

No. 20-315

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IN THE  
**Supreme Court of the United States**

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JOSE SANTOS SANCHEZ AND SONIA GONZALEZ,  
*Petitioners,*

v.

ALEJANDRO MAYORKAS, SECRETARY, UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY, ET AL.,  
*Respondents.*

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

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**BRIEF OF AMERICAN IMMIGRATION  
LAWYERS ASSOCIATION, NATIONAL  
IMMIGRANT JUSTICE CENTER, AND  
AMERICAN FRIENDS SERVICE COMMITTEE  
AS *AMICI CURIAE* IN SUPPORT OF  
PETITIONERS**

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## STATEMENT OF INTEREST<sup>1</sup>

*Amicus* American Immigration Lawyers Association (AILA) is a national, nonpartisan, and nonprofit organization comprised of more than 15,000 attorneys and law professors who practice and teach immigration law. AILA member attorneys represent U.S. families seeking permanent residence for close family members, as well as U.S. businesses seeking talent from the global marketplace.

*Amicus* National Immigrant Justice Center (NIJC) is a nonprofit agency that represents immigrants, refugees, and asylum-seekers. Together with hundreds of attorneys who co-counsel with NIJC on a pro bono basis, NIJC represents more than 10,000 individuals each year.

AILA and NIJC attorneys frequently represent people who are seeking to secure or maintain Temporary Protected Status (TPS). *Amici* assist their clients with the extensive requirements of the TPS process. Beneficiaries go on to form deep ties with their communities and play an important role in U.S. families and the U.S. economy. *Amici* have likewise assisted many clients who have obtained TPS to adjust their status to become lawful permanent residents.

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<sup>1</sup> No party or counsel for a party authored this brief in whole or in part. No party, counsel for party, or person other than *amici curiae* or counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioners filed a notice of blanket consent with the Clerk. Respondents have consented to the filing of this brief.

*Amicus* American Friends Service Committee (AFSC) is a Quaker organization that promotes lasting peace with justice, as a practical expression of faith in action. AFSC believes that all people deserve to be safe from harm and treated with dignity and respect. Following from that belief, AFSC works to address the root causes of migration and to support migrant and refugee communities, including through legal services and advocacy. AFSC has worked closely with TPS recipients since the program was created and has supported their organizing and advocacy efforts for fair and humane immigration laws and policies that would provide them and other immigrants with a path to permanent lawful status. AFSC offices in Florida, Iowa, and New Jersey have provided legal representation to hundreds of TPS recipients in connection with the TPS registration process and their applications for adjustment of status.

*Amici* submit this brief to share the experiences of TPS recipients with whom they have worked. Those experiences—together with the pertinent statutory text—leave no doubt that Congress afforded TPS recipients an opportunity to adjust their status to become lawful permanent residents through 8 U.S.C. §§ 1254a and 1255.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Congress adopted the TPS program in 1990 to ensure that eligible foreign nationals in the United States are not required to return to dangerous conditions in their countries of origin. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978, 5030-36. At the same time, Congress inaugurated the program by designating El Salvador as the first TPS-

eligible country of origin, *id.* § 303, 104 Stat. at 5036-38, “a decision based on the civil war raging in that country at the time.” Cecilia Menjívar, *Temporary Protected Status in the United States: The Experiences of Honduran and Salvadoran Immigrants* 3 (May 2017).<sup>2</sup>

Today, ten countries are the subject of TPS designations: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen.<sup>3</sup> See Jill H. Wilson, Cong. Research Serv., RS20844, *Temporary Protected Status: Overview and Current Issues* 6 (Oct. 26, 2020).<sup>4</sup> The events that precipitated those designations all have one thing in common: serious, even deadly, danger. See *id.* at 6-13 (discussing earthquakes, hurricanes, floods, and the associated “disruption of living conditions”; “chronic instability and humanitarian crises”; and “civil war”); see also 8 U.S.C. § 1254a(b)(1)(B).

Not everyone from a TPS-designated country is eligible to obtain TPS. Perhaps most importantly, a person must be in the United States as of the date of designation—it is not possible to come to the United States *after* designation seeking to benefit from TPS.

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<sup>2</sup> Available at [https://www.nationaltpsalliance.org/wp-content/uploads/2018/08/TPS\\_Report\\_FINAL\\_v5.pdf](https://www.nationaltpsalliance.org/wp-content/uploads/2018/08/TPS_Report_FINAL_v5.pdf).

<sup>3</sup> The prior Administration scheduled some of those designations for termination, but none have yet taken effect owing to existing litigation. See *Temporary Protected Status*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status> (last reviewed/updated Jan. 29, 2021) (listing all ten as “Countries Currently Designated for TPS”). It is unclear as of the time of filing whether the current Administration intends to follow through on these terminations.

<sup>4</sup> Available at <https://fas.org/sgp/crs/homesec/RS20844.pdf>.

