

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF NEW YORK

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

6 Plaintiffs,

7 v.

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

14 Defendants.

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

**MEMORANDUM OF
LAW IN SUPPORT OF
PLAINTIFFS' MOTION
FOR SUMMARY
JUDGMENT**

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1 **I. INTRODUCTION**

2 Plaintiffs and proposed class members are individuals who entered the United States
3 without inspection and subsequently applied for and were granted Temporary Protected Status
4 (TPS). After years of living in the United States in this lawful—although nonpermanent—status,
5 they seek to adjust their status to become lawful permanent residents (LPRs) based on immigrant
6 visa petitions filed on their behalf by a U.S. citizen spouse, parent, or adult child or employer.
7 However, Defendant U.S. Citizenship and Immigration Services (USCIS) either already has
8 denied or will deny their applications based on a written policy that Plaintiffs and proposed class
9 members contend is unlawful.
10

11
12 At issue in the policy, and in this case, is the language of 8 U.S.C. § 1254a(f)(4), which
13 provides that “for purposes of adjustment of status under [8 U.S.C. § 1255] and change of status
14 under [8 U.S.C. § 1258], the [TPS holder] shall be considered as being in, and maintaining,
15 lawful status as a nonimmigrant.” As two courts of appeals have held, through that provision,
16 TPS holders are deemed “inspected and admitted” for purposes of adjustment of status under 8
17 U.S.C. § 1255. *See Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. U.S. Citizenship*
18 *& Immigration Services*, 718 F.3d 548 (6th Cir. 2013). Any other interpretation contravenes the
19 TPS statute, 8 U.S.C. § 1254a. Accordingly, the Court should grant summary judgement in favor
20 of Plaintiffs and proposed class members.
21

22 **II. BACKGROUND ON TPS, ADJUSTMENT OF STATUS, AND**
23 **NONIMMIGRANTS**

24 **A. Temporary Protected Status**

25 Congress enacted the TPS statute in 1990 as a humanitarian program. Immigration Act
26 of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990). Pursuant to 8 U.S.C. § 1254a, the
27 Department of Homeland Security (DHS) Secretary may designate a foreign country for TPS due
28

1 to conditions in the country that temporarily prevent the country’s nationals from returning
2 safely, or where the country is unable to handle the return of its nationals adequately. *See* 8
3 U.S.C. § 1254a(b)(1) (enumerating circumstances for TPS designation). The Secretary has
4 designated countries for TPS following environmental disasters, such as an earthquake or
5 hurricane; epidemics; and ongoing armed conflicts. USCIS, Temporary Protected Status,
6 *Countries Currently Designated for TPS* (June 5, 2018),
7 <https://www.uscis.gov/humanitarian/temporary-protected-status>.

8
9 As of January 1, 2017, ten countries were designated for TPS: El Salvador, Haiti,
10 Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen. *Id.* Several of
11 these first were designated close to or more than two decades ago: Somalia in 1991, Sudan in
12 1997, Honduras in 1999, Nicaragua in 1999, and El Salvador in 2001. *Id.* DHS designated the
13 other countries within the last eight years. *Id.*

14
15 Until 2017, DHS continuously renewed and/or extended the designation of each of these
16 countries following the Secretary’s periodic review. *Id.* However, in 2017, the Secretary
17 announced the termination of the TPS designation for Haiti, Nicaragua, and Sudan.¹ In 2018
18 thus far, the Secretary has announced the termination of the TPS designations for El Salvador,
19 Nepal and Honduras.² With respect to each termination, the Secretary deferred the effective date
20
21

22
23 ¹ *See* DHS, Acting Secretary Elaine Duke Announcement on Temporary Protected Status
24 for Haiti (Nov. 20, 2017), [https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-](https://www.dhs.gov/news/2017/11/20/acting-secretary-elaine-duke-announcement-temporary-protected-status-haiti)
25 [https://www.dhs.gov/news/2017/11/06/acting-secretary-elaine-duke-announcement-temporary-](https://www.dhs.gov/news/2017/11/06/acting-secretary-elaine-duke-announcement-temporary-protected-status-nicaragua-and)
26 [protected-status-nicaragua-and](https://www.dhs.gov/news/2017/11/06/acting-secretary-elaine-duke-announcement-temporary-protected-status-nicaragua-and); USCIS, Temporary Protected Status Country Designation: Sudan
27 (May 9, 2018), [https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-](https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-sudan)
28 [protected-status-designated-country-sudan](https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-sudan).

² DHS, Secretary of Homeland Security Kirstjen M. Nielsen Announcement on Temporary
Protected Status for El Salvador (Jan. 8, 2018),
<https://www.dhs.gov/news/2018/01/08/secretary-homeland-security-kirstjen-m-nielsen->

1 between 12 to 18 months to “provide time for individuals with TPS to seek an alternative lawful
2 immigration status in the United States, if eligible, or, if necessary, arrange for their departure.”
3 *See supra* n.1, Acting Secretary Elaine Duke Announcement on Temporary Protected Status for
4 Nicaragua and Honduras.
5

6 Upon initially designating a country for TPS, DHS issues a notice advising nationals of
7 that country of a period in which they may apply for TPS if they meet strict eligibility
8 requirements, including demonstrating admissibility to the United States. 8 U.S.C. §
9 1254a(c)(1)(A)(iii). Thus, any applicant for TPS must submit themselves for inspection and
10 demonstrate that they are admissible or demonstrate that they qualify for a waiver of any
11 applicable ground of admissibility. An applicant is not eligible for TPS, and no waiver is
12 available, if the individual has been convicted of certain crimes, including any felony or two or
13 more misdemeanors, is found to have persecuted others, or is found to be a security threat to the
14 United States. 8 U.S.C. § 1254a(c)(2)(B); 8 C.F.R. § 244.4.
15

16 The application process is rigorous, requiring the applicant to submit information
17 regarding, *inter alia*, any prior criminal history and/or immigration violation. *See* 8 C.F.R. §
18 244.9; *see also* USCIS, Form I-821, Application for Temporary Protected Status (Apr. 11, 2018),
19 <https://www.uscis.gov/i-821>. In addition, DHS crosschecks applicants’ photographs and
20 fingerprints to verify their criminal and immigration histories. USCIS, Temporary Protected
21 Status, *Application Process* (June 5, 2018), <https://www.uscis.gov/humanitarian/temporary->
22
23

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25 _____
26 announcement-temporary-protected; DHS, Secretary of Homeland Security Kirstjen M. Nielsen
27 Announcement on Temporary Protected Status for Nepal (April 26, 2018),
28 <https://www.dhs.gov/news/2018/04/26/secretary-kirstjen-m-nielsen-announcement-temporary-protected-status-nepal>; DHS, Secretary of Homeland Security Kirstjen M. Nielsen
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<https://www.dhs.gov/news/2018/05/04/secretary-homeland-security-kirstjen-m-nielsen-announcement-temporary-protected>.

1 protected-status. Only after DHS has carefully screened them through the application process
 2 and found them admissible (or granted a waiver of inadmissibility) are applicants approved for
 3 TPS, generally for a period of eighteen months. *Id.* The Secretary of DHS must review and
 4 either terminate or extend and/or redesignate a country for TPS every 6 to 18 months. 8 U.S.C. §
 5 1254a(b)(3)(C). After DHS extends or redesignates a country for TPS, TPS holders from that
 6 country must reapply to renew their status, verifying that they continue to satisfy all eligibility
 7 requirements. 8 C.F.R. § 244.17; *see also* USCIS, Temporary Protected Status, *Maintaining TPS*
 8 (June 5, 2018), <https://www.uscis.gov/humanitarian/temporary-protected-status>.

