

**No. 25-5724**  
**(scheduled for oral argument in January 2026, before Judges**  
**Wardlaw, Mendoza, and Johnstone)**

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**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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**NATIONAL TPS ALLIANCE, et al.,**  
Appellees-Plaintiffs,

v.

**KRISTI NOEM, et al.,**  
Appellants-Defendants.

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On Appeal from the United States District Court  
for the Northern District of California  
District Court Case No. 3:25-cv-1766

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**APPELLANTS' REPLY BRIEF**

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BRETT A. SHUMATE  
*Assistant Attorney General*

YAAKOV M. ROTH  
*Principal Deputy Assistant Attorney*  
*General*

DREW C. ENSIGN  
*Deputy Assistant Attorney General*

WILLIAM H. WEILAND  
*Acting Assistant Director*

JEFFREY M. HARTMAN  
*Trial Attorneys*  
Office of Immigration Litigation  
Civil Division  
U.S. Dep't of Justice  
P.O. Box 878  
Ben Franklin Station  
Washington, D.C. 20044  
Phone: (202) 532-4404  
Jeffrey.M.Hartman@usdoj.gov

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## INTRODUCTION

This case arises in an even more “unusual posture” than Plaintiffs acknowledge. Resp.1. The district court postponed and invalidated the challenged actions of the Secretary of Homeland Security; this Court twice declined to grant interim relief; and the Supreme Court twice intervened so that the Secretary’s actions could take effect. *See Noem v. Nat’l TPS Alliance*, — S. Ct. —, 2025 WL 2812732, \*1 (Oct. 3, 2025) (staying the district court’s judgment under 5 U.S.C. §706); *Noem v. Nat’l TPS Alliance*, 145 S. Ct. 2728 (2025) (staying the district court’s relief under 5 U.S.C. §705). This level of Supreme Court intervention—twice in a single case—is indeed rare.

Plaintiffs cite two cases where the Supreme Court reached a different determination as to the merits when it considered a case on plenary review. Here, though, the Supreme Court has determined twice that the government is likely to succeed on the merits. In this “unusual posture,” it is especially true that “every maxim of prudence suggests that [the Court] should decline to take the aggressive step of ruling that the plaintiffs here are in fact likely to succeed on the merits right upon the heels of” *two* “Supreme Court’s stay order[s] necessarily concluding that

they were unlikely to do so.” *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 230 (4th Cir. 2020).

The district court’s approach conflicts with §1254a(b)(5)(A) and would significantly undermine that plain bar on judicial review. If the district court were right, litigants will be able to evade Section 1254a(b)(5)(A) and obtain review of TPS designations or extensions—not just terminations—by repackaging an arbitrary-and-capricious claim as a pattern-or-practice claim. That cannot be the law: to have any force, §1254a(b)(5)(A) must apply even where TPS recipients disagree with the Secretary’s TPS determinations or allege (incorrectly, here) that they are unlawful.

If the Court reaches the merits, it must reverse because the district court failed to recognize that the Secretary’s unreviewable “national interest” determination was independently dispositive and abused its discretion by considering extra-record evidence to manufacture extra-statutory procedural requirements in violation of fundamental principles of administrative law. And it failed to recognize that there is nothing arbitrary-or-capricious about the Secretary’s determinations. It also

erred by extending universal relief to non-parties. This Court should take the Supreme Court’s lead and reverse.

## **ARGUMENT**

### **I. *NTPSA I* IS NOT CONTROLLING**

Plaintiffs claim that *NTPSA I* dictates the outcome of this appeal. Resp.14-17. That is wrong, and in all events, will not be true when the Court vacates *NTPSA I* because it became moot before the government could seek further review.

#### **A. Plaintiffs Conflate Interim Relief Under 5 U.S.C. §705 With A Final Judgment Under 5 U.S.C. §706**

Under §705, courts apply the preliminary injunction factors and make a predictive finding on whether to postpone an agency action “pending judicial review.” 5 U.S.C. §705; *see Nat’l TPS Alliance v. Noem*, 150 F.4th 1000, 1015-16 (9th Cir. 2025) (*NTPSA I*); *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 668 (9th Cir. 2021). A decision under §705 is provisional and focused on maintaining the status quo during the pendency of litigation. *See Bakersfield v. Boyer*, 610 F.2d 621, 624 (9th Cir. 1979).

In contrast, courts enter final decisions on the legality of an agency’s action under §706. 5 U.S.C. §706; *see, e.g., Fejes v. Fed. Aviation*

*Admin.*, 98 F.4th 1156, 1159 (9th Cir. 2024). That is not a predictive finding but a decision on the merits. *See Dep’t of Com. v. New York*, 588 U.S. 752, 773 (2019).

In *NTPSA I*, this Court affirmed the district court’s grant of interim APA relief, reasoning Plaintiffs were “*likely* to succeed on their claim that the vacatur of a prior extension of TPS is not permitted by the governing statutory framework.” 150 F.4th at 1008 (emphasis added). Similarly, *NTPSA I* explained that the Court in *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020) (vacated upon rehearing en banc), “never conclusively resolved the merits of the preliminary injunction, much less the final merits determination” after vacating the district court’s grant of a preliminary injunction that barred four TPS terminations from taking effect. 150 F.4th at 1015 n.5.

Because the merits questions presented here “differ[] from the inquiry as to the preliminary injunction,” that alone is sufficient to distinguish this appeal from *NTPSA I* and this Court’s stay decision in *National TPS Alliance v. Noem*, — F.4th —, 2025 WL 2661556 (9th Cir.

Sept. 17, 2025) (*NTPSA II*).<sup>1</sup> *East Bay*, 993 F.3d at 662, 669-75 (adopting a legal interpretation opposite to that in a published stay order).