See 8 U.S.C. § 1254a(c)(1)(A). She must also maintain a continuous residence in the United States, and satisfy extensive eligibility requirements. See generally *id.* § 1254a(c). At least every eighteen months, and sometimes more often, the Government must determine whether to continue offering TPS for nationals of any given country. Those extensions, however, do not change or expand who is eligible for TPS; they only allow those already eligible to continue holding the status. See, e.g., Extension of the Designation of El Salvador for Temporary Protected Status, 81 Fed. Reg. 44,645, 44,646 (July 8, 2016).

In total, over 400,000 people currently benefit from TPS. Wilson, *supra*, at 6. As a result of the statutory residency requirements, all of them arrived in the United States at least five years ago, and over *eighty percent* have been living in the United States continuously for over twenty years. *Id.*

Unsurprisingly, these long-term U.S. residents have formed tight connections with the communities where they live. Many have married and had children here. Menjívar, *supra*, at 9-10. They are authorized to work in the United States too, 8 U.S.C. § 1254a(a)(1)(B), allowing them “to actively contribute to society economically, socially, and culturally.” Menjívar, *supra*, at 21. Through these economic and family ties, “these immigrants are rooted and settled in the United States and socially integrated in communities across the country.” *Id.* at 9.

Section 1255 of the Immigration and Nationality Act (INA) sets out the process for noncitizens in the United States to adjust their status to become lawful permanent residents. That provision requires, among other things, an immigrant visa to be available to the

person. 8 U.S.C. § 1255(a). The INA specifies who may seek to satisfy this criterion on the applicant’s behalf—generally, U.S. citizen relatives or U.S. employers. *See id.* § 1153(a), (b), (d) (allocating immigrant visas based on family or employment relationships).

TPS holders are not categorically barred from adjustment of status. *Cf. id.* § 1255(c) (categories of ineligibility for adjustment of status). On the contrary, Congress allows TPS-holders to be treated as lawfully present nonimmigrants for purposes of adjustment of status. *Id.* § 1254a(f)(4). Thus, as Petitioners argue and *amici* agree, the statute facilitates the adjustment of status process for TPS holders who are otherwise eligible.

The Government takes a different view of what Congress authorized. Despite the extensive scrutiny TPS recipients undergo and the longstanding connections that they have formed with their communities, the Government would require any TPS recipients who physically entered the country without undergoing inspection and being either admitted or paroled to return to their countries of origin—sometimes for months or years—to apply for and await the issuance of a visa. That procedure would expose TPS recipients to the very dangers Congress sought to protect them from, and it would impose needless hardship on the U.S. citizens who live and work with TPS beneficiaries.

The Court should reject that reading of the statute as inconsistent with both the plain text and common sense. Congress directed that TPS holders must be treated as having “lawful status as \* \* \* nonimmigrant[s],” *id.* § 1254a(f)(4), encouraging their connections and contributions to the United States. This

Court should give full effect to that requirement and hold that TPS recipients are eligible to seek adjustment of status to become lawful permanent residents.

### ARGUMENT

#### I. TPS RECIPIENTS UNDERGO A REVIEW PROCESS ANALOGOUS TO INSPECTION AND ADMISSION AND ARE THEREFORE CONSIDERED INSPECTED AND ADMITTED FOR ADJUSTMENT OF STATUS PURPOSES.

1. Congress has carefully delineated who is eligible to become a TPS holder. First and foremost, applicants must have “been continuously physically present in the United States since the effective date of the most recent designation of that state” and must have “continuously resided in the United States” since the date specified by the Secretary of Homeland Security. 8 U.S.C. § 1254a(c)(1)(A)(i), (ii). In practice, this means that TPS recipients must have come to the United States *before* the date a country is designated for the TPS program, thereby ensuring that the designation itself does not precipitate a flood of new arrivals.

Presence is just the starting point. Noncitizens are per se barred from TPS if they have ever been convicted of “any felony or 2 or more misdemeanors” while “in the United States,” regardless of the nature of the offenses or their age. *Id.* § 1254a(c)(2)(B)(i). There is also a per se bar for persecutors, terrorists, and people firmly resettled in third countries. *Id.* §§ 1254a(c)(2)(B)(ii), 1158(b)(2)(A).

Moreover, a TPS applicant must generally be “admissible as an immigrant.” *Id.* § 1254a(c)(1)(A)(iii),

(c)(2)(A)(iii).<sup>5</sup> Admissibility refers to a set of criteria defined in 8 U.S.C. § 1182 that noncitizens must meet to be physically allowed in the country or to adjust status. The inadmissibility statute includes approximately 74 inadmissibility grounds, *see generally* 8 U.S.C. § 1182, including that the person must not have been convicted of a crime involving moral turpitude, *id.* § 1182(a)(2)(A)(i)(I), crimes involving controlled substances, *id.* § 1182(a)(2)(A)(i)(II), or various other offenses.

Some inadmissibility grounds may be waived, including “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.” *Id.* § 1254a(c)(2)(A)(ii). But the criminal and terrorist inadmissibility grounds cannot be waived, *id.* § 1254a(c)(1)(A)(iii), except for a single possession conviction involving under 30g of marijuana, *id.* § 1254a(c)(2)(A)(iii).

