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Deportation As A Death Sentence: Equal Protection Violations In The Trump Administration’s Termination Of Medical Deferred Action

Lauren Silk*

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I. INTRODUCTION

At seven years old, Maria Isabel Bueso arrived in the United States from Guatemala to participate in a clinical trial at the request of doctors researching Mucopolysaccharidosis VI (MPS-6)—an

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uncommon and debilitating genetic disease.¹ With complications from dwarfism, blurred vision, and spinal cord compression, Bueso was not expected to live beyond the age of twenty.² The rarity of the disease also made Bueso's participation all the more necessary as doctors struggled with trial enrollment.³ Yet, with Bueso's help, doctors were able to gain FDA approval for a new medication that extended her life span by more than ten years.⁴ Today, at twenty-four years old, Bueso has been recognized for her advocacy by local and national legislators and is receiving ongoing treatment through her parents' private insurance.⁵

At thirty-three years old, M.K. contemplates the impossibility of leaving the tenth floor of a Boston hospital, where he receives treatment for a rare vascular tumor.⁶ A software engineer from Morocco, M.K. came to the United States as a place of last resort after being denied operation in Belgium, Germany, and South Korea.⁷ He turned to Boston after discovering two doctors who would treat him, arriving on a tourist and medical visa in 2017.⁸ With his authorized stay expiring, M.K. applied for medical deferred action—an alternate grounds for permitting him to stay in the United States for treatment.⁹

For Bueso, M.K., and countless others, the United States' discretionary program granting medical deferred action to immigrants demonstrating extreme medical need has been a godsend. Where relief is often not accessible within their own native countries, foreign nationals have been granted authorization to remain in the United

¹ Miriam Jordan & Caitlin Dickerson, *Sick Migrants Undergoing Lifesaving Care Can Now Be Deported*, N.Y. TIMES (Aug. 29, 2019), <https://www.ny-times.com/2019/08/29/us/immigrant-medical-treatment-deferred-action.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Shannon Dooling, *As Feds Reopen Some Medical Deferral Cases, Boston Patients Find Hope*, WBUR NEWS (Sept. 4, 2019), <https://www.wbur.org/news/2019/09/04/boston-migrants-react-medical-deferral-action-change>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

States regardless of their status.¹⁰ However, when news broke on August 7, 2019, that U.S. Customs and Immigration Services (USCIS) would no longer review medical deferred action applications, the lives of many beneficiaries were put into question.¹¹ With little fanfare, USCIS denied and deferred applications to Immigration and Customs Enforcement (ICE)—the agency charged with deportation.¹²

For beneficiaries like M.K., the life-altering news came from the media first: “‘What happen[ed] is I read your article before I even saw the letter, and I called a family member to check out the mail and surprise, surprise, there’s the letter.’”¹³ The implications were clear. With deportations imminent, the risk of death was essentially guaranteed. According to Arizona-based immigration attorney Jonathan Solorzano, deferral of one of his client’s applications to ICE resulted in a denial and deportation.¹⁴ Solorzano’s client suffered from a severe heart condition that rendered him immobile after several surgeries; yet, even with a letter from his cardiologist declaring that a return to Mexico would invariably lead to his death, ICE deported him.¹⁵ A few weeks later, Solorzano’s client died.¹⁶

After much criticism, on September 19, 2019, USCIS announced it would continue reviewing applications for medical deferred action.¹⁷ Notwithstanding the change in course, the program’s hiatus caused much confusion and led commentators to speculate as to a discriminatory motive behind the policy change.¹⁸ Termination of medical deferred action—a small but longstanding program primarily benefiting non-white, non-European immigrants—raises

¹⁰ See *Frequently Asked Questions*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/archive/frequently-asked-questions> (last updated Mar. 8, 2018).

¹¹ See Madeline Ackley, *Potential Deportation of Medically Vulnerable Migrants Halted, but Questions Remain*, CRONKITE NEWS ARIZ. PBS (Sept. 26, 2019) <https://cronkitenews.azpbs.org/2019/09/26/medical-deferred-action/>.

¹² *Id.*

¹³ Dooling, *supra* note 6.

¹⁴ Ackley, *supra* note 11.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *id.*

questions as to the equal protection violations experienced by beneficiaries threatened with deportation.

Part I of this Note provides background on the origins and practice of medical deferred action. It also references analogous immigration policies whose implementation or threatened cancellation have been challenged in the courts. Part II identifies the standard for an equal protection challenge, pinpointing the presence of disparate impact and discriminatory intent behind the Trump Administration's temporary cancellation of medical deferred action. Finally, Part III addresses how courts should proceed in analyzing a medical deferred action equal protection challenge and the implications of relying upon a discretionary, impermanent program.

II. ROLLBACK OF MEDICAL DEFERRED ACTION AND ANALOGOUS IMMIGRATION POLICIES

A. *Background on Medical Deferred Action*

The practice of deferred action long predates the widely publicized Deferred Action for Childhood Arrivals policy, or DACA, first introduced by the Obama administration in November 2014.¹⁹ The action originates from the use of prosecutorial judgment in prioritizing certain deportation proceedings over others²⁰ and is defined as “a discretionary determination to defer a removal action of an individual as an act of prosecutorial discretion” according to U.S. Customs and Immigration Services.²¹ Government regulations have deemed it “an act of administrative convenience to the government which gives some cases lower priority.”²² Though a grant of deferred action does not bestow lawful status, an individual is considered by the Department of Homeland Security (DHS) to be lawfully present during the duration of the an authorized stay.²³ In other

¹⁹ *Deferred Action Basics*, NAT'L IMMIGR. F. (Apr. 15, 2016), <https://immigrationforum.org/article/deferred-action-basics/>.

²⁰ *Id.*

²¹ *Frequently Asked Questions*, *supra* note 10.

²² Complaint at 6, *Irish Int'l Immigrant Ctr., Inc. v. Cuccinelli*, (D. Mass. 2019) (No. 1:19-cv-11880-IT) (citing 8 C.F.R. § 274a.12(c)(14)).

²³ *Frequently Asked Questions*, *supra* note 10.

words, USCIS will not pursue removal proceedings against those present by way of deferred action.²⁴

Deferred action stemmed from a practice of the United States Immigration and Naturalization Service (INS), DHS's predecessor, in which low priority was given to undocumented immigrants who demonstrated extreme hardship upon leaving the United States.²⁵ Such individuals are known as "non-priority aliens" and would essentially be given a pass on active deportation proceedings under an unacknowledged INS practice.²⁶ This non-priority status evolved into the use of deferred action on an *ad hoc* basis and a discretionary relief basis toward specific groups of undocumented immigrants.²⁷

Pertinent here is the *ad hoc* basis for deferred action typically granted to individuals for humanitarian purposes, such as caring for a family member with serious mental or physical illness or obtaining medical assistance for a serious mental or physical illness.²⁸ Also known as medical deferred action or non-military deferred action, the program grants deferrals from deportation for a two-year period to undocumented immigrants who show extreme medical need, such as cancer, cystic fibrosis, HIV, cerebral palsy, muscular dystrophy, or epilepsy.²⁹

Determinations are made on a case-by-case basis in light of the totality of the circumstances and use a similar analysis as that employed when considering B-2 visas filed for medical purposes.³⁰ The requests are seemingly administered under USCIS's 2012 "Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices" for "all requests for deferred action . . . handled at USCIS Field Offices."³¹ After years of practice, the

²⁴ *Deferred Action Basics*, *supra* note 19.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Shannon Dooling, *Trump Administration Ends Protection for Migrants' Medical Care*, NPR (Aug. 27, 2019, 7:39 AM), <https://www.npr.org/2019/08/27/754634022/trump-administration-ends-protection-for-migrants-medical-care>.

³⁰ *USCIS Re-Opens Previously Pending Deferral Requests*, U.S. CITIZENSHIP IMMIGR. SERVS., <https://www.uscis.gov/news/alerts/uscis-re-opens-previously-pending-deferral-requests> (last updated Sept. 2, 2019).

³¹ Complaint, *supra* note 22, at 7-8 (citing U.S. Citizenship & Immigr. Servs., *Standard Operating Procedures for Handling Deferred Action Requests at USCIS*

applications have undergone a uniform procedure for processing with individualized determinations for responses.³² Once submitted to the local USCIS field office, the application is assessed by a Field Office Director and/or District Director and is ultimately decided by a USCIS Regional Director.³³ Signing as verification of the enclosed content, applicants are expected to provide medical and supporting documents such as “proof of identity and nationality, biographic information, ‘medical information, evidence of community and familial ties and equities, conditions in the requestor’s county of origin, etc.’”³⁴ They are also expected to submit fingerprints and are subjected to a series of background checks completed by USCIS before approval.³⁵

Upon approval, not only are deportation proceedings stayed, but immigrants granted deferred action can seek work authorization and a driver’s license.³⁶ Because of the stay, rather than amassing unlawful presence, recipients retain the possibility of receiving future immigration benefits that would have otherwise been barred under 8 U.S.C. section 1182(a)(9)(B)(i).³⁷ Other available aid includes Social Security, retirement, and disability benefits, and depending on the state, unemployment insurance.³⁸ Overall, the program offers mobility, stability, and relief to sick migrants and their respective family members while receiving life-saving treatment.³⁹

However, on August 7, 2019, medical deferred action was placed on a temporary hiatus.⁴⁰ On that day, USCIS purportedly stopped processing deferral requests and pawned the responsibility onto Immigration and Customs Enforcement—a shift of duty that

Field Offices 3 n.1 (Mar. 7, 2012) [hereinafter *USCIS Standard Operating Procedures*]).

