No. 18-16981

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CRISTA RAMOS, *et al.*,

Plaintiffs-Appellees,

v.

KIRSTJEN NIELSEN, *et al.*,

Defendants-Appellants.

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

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INTRODUCTION

Temporary Protected Status ("TPS") is a humanitarian program that provides immigration relief to people from countries stricken by war, natural disaster, epidemic, or other catastrophe. 8 U.S.C. 1254a. Approximately 300,000 people from El Salvador, Haiti, Nicaragua, and Sudan lawfully reside in the United States with TPS. They have approximately 200,000 U.S.-citizen children, most of whom are of school age. The vast majority have lived here for over 15 years, often for decades. They own homes, pay taxes, enhance their local communities, and contribute billions of dollars to the national economy.

Over the past 25 years, Administrations have consistently extended TPS based on comprehensive evaluations of all conditions in a given country—including intervening events, *i.e.*, those occurring after initial designations. But when the Administration changed in January 2017, so did TPS. The Administration adopted a new practice that deemed intervening events categorically irrelevant, without providing an explanation. It soon terminated TPS for nearly 95% of all recipients.

Plaintiffs brought this challenge, and, with limited discovery, uncovered disturbing facts. Despite Defendants' denials, the decisions to terminate TPS for El Salvador, Haiti, Nicaragua, and Sudan rested on a newly-invented and pretextual restriction on what country conditions could be considered when deciding whether to extend TPS. Both public statements—including two Department of Homeland Security (DHS)

Secretaries' sworn Congressional testimony—and numerous internal documents revealed conscious adoption of this new practice to end TPS, as well as confusion, resistance, and reluctant acquiescence by career officials concerned by the change. The new interpretation allowed the Administration to disregard anything "bad" unless it could be "clearly linked to the initial disasters prompting the [initial] designations." ER.25.

Even worse, discovery revealed that racial animus motivated the new practice and terminations. The media already had reported President Trump's demand to replace TPS holders "from shithole countries" with immigrants from "countries such as Norway," along with many similar racist pronouncements, maligning immigrants as "snakes," "animals," and threats to European "culture." ER.30-31. But discovery revealed these were not just hateful rhetoric. They were a call to action.

Surrogates working to advance the President's immigration agenda heeded that call. After taking positions within DHS, these individuals fundamentally altered TPS decisionmaking process. They changed the conclusions of career officials, disregarded "all of the standard metrics" that traditionally guided TPS decisions, and ignored country conditions evidence where it did not lead to "the conclusion [they] [we]re looking for." ER.25; ER.36. Examples of human rights violations vanished, leaving assessments "incomplete," "lopsided," and "sanitized." SER.17.

Discovery further confirmed that the White House directly pressured DHS Secretaries, along with other officials charged with making

TPS decisions, to terminate TPS. Indeed, the White House called a Cabinet meeting shortly before TPS deadlines to advocate for terminations. The tactics worked. The Secretaries terminated TPS for El Salvador, Haiti, Nicaragua, and Sudan (and, later, Honduras and Nepal). Secretary Duke internally described her motivation as "the result of an America first view" to advance "the President's position on immigration." ER.29; ER.36.

The district court carefully considered the extensive evidence establishing the facts above before issuing a preliminary injunction. The TPS terminations threatened hundreds of thousands of people with the loss of legal status, jobs, homes, medical care, access to education, community networks, and other unique opportunities. Perhaps worst of all, their U.S.-citizen children faced an impossible choice: they could stay with their families or stay in their country, but not both. The equities overwhelmingly favored Plaintiffs. In contrast, Defendants pointed to no harm they would suffer were TPS holders permitted to live here lawfully, as they have for years, pending trial.

The court also found a likelihood of success. On the Administrative Procedure Act (APA) claim, it considered the "wealth of record evidence" confirming Defendants' unexplained departure from longstanding practice. ER.19. The court independently found Plaintiffs' discrimination claim raises serious questions on the merits, based on detailed factual findings.

On appeal, Defendants concede the equitable factors. They instead attack jurisdiction, but ignore the strong presumption favoring judicial review, under which courts have rejected similar arguments when construing comparable jurisdictional provisions. On the merits, Defendants ask this Court to ignore virtually all record facts to make the Secretaries' decisions appears lawful. But the district court's detailed findings are based on the evidence—the foundation of meaningful judicial review—and they refute Defendants' counterfactual narrative. Overwhelming evidence establishes both that Defendants adopted a new policy to ignore intervening events, and that the stain of racial animus infects the Secretaries' termination decisions.

The district court acted well within its discretion when granting Plaintiffs' preliminary injunction motion. This Court should affirm.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. 1331. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court abused its discretion in finding a likelihood of success on Plaintiffs' APA claims because Defendants departed from longstanding practice without providing any reasoned explanation.

2. Whether the district court abused its discretion in finding serious questions on Plaintiffs' Fifth Amendment claims because the departure from prior practice and TPS terminations were motivated by racial animus.

3. Whether the district court abused its discretion by enjoining implementation or enforcement of the decisions to terminate TPS for El Salvador, Haiti, Nicaragua, and Sudan.

STATEMENT OF THE CASE

A. Background of TPS Statute

TPS provides humanitarian immigration relief to individuals "who cannot safely return home to a war-torn or disaster-ridden country." *Ramirez v. Brown*, 852 F.3d 954, 955 (9th Cir. 2017).

Before TPS's enactment in 1990, Presidents and Attorneys General used "extended voluntary departure" (EVD) and other mechanisms to permit certain nationals to remain in the United States for humanitarian reasons. *See* Lynda J. Oswald, Note, *Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 Mich. L. Rev. 152, 157-60 (1986). The practice lacked "any specific criterion or criteria, … by which grants of 'extended voluntary departure' are determined." *Id.* at 178 n.153 (citing Letter from Attorney General W.F. Smith to Representative L.J. Smith (July 19, 1983)). Arbitrary results ensued, drawing objections from Congress. *See* H.R. Rep. No. 100-627, at 4 (1988) (Congress introduced predecessor bills to TPS based on repeated concerns

about lack of criteria for EVD and create a "more formal and orderly mechanism" for providing humanitarian relief on a temporary basis).

In response, Congress enacted TPS to guide and constrain executive practice. TPS requires the DHS Secretary to consult with "appropriate" government agencies, after which she may "designate" a country based on armed conflict, environmental disaster or epidemic, or other extraordinary conditions. 8 U.S.C. 1254a(b)(1). Designations last 6 to 18 months, effective upon notice in the *Federal Register*. *Id.* 1254a(b)(2). The Secretary must periodically "review the conditions in the foreign state" and "determine whether the conditions for such designation under [the statute] continue to be met." *Id.* 1254a(b)(3)(A). If the Secretary determines that a country "no longer continues to meet the conditions for designation under [the statute]," she "shall terminate the designation." *Id.* 1254a(b)(3)(B). Otherwise "the period of designation of the foreign state is extended" for 6, 12, or 18 months. *Id.* 1254a(b)(3)(C). Nowhere does the statute grant the Secretary discretion to terminate TPS if conditions warrant extension. Nor does the statute limit successive extensions. *Id.*

B. The Administration Pushed a Predetermined Political Agenda to End TPS.

The Trump Administration has ended TPS for more than 95% of those who had it.[1] Presented with a wealth of evidence, the district court

[1] After Plaintiffs filed the complaint, Defendants terminated TPS for approximately 100,000 people from Honduras and Nepal. Temporary

found the "White House was putting pressure on DHS to end TPS" and "did, in fact, have influence on the TPS decisions." ER.28-29. Most significantly, the Administration replaced a long-established standard allowing consideration of all current conditions—including intervening events—with a narrow one restricting consideration to what Defendants describe as the original "conditions that gave rise to the years-old TPS designations." AOB.2. The Administration adopted that standard, along with various other changes to the TPS process, "to get to the President/White House's desired result of terminating TPS." ER.32.

The record contains numerous examples of this pressure. For instance, three days before the deadline for TPS decisions for Nicaragua and Honduras, the White House convened a Cabinet-level meeting urging termination for Nicaragua, Honduras, Haiti, and El Salvador. ER.28. In a "Discussion Paper" to guide the meeting, the White House advocated for termination under the new standard—that "the temporary conditions that arose out of natural disasters and supported [the original] TPS designations have long ceased to exist." ER.294-309; *see* SER.227 at 340:1-6; SER.229 at 348:2-21.

Protected Status: Overview and Current Issues (Oct. 10, 2018), https://www.everycrsreport.com/reports/RS20844.html; ER.308 (TPS-holder population by nationality, excluding Sudan).

Following the meeting, White House Chief of Staff John Kelly and Homeland Security Adviser Tom Bossert repeatedly urged Acting Secretary Elaine Duke to terminate TPS. ER.28-30; ER.632 (memorializing Duke's "discussion with [Bossert]" where he "informed [her] of a strategy [she] was not previously aware of"); ER.823 (Duke's notes, memorializing that Bossert argued "conditions in [four] countries no longer exist" and would be "extremely disappointed if [the decision was] kick[ed] into lap of next Sec[retary]"); SER.58-60 at 158:5-160:20; SER.163-64 ("massive pressure" to terminate Honduras, including Kelly telling Duke that continuing TPS was an obstacle to President's "wider strategic goal" on immigration).

Duke pre-determined "[t]he TPS program must end for these countries soon" and acknowledged "[*t*]*his conclusion* [*was*] *the result of an America first view*." ER.36; *see* ER.145. She then terminated TPS for Nicaragua and Haiti, ER.5-6, and also shortened the termination window for Nicaragua from 18 to 12 months under further White House pressure. ER.28 n.11; SER.280 (email from Bossert thanking DHS "for the 12 month outcome"). Her successor, Secretary Kirstjen Nielsen, terminated TPS for El Salvador shortly thereafter. ER.7.

The district court found the record supports the conclusion that Acting Secretary Duke "was largely carrying out or conforming with a predetermined presidential agenda to end TPS." ER.29 (citing Duke's aim to "send a clear signal that TPS in general is coming to a close" in a manner

"consistent with the President's position on immigration"). The district court also credited evidence the White House was "keenly interested" in TPS. ER.28. Stephen Miller, President Trump's senior adviser for domestic policy, "frequently" reached out to DHS Chief of Staff Chad Wolf and DHS Senior Advisor Gene Hamilton to urge termination. ER.28. The White House Domestic Policy Council "sought repeatedly to influence the decision-making processes at the State Department and DHS in order to ensure a pre-determined outcome: the termination of TPS designations for [El Salvador, Honduras, and Haiti]." SER.203; *see* SER.193.

