Better Late Than Never: Climate Displacement and the Case for Expanding Temporary Protected Status

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“Only when we’re drowning do we understand how fierce our feet can kick.”

I. THE STORY OF A CLIMATE MIGRANT: ILLUSTRATING THE MULTI-CAUSAL NATURE OF CLIMATE DISPLACEMENT

Delmira de Jesús Cortez Barrera (Cortez) lives directly outside El Salvador’s capital, San Salvador – a city home to one of the highest murder rates in the world. Despite her current urban address, Cortez’s roots are agricultural; her parents worked on maize and bean plantations in a small, rural Salvadoran town called El Paste and managed to raise nine children in a modest home there. But when a devastating coffee blight destroyed seventy percent of Salvadoran crops in 2012 and national disasters, like hurricanes and droughts, took an additional toll on vulnerable farming communities across the region, Cortez left El Paste in search of more stability.


3. Id. (discussing Cortez family’s agricultural success prior to slow-onset effects of climate change resulting in drought and unpredictable weather patterns).

4. Id. (describing destabilizing effects of drought and unpredictable weather patterns on agricultural livelihoods pursued in hot, dry climates affected most detrimentally by climate change); see also OHCHR & PDD REPORT, supra note 1 (noting El Salvador’s location in Dry Corridor of Central America, along with Guatemala, Honduras, Nicaragua, and Panama). The Dry Corridor faces agricultural production challenges like water supply shortages due to climate change-induced temperature rise. Id. (explaining how long-term drought and other extreme weather events will only exacerbate problems as they become increasingly commonplace).
After marrying and fleeing to a small Salvadoran city, a hit man murdered Cortez’s husband a block from their shared home.\(^5\)

Since returning to farming in El Pase was no longer a viable option due to slow-onset climate disaster, Cortez sought employment in the more populous city of San Salvador following her husband’s death.\(^6\) Today, Cortez makes less than two hundred dollars a month selling pupusas, El Salvador’s national dish of stuffed corn cakes, within earshot of a gang-controlled block.\(^7\) She struggles to pay the rent and send money to her parents, who care for her two young daughters in El Pase due to the dangerous living conditions in San Salvador.\(^8\) Cortez is desperate to make her way to the United States.

\(^5\) Lustgarten, supra note 2 (providing examples of intersectional, complex effects of climate-driven migration, including increased levels of violence and gang control in urban centers). In 2016 alone, approximately 220 thousand people left El Salvador, and eighty-four percent of those fleeing the country cited gang violence as a reason for their departure. OHCHR & PDD Report, supra note 1, at 38 (classifying El Salvador, after Syria, as country with second largest number of forced migrants in 2016).

\(^6\) See Lustgarten, supra note 2 (describing Cortez’s search for secure employment in San Salvador and classifying water shortages as one impetus for in-country movement in El Salvador, especially across farming communities); see also OHCHR & PDD Report, supra note 1, at 38 (exploring connection between rural-to-urban migratory patterns and economic factors like employment issues and crop loss).

\(^7\) Lustgarten, supra note 2 (detailing Cortez’s dangerous living conditions due to combination of migration-driven overcrowding and resource depletion in urban centers); see also Satchit Balsari, Caleb Dresser & Jennifer Leaning, Climate Change, Migration, and Civil Strife, 7 CURRENT ENV’T HEALTH REPORTS 404, 405 (2020) (identifying climate change as “threat multiplier” because it can “significantly exacerbate the conditions that lead to conflict, destitution and displacement”). An analysis of displacement in regions including Central America’s Dry Corridor, the Sahel, and the Middle East and North Africa (MENA) suggests that climate change and social crises overlap as drivers of migration. Id. at 407 (explaining how “[u]nderlying political grievances in . . . urban areas [in Western Syria], already stretched for resources by 1.5 million Iraqi refugees from previous years, were aggravated by the addition of [an] economically disenfranchised [farming] population” migrating due to prolonged drought). Empirical findings reinforce this theory: strong governments and economies with adequate resources and planning measures are more likely to respond to an influx of climate-displaced people without experiencing significant social conflict. Id. at 408 (synthesizing existing research and describing how factors like “the capacity of the host government and its economy to absorb the incoming population, the extent to which the incoming population is related politically or socially to another population threatening the state’s internal order, and the underlying historical vulnerability of this society to civil war or armed conflict” can serve as mediating factors for social and armed conflict that may stem from climate-related migration). In contrast, countries with historical and economic vulnerabilities are more likely to experience intense social conflict due to climate-induced migration patterns. Id. (arguing that host government capacity and economy affect likelihood of climate migration-driven social unrest).

