Nos. 24A1059

In the Supreme Court of the United States

KRISTI NOEM, SECRETARY OF HOMELAND SECURITY, ET AL., *Applicants*,

v.

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

ON APPLICATION TO STAY THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

ROSE CUISON-VILLAZOR
CENTER FOR IMMIGRANT JUSTICE
RUTGERS LAW SCHOOL
123 Washington Street
Newark, NJ 07102
(973) 353-3159
rose.villazor@law.rutgers.edu

ROBERT S. CHANG
Counsel of Record
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
UC IRVINE SCHOOL OF LAW
401 E. Peltason Dr.
Irvine, CA 92697
(949) 824-3034
rchang@law.uci.edu

Counsel for Amici Curiae

May 8, 2025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici are the following 48 members of the One Hundred Nineteenth Congress:

Debbie Wasserman Schultz
Representative of Florida

Jamie Raskin
Representative of Maryland

James P. McGovern
Representative of Massachusetts

Jared Huffman
Representative of California

Adriano Espaillat
Representative of New York

Greg Casar
Representative of Texas

Eleanor Holmes Norton
Representative of D.C.

Brad Sherman
Representative of California

Betty McCollum
Representative of Minnesota

Steve Cohen
Representative of Tennessee

Paul D. Tonko
Representative of New York

Suzanne Bonamici
Representative of Oregon

Bennie G. Thompson
Representative of Mississippi

Nydia M. Velazquez
Representative of New York

Yvette D. Clark
Representative of New York

Bradley Scott Schneider
Representative of Illinois

Jerry Nadler
Representative of New York

Danny K. Davis
Representative of Illinois

Jan Schakowsky
Representative of Illinois

Kathy Castor
Representative of Florida

Henry C. ("Hank") Johnson, Jr.
Representative of Georgia

Frederica S. Wilson
Representative of Florida

Dina Titus
Representative of Nevada

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or its counsel made a monetary contribution to its preparation or submission.

Lois Frankel
Representative of Florida

Robin L. Kelly
Representative of Illinois

Lou Correa
Representative of California

Darren Soto
Representative of Florida

Veronica Escobar
Representative of Texas

Jesús G. "Chuy" García
Representative of Illinois

Alexandria Ocasio-Cortez
Representative of New York

Troy A. Carter, Sr.
Representative of Louisiana

Maxwell Frost
Representative of Florida

Sydney Kamlager-Dove
Representative of California

Andrea Salinas
Representative of Oregon

Janelle Bynum
Representative of Oregon

Luz Rivas
Representative of California

Juan Vargas
Representative of California

Donald Beyer
Representative of Virginia

Pramila Jayapal
Representative of Washington

Steven Horsford
Representative of Nevada

Lizzie Fletcher
Representative of Texas

Sylvia R. Garcia
Representative of Texas

Rashida Tlaib
Representative of Minnesota

Sheila Cherfilus-McCormick
Representative of Florida

Robert Garcia
Representative of California

Jared Moskowitz
Representative of Florida

Gabe Amo
Representative of Rhode Island

Maxine Dexter
Representative of Oregon

Many of the amici have served in the House through the implementation of TPS under Democratic and Republican Administrations.

As members of Congress, amici have a strong and unique interest in ensuring that the Executive Branch faithfully executes the laws Congress enacts and does not usurp Congressional or Judicial authority. Amici offer their perspectives and expertise to assist this Court in resolving questions related to statutory construction and the scope of what Congress delegated to the Executive Branch in the Temporary Protected Status (TPS) statute. Amici have a special interest in ensuring that the TPS statute is faithfully followed because of the severe and substantial economic and social impacts that the unlawful revocation of TPS for hundreds of thousands of people would have on their districts and the communities they represent in Congress.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici, as members of Congress, are keenly aware of the critical role that separation of powers plays in our constitutional democracy as a means to safeguard against the concentration of power within a single government branch. Separation of powers requires that the Executive Branch not usurp Congress's power to make laws; it mandates that the Executive Branch not override the Judiciary's power to declare what the law is; and it obligates the Judiciary to not shy from its duty to prevent Executive Branch overreach that upsets the carefully calibrated role each co-equal branch plays in our constitutional democracy.

