No. 20-315

IN THE

Supreme Court of the United States

JOSE SANTOS SANCHEZ, et al.,

Petitioners,

v.

ALEJANDRO N. MAYORKAS,
SECRETARY OF HOMELAND SECURITY,

Respondent.

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

BRIEF FOR NATIONAL IMMIGRATION LITIGATION ALLIANCE, AMERICAN CIVIL LIBERTIES UNION, AND NORTHWEST IMMIGRANT RIGHTS PROJECT AS AMICI CURIAE IN SUPPORT OF PETITIONERS

MARY KENNEY
KRISTIN MACLEOD BALL
TIFFANY LIEU
NATIONAL IMMIGRATION LITIGATION ALLIANCE
10 Griggs Terrace
Brookline, MA 02446

JOEL W. NOMKIN
Counsel of Record
JNomkin@perkinscoie.com
SAMANTHA J. BURKE
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012

Additional Counsel on Inside Cover

MATT ADAMS
NORTHWEST IMMIGRANT
RIGHTS PROJECT
615 Second Avenue
Suite 400
Seattle, WA 98104

MICHAEL K.T. TAN
AMERICAN CIVIL LIBERTIES
UNION
125 Broad Street, 18th Floor
New York, NY 10004

DAVID D. COLE
AMERICAN CIVIL LIBERTIES
UNION
915 15th Street Northwest
Washington, D.C. 20005

MATTHEW MOFFA
PERKINS COIE LLP
1155 Avenue of the
Americas, 22nd Floor
New York, NY 10036

LAURA HILL
LAUREN J. TSUJI
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Regulations

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU, through its Immigrants' Rights Project (IRP) and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens.

The **National Immigration Litigation Alliance** (NILA) is a non-profit organization dedicated to championing the right of noncitizens and to elevating the capacity and quality of those who represent them. NILA engages in impact litigation to ensure that noncitizens receive the full protections of the law. In addition, NILA builds the capacity of other attorneys to litigate in the immigrants' rights arena by cocounseling individual federal court cases and by providing strategic advice and assistance to its members.

The **Northwest Immigrant Rights Project** (NWIRP) is a nonprofit legal organization dedicated

---

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

to the defense and advancement of noncitizens' legal rights. NWIRP provides community education, legal consultations, and direct representation to low-income immigrants placed in removal proceedings, as well as other noncitizens seeking immigration benefits.

SUMMARY OF ARGUMENT

Congress explicitly crafted the Temporary Protected Status (TPS) statute to treat TPS recipients as "nonimmigrants" under the Immigration and Nationality Act (INA). Accordingly, 8 U.S.C. § 1254a(f)(4) directs that noncitizens "shall be considered as being in, and maintaining, lawful status *as a nonimmigrant*" "for purposes of adjustment of status." (emphasis added). The benefits and conditions applied to TPS recipients parallel those provided to nonimmigrants under the INA. And like nonimmigrants, Congress made TPS recipients eligible to apply for adjustment of status.

The court below held that only those TPS recipients who had been inspected and admitted at a port of entry are eligible for adjustment of status. But nonimmigrants are, by definition, inspected and admitted into the United States. Some are inspected and admitted at a port of entry; others are deemed to have been inspected and admitted stateside. Because Congress mandated that a TPS recipient "shall be considered as" a "nonimmigrant," the recipient is also deemed to have been inspected and admitted, whether at a port of entry or within the

United States. TPS recipients, like nonimmigrants, are therefore eligible to adjust their temporary status to permanent resident status—so long as they meet the other requirements for doing so. As set forth in Section II *infra*, the Third Circuit's failure to recognize that Congress purposefully cast TPS recipients like nonimmigrants for purpose of adjustment of status led to that court's erroneous conclusion that TPS recipients are not likewise deemed inspected and admitted for that purpose.

Treating all TPS recipients as having been inspected and admitted for purposes of adjustment of status does not, as the court below stated, "undermine the purpose of the TPS statute." App. to Pet. Cert. 11a. Rather, it furthers that purpose, by permitting persons who have long lawfully resided in this country the opportunity to become permanent residents where otherwise eligible to do so, to the same extent that nonimmigrants may.

