

**No. 26-199**

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

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

vs.

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

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA, NO. 3:25-CV-05687-TLT  
HONORABLE TRINA L. THOMPSON

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## INTRODUCTION

Congress created the Temporary Protected Status (TPS) program to “constrain[] Executive authority” by imposing “explicit guidelines” and “specific procedural steps” to govern the Secretary’s decisions about nationality-based humanitarian relief. *Nat’l TPS All. v. Noem*, 150 F.4th 1000, 1010 (9th Cir. 2025) (“*NTPSA I*”). In Defendants’ view, Congress wasted its time. The Secretary can ignore the TPS statute’s guidelines and procedures, and courts are powerless to do anything. But agencies may not act without regard to express limits established by Congress, and the TPS statute does not strip the federal courts of their constitutional duty to interpret and enforce those limits here.

The district court found, in a careful, 52-page summary judgment order based on extensive record evidence, that the Secretary’s TPS terminations for Honduras, Nicaragua, and Nepal violated the APA for three reasons. First, the Secretary misinterpreted the TPS statute when she deemed conditions unrelated to the crises that triggered the countries’ initial TPS designations irrelevant to her assessment of whether the countries could “handle adequately the return” of their nationals. Second, the Secretary failed to comply with the statutory requirement that her TPS decisions be made only “*after consultation* with appropriate agencies.” And, third, the Secretary violated the APA’s change-in-

position doctrine when she abandoned decades of prior agency practice of basing TPS decisions on a full range of country conditions, regardless of their relation to the original crisis, without acknowledgment or explanation.

This Court has jurisdiction over Plaintiffs’ first two claims under its recent opinion in *National TPS Alliance v. Noem*, 166 F.4th 739 (9th Cir. 2026) (“*NTPSA III*”). *NTPSA III* exercised jurisdiction to review “questions of statutory interpretation” in the context of a challenge to the termination of TPS for Venezuela. There is no basis for distinguishing between the claims over which this Court exercised jurisdiction in *NTPSA III* and Plaintiffs’ first two claims in this case, all of which concern statutory errors underlying a TPS termination. This Court also has jurisdiction to review Plaintiffs’ third claim because it does not challenge a “determination” as that term is used in the TPS statute.

On the merits, this Court should affirm on all three of Plaintiffs’ claims. The district court correctly reads the TPS statute to require consideration of *all* conditions that impact a country’s ability to handle its nationals’ return. That understanding flows from the statute’s plain text and is consistent with the humanitarian purpose of the program. Defendants’ contrary interpretation—that the statute *forbids* consideration of conditions unrelated to the original basis for designation—imposes a bizarre

constraint on the Secretary’s discretion that obviously contravenes the statute’s purpose. It also literally ignores the language of the statute—Defendants claim the statute uses “and” where it actually uses a comma—and would lead to absurd results, like deeming nationals can safely return to a country in the midst of civil war simply because it has recovered from an earlier earthquake. Even if this Court holds the statute simply permits (but does not require) consideration of intervening conditions, it should still affirm, because the Secretary’s termination decisions rested on a misinterpretation of statute as *prohibiting* consideration of intervening conditions.

Finally, Defendants’ request for reassignment is nothing more than a regrettable escalation in a dangerous trend of impugning the integrity of federal judges who do not accept the government’s legal positions. It is utterly meritless and should be rejected.

## STATEMENT

### I. FACTUAL BACKGROUND

#### A. Congress’s Statutory Scheme for TPS

“In enacting the TPS statute [in 1990], Congress designed a system of temporary status that was predictable, dependable, and insulated from electoral politics,” replacing the prior ad hoc system for humanitarian protection. *NTPSA I*, 150 F.4th at 1008. Legislators “stressed the importance of constraining Executive

authority and insulating vulnerable noncitizens from politics: ‘Refugees, spawned by the sad and tragic forces of warfare, should not be subject to the vagaries of our domestic politics as well.’” *Id.* at 1010 (quoting 135 Cong. Rec. H7501 (daily ed. Oct. 25, 1989) (statement of Rep. Meldon Edises Levine)).

The TPS statute authorizes the Secretary of Homeland Security to provide humanitarian relief to certain citizens of countries in crisis, and prescribes “explicit guidelines, specific procedural steps, and time limitations” governing such relief. *Id.* To qualify for and maintain TPS, applicants must not have been “convicted of any felony or 2 or more misdemeanors,” or be a danger to U.S. security. § 1254a(c)(1)(A)(iii), (c)(2)(B)(i), (c)(3)(A).<sup>1</sup>

The statute vests the Secretary with substantial discretion over whether to designate a country for TPS. So long as she determines certain country conditions exist, she “may” choose to designate a country for protection. § 1254a(b)(1). The Secretary also has discretion, commonly exercised, to redesignate countries for TPS, which permits later-arriving nationals.<sup>2</sup> § 1254a(c)(1)(A)(i) (requiring that TPS beneficiaries “ha[ve] been continuously

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<sup>1</sup> Unless noted, all statutory citations herein are to Title 8 of the United States Code.

<sup>2</sup> 2-SER-267, 2-SER-271, 2-SER-274.

physically present in the United States since the effective date of the most recent designation” of their country).

In contrast, the statute strictly limits the Secretary’s discretion after a designation through rules governing the timing of periodic review, the process for conducting that review, and mandatory criteria for deciding whether to extend or terminate TPS designations. *See generally* § 1254a(b). “[A]t least 60 days before [the] end” of any “period of designation,” the Secretary “shall” conduct a “periodic review” to determine whether designation remains warranted. § 1254a(b)(3). Specifically, “after consultation with appropriate agencies,” the Secretary “shall review the conditions in the foreign state” and “shall determine whether the conditions for such designation . . . continue to be met.” § 1254a(b)(3)(A). As relevant in this case, criteria for designation include that:

- (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected,
- (ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and
- (iii) the foreign state officially has requested designation under this subparagraph.

§ 1254a(b)(1)(B).

The periodic review process typically involves both USCIS and the State Department preparing country conditions memoranda and recommendations for the Secretary. 2-SER-277-78, 2-SER-282-83; *see also Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1082 (N.D. Cal. 2018) (describing process). During the review, DHS has historically considered the full range of conditions affecting a country’s ability to handle the return of its nationals, rather than limiting its review to conditions related to the crisis that triggered initial designation. 1-ER-46. If the Secretary makes an “affirmative determination” that “conditions for [] designation . . . continue to be met,” § 1254a(b)(3)(A), or fails to make any decision by the statutory deadline, then the designation “is extended” for 6 months or “in [her] discretion . . . a period of 12 or 18 months.” § 1254a(b)(3)(C). If the Secretary determines the statutory conditions are no longer met, she “shall terminate the designation.” § 1254a(b)(3)(B).

### **B. TPS for Honduras, Nicaragua, and Nepal**

Honduras and Nicaragua were first designated for TPS in 1999 in the wake of a devastating hurricane. 1-ER-6-7. Each country’s designation was subsequently extended over a dozen times based on their slow recovery from the hurricane as well as other social, economic, environmental, and infrastructural challenges that were not related to the hurricane but that rendered the country unable to “handle adequately the return” of its

nationals. § 1254a(b)(1)(B)(ii). For instance, decisions to extend TPS for Honduras cited environmental disasters that occurred after Hurricane Mitch, 68 Fed. Reg. 23744, 23745 (May 5, 2003), and a “political crisis.” 75 Fed. Reg. 24734, 24735 (May 5, 2010). Extensions for Nicaragua cited factors such as problems of governance and “political tension.” 76 Fed. Reg. 68493, 68495 (Nov. 4, 2011).

Nepal was first designated for TPS by Secretary Jeh Johnson on June 24, 2015, after a 7.8 magnitude earthquake and a number of significant aftershocks struck the country, killing nearly 9,000 people, injuring more than 20,000 people, displacing millions, and destroying or significantly damaging over 750,000 homes. 80 Fed. Reg. 36346, 36347 (June 24, 2015). On October 26, 2016, DHS extended Nepal’s designation for eighteen months. 81 Fed. Reg. 74470, 74471–72 (Oct. 26, 2016). The extension took into account a variety of factors and conditions that arose subsequent to the original designation—many of which were unrelated to the earthquakes, including civil unrest and the obstruction of crossings at the Nepal-India border. *Id.*

While their country’s TPS designations remained in effect, TPS holders from Honduras, Nicaragua, and Nepal built lives in this country. They raised children, started businesses, and worked essential jobs in childcare, construction, and other industries. 1-ER-

11-12. Those who came as children grew up and, in some cases, had children themselves. *Id.* Those who came as young adults worked for decades and reached the age for retirement. *Id.* TPS holders served as church pastors, union representatives, and community volunteers. *Id.* They worked as mechanics, nurses, managers, realtors, and cleaners. *Id.* Throughout, they relied on TPS for stability, work authorization (and accompanying employment-based health insurance), and assurance that they would not be forced to return, with or without their families, to countries that remained unsafe. *Id.*

**C. Defendants’ Project to End TPS, and the Pre-Ordained Termination of TPS for Honduras, Nicaragua, and Nepal**

Between 2017 and 2018, during the first Trump administration, DHS announced terminations of TPS designations for six countries, including Honduras, Nicaragua, and Nepal. 1-ER-7. District courts reviewing the termination decisions found DHS had arbitrarily adopted a new interpretation of the TPS statute that “eliminat[ed] consideration of intervening conditions” in order to “get to the President/White House’s desired result of terminating TPS” and “send a clear signal that TPS in general is coming to a close.” *Ramos v. Nielsen*, 336 F. Supp. 3d at 1090, 1099, 1101; *see also Saget v. Trump*, 375 F. Supp. 3d 280, 353 (E.D.N.Y. 2019)

(finding that defendants “reverse engineered the TPS process to support their desired conclusion to terminate TPS for Haiti, thereby violating the requirements of the TPS statute”). As a result of litigation, the terminations did not enter into effect.

