No. _____

In The
Supreme Court of the United States

OSCAR ERNESTO MELENDEZ,

Petitioner,

v.

KEVIN K. McALEENAN, Acting Secretary, U.S. Department of Homeland Security; LEE CISSNA, United States Citizenship and Immigration Services Director; and MARK SIEGL, Field Office Director,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RAED GONZALEZ, ESQ.
Counsel of Record for Petitioner
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
Tel: (713) 481-3040
rgonzalez@gonzalezolivierillc.com

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

AMANDA WATERHOUSE, ESQ.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
awaterhouse@gonzalezolivierillc.com

ALEXANDRE AFANASSIEV, ESQ.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
aafanassiev@gonzalezolivierillc.com

QUESTIONS PRESENTED FOR REVIEW

This Court has the opportunity before it to resolve a major split between the Circuit Courts of Appeal on the issue regarding whether Temporary Protected Status ("TPS") constitutes an admission for purposes of adjustment of status under 8 U.S.C. § 1255(a) and thus overcomes the bar of ineligibility under 8 U.S.C. § 1255(c). In this case, the Fifth Circuit Court of Appeals, in a published decision, agreed with the Eleventh Circuit's ruling in *Serrano v. United States Attorney General*, 655 F.3d 1260 (11th Cir. 2011) and held that TPS is not a new entry into the United States, and therefore, 8 U.S.C. § 1255(c)'s bar on eligibility for adjustment of status applies. In so holding, the Fifth Circuit found in opposite to the Sixth Circuit's holding in *Flores v. United States Citizenship and Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013) and more recently to the Ninth Circuit's holding in *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017), both of which found that a grant of TPS is in fact an admission for purposes of adjustment of status. Petitioner seeks review of the Fifth Circuit's decision in this case. Petitioner respectfully asserts that this case will have a direct impact on the lives of thousands of immigrants in the United States who have been granted TPS and are now attempting to adjust their status to become lawful permanent residents. As such, it also deserves review by the High Court in light of the fact that this case presents questions of national importance, as it relates to the interpretation of the U.S. immigration laws. Accordingly, the questions presented for review are as follows:

1. Whether a grant of TPS to an alien by the U.S. Citizenship and Immigration Services ("USCIS")

QUESTIONS PRESENTED FOR REVIEW
—Continued

constitutes a lawful admission into the United States for purposes of his or her eligibility for adjustment of status under 8 U.S.C. § 1255(a).

2. Whether grant of TPS constitutes an admission that allows an alien to avoid 8 U.S.C. § 1255(c)'s bar to adjustment of status even though the alien failed to maintain lawful status prior to the grant of TPS.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

STATEMENT OF RELATED CASES

The case caption for this case in the United States District Court for the Southern District of Texas was *Melendez v. Duke, et al.*, 4:17-cv-3436 (S.D. Tex. May 9, 2018). The District Court entered a final judgment in the case on May 9, 2018. App. B, *infra*.

The case caption for this case in the United States Court of Appeals for the Fifth Circuit was *Melendez v. McAleenan*, 928 F.3d 425 (5th Cir. 2019). The Fifth Circuit entered a final decision on the case on June 27, 2019. App. A, *infra*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CITATIONS TO THE OPINIONS AND ORDERS BELOW

The opinion and order of the United States Court of Appeals for the Fifth Circuit, denying Petitioner's appeal, is published and reported as *Melendez v. McAleenan*, 928 F.3d 425 (5th Cir. 2019). App. A, *infra*.

The memorandum and order of the United States District Court for the Southern District of Texas, dismissing Petitioner's complaint, is unreported. App. B, *infra*.

The decision of the USCIS, denying Petitioner's I-485, Application for Adjustment of Status, is unreported. App. C, *infra*.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit dismissed Petitioner's appeal on June 26, 2019. App. A, *infra.* Pursuant to 28 U.S.C. § 1254(1), jurisdiction in this Court is proper by writ of certiorari because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."

APPLICABLE STATUTES

8 U.S.C. § 1101(a)(13), which provides: "(A) The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration

officer. (B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted. (C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—(i) has abandoned or relinquished that status, (ii) has been absent from the United States for a continuous period in excess of 180 days, (iii) has engaged in illegal activity after having departed the United States, (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings, (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer."

