Fixing TPS After *Mayorkas*: Why the Nature of TPS Requires Giving Inadmissible TPS Holders a Method to Convert Status

This Note analyzes recent jurisprudence regarding the statutory eligibility of foreign nationals who hold Temporary Protected Status (TPS) and have entered the United States unlawfully to convert their status to Lawful Permanent Residency (LPR) without leaving the United States and reentering at a later time. During early TPS-to-LPR jurisprudence, several circuit-level decisions held that inadmissible TPS holders could convert their status through an agency waiver of inadmissibility. Later on, however, many circuit courts precluded these TPS holders from converting their status. The Supreme Court's decision in Sanchez v. Mayorkas *was the final nail in the conversion coffin, explicitly precluding many TPS holders from a realistic possibility of conversion. As a result, the circuit split surrounding conversion is resolved, but the future for TPS holders ("statusholders") is in doubt. As a result, this Note argues that the best immediate course of action to ensure a future for TPS holders who have entered unlawfully, for both humanitarian and administrative purposes, is for the passage of legislation that would provide a pathway to permanent residency for these statusholders by establishing baseline requirements for conversion. This legislation would allow a pathway to permanent residency for many long-term TPS holders, lessening the administrative burdens on the United States government in the long term.*

INTRODUCTION

The American immigration process is complex in its scheme, arduous in its process, and frequently harsh in its results. There are

numerous ways in which foreign nationals[1] who wish to enter the United States must sift through procedural obstacles to determine their respective immigration statuses.[2] Frequently, immigrants are faced with life-threatening challenges that make entry and stay in the United States all the more uncertain, especially when escaping countries facing instability and conflict.[3] Like many administrative regimes, the immigration system is complicated by federal statutes with unclear directives to immigration agencies such as the U.S. Citizenship and Immigration Services (USCIS), a branch of the U.S. Department of Homeland Security (DHS).[4] For example, one particular class of foreign nationals, Temporary Protected Status (TPS) holders, has members who have been in this country for decades—long enough to raise families and send their children to high school.[5] Yet, because of the current state of immigration law, their ability to remain in the

1. The technical term used in the United States code is "alien," which is a term of art defined as "any person not a citizen or national of the United States" in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3). Because connotations of the word portray those who are noncitizens of the United States as something other than human, I will substitute the term "foreign national."

2. *See, e.g.*, 8 U.S.C. § 1158 (discussing refugees and asylum). For a more comprehensive list including numerous immigrant visa categories, see *Directory of Visa Categories*, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html [https://perma.cc/8DAZ-BEA9].

3. *See, e.g.*, Jeffrey A. Greenberg, *The Political Economy of Cuban Baseball Player Smuggling and Its Possible Impacts on International and Domestic Law*, 58 COLUM. J. TRANSNAT'L L. 443, 452 (2020) (discussing defecting Cuban baseball players consuming their passports and paying massive smugglers' fees to avoid being returned to Cuba under threat of violence). *See generally* SONIA NAZARIO, ENRIQUE'S JOURNEY (2006) (discussing a young man's journey from Honduras to the United States, including navigating hazards such as jumping on moving trains to arrive in the United States).

4. *See* 6 U.S.C. §§ 111(a), 271(a)(1); *see also infra* Part II; David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Rule of Last Resort After* Chevron, 59 ADMIN L. REV. 479, 480–83 (2007).

5. *See* 8 U.S.C. § 1254a(b)(2)–(3) (setting out an initial six to eighteen month timeframe for TPS holders when a country's citizens initially become TPS-eligible, then describing procedures for periodic renewal of those citizens' TPS-eligibility); *see also Temporary Protected Status Designated Country: El Salvador*, U.S. IMMIGR. & NAT'Y SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador [https://perma.cc/77R5-EVQV] (illustrating how El Salvador has been TPS eligible since 2001). Many countries' citizenries have decades-long TPS eligibility. Because TPS arises out of, among other things, geopolitical conflict or the effects of natural disasters, the initial six to eighteen month period of TPS is sometimes insufficient to protect statusholders. To that end, TPS for some countries requires frequent, periodic renewal—such is the case for El Salvador.

United States, and avoid the gauntlet that is reentry, may be revoked freely at the discretion of the Executive Branch.

TPS holders are foreign nationals who hail from specifically designated countries that face domestic civil or environmental threats and, because of those threats, have fled and are unable to safely return to their country of citizenship.[6] However, per its name, TPS is by no means a permanent authorization to stay within the United States. The Attorney General can determine that the conditions causing a country's citizens to become TPS-eligible have ceased and terminate that country's (and, by extension, its citizens') TPS grants.[7] And, even when those threats persist beyond the initial statutory period, the Attorney General must periodically extend a country's TPS designation in order for TPS holders to maintain their status.[8] As a result, any grant of TPS comes with a significant level of uncertainty.

Recently, in *Sanchez v. Mayorkas*, the Supreme Court held that TPS holders who unlawfully enter the United States are unable to convert their status to Lawful Permanent Residency (LPR).[9] This Note will illustrate the progression of status conversion jurisprudence for this subset of TPS holders. Part I provides background on TPS and LPR and offers a brief look at the "admission requirement" and "status conversion" under existing immigration statutes and case law. Part II describes the federal court history on status conversion and sets up the outlook following *Sanchez v. Mayorkas*. Part III discusses how Congress should respond to *Mayorkas* in order to provide a pathway to permanent residency for a broader class of TPS holders. In doing so, this Part will analyze the Biden Administration's action on TPS and illustrate how the administration tried and failed to keep the door open to a subsequent reinterpretation of the statute permitting conversion. Finally, this Note recommends that legislation providing for conversion from TPS-to-LPR status—even for unlawful entrants—is the appropriate course of action from both a humanitarian and administrative efficiency standpoint. To that end, this Note suggests that Congress set out baseline categories of TPS holders who may convert status while reserving a grant of regulatory authority to immigration agencies, which can use their expertise to appropriately expand the scope of status conversion in a manner superior to that of Congress.

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6. 8 U.S.C. § 1254a(b)(1)(A)–(C).

7. *Id.* § 1254a(b)(3)(B).

8. *Id.* § 1254a(b)(3)(C).

9. Sanchez v. Mayorkas, 141 S.Ct. 1809, 1815 (2021).

I. IMMIGRATION STATUSES AND ADJUSTMENT

Immigration law in the United States is notoriously complex, with a multitude of immigration statutes and statuses.[10] While combing through this body of law is difficult at best, it is further complicated because executive decision-making can change aspects of the immigration system at any time,[11] due to the bifurcated immigration power between the Executive and the Legislature.[12] Section I.A delineates the history of TPS from inception until late 2020 and provides insight into the recent evolution of TPS in order to provide context for TPS jurisprudence. Section I.B outlines the requirements for LPRs, the status conversion statute's goals, and the admission requirement thereunder, as well as some of the exceptions to the LPR admission requirement. Framing the differences between the TPS and LPR statutes in the context of real-world events will also help structure the outstanding administrative problems with the *Mayorkas* decision.

A. Background on TPS

1. History of TPS

TPS arose out of the Immigration Act of 1990.[13] The Act, per its express purpose, sought to "[a]mend the Immigration and Nationality Act to change the level, and preference system for immigrants to the United States, and to provide for administrative naturalization, and for other purposes."[14] Accordingly, the Act overhauled the immigration system as a whole and specifically changed the qualifications for some immigrant statuses.[15] TPS

10. *See* 8 U.S.C. §§ 1254a–1255, 1158, 1427 (discussing Temporary Protected Status, Lawful Permanent Residency, Asylees, and Naturalized Citizens).

11. *See, e.g.*, *President Biden's Executive Actions on Immigration*, CTR. FOR MIGRATION STUDS., https://cmsny.org/biden-immigration-executive-actions [https://perma.cc/2RA8-TNHJ].

12. *See* Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 458 (2009) (discussing the allocation of powers between the President and Congress).

13. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

14. *Id.*

15. *See, e.g., id.* at 5030 (referring to TPS).

provides temporary protection for citizens of countries with major domestic threats that might preclude safely returning home.[16] At enactment, two forms of status existed for permanent protection for certain groups of foreign nationals: refugee and asylum status, both of which were designed to protect from persecution on grounds such as race or religion.[17] Accordingly, one main difference between TPS holders and asylees or refugees is the circumstances of the grant: Asylees[18] or refugees[19] flee specific persecution by an organized group, such as a government, within their country. In contrast, TPS holders are status-eligible because they flee natural disaster or ongoing armed conflict. Both conditions involve imminent harm to foreign nationals, but harm to TPS holders arises more out of general chaos, rather than the organized and individual harm to which asylees or refugees might be subjected.[20]

TPS is not the first immigration status of its kind. In the 1980s, the Attorney General began to allow otherwise ineligible immigrants of certain nationalities to remain in the United States because of threats in their home country under a status known as Extended Voluntary Departure (EVD).[21] The Attorney General's power to do so was grounded in the Immigration and Nationality Act (INA), which provided the Attorney General broad discretion in immigration matters.[22] Unlike in the case of asylees or refugees, these threats were not particularized to the specific foreign national coming from a certain country but were instead generalized to the entirety of foreign nationals fleeing a country that might qualify for EVD.[23] EVD grants were temporary, and the Attorney General had no explicit statutory power to grant "blanket" EVD qualifications to nationals of a specific

16. 8 U.S.C. § 1254a(b)(1)(B)(i)–(iii); *see* Bill Frelick & Barbara Kohnen, *Filling the Gap: Temporary Protected Status*, 8 J. REFUGEE STUDS. 339 (1995). These threats include but are not necessarily limited to natural disaster or domestic armed conflict.

