

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 NOOR DOE, *et al.*,
4 Plaintiffs,

5 v. 26 CV 2103 (DEH)

6 KRISTI NOEM, *et al.*,
7 Defendants.

Hearing

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8 ABDO DOE, *et al.*,
9 Plaintiffs,

10 v. 26 CV 2280 (DEH)

11 KRISTI NOEM, *et al.*,
12 Defendants.

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New York, N.Y.
April 16, 2026
10:10 a.m.

14 Before:

15 HON. DALE E. HO,
16 District Judge

17 APPEARANCES

18 GOLDBERG & ASSOCIATES
19 Attorneys for Plaintiffs Noor Doe, *et al.*
20 BY: JULIE A. GOLDBERG

21 SHAYANA KADIDAL
22 RAZEEN ZAMAN
23 Attorneys for Plaintiffs Abdo Doe, *et al.*

24 JAY CLAYTON
25 United States Attorney for the
Southern District of New York
ADAM M. GITLIN
MARK OSMOND
Assistant United States Attorneys

1 (Case called)

2 MS. GOLDBERG: Julie Goldberg on behalf of plaintiffs.
3 Good morning, your Honor.

4 MR. KADIDAL: Good morning, your Honor, Shayana
5 Kadidal from the Center for Constitutional Rights for the Abdo
6 Doe plaintiffs in 2280.

7 MS. ZAMAN: Good morning, your Honor, Razeen Zaman
8 with the Asian American Legal Defense and Education Fund for
9 the Abdo Doe plaintiffs.

10 THE COURT: Good morning.

11 MR. OSMOND: Good morning, your Honor, Mark Osmond
12 from the U.S. Attorney's Office for the government.

13 MR. GITLIN: Good morning, your Honor, Adam Gitlin
14 from the U.S. Attorney's Office, also for the government.

15 THE COURT: Good morning. Everyone have a seat.

16 We are here on the plaintiffs' motions in these two
17 cases to postpone agency action. There are a few housekeeping
18 matters, and then I thought we would just dive right into
19 argument.

20 There are two kind of stray motions on the two
21 dockets.

22 First, in 26 CV 2103, there is a motion for leave to
23 file a reply with excess pages.

24 Is there any objection from the government on that?

25 MR. OSMOND: No, your Honor.

1 THE COURT: The motion is granted. ECF 25 and 26,
2 2103, is granted *nunc pro tunc*.

3 Then, second, there is a motion for leave to proceed
4 pseudonymously in 26 CV 2280. That's at ECF number 20.

5 I just want to see if there is any objection from the
6 government on that one.

7 MR. OSMOND: The government takes no position on that
8 motion, your Honor.

9 THE COURT: Thank you.

10 I reviewed the motion, and in light of the factors
11 that the Second Circuit set out in *Sealed Plaintiff v. Sealed*
12 *Defendant*, at 537 F.3d, 185 (2d Cir. 2008), I find that those
13 factors weigh in favor of granting leave to proceed
14 pseudonymously, as I also granted in the lower numbered case,
15 2103, so ECF number 20 is granted.

16 That's all the housekeeping I had. Then I thought we
17 could turn to argument. I would hear from the plaintiffs first
18 and then from the government.

19 If there is anything you want to raise with me before
20 we begin, please let me know.

21 Mr. Osmond, I see you're about to speak. Go ahead.

22 MR. OSMOND: One housekeeping item from the
23 government. Mr. Gitlin and I divided up the issues we were
24 planning to address. I was planning to address the
25 jurisdictional issues and the equal protection claim, and Mr.

1 Gitlin was going to handle the other issues, including the APA
2 claim and the equitable preliminary injunction factors.

3 THE COURT: That's fine.

4 Yes, Mr. Kadidal.

5 MR. KADIDAL: We are also planning to split argument.
6 With the Court's permission, I was hoping to address
7 jurisdiction and the issues that the Court raised in its order
8 last evening, docket ECF 41, regarding discovery and privilege,
9 and Ms. Zaman will address the merits.

10 THE COURT: Thank you.

11 Ms. Goldberg, you have something?

12 MS. GOLDBERG: I do, your Honor.

13 I did put on the docket this morning, because I was
14 already, prior to the Court's order, kind of looking into the
15 situation, regarding discovery, so I know it's -- probably the
16 Court hasn't had an opportunity to review it, but I did put in
17 a status letter on the docket regarding my efforts in the
18 administrative record.

19 THE COURT: Is there anything about that that you want
20 to summarize?

21 MS. GOLDBERG: I'm happy after argument, or does the
22 Court want to begin with that?

23 THE COURT: Why don't we just jump right into
24 argument, and then we can deal with it towards the end.

25 Ms. Goldberg, would you like to proceed?

1 MS. GOLDBERG: I would, and I am going to be brief.

2 Obviously, there has been extensive briefing, not only
3 in this case and the related case, but several cases around the
4 country.

5 In light of the Court's order last night, this Court
6 seems well apprised of not only this case but all the cases in
7 the other courts.

8 I do not intend to waste time, but I would like to
9 highlight four important points that demonstrate the decision
10 to end Yemen PTS was both pretextual and with racist animus and
11 not within the confines of the law, and then address any issues
12 the Court would like me to highlight.

13 I start every court where I first appeared, I do want
14 to preapologize to the Court. I am dyslexic. If I
15 mispronounce words or names, it's not intentional. I never
16 appeared before you, so I want to make that known.

17 Yemen is in active war. Even the United States, in
18 conjunction with the Saudi-led coalition, is actively bombing
19 currently in the south and as late as three weeks ago. Also in
20 the north, as a behind-the-scenes advisor to Israel, they are
21 bombing there as well.

22 Even United Nation workers are not safe to travel in
23 Yemen, and closure of airports makes return for most of the
24 Yemenise impossible.

25 Every single thing in the administrative record that

1 was produced highlights the fact that Yemen, in 2025 and 2026,
2 has gotten worse, not better.

3 The strength of this evidence in conjunction with the
4 other TPS cases lends credibility to the fact that 8 U.S.C.
5 1254(a) was absolutely not followed.

6 As to jurisdiction, Gorsuch has reminded us several
7 times, the Constitution separation of powers was adopted to
8 ensure that the people's liberties would not be lost to all the
9 accumulation of powers -- legislative, executive, and
10 judiciary -- in the same hands.

11 If Congress could pass a law directing that Smith wins
12 in a pending case, it would violate the Constitution. And if
13 it can do that by stripping jurisdiction instead of separation
14 of powers, it would mean little. *Patchak v. Zinke*, 583 U.S.C.
15 244. Nothing in the record or by way of public comment
16 demonstrates that in fact there was a national security issue.
17 Publicly the government, through vis-a-vis Trump and his
18 administration, has stated a preference for "nice countries,
19 you know, like Denmark, Switzerland, and Norway" to,
20 "unbelievable places like countries that are a disaster." "We
21 have had to live with these animals, but we are not going to
22 live with them for long. You watch." "They have destroyed the
23 fabric of our country." "They include Syria, Somalia, Yemen,
24 Russia, China, Iran, and all of Africa. They are storming the
25 country. They are storming our borders. We have no idea who

1 they are and where they come from."

2 The promulgation and the idea that all of a sudden
3 there is national safety issues is nothing more than fluff for
4 a racist agenda. Yemen applicants are fingerprinted and
5 investigated actually at a higher standard than any other
6 countries. The U.S. embassy also scrutinizes their visas.

7 THE COURT: What do you mean by that, by that they are
8 scrutinized more heavily than -- do you mean other TPS
9 applicants?

10 MS. GOLDBERG: Yeah. That's what I was going to get
11 into.

12 First of all, when a Yemeni applicant goes to the
13 consulate overseas, they are labeled things like visa donkey,
14 visa camel, and they get these specific labels if they are from
15 particular countries. They then go through this really
16 high-level scrutiny in Washington, it's a two-phase process,
17 where they actually are vetted and analyzed both not only by
18 the Department of State, but a lot of times like the FBI, so
19 they go through a due process. It's at a much higher standard.

20 THE COURT: Where is that in the record?

21 MS. GOLDBERG: I'm sure that will come out through
22 discovery, but we have put some of this in our complaint.

23 THE COURT: It's not supported by any evidentiary
24 submissions in support of the motion for postponing the agency
25 action?

1 MS. GOLDBERG: It is not. It's in our complaint.

2 Some of it is public record, by the way, through a lot
3 of other cases that we have brought. For example, USCIS has a
4 whole separate Yemeni adjudication scheme for Yemen cases. In
5 fact the folders at USCIS are a different color from all the
6 other countries. I will get you the cite for that particular
7 case. It was brought in the Western District of New York,
8 where they revoked some of the Yemeni adjudication scheme.

9 Yemen, more than any TPS country, has a lengthy
10 history in the U.S. since the early 1800s, and specifically
11 after the Suez Canal opened in 1969. They have lived here.
12 They have served in the Merchant Marines and the military.
13 They are the very fabric and work force that help opened the
14 first car factories in Michigan.

15 The FBI, USCIS, and other government agencies have
16 lengthy documented ancestry, particularly in Yemen, which is
17 easy to track, given the tribal nature and the family names in
18 each city. In fact, if you see *United States of America v.*
19 *Almontaser*, 2.25 MJ 30076 duty, the government even tracks
20 Yemeni that are in Mexico.

21 Finally, you don't throw the baby out with the
22 bathwater. Congress did not pass Section 8 U.S.C. 1254(a)
23 using the word shall 66 times when directing the Attorney
24 General. Legal interpretation: Must. So that the Attorney
25 General, if he violated the policy, the entire statute could be

1 invalidated. For decades the Supreme Court has recognized that
2 Congress does not lightly strip courts of jurisdiction to
3 review legal questions.

4 The question we raise here today is a legal one, not a
5 fact finding. We are not asking you to find out if Yemen is
6 safe or not. We are not asking the Court to substitute the
7 Yemen conditions. We are merely asking the Court to
8 investigate if the law was followed, and if it wasn't, then to
9 order the government to go back and follow 8 U.S.C. 1254(a).

10 I'm happy to supplement by the end of the day, with
11 the case law regarding the higher scrutiny and the Yemeni
12 adjudication scheme. There are several cases around the
13 country regarding that.

14 THE COURT: Thank you, Ms. Goldberg.

15 I'll turn to plaintiffs in 2280.

16 MR. KADIDAL: Thank you, your Honor. We will, I
17 guess, address discovery and privilege at the very end.

18 I will start with jurisdiction. The strong
19 presumption in favor of judicial review can only be overcome by
20 clear and convincing evidence of congressional intent to strip
21 jurisdiction, and neither provision that the government relies
22 on here evinces such an intent.

23 More than a dozen federal court opinions have decided
24 that claims like ours survive the jurisdiction-stripping
25 provisions relied on by the government, and those courts do so

1 by relying on precedence from the Supreme Court.

2 *McNary* and *Reno v. CSS* treat very similar language,
3 yet they acknowledge that challenges to unlawful and general
4 policies, patterns or practices may still be heard. Those
5 challenges are not about what the secretary decided but how she
6 decided it. They are collateral to the individual country
7 condition determinations referred to in the TPS statute and
8 that statute.

9 THE COURT: I was going to say, I don't mean to cut
10 you off, but I actually do with this question. It's actually
11 not a question. I should have just started with a sort of
12 expectation setting from everyone.

13 What I'd like to do, when it comes to the argument
14 today, is really focus as much as possible our limited time, in
15 light of the time constraints we have today and how quickly
16 these motions need to be resolved, on issues that haven't been
17 raised perhaps as directly in the cases that have already been
18 litigated.

19 That's not to say that I've made up my mind on any of
20 the issues in this case, including jurisdiction, but I guess
21 what I would ask is, is there anything with respect to
22 jurisdiction that you want to argue that has not been addressed
23 in some of the other decisions on TPS terminations, and most
24 specifically Judge Reyes' decision in the Haiti case and Judge
25 Murphy's recent decision from the District of Massachusetts?

1 MR. KADIDAL: Sure.

2 Your Honor, with 15 opinions, I think almost
3 everything has been touched on at least once, but I think it's
4 useful to look at the Supreme Court briefs, both topside briefs
5 have already been filed, to see really where the issue has been
6 joined.

7 The government's position, as expressed in those
8 Supreme Court briefs, is that the word determination covers not
9 only the final decision, the thumbs up or thumbs down, on
10 extending TPS, but also any antecedent decisions leading up to
11 the final conclusion, and we think that's incompatible with the
12 text.

13 If you look at 1254(a)(B)(3) and (B)(5), the word
14 determination is used seven times. It is used in every
15 instance to refer to the country condition determination. That
16 is the determination at issue. Is there an armed conflict
17 going on. Are there extraordinary conditions that are
18 temporary going on. And perhaps determination can also be used
19 textually to refer to the choice of time for extension, six
20 months, 12 months, 18 months, but that's it. It doesn't cover
21 every antecedent decision, as the government has argued in its
22 Supreme Court briefs and as I think is implicit in the briefs
23 here.

24 To get that far, the statute would have to try to bar
25 any claims relating to TPS or use language like any decision or

1 action by the secretary relating to TPS are not subject to
2 federal court jurisdiction.

3 That is the kind of language Congress used in the
4 military commissions act 20 years ago, to our great dismay.
5 That's what it requires to reach the standard of clear and
6 convincing evidence of congressional intent, and (b) (5) (A)
7 falls far short of that. Again, 15 courts have agreed with us
8 on that front.

9 THE COURT: Is there any scenario on which the
10 secretary terminates TPS where there would be no judicial
11 review?

12 MR. KADIDAL: I guess that's the question of what is
13 barred by this. And I think the example that I'd like to throw
14 out there is there are, in the administrative records, some
15 reports from Oxfam, from Human Rights Watch. If we said, look,
16 that Oxfam report, the secretary didn't give it sufficient
17 weight in making her substantive decision, that would be a
18 claim that, if we were to win it, would require reversing the
19 substantive decision, and I think that's really the touchstone
20 for that division between what *McNary* would call substantive
21 decisions and procedural decisions. A procedural decision, if
22 you win on it, the remedy is you go back to the agency for more
23 process, select the prize in the proverbial pie-eating contest.