Moreover, in *Doe v. San Diego Unified School District*, this Court reasoned that the “legal analysis” of opinions addressing the merits of a preliminary injunction pending appeal are “persuasive but not binding on future merits panels.” 19 F.4th 1173, 1177 n.4 (9th Cir. 2021) (quoting *East Bay*, 993 F.3d at 660)). The same conclusion is warranted here, especially because the Supreme Court twice reached the opposite conclusion as this Court about the Secretary’s likelihood of success on the merits of the applicability of §1254a(b)(5)(A) in *this case*. See *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (noting an exception to the law of the case doctrine where a “decision is clearly erroneous and its enforcement would work a manifest injustice” or where “intervening controlling authority makes reconsideration appropriate”); This case and *NTPSA I* are in the same relative posture as the preliminary injunction ruling and final judgment appeal in *Doe*. Compare *Doe*, 19 F.4th at 1176, with *NTPSA I*, 150 F.4th at 1015;

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<sup>1</sup> The Secretary agrees that *NTPSA II*’s stay analysis does not control the merits. Resp.16 (citing *East Bay*, 993 F.3d at 661).

Resp.14. In short, *NTPSA I* should not control the Court’s analysis because unlike that predictive opinion, this appeal addresses the merits of Plaintiffs case following a second Supreme Court stay. That is in no way inconsistent with the law of the circuit doctrine. *See* Resp.14. *NTPSA I* is a precedent of the Court (for now, *see* §I.B). But *Doe* explains the scope of the precedential effect. It precedentially resolves the likelihood-of-success questions presented by the preliminary-injunction stage of this case, but that does not equate to a definitive resolution of the actual-success questions presented in this final-judgment appeal.

Plaintiffs cite *East Bay*, but that decision addressed when a “published motions panel order” regarding “a stay” controls a merits panel’s “decision on the merits of the preliminary injunction appeal,” not the effect of a preliminary injunction appeal (or its APA equivalent) on a final-judgment appeal. 993 F.3d at 660. To be sure, it recognized that there “may be circumstances” where a motions panel can bind a future merits panel—but *East Bay* described that exception as applying when the motions panel answers “pure questions of law for which preexisting binding authority necessarily compelled the answer.” *Id.* at 661 n.3. No one contends that exception is relevant here.

**B. Vacatur of *NTPSA I* Would Moot Plaintiffs' Reliance On It**

Plaintiffs' reliance on *NTPSA I* is misplaced for the additional reason that the district court unilaterally mooted this Court's opinion regarding interim relief under 5 U.S.C. §705 when it entered partial final judgment, preventing the government from seeking further review of this Court's *NTPSA I* opinion. Gov't.18 n.4; see *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016); *Hassoun v. Searls*, 976 F.3d 121, 134 (2d Cir. 2020) (similar).

Plaintiffs never contest that the district court's judgment rendered this Court's opinion moot or that under this Court's precedents, "vacatur is generally automatic in the Ninth Circuit when a case becomes moot on appeal." *Donovan v. Vance*, 70 F.4th 1167, 1173 (9th Cir. 2023); Resp.15. Their assertion that the Secretary forfeited the right to seek vacatur or rehearing in the three business days between issuance of the *NTPSA I* opinion and the final judgment has no foundation. Fed. R. App. P. 40(d)(1); see 28 C.F.R. §0.20(b); 1994 Advisory Committee Notes ("extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a

rehearing.”); Resp.15. Nor has the government’s time to file a rehearing petition seeking vacatur expired, in light of this Court’s Administrative Order extending all government deadlines affected by the recent appropriations lapse. Because this Court should vacate the *NTPSA I* opinion as moot, the panel should not rely on its reasoning here.

## **II. THE DISTRICT COURT LACKS JURISDICTION TO REVIEW PLAINTIFFS’ APA CLAIMS**

### **A. The TPS Statute Forecloses Plaintiffs’ Challenges**

The Court lacks authority to review Plaintiffs’ unfounded claims that the Secretary lacked power to vacate the TPS extensions. At minimum, the Court lacks authority to review Plaintiffs’ arbitrary-and-capricious challenges to the vacatures and the termination of TPS for Venezuela.

The TPS statute provides that “[t]here is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state” for TPS. §1254a(b)(5)(A). That jurisdictional bar is clear. *See Bouarfa v. Mayorkas*, 604 U.S. 6, 19 (2024) (holding that §1252(a)(2)(B)(i) clearly and convincingly barred review of visa revocations); *Patel v. Garland*, 596 U.S. 328, 338-39 (2022) (examining the ordinary meaning of broadening



terms). By foreclosing “judicial review,” §1254a(b)(5)(A) unequivocally bars Plaintiffs’ APA challenges to the TPS Haiti and Venezuela vacatur (which are determinations with respect to TPS extensions) and Venezuela termination. *See Noem*, 2025 WL 2812732, at \*1 (granting a stay after concluding the Secretary was likely to prevail on this claim).

Even if Plaintiffs were correct that the judicial review bar does not cover all challenges to TPS terminations, the bar at minimum does not permit arbitrary and capricious challenges—even ones Plaintiffs describe as “collateral.” Allowing “collateral” arbitrary-and-capricious challenges to otherwise-unreviewable TPS determinations “would eviscerate the statutory bar, for almost any challenge to [a determination] could be recast as a challenge to its underlying methodology.” *DCH Reg’l Med. Ctr. v. Azar*, 925 F.3d 503, 505-07 (D.C. Cir. 2019). That is implausible when the point of the statute was to “limit[] unwarranted... extensions of TPS,” *Ramos*, 975 F.3d at 891, which is why this Court previously rejected arbitrary-and-capricious challenges under the APA, as they “cannot obtain judicial review over what is essentially an unreviewable challenge to specific TPS terminations by simply couching their claim as a collateral ‘pattern or practice’ challenge.” *id.* at 983.