³² *See id.* at 8.

³³ *Id.*

³⁴ *Id.* (citing *USCIS Standard Operating Procedures* at 3).

³⁵ *Id.* (citing *USCIS Standard Operating Procedures* at 4-6).

³⁶ Monique O. Madan & Ben Conarck, *Undocumented Immigrants with Serious Illnesses Had a Lifeline. Now It May Be Gone*, MIAMI HERALD (Aug. 27, 2019, 8:13 AM), www.miamiherald.com/news/local/immigration/article234426937.html.

³⁷ Complaint, *supra* note 22, at 7.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Ackley, *supra* note 11.

implied full execution of deportation proceedings.⁴¹ Though the revocation was implemented as of August 7, USCIS did not publicly announce the change, resulting in a delay in notification to the public and ICE.⁴² In fact, ICE declined to take over the program and denied knowledge of USCIS's plan to discontinue the program.⁴³

The delay in notice also affected immigrants applying for medical deferred action, who received letters that they were "not authorized to remain in the United States"; rather, they were told they had thirty-three days to voluntarily leave or await possible forced removal.⁴⁴ During this time, people were left in a state of confusion regarding their status and their ability to retain treatment; further, doctors noted that thirty-three days was insufficient time to transfer the patient.⁴⁵

Criticism grew from the medical community and Congress on what effectively amounted to a death sentence since some of the required equipment, such as breathing and feeding tubes, are sparse to nonexistent in some of the patients' home countries.⁴⁶ On August 30, Congress delivered a letter to DHS, USCIS, and ICE backed by nearly 130 congressional signatories demanding answers and the reversal of "[yet] another cruel action by the Trump Administration to attack our most vulnerable immigrant neighbors."⁴⁷ Congress gave a deadline of September 13, 2019.⁴⁸ Shortly thereafter, over a dozen

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Letter from Michael J. McCleary, Field Office Dir., U.S. Citizenship and Immigration Servs., U.S. Dep't of Homeland Sec., to [REDACTED] (Aug. 15, 2019), https://d279m997dpfwgl.cloudfront.net/wp/2019/08/Redacted_MedDA_denials.pdf.

⁴⁵ Priyanka Dayal McCluskey, '*Deportation . . . With This Type of Medical Condition is a Death Sentence*': *Outrage Grows over Federal Policy Change*, BOSTON GLOBE (Aug. 29, 2019, 8:25 PM), <https://www.bostonglobe.com/metro/2019/08/29/deportation-from-united-states-with-this-type-medical-condition-death-sentence-representative-ayanna-pressley-said/I2Fm6F5b85EKKdLMaLMi3M/story.html>.

⁴⁶ *Id.*

⁴⁷ Letter from Congress, to Kevin McAleenan, Acting Secretary, Dep't of Homeland Sec., Ken Cuccinelli, Acting Dir., U.S. Citizenship and Immigration Servs., & Matthew T. Albence, Acting Dir., U.S. Immigration and Customs Enf't (Aug. 30, 2019), <https://pressley.house.gov/sites/pressley.house.gov/files/083019%20Deferred%20Action%20Letter.pdf>.

⁴⁸ *Id.*

state attorney generals signed on to a letter to USCIS and ICE relaying concerns and questions on how medical deferral requests should be made in the future.⁴⁹ The House Subcommittee on Civil Rights and Civil Liberties held an emergency hearing on September 12, which despite an abundance of testimonial evidence from the victims, included little comment from USCIS regarding why the program ended and on whose orders.⁵⁰ This lack of cooperation resulted in a threat of subpoena from freshman Representative Alexandria Ocasio-Cortez.⁵¹

In the face of mounting outrage, USCIS announced on September 2 that it would limit reconsideration to applications pending as of August 7 in a second attempt to phase out its role in medical deferred action cases.⁵² The announcement amounted to a staggering 791 pending petitions.⁵³ Subsequently, on September 19, 2019, DHS confirmed that deferred action petitions would be processed once again by USCIS.⁵⁴ Notably, petitions were instructed to be scrutinized and granted solely “on compelling facts and circumstances”⁵⁵—a vague criterion.

Though the program’s termination only lasted for a month, 424 people received rejection letters out of the estimated 1,000 that apply yearly.⁵⁶ In Massachusetts alone, an immigration attorney

⁴⁹ Associated Press, *Healey Among State Attorneys General Seeking Answers On Immigrant Medical Care Cases*, WBUR NEWS (Sept. 4, 2019), <https://www.wbur.org/news/2019/09/04/ag-maura-healey-medical-deferred-action>.

⁵⁰ Press Release, House Comm. on Oversight and Reform, Subcommittee Examined Administration’s Decision to Deport Critically Ill Children During Emergency Hearing (Sept. 12, 2019), <https://oversight.house.gov/news/press-releases/subcommittee-examined-administration-s-decision-to-deport-critically-ill>.

⁵¹ *Id.*

⁵² USCIS Re-Opens Previously Pending Deferral Requests, *supra* note 30.

⁵³ Shannon Dooling, *Congress Expected To Subpoena ICE, USCIS To Testify In 2nd Hearing On Reinstated Medical Deferred Action*, WBUR NEWS, <https://www.wbur.org/news/2019/10/11/medical-deferred-action-immigration-hearing-house> (last updated Oct. 11, 2019).

⁵⁴ Ackley, *supra* note 11.

⁵⁵ Letter from Ken Cuccinelli, Acting Dir., U.S. Citizenship and Immigr. Servs., to Jamie Raskin, Chairman of the Subcomm. on Civil Rights and Civil Liberties, House of Rep. (Sept. 19, 2019), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Chairman%20Raskin%20Letter.pdf> [hereinafter Letter from Ken Cuccinelli].

⁵⁶ Ackley, *supra* note 11.

calculated a group of roughly forty families that were affected and estimated the potential for thousands to be affected nationally during the program's termination.⁵⁷ Worse yet, as of October, families were still awaiting news of approval or denial of their deferral applications.⁵⁸

In the aftermath, concern stems not only from the month-long turmoil that resulted from the policy change, but also from recent trends of denying medical deferred action to those who are at risk of dying upon deportation.⁵⁹ The Trump Administration has focused on violent offenders rather than the medically vulnerable, implementing a more rigid and less compassionate policy over the past few years.⁶⁰ As a consequence of the change in policy without public notice, Congress is demanding transparency and investigating the Trump Administration's decision.⁶¹

B. *The Trump Administration's Muslim Ban*

Unfortunately, the unannounced revocation of medical deferred action is not the first time the Trump Administration has taken federal officials by surprise in changing immigration policy with limited notice.⁶² Taken together, it reflects a pattern of targeted measures implemented to limit the flow of certain immigrants from entering U.S. borders. Case in point, the first policy initiative issued on January 27, 2017, concerned limiting the number of refugee petitions accepted and suspending for ninety days the admittance of immigrants from countries predetermined as housing "terrorist threats"—a policy infamously known as the Muslim Ban.⁶³

Under the guise of "protect[ing] the American people from terrorist attacks by foreign nationals admitted to the United States," Executive Order 13769 held conditions such as warfare, disaster, and civil disturbances under scrutiny in the name of safeguarding U.S. national security.⁶⁴ In addition to curbing the admittance of

⁵⁷ McCluskey, *supra* note 45.

⁵⁸ Dooling, *supra* note 53.

⁵⁹ See Ackley, *supra* note 11.

⁶⁰ *Id.*

⁶¹ Dooling, *supra* note 53.

⁶² Jordan & Dickerson, *supra* note 1.

⁶³ *Id.*

⁶⁴ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

refugees, it placed an automatic ninety-day suspension on the entry of individuals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.⁶⁵ Countries were chosen based on the following criteria:

[S]uspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence.”⁶⁶

In short, it deemed the entry of immigrants from countries in strife to be extraordinarily suspect. The cited rationale was that the agencies needed temporary reprieve from administrative burdens to better utilize resources and adopt proper standards for screening foreign nationals.⁶⁷ The price of administrative convenience, however, meant sacrificing the safe harbor and welfare of refugees and foreign nationals from Muslim-majority countries.