On June 21, 2023, DHS rescinded the TPS terminations for Honduras, Nicaragua, and Nepal and extended each country’s designation. The rescission decisions extensively critiqued the flawed country conditions analysis in the termination decisions. *See* 88 Fed. Reg. 40304 (June 21, 2023) (Honduras); 88 Fed. Reg. 40294 (June 21, 2023) (Nicaragua); 88 Fed. Reg. 40317 (June 21, 2023) (Nepal). The extensions were based on a variety of conditions, including conditions that were unrelated to the crises that had precipitated the original designations. *See* 88 Fed. Reg. at 40309, 40311 (extending TPS for Honduras based in part on “more recent environmental disasters,” “violence and social and political concerns”); 88 Fed. Reg. at 40300 (extending TPS for Nicaragua and finding “political instability and a humanitarian crisis . . . continue to render the country temporarily unable to adequately handle the return of its nationals”); 88 Fed. Reg. at 40321–24 (extending TPS for Nepal and taking into account subsequent earthquakes, droughts, floods, and impacts of Russia’s war on Ukraine). Litigation challenging the terminations was subsequently

dismissed as moot. *Ramos v. Nielsen*, 709 F. Supp. 3d 871, 886 (N.D. Cal. 2023).

After taking office, the second Trump administration quickly resumed its efforts to end TPS. On the day he took office, President Trump issued an Executive Order characterizing immigrants as an “[i]nvasion” against which Americans need “[p]rotecting” and directing the DHS Secretary to “promptly take all appropriate action,” to rescind prior administrations’ decisions that allegedly “increased or continued [the] presence of illegal aliens in the United States,” including by reviewing “designations of Temporary Protected Status.” *Protecting the American People Against Invasion*, Exec. Order No. 14159 § 16, 90 Fed. Reg. 8443, 8446 (Jan. 20, 2025). TPS holders are by definition lawfully present, but the Order mandated that TPS designations be “limited in scope” to ameliorate the “continued presence of illegal aliens.” *Id.* This echoed campaign statements by President Trump and Vice President Vance. 1-ER-8. Indeed, in an October 2024 interview, then-candidate Trump stated that he intended to “revoke” TPS if elected because—notwithstanding TPS’s clear statutory basis—“it’s not legal.” *Id.*; see also 7-ER-957-958.

Secretary Noem began the process of ending TPS immediately upon arriving in office. Within a week of her confirmation, she issued an unprecedented decision vacating the prior

administration's extensions of TPS for Venezuela. *NTPSA III*, 166 F.4th at 751–52. She explained her decisions as follows: “When the president gives a directive, the Department of Homeland Security will follow it . . . . [W]e are getting direction on how this [TPS] works from the direction of the president of the United States. And he is pausing the program to re-evaluate.” 7-ER-972-973. A social media post from DHS later asserted that “[t]he Biden Administration exploited Temporary Protected Status to let half a million poorly vetted migrants into this country—from MS-13 gang members to known terrorists and murders.” 1-ER-41-42 (quoting 7-ER-987). A DHS press release similarly claimed TPS has “allow[ed] criminal aliens to come to our country and terrorize American citizens” and permits “child abusers and other violent criminals [to] hide behind a humanitarian designation.” 1-SER-188. In fact, TPS applies only to migrants already present in the U.S., and anyone who poses a threat to the U.S. or has more than a single misdemeanor conviction is ineligible for protection. § 1254a(c)(2).

Over the next year, Secretary Noem terminated TPS for every single country whose designation came up for periodic review—Venezuela, Haiti, Afghanistan, Cameroon, Nicaragua, Honduras, Nepal, Syria, South Sudan, Burma (Myanmar), Somalia, Ethiopia,

and Yemen.<sup>3</sup> Her termination decisions repeatedly concluded that TPS holders could safely return to live in countries the State Department deems too dangerous even to visit. 1-SER-157, 1-SER-153, 1-SER-149, 1-SER-144, 1-SER-141. The Secretary described her termination decisions as fulfilling “President Trump’s promise to rescind policies that were magnets for illegal immigration and inconsistent with the law.” 1-ER-8. In each case, she gave TPS holders, including beneficiaries who had held that status for up to twenty-five years, only 60 days to prepare for the loss of status—a sharp departure from the agency’s prior practice of providing at least a six-month wind down, and usually twelve or eighteen months. 1-ER-49.

In Spring 2025, USCIS began preparing analyses of country conditions to inform the Secretary’s periodic review of TPS designations for Honduras, Nicaragua, and Nepal. Career

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<sup>3</sup> 90 Fed. Reg. 8805 (Feb. 3, 2025) (Venezuela TPS Vacatur); 90 Fed. Reg. 9040 (Feb. 5, 2025) (Venezuela TPS Termination); 90 Fed. Reg. 54733 (Nov. 28, 2025) (Haiti); 90 Fed. Reg. 20309 (May 13, 2025) (Afghanistan); 90 Fed. Reg. 23697 (June 4, 2025) (Cameroon); 90 Fed. Reg. 30086 (July 8, 2025) (Nicaragua); 90 Fed. Reg. 30089 (July 8, 2025) (Honduras); 90 Fed. Reg. 24151 (June 6, 2025) (Nepal); 90 Fed. Reg. 45398 (Sept. 22, 2025) (Syria); 90 Fed. Reg. 50484 (Nov. 6, 2025) (South Sudan); 90 Fed. Reg. 53378 (Nov. 25, 2025) (Burma (Myanmar)); 91 Fed. Reg. 1547 (Jan. 14, 2026) (Somalia); 90 Fed. Reg. 58028 (Dec. 15, 2025) (Ethiopia); 91 Fed. Reg. 10402 (Mar. 3, 2026) (Yemen).

researchers concluded in no uncertain terms that “Honduras is not considered safe for returning nationals, especially those vulnerable to gang violence, political persecution, or economic hardship.” 3-ER-182. A letter from Honduras’ Foreign Minister confirmed that “[a] sudden and massive return of TPS beneficiaries could not be accommodated,” “would place a significant burden on Honduras’s economic and social infrastructure,” and could serve as “a tool for national destabilization.” 1-SER-140.

As to Nicaragua, USCIS researchers found the country “is experiencing political instability and a humanitarian crisis that continue to render the country temporarily inadequate to handle the return of its nationals.” 4-ER-391. They reported that “[t]he rule of law [in Nicaragua] collapsed [in 2018]” and by 2024 the country had “become a police state.” 4-ER-373 (internal quotation marks omitted). Researchers also noted that “several sectors . . . remained severely impacted” by Hurricane Mitch. 4-ER-391-92. USCIS’s research memo for Nepal did not explicitly address the country’s ability to handle the return of its nationals but observed that earthquakes and flash floods that occurred after the 2015 earthquake had “le[ft] many without reliable access to clean water” and “impacted Nepal’s food security.” 5-ER-554-55.

In addition to compiling their own research on country conditions, USCIS officials awaited the customary country

conditions reports from the State Department, but none were forthcoming. 1-ER-42 (“We did not receive a recommendation from DOS.”) (quoting 8-ER-1143). Instructions subsequently made clear “that DOS will not provide country conditions anymore.” *Id.* Instead, the “understanding” was that the State Department would provide only a “1 pg letter” focused on national interest—a factor not relevant to whether a country continues to meet the conditions for designation under § 1254a(b)(1)(B). 8-ER-1145 (confirming “general understanding is that DOS is no longer providing country conditions”). *See also* 3-ER-165-79 (State Department letter for Honduras, focused on national interest).

In fact, Secretary of State Rubio did not provide even a 1-page ‘national interest’ letter regarding Nicaragua or Nepal’s designations. He declined to provide a recommendation regarding Nicaragua because he “did not concur” with what he understood to be an already-made decision to terminate for Nicaragua. 1-SER-014. As to Nepal, DHS officials initially sought a recommendation from Secretary Rubio but stopped requesting his input once they located a recommendation from previous Secretary of State Blinken that supported their desired result of termination. 1-ER-42. *See also* 8-ER-1137. In the absence of contemporaneous State Department country conditions reports, DHS relied on stale State Department country conditions reports, prepared under the prior

administration, for Nicaragua and Nepal. 4-ER-358-72; 5-ER-540-48. For Honduras, DHS did not consider any State Department country conditions report at all; the only State Department input received was the cursory letter focused on national interest. 3-ER-165-79.

Despite USCIS research indicating serious ongoing problems in Honduras, Nicaragua, and Nepal—and explicitly finding that return to Honduras or Nicaragua was untenable and unsafe for nationals of these countries—USCIS prepared Decision Memos for Secretary Noem that recommended termination for all three countries *without even mentioning* the conditions researchers had identified as unsafe. Instead, the Decision Memos focused exclusively on the original reason for the designation, concluding that termination was required because the effects of the precipitating natural disaster had dissipated. *See* 7-ER-989-996 at 992 (recommending termination for Nepal because “the impacts of the 2015 earthquake that were the basis for the initial 2015 TPS designation no longer prevent Nepal’s nationals from returning in safety” without addressing access to water and food security); 1-SER-133 (addressing whether Nicaragua “continues to experience” Hurricane Mitch but containing no mention of political instability or humanitarian crisis that led researchers to conclude country could not handle the return of its nationals); 7-ER-1064-1071 at

1066 (addressing whether Honduras “continues to experience Hurricane Mitch” but containing no mention of gang violence, political persecution, or economic hardship that led researchers to deem the country unsafe).

