

# 19-1685-cv

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## United States Court of Appeals for the Second Circuit

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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., NAISCHA VILME,

*Plaintiffs-Appellees,*

– v. –

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

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK (BROOKLYN)

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**BRIEF FOR *AMICI CURIAE* ANTI-DEFAMATION LEAGUE, JAPANESE AMERICAN CITIZENS LEAGUE, NATIONAL COUNCIL OF JEWISH WOMEN, LATINOJUSTICE PRLDEF, UNIDOSUS, NATIONAL IMMIGRATION LAW CENTER, UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, WOMEN OF REFORM JUDAISM, MEN OF REFORM JUDAISM, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AMERICAN FEDERATION OF TEACHERS AFL-CIO, SERVICE EMPLOYEES INTERNATIONAL UNION, COALITION ON HUMAN NEEDS, BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE, HISPANIC FEDERATION, AND HAITIAN WOMEN FOR HAITIAN REFUGEES IN SUPPORT OF PLAINTIFFS-APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT OF *AMICI CURIAE***

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* certify that *amici* are not publicly held corporations, do not have any parent corporations, and have not issued any shares of stock.

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**IDENTITY AND INTEREST OF *AMICI CURIAE***<sup>1</sup>

Pursuant to Federal Rule of Appellate Procedure 29, *Amici Curiae* Anti-Defamation League (“ADL”), Japanese American Citizens League, National Council of Jewish Women, LatinoJustice PRLDEF, UnidosUS, National Immigration Law Center, Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, Men of Reform Judaism, United Food and Commercial Workers International Union, American Federation of Teachers AFL-CIO, Service Employees International Union, Coalition on Human Needs, Bend the Arc: A Jewish Partnership for Justice, Hispanic Federation, and Haitian Women for Haitian Refugees respectfully submit this brief in support of Appellees.

Founded in 1913, ADL is an anti-hate organization that seeks to stop the defamation of the Jewish people, and fights to secure justice and fair treatment for all people. Its 25 regional offices throughout the United States provide materials, programs and services to promote civil rights and combat anti-Semitism and all forms of bigotry. Because of its history fighting discrimination, including prejudice toward immigrants and religious minorities, ADL can provide unique and important

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), ADL states that no party’s counsel authored this brief in whole or in part, and no party, party’s counsel, or other individual contributed money intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

insights for the Court in addressing and analyzing the evidence of animus that the District Court found to have been a motivating factor underlying the termination of Temporary Protected Status for Haitians. ADL has played an active role in responding to anti-immigrant fervor, including highlighting and critiquing the normalization of hate. ADL has a stake in this case, since fighting all forms of hate and discrimination is central to its mission.

The Japanese American Citizens League (“JACL”) is the nation’s oldest and largest Asian American civil rights organization whose mission is to secure and maintain the civil rights of Japanese Americans and all others who are victimized by injustice and bigotry. JACL was founded in 1929 when Japanese immigrants and Japanese Americans were subject to racist anti-immigrant rhetoric and discrimination which led to the mass incarceration of nearly 120,000 people of Japanese heritage during World War II.

The National Council of Jewish Women (“NCJW”) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW’s Resolutions state that NCJW resolves to work for “Comprehensive, humane, and equitable immigration, refugee, asylum, and naturalization laws, policies, and practices that facilitate and expedite legal status

and a path to citizenship for more individuals.” Consistent with its Principles and Resolutions, NCJW joins this brief.

LatinoJustice PRLDEF is a national non-profit civil rights legal defense fund that has advocated for and defended the constitutional rights of all Latinos to ensure their equal protection under the law since 1972. LatinoJustice has engaged in and supported law reform litigation opposing expanded federal immigration enforcement and challenging government policies and practices seeking to arbitrarily curtail and limit immigrants’ rights.

UnidosUS, formerly the National Council of La Raza (NCLR), is the nation’s largest Latino civil rights and advocacy organization. Through its unique combination of research, advocacy, programs, and a national network of nearly 300 community-based Affiliate organizations across the country, UnidosUS simultaneously challenges the social, economic, and political barriers that affect Latinos in the United States. Since its founding in 1968, UnidosUS has contributed to a stronger America by elevating the voice of Latinos, and defending and advancing the community’s concerns. Today, UnidosUS remains steadfast in its mission to realize a day where all Latinos thrive and their contributions are fully recognized.

National Immigration Law Center (“NILC”) is the primary national organization in the United States exclusively dedicated to defending and advancing

the rights and opportunities of low-income immigrants and their families. Over the past 35 years, NILC has won landmark legal decisions protecting fundamental rights, and advanced policies that reinforce our nation's values of equality, opportunity, and justice. NILC's interest in the outcome of this case arises out of its efforts to defend against the racial animus, discriminatory impact, and xenophobic nature of the Executive's immigration policies as well as its concern for the direct and indirect harms to immigrant communities when the Executive takes unilateral action to exclude immigrants.

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis; Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world; and Men of Reform Judaism come to this issue out of their longstanding and deep commitment to just, compassionate, and humane immigration policy that reflects the basic principles of human dignity and human rights. As Jews, they have known the experience of both fleeing persecution and being "strangers in strange lands," making them especially sensitive to the plight of those seeking refuge today.

The United Food and Commercial Workers International Union ("UFCW") represents 1.3 million workers, the majority of whom work in the retail, meat

packing, and food processing industries. UFCW's members and their loved ones include Haitian TPS-holders who have been in this country for many years working, building their families, and paying taxes. The UFCW supports these members, who contribute to the health of our union and to the U.S. economy.

The American Federation of Teachers, AFL-CIO represents 1.7 million members who work as educators, faculty, paraprofessionals, health care workers and state employees. AFT has a long standing interest in participating in litigation to vindicate the rights of immigrants and their families.