Those who meet the threshold statutory criteria and are not barred from TPS must fill out a thirteen-page application form (with another 18 pages of instructions)—Form I-821. U.S. Citizenship & Immigration Services (USCIS), *Application for Temporary Protected Status*.<sup>6</sup> The application asks for a great deal of information—reaching far back into an applicant’s past and including deeply personal details such as former spouses, *id.* at 5, and political activities, *id.* at 8.

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<sup>5</sup> Certain employment-based inadmissibility grounds, which generally require workers to obtain certifications before working in the United States, are inapplicable in the TPS context. *See* 8 U.S.C. § 1254a(c)(2)(A)(i).

<sup>6</sup> Available at <https://www.uscis.gov/sites/default/files/document/forms/i-821.pdf> (last revised July 3, 2019).

The application also demands a comprehensive history of any criminal activity. *Id.* at 8-9. And it must be submitted “under penalty of perjury.” *Id.* at 11. Applicants must submit fees typically totaling hundreds of dollars. *See I-821, Application for Temporary Protected Status*, USCIS (last reviewed/updated June 12, 2020) (“Filing Fee” dropdown).<sup>7</sup>

If the applicant requires a waiver of any inadmissibility ground, she must also complete Form I-601, another 12 pages with 22 pages of instructions. *See I-601, Application for Waiver of Grounds of Inadmissibility*, USCIS (last reviewed/updated Sept. 22, 2020).<sup>8</sup> That form requires the applicant to state (under oath) any grounds of inadmissibility and to make a statement regarding the inadmissibility.

The Government can take weeks or months to process a TPS application. It collects biometric information from applicants, which is checked against federal databases. *See* 8 C.F.R. §§ 103.2(b)(9), 103.16. An applicant may be required to interview with an immigration officer to answer further questions about her background, or produce “documentary evidence” to support her eligibility. *See id.* §§ 244.8, 244.9. USCIS may issue a Request for Evidence if it finds that additional evidence is required; or it may deny the application without such notice, forcing the noncitizen to seek reopening or reconsideration. *See*

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<sup>7</sup> Available at <https://www.uscis.gov/i-821>. The TPS filing fee is fixed by statute at \$50, but if the TPS holder wishes to work, she must also file Form I-765, which requires a separate fee. *Id.* That fee is currently \$410. *Id.* A biometric services fee adds another \$85. *Id.*

<sup>8</sup> Available at <https://www.uscis.gov/i-601>.

USCIS, PM-602-0163, *Policy Memorandum: Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)* (July 13, 2018).<sup>9</sup>

The process is demanding and full of procedural traps for the unwary. For instance, when William Osmin Barrientos applied for TPS, USCIS requested additional proof of eligibility; Barrientos didn't respond quickly enough, and was denied. *In re Barrientos*, 24 I. & N. Dec. 100, 101 (B.I.A. 2007). He sought reopening, which was denied. *Id.* Barrientos appealed, and only then was he allowed to renew his application in removal proceedings. *Id.* at 101-102.

Generally, the most involved factual issue in TPS cases is showing someone's presence or residence in the United States, particularly where an applicant entered unlawfully, thus generating no contemporaneous record of entry. Antonio Figueroa, for example, had to produce multiple witnesses to an immigration judge in order to prove continuous residence in the United States for just a three month period—from February to May 2001. *In re Figueroa*, 25 I. & N. Dec. 596, 596 (B.I.A. 2011).

TPS is also a discretionary benefit, and may be denied even when an applicant satisfies the baseline criteria. 8 U.S.C. § 1254a(a)(1)(A). For instance, where a TPS applicant was convicted of a misdemeanor that did not disqualify him from relief, an immigration judge conducted a trial to decide whether to grant re-

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<sup>9</sup> Available at [https://www.uscis.gov/sites/default/files/document/memos/AFM\\_10\\_Standards\\_for\\_RFEs\\_and\\_NOIDs\\_FINALE2.pdf](https://www.uscis.gov/sites/default/files/document/memos/AFM_10_Standards_for_RFEs_and_NOIDs_FINALE2.pdf).

lief, and denied TPS after finding the applicant's account of the offense was not credible. *In re D-A-C-*, 27 I. & N. Dec. 575, 579 (B.I.A. 2019).

When a TPS application is finally approved, the Government issues to the recipient Form I-94, which the Government itself refers to as an "Arrival" record. *See* Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for el Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 85 Fed. Reg. 79,208, 79,208 (Dec. 9, 2020).

Even approval is not the end of the road. Like the underlying designations, individual TPS authorizations must be renewed periodically, at intervals set by the Government. *See* 8 U.S.C. § 1254a(d)(2). TPS holders must apply for renewal, requiring another Form I-821 more expensive fees. *See supra* pp. 7-8 & n.7.

2. In all relevant respects, the TPS process resembles inspection and admission as a nonimmigrant. The INA requires those who seek admission to the United States to "be inspected by immigration officers." 8 U.S.C. § 1225(a)(3). During the inspection process, just as in the TPS process, the immigration officer considers whether an applicant is "inadmissible" under Section 1182 and, if so, whether the applicant has received a waiver with respect to any potential ground for inadmissibility. *See generally id.* §§ 1225, 1182. If the person seeking admission passes inspection and otherwise has appropriate documentation demonstrating status as a nonimmigrant, *id.* § 1184, then he may be admitted into the United States. Like TPS recipients, the admitted person receives Form I-94 as a record of admission.