\(^8\) Lustgarten, supra note 2 (noting Cortez’s limited options for securing economic stability after climate change disrupted her family’s agricultural livelihood). The Food and Agricultural Organization (FAO) of the United Nations (U.N.) estimates that total crop losses in Central America’s Dry Corridor ranged from fifty to ninety percent between 2006 and 2016, leaving millions food insecure and in need of humanitarian aid. Tio Diaz & Dominique Burgeon, FOOD & AGRIC. ORG. OF
and believes it is the only way to ensure her family’s survival. For now, though, she continues to sink deeper into poverty.

The climate change-induced drought and generally unpredictable weather patterns that ruined agricultural livelihoods in El Paste’s rural countryside left Cortez with limited options for upward mobility. And as San Salvador’s overcrowding, food shortages, and gang violence continue, external migration appears to be Cortez’s only option moving forward. Her story demonstrates the intersection between climate crises and involuntary relocation within and across borders. This Comment will address the protective legal mechanisms in place for climate-displaced individuals in the United States, identify the weaknesses at play within these legal frameworks, and provide recommendations for practically expanding Temporary Protected Status (TPS) – an existing safeguard under the Immigration and Nationality Act (INA).

A. Climate Displacement

Climate displacement is in-country or cross-border movement that stems from permanent or temporary environmental disasters. Sudden natural disasters – like hurricanes, wildfires, and earthquakes – can cause these climate change-fueled migration patterns. Significantly, however, slow-onset climate crises can also lead to climate displacement. For example, reduced crop yields, resource shortages in overcrowded urban centers, rising sea levels,
climate change-induced violence, and crumbling infrastructure all have the potential to force relocation within and across country borders. Further, declining crop production can increase prices for food staples in dry regions, threatening nutrition and food security in these vulnerable communities. In short, climate change-fueled environmental crises – both sudden and slow-onset – drive migration, and social factors like violence and political unrest can amplify and reinforce a multi-causal cycle of displacement.

At first, migration related to environmental factors typically takes place within the borders of affected countries. More specifically, in the world’s hottest and driest regions, individuals primarily participate in in-country, rural-to-urban migration. These individuals often relocate to cities hoping to secure more permanent employment and economic stability, but in reality, they encounter resource-depleted, populous living conditions. Agricultural communities reliant on periodic rains experience these challenges and patterns profoundly. Cortez’s story, which was covered extensively by *The New York Times*, illustrates this harsh reality. Moreover, climate change practically ensures this in-country migratory pattern’s

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18. See id. (providing examples of intersection between climate change and forced relocation). President Obama formally recognized “the relationship between climate change, migration, and sociopolitical instability” in 2016. *Id.* (highlighting United States government’s awareness of climate displacement).


21. See Greenfield, supra note 15 (describing climate migration within countries, typically towards urban areas); see also Lustgarten, supra note 2 (giving reasons for mass in-country climate migration).

22. See Greenfield, supra note 15 (discussing urbanization and migratory patterns stemming from climate crises in rural regions); see also Lustgarten, supra note 2 (emphasizing importance of addressing climate concerns in urban planning).

23. See Lustgarten, supra note 2 (detailing climate migration’s strain on resources and available affordable housing).

24. See Balsari et al., supra note 7, at 405-06 (explaining how climate change-induced weather patterns force farmers to abandon homes and assets).

