

Appeal No. 18-16981

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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*Crista Ramos, et al.,*

Plaintiffs-Appellees,

v.

*Kirstjen Nielsen, et al.,*

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
THE HONORABLE EDWARD M. CHEN, JUDGE  
CASE NO. 3:18-CV-01554-EMC

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**BRIEF OF AMICI CURIAE 6 COUNTIES AND 31 CITIES IN SUPPORT OF PLAINTIFFS-  
APPELLEES AND FOR AFFIRMANCE**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* all are political subdivisions for whom no corporate disclosure is required.

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## INTEREST OF AMICI CURIAE<sup>1</sup>

Congress created the Temporary Protected Status (“TPS”) program to protect immigrants who cannot return safely to their home country because of armed conflict, natural disaster, or other extraordinary circumstances. Pursuant to 8 U.S.C. § 1254a, when the Secretary of the Department of Homeland Security (“DHS”) finds that these conditions exist, that country’s citizens may live and work in the United States without fear of deportation.

The TPS program enables thousands of immigrants from El Salvador, Haiti, Nicaragua, and Sudan to reside in Amici’s communities and lead lives indistinguishable from their citizen-neighbors. To earn protected status, TPS recipients must pass criminal background checks and undergo individual review by U.S. Citizenship and Immigration Services (“USCIS”). *See* 8 U.S.C. § 1254a(c). Because TPS entitles a recipient to work authorization and protection from deportation, *see* 8 U.S.C. § 1254a(a)(1), (d)(4), most TPS holders have, over years and in some cases decades, formed families, purchased homes, obtained educations, and built deep-rooted lives.

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<sup>1</sup> All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned counsel certifies that this brief was authored in full by Amici and their counsel, no party or counsel for a party authored or contributed monetarily to this brief in any respect, and no other person or entity—other than Amici and their counsel—contributed monetarily to this brief’s preparation or submission.

In late 2017 and early 2018, Defendants-Appellants (“Defendants”) announced the termination of TPS designations for El Salvador, Haiti, Nicaragua, and Sudan.<sup>2</sup> Defendants have taken the position that, in determining whether to extend a TPS designation, they must assess only the specific condition that originally served as the basis for the country’s protected status designation, and ignore intervening natural disasters, conflicts, and other serious social and economic problems.<sup>3</sup> Such a narrow view departs from both the plain language of the statute and the consistent practice of prior administrations.

The TPS statute directs that, in reviewing a country’s designation, the Secretary “shall review the conditions in the foreign state (or part of such foreign state) for which a designation is in effect under this subsection and shall determine whether the conditions for such designation under this subsection continue to be met.” 8 U.S.C. § 1254a(b)(3)(A). Nothing in this language limits the Secretary’s

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<sup>2</sup> While this suit challenges TPS terminations for El Salvador, Haiti, Nicaragua, and Sudan, Defendants have also terminated TPS status for Honduras and Nepal. The considerations described in this brief apply with equal weight to those terminations.

<sup>3</sup> *Oversight of the United States Department of Homeland Security Before the S. Comm. on the Judiciary*, 115th Cong. (Jan. 16, 2018) (statement of Kirstjen M. Nielsen, Secretary, U.S. Department of Homeland Security), <https://www.c-span.org/video/?439257-2/homeland-security-oversight-part-1&start=2405> (“The law does not allow me to look at the country conditions of a country writ large. It requires me to look very specifically as to whether the country conditions originating from the original designation continue to exist.”).

consideration of “conditions” to those articulated in the original designation. Indeed, this arbitrary limit marks a stark departure from past TPS designations, in which DHS consistently considered intervening events and circumstances as well as the conditions that motivated the original designation. Defendants have offered no explanation for departing from their previous policy and the administrative record makes clear that they did not consider the dramatic negative effects this departure would have on TPS recipients and Amici. Defendants’ ill-advised policy change was arbitrary and capricious and violates the Administrative Procedure Act (“APA”).

Although the sudden change in Defendants’ approach to TPS designations was never explained, statements by administration officials, including the President, make clear that the decision was motivated by racial animus. Put simply, the Administration viewed the TPS program as a hindrance to its strategic immigration goals, namely keeping “all these people from shithole countries” out of the United States.<sup>4</sup> Defendants’ unjustified termination of TPS leaves the future of more than 300,000 immigrants hanging in doubt.

Amici are 6 counties and 31 cities, located in 20 states across the country that are home to TPS recipients whose status is at risk. There is no doubt that

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<sup>4</sup> See Josh Dawsey, *Trump derides protections for immigrants from ‘shithole’ countries*, Wash. Post (Jan. 12, 2018), <https://goo.gl/7fwa24>.

Defendants' TPS terminations will negatively impact Amici, their communities, and their residents. TPS recipients contribute meaningfully to economic and cultural life—they work, pay taxes, raise children (including hundreds of thousands of U.S. citizens), and participate actively in local religious communities. TPS protection also facilitates trust between immigrant communities and law enforcement. If TPS recipients must face the impossible choice of either going underground or returning to the disaster-stricken countries from which they fled, Amici will lose these invaluable community benefits.

