



Practice Advisory Series
TEMPORARY PROTECTED STATUS

PENDING TPS LITIGATION
Sixth Installment

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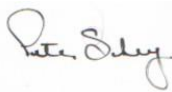
Practice Advisory Forward

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a wide range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved major victories in numerous major cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of disadvantaged persons.

This practice advisory provides a summary of the current pending Temporary Protected Status litigation. It will provide the court where the litigation is filed, the parties, and give an overview of the arguments presented in each case.

Manuals prepared by the Center are constantly being examined for improvements and updated to reflect current practices. Please feel free to email pschey@centerforhumanrights.org if you would like to suggest updates or edits to portions of this practice advisory.



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I. Introduction

This practice advisory acts as the seventh installment in a series about the United States creation, utilization, and termination of several country's Temporary Protected Status ("TPS"). This practice advisory will provide an overview of the current pending litigation challenging the Trump administration's termination of TPS for several countries.

Countries may be granted TPS, "due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately."¹

The Secretary can extend or terminate TPS after a review of country conditions. A decision about a six, twelve, or eighteen-month extension or termination must be made at least sixty days before the TPS designation expiration date. If the Secretary decides to terminate the status, the Secretary provides a transition period for the affected TPS holders in the U.S. to move back to their countries.²

Nicaragua was granted TPS on January 5, 1999 by Attorney General Janet Reno.³ Its TPS designation was set to expire on January 5, 2018, and the termination is effective on January 5, 2019.⁴ Haiti was granted TPS on January 21, 2010. Its TPS designation was set to expire on March 9, 2018, and the termination is effective on July 22, 2019.⁵ El Salvador was granted TPS

¹ *Temporary Protected Status*, U.S. Citizenship and Immigration Services (Feb. 02, 2018) <https://www.uscis.gov/humanitarian/temporary-protected-status>.

² *Id.*

³ Designation of Nicaragua Under Temporary Protected Status 64 Fed. Reg. ,527(Jan. 5, 1999).

⁴ Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59505, 59636 (Dec. 15, 2017).

⁵ Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 59505, 2648, 2548-49 (Dec. 15, 2017).

on March 9, 2001. Its TPS designation was set to expire on, March 9, 2018, and the termination is effective on September 9, 2019.⁶

II. Summary of Temporary Protected Status Litigation

As of March 15, 2018, four (4) lawsuits challenging the termination of TPS have been filed. All four lawsuits provide background information on the creation and implementation of the specific country's TPS, a summary of the significant facts provided for in the federal register designation, extensions, and termination notices explaining country conditions and whether these affected countries continued to be eligible for TPS, and evidence that the Department of Homeland Security's rescission of TPS was motivated by racial discrimination.

A. *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018)

NAACP v. DHS, No. 18-00239 (D. Md. filed Jan. 24, 2018) was filed in the U.S. District Court for the District of Maryland on January 24, 2018. The National Association for the Advancement of Colored People ("NAACP") is the named Plaintiff, and the NAACP brings this action on behalf of its members which include Haitian TPS beneficiaries. The NAACP brings this action against the Department of Homeland Security, Elaine Duke Acting Secretary of Homeland Security, and Kristjen Nielsen Secretary of Homeland Security ("Defendants").

Unlike the other cases, the NAACP emphasizes the widespread dismay created by Haitian TPS termination by including quotes from, "officials from across the political spectrum warn[ing] against TPS rescission."⁷

i. Violation of the Fifth Amendment

The NAACP's first cause of action alleges that Defendant's "decision to rescind TPS

⁶ Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 12629, 12630 (Dec. 15, 2017).

⁷ *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 16-22.

protections for Haitians living the United States violates both aspects of the Fifth Amendment [due process and equal protection], because the Administration intended to discriminate against Haitian immigrants to the United States because of race and/or ethnicity.”⁸ For example Plaintiffs’ allege that --,

President Trump articulated his antipathy towards Haitians in particular in June 2017, when, during a meeting in the Oval Office with then-Homeland Security Secretary Kelly and Secretary of State Tillerson, he reportedly reacted to a document listing how many immigrants had received visas to enter the United States in 2017. Upon learning that 15,000 Haitian people had received such visas, President Trump is reported to have stated they “all have AIDS”⁹ ... President Trump is alleged to have further disparaged Haitians in particular, asking “Why do we need more Haitians?” and ordered the bill’s drafters to “take them out.”⁸³ In this meeting, the President is further alleged to have expressed his preference for more immigrants from places like Norway,⁸⁴ where the population is over 90 percent white. Haiti’s population, by contrast, is over 95 percent Black.¹⁰

Plaintiffs’ provide further evidence of the Administration’s discrimination by quoting President Trump: “We have some bad hombres here, and we’re going to get them out,”¹¹ and, “[w]hen Mexico send 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 bringing drugs.

⁸ *Id.* at 31.

⁹ Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>. This article states that other officials insist that President Trump never used the words “AIDS” or “huts.” Several participants in the meeting said that they did not recall President Trump using those words.

¹⁰ Josh Dawsey, *Trump derides protections for immigrants from ‘shithole’ countries*, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.b56f11cc896f. Other senators have suggested the word used might have been “shithouse.” Julie Hirschfeld Davis, *Trump’s Harsh Words, Not His Plan for Wall, Dominate Hearing*, N.Y. Times (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/us/politics/trump-shithole-shithouse-immigration.html>.

¹¹ Michael Scherer, *2016 Person of the Year: Donald Trump*, TIME (Dec. 2016), <http://time.com/time-person-of-the-year-2016-donald-trump/>.