24 THE COURT: A substantive disagreement with the
25 secretary's determination, not reviewable.

1 MR. KADIDAL: That's right. It would require reversal
2 of the substantive decision and that's not what we are asking
3 for here. We are asking for this issue to be batted back to
4 the agency to follow the policies that the secretary was
5 supposed to and did not here. It doesn't demand a different
6 answer on the merits and, therefore, it is collateral to the
7 merits.

8 I think one other issue that's been joined in the
9 Supreme Court briefs, and again this has been addressed here
10 and there in the lower court opinions, but it's the focus of
11 the Supreme Court briefs, is really a question of which claims
12 here are collateral and why are they collateral.

13 I think for present purposes that's a pretty easy
14 question to answer because the first of our several claims, I
15 think I've outlined maybe about six categories, is lack of
16 consultation with the agencies, particularly the State
17 Department, which is thought to have all this expertise about
18 what's going on in foreign countries. That is a pure process
19 question.

20 The question what consultation means has been debated
21 by some of these courts, right. I don't think this Court needs
22 to dig very deep into that question because here there was
23 essentially no consultation. There was one sentence --

24 THE COURT: This does seem to get into the merits a
25 bit. I'm happy to probe this, but I also want to respect the

1 division of labor that you said that you are going to be making
2 with your cocounsel. I do have some questions about this. I
3 can hold them or we can get into them.

4 MR. KADIDAL: I think it probably makes sense to hold
5 them, but I think my point is simply that what we have here on
6 any common sense definition of the word consultation is not
7 adequate.

8 Some of the lower court cases, the *NTPSA* case, 166
9 F.4th. There are a couple of *NTPSA* cases that say that it has
10 to be meaningful input from the agency. The *Aung Doe* case in
11 the Northern District of Illinois says it has to be a
12 meaningful exchange of information. I think a common sensical
13 reading of the term would indicate some opportunity to download
14 the expertise of the agencies on the subject matter that they
15 are expert in that's relevant to the case here, and that just
16 didn't happen here.

17 THE COURT: I take your point that there is very
18 little in the administrative record here showing what one could
19 call consultation, and I'm going to save some of my questions
20 about that for your cocounsel, but it seems like it's
21 essentially equal to what was in the Haiti case.

22 I do think this gets a little bit at the reviewability
23 issues that you're addressing. The way you define consultation
24 was that there has to be some sort of meaningful back and forth
25 or meaningful exchange. Meaningful, it's kind of a nebulous

1 word. How do I decide whether or not an exchange is
2 sufficiently meaningful to qualify as consultation? I know
3 that you're saying I don't need to define the outer boundaries,
4 but I have got to put some kind of meat on the bones.

5 MR. KADIDAL: There is a useful case that we found in
6 the Ninth Circuit that collects a whole bunch of authorities
7 from the Supreme Court that it would be helpful for the Court
8 to look to because this question comes up a lot in the
9 administrative law field. That case is *California Wilderness*
10 *Coalition v. Department of Energy*. It's 631 F.3d 1072. That's
11 a Ninth Circuit case from 2011. And what they say there is
12 simply: "It has to be something more than opportunity to
13 comment because that would make the requirement to consult
14 superfluous."

15 I think what we have here at Bates 266 in the
16 administrative record is one sentence from a State Department
17 official saying, we have no objections, and that's no different
18 than what the general public can do once they get notice that
19 this has happened.

20 I will offer a comment. I don't think on any common
21 sense reading of the word that that is the process that
22 Congress intended here, and that's why this is a procedural
23 objection, and that's why we have jurisdiction over it, because
24 it is collateral to the merits.

25 Does that make sense to you?

1 THE COURT: I understand the point, but I'm still
2 trying to figure out how, as a judge, I am supposed to enforce
3 that procedural requirement.

4 I take your point about this case, there being very
5 little of what one could describe as consultation, but I still
6 don't know how I am supposed to make that assessment.

7 MR. KADIDAL: We can hope for some clarity from the
8 Supreme Court since this takes up about 10 pages of the
9 government's brief.

10 THE COURT: Unfortunately, it's not going to come
11 before the buzzer goes off here, so I am going to have to rule
12 without the benefit of that guidance.

13 MR. KADIDAL: Again, I think here what you have is
14 clearly inadequate to almost any reasonable reading of the
15 term.

16 I can run through one or two more really quickly just
17 to show that we have here what are essentially collateral
18 challenges and not substantive ones.

19 We have argued purely legal argument that
20 quote/unquote national interest is not a statutory basis for
21 termination. It's only able to be considered at the initial
22 designation. That's a pure legal argument. So saying that the
23 secretary considered it is essentially a process claim.

24 Departure from past practice without proper
25 explanation. That's another one of our merits claims, but

1 that's also a process claim. She failed to consider the past
2 determination. She failed to explain any departure. Those are
3 procedural buttons or boxes that the secretary is supposed to
4 check. That's a claim relating to how she decided, not what
5 she decided.

6 So I think, again, the failure to explain the
7 departure from past practice is a procedural violation.
8 Therefore, it's collateral to the merits of her decision, and
9 this Court clearly has jurisdiction over it.

10 THE COURT: If there were two additional sentences in
11 the Federal Register that just said I have considered the
12 original designation and I've considered the extensions and in
13 spite of those determinations, or having reviewed those
14 determinations, I conclude that termination remains warranted
15 here, would that be sufficient from a procedural perspective?

16 MR. KADIDAL: No. I suspect that more would be
17 required based on just standard administrative law on the
18 requirements, but I am going to maybe leave that question to my
19 cocounsel.

20 Couple others. Political influence, the idea that the
21 president doesn't get to make this decision, but the secretary
22 is supposed to, right. If the Secretary of Energy made this
23 decision, that would be a process claim, and here we claim
24 essentially that the president did, and, again, I think that's
25 a process claim.

1 Free standing equal protection constitutional claim,
2 again, a legal claim. It is constitutional, and I think
3 typically Courts ask for even more clear evidence of an intent
4 to strip jurisdiction there.

5 THE COURT: On the point of the president making the
6 decision, the president does sell the policy agenda for the
7 executive branch, right?

8 MR. KADIDAL: Sure.

9 THE COURT: I can see how with like a quasi
10 independent body or maybe with a different department there
11 would be a degree of insulation that's required here, but the
12 president can say, I am going to hire a homeland security
13 secretary who agrees with me about TPS, right?

14 MR. KADIDAL: But Congress in the TPS statute evinced
15 a desire that these decisions basically be made scientifically.
16 That was the whole point of this regime replacing the previous
17 regime where there was a great deal of executive discretion.
18 So the point was, the people don't elect a president who comes
19 in and just makes a policy decision.

20 THE COURT: It's still a political appointee who sits
21 atop the department. It's not the top career diplomat or
22 foreign service officer who has risen up through the ranks.
23 It's a political appointee and political considerations do get
24 to come into the decisions that cabinet secretaries make,
25 right?

1 MR. KADIDAL: I don't know that I would characterize
2 these decisions as political. Congress passed a specific
3 amount of power to the secretary, to the Attorney General and
4 now I guess it's in the hands of the DHS secretary. It's
5 Congress that gets to say how that power is going to be
6 exercised, and everything about the statute indicates that the
7 power is supposed to be exercised in a manner that's related to
8 objective facts on the ground, those country conditions.

9 THE COURT: I can agree with that, but that doesn't
10 mean that political considerations can't come into play at all,
11 does it? I guess we are starting to beg the question of what
12 is a political consideration? People of different political
13 orientations can have different views on those criteria that
14 you are describing as scientific, can't they?

15 MR. KADIDAL: Can they really? Is there an armed
16 conflict in a country that makes it unsafe for people to
17 return? I don't think of that as fundamentally a decision
18 about ideology. That's a factual decision. There may be some
19 leeway.

20 THE COURT: It might be a mixed question of those
21 things. The way you're framing it, it sounds like you're
22 asking me to engage in a substantive review, right. If the
23 Secretary of Homeland Security comes in and says, I don't think
24 there is an armed conflict in this one country that's been
25 designated for TPS anymore, I know there is like some

1 skirmishes or something, but I don't think it meets the
2 definition of an armed conflict. You would say what, that I
3 have the ability then to come in and say that's not what the
4 evidence says, it is an armed conflict?

5 MR. KADIDAL: I would say that you have the ability to
6 ask whether the secretary made that decision, whether she made
7 it in good faith, whether pretext was applied, whether she had
8 the factual database from which to proceed.

9 She is supposed to consult with state, perhaps, even
10 if they are relevant agencies within the terminology of the
11 statute, with defense and perhaps the Attorney General as well
12 about conditions -- sorry. Not the Attorney General -- with
13 treasury because treasury has a role in designation of groups
14 like Al-Qaeda in the Arabian peninsula and Ansar Allah as
15 terrorist organizations.

16 You can ask whether the secretary did the very
17 specific things that Congress demanded that she do when
18 Congress passed her the power to make these decisions.

19 THE COURT: Let's say the secretary does all those
20 things. You may find the administrative record here deficient
21 in some respects, but there is a lot on some of those factors
22 that you mentioned in the administrative record, and the
23 secretary looks at it, and you look at that administrative
24 record and you think there is no way that an objective,
25 good-faith look at that record could support a decision to

1 terminate, and the secretary just says, look, I just see it
2 differently. Now what?

3 MR. KADIDAL: Well, I would submit that the procedural
4 objections that we have are subject to objective determination.
5 Again, I think that first one, consultation, is enough by
6 itself to get us over the finish line here because it's clearly
7 procedural, it's clearly collateral, therefore not stripped
8 away by (b) (5) (A), and that's sufficient because that clearly
9 didn't happen here. We have one sentence.

10 THE COURT: Let me just ask you one more question
11 about it. And, again, if you want to defer to your cocounsel,
12 that's fine.

13 What's the purpose of the consultation requirement?
14 Why is it there?

15 MR. KADIDAL: I think any common sensical reading of
16 the statute would indicate that Congress wanted the cabinet
17 official, originally the Attorney General, to download the
18 expertise from the different agencies that had it, right. In
19 ordinary circumstances, how would the Attorney General sitting
20 in Washington really have a basis to know whether or not there
21 is an armed conflict going on in Yemen.

22 THE COURT: The reason is, if I may, is that the
23 decision to terminate TPS requires some sort of expertise that
24 the decision maker may not actually have a monopoly on. And
25 there is a different executive branch agency that has some

1 expertise on the criterion or criteria that the termination
2 decision is supposed to be made on and that's why Congress
3 said, you have to go consult with that agency. Is that right?

4 MR. KADIDAL: Absolutely. I think that's almost
5 certainly what Congress was thinking.

6 THE COURT: So it's not, you can consult and the
7 Secretary of State says, the weather is very nice in Yemen,
8 it's actually quite warm, so you can send people back. It's
9 because the criteria of the statute about country conditions
10 are something that the Secretary of State presumably has some
11 expertise on that the Attorney General in the initial statutory
12 framework did not. Is that right?

13 MR. KADIDAL: I think that's right. And so, again,
14 your hypothetical about the weather wouldn't be adequate. I
15 think it would have to be the sort of information that Congress
16 presumably expected the State Department, as a relevant agency,
17 to be able to download. Again, not limited to the State
18 Department, right.

19 I think one final set of claims that we have.

20 THE COURT: I'm sorry. Let me just ask you. You said
21 it's not limited to the State Department. What other agencies,
22 in your view, does the Secretary of Homeland Security have to
23 consult with in making a termination decision?

24 MR. KADIDAL: I think from my standpoint, it would be
25 relevant to consult with defense and treasury. The government

1 may have a different view of that.

2 THE COURT: You said it would be relevant to, but my
3 question is, what is required?

4 MR. KADIDAL: I think the statute, and maybe I'm using
5 the wrong terminology, but I believe the statute uses the
6 term -- sorry. I am corrected by my cocounsel. The statute
7 using the term appropriate agencies.

8 THE COURT: That's right. Which of the appropriate
9 agencies under the statute and what's your support for each of
10 the ones that you think fall into that?

11 MR. KADIDAL: For state, very clearly, we have talked
12 about it already, they have expertise in foreign country
13 conditions. This is their stock and trade. For defense, we
14 are talking about armed conflicts to which the United States
15 essentially at this point is a party for treasury. I think it
16 would be treasury's presumptive expertise through OFAC in the
17 activities of terrorist organizations that are designated as
18 FTOs on the lists maintained by OFAC.

19 THE COURT: Anything else?

20 MR. KADIDAL: I'm not prepared to say that's the
21 complete universe.

22 THE COURT: I feel like this should not be a
23 particularly challenging question because if you are going to
24 say that the statute requires, and that it's clear that the
25 statute requires, that the homeland security secretary has to

1 consult with particular agencies, and you want me to order that
2 this determination should be put on hold and remanded back to
3 the agency, the agency needs to know who they are supposed to
4 consult with.

5 MR. KADIDAL: I think it might be enough for this
6 Court to say you needed to consult with state and you didn't.
7 I don't know that this Court has to offer a complete roadmap to
8 what an adequate satisfaction of Congress' requirement to
9 consult with appropriate agencies is.

10 THE COURT: I think the problem with that is that we
11 would be right back here within six months. And if what you
12 are interested in is a proper process that comports with the
13 statutory framework in the Administrative Procedure Act,
14 then -- I mean, if it's hard for you to determine what the
15 proper procedures are, I don't know how homeland security is
16 supposed to figure that out.

17 MR. KADIDAL: I don't mean to be evasive here. It's
18 just that we are on a compressed schedule, and I haven't had a
19 huge amount of time to think through this one particular
20 question.

21 I do think those three agencies, to me, they make
22 sense on first glance, given the record that we have in front
23 of us.

24 THE COURT: Did any of the courts in any of the other
25 TPS cases state which agencies are required for consultation?

1 MR. KADIDAL: I am not sure what the answer is to that
2 question, your Honor. I don't recall seeing a bunch of them
3 specified. I can try to take a look and get back to the Court,
4 if that works.