Officials from the Administration's immigration transition team—including Gene Hamilton, Kathy Nuebel Kovarik, and Lee Francis Cissna—assumed high-level positions at DHS and U.S. Citizenship & Immigration Services (USCIS), where they directly shaped TPS policy. SER.77-78 at 39:10-40:18; SER.79-80 at 45:13-46:13. In October 2017, Kovarik hired Robert Law and assigned him responsibility for editing TPS recommendations. *See* SER.14-15; SER.81 at 56:11-23; SER.83 at 58:19-22; SER.93 at 108:16-22; SER.94 at 111:11-24. Law previously worked for the "anti-immigrant hate group" Federation for American Immigration Reform (FAIR), SER.162-32, where he co-authored a report for the 2017 Presidential Transition to "revoke TPS for any country that has received more than two renewals." SER.136; *see* SER.118-24; SER.151-53.

The Trump Administration also altered the process for conducting TPS reviews. Historically, reviews began with an objective "country conditions report." ER.4-6. Those reports formed the basis for internal decision memos, which contained the USCIS Director's recommendation to the Secretary, and ultimately formed the basis of *Federal Register* notices ("FRN"). ER.4-5. Career specialists within USCIS prepared the reports and drafted decision memos. ER.4-5.

Under Trump, political surrogates like Kovarik assumed responsibility for periodic TPS reviews. They reassigned responsibility for drafting FRNs from career staff to political surrogates and "repackaged" career staff recommendations to justify denials instead of extensions. ER.32-36; *see* ER.23 n.7 (describing country conditions memos prepared by career officials); SER.274-78; SER.339-41. The Administration now reviewed multiple countries simultaneously, even though each had different originating and current conditions, and different review deadlines. *Compare* ER.1014 ¶ 11("separate review process was conducted for each country at issue."), *with* ER.304 (White House "coordinat[ing] the conditions and process for terminating [TPS] for aliens from El Salvador, Honduras, Nicaragua, and Haiti."). They bypassed regular clearance processes and announced decisions shortly before statutory deadlines, upsetting congressionally-mandated inter-agency and inter-departmental input. SER.182 (career official expressing concern about "stick[ing]

memos in front of the Secretary and say[ing] 'sign here'"); SER.185 (career official asking "[A]re we now taking these FRNs to OMB for clearance or just FYI? I'm afraid we won't get sign off in time if we have to wait for them."); SER.188-90. And they applied the Administration's new standard to justify termination by eliminating consideration of post-designation events. ER.20-26.

C. The Administration's New Standard Discarded Decades of Practice.

As the district court found, the Trump-era "DHS made a deliberate choice to base the TPS decision solely on whether the originating conditions or conditions directly related thereto persisted, regardless of other current conditions no matter how bad, and … this was a clear departure from prior administration practice" that was "substantial and consequential." ER.26 (Duke intended "strong break with past practice"). The district court recited "a wealth of record evidence" to support this finding. ER.19-25; ER.69-76.

The district court found—based on FRNs, public statements, sworn testimony, and internal records—that prior Administrations relied on "[i]ntervening factors arising after a country's original TPS designation" to extend TPS. ER.19 (quoting declaration of former USCIS Director

Leon Rodriguez); ER.69-76.[2] Secretaries considered "the full range of current country conditions" in making TPS decisions, regardless of whether those conditions traced back to events that triggered original designations. ER.19-20. For example, although initial designations typically arise from discrete catastrophes—like earthquakes (El Salvador and Haiti), hurricanes (Nicaragua), or civil wars (Sudan)—USCIS specialists repeatedly recommended, and the Secretary repeatedly approved, extensions due to "subsequent natural disasters, issues of governance, housing, health care, poverty, crime, general security, and other humanitarian considerations." ER.19-20.[3]

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[2] *Compare, e.g.*, 66 Fed. Reg. 14, 214 (Mar. 9, 2001) (designating El Salvador because of "environmental disaster and substantial disruption of living conditions caused by the earthquakes"), *with* 77 Fed. Reg. 1,710, 1,712 (Jan. 11, 2012), 80 Fed. Reg. 893, 894-95 (Jan. 7, 2015), *and* 81 Fed. Reg. 44,645, 44,647 (July 8, 2016) (extensions for El Salvador due to recent "adverse climatic conditions," "leaf rust epidemic," fiscal and unemployment challenges, and "[i]ncreasing violence and insecurity," despite reconstruction of "all major roads damaged by [original] earthquakes").

[3] *See* ER.191; ER.356; ER.688 (State Department memos stating prior extensions for El Salvador, Haiti, and Nicaragua were based on, *inter alia*, subsequent natural disasters, economic crises, and security challenges); SER.272 (agency backgrounder stating that TPS designations for El Salvador and Nicaragua have "been continuously extended ... due [in part to] subsequent compounding environmental disasters"); SER.64 at 218:9-12 (testimony from former U.S. Ambassador to Honduras that "successive administrations had renewed TPS for Honduras long after the conditions that resulted from Hurricane Mitch had begun to dissipate or had dissipated"); SER.283-302; SER.304-31 (2016 decision memos recommending extensions for Nicaragua and El Salvador because of "subsequent environmental disasters").

By contrast, under the new standard extensions were permitted only where conditions *directly related to the original reason* for a designation—irrespective of intervening humanitarian crises—warranted extension. ER.19-25. For example, in June 2017, then-Secretary Kelly testified: 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.*" ER.21. And, in January and April 2018, Secretary Nielsen adopted the same position in testimony, asserting: "[t]he law does not allow me to look at the country conditions of a country, writ large," but instead "requires me to look very specifically as to whether the country conditions originating from the original designation continue to exist." ER.22-23. She further explained, "if I cannot say that the conditions emanating from the earthquakes [underlying El Salvador's original designation] still exist, regardless of other systemic conditions, I must terminate TPS." *Id.*

Below and here, Defendants deny any departure from past practice, which explains why they have never formally acknowledged or offered any rationale for the change. *E.g.*, AOB.30-39; ECF.20; ECF.116. But Defendants clearly implemented new internal standards, starting with the first TPS periodic review of this Administration: Haiti.

In March 2017, career specialists recommended an 18-month extension for Haiti based on a broad range of humanitarian conditions.

SER.179. Applying the new standard, political surrogates initially flipped the recommendation to an outright denial. ER.24 n.8. They asserted, "the law only permits an extension of Haiti's TPS designation if the extraordinary and temporary conditions that prompted designation continue to exist." *Id.* Career staff observed the decision "was a political one" based on a new standard considering only conditions stemming from the earthquake. ER.20. Ultimately, DHS settled on a 6-month extension. ER.5. The FRN and public messaging made clear that it would be the last. *Id.* Haitian TPS holders were told to "prepare for their return to their homeland." *Id.* On a press call, DHS spokespeople reported the Secretary was approaching TPS with "a fresh set of eyes" and basing decisions only on "whether conditions that led to Haiti's initial designation in 2010 remain." SER.70-71.

The Administration next implemented its new standard by terminating Sudan's TPS in September 2017. In a draft decision memo, career officials reviewed a broad range of conditions, including intervening events such as a cholera outbreak and lack of access to drinking water, and concluded, "termination does not appear to be warranted." ER.32; ER.958. But political surrogates edited the decision memo to recommend termination. ER.32-33. In support, they tacked on a section focused narrowly on the factors that triggered Sudan's original designation. ER.32-34. The resulting decision memo was so incoherent that USCIS Director

Francis Cissna said it read "like one person who strongly supports extending TPS for Sudan wrote everything up to the recommendation section, and then someone who opposes extension snuck up behind the first guy, clubbed him over the head, pushed his senseless body out of the way, and finished the memo." ER.33. The memo was changed several more times before ultimately being revised "to clearly support the … decision to terminate." ER.33-34. The disconnect between the termination and the dangerous conditions in Sudan drew criticism from within DHS and the State Department. ER.34-35 (identifying "significant mischaracterizations … at odds with the [State] Department's understanding of circumstances on the ground").

Terminations for Nicaragua, Haiti, and El Salvador followed. Each "underwent a similar process." ER.35. Trump Administration surrogates within DHS complained that decision memos drafted by career professionals "read[] as though we'd recommend an extension [because] we talk so much about how bad it is." ER.25. For example, Law (the former FAIR director) complained the Haiti decision memo drafted by career professionals "is overwhelming[ly] weighted for extension which I do not think is the conclusion we are looking for," so he edited it to make it "fully support termination." ER.36. A career professional explained, "the basic problem is that it IS bad there [with respect to] *all of the standard metrics*." ER.25 (emphasis added). He observed, "our strongest argument for

termination … is just that it is not bad in a way clearly linked to the initial disasters prompting the designations." ER.25.[4]

Cissna approved the reworked USCIS recommendations to terminate TPS for El Salvador, Haiti, and Nicaragua. Final decision memos recited the new standard and recommended termination because "current challenges cannot be directly tied to destruction stemming from" the original reasons for designation. ER.23-25. The FRNs were similarly limited. ER.19. DHS asserted "the INA restricts considerations for continuing designation of TPS to the conditions on the ground as impacted by the initial event." ER.22.

D. Overwhelming Evidence Shows the TPS Terminations Were Motivated by Racial Animus.

All these changes occurred in a climate infected by the President's "America First" approach, *infra* Pt.III.C & n.16, including numerous racist statements against non-white, non-European immigrants. The district court found evidence the terminations were designed to further a "predetermined presidential agenda to end TPS" influenced by the President's racial animus against "non-white, non-European" immigrants.

[4] Career officials repeatedly expressed similar concerns. *E.g.*, SER.17 (career employee noted removal of human rights violations "could be read as taking another step toward providing an incomplete and lopsided country conditions presentation to support termination"); SER.19 ("The country conditions are what they are. If they're uncomfortable with the termination conclusion following from them … we propose paring down that section to simply [sic] the statutory language.").

