

LSU Journal of Energy Law and Resources

Volume 10
Issue 2 *Summer 2022*

8-11-2022

The Climate is Changing, So Should We: An Analysis of Legal Inadequacies Amidst the Rise of Climate Migration

Reagan Moody

Repository Citation

Reagan Moody, *The Climate is Changing, So Should We: An Analysis of Legal Inadequacies Amidst the Rise of Climate Migration*, 10 LSU J. of Energy L. & Resources (2022)
Available at: <https://digitalcommons.law.lsu.edu/jelr/vol10/iss2/12>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in LSU Journal of Energy Law and Resources by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

The Climate is Changing, So Should We: An Analysis of Legal Inadequacies Amidst the Rise of Climate Migration

*Reagan Moody**

TABLE OF CONTENTS

Introduction	508
I. Background: Temporary Protected Status and its History of Protecting Climate Change Migrants	511
A. Temporary Protected Status	511
B. Current Litigation Surrounding TPS Designations and Terminations	513
1. <i>Ramos v. Wolf</i>	513
2. <i>Bhattarai v. Nielsen</i>	518
3. <i>Saget v. Trump</i>	519
4. The Biden Administration’s Response	521
5. Revealing the Fragility of TPS	523
II. Risks Associated with the Rise of Climate Change and Climate Migration	523
A. Human Migration Patterns in Relation to Climate Change	524
B. Effects of Open and Closed Borders in Response to Climate Change	525
III. Expanding Beyond Refugee Status	526
IV. Recognizing the Climate Change Migrant	527
A. Duties to Climate Change Migrants	527
B. A Call for Legislation	529
1. Structure	529
2. Green New Deal	530
3. International Environmental Protections	531
4. Limiting the Length of Temporary Protected Status Designations	533
Conclusion	534

INTRODUCTION

On January 18, 2018, in a series of terminations, the Department of Homeland Security (DHS) announced it would not further extend Temporary Protected Status (“TPS”) for the country of El Salvador, determining that the conditions of the country no longer supported its need for TPS.¹ Since 2001, this TPS designation was a legal protection that allowed Salvadorans to temporarily reside in the United States (“U.S.”) due to the damaging effects caused by a series of earthquakes in the region.² Approximately half of Salvadoran TPS beneficiaries have resided and worked in the U.S. for two decades but are now facing the possibility of forced removal from the country they have long called home.³

After the TPS termination, Crista Ramos, a high school freshman, was faced with an unfathomable decision.⁴ Crista’s mother has lived in the U.S. since she was 12 years old as a TPS holder, but she now faces possible deportation.⁵ As a consequence, Crista was seemingly presented with two choices: (1) continue to reside in California alone or (2) move to El Salvador with her mother.⁶ Instead choosing a third option, Crista and her family decided to pursue litigation and vocalize this injustice.⁷ Throughout these efforts, Crista was even afforded the opportunity to travel to Rome and meet Pope Francis with hopes of gaining his support in her fight to

Copyright 2022, by REAGAN MOODY.

* J.D./D.C.L., 2022, Paul M. Hebert Law Center, Louisiana State University. The author extends her sincerest gratitude to Professor Darlene Goring and Professor Pedro Gerson for their time, guidance, and encouragement and the Journal of Energy Law and Resources Volume IX and Volume X board members for their careful edits and insightful comments. Additionally, the author extends her gratitude to her family and friends for their unwavering love and support throughout the writing and production process.

1. Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654 (Jan. 18, 2018); Farida Jhabvala Romero, *California Teen Leads Suit to Keep Hundreds of Thousands of Immigrants in U.S.*, KQED (Dec. 21, 2018), <https://www.kqed.org/news/11714388/california-teen-leads-suit-to-keep-hundreds-of-thousands-of-immigrants-in-u-s> [<https://perma.cc/LKX8-ETBL>].

2. Romero, *supra* note 1; Class Action Complaint, *Ramos v. Nielsen*, 2018 WL 4823816 (N.D. Cal. Mar. 12, 2018) (No. 18-cv-1554).

3. Class Action Complaint, *supra* note 2.

4. Romero, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

urge Congress for permanent protections for TPS holders.⁸ During her visit, the Pope offered these words to Crista and other children of TPS beneficiaries: “Keep fighting. Migrating is a human right. Is that clear? And nobody can stop it.”⁹

In *Ramos v. Wolf*, the district court recognized the arduous conditions still present in El Salvador and ruled in favor of Crista and the plaintiffs, issuing a preliminary injunction barring TPS terminations for El Salvador, Sudan, Nicaragua, and Haiti.¹⁰ However, on September 14, 2020, the U.S. Court of Appeals for the Ninth Circuit vacated the preliminary injunction, leaving no remedy for Crista and her family.¹¹

Although Crista’s mother and other TPS beneficiaries were originally displaced by a singular environmental event, conditions in many TPS designated countries have worsened each year due to climate change.¹² Thus, TPS holders are not temporarily affected as the name suggests. Rather, climate change has resulted in an abundance of long-lasting effects, contributing to the rise of climate migration.

In general, climate migration is the displacement of individuals from their homelands due to climate change.¹³ Greenhouse gas emissions give rise to climate change induced events such as sudden onset disasters, slow on-set environmental degradation, “sinking” small island states, governmental designation of high-risk areas too dangerous for human habitation, and indirectly, civil unrest.¹⁴ Developing countries are most at risk to these hazards, as poverty can be linked to greater dependence on climate-sensitive resources such as access to clean water.¹⁵ As a result, habitable land is lost, access to natural resources is reduced, and

8. *Id.*

9. *Id.*

10. *Ramos v. Wolf*, 975 F.3d 872, 878 (9th Cir. 2020).

11. *See id.* at 878–79.

12. I will adopt the United Nations’ definition of climate changes for this Comment: “Climate change refers to long-term shifts in temperatures and weather patterns. These shifts may be natural, such as through variations in the solar cycle. But since the 1800s, human activities have been the main driver of climate change, primarily due to burning fossil fuels like coal, oil and gas. Burning fossil fuels generates greenhouse gas emissions that act like a blanket wrapped around the Earth, trapping the sun’s heat and raising temperatures.” *What Is Climate Change?*, UNITED NATIONS, <https://www.un.org/en/climatechange/what-is-climate-change> [<https://perma.cc/4XP6-8F3R>] (last visited Feb. 7, 2022).

13. Autumn Skye Bordner, *Climate Migration & Self-Determination*, 51 COLUM. HUM. RTS. L. REV. 183, 186 (2019).

14. Katrina Miriam Wyman, *Responses to Climate Migration*, 37 HARV. ENVTL. L. REV. 167, 171 (2013).

15. *Id.* at 173.

individuals are prompted to migrate.¹⁶ In sum, rising temperatures are driving climate migrants away from the poorest and hottest parts of the world.¹⁷

The Ninth Circuit in *Ramos* and the TPS statute both emphasize that the U.S. affords no long-term legal protections for individuals who endure such catastrophic environmental effects, despite the onset of climate change and years of extending TPS designations for other intervening environmental causes.¹⁸ While the policies enforced through TPS once served its beneficiaries well, the *Ramos* decision reveals an injustice that cannot be redressed by current law or the plain language of the TPS statute. Therefore, the U.S. must provide a legal remedy through amendments to the Immigration and Nationality Act (INA) formally recognizing climate change migrants as a specified group of protected persons and providing a pathway to permanent residency.

