Case No. 14-35633

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS RAMIREZ*, et al.*,

Plaintiffs-Appellees,

v.

LINDA DOUGHERTY*, et al.*

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
Agency No. A093-429-328

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS/APPELLEES

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CORPORATE DISCLOSURE STATEMENT

I, Mary Kenney, attorney for *Amicus Curiae*, American Immigration Council, certify that the American Immigration Council is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporations which own 10% or more of its stock.

Dated: February 26, 2015 s/ Mary Kenney

I, Devin Theriot-Orr, attorney for *Amicus Curiae*, American Immigration Lawyers Association, certify that the American Immigration Lawyers Association is a non-profit organization which does not have any parent corporations or issue stock and consequently there exists no publicly held corporations which own 10% or more of its stock.

Dated: February 26, 2015 s/ Devin Theriot-Orr

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I. INTRODUCTION AND STATEMENT OF *AMICI*[1]

The American Immigration Council (Council) and the American Immigration Lawyers Association (AILA) proffer this *amicus curiae* brief in support of the Appellee Jesus Ramirez to assist the Court with the question of whether a grant of Temporary Protected Status (TPS) by the United States Citizenship and Immigration Services (USCIS) must be considered an admission for purposes of 8 U.S.C. § 1255, the statute setting forth the eligibility requirements for a noncitizen to adjust to lawful permanent residence (LPR). *Amici* argue that the plain language of the TPS statute compels this result.

In the TPS statute, Congress specified that, "for purposes of adjustment of status," a TPS recipient "shall be considered as being in [ ] lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). As shown below, a noncitizen can only "be in" nonimmigrant status if he or she was admitted to the United States in that status. Thus, the mandate that USCIS *consider* TPS recipients to be in nonimmigrant status necessarily requires that USCIS also *consider* them admitted. Because Congress created a legal fiction that does not require that a recipient actually be a nonimmigrant—and similarly does not require an

[1] *Amici* state pursuant to Fed. R. App. P. 29(c) that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amici curiae*, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief.

actual admission—the statutory definition of the term "admission" is not relevant in this context. Moreover, nothing in the legislative history of the TPS statute indicates a different intent.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants.

AILA is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

The Council and AILA have an interest in ensuring that all noncitizens have the fullest opportunity to achieve lawful permanent status permitted by the INA. In accord with this, the Council proffered briefs in other cases on the issue now before the Court, including in the present case when it was before

the District Court. *See also Fiallos Ortiz v. Holder*, No. 13-70864 (9th Cir. *amicus* brief submitted April 10, 2014).

II. ARGUMENT

Amici agree with Appellee that § 1254a(f)(4) is unambiguous. Consequently, this provision must be interpreted consistent with Congress' clear intent as expressed by the plain language of the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (Courts "must give effect to the unambiguously expressed intent of Congress."). Here, Congress clearly mandated that, as one of the benefits of TPS status and solely "for purposes of adjustment of status," a TPS recipient "shall be considered as being in [ ] nonimmigrant status." 8 U.S.C. § 1254a(f)(4). Considering this provision, the Sixth Circuit found the statutory language to be "plain" and thus interpreted it "exactly as written," holding that a TPS beneficiary is "admitted" within the meaning of 8 U.S.C. § 1255(a). *Flores v. USCIS*, 718 F.3d 548, 552 (6th Cir. 2013); see also *Medina v. Beers*, No. ___, __ F. Supp.3d __, 2014 WL 5695675 (E.D. Penn. Nov. 5, 2014) (same); *but see Serrano v. U.S. Attorney General*, 655 F.3d 1260 (11th Cir. 2011) (finding statute ambiguous and deferring to government's interpretation).

Appellee thoroughly detailed the reasons why § 1254a(f)(4) is unambiguous. *Amici* will not simply repeat Appellee's arguments, although

we adopt them in full. Instead, this brief will further elaborate several key points.

a. The Majority of TPS Recipients, Including Appellee, Live in the United States for a Decade or More, Building their Lives Here.

