No. 20-315

IN THE

Supreme Court of the United States

JOSE SANTOS SANCHEZ AND SONIA GONZALEZ,
Petitioners,

v.

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR AMICI CURIAE IMMIGRATION LAW PROFESSORS IN SUPPORT OF PETITIONERS

ANDREW J. WILHELM
ALEXANDER V. OGREN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036-5306

ETHAN D. DETTMER
Counsel of Record
KELSEY JOHN HELLAND
RYAN AZAD
COURTNEY WANG
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
(415) 393-8292
edettmer@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Bills

Other Authorities

INTEREST OF AMICI CURIAE [1]

Amici curiae are law professors who teach, research, and write about immigration law, including the statutory provisions related to Temporary Protected Status ("TPS") under the Immigration and Nationality Act ("INA"). A complete list of amici's names, titles, and affiliations (for identification purposes only) is set forth in the appendix to this brief.

Amici present this brief to provide background on the legislative history of TPS and analysis of how that legislative history supports petitioners' position in this appeal.

SUMMARY OF ARGUMENT

For decades, both the Executive and Congress have protected foreign nationals on American soil from returning to countries experiencing war, natural disaster, or other life-threatening conditions. These governmental initiatives—executive actions such as extended voluntary departure ("EVD") and congressional stop-gap measures—illuminate the widely shared concerns that later gave rise to TPS.

The legislative history of TPS itself shows Congress's intent that eligible TPS holders be able to adjust their immigration status to lawful permanent resident ("LPR") under 8 U.S.C. §§ 1254a(f)(4) and 1255. In the early 1980s, Congress introduced several

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation. Petitioners have filed blanket consents to *amicus* briefs in this action. Respondents have indicated that they consent to the filing of this *amicus* brief.

bills that sought to impose oversight over the Executive's ad hoc use of EVD. One set of bills sought to provide safe haven to Salvadoran nationals to whom the Reagan Administration refused to extend EVD—and would have permitted Salvadorans to adjust to LPR regardless of whether they had lawful status or entered the country with inspection and admission. Similar bills were introduced for certain Chinese nationals in the wake of the 1989 Tiananmen Square Massacre. After neither Salvadoran- nor Chinese-focused LPR legislation passed, Congress took up a broad overhaul of the INA in 1990. This time it passed. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 ("1990 Act").

Two provisions of the INA are forefront in this case. First, Section 1255(a) (which preceded the 1990 Act) provides that "[t]he 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 . . . , to that of an alien lawfully admitted for permanent residence if" she meets certain criteria. The second was added via the 1990 Act and specifically addresses the benefits of TPS: Section 1254a(f)(4) provides that "for purposes of adjustment of status under section 1255 . . . , the alien [who has been granted TPS] shall be considered as being in, and maintaining, lawful status as a nonimmigrant." Additionally, Section 1254a(h) requires a Senate supermajority to "consider any bill, resolution, or amendment that . . . provides for adjustment to lawful temporary or permanent resident alien status for any alien receiving temporary protected status under this section" or "has the effect" of doing so.

Section 1254a(f)(4)'s language first appeared in pre-1990 Act bills to provide safe haven to certain Chinese nationals. Subsequent negotiations over the 1990 Act resulted in a compromise between legislators who wanted to provide a wide path to LPR and those concerned about a blanket TPS-to-LPR adjustment. The result was that the 1990 Act kept the Section 1254a(f)(4) language from earlier bills, which allowed eligible TPS recipients to seek *individual administrative* adjustment of status—but balanced it with Section 1254a(h), which precluded *legislative programmatic* adjustment absent a Senate supermajority. This compromise forecloses respondents' reading that eligible TPS holders like petitioners here are categorically unable to apply for adjustment of status.

Respondents' position would lead to at least three outcomes incompatible with the underlying rationale of the 1990 Act and Congress's longstanding commitment to those who cannot return to their countries of origin. First, respondents' theory would require TPS holders to upend (and likely risk) their lives by returning to their countries of origin to apply for lawful permanent residence—despite congressional efforts to prevent that very scenario. Second, respondents' theory would perpetuate the imbalance of TPS holders who pay taxes without enjoying most of the corresponding benefits. Third, respondents' theory assumes that Congress favors TPS holders who overstay their visas over those who did not secure a visa at the outset, and even those (like petitioners) whose immigration petitions were subsequently approved. Respondents provide no basis for such arbitrary favoritism, and no legislative history supports it.

Petitioners' position avoids these illogical outcomes and other pitfalls—and remains true to congressional intent. Permitting TPS holders like petitioners to seek adjustment to LPR comports with how Congress treats other displaced individuals like asylees, crime victims, and trafficking victims. Such a holding would not create a magnet effect for would-be immigrants outside the United States because TPS applies only to those already present in the country. And adopting petitioners' position would not lead to an influx of new LPRs because immigrant visas are subject to statutory quotas. It would simply allow the government to exercise its discretion among a larger pool of LPR-eligible applicants.

For these reasons (and others beyond the scope of this brief), the Court should reverse the Third Circuit.

ARGUMENT

For roughly a century after the country's founding, most immigration was encouraged, and admission requirements were rare. Shoba S. Wadhia, *Americans in Waiting: Finding Solutions for Long Term Residents*, 46 J. Legis. 34, 35 (2019). The United States welcomed noncitizens fleeing destitution, hunger, war, disease, and similar catastrophes. *See* Andrew I. Schoenholtz, *The Promise and Challenge of Humanitarian Protection in the United States: Making Temporary Protected Status Work as a Safe Haven*, 15 Nw. J. L. & Soc. Pol'y 1, 2–3 (2019) ("Schoenholtz"). Accordingly, Congress did not authorize deportations of those who arrived without authorization until 1891—and even then only short-term residents could be deported. Mae Ngai, *We Need*

a Deportation Deadline, Wash. Post (June 14, 2005), https://wapo.st/36YHPny.

