --
4 can be or should be permitted to be a
5 motivating factor.

6 GENERAL SAUER: I strongly disagree
7 with that. Regents assumed that Arlington
8 Heights would apply, and it said these kinds of
9 statements are unilluminating. They, you know,
10 raise no plausible inference of discriminatory
11 animus. Yeah?

12 JUSTICE JACKSON: General, what about
13 poisoning the blood of Americans?

14 GENERAL SAUER: If you -- if you look
15 at those statements in context, again, they're
16 clearly talking about problems like crime --

17 JUSTICE JACKSON: What about bad
18 genes, "bad genes"?

19 GENERAL SAUER: Again, poverty --

20 JUSTICE JACKSON: Also not -- not
21 racially --

22 GENERAL SAUER: Yes. Yeah, they --
23 they -- they presented them wrenched from
24 context. You can look at each one of those
25 statements. They're talking about problems of

1 crime, poverty, welfare dependency, again,
2 problems that have been emphasized again and
3 again by not just President Trump, not just the
4 Secretary, but many others who favor a tough
5 immigration policy. And if the position of the
6 district courts here --

7 JUSTICE JACKSON: So your -- the
8 position of the United States is that we have
9 to have an actual racial epithet, that we
10 don't -- we aren't allowed to look at all the
11 contexts, to include the President's insistence
12 that immigrants from certain countries,
13 largely, if not almost exclusively, countries
14 with African immigrants, black African
15 immigrants, are not allowed, and -- and calling
16 these sorts of names and the types of things he
17 said about Haiti, at the same time that it is
18 the policy of the United States to encourage
19 and welcome immigrants from places like Norway
20 and Denmark and white South -- South Africans,
21 your view is that it's not appropriate for the
22 Court to take into account that kind of
23 evidence or the context in which all of this is
24 happening?

25 GENERAL SAUER: It's our view that

1 those statements that they allege, which
2 include statements that were before the Court
3 in both Trump against Hawaii and Regents --
4 keep in mind this is the third time this kind
5 of claim has come before this Court. It
6 rejected it in Trump against Hawaii, rejected
7 it again in Regents --

8 JUSTICE JACKSON: Right. But the
9 immigration policy, the idea -- the white South
10 African immigration policy is recent, so that
11 wasn't in Trump against Hawaii. That wasn't --
12 the statements about Haiti and eating pets and
13 the names that were called with respect to
14 these immigrants even though they are lawfully
15 in the United States, that -- those are pretty
16 recent. So let's separate it out then. What
17 do you say about those kinds of things?

18 GENERAL SAUER: Again, by the -- as
19 the Court held in Regents, these are statements
20 made in different contexts that are remote in
21 time. They are unilluminating. The Court said
22 in Regents, the Chief Justice's opinion in
23 Regents says we're going to give them the most
24 negative possible interpretation. That's
25 provided by the plaintiffs in that case, and --

1 JUSTICE JACKSON: I'm giving them the
2 most negative interpretation. So tell me my --
3 if I assume or think that these are related to
4 the President's intentions to encourage certain
5 immigrants on the basis of race and discourage
6 others, what do we do with that in light of
7 Arlington Heights?

8 GENERAL SAUER: The Court should
9 conclude that the statements are unilluminating
10 and fail to raise any plausible inference of
11 animus.

12 JUSTICE JACKSON: That's not what
13 Judge -- Judge Reyes found that they were
14 illuminating. Aren't we applying a clear error
15 standard here? What do we do -- we're not
16 looking at this de novo. We have a district
17 court finding that there is evidence of
18 discriminatory intent here, enough early in the
19 case to allow this claim to go forward.

20 So aren't we bound in some regard with
21 respect to what the lower court has already
22 determined about these facts?

23 GENERAL SAUER: I would say --

24 JUSTICE JACKSON: No?

25 GENERAL SAUER: -- I -- I don't -- I

1 don't concede that, but it does not matter.

2 JUSTICE JACKSON: You think there's
3 not --

4 GENERAL SAUER: Under any standard of
5 review --

6 JUSTICE JACKSON: It's not clear error
7 review?

8 GENERAL SAUER: -- the Court's looking
9 at exactly the same statements that -- that --
10 that she is looking at. The Court should apply
11 the logic of Regents, which says, first of all,
12 the President's statements are less relevant;
13 the Secretary's statements are what matter.
14 Again, these kinds of statements don't refer to
15 race.

16 JUSTICE JACKSON: So ignore the
17 findings of fact of the lower court, do not
18 give them any deference, no clear error review,
19 we're just looking at this afresh?

20 GENERAL SAUER: I think it does not --
21 it does not matter with deference or without
22 deference. This claim just doesn't get off the
23 starting blocks. It's the third time this sort
24 of claim has been brought. The lower courts
25 are enamored of these kinds of claims, but this

1 is the third time this kind of claim has come
2 before this Court. It's rejected it in Hawaii,
3 rejected it in Regents, should be rejected
4 again here. It's not --

5 JUSTICE BARRETT: General, can I --

6 JUSTICE KAGAN: So, General, maybe --
7 maybe --

8 JUSTICE BARRETT: -- ask you a
9 question about -- oh.

10 JUSTICE KAGAN: I'm sorry, go ahead.

11 JUSTICE BARRETT: No, no, no.

12 JUSTICE KAGAN: No, no, no, go ahead.

13 JUSTICE BARRETT: Allow your voice a
14 minute.

15 JUSTICE KAGAN: I'll have more time to
16 recover.

17 (Laughter.)

18 JUSTICE BARRETT: I wanted to take you
19 to the procedural objection. Let's say that
20 you lose on your argument that even the process
21 that the Secretary followed to terminate is not
22 subject to judicial review.

23 What would -- take your best crack at
24 articulating what standards a court would apply
25 when reviewing the sufficiency of the

1 consultation.

2 GENERAL SAUER: In other words, if --
3 if the argument is that the consulting claim
4 alone is procedural and reviewable?

5 JUSTICE BARRETT: Is reviewable, is --
6 yeah, yeah, yeah.

7 GENERAL SAUER: Yes.

8 JUSTICE BARRETT: So we have this
9 exchange, the email exchange, in Miot. I mean,
10 what -- what -- take your best crack at --

11 GENERAL SAUER: I think --

12 JUSTICE BARRETT: -- articulating the
13 standards by which a court would review that.

14 GENERAL SAUER: Again, I think this
15 Court should go to the dictionary definition of
16 "consult." And you see this actually in the
17 Syria brief, where they concede that seeking
18 input is consultation. Seeking advice from
19 someone knowledgeable is a form of
20 consultation. And keep in mind it's not just
21 consult. It also says appropriate.

22 So the word "appropriate," the Court's
23 held in other contexts, confers broad
24 discretion. So the Secretary could decide, I
25 don't think there are any appropriate agencies

1 to talk to here. You know, again, that would
2 be within -- assuming reviewability, which we
3 strongly disagree with --

4 JUSTICE BARRETT: Right. Okay.
5 Taken.

6 GENERAL SAUER: -- but even there,
7 again, it's -- it's a weak claim. It's --
8 this -- the phrase after -- it says three times
9 after consultation with appropriate agencies
10 the Secretary is going to do a bunch of things.
11 And what you have here is the district courts.
12 They initially said she didn't consult at all.
13 But it turns out that she did. There is an
14 exchange with the Department of State.

15 So now they're saying, well, that
16 wasn't quite enough, it wasn't meaningful
17 enough. You see how substance has already
18 crept back into even this case. It's not our
19 situation.

20 JUSTICE KAGAN: What -- what would
21 happen -- what would happen, General, if the
22 original email had been sent out and no
23 response came back? Would that also be
24 appropriate consultation?

25 GENERAL SAUER: Absolutely, yes. In

1 other words, she can't force the Secretary
2 of -- or -- or -- or the State Department to
3 respond, and so, for that reason, yes, that
4 would be appropriate consultation too.

5 JUSTICE KAGAN: Suppose it were the
6 response that came back said, I've got to run
7 some traps here in the building, we'll get you
8 an answer by Wednesday, and then the Secretary
9 made her determination on Tuesday.

10 GENERAL SAUER: Consultation has
11 happened on her end. And, again, she cannot
12 force the state to provide -- State Department
13 to provide a timely response. The -- the
14 statute regulates what the Secretary does, not
15 what Department of State does.

16 JUSTICE KAGAN: Even though the
17 Secretary was, like, well on her way to getting
18 a timely response?

19 GENERAL SAUER: And, again, if you've
20 asked, you -- you've consulted. And, here, of
21 course, we have an exchange where there's a
22 prompt response.

23 JUSTICE KAGAN: Suppose that, you
24 know, the -- the -- the question is made -- the
25 question is proffered, and then the -- the

1 response comes back, wasn't that baseball game
2 tonight great, last night great?

3 GENERAL SAUER: Again, State can say
4 something completely unresponsive. If she
5 sought input from State, she has consulted.
6 And, again, this is the sort of discretionary
7 call that for very good reasons the statute
8 vests in the Secretary.

9 How much do I need to talk, which
10 agencies do I talk to, is this response good
11 enough? Again, in this case, in the South
12 Sudan example, she said, you know what, I want
13 some more information, I haven't heard back.
14 She did the exact -- I mean, that's really the
15 hypothetical.

16 JUSTICE KAGAN: And then -- and then
17 your -- your -- I think you said that even if
18 the Secretary didn't ask the question, she
19 could have just decided not to ask the question
20 and that would be appropriate consultation too?

21 GENERAL SAUER: If she doesn't ask at
22 all, I don't think I would say that that's
23 consultation.

24 JUSTICE KAGAN: I thought you said --

25 GENERAL SAUER: I would say that's not

1 subject to judicial review. But she --

2 JUSTICE KAGAN: I thought -- I --
3 assuming it's subject to judicial review. I --
4 I -- I had thought that you said that she could
5 have decided that there was no person whose
6 opinions mattered.

7 GENERAL SAUER: Yeah. No, if there's
8 a determination that none of the agencies is
9 appropriate, then as opposed to there is an
10 appropriate agency, but I decline to consult
11 with them, that would be the distinction that I
12 would raise.

13 JUSTICE KAGAN: Okay. But, as to
14 everybody else, as long as you ask a question,
15 whether or not you wait for the answer, whether
16 or not you give them appropriate time for the
17 answer, whatever the answer is, whether the
18 answer is on a completely unrelated topic, it
19 just doesn't matter?

20 GENERAL SAUER: That would fall within
21 the plain meaning of the word "consultation,
22 as we argue, and, again --

23 JUSTICE KAGAN: I mean, really? The
24 plain meaning of the word "consultation"?
25 Like, the plain meaning of the word

1 "consultation" seems to me like you consult
2 with somebody on a topic. That means you ask a
3 question. They give an answer that's on the
4 same topic. You know, it doesn't have to be
5 long. You don't have to lock a person in the
6 room together for three hours. But, I mean,
7 you have to ask the question: Hey, what are
8 country conditions like?

9 And then the answer comes back country
10 conditions are fine or they're not fine. You
11 know, that's appropriate consultation. I'm
12 not, like, asking for the moon, but, you know,
13 what are country conditions like? Weren't the
14 Dodgers great last night? That does not seem
15 like appropriate consultation.

16 GENERAL SAUER: To seek advice or
17 input is consultation. And with -- with
18 respect to the example of locking them in the
19 room for three hours, that's kind of the road
20 that the district courts are going down.
21 They're saying you did check with it, but it
22 wasn't meaningful enough, so we give you kind
23 of a D-plus on your consultation.

24 JUSTICE KAGAN: Well, but that's not
25 the road I'm going down. I mean, I guess I

1 said that because that's not the road I'm going
2 down. And, you know, sometimes consultation is
3 very thorough and sometimes in government it's
4 not very thorough.