ER.29; ER.97. The record of the President's overtly racist statements is voluminous. It includes the President repeatedly telling a parable comparing immigrants to deadly snakes, ER.31, accusing "thousands and thousands" among the "large [New Jersey] Arab populations" of celebrating the September 11, 2001 attacks, SER.241, asserting "15,000 recent immigrants from Haiti 'all have AIDS," ER.30; *see* SER.252, and calling immigrants "animals." ER.31; *see* SER.267. The district court also found that, in making TPS decisions, the Secretary sought to secretly obtain criminal history and benefits information about TPS holders never previously considered that "coincides with racial stereotypes—*i.e.*, that non-whites commit crimes and are on the public dole." ER.37.

Significantly, on January 11, 2018, during a bipartisan immigration meeting to discuss a legislative proposal granting status to some that dealt with TPS-holders from Haiti, El Salvador, and certain African countries, the President asked: "Why are we having all these people from shithole countries come here?" ER.30-31; *see* SER.260. "[He] then suggested that the United States should instead bring more people from countries such as Norway." *Id.* President Trump "told lawmakers that immigrants from Haiti 'must be left out of any deal.'" *Id.*

In the district court, Defendants did not dispute the existence or meaning of these and other hate-filled statements. ER.30 n.13.

E. Evidence of Irreparable Harm Stands Unrebutted.

Defendants have never disputed the evidence supporting the district court's finding of irreparable harm. ER.8-15. More than 300,000 TPS holders from El Salvador, Haiti, Nicaragua, and Sudan have lived lawfully in the United States for "a significant number of years, some as many as twenty." ER.8. They have "hundreds of thousands of U.S.-citizen children, 192,000 born to Salvadoran [TPS] beneficiaries alone." ER.8-9. Without TPS, Plaintiffs and other TPS holders "risk being uprooted from their homes, jobs, careers, and communities." ER.8. Removal means returning to countries that "may not be safe" and where "their children and family members may have little or no ties." *Id.* Families face an impossible choice: "[E]ither bringing their children with them, giving up their children's lives in the United States (for many, the only lives they know), or being separated." *Id.* Termination has caused "great emotional distress, fear, and anxiety." ER.9.

The district court also weighed the harm to the public interest. ER.10. TPS holders have a "significant presence" in the national economy. *Id.* It remains undisputed that "loss of legal status for these TPS holders is projected to cost $132.6 billion in GDP (due to lost earnings as well as decreased industry outputs), $5.2 billion in Social Security and Medicare contributions, and $733 million in employers' turnover costs." ER.10.

F. Procedural History

In March 2018, Plaintiffs filed suit, alleging the new standard and resulting TPS terminations for El Salvador, Haiti, Nicaragua, and Sudan violated the APA and Fifth Amendment. ER.1049-53. Defendants unsuccessfully moved to dismiss. ER.99-100. Plaintiffs then conducted limited discovery for each country. SER.365-66. When Defendants refused to timely respond or produce critical records, Plaintiffs secured a series of rulings compelling production. SER.360-61; SER.358-59; SER.350-357.

In August 2018, Plaintiffs moved for a preliminary injunction. ECF.89; ECF.120. After permitting over-length briefs and extended argument, the district court exhaustively reviewed the record and concluded (1) the equitable factors tipped decisively in Plaintiffs' favor, and (2) Plaintiffs established a likelihood of success on the APA claims and at least serious questions on the discrimination claim. ER.14-15; ER.27; ER.37; ER.42. The Court then set a hearing to discuss an expedited pretrial schedule. Defendants appealed. Shortly thereafter, the parties jointly requested, and the district court granted, a stay pending appellate review. ECF.138. The parties' agreement provided, *inter alia*, that Defendants would not issue new termination decisions for these four countries during the pendency of this appeal. ECF.135-1 at 4, 9.

SUMMARY OF ARGUMENT

I. Defendants concede Plaintiffs will suffer irreparable harm, the equities tip sharply in Plaintiffs' favor, and an injunction serves the public interest. The district court's equitable findings are thoroughly supported by declarations, Defendants' documents, and *amicus* briefs from state and local governments. If this Court were to reverse, 300,000 people would lose their immigration status, jobs, and in many cases homes, families, and the only country they have known for decades. Their citizen children would have to choose between staying with their parents or staying here, in their country. Most of this harm could not be undone if a court concludes the terminations were unlawful after trial. In contrast, if the Court affirms and Plaintiffs lose at trial, the only "harm" would be extending lawful status for long-time, lawful residents for a few additional months. Equitable considerations thus overwhelmingly favor preliminary relief.

II. Plaintiffs established a likelihood of success under the APA, and the record amply supports affirmance. Congress did not strip federal courts of jurisdiction to hear all challenges to TPS decisions in 8 U.S.C. 1254a(b)(5)(A). Courts consistently have read similar jurisdictional statutes concerning agency "determination[s]" to permit review of unlawful decisionmaking practices, even though courts often set aside hundreds of agency decisions after finding a process illegal. So long as the relief sought does not dictate the outcome of new determinations, but requires

only a lawful process, the claims do not challenge "determinations." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 494 (1991). Here, the injunction does not bar Defendants from terminating TPS. It merely requires them to take such action, if they choose to, using lawful practices and procedures.

On the APA claim's merits, Defendants concede agencies must acknowledge and provide good reason for departures from past practice. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). While Defendants insist no change in practice occurred, the district court exhaustively reviewed the evidence and found DHS "made a deliberate choice to base the TPS decision solely on whether the originating conditions or conditions directly related thereto persisted, regardless of other current conditions no matter how bad." ER.26. The unexplained change represented a "clear," "substantial and consequential" departure from past practice. ER.26.

Defendants provide no bases for setting aside a finding supported by "a wealth of record evidence" as clearly erroneous. ER.19. Instead, Defendants largely ignore the evidence, offering an alternative account of DHS practices. No precedent permits a reviewing court to ignore findings buttressed by voluminous evidence, including sworn testimony by two DHS Secretaries. ER.15-27; ER.69-77.

Defendants' passing assertion that the district court erred in permitting discovery is waived. In any case, the court acted well within its

discretion because Defendants failed to produce the "whole" administrative record and discovery was necessary to ensure meaningful review.

III. The District Court did not abuse its discretion in finding serious questions on the merits of Plaintiffs' Fifth Amendment claims.

The record includes extensive evidence that racial animus was a motivating factor, including direct evidence President Trump expressed racial animus towards non-white, non-European immigrants during a meeting *about TPS*. Defendants re-imagine his racist remarks as legitimate expressions of concern over immigration, but the Court should reject their Orwellian invitation to whitewash these disturbing statements. The evidence plainly establishes the President's animus.

Substantial evidence also establishes extensive, successful pressure exerted by the White House to influence these particular decisions. The White House pressured DHS Secretaries—in various ways and at multiple levels—to terminate TPS. Defendants departed from traditional decision-making processes and procedures to reach a "pre-ordained result desired by the White House." ER.2. The district court found the Secretaries' own internal statements prove they made decisions to further the Administration's "America First" anti-immigrant agenda. Although Plaintiffs need not establish likely success given the imbalance in equities, the evidence of racial animus here far exceeds that threshold.

Defendants argue for deference under *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), but this Court already rejected that argument in *Regents of*

the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 519 (9th Cir. 2018). This case, like *Regents*, involves people already residing here rather than individuals seeking admission. *Trump*'s deferential standard therefore does not apply. Deference is instead owed to the district court.

IV. Defendants argue the district court abused its discretion by enjoining implementation or enforcement of the TPS terminations, instead of just exempting Plaintiffs—an argument they never made below. In any event, the APA permits courts to restrain agency action, which invariably affects non-parties. Similarly, the Fifth Amendment requires courts to undo the effects of invidious discrimination root and branch, even where challenged only by individual plaintiffs.

STANDARD OF REVIEW

This Court reviews preliminary injunctions for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). Review is "limited and deferential," *id.*, and reversal warranted "only if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Doe v. Kelly*, 878 F.3d 710, 719 (9th Cir. 2017) (quotation omitted). "Under th[e] [clear error] standard … we affirm the court's finding so long as it is plausible." *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017) (quotation omitted).

A preliminary injunction is warranted when plaintiffs are "likely to succeed on the merits," "likely to suffer irreparable harm," "the balance

of equities tips in [their] favor," and an injunction serves "the public interest." *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1142 (9th Cir. 2018) (quotation omitted). Relief is also appropriate where "serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiffs'] favor." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (quotation omitted).

ARGUMENT

I. Defendants Concede the Equitable Factors Sharply Favor Plaintiffs.

The district court found Plaintiffs will suffer irreparable harm, the equities tip sharply in their favor, and an injunction serves the public interest. ER.8-15. Defendants never dispute Plaintiffs' "compelling case" or the court's extensive findings. ER.8. TPS holders, their families, and communities will irreparably suffer from terminations. *Id.* Defendants also concede that leaving TPS in place pending final adjudication is harmless, particularly compared to the massive impacts of wrongful termination. *Id.* The equities strongly favor affirmance.

II. The District Court Did Not Abuse its Discretion in Finding the APA Claims are Likely to Succeed.

A. The District Court Had Jurisdiction.

Federal courts have consistently recognized APA jurisdiction to review unexplained departures from prior agency practice. *Fox*, 556 U.S. at

515-16 (permitting challenge to unexplained departure from agency practice). Contrary to Defendants' claim, Section 1254a(b)(5)(A) does *not* vest DHS with unreviewable discretion to terminate TPS, no matter how arbitrary.[5] The statute only bars challenges to TPS "determinations"—not to the unlawful adoption, without explanation, for deciding whether to terminate existing TPS designations. ER.58-63.

1. Defendants ignore "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670-71 (1986). Congress enacted the TPS statute just four years after *Bowen*. Courts have repeatedly applied *Bowen*'s presumption to immigration statutes. *E.g.*, *I.N.S. v. St. Cyr*, 533 U.S. 289, 298 (2001) (applying "strong presumption in favor of judicial review of administrative action" to find jurisdiction).