17. Frelick & Kohnen, *supra* note 16, at 339–40. Refugee status was conferred to immigrants of "'special humanitarian concern," and the number of refugees that were admitted had a hard cap. Asylees were already within the United States, but asylum was temporary unless their status converted; however, there was an annual cap on the number of asylees that could have their status converted. *Id.*

18. *See* 8 U.S.C. § 1158.

19. *See id.* § 1101(a)(42).

20. *Compare* 8 U.S.C. § 1158(b)(B)(i) *with* 8 U.S.C. § 1254a(b)(1).

21. Lynda J. Oswald, Note, *Extended Voluntary Departure: Limiting the Attorney General's Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 152–53 (1987).

22. *Id.* at 155.

23. *Id.* at 157.

country, though the Attorney General nonetheless unilaterally granted EVD in such a manner.[24] And EVD status allowed certain classes of immigrants to depart the United States "voluntarily" rather than through deportation proceedings.[25]

There are some salient similarities between EVD and TPS. First, both TPS and EVD present a safe haven for foreign nationals fleeing certain types of danger originating in their home countries.[26] Just like the Attorney General could grant EVD designation for certain countries, the Attorney General can also grant TPS for periods of six to eighteen months and can renew those periods should the conditions that led to TPS persist.[27] However, unlike under EVD, where status was granted with a presumptive intention to redirect foreign nationals to voluntarily re-enter the United States through other channels,[28] TPS takes a more refined approach. It first allows foreign nationals to stay in the United States without suggestion of departure during the period of time that they become TPS-eligible.[29] Then, the Government grants certain foreign nationals whose TPS eligibility has expired Deferred Enforced Departure (DED) status.[30] DED, which arises out of the Attorney General's enforcement of the Immigration and Nationality Act of 1952, operates similarly to the EVD extension by allowing certain foreign nationals to remain in the United States without an explicit statutory grant.[31] Consequently, when the Attorney General deems necessary, the statutory expiration of TPS allows a more relaxed

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24. *Id.* at 157, 159–60.

25. *See id.* at 155–56, 155 n.21 ("Unlike deportation, voluntary departure (1) 'avoids the stigma of compulsory ejection;' (2) 'facilitates the possibility of return to the United States;' (3) 'often entails the certainty of speedy return;' and (4) 'enables the applicant to select his own destination.'") (citing C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.3e(6a) (1981)).

26. *See supra* notes 16, 21 and accompanying text.

27. 8 U.S.C. § 1254a(b)(1)–(3). *But see* JILL H. WILSON, CONG. RSCH. SERV., RS20844, TEMPORARY PROTECTED STATUS: OVERVIEW AND CURRENT ISSUES 2 (2017). Wilson's report suggests that it is the Secretary of Homeland Security that actually has the discretion to grant TPS and its extensions. The discrepancy is likely the effect of 8 U.S.C. § 1254a(b)(1), which states that "[t]he Attorney General, after consultation with appropriate agencies of the Government, may designate any foreign state . . . ."

28. *See* Oswald, *supra* note 21, at 155.

29. *See* WILSON, *supra* note 27, at 3.

30. *Id*. at 4.

31. *See* Benjamin M. Haldeman, *Discretionary Relief and Generalized Violence in Central America: The Viability of Non-Traditional Applications of Temporary Protected Status and Deferred Enforced Departure*, 15 CONN. PUB. INT. L.J. 185, 188–89, 191 (2016) (citing 8 U.S.C. § 1103(a)(1) (1952)).

timeline for certain foreign nationals to get their affairs in order to leave the United States—at least, as much as they can when forced to leave the place they currently call home.

There are several explicit statutory benefits to TPS. First, if a foreign national is a national from a country that is eligible for TPS, and they are granted TPS, then they may not be deported from the United States.[32] TPS holders may also obtain employment authorization.[33] Given the present conditions of the global COVID-19 pandemic, TPS holders play noticeable and necessary roles in the American workforce by offering crucial services in a time of need for the country as a whole.

However, there are certain statutory requirements for prospective TPS holders. First, as previously mentioned, the TPS holder must be a national of a country designated as eligible for TPS.[34] The TPS holder must also have continuous physical presence in the United States since the most recent designation of their home country; have continuously resided in the United States since a date that the Attorney General has designated; be admissible as an immigrant with certain exceptions; and must register for TPS within a 180-day period set by the Attorney General.[35] Moreover, TPS holders can lose eligibility by fraudulently reporting to the Attorney General that they met these requirements, by failing to maintain a continuous presence, or by failing to re-register after the Attorney General re-designates their country under the TPS statute.[36] Accordingly, while TPS provides benefits for foreign nationals in need, TPS holders must abide by 8 U.S.C. § 1254a's requirements throughout their residency in the United States.[37]

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32. 8 U.S.C. § 1254a(a)(1)(A). A grant of TPS can also be extended to a foreign national who has no nationality if the last country of residency of that foreign national is a country that has citizens qualifiable for TPS. *Id.*

33. *Id.* § 1254a(a)(1)(B). Notably, a 2017 study showed that among TPS holders from Honduras, El Salvador, and Haiti, over 250,000 TPS holders held jobs. Robert Warren & Donald Kerwin, Ctr. for Migration Stud., *A Statistical and Demographic Profile of the US Temporary Protected Status Populations from El Salvador, Honduras, and Haiti*, 5 J. MIGRATION & HUM. SEC. 577, 584 tbl.3 (2017).

34. 8 U.S.C. § 1254a(a)(1).

35. *Id.* § 1254a(c)(1)(A)(i)–(iii). For a discussion regarding waivers to admissibility, see *infra* Section I.B.3.

36. *See* 8 U.S.C. § 1254a(c)(3)(A)–(C). Brief departures from the United States or departures due to family emergency are exempted from these stringent requirements. *Id.* § 1254a(c)(4).

37. *See id.* § 1254a(d)(2).

2. Recent Developments in TPS, Immigration, and Where TPS Stands Today

Today, TPS still plays a significant role in the U.S. immigration system. As of October 2018, there are over 430,000 TPS holders residing in the United States who hail from twelve different countries in Central America, Africa, and Asia; the overwhelming majority of TPS holders come from El Salvador, Honduras, and Haiti.[38] Many of the countries whose citizens may receive TPS were initially designated as TPS-eligible over eighteen months ago, so previous agency determinations have cyclically renewed TPS for extended periods of time.[39] With many of these TPS grants seeing periodic statutory extensions, it is apparent that many of the geopolitical situations that lead to a country's designation' as TPS-eligible are often unresolved outside of the initial statutory period timeframe of eighteen months.[40]

The intricate requirements of TPS are continuously fluctuating for many statusholders. The Trump administration began to revoke TPS eligibility for many TPS holders because of improved conditions: The administration claimed that many then-TPS eligible countries stabilized, and so the rationale for granting these countries TPS ceased and repatriation of statusholders was thus feasible.[41] Accordingly, in November 2019, the Trump Administration extended TPS eligibility

38. *Temporary Protected Status*, U.S.C.I.S. (Sept. 9, 2021), https://www.uscis.gov/humanitarian/temporary-protected-status [https://perma.cc/KC8G-SRBS]; Recently, the Biden administration extended TPS to Venezuela and Myanmar. While statistics about the precise number of TPS holders vary by source, according to 2018 USCIS information given to the Congressional Research Service, of the 436,866 then-existing TPS holders, 252,526 originated in El Salvador; 58,557 in Haiti; 86,031 in Honduras, 14,791 in Nepal; 5,305 in Nicaragua; 499 in Somalia; 77 in South Sudan; 1,048 from Sudan; 6,916 from Syria; and 1,116 from Yemen. JILL H. WILSON, CONG. RSCH. SERV., RS20844, TEMPORARY PROTECTED STATUS AND DEFERRED ENFORCED DEPARTURE 5 tbl. 1 (2021); *see generally* Warren & Kerwin, *supra* note 33.

39. Notably, El Salvador, from which over half of TPS holders originate, has been designated as a country whose citizens are TPS-eligible since 2001. Honduras and Nicaragua have been eligible even longer, dating back as far as 1998. *Temporary Protected Status*, *supra* note 38.

40. *See infra* Section II.A.