They're bringing crime. They're rapists ... It's coming from more than Mexico. It's coming from all over South and Central America.”¹²

They further support the claim that Defendants' engaged in discrimination by stating, “[t]he inference of race and/or ethnicity discrimination is supported by the Administration's departure from the normal decision-making process; the fact that the decision bears more heavily on one race than another; the sequence of events leading to the decision; the contemporaneous statements of decisionmakers; and the historical background of the decision ... ”¹³ In support Plaintiffs' allege that DHS *has* previously undertaken a careful review as to whether conditions in Haiti continued to reflect the severe problems with respect to housing, food security, infrastructure, public health, access to health care, and gender-based violence that originally resulted from the 2010 earthquake and warranted Haiti's TPS designation. Defendant Duke, however, “failed to fully consider those factors in rescinding Haiti's TPS.”¹⁴

The NAACP also asserts that an inference of race discrimination is supported by the defendants' departure from the analysis that previous Secretaries of Homeland Security have undertaken, and from INA § 244(b)(3)'s and 8 U.S.C. § 1254a's “requirement that DHS undertake a genuine, good faith review” of the conditions in a foreign state designated for TPS to determine whether the conditions for designation continue to be met.¹⁵ In furtherance of this claim, Plaintiffs' acknowledge,

Defendant Duke failed to address the persistent gender-based violence in the internally displaced persons camps, which Mr. Kelly himself described

¹² *Full text: Donald Trump announces a presidential bid*, Wash. Post (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.9dd8ac586d54.

¹³ *Id.* The NAACP cited as supporting case law *Vill. of Arlington Heights v. Metro. Hous. Development Corp.*, 429 U.S. 252 (1977).

¹⁴ *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 24.

¹⁵ *Id.* at 32.

as a serious concern just months earlier. Defendant Duke also failed to consider the fact that people who were displaced by the earthquake moved back to unsafe homes or were relocated to informal settlements in hazardous areas. Defendant Duke also failed to consider the extent of the damage that Hurricane Matthew caused, which Mr. Kelly noted killed more than 500 people and left more than 150,000 without housing. Defendant Duke also failed to address that 40 percent of the Haitian population lacked access to fundamental health and nutrition services. Defendant Duke also failed to address the questionable habitability of the buildings the earthquake destroyed, or conditions in the remaining internally displaced persons camps. Furthermore, although Defendant Duke noted the decrease in cholera, she failed to consider whether access to medical care had improved or whether Haiti's physical health infrastructure was restored.¹⁶

In addition, the NAACP alleges that defendants' "manufactur[ed] ... evidence that Haitian TPS recipients engage in criminal activity ..." This is evidenced by the White House's exertion of pressure on Defendant Duke to expel tens of thousands of Hondurans ...¹⁷ Plaintiffs' support this claim by offering evidence that, "while Mr. Kelly was Secretary of Homeland Security, DHS officials sought crime data on Haitians with TPS. DHS also sought information on how many Haitian nationals were receiving public benefits in the United States, even[a]fter USCIS staff said they could not gather information about wrongdoing ..." .⁷⁰

ii. Mandamus

The NAACP also claims, "Defendants have failed to carry out their mandatory and non-discretionary duties owed to Plaintiff," including the duties established in 8 U.S.C. § 1254a(b)(3). Plaintiff's move the court to issue a writ of mandamus, under 28 U.S.C. § 1361, to compel Defendant's to fulfill their mandatory and discretionary duties provided for under 8 U.S.C. § 1254a(b)(3) (INA), the United States Constitution, and any other applicable law. 8 U.S.C. § 1254a(b)(3) discusses the duties of DHS surrounding periodic review, termination, and

¹⁶ *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 24-25.

¹⁷ *Id.* at 32-33.

extension of TPS.

Plaintiffs' support this claim through discussion of publication procedure,

Although DHS published its other TPS determinations in the Federal Register within days of publicly announcing the decisions, it took DHS until January 18, 2018, to provide an analysis to support its putative reasons for the rescission decision. This unprecedented delay has disrupted the lives of TPS recipients across the country. That is because the last extension— issued on May 24, 2017 and set to expire on January 22, 2018—remained operative until DHS gave notice in the Federal Register of its November 2017 decision to rescind. Until DHS published its November 2017 decision in the Federal Register, Haitian immigrants with TPS would be unable to legally work or receive public benefits after January 22, 2018. As a result, upon information and belief, scores of Haitians with TPS lost or were denied employment and/or federal entitlements like Medicare because they were unable to timely re-apply for those benefits.¹⁸

iii. Declaratory Judgment

In their third claim, the NAACP moves the Court for declaratory judgment under 28 U.S.C. § 2201 because, Defendants' violations of the Constitution have injured and will continue to injure Plaintiff and its members, "including but not limited to stigmatic injury, which derives from, *inter alia*, the government's efforts to intentionally discriminate against Black immigrants to the United States, and DHS's efforts to link Haitians and/or Black immigrants to criminality and exploitation of public benefits."¹⁹

Plaintiffs' provide evidence of injury by quoting the current Administration, President Trump learned that 40,000 immigrants from Nigeria had received visas to enter the United States in 2017. According to news reports, he reacted by stating that, "once they had seen the United States, these Nigerian immigrants would never go back to their "huts" in Africa."²⁰

¹⁸ *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 23.

¹⁹ *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 34.

