No. 20-315

In the Supreme Court of the United States

JOSE SANTOS SANCHEZ, ET AL., PETITIONERS

v.

CHAD WOLF, ACTING SECRETARY OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that in order to be eligible to adjust his immigration status to that of a lawful permanent resident, an alien who is present in the United States must generally have been "inspected and admitted or paroled" into the United States, 8 U.S.C. 1255(a), and must also have "maintain[ed] * * * a lawful status" for a specified period, 8 U.S.C. 1255(c)(2); see 8 U.S.C. 1255(k)(2)(A).

A separate provision of the INA authorizes the Secretary of Homeland Security to grant nationals of designated foreign states "temporary protected status" if conditions in their home country (such as a natural disaster) make it unsafe for them to return there. 8 U.S.C. 1254a(b)(1). "During a period in which an alien is granted temporary protected status," he is generally not subject to removal from the United States and, "for purposes of adjustment of status under section 1255 * * * shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. 1254a(f)(4). The question presented is:

Whether an alien who has been granted temporary protected status after entering the country illegally, without being inspected and admitted or paroled into the United States, must be treated not only as "maintain[ing] * * * a lawful status," 8 U.S.C. 1255(c)(2), but also as having been "inspected and admitted or paroled" into the United States for purposes of eligibility for adjustment of status, 8 U.S.C. 1255(a).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.J.):

Sanchez v. *Johnson*, No. 16-651 (Dec. 7, 2018)

United States Court of Appeals (3d Cir.):

Sanchez v. *Secretary U.S. Dep't of Homeland Sec.*, No. 19-1311 (July 22, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 967 F.3d 242. The opinion of the district court granting petitioners' motion for summary judgment (Pet. App. 21a-38a) is not published in the Federal Supplement but is available at 2018 WL 6427894.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2020. The petition for a writ of certiorari was filed on September 8, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that certain aliens present in the United States may apply to adjust their immigration status to that of a lawful permanent resident.

8 U.S.C. 1255. The INA establishes several criteria that an alien generally must meet in order to be eligible for such adjustment of status.

The threshold criterion is that the alien must either have been "inspected and admitted or paroled into the United States" or "hav[e] an approved petition for classification as a [Violence Against Women Act (VAWA)] self-petitioner." 8 U.S.C. 1255(a). Only the former of those threshold qualifications—concerning inspection and admission or parole—is directly at issue here.[1] As relevant to that qualification, the INA defines "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A).

In addition to satisfying one of those threshold requirements, an applicant for adjustment of status generally must not have engaged in "unauthorized employment" prior to applying for adjustment of status, must not be "in unlawful immigration status on the date of filing the application for adjustment of status," and must not have "failed (other than through no fault of his own or for technical reasons) to maintain continuously a lawful status since entry into the United States." 8 U.S.C. 1255(c)(2). And the INA further provides that the applicant must be "eligible to receive an immigrant visa and [be] admissible to the United States for permanent residence, and * * * an immigrant visa [must be] immediately available to him at the time his application is filed." 8 U.S.C. 1255(a).

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[1] The INA defines a "VAWA self-petitioner" to include certain aliens who have been subject to particular forms of abuse or deception by U.S. citizens. See 8 U.S.C. 1101(a)(51). Petitioners do not qualify as VAWA self-petitioners and do not invoke that provision.

Congress also has created exceptions to certain of these requirements. As relevant here, the requirement in Section 1255(c)(2) that an alien not previously have engaged in unauthorized employment and have maintained lawful status continuously since entry is inapplicable to certain employment-based adjustment-of-status applicants if they are "present in the United States pursuant to a lawful admission" at the time of their application and have not "subsequent to such lawful admission * * * for an aggregate period exceeding 180 days * * * failed to maintain, continuously, a lawful status" or "engaged in unauthorized employment." 8 U.S.C. 1255(k)(1), (2)(A), and (B).

