IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTRAL AMERICAN RESOURCE CENTER, et al.,

Plaintiffs,

v.

KENNETH T. CUCCINELLI II, in his official capacity as Senior Official Performing the Duties of the Director of U.S. Citizenship and Immigration Services, et al.,

Defendants.

Case No. 20-cv-02363 (RBW)

ORAL ARGUMENT REQUESTED

MOTION FOR A PRELIMINARY INJUNCTION
OR, IN THE ALTERNATIVE, EXPEDITED PARTIAL SUMMARY JUDGMENT
AND SUPPORTING MEMORANDUM

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INTRODUCTION

For decades, Congress has provided a means by which nationals of countries ravaged by natural disaster, war, or other "extraordinary and temporary conditions" could seek refuge in the United States through the Temporary Protected Status ("TPS") program. 8 U.S.C. § 1254a. If those who fled these conditions, by foot or water, were fortunate enough to make it to the United States, they often arrived without lawful status, or much else. TPS provided these individuals with significant benefits, including protection from removal,[1] work authorization, and the ability to travel abroad and return, for as long as they are enrolled in the program. Those benefits have allowed the program's beneficiaries the opportunity to build a life in the United States, function as members of the community, and eventually adjust to lawful permanent resident ("LPR") status, with all of the stability and protection that comes with that status.

This case concerns an action Defendants unlawfully took to effectively deny eligible TPS beneficiaries with pre-existing removal orders the ability to adjust their status—and thus to stay in the United States permanently—at the same time that Defendants are rapidly closing in on ending TPS protections altogether. On December 20, 2019, Defendants announced through a policy alert (the "TPS Policy Alert") that they would no longer consider authorized travel abroad to "result in the execution of any outstanding removal order to which a TPS beneficiary may be subject."[2] In doing so, Defendants deviated from USCIS's long-held view that, by traveling abroad with USCIS's authorization, a TPS beneficiary executes any removal order to which they were subject upon departure.

[1] For ease of reference, and for purposes of this memorandum, the terms "deportation" and "removal" are used interchangeably.

[2] U.S. Citizenship and Immigr. Servs. ("USCIS"), PA-2019-12, *Policy Alert: Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal*, at 1 (Dec. 20, 2019), https://perma.cc/DT8L-QVE7.

This shift causes irreparable and ongoing harm to TPS beneficiaries with removal orders. It strips USCIS of jurisdiction over such adjustment applications, depriving immigrants of a forum in which they may directly seek adjustment to LPR status, and it imposes a new immigration liability for TPS beneficiaries by effectively reviving and making enforceable removal orders that, under USCIS's prior view, would have been deemed executed. This harm is particularly severe because Defendants are on the brink of ending TPS protections altogether for beneficiaries from a number of covered countries. Defendants' decision to eliminate TPS protections for beneficiaries from Sudan, Nicaragua, Nepal, and Honduras could take effect as soon as March 2021, and November 2021 for El Salvadoran beneficiaries. All that protects TPS holders from these countries are injunctions that are either currently slated to dissolve or that could be set aside on appeal at any time—leaving the Individual Plaintiffs, CARECEN's clients, and thousands of other immigrants who have lived in this country for decades at risk of imminent deportation. Expedited relief is therefore required to ensure that these individuals have a meaningful opportunity to obtain the protections offered by adjustment of status before they become subject to removal.

Expedited relief is also warranted because the TPS Policy Alert is unlawful in at least four distinct ways.

First, the TPS Policy Alert was enacted by Defendant Kenneth T. Cuccinelli, whose service as acting Director of USCIS was unlawful, as another judge in this District has already concluded. *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 27 (D.D.C. 2020).

Second, it cannot be squared with the unambiguous text of the Immigration and Nationality Act ("INA"), which states that "any alien ordered deported or removed … who has

left the United States, shall be considered to have been deported or removed in pursuance of law." 8 U.S.C. § 1101(g).

Third, it was arbitrary and capricious because Defendants failed to acknowledge its deviation from past practice, failed to address the settled reliance interests of TPS beneficiaries and their legal advocates, like Plaintiffs, and failed to offer any reasoned justification for the policy.

Fourth, it altered the substantive legal rights of TPS beneficiaries applying for adjustment of status without first providing any notice or opportunity for public comment.

For these reasons, and as described more fully below, the Court should, during the pendency of this case, enjoin the TPS Policy Alert and enjoin Defendants from processing adjustment applications in accordance with its terms. In the alternative, Plaintiffs respectfully request that the Court convert this motion to one for partial summary judgment, expedite briefing and consideration of that motion, including the submission of an administrative record, enter judgment for Plaintiffs, enjoin the TPS Policy Alert on a permanent basis, and order Defendants to reprocess the applications of Plaintiffs Blanca Mirna Romero del Cid, Jose Oscar Velasco Garcia, Vilma Haydee Hernandez, and Heroldine Bazile, and to complete their consideration of Plaintiff Juan Francisco Medina's application for adjustment and any applications of CARECEN's clients that are now pending.

BACKGROUND

A. Statutory and regulatory background

This case involves two legal regimes implicating the interests of TPS beneficiaries: the rules governing the Temporary Protected Status program, and the rules governing which immigrants may apply to adjust their status to lawful permanent resident.

1. The Temporary Protected Status program

By enacting the Immigration Act of 1990, Congress established the TPS program, which authorized the Attorney General—now, the Secretary of Homeland Security, *see* 6 U.S.C. § 557—to designate countries experiencing armed conflict, natural disaster, epidemic, or other extraordinary conditions, and to grant TPS to the nationals of those countries. *See* Pub. L. 101-649, § 302, 104 Stat. 4978, 5030, *codified at* 8 U.S.C. § 1254a. TPS is available to noncitizens regardless of whether they entered lawfully and even to those who are subject to a final removal order. 8 U.S.C. § 1254a(c)(1)(A), (2). Status under the program not only confers beneficiaries with protection from removal and work authorization, *id.* § 1254a(a)(1), but also allows the beneficiary to "travel abroad with the prior consent" of the government, *id.* § 1254a(f)(3).

2. The adjustment of status process

Although TPS provides only temporary protection, beneficiaries with a qualifying relationship to a U.S. citizen are able to secure a permanent immigration status by adjusting to lawful permanent resident. LPR status confers many important benefits, including authorization to live and work in the United States indefinitely, *see id.* § 1101(a)(20), and eligibility to eventually become a U.S. citizen, *id.* § 1427.

To apply for adjustment, TPS beneficiaries must determine whether they are eligible and which agency has jurisdiction over their application. Eligibility requires that, in addition to a qualifying relationship to a U.S. citizen, *see id.* § 1151(b)(2)(A)(i), applicants demonstrate that they have been inspected and admitted or paroled into the United States, are admissible, and that an immigrant visa is immediately available to them. *Id.* § 1255(a).

Depending on the circumstances, exclusive jurisdiction over an adjustment application will lie with either USCIS or the Executive Office for Immigration Review ("EOIR")—the component of the U.S. Department of Justice that presides over immigration court proceedings to

remove noncitizens from the United States. 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(i). For individuals with a prior removal order, which agency has jurisdiction over their adjustment application turns on whether the order has been "executed." If the individual is subject to an unexecuted removal order, EOIR has jurisdiction. *Id.* § 1245.2(a)(1)(i). If the removal order has been executed, USCIS has jurisdiction. *Id.* § 245.2(a)(1).

There are stark differences in the adjudicative process between the two agencies. USCIS offers a non-adversarial adjudication of the adjustment application, *Adjustment of Status*, USCIS, https://perma.cc/9UGN-AB2K (last updated Sept. 25, 2020), whereas EOIR adjudications are adversarial proceedings before an immigration judge, *Immigration Benefits in EOIR Removal Proceedings*, USCIS, https://perma.cc/Y77G-ZRZU (last updated Aug. 5, 2020). Key here, however, is not the procedural distinctions between the forums, but the fact that, for TPS beneficiaries with removal orders, only an application to USCIS receives *direct review* of its merit. An application to EOIR does not.

Instead, if jurisdiction properly lies with EOIR, and the immigration case has been closed, the applicant will need to first convince the immigration court to reopen their closed case. This is a substantial hurdle that is difficult to overcome. Reopening is generally unavailable to those who become eligible for adjustment more than 90 days after their removal order was entered and also to those who departed the United States while the removal order was effective. *See* 8 C.F.R. §§ 1003.2(c)-(d), 1003.23(b)(1). Those circumstances will necessarily apply to many TPS beneficiaries, including the Individual Plaintiffs, who traveled abroad with USCIS's consent many years after receiving a final removal order, *see infra* 9-10; 8 C.F.R §§ 1003.2(c)-(d), 1003.23(b)(1). In this way, the execution of the removal order does more than just shift jurisdiction from one immigration agency to another; it confers jurisdiction on the only agency

(USCIS) that is able to directly adjudicate adjustment applications for TPS beneficiaries with removal orders.

3. Defendants' past practices

Historically, however, TPS beneficiaries have been able to obtain USCIS review by traveling abroad with USCIS's consent and then lawfully returning. As USCIS—and its predecessor, the Immigration and Naturalization Service ("INS")—has long understood, a TPS beneficiary's authorized departure executes any removal order. Defendants have repeatedly recognized that "a TPS alien who departs the United States while a deportation order is in effect carries out his or her own deportation." U.S. Dep't of Justice, INS, Gen. Couns.'s Off., Genco Op. No. 91-49 (INS), Memorandum: Advanced Parole for TPS Eligible Aliens in Deportation Proceedings, 1991 WL 1185160, at *3 (June 17, 1991); *Matter of R-D-S-B-*, 2018 WL 5981636 (DHS), at *2–3 (AAO Oct. 26, 2018) (concluding that TPS beneficiary's "departure executed his final order of removal"); *In re* [Name redacted], 2013 WL 5504876 (DHS), at *3 (AAO Feb. 22, 2013) (concluding that TPS beneficiary's departure on advance parole "executed his final order of removal"); *cf. Nken v. Holder*, 556 U.S. 418, 440 (2009) ("Removal orders 'are self-executing orders, not dependent upon judicial enforcement.'") (quoting *Stone v. INS*, 514 U.S. 386, 398 (1995)). Upon lawfully returning with USCIS's prior consent, the TPS beneficiary would meet the eligibility requirements for adjustment of status, 8 U.S.C. § 1255(a), and USCIS would accept jurisdiction over that application.

