No.

In the Supreme Court of the United States

JOSE SANTOS SANCHEZ AND SONIA GONZALEZ,
PETITIONERS,

v.

SECRETARY UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under 8 U.S.C. § 1254a(f)(4), a grant of Temporary Protected Status authorizes eligible noncitizens to obtain lawful-permanent-resident status under 8 U.S.C. § 1255.

PARTIES TO THE PROCEEDINGS

Petitioners are Jose Santos Sanchez and Sonia Gonzalez. Respondents are Secretary, United States Department of Homeland Security; Director, United States Citizenship & Immigration Services; Director, United States Citizenship & Immigration Services Nebraska Service Center; and District Director, United States Citizenship & Immigration Services Newark.

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PETITION FOR A WRIT OF CERTIORARI

Jose Santos Sanchez and Sonia Gonzalez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 967 F.3d 242. Pet. App. 1a-20a. The opinion of the district court is unreported and available at 2018 WL 6427894 (D.N.J. Dec. 7, 2018). Pet. App. 21a-38a. The decisions of United States Citizenship and Immigration Services (USCIS) denying petitioners'

applications to become lawful permanent residents are unreported. Pet. App. 39a-51a.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 244(f)(4) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1254a(f)(4), provides:

> During a period in which an alien is granted temporary protected status under this section . . . 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.

Section 245 of the INA, 8 U.S.C. § 1255, provides in relevant part:

> The status of an alien who was inspected and admitted or paroled into the United States . . . 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(a).

> [S]ubsection (a) shall not be applicable to . . . (2) subject to subsection (k), an alien . . . 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.

8 U.S.C. § 1255(c)(2).

> An alien who is eligible to receive an immigrant visa . . . may adjust status pursuant to subsection (a) and notwithstanding subsection (c)(2) . . . if—
>
> > (1) the alien, on the date of filing an application for adjustment of status, is present in the United States pursuant to a lawful admission;
> >
> > (2) the alien, subsequent to such lawful admission has not, for an aggregate period exceeding 180 days—
> >
> > > (A) failed to maintain, continuously, a lawful status;
> > >
> > > (B) engaged in unauthorized employment; or
> > >
> > > (C) otherwise violated the terms and conditions of the alien's admission.

8 U.S.C. § 1255(k).

Sections 244 and 245 of the INA, 8 U.S.C. §§ 1254a, 1255, and other relevant provisions of the INA are set forth in their entirety in the appendix. Pet. App. 52a-103a.

STATEMENT

The Immigration and Nationality Act (INA) authorizes the government to confer Temporary Protected Status (TPS) on eligible natives of countries suffering humanitarian crises who reside in the United States. The INA provides that TPS recipients shall be "considered as being in, and maintaining, lawful status as a nonimmigrant," 8 U.S.C. § 1254a(f)(4), for the purpose of applying to become a lawful permanent resident. This case presents the question whether a grant of TPS authorizes eligible noncitizens to obtain lawful-permanent-resident status under 8 U.S.C. § 1255 if they were not inspected and admitted when they first entered the United States. That question, to quote the government's opening brief below, is "important and recurring" and "has divided the federal courts of appeals." Gov't C.A.3 Br. 1. Absent this Court's review, TPS recipients' eligibility for lawful-permanent-resident status will depend on the state of their residence. That conflict in the administration of a federal immigration statute affecting hundreds of thousands of individuals demands this Court's review.

Section 244 of the INA, 8 U.S.C. § 1254a, allows citizens of designated countries experiencing war, natural disasters, or similar conditions to apply for TPS. Federal law authorizes TPS recipients to live and work in the United States while their countries' designations remain in effect. Hundreds of thousands of individuals from El Salvador, Haiti, Somalia, Syria, and Yemen, among other countries, currently reside in the United States under a grant of TPS. Many of those individuals have held TPS—and lived and worked lawfully in the United States—for decades.

The question that divides the courts of appeals concerns the eligibility of TPS recipients to become lawful

permanent residents of the United States. The INA provides that a TPS recipient "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" "for purposes of adjustment" to lawful-permanent-resident status. 8 U.S.C. § 1254a(f)(4). The Act further provides that eligible individuals who have been "inspected and admitted or paroled into the United States"—as, for example, when an individual enters the United States through a designated port of entry—may receive an adjustment to lawful-permanent-resident status. 8 U.S.C. § 1255(a).

The Sixth and Ninth Circuits have held that, under section 1254a(f)(4), an individual who initially entered the United States without being inspected and admitted, but later applied for and received TPS, is eligible to obtain lawful-permanent-resident status. In the decision below, the Third Circuit rejected the holdings of those courts. Like the Eleventh Circuit, it held that a TPS recipient who initially entered the country without being inspected and admitted is categorically ineligible for adjustment of status. The Third Circuit acknowledged that its decision conflicted with those of the Sixth and Ninth Circuits, deepening a square and intractable circuit split. Only this Court can break the stalemate.

This case is an ideal vehicle to decide the question. Petitioners are a married couple from El Salvador. Both entered the United States without being inspected and admitted. After earthquakes devastated El Salvador, petitioners applied for, and received, TPS in 2001. They have resided in the United States for more than two decades. In 2007, petitioner Jose Santos Sanchez's employer successfully petitioned for Mr. Sanchez to become eligible to receive an employment-based immigrant visa. Mr. Sanchez then applied for lawful-permanent-resident status, and his wife applied as his derivative. In the Sixth

and Ninth Circuits, petitioners would be eligible to adjust to lawful-permanent-resident status. But the Third Circuit held that petitioners are categorically ineligible for adjustment of status because Mr. Sanchez had never been "admitted" for purposes of section 1255.