²⁰ Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html>. This article states that

Additionally, Plaintiffs’ discuss injuries to Haitians through the government’s special privileges directed at other immigrant communities. They state, “although Haiti and Cuba share comparable histories of persecution and economic deprivation ... [the] disparity is manifest in the so-called Wet-Foot/Dry- Foot immigration policy, which ... allows Cuban immigrants who reach American soil to remain and become American citizens [and]Haitians have no such special status.”²¹

B. *Centro Presente v. Donald Trump*, No. 18-10340 (D. Mass. filed Feb. 22, 2018)

Centro Presente v. Donald Trump, No. 18-10340 (D. Mass. filed Feb. 22, 2018) was filed in the U.S. District Court for the District of Massachusetts on February 22, 2018. Plaintiff’s represented in this lawsuit are eight recipients of TPS from El Salvador and Haiti and a non-profit organization, Centro Presente, with TPS members. Centro Presente and the five individuals bring this action against President Donald J. Trump, the Department of Homeland Security, Elaine Duke Acting Secretary of Homeland Security, and Kristjen Nielsen Secretary of Homeland Security (“Defendants”). Plaintiffs’ seek, “declaratory judgment that the Trump Administration’s termination of TPS designation for those two countries should be set aside as unconstitutional and contrary to federal law and further enjoining the Administration from violating Plaintiffs’ Constitutional rights.”²²

Unlike the other cases, *Centro Presente* provides an analysis of the, “harms and effects of Defendants’ discriminatorily motivated actions.”²³ Plaintiffs’ allege,

If TPS rescission goes into effect, Plaintiffs, and other TPS beneficiaries will suffer immediate and irreparable injuries to their rights under the U.S. Constitution

other officials insist that President Trump never used the words “AIDS” or “huts.” Several participants in the meeting said that they did not recall President Trump using those words.

²¹ *NAACP v. DHS*, No. 18-00239 (D. Md. filed Jan. 24, 2018) at 33.

²² *Centro Presente v. Donald Trump*, No. 18-10340 at 1 (D. Mass. filed Feb. 22, 2018).

²³ *Id.* at 31.

and federal law; to their proprietary interests; and to their dignity. Without TPS, most beneficiaries will not have access to employment authorization which gives these immigrants (and their employers) an assurance that they may put their talents to use – something that benefits Massachusetts and the country as a whole. Without employment, many TPS beneficiaries will also lose health benefits. Plaintiffs and other TPS beneficiaries will have to prepare for imminent removal. Plaintiffs will incur costs to ensure that their property rights, family relationships, and tax obligations are protected. [TPS] rescission stigmatizes immigrants of color, as well as their children and families, and imposes a dignitary harm by denying them the dignity and respect they deserve under the U.S. Constitution and federal law. By labeling TPS beneficiaries from El Salvador and Haiti as undesirable. . . the federal government ratifies and legitimizes the notion that immigrants of color. . . are worthy of lesser social stature.²⁴

i. Violation of Equal Protection Clause

In their first cause of action Plaintiffs’ claim, “Defendants’ decision to rescind TPS protections for Salvadoran and Haitian immigrants living in the United States violates the Fifth Amendment because it constitutes intentional discrimination against both groups on the basis of race, ethnicity, and/or national origin.”²⁵ Like the NAACP, Centro Presente supports their claims by alleging an inference of discrimination through, “the Trump Administration’s departure from the normal decision-making process. ; t.”²⁶ Plaintiffs’ claim there was a departure from the normal decision-making process by asserting, “[u]nlike the extensions of Haiti’s TPS protection in other Administrations, Defendants failed to mention the numerous natural disasters Haiti recently experienced, the slow process of economic and infrastructural recovery described in recent extensions, the remaining food scarcity, or the persistent reports of gender-based violence.”²⁷

Defendants’ deviate from INA § 244(b)(3)’s and 8 U.S.C. § 1254a’s requirement that DHS, “undertake a genuine, good faith review of the conditions in a foreign country designated

²⁴ *Id.* at 31-32.

²⁵ *Centro Presente v. Donald Trump*, No. 18-10340 at 1 (D. Mass. filed Feb. 22, 2018).

²⁶ *Id.* at 33.

²⁷ *Id.* at 25.

for TPS to determine whether the conditions for designation continue to be met.”²⁸ Plaintiffs’ assert there was no genuine, good faith review of country conditions, because Defendants’ ignored such facts, “that the situation in Haiti is destitute.” Plaintiffs’ cite the U.S. Department of State who notes that gender-violence such as “rape . . . and societal discrimination against women” remains a serious problem, [and]Haiti still contains a high number of internally displaced persons including “14,000 people displaced by Hurricane Matthew” and “several thousand street children” in Port-Au-Prince.”²⁹ Against this background, the country’s reconstruction and development is far from complete.

Lastly, Plaintiffs’ allege, “President Trump’s comments. . . which informed practice in executive agencies,”³⁰ is discriminatory.” Plaintiffs’ support this claim, [w]hile being briefed on the proposal to reallocate visas to TPS recipients, President Trump is reported to have grown angry and incredulous at the terms of the proposed plan. He specifically derided individuals from terminated TPS nations, asking: “Why are we having all these people from shithole countries come here?”³¹

ii. Violation of Due Process

Plaintiffs’ also allege, a Due Process violation, prohibiting irrational government action and in turn, “defendants have failed to carry out their duties. . .” Additionally, Plaintiffs’ expand on the due process violation asserting, “[t]he Defendants’ discriminatory decision to rescind TPS for Salvadorans and Haitians deprives Plaintiffs’ of the appropriate and non-discriminatory

²⁸ *Id.* at 33.

