CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

NATIONAL OFFICE

8757 Georgia Avenue • Suite 850 • Silver Spring, MD 20910• Tel: 301.565.4800• Fax: 301.565.4824 • Website: www.cliniclegal.org

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Samantha Deshommes
Chief, Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
5900 Capital Gateway Drive
Camp Springs, M.D. 20746

Re: Docket ID number USCIS-2021-0004; Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input

Dear Ms. Deshommes,

The Catholic Legal Immigration Network, Inc. ("CLINIC")[1] respectfully submits the following comment in response to the U.S. Department of Homeland Security's ("DHS") "request for public input" "on how U.S. Citizenship and Immigration Services ("USCIS") can reduce administrative and other barriers and burdens … that prevent foreign citizens from easily obtaining access to immigration services and benefits."[2]

Rooted in the Gospel value of welcoming the stranger, CLINIC is the nation's largest network of nonprofit immigration legal services providers, with more than 370 programs in 49 states and the District of Columbia that collectively serve hundreds of thousands of low-income immigrants each year. CLINIC's activities include training and technical assistance, advocating for humane immigration policies, building the capacity of immigration programs, leading impact litigation, and running remote representation projects. Legal service providers in CLINIC's network presently represent clients who are and will be adversely affected by the USCIS policies identified in this comment.

[1] This comment was prepared with the assistance of Benjamin Seel, John Lewis, and Sean Lev of the Democracy Forward Foundation; Bradley Jenkins, Michelle Mendez, and Rebecca Scholtz of CLINIC; Tara Ganapathy and James B. Amler of Debevoise & Plimpton LLP; and Julie A. Soininen of Montagut & Sobral, PC. The above listed authors also serve as counsel for the plaintiffs in *Central American Resource Center ("CARECEN") v. Renaud*, Case No. 20-cv-2363 (RBW) (D.D.C. filed Aug. 26, 2020), a pending case which challenges the TPS Policy Alert discussed herein.

[2] *Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services*, 86 Fed. Reg. 20,398, 20,398 (Apr. 19, 2021).

Through this comment, CLINIC identifies two USCIS policies that impede the ability of Temporary Protected Status ("TPS") beneficiaries to obtain the benefit of lawful permanent resident ("LPR") status:

1. A policy alert announcing that "TPS beneficiaries who had outstanding, unexecuted final removal orders at the time of departure, remain TPS beneficiaries who continue to have outstanding, unexecuted final removal orders upon lawful return."[3]

2. An adopted decision of the Administrative Appeals Office ("AAO") holding that "TPS-authorized travel will not satisfy the requirements of 'inspected and admitted or paroled' into the United States for purposes of adjustment of status under section 245(a) of the Immigration and Nationality Act."[4]

These policies are inconsistent with the text and spirit of the President's stated goal of "ensur[ing] that our laws and policies encourage full participation by immigrants … in our civic life; that immigration processes and other benefits are delivered effectively and efficiently; and that the Federal Government eliminates sources of fear and other barriers that prevent immigrants from accessing government services available to them."[5] The two policies CLINIC has identified discourage "full participation … in our civic life,"[6] by imposing—instead of reducing—"barriers and burdens … that prevent [TPS beneficiaries] from easily obtaining access to immigration services and benefits."[7] Moreover, both policies are based on the same flawed reading of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA")—a set of technical amendments to the statute creating the TPS program. As explained more fully below, MTINA requires that TPS beneficiaries who travel with USCIS authorization "shall be inspected and admitted in the same *immigration status* the alien had at the time of departure."[8] Rather than giving "immigration status" its ordinary meaning, however, USCIS reads that phrase as "encompass[ing] the legal incidents of status,"[9] as well as all "circumstances" that might be said to apply.[10] In practice, this unlawful interpretation of the statute denies TPS beneficiaries the important protections associated with travel that Congress created for TPS beneficiaries three decades ago, and effectively precludes many thousands of TPS beneficiaries

[3] USCIS, PA-2019-12, *Policy Alert: Effect of Travel Abroad by Temporary Protected Status Beneficiaries with Final Orders of Removal*, at 2 (Dec. 20, 2019), https://bit.ly/3oi9ebQ (the "TPS Policy Alert"); USCIS, *Policy Manual*, Vol. 7, Pt. A, Ch. 3(D) n.19 [hereinafter USCIS-PM], https://bit.ly/33U6Azr (codifying the TPS Policy Alert into the USCIS policy manual).

[4] USCIS, PM-602-0179, *Policy Memorandum:* Matter of Z-R-Z-C-, *Adopted Decision 2020-02* , at 3 (AAO Aug. 20, 2020), https://bit.ly/3uG09fb ("*Matter of Z-R-Z-C-*"); *see also* 7 USCIS-PM B.2(A)(5), https://bit.ly/3bDQgHw (codifying the adoption of *Matter of Z-R-Z-C-* into the USCIS policy manual).

[5] Exec. Order No. 14,012, 86 Fed. Reg. 8,277, 8,277 (Feb. 5, 2021).

[6] *Id.*

[7] 86 Fed. Reg. at 20,398.