8 U.S.C. § 1254a(f), which provides: "Benefits and status during period of temporary protected status. During a period in which an alien is granted temporary protected status under this section—(1) the alien shall not be considered to be permanently residing in the United States under color of law; (2) the alien may be deemed ineligible for public assistance by a State (as defined in section 1101(a)(36) of this title) or any political subdivision thereof which furnishes such

assistance; (3) the alien may travel abroad with the prior consent of the Attorney General; and (4) for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant."

8 U.S.C. § 1255(a), which provides: "Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed."

8 U.S.C. § 1255(c), which provides: "Alien crewmen, aliens continuing or accepting unauthorized employment, and aliens admitted in transit without visa. Other than an alien having an approved petition for classification as a VAWA self-petitioner, subsection (a) shall not be applicable to (1) an alien crewman; (2) subject to subsection (k), an alien (other than an immediate relative as defined in section 1151(b) of this title or a special immigrant described in section 1101(a)(27)(H), (I), (J), or (K) of this title) who hereafter continues in

or accepts unauthorized employment prior to filing an application for adjustment of status or who is in unlawful immigration status on the date of filing the application for adjustment of status or who has failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States; (3) any alien admitted in transit without visa under section 1182(d)(4)(C) of this title; (4) an alien (other than an immediate relative as defined in section 1151(b) of this title) who was admitted as a nonimmigrant visitor without a visa under section 1182(l) of this title or section 1187 of this title; (5) an alien who was admitted as a nonimmigrant described in section 1101(a)(15)(S) of this title,[1] (6) an alien who is deportable under section 1227(a)(4)(B) of this title; (7) any alien who seeks adjustment of status to that of an immigrant under section 1153(b) of this title and is not in a lawful nonimmigrant status; or (8) any alien who was employed while the alien was an unauthorized alien, as defined in section 1324a(h)(3) of this title, or who has otherwise violated the terms of a nonimmigrant visa."

STATEMENT OF THE CASE

The Court of Appeals for the Fifth Circuit had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291, which grants a court of appeals jurisdiction over all appeals from final decisions issued by a district court of the United States.

On June 27, 2019, the Fifth Circuit vacated the District Court's decision with respect to jurisdiction, but ultimately dismissed Petitioner's complaint on the merits. In its decision, the Fifth Circuit determined that a grant of TPS is not an admission, and thus, does not overcome the bar to eligibility for adjustment of status under 8 U.S.C. § 1255(c). Petitioner maintains that the Fifth Circuit Court's decision is legally erroneous for the reasons stated below and requests that this Court vacate said decision and remand this case for further proceedings.

Petitioner argues that the grant of this Writ is appropriate so that the Court may resolve a split between the Fifth and Eleventh Circuit on one side, and the Sixth and Ninth Circuits on the other, by addressing crucial legal questions regarding the interpretation of key statutes governing TPS and adjustment of status. Petitioner asserts that resolving those issues are of paramount and national importance, as said issues affect countless aliens in the United States who have TPS and are attempting to adjust their status to become lawful permanent residents. Accordingly, this Court's review is warranted.

Factual Background and Procedural History

The Petitioner, Oscar Ernesto Melendez, is a native and citizen of El Salvador. App. A, *infra*. He entered the United States in February of 2000 on a nonimmigrant visa and was authorized to remain in the country for one month. *Id.* However, Petitioner did

not depart within the one-month period and has remained in the United States ever since. *Id*.

In August of 2001, Petitioner filed for TPS and it was granted by the immigration authorities.[1] *Id*. Petitioner does concede that from February of 2000 until approximately sometime in late 2001—when he got his TPS granted—he was out of status in the United States.

Following the grant of TPS, Petitioner maintained this status and remained in the country with permission; and in July of 2016, he filed for adjustment of status to that of a lawful permanent resident. *Id*. The application for adjustment was based on an approved I-130 petition that was filed on Petitioner's behalf by his U.S. citizen brother. *Id*.

However, on September 26, 2017, the USCIS denied Petitioner's adjustment of status application. App. C, *infra*. In its decision, the USCIS contended that Petitioner was ineligible for adjustment of status under 8 U.S.C. § 1255(a) because Petitioner failed to maintain *continuous* lawful status since his entry into the United States, i.e. from February 2000 to the time application for adjustment of status was actually filed with the USCIS. *Id*.

On November 13, 2017, Petitioner filed a complaint with the U.S. District Court for the Southern District of Texas. App. B, *infra*. In that complaint,

---

[1] As noted by the Fifth Circuit, the exact date of the grant of TPS was not in the record.