41. Suzanna Gamboa & Reuters, *Court Rules Trump Can End Temporary Protected Status for Families*, NBC NEWS (Sept. 14, 2020), https://www.nbcnews.com/news/latino/court-rules-trump-can-end-temporary-protected-status-immigrant-families-n1240072 [https://perma.cc/BET5-PPAT].

to only six of the ten then-TPS-eligible countries.[42] However, those six countries collectively represented fewer than 10,000 TPS holders.[43] At the time, TPS for each of these countries was set to expire between March 2020 and March 2021.[44] While both dates have passed, the termination of TPS remained on a litigation hold for an extended period, during which TPS holders were permitted to stay in the country.[45]

However, on September 14, 2020, the Ninth Circuit held that the revocation of TPS for several of these countries was a lawful use of executive power, ending an existing litigation hold.[46] Nevertheless, the Biden Administration has since extended (or created) TPS for each of the now twelve countries whose citizens are TPS-eligible, and so the earliest TPS can expire for any given country is May 2, 2022 (the expiration deadline for South Sudan).[47]

Absent the Biden Administration's extensions, the Ninth Circuit decision would have resulted in 300,000 to 400,000 TPS holders residing in the United States eventually being forced to relocate or find other means of re-entering the country, or else risk being in the country unlawfully.[48] Since deportation statistics became available in 1892, the United States has only deported more than 400,000 foreign nationals in one year once—in 2013 (and to be sure,

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42. D'Vera Cohn, Jeffrey S. Passel & Kristen Bialik, *Many Immigrants with Temporary Protected Status Face Uncertain Future in U.S.*, PEW RSCH. CTR. (Nov. 27, 2019), https://www.pewresearch.org/fact-tank/2019/11/27/immigrants-temporary-protected-status-in-us/ [https://perma.cc/B6TD-F347]. These countries were El Salvador, Haiti, Sudan, Nicaragua, Honduras, and Nepal. *See also* Cody M. Gecht, *Lawful Permanent Residency: A Potential Solution for Temporary Protected Status Holders in the Eastern District of New York*, 36 TOURO L. REV. 471, 484 tbl.3 (2020).

43. *See* Cohn, Passel, and Bialik, *supra* note 42.

44. *Id*.

45. *Id.*; *see* Ramos v. Wolf, 975 F.3d 872, 884 n.9 (9th Cir. 2020).

46. *See Ramos*, 975 F.3d at 896. The Ninth Circuit also vacated the district court's holding by ruling that the district court abused its discretion in concluding that the TPS-holder plaintiffs had presented ample evidence to suggest that the President had acted with racial animus. Finally, the beneficiaries failed to bring sufficient evidence to support their claims. *Id.*

47. D'Vera Cohn, *Biden Administration Widens Scope of Temporary Protected Status for Immigrants*, PEW RSCH. CTR. (Oct. 8, 2021), https://www.pewresearch.org/fact-tank/2021/10/28/biden-administration-widens-scope-of-temporary-protected-status-for-immigrants/ [https://perma.cc/URZ7-N8ZE].

48. *See* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10541, NINTH CIRCUIT DECISION ALLOWS TERMINATION OF TEMPORARY PROTECTED STATUS FOR SUDAN, NICARAGUA, AND EL SALVADOR TO GO FORWARD 5 (2021).

it is difficult to imagine more than 400,000 foreign nationals being deported prior to the 20th century).[49] Moreover, since 2010, the number of annual "returns," or voluntary exits of a deportable foreign national from the United States without an order, has only exceeded 400,000 once, and in the last few years, has barely peaked over 100,000.[50] Accordingly, based on the data from the past ten years, cessation of TPS via the Trump administration's policy could—over time—heighten the present burdens on immigration agencies.[51] At the same time, given the number of TPS holders that come from countries that have received decades-long extensions of TPS, broad elimination of TPS would impact tens, if not hundreds, of thousands of TPS-dependent families. The Biden administration's re-extension of TPS[52] halted the administrative and humanitarian perils of mass TPS revocation—for the time being. To remedy future widespread TPS elimination, the Biden Administration has proposed legislation reworking the immigration system, including TPS.[53]

B. Lawful Permanent Residency

1. Background on Lawful Permanent Residency

The most common form of nonimmigrant residency in the United States is LPR, which is statutorily incorporated under 8 U.S.C. § 1255. LPR holders are more commonly known as "green card

49. *2018 Yearbook of Immigration Statistics*, U.S. DEP'T OF HOMELAND SEC. tbl.39 (2020), https://www.dhs.gov/immigration-statistics/yearbook/2018/table39 [https://perma.cc/36HM-PQ5L]. These years were 2012–2014, peaking in 2013 with 432,281 forced deportations. It appears safe to assume that these are the only three years in the history of the country that eclipse 400,000 deportations because deportations only eclipsed 100,000 for the first time in 1997. *Id.*

50. *Id.* Notably, the number of returns has been historically significantly higher than the number of forced removals, peaking at 1,675,876 in 2000. *Id.*

51. *See* discussion accompanying notes 38–45. The Trump administration's decision would have ended status for between 300,000–400,000 statusholders, making that many holders deportable. The voluntary exits in recent years have hardly reached 100,000, and the number of deportations has exceeded 400,000 only once. *See supra* note 49 and accompanying text. Thus, the number of former TPS holders exiting—via deportation or otherwise—would significantly shift the burdens on the immigration system.

52. *See infra* Section III.A.1.

53. *See infra* Part III.

holders," and the United States had over 13.6 million LPRs in 2019.[54] Grants of LPR come with numerous benefits, including substantial protections from deportation, access to private employment rights, protections for re-entry into the United States, and, in the long term, the possibility of becoming a U.S. citizen through naturalization.[55] Because of these benefits, LPR status, in many aspects, functions similarly to U.S. citizenship and thus is desirable for many foreign nationals who wish to stay in the United States.[56] On the other hand, LPR status also imposes certain obligations usually associated with U.S. citizenship, including making the holder subject to taxation on worldwide income (rather than from just U.S. sources) and even conscription, if the government imposes such a measure.[57]

The statute that describes the criteria for LPRs is extensive and filled with exceptions. Oftentimes, foreign nationals apply from one form of immigration status to another, undergoing a process known as status conversion.[58] To undergo status conversion, the foreign national must meet several requirements. First and most notably, the foreign national must be "inspected and admitted or paroled" into the United States.[59] Furthermore, the status conversion statute expressly designates certain groups as eligible for status conversion under U.S. immigration law, although the statute also gives the Attorney General discretion to create exceptions to inadmissibility.[60]

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54. BRYAN BAKER, ESTIMATES OF THE LAWFUL PERMANENT RESIDENT POPULATION IN THE UNITED STATES AND THE SUBPOPULATION ELIGIBLE TO NATURALIZE: 2015–2019 (U.S. Dep't Homeland Sec'y, Off. Immigr. Stat. ed., 2019).

55. *See* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 93 (2001).

56. *Id.*

57. *Id.*

58. 8 U.S.C. § 1255 (permitting the Attorney General to modify a foreign national's status from one form of status to another if the foreign national has, for example, applied for LPR and is eligible to have their status modified).

59. *Id.* § 1255(a). The precise meaning of "parole" is outside the scope of this Note, but for a discussion of circuit disjunction regarding the definition of "inspected and admitted," see *infra* Part II.A.

60. 8 U.S.C. § 1255. Specific eligible groups include those receiving a green card through family, employment, special categories of immigrants (such as religious workers, international media members, and Afghan or Iranian nationals as defined under 8 U.S.C. § 1101(a)(27)(K)), refugees or asylees, human trafficking and crime victims, and victims of abuse, amongst others. This is in accordance with some of the language in the TPS statute as well. For example, 8 U.S.C. § 1254a(b)(5) precludes judicial review of Attorney General determinations of country designations as eligible under the TPS statute.

2. Statistics and Policy on Status Conversion

Despite explicit statutory permissibility of conversion for certain categories of immigrants under federal immigration law, logistical problems present continuous issues in the overarching immigration scheme. While the number of LPR holders increased by a net 600,000 individuals between 2015–2019, over one million new immigrants are granted LPR status annually.[61] However, in 2017, nearly four million approved LPR visa petitions were pending because of numerical limits on conversion imposed by the INA.[62] While some of the constraints are statutory—such as a limitation on immigration into the United States for immediate relatives or marital status—others vary, such as the annual number of refugees set by the President.[63] Accordingly, the stringent statutory constraints for immigrants entering the country encumbers the system for accommodating green card holders and enabling status conversion.

3. The Admission Requirements of TPS and LPR

A significant question within the intricacies of immigration law is whether there are limitations on TPS holders to convert to LPR status.[64] One of the fundamental requirements of both TPS and LPR status under U.S. immigration law is the presence of an "admission requirement."[65] Admission means that a foreign national has been lawfully granted entry into the United States after inspection by an immigration official at a "port-of-entry."[66] The complexities of immigration law make starting with inadmissibility the easiest way to understand admissibility. Inadmissibility law excludes some forms of

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61. WILLIAM A. KANDEL, CONG. RSCH. SERV., R46291, THE EMPLOYMENT-BASED IMMIGRATION BACKLOG 1 (2020). The Kandel report discusses a backlog of green cards that arise from employer-sponsored green cards under the immigration statutory scheme.

62. U.S. STATE DEP'T, ANNUAL REPORT OF IMMIGRANT VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2020 at 4 (2020), https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2020_vF.pdf [https://perma.cc/G43U-RKT2].

63. *See* Ryan Baugh, *U.S. Lawful Permanent Residents: 2019*, DEP'T HOMELAND SEC'Y at 2, 9, https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/lawful_permanent_residents_2019.pdf [https://perma.cc/6JWK-MZHK].

64. For a discussion on case law regarding status conversion, see *infra* Section II.A.

65. 8 U.S.C. §§ 1254a(c)(1)(A)(iii), 1255(a).

66. *Id.* § 1101(a)(13)(A).

entry from qualifying as an admission and certain classes of foreign nationals from admissible entry into the United States.[67] Forms of inadmissibility include restrictions on certain criminal convictions,[68] entry restrictions on individuals who might pose adverse foreign policy consequences, and specific totalitarian party membership.[69] Moreover, specific foreign nationals may be inadmissible if the Attorney General designates them as a "public charge," a limitation based on that foreign national's disability or prospective lack of economic value.[70] While there are numerous other restrictions, one notable rule states that any entrant into the country "without being admitted or paroled" is inadmissible.[71] This suggests unlawful entry is disfavored in any non-exempted context for the purposes of status conversion.