B. Factual background.

1. Defendants' efforts to end TPS

Beginning in October 2017, the Trump Administration announced that it was terminating the TPS designations for Sudan, 82 Fed. Reg. 47,228 (Oct. 11, 2017), Nicaragua, 82 Fed. Reg. 59,636 (Dec. 15, 2017), El Salvador, 83 Fed. Reg. 2,654 (Jan. 18, 2018), Haiti, 83 Fed. Reg.

2,648 (Jan. 18, 2018), Nepal, 83 Fed. Reg. 23,705 (May 22, 2018), and Honduras, 83 Fed. Reg. 26,074 (June 5, 2018). Federal courts swiftly enjoined each of those termination decisions. *See Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018) (granting preliminary injunctions against terminations of Sudan, Nicaragua, Haiti, and El Salvador TPS designations), *vacated and remanded sub nom. Ramos v. Wolf*, No. 18-16981, 2020 WL 5509753 (9th Cir. Sept. 14, 2020); *see also Saget v. Trump*, 375 F. Supp. 3d 280, 378 (E.D.N.Y. 2019) (enjoining termination of Haiti's TPS designation on nationwide basis).

However, the Ninth Circuit recently vacated the nationwide injunction in *Ramos*, meaning that Defendants will soon be free to eliminate TPS protections for individuals from those countries. *See Ramos*, 2020 WL 5509753. More than 400,000 beneficiaries now stand to lose their legal status, *see Total Number of Current I-821 Temporary Protected Status (TPS) Individuals as of November 29, 2018*, USCIS (Nov. 29, 2018), https://perma.cc/WTN3-B483, and beneficiaries with removal orders, like the Individual Plaintiffs, could face imminent removal as soon as March 2021 for those from Sudan, Nicaragua, Nepal, Honduras, and November 2021 for El Salvadoran beneficiaries.[3]

Separately, on December 20, 2019, then-purported acting Director of USCIS, Ken Cuccinelli, issued the TPS Policy Alert, which eliminates USCIS as a forum through which TPS

[3] The injunction issued in *Saget v. Trump*, enjoining Defendants' termination of Haiti's TPS designation on a nationwide basis, remains in effect, *see* 375 F. Supp. 3d at 378, although the case is currently awaiting a decision from the Second Circuit. *See Saget v. Trump*, 19-cv-1685 (2d Cir. June 22, 2020), ECF No. 245 (case heard). Defendants stipulated in the *Ramos* litigation that "the TPS designations for Sudan, Nicaragua, Haiti, and El Salvador will remain in effect on a nationwide basis until the later of (a) 120 days following the issuance of any mandate to the district court reversing the injunction or (b) the Secretary's previously announced termination date." *Ramos*, 2020 WL 5509753, at *10 n.11; Stip. To Stay Proceedings, *Ramos*, No. 18-cv-1554 (N.D. Cal. Oct. 26, 2018), ECF No. 137 ¶ 6(c). TPS designations for Honduras and Nepal are now also free to take effect on the same timeline, as they have been held pending resolution of that litigation. *See Temporary Protected Status*, USCIS, https://perma.cc/96JC-8SBK (last updated Sept. 8, 2020).

beneficiaries with final removal orders who subsequently traveled abroad with USCIS's consent and lawfully returned can apply for adjustment of status. Under the new policy:

> [A] TPS beneficiary who obtains USCIS's authorization to travel abroad temporarily (as evidenced by an advance parole document) and who departs and returns to the United States in accordance with such authorization remains in the same exact immigration status and circumstances as when he or she left the United States. Such travel does not result in the execution of any outstanding removal order to which a TPS beneficiary may be subject.

TPS Policy Alert at 1. The TPS Policy Alert thus announced a nationwide policy under which a TPS beneficiary's departure no longer has any legal effect on a prior removal order, which remains un-executed. *See id.* USCIS has, in effect, divested itself of jurisdiction over adjustment applications submitted by TPS beneficiaries with removal orders who subsequently traveled abroad with USCIS's consent and lawfully returned. *See id.*

Although not mentioned directly in the TPS Policy Alert, documents implementing the new policy illustrate that Defendants rely entirely on language in Section 304(c) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA")—a set of technical amendments to the TPS statute—as the basis for this important change. *See, e.g.*, *Policy Manual*, USCIS, at Vol. 7, Pt. A, Ch. 3 n. 19 [hereinafter USCIS-PM], https://perma.cc/6RX9-FHJL (last updated Oct. 15, 2020) (citing MTINA § 304(c), Pub. L. 102-232, 105 Stat. 1733, 8 U.S.C. § 1254a note).

2. Harm to Plaintiffs

Each of the Individual Plaintiffs is a TPS beneficiary with a prior order of removal, who has traveled abroad with USCIS authorization and then lawfully returned, and who has applied (or is ready to apply) for adjustment of status with USCIS based on a qualifying relationship to a U.S. citizen. Prior to the TPS Policy Alert, each would have been eligible to apply to USCIS for adjustment of status. *See* Declaration of Blanca Mirna Romero del Cid ("Romero Decl.") ¶¶ 1, 3-

4, 7-8 (attached as Exhibit A); Declaration of Jose Oscar Velasco Garcia ("Velasco Decl.") ¶¶ 1, 4, 7, 10-11, 17, (attached as Exhibit B); Declaration of Vilma Haydee Hernandez ("Hernandez Decl.") ¶¶ 1, 4, 7-8, 15 (attached as Exhibit C); Declaration of Heroldine Bazile ("Bazile Decl.") ¶¶ 1, 2, 9-10, 16 (attached as Exhibit D); Declaration of Juan Francisco Medina ("Medina Decl."), ¶¶ 1, 3-4, 7-8, 14 (attached as Exhibit E); Declaration of Maria Floriselda Alvarez Gomez ("Alvarez Decl."), ¶¶ 1, 3-4, 7-8, 14 (attached as Exhibit F); Declaration of Yolanda Maritza Ramirez Martinez ("Ramirez Decl."), ¶¶ 1, 4, 6, 9-10, 16 (attached as Exhibit G). The TPS Policy Alert now stands in their way.

Indeed, the applications of Plaintiffs Romero, Velasco, Hernandez, and Bazile have already been denied by USCIS, even though they applied prior to the TPS Policy Alert's publication. *See* Romero Decl. ¶ 9; Velasco Decl. ¶ 12; Hernandez Decl. ¶¶ 9-10; Bazile Decl. ¶ 12. Plaintiff Medina, likewise, applied for adjustment before the TPS Policy Alert issued and, while his application remains pending before USCIS, the TPS Policy Alert makes an adverse outcome a virtual certainty. Medina Decl. ¶¶ 8-9. Plaintiffs Alvarez and Ramirez are both eager to apply for adjustment, and have taken predicate steps to successfully do so under Defendants' prior policy, but have so far abstained from applying; both understand that doing so while the TPS Policy Alert remains in effect would be futile. *See* Alvarez Decl. ¶¶ 8-9; Ramirez Decl. ¶ 11.

The TPS Policy Alert thus forecloses USCIS as a forum in which the Individual Plaintiffs can have their adjustment applications adjudicated on the merits, leaving only the possibility of adjustment through EOIR. But adjustment through EOIR is not directly available to any of the Individual Plaintiffs, as each of their respective orders were entered many years ago and their immigration court cases subsequently closed. *See* Romero Decl. ¶ 2 (1998); Velasco Decl. ¶ 4

(1995); Hernandez Decl. ¶ 4 (2001); Bazile Decl. ¶ 2 (1999); Medina Decl. ¶ 3 (1991); Alvarez Decl. ¶ 3 (1996); Ramirez Decl. ¶ 4 (1999). Rather, to have EOIR consider the merits of their adjustment application, each would first need to prevail on a motion to reopen their immigration cases. *See* Declaration of Genevieve Augustin ("Augustin Decl.") ¶¶ 13-14 (attached as Exhibit H) (describing the motion to reopen process for similarly situated TPS beneficiaries).

Overcoming this predicate barrier to even *applying* for adjustment is no easy feat: each became eligible for adjustment too long after their removal orders were entered, and later departed the United States under an effective removal order. *See* Romero Decl. ¶¶ 3, 7, 10; Velasco Decl. ¶¶ 4-5, 10; Hernandez Decl. ¶¶ 4, 7, 11; Bazile Decl. ¶¶ 2, 9, 13; Medina Decl. ¶¶ 3, 7, 10; Alvarez Decl. ¶¶ 3, 7, 10; Ramirez Decl. ¶¶ 4, 10, 12. Plaintiff Velasco additionally previously sought to reopen his case. Velasco Decl. ¶ 13. Thus, none has a statutory basis to have their case reopened. *See* 8 C.F.R. §§ 1003.2, 1003.23(b)(1). Instead, they must rely on the discretion of the immigration court to reopen their cases *sua sponte*—a highly discretionary form of relief that is granted only under certain "exceptional circumstances." *See Matter of J-J-*, 21 I. & N. Dec. 976, 976 (BIA 1997). What this means is that, at present, the TPS Policy Alert not only denies the Individual Plaintiffs access to the only forum in which they could directly apply for adjustment of status (USCIS), but it also effectively prevents them from applying for adjustment entirely.

Plaintiffs face these roadblocks to adjustment, moreover, at a time when Defendants are rapidly closing in on ending TPS protections altogether. Plaintiffs Romero, Velasco, Hernandez, Medina, Alvarez, and Ramirez—each of whom has TPS through El Salvador's designation, Romero Decl. ¶ 4; Velasco Decl. ¶ 7; Hernandez Decl. ¶ 4; Medina Decl. ¶ 4; Alvarez Decl. ¶ 4; Ramirez Decl. ¶ 6—could face removal as soon as November 2021. *See supra* 6-7. Plaintiff

Bazile, who has TPS through Haiti's designation, Bazile Decl. ¶ 3, could soon face similar risk should the injunction protecting Haiti's TPS be vacated on appeal. *See supra* 6-7. These looming deadlines are all the more pressing in view of the passage of time that can occur between an applicant's submission and the agency's determination. *See, e.g.*, Romero Decl. ¶¶ 8-9 (nearly 18-months between submission of adjustment application and USCIS's denial).

