UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Amado de Jesus MORENO; Nelda Yolanda REYES; Jose CANTARERO ARGUETA; Haydee AVILEZ ROJAS,

Plaintiffs,

v.

Kirstjen NIELSEN, Secretary, U.S. Department of Homeland Security, in her official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; L. Francis CISSNA, Director, U.S. Citizenship and Immigration Services, in his official capacity; U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

Case No.: 1:18-cv-01135-RRM

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 3

A. STANDARD FOR OBTAINING PRELIMINARY RELIEF 3

B. PLAINTIFFS MERIT PRELIMINARY INJUNCTIVE RELIEF 3

1. Plaintiffs Are Likely to Prevail on Their INA and APA Claims. 3

a. The statutory scheme controlling TPS and adjustment of status and cases interpreting the relevant provisions 4

b. 8 U.S.C. § 1254a(f)(4) requires USCIS to consider TPS holders as inspected and admitted as nonimmigrants for purposes of LPR adjustment of status 9

c. Congressional intent supports the plain meaning of 8 U.S.C. § 1254a(f)(4) 13

2. Plaintiffs Have Suffered, and Will Continue to Suffer, Irreparable Harm Absent This Court's Intervention 14

3. The Public Interest and Balance of Equities Weigh Heavily in Favor of Granting Injunctive Relief 24

III. CONCLUSION 25

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Table of Authorities

Cases

Aguilar v. Baine Service Systems, Inc., 538 F. Supp. 581 (S.D.N.Y. 1982) 18, 23
Ariz. Dream Act Coalition v. Brewer, 757 F.3d 1053 (9th Cir. 2014) 23
Bonilla v. Johnson, 149 F. Supp. 3d 1135 (D. Minn. 2016) 7, 10, 11
Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 9
Duarte-Ceri v. Holder, 630 F.3d 83 (2d Cir. 2010) 13
Flores v. U.S. Citizenship & Immigration Servs., 718 F.3d 548 (6th Cir. 2013) ..... passim
Gozlon-Peretz v. United States, 498 U.S. 395 (1991) 13
Kirwa v. U.S. Dep't of Defense, No. 17-1793(ESH), 2017 U.S. Dist. LEXIS 176826 (D.D.C. Oct. 25, 2017) 15, 23
League of Women Voters v. Newby, 838 F.3d 1 (D.C. Cir. 2016) 25
Medina v. Beers, 65 F. Supp. 3d 419 (E.D. Pa. 2014) 7, 10, 11
N. Am. Soccer League, LLC v. U. S. Soccer Fed'n, Inc., 883 F.3d 32 (2d Cir. 2018) 3
Nken v. Holder, 556 U.S. 418 (2009) 24
Oneida Nation of N.Y. v. Cuomo, 645 F.3d 154 (2d Cir. 2011) 3
Paulsen v. County of Nassau, 925 F.2d 65 (2d Cir. 1991) 15
Ramirez v. Brown, 852 F.3d 954 (9th Cir. 2017) ..... passim
Ramos v. Nielsen, No. 18-cv-01554-EMC, 2018 U.S. LEXIS 171272 (N.D. Cal. Oct. 3, 2018) 1, 9, 16
Rosenberg v. Fleuti, 374 U.S. 449 (1963) 13
Sami Al Karim v. Holder, No. 08-cv-00671-REB, 2010 U.S. Dist. LEXIS 30030 (D. Colo. Mar. 29, 2010) 15, 16
Schwebel v. Cradall, No. 17-cv-8541), 2018 U.S. Dist. LEXIS 154719 (S.D.N.Y. Sept. 7, 2018) 23
Serrano v. U.S. Att'y Gen., 655 F.3d 1260 (11th Cir. 2011) 7, 10, 12
Small v. Avanti Health Sys., LLC, 661 F.3d 1180 (9th Cir. 2011) 25
State St. Bank & Trust Co. v. Salovaara, 326 F.3d 13 (2d Cir. 2003) 10
TRW Inc. v. Andrews, 534 U.S. 19 (2001) 9
United States v. Aguilar, 585 F.3d 652 (2d Cir. 2009) 13
Vargas v. Meese, 682 F. Supp. 591 (D.D.C. 1987) 15, 23
Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. Feb. 13, 2018) 18, 23, 24
Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994) 25
Willis v. Lascaris, 499 F. Supp. 749 (N.D.N.Y. 1980) 18
Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008) 3, 14
You v. Nielsen, 321 F. Supp. 3d 451, 468 (S.D.N.Y. 2018) 16

Statutes

5 U.S.C. § 702 4
5 U.S.C. § 706(2)(A) 4
8 U.S.C. § 1101(a)(15) 11
8 U.S.C. § 1151(b)(2)(A)(i) 12
8 U.S.C. § 1152(b)(3) 12
8 U.S.C. § 1182 7
8 U.S.C. § 1182(a)(9)(B)(i)(II) 6, 22
8 U.S.C. § 1182(a)(9)(B)(v) 23

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

8 U.S.C. § 1184(a)(1) 2, 6, 10
8 U.S.C. § 1186a(e) 12
8 U.S.C. § 1254a 4, 13
8 U.S.C. § 1254a(a)(1) 5
8 U.S.C. § 1254a(b)(1) 4
8 U.S.C. § 1254a(b)(3)(C) 5
8 U.S.C. § 1254a(c)(1) 25
8 U.S.C. § 1254a(c)(1)(A)(iii) 5
8 U.S.C. § 1254a(c)(2) 25
8 U.S.C. § 1254a(c)(2)(A) 5
8 U.S.C. § 1254a(c)(2)(B) 5
8 U.S.C. § 1254a(d)(4) 5
8 U.S.C. § 1254a(f) 8
8 U.S.C. § 1254a(f)(3) 5
8 U.S.C. § 1254a(f)(4) ..... passim
8 U.S.C. § 1255 ..... passim
8 U.S.C. § 1255(a) 6, 12, 13
8 U.S.C. § 1255(c) 6
8 U.S.C. § 1255(c)(2) 6, 10
8 U.S.C. § 1255(k) 6
8 U.S.C. § 1258 ..... 6, 11
42 U.S.C. § 402(y) 19

Regulations

8 C.F.R. § 214.1 11
8 C.F.R. § 214.1(a)(3)(i) 2, 6, 10
8 C.F.R. § 245.1(d)(1)(ii) 10

Other Authorities

Dep't of Homeland Sec., *Acting Secretary Elaine Duke Announcement On Temporary Protected Status For Haiti* (Nov. 20, 2017) 8
Dep't of Homeland Sec., *Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Nicaragua And Honduras* (Nov. 6, 2017) 8,16
Dep't of Homeland Sec., *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Honduras* (May 4, 2018) 8
Dep't of Homeland Sec., *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for El Salvador* (Jan. 8, 2018) 8
Dep't of Homeland Sec., *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Nepal* (Apr. 26, 2018) 8
Jill H. Wilson, Cong. Research Serv., RS20844, *Temporary Protected Status: Overview and Current Issues* (2018) 21
Robert Warren and Donald Kerwin, *A Statistical and Demographic Profile of the U.S. a Temporary Protected Status Population for El Salvador, Honduras and Haiti*, 5. J. Migr. & Hum. Sec. 577 (2017) 1
U.S. Citizenship & Immigration Servs., *Temporary Protected Status for Sudan to Terminate in November 2018* (Sept. 18, 2017) 9