²⁹ U.S. Dep’t of State, Haiti 2016 Human Rights Report 1, 24 (2016).

³⁰ *Id.*

³¹ Eli Watkins & Abby Phillip. *Trump Decries Immigrants from ‘shithole countries’ Coming to the US*, CNN, (Jan. 12, 2018) (available at: <https://www.cnn.com/2018/01/11/politics/immigrants-shithole-countries-trump/index.html>).

process due to them under the law.”³² In addition to the examples stated under subparagraph (i), Plaintiff’s assert, Defendants’ analysis of the situation in Haiti, “conflicts sharply with the federal government’s own reports and analysis released by the Department of State which consistently reflect the conditions described in the Federal Register for Haiti’s TPS extensions.”³³ For example, the Department of State has noted that in Haiti “violent crime such as armed robbery, is common, [and]local police may lack resources to respond effectively to serious crimes or emergencies.”³⁴

iii. Mandamus

As previously described in *NAACP v. DHS*, Plaintiffs’ in *Centro* seek a writ of mandamus. Plaintiffs’ claim, Defendants have failed to carry out their mandatory and non-discretionary duties owed to Plaintiffs [which], “irrevocably harm Plaintiffs.”³⁵ By not engaging in a genuine review of country conditions and rescinding TPS,

Plaintiffs and other TPS beneficiaries will be denied work, including workplace benefits and protections. Without TPS, most beneficiaries will not have access to employment authorization which gives these immigrants (and their employers) an assurance that they may put their talents to use – something that benefits Massachusetts and the country as a whole. Without employment, many TPS beneficiaries will also lose health benefits. Plaintiffs and other TPS beneficiaries will have to prepare for imminent removal. Plaintiffs will incur costs to ensure that their property rights, family relationships, and tax obligations are protected. These financial burdens will decrease the overall resources available to TPS beneficiaries and their families.³⁶

³² *Id.* at 34. Plaintiffs rely on *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 532-33 (1973) to support their assertion that the Due Process Clause prohibits irrational government action.

³³ *Id.* at 25.

³⁴ U.S. Dep’t of State, Travel Advisory on Haiti (last updated Aug. 2, 2017).

³⁵ *Centro Presente v. Donald Trump*, No. 18-10340 at 1 (D. Mass. filed Feb. 22, 2018) at 35.

³⁶ *Id.* at 32.

iv. Declaratory Judgment

As its fourth cause of action, Plaintiffs' seek declaratory judgment because Defendants' violated the U.S. Constitution and other laws Plaintiffs' further claim, "Defendants' illegal actions have injured and will continue to injure all Plaintiffs and those similarly situated."³⁷ Plaintiffs' provide ample evidence of current and future injury by stating,

Rescission stigmatizes immigrants of color, as well as their children and families, and imposes a dignitary harm by denying them the dignity and respect they deserve under the U.S. Constitution and federal law. TPS rescission triggers and fuels social stigma, harassment, discrimination, and even violence against immigrants of color. By labeling TPS beneficiaries from El Salvador and Haiti as undesirable and by contrasting them with immigrants from predominantly white countries such as Norway, the federal government ratifies and legitimizes the notion that immigrants of color -- particularly those deemed by President Trump to come from "shithole countries" -- are worthy of lesser social stature. This compromises their well-being and encourages discrimination against immigrants of color. In this manner, the Trump Administration's decision to terminate TPS for these countries has caused, is causing, and will continue to cause dignitary harms and psychological injuries to families and children.³⁸

C. *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018)

Ramos v. Nielsen, No. 18-01554 (N.D. Cal. filed Mar. 12, 2018), is a class action filed in the United States District Court Northern District of California on March 12, 2018. The class, made up of children of TPS beneficiaries, brought this action against Kristjen Nielsen Secretary of Homeland Security, Elaine Duke Deputy Secretary of Homeland Security, the Department of Homeland Security, and the United States of America. The proposed class is represented by counsel from the National Day Laborer Organizing Network ("NDLON"), the American Civil Liberties Union of Southern California, and Sidley Austin LLP.

³⁷ *Id.*

³⁸ *Id.* at 32-33.

i. Class Definition

Plaintiffs’ represented in this class action are, “U.S. citizen children, their non-citizen parents, and other non-citizen adults who are in the United States legally, and who have lived in this country lawfully for years, in some cases decades,³⁹ and the [m]inor plaintiffs seek to represent the following nationwide class: The U.S. citizen children, from ages five to eighteen, of all TPS holders from El Salvador, Haiti, Nicaragua, and Sudan.”⁴⁰

Plaintiffs’ propose that the class satisfies the Federal Rules of Civil Procedure. For example, the class is so numerous that joinder is impracticable because, “there are tens of thousands of U.S. citizen children of TPS holders from El Salvador, Haiti, Nicaragua, and Sudan, [and]thousands of those children are minors confronted with the possibility of losing either the ability to live in their country or the care and support of a TPS-holder parent.”⁴¹

ii. Violation of Due Process Clause of the Fifth Amendment

Plaintiffs’ raise a claim alleging a violation of the Due Process Clause of the Fifth Amendment, which implicate “[t]hree such fundamental rights.”⁴² Unlike the other case, Plaintiffs’ uniquely describe the three fundamental rights violations stating,

Defendants’ new rule violates the constitutional rights of school-age United States citizen children of TPS holders, by presenting them with an impossible choice: they must either leave their country or live without their parents. It is well established that a U.S. citizen has an absolute right to reside in this country. It is equally well established that families have a fundamental right to live together without unwarranted government interference.⁴³

Plaintiffs’ also assert, “[a]s with any child, their well-being and future development are

³⁹ *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018).