5 But, if Congress says to consult about
6 a particular subject matter, then it seems as
7 though what Congress said was you should ask
8 somebody and they should give an answer.

9 GENERAL SAUER: Certainly, you should
10 ask somebody. The statute doesn't say she can
11 compel them to give an answer, and she did ask.
12 So regardless of what --

13 JUSTICE JACKSON: But, General, the
14 statute does go a little further than that. I
15 mean, you keep homing in on the word
16 "consultation." But, if we read what the
17 statute says, and I'm paraphrasing the relevant
18 part, "after consultation with appropriate
19 agencies of the government, the Secretary shall
20 review the conditions in the foreign state for
21 which a designation is in effect and such" --
22 "and shall determine whether the conditions for
23 such designation continue to be met."

24 So, surely, the consultation, however
25 long or short, can't be about something other

1 than country conditions. I mean, if you read
2 the whole sentence, what she's consulting about
3 is her determination as to whether the country
4 conditions are still in effect.

5 GENERAL SAUER: I think what she's
6 consulting about is a little more specific than
7 that. She -- it says, you know, after
8 consultation with appropriate agencies, she
9 shall assess the country conditions and
10 determine whether or not the criteria set forth
11 in subsection 1 are still met.

12 So the consultation can relate to not
13 just country conditions but anything else that
14 is relevant to that.

15 JUSTICE JACKSON: But you just said
16 with Justice Kagan it can relate to baseball.
17 What I'm trying to do is figure out whether
18 this statute, when it requires consultation, at
19 least requires some exchange of information
20 concerning this subject, whether the country
21 conditions are still met.

22 GENERAL SAUER: I believe I said, if
23 the response has to do with baseball, there's
24 really nothing she can do about that. She
25 still consulted. If she sends an email to

1 State and says, hey, what do you think of the
2 Dodgers, I don't think we would argue that that
3 constitutes consultation, because I think you
4 correctly pointed out the context of that
5 statute.

6 Now it's not just country conditions.
7 It's the entire determination whether or not
8 the -- the -- the criteria for designation
9 under subsection 1 are still met. If she's
10 seeking input about that, she has consulted.

11 I see my time's up.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 General.

14 Justice Thomas, anything further?

15 Justice Alito?

16 Justice Sotomayor?

17 JUSTICE SOTOMAYOR: General, I don't
18 think you -- I know -- General --

19 GENERAL SAUER: I'm sorry.

20 (Laughter.)

21 CHIEF JUSTICE ROBERTS: Party's over.
22 No, you've got to stay there.

23 GENERAL SAUER: I'm very sorry.

24 JUSTICE SOTOMAYOR: All right. You're
25 not disputing that the email exchange of

1 July 21st and July 22nd with respect to Syria
2 and September 5th with respect to Hawaii, where
3 the Secretary asked the State Department to
4 discuss country conditions, that that was the
5 extent of the consultation, correct?

6 GENERAL SAUER: I believe that's
7 what's in the administrative record for both
8 cases. Obviously, one case comes to the Court
9 where the administrative record was -- appears
10 later. There's two different email exchanges.

11 The one in the Syria case says we're
12 re-reviewing country conditions with respect to
13 this country. The other one I believe is in
14 the Haiti case says we're, you know,
15 considering -- or I don't remember the exact
16 words, but considering the following four
17 countries.

18 JUSTICE SOTOMAYOR: Right. But the
19 point is that that was the extent of it? There
20 was no other information that the State
21 Department provided?

22 GENERAL SAUER: We haven't pointed to
23 anything else in the administrative record to
24 satisfy the consultation requirement.

25 JUSTICE SOTOMAYOR: All right. And so

1 the question is, if we believe the statute by
2 its terms requires specific consultation with
3 respect to country conditions as opposed to
4 foreign policy concerns, there was no
5 information addressed by the Department of
6 State with respect to the country conditions?

7 GENERAL SAUER: I disagree because,
8 obviously, sending aliens back based on country
9 conditions raises all kinds of foreign policy
10 issues. So, if you say no foreign policy
11 concerns, then --

12 JUSTICE SOTOMAYOR: That -- that's --
13 well, no, because you're also taking the
14 position that irrespective or regardless of --
15 I think I just made up -- I used a
16 grammatically incorrect word -- regardless of
17 whether country conditions were bad or not, our
18 national interests required termination,
19 correct?

20 GENERAL SAUER: Yes.

21 JUSTICE SOTOMAYOR: So we can't assume
22 that the State Department that doesn't answer
23 the question presented is actually describing
24 country conditions?

25 GENERAL SAUER: Yeah. And I think I

1 would stand on what I said in response to
2 Justice Jackson, which is that the consultation
3 relates to not just the assessment of country
4 conditions but the entire determination, as
5 that very same sentence goes on to say, to
6 whether or not the conditions under subsection
7 1 are met.

8 JUSTICE SOTOMAYOR: The only thing --
9 I'm looking at Haiti. The only thing asked
10 for, we are reviewing country conditions in
11 Haiti. Can you advise on State's views on that
12 matter? I mean, all right. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?
14 Justice Gorsuch, anything further?
15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: Can you explain
17 the reasons why Congress would have barred
18 judicial review as broadly as you assert?

19 GENERAL SAUER: I -- I'd emphasize
20 two. There are several. I think perhaps most
21 importantly, the kind of determination that is
22 at issue here is just the sort of determination
23 that lies kind of at the heartland of what has
24 been traditionally entrusted to the political
25 branches.

1 And given -- let me give you a couple
2 examples of that. If you consider, for
3 example, the determination that is made in both
4 of the termination orders that these are
5 nations that have emerged from difficult times
6 and there are new fledgling governments there.
7 And, for example, in the Syria determination,
8 the Secretary says it's our foreign policy to
9 project a message of confidence to the
10 fledgling government of Syria. The president
11 has taken away sanctions. He has recognized
12 that government. There's refugees returning
13 from all over the world. And if we don't
14 terminate TPS, it will send a message of doubt
15 about that country.

16 That -- that's the sort of
17 foreign-policy-freighted decision that lies at
18 the heartland of the political branch's
19 competence, and it's the sort of thing maybe
20 you -- as you see in this case, those sorts of
21 determinations being second-guessed by the
22 district courts, it's almost like these
23 district courts are appointing themselves
24 junior varsity Secretaries of State saying I --
25 I second-guess that.

1 So, if you look at the whole package
2 here --

3 JUSTICE KAVANAUGH: Well, that's Syria
4 and the Assad regime. I understand that one.

5 GENERAL SAUER: Yeah.

6 JUSTICE KAVANAUGH: Do you want to
7 give a similar answer on Haiti?

8 GENERAL SAUER: Very similar answer,
9 very similar points are made as to Haiti. I'd
10 emphasize to the Court, if you look at Footnote
11 35 in the Haiti termination and the
12 accompanying text where it talks about the
13 problem of ongoing chain migration out of
14 Haiti, there's an ongoing exodus, and they
15 argue in this case that the TPS holders are
16 some of the most educated, some of the most
17 law-abiding, some of the sort of best and the
18 brightest that are in diaspora. That Footnote
19 35 cites an article that she relied on,
20 "Engaging the Haitian Diaspora," where it talks
21 about how, in neighboring Caribbean countries,
22 the United States, and Canada, there are
23 hundreds of thousands of Haitian nationals who
24 are abroad -- you know, who are abroad now.

25 And the determination, this notion

1 that there's ongoing chain migration, the
2 concern is are we actually creating,
3 contributing to the problem, creating a
4 self-fulfilling prophecy by ensuring that
5 there's an indefinite expectation of all those
6 people. There's this kind of talent drain out
7 of Haiti. That's the sort of, like,
8 foreign-policy-freighted -- that is weighing
9 incommensurables under conditions of
10 uncertainty, that is the sort of
11 foreign-policy-freighted decision and
12 determination that's naturally left to the
13 political branches.

14 So there can be hypotheticals about,
15 you know, the Secretary could do something
16 lawless or crazy, and Congress has a way, has
17 tools to address that because there's annual
18 reports. In the annual report, she's not going
19 to say or he's not going to say, I flipped a
20 coin. The annual report's going to have to
21 give reasons. And if Congress does not --

22 JUSTICE KAVANAUGH: The annual reports
23 would be after the fact, so --

24 GENERAL SAUER: That is true, but --

25 JUSTICE KAVANAUGH: -- the concern

1 you've heard here is that's already done then.

2 GENERAL SAUER: It is done, but it has
3 to be reviewed every 18 months. And that
4 structure itself kind of makes judicial review
5 a misfit because judicial review takes more
6 than 18 months. So, if we're put under a
7 preliminary injunction, as we saw in the Ramos
8 litigation, you know, from 2018 through 2020,
9 even though there's supposed to be this ongoing
10 18-month re-review, the district -- the
11 district courts enter -- they put in an
12 injunction, and all of a sudden you have this
13 sort of extended thing.

14 Keep in mind this is Temporary
15 Protected Status. The word "temporary" is used
16 again and again in the statute, including its
17 title. And we're looking at a situation where
18 there have been initial designations that go
19 back to 1991 in the case of Somalia, Hurricane
20 Mitch in 1998, 20 -- 27 years ago, as to
21 Honduras and Nicaragua, and these were still in
22 effect until -- still are in effect.

23 So there's a sense that -- and one
24 very important point I'd make there is, if you
25 look at Haiti specifically, the Haitian

1 termination has now been enjoined twice, both
2 in the first Trump administration and in this
3 administration. And so the judicial review is
4 having this effect of really defeating the
5 fundamental purpose of the statute, which is
6 inherently temporary. There's this very
7 frequent periodic review.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 Justice Jackson?

12 JUSTICE JACKSON: So I have no doubt
13 that there are foreign policy considerations,
14 but do you dispute that the thrust of this
15 statute is actually the humanitarian concern
16 that the initial designation under this statute
17 is supposed to be a consideration of whether
18 there is an ongoing armed conflict within the
19 state, and due to such a conflict, returning
20 the aliens who are nationals of that state
21 would pose a "serious threat" to their personal
22 safety?

23 It seems to me that this statute does
24 allow the Secretary to take into the account --
25 into account the kinds of things that you

1 discussed with Justice Kavanaugh but against
2 the backdrop of the actual purpose of the
3 statute, which is what conditions are in this
4 country and whether or not it would be safe to
5 return those people.

6 And so I -- I guess I'm just
7 struggling with your argument that the
8 Secretary can make this determination without,
9 as a procedural matter, taking into account
10 country conditions, as the statute requires.

11 GENERAL SAUER: The Secretary is
12 obligated to consider country conditions under
13 (b) -- of various kinds, different kinds of
14 country conditions, under (b)(1)(A), (b)(1)(B),
15 and (b)(1)(C).

16 JUSTICE JACKSON: And if she doesn't,
17 you say not reviewable?

18 GENERAL SAUER: Not reviewable. Under
19 (b)(1)(C), most relevant, she considers not
20 just country conditions but also whether
21 allowing the aliens to stay here would be
22 contrary to the United States' national
23 interests.

24 If anything is discretionary, if
25 anything exudes deference --

1 JUSTICE JACKSON: Yes, you're picking
2 that part of the statute --

3 GENERAL SAUER: -- to the Secretary,
4 that language does.

5 JUSTICE JACKSON: -- but I've read --
6 I've read other parts of the statute that
7 require her to do country conditions. And
8 you're saying, if she doesn't, that's not
9 reviewable; see the other parts of the statute
10 that talk about foreign policy.