Plaintiff CARECEN is a non-profit corporation organized under the laws of the District of Columbia. Augustin Decl. ¶ 3. CARECEN works to foster the comprehensive development of the Latino population in the Washington, D.C. area by providing legal counseling and community education services on a range of issues, including immigration, housing and personal finance, and citizenship and naturalization. *Id.* ¶ 4. Among other low- or no-cost services, CARECEN advises individuals on the TPS program, including TPS beneficiaries with final removal orders who wish to adjust to LPR status. *Id.* ¶¶ 10-11. The TPS Policy Alert has disrupted CARECEN's mission and operations, including by forcing it to divert resources to studying the impact of the TPS Policy Alert, and establishing new screening and client intake procedures to ensure it does not take on cases where the individual will, because of the TPS Policy Alert, have to apply for adjustment of status through EOIR. *Id.* ¶¶ 13-18. These cases will require first prevailing on a potentially contested motion to reopen before EOIR will adjudicate an adjustment application on the merits, a result that is far from guaranteed. *Id.* ¶¶ 13-14. By the same token, the TPS Policy Alert has interfered with CARECEN's ability to form client relationships. *Id.* ¶ 17.

C. Proceedings in this Court.

Plaintiffs filed the Complaint (ECF No. 1) on August 26, 2020, asserting seven claims: (I) the TPS Policy Alert violates the INA, 8 U.S.C. § 1101(g), and is therefore contrary to law, Compl. ¶¶ 199-203; (II) the TPS Policy Alert is arbitrary and capricious, *id.* ¶¶ 204-09; (III) the

TPS Policy Alert was unlawfully issued without notice and comment, *id.* ¶¶ 210-14; (IV) the TPS Policy Alert was issued by an acting official, Mr. Cuccinelli, who did not meet the requirements of the Federal Vacancies Reform Act ("FVRA"), *id.* ¶¶ 215-21; (V) Mr. Cuccinelli's service violated the Appointments Clause of the Constitution, *id.* ¶¶ 222-26; (VI) the TPS Policy Alert is *ultra vires*, *id.* ¶¶ 227-29; and (VII) the TPS Policy Alert violates the equal protection guarantee incorporated into the Fifth Amendment because it discriminates on the basis of race, national origin, and nationality, and was motivated by animus and a desire to affect such discrimination, *id.* ¶¶ 230-34.

Plaintiffs now move for a preliminary injunction or, in the alternative, expedited partial summary judgment on Count I (contrary to law), Count II (arbitrary and capricious), Count III (notice and comment), and Count IV (FVRA).[4]

LEGAL STANDARD

A plaintiff seeking a preliminary injunction must establish that "[1] he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted). In this Circuit, courts "must employ" a "'sliding-scale approach' in evaluating the preliminary injunction factors," *Mott Thoroughbred Stables, Inc. v. Rodriguez*, 87 F. Supp. 3d 237, 243 & n.7 (D.D.C. 2015) (Walton, J.) (citing *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011)), pursuant to which "a strong showing on one factor could make up for a

[4] In advance of filing this motion, and pursuant to Local Civil Rule 7(m), Plaintiffs' counsel conferred with Defendants' counsel regarding the possibility of resolving this case on cross-motions for summary judgment and under a mutually agreeable briefing schedule. Defendants rejected that proposal. Plaintiffs thereafter informed Defendants that they would proceed with the filing of the instant motion, which Defendants represented they oppose. Defendants have further indicated that they intend to seek to have this case transferred to a different venue. Plaintiffs will oppose such a motion if and when it is filed.

weaker showing on another," *Sherley*, 644 F.3d at 392; *accord Nat'l Immigr. Project of Nat'l Lawyers Guild v. EOIR*, 456 F. Supp. 3d 16, 25 (D.D.C. 2020).

In resolving a motion for a preliminary injunction, "the court may advance the trial on the merits and consolidate it with the hearing." Fed. R. Civ. P. 65(a)(2). At that point, a movant is entitled to summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Generally, in cases under the Administrative Procedure Act, "[t]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Winder HMA LLC v. Burwell*, 206 F. Supp. 3d 22, 31 (D.D.C. 2016) (quotation omitted). Resolution of a summary judgment motion on an expedited basis is appropriate where there are no material facts in dispute and there is "good cause" to proceed to judgment quickly, 28 U.S.C. § 1657, such as to protect against the risk of "serious imminent" consequences that might result from delay. *See, e.g.*, *Arrington v. Grp. Hospitalization & Med. Servs., Inc.*, 806 F. Supp. 287, 288 (D.D.C. 1992) (approving "an expedited schedule" for cross-motions "in view of the plaintiff's serious imminent health hazard").

ARGUMENT

I. The TPS Policy Alert is unlawful.

Plaintiffs are likely to prevail on the merits and are entitled to judgment on any of four distinct claims.

First, Defendants' enactment of the TPS Policy Alert—which establishes a nationwide policy governing all USCIS field offices—was issued by a government official, Mr. Cuccinelli, who a judge of this Court has already held was unlawfully appointed as the acting Director of USCIS. The reasoning in that decision applies here with equal force. DHS created a new position for Mr. Cuccinelli, designated him as the "first assistant" to the vacant office of Director, and, on

the same day, purported to make Mr. Cuccinelli the acting Director on that basis. *L.M.-M.*, 442 F. Supp. 3d at 27. However, because Mr. Cuccinelli was never actually "subordinate to the principal office," he could not have been a valid "first assistant" under the FVRA—and therefore could not lawfully serve as the acting Director. *Id.* at 27-29. Like the policies at issue in *L.M.-M.*, the TPS Policy Alert should be set aside. *See infra* § I.A.

Second, the TPS Policy Alert is contrary to the INA, which unambiguously provides that one who has been ordered removed and then departs "shall be considered to have been deported or removed." 8 U.S.C. § 1101(g). Despite this clear language, and their own past practice of treating a departure as sufficient to execute a removal order, Defendants now purport to *clarify* in the TPS Policy Alert that authorized travel by a TPS beneficiary does not execute any removal order to which the individual is subject. *See infra* § I.B.

Third, Defendants acted arbitrarily and capriciously by failing to acknowledge that the TPS Policy Alert announces a change in policy, failing to account for the reasonable reliance interests that their decision upset, and failing to provide a reasoned justification for their decision. *See infra* § I.C.

Fourth, Defendants enacted the TPS Policy Alert without notice or an opportunity for the public to comment, despite the fact that it alters the legal rights of TPS beneficiaries with removal orders and so constituted a legislative rule for which pre-promulgation notice and comment were required. *See infra* § I.D.

A. Mr. Cuccinelli's appointment is unlawful under the Federal Vacancies Reform Act. (Count IV)

Because Mr. Cuccinelli was not lawfully appointed acting Director of USCIS, any directives he issued in that capacity, including the TPS Policy Alert, are unlawful. Indeed, Judge Moss held in March, in a decision that the government ultimately decided not to appeal, that Mr.

"Cuccinelli was not lawfully appointed to serve as acting Director and that, as a result, he lacked authority" to issue directives in that capacity. *L.M.-M.*, 442 F. Supp. 3d at 9. That analysis applies directly here, and this Court should reach the same conclusion.

The FVRA, enacted in 1998, provides the President with limited authority to appoint acting officials while preserving the Senate's advice and consent power—a power that serves as "a critical 'structural safeguard [] of the constitutional scheme.'" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)). The FVRA permits an individual to act as an official in an office requiring Presidential nomination and Senate confirmation (a so-called "PAS" office) under certain, specified circumstances. As a default rule, the FVRA provides that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily." 5 U.S.C. § 3345(a)(1). However, the President may select another individual to temporarily fill the vacancy if that individual either already serves in a PAS office, *id.* § 3345(a)(2), or if, during the year prior to the vacancy, the person served in the same agency for not less than 90 days and at the GS-15 rate of pay, *id.* § 3345(a)(3). These "carefully calibrated limits," *English v. Trump*, 279 F. Supp. 3d 307, 312 (D.D.C. 2018), require the President to select someone who "has already passed the tests of Senate confirmation and presidential appointment" or possesses "experience and seniority," *L.M.-M.*, 442 F. Supp. 3d at 28, if he wishes to override the FVRA's default rule.

Mr. Cuccinelli, however, could not have become the acting Director of USCIS through any of these enumerated paths. He had not been serving in a PAS office, *see id.* § 3345(a)(2), and had not been employed by USCIS (or, indeed, any other DHS component) in the year prior to the vacancy. *L.M.-M.*, 442 F. Supp. 3d at 10; Declaration of Catherine Vasquez ("Vasquez Decl.") (attached as Exhibit I), Ex. 1. Nor was Mr. Cuccinelli the first assistant at the time the vacancy

opened. *L.M.-M.*, 442 F. Supp. 3d at 10; Vasquez Decl., Ex. 2; *see* 5 U.S.C. § 3345(a)(1). To the contrary, the Deputy Director of USCIS appears to have been designated as the first assistant to the Director since the office's creation. *L.M.-M.*, 442 F. Supp. 3d at 10. On June 1, 2019, the date the resignation of the last confirmed Director of USCIS, Lee Francis Cissna, became effective, *see* Vasquez Decl., Ex. 3, Mark Koumans was serving as Deputy Director, *id.*, Ex. 2. *See L.M.-M.*, 442 F. Supp. 3d at 10.

To appoint Mr. Cuccinelli to serve as acting Director, Defendants attempted an end-run around the FVRA's requirements. Specifically, after forcing out the previous Director, then-acting Secretary of Homeland Security Kevin McAleenan took the unprecedented steps of creating an entirely new position of Principal Deputy Director, designating the holder of that office as first assistant to the Director, Vasquez Decl., Exs. 5 & 6, and appointing Mr. Cuccinelli as Principal Deputy Director, *id.*, Ex. 5. *L.M.-M.*, 442 F. Supp. 3d at 10. The orders documenting these steps show that both Mr. Cuccinelli's appointment as Principal Deputy Director, Vasquez Decl., Ex. 5, and the designation of the Principal Deputy Director as the first assistant, *id.*, Ex. 6, took place on the same day Defendants announced Mr. Cuccinelli's appointment as acting Director, *id.*, Ex. 4, and would lapse as soon as a new USCIS Director was confirmed, *id.*, Ex. 6. *L.M.-M.*, 442 F. Supp. 3d at 10.

This extraordinary, good-for-one-ride-only attempt to manipulate the structure of USCIS just to install Mr. Cuccinelli violated the FVRA in several ways. ***First***, as Judge Moss held, Mr. Cuccinelli never served as a first assistant within the meaning of the FVRA. ***Second***, even if Mr. Cuccinelli qualified as a first assistant, he was appointed to that role only after the directorship became vacant. And ***third***, multiple courts have also held that acting Secretary McAleenan's

service itself was legally unauthorized—meaning that he lacked the authority to appoint Mr. Cuccinelli in the first place. We discuss each point in turn.