The Service Employees International Union ("SEIU") is a labor organization of approximately two million working people in the United States and Canada. SEIU's members are united by the belief in the dignity and worth of workers and the services they provide and dedicated to improving the lives of workers and their families and creating a more just and humane society. SEIU's members include foreign-born U.S. citizens, lawful permanent residents, and immigrants authorized to work in the United States, including immigrant workers in Temporary Protected Status (TPS) from Haiti. Many of SEIU's members have mixed-status families. SEIU's commitment to racial and immigrant justice, reflected in its policies and programs, is deep and long-standing. SEIU's mission statement, embedded in its Constitution, states: "We believe our strength comes from our unity, and that we must not be divided by forces of discrimination based on gender, race, ethnicity,

religion, age, physical ability, sexual orientation, or immigration status.” SEIU represents diverse immigrant workers across North America and, consistent with its core mission statement and Constitution, works to enforce equality and non-discrimination in the workplace and in our country’s institutions.

The Coalition on Human Needs (“CHN”) is an alliance of more than 100 national-scope organizations, including faith-based groups, human service providers, labor, civil rights, policy experts and other advocates, whose mission since 1981 is to protect and advance the interests of low-income and vulnerable people in the U.S. Recognizing that discrimination on the basis of race, ethnicity, religion, or immigrant status is a pernicious contributor to poverty and inequality, CHN has throughout its existence opposed discriminatory policies and supported the protections of law and policy to root out discrimination in the design or implementation of federal programs.

Bend the Arc: A Jewish Partnership for Justice, is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are compelled to create justice and opportunity for Americans.

Founded in 1990, Hispanic Federation (“HF”) seeks to empower and advance Hispanic communities, support Hispanic and immigrant families, and strengthen Latino institutions through policy advocacy and programs in the areas of education,



health, immigration, civic engagement, economic empowerment, & the environment. Historically, Latinos in the U.S. have been victims of social and institutional racism and discrimination as well as anti-immigrant sentiment (whether immigrants or not), affecting their livelihoods, health, and social mobility. Between 2012 and 2015, more than one in five suspected hate crimes victimized Latinos (according to National Crime Victimization Survey data). By law, the TPS redesignation process must be devoid of political or electoral considerations. Hispanic Federation contends that it should also be free from racist and discriminatory ideologies.

Haitian Women for Haitian Refugees (“HWHR”) was founded in 1992 to respond to the human needs of Haitian refugees and immigrants in the U.S., fleeing persecution. Through education, community organizing, leadership development and collective action, HWHR members empower themselves as they struggle for social and economic justice. HWHR conducts leadership, organizing and worker education trainings for adult literacy learners where Haitian women make global connections to local realities. Haitian Women for Haitian Refugees (HWHR) and Haitian Lawyers Association joined NAACP in a lawsuit against the U.S. Department of Homeland Security, challenging the wrongful termination of Temporary Protective Status (“TPS”) for Haitian immigrants. As a co-plaintiff of this lawsuit, it is the organization’s position that TPS for Haitians was terminated on

the basis of racial discrimination. Members of HWHR's TPS Committee are working together with the National TPS Alliance to protect TPS and to fight for a permanent solution through a TPS to Residency campaign.

## INTRODUCTION

While there is no constitutional protection requiring the United States to afford Temporary Protected Status ("TPS") to those deemed worthy of our nation's protection, there is a clear constitutional prohibition on discrimination in the implementation of government policies based on race, national origin, and other protected characteristics.<sup>2</sup> *Amici* submit that ample evidence of racial animus exists to support the District Court's decision that the termination of TPS protection for Haitians was discriminatory and therefore contrary to fundamental equal protection principles.

According to *amicus* ADL's report, *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.*, "[a]nti-immigrant fervor, once relegated to more extreme quarters, has been increasingly mainstreamed over the last ten years."<sup>3</sup> Anti-immigrant groups have shifted the boundaries of what is "acceptable within political action and public discourse."<sup>4</sup> Individuals with close ties to these groups and other

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<sup>2</sup> U.S. Const. Am. V. This is the case even in the immigration context. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>3</sup> Anti-Defamation League, *Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.* (Nov. 2018), <https://www.adl.org/media/12249/download>.

<sup>4</sup> *Id.*

advocates for anti-immigrant policies have attained positions of influence in the current Administration of President Donald J. Trump, distorting the historical understanding of conservatism in the political debate.<sup>5</sup> The result of this, combined with the current Administration's rhetoric, has been a pervasive acceptance and normalization of racist, xenophobic, and anti-immigrant sentiment, which has impacted government policy.

President Trump has repeatedly made overtly prejudiced statements, as well as numerous coded invocations of racial animus, some of which are eerily reminiscent of dehumanizing language used in the darkest times of modern history. The evidence also shows that the President is well-aware of the true meaning of the language he has used, and in particular the "America First" slogan, which was used to advance a racist, anti-Semitic agenda. The President's coded invocations of racial animus have been echoed and implemented by key members of this Administration responsible for TPS programs, including both the former-Acting Department of Homeland Security ("DHS") Secretary Elaine Duke and former DHS Secretary Kirstjen Nielsen, indicating they are indeed the motivating principles underlying these government actions. It is in this context that the Court must examine the Trump Administration's decision to terminate TPS for Haitians.

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<sup>5</sup> *Id.*

Given this disturbing evidence, the District Court correctly recognized that there is both direct and circumstantial evidence that a discriminatory purpose was a motivating factor behind the termination of TPS for Haitians, in violation of the equal protection component of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

## ARGUMENT

### **I. The Administration's Decision to Terminate TPS For Haitians Was Unlawfully Motivated by a Discriminatory Purpose.**

The record in this case is replete with evidence from this Administration that race and nationality were motivating factors in the decision to terminate TPS for Haitians. The Administration has repeatedly communicated a preference to exclude non-white and non-European Immigrants.