What began as one executive order snowballed into further executive action. Executive Order 13780 was announced in March 2017, superseding the first order.⁶⁸ Its effect was to place travel limitations on Iran, Libya, Syria, Yemen, Somalia, North Korea, and Venezuela and to restrict entry by refugees lacking a visa or valid travel documents.⁶⁹ The document is itself aware of the protestations of religious animus levied against its first iteration. Rather than ignore the outrage, however, it disputes it.⁷⁰ Executive Order 13769 begins with a summary of its predecessor and tactfully mistakes the controversy over religious favoritism as concern over prioritizing

⁶⁵ *Id.*

⁶⁶ Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017).

⁶⁷ Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

⁶⁸ Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 9, 2017).

⁶⁹ *Id.*

⁷⁰ *See id.*

refugee petitions from persecuted religious minorities.⁷¹ More than an attempt at appeasement, the acknowledgment shows the Trump Administration's attempt to prepare for anticipated litigation.

The order was followed by two revisions by way of Presidential Proclamations 9645 and 9723.⁷² Presidential Proclamation 9645 was released on September 24, 2017, and notably added Chad, North Korea, and Venezuela and removed Sudan from the travel restrictions list.⁷³ More recently, in April 2018, Presidential Proclamation 9723 extended the ban on tourist and business visa applications from Libya and Yemen; banned some visas for Venezuelan government officials; barred all but student and exchange visitor visa applications from Iran; instituted a total ban on immigrant visa applications from Somalia; and disallowed travel for North Korean and Syrian foreign nationals.⁷⁴ The latest change in 2020 saw the addition of six new countries—Eritrea, Kyrgyzstan, Nigeria, Myanmar, Tanzania, and Sudan—leading to its additional characterization as an “African ban.”⁷⁵

Despite the changes, the anticipated litigation came to pass. Following the first executive order, suits were hastily filed, and courts around the country swiftly blocked implementation of the travel ban.⁷⁶ The second executive order was permitted to take partial effect after the Supreme Court decided to review appeals of lower courts' rulings blocking the ban.⁷⁷ Upon its expiration, however, the Supreme Court dismissed the appeals made by the Trump Administration.⁷⁸

As the adage goes, the third time was the charm. With the delivery of Presidential Proclamation 9645 in September 2017, the debate

⁷¹ *Id.*

⁷² Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017); Proclamation No. 9723, 83 Fed. Reg. 15937 (Apr. 13, 2018).

⁷³ Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017).

⁷⁴ Proclamation No. 9723, 83 Fed. Reg. 15937 (Apr. 13, 2018).

⁷⁵ Sam Levin, *Trump is Deciding Who is American: How the New Travel Ban is Tearing Families Apart*, GUARDIAN (Feb. 16, 2020, 6:00 PM), <https://www.theguardian.com/us-news/2020/feb/16/trump-is-deciding-who-is-american-how-the-new-travel-ban-is-tearing-families-apart>.

⁷⁶ Adam Liptak & Michael D. Shear, *Trump's Travel Ban is Upheld by Supreme Court*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html>.

⁷⁷ *Id.*

⁷⁸ *Id.*

over constitutionality reached the Supreme Court in *Trump v. Hawaii*.⁷⁹ The challenge was brought by the State of Hawaii, U.S. citizens and permanent residents with relatives seeking to apply for visas, and a Muslim non-profit organization.⁸⁰ The suit objected to the travel ban applied to the six Muslim-majority countries on the grounds that the travel ban was based on religious animus with insufficient evidence of national security concerns.⁸¹ The challengers won at the trial and appellate levels, where the U.S. Court of Appeals for the Ninth Circuit held that the president abused the congressional authority granted to the president over immigration and discriminated in issuing visas in violation of immigration laws.⁸²

In a 5-4 split, the Supreme Court upheld the travel ban on the determination that the president acted within the scope of his congressionally delegated power.⁸³ The decision did not hinge on the Establishment Clause claim of religious discrimination; instead, the majority merely noted the president's religiously inflammatory rhetoric as present but not dispositive.⁸⁴ Greater focus was granted to the presidential office in general with Chief Justice Roberts emphasizing that the concern was not over whether to denounce the president's speech.⁸⁵ Rather, the issue involved "the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility."⁸⁶ In doing so, [the Court] must consider not only the statements of a particular President, but also the authority of the Presidency itself."⁸⁷ As such, Chief Justice Roberts decided that the travel ban itself was neutral and expressed a legitimate basis in promoting sufficient vetting of foreign nationals in accordance with U.S. national security.⁸⁸

⁷⁹ See *id.*

⁸⁰ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁸¹ *Id.* at 2406.

⁸² *Id.* at 2406-07; see also Miriam Jordan, *Appeals Court Rules Against Latest Travel Ban*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/us/travel-ban-court.html>.

⁸³ *Trump*, 138 S. Ct. at 2421.

⁸⁴ See *id.* at 2417-24.

⁸⁵ *Id.* at 2418.

⁸⁶ *Id.* at 2401.

⁸⁷ *Id.* at 2418.

⁸⁸ *Id.* at 2421.

Again, the decision was not unanimous, and a strong dissent indicated a reluctance by some justices to accept a purely, religiously neutral basis for instituting a travel ban.⁸⁹ In her scathing dissent, Justice Sotomayor emphasized Trump's unapologetic and continued verbal attacks against the religion of Islam.⁹⁰ She determined the Trump Administration's use of national security to be a guise or laundered attempts by his attorneys to conceal the discriminatory intent of the Proclamation.⁹¹ Turning to a recently decided case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), she pointed out the Court's folly—"the [real] question [was] whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom."⁹² Though the Supreme Court upheld the ban,⁹³ there is still potential for a case turning on whether there was neutral intent behind the decision rather than focusing on potential presidential abuse of delegated authority.

C. Termination and Extension of TPS

Another revelation that came with the Trump Administration was that Temporary Protected Status (TPS) designations would also be in jeopardy. Pursuant to 8 USCA section 1254a, the Attorney General may grant lawful presence and work authorization to qualifying foreign nationals under temporary protected status.⁹⁴ In practice, it is the Secretary of Homeland Security that "designate[s] a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately."⁹⁵ TPS designations are typically considered for countries with "[o]ngoing armed conflict (such as civil war)," "[a]n environmental conflict (such as earthquake or

⁸⁹ See generally *Trump*, 138 S. Ct. at 2429-47.

⁹⁰ *Id.* at 2435-38.

⁹¹ *Id.* at 2439.

⁹² *Id.* at 2447.

⁹³ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

⁹⁴ 8 U.S.C. § 1254a (2019).

⁹⁵ *Temporary Protected Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> (last updated Jan. 17, 2020).

hurricane), or an epidemic,” and “[o]ther extraordinary and temporary conditions.”⁹⁶ Currently, that list includes El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen.⁹⁷ Consequently, TPS beneficiaries are not subject to removal from the United States, have work authorization, and may obtain travel authorization.⁹⁸ Moreover, such individuals are free from detention based on their immigration status.⁹⁹

Grants of TPS were common practice across party lines for almost two decades until the Trump Administration threatened to discontinue TPS for many beneficiaries.¹⁰⁰ With expiration dates approaching, the Department of Homeland Security considered whether to keep renewing TPS designations, which typically last anywhere from six to eighteen months.¹⁰¹ Despite estimates of a \$6.9 billion drop in Social Security and Medicare contributions, Trump Administration officials entertained the idea of discontinuing TPS for Haiti, Honduras, and El Salvador.¹⁰² Threats to terminate TPS designations also implicated a drain on public resources through the loss of property taxes, home foreclosures, and revocation of employer-sponsored health insurance.¹⁰³ Adding to the economic consequences of such a decision were social costs. As stated by Armando Carmona, a National TPS Alliance spokesperson, “[t]hese are folks that have been in this country for years. Some have been here for almost two decades. They work here, they’ve built families here, they have U.S. citizen children.”¹⁰⁴

With the loss of TPS imminent, plaintiffs in California filed suit in *Ramos v. Nielson* claiming discrimination as the motivating factor

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Nicole Acevedo, *Immigration Protections for Some Extended as They Fight Trump Admin. In Court*, NBC NEWS (Nov. 1, 2019, 6:21 PM), <https://www.nbcnews.com/news/latino/immigration-protections-some-extended-they-fight-trump-admin-court-n1075291>.

¹⁰¹ Teo Armus, *Will Central Americans, Haitians ‘Protected’ by U.S. be Sent Home?*, NBC NEWS (Oct. 23, 2017, 4:22 PM), <https://www.nbcnews.com/news/latino/end-temporary-protected-status-could-cost-economy-billions-reports-say-n812816>.

¹⁰² *Id.*

¹⁰³ *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1085–86 (N.D. Cal. 2018).