Defendants have not provided "clear and convincing evidence" to overcome their "heavy burden" to show Congress prohibited *all* judicial review of TPS decisions. *Bowen*, 476 U.S. at 671. Consistent with *Bowen*'s rule, courts have narrowly read "determination" in jurisdictional provisions, so as to preserve review over claims that attack a collateral legal defect in the decisionmaking process, rather than the decision itself. *McNary*, 498 U.S. at 494. Where the relief sought does not dictate the

[5] Section 1254a(b)(5)(A) provides there "is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection."

outcome of the agency's decision, but only compels a valid process, the claim does not challenge the agency's "determination." *Immigrant Assistance Project of AFL-CIO v. I.N.S.* (*IAP*), 306 F.3d 842, 862-63 (9th Cir. 2002).

The district court's order does not enjoin the Secretaries' "determinations" because it does not enjoin Defendants from re-enacting the terminations under lawful standards and procedures. ER.42-43; ER.1054-55. Relatedly, the injunction does not "have the effect of establishing [Plaintiffs'] entitlement to" TPS; it merely holds invalid practices that led to these determinations. *McNary*, 498 U.S. at 495. Other district courts considering APA challenges to these terminations agree. *Saget v. Trump*, 2018 WL 6584131, at *4 (E.D.N.Y. Dec. 14, 2018) (finding jurisdiction because "Plaintiffs [we]re not seeking a substantive declaration … that they [we]re entitled to any particular TPS determination"); *CASA de Maryland, Inc. v. Trump*, 2018 WL 6192367, at *8 (D. Md. Nov. 28, 2018); *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 409 (D. Mass. 2018).[6]

Defendants accuse Plaintiffs of challenging "what factors a given Secretary [found] *most* significant," or that "[t]he Secretary failed to *adequately* explain why she did not offer a *detailed* discussion of a particular

[6] After the injunction issued, the parties negotiated an agreement under which Defendants would not issue new terminations for these countries pending this appeal. ECF.138.

substantive factor." AOB.22-23 (emphases added). But "[t]he [agency] cannot reframe plaintiffs' complaint to evade responsibility for failing to abide by the APA's requirements." *Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786, 806 (6th Cir. 2018). Plaintiffs contend—and the district court found—the Administration adopted a wholly new practice that rendered an important category of facts—intervening events—*entirely* irrelevant, without providing *any* explanation. ER.26-27. If true, that violates the APA and falls outside Section 1254a(b)(5)(A)'s scope.

Defendants also deny any change occurred. AOB.32-33. The district court squarely found to the contrary, but "[t]he merits of Plaintiffs' claims have no bearing on whether the district court has subject matter jurisdiction." *Proyecto San Pablo v. I.N.S.*, 189 F.3d 1130, 1138 (9th Cir. 1999). If no change occurred, Plaintiffs lose on the merits, not on jurisdiction.

2. Plaintiffs' interpretation of Section 1254a(b)(5)(A) follows from four binding decisions that narrowly read similar jurisdiction-stripping statutes as permitting collateral challenges to agency policies and practices. *McNary*, 498 U.S. at 492-94; *Reno v. Catholic Soc. Servs., Inc.* (*CSS*), 509 U.S. 43, 55-58 (1993); *IAP*, 306 F.3d at 862-64; *Proyecto San Pablo*, 189 F.3d at 1138. These cases control.

McNary upheld judicial review of statutory and constitutional challenges to government policies and practices concerning an immigration benefits program. 498 U.S. at 481-84, 496-98. The statute barred "judicial

review of a determination respecting an application for adjustment of status" under the program. *Id.* at 491 (quoting Section 1160(e)(1)).

McNary found the statute's use of "determination" critical. "Significantly, the reference to 'a determination' describes a single act rather than … a practice or procedure employed in making decisions." *Id.* at 492.[7] Congress could have used broader language had it wanted to bar "all causes … arising under" the statute, or "all questions of law and fact" in such suits, rather than merely review of "determination[s]." *Id.* at 494. The Court also read the statute to preserve judicial review because, without it, claimants could not present all relevant evidence through the administrative review process, upsetting the "well-settled presumption" favoring review of agency action. *Id.* at 496-97.

Two years later, the Court applied *McNary* to another statute that used "determination," again permitting collateral statutory and constitutional challenges, including to an agency's implausibly narrow statutory

[7] Defendants claimed below that Section 1254a(b)(5)(A) was broader than the statute in *McNary* because it refers to "any" instead of "a" determination, but courts have consistently read statutes barring review of "any" determination or decision narrowly, applying the same cases relied on in *McNary*. *E.g.*, *Demore v. Kim*, 538 U.S. 510, 516 (2003) (holding statute precluding review of "any action or decision by the Attorney General" did not bar collateral challenge); *Bowen*, 476 U.S. at 679 (construing statute providing "[n]o action … shall be brought under section 1331 … to recover on any claim" inapplicable to general statutory and constitutional challenges).

interpretation. *CSS*, 509 U.S. at 47, 55-58, 63-64. "[T]he language setting the limits of the jurisdictional bar describes the denial of an individual application, and thus applies only to review of denials of individual … applications." *Id.* at 56 (quotations omitted).[8]

The agency's determination—a single act—to terminate TPS for a particular country is directly analogous to the determination to deny a benefits application in *McNary* and *CSS*. And the agency's unlawful adoption of a new standard for TPS determinations is analogous to the unlawful practices and standards challenged in those cases.

This Court has applied *McNary* and *CSS* to narrowly construe "determination" in several cases. *IAP* upheld jurisdiction over a challenge to INS's misapplication of a rule that, to qualify for legalization, an individual's unlawful presence had to be "known to the government." 306 F.3d at 863. INS required applicants to show schools had reported them to INS, and rejected other types of evidence. *Id.* at 862-63. This Court rejected the INS's jurisdictional challenge, stating the *IAP* plaintiffs did not seek a ruling establishing "eligib[ility] for adjustment of status," *id.* at 864, just as Plaintiffs here do not argue the Secretary was compelled to extend TPS. Instead, the *IAP* plaintiffs challenged only the practice INS

[8] Contrary to Defendants' claim, *CSS* was not limited to challenges to regulations that do not "refer or rely on" individual applications. AOB.28. It rejected the government's attempt to distinguish *McNary* on that basis. The merits claim in *CSS* focused almost entirely on adoption of a flawed agency standard, just like the claims here. AOB.47.

employed to make eligibility assessments, *id.*, just as here Plaintiffs challenge only the practice Defendants employed for terminating TPS (because the agency adopted it in violation of the APA). *Accord Proyecto*, 189 F.3d at 1138 (upholding jurisdiction over collateral challenge).

The presumption favoring judicial review, coupled with Section 1254a(b)(5)(A)'s reference to "determinations," compels the same result here. While Section 1254a(b)(5)(A) focuses on country-specific decisions rather than individual TPS applicants, Plaintiffs' APA challenge goes to the agency's underlying practice; it does not dictate the outcome of any particular determination. Because Plaintiffs do not seek to establish that a particular country must remain designated, they do not challenge a "determination" under Section 1254a(b)(5)(A).

Defendants assert Plaintiffs challenge "the specific determinations themselves," AOB.21-23, but Plaintiffs' claim does not rest on criticism of the Secretaries' "assessments of conditions in foreign countries," "predictive judgments," or the "adequacy of [the] basis for making a particular TPS determination." AOB.23. Plaintiffs' APA claim never contests the factual support for statements made in determinations. Instead, it challenges the agency's failure to explain a new practice—refusal to consider intervening events when deciding whether to extend or terminate TPS.

Defendants also claim the relief sought here differs from *McNary* because Plaintiffs seek to set aside terminations. AOB.23; AOB.27. But the *McNary* "injunction requir[ed] the INS to vacate large categories of

denials." *McNary*, 498 U.S. at 489. Similarly, *CSS* required INS to accept applications it had previously rejected. *CSS*, 509 U.S. at 48-49, 52. So did the orders in *IAP* and *Proyecto*. *E.g.*, *IAP*, 306 F.3d at 851, 873 (remanding "so that any [such] applicants who may have been denied legalization as a consequence of invalid INS regulations may be identified, and granted appropriate relief"). As these cases show, the relevant test is not whether orders set aside agency decisions. That happens in almost every case where agencies adopted unlawful practices. Rather, the question is whether the relief sought would compel an agency to reach a particular result, even if acting under lawful policies and procedures.

3. Defendants cite cases involving different jurisdictional provisions, AOB.25-27, but none disturb the "guiding principle" that statutes barring review of "determinations" preserve jurisdiction over "challenges to [INS] procedures or practices." *Ortiz v. Meissner*, 179 F.3d 718, 721-722 (9th Cir. 1999). All are also distinguishable.

First, several involve statutes using far stronger preclusive language than Section 1254a(b)(5)(A). For example, the statute in *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018), gave "sole and unreviewable discretion" to the Secretary over certain decisions. Similarly, *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012), and *JEFM v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016), involved 8 U.S.C. 1252(b)(9), which applies not to "determinations," but to "all questions of law and fact" arising from any "action taken or proceeding brought" to remove non-citizens.

These cases undermine Defendants' position, because Congress did *not* use comparable language here.

Second, several of Defendants' cases involve *channeling* rather than *preclusion* of judicial review; they concern only *where* claims can be reviewed, not *whether* claims can be reviewed. *E.g.*, *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 876 (9th Cir. 2009) ("meaningful judicial review of [plaintiff's] substantive challenge is available" through administrative process); *Martinez*, 704 F.3d at 623 ("Martinez had his day in court"); *JEFM*, 837 F.3d at 1036-38. Because those statutes do not, on their face, involve a complete denial of review, courts have read them without the strong presumption applicable in *McNary*, *CSS*, and here.[9]

Third, several of Defendants' cases involve direct rather than collateral challenges. Because the relief sought would have dictated agency

[9] Below, Defendants said review "may" be available for TPS holders once in removal proceedings. ECF.20 at 23. They now contend Congress barred all review. AOB.29. Under *McNary*, even review in removal proceedings would be inadequate: requiring individual TPS holders to wait in this country (in violation of law) and either be arrested or turn themselves in to obtain review would be "[q]uite obviously … tantamount to a complete denial of judicial review for most [affected individuals]." *McNary*, 498 U.S. at 496-97; *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (plurality) (jurisdictional provision inapplicable where it leaves at least some without "any meaningful chance for judicial review"); ECF.23 at 14. Moreover, the record needed would not be available without discovery, and TPS holders with final removal orders would not have even a theoretical possibility of obtaining review of the claims raised here, as their proceedings would be over.

decisions, the claims challenged agency "determinations." For example, the relief sought in *Skagit Cty. Pub. Hosp. Dist. No. 2 v. Shalala,* 80 F.3d 379, 386 (9th Cir. 1996), required not just setting aside an agency decision, but also adopting a particular classification. *Accord Rialto*, 581 F.3d at 876.[10]

4. Defendants also advance meritless policy arguments for their position. AOB.29-30. They claim Congress wanted to insulate the Secretary's reasons and judgments, and to stop virtually all TPS-related litigation, because it would undermine TPS's inherently discretionary nature. *Id.* But Plaintiffs seek no review of foreign policy judgments; they raise a quintessentially legal challenge to the agency's failure to explain a new practice for administering TPS.