⁴⁰ *Id.* at 29

⁴¹ *Id.*

⁴² *Id.* at 31.

⁴³ *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 2.

tied to nurturing and stable relationships with their parents.. Plaintiffs’ note, [t]he most important factor in the development of brain architecture—the trillions of connections among and across neurons in a child’s brain—is the interactive and responsive relationship between child and parent.⁴⁴⁼

Plaintiffs’ describe the second fundamental right violation for at so long as these U.S. citizen plaintiffs remain minors, "they have a fundamental right protected by both the First and Fifth Amendments to live with and be raised by their parents."⁴⁵ They assert, “U.S. citizen children of TPS holders face an impossible choice between the care and support of their parents, and the rights and benefits of U.S. citizenship.”⁴⁶ Children can continue to live with their parents, but only by “relocating to a foreign country, leaving behind their schools, their communities, and the benefits of living in the U.S. . . .” Plaintiffs’ retort or, “they can choose to remain in the U.S., but then must give up living with one or both parents. . . .”⁴⁷ Plaintiffs’ further support this assertion by providing declarations of children of TPS recipients,

Plaintiff Crista Ramos, fourteen years old, is the eldest child of TPS holder Plaintiff Cristina Morales. Crista was born in Marin, California, and is now an eighth grade student at Saint Raphael School. She is currently applying to high school and dreams of being an immigration lawyer. She lives with her mother, father, and her eleven-year-old brother Diego in San Pablo, California. Crista worries about what will happen if her mother loses her TPS status and is deported because she depends on her. She has never lived in or traveled to El Salvador.⁴⁸

Plaintiffs’ describe the third fundamental right violation, [t]he government’s decision to end the lawful immigration status of their parents, “impinges upon the U.S. citizen plaintiffs’

⁴⁴ Center on the Developing Child at Harvard University, *Three Principles to Improve Outcomes for Children and Families* 3–4 (2017), <http://www.developingchild.harvard.edu>.

⁴⁵ *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 31.

⁴⁶ *Id.* at 12.

⁴⁷ *Id.* at

⁴⁸ *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 12.

constitutionally-protected liberty interests.”⁴⁹ Plaintiffs’ also assert, “these American children have a powerful interest in not being compelled to choose between two alternatives when each alternative will deprive them of a substantial, constitutionally-protected aspect of liberty.”⁵⁰ In furtherance of this claim Plaintiffs’ provide additional declarations of TPS recipients stating,

Plaintiff Imara Ampie, forty-five years old, was born and raised in Managua, Nicaragua. In August 1998, at the age of twenty-six years old, Imara traveled to the United States to procure material for her mother’s tailoring business. While she was in the United States, Nicaragua was devastated by Hurricane Mitch and the U.S. government designated Nicaragua for TPS. She married a Nicaraguan TPS holder, and they are raising two young sons. Imara is a homemaker and cares for their children. Imara has lived in the Bay Area for twenty years. She and her family have owned a home in Contra Costa County in northern California since 2008. She is concerned that if TPS for Nicaragua is terminated, she and her husband may be forced to return to Nicaragua even though their lives and family are here, and there will be inadequate options to satisfy the health care and educational needs for her family. Her children would suffer if forced to relocate to Nicaragua, but would also face tremendous obstacles if forced to remain in the United States without their parents.⁵¹

iii. Violation of Equal Protection Guarantee

Like the aforementioned cases, Plaintiffs’ contend, “defendants’ new rule violates the Fifth Amendment’s Due Process Clause . Plaintiffs’ claim, [t]he rule violates the Equal Protection guarantee of the Due Process Clause because, “Defendants’ decision to terminate the TPS designations for El Salvador, Haiti, Nicaragua, and Sudan [is] ... motivated, at least in part, by intentional discrimination based on race, ethnicity, or national origin.”⁵² Plaintiffs’ in *Ramos* repeat many of the same racist, discriminatory remarks evidenced in the other lawsuits, but they also assert, “[b]oth during his campaign and after taking office, President Trump has repeatedly

⁴⁹ *Id.* at 31.

⁵⁰ *Id.*

⁵¹ *Id.* at 17.

⁵² *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 32.

compared immigrants to snakes who will bite and kill anyone foolish enough to take them in.”⁵³

iv. Violation of Due Process Clause

Their third claim maintains, “[t]he new rule constitutes an arbitrary, unexplained abandonment of the government’s longstanding interpretation of the TPS statute, on which several hundred thousand people have come to rely.”⁵⁴ Plaintiffs’ support this claim citing the actions of former Attorney Generals, “[they] considered intervening natural disasters, conflicts, and other serious social and economic problems as relevant factors when deciding whether to continue or instead terminate a TPS designation.”⁵⁵ Plaintiffs’ also note, [a]lthough no relevant statute or regulation has changed in the intervening decades, “the Trump administration’s DHS has now taken a position that such factors cannot be considered.”⁵⁶

Plaintiffs’ provide further evidence that the Administration adopted the new interpretation without a, “formal announcement to disclose its rationale for making a dramatic change to a decades-old policy.”⁵⁷ Plaintiffs’ also allege the change became public during testimony by then-Secretary Kelly at a Senate hearing on June 6, 2017, [and] Secretary Kelly stated ““the program [TPS] is for a specific event, and [i]n – in Haiti, it was the earthquake.”⁵⁸ Plaintiffs’ continue to quote Secretary Kelly, “[y]es, Haiti had horrible conditions before the earthquake, and those conditions aren’t much better after the earthquake. But the earthquake

⁵³ “*The Snake*”: Donald Trump brings back his favorite anti-immigrant fable at CPAC (Feb 23, 2018), <https://www.vox.com/policy-and-politics/2018/2/23/17044744/trump-snake-speech-cpac>. Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. Times (Dec. 23, 2017), <https://nyti.ms/2DEQLyv>.

