No. 20-315

In the Supreme Court of the United States

JOSE SANTOS SANCHEZ AND SONIA GONZALEZ,
PETITIONERS,

v.

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

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

REPLY BRIEF FOR PETITIONERS

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Section 1254a(f)(4) puts TPS recipients on the same footing as individuals who have "lawful status as a nonimmigrant" for purposes of adjusting status under section 1255. The only way to obtain lawful nonimmigrant status is through inspection and admission. *See* 8 U.S.C. § 1184(a)(1), (b). Thus, nonimmigrants are inspected and admitted, and TPS recipients considered as being in lawful nonimmigrant status are considered inspected and admitted. They may adjust status under sections 1255(a) and (k) if they satisfy section 1255(a)'s three enumerated criteria and are not subject to section 1255(c)'s statutory

bars. Some TPS recipients will satisfy those requirements. Others will not. But all TPS recipients are considered inspected and admitted for purposes of section 1255.

According to the government, admission and status are distinct concepts, and section 1254a(f)(4) refers to status while section 1255 refers to admission. That argument ignores the indissoluble relationship between admission and *nonimmigrant* status. One cannot obtain lawful nonimmigrant status without admission. The one counterexample the government musters proves petitioners' rule: Congress provided explicitly that "alien crewmembers" should not be considered admitted—an exception that is necessary *because* admission is otherwise a characteristic of nonimmigrant status.

The government's interpretation of the statute is atextual and implausibly narrow. In the government's view, section 1254a(f)(4) means only that TPS recipients *previously* admitted into lawful nonimmigrant status are in and maintain "lawful status," primarily for purposes of section 1255(c)(2). Section 1254a(f)(4), however, applies to all of section 1255, and Congress specified that TPS recipients would be considered to be in "lawful status *as a nonimmigrant*." Congress drafted differently worded adjustment-of-status provisions in contemporaneous legislation—including the rejected Senate version of the Act—that benefited only individuals already admitted into lawful nonimmigrant status.

The government no longer contends that section 1254a(f)(4) is unambiguous. Instead, the government argues that it has reasonably interpreted ambiguous text and thus should receive *Chevron* deference. The statutory text, however, forecloses the government's construction. And the agency action the government invokes—regulatory preambles, informal adjudications rubber-

stamped by the Attorney General, and adjudicative dicta—do not warrant deference. The Court should reverse the decision below.

I. TPS Recipients Are Considered "Inspected and Admitted" for Purposes of Adjusting Status Under Section 1255

A. The Statutory Text Establishes That TPS Recipients Are Considered "Inspected and Admitted"

Sections 1254a(f)(4) and 1255 create a syllogism. TPS recipients are considered to be in "lawful status as a nonimmigrant" for purposes of section 1255. 8 U.S.C. § 1254a(f)(4). Section 1184, along with other INA provisions, the INA's implementing regulations, and DHS's own guidance, establish that nonimmigrants necessarily are "inspected and admitted." Therefore, TPS recipients are considered "inspected and admitted" for purposes of section 1255, and may adjust status as long as they otherwise satisfy section 1255(a)'s three enumerated criteria and are not subject to statutory bars on adjustment.[1]

1. The government concedes (at 36) the first step of petitioners' syllogism: when one thing is considered as another, it is treated as if it really were the other thing. The government argues, however, (at 36-37) that section 1254a(f)(4) means only "that a TPS recipient is treated as if he really were in lawful status," not "that he is treated as admitted."

That argument echoes the interpretative argument this Court rejected in *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659-60 (2017). There, this Court rejected the respondents' contention that "[i]f a definition or rule has two criteria, and a further provision

[1] The government does not dispute that petitioners satisfy the three enumerated requirements.

expressly modifies only one of them, that provision is understood to affect only the criterion it expands or modifies." *Id.* at 1659. The Court dismissed that reasoning on the ground that the two criteria at issue were "not unrelated" and one "serve[d] as a necessary precondition" of the other. *Id.* at 1661.[2]

2. Admission is a "necessary precondition" of nonimmigrant status. Section 1184, the operative INA provision authorizing the government to confer nonimmigrant status, "presume[s]" that noncitizens are immigrants until they "establish[] . . . at the time of application for admission, that [they are] entitled to a nonimmigrant status." 8 U.S.C. § 1184(b). In other words, admission is the statutory mechanism by which individuals obtain nonimmigrant status.