b. The INA separately provides that the Secretary of Homeland Security may grant nationals of a foreign state who are present in the United States "temporary protected status" (TPS), on a case-by-case basis, if the Secretary has determined that conditions in their home country (such as a natural disaster) make it unsafe for them to return there. 8 U.S.C. 1254a(a)(1)(A); see 8 U.S.C. 1254a(b)(1).[2] When an alien is granted TPS, he is not subject to removal from the United States "during the period in which such status is in effect," and is authorized to obtain employment. 8 U.S.C. 1254a(a)(1). And "for purposes of adjustment of status under section 1255," the alien with TPS "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for as long as the TPS designation remains in effect. 8 U.S.C. 1254a(f)(4). But the alien "shall not be considered to be permanently residing in the United States

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[2] Congress originally assigned responsibility for TPS designations to the Attorney General, but reassigned that responsibility to the Secretary of Homeland Security in 2002. See 6 U.S.C. 557.

under color of law"; "may be deemed ineligible for public assistance by a State"; and may travel abroad only with the prior consent of the Secretary of Homeland Security. 8 U.S.C. 1254a(f)(1)-(3).

2. Petitioners Jose Santos Sanchez and Sonia Gonzalez are husband and wife and citizens of El Salvador who entered the United States without inspection and admission (or parole) in 1997 and 1998, respectively. Pet. App. 3a. In March 2001, the United States designated El Salvador under the TPS program after the country experienced three earthquakes. See 8 U.S.C. 1254a(b)(1)(B); *Designation of El Salvador Under Temporary Protected Status Program*, 66 Fed. Reg. 14,214, 14,214 (Mar. 9, 2001). Petitioners were granted TPS in 2001 and have held that status continuously since that time. Pet. App. 3a, 22a.

In 2014, petitioners applied for employment-based adjustment of status under 8 U.S.C. 1255; Sanchez was the beneficiary and Gonzalez was a derivative beneficiary of his application. Pet. App. 4a, 23a. In 2017, U.S. Citizenship and Immigration Services (USCIS) denied Sanchez's application because he entered the United States without inspection and admission and thus was statutorily ineligible under Section 1255(a). *Id.* at 39a-40a, 45a-47a. Consistent with the agency's longstanding guidance, USCIS concluded that Sanchez's receipt of TPS did not constitute an admission into the United States. *Ibid.* USCIS also decided that his pre-TPS period of unlawful employment from 1997 until his receipt of TPS made him ineligible for an adjustment of status. *Id.* at 40a, 46a; see 8 U.S.C. 1255(c)(2). As an employment-based applicant, Sanchez had argued that Section 1255(k) made that bar inapplicable, but USCIS concluded that Section 1255(k)'s exception is available

only for an alien who is "present in the United States pursuant to a lawful admission," 8 U.S.C. 1255(k)(1), and that Sanchez's receipt of TPS was not an admission. Pet. App. 46a. USCIS denied Gonzalez's application because its success depended on the success of Sanchez's application. *Id.* at 49a-50a.

3. Petitioners filed suit, arguing that the denial of their applications violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and their due-process rights because their grant of TPS qualified as an admission under Section 1255. Pet. App. 23a-24a. They also sought mandamus relief. *Id.* at 23a.

The district court granted summary judgment to petitioners on their APA claim, holding that a grant of TPS is considered an inspection and admission for purposes of adjustment of status under Section 1255. Pet. App. 30a-34a, 34a-35a, 37a. The court stated that because an alien with TPS is "'considered' as being in, and maintaining, lawful status as a nonimmigrant," that lawful nonimmigrant status renders an alien with TPS "'inspected and admitted' under [Section] 1255." *Id.* at 31a (quoting 8 U.S.C. 1254a(f)(4) and 1255(a)). The court reasoned that "a person must first have lawful status in order to 'maintain' that lawful status." *Id*. at 33a (emphasis removed). Based on that analysis, the court ruled that the agency acted arbitrarily and capriciously in denying petitioners' applications and remanded to USCIS for further review of their applications. *Id.* at 35a, 37a-38a.

The district court dismissed the mandamus claim as moot and rejected the due-process claim because petitioners could not "show they are entitled to the adjustment of status." Pet. App. 36a-37a.[3]

4. The court of appeals reversed. Pet. App. 1a-20a. It held that "a grant of TPS does not constitute an 'admission' into the United States under [Section] 1255." *Id.* at 20a.