9
 10
 11 Individuals with valid TPS cannot be detained or deported by DHS for lack of
 12 immigration status, are entitled to employment authorization, and may travel abroad with the
 13 prior consent of DHS. 8 U.S.C. § 1254a(a)(1), (d)(4), (f)(3). Additionally, and relevant here,
 14 “for purposes of adjustment of status under [8 U.S.C. § 1255] and change of status under [8
 15 U.S.C. § 1258], the [TPS holder] shall be considered as being in, and maintaining, lawful status
 16 as a nonimmigrant.” 8 U.S.C. § 1254a(f)(4).

17 18 **B. Adjustment of Status**

19 Section 1255 governs the process by which individuals with temporary nonimmigrant
 20 status³ may apply to adjust to LPR status based on their relationship with a U.S. citizen or LPR
 21

22
 23 ³ 8 U.S.C. § 1255 initially provided adjustment of status only for individuals with non-
 24 immigrant visas (by definition, temporary visas) who sought to adjust to immigrant visas
 25 (permanent lawful residence). Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat.
 26 163 (1952). Over time Congress provided additional categories of individuals the opportunity to
 27 apply for adjustment. *See, e.g.*, 8 U.S.C. § 1255(i) (allowing adjustment for noncitizens who
 28 have no lawful status if a qualifying visa petition was filed by a date specified and other
 qualifying conditions are met); § 1255(g), (h) (allowing adjustment for noncitizens who qualify
 as enumerated “special immigrants” under 8 U.S.C. § 1101(a)(27)); § 1255(j) (allowing
 adjustment for certain informants assisting in the investigation of criminal organizations); §
 1255(l) (allowing adjustment for survivors of trafficking who have been granted a T visa); §

1 family member or an employer within the United States.⁴ Adjustment of status allows the
2 applicant to obtain lawful status while remaining in the United States, instead of having to leave
3 the United States to apply for an immigrant visa from a U.S. embassy or consulate abroad, an
4 often-lengthy process which creates additional legal hurdles, including, for some, a bar on
5 returning to the United States for up to ten years. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II).

7 To be eligible to adjust, individuals generally must demonstrate that they have been
8 “inspected and admitted or paroled into the United States.” 8 U.S.C. § 1255(a). The terms
9 “admitted” and “admission” are defined, in part, as “the lawful entry of the [noncitizen] into the
10 United States after inspection and authorization by an immigration officer.” 8 U.S.C. §
11 1101(a)(13)(A). Analyzing the history and use of these terms in the Immigration and Nationality
12 Act (INA), the Board of Immigration Appeals (BIA) held that Congress “was not providing the
13 exclusive definition for th[e]se terms” in § 1101(a)(13)(A). *Matter of Agour*, 26 I&N Dec. 566,
14 572 (BIA 2015). Indeed, the adjustment statute itself refers to S, T and U visa holders being
15 admitted in S, T and U status, even though their admission, like a grant to TPS, does not require
16

18
19
20 1255(m) (allowing adjustment for survivors of enumerated violent crimes who have been granted
a U visa).

21 ⁴ USCIS explains the purpose of the adjustment of status provision as follows:

22 Congress created the adjustment of status provisions to enable a foreign
23 national physically present in the United States to become an LPR without
24 incurring the expense and inconvenience of traveling abroad to obtain an
immigrant visa. Congress has further modified the adjustment of status
provisions to:

- 25 •Promote family unity;
- 26 •Advance economic growth and a robust immigrant labor force;
- 27 •Accommodate humanitarian resettlement; and
- Ensure national security and public safety.

28 USCIS, USCIS Policy Manual, Vol. 7, Part A. Chapter 1, § A (May 23, 2018),
<https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartA-Chapter1.html>.

1 a “lawful entry” into the United States. *See* 8 U.S.C. § 1255(j), (l), (m).

2 An applicant for lawful permanent residence also generally must be “eligible to receive
3 an immigrant visa” (based on an approved visa petition filed by a qualifying family member or
4 employer) that is immediately available at the time the time of application. 8 U.S.C. § 1255(a).
5 Applicants also must demonstrate that they are “admissible to the United States,” i.e., either not
6 subject to any applicable ground of inadmissibility set forth in 8 U.S.C. § 1182 or eligible for a
7 waiver of any such ground. *Id.* Finally, they must show that they are not barred from adjustment
8 under 8 U.S.C. § 1255(c)(2) for, inter alia, unlawful presence or unauthorized employment or
9 must satisfy an exception to those bars. Immediate relatives of U.S. citizens—such as Plaintiffs
10 Reyes and Avilez Rojas—are exempted from these bars. 8 U.S.C. § 1255(c)(2); *see also* 8
11 U.S.C. § 1151(b)(2)(A)(i) (defining “immediate relatives” as spouses, parents of adult children,
12 or children of U.S. citizens). Similarly, certain employment-based adjustment applicants, such
13 as Plaintiffs Moreno and Cantarero Argueta, also are exempted if, at the time of filing the
14 adjustment application, they are “present in the United States pursuant to a lawful admission”
15 and meet other requirements. 8 U.S.C. § 1255(k). To be eligible for the exception under §
16 1255(k), applicants also need to show that, subsequent to their “admission,” they have less than
17 180 days of unlawful presence, unauthorized employment, or other violation of the terms of
18 admission. *Id.* Were the grant of TPS considered an admission, as the statute requires, Plaintiffs
19 Moreno and Cantarero would satisfy this condition.

24 C. Nonimmigrant Status

25 There are twenty-two nonimmigrant classifications, with numerous subclassifications. 8
26 U.S.C. § 1101(a)(15)(A)-(V); *see also* 8 C.F.R. § 214.1(a)(1) (designating subclassifications
27 within the nonimmigrant classifications). TPS is not one of these classifications. *Id.*
28

1 Nonetheless, as noted above, the TPS statute expressly requires that “for purposes of adjustment
2 of status under [8 U.S.C. § 1255] and change of status under [8 U.S.C. § 1258], the [TPS holder]
3 shall be considered as being in, and maintaining, lawful status as a nonimmigrant.” 8 U.S.C. §
4 1254a(f)(4).

5
6 “Being in” nonimmigrant status necessarily requires an admission. All nonimmigrants
7 are admitted in nonimmigrant status. 8 U.S.C. § 1184(a) (“The admission of any [noncitizen] as
8 a nonimmigrant shall be for such time and under such conditions as the Attorney General may by
9 regulations prescribe”); 8 C.F.R. § 214.1(a)(3) (discussing admission requirements for
10 nonimmigrants). Additionally, only those admitted in nonimmigrant status are permitted to
11 change to another nonimmigrant status. 8 U.S.C. § 1258.

12
13 Generally, nonimmigrants are admitted following a two-step application and inspection
14 process. First, the noncitizen must apply for a nonimmigrant visa from a consular officer abroad.
15 8 U.S.C. §§ 1201(a)(1)(B), 1202(c)–(d). Obtaining a nonimmigrant visa, however, does not
16 guarantee admission. 8 U.S.C. § 1201(h). Instead, the nonimmigrant also must be inspected by
17 DHS officers at a port of entry. 8 U.S.C. § 1201(f); 8 C.F.R. § 214.1(a)(3) (“A nonimmigrant[‘s]
18 admission to the United States is conditioned on compliance with any [applicable] inspection
19 requirement” in the regulations); 8 C.F.R. § 235.1. Thus, nonimmigrants must “establish[] to the
20 satisfaction of the consular officer, at the time of application for a visa, and the immigration
21 officers, at the time of application for admission, that [they are] entitled to a nonimmigrant status
22 under section 1101(a)(15) of this Title.” 8 U.S.C. § 1184(b).