⁵⁴ *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 3.

⁵⁵ *Id.* at 21.

⁵⁶ *Id.*

⁵⁷ *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), available at <https://www.c-span.org/video/?429383-1/secretary-kelly-travel-ban-injunctions-hobbling-homeland-security-screening-effort&start=5492>.

⁵⁸ *Id.*

was why TPS was—was granted and – and that’s how I have to look at it.”⁵⁹

Plaintiffs’ use El Salvador’s termination as a prime example of this new rule,

El Salvador was most recently designated for TPS on March 9, 2001 after three devastating earthquakes.⁶⁰ All told, various administrations continued TPS for El Salvador eleven times based on a variety of factors and conditions that did not exist at the time of the original designation, and that were unrelated to the earthquakes.⁶¹ Among other considerations, they cited droughts and a leaf rust epidemic that caused destabilizing food insecurity and malnutrition,⁶² health emergencies,⁶³ subsequent environmental

⁵⁹ *Id.*

⁶⁰ A devastating, 7.6 magnitude earthquake hit El Salvador on January 13, 2001, followed by over 3,000 aftershocks. The earthquakes killed over 1,100 people, damaged or destroyed approximately 220,000 homes, 1,696 schools, and 856 public buildings, and affected approximately 1.5 million people. Designation of El Salvador Under Temporary Protected Status, 66 Fed. Reg. 14,214 (Mar. 9, 2001).

⁶¹ See Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645, 44,647 (July 8, 2016); Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893, 894 (Jan. 7, 2015); Extension of the Designation of El Salvador for Temporary Protected Status, 78 Fed. Reg. 32,418, 32,419 (May 30, 2013); Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 77 Fed. Reg. 1710, 1711–12 (Jan. 11, 2012); Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 75 Fed. Reg. 39,556, 39,557–58 (July 9, 2010); Extension of the Designation of El Salvador for Temporary Protected Status, 73 Fed. Reg. 57,128, 57,129 (Oct. 1, 2008); Extension of the Designation of El Salvador for Temporary Protected Status, Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 72 Fed. Reg. 46,649, 46,649–50 (Aug. 21, 2007); Extension of the Designation of Temporary Protected Status for El Salvador, Automatic Extension of Employment Authorization Documentation for El Salvadorian TPS Beneficiaries, 71 Fed. Reg. 34,637, 34,638 (June 15, 2006); Extension of the Designation of Temporary Protected Status for El Salvador, Automatic Extension of Employment Authorization Documentation for El Salvador TPS Beneficiaries, 70 Fed. Reg. 1450, 1451 (Jan. 7, 2005); Extension of the Designation of El Salvador Under Temporary Protected Status Program, Automatic Extension of Employment Authorization Documentation for El Salvador, 68 Fed. Reg. 42,071, 42,072 (July 16, 2003); Extension of the Designation of El Salvador Under the Temporary Protected Status Program, Automatic Extension of Employment Authorization Documentation for Salvadorans, 67 Fed. Reg. 46,000, 46,000–01 (July 11, 2002).

⁶² Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893, 895 (Jan. 7, 2015). Extension of the Designation of El Salvador for Temporary Protected Status, 67 Fed. Reg. 46,000, 46,000–01 (July 11, 2002).

⁶³ Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645, 44,647 (July 8, 2016) (identifying that the environmental and social conditions plaguing

disasters, including another earthquake in 2012, volcanic eruptions, hurricanes, mudslides and flooding,⁶⁴ economic instability, and crime⁶⁵ as grounds for continuing TPS. But when terminating TPS for Salvadorans in January 2018, Secretary Nielsen ignored the contemporary realities of life in El Salvador by asking only whether disruptions traceable to the 2001 earthquakes had abated. The Secretary relied on generic platitudes,⁶⁶ ignoring natural and environmental disasters, pervasive gang violence, mass food insecurity, and other humanitarian crises since the 2001 earthquake.⁶⁷

v. Violation of the Administrative Procedure Act

Lastly, Plaintiffs’ assert another unique claim, “Defendants’ sudden and unexplained departure from decades of consistent interpretation and corresponding practice violates the Administrative Procedure Act.”⁶⁸ Plaintiffs’ continue to allege, “Defendants’ termination of the TPS designations for El Salvador, Haiti, Nicaragua, and Sudan constitutes “final agency action

the country spurred an outbreak of mosquito borne illnesses, including chikungunya and dengue).⁶⁴ Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893, 894 (Jan. 7, 2015) (noting that Tropical Storm Barry hit El Salvador in June 2013, causing flooding, and in December 2013, the Chaparrastique volcano erupted in December 2013, forcing thousands of people to evacuate their homes); Extension of the Designation of El Salvador for Temporary Protected Status, 78 Fed. Reg. 32,418, 32,419 (May 30, 2013); Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 77 Fed. Reg. 1710, 1712 (Jan. 11, 2012); Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries, 75 Fed. Reg. 39,556, 39,558 (July 9, 2010); Extension of the Designation of Temporary Protected Status for El Salvador, Automatic Extension of Employment Authorization Documentation for El Salvadorian TPS Beneficiaries, 71 Fed. Reg. 34,637, 34,638 (June 15, 2006).

