

IN THE
Supreme Court of the United States

JOSE SANTOS SANCHEZ, ET AL.,
Petitioners,

v.

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

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

**BRIEF OF THE SERVICE EMPLOYEES
INTERNATIONAL UNION AND OTHER
LABOR UNIONS AS *AMICI CURIAE*
IN SUPPORT OF THE PETITIONERS**

NICOLE G. BERNER
MONICA T. GUIZAR
CLAUDIA P. LAINEZ
SERVICE EMPLOYEES
INTERNATIONAL UNION
1800 Massachusetts Ave. NW
Washington, DC 20036

ERICA C. LAI
Counsel of Record
MELISSA H. MAXMAN
RONALD F. WICK
ANDREW J. PECORARO
COHEN & GRESSER LLP
2001 Pennsylvania Ave. NW
Suite 300
Washington, DC 20006
(202) 851-2070
elai@cohengresser.com

TABLE OF CONTENTS

	Page
INTERESTS OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. TPS holders are a vital part of the American labor force.	4
II. The ability of TPS workers to contribute fully to the U.S. economy is limited by the uncertainty associated with TPS. ...	11
A. TPS workers are disproportionately subjected to exploitation.	11
B. The tenuous nature of TPS often causes unnecessary job loss for TPS workers and workplace disruptions for businesses that employ TPS workers.	13
III. Petitioners’ interpretation of the INA alleviates uncertainty surrounding TPS workers by allowing sponsorship for lawful permanent residence.....	17
A. Permitting TPS workers to become permanent residents is consistent with the INA’s sponsorship provisions for other lawful nonimmigrants.	17
B. Permitting TPS workers to be sponsored for permanent residence would alleviate the adverse impacts of the uncertainty of TPS, resulting in substantial benefits to the U.S. economy.	20
CONCLUSION.....	23

TABLE OF AUTHORITIES

	Page
Cases	
<i>Flores v. U.S. Citizenship & Immigration Servs.</i> , 718 F.3d 548 (6th Cir. 2013).....	3
<i>Ramirez v. Brown</i> , 852 F.3d 954 (9th Cir. 2017).....	3
<i>Rivera v. NIBCO, Inc.</i> , 364 F.3d 1057 (9th Cir. 2004).....	13
<i>Scialabba v. Cuellar de Osorio</i> , 573 U.S. 41 (2014).....	20
<i>Velasquez v. Barr</i> , 979 F.3d 572 (8th Cir. 2020).....	3
Statutes	
8 U.S.C.	
§ 1151(a)	17
§ 1153.....	20
§ 1153(b)	18
§ 1153(b)(2)	18
§ 1153(b)(3)	18
§ 1154(a)(1)(F)	18
§ 1182(a)(5)(A)(i)	18
§ 1254a.....	2
§ 1254a(b)(2).....	14
§ 1254a(f)(4).....	17, 20, 23
§ 1255.....	17, 20, 23
§ 1255(a)	2, 3

TABLE OF AUTHORITIES—Continued

	Page
Regulations	
8 C.F.R.	
§ 204.5.....	18
§ 204.5(g)	18
§ 204.5(l)	18
§ 204.5(l)(4).....	18
§ 204.5(n)	18
§ 244.17.....	14
§ 245.2.....	18
20 C.F.R. § 656.1(a).....	18
Other Authorities	
Amicus Curiae Brief of the States of California, District of Columbia, Massachusetts, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington In Support of Plaintiffs and Appellees, <i>Ramos v. Wolf</i> , 975 F.3d 872 (9th Cir. 2020) (No. 18-16981), 2019 WL 571433.....	22
Brief of Amici Curiae 6 Counties and 31 Cities in Support of Plaintiffs-Appellees and for Affirmance, <i>Ramos v. Wolf</i> , 975 F.3d 872 (9th Cir. 2020) (No. 18-16981), 2019 WL 571430.....	22
Extension of the Designation of El Salvador for Temporary Protected Status, 80 Fed. Reg. 893 (Jan. 7, 2015).....	14

TABLE OF AUTHORITIES—Continued

	Page
Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 85 Fed. Reg. 79,208 (Dec. 9, 2020)	14
Alex Nowrasteh, <i>E-Verify Errors Plague Workers With Temporary Protected Status</i> , CATO Inst. (Apr. 30, 2020).....	15
Am. Immigration Council, <i>Workers with Temporary Protected Status in Key Industries and States</i> (Jan. 9, 2019)	8
Bureau of Labor Statistics, <i>Volunteering in the United States, 2015</i> (Feb. 25, 2016)	7
Cecilia Menjivar, <i>Temporary Protected Status in the United States: The Experiences of Honduran and Salvadoran Immigrants</i> , Ctr. for Migration Research (May 2017).....	<i>passim</i>
Envoy Global, <i>Immigration Trends Report 2020</i> (2020)	18, 19
Farida Jhabvala Romero, <i>Employers, Immigrants Grapple With Uncertainty Over TPS Work Permits</i> , KQED (Feb. 8, 2018).....	14
Francisco L. Rivera-Batiz, <i>Undocumented Workers in the Labor Market: An Analysis of the Earning of Legal and Illegal Mexican Immigrants in the United States</i> , 12 J. Population Econ. 91 (1999).....	21