5 THE COURT: OK.

6 MR. KADIDAL: There is only one last set of claims,
7 and I can stop after this, which are claims that relate to
8 omissions, internal contradictions, and other irregularities in
9 the record. I would submit that all of those are suggestive of
10 a flawed process of pretext, lack of actual review, lack of
11 full consultation, all the things that we have already talked
12 about.

13 With that, I think I can hand it to my cocounsel, if
14 there aren't further questions.

15 THE COURT: Not at this time. Thank you.

16 MR. KADIDAL: Thank you, your Honor.

17 THE COURT: Ms. Zaman.

18 MS. ZAMAN: If it's OK, could I address that last
19 question?

20 THE COURT: Sure. Please.

21 MS. ZAMAN: So there isn't a requirement about any
22 specific agency that the secretary is required to consult with,
23 according to the statute. But what it does say is appropriate
24 government agencies, meaning an agency at least, one that's
25 outside of itself.

1 And what we have in the administrative record is not a
2 single agency. Not a single agency outside of the Department
3 of Homeland Security was consulted with. So we don't have to
4 actually address the question of which agency, because I don't
5 think that that is something that was actually written in the
6 statute, but we know it has to be a different agency from the
7 Department of Homeland Security.

8 THE COURT: If I'm trying to provide guidance to
9 homeland security on a remand, what am I supposed to say -- I
10 get your point that I don't have to determine the outer
11 boundaries of what's required in order to rule in your favor,
12 but homeland security is going to, if there is a remand, say,
13 OK, let's do this again. What are they supposed to do?

14 MS. ZAMAN: Your Honor, I would point to the GAO
15 report, which I believe is Exhibit 1 in the Noor Doe plaintiffs
16 brief for their motion to postpone. And in the GAO report they
17 went through every single termination from 2014 to 2018,
18 covering all the TPS countries. So they went through basically
19 what is the process like when it comes to periodic review. And
20 what they found is, it is the same process.

21 So how it starts is, it starts months ahead of time.
22 When USCIS begins a process --

23 THE COURT: For which agencies were consulted in those
24 previous termination determinations?

25 MS. ZAMAN: Yes. In that GAO report they repeatedly

1 found it was the Department of State that was consulted. That
2 was the agency that was always consulted for the years that
3 they looked at, 2014 to 2018.

4 THE COURT: What about defense, treasury, as your
5 cocounsel suggested, were those consulted?

6 MS. ZAMAN: They didn't mention those. If they did,
7 they didn't mention those specifically.

8 If you just even look at Yemen, since Yemen was
9 designated since 2015 up to this particular termination, the
10 Department of State has always been consulted for every single
11 redesignation and extension, so I think we can look at that.

12 There is a long process. It begins with the USCIS'
13 office of policy and strategy. So they begin the process and
14 they actually reach out to another USCIS office, and that's
15 called the office of refugee asylum and international
16 operations directorate. So they have to prepare their own
17 country conditions memo.

18 THE COURT: That's within DHS, right?

19 MS. ZAMAN: That is within DHS.

20 THE COURT: I thought we were talking about
21 consultation with agencies external to DHS.

22 I think the point that you're making might be relevant
23 to the question of whether or not there has been an adequate
24 review of country conditions, but let's stay for a moment on
25 the outside agency consultation requirement that you say was

1 violated here.

2 What else is there in those GAO reports other than
3 consultation with state?

4 MS. ZAMAN: I apologize, your Honor.

5 THE COURT: That's OK.

6 MS. ZAMAN: What I was trying to say is, there are two
7 country condition reports that are made. One is by USCIS. The
8 other is by the Department of State. The Department of State,
9 specifically --

10 THE COURT: Walk me through what the consultation with
11 state looked like during that time period that you're
12 describing in the GAO report. What happened?

13 MS. ZAMAN: They always go to the Bureau of
14 Population, Refugees, and Migration. And the bureau then goes
15 to local embassies who have on-the-ground experience with
16 conditions that are ongoing. So there is an exchange of
17 information between the embassies and the Bureau of Population,
18 Refugees, and Migration. Together with that exchange of
19 information they put together a memo, and they bring it to the
20 Secretary of State, who then has to write their own
21 recommendation memo, who then submits that to the secretary of
22 the Department of Homeland Security.

23 THE COURT: I can see that that could be an example of
24 what you would consider an adequate consultation under the
25 statute, but you're not arguing, are you, and correct me if I'm

1 wrong, that that precise process that has been followed in the
2 past is what is required under the statute, are you?

3 MS. ZAMAN: I'm not arguing that it is required
4 because it is not specifically in the statute, but what I am
5 saying is that that has been consistently followed as written
6 by the GAO report.

7 THE COURT: But a deviation from what has been done in
8 the past doesn't amount to an APA violation, does it?

9 MS. ZAMAN: Well, it does if there is no explanation
10 for the deviation. If there is a rapid change with no
11 explanation of what happened, if there is no good reason for
12 why there is such a change, especially --

13 THE COURT: So a new administration can't come in and
14 say, look, I understand how these determinations were made in
15 the past, we are just going to different it differently now.
16 An administration is frozen with the past procedural -- I am
17 not even going to say requirements, because it's not required
18 by the statute, but the past procedural paths that previous
19 administrations have taken?

20 MS. ZAMAN: Certainly they are not, but there are
21 certain procedures that they do need to follow.

22 THE COURT: What's your authority for that?

23 MS. ZAMAN: That would be a number of APA cases, your
24 Honor. So, for instance, let me begin with -- I apologize.
25 Starting the long line, I guess, beginning at *FCC v. Fox*, if

1 there is a change, there needs to be, one, an announcement, and
2 there actually has to be an -- and if there is actually a
3 change, there needs to also be, at the same time, some kind of
4 good reason that is mentioned. So here there is no
5 acknowledgement, there is no mention of any reason for why this
6 particular process was not followed this time around.

7 The APA cases continue with *Encino*. There is reliance
8 interests. The most recent, I would say, is *Wages and White*
9 *Lion*, and basically they all say the same thing when it comes
10 down to it. It's fine for the administration to make a change,
11 but the change needs to come with at least an acknowledgement
12 that there is a change and some kind of reason. And in this
13 case, if there is a particular contradiction to something that
14 has happened in the past -- and in this case there was, because
15 the prior secretary found that it was not against the U.S.
16 national interests, right, to extend TPS. If that's the case,
17 there is a heightened requirement to justify even further, and
18 here there was zero justification whatsoever. So they are
19 allowed to break from practice, but they can't do it silently,
20 they can't do it without mentioning why there is a change now,
21 and they can't also do it without mentioning the reliance
22 interests that have occurred in the interim.

23 What I was trying to say about the process is that
24 this is a months-long process typically. According to the GAO
25 report, it can take six months. So what the Secretary of

1 Homeland Security is supposed to get at the end of the day is
2 two different memos, one from state and one internally from
3 USCIS. It has to go through clearance processes. They are
4 allowed to consult with other agencies in the interim. And
5 after all of that, that's how she decides.

6 Here, as my colleague was saying, we have one line.
7 We have one sentence. That's what we have. Nothing was
8 followed and there is nothing in the record to actually
9 indicate why, all of a sudden, right, that this was the process
10 when, from 2015 to 2024, there was the same process followed
11 where the secretary got two different memos, one from USCIS,
12 one from the Department of State, and that's how they made
13 their decision at that time. There was no mentioning in this
14 termination notice why there was a change here at all.

15 THE COURT: I think we have talked a lot about the
16 consultation with state. Let's talk about the internal review.

17 The secretary has to engage in a review of the country
18 conditions, right? And you're saying that in the past that was
19 done via the report from USCIS?

20 MS. ZAMAN: And Department of State, yes.

21 THE COURT: I'm setting aside the interagency
22 consultation portion and just focusing on the secretary's own
23 review.

24 With respect to that other piece, in the past there
25 was this report from the State Department. You talked about

1 the process that went into that.

2 This time, in this case, there was a single email
3 exchange, right, and that's in the AR, and I do have some
4 questions about that. But set that aside for a second. We
5 just talked about the internal process that the secretary
6 undertakes. In the past there was a USCIS report that was
7 done. What was done here?

8 MS. ZAMAN: Here it appears that there are two USCIS
9 reports. And what is extraordinary about Yemen is --

10 THE COURT: Where are they in the AR?

11 MS. ZAMAN: Yes. We can find that in 22, and we can
12 find that in -- sorry. I am getting confused by all these
13 suggestions at this point. I think people are trying to be
14 helpful by pointing out, but there is two different memos. One
15 of them is a policy memo and one of them is a country of origin
16 info considerations memo.

17 THE COURT: The first one, the policy memo, that's the
18 one at AR22?

19 MS. ZAMAN: No. That would be the country of origin
20 information --

21 THE COURT: That's the second one. Where is the first
22 one?

23 MS. ZAMAN: I think that is the first one, right, and
24 then the second one would be --

25 THE COURT: The policy considerations memo, that's at

1 AR34, right?

2 MS. ZAMAN: That is at AR34.

3 THE COURT: Why are these memoranda not enough to
4 satisfy the requirement that the secretary engage in a review
5 of the country conditions prior to termination?

6 MS. ZAMAN: Because the statute says agencies. It
7 never says within itself.

8 THE COURT: I thought there were two separate
9 requirements here, at least that's the way that I was thinking
10 about it, and you tell me if I have that wrong. That there is
11 consultation with relevant agencies and then there is also --
12 before the secretary makes her own determination she has got to
13 engage in her own review of the country conditions. I'm
14 separating those two out. Do you not agree that that's a good
15 way of thinking about it?

16 MS. ZAMAN: Yes, your Honor, I do.

17 THE COURT: Leave aside the consultation point and
18 just focus on the internal review point. Why are these two
19 memoranda insufficient for that?

20 MS. ZAMAN: Well, I don't think we need to be
21 hypothetical here, your Honor, because what's extraordinary
22 about Yemen is that there appears to be a contradiction just in
23 the memo itself. I believe the termination notice concludes
24 that there is no armed conflict. However, here, on page 36, it
25 says that Yemen is experiencing challenges related to ongoing

1 armed conflict. The war in Yemen remains unresolved. The
2 situation in Yemen remains deeply fragile by regional turmoil
3 that continues.

4 So there is the very opposite conclusion that was
5 reached in the Federal Register notice.

6 THE COURT: Where does the determination of the
7 Federal Register say that there is no more armed conflict in
8 Yemen? That's not my recollection of it. My recollection is
9 that it says that improvements, notable improvements with
10 respect to armed conflict in Yemen had been observed, but it
11 doesn't say that there is no armed conflict in Yemen at all,
12 right?

13 MS. ZAMAN: Sorry, your Honor. Just give me one
14 minute.

15 THE COURT: Sure. It's all right if you don't have
16 it.

17 In the interest of time, we should probably move along
18 to any additional points you want to make. We are almost at an
19 hour. I don't have much more than two today, so, in all
20 fairness, I should get to the government soon.

21 MS. ZAMAN: Sorry, your Honor. I do think it does say
22 that. It says at several points, particularly in the section
23 where it notes that there continues to be --

24 THE COURT: I'm sorry. What page are you at?

25 MS. ZAMAN: I am looking at a printout, so that is

1 slightly different from the Federal Register notice itself.

2 I'm looking at the paragraph.

3 THE COURT: That's OK. Just tell me.

4 MS. ZAMAN: What I'm trying to say is -- yes. That
5 would be 10,405. Even in that paragraph, while acknowledging
6 that there appears to be some tension between its determination
7 that requiring the return of Yemeni nationals -- sorry. Let me
8 read that.

9 DHS acknowledges that there may appear to be some
10 tension between its determination under INA Section
11 244(b) (1) (A) that requiring the return of Yemeni nationals and
12 aliens having no nationality who last resided in Yemen does not
13 pose a serious threat, and it continues on. And its separate
14 determination under INA Section 244, that extraordinary and
15 temporary conditions -- I apologize, your Honor. I read that
16 wrong. I read that too fast. Let me go back and start again.

17 THE COURT: That's OK. I see the paragraph that
18 you're referring to. You don't have to read it into the
19 record.

20 MS. ZAMAN: What I'm trying to say is, there was a
21 determination that there is not an armed conflict that prevents
22 Yemenis from returning back safely. She did make that
23 determination in fact.

24 THE COURT: Not to nitpick here, but what she says is,
25 does not pose a serious threat to their personal safety due to

1 an armed conflict. That's not the same as saying there is no
2 armed conflict.

3 MS. ZAMAN: OK, your Honor. If that's the case,
4 though, then that that means that she actually didn't make the
5 determination that's required to terminate TPS, if that is
6 actually the case.

7 THE COURT: Because the termination has to be whether
8 there is an armed conflict or not.

9 MS. ZAMAN: Exactly. If she didn't make that for
10 extraordinary and temporary conditions, and you're also saying
11 she also didn't make that for armed conflict, I guess she
12 didn't make that determination whatsoever then and that compels
13 extension, according to the statute.

14 THE COURT: Ms. Goldberg, I gave you some time, but I
15 need to turn to the government.

16 Are there any additional points you would like to make
17 before I turn to the government?

18 MS. ZAMAN: I was happy to go through the
19 administrative record a little bit, if that was helpful at all.
20 Otherwise, we wanted to talk a little bit about the equal
21 protection claim, but we can also come back later to it.

22 THE COURT: Let me just ask you briefly about the
23 equal protection claim. What's your best piece of evidence
24 that the decision to terminate TPS was motivated by animus?

25 Actually, before you answer that question, what's the

1 protected class here?

2 MS. ZAMAN: The protected class is nonwhite,
3 non-European, but, you know -- I guess their animus for Yemenis
4 is intersectional, so we do believe there is an anti Muslim
5 animus in there as well.

6 THE COURT: What's your best case of evidence for
7 that?

8 MS. ZAMAN: It's all of it, your Honor. We believe
9 *Arlington Heights* is the right --

10 THE COURT: I didn't ask about the legal framework. I
11 said, what's your best piece of evidence for your claim, as a
12 factual matter, that the decision to terminate was motivated by
13 animus?

14 MS. ZAMAN: There is a number of things, but I will
15 say, to make it easy, three months before terminating TPS for
16 Yemen, she referred to nationals from travel-banned countries,
17 and Yemen is one of those countries, as leeches, killers, he
18 said. We don't want them, not one.