Appellants stress that TPS is a "temporary" status. *See*, e.g., Dkt. 6-1 at 15-17. *Amici* do not dispute that this is correct as a technical matter. However, TPS is temporary only in so far as it is not a permanent status. Because it is almost never a short-lived status, but instead generally lasts for a decade or more, and because there is never a predictable point at which a country's TPS designation will be lifted, TPS is far from "temporary" for those living in this status.

The statute provides that the Attorney General may designate a foreign country for TPS due to conditions in the country—such as a natural disaster or a civil war—that prevent the country's nationals who are living in the United States from returning safely. 8 U.S.C. § 1254a(b). Essentially, the statute recognizes that these individuals are stranded in the United States for reasons beyond their control. A national of the designated country residing in the United States may apply for and be granted TPS benefits if he satisfies all eligibility requirements. Once granted TPS, the individual may retain that status for as long as the United States continues the designation of the

particular home country, provided he remains within the United States and renews his status when required. 8 U.S.C. § 1254a(c)(3).

While a country's designation is for a specific period, it is subject to unlimited renewals upon the Attorney General's determination that the home country's adverse conditions remain sufficiently severe. Practically speaking, this means that an individual's TPS status can last for an indefinite—and unpredictable—period. The TPS recipient cannot foresee when it will end because he cannot know whether or when conditions will improve in his home country or whether the Attorney General will continue the TPS designation.

For most TPS recipients, this means that they remain in TPS status for years, and sometimes decades. The Attorney General first designated El Salvador, Appellee's home country, in 2001 and has renewed this designation continuously for 14 years, most recently on January 15, 2015. 80 Fed. Reg. 893-96. Appellee applied for TPS in 2001, when El Salvador was first designated, and has periodically renewed his status as required. Dkt. 13 at 4-5. Nationals of other TPS-designated countries have remained in TPS status for even longer periods. Somalia's designation has been renewed continuously for 23 years. 78 Fed. Reg. 65690 (as corrected 78 Fed. Reg. 66756). The designation for Sudan has lasted 17 years, 78 Fed. Reg. 1872; while that for Honduras and Nicaragua, for 16 years. 78 Fed. Reg. 20123 and

20128. The remaining six countries—Guinea, Haiti, Liberia, Sierra Leone, South Sudan, and Syria—each were initially designated more recently. *See* 79 Fed. Reg. 69511 (Guinea first designated on November 21, 2014); 79 Fed. Reg. 11808 (Haiti first designated on January 21, 2010); 79 Fed. Reg. 69502 (Liberia first designated on November 21, 2014); 79 Fed. Reg. 69506 (Sierra Leone first designated on November 21, 2014); 78 Fed. Reg. 1866 (South Sudan was first designated effective November 3, 2011); and 78 Fed. Reg. 36223 (Syria first designated on March 29, 2012). In no case is it clear when the Attorney General will discontinue designating a country for TPS.

All TPS recipients, while in that status, are permitted to live and work in the United States. 8 U.S.C. §§ 1254a(a)(1)(B), (a)(2). These individuals establish homes in the United States, marry, have and raise U.S. citizen children, and become involved in their communities. In short, unable to return to their unstable home countries, they build their lives in the United States. As the Sixth Circuit cogently explained, the plaintiff in *Flores*:

> has been in the United States for about fifteen years. He has roots here. His wife and minor child are here. They are both United States citizens. He is of good moral character and a contributing member of society. He has waited his turn for an independent, legal, and legitimate pathway to citizenship, through the immediate relative visa application …. The Government is essentially telling him that he is protected and can stay here, but that he will never be allowed to become an LPR, even for an independent basis.

718 F.3d at 555; *accord Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc) (noting that "when possible, we interpret statutes so as to preclude absurd results").

Like the plaintiff in *Flores*, Appellee Ramirez has built his life in the United States. He married a U.S. citizen in 2012. Based upon this marriage, and the approved "Petition for Alien Relative" that his wife filed on his behalf, he now is considered an "immediate relative" of a U.S. citizen, a classification which provides him with an independent basis for adjusting to lawful permanent resident status. It is only Appellants' strained and excessively narrow interpretation of § 1254a(f)(4) which prevents him from doing so.

b. The Statutory Definition of "Admission" Is Inapplicable Under the Legal Fiction Created by Section 1254a(f)(4).

