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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 CRISTA RAMOS, individually and on behalf
13 of others similarly situated, CRISTINA
MORALES, BENJAMIN ZEPEDA,
14 individually and on behalf of others similarly
situated, ORLANDO ZEPEDA, JUAN
15 EDUARDO AYALA FLORES, individually
and on behalf of others similarly situated,
16 MARIA JOSE AYALA FLORES, ELSY
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18 individually and on behalf of others similarly
situated, RILYA SALARY, SHERIKA
19 BLANC, IMARA AMPIE, MAZIN AHMED,
HIWAIDA ELARABI,

20 *Plaintiffs,*

21 v.

22 KIRSTJEN NIELSEN, in her official capacity
23 as Secretary of Homeland Security, ELAINE
C. DUKE, in her official capacity as Deputy
24 Secretary of Homeland Security, UNITED
STATES DEPARTMENT OF HOMELAND
25 SECURITY, and UNITED STATES OF
AMERICA,

26 *Defendants.*

Case No. 3:18-cv-01554-EMC

**[PROPOSED] BRIEF OF AMICI
CURIAE 28 CITIES AND 6 COUNTIES
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

Judge: Honorable Edward M. Chen

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INTEREST OF AMICI CURIAE

1
2 Congress created the Temporary Protected Status (TPS) program to protect immigrants
3 who cannot return safely to their home country because of armed conflict, natural disaster, or
4 other extraordinary circumstances. Pursuant to 8 U.S.C. § 1254a, when the Secretary of the
5 Department of Homeland Security (DHS) finds that such conditions exist and prevent nationals
6 from returning safely—or, in certain circumstances, where the country is unable to adequately
7 handle the return of nationals—that country’s citizens may live and work in the United States
8 without fear of deportation.

9 The TPS program enables thousands of immigrants from El Salvador, Haiti, Nicaragua,
10 and Sudan to reside in Amici’s communities and lead lives indistinguishable from their citizen-
11 neighbors. To earn protected status, TPS recipients had to meet rigorous qualifications, including
12 having no serious criminal record and undergoing individual review by the U.S. Citizenship and
13 Immigration Service (USCIS). *See* 8 U.S.C. § 1254a(c). Because TPS entitles a recipient to
14 work authorization and protection from deportation, *see id.* § 1254a(a)(1), (d)(4), most TPS
15 holders have, over years and in some cases decades, formed families, purchased homes, obtained
16 educations, and built deep-rooted lives.

17 In late 2017 and early 2018, Defendants announced the termination of TPS designations
18 for El Salvador, Haiti, Nicaragua, and Sudan.¹ In so doing, Defendants have taken the position
19 that, in determining whether to extend TPS status, they can only assess the specific condition that
20 served as the basis for the country’s original designation, and cannot consider intervening natural
21 disasters, conflicts, and other serious social and economic problems. DHS Secretary Kirstjen
22 Nielsen asserted that “[t]he law does not allow me to look at the country conditions of a country
23 writ large. It requires me to look very specifically as to whether the country conditions
24
25

26 _____
27 ¹ While this suit challenges TPS terminations for El Salvador, Haiti, Nicaragua, and Sudan, it
28 should be noted that Defendants have also terminated TPS status for other countries, such as
Honduras and Nepal. Many of the same considerations described in this brief would apply with
equal weight to those terminations.

1 originating from the original designation continue to exist.”² But such a crabbed view departs
2 from both the plain language of the statute and the consistent practice of multiple prior
3 administrations. The TPS statute directs that, in reviewing a country’s designation, the DHS
4 Secretary “shall review the conditions in the foreign state (or part of such foreign state) for which
5 a designation is in effect under this subsection and shall determine whether the conditions for
6 such designation under this subsection continue to be met.” 8 U.S.C. § 1254a(b)(3)(A). Nothing
7 in the statute limits the consideration of “conditions” to those in the original designation. Indeed,
8 such a limit marks a stark departure from TPS designations made by prior administrations, in
9 which DHS consistently considered intervening conditions as well as those conditions in the
10 original designation.

11 Although the reasons for Defendants’ sudden change in their approach to TPS
12 designations were never explained, statements by administration officials, including the President,
13 make clear that the decision was motivated by racial animus. Put simply, the TPS program was
14 seen as “prevent[ing] [the Trump Administration’s] wide strategic goal on immigration,” which in
15 President Trump’s own words included keeping “all these people from shithole countries” out of
16 the United States.³ Defendants’ unjustified and ill-advised termination of TPS leaves the future
17 of more than 300,000 immigrants hanging in doubt.