With all the intricacies of inadmissibility under 8 U.S.C. § 1182, the statute also has plentiful exceptions to inadmissibility. For example, familial exemptions are allowable as waivers to inadmissibility for circumstances such as "extreme hardship."[72] Looking at the TPS statute, the Attorney General has broad discretion to waive certain provisions of inadmissibility for TPS, notwithstanding that an immigrant must be "admissible" in order to receive a grant of TPS.[73]

However, of particular note are two parts of the chapter: 8 U.S.C. §§ 1254a and 1255, which deal with grants of TPS and conversions to LPR status.[74] Under these sections, the Attorney General has the regulatory authority to regulate conversion to LPR

67. *Id.* § 1182.

68. Notable crimes enumerated under § 1182(a)(2)(A) include money laundering, ties to terrorist organizations or other criminal enterprises, drug trafficking, and suppression of religious liberty. *Id.* § 1182(a)(2)(A).

69. *Id.* § 1182(a)(3)(C)–(E). A specific affiliation listed pertains to those who perpetrated Naziism-related persecutions.

70. When making such a determination, the Attorney General looks to factors of age, health, family status, financial assets, and education or skills. *Id.* § 1182(a)(4)(B).

71. *Id.* § 1182(a)(6)(A)(i). There are limited exceptions under this subsection for certain children and women who have been battered or subjected to "extreme cruelty." *Id.* § 1182(a)(6)(A)(ii)

72. *Id.* § 1182(h).

73. *Id.* § 1254a(c)(1)(A)(iii), (2)(A)(ii).

74. *Id.* §§ 1254a–1255.

status or waive grounds of inadmissibility under either section.[75] § 1255 does not reference waivers under § 1254a either affirmatively or negatively, but § 1254a makes general reference to § 1255, stating: "For the purposes of adjustment of status under section 1255 of this title . . . the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant."[76] This suggests that there is interplay between these statutes and that the Attorney General could play a role in making rules about status for some TPS holders with a proper delegation of authority.[77] To that end, the LPR statute reserves some space for agency discretion.[78] Yet, such legislation, the Supreme Court's decision in *Sanchez v. Mayorkas* precludes status conversion for inadmissible TPS holders under the current statutory scheme.[79]

Admissibility requirements can be waived under both TPS and LPR status.[80] The important question is whether an admissibility waiver for TPS also extends to waive admissibility for LPR conversion. Reading §§ 1254a and 1255 together suggests that this is possible. However, the list of exemptions contained within the § 1182 admissibility provisions could also indicate that § 1182 is the exhaustive list of inadmissibility exemptions for the purpose of status conversion.[81]

Clearly, U.S. immigration law is rife with ambiguities. Not only are there numerous immigration statuses, but there are also numerous circumstances in which immigrants may convert their status. The statutory scheme suggests that some form of TPS-to-LPR status conversion is possible. This leaves open the question—to what extent may TPS holders convert to LPR status?

II. TPS-TO-LPR CONVERSION: MANDATORY, NARROW, OR

75. *Id.* The power to waive comes with exceptions. For example, the Attorney General cannot waive inadmissibility for some drug-related offenses or those connected with terrorist groups under the TPS or LPR subsections when certain conditions are met. *Id.* §§ 1254a(c)(2)(A)(iii), 1255(h)(2)(B).

76. *Id.* § 1254a(f)(4).

77. *Cf.* City of Arlington v. Fed. Commc'ns Comm'n, 569 U.S. 290, 296–301 (2013) (discussing how agencies get *Chevron* deference on interpretations concerning the scope of their authority—that is, jurisdiction).

78. *See* Immigr. & Naturalization Servs. v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) (suggesting that, for the purposes of administrative discretion, that *Chevron* deference applies in the context of immigration law).

79. Sanchez v. Mayorkas, 141 S. Ct. 1809, 1814 (2021).

80. 8 U.S.C. §§ 1254a(c)(2)(A), 1255(h).

81. *Id.* § 1255(h)(2)(A).

SOMEWHERE IN THE MIDDLE?

Many immigrants, once in the United States, wish to convert a temporary status—such as TPS—to LPR status. Sadly, recent developments—most notably, the Supreme Court's decision in *Sanchez v. Mayorkas*—have made conversion impossible for all TPS holders who entered unlawfully and have yet to re-enter the United States. There is no question that TPS holders who have been inspected, admitted, and are visa-eligible can convert status, as they meet all the statutory elements for doing so.[82] Under several parts of the INA, even the "admission" requirement" is waivable for status conversion. Prior to *Mayorkas*, some federal circuits allowed the Attorney General to waive "admissibility" for status conversion, but this option is no longer available. *Mayorkas* further restricted the options for immigrants seeking to stay in the United States. Closing off this path is particularly devastating considering the extended duration of TPS designation for many countries.

This Part scrutinizes the "admission requirement" and inadmissibility under 8 U.S.C. §§ 1182, 1254a, and 1255 in order to analyze jurisprudence on status conversion. Sections II.A and B examine the earlier fracture between circuit courts that analyzed whether statutory conversion was permissible. These sections compare circuits that allowed status conversion through inadmissibility waivers and those that did not, which led to an ambiguous conversion doctrine prior to *Mayorkas*. Section II.C will then lay out the Supreme Court's reasoning in *Mayorkas*, which held status conversion no longer possible for inadmissible TPS holders. In doing so, Section II.C will set up a discussion about how the Biden Administration's pursuit of the *Mayorkas* case likely eliminated an administrative pathway for resolution of this important policy issue.

A. The Sixth and Ninth Circuits Permitted Status Conversion Through Inadmissibility Waiver

The main disagreement between circuits came from the interpretation of the interplay between 8 U.S.C. §§ 1254a(f)(4) and 1255. The Sixth and Ninth Circuits interpreted § 1254a(f)(4), which

82. To do otherwise would render 8 U.S.C. § 1254a(f)(4), which states that "for purposes of adjustment of status under section 1255 of this title and change of status under section 1258 of this title, the alien shall be considered as being in, and maintaining, lawful status as a nonimmigrant," superfluous. The text clearly references that some status adjustment is possible. 8 U.S.C. § 1254a(f)(4).

states that TPS holders maintain "lawful status as [] nonimmigrant[s]" with respect to status conversion, as thereby waiving any admissibility requirement under § 1255.[83] Conversely, the Third, Fifth, and Eleventh Circuits interpreted § 1255(a), which requires those seeking conversion of status to be "inspected and admitted" into the United States, as unaltered by § 1254a(f)(4).[84] These five circuits each had their own policy-based reasons for permitting or denying conversion of status based on the facts of the individual cases, as will be explored below.

Overall, the Sixth and Ninth Circuits were the strongest advocates for status conversion under TPS-to-LPR jurisprudence. In *Flores*, the Sixth Circuit focused on the fact that Saady Suazo, a foreign national, met two out of the three requirements for conversion of status—a family visa was available to him, and he had applied for status conversion.[85] Suazo had married and even begun raising a family in the United States.[86] During his possession of TPS, Suazo had maintained "good moral character."[87] Because of Suazo's familial presence and moral character, the Sixth Circuit concluded that Suazo was "the exact type of person that Congress would have in mind to allow adjustment of status from TPS beneficiary to LPR."[88] Thus, these policy considerations likely swayed the court in Suazo's case.

Beyond the individual facts and policy considerations in Suazo's case, the Sixth Circuit also relied on the text of the INA to allow conversion of status. The court interpreted § 1254a(f)(4) with respect to the entirety of § 1255 and stated that the Third, Fifth, and Eleventh Circuits' reading of § 1254a(f)(4) would have the effect of limiting § 1254a(f)(4)'s application to only waiving the admission requirement for immigrants who have worked without authorization under § 1255(c)(2).[89] Describing this reading as unduly specific, the Sixth Circuit concluded that Congress intended a broader reading to

83. *See* Ramirez v. Brown, 852 F.3d 954, 962–63 (9th Cir. 2017); *see also* Flores v. U.S. Citizenship & Immigr. Servs., 718 F.3d 548, 552–53 (6th Cir. 2013).

84. Sanchez v. Sec'y U.S. Dep't of Homeland Sec., 967 F.3d 242, 250–51 (3d Cir. 2020) *cert. granted sub nom.* Sanchez v. Wolf, 2021 WL 77237 (2021); Serrano v. U.S. Att'y Gen., 655 F.3d 1260, 1265–66 (11th Cir. 2011).

85. *Flores*, 718 F.3d at 550. Suazo, the applicant, petitioned for conversion of status fifteen years after coming to the United States. *Id.*

86. *Id.* at 549.

87. *Id.* at 550.

88. *Id.* at 555.