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

U.S. Citizenship & Immigration Servs., USCIS Policy Manual (Aug. 23, 2017)……...8
Zuzana Cepla, Fact Sheet: Temporary Protected Status, National Immigration Forum, May 5, 2018.....19

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

I. INTRODUCTION

Plaintiffs and the class members they seek to represent (hereinafter Plaintiffs), *see* Dkt. 32, hold Temporary Protected Status (TPS) and are independently eligible to become lawful permanent residents (LPRs) through qualifying U.S. citizen relatives or employers. The vast majority of TPS holders have held that status for 15 to 24 years and are fully integrated into U.S. communities. Through the policy challenged here, Defendants unlawfully deny Plaintiffs the opportunity to adjust from TPS to LPR status. As a result, and despite deep roots in the United States, all are forced to remain in limbo—unable to become LPRs, the first step towards obtaining U.S. citizenship. Compounding this obstacle, the Secretary of the Department of Homeland Security (DHS), Defendant Nielsen, has announced the termination of TPS for several hundred thousand individuals in the United States—including the majority of Plaintiffs. After a District Court preliminarily enjoined the termination of TPS for some—though not all—of these individuals, Defendant Nielsen immediately appealed that decision to the Ninth Circuit Court of Appeals. *Ramos v. Nielsen*, No. 18-cv-01554-EMC, 2018 U.S. LEXIS 171272 (N.D. Cal. Oct. 3, 2018), appeal pending No. 18-16981 (9th Cir. filed Oct. 12, 2018). Not only does the preliminary injunction not apply to Hondurans—including Plaintiffs Cantarero Argueta, Reyes, and Avila-Rojas—and Nepalis, it is unknown whether it will be upheld on appeal. Thus, the future of all Plaintiffs remains uncertain, at best. Plaintiffs seek a preliminary injunction requiring Defendants to properly apply the law with respect to their LPR applications.

The Immigration and Nationality Act (INA) expressly provides that a person granted TPS is considered "as being in, and maintaining, lawful status as a nonimmigrant" for the purpose of applying for adjustment to LPR status under 8 U.S.C. § 1255. *See* 8 U.S.C. § 1254a(f)(4). In order to be "in, and maintaining, lawful status as a nonimmigrant," DHS must have inspected

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

and admitted the individual. *See, e.g.*, 8 U.S.C. § 1184(a)(1); 8 C.F.R. § 214.1(a)(3)(i). As set forth in the written policy challenged here, DHS refuses to follow the plain language of § 1254a(f)(4); that is, Defendants refuse to consider a TPS holder to have been inspected and admitted—a requirement for adjusting to LPR status—pursuant to the grant of TPS. Under this unlawful policy, Defendant U.S. Citizenship and Immigration Services (USCIS) has or will deny Plaintiffs' applications for LPR status.

As a result of Defendants' policy, Plaintiffs face an uncertain future: unable to pursue a path to citizenship and unsure how long their TPS will last. As LPRs, they would be able to remain in the United States with their U.S. citizen family members and at their current jobs irrespective of whether Defendant Nielsen terminates the TPS designations for their countries of origin. Without the opportunity to adjust to LPR status, they face the imminent loss of their legal status and the employment authorization that accompanies it, which would leave them unable to support themselves and vulnerable to deportation, even though they have lived here lawfully for as long as 20 years, raising families, working, and purchasing homes.

Plaintiffs demonstrate below that they are likely to succeed on the merits; in fact, all but one court to have ruled on the issue have rejected Defendants' interpretation as flouting the plain language of 8 U.S.C. § 1254a(f)(4). Plaintiffs are suffering and will continue to suffer irreparable harm in the absence of a preliminary injunction given their loss of the opportunity to stabilize their status. Plaintiffs also demonstrate that the balance of equities tips in their favor, and that an injunction is in the public interest. Plaintiffs ask this Court to preliminarily enjoin Defendants from applying their unlawful policy, and to order Defendants to reopen and readjudicate adjustment applications that DHS denied under this policy.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

II. ARGUMENT

A. STANDARD FOR OBTAINING PRELIMINARY RELIEF

A party seeking a preliminary injunction must ordinarily establish (1) "irreparable harm"; (2) "either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party"; and (3) "that a preliminary injunction is in the public interest." *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011) (internal quotation marks omitted); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (requiring moving party to show that (1) she "is likely to succeed on the merits," (2) she "is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in [her] favor," and (4) that "an injunction is in the public interest"). Plaintiffs satisfy either formulation of the test.

B. PLAINTIFFS MERIT PRELIMINARY INJUNCTIVE RELIEF

1. Plaintiffs Are Likely to Prevail on Their INA and APA Claims.

Plaintiffs need only show "sufficiently serious questions going to the merits" because they are also able to demonstrate the balance of hardships tips sharply in their favor. *Oneida Nation of N.Y.*, 645 F.3d at 164. However, even if the relief sought—that Defendants correctly apply the governing statute—were deemed to be a mandatory injunction, Plaintiffs satisfy the heightened legal standard of showing "'a clear or substantial likelihood of success on the merits.'" *N. Am. Soccer League, LLC v. U. S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (quotations omitted). Under either inquiry, Plaintiffs demonstrate that Defendants' policy violates the plain language of the TPS statute and Congress' statutory scheme.

Plaintiffs are likely to succeed on their claim that Defendants' policy of refusing to

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

recognize TPS holders as inspected and admitted nonimmigrants for adjustment purposes violates the plain language of 8 U.S.C. § 1254a(f)(4) by failing to give meaning to Congress' instruction that all TPS holders "shall be considered as being in, and maintaining, lawful status as a nonimmigrant." Additionally, Defendants' policy violates the congressional intent behind § 1254a, an ameliorative statute aimed at relieving eligible persons from designated countries of the burden of returning to the natural disaster or catastrophe that triggered the TPS designation.

Plaintiffs also are likely to prevail on their claim, brought under the Administrative Procedure Act (APA), that Defendants' policy constitutes unlawful agency conduct. *See* 5 U.S.C. § 706(2)(A)-(D).[1] Defendants' failure to comply with the law creates a "legal wrong" and an agency action that "adversely affected or aggrieved" Plaintiffs, which entitles them to relief. 5 U.S.C. § 702. Because Defendants' policy flouts both the plain meaning of § 1254a(f)(4) and the larger statutory scheme, it is "not in accordance with law." 5 U.S.C. § 706(2)(A).