Whether the Third Circuit was correct is a question of paramount importance, as the government itself argued below. Under the Third Circuit's interpretation, TPS recipients who initially entered the United States without being inspected and admitted could never become lawful permanent residents without first leaving this country—and the lives they have built here—behind. Given these stakes, it is no surprise that the question presented recurs frequently. Four circuits have already decided it, and additional cases are currently pending in the lower courts. Without this Court's intervention, similarly situated TPS recipients will receive disparate treatment based on where they live. The Court should grant the petition.

A. Statutory Background

1. TPS is a form of humanitarian immigration relief provided to foreign nationals present in the United States who cannot safely return to their home countries because of armed conflict, natural disaster, or similar extraordinary conditions. *See* 8 U.S.C. § 1254a.

Congress created the TPS regime in the Immigration Act of 1990, Pub L. No. 101-649, 104 Stat. 4978. That Act vested the Attorney General with authority to designate a foreign country for TPS status. 8 U.S.C. § 1254a(b). Congress has since transferred that authority to the Secretary of Homeland Security. 8 U.S.C. § 1103; 6 U.S.C. § 557. An initial TPS designation lasts between six and eighteen months. 8 U.S.C. § 1254a(b)(2). At the end of

that period, the Secretary reviews the designation and either extends it for another six- to eighteen-month term or terminates it if conditions in the country are no longer unsafe. 8 U.S.C. § 1254a(b)(3). The law imposes no limits on successive extensions.

Noncitizens from designated countries must apply for TPS within a specified timeframe. 8 U.S.C. § 1254a(c)(1)(A)(iv); 8 C.F.R. § 244.2(f). To be eligible, they must satisfy a number of requirements. 8 U.S.C. § 1254a(c); 8 C.F.R. § 244.2. For instance, they must demonstrate their continuous physical presence in the United States since the effective date of the designation. 8 U.S.C. § 1254a(c)(1)(A)(i); 8 C.F.R. § 244.2(b); *see also* 8 U.S.C. § 1254a(c)(1)(A)(ii) (requirement to demonstrate continuous residence); 8 C.F.R. § 244.2(c) (same). They must demonstrate that, subject to certain exceptions, they are "admissible as an immigrant." 8 U.S.C. § 1254a(c)(1)(A)(iii), (c)(2)(A); 8 C.F.R. §§ 244.2(d), 244.3. And they must demonstrate that they are not categorically ineligible—for instance, because they have been convicted of a felony. 8 U.S.C. § 1254a(c)(1)(A)(iii), (c)(2)(B); 8 C.F.R. §§ 244.2, 244.4.

Individuals who wish to obtain TPS must file an application on a form specified by the agency. *See* 8 C.F.R. § 244.6. The current version of that form, Form I-821, is thirteen pages long and requires the applicant to answer dozens of questions.[1] The agency may require the appli-

[1] USCIS, Application for Temporary Protected Status (Jul. 3, 2019), https://www.uscis.gov/sites/default/files/document/forms/i-821.pdf.

cant to appear for an interview before an immigration officer and to produce documentary evidence in support of the application. 8 C.F.R. § 244.8.

Individuals who receive TPS cannot be removed from the United States and are authorized to work for the duration of their country's TPS designation. 8 U.S.C. § 1254a(a)(2), (c)(1)(A). The Act also speaks to TPS recipients' eligibility to adjust to immigrant status and to change to a different form of nonimmigrant status. It provides: "For purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title," an individual with TPS "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4).

2. Currently, ten countries have TPS designations: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen.[2] The government conferred TPS designations on these countries for different reasons and at different times. For example, it designated Syria in 2012 based on "the Syrian military's violent suppression of opposition to President Bashar al-Assad's regime." Extension of the Designation of Syria for Temporary Protected Status, 84 Fed. Reg. 49,751, 49,752 (Sept. 23, 2019). El Salvador, for its part, received a TPS designation in 2001 based on "the devastation resulting from a series of earthquakes." Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645, 44,646 (Jul. 8, 2016).

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[2] USCIS, Temporary Protected Status (Sept. 1, 2020), https://www.uscis.gov/humanitarian/temporary-protected-status (Countries Currently Designated for TPS).

Currently, more than 400,000 individuals have TPS.[3] Salvadorans account for more than 250,000 TPS recipients, by far the largest number from any one country. *Id.* For Salvadorans to be eligible for TPS, they must have had continuous presence in the United States since February 2001.[4] Salvadoran TPS recipients thus have been living and working in this country lawfully for almost two decades.

3. Lawful permanent residents, also known as "green-card" holders, are noncitizens authorized to live permanently in the United States. *See Barton v. Barr*, 140 S. Ct. 1442, 1445 (2020). There are roughly 13 million lawful permanent residents in the United States.[5]

There are various paths to lawful permanent residence. The most common path is through a petition filed by an immediate family member who is either a U.S. citizen or (for some relations) a lawful permanent resident. Another path is through employer sponsorship. Finally,

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[3] Jill H. Wilson, *Temporary Protected Status: Overview and Current Issues*, Congressional Research Service 1 (Apr. 1, 2020), https://www.everycrsreport.com/reports/RS20844.html (Summary).