America's national immigration policy has become more restrictive over time. What has not changed, however, is the powerful opposition to uprooting through removal noncitizens who "settle [in America], raise families [] acquire property . . . [and] become part of the nation's economic and social fabric." *Ibid.* As Judge Learned Hand wrote, to deport those who are a "stranger" to their country of origin would subject them to "utter destruction," and such a "cruel and barbarous result would be a national reproach." *United States ex rel. Klonis v. Davis*, 13 F.2d 630, 630–31 (2d Cir. 1926). This is particularly so where noncitizens come to America because of life-threatening conditions in their native countries—conditions that can last for years or decades. There is little justification for initially protecting those individuals but later deporting them despite no material improvement in their country of origin.

The Executive has therefore frequently exercised discretion to shield certain vulnerable noncitizens from deportation. Congress, for its part, has responded by enacting (i) what is now 8 U.S.C. § 1255(a), a general statute permitting the Attorney General to exercise discretion in adjusting individuals' status to lawful permanent resident, and (ii) various one-off laws *requiring* the Attorney General to do so for particular groups. Both sets of laws recognize these noncitizens' economic and social ties to this country, and demonstrate unwillingness to deport them to dangerous countries that are no longer, in any real sense, their home.

Section 1254a(f)(4) is an outgrowth of this demonstrated unwillingness to turn a blind eye toward ongoing dangers. Lawmakers' statements leading to the 1990 Act's passage make clear that Congress intended to impose standards on ad hoc Executive decisions while reaffirming the country's commitment to shelter noncitizens whose lives are in danger, even if they must remain here for years. Respondents' interpretation—that many such individuals are categorically barred from adjusting status—would flout the intent underlying the 1990 Act.

I. For Decades, The Government Has Protected Noncitizens Unable To Return To Their Countries Of Origin Due To Life-Threatening Conditions

TPS grew out of a long tradition of providing refuge to foreign nationals whose counties of origin were suffering war, natural disaster, or similar life-threatening conditions. For the Executive, this entailed exercising discretion not to deport foreign nationals. Building on this practice, Congress regularly granted lawful status to classes of noncitizens via statute. These polices differed slightly in how noncitizens could obtain benefits, but they shared a common understanding: Where noncitizens within the country's borders cannot safely return to their country of origin, they should not be exposed through deportation to the dangers from which they fled, regardless of how they arrived.

A. TPS's Roots in Executive Action Evince a Longstanding Policy to Offer Non-Discriminatory Refuge to Noncitizens

In light of the turmoil resulting from World War II and the Cold War, the Executive decided not to send noncitizens living in the United States back to devastated countries where they stood little chance of building a life. Beginning in the 1960s, the Executive extended class-based relief from deportation to noncitizens whose "home countries were dangerous or chaotic" through a program known as EVD. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 122 (2015). Under this program, the Attorney General instructed then-Immigration and Naturalization Service ("INS") officials to refrain from deporting noncitizens if return to their country of origin was unsafe, "usually [due] to war, civil unrest, or natural disasters." Cong. Research Serv., RS20844, *Temporary Protected Status: Overview & Current Issues* 3 (2018), https://bit.ly/3p2bJ0w. Rooted primarily in the Executive's constitutional authority to conduct foreign policy, these instructions provided "blanket relief" to groups of individuals based on their ties to a particular country, rather than evaluating voluntary departure on a case-by-case basis. *Ibid.*; *see also* H.R. Rep. 101-245, at 11 (1989); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with . . . the conduct of foreign relations[.]").

EVD was primarily a humanitarian policy. Lynda J. Oswald, *Extended Voluntary Departure: Limiting*

the Attorney General's Discretion in Immigration Matters, 85 Mich. L. Rev. 152, 163–64, 177 (1986) ("Oswald"). From 1960 through 1989, the Executive granted EVD to nationals of at least fourteen countries, which—in each instance—were experiencing natural or man-made dangers that compelled humanitarian relief: Cuba, the Dominican Republic, Czechoslovakia, Chile, Cambodia, Vietnam, Laos, Lebanon, Ethiopia, Uganda, Iran, Nicaragua, Afghanistan, and Poland. Schoenholtz, *supra*, at 5; Oswald, *supra*, at 177 & n.152. Regarding Poland, for example, one congressman urged action as "a clear expression of our humanitarian commitment to these individuals and a recognition of our obligation not to return them, at this time," due to ongoing martial law. 127 Cong. Rec. 31,493 (1981); *see also In re Sosa Ventura*, 25 I. & N. Dec. 391, 394 (B.I.A. 2010) (EVD "existed for decades to address humanitarian concerns").

In 1990, EVD became known as deferred enforced departure ("DED"). *Temporary Protected Status: Overview & Current Issues*, *supra*, at 3 & n.20; *see also* Cong. Research Serv., R45158, *An Overview of Discretionary Reprieves from Removal: Deferred Action, DACA, TPS, and Others* 15 (2018), https://bit.ly/2ZiKioL ("EVD was an earlier version of DED that fell mostly into disuse with the advent of DED in 1990[.]"). Despite the change in nomenclature, DED's mission was the same: to shelter noncitizens from countries experiencing widespread human suffering. President George H.W. Bush first granted DED to certain Chinese nationals following the Tiananmen Square Massacre. Claire Bergeron, *Temporary Protected Status After 25 Years: Addressing the Challenge of Long-Term 'Temporary' Residents &*

Strengthening a Centerpiece of US Humanitarian Protection, 2 J. Migration & Hum. Sec. 23, 26 (2014) ("Bergeron"). Nationals of several other countries (Haiti and Liberia, for example) also have received DED. Schoenholtz, *supra*, at 6; Nat'l Immigration Forum, *Fact Sheet: Deferred Enforced Departure (DED)* (Feb. 12, 2021), https://bit.ly/3p6cd5W. Most recently, President Trump granted DED to certain Venezuelan nationals he determined could not return to "the worst humanitarian crisis in the Western Hemisphere in recent memory." Deferred Enforced Departure for Certain Venezuelans, 86 Fed. Reg. 6,845 (Jan. 25, 2021).