1 Due to the nature of the S,⁵ T,⁶ and U⁷ nonimmigrant categories, applicants may apply
2 either abroad or from within the United States. As previously noted, admissions may occur
3 absent the “lawful entry” of an individual with a specified visa. In a non-precedent decision, the
4 BIA held that a stateside grant of nonimmigrant U status was an “admission” even though it did
5 not satisfy the statutory definition of the term. *See* Exh. QQ, *Alejandro Garnica Silva*, AXXX-
6 XXX-XXX (BIA June 29, 2017).⁸ In so holding, the BIA adopted DHS’ argument that to find
7 otherwise would create “absurd results.” *See* Exh. RR, Supplemental Brief of U.S. Dep’t of
8 Homeland Security, *Alejandro Garnica Silva*, AXXX-XXX-XXX at 13 (BIA May 31, 2016)
9 (arguing against an interpretation that would “exclude certain [noncitizens] in U nonimmigrant
10 status from adjusting status where eligibility is dependent upon the [noncitizen] being physically
11 present for three years since the date of admission as a nonimmigrant in U status”). In so
12 arguing, DHS relied on both statutory language and the absurd results that otherwise would
13 occur absent such an interpretation. *Id.* at 6, 9-12. In *Garnica Silva*, the BIA indicated that the
14 same result would apply to those granted S and T nonimmigrant status. Exh. QQ, *Alejandro*
15 *Garnica Silva* at 6, 7. It is readily apparent that the statute allows for multiple forms of
16 admission, just as it allows for groups other than the traditional nonimmigrant visa holders to
17 apply for adjustment of status under 8 U.S.C. § 1255.

23
24 ⁵ A total of 250 S visas are available each year for noncitizens willing to cooperate with the
25 United States with respect to criminal or terrorist activity. 8 U.S.C. §§ 1101(a)(15)(S); 1184(k).

26 ⁶ A T visa is available to certain victims of trafficking who are physically present in the
27 United States, American Samoa, or the Northern Mariana Islands, or are at a port of entry. 8
28 U.S.C. § 1101(a)(15)(T); *see also* 8 U.S.C. § 1184(o) (outlining additional information about the
T visa).

⁷ A U visa is available to certain victims of crime that occurred within the United States or
its territories or possessions. 8 U.S.C. § 1101(a)(15)(U); *see also* 8 U.S.C. § 1184(p) (outlining
additional information about the U visa).

1 **D. Relevant Federal Court Decisions**

2 Two Courts of Appeals have held that 8 U.S.C. § 1254a(f)(4) unambiguously requires
 3 DHS to find that TPS holders are deemed “inspected and admitted” for purposes of adjustment
 4 of status under 8 U.S.C. § 1255. *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. U.S.*
 5 *Citizenship & Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013). The plaintiffs in both cases had
 6 identical legal claims to those of Plaintiffs and proposed class members here: they initially
 7 entered without inspection, subsequently were granted TPS, then became eligible to adjust to
 8 LPR status based on a qualifying relationship. *Ramirez*, 852 F.3d at 957; *Flores*, 718 F.3d at
 9 550. In both cases, USCIS denied the plaintiffs’ adjustment applications solely because they had
 10 initially entered without inspection and thus allegedly failed to demonstrate that they had been
 11 inspected and admitted as required by § 1255(a). *Ramirez*, 852 F.3d at 957; *Flores*, 718 F.3d at
 12 550. Both Courts of Appeals rejected USCIS’ position, holding instead that, because §
 13 1254a(f)(4) expressly deems TPS holders to be in lawful nonimmigrant status specifically for
 14 purpose of adjustment of status, the applicant is deemed to have met all requirements for
 15 nonimmigrant status, including inspection and admission, and granted relief under the
 16 Administrative Procedure Act (APA). *Ramirez*, 852 F.3d at 965; *Flores*, 718 F.3d at 554. At
 17 least two district courts have issued similar decisions. *See Medina v. Beers*, 65 F. Supp. 3d 419
 18 (E.D. Pa. 2014); *Bonilla v. Johnson*, 149 F. Supp. 3d 1135 (D. Minn. 2016).

19 The Eleventh Circuit held the opposite without fully analyzing the interplay of the TPS
 20 provision at § 1254a(f)(4) with the adjustment statute at § 1255. *Serrano v. U.S. Att’y Gen.*, 655
 21 F.3d 1260 (11th Cir. 2011). However, both the Sixth and the Ninth Circuits rejected the sparse
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 28 ⁸ Although specifically considering whether the grant of a U visa was an admission for
 purposes of a removal provision, 8 U.S.C. § 1227(a)(2)(A)(i), the BIA also found that it was an
 admission for purposes of adjustment of status. *Id.* at 7-8.

1 analysis provided in the Eleventh Circuit’s per curium decision. *Ramirez*, 852 F.3d at 959-60;
2 *Flores*, 718 F.3d at 555. To date, no other court of appeals has ruled on the issue and no cases
3 are known to be pending before the courts of appeals.

4
5 **E. USCIS’ Policy**

6 USCIS’ written policy states that “[a] foreign national who enters the United States
7 without inspection and subsequently is granted temporary protected status (TPS) does not meet
8 the inspected and admitted or inspected and paroled requirement. . . . A grant of TPS does not
9 cure a foreign national’s entry without inspection or constitute an inspection and admission of
10 the foreign national.” USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5).⁹ In a footnote, the
11 policy manual acknowledges the Sixth Circuit’s decision in *Flores* and provides that the court’s
12 holding is limited to applicants living within the jurisdiction of the Sixth Circuit. *Id.* n.56. To
13 date, USCIS has not modified the policy to reflect the Ninth Circuit’s ruling in *Ramirez*.¹⁰ In
14
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17 ⁹ USCIS’ policy reads in relevant part:

18 A foreign national who enters the United States without inspection and subsequently is
19 granted temporary protected status (TPS) does not meet the inspected and admitted or
20 inspected and paroled requirement [for adjustment of status]. There is no legislative
21 provision or history to suggest that Congress intended that recipients of TPS be eligible
22 for adjustment.

23 USCIS’ approval of TPS confers lawful immigration status on the foreign national, but
24 only for the stipulated time period and so long as the foreign national complies with all
25 TPS requirements. Recipients of TPS must still meet the threshold requirement that a
26 foreign national has been inspected and admitted or inspected and paroled in order to be
27 eligible for adjustment of status. A grant of TPS does not cure a foreign national’s entry
28 without inspection or constitute an inspection and admission of the foreign national.

26 USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5),
27 <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter2.html> (May
28 23, 2018). This policy references both *Serrano* and much older opinions from the General
Counsel of the legacy Immigration and Naturalization Service. *Id.* at n. 58.

¹⁰ Upon information and belief, USCIS is following *Ramirez* with respect to adjustment
applicants residing in the states within the Ninth Circuit’s jurisdiction.

1 jurisdictions where USCIS is not obligated to follow a circuit decision, Defendants will apply the
2 policy to deny adjustment of status to TPS holders who initially entered without inspection
3 despite the fact that they subsequently applied for TPS, were subject to a rigorous inspection
4 process, found admissible and granted TPS with its attendant benefits, as defined at § 1254a(f),
5 including that they be deemed in nonimmigrant status for purposes of seeking to adjust status
6 under § 1255.