In the proceedings below, the District Court granted Plaintiffs-Appellees' ("Plaintiffs") preliminary injunction in part because Plaintiffs, states, and local communities—including Amici—would suffer irreparable harm from Defendants' decisions to terminate TPS. Appellants' Excerpts of Record ("ER") 14–15. When federal agencies depart suddenly and without explanation from established practices and policies, states and localities must manage the economic and public safety fallout, which impacts all of their residents regardless of immigration status. Defendants' unlawful decision to revoke TPS not only threatens the recipients and their families, but will also materially harm Amici and their communities. Amici thus have a strong interest in the resolution of this appeal in favor of Plaintiffs.

## ARGUMENT

### **I. DEFENDANTS' UNLAWFUL DECISION TO TERMINATE TPS WILL IRREPARABLY HARM AMICI JURISDICTIONS AND THEIR RESIDENTS**

#### **A. TPS Recipients Are Deeply Integrated Into Amici's Communities**

Plaintiffs' personal experiences, *see* ER.46–49, are similar to those of thousands of other TPS recipients affected by Defendants' unlawful actions: They are public servants, small business owners, students, homeowners, and active members of their communities. For example, Oscar Cortez rises before dawn to commute to his job as a plumber. He owns a townhouse in Maryland, carries a Costco card, roots for the Boston Red Sox, and sets aside money in a college fund for his daughters.<sup>5</sup> Helen Avalos works as a janitor at Walter Reed National Military Medical Center, has three children and two grandchildren, and financially supports her elderly mother.<sup>6</sup> Orlando Zepeda is a husband and father whose two children attend private school in Los Angeles.<sup>7</sup> Yesenia Reyes fled El Salvador in 2000. She now works 80 hours a week as a housekeeper at two Los Angeles hotels

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<sup>5</sup> Maria Sacchetti, '*We will lose practically everything*': Salvadorans devastated by TPS decision, Wash. Post (Jan. 8, 2018), [https://www.washingtonpost.com/local/immigration/i-consider-this-my-country-salvadorans-in-us-brace-for-tps-decision/2018/01/07/77914402-f19e-11e7-b3bf-ab90a706e175\\_story.html?utm\\_term=.11114d8b96ce](https://www.washingtonpost.com/local/immigration/i-consider-this-my-country-salvadorans-in-us-brace-for-tps-decision/2018/01/07/77914402-f19e-11e7-b3bf-ab90a706e175_story.html?utm_term=.11114d8b96ce).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

in order to afford her daughter's diabetes medication.<sup>8</sup> Dady Jean brought her 16-month old daughter Schnaika to the United States from Haiti for medical care after Schnaika was seriously injured in the 2010 earthquake. Dady believes her daughter could have died if they stayed in Haiti.<sup>9</sup> Each of these individuals is a TPS recipient. They and thousands like them reside in Amici's communities and lead lives that look much like those of their citizen-neighbors. Now, because of Defendants' unlawful decision to terminate their TPS protection, their future in this country hangs in doubt.

For Plaintiffs, and more than 300,000 other immigrants from El Salvador, Haiti, Nicaragua, and Sudan, TPS provides the safety and security needed to build productive lives in the United States.<sup>10</sup> Most beneficiaries have lived in the United States for a decade,<sup>11</sup> and, for many, this country is the only home they truly know. About 20 percent of TPS beneficiaries from El Salvador, and

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<sup>8</sup> Andrea Castillo, *Thousands of Salvadorans in Los Angeles worry about Trump ending temporary legal status*, L.A. Times (Jan. 6, 2018), <https://goo.gl/YmpkjU>.

<sup>9</sup> Moni Basu, *America rescued her from Haiti. Now Trump wants to send her back*, CNN (Dec. 19, 2017, 4:38 PM), <https://www.cnn.com/2017/12/19/us/haitians-lose-protected-status/index.html>.

<sup>10</sup> Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, Congressional Research Service at Table 1 (Oct. 10, 2018).

<sup>11</sup> Robert Warren & Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. on Migration & Human Security 577, 582 at Table 2 (2017).

30 percent of TPS beneficiaries from Haiti, arrived in the United States before they turned 15.<sup>12</sup> More than 20 percent of Salvadoran and Haitian beneficiaries have a mortgage<sup>13</sup> and most have families here, too. The beneficiaries threatened by Defendants' rescission have hundreds of thousands of U.S.-citizen children—192,700 born to Salvadoran beneficiaries alone.<sup>14</sup>

With these deep roots in place, TPS beneficiaries are fully integrated into their communities. Among Haitian beneficiaries, for example, nearly all speak some English, with three-quarters being fluent.<sup>15</sup> And a survey of TPS recipients from El Salvador, Honduras, and Nicaragua found that 30 percent are civically active, with 20 percent engaging in community service.<sup>16</sup> This level of community involvement is higher than the rates of participation by U.S. citizens.

Amici cities and counties have benefitted greatly from this engagement, as TPS recipients from the countries at issue are disproportionately concentrated

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<sup>12</sup> *Id.* at 581.

<sup>13</sup> *Id.* at 582 at Table 2.

<sup>14</sup> *Id.* at 581.

<sup>15</sup> *Id.* at 588.