Starting with the statutory text, the court of appeals observed that "admission" and "status" are distinct concepts in immigration law. Pet. App. 7a. It rejected the argument, advanced by petitioners, that by "obtaining lawful nonimmigrant status, the alien goes through inspection and is deemed admitted." *Id.* at 8a (citation omitted). The court reasoned that "the text of [Section] 1254a does not mention that a grant of TPS is (or should be considered) an inspection and admission." *Ibid.* The court also stated that "a grant of TPS cannot be an 'admission' because [Section] 1254a requires an alien to be present in the United States to be eligible for TPS." *Ibid.* And the court further observed that an alien may be granted lawful status without an admission, as occurs when a person is granted asylum. *Ibid.*

The court of appeals determined that the INA's statutory context and structure also supported its conclusion. Pet. App. 9a. The court noted that Congress has created explicit exceptions to Section 1255(a)'s admission requirement for other classes of aliens, but did not

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[3] The reproduction of the district court's opinion in the Petition Appendix indicates in its opening paragraph that the court granted petitioners' mandamus and due process claims. See Pet. App. 21a. That is incorrect, apparently reflecting a typographical error introduced during the preparation of the Petition Appendix. See D. Ct. Doc. 35, at 1 (Dec. 7, 2018).

do so for TPS recipients. *Ibid.* (discussing 8 U.S.C. 1255(h) and (i)); see 8 U.S.C. 1255(h)(1) (providing that "a special immigrant described in section 1101(a)(27)(J) of this title * * * shall be deemed, for purposes of subsection (a), to have been paroled into the United States"); 8 U.S.C. 1255(i)(1)(A)(i) (providing that certain "alien[s] physically present in the United States * * * who * * * entered the United States without inspection * * * may apply * * * for the adjustment of * * * status to that of an alien lawfully admitted for permanent residence"). The court presumed that Congress had acted "intentionally and purposely in the disparate inclusion or exclusion" of that language, evincing an intent not to exempt TPS recipients from the admission or parole requirement. Pet. App. 9a (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)).

The court of appeals further reasoned that reading Section 1254a(f)(4) both to provide lawful status and to constitute an admission would render Section 1254a(h) —which requires a supermajority of the Senate to approve legislation that adjusts the status of any TPS recipient—superfluous. Pet. App. 10a. And the court also explained that "[i]f being considered in lawful nonimmigrant status was the same as being inspected and admitted or paroled," Congress would not have "list[ed] inspection and admission or parole as a threshold requirement in [Section] 1255(a) and failure to maintain lawful status as a bar to eligibility * * * in [Section] 1255(c)(2)." *Id.* at 10a-11a. If admission and lawful status were instead intertwined in the fashion petitioners advocated, "anyone who is considered in lawful status would be able to satisfy [Section] 1255(a)'s admission requirement, thus rendering the two provisions superfluous." *Id.* at 11a.

Finally, the court of appeals observed that its reading was consistent with Congress's purpose in enacting the TPS provisions as a temporary protection designed to shield from removal aliens already in the country, not to "open the door to more permanent status adjustments that Congress did not intend." Pet. App. 11a.

The court of appeals recognized that its decision was inconsistent with the Sixth Circuit's decision in *Flores* v. *USCIS*, 718 F.3d 548 (2013), and the Ninth Circuit's decision in *Ramirez* v. *Brown*, 852 F.3d 954 (2017), but it "respectfully disagree[d] with those decisions." Pet. App. 11a; see *id.* at 11a-20a (explaining the court's disagreement with *Flores* and *Ramirez*).

DISCUSSION

The court of appeals correctly determined that a grant of TPS allows an alien to "maintain * * * lawful status" for purposes of establishing eligibility for adjustment of status, 8 U.S.C. 1255(c)(2), but does not by itself satisfy the separate eligibility requirement that the alien have been "inspected and admitted or paroled" into the United States, 8 U.S.C. 1255(a). Petitioners are correct, however, that the decision below implicates a recurring question of substantial importance on which the circuits are divided, and that this case presents an appropriate vehicle in which to resolve that question. See Pet. 15-25. Accordingly, the petition for a writ of certiorari should be granted.