11 I just don't understand the concept of
12 the Secretary being constrained to do certain
13 things and not being required to do them in the
14 sense that they're not enforceable. She can
15 basically do whatever she -- she wants, I hear
16 from your argument.

17 GENERAL SAUER: Congress assumed that
18 risk when it said there is no judicial review
19 of any determination --

20 JUSTICE JACKSON: All right.

21 GENERAL SAUER: -- with respect to
22 termination.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 General.

1 Mr. Arulanantham.

2 ORAL ARGUMENT OF AHILAN T. ARULANANTHAM
3 ON BEHALF OF THE RESPONDENTS IN CASE NO. 25-1083

4 MR. ARULANANTHAM: Thank you,
5 Mr. Chief Justice, and may it please the Court:

6 Congress struck a balance in the TPS
7 statute. It granted the Secretary substantial
8 discretion to designate countries at the outset
9 but constrained the authority to terminate TPS
10 once people have come to rely on it through
11 mandatory procedures and rules.

12 Congress struck a corresponding
13 balance on judicial review. It didn't broadly
14 bar review of all policies and procedures or
15 all questions of law and fact, as in
16 neighboring immigration statutes. It barred
17 review of any determination in subsection (b),
18 which are the country conditions assessments on
19 which the Secretary would be expected to have
20 expertise.

21 Congress thus preserved review to
22 ensure compliance with other requirements in
23 the statute, including in subsection (b), like
24 the obligation to consult and to make decisions
25 based on country conditions.

1 The bottom line is this: The
2 Secretary can terminate TPS, but he must turn
3 square corners, follow the rules Congress set.

4 In contrast, as we've heard today, the
5 government reads this statute like a blank
6 check. Today, they want to use it to expel
7 non-citizens. But the power that they seek is
8 a double-edged sword. The Secretary could
9 designate every country from which an
10 undocumented person has come to the United
11 States explicitly to provide mass immigration
12 relief under this statute, and on their view,
13 the courts could do nothing. That contravenes
14 the text, bedrock administrative law, and
15 common sense.

16 On the merits, this is an easy case.
17 One basis for Syria's designation is armed
18 conflict. But the Secretary never consulted
19 the State Department about the armed conflict.
20 Even today, the State Department's website says
21 armed conflict in Syria remains active.

22 In addition, the other basis for
23 Syria's designation, which is extraordinary and
24 temporary conditions, she terminated based on
25 the national interest. But the plain text

1 makes clear that the termination must be based
2 solely on the conditions in the foreign state.

3 Finally, it matters that this case is
4 here on a preliminary relief order that just
5 preserved TPS while the case proceeds. People
6 like Dr. Sara Doe, a pediatrician giving
7 lifesaving care to children, have no later
8 recourse if they are illegally stripped of
9 their work authorization, let alone face
10 detention or deportation. Laila Doe's daughter
11 came here at the age of three and is now about
12 to graduate high school. She should keep her
13 status while the case proceeds.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Would you be kind
16 enough to say what else is reviewable under --
17 despite the -- the jurisdiction-stripping
18 provision? Because it seems pretty broad. It
19 says there's no judicial review of any
20 determination of the Attorney General.

21 MR. ARULANANTHAM: So we agree it's
22 broad, Your Honor.

23 JUSTICE THOMAS: Yeah.

24 MR. ARULANANTHAM: It bars everything
25 that the Secretary determines in subsection

1 (b). And if you look for the word "determines"
2 in subsection (b), it appears in many places.

3 But there are other words also, like
4 in (b)(3)(A), the Secretary has an obligation
5 after consultation with appropriate agencies.
6 And that is not described as a determination.
7 So we think there's review over consultation.

8 The Secretary also has an -- an
9 obligation to review conditions in the foreign
10 state. So we think that there then should be
11 review over just whether the fact, did she, in
12 fact, review the conditions in the foreign
13 state? Not if she got it right, but did she
14 review it?

15 There are other things in there too.
16 The opening line is "at least 60 days before
17 the end of initial period of designation." So
18 there's a timing rule. When do you get to do
19 this? And, you know, as some of these
20 hypotheticals have suggested, you can't do it
21 immediately. You can't do it -- and so there's
22 review over the timing as well.

23 But -- but it's very minimal. It's
24 only the procedural rules. But I would argue,
25 Your Honor, that in a context where there's no

1 review on the substantive determination, the
2 procedural rules are all the more important
3 then to ensure that we have appropriate
4 government decision-making.

5 JUSTICE THOMAS: So, in the case of
6 appellate courts, for example, they have
7 authority to review judgments. Would you,
8 using the same logic, say they can only review
9 the substantive underlying judge -- judgment
10 but not the underlying determinations?

11 MR. ARULANANTHAM: No, Your Honor.
12 I -- if I understand the hypothetical
13 correctly, I think it actually favors us
14 because this statute uses the word
15 "determination" as a distinct act from the
16 ultimate order to either extend, designate, or
17 terminate TPS. This is very clear from the
18 termination provision, which is (b)(3)(B).
19 It's the next one after the one which has the
20 consultation rule in it.

21 It says -- and I'll apologize in
22 advance because the words are very -- sound
23 very similar -- it says, if the Attorney
24 General determines -- determines -- that a
25 foreign state no longer meets the conditions

1 for designation, he shall terminate the
2 designation by publishing notice of the
3 determination in the Federal Register.

4 So it's clearly using them as two
5 distinct ideas. One is the determination,
6 that's the country conditions assessment, then
7 the termination order or the extension order or
8 the designation order. They're distinct acts
9 in this context.

10 JUSTICE THOMAS: Normally, though, we
11 would think that the subsidiary considerations
12 that lead to a judgment would also be
13 reviewable or non-reviewable depending on
14 jurisdiction.

15 MR. ARULANANTHAM: I don't think
16 there's any such general principle of
17 administrative law, Your Honor. We cite the
18 Zuch case just recently in the tax context,
19 which literally holds the opposite. It says,
20 you know, the -- the things that make up the
21 determination, the inputs, are different from
22 the output.

23 McNary and Reno v. Catholic Social
24 Services both construed the word
25 "determination" in an immigration statute,

1 contemporaneously with all of this, to
2 distinguish between the determination and the
3 antecedent procedural questions and
4 decision-making criteria, and they relied on
5 Bowen, which we -- we heard discussion of
6 earlier.

7 And I think the last point I'd like to
8 make just on this subject, Your Honor, is, even
9 if you might have voted the other way in those
10 cases in the first instance, right, the word
11 "determination" has become embedded in our
12 immigration law with a narrower meaning than
13 what the government ascribes to it here.

14 And you can see that most clearly from
15 the way Congress wrote provisions in 1996,
16 which is just three years after Catholic Social
17 Services, which is, in turn, two years after
18 McNary. They wrote provisions saying, for
19 example, the expedited removal provisions, they
20 bar review of any individual determination or
21 any other cause or claim related to expedited
22 removal.

23 There's another provision which bars
24 procedures and policies related to expedited
25 removal, in addition to what is already the bar

1 on determination. And then, of course,
2 subsection (b)(9) in the same statute, which
3 Justice Alito's plurality construed in Jennings
4 v. Rodriguez, which we all remember, all
5 questions of law and fact. That's what it bars
6 review of, all questions of law and fact,
7 including substantial statutory and
8 constitutional claims. This is about district
9 court review of removal orders.

10 So they clearly have broader language
11 that they use when they want to cover more
12 than -- when they want to cover all of the
13 antecedent steps.

14 JUSTICE BARRETT: And, counsel --

15 JUSTICE ALITO: In order for you to
16 win this case, is it necessary for us to find
17 that the word "determination" in (b)(5)(A) is a
18 term of art?

19 MR. ARULANANTHAM: No, I don't think
20 it's a term of art, Your Honor. I -- I resist
21 that characterization. I do think there's two
22 way -- paths for us to victory.

23 JUSTICE ALITO: Well, let me put it a
24 different way. Would it be necessary for us to
25 say that we give that term in that provision

1 something other than its ordinary meaning in
2 regular speech?

3 MR. ARULANANTHAM: No, Your Honor, I
4 mean, although I do think context is
5 everything, right, when we're construing
6 statutes, and "determination" there we think
7 has to be understood by reference to
8 "determine," which is used eight times in the
9 same subsection to mean country conditions
10 assessment.

11 JUSTICE ALITO: Well, I take that to
12 be a yes. We have to -- we have to say, look,
13 "determination" is a very broad word, it's used
14 all the time by -- in -- in many different
15 statutory provisions, it's used all the time by
16 this Court.

17 If we apply ordinary meaning of that
18 term here, I -- I -- I -- I -- I really don't
19 understand how you can prevail.

20 MR. ARULANANTHAM: Well, I guess
21 because I don't think that it always has the
22 full potential breadth that the government has
23 ascribed to it. For example, in this statute,
24 we see it's used two times outside of
25 subsection (b), more than two times but in two

1 sentences outside of subsection (b).

2 And I concede and this was discussed
3 that those are not about country conditions
4 assessment -- assessments. So it has a
5 different meaning there. But the bar only
6 applies to determinations in subsection (b).
7 And so, again, I think it just means -- it
8 refers back.

9 But my fall-back position, Your Honor,
10 even if you're not willing to say determination
11 should be tied tightly to determine, the two
12 claims in particular, the consultation claim
13 and then the claim about national interest and
14 whether it's appropriately considered at the
15 termination phase, those are the kinds of
16 claims that this Court has considered in
17 administrative law cases going back a hundred
18 years. You know, if you look at the
19 administrative law scholars, the Cox, Rick
20 Hills, Emma Kaufman brief, it talks about this
21 history.

22 Claims that process is reviewable,
23 even if the ultimate decision is final, have
24 been reviewable in immigration statutes going
25 back to Nishimura Ekiu in 1892. Claims that

1 you've read the wrong criteria into the
2 statute, not whether you got it right, but just
3 are you considering a factor which actually is
4 not the one that's supposed to be considered,
5 those go back to 1904, Gonzales v. Williams and
6 other cases like that.

7 So you could say we're not necessarily
8 giving you that determination that has to be
9 hitched directly to determine, but say we are
10 reading the statute to not be the broadest
11 conceivable jurisdictional bar ever,
12 particularly given that Congress wrote broader
13 ones just a couple of years after this Court
14 had decided McNary and CSS.

15 And that would be at least the first
16 two claims. The consultation claim and the
17 claim about the statutory criteria would be --
18 which is a pure question of law. I mean, it's
19 just about how you read the statute and how you
20 read the words, is national interest, you know,
21 incorporated into (b)(3) or only in (b)(1).

22 Those claims could be reviewable even
23 on a much narrower theory than our front-line
24 theory, which is that you should use the text
25 and refer to the term --

1 JUSTICE BARRETT: Counsel, can I give
2 you a hypothetical? Let's imagine that there
3 is a more robust record of consultation here,
4 and the Secretary consults the State Department
5 and the State Department says the country
6 conditions in Syria remain terrible, armed
7 conflict continues, and, you know, I -- I think
8 it would be fine and in the national interest
9 to continue TPS status for Syrian refugees.

10 The Secretary says, yeah, you know
11 what, I'm going to terminate it anyway.

12 Is that reviewable?

13 MR. ARULANANTHAM: So just two
14 thing -- a quick point about your hypo.
15 National interest is not a factor on armed
16 conflict. I just want to flag that for later
17 when we get there.

18 JUSTICE BARRETT: Okay. Okay. Okay.
19 I mean, my point here doesn't really matter.

20 MR. ARULANANTHAM: Yes, entirely.

21 JUSTICE BARRETT: I mean, I'm just
22 saying, like, let's imagine that consultation
23 happens, it's a robust consultation, but
24 everything that she hears cuts in favor of
25 keeping TPS status, and she says, I'm

1 terminating it.