B. Congress Has Favored Long-Term Solutions for Those Fleeing Intractable, Indefinite Dangers Abroad

Consistent with EVD and DED's humanitarian goals, Congress has repeatedly reinforced its commitment to protect migrants fleeing long-term catastrophe. *See* Schoenholtz, *supra*, at 5. Recognizing that "a certain number of [noncitizens] are [going to be] here permanently," Congress has enacted several statutes to prevent the unjust and unproductive deportation of noncitizen residents. *Temporary Safe Haven Act of 1987: Hearing Before the Subcomm. on Immigr., Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 100th Cong. 117 (1987) (testimony of Doris Meissner).

The earliest such statute allowed "bona fide political or religious refugee[s]" who arrived in the United States prior to July 1933 to apply for "registration," provided that they met certain conditions such as good

moral character.[2] An Act Relating to the Record of Registry of Certain Aliens, Pub. L. No. 73-299, 48 Stat. 926–27 (1934). At that time, the United States was reluctant to admit noncitizens it deemed undesirable, including Jews. Congress nevertheless recognized the need to not send refugees with roots in the United States back to Nazi Germany.

Closer analogues to TPS began with the Hungarian Refugee Act of 1958, Pub. L. No. 85-559, 72 Stat. 419. Following an unexpected revolution in Hungary in which many believed the United States had "let[] the Hungarians down," President Eisenhower authorized several thousand escapee visas for Hungarian citizens and permitted over 30,000 additional Hungarians to enter the country as parolees under the INA. Peter Pastor, *The American Reception and Settlement of Hungarian Refugees in 1956–1957*, 9 e-Journal Am. Hungarian Educators Ass'n 197, 199–200 (2016), https://bit.ly/2Nvidry.[3] These parolees could live and

---

[2] Registry "enables certain unauthorized aliens in the United States to acquire permanent resident status." USCIS, *Policy Manual: Chapter 4 – Aliens Who Entered the United States Prior to January 1, 1972*, https://bit.ly/3aCIcXd.

[3] The parole power, arising from Section 212(d)(5) of the INA, gives the Executive discretion to allow unauthorized or inadmissible noncitizens into the country on a temporary, case-by-case basis, "for urgent humanitarian reasons." Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 502 (2009). It was widely used before the Refugee Act curtailed Executive authority in 1980 on separation-of-powers (not humanitarian) grounds. *Id.* at 503 & n.158 ("One of the principal arguments for the Act was that it would bring the admission of refugees under greater Congressional and statutory control and eliminate the need to use the parole authority."

work in the United States, but could not become LPRs under the INA at that time—until Congress enacted the Hungarian Refugee Act. Because Hungary's ongoing violence made "clear that [Hungarian parolees] would not return to Hungary soon," *ibid.*, Congress allowed any "paroled Hungarian refugee, who had been in the United States at least two years, [to] be admitted for permanent residence," subject to limited conditions. *In re K—*, 9 I. & N. Dec. 121, 122 (B.I.A. 1960).

The Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161, operated similarly. Hundreds of thousands of Cubans had fled the Castro regime to the United States prior to 1966, and the bipartisan Act granted work authorization and lawful permanent residence to Cuban nationals who had been in the United States for at least one year. Library of Cong., *1966: The Cuban Adjustment Act of 1966*, https://bit.ly/3dg75dd. The Act was sweeping: It guaranteed lawful permanent residence "to any Cuban arriving in the United States by any means, legal or illegal," and exempted "Cubans from those aspects of the [INA] that render inadmissible and deportable all other aliens arriving in the United States illegally," such as those who arrived "outside a designated port of entry, or without valid documentation such as a passport or entry visa." David Abraham, *The Cuban Adjustment Act of 1966: Past And Future*, 2015 Emerging Issues 7331, at 1 (footnotes omitted).

Congress later extended lawful permanent residence to other groups of EVD recipients and similarly-

---

(quoting Sen. Edward M. Kennedy, *Refugee Act of 1980*, 15 Int'l Migration Rev. 141, 146 (1981))).

situated noncitizens. At least six times, Congress *required* the Executive to adjust the status of any member of certain groups to LPR—using the word "shall" each time—so long as the applicant met statutory requirements:

1. In 1987, noncitizens who had received EVD in the previous five years, encompassing "nationals from Afghanistan, Ethiopia, Poland, and Uganda," were guaranteed lawful permanent residence. Schoenholtz, *supra*, at 28; Pub. L. No. 100-204, 101 Stat. 1400.
2. In 1989, certain "Jews, Evangelical Christians, and Ukrainian Christians of the Orthodox and Roman Catholic denominations" from the former Soviet Union could adjust status as "Lautenberg parolees." USCIS, *Policy Manual: Chapter 2 – Eligibility Requirements*, https://bit.ly/3pmM6I1; Pub. L. No. 101-167, 103 Stat. 1263.
3. In 1992, Chinese nationals granted DED were permitted to adjust to lawful permanent residence. Chinese Student Protection Act ("CSPA"), Pub. L. No. 102-404, 106 Stat 1969.
4. In 1997, the Nicaraguan Adjustment and Central American Relief Act ("NACARA") guaranteed lawful permanent residence for certain Nicaraguan and Cuban citizens. Pub. L. No. 105-100, 111 Stat. 2193.
5. In 1998, certain Haitians were guaranteed lawful permanent residence through the Haitian Refugee Immigration Fairness Act, Pub. L. No. 105-277, 112 Stat. 2681–538.
6. In 2000, the Indochinese Parole Adjustment Act, Pub. L. No. 106-429, 114 Stat. 1900A–57,

> permitted "citizens of Vietnam, Cambodia, and Laos" to adjust to LPR. USCIS, *Policy Manual: Chapter 2*, *supra*.[4]