#### **A. President Trump Has Specifically and Repeatedly Demonstrated Animus Towards Haitians.**

At the now infamous January 2018 immigration-focused meeting with lawmakers in the Oval Office, President Trump reportedly asked, “[w]hy are we having all these people from shithole countries come here?”<sup>6</sup> referring to several predominantly non-white countries, including Haiti. President Trump went on to

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<sup>6</sup> Josh Dawsey, *Trump Derides Protections for Immigrants from ‘shithole’ countries*, THE WASHINGTON 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?noredirect=on&utm\\_term=.17eae1fb0eb5](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?noredirect=on&utm_term=.17eae1fb0eb5).

ask, specifically, “[w]hy do we need more Haitians?” and announced that “immigrants from that country must be left out of any deal.”<sup>7</sup> The President then suggested that the United States should instead focus on bringing more people “from countries such as Norway,”<sup>8</sup> denigrating Haitians and exhibiting a clear preference for white-European immigrants over non-white and non-European immigrants.

President Trump has demonstrated animus specifically towards Haitians on other occasions as well. Prior to taking office, during the 2016 presidential campaign, he also described Haiti as a “shithole.”<sup>9</sup> And after assuming the presidency, in December 2017, President Trump reportedly said that Haitians “all have AIDS.”<sup>10</sup>

While President Trump denied using the term “shithole” at the January 2018 meeting, he has never expressed any desire to welcome or attract immigrants from Haiti or other predominantly non-white and non-European countries. To the contrary, the opposite message is frequently conveyed. Although Senators Lindsay Graham and Richard Durbin confirmed that the President used the phrase “shithole countries,” former DHS Secretary Nielsen denied hearing any specific slurs at the

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Alex Daugherty, *Trump called Haiti a ‘sh—hole’ campaigning in Miami in 2016, Woodward’s book says*, THE MIAMI HERALD (Sept. 11, 2018).

<sup>10</sup> Michael D. Shear and Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, THE NEW YORK TIMES (Dec. 23, 2017).

meeting in question, but nevertheless admitted that the President used “tough language” while discussing the topic.<sup>11</sup> Former DHS Secretary Nielsen was considered “complicit” by some commentators based on her response.<sup>12</sup> Since her departure from government, however, Nielsen has changed her position.<sup>13</sup>

The “shithole” comment was widely understood to be an expression of racial animus, an expression consistent with the Administration’s comments reflecting a racially discriminatory preference for white-European immigrants.<sup>14</sup> World leaders

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<sup>11</sup>Tal Kopan and Veronica Stracqualursi, *DHS Secretary says Trump used ‘tough’ language on immigration but denies hearing specific slurs*, CNN (Jan. 16, 2018), <https://www.cnn.com/2018/01/16/politics/kirstjen-nielsen-dhs-secretary-hearing/index.html>.

<sup>12</sup> *Id.*

<sup>13</sup> Discussing the reason for her departure from the agency, former Secretary Nielsen said “she left office because ‘saying no’ and refusing to do things that others in the administration wanted was ‘not going to be enough.’” Geneva Sands, *Kirstjen Nielsen says she left DHS because ‘saying no’ wasn’t enough*, CNN (Oct. 22, 2019), <https://www.cnn.com/2019/10/22/politics/kirstjen-nielsen-speech/index.html>.

Nielsen explained, in October 2019, that “[t]here were a lot of things that, there were those in the administration who thought that we should do, and just as I spoke truth to power from the very beginning, it became clear that saying no, and refusing to do it myself was not going to be enough, so it was time for me to offer my resignation.” *Id.* Since Nielsen’s departure, there has been recurring turnover in DHS. The same month that Nielsen made these comments, Kevin McAleenan, who replaced former Secretary Nielsen, announced his own departure from the agency. *See* Molly O’Toole and Molly Hennessy-Fiske, *Homeland Security acting head Kevin McAleenan resigns, leaving department at war with itself*, LOS ANGELES TIMES (Oct. 11, 2019).

<sup>14</sup> President Trump has stated, in a joint press conference with Theresa May, the Prime Minister of the United Kingdom, that he views immigration as “bad for Europe,” and that it “is very negative for Europe.” *See, Full Text: Donald Trump-Theresa May Press Conference*, POLITICO (July 13, 2018), <https://www.politico.com/story/2018/07/13/full-text-theresa-may-trump-visit->

condemned President Trump's comment and interpreted it as a preference for white-European immigrants over non-white and non-European immigrants. For example, United Nations human rights spokesperson Rupert Colville reasoned, "[y]ou cannot dismiss entire countries and continents as 'shitholes,' whose entire populations, who are not white, are therefore not welcome."<sup>15</sup>

B. President Trump's Animus Towards Haitians Is Consistent With His Views Towards Other Non-White Immigrants.

The President's disparaging remarks against Haitians are also congruous with numerous other statements he has made denigrating non-white, non-European immigrants. For example, he has characterized Mexican immigrants as "rapists," accusing them of "bringing crime" to the United States,<sup>16</sup> even though various studies have shown that "immigrants—regardless of where they are from, what

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transcript-718569. President Trump has also stated that "[a]llowing the immigration to take place in Europe is a shame," and that it has "changed the fabric of Europe and, unless you act very quickly, it's never going to be what it was and I don't mean that in a positive way." See Tom Newton Dunn, *Migrants 'Harm UK' Donald Trump Says Britain is 'Losing its Culture' Because of Immigration*, THE SUN (July 12, 2018), <https://www.thesun.co.uk/news/6766947/donald-trump-britain-losing-culture-immigration/>.