Thus, even if the Court could review whether the statute authorizes the Secretary to vacate TPS extensions or designations, §1254a(b)(5)(A) still forecloses Plaintiffs’ challenges (Resp.22-26) to the adequacy of the Secretary’s consultation within the Executive branch, as well as her rationale for vacating extensions for Haiti and Venezuela and terminating Venezuela’s 2023 TPS designation, because those are not “first order question[s]” about the Secretary’s authority and are “‘determination[s]... with respect to the... termination or extension’ of a country for TPS.” *NTPSA I*, 150 F.4th 1017 (quoting §1254a(b)(5)(A)); Gov’t.24-30.

Plaintiffs’ challenge to the Secretary’s authority to reconsider TPS extensions mirrors the claim this Court refused to consider in *Ramos*. The Court there noted that simply characterizing a claim as a collateral challenge “is not an automatic shortcut to federal court jurisdiction.” 975 F.3d at 893 (citing *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018)). It then recognized that the plaintiffs’ assertion of a “new and unexplained practice” was tantamount to a claim that the agency acted “arbitrarily and capriciously,” because §1254a did not expressly preclude the Secretary’s actions. *Id.* (“the alleged illegality of the agency action

here is based solely on the APA and its requirement that agencies not ‘arbitrarily and capriciously’ depart from past practice”).

Here too, respondents’ arbitrary-and-capricious claims all go to the substance of the Secretary’s determinations. The district court deemed the Secretary’s decisions pretextual by claiming that they lacked record support, 1-ER-48-50, that she failed to adequately consider alternatives or reliance interests, 1-ER-47-48, that she failed to adequately “explain” her decision, 1-ER-45-47; and that she had departed from past practice, 1-ER-51-53. Each is “essentially an attack on the substantive considerations underlying the Secretary’s specific TPS determinations, over which the statute prohibits review.” *Ramos*, 975 F.3d at 893.

Plaintiffs hardly argue otherwise, instead focusing on the district court’s holding that the Secretary “failed to consult with the State Department” before making the termination decision. Resp.23. Though framed as “procedural,” this claim too requires substantive second-guessing of the termination determination and the consultations underlying it. See 1-ER-51-54 (describing this as one of plaintiffs’ “arbitrary and capricious” challenges). The district court concluded (i) that the State Department’s report during this administration was too

short, 1-ER-14-15; (ii) that other State Department reports (from the months before) were too outdated, 1-ER-52; and (iii) that the evidence in those latter reports did not support the Secretary’s termination determination, 1-ER-52. Those supposed flaws go to the substance of the Secretary’s determinations—exactly the type of attack on termination determinations that Section 1254a(b)(5)(A) forbids.

Plaintiffs’ additional arguments fail.

1. Plaintiffs largely rely on a mistakenly narrow reading of the word “determination.” They agree that “determination” is broad enough to cover “virtually any decision or judgment,” Resp.20, but they argue that §1254a(b) compels a narrower reading because “*every one*” of the uses of “determine” or “determination” in that subsection refers to “the Secretary’s assessment of whether *country conditions* meet” the statutory requirements, Resp.18.

At a basic level, that argument does not square with the way Congress wrote the judicial review bar. Congress plainly did not set out to write a narrow bar that depends on subtle implications. Gov’t.19-21. It used not one, but two broadening terms—“any” and “with respect to.” *Id.* §1254a(b)(5)(A). And it specified the determinations that were

covered—determinations under subsection (b) regarding “designation” and “termination or extension of a designation.” As a matter of text, Plaintiffs would impermissibly read those broadening terms out of the statute. And as a matter of context, their reading contradicts the clue from the broadening language that Congress used a barrel, not a thimble, to douse judicial review.

Plaintiffs’ reading fails for three additional reasons.

a. First, “determination,” without more, is not the sort of term to which the presumption of consistent usage readily applies. The presumption instructs that “[i]n a given statute, the same term usually has the same meaning.” *Pulsifer v. United States*, 601 U.S. 124, 149 (2024). That inference works only for “terms with some heft and distinctiveness, whose use drafters are likely to keep track of and standardize.” *Id.*; see *Barry v. McDonough*, 101 F.4th 1348, 1356-57 (Fed. Cir. 2024). Cutting against Plaintiffs’ argument that “determination” has a special meaning here, “determination” and its variations appear hundreds of times in Title 8 and thousands of times throughout the U.S. Code. It is not a “distinctive” term, unlike “money remuneration” or “principal activity,” that drafters are likely to have carefully

standardized to craft, by implication, a narrow bar on judicial review. *Pulsifer*, 601 U.S. at 149.

**b.** Plaintiffs’ argument also fails because even if the canon applied to “determination,” Congress did not use “determination” consistently in §1254a. The presumption “grows weaker with each difference in the formulation of the provisions under inspection.” *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 436 (2002). Here, the statute contradicts Plaintiffs’ claim that every use of “determine” or “determination” refers only to findings about country conditions. Resp.18. Nor does the statute consistently use “determination” to refer to findings about country conditions, as it would if Plaintiffs were right that Congress carefully crafted a statute-specific meaning of that word.

Plaintiffs focus exclusively on §1254a(b), but they ignore that §1254a repeatedly uses “determine” or “determination” to refer to findings or decisions other than country conditions. For example, §1254a(c)(2)(A) refers to “the determination of an alien’s admissibility”—that is, whether a specific alien qualifies for TPS. That use of “determination” plainly does not refer to country conditions. *See also id.* §1254a(a)(4)(B) (referring to “a final determination with respect to the

alien’s eligibility for” TPS). Similarly, §1254a(d)(3) refers to “publication of the notice of *the determination*” under §1254a(b)(3)(B)—in other words, the Secretary’s final decision to terminate. The same subsection also permits the Secretary to “determin[e]” the effective date for the termination. *Id.* §1254a(d)(3).

