UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CRISTA RAMOS, et al.,

Plaintiffs,

v.

KIRSTJEN NIELSEN, et al.,

Defendants.

Case No. 18-cv-01554-EMC

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Docket No. 120

The federal government seeks to terminate the Temporary Protected Status ("TPS") designations for four countries: Haiti, Sudan, Nicaragua, and El Salvador. Under three prior administrations, the TPS designations of these countries have been repeatedly extended based on adverse and dangerous conditions in these countries. Under the designations, approximately 300,000 TPS beneficiaries have been allowed to stay and work in the United States because of dangerous or unsafe conditions in their home countries.[1] Without TPS designations, these beneficiaries will be subject to removal from the United States.

Plaintiffs in this case are TPS beneficiaries (who have resided in the United States for years) along with their U.S.-citizen children. In this suit, Plaintiffs challenge the Trump administration's decision to terminate TPS status for the affected countries. Currently pending before the Court is Plaintiffs' motion for a preliminary injunction. Plaintiffs seek to enjoin the government from implementing or enforcing the decisions of the Secretary of the Department of Homeland Security to terminate TPS designations of these countries pending a final resolution of

[1] *See* Degen Decl., Ex. 14 (NSC Memo) (indicating that there are 5,349 TPS beneficiaries from Nicaragua; 263,282 TPS beneficiaries from El Salvador; and 58,706 TPS beneficiaries from Haiti); Degen Decl., Ex. 87 (Decision Memo at 2) (indicating that there are 1,039 TPS beneficiaries from Sudan).

foreign state (or part of such foreign state) . . . and shall determine whether the conditions for such designation under this subsection continue to be met."

- "If the Attorney General determines . . . that a foreign state (or part of such foreign state) no longer continues to meet the conditions for designation under paragraph (1), the Attorney General shall *terminate* the designation . . . ." *Id.* § 1254a(b)(3)(B) (emphasis added).
- "If the Attorney General does not determine . . . that a foreign state (or part of such foreign state) no longer meets the conditions for designation under paragraph (1), the period of designation of the foreign state is *extended* for an additional period of 6 months (or, in the discretion of the Attorney General, a period of 12 or 18 months)." *Id.* § 1254a(b)(3)(C) (emphasis added).

Section 1254a(b)(5)(A) provides that "[t]here is no judicial review of any determination of the Attorney General with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection." *Id.* § 1254a(b)(5)(A). However, the Court previously held that this provision does not bar the Court from considering Plaintiffs' particular claims brought in the instant case, including their Administrative Procedure Act ("APA") and Equal Protection claims. *See* Docket No. 55 (Order at 15, 20-21) (holding that this provision does not preclude a challenge to general collateral practices or certain colorable constitutional claims).

B. General Process for TPS Designation Decision (on Periodic Review)

For the most part, the parties agree that the general process for a TPS designation decision (on periodic review) is as follows. The decisions are formally made by the Secretary for the Department of Homeland Security ("DHS"). For her review, RAIO[2] (a division within USCIS) provides a Country Conditions Memo. In addition, OP&S[3] (another division within USCIS) drafts a Decision Memo that contains USCIS's recommendation on what to do about the TPS designation. Once the Decision Memo is finalized, the USCIS Director passes it on to the DHS

[2] RAIO stands for Refugee, Asylum and International Operations Directorate.

[3] OP&S stands for Office of Policy and Strategy.

influenced or manipulated their decisionmaking process." Docket No. 55 (Order at 43).

As to the first issue, Plaintiffs have pointed to several pieces of evidence suggesting that the White House was putting pressure on DHS to end TPS. For example, there is evidence that "the White House was keenly interested in the [DHS] Secretary's decisions related to TPS," Degen Decl., Ex. 12 (Nealon Depo. at 89-90), and that Stephen Miller, "an important [senior] adviser to the President and the White House," "frequently" reached out to Chad Wolf, the DHS Chief of Staff, about TPS, Degen Decl., Ex. 85 (Nealon Depo. at 288, 297, 300), as well as Gene Hamilton, the Senior Counselor to the DHS Secretary. On more than one occasion, Mr. Hamilton stated that "Mr. Miller favored the termination of TPS." Degen Decl., Ex. 85 (Nealon Depo. at 292).

