

No. 19-1685

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PATRICK SAGET, SABINA BADIO FLORIAL, GERALD MICHAUD, BEATRICE BELIARD, RACHELLE GUIRAND, JEAN CLAUDE MOMPOINT, YOLNICK JEUNE, GUERLINE FRANCOIS, LEOMA PIERRE, HAITI LIBERTE, FAMILY ACTION NETWORK MOVEMENT, INC., AND NAISCHA VILME,
PLAINTIFFS-APPELLEES,

v.

DONALD J. TRUMP, UNITED STATES OF AMERICA, DEPARTMENT OF HOMELAND SECURITY, KIRSTJEN M. NIELSEN, AND ELAINE C. DUKE,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF OF THE DISTRICT OF COLUMBIA, CALIFORNIA,
MASSACHUSETTS, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS,
MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY,
NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE
ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFFS-APPELLEES**

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INTRODUCTION AND INTEREST OF *AMICI* STATES

Collectively, *Amici* States are home to hundreds of thousands of people who hold Temporary Protected Status (“TPS”), a legal status provided to foreign nationals who are present in the United States when their countries of origin become unsafe and cannot handle their return. Thousands of these TPS holders are from Haiti, which the Department of Homeland Security (“DHS”) first designated for TPS after a devastating earthquake in 2010. Haitian TPS holders are nurses, home health care aides, pastors, chefs, bus drivers, teachers, landscapers, and child care providers. They are homeowners, business owners, union members, class presidents, and civic leaders. They are also neighbors, coworkers, family members, and friends.

Terminating TPS for Haiti would strip these community members of legal authorization to work and could result in their removal to a country that is unsafe and unprepared to reintegrate them. Many TPS holders presumably would be removed or otherwise have no choice but to leave while others would go into the shadows; all would lose the right to remain legally in the United States and support themselves and their families. The result would be not only harm to the welfare of TPS holders and their families, but also shuttered businesses, labor shortages, and greater strain on public and private social services.

The defendants' termination of TPS for Haiti and other countries is already hurting the economy and civil society, as the prospect of widespread deportation has left whole communities uncertain, confused, and afraid. In addition to preventing these harms, *Amici* States have an interest in ensuring that federal agencies engage in reasoned, good-faith decision-making. Accordingly, *Amici* States have a vital interest in this matter and in preserving the district court's injunction halting, on a nationwide basis, the termination of TPS for Haiti pending a final adjudication.

ARGUMENT

I. The District Court Correctly Determined That Plaintiffs Are Likely To Succeed On The Merits Of Their Claim Because The DHS Acting Secretary's Decision To Terminate TPS For Haiti Was Pretextual.

The district court properly concluded that plaintiffs are likely to succeed on the merits of their claim that DHS Acting Secretary Elaine C. Duke's decision to terminate TPS for Haiti violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, because it was pretextual.¹ The APA authorizes a reviewing

¹ The defendants contend that "[t]o the extent the district court relied on evidence outside the administrative record, that was alone an abuse of discretion." Br. 31. In the ordinary case under the APA, a court reviewing agency action is "limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019). There is, however, "a narrow exception to the general rule against inquiring into the mental processes of administrative decisionmakers." *Id.* (internal quotation marks omitted). When a party makes "a strong showing of bad faith or improper behavior, such an inquiry may be warranted and may justify extra-record discovery." *Id.* at 2573-74 (internal quotation marks omitted). In this case, as

court to “hold unlawful and set aside” an agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). A finding that the agency acted in bad faith is “material to determining” whether the agency acted arbitrarily in violation of the APA. *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996); see *Latecoere Int’l, Inc. v. U.S. Dep’t of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994). Accordingly, under certain unusual circumstances, courts have set aside agency action as arbitrary and capricious where the decisionmaker acted in bad faith. See, e.g., *Woods Petroleum Corp. v. U.S. Dep’t of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (setting aside the agency’s decision as arbitrary and capricious where it was “obvious that the sole

detailed more fully *infra*, plaintiffs made a strong showing that DHS officials decided to terminate TPS for Haiti *before* identifying a rationale to support that decision. This preliminary showing of bad faith supported the district court’s determination that additional evidence beyond the administrative record was necessary to understand the agency’s decision. See, e.g., *Dep’t of Commerce*, 139 S. Ct. at 2574 (finding no abuse of discretion in ordering extra-record discovery because the evidence showed that enforcement of the Voting Rights Act—the Secretary of Commerce’s stated rationale for reinstating a citizenship question on the census—“played an insignificant role in the decisionmaking process”); *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009) (finding plaintiffs’ strong showing of bad faith warranted extra-record discovery where evidence indicated that the agency made its decision to deny petition even “before review staff had completed their reviews”); see also *Latecoere Int’l, Inc. v. U.S. Dep’t of Navy*, 19 F.3d 1342, 1357 (11th Cir. 1994) (reviewing evidence beyond the administrative record because plaintiff made a strong showing that the Navy’s decision to award the contract to plaintiff’s competitor was in bad faith). Furthermore, the district court noted that, notwithstanding its decision on the scope of review, it “c[ould]—and d[id]—resolve Plaintiffs’ likelihood of success on evidence contained within the administrative record.” SA 86.

