

Michigan Journal of Race and Law

Volume 26

2021

“We Are Asking Why You Treat Us This Way. Is It Because We Are Negroes?” A Reparations-Based Approach to Remediating the Trump Administration’s Cancellation of TPS Protections for Haitians

Sarah E. Baranik de Alarcón
Safe Horizon Immigration Law Project

David H. Secor

Norma Fuentes-Mayorga
City College of New York

Follow this and additional works at: <https://repository.law.umich.edu/mjrl>



Part of the [Immigration Law Commons](#), [Law and Race Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Sarah E. Baranik de Alarcón, David H. Secor & Norma Fuentes-Mayorga, *“We Are Asking Why You Treat Us This Way. Is It Because We Are Negroes?” A Reparations-Based Approach to Remediating the Trump Administration’s Cancellation of TPS Protections for Haitians*, 26 MICH. J. RACE & L. 1 (2020).
Available at: <https://repository.law.umich.edu/mjrl/vol26/iss1/10>

<https://doi.org/10.36643/mjrl.26.1.we>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

“WE ARE ASKING WHY YOU TREAT US THIS WAY.
IS IT BECAUSE WE ARE NEGROES?”¹
A REPARATIONS-BASED APPROACH TO REMEDYING
THE TRUMP ADMINISTRATION’S CANCELLATION OF
TPS PROTECTIONS FOR HAITIANS

*Sarah E. Baranik de Alarcón, Esq., David H. Secor, Esq., and
Norma Fuentes-Mayorga, Ph.D.**

*“By listening to those who have paid the greater price for their com-
mitment to a just world, we can move forward with them, closer to the
place of peace.”²*

INTRODUCTION 2
I. THE WOUNDS CAUSED BY A HISTORY OF DISCRIMINATION
AGAINST NON-WHITE IMMIGRANTS – A BACKGROUND 5

* Sarah Baranik de Alarcón is the Bronx Staff Attorney at the Safe Horizon Immigration Law Project. She is a former Fulbright Scholar and professor at the Universidad Viña del Mar, Chile. She thanks Professor Caitlin Barry, Esq. for her guidance in the authorship of this article, Andre Desir for his editorial assistance, her co-authors for their brilliance, and her husband, Diego, for his endless support.

Norma Fuentes-Mayorga is an Assistant Professor in Sociology, Latin American and Latina/o Studies at the City College of New York (CUNY). Her research documents the immigration and integration experiences of Afro-Caribbean and Indigenous women from the Dominican Republic and Mexico and the contributions they make to the sending and the host community. She received her Ph.D. from Columbia University in 2005. Her comparative work has been published in the United States, Latin America, and Europe; notably, in the *Annual Review of Sociology; Latino Studies, and Research Papers in Education*.

David Secor is an immigration attorney who primarily works on asylum and deportation defense in the Mid-Atlantic. He is a D.C. metro native, admitted to practice in the state of Maryland, and has appeared before the Immigration Courts in Philadelphia, Baltimore, Arlington, and York County Detention Center. He has previously written for the National Immigrant Justice Center on the need for non-carceral alternatives over immigration detention. He thanks his co-workers for their tireless efforts in their advocacy for Haitian TPS holders and a just future for immigrants.

The authors would like to particularly thank Editor-in-Chief, Courtney Liss, and all of the staff at Vol. 26, Michigan Journal of Race & Law for their assistance with this article during a global pandemic and polarizing election.

1. *Haitians: We'll Kill Ourselves*, N.Y. TIMES, Nov. 29, 1981, at E19.

2. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 398-99 (1987).

| | | |
|------|---|----|
| A. | <i>The Infection: Race-Based Discrimination in U.S. Immigration Policies</i> | 5 |
| B. | <i>A Wound Left to Fester: From Twin Colonial Revolutions to Imperial Subjugation: The Problematic History of Haiti and the United States</i> | 10 |
| II. | THE TPS BAND-AID AND A WOUND QUICKLY GOING SEPTIC: A NOT-SO-TEMPORARY STATUS WITH SOME PROTECTIONS FOR HAITIANS..... | 15 |
| A. | <i>Covering the Injury: Temporary Protected Status (TPS), A Short Fix</i> | 16 |
| B. | <i>The Infection Beneath the Dressage: TPS Grant and Cancellation for Haitians</i> | 18 |
| C. | <i>The Wound Spreads: The Detrimental Effects of the Trump Administration Rescinding TPS for Haitians</i> | 22 |
| III. | UNCOVERING THE WOUND: LEGAL CHALLENGES TO CANCELLATION OF TPS DUE TO RACE-BASED DISCRIMINATION..... | 27 |
| A. | <i>Bleeding Direct Evidence of Harm: Anti-Immigrant Animus in Rhetorically Racialized Politics</i> | 28 |
| B. | <i>Telltale Signs of Infection: Circumstantial Evidence in the Departure from the Previous TPS Renewal Process</i> | 31 |
| IV. | ASSESSING THE INJURY: THE IMPACT OF LEGAL CHALLENGES..... | 35 |
| V. | CLEANING THE WOUND: VIEWING TPS THROUGH THE LENS OF REPARATIONS AND REMITTANCES..... | 38 |
| A. | <i>Recognizing the Harm Done to People Raced as Black: “Now Never Begins Yesterday.”</i> | 38 |
| B. | <i>Stitching up the Injury: Reparations</i> | 40 |
| C. | <i>Recovery Through Rethinking Aid: Remittances</i> | 44 |
| VI. | MOVING TOWARDS HEALING..... | 46 |

INTRODUCTION

On November 20, 2017, then-acting Secretary of Homeland Security Elaine Duke announced that beginning in summer 2019, Haitians would no longer receive Temporary Protected Status (TPS), a short-term legal designation guaranteeing their right to remain and work in the United States.³ This announcement followed an investigation by the De-

3. Press Release, Elaine Duke, Acting Secretary, Dep’t of Homeland Sec., Announcement on Temporary Protected Status for Haiti (Nov. 20, 2017), <https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti#> [<https://perma.cc/R9YM-8HJ9>] (announcing decision not to extend TPS).

partment of Homeland Security (DHS) into continuing TPS for Haitians that, unlike investigations in prior years, asked for crime statistics and welfare information on Haitians with TPS. The announcement followed a series of racist remarks from President Donald Trump, which included commenting that Haitians “all have AIDS”⁴ and asking “[w]hy are we having all these people from shithole countries come here?” in response to reports of immigration from El Salvador, Haiti, and African nations.⁵

At the time of publication, advocates have filed four lawsuits in United States (U.S.) federal courts that challenge the cancellation of TPS for Haitians.⁶ In *Ramos v. Nielsen*⁷ and *Saget v. Trump*,⁸ the Northern District of California and the Eastern District of New York, respectively, issued preliminary injunctions, essentially staying the cancellation of TPS until a final decision is made on the case.⁹

While the injunction in *Ramos* was reversed and vacated by the Ninth Circuit at the time of this paper’s publication, the injunction in *Saget* remains, the decision to cancel TPS is still on the books, and the future status of TPS continues to change pending ongoing litigation and administrative action.¹⁰ The justifications for canceling TPS for Haitians

4. See Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trump Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html> (discussing racist remarks reportedly made during meeting with president).

5. See Josh Dawsey, *Trump Derides Protections for Immigrants from ‘Shithole’ Countries*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.aa8f0120c055&wpiscr=al_news__alert-politics—al (discussing comments made during a meeting on immigration); see also Ali Vitali, Kasie Hunt & Frank Thorp V, *Trump Referred to Haiti and African Nations as ‘Shithole’ Countries*, NBC NEWS (Jan. 11, 2018), <https://www.nbcnews.com/politics/white-house/trump-referred-haiti-african-countries-shithole-nations-n836946> [<https://perma.cc/E7PU-XFPL>].

6. See *Challenges to TPS and DED Terminations and Other TPS-Related Litigation*, CATH. LEGAL IMMIGR. NETWORK, INC. (Sept. 21, 2020), <https://cliniclegal.org/resources/humanitarian-relief/temporary-protected-status-and-deferred-enforced-departure/challenges> [<https://perma.cc/MX72-D4EE>] (noting additional challenges to TPS terminations for other countries).

7. *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *vacated and remanded sub nom. Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020); see also *Ramos v. Wilson*, ACLU OF SOUTHERN CAL., <https://www.aclusocal.org/en/cases/ramos-v-nielsen> [<https://perma.cc/XR9H-GGDW>] (last visited Oct. 19, 2020).

8. *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. 2019).

9. See *Ramos*, 336 F. Supp. 3d 1075; see also CATH. LEGAL IMMIGR. NETWORK, INC., *supra* note 6.

10. See *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020); *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. 2019); *What’s Next for TPS Holders?* ACLU OF SOUTHERN CAL., <https://www.aclusocal.org/en/know-your-rights/whats-next-tps-holders> [<https://perma.cc/WS5Y-4DW7>] (last visited Nov. 22, 2020). See U.S. CITIZENSHIP &

reflect long-standing, exclusionary racism within U.S. immigration law, and specifically, long-standing discrimination against Black immigrants.¹¹ Those racist justifications further highlight the need to develop new humanitarian approaches to immigration law that don't simply provide relief from harm, but actually repair the harms done.

This Article places the Trump Administration's decision to cancel TPS for Haitians within the longer history of U.S. racism and exclusion against Haiti and Haitians, observes the legal challenges against this decision and their limitations, and imagines a future that repairs the harms caused by past and current racist policies. First, this Article briefly outlines the history of exclusionary, race-based immigration laws in the United States, and specifically how this legal framework, coupled with existing anti-Black ideologies in the United States, directly impacted Haitians and Haitian immigrants arriving in the United States. Next, the Article provides an overview of the TPS decision-making process, the Trump Administration's openly racist comments against Haitians and other people of color before and during the decision-making process to cancel TPS, and the departure from the established administrative process for TPS cancellation. The Article then reviews the legal challenges against TPS cancellation and the arguments that the decision violated the Equal Protection Clause and how such efforts reveal the limitations of litigation as a tool to achieve social justice.

Looking towards the future, this Article discusses reparations and remittances as creative ways to repair some of the damage wrought by the United States' history of racial discrimination in immigration and foreign policy against Haitians. Specifically, this Article explores three solutions: (1) recognizing the harms caused specifically to Haitians by the United States' exclusionary foreign affairs and immigration policies; (2) using material and non-material forms of reparations, including extending TPS, offering a pathway for citizenship for TPS holders, or offering Haitian TPS recipients benefits to public programs; and (3) valuing the role remittances play in affirming Haitians' autonomy and working towards eroding decades of imperialistic treatment of Haitians.

IMMIGR. SERVS., *Temporary Protected Status* (last reviewed Sept. 8, 2020), <https://www.uscis.gov/humanitarian/temporary-protected-status> [https://perma.cc/3FR9-NU8W] (noting that, due to injunctions in several court cases "USCIS will extend, through Oct. 4, 2021, Temporary Protected Status (TPS) and the validity of certain TPS-related documentation."); see also Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 85 Fed. Reg. 79,208 (Dec. 9, 2020).

11. For more on this, see *Institutional Racism*, LEXICO, https://www.lexico.com/definition/institutional_racism [https://perma.cc/3U6Y-TWFN].

This paper recognizes that there is no instant remedy for the centuries of harm the United States inflicted upon Haitians. As Yale Professor Harlon Dalton so aptly analogizes:

Dealing with our racial wound is very much like [dealing with a physical wound]. Healing is a process that has many steps. Yet we try to move too quickly from the traumatic event to the day the bandages are removed. In our zeal to avoid inflaming the wound, we fail to clean it properly. We rush to close it, and do not check to see if our stitches have held. We ignore the possibility of infection, and convince ourselves that the occasional oozing is nothing to worry about. We cover it with material that is contaminated, and leave the dressing unchanged for fear of what we may discover underneath. And so our racial wound festers.¹²

This Article aims to uncover the festering wound caused by decades of racism towards Haitians through national and international politics and offers ideas for healing.

I. THE WOUNDS CAUSED BY A HISTORY OF DISCRIMINATION AGAINST NON-WHITE IMMIGRANTS – A BACKGROUND

A. *The Infection: Race-Based Discrimination in U.S. Immigration Policies*

From its inception, the U.S. government has rhetorically promised to welcome immigrants of all origins, and yet has categorically failed to deliver on that promise.¹³ Writing to his friend in the Netherlands, George Washington wrote, “I had always hoped that this land might become a safe and agreeable asylum to the virtuous and persecuted part of mankind, to whatever nation they might belong”¹⁴ Historically, however, this promise of welcome has only been a guaranteed for white Europeans.¹⁵ In reality, the rhetoric of a nation of religious freedom for

12. HARLON DALTON, RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS & WHITES 99 (1996).

13. See Kaila C. Randolph, *Executive Order 13769 and America's Longstanding Practice of Institutionalized Racial Discrimination Towards Refugees and Asylum Seekers*, 47 STETSON L. REV. 1d, 8 (2017) (discussing racial discrimination in immigration).

14. Letter from George Washington to Francis Adrian Van der Kemp (May 28, 1788), <https://founders.archives.gov/documents/Washington/04-06-02-0266> [<https://perma.cc/A3DR-VE7G>].

15. See, e.g., Naturalization Act of 1790, ch. 3, 1 Stat. 103 (allowing any immigrant who was a “free white person,” had lived in the United States for two years and could demonstrate good moral character to apply in court for U.S. citizenship).

immigrants of all nations contrasted starkly with the enslavement and forced immigration of African peoples, the genocide and forced relocation of indigenous peoples, and the racist ideologies held by many U.S.-Americans.¹⁶ The 1857 *Dred Scott v. Sandford*¹⁷ decision went so far as to declare that African Americans were not and could never be U.S. citizens.¹⁸ The forced kidnapping of enslaved individuals created a U.S. immigration system that, as immigration scholar Professor Rhonda Magee observes, “was inculcated with the notion of a permanent, quasi-citizen-worker underclass and privileged white ethnics under naturalization law—its legacies we can see up to the present day.”¹⁹

Countless examples throughout U.S. history highlight both blatant and thinly veiled efforts to exclude non-European immigrants.²⁰ For instance, the Chinese Exclusion Act of 1882 explicitly barred Chinese laborers from immigrating to the United States, a precursor to years of the United States barring individuals from entering the country based on national origin.²¹ Congress used discriminatory measures such as literacy tests,²² quota systems,²³ and the likelihood to “be a public charge” to fur-

16. See Randolph, *supra* note 13, at 7 (discussing racial discrimination in immigration); see also Benjamin Franklin, *Observations Concerning the Increase of Mankind, Peopling of Countries, etc.* (1751) (“Why should Pennsylvania, founded by the English, become a Colony of Aliens, who will shortly be so numerous as to Germanize us instead of our Anglifying them, and will never adopt our Language or Customs, any more than they can acquire our Complexion?”); see generally KEVIN R. JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS* (2003) (observing the United States’ history of race-based oppression and exclusion). Assimilationist scholars have argued that becoming a North American has inevitably implicated the internalization of racist ideologies, where whiteness is valued and blackness inferiorized, even if at a subconscious level; see RICHARD D. ALBA, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* (2009); MILTON MYRON GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* (1964); Ramon Grosfoguel & Eric Mielants, *The Long-Durée Entanglement Between Islamophobia and Racism in the Modern/Colonial Capitalist/Patriarchal World-System*, 5 HUMAN ARCHITECTURE: J. SOCIO. SELF-KNOWLEDGE, Fall 2006, at 1.

17. *Scott v. Sandford*, 60 U.S. 393 (1857).

18. *Id.* at 406.

19. Rhonda V. Magee, *Slavery As Immigration?*, 44 U.S.F. L. REV. 273, 276-77 (2010) (emphasis added) (arguing that “transatlantic slavery was . . . a system of state-sponsored forced migration human trafficking”). For a discussion of African exclusion in immigration matters, see generally Bill Ong Hing, *Symposium: Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994) (discussing lack of migration from Africa to the United States).

20. See Hing *supra* note 19, at 237. For a further discussion of exclusionary immigration policy, see *infra* notes 21-24 and accompanying text.

21. See generally Randolph, *supra* note 13 (discussing exclusion of certain immigrants based on national origin or race).