The government offers no response to section 1184(b). The government (at 38-39) asserts that section 1184(a) "simply authorizes USCIS to set the conditions under which nonimmigrants *may* be admitted," and does not establish "that every person in nonimmigrant status has been admitted." But the government does not identify any other mechanism in the INA for conferring nonimmigrant status. The government likewise does not respond to the many other INA provisions indicating that nonimmigrants are "admitted" into nonimmigrant status. Pets.' Br. 19. Congress even uses the term "admission" as *synonymous* with "status" when it comes to nonimmigrants: "[e]very alien applying for a nonimmigrant visa" must use the application forms for the "various classes of nonimmigrant *admissions*." 8 U.S.C. § 1202(c) (emphasis added).

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[2] The government (at 37-38) dismisses *Advocate Health Care Network* as involving a statutory definition and the word "includes," but neither of those features controlled the Court's syllogistic reasoning.

The government contends (at 39-40) that its regulations and policy materials do not "determine that all nonimmigrants necessarily are" admitted. But the regulations and policy materials plainly treat admission as a prerequisite to nonimmigrant status. Under the regulations implementing section 1184(a)(1), every category of nonimmigrant defined in section 1101(a)(15)—other than crewmembers, discussed below—is "admitted."[3] Notably, when Congress enacted the TPS statute, the contemporaneous regulation implementing section 1255 defined "lawful immigration status" for purposes of section 1255(c)(2) to include individuals "[a]dmitted in nonimmigrant status as defined in section 101(a)(15) of the Act." 8 C.F.R. § 245.1(c)(1)(ii) (1990). DHS's policy manual is equally explicit: "A nonimmigrant is an alien who is admitted to the United States for a specific temporary period of time." USCIS, Policy Manual, Vol. 2, Pt. A, Ch. 1.

The government offers two examples in an attempt to show that admission is not a necessary characteristic of lawful nonimmigrant status. First, the government asserts (at 20, 39) that certain crime victims with "U" nonimmigrant status are "not 'admitted' as the INA defines that term in section 1101(a)(13)(A)." But both the government and the BIA understand U-visa recipients to be admitted, and the grant of U-visa status to be an "admission," even

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[3] *See* 8 U.S.C. § 1101(a)(15) (defining classes of nonimmigrants); 8 C.F.R. § 214.2(a)(1) (A-visas); 214.2(b)(1) (B-visas); 214.2(c)(2), (3) (C-visas); 214.2(e)(19) (E-visas); 214.2(f)(1)(i) (F-visas); 214.2(g)(1) (G-visas); 214.2(h)(1), (13) (H-visas); 214.2(i)(1) (I-visas); 214.2(j)(1) (J-visas); 214.2(k)(6)(ii) (K-visas); 214.2(*l*)(1)(i) (L-visas); 214.2(m)(1) (M-visas); 214.2(n)(3) (N-visas); 214.2(o)(10) (O-visas); 214.2(p)(12) (P-visas); 214.2(q)(2)(i) (Q-visas); 214.2(r)(1) (R-visas); 214.2(t)(9) (S-visas); 214.11(c) (T-visas); 214.14(c)(7), (f)(1) (U-visas); 214.15(a) (V-visas).

when it occurs within the United States. *Matter of Garnica Silva*, 2017 Immig. Rptr. LEXIS 21813, *12-13, *22 (BIA June 29, 2017). As the Board explained, "[t]hat understanding is consistent with the Immigration and Nationality Act and regulations that reference and consistently treat nonimmigrants as 'admitted' aliens." *Id.* at *20; *see* n.3, *supra*; Pets.' Br. 27-28; NILA Amicus Br. 22-23 & n.6.

Second, the government points (at 39) to 8 U.S.C. § 1101(a)(13)(B), which provides that "alien crewmen"—who have nonimmigrant status when their vessel lands, 8 U.S.C. § 1101(a)(15)(D)—"shall not be considered to have been admitted." That exception proves petitioners' rule. To obtain nonimmigrant status, an individual must be admitted. Pp.4-5, *supra*; Pets.' Br. 18-20. When Congress wanted a different rule to apply, it created an explicit statutory exception. 8 U.S.C. § 1101(a)(13)(B).[4] "[T]here would be no need to provide [such] an exception" were nonimmigrants not, as a class, admitted. *Gitlitz v. Comm'r*, 531 U.S. 206, 214 (2001).

