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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
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7 CRISTA RAMOS, et al.,

8 Plaintiffs,

9 v.

10 KIRSTJEN NIELSEN, et al.,

11 Defendants.

Case No. [18-cv-01554-EMC](#)

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS**

Docket No. 20

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United States District Court  
Northern District of California

In 1990, Congress passed and President George H. W. Bush signed the Immigration Act of 1990, creating the “Temporary Protected Status” (TPS) program. *See* Pub. L. 102-232 (1991). The TPS statute codifies a long-standing practice: “every Administration since and including that of President Eisenhower has permitted one or more groups of otherwise deportable aliens to remain temporarily in the United States out of concern that the forced repatriation of these individuals could endanger their lives or safety.” H.R. Rep. 100-627, at 6 (1988). TPS is thus a humanitarian program: it authorizes the Secretary of Homeland Security to temporarily permit nationals from certain countries to live and work in the United States when an ongoing armed conflict, environmental disaster, or other conditions prevent the safe return of those persons to their countries of origin. *See* 8 U.S.C. § 1254a(b)(1)(A)-(C). Since 1990, several countries have received TPS status.

At issue here are the designations for El Salvador, Nicaragua, Haiti, and Sudan. Sudan was designated for TPS in 1997 on account of a brutal civil war. Its TPS designation was extended periodically by every administration until late 2017, when Defendants announced that Sudan’s status would be terminated. Similarly, Nicaragua was designated in 1999 due to Hurricane Mitch; El Salvador was designated in 2001 and Haiti in 2010, both on the basis of

1 devastating earthquakes. Each country's TPS designation was periodically extended on every  
2 occasion until late 2017. Between October 2017 and January 2018, Defendants announced that  
3 TPS status for all four countries would be terminated by November 2, 2018 (Sudan), January 5,  
4 2019 (Nicaragua), July 22, 2019 (Haiti), and September 9, 2019 (El Salvador).

5 These TPS designations have given rise to a sizeable population of over 200,000 people  
6 who have lived in the United States with lawful status pursuant thereto for 10-20 years. Many  
7 have built careers, bought homes, married, and had children—children who are U.S. citizens.

8 Plaintiffs in this case are TPS-beneficiaries and their U.S.-citizen children. At the crux of  
9 their complaint is an allegation that Defendants, under the President's influence, have adopted a  
10 new interpretation of the TPS statute. Whereas prior administrations evaluated the severity of  
11 intervening events when considering whether to extend TPS, the present administration allegedly  
12 ignores those events and focuses solely on whether the original rationale for TPS continues to  
13 exist.

14 Plaintiffs assert four legal claims. First, the U.S.-citizen children between the ages of 5  
15 and 18 allege that Defendants' termination violates their substantive due process rights because  
16 the Government—without good reason—is forcing them to choose between living in the United  
17 States without their parents or leaving their country of citizenship to return to countries they  
18 maintain are unsafe. Second, Plaintiffs allege that the termination of TPS and adoption of a new  
19 interpretation of the TPS statute violates the Constitution's equal protection guarantee because ~~it~~  
20 they were based on President Trump's racial animus against persons from those countries and his  
21 alleged disdain for non-white immigrants. Third, the TPS beneficiaries allege that Defendants  
22 have violated their substantive due process rights because they have not advanced a reasonable  
23 basis to terminate their TPS status of the countries in question or to change their interpretation of  
24 the TPS statute. Finally, the TPS-beneficiaries allege that Defendants' actions violated the  
25 Administrative Procedure Act (APA) because Defendants departed from long-standing policy and  
26 practice without acknowledging the change or providing good reasons for it.

27 Defendants have moved to dismiss on the basis that the Court lacks jurisdiction to hear  
28 Plaintiffs' claims or review the Secretary's decisions with respect to TPS. Defendants also

1 maintain that, even if the Court has jurisdiction, Plaintiffs fail to state a claim on any theory.

2 A hearing was held on June 22, 2018. *See* Docket Nos. 35, 39. On June 25, 2018, this  
3 Court issued a summary order denying the motion (Docket No. 34 ). This order elaborates on that  
4 order and addresses intervening case law.

## 5 I. FACTUAL BACKGROUND

6 Plaintiffs are nine persons who have permission to live and work in the United States  
7 because their countries of origin have been designated for “Temporary Protected Status” (TPS)  
8 and four U.S.-citizen children whose parents currently hold TPS status. *See* Compl. ¶¶ 16-29.  
9 The TPS holders come from Sudan, Nicaragua, El Salvador, and Haiti, four countries that have  
10 continuously been designated for TPS since 1997, 1999, 2001, and 2010, respectively. Pursuant to  
11 these TPS designations, Plaintiffs with TPS have been lawfully present in the United States from  
12 approximately ten to twenty years. Despite long-standing practice periodically extending TPS  
13 designations for these four countries, Defendants announced that TPS would be terminated over a  
14 three month period between October 2017 and January 2018. As a result, over 200,000 residents  
15 who have resided in the United States for years, some for decades, stand to lose their permission to  
16 live and work in the United States and will be subject to deportation. Below, the Court  
17 summarizes Plaintiffs’ personal experiences as well as the history of TPS designations for each of  
18 the four countries at issue.

### 19 A. Plaintiffs’ Backgrounds

20 The following is a sample of Plaintiffs’ backgrounds alleged in the Complaint.

#### 21 1. Hiwaida Elarabi (Sudan)

22 Plaintiff Hiwaida Elarabi is originally Sudanese, but has lived in the United States since  
23 1997 with TPS status. Compl. ¶ 29. She came to the United States with a valid visitor’s visa in  
24 1997 to visit her aunt and family (all of whom are U.S. citizens); the security situation in Sudan  
25 deteriorated during her stay. Compl. ¶ 65. For that reason, the United States government  
26 designated Sudan for TPS and Ms. Elarabi was permitted to remain in the United States because  
27 she could not safely return to Sudan. *Id.* She has spent the past 20 years here because the United  
28 States has extended Sudan’s TPS designation at every relevant interval. In the United States, Ms.

1 Elarabi a Master’s degree in Bioinformatics from Brandeis University. *Id.* For 16 years, she  
 2 worked as a Health Educator at the Massachusetts Department of Public Health. *Id.* In 2015, she  
 3 borrowed money to open a restaurant. *Id.* After Defendants terminated Sudan’s TPS designation,  
 4 she “made the difficult decision to sell it, at great cost” because “her future was uncertain and she  
 5 did not know whether she would be able to sustain the restaurant.” *Id.* Now, she must leave the  
 6 country she has lived in since 1997.

7 2. Elsy Yolanda Flores de Ayala, Maria Jose and Juan Eduardo (El Salvador)

8 Plaintiff Elsy Yolanda Flores de Ayala was born in El Salvador. Her mother, father, and  
 9 siblings fled El Salvador in the 1980s due to the country’s brutal civil war, but she could not make  
 10 the journey because she was too young. Compl. ¶ 60. Her immediate relatives are now U.S.  
 11 citizens or legal permanent residents. In 2000, Ms. Flores de Ayala married, and migrated to the  
 12 United States with her daughter, Plaintiff Maria Jose Ayala Flores, a one-year-old at the time. *Id.*  
 13 While they were in the United States, devastating earthquakes struck El Salvador. *Id.* The United  
 14 States determined that nationals of El Salvador could not safely return and designated the country  
 15 for TPS. *Id.* Ms. Flores de Ayala and her daughter, Maria Jose, been living in the United States  
 16 since 2000 with TPS protection. In the United States, Ms. Flores de Ayala has worked as a  
 17 domestic worker and child-care provider for over fourteen years. *Id.*

18 Maria Jose, Ms. Flores de Ayala’s daughter, is now 19-year-old. Compl. ¶ 59. She was  
 19 brought to the United States as an infant and has lived virtually her whole life here under the  
 20 umbrage of TPS. *Id.* All her schooling has taken place here. *Id.* In 2016, she graduated high  
 21 school. *Id.* She did not learn of her TPS status until she applied for college and realized she was  
 22 ineligible for many scholarships. *Id.* Currently, she is studying mathematics at Montgomery  
 23 College in Maryland and would like to teach math to elementary students. *Id.* However, if  
 24 Defendants’ termination of TPS for El Salvador takes effect, she will be required to leave the only  
 25 country she has known and will be unable to complete her studies.

26 Ms. Flores de Ayala’s youngest son, Juan Eduardo, is a U.S.-citizen. Compl. ¶ 53. He was  
 27 born in the United States and is also a plaintiff in this case. *Id.* He is currently in seventh grade.  
 28 *Id.* He may have no choice but to return to El Salvador with his parents and siblings, or be

1 separated from them and placed with another family if he remains in the country of his citizenship  
2 to complete his education. *Id.*

3 3. Hnaidi Cenemat and Wilna Destin (Haiti)

4 The plaintiffs from Nicaragua and Haiti will confront similar hardship. Plaintiff Hnaidi  
5 Cenemat is also a U.S.-citizen, fourteen years old, whose mother, Plaintiff Wilna Destin, was born  
6 in Haiti but has lived in the United States for 18-years after Haiti suffered from an earthquake that  
7 prompted TPS designation. Compl. ¶ 54. Hnaidi is a freshman high school student in Florida,  
8 where she is on the honor roll and active in her school and church communities, joining her church  
9 choir and aspiring to join the cheerleading and flag football teams at her school in addition to the  
10 Student Council. *Id.* She enjoys studying math and science and aspires to become an  
11 obstetrician/gynecologist to help others. *Id.* She fears moving to Haiti with her mother—a  
12 country she does not know—but she also fears being placed with a foster family in the United  
13 States without her mother. *Id.* The situation is no less harrowing for her mother, Wilna. Compl. ¶  
14 61. Wilna not only fears separation from her daughter, but also does not want to leave behind the  
15 life she has built in the United States over the past eighteen years (eight of them with TPS status).  
16 *Id.* She owns a home in Florida, is an active member of her community and church, and has  
17 worked for a union for the past four years. *Id.* After Hurricane Katrina, she traveled to New  
18 Orleans to volunteer with humanitarian relief efforts. *Id.*

19 4. Imara Ampie (Nicaragua)

20 Plaintiff Imara Ampie was born in Nicaragua, but traveled to the United States in 1998 at  
21 the age of 26 to procure material for her mother's tailoring business. Compl. ¶ 63. While she was  
22 here, Nicaragua was devastated by Hurricane Mitch. *Id.* The government designated Nicaragua  
23 for TPS, so Ms. Ampie stayed here. *Id.* She married another TPS holder and they had two  
24 children in the United States, who are both U.S. citizens. *Id.* She has lived here for twenty years.  
25 *Id.* She owns a home in California. *Id.* She worries that she will have to return to Nicaragua  
26 despite the lives she and her husband have built here, and that she will not be able to satisfy her  
27 family's health care and educational needs in Nicaragua. *Id.* Her children would suffer whether  
28 they are required to return to Nicaragua or whether they remain in the United States without their

1 parents. *Id.* She has been here more than half of her adult life.

2 The plight of other named Plaintiffs are described in ¶¶ 50-65 of the Complaint. As noted  
3 above, over 200,000 other people stand to lose their TPS status. *Id.* ¶ 2. Further, over 200,000  
4 U.S.-citizen children have at least one parent who is a TPS holder likely to be deported. *Id.*

5 B. Background of TPS Designations and Terminations

6 The history of TPS designation for Haiti, El Salvador, Nicaragua, and Sudan is  
7 summarized below.

8 1. Haiti

9 Haiti was originally designated for TPS on January 21, 2010 based on the 7.0-magnitude  
10 earthquake on January 12, 2010 that prevented Haitians from returning safely. *See Designation of*  
11 *Haiti for Temporary Protected Status*, 75 Fed. Reg. 3476 (Jan. 21, 2010). The Secretary described  
12 that a third of Haiti’s population had been affected by the earthquake and that Haiti’s critical  
13 infrastructure—including hospitals, food, water, electricity, and telephone supplies—was severely  
14 impaired. *Id.* Haiti’s designation was subsequently extended and re-designated four times by the  
15 Obama administration and once by the Trump administration.<sup>1</sup> Three of the designations cited  
16 factors other than the original earthquakes; for example, the 2012, 2014, and 2015 extensions cited  
17 subsequent “steady rains . . . which led to flooding and contributed to a deadly cholera outbreak.”<sup>2</sup>

18 On January 18, 2018, Acting Secretary Duke announced that Haiti’s TPS designation  
19 would be terminated effective July 22, 2019. *See Termination of the Designation of Haiti for*  
20 *Temporary Protected Status*, 83 Fed. Reg. 2648-01 (Jan. 18, 2018). The termination notice states  
21 that “DHS has reviewed conditions in Haiti” in consultation with other federal agencies and  
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24 <sup>1</sup> *See Extension and Redesignation of Haiti for Temporary Protected Status*, 76 Fed. Reg. 29,000-  
25 01, 29,000 (May 19, 2011); *Extension of the Designation of Haiti for Temporary Protected Status*,  
26 77 Fed. Reg. 59,943-01 (Oct. 1, 2012); *Extension of the Designation of Haiti for Temporary*  
*Protected Status*, 79 Fed. Reg. 11,808-01, 11,808 (Mar. 3, 2014); *Extension of the Designation of*  
*Haiti for Temporary Protected Status*, 80 Fed. Reg. 51,582-01 (Aug. 25, 2015); *Extension of the*  
*Designation of Haiti for Temporary Protected Status*, 82 Fed. Reg. 23,830-01 (May 24, 2017).

27 <sup>2</sup> *Extension of the Designation of Haiti for Temporary Protected Status*, 77 Fed. Reg. 59,943-01  
28 (Oct. 1, 2012); *see also Extension of the Designation of Haiti for Temporary Protected Status*, 79  
Fed. Reg. 11,808-01, 11,808 (Mar. 3, 2014) (same); *Extension of the Designation of Haiti for*  
*Temporary Protected Status*, 80 Fed. Reg. 51,582-01 (Aug. 25, 2015) (same).

1 “determined . . . that the conditions for Haiti’s designation for TPS—on the basis of ‘extraordinary  
2 and temporary conditions’ relating to the 2010 earthquake that prevented Haitian nationals from  
3 returning safely—are no longer met.” *Id.* at 2650. The notice states that Haiti “has made progress  
4 recovering from the 2010 earthquake and subsequent effects that formed the basis for its  
5 designation,” including that 98% of internally displaced persons sites have closed, and only  
6 38,000 of the estimated 2 million Haitians who lost their homes were still living in camps in June  
7 2017. *Id.* The United Nations had withdrawn its peacekeeping mission in October 2017. *Id.* It  
8 held a presidential election, and the Haitian government was working to rebuild government  
9 infrastructure that had been destroyed. Economic recovery “has been generally positive.” *Id.*  
10 Further, “[a]lthough Haiti has grappled with a cholera epidemic that began in 2010 in the  
11 aftermath of the earthquake, cholera is currently at its lowest level since the outbreak began.” *Id.*  
12 Based on these considerations, the Acting Secretary determined that “the conditions for the  
13 designation of Haiti for TPS” are no longer met. *Id.*

## 14 2. El Salvador

15 El Salvador was designated for TPS on March 9, 2001 based on a series of earthquakes.  
16 *See Designation of El Salvador Under Temporary Protected Status*, 66 Fed. Reg. 14214 (Mar. 9,  
17 2001) (citing a “devastating earthquake” causing displacement of 17% of the population,  
18 destruction of 220,000 homes, 1,696 schools, and 856 public buildings, and causing losses in  
19 excess of \$2.8 billion). El Salvador’s designation has been extended 11 times by the Bush and  
20 Obama administrations,<sup>3</sup> including due to “a subsequent drought” in 2002,<sup>4</sup> and the effects of

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22 <sup>3</sup> *See Extension of the Designation of El Salvador Under the Temporary Protected Status*  
23 *Program*, 67 Fed. Reg. 46,000-01, 46,000 (Jul. 11, 2002); *Extension of the Designation of El*  
24 *Salvador Under Temporary Protected Status Program*, 68 Fed. Reg. 42,071-01, 42,072 (Jul. 16,  
25 2003); *Extension of the Designation of Temporary Protected Status for El Salvador*, 70 Fed. Reg.  
26 1450-01, 1451 (Jan. 7, 2005); *Extension of the Designation of Temporary Protected Status for El*  
27 *Salvador*, 71 Fed. Reg. 34,637-01, 34,638 (June 15, 2006); *Extension of the Designation of El*  
28 *Salvador for Temporary Protected Status*, 72 Fed. Reg. 46,649-01, 46,650 (Aug. 21, 2007);  
*Extension of the Designation of El Salvador for Temporary Protected Status*, 73 Fed. Reg. 57,128-  
01, 57,129 (Oct. 1, 2008); *Extension of the Designation of El Salvador for Temporary Protected*  
*Status*, 75 Fed. Reg. 39,556-01, 39,558-59 (July 9, 2010); *Extension of the Designation of El*  
*Salvador for Temporary Protected Status*, 77 Fed. Reg. 1710-02, 1712 (Jan. 11, 2012); *Extension*  
*of the Designation of El Salvador for Temporary Protected Status*, 78 Fed. Reg. 32,418-01, 32,420  
(May 30, 2013); *Extension of the Designation of El Salvador for Temporary Protected Status*, 80  
Fed. Reg. 893-01, 894-95 (Jan. 7, 2015); *Extension of the Designation of El Salvador for*

1 Tropical Storm Stan, the eruption of the Santa Ana volcano, subsequent earthquakes, and  
2 Hurricane Ida in the 2010 notice.<sup>5</sup>

3 On January 18, 2018, Secretary Nielsen announced the termination of TPS effective  
4 September 9, 2019. *See Termination of the Designation of El Salvador for Temporary Protected*  
5 *Status*, 83 Fed. Reg. 2654-01 (Jan. 18, 2018). According to the notice, the Secretary “reviewed  
6 conditions in El Salvador” and considered input from other government agencies, and “determined  
7 that the conditions supporting El Salvador’s 2001 designation for TPS on the basis of  
8 environmental disaster due to the damage caused by the 2001 earthquakes are no longer met.” *Id.*  
9 at 2655-56. The notice states that recovery efforts relating to the earthquakes have “largely”  
10 completed, “social and economic conditions affected by the earthquakes have stabilized,” and  
11 “people are able to conduct their daily activities without impediments directly related to damage  
12 from the earthquakes.” *Id.* at 2656. It also notes that El Salvador has been accepting the return of  
13 people removed from the United States, including 20,538 persons in 2016 and 18,838 in 2017. *Id.*  
14 The notice also describes the international aid El Salvador has received since 2001, the completion  
15 of “many reconstruction projects,” including schools, hospitals, homes, and support for improving  
16 water, sanitation, and roads. The notice also cites “stead[y] improv[ement]” in El Salvador’s  
17 economy, including a 7% unemployment rate and increases in its gross domestic product. *Id.* The  
18 notice acknowledges that assistance and resources for returnees are “limited,” but that the  
19 governments of the U.S., El Salvador, and international organizations “are working cooperatively  
20 to improve security and economic opportunities.” *Id.*

21 3. Nicaragua

22 Nicaragua was originally designated for TPS on January 5, 1999 on the basis of Hurricane  
23 Mitch. *See Designation of Nicaragua Under Temporary Protected Status*, 64 Fed. Reg. 526-01,  
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25 *Temporary Protected Status*, 81 Fed. Reg. 44,645-03 (July 8, 2016).