25. Lustgarten, supra note 2 (providing Cortez’s personal account of rural-to-urban migration in El Salvador).
persistence; in fact, recent estimates suggest that by 2050, climate change could force over 200 million people to migrate within their home countries.\footnote{26. World Bank, supra note 19 (reporting statistical predictions about internal climate migration “across six world regions”).}

When pressure on countries’ political and economic systems increases and internal migration efforts fail, cross-border migration becomes one of the only viable options for those looking to escape intensified resource depletion.\footnote{27. See Bermeo & Leblang, supra note 20 (describing rural-to-urban climate migration patterns and resource depletion’s effects, such as poverty, violence, and food insecurity).} One climate model, which relies on economic development and climate data across Central American countries, predicts that “in extreme climate scenarios” more than thirty million people will attempt to cross the border into the United States throughout the next thirty years.\footnote{28. See Lustgarten, supra note 2 (providing climate model designed to capture number of climate migrants in coming decades).} Projections like this demonstrate the urgent need to implement legal protections for the growing number of climate-displaced people in the United States.\footnote{29. See id. (predicting rise in migration intensified by climate crises); Mara A. Mahmud, Climate Migration and the Future of Immigration Policy in the United States, Ctr. for Migration Studs. (Dec. 15, 2022), https://cmsny.org/us-climate-migration-mahmud-121522/ (advocating new solutions and innovations to tackle growing issue of climate migration).}

Latin America, South Asia, and sub-Saharan Africa are regions particularly vulnerable to high, imminent levels of internal and cross-border climate migrations.\footnote{30. See Mia Prange, Climate Change Is Fueling Migration. Do Climate Migrants Have Legal Protections?, Council on Foreign Rels., https://www.cfr.org/in-brief/climate-change-fueling-migration-do-climate-migrants-have-legal-protections#:~:text=Climate%20migration%20occurs%20when%20people,seas%20and%20intensifying%20stress (Dec. 19, 2022) (identifying climate-driven migration as both current and future reality in many vulnerable regions).} Small island countries like Kiribati, Maldives, and Tuvalu already face permanent displacement threats due to land longevity concerns as sea levels continue to rise, meaning they will likely need to move their entire populations.\footnote{31. See Ilan Kelman, Difficult Decisions: Migration from Small Island Developing States Under Climate Change, 3 Earth’s Future 133, 134 (2015) (demonstrating urgent need for migration policies in Small Island Developing States where rising sea levels and limited freshwater sources threaten land sustainability).}

In addition, extreme weather events will continue and become more common, further driving mobility.\footnote{32. See OHCHR & PDD Report, supra note 1, at 36 (noting increased likelihood of climate change-induced extreme weather).} In the past decade alone, droughts in Central America brought about crop losses of seventy percent or more during certain harvests, which likely contributed...
to increases in migration to the United States from Honduras and Guatemala in 2018 and 2019.\textsuperscript{33}

B. Enhancing TPS to Protect Climate Migrants in the United States: A Roadmap

This Comment proposes altering the INA’s TPS provision to further protect climate migrants.\textsuperscript{34} First, federal legislators should dissolve the “environmental disaster” TPS designation option.\textsuperscript{35} Second, Congress should revise TPS to allow long-term TPS holders to convert to lawful permanent resident (LPR) status.\textsuperscript{36}

Part II begins by evaluating the current legal safeguards for displaced communities under United States refugee and asylum law.\textsuperscript{37} More specifically, it highlights the INA’s failure to provide adequate relief for climate migrants through refugee and asylum law and analyzes the statutory language responsible for climate migrants’ exclusion.\textsuperscript{38} Part III analyzes the strengths and weaknesses of TPS, a uniquely protective legal mechanism for involuntary migrants who do not necessarily fit under the INA’s narrow definition of “refugee.”\textsuperscript{39} Part IV provides two recommendations for broadening the TPS provision to ensure more consistent and guaranteed protection for climate-displaced individuals.\textsuperscript{40} And critically, Part IV also details the statutory and practical support for this Comment’s proposed


\textsuperscript{34} For a discussion of the statutory changes proposed by this Comment, see \textit{infra} notes 172–215 and accompanying text.

