

No. 25-5724

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

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

vs.

KRISTI NOEM, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, NO. 3:25-CV-01766-EMC
HONORABLE EDWARD M. CHEN

**PLAINTIFFS-APPELLEES' OPPOSITION TO PETITION FOR
REHEARING EN BANC**

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TABLE OF CONTENTS

INTRODUCTION 1

I. THE IMPORTANCE OF TPS DOES NOT WARRANT EN BANC REVIEW GIVEN THE SUPREME COURT’S STAY 3

II. THE PANEL’S JURISDICTIONAL HOLDING DOES NOT WARRANT EN BANC REVIEW 7

III. THE PANEL’S HOLDING THAT THE TPS STATUTE DOES NOT IMPLICITLY AUTHORIZE VACATUR DOES NOT WARRANT EN BANC REVIEW13

IV. THE PANEL’S RULING REGARDING THE HAITI PARTIAL VACATUR DOES NOT WARRANT EN BANC REVIEW17

CONCLUSION.....21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>African Cmty. Together v. Noem</i> , No. 25-cv-13939, 2025 WL 3759533 (D. Mass. Dec. 30, 2025)	4
<i>Allen v. Milligan</i> , 599 U.S. 1 (2023)	3
<i>Biden v. Nebraska</i> , 600 U.S. 477 (2023)	3
<i>CASA de Md., Inc. v. Trump</i> , 355 F. Supp. 3d 307 (D. Md. 2018)	5
<i>CASA, Inc. v. Noem</i> , 792 F. Supp. 3d 576 (D. Md. 2025)	5
<i>Centro Presente v. DHS</i> , 332 F. Supp. 3d 393 (D. Mass. 2018)	5
<i>China Unicom (Ams.) Ops. Ltd. v. F.C.C.</i> , 124 F.4th 1128 (9th Cir. 2024)	14
<i>Church of Scientology of Cal. v. United States</i> , 506 U.S. 9 (1992)	19
<i>City of Arlington v. F.C.C.</i> , 569 U.S. 290 (2013)	13
<i>Dickens v. Ryan</i> , 744 F.3d 1147 (9th Cir. 2014)	19
<i>Doe v. Noem</i> , No. 25-cv-15483 (N.D. Ill. Jan. 23, 2026)	4
<i>Doe v. Noem</i> , No. 25-cv-8686 (S.D.N.Y. Nov. 19, 2025)	4

<i>FBI v. Fikre</i> , 601 U.S. 234 (2024)	20, 21
<i>Garcia v. USCIS</i> , 146 F.4th 743 (9th Cir. 2025) (Bress, J., concurring)	12
<i>Gorbach v. Reno</i> , 219 F.3d 1087 (9th Cir. 2000) (en banc).....	14
<i>Haitian Evangelical Clergy Ass'n v. Trump</i> , 789 F. Supp. 3d 255 (E.D.N.Y. 2025)	4, 21
<i>Immigrant Assistance Project of L.A. Cnty. Fed'n of Lab. (AFL-CIO) v. I.N.S.</i> , 306 F.3d 842 (9th Cir. 2002).....	12
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024)	3
<i>McNary v. Haitian Refugee Ctr., Inc.</i> , 498 U.S. 479 (1991)	2, 11
<i>Miot v. Trump</i> , No. 25-cv-02471, 2026 WL 266413 (D.D.C. Feb. 2, 2026)	4
<i>Nakka v. USCIS</i> , 111 F.4th 995 (9th Cir. 2024)	13
<i>Nat'l TPS All. v. Noem</i> , 798 F. Supp. 3d 1108 (N.D. Cal. 2025).....	20
<i>Nat'l TPS All. v. Noem</i> , No. 25-cv-05687-TLT, 2025 WL 4058572 (N.D. Cal. Dec. 31, 2025)	4, 6
<i>Nat'l TPS All. v. Noem</i> , No. 26-199 (9th Cir. Feb. 9, 2026)	7
<i>Nat'l TPS All. v. Noem (NTPSA III)</i> , --- F.4th ---, 2026 WL 226573 (9th Cir. Jan. 28, 2026).....	<i>passim</i>

