No. 18-16981

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CRISTA RAMOS, *et al.*,
Plaintiffs and Appellees,

v.

CHAD WOLF, *et al.*,
Defendants and Appellants.

On Appeal from the United States District Court
for the Northern District of California, Case No. 3:18-cv-01554-EMC
Honorable Edward M. Chen

APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION

This case concerns decisions terminating the lawful immigration status and work authorization of approximately 300,000 people under the Temporary Protected Status (TPS) statute. The district court preliminarily enjoined the terminations, thereby allowing these TPS holders and their families—including 200,000 children who are U.S. citizens by birth, many of whom are school-aged—an opportunity to remain here while Plaintiffs complete discovery and present their full case on the merits.

In a split decision, the Panel reversed. It held that Congress stripped federal courts of jurisdiction over any challenge to TPS decisions as arbitrary and capricious, even one limited to an unexplained departure from past practice in statutory interpretation rather than the merits of any individual decisions. It also held the district court committed clear error in finding "serious questions" on the merits of Plaintiffs' Fifth Amendment claim.

This Court should grant rehearing or rehearing en banc for three reasons. *First*, this case presents questions of exceptional importance. The Panel's decision will bring catastrophic and irreversible harm to several hundred thousand families and cascading damage to the economy and public health, all before the district court even considers the merits on a full record.

Second, the Panel's decision conflicts with *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), and this Court's cases applying it. Statutes barring review of "determinations" are ubiquitous in administrative law, and this Court's prior cases have *always* found jurisdiction where, as here, the plaintiffs *did not* seek a ruling on their substantive eligibility for the underlying statutory benefit.

Moreover, by stripping courts of jurisdiction to review arbitrary and capricious TPS decision-making by the Executive Branch, the Panel's decision leaves the judiciary powerless to stop future administrations from using TPS for reasons wholly unrelated to the statute's humanitarian objectives, writing a blank check for the Executive Branch to advance whatever immigration objectives it prefers. That unchecked power could be used to harm immigrants (as here) *or to help them*. Future administrations could grant TPS to Mexico or China just to sweeten a trade deal or increase the pool of authorized immigrant workers, and courts could do nothing.

Third, the Panel's decision adopts a virtually insurmountable standard for proving discrimination in contravention of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). The record here contains powerful evidence of discriminatory animus backed by findings as detailed as any described in this Court's

precedent, yet the Panel found no "serious questions" even when reviewing only for clear error.

ARGUMENT

I. THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE.

Rarely do issues of legal significance so directly and profoundly affect the lives of so many people. The Panel's decision will fundamentally alter the lives of 300,000 TPS holders, many of whom have lived here lawfully for nearly *twenty years*. It will also immeasurably harm their 200,000 U.S. citizen children, many of whom are school-aged. If their parents lose status, these American children will be forced to either separate from their parents or move to countries historically deemed too unstable to accept returnees.[1]

The TPS terminations would also severely damage the nation's economy and public health during a national crisis. They would end employment authorization for these 300,000 TPS holders, costing our economy $132.6 billion in GDP, $5.2 billion in Social Security and Medicare contributions, and $733 million in employers' turnover costs. 1-ER-10. They would also compromise public health because more than 100,000 TPS holders perform "essential

[1] The district court found Defendants' determinations that these countries are now safe were the product of "a pre-determined outcome." 1-ER-31–32. The Panel did not disturb that finding. Op. 28.

work" under DHS's classification system, including 11,000 in our beleaguered healthcare system. Dkt. 88.

In contrast, Defendants suffer *no harm* from maintaining the injunction pending final judgment, as they have acknowledged. *See* Oral Argument 18:06–19:19.

The equities supporting a preliminary injunction therefore remain uncontested, and they strongly counsel in favor of rehearing. Plaintiffs seek only to maintain the TPS status they have held for years pending final judgment. The Panel's decision acknowledged some "record evidence" already supports "the district court's findings" of "racial animus," and suggested more could strengthen Plaintiffs' discrimination claims. Op. 49. Because discovery remains unfinished, Plaintiffs may yet uncover that evidence. The Panel's conclusion that Plaintiffs could succeed if they discover more facts renders its decision to so profoundly alter the status quo truly shocking. Defendants would suffer *no harm* from maintaining the preliminary injunction until the district court renders final judgment. In contrast, if further discovery confirms the terminations were unlawful, most of the catastrophic harm caused by permitting them to take effect in the interim would be irreversible. Given the lives at issue in this case, that error alone warrants rehearing.

II. THE PANEL'S JURISDICTIONAL RULING CONFLICTS WITH *McNARY* AND THIS COURT'S CASES CONSTRUING IT.

The Panel's jurisdictional holding conflicts with *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), and this Court's decisions interpreting it. *McNary* and its progeny establish a simple rule for applying jurisdictional provisions that bar review of agency "determinations": a claim does not challenge an agency's determination if it does not seek to dictate the outcome of the agency's decision. If the relief requested does not compel a particular result, then the claim seeking that relief does not impair an agency's ability to make its own "determination." This Court has applied that rule many times, consistently finding jurisdiction to review claims challenging a generally applicable flaw in agency determinations.

Under *McNary*, Plaintiffs' primary APA claim is obviously reviewable. For decades DHS considered intervening events when making termination decisions, but then suddenly read the statute to forbid that practice without explaining the change. As Judge Christen's dissent explains, the extensive record of procedural irregularity here establishes a radical departure from past practice with no explanation. Op. 94–104 (Christen, J., dissenting). DHS's decisions were "contrived," *Dep't of Com. v. New York*, 139 S. Ct.

2551, 2575 (2019), to reach "the conclusion [they] [we]re looking for." 1-ER-25–36; *see also* Op. 84 (Christen, J., dissenting) (noting similarity to APA claim in *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020)).