[8] MTINA, Pub. L. 102-232, § 304(c)(1)(A), 105 Stat. 1733 (emphasis added).

[9] *Matter of Z-R-Z-C-* at 8.

[10] TPS Policy Alert at 1; 7 USCIS-PM A.3(D) n.19.

from ever becoming eligible or able to adjust their status to lawful permanent resident and, eventually, become U.S. citizens.

As neither policy serves the professed policy interests of the Administration to ensure that immigrants can fully participate in civic life, nor passes muster under federal law, both should be promptly rescinded.

I. The TPS Policy Alert and USCIS's adoption of *Matter of Z-R-Z-C-* create barriers to accessing benefits and services.

A. The TPS Policy Alert

By its plain terms, the Immigration and Nationality Act ("INA"), codified at 8 U.S.C. § 1101 *et seq.*, mandates that, when an individual subject to a removal order "le[aves] the United States," they "shall be considered to have been … removed."[11] Thus, although it has not applied uniformly across field offices, USCIS—and its predecessor agency the Immigration and Naturalization Service ("INS")—has historically recognized that "a TPS alien who departs the United States while a deportation order is in effect carries out his or her own deportation."[12] And, on that basis, USCIS has accepted jurisdiction over adjustment applications submitted by TPS beneficiaries who lawfully returned to the United States after travel abroad pursuant to USCIS's authorization.

On December 20, 2019, the Office of the Director of USCIS published the TPS Policy Alert, which stated, in relevant part, that:

> [A] TPS beneficiary who obtains USCIS['s] authorization to travel abroad temporarily (as evidenced by an advance parole document) and who departs and returns to the United States in accordance with such authorization remains in the same exact immigration status and circumstances as when he or she left the United States. ***Such travel does not result in the execution of any outstanding removal order to which a TPS beneficiary may be subject***.[13]

The TPS Policy Alert amounted to a new, nationwide policy under which a TPS beneficiary's departure no longer has any legal effect on a prior removal order, which as a consequence of this new policy remains un-executed upon their lawful return.[14] Because USCIS now considers such applicants to have un-executed removal orders, it also considers jurisdiction over their applications

[11] INA § 101(g) (*as codified at* 8 U.S.C. § 1101(g)).

[12] Legal Op. from Paul W. Virtue, Acting Gen. Couns., INS to Terrance O'Reilly, TPS Coordinator, INS, *Advanced Parole for TPS Eligible Aliens in Deportation Proceedings*, Genco Op. 91-49, 1991 WL 1185160, at *3 (June 17, 1991); *Matter of R-D-S-B- Appeal of New York, New York District Office Decision*, 2018 WL 5981636, at *2 (AAO Oct. 26, 2018) (concluding that TPS beneficiary's "departure executed his final order of removal"); *In re* [Applicant name redacted], 2013 WL 5504876, at *3 (AAO Feb. 22, 2013) (concluding that TPS beneficiary's departure on advance parole "executed his final order of removal"); *cf. Nken v. Holder*, 556 U.S. 418, 440 (2009) ("Removal orders 'are self-executing orders, not dependent upon judicial enforcement.'") (quoting *Stone v. INS*, 514 U.S. 386, 398 (1995)).

[13] TPS Policy Alert at 1 (emphasis added).

[14] *Id.*

for adjustment to lie exclusively with the Executive Office of Immigration Review ("EOIR").[15] In effect, USCIS has, on a nationwide basis, divested itself of jurisdiction over adjustment applications submitted by TPS beneficiaries with final removal orders even though they subsequently departed the United States.

In practice, this means that TPS beneficiaries with removal orders effectively have no forum in which they can have their application for adjustment considered on the merits, let alone granted. If their application cannot be adjudicated by USCIS, TPS beneficiaries with removal orders will need to first convince the immigration court to reopen their long-closed case before the adjustment application will be considered. But the statutory right to reopen is generally unavailable to those who become eligible for adjustment more than 90 days after their removal order was entered and also to those who departed the United States while the removal order was effective.[16] Many TPS beneficiaries who traveled abroad with USCIS's consent long after receiving a final removal order will be constrained by these statutory dead-ends for reopening. These individuals are therefore reliant on the immigration court exercising its regulatory *sua sponte* authority to reopen their case for "exceptional circumstances,"[17] a challenging path that may well be foreclosed entirely.[18]

The TPS Policy Alert thus imposes tremendous burdens on TPS beneficiaries. Indeed, in nearly all cases, the insurmountable hurdles imposed by the TPS Policy Alert will serve to deprive noncitizens with decades-long ties to their communities of the opportunity to make those community ties permanent and will remove the incentive for other TPS beneficiaries, such as those in the process of building their lives in the United States, to deepen their community connections. For example:

- Blanca Mirna Romero del Cid is a national of El Salvador who has lived in the United States for approximately 26 years, where she has raised four U.S. citizen children. Ms. Romero took all necessary steps to apply for adjustment of status under USCIS's prior policy—even traveling to El Salvador on an advance parole travel document—but the TPS Policy Alert now stands in her way.[19]

- Jose Oscar Velasco Garcia finds himself is in a similar position. A national of El Salvador, Mr. Velasco has lived in the United States for approximately 27 years during which time he has married, started his own business, and raised two U.S. citizen children. And yet, despite taking all necessary steps to adjust status under USCIS's prior practice, the TPS

[15] *See* 8 C.F.R. §§ 245.2(a)(1), 1245.2(a)(1)(i); *see also* Mem. of P. & A. in Supp. of Defs.' Mot. to Dismiss at 2, *CARECEN*, No. 20-cv-2363 (D.D.C. Dec. 4, 2020), ECF No. 30-1.