Finally, as Plaintiffs fully demonstrate in the Opposition to Defendants' Motion to Dismiss or in the Alternative, Motion for Summary Judgment, Dkt. 35, and in their own Motion for Summary Judgment, Dkt. 29, Plaintiffs are likely to succeed in demonstrating that this Court has jurisdiction and that venue is proper. Plaintiffs do not repeat those arguments here.

a. The TPS and adjustment of status statutory scheme and relevant cases

Congress enacted the TPS statute in 1990 as a humanitarian program. Pursuant to 8 U.S.C. § 1254a, the DHS Secretary may designate a foreign country for TPS due to conditions in the country that temporarily prevent the country's nationals from returning safely. *See* 8 U.S.C. § 1254a(b)(1). The Secretary has designated countries for TPS following environmental disasters, epidemics, and ongoing armed conflicts. As of January 1, 2017, ten countries were designated

[1] Plaintiffs adequately pled a claim under § 706(2), contrary to Defendants' contention. *See* Dkt. 35.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

for TPS: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen. Several of these were first designated close to or more than two decades ago: Somalia in 1991, Sudan in 1997, Honduras and Nicaragua in 1999, and El Salvador in 2001. DHS designated the other countries within the last seven years.

Upon designating a country for TPS, DHS advises nationals of that country who are present in the United States of a period in which they may apply for TPS if they meet strict eligibility requirements, including demonstrating admissibility to the United States. 8 U.S.C. § 1254a(c)(1)(A)(iii). Certain grounds of inadmissibility are waived by statute and others may be waived at the discretion of DHS. 8 U.S.C. § 1254a(c)(2)(A). An applicant is not eligible for TPS, and no waiver is available, if the individual has been convicted of certain crimes, including any felony or two or more misdemeanors, is found to have persecuted others, or is found to be a security threat to the United States. 8 U.S.C. § 1254a(c)(2)(B).

The application process is rigorous, requiring the applicant to submit information regarding any prior criminal history and/or immigration violations. DHS crosschecks applicants' photographs and fingerprints to verify their criminal and immigration histories. Only after DHS has carefully screened them and found them admissible (or granted a waiver of inadmissibility) are applicants approved for TPS, generally for a period of 18 months. The Secretary of DHS must review and either terminate or extend and/or redesignate a country for TPS every 6 to 18 months. 8 U.S.C. § 1254a(b)(3)(C). After each extension or redesignation, TPS holders must reapply to renew their status, verifying their continued eligibility.

Individuals in TPS cannot be detained or deported for lack of immigration status, are entitled to work authorization, and may travel abroad with the prior consent of DHS. 8 U.S.C. § 1254a(a)(1), (d)(4), (f)(3). Additionally, "for purposes of adjustment of status under [8 U.S.C. §

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

1255] and change of status under [8 U.S.C. § 1258], the [TPS holder] shall be considered as being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). The statute and regulations require that, for a nonimmigrant to "be in" nonimmigrant status, he or she first must have been inspected and admitted. 8 U.S.C. §1184(a)(1); 8 C.F.R. §214.1(a)(3)(i).

Section 1255 governs the process by which individuals with nonimmigrant status may apply from within the United States to adjust to LPR status based on their relationship with a U.S. citizen or LPR family member or employer. Through this process, they can avoid having to leave and apply for an immigrant visa from a U.S. embassy or consulate abroad, an often-lengthy process which creates additional legal hurdles including, for some, a bar on returning to the United States for up to ten years. See 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Adjustment applicants generally must have been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a). Additionally, they must be eligible for an immigrant visa (based on a petition filed by a qualifying relative or employer) that is immediately available at the time of application. *Id*. They also must be "admissible to the United States," i.e., either not subject to a ground of inadmissibility or eligible for a waiver of any such ground. *See* 8 U.S.C. § 1182. Finally, they cannot be barred from adjustment under 8 U.S.C. § 1255(c) for, inter alia, unlawful presence or unauthorized employment, or must satisfy an exception to those bars. Immediate relatives—that is, the spouses, parents (of adult children) or children of U.S. citizens, such as Plaintiffs Reyes and Avila-Rojas—are exempt from these bars. 8 U.S.C. § 1255(c)(2). Similarly, certain employment-based adjustment applicants, such as Plaintiffs Moreno and Cantarero Argueta, also are exempt if, at the time of applying for adjustment, they are, inter alia, "present in the United States pursuant to a lawful admission." 8 U.S.C. § 1255(k).

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Two Courts of Appeals have held that 8 U.S.C. § 1254a(f)(4) unambiguously requires DHS to find that TPS holders are deemed "inspected and admitted" for purposes of adjustment of status under 8 U.S.C. § 1255. *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013). In both, the plaintiffs had identical legal claims to those of Plaintiffs here: they initially entered without inspection, were granted TPS, then became eligible to adjust to LPR status based on a qualifying relationship. USCIS denied both plaintiffs' adjustment applications solely because they entered without inspection and thus allegedly failed to show an inspection and admission. Both courts disagreed, holding that, because § 1254a(f)(4) expressly deems TPS holders to be in lawful nonimmigrant status for purposes of adjustment of status, the applicant is deemed to have met all requirements for nonimmigrant status, including inspection and admission. *See also Medina v. Beers*, 65 F. Supp. 3d 419 (E.D. Pa. 2014); *Bonilla v. Johnson*, 149 F. Supp. 3d 1135 (D. Minn. 2016).

The Eleventh Circuit held the opposite without fully analyzing the TPS statute. *Serrano v. U.S. Att'y Gen.*, 655 F.3d 1260 (11th Cir. 2011). However, the Sixth and the Ninth Circuits rejected the sparse analysis in *Serrano*. *Ramirez*, 852 F.3d at 959-60; *Flores*, 718 F.3d at 555. To date, no other Court of Appeals has ruled on the issue and no cases are known to be pending before the Courts of Appeals.

USCIS' policy rejects the plain language of the statute, as interpreted by the Sixth and Ninth Circuits and district courts. Instead, USCIS declares that "[a] foreign national who enters the United States without inspection and subsequently is granted temporary protected status (TPS) does not meet the inspected and admitted or inspected and paroled requirement." U.S. Citizenship & Immigration Servs., USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5) (Aug. 23, 2017), https://tinyurl.com/zmmn2t7. Referencing *Flores*, the policy instructs USCIS adjudicators

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

that it applies only to those living within the Sixth Circuit's jurisdiction. *Id.* n.56. *Ramirez* is not referenced, although on information and belief, USCIS applies *Ramirez* within the Ninth Circuit.

Under Defendants' policy, TPS holders outside of the Sixth or Ninth Circuits who initially entered without inspection are ineligible to adjust to LPR status despite their subsequent application for TPS, pursuant to which they were inspected, found admissible and granted TPS with its attendant benefits, as defined at § 1254a(f). All Plaintiffs were or will be denied adjustment solely on this basis. Thus, the issue presented here, on which Plaintiffs have a likelihood of success, is whether a TPS holder, who under the plain language of § 1254a(f)(4) is considered to be in nonimmigrant status for adjustment purposes, accordingly qualifies as having been "inspected and admitted" under § 1255, even if he or she first entered without inspection.