\textsuperscript{35} For a more specific roadmap of this Comment’s proposed statutory changes, see \textit{infra} notes 172–75 and accompanying text.

\textsuperscript{36} For a discussion of this Comment’s argument regarding LPR status, see \textit{infra} notes 198-215 and accompanying text.

\textsuperscript{37} For a discussion of the legal safeguards for climate-displaced individuals under United States refugee and asylum law, see \textit{infra} notes 42-99, 120-71 and accompanying text.

\textsuperscript{38} For a discussion of the gap in protection negatively affecting cross-border climate migrants under United States law, see \textit{infra} notes 100-19 and accompanying text.

\textsuperscript{39} For a discussion of the INA’s TPS provision and its implications, see \textit{infra} notes 120-71 and accompanying text.

\textsuperscript{40} For a discussion of two distinct ways to revise the INA to better protect climate migrants, see \textit{infra} notes 172–215 and accompanying text.
changes to the TPS provision. Part V addresses the need for comprehensive climate migration policies in the United States.

II. PROTECTIVE LEGAL MECHANISMS FOR CLIMATE-DISPLACED COMMUNITIES UNDER UNITED STATES REFUGEE AND ASYLUM LAW

The legal definitions peppering United States immigration law – and international humanitarian law, for that matter – tend to overlook climate-displaced communities. Still, the implementation of protective measures requires scrutinizing the law’s exclusion of these climate-displaced communities within current legal frameworks and offering pragmatic solutions to address what existing scholarship has routinely referred to as the legal “rights gap” affecting climate change migrants. The following sections will outline the current legal frameworks surrounding climate displacement and assess the weaknesses of these frameworks in protecting climate change migrants.

At the outset, it is worth noting that the following analysis focuses on the protective legal frameworks for climate-displaced individuals seeking humanitarian relief in the United States. Consequently, this Comment makes an interpretive argument relating to the TPS provision of the INA, which creates a Department of Homeland Security (DHS) program allowing migrants to live and work legally in the United States. While an existing body of scholarship tends to

41. For a discussion of the textual and practical support for the statutory changes proposed by this Comment, see infra notes 172–215 and accompanying text.

42. For a discussion of the inadequacy of the protective legal mechanisms for climate-displaced individuals seeking shelter within the United States, see infra notes 217-23 and accompanying text.


44. Katrina Wyman, Responses to Climate Migration, 37 HARV. ENV’T L. REV. 167, 177 (2015) (describing rights gap experienced by climate migrants under most domestic immigration policies and international law); see also Suzanne Seltzer, Temporary Protected Status: A Good Foundation for Building, 6 GEO. IMMIGR. L.J. 773, 774 (1992) (describing how INA’s TPS provision provides avenue for broader immigration relief for displaced individuals excluded from narrow definition of “refugee”).

45. For a discussion of United States refugee and asylum law, see infra notes 42-99, 120-71 and accompanying text. For a discussion of the INA’s TPS provision and its implications, see infra notes 120-71 and accompanying text.

46. For a discussion of United States immigration law, which focuses primarily on the INA and its provisions, see infra notes 42-99, 120-71 and accompanying text.

focus on the role of climate migration in the international law arena, this Comment’s TPS-focused nature lends itself to providing more background on and analysis of United States immigration law.\textsuperscript{48}

A. Refugees and Asylees Under the Immigration and Nationality Act

The landmark passage of the INA overhauled the decades-long federal quota system at the heart of the United States’ immigration policy, laying the groundwork for reform.\textsuperscript{49} Prior to the INA, the Immigration Act of 1924 – or the “Johnson-Reed Act” – drastically restricted the number of immigrants allowed into the United States each year and implemented strict quotas.\textsuperscript{50} Today, under the INA, refugees and asylees face fewer hurdles when seeking humanitarian protection in the United States.\textsuperscript{51} To obtain refugee or asylee status, however, the INA burdens applicants with proving that they fall under the INA’s narrow definition of “refugee.”\textsuperscript{52} Significantly, only applicants with refugee or asylee status can access certain protective mechanisms under the law.\textsuperscript{53}