TPS recipients, in short, are considered as being in lawful nonimmigrant status. The INA establishes that persons in nonimmigrant status are uniformly admitted—save a single, explicit statutory exception that only confirms the default rule. Because admission is a "necessary precondition" of nonimmigrant status, *Advocate Health*

[4] Congress similarly carved out alien crewmembers from the class of persons eligible to adjust status under section 1255. 8 U.S.C. § 1255(c)(1).

Care Network, 137 S. Ct. at 1661, TPS recipients are considered "inspected and admitted" for purposes of sections 1255(a) and (k).[5]

B. The Government's Defense of the Third Circuit's Reasoning Lacks Merit

1. Echoing the Third Circuit (Pet. App. 7a), the government argues (at 14-16) that TPS recipients who entered the country unlawfully do not satisfy the definition of "admission" in section 1101(a)(13)(A). The statutory definition, however, does not inform the question presented. Section 1254a(f)(4) means that TPS recipients *are considered to be* in lawful status as nonimmigrants for purposes of section 1255, and thus are considered admitted for that purpose—even if they do not meet the definition's terms. Pets.' Br. 20-24; *see Sturgeon v. Frost*, 139 S. Ct. 1066, 1081 (2019). Section 1254a(f)(4) does not render TPS recipients "admitted" for *all* purposes under the INA.

The definition, in any event, could not bear on Congress' intent when it enacted the TPS statute in 1990 because Congress did not enact the definition until 1996. The government responds (at 35) that it was "settled" in 1990 that admission "referred to an authorized entry." But contemporaneous provisions used "admission" in a way inconsistent with physical entry at the border. For example, section 1255(b) called adjustment of status (which necessarily took place from within the country) an "admission." 8 U.S.C. § 1255(b) (1988).

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[5] Petitioners explained—and the government does not dispute—that if petitioners are considered "admitted" for purposes of section 1255(a), they also are considered present "pursuant to a lawful admission" under section 1255(k) for purposes of overcoming the bar in section 1255(c)(2). Pets.' Br. 25.

Finally, the government's argument (at 16) that "admission" refers exclusively to physical entry into the United States is wrong. The statutory definition does not explicitly refer to a physical port of entry, unlike another nearby provision. Pets.' Br. 27 (citing 8 U.S.C. § 1101(a)(15)(T)(i)(II)). And the government previously has urged that "admission" is *not* always a physical entry because "'admission' . . . has so many applications and is used in so many different ways throughout the Act that it would be 'futile' for [the BIA] to restrict its meaning by reference to section 101(a)(13)(A)." *Matter of Alyazji*, 25 I. & N. Dec. 397, 403 (BIA 2011); *see also* pp.5-6, *supra*.

2. The government next argues (at 16-17) that "admission" and "lawful status" are distinct concepts. *See also* Pet. App. 7a. That is sometimes true but beside the point. To obtain "lawful status as a nonimmigrant," an individual *must* be inspected and admitted. Pp.4-5, *supra*. So while other persons with "lawful status"—asylum seekers, for example—may not be admitted, persons with lawful *nonimmigrant* status are. *See Matter of Garnica Silva*, 2017 Immig. Rptr. LEXIS 21813, *20-22 (distinguishing between asylees and nonimmigrants).

The government argues (at 16-17) that "[b]ecause 'admission' and 'lawful status' refer to distinct concepts, establishing one does not automatically establish the other." None of the examples it provides, however, are apposite. The relevant question is whether establishing "lawful status *as a nonimmigrant*" automatically establishes "admission." For the reasons already set forth, it does, which is why the government has to invoke (at 17) asylum status to attempt to make its point.

3. The government points (at 17-21) to an alphabet soup of provisions to show that Congress used different language to allow other categories of noncitizens to adjust

status regardless of their manner of entry. *See also* Pet. App. 9a-10a. Those provisions all postdate Congress' enactment of the TPS statute in 1990, and subsequent legislation is a "hazardous basis for inferring the intent of an earlier Congress." *United States v. Texas*, 507 U.S. 529, 535 n.4 (1993) (citation omitted). These provisions only show, as the government admits (at 21), that Congress has "many ways" to make individuals eligible to adjust status. Section 1254a(f)(4) is one such way.

Section 1255(a). The government notes (at 19-20) that Congress permitted VAWA (Violence Against Women Act) self-petitioners to adjust status in section 1255(a). That drafting choice reflects the fact that VAWA self-petitioners might not already have nonimmigrant status. *See* 8 C.F.R. § 204.2(c). Additionally, Congress did not enact a single provision governing VAWA self-petitioners' benefits and status, and instead scattered VAWA's provisions throughout the INA and enacted them at various times. *Cf.* 8 U.S.C. § 1254a(f). As a result, it made VAWA self-petitioners eligible to adjust directly to lawful-permanent-resident status by amending section 1255(a).