1. The court of appeals correctly held that petitioners are ineligible for an adjustment of status because their receipt of TPS did not constitute an admission or parole into the United States under 8 U.S.C. 1255.

a. As relevant here, an alien must generally satisfy two requirements to be eligible for adjustment of status under Section 1255: he must have been "inspected and

admitted or paroled into the United States," 8 U.S.C. 1255(a), and he must not have "failed * * * to maintain continuously a lawful status" for a designated period prior to, and encompassing, the date of his application, 8 U.S.C. 1255(c); see 8 U.S.C. 1255(k)(2)(A).

Those requirements are distinct, and the statutory provision addressing the effect of a grant of TPS on eligibility for adjustment of status—Section 1254a—speaks only to the second of them. It states that "for purposes of adjustment of status under section 1255," an alien with TPS "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. 1254a(f)(4). It does not, by contrast, state that such an alien shall be considered as being "admitted" or "paroled" into the United States. Indeed, the terms *admitted* and *admission* appear in 8 U.S.C. 1254a only to advise that "[n]othing in [Section 1254a] shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for [TPS]." 8 U.S.C. 1254a(c)(5). That strongly indicates that Congress did not understand an admission to the United States to be a constituent part of a grant of TPS.

Accordingly, an alien who has already been inspected and admitted into the United States may rely on his TPS status to satisfy Section 1255's requirement that he be in and maintain lawful status in order to be eligible for adjustment, even if the lawful status he received when he originally entered the country lapses. See 8 U.S.C. 1254a(f)(4). But if an alien has not already been admitted or paroled into the United States, then receiving a grant of TPS will not satisfy the requirement of such "admi[ssion] or parole[]" in order to obtain a further adjustment of status to that of a permanent

resident, 8 U.S.C. 1255(a). An alien who entered the country without inspection and admission or parole and finds himself in that situation will be permitted to remain in the United States "during the period in which [his temporary protected] status is in effect," 8 U.S.C. 1254a(a)(1)(A), but is not eligible to adjust his status to that of a lawful permanent resident under Section 1255(a).

b. Other provisions of the INA reinforce that admission and lawful status are distinct concepts that hold separate legal significance, such that establishing one does not necessarily establish the other. The INA defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). That confirms that the requirement in Section 1255(a) that an alien have been "inspected and admitted" refers to the particular historical event that includes affirmative authorization specifically with respect to the admission.

"[L]awful status," in contrast, is not a particular historical event but rather the legal condition held by the alien. See 16 *The Oxford English Dictionary* 573 (2d ed. 1989) (defining "status" as "[t]he legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations; condition in respect, e.g., of liberty or servitude, marriage or celibacy, infancy or majority"). Though not defined in the INA, the term naturally refers to the alien's permission to be present in the United States. Cf. *In re Blancas-Lara*, 23 I. & N. Dec. 458, 460 (B.I.A. 2002) (holding that the term "'status'" in 8 U.S.C. 1229b(a)(2) "denotes someone who possesses a certain legal standing, e.g., classification as an immigrant or nonimmigrant"); 8 C.F.R.

245.1(d)(1) (listing types of "lawful immigration status").

Because the terms refer to distinct immigration-law concepts, establishing one does not automatically establish the other. For example, an alien who was lawfully admitted into the United States as a nonimmigrant can lose his lawful status by overstaying his visa. 8 U.S.C. 1227(a)(1)(B). Such an alien has been admitted, but has not maintained his lawful status. Conversely, an alien who entered the country illegally can subsequently obtain lawful status, as when an alien applies for and obtains asylum during removal proceedings stemming from his unlawful entry. See, *e.g.*, *In re V-X-*, 26 I. & N. Dec. 147 (B.I.A. 2013) (holding that a grant of asylum in the United States is not an admission); 8 C.F.R. 245.1(d)(1)(iv) (asylees are in lawful status). Such an alien has lawful status, but has not been admitted.