<sup>15</sup> Ed O'Keefe and Anne Gearan, *Trump Condemned for 'Shithole' Countries Remark, Denies Comment but Acknowledges 'Tough' Language*, THE WASHINGTON POST (Jan. 13, 2018), [https://www.washingtonpost.com/politics/trump-acknowledges-tough-language-but-appears-to-deny-shithole-remark/2018/01/12/c7131dae-f796-11e7-beb6-c8d48830c54d\\_story.html](https://www.washingtonpost.com/politics/trump-acknowledges-tough-language-but-appears-to-deny-shithole-remark/2018/01/12/c7131dae-f796-11e7-beb6-c8d48830c54d_story.html).

<sup>16</sup> Michelle Ye Hee Lee, *Donald Trump's false comments connecting Mexican immigrants and crime*, THE WASHINGTON POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>.

immigration status they hold, and how much education they have completed—are less likely than native-born citizens to commit crimes or become incarcerated.”<sup>17</sup>

While a candidate for President, Trump also released a public, written statement asserting “[t]he United States has become a dumping ground for Mexico and, in fact, for many other parts of the world.”<sup>18</sup> The President also compared immigrants and refugees to snakes who “fatally bite[.]” those who take them in and give them care,<sup>19</sup> and referred to particular categories of immigrants as “animals”<sup>20</sup> and an infestation.<sup>21</sup> This language is reminiscent of Nazi descriptions of Jews as rats and

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<sup>17</sup> Anti-Defamation League, *Myths and Facts About Immigrants and Immigration*, <https://www.adl.org/resources/fact-sheets/myths-and-facts-about-immigrants-and-immigration>. In fact, “there is no evidence immigrants commit more crime than native-born Americans.” See Michelle Ye Hee Lee, *supra* note 16.

<sup>18</sup> Hunter Walker, *Donald Trump just released an epic statement raging against Mexican immigrants and ‘disease’*, BUSINESS INSIDER (July 6, 2015), <https://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7>.

<sup>19</sup> Eli Rosenberg, *‘The Snake’: How Trump appropriated a radical black singer’s lyrics for immigration fearmongering*, THE WASHINGTON POST (Feb. 24, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/02/24/the-snake-how-trump-appropriated-a-radical-black-singers-lyrics-for-refugee-fearmongering/>.

<sup>20</sup> Aliza Luft and Daniel Solomon, *How Dangerous is it When Trump Calls Some Immigrants ‘animals’?*, THE WASHINGTON POST (May 25, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/25/how-dangerous-is-it-when-trump-calls-some-immigrants-animals/?utm\\_term=.ee0ae5cf2a1d](https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/25/how-dangerous-is-it-when-trump-calls-some-immigrants-animals/?utm_term=.ee0ae5cf2a1d).

<sup>21</sup> Abigail Simon, *People Are Angry President Trump Used This Word to Describe Undocumented Immigrants*, TIME (June 19, 2018), <http://time.com/5316087/donald-trump-immigration-infest/>.



vermin prior to the Holocaust<sup>22</sup> and Hutu extremists' description of Tutsis as snakes and cockroaches in the lead-up to the Rwandan genocide.<sup>23</sup>

Such dehumanizing language “grants legitimacy to those who do believe that certain others are inherently threatening, dangerous and ought to be eliminated from the community.”<sup>24</sup> Scholarship indicates that, “how local leaders respond to dehumanizing propaganda has the power to either encourage or disrupt these narratives and their impact.”<sup>25</sup>

C. President Trump's Racial Animus Has Been Translated Into Discriminatory Policy.

The demonization and degradation of non-white and non-European immigrants cloaked with the legitimacy of the Office of the President is disconcerting, and only worsened by the evidence that this rhetoric has influenced actual policy,<sup>26</sup> including demonstrably through actions specifically targeting

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<sup>22</sup> Defining the Enemy, Holocaust Encyclopedia, <https://encyclopedia.ushmm.org/content/en/article/defining-the-enemy> (last visited Feb. 5, 2019).

<sup>23</sup> Propaganda and Practice, Human Rights Watch, <https://www.hrw.org/legacy/reports/1999/rwanda/Geno1-3-10.htm> (last visited Feb. 5, 2019).

<sup>24</sup> Luft, *supra* note 20.

<sup>25</sup> *Id.*

<sup>26</sup> As another symbolic example, in February 2018, U.S. Citizenship and Immigration Services (“USCIS”), the agency responsible for writing recommendations on TPS decisions, removed the reference to the United States as a “nation of immigrants” from its mission statement. L. Francis Cissna, *USCIS Director Francis Cissna on New Agency Mission Statement*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Feb. 22, 2018), <https://www.uscis.gov/news/news->

Haitians. Notably, President Trump took the step of terminating TPS protection for Haitians against the advice of “[s]enior State Department officials and career diplomats.”<sup>27</sup> Officials and diplomats “repeatedly warned the Trump administration that taking away legal protections for immigrants from El Salvador, Honduras, and Haiti would put national security, foreign relations, and the immigrants’ American-born children at risk, according to internal State Department documents.”<sup>28</sup> Furthermore, Thomas Shannon, the senior foreign service official in the State Department at the time, “appealed to [then-Secretary of State Rex] Tillerson to renew protections for immigrants from the three countries.”<sup>29</sup> In a memo to Tillerson, Shannon stated, that “[t]hough conditions in Haiti relating to the 2010 earthquake had improved, for example, housing shortages and public health crises