Internal agency communications confirm personnel received “new guidelines” directing them to revise reports by “[f]ocusing on conditions described in the original designation and how they are/aren’t the same now.” 1-ER-42-43; 8-ER-1077. Staff were instructed to “[i]nclude any improvements” but steer clear of numerous topics, including environmental concerns, climate change, corruption, and women’s rights. *Id.* Researchers were also instructed to seek information about “[a]ny fraud or vetting problem statistic for aliens from a TPS designated country.” 1-SER-020. Agency personnel recognized these instructions as a departure from prior practice. *Id.* (explaining that in contrast to “[t]ypical[]” processes, “the Department is very focused on research that pertains directly to the original reason for a country’s TPS designation, and the ability for the U.S. to successfully return aliens to that country”). And they marveled that the new data sought did not even support the conclusion for which it was used: the “number of fraud” findings was so “LOW . . . [i]t’s laughable that it’s even in the paper.” 1-ER-43; 8-ER-1153 (addressing fraud findings for Nepali TPS holders).

Secretary Noem published her decision terminating TPS for Nepal on June 6, 2025. 5-ER-535-538. She published her decisions terminating TPS for Honduras and Nicaragua on July 8, 2025. 4-ER-354-356; 3-ER-158-161. Like the Decision Memos, the termination notices fail to reference conditions researchers had found could impede the safe return of TPS holders. *Id.*

Discovery in other challenges to Secretary Noem's TPS decisions has revealed similar patterns of omissions, contradictions, irregularities, and unexplained departures from past practice, including failure to consult with the U.S. State Department as to conditions in the foreign state or to examine and consider current country conditions in the termination decision. *See Miot v. Trump*, No. 25-CV-02471, 2026 WL 266413, at \*20–24 (D.D.C. Feb. 2, 2026); *Doe v. Noem*, 25-CV-15483, 2026 WL 184544, at \*13–17 (N.D. Ill. Jan. 23, 2026); *Nat'l TPS All. v. Noem*, 163 F.4th 1152, 1160 (9th Cir. 2025) (“*NTPSA II*”); *African Cmty's. Together v. Noem*, No. 25-CV-13939, 2026 WL 395732, at \*10–12 (D. Mass. Feb. 12, 2026); *CASA, Inc. v. Noem*, 792 F. Supp. 3d 576, 606 (D. Md. 2025).

The terminations of TPS for Honduras, Nicaragua, and Nepal have wreaked havoc on the lives of TPS holders, all of whom lived lawfully in this country for at least 25 years (Honduras and Nicaragua) or ten years (Nepal). TPS holders have lost employment

(with large numbers losing all regular income almost immediately), had to sell businesses, been unable to make rent and mortgage payments, lost essential medical care and services for their children, and suffered depression, anxiety, and “terror.” 1-SER-099 (Declaration of Emilia Garcia); 1-SER-086 (Declaration of Anil Shahi).

## II. PROCEDURAL BACKGROUND

On July 7, 2025, Plaintiffs filed suit. 1-ER-3. The next day, Plaintiffs filed a motion to postpone the termination of TPS for Honduras, Nicaragua, and Nepal. *Id.* On July 31, 2025, following briefing and a hearing, the district court granted Plaintiffs’ motion. *Id.* On August 20, 2025, in an unexplained order, this Court granted the government’s motion for a stay of the district court’s order pending appeal but denied the government’s request to stay further district court proceedings. Order, *Nat’l TPS All. v. Noem*, Case No. 25-4901 (Aug. 20, 2025), ECF 19.1.

On August 21, 2025, following Defendants’ production of the Certified Administrative Record, the magistrate judge granted Plaintiffs’ motion for limited extra-record discovery. 1-SER-175. On October 2, 2025, the district court granted Plaintiffs’ motion for class certification. 1-ER-4. On November 18, 2025, the district court held a hearing on Defendants’ motion to dismiss, Plaintiffs’ motion

to consider extra-record evidence, and the Parties' cross-motions for summary judgment. *Id.*

On November 24, 2025, the district court issued an order granting Plaintiffs' request to consider extra-record evidence. 1-SER-010. On December 31, 2025, the district court issued an order denying Defendants' motion to dismiss, granting Plaintiffs' motion for summary judgment, and denying Defendants' motion for summary judgment. 1-ER-2. The court "declare[d] that the termination of TPS for Nepal on June 6, 2025, and Honduras and Nicaragua on July 7, 2025, were unlawful under the APA" and "vacate[d] the Secretary's termination decisions with respect to Honduras, Nepal, and Nicaragua." 1-ER-52. The court entered partial final judgment for Plaintiffs on three distinct APA claims: (1) the Secretary misinterpreted the TPS statute by deeming conditions unrelated to the crises that triggered the countries' initial TPS designations irrelevant to her periodic review; (2) the Secretary failed to comply with the statutory requirement that TPS decisions be made only "*after consultation* with appropriate agencies," § 1254a(b)(3)(A) (emphasis added), and (3) the Secretary violated the APA's change-in-position doctrine by abandoning decades of prior agency practice of basing TPS decisions on a full range of country conditions, regardless of their relation to the original crisis, without acknowledgment or explanation.

On February 9, 2026, this Court granted Defendants’ request to stay “the district court’s vacatur order,” relying in significant part on the Supreme Court’s unreasoned stay of a summary judgment order in a different TPS case. 1-SER-004. On March 23, 2026, this Court dismissed Defendants’ appeal of the district court’s July 31 postponement order as moot given the district court’s entry of partial final judgment. Order, *Nat’l TPS All. v. Noem*, Case No. 25-4901 (Mar. 23, 2026), 1-SER-003.

### STANDARD OF REVIEW

The district court was required to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’ ‘in excess of statutory jurisdiction,’ or ‘without observance of procedure required by law.’” *Turtle Island Restoration Network v. U.S. Dep’t of Com.*, 878 F.3d 725, 732 (9th Cir. 2017) (quoting 5 U.S.C. § 706(2)(A), (C)–(D)). This Court “review[s] *de novo* the district court’s grant of summary judgment” in cases brought under the Administrative Procedure Act (APA). *Grand Canyon Tr. v. U.S. Bureau of Reclamation*, 691 F.3d 1008, 1016 (9th Cir. 2012). Underlying factual findings are reviewed for clear error. *See Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 976 (9th Cir. 2012).

## ARGUMENT

### I. THE DISTRICT COURT HAD JURISDICTION OVER PLAINTIFFS' APA CLAIMS

The district court correctly concluded that Section 1254a(b)(5)(A) does not bar Plaintiffs' claims. 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)].

Contrary to Defendants' misreading of the statute, it does not bar review of all challenges to "TPS terminations," regardless of the nature of the underlying legal defect alleged. AOB 11. That view is foreclosed by *NTPSA III*, which found jurisdiction to review "questions of statutory interpretation" in the context of a challenge to the termination of TPS for Venezuela. 166 F.4th at 757; *see also id.* at 766 ("[T]he judicial review bar in § 1254a(b)(5)(A) does not preclude us from reviewing Plaintiffs' claim that the Secretary acted in excess of her statutory authority by terminating the 2025 Extension."). Instead, Section 1254a(b)(5)(A) bars challenges to certain "determination[s] of the [Secretary]." None of Plaintiffs' claims challenge any determination as that term is used in this statute.

**A. Section 1254a(b)(5)(A) bars only claims challenging the Secretary’s country conditions assessments**

*NTPSA III*’s conclusion that this Court has jurisdiction to review some claims challenging TPS terminations follows from the statute’s text. As the rest of Section 1254a(b) makes clear, “determination” in Section 1254a(b)(5)(B) refers to the Secretary’s assessment of whether a country satisfies the conditions requirements for a TPS designation, extension, or termination. It is “fundamental that a section of a statute should not be read in isolation from the context of the whole Act.” *Richards v. United States*, 369 U.S. 1, 11 (1962). Yet Defendants fail to analyze Subsection 1254a(b)’s other uses of “determination” or “determine,” choosing instead to rest on dictionary definitions to assert that “‘determination’ covers action by the Secretary regarding the designation of a foreign country for TPS,” AOB 11, without any consideration of how the term is used in context.

The statute’s use of “determine” and “determination” shows Defendants’ interpretation is meritless. As the district court explained:

A full review of § 1254a supports a finding that the phrase “any determination” should be interpreted to mean the single act of deciding whether the country conditions continue to be met for the purposes of designating or terminating TPS.

1-ER-14.

Subsection 1254a(b) contains eight uses of the words “determine” or “determination,” and *every one* refers unambiguously to the Secretary’s assessment of whether *country conditions* meet the requirements for designation, extension, or termination. For example, Section 1254a(b)(3)(A) requires the Secretary to “*determine* whether the conditions for [] designation . . . continue to be met” and publish “*such determination* (including the basis for *the determination*, and, in the case of *an affirmative determination*, the period of extension of designation).” (emphases added). Section 1254a(b)(3)(B) also refers to country conditions “determinations,” providing:

If the [Secretary] *determines* under subparagraph (A) that a foreign state (or part of such foreign state) no longer continues to meet the conditions for designation under paragraph (1), the [Secretary] shall terminate the designation by publishing notice in the Federal Register of the *determination* under this subparagraph (including the basis for the *determination*).