reason behind” the decision “was to provide a pretext for the [agency’s] ulterior motive”), *aff’d on reh’g*, 47 F.3d 1032 (1995) (en banc); *Tummino v. Torti*, 603 F. Supp. 2d 519, 544 (E.D.N.Y. 2009) (determining that the agency acted in bad faith based on evidence of “(1) repeated and unreasonable delays, pressure emanating from the White House, and the obvious connection between the confirmation process of two FDA Commissioners and the timing of the FDA’s decisions; and (2) significant departures from the FDA’s normal procedures and policies in the review of the [current] applications as compared to the review of [prior] applications”).²

In this case, plaintiffs submitted strong evidence that DHS made the decision to terminate TPS for Haiti well before Acting Secretary Duke determined her justification for doing so. As early as March 2017, eight months before the termination decision, United States Citizenship and Immigration Services

² See also *Cowpasture River Pres. Ass’n v. Forest Serv.*, 911 F.3d 150, 179 (4th Cir. 2018) (concluding that the agency acted arbitrarily and capriciously where its approval of the project “was a preordained decision and [the agency] reverse engineered the [record of decision] to justify this outcome” (internal quotation marks omitted)), *cert. granted sub nom. Atl. Coast Pipeline, LLC v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 36 (2019); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54-55 (D.C. Cir. 1977) (per curiam) (concluding that “where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it” by private interests ex parte, a court “must treat the agency’s justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary”).

(“USCIS”) political appointees, prompted by DHS officials, “directed staffers to ‘refashion’ the draft Director Memorandum,” which had recommended an 18-month extension, to “include an option for terminating TPS for Haiti.” Special Appendix (“SA”) 20. In an April 2017 email to DHS Spokesman David Lapan, Gene Hamilton, Senior Advisor to then-Secretary of DHS John Kelly, wrote: “African countries are toast . . . Haiti is up next.” SA 115. At the end of May 2017, when Secretary Kelly decided to extend TPS for Haiti for six months, DHS simultaneously forecast the eventual termination decision in a press release and Federal Register Notice, which urged TPS recipients “to prepare for their return to Haiti in the event that Haiti’s TPS designation is not extended again.” SA 31. In June 2017, to prepare responses to inquiries from the public about TPS, a USCIS official e-mailed career staffers stating that “Secretary Kelly want[ed] a stronger response beginning to build a case for not extending TPS for Haiti.” SA 35 (internal quotation marks omitted). And James Nealon testified that, when he arrived at DHS as the Acting Undersecretary for Policy in July 2017, “there was a general feeling that TPS . . . for Haiti was going to be terminated.” SA 33.

By October 2017, as USCIS staffers prepared a Director Memorandum recommending termination, criticism from senior officials highlighted the discrepancy between the country conditions in Haiti and the recommendation to terminate TPS. *See, e.g.*, SA 46 (“The problem is that [the Director Memorandum]

reads as though we'd recommend an extension [because] we talk so much about how bad it is [in Haiti], but there's not enough in there about positive steps that have been taken since its designation."); SA 47 ("The draft is overwhelming[ly] weighted for extension[,] which I do not think is the conclusion we are looking for."); SA 48 (describing how a USCIS official changed the memorandum's conclusion to "fully support termination" and "provided comment boxes where additional data should be provided to back up this decision"). Furthermore, Acting Secretary Duke's notes confirm that as of November 2017, she had not yet established a rationale for her decision to terminate TPS for Haiti later that month. *See, e.g.*, SA 51 (writing as to her "[r]ationale" for terminating TPS: "don't know, need to rationalize conflicting info" but that "all agree [TPS] must end"). Meanwhile, White House officials exerted significant pressure on Acting Secretary Duke, expressly recommending that she terminate TPS with an effective date of January 5, 2019, and warning that "the White House would be extremely disappointed if [she] kick[ed the termination decision] into [the] lap of [the] next [S]ecretary." SA 52 (internal quotation marks omitted).