89. *Id.* at 553.

apply to the entirety of § 1255.[90] In doing so, the Sixth Circuit's reading effectively assumed that a TPS grant or waiver of inadmissibility acted as a "fictional entry" for the purposes of § 1255, or just a waiver that carries over to § 1255.[91]

The district court had held that the plain language of the immigration statutes precluded Suazo from status conversion because he was not formally "inspected or admitted to the United States" pursuant to 8 U.S.C. § 1255.[92] However, the Sixth Circuit overturned the district court's decision because of three requirements, two of which Suazo uncontrovertibly met: First, he had applied for adjustment of status and, second, an immigrant visa was immediately available to him by means of his wife.[93] However, the third requirement for status adjustment was that he be "inspected and admitted" or paroled under 8 U.S.C. § 1255.[94] Suazo did not meet the literal meaning of "inspected and admitted" into the United States because, while the TPS statute considered him "lawfully in" the United States, he never lawfully entered through a port-of-entry. Nevertheless, the Sixth Circuit stated that the Attorney General has limited discretion to adjust status under § 1254a(c)(2)(A)(iii) and that the TPS holders were not statutorily barred from doing so under § 1182.[95] These reasons counseled for allowing Suazo to convert to LPR status.[96]

The 2017 Ninth Circuit case *Ramirez v. Brown* presented a strikingly similar factual scenario to *Flores*. Jesus Ramirez entered the United States in 1999, was granted TPS in 2001, married a U.S. citizen in 2012, was the subject of an I-485 petition for a family visa, and continuously reapplied for TPS successfully until the denial of his LPR status.[97] Thus, many of the same policy considerations that the Sixth Circuit considered would also apply to Ramirez's case: He had been a TPS holder for a long time, in good standing, and had a family with him in the United States. However, the Ninth Circuit focused on the practical implications of prohibiting conversion of status for those who

90. *Id*.

91. For a brief discussion on the notion of a "fictional legal entry," see Velasquez v. Barr, 979 F.3d 572, 580 (8th Cir. 2020).

92. *Flores*, 718 F.3d at 550.

93. *Id.* at 551.

94. *Id.*

95. *Id.* at 553.

96. *Id.* at 555–56.

97. Ramirez v. Brown, 852 F.3d 954, 957–58 (9th Cir. 2017).

were not lawfully admitted. Specifically, it focused on the burden of requiring otherwise convertible immigrants to leave the United States and return through a "port-of-entry," rather than just converting them using the existing TPS structure from within the United States.[98]

Moreover, the Ninth Circuit focused on the requirements for lawful nonimmigrant status.[99] It honed in on the fact that submitting citizenship and other identification procedures were required to demonstrate admissibility into the United States, noted the stringent waiver possibilities for admission, and cited the possibility of immigrant interviews as evidence of the "rigorous inspection process" that compares to admission processes generally as evidence supporting conversion of status.[100] Like the Sixth Circuit, the Ninth Circuit mentioned the awkwardness with which immigration agencies treated § 1254a(f)(4) as referencing § 1255(c)(2) only, solely because both sections use the term "lawful status."[101] To read the section this way would create an anomalous result: Section 1255(c)(2) does not apply to a citizen's TPS-holding relatives.[102] Accordingly, this would constrict § 1254a(f)(4) because it would limit TPS conversion to work-visa applicants rather than family-visa applicants.[103] Apart from the text, there was no evidence supporting this reading of the statute.[104] Finally, the Ninth Circuit concluded that the language between §§ 1254a and 1258 is parallel, substituting "lawfully admitted" with "being in lawful status," thereby equating the two terms.[105] Accordingly, through reading the statutes together and ascertaining the purpose of the statues, the Ninth Circuit, too, concluded that TPS-to-LPR conversion was permissible for an "inadmissible" foreign national.

B. Other Circuits Prohibit Status Conversion Through Inadmissibility

98. *Id.* at 961–62.

99. *Id.* at 960.

100. *Id.* at 958.

101. *Id.* at 961–62.

102. *Id.* at 962.

103. *Id.*

104. *Id.*

105. *Id.* ("Tracking the language in the two provisions, § 1254a(f)(4) equates 'being in . . . lawful status as a nonimmigrant' with § 1258(a)'s 'lawfully admitted . . . as a nonimmigrant.' This statutory mirroring is significant because § 1258 uses the word 'admitted,' . . . .").

Waiver

While the Sixth and Ninth Circuits allowed otherwise inadmissible TPS holders to convert to LPR through inadmissibility waivers, the Third, Fifth, and Eleventh Circuits came to the opposite conclusion, mainly based on the statutory text. The circuit split demonstrates the complexity of these immigration statutes.

1. The Third and Eleventh Circuits Preclude Conversion of Status Through Statutory Text

Completely contrary to *Ramirez* and *Flores*, the Third Circuit in *Sanchez v. Secretary United States Department of Homeland Security* concluded that TPS does not constitute an "admission" under the immigration statutes.[106] While the facts in *Sanchez* were mostly similar to those in *Ramirez* and *Flores*, the two plaintiffs in *Sanchez* were a husband and wife who both filed for adjustment of status after a long period of time in the United States.[107] The Third Circuit, disagreeing with the courts in *Ramirez* and *Flores*, stated that its own precedents drew a fine line between "admission" and "status" and that the two were not analogous.[108] The *Sanchez* court further noted explicit categories of immigrants that were allowed to convert status and stated that TPS holders did not fit into those categories,[109] while also noting that TPS is a temporary protection and thus cannot be sustained as conversion to permanent residency.[110] For these reasons, the Third Circuit stated that its precedents, textual support, and

106. Sanchez v. Sec'y U.S. Dep't of Homeland Sec., 967 F.3d 242, 244 (3d Cir. 2020), *cert. granted sub nom.* Sanchez v. Wolf, 2021 WL 77237 (2021).

107. *See id.* The government did not contest the necessity of a visa requirement in this case, so the admission requirement was the ultimate determination at stake in *Sanchez*.

108. *Id.* at 245–46 (citing Hanif v. Att'y Gen., 694 F.3d 479, 485 (3d Cir. 2012)). The Third Circuit also suggested that "entry" required physical entrance, a point in tension with the holdings in *Flores* and *Ramirez*. *See* Taveras v. Att'y Gen., 731 F.3d 281, 290–91 (3d Cir. 2013). Through its precedents, the Third Circuit also concluded that TPS is not a program for entry. *See* De Leon-Ochoa v. Att'y Gen., 622 F.3d 341, 353–54 (3d Cir. 2010). These considerations suggest some of the Third Circuit's reasoning rested on its own precedents rather than broader interpretations of immigration law.

109. *See Sanchez*, 967 F.3d at 247.

110. *Id.* at 249.

statutory structure militated against status conversion.[111] Last summer, the Supreme Court affirmed the Third Circuit's decision.[112]

The Eleventh Circuit, in 2011, came to a similar conclusion, precluding conversion of status in *Serrano v. United States Attorney General*,[113] though for slightly different reasons. Similar to the TPS holders in *Flores* and *Ramirez*, Jose Garcia Serrano, a citizen of El Salvador, entered the United States in 1996 unlawfully, registered for TPS in 2001, and married a U.S. citizen who filed a Petition for Alien Relative on his behalf in order for him to seek adjustment to LPR status.[114] The Eleventh Circuit concluded that 8 U.S.C. § 1254a(f)(4) limited status conversion to TPS holders who have been lawfully admitted to the United States.[115]

Of note, however, was the Eleventh Circuit's inclusion of a footnote citing *United States v. Orellana*,[116] where the Fifth Circuit concluded that a TPS applicant, who was technically statutorily ineligible for TPS because of a criminal conviction that he disclosed on his TPS application, could nonetheless be granted TPS.[117] Concluding that *Orellana* dealt with a case about a criminal conviction and that Serrano did not assert that he disclosed his unlawful entry on his application for TPS, the Eleventh Circuit found this information to be of little relevance.[118] Nevertheless, this footnote brings up an important consideration: If Serrano actually did fail to disclose his unlawful entry into the United States, he would have been ineligible for TPS and thus the status could not have acted as a waiver to

111. The Third Circuit also contested much of the reasoning in *Ramirez* and *Brown*. First, those cases did not distinguish between "status" and admission; second, the Ninth Circuit permits alternate constructions of "admission" when permissible per its case law; third, that the "anomalous result" for the statute not benefitting relatives of American citizens would be circumvented by inspection and admission; fourth, those decisions brought in other irrelevant statutory language to collapse admission and status together; and fifth, that the Ninth Circuit contradicts itself when it reads TPS as a form of limited, temporary relief that also facilitates permanent residence. *Id.* at 250.

112. *See infra* Section II.C.

113. *See* Serrano v. United States Att'y Gen., 655 F.3d 1260, 1265 (11th Cir. 2011).

114. *Id.* at 1263.

115. *Id.* at 1265.

116. United States v. Orellana, 405 F.3d 360 (5th Cir. 2005).

117. *Serrano*, 655 F.3d at 1265 n.4 (quoting *Orellana*, 405 F.3d at 363 n.8 (internal citation omitted)).

118. *Id.*

admissibility on those grounds because it was fraudulently obtained.[119] Yet, the Eleventh Circuit concluded that this point was irrelevant under its analysis because unlawful admission of any kind—disclosed or not—bars conversion of status.[120] This, however, would be important for an analysis following *Ramirez* or *Flores*: assuming that TPS acts as an inadmissibility waiver, if inadmissibility is through fraudulently induced TPS, the government cannot waive inadmissibility that it does not know about.