TABLE OF AUTHORITIES—Continued

	Page
Heather Boushey & Sarah Jane Glynn, <i>There Are Significant Business Costs to Replacing Employees</i> , Ctr. for Am. Progress (Nov. 16, 2012)	21
Jill H. Wilson, Cong. Research Serv., RS20844, <i>Temporary Protected Status: Overview and Current Issues</i> (2020)	6
Jennifer M. Chacón, <i>Producing Liminal Legality</i> , 92 Denv. U.L. Rev. 709 (2015)	11
Kati L. Griffith, Shannon Gleeson, & Vivian Vázquez, <i>Immigrants in Shifting Times on Long Island, NY: The Stakes of Losing Temporary Status</i> , 97 Denv. L. Rev. 743 (2020).....	19
Kati L. Griffith & Shannon M. Gleeson, <i>The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims</i> , 39 Comp. Lab. L. & Pol’y J. 111 (2017).....	12, 13
Leisy J. Abrego & Sarah M. Lakhani, <i>Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses</i> , 37 L. & Pol’y 265 (2015).....	11
Letter from Neil L. Bradley, Senior Vice President & Chief Policy Officer, U.S. Chamber of Commerce, to Elaine Duke (Oct. 26, 2017)	8
Marc Rosenblum & Lang Hoyt, <i>The Basics of E-Verify, the U.S. Employer Verification System</i> , Migration Pol’y Inst. (July 13, 2011).....	15

TABLE OF AUTHORITIES—Continued

	Page
Maria E. Echautegui & Linda Giannarelli, <i>The Economic Impact of Naturalization on Immigrants and Cities</i> , Urban Inst. (Dec. 2015).....	22
Marisa Lifschutz, <i>Top Five Sectors Exposed to Labor Shortages in 2018</i> , Industry Insider (July 12, 2018).....	8
MyVisaJobs.Com, <i>2020 Green Card Report: Top Beneficiary Visa Status</i>	19
MyVisaJobs.Com, <i>United States Working Visa & Green Card Reports</i>	19
Nicole Prchal Svajlenka & Tom Jawetz, <i>A Demographic Profile of TPS Holders Providing Essential Services During the Coronavirus Crisis</i> , Ctr. for Am. Progress (Apr. 14, 2020).....	9
Nicole Prchal Svajlenka, Angie Bautista-Chavez, and Laura Muñoz Lopez, <i>TPS Holders Are Integral Members of the U.S. Economy and Society</i> , Ctr. for Am. Progress (Oct. 20, 2017).....	8
Robert Warren & Donald Kerwin, <i>A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti</i> , 5 J. Migration & Human Sec. 577 (2017)	6, 7, 8
Shannon Gleeson & Kati L. Griffith, <i>Employers as Subjects of the Immigration State: How the State Foments Employment Insecurity for Temporary Immigrant Workers</i> , L. & Soc. Inquiry 1 (2020)	12

TABLE OF AUTHORITIES—Continued

	Page
U.S. Chamber of Comm., Commercial Construction Index (Fourth Quarter 2020) ..	9
U.S. Dep’t of Homeland Sec., <i>Annual Flow Report, U.S. Lawful Permanent Residents: 2019</i> (2020)	17
U.S. Dep’t of Homeland Sec., Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response (2020)	9
U.S. Dep’t of Justice, Justice Department Warns Employers Not to Discriminate Against Salvadoran Workers With Temporary Protected Status in Newly- Released Video (Aug. 25, 2016)	12
U.S. Dep’t of Labor, Characteristics and Labor Market Behavior of the Legalized Population Five Years Following Legalization (1996)	22
Zoe Henry, <i>Small Businesses Brace for Losses as Trump Ends TPS for Immigrants</i> , Inc. (Jan. 10, 2018)	16

INTERESTS OF *AMICI CURIAE*¹

The Service Employees International Union (“SEIU”) is a labor union of approximately two million diverse members who work in healthcare, the public sector, and property services throughout the United States, Canada, and Puerto Rico. SEIU’s members include foreign-born U.S. citizens, lawful permanent residents, immigrants, and foreign nationals authorized to work in the United States, including recipients of Temporary Protected Status (“TPS”) from various designated countries. SEIU members are united by their belief in the dignity and worth of all workers and the services they provide.

SEIU’s commitment to immigrant justice is deep-rooted and long-standing. SEIU’s mission statement, embedded in its Constitution, states: “We believe our strength comes from our unity, and that we must not be divided by forces of discrimination based on gender, race, ethnicity, religion, age, physical ability, sexual orientation, or immigration status.” Consistent with this mission statement, SEIU members work to create a more just and humane society with opportunity for all, regardless of immigration status.

This brief is also submitted on behalf of seven additional labor unions listed in the attached Appendix that work to protect workers, including those with TPS. As labor organizations, *amici* are fully committed to supporting the rights of all workers and to ensuring that their contributions are properly recognized. Advocating for the rights of Petitioners in this

¹ No counsel for a party or person other than *amici* and their counsel authored any part of this brief, or contributed money intended to fund its preparation or submission. All parties have consented to the filing of this brief.

case is part and parcel of *amici*'s mission to secure workplace equality.

SUMMARY OF ARGUMENT

The U.S. economy depends on workers with TPS to fill critical positions in essential industries, including healthcare. But the Third Circuit's interpretation of the statutes governing the interplay between TPS and eligibility for adjustment of status, 8 U.S.C. §§ 1254a and 1255(a), threatens these workers' valuable contributions by categorically barring TPS holders who entered the United States without inspection from obtaining lawful permanent residence. Without an avenue to seek a permanent legal status, TPS workers are effectively trapped in legal limbo, and the long-term availability of labor to employers in critical industries remains in question.

More than 400,000 individuals with TPS live in the United States. They make up an integral part of the American labor force, filling positions in a wide range of industries that include not only healthcare but also construction, hospitality, repair and maintenance, child care, and landscaping. More than 130,000 TPS holders have served as essential workers during the COVID-19 pandemic, risking their own and their families' health to keep this country running. And because most TPS holders have lived in the United States for decades, many employers have come to depend on them, investing significant resources in their training and development.

Because of their precarious position, however, TPS workers are often subjected to exploitative conditions, including wage and overtime violations. Without the ability to pursue lawful permanent residence, TPS workers are likely to accept and endure such conditions,

rather than risk losing their jobs or attracting unwanted government scrutiny by seeking lawful redress.