Plaintiffs' evidence also demonstrated that multiple departures from normal agency procedures precipitated Acting Secretary Duke's decision. Career staffers testified that "no senior USCIS officials had ever asked them to gather criminality or welfare data on a TPS population during their combined nine years as USCIS

researchers.” SA 24. Yet DHS and USCIS appointees repeatedly directed career staffers to collect criminality and welfare data on Haitian TPS recipients “to bolster the decision to terminate TPS for Haiti.” SA 23. For example, Kirstjen M. Nielsen, Secretary Kelly’s Chief of Staff at the time, emailed USCIS appointees seeking specific criminality and welfare data and asking them to “describe what has changed in Haiti warranting the recommended change” in the TPS designation. SA 25. Moreover, when Acting Secretary Duke announced the decision to terminate TPS for Haiti in November 2017, DHS abandoned its longstanding practice of considering all of the country’s conditions and instead considered conditions only relating to the original event supporting the designation, the 2010 earthquake. In doing so, DHS also “manipulated, minimized, and omitted,” SA 116, many of the facts described in the October 2017 report by the Refugee, Asylum, and International Operations Directorate, which “found [m]any of the conditions prompting the original January 2010 TPS designation persist, and the country remains vulnerable to external shocks and internal fragility,” SA 42 (internal quotation marks omitted). The Department of State also violated its own longstanding practice of giving great deference to the recommendation of the U.S. Embassy in Haiti, omitting altogether the Embassy’s findings in the memorandum presented to then-Secretary of State Rex Tillerson. SA 40.

These facts mirror the evidence of bad faith in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). In that case, the evidence revealed a “significant mismatch” between the Secretary of Commerce’s decision to reinstate a citizenship question on the census and his stated rationale of better enforcing the Voting Rights Act of 1965 (“VRA”). *Id.* at 2575. The Court observed that “the Secretary began taking steps to reinstate a citizenship question about a week into his tenure,” yet there was “no hint that he was considering VRA enforcement in connection with that project.” *Id.* The Secretary unsuccessfully attempted to elicit a request for citizenship data from DHS and from the Department of Justice (“DOJ”)’s Executive Office for Immigration before Department of Commerce staff proposed that DOJ’s Civil Rights Division might be willing to request the data for VRA enforcement purposes. *Id.* DOJ’s Civil Rights Division, in turn, “expressed interest in acquiring” this data only after “the Secretary contacted the Attorney General directly.” *Id.* The Court concluded that the Department of Commerce “went to great lengths to elicit the request” for citizenship data “from DOJ (or any other willing agency)” and that the VRA enforcement rationale “seem[ed] to have been contrived,” thus necessitating an agency remand. *Id.*

Just as the Department of Commerce searched for a justification for its preordained decision to reinstate a citizenship question, DHS did so for its decision to terminate TPS for Haiti. Considerable evidence in the record established that

there was a “disconnect between the decision made” by DHS and “the explanation given.” *Dep’t of Commerce*, 139 S. Ct. at 2575. Under these unusual circumstances, the district court properly determined that plaintiffs are likely to succeed on their claim that Acting Secretary Duke’s decision was pretextual and therefore violated the APA.

II. The District Court Properly Exercised Its Discretion To Remedy The Widespread Harm Of Terminating TPS For Haiti Through A Nationwide Preliminary Injunction.

A. Injunctive relief is in the public interest, given the serious ramifications that terminating TPS will have for the *Amici* States.

A court reviewing the propriety of a preliminary injunction must consider, among other factors, whether “an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The public interest “includes the ramifications of granting or denying the preliminary injunction on nonparties to the litigation,” such as *Amici* States here. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1100 (7th Cir. 2008); accord *Golden Gate Rest. Ass’n v. City & County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008). The district court correctly determined that a preliminary injunction is in the public interest because of the serious, sweeping harm that would result if the termination decision takes effect.

A majority of TPS holders from Haiti have lived in the United States for many years. On average, Haitian TPS recipients have lived in this country for 13 years,³ and 16% of these individuals have lived here for 20 years or more.⁴ During this time, these residents have built lives in the United States. They have started families, founded businesses, bought homes, joined churches, settled in communities, earned degrees, and advanced in their careers. Haitian TPS holders contribute to the *Amici* States' economic and civic life in countless ways. Upholding the preliminary injunction will prevent grave and unnecessary harm not only to Haitian TPS recipients but also to the residents of *Amici* States who rely on their Haitian family members and neighbors for care, friendship, community cohesion, and economic vitality.

1. Terminating TPS for Haiti will tear families apart.

The impact of DHS's decision on TPS recipients' family members is an important aspect of the public interest. *See, e.g., Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (considering the "financial and psychological strain on the

³ Nicole Prchal Svajlenka et al., *TPS Members Are Integral Members of the U.S. Economy and Society*, Ctr. for Am. Progress (Oct. 20, 2017), <https://tinyurl.com/TPSCAP>.