Although TPS was enacted in 1990, the post-1990 statutes cited above do not suggest that Congress believed that adjustment under Section 1255's general adjustment provision was unavailable to individual TPS recipients. There is a material difference between legislatively mandating a blanket, uniform path to lawful permanent residence for certain classes of noncitizens, on the one hand, and TPS recipients' ability to seek administrative adjustment of their individual status, on the other. *Temporary Protected Status: Overview & Current Issues*, *supra*, at 3 ("TPS does not provide a path to lawful permanent residence or citizenship, but a TPS recipient is not barred from adjusting to nonimmigrant or immigrant status if he or she meets the requirements."). For example, opponents of the Temporary Safe Haven Act of 1987 (which never became law) testified that EVD status *terminated* upon the passage of class-wide LPR legislation like the Cuban Adjustment Act, suggesting that such legislation rendered continued EVD unnecessary. *Temporary Safe Haven Act of 1987: Hearing*, *supra*, at 22 (testimony of Delia Combs). Individual adjustment under Section 1255 and class-wide legislation are thus two different paths to lawful permanent residence. Congress's actions before and after the 1990 Act show that some foreign disasters are so serious that they

---

[4] Prior legislation had granted LPR to some Indochinese noncitizens, *see* Pub. L. No. 95-145, 91 Stat. 1223 (1977), and this act plugged remaining gaps. AILA's Comment on the Indochinese Parolee Adjustment Regulations (Sept. 6, 2020), https://bit.ly/2Zk99Zy.

require the Executive to provide safe haven on a class-wide basis. But that does not detract from Congress's concern for eligible individual TPS recipients who may seek their own administrative adjustment.

And that concern is not limited to TPS recipients. Noncitizens who have been granted asylum, for example, may apply to become LPRs after one year if they continue to have refugee status. 8 U.S.C. § 1159(b).[5] Asylees, like TPS recipients, need not present themselves at a port of arrival to seek protection; any noncitizen physically present in the United States can seek asylum within one year of arrival. *Id.* § 1158(a)(1).

U and T visas work similarly. The U visa system was established to "protect victims of domestic and other violent crimes," including undocumented noncitizens who might be deterred from reporting abuse out of fear of deportation. Nat'l Immigration Law Ctr., *The U Visa and How It Can Protect Workers*, at 1 (Sept. 2010), https://bit.ly/3rVZ2pN. Like asylees, qualifying U visa holders may apply to become LPRs. 8 U.S.C. § 1255(m); USCIS, *Green Card for a Victim of a Crime (U Nonimmigrant)*, https://bit.ly/3s1BMqF. The T visa system operates much the same way, but for undocumented noncitizens who arrive in the United States as a result of sex or labor trafficking. USCIS, *Victims of Human Trafficking: T Nonimmigrant Status*, https://bit.ly/3pntSpG. As with asylees, the paramount congressional policy underlying U and

---

[5] Longstanding noncitizens may also apply for adjustment if they arrived prior to November 29, 1990, and are no longer a refugee due only to a change in country circumstances. 8 C.F.R. § 209.2.

T visas is "offering protections to victims" regardless of how they arrived. U.S. Dep't of Homeland Sec., *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies* 4, 9, https://bit.ly/37hh9Pi.

As these examples demonstrate, Congress has repeatedly indicated its intent to provide a haven for those fleeing life-threatening conditions in their countries of origin, and not uproot those already within the nation's borders for humanitarian reasons, regardless of how they arrived. For purposes of seeking adjustment to lawful permanent residence, there is neither a logical basis nor any legislative history to suggest congressional intent to distinguish between asylees and U and T visa holders, on the one hand, and TPS recipients, on the other. Each of these groups face life-threatening conditions in their countries of origin, and none are required to be inspected and admitted at a port of arrival before seeking adjustment to lawful permanent residence.

II. TPS's Legislative History Demonstrates Congress's Intent To Continue Protecting Noncitizens Unable To Return Safely To Their Countries Of Origin

TPS codified EVD, establishing congressional oversight over what had been, until 1990, ad hoc decision-making by the Executive. Although TPS allowed the Attorney General some discretion in granting temporary safe haven status, it established statutory criteria that Attorneys General across administrations were required to use.

The legislative process resulting in the 1990 Act (which created TPS) was neither fast nor direct. Throughout the 1980s, Congress attempted to provide such relief to Salvadoran and Chinese nationals who could not safely return to their countries of origin. Early bills aimed at Salvadoran relief included provisions allowing for adjustment to lawful permanent residence. And a bill aimed at Chinese relief incorporated language identical to what was eventually codified as Section 1254a(f)(4). These bills, culminating in the 1990 Act, show Congress's willingness to allow qualifying individuals who cannot return home for indefinite periods of time to adjust their status to something more permanent.

As explained below, the combination of Section 1254a(f)(4) and Section 1254a(h)(2) represented a legislative compromise between members of Congress who disfavored broad grants of lawful permanent residence and those who wanted to ensure that otherwise qualifying TPS holders could apply to become LPRs individually. To the extent that proposed legislation introduced after the 1990 Act is relevant, it confirms that Congress intends to allow qualifying TPS holders like petitioners to seek adjustment under Sections 1254a(f)(4) and 1255.

A. Proposed Laws Preceding the 1990 Act Lay the Groundwork for TPS

Although TPS was not enacted until 1990, Congress considered several pieces of legislation in the preceding years that incorporated TPS-like elements. At least three categories of legislation helped to shape TPS's final statutory language: (1) Salvadoran-focused bills reacting to the Salvadoran civil war; (2) the

Temporary Safe Haven Acts; and (3) Chinese-focused bills reacting to the Tiananmen Square Massacre.

1. Salvadoran-focused Bills Permitted Adjustment to LPR

In the early 1980s, many public interest groups lobbied the Reagan Administration to extend EVD to Salvadorans due to the ongoing civil war in El Salvador. *See* Bergeron, *supra*, at 26. When the Administration did not do so, lawmakers introduced legislation to temporarily suspend Salvadorans' deportation. *See, e.g.*, S. 2131, 98th Cong. (1983) (providing for temporary suspension of deportation for Salvadorans); Immigration Reform and Control Act of 1983, S. 529, 98th Cong. (1983); Immigration Reform and Control Act of 1983, H.R. 1510, 98th Cong. (1983). These bills did not become law, however, because the House and Senate failed to resolve differences in conference.