Additionally, employers face potentially significant disruptions to their businesses due to the impermanent nature of TPS. Without any guarantee that TPS employees will remain authorized to work, employers are unable to forecast their ability to fulfill orders and complete projects. And even well-meaning employers often mistakenly terminate, suspend, or decline to hire TPS workers who are authorized to work because of difficulties navigating the administrative bureaucracy associated with verifying such authorization.

In sum, the transitory nature of TPS creates an ongoing challenge both to TPS holders who participate in the work force and to the employers who hire them. The Third Circuit’s decision, which interprets 8 U.S.C. § 1255(a) as prohibiting TPS workers who entered the United States unlawfully from adjusting status, exacerbates that challenge. Conversely, Petitioners’ proffered interpretation—adopted by the Sixth, Eighth, and Ninth Circuits²—allows TPS workers who have been sponsored for lawful permanent residence to adjust status. This majority interpretation is consistent with the language and structure of the Immigration and Nationality Act (“INA”).

Petitioners’ statutory interpretation, if adopted by the Court, would encourage employers, who are increasingly using employment-based immigrant visa petitions to protect their investment in nonimmigrant workers, to sponsor their TPS workers, secure in the knowledge that these workers can seek to ad-

² See *Velasquez v. Barr*, 979 F.3d 572, 576 (8th Cir. 2020); *Ramirez v. Brown*, 852 F.3d 954 (9th Cir. 2017); *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548 (6th Cir. 2013).

just status on equal terms with other nonimmigrants. The opportunity to become permanent members of our society would also better equip TPS workers to challenge unfair and discriminatory work practices without fear of retaliation. The promise of lawful permanent residence in the United States, where TPS holders have long made their home, has also been shown to inspire immigrants to invest in their language skills and other education and training, leading to increased productivity and a stronger, more valuable workforce. Such benefits would enrich the entire U.S. economy.

For all these reasons, *amici* urge the Court to adopt the interpretation of the INA offered by Petitioners and reverse the decision of the Third Circuit.

ARGUMENT

I. TPS holders are a vital part of the American labor force.

Petitioners Jose Sanchez and Sonia Gonzalez have lived in the United States for more than twenty years and have been valuable members of the U.S. labor force since 1997 and 2003, respectively. C.A. App. 63, 134. Their experiences are similar to those of thousands of *amici*'s TPS-holding members who have worked and contributed to the U.S. economy for decades. For example:

- **O.C.** is a 40-year-old member of SEIU Local 32BJ who came to the United States from Honduras in 1998 when he was approximately 18. He lives in Maryland with his family, including his two minor U.S.-citizen children. O.C. is a janitor who works two jobs, 12 hours per day, five days per week to support his family.

- **G.M.** is a 47-year-old member of SEIU Local 32BJ who came to the United States from Haiti in 2010. He lives in Brooklyn, New York and works multiple jobs to support his family. G.M.'s principal job is as a security officer and wheelchair attendant at LaGuardia International Airport, and he has worked there for the last several years. Each weekday, he gets up at 2:30 a.m. to work at the airport and then teaches martial arts to 20 children in an after-school program. On the weekends, he teaches another class online. He says:

Workers like me with TPS and other immigrants work hard. We are still showing up to work and on the front lines of the virus. . . . Right now, people on the front lines don't see who is an immigrant. We don't see who is an American. We see each other as a unit, at war fighting the virus.

- **O.S.** is a 51-year-old member of the SEIU Southern Regional Joint Board of Workers United who came to the United States from Honduras more than 22 years ago. She is grandmother to two U.S.-citizen children and considers the United States her home. O.S. lives in Durham, North Carolina, and works two jobs to support herself and her family. During the day, O.S. works at a laundry facility, and, in the evening, she works at an office building where she ensures offices are disinfected and safe for other working families.
- **M.E.H.** is a member of SEIU Local 32BJ who came to the United States from Nicaragua in 1998. She lives in Florida with her family and has been contributing to the U.S. economy and her local community for more than 20 years. For

the past 10 years, she has worked as a janitor at Nova Southeastern University in Broward County. She says that “as a janitor . . . the students and faculty rely on me to keep the buildings safe and sanitized—especially important during the COVID-19 pandemic.”

- **V.L.** is a member of SEIU United Services Workers West who came to the United States from El Salvador more than 20 years ago. V.L. lives in Sylmar, California with her two United States-citizen children. She is a janitor and advocate who co-founded the Ya Basta! Coalition, an effort to advance the workplace safety and dignity of women and other workers vulnerable to sexual violence and harassment in the janitorial industry. She has dedicated herself to raising awareness and training janitors and supervisors to identify and stop harassment, assault, and rape.

Each of these individuals is a TPS recipient. They, and thousands of TPS holders like them, are dedicated employees and active members of their communities whose future in this country remains uncertain if they are prohibited from obtaining lawful permanent residence on the same terms as other nonimmigrant workers.

For nearly 411,000 men and women from El Salvador, Honduras, Haiti, Nepal, Syria, Nicaragua, Yemen, Sudan, Somalia, and South Sudan, TPS provides the ability to build productive lives in the United States.³ Most have lived here for more than a decade.⁴

³ Jill H. Wilson, Cong. Research Serv., RS20844, *Temporary Protected Status: Overview and Current Issues* 5 (2020).