⁴ Robert Warren & Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. Migration & Hum. Security 577, 578, 581 (2017), <https://tinyurl.com/profile-tps>.

families of detainees” and concluding that a preliminary injunction served the public interest); *Golden Gate Rest. Ass’n*, 512 F.3d at 1126 (considering “the hardship to all individuals” subject to a challenged ordinance, including “the indirect hardship to their friends and family members,” in determining that a stay was in the public interest). In this case, a preliminary injunction is in the public interest because terminating TPS for Haiti will wreak havoc on families across the United States.

While living and working in the United States legally for over a decade (on average), many Haitian TPS holders have gotten married, had children, and established families. Nine percent of TPS holders are married to a U.S. citizen spouse, and 27,000 U.S. citizen children have been born to Haitian TPS holders.⁵ Consequently, there are tens of thousands of people living in “mixed-status” households, in which one or both parents hold TPS while some or all of the children (and sometimes, one spouse) are U.S. citizens. Terminating TPS will force these “mixed-status” families to confront agonizing choices. A parent faced with loss of status will have to decide whether to: (1) return to Haiti alone, leaving her children behind; (2) take her children to a country that is unfamiliar and where their safety is uncertain; or (3) stay in the United States and retreat into the shadows, knowing that she cannot work legally and could be deported at any moment. No parent should

⁵ Warren & Kerwin, *supra* note 4, at 578, 582.

have to face these choices. Yet allowing DHS’s unlawful decision to take effect—prior to a final adjudication on the merits—would force tens of thousands of individuals to choose immediately.

Indeed, the prospect of confronting these choices is already harming U.S. citizen children. Throughout *Amici* States, children who fear their family members’ deportation are experiencing serious mental health issues, including depression, anxiety, self-harm, and regression.⁶ Studies show that children’s concerns about their parents’ immigration status can impair their socioemotional and cognitive development.⁷ Perhaps unsurprisingly, children whose immigrant mothers are subject to deportation have higher incidence of adjustment and anxiety disorders.⁸

These harms only intensify when fears of forcible separation become reality. In one study, children with deported parents refused to eat, pulled out their hair, had persistent stomachaches and headaches, engaged in substance abuse, lost interest in daily activities, and had difficulty maintaining positive relationships with

⁶ Wendy Cervantes et al., *Our Children’s Fear: Immigration Policy’s Effects on Young Children*, Ctr. Law & Soc. Pol’y 8-10 (Mar. 2018), <https://tinyurl.com/ChildFears>.

⁷ Hirokazu Yoshikawa, *Immigrants Raising Citizens: Undocumented Parents and Their Young Children* 120-36 (2011).

⁸ Jens Hainmueller et al., *Protecting Unauthorized Immigrant Mothers Improves Their Children’s Mental Health*, Science (Sept. 8, 2017), <https://tinyurl.com/HainScience> (concluding that “[p]arents’ unauthorized status is [] a substantial barrier to normal child development and perpetuates health inequalities through the intergenerational transmission of disadvantage”).

non-detained parents.⁹ Additionally, these childhood traumas can inflict lasting harms, including anxiety, depression, and severe impairments of a child's self-worth and ability to form close relationships later in life.¹⁰ Studies of adults who were separated from their families as children showed negative outcomes on measures of mental health,¹¹ substance abuse,¹² marital success,¹³ and intellectual ability,¹⁴ and higher rates of chronic illnesses such as diabetes and heart disease.¹⁵

Beyond the damage to children's health, forcible separation can impose economic burdens on "mixed-status" households. Removing a family member who

⁹ Heather Koball et al., *Health and Social Service Needs of US-Citizen Children with Detained or Deported Immigrant Parents*, Migration Pol'y Inst. 5 (Sept. 2015), <https://tinyurl.com/MIRFinal>.

¹⁰ Kristen Lee Gray, *Effects of Parent-Child Attachment on Social Adjustment and Friendship in Young Adulthood*, Cal. Poly. St. U., San Luis Obispo (June 2011), <https://tinyurl.com/j3lgrno>.

¹¹ Katri Räikönnen et al., *Risk of Severe Mental Disorders in Adults Separated Temporarily from Their Parents in Childhood: The Helsinki Birth Cohort Study*, 45 J. Psychiatric Res. 332, 336 (2011); Moises Velasquez-Manoff, *Finland Saved These Children From War. Did It Hurt Them in the Process?*, N.Y. Times (Sept. 19, 2018), <https://tinyurl.com/NYT-Fam-Sep>.

¹² Räikönnen et al., *supra* note 11, at 336.

¹³ Anu-Katriina Pesonen et al., *Reproductive Traits Following a Parent-Child Separation Trauma during Childhood: A Natural Experiment During World War II*, 20 Am. J. Hum. Biology 345 (2008) (finding higher rates of divorce).