<i>Noem v. Nat’l TPS All.</i> , No. 25A326 (S. Ct. Sept. 19, 2025)	10, 14
<i>Noem v. Nat’l TPS All.</i> , No. 24A1059 (S. Ct. May 19, 2025)	10
<i>NTPSA v. Noem</i> , 150 F.4th 1000 (9th Cir. 2025)	12, 14
<i>NTPSA v. Noem</i> , No. 25-5724 (9th Cir. Jan. 28, 2026)	15
<i>Patel v. Garland</i> , 596 U.S. 328 (2022)	11, 12
<i>In re Patullo</i> , 271 F.3d 898 (9th Cir. 2001).....	19
<i>Proyecto San Pablo v. I.N.S.</i> , 189 F.3d 1130 (9th Cir. 1999).....	12
<i>Ramos v. Nielsen</i> , 321 F. Supp. 3d 1083 (N.D. Cal. 2018).....	5
<i>Ramos v. Wolf</i> , 975 F.3d 872 (9th Cir. 2020).....	9
<i>Reno v. Cath. Soc. Servs., Inc.</i> , 509 U.S. 43 (1993)	2, 11
<i>Saget v. Trump</i> , 375 F. Supp. 3d 280 (E.D.N.Y. 2019)	5
<i>Trump v. CASA, Inc.</i> , 606 U.S. 831 (2025)	3
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950)	19
<i>United States v. Texas</i> , 143 S. Ct. 51 (2022) (mem.)	3

<i>United States v. Texas</i> , 599 U.S. 670 (2023)	3
<i>West Virginia v. EPA</i> , 597 U.S. 1126 (2016) (mem.)	3
<i>West Virginia v. EPA</i> , 597 U.S. 697 (2022)	19, 22
Statutes	
8 U.S.C. § 1252(f)(1).....	13
8 U.S.C. § 1254a.....	<i>passim</i>
Other Authorities	
90 Fed. Reg. 28760 (July 1, 2025).....	21
90 Fed. Reg. 54733 (Nov. 28, 2025)	20
United States Court of Appeals for the Ninth Circuit, <i>Oral Argument in 25-2120 National TPS Alliance, et al. v. Noem et al., YouTube</i> (July 16, 2025), https://www.youtube.com/watch?v=SSIf7bEQz3c	10

INTRODUCTION

Defendants seek rehearing en banc in a transparent attempt to delay the return of this case to the Supreme Court. There is no conflict or even any tension between the panel's decision and prior Ninth Circuit precedent. The panel's basic ruling—that this Court will not condone naked defiance of statutory limits on an agency's authority—should hardly be controversial.

Nor do the important issues in this case warrant en banc review. Defendants do not need en banc relief to vindicate their interests, as they already secured a stay from the Supreme Court. And while the catastrophic harm that 600,000 Venezuelan TPS holders now face as a result of Defendants' unlawful orders undoubtedly constitutes a matter of exceptional importance, there is nothing this Court can do to address it.

Defendants claim to seek en banc review because there have been many judicial decisions that, in their view, erroneously constrain their TPS decisionmaking. But those cases are hardly limited to this Circuit. District courts all across the country have consistently rejected

Defendants' arguments. If Defendants truly want TPS caselaw to be uniform, then they should immediately seek certiorari.

In short, this petition is merely a tool for delay that Defendants have employed because they are more than happy to preserve the status quo, as it permits them to detain and deport TPS holders despite multiple comprehensive opinions finding their actions unlawful. This Court should not distort its en banc process to accommodate Defendants' agenda. Defendants have consistently proven unable to win on both jurisdiction and the merits. At least four judges within the Ninth Circuit—and others across the country—have rejected their arguments. Even if some members of this Court think that every other judge to confront these questions erred, the appropriate course is to let the Supreme Court resolve these issues as soon as possible.