8 **III. ARGUMENT**

9 **A. Summary Judgment Standard**

10 Summary judgment is warranted where “there is no genuine dispute as to any material
11 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The
12 moving party bears the burden of demonstrating that he or she is entitled to summary judgment.
13 *White v. Prof'l Claims Bureau, Inc.*, 284 F. Supp. 3d 351, 357 (E.D.N.Y. 2018). “Once the
14 moving party has met its burden, the opposing party ‘must do more than simply show that there
15 is some metaphysical doubt as to the material facts . . . [T]he nonmoving party must come
16 forward with specific facts showing that there is a genuine issue for trial.’” *Id.* (quoting
17 *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002)) (alteration in original).

20 **B. Plaintiffs Assert Three Distinct Claims**

21 Plaintiffs brought this lawsuit to challenge Defendants’ policy pursuant to which USCIS
22 adjudicators will deny the adjustment applications of all TPS holders who initially entered the
23 United States without inspection, unless they reside within the jurisdiction of the Sixth or Ninth
24 Circuit Court of Appeals, in which USCIS is obligated to follow circuit law. *See* USCIS Policy
25 Manual, Vol. 7, Part B, Ch. 2(A)(5). They seek an order declaring that the policy is unlawful
26 and enjoining Defendants from applying it to them or proposed class members. Dkt. 12 at 24, ¶¶
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28

1 c-f. Plaintiffs and proposed class members whose applications USCIS already has denied
2 pursuant to the policy also seek an order compelling Defendants to reopen and readjudicate their
3 applications under the proper interpretation of the law. Dkt. 12 at 24, ¶ g.
4

5 In support of this relief, Plaintiffs pled three distinct claims: An APA claim under 5
6 U.S.C. § 706(2); an APA claim under 5 U.S.C. § 706(1); and a Mandamus claim, 28 U.S.C. §
7 1361. Pursuant to the APA, “‘final agency action for which there is no other adequate remedy in
8 a court [is] subject to judicial review,’ at the behest of ‘[a] person . . . adversely affected or
9 aggrieved by agency action.’” *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.
10 4 (1986) (quoting 5 U.S.C. §§ 702, 704) (alterations in original); *see also Sharkey v. Quarantillo*,
11 541 F.3d 75, 84 (2d Cir. 2008) (same). Under the APA, this Court can “compel agency action
12 unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1), and set aside agency action
13 that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5
14 U.S.C. § 706(2)(A). *See, e.g., Ramirez*, 852 F.3d 954 (reviewing under the APA USCIS’
15 interpretation of 8 U.S.C. § 1254a to improperly bar adjustment of status); *Flores*, 718 F.3d 548
16 (same); *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1046 (E.D.N.Y. 1993) (recognizing
17 that “[a]gency actions that do not fall within the scope of a statutory delegation of authority are
18 ultra vires and must be invalidated by reviewing courts” under the APA).
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21 Furthermore, this Court can grant Plaintiffs and proposed class members mandamus
22 relief. *See* 28 U.S.C. § 1361 (providing authority “to compel an officer or employee of the
23 United States or any agency thereof to perform a duty owed to the plaintiff”); *Richards v.*
24 *Napolitano*, 642 F. Supp. 2d 118, 133-134 (E.D.N.Y. 2009) (granting mandamus relief in the
25 form of reopening an adjustment application where USCIS’ denial of the application was not “in
26 accordance with law”); *Pierre v. McElroy*, 200 F. Supp. 2d 251, 253 (S.D.N.Y. 2001) (requiring
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1 immigration agency to perform its duties where “Congress has granted plaintiff a clear right and
2 provided for a concomitant duty on the part of the [agency]”).

3 Like the Plaintiffs in *Ramirez* and *Flores*, all Plaintiffs have standing to challenge
4 Defendants’ policy as set forth in the USCIS Policy Manual and to seek injunctive and
5 declaratory relief from its application—whether past or imminent—to their cases. *Los Angeles v.*
6 *Lyons*, 461 U.S. 95, 101-02 (1983) (holding that a showing of a “real and immediate” threat of
7 future injury will establish standing for injunctive relief); *Knife Rights, Inc. v. Vance*, 802 F.3d
8 377, 385-87 (2d Cir. 2015) (finding that three plaintiffs had standing because each established a
9 credible threat of future harm). USCIS already has denied the applications of Plaintiffs Moreno
10 and Reyes, and thus there can be no dispute as to their standing. Because this policy is applied to
11 all adjustment applicants who are TPS holders who initially entered without inspection, other
12 than those residing within the Sixth or Ninth Circuits, USCIS will apply the policy to deny
13 Plaintiff Cantarero Argueta’s and Plaintiff Avilez Rojas’ applications. In short, each has
14 suffered or faces a “concrete and particularized” injury that is “actual or imminent” as a direct
15 result of the challenged policy; additionally, it is “likely” that this injury will be remedied by a
16 favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations omitted).
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20 In sum, Defendants have not acted in accordance with the law and have unlawfully
21 withheld agency action by refusing to lawfully adjudicate Plaintiffs’ adjustment of status
22 applications in accordance with the statutes and by refusing to find that their grant of TPS was an
23 inspection and admission for purposes of adjustment of status.
24

25 **1. Count One—Administrative Procedure Act, 5 U.S.C. § 701 et seq.**

26 Plaintiffs’ first claim is brought under the APA, 5 U.S.C. § 701 *et seq.*, and alleges that
27 “Defendants violate the plain meaning of 8 U.S.C. § 1254a(f)(4) when they deny an adjustment
28 application of a TPS holder because the beneficiary has not been inspected and admitted for purposes

1 of adjustment of status.” Dkt. 12 ¶ 82; *see also id.* ¶¶ 78-83. As stated, this claim falls squarely
2 under 5 U.S.C. § 706(2)(A), which states that a “reviewing court shall . . . hold unlawful and set
3 aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of
4 discretion, or otherwise *not in accordance with law.*” (Emphasis added).

5
6 Plaintiffs repeat throughout the Amended Complaint their allegation that Defendants’
7 policy violates the plain meaning of the statute. *See, e.g.*, Dkt. 12 ¶ 1 (alleging that Plaintiffs’
8 and putative class members’ “applications have been, or will be, denied due to Defendants’
9 erroneous interpretation of one provision of the TPS statute, 8 U.S.C. § 1254a(f)”; ¶¶ 6-7 (detailing
10 Defendants’ violation of § 1254a(f)(4) and stating, “Plaintiffs and class members seek declaratory
11 and injunctive relief to remedy Defendants’ violation of the statute”); ¶¶ 27-28 (detailing how
12 Plaintiff Moreno’s adjustment application was denied as a result of Defendants’ “unlawful policy”
13 and specifying that he “wishes to have his adjustment application fairly adjudicated in accordance
14 with the law”); ¶¶ 32-33 (same with respect to Plaintiff Reyes); ¶¶ 39-40 (alleging that “[b]ut for
15 Defendants’ unlawful policy, Plaintiff Cantarero Argueta would be found eligible both for the
16 exemption from the unlawful presence bar to adjustment of status found in § 1255(k) and also for
17 adjustment of status” and asserting that Plaintiff Cantarero Argueta “wishes to have his adjustment
18 application fairly adjudicated in accordance with the law”); ¶¶ 44-45 (same with respect to Plaintiff
19 Avilez Rojas).¹¹