⁶⁵ Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893, 895 (Jan. 7, 2015) (considering that almost half of all Salvadorans lived in poverty, a third were underemployed, and El Salvador’s annual GDP growth fell way behind its neighboring countries); Extension of the Designation of El Salvador Under Temporary Protected Status Program, Automatic Extension of Employment Authorization Documentation for El Salvador, 68 Fed. Reg. 42,071, 42,072 (July 16, 2003) (considering that a large number of returnees would “creat[e] social unrest and exacerbat[e] a critical crime situation”)

⁶⁶ Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654, 2656 (Jan. 18, 2018).

⁶⁷ *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 23-24.

⁶⁸ *Id.* at 3.

for which there is no other adequate remedy in a court” pursuant to 5 U.S.C. § 704, because the Defendants’ termination results in the TPS Holders’ loss of TPS “automatically and without further notice or right of appeal,” 8 C.F.R. § 244.19.”⁶⁹

They also assert, “adoption of a new, drastically narrower interpretation of the TPS statute was arbitrary, capricious, and contrary to law in violation of the APA because it represented a sudden and unexplained departure from decades of decision-making practices and ordinary procedures.”⁷⁰ Plaintiffs’ support their claim, “[b]y shifting the decision-governing standard for country designations without explanation, Defendants have ignored a clear statutory command and engaged in procedurally flawed decision-making.”⁷¹ Further, Defendants changed their policy without taking into account the serious reliance interests that their prior policy had engendered. Plaintiffs’ reiterate that the current Administration has adopted a new interpretation to disclose its rationale and instead of formally publishing this new rationale members of the administration simply talked about their new decision-making process.⁷² This is further evidenced through a statement by Secretary Nielsen, “[t]he 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.”⁷³

D. *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018)

⁶⁹ *Id.* at 34.

⁷⁰ *Id.*

⁷¹ *Ramos v. Nielsen*, No. 18-01554 at 1 (N.D. Cal. filed Mar. 12, 2018) at 21-22.

⁷² *Id.*

⁷³ *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).

Saget v. Trump, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) was filed in the U.S. District Court for the Eastern District of New York on March 15, 2018. Plaintiffs’ in this case include Haïti Liberte, a newspaper relying on the writing skills of Haitian TPS recipients, Family Action Network Movement, Inc, an organization who expended resources assisting TPS recipients, and several beneficiaries of TPS. *Saget* brought this action against President Donald Trump, the United States of America, Department of Homeland Security, Elaine Duke Acting Secretary of Homeland Security, and Kristjen Nielsen Secretary of Homeland Security (“Defendants”).

i. Violation of Administrative Procedures Act

Plaintiffs’ in *Saget v. Trump*, like those in *Ramos v. Nielsen*, claim that Defendants’ violated the Administrative Procedures Act. First, they claim, [a]lthough the TPS statute provides for, 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, “Plaintiffs are not challenging the TPS “determination” itself but the “practice or procedure employed in making [termination] decisions” by Defendants”⁷⁴.

Plaintiffs’ support this claim by asserting, “Defendants’ termination of Haitian TPS constitutes final agency action; is arbitrary and capricious; an abuse of discretion; otherwise not in accordance with the law; is an excess of statutory authority; and was undertaken without observance of procedure requires by law.”⁷⁵ Plaintiffs’ recognize, “Defendants’ employed an invalid and unauthorized process to terminate Haiti’s TPS designation irrespective of the statutory criteria for review by Congress.”⁷⁶ Plaintiffs’ further assert Defendants’ process does

⁷⁴ *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 27.

⁷⁵ *Id.*

⁷⁶ *Id.*

not, “ensure the protection of noncitizens vulnerable to extraordinary environmental, geopolitical, health and/or other human tragedies, and Defendants abandoned without explanation or justification their well-established standard for reviewing designation.”⁷⁷

Plaintiffs’ provide further evidence that Secretary Kelly abandoned prior standards for reviewing designations, “Kelly indicated that he would only look at “the earthquake” in Haiti—not the other “horrible conditions”—even though past Secretaries have looked at a range of “extraordinary” conditions to determine whether the TPS extension was warranted.”⁷⁸ Plaintiffs’ also claim, “[t]he word temporary in the program name does not refer to arbitrarily-measured time periods of short duration, but rather to measurable criteria used for regular evaluation of whether extraordinary conditions giving rise to the need for protection continue.”⁷⁹

ii. Violation of Due Process

Like each of the four cases, *Saget* alleges a due process clause violation claiming, Defendants’ termination of Haitian TPS “arbitrarily deprives current TPS recipients of the process . . . , as shown by the Administration’s departure from. . . the process for termination of TPS,” set forth in 8 U.S.C. § 1254a.⁸⁰ Plaintiffs’ assert,

[t]he [termination] announcement ignored the basis for the original and ongoing designation based upon extraordinary conditions under 8 U.S.C. § 1254a(b)(1)(C), which included all of the events enumerated in Kelly’s extension. Instead, it summarily asserted that the “extraordinary but temporary conditions caused by the 2010 earthquake no longer exist. The statement failed to explain how—in less than a year—Haiti has managed to overcome the seven key justifications identified by DHS in December 2016 to maintain TPS . . . ⁸¹

⁷⁷ *Id.*

⁷⁸ *Id.* at 21.

⁷⁹ *Id.*

⁸⁰ *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 28.