18 Amici are 28 cities and 6 counties, located in 19 states across the country that are home to
19 TPS recipients whose status is at risk.⁴ There is no doubt that Defendants’ TPS terminations will
20 negatively impact Amici, their communities, and thousands of residents. For each Amicus, TPS
21 recipients contribute meaningfully to economic and cultural life—they work, pay taxes, raise
22 children (hundreds of thousands of whom are U.S. citizens), and participate actively in their local
23 religious communities. TPS protection also facilitates trust and communication between
24

25 ² *Oversight of the United States Department of Homeland Security Before the S. Comm. on the*
26 *Judiciary*, 115th Cong. (Jan. 16, 2018) (statement of Kirstjen M. Nielsen, Secretary, U.S.
Department of Homeland Security).

27 ³ Josh Dawsey, *Trump derides protections for immigrants from “shithole” countries*, Wash. Post
(Jan. 12, 2018), available at <https://goo.gl/7fwa24>.

28 ⁴ A full list of proposed Amici is attached here as Appendix A.

1 immigrant communities and law enforcement. These benefits will evaporate if TPS recipients are
 2 put to the impossible choice of either going underground or returning to the disaster-stricken
 3 countries from which they fled. Programs like TPS also impose benefits and burdens on state and
 4 local governments, which in turn often impact strategic planning and decisions by local officials.

5 When federal decision makers make unannounced and unexplained departures from
 6 established practices and policies, states and localities must deal with the consequences for local
 7 economies, public safety, and U.S. citizen family members and community members. This in
 8 turn undermines Amici's ability to effectively serve their own residents. Defendants' unlawful
 9 decision to revoke TPS thus not only threatens the individuals with protected status and their
 10 families, but will also materially harm Amici and their other residents.

11 ARGUMENT

12 I. DEFENDANTS' UNLAWFUL DECISION TO TERMINATE TPS FOR EL 13 SALVADOR, HAITI, NICARAGUA, AND SUDAN WILL HARM AMICI JURISDICTIONS AND OUR RESIDENTS

14 A. TPS Recipients Are Deeply Integrated into Amici's Communities

15 As this Court has acknowledged, Plaintiffs' personal experiences reflect their important
 16 roles in each of their communities: They are public servants, small business owners, students,
 17 homeowners, and active members of their communities. *See* Order Denying Defs.' Mot. to
 18 Dismiss, ECF No. 55 ("MTD Order") at 3-6. These Plaintiffs' stories are representative of the
 19 thousands of other TPS recipients affected by Defendants' unlawful actions. For example, Oscar
 20 Cortez rises before dawn to commute to his job as a plumber, which pays for a townhouse in
 21 Maryland. He carries a Costco card, roots for the Boston Red Sox, and sets aside money in a
 22 college fund for his daughters.⁵ Helen Avalos works as a janitor at Walter Reed National
 23 Military Medical Center, has three children and two grandchildren, and provides financial support
 24 to her elderly mother.⁶ Orlando Zepeda is a husband and father whose two children attend private
 25 school in Los Angeles.⁷ Yesenia Reyes fled El Salvador 17 years ago to escape gang violence

26 ⁵ Maria Sacchetti, *'We will lose practically everything': Salvadorans devastated by TPS decision*,
 27 Wash. Post (Jan. 8, 2018), available at <https://goo.gl/dXy7il>.

28 ⁶ *Id.*

⁷ *Id.*

1 and domestic abuse. She now works 80 hours a week as a housekeeper at two Los Angeles hotels
2 so that she can afford her daughter's diabetes medication.⁸ Dady Jean brought her 16-month old
3 daughter Schnaika to the United States from Haiti for medical care after Schnaika was seriously
4 injured in the 2010 earthquake. Schnaika, now in the third grade, attends weekly physical therapy
5 sessions to improve her movement and balance. Dady believes her daughter could have died if
6 they stayed in Haiti, and that Schnaika's life prospects would be bleak if they were forced to
7 return.⁹ Each of these individuals is a TPS recipient. They and thousands like them reside in
8 Amici's communities and lead lives that look much like those of their citizen-neighbors. Now,
9 because of Defendants' decision to terminate their TPS protection for discriminatory reasons,
10 their future in this country hangs in doubt.