Plaintiffs do not challenge the TPS determinations themselves. Because "Plaintiffs did not ask the district court to reweigh the factors the Secretary considered when she terminated TPS … nor did they seek a ruling that [their countries] are entitled to TPS designations," they did not challenge the substance of DHS's "determination" to terminate TPS under 8 U.S.C. 1254a(b)(5)(A). Op. 68, 72–91 (Christen, J. dissenting); *see also McNary*, 498 U.S. at 495 (challenge reviewable where individuals "d[id] not seek a substantive declaration that they are entitled to [lawful immigration] status").

The Panel reached a contrary conclusion by disregarding *McNary*. For three reasons, this Court should grant rehearing and rectify the conflict.

First, the Panel's departure from *McNary* effectively immunizes Executive Branch action under the TPS statute from virtually all review for arbitrary decision-making. The Panel holds "an allegation that the Secretary reached certain TPS determinations in an 'arbitrary and capricious' manner would not be reviewable under

section 1254a." Op. 38–39; *see also* Op. 41 (holding "failure to adequately explain" departure from past practice unreviewable).

That holding empowers future administrations to limit *or expand* TPS in other arbitrary ways. For example, the government would escape judicial review even if it granted TPS to Mexico or China simply to expand the pool of immigrant workers or advance trade negotiations. Under the Panel's decision, challenges to such arbitrary decisions would have to be dismissed as "an attack on the substantive considerations underlying the Secretary's specific TPS determinations, over which the statute prohibits judicial review." Op. 41. That a future administration could totally fail to explain how such decisions conform to the TPS statute's humanitarian criteria would make no difference, because the failure to explain departures is now unreviewable. *Id.*

Second, the conflict created by the Panel's treatment of *McNary* will create confusion in administrative law jurisprudence, because "the principles announced [in *McNary*] apply more generally to all statutes that bar judicial review of *individual* agency actions." *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 875 (9th Cir. 2009).

The conflict is inescapable because the district court's ruling left the Secretary free to "make a new determination whether TPS should be extended or terminated" after correcting the legal errors

the district court identified (primarily the failure to explain a dramatic departure from past practice). 1-ER-62. The district court had "not … compelled [the Secretary] to extend each country's TPS designation." *Id.*

Under *McNary*, that fact alone should have disposed of the jurisdictional issue. This Court has never before found a claim unreviewable under a *McNary*-type statute where the plaintiffs *did not* seek a ruling on their "substantive eligibility for a statutory benefit." Op. 78 (Christen, J., dissenting). Until now, where the relief sought did not compel any particular "determination," this Court always found jurisdiction. *E.g.*, *Immigrant Assistance Project of L.A. Cnty. Fed'n of Labor (AFL-CIO) v. INS*, 306 F.3d 842, 870 (9th Cir. 2002) (finding jurisdiction where INS ordered "to adjudicate such applications in accordance with the procedures established in this court's rulings"); *Proyecto San Pablo v. INS*, 189 F.3d 1130, 1138, 1140 (9th Cir. 1999) (jurisdiction over "procedures by which the legalization program is administered," despite "exclusive review scheme," "[b]ecause resolution of Plaintiffs' claim need not implicate … their eligibility"); *Ortiz v. Meissner*, 179 F.3d 718, 722 (9th Cir. 1999) (jurisdiction where "plaintiffs d[id] not challenge the INS's interpretation of the substantive eligibility requirements for legalization"). *Cf. Skagit Cnty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 384–87 (9th Cir. 1996) (distinguishing *McNary* because

hospital sought order awarding reimbursement). The Panel's decision conflicts with every one of these cases.

Even where plaintiffs *did* attempt to dictate an agency's decision, this Court has not automatically found the claim barred. Instead, it has looked to other factors, generally finding no jurisdiction only where plaintiffs' rights could "be effectively advanced" through other avenues, such as by "appeal from an individual order of deportation." *Naranjo-Aguilera v. INS*, 30 F.3d 1106, 1114 (9th Cir. 1994) (no jurisdiction where claim could be raised in removal proceedings). *See also City of Rialto*, 581 F.3d at 876 (no jurisdiction where "meaningful judicial review of [plaintiff's] substantive challenge is available" through another mechanism). Here, however, the Panel stated there is no other avenue for judicial review of these claims, but barred them anyway. Op. 44. Courts properly demand far stronger preclusive language before construing statutes to *entirely* foreclose review. *E.g.*, *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018).

Third, the Panel's new rule barring Plaintiffs' claim as "essentially … a substantive challenge to the Secretary's underlying analysis" of the TPS terminations, Op. 40, based on "a fluid range of considerations," Op. 43, creates yet more conflict with prior law. For example, the Panel barred review based on purported structural cues in the TPS statute. Op. 36–38. That rationale conflicts with

McNary's reliance on the "well-settled presumption" favoring judicial review of agency action, 498 U.S. at 496–97, which ordinarily requires "specific language or specific legislative history," or other comparably definitive evidence to foreclose all judicial review of agency action. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670–71, 673 (1986) ("strong presumption"); *see also Regents*, 140 S. Ct. at 1905 ("basic presumption"). Although the Panel mentioned that presumption, Op. 32, its reliance on implicit statutory signals makes clear that it did not apply the presumption. *Compare* Op. 36, *with* Op. 91 (Christen, J., dissenting).[2]

The Panel further relied on the fact that Plaintiffs did not challenge "any agency procedure or regulation," but rather the new *practice* of refusing to consider intervening conditions. Op. 40. But *McNary* itself involved a challenge to agency practices, as did other