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releases/uscis-director-l-francis-cissna-new-agency-mission-statement; see also Carol Kuruvilla, *U.S. Immigration Agency Changes Mission Statement to Reflect ‘America First’ Agenda*, HUFFPOST (Feb. 27, 2018), [https://www.huffingtonpost.com/entry/immigration-uscis-mission-statement\\_us\\_5a8f4884e4b03b55731a411c](https://www.huffingtonpost.com/entry/immigration-uscis-mission-statement_us_5a8f4884e4b03b55731a411c). The change occurred under the leadership of President Trump-appointee, L. Francis Cissna, who also played a key role in the TPS termination decisions. See generally Resp. Br. at 27–28. Former USCIS director Leon Rodriguez described the change to the USCIS mission as a “particularly sad turn of history.” Miriam Jordan, *Is America a ‘Nation of Immigrants’? Immigration Agency Says No*, THE NEW YORK TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/us/uscis-nation-of-immigrants.html>.

<sup>27</sup> Nicole Narea, *Exclusive: State Department officials warned Trump not to revoke protections for immigrants*, VOX (Nov. 7, 2019), <https://www.vox.com/policy-and-politics/2019/11/7/20950689/trump-tps-temporary-protected-status-el-salvador-haiti-honduras-state-department-report-senate>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

remained, particularly in the camps for internally displaced individuals where there were cholera outbreaks.”<sup>30</sup>

Further demonstrating the targeting of Haitians, “American authorities rejected more political asylum requests from Haitians than those from any other national group,” and “[a]mong those who made it to American shores, Haitians were disproportionately incarcerated.”<sup>31</sup> And, in January 2018, the Trump Administration revoked Haiti’s eligibility for a small number of temporary visas to do agricultural or seasonal work.<sup>32</sup> In January 2018, Haitians were subject to further governmental scrutiny. In what has been reported as an “unprecedented move,” internal USCIS emails “indicat[ed] that the agency ha[d] made inquiries into the Haitian community’s criminal history” in order to justify the termination of TPS.<sup>33</sup> Those USCIS emails “reveal[ed] that the agency want[ed] to know how many of the 58,000 Haitians enrolled in the Temporary Protected Status program are taking advantage of public benefits, which they are not eligible to receive”—a move decried by

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<sup>30</sup> *Id.*

<sup>31</sup> Simon Romero, *Trump Disparaged Their Home Country. Here’s What Miami’s Haitian’s Think*, THE NEW YORK TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/us/miami-haitians-trump.html>.

<sup>32</sup> *Id.*

<sup>33</sup> Jacqueline Charles and Franco Ordonez, *Trump Administration Seeking Criminal History of Haitians*, THE MIAMI HERALD (May 9, 2017), <https://www.miamiherald.com/news/nation-world/world/americas/haiti/article149456234.html>.

members of the Congressional Black Caucus as one that “defies both the letter and spirit of the law, while corroding the values of our nation of immigrants.”<sup>34</sup>

The targeting of Haitian individuals continued most recently in August 2019, when the Trump Administration ended the Haitian Family Reunification Parole Program, program allowing Haitians eligible to receive a green card after a two year waiting period to spend that waiting period in the United States with relatives.<sup>35</sup> USCIS announced on August 2, 2019 that it was ending this program and “will now decide whether to allow Haitians to travel to the U.S. to await their lawful permanent resident status on a case-by-case and humanitarian basis.”<sup>36</sup> These actions, seen in context with the aforementioned statements by President Trump, are the policy manifestations of racial animus.

## **II. The Administration’s Pervasive Coded and Symbolic Invocations of Racial Animus Further Demonstrate the TPS Termination For Haitians Was Unlawfully Motivated.**

The District Court focused its decision, in part, on former-Acting DHS Secretary Duke’s statement that her TPS decisions were consistent with an “America First” approach to TPS policy. *Amici* believe it is important to provide context that

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<sup>34</sup> *Id.*

<sup>35</sup> Jacqueline Charles, *Trump to Haitians awaiting green cards: You Can’t Come to the U.S., Wait in Haiti*, THE MIAMI HERALD (Aug. 2, 2019), <https://www.miamiherald.com/news/nation-world/world/americas/haiti/article233447842.html>

<sup>36</sup> *Id.*

will help the Court understand the term “America First” and the significance of its use by the Administration in the current immigration debate. The “America First” slogan invokes a long and troubling history of racial animus, which was known to the President when he and other senior officials in the Administration employed the phrase.

A. The “America First” Slogan Used By the Administration Has a Deep History of Racism and Anti-Semitism.

The policy ideals that fall within “America First” harken back to a dangerous past. Since at least the early 1900s, “America First” has been used to propagate anti-immigrant sentiment and racial animus. In the 1920s, it was used prominently by the KKK. Binghamton, New York was the site of a KKK “America First” Parade where banners reading “America First | One God | One Country | One Flag” were openly displayed.<sup>37</sup> In January 1922, a KKK parade in Alexandria, Louisiana bore two flaming crosses and banners with the slogans “America First” and “White Supremacy.”<sup>38</sup> Another variation of the slogan appeared in an “Imperial Proclamation” submitted to Congress as evidence during a 1921 hearing on the

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<sup>37</sup> Binghamton, NY: Ku Klux Klan stages an ‘America First’ parade in Binghamton, NY. Photograph, Getty Images. (1920s), <https://www.gettyimages.com/detail/news-photo/ku-klux-klan-stages-an-america-first-parade-in-binghamton-news-photo/514702614>.

<sup>38</sup> Sarah Churchwell, *End of the American Dream? The dark History of ‘America First’*, THE GUARDIAN (Apr. 21, 2018), <https://www.theguardian.com/books/2018/apr/21/end-of-the-american-dream-the-dark-history-of-america-first>.