[16] *See* 8 C.F.R. §§ 1003.2(c)-(d), 1003.23(b)(1).

[17] *See Matter of J-J-*, 21 I. & N. Dec. 976, 976 (BIA 1997).

[18] *See Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure*, 85 Fed. Reg. 81,588, 81,591 (Dec. 16, 2020) (the "Appellate Procedures Rule") (removing the ability of immigration judges to reopen cases *sua sponte*); *see also* Mem. Order, *CLINIC. v. EOIR*, Case No. 21-cv-94 (RJL) (D.D.C. Apr. 4, 2021), ECF No. 46 (staying the Appellate Procedures Rule).

[19] *See* Compl., *CARECEN*, No. 20-cv-2363, at ¶¶ 26-31 (D.D.C. Aug. 26, 2020) (the "Complaint"), ECF No. 1.

Policy Alert stands in Mr. Velasco's way, as USCIS now considers unexecuted a 1995 deportation order despite his subsequent authorized departure.[20]

- Heroldine Bazile is a 27 year old national of Haiti who has lived in the United States with her U.S. citizen father and siblings since she was eight months old. Although she traveled with USCIS's authorization prior to the TPS Policy Alert, that policy now blocks her from adjusting status because USCIS considers the removal order she received as a minor child to be unexecuted. As a result, Ms. Bazile is unable to adjust her status and ensure she can remain in the only country she has ever known.[21]

Importantly, the costs of this policy are born not only by the individuals who are no longer able to adjust their status, but also by the U.S. citizen family members who rely on these individuals for care and support. For example:

- Maria Floriselda Alvarez Gomez is a national of El Salvador who has lived in the United States for more than 25 years. Ms. Alvarez, who works as a restaurant manager, supports her four U.S. citizen children, including a daughter with autism. Although Ms. Alvarez took all of the predicate steps necessary to adjust her status, the TPS Policy Alert now prevents her from doing so. As a consequence, her future and that of her family is far less certain and secure.[22]

B. USCIS's adoption of *Matter of Z-R-Z-C*

On August 20, 2020, USCIS adopted the decision of the Administrative Appeals Office in *Matter of Z-R-Z-C-*, and instructed all USCIS officials to follow its reasoning in adjudications.[23] *Matter of Z-R-Z-C-* made several findings, including that "TPS-authorized travel will not satisfy the requirements of 'inspected and admitted or paroled' into the United States for purposes of adjustment of status under section 245(a) of the Immigration and Nationality Act."[24] *Matter of Z-R-Z-C-* reversed long-standing USCIS policy, under which USCIS and its predecessor agency, INS, had treated TPS beneficiaries who traveled on advance parole as having satisfied INA § 245's requirement that applicants for adjustment of status have been "inspected and admitted or paroled."

Perhaps recognizing the fundamental unfairness to TPS beneficiaries of reversing this longstanding position, USCIS elected to apply the policy only prospectively, meaning that TPS beneficiaries who returned from authorized travel *prior to* August 20, 2020 are considered to have been "inspected and admitted or paroled" upon their return.[25] Nevertheless, USCIS's adoption of *Matter of Z-R-Z-C-* will still preclude adjustment for many thousands of TPS beneficiaries who

[20] *Id.* ¶¶ 32-37.

[21] *Id.* ¶¶ 44-50.

[22] *See id.* ¶¶ 57-61; *see also* Daniella Cheslow, *TPS Holders in D.C. Region Sue To Stop Policy Change That Could Lead To Deportation*, DCist (Oct. 23, 2020), https://bit.ly/3wihhbt.

[23] *See Matter of Z-R-Z-C-* at 1; *see also* 7 USCIS-PM B.2(A)(5).

[24] *Matter of Z-R-Z-C-* at 3.

[25] *Id.* at 1.

initially entered without inspection and did not have the opportunity to travel pursuant to an advance parole document before August 20, 2020.

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Both the TPS Policy Alert and the *Matter of Z-R-Z-C-* Adopted Decision leave TPS beneficiaries in an uncertain and precarious position. Absent these policies, many more TPS beneficiaries would be able to regularize their status, plan for their future, and deepen their ties in communities that some have called home for decades. These policies also deny them the ability to become naturalized U.S. citizens, should they wish to do so. Collectively, the TPS Policy Alert and the adoption of *Matter of Z-R-Z-C-* discourage "full participation … in our civic life," and are appropriate for review and rescission under Executive Order 14,012.

II. The TPS Policy Alert and USCIS's adoption of *Matter of Z-R-Z-C-* rely on the same faulty construction of MTINA.

A. USCIS's construction of MTINA in the TPS Policy Alert and *Matter of Z-R-Z-C-* contradicts unambiguous statutory language.