ARGUMENT

I. CONGRESS EXPRESSLY DIRECTED THAT TPS RECIPIENTS ARE TO BE CONSIDERED AS NONIMMIGRANTS FOR PURPOSES OF ADJUSTMENT OF STATUS

Congress specified that, for purposes of adjustment of status to lawful permanent residence under 8 U.S.C. § 1255 and change of status under 8

U.S.C. § 1258, noncitizens holding Temporary Protected Status (TPS) "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). As a result, TPS recipients are treated as nonimmigrants when applying for lawful permanent residence under 8 U.S.C. § 1255. And because all "nonimmigrants" are by definition inspected and admitted into the United States, TPS recipients are, by virtue of being treated as "nonimmigrants," also deemed to have been inspected and admitted.

Although nonimmigrants are by definition admitted, and although Congress directed that TPS recipients must be considered as nonimmigrants for adjustment purposes, the Third Circuit held that "TPS does not constitute an admission." App. to Pet. Cert. 20a. In the panel's view, treating TPS recipients as admitted "would open the door to more permanent status adjustments that Congress did not intend." *Id.* at 11a. But Congress explicitly *did* open the door for TPS recipients to obtain permanent resident status, just as it has done for nonimmigrants. In concluding otherwise, the appellate court ignored the immigration benefits that can flow to noncitizens who hold a temporary status, and overlooked *why* Congress elected to treat TPS recipients as nonimmigrants for purposes of adjustment of status.

A. The nonimmigrant category applies to noncitizens who enter the United States on a temporary basis.

For more than two hundred years, Congress has maintained a clear statutory distinction between "immigrant" and "nonimmigrant" status. *See* INS, U.S. Dep't of Just., *1991 Statistical Yearbook of the Immigration and Naturalization Service* 90 (1992) (describing statutory history of nonimmigrant status). Since well before the enactment of the TPS statute and continuing today, the Immigration and Nationality Act (INA) defines an "immigrant" to mean "every [noncitizen] except a[ ] [noncitizen] who is within one of the following [specified] classes of nonimmigrant [noncitizens]." 8 U.S.C. § 1101(a)(15). The terms are exclusive; there is no room for overlap.

The key difference between the "immigrant" and "nonimmigrant" categories is that nonimmigrants are admitted to the United States for a specific time and for a specific purpose. *See* Richard D. Steel, *Steel on Immigration Law* § 2:28 (2020 ed.). Immigrants, by contrast, may stay in the United States indefinitely. *See Barton* v. *Barr*, 140 S. Ct. 1442, 1445 (2020).

The INA designates twenty-two classes of noncitizens as nonimmigrants. *See* 8 U.S.C. § 1101(a)(15). These classes are highly varied, including diplomatic officials, *id.* § 1101(a)(15)(A), students, *id.* § (1101)(a)(15)(F), and highly educated

workers, *id.* § (1101)(a)(15)(H)(i)(b). *See* Jill H. Wilson, Cong. Rsch. Serv., R45938, Nonimmigrant and Immigrant Visa Categories: Data Brief (2021). Each category has specific statutory and regulatory requirements that a noncitizen must satisfy before being granted nonimmigrant status. *See* 8 U.S.C. §§ 1101(a)(15), 1184; 8 C.F.R. § 214.1 *et seq*.

B. Nonimmigrants are by definition inspected and admitted.

Despite the differences within various nonimmigrant classifications, a common procedural thread links all nonimmigrants: to hold nonimmigrant status, a noncitizen must have been inspected and admitted to the United States as a nonimmigrant. That inspection and admission, however, need not occur at a port of entry—in fact, it is often "deemed" to have occurred stateside, when nonimmigrant status is accorded to a noncitizen already in the United States. *See* Section II.B *infra*. Both the INA and its regulations demonstrate that inspection and admission are necessary prerequisites to obtaining nonimmigrant status.