¹⁴ Anu-Katriina Pesonen et al., *Intellectual Ability in Young Men Separated Temporarily from Their Parents in Childhood*, 39 Intelligence 335 (2011) (showing severe decline in verbal ability and moderate impairments in general intelligence and mathematics).

¹⁵ Velasquez-Manoff, *supra* note 11.

is the primary source of income for the household can lead to economic hardship and loss of housing for family members remaining in the United States.¹⁶ It can also place the care of children, seniors, and disabled family members at serious risk.¹⁷ As a result, many families increasingly will resort to social services, straining the limited resources of *Amici* States. For example, state-level data indicated that as of 2011, over 5,000 children in the United States were living in foster care because their parents had been detained or deported.¹⁸ Long-term foster care costs about \$25,000 per child per year, meaning that prior immigration enforcement actions have overall cost state and local governments about \$125 billion annually.¹⁹ If the termination decision takes effect and Haitian TPS holders must leave their families, that cost could increase substantially.

These harms are magnified because, contrary to DHS's determination, conditions in Haiti still "prevent aliens who are nationals of the state from returning

¹⁶ Randy Capps et al., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families: A Review of the Literature*, Migration Pol'y Inst. 10 (Sept. 2015), <https://tinyurl.com/CappsMPI>.

¹⁷ *Id.* at 13-14.

¹⁸ Seth Freed Wessler, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, Applied Res. Ctr. 22 (Nov. 2011), <https://tinyurl.com/ARCFam>.

¹⁹ Nicholas Zill, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption*, Nat'l Council for Adoption 3 (May 1, 2011), <https://tinyurl.com/ZillFoster>.

to the state in safety.” 8 U.S.C. § 1254a(b)(1)(C). As the district court detailed, the Haitian government repeatedly warned DHS that Haiti did not have the capacity to accept the return of all Haitian nationals with TPS, citing “the housing shortage, destruction from Hurricane Matthew [in 2016], the cholera epidemic, food insecurity, and damage from other environmental disasters.” SA 56. In its initial recommendation that DHS extend TPS for Haiti, the Department of State described the “significant lingering effects from the 2010 earthquake . . . in the areas of infrastructure, health, sanitation services, and emergency response capacity”; the tens of thousands of people living in evacuation shelters and temporary facilities; “the creation of informal settlements located in hazardous areas”; and displaced persons moving back to unsafe homes. SA 37-38. The U.S. Embassy in Haiti advised that the Haitian government would not be able to reabsorb current TPS holders “in a time frame of less than several years.” SA 39. Likewise, Major General Jon Norman, then-Chief of Staff for the U.S. Southern Command, warned Acting Secretary Duke that return of “an estimated 59,000 Haitians from the US” would “likely overwhelm a fragile government system and infrastructure” and “place additional security stress upon the Haitian government, which is contending with rising crime and violence” following the withdrawal of the United Nations

peacekeeping mission.²⁰ SA 53-54. These acute, systemic concerns illustrate the impossible choices and serious risks of harm that TPS holders would face if the Court dissolves the injunction.

2. *Amici* States’ economies and workforces will suffer.

The potential detriment to *Amici* States’ economies and workforces reinforces the need for a preliminary injunction. *See, e.g., Red Earth LLC v. United States*, 657 F.3d 138, 146 (2d Cir. 2011) (per curiam) (affirming the district court’s conclusion that “the potential for economic harm to plaintiffs tipped the scales of public interest in favor of enjoining the problematic provisions”); *New York v. DHS*, No. 19-CV-7777, 2019 WL 5100372, at *10 (S.D.N.Y. Oct. 11, 2019) (finding preliminary injunction against expansion of “public charge” rule “preventing the alleged economic and public health harms [would] provide[] a significant public benefit”).

²⁰ Initially, the United Nations sent thousands of soldiers and police officers to Haiti in 2004, after a rebellion led to the removal of then-President Jean-Bertrand Aristide. Andres Martinez-Casares, *U.N. Peacekeeping Mission to Haiti Ends After 15 Years with Mixed Legacy*, Reuters (Oct. 15, 2019), <https://tinyurl.com/un-reuters>. Following the 2010 earthquake, the United Nations increased its presence in Haiti “to support the immediate recovery, reconstruction and stability efforts in the country.” *MINUSTAH Fact Sheet*, United Nations Peacekeeping, <https://tinyurl.com/un-minustah>.