22. See The Immigration Act of 1924 (The Johnson-Reed Act), Pub. L. No. 68-139 (replaced by the Immigration and Nationality Act of 1965).

ther exclude underprivileged individuals of color—or those seen to be from undesired racial and ethnic groups—from entering the United States.²⁴

Quota systems specifically excluded individuals of African descent from immigrating to the United States by restricting the quantity of admitted immigrants from a particular nationality to a percentage of the number of immigrants of the same nationality already in the United States.²⁵ Because United States census data did not include African Americans, nearly all immigration from Africa was barred while the quota systems were in place from 1917 to 1965.²⁶

The Immigration and Nationality Act of 1965 prohibited discrimination based on race and nationality, thus ending the quota system.²⁷ However, recent policy decisions—while ostensibly race-neutral—go against the spirit of the Immigration and Nationality Act of 1965. For example, the regular categorization of Central American and Caribbean refugees as “economic migrants,” rather than asylum seekers fleeing persecution, has led to the exclusion and deportation of thousands of individuals seeking protections under international law.²⁸ The “diversity visa”

23. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1112, 1127 (1998) (describing quota system whereby proportion of individuals allowed into the United States was based on percentages defined by 1890 census); see also Randolph, *supra* note 13, at 17 (noting that quota systems continued from 1917 to 1965).

24. See Randolph, *supra* note 13, at 18–19 (discussing how the U.S. government denied visas to Jews fleeing Nazis because they were “likely to [be] a public charge” and even sent back ships full of refugees who later died in Holocaust).

25. See Malissia Lennox, *Refugees, Racism, and Reparations: A Critique of the U.S.’ Haitian Immigration Policy*, 45 STAN. L. REV. 687, 714 (1993) (“In 1924, the allowable immigration rate was reduced to 2 percent and African-Americans were explicitly excluded from the census.”).

26. *Id.*

27. Immigration and Nationality Act of 1965 §§ 201, 202, 8 U.S.C. §§ 1151, 1152(a)(1)(A) (“no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”).

28. See generally Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL’Y INST. (Apr. 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era> [<https://perma.cc/7KJH-TL9E>] (discussing treatment of Central American migrants and asylum-seekers); Cecilia Menjivar, *Central American Immigrant Workers: How Legal Status Shapes the Labor Market Experience*, in 27 RESEARCH IN THE SOCIOLOGY OF WORK 3–28 (Jody Agius Vallejo ed., 2017); Cecilia Menjivar, Andrea Gómez Cervantes & Daniel Alvord, *The Expansion of “Crimmigration,” Mass Detention, and Deportation*, 12 SOCIO. COMPASS, e12573 (2018).

program, which proposes bringing more immigrants from countries with “low” numbers of applicants, tends to favor European immigrants.²⁹

Following the September 11, 2001 attacks, a new pattern of racialization has been most apparent in the increased rates of apprehension and deportation targeting foreign-born Black, Latino, and Muslim groups.³⁰ The passing of two federal laws—the 1996 Anti-Terrorism and Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)—tied immigration policies to criminal laws.³¹ These laws increased social control over individuals who had certain types of criminal convictions and ensured that these immigrants be deported with little recourse through due process and judicial review, as has been the case, for example, of most Dominicans in New York City, the majority of whom are legal permanent residents.³² The USA Patriot Act of 2001 intensified the provisions of these two 1996 laws, enhancing their effectiveness by establishing the link between local law enforcement on crime and national law enforcement on immigration.³³

29. See Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 532 (2000) (noting impacts of immigration laws and their intersection with race).

30. Christopher Rivera, *The Brown Threat: Post-9/11 Conflations of Latina/os and Middle Eastern Muslims in the US American Imagination*, 12 LATINO STUD. 44, 59 (2014). Please note, in this paper the authors use the term “Latino” instead of the gender-neutral “Latinx” to reflect the fact that deportation has mainly targeted the foreign-born, who largely identify as “Latino” or “Hispanic.” See Luis Noe-Bustamante, Lauren Mora & Mark Hugo Lopez, *About One-In-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RSCH. CTR. (Aug. 11, 2020) <https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/> [<https://perma.cc/ELQ8-C3CL>] (reflecting that only three percent of U.S. Hispanics identify as “Latinx” and only twenty-nine percent were aware of this label). Since a larger majority of deportees are male, the authors consider the term Latino most appropriate in this context. See also, Maria R. Scharrón-del Río & Alan A. Aja, *Latinx: Inclusive Language as Liberation Praxis*, 8 J. LATINX PSYCH. 7 (2020).

31. Melina Juárez, Bárbara Gómez-Aguiñaga & Sonia P. Bettez, *Twenty Years After IIRIRA: The Rise of Immigrant Detention and Its Effects on Latinx Communities Across the Nation*, 6 J. ON MIGRATION AND HUM. SECURITY 74 (2018); Rivera, *supra* note 30, at 44–64; see also DAN KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 10–13 (2007).

32. See DAVID C. BROTHERTON & LUIS BARRIOS, *BANISHED TO THE HOMELAND: DOMINICAN DEPORTEES AND THEIR STORIES OF EXILE* 23, 81 (2011) (describing how immigration and criminalization laws have targeted non-citizen, Brown and Black Latino men for deportation since 9/11); Menjívar et al., *supra* note 28.

33. Monisha Das Gupta, *“Don’t Deport Our Daddies”*: *Gendering State Deportation Practices and Immigrant Organizing*, 28 GENDER & SOC’Y 83, 89 (2014).

These acts linking federal laws and local ordinances have resulted in the increased criminalization and deportation of non-white groups.³⁴ This virulent backlash continues to be racialized, as it increasingly targets mostly Black and Brown Latino and Muslim immigrants. Recent research suggests this pattern is mainly gendered, as men continue to rank top among the criminalized, perceived as threats to the U.S. national security and economy.³⁵ This is most recently evidenced by President Trump's sustained depiction of Mexicans and Central American refugees as illegal immigrants or as invaders, arriving in "caravans."³⁶ This criminalized portrayal reproduces systemic racialization and dehumanizes—but also ignores—the life-threatening circumstances that fuel these groups to seek refuge in the United States in the first place.³⁷ Further, the modern-day "control through deterrence" policies on the Mexican-U.S. border have resulted in the deaths of thousands of refugees yet sparked hardly any public outcry in the United States.³⁸ The rhetoric that the United States

34. Doris Marie Provine & Roxanne Lynn Doty, *The Criminalization of Immigrants as a Racial Project*, 27 J. CONTEMP. CRIM. JUST. 261, 272 (2001); see also Rivera, *supra* note 30, at 60.

35. See Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUD. 271, 274 (2013). For a comprehensive history of how immigration policies aimed at deportation and population control have always targeted non-white, working class, foreign-born groups, mostly from Latin America, Asia, and Africa, see Provine & Doty, *supra* note 34. For more historical antecedents on the societal racialization of Hispanic people in the United States, see Rubén G. Rumbaut, *Pigments of Our Imagination: On the Racialization and Racial Identities of 'Hispanics' and 'Latinos'*, in HOW THE U.S. RACIALIZES LATINOS: WHITE HEGEMONY AND ITS CONSEQUENCES 15–36 (José A. Cobas, Jorge Duany & Joe R. Feagin eds., 2009) (Observing: "Latin Americans were exempted from these legal exclusions. Largely at the urging of American growers and ranchers, no limits were set on Western Hemisphere countries: it was understood that cheap, unskilled Mexican labor could be recruited when needed, as happened during World War I and the 1920s, and again during the Bracero Program; and that those laborers could be deported *en masse* when they were no longer needed, as happened during the 1930s and again during "Operation Wetback" in the mid 1950s.").

36. See Eduard Fabregat, Sara Vinyals-Mirabent & Marian Meyers, "They Are Our Brothers": *The Migrant Caravan in the Diasporic Press*, 31 HOW. J. COMMUNICATIONS 204 (2020). See generally PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (describing civic myths of legal immigration).

37. UNITED NATIONS HIGH COMM'R FOR REFUGEES, *WOMEN ON THE RUN* (2015), <https://www.unhcr.org/5630f24c6.pdf> [<https://perma.cc/HUN9-Y4MY>]. See also PATRICIA HYNES, MICHELE LAMB, DAMIEN SHORT & MATTHEW WAITES, *NEW DIRECTIONS IN THE SOCIOLOGY OF HUMAN RIGHTS* (2016); Tanya Golash-Boza & Cecilia Menjivar, *Causes and Consequences of International Migration: Sociological Evidence for the Right to Mobility*, 16 INT'L J. HUM. RTS. 1213, 1214 (2012).

38. See BILL ONG HING, *DEFINING AMERICA: THROUGH IMMIGRATION POLICY 2* (Jo Carillo, Darrell Y. Hamamoto, Rodolfo D. Torres & E. Frances White eds., 2004).

welcomes immigrants of all origins has proved to be myth that was only true for some, a case that is exemplified in the experience of Haiti and Haitians.

B. *A Wound Left to Fester: From Twin Colonial Revolutions to Imperial Subjugation: The Problematic History of Haiti and the United States*

While discriminating against other non-white immigrants, including Haitians, the United States has also intervened and undermined Haitians in Haiti for much of its history. The United States failed to recognize Haiti's sovereign status for nearly seventy years after its independence and regularly refused to recognize Haitian asylum seekers as political refugees. From the colonial era to the present-day policies that deprive the Haitian people of their agency, the United States has treated Haiti unjustly, causing lasting, residual harm to its citizens.³⁹

In 1791, enslaved men and women of African descent launched the largest insurrection of enslaved persons in world history, freeing everyone on the former French colony of Saint-Domingue within two years and establishing their independence as the first Black republic in the Western Hemisphere.⁴⁰ For nearly seven decades, the United States refused to recognize Haiti's sovereignty, in large part due to fears that such a recognition of an independent Black republic would threaten the United States' own system of racial slavery and caste.⁴¹ The United States stood by silently as Haiti was forced to sign an agreement to compensate France for taking its "property"—the very human beings who made up the fabric of the newly-formed country—and the United States benefited from loaning to Haiti at exorbitant interest rates.⁴² Adjusted for inflation, it took

39. The scope of this paper does not seek to chronicle the entire history of Haitian-U.S. relations but rather mentions several pertinent historical events to provide context for reparations. For further information on the history of Haitian-U.S. relations, see *infra* Part II.C.

40. See LAURENT DUBOIS, *HAITI: THE AFTERSHOCKS OF HISTORY*, 22-51 (2012).

41. See *id.* The United States did not recognize Haiti as a nation until 1862, 58 years after Haiti declared itself an independent nation. See also OFF. OF THE HISTORIAN, *THE U.S. AND THE HAITIAN REVOLUTION, 1791-1804*, <https://history.state.gov/milestones/1784-1800/haitian-rev> [<https://perma.cc/DD9Q-VEHC>] (acknowledging lack of U.S. support for Haitian revolutionaries); Horace Campbell, *Haiti: Reparations and Reconstruction*, PAMBAZUKA NEWS (May 19, 2011) <https://www.pambazuka.org/governance/haiti-reparations-and-reconstruction> [<https://perma.cc/XG5X-M4W3>] (outlining Haiti's history and arguing for reparations).

42. Dan Sperling, *In 1825, Haiti Gained Independence from France for \$21 Billion -- It's Time for France to Pay It Back*, FORBES (Dec. 6, 2017, 6:10 PM), <https://www.forbes.com/sites/realspin/2017/12/06/in-1825-haiti-gained-independence-from-france-for-21-billion-its-time-for-france-to-pay-it-back/#2571f5fe312b> [<https://perma.cc/CW82-HLRS>] ("Haiti dutifully paid France reparations over the course of nearly six generations

Haiti 122 years to pay off its twenty-one billion dollar “debt” and the interest on that “debt.”⁴³ This destabilized the country economically for decades because it was spending approximately 80 percent of its budget at times on repayments to lenders such as the United States.⁴⁴ From 1915 to 1934, the United States invaded and occupied Haiti under the guise of maintaining its financial interests.⁴⁵ Then-Secretary of State Robert Lansing justified the intervention with racist undertones, arguing that Haitians were incapable of self-government and had “an inherent tendency toward savagery and a physical inability to live a civilized life.”⁴⁶ Senator Medill McCormick echoed the sentiment, touting the occupation as necessary to “develop the country, the Government, and above all, the civilization of the people, of whom the overwhelming majority have African blood in their veins.”⁴⁷

The U.S. occupation further destabilized the country and robbed Haitians of their agency as U.S. Marines helped businesses take land from Haitian rural landowners, dismantle labor unions, and violently suppress uprisings.⁴⁸ Even though the occupation ended in 1934, the United States continued to exert control over much of Haiti’s external finances until

– with interest.”). “In 1825, barely two decades after winning its independence against all odds, Haiti was forced to begin paying enormous ‘reparations’ to the French slaveholders it had overthrown.” *Id.* See also DUBOIS, *supra* note 40 (discussing Haiti’s history); see also Vanessa Buschschluter, *The Long History of Troubled Ties Between Haiti and the US*, BBC NEWS (Jan. 16, 2010), <http://news.bbc.co.uk/2/hi/americas/8460185.stm> [<https://perma.cc/94MM-7XLP>] (discussing Haiti’s history).

43. Bill Quigley, *Why the US Owes Haiti Billions — The Briefest History*, HUFFINGTON POST (Mar. 19, 2010, 5:12 AM), https://www.huffingtonpost.com/bill-quigley/why-the-us-owes-haiti-bil_b_426260.html [<https://perma.cc/2CY8-GMPH>] (discussing U.S. history in Haiti and case for reparations); see also Sidney W. Mintz, *Whitewashing Haiti’s History*, BOS. REV. (Jan. 22, 2010), <https://bostonreview.net/archives/BR35.1/mintz.php> [<https://perma.cc/55YH-XYCV>] (noting that “[a] country wracked by more than a decade of invasion and revolution, then faced with financial punishment and isolation for scores of years, could not build the internal framework a strong civil society requires”).

44. See Sperling, *supra* note 42. See also John Henley, *Haiti, A Long Descent into Hell*, GUARDIAN (Jan. 14, 2010, 2:00 PM), <https://www.theguardian.com/world/2010/jan/14/haiti-history-earthquake-disaster> [<https://perma.cc/ZZR8-Y3MF>] (discussing history of Haiti).

45. See David Kroeker Maus, *100 Years of American Occupation in Haiti*, ANTILLEAN MEDIA GROUP (Jan. 28, 2015), <https://www.antillean.org/american-occupation-in-haiti-100/> [<https://perma.cc/B8PJ-J9T6>] (describing U.S. intervention in Haiti).

46. *Id.*

47. *Id.*

48. See Westenley Alcenat, *The Case for Haitian Reparations*, JACOBIN (Jan. 14, 2017), <https://www.jacobinmag.com/2017/01/haiti-reparations-france-slavery-colonialism-debt/> [<https://perma.cc/3E7Z-LAKA>] (discussing case for reparations for Haiti and describing the history of U.S. occupation of Haiti).

1947.⁴⁹ Haitian security forces trained by the United States, the *Gendarmerie*, and military leaders from the American Military School in Haiti continued to assert power in Haiti through the 1950s, and U.S.-backed dictators pillaged the country through the 1980s, committing numerous human rights violations, including the torture, arbitrary arrests, and disappearing of individuals to undisclosed prisons, all as part of the U.S.-led War on Drugs.⁵⁰

The colonial, white supremacist, and paternalistic attitude with which the United States treated Haiti in its finances and governance has also been reflected in its treatment of Haitian refugees. From the 1970s on, thousands of Haitians fleeing to the United States as political refugees were denied asylum because they were viewed as economic migrants and many others were returned to Haiti without an accurate determination of their asylum claim through the “Interdiction Program.”⁵¹ At the same time, Haitians in the United States faced racial discrimination, including a ban on blood donations from Haitians due to unfounded concerns about AIDS.⁵² In November 1991, the Coast Guard began sending Haitian asylees to Guantanamo Bay, Cuba, where they were held in deplorable conditions and eventually repatriated without credible fear interviews for

49. Edwidge Danticat, *The Long Legacy of Occupation in Haiti*, NEW YORKER (July 28, 2015), <https://www.newyorker.com/news/news-desk/haiti-us-occupation-hundred-year-anniversary> [<https://perma.cc/3J8W-M4SB>] (describing U.S. occupation of Haiti).

50. *Id.* See also Quigley, *supra* note 43 (discussing brief history of Haiti).

51. See Lennox, *supra* note 25 (noting that of 50,000 Haitians who attempted to gain asylum between 1972 and 1980, a mere 25 were granted asylum). See Clare P. Gutekunst, *Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis*, 10 YALE J. INT’L L. 151, 154 (1984) (discussing policies returning migrants fleeing Haiti during the 1980s). See also High Seas Interdiction of Illegal Aliens, Proclamation No. 4865, 3 C.F.R. 50 (1981), *reprinted in* 8 U.S.C. § 1182 app. at 1259 (1988) (allowing for Haitians to be returned to their home country if intercepted at sea). See also Rachael L. Godlove, *United States Asylum Policy: Safe Haven or Structured Exclusion?* 1, 72 (Nov. 21, 2008) (M.A. thesis, Georgetown University), <https://repository.library.georgetown.edu/bitstream/handle/10822/558205/umigeorgetown-1068.pdf?sequence=1> [<https://perma.cc/3QKN-PS2N>] (discussing unfair treatment of Haitian asylum-seekers); *History Lesson 9: Refugees from the Caribbean – Cuban and Haiti “Boat People”*, CONST. RIGHTS FOUND., <http://www.crfimmigrationed.org/lessons-for-teachers/148-hl9> [<https://perma.cc/854L-QVS2>] (last visited Nov. 9, 2020) (detailing history of Haitian refugees).