26 <sup>4</sup> *Extension of the Designation of El Salvador Under the Temporary Protected Status Program*,  
27 67 Fed. Reg. 46,000-01, 46,000 (July 11, 2002).

28 <sup>5</sup> *Extension of the Designation of El Salvador for Temporary Protected Status*, 75 Fed. Reg.  
39,556-01, 39,558-59 (July 9, 2010).



1 526 (Jan. 5, 1999) (“Hurricane Mitch swept through Central America causing severe flooding and  
2 associated damage in Nicaragua,” including “substantial disruption of living conditions”).

3 Nicaragua’s designation was extended 13 times by the Clinton, Bush, and Obama  
4 administrations.<sup>6</sup> Its status was extended several times thereafter, including based on subsequent  
5 developments, such as “recent droughts as well as flooding from Hurricane Michelle” in 2002,<sup>7</sup>  
6 and subsequent natural disasters and storms.<sup>8</sup>

7 On December 15, 2017, Acting Secretary Duke announced that Nicaragua’s designation  
8 would terminate effective January 5, 2019. *See Termination of the Designation of Nicaragua for*  
9 *Temporary Protected Status*, 82 Fed. Reg. 59636-01 (Dec. 15, 2017). The termination notice  
10 states that “DHS has reviewed conditions in Nicaragua” and that based on the review, “the  
11 Secretary has determined that conditions for Nicaragua’s 1999 designation for TPS on the basis of  
12 environmental disaster due to the damage caused by Hurricane Mitch are no longer met.” *Id.* at  
13 59637. The Secretary found that “[i]t is no longer the case that Nicaragua is unable, temporarily,  
14 to handle adequately the return of nationals of Nicaragua,” that recovery efforts “have largely been  
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16 <sup>6</sup> *See Extension of the Designation of Nicaragua Under the Temporary Protected Status Program*,  
17 65 Fed. Reg. 30,440-01, 30,440 (May 11, 2000); *Extension of the Designation of Nicaragua*  
18 *Under the Temporary Protected Status Program*, 66 Fed. Reg. 23,271-01, 23,272 (May 8, 2001);  
19 *Extension of the Designation of Nicaragua Under the Temporary Protected Status Program*, 67  
20 Fed. Reg. 22,454-01, 22,454 (May 3, 2002); *Extension of the Designation of Nicaragua Under*  
21 *Temporary Protected Status Program*, 68 Fed. Reg. 23,748-01, 23,749 (May 5, 2003); *Extension*  
22 *of the Designation of Temporary Protected Status for Nicaragua*, 69 Fed. Reg. 64,088-01 (Nov. 3,  
23 2004); *Extension of the Designation of Temporary Protected Status for Nicaragua*, 71 Fed. Reg.  
24 16,333-01 (Mar. 31, 2006); *See Extension of the Designation of Nicaragua for Temporary*  
25 *Protected Status*, 72 Fed. Reg. 29,534-01, 29,535 (May 29, 2007); *Extension of the Designation of*  
26 *Nicaragua for Temporary Protected Status*, 73 Fed. Reg. 57,138-01, 57,139 (Oct. 1, 2008);  
27 *Extension of the Designation of Nicaragua for Temporary Protected Status*, 75 Fed. Reg. 24,737-  
28 01, 24,738 (May 5, 2010); *Extension of the Designation of Nicaragua for Temporary Protected*  
*Status*, 76 Fed. Reg. 68,493-01 (Nov. 4, 2011); *Extension of the Designation of Nicaragua for*  
*Temporary Protected Status*, 78 Fed. Reg. 20,128-01 (Apr. 3, 2013); *Extension of the Designation*  
*of Nicaragua for Temporary Protected Status*, 79 Fed. Reg. 62,176-01 (Oct. 16, 2014); *Extension*  
*of the Designation of Nicaragua for Temporary Protected Status*, 81 Fed. Reg. 30,325-01 (May  
16, 2016).

<sup>7</sup> *Extension of the Designation of Nicaragua Under the Temporary Protected Status Program*, 67  
Fed. Reg. 22,454-01, 22,454 (May 3, 2002).

<sup>8</sup> *See, e.g., Extension of the Designation of Temporary Protected Status for Nicaragua*, 71 Fed.  
Reg. 16,333-01 (Mar. 31, 2006); *Extension of the Designation of Nicaragua for Temporary*  
*Protected Status*, 72 Fed. Reg. 29,534-01, 29,535 (May 29, 2007).

1 completed,” that “[t]he social and economic conditions affected by Hurricane Mitch have  
 2 stabilized,” and that “people are able to conduct their daily activities without impediments directly  
 3 related to damage from the storm.” *Id.* Furthermore, the Secretary noted that Nicaragua has  
 4 received significant international aid, many reconstruction projects have been completed, hundreds  
 5 of homes destroyed have been rebuilt, the Nicaraguan government has built new roads in many  
 6 areas affected by Hurricane Mitch, access to drinking water and sanitation has improved,  
 7 electrification of the country has increased from 50% in 2007 to 90% today, 1.5 million textbooks  
 8 have been provided to 225,000 primary students of the poorest regions, and Internet access is now  
 9 widely available. *Id.* In addition, the Secretary noted that Nicaragua’s relative security has  
 10 attracted tourism and foreign investment, cites growth in Nicaragua’s GDP, and notes that the  
 11 State Department has no current travel warning to Nicaragua. *Id.* Based on these considerations,  
 12 the Secretary “determined . . . that Nicaragua no longer meets the conditions for designation of  
 13 TPS under section 244(b)(1) of the INA.” *Id.*

14 4. Sudan

15 Sudan was designated for TPS in November 1997 due to an ongoing armed conflict and  
 16 extraordinary conditions preventing nationals from returning safely. *See Designation of Sudan*  
 17 *Under Temporary Protected Status*, 62 Fed. Reg. 59737-01 (Nov. 4, 1997) (finding that “a return  
 18 of aliens who are nationals of Sudan . . . would pose a serious threat to their personal safety as a  
 19 result of the armed conflict in that nation”). It was periodically extended and/or re-designated for  
 20 TPS 15 times by the Clinton, Bush, and Obama administrations,<sup>9</sup> often citing factors other than the

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 22 <sup>9</sup> *Extension of Designation of Sudan Under Temporary Protected Status Program*, 63 Fed. Reg.  
 23 59,337-01 (Nov. 3, 1998); *Extension and Redesignation of Sudan Under the Temporary Protected*  
 24 *Status Program*, 64 Fed. Reg. 61,128-01, 61,128 (Nov. 9, 1999); *See Extension of Designation of*  
 25 *Sudan Under the Temporary Protected Status Program*, 65 Fed. Reg. 67,407-01 (Nov. 9, 2000);  
 26 *Extension of the Designation of Sudan Under the Temporary Protected Status Program*, 66 Fed.  
 27 Reg. 46,031-01 (Aug. 31, 2001); *Extension of the Designation of Sudan Under the Temporary*  
 28 *Protected Status Program*, 67 Fed. Reg. 55,877-01 (Aug. 30, 2002); *Extension of the Designation*  
*of Sudan Under Temporary Protected Status Program*, 68 Fed. Reg. 52,410-01 (Sept. 3, 2003);  
*Extension and Re-designation of Temporary Protected Status for Sudan*, 69 Fed. Reg. 60,168-01,  
 60,169 (Oct. 7, 2004); *Extension of Designation of Sudan Under the Temporary Protected Status*  
*Program*, 70 Fed. Reg. 52,429-01 (Sept. 2, 2005); *Extension of the Designation of Sudan for*  
*Temporary Protected Status*, 72 Fed. Reg. 10,541-02 (Mar. 8, 2007); *Extension of the Designation*  
*of Sudan for Temporary Protected Status*, 73 Fed. Reg. 47,606-02 (Aug. 14, 2008); *Extension of*  
*the Designation of Sudan for Temporary Protected Status*, 74 Fed. Reg. 69,355-02 (Dec. 31,

1 armed conflict but possibly related, such as forced relocation, human rights abuses, famine, and  
2 denial of access to humanitarian agencies.<sup>10</sup>

3 On October 11, 2017, Acting Secretary Elaine C. Duke announced the termination of  
4 Sudan's TPS status, to be effective November 2, 2018 in order to permit an orderly transition. *See*  
5 *Termination of the Designation of Sudan for Temporary Protected Status*, 82 Fed. Reg. 47228-02  
6 (Oct. 11, 2017). The notice explains that Sudan's designation was terminated because:

7 DHS and the Department of State (DOS) have reviewed the  
8 conditions in Sudan. Based on this review and consultation, the  
9 Secretary has determined that conditions in Sudan have sufficiently  
10 improved for TPS purposes. Termination of the TPS designation of  
11 Sudan is required because it no longer meets the statutory conditions  
12 for designation. The ongoing armed conflict no longer prevents the  
return of nationals of Sudan to all regions of Sudan without posing a  
serious threat to their personal safety. Further, extraordinary and  
temporary conditions within Sudan no longer prevent nationals from  
returning in safety to all regions of Sudan.

13 *Id.* at 47230. The notice explains that conflict is limited to Darfur and the Two Areas (South  
14 Kordofan and Blue Nile states), but that in the 2016-2017 timeframe, the parties in conflict  
15 engaged in "time-limited unilateral cessation of hostilities declarations" that "result[ed] in a  
16 reduction in violence and violent rhetoric." *Id.* "The remaining conflict is limited and does not  
17 prevent the return of nationals of Sudan to all regions of Sudan without posing a serious threat to  
18 their personal safety." *Id.* Additionally, food security has improved, humanitarian actors have  
19 been able to provide needed humanitarian aid, and conditions no longer prevent all Sudanese  
20 nationals from returning in safety despite the country's poor human rights record. *Id.* The notice  
21 concludes that, in consideration of these factors, "the Secretary has determined that the ongoing  
22 armed conflict and extraordinary and temporary conditions that served as the basis for Sudan's  
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24 2009); *Extension of the Designation of Sudan for Temporary Protected Status*, 76 Fed. Reg.  
25 63,635-01 (Oct. 13, 2011); *Extension and Redesignation of Sudan for Temporary Protected*  
26 *Status*, 78 Fed. Reg. 1872-01 (Jan. 9, 2013) (detailing the 2005 Comprehensive Peace Agreement  
and continuing violence); *Extension of the Designation of Sudan for Temporary Protected Status*,  
79 Fed. Reg. 52,027-01, 52,029 (Sept. 2, 2014); *Extension of the Designation of Sudan for*  
*Temporary Protected Status*, 81 Fed. Reg. 4045-01 (Jan. 25, 2016).

27 <sup>10</sup> *See, e.g., Extension of Designation of Sudan Under the Temporary Protected Status Program*,  
28 65 Fed. Reg. 67,407-01 (Nov. 9, 2000); *Extension of the Designation of Sudan Under the*  
*Temporary Protected Status Program*, 67 Fed. Reg. 55,877-01 (Aug. 30, 2002).

1 most recent designation have sufficiently improved such that they no longer prevent nationals of  
2 Sudan from returning in safety to all regions of Sudan.” *Id.*

3 C. Defendants’ Termination Decisions

4 Plaintiffs question how the conditions in four countries that had been repeatedly designated  
5 for TPS by multiple administrations over an eight to twenty year period improve within the span  
6 of four months between October 2017 and January 2018. Plaintiffs contend Defendants “adopted  
7 a novel interpretation of the TPS statute.” Compl. ¶ 75. Previously, “DHS or its predecessors  
8 considered intervening natural disasters, conflicts, and other serious social and economic problems  
9 as relevant factors when deciding whether to continue or instead terminate a TPS designation,” but  
10 “the Trump administration’s DHS has now taken the position that such factors cannot be  
11 considered.” *Id.* This change occurred without any explicit acknowledgment, announcement, or  
12 explanation. *Id.* ¶ 76.

13 Plaintiffs cite two statements given to Congress by DHS officials as evidence to support  
14 those claims. On June 6, 2017, then-DHS Secretary John Kelly stated that “the program [TPS] is  
15 for a specific event. In – in Haiti, it was the earthquake. Yes, Haiti had horrible conditions before  
16 the earthquake, and those conditions aren’t much better after the earthquake. But the earthquake  
17 was why TPS was – was granted and – and that’s how I have to look at it.” *Id.* ¶ 76. Current  
18 Secretary Kirstjen Nielson more expressly stated that “[t]he law does not allow me to look at the  
19 country conditions of a country writ large. It requires me to look very specifically as to whether  
20 the country conditions originating from the original designation continue to exist.” *Id.* ¶ 77.

21 Plaintiffs contend this change in approach was not a good-faith change in legal  
22 interpretation of the TPS statute. Instead, they allege Defendants’ action was motivated by racial  
23 and national-origin animus. Compl. ¶ 66. They trace the animus to President Donald J. Trump  
24 and others in his administration who have made statements which “leave no doubt as to the  
25 speaker’s racially discriminatory motives against non-white and non-European immigrants.” *Id.*  
26 Most relevant to the TPS terminations at issue here, in a January 11, 2018 meeting with  
27 Congressional representatives concerning TPS protections for nationals from Latin American and  
28

1 African countries, in which at least El Salvador and Haiti were specifically discussed,<sup>11</sup> President  
 2 Trump wondered aloud, “Why are we having all these people from shithole countries come here?”  
 3 *Id.* ¶ 70. He expressed a preference, instead, for immigrants from countries like Norway, which is  
 4 overwhelmingly white. *Id.* President Trump asked “Why do we need more Haitians?” and  
 5 “insisted that lawmakers ‘[t]ake them out’ of any potential immigration deal.” *Id.*

6 Just one week after President Trump’s comments, Deputy Secretary Duke announced the  
 7 decision terminating Haiti’s TPS designation, and Secretary Nielsen announced the decision  
 8 terminating El Salvador’s designation. Compl. ¶¶ 81, 84. Secretary Nielsen was allegedly present  
 9 at the meeting with President Trump. *Id.* ¶ 72.

10 The White House has allegedly exerted pressure on DHS with respect to recent TPS  
 11 terminations. In particular, Plaintiffs allege that in November 2017, White House Chief of Staff  
 12 John F. Kelly and White House Homeland Security Adviser Tom Bossert “repeatedly called  
 13 Acting [DHS] Secretary Duke and pressured her to terminate the TPS designation for Honduras.”  
 14 Compl. ¶ 73. One official with knowledge of the exchange stated that “[t]hey put massive  
 15 pressure on [Acting Secretary Duke].” *Id.* Chief of Staff Kelly who allegedly called from Japan  
 16 while traveling with President Trump, “was irritated and persistent,” and “warn[ed] Acting  
 17 Secretary Duke that the TPS program ‘prevents [the Trump Administration’s] wider strategic goal’  
 18 on immigration.” *Id.* The pressure was so severe that Acting Secretary Duke stated she would  
 19 resign her position. *Id.*

## 20 II. LEGAL STANDARD

21 Defendants move to dismiss under both Rule 12(b)(1) and 12(b)(6).

### 22 A. Rule 12(b)(1)

23 “[A] defendant may challenge the plaintiff’s jurisdictional allegations in one of two ways.  
 24

25 \_\_\_\_\_  
 26 <sup>11</sup> Plaintiffs’ complaint cites a news article stating that the topic of discussion at the January 11,  
 27 2018 meeting was immigrants “from Haiti, El Salvador, and African countries. *See* Compl. at 20,  
 28 n. 37 (citing Josh Dawsey, *Trump Derides Protections for Immigrants from “Shithole” Countries*,  
 WASH. POST (Jan 12, 2018), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html). The article is incorporated by reference into the complaint. *See In re NVIDIA Corp. Securities Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014).

1 A ‘facial’ attack accepts the truth of the plaintiff’s allegations but asserts that they are insufficient  
2 on their face to invoke federal jurisdiction. The district court resolves a facial attack as it would a  
3 motion to dismiss under Rule 12(b)(6): Accepting the plaintiff’s allegations as true and drawing  
4 all reasonable inferences in the plaintiff’s favor, the court determines whether the allegations are  
5 sufficient as a legal matter to invoke the court’s jurisdiction.” *Leite v. Crane Co.*, 749 F.3d 1117,  
6 1121 (9th Cir. 2014) (citations and quotations omitted).

7 “A ‘factual’ attack, by contrast, contests the truth of the plaintiff’s factual allegations,  
8 usually by introducing evidence outside the pleadings. When the defendant raises a factual attack,  
9 the plaintiff must support her jurisdictional allegations with ‘competent proof,’ under the same  
10 evidentiary standard that governs in the summary judgment context. The plaintiff bears the  
11 burden of proving by a preponderance of the evidence that each of the requirements for subject-  
12 matter jurisdiction has been met.” *Id.* (citations omitted).

13 Here, Defendants concede that they are mounting only a “facial” attack to Plaintiffs’  
14 allegations with respect to jurisdiction. Accordingly, the Court accepts those allegations as true  
15 and draws reasonable inferences in their favor.