<sup>16</sup> Cecilia Menjivar, *Temporary Protected Status in the United States: The Experiences of Honduran and Salvadoran Immigrants*, Center for Migration Research 19–20 (May 2017), <https://goo.gl/KdS1fU>. Though Honduras is not a subject of this suit, this survey includes Honduran TPS recipients.

there. In New York City alone, there are approximately 5,400 Haitian TPS recipients.<sup>17</sup> City of Los Angeles Mayor Eric Garcetti condemned Defendants’ decision to end TPS for the 30,400 Salvadoran recipients in the Los Angeles region because it “creates hardship and uncertainty for young Americans who are making extraordinary contributions in the only home they know.”<sup>18</sup> Boston Mayor Martin J. Walsh outlined the positive effect these TPS recipients have on Amici communities in a letter urging Defendants to extend TPS for Haiti, noting that the “16,000 Haitian immigrants and nationals who live in the City of Boston” have “enriched and strengthened our City in immeasurable ways.”<sup>19</sup> Given these statistics, it is not surprising the District Court held that Amici and the public would be harmed if these civically engaged individuals were forced to leave our communities. *See* ER.9–10.

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<sup>17</sup> *Fact Sheet: Temporary Protected Status (TPS) Recipients in New York City, NYC Mayor’s Office on Immigrant Affairs* 1 (Jan. 2018), <https://www1.nyc.gov/assets/immigrants/downloads/pdf/Fact-Sheet-TPS-NYC.pdf>.

<sup>18</sup> Statement: Mayor Garcetti on Trump Administration Order to End Temporary Protected Status for El Salvador, L.A. Mayor (Jan. 8, 2018), <https://www.lamayor.org/statement-mayor-garcetti-trump-administration-order-end-temporary-protected-status-el-salvador>.

<sup>19</sup> Letter from Martin J. Walsh to Secretary of State Rex Tillerson and Secretary of Homeland Security John F. Kelly (May 16, 2017), <https://www.boston.gov/news/mayor-walshs-letter-requesting-extend-temporary-protected-status-haiti>.

**B. Terminating TPS Will Undermine Public Safety by Eroding Community Cooperation With Law Enforcement**

TPS has also helped make Amici's neighborhoods safer. Because TPS recipients are exempt from deportation, they are able to report crimes and work with law enforcement on investigations and prosecutions without fear of retribution. By terminating TPS, Defendants inject the fear of deportation back into recipients' lives and threaten to destroy their delicate relationship with local law enforcement.<sup>20</sup> All TPS recipients submitted to DHS, as part of their TPS applications, detailed information about their immigration status and where they and their families live. These disclosures are likely to create fear of increased immigration enforcement activity among TPS recipients. Amici will be irreparably harmed if these communities cease cooperating with law enforcement. Once the trust between law enforcement and immigrant communities is lost it "is not easily restored" and as a result, "there is no adequate remedy at law." *See City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 877–78 (N.D. Ill. 2018).

Amici's fears are not theoretical. It is well-documented that as immigration enforcement and the threat of deportation increase, the likelihood of undocumented

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<sup>20</sup> TPS recipients will return to their former immigration status. Most TPS recipients "likely do not enjoy any other status entitling them to stay" and thus would become eligible for removal. ER.8 n.4.

immigrants reporting crimes decreases significantly.<sup>21</sup> For example, a 2017 survey of Mexican nationals in San Diego revealed that 60.8 percent of undocumented immigrants are less likely to report a crime they witness to police if local law enforcement officials are “working together with ICE.”<sup>22</sup> Similarly, in a 2013 survey, 67 percent of undocumented individuals reported that they were less likely to offer information to law enforcement as a witness if they feared officers would inquire about their or others’ immigration status; 70 percent reported being less likely to contact law enforcement authorities *even if they were victims of a crime*.<sup>23</sup> A recent report from Princeton analyzing crime data from the Dallas Police Department further demonstrates immigration policy’s tangible effect on crime reporting data. According to the report, during the Priority Enforcement Program,

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<sup>21</sup> See, e.g., Chuck Wexler, *Police chiefs across the country support sanctuary cities because they keep crime down*, L.A. Times, Mar. 6, 2017, <https://goo.gl/Fut52T>.

<sup>22</sup> Tom Wong, *Sanctuary Cities don’t ‘breed crime.’ They encourage people to report crime*, Wash. Post (Apr. 24, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/24/sanctuary-cities-dont-breed-crime-they-encourage-people-to-report-crime/?noredirect=on&utm\\_term=.9a22bfea81c1](https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/24/sanctuary-cities-dont-breed-crime-they-encourage-people-to-report-crime/?noredirect=on&utm_term=.9a22bfea81c1) (emphasis omitted); see also Declaration of Tom K. Wong ¶ 35 *California ex rel. Becerra v. Sessions*, No. 17-04701, ECF No. 116-4 (N.D. Cal. July 9, 2018).