Plaintiffs also ignore the variation among even the uses of “determination” on which they focus in subsection (b). For one thing, the statute refers to a “determin[ination] whether the conditions for...*designation* under this subsection continue to be met,” §1254a(b)(3)(A); *see* §1254a(b)(3)(B) (referring to a determination “under subparagraph (A) that a foreign state . . . no longer continues to meet the conditions for designation under paragraph (1)); §1254a(b)(3)(C) (similar). The “conditions for designation under paragraph (1)” include not only country conditions but also whether the designation would be “contrary to the national interest.” §1254a(b)(1)(C).

For another thing, Congress used the word “determination” with different modifiers in each instance. That, too, defeats the idea that Congress created a consistent meaning for “determination” in §1254a. *See Ours Garage*, 536 U.S. at 436 (“difference[s] in the formulation” cut

against presumption’s application). One provision requires the Secretary to “determine whether” the conditions for a TPS designation are met and publish “*such* determination.” §1254a(b)(3)(A) (emphasis added). Two others, subparagraphs (B) and (C), refer to a “determin[ation] *under subparagraph (A).*” §1254a(b)(3)(B)-(C) (emphasis added). And the judicial-review provision uses a different formulation: “any determination of the [Secretary] *with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.*” §1254a(b)(5)(A) (emphasis). Those differing formulations mean that Plaintiffs cannot invoke the presumption of consistent usage. Instead, if anything, those formulations trigger the converse principle that “different terms usually mean different things.” *Pulsifer*, 601 U.S. at 149 (“material-variation canon”). It would be surprising if Congress used *different* phrases to create a *consistent* term. And if Plaintiffs were right that “determination” means “finding regarding country conditions,” the additional phrases Congress used in §1254a(b)(3)(A), (B)-(C), and (b)(5)(A) would all be unnecessary and superfluous. That is not a compelling reading of the statute.



c. Section 1254a also defeats Plaintiffs’ view that Congress carefully and consistently used “determination” to mean “the Secretary’s assessment of whether *country conditions* meet the requirements,” Resp.18, because Congress repeatedly used other words to refer to the Secretary’s assessment of country conditions. Section 1254a(b)—the provision on which Plaintiffs focus—refers to the Secretary’s assessment of country conditions as “findings.” 8 U.S.C. §1254a(b)(1)(A) (“finds that there is an ongoing armed conflict”), (B) (“finds that ... there has been an earthquake, [etc.]”), (C) (“finds that there exist extraordinary and temporary conditions”); *see id.* §1254a(b)(1) (“a statement of the findings under this paragraph”). Plaintiffs never explain why Congress would use “find” and “determine” interchangeably if it established the specialized meaning for “determine” they claim.

2. Seizing on a theory the district court did not adopt, *see* 1-ER-25-31, Plaintiffs say that the Secretary’s reasoning for the Venezuela vacatur is not shielded by §1254a(b)(5)(A) because it relates to TPS registration under §1254a(c)(1)(A)-(B). Resp.22-23. That approach has little to commend it. First, it is impossible to square with the text of the review bar: That one aspect of the Secretary’s reasoning touched on

registration does not transform the vacatur of an extension into something other than a “determination” “with respect to” an “extension.” The Secretary vacated a register notice announcing a TPS *extension*. 3-ER-141 (Venezuela Vacatur). It blinks reality that that notice represented something other than a decision with respect to an extension.

Second, their theory is practically unworkable. It would require courts to parse the Secretary’s “*basis* for the determination,” 8 U.S.C. §1254a(b)(3)(B) (emphasis added), going line by line through a Federal Register notice to parse which reasons are reviewable and to determine the effect of and remedies for any errors they identify in the reviewable portions of the notice. Gov’t.29.

Third, Plaintiffs’ theory would eviscerate the review bar. Every TPS designation, extension, and termination has consequences for registration. If those consequences are enough to make the review bar inoperative, then Congress has not succeeded in shielding any TPS actions from judicial review.

Finally, as explained (Gov’t.29-30), when the Secretary vacated her predecessor’s extension, she necessarily made a determination that

involves whether “the conditions for designation continued to be met.” *Venezuela Vacatur*, 90 Fed. Reg. at 8806. Extending TPS is an unreviewable determination regarding an extension; so is vacating an extension.

### 3. Plaintiffs’ remaining counterarguments fare no better.

Plaintiffs’ attempt to distinguish cases where this Court has enforced limitations on judicial review of “determinations” misses the point. Resp.24-25. In those cases, this Court *enforced* bars on review of specified “determinations,” including where doing so barred any legal or constitutional challenges. *See, e.g., Skagit County v. Shalala*, 80 F.3d 379, 386 (9th Cir. 1996) (“if a procedure is challenged only in order to reverse the [Secretary’s] individual reclassification decision, judicial review is not permitted.”); *Nicholas v. United States*, 633 F.2d 829, 830-31 (9th Cir. 1980) (statute providing “any determination made by a district court... shall not be reviewed by any other Court,” barred appellate review of “constitutional and evidentiary determinations.”).

Plaintiffs’ attempt to analogize §1254a(b)(5)(A) to *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), and *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 60-65 (1993), also fails. Unlike Section

1254a(b)(5)(A), IRCA’s review provisions aimed to *channel*—but not foreclose—challenges to individual denials of adjustment of status. *See McNary*, 498 U.S. at 492 n.12 (describing the IRCA’s judicial review procedures and noting that they were intended to provide the “exclusive method of judicial review”). *McNary* and its progeny thus reflect the Court’s aim to ensure an appropriate judicial forum for pattern-or-practice claims that would otherwise escape review. *Id.* at 496-98; *Reno*, 509 U.S. at 60-65. Precluding review of such claims was untenable because “it [was] most unlikely that Congress intended to foreclose all forms of meaningful judicial review” given the statute’s “limited review provisions.” *McNary*, 498 U.S. at 496. But *McNary* also recognized that Congress *could* use “more expansive language” in fashioning a bar to judicial review. That is precisely what Congress did in Section 1254a(b)(5)(A),<sup>2</sup> so *McNary* and *Reno* support the government, not Plaintiffs.