[4] USCIS, Temporary Protected Status Designated Country: El Salvador (Nov. 1, 2019), https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador.

[5] Bryan Baker, *Estimates of the Lawful Permanent Resident Population in the United States and the Subpopulation Eligible to Naturalize: 2015-2019*, Office of Immigration Statistics 1 (Sept. 2019), https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015_-_2019.pdf (Population Estimates).

asylees and individuals from certain countries with relatively low levels of immigration may be eligible to become lawful permanent residents.[6]

For individuals residing outside the United States, the mechanism for obtaining immigrant status is to obtain an immigrant visa from a U.S. consulate permitting entry into the United States as an immigrant. For individuals already residing within the United States, by contrast, the mechanism is to adjust status under 8 U.S.C. § 1255(a).[7] Under section 1255(a), a noncitizen who was "inspected and admitted or paroled into the United States" may adjust to lawful-permanent-resident status "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(a).

For applicants seeking lawful-permanent-resident status through employer sponsorship, an applicant's employer first files an immigrant visa petition (I-140 petition) with USCIS. 8 U.S.C. § 1154(a)(1)(F); 8 C.F.R. § 204.5. If the government approves the petition, the applicant can then apply for adjustment to lawful-permanent-resident status when a visa becomes available. 8 C.F.R. §§ 204.5(n), 245.2.

An employment-based applicant cannot adjust to lawful-permanent-resident status if he "accepts unauthorized

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[6] Dep't of Homeland Security, Immigrant Classes of Admission (April 7, 2017), https://www.dhs.gov/immigration-statistics/lawful-permanent-residents/ImmigrantCOA.

[7] USCIS, Consular Processing (May 4, 2018), https://www.uscis.gov/green-card/green-card-processes-and-procedures/consular-processing.

employment prior to filing an application for adjustment of status," "is in unlawful immigration status on the date of filing the application for adjustment of status," or "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." 8 U.S.C. § 1255(c)(2). Those prohibitions do not apply, however, if the applicant "is present in the United States pursuant to a lawful admission" "on the date of filing an application for adjustment of status," and "subsequent to such lawful admission has not, for an aggregate period exceeding 180 days," "failed to maintain, continuously, a lawful status," "engaged in unauthorized employment," or "otherwise violated the terms and conditions" of his admission. 8 U.S.C. § 1255(k).

B. Factual and Procedural Background

1. Petitioners Jose Santos Sanchez and Sonia Gonzalez, a married couple from El Salvador, C.A. App. 278, have resided in New Jersey for nearly a quarter of a century. C.A. App. 62, 134. Each has held the same job for years—Mr. Sanchez at Viking Yachts and Ms. Gonzalez at the Borgata Casino. *Id.* Petitioners have been married since 2006 and have four sons; the youngest was born in the United States and thus is a U.S. citizen. C.A. App. 66, 85.

Following El Salvador's TPS designation in 2001, petitioners applied for and received TPS, which they retain to this day. C.A. App. 278. In 2006, Viking Yachts filed an employment-visa petition for Mr. Sanchez based on his position as a skilled worker or professional. C.A. App. 71. USCIS approved the petition in 2007. *Id.* In June 2014, petitioners applied to adjust their status to that of lawful permanent residents. C.A. App. 65-70, 138-42. Mr.

Sanchez relied on his approved petition, and Ms. Gonzalez applied for derivative status. C.A. App. 65, 71, 138.

In March 2015, USCIS denied petitioners' applications for adjustment of status. C.A. App. 52-54, 124-26. It determined that Mr. Sanchez was ineligible for adjustment of status because he had "never been admitted into the United States" and thus did not meet section 1255(a)'s requirement that an applicant be "inspected and admitted or paroled." C.A. App. 53. USCIS deemed 8 U.S.C. § 1254a(f)(4) irrelevant. *Id.*[8] Having denied Mr. Sanchez's petition, USCIS also denied Ms. Gonzalez's derivative application. C.A. App. 124-26.

2. Petitioners filed suit in federal district court in 2015. C.A. App. 163-73. They claimed that USCIS's decision was "not in accordance with law" under the Administrative Procedure Act because it was inconsistent with the language of the INA. C.A. App. 171-72. The Secretary responded by asking the district court for a series of ex-

[8] USCIS's denial of Mr. Sanchez's petition was consistent with longstanding agency guidance. *See* USCIS Policy Manual, Vol. 7 (Adjustment of Status), Part B (245(a) Adjustment), Chapter 2 (Eligibility Requirements) (Sept. 2, 2020) ("An alien who enters the United States without inspection and subsequently is granted temporary protected status (TPS) does not meet the inspected and admitted or inspected and paroled requirement."); *accord In re H-G-G-*, 27 I. & N. Dec. 617, 641 (USCIS Admin. App. Office 2019); INS General Counsel Op. No. 93-59, *Temporary Protected Status and eligibility for adjustment of status under Section 245*, 1993 WL 1504006, at *1 (Aug. 17, 1993); INS General Counsel Op. No. 91-27, *Temporary protected status and eligibility for adjustment of status under Section 245*, 1991 WL 1185138, at *1 (Mar. 4, 1991).

tensions. C.A. App. 25-26. During that time, USCIS reopened, and gave closer consideration to, petitioners' applications. C.A. App. 50, 122.