16 B. Rule 12(b)(6)

17 In reviewing a motion to dismiss, the Court takes all allegations of material fact as true and  
18 construes them in favor of the plaintiffs to determine whether a plausible legal claim has been  
19 stated. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). A claim “has facial plausibility  
20 [if the plaintiffs] plead[] factual content that allows the court to draw the reasonable inference that  
21 the defendant is liable for the misconduct alleged.” *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009).  
22 Importantly, “[i]f there are two alternative explanations [for the challenged conduct], one  
23 advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff’s  
24 complaint survives a motion to dismiss under Rule 12(b)(6).” *Starr v. Baca*, 652 F.3d 1202, 1216  
25 (9th Cir. 2011). Dismissal is only warranted if Defendants’ “plausible alternative explanation is  
26 so convincing that [Plaintiffs’] explanation is *implausible*.” *Id.* (emphasis in original).

27 **III. DISCUSSION**

28 Defendants argue that the Court lacks jurisdiction to review any claim related to

1 Defendants' termination of TPS for the four countries at issue and that, even if the Court can  
 2 consider Plaintiffs' claims, they each fail on the merits. For the reasons stated in its prior  
 3 summary order and below, the Court denies Defendants' motion.

4 A. Jurisdictional Bar – Dismissal Under Rule 12(b)(1)

5 Section 1254a(b)(5)(A) of the TPS statute provides:

6 There is no judicial review of any determination of the [Secretary of  
 7 Homeland Security]<sup>12</sup> with respect to the designation, or termination  
 8 or extension of a designation, of a foreign state under this  
 subsection.

9 8 U.S.C. § 1254a(b)(5)(A).

10 Defendants construe this provision broadly to preclude review not only of the Secretary's  
 11 substantive determination with respect to a particular country (*e.g.*, whether conditions in a  
 12 particular foreign country have abated), but also any generally applicable process, practice, or  
 13 legal interpretation employed by the Secretary in making such determinations. The Court first  
 14 construes the scope of § 1254a and then considers whether Plaintiffs' claims fall within its scope.

15 1. Section 1254a Does Not Preclude Challenges to General Collateral Practices

16 Statutory interpretation begins with the text of the statute. *See Los Angeles Lakers, Inc. v.*  
 17 *Fed. Ins. Co.*, 869 F.3d 795, 802 (9th Cir. 2017). Construction of a jurisdiction-stripping statute,  
 18 however, is guided by important overarching principles. "A strong presumption exists that the  
 19 actions of federal agencies are reviewable in federal court." *KOLA, Inc. v. U.S.*, 882 F.2d 361, 363  
 20 (9th Cir. 1989); *see also Sackett v. E.P.A.*, 566 U.S. 120, 128 (2012) (explaining that "[t]he  
 21 APA . . . creates a presumption favoring judicial review of administrative action"). Furthermore,  
 22 "where Congress intends to preclude judicial review of constitutional claims its intent to do so  
 23 must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). The presumption in favor of judicial  
 24 review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary  
 25 legislative intent." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (citations omitted). Such  
 26 indications may be "drawn from 'specific language,' 'specific legislative history,' and 'inferences  
 27

28 <sup>12</sup> Section 1254a vests this authority with the Attorney General, but that power was subsequently transferred to the Secretary of Homeland Security. *See* 8 U.S.C. § 1103; 6 U.S.C. § 557.

1 of intent drawn from the statutory scheme as a whole,’ that Congress intended to bar review.”  
2 *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) (quotation omitted). Finally,  
3 “[e]ven where the ultimate result [of a statute] is to limit judicial review, . . . as a matter of the  
4 interpretive enterprise itself, the narrower construction of a jurisdiction-stripping provision is  
5 favored over the broader one.” *ANA Int’l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004). Giving  
6 effect to provisions eliminating judicial review raises serious questions as to separation of powers,  
7 and raises constitutional concerns. *See Webster*, 486 U.S. at 603 (explaining that a “heightened  
8 showing” of Congressional intent is required “in part to avoid the ‘serious constitutional question’  
9 that would arise if a federal statute were construed to deny any judicial forum for a colorable  
10 constitutional claim”).

11 The TPS statute precludes review of the “any *determination* . . . with respect to the  
12 designation, or termination or extension of a designation, of a foreign state under this subsection.”  
13 8 U.S.C. § 1254a(b)(5)(A) (emphasis added). The statute does not define “determination,” but it  
14 is evident from the statutory context that this provision refers to the designation, termination, or  
15 extension of a country for TPS. *Id.* The statute uses the word “determines” or “determination” in  
16 connection with the Secretary’s initial designation, periodic review, and termination of a TPS  
17 foreign-state designation. *See* 8 U.S.C. § 1254a(b)(3)(A) (providing that the Secretary  
18 periodically “shall *determine* whether the conditions for such designation . . . continue to be met”  
19 and to timely publish “such *determination*”); *id.* § 1254a(b)(3)(B) (if the Secretary “determines”  
20 the conditions are no longer met, then he “shall terminate the designation by publishing notice . . .  
21 of the *determination*”); *id.* § 1254a(b)(3)(C). There is no clear provision stating “determination”  
22 refers to, *e.g.*, general procedures or criteria applied in making such country-by-country  
23 determinations.

24 The Supreme Court has concluded that similar statutes which preclude review of a  
25 “determination” of immigration status did not preclude review of collateral practices and policies.  
26 For example, *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991), concerned a jurisdiction-  
27 stripping provision related to the “Special Agricultural Workers” (SAW) amnesty program for  
28 certain farmworkers. Under the Immigration Reform and Control Act of 1986 (“IRCA”), alien



1 farmworkers who were unlawfully present but met certain criteria could apply for adjustment of  
2 status. *See generally* 8 U.S.C. § 1160(a). The Attorney General was responsible for administering  
3 the application process, including a required interview. The plaintiffs in *McNary* alleged that the  
4 “interview process was conducted in an arbitrary fashion that deprived applicants of the due  
5 process guaranteed by the Fifth Amendment to the Constitution” because, *inter alia*, they were not  
6 apprised of or given an opportunity to challenge adverse evidence, denied the opportunity to  
7 present witnesses, were denied access to competent interpreters, and because the interviews were  
8 not recorded, inhibiting meaningful review of denials. *Id.* at 487. They did not challenge their  
9 individual denials on the merits (*i.e.*, the application of the statute’s substantive eligibility criteria  
10 to their individual case), but rather collaterally challenged the process under which their denials  
11 were determined.

12 The government argued that the *McNary* plaintiffs’ claims were precluded from bringing  
13 suit because the statute (similar to the TPS statute here) provided that “[t]here shall be no  
14 administrative or judicial review of a determination respecting an application for adjustment of  
15 status under this section except [as provided under 8 U.S.C. § 1160(e)(3)(A) of ‘an order of  
16 exclusion or deportation’].” 8 U.S.C. § 1160(e). The Supreme Court held that “the reference to ‘a  
17 determination’ describes a single act rather than a group of decisions *or a practice or procedure*  
18 *employed in making decisions.*” *Id.* at 492 (emphasis added). The court found that its  
19 interpretation was bolstered by the fact that the statute limited judicial review of such  
20 “determinations” to a narrow process; that review was limited to an administrative record related  
21 to an individual’s eligibility for relief, and was thus inadequate “to address the kind of procedural  
22 and constitutional claims” asserted by the plaintiffs. *Id.* at 493. The Supreme Court noted that,  
23 “had Congress intended the limited review provisions . . . to encompass challenges to INS  
24 procedures and practices, it could easily have used broader statutory language,” such as “all  
25 causes . . . arising under” the statute, or “all questions of law and fact. *Id.* at 494. In short, the  
26 Supreme Court held that “[w]e agree . . . this language [describes] the process of direct review of  
27 individual denials of SAW status, rather than as referring to general collateral challenges to  
28 unconstitutional practices and policies used by the agency in processing applications.” 498 U.S. at

1 492.

2 The Supreme Court applied *McNary* in *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43  
 3 (1993) (“*CSS*”). In *Reno*, the Supreme Court considered a challenge to regulations promulgated  
 4 by the AG pursuant to IRCA with respect to another amnesty program permitting certain aliens to  
 5 adjust their immigration status. A similar set of jurisdiction-stripping provisions collectively  
 6 provided that “a determination respecting an application for adjustment of status” could only be  
 7 reviewed in a single level of administrative appellate review and then “only in the judicial review  
 8 of an order of deportation.” See 8 U.S.C. §§ 1255a(f)(1), 1255a(f)(3)(A), 1255a(f)(4)(A),  
 9 1255a(f)(1). Although the suit in *Reno* was not the judicial review authorized by the statute, the  
 10 Court permitted the case to proceed because the plaintiffs’ challenge was to the AG’s regulations  
 11 interpreting the statute, rather than an individual determination. The Supreme Court thus held that  
 12 the jurisdiction-stripping provision did not apply.<sup>13</sup>

13 Here, Plaintiffs challenge, *inter alia*, DHS’s change in interpretation of the TPS statute (a  
 14 general procedural issue), not an individual determination.<sup>14</sup> The Department’s general  
 15 interpretation of the TPS statute is a question distinct from the Department’s designation or  
 16 termination of a particular country’s TPS status.

17 Contrary to Defendants’ argument, the statute’s reference to “*any* determination” does not  
 18 subsume “any” general policies or practices. Rather, the word “any” must be understood in its  
 19 grammatical context: “any determination . . . *with respect to the designation, or termination or*  
 20

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21 <sup>13</sup> The Supreme Court then determined that several plaintiffs’ claims may not be ripe because they  
 22 had not yet applied for and been denied adjustment of status under the regulation they challenged.  
 23 Defendants do not challenge the ripeness of Plaintiffs’ claims in this case. Moreover, no such  
 24 problem appears. In *CSS*, the plaintiffs were unlawfully present in the United States and would  
 25 not be affected by the problematic regulation unless they applied for adjustment of status and then  
 were denied on the basis of the challenged regulation (rather than on other grounds). In contrast,  
 here, Plaintiffs and others similarly situated have permission to remain in the United States and  
 Defendants’ actions will, if undisturbed, strip them of that status.

26 <sup>14</sup> See also *Immigrant Assistance Project of AFL-CIO v. I.N.S.*, 306 F.3d 842, 862-63 (9th Cir.  
 27 2002) (applying *McNary* to hold that a statute depriving aliens applying for amnesty of “judicial  
 28 review of a determination respecting an application for adjustment” did not preclude district court  
 jurisdiction over the plaintiffs’ “procedural rather than substantive” challenge); *Proyecto San  
 Pablo v. I.N.S.*, 189 F.3d 1130, 1138-41 (9th Cir. 1999) (same).

1 *extension of a designation, of a foreign state.*” 8 U.S.C. § 1254a(b)(5)(A) (emphasis added). *See*  
2 *Small v. U.S.*, 544 U.S. 385, 388 (2005) (holding that statutory phrase “convicted in any court” did  
3 not include foreign courts); *U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) (holding that  
4 “respondent errs in placing dispositive weight on the broad statutory reference to ‘any’ law  
5 enforcement officer or agency without considering the rest of the statute”). In context, “any  
6 determination” means the determination to designate, the determination to terminate, and the  
7 determination to extend a designation. “Any” modifies but does not define “determinations.”

8 The government cites a House Judiciary Committee report which states that “none of the  
9 [Secretary’s] decisions with regard to granting, extending, or terminating TPS will be subject to  
10 judicial review,” H.R. Rep. No. 101-245 (1989), at 14. That citation is inapt for two reasons.  
11 First, this committee report concerns the “Chinese Temporary Protected Status Act of 1989,”  
12 House Resolution 2929 (101st Congress), which was never passed. Although the judicial review  
13 provision in that proposed legislation is similar to the language ultimately included in the general  
14 TPS statute passed and codified at 8 U.S.C § 1254a, the latter was part of the Immigration Act of  
15 1990, Pub. L. No. 101-649, Nov. 29, 1990. Defendants have not identified other relevant  
16 legislative history pertaining to the legislation actually passed by Congress. In any case, the  
17 language cited in this committee report would not provide additional guidance even if it pertained  
18 to the TPS statute at issue here. It merely echoes the language of the statute, using the word  
19 “decisions” instead of “determinations.” That is not clear and convincing evidence of  
20 Congressional intent to strip jurisdiction of the courts to review generally applicable policies and  
21 practices which transcend individual TPS determination for a particular country.

22 Finally, the fact that Plaintiffs’ challenge might result in vacating the four TPS  
23 determinations at issue in this case is not dispositive to the interpretation question at hand. The  
24 same was true in *McNary* and *CSS*; both had the effect of vacating individual determinations and  
25 requiring the agency to re-consider them after correcting procedural deficiencies and applying the  
26 correct legal standard. Similarly, if Plaintiffs prevail here, Defendants would not be compelled to  
27 extend each country’s TPS designation. Instead, Defendants may make a new determination  
28 whether TPS should be extended or terminated once they correct any legal errors identified by the

1 Court.

2 2. Section 1254a Does Not Preclude Colorable Constitutional Claims

3 Plaintiffs' constitutional claims do challenge, *inter alia*, DHS's determinations to terminate  
4 each of the four country's TPS status on grounds that do not depend on DHS's general  
5 interpretation of the TPS statute. For example, the U.S.-citizen children allege that Defendants'  
6 termination of their parents' TPS status violates their substantive due process rights because  
7 "Defendants have articulated no substantial governmental interest and have failed to adequately  
8 tailor their action to promote any legitimate interest they may have," and the TPS termination  
9 notices do not "identif[y] any risk to the interests of the United States that would follow from  
10 allowing the school-aged U.S. citizen children to remain in the United States with their TPS holder  
11 parents until the children reach the age of majority." Compl. ¶ 105. Similarly, Plaintiffs' equal  
12 protection claim alleges that "Defendants' decisions to terminate the TPS designations for El  
13 Salvador, Haiti, Nicaragua, and Sudan are unconstitutional because they were motivated, at least  
14 in part, by intentional discrimination based on race, ethnicity, or national origin." Compl. ¶ 110.  
15 Finally, the TPS-holder Plaintiffs allege that their due process rights have been violated because  
16 "[t]he government also has not articulated, and cannot establish, any rational basis for . . . ignoring  
17 the current capability of TPS countries to safely receive longtime TPS holders, their families, and  
18 their U.S. citizen children." Compl. ¶ 115.

19 These challenges are not collateral challenges to broad policies. Rather, they directly  
20 attack the determinations themselves. Thus, *McNary* and *Reno* do not apply to these challenges.  
21 Nevertheless, as noted above, "where Congress intends to preclude judicial review of  
22 constitutional claims its intent to do so must be clear." *Webster*, 486 U.S. at 603. This  
23 "heightened showing" is required "in part to avoid the 'serious constitutional question' that would  
24 arise if a federal statute were construed to deny any judicial forum for a colorable constitutional  
25 claim." *Id.* (citation and quotation omitted).

26 Here, Plaintiffs argue that the phrase "under this subsection" in Section 1254a(b)(5)(A)  
27 means that the provision does not preclude a legal claim arising under the Constitution or other  
28 statutes. *See* 8 U.S.C. § 1254a(b)(5)(A) ("There is no judicial review of any determination of the

1 Attorney General . . . *under this subsection.*” (emphasis added)). This argument is not persuasive.  
 2 Under Plaintiffs’ interpretation, the statute only precludes a cause of action arising directly under §  
 3 1254a; but there is no direct cause of action under § 1254a, so Plaintiffs’ interpretation would  
 4 render the phrase meaningless. Rather, as the Government contends, “under this subsection” is  
 5 more reasonably read to describe the “determinations” for which review is precluded, *i.e.*, specific  
 6 TPS determinations made by the Secretary under the statute.

7 However, there is no “clear and convincing” evidence that Congress intended to preclude  
 8 the Court from reviewing constitutional challenges of the nature alleged here. Indeed, as Plaintiffs  
 9 point out, where Congress otherwise intended to preclude review of *all* constitutional claims in the  
 10 INA, it said so explicitly. *See* 8 USC 1252(b)(9) (“Judicial review of all questions of law and fact,  
 11 *including interpretation and application of constitutional and statutory provisions*, arising from  
 12 any action taken or proceeding brought to remove an alien . . . shall be available only in judicial  
 13 review of a final order under this section.” (emphasis added)); *see also McNary*, 509 U.S. at 494.  
 14 Such a clear expression of intent is absent in the TPS statute.<sup>15</sup> Constitutional concerns counsel  
 15 for a narrow interpretation of jurisdiction-limiting statutes. Thus, absent clear evidence of  
 16 Congressional intent, the jurisdiction-stripping provision should be construed to preclude review  
 17 only of claims challenging a determination for reasons that are “closely tied to the application and  
 18 interpretation of statutes” which are committed by statute to the Secretary’s discretion. *See*  
 19 *Cuozzo*, 136 S.Ct. at 2141-42 (holding that lawsuit challenging U.S. Patent and Trademark  
 20 Office’s decision to institute inter partes review based on the alleged insufficiency of the petition

21 \_\_\_\_\_  
 22 <sup>15</sup> The government cites only one case to support its interpretation that § 1254a precludes review  
 23 of constitutional claims, *Krua v. U.S. Dept. of Homeland Sec.*, 729 F.Supp.2d 452, 455 (D. Mass.  
 24 2010) (holding that pro se Liberian national’s claim that Secretary’s TPS designation violated the  
 25 equal protection guarantee because it arbitrarily distinguished between Libyans present in the U.S.  
 26 before and after Oct. 1, 2002 was precluded from review). The *Krua* court did not undertake a  
 27 reasoned analysis in construing Section 1254a’s jurisdiction-stripping provision so is not  
 28 persuasive. In any event, it is not necessarily inconsistent with the Court’s holding. Arguably, the  
 Secretary’s decision with respect to eligibility cut-off dates for TPS protection is “closely related”  
 to administration of the TPS statute and therefore unreviewable under *Cuozzo*. *See* 8 U.S.C.  
 § 1254a(b)(2)(A) (TPS designation of a foreign state “take[s] effect upon the date of  
 publication . . . or such later date as the Attorney General may specify”). Thus, the plaintiff’s  
 equal protection challenge based on the differential treatment of Liberians arriving before and  
 after a particular cut-off date established by law could be precluded. In contrast, Congress did not  
 charge the Secretary with making termination decisions on the basis of racial animus.

