No. 20-315

In the Supreme Court of the United States

JOSE SANTOS SANCHEZ, ET UX.,
Petitioners,

v.

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

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

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, under 8 U.S.C. 1254a(f)(4), a grant of temporary protected status must be treated as an admission into the United States for purposes of a foreign national's application for adjustment to lawful permanent resident status under 8 U.S.C. 1255.

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C.2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

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[1] Petitioners have filed a written blanket consent to the filing of *amicus* briefs in this action. Respondents have stated in writing that they consent to the filing of this *amicus* brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

Petitioners' construction of the temporary protected status ("TPS") statute, 8 U.S.C. § 1254a, undermines the careful balance that Congress has struck between humanitarian concerns and immigration consequences that runs through the Immigration and Nationality Act ("INA"). The adjustment of status statute, 8 U.S.C. § 1255, is designed to provide relief to law-abiding nonimmigrant aliens who become eligible for lawful permanent resident status after they have entered the country. Such aliens are eligible to adjust their status within the United States and are not required to travel abroad to obtain an immigrant visa. But since its inception, Congress has declined to extend this form of relief to aliens who enter the country illegally. This bar from relief provides a strong incentive for aliens to comply with our immigration laws.

Under Petitioners' construction of the TPS statute, any alien who has obtained TPS is considered to have been "inspected and admitted" for the purposes of section 1255(a). According to Petitioners' view of the law, even aliens who evaded immigration officers and surreptitiously entered the country years ago, worked without authorization, and accrued years of unlawful status in the United States are deemed to have entered the country in accordance with our laws and to be in lawful status for purposes of adjustment of status. Such a view of the law is untenable in light of the purposes and policies underlying both the TPS and adjustment of status statutes.

TPS was enacted in 1990 in order to protect aliens, regardless of legal status, from deportation or removal

if conditions in their home country rendered return unsafe. As part of the TPS statute, Congress provided that during the temporary period that an alien is a recipient of TPS, he or she will be considered to be in, and maintaining, lawful status as a nonimmigrant for purposes of adjustment of status. This provision was designed to preserve the availability of adjustment of status for law-abiding nonimmigrants who cannot return home when their current status expires due to unsafe country conditions.

The Court should reject Petitioners' construction of section 1254a(f)(4) because it contradicts the policies and purposes underlying both section 1254a and 1255 by providing an avenue for adjustment of status where none existed before. In contrast, the government's interpretation is consistent with both the text and purposes of both statutes. Accordingly, the Court should defer to the government's long-standing construction of the statute and affirm the decision of the court of appeals.

ARGUMENT

Petitioners' Interpretation Undermines the Incentives that Congress Created in Limiting Adjustment of Status to Aliens Who Have Been Inspected and Admitted

The INA as a whole reflects a complex and comprehensive set of rules that balance humanitarian concerns with consequences for those who fail to comply with the law. This case arises at the intersection of two sections of the INA that adress such concerns and consequences: 8 U.S.C. § 1254a, which

governs TPS; and 8 U.S.C. § 1255, which governs adjustment of status. Congress has struck a balance between the humanitarian concerns underlying both the TPS and adjustment of status statutes while maintaining certain incentives for aliens to respect and comply with immigration law. Petitioners urge this Court to upend the balance struck by Congress and ignore the incentives that would be undermined by their interpretation of the law. This Court should reject their position and affirm the denial of their applications for adjustment of status.

* * *

Broadly speaking, the INA recognizes two types of arriving aliens, the immigrant and the nonimmigrant. *See* 8 U.S.C. § 1101(a)(15) (defining an immigrant as "every alien except an alien who is within one of the following classes of nonimmigrant aliens"). An immigrant seeks admission as a lawful permanent resident and to settle in the United States. A nonimmigrant seeks admission for a temporary time and purpose, and intends to return to his or her residence in a foreign country. *See*, *e.g.*, 8 U.S.C. § 1101(a)(15)(B), (F), (J). Prior to entry, every immigrant, and some nonimmigrants, must obtain a visa at a consular office abroad. Under section 1255, however, a nonimmigrant alien who has been "inspected and admitted or paroled into the United States" may apply for adjustment of status to that of a lawful permanent resident from within the United States if he or she becomes eligible for admission as a lawful permanent resident. Thus, adjustment of status allows a nonimmigrant to adjust status to that of a

lawful permanent resident without incurring the time, expense, and uncertainty of seeking an immigration visa abroad.

Petitioners contend that aliens such as themselves, who have been granted TPS, should be able to adjust their status to that of lawful permanent residents even though they entered the country in violation of the law. For the reasons set forth by the government in its brief, Petitioners have failed to show that the agency's denial of their application for adjustment of status is contrary to law. In addition to the reasons set forth by the government, the Court should reject Petitioners interpretation of section 1254a(f)(4) because it goes beyond the purposes of the TPS statute and also undermines the purpose of the threshold requirement of admission in section 1255(a).