In November 2016, USCIS issued a notice of its intention to deny petitioners' applications. C.A. App. 40-41. It reiterated its understanding that Mr. Sanchez had "never been admitted into the United States." C.A. App. 40. Additionally, USCIS expressed its view that Congress did not intend "to give significant advantages to [TPS recipients] in the adjustment process." C.A. App. 41.

USCIS issued final decisions denying petitioners' applications in February 2017. Pet. App. 39a-51a. It concluded that "[a] foreign national who enters the United States without inspection and subsequently is granted TPS does not meet the inspected and admitted or inspected and paroled requirement." Pet. App. 45a. USCIS acknowledged (but stated that it was not bound by) the Sixth Circuit's contrary decision in *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), which holds that a TPS recipient "meets the inspected and admitted requirement for adjustment of status under INA 245 even if [she] entered the United States without inspection." Pet. App. 45a-46a. USCIS also denied Ms. Gonzalez's derivative application. Pet. App. 49a-51a.

The parties returned to the district court following the denial of petitioners' reopened applications. In December 2018, the district court granted summary judgment to petitioners on their APA claim. Pet. App. 21a-38a. The district court held that section 1254a(f)(4) satisfied section 1255(a)'s threshold requirement of being inspected and admitted. The court rejected the Secretary's argument that one who "initially entered the U.S. without inspection" "can never satisfy the threshold requirement of being 'admitted.'" Pet. App. 30a-31a. Relying on the

Sixth Circuit's decision in *Flores* and the Ninth Circuit's more recent decision in *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017)—as well as other district court decisions to the same effect—the district court held that the "lawful status" afforded a TPS recipient "is wholly consistent with being considered as though Plaintiffs had been 'inspected and admitted' under § 1255." Pet. App. 31a-32a.

The district court remanded petitioners' cases to USCIS. Pet. App. 35a.

3. The government appealed to the Third Circuit. On appeal, the government characterized the case as presenting "an important and recurring question of statutory interpretation that has divided the federal courts of appeals." Gov't C.A.3 Br. 1.

On July 22, 2020, the Third Circuit reversed. Pet. App. 1a-20a. It held that a grant of TPS under 8 U.S.C. § 1254a does not satisfy the "admission" requirement for adjustment of status under 8 U.S.C. § 1255. Pet. App. 3a, 20a n.7.

Reviewing the statutory text, the Third Circuit reasoned that considering a TPS recipient to have "lawful nonimmigrant status" under section 1254a is not an "admission" because the Third Circuit has "drawn a clear line between 'admission' and 'status.'" Pet. App. 7a. According to the court, "admission" means *physical* entry into the country, and having "lawful status" thus does not necessarily mean that a noncitizen has been "admitted." Pet. App. 7a.

The court further concluded that the statutory structure supported its reading, explaining that, in its view: (1) Congress created an exception to the admission requirement for certain noncitizens besides TPS recipients; (2) the status of TPS recipients can be adjusted by Congress

through special legislation only by a supermajority of the Senate; (3) certain subsections of section 1255 refer to admission and lawful status as distinct concepts; and (4) petitioners' reading would render the "admission" requirement of section 1255(a) and the maintaining-lawful-status requirement of section 1255(c) superfluous. Pet. App. 9a-11a. Finally, reviewing the statutory purpose, the court stated that TPS is inherently temporary and thus should not be the basis for a permanent adjustment of status. Pet. App. 11a.

The Third Circuit acknowledged that its decision conflicted with both the Sixth Circuit's decision in *Flores* and the Ninth Circuit's decision in *Ramirez*. *Id.* But the court "disagree[d] with those opinions." *Id.*

REASONS FOR GRANTING THE PETITION

This petition presents the paradigmatic case for certiorari: the courts of appeals have divided over the meaning of a federal statute that demands uniform construction and affects hundreds of thousands of individuals nationwide. The question presented is critically important to TPS recipients, many of whom—while being considered to have lawful nonimmigrant status under the TPS statute—have married U.S. citizens or lawful permanent residents or, as here, have been sponsored by their employer for permanent residence. Without this Court's intervention, this question will continue to recur and to divide the circuits. The Court should grant the petition.

I. The Question Presented Has Divided the Courts of Appeals

Four courts of appeals have considered whether a TPS recipient is eligible to become a lawful permanent resident under section 1255 if the recipient originally entered the United States without inspection and admission. The

Sixth and Ninth Circuits have answered in the affirmative. In the decision below, the Third Circuit joined the Eleventh Circuit in reaching the opposite conclusion. The result is a clean circuit split that thwarts uniform application of the immigration laws. This Court's review is necessary to resolve the disagreement.

1. As the decision below acknowledged, two courts of appeals have held that a TPS recipient is "inspected and admitted" for purposes of an adjustment of status under section 1255.

a. In *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017), the Ninth Circuit held that a Salvadoran national who obtained TPS after entering the country without being inspected and admitted and then married an American citizen was eligible to adjust status under section 1255.