11 For these individuals and more than 300,000 other immigrants from El Salvador, Haiti,
12 Nicaragua, and Sudan, TPS provides the safety and security needed to build productive lives in
13 the United States.¹⁰ Most of these individuals have lived in the United States for at least one
14 decade; most Salvadoran beneficiaries have lived here for more than two.¹¹ Indeed, for many, the
15 United States is the only home they truly know. About 20 percent of TPS beneficiaries from El
16 Salvador, and 30 percent of those from Haiti, arrived in the United States before they turned 16.¹²
17 More than 20 percent of Salvadoran and Haitian beneficiaries now own their homes¹³ and most
18 have families here, too. The beneficiaries threatened by Defendants' rescission have hundreds of
19 thousands of U.S.-citizen children, 192,000 born to Salvadoran beneficiaries alone.¹⁴

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

22 ⁹ *Id.*

23 ¹⁰ Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, Congressional
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24 ¹¹ Robert Warren & Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary*
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25 Security 577, 582 at Table 2 (2017).

26 ¹² *Id.* at 577.

27 ¹³ Cecilia Menjivar, *Temporary Protected Status in the United States: The Experiences of*
Honduran and Salvadoran Immigrants, Center for Migration Research (May 2017),
<https://goo.gl/KdS1fU>.

28 ¹⁴ Warren & Kerwin, *supra* n.11, at 581.

1 With these deep roots in place, TPS beneficiaries are fully integrated into their
2 communities. Among Haitian TPS beneficiaries, for example, nearly all speak at least some
3 English, and three-quarters report speaking English well, very well, or speaking only English.¹⁵
4 And a survey of TPS recipients from El Salvador, Honduras, and Nicaragua found that 30 percent
5 are civically active, and about 20 percent engage in community service such as volunteering with
6 nonprofit organizations or at children’s hospitals.¹⁶ This level of community involvement is
7 higher than the rates of such participation by U.S. citizens. Amici cities and counties have
8 benefitted greatly from this engagement, as TPS recipients from the countries at issue are
9 disproportionately concentrated there. For example, nearly 30,000 Salvadoran TPS recipients
10 reside in Los Angeles County.¹⁷ And in New York City alone, there are approximately 5,400
11 Haitian TPS recipients.¹⁸ Boston Mayor Martin J. Walsh outlined the positive effect these TPS
12 recipients have on Amici communities in a letter urging Defendants to extend TPS for Haiti,
13 noting that the “16,000 Haitian immigrants and nationals who live in the City of Boston” have
14 “enriched and strengthened our City in immeasurable ways.”¹⁹ The U.S. Conference of Mayors
15 echoed this sentiment, arguing that “Haitian TPS recipients are integral members of our
16 neighborhoods, workplaces, religious communities, schools, and health care institutions.”²⁰

17 In short, these TPS recipients are interwoven into Amici’s community fabric. As
18 neighbors, families, and community members, they are indistinguishable from their families and
19 neighbors who enjoy citizenship or legal permanent residence.

21
22 ¹⁵ *Id.*

23 ¹⁶ Menjívar, *supra* n.13. Though Honduras is not a subject of this suit, the survey includes
24 Honduran TPS recipients.

25 ¹⁷ Warren & Kerwin, *supra* n.11, at 587.

26 ¹⁸ U.S. Census Bureau, 2010-2014 American Community Survey Public Use Micro Data Sample
27 (as augmented by the New York City Mayor’s Office for Economic Opportunity) (“American
28 Community Survey”).

¹⁹ Letter from Martin J. Walsh to Secretary of State Rex Tillerson and Secretary of Homeland
Security John F. Kelly (May 16, 2017), *available at* <https://goo.gl/9rRcMB>.

²⁰ Letter from U.S. Conference of Mayors to Secretary of State Rex Tillerson and Acting DHS
Secretary Elaine Duke (Nov. 10, 2017), *available at* <https://goo.gl/cFbtwq>.