Section 1184, titled "Admission of nonimmigrants," addresses the process of applying for nonimmigrant status. It provides that any nonimmigrant must be admitted into that status: "The *admission* to the United States of *any* [noncitizen] *as a nonimmigrant* shall be for such time and under such conditions as the Attorney General may by regulations prescribe . . . ." 8 U.S.C. § 1184(a)(1) (emphasis

added); *see also Ramirez* v. *Brown*, 852 F.3d 954, 960 (9th Cir. 2017); *Velasquez* v. *Barr*, 979 F.3d 572, 577 (8th Cir. 2020). It also makes clear that all noncitizens are presumed to be immigrants, unless they can "establish[] to the satisfaction of . . . the immigration officers, *at the time of application for admission*, that [they are] entitled to a nonimmigrant status." 8 U.S.C. § 1184(b) (emphasis added).[2] Conversely, a noncitizen who is *not* admitted to the United States is not eligible for nonimmigrant status.

The INA's implementing regulations likewise presuppose that admission is a necessary condition for nonimmigrant status. The regulations define an individual in "lawful immigration status" as a

---

[2] The only narrow exceptions to this presumption of immigrant status are nonimmigrants under § 1101(a)(15)(L) or (V), and most nonimmigrants described in § 1101(a)(15)(H)(i). *See* 8 U.S.C. § 1184(b). This does not alter the fact that those categories of nonimmigrants are definitionally admitted into their status, just as are all nonimmigrants. *See, e.g.*, 8 U.S.C. § 1184(a)(1); 8 U.S.C. § 1101(a)(15)(L) (defining a nonimmigrant under this category as a noncitizen "who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity"); 8 C.F.R. § 214.1(a)(3) (setting out admission and other general requirements for nonimmigrants); *id.* § 214.2(h)(1)(i) ("Admission of temporary employees").

noncitizen "*admitted to the United States in nonimmigrant status* as defined in [8 U.S.C. § 1]101(a)(15)[.]" 8 C.F.R. § 245.1(d)(1)(ii) (emphasis added). An individual who qualifies as a nonimmigrant under § 1101(a)(15) is, therefore, necessarily "admitted to the United States." Other regulations confirm this interpretation. *See, e.g.*, 8 C.F.R. § 103.6(c)(2) ("When the status of a nonimmigrant who has violated the conditions of his admission . . ."); *id.* § 212.23(c)(2) ("Nonimmigrants admitted under section 101(a)(15)(S) of the Act . . .").[3]

Moreover, a noncitizen "admitted" to the United States has by definition also been "inspected." The INA defines "admission" and "admitted" as "the lawful entry of the [noncitizen] into the United States *after inspection* and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (emphasis added); *see also* 8 C.F.R. § 214.1(a)(3) ("A nonimmigrant [noncitizen's] admission to the

---

[3] In its briefing to the Third Circuit, the government noted that the only time "admission" or "admitted" is mentioned in § 1254a is "to advise that nothing in § 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]." Defs.-Appellants' Opening Br. 17–18 (quoting 8 U.S.C. § 1254a(c)(5)). But this provision simply means that noncitizens cannot be admitted to the United States solely for the purpose of applying for TPS—they must already be present in the United States to receive TPS. It does not mean that the grant of TPS, for statutory purposes, is not an "admission."

United States is conditioned on compliance with any inspection requirement in § 235.1(d) or of this chapter, as well as compliance with part 215, subpart B, of this chapter, if applicable."). Inspection is thus inherent to admission, and admission is inherent to nonimmigrant status. For statutory purposes, then, all nonimmigrants are necessarily both inspected and admitted.

C. Nonimmigrants can "adjust" their status to remain in the United States as lawful permanent residents.

Even though nonimmigrants are treated as temporary visitors, they are often authorized to remain in the United States for many years. *See, e.g.*, 8 U.S.C. § 1184(g)(4) (authorizing admission of certain temporary workers for up to six years); 8 C.F.R. § 214.2(e)(19)–(20) (authorizing period of admission of treaty traders and investors for two years and unlimited extensions of up-to-two years each); *id.* § 214.2(f)(5) (authorizing admission of students for indefinite period so long as they are pursuing a full-time course of study at an approved institution; students may pursue multiple degrees consecutively, thus extending their stay); *id.* § 214.2(l)(12) (limiting period of stay for intracompany transferees in a managerial or executive capacity to seven years).