1. Mr. Cuccinelli never served as a first assistant.

Judge Moss concluded that Mr. "Cuccinelli's appointment fails to comply with the FVRA" because he "never did and never will serve in a subordinate role—that is, as an 'assistant'—to any other USCIS official." *L.M.-M.*, 442 F. Supp. 3d at 24. "For this reason alone, [the government's] contention that his appointment satisfies the FVRA cannot be squared with the text, structure, or purpose of the FVRA." *Id.* at 24-25.

Starting with the text, Judge Moss reasoned that "under any plausible construction," the term first assistant "comprehends a role that is, in some manner and at some time, subordinate to the principal." *Id.* at 25. Applying that "commonsense understanding of the meaning of the default provision, [Mr.] Cuccinelli d[id] not qualify as a 'first assistant' because he was assigned the role of principal on day-one and, by design, he never ha[d] served and never will serve 'in a subordinate capacity' to any other official at USCIS." *Id.* at 26. "[L]abels—without any substance—cannot satisfy the FVRA's default rule under any plausible reading of the statute." *Id.*

Judge Moss also found that "[n]othing in the historical record of the Vacancies Act" supported the government's view. *Id.* at 27. The government "failed to identify a single example of a post-vacancy first assistant serving in an acting capacity prior to enactment of the FVRA." *Id.* at 27-28. Leaving aside whether Congress intended to allow post-vacancy first assistants, he found "no evidence" that "Congress or the Executive Branch imagine[d] that an agency could create a new position after a vacancy arose; … treat that new position as the "first assistant" to the vacant office; and … further specify that all would return to its original state once the PAS vacancy was filled." *Id.* at 28.

"The structure and purpose of the FVRA further confirm that Cuccinelli was not lawfully designated to serve as the acting Director of USCIS." *Id.* (citation omitted). The FVRA allows the President, and the President alone, to choose someone other than the first assistant "*as long as* that person is either a Senate-confirmed appointee … or an employee within the same agency." *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 11 (D.C. Cir. 2019) (emphasis added) (citation omitted). But the government's "reading of the FVRA," under which a subordinate official can manipulate internal lines of succession to appoint whoever they wish, "would decimate this carefully crafted framework." *L.M.-M.*, 442 F. Supp. 3d at 28. "The President would be relieved of responsibility and accountability for selecting acting officials, and the universe of those eligible to serve in an acting capacity would be vastly expanded," *id.*, rendering the FVRA nugatory.

Thus, Mr. Cuccinelli never served as first assistant within the meaning of the FVRA.

2. Mr. Cuccinelli was not the first assistant when the vacancy occurred.

Judge Moss's reasoning is enough to resolve this case. But, even assuming Mr. Cuccinelli was, at some point, a first assistant, he could only become the acting Director if he served as the first assistant *when the vacancy arose*. The statute mandates that, "[i]f an officer … dies, resigns, or is otherwise unable to perform the functions and duties of the office[,] … the first assistant … *shall* perform" those duties. 5 U.S.C. § 3345(a)(1) (emphasis added). It therefore provides what the Supreme Court characterized as a "mandatory and self-executing" procedure for immediately filling a vacancy with the first assistant at the moment the office becomes vacant. *SW Gen.*, 137 S. Ct. at 940; *see also Guedes*, 920 F.3d at 11 ("default"); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 557 (9th Cir. 2016) ("automatically"); *English*, 279 F. Supp. 3d at 312 ("default rule"). What matters, then, is who is serving as the first assistant at the time of that triggering event.

The structure and purpose of the FVRA likewise support this reading. As explained above, the FVRA provides only "two ways the President may override the automatic operation of (a)(1)," *Kitsap*, 816 F.3d at 557—otherwise, whoever is first assistant when the vacancy arises must automatically ascend. The Senate Report concerning the FVRA emphasizes this critical point multiple times. Specifically, the Report, which was issued before the bill was amended to permit the President to designate career staffers, *see* 5 U.S.C. § 3345(a)(3), explains that "[i]f there is no first assistant, the President must designate another Senate-confirmed official." S. Rep. 105-250, at 7 (1998). "[I]f there is no first assistant, and no presidential designation, no one may serve as acting officer." *Id.* at 14. Similarly, in describing Section 3346, which permits an acting official to continue to serve after a failed nomination, the Report states that it "allows the office to be temporarily filled by 'the person' who was originally eligible to be the acting officer at the time the vacancy arose." *Id.* at 15. Congress gave no sign that the President could circumvent the FVRA's limits by appointing a *new* first assistant to assume the acting role.

That is because conferring unconstrained power upon the President to fill vacancies with acting officials would conflict with Congress's fundamental purpose in enacting the FVRA. Only four statutes expressly assign the title of "first assistant" to a particular office and thereby prevent the Executive Branch from creating a new first assistant position. *See* 6 U.S.C. § 113(a)(1)(A), (F) (Deputy Secretary of Homeland Security and Under Secretary for Management); 7 U.S.C. § 2211 (Deputy Secretary of Agriculture); 10 U.S.C. § 137a(b) (Deputy Under Secretary of Defense); 28 U.S.C. § 508(a) (Deputy Attorney General). And even where a statute names a first assistant, or can be read to do so implicitly, the only limitation on the President's temporary appointment power would be whatever limitations that statute imposes on the selection of a first assistant. Accordingly, in many circumstances—like those here—the

underlying statute may not require Senate confirmation, tenure in the agency, or anything at all for an individual to serve as first assistant, meaning that the power to fill the vacancy would be unbounded. That result cannot be what Congress intended, especially since the vacancies laws are "generally strictly and narrowly interpreted," *Olympic Fed. Sav. & Loan Ass'n v. Dir., Off. of Thrift Supervision*, 732 F. Supp. 1183, 1198 (D.D.C. 1990).

Even if one were to assume that an official need not have been the first assistant at the time of the vacancy, then, at the very least, the *office* in which that individual serves must have existed at the time of the vacancy. Such a reading avoids giving the Executive Branch unbounded authority to leapfrog existing first assistants through procedural gimmicks. The Principal Deputy Director position had never existed at USCIS, and was designed to dissolve as soon as a new USCIS Director is appointed. The creation of that position solely so that the President could select an individual with no history of service at USCIS—and who lacked the support of the Senate—to act as its Director directly contravenes the FVRA.

3. Acting Secretary McAleenan lacked the authority to appoint Mr. Cuccinelli as Principal Deputy Director.

The third independent reason that Mr. Cuccinelli's service was unlawful results from *who* installed him in that role. As multiple district courts and the Government Accountability Office ("GAO") have recently concluded, "when [Secretary] Nielsen vacated the office, and [Kevin] McAleenan assumed the position of Acting Secretary, he was **not** next in line" under the operative Homeland Security Act succession order and therefore "assumed the role of Acting Secretary without lawful authority." *Casa de Maryland, Inc. v. Wolf*, No. 20-cv-2118-PX, 2020 WL 5500165, at *21 (D. Md. Sept. 11, 2020); *Immigrant Legal Res. Ctr.* ("*ILRC*") *v. Wolf*, No. 20-cv-5883-JSW, 2020 WL 5798269, at *8 (N.D. Cal. Sept. 29, 2020); *La Clinica de la Raza v. Trump*, No. 19-cv-04980-PJH, 2020 WL 4569462, at *13 (N.D. Cal. Aug. 7, 2020); *see also*

GAO, B-331650, Decision: Matter of Department of Homeland Security (Aug. 14, 2020) [hereinafter GAO Decision], https://perma.cc/TU6G-YCBD.

By extension, those who were installed within the Department pursuant to Mr. McAleenan's purported authority—like Defendant Cuccinelli—similarly lacked authority. *See Casa de Maryland*, 2020 WL 5500165, at *23 (reasoning that Mr. "McAleenan's appointment was invalid" so he also "lacked the authority to amend the order of succession" to install Secretary Wolf); *ILRC*, 2020 WL 5798269, at *8; *La Clinica*, 2020 WL 4569462, at *14; *see also GAO Decision*. Thus, Mr. Cuccinelli was never lawfully appointed as Principal Deputy Director, and so could not ascend to the position of acting Director even if that position qualified as the first assistant to the Director.

* * *

On any of these theories, Mr. Cuccinelli's service as acting Director was unlawful. Accordingly, the TPS Policy Alert—which was promulgated by the "Office of the Director" while Mr. Cuccinelli purported to fill that role—is necessarily unlawful as well. *See L.M.-M.*, 442 F. Supp. 3d at 36; *see also, e.g.*, *Casa de Maryland*, 2020 WL 5500165, at *23, 34 (concluding that Mr. McAleenan's appointment was likely invalid and that he lacked authority to alter succession orders within DHS, and preliminarily enjoining an immigration policy on that basis). "An action taken by any person who is not acting" lawfully "in the performance of any function or duty of a vacant office" to which the FVRA applies "shall have no force or effect," 5 U.S.C. § 3348(d)(1), and "may not be ratified," *id.* § 3348(d)(2). Mr. Cuccinelli promulgated the TPS Policy Alert pursuant to the USCIS Director's authority to "establish the policies for performing [their] functions" and to "establish national immigration services policies and priorities," 6 U.S.C. § 271(a)(3)(A), (D)—authority which he did not lawfully possess. Even if

the FVRA's enforcement mechanism were unavailable, the TPS Policy Alert is "not in accordance with law," and was taken "in excess of statutory … authority." 5 U.S.C. § 706; *see L.M.-M.*, 442 F. Supp. 3d at 34. It should therefore be preliminarily enjoined or, alternatively, set aside.

B. The TPS Policy Alert is contrary to the INA. (Count I)

Leaving aside that Defendant Cuccinelli lacked any lawful authority to enact the TPS Policy Alert, the Alert also fails to withstand scrutiny on its own terms. It violates the unambiguous statutory mandate of the INA that an individual "ordered deported or removed … who has left the United States, shall be considered to have been deported or removed in pursuance of law." 8 U.S.C. § 1101(g). Defendants' contrary interpretation rests on a flawed understanding of technical changes enacted in Section 304 of MTINA, Pub. L. 102-232, 105 Stat. 1733.