A grant of TPS is similar, in this respect, to a grant of asylum: an alien need not have been lawfully admitted to the United States in order to be granted TPS by the Secretary of Homeland Security, see 8 U.S.C. 1254a(c) (establishing eligibility criteria for TPS), but neither does the grant of TPS constitute an admission.

c. That Congress intended a grant of TPS to satisfy only the "lawful status" requirement of Section 1255, not the separate "admitted or paroled" requirement, is further confirmed by the fact that when Congress wanted to waive or deem satisfied that "admitted or paroled" requirement, it said so expressly. In Section 1255(g), for example, Congress provided that the class of "special immigrant[s] described in" 8 U.S.C. 1101(a)(27)(K) "shall be deemed, for purposes of subsection (a), to have been paroled into the United

States." 8 U.S.C. 1255(g); see 8 U.S.C. 1255(h)(1) (same for "special immigrant[s]" described in 8 U.S.C. 1101(a)(27)(J)). And in Section 1255(i), Congress identified certain aliens who "entered the United States without inspection" but who "may apply * * * for the adjustment of * * * status to that of an alien lawfully admitted for permanent residence," "[n]otwithstanding the provisions of subsections (a) and (c) of this section." 8 U.S.C. 1255(i)(1) and (1)(A). The fact that Congress explicitly waived or deemed satisfied the inspection and admission or parole requirement for *those* aliens, while omitting any comparably explicit waiver or deeming provision for TPS recipients, indicates that Congress intended to leave the requirement in place for TPS recipients. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original); see also Pet. App. 9a-10a.

d. Congress had good reason to provide that a grant of TPS would confer on its recipient a lawful status for as long as the TPS remains in effect, but would not itself constitute an admission into the United States.

The TPS program is designed to assist aliens who are already present in the United States at a time when their home country experiences "temporary conditions * * * that prevent aliens who are nationals of the [country] from returning to the [country] in safety," 8 U.S.C. 1254a(b)(1)(C); see 8 U.S.C. 1254a(b)(1)(A) and (B) (allowing for TPS designations based on similarly time-limited events making an alien's return to his home country unsafe or seriously hindering the country's

ability to "handle adequately the return" of the country's nationals). Regardless of whether an alien entered the United States illegally, allowing the alien to remain temporarily in the United States while such a crisis persists not only protects the individual from return to unsafe conditions but also helps to mitigate humanitarian conditions in his home country as the country recovers. Congress has accordingly provided, as a matter of legislative grace, a form of temporary humanitarian protection that permits aliens to remain in the United States for so long as the Secretary determines that the conditions underlying the designation of a country for TPS continue to exist, even if those aliens entered the United States illegally. See 8 U.S.C. 1254a(a)(1)(A). And reflecting the humanitarian concerns involved, Congress has made such protection available through procedures that are more lenient than those applicable when an alien applies for lawful admission into the United States. See 8 U.S.C. 1254a(b)(2)(A) (providing that specified requirements applicable to an alien seeking admission are inapplicable to an alien seeking TPS, and authorizing the Secretary to waive other such requirements); see also Pet. App. 17a ("[A]n alien at a port of entry may be subject to a full range of inadmissibility grounds that an applicant for TPS is not.").

The fact that Congress desired to afford temporary protection during such crises both for aliens who entered the country legally and for aliens who entered the country illegally, however, does not mean that Congress treated both groups identically in all respects. To the contrary, it makes sense that Congress would be more solicitous of aliens who entered the country legally and subsequently found themselves stranded here because

of an unexpected crisis in their home country, as compared with aliens who entered the country illegally. And treating a grant of TPS as providing a temporary lawful *status* for purposes of adjustment of status under Section 1255, but not as creating a new lawful admission, does just that: it allows both groups to remain in the United States while the crisis persists, but makes only those who had already gone through the process of obtaining lawful admission to the United States eligible for the (possible) additional benefit of adjusting their status to that of a lawful permanent resident. See Pet. App. 17a-18a.