During that time, nonimmigrants may develop strong relationships to the United States—

professional, social, and familial. Congress recognized the value of these relationships by creating a path for nonimmigrants to convert their "temporary" status to permanent immigrant status. In particular, if otherwise eligible, a nonimmigrant can "adjust" her status to that of a lawful permanent resident based on sponsorship by a close family member or an employer. *See* 8 U.S.C. § 1154 (detailing procedure by which qualifying family members and employers may petition for immigrant classification for a noncitizen).

D. The INA authorizes TPS recipients, like nonimmigrants, to adjust their status to permanent resident if they are otherwise eligible to do so.

Congress enacted the TPS statute in 1990 in response to adverse country conditions around the globe. *See* Immigration Act of 1990 § 244A, Pub. L. No. 101-649, 104 Stat. 4978 (enacted S. 358); *see also* S. Rep. No. 101-55 (1990) (Conf. Rep.); H.R. Rep. No. 101-955, at 127 (1990) (Conf. Rep.). The legislation was designed to protect noncitizens who had legitimate grounds to fear returning home, but who did not qualify for refugee status or asylum status. *See* 8 U.S.C. § 1101(a)(42)(A) (defining requirements for obtaining refugee status); *id.* § 1158(b)(1)(B)(i) (defining requirements for obtaining asylum).

The TPS statute protects noncitizens who are already in the United States from deportation, and

grants them work authorization, when conditions in their home country would prevent their safe return. *See Ramirez*, 852 F.3d at 955–956. The Secretary of Homeland Security may designate a foreign state under the TPS statute if he or she finds that (1) an armed conflict is ongoing in the foreign state which would pose a serious physical danger to returning nationals; (2) a natural disaster has rendered the foreign state unable to adequately handle the return of nationals, and the foreign state has requested TPS designation; or (3) extraordinary and temporary conditions exist in the foreign state that prevent a safe return for its nationals. 8 U.S.C. § 1254a(b); *see also* 8 U.S.C. § 1103; 6 U.S.C. § 557.

TPS recipients receive a temporary status, like nonimmigrants do. *See* 8 U.S.C. § 1254a(b)(2). However, many TPS recipients, like many nonimmigrants, remain in the United States lawfully for decades and establish roots that far exceed those of the typical "temporary" visitor. That is, in part, because a country's TPS designation can be—and often is—extended each time it is set to expire, resulting in that country's designation lasting many years. *Id.* For example, TPS designation for Somalia has been renewed continuously since 1991, Honduras since 1999, and El Salvador since 2001. *See* Designation of Nationals of Somalia for Temporary Protected Status, 56 Fed. Reg. 46804 (Sept. 16, 1991); Designation of Honduras Under Temporary Protected Status, 64 Fed. Reg. 524-02 (Jan. 5, 1999); Designa-

tion of El Salvador Under Temporary Protected Status, 66 Fed. Reg. 14214 (Mar. 9, 2001). Consequently, many TPS recipients develop deep professional, community, and personal ties during their time in the United States.

Given the temporary—but often lengthy—nature of TPS, Congress decided to give TPS recipients the same choice of maintaining temporary status or seeking permanent residence that the INA gives eligible nonimmigrants. *See* 8 U.S.C. § 1254a(f)(4). Congress recognized that some TPS recipients would become independently eligible to apply for permanent residence based upon family and employment relationships developed while in the United States.[4]

Instead of creating a new adjustment-of-status provision, Congress elected to give TPS recipients access to the existing adjustment statute for nonimmigrants. *See Ramirez*, 852 F.3d at 961 (noting the "language and structure" of the TPS statute

---

[4] Congress provided TPS recipients a number of benefits not directly related to the statute's principal purpose, but also not inconsistent with that purpose. For example, Congress specified that TPS recipients "may travel abroad with the prior consent of the Attorney General." 8 U.S.C. § 1254a(f)(3). Permitting such travel does not further the purpose of providing a haven until it is safe for the TPS recipient to return to his or her country. Similarly, interpreting § 1254a(f)(4) as allowing otherwise eligible TPS recipients to adjust their status does not undermine this purpose. *Contra* App. to Pet. Cert. 11a.