2. The Argument Against TPS as a Waiver for Inadmissibility

The Third Circuit took up this argument in *Saliba v. Attorney General of the United States*.[121] In that case, Saliba entered the United States in 1992 and provided falsified documentation stating that he was a citizen of Lebanon, leading to a grant of TPS, when in reality he was a citizen of Syria, a country whose citizens were ineligible for TPS at the time.[122] In 2001, Immigration and Naturalization Services (INS) "mistakenly" granted him LPR status despite his fraudulent procurement of TPS.[123] Saliba later applied for naturalization in 2006; USCIS discovered Saliba's fraudulent status and denied his application for naturalization.[124] Concluding that Saliba's misrepresentations were "necessary material to his procurement of his status" because his actual native country, Syria, was ineligible for TPS until much later, the Third Circuit held that Saliba was statutorily ineligible for LPR status.[125] Accordingly, if it had not been for a five-

119. *See* José A. Juarez Jr., *Flores v. United States Customs and Immigration Services: Clearing the Way to Admission for Temporary Protected Status Beneficiaries*, 45 CAP. U. L. REV. 549, 574 (2017).

120. *Contra id.* The Plaintiff's circuit court memo also makes no mention that he disclosed his status, only adding to the obscurity of the point in contention about whether Serrano simply failed to mention that he had disclosed his unlawful entry, or if he actually did not disclose unlawful entry altogether. *See generally* Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss, Plaintiff's Motion for Summary Judgment, and Request for Oral Argument, Serrano v. Holder, 2010 WL 2010007 (N.D. Ga. 2010).

121. Saliba v. Att'y Gen., 828 F.3d 182 (3d Cir. 2016).

122. *Id.* at 185.

123. *Id*.

124. *Id.* The Third Circuit affirmed the denial of naturalization.

125. *Id.* at 190.

year statute of limitations,[126] Saliba's improper LPR status would have been rescinded.[127]

The Fifth Circuit recently developed a new line of argumentation regarding status conversion in *Melendez v. McAleenan*.[128] In that case, Melendez, a Salvadoran citizen, entered the United States in 2000 on a one-month immigrant visa, failed to leave upon its expiration, and, after filing for TPS in August of 2001, was ultimately granted TPS.[129] Accordingly, Melendez was deemed an unlawful foreign national for over a year within the United States.[130] The Fifth Circuit looked to parse two parts of the relevant immigration statutes together. The first part barred adjustment of status of one "who has failed . . . to maintain continuously a lawful status since entry into the United States."[131] The second states that TPS holders, for the purposes of adjustment of status under § 1255, are considered to be in the United States and maintaining lawful status as nonimmigrants.[132] Melendez attempted to use the latter provision to cure the period of time during which he was unlawfully in the United States, implying that Melendez's TPS functioned as retroactive lawful entry into the United States for the purposes of status conversion.[133]

But the Fifth Circuit did not allow Melendez to cure his defective period for status conversion eligibility. To that end, the Fifth Circuit held that giving TPS this type of retroactive extension would result in TPS grants acting as a "new entry" into the United States.[134] Following this line of reasoning, the Fifth Circuit extended this to TPS holders who had initially entered the United States unlawfully—rather than overstaying an expired visa in the United States—as not qualifying for adjustment of status.[135] Thus, the court reasoned, TPS

126. 8 U.S.C. § 1256(a).

127. *Saliba*, 828 F.3d at 198.

128. Melendez v. McAleenan, 928 F.3d 425 (5th Cir. 2019).

129. *See id.* at 426. El Salvador was statutorily eligible as of March 2001.

130. *Id*.

131. 8 U.S.C. § 1255(c)(2).

132. *Id.* § 1254a(f)(4). *Melendez*, 928 F.3d at 427–28.

133. *Melendez*, 928 F.3d at 428.

134. *Id.* at 428–29. In effect, this would likely preclude any TPS holder who has not been "inspected and admitted" into the United States from converting status; precluding the retroactive extension would make TPS status conversion fail in a different manner than before.

135. Nolasco v. Crockett, 978 F.3d 955, 958 (5th Cir. 2020).

does not create a "fictional legal entry" for purposes of § 1255.[136] Either way, the end result for the Fifth Circuit was the same as the Third and Eleventh Circuits: The status holder cannot convert under either rationale.

The circuit court decisions have much differentiating them with respect to whether TPS is an inadmissibility waiver for the purposes of conversion to LPR. While some circuits perceived TPS to act as a formal waiver, others thought that allowing status conversion contravenes the statute's purpose, or suggested that courts should, at a minimum, defer to agency interpretation in cases where ambiguity is present. The Supreme Court resolved this issue last year.

C. Sanchez v. Mayorkas: The Supreme Court Weighs In

The circuit split on TPS-to-LPR jurisprudence did not go unnoticed. On June 7, 2021, the Supreme Court decided *Sanchez v. Mayorkas*, the appeal of *Sanchez v. Secretary United States Department of Homeland Security*. In the end, the Court unanimously concluded that TPS holders who entered the United States unlawfully are not eligible for LPR status solely because of TPS.[137]

The Court began by pointing out that § 1255(a)—which concerns conversion to LPR status generally—requires applicants to enter the country lawfully and with inspection in order to receive a grant of LPR status.[138] But further, § 1255(k), which concerns LPR applicants who had worked in the United States unlawfully at some point, also requires former unauthorized workers to enter the United States "pursuant to a lawful admission."[139] It followed that, because the petitioner in *Sanchez* worked unlawfully and was never "admitted" into the United States, he could not convert status—despite his grant of TPS.[140] Instead, the Court concluded that § 1254a(f)(4), which states that TPS holders are "considered as being in, and maintaining, lawful status as a nonimmigrant,"[141] only permits admitted TPS

136. *Id*. *But see* Velasquez v. Barr, 979 F.3d 572, 580 (8th Cir. 2020) (holding that TPS operated as a fictional legal entry, at least prior to *Mayorkas*).

137. Sanchez v. Mayorkas, 141 S. Ct. 1809, 1810 (2021).

138. *See id.* at 1811.

139. *Id.* at 1813.

140. *Id.*

141. 8 U.S.C. § 1254a(f)(4).

holders to convert status, rather than providing carte blanche for *any* TPS applicant to convert status—admitted or not.[142]

Sanchez argued that admission and conferral of nonimmigrant status are inextricably linked.[143] His reading of the statute was that any nonimmigrant status acted as a de facto admission and thus rendered him eligible for conversion of status.[144] Yet, the Court observed that there are other immigrants who can convert status absent admission via explicit statutory directive.[145] To the Court, it followed that because the INA included positive language indicating that other inadmissible foreign nationals could convert to LPR status, inadmissible TPS holders were precluded from converting status.[146] Because Congress did not textually provide for TPS grantees who lawfully entered the United States, the Court concluded that TPS holders who entered the country unlawfully could not convert status.[147] Finally, the Court noted that some foreign nationals that receive TPS *do* enter lawfully (for example, those who receive tourist visas and are granted status while in the country), and so § 1254a(f)(4) is not superfluous statutory text.[148]

And that was it. In eleven short pages, the Court struck down the realistic possibility of LPR status for thousands of TPS holders, including many who have been in the country for decades. As a result, while the Court resolved the circuit split, the underlying issue remains: How can TPS holders who have been in the United States for years—decades even—acquire some long-term assurance that they won't be removed from the country that they now call home if TPS?

III. CONGRESS SHOULD PROVIDE A PATHWAY TO PERMANENT RESIDENCY FOR UNLAWFUL ENTRANT TPS HOLDERS

The Supreme Court's decision in *Mayorkas* resolved the circuit split about whether status conversion for unlawful entrant TPS holders

142. *See Mayorkas*, 141 S. Ct. at 1813 ("Lawful status and admission, as the court below recognized, are distinct concepts in immigration law: Establishing one does not necessarily establish the other.").

143. *See id.* at 1814.

144. *See id.*

145. *See id.* at 1810; *see, e.g.*, 8 U.S.C. §§ 1101(a)(10), (a)(15)(D)(i), (a)(13)(B) (specific foreign crewmen).

146. *See Mayorkas*, 141 S. Ct. at 1814–15.

147. *Id.* at 1815.

148. *See id.*

was statutorily permissible. Yet, the underlying issue for many statusholders remains. Rather than an issue of law, this turned into an issue of policy.

Section III.A proposes a legislative framework for resolving the outstanding conversion issue for unlawful entrant TPS holders. It discusses how the Biden administration's oral argument during *Sanchez v. Mayorkas* indicated a willingness to resolve the conversion issue through administrative remedies rather than through the courts. But, because of the holding in *Sanchez*, the Supreme Court foreclosed administrative remedies as a stopgap, pending legislation to resolve this issue. Section III.B then describes how Congress can proceed to set out a framework for conversion of TPS-to-LPR status for unlawful entrants. It concludes by arguing that some conversion for unlawful entrants should be permitted as a baseline under the statutory scheme, but that Congress could leave discretion to immigration agencies in order to promulgate regulations to avoid agency backlogs and improve efficiency.

A. Considerations for TPS Holders Looking to Convert and Future Congressional Outlook

1. Looking Forward in the Biden Administration

The Biden administration has already shown more willingness to effectuate pro-TPS changes than its predecessor. For example, the Biden administration has decided to review every Trump-era determination of termination of TPS.[149] Moreover, the Biden team granted TPS designations to Venezuela and Myanmar and extended TPS designations for Haiti, Honduras, Nepal, Nicaragua, and Sudan following Trump-era terminations.[150] While the Biden administration's early days have reinvigorated TPS following these terminations, the Trump-era policies reflect the unstable and vulnerable nature of TPS holders who entered unlawfully and have yet to lawfully re-enter the United States.[151] Thus, if the Biden

149. *The Biden Plan For Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS: DEMOCRATS, https://joebiden.com/immigration/ [https://perma.cc/2YZ7-ALFQ].