\begin{itemize}
\item \textsuperscript{48} For a discussion of TPS and its implications for climate-displaced communities in the United States, see infra notes 120–71 and accompanying text.
\item \textsuperscript{50} Immigration Act of 1924, H.R. 7995, 68th Cong. (1924) (enacted) (codifying immigration quotas that effectively ended immigration from countries outside of Northern and Western Europe).
\item \textsuperscript{51} See \textit{Immigration and Nationality Act of 1965}, supra note 48 (explaining INA’s role in “eras[ing] America’s longstanding policy of limiting immigration based on national origin”).
\item \textsuperscript{52} See Claire Klobucista, James McBride & Diana Roy, \textit{How Does the U.S. Refugee System Work?}, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/how-does-us-refugee-system-work-trump-biden-afghanistan (Feb. 15, 2023, 3:39 PM) (explaining how United States law requires asylees to meet INA’s “refugee” definition). Since both refugee and asylee status require meeting the INA’s “refugee” definition, a person’s location at the time of application tends to determine whether they will be classified as a refugee or an asylee in the United States. \textit{Id.} (describing role of location in asylum and refugee applications). More specifically, asylum-seekers are physically present in the United States or at a United States point of entry when applying for asylee status, while refugees are typically granted refugee status prior to their arrival in the United States. \textit{Id.} (detailing importance of applicants’ location). The United Nations High Commissioner for Refugees (UNHCR) determines whether an individual is classified as a refugee, and the United States federal government is subsequently responsible for carrying out the screening, approval, and resettlement processes. \textit{Id.} (highlighting federal government’s duties following UNHCR determination). Unlike refugees, asylum-seekers carry the burden of proving that they are refugees under the INA. \textit{Id.} (establishing differences in refugee and asylum application processes).
\item \textsuperscript{53} See \textit{Asylum Manual}, IMMIGR. EQUALITY, https://immigrationequality.org/
For example, refugees and asylees may legally live and work anywhere in the United States, travel abroad, and apply for a Social Security card. Their spouses or unmarried children may also benefit, for refugees and asylees may request to “receive asylum or refugee derivative status to live in the United States.” After one year of official refugee or asylee status, refugees are required, and asylees are permitted, to apply for lawful permanent resident (LPR) status, a nonimmigrant status codified under Section 1255 of the INA. LPR status allows individuals to live and work permanently in the United States and become citizens through the naturalization process after four years. While asylum status does not expire, LPR status confers more public benefits and ensures that DHS will not terminate asylum and pursue removal actions. Attempts to revoke asylum are uncommon but possible, incentivizing LPR applications. In sum, obtaining refugee status or asylee status creates a clear path toward obtaining LPR status, which ultimately opens the door to United States citizenship and the rights, security, and privileges that it affords.

According to United States Citizenship and Immigration Services (USCIS), there are three ways individuals may obtain asylum status. First, individuals may apply for asylum affirmatively by filling out Form I-589, the Application for Asylum and for Withholding of Removal, within one year of arrival in the United States and...
submitting it to USCIS.62 If USCIS rejects an applicant’s affirmative application, USCIS refers the case to an immigration judge (IJ) who conducts a de novo review independent of the USCIS decision.63 Second, individuals subject to expedited removal but found to have a credible fear of persecution or torture might receive asylum from a USCIS officer following an asylum merits interview or receive a Notice to Appear before an IJ for consideration of asylum.64 Third, individuals may apply for asylum as a defense to removal from the United States, which requires appearing before an IJ.65

Regardless of an applicant’s path to asylum, meeting the INA’s definition of “refugee” – which is required for obtaining asylum – is a high, challenging bar that many forcibly or involuntarily displaced individuals fail to meet.66 The INA defines “refugees” as people outside their countries of nationality who are unable or unwilling to return to their countries of nationality because of either “persecution or a well-founded fear of persecution[.]”67 And critically, to be considered a “refugee” under the INA, an individual must fear or flee persecution “on account of” at least one of five statutory explicit categories: race, religion, nationality, membership in a particular social group, or political opinion.68 Congress incorporated this definition of “refugee” into law following the United Nations 1951 Convention and 1967 Protocols relating to the Status of Refugees.69