"signal that Congress contemplated that TPS recipients, via their treatment as lawful nonimmigrants, would be able to make use of § 1255"). That statute is titled "[a]djustment of status of nonimmigrant to that of person admitted for permanent residence," and is thus clearly intended to apply to nonimmigrants. 8 U.S.C. § 1255. To make the necessary statutory link between § 1255 and TPS recipients, Congress enacted 8 U.S.C. § 1254a(f)(4), which provides that noncitizens "shall be considered as being in, and maintaining, lawful status *as a nonimmigrant*" "for purposes of adjustment of status." (emphasis added). This provision advances the fundamental purpose of the TPS statute by ensuring that recipients who may otherwise be eligible to adjust status are not required to return to their home countries—where the war, disaster, or extraordinary conditions giving rise to TPS designation in the first instance presumably continue—in order to complete the process. Instead, for purposes of adjustment of status, all TPS holders are deemed inspected and admitted as nonimmigrants.

Treating TPS recipients as nonimmigrants does not mean *all* TPS recipients may adjust status. TPS recipients remain subject to the same eligibility requirements as nonimmigrants in this respect. *Steel on Immigration Law* § 7:4 ("Adjustment of status is not an independent basis to receive permanent residence. It is a procedure to obtain permanent resident status if the [noncitizen] has established eligi-

bility."). For instance, TPS recipients, like nonimmigrants, must have some basis for adjusting their status, such as an approved visa petition filed by a qualifying family member or employer. *See id.* And they cannot adjust their status if they are subject to a statutory bar, for example, as a result of accepting unauthorized employment. *See* 8 U.S.C. § 1255(c)(2) (imposing a bar but exempting "immediate relatives" and certain employment-based adjustment applicants such as Mr. Sanchez); *see also* 8 U.S.C. §§ 1151(b)(2)(A) (defining "immediate relatives), 1255(k) (setting out requirements for exemption for certain employment-based adjustment applicants).

Thus, the Third Circuit erred in suggesting that the Petitioners' interpretation of the statute would allow "TPS recipients [to] *readily* become permanent residents." App. to Pet. Cert. 14a (emphasis added). All TPS recipients must have an independent basis to apply for lawful permanent residence. Congress merely placed TPS recipients on the same footing as nonimmigrants for purposes of applying for adjustment of status to lawful permanent residence from within the United States.

E. Congress's decision to treat TPS recipients as nonimmigrants reflects the significant similarities between the two groups.

The Third Circuit's reasoning ignores other substantial legal and practical similarities between

TPS recipients and nonimmigrants. Those overlapping characteristics, which extend far beyond the "temporary" nature of each group's status, confirm that Congress intended to treat TPS recipients as nonimmigrants for purposes of adjustment of status, and justifies interpreting the TPS statute to deem those recipients as inspected and admitted.

First, both TPS recipients and nonimmigrants undergo a rigorous application and inspection process before they receive status. *See Ramirez*, 852 F.3d at 960 ("[T]he TPS application is subject to a rigorous process comparable to any other admission process."). TPS applicants must complete lengthy application forms that request extensive biographical, familial, and other identifying information, as well as information about the applicant's immigration history and any criminal history. *See* Form I-821. Employers seeking to sponsor a noncitizen for certain nonimmigrant classifications must provide similar information. *See* Form I-129.[5]

[5] For Form I-821, see U.S. Citizenship & Immigration Servs., Dep't Homeland Sec., *I-821, Application for Temporary Protected Status*, https://www.uscis.gov/i-821 (last visited Feb. 20, 2021). For Form I-129, see U.S. Citizenship & Immigration Servs., Dep't Homeland Sec., *I-129, Petition for a Nonimmigrant Worker*, https://www.uscis.gov/i-129 (last visited Feb. 20, 2021).

Like nonimmigrants, TPS applicants may also be required to present themselves to an immigration officer for examination. *Compare* 8 C.F.R. § 244.8; 8 U.S.C. § 1184(b) (noting a nonimmigrant must establish entitlement to nonimmigrant status to the "satisfaction of the consular officer . . . and the immigration officers"); *see also* 8 C.F.R. § 235.1. The purpose of the examination is to establish the TPS applicant's eligibility for status, just as nonimmigrants are required to undergo an inspection during the admission process. TPS applicants must also provide documentary evidence showing that they meet the eligibility criteria, similar to that required of nonimmigrants at inspection and admission. *Compare* 8 C.F.R. § 244.9 (requiring a TPS applicant to present proof of identity and residence, and evidence of immigration status), *with id.* § 212.1 (detailing documentary requirements for nonimmigrants), *and id.* § 212.1 ("A valid unexpired visa . . . and an unexpired passport shall be presented by each arriving nonimmigrant.").