(emphases added). Subsection 1254a(b)(3)(C) uses the word “determine” the same way, mandating extension if the Secretary “does not *determine*” a country no longer satisfies the conditions for designation. (emphasis added). *See also* § 1254a(d)(3) (referring to “the *determination*” that country conditions require termination) (emphasis added). Thus, Section 1254a(b)(5)(A) bars challenges to

any of the Secretary's "determinations" regarding whether a particular country satisfies applicable conditions requirements. In contrast, nowhere does the statute use "determination" to refer to the ultimate decision to designate, extend, or terminate TPS as to any particular country. Nor does it bar review of claims alleging the Secretary adopted illegal practices when making such a decision or utilized an erroneous interpretation of the statute.

Defendants nonetheless contend that the decision to terminate is *itself* a determination, AOB 11. Again, that position is foreclosed by *NTPSA III*. See 166 F.4th at 757, 766. But in any event, it also cannot be reconciled with how the statute uses the relevant terms. It consistently refers to any "determination" regarding country conditions as *distinct* from the designation, termination, or extension that follows from that determination, thus making clear that the determination regarding country conditions is a distinct act. While designation, extension, and termination decisions must rest on country conditions determinations, they are not *themselves* "determinations" as Congress used the term here. *E.g.*, § 1254a(b)(3)(A) (the Secretary shall "*determine* whether the conditions for such *designation* . . . continue to be met") (emphases added); § 1254a(b)(3)(B) (If the Secretary "*determines* . . . that a foreign state . . . no longer

continues to meet the conditions for *designation* . . . [she] shall *terminate* the designation.”) (emphases added).

Thus, while “determination” theoretically could, in other contexts, refer broadly to virtually any decision or judgment, in Section 1254a(b) it refers to country conditions determinations.

Careful attention to the statute’s use of “determination” is particularly appropriate because the Supreme Court has twice construed that same term to preserve review of APA claims in immigration cases decided shortly after Congress enacted the TPS statute, as this Court recognized in *NTPSA III*. See 166 F.4th at 756–57 (citing *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479, 491–92 (1991)); see also *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 56–58 (1993) (“*CSS*”) (same, as applied to statutory interpretation claim). This Court repeatedly relied on those cases as well, even before the *NTPSA (Venezuela)* litigation. See, e.g., *Immigrant Assistance Project of the L.A. AFL-CIO v. INS*, 306 F.3d 842, 862–63 (9th Cir. 2002) (“*IAP*”) (same, as to claim about proof requirements).

Defendants assert the TPS statute uses “determination” more broadly than in *McNary*, *CSS*, *IAP*, and other cases construing that term because the statute here uses the terms “any” and “with respect to.” AOB 12–14. But those terms also have clear meanings when placed within the context of this statute, as they must be. See

*Small v. United States*, 544 U.S. 385, 388 (2005) (“The word ‘any’ considered alone cannot answer this question. . . . [W]e must look beyond that word itself.”); *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004) (any “mean[s] different things depending upon the setting”). The TPS statute uses “any” to refer to the various determinations within its scope—including country conditions assessments required for any of the three possible bases for a TPS designation and corresponding determinations supporting extensions or terminations. *See generally* § 1254a(b)(1) (describing different bases for designation); § 1254a(b)(3) (setting forth detailed criteria and procedures for TPS status review for each discrete decision). And “with respect to” distinguishes determinations that pertain to designation, extension, and termination under subsection (b) from determinations that concern eligibility for benefits and physical presence, which are addressed under different subsections—and therefore beyond the scope of Section 1254a(b)(5)(A)’s bar. *See* §§ 1254a(a)(4)(B), (c)(2)(A), (e) (all referring to other “determinations”).

Defendants also ignore that the statutes in *McNary*, *CSS*, and *IAP* used “respecting” much as this statute uses “with respect to,” but those cases never read them to preclude collateral statutory authority claims like the one raised here. Similarly, the Supreme Court declined to interpret a statute limiting review of “any

determination” of benefit amounts to preclude collateral challenges, reasoning that the phrase “any determination” “simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves.” *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 675 (1986).

Defendants seek support from *Patel v. Garland*, 596 U.S. 328 (2022), which read a statute barring review of “any judgment regarding the granting of relief” to bar a factual claim. AOB 14. But the statute in *Patel* referred to “judgment,” not “determination,” 596 U.S. at 338; found review barred for *factual* claims, not legal ones, *id.* at 347; and relied on other context clues not present here. *Id.* at 339 (citing history of § 1252(a)(2)(D)); *cf. Wilkinson v. Garland*, 601 U.S. 209, 221 (2024) (finding reviewable a question of law otherwise subject to the same stripping provision); *Britkovyy v. Mayorkas*, 60 F.4th 1024, 1030 (7th Cir. 2023) (distinguishing *McNary* and *CSS* because they concerned “determination” rather than “judgment”).

Defendants next rely on cases interpreting different terms, in different statutes, from different contexts, to suggest jurisdiction limiting provisions *in general* should be read to encompass collateral challenges lest collateral claims serve as “work around[s].” AOB 14–16. But any general rule to that effect would

be inconsistent with *McNary* and its progeny. Unsurprisingly, Defendants' cases support no such rule. *Skagit County Public Hospital District No. 2 v. Shalala*, 80 F.3d 379, 386 (9th Cir. 1996) held that Plaintiff's challenges to agency "procedures" was "appropriate under *Bowen*," but unavailable due to mootness. *Reeb v. Thomas*, 636 F.3d 1224, 1226 (9th Cir. 2011) found a prisoner's APA challenge to his expulsion from a drug treatment program barred by a statute that said "the provisions of [the APA] do not apply to the making of any determination, decision, or order under" treatment program decisions. *Id.* (cleaned up). The provision actually changed the applicable substantive law, rather than merely limiting jurisdiction, and barred review of any "decision[] or order," which this Court read as barring review of "any substantive decision" concerning placement. *Id.* at 1227. In contrast, Section 1254a(b)(5)(B) nowhere states the APA is inapplicable, and bars review only of "determinations." Similarly, *Bouarfa* involved a "deeming" provision that explicitly provided agency actors with near-unfettered discretion. *See, e.g., Bouarfa v. Mayorkas*, 604 U.S. 6, 14 (2025) (finding no jurisdiction where provision authorized agency action for what Secretary "deems to be good and sufficient cause"). *Nichols v. United States*, 633 F.2d 829 (9th Cir. 1980) is even farther afield. The tax assessment review scheme there *permitted* judicial review in district court; it barred only appeals

and therefore implicated none of the jurisdiction-limiting doctrine at issue in this case. *Id.* at 831.<sup>4</sup>

None of the other cases Defendants cite, AOB 16, use the word “determination” or read a jurisdiction-limiting provision to bar review of claims like Plaintiffs’ legal claims. *See Amgen, Inc. v. Smith*, 357 F.3d 103, 112–13 (D.C. Cir. 2004) (reading statute to preserve review of agency authority claims); *Yale New Haven Hosp. v. Becerra*, 56 F.4th 9, 18 (2d Cir. 2022) (finding no jurisdiction to review agency decision about which data should be used to “estimate” hospital funding because statute barred review of “estimate[s]” and explicitly defined that term to include data selection); *DCH Reg’l Med. Ctr. v. Azar*, 925 F.3d 503, 506 (D.C. Cir. 2019) (stating that court might have had authority to review manner by which agency calculated payments if regulatory scheme provided general rule for calculating payments); *United States v. Tohono O’Odham Nation*, 563 U.S. 307, 316 (2011) (holding judicial review available in only one court, not two); *Delgado v. Quarantillo*, 643 F.3d 52, 54–55 (2d Cir. 2011) (per curiam) (no jurisdiction

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<sup>4</sup> *Center for Biological Diversity v. Bernhardt* held a statutory claim barred, but the jurisdiction limiting provision there was broader than the one here, because it barred review of a “determination, finding, action, or omission.” 946 F.3d 553, 557 (9th Cir. 2019). The Court held it lacked jurisdiction because Plaintiffs’ claim challenged an “action.” *Id.* at 563–64.

where claim was previously reviewed in challenge to removal order); *Bazua-Cota v. Gonzalez*, 466 F.3d 747, 748–49 (9th Cir. 2006) (no jurisdiction to review denial of adjustment application where Plaintiffs failed to raise colorable constitutional claim or question of law).<sup>5</sup>

Defendants assert this Court must look to “the relief sought” to assess whether Plaintiffs’ claims are reviewable, implying they are not because Plaintiffs sought vacatur of the challenged terminations. AOB 15–16. But the *McNary* “injunction requir[ed] the INS to vacate large categories of denials.” *McNary*, 498 U.S. at 489. Similarly, *CSS* required INS to accept applications it had previously rejected. *CSS*, 509 U.S. at 48–49, 52. So did the orders in *IAP* and *Proyecto*. *E.g.*, *IAP*, 306 F.3d at 851, 873 (remanding “so that any [such] applicants who may have been denied legalization as a consequence of invalid INS regulations may be identified, and granted appropriate relief”). As these cases show, the relevant test is not whether orders set aside agency decisions. That happens in almost every case where agencies adopted unlawful practices. Rather, the question is whether the relief sought would compel an

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<sup>5</sup> In addition to not using the term “determination,” the statute in *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 44 (1991), provided for review of legal questions in the Court of Appeals.

agency to reach a particular result, even if acting under lawful policies and procedures. Here, nothing in the relief Plaintiffs seek would bar the Secretary from making new termination decisions, provided she follows the requisite procedures and acts with permissible motives. *See generally City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 875 (9th Cir. 2009) (canvassing several precedents before recognizing key “distinction between precluded judicial review . . . and [permissible] judicial review of ‘methods’ and other collateral issues”) (citation omitted)).