Documents implementing these policies make clear that USCIS relied entirely on an erroneous interpretation of language in Section 304(c) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991—a set of technical amendments to the TPS statute—as the basis for these important changes.[26] USCIS's reliance on its flawed interpretation of MTINA provides further reason to review and rescind these polices.[27]

Section 304(c) of MTINA is contained in a note to INA § 244 and provides that a TPS beneficiary who travels on advance parole "shall be inspected and admitted in the same *immigration status* the alien had at the time of departure."[28] Rather than giving "immigration status" its ordinary meaning, however, USCIS reads that phrase as "encompass[ing] the legal incidents of status,"[29] as well as all "circumstances" that might be said to apply.[30] In practice, this means that USCIS considers a TPS beneficiary with a removal order who obtains an advance parole document, departs, and lawfully returns through a port of entry to return in the "status" of a TPS beneficiary with an unexecuted removal order who has been neither inspected, admitted, nor paroled.[31] That reading of MTINA pushes the statute past the breaking point.

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[26] *See* 7 USCIS-PM A.3(D) n.19 (citing MTINA § 304(c)); *see also Matter of Z-R-Z-C-* at 5-6.

[27] Although CLINIC believes the meaning of MTINA is clear, the substantial burden these policies impose on TPS beneficiaries seeking to adjust their status provides reason enough to review these policies for rescission, even if USCIS believes MTINA leaves room for multiple plausible interpretations.

[28] MTINA § 304(c)(1)(A) (emphasis added).

[29] *Matter of Z-R-Z-C-* at 10.

[30] TPS Policy Alert at 1; 7 USCIS-PM A.3(D) n.19.

[31] *See Matter of Z-R-Z-C-* at 10-11.

The term "status," as it is used in MTINA—a statute amending the law creating the Temporary Protected *Status* program—refers to a TPS beneficiary's status as a TPS *recipient* and not anything else.[32] That common-sense interpretation is consistent with how the term "status" is used throughout immigration law.[33] It is also consistent with how courts have understood that term.

In *Gomez v. Lynch*, for example, the Fifth Circuit rejected the argument that a noncitizen who had traveled abroad and been "admitted" upon his lawful return would revert to a status of "'present in the United States without being admitted or paroled'" once their status as a temporary resident lapsed.[34] "Status," the Fifth Circuit found, relates only to a noncitizen's "permission to be present."[35] While "specific characteristics"—such as "lack of admission" or "work authorization"—may lead to "various subsidiary descriptions within th[e] categories" of immigrant status or nonimmigrant status, they are not part of the noncitizen's *status*.[36] Thus, while the "lack of admission can *cause* … unlawful status, … it is not *part* of that unlawful status."[37] In other words, MTINA is concerned only with ensuring that a TPS beneficiary returning from a period of authorized travel returns to their *status* as a TPS beneficiary; any "circumstances" or "incidents" are not part of that "status."

The error USCIS commits by adopting an expansive understanding of "status" is illustrated by the conflict that interpretation creates with plain statutory language.

i. The TPS Policy Alert's erroneous interpretation of MTINA

The TPS Policy Alert's assertion that a TPS beneficiary's authorized departure from the United States has no legal effect on any prior removal order,[38] cannot be squared with INA § 101(g)'s explicit statement that one who has been "ordered deported or removed" and "has left the United States[] shall be considered to have been deported or removed."[39] As the Ninth Circuit has stated, that "plain statutory text clearly envisions that any departure is sufficient to execute a removal order."[40] In this regard, USCIS has not argued that MTINA's technical amendments were meant

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[32] *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted) ("[A] statute is to be read as a whole … since the meaning of statutory language, plain or not, depends on context").

[33] *See, e.g.*, INA § 101(a)(20) (defining "[t]he term 'lawfully admitted for permanent residence'" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant"); *id.* § 101(a)(27)(I) (referring to "the status of a nonimmigrant"); *id.* § 214 (differentiating between "immigrant" and "nonimmigrant status").

[34] 831 F.3d 652, 658-60 & n.11 (5th Cir. 2016) (citations omitted).

[35] *Id.* at 658-59 & n.10.

[36] *Id.*

[37] *Id.* at 659; *see also Matter of Blancas–Lara*, 23 I. & N. Dec. 458, 460 (BIA 2002) (describing "status" as a "term of art" that "denotes someone who possesses a certain legal standing" as an immigrant or nonimmigrant).

[38] TPS Policy Alert at 2.

[39] INA § 101(g).