Part I of this Comment will provide the background of TPS and recent litigation: *Ramos v. Wolf*, *Bhattarai v. Nielsen*, and *Saget v. Trump*. This series of cases illustrates the issues that arose from the Trump administration gradually dissolving TPS. Part II of this Comment will further outline the risks and legal problems associated with climate change in accordance with the global and national effects of climate migration. These arguments stress TPS's ineffectiveness, as it has become a de facto solution in the accommodation of climate change migrants. Part III of this Comment will provide information on the current definition of "refugee" within the INA and its inability to encompass legal protections for climate change migrants. Part IV of this Comment will then present a legal solution for the classification of climate change migrants within the INA. Subsequent recommendations to bolster this proposal will also be provided.

16. *Id.* at 174.

17. See Abrahm Lustgarten, *Where Will Everyone Go?*, PROPUBLICA (July 23, 2020), <https://features.propublica.org/climate-migration/model-how-climate-refugees-move-across-continents/> [<https://perma.cc/2GWP-B9SH>].

18. Miriam Jordan, *400,000 Immigrants Can Be Forced to Leave the U.S., Court Rules*, N.Y. TIMES (Sept. 14, 2020), <https://www.nytimes.com/2020/09/14/us/immigrants-temporary-protected-status.html?smid=fb-nytimes&smtyp=cur&fbclid=IwAR0naeUxCVshuiZfzc5IcbmWDZY13141sCxpFuiP3hwILx4KeLL8FHkuClc> [<https://perma.cc/P3G7-J69Z>].

I. BACKGROUND: TEMPORARY PROTECTED STATUS AND ITS HISTORY OF PROTECTING CLIMATE CHANGE MIGRANTS

This section will articulate the legal and humanitarian protections that TPS intended to provide but are now hindering TPS beneficiaries and their families. The legislative intent of TPS was to provide a temporary safe haven for individuals escaping harm; however, the present application of TPS is contrary to that goal.¹⁹ Further, the DHS attempted to strip the minimal reliability TPS currently offers for climate change migrants pursuant to the Trump administration's "America First" agenda.²⁰ *Ramos v. Wolf*, *Bhattarai v. Nielsen*, and *Saget v. Trump* all illustrate the hardship and uncertainty that is the foundation for the ongoing legal battles regarding the protection of TPS beneficiaries and their families.

A. Temporary Protected Status

Congress established TPS designations through the enactment of the INA.²¹ The INA directs the Secretary of Homeland Security (the "Secretary") to designate a country as eligible for TPS when temporary conditions inhibit the safety of the country's nationals, such as an ongoing armed conflict, environmental disaster, epidemic, or any other extraordinary and temporary condition.²² The federal government is then prohibited from removing individuals from the U.S. who are granted TPS.²³

19. See Claire Bergeron, *Temporary Protected Status After 25 Years: Addressing the Challenge of Long-Term "Temporary" Residents and Strengthening a Centerpiece of US Humanitarian Protection*, 2 J. ON MIGRATION & HUM. SEC. 22 (2014), <https://journals.sagepub.com/doi/pdf/10.1177/233150241400200103> [<https://perma.cc/5TV4-URG6>]; see also H.R. REP. NO. 100-627 (1988).

20. Appellees' Answering Brief, *Ramos v. Wolf*, 975 F.3d 872 (2019) (No. 18-16981), 2019 WL 468274, at *8.

21. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

22. 8 U.S.C. § 1254a(b)(1). The TPS statute designates the Attorney General of the U.S. as the authority for determinations, however, TPS was enacted before the creation of DHS in 2002. Thus, when DHS was established, most of the Attorney General's immigration-related authority was transferred to the Secretary. JILL H. WILSON, CONG. RSCH. SERV., RS20844, TEMPORARY PROTECTED STATUS AND DEFERRED ENFORCED DEPARTURE 2 n.9 (2021).

23. *Id.* § 1254a(a)(1)(A).

TPS is currently designated for ten different countries,²⁴ and over 400,000 individuals benefit from the designations.²⁵ The DHS asserts that these benefits are temporary and do not provide a pathway to permanent resident status or any other immigration status.²⁶ However, beneficiaries may apply for other immigration benefits or protections for which they are eligible.²⁷ Further, these beneficiaries can also obtain an employment authorization document and may be granted travel authorization.²⁸

A foreign state's TPS designation can last for no less than six months and no more than 18 months, a time period specified by the Secretary.²⁹ However, at least 60 days before the designation period expires, the Secretary must review the foreign state's conditions and determine whether the designation should remain in effect.³⁰ The length of these extensions can either be six, 12, or 18 months.³¹ This process applies to any extension periods enforced thereafter.³² In contrast, if the Secretary determines these extraordinary conditions are no longer present within the foreign state, then the designation in question must be terminated.³³

However, the Secretary in prior administrations determined the extension or termination of a foreign state's TPS designation by considering intervening causes such as subsequent natural disasters and economic crises.³⁴ Although such language is not codified within the TPS statute, the Trump administration ignored years of this well-established

24. The TPS designated countries include: Burma (Myanmar), El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, Venezuela, and Yemen. The TPS terminations for El Salvador, Haiti, Honduras, Nicaragua, Nepal, and Sudan will not go into effect until litigation regarding these decisions is finalized. *Temporary Protected Status*, U.S. CITIZEN & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/W729-5UPM>] (last visited Oct. 24, 2021).

25. Class Action Complaint, *supra* note 2.

26. 8 U.S.C. § 1254a(f).

27. See *Temporary Protected Status*, *supra* note 24. Such actions include: (1) applying for nonimmigrant status; (2) filing for adjustment of status based on an immigration petition; or (3) applying for any other immigration benefit or protection of which an individual may be eligible. *Id.*

28. 8 U.S.C. § 1254a.

29. *Id.* § 1254a(b)(2).

30. *Id.* § 1254a(3)(A).

31. *Id.* § 1254a(3)(C).

32. *Id.* § 1254a(3)(A).

33. *Id.* § 1254a(3)(B).

34. See *Ramos v. Wolf*, 975 F.3d 872, 908 (9th Cir. 2020) (Christen, dissenting).

practice and refused to factor intervening circumstances into these decisions, thus terminating several existing TPS designations.³⁵

B. Current Litigation Surrounding TPS Designations and Terminations

Although TPS was legislatively intended for temporary use, the practice of extending TPS designations by prior administrations has allowed beneficiaries to reside in the U.S. for prolonged periods, albeit with uncertainty as to whether such extensions will continue. If continual extensions are warranted, then the legal protections for TPS should be solidified by unambiguous codification in order to prevent the injustices outlined in the recent litigation.

1. Ramos v. Wolf

The TPS designation for Nicaragua was determined in 1999 as a result of the destruction generated by Hurricane Mitch.³⁶ The Bush and Obama administrations extended Nicaragua's TPS designation 13 times, citing droughts and flooding from Hurricane Michelle in 2002 as well as issues spurred by subsequent natural disasters and storms.³⁷ On December 15, 2017, Acting Secretary Elaine Duke terminated the TPS designation for Nicaragua, stating the country's current conditions no longer warranted a TPS designation.³⁸

The TPS designation for El Salvador was implemented in 2001 due to the disastrous effects of three earthquakes in the region.³⁹ As a result of these natural disasters, 17% of the population was displaced.⁴⁰ The Bush and Obama administrations extended the designation 11 times, citing extensive drought, effects from Tropical Storm Stan, the Santa Ana volcanic eruption, subsequent earthquakes, and devastation from the 2009 Hurricane Ida.⁴¹ On January 18, 2018, the TPS designation for El Salvador was terminated.⁴² Secretary Kirstjen Nielsen noted El Salvador's designation was terminated due to the country's supposed recovery from

35. *Id.*

36. *Id.* at 881.