1 for review was precluded by jurisdiction-stripping statute, but expressly holding that “we do not  
2 categorically preclude review of a final decision where . . . there is a due process problem with the  
3 entire proceeding, nor does our interpretation enable the agency to act outside its statutory limits”).

4 Applying that principle here, Section 1254a does not reflect a clear Congressional intent to  
5 preclude this Court from reviewing Plaintiffs’ constitutional challenges to the Secretary’s  
6 determinations. The substance of Plaintiffs’ constitutional challenges is far afield of fact-based  
7 criteria that are “closely tied” to administration of the TPS statute. While the Secretary’s  
8 evaluation of particular facts based on statutory criteria under 8 U.S.C. § 1254a(b)(1)(A)-(C) may  
9 be “closely tied to the application and interpretation of statutes related to” the Secretary’s  
10 decisions, ascertaining whether the decision is driven by unconstitutional racial animus is not.  
11 Nor is the purely legal question regarding the scope of a person’s substantive due process interests  
12 against removal (*i.e.*, how to balance an *individual’s* interests with the Government’s interests).  
13 Unlike, *e.g.*, a challenge to the Secretary’s determination to terminate TPS for a particular country  
14 being allegedly arbitrary because the country is not in fact safe, the constitutional claims at issue  
15 here do not focus on the factual accuracy of the Secretary’s evaluation of specific country  
16 conditions, an evaluation which Section 1254a was intended to insulate. Instead, these  
17 constitutional challenges are predicated on facts outside the considerations prescribed (and  
18 committed to the Secretary’s evaluation) by the TPS statute.

19 Defendants argue that the *Webster* presumption in favor of judicial review of colorable  
20 constitutional claims does not apply here because Congress did not preclude all judicial review but  
21 “simply channel[ed] review of a constitutional claim to a particular court.” *Elgin v. Dept. of*  
22 *Treasury*, 567 U.S. 1, 9 (2012).<sup>16</sup> Defendants’ argument rests on the assumption that an alien

23  
24 <sup>16</sup> In its Reply brief, the Government cites the plurality opinion in *Patchak v. Zinke*, 138 S. Ct.  
25 897 (2018). In that case, the plaintiff sued the Secretary of the Interior for taking land into trust on  
26 behalf of an Indian tribe; after the suit was instituted, Congress passed a statute stripping the  
27 district courts of jurisdiction over lawsuits relating to the land. *Id.* at 902. The plaintiff argued  
28 that Congress violated Article III of the Constitution by improperly directing the results of  
pending litigation. *Id.* at 904. The Supreme Court explained that “Congress violates Article III  
when it ‘compel[s] . . . findings or results under old law,’” but not “when it ‘changes the law.’”  
*Id.* at 905 (citations omitted, alteration in original). The court interpreted the new statute stripping  
jurisdiction as a change in law that was not problematic. In so doing, the court explained that  
“Congress generally does not infringe the judicial power when it strips jurisdiction because, with

1 ordered removed may seek judicial review in the context of removal proceedings of constitutional  
2 claims challenging termination of a country's TPS status under 8 U.S.C. § 1252(a)(2)(D).<sup>17</sup> The  
3 argument is flawed for several reasons.

4 First, Defendants do not concede that review of constitutional claims through those  
5 procedures would be available to aliens ordered removed: Defendants therefore seem to doubt  
6 their own premise.

7 Second, the TPS statute was passed in 1990; the TPS statute did not purport to "channel"  
8 review of constitutional claims arising out of TPS country determinations to a particular forum.  
9 Congress did not create the judicial review provisions of 8 U.S.C. § 1252(a)(2)(D) until a decade  
10 later, when it passed the REAL ID Act of 2005, Pub. L. 109-13, in response to the Supreme  
11 Court's decision in *INS v. St. Cyr.*, 533 U.S. 289 (2001). The Act eliminated district court habeas  
12 jurisdiction over orders of removal" and "addressed Suspension Clause concerns raised in *St. Cyr.*  
13 by allowing (i.e., reinstating) review in courts of appeal of final removal orders of aggravated  
14 felons for 'constitutional claims or questions of law.'" *Iasu v. Smith*, 511 F.3d 881, 886 (9th Cir.  
15 2007) (quoting 8 U.S.C. § 1252(a)(2)(D)). The REAL ID Act reflects Congress's intent to  
16 channel constitutional challenges to a *removal order*; it does not reflect a Congressional purpose  
17 to circumvent constitutional challenges to TPS country determinations; nor was it intended to limit  
18 challenges brought by a person who is not facing removal (e.g., a U.S.-citizen).

19 Third, U.S.-citizen children cannot seek judicial review through that process because they  
20 are not aliens who would be ordered removed; Congress therefore could not have intended to  
21 channel their claims to appeals from a removal proceeding.

22 Finally, even for aliens ordered removed, judicial review in removal proceedings would be  
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24 limited exceptions, a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial  
25 power." *Id.* at 907. The plurality opinion's language is inapposite because, as explained above,  
26 Congress has not clearly expressed its intent to strip the Court of jurisdiction over Plaintiffs'  
27 claims here. Thus, the question whether Congress *could* strip the district court of jurisdiction over  
28 constitutional claims is not necessarily at issue here.

<sup>17</sup> See 8 U.S.C. § 1252(a)(2)(D) (providing that "[n]othing . . . in any other provision of this chapter . . . which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review [of a final order of removal] filed with an appropriate court of appeals in accordance with this section").

1 ineffective because it would be limited to “the administrative record on which the order of  
2 removal is based.” *See* 8 U.S.C. § 1252(b)(4)(A). Plaintiffs would not have an opportunity to  
3 develop a record regarding their constitutional claims to support review.

4 For these reasons, Congress has not clearly indicated an intent to preclude jurisdiction over  
5 colorable constitutional challenges related to TPS determinations.

6 B. Motion to Dismiss

7 Plaintiffs bring four claims. First, they allege that Defendants’ adoption of a new  
8 interpretation of the TPS statute violates the Administrative Procedure Act insofar as it departed  
9 *sub silentio* from a past practice (Count Four). Second, Plaintiffs bring two separate due process  
10 claims on behalf of the TPS-holding parents and the U.S.-citizen children on the basis that  
11 Defendants have not advanced a sufficient rationale to justify infringing on their protected liberty  
12 and/or property interests (Counts One and Three). Finally, Plaintiffs allege that Defendants’  
13 termination of TPS violates the equal protection guarantee of the Due Process Clause because it  
14 was motivated, at least in part, by racial or national-origin animus. The Court analyzes each claim  
15 on which Defendants seek dismissal substantively under Rule 12(b)(6).

16 1. APA Claim (Count Four)

17 a. Legal Standard

18 Under the APA, agency action may be set aside if it is arbitrary or capricious. *See* 5  
19 U.S.C. § 706(2)(A). Under this standard, an agency must “examine the relevant data and  
20 articulate a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Assn. of United States,*  
21 *Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). But “a court is not to  
22 substitute its judgment for that of the agency” and “should uphold a decision of less than ideal  
23 clarity if the agency’s path may reasonably be discerned.” *F.C.C. v. Fox Television Stations, Inc.*,  
24 556 U.S. 502, 513-14 (2009) (citation and quotation omitted).

25 The APA constrains an agency’s ability to change its practices or policies without  
26 acknowledging the change or providing an explanation. “[T]he requirement that an agency  
27 provide reasoned explanation for its action would ordinarily demand that [an agency] display  
28 awareness that it *is* changing position.” *Id.* at 515 (emphasis in original). Thus, agencies “may



1 not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books,”  
2 and “must show that there are good reasons for the new policy.” *Id.* (emphasis in original). An  
3 agency need not demonstrate that “the reasons for the new policy are *better* than the reasons for  
4 the old one; it suffices that the new policy is permissible under the statute, that there are good  
5 reasons for it, and that the agency *believes* it to be better, which the conscious change of course  
6 adequately indicates.” *Id.* (emphasis in original).

7 This constraint on changes to agency policy is not limited to formal rules or official  
8 policies. It applies to practices implied from the agency conduct. For example, in *California*  
9 *Trout v. F.E.R.C.*, 572 F.3d 1003 (9th Cir. 2009), the plaintiffs challenged the Federal Energy  
10 Regulatory Commission’s (FERC) denial of their untimely attempt to intervene in a proceeding  
11 concerning the renewal of an operating license for a dam and power plant. In essence, the  
12 plaintiffs argued that FERC’s decision to grant late intervention requests in three prior  
13 adjudications had given rise to an implicit rule that FERC would always grant late requests in  
14 certain circumstances, and that FERC was required to offer a reasoned explanation before  
15 abandoning that practice. Although it ultimately held against the plaintiffs, the Ninth Circuit  
16 agreed that the alleged change in adjudicative practice was subject to the APA’s requirements for  
17 reasoned decision-making. It explained that “while an agency may announce new principles in an  
18 adjudicatory proceeding, it may not depart, *sub silentio*, from its usual rules of decision to reach a  
19 different, unexplained result in a single case.” *Id.* at 1022(quotation and citation omitted).  
20 Rather, “‘if [an agency] announces and follows—by rule *or by settled course of adjudication*—a  
21 general policy by which its exercise of discretion will be governed, an irrational departure from  
22 that policy (as opposed to an avowed alteration of it) could constitute action that must be  
23 overturned as ‘arbitrary, capricious, [or] an abuse of discretion’ within the meaning of the  
24 Administrative Procedure Act.” *Id.* at 1023 (quoting *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32  
25 (1996)) (emphasis added, alteration in original). The court proceeded to consider the claim on the  
26 merits and held that the agency’s prior decisions had *not* “establish[ed] a broad principle that the  
27 Commission will allow untimely intervention.” *Id.* at 1024.

28 Thus, *California Trout* establishes that a shift in agency practice (as opposed to a formal

1 rule or policy) is also reviewable under the APA. Courts have also looked, in part, to whether an  
 2 agency's past practice evinces the existence of an implicit rule or policy. *See, e.g., Northwest Env.*  
 3 *Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668 (9th Cir. 2007) (holding that BPA's decision  
 4 to stop funding Fish Passage Center and to divert its responsibilities to two other entities after  
 5 nearly two decades was arbitrary and capricious where no reasoned explanation was provided);  
 6 *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 927 (D.C. Cir. 2017) (after  
 7 "longstanding practice" of treating certain land as if it were part of the Wild Horse Territory,  
 8 agency's unexplained change in practice was arbitrary-and-capricious, particularly where it  
 9 "fail[ed] even to acknowledge its past practice . . . let alone to explain its reversal of course in the  
 10 2013 decision").

11 b. Plaintiffs Plausibly Allege a Change in Practice or Policy

12 Plaintiffs allege that to justify the termination of TPS for El Salvador, Haiti, Nicaragua,  
 13 and Sudan, "DHS has adopted a novel interpretation of the TPS statute. Under prior  
 14 administrations, DHS or its predecessors considered intervening natural disasters, conflicts, and  
 15 other serious and social economic problems as relevant factors when deciding whether to continue  
 16 or instead terminate a TPS designation. . . . [T]he Trump administration's DHS has now taken the  
 17 position that such factors cannot be considered." Compl. ¶ 75. Plaintiffs more specifically cite  
 18 former Secretary Kelly's June 6, 2017 Senate testimony that "the [TPS] program is for a specific  
 19 event. In – in Haiti, it was the earthquake. Yes, Haiti had horrible conditions before the  
 20 earthquake, and those conditions aren't much better after the earthquake. But the earthquake was  
 21 why TPS was – was granted and – and that's how I have to look at it." Compl. ¶ 76.  
 22 Additionally, as noted above, Secretary Nielsen later stated that "[t]he law does not allow me to  
 23 look at the country conditions of a country writ large. It requires me to look very specifically as to  
 24 whether the country conditions originating from the original designation continue to exist." *Id.* ¶  
 25 77. Plaintiffs also cite three press releases issued by DHS with respect to TPS for El Salvador,  
 26 Haiti, Nicaragua, and Honduras where the Secretary stated that she compared "the conditions upon  
 27 which the country's original designation was based" with "an assessment of whether those  
 28 originating conditions continue to exist." *Id.* ¶ 78.

1 Defendants argue that a facial comparison between the termination notices here and prior  
 2 notices shows that they are in fact consistent, not that any radical change has occurred. Indeed, to  
 3 state a claim, Plaintiffs must plausibly allege not only that Defendants considered only the  
 4 “originating conditions” in terminating TPS here, but also that Defendants’ prior practice was to  
 5 the contrary. They have done so here. Prior to October 2017, extension and/or re-designation  
 6 notices indicate that DHS consistently considered, at the very least, whether intervening events  
 7 had frustrated or impeded recovery efforts from the originating conditions in Sudan, Haiti,  
 8 Nicaragua, and El Salvador. For example, in notices regarding Sudan, DHS emphasized *both* the  
 9 persistence of the armed conflict prompting the original designation *and* consequential problems  
 10 beyond the conflict itself, which together prevented the safe return of Sudanese nationals.<sup>18</sup> The

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 12 <sup>18</sup> **Sudan:**

- 13 • *Extension and Redesignation of Sudan Under the Temporary Protected Status Program*, 64 FR 61128-01, 1999 WL 1008419 (Nov. 9, 1999) (finding that the armed conflict is ongoing and extraordinary and temporary conditions continue to exist);
- 14 • *Extension of Designation of Sudan Under the Temporary Protected Status Program*, 65 Fed. Reg. 67,407-01 (Nov. 9, 2000) (noting that the civil war continues and highlighting some of its effects, including forced relocation, destruction of indigenous trading and production systems, and a risk of famine);
- 15 • *Extension of the Designation of Sudan Under the Temporary Protected Status Program*, 66 Fed. Reg. 46,031-01 (Aug. 31, 2001) (noting that the civil war continues and associated impact, including human rights abuses, displacement, insecurity, and famine);
- 16 • *Extension of the Designation of Sudan Under the Temporary Protected Status Program*, 67 Fed. Reg. 55,877-01 (Aug. 30, 2002) (noting ongoing civil war, failure of peace negotiations, and associated human rights abuses, forced displacement, denial of access to humanitarian agencies, and so on);
- 17 • *Extension of the Designation of Sudan Under Temporary Protected Status Program*, 68 Fed. Reg. 52,410-01 (Sept. 3, 2003) (same);
- 18 • *Extension and Re-designation of Temporary Protected Status for Sudan*, 69 Fed. Reg. 60,168-01, 60,169 (Oct. 7, 2004) (same);
- 19 • *Extension of the Designation of Sudan for Temporary Protected Status*, 76 Fed. Reg. 63635-01 (Oct. 13, 2011) (concluding that “because the armed conflict is ongoing, although there have been a few improvements . . . the extraordinary and temporary conditions that prompted . . . redesignation persist”);
- 20 • *Extension and Redesignation of Sudan for Temporary Protected Status*, 78 Fed. Reg. 1872-01 (Jan. 9, 2013) (same because “the conditions in Sudan that prompted the TPS designation not only continue to be met but have deteriorated” and “[t]here continues to be a substantial, but temporary, disruption of living conditions in Sudan based upon ongoing armed conflict and extraordinary and temporary conditions”);
- 21 • *Extension of the Designation of Sudan for Temporary Protected Status*, 79 Fed. Reg. 52,027-01, 52,029 (Sept. 2, 2014) (same);
- 22 • *Extension of the Designation of Sudan for Temporary Protected Status*, 81 Fed. Reg. 4045-01 (Jan. 25, 2016) (same).

1 same is generally true of Nicaragua and Hurricane Mitch,<sup>19</sup> El Salvador's earthquake,<sup>20</sup> and Haiti's

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3 <sup>19</sup> **Nicaragua:**

- 4 • *Extension of the Designation of Nicaragua Under the Temporary Protected Status Program*, 65 Fed. Reg. 30,440-01, 30,440 (May 11, 2000) (“The conditions which led to the original designation are less severe, but continue to cause substantial disruption to living conditions in Nicaragua.”);
- 5 • *Extension of the Designation of Nicaragua Under the Temporary Protected Status Program*, 66 Fed. Reg. 23,271-01, 23,272 (May 8, 2001) (“sufficient damage from Hurricane Mitch persists”);
- 6 • *Extension of the Designation of Nicaragua Under the Temporary Protected Status Program*, 67 Fed. Reg. 22,454-01, 22,454 (May 3, 2002) (“**[R]ecent droughts as well as flooding from Hurricane Michelle in 2001 compounded the humanitarian, economic, and social problems initially brought on by Hurricane Mitch in 1998**” (emphasis added));
- 7 • *Extension of the Designation of Nicaragua Under Temporary Protected Status Program*, 68 Fed. Reg. 23,748-01, 23,749 (May 5, 2003) (same);
- 8 • *Extension of the Designation of Temporary Protected Status for Nicaragua*, 69 Fed. Reg. 64,088-01 (Nov. 3, 2004) (“Reconstruction of infrastructure damaged by Hurricane Mitch continues.”);
- 9 • *Extension of the Designation of Temporary Protected Status for Nicaragua*, 71 Fed. Reg. 16,333-01 (Mar. 31, 2006) (“**While progress has been made in reconstruction from Hurricane Mitch, Nicaragua has not been able to fully recover, in part due to follow-on natural disasters that have severely undermined progress towards an economic recovery that would enable Nicaragua to adequately handle the return of its nationals.**” (emphasis added));
- 10 • *Extension of the Designation of Nicaragua for Temporary Protected Status*, 72 Fed. Reg. 29,534-01, 29,535 (May 29, 2007) (concluding no recovery from Hurricane Mitch and noting that subsequent storms have caused the country to remain vulnerable);
- 11 • *Extension of the Designation of Nicaragua for Temporary Protected Status*, 73 Fed. Reg. 57,138-01, 57,139 (Oct. 1, 2008) (concluding that disruption from Hurricane Mitch persists and noting that subsequent economic crises and natural disasters have exacerbated issues caused by Hurricane Mitch);
- 12 • *Extension of the Designation of Nicaragua for Temporary Protected Status*, 75 Fed. Reg. 24,737-01, 24,738 (May 5, 2010) (country “has not fully recovered from Hurricane Mitch” and that “more recent natural disasters have slowed the recovery from Hurricane Mitch”);
- 13 • *Extension of the Designation of Nicaragua for Temporary Protected Status*, 76 Fed. Reg. 68,493-01 (Nov. 4, 2011) (describing subsequent natural disasters and noting that “[e]ach of these environmental events has hampered the recovery efforts from Hurricane Mitch”);
- 14 • *Extension of the Designation of Nicaragua for Temporary Protected Status*, 78 Fed. Reg. 20,128-01 (Apr. 3, 2013) (“[R]ecovery from Hurricane Mitch is still incomplete” and “**subsequent natural disasters . . . hamper[ed] the recovery efforts**” (emphasis added));
- 15 • *Extension of the Designation of Nicaragua for Temporary Protected Status*, 79 Fed. Reg. 62,176-01 (Oct. 16, 2014) (same);
- 16 • *Extension of the Designation of Nicaragua for Temporary Protected Status*, 81 Fed. Reg. 30,325-01 (May 16, 2016) (“Nicaragua continues to suffer from the residual effects of Hurricane Mitch, and **subsequent disasters have** caused additional damage and added to the country’s fragility” which “**exacerbated the persisting disruptions caused by Hurricane Mitch**” (emphasis added)).