⁴ Robert Warren & Donald Kerwin, *A Statistical and Demographic Profile of the US Temporary Protected Status Popula-*

For example, more than one-half of TPS recipients from El Salvador and Honduras, countries designated in 2001 and 1999, respectively, have lived in the United States for more than two decades.⁵ Nearly a quarter of TPS recipients from those countries were 15 years old or younger when they arrived in the United States and have known no other home as adults.⁶

Because of these deep roots, TPS holders are fully integrated into their communities. Nearly one-third of households with Salvadoran, Honduran, or Haitian TPS holders have mortgages.⁷ Further, a national survey of TPS holders from El Salvador, Honduras, and Nicaragua found that the overwhelming majority pay income taxes and have contributed to social security for more than 15 years.⁸ At the local level, about 30 percent of TPS holders are civically active in their communities, such as through volunteer work, schools, and churches, exceeding civic participation rates in the general U.S. population.⁹

tions from El Salvador, Honduras, and Haiti, 5 J. on Migration & Human Security 577, 582 tbl. 2 (2017).

⁵ *Id.* at 581.

⁶ *See id.* at 582 tbl. 2.

⁷ *Id.* at 582.

⁸ *See* Cecilia Menjívar, *Temporary Protected Status in the United States: The Experiences of Honduran and Salvadoran Immigrants*, Ctr. for Migration Research 16–17 (May 2017) (80.3 percent of TPS holders pay income taxes, with 90 percent reporting having filed income taxes every year in the three years prior to the survey).

⁹ *Compare id.* at 19–20, with Bureau of Labor Statistics, *Volunteering in the United States, 2015* (Feb. 25, 2016) (“The [general population] volunteer rate declined by 0.4 percentage point to 24.9 percent for the year ending in September 2015.”), <https://www.bls.gov/news.release/volun.nr0.htm>.

TPS holders also contribute substantially to the U.S. economy. Their overall labor force participation rate is 88.5 percent.¹⁰ Research shows that removing TPS workers could cripple the U.S. labor force, resulting in at least a \$164 billion loss in gross domestic product (“GDP”) over the next decade.¹¹ Moreover, nearly 11 percent of TPS holders report owning their own businesses, thereby creating American jobs.¹²

These workers are key contributors to the industries in which they work, developing crucial skills and gaining experience needed for their employers and industries to operate effectively. Several of the industries that employ large numbers of TPS holders have long suffered from a skilled-labor shortage.¹³ For instance, the construction industry, which employs more workers with TPS than any other industry,¹⁴ has experienced sizeable labor shortages in recent years.¹⁵

¹⁰ Menjívar, *supra* note 8, at 12.

¹¹ Nicole Prchal Svajlenka, Angie Bautista-Chavez, & Laura Muñoz Lopez, *TPS Holders Are Integral Members of the U.S. Economy and Society*, Ctr. for Am. Progress (Oct. 20, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/10/20/440400/tps-holders-are-integral-members-of-the-u-s-economy-and-society/>.

¹² Menjívar, *supra* note 8, at 13; *see also* Warren & Kerwin, *supra* note 4, at 588.

¹³ *See, e.g.*, Marisa Lifschutz, *Top Five Sectors Exposed to Labor Shortages in 2018*, Industry Insider (July 12, 2018), <https://www.ibisworld.com/industry-insider/analyst-insights/top-five-sectors-exposed-to-labor-shortages-in-2018/>.

¹⁴ Warren & Kerwin, *supra* note 4, at 583; Am. Immigration Council, *Workers with Temporary Protected Status in Key Industries and States* (Jan. 9, 2019), <https://www.americanimmigrationcouncil.org/research/workers-temporary-protected-status-key-industries-and-states>.

¹⁵ *See* Marisa Lifschutz, *supra* note 13; *see also* Letter from

The ongoing COVID-19 pandemic has only exacerbated these shortages as contractors continue to report “moderate to high levels of difficulty” finding workers with the necessary skills.¹⁶

During the pandemic, many TPS workers have served on the front lines. More than 131,000 TPS holders work in “essential” industries such as home health and food processing.¹⁷ Due to the nature of their jobs, TPS workers in these fields do not have the option to work from home, which means they risk their own safety to provide our country with essential services.¹⁸ According to U.S. Department of Homeland Security (“DHS”) guidance, “essential workers” like these are “needed to maintain the services and functions Americans depend on daily and that need to be able to operate resiliently during the COVID-19 pandemic response.”¹⁹ *Amici’s* members illustrate the contributions TPS workers have made:

Neil L. Bradley, Senior Vice President & Chief Policy Officer, U.S. Chamber of Commerce, to Elaine Duke, Acting Secretary of Homeland Security (Oct. 26, 2017) (“Ending the TPS designation for [El Salvador, Honduras, and Haiti] will exacerbate existing labor shortages in the [construction] industry at a time when such workers are essential.”).

¹⁶ U.S. Chamber of Comm., Commercial Construction Index 5 (Fourth Quarter 2020), https://www.uschamber.com/sites/default/files/2020_cci_q4_updated_final.pdf.

¹⁷ Nicole Prchal Svajlenka & Tom Jawetz, *A Demographic Profile of TPS Holders Providing Essential Services During the Coronavirus Crisis*, Ctr. for Am. Progress (Apr. 14, 2020), <https://www.americanprogress.org/issues/immigration/news/2020/04/14/483167/demographic-profile-tps-holders-providing-essential-services-coronavirus-crisis/>.

¹⁸ *Id.*

¹⁹ U.S. Dep’t of Homeland Sec., Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and

- **A.M.**, a TPS holder and member of SEIU United Healthcare Workers West, came from El Salvador more than 20 years ago. He is a nursing assistant in California and has worked extra hours at a medical center to help combat the rising number of COVID-19 cases. He puts himself and his family at risk daily in choosing to honor his commitment to being a healthcare worker.
- **B.R.**, a member of SEIU Local 32BJ, is an essential worker at Walter Reed National Military Medical Center, where she ensures hospital rooms are clean and safe for patients. She came to the United States when she was 18, and has been living, working, and contributing to the United States for more than 21 years. She explains “[w]e work hard to keep everything under control during this pandemic because our jobs can mean life or death for everyone inside.”
- **O.C.**, mentioned above, *see* p. 4 *supra*, works two jobs as a janitor disinfecting medical clinics in Maryland. He is concerned about his future in the United States:

My work is not only essential to reducing the spread of COVID-19 but I risk my health and my family’s health every single time I show up [to work]. . . . It is sad because the government considers me an essential worker, and I risk my life to keep others safe, but at the same time it wants to separate me from my family and deport me to a country far from my children and wife. All I ask is that they

give us the opportunity to continue working, help the country survive the pandemic, and see my children grow up in their country.