Moreover, if Congress wanted to grant agencies unfettered power to disrupt the thousands of people's lives, it would have written expansive language. *Cf. Gebhardt*, 879 F.3d at 987. Instead, Congress did *not* give the Secretary blanket discretion to *terminate* TPS. It conferred discretion as to initial designations, 8 U.S.C. 1254a(b)(1), but *required* extensions

[10] Other cases Defendants cite involve factual and statutory contexts far afield. For example, *Skagit Cty. Pub. Hosp.*, 80 F.3d at 386, *Amgen, Inc. v. Smith*, 357 F.3d 103, 112 (D.C. Cir. 2004), and *Am. Soc. of Cataract & Refractive Surgery v. Thompson*, 279 F.3d 447, 454 (7th Cir. 2002), turned on a unique "budget neutrality" requirement from the Medicare context that was incompatible with judicial review.

where conditions warrant (while reserving discretion on the length of extensions), 8 U.S.C. 1254a(b)(3)(C). *Compare Morales de Soto v. Lynch*, 824 F.3d 822, 827 (9th Cir. 2016) (analyzing reviewability of claim challenging exercise of prosecutorial discretion).

For all these reasons, Section 1254a(b)(5)(A) lacks "clear and convincing evidence" of congressional intent to foreclose judicial review of Plaintiffs' APA claim. *CSS*, 509 U.S. at 64.

B. Defendants Violated the APA by Departing from Past Practice without Acknowledgement or Explanation.

Defendants fail to engage with the factual record underlying the district court's APA ruling. Instead, they attack a straw man and mischaracterize Plaintiffs' claim as a challenge to the *weight* DHS gave to intervening conditions. AOB.30. As noted above, Plaintiffs challenge DHS's refusal to consider intervening conditions *at all*, after decades of considering them. Defendants offer a few cherry-picked examples to suggest nothing changed. But the district court found Defendants' account "belied by the record evidence." ER.25-26. That finding was not clear error.

1. An agency violates the APA by departing from past practice without "display[ing] awareness that it *is* changing position" and providing "good reasons for the new policy." *Fox*, 556 U.S. at 515-16; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (applying heightened standard where change implicates reliance interests); *Lal*

v. I.N.S., 255 F.3d 998, 1006-07 (9th Cir. 2001) (requiring asylum applicant to establish ongoing disability violated APA where agency did not previously impose that condition).

The "good reason" requirement "is not limited to officially promulgated regulations." *Robbins v. Reagan*, 780 F.2d 37, 45-49 (D.C. Cir. 1985). It applies to changes manifested in decisions, informal guidance, and practices. *Id.* (reviewing whether agency provided adequate explanation for reversing commitment to homeless shelter); *Lal*, 255 F.3d at 1006-07 ("By changing its settled practice … the BIA acted impermissibly and committed an arbitrary and capricious act."); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-88 (9th Cir. 2007) (departure from decades-old funding practice); *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923-24 (D.C. Cir. 2017) (departure from long-standing land management practice).

Defendants cite *California Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009), but it undermines their argument, as the district court found. ER.15-16. *California Trout* recognized "an irrational departure" from a policy manifested only in agency decisionmaking can violate the APA. *Id.* at 1023. And, contrary to Defendants' suggestion, because it did not involve a jurisdiction-stripping provision, it sheds no light on how to interpret Section 1254a(b)(5)(A).

Accordingly, DHS could not stop considering intervening conditions when making TPS determinations without a sound explanation. ER.15-

19. Every district court to consider the question agrees. *Saget*, 2018 WL 6584131, at *7 (upholding APA claim based on allegation DHS stopped considering intervening conditions); *CASA de Maryland*, 2018 WL 6192367, at *14; *Centro Presente*, 332 F.Supp.3d at 417.

2. The district court did not clearly err in finding DHS stopped considering intervening conditions. Its order includes *seven pages* describing "a wealth of record evidence to support Plaintiffs' position that the DHS changed its practices with regard to TPS designations." ER.19-26. Defendants do not refute those findings, let alone show clear error. Instead, they ask this Court to ignore the facts and advocate for an meager conception of the administrative record. As explained below, Defendants waived any challenge to the scope of the record, and the district court's evidentiary rulings are correct. *Infra* Pt.II.C.

a. Extensive evidence supports the district court's finding that DHS previously considered intervening conditions. As former USCIS Director Rodriguez testified, under previous Administrations, "USCIS had broad discretion to consider ... [i]ntervening factors," regardless of any connection to the originating event. ER.1015. The prior practice was explicitly acknowledged in internal documents, confirmed during officials' testimony, and manifested in decades of FRNs. *Supra* Bkgd.C.

Extensive evidence also supports the district court's finding that, in the Trump-era, DHS *stopped* considering intervening conditions. *See id.* Former Secretary Kelly and Secretary Nielsen testified before Congress

that Trump-era TPS decisions had to rest solely on whether the original condition triggering TPS continued to exist, because considering "the country conditions … writ large" would violate the TPS statute.[11] ER.22 (citing ECF.122-36 at 24-26).

The new standard is also reflected in Trump-era decision memos, which explicitly disclaim consideration of "challenges [that] cannot be directly tied" to the original event. ER.24; ER.349-55; ER.743-49; *supra* Bkgd.C (discussing Sudan decision memo). Internal agency documents confirm DHS abandoned "the standard metrics" in favor of asking only whether conditions were "bad in a way clearly linked to the initial disasters prompting the designations." ER.25 (quoting ECF.122-2). The "curt" FRN's display the changed approach by entirely "fail[ing] to address numerous conditions that justified extensions of TPS status in the most recent notices issued by prior administrations." ER.73; *supra* Bkgd.C.

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[11] Defendants have not argued the Secretaries' statements constitute a good reason for changing policy under *Fox*. Nor could they. A conclusory statement that a new interpretation is "more consistent with statutory language than alternative[s]" does not suffice. *Encino Motorcars*, 136 S. Ct. at 2127. Moreover, at times Defendants concede the statute *requires* consideration of current conditions and intervening events. AOB.31. That concession establishes an independent APA violation: the Secretaries ignored intervening conditions because they incorrectly believed they were legally required to do so. *See Regents,* 908 F.3d at 505 ("[W]here an agency purports to act solely on the basis that a certain result is legally required, and that legal premise turns out to be incorrect, the action must be set aside.").

Defendants assert the change in standard was "narrow[]," AOB.22, but the district court found it "substantial and consequential," citing extensive evidence of widely divergent pre- and post-Trump Administration practices. ER.20-27. Nor did the district court change its assessment of the new standard. AOB.22. The motion to dismiss order described the new standard as "focus[ing] solely (or nearly solely) on the originating condition without considering intervening events." ER.75-76. That is materially indistinguishable from "ma[king] TPS decisions turn on whether the originating condition or conditions directly related thereto continued to exist, disregarding all other current conditions no matter how bad," as the preliminary injunction order states. ER.37. Both descriptions differ significantly from the old standard, which considered any intervening conditions, regardless of their connection to the originating event. ER.19-20; *supra* n.2.

Moreover, as the district court found, agency officials recognized the new practice was a departure. ER.26. Then-Secretary Kelly distanced the Trump approach from prior Administrations, claiming "they just automatically renew[ed] it" and that "no one's ever looked at" whether Central American countries had recovered from events that triggered designations. SER.170-72. Acting Secretary Duke told the White House her TPS decisions represented "a strong break with past practice." ER.36; ER.632.

Finally, even if the Court could look only to the administrative record as Defendants narrowly construe it, the record would still require

affirmance. Past TPS extensions were based on a variety of intervening conditions, whether related to the originating condition or not. ER.191; ER.356; ER.688 (State Department memos confirming prior extensions for El Salvador, Haiti, and Nicaragua were based on, *inter alia*, subsequent natural disasters, economic crises, and security challenges); *see also* ER.148-49 (email from U.S. Southern Command favoring extension); ER.197-210; ER.217-219; ER.227-39; ER.286-90; ER.291-93; ER.312-14; ER.362-79; ER.476; ER.645-56; ER.961-72 (input from career officials addressing wide range of conditions, including many intervening factors unrelated to originating conditions). When terminating TPS, Trump-Administration Secretaries did *not* consider intervening conditions. ER.189-90; ER.306; ER.353; ER.746; ER.833 (Trump-era memo); *infra* n.11.

b. Ignoring overwhelming evidence, Defendants insist nothing changed—*i.e.*, DHS considered the same factors it always had. AOB.30-38. A handful of cherry-picked facts cannot establish clear error.

Defendants assert DHS considered intervening events if they "hampered recovery" from the triggering original. AOB.31. Even if true, that would not defeat Plaintiffs' claim, as the record shows DHS's past practice was to consider intervening events *without limitation*. Defendants' evidence also is unpersuasive. They rely on FRNs announcing terminations, which show only that DHS examined certain general conditions like infrastructure to decide whether countries recovered from original events, not that DHS considered intervening events "writ large." *E.g.*,

AOB.31-32 (citing TPS Termination for El Salvador, 83 Fed. Reg. 2,654 2,655-56 (Jan. 18, 2018) (noting homes and other infrastructure damaged by earthquake have been rebuilt)).