Perhaps the Supreme Court will reverse this Court, abrogate (or ignore) its prior precedent construing the word “determination” in immigration jurisdictional statutes,¹ and authorize a vast expansion of agency authority even though it has consistently done the opposite in

¹ See *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991), *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 56–58 (1993) (CSS).

other contexts.² But that possibility is no reason to delay the Supreme Court’s review of this case. And the other possibility—that the Court will agree with every court to consider the question and find the Secretary lacked authority to vacate TPS for Venezuela—more than suffices to deny Defendants’ meritless petition for rehearing en banc.³

I. THE IMPORTANCE OF TPS DOES NOT WARRANT EN BANC REVIEW GIVEN THE SUPREME COURT’S STAY

Defendants argue en banc review is warranted because of the exceptional importance of the issues this case presents. Plaintiffs agree that the fate of 600,000 Venezuelans who fled a country that remains extraordinarily dangerous presents an issue of profound importance, but, as explained above, en banc review at this stage would have no

² See *West Virginia v. EPA*, 577 U.S. 1126 (2016) (mem.) (granting stay preventing EPA rule from taking effect); *Biden v. Nebraska*, 600 U.S. 477, 494–500 (2023) (holding that the Secretary of Education exceeded their authority in attempting to cancel student loan debt); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (overturning Chevron).

³ Contrary to Defendants’ suggestion, that the Supreme Court stayed prior orders in this case does not mean it will reverse them. See *Allen v. Milligan*, 599 U.S. 1, 16–19 (2023) (affirming ruling it had stayed); *United States v. Texas*, 143 S. Ct. 51 (2022) (mem.) (denying stay of district court order); *United States v. Texas*, 599 U.S. 670, 686 (2023) (reversing that same order); see also *Trump v. CASA, Inc.*, 606 U.S. 831, 860 (2025) (stay may be granted based on “threshold error” without assessing merits).

practical effect on the lives of Venezuelan TPS holders due to the Supreme Court stay order.

Defendants assert the case is important because of what it calls “an unprecedented wave of interference” with Defendants’ TPS decisionmaking. Petition for Rehearing En Banc (Dkt. 76.1 “PFREB”) at 8. Defendants appear to be referring to their having repeatedly lost challenges to their TPS termination decisions in cases throughout the country—both on jurisdiction and the merits. *See Miot v. Trump*, No. 25-cv-02471, 2026 WL 266413, at * 9 (D.D.C. Feb. 2, 2026) (postponing Haiti termination); *Nat’l TPS All. v. Noem*, No. 25-cv-05687-TLT, 2025 WL 4058572, at *7–9 (N.D. Cal. Dec. 31, 2025) (vacating Honduras, Nicaragua, Nepal terminations); *African Cmty. Together v. Noem*, No. 25-cv-13939, 2025 WL 3759533, at *1–2 (D. Mass. Dec. 30, 2025) (granting administrative stay of termination of TPS for South Sudan); Order, *Doe v. Noem*, No. 25-cv-8686 (S.D.N.Y. Nov. 19, 2025), Dkt. 54 (postponing Syria termination); Memorandum Opinion and Order at 1–2, 9–20, 25–54, *Doe v. Noem*, No. 25-cv-15483 (N.D. Ill. Jan. 23, 2026), Dkt. 51 (postponing Burma termination); *Haitian Evangelical Clergy Ass’n v. Trump*, 789 F. Supp. 3d 255, 273 (E.D.N.Y. 2025) (*HECA*)

(setting aside Haiti partial vacatur); *CASA, Inc. v. Noem*, 792 F. Supp. 3d 576, 592–93 (D. Md. 2025) (finding jurisdiction to review Afghanistan termination).⁴