[2] In addition to ignoring that *McNary* does not permit reliance on implicit statutory cues, the Panel misread the cues on which it erroneously relied. It claimed the statute's limitations on the Secretary's discretion counsel only "in favor of limiting unwarranted designations or extensions of TPS." Op. 36. But the statute also deprives the Secretary of discretion to *terminate* TPS where country conditions warrant continued designation. Immigration Law Scholars Amici Br. 10–11 (citing 8 U.S.C. 1254a(b)(3)(B)–(C)). The Panel also invoked the Secretary's broad power "to designate any foreign country for TPS," Op. 36, but this case concerns limits on authority to *terminate* existing designations, not initial designations. And Defendants themselves disagreed with the Panel's holding that the statute allows the Secretary to disregard intervening events. *Compare* Op. 42, *with* AOB 31–32.

cases applying it. *McNary*, 498 U.S. at 489 n.9. *See also Immigrant Assistance Project*, 306 F.3d at 863 (finding jurisdiction to challenge "INS's practice"); *Proyecto San Pablo*, 189 F.3d at 1138–39 (same).

The Panel also pointed to the declaratory and injunctive relief Plaintiffs sought, which asks to set aside the terminations. Op. 40. But, again, no prior decision had considered that relevant. In fact, *McNary* and several of its progeny enjoined agency decisions, just as the district court did here. *McNary*, 498 U.S. at 489 & n.10 (affirming "injunction requiring the INS to vacate large categories of denials"). *See also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 48–49, 52 (1993) (requiring re-adjudication of thousands of previously-rejected applications); *Immigrant Assistance Project*, 306 F.3d at 851, 873 (remanding for re-adjudication under correct legal standards); *Campos v. Nail*, 43 F.3d 1285, 1287 (9th Cir. 1994) (affirming order "nullifying all deportation orders of class members who were denied changes of venue").[3]

[3] Although it does not directly implicate *McNary*, the Panel's suggestion that review was unavailable because the Secretary need not explain a departure from a discretionary practice, Op. 42, conflicts with *Lal v. INS*, 255 F.3d 998, 1007 (9th Cir. 2001) (reviewing and reversing claim of "irrational departure" from pre-existing "general policy" governing exercise of discretion), and several Supreme Court cases. Op. 90 (Christen, J., dissenting) (collecting cases).

III. THE PANEL'S APPLICATION OF *ARLINGTON HEIGHTS* CONFLICTS WITH THIS COURT'S ANTI-DISCRIMINATION PRECEDENTS.

Were this Court to affirm the preliminary injunction on Plaintiffs' APA claim, it would not need to reach the constitutional question. But the Panel's resolution of that issue independently warrants rehearing. The Panel's decision conflicts with settled anti-discrimination doctrine in several respects as set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Staub v. Proctor Hospital*, 562 U.S. 411 (2011). Most important, a claim of racially-motivated decision-making does not require a smoking-gun admission by the most senior decisionmaker. Rather, factfinders may infer intent based on all relevant evidence, including conduct by other actors and irregular decision-making.

In rejecting the constitutional claim because early discovery had not uncovered a smoking-gun admission, the Panel disregarded the central teaching of *Arlington Heights*. The Panel also contravened precedent by considering the record evidence supporting a finding of discrimination only in isolation rather than as a whole, by assuming the role of trier of fact rather than reviewing for clear

error, and by rewriting the law governing causation in discrimination cases. This Court should not let such departures from settled law stand.

Based on a large (albeit preliminary) record, the district court found both direct and circumstantial evidence of "race being a motivating factor" in the terminations. 1-ER-31. Just days after his DHS Secretary made the last (and largest) TPS termination decision at issue here, the President rejected a proposal to permit TPS holders to stay, asking "[w]hy are we having all these people from shithole countries come here?" and then suggesting "the United States should instead bring more people from countries such as Norway." 1-ER-30–31. The district court also found the "White House was putting pressure on DHS to end TPS" and "did, in fact, have influence on the TPS decisions," 1-ER-28–29, "to get to the President/White House's desired result of terminating TPS." 1-ER-32. The district court found this pressure worked, as Acting Secretary Duke was "largely carrying out or conforming with a pre-determined presidential agenda to end TPS." 1-ER-29. In her own words, she believed her termination decisions were "the result of an America First view," 1-ER-36—a slogan long associated with racial discrimination, as the President himself knew. Anti-Defamation League Amici Br. 18–23.

The district court's findings of racial animus were reviewable only for clear error. Op. 31. Because the equities overwhelmingly favor Plaintiffs, "serious questions" as to whether those findings were "plausible" should have sufficed to affirm. *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (in race discrimination case, holding animus finding may be "plausible" "even if another [explanation] is equally or more so"). "[W]hen relying on *Arlington Heights* to demonstrate that an action was motivated by a discriminatory purpose, a plaintiff need provide '*very little such evidence* to raise a genuine issue of fact; *any indication of discriminatory motive* may suffice to raise a question that can only be resolved by a fact-finder.'" *Arce v. Douglas*, 793 F.3d 968, 977–78 (9th Cir. 2015) (emphases added).

The Panel subjected the findings below to a different, far higher standard, creating obvious conflicts with this Court's precedent in several ways.

First, the Panel refused to permit the factfinder to infer discriminatory motive from proof that the White House influenced the terminations coupled with the President's expressions of racial animus against TPS holders close in time to the termination decisions. Instead, it insisted on even more direct proof that the President's pressure on TPS decisionmakers was motivated by and traceable to

his expressed animus against TPS holders. Op. 50 (requiring evidence that "the President's statements played [a] role in the TPS decision-making process"); Op. 53 (requiring evidence "linking" the fact that "DHS Secretaries were influenced by President Trump … in their TPS decision-making" and evidence that President Trump "expressed animus against non-white, non-European immigrants").