52. Bruce Lambert, *Now, No Haitians Can Donate Blood*, N.Y. TIMES, Mar. 14, 1990, at A20, <https://www.nytimes.com/1990/03/14/us/now-no-haitians-can-donate-blood.html#:~:text=The%20latest%20change%2C%20officially%20adopted,regardless%20of%20when%20they%20immigrated.> (“The Haitian-American leaders also say the move will revive the stigma and bias that afflicted Haitians when the Federal Centers for Disease Control initially listed them as a high-risk group.”).

asylum, as required under international law.⁵³ Those with HIV/AIDS were detained in what some have deemed the world's first HIV/AIDS internment camp and denied protections normally afforded to refugees seeking U.S. assistance, despite legal challenges.⁵⁴ Professor Harold Hongju Koh, a lawyer for the interned Haitians, observed:

[T]he archetypal 'good' alien favored by American immigration law is a white, European, healthy, heterosexual, self-sufficient refugee, arriving alone in search of political asylum . . . it hardly surprises that black, poor Caribbean migrants arriving in large numbers, many afflicted with HIV (a disease associated with homosexuals) should fare poorly in our courts.⁵⁵

The United States' treatment of Haitians refugees from the 1970s through the 1990s stands in stark contrast with its treatment of Cuban political refugees under the Cuban Adjustment Act (CAA), which required the United States to return Cubans intercepted at sea to Cuba while providing those Cubans who made it to the United States with protection, access to welfare programs and services, and a path to citizenship.⁵⁶ While many Cubans are categorized as "white," Haitians are of

53. See Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2394 (1994) (discussing repatriation of Haitians without credible fear interviews). See also Ron Harris, *Immigration: Fleeing Haitians Failing to Find a U.S. Advocacy: Few Voices Among Groups Who Once Escaped Oppression Are Raised in Refugees' Behalf*, L.A. TIMES, Dec. 3, 1991, <https://www.latimes.com/archives/la-xpm-1991-12-03-mn-591-story.html> [<https://perma.cc/A7LR-73FH>] (discussing legal challenges to programs interning Haitians). See also Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 141-42 (1995) (discussing detention of Haitian asylum seekers at Guantanamo Bay). Koh notes that "of the 22,000 Haitians interdicted at sea during the next decade, only eleven were screened in and brought to the U.S. to pursue asylum claims." *Id.* at 142. See generally Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the U.S.*, 60 BROOK. L. REV. 841, 848-49 (1994) (describing challenges faces by Haitians seeking asylum in the U.S. in the 1990s).

54. See Koh, *America's Offshore Refugee Camps*, *supra* note 53, at 142 ("The INA offers these statutory protections only to aliens who reside in or have arrived at the border of the U.S."). See also Edwidge Danticat, *Trump Reopens an Old Wound for Haitians*, NEW YORKER (Dec. 29, 2017), <https://www.newyorker.com/news/news-desk/trump-reopens-an-old-wound-for-haitians> [<https://perma.cc/3CAL-F476>] (discussing misinformation regarding Haitians with HIV/AIDS and discrimination within the United States); Lizzy Ratner, *The Legacy of Guantánamo*, NATION (July 14, 2003), <https://www.thenation.com/article/archive/legacy-guantanamo/> (discussing internment of individuals with HIV/AIDS at Guantanamo Bay).

55. Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2422 (1994).

56. See Cuban Adjustment Act of 1966, Pub. L. No. 89-732. See Julia Preston, *Tension Simmers as Cubans Breeze Across the Border*, N.Y. TIMES (Jan. 12, 2016),

African descent and mostly “Black.”⁵⁷ Arguably, the United States had a political interest in supporting those fleeing “communism” in Cuba, but no other nationality had—or has—the immigration benefits that Cubans were granted upon entry, including other countries with communist regimes.⁵⁸

The United States maintained a strong military presence in Haiti with multiple military interventions in the 1990s and 2000s, as well as involvement in several changes in dictators.⁵⁹ The United States supported foreign-owned sweatshops in Haiti and dumped U.S.-subsidized produce—including rice and sugar—into Haiti, greatly harming the local

https://www.nytimes.com/2016/02/13/us/as-cubans-and-central-americans-enter-us-the-welcomes-vary.html?_r=0 (noting difference in treatment between Cubans and other immigrants). The wet foot/dry foot policy ended in 2016. See also Adrian Florido, *End Of ‘Wet-Foot, Dry-Foot’ Means Cubans Can Join Ranks Of ‘Undocumented’*, NPR (Jan. 15, 2017, 7:07 AM), <https://www.npr.org/sections/codeswitch/2017/01/15/509895837/end-of-wet-foot-dry-foot-means-cubans-can-join-ranks-of-the-undocumented> [<https://perma.cc/JLK2-JARZ>] (observing “most of the Cubans who fled Castro’s regime soon after the 1959 revolution were political exiles . . . of the largely white middle class whose property and businesses Castro seized and nationalized. . . . [T]his set Cubans apart from many other Latinos in the U.S., who aside from tending to be economic migrants also lacked the legal status that would have allowed them to achieve their full potential.”). See generally RUTH ELLEN WASEM, CONG. RSCH. SERV., CUBAN MIGRATION TO THE U.S.: POLICY AND TRENDS 1, 2 (2009), <https://fas.org/sgp/crs/row/R40566.pdf> [<https://perma.cc/73NN-ZA9R>] (discussing Cuban migration over the 20th century).

57. See Randolph, *supra* note 13, at 26 (discussing differing policies towards Haiti and Cuba). See also *Human Rights in Haiti: Hearing Before the Subcomm. on Int’l Orgs of the House Comm. of Int’l Relations*, 94th Cong. 70 (1975) (noting “U.S. Government’s position toward Haitian refugees contrast [sic] sharply with the warm welcome extended Cuban refugees (who are mostly white)”). See generally *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 497 (S.D. Fla. 1980), *aff’d sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (comparing treatment of Haitians and Cubans).

58. See WASEM, *supra* note 56, at 2 (“The [Cuban Adjustment Act], as amended, provides that certain Cubans who have been physically present in the U.S. for at least one year may adjust to permanent resident status at the discretion of the Attorney General—an opportunity that no other group or nationality has.”).

59. Jonathan M. Katz, *This Is How Ignorant You Have to Be to Call Haiti a ‘Shithole,’* WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/01/12/this-is-how-ignorant-you-have-to-be-to-call-haiti-a-shithole/?utm_term=.ed1f0521e61f (discussing history of Haiti). For a discussion of United States intervention into Haitian democracy, see Jake Johnson, *Revealed: USAID Funded Group Supporting Haitian President in 2011*, AL JAZEERA AM. (July 15, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/7/15/usaid-funded-group-supporting-haitian-president.html> [<https://perma.cc/2YNJ-GT3P>] (describing U.S. role in 2010 elections in Haiti); see also Press Release, Ctr. for Econ. Pol’y & Rsch., *OAS Insider Reveals Details of Illegal Foreign Intervention Against Haitian Democracy* (Feb. 25, 2014), <https://www.cepr.net/press-release/oas-insider-reveals-details-of-illegal-foreign-intervention-against-haitian-democracy/> [<https://perma.cc/B39H-NBWK>] (discussing U.S. interference in Haitian elections).

economy, putting local farmers out of business, furthering deforestation, and forcing people to migrate to over-crowded cities to look for work.⁶⁰ United States aid to Haiti following the 2010 earthquake supported large NGOs, many of which used outside contractors for rebuilding parts of Haiti, thus taking work away from the local economy, giving Haitians less ownership in recovery efforts, and taking agency away from the Haitian government.⁶¹ This approach to aid created dependence on international NGOs and continues to cripple the Haitian economy and government.⁶² Thus, what started as a refusal to recognize the sovereignty of the first nation of freed enslaved people continues in a paternalistic refusal to recognize the ability of the Haitian government to handle international aid, a refusal to believe that conditions in Haiti have not materially improved since the 2010 earthquake, and a refusal to continue any form of protected status for Haitians, motivated by a president's personal animus for Haiti. As Fredrick Douglass once observed: "Haiti is black, and we have not yet forgiven Haiti for being black."⁶³

II. THE TPS BAND-AID AND A WOUND QUICKLY GOING SEPTIC: A NOT-SO-TEMPORARY STATUS WITH SOME PROTECTIONS FOR HAITIANS

The United States government granted and then cancelled Temporary Protective Status (TPS) for Haitians, in keeping with the nation's long history of de jure and de facto xenophobic and racist treatment of Haitians. TPS falls into a long line of immigration policies that create a second-class status for immigrants and, disproportionately, immigrants of color. This Part provides an overview of TPS, the grant of TPS for Haitians, its subsequent cancellation, and the impact on Haitians, the communities they live in, and the Haitian diaspora in the United States. The

60. Amy Wilentz, *The Distant Memories of Haiti Before the Quake*, TIME (Jan. 23, 2010), http://content.time.com/time/specials/packages/article/0,28804,1953379_1953494_1956237,00.html [<https://perma.cc/H2E7-5VSG>] (discussing impact of subsidized goods on Haitian marketplace). See generally Henley, *supra* note 44 (discussing deforestation in Haiti).

61. See Richard Knox, *5 Years After Haiti's Earthquake, Where Did The \$13.5 Billion Go?*, NPR (Jan. 12, 2015, 11:06 AM), <https://www.npr.org/sections/goatsandsoda/2015/01/12/376138864/5-years-after-haiti-s-earthquake-why-aren-t-things-better> [<https://perma.cc/23NP-GRUJ>] (noting how "[w]ith few exceptions, donor nations and nongovernmental organizations insist on keeping control of their projects, which are set according to their own priorities.").

62. CLARE LOCKHART & JOHANNA MENDELSON FORMAN, *ESCAPING THE CRISIS TRAP: NEW OPTIONS FOR HAITI* (2014) 22-24.

63. Frederick Douglass, *Lecture on Haiti at the 1893 Chicago World's Fair* (Jan. 2, 1893), <http://faculty.webster.edu/corbetre/haiti/history/1844-1915/douglass.htm> [<https://perma.cc/H5FK-T9PF>] (last visited Oct. 14, 2020).

historical background and disparate impact are key elements in the race-based discrimination challenges the Article will address in Part III.

A. *Covering the Injury: Temporary Protected Status (TPS),
A Short Fix*

Congress created TPS in 1990 as a short-term humanitarian measure to temporarily safeguard foreign nationals present in the United States.⁶⁴ However, the process for TPS designation has been highly political and has offered little stability for those whose TPS designation has been frequently renewed.⁶⁵ TPS applies in three situations: (1) where there is an “ongoing armed conflict within the state” that “would pose a serious threat” to the personal safety of citizens of that state;⁶⁶ (2) when a natural event causes a “substantial, but temporary, disruption of living conditions” that would make it difficult for the state to receive repatriated citizens;⁶⁷ and (3) when there are “extraordinary and temporary conditions” that would make it dangerous for individuals to return to their country of origin and their temporary stay in the United States would not compromise “the national interest of the U.S.”⁶⁸ To grant TPS to residents of a country, the Secretary of the Department of Homeland Security (“DHS Secretary”) traditionally confers with government agencies, including the Department of State, to determine the conditions in the country under consideration.⁶⁹ Notably, TPS takes the “national interest of the U.S.” into account in only one category, creating a strong statuto-

64. See Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT’L L. 279, 280 (2000) (discussing TPS as “a short-term strategy to secure the immediate physical safety of refugees and a way station to more durable protection.”). See Donald Kerwin, *Creating a More Responsive and Seamless Refugee Protection System: The Scope, Promise and Limitations of US Temporary Protection Programs*, 2 J. ON MIGRATION & HUM. SEC. 44 (2014), <https://journals.sagepub.com/doi/pdf/10.1177/233150241400200104> [<https://perma.cc/DD29-357L>]. See, e.g., 135 Cong. Rec. H7501-3, at H7507 (statement of Rep. Brennan) (expressing humanitarian need for TPS). See also 136 Cong. Rec. H8629-02 (1990) (expressing humanitarian need to respond to individuals already present in the United States).

65. See sources cited *supra* note 64.

66. 8 U.S.C. § 1254a(b)(1)(A).

67. *Id.* § 1254a(b)(1)(B).

68. *Id.* § 1254a(b)(3)(C).

69. *Id.* § 1254a(b)(1). Prior to the creation of the Department of Homeland Security in 2002, TPS designation and extension was given by the Attorney General. See generally Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, CONG. RSCH. SERV. (Apr. 1, 2020), <https://crsreports.congress.gov/product/pdf/RS/RS20844/53> [<https://perma.cc/9JQ7-DA45>] (describing TPS).

ry interpretation argument that internal politics and domestic concerns should not be considered under the other categories for granting TPS.⁷⁰

The DHS Secretary can issue or extend TPS for periods of six to eighteen months, and TPS recipients in the United States have received temporary status in the country for up to twenty-nine years based on ongoing crises.⁷¹ TPS has been granted to a variety of groups, including Hondurans and Nicaraguans after Hurricane Mitch in 1998 and Kosovo residents during and after the genocide.⁷² Currently, immigrants from El Salvador, Haiti, Honduras, Nepal, Nicaragua and Sudan account for 98 percent of TPS recipients.⁷³

While TPS recipients are granted legal status and authorization to work, TPS does not encourage or drive migration to the United States from designated countries—the program only protects individuals already present in the United States when natural or political disasters occur.⁷⁴ Unlike asylum, which is granted based on individual persecution, TPS is given when country conditions as a whole make it unsafe to return.⁷⁵ Also unlike asylum, which provides an eventual path for permanent residence in the United States, TPS offers no direct path to a stable immigration status.⁷⁶ With the continual consideration of country conditions and

70. Sarah Anchors, *Temporary Protected Status: Making the Designation Process More Credible, Fair, and Transparent*, 39 ARIZ. ST. L.J. 565, 579 n. 81 (2007) (“the fact that the statute only instructs the AG to consider the ‘national interest of the U.S.’ in reference to granting TPS under this final category indicates that the AG is not to consider U.S. national interests under the other categories.” (citing 8 U.S.C. § 1254a (b)(1)(C) (2000))).

71. See Bill Frelick, *What's Wrong with Temporary Protected Status and How to Fix It*, HUM. RTS. WATCH (Mar. 1, 2020, 9:00 AM), <https://www.hrw.org/news/2020/03/01/whats-wrong-temporary-protected-status-and-how-fix-it> [<https://perma.cc/SJK8-XHLR>] (stating timeline within which TPS must be renewed; citing U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 10) “TPS has been in effect for 10 years for Haitians, 19 for Salvadorans, 21 for Hondurans and Nicaraguans, 23 for Sudanese, and 29 for Somalis.”

72. Anchors, *supra* note 70, at 573 (discussing situations in Honduras, Nicaragua, and Kosovo that led to their TPS designation).

73. D’vera Cohn, Jeffrey S. Passel & Kristen Bialik, *Many Immigrants with Temporary Protected Status Face Uncertain Future in U.S.*, PEW RSCH. CTR. (Nov. 27, 2019), <https://www.pewresearch.org/fact-tank/2019/11/27/immigrants-temporary-protected-status-in-us/> [<https://perma.cc/Z43A-XN83>].

74. Anchors, *supra* note 70, at 579 (“TPS is unlikely to make the U.S. a ‘magnet,’ meaning it is unlikely that the program encourages people to try to enter the United States. TPS only affects those who are already in the U.S.”)

75. *Id.* at 580 (discussing TPS determinations).