The court began with the text. It observed that an individual with TPS is "considered as being in, and maintaining, *lawful status as a nonimmigrant*" "for purposes of adjustment of status under section 1255." *Id.* at 959 (citation omitted). That language "explicitly refers to the adjustment statute . . . and confers the status of lawful nonimmigrant on TPS recipients." *Id.* Thus, the court explained, an individual with TPS meets section 1255's admission requirement because "an alien who has obtained lawful status as a nonimmigrant has necessarily been 'admitted.'" *Id.* at 960.

The court further observed that the "rigorous process" an individual must navigate to obtain TPS bolstered the court's conclusion. *Id.* "[T]he application and approval process for securing TPS," the court explained, "shares many of the main attributes of the usual 'admission' process for nonimmigrants." *Id.* at 960. For example, "an alien seeking TPS must establish that he meets

the identity and citizenship requirements for that status, usually by submitting supporting documentation like a passport." *Id.* Likewise, an individual seeking TPS "must adequately demonstrate that he is eligible to be admitted to the United States, with the possibility that some grounds of inadmissibility may be waived." *Id.* And, as in the ordinary admission process, "[o]nce the request for . . . TPS has been submitted, the application is scrutinized for compliance—sometimes supplemented with an interview of the applicant—then approved or denied by USCIS." *Id.*

Finally, the Ninth Circuit looked to the structure and purpose of the TPS regime. It observed that the language of section 1254a(f)(4) parallels the title of section 1255, which provides for "[a]djustment of *status* of nonimmigrant to that of person admitted for permanent residence." *Id.* at 961 (emphasis added) (citation omitted). The court also noted that section 1254a(f)(4) states that individuals with TPS are "considered as being in, and maintaining, lawful status as a nonimmigrant" "for purposes of . . . change of status under section 1258." *Id.* (alteration in original). Section 1258, in turn, allows the Secretary to "authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien *lawfully admitted* to the United States as a nonimmigrant who is continuing to maintain that status." 8 U.S.C. § 1258(a). Given that "statutory mirroring," the court concluded that being in "lawful status as a nonimmigrant" "for purposes of . . . change of status under section 1258," implies that an individual "qualifies as being 'admitted' for purposes of both statutory provisions—§§ 1255 and 1258—cited in § 1254a(f)(4)." *Ramirez*, 852 F.3d at 961-62 (citation omitted).

Addressing the purpose of the statute, the court explained that Congress designed TPS to provide a "safe harbor" for individuals who cannot safely return to their home countries. *Id.* at 963. Requiring an individual to leave the United States, obtain a visa in a foreign country, and return before being "inspected and admitted," according to the court, is contrary to that basic rationale. *Id.* at 963-64.

b. The Sixth Circuit reached the same conclusion in *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013). The applicant there, a Honduran immigrant, had entered the country without being inspected and admitted, then obtained TPS and married an American citizen. In *Flores*, as in *Ramirez*, the court began by observing that the text of section 1254a affords a TPS recipient the same treatment as any other person with "lawful status as a nonimmigrant for purposes of adjustment of status under § 1255." *Id.* at 553. Because other lawful nonimmigrants are considered admitted for adjustment-of-status purposes, the court reasoned, the same must be true of TPS recipients. *Id.* at 553-54.

The court looked to other provisions of the INA to confirm its analysis. Sections 1254a(c)(2)(A)(ii) and (iii), the court explained, specify which grounds of admissibility the Attorney General may and may not waive when granting TPS. *Id.* at 553. And section 1182 specifies many classes of noncitizens who are ineligible for admission, but does not include TPS beneficiaries. *Id.* at 554. Those provisions, the court concluded, confirm that a grant of TPS satisfies the inspection and admission requirement of section 1255. *Id.* at 553-54.

Finally, like the Ninth Circuit, the Sixth Circuit considered the purpose of the TPS regime. And, like the

Ninth Circuit, the Sixth Circuit highlighted the absurd results of the government's position. Although a TPS recipient "is protected and can stay here," an otherwise eligible TPS recipient would need to "leave the United States, be readmitted, and then go through the immigration process all over again" to apply for lawful-permanent-resident status. *Id.* at 555.

2. a. As the government represented below, *see* Gov't C.A.3 Br. 7, the Eleventh Circuit reached the opposite conclusion in *Serrano v. United States Attorney General*, 655 F.3d 1260 (11th Cir. 2011) (per curiam). The applicant in that case was a Salvadoran immigrant who entered the country without inspection, then obtained TPS and married an American citizen. *Id.* at 1263. DHS denied his application for adjustment of status based on his initial entry without inspection and admission. *Id.* Serrano appealed the denial. On appeal, the Eleventh Circuit interpreted his argument to be that section 1254a(f)(4) "alters the 'inspected and admitted or paroled' limitation on eligibility for adjustment of status under § 1255(a)." *Id.* at 1265.

The Eleventh Circuit rejected that argument, holding that a TPS recipient's "'lawful status as a nonimmigrant' for purposes of adjusting his status does not change § 1255(a)'s threshold requirement that he is eligible for adjustment of status only if he was initially inspected and admitted or paroled." *Id.* The Eleventh Circuit added that the result would be the same even if the statute were ambiguous, because DHS's longstanding guidance would be entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Serrano*, 655 F.3d at 1266.

b. In the decision below, the Third Circuit "disagree[d] with the Sixth and Ninth Circuits' interpretations of the statute." Pet. App. 19a.