KKK's activities.<sup>39</sup> The phrase was also used in KKK literature and speeches to foment anti-immigrant sentiment. For example, in 1923 a KKK speaker proclaimed, "I stand for America first, last and always . . . I am opposed to any organization which tries to bring in foreign and alien ideals."<sup>40</sup>

The "American First" slogan was revived during the World-War II era in support of right-wing groups that backed Nazi Germany or otherwise opposed U.S. intervention in the war.<sup>41</sup> The most prominent figure to invoke the "America First" ideology at that time was aviator Charles Lindbergh. Lindbergh was among the leadership of the America First Committee, an organization whose chief mission was opposing U.S. intervention in World War II.<sup>42</sup> Lindbergh was also a notorious anti-Semite and defender of the Nazi party. In an infamous speech at an America First Rally in Des Moines Iowa in September 1941, he declared that "the British and the Jewish races . . . for reasons which are not American, wish to involve us in the war."<sup>43</sup>

After the attack on Pearl Harbor and the United States' entry into World War II, the "America First" phrase faded from mainstream use. In the decades that

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<sup>39</sup> David Emery, *Fact Check: Was 'America First' a Slogan of the Ku Klux Klan?*, SNOPEs (Feb. 9, 2018), <https://www.snopes.com/fact-check/america-first-ku-klux-klan-slogan/>.

<sup>40</sup> *Id.*

<sup>41</sup> Susan Dunn, *Trump's 'America First' has ugly echoes from U.S. history*, CNN (Apr. 28, 2016), <https://www.cnn.com/2016/04/27/opinions/trump-america-first-ugly-echoes-dunn/>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

ensued the ideology and phrase were “kept alive by underground fascist movements”<sup>44</sup>—until President Trump adopted the slogan and made it the cornerstone of his presidential campaign and this Administration.

Indeed, the President elevated the phrase in his inaugural address in 2017 when he promised that “[f]rom this day forward, a new vision will govern our land. From this day forward, it’s going to be—always—America First.”<sup>45</sup> In his first State of the Union Address in 2018, President Trump reiterated a commitment to this principle, both as a legislative philosophy and as the actual policy of his new Administration, promising to “fulfill[ ] [his] ironclad pledge to only sign a bill that puts America first.”<sup>46</sup> Just a few months later, in March 2018, “[i]n her personal notes to herself, anticipating the impending cancellation of TPS for over 250,000 people from El Salvador, Honduras, and Nicaragua,”<sup>47</sup>—terminations which she reviewed concurrently with TPS for Haiti—then-Acting DHS Secretary Duke wrote: “[t]he TPS program must end . . . [t]his conclusion is the result of an America first

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<sup>44</sup> Churchwell, *supra* note 38.

<sup>45</sup> David Von Drehle, *Donald Trump’s Unprecedented, Divisive Speech*, TIME (Jan. 20, 2017), <http://time.com/4641547/inauguration-2017-donald-trump-america-first/>.

<sup>46</sup> President Donald J. Trump’s State of the Union Address (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>.

<sup>47</sup> *Documents Reveal How Trump’s Racist “America First” Agenda Pressured DHS to End Humanitarian Program*, NATIONAL TPS ALLIANCE, <https://www.nationaltpsalliance.org/tps-lawsuit/government-documents-tell-all-about-trump-administration-and-tps>.

view of the TPS decision.”<sup>48</sup> In sum, this administration has expressed commitment to “America First,” a phrase carrying a pernicious and well-documented history as an expression of racial animus.

B. President Trump Has Demonstrated An Understanding of the History and Meaning of the Phrase “America First.”

During the presidential campaign for the 2000 election, then-Mr. Trump decried the use of “America First” as the slogan of Reform Party presidential candidate Patrick Buchanan, calling him a “Hitler lover” and “the choice of ‘the really staunch-right wacko vote.’”<sup>49</sup> However, he later adopted that same phrase as his own. During the 2016 presidential election, then-candidate Trump was asked directly if he was familiar with the history of the phrase “American First.” He responded, “I was familiar, but it wasn’t used for that reason. It was used as a brand-new, very modern term.”<sup>50</sup> President Trump’s claim to redefine a term that “ha[d]

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<sup>48</sup> See JA1341.

<sup>49</sup> Ron Elving, *Trump Vows Policy Vision Of ‘America First,’ Recalling Phrase’s Controversial Past*, NPR (Jan. 21, 2017), <https://www.npr.org/2017/01/21/510877650/trump-vows-policy-vision-of-america-first-recalling-phrases-congtroversial-past>. See also Sean Illing, *How “America First” ruined the “American dream”*: Author Sarah Churchwell on the entangled history of America’s most loaded phrases, VOX (Oct. 22, 2018), <https://www.vox.com/2018/10/22/17940964/america-first-trump-sarah-churchwell-american-dream> (Churchwell noting that the Trump campaign “chose the phrase ‘America First’ pretty late in the campaign, and it seem[s] pretty deliberate,” noting Trump’s comments on Buchanan’s use of the phrase in the 1990’s to “curry favor with the right-wing wacko nut jobs . . .”).

<sup>50</sup> *Transcript: Donald Trump on NATO, Turkey’s Coup Attempt and the World*, THE NEW YORK TIMES (July 21, 2016),



been largely banished from respectable discourse”<sup>51</sup> rang hollow for many in mainstream society who saw it as a signal of the President’s world view and policy intentions.<sup>52</sup>

In recent years, many interested stakeholders provided history and context about the phrase to the President, illuminating why its use is offensive.<sup>53</sup> Professor Laurel Leff of Northeastern University has said that Trump’s “embrace” of the America First slogan “is either ahistorical or, more frighteningly, is picking up on anti-Semitic sentiment.”<sup>54</sup> *Amicus* ADL wrote to the President explaining that, “for many Americans, the term ‘America First’ will always be associated with and tainted by this history . . . choosing a call to action historically associated with incivility and intolerance seems ill-advised.”<sup>55</sup> The Administration’s ongoing use of the phrase

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<https://www.nytimes.com/2016/07/22/us/politics/donald-trump-foreign-policy-interview.html>.

