

September 6, 2016

The Honorable Barack H. Obama  
The White House  
1600 Pennsylvania Ave., NW,  
Washington, DC 20500

**Re: Executive Authority to Expand TPS to Protect 1.2 Million Immigrants from Deportation**

Dear Mr. President:

The undersigned 102 immigration, administrative, and international law professors and scholars write to express our position regarding the scope of your authority to issue designations of Temporary Protected Status (TPS) to approximately 1.2 million undocumented immigrants from El Salvador, Honduras, and Guatemala, particularly in light of the deadlocked Supreme Court's failure to reach a decision in *United States v. Texas* and the dire conditions in the Northern Triangle Countries.<sup>1</sup> In support, this letter outlines the legal underpinning for TPS and the actions your Administration can undertake during the continued pendency of the litigation around Deferred Action for Parents of Lawful Permanent Residents and expansion of Deferred Action for Childhood Arrivals. Finally, the letter outlines how your Administration has substantial discretion to designate countries for TPS and that such designations would likely be immune from many judicial challenges due an explicit bar to litigation established by Congress.

The legal authority for TPS outlined in this letter supplements—and does not supplant—the robust legal foundation for the U.S. Department of Homeland Security (DHS) to exercise prosecutorial discretion to protect from removal a segment of the nation's undocumented population—a legal position widely accepted by immigration and administrative scholars and a position that the below signatories still hold.<sup>2</sup> Prosecutorial discretion remains and will continue to be a different—but equally legally and constitutionally sound—form of immigration protection that your Administration should continue to defend in *United States v. Texas* and other contexts.

**I. TEMPORARY PROTECTED STATUS BACKGROUND**

Established by Congress through the Immigration Act of 1990, TPS represents a congressionally authorized delegation of discretion to address emergent humanitarian crises.<sup>3</sup> TPS is a

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<sup>1</sup> *United States v. Texas*, 579 U.S. \_\_\_\_ (2016).

<sup>2</sup> Letter from Shoba Sivaprasad Wadhia, Professor of Law, Pennsylvania State University Dickinson School of Law, et. al to Barack H. Obama, President, United States (Sep. 3, 2014), available at <https://pennstatelaw.psu.edu/file/Law-Professor-Letter.pdf>; Brief for Administrative Law Scholars, et. al, as Amici Curiae Supporting Petitioners, *United States v. Texas*, 579 U.S. \_\_\_\_ (2016) (No. 15-674), available at <http://www.scotusblog.com/wp-content/uploads/2016/03/15-674tsacAdminLawScholars.pdf>; Letter from Hiroshi Motomura, Professor of Law, University of California Los Angeles School of Law, et. al (Nov. 2014), available at <https://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf>.

<sup>3</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5029, available at <https://www.gpo.gov/fdsys/pkg/STATUTE-104/pdf/STATUTE-104-Pg4978.pdf>; Madeline Messick and Claire Bergeron,

temporary, humanitarian form of immigration protection that provides short-term relief from deportation and employment authorization for immigrants who cannot safely return to their home country.<sup>4</sup> The statute authorizes your Administration—through the Secretary of DHS—to designate a country for TPS if he finds that: (1) there is “an ongoing armed conflict” and, as an outgrowth of that conflict, deporting immigrants would “pose a serious threat to their personal safety;”<sup>5</sup> (2) there is an “earthquake, flood, drought, epidemic, or other environmental disaster,” the foreign country is unable to adequately handle the return of their nationals, and the foreign government requests TPS;<sup>6</sup> or (3) there exist “extraordinary and temporary conditions” that prevent immigrants from being deported to their home country in safety.<sup>7</sup>

This letter does not extensively set out the country conditions of the Northern Triangle countries, as there is already extensive scholarship, advocacy, and even a previous letter from legal scholars on the dangerous conditions in these three countries.<sup>8</sup> Importantly, however, your Administration has already acknowledged how deteriorating security conditions in El Salvador justify the critical need for TPS and the importance of staying the removal of its nationals from the United States. Just weeks ago, Secretary of DHS Jeh Johnson cited, as part of the justification for an older TPS designation for El Salvador, the “[i]ncreasing violence and insecurity,” “extortion demands from gangs,” and the government’s “struggle to respond adequately to increasing levels of crime.”<sup>9</sup> Tellingly, in July, your Administration also announced the expansion of the Central American Minors program, in light of “ongoing humanitarian challenges in Central America.”<sup>10</sup>

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*Temporary Protected Status in the United States: A Grant of Humanitarian Relief that Is Less than Permanent*, MIGRATION POLICY INSTITUTE, July 2, 2014, available at <http://www.migrationpolicy.org/article/temporary-protected-status-united-states-grant-humanitarian-relief-less-permanent>.

<sup>4</sup> 8 U.S.C. § 1254a (West 2016).

<sup>5</sup> *Id.* at § (b)(1)(A).

<sup>6</sup> *Id.* at § (b)(1)(B).

<sup>7</sup> *Id.* at § (b)(1)(C).