[40] *Nicusor-Remus v. Sessions*, 902 F.3d 895, 899 (9th Cir. 2018); *see also Mrvica v. Esperdy*, 376 U.S. 560, 563 (1964) (noting that there is "no doubt" under the statute that a departure after a deportation order executes the order); *Mansour v. Gonzales*, 470 F.3d 1194, 1199 (6th Cir. 2006) (brief, voluntary trip abroad executed removal order).

to implicitly repeal INA § 101(g)'s plain language. Such an assertion would be both strongly disfavored,[41] and surpassing strange in this context, since MTINA was enacted, as its name implies, to make only "certain technical corrections,"[42] so that the Immigration Act of 1990's substantive reforms would be "more logical, easier to implement, and *fairer* for all."[43]

ii. *Matter of Z-R-Z-C-*'s erroneous interpretation of MTINA

Matter of Z-R-Z-C- commits a similar error by reading MTINA as requiring TPS beneficiaries returning from authorized travel to be returned to their "status" as "a TPS recipient who was not inspected and admitted or paroled into the United States."[44] As an initial matter, that reading of MTINA ignores MTINA's plain language, which states that returning TPS beneficiaries "shall be inspected and admitted."[45] But *Matter of Z-R-Z-C-* also ignores the plain language of the INA, which defines "admission" to mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[46] Contrary to *Matter of Z-R-Z-C,* a TPS beneficiary who embarks on authorized travel abroad and then lawfully reenters after submitting to an inspection by a U.S. Customs and Border Protection ("CBP") official has plainly been inspected, authorized, and admitted.[47]

Each of these incongruities stems from *Matter of Z-R-Z-C-*'s fundamental flaw: its interpretation of "status" in MTINA § 304(c) to include the circumstances of a prior entrance. But, as discussed above, courts have made clear that the circumstances of a prior entrance do not constitute "status,"[48] and there is good reason to reject such a reading of MTINA here, where the "inspected and admitted" language used in MTINA § 304(c) mirrors that which Congress used in establishing eligibility for adjustment of status. INA § 245(a) (*as codified at* 8 U.S.C. § 1255(a)). Given that Congress enacted MTINA to make the administration of immigration law, including as it applies to TPS beneficiaries, "more logical, easier to implement, and fairer,"[49] there is no good reason to presume that Congress would have used the same words to establish eligibility for adjustment in

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[41] *See Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citation omitted) ("[R]epeals by implication are not favored.").

[42] MTINA, 105 Stat. at 1733 (preamble).

[43] 137 Cong. Rec. 34,791 (1991) (emphasis added); *see also* H.R. Rep. No. 102-383, 1991 WL 257487, at *2 (1991) ("In light of the scope and complexity of the 1990 [Immigration] Act … a number of technical errors in the [1990 Immigration Act] have come to [our] attention …. H.R. 3670 is principally designed to correct those errors[.]"); *Nat'l Ass'n of Mfrs. v. U.S. Dep't of Labor*, No. 95-cv-0715, 1996 WL 420868, at *4 (D.D.C. July 22, 1996) ("In order to correct errors that Congress perceived in the [Immigration Act of 1990] … Congress passed the Miscellaneous and Technical Immigration and Naturalization Amendments[.]").

[44] *Matter of Z-R-Z-C-* at 4.

[45] MTINA § 304(c)(1)(A).

[46] INA § 101(a)(13)(A).

[47] *Matter of Z-R-Z-C-* at 4. Indeed, *Matter of Z-R-Z-C-* holds that this fact pattern does not even amount to a "parole"—which would also satisfy the requirement for adjustment of status, INA § 245 (a)—despite acknowledging that TPS beneficiaries travel with USCIS authorization on advance *parole*, *Matter of Z-R-Z-C-* at 9.

[48] *Gomez*, 831 F.3d at 658-60 & n.11.

[49] 137 Cong. Rec. 34,791 (1991).

one context and to foreclose the possibility of adjustment for many TPS beneficiaries entirely in another.[50]

Matter of Z-R-Z-C- suggests that this reading is justified so as to avoid a scenario in which a TPS beneficiary is "inspected and admitted" and thereby "in a better position than they had been upon their physical departure from the United States pursuant to TPS-authorized travel."[51] But this misses the same point. MTINA is concerned with the non-citizen being returned to the same status—*i.e.* TPS.[52] The statute does nothing to disturb the ordinary consequences of authorized travel, which have long been recognized as a means for meeting the adjustment of status requirement found in INA § 245(a). Thus, a non-citizen can be returned to their TPS status and also deemed "inspected and admitted" for purposes of adjustment eligibility under INA § 245, or at a minimum, "paroled" pursuant to their return under a grant of advance parole.

iii. INS's contemporaneous understanding of MTINA confirms that USCIS's recently adopted view of MTINA is wrong.

A review of opinions issued around the time of MTINA's enactment by USICS's predecessor agency, INS, further confirms that the interpretation of MTINA expressed in the TPS Policy Alert and *Matter of Z-R-Z-C-* is unsupported. Prior to the enactment of MTINA, INS had concluded that (1) re-entrance following a period of authorized travel pursuant to advance parole satisfied the "inspected and admitted or paroled" requirement of INA § 245(a),[53] and (2) a TPS beneficiary's authorized "departure executes the deportation order."[54] INS's position at the time, however, was that TPS beneficiaries returning from a period of authorized travel could face exclusion proceedings, which contained fewer procedural protections than the deportation proceedings TPS beneficiaries would have been subject to prior to their departure.[55] In response to this narrowing of procedural rights by INS, Congress enacted MTINA § 304(c)(1), which amended, in relevant part, the portion of the Immigration Act of 1990 governing travel authorization for TPS beneficiaries. By providing that a TPS beneficiary "*shall be inspected and admitted* in the same immigration status the alien had at the time of departure," MTINA § 304(c)(1)(A) (emphasis added), Congress ensured that returning TPS beneficiaries would be "inspected and admitted" and thus protected against those "exclusion" proceedings upon their return.[56]

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[50] *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) ("[W]e presume that the same term has the same meaning when it occurs here and there in a single statute.").