Haitian TPS holders participate in the labor force at a rate of 81 percent, which is significantly higher than the overall national rate of 63 percent.²¹ Over ten years, the loss of legal status for Haitian TPS holders is projected to cost more than \$2.7 billion in gross domestic product (GDP) due to lost earnings and lower industry outputs, over \$428 million in Social Security and Medicare contributions, and nearly \$60 million in turnover costs to employers.²² The District of Columbia witnessed the consequences of mass departures of immigrant populations in 2007, when nearby Prince William County, Virginia, adopted a policy authorizing police officers to check the immigration status of anyone they stopped whom they suspected might be undocumented. Thousands of immigrants fled the county, “[b]usinesses were driven to the brink of bankruptcy,” and “entire shopping centers had to shut down.”²³

The impact of terminating TPS will be felt most acutely in fields where Haitian TPS holders are concentrated, including hospitality, food service, education and child care, construction, and health care.²⁴ Replacing these workers may prove

²¹ Warren & Kerwin, *supra* note 4, at 577, 582.

²² Amanda Baran & Jose Magaña-Salgado, *Economic Contributions by Salvadoran, Honduran, and Haitian TPS Holders*, Immigrant Legal Resource Ctr. 5, 7, 8 (Apr. 2017), <https://tinyurl.com/TPSEcon>.

²³ Lautaro Grinspan, *Here’s Why the Fate of TPS Has Such Major Implications for DC*, *Washingtonian* (Oct. 16, 2018), <https://tinyurl.com/fate-tps>; see also Jeremy Borden, *Latinos Returning to Pr. William After Immigration Crackdown, but Scars Remain*, *The Washington Post* (June 26, 2012), <https://tinyurl.com/pr-william>.

²⁴ Warren & Kerwin, *supra* note 4, at 583-84.

difficult, leading to a shortage of necessary services and a strain on state and local economies. For example, about 1,000 construction workers are Haitian TPS holders.²⁵ The loss of these workers would hurt the construction industry, which is already “having trouble hiring workers.”²⁶ More broadly, this labor shortage could undermine infrastructure development, jeopardizing *Amici* States’ ability to prepare for and rebuild after natural disasters.²⁷

Amici States will also suffer by losing Haitian TPS holders as homeowners. Twenty-three percent of Haitian TPS households have mortgages,²⁸ an important measure of their contribution to the national economy. Loss of legal status for these homeowners could lead to job loss or deportation, which would result in more foreclosures.²⁹ Foreclosures, in turn, not only cause hardship for families but also

²⁵ *Id.* at 584.

²⁶ Kim Slowey, *DACA Expiration, TPS Elimination Threaten 100K+ Construction Jobs*, Construction Dive (Jan. 24, 2018), <https://tinyurl.com/TPSConst>.

²⁷ Louis Hansen, *Another Problem for Fire Victims — Shortage of Construction Workers*, San Jose Mercury News (Aug. 2, 2018), <https://tinyurl.com/Merc-Contstr>; New Amer. Econ. Research Fund, *How Temporary Protected Status Holders Help Disaster Recovery and Preparedness* (Nov. 6, 2017), <https://tinyurl.com/NewAmTPS>.

²⁸ Warren & Kerwin, *supra* note 4, at 582.

²⁹ Jacob S. Rugh & Matthew Hall, *Deporting the American Dream: Immigration Enforcement and Latino Foreclosures*, 3 Soc. Sci. 1053 (2016), <https://tinyurl.com/Rugh-frclse>.

require the expenditure of local resources to address the effects of foreclosure, including declining property values, abandoned homes, crime, and social disorder.³⁰

3. Public health will suffer and *Amici* States' healthcare costs will rise.

A preliminary injunction is also in the public interest because of the likely harm to overall public health, vulnerable populations' access to critical care, and public health care expenses from the termination decision. *See, e.g., New York v. Operation Rescue Nat'l*, 273 F.3d 184, 202 (2d Cir. 2001) (observing that public interests supporting injunction included, among others, "protecting freedom to receive reproductive health services" and "advancing medical privacy and the well-being of patients seeking care at facilities"); *N.Y. State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1262-63 (S.D.N.Y. 1989) ("The public interest in ensuring the availability of health care supports the granting of injunctive relief."), *aff'd as modified*, 886 F.2d 1339 (2d Cir. 1989).³¹

When TPS holders lose work authorization, many will lose employer-sponsored health insurance for themselves and their families, hindering

³⁰ G. Thomas Kingsley et al., *The Impacts of Foreclosures on Families and Communities*, The Urb. Inst. 13, 19 (May 2009), <https://tinyurl.com/GTKUrban>.