This Court has never previously required such "caught-in-the-act" evidence to infer discriminatory intent. In effect, that requirement leaves courts powerless to remedy a huge swath of unconstitutional discriminatory conduct for purported lack of proof. Defendants already have asserted executive privilege over evidence responsive to Plaintiffs' discovery requests—documents and communications the Panel would apparently require for Plaintiffs to raise even a "serious question" of discriminatory intent. *E.g.*, ECF 84 at 1–2. The Panel's rule would leave the most powerful actors in our government largely unconstrained by the Constitution's prohibition on discrimination.

Second, the Panel erroneously discounted overwhelming evidence of irregular decision-making and other indirect evidence, even though this Court has repeatedly found it highly probative of discriminatory animus. This Court has even affirmed animus findings based almost *entirely* on irregular decision-making. *E.g.*, *Ave.*

6E Invs., LLC v. City of Yuma, 818 F.3d 493, 505 (9th Cir. 2016) (crediting irregular decision-making though "[n]one of the alleged statements [of councilmembers] expressly refer[red] to race"); *Arce*, 793 F.3d at 978 (irregular decision-making enough despite "only a few snippets of overtly discriminatory expression," because "officials … seldom, if ever, announce on the record … their desire to discriminate against a racial minority").

No prior decision has dismissed irregularities as essentially irrelevant. But the Panel dismissed multiple irregularities as not indicative of *any* discriminatory motive: "[E]ven accepting that the agency made its decisions with a predetermined objective to terminate TPS, there is still no evidentiary support for the conclusion that this overarching goal was motivated by racial animus" rather than "the administration's immigration policy." Op. 52. This contravenes *Arlington Heights*, which holds "[s]ubstantive departures too may be relevant, particularly if the factors usually considered … strongly favor" a different outcome. *Arlington Heights*, 429 U.S. at 267. Moreover, "[p]roof that the defendant's explanation is unworthy of credence … is probative of intentional discrimination, and it may be quite persuasive." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1123 (9th Cir. 2004); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (factfinder "can reasonably

infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose" because it can "consider a party's dishonesty … as 'affirmative evidence of guilt'").

The Panel compounded this error by substituting its own view of the evidence for the district court's. Although the Panel acknowledged factual findings were reviewable for clear error, it conducted plenary review of the facts "[b]ased on [its] review of the evidence," Op. 54, and showed no sign of deference. Op. 52 (rejecting discriminatory motive explanation without discussing whether it was "plausible"). In particular, the Panel rejected reliance on the President's "shithole countries" statement because he made it three days after the last termination. *Id.* But even assuming Plaintiffs had to show his statements themselves influenced the decisionmakers, it is surely "plausible" that the President expressed similar sentiments to those involved in TPS decision-making before then, particularly given his numerous similar public statements and the record evidence establishing that the White House pressured the Secretary to end TPS. 1-ER-28–31.

The Panel also noted the Supreme Court's recent rejection of a discrimination claim in *Regents*, Op. 48–49, but the record here dwarfs those allegations. *Regents* found "nothing irregular" about the decision-making surrounding the DACA rescission, 140 S. Ct.

at 1916, whereas here the district court's extensive finding of irregularities were almost entirely unrefuted.[4] *Regents* also rejected reliance on President Trump's statements about Latinos as "remote in time and made in unrelated contexts," *id.*, whereas his statements here were specifically about TPS holders and came within days of the termination decisions. *See* 1-ER-30–31.

Third, the Panel created conflict by rejecting the district court's liability theory—that the President harbored animus and influenced those responsible for the termination decisions. 1-ER-27–28. This Court has repeatedly held that where one actor who harbors animus influences another, the resulting decision violates anti-discrimination law. *Compare* Op. 49 (requiring evidence either that "the President personally," rather than through his subordinates, "sought to influence the TPS terminations," or that lower-level officials "were themselves motivated by animus"), *with Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) (animus could be

[4] The Panel took issue with one aspect of the evidence of irregular decision-making—that "higher agency officials 'repackaged' the TPS decision memoranda." Op. 52. Its treatment of that evidence understates it, but in any event addresses only one piece of the overwhelming evidence establishing irregular decision-making. Op. 92–101 (Christen, J., dissenting).

imputed to DHS where "biased subordinate influenced or was involved in" "allegedly independent" decision), *and France v. Johnson*, 795 F.3d 1170, 1176 (9th Cir. 2015) (same for Border Patrol).

The Panel suggested this Court previously imputed the animus of others to a decisionmaker only in "employment discrimination" cases, Op. 49, but this Court and others have done so in other contexts. *E.g.*, *Ave. 6E*, 818 F.3d at 504 (holding "community animus can support a finding of discriminatory motives by government officials, even if the [city council] officials do not personally hold such views"); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (finding constitutional violation where there was "no doubt that the defendants knew that a significant portion of the public opposition [to fair housing] was racially inspired, and their public acts were a direct response to that opposition").

While the Panel suggested the district court's liability theory had not been "extended to the foreign policy or national security realm," Op. 49, its decision elsewhere recognized the "lack of national security justification" for the terminations. Op. 47. The Panel also never explained why its newly created foreign-policy exception to the Constitution's prohibition on intentional race discrimination should apply here, where the decisions target individuals who have lived lawfully in this country, many for decades. *Cf. Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (distinction between noncitizens

who have entered and those who have not "runs throughout immigration law"). The potentially sweeping nature of this exception counsels against adopting it in a case where the Court need not even reach the constitutional question.