2. Petitioners contend that even if a grant of TPS does not actually qualify as an "admi[ssion] * * * into the United States," 8 U.S.C. 1255(a), aliens who receive TPS should be "*considered* inspected and admitted 'for purposes of an adjustment of status under section 1255.'" Pet. 27 (emphasis added). Petitioners arrive at that conclusion in three steps: (1) Section 1254a(f)(4) requires that TPS recipients "'be considered as being in, and maintaining, lawful status as a nonimmigrant'"; (2) in order to obtain such lawful status as a nonimmigrant, "an alien must be admitted"; and (3) therefore, an alien who receives TPS must be considered as having taken all the "prerequisite" steps to obtaining nonimmigrant status—including being lawfully admitted. Pet. 26-27; see Pet. 29 (arguing that "lawful-immigrant status * * * presupposes * * * 'inspection and admission'").

That reasoning glosses over the specific language that Congress used in Section 1254a(f)(4). As discussed, see pp. 8-11, *supra*, the INA uses "inspection and admission" and "lawful status" to refer to distinct

immigration concepts. When Congress intends to create a legal fiction about whether such a requirement is satisfied, it says so directly, as by "deem[ing]" an alien "to have been paroled into the United States." 8 U.S.C. 1255(h). In Section 1254a(f)(4), Congress spoke in that manner only to "lawful status": the alien "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. 1254a(f)(4). Petitioners would erase that distinction by reasoning that to obtain lawful nonimmigrant status through ordinary means, the alien would need to have been admitted—and therefore should be deemed to have been admitted even if he did not obtain lawful status as a nonimmigrant through the ordinary means. The very function of Section 1254a(f)(4), however, is to provide an alternative means by which TPS recipients can benefit—albeit only on a temporary basis—by being treated as though they held "lawful status as a nonimmigrant," *without* satisfying the ordinary rules. *Ibid.* It makes no sense, in that deliberately distinct context, to pretend that the alien has actually satisfied those ordinary rules, and Congress gave no indication it intended the Secretary to do so.[4]

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[4] Petitioners separately contend (Pet. 25-26) that Section 1255(b), which requires the government to "record the alien's lawful admission for permanent residence as of the date the order * * * approving the application for the adjustment of status is made," 8 U.S.C. 1255(b), suggests by analogy that aliens are *in fact* admitted when they receive TPS. But that provision is merely a recordkeeping requirement related to the limitation on the "number of the preference visas" that can be issued in a given year. *Ibid.* That the INA looks for that purpose to the date on which the alien adjusts status, not the date that the alien was admitted into the United States, does not change the substantive meaning of "admitted" in Section 1255(a).

3. For the reasons above, the court of appeals' reading of Sections 1254a and 1255 clearly represents the best one in light of the statutory text, structure, and context. Even if there were greater uncertainty about the statute's proper interpretation, however, this Court's settled precedents would require deference to the government's reading here.

For nearly three decades—since shortly after Congress established the TPS regime in 1990, see Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978—the government has consistently adhered to the position that a grant of TPS does not constitute an admission into the United States. See *Temporary protected status and eligibility for adjustment of status under Section 245*, Genco Op. No. 91-27, 1991 WL 1185138, at *1 (INS Mar. 4, 1991); see also Pet. 12 n.8 (collecting additional administrative decisions). In 2019, the USCIS Administrative Appeals Office (AAO), with the approval of the Attorney General, see 8 C.F.R. 1003.1(i), issued a precedential decision confirming that consistent position. See *In re H-G-G-*, 27 I. & N. Dec. 617, 617 n.1 & 641 (A.A.O. 2019); see also *In re Padilla Rodriguez*, 28 I. & N. Dec. 164, 167-168 (B.I.A. 2020) (agreeing with *In re H-G-G-*).

This Court has held that where an agency advances such a consistent and authoritatively stated interpretation of the INA, that interpretation must "prevail[] if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best." *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591 (2012). The court of appeals below had no need to apply such deference because it independently concluded that the government's

position represented the best interpretation of the statute. But if this Court had any doubt on that score, the decision below at least shows that the government's position here represents a "reasonable construction of the statute," *ibid.*, and the court of appeals' decision could be affirmed on that basis as well.