¹⁰⁴ Armus, *supra* note 101.

behind DHS's decision.¹⁰⁵ Plaintiffs particularly relied upon alleged evidence that the Secretary or Acting Secretary of the Department of Homeland Security acted under the guidance of the Trump Administration and President Trump's animus toward non-white, non-European foreign nationals.¹⁰⁶ The Court found such evidence to be dispositive of an equal protection violation, sharing that the DHS Secretary or Acting Secretary was not required to "personally harbor animus" if the president's animus "influenced or manipulated their decisionmaking process."¹⁰⁷

Ultimately, the consistency between DHS actions and the President's immigration agenda sufficed for a preliminary showing of an equal protection violation, and plaintiffs were granted an injunction to continue extending protections.¹⁰⁸ The Court first relied upon direct evidence of the President's animus, including but not limited to: calling Mexican immigrants "drug dealers or users, criminals, and rapists"; implementing an absolute ban on Muslim immigration; asserting that all recent Haitian immigrants were AIDS carriers; alleging that recent Nigeran immigrants would "never go back to their huts" in Africa; referencing TPS-designated countries—Haiti, El Salvador, and African countries—as "shithole countries" and inviting greater immigration from Norway—a predominantly white country—; and cautioning Europe of an impending culture change from recent immigration patterns which he described as being "a very negative thing for Europe."¹⁰⁹

Supplementing the direct evidence, the Court also found sufficient circumstantial evidence of a discriminatory motive.¹¹⁰ Such evidence included: frequent exchanges between Chad Wolf, the DHS Chief of Staff, and Stephen Miller, senior advisor to the president and strong advocate for terminating TPS; a recommendation by the White House National Security Council to Acting DHS Secretary Elaine Duke to end TPS designations; and a discussion between White House Chief of Staff John Kelly and Acting DHS Secretary

¹⁰⁵ See generally *Nielsen*, 336 F. Supp. 3d 1075.

¹⁰⁶ *Id.* at 1098.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1105.

¹⁰⁹ *Id.* at 1100-01.

¹¹⁰ *Id.* at 1101.

Duke regarding TPS status for Central American countries.¹¹¹ Taken together, the court found enough evidence to believe that DHS was “largely carrying out or conforming with a predetermined presidential agenda to end TPS.”¹¹²

Just as promising was the Eastern District of New York’s ruling in *Saget v. Trump*.¹¹³ Following the Northern District of California, the Eastern District too found equal protection challenges meritorious for a preliminary injunction on termination of TPS for Haiti.¹¹⁴ Direct evidence of discriminatory animus exhibited toward non-white immigrants provided the basis for relief.¹¹⁵ Overall, the court relied upon the same animus-ridden rhetoric cited in *Ramos*—particularly Haiti-specific comments such as Trump’s asking “[w]hy are we having all these people from shithole countries come here?” and his claim that Haitians “all have AIDS” in a meeting with former DHS Secretary Kelly.¹¹⁶ The Eastern District also turned to official discussions between the Oval Office and DHS reflecting an intent to end TPS designations for predominantly non-white countries to lessen the number of non-white immigrants lawfully present within the United States.¹¹⁷ Such conversations demonstrated “procedural and substantive departures from the established decisionmaking process.”¹¹⁸ DHS official Megan Westmoreland suggested as much, stating:

“We are concerned how [the Secretary] could find Haiti to meet TPS conditions now but find in just a few months from now that it no longer does. Do the clients really believe conditions will improve over the current baseline over the next 4-6 months? Could extending now box [the Secretary] in for the next termination?”¹¹⁹

¹¹¹ *Ramos*, 336 F. Supp. at 1098-99.

¹¹² *Id.* at 1099.

¹¹³ *See* 375 F. Supp. 3d 280 (E.D.N.Y. 2019).

¹¹⁴ *See id.* at 379.

¹¹⁵ *Id.* at 369-72.

¹¹⁶ *Id.* at 371.

¹¹⁷ *Id.* at 371-72.

¹¹⁸ *Id.* at 373.

¹¹⁹ *Saget*, 375 F. Supp. 3d at 373.

Ultimately, the court relied on proof that “the [DHS] Secretary was influenced by the White House and White House policy to ignore statutory guidelines, contort data, and disregard objective reason to reach a predetermined decision to terminate TPS and abate the presence of non-white immigrants in the country.”¹²⁰ The White House’s influence was uncontested; rather, the government asserted that the evidence only allowed for a presumption that termination was predicated on countries no longer meeting statutory conditions for TPS.¹²¹ However, for purposes of the court’s analysis, “[t]hat the White House ‘led’ the decision to terminate is contrary to the statute and indicates the White House heavily influenced DHS in the decision to terminate TPS.”¹²²

Outcomes such as those in *Ramos* and *Saget* suggest a basis for equal protection challenges founded upon Trump’s discriminatory rhetoric and the influence of his presidential agenda on agencies.

II. A CASE FOR EQUAL PROTECTION VIOLATIONS IN THE TEMPORARY HIATUS OF MEDICAL DEFERRED ACTION

A. Availability of Equal Protection Claims to Foreign Nationals

Whatever the labeling, discrimination based on race, national origin, ancestry, or ethnicity stands in violation of equal protection guaranteed by the U.S. Constitution.¹²³ Equal protection guarantees, as used against federal actors, can be found in the Fifth Amendment.¹²⁴ The Due Process Clause provides that no person shall “be deprived of life, liberty, or property, without due process of law”¹²⁵ In other words, the federal government and its agents are obligated to treat individuals of like conditions and circumstances the same.¹²⁶

¹²⁰ *Id.* at 368-69.

¹²¹ *Id.* at 368.

¹²² *Id.* at 371.

¹²³ See U.S. CONST. amend. V.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection

In its simplest form, once a claim is before a court, a bifurcated test is applied.¹²⁷ The first step begins by weighing the proffered evidence of discrimination from federal action that allegedly harmed the individual.¹²⁸ The second step then looks to precedent to apply the appropriate level of scrutiny for the type of discrimination alleged.¹²⁹ At a minimum, a legal classification or distinction only stands if it “neither burdens a fundamental right nor targets a suspect class . . . so long as it bears a rational relation to some legitimate end.”¹³⁰

Notably, the clause does not refer to citizenship¹³¹— rather, it refers to “person[s].”¹³² In general, the Constitution grants protections to *individuals*, regardless of legal status, with its amendments delineating a series of negative rights limiting government action over certain guaranteed freedoms.¹³³ This pattern is only interrupted by the Privileges and Immunities Clause of the Fourteenth Amendment (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”)¹³⁴ and by references to voting requirements or prerequisites for running for office made in the Fifteenth and Nineteenth Amendments.¹³⁵

Here, however, the Due Process Clause and Equal Protection Clause¹³⁶ (“[N]or shall any state . . . deny to any *person* within its jurisdiction the equal protection of the laws.”)¹³⁷ lack any such

of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”).

¹²⁷ See *Equal Protection*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/equal_protection (last visited Jan. 19, 2020).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

¹³¹ See U.S. CONST. amend. V.

¹³² *Id.*

¹³³ See generally David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

¹³⁴ U.S. CONST. amend. XIV, § 1.

¹³⁵ See *id.*; *Rights of Non-Citizens Under the Equal Protection Clause*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/alienage.html> (last visited Jan. 19, 2020).

¹³⁶ The Equal Protection Clause is used against the states rather than federal government, but it is referenced here for relevance.

¹³⁷ U.S. CONST. amend. XIV, § 1 (emphasis added).

distinction in citizenship status. The Court in *Plyer v. Doe* confirmed the significance of this lack of distinction.¹³⁸

Faced with an equal protection challenge, the Court invalidated a Texas law permitting the state to withhold funding from local schools enrolling children of undocumented individuals.¹³⁹ In reading the Equal Protection Clause, the Court found the operative phrase to be “any person within the jurisdiction” of the State.¹⁴⁰ According to the Court, “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.”¹⁴¹ If ever there was a need, the Court confirmed that an undocumented individual is indeed a person and then discussed whether illegal presence in the United States rendered a person outside of the state’s jurisdiction.¹⁴² The Court’s answer: a resounding no.¹⁴³

Presence within a state’s boundaries was enough to consider a person within the jurisdiction of the state.¹⁴⁴ The Court elaborated that, for purposes of equal protection, a person who is subject to the state’s laws is sufficiently within its jurisdiction notwithstanding the potential for that individual to be expelled for unlawful presence.¹⁴⁵ Thereafter, the Court affirmed that equal protection applies to both citizens and non-citizens of the United States.¹⁴⁶ Later cases affirmed this idea, though it is worth noting the greater standard of due process afforded to those who are legally present in the United States as compared to those seeking admittance.¹⁴⁷

¹³⁸ See generally 457 U.S. 202 (1982).

¹³⁹ *Id.* at 224-30.

¹⁴⁰ *Id.* at 210.

¹⁴¹ *Id.*

¹⁴² *Id.* at 211.