The Third Circuit first addressed *Flores*. The court believed that the Sixth Circuit had misread the text of sections 1254a and 1255 by "conflat[ing] 'lawful status' with 'admission.'" Pet. App. 13a. The Third Circuit also dismissed *Flores*'s reliance on other statutory provisions, reasoning that the discussion of admissibility in section 1254a "has no bearing" on the admission requirement of section 1255. Pet. App. 14a. The Third Circuit similarly dismissed *Ramirez* for "fail[ing] to acknowledge the meaningful differences between 'status' and 'admission.'" Pet. App. 17a. The Third Circuit characterized the Ninth Circuit's reliance on other statutory provisions as "unpersuasive," because section 1254a(f)(4) still would have some independent effect under the Third Circuit's interpretation. Pet. App. 17a-18a.

The Third Circuit considered the Eleventh Circuit's framing of the issue in *Serrano*—*i.e.*, whether a grant of TPS alters (rather than satisfies) section 1255(a)'s admission requirement—to be "slightly different" than the ruling advocated by petitioners. Pet. App. 19a n.6. But the Third Circuit nonetheless observed that its interpretation of the relevant statutes was "closely aligned" with the Eleventh Circuit's. *Id.*; *see Ramirez*, 852 F.3d at 959-60 (observing that *Serrano* conflicts with *Flores*); *cf. Flores*, 718 F.3d at 555 n.4 (concluding that its decision did not conflict with *Serrano*).

The upshot is an intractable circuit split. In the Sixth and Ninth Circuits, a TPS recipient who entered the United States without being inspected and admitted is eligible to adjust status under section 1255 (assuming the other requirements for adjustment of status are satisfied). In the Third and Eleventh Circuits, the same applicant is categorically ineligible for adjustment of status.

This Court's intervention is necessary to restore uniformity in the application of the immigration laws.

II. The Question Presented Is Important and Squarely Presented

1. The government agrees that the question presented is "important and recurring." Gov't C.A.3 Br. at 1. The question affects both current TPS recipients and prospective recipients from countries that will suffer humanitarian crises and receive TPS designations in the future. Presently, more than 400,000 noncitizens from ten countries have applied for and received TPS.[9] TPS recipients reside in "all 50 states, the District of Columbia, and the U.S. territories."[10]

Tens of thousands of those individuals are eligible for immigrant visas. Consider TPS recipients who, like petitioners, are originally from El Salvador and have resided in the United States for decades. "Ten percent of El Salvadoran . . . TPS beneficiaries" are married to a legal resident, making them eligible for spouse visas under 8 U.S.C. § 1154(a)(1)(A). Center for Migration Studies, *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. Migration & Hum. Sec. 577, 578 (2017). In addition, nearly 90 percent of Salvadoran TPS recipients are in the labor force and could, depending on the nature of their employment, be eligible for employment-related visas under 8 U.S.C. § 1154(a)(1)(F). *Id.* at 582.

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[9] Wilson, *supra*, at 5 tbl. 1 (TPS Beneficiaries by Country of Citizenship).

[10] Wilson, *supra*, at 13 (State of Residence of TPS Recipients).

The question presented has a life-changing impact on TPS recipients who are eligible to adjust status based on a family relationship or employment but who initially entered the United States without inspection and admission. Under the Third Circuit's interpretation, those individuals could never receive lawful-permanent-resident status while remaining in the United States. Instead, a TPS recipient would have to leave the United States, travel to a foreign country, attempt to obtain an immigrant visa through processing at a U.S. consulate, then return to the United States as an immigrant.

That process would be onerous under any circumstances. But it is especially problematic for TPS recipients. For one thing, immigrant-visa processing ordinarily takes place at an embassy or consulate in a foreign national's home country. *See* 8 C.F.R. § 42.61(a). The native countries of individuals with TPS, however, are necessarily unsafe because of war, a natural disaster, or some other "extraordinary . . . conditions . . . that prevent aliens from returning to the state in safety." 8 U.S.C. § 1254a(b). And TPS recipients who leave the United States to obtain a visa from a consulate abroad may face additional barriers to reentry. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(i). The government's position, therefore, necessarily requires TPS recipients to risk their safety—potentially for a sustained period of time—to attempt to obtain immigrant status.

Even setting physical safety aside, leaving the United States to obtain admission elsewhere would impose a tremendous burden. Many TPS recipients, including petitioners, have lived in the United States for decades. Salvadorans, for example, must have entered the United

States by February 13, 2001 to qualify for TPS.[11] As a result, the majority of TPS recipients from El Salvador have lived in the United States for twenty years or more. Center for Migration Studies, *A Statistical and Demographic Profile of Temporary Protected Status Populations*, *supra*, at 582. And Salvadoran TPS recipients have given birth to roughly 200,000 American citizen children, who have never lived in El Salvador. *Id.*

2. Given the significance of the question presented, it is no surprise that the issue has recurred recently and frequently. Four courts of appeals—the Third, Sixth, Ninth, and Eleventh Circuits—have addressed the question directly. *See* Pet. App. 3a; *Ramirez*, 852 F.3d 954; *Flores*, 718 F.3d 548; *Serrano*, 655 F.3d 1260.