76. *Temporary Protected Status: An Overview*, AM. IMMIGR. COUNCIL (Feb. 2, 2020), <https://www.americanimmigrationcouncil.org/research/temporary-protected-status-overview> [<https://perma.cc/9SL6-AGM5>] (“TPS does not provide beneficiaries with a separate path to lawful permanent residence (a green card) or citizenship. However, a TPS recipient who otherwise is eligible for permanent residence may apply for that status.”); See Frelick, *supra* note 71 (proposing changes to U.S. refugee law to protect indi-

eighteen-month extensions, TPS holders are afforded no certainty of their immigration status and left in “legal limbo.”⁷⁷

B. *The Infection Beneath the Dressage: TPS Grant and Cancellation for Haitians*

On January 12, 2010, a 7.0 magnitude earthquake struck Haiti, killing over 220,000 people.⁷⁸ Three days later, then-Secretary of Homeland Security, Janet Napolitano, announced the decision to grant TPS to Haitian nationals in the United States.⁷⁹ Nine days later, the designation was published in the Federal Register, citing the impact the earthquake had on critical infrastructure such as roads, hospitals, schools, and transportation systems for food, fresh water, and medical supplies.⁸⁰ Due to political

individuals who currently do not receive protection). *See also id.* (discussing the U.S.’s international obligations under the 1951 Refugee Convention and the ways in which other countries have incorporated the ideas of temporary protection into their asylum systems). “Many countries around the world conduct a two-pronged assessment when considering a claim for protection. They include all European Union (EU) member states, Albania, Australia, Bosnia, Canada, Finland, Macedonia, Mexico, Montenegro, New Zealand, Norway, Serbia, South Africa, South Korea, Switzerland, Turkey, and Ukraine. First, these systems examine claims using the international refugee definition from the 1951 Refugee Convention: a well-founded fear of being persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion. But asylum seekers who do not meet this definition can also be recognized as needing a complementary status as a protected person if they can establish that, if returned, they would face a real risk of serious harm for reasons other than a fear of being persecuted.” *Id.* (internal citations omitted).

77. Tianhao He & Daren Zhang, Opinion, *Uncertainty over TPS*, BOS. GLOBE (Nov. 18, 2019, 12:15 AM), <https://www.bostonglobe.com/2019/11/18/opinion/uncertainty-over-tps/> [<https://perma.cc/7B62-M2WZ>]; *See also* Claire Bergeron, *Temporary Protected Status After 25 Years: Addressing the Challenge of Long-Term “Temporary” Residents and Strengthening a Centerpiece of US Humanitarian Protection*, 2 J. ON MIGRATION & HUM. SEC. 22, 29 (2014).

78. *Haiti Earthquake - Our Response*, OXFAM INT’L, <https://www.oxfam.org/en/haiti-earthquake-our-response> [<https://perma.cc/8FDA-MAMX>] (last visited Nov. 22, 2020) (describing 2010 earthquake).

79. Press Release, Dep’t of Homeland Sec., Statement from Homeland Security Secretary Janet Napolitano on Temporary Protected Status (TPS) for Haitian Nationals (Jan. 15, 2010), <https://www.dhs.gov/news/2010/01/15/secretary-napolitano-temporary-protected-status-tps-haitian-nationals> [<https://perma.cc/SE6B-APGE>] (noting provision of a “temporary refuge” for Haitians “whose personal safety would be endangered by returning to Haiti”).

80. Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3,476 (Jan. 21, 2010). *See also* Jordan E. Dollar & Allison D. Kent, *In Times of Famine, Sweet Potatoes Have No Skin: A Historical Overview and Discussion of Post-Earthquake U.S. Immigration Policy Towards the Haitian People*, 6 INTERCULTURAL HUM. RTS. L. REV. 87, 113 (2011) (discussing impact of 2010 earthquake on Haiti and U.S. immigration policy).

instability, internal displacement, a cholera outbreak, subsequent natural disasters, and continued poverty, the United States extended Haiti's TPS classification for subsequent eighteen-month periods from 2010 to 2017.⁸¹

Under the Trump administration, the process for extending TPS differed significantly. While TPS extensions are typically based on conditions within the TPS-designated country, the Trump Administration instead began seeking crime and welfare data on Haitian TPS recipients, despite the fact that TPS holders are ineligible for welfare.⁸² In addition to seeking data on criminal records and welfare use of TPS recipients, USCIS Chief of Policy and Strategy Kathy Kovarik also sought data on how many Haitian TPS recipients were "illegal pre-TPS designation."⁸³ She instructed staff to provide information "[g]iven that the Sec is going to need it to make a decision."⁸⁴ Following these inquiries, then-Secretary of Homeland Security John Kelly extended TPS for Haitians for six months on May 22, 2017, citing the country's multiple camps for internally displaced persons, gender-based violence, and the fact that

81. See Extension and Redesignation of Haiti for Temporary Protected Status, 76 Fed. Reg. 29,000, 29,001 (May 19, 2011) (describing conditions leading to extension of TPS); Extension of the Designation of Haiti for Temporary Protected Status, 77 Fed. Reg. 59,943, 59,944 (Oct. 1, 2012); Extension of the Designation of Haiti for Temporary Protected Status, 79 Fed. Reg. 11,808, 11,809 (Mar. 3, 2014); Extension of the Designation of Haiti for Temporary Protected Status, 80 Fed. Reg. 51,582, 51,583 (Aug. 25, 2015); see also Complaint at 7-5, *NAACP v. U.S. Dep't of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239).

82. See Alicia A. Caldwell, *AP Exclusive: US Digs for Evidence of Haiti Immigrant Crimes*, ASSOCIATED PRESS (May 9, 2017), <https://apnews.com/740ed5b40ce84bb398c82c48884be616> [<https://perma.cc/Y8YT-AS8Z>] (reporting that U.S. Citizenship and Immigration Services [USCIS] head of policy and strategy responded to information that data could not be found on crime rates of TPS recipients by stating, "We should also find any reports of criminal activity by any individual with TPS. Even though it's only a snapshot and not representative of the entire situation, we need more than 'Haiti is really poor' stories."). Notably, TPS recipients are not eligible to receive welfare.

83. First Amended Complaint at ¶ 79, *Saget v. Trump*, 375 F. Supp. 3d 287 (E.D.N.Y. filed May 31, 2018) (No. 18-cv-01599) (citing Ex. 4 at 44, 48); Caldwell, *supra* note 82.

84. First Amended Complaint at ¶ 79, *Saget v. Trump*, 375 F. Supp. 3d 287 (E.D.N.Y. filed May 31, 2018) (No. 18-cv-01599). Soon after, various Senators wrote to then-DHS Secretary John F. Kelly regarding the information on criminal history and public benefits data on Haitian TPS holders. See Letter from Senator Robert Menendez, et al., to John F. Kelly, Sec'y, Dep't of Homeland Sec. (May 19, 2017), https://www.menendez.senate.gov/imo/media/doc/HAITI-TPS_5_19_17.pdf [<https://perma.cc/ZGD6-VCCX>]. The Senators expressed that they were "concerned that you will use this information in your decision. Such analysis would be outside the statutory framework for deciding whether to extend TPS, and it would be a disturbing executive overreach . . . [T]he timing of this information request suggests that this information is pretext to deny an extension of TPS." *Id.*

those who had left displacement camps had “moved back to unsafe homes or relocated to informal settlements located in hazardous areas.”⁸⁵ In his decision, Secretary Kelly also noted the impact of Hurricane Matthew on Haiti in 2016, flooding and landslides in April 2017, and increasing food insecurity in Haiti.⁸⁶ While he found the conditions in Haiti supported an extension of TPS, he also noted that Haitian TPS holders should prepare to return to Haiti.⁸⁷

In June 2017, Secretary Kelly testified to the Senate and ascribed past TPS extensions to “automatic renewals.”⁸⁸ He repeatedly stressed he wanted to focus on the word “temporary” in the program’s name and indicated he would only look at “the earthquake” in Haiti, despite the fact that previous Secretaries considered “extraordinary” conditions to determine whether the TPS extension was warranted.⁸⁹ Despite bipartisan support from prominent politicians, calls from the Haitian government to extend TPS for Haiti, and evidence from international NGOs, on November 20, 2017, DHS issued a press release stating its intention to cancel TPS for Haitians: “[b]ased on all available information . . . those extraordinary but temporary conditions caused by the 2010 earthquake no longer exist.”⁹⁰ According to the press release, the termination would have a

85. See Extension of the Designation of Haiti for Temporary Protected Status, 82 Fed. Reg. 23,830, 23,832 (May 24, 2017).

86. *Id.*

87. *Id.*

88. *The Department of Homeland Security Fiscal Year 2017 Budget Request: Hearing Before the S. Comm. on Homeland Sec. & Gov. Aff.*, 115th Cong. (2017) [hereinafter *Budget Request Hearing*] (statement of John F. Kelly, Sec’y, Dep’t of Homeland Sec.).

89. See Saget First Amended Complaint, *supra* note 83, at 27 “DHS officials were communicating the same message in internal correspondence. For example, in preparation for a meeting between newly-elected Haitian President Jovenel Moïse and the Vice President Mike Pence at a Chamber of Commerce conference in Miami, Director of Latin American and Caribbean Affairs at DHS, David Cloe, circulated talking points including: ‘TPS is meant to be a temporary measure, not a permanent parole policy.’” (citing *Budget Request Hearing*, *supra* note 88).

90. Press Release, Dep’t of Homeland Sec., Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti (Nov. 20, 2017), <https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti#> [<https://perma.cc/624H-27WR>] (announcing decision not to extend TPS). For examples of bipartisan support of continuing TPS, see, e.g. Letter from Sen. Benjamin L. Cardin, Ranking Member, Comm. on Foreign Relations, to Elaine C. Duke, Acting Sec’y, Dep’t of Homeland Sec. (Nov. 8, 2017), <https://www.foreign.senate.gov/imo/media/doc/11-8-17%20BLC%20letter%20to%20DHS%20on%20Haiti%20TPS%20extension.pdf> [<https://perma.cc/ZA22-RJ6D>] (requesting TPS extension); Letter from Rep. Jimmy Gomez, et al., to John Kelly, White House Chief of Staff, & Elaine C. Duke, Acting Sec’y, Dep’t of Homeland Sec. (Nov. 1, 2017), https://gomez.house.gov/uploadedfiles/11-01-2017_congressman_jimmy_gomez_letter_to_white_house_cos_kelly_and_dhs_acting_secretary_duke_re_temporary_protected_status.pdf [<https://perma.cc/R9ZV-SS63>] (noting humanitarian impact of TPS cancellation).

delayed effective date of eighteen months, but the conclusions stated in the press release were not recorded in the Federal Register until two months later.⁹¹ The reasons cited for TPS cancellation included the decrease in internally displaced persons, increasing GDP growth, and lower levels of cholera.⁹²

Haitian TPS holders and advocates for Haitians recognized that both the decision to cancel the program and the rationale provided by DHS were inconsistent with the prior approaches to TPS and the material conditions of Haiti.⁹³ Haiti's Ambassador to the United States, Paul G. Altidor, noted that Hurricane Matthew, flooding, a cholera breakout, and further damage from Hurricanes Irma and Maria impeded Haiti's efforts to recover and its inability to receive returning citizens.⁹⁴ Steve Forester, the Immigration Policy Coordinator for the Institute for Justice and Democracy in Haiti, noted, "Haiti is a textbook case for TPS."⁹⁵ He ob-

91. See Dep't of Homeland Sec., *supra* note 90; Termination of the Designation of Haiti for Temporary Protected Status, 83 Fed. Reg. 2,648 (Jan. 18, 2018).

92. Prelim. Inj. Order at 57, *Saget v. Trump*, 351 F.Supp. 3d 251 (E.D.N.Y. filed Apr. 11, 2019) No. 18-CV-1599 https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit/impact_litigation/2019_12Apr_tps-haiti-prelim-injunt.pdf [<https://perma.cc/EQ4W-MBX7>] (further explaining and outlining the irregular process by which TPS for Haitians was cancelled); see Ivan Watson & Joe Vaccarello, *U.N. Sued for 'Bringing Cholera to Haiti,' Causing Outbreak That Killed Thousands*, CNN (Oct. 10, 2013), <https://www.cnn.com/2013/10/09/world/americas/haiti-un-cholera-lawsuit/index.html> [<https://perma.cc/4DKC-TEP5>] (describing cholera crisis).

93. See Letter from Paul G. Altidor, Haitian Ambassador to the United States, to Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. (Oct. 4, 2017), <http://www.miamiherald.com/latest-news/article178072401.ece/binary/Lettertothe%20HonorableElaineC.Duke.pdf> (requesting TPS extension for Haitians and noting how, in response to signaling from U.S. officials that TPS would soon end and as a result of extensive environmental damage caused by the landslides and Hurricane Matthew, the Haitian government requested an 18-month extension for TPS on October 4, 2017). See also Letter from the Cong. Black Caucus to Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. (Nov. 3, 2017), <http://www.ijdh.org/wp-content/uploads/2017/10/CBC-Haiti-TPS-Update-Letter.pdf> (discussing impact of repatriation of TPS recipients and loss of remittances) [<https://perma.cc/MN3X-Z99M>]; Letter from Rep. Alcee L. Hastings et al., to Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. (Sept. 18, 2017), <https://alceehastings.house.gov/news/documentsingle.aspx?DocumentID=398877> (urging renewal of TPS).

94. Letter from Paul G. Altidor, Haitian Ambassador to the U.S., to Elaine C. Duke, Acting Sec'y, Dep't of Homeland Sec. (Oct. 4, 2017), <http://www.miamiherald.com/latest-news/article178072401.ece/binary/Lettertothe%20HonorableElaineC.Duke.pdf> (requesting TPS extension for Haitians).

95. Press Release, Inst. for Just. and Democracy in Haiti, DHS Distorts Law and Precedent to Ignore Glaring Facts on Haiti TPS (Nov. 2017), <http://www.ijdh.org/2017/11/topics/immigration-topics/for-immediate-release-dhs-distorts-law-and-precedent-to-ignore-glaring-facts-on-haiti-tps> [<https://perma.cc/2YSH-M74V>] (noting "[DHS] cynically moved the goalposts, ignoring the realities on the ground to justify a result determined by an anti-immigrant agenda, not facts.").

served, “Haiti has recently endured precisely the extraordinary blows contemplated by the TPS statute, specifically an unchecked cholera epidemic and October 2016’s Hurricane Matthew, which DHS itself cited in its analysis as recently as May [2017].”⁹⁶ Despite evidence that conditions in Haiti had not improved since the 2010 earthquake, DHS ended TPS for Haitians, meaning that Haitians in the United States who currently hold TPS will no longer be able to legally remain in the country upon its expiration.⁹⁷

C. *The Wound Spreads: The Detrimental Effects of the Trump Administration Rescinding TPS for Haitians*

Many Haitian immigrants and their U.S.-born descendants predict that TPS cancellation will be devastating for both Haitians who have TPS and the communities they live and participate in.⁹⁸ In 2017, the majority of Haitians with TPS had been in the United States for seven to fifteen years and their earnings contribute both to Haiti’s recovery and the United States’ tax base.⁹⁹ Many Haitians have already been impacted by the decision: the failure of DHS to publish its November 2017 decision in the Federal Register until January 18, 2018 resulted in many Haitians losing their employment due to uncertainties regarding their legal permission to work.¹⁰⁰

Centro Presente v. Trump, which challenges the cancellation of TPS for Haitians and Salvadorans, highlights not only the economic but also the emotional and material harm that will be inflicted from the decision.

If TPS rescission goes into effect, Plaintiffs, and other TPS beneficiaries will suffer immediate and irreparable injuries to their rights under the U.S. Constitution and federal law; to their proprietary interests; and to their dignity. Without TPS,

96. *Id.*

97. Press Release, U.S. Dep’t of Homeland Sec., Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Haiti (Nov. 20, 2017), <https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti#> [<https://perma.cc/A28B-X37U>] (announcing decision not to extend TPS).

98. For a discussion of the impact of TPS cancellation on both Haiti and the United States, see *infra* Part III.

99. The Politics of Immigration, *Action Kit for Haitian TPS - May 19*, BLOGGER (May 19, 2017) http://thepoliticsofimmigration.blogspot.com/2017/05/action-kit-for-haitian-tps-may-19_19.html [<https://perma.cc/35KM-5XKY>] (providing information about TPS for Haitians).