A. The Text, History, and Purpose of the "Inspected and Admitted" Requirement in Section 1255

The text, history, context, and purpose of section 1255 reveal that Congress created a strong disincentive for illegal immigration by barring aliens who enter the United States without inspection and in contradiction of law from adjusting their status to that of a lawful permanent resident. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i) (rendering inadmissible any alien present in the United States without being admitted or paroled); 1225(a)-(b) (requiring inspection of an arriving alien by an immigration officer); 1325 (criminalizing entry without inspection).

In order to qualify for adjustment of status, an applicant must first meet the threshold requirement that he or she has been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a). The applicant must also be eligible to receive an immigrant visa, be admissible as a permanent resident, and have an immigrant visa immediately available. *See* 8 U.S.C. § 1255(a)(2) & (3).

The legislative history for section 1255(a) reveals that Congress created the "inspected and admitted" threshold requirement to prevent aliens who entered the United States surreptitiously from adjusting their status to that of lawful permanent residents. Prior to 1952, obtaining immigrant status was possible only through the issuance of an immigrant visa by a United States consular office abroad. *Choe v. INS*, 11 F.3d 925, 928 (9th Cir. 1993). In 1952, Congress enacted the adjustment-of-status provision codified at 8 U.S.C. § 1255, which affords aliens who enter as nonimmigrants a means of becoming permanent residents without having to depart the United States and apply for an immigrant visa from a consular office in the alien's country of nationality.

Section 1255(a), as originally enacted, permitted the adjustment of status of an alien who was "lawfully admitted … as a *bona fide* nonimmigrant"[2] and who

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[2] A *bona fide* nonimmigrant is an alien who intends to depart the United States when his status as a nonimmigrant ends. An alien who intends to remain in the United States when he applies for a nonimmigrant visa or when he applies for admission is not a *bona fide* nonimmigrant. *See Ameeriar v. INS*, 438 F.2d 1028, 1032 (3d Cir. 1971) (en banc).

"maintain[ed] that status." Immigration and Nationality Act of June 27, 1952 ("INA"), ch. 477, § 245(a), 66 Stat. 163, 217. This provision required an alien to have a procedurally regular, and also substantively legal, admission in order to be considered for adjustment of status. *Matter of Quilantan*, 25 I. & N. Dec. 285, 288-89 (BIA 2010). In *INS v. Phinpathya*, this Court discussed a Senate Report accompanying the INA that complained of "aliens [who] are deliberately flouting our immigration laws by [entering] the United States illegally or ostensibly as nonimmigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents." 464 U.S. 183, 190-91 (1984) (quoting S. Rep. No. 1137, 82d Cong., 2d Sess., pt. 1, p. 25 (1952)).

In 1958, Congress amended the statute by dropping the lawful-admission and maintenance-of-status requirements, but retaining the requirement that an alien be admitted as a *bona fide* nonimmigrant. *See* Act of Aug. 21, 1958, Pub. L. No. 85-700, 72 Stat. 699. Two years later, Congress further amended section 1255(a) to remove the requirement that an alien be admitted as a *bona fide* nonimmigrant and permitted adjustment of status to any alien, other than an alien crewman, "who was inspected and admitted or paroled into the United States." Act of July 14, 1960, Pub. L. No. 86-648, § 10, 74 Stat. 504, 505. Thus, the threshold requirement of section 1255(a) relevant to Petitioners application for adjustment of status—that they be "inspected and admitted or paroled"—is substantively the same as the 1960 amendment.

The Senate Report that accompanied the 1960 legislation amending section 1255(a) stated that a purpose of the amendment was to "broaden the existing procedure for the adjustment of the status … to include all aliens (other than crewmen) who have been inspected at the time of their entry into the United States." *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1117 (9th Cir. 2007) (quoting S. Rep. No. 86-1651 (1960) (as reprinted in 1960 U.S.C.C.A.N. 3124, 3125)). Significantly, the Senate Report went on to state: "The wording of the amendment is such as not to grant eligibility for adjustment of status … to aliens who entered the United States surreptitiously." *Id.* (quoting 1960 U.S.C.C.A.N. at 3137).

The Board of Immigration Appeals ("Board") has held that by dropping the "*bona fide* nonimmigrant" language from section 1255(a), Congress intended that the "inspected and admitted or paroled" language requires only a procedurally regular entry (as opposed to a substantively lawful entry) for purposes of section 1255(a). *Quilantan*, 25 I. & N. Dec. at 290-91. This holding is consistent with the later-added definition for "admission" and "admitted" in the INA. *See id.*; 8 U.S.C. § 1101(a)(13)(A) (defining "admission" and "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer"). So long as an alien presents him- or herself to an immigration officer for inspection and does not make a false claim of citizenship, a subsequent admission will be procedurally regular. *See Quilantan*, 25 I. & N. Dec. at 293.

Although Congress broadened the scope of the threshold requirement to being "inspected and admitted" in section 1255(a) between 1952 and 1960, it has always evinced an intent that adjustment of status be available only to aliens who present themselves for inspection to an immigration officer and make no false claim of citizenship. And by limiting the availability of adjustment of status to only those aliens, section 1255(a) creates a strong incentive for aliens to comply with the laws governing admission and not surreptitiously enter the United States by evading inspection.