*Nakka v. USCIS*, 111 F.4th 995 (9th Cir. 2024), is also inapposite. Resp.21. *Nakka* evaluated a different provision, 8 U.S.C. §1252(a)(2)(D)),

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<sup>2</sup> The administrative review Congress established in §1254a(b)(5)(B) further indicates that §1254a(b)(5)(A) is intended to bar programmatic challenges to TPS designations.

and misinterpreted *McNary*'s narrow holding for all the reasons Judge Bress persuasively explained in his opinion in *Garcia v. USCIS*, 146 F.4th 743, 757-61 (9th Cir. 2025), calling for *Nakka* to be overruled. Moreover, Plaintiffs never acknowledge that in the REAL ID Act of 2005, Pub. L. No. 109-13, §106, 119 Stat. 231, 310-11, Congress defined “judicial review” throughout chapter 12 of the Immigration and Nationality Act, to foreclose habeas corpus review and “review pursuant to any other provision of law (statutory or nonstatutory).” 8 U.S.C. §1252(a)(5); see *Thoung v. United States*, 913 F.3d 999, 1005 (10th Cir. 2019); Resp.21-22. Congress has spoken with the requisite clarity, and the Court should not repeat *Nakka*'s error here. See *Garcia*, 146 F.4th at 757-61 (Bress, J., concurring); *Ramos*, 975 F.3d at 890.

Finally, Plaintiffs reiterate the presumption of judicial review and their theoretical parade of horrors, but neither argument can “surmount the plain language of the statute.”<sup>3</sup> *Truck Insur. Exch. v.*

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<sup>3</sup> The government's reference to *Leedom v. Kyne*, 358 U.S. 184 (1958), at a prior argument is consistent with its position that §1254a(b)(5)(A) bars Plaintiffs' APA claims, because the *Kyne* doctrine potentially applies where a “statutory review scheme forecloses all other forms of judicial review,” *NRC v. Texas*, 605 U.S. 665, 681 (2025). Plaintiffs still disclaim and forfeit any reliance on the *Kyne* doctrine, so it has no application

*Kaiser Gypsum Co., Inc.*, 602 U.S. 268, 284 (2024); *Garcia*, 146 F.4th at 754; Resp.20, 26. Congress said what it meant in 1254a(b)(5)(A): there is “no judicial review” of “any determination” with respect to a TPS designation, extension, or termination. Because Plaintiffs APA challenges violate that prohibition, this Court should reverse.

**B. The District Court’s Order Violated Section 1252(f)(1)**

Regardless of the district court’s characterization, its judgment had the effect of enjoining, or at least restraining, the Secretary’s implementation of the TPS statute. *See United States v. Texas*, 599 U.S. 670, 690-701 (2023) (Gorsuch, J., concurring) (agreeing that a district court cannot use vacatur under 5 U.S.C. §706 to “sidestep” §1252(f)(1)). Until it was stayed (for the second time) by the Supreme Court, the judgment effectively nullified the challenged actions and forced the government to implement TPS extensions that the Secretary ultimately determined are contrary to the national interest. That order violates

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here. Resp.20-21 n.6. And the government’s position before this Court is not inconsistent with its position before the Supreme Court, where the government streamlined its arguments to defend only on the merits of the vacatur claim.

§1252(f)(1) because it requires the Secretary to operate TPS exclusively in the manner ordered by the district court. Gov't.33-39.

Plaintiffs contend that the panel is bound to follow *Immigrant Defenders v. Noem*, 145 F.4th 972 (9th Cir. 2025), *reh'g petition filed* (Aug. 7, 2025). Resp.26-27. *Immigrant Defenders* considered preliminary relief under 5 U.S.C. §705, not a final judgment under §706, so it does not control. This Court has never held that §1252(f)(1) is inapplicable to a *judgment* that *permanently* restrains the operation of a covered provision under 5 U.S.C. §706. *See Imm. Def.*, 145 F.4th at 989-90; *NTPSA I*, 150 F.4th at 1018-19. Moreover, despite acknowledging that this Court's §1252(f)(1) analysis is incompatible with its exercise of jurisdiction over interlocutory appeals challenging interim relief under §705, Resp.27, Plaintiffs never grapple with and simply repeat the analytical errors underlying *Immigrant Defenders* that warrant en banc consideration. *Compare* Gov't.37, *with* Resp.26-27. Thus, *Immigration Defenders* provides no basis to ignore §1252(f)(1)'s prohibition on judgments that permanently “enjoin or restrain” the operation of §1254a.

Plaintiffs’ related reliance on *Rodriguez v. Hayes*, 591 F.3d 1105, 1119 (9th Cir. 2009), is misplaced because—contrary to their assertions, Resp.27 & n.10—the Supreme Court directly addressed that decision and *remanded* for this Court to consider whether §1252(f)(1) barred “classwide injunctive relief based on... constitutional claims” after reversing this Court’s erroneous statutory interpretations. *Jennings v. Rodriguez*, 583 U.S. 281, 313 (2018) (citing *Rodriguez*, 591 F.3d at 1120). Moreover, the portion of this Court’s reasoning that the Supreme Court quoted—that §1252(f)(1) did not prevent action “to enjoin conduct... not authorized by the statutes,” *Jennings*, 583 U.S. at 313 (citing *Rodriguez*, 591 F.3d at 1120)—was expressly overruled in *Aleman-Gonzalez*, 596 U.S. at 552-53. In doing so, the Supreme Court did not adopt the limited interpretation of “restrain” that this Court relied on. *Aleman-Gonzalez*, 596 U.S. at 549 (discussing the meanings of “restrain”). Finally, unlike *Rodriguez*, Plaintiffs never sought “classwide declaratory relief.” 591 F.3d at 1119. Thus, *Rodriguez* has no application here.