And the scrutiny associated with TPS applications is comparable to the scrutiny that applicants for nonimmigrant visas undergo. In this context, too, both categories of individuals must establish that they meet the same admissibility criteria. *See* 8 U.S.C. §§ 1182, 1184, 1254a(c). Both must also undergo extensive application processes that often involve significant follow up communication with the adjudicating officers. *Compare* 9 F.A.M. § 403 (describing the procedures for adjudicating nonimmigrant visa applications), *with* 8 C.F.R. part 244 (describing similar procedures for TPS applicants).

3. These parallels between admission and inspection as a nonimmigrant and application for TPS explain why Congress chose to treat TPS holders “as being in, and maintaining, lawful status as a nonimmigrant” for purposes of adjustment of status. 8 U.S.C. § 1254a(f)(4). “[B]y the express provisions of the INA, (1) every person with lawful status as a nonimmigrant has been ‘admitted’ into the United States, and (2) all nonimmigrants are ‘inspected’ before admission.” *Velasquez v. Barr*, 979 F.3d 572, 577 (8th Cir. 2020). Because TPS recipients have undergone a process analogous to inspection and admission, it makes sense that Congress directed the Government to treat them “as nonimmigrants.” Like nonimmigrants, TPS recipients are therefore eligible to seek adjustment of status providing they satisfy the INA’s additional requirements. *See* 8 U.S.C. § 1255.

## II. TPS RECIPIENTS FORM DEEP AND MEANINGFUL TIES WITH THEIR COMMUNITIES.

For those who successfully complete the application process and become TPS holders, a number of opportunities become available. Beneficiaries are eligible to work in the United States, 8 U.S.C. § 1254a(a)(1)(B), and obtain key documentation, such as a Social Security number and driver’s license, Menjívar, *supra*, at 4. These benefits—combined with the protection that TPS offers from detention on the basis of immigration status and removal from the United States—enable TPS recipients to become fully participating members in their communities. *See id.* (noting TPS recipients’ relative “mobility” and participation “in society’s institutions and civic organizations”).

The connections they form are not fleeting. Congress did not cap the number of times the Government can extend a country’s TPS designation. *See* 8 U.S.C. § 1254a(c)(3)(C). And precisely because TPS is not granted to a country except under extreme conditions, the conditions that give rise to an initial designation often persist for long periods. Thus, the Government has chosen to extend most TPS designations for many years. Wilson, *supra*, at 6. As a result, the vast majority of TPS recipients have been living in the United States continuously for over twenty years. *Id.*

These people have set down deep roots in their communities. Petitioners in this case, Jose Santos Sanchez and his wife Sonia Gonzalez, are perfect examples. Like all TPS holders from El Salvador, they have lived in the United States for more than two decades. *See* Pet’rs Br. 12; Wilson, *supra*, at 6 (noting the required arrival date for El Salvadoran TPS recipients

as February 13, 2001). A married couple living in New Jersey, they have four sons, one of whom is a U.S. citizen born in the United States. Pet'rs Br. 12. They have been employed for years: Mr. Sanchez at Viking Yachts, *id.* at 13, and Ms. Gonzalez at the Borgata Casino, Pet. 11. Mr. Sanchez's contributions so impressed Viking that it was willing to file a petition for a skilled worker visa on his behalf. In short, thanks to the protections afforded by TPS, Mr. Sanchez and Ms. Gonzalez have made this country their home.

They are far from alone. Across the country, TPS holders form an integral part of the fabric of their communities.

Consider Gustavo Martinez Mena. Mr. Martinez Mena arrived with his parents in the United States from El Salvador in 1990, all of two years old. *See* Compl. ¶ 2, *Martinez Mena v. Leopold*, No. 2:20-cv-01489 (E.D. Wis. Sept. 24, 2020), ECF No. 1. For all practical purposes, he has lived his entire life in the United States, primarily in Kenosha, Wisconsin. *See id.* ¶ 28. In that time, he has grown up, graduated from high school, and become an assistant manager at a local restaurant. *Id.* ¶¶ 28-29. He married Regina Martinez, a U.S. citizen, and has three children, all U.S. citizens. *Id.* ¶ 30.

Or "Carla."<sup>10</sup> Like Mr. Martinez Mena, Carla arrived in the United States as a child; she was only eight years old when she came. *See* Volpe Decl. ¶ 4(b), *Moreno v. Nielsen*, No. 1:18-cv-01135 (E.D.N.Y. Feb. 22, 2018), ECF No. 2-13. Born in Honduras, Carla finished the majority of her education in the United States, and now works as a practice manager for a

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<sup>10</sup> Names in quotation marks are pseudonyms.

medical office with locations in Washington, D.C., and Maryland. *Id.* She's good at her job, and her bilingual language skills enhance the medical practice's ability to work with diverse patients. *Id.* She has a daughter who is a U.S. citizen. *Id.*

Or "Mr. B." Mr. B has held TPS since Honduras was first designated in 1999. Blackford Decl. ¶ 4, *Moreno*, No. 1:18-cv-01135 (E.D.N.Y. Feb. 22, 2018), ECF No. 2-21. He has worked for over ten years as a manual laborer for the same company. *Id.* Mr. B's wife, a U.S. citizen, suffers from a mental health condition, making Mr. B the sole source of income for his family. *Id.* The couple has three U.S. citizen children. *Id.*

Or "Arturo." Arturo arrived thirty years ago, at age nine, fleeing the Salvadoran civil war. He graduated high school in the United States, and has lived over three-quarters of his life here. His mother has obtained permanent resident status, but Arturo remains in TPS.