<sup>23</sup> Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (Univ. of Ill. Chicago May 2013), at 5–6, [https://www.policylink.org/sites/default/files/INSECURE\\_COMMUNITIES\\_REPORT\\_FINAL.PDF](https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF).

which limited ICE's enforcement priorities, there was roughly a 10 percent increase in police reports filed by Latino individuals.<sup>24</sup> These results suggest that when communities ameliorate fears of immigration enforcement, trust between immigrants and law enforcement increases.<sup>25</sup>

The current Administration's immigration enforcement priorities, which ignore these lessons on community policing, have directly affected public safety in California. In the first three months of 2017, reports of sexual assault among the Latino population in the City of Los Angeles declined 25 percent, and domestic-violence reports dropped 10 percent.<sup>26</sup> There was no corresponding decline among non-Latino victims.<sup>27</sup> The City of Los Angeles Police Department attributes this troubling drop in reporting to deportation fears in the Latino community.<sup>28</sup>

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<sup>24</sup> Elisa Jácome, *The Effect of Immigration Enforcement on Crime Reporting: Evidence from the Priority Enforcement Program* 13 (Princeton U. Indus. Rel. Sec. Working Paper No. 624, Oct. 2018), <http://arks.princeton.edu/ark:/88435/dsp018p58pg70r>.

<sup>25</sup> *Id.* at 24.

<sup>26</sup> See Sarah Stillman, *When Deportation Is a Death Sentence*, *The New Yorker* (Jan. 15, 2018), <https://goo.gl/4s1P6N>.

<sup>27</sup> See *id.*

<sup>28</sup> L.A. Police Dep't., *Decline in Reporting of Crime Among Hispanic Population* (Mar. 21, 2017), [http://www.lapdonline.org/home/news\\_view/61998#](http://www.lapdonline.org/home/news_view/61998#). Conversely, the diligent efforts by the Department to communicate its commitment to the undocumented community had a positive effect on community trust. Last year, the Department reiterated it would not question residents for the sole purpose

Empirical evidence supports that conclusion. For example, a 2017 survey of Latino immigrant populations in the mid-Atlantic found that almost 30 percent of participants “very often” or “always” avoid contact with police; 39.4 percent avoid medical care, police, and services; and 47.6 percent warn their children to stay away from authorities.<sup>29</sup>

By creating uncertainty and fear, Defendants have not only threatened the well-being of hundreds of thousands of TPS beneficiaries—they have also created a public safety threat that jeopardizes Amici’s community policing initiatives and creates the risk of long-term damage to their law enforcement efforts.

### **C. TPS Recipients Contribute Substantially to the Economy Nationwide and in Amici Cities and Counties**

TPS recipients also make critical contributions to Amici’s economies as workers, consumers, entrepreneurs, and taxpayers. For example, the labor force participation rate of Salvadoran and Haitian beneficiaries is 88 percent and 81

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of determining immigration status (Special Order 40). Since then, the gap between the Latino community and citywide reporting of sexual assaults decreased to under 4 percent and the gap for domestic violence reporting decreased to 0.4 percent. L.A. Police Dep’t., *Statement on Sexual Assault and Domestic Violence Reporting in Immigrant Communities* (Apr. 27, 2018), [http://www.lapdonline.org/newsroom/news\\_view/63831](http://www.lapdonline.org/newsroom/news_view/63831).

<sup>29</sup> Kathleen M. Roche et al., *Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents*, 62 J. Adolescent Health 525, 528–29 (2018), [https://www.jahonline.org/article/S1054-139X\(18\)30054-5/pdf](https://www.jahonline.org/article/S1054-139X(18)30054-5/pdf).

percent, respectively—compared to 63 percent for the U.S. population as a whole.<sup>30</sup> Many are self-employed, meaning they have created jobs for themselves and for others.<sup>31</sup> Their work has positive effects on the rest of the economy, as “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

These significant contributions will be compromised by Defendants’ termination decisions. *See* ER.10 (“Without a preliminary injunction, these TPS beneficiaries will no longer be able to work, thus adversely impacting state and local economies.”). In an October 2017 letter to the Secretary, the U.S. Chamber of Commerce urged DHS to extend TPS for El Salvador, Haiti, and Honduras, warning that stripping beneficiaries of work authorization would “adversely impact several key industries where TPS recipients make up a significant amount of the workforce,” like construction, food processing, hospitality, and home healthcare services.<sup>32</sup> For example, 50,000 TPS recipients from these countries work in

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<sup>30</sup> Warren & Kerwin, *supra* n.11, at 583 (statistics as of May 2017).

<sup>31</sup> *Id.* at 588.

<sup>32</sup> Letter from Neil L. Bradley, Senior Vice President & Chief Policy Officer, U.S. Chamber of Commerce, to Elaine Duke, Acting Secretary of Homeland Security (Oct. 26, 2017),

construction, which means termination would “exacerbate existing labor shortages in the industry at a time when such workers are essential to hurricane recovery efforts in states like Texas and Florida.”<sup>33</sup> In January 2018, the Chamber reiterated that terminating El Salvador’s TPS designation “is not sound policy” because “companies in various industries will have to fire their valued employees and then scramble to fill these positions” rather than using resources to expand operations.<sup>34</sup>

Defendants’ decision to terminate TPS will also have broader consequences for the economy at large. The elimination of work authorization for TPS holders from El Salvador, Haiti and Honduras would reduce the country’s GDP by \$45.2 billion.<sup>35</sup> Tax revenues would also suffer; one report concluded that “TPS-protected Salvadoran homeowners paid between \$24.7 million and \$45.9 million in property taxes in California in 2017.” The same report estimates these families have paid “between \$22.1 million and \$32 million in 2017 property taxes” in the

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[https://www.uschamber.com/sites/default/files/171024\\_temporaryprotectedstatus\\_dhs\\_duke.pdf](https://www.uschamber.com/sites/default/files/171024_temporaryprotectedstatus_dhs_duke.pdf).