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27 <sup>20</sup> **El Salvador:**

- 28 • *Extension of the Designation of El Salvador Under the Temporary Protected Status Program*, 67 Fed. Reg. 46,000-01, 46,000 (July 11, 2002) (concluding that “the conditions

1 earthquake.<sup>21</sup> As the highlighted language in these footnotes demonstrates, prior administrations  
 2 considered subsequent, intervening events such as droughts extending TPS status. In some cases,  
 3 such intervening events were considered irrespective of whether they had any causal relationship

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 5 that warranted TPS designation initially continue to exist” but noting that the recovery  
 “**has been further affected by a subsequent drought**” (emphasis added));

- 6 • *Extension of the Designation of El Salvador Under Temporary Protected Status Program*,  
 68 Fed. Reg. 42,071-01, 42,072 (July 16, 2003) (finding that recovery from earthquake  
 7 was ongoing and “the conditions that prompted designation . . . continue to be met”);
- 8 • *Extension of the Designation of Temporary Protected Status for El Salvador*, 70 Fed. Reg.  
 1450-01, 1451 (Jan. 7, 2005) (same);
- 9 • *Extension of the Designation of Temporary Protected Status for El Salvador*, 71 Fed. Reg.  
 34,637-01, 34,638 (June 15, 2006) (the conditions that initially gave rise to the designation  
 . . . continue to exist”);
- 10 • *Extension of the Designation of El Salvador for Temporary Protected Status*, 72 Fed. Reg.  
 46,649-01, 46,649-50 (Aug. 21, 2007) (concluding that “there continues to be a substantial,  
 11 but temporary, disruption in living conditions . . . resulting from the earthquakes that  
 struck the country in 2001”);
- 12 • *Extension of the Designation of El Salvador for Temporary Protected Status*, 73 Fed. Reg.  
 57,128-01, 57,129 (Oct. 1, 2008) (same);
- 13 • *Extension of the Designation of El Salvador for Temporary Protected Status*, 75 Fed. Reg.  
 39,556-01, 39,558-59 (July 9, 2010) (same, but explaining that “[**more recent natural**  
 14 **disasters have delayed the recovery from the 2001 earthquakes,**” including Tropical  
 Storm Stan in October 2005, the eruption of the Santa Ana volcano, a series of earthquakes  
 15 in 2006, and Hurricane Ida in 2009 (emphasis added));
- 16 • *Extension of the Designation of El Salvador for Temporary Protected Status*, 77 Fed. Reg.  
 1710-02, 1712 (Jan. 11, 2012) (noting that El Salvador was “still rebuilding from the  
 17 devastating 2001 earthquakes” and the efforts “**have been further complicated by more**  
**recent natural disasters and by sluggish economic growth**” (emphasis added));
- 18 • *Extension of the Designation of El Salvador for Temporary Protected Status*, 78 Fed. Reg.  
 32,418-01, 32,420 (May 30, 2013) (same);
- 19 • *Extension of the Designation of El Salvador for Temporary Protected Status*, 80 Fed. Reg.  
 893-01, 894-95 (Jan. 7, 2015) (documenting a series of natural disasters that “have caused  
 20 **substantial setbacks to infrastructure recovery and development since the 2001**  
**earthquakes**” (emphasis added));
- 21 • *Extension of the Designation of El Salvador for Temporary Protected Status*, 81 Fed. Reg.  
 44,645-03 (July 8, 2016) (same).

22 <sup>21</sup> **Haiti:**

- 23 • *Extension and Redesignation of Haiti for Temporary Protected Status*, 76 Fed. Reg.  
 29,000-01, 29,000 (May 19, 2011) (concluding that “the conditions prompting the original  
 designation continue to be met”);
- 24 • *Extension of the Designation of Haiti for Temporary Protected Status*, 77 Fed. Reg.  
 59,943-01 (Oct. 1, 2012) (concluding that “the extraordinary and temporary conditions that  
 25 prompted the original January 2010 TPS designation and the July 2011 extension and  
 redesignation persist” and noting that camp conditions were exacerbated by later “steady  
 26 rains” and ongoing problems of food security);
- 27 • *Extension of the Designation of Haiti for Temporary Protected Status*, 79 Fed. Reg.  
 11,808-01, 11,808 (Mar. 3, 2014) (same); and,
- 28 • *Extension of the Designation of Haiti for Temporary Protected Status*, 80 Fed. Reg.  
 51,582-01 (Aug. 25, 2015) (same).

1 to the original TPS designation.<sup>22</sup>

2 In sharp contrast to these prior notices—which were frequently detailed and lengthy—the  
3 termination notices for Sudan, Haiti, Nicaragua, and El Salvador are curt and fail to address  
4 numerous conditions that justified extensions of TPS status in the most recent notices issued by  
5 prior administrations. The following chart illustrates the types of conditions cited in the prior  
6 notices but not discussed in Defendants’ termination notices in these four cases.

Country	Factors Cited to Support Prior Extensions	Termination Notices
<b>El Salvador</b>	<b>July 8, 2016 Extension:</b> · “Subsequent natural disasters and environmental challenges, including hurricanes and tropical storms, heavy rains and flooding, volcanic and seismic activity”	<b>January 2018 Termination:</b> · No reference to subsequent natural disasters
	· Prolonged regional drought impacting food security	· No reference to regional drought and food security
	· A housing deficit of 630,000 because 340,000 houses not yet rebuilt from earthquake	· No specific reference or numbers concerning housing deficits, but general statements about reconstruction
	· Coffee rust epidemic	· No reference to coffee rust epidemic
	· More than 10 percent of population lacks access to potable water	· No reference to water access
	· March 2016 extortion by gangs resulted in weeklong temporary bottled water shortage in San Salvador	· No reference to gang extortion
	· Violence and insecurity impeding economic growth, particularly \$756 in extortion payments to gangs in 2014 alone	· No reference to violence and insecurity but general statements that international organizations are working to provide security and economic support
	· Corrupt police and judiciary · In 2014, almost a third of the work force was unemployed and lived in poverty	· No reference to corruption · No specific reference to poverty and unemployment but mentions international economic support

22 *See, e.g., Extension of the Designation of Haiti for Temporary Protected Status*, 82 Fed. Reg. 23,830-01 (May 24, 2017) (noting that “lingering effects of the 2010 earthquake remain” despite “significant progress,” but *noting that conditions warrant a brief extension due to Hurricane Matthew’s October 2016 landfall and heavy rains in April 2017*, though not explicitly discussing any apparent link between those events and the earthquakes).

Country	Factors Cited to Support Prior Extensions	Termination Notices
<b>Nicaragua</b>	<p><b>May 16, 2016 Extension:</b></p> <ul style="list-style-type: none"> <li>· Heavy rains and flooding in October 2014, May 2015, and June 2015</li> <li>· Earthquakes in April and October 2014</li> <li>· Telica volcano erupted 426 times in July 2015</li> <li>· A prolonged regional drought and coffee rust epidemic negatively impacting livelihoods and food security</li> </ul>	<p><b>December 2017 Termination:</b></p> <ul style="list-style-type: none"> <li>· No specific reference to 2014-2015 heavy rains and flooding</li> <li>· No specific reference to 2014 earthquakes</li> <li>· No specific reference to 2015 volcanic eruptions</li> <li>· No specific reference to coffee rust epidemic or regional drought</li> </ul>
<b>Haiti</b>	<p><b>May 24, 2017 Extension (Trump Administration):</b></p> <ul style="list-style-type: none"> <li>· Hurricane Matthew in October 2016 damaged crops, housing ,livestock, and infrastructure</li> <li>· Heavy rains in late April 2017 killing people, damaging homes, and destroying crops causing food insecurity</li> <li>· Ongoing cholera epidemic</li> </ul>	<p><b>January 2018 Termination:</b></p> <ul style="list-style-type: none"> <li>· No reference to Hurricane Matthew</li> <li>· No reference to heavy rains</li> <li>· “Although Haiti has grappled with a cholera epidemic that began in 2010 in the aftermath of the earthquake, cholera is currently at its lowest level since the outbreak began.”</li> </ul>
	<p><b>August 25, 2015 Extension (Prior Admin):</b></p> <ul style="list-style-type: none"> <li>· Cholera epidemic – as of Dec. 2014, 725,000 people affected and 8,800 deceased</li> <li>· Food insecurity- as of Jan. 2015, 2.5 million people could not cover basic food needs</li> <li>· Political instability – after expiration of local and parliamentary mandates in January 2015, protests and demonstrations have turned violent</li> </ul>	<ul style="list-style-type: none"> <li>· Same as above</li> <li>· No reference to food insecurity</li> <li>· Mentions February 2017 presidential election without specific discussion of whether there are still violent protests and demonstrations</li> </ul>

United States District Court  
Northern District of California

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Sudan	Jan 25, 2016 Extension:	October 2017 Termination:
	<ul style="list-style-type: none"> <li>In 2014, Sudanese government deployed a new paramilitary service carrying out a campaign that began in April 2014, was renewed December 2014, and continued into 2015, resulting in widespread civilian displacement.</li> </ul>	<ul style="list-style-type: none"> <li>Acknowledges continuing conflict in Darfur and the Two Areas and stating that “toward the end of 2016 and through the first half of 2017, parties to the conflict renewed a series of time-limited unilateral cessation of hostilities” and that “[t]he remaining conflict is limited and does not prevent the return of nationals of Sudan to all regions of Sudan without posing a serious threat to their personal safety”</li> </ul>
	<ul style="list-style-type: none"> <li>“[A]n increase in criminal activity and intertribal conflict”</li> </ul>	<ul style="list-style-type: none"> <li>No reference to criminal activity</li> </ul>
	<ul style="list-style-type: none"> <li>“Reports of human rights violations and abuses [which] are widespread, including . . . extrajudicial and unlawful killings” and “abuse . . . of certain populations, including journalists, political opposition, civil society, and ethnic and religious minority groups”</li> </ul>	<ul style="list-style-type: none"> <li>“Although Sudan’s human rights record remains extremely poor in general, conditions on the ground no longer prevent all Sudanese nationals from returning in safety.”</li> </ul>
	<ul style="list-style-type: none"> <li>Displacement of 143,000 persons between January and May 2015 and a March 2015 report that 250,000 Sudanese fled to South Sudan and Ethiopia</li> </ul>	<ul style="list-style-type: none"> <li>Acknowledges that hundreds of thousands have fled but that the remaining conflict is limited and does not prevent their safe return</li> </ul>
	<ul style="list-style-type: none"> <li>6.9 million people in need of humanitarian assistance. 2 million children suffering from malnutrition. 550,000 from severe malnutrition.</li> </ul>	<ul style="list-style-type: none"> <li>“Above-harvests have moderately improved food security. While populations in conflict-affected areas continue to experience acute levels of food security, there has also been some improvement in access for humanitarian actors to provide much-needed humanitarian aid”</li> </ul>

This comparison demonstrates the plausibility of Plaintiffs’ allegation of a shift from past practice or policy. For every country (although to varying degrees), factors that were explicitly considered recently by prior administrations were wholly absent from the four termination notices issued between October 2017 and January 2018. That supports a plausible inference, corroborated by the statements of former Secretary Kelly and Secretary Nielsen, that Defendants changed their interpretation of the TPS statute so as to focus solely (or nearly solely) on the originating



1 condition without considering intervening events in making TPS determinations.

2 There are only two exceptions to this observation. First, Haiti's designation was extended  
3 once by former Secretary Kelly under the current administration. *See Extension of the*  
4 *Designation of Haiti for Temporary Protected Status*, 82 Fed. Reg. 23,830-01 (May 24, 2017).  
5 This does not undermine Plaintiffs' allegations that the change in policy occurred recently.  
6 Indeed, a comparison between Secretary Kelly's extension and Acting Secretary Duke's  
7 termination six months later supports an inference of an intervening change in policy or practice:  
8 although Secretary Kelly explicitly considered intervening events like Hurricane Matthew in  
9 October 2016 and heavy rains in late April 2017, Acting Secretary Duke did not.

10 Second, arguably the termination notice for Sudan touches, albeit indirectly and with much  
11 less specificity, on nearly all of the themes discussed in the most recent extension notice.  
12 However, that does not undermine the plausibility that Defendants at some point adopted a new  
13 rule or policy as indicated by the discrepancies between the notices for El Salvador, Haiti, and  
14 Nicaragua. The arguably more complete discussion with respect to Sudan does not defeat the  
15 viability of Plaintiffs' APA claim challenging the change in practice itself; at most, it might affect  
16 the scope of Plaintiffs' remedy if, for example, the new rule or policy was not instituted until after  
17 Sudan's termination.<sup>23</sup>

18 Finally, Defendants argue that prior administrations have terminated TPS despite ongoing  
19 problems in the designated countries. That fact is not dispositive to the case at bar. The question  
20 is whether those ongoing problems were *considered* when the termination decision was made.

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23 <sup>23</sup> The Government cited the example of Montserrat, which was initially designated for TPS based  
24 on a volcanic eruption in 1997, *see* 62 Fed. Reg. 45686 (Aug. 28, 1997), and then re-designated  
25 six times, *see* 63 Fed. Reg. 45864 (Aug. 27, 1998); 64 Fed. Reg. 48190 (Sep. 2, 1999); 65 Fed.  
26 Reg. 58806 (Oct. 2, 2000); 66 Fed. Reg. 40834 (Aug. 3, 2001); 67 Fed. Reg. 47002 (Jul. 17,  
27 2002); 68 Fed. Reg. 39106 (Jul. 1, 2003). However, its TPS designation was eventually  
28 terminated in 2004 because "the volcanic eruptions can no longer be considered temporary in  
nature" based on scientists' position that such eruptions "generally last 20 years, but the volcano  
could continue to erupt sporadically for decades." *See Termination of the Designation of*  
*Montserrat Under the Temporary Protected Status Program*, 69 Fed. Reg. 40642-01 (Jul. 6,  
2004). This example is inapposite, however, because the termination notice reflected a judgment  
that the originating condition was not "temporary." Defendants' terminations of TPS for Haiti,  
Sudan, El Salvador, and Nicaragua are not based on such a finding; rather, they are based on the  
notion that the originating condition has abated.

1 The notices confirm Plaintiffs’ assertion that under the prior practice, intervening events were at  
2 least considered.<sup>24</sup>

3 In sum, Plaintiffs’ allegations and a facial review of the termination notices support a  
4 plausible inference that Defendants have adopted a new policy or practice without any explanation  
5 for the change. Accordingly, Plaintiffs have stated a claim under the APA, and thus Defendants’  
6 motion to dismiss the APA claim is **DENIED**.

7 2. U.S. Citizens’ Children’s Due Process Claim to Family Integrity (Count One)

8 The U.S.-citizen children assert that Defendants have not “articulated [a] substantial  
9 governmental interest” to justify intruding on their right to live in the United States, to live with  
10 their parents, and against being forced to make a choice between the two, thus violating their  
11 substantive due process rights. *See* Compl. ¶¶ 105-6.

12 “The concept of ‘substantive due process’ . . . forbids the government from depriving a  
13 person of life, liberty, or property in such a way that ‘shocks the conscience’ or ‘interferes with  
14 rights implicit in the concept of ordered liberty.’” *Nunez v. City of Los Angeles*, 147 F.3d 867, 871  
15 (9th Cir. 1998). To establish a claim, “a plaintiff must, as a threshold matter, show a government  
16 deprivation of life, liberty, or property.” *Id.* The right in question must be one of “those  
17 fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and  
18 tradition.” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation omitted). “The  
19 protections of substantive due process have for the most part been accorded to matters relating to  
20 marriage, family, procreation, and the right to bodily integrity.” *Nunez*, 147 F.3d at 871, n.4

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<sup>24</sup> *See Termination of Designation of Angola Under the Temporary Protected Status Program*, 68  
Fed. Reg. 3896-01, 3896 (Jan. 27, 2003) (though originally designating Angola due to an armed  
conflict between the Angolan government and the National Union for the Total Independence of  
Angola, the termination notice reflects that the Department also considered, *inter alia*, a continuing  
“separate insurgency led by . . . the Front for the Liberation of the Enclave of Cabinda/Armed  
Forces of Cabinda,” “the humanitarian needs of 380,000 UNITA members and their families,” 4  
million displaced persons, a lack of “housing, medical services, water systems, and other basic  
services destroyed by a 27-year-long war,” “8 million landmines planted in Angolan soil” through  
40 percent of the countryside); *Termination of the Province of Kosovo in the Republic of Serbia in  
the State of the Federal Republic of Yugoslavia (Serbia-Montenegro) Under the Temporary  
Protected Status Program*, 65 Fed. Reg. 33,356-01, 33,356 (May 23, 2000) (terminating TPS  
because the original armed conflict had ended, but noting that “conditions remain difficult with  
bursts of ethnically-motivated violence”).

1 (citation omitted). Courts have “always been reluctant to expand the concept of substantive due  
 2 process because guideposts for responsible decisionmaking in this unchartered area are scarce and  
 3 open-ended . . . lest the liberty protected by the Due Process Clause be subtly transformed into  
 4 the policy preferences of [the courts].” *Washington*, 521 U.S. at 720 (quotation and citation  
 5 omitted).