37. *Id.*

38. *Id.*; Termination of the Designation of Nicaragua for Temporary Protected Status, 82 Fed. Reg. 59636 (Dec. 15, 2017).

39. *Ramos*, 975 F.3d at 881.

40. *Id.* at 882.

41. *Id.*

42. *Id.* at 882–83; Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654 (Jan. 18, 2018).

the conditions effectuated by the 2001 earthquakes.⁴³ Secretary Nielsen could have considered the subsequent natural disasters, gang violence, and food insecurity plaguing El Salvador today, which inhibited the country's full recovery.⁴⁴ However, Secretary Nielsen disregarded these hardships.⁴⁵

Haiti was granted TPS designation in 2010 following a 7.0-magnitude earthquake.⁴⁶ The earthquake affected one-third of the country's population and severely impaired critical infrastructure, including its capacity for electricity, water, and telephone services.⁴⁷ These circumstances prompted alarming fuel, food, and water shortages.⁴⁸ Haiti's TPS designation was extended or re-designated five times, with the Trump administration responsible for one of the extensions.⁴⁹ The extensions in 2012, 2014, and 2015 were due to floods that contributed to a deadly cholera outbreak.⁵⁰ However, on November 20, 2017, the DHS announced it would not extend Haiti's TPS designation.⁵¹ Acting Secretary Duke attributed Haiti's TPS termination to a lack of extraordinary and temporary conditions relating back to the country's 2010 earthquake,⁵² despite previous Secretary John Kelly stating less than a year earlier that "conditions in Haiti supporting its designation for TPS persist."⁵³

In sum, TPS beneficiaries from these countries were originally displaced due to natural disasters and continued to have their TPS designations extended or re-designated by past administrations because of subsequent, and sometimes linked, natural disasters.⁵⁴ Notwithstanding the subsequent natural disasters, the Trump administration maintained that the conditions supporting the countries' initial TPS designations were no longer present, disregarding any other adverse conditions that may have warranted another extension or re-designation.

43. *Ramos*, 975 F.3d at 882.

44. Class Action Complaint, *supra* note 2.

45. *Id.*

46. *Ramos*, 975 F.3d at 882.

47. *Id.*; Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3476, 3477 (Jan. 21, 2010).

48. *Id.*

49. *Ramos*, 975 F.3d at 882.

50. *Id.*

51. Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. at 3477.

52. *Ramos*, 975 F.3d at 883.

53. Class Action Complaint, *supra* note 2.

54. *Ramos*, 975 F.3d 872. TPS beneficiaries from the country of Sudan also joined this suit due to termination; however, its TPS designation was attributed to an ongoing civil war, not an environmental event. *See id.* at 880.

In *Ramos v. Wolf*, TPS beneficiaries from Nicaragua, El Salvador, and Haiti, along with their U.S.-citizen children, challenged these TPS terminations before a three-judge panel as unlawful pursuant to the Administrative Procedure Act (APA) and the Equal Protection Clause of the Fifth Amendment.⁵⁵ These plaintiffs were lawfully residing in the U.S. for decades, building lives and growing families.⁵⁶

The plaintiffs first argued the Secretary's actions "violated the APA by departing from prior practice without an adequate explanation."⁵⁷ The plaintiffs alleged that the Secretary's decision to depart from multiple prior administrations' precedent of intervening events in TPS determinations should have been adequately explained before the TPS terminations were issued, as such an abrupt change in practice was "arbitrary and capricious."⁵⁸ However, the Ninth Circuit found the APA claim was barred, stating it "fundamentally attack[ed] the Secretary's specific TPS determinations,"⁵⁹ and "judicial review of any TPS determination made by the [Secretary] with respect to the designation, or termination or extension of a designation, of a foreign state" is prohibited by the TPS statute.⁶⁰

The plaintiffs further argued the TPS decisions "were motivated by discriminatory animus in violation of Fifth Amendment equal protection principles."⁶¹ They relied on the Supreme Court's reasoning in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, which requires "[p]roof of racially discriminatory intent or purpose . . . to show a violation of the Equal Protection Clause."⁶² Specifically, the plaintiffs claimed the terminations made by the Secretary were unjustly influenced by President Trump's "animus against non-white, non-European immigrants."⁶³ Evidence of President Trump's animus include his claim that "15,000 recent immigrants from Haiti 'all have AIDS'" as well as his

55. *Ramos*, 975 F.3d at 878; *Update on Ramos v. Nielsen*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/update-on-ramos-v-nielsen> [<https://perma.cc/XD85-KRJT>] (last visited Oct. 21, 2021).

56. *See Ramos*, 975 F.3d at 900 (Nelson, concurring).

57. *Id.* at 883.

58. *Id.* at 893.

59. *Id.* at 895.

60. *See Ramos*, 975 F.3d at 888, 893 (quoting 8 U.S.C. § 1254a(b)(5)(A)).

61. *Id.* at 883.

62. Appellees' Answering Brief, *supra* note 20, at *17; *Ramos*, 975 F.3d at 896 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)).

63. *Ramos*, 975 F.3d at 897.

remark referring to immigrants as “animals,” among other derogatory and unsubstantiated declarations.⁶⁴

While the Ninth Circuit acknowledged President Trump’s express racial animus toward “non-white, non-European immigrants,” the court concluded that the Secretary’s TPS terminations were not linked to the President’s remarks, but rather the Secretary was complying with the standard that executive officials typically conform to the current administration’s policies.⁶⁵ To support their conclusion, the Ninth Circuit cited to a recent Supreme Court decision that found no racial animus present in the Trump administration’s rescission of Deferred Action for Childhood Arrivals (DACA).⁶⁶ The Ninth Circuit held that the *Ramos* plaintiffs presented a “glaring lack of evidence tying the President’s alleged discriminatory intent to the specific TPS terminations.”⁶⁷ The court concluded that this standard of intent could have been met if the plaintiffs provided “evidence that the President personally sought to influence the TPS terminations, or that any administration officials involved in the TPS decision-making process were themselves motivated by animus against ‘non-white, non-European’ countries.”⁶⁸

Additionally, the court cited that while the four countries terminated under TPS were “non-European” with predominantly “non-white” populations, the Trump administration extended TPS determinations for four other countries during this time period that were also “non-European” with predominantly “non-white” populations.⁶⁹ The Ninth Circuit ultimately found that the plaintiffs failed to meet their burden to prove a likelihood of success on the merits of their Equal Protection claim.⁷⁰ Because of this, the Ninth Circuit panel concluded that the district court abused its discretion in issuing the preliminary injunction barring the implementation of the TPS terminations.⁷¹ However, a decision is pending on the plaintiffs’ petition for further review before the entire Ninth Circuit.⁷² Therefore, the court has not yet issued its directive to the district

64. See Appellees’ Answering Brief, *Ramos v. Wolf*, *supra* note 20, at *17.

65. *Ramos*, 975 F.3d at 897.

66. *Id.* (citing *Dep’t. of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020)).

67. *Id.*

68. *Id.*

69. *Id.* at 898.