100. See Complaint at 23, *NAACP v. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239) (explaining importance of having timely information for expansion of TPS).

most beneficiaries will not have access to employment authorization which gives these immigrants (and their employers) an assurance that they may put their talents to use . . . Without employment, many TPS beneficiaries will also lose health benefits. Plaintiffs and other TPS beneficiaries will have to prepare for imminent removal. Plaintiffs will incur costs to ensure that their property rights, family relationships, and tax obligations are protected. [TPS] rescission stigmatizes immigrants of color, as well as their children and families, and imposes a dignitary harm by denying them the dignity and respect they deserve under the U.S. Constitution and federal law. By labeling TPS beneficiaries from El Salvador and Haiti as undesirable . . . the federal government ratifies and legitimizes the notion that immigrants of color . . . are worthy of lesser social stature.¹⁰¹

Prior to TPS cancellation, advocates warned against the negative impact of cancelling TPS, noting that conditions in Haiti are not stable enough to receive deportees safely and warning of the harm that the influx of TPS recipients could have on the country.¹⁰² Given that Haiti is still struggling to rebuild its infrastructure since the earthquake, including housing, hospitals, schools, and other critical services, accepting an additional 58,000 individuals into the country would create enormous strain on a vulnerable country already facing significant difficulty providing for its own citizens.¹⁰³ Haitian activist Marleine Bastien observed, “Haiti is not ready to absorb 58,000 [individuals] . . . It’s going to be a disaster for the 58,000 families in the United States and a disaster for Haiti.”¹⁰⁴ In a bipartisan letter to DHS, members of Florida’s congressional delegation expressed a similar concern: “persistent, difficult conditions in Haiti war-

101. Complaint at 31-32, *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. filed Feb. 22, 2018) (No. 18-cv-10340).

102. *BAJI Denounces DHS’ Inhumane Decision to Terminate Program for Haitian Earthquake Survivors*, PRISON INDUSTRY DIVESTMENT MOVEMENT (Nov. 21, 2017), <https://prisondivest.com/2017/11/20/baji-denounces-dhs-inhumane-decision-to-terminate-program-for-haitian-earthquake-survivors/> [https://perma.cc/55NF-NRJP] (“Large influxes of nationals will disrupt and negatively impact the nation’s path towards recovery”).

103. See *infra* notes 104-07 and accompanying text.

104. Jaqueline Charles & Patricia Mazzei, *Haitian Quake Victims in the U.S. Will Lose Deportation Protection in 2019*, MIA. HERALD (Nov. 21, 2017), <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article185716193.html> (discussing impact of cancellation of TPS on Haitians).

rant a full extension . . . We owe it to the Haitian people to assist them in their efforts, especially as they begin to make limited progress.”¹⁰⁵

In addition, many Haitian TPS holders in the United States no longer feel that they have ties to Haiti. As Paula Vilme, a young Haitian mother who has lived in the United States since age nine, observed, “I do not believe I will survive one month in Haiti . . . I’ve been here [in the United States] for so long. My whole life is here . . . [.] This is home, so when they tell you to go back, where am I going to?”¹⁰⁶ Paula is not the only Haitian TPS holder raising a family in the United States. More than 270,000 U.S. citizen children have parents who are TPS recipients from either Haiti, El Salvador, or Honduras, meaning a parent could potentially be forced to leave their children behind in the United States or a child would be forced to go to a country they do not know.¹⁰⁷ Ramos focuses further on the impact on children:

Defendants’ new rule violates the constitutional rights of school-age U.S. citizen children of TPS holders, by presenting them with an impossible choice: they must either leave their country or live without their parents. It is well established that a U.S. citizen has an absolute right to reside in this country. It is equally well established that families have a fundamental right to live together without unwarranted government interference.¹⁰⁸

Moreover, cancellation of TPS will impact the U.S. and Haitian economies.¹⁰⁹ The Center for American Progress estimated that an aver-

105. Letter from Sen. Bill Nelson et al., to Elaine C. Duke, Acting Sec’y, Dep’t of Homeland Sec. (Nov. 21, 2017), https://www.realclearpolitics.com/video/2017/11/21/trump_administration_ending_temporary_protective_status_for_58000_haitian_refugees.html [<https://perma.cc/V26J-ZSTB>].

106. See Charles & Mazzei, *supra* note 104.

107. 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. SEC. 577, 581 (2017); see also Letter from Sen. Patty Murray et al., to Elaine C. Duke, Acting Sec’y, Dep’t of Homeland Sec., Reverse Administration Decision to Expose Thousands to Dangerous Deportations (Nov. 9, 2017), <https://votesmart.org/public-statement/1205364/letter-to-the-hon-elaine-c-duke-acting-secretary-of-homeland-security-reverse-administration-decision-to-expose-thousands-to-dangerous-deportations#.W15A1ainGUk> [<https://perma.cc/4N24-RX98>] (discussing impact of TPS termination on children of United States citizens).

108. Class Action Complaint at 2, *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. filed Mar. 12, 2018) (No. 18-cv-01554).

109. See generally, AMANDA BARAN & JOSE MAGAÑA-SALGADO, IMMIGRANT LEGAL RES. CTR., ECONOMIC CONTRIBUTIONS BY SALVADORAN, HONDURAN, AND HAITIAN TPS HOLDERS: THE COST TO TAXPAYERS, GDP, AND BUSINESSES OF ENDING TPS (Apr. 2017), https://www.ilrc.org/sites/default/files/resources/2017-04-18_economic

age of \$10,070 is spent in deporting just *one* person.¹¹⁰ Bloomberg reported that canceling TPS would cost the United States \$280 million in contributions to its GDP.¹¹¹ The Immigrant Legal Resource Center estimated that ending TPS for Haiti and Honduras would reduce Social Security and Medicaid by \$6.9 billion over a decade and decrease the U.S. GDP by \$45.2 billion over the same period.¹¹²

Canceling TPS would cause Haiti to suffer the additional loss of the investment revenue that Haitians living in the United States contribute to their ancestral homeland.¹¹³ For example, in 2006, remittances composed 20 percent of Haiti's gross domestic product (GDP) and by 2019 remittances made up nearly 40 percent of GDP.¹¹⁴ Additionally, in Haiti, due to the fact that the financially weakened state cannot absorb all the costs of caring for its citizens, remittances make up for the state's deficiencies, allowing many families to invest in their health or basic necessities, mainly the education of their children.¹¹⁵

Additionally, TPS holders play key roles in their communities—working, paying taxes, volunteering, participating in civic life, and building equity.¹¹⁶ According to a 2017 study, 6,200 households with Haitian

_contributions_by_salvadoran_honduran_and_haitian_tps_holders.pdf [https://perma.cc/8Y7L-UGPF] (discussing economic impact of TPS cancellation).

110. Philip E. Wolgin, *What Would It Cost to Deport All 5 Million Beneficiaries of Executive Action on Immigration?* CTR. FOR AM. PROGRESS (Feb. 23, 2015, 8:53 AM), <https://www.americanprogress.org/issues/immigration/news/%202015/02/23/106983/what-would-it-cost-to-deport-all5-million-beneficiaries-of-executive-action-on-immigration/> [https://perma.cc/X5ZT-637A].

111. LAURA D. FRANCIS, BLOOMBERG BNA, ENDING HAITIANS' PROTECTED STATUS COULD COST U.S. \$280M (May 16, 2017), <https://www.ilrc.org/sites/default/files/resources/pd.pdf> [https://perma.cc/5V2W-44UQ].

112. See BARAN & MAGAÑA-SALGADO, *supra* note 109; see also LOCKHART & FORMAN, *supra* note 62, at 22–24 (discussing remittances).

113. See *Personal Remittances, Received (% of GDP) – Haiti*, WORLD BANK, <https://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS?locations=HT> [https://perma.cc/5UK3-KLBT] (last visited Oct. 16, 2020).

114. See IMF, HAITI: 2019 ARTICLE IV CONSULTATION—PRESS RELEASE; STAFF REPORT; AND STATEMENT BY THE EXECUTIVE DIRECTOR FOR HAITI (Apr. 20, 2020) <https://www.imf.org/~media/Files/Publications/CR/2020/English/1HTIEA2020001.ashx>

115. See generally, Catalina Amuedo-Dorantes, Annie Georges & Susan Pozo, *Migration, Remittances, and Children's Schooling in Haiti*, 630 THE ANNALS AM. ACAD. POL. & SOC. SCI. 224 (2014). As Susan Pozo's current research illustrates, remittances mediate the access to higher education and social mobility among historically neglected and racialized ethno-racial minorities in the Dominican Republic and Mexico. See NORMA FUENTES-MAYORGA, FROM HOMEMAKERS, TO BREADWINNERS TO COMMUNITY LEADERS: A LATINA FEMINIST VIEW AT MIGRATION (forthcoming).

116. Class Action Complaint at 7, *Ramos v. Nielsen*, 321 F. Supp. 3d. 1083 (N.D. Cal. filed Mar. 12, 2018) (No. 18-cv-01554).

TPS holders have a mortgage.¹¹⁷ Eighty-one percent of Haitian TPS holders are employed and pay into the U.S. tax base.¹¹⁸ During the COVID-19 pandemic, more than 130,000 temporary protected status holders from El Salvador, Honduras, and Haiti served as essential workers.¹¹⁹ For these individuals, termination of TPS would mean substantial financial costs to protect their assets and resettle to a country where they may no longer have ties.¹²⁰ For communities in the United States where TPS holders live, it would mean the loss of parents, employers, employees, and people who make up the fabric of those communities.¹²¹

An additional concern for the cancellation of TPS is that those who lose TPS will continue to live and work in the United States but as undocumented workers.¹²² Many undocumented workers face significant vulnerabilities to exploitation from their employers in the United States given their employers' threats of contacting immigration enforcement if they do not comply.¹²³ Undocumented workers often face wage theft, dangerous or hazardous working conditions, sexual harassment and exploitation in the workplace, and toxic, abusive working environments.¹²⁴

For the foregoing reasons, cancellation of TPS for Haitians would cause adverse humanitarian consequences that do not align with the purpose of TPS to temporarily protect individuals. In order to prevent future harm, TPS—and the way the United States approaches past and future immigration—should be reimagined. However, before reimagining the future, advocates must first confront the United States' long history of

117. See *id.* (citing Warren & Kerwin, *supra* note 107, at 583).

118. See Warren & Kerwin, *supra* note 107, at 582.

119. Prchal Svajlenka & Tom Jawetz, *A Demographic Profile of TPS Holders Providing Essential Services During the Coronavirus Crisis*, CTR. FOR AM. PROGRESS (Apr. 14, 2020), <https://ampr.gs/3cnmrZH> [<https://perma.cc/WU38-HBMH>].

120. See Complaint at 3–4, *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. filed Feb. 22, 2018) (No. 18-cv-10340).

121. *Id.*

122. See Jaqueline Charles, *Haitian and Salvadoran TPS Holders Sue Trump Administration*, MIA. HERALD, (Feb. 22, 2018, 3:13 PM), <http://www.miamiherald.com/news/nation-world/world/americas/haiti/article201552444.html>.

123. See REBECCA SMITH & EUNICE HYUNHYE CHO, NAT'L EMP. L. PROJECT, WORKERS' RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS (Feb. 2013), <http://stage.nelp.org/wp-content/uploads/2015/03/Workers-Rights-on-ICE-Retaliatio-Report.pdf> [<https://perma.cc/ADQ2-6UCL>] (discussing challenges undocumented workers face).

124. *Id.*; see also Eileen Appelbaum, Annette Bernhardt & Richard J. Murnane, *Low-Wage America: How Employers Are Reshaping Opportunity in the Workplace*, Jan. 2004, Indus. & Lab. Rels. Rev.; NORMA FUENTES-MAYORGA, *THE IMMIGRANT EXPERIENCES OF DOMINICAN AND MEXICAN WOMEN IN THE 1990S: CROSSING BOUNDARIES OR TEMPORARY WORK SPACES* (2007); Nina Martin, Sandra Morales & Nick Theodore, *Migrant Worker Centers: Contending with Downgrading in the Low-Wage Labor Market*. 68 *GeoJournal* 155 (2007).

structural racism and prejudice against Haitians and other non-white immigrants. A number of recent lawsuits highlight how explicitly discriminatory the decision to rescind TPS for Haitians was and offer an example of how to confront racist decision-making processes.

III. UNCOVERING THE WOUND: LEGAL CHALLENGES TO CANCELLATION OF TPS DUE TO RACE-BASED DISCRIMINATION

On January 24, 2018, the National Association for the Advancement of Colored People (NAACP) filed a complaint in the U.S. District Court of Maryland seeking to “enjoin DHS’s November 2017 decision to rescind Temporary Protective Status (“TPS”) for Haitian immigrants, as it reflects an egregious departure from the TPS statute’s requirements and an intent to discriminate on the basis of race and/or ethnicity.”¹²⁵ Following *NAACP v. Department of Homeland Security*, advocates in three other federal cases—*Saget v. Trump*,¹²⁶ *Centro Presente v. Trump*,¹²⁷ and *Ramos v. Nielsen*¹²⁸—challenged the termination of TPS for Haitians and other minority TPS holders on multiple grounds, including Equal Protection grounds.¹²⁹ These claims assert multiple challenges to TPS termination, including that the decisions to terminate TPS were “motivated by

125. See Complaint at 239, *NAACP v. U.S. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239).

126. Complaint for Declaratory & Injunctive Relief, *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. filed Mar. 15, 2018) (No. 18-cv-01599).

127. Complaint, *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. filed Feb. 22, 2018) (No. 18-cv-10340).

128. Class Action Complaint, *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. filed Mar. 12, 2018) (No. 18-cv-01554).

129. See generally First Amended Complaint, *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. filed May 31, 2018) (No. 18-cv-01599) 2018 WL 8344939 (outlining argument for race discrimination based on contemporaneous statements); Complaint at 22, 31 ¶ 88, *NAACP v. U.S. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239) (“the Administration’s departure from the normal decision-making process; the fact that the decision bears more heavily on one race than another; the sequence of events leading to the decision; the contemporaneous statements of decision-makers; and the historical background of the decision.”). See also Complaint at 33, *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. filed Feb. 22, 2018) (No. 18-cv-10340) (“The inference of race, ethnicity, and/or national origin discrimination is supported by the Trump Administration’s departure from the normal decision-making process; the fact that the decision bears more heavily on one race than another; the sequence of events leading to the decision; the contemporaneous statements of decision-makers; and the historical background of the decision.”). Notably, other lawsuits have also challenged the cancellation of TPS for other countries, but these suits do not include Haitian TPS holders and are not discussed in this paper. see CATH. LEGAL IMMIGR. NETWORK, INC., *supra* note 6.

racism and racial, ethnic, and/or national origin discrimination.”¹³⁰ To prevail on a race-based discrimination claim, individuals are not required to show that the discriminatory purpose was the sole or primary purpose of the challenged action, only that it was a “motivating factor.”¹³¹ When evaluating claims of intentional race-based discrimination, the Court considers both direct evidence of racial animus and circumstantial evidence of discriminatory intent, including historical background, legislative and /or administrative history, greater impact on one race than another, and contemporary statements.¹³² This Part briefly outlines the basic arguments the cases present for a race-based Equal Protection claim.¹³³

A. *Bleeding Direct Evidence of Harm: Anti-Immigrant Animus in Rhetorically Racialized Politics*

The theory that TPS’s cancellation was motivated by racial discrimination is supported by evidence of President Trump’s racial animus against non-white, non-European individuals, since the White House oversees such policy decisions.¹³⁴ In the suits challenging TPS cancella-

130. Complaint at 33, *Centro Presente v. Trump*, 332 F. Supp. 3d 393 at ¶ 107 (D. Mass. filed Feb. 22, 2018) (No. 18-cv-10340).

131. See Order Granting Plaintiffs’ Motion for Preliminary Injunction, *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. filed Aug. 23, 2018) (No. 18-cv-01554) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015)).

132. *Village of Arlington Heights*, 429 U.S. at 266-68.

133. Importantly, the Supreme Court held that the equal protection guarantee applies to all persons in the United States. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

134. See *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1093 (N.D. Cal. 2018), *vacated and remanded sub nom. Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020) (order granting preliminary injunction, noting an email exchange explaining that the decision to terminate “was a political one” and instructions to “highlight [the] temporary nature” of TPS in breaking with past practice). Additionally, a Senior Advisor to the Chief of OP&S (the division within USCIS that writes USCIS recommendation on how to proceed regarding the TPS Designation) responded to the Decision Memo for Haiti, stating: “The draft is overwhelming[ly] weighted for extension which I do not think is the conclusion we are looking for.” *Id.* at 1104. In the order denying defendants’ motion to dismiss in the *Ramos* case, the Northern District of California noted: “Even if Acting Secretary Duke and Secretary Nielsen do not personally harbor animus towards TPS-beneficiaries from Haiti, El Salvador, Nicaragua, and Sudan, their actions may violate the equal protection guarantee if President Trump’s alleged animus influenced or manipulated their decision-making process.” *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1123 (N.D. Cal. 2018). The court in *Saget* came to similar conclusions in its preliminary injunction. See *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. 2019) (finding, for example, that Acting DHS Secretary Duke’s termination of TPS for Haiti was influenced by President Trump’s “America First” policy of reducing the United States’ number of non-white immigrants). For a summary of the preliminary injunction in *Saget*, see Press Release, Nat’l Immigr. Project, Federal Court

tion, plaintiffs included Trump's own comments both prior to and during his term in their arguments for intentional racial discrimination.¹³⁵ Below, we outline some of the President's more egregious comments and actions as non-exhaustive examples of his direct racial animus.¹³⁶

Well before his political career began, Trump faced a lawsuit for policies excluding Black tenants from apartment buildings he owned and operated.¹³⁷ According to the former president of Trump Plaza Hotel and Casino, Trump once stated, "laziness is a trait in the blacks."¹³⁸ Trump also claimed for years that former President Obama was not born in the United States and used his support of the "birther" conspiracy and racist stereotypes to play on societal fears in his 2016 presidential campaign.¹³⁹

Blocks Trump's Termination of Humanitarian Status for Haitians (Apr. 12, 2019), available at https://www.nationalimmigrationproject.org/pr/2019_12Apr_haiti_tps.html [<https://perma.cc/7G5L-DF3B>].