The United States has benefited greatly from the commitment and contributions of TPS workers such as these. Petitioners' interpretation of the relevant statutory provisions protects these contributions and, consistent with the goals of the INA, allows TPS workers to seek lawful permanent residence in the United States.

II. The ability of TPS workers to contribute fully to the U.S. economy is limited by the uncertainty associated with TPS.

Businesses and the economy as a whole benefit from having a skilled and reliable work force. The indefinite nature of TPS, however, creates uncertainty about TPS workers' long-term availability, leading to both worker exploitation and business disruption.

A. TPS workers are disproportionately subjected to exploitation.

Workers with TPS status are often subjected to workplace discrimination and exploitation.²⁰ As with other nonimmigrant workers, abusive employers use immigration status to prevent TPS workers from exercising their workplace rights. These same employ-

²⁰ Menjívar, *supra* note 8, at 16. Several scholars have observed that provisional legal statuses, like TPS, do not “offer a shield” from workplace exploitation. *See, e.g.*, Jennifer M. Chacón, *Producing Liminal Legality*, 92 *Denv. U.L. Rev.* 709, 710 (2015); Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 *L. & Pol’y* 265, 266 (2015) (discussing the social and legal vulnerabilities of various groups of lawfully present non-citizens, including TPS holders).

ers assume that such workers are not entitled to certain legal protections, such as minimum wage and overtime laws.²¹ In a recent survey of TPS workers, “about 7% of TPS holders mentioned that their boss did not pay them on time in the 12 months prior to the survey, and almost 11% indicated that their boss paid them less than what they were supposed to be paid.”²² Such exploitation led the U.S. Department of Justice to release a video in 2016 warning employers not to discriminate against Salvadoran TPS workers.²³

Despite facing such hardships, TPS workers often are reluctant to raise complaints. Because their work authorization extends for, at most, eighteen months at a time, they fear that they will not be able to find a second job if they complain or leave their current one.²⁴ Moreover, temporary nonimmigrant workers as well as TPS holders, face considerable obstacles to bringing workplace-related legal claims.²⁵ The constant need to renew their status coupled with the ever-present risk that a TPS designation will not be renewed

²¹ Menjívar, *supra* note 8, at 16.

²² *Id.*

²³ Press Release, U.S. Dep’t of Justice, Justice Department Warns Employers Not to Discriminate Against Salvadoran Workers With Temporary Protected Status in Newly-Released Video (Aug. 25, 2016), <https://www.justice.gov/opa/pr/justice-department-warns-employers-not-discriminate-against-salvadoran-workers-temporary-0>.

²⁴ See Shannon Gleeson & Kati L. Griffith, *Employers as Subjects of the Immigration State: How the State Fosters Employment Insecurity for Temporary Immigrant Workers*, L. & Soc. Inquiry 1, 23 (2020).

²⁵ See Kati L. Griffith & Shannon M. Gleeson, *The Precarity of Temporality: How Law Inhibits Immigrant Worker Claims*, 39 Comp. Lab. L. & Pol’y J. 111, 129–130 (2017).

stoke TPS workers' anxiety and fear, and "deepens a TPS worker's sense of powerlessness when faced with workplace law abuse."²⁶ Because they are subject to governmental monitoring, TPS workers are frequently unwilling to participate in adversarial agency or judicial proceedings that might subject them to employer retaliation or draw attention to their immigration status.²⁷ Thus, TPS workers typically choose to accept such exploitative conditions and avoid bringing legitimate claims against their employers.²⁸

B. The tenuous nature of TPS often causes unnecessary job loss for TPS workers and workplace disruptions for businesses that employ TPS workers.

The uncertainty surrounding the future of TPS also creates difficulties for employers who hire TPS workers. Understanding and tracking deadlines and work authorizations associated with TPS imposes costly administrative burdens, leading to business disruptions for employers and unnecessary job losses for TPS workers. Further, a given country's TPS designation can be terminated at any time, necessarily limiting the ability of businesses to rely on TPS employees in the long term.

²⁶ *Id.*

²⁷ See *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064–65 (9th Cir. 2004) (explaining that both documented and undocumented immigrant workers are "reluctant to report abusive or discriminatory employment practices" out of fear of retaliation); Griffith & Gleeson, *supra* note 25, at 129–130.

²⁸ See Griffith & Gleeson, *supra* note 25, at 129 (including an interview with a TPS worker, Karl, who continued working a job with "no respect [and] not a lot of money" because "he perceived that there were no other options.").

Under the statutory structure, each TPS designation lasts between six and eighteen months. *See* 8 U.S.C. § 1254a(b)(2). Each time a particular country is re-designated under the TPS program, TPS holders from that country must re-apply to renew their status, attesting to their continued eligibility. *See* 8 C.F.R. § 244.17.

Due to lengthy timeframes involved with processing such renewal applications, many TPS registrants do not receive updated employment authorization documents (“EADs”) before their current documentation expires. Accordingly, DHS often issues Federal Register notices automatically extending TPS holders’ work authorization before new EADs are issued. *See, e.g.*, 85 Fed. Reg. 79,208, 79, 209 (Dec. 9, 2020) (“Through this Federal Register notice, DHS automatically extends the validity of EAD’s . . . issued to beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal.”); 80 Fed. Reg. 893, 893 (Jan. 7, 2015) (“Accordingly, through this Notice, DHS automatically extends the validity of EADs issued under the TPS designation of El Salvador for 6 months, through September 9, 2015.”).