22 Plaintiffs challenge a final agency action, as required by the APA. The final agency
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26 ¹¹ In *Sharkey*, 541 F.3d at 83, the plaintiff cited 5 U.S.C. §§ 702 and 706 in support of her
27 claims, without referencing specific subsections. As here, however, she also described the
28 agency action that was challenged and the relief she sought. From this, the court readily
ascertained that her request that the court find the agency’s action unlawful was made pursuant
to § 706(2), while her request that the court compel USCIS to provide her proof of her LPR
status was made under § 706(1). *Id.*

1 action challenged here is the policy of USCIS. *See* USCIS Policy Manual, Vol. 7, Part B, Ch.
2 2(A)(5). Defendants do not dispute that, pursuant to this written policy, a grant of TPS does not
3 constitute an inspection and admission for purposes of adjustment of status under 8 U.S.C. §
4 1255 or that USCIS’ adjudicators must deny all applications filed by Plaintiffs or proposed class
5 members that depend on the TPS grant to demonstrate an inspection and admission.
6

7 Two conditions are required for finality under the APA, 5 U.S.C. § 704: the action must
8 be the “consummation of the agency’s decision-making process” and it “must be one by which
9 rights or obligations have been determined or from which legal consequences flow.” *Bennett v.*
10 *Spear*, 520 U.S. 154, 177-78 (1997) (quotations omitted). Defendants’ policy satisfies this test.
11 First, it reflects the consummation of Defendants’ decision-making process, and, second, it is a
12 policy pursuant to which the rights of TPS holders—including all Plaintiffs and proposed class
13 members—are decided. *See Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016) (quoting standard
14 set forth in *Bennett*). The Supreme Court has interpreted the finality requirement in a “pragmatic
15 way.” *Fed. Trade Comm. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980) (quotation
16 omitted).
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19 Additionally, Plaintiffs and proposed class members are adversely affected by the fact
20 that Defendants’ actions are not in accordance with the law—pursuant to Defendants’ unlawful
21 policy, they are unable to adjust to LPR status, despite their statutory eligibility to do so. *See*
22 *supra* Section II.E. But even beyond the basic legal wrong of Defendants’ misapplication of the
23 immigration statutes, Plaintiffs and proposed class members face a variety of harms due to
24 Defendants’ policy. The majority face imminent loss of their legal status, without a meaningful
25 opportunity to pursue the alternative lawful immigration status for which they are statutorily
26 eligible. *See supra* at 2-3 (discussing the termination of TPS for six countries over the past
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28

1 year).

2 Moreover, without the ability to adjust to LPR status, Plaintiffs and proposed class
3 members will lose their work authorization when their TPS terminates. As a result, individuals
4 like Plaintiff Moreno and Plaintiff Cantarero Argueta will lose their jobs and remain unable to
5 secure other work and thus will be left without the means to support themselves and their
6 families. *See, e.g.*, Amended Motion for Class Certification (hereinafter, MCC), Exh. AA ¶¶ 9-
7 10; MCC, Exh. CC ¶ 11. Others, like Plaintiff Avilez Rojas, will lose eligibility for the Social
8 Security Retirement income based on their prior work that provides their sole support during
9 retirement. *See* 42 U.S.C. § 402(y); MCC, Exh. DD ¶¶ 7-9, 13.

10 Finally, Plaintiffs have no other adequate remedy available to them in any court. *See,*
11 *e.g., Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (noting that APA review is not available
12 only where “Congress has provided special and adequate review procedures”) (quotation
13 omitted); *Sharkey*, 541 F.3d at 90 n.14 (finding review procedures for individuals ordered
14 removed an insufficient alternative remedy for noncitizen who had not been ordered removed).

15 **2. Count Two—Administrative Procedure Act, 5 U.S.C. § 706(1)**

16 Plaintiffs’ second claim seeks to compel “agency action unlawfully withheld” under 5
17 U.S.C. § 706(1). Dkt. 12 ¶ 85. It alleges that Defendants have a duty to correctly apply §
18 1254a(f)(4) when adjudicating their adjustment applications by finding that the grant of TPS
19 constitutes an inspection and admission for purposes of 8 U.S.C. § 1255; that Defendants have a
20 policy of refusing to make this finding; and that, as a result, Plaintiffs and proposed class
21 members are deprived “of a lawful adjudication of their adjustment of status applications”
22 Dkt. 12 ¶ 89; *see also id.* ¶¶ 84-92.

23 Defendants’ duty is a mandatory one, as all federal officials are required to follow the
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1 law. *See, e.g., Meyers and Meyers, Inc. v. U.S. Postal Service*, 527 F.2d 1252, 1261 (2d Cir.
2 1975) (noting that, with respect to a claim that a federal official violated governing regulations,
3 “[i]t is, of course, a tautology that a federal official cannot have discretion to behave
4 unconstitutionally or outside the scope of his delegated authority”); *Richards*, 642 F. Supp. 2d at
5 134 (“There is no dispute that defendants owe a ‘clear nondiscretionary duty’ to plaintiff to
6 adjudicate her [visa] petition and [adjustment of status] application in accordance with law.”).

8 Plaintiffs seek an order compelling Defendants to find that, pursuant to Congress’
9 instruction that TPS holders be considered in nonimmigrant status for purposes of adjustment of
10 status under § 1255, Plaintiffs were inspected and admitted for purposes of § 1255 when they
11 were granted TPS. Accordingly, Defendants must reopen and readjudicate the applications of
12 Plaintiffs and proposed class members that were denied pursuant to Defendants’ unlawful policy.
13 Dkt. 12 at 24, ¶¶ e, f, g; *see also Richards*, 642 F. Supp. 2d at 133-34.

15 Defendants would place Plaintiffs in a catch-22—first asserting that a suit is precluded
16 before an adjustment application is decided because it is not yet ripe and then arguing that,
17 subsequent to a denial of adjustment, the case is moot. Dkt. 22 at 2-3. These arguments are
18 inconsistent and would make it impossible for any individual to ever sue over the denial of a
19 government benefit. More importantly, they are wrong. The claims of Plaintiffs and proposed
20 class members whose applications have been denied are not moot. Each filed this suit
21 specifically to remedy the unlawful denial and thus ask the Court to order Defendants to reopen
22 and readjudicate their cases, applying the proper interpretation of § 1254a(f)(4). *Accord*
23 *Richards*, 642 F. Supp. 2d at 133-34. Additionally, the claims of the plaintiffs and proposed
24 class members whose applications have not yet been decided are ripe for review. *Sharkey*, 541
25 F.3d at 89-90.
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1 **3. Count Three—Mandamus Act, 28 U.S.C. § 1361**¹²

2 Plaintiffs’ third claim is for mandamus relief, seeking “to compel a federal official or
3 agency to perform a duty.” Dkt. 12 ¶ 94. Specifically, Plaintiffs allege that, through their policy,
4 Defendants violate their “duty to find that a current TPS holder has been ‘inspected and
5 admitted’ when adjudicating an adjustment of status application.” *Id.* ¶ 96. Plaintiffs allege that
6 they have a clear right to have the law correctly applied in their cases, that Defendants have a
7 nondiscretionary duty to act, and that there is no other adequate remedy at law. *Id.* ¶¶ 93-101.
8 Addressing a similar issue in the class action *City of New York v. Heckler*, the Second Circuit
9 affirmed that the district court had mandamus jurisdiction to order the Social Security
10 Administration (SSA) to reopen cases that were denied under an agency policy which misapplied
11 the statute and regulations and to order SSA to reinstate benefits to claimants until their
12 eligibility could be determined properly. 742 F.2d 729, 740 (2d Cir. 1984), *aff’d on other*
13 *grounds*, 476 U.S. 467 (1986); *see also Richards*, 642 F. Supp. 2d at 133-34.