6 Plaintiffs’ assertion that the government’s action in terminating TPS status of four  
 7 countries which foreshadows the deportation of parents of U.S.-citizen children places this case in  
 8 relatively unchartered waters.

9 The cases in which courts have referred to a U.S. citizen’s right to enter and live in the  
 10 United States have generally involved direct attempts by the government to obstruct a U.S.  
 11 citizen’s return from abroad, a scenario different from the case at bar. *See U.S. v. Wong Kim Ark*,  
 12 169 U.S. 649 (1898) (confirming that children born in the U.S. are citizens under 14th  
 13 Amendment and that, therefore, citizen could not be denied entry to the U.S.); *Lee Sing Far v.*  
 14 *U.S.*, 94 F.3 834, 836 (9th Cir. 1899) (a U.S. citizen has the “right to land and remain in the United  
 15 States”).<sup>25</sup> These cases did not involve indirect pressures upon a citizen resulting from action  
 16 taken against others. But Plaintiffs have not cited any cases addressing whether the government’s  
 17 application of such indirect pressure may constitute a violation of substantive due process, and if  
 18 so, under what circumstances.

19 It is well-settled that children have a liberty interest in living with their parents. *See, e.g.,*  
 20 *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013) (“The right to live with and not be  
 21 separated from one’s immediate family is a right that ranks high among the interests of the  
 22 individual and that cannot be taken away without procedural due process.” (quotation omitted)).  
 23 However, Plaintiffs have not cited any case where this interest was deemed sufficient to prevent  
 24 the enforcement of a legitimate immigration law to remove a person at the cost of family  
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26 <sup>25</sup> *Nguyen v. I.N.S.*, 533 U.S. 53, 67 (2001) refers to “the absolute right to enter [the United  
 27 States’] borders,” but the Supreme Court was reviewing whether the state could condition  
 28 acquisition of citizenship of persons born abroad depending on whether citizenship derived from a  
 mother or father. The court was not squarely confronted with government action frustrating the  
 right to enter the United States.

1 separation.<sup>26</sup> The Government cites a litany of cases rejecting the notion that immigration  
 2 enforcement resulting in family separation inherently violates a U.S. citizen’s constitutional rights.  
 3 For instance, in *Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018), the Ninth Circuit held that  
 4 U.S. citizen’s due process rights were not violated by denial non-citizen wife and her children’s  
 5 visa petitions based on his own sex offense because “the generic right to live with family is ‘far  
 6 removed’ from the specific right to reside in the United States with non-citizen family members,”  
 7 and holding that “a fundamental right to reside in the United States with [one’s] non-citizen  
 8 relatives” “would “run[] headlong into Congress’ plenary power over immigration.” *See Morales-*  
 9 *Izquierdo v. Dep’t of Homeland Sec.*, 600 F.3d 1076, 1091 (9th Cir. 2010) (holding that “lawfully  
 10 denying Morales adjustment of status does not violate any of his or his family’s substantive rights  
 11 protected by the Due Process Clause” even “when the impact of our immigration laws is to scatter  
 12 a family or to require some United States citizen children to move to another country with their  
 13 parent”), *overruled in part on other grounds by Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th  
 14 Cir. 2012) (en banc). *Cf. De Mercado v. Mukasey*, 566 F.3d 810, 816 n.5 (9th Cir. 2009) (stating,  
 15 in dicta, that “family unity” theory of due process in immigration context is “implausible” because  
 16 “no authority [has been identified] to suggest that the Constitution provides [alien petitioners] with  
 17 a fundamental right to reside in the United States simply because other members of their family  
 18 are citizens or lawful permanent residents”).<sup>27</sup>

19 \_\_\_\_\_  
 20 <sup>26</sup> Plaintiffs cite cases that merely hold that a U.S. citizen has a “protected liberty interest in  
 21 marriage [that] gives rise to a right to constitutionally adequate procedures in the adjudication of  
 22 her husband’s visa application.” *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008)  
 23 (holding that U.S.-citizen spouse of Mexican national had liberty interest permitting her to  
 24 challenge denial of her husband’s visa application, but it was limited to assuring that “the reason  
 given [for denial] is facially legitimate and bona fide”); *see also Cardenas v. U.S.*, 826 F.3d 1164,  
 1170-72 (9th Cir. 2016). But that liberty interest, cited to support a procedural due process claim,  
 did not overcome the government’s interest in either case, so long as the government had  
 identified a facially valid and bona fide reason for denying the visa.

25 <sup>27</sup> The Government has also cited out-of-circuit cases in accord. *See Payne-Barahona v.*  
 26 *Gonzales*, 474 F.3d 1, 1-2 (1st Cir. 2007) (explaining that “[t]he circuits that have addressed the  
 27 constitutional issue (under varying incarnations of the immigration laws and in varying procedural  
 28 postures) have uniformly held that a parent’s otherwise valid deportation does not violate a child’s  
 constitutional right,” “[n]or does deportation necessarily mean separation since the children could  
 be relocated during their minority”); *Ayala-Flores v. INS*, 662 F.2d 444, 446 (6th Cir. 1981) (per  
 curiam) (same); *Marin-Garcia v. Holder*, 647 F.3d 666, 674 (7th Cir. 2011) (“If an alien could  
 avoid the consequences of unlawful entry in to the United States by having a child, it would create

1 Plaintiffs are correct that *Gebhardt*, *Morales-Izquierdo*, and *De Mercado* differ from the  
 2 instant situation in three senses. First, they involved persons who were removed or denied an  
 3 immigration benefit based on criminal conduct, thus heightening the government’s interest in  
 4 removal. Second, they involved persons seeking a permanent right to remain in the United States  
 5 whereas Plaintiffs seek only temporary permission for their parents to reside until they reach  
 6 adulthood. Third, the children here have a stronger liberty interest because the countries to which  
 7 they would be forced to return are allegedly unsafe.<sup>28</sup> But these factors do not appear to have been  
 8 material to the analysis in these cases.<sup>29</sup> Accordingly, the government appears to have a  
 9 persuasive argument.

10 Plaintiffs also assert the “unconstitutional choice” doctrine in advancing their due process  
 11 claim. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (it is “intolerable that one  
 12 constitutional right should have to be surrendered in order to assert another”). However, while the  
 13 Court recognizes that U.S.-citizen children Plaintiffs will face the difficult and unenviable choice  
 14 between living in the United States or abroad with their parents in a land they have never known,  
 15 the “unconstitutional choice” doctrine appears inapt. Virtually all of the cases that Plaintiffs have

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 17 perverse incentives and undermine Congress’s authority over immigration matters.”).

18 <sup>28</sup> The only case Plaintiffs cite alluding to dangerous conditions as a basis for a constitutional  
 19 limitation on removal, *Martinez de Mendoza v. I.N.S.*, 567 F.2d 1222 (3d Cir. 1977), does not in  
 20 fact go so far. In *de Mendoza*, a Colombian mother with a U.S.-citizen child had been ordered  
 21 deported, but in her appellate petition identified new evidence that her and her daughter’s safety  
 22 might be endangered if they were deported. The court held, on statutory grounds specific to the  
 23 standard of review, that new material evidence required remand to the agency for reconsideration.  
 The court merely hinted, in dicta, in a footnote, that if the allegations of physical danger “are  
 correct, they may well be sufficient to raise questions of the constitutionality of such deportation.”  
*Id.* at 1225, n.8. But Plaintiffs have not cited any case in the past 44 years that has relied on this  
 footnote to establish a constitutional rule against deportation in case of dangerous country  
 conditions.

24 <sup>29</sup> Plaintiffs also cite *Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996), but it is inapposite. There, the  
 25 government had arranged for Wang to be paroled into the United States from China to give grand  
 26 jury testimony, which the government knew might have been procured through torture. When  
 27 Wang arrived, he testified that Chinese authorities tortured him to obtain false testimony. *Wang*  
 28 was decided under the state-created danger doctrine: because the government “placed Wang in  
 danger of violating his own conscience and the federal perjury statute, or of facing torture and  
 possible execution in China,” *id.* at 819, its own actions created the danger he sought to avoid by  
 return to China. Plaintiffs’ allegations here are dissimilar. They do not allege the government  
 created a danger specific to Plaintiffs simply by granting temporary protective status to their  
 parents.

1 cited arise in the criminal prosecution context,<sup>30</sup> or in the immigration context on the narrow  
 2 question of whether an alien’s right to choose voluntary departure could be conditioned on  
 3 abandonment of the right to judicial review.<sup>31</sup> Plaintiffs have not cited a case where the forced  
 4 choice doctrine was applied to prohibit the government from deporting a non-citizen parent from  
 5 their U.S.-citizen child based solely on the asserted due process interest in family integrity; even  
 6 though the due process interest was recognized in those cases, it was not sufficient to overcome  
 7 the government’s interests. To hold that substantive due process bars deportation of parents could  
 8 have the effect of circumventing the holdings in *Gebhardt*, *Morales-Izquierdo*, and *De Mercado*.

9 In any event, the nature of Plaintiffs’ choice here is arguably different from  
 10 “unconstitutional choice” cases such as *Simmons*, *Jackson*, or *Elian*. In those cases, by asserting  
 11 one right, the individual necessarily extinguished the other. Here, even if a U.S.-citizen child left  
 12 the country to live with a parent, they would retain the right to return to and live in the U.S; they  
 13 would still be legally free to stay or leave. It is not clear that the forced-choice doctrine would  
 14 extend to this situation, where the government is not forcing a person to irretrievably relinquish  
 15 one right in order to exercise another.

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16  
 17 <sup>30</sup> See *Simmons*, 390 U.S. at 394 (holding that criminal defendant’s testimony to establish  
 18 standing to request exclusion of evidence under Fourth Amendment could not be admitted against  
 19 him to demonstrate guilt without violating Fifth Amendment or else defendant is forced to  
 20 abandon one right in favor of another); *United States v. Jackson*, 390 U.S. 570 (1968) (holding  
 21 that criminal statute which conditioned unavailability of the death penalty for kidnapping on the  
 22 defendant’s abandonment of right to jury trial was unconstitutional); *Lefkowitz v. Cunningham*,  
 23 431 U.S. 801, 807-08 (1977) (invalidating New York law which provided that an officer of a  
 24 political party who refused to testify before a grand jury or waive immunity against subsequent  
 25 criminal prosecution would lose his position and be barred from holding any other party or public  
 26 office for five years unconstitutionally required choosing between First and Fifth Amendment  
 27 rights); *Bittaker v. Woodford*, 331 F.3d 715, 724 n.7 (9th Cir. 2003) (holding that defendant’s right  
 28 to bring ineffective assistance of counsel claim could not be conditioned on waiving attorney-  
 client privilege with respect to subsequent prosecution); *Boyd v. United States*, 116 U.S. 616, 621-  
 22 (1886) (analyzing whether the search and seizure of a man’s papers was equivalent to  
 compelling a person to testify against themselves under the Fifth Amendment and thus an  
 unreasonable search under the Fourth Amendment), *overruled on other grounds*, *Warden, Md.  
 Penitentiary v. Hayden*, 387 U.S. 294 (1967). Further, *New York v. United States*, 505 U.S. 144,  
 176 (1992) (holding, inter alia, that legislation regulating disposal of radioactive waste exceeded  
 Congress’s enumerated powers insofar as it offered states a “choice” between two unconstitutional  
 alternatives), is inapposite, because it did not involve a forced choice between two constitutional  
 rights but rather the validity of two unconstitutional conditions.

<sup>31</sup> See *Elian v. Ashcroft*, 370 F.3d 897, 900 (9th Cir. 2004); see also *Contreras-Aragon v. I.N.S.*,  
 852 F.2d 1088, 1094-95 (9th Cir. 1988).

1           The Court need not resolve these questions at this time, however. *See In re Snyder*, 472  
 2 U.S. 634, 642 (1985) (“We avoid constitutional issues when resolution of such issues is not  
 3 necessary for disposition of a case.”). If the challenged action by the Administration were  
 4 otherwise illegitimate and unlawful, the deprivation of Plaintiffs’ liberty interests in family  
 5 integrity, even if typically insufficient to defeat the government’s interest in enforcing valid  
 6 immigration laws, may be unlawful where it is not be supported by a legitimate government  
 7 interest. *Cf. Smith v. City of Fontana*, 818 F.2d 1411, 1419-20 (9th Cir. 1987) (state had “no  
 8 legitimate interest in interfering with [protected] liberty interest [in familial relations] through the  
 9 use of excessive force by police officers”), *overruled on other grounds, Hodgers-Durgin v. de la*  
 10 *Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999); *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir.  
 11 2011) (noting that “a bare . . . desire to harm a politically unpopular group [is] not [a] legitimate  
 12 state interest” (citation and quotation omitted)). Because Plaintiffs have adequately pled that  
 13 Defendants’ actions violate the APA and equal protection (as discussed below), Plaintiffs’ due  
 14 process claim is sufficiently plausible to proceed at least on that basis.

15           3.       TPS-Beneficiaries’ Due Process Claim (Count Three)

16           The TPS-beneficiaries separately allege that, as persons lawfully present in the United  
 17 States, they have a significant liberty interest protected by the Due Process Clause in non-arbitrary  
 18 decisionmaking with respect to the continuation of TPS status. *See* Compl. ¶¶ 113-15. Plaintiffs  
 19 assert that Defendants’ termination decisions must at least pass a rationality test, and that “[t]he  
 20 government . . . has not articulated, and cannot establish, any rational basis for reversing course on  
 21 decades of established TPS policy and ignoring the current capability of TPS countries to safely  
 22 receive longtime TPS holders, their families, and their U.S. citizen children.” Compl. ¶ 115.

23           Plaintiffs assert two bases for the liberty interest asserted here: a “property” interest  
 24 conferred by the TPS statute in remaining in the U.S. so long as their countries of origin are  
 25 unsafe, and a liberty interest based on the right to live and work in the United States conferred by  
 26 the TPS statute. The Court analyzes each in turn.

27           a.       Property Interest

28           “[A] person receiving . . . benefits under statutory and administrative standards defining

1 eligibility for them has an interest in continued receipt of those benefits.” *Nozzi v. Hous. Auth.*,  
2 806 F.3d 1178, 1190-91 (9th Cir. 2015) (citation omitted). A statute does not give a claim of  
3 entitlement, however, when availability of the benefit is entirely discretionary. *See Kwai Fun*  
4 *Wong v. United States*, 373 F.3d 952, 967-68 (9th Cir. 2004) (no procedural or substantive due  
5 process interest in “temporary parole status” where “the statute makes clear that whether and for  
6 how long temporary parole is granted are matters entirely within the discretion of the Attorney  
7 General”); *Meachum v. Fano*, 427 U.S. 215, 228 (1976) (holding that a prisoner has no due  
8 process interest against transfer from one prison to another within the same state system, but there  
9 was no statute purporting to grant him any entitlement to a particular prison). To constitute a  
10 protected property interest, an individual must have “more than an abstract need or desire” or  
11 “unilateral expectation” for a benefit, but rather a “legitimate claim of entitlement” based on, inter  
12 alia, “existing rules or understandings that stem from an independent source such as state law,” a  
13 “statute defining eligibility,” a contract “creat[ing] and defin[ing]” certain terms, or some other  
14 “clearly implied promise.” *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-78  
15 (1972) (holding that public employee had no cognizable property interest in re-appointment for a  
16 second term where contract did not provide for renewal).

17 Defendants contend that TPS designations are entirely discretionary and that Plaintiffs  
18 therefore have no legitimate claim of entitlement protected by due process. That is not entirely  
19 correct. The Secretary is given broad discretion in deciding whether to make an *initial* TPS  
20 designation. *See* 8 U.S.C. § 1254a(b)(1) (“The [Secretary], after consultation with appropriate  
21 agencies of the Government, *may* designate any foreign state . . . .” (emphasis added)). An alien  
22 from an undesignated country therefore would not appear to have any legitimate entitlement to  
23 receive TPS status.

24 The same is not true with respect to extensions and terminations, however. The statute  
25 provides that the Secretary “shall” terminate TPS status only if the Secretary “determines . . . that  
26 a foreign state . . . no longer continues to meet the conditions for designation under paragraph (1).”  
27 8 U.S.C. § 1254a(b)(3)(B). If the Secretary does not make that determination, then “the period of  
28 designation of the foreign state is extended for an additional period.” *Id.* § 1254a(b)(3)(C). That



1 Plaintiffs are entitled to continue receiving benefits until the Secretary makes the determination to  
 2 terminate pursuant to the process and criteria set forth in the statute brings this case closer to *Nozzi*  
 3 than *Wong* and *Meachum*.

4 To be sure, Plaintiffs' statutory entitlement is narrower than they suggest. The statute does  
 5 not guarantee that a country will continue to be designated for TPS so long as its conditions *in fact*  
 6 warrant. Rather, it merely provides that the Secretary "shall *review* the conditions . . . and shall  
 7 *determine* whether the conditions for such designation under this subsection continue to be met."  
 8 8 U.S.C. § 1254a(b)(3)(A) (emphasis added). Because Plaintiffs' "reasonable expectation of  
 9 entitlement is determined largely by the language of the statute," *Wedges/Ledges of Cal., Inc. v.*  
 10 *City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994) (citation omitted), they can expect no more  
 11 than the statutorily-mandated "review" and "determin[ation]." And, as explained above, the Court  
 12 generally may not review the Secretary's factual evaluation of country conditions. Nevertheless,  
 13 if the Secretary's determination is unlawful for other reasons, Plaintiffs may state a due process  
 14 claim. Plaintiffs arguably have a property interest in loss of TPS status, a loss which may not be  
 15 justified by an unlawful government interest. Accordingly, to the extent Plaintiffs' challenge is  
 16 based on a property-entitlement theory, they have at least a plausible claim co-extensive with their  
 17 ability to prove that Defendants violated the APA or equal protection guarantee.

18 b. Liberty Interest

19 Plaintiffs' also assert a liberty interest arising from the fact that the TPS statute permits  
 20 them to live and work in this country. *Cf. Bridges v. Wixon*, 326 U.S. 135, 154 (1945) (observing  
 21 that deportation "visits a great hardship on the individual and deprives him of the right to stay and  
 22 live and work in this land of freedom").