Ultimately, the question this Court must address is whether Plaintiffs’ claims against the termination orders—that the Secretary misinterpreted the statute, failed to comply with statutory consultation and review requirements, and departed from prior practice without explanation—are conceptually distinct from whether country conditions supported designation, extension, or termination. *See Axon Enter. v. FTC*, 598 U.S. 175, 193 (2023) (whether claim is collateral turns on “the nature of the claim[]”). Because they clearly are, this Court retains jurisdiction to consider them.

Indeed, the Supreme Court has consistently found APA claims like these reviewable in the immigration context. *Biden v. Texas*, 597 U.S. 785, 806–07 (2022), rejected the government’s justiciability arguments and reached both a statutory

interpretation claim and other APA claims against DHS's border policies. It held that "under the APA, DHS's exercise of discretion within [immigration law's] statutory framework must be reasonable and reasonably explained." *Id.* at 805–08. Two years earlier, the Supreme Court found jurisdiction to consider an APA claim challenging another agency decision affecting several hundred thousand immigrants. *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (reversing DACA rescission for failure to consider alternatives). Defendants' suggestion that immigration cases are somehow exempt from normal rules of judicial review is thus incorrect. AOB 18.

Finally, were this a close call as to whether Plaintiffs' claims fall within the jurisdiction limiting provision, two background principles justify rejecting Defendants' view. *First*, reading Section 1254a(b)(5)(A) to bar review over any TPS-related decision of any kind—including those collateral to the Secretary's ultimate decision—would leave a wide range of lawless agency behavior entirely unreviewable. For example, if Defendants were correct, a decision granting TPS to Mexico for fifty years explicitly to accomplish mass legalization, or to India or China to sweeten a trade deal, or to "sell" them to a country in exchange for a bribe, *cf. NTPSA III*, 166 F.4th at 757; would be unreviewable "determinations" to designate TPS. Though such actions would be

contrary to the statute’s terms—because TPS designations cannot last longer than 18 months or be made for reasons not specified in the statute—no court could review them.

That is not what any rational Congress could intend, let alone one enacting a statute to *constrain* executive discretion. *See* Background I.A, *supra*. *NTPSA I*, 150 F.4th at 1018 (“Congress intended to constrain the authority of the Executive, not to render all aspects of the TPS program unreviewable.”). It is not sensible, for instance, to conclude that Congress would statutorily proscribe TPS decisions to 18 months if the Secretary actually had unfettered power to ignore the statute at her whim. When faced with results “no sensible person could have intended,” the Supreme Court has “eschewed ‘uncritical literalism’” and instead read jurisdiction-limiting statutes more narrowly, both in the immigration code and elsewhere. *Jennings v. Rodriguez*, 583 U.S. 281, 293–94 (2018) (plurality) (citation omitted) (construing “arising from” narrowly, citing cases construing “affecting,” “related to,” and “in connection with” narrowly in jurisdictional statutes).

*Second*, Congress drafts legislation against a “strong presumption” favoring “judicial review of administrative action.” *Smith v. Berryhill*, 587 U.S. 471, 483 (2019) (citing *Bowen*, 476 U.S. at 670); *Abbott Lab’s v. Gardner*, 387 U.S. 136, 141 (1967) (total preclusion disfavored absent “clear and convincing” evidence); *Axon*

*Enter.*, 598 U.S. at 207–08 (Gorsuch, J., concurring); *see also* *Leedom v. Kyne*, 358 U.S. 184, 190 (1958) (presumption particularly strong where claim alleges agency acted in excess of delegated authority). The Secretary’s annual report to Congress is obviously no substitute for judicial oversight. AOB 18. “We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the *courts* to grant relief when an executive agency violates such a command.” *Bowen*, 476 U.S. at 681 (emphasis added). Here, Defendants’ reading would bar review of important statutory challenges affecting tens of thousands of people. This Court should not adopt that extreme position.

**B. This Court Has Jurisdiction Over Plaintiffs’ Claims  
Under *NTPSA III***

Whether or not this Court accepts the arguments advanced above, it must find at least two of Plaintiffs’ three claims cognizable because they allege statutory errors that are plainly reviewable under *NTPSA III*. Plaintiffs’ first claim is that the Secretary failed to consider intervening conditions—conditions arising after, and unrelated to, the initial designation—“based on an erroneous reading of the TPS statute.” 1-ER-48. Plaintiffs’ second claim is that the Secretary failed to “comply with the TPS statute’s requirement

that TPS decisions be made after interagency consultation and an objective review of the country conditions.” 1-ER-40.

*NTPSA III* holds that this Court has jurisdiction to review “questions of statutory interpretation,” which means that this Court has jurisdiction over Plaintiffs’ first and second claims. 166 F.4th at 757. Defendants’ argument to the contrary is based on the untenable position that *NTPSA III* is limited to vacatur challenges and other claims that the Secretary exceeded her statutory authority. AOB 20–21. It is not. *NTPSA III* cannot be limited to vacatur claims because it exercised jurisdiction to review Plaintiffs’ challenge to the *termination* of TPS for Venezuela. *NTPSA III*, 166 F.4th at 766 (“[W]e hold that the judicial review bar in § 1254a(b)(5)(A) does not preclude us from reviewing Plaintiffs’ claim that the Secretary acted in excess of her statutory authority by terminating the 2025 Extension.”). *NTPSA III* also cannot be limited to some narrow category of statutory interpretation claims concerning the extent of the Secretary’s authority because it explicitly found jurisdiction to review “questions of statutory interpretation” generally. *Id.* at 757; *see also Ramos v. Wolf*, 975 F.3d 872, 895 (9th Cir. 2020), *reh’g en banc granted, opinion vacated*, 59 F.4th 1010 (9th Cir. 2023) (“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.”).

Moreover—as Defendants acknowledge, AOB 20—“there is *no difference*, insofar as the validity of agency action is concerned, between an agency’s exceeding the scope of its authority” and an agency “improperly” exercising its authority, including by misinterpreting a statute. *City of Arlington v. FCC*, 569 U.S. 290, 298–99 (2013). Defendants suggest *NTPSA III* ignores this principle, but it is Defendants’ untenable interpretation of *NTPSA III* that makes that error. *NTPSA III* itself makes no such distinction.

*NTPSA III* controls here because there is no meaningful difference for jurisdictional purposes between Plaintiffs’ challenge to the termination of TPS for Venezuela in that case and Plaintiffs’ first and second claims in this case. All allege statutory errors. In *NTPSA III*, the error was a premature termination in “violat[ion of] the plain text of the TPS statute.” 166 F.4th at 766. In this case, the errors are terminating without considering intervening conditions “based on an erroneous reading of the TPS statute” and failure to comply with the statute’s consultation and review requirements. 1-ER-40, 48. Because all of these claims involve questions of statutory interpretation, this Court has jurisdiction to review them.

### **C. This Court Has Jurisdiction Over Plaintiffs' Change-in-Position Claim**

Plaintiffs' third claim does not concern a question of statutory interpretation but is nonetheless reviewable because it does not challenge any of the Secretary's "determinations" regarding whether a particular country satisfies applicable conditions requirements. Instead, Plaintiffs' third claim alleges the Secretary violated the APA by breaking from decades of agency practice in declining to consider intervening conditions without acknowledging or providing a good reason for the change. 1-ER-44-48. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (holding that agencies must acknowledge and provide "good reasons" for changes in agency policy). The Secretary's unexplained about-face is not a "determination" as that term is used in the TPS statute. *See supra* Argument I.A; *see also Ramos v. Wolf*, 975 F.3d at 909–911 (9th Cir. 2020) (Christen, J., dissenting). Further, granting relief on this claim would not compel the Secretary to extend TPS. The Secretary would remain free to terminate as long as she either considered intervening conditions or acknowledged and provided a good reason for her decision not to.

## II. THE DISTRICT COURT CORRECTLY FOUND DEFENDANTS VIOLATED THE APA

### A. The Secretary Violated the TPS Statute By Failing to Consider Intervening Conditions

The district court granted judgment on Plaintiffs' first claim, ruling that the challenged terminations were "[c]ontrary to [l]aw" because the TPS statute requires the Secretary to consider intervening conditions during the periodic review process, but she did not. 1-ER-44-47. Defendants concede the Secretary did not consider intervening conditions. *See* 1-ER-44 ("[T]he Secretary is limited to consideration of the conditions which gave rise to the original TPS designation."); AOB at 27 (TPS periodic review does not take into account "new, unrelated conditions"). The only question before this Court with respect to this claim is whether the district court correctly interpreted the statute.

The TPS statute provides the Secretary "shall" periodically "review the conditions in" a designated country to "determine whether the conditions for [TPS] designation . . . continue to be met." § 1254a(b)(3)(A). Honduras, Nicaragua, and Nepal were designated for TPS under Subsection (b)(1)(B), which permits designation (and requires extension) where:

- (i) there has been an earthquake, flood, drought, epidemic, or other environmental disaster in the state

resulting in a substantial, but temporary, disruption of living conditions in the area affected,  
(ii) the foreign state is unable, temporarily, to handle adequately the return to the state of aliens who are nationals of the state, and  
(iii) the foreign state officially has requested designation under this subparagraph.