2 MR. ARULANANTHAM: We --

3 JUSTICE BARRETT: Is that -- is that
4 reviewable?

5 MR. ARULANANTHAM: We could not
6 challenge on the ground that she is wrong and
7 the State Department is right. What the
8 statute does is it tries to get the government
9 to speak in one voice, which this Court has
10 said is very important and is a huge problem
11 here when, you know, you have them going back
12 and forth, but if ultimately the Secretary
13 says, you know, speaking in one voice is
14 important, but my people, country conditions
15 people, think that the armed conflict is over,
16 so that's what we're doing, that is not
17 reviewable.

18 But what is reviewable is whether she
19 actually asks anything and gets any information
20 about country conditions.

21 JUSTICE BARRETT: Is this going to get
22 you very much? I mean, if it's just kind of a
23 box-checking exercise, I mean, why would
24 Congress permit review of the procedural aspect
25 when, really, what everybody cares about much

1 more is the substance?

2 MR. ARULANANTHAM: I think it's
3 because Congress and us too and the millions of
4 people who live with TPS holders have some
5 faith in government, and they believe that if
6 there is consultation, the decisions will be
7 better.

8 JUSTICE JACKSON: And that's really
9 not unusual, right? I mean, isn't that the
10 whole thrust of something like the APA?

11 MR. ARULANANTHAM: Absolutely.

12 JUSTICE JACKSON: That Congress has
13 always sort of understood that agencies are
14 going to have a lot of discretion at the end of
15 the day to make the determinations, but we
16 still need to police to some extent the inputs,
17 what they're looking at, whether they give the
18 public notice and comment, all of the things
19 about procedural rules and requirements for
20 decision-making are important even if the
21 ultimate decision is still left to the agency.

22 MR. ARULANANTHAM: Absolutely, Your
23 Honor. You know, our view is that even if it
24 comes back like a box-checking exercise, people
25 will at least know that somebody talked to

1 somebody else.

2 And it makes sense, of course, DHS has
3 foreign policy expertise. They have their
4 asylum and refugee office and all those people.
5 But the State Department also has a lot of
6 foreign policy expertise and information.

7 JUSTICE KAGAN: Can I ask --

8 JUSTICE ALITO: Would you -- I mean,
9 would you -- and just to follow up on what
10 Justice Jackson is asking, do you think we can
11 read (b)(5)(A) at least to say we're ruling out
12 APA review here?

13 MR. ARULANANTHAM: Your Honor, I don't
14 want to belabor that point because our brief
15 addresses it at great length. In our view,
16 there is a difference from the Department of
17 Commerce case between whether the record
18 evidence supports the conclusion and whether
19 the decision is motivated by some impermissible
20 criteria.

21 And in Department of Commerce,
22 obviously, the record evidence did support the
23 conclusion, but nonetheless, the decision was
24 based on, you know, a contrived reason. That
25 is the reason why we think pretext claims are

1 reviewable.

2 But it doesn't matter because the
3 first two claims are -- are much more
4 canonically sort of old -- you know, older than
5 SEC v. Chenery. You know, I think that
6 decision really becomes reviewable. This
7 becomes canonical APA law that pretext claims
8 should be understood differently after Chenery
9 I, but these other ideas are much, much older
10 than that, and that's really, you know, all we
11 have to say about it.

12 CHIEF JUSTICE ROBERTS: Well, in
13 Department of Commerce, of course, we said that
14 political considerations are a permissible
15 factor. How are we supposed to determine how
16 much political influence is too much?

17 MR. ARULANANTHAM: Yeah. I -- I
18 think, in this case, the Secretary said on CNN
19 the day after her first TPS decision that we
20 are taking direction from the direction of the
21 President, he is pausing this program. And
22 after that -- meaning the TPS program. And
23 then there have been 13 terminations in a row.

24 So the district court just said on --
25 we're here on preliminary relief. I think it's

1 a factual finding for clear error review.
2 The -- the district court said, you know, I
3 think that I will take that statement, when
4 coupled with the confirmatory action of all the
5 TPS terminations and the absence of
6 consultation and all the rest of it, to mean
7 that --

8 CHIEF JUSTICE ROBERTS: Well, that's a
9 particular circumstance. But, I mean, in
10 general, how would you articulate the principle
11 that this is too much? How do you judge, as a
12 general matter, how much political influence is
13 too much?

14 MR. ARULANANTHAM: Only --

15 CHIEF JUSTICE ROBERTS: Not -- not
16 that you're saying, well, it was too much in
17 this case but more generally.

18 MR. ARULANANTHAM: Yeah. I mean, I
19 don't think -- I wouldn't change a word of
20 Commerce, Your Honor, and --

21 CHIEF JUSTICE ROBERTS: I wouldn't
22 either.

23 (Laughter.)

24 MR. ARULANANTHAM: Yes. I figured you
25 would say that. And -- and I just -- I just

1 think this is also a very rare outlier case
2 where the Secretary actually said on national
3 television the day after the decision that she
4 was motivated by an impermissible factor.

5 You know, I want to come back to this
6 consultation question, though, to talk about
7 this email. As Justice Sotomayor had said, the
8 entire consultation in this case is reprinted
9 on less than one page, page 41 of our brief.

10 JUSTICE KAGAN: Well, could I ask
11 about that particularly? Suppose that there
12 was the same question asked from DHS to State
13 Department, and instead of the answer being
14 State has no foreign policy concerns with
15 ending these TPS designations, suppose the
16 answer was just State has no concerns with
17 ending these TPS designations.

18 MR. ARULANANTHAM: I mean --

19 JUSTICE KAGAN: Would that be
20 appropriate? Would that be -- would that cross
21 the line into that's fine?

22 MR. ARULANANTHAM: I mean, that is a
23 much harder case than ours because it might be
24 true that no concerns encompasses country
25 conditions, you know, and I'm not saying that

1 definitely that person should win because I
2 think, you know, you -- the -- the
3 government -- I mean the plaintiffs may be
4 entitled to -- to -- to argue that that's not
5 actually what happened there.

6 But our case is so much easier than
7 that because --

8 JUSTICE KAGAN: Well, is it so much
9 easier? I mean, I wonder -- I mean, the State
10 Department probably says no foreign policy
11 concerns five times before breakfast every day.
12 It's just -- it's -- that's what the -- the
13 State Department. They deal with foreign
14 policy concerns. So, if somebody asks them
15 something, they say no foreign policy concerns.

16 Does that really -- is that really
17 going to make the difference between what is
18 permissible consultation and what is not
19 permissible consultation, the fact that they
20 put the words "foreign policy" in the answer?

21 MR. ARULANANTHAM: So -- so two
22 things. First, this same exact worded email,
23 no foreign policy concerns or sometimes they
24 said foreign policy objections, but foreign
25 policy concerns or objections is now the record

1 in seven consecutive TPS terminations under
2 this statute. And that's why all these
3 district courts that they're talking about,
4 right, it's the same thing.

5 So it's not obvious to me that, oh,
6 they could have just written country conditions
7 and they chose to write foreign policy. You
8 know, but, you know, I'd still say turn the
9 square corner and make them -- make them do it.

10 But, beyond that, there is -- you
11 know, we -- we have also our --

12 JUSTICE KAGAN: When you say that,
13 when you say, look, this is -- this is
14 obviously deliberate language because it was
15 used in seven, what are you suggesting about
16 why they used this language?

17 MR. ARULANANTHAM: So, look, I -- I
18 don't -- I don't know, but I think it is
19 possible that they don't have a foreign policy
20 concern, but they're not comfortable saying
21 that the armed conflict in Syria is over when
22 their own website is saying, if you go to
23 Syria, leave a DNA sample, execute a will
24 before you go, it's active armed conflict, no
25 part of Syria is safe, every part is wracked

1 with violence --

2 JUSTICE KAVANAUGH: Well, it's not the
3 Assad regime anymore, though. I mean, that --
4 the whole thing was the Assad regime after 53
5 years of complete oppression and brutal
6 treatment is gone.

7 MR. ARULANANTHAM: But -- so, Your
8 Honor --

9 JUSTICE KAVANAUGH: So do you agree
10 the Assad regime change is a significant change
11 in the history of that country and the -- and
12 the Middle East more broadly?

13 MR. ARULANANTHAM: I mean, of course,
14 anybody would agree with that, Your Honor, but
15 I -- but --

16 JUSTICE KAVANAUGH: Okay. Well,
17 that's an important marker then because
18 that's -- that's a -- a big shift in both Syria
19 but also the posture of other countries towards
20 Syria, at least as I -- I don't pretend to be
21 an expert, but that's my understanding of
22 what's the backdrop here.

23 MR. ARULANANTHAM: So -- so two
24 thoughts, Your Honor. Then I want to briefly
25 talk about national interest if -- if there's

1 time.

2 So, first, you know, we're not --
3 we're not interested in a debate about whether
4 Syria is or is not safe, so, you know, we
5 haven't gotten into that precisely because it's
6 barred by the judicial review bar, right? Our
7 view is they have to consult and that's the end
8 of it.

9 And the second thing I would say is
10 the State Department's own reports believe, of
11 course, Assad -- they recognize Assad has
12 ended, but they say active violence in every
13 part of the country, the daycare that Laila
14 Doe's daughter went to got bombed, the building
15 next to it has been bombed again in southern
16 Syria. That's not the same conflict. It's the
17 Israeli incursion. There's a war between
18 Turkey and Kurdistan -- Kurds going on in the
19 north. There's still lots of conflict
20 according to the State Department's accounts
21 and the -- the CRS report about this. These
22 are in the Joint Appendix.

23 So I don't think it's as simple as
24 that, but we don't contest, if the Secretary
25 says, I disagree, Syria is safe, that's fine,

1 but she still has to turn the square corners
2 and follow the steps.

3 JUSTICE KAVANAUGH: Yeah.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas, anything further?

7 JUSTICE THOMAS: Just briefly with
8 respect to the jurisdiction-stripping provision
9 again. If the Secretary actually designates --
10 does not terminate but designates in favor
11 of -- of a particular group, can others use the
12 exact same objection that you're offering?

13 MR. ARULANANTHAM: I'm not sure I
14 understand the question, Your Honor.

15 JUSTICE THOMAS: Well, would they be
16 able to challenge the same way that you're
17 challenging --

18 MR. ARULANANTHAM: I got it.

19 JUSTICE THOMAS: -- a positive
20 designation?

21 MR. ARULANANTHAM: Got it. So, no,
22 Your Honor, but not because of the review bar.
23 What they can challenge -- the statute says the
24 Secretary may designate -- this is -- now we're
25 talking about (b)(1), right?

1 JUSTICE THOMAS: Yeah, yeah.

2 MR. ARULANANTHAM: May designate only
3 if, and then one of these three criteria have
4 to be met.

5 JUSTICE THOMAS: Yeah.

6 MR. ARULANANTHAM: So, even if a
7 country is horribly in crisis, there's no
8 obligation to designate. And that's the reason
9 why that's unreviewable, you know.

10 But, of course, it doesn't cut the
11 other way, right? On their view, if the
12 Secretary -- this was my opening
13 hypothetical -- if the Secretary designated
14 Mexico for immigration relief, it's
15 unreviewable. On our view, it is reviewable
16 because you look to the -- to the criteria to
17 see whether they actually applied. Did they
18 care at all about conditions, or were they just
19 trying to achieve some political end?

20 JUSTICE THOMAS: Yeah.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: One of the points that
23 General Sauer made was that if we accept your
24 arguments, it will create a hole in the
25 judicial review bar that you could drive a

1 convoy of trucks through.