In 2017, the DHS Secretary announced the termination of the TPS designation for Haiti, Nicaragua, and Sudan,[2] and in 2018, for El Salvador, Nepal, and Honduras.[3] With respect to each termination, the Secretary deferred the effective date between 12 to 18 months to "provide time for individuals with TPS to seek an alternative lawful immigration status in the United States, if eligible, or, if necessary, arrange for their departure." Dep't of Homeland Sec., *Nicaragua and Honduras Announcement*. However, contrary to the plain language of the INA, Defendants' policy prevents Plaintiffs from obtaining such "an alternative lawful immigration status."

---

[2] U.S. Citizenship & Immigration Servs., *Temporary Protected Status for Sudan to Terminate in November 2018* (Sept. 18, 2017), https://tinyurl.com/ycfahnsz; Dep't of Homeland Sec., *Acting Secretary Elaine Duke Announcement on Temporary Protected Status for Nicaragua And Honduras* (Nov. 6, 2017), https://tinyurl.com/yal9nujn (hereinafter *Nicaragua and Honduras Announcement*); Dep't of Homeland Sec., *Acting Secretary Elaine Duke Announcement On Temporary Protected Status For Haiti* (Nov. 20, 2017), https://tinyurl.com/y98h4msv.

[3] Dep't of Homeland Sec., *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for El Salvador* (Jan. 8, 2018), https://tinyurl.com/y7463q6v; Dep't of Homeland Sec., *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Nepal* (Apr. 26, 2018), https://tinyurl.com/ycvtde9n; Dep't of Homeland Sec., *Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary Protected Status for Honduras* (May 4, 2018), https://tinyurl.com/ydy6mued.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

The U.S. District Court for the Northern District of California enjoined termination of TPS for nationals of El Salvador, Haiti, Nicaragua, and Sudan and, pursuant to Defendant Nielsen's appeal, this preliminary injunction will be reviewed by the Ninth Circuit. *Ramos*, *supra*. While the appeal is pending, the government has informed the District Court of the steps it will take to implement the injunction. *Ramos*, *supra*, No. 3:18-cv-01554-EMC, Dkt. 135-1 to 135-3. If the injunction is reversed by the Ninth Circuit, many Plaintiffs will face imminent harm. *See* § II.B.2 below. And even if it is upheld, there is no injunction against the termination of TPS for Honduras or Nepal and thus no protection for Plaintiffs such as Cantarero Agueta, Reyes, and Avila-Rojas.

b. Plaintiffs are likely to succeed on the claim that 8 U.S.C. § 1254a(f)(4) requires USCIS to consider TPS holders as inspected and admitted as nonimmigrants for purposes of LPR adjustment of status

As noted, two Courts of Appeals agree with Plaintiffs' interpretation of 8 U.S.C. § 1254a(f)(4), thus demonstrating that Plaintiffs are likely to succeed on this argument. In § 1254a(f)(4), Congress expressly authorized persons with TPS to adjust to LPR status if they are otherwise independently eligible for an immigrant visa, i.e., have an immediate relative who is a U.S. citizen, or an employer qualified to petition for them. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself.").

Congress mandated that TPS recipients "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjustment under § 1255. Each of the phrases, "being in …. nonimmigrant status" and "maintaining …. nonimmigrant status," must be given independent meaning, in accord with the "cardinal principle of statutory construction" that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534

U.S. 19, 31 (2001) (citations and internal quotation marks omitted); *see State St. Bank & Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2d Cir. 2003). Because an individual must be inspected and admitted in order to "be[] in" nonimmigrant status, Defendants' interpretation fails to give independent meaning to the phrase "being in." Moreover, if Defendants' interpretation were correct, the statute only would need to consider a TPS holder as "maintaining" nonimmigrant status as it would only benefit those already holding nonimmigrant status at the time TPS was granted. See Dkt. 31 at 6-7. For these reasons, all but one of the courts to have interpreted § 1254a(f)(4) found this language to unambiguously require that TPS holders be considered as being inspected and admitted as nonimmigrants for purposes of adjustment. *Ramirez*, 852 F.3d at 958; *Flores*, 718 F.3d at 551-52; *Bonilla*, 149 F. Supp. 3d at 1138-39; *Medina*, 65 F. Supp. 3d at 428-29; *but see Serrano*, 655 F.3d at 1265.

Both the INA and regulations require that only an individual who has been "admitted" can hold nonimmigrant status. Entitled "Admission of Nonimmigrants," 8 U.S.C. § 1184(a)(1) directs that "[t]he admission of any [noncitizen] as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulation prescribe." In turn, regulations mandate that a "nonimmigrant['s] . . . admission to the United States is conditioned on compliance with any inspection requirement . . . ." 8 C.F.R. § 214.1(a)(3)(i). Additionally, someone who is not in "lawful immigration status" generally is barred from adjusting. 8 U.S.C. § 1255(c)(2). Significantly, "lawful immigration status" is defined for purposes of this provision as including noncitizens "admitted to the United States in nonimmigrant status," 8 C.F.R. § 245.1(d)(1)(ii), further confirming that a precondition of "being in" nonimmigrant status is that the individual has been inspected and admitted. *Ramirez*, 852 F.3d at 960 ("[B]y the very nature of obtaining lawful nonimmigrant status, the [noncitizen] goes through inspection and is deemed

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

'admitted.'"); *Flores*, 718 F.3d at 554 (finding that a TPS holder is inspected and admitted for adjustment "because he is considered [as] being in lawful nonimmigrant status"); *see also Medina*, 65 F. Supp. 3d at 430; *Bonilla*, 149 F. Supp. 3d at 1140.

Further support for this position is found in 8 U.S.C. § 1258, which pertains to a change from one nonimmigrant classification to another. The TPS provision applies to both a change of status under § 1258 and adjustment of status under § 1255. 8 U.S.C. § 1254a(f)(4). Section 1258 specifically applies to individuals seeking to change their status after being "lawfully admitted to the United States as a nonimmigrant." If "being in" nonimmigrant status did not encompass an admission, § 1254a(f)(4) would not meaningfully provide TPS holders with the ability to change status under § 1258. That is, a TPS holder could not change from one lawful status to another if he or she were not considered as having been "admitted." In short, for purposes of both adjustment of status and change of status, "being in" lawful nonimmigrant status necessitates that the individual was inspected and admitted in that status.