As another example, shortly before Acting Secretary Duke was to make a decision on the TPS designations for Nicaragua, Honduras, and El Salvador, a White House Principals Meeting was held to discuss the TPS designations.[10] It appears that attendees included high-level White House officials such as Chief of Staff Kelly, then-Principal Deputy Chief of Staff Nielsen, and Press Secretary Sanders. A memo distributed by the White House National Security Council in advance of the meeting recommended that the TPS designations be terminated and that Congress be engaged "to pass a comprehensive immigration reform to include a merit based entry system." Degen Decl., Ex. 14 (NSC Memo at 2). The National Security Council recommendation to terminate TPS status was given to Acting Secretary Duke. *See* Degen Decl., Ex. 29 (Memo at 2). In addition, White House Chief of Staff Kelly subsequently had a conversation with Acting Secretary Duke about the TPS designations for the Central American countries.[11] *See* Degen

[10] A Principals Meeting is "a meeting of people at the cabinet level to coordinate policy." Docket No. 117-4 (Martin Decl., Ex. 4) (Nealon Depo. at 340).

[11] The Washington Post reported that White House Chief of Staff Kelly had put pressure on Acting Secretary Duke to terminate Honduras's TPS designation. *See* Degen Decl., Ex. 28 (Washington Post article, dated November 9, 2017). The Court acknowledges, however, that, in an email that was eventually passed on to Acting Secretary Duke, White House Chief of Staff Kelly maintained that he merely told Acting Secretary Duke that the decision was hers and that he would recommend a limited extension no longer than twelve months for the Central American countries. *See* Martin Decl., Ex. 3 (email) (White House Chief of Staff maintaining that he simply conveyed that his "view was to grant limited (no more than 12 months or so [versus] the maximum 18 months allowed by the TPS program) to the Central American TPS recipients who

that the United States should instead bring more people from countries such as Norway," which has a predominantly white population. Degen Decl., Ex. 96 (Washington Post article). He also told lawmakers that immigrants from Haiti "must be left out of any deal." Degen Decl., Ex. 96 (Washington Post article).

- In February 2018, President Trump gave a speech at the annual Conservative Political Action Conference where he used MS-13 – a gang with many members having ties to Mexico and Central America – to disparage immigrants, indicating that that they are criminals and comparing them to snakes. *See* Degen Decl., Ex. 93 (article from www.vox.com); *see also* Degen Decl., Ex. 98 (New York Times article) (stating that President Trump characterized undocumented immigrants as "'animals'").
- In July 2018, President Trump told European leaders that "they 'better watch themselves' because a wave of immigration of 'changing the culture' of their countries,'" which he characterized as being "'a very negative thing for Europe.'" Degen Decl., Ex. 99 (Washington Post article).

See also Centro Presente, 2018 U.S. Dist. LEXIS 122509, at *15-19 (cataloguing evidence of possible animus, including but not limited to those identified above).

The Court also notes that not only is there direct evidence of animus, but there is also circumstantial evidence of race being a motivating factor. Under *Arlington Heights*, circumstantial evidence of a discriminatory intent can be inferred from, *e.g.*, "[t]he impact of the official action – whether it bears more heavily on one race than another"; "[t]he historical background of the decision" and "[t]he specific sequence of events leading up to the challenged decision"; and "[d]epartures from the normal procedural sequence." *Arlington Heights*, 429 U.S. at 266-67 (internal quotation marks omitted). In the instant case, consideration of these factors weighs in favor of Plaintiffs.

First, the impact of the TPS terminations clearly bears more heavily on non-white, non-European individuals; indeed, it affects those populations exclusively.

Also, the sequence of events leading up to the challenged decisions are irregular and

established ties to the community, no foreign policy or national security interest has been relied upon the DHS to support its decision to terminate TPS status for the affected countries, and the TPS statute does not conferred unfettered authority upon the Secretary. The justification for a kind of super deference advocated by the government in this case is not warranted.