2 And you have now said repeatedly that
3 it's necessary for the Secretary to turn square
4 corners, which seems to open -- which seems to
5 support what he says, that if we depart from
6 the ordinary meaning of the review bar, then it
7 is always going to be possible to pick
8 procedural faults in -- to raise procedural
9 objections to what's been done.

10 And what you've said about
11 consultation makes me think that that may be
12 true because, here, there was some
13 consultation. All right, it was very brief
14 and maybe it's not what one would hope for, but
15 still, once you say, well, it's -- it's
16 permissible to review the adequacy of the -- of
17 the consultation, it's always going to be
18 possible to pick -- to -- to raise objections
19 about the adequacy of the -- of the
20 consultation and the words that the State
21 Department comes back with.

22 MR. ARULANANTHAM: So two thoughts,
23 Your Honor. First, our consultation claim in
24 this sense is extremely narrow. We don't argue
25 about the levels. We don't argue about the

1 amount. All we say is it has to be about a
2 subject, deliberation about a subject, so they
3 have to talk about country conditions.

4 And you could hold that, Your Honor,
5 and leave aside, just say we're not saying it's
6 okay to police meaningfulness, even though, in
7 other statutes, lower courts do -- you know,
8 consultation claims -- consultation provisions
9 are in other -- other statutes and, you know,
10 the sky doesn't fall.

11 But, if -- if your -- that's Your
12 Honor's concern, just only say it has to be
13 about the topic, and -- and we don't say
14 anything about, you know, meaningfulness in a
15 broader sense. That's my first answer.

16 My second answer is, you know, the
17 State Department actually provided reports
18 because they did care about speaking in one
19 voice for 35 years under this statute. This is
20 in the former senior government officials'
21 brief, a bipartisan brief, including somebody
22 from the first Trump administration talking
23 about the fact that they used to actually look
24 at all the different components of the State
25 Department and talk about this so that they

1 could make sure that the decision was good.

2 There was never a challenge to
3 consultation under that. Even in the first
4 Trump administration --

5 JUSTICE ALITO: You think that sort of
6 elaborate process is necessary --

7 MR. ARULANANTHAM: No.

8 JUSTICE ALITO: -- under this statute?

9 MR. ARULANANTHAM: No. No, I do not,
10 Your Honor, I do not. My point is just, you
11 know, it wasn't a problem until the form emails
12 started. Even in the first Trump
13 administration, when there were -- that was the
14 first time there were other TPS challenges.
15 Before that, 16 designations -- terminations,
16 never a challenge, right? It started then.

17 Even after that, this consultation
18 claim has only arisen because now they're doing
19 the form email.

20 JUSTICE ALITO: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 JUSTICE SOTOMAYOR: Justice Barrett
24 sort of was asking a question about -- almost
25 sounded a little bit like harmless error, even

1 if they didn't consult. That's okay because,
2 you know, they were going to make the same
3 decision. How do you deal with that?

4 I mean, this is a due process claim,
5 and we've never said what the final
6 determination is important to due process,
7 correct?

8 MR. ARULANANTHAM: Yeah, correct, Your
9 Honor. You know, I think I would say two
10 things about it. First, there isn't a basis in
11 this record to say that she would have done the
12 same thing if the State -- particularly on the
13 armed conflict designation, where national
14 interest is not a criteria, so you have to find
15 that --

16 JUSTICE SOTOMAYOR: That's under the
17 (A) section of the statute?

18 MR. ARULANANTHAM: Correct, it's under
19 (b)(1)(A). That's -- there's two designations
20 for Syria, one under armed conflict and the
21 other under extraordinary temporary conditions.

22 Our position is that even under the
23 latter one, it is not permissible to consider
24 national interest at the periodic review stage
25 because what is required is that there be

1 review of conditions in the foreign state.

2 And we think, when the word
3 "conditions" is used, you know, just a couple
4 lines later, it's referring back to conditions
5 in the foreign state and not criteria, which is
6 what my friend kept saying. And if you look at
7 the -- the word, the name, the label of it is
8 extraordinary and temporary conditions, which
9 is talking about country conditions; (b)(1)(B)
10 also says living conditions.

11 So every time the word "conditions" is
12 used in -- in subsection (b), it's talking
13 about country conditions. National interest is
14 not a condition, right? So that -- that's
15 our -- our argument, our -- our argument on the
16 merits as to the second one.

17 But, on the first one, even as to
18 process, there's nothing in this record to tell
19 you that if they had actually consulted, the
20 Secretary would have said, I don't care what
21 the State Department says. Maybe she would
22 have said, oh, wow, that's not good. And they
23 would have perhaps, you know, led to a
24 different view.

25 And so I think, even if harmless error

1 is permissible in this context, there just
2 isn't a basis to find it, and it -- it is again
3 important for the government to speak in one
4 voice, and I think that would be the benefit
5 of -- of imposing -- enforcing the consultation
6 requirement here.

7 JUSTICE SOTOMAYOR: Well, I mean, the
8 whole purpose of -- of the TPS is to ensure
9 that the executive is open about what it's
10 doing, correct?

11 MR. ARULANANTHAM: Yes, Your Honor.
12 Transparency is all through the statute, Your
13 Honor.

14 JUSTICE SOTOMAYOR: And so, to the
15 extent that a President says country -- it's
16 not safe for these people to come back or I'm
17 unwilling to say it's safe for those people to
18 come back, Haiti shows that four of the people
19 who were sent back, that have gone back, were
20 killed. So I -- I'm not going to say it, but I
21 don't care, I'm still going to end the program,
22 that that's a different impact than saying it's
23 safe --

24 MR. ARULANANTHAM: It --

25 JUSTICE SOTOMAYOR: -- and I have an

1 alternative reason anyway?

2 MR. ARULANANTHAM: It absolutely is,
3 Your Honor. And I think it's also important to
4 remember that this issue about whether you can
5 terminate on the basis of national interest, it
6 only arises if the country is still unsafe, the
7 alternative ground, right, it only arises if
8 the country is still unsafe and as to people
9 who have been able to keep their TPS because
10 despite being vetted 18 months, every 18
11 months, resubmitting their background,
12 resubmitting criminal history checks, they have
13 been found not to have even a single felony or
14 more than one misdemeanor or any of the other
15 grounds. So we're talking about the power to
16 mass expel people who have done nothing wrong
17 to countries that remain unsafe.

18 And our view is it is unlikely that a
19 refugee protection statute would have given
20 that power to the Secretary.

21 JUSTICE SOTOMAYOR: What do you do
22 with -- there are two pools here. One is the
23 people who have been given TPS status for a
24 long period of time and the new applicants for
25 which there hasn't been checking yet.

1 MR. ARULANANTHAM: Yes.

2 JUSTICE SOTOMAYOR: Could a President
3 come and say the problem -- I'm not going to
4 terminate the program because the country's
5 still not safe, but I'm not going to give new
6 applicants permission to stay because I can't
7 vet those guys?

8 MR. ARULANANTHAM: Yes, absolutely,
9 Your Honor. So, in the periodic review
10 process, there's three options. You can
11 terminate, you can extend, and if you extend,
12 you can also designate -- designate again, but
13 you don't have to.

14 If you designate again, that updates
15 the date and has the effect of then bringing
16 new people into the eligibility criteria. But
17 the statute doesn't mandate that. It mandates
18 extension if the country is unsafe, but it does
19 not mandate designation. That is like a new
20 designation.

21 And so, absolutely, the government
22 could take the position either individually or
23 categorically that we're not going to do any
24 new designations, no more TPS holders, but this
25 fixed population, the people who already have

1 it and have come to rely on the fact that if
2 the government is -- determines that their
3 country is unsafe, then they get to stay, they
4 would still -- that closed population would
5 still be protected, Your Honor.

6 JUSTICE SOTOMAYOR: So that answers
7 the General's position about this being a pull
8 country in some way, that our policy is a pull?

9 MR. ARULANANTHAM: Yes, Your Honor. I
10 think my -- my friend for the Miot plaintiffs
11 will also point out that there's no evidence
12 for this -- this claim about the pull factor.
13 I'll leave that to them, but yes, Your Honor --

14 JUSTICE SOTOMAYOR: There are --

15 MR. ARULANANTHAM: -- there is no
16 need, you can -- you can just solve the problem
17 by saying we're not going to let any new people
18 into the program. We are going to limit our
19 extensions to countries that are unsafe for
20 people who already have TPS.

21 JUSTICE SOTOMAYOR: The people who are
22 here, however, and previously been vetted,
23 no -- there's no new problem with that vetting
24 for them?

25 MR. ARULANANTHAM: No, Your Honor. In

1 fact, the -- the statute requires that their
2 TPS be rescinded if they commit a felony or
3 become inadmissible on any of a very broad set
4 of grounds.

5 So it's -- it's extremely narrow
6 protection. But, if they -- if they don't, if
7 they do nothing wrong, then -- and their
8 country is still unsafe, the statute requires
9 that they remain protected.

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: Your argument that the
13 national interest claim is reviewable seems
14 harder to me than the procedural argument, and
15 here's why.

16 I mean, I would have thought it's a --
17 it's just a -- a version of an argument that is
18 made all the time when it comes to
19 administrative action, like you took the wrong
20 factors into account or, you know, you didn't
21 take the right factors into account. That's a
22 kind of standard part of arbitrary and
23 capricious review.

24 And I would have thought that if this
25 judicial review provision does anything, it

1 basically says don't subject the Secretary's
2 determination to arbitrary-and-capricious
3 review as we know it.

4 MR. ARULANANTHAM: Mm-hmm.

5 JUSTICE KAGAN: So why should we treat
6 this argument, this national interest argument,
7 any differently?

8 MR. ARULANANTHAM: So I think there's
9 some categorical distinction in my head between
10 an argument like, oh, you looked at the
11 earthquake recovery in this portion of the
12 country but not in that portion of the country
13 or you didn't consider this evidence about how
14 the armed conflict is in the southern part but
15 not the eastern part.

16 Those are still within the purview of
17 the statutory criteria about armed conflict or
18 temporary living conditions, right? But it's
19 something else if the Secretary says, oh, I'm
20 designating the -- I'm terminating the armed
21 conflict designation because there -- there's
22 been earthquake recovery. But earthquake is
23 not a criteria for the armed conflict. It's
24 only a criteria under (b)(1)(B).

25 JUSTICE KAGAN. Well, that makes it

1 sound as though, if there's any legal error
2 attached to the Secretary's determination,
3 review can come in. And is -- is -- is --
4 are -- are you reading the review provision
5 that way, that it's just about factual errors,
6 not legal errors?

7 MR. ARULANANTHAM: I -- I do think --
8 I do think there can be -- I mean, when we're
9 talking about Guerrero-Lasprilla and Wilkinson
10 definition of legal error, obviously, that
11 might be broad. I don't think the Court has to
12 say that those are reviewable.

13 But the claim that we're making here
14 is that the national interest, you heard me say
15 it, right, the national interest is only at the
16 outset, and it's not in the periodic review
17 because periodic review is a conditions
18 analysis whereas national interest is not
19 described as a condition, it's in
20 contradistinction to conditions. That is a
21 pure question of law. You don't need to know
22 anything -- anything at all about facts in
23 order to assess that criteria question.

24 And, Your Honor, there --

25 JUSTICE KAGAN: But it's also very

1 easy for Congress to write a review provision
2 that's confined to non-legal questions. And
3 that's not what Congress did here.

4 MR. ARULANANTHAM: That's true, Your
5 Honor, although they also can easily say --

6 JUSTICE KAGAN: I mean --

7 MR. ARULANANTHAM: -- all questions --

8 JUSTICE KAGAN: -- this has nothing to
9 do with, like, even if I read this statute as
10 saying determination, is with respect to the
11 determination about country conditions, but
12 if -- if you're in that world where the
13 question is, like, how did you determine
14 country conditions, whether you made a factual
15 error, whether you made a legal error, Congress
16 in this provision seems not to care.