70. See *id.* at 897–89.

71. See *id.* at 899.

72. *Update on Ramos v. Nielsen*, *supra* note 55; *Update on Bhattarai v. Nielsen*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/>

court to make the panel's ruling effective, and the injunction remains in place.⁷³

The overarching injustice in *Ramos* is depicted by the uprooting of migrants' lives who have made homes and started families in the U.S. Since the inception of TPS, its application has reflected a "long-established standard allowing consideration of all current conditions," including intervening events.⁷⁴ Thus, TPS beneficiaries reasonably operated under the belief that this benefit would continue to be renewed. However, their belief was disrupted when the Trump administration employed a narrow and restrictive view, dictating that only the "original 'conditions that gave rise to the years-old TPS designations'" should be considered.⁷⁵ In response to this abrupt policy change, the majority opinion stated that the consideration of "intervening events" is a determination left to the DHS and the "special expertise" and "institutional competence" of the Secretary's discretion, as found in 8 U.S.C. § 1254a.⁷⁶ While the Secretary may take "intervening events" into account, the statute does not *require* such considerations, which allowed the Trump administration to abandon the decades-long policy practice.

Judge Nelson, delivering the concurrence for the Ninth Circuit panel in *Ramos*, did not discount that the TPS beneficiaries involved in the case rightfully deserve legislative protection.⁷⁷ He explained, however, that the limitation rested upon the narrow interpretation of the law, which resulted in TPS providing no legal remedy for the plaintiffs.⁷⁸ Unfortunately, this legislative shortcoming extends beyond the control of the judiciary. As the Ninth Circuit cited in *City & County of San Francisco v. United States Citizenship & Immigration Services*, Congress is the governing body responsible for addressing the deficiencies in our nation's immigration policies.⁷⁹

humanitarian/temporary-protected-status/update-on-bhattarai-v-nielsen [https://perma.cc/QWK9-X2DR] (last visited Oct. 24, 2021).

73. *Update on Ramos v. Nielsen, supra* note 55; *Update on Bhattarai v. Nielsen, supra* note 72.

74. Appellees' Answering Brief, *Ramos v. Wolf, supra* note 20, at *7.

75. *Id.*

76. *See Ramos*, 975 F.3d at 893.

77. *See id.* at 900 (Nelson, R., concurring).

78. *See id.*

79. "By constitutional design, the branch that is qualified to establish immigration policy and check any excesses in the implementation of that policy is Congress." *City & Cnty. of S.F. v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 809 (9th Cir. 2019).

2. Bhattarai v. Nielsen

Simultaneously with *Ramos*, litigation regarding the TPS terminations of Nepal and Honduras is ongoing in *Bhattarai v. Nielsen*. The TPS designation for Nepal was initially determined in 2015 after a 7.8-magnitude earthquake and its aftershocks affected the region.⁸⁰ As a result, approximately 9,000 people were killed; 20,000 were injured; and millions were displaced.⁸¹ The designation was then extended in 2016 due to civil unrest, obstruction at the borders, and inadequate sanitation. These conditions were either wholly or partially unrelated to the initial natural disaster.⁸² On April 26, 2018, Secretary Nielsen terminated the TPS designation for Nepal, stating that the country had since recovered from the 2015 earthquake.⁸³

The TPS designation for Honduras was implemented in 1999 following Hurricane Mitch.⁸⁴ Prior administrations extended the designation 14 times, citing additional environmental disasters, a deteriorating economy, and a political crisis subsequently affecting economic activity.⁸⁵ Nonetheless, on May 4, 2018, Secretary Nielsen terminated the TPS designation for Honduras, concluding that the country had since recovered from Hurricane Mitch.⁸⁶

On February 10, 2019, TPS beneficiaries and their children from Nepal and Honduras filed a class action complaint alleging violations of the APA and Equal Protection Clause just as the plaintiffs did in *Ramos*.⁸⁷ The complaint contained an additional claim that the Secretary violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution.⁸⁸ The petitioners stated that the Trump administration's standard for determining TPS extensions and terminations was motivated by the "intentional race-, ethnicity-, and national-origin-based animus against TPS holders" and thus violated "the equal protection guarantee of the Fifth Amendment's Due Process Clause."⁸⁹ Therefore, due to the similar issues

80. See Complaint, *Bhattarai v. Nielsen*, 2019 WL 528658 (N.D. Cal. 2019) (No. 19-cv-731).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

raised in *Ramos*, the district court in *Bhattarai* will stay proceedings pending the outcome of the *Ramos* appeal.⁹⁰

3. *Saget v. Trump*

On May 31, 2018, the plaintiffs in *Saget v. Trump* challenged then-Acting Secretary Duke's TPS termination of Haiti.⁹¹ The plaintiffs claimed the termination was arbitrary and capricious, an abuse of discretion, and in violation of the APA, the Regulatory Flexibility Act,⁹² and the Due Process and Equal Protection Clauses of the Fifth Amendment of the U.S. Constitution.⁹³

On April 11, 2019, the U.S. District Court for the Eastern District of New York issued a preliminary injunction enjoining Haiti's TPS termination, which will remain in effect pending resolution of the case.⁹⁴ The court held that the judicial review provision of the TPS statute⁹⁵ does not bar review of Secretary Duke's decision-making process in her TPS termination of Haiti; rather, it merely bars direct review of individual TPS determinations.⁹⁶ The TPS statute does not grant the Secretary with "unfettered discretion," nor does it provide her with "sole and unreviewable discretion."⁹⁷ Rather, the TPS statute requires the Secretary to: "(1) consult with appropriate government agencies; (2) publish the basis for a determination in the federal register; and (3) terminate a foreign state's TPS if that state no longer meets the conditions for designation."⁹⁸ Thus, according to the TPS statute and the APA's "strong presumption in

90. *Update on Bhattarai v. Nielsen, supra* note 72.

91. *Saget v. Trump*, 375 F. Supp. 3d 280, 329 (E.D.N.Y. 2019).

92. *Id.* at 329. The Court rejected the Regulatory Flexibility Act argument as the plaintiff, Haiti Libert , is not a regulated small entity "adversely affected or aggrieved by final agency action" as required by the Act to be afforded judicial review. Thus, Haiti Libert  lacked prudential standing to bring the claim. *Id.* at 338.

93. *Saget*, 375 F. Supp. 3d at 329.

94. *Temporary Protected Status Designated Country: Haiti*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti> [<https://perma.cc/WXM3-YGYT>] (last visited Oct. 25, 2021).

95. 8 U.S.C. §1254a(b)(5)(A).

96. *Saget*, 375 F. Supp. 3d at 331.

97. *Id.* at 332.