Defendants’ characterization of the cases they have lost is both disturbing and wrong. Judicial review represents a fundamental check-and-balance woven into the fabric of our constitutional order, not improper “interference.” While Defendants think nothing of recklessly accusing jurists of partisanship and bias, an adverse ruling is not proof of bias. The presumption is and remains that each and every judge throughout the country who has repeatedly ruled against Defendants in TPS cases—both on jurisdiction and the merits—did so based on an independent and impartial assessment of the facts and the law. The near-uniform litany of decisions rejecting Defendants’ actions stripping TPS status from all who hold it is strong evidence that the panel’s

⁴ See also *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1101–08 (N.D. Cal. 2018) (enjoining terminations for El Salvador, Haiti, Nicaragua, and Sudan during first Trump administration); *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 317–322 (D. Md. 2018) (finding jurisdiction to review Haiti termination); *Centro Presente v. DHS*, 332 F. Supp. 3d 393, 404–409 (D. Mass. 2018) (same for El Salvador and Haiti); *Saget v. Trump*, 375 F. Supp. 3d 280, 330–33 (E.D.N.Y. 2019) (enjoining Haiti termination).

analysis here is *correct*, and that it is Defendants who are misinterpreting the law.

Moreover, as the string cite above reveals, most of the TPS decisions Defendants cite as “interference” are not in this circuit. Indeed, only one other TPS case is here. *See Nat’l TPS All.*, 2025 WL 4058572 (N.D. Cal. Dec. 31, 2025). If Defendants truly sought to expedite review of the common legal issues these cases present, they would seek Supreme Court review in this case *now*. That they have not done so confirms Plaintiffs’ view that this rehearing petition is a delay tactic. Even if this Court finds Defendants’ concern about lower court “interference” compelling, it should deny the petition, which will force Defendants to seek Supreme Court review more quickly.

Defendants’ motives aside, the only issue of exceptional importance here concerns the hundreds of thousands of Venezuelan TPS holders who have suffered catastrophic harm—including lost employment, detention, and deportation despite holding TPS status that by law should extend through October 2, 2026—due to the Supreme Court’s stay orders. *See also Nat’l TPS All. v. Noem (NTPSA III)*, --- F.4th ---, 2026 WL 226573, at *18 (9th Cir. Jan. 28, 2026)

(documenting massive harms to NTPSA members from Venezuela).

Because only the Supreme Court can give practical effect to any ruling on the legality of the decisions at issue here, this Court should not delay that Court's resolution of them by granting en banc review.

II. THE PANEL'S JURISDICTIONAL HOLDING DOES NOT WARRANT EN BANC REVIEW

Contrary to Defendants' claims, the panel's jurisdictional holding does not warrant en banc review, as it is correct and plainly creates no conflict.⁵ The central dispute in this case concerns the meaning of 8 U.S.C. § 1254a(b)(5)(A). That provision states:

“There is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection [i.e., subsection (b)].”

This Court held that provision “does not bar judicial review of a claim that the Secretary exceeded her statutory authority.” *NTPSA III*,

⁵ In contrast, the February 9, 2026 emergency stay order in *NTPSA v. Noem (NTPSA Honduras/Nicaragua/Nepal)*, concerning 60,000 TPS holders from those countries, *does* have a catastrophic real world impact, and appears to conflict with both the Panel's decision here and other cases construing jurisdictional provisions and assessing the balance of hardships in immigration cases. Order at 1–5, *Nat'l TPS All. v. Noem*, No. 26-199 (9th Cir. Feb. 9, 2026), ECF 11.1.

2026 WL 226573, at *9. Defendants seek rehearing because they believe that conclusion “is plainly wrong.” *See* PFREB 4; *see also id.* at 9 (“The panel resolved the reviewability question incorrectly, and the en banc Court should correct [the panel’s] mistake.”). Defendants believe Section 1254a(b)(5)(A) bars review of “every facet of the Secretary’s TPS determinations.” *Id.* at 10. In their view, the Secretary could extend TPS for 30 years, or even sell TPS extensions, and courts could do nothing. *Compare NTPSA III*, 2026 WL 226573, at *9 (describing absurd results of Defendants’ view) *with* PFREB 11 (claiming such concerns “cannot surmount” what Defendants view as statute’s plain language).⁶