135. See First Amended Complaint, *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. filed May 31, 2018) (No. 18-cv-01599) (outlining argument for race discrimination based on contemporaneous statements); Complaint, *NAACP v. Dep't of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239); *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. 2018); Complaint, *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. filed Mar. 12, 2018) (No. 18-cv-01554). For more examples of such statements, see *infra* notes 137-50 and accompanying text. This section highlights some of the more egregious statements made by the executive. In *Ramos*, the Court addressed the fact that *Trump v. Hawaii* does not apply in this case. "The case at bar is distinguishable from *Trump* in several respects. First, Defendants herein did not cite national security as a basis for terminating TPS. . . . Second, unlike the Proclamation in *Trump*, Defendants have not claimed that TPS has been terminated for foreign policy reasons. . . . Third, the TPS-beneficiaries here, unlike those affected by the Proclamation in *Trump*, are already in the U.S. Fourth, relatedly, aliens within the U.S. have greater constitutional protections than those outside who are seeking admission for the first time. Fifth, the executive order at issue in *Trump* was issued pursuant to a very broad grant of statutory discretion . . ." *Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1129 (N.D. Cal. 2018), *vacated and remanded sub nom. Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020).

136. See *infra* notes 137-50 and accompanying text. This Article does not include all of the racist remarks and actions cited in the complaint and also adds additional context not cited in the complaints.

137. *Decades-Old Housing Discrimination Case Plagues Donald Trump*, NPR (Sep. 29, 2016 10:22 PM), [https://www.npr.org/2016/09/29/495955920/donald-trump-plagued-by-decades-old-housing-discrimination-case%20\(discussing%20housing%20discrimination%20case](https://www.npr.org/2016/09/29/495955920/donald-trump-plagued-by-decades-old-housing-discrimination-case%20(discussing%20housing%20discrimination%20case) [<https://perma.cc/W7U2-JTD5>] (discussing housing discrimination case).

138. Nick Gass, *The 15 Most Offensive Things that Have Come Out of Trump's Mouth*, POLITICO (Dec. 8, 2015, 10:21 PM), <https://www.politico.eu/article/15-most-offensive-things-trump-campaign-feminism-migration-racism/> [<https://perma.cc/G5UV-CVKL>] (discussing racist comments made by Trump).

139. See *id.*; see also German Lopez, *Trump Is Still Reportedly Pushing His Racist "Birther" Conspiracy Theory About Obama*, VOX (Nov. 29, 2017, 10:40 AM), <https://www.vox.com/policy-and-politics/2017/11/29/16713664/trump-obama-birth-certificate> (discussing birther conspiracy).

Candidate Trump began his campaign with a direct, racist attack on Mexican immigrants, calling them “rapists” and accusing them of bringing drugs and crime to the United States.¹⁴⁰ Later in his campaign, he reiterated this point, stating, “The Mexican government . . . send[s] the bad ones over because they don’t want to pay for them.”¹⁴¹ He questioned the ability of District Judge Gonzalo Curiel to make a neutral decision in a lawsuit because of his Mexican heritage, a comment Speaker of the House Paul Ryan noted was “sort of like the textbook definition of a racist comment.”¹⁴² He also called for “a total and complete shutdown of Muslims entering the U.S.”¹⁴³ Candidate Trump’s racist remarks continued with a racist tweet echoing false and manufactured statistics that Black individuals commit 81 percent of the homicides of white individuals, a figure unsupported by official data (which notes the rate is actually 15 percent).¹⁴⁴

140. Complaint at 27, *NAACP v. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239); see also Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (Jul. 8, 2015 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/> (“When Mexico sends its people . . . [t]hey’re sending people that have lots of problems, and they’re bringing those problems . . . They’re bringing drugs. They’re bringing crime. They’re rapists.”).

141. Andrew O’Reilly, *At GOP Debate, Trump Says ‘Stupid’ U.S. Leaders are Being Duped by Mexico*, FOX NEWS (Aug. 6, 2015), <https://www.foxnews.com/politics/at-gop-debate-trump-says-stupid-u-s-leaders-are-being-duped-by-mexico> [<https://perma.cc/FHB9-8FZ4>] (detailing comments by Trump regarding Mexico).

142. Complaint at 28, *NAACP v. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239) (citing *Transcript of Face the Nation*, CBS NEWS (June 5, 2016, 12:57 PM), <https://www.cbsnews.com/news/face-the-nation-transcripts-june-5-2016-trump/> [<https://perma.cc/34FP-4S2K>]; Jose A. DelReal & Katie Zezima, *Trump’s Personal, Racially Tinged Attacks on Federal Judge Alarm Legal Experts*, WASH. POST (June 1, 2016), https://www.washingtonpost.com/politics/2016/06/01/437c9ae6-280b-11e6-a3c4-0724e8e24f3f_story.html?utm_term=.5c1816dc5543 (discussing Trump’s comments).

143. Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 4:18 AM), <https://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/> [<https://perma.cc/PA4S-PEWS>].

144. John Greenburg, *Trump’s Pants on Fire Tweet That Blacks Killed 81% of White Homicide Victims*, POLIFACT (Nov. 23, 2015), <https://www.politifact.com/factchecks/2015/nov/23/donald-trump/trump-tweet-blacks-white-homicide-victims/> [<https://perma.cc/A6XX-E6DT>] (noting “black on white” homicides, according to FBI data, are closer to 15 percent). For more on how the tweet perpetuated white supremacist talking points, see Benedict Cosgrove, *The Single, Four-Year-Old Tweet That Told Us Everything We Were in for with Donald Trump*, THE INDEPENDENT (Sept. 7, 2019) <https://www.independent.co.uk/voices/donald-trump-tweet-black-white-crime-alabama-hurricane-dorian-racist-a9095051.html> (noting “the numbers aren’t just wrong; they are wrong with intent. They are meant to frighten white people or, better yet, reinforce the assumptions of those who long ago bought into our founding lie: that African

President Trump continued his anti-immigrant rhetoric during his first week in office when he issued an executive order banning individuals from majority-Muslim countries and another creating the “Victims of Immigration Crime Engagement” hotline, furthering the lie that immigrants perpetuate crime.¹⁴⁵ In a June 2017 private discussion on immigration, President Trump allegedly stated that Haitians “all have AIDS,” echoing the pejorative racist stereotypes made against Haitians in the 1980s and 1990s.¹⁴⁶ During the same conversation, he noted that Nigerians, upon seeing the United States, would “never go back to their huts” in Africa.¹⁴⁷

On January 11, 2018, President Trump asked, “Why are we having all these people from shithole countries come here?” in response to reports of immigration from El Salvador, Haiti, and African nations.¹⁴⁸ During the same meeting, individuals present reported that he stated, “Why do we need more Haitians? . . . Take them out.”¹⁴⁹ The comments juxtaposed with statements urging the United States to admit more immigrants from countries “like Norway.”¹⁵⁰ In the context of so many racist comments against Black Americans and immigrants of color, it came as little surprise when the Trump administration cancelled TPS for Haitians.

B. *Telltale Signs of Infection: Circumstantial Evidence in the Departure from the Previous TPS Renewal Process*

The decision-making process leading to TPS in 2017 differed greatly from previous decisions to extend TPS for Haiti, and evidence suggests

Americans are inherently violent and pose a constant threat to pale, god-fearing folk.”). Cosgrove goes on to note, “Ultimately the specific numbers in Trump’s tweet don’t matter. What does matter is that a major-party candidate for president of the U.S. re-tweeted a racist load of crap from a suspicious, seemingly neo-Nazi Twitter stream — and 10,000-plus followers “liked” it.” *Id.*

145. See *Victims of Immigrant Crime Engagement (VOICE) Office*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/voice> [<https://perma.cc/FHZ9-HA27>] (website for victims of immigrant crime) (last visited Nov. 7, 2020); see also Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (banning travel to U.S. from individuals from Majority-Muslim nations).

146. See Shear and Davis, *supra* note 4 (discussing racist remarks reportedly made during meeting with president). “[O]fficials strenuously insisted that Mr. Trump never used the words “AIDS” or “huts” to describe people from any country. [B]ut the two officials who described the comments found them so noteworthy that they related them to others at the time.” *Id.*

147. *Id.*

148. See Dawsey, *supra* note 5 (discussing comments made during a meeting on immigration).

149. *Id.*

150. *Id.*

that one difference was that race was a motivating factor in the government's decision to cancel TPS for Haitians.¹⁵¹ Under *Arlington Heights*, there are multiple factors to consider when deciding if there was discriminatory intent, including the “impact of the official action – whether it bears more heavily on one race than another”; the “historical background of the decision” and the “specific sequence of events leading up to the challenged decision”; and “[d]epartures from the normal procedural sequence.”¹⁵² As Part II of this Article provides an outline of the history of TPS and the impact of cancellation on Haitians, this current Part focuses on the departure from the previous TPS renewal process. The cases challenging TPS demonstrate how the departure from regular process and the racist motivations in that process are key factors within the *Arlington Heights* analysis of race-based discrimination.¹⁵³

From 2011 to 2016, each presiding Secretary of Homeland Security consulted with international organizations and considered conditions in Haiti in making each of their decisions.¹⁵⁴ Each decision to extend TPS was then published in the Federal Register within several days of the decision.¹⁵⁵ The 2017 decision followed no such protocol, but rather the administration sought crime and welfare information based on racial stereotypes.¹⁵⁶

In the decisions to extend TPS prior to 2017, previous Secretaries of Homeland Security noted the scale of damage, the number of people internally displaced, the impact of the cholera outbreak, the rates of mal-

151. See, e.g., *supra* Part II.B.

152. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977) (internal quotation marks omitted).

153. See generally First Amended Complaint, *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. filed May 31, 2018) (No. 18-cv-01599); Complaint at 7–15, *NAACP v. U.S. Dep't of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239); Complaint at 33, *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. filed Feb. 22, 2018) (No. 18-cv-10340); Class Action Complaint, *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. filed Mar. 12, 2018) (No. 18-cv-01554).

154. See, e.g., Complaint at 7–15, *NAACP v. U.S. Dep't of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239) (noting agencies consulted with and conditions leading to decision to extend TPS designation for Haiti); Extension of the Redesignation of Haiti for Temporary Protected Status, 76 Fed. Reg. 29,000 (May 19, 2011) [hereinafter “2011 Extension”] (describing conditions leading to extension of TPS); Extension of the Designation of Haiti for Temporary Protected Status, 77 Fed. Reg. 59,943 (Oct. 1, 2012) [hereinafter “2012 Extension”] (same); Extension of the Designation of Haiti for Temporary Protected Status, 79 Fed. Reg. 11,808 (Mar. 3, 2014) [hereinafter “2014 Extension”] (same); Extension of the Designation of Haiti for Temporary Protected Status, 80 Fed. Reg. 51,582 (Aug. 25, 2015) [hereinafter “2015 Extension”] (same).

155. Complaint at 7–15, *NAACP v. U.S. Dep't of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239);

156. See *supra* Part II.B.

nutrition, and the portion of the population living below the poverty line.¹⁵⁷ The decisions took into account the political instability in Haiti and the country's inability to provide adequate social services, infrastructure, education, or healthcare.¹⁵⁸ The impacts of Hurricane Sandy and Tropical Storm Isaac influenced later extensions, along with the fact that the 2010 earthquake "exacerbated pre-existing vulnerabilities, including gender-based violence, trafficking, sexual exploitation, child labor, domestic violence, and recruitment into crime or violence."¹⁵⁹ For example, the 2014 decision noted that the "extraordinary and temporary conditions that led to Haiti's designations continue to exist and prevent Haitian nationals . . . from returning to Haiti in safety."¹⁶⁰

During the consideration to extend TPS in 2017, a U.S. Citizenship and Immigration Services memo noted that "[m]any of the conditions prompting the original January 2010 TPS designation persist, and the country remains vulnerable to external shocks and internal fragility."¹⁶¹ A large portion of the documents involved in the decision-making process were later redacted, making it difficult to determine the other factors that played into the decision.¹⁶² The decision to terminate TPS did not appear to take account of factors including the gender-based violence in the internally displaced persons camps, the population's lack of access to fundamental health and nutritional services, the destruction from the earthquake, the impact of hurricanes since 2010, or food insecurity.¹⁶³ As *Centro Presente* argues, the decision deviated from INA § 244(b)(3)'s and 8 U.S.C. § 1254a's requirement that DHS "undertake a genuine, good faith review of the conditions in a foreign country designated for TPS to

157. See, e.g., 2011 Extension, *supra* note 154 (describing conditions leading to extension of TPS; extending TPS from July 23, 2011 through January 22, 2013); 2012 Extension, *supra* note 154 (extending TPS through July 22, 2014); 2015 Extension, *supra* note 154 (noting conditions in Haiti, including "malnutrition rates higher than emergency thresholds" and extending TPS from January 23, 2016 through July 22, 2017).

158. See, e.g., 2014 Extension, *supra* note 154 (extending TPS from July 23, 2014 through January 22, 2016).

159. *Id.*

160. *Id.*

161. See U.S. CITIZENSHIP & IMMIGRATION SERVS., TPS CONSIDERATIONS: HAITI (OCTOBER 2017) NATURAL DISASTER, BACKGROUND & OVERVIEW 26-43 https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit/impact_litigation/2018_Jun_USCIS-foia-tps-haiti.pdf [<https://perma.cc/N7LP-92S4>].

162. See Tal Kopan, *DHS Decision to End Haitian Immigrant Protections Questioned*, CNN (Apr. 17, 2018, 3:57 PM) <https://www.cnn.com/2018/04/17/politics/haiti-tps-documents-questions/index.html> [<https://perma.cc/X2CZ-52L8>] (discussing results of Freedom of Information Act request).

163. See, e.g., Complaint at 24-26, *NAACP v. U.S. Dep't of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239).

determine whether the conditions for designation continue to be met.”¹⁶⁴ In the 2017 publication in the Federal Register, then-Secretary Duke did not cite which “U.S. government agency” DHS consulted with in making the decision to cancel TPS.¹⁶⁵ This differs from other previous notices in the Federal Register, which referenced consultations with the Department of State.¹⁶⁶ As the *NAACP v. Department of Homeland Security* Complaint notes, “DHS departed from the normal decision-making process in deciding to rescind Haitian TPS by failing to engage the factors identified in the original determination, the factors identified in the four subsequent 18-month extensions, and the factors that Mr. Kelly identified in his extension just five months earlier.”¹⁶⁷ *Saget and Ramos* raise similar concerns.¹⁶⁸

Furthermore, as mentioned previously, DHS requested information on the number of TPS recipients receiving welfare and accused of criminal activity.¹⁶⁹ As the *NAACP v. Department of Homeland Security* Complaint argues, the attempts to gather data on Haitian TPS holders’ crimes and use of public benefits play “on false anti-Black stereotypes about criminality and exploitation of public benefits, and suggests the effort to manufacture a public safety rationale for the planned rescission.”¹⁷⁰ These significant changes to the TPS decision-making process provide circumstantial evidence of racial discrimination.

164. Complaint at 33, *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. filed Feb. 22, 2018) (No. 18-cv-10340).

165. See *Termination of the Designation of Haiti for Temporary Protected Status*, 83 Fed. Reg. 2648 (Jan. 18, 2018).

166. See Complaint at 23, *NAACP v. U.S. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239) (“The January 18, 2018, notice does not indicate whether DHS consulted with the Department of State before the rescission.”).

167. See Complaint at 26, *NAACP v. U.S. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239).

168. See, e.g., Complaint for Declaratory and Injunctive Relief, *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. filed Mar. 15, 2018) (No. 18-cv-01599) (Prelim. Injunction Order filed Apr. 11, 2019) [<https://perma.cc/JJ9Y-3VM9>]. See generally Complaint at 1, *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. filed Feb. 22, 2018) (No. 18-cv-10340); Motion for Preliminary Injunction, *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. filed Mar. 12, 2018) (No. 18-cv-01554). See also Press Release, Nat’l Immigr. Project, Federal Court Blocks Trump’s Termination of Humanitarian Status for Haitians (Apr. 12, 2019), https://www.nationalimmigrationproject.org/pr/2019_12Apr_haiti_tps.html [<https://perma.cc/7G5L-DF3B>].