1 **B. TPS Recipients Contribute Substantially to the Economy Nationwide and in**
 2 **Amici Cities and Counties**

3 TPS recipients also make great contributions to Amici’s economies as workers,
 4 consumers, entrepreneurs, and taxpayers. The labor force participation rate of Salvadoran and
 5 Haitian beneficiaries is 88 percent and 81 percent, respectively—compared to 63 percent for the
 6 U.S. population as a whole.²¹ A number of those individuals are self-employed, meaning they
 7 have created jobs for themselves and likely for others as well.²² Their work has positive effects
 8 on the rest of the economy, as “the skills needed in today’s increasingly global marketplace can
 9 only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”
 10 *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

11 Recognizing the importance of these contributions, in October 2017 the U.S. Chamber of
 12 Commerce urged DHS to extend TPS for El Salvador, Haiti, and Honduras.²³ The Chamber
 13 wrote that stripping beneficiaries of work authorization would “adversely impact several key
 14 industries where TPS recipients make up a significant amount of the workforce . . . includ[ing]
 15 construction, food processing, hospitality, and home healthcare services.”²⁴ In particular, the
 16 Chamber noted that 50,000 TPS recipients from these countries work in construction, which
 17 means termination would “exacerbate existing labor shortages in the industry at a time when such
 18 workers are essential to hurricane recovery efforts in states like Texas and Florida.”²⁵
 19 Terminating TPS would have other weighty ramifications. The elimination of work authorization
 20 for TPS holders from these three countries would reduce the country’s GDP by \$45.2 billion.²⁶
 21 Tax revenues would also suffer; one report concluded that “TPS-protected Salvadoran
 22 homeowners paid between \$24.7 million and \$45.9 million in property taxes in California in 2017

23 ²¹ Warren & Kerwin, *supra* n.11, at 577.

24 ²² *Id.*

25 ²³ 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), *available at*
<https://goo.gl/QkHh5v>.

26 ²⁴ *Id.*

27 ²⁵ *Id.*

28 ²⁶ Amanda Baran et al., *Economic Contributions by Salvadoran, Honduran, and Haitian TPS*
 Holders, ILRC (Apr. 2017), *available at* <https://goo.gl/wELesM>.

1 In the Los Angeles area alone, it's likely these families paid between \$22.1 million and \$32
 2 million in 2017 property taxes."²⁷ Social Security and Medicare would lose \$6.9 billion in
 3 contributions from TPS holders,²⁸ and employers would incur nearly \$1 billion in turnover
 4 costs.²⁹ As cities and counties that are home to an outsized proportion of TPS holders, Amici and
 5 our residents would bear the brunt of these macro- and microeconomic burdens.

6 Indeed, Haitian TPS recipients generated an estimated \$206 million in Gross City Product
 7 (GCP) for New York City in 2017.³⁰ Similarly, Massachusetts would lose \$203.8 million in GDP
 8 without Haitian TPS recipients³¹—and with nearly all of the state's Haitian population living in
 9 the Boston metropolitan area, the economy of amici Boston, Cambridge, Chelsea, and Somerville
 10 would be most affected. The loss of such contributions would make it more difficult for Amici
 11 cities and counties to provide much-needed investments to support our schools, repair our roads
 12 and bridges, and sustain the social services that keep our communities strong.

13 **C. Terminating TPS Will Undermine Public Safety by Eroding Police-**
 14 **Community Cooperation**

15 TPS has also helped make our neighborhoods safer. Because recipients are exempt from
 16 deportation, they are able to cooperate freely with law enforcement to report crimes without fear
 17 of retribution. Revoking protected status for over 200,000 individuals would create a new swath
 18 of immigrants likely subject to deportation. Indeed, the revocation of TPS protection is more than
 19 a mere symbolic statement of DHS's desire to deport these residents—President Trump himself
 20 said, referring to Haitians' legal protections, "[t]ake them out."³²

21 All immigrants with TPS have previously submitted to DHS, as part of their TPS
 22 application, detailed information about their immigration status and where they and their families

23 ²⁷ *Zillow Research, TPS-Protected Salvadoran Homeowners Paid Approx. \$100M in Property*
Taxes Last Year (Jan. 8, 2018), available at <https://goo.gl/oTriuB>.

24 ²⁸ Baran, *supra* n.27.

25 ²⁹ *Id.*

26 ³⁰ American Community Survey, *supra* n.19.

27 ³¹ Center for American Progress, *TPS Holders in Massachusetts*, available at
<https://goo.gl/wq9Pu2> (last visited June 14, 2018).

28 ³² Josh Dawsey, *Trump derides protections for immigrants from "shithole" countries*, Wash. Post
 (Jan. 12, 2018), available at <https://goo.gl/7fwa24>.