Defendants argue a reference to food security in Sudan shows the Secretary considered intervening factors, but food insecurity was a reason for Sudan's TPS redesignation, not an intervening factor. *Sudan Extension and Redesignation*, 78 Fed. Reg. 1,872, 1,875 (Jan. 9, 2013) (referencing food insecurity).[12]

Defendants suggest this Court should simply *assume* DHS considered intervening events because, they now contend, the statute required

[12] Redesignations are *not* extensions. As the government concedes, they are "the functional equivalent of a new designation." AOB.6. They derive from the same statutory authority as original designations and, therefore, are based on original rather than intervening conditions. *Somalia Extension and Redesignation*, 77 Fed. Reg. 25,723, 25,724 (May 1, 2012) (redesignation authority stems from 8 U.S.C. 1254a(b)(1)). The Trump Administration has treated them as such under its new TPS standard. SER.343 (when State Department did "extensive redraft" of Sudan TPS Memo to apply the new standard, it "focus[ed] on whether conditions cited in the 2013 *redesignation* continue") (emphasis added)). That explains the extensions for Somalia and Yemen, on which Defendants erroneously rely. AOB.31. What Defendants describe as "intervening conditions" there were actually original conditions, because they previously provided the bases for each country's redesignation. *Compare id.*, 83 Fed. Reg. at 43,696 (describing "new conflict patterns, drought, and flooding" in Somalia), *with Somalia Extension and Redesignation*, 77 Fed. Reg. at 25,725 (citing conflict, drought, and flooding); AOB.31-32 (describing ongoing cholera epidemic in Yemen), *and Yemen Extension and Redesignation*, 82 Fed. Reg. 859, 861 (Jan. 4, 2017) (cholera outbreak). To be clear, Plaintiffs do not contend that any of the four countries should have been redesignated.

it. AOB.31. The district court rejected that argument as "belied by the record evidence." ER.25-26. Moreover, at times Defendants still advocate the Secretaries' narrow reading. *E.g.* AOB.33 ("[T]he statute contemplates the Secretary will focus her decision to terminate or extend an existing TPS designation on the originating event.").

Defendants claim previous Secretaries "considered intervening conditions only to the extent that they could be linked to or impeded recovery from the event underlying the initial designation or re-designation." AOB.33-34. That assertion cannot be reconciled with substantial contrary evidence, let alone overcome the clear error standard. *Supra* Bkgd.C & n.3. Defendants' offer isolated examples, none of which is persuasive. AOB.34-36. Some show DHS *extended* TPS because conditions prompting original designations remained, but that is consistent with considering all country conditions. *Centro Presente*, 332 F. Supp. 3d at 414 (rejecting similar argument). Defendants also cite 20-plus-year-old notices they contend mention only original conditions, but FRN's at the time contained almost no explanation and therefore shed no insight into agency reasoning. AOB.35-36. Other notices involve countries designated for brief periods, during which intervening conditions may not have developed. *Id.* (Guinea). Finally, Defendants cite prior terminations despite ongoing problems. But, as the district court found, those notices confirm that "under the prior practice, intervening events were at least considered." ER.77.

Citing no evidence, Defendants argue "DHS's longstanding recognition of a distinction between redesignations and extensions" shows *redesignation* is the proper means to account for intervening conditions, while *extensions* must rest only on original conditions. AOB.33. This simply does not describe pre-Trump era practice. Prior extensions often rested on intervening conditions. *Supra* nn.2-3; *e.g.*, *Nicaragua Extension*, 81 Fed. Reg. 30,325 (May 16, 2016) (extending TPS designation based on Hurricane Mitch "and subsequent environmental disasters"). Redesignation serves to broaden the category of *individuals* eligible for TPS protections; it had never been the sole vehicle for accounting for intervening humanitarian crises justifying TPS. *E.g.*, *Somalia Extension and Redesignation*, 77 Fed. Reg. at 25,724 (describing redesignation as a tool for "tailor[ing] the 'continuous residence' date to offer TPS to the group of eligible individuals that the Secretary deems appropriate").

Finally, Defendants argue the "decision-making process more generally" shows Secretaries *received* a broad set of information. AOB.37. However, as the district court found the fact "that Acting Secretary Duke *received* information regarding current conditions, does not prove she ultimately considered and relied on those conditions in deciding to terminate TPS status. The substantial record recited above strongly suggests she did not." ER.25.

In sum, after reviewing thousands of pages of evidence, the district court found "a conscious choice by DHS under the Trump administration

to take a different approach [to TPS]." ER.26 n.9. That finding has substantial support. And because Defendants concede the correctness of the district court's determination "that DHS never acknowledged any change in practice and thus has not provided any explanation for any such change" (ER.17; AOB.30), the district court did not abuse its discretion in finding a likely APA violation.

C. The District Court Appropriately Considered the Full Record.

Defendants superficially argue the district court erred in "allowing discovery" and considering "evidence outside the administrative record." AOB.38-39. Assuming an objection to the scope of the record was preserved below, Defendants waived it on appeal by never citing applicable legal standards, let alone "specifically and distinctly" arguing the matter. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) ("[A] bare assertion does not preserve a claim."). Defendants complied with the discovery orders rather than appeal, SER.365-66; SER.346-49; SER.344-45, never objected to admissibility, "voluntar[ily] waive[d]" privilege by producing "many documents" purportedly outside the administrative record, ECF.43 at 6, and have cited evidence outside their administrative record on appeal. AOB.41, 52-53.

District courts have "broad discretion" over discovery, *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003), including whether to admit extra-record evidence—matters reviewed for abuse of discretion,

Lands Council v. Powell, 395 F.3d 1019, 1030 n.11 (9th Cir. 2005). Errors must cause prejudice to warrant reversal. *Payne v. Norwest Corp.*, 185 F.3d 1068, 1072 (9th Cir. 1999). A district court can "expand[] the record or permit[] discovery" where an agency fails to produce the whole record, *Pub. Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982), when "necessary to determine whether the agency … has explained its decision," or upon "a showing of agency bad faith." *Lands Council*, 395 F.3d at 1030 (quotations omitted); *Webster v. Doe*, 486 U.S. 592, 604 (1988) (discovery available for APA and constitutional claims).

Here, the district court properly considered discovery materials because Defendants failed to timely produce complete administrative records under 5 U.S.C. 706—another ruling Defendants never challenged on appeal. ECF.28 at 1-2; ECF.43 at 1-2. Moreover, meaningful review of Plaintiffs' claims required consideration of evidence potentially outside the administrative record, as the district court's extensive reliance on such evidence in support of its findings on both claims illustrates. *See infra* Pt.III.C. Finally, Defendants concede the APA claim required considering documents outside the administrative record—*e.g.*, "past, public TPS termination decisions." AOB.38.

The district thus appropriately considered the full record.

III. The District Court Did Not Abuse its Discretion in Finding the Fifth Amendment Claim Raises Serious Questions.

A. The District Court Had Jurisdiction.

Defendants advance the extreme view that Section 1254a(b)(5)(A) insulates unconstitutional conduct from review. AOB.39. A Secretary could write in the *Federal Register* that she is terminating TPS because she hates non-white people "from shithole countries," and courts could do nothing.

That is not the law. Congress must speak with unmistakable clarity to foreclose constitutional claims, as doing so may itself be unconstitutional. *Webster*, 486 U.S. at 603; *Bowen*, 476 U.S. at 681 n.12. Even statutes granting seemingly unfettered discretion do not foreclose constitutional claims. *E.g.*, *Gebhardt*, 879 F.3d at 987-88; *Demore v. Kim*, 538 U.S. 510, 516-17 (2003). Section 1254a(b)(5)(A) never even references constitutional claims. *Compare* 8 U.S.C. 1252(b)(9).

B. *Arlington Heights* Governs Plaintiffs' Equal Protection Claim.

Defendants' argument for deferential review under *Trump v. Hawaii* is foreclosed by this Court's decision in *Regents*, 908 F.3d at 519-20, which applied *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), to a discrimination claim challenging federal immigration policy.

As in *Regents*, Plaintiffs are already present; none seek admission. *Compare Regents*, 908 F.3d at 489-90, *with Trump*, 138 S. Ct. at 2414,

Kleindienst v. Mandel, 408 U.S. 753, 754 (1972), *and Fiallo v. Bell*, 430 U.S. 787, 790 (1977). That distinction is critical, because "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). *Zadvydas* applied standard Fifth Amendment doctrine in a case directly "implicat[ing] relations with foreign powers," AOB.19, because the plaintiffs had already entered the United States. *Zadvydas*, 533 U.S. at 684-686, 690. Similarly, this Court applies standard due process doctrine for immigrants already present. *E.g.*, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (en banc) (applying heightened scrutiny because claim involved "fundamental right"); *Oshodi v. Holder*, 729 F.3d 883, 889-91 (9th Cir. 2013) (en banc) (applying ordinary procedural due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976), in removal case); *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011) (same for challenge to procedures governing detention incident to removal).

Defendants suggest *Regents* is distinguishable because it involved a motion to dismiss a complaint challenging an "unusual" decisionmaking process. AOB.48. That cannot undermine *Regent's* doctrinal analysis. *Id.* In any event, these TPS terminations were "irregular," ER.31, and based on a "contrived excuse"—a new standard invented to justify preordained terminations. *See Regents*, 908 F.3d at 519.

Regents also forecloses Defendants' argument that the standard of review comes from *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471 (1999), and *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008). *Regents*, 908 F.3d at 519 (holding *AADC* inapplicable). Those courts applied deferential standards because the claims concerned challenges to prosecutorial discretion (*i.e.*, selective enforcement claims) by people who were concededly deportable. *Reno*, 525 U.S. at 489; *Rajah*, 544 F.3d at 438. Plaintiffs are all lawfully present, and they are not "making an equal protection argument … to avoid [their] own deportation." *Regents*, 908 F.3d at 519; *see Kwai Fun Wong v. I.N.S.*, 373 F.3d 952, 964, 970 (9th Cir. 2004) (distinguishing *AADC* in discrimination claim not challenging selective enforcement).