19 THE COURT: So this is the December 2025 comment, is
20 that right?

21 MS. ZAMAN: Correct.

22 She made that on December 1, and December 2 USCIS
23 issued a memo freezing adjudication of all applications from
24 nationals from travel-banned countries, including Yemen,
25 meaning that at that point she knew that the Yemenise would not

1 have the option to have their asylum applications adjudicated,
2 to have any affirmative application adjudicated. Knowing that,
3 three months later, she still decided to terminate TPS for
4 Yemen.

5 THE COURT: Any other evidence from homeland security?

6 MS. ZAMAN: There is a long line of evidence.

7 THE COURT: About Yemen specifically.

8 MS. ZAMAN: Yes.

9 One, I want to say, in October 2024, I know it's
10 before President Trump took office, but I do believe it's
11 relevant because he did pledge at that time to terminate TPS.
12 But he also, in a campaign rally in Pennsylvania, he referred
13 to Yemenise as terrorists, said that we need to deport them,
14 said that there is too many of them.

15 And so on January 20, the first day he took office,
16 there was proclamation 14159 that was issued. That
17 proclamation specifically directed the secretary to limit TPS.
18 It referred to immigration and immigrants as invaders, and it
19 said that they had to reduce illegal aliens, even though TPS
20 holders are lawful immigrants by virtue of having TPS. That's
21 the first day.

22 Right after that, just a few days later, the
23 secretary, after she gets confirmed by senate, she already
24 terminates TPS for Venezuela. That's the first country. A few
25 days later she goes on CNN and she says, well, when the

1 president gives an order, I need to follow it. So that's what
2 she referred to. That's what began the saga.

3 THE COURT: Thank you.

4 I think, in fairness, I do have to get over to the
5 government. I will give plaintiffs an opportunity on reply,
6 but let's turn to the government now.

7 Ms. Goldberg, I said I would give plaintiffs an
8 opportunity on reply.

9 MR. OSMOND: Thank you, your Honor.

10 Plaintiffs' claims are statutorily barred. The very
11 statute that created --

12 THE COURT: Mr. Osmond, I am going to tell you the
13 same thing that I told your friend on the other side, that on
14 jurisdiction it's not that I'm not interested in the
15 jurisdictional arguments, and I have read all the other TPS
16 decisions, but is there something that's not in them that you
17 think is important for me to focus on? Is there something in
18 them that you want to emphasize that they got wrong from your
19 perspective, just in the interest of time.

20 MR. OSMOND: I would point out a couple of things.

21 First, as we note in our brief, the Supreme Court in
22 the NTPSA cases necessarily decided that the government was
23 likely to succeed on the success of the merits --

24 THE COURT: I think I've already rejected that point.
25 The Second Circuit also denied a stay in the case before Judge

1 Failla. Is that right?

2 MR. OSMOND: That's true, your Honor.

3 THE COURT: So the Second Circuit, by your logic,
4 necessarily decided something else, and I'm not sure what I'm
5 supposed to do as just a little district court with that
6 conflicting guidance.

7 MR. OSMOND: As we note in our brief, your Honor,
8 motion orders from the Second Circuit are not binding in the
9 same case, let alone in other cases. You can look to those
10 orders for persuasive authority, obviously, but those orders
11 are not binding.

12 By the very terms of the Second Circuit order, I think
13 it's clear that they were limiting the decision to that case
14 because they actually distinguish the NTPSA case saying that it
15 was --

16 THE COURT: Aren't the jurisdictional arguments the
17 same?

18 MR. OSMOND: In our view, yes. But the Second Circuit
19 found that it was for a different country so that it couldn't
20 apply then. In our view, it was the exact same argument that
21 was before the Supreme Court.

22 THE COURT: There is nothing about the jurisdictional
23 point that's country specific, right?

24 MR. OSMOND: We don't think so, your Honor.

25 Other than that, I would just note, I am not sure if

1 this came through in the briefing, there are a number of
2 district courts that have rejected the government's position on
3 the statutory bar.

4 THE COURT: I'm aware.

5 MR. OSMOND: I just wanted to point out that the Ninth
6 Circuit twice allowed terminations to go into effect, and the
7 Fourth Circuit did the same thing, and this was on the heels of
8 the Supreme Court's ruling in the *NTPSA* --

9 THE COURT: In those decisions did they offer any
10 reasoning on the jurisdictional point?

11 MR. OSMOND: One of the Ninth Circuit decisions did.
12 That's the more recent one. And we cite that --

13 THE COURT: That's a stay decision, right?

14 MR. OSMOND: That's a stay decision.

15 THE COURT: I am just not sure what I am supposed to
16 do with all these different stay decisions. It seems like
17 you're telling me that when the Second Circuit tee clients to
18 issue a stay, I don't have to look at that, but then when the
19 Ninth Circuit grants a stay, then I am supposed to take that
20 persuasively. I am not sure what I am supposed to do with all
21 of this.

22 MR. OSMOND: I understand how it's a muddy picture,
23 your Honor. We would just point out that there are decisions
24 going both ways.

25 THE COURT: Again, it's not that I have made up my

1 mind on this question, it's, I think, complicated, but I want
2 to spend most of the time on the merits and not on
3 jurisdiction. So if there are just particular things you want
4 to emphasize that you think the other district courts who have
5 adjudicated this question but haven't agreed with you on
6 jurisdiction have either overlooked or misunderstood, then tell
7 me.

8 MR. OSMOND: The one other point I would make, your
9 Honor, is that plaintiffs' claims are barred not only by the
10 TPS statute itself, but also by Section 1252(f)(1). I think a
11 point that a lot of district courts have overlooked is that
12 1252(f)(1) strips district courts of the authority to both
13 enjoin and restrain the operation of certain statutes,
14 including the TPS statute. A lot of courts have looked at this
15 language and said, well, it's not technically an injunction,
16 so, therefore, it doesn't apply, but a number of courts have
17 said it has the same practical effects as an injunction, and
18 also, at a minimum, it restrains the secretary from enforcing
19 the statute because it prevents the secretary from implementing
20 the termination decision. So that's one point that I think a
21 lot of courts have overlooked.

22 THE COURT: OK. Thanks.

23 Is there no scenario in which a secretary terminates
24 TPS in which judicial review might be possible?

25 MR. OSMOND: The government does interpret the bar on

1 judicial review broadly. When Congress says any determination
2 with respect to the termination --

3 THE COURT: It's not just termination. That's any TPS
4 determination, right?

5 MR. OSMOND: That's true. We haven't emphasized that,
6 but it applies to designations and extensions as well.

7 THE COURT: If a secretary were to designate a country
8 for TPS for a century, unreviewable.

9 MR. OSMOND: Your Honor, I would direct the Court to
10 what Justice Sotomayor said in the *Truck Insurance Exchange*
11 case. That's 602 U.S. 268, 284. It's a 2024 decision. The
12 justice wrote: A parade of horribles argument generally cannot
13 surmount the plain language of the statute.

14 THE COURT: I will take that as a yes, unreviewable.

15 MR. OSMOND: In the government's view, it would be
16 unreviewable. I understand how it can be a troubling to hear
17 that, but it's --

18 THE COURT: It's not that it's troubling to hear it.
19 I am trying to understand the metes and bounds of the
20 government's position.

21 You're perfectly free to make the point that I
22 shouldn't base my interpretation on the statute on the
23 possibility that something terrible might happen, that it might
24 prevent review of something terrible or nonsensical from
25 happening, but my question wasn't so much that. It was just,

1 what is the government's position here?

2 And the government's position is, yes. If a secretary
3 says, TPS for a century, unreviewable. And if a secretary
4 comes in on the first day and issues a memo that says I'm
5 terminating TPS, period, that's all there is in the Federal
6 Register, one sentence, and a party says, what's the
7 administrative record, and the government comes back and says,
8 there is no administrative record. The administrative record
9 is one sentence in the Federal Register. Unreviewable.
10 Correct?

11 MR. OSMOND: That is the government's position.

12 If I could just add a little bit of explanation to
13 that. Congress gave courts APA review and it can also cabin
14 that review. And in this instance it has taken TPS
15 determinations outside of judicial review. If a secretary
16 starts acting in an arbitrary way, nothing like that has
17 happened here, but if it were to happen, Congress could amend
18 the TPS statute, there could be political consequences
19 associated with it, but APA review is just not the remedy to
20 deal with those sorts of things.

21 THE COURT: Understood.

22 Anything else on the jurisdictional point before I
23 turn to Mr. Gitlin on the merits?

24 MR. OSMOND: No, your Honor.

25 THE COURT: Thank you, Mr. Osmond.

1 Mr. Gitlin.

2 MR. GITLIN: Thank you, your Honor.

3 I'm mindful of your Honor's guidance about focusing on
4 the issues that generally have been brought up in other
5 litigation and focusing on some of the arguments that have been
6 heard today.

7 I will just mention a couple points at the outset. I
8 know this is in other cases, but the standard of review in APA
9 cases is narrow and deferential. The Court is not empowered to
10 reweigh the evidence. It doesn't look at whether the Court
11 would have reached the same conclusion as the secretary. The
12 question is whether the agency examined the relevant facts and
13 gave a rational explanation.

14 THE COURT: Followed the right process.

15 The plaintiffs here characterized their arguments here
16 as procedural, not substantive, that they are not asking me to
17 review the secretary's determination based on my own reweighing
18 of the evidence in the CAR, but to look at how she arrived at
19 her decision. I think, at least in principle, there is
20 agreement amongst the parties on that. I am sure there is
21 disagreements as to what falls on which side of that line.

22 But why don't we start with, I think, plaintiffs'
23 first argument about the requirement that the secretary --
24 again, this is all assuming that there is jurisdiction. I take
25 your points that there may not be, and I have to resolve that

1 question. But assuming that there is, that the secretary has
2 to, before making the determination decision, engage in some
3 sort of consultation with the relevant agencies.

4 What does that mean?

5 MR. GITLIN: Your Honor, it's the government's
6 position that the secretary did in fact undertake the
7 consultation that's required. The statute says that the
8 secretary must engage in appropriate consultation. It doesn't
9 explain what that consultation means. In this case, and as the
10 notice lays out --

11 THE COURT: Before we get to the facts of this case,
12 tell me what you think that that means. What does the
13 secretary have to do in order to satisfy that requirement? Are
14 there particular agencies? I asked this question of your
15 friend on the other side. Are there particular agencies that
16 the secretary has to consult in order to comply with that
17 requirement?

18 MR. GITLIN: Your Honor, the statute does not say
19 particular agencies that the secretary has to consult with.

20 THE COURT: So if the secretary consults with NOAA and
21 says, how is the weather in Yemen, is that sufficient under the
22 statute?

23 MR. GITLIN: Your Honor, it's the government's
24 position that the statute doesn't prescribe detailed
25 requirements for what consultation means. There are other

1 statutes, and we included that in the government's opposition
2 brief.

3 THE COURT: So the answer is no, that the statute
4 wouldn't prohibit that, is that right?

5 MR. GITLIN: The answer, your Honor, is that the
6 statute does not explain in detail, as other statutes do, as
7 Congress has written into other statutes the exact
8 consultation.

9 THE COURT: I understand that's your reason for why
10 this statute is different from others. But I'm trying to
11 understand the bottom line of the government's position here.
12 The statute doesn't require the secretary to consult with any
13 agency in particular. Is that right?

14 MR. GITLIN: Not any agency in particular. It
15 requires appropriate consultation.

16 THE COURT: I understand that. What is appropriate
17 consultation in this context?

18 MR. GITLIN: In this case, in this context, your
19 Honor, the secretary reached out to other agencies, as the
20 notice stated, including the Department of State. Your Honor
21 discussed --

22 THE COURT: Agency singular, Department of State,
23 right? There is no other agency that it reached out to.

24 MR. GITLIN: There are other agencies, your Honor.

25 THE COURT: Which ones?

1 MR. GITLIN: The notice lays out that the secretary
2 reached out to the Department of Defense. This is at page
3 10406 of the Federal Register.

4 THE COURT: Where is that reflected in the CAR?

5 MR. GITLIN: In the CAR there is a reference to the
6 Department of State consultation. I don't have a particular
7 cite to the consultation regarding the Department of Defense.

8 THE COURT: Sorry. Let me back up because I do think
9 that is important.

10 Tell me which agencies the secretary consulted with,
11 and then we will talk about the administrative record
12 separately. State, defense, what else?

13 MR. GITLIN: The notice says that the secretary
14 consulted with the Secretary of State, the Secretary of
15 Defense, and the Attorney General, as well as -- excuse me,
16 your Honor.

17 THE COURT: State, defense, DOJ.

18 MR. GITLIN: May I have one second to just confer?

19 THE COURT: Yes.

20 MR. GITLIN: Your Honor, I was reading from a
21 different part of the register. The secretary consulted with
22 the Secretary of State and that's reflected in the CAR at the
23 site.

24 THE COURT: 266 to 267.

25 MR. GITLIN: Exactly, your Honor.

1 THE COURT: Just so the record is clear, did the
2 secretary consult with defense before making the termination
3 decision?

4 MR. GITLIN: It's not in the notice, your Honor. We
5 are not aware of that consultation taking place.

6 THE COURT: Did the secretary consult with DOJ before
7 making the determination decision?

8 MR. GITLIN: That is also not in the notice.

9 THE COURT: Not in the notice and neither
10 consultations with defense or DOJ are reflected in the CAR,
11 correct?

12 MR. GITLIN: Correct, your Honor.

13 THE COURT: The only agency that the secretary
14 consulted with prior to the termination decision is state.

15 MR. GITLIN: Yes, your Honor.

16 THE COURT: And the CAR reflects that in an email
17 exchange at AR266 to 267. Is that reflected anywhere else in
18 the CAR, the consultation with state, I mean?

19 MR. GITLIN: No, your Honor. That's the consultation.

20 THE COURT: Just so I'm clear, the sum total of
21 consultation with the CAR with agencies outside of DHS is the
22 email exchange with state at AR266 to 267?