1. The TPS Policy Alert contradicts the unambiguous language of the INA.

By its plain terms, the INA mandates that, when an individual subject to a removal order "le[aves] the United States" and returns, they "shall be considered to have been … removed." 8 U.S.C. § 1101(g); *see Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (explaining that the term "shall" is "mandatory, not precatory"). Thus, "[t]he plain statutory text clearly envisions that any departure is sufficient to execute a removal order." *Nicusor-Remus v. Sessions*, 902 F.3d 895, 899 (9th Cir. 2018); *see also Mrvica v. Esperdy*, 376 U.S. 560, 563 (1964) (noting that there is "no doubt" under the statute that a departure after a deportation order executes the order); *Mansour v. Gonzales*, 470 F.3d 1194, 1199 (6th Cir. 2006) (finding that even a brief, voluntary trip abroad sufficed to execute a removal order).

That rule continues to govern even when the noncitizen who is subject to the removal order is a TPS beneficiary. The statutory text does not distinguish between types of removal

orders or categories of noncitizen. To the contrary, the statute clarifies that an order is deemed executed "irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." 8 U.S.C. § 1101(g). USCIS's predecessor, INS, recognized as much immediately after TPS was enacted, directing that "a TPS alien who departs the United States while a deportation order is in effect carries out his or her own deportation." Genco Op. No. 91-49 (INS), 1991 WL 1185160, at *3. USCIS continued to express this understanding for at least the next 27 years. *See, e.g.*, *Matter of R-D-S-B-*, 2018 WL 5981636, at *2 (concluding that a TPS beneficiary's "departure executed his final order of removal"); *In re* [Name redacted], 2013 WL 5504876, at *3 (drawing the same conclusion).

Nevertheless, the TPS Policy Alert purports to "[c]larif[y] that TPS beneficiaries who had outstanding, unexecuted final removal orders at the time of departure, remain TPS beneficiaries who continue to have outstanding, unexecuted final removal orders upon lawful return." TPS Policy Alert at 2. That understanding cannot be squared with Section 1101(g).

2. MTINA does not support the TPS Policy Alert.

In enacting the TPS Policy Alert, Defendants appear to have relied on Section 304(c) of MTINA, contained in a note to 8 U.S.C. § 1254a, which provides that a TPS beneficiary "whom the Attorney General authorizes to travel abroad temporarily and who returns to the United States in accordance with such authorization … shall be inspected and admitted in the same *immigration status* the alien had at the time of departure." MTINA § 304(c)(1)(A) (emphasis added). Rather than giving "immigration status" its ordinary meaning, Defendants apparently interpret it to encompass additional "circumstances," TPS Policy Alert at 1; 7 USCIS-PM A.3(D) n. 19, and all "[i]ncidents of status," 7 USCIS-PM B.2(A)(5) n. 74, https://perma.cc/KRD8-WDX5. This includes, in Defendants' view, virtually every fact about an individual's immigration history and background: "the manner of the alien's most recent entry into the United

States, pending removal orders, ongoing removal proceedings, applicable adjustment bars described in INA 245(c), and grounds of inadmissibility." *Id.* That reading of MTINA pushes the statute well past the breaking point.

a. The term "status," as it is used in MTINA—a statute amending the law creating the Temporary Protected *Status* program—refers to a TPS beneficiary's status as a TPS *recipient. See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted) ("a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context"); *Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute.'") (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)). That common-sense interpretation is consistent with how the term "status" is used throughout immigration law—*see, e.g.*, 8 U.S.C. § 1184 (differentiating between "immigrant" and "nonimmigrant status")—and with how it has been understood by other courts.

In *Gomez v. Lynch*, for example, the Fifth Circuit invoked the "canon against surplusage" to reject the government's argument that a noncitizen, who had traveled abroad and been "admitted" upon his lawful return, would revert to a status of "'present in the United States without being admitted or paroled'" once their status as a temporary resident lapsed. 831 F.3d 652, 658-60 & n.11 (5th Cir. 2016). "Status," the Fifth Circuit found, relates only to a noncitizen's "permission to be present." *Id.* at 658-59 & n.10. While "specific characteristics"—such as "lack of admission" or "work authorization"—may lead to "various subsidiary descriptions within th[e] categories" of immigrant status or nonimmigrant status, they are not part of the noncitizen's *status*. *Id.* ("[L]ack of admission can *cause* … unlawful status, but it is not *part* of that unlawful status."); *see In Re Blancas–Lara*, 23 I. & N. Dec. 458, 460 (BIA 2002)

(describing "status" as a "term of art" that "denotes someone who possesses a certain legal standing" as an immigrant or nonimmigrant). In other words, "circumstances" and "incidents" of status are not an immigrant's status, as that term is used in immigration law.

Defendants' contrary and expansive understanding of "status" would mean that MTINA implicitly repealed Section 1101(g)'s explicit statement that one who has been "ordered deported or removed" and "has left the United States, shall be considered to have been deported or removed," through a technical amendment to a different subchapter. But it is well-established that "repeals by implication are not favored." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (quotation marks omitted). Rather, "the intention of the legislature to repeal must be clear and manifest." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978). And it would be surpassing strange in this context, where MTINA was enacted, as its name implies, to make only "certain technical corrections," MTINA, Pub. L. 102-232, 105 Stat. at 1733 (preamble), so that the Immigration Act of 1990's substantive reforms would be "more logical, easier to implement, and *fairer* for all," *see* 102 Cong. Rec. 34,791 (1991) (emphasis added).[5]

b. Moreover, those technical corrections were intended to ensure that TPS beneficiaries, upon their return, were *not* deprived of procedural protections they would have enjoyed prior to their departure. The history surrounding MTINA's passage is instructive.

When INS first implemented TPS, it implemented the TPS statute's travel benefit through invocation of its "advance parole" authority to consent to travel for TPS beneficiaries. 8

[5] *See also* H.R. Rep. No. 102-383, at 2 (1991) ("In light of the scope and complexity of the 1990 [Immigration] Act … a number of technical errors in the [1990 Immigration Act] have come to [our] attention …. H.R. 3670 is principally designed to correct those errors"); *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Labor*, 1996 WL 420868, at *4 (D.D.C. July 22, 1996) ("In order to correct errors that Congress perceived in the [Immigration Act of 1990] … Congress passed the Miscellaneous and Technical Immigration and Naturalization Amendments").

U.S.C. § 1254a(f)(3); 8 C.F.R. § 244.15; *see* Genco Op. No. 91-49 (INS), 1991 WL 1185160, at *2. The TPS statute did not compel INS to look to its "advance parole" authority for this purpose, and the choice to do so by INS was consequential for TPS beneficiaries because "advance parole" is a form of advance travel authorization that comes with limitations. For instance, when seeking to re-enter the country pursuant to a grant of "advance parole," the TPS beneficiary would be permitted to physically re-enter but was not considered legally "admitted" and was instead viewed, in the eyes of the law, as continuing to stand at the border. *Id.* (citing 8 U.S.C. § 1182(d)(5)(A)). This legal fiction rendered the TPS beneficiary subject to "exclusion" proceedings upon re-entrance, with fewer procedural protections, rather than the deportation proceedings the beneficiary would have been subject to prior to their departure. *See id.* Thus, the manner in which INS deigned to permit travel inappropriately circumscribed important procedural rights of returning TPS beneficiaries in a manner not intended by Congress.

In response to this narrowing of procedural rights, Congress enacted MTINA, which amended, in relevant part, the portion of the Immigration Act of 1990 governing travel authorization for TPS beneficiaries. It provides that a TPS beneficiary "whom the Attorney General authorizes to travel abroad temporarily and who returns to the United States in accordance with such authorization … *shall be inspected and admitted* in the same immigration status the alien had at the time of departure," provided the individual remains eligible for TPS. MTINA § 304(c)(1) (emphasis added). MTINA thereby ensured that returning TPS beneficiaries would be "inspected and admitted" and thus protected against "exclusion" proceedings upon their return. *Id.*

Two months after MTINA's enactment, INS signaled that it had received Congress' message, describing it as "a conscious choice made by Congress to preserve certain deportation

and exclusion rights for TPS aliens who have been granted authorization to travel." U.S. Dep't of Justice, INS, Gen. Couns.'s Off., Genco Op. No. 92-10 (INS), Legal Opinion: Travel Authorization for Aliens Granted TPS, 1992 WL 1369349, at *1 (Feb. 27, 1992). INS further acknowledged that "Congress here *did not intend that authorized travel abroad be treated the same way as the grant of advance parole*," and recommended that changes to the travel authorization application (Form I-131) be made accordingly. *Id.* (emphasis added).[6] INS concluded that "TPS (and family unity) aliens granted authorization 'to travel' must be readmitted to the United States in the same immigration status they had at the time of departure," but gave no indication that it thought MTINA altered the ability of a TPS beneficiary to execute a removal order by traveling. *Id.*[7]

INS's contemporaneous understanding endured for more than two decades, during which time, USCIS continued to treat a TPS beneficiary's departure as executing a removal order. *See, e.g.*, *Matter of R-D-S-B-*, 2018 WL 5981636, at *2 (concluding that TPS recipient's "departure executed his final order of removal"). "Such a longstanding, uniform construction by the agency charged with administration of [a particular Act], particularly when it involves a contemporaneous construction of the Act by the officials charged with the responsibility of

[6] Despite this recognition, INS and now USCIS have continued to authorize travel under TPS "pursuant to the Service's advance parole provisions." 8 C.F.R. § 244.15.

[7] INS's General Counsel further confirmed this contemporary understanding through a 1993 opinion that addressed whether INS could "approve travel authorization for a TPS registrant who has been issued an order to show cause, without first cancelling the order to show cause." U.S. Dep't of Justice, INS, Gen. Couns.'s Off., Genco Op. No. 93-51 (INS), Your CO 1810.6-C Memorandum of September 15, 1992: Travel Permission for Temporary Protected Status (TPS) Registrants, 1993 WL 1503998, at *1 (Aug. 4, 1993). In concluding that travel could be authorized for such an individual, INS asserted that the individual would "remain subject to deportation" proceedings upon their return. *Id.* Because only a show cause order, but no final deportation order, had been granted to this individual prior to their departure, Section § 1101(g) would have no role to play; there was no final order to execute through departure. Rather, this opinion merely reflects the goal of MTINA: to ensure that a TPS beneficiary in this situation would be placed in a deportation proceeding upon their return, with its stronger procedural protections, as opposed to receiving only the limited procedural protections of an exclusion proceeding.

setting its machinery in motion, is entitled to great respect." *Chemehuevi Tribe of Indians v. Fed. Power Comm'n*, 420 U.S. 395, 409-10 (1975) (citations omitted).