<sup>51</sup> Eli Lake, *Trump’s New Slogan Has Old Baggage From Nazi Era*, BLOOMBERG (Apr. 27, 2016), <https://www.bloomberg.com/opinion/articles/2016-04-27/trump-s-america-first-slogan-has-nazi-era-baggage>.

<sup>52</sup> See Peter Baker, ‘Use That Word!’: Trump Embraces the ‘Nationalist’ Label, THE NEW YORK TIMES (Oct. 23, 2018), <https://www.nytimes.com/2018/10/23/us/politics/nationalist-president-trump.html>.

<sup>53</sup> Press Release, Anti-Defamation League, ADL Urges Donald Trump to Reconsider “America First” in Foreign Policy Approach (Apr. 28, 2016), <https://www.adl.org/news/press-releases/adl-urges-donald-trump-to-reconsider-america-first-in-foreign-policy-approach#.WIJ187YrKV4>; Dina Kraft, *In Trump’s push for ‘America First,’ troubling echoes of anti-Semitic chapter*, THE TIMES OF ISRAEL (Jan. 29, 2017), <https://www.timesofisrael.com/trumps-push-for-america-first-takes-dark-page-from-anti-semitic-crusade/>.

<sup>54</sup> *Id.*

<sup>55</sup> Press Release, Anti-Defamation League, *supra* note 53.

“America First” does not appear brand new or modern. On the contrary it conveys the same troubling sentiment of its past, which is particularly disconcerting coming from the White House.

C. The President Has Been Unwilling to Forcefully and Timely Dissociate from White Supremacists.

The President’s unwillingness to forcefully and timely reject white supremacists during his presidency and previously, reinforces the bias at the heart of the TPS terminations. In August 2017, after a “Unite the Right” rally in Charlottesville, Virginia during which “[m]archers threw Nazi salutes as they waved swastika flags, proudly wore swastika pins and shirts, and shouted “sieg heil!”<sup>56</sup> President Trump failed to emphatically denounce the supremacist rally. Instead of immediately condemning the displays of hatred, bigotry, and violence, he stayed silent on the matter for several days. He then proclaimed that “there is blame on both sides,” adding, “[w]hat about the ‘alt-left’?”<sup>57</sup> Former DHS Secretary Nielsen echoed the President’s comments, stating that there were, in fact, “very fine people

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<sup>56</sup> Anti-Defamation League, Anti-Semitism on Full Display in Charlottesville (Aug. 15, 2017), <https://www.adl.org/blog/anti-semitism-on-full-display-in-charlottesville>.

<sup>57</sup> Dan Merica, *Trump says both sides to blame amid Charlottesville backlash*, CNN (Aug. 16, 2017), <https://www.cnn.com/2017/08/15/politics/trump-charlottesville-delay/index.html>; Glenn Thrush & Maggie Haberman, *Trump is Criticized for Not Calling Out White Supremacists*, THE NEW YORK TIMES (Aug. 12, 2017), <https://www.nytimes.com/2017/08/12/us/trump-charlottesville-protest-nationalist-riot.html>.

on both sides.”<sup>58</sup> This is in stark contrast to the public comments of many other prominent political figures, including then-Speaker of the House of Representatives Paul Ryan, who called white supremacy “repulsive” and said “there can be no moral ambiguity.”<sup>59</sup> Republican Senator Marco Rubio commented that the “white nationalists in Charlottesville were ‘100% to blame,’” adding that “[t]he #WhiteSupremacy groups will see being assigned only 50% of blame as a win . . . We can not allow this old evil to be resurrected.”<sup>60</sup>

Questions about then-candidate Trump’s hostility toward minorities also pre-date the 2016 election. When prominent white supremacist David Duke, the former “Grand Wizard” of the KKK, endorsed him and told listeners on a radio show that a vote for anyone else would be “treason to your heritage,”<sup>61</sup> Trump’s reaction was troubling. In August 2016, asked whether he repudiates David Duke’s endorsement,<sup>62</sup> he responded “[s]ure . . . if that would make you feel better, I would

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<sup>58</sup> Lydia O’Connor, *Kirstjen Nielsen Doubles Down on Trump’s Infamous ‘Both Sides’ Comment*, HUFFPOST (July 19, 2018), [https://www.huffingtonpost.com/entry/kirstjen-nielsen-both-sides-charlottesville\\_us\\_5b50c67ce4b0fd5c73c33f7e](https://www.huffingtonpost.com/entry/kirstjen-nielsen-both-sides-charlottesville_us_5b50c67ce4b0fd5c73c33f7e).

<sup>59</sup> Michael D. Shear and Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames ‘Both Sides’*, THE NEW YORK TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html>.

<sup>60</sup> *Id.*

<sup>61</sup> Evan Osnos, *Donald Trump and the Ku Klux Klan: A History*, THE NEW YORKER (Feb. 29, 2016), <https://www.newyorker.com/news/news-desk/donald-trump-and-the-ku-klux-klan-a-history>.