Petitioner sought: (1) a declaration that the USCIS's decision to deny his application for adjustment of status was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law;" and (2) an order from the Court to set aside the USCIS's decision and compel the USCIS to reopen his case. *Id*.

After Petitioner's complaint was filed, the Respondents moved to dismiss Petitioner's case pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(1), arguing that the District Court lacked subject-matter jurisdiction over the complaint. *Id*. On May 9, 2018, the District Court granted the motion and dismissed Petitioner's case based on lack of subject-matter jurisdiction.[2]

Petitioner timely appealed the District Court's decision to the Fifth Circuit arguing that jurisdiction was proper; as well as reiterated his argument that his grant of TPS was an admission, which amounted to entry, and as a result, he was not subject to the ineligibility bar under 8 U.S.C. § 1255(c), because following his admission on TPS, he effectively maintained his lawful presence in the United States. App. A, *infra*.

On June 27, 2019, the Fifth Circuit agreed with Petitioner that the District Court had subject-matter jurisdiction over his complaint. *Id*. However, the Court dismissed the complaint because it also found that Plaintiff could not succeed on the merits. *Id*. Specifically, the Fifth Circuit agreed with the reasoning in *Serrano*

[2] The District Court did not reach the merits of Petitioner's case.

v. United States Attorney General, 655 F.3d 1260 (11th Cir. 2011), and determined that grant of TPS did not amount to a new admission into the United States and, as a result, did not cure any prior unlawful presence that an alien accrues prior to the grant of TPS. *See* App. A, *infra*. In other words, the grant of TPS was not an entry and, as such, did not make Petitioner's prior period of unlawful status lawful. *Id*.

Contending that the Fifth Circuit made several legal errors in its decision, Petitioner is now filing the present Petition for Writ of Certiorari with this Court. Petitioner respectfully requests that this Court grant the Writ and remand this case back to the Fifth Circuit for a new decision.

ARGUMENT FOR GRANTING THE WRIT

Petitioner asserts that this Writ should be granted because it will afford the Court the opportunity to resolve a split between the Fifth and Eleventh Circuits, and the Sixth and Ninth Circuits, regarding whether an alien who has been granted TPS has made a lawful admission into the United States. Petitioner calls on this High Court, the overseer of law and equity, to resolve the split in favor of the Sixth and Ninth Circuits and reject the Fifth and Eleventh Circuits' erroneous interpretation of the statutes relating to TPS and adjustment of status. Specifically, Petitioner moves this Court to hold that a grant of TPS is an admission amounting to a new entry, making prior periods of

unlawful presence prior to the grant of TPS irrelevant for purposes of adjustment of status eligibility and allowing an otherwise eligible alien to adjust his or her status to that of a lawful permanent resident in the United States, pursuant to 8 U.S.C. § 1255(a).

8 U.S.C. § 1255(a) provides that an alien who was admitted or inspected into the U.S. is eligible for adjustment of status to that of a lawful permanent resident if: (1) the alien makes an application; (2) the alien is eligible to receive an immigrant visa and is otherwise admissible for permanent residence; and (3) an immigrant visa is available at the time his application is filed.

However, 8 U.S.C. § 1255(c) places limits on an applicant's ability to adjust his or her status by providing that, with certain exceptions not applicable here, the applicant must "maintain continuously a lawful status *since entry* into the United States" in order to be eligible to adjust under 8 U.S.C. § 1255(a) (emphasis added).

While the term "entry" is not specifically defined in the statute, it does appear in the definition of the term "admission" as follows: "The terms 'admission' and 'admitted' mean, with respect to an alien, *the lawful entry* of the alien into the United States after inspection and authorization by an immigration officer." *See* 8 U.S.C. § 1101(a)(13)(A) (emphasis added).

Further, 8 U.S.C. § 1254a(f), states, in relevant part, that an alien granted TPS "for purposes of adjustment of status under section 1255 . . . the alien shall be considered as being in, and maintaining, lawful

status as a nonimmigrant." According to that provision then, 8 U.S.C. § 1254a(f)(4) specifically provides that it is applicable "for purposes of adjustment of status under" 8 U.S.C. § 1255. Had Congress intended that this provision would be limited by § 1255(c)(2), it would have stated so. It did not, and instead deliberately gave broad application to § 1254a(f) by allowing a TPS holder to seek adjustment of status under all of § 1255, which includes § 1255(a).

Moreover, § 1254a(f)(4) does not precisely track the language of § 1255(c)(2). The former refers to a TPS beneficiary having lawful status as a nonimmigrant, which is a very specific type of status entailing admission into the United States under such designation, while the latter refers to maintaining continuously a lawful status, without specifying any particular type of lawful status.