The proposed 1983 Acts did not contain the adjustment of status language or supermajority requirement later seen in the 1990 Act, but they specifically authorized the Attorney General to adjust to LPRs noncitizens who entered the United States prior to 1982 and lacked lawful status. *See* S. 529, 98th Cong., at Title III; H.R. 1510, 98th Cong. at Title III. This authorization foreshadowed the 1990 Act, which permits adjustment to LPR even for those TPS recipients who entered without inspection and admission.

2. The Temporary Safe Haven Acts Outlined the Policies and Future Statutory Framework of TPS

In 1987, as Congressman Romano Mazzoli listened to debate on a bill that would have required an

investigation into how circumstances in El Salvador and Nicaragua compared with previous grants of EVD, he determined that humanitarian decisions were being made through EVD "on an ad hoc basis without proper guidelines or standards." *Temporary Safe Haven Act of 1987: Hearing*, *supra*, at 2. Congressman Mazzoli attempted to fill that "gap in the current existing law" by introducing the Temporary Safe Haven Act, H.R. 2922, 100th Cong. (1987) ("TSHA I"). *Id.* at 1. Like the TPS scheme eventually enacted in 1990, TSHA I defined the standards under which the Attorney General could grant safe haven, the process for extending and terminating designations, and the legal status and limited benefits provided to eligible beneficiaries. H.R. 2922, 100th Cong., § 2. TSHA I did not, however, contain the adjustment of status language of Section 1254a(f)(4) or the supermajority requirement of Section 1254a(h)(2).

Much of the hearing on TSHA I concerned the fact that individuals authorized to reside temporarily in the United States often stay for long periods and integrate into the American economy. The Reagan Administration tended to view this as evidence of abuse of EVD grants and usurpation of American jobs. Given the Administration's concern that "people here temporarily will really never leave," it wanted to place clear time limits on blanket grants of safe haven. *Temporary Safe Haven Act of 1987: Hearing*, *supra*, at 25. Indeed, a State Department witness who generally favored TSHA I nevertheless recommended it be limited to exclude any "possibility of permanent adjustment of status solely by virtue of having received safe haven." *Id.* at 15 (testimony of Richard Schifter).

Congressional Democrats, by contrast, tended to view EVD recipients' integration into communities and the labor market positively. Congressman Mazzoli explained that, as "the Polish EVD" situation demonstrated, some EVD recipients "will have been here three, four, five, six years, in which case, they have necessarily put down roots, developed equities so that their departure from the country would be a severe wrench to them and their families." *Temporary Safe Haven Act of 1987: Hearing*, *supra*, at 26. In response, a former acting Chair of the INS recommended that Congress revise the INA "so that persons who have been granted safe haven but can still not return after many years may adjust status." *Id.* at 45 (testimony of Doris Meissner). She noted that "about one-half of the potential safe haven situations that will arise are likely to be semi-permanent, that is five years or more." *Ibid.*

Following the hearing, the House Subcommittee posed supplemental questions to the Reagan Administration, including: "Under what circumstances may an EVD beneficiary change status to permanent residency?" *Temporary Safe Haven Act of 1987: Hearing*, *supra*, at 169. The Administration responded that "[i]ndividuals under EVD may apply at any time for any administrative relief for which they qualify, such as permanent residence, legalization, etc. The EVD status, however, does not provide an eligibility preference for permanent residency." *Ibid.*

In April 1988, the House Subcommittee substituted a clean bill favorably reported to the full Committee. Temporary Safe Haven Act of 1988, H.R. 4379, 100th Cong., (1988) ("TSHA II"); H.R. Rep. No. 100-627 (1988). The bill's "purpose" was to "replace"

EVD "with a more formal and orderly mechanism for the selection, processing and registration of such individuals." H.R. Rep. No. 100-627, at 4. Specifically, TSHA II proposed to replace EVD with a program called Authorization to Remain Temporarily ("ART"), which would be granted to noncitizens according to statutory preconditions such as armed conflict, environmental disaster, and other extraordinary events. *Id.* at 8. Hearkening back to the hearing on TSHA I, the Report clarified that TSHA II would "not create an admissions program. It [was] designed to protect individuals already in the United States and [gave] no alien any right to come to the United States." *Id.* at 9 (emphasis omitted). The House approved TSHA II, *see* 134 Cong. Rec. H9686 (daily ed. Oct. 5, 1988), but the Senate took no action on it.

3. Chinese-focused Bills Provided Long-Term Lawful Status to Noncitizens Unable to Return Home

In 1989, several House bills sought to offer relief to Chinese nationals, particularly students, who were in the United States during the Tiananmen Square Massacre. Two such bills, which proceeded in parallel, inform the question presented in this case.

First, Congress passed the Emergency Chinese Immigration Relief Act of 1989, H.R. 2712, 101st Cong. (1989) ("ECIRA"), which contained similar language to Section 1254a(f)(4):

> For purposes of any adjustment of status under section 245 of the Immigration and Nationality Act (8 U.S.C. 1225) . . . in the case of an alien who is a *national of China* and

> who, as of June 5, 1989, *was present in the United States in the lawful status of a nonimmigrant* . . . , such an alien *shall be considered as having continued to maintain lawful status as such a nonimmigrant (and to have maintained continuously a lawful status) for the period described in subsection (d).*

ECIRA, § 2(b) (emphases added). ECIRA did not ultimately become law because President Bush vetoed it.

Second, the Chinese Temporary Protected Status Act of 1989, H.R. 2929, 101st Cong. (1989) ("CTPSA"), contained language *identical* to what would later appear in Section 1254a(f)(4): "for purposes of adjustment of status under section 245 . . . the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant." Unlike ECIRA—which was limited to Chinese nationals—CTPSA sought to provide "a generic solution for nationals of any country residing temporarily in the United States on nonimmigrant visas at the time of the occurrence of armed conflict or catastrophic environmental disaster in their home country." *Immigration Status of Chinese Nationals Currently in the United States: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law on H.R. 2929, H.R. 2712, 2722, and H.R. 2726*, 101st Cong. 2 (1989) (statement of Congressman Bruce Morrison).