Or "Ms. NR," whose story resembles Arturo's in many ways. She too, fled the Salvadoran civil war, arriving at age eleven. Her mother is a lawful permanent resident, and her husband and newborn child are U.S. citizens.<sup>11</sup>

Each of these people now have made a life and home for themselves in the United States. In every sense that matters, they are fully fledged members of U.S. communities, and a large percentage have family relationships with U.S. citizens that the INA uniquely favors. And their presence has been a boon for the United States, too. A recent study estimated that TPS

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<sup>11</sup> Documentation of the stories of Arturo and Ms. NR is on file with the authors.

recipients from just three countries contribute *billions* in pre-tax wages and salary income to Gross Domestic Product on an annual basis. Amanda Baran et al., Immigrant Legal Res. Ctr., *Economic Contributions by Salvadoran, Honduran, and Haitian TPS Holders* 5 (April 2017).<sup>12</sup> That adds up to hundreds of millions in Social Security and Medicare contributions. *See id.* at 7.

More recently, TPS holders in the healthcare industry, like Carla, have been playing a vital role in helping the country navigate the recent pandemic. “An estimated 11,600 health care workers today are TPS holders \* \* \* .” Nicole Prchal Svajlenka & Tom Jawetz, *A Demographic Profile of TPS Holders Providing Essential Services During the Coronavirus Crisis*, Ctr. for Am. Progress (Apr. 14, 2020).<sup>13</sup>

Arcadio Mejia is one of them. A TPS holder and certified nursing assistant who has worked at a medical center in Los Angeles for twelve years, Mejia was repeatedly exposed to COVID-19 on the job. America’s Voice, *ICYMI: TPS Holders in Limbo Face Termination of Immigration Status While Working on the Frontlines of COVID-19 Pandemic* (Apr. 7, 2020).<sup>14</sup> Despite the danger to himself, Mejia kept showing up

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<sup>12</sup> Available at [https://www.ilrc.org/sites/default/files/resources/2017-04-18\\_economic\\_contributions\\_by\\_salvadoran\\_honduran\\_and\\_haitian\\_tps\\_holders.pdf](https://www.ilrc.org/sites/default/files/resources/2017-04-18_economic_contributions_by_salvadoran_honduran_and_haitian_tps_holders.pdf).

<sup>13</sup> Available at <https://www.americanprogress.org/issues/immigration/news/2020/04/14/483167/demographic-profile-tps-holders-providing-essential-services-coronavirus-crisis/>.

<sup>14</sup> Available at [https://americasvoice.org/press\\_releases/icymi-tps-holders-in-limbo-face-termination-of-immigration-status-while-working-on-the-frontlines-of-covid-19-pandemic/](https://americasvoice.org/press_releases/icymi-tps-holders-in-limbo-face-termination-of-immigration-status-while-working-on-the-frontlines-of-covid-19-pandemic/).

to help patients—even working extra hours to fight the pandemic. *Id.*

Thousands more TPS recipients contribute in other essential ways, including farming and food manufacturing, warehousing, and transportation. Svajlenka & Jawetz, *supra*. TPS holders likewise fill vital roles in the restaurant and waste management sectors. *Id.* These TPS recipients “are providing a service to the entire [N]ation at great personal risk.” *Id.*

### **III. CONGRESS INTENDED TO PROTECT TPS RECIPIENTS FROM DANGER AND HARDSHIP.**

The fundamental purpose of TPS is to shield those who are eligible from exceptional danger. A TPS designation may only be issued when there “is an ongoing armed conflict within [a] state” that “pose[s] a serious threat to \* \* \* personal safety”; “an earthquake, flood, drought, epidemic, or other environmental disaster \* \* \* resulting in a substantial \* \* \* disruption of living conditions”; or when a country is otherwise “unable \* \* \* to handle adequately the return to the state of aliens who are nationals of the state.” 8 U.S.C. § 1254a(b)(1). Congress recognized that it would violate fundamental humanitarian norms to require immigrants to return home to such catastrophic conditions. *See Wilson, supra*, at 1-3. And, recognizing that these conditions might persist for years without permitting safe return, Congress authorized the Government to extend a country’s TPS designation indefinitely so long as the Secretary gives “notice” that “the conditions for such designation \* \* \* continue to be met.” 8 U.S.C. § 1254a(b)(3)(A), (C). If and when the conditions abate, the Government will “terminate the designation.” *Id.* § 1254a(b)(3)(B).