Sections 1255(g), (h), and (i). The government next cites (at 20) sections 1255(g) and (h), which deem certain "special immigrants" to be "paroled" for purposes of section 1255(a). 8 U.S.C. §§ 1255(g), (h). The government also cites section 1255(i), under which certain noncitizens who filed petitions before May 2001 may adjust status "notwithstanding" subsections 1255(a) and (c). Sections 1255(g), (h), and (i) cover individuals who do not have nonimmigrant status. If these individuals were considered as "being in . . . nonimmigrant status" like TPS recipients, there would be no need to reference parole or status adjustment explicitly.

The government relatedly argues (at 40-41) that Congress could have amended section 1254a(f)(4) in 1991 when it enacted section 1255(h), after the agency articulated its reading of section 1254a(f)(4). The government does not advance a ratification argument, nor could it. "[I]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *United States v. Wells*, 519 U.S. 482, 496 (1997) (citation omitted). Such reasoning would be all the more "treacherous" here where the at-issue interpretation was set forth only in an informal agency opinion and a regulatory preamble. *Id.*; *see* Part III, *infra*.

The 1991 statute, moreover, supports petitioners' interpretation. There, Congress specified that TPS recipients returning from authorized temporary travel abroad—as petitioners did, *see* Pets.' Br. 13 n.7—should be "*inspected and admitted* in the same immigration status [they] had at the time of departure." Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, Title III, § 304(c)(1)(A) (emphasis added) (codified as 8 U.S.C. § 1254a Note). That language demonstrates that Congress understood TPS recipients like petitioners to be "inspected and admitted" irrespective of the manner of original entry.

Section 1255(l). The government compares (at 17) section 1254a(f)(4) to section 1255(*l*), which contains special adjustment-of-status provisions for victims of sexual or labor trafficking (T-visa recipients). The statutory text assumes that T-visa holders, like other nonimmigrants, are "admitted into the United States"—even though T-visa status is usually obtained from *within* the United States. 8 U.S.C. § 1255(*l*)(1); NILA Amicus Br. 23.

Section 1255(m). The government invokes (at 20-21) section 1255(m), which allows U-visa recipients to adjust status if they were "admitted into the United States (or otherwise provided nonimmigrant status) under section 1101(a)(15)(U)" and meet other requirements. 8 U.S.C. § 1255(m)(1). As already discussed, U-visa holders *are* admitted. Pp.5-6, *supra*; *see also* NILA Amicus Br. 22-24 & n.6. The government emphasizes the provision's parenthetical reference to individuals "otherwise provided nonimmigrant status," but the government previously has explained that this phrase refers to persons who had another nonimmigrant status before changing to U status under section 1258. *Matter of Garnica Silva*, 2017 Immig. Rptr. LEXIS 21813, *18 n.11; *see* 8 U.S.C. § 1258(b).[6]

C. The Government's Interpretation Is Implausibly Narrow and Atextual, and Ignores Contemporaneous Legislation

1. The government contends (at 26-27) that section 1254a(f)(4) (1) allows admitted nonimmigrants who lost nonimmigrant status after receiving TPS to avoid the bar on removal in section 1255(c)(2), and (2) allows admitted nonimmigrants who lost status less than 180 days before receiving TPS to obtain relief under 1255(k).[7]

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[6] The government also claims support (at 21) from the draft American Dream and Promise Act of 2021, H.R. 6, 117th Cong., which clarifies that TPS recipients are considered inspected and admitted. Given the existing circuit split on the question presented, no reason exists to infer that the Act's sponsors agree with the government's interpretation—as the provision's title, "Clarification," establishes. *Id.* § 203.

[7] The government (at 26) accuses petitioners of "misdescrib[ing]" the government's position. Petitioners accurately describe the position the government took below. U.S. CA3 Br. 3, 23-24.

When Congress enacted the TPS statute in 1990, however, it could not have had section 1255(k)—which Congress enacted seven years later—in mind. U.S. Br. 24 n.8. In the government's view, therefore, section 1254a(f)(4) originally operated only to allow the subset of TPS recipients subject to section 1255(c)(2) to overcome that provision if they had nonimmigrant status when they received TPS. But section 1254a(f)(4) applies by its terms to all TPS recipients and cross-references the entirety of section 1255. If Congress "intended to refer" only to section 1255(c)(2), "it presumably would have done so—just by adding a letter, a number, and a few parentheticals." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018).