Defendants’ reading of the statute is plainly incorrect, but even if it were not, that fact would not justify en banc rehearing, for several reasons. First, no decision of *any court* has ever accepted Defendants’ extreme jurisdictional position. The vacated panel majority opinion in *Ramos* did not. *See Ramos v. Wolf*, 975 F.3d 872, 895 (9th Cir. 2020),

⁶ Defendants’ suggestion that Congress might have favored these absurd outcomes because “lower courts” are too error prone makes no sense, as their interpretation would bar review in the Supreme Court also. PFREB 4.

vacated upon reh'g en banc, 59 F.4th 1010 (9th Cir. 2023). The panel majority there made clear it would have found jurisdiction over claims asserting an erroneous interpretation of the TPS statute, stating:

“In general, a claim that an agency has adopted an erroneous interpretation of a governing statute would be reviewable under *McNary*, particularly because the court’s resolution of these sort of challenges turns on a review of the law itself, rather than a review of the merits of any specific agency determinations.”

*Id.*⁷

Second, Defendants’ position also goes well beyond what the Solicitor General argued in this case when the government sought a stay from the Supreme Court; contradicts the position Defendants themselves took before this Court previously, and—to the extent one can divine any legal principle from the Supreme Court’s unexplained stay orders in this case—conflicts with those as well. The Solicitor General did not contest jurisdiction on Plaintiffs’ vacatur authority

⁷ The vacated opinion rejected plaintiffs’ statutory interpretation claim there only because it believed the plaintiffs had not adequately pled that legal error. *See id.* (“[W]e decline to adopt the dissent’s reconstruction of Plaintiffs’ APA claim as a challenge to an agency interpretation of the TPS statute”).

claim in the stay litigation at the Supreme Court.⁸ In keeping with that position, Defendants previously acknowledged to this Court that there could be exceptions to the jurisdictional bar for some undefined set of “extraordinary cases.”⁹ They have never explained what changed to justify their flip-flop in this respect. Similarly, the Supreme Court’s first stay order preserved Plaintiffs’ ability to challenge the Secretary’s retroactive invalidation of TPS-related documentation issued under the January 17 extension. *See Noem v. Nat’l TPS All.*, No. 24A1059 (S. Ct. May 19, 2025) (order granting stay). The district court subsequently ruled that invalidation unlawful, and Defendants have not appealed that ruling.¹⁰ But if their extreme jurisdictional position were correct, that claim would not be cognizable either.

Third, unlike Defendants’ reading of Section 1254a(b)(5)(A), the Panel’s interpretation is both internally coherent and consistent with longstanding precedent, including *McNary v. Haitian Refugee Center*,

⁸ *See* Defendants’ Application for Stay at 18 n.11 *Noem v. Nat’l TPS All.*, Case No. 25A326 (S. Ct. Sept. 19, 2025).

⁹ United States Court of Appeals for the Ninth Circuit, *Oral Argument in 25-2120 National TPS Alliance, et al. v. Noem et al.* at 3:19-5:15, *YouTube* (July 16, 2025),

<https://www.youtube.com/watch?v=SSIf7bEQz3c>.

¹⁰ PFREB 14 n.3.

Inc., 498 U.S. 479, 492 (1991), *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56–58 (1993) (*CSS*), and this Court’s earlier decision in *NTPSA I*. See *NTPSA III*, 2026 WL 226573, at *8. The statute at issue here bars review of “any *determination*” with respect to one particular subsection of the TPS statute. Careful attention to the statute’s use of “determination” is appropriate because, as the Panel explained, the Supreme Court has twice construed that same term narrowly in immigration cases decided shortly after Congress enacted the TPS statute. *McNary*, 498 U.S. at 492 (reading “determination” not to encompass “collateral” challenge to agency practices); *CSS*, 509 U.S. at 56–58 (same, for statutory interpretation claim).