Given these statutory directives, if someone holds TPS, it is only because the dangerous conditions that Congress identified are an *ongoing* threat to those who return to the designated country. Yet in the Government’s view, TPS recipients who were not inspected and admitted at the border or paroled into the United States must expose themselves to those very dangers if they hope to adjust their status to become lawful permanent residents. *See* Br. in Opp. 13-14. That is because the only alternative available to most TPS holders is to obtain a visa by application to the consulate at the country of origin. *See* 8 U.S.C. § 1255(a)(3); Pet’rs Br. 8.<sup>15</sup> Those who make this journey will often be physically separated from their counsel and family support networks, making it all the more difficult to navigate the process and address any unexpected hurdles that arise.

The danger to those subjected to the Government’s rule is real. “Ms. S,” for example, is a person originally trafficked into the United States from Haiti as a minor. Shafiqullah Decl. ¶ 4, *Moreno*, No. 1:18-cv-01135 (E.D.N.Y. Feb. 22, 2018), ECF No. 2-8. She suffered

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<sup>15</sup> In a recent decision, the Administrative Appeals Office took the position that persons who receive “advance parole” to travel abroad through the TPS program have not been “paroled” into the United States for purposes of Section 1255(a). *See* USCIS, PM-602-0179, *Policy Memorandum: Matter of Z-R-Z-C, Adopted Decision 2020-02 (AAO Aug. 20, 2020)*. Before that decision, TPS recipients seeking to adjust status on the basis of an immediate family relationship could qualify under Section 1255(a) by receiving “advance parole.” If that decision accurately describes the law—a point that *amici* vigorously contest—then even more TPS holders must undergo an onerous and lengthy stay abroad to obtain a visa and return.

years of abuse at the hands of her traffickers. *Id.* Returning to Haiti might expose her once again to her captors.

“Mr. P,” from Honduras, faces similar peril. Taylor Decl. ¶ 6, *Moreno*, No. 1:18-cv-01135 (E.D.N.Y. Feb. 22, 2018), ECF No. 2-15. A TPS recipient since 1999, Mr. P works in the deli department of a local supermarket and has three children with his U.S. citizen wife. *Id.* The couple have concluded that it is simply too dangerous for him to return to Tegucigalpa, Honduras, for a visa interview given current country conditions. *Id.*; *see also Honduras Travel Advisory*, U.S. Dep’t of State (Nov. 23, 2020)<sup>16</sup> (“Violent crime, such as homicide and armed robbery, is common. Violent gang activity, such as extortion, violent street crime, rape, and narcotics and human trafficking, is widespread. Local police and emergency services lack sufficient resources to respond effectively to serious crime.”).

So too “MR.” Miller Decl. ¶ 4, *Moreno*, No. 1:18-cv-01135 (E.D.N.Y. Feb. 22, 2018), ECF No. 2-12. Originally from El Salvador, MR came to the United States in 1993 and now has a lawful permanent resident partner and two U.S. citizen children. *Id.* Returning to El Salvador is out of the question for MR, in light of the violence that her family and friends have experienced. *Id.*; *see also El Salvador Travel Advisory*, U.S. Dep’t of State (Sept. 14, 2020)<sup>17</sup> (“Violent crime, such

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<sup>16</sup> Available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/honduras-travel-advisory.html>.

<sup>17</sup> Available at <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/el-salvador-travel-advisory.html>.

as murder, assault, rape, and armed robbery, is common. Gang activity, such as extortion, violent street crime, and narcotics and arms trafficking, is widespread. Local police may lack the resources to respond effectively to serious criminal incidents.”).

And the hardships do not fall just on TPS holders themselves. Their families and co-workers in the United States suffer too.

Melvin Medina, a TPS recipient married to a U.S. citizen, has six children living in the United States, one of whom has special needs. Hohenstein Decl. ¶ 3, *Moreno*, No. 1:18-cv-01135 (E.D.N.Y. Feb. 22, 2018), ECF No. 2-11. The family depends on Mr. Medina’s income, and could not afford for Mr. Medina to leave the United States even for a short period. *Id.*; *see also Medina v. Beers*, 65 F. Supp. 3d 419, 435-436 (E.D. Pa. 2014) (“To force [Mr. Medina] to return to a country that the United States Attorney General has deemed dangerous simply to have Plaintiff physically re-enter the United States is a result that appears to serve no practical purpose.”).

“Ms. T” likewise has obligations binding her to the United States. Takhsh Decl. ¶ 4, *Moreno*, No. 1:18-cv-01135 (E.D.N.Y. Feb. 22, 2018), ECF No. 2-18. She is a certified nursing assistant who has been working at a nursing home for many years. *Id.* Her husband, a U.S. citizen, suffered a car accident, making her the sole caregiver for her husband and very young daughter. *Id.* ¶¶ 4, 5. She cannot realistically leave them to return to Haiti in an effort to obtain permanent residence.

The arbitrariness of the government’s interpretation is vividly on display in the case of the “NE family.”