23 MR. GITLIN: Yes, your Honor.

24 THE COURT: Is there any evidence of consultation with
25 agencies outside of DHS that's not reflected in the CAR?

1 MR. GITLIN: No, your Honor. The evidence is in the
2 CAR.

3 THE COURT: Great. Thank you. That's helpful.

4 Now, let's talk about the statute aside from the
5 record. Your view is the statute does not prescribe any
6 particular agency that homeland has to consult with before
7 making a TPS determination decision, is that right?

8 MR. GITLIN: Yes, your Honor. The statute says -- as
9 I mentioned earlier, it says appropriate consultation. It
10 doesn't define what appropriate consultation means. It doesn't
11 say which agencies. As I said earlier, Congress knows how to
12 implement additional procedures when it chooses to. We
13 cited --

14 THE COURT: Congress could have, for example, said,
15 consult with state, consult with defense, consult with DOJ
16 before you make the decision.

17 MR. GITLIN: Exactly. Or explain what that
18 consultation means. For example, there is one statute that we
19 cited to which says, the appropriate consultation requires
20 discussions to be in person. That's not what the TPS statute
21 says. The TPS statute only says appropriate consultation.

22 THE COURT: What about the content of the
23 consultation? Does the statute put any limits on what they
24 have to talk about?

25 MR. GITLIN: No, your Honor. Once again, it says

1 appropriate consultation. That does not include the specific
2 content.

3 THE COURT: Congress didn't say, I can't say it's
4 really up to the homeland security secretary to decide which
5 agencies to talk to and what to talk to them about before
6 terminating TPS.

7 MR. GITLIN: Sorry, your Honor. Would you mind
8 restating that to make sure I understand.

9 THE COURT: Sure. Congress didn't tell the homeland
10 security -- this is your view. I'm not expressing mine. I
11 don't know what I think yet. But Congress didn't tell homeland
12 security who they have to talk to and what they have to talk
13 about before making a termination decision, right?

14 MR. GITLIN: Correct, your Honor.

15 THE COURT: So it's up to the homeland security
16 secretary in her discretion to make those determinations,
17 right?

18 MR. GITLIN: Yes, your Honor.

19 THE COURT: And I think I know what you are going to
20 say, because I heard it from Mr. Osmond on the parade of
21 horrors, but if the homeland security secretary calls the
22 head of the FDA and says, I'm thinking of terminating Yemen
23 TPS, how is the cuisine over there? And the FDA secretary
24 says, I have no objections to you terminating TPS based on the
25 cuisine in Yemen. The secretary then terminates TPS for Yemen.

1 That complies with the statutory requirement.

2 MR. GITLIN: Your Honor, that's not this case.

3 THE COURT: I'm well aware of that, but that's not my
4 question.

5 MR. GITLIN: That's a hypothetical. I think the
6 notice very clearly lays out the various factors, and the CAR
7 lays out the evidence on which the decision was made.

8 THE COURT: Mr. Gitlin, that wasn't my question. My
9 question was, if the Secretary of State consults with the head
10 of the FDA and says, how is the food in Yemen, can I terminate
11 TPS, I want to terminate TPS, the FDA says go ahead, I have no
12 objection, the food in Yemen is great. That is sufficient
13 consultation with appropriate agencies under the statute?

14 MR. GITLIN: Your Honor, again, I don't think that
15 that is a hypothetical that even sort of is close to anything
16 that happened here.

17 THE COURT: Again, it's not about this case. It's
18 about understanding the government's position, because the
19 government I think is saying that the secretary has essentially
20 unreviewable -- even if there is jurisdiction, under this
21 provision, the secretary has unreviewable discretion to consult
22 with whatever agencies it wants and talk about whatever it
23 wants before terminating TPS that thousands of people rely on,
24 right? That's I think the government's position. I'm just
25 asking you to clarify that. Is that right?

1 MR. GITLIN: The government's position, your Honor, is
2 that the statute doesn't define what appropriate consultation
3 means in this case.

4 THE COURT: It doesn't define it in terms of who or
5 what that consultation has to be with, right?

6 MR. GITLIN: Correct.

7 THE COURT: That's the government's position. So the
8 secretary can make her own determination as to which agencies
9 to talk about and what to talk to them about before termination
10 TPS, right?

11 MR. GITLIN: As it is appropriate under the statute.

12 THE COURT: Your argument would then be, if the
13 secretary does something like I just suggested, something crazy
14 like that, that the appropriate remedy would be for Congress to
15 pass a new statute, to impeach the secretary, to get a new
16 administration, not judicial review. That's your argument,
17 right?

18 MR. GITLIN: Yes, your Honor.

19 THE COURT: I am just trying to understand the bounds
20 of your argument.

21 MR. GITLIN: Yes, your Honor. Though, as I said --

22 THE COURT: I am not trying to get you to defend the
23 FDA hypothetical. I know that it's a bad one. But I think
24 it's consistent with your interpretation of the statute.

25 MR. GITLIN: I would just say, your Honor, that that

1 hypothetical is not what happened here.

2 THE COURT: Let's talk about what happened here
3 because you got one email, right, that was sent, it's at AR266,
4 that was sent in -- you have one email from Rob Law to Spencer
5 Chretien. Rob Law is in homeland security and Chretien is in
6 state?

7 MR. GITLIN: Yes, your Honor. I am looking at the
8 redacted copy right now.

9 THE COURT: October 9, Law sends an email to Chretien
10 asking about TPS review, a line and a half, two sentences.
11 Chretien says on the same day, we will make sure we get it done
12 on time, essentially. I'm paraphrasing.

13 About a month later, on November 5, Rob Law says,
14 checking in on this one.

15 And then Chretien responds on the same day,
16 November 5, 2025: I confirm that state has no foreign policy
17 objections to a change at TPS status for Yemen.

18 That's everything, right? That's the sum total of
19 consultation with external agencies prior to termination of
20 TPS, correct?

21 MR. GITLIN: Yes, your Honor.

22 THE COURT: And this is sufficient, from your
23 perspective?

24 MR. GITLIN: Yes, your Honor. Again, because the
25 statute doesn't define appropriate consultation, and it's the

1 government's position that this consultation was appropriate.

2 THE COURT: Who are Rob Law and Spencer Chretien?

3 MR. GITLIN: Your Honor, Mr. Chretien is a senior
4 bureau official in the Bureau of Population, Refugees, and
5 Migration within the Department of State, and I would have to
6 get back to you, your Honor, about Mr. Law's position.

7 THE COURT: Mr. Law is mentioned in the supplemental
8 filing in the Supreme Court in the Haiti and Syria TPS cases,
9 is he not?

10 MR. GITLIN: I believe that's correct, your Honor.

11 THE COURT: This question is probably better posed to
12 the plaintiffs than it is to you, so I'll refrain from asking
13 about the significance of that, if anything.

14 I do have one more question about this email exchange.
15 AR267, which is, there is a lot of redactions here in terms of
16 people's email addresses, which is of course appropriate. But
17 on the last page, on AR267, there is what appears to be a
18 paragraph that's redacted, and I don't think that there is any
19 explanation as to what is the basis for that redaction.

20 Can you tell me what the basis for it is?

21 MR. GITLIN: Your Honor, I would have to look into
22 that exactly, but my understanding would be that there were
23 redactions because it was deliberative material and therefore
24 not part of the administrative record and also that
25 deliberative process privilege, so on those two grounds.

1 THE COURT: Thank you.

2 I cut you off, Mr. Gitlin. What was your next point
3 you wanted to make?

4 MR. GITLIN: Your Honor, there are a couple of other
5 points that plaintiffs raised, and I think these were not
6 raised in other cases, and I'm happy to discuss later, when
7 your Honor would like, the Supreme Court letter that was part
8 of your Honor's order last night.

9 But plaintiffs focused on the armed conflict criteria
10 in the statute and said, because some of the certified
11 administrative record mentioned that there was ongoing
12 conflict, that in and of itself would mean it was not
13 reasonable for the secretary to conclude that that criteria
14 within the statute was not met, and, I would just say,
15 plaintiffs' reading of the statute is incorrect in the
16 government's view.

17 The statute says, if the Attorney General finds that
18 there is ongoing armed conflict, I'm taking out the not
19 relevant words for this, that would pose a serious threat to
20 the personal safety of returning nationals. That's what the
21 statute says, your Honor. And the notice lays out that, yes,
22 there is ongoing sporadic events occurring in the country.
23 That's at 10404 in the notice. There are also notable
24 improvements in the country, such that the statutory criteria
25 for the armed conflict is not met.

1 THE COURT: Based on what you just said, let me ask
2 you just to back up for a second. Does that mean that you
3 agree that the secretary is required to consider that question
4 whether or not there is an armed conflict that poses a danger
5 to people upon return before terminating TPS?

6 MR. GITLIN: Yes. For the nationals in this case, for
7 the plaintiffs in this case, yes, given that that was one of
8 the grounds on which TPS was determined to be applicable here.

9 THE COURT: Again, this is assuming jurisdiction,
10 which I know you dispute. If the secretary issued a
11 proclamation -- that's not the right word -- issued a
12 determination in the Federal Register that said, I have chosen
13 not to review whether or not there is an armed conflict that
14 poses a threat to people upon return, and I'm terminating TPS
15 anyway, assuming jurisdiction, would that be a violation of the
16 APA?

17 MR. GITLIN: Can your Honor just restate the question.

18 THE COURT: Sure. The secretary says, I have decided
19 not to assess whether or not there is an armed conflict that
20 poses a danger to people upon their return. I am going to end
21 TPS anyway, not having made any determination at all in that
22 regard. Is that an APA violation?

23 MR. GITLIN: Assuming that there is jurisdiction, your
24 Honor?

25 THE COURT: I know you dispute it. Assume for a

1 second that it's there.

2 MR. GITLIN: The first thing that I would say is,
3 that's not what happened.

4 THE COURT: I understand it's not what happened here.
5 It's a hypothetical. Again, the purpose of a hypothetical is
6 to not just to play gotcha with you. It's trying to understand
7 what is the government's position here, because it sounds like
8 you are now acknowledging that there are some procedural limits
9 on what the secretary can do. Maybe I'm wrong about that. You
10 tell me. If a secretary says, I am not going to consider the
11 statutory criteria of is there an armed conflict that poses a
12 danger to people upon their return, is that a violation?

13 MR. GITLIN: Your Honor, if the Attorney General
14 determines under subparagraph A that a foreign state or part of
15 such foreign state no longer continues to meet the conditions
16 of designation, then the Attorney General shall terminate the
17 designation.

18 THE COURT: And the condition of determination
19 relevant here is armed conflict that poses a danger to people
20 upon their return, right?

21 MR. GITLIN: Yes.

22 THE COURT: If the secretary says, I am not going to
23 consider that at all, and I am going to terminate TPS, assuming
24 jurisdiction, would the APA prohibit that?

25 MR. GITLIN: I would say under the statute the

1 secretary is required to, in the determination of whether to
2 terminate designation, to look at the conditions.

3 THE COURT: That justify the initial designation in
4 the first instance.

5 MR. GITLIN: Exactly, your Honor. And in this case --

6 THE COURT: In this case a secretary did, but if the
7 secretary hadn't, violation?

8 MR. GITLIN: The secretary would be required to
9 consider those conditions.

10 THE COURT: I think that's a yes. Is that a yes?

11 MR. GITLIN: Yes. Your Honor, the secretary is
12 required to consider the conditions and whether they are still
13 met.

14 So, again, assuming that there is jurisdiction, which
15 we dispute, then that would not be in accordance with the text,
16 but, again, the secretary considered that here. So we don't
17 think that hypothetical applies.

18 THE COURT: Thank you.

19 Can we talk a little bit about the national interest.
20 I understand your position on how the secretary can consider
21 that. My questions really are about what in the CAR supports
22 the representations made in the Federal Register about the
23 national interest. I think the Federal Register says that
24 termination of TPS is in the national interests for a few
25 different reasons, including problems with vetting and

1 screening people from Yemen, concerns about public safety or
2 fraud, national security concerns, and visa overstays/pull
3 factor I think is another way that it's described.

4 I just want to make sure that I'm not missing
5 something. There is no other sort of national interest that
6 the secretary is invoking other than the things that I have
7 just listed.

8 MR. GITLIN: That's correct, your Honor.

9 THE COURT: What I want to know is, what is there in
10 the administrative record to support each of these points?

11 Let's start with, say, pull factor and visa overstays.
12 What is there in the administrative record that supports that?
13 It's in the national interests to terminate TPS for people from
14 Yemen in order to, you know, stop this kind of pull factor for
15 undocumented immigration or people to overstay their visas.

16 MR. GITLIN: Your Honor, there is a reference to an
17 article in the notice related to the pull factor. This is at
18 footnote 83 in the notice.

19 But, your Honor, if your Honor would like supplemental
20 briefing on sort of exactly what aspects of the record, those
21 are the reasons that the secretary concluded that it was not in
22 the national interest.

23 THE COURT: That article, does that talk about Yemen
24 specifically? Do you know? If you don't know the answer off
25 the top of your head, it's OK.

1 MR. GITLIN: I would have to double-check that.

2 THE COURT: The link is here. We can look at it.

3 But is there anything in the administrative record on
4 the issue of pull factor, for example?

5 MR. GITLIN: We'd have to double-check the record for
6 this.

7 THE COURT: I know. It was just compiled a few days
8 ago, so it's a little unfair of me to ask. I am trying to see
9 what there is in the administrative record that matches up with
10 what's in the determination in the Federal Register.

11 On visa overstays, I looked at the CAR after I came
12 in, and I found something, a document that -- the page I'm
13 looking at -- I don't know if you have a copy of the CAR with
14 you, do you?

15 MR. GITLIN: I do, your Honor.

16 THE COURT: Great.

17 It is AR251. It's some USCIS compilation of data -- I
18 don't know if they are the source of the data -- on various
19 things. And on AR251 there is something about visa overstays,
20 but it's a bunch of numbers and percentages in a table, and I
21 didn't know what to make of it.

22 What does that say about the number of people from
23 Yemen who are overstaying their visas and if any of them became
24 TPS holders or were TPS holders. I guess it would be became
25 TPS holders. But please.

1 MR. GITLIN: Your Honor, we'd have to consult with
2 sort of the agency and agency's statisticians and experts to
3 provide more information about this chart.