1 live. These factors may create an understandable fear among TPS recipients in Amici's
2 communities that could lead these immigrants to cease communication with law enforcement,
3 even if they are victims of or witnesses to a crime.

4 As local governments charged with ensuring their residents' safety, Amici understand that
5 if immigrants "fear[] that interaction with police leads to arrest and deportation, they will be
6 reluctant to report crimes, make statements, or testify in court. This chilling effect leaves cities
7 less safe for everyone."³³

8 Research has shown that as immigration enforcement and the threat of deportation
9 increase, the likelihood of undocumented immigrants reporting crimes drops significantly.³⁴ In a
10 2013 survey, for example, 67 percent of undocumented individuals reported they would be less
11 likely to offer information to law enforcement as a witness if officers were free to inquire about
12 their or others' immigration status.³⁵ Seventy percent reported being less likely to contact law
13 enforcement authorities *even if they were victims of a crime*.³⁶ In a survey conducted by the
14 Police Foundation, for example, 74 percent of law enforcement personnel and public officials
15 reported that aggressive enforcement of immigration law would decrease community trust of
16 police, and 83 percent said it would decrease reporting of criminal activity.³⁷

17 These studies have been borne out in practice. In jurisdictions across the country, from
18

19 ³³ Angela S. Garcia, *The Sanctuary Cities Debate*, Univ. of Chicago, 23 SSA Magazine 1 (2016),
20 available at <https://goo.gl/iGkrdz>.

21 ³⁴ See, e.g., Chuck Wexler, *Police chiefs across the country support sanctuary cities because they*
22 *keep crime down*, L.A. Times (Mar. 6, 2017), available at <https://goo.gl/Fut52T>; Anita Khashu,
23 *The Police Foundation, The Role of Local Police: Striking a Balance Between Immigration*
24 *Enforcement and Civil Liberties* 24 (Apr. 2009).

25 ³⁵ Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in*
26 *Immigration Enforcement*, Univ. of Ill. Chicago, at 5-6 (May 2013), available at
27 <https://goo.gl/wK3O7o>.

28 ³⁶ *Id.* at 5; see also Randy Capps, et al., *Delegation and Divergence: A Study of 287(g) State and*
Local Immigration Enforcement 43, Migration Policy Inst. (Jan. 2011) (finding in multiple
counties that increased local-federal law enforcement cooperation meant "community respondents
were likely to report that immigrants were venturing into public places with less frequency,
failing to report crimes or interact with police, interacting less with schools and other institutions,
patronizing local businesses less often, and changing their driving patterns").

³⁷ Anita Khashu, *The Police Foundation, The Role of Local Police: Striking a Balance Between*
Immigration Enforcement and Civil Liberties 24 (Apr. 2009).

1 Houston³⁸ to Los Angeles,³⁹ police have seen a drop in domestic violence reports from their
 2 Latino communities, while reporting among non-Latino victims was virtually unchanged. As a
 3 result, 82 percent of the prosecutors surveyed said that domestic abuse cases have become harder
 4 to prosecute.⁴⁰ In a sworn declaration last year, Los Angeles County Sheriff Jim McDonnell
 5 summed it up plainly: “Public safety requires that people come forward if they are a crime
 6 victim or be willing to come forward as a witness to a crime without fear of being deported.”⁴¹
 7 By creating uncertainty and fear, Defendants have not only threatened the well-being of hundreds
 8 of thousands of TPS beneficiaries—they have also created a needless risk to broader public
 9 safety.

10 **II. DEFENDANTS’ TPS TERMINATION VIOLATES EQUAL PROTECTION** 11 **BECAUSE IT WAS MOTIVATED BY RACIAL ANIMUS**

12 Defendants’ decision to rescind TPS violates the Fifth Amendment, because it amounts to
 13 intentional discrimination on the basis of race, ethnicity, and/or national origin. Amici have a
 14 strong interest in preventing discrimination and enforcing equal protection laws. In fact, most, if
 15 not all, Amici have created local laws prohibiting discrimination based on ethnicity and national
 16 origin in all aspects of life—housing, employment, public accommodation, transportation,
 17 schooling, and government services. E.g., Los Angeles Charter §§ 104(i), 1024; Los Angeles
 18 Admin. Code §§ 4.400, 10.8, 10.13; Municipal Code of Chicago, Ill. §§ 2-160-010, 5-8-010, 9-
 19 115-180, 13-72-040; Las Cruces Municipal Code § 14-26 et seq.; New York City Charter § 900;
 20 N.Y.C. Admin. Code § 8-107; Philadelphia Code §§ 9-1101, 9-1103, 9-1106, 9-1108. Such laws
 21 reflect Amici’s strong commitment to equal rights, as well as their belief that diversity enriches

22 ³⁸ Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of*
 23 *Deportation.*, N.Y. Times (June 3, 2018), available at <https://goo.gl/3kN9eN>.