17 MR. ARULANANTHAM: So I agree that
18 this provision doesn't read fact law into it
19 one way or another. And I -- I think our
20 narrower argument -- Justice Alito had said --
21 you know, I took the question to be maybe --
22 maybe I'm not buying your full -- full-bore
23 determination argument, do you have anything to
24 fall back? And what I was saying was, if
25 you -- if you don't want to take the full

1 textual view, then read it against the backdrop
2 of administrative law, where, obviously, this
3 Court generally or courts generally have the
4 last view on questions of law.

5 But I think, if you say no, that's not
6 the -- what they're doing here, so some legal
7 questions are going to be barred, what I would
8 say is, whether or not this is within the scope
9 of the determination, that is our -- what we
10 are disputing, right, because we're saying it's
11 not a country condition because it doesn't use
12 the word "condition" to describe it, and the
13 review provision is limited to conditions in
14 the foreign state. And this is not in the
15 foreign state.

16 So, at least that claim, the threshold
17 question of, like, do you get into the
18 reviewability bar or not, that should be
19 reviewable even if, once we're in it, you would
20 say, like, a legal -- a -- a legal dispute
21 about which kinds of conditions should be in it
22 or not, that that would be barred, you know.

23 And we don't -- we don't believe that
24 that necessarily is the case either, but just
25 to be clear, like, our claim is, at the very

1 highest level, it's just about the criteria of
2 even what counts as a condition.

3 JUSTICE KAGAN: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: How many Syrians
8 have returned to Syria since the end of the
9 Assad regime? And is that of any relevance to
10 what you've been saying about country
11 conditions?

12 MR. ARULANANTHAM: I mean, I'd say the
13 same thing that I said to you earlier, Your
14 Honor. Two answers. First is it is of no
15 relevance because, even if the Secretary is
16 right and the State Department is wrong, it
17 doesn't change the fact that they didn't talk
18 to each other, and the national interest is not
19 a criteria and those are claims that are
20 clearly reviewable under the statute. So, A,
21 that's my answer.

22 Second, it is true that people have --
23 many people have gone from Lebanon back into
24 Syria, but if we're -- if we're reading the
25 newspaper now and sort of outside the

1 administrative record, there might be good
2 reasons why people are going from southern
3 Lebanon back to Syria if they're having to pick
4 between the two places. And that is not the
5 same thing as saying, oh, we're going from
6 California to Syria.

7 And so I don't think the fact that you
8 have this mass movement of people is
9 necessarily indicative of whether it is safe to
10 go there or not. As I said, there is still
11 active armed conflict. There's bombing
12 happening now in Syria. So, you know, it may
13 be better or worse. Some people say the
14 mortality rate is higher. I haven't -- you
15 know, I don't know.

16 But, anyway, yeah, that -- I think --
17 I think it does not answer the question
18 ultimately, even though -- even if it did, we
19 still should win.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 Justice Jackson?

24 JUSTICE JACKSON: So I'm interested in
25 the standards applicable to our decision-making

1 in this case, and one of them is the thought
2 that even if "determination" could be read to
3 mean different things, the final conclusion or
4 close to it, versus the final conclusion plus
5 the antecedent steps, I thought we had a
6 presumption of reviewability that was supposed
7 to apply to our interpretive analysis in a
8 situation like this.

9 So am I wrong about that?

10 MR. ARULANANTHAM: You're absolutely
11 right, Your Honor. It's applied in Bowen, in
12 McNary, in Catholic Social Services, and, of
13 course, in Guerrero-Lasprilla, you know, and --
14 and Wilkinson.

15 JUSTICE JACKSON: So, when Justice
16 Thomas says, well, the background is that we
17 wouldn't interpret this in -- if we're sort of
18 trying to figure out what "determination" is,
19 we -- we -- we wouldn't allow for you to review
20 it, I think the opposite is true.

21 In other words, if there's some
22 confusion about the express -- the scope of the
23 express determination -- the express review
24 bar, I thought our rules under our precedents
25 say you're supposed to interpret it narrowly.

1 MR. ARULANANTHAM: Yes, Your Honor.
2 Two things on this. First, the presumption is
3 clear that they have to show clear and
4 convincing evidence. So the question is, you
5 know, is what we've said by hooking it to
6 "determine" or read it against the hundred
7 years of administrative law good enough to just
8 get above what would be needed, you know, to
9 beat clear and convincing. And I think it is.

10 And the second thing I'd say on that
11 subject is, Your Honor, *Biden v. Texas* from
12 just a couple years ago, this Court holds the
13 APA governs the DHS's parole policy, and it has
14 to be reasonable and reasonably explained
15 against -- and they -- it reaches that holding,
16 every judge -- justice of this Court endorses
17 that idea in the face of a
18 jurisdiction-stripping argument which the
19 government makes about the scope of the
20 injunction and, you know, all of that I'm sure
21 you all remember.

22 And so it's both true that, as a
23 general matter, this Court has applied the
24 presumption in both large and small immigration
25 cases and also that it has done it particularly

1 in a context like this one, where the issue is
2 about whether Mexico, you know, basically,
3 the -- had to be -- the U.S. had to be forced
4 to negotiate with Mexico. And so --

5 JUSTICE JACKSON: All right. And my
6 second -- my second issue about standards, is
7 there a clear error standard that is applicable
8 to the district court's findings here, findings
9 of fact, for example, about whether or not
10 there was likely discriminatory intent with
11 respect to this policy?

12 MR. ARULANANTHAM: Yes, absolutely,
13 Your Honor. It is both true -- it's double
14 deference, I would argue, because it's both
15 here on preliminary relief, there may be more
16 evidence to come if the case is allowed to
17 survive, certainly, the constitutional claim is
18 going to be allowed to survive given the -- on
19 jurisdiction anyway, and, in addition, because
20 factual findings are reviewed for clear error
21 in general, then it is true that -- that clear
22 error operates there.

23 I think that now, since we have the
24 email about consultation and we all agree that
25 that's the scope of it, it's not really

1 relevant. You can read that one page of our
2 brief --

3 JUSTICE JACKSON: Or it's just so
4 obviously not an error, not a clear error as a
5 result of that evidence, right?

6 MR. ARULANANTHAM: Well, yes, Your
7 Honor, absolutely. I mean --

8 JUSTICE JACKSON: I mean, we're still
9 applying the clear error -- you're not saying
10 jettison the clear error standard; you're just
11 saying look at this evidence. If the district
12 court found it to be that the email in terms of
13 consultation or the discriminatory intent in
14 terms of what the President said -- our -- our
15 burden is to determine whether or not she made
16 a clear error in her fact-finding related to
17 those issues, correct?

18 MR. ARULANANTHAM: Yes, absolutely,
19 Your Honor. And the last thing I would just
20 say about that is, on the pretext claim, where
21 I know there -- maybe everybody doesn't think
22 that we have all the evidence, it's not the
23 evidence that was in Commerce because it was a
24 full trial in Commerce. I think, in that
25 context too, it is relevant that we are here on

1 preliminary relief because the district court
2 was looking at it and that's -- that's what
3 you've got.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Pipoly.

8 ORAL ARGUMENT OF GEOFFREY M. PIPOLY
9 ON BEHALF OF THE RESPONDENTS IN CASE NO. 25-1084

10 MR. PIPOLY: Mr. Chief Justice, and
11 may it please the Court:

12 For decades, administrations of both
13 parties successfully terminated TPS
14 designations without inviting litigation. They
15 did so by following the process Congress set
16 forth in the TPS statute.

17 The termination of Haiti's TPS was
18 different. It was not the result of the
19 mandatory review process but was instead a
20 preordained result driven by the President's
21 resolve to end TPS for Haiti no matter what.

22 The reasons Secretary Noem gave for
23 the termination were pretextual. The DHS
24 documents that we already lodged with this
25 Court show that the Secretary's purported

1 review was a sham. Agency staff was "forced"
2 to include rationales for termination that had
3 no empirical support.

4 The true reason for the termination of
5 the -- for the termination is the President's
6 racial animus towards non-white immigrants and
7 bare dislike of Haitians in particular. The
8 President has disparaged Haitian TPS holders
9 specifically as undesirables from a "shithole
10 country," and days after falsely accusing them
11 of "eating the dogs and eating the cats of
12 Americans," he vowed that he would terminate
13 Haiti's TPS, and that is exactly what happened.

14 Recognizing all this, the district
15 court correctly postponed the termination.
16 This Court should affirm.

17 And I welcome the Court's questions.

18 JUSTICE THOMAS: What weight do you --
19 how would you interpret the
20 jurisdiction-stripping provision?

21 MR. PIPOLY: No different than the Doe
22 plaintiffs do, Justice Thomas.

23 CHIEF JUSTICE ROBERTS: More
24 generally, is there anything that your friend
25 said that you disagree with?

1 MR. PIPOLY: No, Justice -- Chief
2 Justice -- Mr. Chief Justice. My apologies.

3 CHIEF JUSTICE ROBERTS: Whatever.
4 (Laughter.)

5 JUSTICE KAGAN: Can I ask about your
6 equal protection claim?

7 MR. PIPOLY: Certainly.

8 JUSTICE KAGAN: Is this -- is this
9 a -- a race claim or is it a national origin
10 claim, or does it matter?

11 MR. PIPOLY: It's -- it's -- it's a --
12 it's certainly a race-based claim, we would
13 argue, given the -- as -- as some of the
14 questioning earlier got to, the evidence
15 certainly suggests racial animus, which,
16 under -- which -- which the Arlington Heights
17 framework is specifically designed to suss out.

18 The -- the statements, "I would like
19 fewer people from places like Haiti," that were
20 described with the word that I won't repeat
21 again, and countries like Norway and Denmark
22 and Sweden, as Justice Sotomayor suggested
23 earlier, that's very close to what we had in
24 Arlington Heights itself.

25 So we do frame this as a race-based

1 claim. We do think it's racially motivated,
2 particularly in light of the cross-cutting
3 terminations we've seen. As the district court
4 in our case put it, 13 up, 13 down, all
5 non-white. While --

6 JUSTICE KAGAN: So is -- is that it?
7 It's -- it's not Haiti particularly; it's all
8 these countries have people of color as opposed
9 to Denmark and Scandinavian -- you know,
10 Scandinavia generally and whatever?

11 MR. PIPOLY: Sure. I certainly think
12 that the record supports the idea that the
13 President in particular has focused in on
14 Haitians, but it is broader than that.
15 Haitians are our plaintiffs. But the relevant
16 compare -- the relevant group here is -- is all
17 TPS countries, all of which are non-white.

18 JUSTICE KAGAN: And -- and what if one
19 thinks that -- you know, if -- you said there
20 was a determination that no matter what, there
21 was going to be a change to Haiti's TPS status.

22 You know, there seems to have been a
23 pretty clear determination that all TPS status
24 should go, right? There are no -- there's --
25 there's -- there's no TPS status that hasn't

1 been renounced. So how does that fact factor
2 into this equal protection claim?

3 MR. PIPOLY: Sure. Our position is is
4 that you cannot have, for whatever reason,
5 race-based or otherwise, a pre -- a -- an
6 agenda to end TPS because these are
7 country-specific --

8 JUSTICE KAGAN: Quite -- quite right.
9 But that's a different kind of claim. I -- I
10 guess I'm just wondering, like, how to think
11 about the racial component of this if there
12 seems to have been, you know, wherever and
13 whatever TPS I can find, it's not going to
14 exist tomorrow.