14 As with Count Two, Defendants’ duty is a mandatory one. Additionally, as discussed
15 *supra*, there is no other adequate remedy available at law. *See supra* at 16.¹³

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22 ¹² Plaintiffs inadvertently labeled this third claim “Count Two” rather than “Count Three.”
23 Notwithstanding this typographic error, this third claim is distinct from the second claim.

24 ¹³ The Supreme Court has recognized that a mandamus action can “in essence, [be] one to
25 ‘compel agency action unlawfully withheld,’ or alternatively, to ‘hold unlawful and set aside
26 agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in
27 accordance with law.’” *Japan Whaling Ass’n*, 478 U.S. at 230 n.4 (quoting 5 U.S.C. § 706(1),
28 (2)(A)); *see also Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). Thus, while
the Second Circuit has affirmed the dismissal of a mandamus claim which “duplicate[s]” a
surviving APA claim, *see Sharkey*, 541 F.3d at 93, courts may recognize a mandamus claim in
the alternative to an APA claim. *See, e.g., Villa v. U.S. Dep’t of Homeland Security*, 607 F. Supp.
2d 359, 366 (N.D.N.Y. 2009) (“Alternatively, the Court finds that if subject matter jurisdiction is
not available under the APA, the Court would have mandamus jurisdiction.”).

1 **C. The Plain Language of 8 U.S.C. § 1254a(f)(4) Requires that TPS Holders Be**
 2 **Considered as Having Been Inspected and Admitted as Nonimmigrants for**
 3 **Purposes of Adjustment of Status under 8 U.S.C. § 1255**

4 Through 8 U.S.C. § 1254a(f)(4), Congress expressly authorized persons with TPS to
 5 adjust to LPR status, if they are otherwise independently eligible for an immigrant visa, i.e., have
 6 an immediate relative who is a U.S. citizen or an employer qualified to petition for them. 8
 7 U.S.C. § 1254a(f)(4). *See Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102,
 8 108 (1980) (“[T]he starting point for interpreting a statute is the language of the statute itself.”).

9 Subsection 1254a(f)(4) specifies that TPS recipients “shall be considered as being in, and
 10 maintaining, lawful status as a nonimmigrant” for purposes of adjustment under § 1255. All but
 11 one of the courts to have interpreted § 1254a(f)(4) found its language to unambiguously require
 12 that TPS holders be considered as being inspected and admitted as nonimmigrants for purposes
 13 of adjustment of status. *Ramirez*, 852 F.3d at 958; *Flores*, 718 F.3d at 551-52; *Bonilla*, 149 F.
 14 Supp. 3d at 1138-39; *Medina*, 65 F. Supp. 3d at 428-29, 436. *But see Serrano*, 655 F.3d at 1265.

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 17 **1. Inspection and admission is a prerequisite for being “in”**
 18 **nonimmigrant status**

19 Significantly, § 1254a(f)(4) mandates—by use of the word “shall”—that the TPS
 20 recipient be considered as both “being in” and “maintaining” nonimmigrant status. Each of these
 21 phrases must be given meaning, in accord with the “cardinal principle of statutory construction”
 22 that “no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v.*
 23 *Andrews*, 534 U.S. 19, 31 (2001) (quotation omitted); *see also State St. Bank & Trust Co. v.*
 24 *Salovaara*, 326 F.3d 130, 139 (2d Cir. 2003) (“It is well-settled that courts should avoid statutory
 25 interpretations that render provisions superfluous . . .”).
 26

27 Because an individual must be inspected and admitted in order to “be[] in” nonimmigrant
 28 status, 8 U.S.C. § 1254a(f)(4); *see also supra* Section II.C, Defendants’ interpretation fails to

1 give independent meaning to the phrase “being in.” Both the statute and the implementing
2 regulations require that only an individual who has been “admitted” can hold nonimmigrant
3 status. In a section entitled “Admission of Nonimmigrants,” the statute directs that “[t]he
4 admission of any [noncitizen] as a nonimmigrant shall be for such time and under such
5 conditions as the Attorney General may by regulation prescribe.” 8 U.S.C. § 1184(a)(1). The
6 implementing regulations address the timing of and conditions placed on the admission of a
7 nonimmigrant. 8 C.F.R. §§ 214.1, 214.2. Specifically, these regulations mandate that a
8 “nonimmigrant[’s] . . . admission to the United States is conditioned on compliance with any
9 inspection requirement” 8 C.F.R. § 214.1(a)(3)(i) (emphases added). Consequently, “being
10 in” nonimmigrant status requires as a precondition that the individual have been inspected and
11 admitted. *Ramirez*, 852 F.3d at 960 (“In other words, by the very nature of obtaining lawful
12 nonimmigrant status, the [noncitizen] goes through inspection and is deemed ‘admitted.’”);
13 *Flores*, 718 F.3d at 554 (finding that a TPS holder satisfies the inspection and admission
14 requirement for adjustment “because he is considered [as] being in lawful nonimmigrant status”);
15 *Medina*, 65 F. Supp. 3d at 430 (“Under the immigration laws, the process obtaining of
16 ‘nonimmigrant’ status requires the ‘admission’ of the [noncitizen].”); *Bonilla*, 149 F. Supp. 3d at
17 1140 (same).

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21 As discussed above, an adjustment applicant who is in “unlawful immigration status”
22 generally is barred from adjusting to LPR status. 8 U.S.C. § 1255(c)(2). Significantly, the
23 regulations define “lawful immigration status” for purposes of this provision as specifically
24 including noncitizens “admitted to the United States in nonimmigrant status.” 8 C.F.R. §
25 245.1(d)(1)(ii) (emphases added). This definition confirms that an individual must first be
26 “admitted” in order to “be[] in” nonimmigrant status.
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1 An interpretation of § 1254a(f)(4) as applying only to those previously admitted in a
2 nonimmigrant status would render the phrase “being in” superfluous. Because these individuals
3 were “in” nonimmigrant status when admitted regardless of their subsequent TPS applications,
4 Congress’ specification that TPS holders are to be considered to be “maintaining” nonimmigrant
5 status would be sufficient. *See State St. Bank & Trust Co.*, 326 F.3d at 139 (cautioning against
6 statutory interpretations that would render provisions superfluous). Similarly, Defendants’
7 interpretation does not account for Congress’ reference to the “change of status” provision, 8
9 U.S.C. § 1258, in § 1254a(f)(4). Section 1258, which pertains to a change from one
10 nonimmigrant classification to another, specifically applies to individuals seeking to change their
11 nonimmigrant status after being “lawfully admitted to the United States as a nonimmigrant.” If
12 “being in” nonimmigrant status did not encompass an admission, § 1254a(f)(4) would not
13 meaningfully provide TPS holders with the ability to change status under § 1258. That is, a TPS
14 holder could not change from one lawful status to another if he or she were not considered as
15 having been “admitted.” And, as discussed *supra*, if the provision applied only to those already
16 in nonimmigrant status at the time of their grant of TPS, the term “being in” would be rendered
17 superfluous. In short, for purposes of both adjustment of status and change of status, “being in”
18 lawful nonimmigrant status necessitates that the individual was “admitted” in that status.
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21 Moreover, as the Ninth Circuit recognized, “in practice, too, the application and approval
22 process for securing TPS shares many of the main attributes of the usual ‘admission’ process for
23 nonimmigrants.” *Ramirez*, 852 F.3d at 960. Both statuses involve an in-depth application and
24 review process—entailing extensive identity, criminal background, and admissibility screening.
25 *See supra* Section II.A. “That the TPS application is subject to a rigorous process comparable to
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1 any other admission process further confirms that a[noncitizen] approved for TPS has been
2 ‘admitted.’” *Ramirez*, 852 F.3d at 960.