³¹ *See also Pennsylvania v. President U.S.*, 930 F.3d 543, 575 (3d Cir. 2019) (upholding preliminary injunction because "the public interest favors minimizing harm to third-parties by ensuring that women who may lose [] guaranteed contraceptive coverage are able to maintain access to the preventive care to which they are entitled" pending final adjudication of agency rules).

their access to health care.³² For example, studies show that children of undocumented immigrants are often sicker when seeking emergency room care and frequently miss their preventive annual exams.³³ Similarly, undocumented women are less likely than the general population to receive needed healthcare and preventive screenings.³⁴ This leads to significantly higher rates of poor health outcomes, including cervical cancer and birth complications for these women and neonatal morbidity, respiratory distress syndrome, and seizures for their newborns.³⁵ All of these individual health problems have cumulative effects, creating public health consequences that could have been prevented if these patients had better access to preventive and routine care. If TPS holders lose employer-sponsored health insurance, *Amici* States will face increased costs to provide care to uninsured

³² See, e.g., Decl. of Jesse M. Caplan, *New York v. Trump*, 17-CV-5228 ECF No. 55-83 (E.D.N.Y. Oct. 4, 2017); Decl. of Anne McCleod, *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Security*, 17-CV-5211 ECF No. 118-1 (App. 789-90) (N.D. Cal. Nov. 1, 2017); Meredith King, *Immigrants in the U.S. Health Care System: Five Myths that Misinform the American Public*, Ctr. for Am. Progress (June 2007), <https://tinyurl.com/ImmHealth>.

³³ King, *supra* note 32; Katherine Yun et al., *Parental Immigration Status Is Associated with Children's Health Care Utilization: Findings from the 2003 New Immigrant Survey of US Legal Permanent Residents*, 17 *Matern. & Child Health J.* 1913-21 (2013).

³⁴ Am. C. of Obstet. & Gynecol., *Health Care for Unauthorized Immigrants*, Comm. Op. No. 627, 125 *Obstet. Gynecol.* 755 (2015), <https://tinyurl.com/ACOG627>.

³⁵ *Id.*

residents, including emergency health insurance, payments to hospitals and community health centers, and public health programs that serve underinsured patients.³⁶

Terminating TPS will also harm nursing homes, home health care companies, and hospitals, many of which rely on Haitian TPS holders to provide critical services. Hundreds of TPS holders work in hospitals,³⁷ and many others work in other health care facilities or as home health aides.³⁸ Over 60,000 Haitian immigrants work in direct care, making Haiti one of the top five countries of origin for workers in this field.³⁹ In Massachusetts alone, nursing facilities employ about 4,300 Haitians.⁴⁰ If TPS holders no longer can work legally in these jobs, then vulnerable residents will lose the needed services of care providers with whom they

³⁶ See, e.g., Cong. Budget Office, *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments* 8 (Dec. 2007), <https://tinyurl.com/CBOImm> (stating that county governments that share a border with Mexico incurred almost \$190 million in costs for providing uncompensated care to unauthorized immigrants in 2000, representing about one-quarter of all their uncompensated health costs); Caplan Decl., *supra* note 32 (discussing fiscal harms to Massachusetts when immigrants lose employer-sponsored health insurance).

³⁷ Warren & Kerwin, *supra* note 4, at 584.

³⁸ Melissa Bailey, *As Trump Targets Immigrants, Elderly Brace to Lose Caregivers*, Kaiser Health News (Mar. 26, 2018), <https://tinyurl.com/KHNImmig>.

³⁹ Robert Espinoza, *Immigrants and the Direct Care Workforce*, Paraprof'l Healthcare Inst. 4-5 (June 2017), <https://tinyurl.com/PHI-Immig>.

⁴⁰ Letters, *Nursing Facilities, and Their Residents, Will Feel Impact If Haitians' Status Ends*, Boston Globe (Dec. 4, 2017), <https://tinyurl.com/Serotkin>.

have established trusting relationships. This loss of care could result in a serious deterioration in patients' physical and mental health.

Additionally, employers may have difficulty filling the positions left by Haitian TPS holders. Direct care workers generally receive low wages and minimal (if any) benefits, and the work is physically and emotionally demanding. As a result, turnover in the industry is high. For instance, in Massachusetts, one in seven certified nursing assistant positions is vacant, leaving a shortage of 3,000 workers.⁴¹ At the same time, the demand for direct care is rising with a growing elderly population.⁴² If home health care positions remain unfilled, patients who could otherwise receive home health care may be forced to move into nursing facilities, incurring higher costs for patients and *Amici* States. In many cases, this move will significantly diminish patients' quality of life.⁴³

⁴¹ Bailey, *supra* note 38.

⁴² In California and Massachusetts, the position of home health aide is the fastest growing job, predicted to grow by 41% and 38%, respectively, in the next few years. Cal. Employ. Dev. Dep't, 2016-2026 Statewide Employment Projections Highlights, <https://tinyurl.com/CALabMar> ("CA Long-Term" tab); Mass. Exec. Office of Labor & Workforce Dev., *Labor Market Information: Most Job Openings for Massachusetts*, <https://tinyurl.com/MALabMar>; see also Nina Liss-Schultz, *Assisted Living*, Mother Jones (2018) ("Researchers project a shortage of several hundred thousand home care workers in the coming decades."), <https://tinyurl.com/assist-living>.