The Executive Branch advances an interpretation of the TPS statute that, in essence, rewrites the statute to claim a power that Congress did not delegate to the Executive Branch. Further, the Executive Branch asserts an interpretation of the

TPS statute that leaves no role for the judiciary. Amici, drawing on their experience and expertise as members of Congress, explain how these offered interpretations are incorrect and further explain that the TPS statute does not allow for vacatur.

ARGUMENT

I. The Executive Branch Seeks to Usurp Congressional Authority Through Its Novel Interpretation of the TPS Statute.

This case arises from Secretary Noem's decision to "vacate" the previous administration's decision to extend temporary protected status—a legislatively created immigration status subject to a statutory framework—to certain Venezuelan migrants. In its application to stay, the Solicitor General, representing the Executive Branch here, claims the Secretary's vacatur falls within the discretionary power of the Executive Branch and is the result of a "change in administration brought about by people casting their votes." Stay Application at 1, 15 (quoting *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part)).

Because the power to vacate is not mentioned in the TPS statute, the Executive Branch is left to claim an "inherent" power to vacate an extension of a temporary protected status or TPS designation. This claim of "inherent" power must be assessed against the will of Congress; when the action taken—here by the Secretary—is "incompatible with the expressed or implied will of Congress, . . . [the Executive Branch's] power is at its lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343

U.S. 579, 637 (1952) (Jackson, J., concurring). Rather than grant unfettered authority, Congress enacted the TPS statutory framework to *limit* the Executive Branch's discretion when making decisions related to temporary protected status by "replac[ing]. . . ad hoc, haphazard regulations and procedures." 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Bill Richardson). Congress wanted to ensure that migrants are not "subject to the vagaries of our domestic politics," *id.* (statement of Rep. Sander Levine), and that factors "other than purely political ramifications be considered when granting this status to a nation's people," 133 Cong. Rec. (House) 21334 (1987) (statement of Rep. Mario Biaggi).

Ignoring this history, the Executive Branch elevates its own statutory interpretation of the TPS statute to grant itself a power that was neither authorized by Congress nor consistent with the regulatory structure it enacted. In so doing, the Executive Branch intrudes on the legislative function of Congress. It then compounds this intrusion on the separation of powers by claiming the Secretary's novel interpretation is shielded from judicial review.

In short, the Executive Branch's position usurps both legislative and judicial powers. But "[w]hen the separation of powers is at stake," this Court does not "just throw up [its] hands." *Gundy v. United States*, 588 U.S. 128, 168 (2019) (Gorsuch, J. dissenting). This Court must continue to guard against the Executive Branch's attempt to both write and interpret the law.

Contrary to any claim of "inherent power," the Executive Branch does not have the "power to revise clear statutory terms that turn out not to work in practice." *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 327 (2014). As discussed in further detail below, the TPS statute is clear: if a foreign state's designation is terminated, such termination "shall not be effective earlier than 60 days after the date the notice is published or, if later, the expiration of the most previous extension under subparagraph (C)." 8 U.S.C. § 1254a(b)(3)(B). The Secretary cannot avoid that statutory scheme by granting itself a new power to vacate an extension. *See infra* Part II. And only the Secretary's "determination[s]" as to designations, terminations, or extensions are excluded from judicial review, 8 U.S.C. § 1254a(b)(5)(A), not the question of statutory interpretation implicated by the Secretary's novel reading of the TPS statute. *See infra* Part II.A.

Allowing the Secretary to elevate her own interpretation of her powers over those enumerated by Congress "would deal a severe blow to the Constitution's separation of powers[,]" *Utility Air*, 573 U.S. at 327, and upend precedent governing the Congress-Executive relationship that pre-dates the Civil War, *see Morrill v. Jones*, 106 U.S. 466, 424–25 (1883) ("The secretary of the treasury cannot by his regulations alter or amend a revenue law. All he can do is regulate the mode of proceeding to carry into effect what congress has enacted."); *United States v. Williamson*, 90 U.S. 411, 416 (1874) ("It is not in the power of the executive department, or any branch of it, to reduce the pay of an officer of the army. The

regulation of the compensation . . . belongs to the legislative department of the government.").