98. *Id.*

favor of judicial review,”⁹⁹ the court possessed subject matter jurisdiction over the plaintiffs’ claims in seeking a preliminary injunction.¹⁰⁰

For a preliminary injunction, the plaintiffs must demonstrate either a likelihood of success on the merits or serious questions on the merits and a balance of hardships favoring the moving party.¹⁰¹ Additionally, the plaintiffs must demonstrate irreparable harm and that a preliminary injunction would be in the public interest.¹⁰² Addressing the first requirement, the court found a likelihood of success on the merits of the plaintiffs’ APA claim.¹⁰³ The court reasoned that Secretary Duke did not base her decision to terminate Haiti’s TPS designation “on an objective, inter-agency assessment” as required by the TPS statute.¹⁰⁴ Further, her decision constituted an arbitrary and capricious action as she was “improperly influenced by the White House” and “departed from past agency practices without explanation.”¹⁰⁵ Lastly, Secretary Duke’s decision was determined to be pretextual and made in bad faith, as she terminated Haiti’s TPS designation “for the sake of ‘agenda adherence’ to the ‘America first’ platform.”¹⁰⁶

Due to evidence indicative of potential White House animus toward non-white immigrants and its influence on Secretary Duke’s decision, the court found that the plaintiffs raised serious questions on the merits of the Equal Protection claim as well.¹⁰⁷ Specifically, in June 2017, President Trump stated in a meeting, which included then-Secretary John Kelly, that Haitians “all have AIDS.”¹⁰⁸ While serving in the capacity of President Trump’s Chief of Staff, John Kelly also stated that Haitians were “welfare recipients.”¹⁰⁹ As concluded in *Batalla Vidal v. Nielsen*, “Although the use of racial slurs, epithets, or racially charged language does not violate equal protection per se, it can be evidence that official action was motivated by unlawful discriminatory purposes.”¹¹⁰

99. *Id.* at 330.

100. *Id.* at 333.

101. *Id.* at 339.

102. *Id.*

103. *Id.* at 340.

104. *Id.* at 345.

105. *Id.*

106. *Id.* at 343–45.

107. *Id.* at 372.

108. *Id.* at 371.

109. *Id.* at 372.

110. *Id.* (emphasis omitted) (quoting *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 277 (E.D.N.Y. 2018)).

Addressing the irreparable harm requirement, the harm must be an actual, imminent injury that could not be remedied if a court chose to await final adjudication on the merits.¹¹¹ Further, as serious questions on the merits of the Equal Protection claim were raised, the balance of the hardships must be weighed in favor of the plaintiffs.¹¹² If the Haitian TPS beneficiaries were to remain in the U.S., no concrete harms would arise.¹¹³ In contrast, despite the temporary nature of TPS, the court found the “deep psychological pain” and “financial hardships” caused by the termination would force the plaintiffs to suffer a significant and irreparable harm,¹¹⁴ provoking the court to order a preliminary injunction that aligned with the interests¹¹⁵ of the public.¹¹⁶ The court emphatically stated: “Once TPS beneficiaries are removed, the Government’s actions cannot be undone.”¹¹⁷ Thus, the harm was found to be imminent and actual, allowing all elements of a preliminary injunction to be satisfied.¹¹⁸ The court enjoined the TPS termination for Haiti on a nationwide basis, and as in *Ramos* and *Bhattarai*, the preliminary injunction will remain in effect until the case is resolved.¹¹⁹

4. *The Biden Administration’s Response*

Following this series of cases, the Trump administration was replaced by President Joe Biden’s newly elected administration, bringing with it subsequent changes to TPS status. On September 10, 2021, the DHS issued a Federal Register notice that TPS beneficiaries from El Salvador, Haiti, Nicaragua, and Sudan will retain their TPS and TPS documentation until December 31, 2022, while the preliminary injunctions in *Ramos* and

111. *Id.* at 374 (citing *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005)).

112. *See id.* at 378.

113. *See id.* at 377.

114. *Id.* at 376.

115. Due to the Government being a party, the balance of hardships and public interest merged as one factor. Essentially, the Government’s interest *is* public interest. *Id.* at 339–40.

116. Thus, because the balance of hardship and public interest merged as one factor, the balance of hardship tipping in the plaintiffs’ favor satisfied the requirement that a preliminary injunction would be in public interest. *Id.* at 377–78.

117. *Id.*

118. *Id.*

119. *Id.* at 379.

Saget remain in effect.¹²⁰ The notice also extended TPS and TPS documentation until December 31, 2022, to the TPS beneficiaries from Honduras and Nepal while the stay of the proceedings in *Bhattarai* continues.¹²¹ The DHS further provided that future notices will be published as necessary to comply with court orders.¹²²

Additionally, on May 22, 2021, Secretary Alejandro Mayorkas announced a new TPS designation for Haiti that will last for 18 months, effective August 3, 2021, through February 3, 2023.¹²³ The designation provides that Haitian nationals who have continuously resided in the U.S. since July 29, 2021, and have been continuously present in the U.S. since August 3, 2021, should apply for TPS.¹²⁴ Following review, the DHS and the Department of State (DOS) determined that Haiti's TPS designation was warranted due to extraordinary and temporary conditions, such as increased vulnerability to natural hazards that have been further exacerbated by the COVID-19 pandemic.¹²⁵

120. *Update on Ramos v. Nielsen*, *supra* note 55; Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 86 Fed. Reg. 50725, 50726 (Sept. 10, 2021).

121. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 86 Fed. Reg. at 50726; *see also Update on Ramos v. Nielsen*, *supra* note 55.

122. Essentially, the issues presented for TPS beneficiaries in *Ramos*, *Battarai*, and *Saget* are in a flux until a terminal ruling is issued by the federal judiciary. *Update on Ramos v. Nielsen*, *supra* note 55; Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 86 Fed. Reg. at 50726.

123. The previous designation for Haiti and the termination currently being challenged in *Ramos* and *Saget* protected approximately 55,000 beneficiaries. However, this new designation for Haiti includes those previous beneficiaries as well as potentially 100,000 *more* individuals, totaling an estimated 155,000 beneficiaries. Designation of Haiti for Temporary Protected Status, 86 Fed. Reg. 41863, 41863 (Aug. 3, 2021); *Temporary Protected Status Designated Country: Haiti*, *supra* note 94.

124. The designation also instructed "TPS beneficiaries whose TPS has been continued pursuant to court orders" to re-apply for TPS following the notice in the Federal Register. Designation of Haiti for Temporary Protected Status, 86 Fed. Reg. at 41863. This indicates that the beneficiaries who are protected under the preliminary injunctions in *Ramos* and *Saget* should re-apply for TPS under this new designation.

125. *Id.*

5. *Revealing the Fragility of TPS*

As final decisions in *Ramos*, *Bhattarai*, and *Saget* have yet to materialize, and although the Biden administration has attempted to provide solace for the beneficiaries in these cases, one issue remains clear: these terminations were products of the Trump administration's efforts to eliminate TPS entirely. Environmentally displaced individuals, whether affected by temporary or permanent events, would be afforded no legal protections in the U.S., a country in which they have lawfully resided for years. Even if TPS were to remain in effect, the TPS statute's goal to provide temporary and immediate relief for those affected by natural disasters still leaves no legal remedy available for those who suffer the permanent effects of climate change.

Alternatively, the natural disasters that prompt TPS determinations likely do not fit the definition of "temporary," as these events are the result of the pervasive climate change phenomenon. Thus, the language of TPS is contradictory, as a program to provide *temporary* relief for *permanent* environmental effects is clearly insufficient. This discrepancy would further affirm that no explicit legal protections are offered to individuals displaced by ongoing and continuous environmental events occurring in a particular country—a point the Ninth Circuit made abundantly clear. While TPS is admirable in theory, its modern day application cannot fulfill the needs of environmentally displaced persons. The escalation of climate change over time has revealed the inadequacy of this supposed legal protection, as a temporary solution cannot accommodate the permanent issues that TPS beneficiaries face.