24 ³⁹ Sarah Stillman, *When Deportation Is a Death Sentence*, The New Yorker (Jan. 15, 2018),
 available at <https://goo.gl/4s1P6N>.

25 ⁴⁰ Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of*
Deportation., N.Y. Times (June 3, 2018), available at <https://goo.gl/3kN9eN>.

26 ⁴¹ Decl. of Jim McDonnell in Supp. of Pl.’s Am. Mot. for Prelim. Inj. (“McDonnell Decl.”),
 27 *California v. Sessions*, No. 17-cv-4701 (N.D. Cal. 2017), ECF No. 31, ¶ 5; see also Letter from
 28 Sheriff Jim McDonnell to Los Angeles County Inspector Gen. at 8 (Oct. 3, 2017) (noting sheriff’s
 policy to “reassure immigrant communities that there is no need to fear contact with the Sheriff’s
 Department”), available at <https://goo.gl/deeS4N>.

1 communities and diminishes no one.

2 To prevail on their Equal Protection claim, Plaintiffs do not have to prove that the
3 discriminatory motive was Defendants’ sole or even primary purpose, only that it was a
4 “motivating factor.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266
5 (1977); *see also* MTD Order at 44-45. In making this inquiry, courts consider several factors,
6 including “[d]epartures from the normal procedural sequence,” which “might afford evidence that
7 improper purposes are playing a role;” “[t]he specific sequence of events leading up to the
8 challenged decision;” and “[t]he historical background of the decision . . . particularly if it reveals
9 a series of official actions taken for invidious purposes.” *Arlington Heights*, 429 U.S. at 266-68.
10 Each of these factors supports Plaintiffs’ claim that Defendants acted with impermissible animus
11 here.

12 *First*, DHS departed from its normal decision-making process in rescinding TPS.
13 Decisions to extend or terminate a country’s TPS designation are historically based on a
14 comprehensive assessment of country conditions to determine whether the foreign state continues
15 to meet the conditions for designation. *See* 8 U.S.C. § 1254a(b)(1). Pursuant to this process,
16 DHS typically evaluates current country conditions, including any “intervening natural disasters,
17 conflicts, and other serious social and economic problems,” in addition to the conditions
18 supporting the initial determination. Compl. ¶ 75. For example, DHS has extended TPS status
19 for Haiti five times since 2010, including last May, when DHS determined that, in addition to the
20 persistence of earthquake-related issues, new disasters—such as Hurricane Matthew, flooding,
21 landslides, and a cholera epidemic—had kept the country from recovering. *See* 82 Fed. Reg.
22 23830 (May 24, 2017). Defendants’ abrupt decision to terminate Haiti’s status in November
23 2017 departed starkly from this process: Defendants did not even mention the numerous natural
24 disasters Haiti recently experienced, let alone explain how conditions have changed in the last six
25 months.⁴² By the same token, Defendants’ terminations of TPS for El Salvador, Nicaragua, and
26 Sudan similarly neglected to account for intervening events, inexplicably departing from past

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28 ⁴² Termination of the Designation of Haiti Under the Temporary Protected Status Program, 83
Fed. Reg. 2648 (Jan. 18, 2018) (“TPS Termination”).

1 practice.⁴³ This amounts to a clear, unjustified departure from the normal decision-making
2 process.

3 *Second*, the historical background and broader context firmly support this conclusion.
4 President Trump’s extensive history of invective towards immigrants of color strongly reinforces
5 the inference that DHS’s decisions were motivated by racial discrimination.⁴⁴ The President has
6 repeatedly expressed the view that immigrants of color bring disease and crime into the United
7 States.⁴⁵ President Trump expressed such animus from the very start of his presidential
8 campaign: In the speech announcing his run for President, then-candidate Trump said, “[w]hen
9 Mexico sends its people, they’re not sending their best. . . . They’re sending people that have lots
10 of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re
11 bringing crime. They’re rapists. And some, I assume, are good people . . . It’s coming from
12 more than Mexico. *It’s coming from all over South and Latin America.*”⁴⁶ Such discriminatory
13 statements have continued after his election. During a June 2017 meeting, for example, upon
14

15 ⁴³ See MTD Order at 27-32 (comparing past practice to Defendants’ termination decisions for the
16 countries at issue and noting that “[f]or every country (although to varying degrees), factors that
17 were explicitly considered recently by prior administrations were wholly absent from the four
18 termination notices issued between October 2017 and January 2018”); Pls.’ Mot. for Prelim. Inj.,
19 ECF No. 89 (“PI Motion”) at 9-14.