Indeed, even this Court cannot, via its judicial power, "rewrite clear statutes"—such as the TPS statute—to address "policy concerns." *Azar v. Allina Health Servs.*, 587 U.S. 566, 581 (2019). Nor can the Secretary, who lacks judicial power. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391–92 (2024); *id.*, 413–16 (Thomas, J. concurring). Rather than act unilaterally, the executive "must take its complaints" to Congress. *Azar*, 587 U.S. at 581.

II. The Executive Branch Seeks to Usurp Judicial Authority By Claiming that the Judiciary Is Barred from Deciding Whether the TPS Statute Grants the Power to Vacate a TPS Designation.

In order to safeguard the separation of powers, there must be judicial review of the Executive Branch's interpretation of a Congressional statute, and that review must follow the proper rules of statutory construction, including deference to the plain language of a statute, and where necessary, to the legislative intent of Congress. Anything less would subvert the traditional role of Congress (to make the laws) and the executive (to faithfully execute the laws).

By vacating a prior determination to extend a TPS designation, the Secretary interprets the TPS statute to grant herself unenumerated powers never granted by Congress when it created the TPS statutory framework. The Secretary now tries to evade review by claiming that Section 1254a(b)(5)(A) of the TPS statute bars judicial

review of her vacatur, even though that section never mentions the terms vacate or vacatur.

The crux of the Executive Branch's argument is that the Secretary's vacatur is encompassed in the determination of whether to extend a designation, and thus, judicial review of its interpretation of the TPS statute is barred. But that tautology presumes the answer to the question at hand—does the TPS statute allow the Secretary to vacate a previous determination to extend a designation? That question—irrespective of any particular "determination" of a designation, termination, or extension—is one of statutory construction, and thus, properly within the province of judicial review. Proper analysis of a statute must defer to principals of statutory construction, including legislative intent, *not* the self-serving interpretation of an Executive Branch officer.

"Congress expects courts to handle technical statutory questions." *Loper Bright*, 603 U.S. at 402. "Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences." *Id.* at 403. This Court "recognize[s] a 'strong presumption in favor of judicial review" in interpreting statutes, "including statutes that may limit or preclude review." *Cuozzo Speed Techs. v. Com. for Intell. Prop.*, 579 U.S. 261, 273 (2016). This presumption may be overcome only "by 'clear and convincing indications, drawn from 'specific language,' 'specific legislative history,' and 'inferences of intent drawn from the

statutory scheme as a whole,' that Congress intended to bar review.'" *Id.* (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349–50 (1984)).

A. The Plain Language of Section 1254a(b)(5)(A) Does Not Bar Judicial Review of the Secretary's Vacatur.

Section 1254a(b)(5)(A) states, "[t]here is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state." 8 U.S.C. § 1254a(b)(5)(A). The Executive Branch argues the statute unambiguously gives the Secretary "unreviewable authority" such that her decision to vacate the 2023 Designation extension is unreviewable. Stay Application at 16. However, Congress narrowly drafted the scope of the bar on judicial review. First, the word "vacatur" was excluded from the types of determinations the Secretary makes, indicating that the Secretary's vacatur is outside of the scope of Section 1254a(b)(5)(A). *Cf. Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the principle of *expressio unius est exclusion alterius* or expression of one is the exclusion of the other).

Second, the Executive Branch argues that the word "any" has an expansive meaning and captures "determinations of whatever kind." Stay Application at 16 (internal citations and quotation marks omitted). This argument ignores the principle that courts "must give effect to ***every*** word of a statute wherever possible," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) (emphasis added); and ignores that "any" will mean "different things depending on the setting," *Nixon v. Missouri Mun. League*, 541 U.S.