[51] *Matter of Z-R-Z-C-* at 8.

[52] *See* MTINA § 304(c).

[53] *See* Legal Op. from Paul W. Virtue, Acting Gen. Couns., INS to Jim Puleo, Assoc. Comm'r, Examinations, INS, *Temporary Protected Status and Eligibility for Adjustment of Status under Section 245*, INS Genco Op. No. 91-27, 1991 WL 1185138, at *1-2 (Mar. 4, 1991) (holding that "[d]eparture and return under advance parole would relieve" immediate relatives and special immigrants "of ineligibility for adjustment only if the alien is classified as an immediate relative or as a special immigrant").

[54] Legal Op. from Paul W. Virtue, Acting Gen. Couns., INS to Terrance O'Reilly, TPS Coordinator, INS, *Advanced Parole for TPS Eligible Aliens in Deportation Proceedings*, Genco Op. 91-49, 1991 WL 1185160, at *3 (June 17, 1991).

[55] *See id.* at *2.

[56] *Id.*

Two months after MTINA's enactment, INS stated that MTINA represented "a conscious choice made by Congress to preserve certain deportation and exclusion rights for TPS aliens who have been granted authorization to travel."[57] It was these heightened procedural protections—which Congress safeguarded through its instruction that TPS beneficiaries are "inspected and admitted" upon their return—that INS referred to as "incidents of status."[58] Likewise, the INS General Counsel's recommendation that TPS beneficiaries "should not be given advance parole, or be paroled upon return, unless they are already in parole status" was meant to avoid a scenario in which a returning TPS beneficiary was subjected to exclusion proceedings.[59] Nowhere did the INS General Counsel suggest that these efforts to preserve the procedural rights of traveling TPS beneficiaries would simultaneously strip them of beneficial legal consequences of that same travel.

A 1993 INS Acting General Counsel opinion further confirmed that MTINA was meant to enhance procedural protections for traveling TPS beneficiaries, without consequence to other benefits of their authorized travel. In considering whether INS could "approve travel authorization for a TPS registrant who has been issued an order to show cause, without first cancelling the order to show cause," INS's Acting General Counsel concluded that travel could be authorized for such an individual and that the individual would "remain subject to deportation" proceedings upon their return.[60] Such an outcome reflects the language and goals of MTINA. As a result of that amendment, TPS beneficiaries enjoyed the stronger procedural protections of a deportation proceeding and, because, in that particular case, only a show cause order but no final deportation order had been issued to this individual prior to departure, INA § 101(g) had no role to play as there was no final order to execute through departure.

What these contemporaneous opinions illustrate is that INS understood MTINA as a source of *protection* for TPS beneficiaries that ensured they could enjoy their statutory travel rights without suffering a loss of procedural protections upon their return. Nowhere did INS indicate at the time that it thought these enhanced procedural protections came as part of a tradeoff that altered the ability of a TPS beneficiary to execute a removal order by traveling or to be "inspected and admitted or paroled" for purposes of adjusting status upon returning from a period of authorized travel.

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[57] Legal Op. from Grover Joseph Rees III, Gen. Couns., INS to James A. Puleo, Assoc. Comm'r, Examinations, INS, *Travel Authorization for Aliens Granted TPS*, Genco Op. No. 92-10, 1992 WL 1369349, at *1 (Feb. 27, 1992).

[58] *Id.*

[59] *See id.* Despite this recognition, INS and now USCIS have continued to authorize travel under TPS "pursuant to the Service's advance parole provisions." 8 C.F.R. § 244.15(a).

[60] Legal Op. from Paul W. Virtue, Acting Gen. Couns., INS to Lawrence J. Weinig, Acting Assoc. Comm'r, Examinations, INS, *Travel Permission for Temporary Protected Status (TPS) Registrants*, Genco Op. No. 93-51, 1993 WL 1503998, at *1 (Aug. 4, 1993).

III. The TPS Policy Alert failed to acknowledge that it constituted a change in USCIS policy or consider the reliance interests that were upset through the reversal.