District courts in the First, Fifth, and Eighth Circuits have reached the same result as the Sixth and Ninth Circuits. *Bhujel v. Wolf*, 444 F. Supp. 3d 268 (D. Mass. 2020), *appeal docketed*, No. 20-1510 (1st Cir. May 12, 2020); *Melgar v. Barr*, 379 F. Supp. 3d 783 (D. Minn. 2019), *appeal docketed*, No. 19-2130 (8th Cir. June 3, 2019); *Leymis V. v. Whitaker*, 355 F. Supp. 3d 779 (D. Minn. 2018), *appeal docketed*, No. 19-1148 (8th Cir. Jan. 22, 2019); *Bonilla v. Johnson*, No. 14-4962, 2016 WL 10636351 (D. Minn. Dec. 15, 2016); *Rodriguez Solarzano v. Nielsen*, No. 17-249, Order Denying Defs.' Mot. To Dismiss (W.D. Tex. Jan. 15, 2019) (unpub.), *appeal docketed*, No. 19-50220 (5th Cir. Mar. 15, 2019). The government has appealed several of those decisions. As a result, cases raising the question presented are currently pending in the First, Fifth, and Eighth Circuits. *See Bhujel v. Wolf*, No. 20-1510 (1st

[11] Wilson, *supra*, at 5 tbl. 1 (TPS Beneficiaries by Country of Citizenship).

Cir.); *Rodriguez Solorzano v. Nielsen*, No. 19-50220 (5th Cir.); *Velaszquez v. Barr*, Nos. 19-1148, 19-2130 (8th Cir.).

Further percolation is unnecessary. The Third, Sixth, Ninth, and Eleventh Circuits issued substantial opinions addressing the question presented. No matter how the remaining courts of appeals decide the issue, the conflict will persist. Only a decision from this Court can break the deadlock.

3. This case is an ideal vehicle for the Court to address the interplay between the TPS statute and the inspection and admission requirement of section 1255. This question was outcome-determinative below and squarely presented on appeal. The district court, applying the reasoning of *Ramirez* and *Flores*, held that petitioners' initial entry without inspection does not bar adjustment of status; the Third Circuit, rejecting the holdings of those circuits, held the opposite.

There are no jurisdictional or procedural barriers to review. To start, the temporary nature of El Salvador's TPS designation—which is an inherent part of the TPS regime—is no cause for concern. Petitioners would be eligible for an adjustment of status even if the government decided not to extend El Salvador's TPS designation. Petitioners' status "on the date of filing an application for adjustment of status"—not their status at present time—determines their eligibility under section 1255. 8 U.S.C. § 1255(k); USCIS Policy Manual, Vol. 7 (Adjustment of Status), Part A (Adjustment of Status Policies and Procedures), Chapter 2 (Eligibility Requirements) (Sept. 2, 2020). Nothing the government does can alter the fact that petitioners had TPS status when they filed their applications. Thus, the only thing standing between petitioners and the possibility of lawful-permanent-resident status is the Third Circuit's decision.

Nor does current litigation over El Salvador's TPS designation present a vehicle problem. In early 2018, the Secretary announced the termination of the TPS designation for El Salvador, effective in September 2019. *See* Termination of the Designation of El Salvador for Temporary Protected Status, 83 Fed. Reg. 2654, 2655-56 (Jan. 18, 2018). A federal district court, however, enjoined the government from terminating the designation. *See Ramos v. Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *appeal docketed*, No. 18-16981 (9th Cir. Oct. 12, 2018). Soon after, the Secretary announced that individuals from El Salvador will retain TPS status for as long as the injunction remains in effect. *See* Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Honduras, Nepal, Nicaragua, and Sudan, 84 Fed. Reg. 59,403 (Nov. 4, 2019). If the injunction is ultimately overturned on appeal, the TPS designation will remain in effect for at least 365 days after issuance of the appellate mandate. *Id.* at 59,405. Thus, any hypothetical revocation of El Salvador's TPS designation is still far in the future, and for the reason set forth above, would not affect petitioners' eligibility for an adjustment of status.

III. The Decision Below Is Incorrect

The decision below flouts the text and structure of the TPS regime, and leads to a result irreconcilable with the basic purposes of TPS. The Court should grant certiorari and reject the Third Circuit's erroneous interpretation.

1. The Third Circuit's textual analysis, which hinged on the definition of "admission" in section 1101(a)(13)(A), does not survive scrutiny. That provision, according to the court, refers only to *physical* entry into the United States. Pet. App. 7a. The INA, however, defines "admission" as "the lawful entry of the alien into the United

States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

That definition is not limited to physical entry, as Section 1255 itself illustrates. Section 1255(b) describes an adjustment of status—which by definition occurs only after a nonimmigrant is physically present in the United States—as a "lawful admission for permanent residence." Even DHS has acknowledged that an "an 'admission' may extend beyond a customary entry into the United States with a valid visa." *In re H-G-G-*, 27 I & N. Dec. 617, 635 (USCIS Admin. App. Office 2019). Unquestionably, then, an "admission" under the INA need not take place when an individual crosses the border and enters the United States.

The Third Circuit also observed that "admission" and lawful "status" are separate concepts. Pet. App. 6a-7a. According to the Third Circuit, section 1254a(f)(4) only confers "lawful status" on TPS recipients for purposes of section 1255(c); section 1254a(f)(4) does not satisfy what the Third Circuit characterized as the separate requirement under section 1255(a) that a nonimmigrant be "admitted." *Id.* The court reasoned that, "[u]nder Appellees' theory, anyone who is considered in lawful status would be able to satisfy § 1255(a)'s admission requirement, thus rendering the two provisions superfluous." Pet. App. 11a.