<sup>33</sup> *Id.*

<sup>34</sup> Jon Baselice, *Time is Running Out. The Department of Homeland Security Should Extend El Salvador’s TPS Designation*, U.S. Chamber of Commerce (Jan. 5, 2018 2:45PM), <https://www.uschamber.com/series/above-the-fold/time-running-out-the-department-homeland-security-should-extend-el-salvador-s>.

<sup>35</sup> Amanda Baran et al., *Economic Contributions by Salvadoran, Honduran, and Haitian TPS Holders*, 5 (Apr. 2017), <https://www.ilrc.org/report-tps-economic-cost>.

Los Angeles area alone.<sup>36</sup> Social Security and Medicare would lose \$6.9 billion in contributions from TPS holders, and employers would incur nearly \$1 billion in turnover costs.<sup>37</sup> As cities and counties that are home to an outsized proportion of TPS holders, Amici and their residents would bear the brunt of these burdens.

Indeed, Haitian and Salvadoran TPS recipients generated an estimated \$310 million in Gross City Product for New York City in 2017.<sup>38</sup> Similarly, Massachusetts would lose \$203.8 million in GDP without Haitian TPS recipients<sup>39</sup>—and with nearly all of the state’s Haitian population living in the Boston metropolitan area, the economies of Amici Boston, Cambridge, Chelsea, and Somerville would be most affected. The loss of such contributions would make it more difficult for Amici cities and counties to provide much-needed investments to support schools, repair infrastructure, and sustain the social services that keep their communities strong.

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<sup>36</sup> Zillow Research, *TPS-Protected Salvadoran Homeowners Paid Approx. \$100M in Property Taxes Last Year* (Jan. 8, 2018), <https://goo.gl/oTriuB>.

<sup>37</sup> Baran, *supra* n.35 at 8.

<sup>38</sup> Fact Sheet, *supra* n.17.

<sup>39</sup> Center for American Progress Immigration Team, *TPS Holders in Massachusetts*, <https://goo.gl/wq9Pu2> (last visited Feb. 6, 2019).

## II. THIS COURT HAS JURISDICTION TO REVIEW PLAINTIFFS' CLAIMS

Defendants argue that the TPS statute renders this Court powerless to review Plaintiffs' claims. *See* Defendants-Appellants' Opening Brief ("Op. Br."), ECF 11, at 21–30, 39. The provision they cite states "[t]here is no judicial review of any determination of the [DHS Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection." 8 U.S.C. §1254a(b)(5)(A). Multiple federal courts, including the District Court below, have examined this provision, applied well-established interpretative principles, and correctly held that it does not bar review of Plaintiffs' APA and constitutional claims. *See Centro Presente v. United States Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 409 (D. Mass. 2018); ER.58-67; *Casa de Maryland v. Trump*, ---F. Supp. 3d---, 2018 WL 6192367 at \*9 (D. Md. Nov. 28, 2018); *Saget v. Trump*, ---F. Supp. 3d---, 2018 WL 6584131 at \*3, (E.D.N.Y. Dec. 14, 2018).

There is a "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991). The Supreme Court has long held that where Congress seeks to preclude judicial review, particularly of constitutional claims, it must make its intent clear. *See Webster v. Doe*, 486 U.S. 592, 603 (1988); *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993) (courts will "find an intent to preclude such review only if presented with clear and

convincing evidence” (internal quotation omitted)). The TPS statute does not meet this threshold. Tellingly, the statute lacks “the unambiguous and comprehensive language” required to broadly preclude judicial review. *See Casa de Maryland*, 2018 WL 6192367 at \*8. Instead, the statute can and should be read to permit adjudication of the important constitutional and statutory claims in this case.

The statute, by its own terms, isolates only a narrow class of decisions from judicial review: the “determination” that a country does or does not warrant TPS protection. *See* 8 U.S.C. § 1254a(b)(3)(B)–(C) (precluding judicial review of the Secretary’s “designation” of particular countries as eligible for TPS, and the “termination,” or “extension” of those designations). Courts are empowered to review challenges to the general practices and policies by which the determination was made. *McNary*, 498 U.S. at 492 (holding that statutory language stating “there shall be no administrative or judicial review of a determination respecting an application” only precluded review of individual determinations and not “general collateral challenges” to agency action processing applications); *see also Casa de Maryland*, 2018 WL 6192367 at \*8 (“[The TPS statute’s] language closely resembles the language found in *McNary* . . . not to constitute an absolute bar on judicial review, but instead to bar review of the merits of an individual determination”). It is precisely the illegality of those general practices and policies that Plaintiffs challenge here.