125, 132 (2004). Here, Congress expressly included a qualification: "to designations, or terminations or extensions." 8 U.S.C. 1254a(b)(5)(A). These are categorical limitations—the statute does not extend to "determinations of whatever kind," but rather any determinations to designate, terminate or extend TPS. Any other interpretation renders the remaining words of Section 1254a(b)(5)(A) superfluous. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("[It is] a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").

Third, the phrase "with respect to" does not have the "broadening effect" the Executive Branch argues, Stay Application at 16-17, particularly in light of the fundamental statutory canon: "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Executive Branch claims that "with respect to" "covers not only its subject but also matters relating to that subject." Stay Application at 16-17. Here, the subject of "with respect to" is "any determination" of a "designation, or termination or extension of a designation." 8 U.S.C. § 1254a(b)(5)(A). But the Executive Branch wants to extend the bar on judicial review to whether the TPS statute includes the unenumerated action, "vacate," not to matters relating to the determination of designation, termination, or extension. Accepting the Executive Branch's interpretation of "with respect to" means that

Congress's qualification of "any determination" would necessarily submit to the whims of whatever the Executive Branch says is encompassed by the text of the statute. *Cf. United States v. Miller*, 145 S. Ct. 839, 853 (2025) (rejecting a broad reading of "with respect to" when doing so defied the principle "that sovereign-immunity waiver must be construed narrowly").

Finally, a narrow reading of Section 1254a(b)(5)(A) to allow limited judicial review is consistent with the understanding that "Congress acts intentionally and purposely." *Russello v United States*, 464 U.S. 16, 23 (1983). If Congress intended to limit judicial review in all instances, Congress could "easily have used broader statutory language." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991) (holding 8 U.S.C. section 1160(e)(1) barred judicial review only to "direct review of individual denials of SAW status" and not collateral challenges to unconstitutional practices); *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 53–56 (1993) (finding 8 U.S.C. section 1255a(f) only barred judicial review of "the denial of an individual application" while broader challenges not tied to such denials were not barred from judicial review); *cf. Ramos v. Wolf*, 975 F.3d 872, 888–92 (9th Cir. 2020), *aff'g*, *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. 2018), *vacated*, 59 F.4th 1010 (9th Cir. 2023) (agreeing with lower court that section 1254a(b)(5)(A) only barred judicial review of inquiries "into the underlying considerations and reasoning employed by the Secretary in reaching her country-specific TPS determinations" but challenges to unconstitutional practices and policies considered collateral were

reviewable). Because the plain reading of Section 1254a(b)(5)(A) supports a narrow interpretation, the Court is not barred from reviewing the Secretary's vacatur of the 2023 Designation extension.

B. Legislative History Supports a Narrow Interpretation of the Bar on Judicial Review.

Beyond the statutory text, a narrow interpretation of Section 1254a(b)(5)(A) is supported by this Court's "well-settled" and "strong presumption" favoring judicial review of administrative actions. *McNary*, 498 U.S. at 496. This Court has long held that "when a statutory provision is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (citing *Kucana v. Holder*, 558 U.S. 233, 251 (2010)) (internal quotations marks omitted). This presumption can only be overcome by "clear and convincing evidence" of congressional intent to preclude judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967).

The Executive Branch argues that it "has long exercised inherent authority to afford temporary immigration status based on its assessment of conditions in foreign states." Stay Application at 17. However, Congress expressly enacted TPS to address prior concerns about the lack of criteria guiding the Executive Branch and the lack of transparency in the then existing ad hoc process. While Congress recognized the Executive Branch's unique role in matters of foreign policy, it understood that the Executive Branch could not have unfettered discretion in TPS determinations. As

Representative Richardson explained in discussion over a predecessor safe haven bill in 1989, the goal was to "establish an orderly, systematic procedure for providing temporary protected status for nationals of countries undergoing civil war or extreme tragedy, because we need to replace the current ad hoc, haphazard regulations and procedures that exist today." 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Bill Richardson). Against this backdrop, Congress would not create a detailed statutory scheme and then, as the Executive Branch argues, eliminate any mechanism to ensure the process was followed.