¹⁴³ *Id.*

¹⁴⁴ *Plyer*, 457 U.S. at 214.

¹⁴⁵ *Id.* at 215.

¹⁴⁶ See *id.*

¹⁴⁷ See *Centro Presente v. United States Dep’t of Homeland Sec.*, 332 F. Supp. 3d 393, 411 (D. Mass. 2018) (“[T]he foreign nationals here, the individual Plaintiffs, are already lawfully present in the United States and are accorded a higher level of due process than foreign nationals seeking admission to the country.”); see also *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”)

Acknowledging that non-citizens benefit from equal protection, it is clear that, in the present case of medical deferred action, the unequal treatment of immigrants seeking medical refuge in the United States amounted to a violation of equal protection. Since *Korematsu v. United States*,¹⁴⁸ laws rarely make explicit use of a suspect class—such as race—on their face, except in cases of affirmative action policies.¹⁴⁹ If a suspect class were used, it would trigger strict scrutiny by the courts.¹⁵⁰ The facial neutrality of the decision to revoke medical deferred action, however, does not leave the policy immune from challenge. In fact, it is still subject to an equal protection claim, requiring a showing of both disparate impact and discriminatory intent for strict scrutiny to apply.¹⁵¹

Indeed, on September 5, 2019, Irish International Immigrant Center, Inc., sued agents of USCIS, DHS, and the president on behalf of thirty-three individuals and families representing nineteen deferred action applications.¹⁵² Of the applicants in the nineteen cases, six were Haitian, four were Dominican, five were Central and South American, three were African, and one was European.¹⁵³ The complaint filed asserted that the change made by USCIS was “arbitrary, capricious, and based on impermissible animus [in] violat[ion] [of] the [Administrative Procedures Act] and the *Equal Protection guarantees* of the U.S. Constitution.”¹⁵⁴ The following sections aim to provide an equal protection challenge by introducing arguments for the existence of both disparate impact and discriminatory intent.

B. *Disparate Impact*

Evidence of disparate impact is one of the elements required to bring a successful equal protection challenge for a facially neutral policy.¹⁵⁵ The general impact in this case is clear. Immigrants in this

¹⁴⁸ 323 U.S. 214 (1944).

¹⁴⁹ *See id.* at 216.

¹⁵⁰ *Id.*

¹⁵¹ *See* *Gomillion v. Lightfoot*, 364 U.S. 339, 346-48 (1960); *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 231 (1964).

¹⁵² Shannon Dooling, *Civil Rights Advocates Sue Trump Administration Over Medical Deferred Action*, WBUR NEWS (Sept. 5, 2019, 1:58 P.M.), <https://www.wbur.org/news/2019/09/05/aclu-lawsuit-medical-deferred-action>.

¹⁵³ *Id.*

¹⁵⁴ Complaint, *supra* note 22, at 4.

¹⁵⁵ *See* *Gomillion*, 364 U.S. at 346-48; *Griffin*, 377 U.S. at 231.

country who were seeking reprieve from potential deportation for access to medical care were subjected to possible deportation proceedings.¹⁵⁶ With petitions numbered at approximately 1,000 applications that year, applicants gambled with the ability to securely work and drive while they or their family members had serious medical needs addressed.¹⁵⁷

Notwithstanding the number of submitted applications, what made the impact disparate was the greater effect on some groups over others. Disparate impact is found where a class of people is disproportionately affected as compared to others similarly situated.¹⁵⁸ This determination is fact-dependent and made on a case-by-case basis.¹⁵⁹ Data from deferred action applications is not released by USCIS, and accordingly, it is difficult to give an estimate of the national effect the program's temporary revocation had.¹⁶⁰ Nevertheless, sufficient anecdotal evidence exists to establish that medical deferred action's revocation targeted specific immigrants disproportionately.¹⁶¹

For example, in the suit filed by Irish International Immigrant Center, Inc., only one of the nineteen deferred action applicants represented was a European national.¹⁶² The other eighteen cases were primarily from Latin America and the Caribbean, with three filed on behalf of African nationals.¹⁶³ Moreover, an overwhelming majority of Irish International Immigrant Center clients seeking counsel for deferred action are people of color from places in the Caribbean, Central and South America, and Africa.¹⁶⁴

Though a small sample size, the Irish International Immigrant Center clients are largely representative of beneficiaries of a medical deferred action grant.¹⁶⁵ Medical deferred action recipients are

¹⁵⁶ Madan, *supra* note 36.

¹⁵⁷ *Id.*

¹⁵⁸ See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

¹⁵⁹ See generally *id.*

¹⁶⁰ Shannon Dooling, *What's Ahead for The U.S. Policy on Medical Deferred Action for Immigrants*, WBUR NEWS (Dec. 31, 2019), <https://www.wbur.org/news/2019/12/31/medical-deferred-action-immigrants>.

¹⁶¹ *Id.*

¹⁶² Complaint, *supra* note 22, at 11.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 3.

¹⁶⁵ See *id.*

generally individuals and their relatives with serious, chronic illnesses obtaining medical care otherwise unavailable in their native country.¹⁶⁶ Applicants who are successful in getting deferred action frequently come from “low-resource countries with high child mortality and limited access to necessary therapies.”¹⁶⁷

Though the nature of the request is to delay potential removal proceedings from unlawful presence, many immigrants with grants of medical deferred action enter the country legally on tourist visas, seek medical care, and *then* submit an application for deferred status.¹⁶⁸ Yet even the tourist visas on which they come, formally known as B-2 visas, are being granted less and less.¹⁶⁹ In 2017, approximately 6.4 million people entered the United States on a B-visa.¹⁷⁰ In 2018, that number dropped to 5,708,278 B-1 and B-2 visas granted.¹⁷¹ The B-2 visas, relevant here, are primarily used by immigrants with medical deferred status to first gain admittance into the country.¹⁷² According to the U.S. Department of State, B-visas are nonimmigrant visas for tourism with temporary admittance granted for purposes of “vacation, visit with friends or relatives, [and more importantly for the purposes stated here] medical treatment”¹⁷³

The issue lies less with the overall reduced number of B-visas granted, but concerns yet again the disproportionate impact on non-

¹⁶⁶ See Jordan & Dickerson, *supra* note 1.

¹⁶⁷ Emily Pond, *Anti-Immigration Policies Threaten Access to Medical Deferred Action*, MED. BAG (Nov. 21, 2019), <https://www.medical-bag.com/home/news/anti-immigration-policies-threaten-access-to-medical-deferred-action/>.

¹⁶⁸ Sarah Betancourt, *Pressley, Immigration Services Chief Tangle at Hearing*, COMMONWEALTH MAG. (Oct. 30, 2019), <https://commonwealthmagazine.org/immigration/pressley-immigration-services-chief-tangle-at-hearing/>.

¹⁶⁹ Natasha Frost & Dan Kopf, *What are the Chances of Being Rejected for a Travel Visa to the US?*, QUARTZ (Aug. 28, 2019), <https://qz.com/1696508/what-are-the-chances-of-being-rejected-for-a-tourist-or-business-visa/>.

¹⁷⁰ *Id.*

¹⁷¹ Table XVI(B) Nonimmigrant Visas Issued by Classification, U.S. DEPT. OF ST. 1, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXVI-B.pdf> (last visited Nov. 13, 2020).

¹⁷² See generally Frost & Kopf, *supra* note 169.

¹⁷³ *Visitor Visa*, U.S. DEPT. OF ST. – BUREAU OF CONSULAR AFF., <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html> (last visited Jan. 19, 2020).

European immigrants. Compared to an overall refusal rate of 32.4% in the 2018 fiscal year, African, Latin American, and Caribbean countries consistently fared far worse.¹⁷⁴ For example, Haiti was denied at a rate of 67.6%; Chad at a rate of 60.8%; Sierra Leone at a rate of 60.6%; Honduras at a rate of 60.3%; Jamaica at a rate of 54.5%; and Guatemala at a rate of 53.6%.¹⁷⁵ In contrast, European countries fared much better. Toward the bottom of the list were Liechtenstein at 0.0%; Poland at a rate of 4.0%; Luxembourg at a rate of 5.2%; Austria at a rate of 5.4%; Switzerland at a rate of 5.5%; and Iceland at a rate of 7.1%.

Moreover, B-visas limit stays to six months with extensions subject to approval by USCIS.¹⁷⁶ Relative to the number of people granted admittance, DHS reported the “rate of suspected overstays” in 2018 as a mere 1.22%, or roughly 666,582 “overstay events.”¹⁷⁷ For B-visas in particular, the number of overstays hovered at slightly over 300,000 individuals at a rate of 2%.¹⁷⁸ Despite the small number of visa overstay violators, the Trump Administration has set its sights on prioritizing the deportation of the small few whose legal visas have expired.¹⁷⁹ Unsurprisingly, that prioritization has primarily impacted African countries under a policy of targeting the twenty countries with an overstay rate of over ten percent (a number totaling less than 1,000 people in all but two of the countries).¹⁸⁰ Djibouti, for instance, ranks as the country with the highest overstay rate at 44.67%, but only amounts to 180 people; for Chad (the second highest), the 30.78% rate translated to 165 individuals, and for Yemen (the third highest), the 28.52% rate translated to 518 individuals.¹⁸¹ Because the policy focuses on a country’s percentages

¹⁷⁴ Frost, *supra* note 161.