CTPSA shared certain provisions with TSHA II: It would have "allow[ed] the Attorney General to authorize aliens whose homelands are undergoing crises to remain in the United States temporarily," but not "create an admissions program. It [was] designed to protect individuals already in the United States and

[gave] no alien any right to come to the United States." H. Rep. No. 101-245, at 6, 13 (1989). CTPSA went "one step beyond" TSHA II by "also requir[ing] the Attorney General to designate the People's Republic of China as a country whose nationals are deserving of temporary protection." *Id.* at 6. The report accompanying CTPSA clarified it was not meant solely for those with lawful status. *See id.* at 14 ("an alien who receives TPS *while also maintaining some other status*[,] it is the Committee's intent that the alien remain subject" to the conditions of their status that are consistent with TPS) (emphasis added).

Although neither bill was enacted, Chinese students were protected in the interim: President Bush signed Executive Order 12711, deferring departure of Chinese nationals who were in the United States as of June 1989 for several years.

B. The 1990 Act Creates TPS, Simultaneously Addressing EVD's Perceived Shortfalls and Limiting Class-Wide Grants of LPR

After several failed attempts, Congress's attempts to impose statutory oversight in granting temporary safe haven to noncitizens culminated in the introduction of two immigration reform bills: the House's Family Unity and Employment Opportunity Immigration Act of 1990, H.R. 4300, 101st Cong. (1990), and the Senate's Immigration Act of 1990, S. 358, 101st Cong. (1989). As originally introduced, both bills lacked the adjustment language that eventually appeared in Section 1254a(f)(4) and the supermajority requirement of Section 1254a(h)(2).

The Senate bill was introduced in February 1989, when Democrats held a majority of Senate seats but not enough to overcome a filibuster. The original Senate bill was relatively narrow: It did not contain a broad-based adjustment provision, and it permitted certain Chinese nationals to apply to become LPRs only if they "lawfully entered the United States on or before June 5, 1989." S. 358, 101st Cong., § 302. The bill passed overwhelmingly in July 1989.

The House bill was introduced in March 1990. Congressman Joe Moakley proposed an amendment to add Section 244A, titled "Temporary Protected Status for Nationals of El Salvador, Lebanon, Liberia, and Kuwait, and Other Designated Foreign States." *See* 136 Cong. Rec. H8684 (daily ed. Oct. 2, 1990). The "Moakley Amendment," as it became known, sought to achieve what the Salvadoran-focused bills of the 1980s and the TSHAs had intended: to provide a more permanent and predictable solution for noncitizens who could not return to their native countries. The Moakley Amendment included language that eventually became Section 1254a(f)(4): "for purposes of adjustment of status under section 245 and change of status under section 248, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant." H.R. 4300, § 244A(f)(5). Congressman Bill McCollum responded by proposing an amendment that would strike the Moakley Amendment, but it did not pass.

In October 1990, the House passed H.R. 4300, and then passed the Senate's bill by substituting in the full text of H.R. 4300. The Senate rejected the House's substitution of its own bill, and the competing bills went to conference.

Consistent with previous partisan tensions, Democrats generally favored a broad TPS policy, whereas Republicans generally did not. The conferees eventually reached a compromise. Republicans achieved some of their goals: The resulting bill lacked a mandatory safe haven provision for Chinese nationals, 136 Cong. Rec. S17106-01 (1990) (statement of Senator Gorton), dropped mandatory TPS for three countries that had originally been proposed in the Moakley Amendment (Lebanon, Liberia, and Kuwait), H.R. Rep. No. 101-955, at 127 (1990), and required a supermajority of the Senate to grant class-wide lawful permanent residence to TPS recipients, *id.* at 62. But Democrats achieved some of their goals, too: The resulting bill contained a "compromise of an 18-month temporary stay for Salvadorans," 136 Cong. Rec. S17106-01 (1990) (statement of Senator Simpson); H.R. Rep. No. 101-955, at 63, and retained Section 1254a(f)(4)'s adjustment of status language, *id.* at 61.

Notably, the supermajority requirement applies to congressional authorization of *blanket* lawful permanent resident status for *entire* TPS categories. It does not preclude individual TPS recipients from applying for administrative adjustment of status. *See* Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 Geo. Immigr. L.J. 543, 577 (1998) ("Martin et al.") ("Congress required that those granted TPS generally cannot adjust status *through Congressional action* unless a supermajority in the Senate supports such a measure.") (emphasis added). The supermajority requirement thus appeased members of Congress who disfavored providing blanket lawful permanent residence to thousands of noncitizens while remaining true to the

reality that some TPS recipients—through no fault of their own—remain in the United States for extended periods of time and should be permitted to seek lawful permanent residence on an individual, case-by-case basis.

President Bush signed the 1990 Act in November 1990.

C. Subsequent Legislation (to the Extent Relevant) Supports Petitioners

As this Court has warned, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (quotation marks and citation omitted). Yet such information also "should not be rejected out of hand as a source that a court may consider in the search for legislative intent." *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).

To the extent this Court views proposed and enacted legislation after the 1990 Act to be relevant, it supports petitioners. Occasionally, Congress has determined that temporary, discretionary safe haven policies fail to provide adequate protection from life-threatening conditions abroad. In those cases, Congress *requires* the Executive to provide lawful permanent residence to qualifying beneficiaries. Three examples stand out.

First, the 1992 CSPA addressed the lingering concerns that Chinese students were unable to safely return to China after the Tiananmen Square Massacre. Like many of the pre-TPS statutes (and unlike TPS

itself), the CSPA required the Attorney General to adjust the status of eligible applicants from a single country: China. Pub. L. No. 102-404, § 2.