Once granted TPS, recipients must maintain that status by periodically re-registering with USCIS, each time submitting an updated application. Failure to do so results in loss of status. *Id.* § 244.17. Nonimmigrants must similarly maintain their eligibility and status *See* 8 U.S.C. § 1227(a)(1)(C) (subjecting nonimmigrants to removal for overstaying visa).

Second, both TPS applicants and nonimmigrants may be deemed inadmissible for a host of reasons, including immigration history, criminal or national security grounds, and physical health. *See* 8 U.S.C. §§ 1182, 1254a(c); 8 C.F.R. § 244.2. Only some of these inadmissibility grounds may be waived. *Compare* 8 U.S.C. § 1254a(c) (TPS applicants), *with id.* § 1182(a), (d), (g)–(i) (nonimmigrants).

Third, both TPS recipients and nonimmigrants are sometimes authorized to be present in the United States for long enough to establish family, community, and professional ties. To be eligible for TPS status, applicants must have maintained a continuous physical presence and residence in the United States, often for years or even decades. *See* 8 U.S.C. § 1254a(c)(1)(A)(i) (TPS applicant must have "been continuously physically present" since the date the applicant's country was designated for TPS); *id.* § 1254a(c)(1)(A)(ii) (TPS applicant must have "continuously resided in the United States" since a date prescribed by the government). Nonimmigrants, too, may well live in the United States for years, sometimes exceeding a decade. *See, e.g.*, 8 C.F.R. § 214.2(p)(14)(ii)(A) (permitting athletes and entertainers to live and work in the United States for five years, with the possibility of a five-year extension); 8 C.F.R. § 214.2(e)(20) (permitting treaty traders and investors to extend their visas every two years with no cap). It is not uncommon for TPS recipients and nonimmigrants to live in the United States for most of their adult lives.

TPS recipients and nonimmigrants also often develop strong professional ties to the United States. TPS recipients are authorized to work, and may work for the same employer for years. Petitioners Sanchez and Gonzalez, for example, have held the same jobs since 1997 and 2003, respectively. Many nonimmigrant visas also allow recipients to live and work in the United States for years or even decades. *See, e.g.*, 8 C.F.R. § 214.2(e), (g)(4), (l)(12), (p).

In recognition of the importance of these employment relationships, the INA allows a nonimmigrant to adjust status based on an employment relationship. *See* 8 U.S.C. § 1255(k); *id.* § 1153(b). The same rationale applies to TPS recipients who likewise have developed longstanding and vital relationships with their employers.

II. THE THIRD CIRCUIT'S STATUTORY ANALYSIS GUTTED THE STATUTORY MANDATE TO "CONSIDER[ ]" TPS RECIPIENTS AS NONIMMIGRANTS

The Third Circuit misunderstood what it means for a TPS recipient to be "considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjustment of status. 8 U.S.C. § 1254a(f)(4); *see also id.* § 1255. The court based its analysis in part on what it described as a "clear line between 'admission' and 'status,'" defining admission as physical entry into the United States. App. to Pet. Cert. 7a. But that analysis ignores the deem-

ing language in § 1254a(f)(4): by deeming TPS holders to have the status of nonimmigrants for purposes of adjustment, the statute necessarily deems TPS holders as fulfilling the admission requirements needed to qualify for adjustment.

The INA and its underlying regulations make clear that a nonimmigrant must be "inspected" and "admitted" into that status. *See, e.g.*, 8 U.S.C. § 1101(a)(13)(A); *id.* § 1184(a). But inspection and admission do not necessarily need to take place at a border. *See Ramirez*, 852 F.3d at 961; *Velasquez*, 979 F.3d at 580; *In re Alyazji*, 25 I. & N. Dec. 397, 399 (B.I.A. 2011). They may also occur within the United States. But to be "considered as being in, and maintaining, lawful status as a nonimmigrant," 8 U.S.C. § 1254a(f)(4), necessarily means that one is considered as having been inspected and admitted. Without being deemed to satisfy the inspection and admission requirements of a nonimmigrant, a TPS holder cannot be "considered as being in" lawful nonimmigrant status. *See Ramirez*, 852 F.3d at 960 ("[A noncitizen] who has obtained lawful status as a nonimmigrant has necessarily been 'admitted.'"); *accord Velasquez*, 979 F.3d at 577 ("[Section] 1254a(f)(4) unambiguously requires that TPS recipients be considered 'inspected and admitted' for purposes of adjusting their status under § 1255.").