By extension, asylum-seekers have two options for qualifying for protection.70 First, applicants may provide evidence demonstrating past persecution in their home country on account of a protected

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62. Id. (describing affirmative application process).
63. Id. (providing information about IJ’s role following denial of affirmative application).
64. Id. (detailing credible fear determination and subsequent USCIS interview process).
65. Id. (explaining how asylum application can be leveraged as defense to removal in immigration proceeding).
66. See Bergeron, supra note 43, at 24 (clarifying difficulties asylum-seekers face when attempting to satisfy “refugee” definition); see also Dep’t of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963 (2020) (noting how most asylum claims at or near United States border fail).
68. Id. (specifying applicants’ need to prove that their individualized or future persecution was or will be based on at least one of five categories).
70. See Bergeron, supra note 43, at 23 (describing legal pathways for asylum applicants to demonstrate persecution).
Second, applicants may provide evidence demonstrating that they have a well-founded fear of future persecution in their home country on account of a protected ground. That said, if an applicant can successfully show past persecution, a well-founded fear of persecution is assumed. Past persecution, however, is rebuttable if the government can demonstrate, by a preponderance of the evidence, that there has been either a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution or that the applicant could reasonably relocate to another part of the country of origin. While “persecution” is not defined in the INA, the Board of Immigration Appeals (BIA) defines it as “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”

To demonstrate a well-founded fear of persecution, federal courts have found that the applicant’s fear must be “subjectively genuine and objectively reasonable in light of credible evidence.” The applicant’s testimony and credibility are central to assessing the sincerity of their fear, which is critical for meeting the subjective component of the test. In order to meet the objective component of the test, applicants must show, through credible evidence, that persecution is a reasonable possibility. Significantly, the Supreme Court held in Immigration & Naturalization Service v. Cardoza-Fonseca that a ten percent chance of persecution is enough to establish objective reasonability.

72. Id. § 1208.13(b)(2) (explaining that asylum-seekers may demonstrate either past persecution based on protected ground or well-founded fear of future persecution based on protected ground).
73. Id. § 1208.13(b)(1) (providing basis for connection between past persecution and presumption of well-founded fear of future persecution).
74. Id. § 1208.13(b)(1)(i)(A)-(B) (highlighting rebuttable nature of past persecution).
76. See Capric v. Ashcroft, 355 F.3d 1075, 1085 (7th Cir. 2004) (holding that generalized conditions of hardship which affect entire populations do not rise to INA’s definition of “persecution”); see also Sharif v. Immigr. & Naturalization Serv., 87 F.3d 932, 935 (7th Cir. 1996) (finding that “harsh conditions shared by an entire population do not amount to persecution”).
77. See Capric, 355 F.3d at 1085 (holding that “generalized conditions of hardship which affect entire populations do not rise to . . . persecution”).
78. Asylum Manual, supra note 53 (describing objective component of well-founded fear test).
79. 480 U.S. 421, 443 (1987) (reasoning that asylum-seekers need not prove by preponderance of evidence that they will face persecution).
80. Id. at 440 (citing Immigration & Naturalization Serv. v. Stevic, 467 U.S. 407, 431 (1984)) (reasoning that “[t]here is simply no room in the United Nations’ definition [of well-founded fear] for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening”).
More specifically, according to the federal regulatory authority, an applicant has a well-founded fear of persecution if the applicant has: (1) “a fear of persecution in his or her country of nationality . . . on account of race, religion, nationality, membership in a particular social group, or political opinion; (2) there is a reasonable possibility of suffering such persecution [should the applicant] return to that country; and (3) [the applicant] is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of said fear.”

Second, absent evidence that there is a reasonable possibility he or she would be singled out individually, an applicant also has a well-founded fear of persecution if: (1) “the applicant establishes that there is a pattern or practice in his or her country . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (2) the applicant establishes his or her inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.”