The Court’s authority to review Plaintiffs’ constitutional claim is particularly clear. Defendants focus the overwhelming majority of their brief on Plaintiffs’ APA claim, allocating two sentences to their argument that the statute bars Plaintiffs’ Equal Protection claim. Defendants summarily assert that “Congress clearly precluded review of those determinations.” Op. Br. at 39. But Congress did **not** express the clear intent to preclude constitutional claims, even though Congress knows quite well how to do so. This is especially evident when the TPS statute, which is silent on such claims, is compared to other provisions of the Immigration and Nationality Act (“INA”) that explicitly bar review of constitutional claims. *See* 8 U.S.C. § 1252(b)(9) (“Judicial review of all questions of law and fact, *including interpretation and application of constitutional and statutory provisions*, arising from any action taken or proceeding brought to remove an alien . . . shall be available only in judicial review of a final order under this section.” (emphasis added)). “When Congress includes particular language in one section of a statute but omits it in another, this Court presumes that Congress intended a difference in meaning.” *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (internal citation omitted).

### **III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS**

Plaintiffs are likely to succeed on the merits of their Equal Protection and APA claims, either of which is sufficient to satisfy the Plaintiffs' burden under the preliminary injunction standard.

#### **A. Defendants' TPS Termination Violates Equal Protection Because It Was Motivated By Racial Animus**

Defendants' decision to rescind TPS violates the Fifth Amendment because it amounts to intentional discrimination on the basis of race, ethnicity, and national origin. Amici have a strong interest in preventing discrimination and enforcing equal protection laws. In fact, most, if not all, Amici have created local laws prohibiting discrimination based on ethnicity and national origin in all aspects of life—housing, employment, public accommodation, transportation, schooling, and government services. *E.g.*, Los Angeles Charter §§ 104(i), 1024; Los Angeles Admin. Code §§ 4.400, 10.8, 10.13; Municipal Code of Chicago, Ill. §§ 2-160-010, 5-8-010, 9-115-180, 13-72-040; Las Cruces Municipal Code § 14-26 et seq.; New York City Charter § 900; N.Y.C. Admin. Code § 8-107; Philadelphia Code §§ 9-1101, 9-1103, 9-1106, 9-1108. These laws reflect Amici's strong commitment to equal rights, as well as their belief that diversity enriches their communities and benefits their residents.

To prevail on their Equal Protection claim, Plaintiffs must show that discrimination was a “motivating factor” behind Defendants’ revocation of TPS. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also* ER.37–39 (affirming the District Court’s prior decision that *Arlington Heights* governs Plaintiffs’ claims); *Centro Presente*, 332 F. Supp. 3d at 412 (applying the *Arlington Heights* standard); *Casa de Maryland*, 2018 WL 6192367 at \*11 (same); *Saget*, 2018 WL 6584131 at \*9–10 (same).<sup>40</sup> In assessing this claim, the Court considers several factors, including “[d]epartures from the normal procedural sequence,” which “might afford evidence that improper purposes are playing a role;” “[t]he specific sequence of events leading up to the challenged decision;” and “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes.” *Arlington Heights*, 429 U.S. at 266–68. Each of these factors supports Plaintiffs’ claim that the decision to rescind TPS was driven by impermissible animus.

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<sup>40</sup> Defendants mistakenly argue this Court must apply *Trump v. Hawaii*’s rational basis standard. Op. Br. at 49. In *Hawaii*, the Supreme Court applied a rational basis standard because of “the limited due process rights afforded to foreign nationals *seeking entry into the United States* . . . and the particular deference accorded to the executive in making *national security determinations*.” *Centro Presente*, 332 F. Supp. 3d at 411 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–20 (2018) (emphasis added)). Neither of those factors is at issue in TPS termination decisions, which apply to individuals already present in the United States.

*First*, DHS noticeably departed from its normal decision-making process. Decisions to extend or terminate a country’s TPS designation are historically based on a comprehensive assessment of country conditions to determine whether the foreign state continues to meet the conditions for designation. *See* 8 U.S.C. § 1254a(b)(1). Pursuant to this process, DHS typically evaluates current country conditions, including any “intervening natural disasters, conflicts, and other serious social and economic problems,” in addition to the conditions supporting the initial determination. ER.1040, ¶ 75. DHS has extended TPS status for Haiti five times since 2010, including in May 2017, finding that, in addition to the persistence of earthquake-related issues, new disasters—such as Hurricane Matthew, flooding, landslides, and a cholera epidemic—had kept the country from recovering. *See* Extension of the Designation of Haiti Under the Temporary Protected Status Program, 82 Fed. Reg. 23830 (May 24, 2017). Defendants’ abrupt decision to terminate Haiti’s status in November 2017 departed starkly from this process: Defendants did not mention *any* of the natural disasters that the administration found determinative only six months prior, much less explain how they no longer posed an obstacle to the country’s recovery. *See* Termination of the Designation of Haiti Under the Temporary Protected Status Program, 83 Fed. Reg. 2648 (Jan. 18, 2018).

Defendants' terminations of TPS for El Salvador, Nicaragua, and Sudan similarly failed to account for intervening events, inexplicably departing from past practice.<sup>41</sup> Similarly, in its May 2016 Nicaragua extension, DHS extended TPS because of Hurricane Mitch's residual effects *and* "subsequent disasters [including heavy rains, extensive flooding and volcanic eruptions that] have caused additional damage and added to the country's fragility." Extension of the Designation of Nicaragua for Temporary Protected Status, 81 Fed. Reg. 30325, 30326 (May 16, 2016). Inexplicably, DHS's December 2017 termination references Hurricane Mitch recovery efforts, but is silent as to the more recent disasters that prompted the 2016 extension. *See* Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg 59636, 59637 (Dec. 15, 2017). This amounts to a clear, unjustified departure from the normal decision-making process.