A. TPS holders are "considered" to be nonimmigrants for purposes of adjustment of status.

Congress has provided that TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjustment of status under § 1255. 8 U.S.C. § 1254a(f)(4). Because nonimmigrants are by definition inspected and admitted, and because TPS holders are considered nonimmigrants for purposes of § 1255, TPS holders must be deemed inspected and admitted for purposes of the adjustment statute.

Congress's intent is confirmed by the balance of § 1254a(f)(4), which provides that TPS holders "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of change of status under § 1258. *Id.* Section 1258 allows "any [noncitizen] lawfully admitted to the United States as a nonimmigrant who is continuing to maintain that status" to change nonimmigrant classification if the noncitizen is otherwise eligible to do so. *Id.* § 1258(a). Sections 1254a and 1258 are structurally similar, and Congress's choice of language is instructive. In each section, a noncitizen must satisfy two requirements to be eligible to change his or her nonimmigrant classification. First, the noncitizen must (for TPS recipients) "be[] in" nonimmigrant status and (for nonimmigrants) have been "lawfully admitted." *Compare id.* § 1254a(f)(4), *with id.* § 1258(a). Second, the noncitizen must have

"maintain[ed]" lawful status as a nonimmigrant. *See id.* § 1254a(f)(4); *id.* § 1258(a).

The Third Circuit's opinion ignores the rule against superfluity and the distinction between "being in . . . lawful status as a nonimmigrant" on the one hand, and "maintaining[ ] lawful status as a nonimmigrant" on the other hand. The latter encompasses TPS recipients otherwise in lawful status already, while the former includes TPS recipients who would not be in lawful status at the time they seek adjustment but for the grant of TPS. There would be no point in stating that a TPS recipient is "considered as being in" nonimmigrant status if the only purpose of § 1254a(f)(4) were to preserve the right of adjustment for someone who (i) entered on a nonimmigrant visa, (ii) acquired TPS status while in lawful nonimmigrant status, and thereafter (iii) failed to maintain their nonimmigrant status. For those noncitizens, Congress would only need to deem them to have "maintain[ed]" their original nonimmigrant status. Since the statute instructs that TPS recipients are to be treated as nonimmigrants "for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title," Congress clearly intended the "being in" requirement of § 1254a(f)(4) to satisfy the "lawful admission" requirement of § 1258(a) to the same extent persons admitted as nonimmigrants clearly satisfy this requirement. *See Ramirez*, 852 F.3d at 961–962

(noting the "statutory mirroring" of the two provisions). Any other interpretation would nullify an express benefit that § 1254a(f)(4) confers.

B. Because TPS recipients are deemed to have been admitted, they need not demonstrate an admission at a port of entry.

The fact that some TPS recipients were not inspected or admitted at a port of entry is no bar to *treating* them as having been inspected and admitted where Congress has expressly instructed that they should be so considered for purposes of adjustment of status.

The INA recognizes several types of nonimmigrant statuses that are received while in the United States. These nonimmigrants are deemed to have been admitted to the United States, even though they may have never passed through a port of entry as a nonimmigrant visa holder. Thus, in *In re Garnica Silva*, 2017 Immig. Rptr. LEXIS 21813, at *22 (B.I.A. June 29, 2017), the Board of Immigration Appeals held that a noncitizen who was "granted U nonimmigrant status through stateside processing has been 'admitted' to the United States . . . even if he never made an 'entry' within the meaning of section 101(a)(13)(A)." As the Board reasoned, limiting the group of noncitizens treated as having an "admission" to those who entered through a port of entry would have the "paradoxical effect" that adjustment of status would be "unavailable to virtually all

U immigrants." *Id.* at *19 (noting that Congress did not intend such an "incongruous result").