⁸¹ DHS Press Release, *Acting Secretary Elaine Duke Announcement on Temporary Protected Status* (Nov. 20,

In furtherance of the Due Process claim Plaintiffs’ proffer, “the termination was based on the President’s irrational beliefs about Haitians, which are not a legitimate government interest, and the termination was based on the President’s categorical and defamatory assertions about all Haitians, which the Haitian TPS recipients were given no opportunity to challenge.”⁸²

iii. Violation of Equal Protection Clause

Additionally, Plaintiffs’ assert an equal protection argument, “[t]he termination of Haitian TPS targets Haitians and was motivated by racial and national origin animus toward Haitians.”⁸³ This lawsuit, like the three before it, all provide ample evidence of the administration’s racial and national origin animus towards Haitians. Plaintiffs’ cite, “DHS announce that it would make H-2A and H-2B visas for Haitian nationals unavailable, citing “high levels of fraud and abuse,” without providing any evidence to support this assertion.”⁸⁴

iv. Violation of Administrative Procedure Act: Notice-and-Comment Rulemaking

Plaintiffs’ assert a unique claim under the Administrative Procedures Act (“APA”): Notice-and-Comment Rulemaking, “[t]he termination of Haitian TPS constitutes a substantive rule, as it binds DHS to deny applications for TPS to individuals who previously met eligibility criteria.”⁸⁵ Plaintiffs’ further the APA claim by alleging, “ Defendants’ decision to use racial and other criteria not contemplated in the statute or regulations requires DHS to engage in notice-

2017), <https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protectedstatus-haiti>.

⁸² *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 28-29.

⁸³ *Id.* at 29.

⁸⁴ Yeganeh Torbati, *Trump administration bars Haitians from U.S. Visas for Low-Skilled Work*, Reuters (Jan. 17, 2018), <https://www.reuters.com/article/us-usa-immigration-haiti/trump-administration-bars-haitians-from-u-s-visasfor-low-skilled-work-idUSKBN1F702O>.

⁸⁵ *Id.*

and-comment rulemaking before terminating the designation.”⁸⁶ Again, Plaintiffs’ provided evidence that the administration employed racial and other criteria, “Kelly’s remarks indicate that he was focused on terminating Haiti’s TPS ... rather than evaluating the conditions on the ground as the statute requires, and the [termination] failed to explain how Haiti had managed to overcome the list of extraordinary conditions that existed only months earlier when Kelly had reauthorized Haiti’s TPS designation.”⁸⁷

v. Violation Regulatory Flexibility Act

Unlike the aforementioned cases, Plaintiffs’ assert another unique claim that DHS violated the Regulatory Flexibility Act because, “DHS failed to conduct any regulatory flexibility analysis to determine how the termination of Haitian TPS will affect small entities, such as Haïti Liberté ...”⁸⁸ Plaintiffs’ provide evidence that Haïti Liberté ... is directly affected by the termination of Haitian TPS, because, “it will adversely impact the sales of Haïti Liberté, the largest Haitian newspaper distributed in the United States, should a leading writer be forced to return to Haiti.”⁸⁹

vi. Violation of Ultra Vires

Lastly, Plaintiffs’ state an additional new claim, “DHS’s termination of the designation of Haiti as a TPS country is ultra vires of the provisions in the Immigration and Nationality Act

⁸⁶ *Id.* at 29. 5 U.S.C. § § 553(b) & (c) (b) General notice of proposed **rulemaking** shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . . (c)After notice required by this section, the **agency** shall give interested **persons** an opportunity to participate in the **rulemaking** through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

⁸⁷ *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 21-22.

⁸⁸ *Id.* at 3.

⁸⁹ *Id.* at 3 & 30.

(INA), which govern the designation, termination, and extension of TPS countries.”⁹⁰ Plaintiffs’ also assert, ... from the President’s racially motivated desire to remove Haitian TPS holders from the country and DHS’s stated focus on the “temporary” nature of the TPS designation, it is clear that DHS’s decision was not properly based on the required factors set forth at 8 U.S.C. § 1254a(b)(1)(A-C).”⁹¹ Plaintiffs’ further recognize, “[s]ince 2011, DHS has regularly renewed Haitian TPS based on careful consideration of the totality of “extraordinary” conditions affecting Haiti,” under 8 U.S.C. § 1254a(b)(1)(C), “including housing shortages; a cholera epidemic; limited access to medical care, food, and water; political instability; the fragile economy; security risks; gender-based violence; and environmental risks, and [t]hese conditions continue to this day.”⁹² As mentioned above, “[that] statement failed to explain how—in less than a year—Haiti had managed to overcome the seven key justifications identified by DHS in December 2016 to maintain TPS ...”⁹³

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Saget v. Trump*, No. 18-01599 (E.D.N.Y filed Mar. 15, 2018) at 2.

⁹³ *Id.* at 22.

III. Conclusion

Over 300,000 individuals residing in the United States are affected by the termination of TPS.⁹⁴ TPS recipients are faced with looming deportation, separation from their families, losing businesses and livelihoods, and will experience greater exploitation within the workforce. It is important that TPS recipient's fundamental rights, ensured to them through the Due Process Clause and Equal Protection Clause, are protected. It is necessary that the current Administration be held accountable for their actions. We are hopeful that the filing of four lawsuits will help to stop the current administration's ability to remove hundreds of thousands of TPS recipients who have become part of the fabric of our society.

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⁹⁴ Zuzana Jerabek, *Fact Sheet: Temporary Protected Status*, National Immigration Forum (Feb. 8, 2018) (available at: <https://immigrationforum.org/blog/fact-sheet-temporary-protected-status/>).