Defendants argue the Panel should have distinguished *McNary* and *CSS*, and instead applied *Patel v. Garland*, 596 U.S. 328, 338 (2022), but tellingly they do not argue the Panel’s decision not to take that approach actually *conflicts* with *Patel* or any other decision. The statute in *Patel* did not use “determination,” which may be why this Court had previously rejected Defendants’ reliance on it. *NTPSA v. Noem*, 150 F.4th 1000, 1017 (9th Cir. 2025) (*NTPSA I*) (distinguishing *Patel*). *Patel* also had no occasion to consider whether the statute it

interpreted barred all review of a legal claim, where the presumption favoring judicial review has particular force. *NTPSA III*, 2026 WL 226573, at *7, 9. *Patel* barred review only of factual claims. It also relied on other context clues not present here. *Patel*, 596 U.S. at 339 (citing amendment history of 8 U.S.C. § 1252(a)(2)(D)).

Most important for purposes of en banc review, this Court's cases have repeatedly relied on *McNary* and *CSS* to read "determination" narrowly when construing jurisdiction-stripping provisions in the immigration context. *See Garcia v. USCIS*, 146 F.4th 743, 758–61 (9th Cir. 2025) (Bress, J., concurring) (distinguishing *McNary* from *Patel* because, *inter alia*, the former statute used "determination" while the latter used "judgment"); *see also, e.g., Immigrant Assistance Project of L.A. Cnty. Fed'n of Lab. (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 862–64 (9th Cir. 2002) (relying on *McNary* and *CSS* to find legal claim about proof requirements cognizable); *Proyecto San Pablo v. I.N.S.*, 189 F.3d 1130, 1138 (9th Cir. 1999) (challenge to pre-adjudication practices cognizable); *Nakka v. USCIS*, 111 F.4th 995, 1003, 1005 (9th Cir. 2024) (relying on "the *McNary* blueprint" in interpreting different provisions).

Defendants ignore all these cases, and instead cite *City of Arlington v. F.C.C.*, 569 U.S. 290, 297 (2013), which they claim rejected the analytic framework the Panel employed. *Arlington* applied *Chevron*, so its continued vitality is unclear. In any event, *Arlington*'s reasoning that all statutory claims involving agencies are ultimately questions of statutory authority is entirely consistent with the Panel's conclusion that statutory claims are cognizable here. As *Arlington* explained, the "question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *Id.* at 301. That is precisely how the Panel analyzed this case.

In short, whatever else may be said of Defendants' ever-shifting reading of the statute, that the Panel here rejected it does not justify en banc rehearing.¹¹

III. THE PANEL'S HOLDING THAT THE TPS STATUTE DOES NOT IMPLICITLY AUTHORIZE VACATUR DOES NOT WARRANT EN BANC REVIEW

¹¹ Defendants do not argue for en banc based on the Panel's holding affirming the district court's reading of 8 U.S.C. § 1252(f)(1). *NTPSA III*, 2026 WL 226573, at *9. That holding is correct and creates no conflict. Notably, the Solicitor General explicitly declined to seek a stay of the district court's decision on Section 1252(f)(1) when this case was previously at the Supreme Court. *See* Defendants' Application for Stay at 14 n.9 *Noem v. Nat'l TPS All.*, Case No. 25A326 (S. Ct. Sept. 19, 2025).

Defendants also seek en banc rehearing based on the Panel’s merits holding that the TPS statute does not contain implicit vacatur authority, but their argument on this point is equally far-fetched. Defendants assert the Panel erred in rejecting Defendants’ claim of “inherent authority” to vacate a TPS extension, but again do not assert any conflict. PFREB 12–14. Contrary to their claim, the Panel faithfully applied this Court’s governing precedent on the issue, including *China Unicom (Ams.) Ops. Ltd. v. F.C.C.*, 124 F.4th 1128, 1142–51 (9th Cir. 2024); *see also NTPSA I*, 150 F.4th at 1019 (applying *China Unicom* the same way); *Gorbach v. Reno*, 219 F.3d 1087, 1095 (9th Cir. 2000) (en banc) (holding that “[t]here is no general principle that what [an agency] can do, [it] can undo”).