II. RISKS ASSOCIATED WITH THE RISE OF CLIMATE CHANGE AND CLIMATE MIGRATION

To address the lack of legal protections for individuals experiencing long-term damage from a natural disaster, climate change's effects on forced migration must first be examined. Recently, The New York Times, ProPublica, and the Pulitzer Center published a study regarding the migration of people across borders.¹²⁶ The study determined that migration will increase every year regardless of the condition of the climate.¹²⁷ However, as the climate changes, the number of migrants rises significantly.¹²⁸ Accounting for the most extreme of scenarios, the study

126. Lustgarten, *supra* note 17.

127. *Id.*

128. *Id.* If the U.S. took even a modest approach in reducing climate change emissions, approximately 680,000 climate migrants *might* migrate from Central

projected that more than 30 million climate migrants could travel toward the U.S. southern border over the next 30 years.¹²⁹

A. Human Migration Patterns in Relation to Climate Change

In 2007, Alan B. Krueger, a labor economist, and Michael Oppenheimer, a climate geoscientist, developed a study on the environment's effect on individuals' decisions to migrate based on economic insight.¹³⁰ Specifically, the pair examined the statistical relationship between census data, crop yields, and historical weather patterns in Mexico and how farmers acclimated to drought in the region.¹³¹

Published in 2010, Krueger and Oppenheimer's study revealed that Mexican migration to the U.S. drastically increased during periods of drought.¹³² Additionally, the study predicted that climate change could prompt 6.7 million individuals to migrate toward the southern U.S. border by 2080.¹³³ Krueger and Oppenheimer also noted that while such projections are merely an estimate due to the inconsistent nature of human decision-making and migration, it is still pertinent that society begins to grasp the gravity of the situation involving individuals and climate change.¹³⁴

While the precise numbers and reasoning behind human migration are difficult to ascertain, evidence of climate change migration on both a small and large scale has been revealed.¹³⁵ From 2007 to 2010, subtle migration occurred in Syria when extreme drought contributed to crop failure, prompting residents to move toward cities.¹³⁶

On a larger scale, one-fourth of the global population resides in South Asia, and the World Bank predicts this region will soon be home to the

America to the U.S. between now and the year 2050. *Id.* However, that estimate drastically increases to more than one million migrants if the emissions continue unabated; undocumented immigrants are not included in that estimation, which could potentially double the number. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. See Colin P. Kelley et al., *Climate Change in the Fertile Crescent and Implications of the Recent Syrian Drought*, 112 PNAS 3241 (2015), <https://www.pnas.org/content/early/2015/02/23/1421533112> [<https://perma.cc/V543-XQTU>].

highest food insecurity in the world.¹³⁷ Already, 8.5 million previous residents have migrated, with most now living in the Persian Gulf; 17 to 36 million more individuals will likely be forced to migrate as well.¹³⁸ Posing an even greater concern, toward the end of the century, heat and humidity are predicted to rise at such an alarming rate that individuals residing in South Asia will die without air conditioning.¹³⁹ Rising seas will also contribute to large-scale migration in the future, as high tides are projected to submerge multiple regions of Vietnam, China, Thailand, Iraq, and Egypt.¹⁴⁰ Additionally, coastal regions in the U.S. are also extremely susceptible to this danger.¹⁴¹

B. Effects of Open and Closed Borders in Response to Climate Change

The model developed by The New York Times, ProPublica, and the Pulitzer Center details the likelihood of risks associated with climate change and migration depending on whether the U.S. chooses to further open its borders or, alternatively, forcefully close its borders.¹⁴²

If the U.S. were to relax its immigration regulations, globalization would still continue.¹⁴³ Factoring in climate change, drought, and food insecurity in the rural regions of Mexico and other Central American countries would subsequently push residents out of the countryside, prompting millions to seek relief in large cities and further contribute to mass urbanization.¹⁴⁴ Eventually, these individuals would migrate north, resulting in the largest influx of migrants toward the U.S.¹⁴⁵

In contrast, if the U.S. were to limit border passage, migrants would be turned back, thereby indirectly decreasing economic growth and urbanization in Central America.¹⁴⁶ In turn, the population and birth rates in Central America would rapidly rise as the region would become more impoverished.¹⁴⁷ Temperatures would continue to increase, and water and

137. Lustgarten, *supra* note 17.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (“The projected number of migrants arriving from Central America and Mexico rises to 1.5 million a year by 2050, from about 700,000 a year in 2025.”).

146. *Id.*

147. *Id.*

food supplies would become scarcer, exacerbating death by starvation and the conflicts that arise from these shortages.¹⁴⁸ The consequences of building walls, both literally and figuratively, would significantly contribute to these deaths.¹⁴⁹ To avoid such gross injustice, greenhouse gases and other harmful emissions must be reduced, and instead of strictly stifling migration, doors should be opened rather than closed.

III. EXPANDING BEYOND REFUGEE STATUS

Legal scholars have offered many viable and creative solutions to address the lack of legal protections for climate change migrants. A popular proposal includes adopting the term “environmental refugee” or “climate change refugee,” thus expanding the definition of a “refugee” both in the U.S. and internationally.¹⁵⁰ However, scholars recognize this recommendation involves its own set of obstacles.¹⁵¹

Currently, the United Nations Convention Relating to the Status of Refugees (“Refugee Convention”) defines a refugee based on persecution or fear of persecution stemming from one of the following protected characteristics: race, religion, nationality, political opinion, or membership in a particular social group.¹⁵² The language of the INA similarly defines the term “refugee.”¹⁵³ Political upheaval regarding competition over natural resources can serve as an indirect link to classify certain climate migrants under the refugee definition; however, the actual

148. *Id.*

149. *Id.* (“Researchers suggest that the annual death toll, globally, from heat alone will eventually rise by 1.5 million.”).

150. See Shea Flanagan, “Give Me Your Tired, Your Poor, Your Huddled Masses”: *The Case to Reform U.S. Asylum Law to Protect Climate Change Refugees*, 13 DEPAUL J. SOC. JUST. 1, 23–26 (2019); see also Elizabeth Keyes, *Environmental Refugees? Rethinking What’s In A Name*, 44 N.C. J. INT’L L. 461 (2018).

151. See, e.g., Flanagan, *supra* note 150, at 23–26; see also Keyes, *supra* note 150, at 461.

152. Keyes, *supra* note 150, at 464 (citing Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150).

153. 8 U.S.C. 1101(a)(42) (“The term ‘refugee’ means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”).

harms of climate change are still not yet fully recognized, making it difficult to confine climate change migrants to this classification.¹⁵⁴

In addition, climate change migrants are not subjects of persecution inflicted by their government, which is a generally accepted requirement to meet the legal definition of persecution.¹⁵⁵ Even if an individual's government fails to acknowledge or address the environmental harms present in one's country, the government is not actively or directly persecuting that individual, which is necessary under the Refugee Convention.¹⁵⁶

However, the INA offers an explicit example of a "refugee" within its language and recognizes a crucial protection. In defining the term "refugee," the INA states that persons who have been forced or fear being forced to abort a pregnancy or undergo involuntary sterilization are classified under this protected class of individuals due to persecution based on political opinion.¹⁵⁷ Although climate change migrants do not meet this narrow standard, this example opens up the possibility of including another specified group of individuals within the INA's amendments.

IV. RECOGNIZING THE CLIMATE CHANGE MIGRANT

While the U.S. is not the only country contributing to climate change, the nation certainly bears a considerable share. Despite being home to only 4% of the world's population, the U.S. has contributed almost one-third of the excess carbon dioxide currently in the atmosphere.¹⁵⁸ This section explores the U.S.' role in accommodating climate migration in accordance with the country's alarming emissions rates.