It is irrelevant that the district court vacated the Secretary’s determinations under the APA and that its judgment “operates directly upon an agency’s rule and is not directed at persons.” Resp.26.



Section 1252(f)(1) applies “[r]egardless of the nature of the action or claim or the identity of the party or parties bringing the action,” and Plaintiffs indisputably fail to satisfy §1252(f)(1)’s individual proceedings exception. It also belies the fact that the challenged actions here are the *Secretary’s* TPS determinations and that any order that restrains the operation of §1254a necessarily restrains the Secretary because “[t]he way in which laws ordinarily ‘work’ or ‘function’ is through the actions of officials or other persons who implement them. That is certainly true of the statutes to which §1252(f)(1) refers.” *Aleman-Gonzalez*, 596 U.S. at 549.

Plaintiffs would not have brought this lawsuit unless the district court’s order restrained the Secretary’s operation of §1254a with respect to Haiti and Venezuela. Moreover, Plaintiffs moved to immediately enforce the district court’s judgment and won an order obligating the Secretary to effectuate the judgment. Resp.27-28; 1-SER-1-4 (compliance order). The upshot is that the judgment requires the Secretary to extend temporary protection to hundreds of thousands of noncitizens who, but for the judgment, would be ineligible for TPS. That is plainly an order that “enjoins or restrains” the Secretary’s operation of §1254a.

The district court violated §1252(f)(1). Its judgment must be vacated.

### **III. THE SECRETARY HAS INHERENT AUTHORITY TO RECONSIDER TPS EXTENSIONS.**

Considering the Secretary’s “broad and unique discretion” over TPS determinations, *Ramos*, 975 F.3d at 890, and the absence of language foreclosing her inherent authority to reconsider or revoke a TPS designation or extension period, the Secretary properly reconsidered the TPS extensions for Venezuela and Haiti. Plaintiffs’ contrary arguments are unavailing.

Plaintiffs rely on their same faulty premise that *NTPSA I* controls the outcome of this case in arguing that the Secretary had no inherent authority to reconsider her predecessor’s actions. Resp.28-30. As previously explained, *supra* at 4-8, that conflates §705 and §706.

Attempting to distinguish *Haig v. Agee*, 453 U.S. 280 (1981), Plaintiffs argue a statute specifically authorized the Secretary to shorten a passport’s term of validity. Resp.29. Whether that is true, it is irrelevant. The Supreme Court relied solely on the Passport Act, which did not expressly authorize revocation of passports yet gave the Secretary inherent authority to do so. *Id.* at 290-302.

Plaintiffs make no meaningful attempt to reconcile *NTPSA I* with *Haig*, other than implying this Court’s precedent overrules the Supreme Court’s. Resp.29-30 & n.11. They thus fail to grapple with *Haig*’s reminder to not equate congressional silence with disapproval in areas concerning foreign policy and national security, underscoring the Secretary’s inherent authority to reconsider her predecessor’s actions. *Haig*, 453 U.S. at 291; *see Ramos*, 975 F.3d at 896. *Haig* teaches that a statute need not expressly articulate power for an action for the Secretary to have inherent authority to exercise it; it merely must not explicitly limit that authority. *Haig*, 453 U.S. at 290-91; *see CUA v. FCC*, 124 F.4th 1128, 1143 (9th Cir. 2024); *see also Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (recognizing the broad authority conferred under 8 U.S.C. § 1103(a) and observing that “[t]he statute need not specifically authorize each and every action taken by the [Secretary], so long as h[er] action is reasonably related to the duties imposed upon h[er]”).

Plaintiffs are wrong that §1254a(b)(3)(B) explicitly prohibits the Secretary from ending a TPS designation prior to the expiration of the most recent extension. Resp.29. Section 1254a(b)(3)(B) simply

establishes the Secretary’s termination authority and the effective date of a TPS designation’s termination.

Here, just as in *Haig*, Congress never expressly limited the Secretary from reconsidering a TPS extension, particularly one—like the Venezuela extension—that is not yet effective. *See Haig*, 453 U.S. at 290. Plaintiffs err in asserting the Venezuela’s 2023 Extension was already in effect when the Secretary vacated it, as the Secretary’s actions occurred in February, long before the extension became effective in April. Gov’t.22-23, 46, 58. Contra Plaintiffs, §1254a does not authorize simultaneous extensions: after an initial designation ends, the designation is either extended for “the period of extension of designation” the Secretary chooses (§1254(b)(3)(A)), extended automatically “for an *additional period*” if the Secretary makes no periodic review determination (§1254a(b)(3)(C)), or terminated no earlier than “the expiration of the most recent previous extension” (§1254a(b)(3)(C)). Plaintiffs’ interpretation of the statute is also obviously wrong because it would result in TPS extensions shorter or longer than 6, 12, or 18 months—a result they elsewhere agree is unlawful. Resp.30-31

Plaintiffs’ speculation, Resp.31, that Congress could have specifically given the Secretary reconsideration authority rings hollow against a backdrop of precedent recognizing implicit agency authority despite no express statutory language to that effect. *See e.g., id.; CUA*, 124 F.4th at 1143; *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977); Gov’t.39-42.

The Court should reverse the district court’s judgment.

#### **IV. THE CHALLENGED ACTIONS WERE NOT ARBITRARY AND CAPRICIOUS**

Even if Plaintiffs’ arbitrary-and-capricious claims were reviewable, they would fail on their merits.