Congress' use of the term "considered" is also significant. Subsection 1254a(f)(4) does not say that a TPS recipient "*is*" in and maintaining nonimmigrant status—only that he or she shall "be considered as being in, and maintaining," nonimmigrant status. 8 U.S.C. § 1254a(f)(4). Congress did not create a new nonimmigrant classification for TPS recipients. *Cf.* 8 U.S.C. § 1101(a)(15) (listing all nonimmigrant classifications). Instead, through the term "considered," Congress created a legal fiction: that a TPS holder is deemed to be a nonimmigrant for adjustment purposes even though TPS does not satisfy the requirements for any nonimmigrant classification. *See id.*; 8 C.F.R. § 214.1 *et seq.* Admission is just one of these requirements—albeit one that is a prerequisite for *all* the nonimmigrant classifications.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Congress' use of "consider" to indicate that something should be deemed to be other than what it is, is not unique to this section of the INA. For example, 8 U.S.C. § 1152(b)(3) specifies when a noncitizen born in the United States "shall be considered as having been born in a country of which he is a citizen or subject." Clearly, an individual cannot actually be born in two different countries; by using the term "considered," Congress created a legal fiction, treating the person's birth legally as something other than what it was. Similarly, 8 U.S.C. § 1186a(e) mandates that a noncitizen in the United States as a conditional resident "shall be considered" admitted as an LPR for naturalization purposes, and 8 U.S.C. § 1151(b)(2)(A)(i) specifies when the spouse of a deceased U.S. citizen will be "considered" to remain an immediate relative.

Here, Congress created a legal fiction when it mandated that, for purposes of adjustment of status, a TPS recipient shall be "considered as being in, and maintaining, lawful status as a nonimmigrant." Just as TPS recipients do not need to demonstrate that they, in fact, satisfy any of the other eligibility requirements for any nonimmigrant status, they also do not need to demonstrate that, in fact, they were initially admitted. Rather, because an admission is a prerequisite for being in nonimmigrant status, a TPS holder must be "considered" as having been admitted to be "considered" as being in nonimmigrant status.

Plaintiffs have a likelihood of success on the merits in this case notwithstanding the Eleventh Circuit's decision finding that a grant of TPS does not satisfy the requirement of inspection and admission for purposes of adjustment. The Eleventh Circuit did not analyze the language of § 1254a(f)(4). *Serrano*, 655 F.3d at 1264-66. The plaintiff there erroneously argued that he did "not have to meet § 1255(a)'s eligibility requirement," *id.* at 1263, and "that § 1254a(f)(4) alters the 'inspected and admitted or paroled' limitation on eligibility for adjustment of status. . . ." *Id.* at 1265. As a result, the court focused on the "plain language of § 1255(a),"

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

concluding that § 1254a(f)(4) "does not change § 1255(a)'s threshold requirement" of an inspection and admission. *Id*. Because the court failed to consider the key terms in § 1254a(f)(4), it did not address whether this provision required that a TPS holder be considered to have been inspected and admitted for purposes of adjustment of status.

c. Plaintiffs are likely to succeed in demonstrating that Congressional intent supports the plain meaning of 8 U.S.C. § 1254a(f)(4)

Defendants' policy also violates the congressional intent behind § 1254a, an ameliorative statute aimed at relieving TPS holders of the burden of returning to the natural disaster or catastrophe that triggered the TPS designation. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.") (internal quotation marks omitted); *Rosenberg v. Fleuti*, 374 U.S. 449, 461-62 (1963) ("Such a holding would be inconsistent with the general purpose of Congress in enacting § 101(a)(13) to ameliorate the severe effects of the strict 'entry' doctrine."); *Duarte-Ceri v. Holder*, 630 F.3d 83, 89 (2d Cir. 2010) ("In the immigration context, there is a long-standing presumption to construe 'any lingering ambiguities' in favor of the petitioner.") (quotations omitted).

Congress' phrasing in § 1254a(f)(4)—that a TPS holder "shall be considered as being in, and maintaining, lawful status as a nonimmigrant" for purposes of adjustment—corresponds directly with § 1255, entitled "Adjustment of status of nonimmigrant to that of person admitted for permanent residence." Given that the express language of § 1254a(f)(4) mirrors that of § 1255, Congress clearly intended TPS holders to be eligible to apply for "[a]djustment of status of nonimmigrant to that of a person admitted for lawful permanent resident," as § 1255 is titled. *See United States v. Aguilar*, 585 F.3d 652, 657 (2d Cir. 2009) (reviewing both the statutory text and its "placement and purpose" "in the statutory scheme") (internal quotation marks omitted).

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Defendants' policy fails to give effect to the comprehensive statutory scheme whereby Congress provided mechanisms to ensure persons found eligible for TPS were not forced to return to their home countries. Under Defendants' policy, Plaintiffs would have to depart the United States, remain abroad for an indefinite time period as they seek to obtain a visa, and then return to the United States in order to be inspected and admitted, a bizarre proposition given that the TPS statute is intended to protect eligible noncitizens from having to return to countries suffering the effects of severe strife or natural disasters. It is inconsistent with the statute's purpose to conclude that Congress would protect TPS holders from having to return to their countries of origin when they were without lawful status, only to require them to leave the country after being afforded temporary lawful status, often for years, when they become eligible for LPR status through relationships with U.S. citizens or employers.

Similarly, Defendants' interpretation is illogical in that it would require those individuals with strong ties to the United States to depart and thus face separation from their families, homes and employers. *See Flores*, 718 F.3d at 555-56. Instead, consistent with the humanitarian intent behind the TPS statute, Congress created a path for those who now qualify for an immigrant visa to apply for such status from within the United States, rather than forcing them to apply through consular processing abroad. The plain reading of the statute, as interpreted by both the Sixth and the Ninth Circuits, fits with the humanitarian purposes of the TPS statute. The statutory language of § 1254a(f)(4) demonstrates Congress' concern for providing relief; rather than forcing people to return to the sometimes-catastrophic conditions in their countries of origin, Congress provided a path to apply for LPR status from within the United States.

2. Plaintiffs Have Suffered, and Will Continue to Suffer, Irreparable Harm Absent This Court's Intervention

Plaintiffs face more than simply the "possibility of irreparable harm." *Winter*, 555 U.S. at

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

22. Rather, they demonstrate the likelihood of immediate, concrete, irreparable harm absent this Court's intervention. *See Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) ("[I]mproper conduct for which monetary remedies cannot provide adequate compensation suffices to establish irreparable harm.").

Plaintiffs are statutorily eligible to adjust to LPR status. Yet, absent preliminary relief, they are unable to do so within the United States. *Accord Vargas v. Meese*, 682 F. Supp. 591, 595 (D.D.C. 1987) (finding irreparable harm where noncitizens were prevented from applying for change of status from within the United States). LPRs are afforded the opportunity to permanently reside and work in the United States. After five years (three for spouses of U.S. citizens such as Plaintiff Avila-Rojas), an LPR is eligible to apply for citizenship. 8 U.S.C. §§ 1427(a)(1), 1430(a). Courts have recognized that delaying the ability to apply for citizenship constitutes irreparable harm. *See Kirwa v. U.S. Dep't of Defense*, No. 17-1793 (ESH), 2017 U.S. Dist. LEXIS 176826, *45 (D.D.C. Oct. 25, 2017) (citing cases).