Appellants contend that a plain reading of § 1254a(f)(4) is not possible because a grant of TPS is not an "admission" as that term is statutorily defined. Dkt. 6-1 at 18. This Court recognizes the complexity of Congress's use of the term "admission" in the INA. While the statutory definition is primary and generally controls, *Negrete-Ramirez v. Holder*, 741 F.3d 1047, 1052 (9th Cir. 2014), it does not apply in all contexts. Thus, as Appellee explains fully in his brief, this Court has recognized that an adjustment of status can constitute an admission in limited circumstances, *see Ocampa-*

Duran v. Ashcroft, 254 F.3d 1133 (9th Cir. 2005); that the legal fiction that certain juveniles have been paroled into the United States can satisfy the "admitted in any status" requirement for cancellation of removal, *Garcia v. Holder*, 659 F.3d 1261 (9th Cir. 2011);[2] and, similarly, that a person who is accepted into the Family Unity Program has been "admitted in any status" for purposes of cancellation. *Garcia-Quintero v. Gonzales*, 455 F.3d 1006 (9th Cir. 2006). Dkt. 13 at 34-42.

In each situation, the context in which the term "admitted" was used compelled the Court's interpretation. As explained by the Court in *Negrete-Ramirez*, a statutory definition is to be applied "unless doing so is not possible in the particular context." 741 F.3d at 1053. Here, the context in which the term is implicated demonstrates that the statutory definition is not applicable.

Under § 1254a(f)(4), a TPS recipient must be "considered" to be in lawful nonimmigrant status. An individual can only be in lawful nonimmigrant status by being admitted to the United States in that status. *See* 8 U.S.C. § 1184(a) (entitled "Admission of Nonimmigrants" and requiring that the "admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by

[2] As in § 1254a(f)(4), Congress employed a legal fiction with regard to certain abused and neglected juveniles, requiring that they be deemed to have been "paroled into the United States" regardless of how they actually entered the United States. 8 U.S.C. § 1255(h).

regulation prescribe …"). An individual may be able to change from one nonimmigrant classification to another while in the United States, but this is only after first being admitted to the United States in the initial classification. 8 U.S.C. 1258 ("The Attorney General may [ ] authorize a change from any nonimmigrant classification to any other nonimmigrant classification in the case of any alien lawfully admitted to the United States as a nonimmigrant …"). By requiring the TPS recipient "to be considered as being in [ ] lawful status as a nonimmigrant," § 1254a(f)(4) necessarily requires the recipient to be considered admitted.

Being "considered" admitted is not the same as actually having been admitted. Thus, just as § 1254(f)(4) does not require the TPS recipient to actually be a nonimmigrant—which would require the TPS recipient to meet specific requirements for a particular nonimmigrant classification, *see* 8 U.S.C. §§ 1101(a)-(v) (defining more than 20 nonimmigrant classifications)—it also does not require the recipient to actually have been admitted. Instead, the statute authorizes a legal fiction: that individuals who may or may not have been admitted as nonimmigrants are to be treated as if they were. In this context, the statutory definition of admission simply is not relevant.

c. The Legislative History of the TPS Statute Does Not Conflict with its Plain Language.

The legislative history of a provision is not relevant when, as here, Congress expressed its intent through the unambiguous language of the statute. *United States v. Hui Hsiung*, No. 12-10492, __ F.3d __, 2015 U.S. App. LEXIS 1590, *57 n. 11(9th Cir. Jan. 30, 2015) (Refusing to consider legislative history because, where "the text of the statute is unambiguous, [the court] stop[s] with the text and do[es] not refer to extrinsic sources to divine its meaning."). However, even were the Court to consider the history behind the TPS statute, it would find nothing in conflict with the plain meaning of the statute.

Appellants attempt to demonstrate that Congress included § 1254a(f)(4) in the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (IMMAct 90), in order to protect Chinese nationals present in the United States in lawful nonimmigrant status at the time of the Tiananmen Square massacre. Dkt. 6-1 at 48-50. In doing so, Appellants rely solely on proposed legislation unrelated to IMMAct 90, legislation that was never adopted. *Id.* A review of the early versions of what ultimately became IMMAct 90 reveals that the only version to include § 1254a(f)(4) was the House version specifically concerned with citizens of El Salvador, Lebanon, Liberia and Kuwait, and making no mention of citizens of China.