Mr. and Mrs. NE entered the United States from Honduras in 1988 and 1990, respectively; they met in the United States, married, and started a family. Each obtained TPS in 1999. Mrs. NE entered lawfully, but overstayed her tourist visa; Mr. NE had entered without inspection. Mrs. NE was eligible to seek adjustment of status through her U.S. citizen son, as an “immediate relative” of a U.S. citizen, because she had a lawful entry. But due to the government’s interpretation of the statute, Mr. NE’s TPS did not allow him to apply for adjustment of status until he traveled to Honduras. So, despite his 30 years in the United States, Mr. NE traveled back to his dangerous homeland, where he hid inside his family home until he could reenter the United States lawfully to receive adjustment of status.<sup>18</sup> The Government offers no sensible justification for these diverging results, particularly given the safeguards and procedural checks built into the TPS application process. *See supra* pp. 6-10.

Congress did not enact the harsh scheme that the Government imagines. On the contrary, it carefully chose its language in Section 1254a(f)(4) to avoid precisely this result. *See* Pet. Br. 18-25. This Court should honor that choice.

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<sup>18</sup> Documentation of the NE family’s story is on file with the authors.

**CONCLUSION**

For the foregoing reasons, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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MARCH 2021

## **ADDENDUM**

**ADDENDUM A**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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GUSTAVO MARTINEZ MENA,

*Plaintiff,*

v.

KAY F. LEOPOLD, Field Office Director  
United States Citizenship and Immigration Services  
and

UNITED STATES CITIZENSHIP AND IMMIGRATION  
SERVICES,

*Defendants.*

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Case No. 2:20-cv-01489

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Filed: September 24, 2020

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**COMPLAINT FOR MANDAMUS AND  
DECLARATORY RELIEF**

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\* \* \*

2. Mr. Martinez Mena has lived in the United States for thirty years, arriving with his parents at age two in 1990. Since September 2012, he has been continuously in lawful TPS and authorized to work in the United States. He is married to a U.S. citizen and has three U.S. citizen children. He has worked for the same employer for approximately thirteen years, rising to the position of Assistant Manager. Now, after

three decades of living and working in the United States, including raising U.S. citizen children, and based on an immigrant petition filed by his wife, Mr. Martinez Mena seeks to become a lawful permanent resident. However, his application has been denied due to Defendants' erroneous interpretation of the INA.

\* \* \*

28. Mr. Martinez Mena has lived in the United States continuously for over thirty years. In 2005, Mr. Martinez Mena moved with his family to Kenosha, Wisconsin, where he still resides. He completed high school in Kenosha, graduating in 2007.

29. In 2008, at age 20, Mr. Martinez Mena began working at Jimanos Pizzeria in Pleasant Prairie, Wisconsin. He has worked there ever since. He currently is an Assistant Manager.

30. On February 19, 2011, Mr. Martinez Mena married Regina Martinez, a U.S. citizen. They have three U.S. citizen children—Naiely Sarai, age eleven, Navonni Armel, age seven, and Neven, age eighteen months. The family lives together in Kenosha.

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**ADDENDUM B**

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*Moreno v. Nielsen*, No. 1:18-cv-01135  
(E.D.N.Y. Feb. 22, 2018), ECF No. 2-8

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Sworn Declaration of Hasan Shafiqullah in Support  
of Plaintiffs' Motion for Class Certification

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I, Hasan Shafiqullah, make the following declaration based on my personal knowledge, and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

\* \* \*

4. One potentially eligible client was trafficked into the U.S. from Haiti at 14 years of age and suffered years of abuse at the hands of her traffickers. She currently has Haitian TPS, is married to a U.S. citizen, and has a T nonimmigrant visa application pending. Her TPS will terminate effective July 22, 2019.

\* \* \*

**ADDENDUM C**

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*Moreno v. Nielsen*, No. 1:18-cv-01135  
(E.D.N.Y. Feb. 22, 2018), ECF No. 2-11

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Sworn Declaration of Joseph C. Hohenstein in Support of Plaintiffs' Motion for Class Certification

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I, Joseph Cornelius Hohenstein, make the following declaration based on my personal knowledge, and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

\* \* \*

3. The Plaintiff in *Medina v. Beers* was a TPS recipient married to a U.S. citizen. The couple had 6 children. One of their children had special needs. They could not afford for Mr. Medina, the TPS recipient, to leave the United States, even for a short period. To ask that family to do so was, in my opinion, inhumane. He was the person upon whom the family was financially dependent and was one half of a great parenting team. More to the point, the statute on this matter is clear. The District Court in *Medina* decided the case based on the plain language of the TPS statute.

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**ADDENDUM D**

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*Moreno v. Nielsen*, No. 1:18-cv-01135  
(E.D.N.Y. Feb. 22, 2018), ECF No. 2-12

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Sworn Declaration of Nicole Polley Miller, Esq. in  
Support of Plaintiffs' Motion for Class Certification

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I, Nicole Polley Miller, Esq., make the following declaration based on my personal knowledge, and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

\* \* \*

4. We have approximately 20 clients who are unable or unwilling to travel back to their home countries, either because of a fear of return or because they do not have the financial means to pay for the trip. One of AFSC's clients, MR, is a national of El Salvador and entered the U.S. without inspection in 1993. MR has held TPS continuously since 2001. MR has a lawful permanent resident partner and 2 U.S. citizen children. MR's older child turned 21 this year and can petition for MR, but MR is unable to adjust her status under the current USCIS policy because she does not have a lawful admission. MR is terrified to travel to El Salvador on advance parole, given the violence that her family and friends in El Salvador have experienced.