<sup>62</sup> *Id.*

certainly repudiate.”<sup>63</sup> After considerable time and public pressure, President Trump did ultimately renounce Duke, but his message of tacit encouragement had already been conveyed. In fact, after President Trump’s extended silence regarding Charlottesville, Duke said of President Trump: “we are going to fulfill the promises of Donald Trump . . . because he said he’s going to take our country back.”<sup>64</sup>

The President’s unwillingness to disassociate from white supremacists continues even today, through his administration’s continued employment of individuals known to promote white supremacist ideology. On November 12, 2019, the Southern Poverty Law Center (“SPLC”) published an article<sup>65</sup> covering its review of over 900 emails from Stephen Miller, President Trump’s senior immigration advisor, to editors at Breitbart “to shape its coverage of race and immigration.”<sup>66</sup> Among these emails—more than 80% of which were reportedly on

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<sup>63</sup> *Id.*

<sup>64</sup> Libby Nelson, “*Why we voted for Donald Trump*”: David Duke explains the white supremacist Charlottesville protests, VOX (Aug. 12, 2017), [https://www.vox.com/2017/8/12/16138358/charlottesville-protests-david-duke-kkk](https://www.vox.com/2017/8/12/16138358/charlottesville-protests-david-duke-<u>kkk</u>).

<sup>65</sup> Michael Edison Hayden, *Stephen Miller’s Affinity for White Nationalism Revealed in Leaked Emails*, Southern Poverty Law Center, (Nov. 12, 2019), <https://www.splcenter.org/hatewatch/2019/11/12/stephen-millers-affinity-white-nationalism-revealed-leaked-emails>.

<sup>66</sup> Michelle Goldberg, *Stephen Miller Is a White Nationalist. Does It Matter?*, THE NEW YORK TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/opinion/stephen-miller-white-nationalism.html>.

the subjects of race or immigration—Miller “pushed racist immigration stories.”<sup>67</sup> These emails—from 2015 and 2016, when Miller was still an aide to then-Senator Jeff Sessions—reveal “that Miller was steeped in white nationalism before he joined the White House, where he’s had an opportunity to put his racist views into practice.”<sup>68</sup> In one of the leaked emails, Miller “argued against Mexican hurricane victims receiving temporary protected status,” cautioning Breitbart editors that “T.P.S. is everything,”<sup>69</sup> and citing a link to a VDARE story by Steve Sailer, “an anti-immigration activist who traffics in discredited race science.”<sup>70</sup> The recipient of those emails, a former reporter for Breitbart, has since concluded that: “What Stephen Miller sent to me in those emails has become policy at the Trump administration.”<sup>71</sup>

Following the revelation of Miller’s promotion of white supremacist ideology, Jonathan Greenblatt, CEO and National Director of *Amicus*, said to the New York Times that “[t]he evidence is incontrovertible” that Miller has white nationalist

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<sup>67</sup> Hayden, *supra* note 65.

<sup>68</sup> Goldberg, *supra* note 66. Miller’s emails also include recommending “The Camp of the Saints,” a “racist French novel . . . popular among white nationalists and neo-Nazis”; suggesting Breitbart source information from an “American Renaissance article by white nationalist Jared Taylor celebrat[ing] the [DOJ] reporting Hispanics in a separate category on crime statistics ‘rather than lumping them in with whites’”; and “posit[ing] conspiracy theories about immigration.” Hayden, *supra* note 65.

<sup>69</sup> Goldberg, *supra* note 66; *see also* Hayden, *supra* note 65.

<sup>70</sup> Hayden, *supra* note 65.

<sup>71</sup> *Id.*

associations, concluding that “[i]t’s no longer speculation. It’s now been substantiated” and that, therefore, “Stephen Miller must resign.”<sup>72</sup> *Amicus* therefore joined a coalition of civil rights organizations in calling on President Trump to remove Miller from his senior advisor position in light of “[t]he recent exposure of his deep-seated racism” and “advancement of white nationalist ideology.”<sup>73</sup> To date, President Trump has not removed Miller, has not responded to the call for Miller’s removal, and Miller remains a White House immigration advisor.

In light of the history and context described above, the Administration’s claim to re-define the meaning of “America First” is simply not credible.

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<sup>72</sup> Goldberg, *supra* note 66.

<sup>73</sup> Letter from The Leadership Conference on Civil and Human Rights to The President (Nov. 18, 2019) [http://civilrightsdocs.info/pdf/policy/letters/2019/FINAL\\_Letter\\_to\\_White\\_House\\_Miller\\_Must\\_Go\\_11.18.19.pdf](http://civilrightsdocs.info/pdf/policy/letters/2019/FINAL_Letter_to_White_House_Miller_Must_Go_11.18.19.pdf).

## CONCLUSION

The Office of the President of the United States is a truly singular platform. Whether characterized in terms of President Roosevelt’s “bully pulpit” or as the leader of the free world, the Office of the President has long wielded exceptional moral and symbolic power. That power manifests in what presidents—and, by extension, administrations and presidential candidates—say and how they choose to say it. This Administration has consistently promoted discriminatory viewpoints, despite frequent admonitions from political opponents and would-be allies alike. The normalizing of racially discriminatory political ideas invites racial discrimination to run rampant, rolling back the hard-won progress our country has made towards advancing equal protection. Ultimately, there is a distinct and disturbing correlation between such anti-immigrant rhetoric and the Administration’s immigration policy decisions, including the decision to terminate TPS protections for Haitians.

The evidence described here leads inescapably to the conclusion that the TPS termination for Haitians was motivated by racial animus, and therefore unconstitutional. The District Court rightfully halted them, and *Amici* respectfully request that this Court affirm the lower court’s ruling.

Dated: December 26, 2019

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**CERTIFICATE OF COMPLIANCE**

This complies with the type-volume limitations set forth in the Federal Rule of Appellate Procedure (“Rule”) 29(a)(5) because it contains 6,278 words, excluding the parts exempted by Rule 32(f). This brief complies with typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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