23 The Court is doubtful whether Plaintiffs can state such a viable due process claim absent  
 24 Defendants' violation of the APA or Equal Protection. In essence, Plaintiffs claim that although  
 25 the protection they received was "temporary" in name, it became "permanent" or "long-term" in  
 26 actual administration and practice and thus gave rise to important interests protected by due  
 27 process. *Cf. Woodby v. I.N.S.*, 385 U.S. 276 (1966) (highlighting "the drastic deprivations that  
 28 may follow when a resident of this country is compelled by our Government to forsake all the

1 bonds formed here and go to a foreign land where he often has no contemporary identification,”  
2 and noting that “many resident aliens have lived in this country longer and established stronger  
3 family, social, and economic ties here than some who have been naturalized citizens”). But this  
4 theory ignores the explicitly *temporary* nature of the TPS status.

5 Moreover, Plaintiffs’ theory, if credited, could undermine the purpose of the TPS statute  
6 by deterring this and future administrations from designating and extending TPS designations in  
7 order to avoid giving rise to a permanent due process defense against removal. And it could have  
8 implications for other nominally temporary immigration statuses, such as student, H-1 and H-2  
9 visa holders, if the status is extended long enough for the alien to form the types of ties and  
10 interests alleged here. These possible consequences, which in effect could result in a new,  
11 judicially-crafted immigration status, might be a reason warranting “reluctan[ce] to expand the  
12 concept of substantive due process.” *Washington*, 521 U.S. at 720 (quotation and citation  
13 omitted).

14 While the Court is dubious about whether Plaintiffs’ asserted due process liberty interest  
15 can overcome the government’s interest in enforcing an otherwise valid immigration law, the  
16 Court need not resolve the question at this time because Plaintiffs have stated a plausible due  
17 process claim at least to the extent that Defendants’ termination also violated the APA and/or the  
18 equal protection guarantee for the same reasons stated above.

19 4. Equal Protection Claim (Count Two)

20 Plaintiffs allege that both: (1) the decision to terminate TPS for Haiti, Nicaragua, El  
21 Salvador, and Sudan, and (2) Defendants’ alleged change in rule, were motivated by racial animus.  
22 Defendants do not deny that President Trump’s alleged statements evidence racial animus; rather,  
23 they argue the President’s animus is irrelevant because the Secretary of Homeland Security, not  
24 the President, terminated TPS for Sudan, Haiti, Nicaragua, and El Salvador. Defendants also  
25 argue that in order to state an equal protection claim, Plaintiffs must allege the existence of a  
26 similarly situated class of people who were treated more favorably for no rational reason. Finally,  
27 Defendants contend that even if Plaintiffs are not required to allege the existence of a comparator  
28 group, the Secretary’s decisions with regard to TPS are subject only to a highly deferential form of

1 rational basis review, rather than strict scrutiny.

2 After the Court had already issued its order denying the motion to dismiss the equal  
3 protection claim ruling, *see* Docket No. 34, the Supreme Court handed down its decision in *Trump*  
4 *v. Hawaii*, 585 U.S. \_\_\_\_ (2018). This Court thereafter invited supplemental briefing whether to  
5 reconsider its earlier holding. For the reasons stated herein, the Court affirms its denial of the  
6 motion.

7 The Court first analyzes whether the President’s animus is attributable to the Secretary.  
8 Then, the Court decides whether a comparator group need be alleged. Next, the Court discusses  
9 whether *Trump v. Hawaii* alters the legal standard or outcome in this case. Finally, the Court  
10 examines whether Plaintiffs’ allegations plausibly state a claim under the correct legal standard.

11 a. President Trump’s Alleged Animus is Attributable to the Secretary of  
12 Homeland Security

13 Plaintiffs concede that they have not alleged direct evidence of animus by Acting Secretary  
14 Duke or Secretary Nielsen. Defendants claim that this failure is dispositive, notwithstanding  
15 President Trump’s alleged animus.

16 Defendants are incorrect. Even if Acting Secretary Duke and Secretary Nielsen do not  
17 personally harbor animus towards TPS-beneficiaries from Haiti, El Salvador, Nicaragua, and  
18 Sudan, their actions may violate the equal protection guarantee if President Trump’s alleged  
19 animus influenced or manipulated their decisionmaking process. For example, in *Poland v.*  
20 *Chertoff*, 494 F.3d 1174 (9th Cir. 2007), the Ninth Circuit permitted the animus of a subordinate  
21 employee to be imputed to his employer, announcing a general holding that “if a subordinate . . .  
22 sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment  
23 action, the subordinate’s bias is imputed to the employer if the plaintiff can prove that the  
24 allegedly independent adverse employment decision was not actually independent because the  
25 biased subordinate influenced or was involved in the decision or decisionmaking process.” *Id.* at  
26 1182. Similarly, in *Avenue 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493 (9th Cir.  
27 2016), in considering an allegation that a city discriminated against a group of developers to please  
28 constituents who had expressed racial animus, the Ninth Circuit held that “[t]he presence of

1 community animus can support a finding of discriminatory motives by government officials, even  
2 if the officials do not personally hold such views.” *Id.* at 504.

3 There is no logical reason why this principle should not apply with equal force when the  
4 superior entity or authority (here, the President) influences a subordinate (here, a cabinet member)  
5 to perform an action charged to the latter. *See Batalla-Vidal*, 291 F.Supp.3d at 279 (holding that  
6 “[i]f, as Plaintiffs allege, President Trump himself directed the end of the DACA program, it  
7 would be surprising if his ‘discriminatory intent [could] effectively be laundered by being  
8 implemented by an agency under his control’”). The central question, simply put, is whether the  
9 challenged decision was infected by the tainted influence.

10 Defendants appear to concede that the White House was involved in the termination  
11 decisions, Reply at 9 (“Of course something of this nature would involve the White House . . .”),  
12 so they do not necessarily reject this “cats’ paw” theory of animus in principle. Instead, they  
13 argue that the White House’s involvement “does not mean that Secretaries Duke and Nielsen did  
14 not independently consider the evidence before them in making their decisions.” *Id.* Even if that  
15 were the case, however, “[i]f there are two alternative explanations, one advanced by defendant  
16 and the other advanced by plaintiff, both of which are plausible, plaintiff’s complaint survives a  
17 motion to dismiss under Rule 12(b)(6).” *Starr*, 625 F.3d at 1216. Here, the claim of President  
18 Trump’s influence is plausible; as explained in more detail below, for example, President Trump  
19 described Haiti as a “shithole” in a meeting with Secretary Nielsen where he expressed desire not  
20 to welcome Haitians in the United States, just days before DHS announced it would terminate  
21 Haiti’s status. *See* Compl. ¶¶ 66, 720, 72, 81, 84. Whether President Trump’s animus altered the  
22 outcome of DHS’s independent decisionmaking process is a question of fact to be resolved in this  
23 litigation.

24 b. Under *Arlington Heights*, Plaintiffs Need Not Rely on a Comparator Group  
25 and May Rely Instead on Direct Evidence of Discriminatory Intent

26 Plaintiffs bring their claim under *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*,  
27 429 U.S. 252 (1977). Under *Arlington Heights*, government action may violate equal protection if  
28 a discriminatory purpose was one motivating factor. *Arlington Heights*, 429 U.S. at 265-66.

1 Under this standard, the Court may look behind the stated reasons for government action to other  
2 circumstantial evidence to find evidence of discriminatory purpose, such as:

- 3 • a decision’s historical background “if it reveals a series of official actions taken for  
4 invidious purposes;”
- 5 • “[t]he specific sequence of events leading up [to] the challenged decision;”
- 6 • “[d]epartures from the normal procedural sequence;”
- 7 • “[s]ubstantive departures . . . particularly if the factors usually considered important  
8 by the decisionmaker strongly favor a decision contrary to the one reached;” and,
- 9 • “[t]he legislative or administrative history . . . especially where there are  
10 contemporary statements by members of the decisionmaking body, minutes of its  
11 meetings, or reports.”

12 *Arlington Heights*, 429 U.S. at 267-78.

13 The Government argues that Plaintiffs must identify a group of similarly situated persons  
14 who were treated more favorably to state an equal protection claim. That is incorrect. Plaintiffs  
15 may state a claim by alleging that “defendants acted with an intent or purpose to discriminate  
16 against the plaintiff based upon membership in a protected class.” *Lee v. City of Los Angeles*, 250  
17 F.3d 668, 686 (9th Cir. 2001) (quotation and citation omitted). While one method alleging a  
18 viable claim of discrimination is for the plaintiff to allege that the defendants (i) withheld a benefit  
19 from the plaintiff (ii) for which he or she was qualified (iii) which was extended to other similarly  
20 situated persons (iv) and that the defendants had no reasonable basis for treating plaintiff  
21 differently, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973), there are alternate  
22 paths to proving discrimination. A plaintiff need not satisfy the *McDonnell Douglas* framework;  
23 *Arlington Heights* permits more generally “a sensitive inquiry into such circumstantial and direct  
24 evidence of intent [to discriminate] as may be available.” 429 U.S. at 266. As the Ninth Circuit  
25 explained in *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158-59 (9th Cir.  
26 2013), “[o]ur cases clearly establish that plaintiffs who allege disparate treatment under statutory  
27 anti-discrimination laws need not demonstrate the existence of a similarly situated entity who or  
28 which was treated better than the plaintiffs in order to prevail. [That] is only *one* way to survive

1 summary judgment on a disparate treatment claim.” (Emphasis in original.) *See Ave. 6E*  
2 *Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504-507 (9th Cir. 2016) (holding that  
3 plaintiffs stated a claim that city’s denial of development permit violated Equal Protection Clause  
4 based on statements evidencing racial animus without allegation that similarly-situated developers  
5 were treated more favorably). *See also* U.S. Department of Justice, Title VI Legal Manual, ¶ B,  
6 available at <https://www.justice.gov/crt/fcs/T6Manual6#PID> (explaining that *Arlington Heights*  
7 and *McDonnell Douglas* are alternative frameworks for proving intentional discrimination).

8 Thus, Plaintiffs need only plausibly plead direct or circumstantial evidence of  
9 discriminatory intent; they do not need specifically to plead that a group of similarly situated  
10 persons were treated more favorably to demonstrate discriminatory intent.

11 c. AADC Does Not Apply to This Case

12 The Government argues that, under *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525  
13 U.S. 471 (1999) (“AADC”), strict scrutiny does not apply in the immigration context even where a  
14 claim of animus against a protected group is plausibly alleged. In AADC, a group of aliens alleged  
15 that the Attorney General had selectively initiated removal proceedings against them on the basis  
16 of their political beliefs and affiliations in violation of the First Amendment. The Supreme Court  
17 explained that “[a]s a general matter . . . an alien unlawfully in this country has no constitutional  
18 right to assert selective enforcement as a defense against his deportation.” 525 U.S. at 488-89.  
19 However, it did not “rule out the possibility of a rare case in which the alleged basis of  
20 discrimination is so outrageous that the foregoing considerations can be overcome.” *Id.* at 491.

21 Importantly, the AADC standard confining discrimination claims to “outrageous” cases is  
22 limited to challenges to the exercise of prosecutorial discretion, *i.e.*, the “discretion to choose to  
23 deport one person rather than another.” *Kwai Fun Wong v. U.S.*, 373 F.3d 952, 970 (9th Cir.  
24 2004). The reason for this limitation stems from the purpose of the AADC rule itself: namely, that  
25 “in deportation proceedings the consequence [of invading prosecutorial discretion] is to permit and  
26 prolong a continuing violation of United States law,” and “[t]he contention that a violation must  
27 be allowed to continue because it has been improperly selected is not powerfully appealing.”  
28 AADC, 525 U.S. at 490-91. Thus, *Kwai Fun Wong* held that AADC did not apply where an alien

1 challenged the discriminatory denial of adjustment of status and revocation of parole rather than  
2 the decision to pursue removal. *See also Batalla Vidal v. Nielsen*, 291 F.Supp.3d 260, 275  
3 (E.D.N.Y. 2018) (“Rather than alleging that they in particular are being targeted for removal  
4 because of their race—in which case judicial review of their suit would presumably be limited by  
5 [the AADC standard]—Plaintiffs allege that the categorical decision to end the DACA program,  
6 which provided them with some limited assurance that they would not be deported, was motivated  
7 by unlawful animus.”).

8 This case is similar to *Kwai Fun Wong*. The challenge here is not to a specific removal  
9 decision, where the continued presence of the alien in the U.S. prolongs an established continuing  
10 violation of law and the only thing that stands in the way of removal is a claim of prosecutorial  
11 misconduct in the selection of persons for removal. Rather, as in *Kwai Fun Wong*, the challenge  
12 here is several steps removed from the prosecutorial decision to seek removal of any particular  
13 individual.<sup>32</sup> Moreover, the challenge here is on a programmatic level; it does not challenge an  
14 individualized prosecutorial decision.

15 Although the Government contends that even programmatic challenges to immigration  
16 policies independent of prosecutorial discretion in selecting individuals for removal are subject to  
17 review under AADC, citing *Kandamar v. Gonzales*, 464 F.3d 65 (1st Cir. 2006) and *Hadayat v.*  
18 *Gonzales*, 458 F.3d 659 (7th Cir. 2006), these cases do not support the Government’s argument.  
19 In *Kandamar*, a Moroccan petitioner was placed in removal proceedings based on statements he  
20 made indicating that he had overstayed his visa in an interview required by the National Security  
21 Entry-Exit Registration System (“NSEERS”) program. NSEERS required young male  
22 nonimmigrant aliens from certain designated countries, including Morocco, to “appear before,  
23 register with, answer questions from, and present documents . . . to DHS.” *Kandamar*, 464 F.3d at  
24 67. In his removal proceedings, *Kandamar* filed a motion to suppress his NSEERS interview  
25 statements arguing, in part, that NSEERS “constitutes racial profiling and discrimination based on  
26 national origin” and was fundamentally unfair because it was used “to entrap nationals of certain

27 \_\_\_\_\_  
28 <sup>32</sup> Apart from TPS status, affected individual may have claims for, *e.g.*, adjustment of status, asylum, or otherwise.

1 countries.” *Id.* at 68. Tellingly, the First Circuit did not apply *AADC*’s narrow standard of review  
2 to Kandamar’s programmatic attack on NSEERS. Rather, it applied the traditional level of review  
3 under the equal protection doctrine for Congressional line-drawing with respect to “immigration  
4 criteria based on an alien’s nationality or place of origin,” *id.* at 72, the rational basis test. The  
5 Court did not apply the specialized *AADC* test to the challenge to the NSEERS program.

6 Separate from this programmatic challenge in the context of his motion to suppress,  
7 Kandamar argued that he was ordered removed based on national origin; the First Circuit agreed  
8 that “a person in the same situation [as Kandahar] but not from one of the NSEERS countries  
9 would not have been placed in removal proceedings.” *Id.* at 74. But because this aspect of  
10 Kandamar’s challenge pertained to the decision to remove him (rather than the decision to  
11 interview him pursuant to NSEERS), the First Circuit followed *AADC* and held that “[t]here is  
12 nothing in this record to demonstrate outrageous discrimination.” *Id.* Thus, the *AADC* standard  
13 was only applied to the challenge to the decision to pursue removal.

14 In *Hadayat*, the Seventh Circuit considered a similar claim by an Indonesian petitioner  
15 alleging that he was placed in removal because of NSEERS whereas a similarly situated person  
16 from another country would not have been. In that context, the Seventh Circuit applied *AADC* to  
17 conclude that “Hadayat’s conclusory comments regarding the allegedly discriminatory *effect* of  
18 NSEERS do not come close to meeting [*AADC*’s] high burden.” 458 F.3d at 665 (emphasis  
19 added). The *AADC* standard was applied because the programmatic attack arose in the context of  
20 his challenge to removal. Hadayat contended “he was unconstitutionally targeted for registration  
21 and removal based on his ethnicity and religion” *id.* at 664-65.

22 Thus, *Kandamar* and *Hadayat* are inapposite because they did not apply *AADC* beyond the  
23 narrow context of direct challenges to the exercise of prosecutorial discretion in removing  
24 individuals from this country.<sup>33</sup> *Cf. Wong*, 373 F.3d at 974, 974, n.29 (refusing to “countenance

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<sup>33</sup> The Government’s reliance on *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016)  
is also inapposite because it has to do with the doctrine of consular nonreviewability with respect  
to the denial of a visa application, for which judicial review is limited to confirming that the  
executive branch has cited a “facially legitimate and bona fide reason.” This case does not involve  
the denial of visa applications and the doctrine consular nonreviewability.



1 that the Constitution would permit immigration officials to engage in such behavior as rounding  
2 up all immigration parolees of a particular race solely because of a consideration such as skin  
3 color,” without “address[ing] the question whether racial, ethnic, or religious discrimination  
4 against immigration parolees is tested by the usual heightened scrutiny applicable to such  
5 classifications”).

6 d. *Trump v. Hawaii Does Not Require a Different Outcome*

7 In light of the Supreme Court’s decision in *Trump v. Hawaii*, 585 U.S. \_\_\_\_, 138 S.Ct. 2392  
8 (2018), the Court must determine whether *Trump* alters that analysis by mandating deferential  
9 rational basis review rather than traditional strict scrutiny under *Arlington Heights* even where  
10 government conduct is motivated by race, color, or ethnicity. The Court is not persuaded that  
11 *Trump*’s standard of deferential review applies here.

12 In *Trump*, the President had issued a Proclamation which “placed entry restrictions on the  
13 nationals of eight foreign states whose systems for managing and sharing information about their  
14 nationals the President deemed inadequate” for purposes of “assess[ing] whether nationals of  
15 particular countries present ‘public safety threats.’” *Id.* at 2404. The President declared that the  
16 restrictions “were necessary to ‘prevent the entry of those foreign nationals about whom the  
17 United States Government lacks sufficient information’; ‘elicit improved identity-management  
18 and information-sharing protocols and practices from foreign governments’; and otherwise  
19 ‘advance [the] foreign policy, national security, and counter-terrorism’ objectives of the United  
20 States. *Id.* at 2405. Further, the restrictions “would be the ‘most likely to encourage cooperation’  
21 [of foreign governments] while ‘protect[ing] the United States until such time as improvements  
22 occur.’” *Id.* The Proclamation purported to be an exercise of statutory authority under 8 U.S.C. §  
23 1182(f), which permits the President to “suspend the entry of all aliens or any class of aliens”  
24 whenever he “finds” that their entry “would be detrimental to the interests of the United States.” 8  
25 U.S.C. § 1182(f).