169. See Caldwell, *supra* note 82 (discussing information sought on Haitians regarding welfare and crime).

170. Complaint at 26, *NAACP v. U.S. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568 (D. Md. filed Jan. 24, 2018) (No. 18-cv-00239).

IV. ASSESSING THE INJURY: THE IMPACT OF LEGAL CHALLENGES

The aforementioned litigation challenging TPS cancellation provides an important framework for understanding the benefits, but also the significant limitations, of impact litigation in producing outcomes that protect historically marginalized groups. The preliminary injunctions in *Ramos* and *Saget*, along with other litigation seeking to halt executive orders revoking protections for immigrants, may provide a hopeful prologue for the success of claims challenging the cancellation of TPS for Haitians.¹⁷¹ Additionally, although the outcome of such claims is far from certain, the injunctions have been influential in extending TPS-related documentation and TPS status, and they could create precedent requiring additional scrutiny of such executive decisions or, at the very least, create a judicial record of the mistreatment of Haitians and other TPS beneficiaries.¹⁷²

In the preliminary injunction issued in *Saget*, the Eastern District of New York ruled that the plaintiffs were likely to prove that DHS was influenced by the administration's political motivations to terminate TPS

171. See Motion for Preliminary Injunction, *Ramos v. Nielsen*, 321 F. Supp. 3d 1083 (N.D. Cal. filed Mar. 12, 2018) (No. 18-cv-01554) (Order Granting Preliminary Injunction filed Oct. 3, 2018); *State v. Trump*, 263 F. Supp. 3d 1049, 1063 (D. Haw. 2017), *aff'd*, 871 F.3d 646 (9th Cir. 2017) (enjoining enforcement of Executive Order No. 13,780); see also *Regents of Univ. of California v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018) (enjoining cancellation of DACA renewal); CATH. LEGAL IMMIGR. NETWORK, INC., *supra* note 6; *Ramos v. Nielsen*, ACLU OF SOUTHERN CAL., <https://www.aclusocal.org/en/cases/ramos-v-nielsen> [<https://perma.cc/XR9H-GGDW>] (last visited Oct. 19, 2020).

172. See Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 85 Fed. Reg. 79,208 (Dec. 9, 2020); U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 10 (noting that, due to injunctions in several court cases “USCIS will extend, through Oct. 4, 2021, Temporary Protected Status (TPS) and the validity of certain TPS-related documentation.”). The USCIS page also notes, “as required by the orders in *Saget* and *Ramos*, the TPS designation for Haiti remains in effect pending further court order. Beneficiaries under the TPS designation for Haiti will maintain their status.” *Id.* Notably, there is an extensive body of case law that records the treatment of Haitians and, in some cases, requires enjoining deportation. See, e.g., *Jean v. Nelson*, 711 F.2d 1455, 1488 (11th Cir. 1983) (recording disproportionate rates of detention of Haitian immigrants); *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd sub nom.* *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982) (noting Haitians unlawfully denied right to present asylum claims and removed from the United States without due process); *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981) (noting denial of due process by sending Haitians to remote areas of United States to be detained); *Sannon v. United States*, 460 F. Supp. 458 (S.D. Fla. 1978) (discussing denial of notice in removal hearings); *Nat'l Council of Churches v. Egan*, No. 79-cv-02959 (S.D. Fla. 1979) (discussing denial of right to work while asylum claims pending and denial of access to information to support their asylum claim).

and did not conduct a good-faith, evidence-based review of facts on the ground to determine whether to extend Haiti's TPS.¹⁷³ Moreover, Judge Kuntz ruled that the Plaintiffs are likely to succeed on the claim that the Trump Administration terminated TPS for Haiti based on racial animus.¹⁷⁴

In *Ramos*,¹⁷⁵ the Northern District of California issued a preliminary injunction blocking the termination of legal status for beneficiaries of TPS from El Salvador, Nicaragua, Haiti, and Sudan.¹⁷⁶ The injunction provides TPS holders the right to remain in the United States until the court rules otherwise.¹⁷⁷ In the decision, the court observed that “not only is there direct evidence of animus, but there is also circumstantial evidence of race being a motivating factor.”¹⁷⁸ However, in September 2020, the Ninth Circuit vacated the case and remanded the case to the District Court.¹⁷⁹ With regard to the Equal Protection claim, the Ninth Circuit found that, “While the district court’s findings that President Trump expressed racial animus against “nonwhite, non-European” immigrants, and that the White House influenced the TPS termination decisions, are supported by record evidence, the district court cites no evidence linking the President’s animus to the TPS terminations.”¹⁸⁰

Even if the legal claims are not successful, they raise creative arguments challenging the cancellation of TPS.¹⁸¹ These challenges and judg-

173. See generally *id.* See also Complaint for Declaratory and Injunctive Relief at 22, *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. filed Mar. 15, 2018) (No. 18-cv-01599) (“[DHS] failed to explain how—in less than a year—Haiti had managed to overcome the seven key justifications identified by DHS in December 2016 to maintain TPS.”).

174. *Saget v. Trump*, 375 F. Supp. 3d 280, 373-74 (E.D.N.Y. 2019).

175. *Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *vacated and remanded sub nom.* *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020).

176. *Id.*

177. *Id.*

178. *Id.* at 31. The court further noted, “Plaintiffs have provided evidence indicating that (1) the DHS Acting Secretary or Secretary was influenced by President Trump and /or the White House in her TPS decision-making and (2) President Trump has expressed animus against non-white, non-European immigrants.” *Id.* at 27.

179. *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020). The Ninth Circuit held that, “(1) judicial review of Plaintiffs’ claim under the Administrative Procedure Act (APA) is barred by 8 U.S.C. § 1254a(b)(5)(A); and (2) Plaintiffs failed to show a likelihood of success, or even serious questions, on the merits of their Equal Protection claim.” *Id.* at 1, available at <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/09/14/18-16981.pdf>.

180. *Id.* at 49. As of the publication of this paper, the ACLU has stated that it will appeal. See *What’s Next for TPS Holders?* ACLU OF SOUTHERN CAL., <https://www.aclusocal.org/en/know-your-rights/whats-next-tps-holders> [<https://perma.cc/WS5Y-4DW7>] (last visited Nov. 22, 2020).

181. For example, the cases assert violations of Equal Protection and Due Process Clauses. See, e.g., Complaint for Declaratory and Injunctive Relief at ¶¶ 106-13, *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. filed Mar. 15, 2018) (No. 18-cv-01599) (noting

es' responses will create a body of case law that future litigants can use to form successful litigation strategies.¹⁸² Additionally, the Complaints call attention to the racially motivated decision to cancel TPS for Haitians and other groups and the reproduction of racialized policies in immigration regulations. Furthermore, laws and lawsuits make a statement about what is important to a society and worth litigating. As such, there is an inherent value in challenging a decision to cancel protections for a group of people based on racist beliefs and a failure to consider evidence of ongoing harm in their country.

However, even if these claims are successful in enjoining the cancellation of TPS, a victory in court will not address the systemic, economic, and political inequalities that destabilized the economic, agricultural, and political landscape in Haiti which makes it so difficult for the country to recover after national disasters.¹⁸³ It is also possible that the cases might be resolved on other grounds and therefore fail to address or resolve the injustice of racial discrimination that the Plaintiffs allege. Lawsuits enjoining the cancellation of TPS do not address the fact that TPS itself is a broken system. Continued extensions of TPS relegate recipients of such visas to second-class residents with no stability and a status at the whim of the administration in power.

True change requires the United States to examine its thorny racial history and consider creative ways to reconcile past wrongdoing. As discussed above, impact litigation has real limitations in accomplishing this goal. The following Part considers the impact of cancellation of TPS on the Haitian community and proposes that reparations and remittances offer a framework to approach TPS moving forward.

“Defendants’ termination of Haitian TPS arbitrarily deprives current TPS recipients of the process to which they are entitled.”); *see also* Complaint at ¶ 137, *Centro Presente v. Trump*, 332 F. Supp. 3d 393 (D. Mass. filed Feb. 22, 2018) (No. 18-cv-10340) (“The Due Process Clause of the Fifth Amendment also prohibits irrational government action.”) (citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 532-33 (1973)). These cases also assert violations of the Administrative Procedure Act, *see, e.g.*, Complaint for Declaratory and Injunctive Relief at ¶¶ 114-19, *Saget v. Trump*, 375 F. Supp. 3d 280 (E.D.N.Y. filed Mar. 15, 2018) (No. 18-cv-01599) (challenging cancellation of TPS based on lack of ability to participate in rule by submitting data, views or arguments as required by 5 U.S.C. § 553(b), (c)), and the Regulatory Flexibility Act, *see, e.g., id.* at ¶¶ 120-24 (“DHS failed to conduct any regulatory flexibility analysis to determine how the termination of Haitian TPS will affect small entities, such as *Haiti Liberte’*, in violation of the Regulatory Flexibility Act (RFA)”).

182. *See supra* notes 171-81 and accompanying text.

183. *See supra* Part I.B (noting history of Haitian–United States relations).

V. CLEANING THE WOUND: VIEWING TPS THROUGH THE LENS OF
REPARATIONS AND REMITTANCES

Lawyer and Professor Mari J. Matsuda states that “[t]he dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of color.”¹⁸⁴

In order to consider the best way to approach TPS going forward, policymakers must consider the criticisms of the current system, listen to the experiences of TPS recipients, and aspire to imagine and work towards a more just future. To envision a different future, it is important to understand that Haiti’s inability to recover from natural disasters and develop politically and economically is largely due to unfettered interference from the United States.¹⁸⁵ To truly take into account the impact that U.S. immigration policy has on countries with TPS recipients, changes and extensions to the program should be viewed through the lens of first recognizing the harm done through past immigration policies and then creatively thinking reparations and remittances.¹⁸⁶

A. *Recognizing the Harm Done to People Raced as Black:
“Now Never Begins Yesterday.”*¹⁸⁷

In order to truly address the issue of racism, particularly as it applies to immigration policies like TPS and its continuing impact on Black

184. Matsuda, *supra* note 2, at 333 (“Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims.”).

185. See Andrew Buncombe, *50,000 Haitians Face Being Deported by Trump Back to Country Still Reeling from Natural Disasters*, INDEPENDENT (May 1, 2017), <http://www.independent.co.uk/news/world/americas/donald-trump-haiti-immigrants-deportations-threat-disasters-a7712346.html> (noting political interference by the United States in Haiti).

186. See, e.g., Joseph Nevins, *Migration as Reparations*, NORTH AM. CONG. ON LATIN AM. (May 24, 2016), <https://nacla.org/blog/2016/05/24/migration-reparations> [<https://perma.cc/F4BF-DTPY>] (“[A] basic concept of justice demands recognition that migration involving the movement of people from exploited and relatively impoverished parts of the world to countries of relative wealth and privilege, is, or at least should be, a right born of debt—an imperial debt. The right to migration, in other words, is a form of reparations.”).

187. RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 6 (2001). I have taken the liberty to use the term “raced as black,” as used by Professor Taunya Lovell Banks, to recognize the fact that race is a social construction assigned to individuals. See Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the U.S.*, 55 RUTGERS L. REV. 903, 911 (2003) (“Non-prejudiced whites, I argue, resist black reparations efforts because they are ignorant of the nature and condition of African slavery, de jure segregation, and the continuing vestiges of public and private discrimination against people raced as black in the U.S.”).

people and people of color in the United States, the country must first be honest about the historical harms done by white people in power to those seen as “other.” Lawyer and Critical Race Theory Professor Derrick Bell has noted, “Despite having completed the vital task of eliminating Jim Crow racial classifications, legal institutions still operate with a perspective that remains perceptually, analytically, and functionally color-coded.”¹⁸⁸ Changing the narrative around immigration to include a recognition of past harms and their continued impact on racialized groups creates a chance for healing to occur.¹⁸⁹ As lawyer and activist Randall Robinson has noted, “To set afoot a new and whole black woman and man we must first tell the victims what happened to them.”¹⁹⁰ In his conception of reparations Author Ta-Nehisi Coates observes:

Reparations—by which I mean the full acceptance of our collective biography and its consequences—is the price we must pay to see ourselves squarely. The recovering alcoholic may well have to live with his illness for the rest of his life. But at least he is not living a drunken lie. Reparations beckons us to reject the intoxication of hubris and see America as it is—the work of fallible humans.¹⁹¹

As both Coates and Robinson recognize, a collective recognition of the racial harm and history of the United States is the first step towards an honest effort at amending the harm done. Part of recognizing the harm and retelling—or, more accurately put, *realistically telling*—the story of U.S. immigration history and its critical intersection with race is including the voices of those who have been excluded from scholarly conversations but who are most impacted by immigration policy decisions.¹⁹² In

188. DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 5, 58 (1987).

189. See Magee, *supra* note 19, at 305 (“By fleshing out the experiences of early African Americans as forced migration immigrants, enslaved workers, and free people (some of whom were exercising the right to vote at the time of the Constitution’s ratification), we might begin the articulation of a new, more inclusive narrative, one that understands this nation as having been strengthened by the contributions of people of diverse backgrounds from the beginning.”).

190. See ROBINSON, *supra* note 187.

191. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/L2YR-7SCZ>] (discussing arguments in support of reparations for African Americans).

192. See Johnson, *supra* note 29, at 551 (discussing “ivory tower” of scholarship around race and immigration and discussing immigration literature and prevalence of white male scholars); Richard Delgado, *The Imperial Scholar: Reflections On a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 563-64 (1984) (“When the inner circle writers

addressing the harm the United States has done to Haiti in particular, it is important to recognize, as the scholar Westenley Alcenat once heard a Haitian street vendor say, “If we were not punished for our independence long ago, we would have had a better time.”¹⁹³

B. *Stitching up the Injury: Reparations*

Reparations for Haiti are especially important because the United States historically supported France’s demand’s for Haiti to pay “reparations” to France for the freedom granted to the enslaved people, “thus distorting the essence and meaning of reparative justice for 100 years.”¹⁹⁴ In order to achieve just immigration, the United States must address the racism in its past and current systems, policies, institutions, and individuals.¹⁹⁵ Reparations are one such way to provide an acknowledgement for harm done and a commitment to work towards righting the wrong.¹⁹⁶ The National Coalition for Black Reparations in America defines reparations as “a process of repairing, healing and restoring a people injured because of their group identity and in violation of their fundamental human rights by governments, corporations, institutions, and families.”¹⁹⁷ International Legal Advisor Emanuela-Chiara Gillard notes, “The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed. Reparation can take various forms, including restitution, compensation or satisfaction.”¹⁹⁸ Professor Mari Matsuda explains that “[r]eparations claims are based on continuing stigma and economic harm [T]he injuries suffered—deprivation of land, resources, edu-

need authority for a factual or social scientific proposition about race they generally cite reports of the U.S. Commission on Civil Rights or else each other.”).

193. See Alcenat, *supra* note 48 (quoting Haitian street vendor).

194. See Campbell, *supra* note 41.

195. See LEAH WISE & GERALD LENOIR, BLACK ALL. FOR JUST IMMIGR. & SOUTHEAST REG’L ECON. JUST. NETWORK, BLACK VOICES CALL FOR NEW APPROACHES TO IMMIGRATION REFORM 3 <https://www.racialequitytools.org/resourcefiles/BLACK-VOICES-CALL-FOR-NEW-APPROACHES-TO-IMMIGRATION-REFORM.pdf> [<https://perma.cc/SFS8-74G6>] (outlining just immigration reform agenda and noting “just immigration cannot be accomplished without addressing systemic policies as well as individual, institutional and structural racism.”)

196. See Matsuda, *supra* note 2, at 395 (“The judgment states, ‘Something terrible has happened for which we are responsible. While no amount can compensate for your loss, we offer here a symbol of our deep regret and our continuing obligation.’”)

197. *Reparations – Learn About Reparations for Blacks in America*, NAT’L COALITION OF BLACKS FOR REPARATIONS IN AM., <http://www.ncobraonline.org/reparations/> [<https://perma.cc/7YBR-TM7Z>] (last visited Oct. 16, 2020).