The government responds (at 28) that Congress may have avoided an explicit cross-reference "for the simple reason that it recognized that other portions of Section 1255 could be amended to include lawful-status requirements." But the government's speculation is not a valid reason to ignore basic rules of statutory interpretation. The government's interpretation of section 1254a(f)(4) remains illogically narrow.

To be clear, petitioners do not dispute that section 1254a(f)(4) serves the narrow functions identified by the government, in addition to considering TPS recipients inspected and admitted for purposes of section 1255(a). Congress enacted broad language that served multiple functions, as the statute's cross-reference to the entirety of sections 1255 and 1258 confirms. The government's interpretation improperly "cherry pick[s]" the narrowest of those functions. *Cyan*, 138 S. Ct. at 1070.

2. Under the government's view, the only TPS recipients who benefitted from section 1254a(f)(4) when Congress enacted the statute were those *already* "in" lawful

nonimmigrant status when receiving TPS. Pp.11-12, *supra*. The government's interpretation thus renders the words "being in" superfluous because Congress could have achieved its supposed objective using only the word "maintaining." Pets.' Br. 31-33. The government responds (at 27) that, even if it is "conceptually possible" for Congress to have used only the word "maintaining," Congress sensibly used both words to "track[] the lawful-status requirements in Section 1255 precisely."

Section 1254a(f)(4), however, does not "track[] the lawful-status requirements in Section 1255 precisely." Section 1255(c)(2) requires only "lawful status," Pets.' Br. 33, but Congress added the words "as a nonimmigrant" in section 1254a(f)(4). The government's tracking argument improperly treats the words "as a nonimmigrant" as surplusage. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). The government conspicuously excises those words throughout its brief. *See, e.g.*, U.S. Br. 11 (section 1254a(f)(4) "authorizes all TPS recipients to establish lawful status"); *id.* at 37 (Congress "treated [TPS recipients] as having lawful status").

The government argues (at 29) that Congress used the words "as a nonimmigrant" in section 1254a(f)(4) because "both Sections 1255 and 1258 describe procedures available to 'nonimmigrant[s].'" That observation proves petitioners' argument. As the government concedes, section 1255 describes "procedures available to 'nonimmigrant[s]'" even though section 1255(a)—the operative provision—does not contain the word "nonimmigrant." Section 1255(a) uses the phrase "inspected and admitted" to describe persons having nonimmigrant status. The title of section 1255—"Adjustment of status of *nonimmigrant* to that of person admitted for permanent resi-

dence"—confirms Congress' understanding that nonimmigrants qualify for adjustment under section 1255(a) because they are inspected and admitted. Pets.' Br. 26.

3. In addition, contemporaneous legislation demonstrates that Congress knew how to write, in far more precise terms, statutes that did what the government claims this statute does. *See* Pets.' Br. 33-35 (citing Emergency Chinese Immigration Relief Act of 1989, H.R. 2712, 101st Cong. § 2(b); Chinese Temporary Protected Status Act of 1989 (CTPSA), H.R. 2929, 101st Cong., § 3(b); Executive Order 12,711 § 3(b), 55 Fed. Reg. 13,897 (Apr. 11, 1990)). Other legislation and an executive order specifically limited the adjustment-of-status benefit to persons who had nonimmigrant status as of a certain date, and provided that those persons would be considered as "maintain[ing]" that status for adjustment-of-status purposes. Pets.' Br. 33-35. The "natural implication" of Congress' choice of broader language in section 1254a(f)(4) is that it "did not intend" the narrower alternative. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) (citation omitted).

The divergence in statutory language is most glaring in the draft CTPSA legislation—which, importantly, first contained the text of what became section 1254a(f)(4). As petitioners explained (at 35), the CTPSA would have created a TPS-like program. Future beneficiaries of that program would be considered as "being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjusting status. H.R. 2929, 101st Cong. § 2(f)(5). Separately, the bill's "transition" section provided that "in the case of an alien who is a [Chinese national], 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)." *Id.* § 3(b).