§ 1254a(b)(1)(B).

Here, agency researchers explicitly concluded that Honduras and Nicaragua could *not* “handle the return” of their nationals—the second factor for designation—due to a “humanitarian crisis,” widespread “gang violence,” and other conditions unrelated to the countries’ original environmental disasters. 3-ER-182 (Honduras); 4-ER-391 (Nicaragua). *See also supra* Statement I.C. They also identified concerns about food security and access to clean water in Nepal. 5-ER-554-555. The Secretary nonetheless terminated TPS. Her termination orders conclude that “conditions resulting from” the countries’ original environmental disasters did not render them unable to handle their nationals’ return. 3-ER-160 (Honduras Termination Notice). *See also* 4-ER-355 (Nicaragua Termination Notice) (finding Nicaragua can “adequately handle the return of its nationals” because of progress recovering from the original environmental disaster); 5-ER-536 (Nepal Termination Notice) (same).

The district court found the Secretary’s interpretation of the TPS statute was “erroneous.” 1-ER-48. Examining the statute’s

plain text, the district court agreed that an extension decision turns on “whether the conditions for such designation . . . continue to be met.” § 1254a(b)(3)(A). But, for two reasons, it concluded that term “conditions for such designation” is properly interpreted to include intervening conditions.

First, the district court examined the criteria for TPS designation in Subsection (b)(1)(B). It observed that “[n]othing in the statutory text ties the second criteria, regarding the country’s ability to handle the return of its nationals, to the disaster that triggered its initial designation.” 1-ER-47. In other words, a country’s inability to handle the return of its nationals is an independent factor under the statute. This conclusion is the crux of the district court’s statutory interpretation, but Defendants have next to nothing to say about it. They devote one sentence to the key question: does the statute impose an unspoken rule that a country’s ability to handle its nationals’ return must be analyzed only in terms of limitations imposed by the original environmental crisis? *See* AOB 28. Or is it relevant, e.g., that the country’s “murderous, dictatorial regime” still poses a threat to returnees? 1-ER-48 (citing emails showing agency’s struggle to explain termination of TPS for Nicaragua given its “murderous, dictatorial regime”).

In Defendants’ view, the statute requires a “link between the natural disaster underlying a TPS designation and the ability of a

foreign country to handle its nationals' return" because it uses "the additive conjunction 'and' between those criteria." AOB 28. This makes no sense. First, the statute does not use "and" between the first factor, regarding environmental disaster, and the second, regarding the country's ability to handle its nationals' return. It uses a comma. § 1254a(b)(1)(B). Second, even if the statute did use 'and,' 'and' does not mean 'because of.' 'And' is a connector. It need not impose any particular relationship between the terms it connects. Rather, as the district court held, the plain text of the statute identifies a country's ability to handle its nationals' return as an *independent* criterion for TPS designation, to be analyzed on its own terms.

Second, the district court held that the term "conditions for such designation" in Subsection (b)(3)(A) is best interpreted to encompass conditions that formed the basis for a country's initial designation decision *as well as* conditions that provided the bases for subsequent extensions. 1-ER-45-46. The district court referred to the initial designation decision and subsequent extension decisions collectively as "the broader designation." *Id.* The district court's interpretation flows from a common-sense reading of the statute's text. Plainly, whenever a country is designated for TPS "such designation" is due not only to the "conditions" that formed the basis for the initial designation decision, but also the

“conditions” that supported any subsequent extensions. For example, Nicaragua was designated for TPS based on Hurricane Mitch, but its designation was most recently extended in part based on a political and humanitarian crisis. *See supra*, Background I. Under any logical understanding, the “conditions” for Nicaragua’s designation thus include both the hurricane and the humanitarian crisis.

The district court’s interpretation is also consistent with the humanitarian purpose of TPS. By not unduly restricting consideration of conditions that led to a country’s ongoing designation and affect its ability to handle the return of its nationals, the district court’s interpretation ensures that beneficiaries will not lose protections while they are unable to return safely to their countries. 1-ER-46-47. In contrast, Defendants’ interpretation would permit TPS holders to be stripped of status while their country is in the midst of a violent war because an earlier natural disaster no longer poses a threat. *Id.*

Defendants protest that conditions arising after an initial TPS designation may be addressed only via re-designation, but that is incorrect. AOB at 26, 28. Defendants point to nothing in the statute that requires that result, relying instead only on a 2023 decision to redesignate Venezuela. *Id.* at 26. That example actually disproves Defendants’ position, because the 2023 decision both

redesignated *and* extended Venezuela’s TPS “based upon the same factual circumstances,” demonstrating that the same country conditions can support either option. *See* 90 Fed. Reg. 5961, 5963 (Jan. 17, 2025). Indeed, TPS designations are regularly extended (but not redesignated) based on intervening conditions. *See infra* Argument II.C. Factors *other than* country conditions influence the choice whether to re-designate or simply extend: namely, redesignation extends protection to nationals who arrived after the initial designation, while extension simply continues protection for existing TPS holders. § 1254a(c)(1)(A)(i) (requiring that TPS beneficiaries “ha[ve] been continuously physically present in the United States since the effective date of the most recent designation” of their country).

Finally, even if this Court were to find the statute ambiguous as to whether intervening conditions are to be considered during the periodic review, it should still affirm the district court’s grant of partial summary judgment on this claim because the Secretary interpreted the statute to *prohibit* consideration of intervening conditions. *See* 1-ER-44 (“Defendants argue that the Secretary is limited to consideration of the conditions which gave rise to the original TPS designation.”); *see also* AOB 27 (“[A] plain and contextual reading of the text shows that the proper focus of the Secretary’s periodic review of TPS designations to determine if they

should be extended or terminated is on whether the conditions that led to the TPS designation ‘continue,’ and not whether new, unrelated conditions have arisen.”). That account is clearly wrong, as nothing in the statutory text imposes that limitation. Agency decisions based on a misinterpretation of the governing statute violate the APA. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (“[A]n order may not stand if the agency has misconceived the law.”).

Because the district court’s statutory interpretation offers the only logical reading of the statute’s plain text and best serves congressional intent, this Court should affirm.

**B. The Secretary Failed to Comply with the TPS Statute’s Consultation and Review Requirements**

The district court also found the terminations violated the APA for a second reason. “Defendants (a) made a preordained decision to terminate TPS and (b) did not base their termination decisions on interagency consultation or country conditions review” in violation of the TPS statute. 1-ER-40-44. *See* § 1254a(b)(3)(A) (requiring Secretary to make TPS decision only “after” engaging in consultation and review); *see also* 5 U.S.C. § 706(2)(D) (agency decisions that fail to “observ[e] . . . procedure required by law” violate the APA). The district court’s finding is supported by overwhelming record evidence and reversible only for clear error.

Defendants attack a strawman, claiming the district court’s ruling on Plaintiffs’ second claim was based on a belief that agency decisions are unlawful whenever “they are guided by administration policy priorities.” AOB 35. Not so. The district court’s ruling was based on two basic rules, which Defendants do not contest. First, the Secretary was required to comply with the TPS statute, pursuant to which TPS decisions can be made only “after consultation with appropriate agencies of the Government” and “review [of] the conditions in the foreign state.” § 1254a(b)(3)(A). Second, the Secretary was required to “offer genuine justifications” for her TPS decisions. 1-ER-40 (citing *Dep’t of Comm. v. New York*, 588 U.S. 752, 785 (2019)); *see also* § 1254a(b)(3)(A) (requiring Secretary to publish “the basis for [her] determination”). Because Defendants cannot contest these basic rules, they instead offer their own interpretation of the facts. But Defendants’ self-serving retelling of the record evidence falls far short of establishing clear error.

*First*, the record includes extensive evidence supporting the district court’s finding that “the Secretary’s Honduras, Nicaragua, and Nepal TPS termination decisions were preordained.” 1-ER-41. Indeed, Defendants have long espoused a commitment to ending “TPS in general” for every TPS-designated country, regardless of the facts on the ground. *Ramos*, 336 F. Supp. 3d at 1099 (quoting

former Acting Secretary Duke’s intention to “send a clear signal that TPS in general is coming to a close . . . consistent with the President’s position on immigration”). The record shows this project continued during the second Trump Administration.

On his first day in office, the President issued an Executive Order directing the Secretary to “limit[]” TPS to ameliorate “the continued presence of illegal aliens,” even though TPS holders are lawfully present pursuant to statute. 90 Fed. Reg. at 8446. The Order echoed the President’s campaign promises to “revoke” TPS, which he had described as “not legal.” 1-ER-8. Secretary Noem immediately “follow[ed]” the President’s “directive,” which she understood as an instruction to “paus[] the [TPS] program.” 1-SER-167. While publicly describing TPS as a means to allow “terrorists and murders” “into this country,” 1-ER-41-42 (even though no one can enter the U.S. under the TPS program and anyone with more than a single misdemeanor conviction is ineligible for protection), she began to end TPS for every country that had it. Her termination decisions proffered, *inter alia*, that nationals could safely return to Afghanistan even though the State Department warns against all travel there; and that the ongoing armed conflict in Syria is over even though the State Department says it is not. *Compare* 90 Fed. Reg. 20309, 20310 (May 13, 2025) (“[R]eturn of Afghan nationals to Afghanistan does not pose a threat to their personal safety.”) *with*

1-SER-159 (“Do not travel to Afghanistan due to civil unrest, crime, terrorism, risk of wrongful detention, kidnapping, and limited health facilities.”); *compare* 90 Fed. Reg. 45398, 45400 (Sept. 22, 2025) (“[T]he situation [in Syria] no longer meets the criteria for an ongoing armed conflict that poses a serious threat to the personal safety of returning Syrian nationals.”) *with* 1-SER-142 (“Syria has experienced active armed conflict since 2011. No part of Syria is safe from violence.”).