¹⁷⁵ *Id.*

¹⁷⁶ CNN Editorial Research, *US Visa Fast Facts*, CNN (Dec. 12, 2017, 5:25 P.M.), <https://www.cnn.com/2017/03/23/us/us-visa-fast-facts/index.html>

¹⁷⁷ *Id.*

¹⁷⁸ Maria Sacchetti & Kevin Uhrmacher, *Nations Targeted By U.S. for High Rates of Visa Overstays Account for Small Number of Violators*, WASH. POST (Apr. 24, 2019, 3:28 P.M.), https://www.washingtonpost.com/immigration/nations-the-white-house-is-targeting-for-visa-overstay-rates-account-for-small-number-of-violators-omit-brazil-venezuela-china/2019/04/24/956ef970-65d7-11e9-82ba-fcfeff232e8f_story.html.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

rather than the raw number of individuals overstaying their visas, the Trump Administration subsequently avoids targeting countries such as Canada with 88,000 overstays.¹⁸²

The final measure in ensuring a disparate impact from the start of a medical deferred action petition is the automatic leniency in admittance to the United States granted by the Visa Waiver Program (VWP). The program, “administered by the Department of Homeland Security in consultation with the State Department, permits citizens of 39 countries to travel to the United States for business or tourism for stays of up to 90 days without a visa.”¹⁸³ VWP is premised on reciprocity whereby U.S. citizens are allowed to travel to these countries under similar parameters.¹⁸⁴ The Latin American, Caribbean, and African countries from which most of the medical deferred action candidates come are absent.¹⁸⁵ Instead, the program includes predominantly white countries such as Australia, Belgium, France, Germany, Norway, Netherlands, Sweden, Switzerland, and the United Kingdom, among others.¹⁸⁶ In other words, “[t]hey are mostly rich nations in Europe and Asia.”¹⁸⁷ Without the advantage of being able to bypass the regular visa requirements for B-2 visas,¹⁸⁸ nationals from Latin American, Caribbean, and African countries are given one less option to access—at a minimum—short-term medical care in the United States.

In sum, the aforementioned evidence cumulatively demonstrate disproportionate harm on non-European medical deferred action recipients. Those with deferred status are primarily immigrants from Latin American, Caribbean, and African countries,¹⁸⁹ the same ones experiencing a decline in B-2 visas granting legal admission to immigrants seeking medical care in the United States and the same ones lacking access to the Visa Waiver Program.¹⁹⁰ Notably, in

¹⁸² *Id.*

¹⁸³ *Visa Waiver Program*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/travel/international-visitors/visa-waiver-program> (last visited Jan. 19, 2020).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Frost & Kopf, *supra* note 169.

¹⁸⁸ *Id.*

¹⁸⁹ *See generally id.*

¹⁹⁰ *See Visa Waiver Program Requirements*, *supra* note 186.

conjunction with measures to limit access into the country, the Trump Administration has implemented policies to disproportionately remove non-European nationals with expired visas.¹⁹¹ The temporary cancellation of medical deferred action was yet another tool used to fulfill campaign promises to prioritize deportation (amidst racial-animus ridden rhetoric).¹⁹²

C. *Discriminatory Intent*

Operating in concert with the discriminatory impact evidenced above is a discriminatory intent to deport non-European immigrants. Similar to disparate impact, discriminatory intent need not be explicit in its motive.¹⁹³ Even a facially neutral statute may be invalidated if its application is invidiously discriminatory.¹⁹⁴ The Court has made clear that the standard is not that “the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law’s disproportionate impact is irrelevant”¹⁹⁵ Rather, “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”¹⁹⁶ Discriminatory intent can be inferred from extreme disparate impact.¹⁹⁷

However, in the absence of an extreme effect on one group, impact alone will not be held as dispositive.¹⁹⁸ Rather, the Court must look at the amalgamation of impact and other factors.¹⁹⁹ It is an inquiry of direct and circumstantial evidence considering such things as events leading up to the policy, legislative or administrative history, and remarks made by those in the decisionmaking body.²⁰⁰

¹⁹¹ See Sacchetti, *supra* note 178.

¹⁹² *Id.*

¹⁹³ See *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁹⁴ *Id.* at 241-42.

¹⁹⁵ *Id.* at 241.

¹⁹⁶ *Id.* at 242.

¹⁹⁷ See *Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (“What the Court has said in those cases is equally applicable here, viz., that ‘Acts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.’”) (internal citations omitted).

¹⁹⁸ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 267-68.

Though the courts rely upon the government's purported rationale behind policy changes in making its determinations in equal protection challenges, that deference is not absolute.²⁰¹ To the contrary:

[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. *When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [to the government's decision] is no longer justified.*²⁰²

More recently, courts have adopted this standard in analyzing administrative bodies' decisions to terminate immigration programs that assist predominantly non-white foreign nationals.²⁰³ In the face of threatened termination of TPS, plaintiffs brought suit claiming discrimination as the primary driving factor behind the administrative decision to end Temporary Protective Status.²⁰⁴ Of particular relevance was the plaintiffs' alleged proof that decisions by the Secretary or Acting Secretary of the Department of Homeland Security were guided by the desires of the Trump Administration and that President Trump exhibited explicit animus toward non-white, non-European foreign nationals.²⁰⁵ The Court addressed the significance of this evidence, stating that "even if the DHS Secretary or Acting Secretary did not 'personally harbor animus . . . , their actions may violate the equal protection guarantee if President Trump's alleged

²⁰¹ *See id.* at 265-66.

²⁰² *Id.* (emphasis added).

²⁰³ *See generally* Ramos v. Nielsen, 336 F. Supp. 3d 1075 (N.D. Cal. 2018).

²⁰⁴ *See generally id.*

²⁰⁵ *Id.* at 1098.

animus influenced or manipulated their decisionmaking process.”²⁰⁶

In light of the consistency between DHS actions and the President’s immigration agenda, the Court found sufficient evidence to indicate a potential equal protection violation.²⁰⁷ The direct evidence of the President’s animus was found in abundance and was limited to a non-exhaustive list of comments.²⁰⁸ Such remarks included: describing Mexican immigrants as “drug dealers or users, criminals, and rapists”; calling for an absolute ban on Muslim immigration; claiming that recent Haitian immigrants were all carriers of AIDS; asserting that recent Nigeran immigrants would “never go back to their huts” in Africa; referring to TPS designated countries—Haiti, El Salvador, and African countries—as “shithole countries” and requesting greater immigration from Norway—a predominantly white country—; and warning Europe of an impending culture change from recent immigration patterns which he described as being “a very negative thing for Europe.”²⁰⁹

Notwithstanding the direct evidence, the Court found that the circumstantial evidence would suffice.²¹⁰ Such proof included: frequent contact between Chad Wolf, the DHS Chief of Staff, and Stephen Miller, senior advisor to the president and strong proponent for terminating TPS; a recommendation by the White House National Security Council to Acting DHS Secretary Duke to end TPS designations; and a discussion between White House Chief of Staff Kelly and Acting DHS Secretary Duke regarding TPS status for Central American countries.²¹¹ Given the sequence and timing of these events, the Court determined that there was enough evidence to presume that DHS was “largely carrying out or conforming with a predetermined presidential agenda to end TPS.”²¹²

Largely pertinent to the present analysis is not only the discriminatory remarks evidenced by the Trump Administration, but also the applicable standard of review for such a case. *Trump v. Hawaii*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1105.

²⁰⁸ *Id.* at 1100.

²⁰⁹ *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1100-01 (N.D. Cal. 2018).

²¹⁰ *Id.* at 1101.

²¹¹ *Id.* at 1098-99.