Unlike in *Trump* (and even more so than in *Regents*), the TPS statute does *not* "exude[] deference to the President in every clause." *Cf. Trump*, 138 S. Ct. at 2407-08. Congress vested TPS authority in the DHS Secretary, and *required* the Secretary to consult with other agencies and extend TPS if conditions so warrant. 8 U.S.C. 1254a(b)(3); *supra* Bkgd.A; *supra* Pt.II.A. Nor do national security considerations justify substantial deference as in *Trump*, *AADC*, and *Rajah*. Defendants never

contended they terminated TPS to protect national security. National security considerations weighed *against* termination, as State Department officials (and many others) warned. AOB.52-53; *supra* Bkgd.C.[13]

The district thus court correctly applied *Arlington Heights* rather than *Trump* to assess Plaintiffs' equal protection claim that "the Executive Branch, motivated by animus, ended a program that overwhelmingly benefits … certain ethnic group[s]." *Regents*, 908 F.3d at 519.

C. Plaintiffs Established Racial Animus was a Motivating Factor in the TPS Terminations.

The district court found that, "at the very least," the evidence of discrimination Plaintiffs submitted supported serious questions on the merits under *Arlington Heights*. ER.37. To prevail at trial, Plaintiffs will need to prove only that racial animus was a "motivating factor" in adopting the new practice or terminating TPS. *Arlington Heights*, 429 U.S. at 265-66; *Arce v. Douglas*, 793 F.3d 968, 978 (9th Cir. 2015).

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[13] Defendants' reliance on *Diaz* and *Galvan* is misplaced. Both concern Congress's substantive judgments about what classes of non-citizens can remain or receive certain benefits. Neither authorizes deferential review to racial discrimination by the Executive. *Mathews v. Diaz*, 426 U.S. 67, 71 (1976) (due process challenge to Congress's decision classifying certain non-citizens as ineligible for Medicare benefits); *Galvan v. Press*, 347 U.S. 522, 529 (1954) (challenge to Congressional authority to classify certain non-citizens as deportable). Neither authorizes deferential review when assessing racial discrimination by the Executive Branch.

This "sensitive inquiry" is guided by several (non-exhaustive) factors, including: (1) "[t]he impact of the official action—whether it bears more heavily on one race than another"; (2) "[t]he legislative or administrative history … [including] contemporary statements by members of the decisionmaking body … or reports"; (3) "[t]he historical background of the decision"; (4) "[t]he specific sequence of events leading up to the challenged decision"; and (5) "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures … particularly if the factors usually considered important by the decisionmaker strongly favour a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 266-68 (quotations omitted). "[A] plaintiff need not establish any particular element" to prevail. *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 504 (9th Cir. 2016).

Defendants largely overlook the evidence bearing on the *Arlington Heights* factors, AOB.49, relying instead on the Secretaries' stated rationales. AOB.40-45. The district court appropriately conducted the deeper review required by *Arlington Heights*, finding substantial evidence racial animus was a motivating factor. ER.27-37.

1. Defendants have never disputed most people from El Salvador, Haiti, Nicaragua, Sudan, and other TPS countries are considered non-white. AOB.46-47; ER.31; ECF.120 at 25. Because Defendants have ended TPS for more than 95% of those who had it when this Administration commenced, all of whom are non-white immigrants, "the impact of

the official action … bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266 (citation omitted).

Defendants note extensions for South Sudan, Syria, Yemen, and Somalia, AOB.42, but TPS recipients from these countries account for less than 5% of TPS beneficiaries. *Supra* n.1.[14] Defendants cannot justify animus by sparing a small population. *Batson v. Kentucky*, 476 U.S. 79, 95-96 (1986) ("For evidentiary requirements to dictate that several must suffer discrimination before one could object, would be inconsistent with the promise of equal protection to all." (quotations omitted)); *Ave. 6E Invs.*, 818 F.3d at 509-13 (existence of "other similarly-priced and similarly-modelled housing" did not foreclose disparate impact finding).

Defendants similarly assert "[t]here is no reason to think the Secretaries would have treated differently an impoverished European country that received a TPS designation." AOB.47. That assertion ignores President Trump's statement *about TPS* that he prefers immigrants from countries like Norway, and his statements about immigrants destroying European culture (among other record evidence). *Supra* Bkgd.D. In any event, Plaintiffs are not required "to prove the existence of a better-treated entity," as that "would lead to unacceptable results." *Pac. Shores*

[14] Zuzana Cepla, *Fact Sheet: Temporary Protected Status*, National Immigration Forum (Oct. 12, 2018), *available at* https://immigrationforum.org/article/fact-sheet-temporary-protected-status/.

Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1159 (9th Cir. 2013).

2. Plaintiffs presented powerful evidence the TPS terminations were influenced by racial animus.

a. The district court did not clearly err in finding "President Trump has expressed animus against non-white, non-European immigrants." ER.27. The President denigrated TPS holders as "people from shithole countries" compared to immigrants from countries like Norway. *Id.* at 30-31. He has made numerous overtly racist statements against people from TPS countries, both on the campaign trail and as President. He has compared immigrants to "snakes" and "animals," claimed all Haitian immigrants have AIDS, stated immigrants have a "very negative" effect on European "culture," and more. *Id.*[15] Courts have found far less overtly racist statements to be strong evidence of animus. *E.g.*, *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) ("racial nature" of anti-busing initiative apparent where proponents also sought to halt desegregation); *Ave. 6E Invs.*, 818 F.3d at 504-07 (reference to Latinos as having large households); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1117 (9th Cir.

[15] Defendants refer to these as "purported statements," AOB.45, but their Answer conceded them, and none are seriously in dispute. ER.30 n.13. Defendants protest it would be "plainly inappropriate" to rely on campaign statements as indicative of racial animus, AOB.45, but no court has adopted that artificial limitation, which makes no sense when, as here, an official continues making racist statements in office.

2004) (affirming because reference to African American as "drug dealer" was plausibly a coded reference to race).

In a remarkable passage, Defendants contend from an "objective legal perspective" the President's statements "reflect the current Administration's focus on America's economic and security interests, not unconstitutional bias." AOB.46; AOB.3 (accusing district court of "uncharitable … interpretation of … remarks attributed to the President"). The Court should reject Defendants' attempt to normalize bigotry. President Trump's statements about Haitians and Nigerians are not "a reflection on the problems that plague those two countries." AOB.46. The President said "*all*" Haitian immigrants have AIDS, and Nigerian immigrants came from "huts." ER.30. These statements denigrate those immigrants. Read charitably or not, they "reflect" nothing other than racial animus. *See* AOB.46.

Similarly, President Trump's statements about "MS-13 and unlawful immigrants in general" do not reflect "concern about the security risks attendant to lax enforcement of the immigration laws." AOB.46. He called them "animals" and repeatedly told a parable comparing immigrants to "snakes." ER.31. Such statements *dehumanize* immigrants to justify cruelty and mistreatment. The Court should reject Defendants' attempt to characterize such racist statements as "reflections" of anything other than animus. *See* AOB.46. Decades of case law has found discriminatory animus based on far less overt comments.

b. The district court also committed no clear error in finding sufficient evidence to raise serious questions that "the DHS Acting Secretary or Secretary was influenced by President Trump and/or the White House in her TPS decision-making." ER.27. Indeed, the evidence more than suffices to establish a likelihood of success on the merits.

First, Plaintiffs showed President Trump himself influenced the TPS decision-making process not only during the infamous "people from shithole countries" meeting, which Secretary Nielsen attended, ER.1038-39, but also during other discussions where his surrogates described the White House's larger anti-immigrant agenda and connected it to the TPS decisions. White House Chief of Staff John F. Kelly and National Security Advisor Tom Bossert pressured Secretary Duke to terminate TPS for Honduras as part of the "wider strategic goal" on immigration. *See supra* Bkgd.B; SER.163-66; *see* SER.60 at 160:2-20. Similarly, Stephen Miller communicated that he "favored the termination of TPS" in conversations with other Trump surrogates working within DHS. ER.28. The White House even convened a cabinet-level principals' meeting at which it advocated terminating TPS for multiple countries shortly before several decision deadlines. ER.769-84. Based on this and other evidence, the district court found the White House had exerted pressure on these decisions. ER.28-29.

Second, Plaintiffs showed individuals working on immigration for President Trump's campaign assumed key positions in DHS, where they

altered the agency's recommendations to favor terminations. *See supra* Bkgd.B. Because these individuals joined Trump's campaign with knowledge of the racist statements he made and then altered the agency's neutral decisionmaking process, their role constitutes strong evidence of racist motivation.

Third, Plaintiffs uncovered *direct* evidence the Secretaries acted to conform their decisions to the President's immigration agenda, demonstrating that his biased motives influenced their behavior. Acting Secretary Duke wrote a memo explaining her decisions, stating "[t]he TPS program must end for these countries soon," "[t]his conclusion allows me to terminate in 18 months," "[and] is the result of an America first view of the TPS decision." ER.36; *see* ECF.122-29. In correspondence with a senior White House official, she admitted the Honduras decision "is a strong break with past practice … [that] will send a clear signal that TPS in general is coming to a close. I believe it is consistent with the President's position on immigration." ER.36. Based on this and other evidence, the district court found "Acting Secretary Duke's writings suggest that she, in her role at DHS, was largely carrying out or conforming with a predetermined presidential agenda to end TPS." ER.29.

Defendants make several arguments to counter this powerful evidence, but they are meritless. While Defendants admit the Secretary's invocation of "America First" refers to the Trump Administration's immigration agenda, they claim the phrase refers only to "a 'merit-based entry'

system and focuses on America's interests foremost." AOB.46. They declined to make that implausible claim before the district court, which found defense counsel "was unable to provide a clear and direct response," ER.36, when asked whether "America First" favors "ending immigration status for those who are nonwhite." SER.4-7 at 67:7-70:20. In fact, "America First" was a prominent anti-Semitic slogan of the Ku Klux Klan and others who supported Nazi Germany prior to World War II.[16] That slogan invokes both "the President's position on immigration," and racial animus, as the two are intertwined. ER.36.

Defendants cannot defeat the discrimination claim merely because the Secretary never said she was terminating TPS because she did not want people from "shithole countries." Because "officials … seldom, if ever, announce … they are pursuing a particular course of action because of their desire to discriminate against a racial minority," it is appropriate to examine "whether they have 'camouflaged' their intent." *Arce*, 793 F.3d at 977 (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064, 1066 (4th Cir. 1982)).