3 Notably, the only court that concluded that a grant of TPS does not satisfy the
4 requirement of inspection and admission for purposes of adjustment did so in a brief per curiam
5 decision without carefully analyzing the language of § 1254a(f)(4). *Serrano*, 655 F.3d at 1264-
6 66. The plaintiff in that case erroneously argued that he did “not have to meet § 1255(a)’s
7 eligibility requirement” because of his grant of TPS, *id.* at 1263, and “that § 1254a(f)(4) alters
8 the ‘inspected and admitted or paroled’ limitation on eligibility for adjustment of status. . . .” *Id.*
9 at 1265. As a result, the court focused its attention on the “plain language of § 1255(a),” the
10 adjustment statute, concluding that § 1254a(f)(4) “does not change § 1255(a)’s threshold
11 requirement that [an applicant] is eligible for adjustment of status only if he was initially
12 inspected and admitted or paroled.” *Id.* (emphasis added). Because it failed altogether to
13 consider what Congress meant by the key terms in § 1254a(f)(4), it did not address whether this
14 provision required a finding that a TPS holder be deemed to have been inspected and admitted
15 for purposes of adjustment under § 1255.
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19 **2. Section 1254a(f)(4) mandates only that the TPS holder be**
20 **“considered” to be in nonimmigrant status, not to hold nonimmigrant**
21 **status in fact**

22 Congress’ use of the term “considered” is also significant. Subsection 1254a(f)(4) does
23 not say that a TPS recipient “is” in, and maintaining, nonimmigrant status—only that he or she
24 “shall *be considered* as being in, and maintaining,” nonimmigrant status. 8 U.S.C. § 1254a(f)(4)
25 (emphasis added). Congress did not create a new nonimmigrant classification for TPS
26 recipients. *Cf.* 8 U.S.C. § 1101(a)(15) (listing all nonimmigrant classifications and not including
27 TPS as a nonimmigrant classification). Instead, by using the term “considered,” Congress
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1 created a legal fiction: that a TPS holder is to be treated as if he or she is a nonimmigrant even
2 though a grant of TPS does not satisfy all the requirements for any one of the nonimmigrant
3 classifications. *See* 8 U.S.C. § 1101(a)(15); 8 C.F.R. § 214.1 *et seq.*¹⁴ Admission is just one of
4 these many requirements—one that is a prerequisite for *all* the nonimmigrant classifications. *See*
5 *supra* Section II.C.
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7 The use of the term “consider” as a means to indicate that something should be deemed to
8 be other than what it is, is not unique to this provision of the INA. For example, 8 U.S.C. §
9 1152(b)(3) identifies circumstances in which a noncitizen born in the United States “shall *be*
10 *considered* as having been born in a country of which he is a citizen or subject.” (Emphasis
11 added). Clearly, an individual cannot be born in two different countries; by using the phrase “be
12 considered,” Congress made known its intent to create a legal fiction—to treat the person’s
13 birthplace legally as something other than what it was. Similarly, 8 U.S.C. § 1101(g) states that
14 a noncitizen under a final order of deportation or removal who has left the United States “shall
15 be considered to have been deported or removed in furtherance of law” regardless of the location
16 to which he departed or the sources of funding which paid for this departure. Again, Congress
17 made clear through use of this term, that such a departure would be deemed a deportation or
18 removal regardless of the actual circumstances. *See also* 8 U.S.C. §§ 1151(b)(2)(A)(i)
19 (specifying circumstances in which the spouse of a deceased U.S. citizen will “be considered” to
20 remain an immediate relative), 1182(a)(5)(B) (setting forth when noncitizens physicians shall
21 “be considered” to have passed certain medical examinations), 1182(p) (specifying when wages
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28 ¹⁴ A noncitizen can hold both TPS and a nonimmigrant status simultaneously. 8 U.S.C. §
1254a(a)(5). TPS holders who independently have a nonimmigrant status would not need to rely
on § 1254a(f)(4) to demonstrate that they are in and maintaining nonimmigrant status.

1 for noncitizen professional athletes “shall be considered” as not affecting the wages of U.S.
2 citizens).

3 Still another example is found in a former provision of the Immigration and Nationality
4 Act (INA) which stated that “[f]or the purposes of this section, an order of deportation heretofore
5 or hereafter entered against a[noncitizen] in legal detention or confinement . . . *shall be*
6 *considered as being* made as of the moment he is released from such detention or confinement,
7 and not prior thereto.” 8 U.S.C. § 1252(c) (1992) (emphasis added). In *Arifa-Mensan v. United*
8 *States*, this Court denied the plaintiff’s request for an order directing immigration officials to
9 immediately deport him pursuant to an order of deportation issued on an earlier date, holding that
10 the order of deportation would only be effective on the date that his term of imprisonment ended.
11 No. CV-92-5426, 1992 U.S. Dist. LEXIS 18676 at *2 (E.D.N.Y. Nov. 20, 1992) (unpublished).

14 Here, Congress created a legal fiction when it mandated that, for purposes of adjustment
15 of status, a TPS recipient shall be “considered as being in, and maintaining, lawful status as a
16 nonimmigrant.” A TPS holder is not, in fact, in nonimmigrant status. Consequently, to benefit
17 from § 1254a(f)(4), TPS holders do not need to demonstrate that they are eligible for
18 nonimmigrant status—which would require satisfying all prerequisites for one of the
19 nonimmigrant classifications created in 8 U.S.C. § 1101(a)(15). For the same reason, TPS
20 holders need not demonstrate that they were inspected and admitted *as* a nonimmigrant. Rather,
21 the statute clarifies that the inspection and determination of admissibility in the TPS process
22 requires that a TPS holder must be “considered” as having been admitted in nonimmigrant status
23 as required by § 1254a(f)(4), because an inspection and admission is a prerequisite for being in
24 nonimmigrant status.
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1 **D. Congressional Intent Supports the Plain Meaning of 8 U.S.C. § 1254a(f)(4)**

2 Defendants’ policy also violates the congressional intent behind § 1254a, an ameliorative
3 statute aimed at relieving eligible persons from designated countries of the burden of returning to
4 the natural disaster or catastrophe that triggered the TPS designation. *See Gozlon-Peretz v.*
5 *United States*, 498 U.S. 395, 407 (1991) (“In determining the meaning of the statute, we look not
6 only to the particular statutory language, but to the design of the statute as a whole and to its
7 object and policy.”) (quotation omitted); *Rosenberg v. Fleuti*, 374 U.S. 449, 461–62 (1963)
8 (“Such a holding would be inconsistent with the general purpose of Congress in enacting §
9 101(a)(13) to ameliorate the severe effects of the strict ‘entry’ doctrine.”); *Duarte-Ceri v.*
10 *Holder*, 630 F.3d 83, 89 (2d Cir. 2010) (“In the immigration context, there is a long-standing
11 presumption to construe ‘any lingering ambiguities’ in favor of the petitioner.”) (quoting *INS v.*
12 *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