A. Duties to Climate Change Migrants

Recognizing the impact of climate change on human mobility and migration is imperative for the implementation of appropriate policy

154. See Keyes, *supra* note 150, at 465.

155. Nicole Angeline Cudiamat, *Displacement Disparity: Filling the Gap of Protection for the Environmentally Displaced Person*, 46 VAL. U. L. REV. 891, 925 (2012).

156. *Id.*

157. 8 U.S.C. 1101(a)(42).

158. See Kevin Loria, *Trump Just Pulled Out of the Paris Agreement – But the US Has Contributed More to Climate Change Than Any Other Country*, BUS. INSIDER (June 1, 2017, 4:36 PM), <https://markets.businessinsider.com/news/stocks/us-effect-on-climate-change-co2-emissions-warming-2017-6> [<https://perma.cc/D2T4-VULA>].

practices. However, forcing climate change migrants into the current and longstanding definition of a refugee is inadequate. Rather, based on the evidence and information acquired, U.S. immigration laws must acknowledge the current reality and thus formally define this unique class of individuals. Through proper classification, a program could be developed to integrate climate change migrants into the U.S. and thus afford them necessary support, protection, and resettlement opportunities.

Such integration has occurred domestically on a smaller scale without any assistance from the legislative branch. In 2005, Hurricane Katrina aggressively swept across the Gulf Coast, leaving many New Orleans residents without a home. As a result, these residents relocated to different communities, including Houston.¹⁵⁹ Evaluating the impact years later, climate migrants from New Orleans successfully integrated into Houston without causing massive, localized distress among the region.¹⁶⁰ Thus, as this illustration of domestic displacement demonstrates, the U.S. is capable of sustaining a larger international influx of climate migrants through appropriate organization, legislation, and interdisciplinary measures.

Historically, our country has also recognized a limited duty in receiving individuals who are fleeing a harm created by the U.S.¹⁶¹ Such a circumstance occurred when Vietnamese refugees were faced with tremendous hardship as the U.S. withdrew the military from their country.¹⁶² The U.S. arguably possesses a similar duty in the context of climate change, as the nation bears a sizable portion of its underlying causes.¹⁶³ Even when examining the Vietnamese refugees' post-war circumstances, the pollution inflicted by the U.S.' utilization of the Agent Orange herbicide vastly affected the region with environmental consequences still present today.¹⁶⁴

More than 50 years later, the byproducts of Agent Orange have contaminated the waters of Vietnam and consequently restricted food supply.¹⁶⁵ As such, the U.S. government plans to provide an estimated \$30 million annually over a ten-year period to rehabilitate the country's

159. Keyes, *supra* note 150, at 486.

160. *Id.*

161. *Id.* at 482.

162. *Id.*

163. *See id.*

164. Christopher Carbone, *Toxic Byproducts of Agent Orange Continue to Pollute Vietnam Environment, Researchers Say*, FOX NEWS (Feb. 28, 2019, 12:10 PM), <https://www.foxnews.com/science/toxic-byproducts-of-agent-orange-continue-to-pollute-vietnam-environment-researchers-say> [<https://perma.cc/HV5M-XLTR>].

165. *Id.*

wildlife and ecosystem from Agent Orange's toxins.¹⁶⁶ Due to the U.S.' significant contribution to the climate change phenomenon as illustrated in the example above, U.S. intervention based on a harm to which the nation contributed would not be unprecedented.

B. A Call for Legislation

As the urgency to respond to climate change increases, so too does the urgency to reform current immigration law. Opportunity for change is available and must emerge from the legislative branch, as the judicial branch is the inappropriate body. Through current initiatives—such as the Green New Deal—and inspiration from international statutes, the U.S. can properly provide climate change migrants with reliable legal protections.

1. Structure

As Congress has failed to respond to the evolution of climate change and migration patterns, a program that keenly focuses on climate change migrants is vital and would require significant legislation to amend the INA statute. In deciding whether a country or a region of a specific country is eligible under such a climate migrant program, the Secretary should first determine that increased changes in the climate have rendered that land uninhabitable for individuals so as to justify a pathway to permanent residency in the U.S. For the most optimal and thorough determinations, the Secretary should not act alone. Rather, it should be strictly required, that these drastic decisions regarding the viability of a country's environment be deliberated and concluded with the Administrator of the Environmental Protection Agency (EPA) and the Secretary of State as well.

Through collaboration between the DHS, EPA, and DOS, proper expert determinations can be made regarding key issues such as imposing a statutory numerical limit of recipients for the program and crafting a formal definition of a "climate change migrant." In regard to a statutory numerical limit of recipients, this scheme would coincide with the numerical caps currently imposed for the U.S.' visa programs and refugee protections, allowing for uniformity among our nation's immigration laws. In contrast, not implementing a statutory cap should be considered, as climate change migrants account for only 5% of all migrants, and studies suggest that opening opportunities for immigration increases both the local

166. *Id.*

and global economy.¹⁶⁷ Likewise, crafting a proper definition of a climate change migrant is equally important, as no definition has yet to be universally concluded. In considering these subjects, the nation's immigration policies and its understanding of climate change's gravity could be appropriately balanced and considered through the collective efforts of the DHS, EPA, and DOS.

Introduction of a new program and formal classification of immigrants would present a profound set of challenges, specifically in light of today's political climate. If such a proposal were to come to fruition, fallacies will inevitably exist, as it is far-reaching for the U.S. alone to sustain the magnitude of this escalating humanitarian crisis. Regardless, engaging in these conversations is important to actively collaborate and produce substantive and positive changes in this dynamic area of law.

2. *Green New Deal*

A climate change migrant program would align with the purpose and mission of the Green New Deal. Introduced in the House of Representatives on February 7, 2019, the non-binding resolution outlines policies to the fight against climate change.¹⁶⁸ Specifically, the Green New Deal notes how “climate change, pollution, and environmental destruction have exacerbated systemic racial, regional, social, environmental, and economic injustices . . . by disproportionately affecting indigenous peoples, communities of color, migrant communities, deindustrialized communities, depopulated rural communities, the poor, low-income workers, women, the elderly, the unhoused, people with disabilities, and youth.”¹⁶⁹

The resolution further describes the goal “to promote justice and equity by stopping current, preventing future, and repairing historic oppression of indigenous peoples, communities of color, migrant communities, deindustrialized communities, depopulated rural communities, the poor, low-income workers, women, the elderly, the unhoused, people with disabilities, and youth”¹⁷⁰ To provide a program

167. Lustgarten, *supra* note 17; L.S. & E.H., *The Case for Immigration*, THE ECONOMIST (Apr. 16, 2018), <https://www.economist.com/open-future/2018/04/16/the-case-for-immigration> [<https://perma.cc/7VT2-T792>].

168. Emily Holden, *What Is the Green New Deal and How Would It Benefit Society?*, THE GUARDIAN (Feb. 11, 2019, 7:43 AM), <https://www.theguardian.com/us-news/2019/feb/11/green-new-deal-alexandria-ocasio-cortez-ed-markey> [<https://perma.cc/SM93-TLH6>].

169. H.R. Res. 109, 116th Cong. (2019).

170. *Id.*

addressing the permanent displacement of climate change migrants would directly coincide with this motive and assist in the furtherance of the Green New Deal's proposals.