There were a total of six versions of Senate Bill 358, including the final version that became IMMAct 90. As first introduced in February 1989 and

subsequently considered and passed by the Senate, S. 358 contained no TPS provision. S. 358, 101st Cong. (introduced in Senate on February 7, 1989). The Senate's concern for Chinese nationals was evidenced, not in a TPS provision, but instead in a provision allowing eligible Chinese nationals to adjust to temporary lawful status. S. 358, 101st Cong. § 302 (as referred to the House Committee on the Judiciary, July 13, 1989). This version of the bill was referred to the House. *Id*.

In October, 1990, the House passed an amended version of S. 358, which included a proposed INA § 244A entitled "Temporary Protected Status." S. 358, 101st Cong. § 324 (Engrossed Amendment as agreed to by House on October 3, 1989). The proposed version of § 244A specifically designated El Salvador, Lebanon, Liberia, and Kuwait, thus making citizens of those countries eligible for TPS status if they otherwise qualified. *Id*. The Engrossed Amendment House version of S. 358 also provided for designation of countries other than those specified under a process to be followed by the Attorney General. *Id*. Under this version of S. 358, citizens of China—unlike those of El Salvador, Lebanon, Liberia, and Kuwait—received no special recognition. *Id*. Instead, they would be eligible to apply for TPS only if the Attorney General first determined that conditions in China warranted its designation under the Act. *Id*. Notably, it was this version that, for the first time, included § 1254a(f)(4). *Id*. The final, adopted version of IMMAct 90

retained § 1254a(f)(4) as proposed by the House, although it did not include the provisions specially designating Lebanon, Liberia and Kuwait. IMMAct 90, § 302. A special designation for El Salvador, however, remained. IMMAct 90, § 303.

While the Engrossed Amendment House version of S. 358 was the first to include § 1254a(f)(4), it was not the first time that such a provision was considered by Congress. A bill entitled "Temporary Protected Status for Nationals of Lebanon" proposed inserting a limited TPS provision for Lebanese citizens within the United States, to be located at INA § 244A. H.R. 3267, 101st Cong. (1st Sess. 1989). . Proposed subsection 244A(f)(5) contained language identical to what is now found at § 1254a(f)(4). *Id.* A similar bill, entitled "Lebanese Temporary Protected Status Act of 1989," was introduced in the Senate in February, 1990. S. 2079, 101st Cong. (2d Sess. 1990). It also contained identical language to that now found in § 1254(f)(4). *Id*. Neither of these bills passed. Instead, as noted above, the House subsequently incorporated the same language in its version of S. 358, along with provisions that—as was done in these two earlier bills—targeted Lebanese citizens, as well as citizens of El Salvador, Liberia and Kuwait, for special TPS treatment. H.R. Rep. 101-786, at § 324 (1990).

This history demonstrates that Congress was not motivated by a concern for Chinese citizens when it first drafted and ultimately adopted the

language found in § 1254a(f)(4). The impact of Tiananmen Square on Chinese students in the United States was clearly a concern to Congress. However, none of the bills which sought to address this concern through the creation of a TPS regime included language similar to that found in § 1254a(f)(4). Chinese and Central American Temporary Protected Status Act of 1989, H.R. 45, 101st Cong. (1st Sess. 1989); Chinese Temporary Protected Status Act of 1989, H.R. 2929, 101st Cong. (1st Sess. 1989); Chinese and Central American Temporary Protected Status Act of 1989, H.R. 3506, 101st Cong. (1st Sess. 1989). Appellants' speculative conclusion that Congress was focused on individuals who might be "unable to return to their country after lawfully entering the United States," Dkt. 6-1 at 50, has no support since it rests entirely on the mistaken premise that a concern for Chinese students was behind the adoption of § 1254a(f)(4). Thus, contrary to Appellants' contention, there is nothing in the legislative history to conflict with a plain reading of the statute.

Respectfully submitted,

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Dated: February 26, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(6) and 29(d) and 29-2(c)(2) because this brief contains 3,032 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(b) because this brief has been prepared using Microsoft Word 2010, is proportionately spaced, and has a typeface of 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 26, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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