Second, the 1997 NACARA created a direct path to lawful permanent residence for Cubans and Nicaraguans. Again, the NACARA required the Attorney General to adjust the status of eligible applicants from certain countries: Cuba and Nicaragua. Pub. L. No. 105–100, § 202(a)(1). Both the CSPA and the NACARA required adjustment of status on a programmatic basis, but neither detracts from Congress's intent that eligible TPS recipients "may" apply for administrative adjustment of their individual status to LPR.[6]

Third, the currently proposed Safe Environment from Countries Under Repression and Emergency Act, S. 879, 117th Cong. ("SECURE Act") would "clarif[y]"—not change—Section 1254a(f)(4) by providing that individual TPS holders seeking adjustment under Section 1255 are considered "as having been inspected and admitted into the United States." SECURE Act, § 2(f). The SECURE Act also would require the Secretary of Homeland Security to adjust the "status of any alien" who meets certain statutory

---

[6] The CSPA and NACARA were not subject to Section 1254a(h)'s supermajority requirement for programmatic adjustment for "any alien receiving temporary protected status." The CSPA applied to DED (not TPS) recipients. The NACARA allowed a pathway to lawful permanent residence for noncitizens "who had applied for asylum and had been living in the United States for a certain period of time," *Temporary Protected Status: Overview & Current Issues*, *supra*, at 13, and thus only incidentally allowed some TPS recipients to benefit.

criteria. *Id.* § 2(a)(1)(A). This *programmatic legislative* change does not speak to whether petitioners here may seek *individual administrative* adjustment. Indeed, Section 1254a(f)(4) makes clear that petitioners may do so.

III. Respondents' Reading Contravenes Congressional Intent To Permit Qualifying TPS Holders To Apply For Adjustment To LPR

The evolution of TPS legislation culminating in the 1990 Act demonstrates that the 101st Congress intended to allow qualifying TPS holders to seek individual administrative adjustment to LPR, even if it did not intend to allow programmatic legislative adjustment of TPS to LPR absent a Senate supermajority. Respondents cannot square their position with Congress's intent. Indeed, respondents' reading would lead to at least three outcomes inconsistent with the 1990 Act's goals.

First, respondents' reading would require TPS holders to travel back to their country of origin—a place they may not have seen in decades—to apply to become LPRs. *See* Pet. Br. 37–38. But several members of the 101st Congress recognized that TPS holders "cannot be expected to return home," 136 Cong. Rec. S17111 (Oct. 26, 1990) (statement of Senator Simon), and would risk "a horrible fate" awaiting them if they did, 136 Cong. Rec. H8686 (Oct. 2, 1990) (statement of Congresswoman Oakar). Indeed, members of Congress repeatedly described their intent not to "return" TPS holders to "countr[ies] immersed in a civil war" where their "lives have been . . . endangered." 136 Cong. Rec. S17108 (Oct. 26, 1990) (statement of

Senator DeConcini); *see also id.* at S17111 (statement of Senator Simon) (describing "war and devastation" that would await anticipated TPS holders forced to return to countries of origin).

The 1990 Act codified these concerns by permitting the Attorney General to grant TPS upon finding one of three things: (i) "an ongoing armed conflict" that "would pose a serious threat to [TPS holders'] personal safety"; (ii) an "environmental disaster . . . resulting in a substantial . . . disruption of living conditions"; or (iii) other similarly "extraordinary . . . conditions" that prevent TPS holders "from returning to the [foreign] state in safety." 8 U.S.C. § 1254a(b)(1). In approving this statutory language, the House Conference Report "strongly urge[d] the Attorney General" to grant TPS to nationals of countries such as Kuwait, Lebanon, and Liberia who could not safely return to those countries. H.R. Rep. No. 101-955, at 6792 (Oct. 26, 1990).

Respondents' reading runs headlong into Congress's repeated indications—in the statutory text, floor debates, and conference report—that it intended to protect TPS holders from unsafe conditions in their countries of origin. TPS holders "cannot be expected" to risk their lives simply to fill out an administrative application for lawful permanent residence. 136 Cong. Rec. S17111 (statement of Senator Simon).

Second, respondents' reading would keep TPS holders in indefinite legal limbo while they pay taxes but receive few corresponding benefits. The 1990 Act bestows work authorization on TPS holders. 8 U.S.C. § 1254a(a)(2). TPS holders (like Mr. Sanchez and Ms. Gonzalez) "are employed at a high rate." Nicole

P. Svajlenka, *TPS Holders Are Integral Members of the U.S. Economy and Society*, Ctr. for Am. Progress (Oct. 20, 2017), https://ampr.gs/3aVP0ym. Like any other employees, TPS holders "must pay federal taxes, state taxes, and Social Security." Eva Segerblom, *Temporary Protected Status: An Immigration Statute that Redefines Traditional Notions of Status and Temporariness*, 7 Nev. L.J. 664, 671 (2007) ("Segerblom"). But the 1990 Act characterizes TPS holders in a way that renders them ineligible for most federal aid and allows states and localities to do the same. 8 U.S.C. § 1254a(f)(2). "Thus, an unfair result occurs in requiring the payment of taxes while denying those same taxpayers benefits." Segerblom, *supra*, at 671; *see also* Geoffrey Heeren, *The Status of Nonstatus*, 64 Am. U. L. Rev. 1115, 1167 (2015) ("Today, [TPS holders] largely remain ineligible for public benefits like food stamps, cash assistance, public housing, social security benefits such as Supplemental Security Income and Social Security Disability Insurance, and federally guaranteed student loans, despite the fact that they typically pay taxes to support this social welfare system."). The longer an individual maintains TPS, the greater the imbalance between taxes paid and lack of corresponding benefits received. Respondents provide no justification for this unfair disparate treatment, nor could they.

Third, respondents concedes that their reading would permit TPS holders who overstayed their visas to apply for adjustment, but not TPS holders who did not secure a visa when they first arrived in the United States. Gov't Cert. Resp. 13–14. Apart from TPS, neither group would be in lawful status, and respondents

cite nothing—case law, legislative history, or otherwise—to support their assertion that "Congress would be more solicitous" of those who overstayed their visas than those who entered without inspection and admission. *Ibid.* If Congress intended to distinguish between two groups that, apart from TPS, would both lack lawful status, the 1990 Act's "text and structure" would make that clear. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). But it does not. At minimum, given the years-long congressional debate over TPS and related policies, one would expect to see such an intent in the "[t]he record of the hearings and floor debates." *Perrin v. United States*, 444 U.S. 37, 45 (1979). But it is not there either. There is simply no evidence that Congress intended to favor those who overstayed their visas over those who did not originally secure a visa—let alone over those who (like petitioners here) *did* eventually secure approved immigration petitions through employer sponsorship.