4 THE COURT: I understand.

5 Just confirm that we don't understand what these
6 numbers mean. This table on AR251 says for fiscal year 2024,
7 667 total NIV overstays.

8 Do I know what that means as far as people from Yemen
9 or Yemen TPS holders specifically?

10 MR. GITLIN: Again, your Honor, this office would have
11 to consult with the --

12 THE COURT: Would a one-line email be enough for the
13 consultation?

14 MR. GITLIN: Sorry, your Honor?

15 THE COURT: I am just kidding about that consultation.
16 We don't know what this means. I take your point.

17 There is also some representation about public safety
18 and fraud. If you scroll up in the AR to AR245, there is this
19 table that says -- the top of the page says, Yemen temporary
20 protected status results, and there is this table about fraud
21 record determinations and another table about public safety
22 records.

23 Do we know what these mean?

24 MR. GITLIN: Your Honor, again, this appears to be an
25 analysis of whether fraud was found in connection with TPS --

1 individuals in the United States from Yemen.

2 THE COURT: So it looks like there were two fraud
3 findings for Yemen?

4 MR. GITLIN: Yes, your Honor.

5 THE COURT: What does that mean, fraud found?

6 MR. GITLIN: Again, I'd have to consult with the
7 agency about exactly what their definition of fraud means.

8 THE COURT: Which agency made the finding of fraud?

9 MR. GITLIN: I would have also to consult with the
10 agency on that point, your Honor.

11 THE COURT: Is it benefits-related fraud? Is that
12 what it is?

13 MR. GITLIN: I would say that the general concern
14 about fraud that is reflected in the notice is that the
15 institutions in Yemen that would provide documentation to allow
16 for visas or for other --

17 THE COURT: I think that was a separate point. I know
18 that that's a point and that was the main point, I think, with
19 the travel ban, but there is a separate point in the Federal
20 Register about -- and I am looking at the center column of page
21 10407 in the last sort of phrase there, for attempting to
22 obtain immigration benefits through fraud. I assumed that that
23 reference to fraud and preventing fraud in the national
24 interest correlated to this fraud record determinations table
25 in the CAR, but maybe that's just an assumption on my part. Is

1 that not right?

2 MR. GITLIN: Your Honor, we'd have --

3 THE COURT: Understood.

4 MR. GITLIN: That appears to be correct, but we would
5 want to just confirm that with the agency.

6 THE COURT: Again, it's OK if the answer is you don't
7 know, because I know this is an expedited time frame. There
8 hasn't been discovery. But it's hard to understand some of the
9 CAR on its face, so I don't know what that means.

10 The second table here, public safety records -- again,
11 it's OK if you don't know the answer. Do we know what these
12 numbers mean? Again, I am trying to understand the match
13 between the TPS determination and what's in the administrative
14 record.

15 MR. GITLIN: Yes, your Honor.

16 Generally speaking, it's whether there were matches in
17 public safety or the law enforcement database. We would have
18 to get sort of the exact details about the scope about what
19 that match meant from the agency.

20 THE COURT: The vetting screening point that you were
21 making, fraudulent documents from Yemen, Ms. Goldberg made some
22 reference to this, but can you tell me how people who get TPS
23 here, how they are vetted and screened?

24 MR. GITLIN: Yes, your Honor.

25 Individuals who are here who applied for TPS status,

1 they submit an application to the government. And the concern
2 with that process is that if they do not have valid paperwork
3 or identification papers because the infrastructure in the
4 country doesn't exist anymore or is not able to, either on the
5 Yemen side to create the documents or the U.S. embassy side to
6 be present in the country and meet with the individuals and
7 review the documents, then it increases the chances that there
8 would be fraud associated with the application process for TPS.

9 THE COURT: I understand how that applies,
10 potentially, assuming that it's correct, to new arrivals from
11 Yemen. How does that apply to existing TPS holders? Because
12 my understanding is that existing TPS holders have already gone
13 through an extensive vetting process by the relevant federal
14 agencies. Is that not right?

15 MR. GITLIN: Yes, existing TPS holders have undergone
16 a vetting process. But if their documentation was not correct,
17 was fraudulent in the first instance --

18 THE COURT: Couldn't they just be denied TPS?

19 MR. GITLIN: I think the concern is that because it is
20 fraudulent, the government may not be able to know one way --

21 THE COURT: The question then is, why were those
22 people given TPS in the first place if the government doesn't
23 know who they are?

24 MR. GITLIN: Your Honor, the concern is that they
25 believe that they are one individual because it may be

1 paperwork that is not proper or is fraudulent, and, therefore,
2 a TPS grant might be provided on that basis.

3 THE COURT: Is the government saying that it is not
4 sure that it knows who existing TPS holders are?

5 MR. GITLIN: No. I think the focus really is on --

6 THE COURT: New people coming in.

7 MR. GITLIN: New people coming into the country from
8 Yemen.

9 THE COURT: Understood.

10 There is a difference between redesignating a country
11 for TPS and terminating TPS, right? Because my understanding
12 is that the former -- the latter deals with existing TPS
13 holders and whether or not they are going to lose their status
14 or, as a redesignation, as a practical matter, implicates
15 whether or not new people can come in and obtain TPS.

16 Is that a correct understanding of the distinction?

17 MR. GITLIN: Could you repeat it one more time to make
18 sure I understand.

19 THE COURT: Sure. Redesignation means new people can
20 come in and apply for TPS, but the question of termination is
21 whether or not existing TPS holders can maintain their status.
22 Is that right?

23 MR. GITLIN: Yes, your Honor.

24 THE COURT: What I don't understand then is that if
25 there is a vetting problem that implicates new people, new

1 arrivals from a country, and doesn't have anything to do with
2 people who already have been granted protected status, why that
3 justification would support termination of TPS for people who
4 already have it and have already been vetted by the government.

5 MR. GITLIN: Your Honor, I think it just goes back to
6 what I was saying earlier, that there is a generalized concern
7 that given that the infrastructure is not in place in Yemen to
8 properly create identification paperwork, even perhaps going
9 back further for individuals who have already been vetted, that
10 that would support -- even for termination for existing TPS
11 holders.

12 THE COURT: I don't understand, though, because I
13 think you're saying that the problem is, we don't know if the
14 documents of new people who come here are valid, which I
15 understand, and I understand how that relates to the travel
16 ban. What I don't understand is how that relates to people who
17 are already here, right. Is there something I'm missing, or is
18 it just they are from the same country?

19 MR. GITLIN: I don't think it's that, your Honor. I
20 think it was what I was saying earlier about a concern about
21 fraud with the identification papers.

22 THE COURT: Correct me if I'm wrong, but there is no
23 attempt to justify the termination of TPS based on the idea
24 that we have misidentified existing TPS holders who may not be
25 the people who they say they are. Is there?

1 MR. GITLIN: Again, I don't have specific cites for
2 that, but the notice outlines the generalized concerns about
3 fraud related --

4 THE COURT: But it's not related to the identity of
5 existing TPS holders; it is related to the validity of
6 documents coming from Yemen today, right?

7 MR. GITLIN: I believe that is generally what the
8 notice is referring to, but I think it's a general concern
9 about validity of paperwork.

10 THE COURT: I asked this question before, but I think
11 we started talking about the rationale, but it's just a plain
12 factual question.

13 What is the process for confirming someone's identity
14 for purposes of giving them TPS? What does that look like, who
15 does it, which agency does it, and what do they do?

16 MR. GITLIN: I have to get back to you about sort of
17 the exact details about the process, but generally speaking the
18 applicant for TPS would submit documents to the Department of
19 Homeland Security, and agencies within it will consider those
20 documents and determine whether TPS is proper for that
21 individual.

22 THE COURT: Can we turn to the plaintiffs' equal
23 protection and discrimination argument. I think I know, based
24 on some of the questions that I have asked already, what your
25 answer is going to be, but I just want to confirm that I

1 understand, again, the government's position here.

2 MR. GITLIN: If I may, Mr. Osmond --

3 THE COURT: That's right. I'm sorry.

4 Any other points you want to make, Mr. Gitlin, before
5 I turn to Mr. Osmond?

6 MR. GITLIN: No, your Honor.

7 THE COURT: Thank you very much.

8 Mr. Osmond, on the plaintiffs' equal protection
9 arguments, assuming reviewability -- again, I know you dispute
10 it -- would it be an APA violation for the termination of TPS
11 to be motivated in part by discriminatory animus against people
12 from the country that's been designated?

13 MR. OSMOND: I got to be honest, your Honor. I don't
14 know that I know the answer to that question. I assume in at
15 least some situations that it would give rise to an APA
16 violation, but standing here now I'm not certain that it always
17 would or always wouldn't.

18 THE COURT: I'm sure this falls into the category of
19 the parade of horrors from Justice Sotomayor, but bear with
20 me.

21 If the Federal Register said, people from Yemen -- and
22 I apologize to the people in the room. I am quoting something
23 from a different context. This is obviously not the views of
24 the Court. But if the Federal Register read: People from
25 Yemen are killers, leeches, and foreign invaders, we don't want

1 them, not one, period. TPS for Yemen is now terminated.

2 Would that be unlawful?

3 MR. OSMOND: If the secretary had put that in the
4 notice, I think that would be a much more troubling case and
5 would potentially give rise to a viable equal protection claim,
6 but there is nothing like that here.

7 THE COURT: There is something quite like it here, but
8 you may argue that the distinction is very material because
9 that's almost a verbatim quote of the secretary from three
10 months before the termination of TPS, I think. It's obviously
11 made in a different context.

12 I guess my question is, are you arguing that the
13 difference in context is what makes that hypothetical I have
14 given you different from this case?

15 MR. OSMOND: Yes, your Honor.

16 I would refer the Court to *DHS v. Regents of the*
17 *University of California*, which we cite in our brief, where the
18 Supreme Court there considered similar statements made about, I
19 believe, Mexican nationals, and the Supreme Court found that
20 those statements were made in different contexts --

21 THE COURT: Those statements were made by the
22 president, right, in *Regents*?

23 MR. OSMOND: Yes.

24 THE COURT: But they were made before he was
25 president. They were made when he was on the campaign trail,

1 right?

2 MR. OSMOND: I don't know that all of them were
3 actually made on the campaign trail. I believe the Supreme
4 Court said they were made in different contexts, so presumably
5 not related to, I think it was the DACA program.

6 THE COURT: But at least some of them were made on the
7 campaign trail.

8 MR. OSMOND: Some of them were, yes.

9 THE COURT: Here it's not the president. We have the
10 decision maker herself saying this. It is a different context.
11 I take your point. But it's not before taking office. Maybe
12 some of the comments in *Regents*, there were some before, maybe
13 there were some after, but I can't remember either. My
14 recollection was they were before, but that may not be all of
15 them.

16 Here we have the secretary making these comments while
17 she is in office, in a slightly -- in a different context, but
18 she is still talking about people who come from Yemen. It's
19 the context of travel, immigration, status in this country, so
20 it's related in some way, I would say.

21 How is it different? I understand your point that
22 context can be different, but why is the difference in context
23 here material to the equal protection point from your
24 perspective?

25 MR. OSMOND: Because, your Honor, the reasons for the

1 termination of Yemen's TPS designation are laid out in the
2 notice and it includes none of those types of statements.

3 THE COURT: If discriminatory animus is one reason for
4 doing something, that taints the entire decision, right? Like
5 you can have 10 legitimate reasons and then one reason be
6 discriminatory animus that renders the act unconstitutional,
7 does it not?

8 MR. OSMOND: Your Honor, in this case --

9 THE COURT: I'm not talking about this case. You can
10 have 10 reasons for doing something that are legitimate, one
11 reason is discriminatory animus. If the record shows that and
12 the fact finder determines that, then the entire house of cards
13 falls. Isn't that right as a legal matter?

14 MR. OSMOND: Under *Trump v. Hawaii*, which we believe
15 applies here --

16 THE COURT: Assume *Trump v. Hawaii* because that's a
17 particular context, foreign policy, and that's migration
18 entering the country. Just some domestic policy decision,
19 right? Like I want to -- I don't know. The governor of the
20 state wants to implement a new tax policy in a predominantly
21 black area of the state, has 10 legitimate reasons for doing
22 it, needs to raise revenue, taxes there have been historically
23 low, but also does it because she has discriminatory animus
24 against black New Yorkers. We would say that's
25 unconstitutional, would we not?

1 MR. OSMOND: Under *Arlington Heights*, which we don't
2 think applies, it's true that the plaintiffs would have to show
3 an invidious discriminatory purpose was a motivating factor.

4 THE COURT: A motivating factor. Not the only one or
5 not even the principal one, correct?

6 MR. OSMOND: Yes.

7 THE COURT: Under *Arlington Heights*, which you say
8 doesn't apply here.

9 MR. OSMOND: Exactly.

10 THE COURT: If we assume that the *Arlington Heights*
11 framework does apply here, I think you would still say that the
12 statements that Secretary Noem made in December were not
13 dispositive for the plaintiff because it's a different context,
14 right?

15 MR. OSMOND: Yes.

16 THE COURT: Why does that context, that difference in
17 context, matter, from your perspective?

18 MR. OSMOND: Because when it comes to making a TPS
19 termination decision, there are statutory factors that the
20 secretary must and did consider, and her reasoning is laid out
21 in the notice.

22 THE COURT: I know you dispute it, but if *Arlington*
23 *Heights* does apply here, that would mean that discriminatory
24 animus, on top of proper consideration of statutory criteria,
25 wouldn't render the determination unlawful. Wouldn't it?

1 Under *Arlington Heights*, it seems to me that it would, but your
2 argument seems to be that I shouldn't take into account what
3 she said in December because it's a different context. It's
4 not related to this decision. And I'm trying to understand why
5 you think that. Is that not an accurate articulation of the
6 government's position here?

7 MR. OSMOND: I don't have the exact statement that
8 you're referring to in front of me that the secretary made.

9 THE COURT: It's all over the plaintiffs' briefing, so
10 you're familiar with it, right?

11 MR. OSMOND: I realize that it is. I have seen it.
12 But I don't have the exact wording in front of me.

13 THE COURT: I think I gave it pretty close to you:
14 Killers, leeches, foreign invaders, we don't want them.

15 Let me back up for a second.

16 Is there any dispute, as a factual matter, that among
17 the people the secretary was referring to in making that
18 statement were people from Yemen?