Plaintiffs are blocked from gaining the stability which comes from permanent residence. Courts have held that irreparable injury results when a federal agency "block[s] access to an existing legal avenue for avoiding removal." *Kirwa*, surpra, 285 F. Supp. 3d at 43 (noting that "every day of delay [towards naturalization] leaves plaintiffs in limbo and in fear of removal. … Plaintiffs live in constant fear that they will lose their work or student visas"). In *Sami Al Karim v. Holder*, No. 08-cv-00671-REB, 2010 U.S. Dist. LEXIS 30030 (D. Colo. Mar. 29, 2010), the court rejected the government's argument that a refugee—who, like a TPS holder, is in a nonpermanent lawful status—was not disadvantaged by an indefinite hold on the adjudication of his LPR application because he was protected from removal and, following an application process, could work and travel:

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

> [T]the legal limbo in which plaintiff daily finds himself has caused him great stress and anxiety. The indefinite nature of the delay …. has real and not insubstantial effects on plaintiff's life and livelihood, including limitations on his ability to travel, potential negative consequences on his legal status as a refugee, and the financial and bureaucratic burdens of regularly filing travel and work applications. Perhaps most critically, the delay [of his LPR status] necessarily delays his goal of becoming a U.S. citizen.

Id., *13-14. Here, neither a delay nor indefinite hold is the issue; instead, Defendants' policy altogether bars Plaintiffs from gaining LPR status, thus magnifying their harm. *See, also, You v. Nielsen*, 321 F. Supp. 3d 451, 468 (S.D.N.Y. 2018) (recognizing that removal following a denial of an adjustment application would cause irreparable harm because it "would close [plaintiff's] application for adjustment of status and bar him from reapplying for a decade" and "may perpetuate grave emotional and psychological harm to his [U.S. citizen] wife and children by splitting apart their family, perhaps forever.").

Here, this harm is compounded by DHS' termination of TPS for Honduran Plaintiffs—such as Plaintiffs Cantarero Agueta, Avila-Rojas and Reyes—in January 2020 and for Nepali Plaintiffs in June 2019. *See supra*, n. 2 and n. 3. Plaintiffs from El Salvador, Haiti, Nicaragua, and Sudan face an uncertain future and their status also may permanently expire if the Ninth Circuit reverses the preliminary injunction in *Ramos*. Although DHS specifically delayed the effective date of the termination of the TPS designation for all of these countries to "provide time for individuals with TPS to seek an alternative lawful immigration status in the United States, if eligible . . . ," *see, e.g.*, Dep't of Homeland Sec., *Nicaragua and Honduras Announcement*, Defendants' policy bars Plaintiffs from doing this.

Without a preliminary injunction, many Plaintiffs will not have time to complete the application process before their TPS is terminated. Defendants regularly take *more than a year* to adjudicate these applications. *See, e.g.*, USCIS, Check Case Processing Times,

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

https://tinyurl.com/ya9xzdw9 (showing processing time ranges for Form I-485 Applications for Permanent Resident at all USCIS Service Centers and field offices); *see also* Dkt. 32-4, Exh. A ¶6 (adjudication of simple adjustment applications takes 9 to 18 months in Massachusetts); 32-9, Exh. F ¶9 (adjustment interviews scheduled more than a year after filing family-based adjustment applications in New York); Dkt. 32-11, Exh. I ¶7 (same, in New Jersey); Dkt. 32-13, Exh. J ¶9 (same, in DC, Maryland and Virginia region); Dkt. 32-23, Exh. T ¶6 (processing adjustment applications in Denver, CO takes 14 to 24 months). An injunction would alleviate Plaintiffs' risk of losing lawful status and the associated harms, discussed below, by halting Defendants' unlawful policy more than a year before various TPS designations terminate. *See, e.g.*, Dkt. 32-17, Exh. N ¶5 (anticipating that "[i]n order not to disrupt status, TPS applicants would need to have at least an 18-month lead time in order to apply for adjustment of status").[4]

Further, without the ability to adjust to LPR status, Plaintiffs will lose their work authorization when their TPS terminates. They will not only lose their jobs but will be unable to secure other work and will be left without the means to pay their rent or mortgages and utilities and to support themselves and their families. Plaintiff Cantarero Argueta is in precisely this situation. He is from Honduras and will lose his TPS in January 2020. He is the primary wage-earner for his family, having worked for the same two employers for the past 12 years. Exh. TT, Second Cantarero Argueta Dec. ¶¶5-8, 11. His employer filed the necessary paperwork to sponsor him for LPR status several years ago, and Plaintiff Cantarero Argueta filed his adjustment application in 2015. Had USCIS not denied his application in June 2018, Dkt. 35-3, he now would be a permanent resident. Instead, he faces the loss of TPS in a little over a year—

[4] In addition, some Plaintiffs will need to prepare and file—or re-file, if they received erroneous denials—their applications. *See, e.g.* Dkt. 32-4, Exh. A ¶6; Dkt. 32-13, Exh. J ¶8; Dkt. 32-18, Exh. O ¶8.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

January 2020. When this happens, he fears that he will be unable to pay his mortgage or otherwise support his two teenage U.S. citizen sons and that they will become homeless. *Id.* ¶11. Plaintiff Moreno is in a similar situation. He is from El Salvador and, unless the preliminary injunction in *Ramos* is upheld by the Ninth Circuit, will lose his TPS along with his work authorization and his job. Exh. WW, Second Moreno Dec. ¶¶2, 9-10. He has been in the United States with TPS for close to two decades and has worked for the same employer for seventeen years. *Id.* ¶¶3, 6-7. Seeking to retain him, his employer sponsored him for a visa so that he could gain permanent residence. *Id.* ¶¶6-7. Plaintiff Moreno is the primary wage earner for his family; without the ability to work, he will be unable to pay his rent and utilities and will face eviction. *Id.* ¶¶9-10. He would like his two U.S. citizen daughters to attend college in the United States but will be unable to save money for tuition without the ability to work. *Id.* ¶10.

The loss of the ability to earn a living constitutes irreparable harm. *See Vidal v. Nielsen*, 279 F. Supp. 3d 401, 434-35 (E.D.N.Y. Feb. 13, 2018) (finding irreparable harm where recipients of a temporary immigration status would become "legally unemployable" and might face the loss of homes and medical insurance if their status was terminated and they lost the accompanying employment authorization); *Aguilar v. Baine Service Systems, Inc.*, 538 F. Supp. 581, 584 (S.D.N.Y. 1982) ("[T]he harm generated by loss of employment extends beyond financial boundaries. The plaintiffs face eviction, cut-off of their utilities and the inability to provide for their children."); *Willis v. Lascaris*, 499 F. Supp. 749, 760 (N.D.N.Y. 1980) ("In a just society, even a temporary undetermining [sic] of th[e] ability [of people to survive] is unacceptable and irreparable.").