Many employers do not understand the complexities of this process, and either will not accept or are unaware that a TPS holder with an expired EAD remains eligible to work. A vice president of a company that employs 3,500 TPS and other workers explains that navigating TPS “is a constant learning experience on understanding and keeping track of deadlines There are a lot more moving parts that a company like ours has never had to deal with before.”²⁹

²⁹ Farida Jhabvala Romero, *Employers, Immigrants Grapple With Uncertainty Over TPS Work Permits*, KQED (Feb. 8, 2018), <https://www.kqed.org/news/11648086/confusion-over-tps-work->

Accordingly, rather than risk civil, or even criminal, penalties for employing an unauthorized worker, employers often elect to suspend or terminate the TPS worker. Indeed, *amici* have often had to intervene when employers unnecessarily sought to suspend or terminate TPS workers due to a misunderstanding regarding their authorization to work.

Even setting aside dealing with expired EAD cards in the face of automatic extensions of work authorization, TPS workers disproportionately face problems when employers use the E-Verify program to verify their work authorization, as the federal government encourages them to do. A study by the CATO Institute found that the E-Verify program has incorrectly returned a “tentative non-confirmation” (a “TNC”) (*i.e.*, an alert that the employee cannot be confirmed as authorized to work) for TPS workers “about 7.3 times” more often than would be expected if the errors were distributed randomly across all cases.³⁰

The effects of such errors can be devastating to both workers and employers. Work-authorized TPS employees incur significant time and money in correcting an erroneous notice, if they are even given the chance. Although employers may not legally fire employees based on a TNC, and must allow workers the opportunity to resolve erroneous alerts, a 2009 study showed that a “substantial number of employers” violated these rules.³¹ Thus, TPS workers may face the loss of

permits-worries-employers-immigrants.

³⁰ Alex Nowrasteh, *E-Verify Errors Plague Workers With Temporary Protected Status*, CATO Inst. (Apr. 30, 2020), <https://www.cato.org/blog/e-verify-errors-plague-workers-temporary-protected-status>.

³¹ Marc Rosenblum & Lang Hoyt, *The Basics of E-Verify, the*

their job through no fault of their own as a result of the E-Verify program's deficiencies. Similarly, employers may be deprived of critical workers necessary to complete projects if they are unable to confirm a TPS worker's employment authorization.

Administrative obstacles aside, the tenuous nature of TPS limits businesses' ability to plan for the future in general. Because there is no guarantee that the designation for any particular country will be renewed, employers cannot accurately estimate their capabilities more than a year and a half in advance.

The Trump Administration's recent attempt to terminate the TPS designation for several countries, including El Salvador, highlights the problems such fragility can create for businesses. Facing the potential loss of their TPS workers, employers immediately braced for adverse impact.³² These employers understood that they would be forced to terminate their TPS workers, which would force them to turn down projects.³³ Additionally, these businesses would have been unable to easily replace such workers.³⁴

Preventing TPS workers from adjusting to permanent resident status risks job loss and significant and lengthy disruptions to businesses. Furthermore, under the government's proposed interpreta-

U.S. Employer Verification System, Migration Pol'y Inst. (July 13, 2011), <https://www.migrationpolicy.org/article/basics-e-verify-us-employer-verification-system>.

³² Zoe Henry, *Small Businesses Brace for Losses as Trump Ends TPS for Immigrants*, Inc. (Jan. 10, 2018), <https://www.inc.com/zoe-henry/entrepreneurs-brace-loss-immigrant-workforce.html>.

³³ *Id.*

³⁴ *Id.*

tion, employers would be unable to prevent such losses by taking the first step in securing their TPS workers' legal status, because the majority of TPS workers would be categorically barred from becoming permanent residents in this country regardless of their efforts.

III. Petitioners' interpretation of the INA alleviates uncertainty surrounding TPS workers by allowing sponsorship for lawful permanent residence.

A. Permitting TPS workers to become permanent residents is consistent with the INA's sponsorship provisions for other lawful nonimmigrants.

TPS holders are considered as "being in, and maintaining, lawful status as a nonimmigrant." 8 U.S.C. § 1254a(f)(4). Because both employers and certain family members are able and willing to sponsor nonimmigrants for lawful permanent residence, there is no principled reason why the same option should not be available for TPS workers. The government's interpretation of the INA, however, improperly singles TPS workers out for exclusion.

Under the INA, nonimmigrants may become lawful permanent residents if they have a basis for obtaining that status. 8 U.S.C. §§ 1151(a), 1255. Often, individuals become lawful permanent residents through a sponsoring family member (*i.e.*, through a U.S. citizen spouse).³⁵ Others may obtain lawful permanent resident status through a sponsoring employer.³⁶

³⁵ U.S. Dep't of Homeland Sec., *Annual Flow Report, U.S. Lawful Permanent Residents: 2019* at 1 (2020).

³⁶ *Id.* at 2.

Specifically, the INA allows employers to sponsor a prospective or current foreign national employee for permanent residence under one or more employment-based visa categories. 8 U.S.C. § 1153(b). The first step of this process is for the employer to obtain a “labor certification” from the U.S. Department of Labor. *See* 8 U.S.C. §§ 1153(b)(2), (3); *id.* § 1182(a)(5)(A)(i); 8 C.F.R. § 204.5(l)(4); 20 C.F.R. § 656.1(a). Next, the employer petitions the U.S. Citizenship and Immigration Services for an employment-based visa under the appropriate category. 8 U.S.C. § 1154(a)(1)(F); 8 C.F.R. § 204.5. This petition requires the employer to certify that it intends to hire the employee upon approval of the petition (or the employee’s entry to the United States for a worker located outside the country), that the employee qualifies for the requested classification, and that the employer can pay the offered wage. 8 C.F.R. § 204.5(g)-(l). Once the petition has been approved and an immigrant visa is available, the beneficiary may apply to adjust status if he or she is in the United States and maintaining lawful nonimmigrant status. 8 C.F.R. §§ 204.5(n), 245.2.