Defendants have thus construed a technical amendment, intended to protect the rights of TPS beneficiaries, to instead contract the rights of TPS beneficiaries by implicitly repealing another longstanding statutory provision. That makes no sense—and there is no indication from the text, structure, or legislative history of MTINA that it is what Congress intended. For these reasons, the TPS Policy Alert cannot be harmonized with the plain terms of Section 1101(g) and so it must be preliminarily enjoined or set aside as contrary to law. *See* 5 U.S.C. § 706(2)(A).

C. The TPS Policy Alert is arbitrary and capricious. (Count II)

In addition to these other legal flaws, Defendants promulgated the Alert in an arbitrary and capricious manner. Under the Administrative Procedure Act, the Court "shall … hold unlawful and set aside agency action … found to be arbitrary [or] capricious." *Id.* An agency's action is arbitrary and capricious if it

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Moreover, the agency is obligated to provide "a more detailed justification" if its change in policy disrupts "serious reliance interests that must be taken into account." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (citation omitted).

Among the TPS Policy Alert's most obvious infirmities is that it runs roughshod over the settled reliance interests of TPS beneficiaries and the organizations that provide legal services to them. It is well established that "[a]n agency cannot … ignore reliance interests." *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1111 (D.C. Cir. 2019). Courts, including the Supreme Court just

this year, have repeatedly struck down changes in immigration policies where agencies "failed to address whether there was 'legitimate reliance'" on the agency's prior immigration policy. *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (citation omitted); *J.O.P. v. DHS*, 409 F. Supp. 3d 367, 378 (D. Md. 2019) (redeterminations of "unaccompanied alien child" status); *NAACP v. Trump*, 298 F. Supp 3d 209, 240 (D.D.C. 2018) (rescission of Deferred Action for Childhood Arrivals, even though recipients "had structured their education, employment, and other life activities on the assumption that they would be able to renew their DACA benefits"), *adhered to on denial of reconsideration*, 315 F. Supp. 3d 457 (D.D.C. 2018), *aff'd and remanded sub nom. Regents*, 140 S. Ct. 1891.

The TPS Policy Alert reversed a longstanding practice upon which individuals and organizations had reasonably relied. From the time the TPS program was enacted, federal immigration authorities have taken the view that if "an alien subject to a deportation order departs the United States, the departure executes the deportation order." Genco Op. No. 91-49 (INS), 1991 WL 1185160 at *3. Prior to the TPS Policy Alert, USCIS consistently accepted jurisdiction over applications for adjustment of status submitted by TPS beneficiaries subject to removal orders who had traveled and lawfully returned. *See* Augustin Decl. ¶ 11; *see also* USCIS, Policy Memorandum: *Matter of Z-R-Z-C-*, Adopted Decision 2020-02, 2020 WL 5255637 at *9 n.11 (AAO Aug. 20, 2020) (noting that INS and USCIS historically took a different view "of the statutory mandate of MTINA to TPS-authorized travel").

Indeed, Defendants have, since the TPS Policy Alert was enacted, admitted as much. In a parallel change, announced on August 20, 2020, Defendants have re-interpreted MTINA § 304 to mean that a TPS beneficiary who travels does not, upon their lawful return, become inspected and admitted or paroled, and thereby remains ineligible to adjust their status. *See* Policy

Memorandum*: Matter of Z-R-Z-C-*, 2020 WL 5255637.[8] In that change, Defendants "[r]ecogniz[e]," however, that their re-interpretation of MTINA § 304—the same section of MTINA on which they are apparently relying for the TPS Policy Alert—breaks with INS and USCIS's "past practice," and that this change affects the "reasonable reliance" placed on this "past practice" by TPS beneficiaries. *See id.* at 1. Accordingly, Defendants have applied this change only "prospectively to TPS recipients who departed and returned" under the TPS statute's travel authorization "after the date" the Adopted Decision was announced—*i.e.*, after August 20, 2020. *Id.*

The same serious reliance interests Defendants recognize in *Matter of Z-R-Z-C-* likewise grew around Defendants' historical understanding of the effect of a departure on a removal order. Individual TPS beneficiaries, like Plaintiffs, following a well-established approach for adjusting status, secured travel authorization from USCIS, spent money to travel to a country they once fled and to which they have no desire to return permanently, and then spent more money on attorneys and fees to submit their application for adjustment of status to USCIS. *See, e.g.*, Romero Decl. ¶¶ 7-8; Velasco Decl. ¶ 10-11; Hernandez Decl. ¶¶ 7-8; Bazile Decl. ¶¶ 9-10; Medina Decl. ¶¶ 7-8; Alvarez Decl. ¶¶ 7-8; Ramirez Decl. ¶¶ 9-10. This now-wasted effort was earnestly undertaken out of a good faith belief that it would allow them to secure a more permanent status for themselves and the lives they have built with their U.S. citizen family members, as it would have prior to the TPS Policy Alert. Instead, each is left vulnerable to the possibility of removal, *supra* 9-11, which would force them to leave behind U.S. citizen family

[8] Plaintiffs' citation to *Matter of Z-R-Z-C-* does not reflect their view that it amounts to a lawful or appropriate change.

and friends, Romero Decl. ¶ 12, move out of family homes, Velasco Decl. ¶ 9, close businesses, *id.*, take their U.S. citizen children out of their schools, Alvarez Decl. ¶¶ 5, 13, and more.

The TPS Policy Alert also disrupted the reliance interests of legal services providers, like CARECEN. Augustin Decl. ¶¶ 12-18. CARECEN provides legal services to many Central American TPS beneficiaries in the Washington, D.C. area, including those from El Salvador, Honduras, and Nicaragua, *id.* ¶¶ 6-7, and has relied on the settled understanding that departure would execute a TPS beneficiary's removal order in advising their clients on how to adjust status through USCIS. *Id.* ¶¶ 10-11. Moreover, CARECEN's organizational mission and low, flat-fee service model depend on it being able to serve its clients efficiently, as it was able to do by helping TPS beneficiaries with removal orders adjust status through USCIS. Eliminating the viability of applying through USCIS means that CARECEN will be able to help fewer TPS beneficiaries regularize their status; CARECEN is not able to take on representations before EOIR, which require a larger investment of resources and have a lower chance of success. *Id.* ¶¶ 7-8, 11-18.

"Agencies are free to change their existing policies," but, in doing so, they "must be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016) (quoting *Fox Television Stations*, 556 U.S. at 515). Defendants do not even acknowledge, however, that they are changing their position—instead obscuring it as a mere *clarification*. *See* TPS Policy Alert at 1. And, as demonstrated above, there is no indication that Defendants considered the reliance interests of TPS beneficiaries or the practitioners who represent them, how disruptive this change would be for those applying for adjustment, or the position in which it would leave TPS beneficiaries at a time in which Defendants are simultaneously seeking to end much of the

TPS program altogether. Defendants' failure to at least acknowledge these important interests is fatal to the TPS Policy Alert. *See Fox Television Stations*, 556 U.S. at 515. At a minimum, the TPS Policy Alert should have been given only prospective effect.

In any event, even if Defendants were writing on a blank slate, they would still be obligated to give "adequate reasons" for their decision to implement the TPS Policy Alert. *Encino Motorcars*, 136 S. Ct. at 2120. Because Defendants have failed to provide "even a minimal level of analysis" for the TPS Policy Alert, it is "arbitrary and capricious and so cannot carry the force of law." *Id.* Indeed, the TPS Policy Alert offers virtually no explanation for the promulgated change beyond noting that the change amounts to a mere *clarification*. *See* TPS Policy Alert at 1. Nor do Defendants explain how the interpretation reflected in the TPS Policy Alert is consistent with the plain language of the INA, 8 U.S.C. § 1101(g)—"an important aspect of the problem" that Defendants evidently failed to consider. *State Farm*, 463 U.S. at 43; *see Magneson v. Mabus*, 85 F. Supp. 3d 221, 226 (D.D.C. 2015) (military board of corrections' "fail[ure] to address … arguments that are not facially frivolous" rendered its decision arbitrary and capricious) (quotation marks omitted).

Defendants have since offered some post hoc clues into their thinking. They now assert, in a policy manual update originally published on October 6, 2020,[9] that, because MTINA § 304(c) was meant "to return the TPS beneficiary to the 'same immigration status the alien had at the time of departure,' this provision of MTINA 'cannot be interpreted to put TPS recipients in a better position than they had been upon their physical departure from the United States[.]'" 7 USCIS-PM B.2(A)(5). But, as discussed above, Defendants do not explain how their reading is

[9] *See USCIS Updates Policy Guidance Regarding Temporary Protected Status and Eligibility for Adjustment of Status*, USCIS: News Alerts (Oct. 6, 2020), https://perma.cc/S3ZQ-9R2Q.

consistent with the INA, nor do they explain why their concern over putting TPS recipients in "a better position" should control over Congress's intent. Defendants also provide no support for their capacious reading of "immigration status" as including all "[i]ncidents" *id.* at n. 74, or "circumstances" of their immigration history, TPS Policy Alert at 1; 7 USCIS-PM A.3(D) n. 19. Regardless, even if this belated explanation held water, it is "nowhere to be found in the" TPS Policy Alert and so "can be viewed only as [an] impermissible *post hoc* rationalizations." *Regents*, 140 S. Ct. at 1908-09. It cannot save the arbitrary and unreasoned TPS Policy Alert.

D. Defendants unlawfully enacted the TPS Policy Alert without notice or an opportunity for the public to comment. (Count III)

The promulgation of the TPS Policy Alert was also procedurally defective. Under the APA, a reviewing court must set aside an agency's action if it was undertaken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Specifically, an agency must provide "[g]eneral notice of proposed rule making" in the Federal Register, as well as "an opportunity to participate in the rule making through submission of written data, views, or arguments," before promulgating a rule. 5 U.S.C. § 553(b). Notice and comment serves both the public's and the agency's best interests because it provides a chance for "interested parties to criticize projected agency action before that action" becomes final and it also "allows the agency to benefit from the parties' suggestions." *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981) (citation omitted). Defendants failed to provide notice and comment before enacting the TPS Policy Alert and so it must be enjoined or set aside.