In sum, other than some non-applicable and narrow exceptions,[3] adjustment of status is only available to aliens who present themselves for inspection upon arriving in the United States. Any alien who unlawfully enters the United States is ineligible for adjustment of status absent plain statutory language to the contrary. *See Sanchez v. Secretary of Homeland Security*, 967 F.3d 242, 251 (3d Cir. 2020) ("Absent a clear statutory directive, a program that provides 'limited, temporary' relief should not be read to facilitate permanent residence for aliens who entered the country illegally.").

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[3] The government identifies several exceptions to the threshold admission requirement where Congress plainly authorized adjustment of status for certain un-admitted aliens but did not do the same for TPS recipients. Gov't Br. 19-21.

B. The TPS Statute Does Not Create an Exception to the Threshold Requirement of Admission for Adjustment of Status

The TPS statute provides a limited, temporary form of relief tied to "temporary conditions … that prevent aliens who are nationals of the [designated country] from returning [there] in safety." 8 U.S.C. 1254a(b)(1)(C). During this safe harbor period, a TPS recipient cannot be removed and may be authorized to work in the United States. *See* 8 U.S.C. § 1254a(a)(1). An alien's presence without admission, or inadmissibility based on that illegal presence, will not preclude a grant of TPS under most circumstances. Section 1254a permits TPS to be granted despite an alien's inadmissibility, but it requires a waiver of the grounds of inadmissibility. 8 U.S.C. § 1254a(c)(2)(A)(ii). Because Petitioners have been granted TPS, their inadmissibility has been waived for the specific purposes of TPS. The waiver is a limited one, however, with the purpose of permitting them to remain in the United States with work authorization, but only for the period of time that TPS is effective. 8 U.S.C. § 1254a(a)(1), (2), (c)(5).

As the government demonstrates in its brief (Gov't Br. 21-25), the text, history, context, and purpose of the TPS statute reflects Congress's intent to preserve the pre-existing ability of aliens who meet the threshold admission requirement of section 1255(a) to adjust their status, but does not support Petitioners'

contention that TPS creates a new pathway to lawful permanent residence in the United States.

The only references to adjustment of status in the TPS statute appear in sections 1254a(f)(4) and (h). Section 1254(h) provides that, absent a supermajority vote, "it shall not be in order in the Senate to consider any bill, resolution, or amendment" that "provides for adjustment to lawful temporary or permanent resident alien status for any alien receiving temporary protected status under this section." By so attempting to restrict its own ability to pass legislation that would create an avenue for TPS recipients to obtain lawful permanent residence through adjustment of status, Congress strongly indicated that adjustment of status is not already available through section 1254a.

Section 1254(f)(4) states that a TPS recipient "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjustment of status "[d]uring a period in which [the] alien is granted [TPS]." The only relevant provisions of section 1255 that refer to "being in" or "maintaining" lawful status are subsections (c)(2) and (k), neither of which help Petitioners overcome the threshold admission requirement in subsection (a). Thus, section 1254a(f)(4) only enables certain aliens who are in lawful status to circumvent the requirements in section 1255(c)(2) relating to being in and maintaining lawful status and to remain eligible for adjustment of status if their original status expires before their TPS terminates. In light of its temporal limitation of the fictious lawful

status (only during the period in which the alien is granted TPS), nothing in section 1254a(f)(4) would obviate any of the bars to adjustment of status in subsections 1255(a) and (c) if the TPS recipient, like Petitioners, was ineligible for adjustment of status before obtaining TPS.

Nevertheless, Petitioners ask this Court to conclude that the temporary and limited relief afforded by the TPS statute renders them "inspected and admitted" within the meaning of section 1255(a) because they must be "considered as being in, and maintaining, lawful status as a nonimmigrant," and all nonimmigrants, in turn, necessarily have been admitted. Pet. Br. 18-25. Petitioners' contention that this syllogism unambiguously renders them "inspected and admitted" for purposes of 1255(a) is flawed for the reasons set forth in the government's brief. Gov't Br. at 33-40.

In addition, Petitioners' interpretation of section 1254a(f)(4) ignores the purpose behind the threshold "inspected and admitted" requirement in section 1255(a) and is untenable in light of the policies and purposes underlying that requirement. *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (stating that statutory interpretation involves looking at a provision in the context of the entire scheme, including the "objects and policy of the law"). Petitioners' approach would contradict Congress's objective of excluding from adjustment of status aliens who entered the country illegally (but later found themselves in need of

protection of the TPS regime and are consequently "considered as being in, and maintaining, lawful status as a nonimmigrant"). As demonstrated above, by permitting relief for those who comply with the procedural requirements of immigration law and denying relief to those who flout the law, Congress intended to balance humanitarian concerns with the maintenance of incentives against law-breaking. This clear congressional purpose strongly bolsters the government's longstanding interpretation.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully Submitted,

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