It was not clear error for the district court to find sufficient evidence that the stated reasons were "camouflage" for unlawful motivations, especially given the President's overtly racist statements in the Secretaries'

[16] Sarah Churchwell, *End of the American Dream? The Dark History of 'America First'*, The Guardian (Apr. 21, 2018), https://www.theguardian.com/books/2018/apr/21/end-of-the-american-dream-the-dark-history-of-america-first.

presence, White House pressure operating at multiple levels for advocating termination, and the Secretaries' private admissions they conformed decisions to the President's "America First" "position" on immigration. Defendants themselves concede the White House influenced TPS decisions. AOB.44. And it *is* "improper for White House officials to convey their views on a significant policy decision," *id.*, when those views are motivated by racial animus—*e.g.*, that certain people should be deported regardless of whether an objective assessment of country conditions warrants that result.

Plaintiffs need show only that unlawful animus was "a motivating factor" in the terminations. *Arlington Heights*, 429 U.S. at 265-66. Even if the Secretaries did not personally harbor animus, overwhelming evidence establishes the President's animus influenced the terminations.

c. In response to powerful evidence, Defendants advocate a novel limitation on anti-discrimination law. They assert, as a categorical matter, courts can disregard evidence that one government official influenced another if the decision is a "statutory determination[] made by Cabinet Secretaries in the foreign-policy or national-security context." AOB.42. Defendants make a related policy argument, asking the Court to exempt the "government regulatory context" from all discriminatory influence claims because it could lead to discovery into Executive deliberations. AOB.43. On their view, if President Trump stated publicly that he or-

dered the Secretary to terminate TPS because people from "shithole countries" destroy European culture, the Court could not consider whether his animus motivated terminations.

Unsurprisingly, Defendants cite no case categorically insulating animus from consideration. This Court and others have employed the "cat's paw" doctrine—that another's animus can influence a decisionmaker—in discrimination cases involving government actors. *See Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) (bias imputed to DHS Customs Service where "biased subordinate influenced or was involved in" "allegedly independent" decision); *France v. Johnson*, 795 F.3d 1170, 1176 (9th Cir. 2015) (same for Border Patrol); *Ave. 6E Invs.*, 818 F.3d at 504 (trier could find discriminatory motive "even if the [zoning] officials do not personally hold such views"); *Perez v. City of Roseville*, 882 F.3d 843, 863 (9th Cir. 2018) (similar, where "biased subordinate" had "'pervasive' influence"). Defendants cite *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), but it rejected the Seventh Circuit's narrow understanding of cat's paw doctrine because "it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's … discriminatory animus … from being the proximate cause of the harm." *Id.* at 419.

Moreover, Defendants never explain why a doctrine about assessing discriminatory intent would apply in every context *except* when

pressure is exerted by the most powerful people in government. If anything, the presumption of influence should apply with added force. *Cf. Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 277-79 (E.D.N.Y. 2018) (applying cat's paw to claim challenging Trump Administration's DACA rescission). Categorically exempting high-level Executive officials from the Constitution's anti-discrimination constraints would invite abuse and leave courts powerless to stop lawless misconduct.

3. Finally, the district court found "the sequence of events leading up to the challenged decisions [were] irregular and suggestive of a predetermined outcome not based on an objective assessment." ER.31-32.[17] This finding is amply supported. Indeed, the Trump surrogates within DHS said as much. Current USCIS Director Francis Cissna described the last-minute changes to the Sudan decision memo draft as being written by "one person who strongly supports extending TPS for Sudan … up to the recommendation section, and then someone who opposes extension snuck up behind the first guy, clubbed him over the head, pushed his senseless body out of the way, and finished the memo." SER.12; *see* SER.14 (Law rewrites Haiti decision memo after asserting, "[t]he draft is overwhelming [sic] weighted for extension which I do not think is the

[17] That finding overcomes any "presumption of regularity," AOB.43, even assuming it applies to race discrimination claims despite the fact that neither *Trump* nor *Arlington Heights* mentions it. *Cf. United States v. Baker*, 416 F.2d 202, 205 (9th Cir. 1969) (evidence that selective service registrant was called out of order sufficed to rebut presumption).

conclusion we are looking for."). Even Acting Secretary Duke expressly acknowledged that she intended her decision to signal "a strong break with past practice." ER.36.

Defendants created that "break" by altering recommendations drafted by career officials. As the district court found, "this was especially apparent with respect to the process on Sudan," but "TPS decision-making for the other countries underwent a similar process." ER.32; ER.35; *see supra* Bkgd.C. The district court found that "after receiving Decision Memos from career DHS employees, higher-level DHS employees—*i.e.*, the political appointees—were 'repackaging' the memos in order to get to the President/White House's desired result of terminating TPS." ER.32. Defendants allege that "overrul[ing] recommendations from career employees is far from evidence of discriminatory animus." AOB.47. But the evidence—including the statements from the Trump surrogates themselves—shows the decision-making process involved far more than "disagreements about policy." AOB.47. Defendants' actions were result-driven, as they themselves admitted.[18]

The district court also found "departures from the normal procedural sequence during the TPS decision-making process." ER.36. Most troubling, "at the apparent behest of then-DHS Secretary Kelly," DHS

[18] Defendants rely on *Wisconsin v. City of New York*, 517 U.S. 1, 23 (1996), but *Wisconsin* declined to apply heightened scrutiny because the Plaintiffs had "not argued" the challenged decision "was based upon an intent to discriminate." *Id.* at 18 n.8.

and USCIS staff secretly collected data on the criminal histories of TPS holders, their use of public benefits, and whether they had immigration status prior to TPS. ER.37. None of this information had been sought before, and none to any factor relevant to TPS determinations. The district court determined "[t]he information sought by the Secretary coincides with racial stereotypes—*i.e.*, that non-whites commit crimes and are on the public dole." *Id.*[19]

Moreover, adoption of the new standard regarding intervening conditions itself constitutes a dramatic departure from normal practice. As one career employee said in response to a request to produce more evidence supporting termination, "[w]e can comb through the country conditions to try to see what else there might be, but the basic problem is that it IS bad there [with respect to] all of the standard metrics. *Our strongest argument for termination, we thought, is just that it is not bad in a way clearly linked to the initial disasters prompting the designations.*" ER.25. That Trump surrogates drastically narrowed the standard without explanation, and that career officials admitted they were searching for a pretext to justify the termination decisions, constitute compelling proof that the decisions were motivated by impermissible considerations.

[19] This evidence also directly refutes Defendants' repeated assertion that no one identified "any evidence" of the Secretary's own animus. AOB.3.

Finally, even if the more deferential *Trump* standard governs, Plaintiffs would still be entitled to a preliminary injunction given the extensive evidence of discrimination. *Trump* permits courts to "look behind the face of the [challenged decision] to the extent of applying rational basis review," including to "consider plaintiffs' extrinsic evidence." 138 S. Ct. at 2420.

On this record, the district court did not clearly err in finding, at a minimum, "serious questions as to whether the terminations of TPS designations could 'reasonably be understood to result from a justification independent of unconstitutional grounds.'" ER.42 (quoting *Trump*, 138 S. Ct. at 2420). Plaintiffs' evidence is stronger than in *Trump*, which lacked the "predecisional materials" available here demonstrating that career officials' neutral assessments recommended a different policy, and that political officials altered them to achieve the President's preferred result. *Trump*, 138 S. Ct. at 2421; ER.31-36. This extraordinary evidence reveals that the purported justifications for terminating TPS were not "bona fide." As one career official candidly stated, each was "a political [decision]" by the Secretary's "advisors." ECF.119-1; ER.20. Thus, Plaintiffs presented "substantially greater evidence of discriminatory motivation" than in *Trump*. *Regents*, 908 F.3d at 520.

IV. The Preliminary Injunction was Appropriately Tailored.

Defendants argue, for the first time on appeal, that the district court improperly entered a "nationwide injunction" and relief should be

restricted to "the individual plaintiffs." AOB.55-57. They fault the district court for making no findings, but they waived this objection by not raising it below. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 510 (9th Cir. 2013).

The court did not abuse its discretion when specifying the injunction's scope. When federal courts determine that agency action is arbitrary and capricious, 5 U.S.C. 706(2)(A), "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Regents*, 908 F.3d at 511 (quotation omitted).

Similarly, "once a court rules that an official act purposefully discriminates, the 'racial discrimination [must] be eliminated root and branch.'" *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016) (quoting *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437-39 (1968)). Defendants cite no case leaving intentionally-discriminatory government conduct unaddressed because it was not a class action. *Cf. Washington*, 458 U.S. at 470 (invalidating anti-busing initiative statewide even though plaintiff was a single school district); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638-39 (1975) (striking down Social Security Act provision distinguishing between widows and widowers in affording benefits in action by individual widower); *Califano v. Goldfarb*, 430 U.S. 199, 206-07 (1977) (same); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294, 316 (2000) (striking down policy permitting prayer district-wide in Establishment Clause challenge brought by two families).

No narrower order could have remedied the far-reaching unlawful effects of Defendants' actions.[20]

CONCLUSION

The preliminary injunction should be affirmed.

Respectfully submitted,

Dated: January 31, 2019

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s/ *Alycia A. Degen*
ALYCIA A. DEGEN

Attorneys for Plaintiffs-Appellees

[20] Nationwide injunctions also promote "uniformity in national immigration policy." *Regents*, 908 F.3d at 512. The court's order promotes that value by applying uniformly to all TPS holders from the four countries harmed by Defendants' actions. ER.42.

STATEMENT OF RELATED CASES

There currently are no cases pending before this Court that are related to this action.

Dated: January 31, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(5), 32(a)(6), 32(a)(7)(B), and 32(g) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1(a), I certify that the attached brief is in 14-point proportionally spaced Century Schoolbook font, and contains 13,841 words, as counted by my word processing program, exclusive of the portions of the brief excepted by Rule 32(f). Pursuant to Ninth Circuit Rule 32-1(e), a signed Form 8 also accompanies the attached brief.

Dated: January 31, 2019

SIDLEY AUSTIN LLP

s/ *Alycia A. Degen*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 31, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 31, 2019

SIDLEY AUSTIN LLP

s/ *Alycia A. Degen*
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature *s/ Alycia A. Degen* **Date: January 31, 2019**
(use "s/[typed name]" to sign electronically-filed documents)