<sup>8</sup> *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, UNHCR, March 12, 2014, available at [http://www.unhcrwashington.org/sites/default/files/1\\_UAC\\_Children%20on%20the%20Run\\_Full%20Report.pdf](http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf); *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, UNHCR, Oct. 28, 2015, available at <http://www.unhcr.org/5630f24c6.html>; Siibylla Brodzinsky and Ed Pilkington, *U.S. government deporting Central American migrants to their deaths*, THE GUARDIAN, Oct. 12, 2015, <http://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america>; Letter from National and State Organizations, to Barack H. Obama, President, United States (Jan. 25, 2016), available at <http://immigrantjustice.org/sites/immigrantjustice.org/files/images/Northern-Triangle-TPS-National-Letter-January-25-2016.pdf>; Letter from Erin B. Corcoran, Professor of Law, University of New Hampshire School of Law, et. al to Barack H. Obama, President, United States (Feb. 16, 2016), available at [http://immigrantjustice.org/sites/immigrantjustice.org/files/2016\\_02\\_26\\_ProfessorTPSLetter.PDF](http://immigrantjustice.org/sites/immigrantjustice.org/files/2016_02_26_ProfessorTPSLetter.PDF).

<sup>9</sup> Extension of Designation of El Salvador Under Temporary Protected Status Program, 81 Fed. Reg. 44,645 (July 8, 2016), available at <https://www.federalregister.gov/articles/2016/07/08/2016-15802/extension-of-the-designation-of-el-salvador-for-temporary-protected-status>.

<sup>10</sup> Press Release, U.S. Department of State, U.S. Expands Initiatives to Address Migration Challenges (July 26, 2016), available at <http://www.state.gov/r/pa/prs/ps/2016/07/260507.htm>.

Although DHS already designated El Salvador and Honduras for TPS, those designations were made in 2001 and 1999, respectively, and therefore exclude from eligibility those nationals who arrived in the United States after those dates.<sup>11</sup> The federal government has never designated Guatemala for TPS. Designating Guatemala and re-designating El Salvador and Honduras for TPS (by advancing eligibility dates to the current date) would make approximately 1.2 million undocumented immigrants eligible to apply for TPS.<sup>12</sup>

## II. YOUR ADMINISTRATION HAS BROAD DISCRETIONARY AUTHORITY TO DESIGNATE TPS FOR THE NORTHERN TRIANGLE COUNTRIES

Congress, through the statutory framework establishing TPS, provided the Secretary discretion in determining when conditions in a foreign country warrant TPS and whether to make such a designation. The TPS statute does not explicitly define “ongoing armed conflict” or “extraordinary and temporary conditions,”<sup>13</sup> but instead delegates that determination to the Secretary, stating that the Secretary “may designate”<sup>14</sup> a foreign country for TPS if the Secretary “finds”<sup>15</sup> that certain conditions exist.

Notably, while the statute explicitly lists specific examples of natural disasters, it lists no such criteria or metrics for the purposes of “ongoing armed conflict” or “extraordinary and temporary conditions.”<sup>16</sup> In short, Congress did not specifically enumerate requirements that must exist, such as specific levels of death, injury, or destruction, to support a designation. The absence of mandatory criteria to consider how to make a TPS designation, coupled with the statute’s plain language, signifies that the Secretary has significant discretion in designating a country for TPS. Moreover, Congress established a framework to disqualify certain individuals from applying for TPS if they did not meet certain criminal history or background requirements, meaning that the protection provided by TPS only includes the population that Congress already explicitly stated should be protected (e.g. those without certain criminal histories) by the TPS statute.<sup>17</sup>

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<sup>11</sup> *Id.*; Extension of the Designation of Honduras for Temporary Protected Status, 71 Fed. Reg. 30,331 (May 16, 2016), available at

<https://www.federalregister.gov/articles/2016/05/16/2016-11306/extension-of-the-designation-of-honduras-for-temporary-protected-status>; See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Temporary Protected Status (July 8, 2016), available at <http://www.uscis.gov/humanitarian/temporary-protected-status>.

<sup>12</sup> Jose Magaña-Salgado, *Relief Not Raids: Temporary Protected Status for El Salvador, Guatemala, and Honduras*, IMMIGRANT LEGAL RESOURCE CENTER, Jan. 2016, available at

<http://www.ilrc.org/resources/relief-not-raids-temporary-protected-status-for-el-salvador-guatemala-honduras>. (“Designation of Temporary Protected Status for El Salvador, Guatemala, and Honduras would make approximately 1.2 million (1,226,044) additional individuals potentially eligible for Temporary Protected Status . . .”).

<sup>13</sup> 8 U.S.C. § 1254a(b)(1)(A), (C) (West 2016).

<sup>14</sup> *Id.* at (b)(1).

<sup>15</sup> *Id.* at (b)(1)(A), (B), (C) (emphasis added).

<sup>16</sup> *Id.* at (b)(1)(B); Nowhere in the statute did Congress list metrics for subsection (b)(1)(A) and (b)(1)(C). See *id.*

<sup>17</sup> 8 U.S.C. § 1254a(c)(2) (West 2016).