3. *International Environmental Protections*

The U.S. has not yet attempted to establish specific environmental protections for migrants; however, other nations have recognized its significance and have paved a route for the U.S. to follow. For example, Sweden and Finland offer protections to individuals who are unable to return to their origin countries due to an environmental disaster.¹⁷¹ In Sweden, this legal protection is not restricted to a temporary basis, unlike the U.S.' TPS statute.¹⁷² Additionally, such an individual is not classified as a traditional refugee, but rather they are designated as "a person otherwise in need of protection."¹⁷³

Similarly, Finland's language offers "a residence permit for humanitarian protection, if there are no grounds . . . for granting asylum . . . but he or she cannot return to his or her country of origin or country of former habitual residence as a result of an environmental catastrophe."¹⁷⁴ The residence permit is "a permit issued to an alien for a purpose other than tourism or a comparable short-term residence entitling the alien to enter the country repeatedly and stay in the country."¹⁷⁵ Furthermore, Finland extends beyond the mere definition of a refugee and provides climate change migrant's long-term protection.

Additionally, the UN Human Rights Committee (the "Committee") recently issued a landmark ruling concerning individuals threatened by the climate change crisis.¹⁷⁶ The Committee heard a case from Ionae Teitota, a resident of the Pacific nation of Kiribati.¹⁷⁷ He sought protection in New Zealand, as the rising sea levels of Kiribati have resulted in violence, overcrowding, social tensions, lack of fresh water, and difficulty growing

171. Keyes, *supra* note 150, at 485.

172. See 5 ch. 1 § Aliens Act (Swedish Code of Statutes [SFS] 2005:716) (Swed.) (2006).

173. 4 ch. 2 § Aliens Act (SFS 2005:716) (Swed.).

174. Ulkomaalaislain Muuttamisesta [Aliens Act] (Suomen säädöskokoelma [SäädK] 301/2004) § 3 (Fin.).

175. *Id.* § 88a.

176. Kate Lyons, *Climate Refugees Can't Be Returned Home, Says Landmark UN Human Rights Ruling*, THE GUARDIAN (Jan. 20, 2020, 12:27 AM), <https://www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling> [https://perma.cc/SGX5-EGBS].

177. *Id.*

crops.¹⁷⁸ New Zealand courts denied protection, and the Committee upheld their position.¹⁷⁹ However, the Committee opened a possible door for climate change migrants. The Committee reasoned that although “sea level rise is likely to render the republic of Kiribati uninhabitable . . . the timeframe of 10 to 15 years. . . could allow for intervening acts by the republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.”¹⁸⁰ Professor Jane McAdam, Director of the Kaldor Centre for International Refugee Law at the University of New South Wales, elaborated on the significance of the committee’s ruling: “[W]ithout robust action on climate at some point in the future, it could well be that governments will, under international human rights law, be prohibited from sending people to places where their life is at risk or where they would face inhuman or degrading treatment.”¹⁸¹

The Committee’s ruling is not formally binding on countries and their governments, but the judgment could expose legal obligations regarding international law between the UN’s Member States.¹⁸² More specifically, under Article 6¹⁸³ and Article 7¹⁸⁴ of the UN’s International Covenant on Civil Political Rights, governments sending migrants back to their home countries if climate change has produced life-threatening risks or a heightened possibility of cruel, inhuman, or oppressive treatment may be unlawful.¹⁸⁵ Thus, the UN’s judgment should serve as a catalyst for the U.S. to act, rather than react, in the redress for this class of individuals.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *See id.*

183. “1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

184. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *Id.*

185. *UN Human Rights Committee Decision on Climate Change Is a Wake-up Call, According to UNHCR*, UN REFUGEE AGENCY (Jan. 24, 2020), <https://www.unhcr.org/news/briefing/2020/1/5e2ab8ae4/un-human-rights-committee-decision-climate-change-wake-up-call-according.html> [<https://perma.cc/9DPT-8NA5>].

4. Limiting the Length of Temporary Protected Status Designations

To move forward in a progressive manner, immigration reform should not end with the implementation of a sole climate change migrant program. The contradictions and shortcomings currently within the TPS language must be resolved, or alternatively, the TPS statute needs to be repealed to conform with a climate change migrant program. In the past, Congress has attempted to patch the faults within our nation's immigration laws regarding TPS. On June 4, 2019, the House of Representatives passed the American Dream and Promise Act, which seeks to cancel removal proceedings against certain aliens who qualified for TPS on certain past dates.¹⁸⁶ These individuals would have to apply for permanent resident status and pass the required background checks.¹⁸⁷ While this would certainly be a step in the right direction, these protections can only be afforded to individuals previously eligible for or that have had TPS on or before September 25, 2016.¹⁸⁸ If this act were passed in the Senate and became law, future TPS beneficiaries would not be afforded such legal protections.

Executive Director of the Central American Resource Center Martha Arevalo describes TPS as only a temporary solution, emphasizing that many TPS beneficiaries have lived in transient status for a very long time, constantly in limbo.¹⁸⁹ This uncertainty should be eliminated to protect the thousands of families who have legally resided in the U.S. long-term and are currently at risk of deportation amid the TPS terminations. The intervening causes in their home countries once considered in TPS extension determinations have since been disregarded.

To mitigate such an injustice, Congress should incorporate language requiring the consideration of intervening causes in TPS determinations. However, such a codification would not provide long-term protections for TPS beneficiaries, as they would potentially be living in a constant "temporary" status.

186. American Dream and Promise Act of 2019, H.R. 6, 116th Cong. § 211(a) (2019).

187. *Id.* § 211(b).

188. See *American Dream and Promise Act 2019: Bill Summary*, NAT'L IMMIGR. F. (June 4, 2019), <https://immigrationforum.org/article/american-dream-and-promise-act-bill-summary/> [<https://perma.cc/M7ZA-RPJN>].

189. Gwen Aviles, *Children of TPS Holders Fight for Their Parents' Protection in Court*, NBC NEWS (Aug. 14, 2019, 5:26 PM), <https://www.nbcnews.com/news/latino/children-tps-holders-fight-their-parents-protection-court-n1042421> [<https://perma.cc/3PYK-5APQ>].

Ultimately, to legitimize the goal of TPS and protect the interests of its beneficiaries, the number of extensions should be limited, and a permanent option provided. After five years designated as a TPS beneficiary, if such an individual is unable to return to their foreign state due to continued extraordinary environmental circumstances, then the individual should be afforded legal protections under the proposed climate change migrant program.

CONCLUSION

Climate change and its consequences pose significant issues, consequently affecting the livelihoods of many individuals and forcing migration. TPS in its current state cannot sustain the pattern of climate migration. While TPS offers limited legal protections, the INA fails to provide the appropriate, long-term remedies necessary for climate change migrants displaced by their home countries' environmental destruction. Additionally, courts are unable to intervene, rendering prompt legislative action as the only remaining option for such individuals. As evidenced in this Comment, the U.S.' immigration laws do not address the current or the future challenges associated with climate change migration. The intricacies and severity of this issue must promptly be acknowledged, and the individuals adversely affected must be afforded the opportunity to rebuild without a lingering fear of sudden removal. Through formal classification of climate migrants, the restructuring of current immigration law, and interdisciplinary efforts to minimize harmful emissions into the environment, the U.S. can emerge as a trailblazer on this important and complex global issue.