**A. Venezuela Termination.** First, the Venezuela termination was not arbitrary and capricious.

1. The district court ruled for Plaintiffs that the Venezuela Vacatur was unlawful only by ignoring the Secretary’s dispositive national-interest rationale for terminating Venezuela’s TPS designation, which rendered harmless any presumed error in consultation of other agencies or assessment of country conditions. Plaintiffs’ half-hearted

attempts to gloss over the district court's mistake lack merit. 1-ER-54; Resp.40-41.

*First*, Plaintiffs contend, perplexingly, that the Secretary waived this argument by failing to raise it below, but this assertion misapprehends her argument. Resp.40. The Secretary is asserting that the *district court erred in its summary judgment order* by specifically declining to reach her national interest finding. 1-ER-54. The Secretary could not have challenged that legal error until the district court made it. Regardless, the Secretary argued at summary judgment that a national interest finding was “a necessary element” of her periodic review of Venezuela’s TPS designation. Dkt. 199 at 17. Thus, the Secretary’s harmless error argument was not waived. *See, e.g., Montana Wildlife Fed’n v. Haaland*, 127 F.4th 1, 41 (9th Cir. 2025) (declining to find government waived harmless error argument where its summary judgment opposition raised the same argument without using harmless error terminology).

*Second*, any alleged error in the Secretary’s consultation is harmless because, once again, a national interest assessment is *independently dispositive* of TPS designations, extensions, and

terminations based on extraordinary and temporary conditions under §1254a(b)(1)(C). Plaintiffs do not meaningfully attempt to refute the point that the TPS statute forbids a designation or extension if the Secretary finds it is not in the national interest or that the Venezuela termination expressly stated that the Secretary’s decision was based on the national interest.<sup>4</sup> §1254a(b)(1)(C); 5-ER-28.

Plaintiffs’ argument blatantly disregards the prejudicial error rule. Resp.41. Again, irrespective of any supposed errors with consultation or consideration of country conditions, this Court must reverse because the Venezuela Termination expressly stated that it was independently justified by an assessment of the national interest, “even assuming the relevant conditions in Venezuela remain[ed] both ‘extraordinary’ and ‘temporary[.]’” 5-ER-275. Accordingly, the district court erred in failing to assess the Secretary’s arguments related to the dispositive national interest criterion, and this Court must reverse its ruling that the termination of Venezuela’s 2023 TPS designation was arbitrary and capricious. *See Carnegie v. FERC*, 968 F.2d 1291, 1294 (D.C. Cir. 1992).

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<sup>4</sup> The Secretary’s consideration of the national-interest criterion dates to the 1990s. *See, e.g.*, Termination of Designation of Liberia Under [TPS], 63 Fed. Reg. 15,437, 15,438 (Mar. 31, 1998).

Plaintiffs cite *California Wilderness Coal. v. U.S. Dep't of Energy*, but that case is irrelevant twice over. For one thing, it was limited to notice-and-comment rulemaking. 631 F.3d 1072, 1090-91 (9th Cir. 2011) (instructing courts to “exercise great caution” before disregarding procedural errors in notice-and-comment rulemaking). No one thinks TPS actions require notice and comment. For another thing, the plain language in the Federal Register notice would amply satisfy even a “cautio[us]” approach to harmless error. *Id.*

2. Plaintiffs’ challenges to the Secretary’s consultation with other agencies and evaluation of country conditions fail because they depend on extra-record evidence that the district court should not have admitted or relied upon—namely, innocuous internal emails depicting the circulation of drafts and a GAO report.

Relying on extra-record evidence is unusual, and here, it was not justified by the “bad faith” or “relevant factors” exceptions Plaintiffs invoke. Resp.32-36; Gov’t 51-55. Plaintiffs argue that the GAO report was necessary to show whether the Secretary utilized the factors typically considered as part of the TPS decision-making process and contend that an explanation was necessary to justify departing from



those factors. Resp.35. But this Court need look no further than §1254a(b)(3) to discern the only factors the Secretary was required to consider under the law. Section 1254a(b)(3) does not mandate the process summarized by the GAO report. Gov't.54; see *Ramos*, 975 F.3d at 891. And the Secretary was not required to justify her internal process for decisionmaking. See *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 539 (D.C. Cir. 1988).<sup>5</sup> The law does not permit the district court to require the Secretary to follow the procedures in the GAO report, over and above the procedures required by §1254a. See *Garland v. Ming Dai*, 593 U.S. 357, 365 (2021). Nor was it in any way unreasonable, unusual, or unlawful for agency staff to prepare draft documents in anticipation of a new administration's policy changes. Gov't.61; Resp.40.

The Secretary did not forfeit her objection to the GAO report by citing it at a preliminary stage in this litigation; she timely objected to

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<sup>5</sup> *Veterans'* holding—that no explanation is needed to depart from non-binding policy—remains good law. See *Grace v. Barr*, 965 F.3d 883, 902 (D.C. Cir. 2020) (distinguishing *Veterans* without questioning its validity). *Veterans* acknowledged that agencies must ordinarily explain departure from longstanding norms but noted the policy at issue was “not specific or prescriptive enough” require such explanation. 843 F.2d at 530, 539. Contra Plaintiffs, Resp.41 n.17, *Veterans* held both that the relevant policy did not create a right of action and “did not bind agency discretion.” *Id.* at 530. So too here.

the taking of extra-record discovery before the district court and has renewed that objection before this Court. *See* Resp.33; Dkt.123.