In addition to the erroneous interpretation of MTINA on which the TPS Policy Alert is based, it suffers from another fatal legal flaw: it was promulgated in an arbitrary and capricious manner. An agency's action is arbitrary and capricious if it

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[61]

Moreover, the agency is obligated to provide "a more detailed justification" if its change in policy disrupts "serious reliance interests that must be taken into account."[62]

USCIS acted arbitrarily for several of these reasons in its promulgation of the TPS Policy Alert. As an initial matter, USCIS did not even acknowledge that a change had taken place, but instead masked the pivot as a mere *clarification* of policy.[63] Given this failure to acknowledge that a change had taken place, it is no surprise that USCIS further failed to acknowledge the serious reliance interests that had settled around the prior practice, which were upset by the TPS Policy Alert.[64] Finally, USCIS failed to offer "adequate reasons" that would justify the TPS Policy Alert,[65] even to explain how the interpretation reflected in the TPS Policy Alert is consistent with the plain language of INA § 101(g)—"an important aspect of the problem" that Defendants evidently failed to consider.[66]

The TPS Policy Alert reversed a longstanding practice upon which individuals and organizations had reasonably relied. Indeed, USCIS admitted as much through the adoption of *Matter of Z-R-Z-C-*, which "[r]ecogniz[ed]" that the re-interpretation of MTINA § 304 breaks with INS and USCIS's "past practice," and that this change affects the "reasonable reliance" placed on this "past practice" by TPS beneficiaries.[67] Accordingly, USCIS is applying that change only "prospectively to TPS recipients who departed and returned" under the TPS statute's travel authorization "after the date" the Adopted Decision was announced—*i.e.*, after August 20, 2020.[68] The same serious reliance interests USCIS recognized in *Matter of Z-R-Z-C-* likewise grew around USCIS's historical understanding of the effect of a departure on a removal order. Individual TPS

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[61] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[62] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (citation omitted).

[63] *See* TPS Policy Alert at 1.

[64] *Fox Television Stations*, 556 U.S. at 515; *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1111 (D.C. Cir. 2019).

[65] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016).

[66] *State Farm*, 463 U.S. at 43; *see Magneson v. Mabus*, 85 F. Supp. 3d 221, 226 (D.D.C. 2015) (military board of corrections' "fail[ure] to address … arguments that are not facially frivolous" rendered its decision arbitrary and capricious) (quotation marks and citation omitted).

[67] *See Matter of Z-R-Z-C-* at 1.

[68] *Id.* at 1-2.

beneficiaries, following a well-established approach for adjusting status, secured travel authorization from USCIS, spent money to travel to a country they once fled to see family they had not seen in years, for example, but had no desire to remain in permanently, and then spent more money on attorneys and fees to submit their application for adjustment of status to USCIS. These efforts, which allowed for the temporary reunification of family, were rendered pointless by the TPS Policy Alert.

USCIS's failure to at least acknowledge that it was changing course and the effect that shift would have on important reliance interests is a fatal flaw that necessitates the TPS Policy Alert's rescission. *See Fox Television Stations*, 556 U.S. at 515.

IV. The TPS Policy Alert and the adoption of *Matter of Z-R-Z-C-* violate the Federal Vacancies Reform Act.

Even if neither USCIS's adoption of *Matter of Z-R-Z-C-* nor the TPS Policy Alert were built upon an erroneous interpretation of MTINA, these policies would remain invalid for another reason that separately justifies their rescission: as a federal court has held, the author of these policies, Ken Cuccinelli, was not lawfully serving at USCIS,[69] and so any policies he implemented in that capacity, including the adoption of *Matter of Z-R-Z-C-* and the TPS Policy Alert, are void.

The Federal Vacancies Reform Act ("FVRA"), enacted in 1998, provides the President with limited authority to appoint acting officials while preserving the Senate's advice and consent power under the Appointments Clause of the Constitution—a power that serves as "a critical 'structural safeguard [] of the constitutional scheme.'"[70] The FVRA permits an individual to act in an office requiring Presidential nomination and Senate confirmation (a so-called "PAS" office) under certain, specified circumstances. As a default rule, the FVRA provides that "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily."[71] However, the President may select another individual if he or she either already serves in a PAS office,[72] or if, during the year prior to the vacancy, he or she served as a senior career official.[73] These "carefully calibrated limits,"[74] require the President to select someone who "has already passed the tests of Senate confirmation and presidential appointment" or possesses "experience and seniority,"[75] if he wishes to override the FVRA's default rule.

Mr. Cuccinelli, however, could not have become the acting Director of USCIS through any of these enumerated paths. He had not been serving in a PAS office,[76] and had not been employed by

[69] *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 37 (D.D.C. 2020).

[70] *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)).

[71] 5 U.S.C. § 3345(a)(1).

[72] *Id.* § 3345(a)(2).

[73] *Id.* § 3345(a)(3).

[74] *English v. Trump*, 279 F. Supp. 3d 307, 312 (D.D.C. 2018).

[75] *L.M.-M.*, 442 F. Supp. 3d at 28.

[76] *See* 5 U.S.C. § 3345(a)(2).

USCIS (or, indeed, any other DHS component) in the year prior to the vacancy.[77] Nor was Mr. Cuccinelli the first assistant at the time the vacancy opened. To the contrary, the Deputy Director of USCIS appears to have been designated as the first assistant to the Director since the office's creation. At the time the last confirmed Director of USCIS, Lee Francis Cissna, was forced to resign, Mark Koumans was serving as Deputy Director.[78]

To appoint Mr. Cuccinelli to serve as acting Director, USCIS attempted an end-run around the FVRA's requirements. After forcing out Mr. Cissna, then-acting Secretary of Homeland Security Kevin McAleenan took the unprecedented steps of creating an entirely new position of Principal Deputy Director, designating the holder of that office as first assistant to the Director, and appointing Mr. Cuccinelli as Principal Deputy Director. The orders documenting these steps show that they took place on the same day USCIS announced Mr. Cuccinelli's appointment as acting Director and would lapse as soon as a new Director was confirmed.[79]