4. Although the court of appeals' judgment is correct, the question presented warrants this Court's review. The question presented has divided the courts of appeals, is important to the sound administration of the immigration laws, and is recurring. This case is a sound vehicle for resolving the question, and the Court therefore should grant the petition for a writ of certiorari.

a. As the court of appeals recognized (Pet. App. 11a-19a), the courts of appeals are divided over the question presented. The Third Circuit here joined the Eleventh Circuit in holding that a grant of TPS does not constitute an "inspection and admission" under 8 U.S.C. 1255. Pet. App. 20a ("[A] grant of TPS does not constitute an 'admission' into the United States under [Section] 1255."); *Serrano* v. *U.S. Att'y Gen.*, 655 F.3d 1260, 1265 (11th Cir. 2011) (per curiam) ("That an alien with [TPS] has 'lawful status as a nonimmigrant' for purposes of adjusting * * * does not change [Section] 1255(a)'s threshold requirement that he is eligible for adjustment * * * only if he was initially inspected and admitted or paroled."). And after the petition for a writ of certiorari was filed, the Fifth Circuit likewise held that "TPS does not create a 'fictional legal entry' for those who first made their way into this country illegally." *Nolasco* v. *Crockett*, 978 F.3d 955, 958 (2020) (citation omitted).

In conflict with those decisions, three other courts of appeals have held that an alien who receives TPS nec-

essarily qualifies as having been "inspected and admitted" even if he entered into the United States without inspection and admission. The decision below expressly noted, and explained at length its reasons for rejecting, the decisions of the Sixth and Ninth Circuits so holding. See Pet. App. 11a-19a (discussing *Ramirez* v. *Brown*, 852 F.3d 954, 964 (9th Cir. 2017); and *Flores* v. *USCIS*, 718 F.3d 548, 554 (6th Cir. 2013)). And since the petition for a writ of certiorari was filed, the Eighth Circuit has joined the Sixth and Ninth Circuits in that position, over a dissent by Judge Loken. See *Velasquez* v. *Barr*, 979 F.3d 572, 581 (8th Cir. 2020) ("TPS recipients are considered 'inspected and admitted' under [Section] 1255(a), regardless of whether they entered the United States without inspection."); see also *id.* at 576 (describing the "split of authority on th[is] issue").

b. The question presented has not only divided the courts of appeals, but also holds substantial practical importance because it affects the uniform administration of the INA regarding significant immigration benefits. An alien granted lawful-permanent-resident status is "lawfully accorded the privilege of residing permanently in the United States as an immigrant," 8 U.S.C. 1101(a)(20), is authorized to seek employment in the United States, see 8 C.F.R. 274a.12(a)(1), and is, in most circumstances, authorized to travel to and from the United States without being required to apply for admission upon return, see 8 U.S.C. 1101(a)(13)(C). Ensuring that such benefits are neither improperly withheld nor improperly granted is important for both individual aliens and the Nation as a whole.

c. The question presented is also frequently recurring, and the conflict over its proper resolution is en-

trenched and unlikely to dissipate on its own. As discussed, the circuit conflict is relatively deep, with three circuits having adopted the government's position and three others having rejected it. See pp. 17-18, *supra*. In reaching their divergent outcomes, moreover, several of the courts of appeals have expressly acknowledged and rejected the views of circuits on the other side of the circuit conflict. See, *e.g.*, Pet. App. 11a-19a; *Velasquez*, 979 F.3d at 576. Given the scope and intentionality of the conflict, review by this Court is warranted.

d. Finally, this case is a suitable vehicle in which to resolve the question presented, with no jurisdictional or other procedural obstacles that would prevent this Court from reaching and deciding the issue. As petitioners note (Pet. 25), the Secretary has announced the termination of the TPS designation for El Salvador, but that decision is the subject of other ongoing litigation and has not yet taken effect. See *Ramos* v. *Nielsen*, 336 F. Supp. 3d 1075 (N.D. Cal. 2018), vacated and remanded, 975 F.3d 872 (9th Cir. 2020). The Secretary has indicated that the determination to terminate the TPS designation for El Salvador "will take effect no earlier than 365 days from the issuance of any appellate mandate" in that litigation, meaning that it would not take effect until at least December 2021. *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal*, 85 Fed. Reg. 79,208, 79,211 (Dec. 9, 2020); see Appellees Pet. for Reh'g, *Ramos*, *supra*, No. 18-16981 (Nov. 30, 2020).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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