Finally, in declining to apply this Court's pre-existing liability rule, the Panel grossly misconstrued *Staub*, which it read to "suggest[]" that "the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principal liable for a tort that requires both." Op. 49. But *Staub* actually held that "[s]o long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable." *Staub*, 562 U.S. at 419. Here, the President wanted to end TPS because he harbored racial animus against TPS holders. Although his subordinate (the Secretary) was the ultimate decisionmaker, "it is axiomatic under tort law that the exercise of judgment by the decisionmaker *does not prevent* the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." *Id.* (emphasis added). A decisionmaker's "exercise of judgment" does *not* "automatically render[] the link to the supervisor's bias 'remote' or 'purely contingent.'" *Id.* Under the Panel's decision, *Staub* now stands for the opposite of what it holds.

CONCLUSION

For these reasons, the Court should grant rehearing or rehearing en banc.

Dated: November 30, 2020

Respectfully submitted,

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

By:/s/ *Ahilan T. Arulanantham*
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

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9th Cir. Case Number(s) 18-16981

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Signature /s/ *Ahilan T. Arulanantham* **Date** November 30, 2020
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CRISTA RAMOS, et al.,

Plaintiffs-Appellees,

v.

PETER T. GAYNOR, in his official capacity as Acting Secretary of Homeland Security, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

RESPONSE TO PETITION FOR REHEARING EN BANC

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INTRODUCTION AND SUMMARY

In 1990, Congress created the Temporary Protected Status (TPS) program to provide on a discretionary basis temporary relief to aliens who cannot safely return in the short-term to their home country as a result of a natural disaster, ongoing armed conflict, or other "extraordinary and temporary conditions in the foreign state." 8 U.S.C. § 1254a(b). Consistent with the discretionary and temporary nature of the relief, Congress barred judicial review of "any determination" by the Secretary of Homeland Security with respect to a TPS designation or termination. *Id.* § 1254a(b)(5)(A). Plaintiffs challenge the Secretary's decision to terminate TPS for four countries—all of which were first designated for TPS at least a decade ago. Plaintiffs allege that the termination decisions were arbitrary and capricious under the APA and violate equal protection.

The panel correctly concluded that plaintiffs are not likely to prevail in this litigation and thus are not entitled to a preliminary injunction. The panel rightly determined that plaintiffs' APA claim—which seeks to set the decisions aside on the ground that the Secretary failed to consider factors that previous Secretaries considered and failed to explain that change—is a challenge to the termination decisions themselves, not a collateral matter, and is thus barred. The panel likewise did not err in concluding that plaintiffs' entirely circumstantial evidence of allegedly discriminatory intent on the Secretary's part was insufficient to raise even serious questions on the merits of their equal protection claim.

The panel's decision on both counts does not conflict with any decision of this Court, the Supreme Court, or any other court of appeals. Indeed, plaintiffs fail to cite a single case in which a court has permitted an APA claim like theirs to proceed in the face of a preclusion provision like § 1254a(b)(5)(A), while contrary cases are legion. Nor have plaintiffs identified a case in which a court has found the kind of indirect evidence plaintiffs proffer here sufficient to support an equal protection claim against a Cabinet Secretary exercising her exclusive authority in a matter implicating foreign policy. Further review is not warranted.

STATEMENT

1. The Immigration and Nationality Act of 1990 authorizes the Secretary of Homeland Security,[1] "after consultation with appropriate agencies of the Government," to designate countries for "Temporary [P]rotected [S]tatus," (TPS) if she finds:

> (A) … that there is an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state (or to the part of the state) would pose a serious threat to their personal safety;
>
> (B) … 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,

[1] The statute originally vested the Attorney General with the power to make TPS decisions. Congress transferred these powers to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557.

> (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; or
>
> (C) … that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety[.]

8 U.S.C. § 1254a(b).

When the Secretary designates a country for TPS, eligible aliens from that country who are physically present in the United States on the effective date of the designation (and continuously thereafter) may not be removed from the United States and are authorized to work here for the duration of the country's TPS designation. 8 U.S.C. § 1254a(a), (c).

Initial designations may not exceed eighteen months. 8 U.S.C. § 1254a(b)(2). The Secretary must review each designation sixty days before the designation period ends to determine whether the conditions for the country's designation continue to be met. *Id.* § 1254a(b)(3)(A). If the Secretary finds that the foreign state "no longer continues to meet the conditions for designation," she "shall terminate the designation" by publishing notice in the Federal Register of the determination and the basis for the termination. *Id.* § 1254a(b)(3)(B). If the Secretary "does not determine" that the foreign state "no longer meets the conditions for designation," then "the period of designation of the foreign state is extended for an additional period of 6

months (or, in the discretion of the [Secretary], a period of 12 or 18 months)." *Id.* § 1254a(b)(3)(C).

The statute makes the Secretary's TPS decisions unreviewable. Section 1254a(b)(5)(A) 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."

2. The government has designated a total of twenty-one countries and one autonomous province for TPS since 1990. The government terminated twelve of those designations prior to 2017.

The four countries at issue in this case (Sudan, Nicaragua, El Salvador, and Haiti) were first designated for TPS more than a decade ago. *See Ramos v. Wolf*, 975 F.3d 872, 880-83 (9th Cir. 2020). Sudan was first designated for TPS in 1997 due to an ongoing armed conflict. *Id.* at 880. Nicaragua was designated for TPS in 1999 following Hurricane Mitch. *Id.* at 881. El Salvador received its designation in 2001, following three earthquakes. *Id.* at 881-82. Haiti was initially designated for TPS in 2010, in the aftermath of an earthquake. *Id.* at 883.

In 2017 and 2018, the Secretary of Homeland Security terminated TPS for each of the four countries. In each instance, the Secretary concluded that the conditions that gave rise to the country's original designation no longer persisted and that those originating events therefore no longer supported a TPS designation. *Ramos*, 975 F.3d at 880-83. As required by statute, the Secretary published notice of her termination

decisions in the Federal Register and explained the reasons why she was terminating the designations. *See id.*; *see also, e.g.*, *Termination of the Designation of Sudan for TPS*, 82 Fed. Reg. 47,228 (Oct. 11, 2017).