Defendants ignore DHS’s social media posts counterfactually describing TPS holders as terrorists and murderers and seek to dismiss the other statements by the decisionmaker (the Secretary) or top administration officials (including the President and Vice President) as “remote” because they were made several months before the challenged terminations. AOB 38. But, as the district court found, the terminations challenged here were not stand-alone decisions, existing separate and apart from the administration’s efforts to end TPS generally. Rather, the decisions to terminate TPS for Honduras, Nicaragua, and Nepal represented specific applications of Defendants’ project to “revoke” TPS. 1-ER-8. Defendants’ statements were not remote from that project, either in time or subject.

Indeed, the terminations of TPS for Honduras, Nicaragua, and Nepal are consistent with the irregularities, omissions,

contradictions, and unexplained departures from past practice documented in other termination decisions from this administration. *See supra* Background I. Career USCIS personnel’s research indicated the three countries continued to face serious challenges and found explicitly that Nicaragua and Honduras were neither safe nor capable of handling their nationals’ return. *See supra* Background I; *see also, e.g.*, 3-ER-182; 1-SER-138; 4-ER-391; 5-ER-554-55. Decision Memos prepared for the Secretary—which the district court found were drafted before full country conditions information was even available, 1-ER-42—nonetheless recommended termination, omitting any mention of the conditions researchers identified as dangerous. 7-ER-988-996; 7-ER-1063-1071; 1-SER-130. The Memos were consistent with “new guidelines” designating large categories of conditions off-limits and urging agency staff to focus on “improvements.” 8-ER-1077. Agency staff were also instructed to supplement their research with information about fraud allegations against TPS holders, even though the number of such cases was so small agency personnel found it “laughable” even to mention them, and even though such information is irrelevant to TPS periodic reviews. 8-ER-1153. And customary State Department country conditions reports were simply eliminated. 8-ER-1143, 1145. They ceased to be provided at all, so the agency was left with stale reports from the prior

administration (for Nicaragua and Nepal) and no report at all for Honduras. In the case of Nicaragua, Secretary of State Rubio declined to provide a recommendation regarding its TPS designation because he “did not concur” with what he understood to be an already-made decision to terminate. 1-SER-014.

Faced with this evidence, the district court was not required “to exhibit a naiveté from which ordinary citizens are free.” *Dep’t of Com.*, 588 U.S. at 785 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d. Cir. 1977)). It was not clear error for the court to find that the Secretary had decided to terminate TPS well “[b]efore reviewing any country conditions reports” or consulting with the State Department. 1-ER-41-42.

*Second*, the record also fully supports the district court’s finding that—even if the Secretary had made her termination decisions *after* considering the State Department materials ultimately included in the Certified Administrative Record (CAR)—her decisions still would not have satisfied the statute’s consultation requirement, because those materials do not reflect “meaningful” consultation, as this Court’s precedent requires. *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1088 (9th Cir. 2011).

This Court’s cases have consistently applied a rigorous conception of what consultation entails. *Id.* at 1088–89 (collecting

cases). Consultation is an “affirmative duty,” that must be “meaningful” and occur before making a decision. *Id.*; *see also, e.g., Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 119–20 (1st Cir. 2002) (holding letters were insufficient to establish that agency complied with statutory consultation requirement).

The district court did not commit clear error in concluding that the stale State Department country conditions reports (for Nicaragua and Nepal, prepared months earlier during the prior administration) and cursory national interest letter (for Honduras, and not discussing country conditions at all) do not satisfy the statutory consultation requirement. At minimum, “meaningful” consultation must be based on information that is both current and relevant to the inquiry at hand—i.e., whether “the conditions in” Honduras, Nicaragua, and Nepal were such that these countries could “handle adequately the return” of their nationals. § 1254a(b)(1)(B)(ii), (b)(3)(A). The consultation here was neither. The State Department reports for Nicaragua and Nepal were months old, and the cursory Honduras letter barely mentioned country conditions at all; instead, it was focused on a statutorily irrelevant factor—whether TPS for Honduras was in the “national interest.” 4-ER-358-72 (Nicaragua); 5-ER-540-48 (Nepal); 3-ER-165-79 (Honduras). The deficiency is especially jarring given DHS itself, in extending TPS for South Sudan, recently acknowledged

the Secretary is “unable to make an informed determination” about TPS based on “a non-current record from the Department of State.” 90 Fed. Reg. 19217, 19217–18 (May 6, 2025). It was for this reason that the Secretary was required to extend TPS automatically for South Sudan during the initial periodic review of the country.<sup>6</sup> *Id.*

Defendants attempt to minimize the significance of their failure to consult with the State Department by asserting that the TPS statute’s consultation requirement can be satisfied by consultation with “other agencies.” AOB 41. This argument might be relevant if Defendants had consulted with some other agency, but they did not. *See* 1-SER-205, 1-SER-197, 1-SER-190 (CAR indices, showing no consultation with other agencies). Moreover, the statute mandates consultation with “appropriate” agencies. § 1254a(b)(3)(A). The legislative history makes clear Congress understood “[t]he Department of State would be one such agency.” 135 Cong. Rec. 25846 (Oct. 25, 1989). For 35 years, DHS shared that understanding. 2-SER-277-78, 2-SER-282-83. Defendants cannot seriously contest that *the State Department* is an “appropriate” agency to consult on conditions in foreign countries.

Finally, Defendants’ contention that the district court abused its discretion in admitting extra-record evidence pursuant to *Lands*

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<sup>6</sup> Secretary Noem terminated South Sudan’s designation at the next opportunity. 90 Fed. Reg. 50484 (Nov. 6, 2025).

*Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005), is meritless. AOB 36. The only flaw Defendants identify in the district court’s order is that the court’s “bad faith” finding was “predicated on” its stayed postponement order. *Id.* But this Court’s stay of the district court’s postponement order “provide[d] no analysis” that could inform the district court’s assessment of whether the *Lands Council* rule permitting extra-record discovery upon a showing of agency bad faith applied. *NTPSA II*, 163 F.4th at 1158. Defendants also assert that the district court erred because it considered extra-record evidence to question the agency’s policy judgments rather than to fill gaps in the administrative record. AOB 37. This is simply a variation of Defendants’ strawman argument, *supra* 45, which fails because the district court did *not* substitute its policy preferences for the agency’s. Rather, the court reviewed the agency’s compliance with the statute Congress wrote, consistent with the constitutional duty of the judiciary to interpret the law. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

**C. The Secretary’s Failure to Consider Intervening  
Conditions Violated the APA’s Change-in-Position  
Doctrine**

The district court also independently granted judgment for Plaintiffs on a third claim, finding that even if the TPS statute does not require consideration of intervening conditions, the Secretary

violated the APA by departing from decades of agency practice of considering intervening conditions without acknowledging or explaining the change. Defendants' objections to the district court's judgment on this claim are meritless.

It is black letter administrative law that an agency changing a prior position must “display awareness that it *is* changing position” and provide “good reasons” for the change. *Fox Television Stations, Inc.*, 556 U.S. at 515; *see also, e.g., Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016). Contrary to Defendants' unsupported assertion, AOB 29, the “good reason” requirement “is not limited to officially promulgated regulations.” *Robbins v. Reagan*, 780 F.2d 37, 45–49 (D.C. Cir. 1985). It applies to changes manifested in decisions, informal guidance, and practices. *Id.* at 49–51 (reviewing whether agency provided adequate explanation for reversing commitment to homeless shelter); *see also FDA v. Wages and White Lion Invs., L.L.C.*, 604 U.S. 542, 570 (2025) (“we have held that an agency changed its position when it . . . ‘abandon[ed] a decades-old practice’”) (citation omitted); *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687–88 (9th Cir. 2007) (departure from decades-old funding practice); *Lal v. INS*, 255 F.3d 998, 1006–07 (9th Cir. 2001) (“By changing its settled practice . . . the BIA acted impermissibly and committed an arbitrary and capricious act.”); *Sw. Airlines v. FERC*, 926 F.3d 851, 858 (D.C. Cir.

2019) (holding agency’s “repeated[] use” of certain types of data in its rate-making decisions established a “consistent practice” that “sets the baseline from which future departures must be explained”); *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923–24 (D.C. Cir. 2017) (departure from longstanding land management practice).

Defendants fleetingly contest the existence of a past practice of considering intervening conditions, AOB 29, but fail to show the district court clearly erred in finding that “DHS has ‘a longstanding practice of considering all country conditions when undertaking the mandatory periodic review under the statute, regardless of their relation to the originating condition.’” 1-ER-46 (quoting *Saget v. Trump*, 375 F. Supp. 3d 280, 350 (E.D.N.Y. 2019)). The evidence overwhelmingly supports the district court’s finding. *See, e.g.*, 1-SER-129 (Trial Transcript, Testimony of Former USCIS Director Leon Rodriguez, *Saget v. Trump*, No. 18-cv-1599 (E.D.N.Y. Jan. 8, 2019) (“[I]ntervening events . . . became part of the analysis as to whether to extend TPS . . . That was my understanding of how the statute operates.”)); 1-SER-122-23 (Declaration of Leon Rodriguez, *Ramos v. Nielsen*, No. 18-cv-1554-EMC (N.D. Cal. Aug. 23, 2018) (“Intervening factors . . . were considered relevant to determining whether a country continued to meet the conditions for continuing TPS designation. This was true regardless of whether those

intervening factors had any connection to the events that formed the basis for the original designation . . . .”)).