This extraordinary, good-for-one-ride-only attempt to manipulate the structure of USCIS just to install Mr. Cuccinelli broke the law in at least two major ways. First, as Judge Moss in the U.S. District Court for the District of Columbia recently held, in a decision that the Government ultimately decided not to appeal, Mr. "Cuccinelli was not lawfully appointed to serve as acting Director" because he never qualified as a first assistant within the meaning of the FVRA.[80] Second, as seven courts and the Government Accountability Office ("GAO") have concluded, acting Secretary McAleenan unlawfully assumed the role of acting Secretary of Homeland Security, and so he lacked any authority to engage in the procedural machinations used to appoint Mr. Cuccinelli.[81]

Because Mr. "Cuccinelli was not lawfully appointed to serve as the acting Director of USCIS," USCIS's adoption of *Matter of Z-R-Z-C-* and its promulgation of the TPS Policy Alert during his tenure were "*ultra vires* under both the FVRA, 5 U.S.C. § 3348(d)(1), and the APA, 5 U.S.C. § 706(2)(A)."[82] Both actions are therefore appropriate for review and rescission.

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[77] *See id.* § 3345(a)(3).

[78] *See L.M.-M.*, 442 F. Supp. 3d at 10.

[79] *See id.*

[80] *Id.* at 8.

[81] *See, e.g.*, *E. Bay Sanctuary Covenant v. Barr*, --- F. Supp. 3d ---, 2021 WL 607869, at *4 (N.D. Cal. Feb. 16, 2021); *Pangea Legal Servs. v. DHS*, --- F. Supp. 3d ---, 2021 WL 75756, at *5-6 (N.D. Cal. Jan. 8, 2021); *La Clinica de la Raza v. Trump*, No. 19-cv-4980-PJH, 2020 WL 7053313, at *8 (N.D. Cal. Nov. 25, 2020); *Batalla Vidal v. Wolf*, --- F. Supp. 3d ---, 2020 WL 6695076, at *8 (E.D.N.Y. Nov. 14, 2020); *Casa de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928, 958-59 (D. Md. 2020); *Immigrant Legal Res. Ctr. ("ILRC") v. Wolf*, 491 F. Supp. 3d 520, 535-36 (N.D. Cal. 2020); GAO, B-331650, *Decision: Matter of Department of Homeland Security* (Aug. 14, 2020), https://bit.ly/3w7mP8C; *see also Al Otro Lado v. Gaynor*, --- F. Supp. 3d ---, 2021 WL 150987, at *5 n.4 (S.D. Cal. Jan. 18, 2021).

[82] *L.M.-M.*, 442 F. Supp. 3d at 37.

V. The TPS Policy Alert and the adoption of *Matter of Z-R-Z-C-* are vestiges of the Trump Administration's animus-driven effort to erect bureaucratic barriers to immigration.

A final reason for rescinding these policies is that they are grounded in the animus toward immigrants that marked immigration policymaking during the Trump Administration. Among other offensive remarks made about immigrants during that dark period, President Trump questioned why the United States would grant immigration protection, including under TPS, for individuals from places he deemed "shithole countries."[83] Mr. Cuccinelli has a similar history of expressing animus towards immigrants, whom he has compared to rats,[84] and has also argued that states should invoke "war powers" to combat an "invasion" of immigrants by "turn[ing] people back at the border," and "let[ting] them swim for it."[85]

Although the Trump Administration did ultimately turn many desperate migrants away at the border, its attack on the United States' immigration commitments by erecting bureaucratic, as opposed to physical, barriers is at least as troubling. Scrubbing unlawful policies like the TPS Policy Alert and *Matter of Z-R-Z-C-* from USCIS's policy manual is a necessary step toward dismantling that anti-immigrant infrastructure and reaffirming the United States' humanitarian commitments. But even leaving the origins of these policies aside, it cannot be disputed that each imposes "administrative and other barriers and burdens … that prevent foreign citizens from easily obtaining access to immigration services and benefits" of the kind USCIS now seeks to identify and eliminate.[86]

Sincerely,

/s/ Anna Marie Gallagher
Anna Marie Gallagher
Executive Director

[83] Ali Vitali et al., *Trump Referred to Haiti and African Nations as 'Shithole' Countries*, NBC News (Jan. 11, 2018), https://nbcnews.to/3eJw48N.

[84] Nick Wing, *Ken Cuccinelli Once Compared Immigration Policy To Pest Control, Exterminating Rats*, HuffPost (July 26, 2013), https://bit.ly/3w4CG7D (Cuccinelli arguing that a District of Columbia ordinance restricting pest control "is worse than our immigration policy" because "[y]ou can't break up rat families").

[85] John Binder, *Exclusive–Ken Cuccinelli: States Can Stop Migrant Caravan 'Invasion' with Constitutional 'War Powers,'* Breitbart (Oct. 23, 2018), https://bit.ly/3tLU0ge.

[86] 86 Fed. Reg. at 20,398.