During the same time period, the Secretary extended the TPS designations of four countries: Somalia, South Sudan, Syria, and Yemen. In each case, the Secretary determined that the conditions that prompted the country's TPS designation persisted and prevented the safe return of the country's nationals, warranting an 18-month extension. *See, e.g., Extension of South Sudan for TPS*, 82 Fed. Reg. 44,205 (Sept. 21, 2017).

3. In March 2018, plaintiffs filed this putative class action challenging the Secretaries' decisions terminating the TPS status of Sudan, Nicaragua, Haiti and El Salvador. As relevant here, the complaint alleges that the termination decisions were unlawful because (1) the Secretary's termination decisions violated the APA because, in reaching those decisions, the Secretary departed from prior agency practice without an adequate explanation; and (2) the decisions were motivated by discriminatory animus in violation of equal-protection principles. *Ramos*, 975 F.3d at 883.

The district court entered a preliminary injunction barring the Secretary from implementing the termination decisions. *Ramos*, 975 F.3d at 884-87. The court concluded that plaintiffs' APA claim could proceed, notwithstanding the TPS statute's judicial review bar, because plaintiffs were purportedly challenging the process by which the Secretary arrived at her determinations, not the determinations themselves.

Id. at 884. The court further concluded that plaintiffs were likely to prevail on their APA claim. *Id.* The court also found that plaintiffs had raised serious questions regarding whether the termination decisions violated equal protection. *Id.* at 885

4. In a divided decision, this Court reversed. *Ramos*, 975 F.3d at 878-79.

The panel majority concluded that plaintiffs' APA claim was precluded by § 1254a(b)(5)(A)'s bar on judicial review of "any determination of the [Secretary] with respect to the designation, or termination or extension of a designation." *Ramos*, 975 F.3d at 893. The Court recognized that, under *McNary v. Haitian Refugee Center, Inc.,* 498 U.S. 479 (1991), § 1254a(b)(5)(A) would not bar a claim challenging an agency "'pattern or practice' that is indeed collateral to, and distinct from, the specific TPS decisions and their underlying rationale." *Ramos*, 975 F3d at 891-92. But the panel concluded that plaintiffs' APA claim did not qualify as such a collateral challenge. *Id.* at 892-93. Instead, the panel held that plaintiffs' APA claim "challenging the Secretary's failure to consider intervening events—or even her failure to adequately explain why the agency is no longer considering intervening events when it did so in the past—[was] essentially an attack on the substantive considerations underlying the Secretary's specific TPS determinations, over which the statute prohibits judicial review." *Ramos*, 975 F.3d at 893. *Id.* at 893. The panel's conclusion that plaintiffs were raising a challenge to the Secretary's termination decisions and not a "genuinely collateral" practice was underscored by the fact that plaintiffs' APA claim "largely depend[ed] on a review and comparison of the substantive merits of the Secretary's

specific TPS terminations" and challenge[d] an action (the Secretary's determination as to which country conditions are most salient) that is "within the agency's special expertise and institutional competence." *Ramos*, 975 F.3d at 893.

The panel also determined that plaintiffs had failed to raise serious questions on the merits of their equal protection claim, even when applying the framework set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Ramos*, 975 F.3d at 896-99. The court emphasized "the glaring lack of evidence tying the President's alleged discriminatory intent to the specific TPS terminations" and the absence of evidence "that any administration officials involved in the TPS decision-making process were themselves motivated by animus." *Id.* at 897. The court also found the plaintiffs' purported circumstantial evidence of discriminatory animus insufficient. The court concluded that there was "no indication the impact of the TPS terminations bear more heavily on 'non-white, non-European' countries," given that the Secretary had extended TPS for several non-white, non-European countries. *Id.* at 898. The court also stressed that a Secretary's desire to conform her decisions to an Administration's policy objectives and disagreements among agency staff were "commonplace" features of agency decision-making, not evidence of racial animus. *Id.* at 899.

Judge Christen dissented. *Ramos*, 975 F.3d at 906-26. Judge Christen would have held that plaintiffs' APA claim was reviewable under *McNary* and that plaintiffs

were likely to prevail on that claim. *Id.* at 909-24. Judge Christen would not have reached plaintiffs' equal protection claim. *Id.* at 926.

ARGUMENT

Further review of the panel's decision is not warranted. The panel correctly concluded that the TPS statute's judicial review bar precludes plaintiffs' APA challenge to the Secretary's TPS determinations. That conclusion is consistent with this Court's precedent and does not conflict with any decisions of the Supreme Court or any other court of appeals. Indeed, plaintiffs fail to cite any case (until this litigation) in which a court has permitted an arbitrary-and-capricious claim to proceed notwithstanding a preclusion provision like § 1254a(b)(5)(A), whereas cases finding such claims to be barred are numerous. The panel also correctly determined that plaintiffs failed to raise serious questions on the merits of their equal protection claim. The panel's fact-specific application of the *Arlington Heights* framework accords with the Supreme Court's recent decision in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), and likewise does not conflict with any decisions of this Court or another court of appeals. The petition for rehearing en banc should be denied.