150. *See Temporary Protected Status*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/temporary-protected-status#tps_countries [https://perma.cc/VM72-W37R]; *see also* Melissa Cruz, *Biden Begins to Restore Temporary Protected Status. Which Countries Could Get TPS Next?*, IMMIGR. IMPACT (Mar. 25, 2021), https://immigrationimpact.com//03/25/countries-with-tps-next-biden/#.YkOLxxDMK3I [https://perma.cc/USB9-P6V3].

151. *See supra* discussion accompanying notes 47–51.

administration (or, thinking ahead, a future presidential administration) changes course and fails to renew TPS when necessary in the future, the uncertainty of the Trump-era policies could return.

But President Biden has already begun the process of reforming the U.S. immigration system by proposing the U.S. Citizenship Act of 2021 ("Citizenship Act").[152] Even more, the Citizenship Act permits that TPS holders who have been continuously present in the United States since January 1, 2017 are automatically LPR eligible if they submit a background check, complete an application, and pay the necessary filing fees.[153]

Yet, by its text, the Citizenship Act requires TPS holders admitted after January 1, 2017 to acquire a new form of status, Lawful Prospective Immigrant (LPI) Status, and hold LPI status before being allowed the chance to convert to LPR status.[154] This is a good start. Yet, prospective LPI holders would need to maintain LPI status for five years before converting to LPR status.[155] The upshot is this: if somebody held TPS on January 1, 2017, they could convert immediately. If another TPS holder received TPS just one day later, that TPS holder would need to wait an additional five years before converting status. While the bill is a good start, it lacks a mechanism for post-January 1, 2017 TPS holders to avoid at least some of this five-year waiting period. To that end, for some long-term TPS holders, the bill as constructed would add another half-decade to their already extensive waiting time to convert status. Therefore, the Citizenship Act, during the legislative process, should at least be amended to afford immigration agencies the discretion to create affirmative procedures for lessening this waiting time. At the same time, it should not permit new limitations on status conversion so as to avoid future administrations from eroding TPS protections arbitrarily, much like the previous administration did.

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152. *See generally* U.S. Citizenship Act of 2021, S. 348, 117th Cong. (2021).

153. *Id.* § 245E(a)(3); 245G(b).

154. *Id.* § 245B, 245C(a)(3), 245E(a). While TPS is available to foreign nationals of only some Attorney General-designated countries, LPI status is available to all foreign nationals. Yet, both statuses require applications, have continuous residency requirements, and have parallel grounds of inadmissibility. U.S. Citizenship Act of 2021 § 245G; 8 U.S.C. § 1254a(2). However, LPI eligibility requires that the applicant be in the United States continuously since January 1, 2021; TPS requires an applicant to be in the United States starting on the date that the Attorney General designated their country's citizens to be TPS-eligible. U.S. Citizenship Act of 2021 § 245G(b)(3)(B)(i); 8 U.S.C. § 1254a(c)(1)(A)(i).

155. U.S. Citizenship Act of 2021 § 245C(a)(3).

Yet, passage of the Citizenship Act remains uncertain because of 8 U.S.C. § 1254a(h)(1), which mandates a supermajority in the Senate in order to modify any requirements of TPS-to-LPR conversion.[156] Thus, while the Citizenship Act is a good start, it still requires legislative refinement and needs to surpass the sixty-vote threshold in the Senate before passage into law. However, this legislative impediment could have been temporarily circumvented with some foresight from the Biden administration.

2. Lessons Learned from *Sanchez v. Mayorkas*

The Supreme Court granted certiorari for *Sanchez v. Mayorkas* on January 8, 2021—two weeks before President Biden's inauguration.[157] The new Biden administration proceeded to argue against Sanchez's conversion of status in front of the Supreme Court—and won.[158]

The decision in *Mayorkas* wasn't close—the Supreme Court unanimously ruled against conversion.[159] But on closer inspection, this was not a victory for the Biden administration. At oral argument, the government argued that a reading of the TPS statute that precluded conversion for unlawful entrant TPS holders was the *better* reading of the immigration statutes.[160] The government specifically avoided stating that the petitioner's reading was unreasonable;[161] it also insisted that it was still unnecessary to categorically preclude a reading of the conversion statute that would permit conversion of status.[162] In

156. It is not clear that such a requirement is constitutionally permissible. *See* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 DUKE L.J. 1772, 1775–76 (2003) (describing this "legislative entrenchment" as constitutionally suspect and inconsistent with democracy). *But see* Eric A. Posner & Adrian Vermeule, *Legislative Retrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2001) (defending entrenchment as necessary for policymaking).

157. Sanchez v. Wolf, 141 S. Ct. 973, 973 (2021).

158. *See* Sanchez v. *Mayorkas*, 141 S. Ct. 1809, 1809 (2021).

159. *Id.* at 1810.

160. *See* Transcript of Oral Argument at 32–33, *Mayorkas*, 141 S. Ct. 1809 (2021) (No. 20-315).

161. *Id.* at 23.

162. *See id.* at 32–33. When Justice Barrett inquired as to whether the government believed the conversion unambiguously favored a reading that precluded conversion, the government expressly stated that the agency should be tasked with interpreting the statute, and, as such, that the Court should hold that the better reading of the statute favored conversion—rather than the *only* version of the statute.

other words, the government tried to leave the door open for a different reading of the statute. But why does this matter?

First, at that time, the jurisprudence regarding conversion at the circuit court level was fractured, with several courts allowing conversion,[163] and several precluding conversion for unlawful entrant TPS holders.[164] Moreover, § 1255(a) authorizes the Attorney General to allow for status conversion under "such rules and Regulations as he may prescribe."[165] The government could have argued for *Chevron* deference under such a setup, but instead chose to avoid the *Chevron* analysis altogether.[166]

In fact, the government argued that the Court need only hold that the government's interpretation of the statute was the "better" reading of the statute, avoiding any *Chevron* issue, and the government alluded to the possibility that it could change its position on the interpretation of the status conversion statute.[167] The government's call for the Court to determine that conversion of status is precluded under §§ 1254a–1255 as "the better" reading of the statute rather than "the only" reading of the statute thus left open the possibility of arriving at a different interpretation later on.

For example, if the Supreme Court had held according to the government's wishes—that is, precluding conversion is the better (but not the *only*) reading of the statute—then the government would not be subsequently precluded from using administrative action to change course.[168] First, changes in legal interpretation sometimes occur when transitioning between different administrations.[169] More importantly, however, in *Brand X*, the Court established that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the

163. *See supra* Section II.A.1.

164. *See supra* Section II.A.2.

165. 8 U.S.C. § 1255(a). *See supra* notes 76–80.

166. *Chevron* is applicable in the immigration law context. *See* Immigr. & Naturalization Servs. v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999); Immigr. & Naturalization Servs. v. Cardoza-Fonseca, 480 U.S. 421, 466 (1987).

167. Transcript of Oral Argument, *supra* note 160, at 38–42. *See generally* Chevron U.S.A., Inc., v. Nat. Res. Def. Couns., Inc., 467 U.S. 837 (1984).

168. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005).

169. *Id.* at 981.

statute and thus leaves no room for agency discretion."[170] Thus, that case does not require an administrative agency to come first-in-time through an interpretation of an ambiguous statute: If a court comes first, so long as it does not expressly preclude an agency's reading, the agency can later interpret the ambiguous statute as it pleases.[171] To that end, had the Court signaled precluding conversion for unlawful entrant TPS holders, it would have effectively given the Biden administration a green light to permit conversion of status, should that have been the new administration's position.

But it did not. The Court rejected conversion of status, and Justice Kagan did not mince words in doing so:

> And § 1255 specifically recognizes that possibility. That section makes these so-called "U" nonimmigrants eligible for LPR status if they were *either* "admitted into the United States" *or* "otherwise provided nonimmigrant status." § 1255(m)(1). There could scarcely be a plainer statement of the daylight between nonimmigrant status and admission (except maybe for the alien crewmen provision). And that plain statement comes in a provision expressly enabling some unlawful entrants to adjust to LPR status. So when Congress does not speak in that manner—when it confers status, but says nothing about admission, for purposes of § 1255—we have no basis for ruling an unlawful entrant eligible to become an LPR.[172]

It is hard to imagine any other interpretation passing muster in federal court following this language from the Supreme Court. As a result, unlawful entrant TPS holders cannot convert to LPR status without leaving the country (if that is even practicable), and only Congress can provide otherwise. *Mayorkas* did not just preclude conversion status under the existing statutes and regulations, but it also in effect prohibited new regulations that would have allowed for conversion of status for unlawful entrant TPS holders.

Thus, the Biden administration's gamble in *Mayorkas* did not pay off. The case thus necessitates that Congress—rather than

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170. *Id.* at 982.

171. Of course, the agency must still use proper process in changing its interpretation of the statute. *See generally* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (explaining that changes in agency position must go through the APA's arbitrary and capricious review).