Instead, in Section 1254a(b)(5)(A) Congress preserved the Secretary's authority in matters uniquely within her purview while preserving judicial review on procedural issues arising under the TPS statute. Thus, as discussed above, Section 1254a(b)(5)(A) only bars judicial review of the Secretary's specific "determination" to designate, extend, or terminate designation of a particular foreign state based on the enumerated statutory framework. But acknowledgment of Executive authority in one respect does not equal an abdication of judicial authority in all.

Where "Congress has made its intent clear, the Court must give effect to that intent." *Miller v. French*, 530 U.S. 327, 328 (2000). Barring judicial review of the Secretary's vacatur ignores the congressional intent behind creating the TPS statute in the first place: to eliminate ad hoc designations and ensure the Executive follows a statutorily prescribed procedure. Because there are no "'clear and convincing indications, drawn from 'specific language,' 'specific legislative history,' and

'inferences of intent drawn from the statutory scheme as a whole,' that Congress intended to bar review,'" the presumption favoring judicial review controls. *Cuozzo Speed Techs.*, 579 U.S. at 273.

III. The TPS Statute Does Not Allow for Vacatur.

A. The Plain Language of the TPS Statute Does Not Authorize the Secretary to Vacate Designations or Extensions of Designations.

"Statutory interpretation must 'begi[n] with,' and ultimately heed, what a statute actually says." *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (quoting *Nat'l Assn. of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 127 (2018)). This Court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (2005)) (internal quotation marks omitted).

"Federal agencies are creatures of statute. They possess only those powers that Congress confers upon them." *Judge Rotenberg Educ. Ctr., Inc. v. FDA*, 3 F.4th 390, 399 (D.C. Cir. 2021). Where, as here, there exists a question requiring statutory interpretation, "as in any field of statutory interpretation, it is [the Court's] duty to respect not only what Congress wrote ***but, as importantly, what it didn't write***." *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 765 (2019) (emphasis added). Here, the plain text and purpose of the TPS statute demonstrates that Congress did not authorize the Secretary to *vacate* an already-granted TPS extension or designation.

As described more fully below, the TPS statute describes a detailed process and time frame for the Secretary to implement designations, extensions, and terminations. It says nothing, however, about vacatur of extensions or designations that have already been granted.

Even though the statute says nothing of vacatur, the Executive Branch argues that the Secretary has "inherent authority" to reconsider past decisions. Stay Application at 20-21. While it is true that administrative agencies possess "some" inherent authority to revisit their prior decisions, this argument oversimplifies the law and fails to recognize that "any inherent reconsideration authority does not apply in cases where Congress has spoken." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014).

Careful review of the Immigration and Nationality Act's ("INA") statutory framework belies any argument that the TPS statute impliedly authorizes the Secretary to vacate prior designations and extensions. The TPS statute meticulously describes how the Secretary may designate, extend, and terminate temporary protected status, when such determinations take effect, and provides specific time periods that apply to each. For example, an initial designation "take[s] effect upon the date of publication of the designation" and "shall remain in effect until the effective date of the termination of the designation." 8 U.S.C. § 1254a(b)(2).

The TPS statute is similarly prescriptive with respect to extensions and terminations. "At least 60 days before the end of the initial period of designation, and

any extended period of designation," the Secretary "after consultation with appropriate agencies of the Government, shall review the conditions in the foreign state . . . and shall determine whether the conditions for such designation under this subsection continue to be met." 8 U.S.C. § 1254a(b)(3)(A). The Secretary must "provide on a timely basis for the publication of notice of such determination . . . in the Federal Register." *Id.* If the Secretary determines "that a foreign state . . . no longer continues to meet the conditions for designation" the Secretary "shall terminate the designation by publishing a notice in the Federal Register." *Id.* 1254a(b)(3)(B). Without such a determination, the designation "***is extended***." *Id.* § 1254a(b)(3)(A) & (C) (emphasis added). Extensions take effect immediately, and last for the length of time specified in the notice, up to 18 months. *Id.*

In contrast, a termination "shall not be effective earlier than 60 days after the date the notice is published ***or, if later, the expiration of the most recent previous extension***." *Id.* § 1254a(b)(3)(B) (emphasis added). Against this backdrop, the Executive Branch's claim that Secretary Noem had inherent authority to vacate the extension of the 2023 Designation is plainly at odds with this statutory framework. As noted, the statute expressly provides that termination of the TPS designation cannot occur earlier than the expiration of the "most recent previous extension," or here, the 18-month extension former Secretary Mayorkas granted on January 17, 2025.