19 MR. OSMOND: That was the point that I was going to
20 bring up, your Honor. My recollection is it was not targeted
21 specifically at Yemeni people, or at least not based on their
22 race or national origin.

23 THE COURT: Was it not in reference to all of the
24 people from the countries that were subject to the travel ban?

25 MR. OSMOND: I believe that was a statement about

1 believing that the travel ban was necessary for people from a
2 number of different countries.

3 THE COURT: One of those countries was Yemen, right?

4 MR. OSMOND: I would just point out, your Honor --

5 THE COURT: Before you point that out, one of the
6 countries subject to the travel ban when those comments were
7 made was Yemen, right?

8 MR. OSMOND: One of the countries I believe was Yemen,
9 your Honor.

10 THE COURT: Make your point, please.

11 MR. OSMOND: As Judge Failla found in her decision,
12 the government disagrees with about 85 percent of her ruling in
13 the Syria case. As she noted there, we had very similar
14 statements. Judge Failla found that there were not enough
15 Syria specific statements to find a viable equal protection
16 claim, even under *Arlington Heights*.

17 And we have the same sorts of statements here. What
18 plaintiffs have done is sort of grouped together most of the
19 world as being nonwhite and non-European and saying there is
20 animus towards all these different groups. But there needs to
21 be a more specific defined protected class, and we just don't
22 have that here for the reasons Judge Failla found. This theory
23 just sweeps too broadly. It would mean every action taken by
24 this administration toward the vast majority of the world would
25 give rise to an equal protection claim and, in the government's

1 view, that can't be.

2 THE COURT: It seems like there are two separate
3 points here. One is that the theory is too nebulous, which I
4 understand. I understand that argument, and I understand what
5 Judge Failla was saying.

6 This sweeps too broadly point, I am not sure I follow
7 that point because if animus sweeps broadly, then the remedy
8 has got to sweep broadly. If the actor expresses animus
9 towards many groups, that wouldn't be a reason for denying
10 relief, would it?

11 MR. OSMOND: If there were specific statements about
12 each group based on their national origin or based on their
13 race, and there were independently sufficient statements about
14 each one of those, then I think that would apply, but that's
15 not what we have here. We have an amalgamation of all sorts of
16 statements about many different groups, many of these
17 statements are taken out of context and cherry picked in a way.
18 But, in the government's view, that just does not give rise to
19 a viable equal protection claim either under Arlington Heights
20 or *Trump v. Hawaii*.

21 THE COURT: Understood. Any further points you would
22 like to make, Mr. Osmond?

23 MR. OSMOND: No, your Honor. Thank you.

24 THE COURT: Thank you.

25 Let me turn to plaintiffs for a reply, and I'll start

1 with Ms. Goldberg.

2 MS. GOLDBERG: I apologize. When I finished, I meant
3 to ask you if you had specific areas, so I apologize.

4 I first want to start by answering some of the
5 questions that my cocounsel just addressed, if that's OK.

6 The Black's Law Dictionary defines meaningful
7 discussion as relevant information that is logically connected
8 intending to prove or disprove a matter in an issue having
9 appreciable probative value that is rationally tending to
10 persuade people of the probability or possibility of some
11 alleged fact.

12 The problem with this administrative record is we have
13 no information about the review of the documents. What we do
14 have is redacted. How did they get to this decision? Who did
15 they consult? Where are their discussions? Where are the
16 consultations in the AR?

17 The Court asked if any of the other courts had
18 explored this. I tried to get it as quick as possible. I
19 could not. There is discussion like we had here in the
20 district court in California.

21 And so we would suggest that the appropriate agencies
22 for Yemen would -- first of all, there is a specifically
23 appointed regional security officer, U.S. mission to Yemen, who
24 works with a team in the U.S. embassy in Riyadh. He would have
25 been key to consult, not only people at the Department of

1 State --

2 THE COURT: You're saying that that's a statutory
3 requirement?

4 MS. GOLDBERG: I'm not saying it's a statutory
5 requirement. What I'm saying is, if you are going to have a
6 meaningful discussion, and you are going to consult outside
7 agencies -- and this is what I want to get to, is who they
8 actually consulted versus who was available. Because if we
9 look at the people that they consulted, at least according to
10 the administrative record --

11 THE COURT: I think it's a person, right? It's more
12 than one?

13 MS. GOLDBERG: I see three in the administrative
14 record.

15 First, we have Rob Law. As of December 25, he is
16 under the secretary of strategic policy and plans at the U.S.
17 Department of Homeland Security. What can he tell us about the
18 conditions in Yemen if he's there just to handle policy?

19 The third person that we have in the administrative
20 record is Spencer -- and I apologize, I mean no disrespect, but
21 Chretien, who serves as the senior advisor to the State
22 Department Bureau of Population, Refugee, and Migration. What
23 can he tell us about the active war security concerns and the
24 conditions of Yemen.

25 THE COURT: His title sounds like he might know

1 something about those topics: Population, migration.

2 MS. GOLDBERG: If you look at the referenced
3 documents, he discusses not conditions, not country conditions.
4 He talks about who is coming in, refugee, and that might
5 minimally go to the discussion on national interest, which I
6 want to circle back to. I kind of want to finish this.

7 The third person that they consulted was Samantha
8 Deshommes, who is the chief of office policy and strategy.

9 It looks like the people that they consulted was not
10 about the country conditions. It was about how do we take this
11 policy away. We basically pulled three policy people. And we
12 left out the most important -- there is a team in Riyadh at the
13 embassy. Why did we not did contact David Schulte, who is the
14 regional security officer. He knows what's going on there. He
15 knows how many U.S. citizens have been killed over there. He
16 knows what's going on.

17 Second of all, they are in constant contact with the
18 government officials: The Department of Defense, the
19 Department of Justice, the Department of Human and Health
20 Services. Then if you want to make a security finding, you
21 should have consulted the FBI, the CIA, again the regional
22 security office.

23 THE COURT: Are you saying that all of those entities
24 and individuals, that the statute requires homeland security to
25 consult?

1 MS. GOLDBERG: I'm not saying it's a requirement.

2 What I am saying is, when you say relevant agencies,
3 there has to be some logical nexus. As this Court was pointing
4 out, I can't call and say, how is the cuisine in Yemen to
5 terminate the TPS.

6 THE COURT: Logical connection to what?

7 MS. GOLDBERG: There is a lack of connection to
8 logical, meaningful discussion.

9 THE COURT: You said that the person or agency that
10 homeland security consults, there has to be a logical
11 connection to something. My question is, what is that
12 something?

13 MS. GOLDBERG: The statute says with the appropriate
14 agencies.

15 THE COURT: Appropriate for what?

16 MS. GOLDBERG: If we wanted to see if the three
17 factors, right: Is there an ongoing armed conflict, is there a
18 serious threat to personal safety, is there earthquakes,
19 drought, all of that. Why would we consult a policy person?

20 THE COURT: The consultation has to in some way be
21 connected to the criteria that the secretary must consider in
22 making the termination decision. That's what you're saying.

23 MS. GOLDBERG: Correct.

24 THE COURT: If the secretary just consults NASA, for
25 example, that would not comport with the consultation

1 requirement.

2 MS. GOLDBERG: Correct.

3 How do you make a national security concern if you
4 didn't consult the FBI, the CIA, and the regional security
5 officer to Yemen.

6 Previous TPS consultations, I will note, prior to this
7 administration, consulted the Department of State and
8 considered primary agency consultations. They provided
9 critical input, and they did that on foreign country policy and
10 conditions through the overseas embassies, which was not done
11 not here. They also consulted the National Security Council.
12 Also, the Department of Justice and USCIS, particularly in key
13 components regarding recommendations and applications. None of
14 that was done here. I went over the three people that reviewed
15 it.

16 The Court asked to give an example. Is there a place
17 in which you can terminate TPS. And I would say yes. Let's
18 say the State Department says: OK. I'm going to contact the
19 embassy in Jordan or Lebanon who is overseeing what's going on
20 in Syria, and the regime has been taken down. There is a new
21 president there, and they are cleaning up humanitarian
22 conditions. And guess what. The United States in March is
23 voting to put back the embassy. And the ambassador's house in
24 Syria has already been opened back up because there is some
25 safety -- it's safe there to start doing this. And the U.S. is

1 putting a presence there, right. And they say, yeah. I think
2 it's OK. The airports are open. Things are moving along.
3 They consulted the right people and there is a logical
4 connection. Then whether Syria has some bad actors and
5 dangerous conditions, I don't think this Court can look at it.

6 But I think when you don't even bother to speak to the
7 embassy and the staff that specifically is in communication on
8 a daily basis with the Yemen government as it changes, and in
9 communication with things over there, then you can't possibly
10 come to this determination.

11 THE COURT: Sounds like you're saying that that's a
12 requirement, that the embassy be contacted.

13 MS. GOLDBERG: I think that if you read the plain
14 language of the statute and the requirements of country
15 conditions, you have to go to someone who is an expert on it.

16 THE COURT: Not necessarily the embassy, but some
17 agency that knows something about the country conditions.

18 MS. GOLDBERG: Correct. And these three people deal
19 with policy. What are we trying to do here? We are just
20 trying to make this policy go away. We are not going to follow
21 the law.

22 I will also note that the Ninth Circuit stay was
23 lifted just recently, but the stay on the order was put in
24 place while there was a filing of the en banc. After the Court
25 determined that it was not going to hear the en banc, they

1 actually lifted the stay, so I did want to point that out.
2 That's despite the fact that the Supreme Court had put the stay
3 on Venezuela. I think that that's important.

4 I would also note that even if the APA review is taken
5 away, you cannot take away the constitutional claims, so I
6 wanted to address that.

7 I want to turn to national security concerns.

8 Vetting and safety. I addressed this, and I told the
9 Court I would give further cases in TPS. If you look at the
10 processing time for cases from Yemen versus other countries,
11 this includes I-130s, overseas processing visas, you will
12 notice it's almost triple the time.

13 Let me give you an example. If I want to file a I-130
14 for my husband in Mexico, it would be take me approximately
15 four to six months to have it adjudicated. If I want to file
16 for an I-130 for my husband in Yemen, it would take about a
17 year and a half to two years. There are extra steps that
18 involve the adjudication.

19 The other thing is, I want to point out the fraud
20 finding. I will agree that they did find -- but I want the
21 Court to pay attention, because this is very important. They
22 found it in applications for parole and arrival and departure
23 records. And there is a couple of things with that.

24 First of all, in the D.C. district there is a specific
25 case. There are a lot of people who are running for their

1 life. So when they come into America to be safe, there is
2 actually a case in the D.C. circuit that specifically says that
3 if there is misrepresentation in the way that you entered the
4 United States, that is not considered fraud for immigration
5 purposes, although it would be recorded for this.

6 So there are people, I will say, that coming from
7 Yemen and say, OK, I am going to school there. But when they
8 get here, they immediately file an asylum. This does not refer
9 to TPS specifically. This refers to some of the way they
10 entered.

11 Also, what's very important is there is a cultural
12 consideration that's not found here. In Yemen, people are
13 born, people die, people get married, and it's cultural in that
14 if they are in a village, they just don't make up a document
15 like here, like we put this American theory here.

16 What happens is, if I'm born in a village and no
17 document is created, and I now want to come to America, and I'm
18 16 years old, and I go to Addin (sic) or I go to Sinnon (sic),
19 I go to the city, I say OK, I would like a birth certificate,
20 that birth certificate is now registered 15 years after my
21 birth, the government would consider that a fraudulent
22 document.

23 So without further explanation as to how they
24 determine these fraud cases, I don't think this can be a proper
25 factor --

1 THE COURT: I don't think I can make a substantive
2 second guess of the secretary's determination in that regard,
3 can I? I thought this is a process claim.

4 MS. GOLDBERG: I'm not asking you to second-guess it.
5 I am asking, how was the process? How did we derive at this
6 percentage of fraud that was committed by Yemeni? How did we
7 derive this. I think that that goes into the process that was
8 abused in pulling numbers and not actually looking at what do
9 these numbers mean.

10 THE COURT: I think you're saying you think the
11 numbers mean one thing, but the secretary is saying, I don't
12 really care what the numbers mean, there is this amount of
13 fraud, and I want to get rid of it, TPS as a result.

14 When it comes to the documents from Yemen, I will just
15 say I'm struggling to grasp the significance because this issue
16 doesn't apply to existing TPS holders, does it?

17 MS. GOLDBERG: I don't believe it does, no. That's my
18 point is, why put in the fraud finding for arrival and
19 departure records when there is no fraud finding for TPS.

20 THE COURT: I understand that point. Thank you.

21 MS. GOLDBERG: Finally, the pulling factor in the
22 overstays, and I think the Court touched on this. I will
23 acknowledge that the percentages are higher, but this is solved
24 very simply by just not doing redesignation but just continuing
25 TPS for the people here. And I would also note, if the Court

1 looks, from 2023 to 2024, the percentage actually went down.

2 As to the claim, I think it's really important to note
3 that the government has not taken away TPS from Ukraine. And I
4 will note that it was so precisely said in cocounsel's -- in
5 the Abdo brief, they talked about all the refugee programs
6 have been turned down except for one small area in Africa. And
7 I would highlight in their brief how they talked about that
8 there was one cable that said, does this apply to nonwhite
9 applicants. And the fact that adjudicator had to send that
10 email kind of touches on the policy of this administration.

11 That's what I wanted to address. I don't know if the
12 Court wants me to get into the admin record or wants me to
13 wait.

14 THE COURT: I don't think so. Thank you,
15 Ms. Goldberg. I appreciate it.

16 Mr. Gitlin, I can come back to you, but let me just
17 give the other plaintiffs an opportunity to reply.

18 MR. KADIDAL: Your Honor, I have nothing on rebuttal
19 on jurisdiction, but I do think we should keep five minutes --
20 I know we are over time -- for talking about the redactions at
21 least, if not the discovery.