For example, while Honduras, Nicaragua, and Nepal were all initially designated for TPS based on natural disasters, each was subsequently extended based on unrelated intervening conditions. *See, e.g.*, 88 Fed. Reg. at 40300 (extending TPS for Nicaragua based in part on “political instability and a humanitarian crisis”); 88 Fed. Reg. at 40310 (extending TPS for Honduras based in part on “staggering levels of crime and violence”); 88 Fed. Reg. at 40323–24 (extending TPS for Nepal in part because “more recent environmental disasters” and “associated macroeconomic shocks” “render Nepal temporarily unable to handle the return of those granted TPS”). Agency officials acknowledged as much. 3-ER-182 (agency memo explaining that previous extension of Honduras’s designation was based on, *inter alia*, “[v]iolence and social and political concerns”); 4-ER-391 (agency memo explaining that previous extension of Nicaragua’s designation was based on, *inter alia*, “political instability”).

Defendants’ examples are not to the contrary. Some of the terminations they cite involve countries designated for brief periods, during which there simply may not have been any relevant intervening conditions. AOB at 26 (Guinea). Others are nearly two decades old, and so say nothing about the agency’s recent past

practice. *Id.* (Burundi). And the fact that two countries' designations were terminated despite a discussion of ongoing challenges *supports* Plaintiffs' claim—it shows intervening conditions were at least *considered*. AOB at 27.

In sum, the district court did not clearly err in finding it was the agency's practice to consider intervening conditions. Controlling precedent required the Secretary to acknowledge and explain her departure from that practice. She did not, and Defendants do not claim otherwise. Accordingly, this Court should affirm.

### **III. DEFENDANTS' REQUEST FOR REASSIGNMENT IS UNWARRANTED**

Defendants conclude with an untenable attack on the integrity of the district court, seeking the “rare and extraordinary” relief of reassignment on remand. *Krechman v. Cnty. of Riverside*, 723 F.3d 1104, 1112 (9th Cir. 2013) (citation omitted). Their grab-bag of grievances does not come close to justifying reassignment, which this Court has rejected even where judges *actually* made intemperate remarks and serious legal errors. *Id.* Defendants' decision to seek reassignment based primarily on alleged improprieties during the postponement phase of this case over six months after indicating their intent to do so and *after* partial final judgment further belies the seriousness of their request.

First, Defendants seek reassignment based on sentences in the introduction and a footnote in the court’s postponement order and a few paragraphs in its December 31 final judgment addressing racism in U.S. history. AOB 44–45. But the court’s decision to compare the events at issue here to prior periods of intense anti-immigrant racism was entirely appropriate, particularly where detailed expert testimony thoughtfully placed current events in historical context. 1-SER-021. Defendants criticize the court’s views as too “strong,” but no amount of “respect for ‘rational and civil discourse’ [can] supply an excuse for leaving an uncomfortable past unexamined.” *Ramos v. Louisiana*, 590 U.S. 83, 99 n.44, 106 (2020) (considering “racist origins of Louisiana’s and Oregon’s laws” a compelling reason to overturn precedent). Where a court finds that the government acted in violation of the law, it cannot be ground for reassignment to say so. Defendants also protest the court’s reliance on sources not cited by the parties. But conducting original research is *not* improper. *Guice v. Postmaster Gen., U.S. Postal Serv.*, 718 F. App’x 792, 795 (11th Cir. 2017) (“[C]ourts are permitted—indeed, obligated—to conduct their own research on legal issues before it.”); *United States v. Davis*, 183 F.3d 231, 252 (3d Cir. 1999) (“[T]he trial court cannot leave everything to the lawyers. The judge has an immanent obligation to research the law[.]”).

Defendants next suggest reassignment is necessary to “preserve the appearance of justice.” In support, Defendants assert that the court inappropriately singled out “government counsel” for “admonish[ment]” at the § 705 hearing. That is not true. AOB 46–47. Review of the transcript shows the court’s comments were directed at counsel for “each” side and came in the context of a request that counsel for both parties “really spend time” discussing the important questions of jurisdiction and statutory interpretation presented by this case. 1-SER-250 at 6:4-10.

Defendants also object to the district court’s rejection of an amicus brief. However, the federal rules do not contemplate amicus briefs before a district court. While district courts can permit such briefs in their discretion, the district court plainly had no obligation to allow any non-party to submit an amicus brief. *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999) (“There is no inherent right to file an *amicus curiae* brief with the Court. It is left entirely to the discretion of the Court.”). Further, the court reasonably explained that it permitted 15 state amici to file an amicus brief because its contents were helpful, 1-SER-251, but denied the motion of a non-profit “public interest law firm” to file an amicus brief because its brief “contains assertions that do not assist the Court’s understanding of the legal issues presented.” 1-

SER-253. That is a permissible and reasoned distinction for the court to have drawn.

Defendants also allege that the court “ignored” precedent. AOB 47. But the fact that Defendants disagree with the district court’s interpretation of certain cases does not mean the district court ignored them. The district court issued a detailed, 52-page opinion supporting its decision with extensive citations to controlling caselaw. Far from “disregard[ing] *CASA*,” *id.*, it posed a written question prior to the postponement hearing to both parties to request their views on the Supreme Court’s decision in that case. 2-ER-82. Nor did the district court “disregard *Trump v. Boyle*,” AOB 47, by holding, *consistent with this Court’s precedent*, that an unreasoned stay order does not establish binding precedent and, in any event, that the claims in this case were distinguishable from those at issue in the prior stay. 1-SER-245-46. *See NTPSA II*, 163 F.4th at 1158 (“We can only guess as to the [Supreme] Court’s rationale when it provides none.”).

Finally, grasping at straws, Defendants suggest the district court’s failure to conform to their unilaterally imposed timeline for ruling on their motion to stay somehow justifies reassignment. AOB 47–48. The suggestion is preposterous, particularly given that, as this Court recognized, Defendants utterly failed to “explain the significance” of their requested timeline. 1-SER-004 n.1.

Defendants’ grievances do not come close to the standard for reassigning a judge. Such an “extraordinary” remedy requires establishing “unusual circumstances,” such as a demonstrated inability to adhere to instructions on remand or a manifest need to “preserve the appearance of justice.” *Krechman*, 723 F.3d at 1111–12. This Court has held that even “several off-color comments” were not enough, *id.*, nor were a judge’s criticisms of expert witnesses as “pointy heads,” *California v. Montrose Chem. Corp. of Cal.*, 104 F.3d 1507, 1521–22 (9th Cir. 1997), nor was a clear “error of law,” *O’Brien v. Welty*, 818 F.3d 920, 937 (9th Cir. 2016). Judge Thompson treated the parties fairly, and nothing in her opinion reflects anything remotely approaching the “rare” types of conduct that could warrant reassignment at the end of an appeal.

Far from supporting reassignment, the government’s argument is a regrettable escalation in a dangerous trend of impugning the integrity of federal judges who do not accept the government’s legal positions. *Cf.* Brief of Amici Curiae, Former Federal and State Judges, in Support of Respondents at 4, *Noem v. Dahlia Doe*, No. 25A952 (U.S. Mar. 5, 2026) (brief of 175 former judges lamenting that “the past year has seen an extraordinary assault on th[e] constitutional ideal” of an impartial judiciary); Amy Howe, *Chief justice rebukes Trump’s call for judicial impeachment*, SCOTUSBLOG (Mar. 18, 2025),

<https://www.scotusblog.com/2025/03/chief-justice-rebukes-trumps-call-for-judicial-impeachment/> (quoting Chief Justice Roberts’ statement that “impeachment is not an appropriate response to disagreement concerning a judicial decision. The normal appellate review process exists for that purpose.”); *see also* Mattathias Schwartz, *Marshals’ Data Shows Spike in Threats Against Federal Judges*, N.Y. Times, May 27, 2025 (cataloguing a “spike in threats [against judges that] coincided with a flood of harsh rhetoric . . . criticizing judges who have ruled against the administration”).

Here, the government has barely attempted to conceal its contempt for Judge Thompson, a jurist with nearly 20 years of service on the state and federal bench, issuing an official press release calling her postponement decision “disgusting,” and attacking her as an “out of control” “activist [] Biden appointee.” *See* 1-SER-188. Such vitriol adds fuel to a fire that has already been stoked to alarming levels; it should not be tolerated, let alone rewarded. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) (“[P]ublic perception of judicial integrity is ‘a state interest of the highest order.’”) (citation omitted); *United States v. Trump*, 88 F.4th 990, 1014 (D.C. Cir. 2023) (“Courts have a legitimate interest in protecting the judicial system from outside pressures . . . . Messages designed to generate alarm and dread . . . will necessarily

hinder the trial process and slow the administration of justice.”  
(cleaned up)).

## CONCLUSION

For the foregoing reasons, this Court should affirm.

Dated: March 31, 2026

Respectfully submitted,

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

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