198. Emanuela-Chiara Gillard, *Reparation for Violations of International Humanitarian Law*, 85 INT’L REV. RED CROSS 529, 531 (2003).

cational opportunity, person-hood, and political recognition—are disabilities that have precluded successful presentation of the claim at an earlier time.”¹⁹⁹ Reparations arise under the legal obligation to make victims whole and are traditionally broken down into two categories: 1) material reparations, such as monetary awards or social welfare programs, and 2) non-material or symbolic reparations, such as formal apologies.²⁰⁰

The United States has supported reparations in the past.²⁰¹ For example, the United States paid reparations to victims of Japanese internment and created a board, the Commission on Wartime Relocation and Internment of Civilians (CWRIC), which assessed how to extend reparations, who to extend reparations to, and when to create monuments and days of remembrance for formerly interned Japanese individuals.²⁰² In its findings supporting a need for reparations, the CWRIC reported a history of anti-Japanese sentiment and legislation, restrictions on Japanese immigration, and refusal of U.S.-citizenship for Japanese descendants well before internment camps began.²⁰³ The Civil Liberties Act of 1988, which granted reparations to individuals of Japanese ancestry (and to Aleut villages), included many principles of reparations.²⁰⁴ The Act’s purposes include: (1) an acknowledgement of the injustices; (2) an apology for the action; (3) provision of a “public education fund to finance efforts to inform the public about the internment of such individuals so as in-

199. See Matsuda, *supra* note 2, at 381–82.

200. See Gillard, *supra* note 198; see also David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1054–55 (2010) (discussing forms of reparations); see also Eric A. Posner & Adrian Verneule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 727–29 (2003); see also Tamar Lewin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES (June 4, 2001), <https://www.nytimes.com/2001/06/04/us/calls-for-slavery-restitution-getting-louder.html> (discussing claims for reparations for African Americans).

201. Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here Is How It Went*, N.Y. TIMES (Jun. 19, 2019), <https://www.nytimes.com/2019/06/19/us/reparations-slavery.html>; see also Erin Blakemore, *The Thorny History of Reparations in the U.S.*, HISTORY.COM (Aug. 29, 2019), <https://www.history.com/news/reparations-slavery-native-americans-japanese-internment> [<https://perma.cc/62FN-QEZ8>].

202. See Matsuda, *supra* note 2, at 381–82.

203. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 1–23 (1st ed. 1983).

204. Civil Liberties Act of 1988, Pub. L. No. 100–383, 102 Stat. 903, 903 (Aug. 10, 1988). The Act also aims to “make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island, in settlement of United States obligations in equity and at law, for (A) injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II; (B) personal property taken or destroyed by United States forces during World War II; (C) community property, including community church property, taken or destroyed by United States forces during World War II; and (D) traditional village lands on Attu Island not rehabilitated after World War II for Aleut occupation or other productive use.” *Id.*

formation to prevent the recurrence of any similar event;” (4) restitution to those who were interned; and (5) instructions to “discourage the occurrence of similar injustices and violations of civil liberties in the future.”²⁰⁵

Traditionally, a reparation claim is presented as follows: “Plaintiff Class A (victim group members) v. Defendant Class B (perpetrator descendants and current beneficiaries of past injustice).”²⁰⁶ In the case of Haitian TPS holders, the victim group members would be the Haitians who have suffered from years of U.S. interference in their country, stereotypes in the United States regarding HIV/AIDS, job loss with the uncertainty surrounding TPS extension, and family strain as a result of almost a decade of an immigration status that is extended every eighteen months.²⁰⁷ The United States has contributed to the political unrest and instability in Haiti and continues to benefit from taxes paid by TPS recipients and contributions to the U.S. economy by such recipients.²⁰⁸

The United States could offer both material and non-material reparations to Haitians—particularly Haitian TPS holders—in the form of

205. In Title II, the same Act also aims to “make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island, in settlement of United States obligations in equity and at law, for (A) injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II; (B) personal property taken or destroyed by United States forces during World War II; (C) community property, including community church property, taken or destroyed by United States forces during World War II; and (D) traditional village lands on Attu Island not rehabilitated after World War II for Aleut occupation or other productive use.” *Id.*

206. See Matsuda, *supra* note 2, at 375. “Plaintiffs operating under a disability are not required to press their claims until the disability is removed; a continuing wrong does not start the clock running under a statute of limitation until the wrong culminates in an act of fraud in concealing the availability of or grounds for an action is another standard exception. All of these exceptions apply to claims for reparations.” *Id.* at 381. “Reparations claims are based on continuing stigma and economic harm. The wounds are fresh and the action timely given ongoing discrimination. Furthermore, the injuries suffered—deprivation of land, resources, educational opportunity, person-hood, and political recognition—are disabilities that have precluded successful presentation of the claim at an earlier time. Outright fraud and factual misrepresentation have also delayed presentation of claims.” *Id.* at 381–82.

207. See Alcenat, *supra* note 48 (discussing the case for reparations).

208. See, e.g., Nevins, *supra* note 186 (“a basic concept of justice demands recognition that migration involving the movement of people from exploited and relatively impoverished parts of the world to countries of relative wealth and privilege, is, or at least should be, a right born of debt—an imperial debt. The right to migration, in other words, is a form of reparations.”). Importantly, there is a humanitarian need to grant individuals the right to stay in the United States and the case for reparations does not negate the real need of many who apply for a right to remain, live, and work in the United States, regardless of where they are from. See e.g., Frelick, *supra* note 71. See also *supra* Part I.B. (discussing history of U.S. interference in Haiti).

various immigration relief and policies. Non-material reparations could include a formal apology to the nation of Haiti for past wrongs, a study of the impact of past policies on Haitians and Haitian immigrants, and guaranteed inclusion of Haitians in future decisions about TPS extensions. A study of the impact that adverse immigration policies have had on Haiti and Haitian immigrants would be an important first step in reparations and giving stronger consideration to the international impact of U.S. immigration policy.

Material reparations could include extending TPS, offering a pathway for citizenship, and offering Haitian TPS recipients benefits to programs which they are currently excluded from, such as Medicaid and unemployment benefits.²⁰⁹ Such policies would be akin to the benefits that were offered to Cubans from 1966 to 2016 under the CAA or an adjustment of status provision which was briefly available to Haitians under the Carter administration.²¹⁰ These material reparations would specifically address the harm done.²¹¹

Another form of material reparations could be reforming TPS entirely and providing a framework to prevent future actions based on racial animus.²¹² Some have suggested that the United States could reform the system for granting TPS by creating a TPS board to weigh the merits of a TPS extension, rather than having TPS decided by a political appointee such as the Secretary of Homeland Security.²¹³ The TPS board could monitor human rights situations, consult with various NGOs and state agencies, and hold hearings to fully understand the perspective of indi-

209. For an approach to concretely reforming TPS, see Frelick, *supra* note 71 (proposing changes to U.S. refugee law that would “provide individualized complementary protection to people outside their countries who are not able to meet the 1951 Refugee Convention standard but who face a serious threat to life or physical integrity if returned because of a real risk of (1) cruel, inhuman, or degrading treatment or punishment; (2) violence; or (3) exceptional situations, for which there is no adequate domestic remedy.”).

210. See *supra* notes 56-58 and accompanying text. See WASEM, *supra* note 56, at 5 (“an adjustment of status provision was included in the Immigration Reform and Control Act (IRCA) of 1986 (P.L. 99-603) that enabled the Cuban-Haitian Entrants who had arrived during the Mariel Boatlift to become LPRs.”)

211. See *id.* See also Part I.B and Part II.B-C (discussing harmful immigration policies and the specific harm caused by cancelling TPS).

212. See *infra* notes 213-19 and accompanying text.

213. See Anchors, *supra* note 70, at 595 (discussing possible TPS board); see also Ari Weitzhandler, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, 64 U. COLO. L. REV. 249, 275 (1993) (suggesting alternatives for granting TPS).

viduals with TPS.²¹⁴ A board re-designating TPS would ideally include members of the community who would receive TPS as part of its decision-making body.²¹⁵ Such a board would not be as politically swayed as current actors are because they could be appointed and only removable for particular reasons.²¹⁶ Additionally, a small board could act quickly.²¹⁷ Like any political body, the board would not be perfect and could have biases or be influenced by lobbying.²¹⁸ Transparency would help counter these issues, as could a concrete set of criteria to be analyzed when granting and extending TPS.²¹⁹ As the U.S. House of Representatives discussed and ultimately wrote into the language of the American Dream and Promise Act of 2019, the law surrounding TPS should be amended to provide a pathway to legal permanent residence for TPS holders who have lived in and contributed to the United States for extended periods, which would further contribute to family unity and more permanently integrate TPS holders into U.S. society.²²⁰ These material and non-material reparations could be a small step in righting past wrongs and rethinking the future of TPS and Haitian-U.S. relations.

C. Recovery Through Rethinking Aid: Remittances

Granting and extending TPS allows Haitians in the United States to contribute to their country's development through remittances, as TPS allows these individuals to legally participate in the U.S. labor force. Remittances are funds which are sent to the home country of an immigrant

214. See Anchors, *supra* note 70, at 596 (citing Stephen H. Legomsky, *The Making of U.S. Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 699 (1995)).

215. For example, in extending TPS for Haiti, Haitians in the United States with TPS would be consulted. *Id.*

216. *Id.* at 596 (discussing benefits of TPS board).

217. *See id.*

218. *See id.*

219. *See id.* at 597 (discussing benefits of transparency and explicit criteria in TPS, including a more rapid response time); *see also* Fitzpatrick, *supra* note 64, at 373 (“The factors examined by the Departments of State and Justice in advising the Attorney General [now Secretary of DHS] in making her periodic decisions on TPS are often unclear.”); *see also* Alice Jackson Smith, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, 28 VA. J. INT’L L. 509, 542 (1988) (suggesting considerations for protection).

220. *See* American Promise Act of 2019, H.R. 6, 116th Cong. § 211(b)(1)(A), (B).; *see also* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE U.S. 156-60 (2006) (discussing situation of immigrants in the United States, contributing to United States society, and seeking a more permanent status). *See also* Gillard, *supra* note 198, at 529-53.

living and working abroad.²²¹ Remittance flows worldwide are more than three times that of official development aid.²²² According to 2019 data, remittances to Haiti made up 38.9 percent of Haiti's GDP.²²³ To facilitate remittances, the United States could encourage regulations that make sending money abroad less costly.²²⁴

Providing Haitians in the United States with the ability to continue to work legally ensures a more stable source of economic support to Haiti than another type of aid program.²²⁵ Previous aid programs in Haiti have created a dependency on foreign NGOs that pay the government little heed and use foreign contractors instead of local expertise.²²⁶ Additionally, foreign aid programs spend much of their funds on flying "experts" to Haiti and paying staff bonuses for "hardship pay" and "danger pay."²²⁷ One study noted that less than a penny of every dollar dedicated to Haitian relief efforts through USAID actually went to a Haitian organization.²²⁸

221. See Dilip Ratha, *Remittances: Funds for the Folks Back Home*, IMF, <http://www.imf.org/external/pubs/ft/fandd/basics/remitt.htm> [https://perma.cc/YQ76-7AN2] (last updated Feb. 24, 2020) (outlining importance of remittances).

222. See Drew Desilver, *Remittances from Abroad Are Major Economic Assets for Some Developing Countries*, PEW RSCH CTR. (Jan. 29, 2018), <https://www.pewresearch.org/fact-tank/2018/01/29/remittances-from-abroad-are-major-economic-assets-for-some-developing-countries/> [https://perma.cc/U8EC-MMS4] (discussing role remittances play in developing nations).

223. *Personal Remittances, Received (% of GDP) – Haiti 2019*, WORLD BANK, <https://data.worldbank.org/indicator/BX.TRF.PWKR.DT.GD.ZS?locations=HT> [https://perma.cc/5UK3-KLBT] (last visited Oct. 16, 2020).

224. See Ben Schiller, *The Fight for the \$400 Billion Business of Immigrants Sending Money Home*, FAST COMPANY (Apr. 28, 2017), <https://www.fastcompany.com/3067778/the-blockchain-is-going-to-save-immigrants-millions-in-remittance-fees> [https://perma.cc/P4WU-Q9GD] (discussing quantity of remittances sent yearly and cost of doing so).

225. See *id.* (discussing remittances); see also Elizabeth Nisbet & William M. Rogers III, *The Earnings Gap Between Undocumented and Documented U.S Farmworkers: 1990 to 2009* (Nat'l Poverty Ctr., Working Paper No. 13-07, 2003), <http://npc.umich.edu/publications/u/2013-07-npc-working-paper.pdf> [https://perma.cc/8YQU-W568] (discussing gap in earnings between documented and undocumented immigrants).

226. Cécile Barbière, *Development Expert: 'Haiti Would Be Better Off Without International Aid'*, EURACTIVE (May 30, 2017), <https://www.euractiv.com/section/development-policy/interview/un-expert-haiti-would-be-better-off-without-international-aid/> [https://perma.cc/4WPG-UGYA]; see also Gillard, *supra* note 198, at 529-53.

227. See Jake Johnson, *Outsourcing Haiti*, BOS. REV. (Jan. 16, 2014), <http://bostonreview.net/world/jake-johnston-haiti-earthquake-aid-caracol> [https://perma.cc/9WTD-42UV] (discussing aid in Haiti); see also Gillard, *supra* note 198.

228. See *id.* ("While bad governance, corruption, incompetent bureaucracy, power struggles, and waste contributed to the ineffective use of aid, what happened in Haiti has more to do with the damage caused by putting political priorities before the needs of those on the ground.").

Unlike aid programs, remittances provide a way to assist the country while acknowledging the agency of individual Haitians sending and receiving remittances to choose how they wish to invest in their nation.²²⁹ This does not mean that remittances will automatically solve economic or political issues in Haiti or that they come without their own challenges.²³⁰ However, facilitating remittances is a step away from imperialism and unfettered interference in Haitian affairs and a step closer to true Haitian independence.

VI. MOVING TOWARDS HEALING

Although immigrants as a whole have struggled throughout U.S. history, the continued inferior treatment of immigrants of color—and particularly Haitians—is evidence of institutionalized racism within the immigration system as a whole.²³¹ Institutionalized racism is defined as “[r]acial discrimination that has become established as normal behavior within a society or organization.”²³² U.S. immigration policy has excluded Haitians for years and discriminatory actions such as the cancellation of TPS for Haitians, which disproportionately impacts Black immigrants, must be confronted and prevented—not simply through legal challenges that highlight current injustices but through concrete, creative policies to address past harm.

Despite their adverse history, Haiti and the United States are neighbors, separated by only 100 miles of blue Caribbean Sea, and share a distinct, centuries-old revolutionary origin story. That common bond should motivate policies that recognize the truth of their relationship—and the extent of the harms done—but also the possibility of what *could be*. An honest commitment to exploring and acknowledging the pain of

229. Renata Sago, *Haitians with TPS Help Fuel Haiti's Economy, One Wire Transfer at a Time*, MARKETPLACE, Apr. 17, 2018, <https://www.marketplace.org/2018/04/17/economy/haitians-with-tps-help-fuel-haitis-economy> [https://perma.cc/9ACE-B9N5] (discussing role that Haitians abroad play in supporting Haiti).

230. *Haiti - Economy: Impacts of Remittances from Diaspora on the National Economy*, HAITILIBRE (Apr. 4, 2017, 11:36 AM), <http://www.haitilibre.com/en/news-20563-haiti-economy-impacts-of-remittances-from-diaspora-on-the-national-economy.html> [https://perma.cc/3LH7-5LXM] (discussing brain drain and use of remittances to import products from abroad).

231. See *supra* Part I and accompanying text (discussing history of Haiti and impact of the United States on Haiti).

232. *Institutional Racism*, LEXICO, https://www.lexico.com/definition/institutional_racism [https://perma.cc/3U6Y-TWFN]; see also Marc Verlot, *Understanding Institutional Racism*, in EUROPE'S NEW RACISM: CAUSES, MANIFESTATIONS, AND SOLUTIONS 27, 31 (Evens Found. ed., 2002) (noting that institutional racism “refers to the manner in which [such] institutions generate or sustain racism . . . through the daily handling of people (everyday level) or through the mechanics of the society (structural level)”).

U.S. immigration policy could lead not only to treating current Haitian asylum seekers and TPS holders with dignity and respect but to imagining a mutually beneficial relationship that benefits both countries as well as the families and individuals caught in between Port-au-Prince and the United States. Such a model of acknowledgement, remittances, and reparations would not only serve the U.S.-Haitian relationship, but also those fleeing persecution and oppression around the world, especially those from the Global South, seeking to realize their rights under international law. As the famous Kréyol proverb goes, “*dèyè mòn gen mòn*,” or “beyond mountains, there are mountains.”²³³ Perhaps the first step towards healing is simply to imagine what a just future could look like, somewhere just beyond those peaks.

233. Dana Rousmaniere, *Something Special in the World*, ATLANTIC (Feb. 2004), <https://www.theatlantic.com/magazine/archive/2004/02/something-special-in-the-world/303111/> [<https://perma.cc/7D8A-7K5S>].