These provisions' cohabitation in the very same predecessor bill—a fact the government's brief ignores—proves that Congress' omission of language limiting the benefit of section 1254a(f)(4) to persons already having nonimmigrant status and its addition of the phrase "being in" were intentional. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

The government speculates that "[t]hose provisions may have been drafted that way simply to follow the course charted by past EVD orders, including President Bush's Executive Order for Chinese nationals." U.S. Br. 30; *see also id.* at 23. That response makes no sense: the draft legislation *predated* President Bush's 1990 executive order for Chinese nationals. Textual differences between that executive order and the TPS statute, moreover, confirm petitioners' reading. The executive order instructed the Attorney General not to remove for a determined period *any* Chinese nationals present in the country on or after June 5, 1989—irrespective of manner of entry. 55 Fed. Reg. 13,897. Its adjustment-of-status provision, however, was limited to "such [Chinese] nationals who were in lawful status" on or after that same date. *Id.*

II. The History and Purpose of the TPS Statute Confirm Petitioners' Interpretation

1. The government's interpretation improperly undoes the legislative compromise that produced the TPS statute. The Senate initially proposed that certain Chinese nationals "present in the United States in the lawful status of a nonimmigrant" should be "considered as having continued to maintain" lawful status. S. 358, 101st Cong. § 302(b) (1989) (passed Senate July 13, 1989). Congress rejected the Senate's narrow formulation in favor of

the broader language in section 1254a(f)(4), while trimming other aspects of the House legislation, adding the supermajority provision governing *legislative* adjustment of status, and designating Salvadorans as the first TPS designees. *See* Immigration Law Professors' Amicus Br. 16-25; Pets.' Br. 39-41.

The government offers *no response* to that history. The government's interpretation essentially resurrects the rejected Senate formulation. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted); *see also Russello*, 464 U.S. at 23-24.

The government's competing historical arguments are unconvincing. The government claims (at 5, 25, 32) that Congress enacted the TPS statute "to codify and standardize" the prior policy of extended voluntary departure and "put TPS recipients on the same footing as beneficiaries of pre-TPS EVD relief." The statute says no such thing. Section 1254a(f)(4) puts TPS recipients on "equal footing," *S. Pac. Co. v. Gileo*, 351 U.S. 493, 499 (1956), with persons who have "lawful status as a nonimmigrant," for purposes of adjusting status. The best evidence of Congressional intent is the text—not the "flawed" extended voluntary departure regime. U.S. Br. 30.

In any event, the history of extended voluntary departure does not support the government's supposition that Congress would not have intended for some TPS recipients who entered without inspection to adjust status. U.S. Br. 25. In 1987, for example, Congress authorized certain extended-voluntary-departure beneficiaries to adjust status regardless of whether they entered lawfully. Pub. L.

No. 100-204, § 902(a), 101 Stat. 1400-1401 (1987); U.S. Br. 23. And Congress was aware that many TPS recipients would "put down roots" in this country because many safe-haven situations would be "semi-permanent." *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, 26, 45 (1987).

Finally, the government does not dispute that Congress knew that hundreds of thousands of "undocumented" Salvadorans were in the United States but nonetheless designated Salvadorans for TPS. H.R. Rep. No. 101-244, at 11 (1989); *see* Immigration Law Professors' Amicus Br. 17. If Congress intended only to confer an adjustment-of-status benefit on Salvadorans who *already* possessed lawful nonimmigrant status, it would have done so clearly, using the Senate's formulation.

The government contends (at 31) that under petitioners' interpretation many Salvadorans still would have been ineligible to adjust status under section 1255(c)(2) if they engaged in unauthorized employment or failed to maintain a lawful status since entry. Petitioners are not arguing to the contrary. And, as the government concedes (at 32 n.9), persons applying to adjust status based on immediate family relationships and special immigrants are not subject to section 1255(c)(2).

2. The government's "purpose" arguments also miss the mark.

As petitioners explained (at 36-38), the government's position produces absurd results. Consider, for example, two individuals who entered the country, obtained TPS, married, and started a family. AILA Amicus Br. 20. Under the government's interpretation, because the wife entered lawfully on a tourist visa but then overstayed her

visa, she may adjust status under section 1255(a) as an immediate relative of her U.S. citizen son. But, because the husband entered unlawfully, he must leave his family and depart the country to attempt to obtain an immigrant visa. Section 1254a(f)(4) contains no hint that Congress intended this result.