*Second*, the historical background and broader context strongly suggest a discriminatory motive. President Trump's extensive history of invective towards immigrants of color reinforces the inference that DHS's decisions were motivated

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<sup>41</sup> *See* ER.70–76 (comparing past practice to Defendants' termination decisions for the countries at issue and noting that "[f]or every country (although to varying degrees), factors that were explicitly considered recently by prior administrations were wholly absent from the four termination notices issued between October 2017 and January 2018").

by racial discrimination.<sup>42</sup> The President has repeatedly expressed the view that immigrants of color bring disease and crime into the United States.<sup>43</sup> President Trump expressed such animus from the very start of his presidential campaign. When announcing his run for President, then-candidate Trump said, “[w]hen Mexico sends its people, they’re not sending their best. . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re

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<sup>42</sup> The fact that Acting Secretary Duke, and not the President, formally made the decision to terminate TPS is of no import. *See, e.g., Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 279 (E.D.N.Y. 2018) (rejecting “Defendants’ remarkable argument that the President apparently *cannot* be liable for rescinding the DACA program because only Acting Secretary Duke had the legal authority to end that program.”); ER.86–87. Further, Trump’s influence on DHS’s decision to terminate TPS is well-documented. *See* ER.27–30 (listing examples).

<sup>43</sup> *See, e.g.,* Donald J. Trump (@realDonaldTrump), Twitter (Feb. 23, 2018, 6:28 AM), <https://goo.gl/41wxKm> (“MS-13 gang members are being removed by our Great ICE and Border Patrol Agents by the thousands, but these killers come back in from El Salvador, and through Mexico, like water. El Salvador just takes our money, and Mexico must help MORE with this problem. We need The Wall!”); Donald J. Trump (@realDonaldTrump), Twitter (May 25, 2016, 9:39 AM), <https://goo.gl/mkqmpN> (“The protesters in New Mexico were thugs who were flying the Mexican flag. The rally inside was big and beautiful, but outside, criminals!”); Donald J. Trump (@realDonaldTrump), Twitter (July 13, 2015, 6:53 AM), <https://goo.gl/2UpESc> (“[B]illions of dollars gets brought into Mexico through the border. We get the killers, drugs & crime, they get the money!”); Donald J. Trump (@realDonaldTrump), Twitter (Feb. 24, 2015, 7:47 PM), <https://goo.gl/hZDyao> (“The Mexican legal system is corrupt, as is much of Mexico. Pay me the money that is owed me now - and stop sending criminals over our border.”); Donald J. Trump (@realDonaldTrump), Twitter (Aug. 5, 2014, 8:55 AM), <https://goo.gl/rS82Ux> (“Our government now imports illegal immigrants and deadly diseases.”).

bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people. . . . It's coming from more than Mexico. *It's coming from all over South and Latin America.*"<sup>44</sup> Such discriminatory statements have continued after his election. During a June 2017 meeting, upon learning that 15,000 Haitians had received visas to enter the United States in 2017, President Trump reportedly said that they "all have AIDS."<sup>45</sup> These "contemporary statements," *Arlington Heights*, 429 U.S. at 268, show without a doubt that animus motivated Defendants' decision.

*Finally*, the "specific sequence of events" leading up to the TPS revocations supports the contention that Defendants' actions were motivated by racial and national origin discrimination. *Arlington Heights*, 429 U.S. at 267. During a meeting on January 11, 2018, President Trump decried the inclusion of protections for Haitians and Salvadorans from "shithole countries" in a proposed immigration deal, expressing a preference, instead, for immigrants from countries like Norway,

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<sup>44</sup> Washington Post Staff, Full text: *Donald Trump announces a presidential bid*, Wash. Post (June 16, 2015), <https://goo.gl/RydLCM> (emphasis added).

<sup>45</sup> Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), <https://goo.gl/Rg6CRo>.

which is overwhelmingly white.<sup>46</sup> Within a week, Defendants announced the decisions terminating TPS for Haiti and El Salvador. ER.1043–44 ¶¶ 81, 84. Defendants’ terminations of TPS for Sudan and Nicaragua occurred prior to this meeting, but they followed a flood of statements by President Trump reflecting animus against non-white immigrants and other persons of Latino or African origin. *See supra* notes 43–44. With respect to Haiti in particular, both internal government documents and the President’s public statements indicate that DHS’s purported rationale for the termination was pretextual. Senior administration officials sought information on how many Haitian TPS recipients received public benefits or had been convicted of crimes of any kind, even though neither factor is relevant to whether TPS status should be terminated and both factors indicate

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<sup>46</sup> Dawsey, *supra* n.4. Defendants argue that Plaintiffs’ Equal Protection claim should fail because they “identify no comparative group of predominately white, European countries that has been treated differently” because “every country currently designated for temporary protected status is majority non-white and non-European.” Op. Br. at 46–47. But the success of Plaintiffs’ claim only requires “proof that a discriminatory purpose has been a motivating factor in the decision,” *Arlington Heights*, 429 U.S. at 265–66, not evidence that another group was treated more favorably, *Pyke v. Cuomo*, 258 F.3d 107, 108–09 (2d Cir. 2001) (“A plaintiff alleging an equal protection claim . . . under a theory of discriminatory motivation underlying a facially neutral policy or statute, generally need not plead or show the disparate treatment of other similarly situated individuals.”).

reliance on racial stereotypes about immigrants of color.<sup>47</sup> Yet one official urged that DHS was “going to need this” data to decide whether to terminate TPS for Haiti.<sup>48</sup>

In short, there can be no question that racial animus and national origin discrimination were at least “motivating factor[s]” behind Defendants’ actions. *Arlington Heights*, 429 U.S. at 265–66.