Although sponsorship is an arduous and often lengthy process, employers are increasingly willing to sponsor their temporary foreign workers. A survey of 433 companies shows that as of 2020, more employers are sponsoring foreign nationals for permanent residence than in any year since 2016 and that they are starting the process earlier in an employee’s tenure.³⁷ Almost three quarters of the employers surveyed sponsor employees for permanent residence, and nearly all of them begin the sponsor-

³⁷ *See* Envoy Global, Immigration Trends Report 2020 at 5, 15 (2020).

ship process during the first year of the worker's employment.³⁸

Moreover, employers increasingly seek to sponsor their TPS workers for permanent residence. The number of labor certification applications filed on behalf of TPS workers has consistently increased since 2016.³⁹ In 2020, individuals with TPS were the eighth-most commonly sponsored visa classification for whom labor certifications were filed.⁴⁰

Affirmance of the decision below would thwart these sponsorship efforts. Under the Third Circuit's reading, even if sponsored TPS workers obtain an approved employment-based visa, most of them would be prohibited from adjusting status because of the manner in which they originally entered the United States.

Even where employers are unable to sponsor their TPS workers for permanent residence, Petitioners' reading of the INA allows many of these workers to seek to adjust status on the basis of family-based sponsorship. It is estimated that, nationally, 298,000 TPS holders live in "mixed-status" households, where one or both parents have TPS while some or all of their family members, including children and spouses, are U.S. citizens.⁴¹ Under Petitioners' interpretation of

³⁸ *Id.* at 15.

³⁹ See MyVisaJobs.Com, *United States Working Visa & Green Card Reports*, <https://www.myvisajobs.com/Reports/> (data extracted on Feb. 24, 2021).

⁴⁰ MyVisaJobs.Com, *2020 Green Card Report: Top Beneficiary Visa Status*, <https://www.myvisajobs.com/Reports/2020-Green-Card.aspx> (last visited Feb. 24, 2021).

⁴¹ Kati L. Griffith, Shannon Gleeson, & Vivian Vázquez, *Immigrants in Shifting Times on Long Island, NY: The Stakes of Losing Temporary Status*, 97 *Denv. L. Rev.* 743, 756 (2020).

the INA, these U.S. citizens are or will be eligible to sponsor their TPS-holding family members for lawful permanent residence and secure their status in the United States. *See* 8 U.S.C. § 1153. Whether the TPS holder is sponsored by a family member or an employer, the United States retains a valuable worker, and, as discussed below, the economy benefits.

Significantly, allowing either employers or eligible family members to sponsor TPS workers for permanent residence would not create a pathway to lawful permanent residence that does not already exist under the INA. Nonimmigrants are not able to adjust status absent some independent basis for doing so, such as employer or family sponsorship. *See* 8 U.S.C. § 1255; *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 46 (2014). Petitioners' interpretation simply recognizes that the INA deems TPS holders to be in, and to be maintaining, "lawful status as a nonimmigrant" for purposes of adjustment of status, 8 U.S.C. § 1254a(f) (4), allowing them to pursue the same bases for adjustment as other nonimmigrants.

B. Permitting TPS workers to be sponsored for permanent residence would alleviate the adverse impacts of the uncertainty of TPS, resulting in substantial benefits to the U.S. economy.

Recognition of TPS workers' eligibility to adjust status would go far toward alleviating the challenges their uncertain status poses to both employees and businesses. *See* Section II, *supra*. Such benefits would reverberate nationwide.

At the outset, the workforce uncertainty for businesses would be minimized. One of the most signifi-

cant expenses a business incurs is in hiring and re-training workers.⁴² On average, it costs about one-fifth of an employee's annual salary to replace that worker.⁴³ Employers who choose to sponsor their TPS workers for permanent residence would have the opportunity to reduce these costs. Further, once a TPS employee becomes a permanent resident, the administrative burden associated with navigating constant verification of work authorization would be alleviated.

Employees are also less likely to face discrimination or mistakes regarding their work authorization if they can obtain a permanent legal status. And in the event such issues do arise, workers with such status are better equipped to contest unlawful terminations and unfair wages or hours, and to avail themselves of appropriate legal protections, if necessary.

These benefits accrue not only to the directly impacted employees and businesses, but to the nation and economy as a whole. Studies have shown that the promise of permanent membership in society inspires immigrants to invest in language skills and in other forms of education and training that raise their productivity.⁴⁴ The U.S. Department of Labor has reported that newly legalized immigrants significantly improved their English language skills

⁴² See Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, Ctr. for Am. Progress (Nov. 16, 2012), <https://www.americanprogress.org/issues/economy/reports/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/>.

⁴³ *Id.*

⁴⁴ See Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earning of Legal and Illegal Mexican Immigrants in the United States*, 12 J. Population Econ. 91, 94 (1999).

and educational attainment within five years of gaining a more permanent status.⁴⁵

Providing TPS workers with an equal opportunity to seek permanent residence also would benefit their local economies. States, cities, and counties around the country have extolled the benefits they receive from TPS holders within their communities and the risks that the substantial loss of such individuals would pose. *See, e.g.*, Amicus Curiae Brief of the States of California, District of Columbia, Massachusetts, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington in Support of Plaintiffs and Appellees at 15-19, *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020) (No. 18-16981), 2019 WL 571433 (explaining that the loss of TPS holders as workers would “cost \$132.6 billion in GDP”); Brief of Amici Curiae 6 Counties and 31 Cities in Support of Plaintiffs-Appellees and for Affirmance at 12-15, *Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020) (No. 18-16981), 2019 WL 571430 (the elimination of work authorization for TPS holders from El Salvador, Haiti and Honduras would reduce the country’s GDP by \$45.2 billion). The average hourly wages of newly legalized populations increase by 8.9 percent, homeownership by 6.3 percent, and overall employment rates by 2 percent.⁴⁶ By recognizing TPS holders’ eligibility to become permanent residents, Petitioners’

⁴⁵ U.S. Dep’t of Labor, Characteristics and Labor Market Behavior of the Legalized Population Five Years Following Legalization (1996).