The government attempts to mitigate the life-threatening implications of its interpretation by suggesting (at 32) that TPS recipients could obtain visas from consulates in third countries as opposed to their still-dangerous home countries. That approach is all but impossible in practice because it would require a third country to confer immigration status on a TPS recipient, in some cases for up to ten years. *See* Pets.' Br. 38. And the State Department itself cautions that individuals "who have been out of status in the United States because they violated the terms of their visa or overstayed the validity indicated on their admission . . . must apply in the country of [their] nationality or legal permanent residence."[8]

Finally, the government (at 31-33) contends that petitioners' interpretation undermines Congress' intent to provide "temporary" protection to TPS recipients. But nonimmigrants—whom the government concedes can adjust status—also have temporary status. Nonimmigrant status is often more "temporary" than TPS. The government provides no reason to think that Congress intended to distinguish in section 1254a(f)(4) between TPS recipients who were admitted as nonimmigrants but then over-

[8] https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/nonimmigrants-present-visiting-canada-mexico.html.

stayed their visas for years, on the one hand, and TPS recipients who entered without inspection, on the other hand.

III. The Government's Interpretation Is Not Entitled to Deference

The government requests *Chevron* deference based on three agency actions: (1) a 1991 regulation parroting the statutory language and an accompanying preamble, (2) the AAO's informal adjudication in *H-G-G-*, and (3) the BIA's decision in *Padilla-Rodriguez*. None exercised congressionally delegated authority to "make rules carrying the force of law" on the question presented. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Even if the statute were ambiguous, the Court should not defer. *See generally* Morrison & Wolfman Amicus Br.

1. The government argues (at 42-43, 46-47)—for the first time—that the TPS implementing regulation and accompanying preamble issued almost 30 years ago warrant *Chevron* and *Kisor* deference. That argument, which the government did not present below or in its brief in opposition, is presumptively forfeited. *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37-38 (2015).

In any event, the government's argument lacks merit. The government claims (at 42) that the regulation "clarif[ies] that TPS recipients are not entitled to unstated benefits, such as the ability to overcome prior acts that triggered disqualification from adjustment to LPR status." The regulation does no such thing. Section 244.10(f)(2)(iv) explains that, after TPS is granted, USCIS must provide notice of the benefits set out in 8 U.S.C. § 1254a(f)(4). In so doing, the regulation simply parrots the language of (f)(4). Section 244.10(f)(3), in turn, explains that TPS recipients are not entitled to benefits

other than those set forth in the statute—without construing the language of (f)(4). The regulation provides no insight to section 1254a(f)(4)'s meaning.

The government further contends (at 43, 46) that the accompanying "explanatory comment"—*i.e.*, the regulation's preamble—deserves *Chevron* or *Kisor* deference. That argument also fails. To start, the government cannot claim *Kisor* deference for its preamble because the relevant regulation simply "restate[s] the terms of the statute itself," as discussed above. *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006).

Moreover, the preamble is not entitled to *Chevron* deference because it "lack[s] the force of law." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Unlike legislative rules promulgated in the Code of Federal Regulations, the preamble does nothing more than "advise the public of the agency's construction of the statute," *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) (citation omitted)—it is prototypically interpretive guidance not entitled to *Chevron* deference, *see Mead*, 533 U.S. at 232.

Finally, interpretations first announced in regulatory preambles provide insufficient notice and opportunity for comment. *See Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (declining even to give *Skidmore* deference to a preamble); *Kingdomware Techs. v. United States*, 136 S. Ct. 1969, 1979 (2016) (declining to decide whether a regulatory preamble warrants deference). The agency did not notify the public that it was contemplating a substantive interpretation of section 1254a(f)(4). The interim rule, like the final rule, merely parroted the statutory language. 56 Fed. Reg. 618, 621 (Jan. 7, 1991). In response to the interim rule, the agency received comments suggesting that TPS recipients should be entitled to adjust status even if they entered without inspection, 56 Fed.

Reg. 23,495 (May 22, 1991). The agency rejected that suggestion in the final rule's preamble, setting forth in three sentences its view of the statute. That procedure failed to provide "fair notice" to the public. *Long Island Care at Home v. Coke*, 551 U.S. 158, 174 (2007).

2. The AAO's "approved" decision in *Matter of H-G-G-*, 27 I. & N. Dec. 617 (AAO 2019), likewise does not warrant deference. *See* Pets.' Br. 44-47; Morrison & Wolfman Amicus Br. 4-27.