Unlike so-called "interpretative rules," "legislative rules" are those that "'have the force and effect of law and are … accorded that weight in the adjudicatory process.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Legislative rules "'supplement[] a statute, adopt[] a new position inconsistent with

existing regulations, or otherwise effect[] a substantive change in existing law or policy.'" *Fed. Law Enf't Officers Ass'n v. Rigas*, 19-cv-735 (CKK), 2020 WL 4903843, at *4 (D.D.C. Aug. 20, 2020) (quoting *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014)). The TPS Policy Alert is plainly a legislative rule under this standard.

To start, the TPS Policy Alert attempts to supplement—really, to undermine—Section § 1101(g)'s unambiguous language governing the effect of travel on an existing removal order. It announces a new position for Defendants that deviates from their previously held view that travel executes an existing removal order, *see* Genco Op. No. 91-49 (INS), 1991 WL 1185160 at *3, conferring jurisdiction over a subsequent application for adjustment on USCIS, *see* Augustin Decl. ¶ 11. Those are the hallmarks of a legislative rule. *See Mendoza*, 754 F.3d at 1021.

Moreover, it cannot be disputed that the TPS Policy Alert has been "accorded … weight in the adjudicatory process." *Perez*, 575 U.S. at 97 (quotation omitted). Defendants have incorporated it into their Policy Manual—a document "contain[ing] the official policies of USCIS" that is "followed by all USCIS officers in the performance of their duties," *see About the Policy Manual*, USCIS, https://perma.cc/S899-D3Y3 (last updated Oct. 15, 2020)—and it is being used to determine whether USCIS will exercise jurisdiction over adjustment applications or deny them outright, *see supra* 8-9 (describing applications of Ms. Romero, Mr. Velasco, Ms. Hernandez, and Ms. Bazile, which USCIS denied in reliance on the TPS Policy Alert).

Defendants attempt to minimize the significance of their action by terming it a mere *clarification*. *See* TPS Policy Alert at 1-2. But where the policy amounts to "an agency chang[ing] the rules of the game," as is the case here, "more than a clarification has occurred," and notice and comment is required. *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). The TPS Policy Alert plainly did change the rules mid-game: relying on the old rules, TPS

beneficiaries, like the Individual Plaintiffs, expended time and money navigating the adjustment of status process, and even submitting applications to USCIS *before* the TPS Policy Alert was issued. *See supra* 9, 30. That effort was wasted once Defendants enacted the TPS Policy Alert. *See supra* 9. The rules have also been changed for advocates like CARECEN, which structured its approach to serving TPS beneficiaries—an important constituency for its organizational mission—around the notion that it could help TPS beneficiaries with removal orders apply to adjust their status through USCIS by assisting them with the process of obtaining authorization to travel. *Supra* 31.

The TPS Policy Alert should therefore be understood as a legislative rule that required Defendants to adhere to the APA's pre-promulgation notice and comment procedures. Their failure to provide that process is fatal to the TPS Policy Alert.

II. Plaintiffs suffer irreparable harm from the TPS Policy Alert.

To merit a preliminary injunction, a plaintiff must show injury that is "both certain and great, actual and not theoretical, beyond remediation, and of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quotation omitted). There is no question that Plaintiffs suffer such harm from the TPS Policy Alert.[10]

[10] Because Plaintiffs are each suffering irreparable harm, each has also suffered injury for purposes of Article III standing. *See League of Women Voters of United States v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (holding that where the challenged action "make[s] it more difficult for the [plaintiff] to accomplish their primary mission . . . they provide injury for purposes both of standing and irreparable harm"); *In re Navy Chaplaincy*, 516 F. Supp. 2d 119, 125 (D.D.C. 2007) ("In the bulk of cases, a finding of an irreparable injury a fortiori signals the existence of an injury-in-fact sufficient to confer standing."), *aff'd*, 534 F.3d 756 (D.C. Cir. 2008).

A. The Individual Plaintiffs suffer irreparable harm and are threatened with even more grievous harm.

As a consequence of the TPS Policy Alert, the Individual Plaintiffs are unable to obtain the certainty of lawful permanent resident status. The TPS Policy Alert has divested USCIS of jurisdiction over their applications and so it has already denied the applications of Plaintiffs Romero, Velasco, Hernandez, and Bazile, and likely will do the same for Plaintiff Medina. *See supra* 9. And while, in Defendants' view, EOIR has jurisdiction over such applications, it will not be able to adjudicate the merits of the Individual Plaintiffs' applications unless and until they are able to reopen their underlying immigration cases—a procedural hurdle overcome only if "exceptional circumstances" warrant. *See Matter of J-J-*, 21 I. & N. Dec. at 976; *see also* 8 C.F.R. §§ 1003.2, 1003.23(b)(1). Thus, practically speaking, the TPS Policy Alert closes the doors to adjustment of status for TPS beneficiaries with pre-existing removal orders.

Moreover, prior to the TPS Policy Alert, the consequence of the Individual Plaintiffs' travel meant, at least, that they would not be subject to an actionable final removal order upon the expiration of their current lawful status under TPS. *See* TPS Policy Alert at 1. That is no longer the case. In Defendants' eyes, the Individual Plaintiffs' prior removal orders remain valid, and so the Individual Plaintiffs are left exposed to the prospect of removal once Defendants formally end the TPS program.[11] That could happen as soon as November 2021 for Plaintiffs Romero, Velasco, Hernandez, Medina, Alvarez, and Ramirez, who have TPS through the designation of El Salvador. *See supra* 10-11; *see also Ramos*, 2020 WL 5509753. Plaintiff

[11] The TPS Policy Alert also denies TPS beneficiaries who have traveled the statutorily prescribed effect of that travel: execution of any removal order to which they were previously subject. *See* 8 U.S.C. § 1101(g). The loss of such legal entitlements constitutes irreparable harm. *See Apotex, Inc. v. Food & Drug Admin.*, No. 06-cv-627 (JDB), 2006 WL 1030151, at *17 (D.D.C. Apr. 19, 2006) ("[L]os[ing] a statutory entitlement … is a harm that has been recognized as sufficiently irreparable."), *aff'd and remanded*, 449 F.3d 1249 (D.C. Cir. 2006); *Vargas v. Meese*, 682 F. Supp. 591, 595 (D.D.C. 1987) (finding irreparable harm where plaintiffs' "statutory right to file" for change of status under Special Agricultural Worker program "will be mooted").

Bazile, who has TPS through Haiti's designation, Bazile Decl. ¶ 3, could soon face similar risk should the injunction protecting Haiti's TPS be vacated on appeal. *See supra* 6-7. That lead time is vanishingly small when measured against the time it often takes USCIS to adjudicate, or re-process, adjustment applications. *See, e.g.*, Romero Decl. ¶¶ 8-9 (describing nearly 18-month processing time). If TPS beneficiaries are to have a fair shot at securing LPR status before their current status is terminated, they will need speedy relief providing access to that process.

The TPS Policy Alert thus "blocks access to an existing legal avenue for avoiding removal"—*i.e.*, adjustment of status—and also leaves "plaintiffs in limbo and in fear of removal." *Kirwa v. United States Dep't of Def.*, 285 F. Supp. 3d 21, 43 (D.D.C. 2017) (citations omitted). That constitutes irreparable harm. *Id.*; *see also Stellar IT Sols., Inc. v. USCIS*, 18-cv-2015 (RC), 2018 WL 6047413, at *11 (D.D.C. Nov. 19, 2018) (finding irreparable harm where USCIS action threatened to leave an individual "without legal status" and subject to "be[ing] placed in removal proceedings at any time"); *Yea Ji Sea v. DHS*, 18-cv-6267-MWF, 2018 WL 6177236, at *8 (C.D. Cal. 2018) (finding that Plaintiff's "lack of legal status" from government's delay of naturalization application constituted irreparable injury).

Once their status under TPS formally ends, there will be nothing stopping Defendants from immediately deporting the Individual Plaintiffs away from their U.S. citizen family members, businesses, property, and communities, depositing them far from home into countries from which they once fled and to which each fear returning. *See, e.g.*, Romero Decl. ¶¶ 12-13; Velasco Decl. ¶¶ 15-16; Hernandez Decl. ¶¶ 13-14; Bazile Decl. ¶ 15; Medina Decl. ¶¶ 12-13; Alvarez Decl. ¶¶ 12-13; Ramirez Decl. ¶¶ 14-15. The harm that would result from these families being torn apart and the Individual Plaintiffs sent to countries that are foreign, and potentially dangerous, to them is incalculable. It is certainly irreparable. *Kirwa*, 285 F. Supp. 3d at 43.

B. CARECEN suffers irreparable harm.

CARECEN is also irreparably harmed by the TPS Policy Alert, which has frustrated its organizational mission and forced it to divert resources. "An organization is harmed if the actions taken by [the defendant] have perceptibly impaired the [organization's] programs." *League of Women Voters*, 838 F.3d at 8 (quotation omitted). "If so, the organization must then also show that the defendant's actions directly conflict with the organization's mission." *Id.* (quotation omitted). If those harms are "beyond remediation," then they are irreparable. *Id.*; *see also Open Cmtys. All. v. Carson*, 286 F. Supp. 3d 148, 174 (D.D.C. 2017).

CARECEN's injuries meet this standard. The TPS Policy Alert "perceptibly impairs" CARECEN's efforts to provide no- or low-cost legal services to the Washington, D.C. area Central American immigrant community, including many TPS beneficiaries, in order to, among other objectives, "[i]ncreas[e] the number of Latino immigrants who maintain or obtain lawful status that enables them to live and work in the United States" and "the number of Latino U.S. citizens." Augustin Decl. ¶ 16; *see also id.* ¶¶ 5-7, 17.

Indeed, CARECEN's injuries are precisely akin to those recognized by the D.C. Circuit. In *League of Women Voters*, the Court held that the League was irreparably harmed by a decision of the Federal Elections Commission that allowed states to require proof of citizenship for voter registration because allowing this requirement created "new obstacles" which "unquestionably make it more difficult for the League to accomplish their primary mission of registering voters." 838 F.3d at 9. So too here. The TPS Policy Alert blocks CARECEN from using one of its primary tools for helping the Central American immigrant community, and its sizeable TPS beneficiary population, apply to adjust their status. Augustin Decl. ¶¶ 10-13. That is an impediment that strikes at the very heart of CARECEN's mission. *Id.* ¶¶ 16-17. In response, CARECEN has been forced to divert resources to understand the implications of the TPS Policy

Alert, and to establish internal procedures—including new client screening protocols—to adapt to this new, more difficult operating landscape. *Id.* ¶ 17. That amounts to irreparable harm. *See, e.g.*, *Open Communities All.*, 286 F. Supp. 3d at 178.