²¹² *Id.* at 1099.

announced a rational basis standard of review in analyzing a challenge to the enforcement of President Trump's Presidential Proclamation banning entry of Muslim foreign nationals from six predominantly Muslim countries.²¹³ However, absent considerations of "the entry of aliens from outside the United States, express national security concerns[,] and active involvement of foreign policy,"²¹⁴ federal district courts in *Ramos* and *Centro Presente* found the appropriate standard to be strict scrutiny.²¹⁵ In other words, the law or policy must be narrowly tailored to further a compelling government interest.²¹⁶

The instant case of revoking medical deferred action more clearly resembles that of *Ramos* and *Centro Presente*, where:

(1) there was no indication that national security or foreign policy was a reason to terminate [medical deferred action]; (2) . . . the [medical deferred action beneficiaries] are already in the United States and aliens within the United States have greater constitutional protections than those outside who are seeking admission for the first time; and (3) the executive order in *Trump v. Hawaii* was issued pursuant to a very broad grant of statutory discretion whereas Congress has not given the Secretary *carte blanche* to terminate [medical deferred action] for any reason whatsoever.²¹⁷

Because *Trump v. Hawaii* did not concern an equal protection challenge to removing immigration status or benefit from those legally present in the United States, it is inapplicable.²¹⁸ Thus, upon a finding of discriminatory intent—all the more likely given the influence of President Trump's racially inflammatory remarks—the

²¹³ See generally *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

²¹⁴ *Ramos*, 336 F. Supp. 3d at 1105.

²¹⁵ See *id.* at 1108; see also *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 412 (D. Mass. 2018) ("The Court thus concludes that Arlington Heights lays out the relevant standard.").

²¹⁶ See *Strict Scrutiny*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²¹⁷ See *Ramos*, 336 F. Supp. 3d at 1105-06 (internal quotation marks omitted).

²¹⁸ *Id.* at 1106.

policy of terminating medical deferred action would likely be subject to a strict scrutiny standard of review.

It need not be assumed that the remarks made by President Trump would serve as a basis for the presence of discriminatory intent behind the termination of medical deferred action. The Complaint in the medical deferred action suit against agents of USCIS, DHS, and the President says as much.²¹⁹ Paragraph 4 of the Introduction to the Complaint explicitly names the President's actions and words as the predicate for his administration's agenda against immigrants of color.²²⁰ More importantly, the Complaint details how President Trump's sentiments are not an outlier.²²¹ It references statements made by Acting Director of USCIS, Kenneth Cuccinelli, equating immigrants to "invaders."²²² More telling is the next allegation: that "just days before USCIS began sending denial letters to people seeking deferred action, [Cuccinelli stated] that the Statue of Liberty's famous exhortation to 'give me your tired, your poor' refers to 'people coming from Europe'"²²³

Much of the direct evidence of racial or national origin animus can be supplemented by circumstantial evidence of discriminatory motive. Cloaked in facially neutral language, the cited rationales behind terminating medical deferred action relied on the premise that such a termination would curb illegal immigrants' leeching of U.S. resources.²²⁴ For example, Cuccinelli falsely asserted that medical deferred action beneficiaries generally entered the United States illegally; but in reality, beneficiaries enter on tourist visas, inquire into the availability of healthcare, and then apply for lawful status under medical deferred action.²²⁵ Though Cuccinelli protested such allegations, his acts of misinformation led Congresswoman Debbie Wasserman Shultz to reproach Cuccinelli and President Trump of following a "white supremacist ideology" by enacting policies greatly affecting immigrants of color.²²⁶

²¹⁹ See Complaint, *supra* note 22, at 3.

²²⁰ *Id.*

²²¹ See *id.*

²²² *Id.*

²²³ *Id.*

²²⁴ See Betancourt, *supra* note 168.

²²⁵ *Id.*

²²⁶ *Id.*

Referring cases to ICE also heavily implicated a desire for removal over a genuine reform in the assessment of medical deferral applications. Though claiming that the termination was an effort to “focus agency resources on faithfully administering our nation’s lawful immigration system,” USCIS shifted the burden onto ICE— “the DHS component agency responsible for removing individuals from the United States.”²²⁷ Legislators protested this move as a means of stoking the fears of undocumented immigrants.²²⁸ In a letter to DHS, legislators lambasted DHS for its renunciation of a longstanding practice to review deferred action applications; in particular, they argued that “[r]equiring . . . prospective applicants [to] request this humanitarian relief by applying to an immigration enforcement agency that detains and deports hundreds of thousands of immigrants annually, will deter many vulnerable children and families from coming forward and seeking life-saving protection.”²²⁹

As suggested, there was no evidence of abuse by applicants of medical deferred action. According to immigration attorney Tammy Fox-Isicoff, “[t]hese cases aren’t our meat and potatoes, they are our Hail Marys. It’s like the administration is stripping every ounce of immigration policy that’s merciful or human.”²³⁰ Sudden revocation of a “small but necessary” program is further suggestive of an underlying ulterior motive.²³¹

Additional circumstantial evidence of discriminatory intent can be found in the events leading to the program’s reinstatement. In particular, USCIS was reluctant to grant testimony or produce evidence after repeated requests from Congress.²³² Instead, USCIS

²²⁷ Madan, *supra* note 36.

²²⁸ Camilo Montoya-Galvez, *More than 100 Lawmakers Denounce Decision to End Program for Sick Immigrants*, CBS NEWS (Aug. 30, 2019, 4:18 PM), <https://www.cbsnews.com/news/medical-deferred-action-more-than-100-lawmakers-decry-decision-to-stop-health-program-for-sick-immigrants/>.

²²⁹ *Id.* (internal quotation marks omitted).

²³⁰ Madan, *supra* note 36.

²³¹ *See id.*

²³² Memorandum from Elijah E. Cummings, Chairman of the House Comm. on Oversight and Reform, House of Rep., to Members of the Comm. on Oversight and Reform (Oct. 10, 2019), <https://d279m997dpfwgl.cloudfront.net/wp/2019/10/2019-10-10.-COR-Memo-on-Subpoena-for-DHS-re-Deporting-Critically-Ill-Children.pdf>.

defended its stonewalling by claiming protection due to ongoing litigation and deliberative process privilege.²³³ Limited cooperation coupled with USCIS's insistence that Congress dwells on "a resolved issue"²³⁴ led to Representative Elijah Cummings issuing a notice of intent to subpoena Acting Directors for USCIS and ICE.²³⁵ Congresswoman Ayanna Pressley commented:

There will not be full justice and full restoration for these families until they have received notification We understand what the genesis was for this because we see what happens in the light of day with this administration, one shudders to think what is happening under the cloak of night.²³⁶

As found in *Ramos*, the influence of President Trump's rhetoric on administrative decisionmaking is sufficiently determinative of an animus-based motive.²³⁷ After some congressional pressure, on October 30, 2019, USCIS Acting Director Ken Cuccinelli testified before members of the House Oversight Committee that it was his decision alone to revoke the program.²³⁸ Taken as true, Cuccinelli's actions still reflect in accordance with the Trump Administration's agenda. From Congresswoman Pressley's questioning of Cuccinelli, it was evident that she suspected the involvement of President Trump or his senior advisor Stephen Miller in the decision to terminate medical deferred action.²³⁹ And yet Cuccinelli took the hit: he both acknowledged the resulting confusion of USCIS's decision and stood firmly behind the premise that the program lacks a legal or regulatory basis, inviting Congress to introduce legislation to implement any desired changes.²⁴⁰

²³³ *Id.*

²³⁴ Letter from Ken Cuccinelli, *supra* note 55.

²³⁵ Memorandum, *supra* note 232.

²³⁶ Dooling, *supra* note 53.

²³⁷ See *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1098 (N.D. Cal. 2018).

²³⁸ Shannon Dooling, 'I Made This Decision, Alone'; Months Later, Clarity Around The End Of Medical Deferred Action, WBUR NEWS (Oct. 30, 2019), <https://www.wbur.org/news/2019/10/30/uscis-ice-cuccinelli-medical-deferred-action-immigration>.

²³⁹ See *Betancourt*, *supra* note 168.

²⁴⁰ Dooling, *supra* note 238.

Ultimately, nothing operates in a vacuum. In light of other administrative practices—such as family separation, mass deportation, and limited healthcare provisions in detention centers—there is little to offset the impression that the termination of medical deferred action was an extension of President Trump fulfilling his divisive campaign agenda.²⁴¹ In sum,

[a]ccelerating policy announcements targeting documented and undocumented immigrants leave little doubt that eliminating medical deferred action, and thereby breaking physician–patient relationships and causing avoidable deaths, was a symbolic gesture. It signifies to the public that these patients’ lives are not worth saving. It signifies to the patients that they are at the mercy of an inscrutable government agency that can suddenly and without explanation issue a death sentence.²⁴²

IV. EQUAL PROTECTION VIOLATION AND ITS IMPLICATIONS

The applicable standard of review for the revocation of medical deferred action is strict scrutiny.²⁴³ Though supporters of its termination would articulate a rational basis standard of review per *Trump v. Hawaii*, such a standard is best limited to cases concerning national security and foreign nationals seeking admittance into the country who are not currently present within U.S. borders.²⁴⁴ Absent considerations of “the entry of aliens from outside the United States, express national security concerns[,] and active involvement of foreign policy,”²⁴⁵ federal courts considering whether the termination of medical deferred action violated equal protection should

²⁴¹ See Lakshmi Ganapathi, et. al., *Medical Deferred Action – Living on Borrowed Time*, 381 N. ENGL. J. MED. 1601, 1602 (2019).