22 THE COURT: OK.

23 MS. ZAMAN: Just quickly on fraud, your Honor, I do
24 want to point out what you already pointed out, that there were
25 two findings of fraud, two out of 2,222 TPS recipients. That

1 is 0.09 percent.

2 THE COURT: Do we know what that fraud is?

3 MS. ZAMAN: We don't know what that fraud is. We
4 don't even know what it is. Whatever calculation she made,
5 that was 0.09 percent. I don't know how that could rationally
6 justify to terminating TPS for over 3,000 people.

7 THE COURT: You're asking me to make a substantive
8 determination that the secretary says there has been some
9 fraud, and you want me to say it's not enough fraud to justify
10 your determination, unless you want me to find that when the
11 secretary is citing fraud, that's not the real reason that the
12 secretary is terminating TPS. Is it that the fraud is not
13 enough as a substantive matter, or are you saying that it's a
14 cover for something?

15 MS. ZAMAN: It does seem like it is a cover for
16 something.

17 THE COURT: This is a pretext argument, and I
18 neglected to ask you this the first time, your first go around.

19 When you say that the determination here was
20 pretextual, my question for you is, what is the pretext? And
21 then I don't think you need to prove what the real reason is,
22 but I am curious as to what your view is as to what the real
23 reason is. What's the cover story and what's the real story?

24 MS. ZAMAN: Your Honor, none of the data, none of the
25 reasons provided in the notice are matching up the data.

1 According to *State Farm* or according to all the APA cases,
2 there has to be some kind of rational connection to the data
3 provided and the reasons.

4 My cocounsel just pointed out in terms of the overstay
5 rates, in terms of the fraud rates, none of the data itself is
6 matching up. So when you strip that down, there is nothing
7 left. There is nothing there to actually justify terminating
8 TPS unless it's actually the racial animus, which is what we
9 think is the case, because this is 13 out of 13 terminations,
10 right. As Judge Failla had said, these are countries all
11 across the globe, all different conditions. How could it
12 possibly be the case that they all deserve terminating at this
13 particular time. That rationally doesn't make any sense.

14 THE COURT: Your argument is, on pretext that when the
15 secretary walks through factors in the Federal Register about
16 the national interest and whatnot, that those are not the real
17 reasons for the termination of TPS, that it's a cover story for
18 discriminatory animus. That is the essence of your pretext
19 argument.

20 MS. ZAMAN: That is how we come to our conclusion
21 because the data doesn't match up to anything she is saying.
22 Because we do have her statements about Yemenise being killers,
23 leeches, invaders, right. We don't want them, not one, she
24 says. We have that. And we have 13 out of 13 terminations. I
25 think we can surmise there was discriminatory purpose here.

1 THE COURT: Thank you.

2 Is there any additional point you want to make before
3 I give the government one last shot, and then we have to turn
4 to the discovery issues, and I do need to conclude very soon.

5 MS. ZAMAN: Just two points quickly, your Honor.

6 Congress did provide in the statute the exact
7 mechanism for terminating TPS for anybody who they thought was
8 fraudulent or who they thought would be a national security
9 threat. That's actually in the statute in paragraphs C3 and
10 C2.

11 So they provided her with a scalpel to individually
12 terminate TPS for those that they made the determinations for.
13 She used a sledgehammer for two people that she found, but we
14 don't even know what the fraud was about because she decided to
15 terminate over 3,000 terminations.

16 The other thing I wanted to mention is that the
17 legislative history of the statute was specifically to
18 constrain executive discretion. This was done specifically
19 because Congress was irritated by the Reagan Administration's
20 desire to not want to extend protection, at that time extended
21 voluntary departure, to Salvadorians.

22 That is where TPS was created in 1990. That was the
23 whole point, to constrain executive discretion.

24 THE COURT: Are those citations in your opening brief?

25 MS. ZAMAN: They are not in our opening brief, but

1 they are in the SCOTUS briefs and the Dahlia Doe brief,
2 definitely.

3 What the government is suggesting and what the
4 government has said on record, by the way, is that the
5 secretary has discretion to terminate TPS by the flip of a
6 coin, maybe because she doesn't like vanilla ice cream. That's
7 what they have said on the record. That's how much discretion
8 they think should be provided, and that's what they think is
9 all that is afforded to terminate 3,000 people's protections,
10 protections they have had for over a decade, and that cannot be
11 the law.

12 THE COURT: Thank you.

13 Mr. Gitlin, please quickly because I know our court
14 reporter in particular needs a break.

15 MR. GITLIN: Sure. Just very quickly, your Honor.

16 I know there was discussion about the fraud point as
17 one rationale for the national interest determination. As we
18 talked about earlier, though, there were other bases for that
19 determination.

20 In addition, counsel for the --

21 THE COURT: The purported improvement in conditions in
22 Yemen.

23 MR. GITLIN: Well, other conditions for the conclusion
24 that continued TPS was against the national interests.

25 Also, your Honor, counsel for plaintiffs question visa

1 processing times and other sort of substance in the record.

2 But that, again, is all second-guessing the secretary. And, as
3 I said at the beginning, the inquiry here is not about sort of
4 reweighing the evidence, and it's a deferential standard for
5 the government.

6 And then also, your Honor, counsel for plaintiffs
7 started mentioning the individuals who are on communications at
8 the State Department, for example, and this is even as support
9 for the argument that consultation wasn't appropriate within
10 the meaning of the statute, but this is going even farther
11 afield of what the statute says. The statute doesn't prescribe
12 which agencies, let alone which employees at which agencies,
13 must be consulted.

14 If you have any other questions, I'm happy to answer
15 them, your Honor.

16 THE COURT: I don't think I do. Thank you, Mr.
17 Gitlin.

18 Thank you for your arguments on the merits.

19 Very briefly, can we touch on the issues of redactions
20 and other issues that I raised in the order that I issued in
21 both cases last night.

22 Ms. Goldberg, do you want to address this first?

23 MS. GOLDBERG: I can do it briefly. I also put a
24 letter on the docket that I think I don't want to repeat.

25 THE COURT: Are you requesting any particular relief

1 right now with respect to the administrative record?

2 MS. GOLDBERG: Yes.

3 First of all, I had reached out to the government and
4 asked for some sort of privilege log to understand why these
5 redactions were made before I proceeded forward.

6 I also, in looking -- the biggest problem with the
7 administrative record is we can't make a decision here because
8 there is no findings, there is no documents reviewing this
9 information.

10 And also in light -- obviously, I understand actual
11 judicial discovery is an extremely high standard in APA cases,
12 but I believe that we have that here. In light of the emails
13 that were lodged at the U.S. Supreme Court, I believe that this
14 has been met. Wherein agency explanations are incongruent with
15 what the record reveals about the agent's priorities and
16 decision making, extrajudicial discovery --

17 THE COURT: I'm familiar with the standard for extra
18 record discovery in an APA case.

19 MS. GOLDBERG: You want the case?

20 THE COURT: That's OK.

21 MS. GOLDBERG: It's all in the record.

22 I think given the emails that were lodged at the
23 Supreme Court, and also I read the briefing back and forth
24 which prompted the Ninth Circuit to grant discovery in that
25 case, I think that's highly relevant in here where you have

1 officers that do policy, and this is not generally someone that
2 would opine on country conditions. I think that it's important
3 to understand what the process was, what was the meaningful
4 consultation they had.

5 I would be asking pretty much the same order as the
6 case in the Ninth Circuit to have that extrajudicial discovery.

7 THE COURT: I'm looking at your letter now. The
8 second request that you put on, which is an unredacted version
9 of the decisional memo at AR1 through 19, is there an analogous
10 memo in any of the other TPS cases that has either been
11 produced in unredacted form or ordered to be produced in
12 unredacted form?

13 MS. GOLDBERG: In the Ninth Circuit, it was along with
14 all the communication emails, which is why --

15 THE COURT: The decisional memo.

16 MS. GOLDBERG: Yes. And the decisional memo, I don't
17 know about that. I apologize.

18 THE COURT: That was my question.

19 MR. OSMOND: Your Honor, I could address that, if
20 you'd like.

21 THE COURT: Sure, Mr. Osmond.

22 MR. OSMOND: The short answer is, it has been produced
23 over the government's objection in other cases.

24 THE COURT: Which ones?

25 MR. OSMOND: I honestly don't know. I know it has

1 been produced in a handful.

2 The government's position is that that memo is
3 covered, it's deliberative material and not properly part of
4 the administrative record and also subject to the deliberative
5 process privilege.

6 We actually just briefed this before Judge Failla
7 because the plaintiffs in the Syria case wanted that as part of
8 the record in light of the fact that the Supreme Court had
9 granted certiorari in the case.

10 So we have withheld it, and the issue is pending
11 before Judge Failla.

12 THE COURT: Understood.

13 Let me come to the other plaintiffs on the
14 discovery-related issues. Let me just come to them real quick.

15 MR. KADIDAL: Can I start with the redactions?

16 THE COURT: Sure.

17 MR. KADIDAL: You asked whether the decisional memo
18 from the USCIS director is available on dockets. On the public
19 SCOTUS docket you can see that in the joint appendix, volume 2,
20 pages 751 to 762, there is a complete fully unredacted version
21 of this memo for Haiti in the public record.

22 In fact, unredacted production of these memos has been
23 ordered in TPS litigation for at least six countries just under
24 the second Trump Administration. I think there are three
25 during the first Trump Administration.

1 Based on the markings on top of that director's memo,
2 the government is asserting deliberative process privilege. It
3 is black letter law. The DPP does not apply to documents that
4 embody a final agency decision once that final agency decision
5 has been made. That's *Fish & Wildlife Service v. Sierra Club*,
6 592 U.S. at 268.

7 THE COURT: Mr. Kadidal, you haven't made a motion to
8 unredact this yet.

9 MR. KADIDAL: We haven't, and that's what I wanted to
10 address first.

11 Ordinarily, it's incumbent on a party seeking to file
12 materials under seal to offer a justification for redactions
13 from the public docket. That's actually a First Amendment
14 based principle. I realize everything was done in a hurry
15 here. Really appreciate the government's efforts to get the
16 CAR filed here.

17 But ordinarily it's incumbent upon them to move for
18 the redactions they seek. There are three here. There is the
19 memo that we talked about, there is a small one at Bates 245,
20 some database search, and then there is the ones that you noted
21 in the supposed consultation email chain at Bates 266 and 67.
22 They should have to justify all that, including the identities
23 of the people on those emails. I can understand the addresses
24 so that they don't get spammed, but we should know who they
25 are.

1 What I would suggest, respectfully, is that this Court
2 order the government to produce it and the decisional memo and
3 the two other redacted documents on the public docket by say
4 Friday evening or justify the redactions with a motion to seal.
5 That would be the normal process.

6 THE COURT: I know it's the normal process. We are
7 kind of in an abnormal situation here.

8 I think some kind of briefing on this is appropriate.
9 I have one from Ms. Goldberg, and I know what she is seeking.
10 Now I know what you're seeking unredacted.

11 I'd like you to file a letter in support of your
12 redactions and the government to file something in response to
13 what Ms. Goldberg and what Mr. Kadidal would like to have
14 unredacted.

15 Mr. Kadidal, how quickly can you get a letter on the
16 docket?

17 MR. KADIDAL: Midnight tonight.

18 THE COURT: You'll have the two requests from the two
19 plaintiffs.

20 Mr. Osmond, how much time do you need to oppose?

21 MR. OSMOND: The typical time under your Honor's
22 rules, three business days.

23 THE COURT: That's for a typical case, and we have an
24 expedited case. I'll let you make another bid.

25 MR. OSMOND: Would Tuesday of next week be OK? I

1 believe that's two business days.

2 THE COURT: That's three business days. Today is
3 Thursday.

4 Why don't we say Monday by 5 p.m. on Monday.

5 In the meantime, so that I can do this very quickly, I
6 am going to ask you to produce the three documents that Mr.
7 Kadidal mentioned to chambers in camera in unredacted form,
8 unless there is some reason why the government can't do that.

9 MR. OSMOND: OK, your Honor. I can take that back. I
10 actually don't know what the documents are offhand. I know
11 there is the decisional memo. I'm not sure about the other
12 two.

13 THE COURT: Is there a national security kind of
14 basis, like I would need to go to a SCIF to look at this
15 document?

16 MR. OSMOND: I'll have to check. Not that I know of.

17 THE COURT: If there is no sort of NatSec issue and
18 it's just a deliberative process privilege, which is all that
19 I've heard asserted at this conference, then I am going to ask
20 you to produce it to me in unredacted form by 12 p.m. tomorrow.

21 MS. GOLDBERG: Your Honor.

22 THE COURT: Yes, Ms. Goldberg.

23 MS. GOLDBERG: Number three, we also asked, if the
24 Court is not inclined to do it to brief, but we also asked to
25 direct the defendants to supplement the administrative record.

1 THE COURT: I see that, and I'm asking him to respond
2 to that.

3 MS. GOLDBERG: I just want to make sure it wasn't just
4 the unredacted documents.

5 THE COURT: I am just asking for the unredacted
6 version of the three documents that Mr. Kadidal mentioned,
7 which also covers the one document that you mentioned, to be
8 produced to me in unredacted form by noon tomorrow, and then
9 the government can oppose your motions to unredact by Monday
10 next week, and then I'll deal with it as soon as I can.

11 Is there anything else that the parties would like to
12 raise before we adjourn today?

13 Ms. Goldberg.

14 MS. GOLDBERG: No, your Honor.

15 THE COURT: Mr. Kadidal.

16 MR. KADIDAL: Real briefly.

17 In camera doesn't necessarily mean going forward *ex*
18 *parte*. We could have a protective order. I have a security
19 clearance. We could figure out a way to look at some of these
20 documents if they can't be made public and analyze the
21 substance all together.

22 THE COURT: Make that point in your letter, if that's
23 the issue.

24 The in camera review is just for me to assess the
25 privilege assertions that the government has made or may make

1 by Monday.

2 Mr. Osmond, anything further?

3 MR. OSMOND: No, your Honor.

4 THE COURT: Thank you all very much for your time. I
5 understand that the clock is ticking on this, and I will try to
6 resolve the pending motions swiftly.

7 Thank you. We are adjourned.

8 (Adjourned)

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