Overall statistics for the Salvadoran, Honduran, and Haitian TPS populations—the largest

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

TPS populations[5]—demonstrate that, like the named Plaintiffs, they are firmly integrated into the United States. For example, the vast majority of Salvadoran TPS holders have been in the United States for at least 17 years. Robert Warren and Donald Kerwin, *A Statistical and Demographic Profile of the U.S. Temporary Protected Status Population for El Salvador, Honduras and Haiti*, 5. J. Migr. & Hum. Sec. 577, 581, Table 1 (2017), https://tinyurl.com/y7k3bl2j. Together, Salvadoran TPS holders have 192,700 U.S. citizen children. *Id.* at 582, Table 2. An estimated 88% are employed, with a median income of $50,000.00. *Id.* They typically work in construction, food service, landscaping, child care and retail jobs. *Id.* at 584, Table 3. Over half have health insurance and one third are purchasing homes. *Id.* at 582, Table 2. The Honduran and Haitian populations also are well-integrated into U.S. society. Haitian TPS holders have 27,000 U.S. citizen children, while Hondurans have 53,500. *Id.* Over 80 percent of both groups are employed, close to or more than half have health insurance, and over 20 percent are purchasing their own homes. *Id.* Given these deep roots, all plaintiffs are suffering and will continue to suffer irreparably due to Defendants' policy.

Retired TPS holders also will suffer irreparable harm if they are unable to apply for LPR status due to Defendants' unlawful policy prior to their loss of TPS. Those eligible for Social Security Retirement income based upon their work in the United States cannot receive this benefit unless in a lawful status such as TPS or LPR status. *See* 42 U.S.C. § 402(y). Plaintiff Avila-Rojas and her 72-year-old U.S. citizen husband are both retired and living on a fixed income from Social Security and her husband's pension. Exh. VV, Second Avila-Rojas Dec. ¶¶3, 7-8. With her Social Security payment of $328 per month, their monthly income is $1,600. *Id.*

[5] Zuzana Cepla, Fact Sheet: Temporary Protected Status, National Immigration Forum, May 5, 2018, https://tinyurl.com/y8kbspzd.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

¶¶7-8. They barely can get by on this income; in fact, it took them several years to save the $1,200 fee for her LPR application. *Id.* ¶¶9, 12. If she has not obtained LPR status by January 2020, when TPS for Honduras will terminate, she will lose her Social Security and her Medicare coverage. *Id.* ¶13. Without this supplement to her husband's income, she will be unable to access the medical care and prescriptions necessary to treat her heart condition. *Id.*

Plaintiffs are also at risk of deportation if they are unable to acquire LPR status prior to the termination of their TPS. Many of them fear for their physical safety if forced to return to their countries of origin due to violence, gangs, political instability, lack of resources, the impact of natural disasters, and/or other unsafe conditions. Plaintiff Cantarero Argueta fears the violence and corruption in Honduras and, for that reason, has never taken either of his U.S. citizen sons there to visit; out of concern for their safety, he would not allow them to visit him in Honduras even if he were deported. Exh. TT, Second Cantarero Argueta Dec. ¶13. Plaintiff Moreno currently pays for private transportation to and from school for his teenage son in El Salvador because teenagers who take public transportation are targeted by gangs. Exh. WW, Second Moreno Dec. ¶13. He fears constantly for his son's safety. *Id.* If deported, he would have no choice but to take his U.S.-citizen daughters to El Salvador despite his fears that his 12-year-old daughter would become a gang target. *Id.* ¶12. *See also* Dkt. 32-7, Exh. D ¶4 (Salvadoran clients fear gang and criminal activity); Dkt. 32-8, Exh. E ¶8 (Salvadoran and Haitian clients concerned with poor conditions); Dkt. 32-12, Exh. I ¶4 (client fears "violence that her family and friends in El Salvador have experienced"); Dkt. 32-14, Exh. K ¶8 (clients fear "political instability and violence"); Dkt. 32-18, Exh. O ¶7 (Haitian client fears "return to a country ravaged by violence and natural disasters"); Dkt. 32-19, Exh. P ¶7 (clients fear return to El Salvador and Honduras); Dkt. 32-22, Exh. S ¶10 (clients fear "increasing violence due to gangs"). In fact, Plaintiffs may

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

be targets for violence specifically because they have returned from the United States where they once held legal status. *See* Dkt. 32-4, Exh. A ¶5; Dkt. 32-11, Exh. H ¶8 (describing clients' "fear of kidnapping, extortion or other victimization by organized criminals who specifically prey on people returning from the U.S.").

In addition, many Plaintiffs face irreparable harm due to the risk of separation from their families and communities in the United States. The vast majority of TPS holders have been living in the United States with lawful status for almost two decades. *Cf.* Jill H. Wilson, Cong. Research Serv., RS20844, *Temporary Protected Status: Overview and Current Issues* 5, Table 1 (2018), https://tinyurl.com/yar63ge3. Most would be separated from their families if deported. *Cf. supra* at 20-21 (discussing hundreds of thousands of U.S. citizen children of TPS holders from El Salvador, Honduras, and Haiti). Plaintiff Avila-Rojas would be forced to leave behind her 72-year-old husband, who is dependent on her; she does not know how he would manage without her or how their relationship would survive. Exh. VV, Second Avila-Rojas Dec. ¶ 14. Deportation would send many Plaintiffs back to countries that are now entirely unfamiliar to them and where they no longer have a place to live or the means to find work. *See, e.g.*, Exh. TT, Second Cantarero Argueta Dec. ¶14 (describing how, during a visit to his dying mother in Honduras, he "felt like a stranger there as so much had changed while I was gone"); Exh. UU, Second Reyes Dec. ¶¶ 5, 12 (describing how she is estranged from her daughters in Honduras and does not know how she could survive there as, at 65 and with serious health problems, she is unable to work); Dkt. 12 ¶45; Dkt. 32-9, Exh. F ¶7; Dkt. 32-13, Exh. J ¶7 (describing clients at risk of "return to countries they have not lived in for decades and where their children and spouses may never have lived"); Dkt. 32-19, Exh. P ¶7 (describing clients at risk of return to places where they have "no residence and no means of future support").

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

In contrast, Plaintiffs have deep ties to their current communities, as many have resided in the United States for their entire adult lives, *see, e.g.*, Dkt. 32-8, Exh. E ¶¶4-5; Dkt. 32-9, Exh. F ¶7; Dkt. 32-10, Exh. G ¶3a; Dkt. 32-13, Exh. J ¶4b; Dkt. 32-19, Exh. P ¶7; Dkt. 32-20, Exh. Q ¶7; Dkt. 32-23, Exh. T ¶4; have supported their U.S. citizen spouses and children, *see, e.g.*, Dkt. 12 ¶37; Dkt. 32-5, Exh. B ¶4; Dkt. 32-6, Exh. C ¶4; Dkt. 32-9, Exh. F ¶5; Dkt. 32-12, Exh. I ¶8; Dkt. 32-13, Exh. J ¶¶4a, 4b; Dkt. 32-18, Exh. O ¶4; Dkt. 32-21, Exh. R ¶4 and have been employed for many years at U.S. companies, including as skilled professionals in fields in which the Department of Labor certified there was a shortage of workers, *see, e.g.*, Dkt. 29-7, Exh. GG, Moreno I-140 Approval Notice; Dkt. 29-13, Exh. MM, Cantarero Argueta I-140 Petition Approval Notice; Dkt. 32-30, Exh. AA ¶15 ("I have been at the same job since soon after I arrived. I have learned new skills and am proud to be using them. I would not be able to find work in El Salvador that would use these skills."); Dkt. 12 ¶¶22, 37; Dkt. 32-6, Exh. C ¶4; Dkt. 32-13, Exh. J ¶¶4a, 4b; Dkt. 32-20, Exh. Q ¶4; Dkt. 32-21, Exh. R ¶4.