15 MR. PIPOLY: I'm sorry, I'm not
16 following. Well, the race-based --

17 JUSTICE KAGAN: You know, that
18 there's -- you -- you can -- you can argue that
19 there was just like an across-the-board, we
20 have to get rid of all these TPS, and the
21 statutory requirements weren't followed and --
22 and -- and all of that, but -- but the
23 injection of this racial component into it, I
24 guess I don't quite see how that operates when
25 all of these programs went.

1 MR. PIPOLY: Well, again, I would
2 point you back to both the President's
3 statements and the Secretary's statements. The
4 Secretary herself described people from Haiti
5 and from 18 other all non-white countries as
6 killers, leaches, entitlement junkies, saying
7 we don't want them, not one, while
8 simultaneously enacting a policy, another
9 humanitarian form of relief, for white and only
10 white South Africans.

11 So, if you want the comparator group,
12 that's part of it. And -- and it's true that
13 the program, the refugee program under which
14 the South -- the white South Africans were
15 admitted is not TPS as such, but both statutes
16 are -- are motivated by the same policy from
17 Congress -- motivated by the same policy.
18 They're both humanitarian programs.

19 In both TPS and with the special
20 refugee program, it's the United States saying
21 these folks are facing some hardship in their
22 home country, at least that's the stated basis,
23 and we're going to let them in. So it's --
24 it's not -- it's -- it's the President's
25 statements in which there is a comparator

1 group, white versus -- non-white countries
2 versus white countries, and it's the fact that
3 you've got the -- the -- that -- those sort of
4 sentiments being articulated into policy --

5 JUSTICE JACKSON: But more directly --

6 MR. PIPOLY: -- with regard to South
7 Africa.

8 JUSTICE JACKSON: -- to Justice
9 Kagan's point, isn't -- isn't your view that
10 the reason why the President was saying all of
11 the TPS programs have to go is because the TPS
12 program relates to countries that have large
13 minority or large racial compositions?

14 MR. PIPOLY: Yes, that's exactly
15 right, Justice.

16 JUSTICE JACKSON: In other words, the
17 motivation for getting rid of all of them is
18 that these programs "benefit" these kinds of
19 people?

20 MR. PIPOLY: That -- that -- yes,
21 that's exactly right. And I apologize if I
22 didn't follow that, but, yes, that is -- that
23 is absolutely correct.

24 And under Arlington Heights, the --
25 the racial motivation need be only one of many

1 factors. In every government policy I can
2 imagine, there is a facially legitimate reason
3 given for the termination and the -- or for the
4 government action. The Arlington Heights
5 framework exists precisely for the purpose of
6 sussing out whether impermissible racial
7 considerations were part of -- were -- were
8 impermissibly in the mix.

9 JUSTICE ALITO: But isn't it the case
10 that TPS was terminated for quite a list of
11 countries? And I -- I -- I -- I can't seem to
12 find the particular page of the transcript
13 where the district court goes through them all.

14 And, yes, none of those is a Nordic
15 country. But -- and I don't like dividing up
16 the people of the world arbitrarily into three
17 racial groups, but you -- you say they're all
18 non-white and that's the -- that's the
19 distinguishing characteristic?

20 MR. PIPOLY: That is the
21 distinguishing characteristic that the district
22 court held. But I would -- I would emphasize,
23 Justice Alito, that --

24 JUSTICE ALITO: Well, do you think
25 that if you put Syrians, Turks, Greeks, and

1 other people who live around the Mediterranean
2 in a lineup, do you think you could say those
3 people are -- are -- that all of them, are they
4 all non-white?

5 MR. PIPOLY: I understand that
6 Syrians, I think, may be classified as white
7 for purposes of the State Department. I --
8 or -- or for under -- under certain
9 government -- you know, certain government
10 programs, but, again, I think race is -- I
11 think, you know, you'd have to poll the public
12 to know what they think the race of a Syrian
13 is. I certainly think they're not white --

14 JUSTICE ALITO: Poll the public? Poll
15 the American people?

16 MR. PIPOLY: Well --

17 JUSTICE ALITO: Do they -- do they
18 think Syrians are white?

19 MR. PIPOLY: I -- I'm -- I wouldn't
20 think that most would, Justice Alito.

21 JUSTICE ALITO: Really?

22 MR. PIPOLY: I really don't.

23 JUSTICE ALITO: Okay. How about
24 Turks?

25 MR. PIPOLY: I honestly haven't

1 considered what racial component I would sort
2 Turks into.

3 JUSTICE ALITO: How about Greeks?

4 MR. PIPOLY: I -- I don't know the
5 answer to that either.

6 JUSTICE ALITO: How about southern
7 Italians?

8 (Laughter.)

9 MR. PIPOLY: Well -- well,
10 certainly -- certainly, 120 years ago, when we
11 had our last wave of European immigration,
12 southern Italians were not considered white.
13 So I think our concept of these things evolves
14 over time.

15 JUSTICE ALITO: How about Spaniards?

16 MR. PIPOLY: I think same answer.
17 About 120 years ago, I don't think they were
18 considered white.

19 JUSTICE ALITO: You have a really
20 large -- you have a really broad definition of
21 who's white and who's not white. As I said, I
22 don't like dividing the people of the world
23 into these groups.

24 MR. PIPOLY: I -- I understand. I --
25 I would that say even under this Court's

1 rationality jurisprudence, if you look at cases
2 like Moreno, it is not necessary for us to get
3 strict scrutiny to win here because,
4 irrespective of how you do the classification
5 at issue here, under those courts' -- under
6 those decisions -- excuse me, under those
7 precedents, bare dislike of -- of an unpopular
8 group is a sufficient basis to find that
9 rational basis is not even satisfied.

10 CHIEF JUSTICE ROBERTS: Given your
11 understanding of the review bar, wouldn't your
12 APA arguments be exactly the same if there were
13 no review bar? In other words, what function
14 does it -- with respect to your APA arguments,
15 in what way does the review bar restrict what
16 you -- what -- what you want to argue?

17 MR. PIPOLY: I will give the same
18 answer that counsel for the Doe plaintiffs
19 gave, which is that there are -- that
20 determination has the same meaning in the TPS
21 statute that it had in the SAW statute at issue
22 in the McNary case, that in that case, the
23 antecedent obligations procedurally were
24 subject to judicial review even if the
25 substantive determination was not.

1 JUSTICE GORSUCH: On that score,
2 counsel, you agreed that the determination --
3 about the country conditions no longer meet the
4 criteria is unreviewable?

5 MR. PIPOLY: Yes, the -- the
6 Secretary's substantive --

7 JUSTICE GORSUCH: That final
8 determination under, what is it, (B), right,
9 (4)(B) -- (3)(B)? Sorry. That's unreviewable?

10 MR. PIPOLY: The Secretary's
11 substantive conclusion as to the existence or
12 non-existence --

13 JUSTICE GORSUCH: Well, it's a
14 determination, right? I mean, that's what the
15 statute says, right?

16 MR. PIPOLY: Correct. And that's how
17 we define determination.

18 JUSTICE GORSUCH: Yeah. And -- and
19 that takes effect once it's published in the
20 Federal Register plus 60 days or something like
21 that under -- under (3)(B), right?

22 MR. PIPOLY: That's correct.

23 JUSTICE GORSUCH: Okay. And that's
24 the determination and that's the effect of the
25 statute, but you say that a court can enjoin it

1 anyway.

2 MR. PIPOLY: No, they can -- well,
3 for -- we didn't get an injunction here. We
4 got 705 relief under the APA.

5 JUSTICE GORSUCH: 705 postponement.

6 MR. PIPOLY: Right.

7 JUSTICE GORSUCH: Yeah, I mean, I'm --
8 I'm just looking at what the court said. I
9 think, in the Syria case, it said the -- the
10 defendants' termination of TPS status for
11 Syrians is hereby postponed. And the D.C.
12 Circuit in your case said the district court
13 postponed termination, right?

14 MR. PIPOLY: That's correct. That's
15 Section 705 of the APA.

16 JUSTICE GORSUCH: How is that not
17 judicial review of the Secretary's
18 determination?

19 MR. PIPOLY: Well, I would say that,
20 again, the -- the claim --

21 JUSTICE GORSUCH: I understand your
22 process point, that you want to look at some
23 antecedent things. But how can it not be
24 judicial review of the determination if you're
25 postponing the determination?

1 MR. PIPOLY: Because determination --
2 well, it -- I -- I can't -- it's difficult for
3 me to answer that question without pointing
4 out --

5 JUSTICE GORSUCH: It's difficult for
6 me to answer the question too.

7 (Laughter.)

8 MR. PIPOLY: It's -- well, no, the --
9 probably for different reasons, but the --

10 (Laughter.)

11 JUSTICE GORSUCH: Well, no, I don't
12 know. I'm asking -- I'm -- I'm just -- I am
13 struggling with that.

14 MR. PIPOLY: No, I understand. The
15 question comes down to do you define
16 "determination" as coextensive with a broader
17 term like "decision." And we see --

18 JUSTICE GORSUCH: No, no, no. I'm --
19 I'm working within your framework for purposes
20 of this question. You know, (3)(B) says, once
21 the Attorney General, but we all agree that's
22 the Secretary, makes the determination the
23 country conditions are no longer met, the
24 determination decision takes effect, published
25 in the Federal Register, plus 60 days,

1 something like that. We -- we all agree on
2 that.

3 And that -- that's what the statute
4 says about the effectiveness of the
5 determination.

6 MR. PIPOLY: Right. We have -- we --
7 the -- the final agency action here that was --
8 that was postponed is as counsel --

9 JUSTICE GORSUCH: Is the
10 determination.

11 MR. PIPOLY: It is the termination,
12 not the determination, which is not subject to
13 judicial review.

14 JUSTICE GORSUCH: That -- that's what
15 you got?

16 MR. PIPOLY: That is consistent with
17 McNary. It's consistent with Bowen.

18 JUSTICE JACKSON: Counsel, is your
19 point that the -- that judicial review runs to
20 the claim? In other words, what -- what is
21 happening in the judicial review bar, when it
22 says there's no judicial review, it means the
23 court cannot consider the claim that's being
24 made, but that's different than what the court
25 having considered the claim ultimately does?

1 MR. PIPOLY: Yeah. That's exactly
2 right. And, again --

3 JUSTICE JACKSON: And so, at the end
4 of the day, if the court considers a claim
5 about a defect in the procedure and thinks it
6 likely and, therefore, postpones the
7 termination while that claim is under review,
8 that's not the same thing as reviewing the
9 ultimate determination?

10 MR. PIPOLY: That's exactly right.
11 The determination here has the same meaning
12 that it had in McNary and Bowen, which is the
13 substantive existence -- the existence
14 substantively of the -- of the -- of the
15 conditions for designation; i.e., is Haiti
16 still safe?

17 The final agency action at issue here
18 is the termination that was published in the
19 Federal Register.

20 JUSTICE GORSUCH: I -- I appreciate
21 all of Justice Jackson's points and yours, but
22 the statute says that determination is
23 effective basically automatically, right, and
24 it -- it tells us when it's effective. And it
25 tells us how it's effective. And that's what

1 the statute -- that's what Congress told us, is
2 once that determination is made, boom, it goes.

3 And -- and I -- I'm just struggling
4 with how -- how that -- that could be true
5 and -- and yet it could also be true that --
6 that judicial review postponing that -- that
7 termination decision is not judicial review of
8 that judicial determination -- of that
9 determination.