The government's claim (at 48) that *H-G-G-* resulted from "formal administrative procedure" is incorrect. The government does not dispute that litigants before USCIS or the AAO are not entitled to a hearing on the record, that noncitizens have no right to appeal denials of adjustment of status to the AAO, that AAO proceedings are entirely opaque, or that litigants are ordinarily unrepresented. The government responds (at 48) only that the parties and an amicus filed briefs in that particular proceeding, and that the AAO produced an "extensive," "published" opinion, but those facts do not amount to "formal administrative procedure." And the relevant question is whether this "category of rulings"—*i.e.*, approved AAO decisions in general—warrants *Chevron* deference, not whether this particular decision does. *Mead*, 533 U.S. at 233.

The government also claims (at 48) that the Attorney General's approval of *H-G-G-* constitutes "formal administrative procedure," and it faults petitioners for failing to show that the Attorney General did not "focus[] fully" on the issue. The Attorney General, however, did not afford the applicant in *H-G-G-* or the public any procedure at all, and nothing is known about the process by which he "approved" *H-G-G-*. Pets.' Br. 46. The government identifies no procedures that ensure that an Attorney General's

rubber-stamping of a separate agency's informal adjudication reflects his fair "deliberation." *Mead*, 533 U.S. at 230.

Finally, although the government claims (at 48) that the AAO "published its decision to serve as precedent[]," it does not dispute that approved AAO decisions are not decisions of the Attorney General himself and do not bind immigration judges or the BIA. *See* Pets.' Br. 47. And an agency cannot buy itself *Chevron* deference simply by labeling an adjudication "precedential." *Mead*, 533 U.S. at 232.

3. Nor does the BIA's decision in *Matter of Padilla-Rodriguez*, 28 I. & N. Dec. 164 (BIA 2020), warrant deference. Pets.' Br. 47-48; Morrison & Wolfman Amicus Br. 27-31. The government does not dispute that BIA dicta should not receive *Chevron* deference. It argues (at 47) only that the BIA's discussion of section 1254a(f)(4) was not dicta. That is wrong. The noncitizen in *Padilla-Rodriguez* did not currently have TPS, was not seeking to adjust status, and did not claim any benefit under subsection (f)(4). *See* 28 I. & N. Dec. at 165. To be sure, the pro se noncitizen invoked case law applying section 1254a(f)(4), but the BIA correctly held that case law "inapplicable." *Id.* at 168. Nonetheless, the BIA purported to decide the scope of section 1254a(f)(4). *Id.* at 164, 168. The BIA is not authorized to promulgate rules; it may only decide "cases before it," *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citation omitted), and the question presented here was not before it.

4. Finally, the claimed consistency of the agencies' interpretation does not warrant deference. *See* U.S. Br. 45 (citing *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

As an initial matter, the government has not consistently interpreted the statute to foreclose adjustment for *all* TPS recipients who entered unlawfully. For nearly thirty years, the government permitted TPS recipients who received advance permission to travel abroad to adjust status under section 1255(a) on the ground that they were "paroled." This interpretation primarily benefitted TPS recipients adjusting status as immediate relatives of U.S. citizens. In 2020, the AAO reversed the agency's position but applied its new position only prospectively. *Matter of Z-R-Z-C-*, Adopted Decision 2020-02, 2020 WL 5255637 (AAO Aug. 20, 2020).

The government's position that TPS recipients are not deemed admitted for purposes of section 1255, although consistent, originates from a 1991 opinion letter with a scant two sentences of reasoning. 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). The 1991 regulatory preamble is just as cursory. 56 Fed. Reg. 23,495. And a 1993 opinion letter—which addressed the separate question (not presented here) whether a grant of TPS overcomes the eligibility bar in section 1255(c)(2)—misunderstood the relevant legislative history. *See* INS General Counsel Op. No. 93-59, *Temporary Protected Status and eligibility for adjustment of status under Section 245*, 1993 WL 1504006, at *2, 4 (Aug. 17, 1993). The agency's initial interpretations were the antithesis of "careful consideration." *Barnhart*, 535 U.S. at 222. And the agencies' recent adherence to flawed reasoning does not cure the flaws.

Nor is the question presented an "interstitial" question implicating USCIS's expert implementation of the INA. *Id.* Petitioners do not contend that a grant of TPS is an "admission" for all purposes of the "administration

of the statute." *Id.* Whether section 1254a(f)(4) considers TPS recipients as "admitted and inspected" for the limited purpose of adjusting status is a pure question of law that should be decided by courts.

* * *

The government does not argue that it should prevail under the less deferential framework of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Accordingly, even if the statute were ambiguous, the Court should accord the government's interpretation no deference.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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