A. The panel's conclusion that § 1254a(b)(5)(A) bars plaintiffs' APA claim is correct and does not conflict with *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), and its progeny. Section 1254a(b)(5)(A) provides that "[t]here is no judicial review of any determination of the [Secretary] with respect to the designation, or

termination or extension of a designation, of a foreign state" for TPS. Provisions of this kind preclude challenges to "the substantive standards that the [decisionmaker] uses" to make the decision and also to "the methods by which the [decisionmaker] adopts those standards." *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018). In other words, they bar claims "challeng[ing] the procedure and substance" of the non-reviewable determination. *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012); *see also Amgen Inc. v. Smith*, 357 F.3d 103, 113 (D.C. Cir. 2004) ("If a no-review provision shields particular types of administrative action, a court may not inquire whether a challenged agency decision is arbitrary, capricious, or procedurally defective."); *Bakran v. Secretary, USDHS*, 894 F.3d 557, 563 (3d Cir. 2018) (provision barring review of a "decision" "preclude[s] [a court] from reviewing both the decision and the process for reaching it"); Appellants' Br. 25-29 (citing additional cases).

Plaintiffs' APA claim alleges that, in arriving at her termination decisions, the Secretary failed to consider factors that previous Secretaries purportedly considered and did not adequately explain the basis for that change in practice. Pet. 5-6. The panel correctly concluded that plaintiffs' APA claim is, in essence, "a substantive challenge to the Secretary's underlying analysis in reaching th[e] specific decisions." *Ramos*, 975 F.3d at 893. The standard a Secretary applies in making a TPS determination, the adequacy of her explanation, and the weight she gives certain factors are all "inextricably linked," *Martinez*, 704 F.3d at 623, to that determination. Moreover, plaintiffs' claim "largely depends on a review and comparison of the

substantive merits of the Secretary's specific TPS terminations," *Ramos*, 975 F.3d at 893, underscoring that their challenge is to the decisions themselves.

The panel's decision accords with the Supreme Court's decision in *McNary*. There, plaintiffs challenged the government's "practices and procedures in administering" an immigration program for agricultural workers. 498 U.S. at 494. Plaintiffs' alleged that the government violated Due Process in processing their applications by, among other things, denying them interpreters at hearings and failing to record the hearings. *Id.* at 488. The Supreme Court concluded that such "collateral challenges" to an agency's policies in processing applications were not barred by the judicial review provision at issue. *Id.* at 492.

Unlike the plaintiffs in *McNary*, plaintiffs here are not challenging a "genuinely *collateral*" agency policy or procedure. *Ramos*, 975 F.3d at 893 (citing *Gebhardt*, 879 F.3d at 987). For the reasons explained above and in the panel's opinion, their claim challenges the substance and procedure of the decisions themselves. That plaintiffs are not challenging a collateral practice relating to the processing of applications distinguishes this case from the few situations in which this Court has permitted a pattern or practice claim to proceed despite a preclusion provision. *See Immigrant Assistance Project of AFL-CIO v. INS*, 306 F.3d 842, 864 (9th Cir. 2002) (emphasizing that the plaintiffs "do not challenge INS's interpretations of IRCA's *substantive* eligibility requirements," but rather "the *procedure* by which they have to prove that they are eligible for adjustment of status"); *Proyecto San Pablo v. INS*, 189 F.3d 1130,

1138 (9th Cir. 1999) (plaintiffs' claimed injury was their "inability to get access to their prior deportation records in a timely fashion").

Plaintiffs wrongly contend (Pet. 5, 8) that *McNary* applies whenever "the relief requested does not compel a particular result" on remand. A successful procedural challenge under the APA rarely, if ever, dictates that an agency reach a particular result on remand. Thus, plaintiffs' interpretation of *McNary* would allow any procedural challenge to proceed. But, as this Court has "reiterated several times before," merely alleging a "'pattern and practice'" claim "is not an automatic shortcut to federal court jurisdiction." *Ramos*, 975 F.3d at 893 (citing cases). A plaintiff's claim may proceed only where a plaintiff challenges a procedure that is collateral to the determination itself, not one that is intertwined with that determination.

Tellingly, plaintiffs cite no case (until this litigation) in which this Court or any other has undertaken review of any kind of arbitrary-and-capricious challenge in the face of a review bar resembling § 1254a(b)(5)(A), much less claims of the kind presented here. By contrast, this Court and others have routinely held such claims barred. *See, e.g.*, *City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865, 877 (9th Cir. 2009) (concluding that *McNary*-type rationale was inapplicable to a "pattern and practice" claim that sought "the very same [relief] that successful direct review … would produce: invalidation of the" underlying unreviewable agency decision); *Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala*, 80 F.3d 379, 386 (9th Cir. 1996) (preclusion provision applies when "a procedure is challenged only in order to reverse the

individual [unreviewable] decision"); *Martinez*, 704 F.3d at 623; *Amgen*, 357 F.3d at 113; *Bakran*, 894 F.3d at 563.

As evidence of the purported danger of finding their APA claim barred, plaintiffs hypothesize that a future Secretary "could totally fail to explain" how a decision to grant TPS "conform[ed] to the TPS statute's humanitarian criteria." Pet. 6-7. Plaintiffs' hypothetical is flawed in numerous respects. Plaintiffs unjustifiably assume that a future Secretary would ignore her obligations under the TPS statute, including her obligation to set forth her reasons for granting a TPS designation in the Federal Register, *see* 8 U.S.C. § 1254a(b)(3)(B). Moreover, the requirement that a Secretary publish her reasons for granting or terminating a TPS designation is the mechanism Congress provided for checking the Secretary's discretion. Congress plainly intended that it, not courts, would take action if the Secretary's explanation was insufficient.

Plaintiffs' hypothetical underscores the fundamental error in their assertion that their APA claim can proceed. Under plaintiffs' theory, *every* TPS designation, extension, or termination decision could be challenged on the ground that the Secretary failed to adequately explain that decision. As this case illustrates, it is not difficult to recast a challenge to a TPS decision as a failure to explain adequately the reasons for that decision, including why certain factors were considered important or why the Secretary reached a different conclusion than a predecessor. Plaintiffs' approach would thus render § 1254a((b)(5)(A)'s bar on judicial review "virtually

meaningless." *Ramos*, 975 F.3d at 880. Allowing plaintiffs to challenge every TPS decision would thwart Congress's plain intent, undermining the discretionary and temporary nature of the relief provided by the TPS program.