Finally, *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008), is distinguishable from the instant case as well. Although *Rajah*, like the instant case, is *not* an admission case, it is still distinguishable because the aliens in *Rajah* were, undisputedly, deportable from the country, and the only issue was whether the aliens might be able to get a reprieve from deportation because the "deportation proceedings were so tainted by the [post-9/11] Program [that required nonimmigrant alien males over the age of 16 from designated countries to appear for registration and fingerprinting] and associated events." *Id.* at 434. *See, e.g., id.* at 434-38 (addressing petitioners' arguments that, *inter alia*, "the Attorney General had no statutory authority to enact the Program," that "the Program was invalidly promulgated because the relevant regulations were not subject to the required public notice and comment," and that the petitioners' "deportation orders violate their rights under . . . Equal Protection . . . because the immigration laws were selectively enforced against them based on their religion, ethnicity, gender, and race"). Moreover, *Rajah* is distinguishable because, while the case (like the instant case) involved an Equal Protection claim, the claim was really one for selective prosecution/enforcement, an area in which the courts have applied substantial deference to the exercise of prosecutorial discretion. *See, e.g., Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 489-90 (1999) (noting that, "[e]ven in the criminal-law field, a selective prosecution claim is a *rara avis*" because "such claims invade a special province of the Executive" and therefore a "criminal defendant [must] introduce 'clear evidence] displacing the presumption that a prosecutor has acted lawfully"; adding that "[t]hese concerns are greatly magnified in the deportation context" but also stating that "we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome").

At the very least, the above analysis indicates that there are serious questions going to the merits as to whether *Trump v. Hawaii* governs in the instant case. Even if *Trump v. Hawaii* did

provide the governing legal standard for the Equal Protection claim here, the Court nevertheless finds that there are serious questions going to the merits that warrant a preliminary injunction. In *Trump v. Hawaii*, the Supreme Court stated that the "standard of review considers whether the [challenged decision] is plausibly related to the Government's stated objective." *Trump v. Hawaii*, 138 S. Ct. at 2420. The Supreme Court also indicated that, in spite of this deferential standard of review, it assumed a court could "look behind the face of the [challenged decision] to the extent of applying rational basis review." *Id.* In other words, a court could "consider [a plaintiff's] extrinsic evidence," including statements by the President, and should "uphold [the challenged decision] so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* Judicial review, though more deferential than traditional strict scrutiny, remains fact based. Here, considering the substantial extrinsic evidence submitted by Plaintiffs, there are serious questions as to whether the terminations of TPS designations could "reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.*; *see also Centro Presente*, 2018 U.S. Dist. LEXIS 122509, at *58-59 (in similar TPS case, stating that, "even if rational basis review were to apply, Plaintiffs' claims, at this early stage of litigation, would still survive"; noting that "there is no justification, explicit or otherwise, for Defendants' switch to focusing on whether the conditions that caused the initial designation had abated rather than a fuller evaluation of whether the country would be able to safely accept returnees").

III. CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' motion for a preliminary injunction.

1. It is hereby ORDERED THAT Defendants, their officers, agents, employees, representatives, and all persons acting in concert or participating with them, are ENJOINED AND RESTRAINED from engaging in, committing, or performing, directly or indirectly, by any means whatsoever, implementation and/or enforcement of the decisions to terminate TPS for Sudan, Haiti, El Salvador, and Nicaragua pending resolution of this case on the merits.

2. It is further ORDERED that Defendants shall take all administrative actions needed to preserve the status quo pending completion of discovery and a ruling on the merits of the

action, including all steps needed to ensure the continued validity of documents that prove lawful status and employment authorization for TPS holders. Defendants shall report to the Court within fifteen (15) days of this Order on the administrative steps taken to comply with this paragraph and otherwise preserve the status quo.

The preliminary injunction shall take effect immediately and shall remain in effect pending resolution of this case on the merits or further order of this Court. The Court shall hold a Case Management Conference on October 26, 2018 at 10:30 a.m. The parties shall file a joint case management conference statement by October 19, 2018 and shall address, *inter alia*, the expedited setting of trial or other means of adjudication of the merits.

This order disposes of Docket No. 120.

IT IS SO ORDERED.

Dated: October 3, 2018

EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California