172. Sanchez v. Mayorkas, 141 S. Ct. 1809, 1814 (2021).

regulatory agencies—be the ones to create a framework for status conversion. But what can be learned from *Mayorkas*? Agencies should play more than just a part in the administration of the conversion framework. The agencies themselves are tasked with administering the U.S. immigration system for hundreds of thousands of TPS holders (and, including other foreign nationals, millions of non-U.S. citizens),[173] so any process for upholding humanitarian standards and effectuating administrative efficiency requires prompt reaction to real-world circumstances. Furthermore, this is not a new proposition: The immigration agencies already have rulemaking authority when adjudicating asylum claims.[174] Furthermore, the TPS regulations could operate on a system that limits the number of conversions per year, much like the ceiling the political branches put on admissible refugees.[175]

There is significant administrative burden associated with managing the hundreds of thousands TPS holders, especially given the cyclical nature of the status. More importantly, however, these agencies provide more nuanced rules for permitting conversion of status, as compared with Congress. Thus, the broader expertise that agencies have is vital in fixing the conversion scheme. It follows that, beyond simple administration of the TPS scheme as Congress enacts it, the immigration agencies could create regulations that make status conversion both more efficient and more sound from a humanitarian perspective.

3. Notice and Comment to Establish Rules Regarding TPS Adjustment to LPR Status

As *Mayorkas* illustrates, any legislation that provides for conversion of status should allow federal agencies to promulgate rules and regulations permitting broader access of conversion of status for TPS holders. Even under the existing statute, such power is left up to the Attorney General, "in his discretion and under such conditions as

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173. *See supra* Part I.

174. *See* 8 C.F.R. § 208.2(a)–(b); *see also* Brian L. Rooney, *Administrative Notice, Due Process, and the Adjudication of Asylum Claims in the United States*, 17 FORDHAM INT'L L.J. 954, 961 n.35 (1993) (discussing rules regarding asylum claims processes in administrative courts).

175. *See* RYAN BAUGH, OFF. OF IMMIGR. STATISTICS: DEP'T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2019 at 2 (2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/refugee_and_asylee_2019.pdf [https://perma.cc/P75B-98ZM].

he may prescribe."[176] It is clear that these agencies play some role in regulating access to LPR status for currently eligible applicants.

To begin, the Attorney General does have broad rulemaking authority under § 1255.[177] Thus, the conditions for which inadmissibility might be waived vary significantly. These include those who have simply entered the United States unlawfully, polygamists, and those unlawfully present for other immigration violations, among others.[178] Accordingly, the Attorney General could conclude that, while waiving inadmissibility may be proper for some TPS immigrants, waiving inadmissibility for the same immigrant for LPR status may be improper absent a longer waiting period, such as the five-year period in the U.S. Citizenship Act. Moreover, two TPS holders who have been inadmissible for the same reason might bring different concerns for adjustment of status: One might have family in the United States because of how long he has been in the country; the other fears persecution that, because of her individual circumstances, could extend well beyond her country's eligibility.

To emphasize this point on a more technical level, one TPS-to-LPR applicant might apply after working in the United States continuously for fifteen years, whereas the other might apply for a work-visa after six months. Thus, duration of residency and employment within the United States could be one consideration for adjustment of status, as the Sixth Circuit emphasized in *Flores*.[179] Additionally, as the Sixth Circuit mentions, the implications of Suazo's being continuously in the United States in "good moral character" and the fact that he had begun to raise a family also favored adjustment to LPR status.[180] Through considerations such as these, the Attorney General can determine rules more distinctly for adjustment of status.

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176. 8 U.S.C. § 1255(a). Similarly, § 1258(a) also discusses change from one class of nonimmigrant status to another.

177. "The status of an alien who was inspected and admitted or paroled into the United States . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence." 8 U.S.C. § 1255.

178. *See, e.g.*, *id.* § 1182(a)(9)(B), (a)(10)(A).

179. Flores v. U.S. Customs & Immigr. Servs., 718 F.3d 548, 555 (6th Cir. 2013) ("Mr. Suazo seems to be the exact type of person that Congress would have in mind to allow adjustment of status from TPS beneficiary to LPR. He has been in the United States for about fifteen years . . . .").

180. *Id.*

Yet, some believers of hardline immigration policy might fear that too-lax immigration policies would lead to heightened criminal activity or cause general economic harm. These fears would be unfounded. In a 2017 survey of TPS holders from Honduras, El Salvador, and Haiti living in metropolitan areas, over 80% were employed in the United States—exceeding the national employment average by around 20%.[181] Further, nearly one third had mortgages, and around half had health insurance.[182] Even more, TPS holders as a class had over 273,000 U.S.-citizen children.[183] Thus, TPS holders contribute substantially to the economy, and the absence of TPS-holder parents would harm their U.S. citizen-children. And, as far as criminal history is concerned, TPS holders need to disclose any criminal offenses in their applications in order to determine eligibility in the first place and for re-registration.[184] Such a concern should be a non-starter because the criminal history of the TPS holder would be known anyways. True, it might be hard for the government to figure out whether a TPS candidate has a criminal history based on their country's internal domestic strife. But forcing an applicant to re-enter through a port-of-entry would not solve this issue: lying to get into the country would be similarly as hard to detect as lying to stay in the country.

Of course, the federal immigration system has its flaws, not least of which are the human rights aspects of the system.[185] However, many of the critiques around the immigration system stem from civil rights violations, gender discrimination, and family separation.[186] While these raise substantial concerns for immigration broadly, at the TPS conversion stage, the risks are muted: TPS holders are lawfully in the United States for extended periods of time, and so conversion does not pose the risks of (and is intended to avoid) leading TPS holders into family separation or detention centers. Even then, to alleviate any concerns about humanitarian issues prior to TPS

181. *See* Warren & Kerwin, *supra* note 33, at 577, 581–82.

182. *Id.* at 577, 583, 586.

183. *Id.* at 577, 581, 587.

184. *See* I-821, APPLICATION FOR TEMPORARY PROTECTED STATUS, U.S. CITIZENSHIP & IMMIGR. SERVS. 7, https://www.uscis.gov/sites/default/files/document/forms/i-821.pdf [https://perma.cc/93DL-K8BZ].

185. *See generally Trauma at the Border: The Human Cost of Inhumane Immigration Policies*, U.S. COMM'N ON CIVIL RIGHTS (2019), https://www.usccr.gov/files/pubs/2019/10-24-Trauma-at-the-Border.pdf [https://perma.cc/SRH4-CJ8G] (decrying the Zero Tolerance policy and forcible separation of families as a "gross human and civil rights violation").

186. *Id.*

conversion regulations through immigration agencies, Congress could set baseline requirements for nondiscrimination or other humanitarian concerns. Taking these considerations into account, ideal legislation would make it so agencies would regulate rights upwards, but not diminish the pre-existing rights that Congress has ordained.

Finally, allowing for adjustment of status would also lighten the administrative burdens on the government, should the government decide that, though admissibility is waived, adjustment should be limited. The present burdens on the immigration system are well-documented because of the continuous renewal process that TPS requires.[187] With the addition of hundreds of thousands of TPS-eligible Venezuelans, this burden will only grow heavier.[188] Allowing broader conversion of status would help alleviate that backlog. To be sure, the administrative burdens would likely be heavier in the short term but optimizing status conversion would alleviate these burdens in the long run due to TPS's continuous renewal requirements. Lawful Permanent Residents do not face the same renewal requirements.[189]

Thus, instead of requiring TPS holders to reapply as their country is redesignated for TPS, allowing a breadth of these statusholders to adjust to LPR status would, over time, reduce the burdens on U.S. immigration agencies. Even more, beyond just TPS, other areas that immigration agencies deal in are similarly burdened and dredge on because of bureaucratic limitations.[190] With over 400,000 TPS applicants presently within the United States, allowing conversion for a broader class of statusholders would facilitate a more efficient immigration and naturalization system.

187. *See* discussion *supra* notes 61–63.

188. *See* Tracy Wilkinson & Molly O'Toole, *Biden Administration Giving Temporary Protected Status to Thousands of Venezuelans in U.S.*, L.A. TIMES (Mar. 8, 2021), https://www.latimes.com/politics/story/2021-03-08/biden-administration-to-give-temporary-protected-status-to-thousands-of-venezuelans-in-u-s [https://perma.cc/PP8Q-R3TG].

189. LPR holders can fail to maintain their status by naturalization or losing or abandoning the status, such as by permanently moving to another country or declaring themselves as nonimmigrants on their tax returns. *See Maintaining Permanent Residence*, U.S. CUSTOMS & IMMIGR. SERVS., https://www.uscis.gov/green-card/after-we-grant-your-green-card/maintaining-permanent-residence [https://perma.cc/F8BW-5SGX].

190. *See supra* Part I.

CONCLUSION

A critical understanding of both immigration and administrative law is essential in determining whether status conversion is statutorily permissible under U.S. immigration law. The *Mayorkas* decision precludes the Biden Administration from using regulatory powers to provide for conversion of status for many TPS holders. As a result, Congress should act swiftly in order to provide a pathway to permanent residency for thousands of long-term statusholders, whose futures remain uncertain under the current statutory framework. Finally, the administrative burdens of requiring TPS holders who entered the country unlawfully to leave and reapply just to satisfy the port-of-entry requirement are cumbersome on the U.S. immigration system. By granting regulatory power to immigration agencies in order to facilitate a smoother oversight process, Congress—with the assistance of the Attorney General and the U.S. immigration agencies—could create a more predictable and humane pathway to LPR status for thousands of TPS holders, while reserving the ability to oversee immigration law as provided by their administrative powers.

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