**3.** Even taking the record as it stands, Plaintiffs’ claims fail. Plaintiffs have not disputed that Secretary Noem could reasonably view and weigh evidence differently than Secretary Mayorkas and draw her own conclusions, including with respect to the national interest. *See Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc); *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1071-72 (9th Cir. 2018) (agency “did not act in an arbitrary and capricious manner by reversing its 2010 Finding” in 2014, although it “relie[d] primarily on the same information in 2014 as it did in 2010”). Resp.39-42. Nor could they. All that was required of the Secretary was to follow the textual requirements of §1254a(b)(3) in terminating Venezuela’s TPS designation. She did so here, and the Court should reverse.

**B.** The Court should also reverse as to the Venezuela Vacatur. None of the district court’s reasons for concluding that the Venezuela vacatur was arbitrary and capricious can withstand scrutiny. 1-ER-45-50; Resp.36-39.

The Secretary did not fail to comprehend that a TPS beneficiary under Venezuela's 2021 designation was necessarily also a TPS beneficiary under the 2023 designation. Resp.36; Gov't.57. The Biden administration itself recognized that concurrently redesignating and extending Venezuela's TPS in October 2023 would result in different concluding dates for 2021 and 2023 registrants, with the former pool having TPS through September 2025 and the latter having TPS through April 2025. 3-ER-210-212. Therefore, Secretary Mayorkas' 2025 consolidation and extension of Venezuela's TPS pools through October 2026 meant that 2021 beneficiaries would have their TPS extended for 13 months. 3-ER-155. Plaintiffs' claim that §1254a itself required this result flies in face of the text, which nowhere authorizes—let alone commands—a 13-month extension. Resp.36; *see* §1254a(b)(3)(C). That soundly justifies the vacatur, which is all that the APA requires. *See Mt. St. Helens Mining*, 384 F.3d at 728.

Plaintiffs' assertion that the argument that the reasons for the Secretary's Venezuela vacatur were a pretext to allow her to undo Secretary Mayorkas's actions relies on improperly admitted extra-record evidence. *Supra*.32-34. But in any event, the communications cited

merely depict agency personnel gathering information regarding country conditions in Venezuela and finalizing drafts for the Secretary to review. 3-ER-145-148. Plaintiffs repeatedly cite *Department of Commerce v. New York* in support of their pretext claim, but the Supreme Court’s overarching message to the Judiciary was one of restraint in evaluating agency policymaking. *See* 588 U.S. at 785 (“It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be.”); *id.* (highlighting the “unusual circumstances” present in the case). Even in *Commerce*, the Supreme Court acknowledged that it “is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy.” *Id.* at 783. None of the evidence Plaintiffs cite indicates a “significant mismatch between the decision the Secretary made and the rationale [s]he provided.” *Id.* at 783; Resp.38-39.

C. Last, the Court should likewise reverse as to the Haiti partial vacatur. Plaintiffs devote just two sentences to the arbitrary-and-capricious claim, never addressing the government’s brief. Resp.42. The

district court erred for the reasons the government has already explained. Gov't.69-70.

This Court should reverse the district court's ruling that the challenged actions were arbitrary and capricious and its admission of extra-record evidence.

## **V. GRANTING UNIVERSAL RELIEF WAS ERROR**

Universal relief was inappropriate here. The Court should at least narrow the relief the district court granted because universal vacatur exceeded its remedial authority. *See Trump v. CASA, Inc.*, 606 U.S. 831, 841 (2025); Gov't.70-75.

Plaintiffs claim countless TPS recipients have experienced injury, yet they made no effort to identify their own members even though the government is aware of their presence by virtue of the TPS registration process. Resp.44. Multiple narrow decisions would not violate the statute—it comports with the APA and traditional equitable principles.

Plaintiffs also speculate about barriers to a judgment properly tailored to the parties. *See* Gov't.74-75. In doing so, they suggest the government would target NTPSA members affected by the Secretary's actions. That is baseless. And it would permit any organizational

plaintiff to end-run the Supreme Court's holding that "universal injunctions" exceed federal courts' power, *CASA*, 606 U.S. at 847, by raising unfounded speculation. Universal vacatur falls outside the authority granted by the APA. If nothing else, this Court should limit the judgment to Plaintiffs and their members when they filed their complaint.

## **CONCLUSION**

The Court should reverse and remand with instructions to dismiss Plaintiffs' APA claims.

Respectfully submitted,

BRETT A. SHUMATE  
*Assistant Attorney General*

YAAKOV M. ROTH  
*Principal Deputy Assistant Attorney General*

DREW C. ENSIGN  
*Deputy Assistant Attorney General*

WILLIAM H. WEILAND  
*Acting Assistant Director*

/s/ Jeffrey M. Hartman  
JEFFREY M. HARTMAN  
Office of Immigration Litigation  
U.S. Department of Justice  
P.O. Box 878, Ben Franklin Station  
Washington, DC 20044  
Telephone: (202) 532-4404  
Email: Jeffrey.M.Hartman@usdoj.gov  
ERIC SNYDERMAN  
LAUREN BRYANT  
CATHERINE ROSS  
LORI MACKENZIE  
DANIEL CAPPELLETTI  
ILANA KRAMER  
SHELBY WADE  
*Trial Attorneys*

**BRIEF FORMAT CERTIFICATION**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1) and Ninth Circuit Rule 32-1(a), I certify that Appellants-Defendants' Reply Brief:

- (1) was prepared using 14-point Century Schoolbook type;
- (2) is proportionally spaced; and,
- (3) contains 7,000 words, exclusive of tables of contents and authorities, and certificates of counsel.

/s/ Jeffrey M. Hartman  
JEFFREY M. HARTMAN  
Trial Attorney  
Office of Immigration Litigation



**CERTIFICATE OF SERVICE**

I certify that on November 19, 2025, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the ACMS system. All parties were served electronically through the ACMS system.

/s/ Jeffrey M. Hartman  
JEFFREY M. HARTMAN  
Trial Attorney  
Office of Immigration Litigation