The exclusion of any reference to § 1255(c)(2) and the inclusion of "nonimmigrant" suggests that Congress meant, for purposes of adjustment of status under § 1255, to designate TPS beneficiaries as nonimmigrants so that such beneficiaries would be deemed inspected and admitted or paroled for purposes of adjustment of status. *Medina v. Beers*, 65 F. Supp. 3d 419, 421, 436 (E.D. Pa. 2014); *Bonilla v. Johnson*, 149 F. Supp. 3d 1135, 1139 (D. Minn. 2016), *appeal dismissed* (Jul. 22, 2016) ("Section 1254a(f)(4) applies to the entirety of § 1255, allows Plaintiff to be considered as being in lawful status as a nonimmigrant for purposes of adjustment of status under § 1255, and therefore satisfies the 'inspected and admitted or paroled' prerequisite

of § 1255(a)"); *Flores*, 718 F.3d at 552 (finding that TPS is an admission for purposes of adjustment of status); *Ramirez*, 852 F.3d at 955 (same).

As a general rule of statutory construction, courts strive to avoid a result that would render statutory language superfluous, meaningless, or irrelevant. *Beers*, 65 F. Supp. at 421. With respect to TPS, Congress drafted § 1254a(f)(4) in broad, general terms. Congress was also most certainly aware "that many TPS beneficiaries entered the country illegally and maintained some period of illegal residence in the United States prior to applying for and being granted TPS." *Id*.; *see also Ramirez*, 852 F.3d at 962. Given this, a contrary interpretation would render § 1254a(f)(4) effectively meaningless, which, in turn, would violate a fundamental canon of statutory construction. *Id*. Such an outcome is avoided, however, if the statute is interpreted, as it has been by other federal courts, to mean that "for purposes of applying for adjustment of status, TPS allows an alien to be deemed a lawful nonimmigrant . . . *satisfying the 'inspected and admitted' requirement and avoiding the bar on those who failed to maintain continuous lawful status*." *Id*. at 432-33 (emphasis added).

The statutory provision is best understood as intended to ameliorate the adverse consequences to TPS grantees who fail to maintain nonimmigrant status obtained by inspection and admission at the border. A contrary reading would nonsensically mean Congress intended for TPS beneficiaries, many of whom reside in the United States for many years following TPS designation, in the by and large, despite being from a

country designated for the TPS program, abandon everything they have accumulated in the U.S., return to the dangerous circumstances in their country of origin and undergo an interview at a U.S. consulate abroad in order to be able to obtain the status of a lawful permanent resident; such dangerous circumstances, among others, may include "an ongoing armed conflict" or "an earthquake, flood, drought, epidemic, or other environmental disaster in the state resulting in a substantial, but temporary, disruption of living conditions in the area affected" or inability of the foreign state "temporarily, to handle adequately the return to the state of aliens who are nationals of the state." 8 U.S.C. § 1254a(b); *see also Flores*, 718 F.3d at 555.

In sum, it follows that Congress, by stating that a TPS beneficiary shall be deemed as "being in and maintaining" lawful nonimmigrant status from the date of being granted TPS and, in turn, admitted in said status into the country, clearly deemed the date of entry to be the date of the grant of TPS. *Id.*; *see also Beers*, 65 F. Supp. 3d at 433 n.8. And since the TPS beneficiaries have been admitted into a lawful status from the date of their TPS grant, they are able to avoid the bar to adjustment of status found in 8 U.S.C. § 1255(c). Accordingly, Respondent now moves this Court to hold the same and find that an alien who has been granted TPS is admitted, constituting a new entry into the United States, and, as a result, overcomes 8 U.S.C. § 1255(c)'s bar to adjustment of status.

CONCLUSION

For the reasons explained above, Petitioner asks that his Petition for Writ of Certiorari be GRANTED, and that he be given the opportunity to present his arguments before this Court.

Respectfully Submitted,

RAED GONZALEZ, ESQ.
Counsel of Record for Petitioner
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
rgonzalez@gonzalezolivierillc.com

AMANDA WATERHOUSE, ESQ.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
awaterhouse@gonzalezolivierillc.com

ALEXANDRE AFANASSIEV, ESQ.
GONZALEZ OLIVIERI, LLC
2200 Southwest Freeway, Suite 550
Houston, Texas 77098
aafanassiev@gonzalezolivierillc.com