20 ⁴⁴ The fact that Acting Secretary Duke, and not the President, formally made the decision to
21 terminate TPS is of no import. See, e.g., *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 279
22 (E.D.N.Y. 2018) (“[R]eject[ing] . . . Defendants’ remarkable argument that the President
23 apparently cannot be liable for rescinding the DACA program because only Acting Secretary
24 Duke had the legal authority to end that program.”); MTD Order at 43-44.

25 ⁴⁵ See, e.g., Donald J. Trump (@realDonaldTrump), Twitter (Feb. 23, 2018, 6:28 AM),
26 <https://goo.gl/41wxKm> (“MS-13 gang members are being removed by our Great ICE and Border
27 Patrol Agents by the thousands, but these killers come back in from El Salvador, and through
28 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,
6:28 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, 5:53 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,
4:47 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, 5:55 AM), <https://goo.gl/rS82Ux> (“Our
government now imports illegal immigrants and deadly diseases.”).

⁴⁶ Washington Post Staff, *Full text: Donald Trump announces a presidential bid*, Wash. Post
(June 16, 2015), available at <https://goo.gl/RydLCM> (emphasis added).

1 learning that 15,000 Haitians had received visas to enter the United States in 2017, President
 2 Trump reportedly said that they “all have AIDS.”⁴⁷ These “contemporaneous statements,”
 3 *Arlington Heights*, 429 U.S. at 267, show without a doubt that animus motivated Defendants’
 4 decision.

5 *Finally*, the “specific sequence of events” leading up to termination supports the
 6 contention that Defendants’ actions were motivated by racial and national origin discrimination.
 7 *Arlington Heights*, 429 U.S. at 267. During a meeting on January 11, 2018, President Trump
 8 decried the inclusion of protections for Haitians and Salvadorans from “shithole countries” in a
 9 proposed immigration deal, expressing a preference, instead, for immigrants from countries like
 10 Norway, which is overwhelmingly white.⁴⁸ Within a week, Defendants announced the decisions
 11 terminating TPS for Haiti and El Salvador. Compl. ¶¶ 81, 84. Defendants’ termination of TPS
 12 for Sudan and Nicaragua occurred prior to this meeting, but subsequent to myriad other
 13 statements made by President Trump reflecting animus against non-white immigrants and other
 14 persons of Latino or African origin. *See supra* notes 45-46. With respect to Haiti in particular,
 15 both internal government documents and the President’s public statements indicate that DHS’s
 16 purported rationale for the termination was pretextual. Senior administration officials sought
 17 information on how many Haitian TPS recipients were on public benefits and how many were
 18 convicted of “crimes of any kind,” even though neither factor is relevant to whether TPS status
 19 should be terminated and both factors indicate reliance on racial stereotypes of immigrants of
 20 color.⁴⁹ Yet one official urged that DHS was “going to need this” data to decide whether to
 21 terminate TPS for Haiti.⁵⁰

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 23
 24 ⁴⁷ Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to*
 25 *Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), <https://goo.gl/Rg6CRo>.

26 ⁴⁸ Dawsey, *supra* n.32.

27 ⁴⁹ National Immigration Project of the National Lawyers Guild, *New Emails and New Memo*
 28 *Reveal New Depths of DHS and DOS’ Lawless Actions in Terminating TPS for Haitians* (May 15,
 2018), available at <https://goo.gl/KJfzsY>.