²⁴² *Id.*

²⁴³ See *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018); see also *Centro Presente v. U.S. Dep’t of Homeland Sec.*, 332 F. Supp. 3d 393, 412 (D. Mass. 2018).

²⁴⁴ See generally 138 S. Ct. 2392 (2018).

²⁴⁵ *Ramos*, 336 F. Supp. 3d at 1105.

determine if such a change in policy was narrowly tailored to a compelling government interest.²⁴⁶

With litigation ongoing, the best indicator of the government's proffered interest in ending medical deferred action comes from the principal actors in its termination. According to USCIS Acting Director Ken Cuccinelli, medical deferred action—a program with decades-long use—lacks any legal or regulatory basis and is subject to revocation at any given moment.²⁴⁷ Specifically, Cuccinelli took the stance that instituting enduring immigration relief, such as that provided by medical deferred action, is the province of Congress.²⁴⁸ The cited rationale for termination resembled this line of thinking—namely, that the program's revocation was an effort to “focus agency resources on faithfully administering our nation's lawful immigration system.”²⁴⁹

Notwithstanding the facially-neutral interest offered, circumstantial evidence of an animus-driven interest can be inferred from “[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.”²⁵⁰ In isolation, Cuccinelli's reasoning is a little suspect. However, in conjunction with the Muslim ban, the attempted termination of TPS, and the inflammatory rhetoric given on the campaign trail and within the Oval Office, the proffered rationale appears pretextual. Given the sequence and timing of these events, there is enough evidence to presume that USCIS was “largely carrying out or conforming with a predetermined presidential agenda”²⁵¹ to end medical deferred action—a basis for which courts can find an equal protection violation.²⁵²

The termination of medical deferred action signaled a sudden shift from common practice to fulfill campaign promises of the new administration. Consequently, Cuccinelli's tendered explanation is

²⁴⁶ See generally *Strict Scrutiny*, Black's Law Dictionary (11th ed. 2019).

²⁴⁷ Betancourt, *supra* note 168.

²⁴⁸ *Id.*

²⁴⁹ Madan, *supra* note 36.

²⁵⁰ *Ramos*, 336 F. Supp. 3d at 1101.

²⁵¹ *Id.* at 1099.

²⁵² See *id.* at 1105.

unconvincing. Even if taken as true, however, courts have dismissed administrative convenience as satisfying a standard of strict scrutiny.²⁵³ More telling, Cuccinelli never provides evidence that the elimination of medical deferred action would help the agency better allocate resources. Rather, evidence shows that USCIS receives a mere 1,000 applications per year.²⁵⁴ As such, there is little to suggest that many resources are being misappropriated for this “small but necessary” program.²⁵⁵

An animus-driven motive will never pass strict scrutiny.²⁵⁶ But even in regard to tailoring, Cuccinelli’s argument for adjusting the focus of USCIS for administrative ease seems both overinclusive and underinclusive. If the concern were with the misuse of resources and an abuse of the immigration system, little sense can be made of eliminating a program for which (1) the majority of its beneficiaries enter legally on a B-visa,²⁵⁷ and (2) there is a small rate of overstay events among its applicants.²⁵⁸ Specifically, for B-visa holders, the number of overstays hovers at slightly over 300,000 individuals at a rate of 2%.²⁵⁹ Rather than showing concern for administrative relief, the shift in review of medical deferred action applications to ICE demonstrated a prioritization of deportation despite the small number of visa overstay violators.²⁶⁰

This prioritization has been myopic in scope, primarily impacting non-European immigrants of color.²⁶¹ A focus on a country’s percentages of overstays rather than the raw number of individuals overstaying their visas has permitted the Trump Administration to avoid targeting countries such as Canada with 88,000 overstays.²⁶² In other words, a claim for resource conservation fails due to

²⁵³ See *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (“And when we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.”).

²⁵⁴ Ackley, *supra* note 11.

²⁵⁵ See Madan, *supra* note 36.

²⁵⁶ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

²⁵⁷ Betancourt, *supra* note 168.

²⁵⁸ See Sacchetti, *supra* note 178.

²⁵⁹ *Id.*

²⁶⁰ See *id.*

²⁶¹ See Complaint, *supra* note 22, at 3.

²⁶² Sacchetti, *supra* note 178.

underinclusiveness if overstays from Western nations remain untargeted.²⁶³ Pertinent here is the fact that medical deferred action recipients are generally individuals and their relatives with serious, chronic illnesses obtaining medical care otherwise unavailable in their native country.²⁶⁴ Beneficiaries frequently come from “low-resource countries with high child mortality and limited access to necessary therapies,”²⁶⁵ and consequently, a move to eliminate a small stream of immigration for life-saving treatment appears overinclusive under a purported rationale of conserving resources.

More revealing is the minimal number of immigrants seeking medical assistance.²⁶⁶ There is neither a strain nor an abuse of the system to warrant such a response from the government. Rather, it is tantamount to a death sentence and reflects a disregard for human life that does not bear U.S. citizenship. In *Ramos*, the court distinguished the disruption and hardship created by the removal of TPS beneficiaries from the lack of real harm to the public interest if the status quo were to remain.²⁶⁷ Though similar, the instant case presents greater consequences—rather than a loss of livelihood, the cost is the loss of life.

Courts have acknowledged that foreign nationals with lawful presence within the United States are granted a greater level of due process as compared to those not already within the nation’s borders.²⁶⁸ Moreover, it has been noted that “[a]lthough their stay is temporary in nature, the shortening of their time in the United States and acceleration of their removal if relief is not granted may constitute irreparable injury.”²⁶⁹ Though the Supreme Court upheld the Muslim travel ban,²⁷⁰ the Court’s 5-4 split leaves potential for this case to turn on whether there was neutral intent behind the decision as opposed to whether there was potential presidential abuse of delegated authority. Given the lack of national security concerns and

²⁶³ See *id.*; see also Frost, *supra* note 161.

²⁶⁴ See Jordan & Dickerson, *supra* note 1.

²⁶⁵ Pond, *supra* note 167.

²⁶⁶ See Madan, *supra* note 36 (noting that the program is small but necessary).

²⁶⁷ *Ramos v. Nielsen*, 336 F. Supp. 3d 1075, 1108 (N.D. Cal. 2018).

²⁶⁸ *Centro Presente v. U.S. Dep’t of Homeland Sec.*, 322 F. Supp. 3d 393, 411 (D. Mass. 2018).

²⁶⁹ *Ramos*, 336 F. Supp. 3d at 1087.

²⁷⁰ See generally *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

the lawful presence of medical deferred action beneficiaries,²⁷¹ courts should follow the standard set in *Arlington* and decline to extend deference to an administrative policy motivated by a discriminatory purpose.²⁷²

Notwithstanding how the courts *should* rule, Cuccinelli was correct in one regard: medical deferred action can be permanently secured by the passage of new legislation rather than relying on the decades-long precedent of using the program through prosecutorial discretion.²⁷³ Instead of seeking permanence by relying on the courts, medical deferred action may best be safeguarded through congressional reform. The ease with which medical deferred action beneficiaries' lives were put in jeopardy demonstrates the need for stability in receiving life-saving treatment.

V. CONCLUSION

Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles

“Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!”²⁷⁴

The recent state of immigration policy for those seeking medical deferred action displays a blatant disregard for the words engraved

²⁷¹ See *Ramos*, 336 F. Supp. 3d at 1108; see also *Centro Presente*, 332 F. Supp. 3d at 412 (“The Court thus concludes that *Arlington Heights* lays out the relevant standard.”).

²⁷² See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

²⁷³ See Betancourt, *supra* note 168 (“[Cuccinelli] told the members of Congress that if they wanted medical deferred action to continue they should pass a law authorizing it. ‘Only Congress can provide permanent immigration relief to a class of aliens,’ he said.”).

²⁷⁴ *The New Colossus*, NAT’L PARK SERV., <https://www.nps.gov/stli/learn/historyculture/colossus.htm> (last updated August 14, 2019).

on the pedestal of the Statute of Liberty. Contrary to our Constitution—written primarily with the guaranteed rights of *persons* in mind—the Trump Administration has seemingly operated with an agenda to limit the rights of foreign nationals within our borders. In conjunction with the Muslim ban and attempts to end TPS designations, the temporary hiatus of medical deferred action review implicated a discriminatory motive to reduce the presence of non-white, non-European immigrants in the United States. The stakes were high. With ICE left at the helm of reviewing applications, deportation was likely and death imminent.

Reinstitution of USCIS's review, though promising, still leaves new and returning applicants in a state of duress and confusion as a backlog of applications are awaiting approval. Without congressional action, medical deferred action remains impermanent. Despite the bleak outcome, there is a silver lining: foreign nationals have equal protection rights. Moreover, any deprivation of such rights resulting in a disparate impact and premised in a discriminatory intent may be challenged in court.