10 MR. PIPOLY: Right. Because the
11 termination decision, the final agency action,
12 includes substantially more than the
13 determination. It includes things like when
14 the --

15 JUSTICE GORSUCH: It includes
16 antecedent things, of course --

17 MR. PIPOLY: Correct.

18 JUSTICE GORSUCH: -- that feed into
19 that determination. I -- I appreciate that.
20 Okay. All right.

21 MR. PIPOLY: Right.

22 JUSTICE GORSUCH: Thank you.

23 JUSTICE BARRETT: Would you like to
24 address -- would you like to address the
25 General's point, the Solicitor General's point,

1 that this would drive a truck through the
2 judicial review bar?

3 MR. PIPOLY: I don't think it would
4 and no more so than, again, McNary or Bowen
5 already did.

6 And -- and I would remind the Court
7 that in Bowen and McNary -- excuse me, in
8 McNary, the plaintiffs in that case won, and
9 maybe this is responsive to Justice Gorsuch's
10 point. Even though they were challenging the
11 procedure by which their SAW determinations was
12 made, they still obtained injunctions and
13 invalidation of the underlying determinations
14 that they were challenging. So this tension
15 that we're identifying between the process and
16 the outcome is one that this Court has been --
17 and that the law has been comfortable with for
18 over 30 years now.

19 As far as it driving a hole through
20 the review bar, I would come back to the exact
21 same point -- well, to a similar point, which
22 is the determination is -- is -- is off the
23 table. We agree with that. Congress could not
24 have intended, we say, for the -- for things --
25 for these antecedent considerations not to be

1 considered because, when it enacted the TPS
2 statute, it already had the benefit of Bowen,
3 and after it passed the review bar, Congress --
4 several years after it passed the review bar,
5 Congress enacted IIRIRA, in which it -- it
6 retained the language from Bowen -- from Bowen,
7 from McNary. So it's reasonable to read the
8 review bar in this case as consistent with that
9 in Bowen and McNary.

10 In other words, Congress knows how to
11 write broader language encompassing more than a
12 specific determination. It could write all
13 questions of law or fact. And, in fact, in
14 some other sections of Title VIII, it even
15 writes language that we think would preclude
16 procedure and process claims, like in -- in
17 another section of Title VIII, it refers to all
18 procedures and policies. That's
19 1252(a)(2)(A)(iv).

20 So Congress knows how to write broader
21 language if it wants to, but it chose not to do
22 so here, even within the background of Bowen
23 and McNary.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas, anything further?

1 JUSTICE THOMAS: How exactly does your
2 equal protection argument work? The Equal
3 Protection Clause applies to states.

4 MR. PIPOLY: Well, this is a claim
5 that arises under the Fifth Amendment -- the
6 Fifth Amendment's equal protection guarantee.

7 JUSTICE THOMAS: Of life, liberty, and
8 property?

9 MR. PIPOLY: That is the equal
10 protection component of the Fifth Amendment due
11 process guarantee. That's correct.

12 JUSTICE THOMAS: So how does it work?

13 MR. PIPOLY: Well, this Court has held
14 repeatedly that --

15 JUSTICE THOMAS: No. How does your
16 claim work? How do you get to the Fifth
17 Amendment?

18 MR. PIPOLY: Because the Fifth
19 Amendment constrains the federal government in
20 the same way that the Fourteenth Amendment
21 constrains states.

22 CHIEF JUSTICE ROBERTS: Justice Alito,
23 anything further?

24 Justice Sotomayor?

25 JUSTICE SOTOMAYOR: The Fifth

1 Amendment says the federal government can't
2 discriminate on the basis of race, correct?

3 MR. PIPOLY: That's exactly right.
4 And -- and the other thing I would -- I would
5 emphasize that I was trying to get at earlier
6 is that even under this case -- this Court's
7 rationality cases, we still win.

8 Remember the -- the facts of Moreno.
9 There was a facially plausible FDA program that
10 did not allow unmarried households to receive
11 food stamps. This Court nonetheless said that
12 there was something else at play there, animus
13 against a particular group, a bare dislike of a
14 particular group.

15 And the President's statements,
16 regardless of whether you consider them
17 inherently racial or some other type of
18 classification, reflect a bare dislike for
19 Haitians in particular.

20 CHIEF JUSTICE ROBERTS: Justice Kagan,
21 anything further?

22 Justice Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 Justice Jackson?

1 Thank you, counsel.

2 Rebuttal, General?

3 REBUTTAL ARGUMENT OF GEN. D. JOHN SAUER

4 ON BEHALF OF THE PETITIONERS

5 GENERAL SAUER: Very briefly,

6 Mr. Chief Justice.

7 Congress balanced the risk that -- by
8 enacting a judicial review bar, Congress
9 balanced the risk that there might be some
10 decision that's erroneous or baseless or
11 off-base against -- that would evade judicial
12 review against the risk of what we're living
13 through here, which is judicial micromanagement
14 of the sorts of foreign-policy-laden
15 determinations and decisions that are naturally
16 conferred upon the -- the political branches.

17 Justice Alito, turning to your "convoy
18 of trucks" question, if you look at the
19 briefing in this case, I think it vividly
20 illustrates the -- the concern that any
21 exception that they put forth, and the
22 exception morphs when they talk about it with
23 different -- you know, different -- different
24 formulations, any one of those exceptions
25 creates a -- a -- an exception that would

1 eviscerate the statutory -- or the judicial
2 review bar here.

3 So, if you look, for example, at the
4 Syria Respondents, the claims they raise, they
5 raise the consultation claim, but as I pointed
6 out earlier, even those consultation claims are
7 starting to bake in substantive criteria. In
8 other words, the district courts are saying,
9 well, you did consult, but your consultation
10 wasn't thorough enough. Therefore, we give you
11 a D-plus. Come back when you've got a B-minus
12 consultation. Maybe we'll let you terminate at
13 that time.

14 And it gets even more striking when
15 you get to their claims and things about the
16 national interest criteria, which is
17 unquestionably a substantive criteria. And
18 then even further, if you look, for example, at
19 the Syria Respondents, their pretext claim,
20 they say, well, we're raising a pretext claim
21 and here's four reasons why we think this
22 decision was pretextual. Reason 3 is a long
23 discussion of how they think the Secretary got
24 the administrative record wrong and made the
25 wrong kinds of judgments and so forth.

1 It gets even more striking when you
2 read the Haiti Respondents' brief, where, in
3 the 11 pages or so in which they discuss the --
4 the merits of their claims, by the second or
5 third page, they've kind of abandoned any
6 pretense that what they're raising is
7 procedural, and they're raising the whole
8 panoply of substantive challenge -- APA-type
9 challenges to this particular decision.

10 So, to the extent there is a -- you
11 know, a -- a -- a -- a judicial -- or any
12 exception to the judicial review bar here,
13 their own briefs, I think, demonstrate that
14 it's going to collapse under its own weight.

15 There's been reference to the
16 presidential directives that we're supposed to
17 provide. There is a presidential directive
18 that was provided. It was provided in the
19 executive order. And the President directed
20 the Secretary to ensure that TPS designations
21 are "appropriately limited in scope" and only
22 as long as necessary to achieve the -- the
23 textual directives in the statute. And that is
24 what the -- that is what the Secretary did
25 here.

1 And then, Justice Gorsuch, as to your
2 question, I do think it's helpful to end this
3 case by look -- or end this argument by looking
4 at their prayer for relief in their complaints,
5 which says we are challenging the termination
6 decision as to these two -- these two
7 countries. We are saying that that termination
8 decision was unlawful. It should be declared
9 unlawful. It should be set aside under the
10 APA. It should be postponed under Section 705.

11 And I think, at that point, at a very
12 high level, we are looking at a -- a request
13 for judicial review of the termination
14 determination, and that is exactly what the
15 statute bars.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 The case is submitted.

20 (Whereupon, at 12:21 p.m., the case
21 was submitted.)

22

23

24

25

1	<p>above [1] 96:8 abroad [2] 49:24,24 absence [1] 71:5 absolutely [11] 37:25 68:11,22 85:2 86:8,21 95:10 97:12 98:7,18 105:23 accept [1] 78:23 accommodated [1] 7:4 accompanying [1] 49:12 according [1] 76:20 account [6] 31:22 52:24,25 53:9 88:20, 21 accounts [1] 76:20 accusing [1] 100:10 achieve [2] 78:19 122:22 across [1] 9:21 across-the-board [1] 103:19 act [2] 12:18 59:15 acting [1] 27:23 action [6] 71:4 88:19 106:4 113:7 114: 17 115:11 active [4] 56:21 74:24 76:12 94:11 acts [1] 60:8 actual [2] 31:9 53:2 actually [16] 13:25 29:21 36:16 46:23 50:2 52:15 59:13 65:3 67:19 72:2 73: 5 77:9 78:17 80:17,23 83:19 addition [3] 56:22 61:25 97:19 additional [1] 28:4 address [3] 50:17 115:24,24 addressed [1] 46:5 addresses [1] 69:15 adequacy [2] 79:16,19 administration [5] 52:2,3 80:22 81:4, 13 administrations [1] 99:12 administrative [12] 45:7,9,23 56:14 60: 17 64:17,19 88:19 92:2 94:1 96:7 121:24 admissibility [1] 22:12 admitted [1] 104:15 adopted [1] 6:8 advance [1] 59:22 advice [2] 36:18 41:16 advise [1] 47:11 affirm [1] 100:16 affirmative [1] 13:25 affirmatively [1] 14:4 afresh [1] 34:19 africa [1] 105:7 african [3] 31:14,14 32:10 africans [3] 31:20 104:10,14 age [1] 57:11 agencies [11] 5:19 15:5 24:22 36:25 37:9 39:10 40:8 42:19 43:8 58:5 68: 13 agency [7] 15:14 40:10 68:21 100:1 113:7 114:17 115:11</p>	<p>agenda [1] 103:6 ago [6] 17:3 18:7 51:20 96:12 108:10, 17 agree [9] 13:8 57:21 75:9,14 91:17 97: 24 112:21 113:1 116:23 agreed [1] 110:2 ahead [3] 21:11 35:10,12 ahilan [1] 55:2 alien [1] 16:12 aliens [7] 8:24 27:14,15,17 46:8 52:20 53:21 alito [25] 44:15 62:15,23 63:11 69:8 78:21,22 81:5,8,20 91:20 106:9,23, 24 107:14,17,20,21,23 108:3,6,15,19 118:22 120:17 alito's [1] 62:3 allege [3] 12:3 29:22 32:1 allow [5] 33:19 35:13 52:24 95:19 119: 10 allowed [4] 31:10,15 97:16,18 allowing [1] 53:21 almost [3] 31:13 48:22 81:24 alone [2] 36:4 57:9 already [12] 8:24 9:18 21:21 33:21 37: 17 51:1 61:25 86:25 87:20 99:24 116: 5 117:2 alternative [2] 85:1,7 although [3] 10:12 63:4 91:5 amendment [6] 118:5,10,17,19,20 119: 1 amendment's [1] 118:6 america [1] 28:15 american [1] 107:15 americans [2] 30:13 100:12 amount [2] 13:14 80:1 amounts [1] 13:18 analysis [3] 21:5 90:18 95:7 animus [5] 30:11 33:11 100:6 101:15 119:12 announce [1] 19:17 announced [1] 19:2 annual [5] 12:21 50:17,18,20,22 another [6] 13:7 25:16 61:23 91:19 104:8 117:17 answer [24] 38:8 40:15,17,17,18 41:3, 9 42:8,11 46:22 49:7,8 72:13,16 73: 20 80:15,16 93:21 94:17 108:5,16 109:18 112:3,6 answerable [1] 18:9 answers [2] 87:6 93:14 antecedent [8] 5:3 61:3 62:13 95:5 109:23 111:23 115:16 116:25 anybody [1] 75:14 anyway [5] 66:11 85:1 94:16 97:19 111:1 apa [8] 68:10 69:12 70:7 96:13 109:12, 14 111:4,15</p>
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