In contrast with respondents' reading, petitioners' reading furthers congressional intent without creating moral hazards.

Reading the 1990 Act to permit TPS holders to seek adjustment to LPR comports with how Congress treats other similarly situated noncitizens. Asylees who entered without inspection and admission, for example, may seek to become LPRs after one year. 8 U.S.C. § 1159(b); 8 C.F.R. § 209.2. Holders of U and T visas similarly may seek adjustment to become LPRs even if they entered without inspection and admission. *See* 8 U.S.C. § 1255(*l*)(1)(A), (m)(1)(B). There is no reason to think that Congress intended to treat TPS holders as inferior to asylees and U and T immigrants for purposes of adjustment. All have suffered

or face humanitarian crises, and all should be treated similarly.

Moreover, TPS "cannot act as a magnet" for would-be immigrants who currently reside outside the United States. Martin et al., *supra*, at 449. "Because [TPS] is limited to refugees currently residing in this country, it offers no incentive to those who are not here." 136 Cong. Rec. S17109 (Oct. 26, 1990) (statement of Senator DeConcini). Thus, ruling in petitioners' favor would not open the floodgates of additional immigrants entering the country.

Finally, any TPS recipients who successfully adjust their status would count against statutory quotas, thus limiting the number of TPS holders who could adjust their status to LPR annually. For example, Mr. Sanchez received an employer-sponsored approved immigration petition and then applied to adjust his temporary lawful status to a permanent one. C.A. App. 71. Ms. Gonzalez applied to adjust her status to LPR under a derivative status. *Id.* at 65, 71, 138. Congress has prescribed that no more than 140,000 people may immigrate each year based on employment. 8 U.S.C. § 1151(d). This statutory quota and others like it mean that a ruling in petitioners' favor would not lead to innumerable adjustments to LPR status. Rather, it would allow the government to allocate available visas to those, like petitioners, who have demonstrated that they deserve one without forcing petitioners to risk their lives in El Salvador just to fill out an application.

CONCLUSION

Congress has made clear that it intends to allow qualifying TPS holders to apply for administrative adjustment of their individual status to LPR, regardless of their manner of entry. This Court should reverse the Third Circuit's contrary determination.

Respectfully submitted,

ETHAN D. DETTMER
Counsel of Record
KELSEY JOHN HELLAND
RYAN AZAD
COURTNEY WANG
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
(415) 393-8292
edettmer@gibsondunn.com

ANDREW J. WILHELM
ALEX V. OGREN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036-5306

Counsel for Amici Curiae

March 1, 2021

APPENDIX

LIST OF *AMICI CURIAE*

Susan M. Akram
Clinical Professor and Director, International
Human Rights Clinic
Boston University School of Law

David Baluarte
Associate Clinical Professor of Law
Director, Immigrant Rights Clinic
Washington and Lee University School of Law

Kristina M. Campbell
Professor of Law
University of the District of Columbia

Michael Churgin
Raybourne Thompson Centennial Professor in Law
University of Texas at Austin

Niels Frenzen
Sidney and Audrey Irmas Endowed Clinical
Professor of Law
Co-Director, USC Immigration Clinic
Univ. of Southern California, Gould School of Law

Denise Gilman
Clinical Professor, Co-Director—Immigration Clinic
University of Texas School of Law

Alan Hyde
Distinguished Professor and Sidney Reitman Scholar
Rutgers Law School

Frances Miriam Kreimer
Visiting Assistant Professor & Director, Clinic for
Asylum, Refugee and Emigrant Services
Villanova University Charles Widger School of Law

Charles H. Kuck
Adjunct Professor
Emory Law School

Theo Liebmann
Clinical Professor of Law
Hofstra Law School

Laura Lunn
Adjunct Professor of Law
University of Denver Sturm College of Law

Fatma E. Marouf, JD, MPH
Professor of Law
Director, Immigration Rights Clinic
Texas A&M University School of Law

Amelia McGowan
Director of Immigration Law
Mississippi Center for Justice
Adjunct Professor
Mississippi College School of Law

Professor Vanessa Merton
Immigration Justice Clinic
Elisabeth Haub School of Law at Pace University

Katie Herbert Meyer
Asst. Prof. of Practice & Director, Immigration Law Clinic
Washington University School of Law

Eugenio Mollo, Jr.
Adjunct Professor
The University of Toledo College of Law

Raquel Muñiz, JD, PhD
Assistant Professor
Boston College

Michael A. Olivas
Wm B. Bates Distinguished Chair (Emeritus)
University of Houston Law Center

Reena Parikh
Assistant Clinical Professor
Boston College Law School

Anam Rahman
Adjunct Professor of Law
Georgetown Law School

Jaya Ramji-Nogales
Associate Dean for Academic Affairs
I. Herman Stern Research Professor
Temple University, Beasley School of Law

Faiza Sayed
Visiting Professor of Clinical Law
Brooklyn Law School

Irene Scharf
Professor of Law
Director, Immigration Law Clinic
Univ. of Massachusetts School of Law

Andrew I. Schoenholtz
Professor from Practice
Georgetown University Law Center

Erica Schommer
Clinical Associate Professor of Law
St. Mary's University School of Law

Doug Smith
Lecturer in Immigration and Human Rights
Brandeis University
Legal Programs Director
The Right to Immigration Institute

Mark E. Steiner
Professor of Law
South Texas College of Law Houston

David B. Thronson
Alan S. Zekelman Professor of International Human Rights Law
Director, Talsky Center for Human Rights of Women and Children
Michigan State University College of Law

Leti Volpp
Robert D. and Leslie Kay Raven Professor of Law
UC Berkeley School of Law

Jonathan Weinberg
Associate Dean for Research & Faculty Development
Wayne State University

Anna Welch
Clinical Professor
University of Maine School of Law

Mary Yanik
Professor of the Practice
Tulane Law School