⁵⁰ *Id.*

1 **III. DEFENDANTS’ FAILURE TO ADEQUATELY CONSIDER THE IMPACT OF**
 2 **TPS TERMINATION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT**

3 “Federal administrative agencies are required to engage in ‘reasoned decisionmaking.’”
 4 *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (citation omitted). When an agency fails this
 5 standard—when it acts in a manner that is “arbitrary, capricious, an abuse of discretion, or
 6 otherwise not in accordance with law”—its action must be set aside. 5 U.S.C. § 706(2)(A).
 7 “[T]he requirement that an agency provide reasoned explanation for its action would ordinarily
 8 demand that [an agency] display awareness that it *is* changing position.” *FCC v. Fox Television*
 9 *Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original). Indeed, the Administrative
 10 Procedure Act (APA) requires an agency to provide “more substantial justification” when “its
 11 prior policy has engendered serious reliance interests.” *Id.*

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

20 When an agency makes an abrupt reversal of longstanding policy, it must explain why:
 21 “Unexplained inconsistency between agency actions is a reason for holding an interpretation to be
 22 an arbitrary and capricious change.” *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d
 23 956, 966 (9th Cir. 2015). Defendants have failed to do so here. “Prior to October 2017,
 24 extension and/or re-designation notices indicate that DHS consistently considered, at the very
 25 least, whether intervening events had frustrated or impeded recovery efforts from the originating
 26 conditions in Sudan, Haiti, Nicaragua, and El Salvador.” MTD Order at 27. With no formal
 27 announcement or explanation whatsoever, Defendants have departed from this consistent
 28 practice, now asserting that they can consider only the condition that served as the basis for the

1 country’s original designation. The change became public during testimony by then-Secretary
 2 Kelly at a Senate hearing on June 6, 2017, when he stated that “[TPS] is for a specific event. In
 3 Haiti, it was the earthquake. Yes, Haiti had horrible conditions before the earthquake, and those
 4 conditions aren’t much better after the earthquake. But the earthquake was why TPS was granted
 5 and . . . that’s how I have to look at it.”⁵¹ Secretary Nielsen corroborated this change of practice,
 6 asserting that “[t]he law . . . requires me to look very specifically as to whether the country
 7 conditions originating from the original designation continue to exist.”⁵² Defendants have not
 8 provided *any* explanation for its change in policy, in clear violation of the APA.

9 This unusual departure from existing practice demonstrates complete disregard for the
 10 “serious reliance interests” engendered by TPS recipients’ many years of residence in the United
 11 States. *Fox*, 556 U.S. at 515. More than 300,000 TPS recipients, and many U.S. citizen children,
 12 will be directly affected by Defendants’ actions. The effect of such a policy change—and its
 13 sudden impact on thousands of families—is surely a “relevant factor” that the government should
 14 have taken into account when considering rescission. *State Farm*, 463 U.S. at 34. The harm is
 15 not limited to individual TPS recipients themselves: TPS recipients from El Salvador, Haiti,
 16 Nicaragua, and Sudan play vital roles in Amici jurisdictions’ communities and economies, and
 17 termination of their status also undercuts public safety. *See supra* Part I. In such circumstances,
 18 the APA requires an agency to provide “more substantial justification” for its change in policy.
 19 *State Farm*, 463 U.S. at 34. Here, Defendants have provided none at all.

20 CONCLUSION

21 For all of the reasons stated above, the Court should preliminarily enjoin Defendants’
 22 unlawful termination of TPS for El Salvador, Haiti, Nicaragua, and Sudan. In short, when
 23 examining the evidence under the proper framework, there can be no question that racial animus
 24 and national origin discrimination were at least “motivating factor[s]” behind Defendants’

25 ⁵¹ *Hearing on the Department of Homeland Security F.Y. 2018 Budget Before the S. Comm. on*
 26 *Homeland Security and Governmental Affairs*, 115th Cong. (June 6, 2017) (statement of
 Secretary John F. Kelly), available at <https://goo.gl/wAEZkB>.

27 ⁵² *Oversight of the United States Department of Homeland Security Before the S. Comm. on the*
 28 *Judiciary*, 115th Cong. (Jan. 16, 2018) (statement of Kirstjen M. Nielsen, Secretary, U.S.
 Department of Homeland Security).

1 actions. *Arlington Heights*, 429 U.S. at 267. In addition, Defendants' *sub silentio* change in
2 policy, without regard for the damage such a change would cause, constitutes a violation of the
3 APA. Given that evidence, the harm Defendants' decision will wreak, and the Court's authority
4 and obligation to remedy unconstitutional executive acts, Plaintiffs' motion for preliminary
5 injunction should be granted.

6
7 Dated: August 30, 2018

By: /s/ Margaret L. Carter

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