While the Executive Branch complains that former Secretary Mayorkas extended the 2023 Designation "before the statute required action," Stay Application at 26, nothing in the TPS statute mandates that the Secretary wait until the last second to review and grant extensions. Indeed, to the extent the Secretary seeks to extend an expiring designation extension, the TPS statute requires the Secretary to act "***[a]t least*** 60 days before end of the initial period of designation, and any extended period of designation." 8 U.S.C. § 1254a(b)(3)(a) (emphasis added). That is, while the TPS statute sets the minimum amount of time before the expiration of a designation or extension to act (at least 60 days), it does not dictate how far in advance the Secretary may act. Secretary Noem's vacatur thus operates as an end-run around the statutory framework adopted by Congress because it effectively terminates a designation before its "most recent previous extension" in violation of the TPS statute.

The lack of implied or inherent authority to vacate TPS designations or extensions is further confirmed by evaluating language Congress used to grant the Secretary revocation authority elsewhere in the INA. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (internal quotation marks and citation omitted); *see also Leatherman*, 507 U.S. at 168.

Other sections of the INA demonstrate that Congress granted the Secretary the authority to revisit and revoke prior approvals in more narrow circumstances. Pursuant to 8 U.S.C. section 1155, the Secretary "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title." 8 U.S.C.A. § 1155. Congress could have, but did not, include similar language in the TPS statute. Exclusion of similar language in the TPS statute evinces Congress's intent to limit the Secretary's ability to revoke or vacate a prior approval outside of the termination procedure prescribed by Section 1254a(b)(3)(B).

B. Congress Created the TPS Statutory Framework to Limit the Executive Branch From Making Arbitrary Decisions and Shield TPS From Domestic Politics.

The TPS statute's prohibition against the type of ad hoc vacatur attempted by Secretary Noem is further supported by the legislative history leading up to the TPS statute's passage. As discussed above, Congress's rationale behind passing TPS was to eliminate the Executive Branch's prior practice of granting humanitarian protection on an ad hoc basis through the practice of "extended voluntary departure". *See supra* (discussing statement of Rep. Bill Richardson); *see also* 136 Cong. Rec. (House) 8686 (statement of Rep. Mary Rose Oakar) ("An orderly, systematic procedure for providing temporary protected status for nationals of countries undergoing war, civil war, or other extreme tragedy is needed to replace the current ad hoc haphazard procedure."). Specifically, Congress recognized the need to

regularize the process of awarding humanitarian protection based on enumerated criteria to protect the decision from political pressures.

As is evident from the legislative history of the TPS statute, Congress anticipated the current political situation, where the current Secretary seeks to vacate TPS for a class of Venezuelan migrants even though the previous Secretary found, following the statutory framework of the TPS statute, that extending the designation of Venezuela warranted. Venezuelans covered by the TPS extension are thus subject to the changing political winds and arbitrary action by the Executive Branch. This is ***precisely*** what Congress sought to avoid by passing the TPS statute.

For example, Representative Levine stated: "[p]erhaps the most important aspect of this bill is that it will standardize the procedure for granting temporary stays of deportation. Refugees, spawned by the sad and tragic forces of warfare, ***should not be subject to the vagaries of our domestic politics*** as well. . . . Our recent domestic political squabble over the relative merits of Salvadorans and Nicaraguans as political refugees should never be repeated." 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Sander Levine) (emphasis added). Similarly, Representative Brennan warned that the prior process of "extended voluntary departure" potentially sent migrants "mixed messages which result from a vague or arbitrary policy." 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Joseph Brennan).