The TPS Policy Alert—because it makes adjusting status unduly burdensome for all TPS beneficiaries with removal orders (and impossible for some)—has further harmed CARECEN by preventing it from forming relationships with prospective clients. Augustin Decl. ¶ 17. This too amounts to irreparable harm. *See, e.g.*, *League of Women Voters*, 838 F.3d at 9 (finding irreparable harm where voter registration organization was impeded by agency action from registering voters); *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 78 (D.D.C. 2001) (finding irreparable harm in financial advisor's "loss of its customers and by the possibly permanently damaged relationships with its customers").

III. The balance of equities and the public interest favor Plaintiffs.

The balance of the equities and public interest factors "merge when the Government is the opposing party." *Guedes*, 920 F.3d at 10 (quotation omitted). Ultimately, in considering whether to grant a preliminary injunction, the Court must "balance the competing claims of injury and ... consider the effect on each party of the granting or withholding of the requested relief." *Jacinto-Castanon de Nolasco v. ICE*, 319 F. Supp. 3d 491, 503 (D.D.C. 2018) (quoting *Texas Child.'s Hosp. v. Burwell*, 76 F.Supp.3d 224, 245 (D.D.C. 2014)). Here, that balance favors a preliminary injunction.

First, as described above, the TPS Policy Alert violates multiple federal statutes and Defendants' own regulations. The D.C. Circuit has emphasized that "there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *League of Women Voters*, 838 F.3d at 12 (quotation omitted); *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) (recognizing that "there is an overriding public

interest … in the general importance of an agency's faithful adherence to its statutory mandate"). In particular, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (citation omitted). Applying these principles in the immigration context, courts in this district have issued injunctions against policies they deemed to be "likely unlawful" and concluding that "[t]he Government 'cannot suffer harm from an injunction that merely ends an unlawful practice.'" *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (quotation omitted).

Second, Defendants have offered no rationale in the TPS Policy Alert justifying their decision to adopt this new policy, nor have they even acknowledged that this shifts the ground under the feet of TPS beneficiaries who had come to rely on USCIS's past practice at a time when Defendants are trying to end TPS protections altogether. *See* TPS Policy Alert. By the same token, Defendants can demonstrate no harm from simply maintaining their preexisting policies. Preliminarily enjoining Defendants from relying on the TPS Policy Alert until the Court can determine its lawfulness would therefore merely "preserve the relative positions of the parties" as they existed prior to December 20, 2019. *Robertson v. Cartinhour*, 429 F. App'x 1, 2 (D.C. Cir. 2011) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)); *see also ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 53 (D.D.C. 2014) ("[T]he balance of the equities tips in [movant's] favor because issuance of an injunction would preserve the status quo.").

Third, there is always "a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009). As explained above, the TPS Policy Alert not only shuts the door on adjustment of status for TPS beneficiaries with removal orders, but also effectively

revives removal orders that, under USCIS's prior practice, would have been deemed executed. Thus, the TPS Policy Alert has, in a single move, blocked TPS beneficiaries from securing their status and made them more vulnerable in their current position. While Defendants "ha[ve] substantial discretion in the area of immigration, … [t]he public interest surely does not cut in favor of permitting an agency to fail to comply with its own binding policies impacting the rights of individuals." *Aracely v. Nielsen*, 319 F. Supp. 3d 110, 157 (D.D.C. 2018) (citations omitted). Thus, both the balance of the equities and the public interest favor injunctive relief.

IV. The Court should enjoin the TPS Policy Alert on a nationwide basis.

For the reasons given above, Plaintiffs are entitled to a preliminary injunction. "[T]he scope of a district court's equitable powers ... is broad, for breadth and flexibility are inherent in equitable remedies." *Brown v. Plata*, 563 U.S. 493, 538 (2011) (quotation omitted). The Court should therefore exercise its equitable powers to enjoin Defendants from processing any adjustment applications on the basis of the TPS Policy Alert or any similar policy.

By its terms, the TPS Policy Alert imposes a binding, nationwide policy governing USCIS's treatment of adjustment of status applications. Indeed, the geographic diversity of the Plaintiffs shows a measure of the policy's reach—it has produced application denials submitted by residents of Florida, Virginia, Maryland, and Washington, D.C. *See* Romero Decl. ¶¶ 1, 9 (resident of Virginia); Velasco Decl. ¶¶ 1, 12 (resident of Virginia); Hernandez Decl. ¶¶ 1, 9 (resident of Washington, D.C.); and Bazile Decl. ¶¶ 1, 12 (resident of Florida); Medina Decl. ¶¶ 1, 8-9 (resident of Maryland); Alvarez Decl. ¶¶ 1, 9 (resident of Virginia); Ramirez Decl. ¶¶ 1, 11 (resident of Virginia). Where an agency's unlawful actions "have 'nationwide impact' and … cause injuries of 'sufficient similarity to the plaintiff[s']' to other … individuals throughout the country," comparably broad relief is warranted. *District of Columbia v. USDA*, 444 F. Supp. 3d 1, 51 (D.D.C. 2020) (quoting *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018)). Indeed, the

D.C. Circuit has specifically rejected the assertion that injunctive relief must be limited to the parties, reasoning that "a single plaintiff, so long as he is injured by the rule, may obtain 'programmatic' relief that affects the rights of parties not before the court." *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).

Nationwide relief is particularly appropriate in cases under the APA. In *National Mining Association*, the D.C. Circuit explained that "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." 145 F.3d at 1409 (quotation omitted). Courts have therefore noted that vacatur is, by its nature, nationwide. *See O.A. v. Trump*, 404 F. Supp. 3d 109, 153 (D.D.C. 2019); *D.A.M. v. Barr*, No. 20-cv-1321 (CRC), 2020 WL 5525056, at *7 (D.D.C. Sept. 15, 2020); *Capital Area Immigrants' Rts. Coal. v. Trump*, No. 19-cv-2117 (TJK), 2020 WL 3542481, at *22 (D.D.C. June 30, 2020). "The same reasoning has force in the preliminary injunction context." *District of Columbia*, 444 F. Supp. 3d at 49 (applying *Nat'l Mining Ass'n*). Because Plaintiffs are likely to obtain vacatur, nationwide preliminary relief is similarly warranted. *See id.* at 55 (granting a preliminary injunction); *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 397-99 (M.D.N.C. 2019) (same).

The nature and timing of Plaintiffs' claims also favors nationwide relief. "[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (citation omitted). Because Plaintiffs "are clearly making a facial challenge" to the TPS Policy Alert—one that argues it is "infirm regardless of how it is applied"—nationwide relief is appropriate. *Doe 2 v. Mattis*, 344 F. Supp. 3d 16, 25 (D.D.C. 2018); *see also District of Columbia*, 444 F. Supp. 3d at 49 ("Nationwide preliminary injunctive relief guarantees that a rule shown likely to be proven

unlawful does not become effective, providing complete relief to the plaintiffs while the rule's legality is finally adjudicated."). Nationwide relief here would also further the constitutional interest in a uniform federal immigration policy. "In immigration matters," courts "have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (citation omitted). There is no reason why some TPS beneficiaries with removal orders, but not others, should be able to obtain the legal protections of lawful permanent resident status. Finally, because TPS beneficiaries who are unable to adjust their status will become vulnerable to removal in short order, "[n]ationwide relief at the preliminary stage also ensures that complete relief remains available to the plaintiffs after that final adjudication." *District of Columbia*, 444 F. Supp. 3d at 49. Thus, the Court should enjoin the TPS Policy Alert on a nationwide basis.

V. In the alternative, the Court should convert Plaintiffs' motion to a motion for partial summary judgment, expedite consideration, and enter judgment for Plaintiffs.

For the reasons explained above, Plaintiffs are likely to prevail on the merits, and their injuries tip the scale toward relief. Nevertheless, if the Court believes that summary judgment would be a more efficient way of resolving this case, Plaintiffs respectfully request that the Court convert this motion to a motion for partial summary judgment, expedite briefing and consideration of that motion, including the submission of an administrative record, vacate the TPS Policy Alert on its face, order Defendants to reprocess the applications of Plaintiffs Romero, Velasco, Hernandez, and Bazile, and to complete their consideration of Plaintiff Medina's application for adjustment, and enter judgment for Plaintiffs.

Such expedited consideration is consistent with the federal rules. "Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing." Fed. R. Civ. P. 65(a)(2). And "a party may file

a motion for summary judgment at any time until 30 days after the close of all discovery." Fed. R. Civ. P. 56(b); *see also* 28 U.S.C. § 1657(a) ("[T]he court shall expedite the consideration of any action … if good cause therefor is shown."). "In APA cases early summary judgment motions are often appropriate, as '[t]he entire case on review is a question of law, and only a question of law.'" *Am. Hosp. Ass'n v. HHS*, 18-cv-2112 (JDB), 2018 WL 5777397, at *2 (D.D.C. Nov. 2, 2018) (quoting *Marshall Cty. Health Care Auth. v. Shalala*, 988 F. 2d 1221, 1226 (D.C. Cir. 1993)). Courts therefore can and do adjudicate APA cases on the basis of expedited cross-motions for summary judgment where there is reason for expedition. *See, e.g.*, *L.M.-M.*, 442 F. Supp. 3d at 15; *Pol'y & Research, LLC v. HHS*, 313 F. Supp. 3d 62, 71 (D.D.C. 2018); *Clean Water Action v. Pruitt*, 17-cv-0817 (KBJ), 2017 WL 8292486, at *1 (D.D.C. Aug. 4, 2017); *Sierra Club v. Pruitt*, 238 F. Supp. 3d 87, 89 (D.D.C. 2017).

Expedition is warranted here. The issues presented by Plaintiffs' motion are principally legal, and can be addressed quickly and efficiently through briefing on dispositive cross-motions. Indeed, other courts have already favorably resolved the substance of Plaintiffs' FVRA claim. For the reasons explained above, the TPS Policy Alert unlawfully impedes TPS beneficiaries with removal orders from adjusting their status at a time when Defendants have also taken steps to eliminate their existing status and work authorization. Whatever the method of disposition, the Court should act with dispatch to ensure that TPS beneficiaries can obtain the relief they deserve.

CONCLUSION

Plaintiffs' motion for preliminary injunction or, in the alternative, expedited partial summary judgment should be granted.

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Respectfully submitted,

/s/ Benjamin Seel

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**Application for admission pro hac vice pending*
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