⁴⁶ *See* Maria E. Echautegui & Linda Giannarelli, *The Economic Impact of Naturalization on Immigrants and Cities*, Urban Inst. at vi (Dec. 2015).

interpretation protects these benefits and helps maximize the likelihood that the various communities in which current TPS holders live and the businesses for which they work will prosper and grow through their continued contributions.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioners' principal brief, the Court should hold that, under 8 U.S.C. § 1254a(f)(4), a grant of Temporary Protected Status authorizes eligible noncitizens to obtain lawful permanent resident status under 8 U.S.C. § 1255, and the judgment of the Third Circuit should be reversed.

Respectfully submitted,

NICOLE G. BERNER
 MONICA T. GUIZAR
 CLAUDIA P. LAINEZ
 SERVICE EMPLOYEES
 INTERNATIONAL UNION
 1800 Massachusetts Ave. NW
 Washington, DC 20036

ERICA C. LAI
Counsel of Record
 MELISSA H. MAXMAN
 RONALD F. WICK
 ANDREW J. PECORARO
 COHEN & GRESSER LLP
 2001 Pennsylvania Ave. NW
 Suite 300
 Washington, DC 20006
 (202) 851-2070
 elai@cohengresser.com

APPENDIX**INTERESTS OF *AMICI CURIAE* JOINING
THE SERVICE EMPLOYEES
INTERNATIONAL UNION****American Federation of State, County and
Municipal Employees**

The American Federation of State, County and Municipal Employees, AFL-CIO (“AFSCME”) is a union of 1.4 million members, including members with TPS, in the United States and Puerto Rico, both in the public and private sectors, who share a commitment to service. AFSCME is participating in this case to advance its mission of helping all working people, including immigrants and people of color, achieve the American dream regardless of their identity. AFSCME is proud to represent members who came to the United States as children and who are contributing to our communities, states, and country.

American Federation of Teachers

The American Federation of Teachers (“AFT”), AFL-CIO represents approximately 1.7 million members employed in K-12 and higher education, public employment, and healthcare. AFT has a long history of civil rights advocacy. AFT has members throughout the country who have received TPS. These members have utilized TPS to obtain employment in institutions that provide essential public services. AFT members also teach students with TPS. These students are integral members of their educational institutions. They contribute to the diversity of experience and viewpoint in classrooms, engage in valuable research projects, and play leadership roles in student life.

Communications Workers of America

The Communications Workers of America, AFL-CIO (“CWA”), is an international labor union representing more than 700,000 workers in the telecommunications, media, manufacturing, airlines, and healthcare industries, and in a wide variety of public sector positions in the United States, Canada, and Puerto Rico. CWA represents and advocates on behalf of workers with respect to workplace rights and broader political and civil rights. As part of this mission, CWA has supported fair, humane, comprehensive immigration reform. Allowing individuals with TPS to become lawful permanent residents will benefit CWA members’ communities and the lives and welfare of fellow workers.

International Brotherhood of Teamsters

International Brotherhood of Teamsters (“IBT”) is a labor organization with more than 1.4 million members, including members with TPS who are employed in a wide array of industries, including but not limited to transportation, construction, healthcare, agricultural, education, retail, and manufacturing across the United States, Canada, and Puerto Rico. The IBT strongly supports the rights of TPS members, many of whom are essential workers, and their right to seek an adjustment of status and work in an environment free of harassment and discrimination regardless of their immigration status. These members make significant contributions to the workforce and our communities, and their inability to seek lawful permanent residence would result in major disruptions in various industries and our food supply chain. Therefore, the IBT and its affiliates would be adversely affected by a decision that prohibits TPS holders from seeking an adjustment of status.

International Union of Painters and Allied Trades

The International Union of Painters and Allied Trades (“IUPAT”) is a labor organization with approximately 140,000 members. IUPAT members work as commercial and industrial painters, glaziers, drywall finishers, floor coverers, and trade show workers, and in many other occupations. IUPAT estimates that about 1,000 of its members are beneficiaries of the TPS program and others have family members who are TPS beneficiaries. Like all IUPAT members, they make a valuable contribution to our economy as a whole while supporting a middle class life for themselves and their families.

United Farm Workers of America

The United Farm Workers of America (“UFW”) is a labor organization that represents thousands of migrant and seasonal farm workers, including TPS holders, in various agricultural occupations throughout the country, and has members of diverse racial, ethnic, and immigration backgrounds throughout the United States. UFW seeks to improve the lives, wages, and working conditions of agricultural workers and their families through collective bargaining, worker education, state and federal legislation, and public campaigns. Since its founding in 1962 by Cesar Chavez, Dolores Huerta, and others, UFW has been dedicated to the cause of eliminating discrimination against farmworkers, Latinos, and any other groups that have been the target of unfair or unlawful treatment.

United Food and Commercial Workers International Union

United Food and Commercial Workers International Union (“UFCW”) is a labor organization that repre-

sents working men and women across the United States. UFCW's 1.3 million members work in a range of industries, with a majority working in retail food, meatpacking and poultry, food processing and manufacturing, and non-food retail. Many of UFCW's members are TPS holders. UFCW's objective is the elevation of its members and assistance to other persons engaged in the performance of work for the purpose of improving wages, hours, benefits, and working conditions. UFCW also endeavors to advance and safeguard full employment, economic security, and social welfare of its members and of workers generally.