Defendants have no coherent answer to the most basic problem with their assertion of implicit authority, which is that it contravenes the statute’s unambiguous rules governing the length of TPS extensions and its detailed procedural and substantive requirements for TPS terminations. *See* Opinion at 32–35, *NTPSA v. Noem*, 25-5724 (9th Cir. Jan. 28, 2026). As the Panel explained, Congress’s rule specifying that TPS extensions last until the end of the period specified in them, *see* 8

U.S.C. § 1254a(b)(2)(B), and its rules setting forth the timing and procedures governing periodic review, *see* 8 U.S.C. § 1254a(b)(3)(A), directly conflict with Defendants’ claim of implicit authority. The vacatur here violated those statutory provisions, and for that reason was not authorized by the statute. Moreover, it would make no sense for Congress to have carefully circumscribed the agency’s authority by specifying the timing and consultation requirements for ending a TPS extension, but then also to have given the agency implicit authority to issue “vacatur” that would end TPS extensions without those same procedural requirements. As the Panel explained, “[t]he use of a fixed term is thus affirmatively inconsistent with positing an implied power to revoke a license at any time.” *NTPSA III*, 2026 WL 226573, at *13 (quoting *China Unicom*, 124 F.4th at 1148).

Defendants attempt to address this problem by limiting their claim of implicit authority to extensions that, they say, are not yet in effect. PFREB at 12–13. They do not explain what statutory language might support that distinction—even this more limited version of their vacatur authority still contravenes the statute’s requirement that extensions must last until the end of the time period they specify, and,

relatedly, that terminations must be preceded by country conditions review and consultation with appropriate agencies. But in any event, the Panel rejected this argument on its *facts*, crediting the district court's finding that the January 17, 2025 extension *was* already in effect at the time the vacatur occurred because the agency had begun to accept and process registration and benefits applications under it. *See NTPSA III*, 2026 WL 226573, at *15 (citing *NTPSA I*, 150 F.4th at 1024 n.12 (crediting district court's factual finding)). Indeed, as the Panel explained, Defendants themselves stated the January 17 extension was in effect when they purported to vacate it and retroactively cancel documentation that had already been issued under it. *See id.* (“[T]he Secretary’s vacatur notice acknowledged that the 2025 Extension ‘ha[d] been in effect’ and that vacatur would ‘restore the status quo preceding [the] notice.’”) (quoting 90 Fed. Reg. 8805, 8807 (Feb. 3, 2025)).

Defendants also mischaracterize the Panel’s holding as to the extension, asserting that it somehow conflicts with the reality that “TPS extensions run consecutively.” PFREB 13. This conflates the question whether an extension is in effect with whether the period of authorized stay it establishes has begun to run. The statute itself plainly

distinguishes between those two issues. The statute specifies that extensions are effective immediately, *see* 8 U.S.C. § 1254a(b)(3)(C) (if periodic review ends without termination decision, designation “is extended”), whereas it provides for a delayed effective date for terminations. *See id.* § 1254a(b)(2)(B); (b)(3)(B). This is why the government can immediately begin issuing documents under an extension, whereas it cannot immediately cancel documents upon termination.

Thus, there can be no serious dispute that the Panel faithfully applied *China Unicom* and this Court’s other law on the question whether agencies have implicit vacatur authority. Nothing in the statute suggests the Secretary has any vacatur authority, whether before or after TPS extensions take effect. The Panel’s straightforward application of this Court’s precedent to the statute’s text and the record in this case is correct. More importantly, it plainly creates no conflict and does not otherwise warrant en banc review.

IV. THE PANEL’S RULING REGARDING THE HAITI PARTIAL VACATUR DOES NOT WARRANT EN BANC REVIEW

Defendants make a distinct argument that this case warrants en banc over what Defendants apparently believe a mootness error. They assert the Haiti partial vacatur became “indisputably moot” when the extension it purported to vacate expired on February 3, and that therefore the panel issued an advisory opinion. PFREB 16–17.