Other nonimmigrant visas, such as those conferred under § 101(a)(15)(T), (S), and (V), are likewise typically granted after the noncitizen has already physically entered the United States. That grant, or lawful change in status to a nonimmigrant, is considered an "admission." *E.g.*, *In re A-M-U-*, A-XXX-XXX-567 (B.I.A. Nov. 18, 2018) (holding that a grant of a V visa to a noncitizen who applied for the visa while stateside constituted an admission); *In re Garnica Silva*, 2017 Immig. Rptr. LEXIS 21813, at *19 (noting stateside S and T visas are similar to U visas for purposes of evaluating "admission").[6]

Congress provided a similar path for adjustment of status for the many TPS recipients who were not previously inspected and admitted through a port of entry. Congress made clear that they are deemed "admitted" for purposes of adjustment of status. To hold otherwise would narrow the opportunity to adjust status to a minuscule subset of TPS recipients: those who entered a port of entry as

---

[6] Notably, in these immigration appeals concerning S, T, U, and V visas, it was the *government* who advocated for the grant of those nonimmigrant visas to be considered an admission, notwithstanding the holders' lack of physical entry at a port of entry. *See In re A-M-U-*, A-XXX-XXX-567 (B.I.A. Nov. 18, 2018); *In re Garnica Silva*, 2017 Immig. Rptr. LEXIS 21813.

nonimmigrants and then later received TPS. Nor would it explain why Congress included language that TPS recipients are not only to be considered as maintaining nonimmigrant status, but instead, that that they should also be considered as *being* in nonimmigrant status in the first place. The limitation imposed by the Third Circuit—that § 1254a(f)(4) applies only to TPS holders who were admitted at a port of entry—has no statutory basis.

Even if the Board's decisions that stateside visa conferral is an admission were ignored, TPS recipients should *still* be considered admitted for purposes of adjustment of status. That is because admission is inherent in nonimmigrant status under all nonimmigrant classifications that existed at the time Congress enacted § 1254a(f)(4). The TPS statute was enacted in 1990, whereas the nonimmigrant classifications for which a stateside grant of status is permitted (S, T, U, and V nonimmigrants) were enacted in 1994 and 2000. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (TPS statute); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (S visa); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (U and T visas); Legal Immigration Family Equity Act, Pub. L. No. 106-553, 114 Stat. 2762 (2000) (V visa).

Congress, in using the phrase "lawful status of a nonimmigrant" in § 1254a(f)(4), was legislating against the backdrop of only those nonimmigrant categories that existed in 1990. *See Parker Drilling*

Mgmt. Servs., Ltd. v. *Newton*, 139 S. Ct. 1881, 1890 (2019). Admission under § 1101(a)(13) was a necessary component of nonimmigrant status under those classifications. By electing to treat TPS recipients as nonimmigrants under § 1254a(f)(4), Congress deemed all TPS recipients to have been admitted, and inspected, for purposes of adjustment of status.

CONCLUSION

Congress expressly provided that TPS recipients would be treated as "nonimmigrants" under the INA. TPS recipients, like nonimmigrants, are thus deemed inspected and admitted. Accordingly, TPS recipients can, like other nonimmigrants, adjust their temporary status to permanent resident status while remaining physically present in the United States so long as they are otherwise eligible to adjust status—because they are deemed to have been inspected and admitted. The Third Circuit erred in holding otherwise.

RESPECTFULLY SUBMITTED, this 1st day of March, 2021

MARY KENNEY
KRISTIN MACLEOD BALL
TIFFANY LIEU
NATIONAL IMMIGRATION LITIGATION ALLIANCE
10 Griggs Terrace
Brookline, MA 02446

JOEL W. NOMKIN
Counsel of Record
SAMANTHA J. BURKE
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012

MATT ADAMS
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Avenue
Suite 400
Seattle, WA 98104

MATTHEW MOFFA
PERKINS COIE LLP
1155 Avenue of the Americas, 22nd Floor
New York, NY 10036

MICHAEL K.T. TAN
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004

LAURA HILL
LAUREN J. TSUJI
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION
915 15th Street Northwest
Washington, D.C. 20005