⁴³ See, e.g., Christine Olsen et al., *Differences in Quality of Life in Home-Dwelling Persons and Nursing Home Residents with Dementia – A Cross-Sectional Study*, 16 BMC Geriatrics 137 (2016), <https://tinyurl.com/NursHomeQual>.

4. Public safety will suffer.

Finally, the risks to public safety that will result from terminating TPS confirm that a preliminary injunction is in the public interest. *See, e.g., Laclede Gas Co. v. St. Charles County*, 713 F.3d 413, 420 (8th Cir. 2013); *Operation Rescue Nat’l*, 273 F.3d at 202 (observing that public interests supporting injunction included “ensuring public safety and order”). The signatories to this brief are Attorneys General, most of whom serve as the chief law enforcement officers of *Amici* States. In that role, the Attorneys General are dedicated to ensuring that police and prosecutors can do their jobs to protect public safety. Terminating TPS for Haiti will make that job more difficult because Haitian TPS holders and their families will be less likely to report crime, even if they are victims, after they lose legal status.⁴⁴ Public safety suffers when law enforcement is unable to obtain evidence of crimes. Under these conditions, *Amici* States will have more difficulty enforcing their criminal codes, a core aspect of state sovereignty. *See, e.g., Alfred L. Snapp & Son, Inc. v. Puerto*

⁴⁴ Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, Dep’t of Urb. Plan. & Pol’y, U. of Ill. at Chi. 5 (May 2013), <https://tinyurl.com/InsecComm> (70 percent of undocumented immigrants reporting they are less likely to contact law enforcement if they were victims of a crime “for fear they will ask me or other people I know about our immigration status”); James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. Times (Oct. 9, 2017), <https://tinyurl.com/Queally> (Los Angeles law enforcement officials reporting precipitous drop in domestic violence reports in Latino community, attributed to victims’ fear of deportation).

Rico, 458 U.S. 592, 601 (1982) (recognizing that “the exercise of sovereign power” includes “the power to create and enforce a legal code”).

B. Only a nationwide injunction can remedy the widespread harms that will result from terminating TPS for Haiti.

The district court properly exercised its discretion when it enjoined DHS’s decision on a nationwide basis. The defendants contend that the district court erroneously “extended relief to parties not before it.” Br. 57. But “the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Two concerns underscore the need for nationwide relief here. First, the APA provides, and courts have long recognized, that the proper remedy for an APA violation is to set aside the rule or decision altogether. 5 U.S.C. § 706(2) (instructing that “the reviewing court shall . . . hold unlawful and *set aside* agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” (emphasis added)); *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (“[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.” (internal quotation marks omitted)); see *Pennsylvania v. President U.S.*, 930 F.3d 543, 575 (3d Cir. 2019) (“Congress determined that rule-vacatur was not

unnecessarily burdensome on agencies when it provided vacatur as a standard remedy for APA violations.”). Second, the need for uniformity in enforcement of immigration laws signifies that an injunction limited to the plaintiffs here “would detract[] from the integrated scheme of regulation created by Congress.” *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (internal quotation marks omitted) (affirming nationwide injunction against the Deferred Action for Parents of Americans and Lawful Permanent Residents program); see *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Security*, 908 F.3d 476, 511 (9th Cir. 2018) (affirming nationwide injunction against rescission of the Deferred Action for Childhood Arrivals (“DACA”) program), *cert. granted*, 139 S. Ct. 2779 (2019).

Here, based on ample evidence of the anticipated harms resulting from the Secretary’s decision, the district court determined that a nationwide injunction is in the public interest. It observed that limiting the injunction to the parties “would not adequately protect the interests of all stakeholders” given that plaintiffs “not only include residents of New York but also individuals and a nonprofit entity based in Florida.” SA 144; *cf. Pennsylvania*, 930 F.3d at 576 (holding that a nationwide injunction was “necessary to provide” plaintiff states “complete relief”). As the court further reasoned, this litigation “concerns a single decision on a nationwide policy,” not “case-by-case enforcement of a particular policy or statute.” SA 144; *cf. Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 438 (E.D.N.Y. 2018) (“Because

the decision to rescind the DACA program had a systemwide impact, the court will preliminarily impose a systemwide remedy.” (internal quotation marks omitted)), *cert. before judgment granted sub nom. McAleenan v. Vidal*, 139 S. Ct. 2773 (2019). For these reasons, the district court properly exercised its discretion by entering a nationwide injunction against terminating TPS for Haiti.

CONCLUSION

The Court should affirm the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Local Rules 29.1(c) and 32.1(4)(A) because the brief contains 6,296 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

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