13 Congress’ phrasing in § 1254a(f)(4)—that a TPS holder “shall be considered as being in,
14 and maintaining, lawful status as a nonimmigrant” for purposes of adjustment of status—
15 corresponds directly with the adjustment provision at § 1255, entitled “Adjustment of status of
16 nonimmigrant to that of person admitted for permanent residence.” Given the express language
17 in § 1254a(f)(4) that “for purposes of adjustment” under § 1255, TPS recipients “shall be
18 considered as being in, and maintaining, lawful status as a nonimmigrant,” it is clear that
19 Congress intended them to be eligible to apply for “[a]djustment of status of nonimmigrant to
20 that of a person admitted for lawful permanent resident,” as § 1255 is titled. As the Ninth Circuit
21 explained:

22 [Section 1255’s] heading is not without significance, as it uses language that
23 directly links the adjustment statute to the TPS statute and § 1254a(f)(4)’s
24 phrasing of “lawful status as a nonimmigrant.” This language and structure signal
25 that Congress contemplated that TPS recipients, via their treatment as lawful

1 nonimmigrants, would be able to make use of § 1255.

2 *Ramirez*, 852 F.3d at 961 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998));
3 *see also Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 809 (1989) (“[T]he words of a statute
4 must be read in their context and with a view to their place in the overall statutory scheme.”);
5 *United States v. Aguilar*, 585 F.3d 652, 657 (2d Cir. 2009) (reviewing the statutory text as well
6 as the “placement and purpose” of the text “in the statutory scheme”) (quotation omitted).
7

8 Moreover, this interpretation is consistent with the intent and purpose of the TPS statute.
9 Defendants’ policy fails to give effect to the comprehensive statutory scheme whereby Congress
10 provided mechanisms to ensure persons found eligible for TPS were not forced to return to their
11 home countries. The TPS designation is based on the existence of a humanitarian crisis in the
12 person’s country of origin. *See* 8 U.S.C. § 1254a(b). Under Defendants’ policy, Plaintiffs and
13 proposed class members would have to depart the United States, obtain a visa abroad, and then
14 return to the United States in order to be inspected and admitted, a bizarre proposition given that
15 the TPS statute is intended to protect noncitizens—even those *without* the basis for becoming
16 lawful permanent residents—from being required to return to countries suffering the effects of
17 severe strife or natural disasters. *See Ramirez*, 852 F.3d at 964 (“Such processing usually takes
18 place in the [noncitizen]’s home country—in this case, the country that the Attorney General has
19 deemed unsafe”). It would be inconsistent with the statute’s purpose to assume that
20 Congress would protect applicants for TPS—the majority without any lawful status—from
21 having to return to their countries of origin, only to require them to leave the United States after
22 they had been inspected, found admissible and granted temporary lawful status, sometimes for
23 years, during which time they had become eligible for LPR status based on their relationships to
24 U.S. citizen family members or employers.
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1 Similarly, Defendants’ interpretation is illogical in that it would require those individuals
2 with strong ties to the United States to depart and thus face separation from their families, homes
3 and employers. *See Flores*, 718 F.3d at 555-56 (“Under the Government’s interpretation, [the
4 plaintiff] would have to leave the United States, be readmitted, and then go through the
5 immigration process all over again. This is simply a waste of energy, time, government
6 resources, and will have negative effects on his family—United States citizens.”).

8 Consistent with Congress’ intent to ensure that individuals are not forced to return to
9 their country of origin where a natural disaster, war or other crisis event initiated the TPS
10 designation, Congress created a path for those who now qualify for an immigrant visa to apply
11 for such status from within the United States, rather than forcing them to leave the country to
12 apply through consular processing abroad. The plain language of the statutes, as interpreted by
13 both the Sixth and the Ninth Circuits, fits with the humanitarian purposes of TPS. The statutory
14 language of § 1254a(f)(4) demonstrates Congress’ concern for providing relief; rather than
15 forcing people to return to the catastrophic conditions in their countries of origin, Congress
16 provided a path to apply for LPR status from within the United States.

19 **E. Defendants’ Policy Creates Absurd Results**

20 Courts must avoid statutory interpretations that produce absurd results or ones that are
21 unreasonable because they are “plainly at variance with the policy of the legislation as a whole.”
22 *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543 (1940) (quoting *Ozawa v. United*
23 *States*, 260 U.S. 178, 194 (1922)); *see also Chronoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir.
24 2003) (rejecting “the government’s invitation to ignore the plain meaning” of a statutory term
25 because it failed to demonstrate that the plain meaning was absurd, futile or unreasonable)
26 (citing *Am. Trucking Ass’ns*, 310 U.S. at 543). Here, Plaintiffs’ interpretation accords with the
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1 plain meaning of the statute and produces neither an absurd nor unreasonable result. In contrast,
2 Defendants’ interpretation as manifested in its policy not only ignores certain words in the
3 statute but produces an absurd result at odds with the purpose of § 1254a(f)(4).
4

5 Congress afforded TPS holders the right to travel outside of the United States, restricted
6 only by the requirement that they obtain prior consent from DHS. 8 U.S.C. § 1254a(f)(3). A
7 TPS holder who wishes to travel abroad may obtain advance consent from USCIS by filing an
8 application for “advance parole.” 8 C.F.R. § 244.15(a); *see also* USCIS, Form I-131,
9 Application for Travel Document (Apr. 11, 2018), <https://www.uscis.gov/i-131>. When granted
10 advance parole, the TPS holder may travel outside of the United States and upon return, is
11 inspected and paroled into the United States.¹⁵ Defendants acknowledge this entry into the
12 United States satisfies the requirement in § 1255(a) that an individual seeking to adjust status has
13 been inspected and either admitted *or* paroled.
14

15 Consequently, a TPS holder who initially entered without inspection—and thus, under
16 Defendants’ policy, is ineligible to adjust under § 1255(a)—can cure this ineligibility by
17 traveling abroad for any reason. In fact, USCIS’ policy specifically recognizes this. It states
18 that:
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20 [i]f a foreign national under TPS departs the United States and is admitted or
21 paroled upon return to a port of entry, the foreign national meets the inspected and
22 admitted or inspected and paroled requirement provided the inspection and parole
23 occurred before he or she filed an adjustment application. . . . For purposes of
24 adjustment eligibility, it does not matter whether the TPS beneficiary was admitted
25 or paroled. In either situation, once the foreign national is inspected at a port of
26 entry and permitted to enter to the United States, the foreign national meets the
27 inspected and admitted or inspected and paroled requirement.

28 ¹⁵ “Parole” is a means by which an immigration officer may permit the temporary entry of a
noncitizen into the United States without granting the individual admission. *See* 8 U.S.C. §
1182(d)(5).

1 USCIS Policy Manual, Vol. 7, Part B, Ch. 2(A)(5). It is absurd to conclude that Congress would
2 have intended, on the one hand, to withhold the benefit of § 1254a(f)(4) to TPS holders who
3 entered without inspection, but on the other hand, allow those same TPS holders to benefit from
4 § 1254a(f)(4) simply by traveling abroad after they have been granted TPS. Defendants’
5 restrictive interpretation produces an absurd result.
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7 **IV. CONCLUSION**

8 For the foregoing reasons, the Court should grant this motion and enter the attached
9 proposed order enjoining USCIS’ unlawful policy in future adjudications and remedying past
10 adjudications denied based on the policy.
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12
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14 Respectfully submitted,

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