Moreover, most Plaintiffs will face additional legal hurdles amounting to irreparable harm if they can only obtain LPR status from outside of the United States. As discussed *supra*, certain noncitizens seek LPR status from outside of the United States and apply for immigrant visas from a U.S. embassy or consulate abroad. But pursuant to 8 U.S.C. § 1182(a)(9)(B)(i)(II), noncitizens face a ten-year bar precluding their return to the United States if they *depart* the country after having lived without lawful status for more than a year in the country—even if they subsequently were granted some form of lawful status like TPS. Significantly, this bar does not apply unless the individual departs the country. *See id.* (rendering inadmissible a noncitizen who "seeks admission within 10 years of" his or her "departure or removal from the United States"). Thus, TPS holders who are permitted to remain in the country to apply for adjustment of status

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

can avoid the 10-year bar. A discretionary waiver is available for some, but not all, individuals subject to this bar. *See* 8 U.S.C. § 1182(a)(9)(B)(v) (permitting waiver for "an immigrant who is the spouse or son or daughter of a United States citizen or of an [LPR]," but not for parents of U.S. citizens or LPRs). For example, the spouse of a U.S. citizen would be eligible to apply for the discretionary waiver, but the parent of a U.S. citizen—such as Plaintiff Reyes, Exh. UU, Second Reyes Dec. ¶¶ 4, 9—would not. *Id.* Even for those eligible to apply for the waiver, they face greater uncertainty as they must demonstrate that the ten-year bar would cause extreme hardship to their qualifying relative and that they merit the waiver as a matter of discretion. *Id.* Hence, if forced to apply for LPR status abroad, many will face the daunting possibility of being excluded for ten years.

Only preliminary relief will protect Plaintiffs from the various types of irreparable harm described above. They are at immediate risk of losing lawful TPS and work authorization unless the Court enjoins Defendants' erroneous interpretation of the TPS statute in time for Defendants to adjudicate (or reopen and readjudicate) their adjustment of status applications in accord with the statute. *See Schwebel v. Cradall*, No. 17-cv-8541, 2018 U.S. Dist. LEXIS 154719, *22-23 (S.D.N.Y. Sept. 7, 2018) (granting plaintiff's APA claim, finding that USCIS violated the INA when it denied the plaintiff's LPR adjustment application, and ordering that the case be reopened and readjudicated in accordance with the law).

Courts recognize that the types of harm Plaintiffs are experiencing and will continue to experience are of an irreparable nature so as to warrant a grant of preliminary injunctive relief. *See, e.g., Vidal*, 279 F. Supp. 3d at 434-35; *Aguilar*, 538 F. Supp. at 584; *Vargas*, 682 F. Supp. at 595; *Kirwa*, 2017 U.S. Dist. LEXIS 176826, *45; *see also Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (holding that "intangible injuries . . . [which] generally lack

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

an adequate legal remedy" and loss of opportunity to pursue professional advancement can constitute irreparable harm). Thus, Plaintiffs face irreparable harm, and preliminary injunctive relief is appropriate.

3. The Public Interest and Balance of Equities Weigh Heavily in Favor of Granting Injunctive Relief.

The public interest and balance of equities factors "merge when the Government is the opposing party," as in this case *Vidal*, 279 F.Supp.3d at 435 (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Regardless, both factors independently favor Plaintiffs. Without immediate injunctive relief, Plaintiffs will continue to suffer irreparable harm to the detriment of the public interest, including the ongoing violation of their statutory rights, loss of lawful immigration status and risk of deportation, separation from their families and communities, loss of ability to work and of income, and exposure to unstable and unsafe conditions in their countries of origin. *See supra* § II.B.2. That many Plaintiffs will lose their TPS within 15 months and that USCIS can take a year or longer to adjudicate an adjustment application tips the balance of equities sharply in favor of preliminary injunctive relief.

What Plaintiffs seek—that Defendants give effect to the statutory right provided by 8 U.S.C. § 1254a(f)(4) when adjudicating their adjustment of status applications—would further the public interest. Most Plaintiffs have resided in the United States for almost two decades in lawful status. In that time, they married, raised families, pursued education and employment, and became integrated into church and community groups. By definition, Plaintiffs are individuals who are otherwise eligible for an immigrant visa through a U.S. citizen relative or qualifying employer, but for Defendants' policy and practice. Dkt. 12 ¶65.

Defendants cannot demonstrate hardship that tips the balance of equities in their favor, as the preliminary injunction would cause no countervailing harm. As TPS holders, Plaintiffs must

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

already demonstrate to USCIS that they do not have a disqualifying criminal record, do not pose a security threat, and are otherwise admissible to the United States. *See* 8 U.S.C. § 1254a(c)(1), (2). Furthermore, Defendants do not serve any public interest by refusing to recognize TPS holders as being lawfully inspected and admitted for purposes of adjustment of status. Indeed, such a policy undermines the public interest, by depriving individuals of their statutory right to adjust to LPR status and thus separating them from their families and communities. *See League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("[T]here is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'") (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)); *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) ("[T]he public interest favors applying federal law correctly.").

Thus, Plaintiffs respectfully submit that the balance of equities and public interest tip sharply in their favor.

III. CONCLUSION

Plaintiffs satisfy the required criteria for injunctive relief. Accordingly, the Court should grant this motion.

Dated October 26, 2018.

American Immigration Council
1331 G St. N.W.
Washington, DC 20005

Respectfully submitted,

s/ *Trina Realmuto*
Trina Realmuto, TR3684
Kristin Macleod-Ball, KM1640
American Immigration Council
100 Summer Street, 23rd Floor
Boston, MA 02110
(857) 305-3600
trealmuto@immcouncil.org
kmacleod-ball@immcouncil.org

Mary Kenney
American Immigration Council
1331 G Street, NW, Suite 200
Washington, D.C. 20005
(202) 507-7512
mkenney@immcouncil.org

Matt Adams
Leila Kang
Northwest Immigrant Rights Project
615 2nd Avenue, Suite 400
Seattle, WA 98104
(206) 957-8611
matt@nwirp.org
leila@nwirp.org

Attorneys for Plaintiffs