### III. CONGRESS EXPLICITLY EXEMPTED TPS DESIGNATIONS, TERMINATIONS, AND EXTENSIONS FROM JUDICIAL REVIEW

Congress provided an additional layer of protection for the Secretary's exercise of discretion: an explicit bar that prohibits legal challenges regarding the Secretary's decision to designate, terminate, and extend designations for countries for TPS.<sup>18</sup> Specifically, the statute states that "There is no judicial review of any determination of the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection."<sup>19</sup> Practically, this means that the TPS statute precludes most legal challenges, including those on which the district court and court of appeals rested their decisions in the ongoing *United States v. Texas* litigation.<sup>20</sup> There, both the district court and court of appeals rejected the Department of Justice's argument that judicial review was precluded because the "agency action is committed to agency discretion by law," an exception to judicial review enumerated under the Administrative Procedures Act (APA).<sup>21</sup>

Importantly, the APA outlines two exceptions to judicial review: when the agency action is committed to the agency discretion by law and when "statutes preclude judicial review."<sup>22</sup> This exception has been affirmed by the United States Supreme Court, which has held that there is a "presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose."<sup>23</sup> The TPS statute's preclusion of judicial review thus satisfies the requirements of the APA clearly and unambiguously.<sup>24</sup>

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<sup>18</sup> *Id.* at (b)(5)(A). The undersigned, however, strongly disagrees with the decision in *United States v. Texas* at the district, appellate, and Supreme Court levels and still firmly believe that the expansion of DACA and DAPA are a lawful exercise of the Executive Branch's authority to enforce our nation's immigration laws.

<sup>19</sup> *Id.*

<sup>20</sup> The district court found that the plaintiffs had the "right of judicial review" under 5 U.S.C. § 702, the framework established by the APA. Unlike TPS, however, there was no specific statute that explicitly precluded judicial review. *Texas v. United States*, 86 F. Supp. 3d 591, 615 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015), *aff'd by an equally divided court*, 579 U.S. \_\_\_\_ (2016); The court of appeals agreed with the district court and concluded that Congress, through the APA, provided judicial review. *Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015), as revised (Nov. 25, 2015), *aff'd by an equally divided court*, 579 U.S. \_\_\_\_ (2016).

<sup>21</sup> *Texas v. United States*, 86 F. Supp. 3d 591, 615 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015), *aff'd by an equally divided court* 579 U.S. \_\_\_\_ (2016); *Texas v. United States*, 809 F.3d 134, 152 (5th Cir. 2015), as revised (Nov. 25, 2015), *aff'd by an equally divided court*, 579 U.S. \_\_\_\_ (2016); 5 U.S.C. § 701 (West 2016).

<sup>22</sup> *Id.* at (a)(1).

<sup>23</sup> *City of Chicago v. U.S.*, 396 U.S. 162, 165 (1969) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)).

<sup>24</sup> The statute's prohibition on legal challenges, however, may not preclude challenges based on Constitutional grounds. One of the arguments raised in *United States v. Texas*, was that the expansion of DACA and DAPA violated the Constitution's requirement that the President "take care and the laws be faithfully executed." U.S. CONST., art. 2, § 3. However, this constitutional theory was not adopted by the district court nor the court of appeals and received no questions during the Supreme Court oral argument. See *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), as revised (Nov. 25, 2015), *aff'd by an equally divided court*, 579 U.S. \_\_\_\_ (2016); *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), as revised (Nov. 25, 2015) *aff'd by an equally divided court*, 579 U.S. \_\_\_\_ (2016); Oral Argument, *United States v. Texas*, 579 U.S. \_\_\_\_ (2016) (No. 15-674). Moreover, a challenge based on the "Take Care" clause would be even less likely to succeed as exercise of the TPS statute would essentially represent the President's implementation of the very law that the Congress itself passed. Importantly, however, the signatories of this letter still firmly believe that even without an explicit bar to judicial review, the issues in *United States v. Texas* are non-justiciable because of a lack of standing among Texas and the other states, as well as because of other established legal obstacles to APA review of the deferred action initiatives.

Since the establishment of TPS, there has never been a single, successful legal challenge to the designation of TPS for a country. Consequently, the robust provisions preventing judicial review and this lack of previous challenges strongly indicate that an exercise of TPS would likely not be enjoined through a legal challenge.

#### **IV. CONCLUSION**

The litigation in *United States v. Texas* could likely continue for years without a definite resolution. In the meantime, your Administration has the legal authority to provide relief to a significant number of undocumented individuals whose deportation is untenable in light of current country conditions for the Northern Triangle countries. Congress explicitly created TPS as a tool for your Administration to address humanitarian crises, delegated substantial authority, and even precluded legal challenges. In light of this explicit congressional authorization, we respectfully ask that your Administration re-designate El Salvador and Honduras and designate Guatemala for TPS. If you have any questions regarding this letter, please do not hesitate to contact Jose Magaña-Salgado of the Immigrant Legal Resource Center at 202-777-8999 or [jmagana@ilrc.org](mailto:jmagana@ilrc.org).

Sincerely,<sup>25</sup>

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