26 Notwithstanding the facially neutral text of the proclamation, the *Trump* plaintiffs alleged  
27 in part that the President’s vitriolic anti-Muslim statements prior to taking the oath of office and  
28 thereafter demonstrated that the proclamation was motivated by religious animus in violation of

1 the First Amendment’s establishment clause. The principal question on review was what level of  
2 scrutiny would apply to the President’s Proclamation in light of the alleged religious animus.

3 The Supreme Court explained that two factors informed the standard of review applied in  
4 *Trump*: that “plaintiffs seek to invalidate a national security directive regulating the entry of aliens  
5 abroad,” and that the executive order was “facially neutral toward religion” and thus required  
6 “prob[ing] the sincerity of the stated justifications for the policy by reference to extrinsic  
7 statements.” *Id.* at 2418 (emphasis added). The court noted that “[f]or more than a century, this  
8 Court has recognized that the admission and exclusion of foreign nationals is a ‘fundamental  
9 sovereign attribute exercised by the Government’s political departments largely immune from  
10 judicial control.’” *Id.* (emphasis added). “Because decisions in these matters may implicate  
11 ‘relations with foreign powers,’ . . . such judgments are ‘frequently of a character more  
12 appropriate to either the Legislature or the Executive.’” *Id.* (quoting *Mathews v. Diaz*, 426 U.S.  
13 67, 81 (1976)). Moreover, because the persons in question were foreign nationals abroad seeking  
14 admission with “no constitutional right to entry,” the scope of review was already  
15 “circumscribed”—review was available only to the extent that denial of the alien’s admission  
16 imposed “burdens [on] the constitutional rights of a U.S. citizen.” *Id.* at 2419. Taking these  
17 factors together, the Supreme Court concluded that “[t]he upshot . . . in this context is clear: ‘Any  
18 rule of constitutional law that would inhibit the flexibility’ of the President ‘to respond to  
19 changing world conditions should be adopted only with the greatest caution,’ and our inquiry into  
20 matters of entry and national security is highly constrained.” *Id.* at 2419-20 (quoting *Mathews*,  
21 426 U.S. at 81-82 (holding that Congress may condition an alien’s eligibility for participation in  
22 federal medical insurance on duration of residency and permanent resident status)). Further, the  
23 proposed inquiry could “intrud[e] on the President’s constitutional responsibilities in the area of  
24 foreign affairs.” *Id.* at 2419.

25 Applying these considerations—the entry of aliens from outside the United States, express  
26 national security concerns and active involvement of foreign policy—the Supreme Court applied a  
27 standard of review “considers whether the entry policy is plausibly related to the Government’s  
28 stated objective to protect the country and improve vetting procedures.” *Id.* at \*21. The Supreme

1 Court “assume[d] that [it] may look behind the face of the Proclamation to the extent of applying  
 2 rational basis review” including consideration of “plaintiffs’ extrinsic evidence [of President  
 3 Trump’s anti-Muslim statements].” *Id.* at 2420. It held, however, that taking these statements into  
 4 consideration, it would “uphold the policy so long as it can reasonably be understood to result  
 5 from a justification independent of unconstitutional grounds.” *Id.*

6 The case at bar is distinguishable from *Trump* in several respects. First, Defendants herein  
 7 did not cite national security as a basis for terminating TPS. Rather, the stated basis purports to be  
 8 nothing more than a factual determination that conditions in the ground in four countries no longer  
 9 meet the statutory criteria of the TPS statute and thus the humanitarian (not national security)  
 10 purposes underpinning TPS status have been obviated.

11 Second, unlike the Proclamation in *Trump*, Defendants have not claimed that TPS has been  
 12 terminated for foreign policy reasons. The government’s decision to terminate TPS status was not  
 13 intended to induce the cooperation or action of a foreign government. *Compare Trump*, 138 S.Ct.  
 14 at 2421 (noting that Proclamation was “expressly premised on legitimate purposes: preventing  
 15 entry of nationals who cannot be adequately vetted and inducing other nations to improve their  
 16 practices”).

17 Third, the TPS-beneficiaries here, unlike those affected by the Proclamation in *Trump*, are  
 18 already in the United States. They are not aliens abroad seeking entry or admission who “have no  
 19 constitutional right of entry” *id.* at 2419;<sup>34</sup> TPS-beneficiaries have been admitted to the United  
 20 States. *See Ramirez v. Brown*, 852 F.3d 954, 958-61 (9th Cir. 2017). As Plaintiffs currently  
 21 reside lawfully in the United States, *id.*, this case is unlike *Trump*; it does not implicate “the  
 22 admission and exclusion of foreign nationals,” *Trump*, 138 S.Ct. at 2418, who have “no  
 23 constitutional rights regarding [their] application” in light of the “sovereign prerogative” “to admit  
 24 or exclude aliens.” *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Hence, the basis for invoking  
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26  
 27 <sup>34</sup> Thus, their situation is unlike persons physically present at a United States port of entry who  
 28 had not been admitted but sought to be paroled. *See Nadarajah v. Gonzales*, 443 F.3d 1069, 1082-  
 83 (9th Cir. 2006) (reviewing agency’s discretion to grant parole to alien under a deferential  
 “facially legitimate and bona fide” reasons standard).

1 broad judicial deference to executive action in excluding aliens does not apply.<sup>35</sup>

2 Fourth, relatedly, aliens within the United States have greater constitutional protections  
 3 than those outside who are seeking admission for the first time. *See Zadvydas v. Davis*, 533 U.S.  
 4 678, 693 (2001) (explaining that “certain constitutional protections available to persons inside the  
 5 United States are unavailable to aliens outside of our geographic borders,” *id.*, “[b]ut once an alien  
 6 enters the country, the legal circumstance changes, for the Due Process Clause applies to all  
 7 ‘persons’ within the United States, including aliens”). The aliens affected by the President’s  
 8 Proclamation in *Trump* were outside the United States and had “no constitutional rights regarding  
 9 [their] application,” *Landon*, 459 U.S. at 32; the courts could therefore only “engage[] in a  
 10 circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights  
 11 of a U.S. citizen.” *Trump*, 138 S.Ct. at 2419. TPS-beneficiaries in the United States in contrast  
 12 have ties to the United States, many with deep, long-term ties. For example, 88% of Salvadoran  
 13 and 81% of Haitian TPS holders are employed, 11% are entrepreneurs, and 30% (45,500  
 14 households with Salvadoran TPS holders and 6,200 with Haitian TPS holders) have mortgages.  
 15 Compl. ¶ 48. *See Landon*, 459 U.S. at 32 (“[O]nce an alien gains admission to our country and  
 16 begins to develop the ties that go with permanent residence his constitutional status changes  
 17 accordingly.”). Although *Landon* refers to permanent resident aliens, the alien’s ties to the United  
 18 States, not his or her formal immigration status, confer increased constitutional protection. *See*  
 19 *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“[A]liens receive constitutional protections  
 20 when they have come within the territory of the United States and developed substantial  
 21 connections with this country.”); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (“The alien, to  
 22 whom the United States has been traditionally hospitable, has been accorded a generous and  
 23 ascending scale of rights as he increases his identity with our society. Mere lawful presence in the  
 24 country creates an implied assurance of safe conduct and gives him certain rights[.]”); *see also*  
 25 *Ibrahim v. Dep’t of Homeland Security*, 669 F.3d 983, 997 (9th Cir. 2012) (holding that alien with  
 26 nonimmigrant student visa had “established ‘significant voluntary connection’ with the United  
 27

28 <sup>35</sup> Indeed, TPS benefits may only be extended to admissible aliens, unless the Government extends a waiver to inadmissibility. *See* 8 U.S.C. § 1254a(c)(1)(A)(iii); *id.* § 1254a(c)(2)(A).

1 States such that she has the right to assert claims under the First and Fifth Amendments,” even  
2 though she had left the country and been denied re-entry while outside the country).

3 Fifth, the executive order at issue in *Trump* was issued pursuant to a very broad grant of  
4 statutory discretion: Section 1182(f) “exudes deference to the President in every clause” by  
5 “entrust[ing] to the President the decisions whether and when to suspend entry . . . ; whose entry to  
6 suspend . . . ; for how long . . . ; and on what conditions.” *Trump*, 138 S.Ct. at 2408. In contrast,  
7 Congress has not given the Secretary *carte blanche* to terminate TPS for any reason whatsoever.  
8 Rather, the TPS statute empowers the Secretary of Homeland Security discretion to initiate,  
9 extend, and terminate TPS in specific enumerated circumstances. 8 U.S.C. § 1254a(b). Even  
10 though the statute circumscribes judicial review, *see supra*, Congress prescribed the discretion of  
11 the Secretary in administering TPS. *Cf. Trump*, 138 S.Ct. at 2424 (Kennedy, J., concurring)  
12 (“There are numerous instances in which the statements and actions of Government officials are  
13 not subject to judicial scrutiny or intervention. That does not mean those officials are free to  
14 disregard the Constitution and the rights it proclaims and protects.”).

15 For these reasons, the facts, legal posture, and legal issues in *Trump* are substantially and  
16 materially different from the present case. *Trump* did not address the standard of review to be  
17 applied under the equal protection doctrine when steps are taken to *withdraw* an immigration  
18 status or benefit from aliens lawfully present and admitted into the United States for reasons  
19 unrelated to national security or foreign affairs. *Trump* therefore does not alter the Ninth Circuit’s  
20 refusal to “countenance that the Constitution would permit immigration officials to . . . round[] up  
21 all immigration parolees of a particular race solely because of a consideration such as skin color.”  
22 *Wong*, 373 F.3d at 974, 974, n. 29. The equal protection guarantee applies with its conventional  
23 force to all persons in the United States. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)  
24 (explaining that the Fourteenth Amendment’s “provisions are universal in their application, to all  
25 persons within the territorial jurisdiction, without regard to any differences of race, of color, or of  
26 nationality” and holding that the administration of a race-neutral law in a prejudicial manner  
27 violates Equal Protection Clause). TPS beneficiaries residing in the United States are such  
28 persons. Accordingly, the deferential standard of review in *Trump* does not apply.

1 e. Application to Plaintiffs' Allegations

2 Having clarified that the *Arlington Heights* framework applies to review of Defendants'  
3 actions and that President Trump's stated animus may be attributed to the Secretary if he  
4 influenced an otherwise independent decision-making process, the Court now reviews whether  
5 Plaintiffs' factual allegations plausibly state a claim.

6 Plaintiffs chiefly rely on a set of anti-immigrant, anti-Muslim comments made by President  
7 Trump to support their claim of animus. As set forth in detail above, President Trump has  
8 allegedly expressed animus toward "non-white, non-European people," Compl. ¶ 9, including by  
9 labeling Mexican immigrants as criminals and rapists, *id.* ¶ 67, "compar[ing] immigrants to snakes  
10 who will bite and kill anyone foolish enough to take them in," *id.* ¶ 68, complaining that 40,000  
11 Nigerians in the United States "would never 'go back to their huts' in Africa," *id.* ¶ 69, and  
12 "disseminat[ing] a debunked story about celebrations of the September 11, 2001, attacks [by  
13 Arabs living in New Jersey]," *id.* President Trump also specifically made derogatory comments  
14 about Haitians, including that the 15,000 admitted to the United States "all have AIDS," *id.* One  
15 week before TPS was terminated, President Trump asked aloud regarding Latin American and  
16 African countries, including Haiti and El Salvador, "Why are we having all these people from  
17 shithole countries come here?" He expressed a preference instead for Norwegians, who are  
18 overwhelmingly white. *Id.* ¶ 70. The President also asked "Why do we need more Haitians?" and  
19 insisted they be removed from an immigration deal. *Id.* ¶ 70. Plaintiffs characterize these  
20 statements and other evidence as evidence of "racial and national-origin animus." Compl. ¶ 66.  
21 These allegations are more than sufficient to support a plausible inference of the President's  
22 animus based on race and/or national origin/ethnicity against non-white immigrants in general and  
23 Haitians, Salvadoreños, Nicaraguans, and Sudanese people in particular.<sup>36</sup>

24 \_\_\_\_\_  
25 <sup>36</sup> Insofar as Plaintiffs allege national origin discrimination, *see* Compl. ¶ 111, the Court construes  
26 it as a reference to ethnicity in light of the nature of the President's alleged comments relying on  
27 stereotypes about the physical or cultural characteristics of persons from the countries in question.  
28 *Cf. Wong*, 373 F.3d at 968, n.21 (construing allegation of national origin discrimination as being  
based on ethnicity); *cf. 29 C.F.R. § 1606.1* (defining "national origin discrimination" under Title  
VII of the Civil Rights Act of 1964 to include "denial of equal employment opportunity because  
of an individual's, or his or her ancestor's place of origin; or because an individual has the  
*physical, cultural or linguistic characteristics of a national origin group*" (emphasis added)).

1           Moreover, Plaintiffs plausibly allege that President Trump’s animus was a factor in the  
2 TPS termination decisions in question. According to Plaintiffs’ allegations, President Trump  
3 repeatedly expressed his animus towards non-white immigrants on the campaign trail and after  
4 entering office, and explicitly linked those sentiments to his proposed immigration policies and  
5 priorities. Most directly, at a meeting about TPS on January 11, 2018, President Trump expressed  
6 his disdain for persons from Haiti and El Salvador,<sup>37</sup> and his administration then took action to  
7 terminate TPS status for those countries a mere 7 days later. Compl. ¶ 70. Although the  
8 termination of Sudan and Nicaragua in October and December 2017 pre-date the January 11, 2018  
9 meeting, they post-date the other statements made by President Trump reflecting animus against  
10 non-white immigrants and other persons of Latino or African origin. *See* Compl. ¶¶ 67  
11 (categorical labels of Mexican immigrants as criminals and rapists), 69 (complaining that migrants  
12 from Nigeria would never “go back to their huts” in Africa); *id.* (disseminating a false anti-Arab  
13 rumor about celebrations of the September 11, 2001 attacks in New Jersey). Thus, Plaintiffs  
14 plausibly allege that President Trump harbored racial and national origin/ethnic animus as of the  
15 time of all four TPS decisions challenged in this case.

16           Further, Plaintiffs plausibly allege that President Trump influenced DHS’s decision to  
17 terminate TPS status. Most directly, Secretary Nielsen was present at the January 11, 2018  
18 meeting where the President referred to Haiti and El Salvador (at least) as “shithole countries” and  
19 questioned why the United States would welcome their people here. Compl. ¶ 72. Haiti and El  
20 Salvador’s TPS designations were terminated seven days later. *Id.* ¶¶ 81, 84. Further, Plaintiffs’  
21 allege that on November 6, 2017, with respect to Honduras—which is not at issue in this case—  
22 the White House Chief of Staff John F. Kelly and White House Homeland Security Adviser Tom  
23 Bossert “repeatedly called Acting Secretary Duke and pressured her to terminate the TPS  
24 designation for Honduras.” *Id.* ¶ 73. Kelly was reportedly traveling with President Trump at the

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25  
26 <sup>37</sup> President Trump did not merely call Haiti and El Salvador “shithole countries.” He asked  
27 “Why are we having all these people from shithole countries come here?” and “Why do we need  
28 more Haitians?” Compl. ¶ 70. These are not merely comments about a place, but can reasonably  
be understood as comments about the *people* who come from those places and their intrinsic  
worth. It is reasonable to infer racial or national-origin/ethnic animus from these statements, as  
confirmed by the reaction of listeners who were present. *Id.* ¶ 71

1 time. *Id.* Another news article cited by Plaintiffs (and thus incorporated into the complaint) notes  
 2 that as early as June 2017 President Trump was “berating his most senior advisers,” including  
 3 then-DHS Secretary John Kelly, about immigrants who had entered the country that year from  
 4 Afghanistan, Haiti, and Nigeria. *Id.* ¶ 69, n.33. Together, these allegations support a plausible  
 5 inference that the White House has proactively inserted itself into DHS’s TPS termination  
 6 decisions during the relevant time period of October 2017 to January 2018 when the termination  
 7 decisions were announced as part of its broader agenda on immigration. Indeed, Defendants  
 8 effectively concede that President Trump has insinuated himself into the TPS process. *See* Reply  
 9 at 9 (“Of course something of this nature would involve the White House . . .”).

10 In light of the allegations above, Plaintiffs have plausibly pled that President Trump’s  
 11 racial and national-origin/ethnic animus was a motivating factor in DHS’s TPS termination  
 12 decisions and thus have plausibly stated an equal protection claim. Defendants’ motion to dismiss  
 13 is **DENIED**.

#### 14 IV. CONCLUSION

15 In sum, the Court holds that Section 1254a does not preclude judicial review of  
 16 Defendants’ APA claim to the extent Plaintiffs challenge the sub silentio departure from a prior  
 17 practice or policy. Further, Section 1254a does not preclude judicial review of Plaintiffs’  
 18 constitutional due process and equal protection claims. Defendants’ motion to dismiss under Rule  
 19 12(b)(1) is **DENIED**.

20 Defendants’ motion to dismiss is also **DENIED**. Plaintiffs have plausibly alleged that  
 21 Defendants’ sub silentio departure from a prior practice or policy violates the Administrative  
 22 Procedure Act (Fourth Claim). Plaintiffs have also plausibly pled that the TPS termination  
 23 decisions, as well as Defendants’ adoption of a new interpretation of the TPS statute, were  
 24 motivated by racial and/or ethnic animus in violation of the equal protection guarantee of the

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1 constitution (Second Claim). Finally, Plaintiffs have plausibly pled that Defendants' termination  
2 decisions violate Plaintiffs' substantive due process rights, at least to the extent that the decisions  
3 violated the APA and/or equal protection guarantee and therefore did not involve pursuit of a  
4 legitimate governmental interest.

5 This order disposes of Docket No. 20.

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7 **IT IS SO ORDERED.**

8  
9 Dated: August 6, 2018

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12 EDWARD M. CHEN  
13 United States District Judge  
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United States District Court  
Northern District of California