This argument is utterly meritless. The panel’s decision was issued *before* February 3. Whether Haitian TPS holders would retain their status between January 28, when the Opinion issued, and February 3, when the partial vacatur expired, presented a live controversy when the panel published its opinion. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12–13 (1992) (availability of “some form of meaningful relief” prevents mootness).¹²

Defendants’ fallback argument is that the Haiti partial vacatur was also mooted by Secretary Noem’s November 28, 2025 “superseding”

¹² Defendants cite *In re Patullo*, 271 F.3d 898, 900–01 (9th Cir. 2001), for the proposition that vacatur is warranted where a case becomes moot after an Opinion is published but before the mandate issues. PFREB 6. But Defendants never filed a motion seeking vacatur. The en banc process is not the means to seek vacatur—a remedy which is “within [the Court’s] discretion based on equity,” *Dickens v. Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014). See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (declining to order vacatur where government “made no motion to vacate the judgment”).

termination decision, which ended Haiti’s TPS effective February 3, 2026. PFREB 15–16. Not so. Under the voluntary cessation exception to mootness, that termination could moot Plaintiffs’ claims only if it were “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *West Virginia v. EPA*, 597 U.S. 607, 720 (2022) (citation omitted). Here, the opposite is true. Secretary Noem made clear she would have ended Haiti’s TPS *before* February 3, but for, in her words, “interference by a federal district judge.” 90 Fed. Reg. 54733, 54733 (Nov. 28, 2025); *see also Nat’l TPS All. v. Noem*, 798 F. Supp. 3d 1108, 1153–57 (N.D. Cal. 2025) (describing Defendants’ extensive efforts to end Haitian TPS early). Therefore it is “reasonabl[e] to] expect[]” she would have ended Haiti’s TPS early, as originally planned, if legal obstacles were removed. Thus, it is not “absolutely clear” she would have refrained from the conduct the district court found unlawful. *See FBI v. Fikre*, 601 U.S. 234, 241 (2024) (applying voluntary cessation exception to mootness).

Defendants protest that voluntary cessation does not apply because the TPS statute required Secretary Noem to issue a new TPS decision for Haiti on November 28. PFREB 16. But the TPS statute says

only that the Secretary must issue a TPS decision “[a]t least 60 days before” a designation is set to expire. 8 U.S.C. § 1254a(b)(3)(A).

Secretary Noem had already done so, announcing on July 1, 2025 that she “determined that Haiti no longer continues to meet the conditions for Temporary Protected Status (TPS).” 90 Fed. Reg. 28760, 28764 (July 1, 2025). And while the July 1 termination could not take effect before February 3 as a result of the district court order here (and a separate order in *HECA, supra*), nothing required the Secretary to issue a new “superseding” decision, rather than delaying implementation of the July 1 decision. Defendants thus bear the “formidable burden” of overcoming the voluntary cessation exception. *Fikre*, 601 U.S. at 241. That Defendants cannot do so flows from Supreme Court precedent and does not even arguably create any conflict.

Details aside, no case establishes a blanket rule that an agency can moot a challenge to its decision by issuing a superseding decision. PFREB 16. Whether a superseding decision renders a challenge moot turns on a fact-based assessment of whether it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *West Virginia*, 597 U.S. at 720 (citation omitted). Where, as

here, an agency “vigorously defends the legality” of the challenged action and “nowhere suggests that if this litigation is resolved in its favor it will not” do the same thing again, a challenge is not moot. *Id.* at 719-20 (citations omitted).

CONCLUSION

This Court should deny the petition for rehearing en banc.

Dated: February 11, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Circuit Rules 27-1(1)(d) and 32-3 because it contains 4165 words, including words manually counted in any visual images, and excluding the parts of the document exempted by Rules 27(a)(2)(B) and 32(f) of the Federal Rules of Appellate Procedure. The brief also complies with the typeface and typestyle requirements of Rules 32(a)(5)–(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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