\* \* \*

**ADDENDUM E**

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*Moreno v. Nielsen*, No. 1:18-cv-01135  
(E.D.N.Y. Feb. 22, 2018), ECF No. 2-13

---

Sworn Declaration of Susannah Volpe in Support of  
Plaintiffs' Motion for Class Certification

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I, Susannah Volpe, make the following declaration based on my personal knowledge, and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

\* \* \*

4. Following are several examples of clients who would be eligible for adjustment of status if TPS were considered an admission. Names have been changed to protect client privacy.

\* \* \*

b. Carla\* entered the US at eight years old in 1998. She applied for and received TPS in 2001. She never accrued unlawful presence and has maintained valid TPS status since her first application. Carla was born in Honduras and is bilingual, having completed the majority of her education in the United States. Carla has a two-year-old U.S. citizen daughter and she works as a Practice Manager for a medical office that has office locations in Washington, DC and Maryland. Her employers have begun work with an immigration lawyer to petition for Carla, as she is skilled at her job and possesses valuable language skills that enhance the medical practice's ability to work with diverse patients. It is not clear that this employment based pe-

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tition will be approved before Carla's TPS status expires. Moreover, without the grant of TPS being considered an admission, she would not be eligible for the exemption to the bar to adjustment for failing to maintain lawful status. For her, travel on a grant of advance parole will not help, because the exemption found in 8 U.S.C. § 1255(k) requires an admission, not simply parole.

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**ADDENDUM F**

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*Moreno v. Nielsen*, No. 1:18-cv-01135  
(E.D.N.Y. Feb. 22, 2018), ECF No. 2-15

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Sworn Declaration of Stephanie R. Taylor in Support  
of Plaintiffs' Motion for Class Certification

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I, Stephanie R. Taylor, make the following declaration based on my personal knowledge, and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

\* \* \*

6. Mr. P is from Honduras. He entered the United States without inspection in November 1998. He registered for TPS in 1999 and successfully re-registered every year since. Mr. P works in the deli department of a local supermarket. He is married to a US citizen and has three children. As an immediate relative of a US citizen, Mr. P would be eligible for adjustment of status if the San Antonio Field Office recognized TPS as a lawful entry. However, because of USCIS's current position on TPS, Mr. P would have to apply for an unlawful presence waiver. Because he has a US citizen wife, he is eligible to apply for a provisional unlawful presence waiver in the United States. Once approved, he would have to attend an immigrant visa interview at the US Consulate in Tegucigalpa. I met with Mr. P and his wife in October 2017 to discuss the provisional waiver process. However, the couple decided it was too dangerous for him to travel back to Honduras, given current country conditions.

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**ADDENDUM G**

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*Moreno v. Nielsen*, No. 1:18-cv-01135  
(E.D.N.Y. Feb. 22, 2018), ECF No. 2-18

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Sworn Declaration of ALEN TAKHSH in Support of  
Plaintiffs' Motion for Class Certification

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I, Alen Takhsh, make the following declaration and state, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct to the best of my knowledge:

\* \* \*

4. My client is from Haiti. She was granted TPS in or about 2010, and she has been in continuous TPS status since that time. She has been married to a U.S. Citizen since 2010, and they have a beautiful, four (4) year-old daughter. She has been working as a certified nursing assistant at a nursing home for the past three (3) years, and prior thereto she performed housekeeping services at a hotel. Her husband was the recent victim of a vehicular accident and sustained serious bodily injuries. He currently cannot see, drive or take care of himself. Her world was turned upside down due to this unfortunate accident, leaving her to care for her husband and four (4) year-old daughter all by herself.

5. My client came to me for help because she felt desperate. Her life is in limbo due to the uncertainty of her ability to adjust status to that of a lawful permanent resident. Since her husband's accident, her desperation regarding her immigration status has intensified; she is the sole caregiver to her seriously injured

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husband and her young daughter, and she now is the  
sole bread-winner for the family.

\* \* \*

**ADDENDUM H**

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*Moreno v. Nielsen*, No. 1:18-cv-01135  
(E.D.N.Y. Feb. 22, 2018), ECF No. 2-21

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Sworn Declaration of Brian J. Blackford in Support  
of Plaintiffs' Motion for Class Certification

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I, Brian J. Blackford, make the following declaration based on my personal knowledge, and declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

\* \* \*

4. For example, one TPS client from Honduras has had TPS status since it was originally designated in 1999. He is married to a U.S. citizen on disability for a mental health issue and has three U.S. citizen children with his spouse. He has been employed as a manual laborer at the same company for over 10 years now (and continuously employed before that after his initial grant of TPS) and is the sole source of income for the family. His U.S. citizen wife has filed a I-130 visa petition for him which was recently approved. He is intending to apply for adjustment of status in the near future but is hesitating because of current USCIS policy and the legal and filing fees that would be lost if his application were denied.

\* \* \*