That analysis is likewise incorrect. Section 1254a(f)(4) provides that, "for purposes of adjustment of status under section 1255 . . . and change of status under section 1258," a TPS recipient "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." The INA contains twenty-two nonimmigrant classifications. 8 U.S.C. § 1101(a)(15). To "be[] in" any of them, an individual must be admitted. *See* 8 U.S.C. § 1184(a)(1); 8 C.F.R. § 214.1(a)(3). In other words, "inspection and ad-

mission" necessarily precedes and is a prerequisite to "being in" lawful nonimmigrant status. By "consider[ing]" TPS recipients to be lawful nonimmigrants, section 1254a(f)(4) necessarily means that TPS recipients are considered inspected and admitted "for purposes of an adjustment of status under section 1255."

The requirements for obtaining TPS bolster that interpretation. The INA does not automatically confer TPS on natives of countries with TPS designations. Individuals who receive TPS undergo an application process akin to—if not more onerous than—the inspection and admission process for nonimmigrants. *See Ramirez*, 852 F.3d at 960. They must prove their identity and citizenship, establish eligibility for admission (or obtain a waiver of inadmissibility), and, in some instances, undergo an interview. *Id.* That "rigorous process" serves the same function that the ordinary inspection and admission process serves for nonimmigrants. *Id.* And it explains why Congress would allow TPS recipients who were not initially inspected and admitted at the border to "be considered as being in . . . lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4).

Admission and lawful status are not coextensive in every case, because a person who is admitted to the United States as a nonimmigrant may fall out of lawful status—for example, by overstaying the approved duration of admission. For that reason, petitioners' reading of sections 1254a(f)(4) and 1255 does not render any portion of 1255 superfluous, as the court of appeals incorrectly concluded. The "inspection and admission" and "lawful status" requirements retain separate meaning under petitioners' interpretation, by requiring that a person admitted to the United States as a nonimmigrant continue to comply with the terms of his or her admission in order to *maintain* lawful status.

2. The Third Circuit's reliance on the structure of the provisions at issue is equally flawed. The court observed that section 1255 affirmatively waives the admission requirement for "special immigrants" and certain noncitizens eligible for a visa but not TPS recipients. Pet. App. 9a (citing 8 U.S.C. §§ 1255(h), (i)). That observation supports petitioners' interpretation, not the government's. Congress did not need to waive the admission requirement for TPS recipients in section 1255 because TPS recipients are deemed admitted by virtue of being considered to be in lawful nonimmigrant status under section 1254a(f)(4). *See supra* pp. 26-27. An affirmative waiver of admission in section 1255 would have made sections 1254a(f)(4) and 1255 redundant.

The Third Circuit's argument that petitioners' interpretation is "in derogation of" section 1254a(h) is similarly meritless. Pet. App. 10a. Section 1254a(h) provides that only a supermajority of the Senate may consider a bill, resolution, or amendment that would "provide for adjustment [of a TPS recipient] to lawful temporary or permanent resident alien status for any alien receiving temporary protected status under this section." Congress' decision to require a supermajority automatically to convert TPS recipients' status, however, says nothing about whether an individual TPS recipient who is otherwise eligible for lawful-permanent-resident status (for example, because of employer sponsorship) meets the admission requirement of section 1255(a). Section 1254a(f)(4) demonstrates beyond any doubt that Congress intended for eligible TPS recipients to be able to adjust status, irrespective of the supermajority requirement of section 1254a(h). The question here is which TPS recipients are eligible, and section 1254a(h) provides no answer to that question.

The Third Circuit also pointed to certain subsections of section 1255 that contain the words "admission" (or "admitted") and "status" as further evidence that admission and lawful status are distinct concepts. Pet. App. 10a (citing 8 U.S.C. §§ 1255(k), 1255(m)(1)). As already explained, that proves nothing about the question presented. Although lawful-immigrant status and admission are distinct concepts, the former presupposes the latter. As a result, a TPS recipient who is considered to "be in" lawful-nonimmigrant status necessarily satisfies the "inspection and admission" requirement of section 1255(a).

3. Finally, the Third Circuit suggested that, because TPS is temporary, considering TPS recipients to be admitted "would open the door to more permanent status adjustments that Congress did not intend." Pet. App. 11a. That argument—for which the Third Circuit provided no citation or other support—begs the question. Congress provided that TPS recipients should be "considered as being in . . . lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). Whether Congress intended that language to make otherwise qualified TPS recipients who were not initially inspected and admitted eligible for adjustment of status is the interpretive question this case presents.

Petitioners' answer, not the Third Circuit's, is consistent with the purpose of the TPS regime. TPS gives individuals the right to remain in the United States when returning to their native countries would be "unsafe." *Ramirez*, 852 F.3d at 963. Allowing qualifying TPS recipients to apply for lawful-permanent-resident status while remaining in the United States—whether or not they were initially inspected and admitted—is consistent with that regime. Requiring TPS recipients to return to their still-unsafe native countries is not. *Id.* at 964.

CONCLUSION

The petition for a writ of certiorari should be granted.

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