These contemporaneous statements of various members of Congress reflect clear legislative intent to constrain executive discretion and replace the prior practice of providing nationality-based humanitarian protection on an ad hoc and opaque basis. The Executive Branch asks this Court to defer to its judgment and allow it to reinterpret the TPS statute in a way that will effectively negate it and return to the pre-TPS era. In the Secretary's view, the outcome of the last election justifies her ability to vacate her predecessor's extension decision, which if upheld, would result in the immediate termination of TPS for the approximately 472,000 individuals previously subject to the 2023 Designation. *See* 88 Fed. Reg. 68130, 68134 (Oct. 3, 2023). Overnight these individuals' lives would be completely upended. That is precisely the kind of "haphazard" process the TPS statute was designed to prevent from occurring to individuals deserving of humanitarian protection.

C. Congress Intended TPS Status to Fill Gaps in Immigration Law Where Asylum Would Not Provide Adequate Protections.

The Executive Branch also suggests respondents have not established irreparable harm because they may apply for asylum if they are afraid to return to Venezuela. *See* Stay Application at 37–38. This assertion also contravenes Congress's intent in passing the TPS statute. Congress specifically designed TPS to provide a statutory framework allowing relief to individuals facing serious but generalized forms of harm as opposed to the targeted persecution necessary to receive asylum.

The Refugee Act of 1980 allows asylum seekers to receive limited immigration benefits on a case-by-case basis. 8 U.S.C. § 1101(a)(42)(A). Asylum applicants bear

the burden of showing that they meet the definition of "refugee" under the INA. *Id.* *Id.* § 1158(b)(1)(B)(ii). The INA defines refugee as any person outside of their country of origin "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A).

To establish a well-founded fear of persecution, asylum applicants must demonstrate that they face both a subjective and objective fear of returning to their country of origin. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987). Analyzing persecution is highly fact-dependent and generally only includes individuals who can demonstrate individualized and targeted persecution. *See generally* Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 Harv. Int'l L.J. 413, 427 (2006); Peter C. Diamond, *Temporary Protected Status Under the Immigration Act of 1990*, 28 Willamette L. Rev. 857, 861 (1992). Thus, individuals who face generalized forms of harm—no matter how life-threatening—would not qualify for asylum. *See, e.g.*, H.R. Rep. No. 100-627, 100th Cong., 2d Sess. at 5 (1988).

In response, Congress created the TPS program to provide temporary protection to individuals unable to return to their country of origin because of ongoing armed conflict, natural disaster, or other extraordinary circumstances. 8 U.S.C. § 1254a. The drafters of the TPS statute recognized that "not everyone who needs

protection meets the strict standard of asylum." *See* 136 Cong. Rec. (House) 8686 (statement of Rep. William H. Gray).

In fact, Congress noted that despite the severe conditions in El Salvador at the time, the asylum approval rate for Salvadorans averaged less than five percent. H.R. Rep. No. 244, 101st Cong., 1st Sess. pt. 1, at 11 (1989). Congress therefore intended the TPS statute to "fill[] an important gap in our immigration and refugee laws." 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Hamilton Fish).

The Secretary's improper vacatur of Respondents' TPS status causes them to suffer irreparable harm despite the potential availability of asylum (or other relief) that may be presented under the immigration laws. Vacatur of Respondents' TPS status defies both the letter and the well-established legislative intent behind Section 1254a. Asylum (or other relief) cannot negate the irreparable harm by the Secretary reopening a "gap" in the immigration laws that Congress sought to fill.

CONCLUSION

For the foregoing reasons, the Court should deny the application.

May 8, 2025

Respectfully submitted,

/s/ Robert S. Chang
Robert S. Chang
Counsel of Record
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
UC IRVINE SCHOOL OF LAW
401 E. Peltason Dr.
Irvine, CA 92697
(949) 824-3034

rchang@law.uci.edu

Rose Cuison-Villazor
CENTER FOR IMMIGRANT JUSTICE
RUTGERS LAW SCHOOL
123 Washington Street
Newark, NJ 07102
(973) 353-3159
rose.villazor@law.rutgers.edu

Counsel for Amici Curiae