Plaintiffs likewise err in asserting that their claim must be reviewable because, unlike in some cases, there is no other avenue for judicial review of their claim. Pet. 9. That Congress broadly barred judicial review of "any determination" relating to a TPS decision, 8 U.S.C. § 1245a(b)(5)(A), supports the conclusion that plaintiffs' arbitrary-and-capricious claim should be precluded, not the opposite. In any event, this Court has applied preclusion provisions like § 1254a(b)(5)(A) even where judicial review is not otherwise available. *See, e.g.*, *Gebhardt*, 879 F.3d at 987; *Skagit*, 80 F.3d at 386.

Finally, plaintiffs fault (Pet. 9-10) the panel for relying on a "range of considerations" in concluding that plaintiffs' APA claim did not qualify as a collateral challenge. In concluding that plaintiffs' claim was barred by § 1254a(b)(5)(A), the panel relied on § 1254a(b)(5)(A)'s language, its statutory context, the agency action at issue, the substance of plaintiffs' claim, and the nature of the relief sought, all factors amply supported by this Court's precedent. *See Ramos*, 975 F.3d at 892-94 (citing cases).

Plaintiffs criticize the panel (Pet. 9) for not placing greater weight on the presumption favoring judicial review of agency action. But, as the panel recognized, *Ramos*, 975 F.3d at 892, that presumption is rebutted where, as here, Congress enacts a statute precluding review. Plaintiffs also err in faulting the panel (Pet. 11) for noting

that plaintiffs sought a declaration that the termination decisions were invalid and an injunction setting the decisions aside. That plaintiffs seek to have the termination decisions set aside is, at a minimum, evidence that they are challenging the decisions themselves. And, contrary to plaintiffs' contention (Pet. 10-11), the panel did not conclude that plaintiffs' claim was barred because plaintiffs were challenging an agency practice, rather than a rule or regulation. The panel recognized that a challenge to a collateral agency practice would be reviewable under *McNary*, but held that plaintiffs had failed to raise such a collateral challenge here. *Ramos*, 975 F.3d at 892-94.

B. The panel's conclusion that plaintiffs failed to raise serious questions with respect to their equal protection claim likewise does not warrant further review. The panel agreed with plaintiffs that the more demanding *Arlington Heights* framework, rather than the rational-basis review standard set forth in *Trump v. Hawaii*, 138 S.Ct. 2392 (2018), applied to plaintiffs' equal protection claim. *Ramos*, 975 F.3d at 895-96. The panel's case-specific application of that framework was correct, accords with the Supreme Court's recent decision in *Department of Homeland Security v. Regents of the University of Cal.*, 140 S.Ct. 1891 (2020), and does not conflict with any decision of this Court.

Contrary to plaintiffs' contention, the panel did not require plaintiffs to present a "smoking-gun admission by the most senior decsionmaker" to establish their claim. Pet. 12; *see also* Pet. 14-15. The panel emphasized that the plaintiffs presented no

evidence that the Secretaries who made the termination decisions harbored discriminatory animus and noted that the Secretaries had, in fact, extended TPS for a number of non-white, non-European countries, undermining plaintiffs' claim that the termination decisions at issue were motivated by discriminatory intent. *Ramos*, 975 F.3d at 898. But the panel acknowledged that "circumstantial evidence may be sufficient to prove a discriminatory intent claim." *Id.* at 898. It simply found that evidence wanting in this case.

The panel did not err, moreover, in discounting plaintiffs' purported "indirect evidence" of discriminatory intent. Pet. 15-16. As the panel explained, many of the circumstances cited by plaintiffs as evidence of discriminatory intent are "commonplace" features of agency decisionmaking, including disagreements between career and political employees, attempts by White House staff to influence policymakers, and a desire to align agency decisions with the current Administration's policy positions. *Ramos*, 975 F.3d at 898-99 (citing cases). The panel's conclusion that such regular aspects of agency decisionmaking do not support a finding of discriminatory intent is plainly reasonable and does not conflict with any decision of this Court.

Nor did the panel err in refusing to impute allegedly discriminatory statements made by the President to the Secretaries. *See* Pet. 18-20; *Ramos*, 975 F.3d at 897. In *Regents*, the Supreme Court rejected a similar attempt to impute the President's allegedly discriminatory remarks to cabinet members. 140 S. Ct. at 1916. As in

Regents, plaintiffs presented no "evidence linking the President's animus to the" relevant agency decisions. *Ramos*, 975 F.3d at 897. Given that "glaring lack of evidence," *id.*, the panel's refusal to attribute the President's remarks to the Secretaries was not erroneous.

Finally, the panel correctly declined to impute the President's statements to the Secretaries under the "cat's paw" theory of liability discussed in *Staub v. Proctor Hosp.*, 562 U.S. 411, 418 (2011). *See Ramos*, 975 F.3d at 897. That theory of liability, developed in the employment context as an exception to the ordinary rules governing tortious intent, has never been applied by any court to foreign-policy decisions made by cabinet-level decisionmakers acting under an oath to uphold the Constitution. *See id.* Extending that sort of imputation to the government regulatory context, moreover, would severely undermine the ability of government officials to make decisions exclusively within their purview. The panel did not err in declining to take that dramatic step.

CONCLUSION

The petition for rehearing should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 40 and Circuit Rule 40-1 because it contains 3,895 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Gerard Sinzdak
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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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