**B. Defendants’ Failure to Adequately Consider the Impact of TPS Termination Violates the APA**

“Federal administrative agencies are required to engage in ‘reasoned decisionmaking.’” *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (citation omitted). When an agency fails this standard—when it acts in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”—its action must be set aside. 5 U.S.C. § 706(2)(A). “[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that [an agency] display awareness that it *is* changing position.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original). Indeed,

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<sup>47</sup> See National Immigration Project of the National Lawyers Guild, *New Emails and New Memo Reveal New Depths of DHS and DOS’ Lawless Actions in Terminating TPS for Haitians* (May 15, 2018), <https://goo.gl/KJfzsY>.

<sup>48</sup> *Id.*

the APA requires an agency to provide “more detailed justification” when “its prior policy has engendered serious reliance interests.” *Id.*

Defendants’ unjustified and ill-considered TPS terminations for El Salvador, Haiti, Nicaragua, and Sudan do not meet this standard. Defendants (i) have failed to articulate any explanation for their change of policy, much less an adequate one, and (ii) have neglected to take into account the enormous economic and social harms TPS termination will cause. DHS’s failures violate the APA, which requires the agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

When an agency makes an abrupt reversal of longstanding policy, it must explain why: “Unexplained inconsistency between agency actions is a reason for holding an interpretation to be an arbitrary and capricious change.” *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (internal quotation marks omitted). Defendants have failed to explain their reversal here. Before October 2017, DHS consistently considered “the full range of current country conditions” including “[i]ntervening factors arising after a country’s original TPS designation . . . . regardless of whether those intervening factors had

any connection to the event that formed the basis for the original designation.”

ER.1015–16; *see supra* Part III.A. Defendants have departed from this consistent practice without explanation and now “disregard[] current conditions if they are not the originating condition or directly related to the originating condition.”

ER.20.

The change became public during testimony by then-Secretary John Kelly at a Senate hearing on June 6, 2017, when he stated that “[TPS] is for a specific event. In Haiti, it was the earthquake. Yes, Haiti had horrible conditions before the earthquake, and those conditions aren’t much better after the earthquake. But the earthquake was why TPS was granted and . . . that’s how I have to look at it.”<sup>49</sup> Secretary Nielsen echoed this sentiment, asserting that “[t]he law . . . requires me to look very specifically as to whether the country conditions originating from the original designation continue to exist.”<sup>50</sup> As the District Court found, Defendants have not provided *any* explanation for their change in policy, in clear violation of the APA. *See* ER.17 (“There is no dispute that DHS never acknowledged any

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<sup>49</sup> *Hearing on the Department of Homeland Security F.Y. 2018 Budget Before the S. Comm. on Homeland Security and Governmental Affairs*, 115th Cong. (June 6, 2017) (statement of Secretary John F. Kelly), <https://goo.gl/wAEZkB>.

<sup>50</sup> Statement of Kirstjen M. Nielsen, Secretary, U.S. Department of Homeland Security, *supra* n.3.

change in practice and thus has not provided any explanation for any such change.”).

This departure from existing practice demonstrates complete disregard for the “serious reliance interests” of TPS recipients, many of whom have lived for years in the United States. *Fox*, 556 U.S. at 515. More than 300,000 TPS recipients, and many U.S. citizen children, will be directly affected by Defendants’ actions. The effect of such a policy change—and its sudden impact on thousands of families—is surely a “relevant factor” that the government should have taken into account when considering rescission. *See State Farm*, 463 U.S. at 43. The harm is not limited to individual TPS recipients themselves: TPS recipients from El Salvador, Haiti, Nicaragua, and Sudan play vital roles in Amici’s communities and economies, and terminating their status undermines public safety initiatives that depend on the participation of all residents, regardless of immigration status. *See supra* Part I. In such circumstances, the APA requires an agency to provide “more detailed justification” for its change in policy. *Fox*, 556 U.S. at 515. Defendants have provided none at all. Defendants refuse to admit there was a change in policy, let alone justify the impact a sudden termination would have on TPS recipients and communities throughout the United States.

In sum, Defendants' ill-reasoned change in policy, made without adequate regard for the damage such a change would cause, constitutes a violation of the APA.

### **CONCLUSION**

For the reasons stated above, Amici respectfully request the Court affirm the District Court's order preliminarily enjoining Defendants' unlawful termination of TPS for El Salvador, Haiti, Nicaragua, and Sudan.

Dated: February 7, 2019

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**CERTIFICATE OF COMPLIANCE**

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) & 32(a)(7)(B) and Circuit Rule 32-1 because it contains 6,529 words, exclusive of the portions of the brief that are exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: February 7, 2019

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