Either way, successfully proving persecution requires a protected ground – race, religion, nationality, membership in a particular social group, or political opinion – be at least one central reason for the asylum seeker’s persecution claim.

Additionally, both the statutory text and federal caselaw indicate that there must be a nexus between the past or feared persecution and the protected category to meet the definition of “refugee” successfully. This nexus requirement comes from the “on account of”

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81. 8 C.F.R. § 208.13(b)(2)(i) (2023) (describing one avenue applicants can take when demonstrating well-founded fear of persecution).

82. Id. § 208.13(b)(2)(iii) (describing process for establishing well-founded fear of persecution absent proof of a reasonable possibility of being singled out).

83. Id. (noting that applicants who fail to show evidence establishing reasonable possibility of being “singled out individually for persecution” must demonstrate pattern or practice of persecution of group, which applicant identifies with, on account of protected ground); see also id. § 208.13(b)(2)(i) (indicating that well-founded fear of persecution must be based on protected ground).

84. See Immigr. & Naturalization Serv. v. Elias-Zacarias, 502 U.S. 478, 482-83 (1992) (holding that Defendant’s refusal to join guerrilla organization and his subsequent fear of retaliation did not constitute “persecution” on account of political opinion). In this case, the court reasoned that “the mere existence of a generalized ‘political’ motive underlying the guerrillas’ forced recruitment is inadequate to establish” a sufficient nexus to a protected ground. Id. at 482 (finding no connection between Defendant’s fear of persecution and Defendant’s political opinion). In addition, the court provided that Elias-Zacarias failed to demonstrate a “well-founded fear” that the guerrillas will persecute him because of [a] political opinion, rather than because of his refusal to fight with them.” Id. at 483. (connecting past or feared persecution with protected category).
language in the INA.\textsuperscript{85} Circuit court cases \textit{Guerrero v. Holder}\textsuperscript{86} and \textit{Ruiz v. Mukasey}\textsuperscript{87} suggest that, to satisfy the nexus requirement, there must be a “causal, non-coincidental link between the past experience or future risk of persecution and the person’s protected status or belief.”\textsuperscript{88} Moreover, the protected ground must be “one central reason” for an applicant’s persecution or well-founded fear of persecution, but it does not have to be the sole reason.\textsuperscript{89} Still, the Board of Immigration Appeals (BIA) has taken an inconsistent approach to the nexus requirement.\textsuperscript{90}

Although the benefits of refugee and asylee status are clear, not all displaced people can demonstrate persecution with a nexus to a protected ground and therefore fail to meet the requirements for asylum.\textsuperscript{91} For instance, widespread political violence or unrest affecting an entire population is not typically enough to establish persecution on one of the INA’s articulated protected grounds.\textsuperscript{92} In \textit{Stserba v. Holder},\textsuperscript{93} for example, the Sixth Circuit clarified that, in countries with endemic violence, “[p]etitioners must have been ‘specifically targeted by the government for abuse based on a statutorily protected ground’ [in order to meet the nexus requirement], not merely victimized ‘by indiscriminate mistreatment’ or ‘random crime.’”\textsuperscript{94} Migration from Venezuela also illustrates the challenges experienced by asylum applicants facing general conditions of violence and unrest in their home countries: As of 2021, over four

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\item \textsuperscript{85} Immigr. and Nationality Act, 8 U.S.C. § 1101(a)(42) (defining “refugee”).
\item \textsuperscript{86} 667 F.3d 74, 77 (1st Cir. 2012) (describing INA’s nexus requirement).
\item \textsuperscript{87} 526 F.3d 31, 36 (1st Cir. 2008) (fleshing out nexus requirement in asylum law).
\item \textsuperscript{88} \textit{See Guerrero}, 667 F.3d at 77 (finding that applicant “must produce ‘convincing evidence of a causal connection’ between the harm that he endured and a statutorily protected ground’; \textit{see also Ruiz}, 526 F.3d at 36 (holding that applicant must “demonstrate a causal connection: that the persecution, whether past or feared, was or is ‘on account of’ one of the five statutorily protected grounds’; \textit{see also LAW OF ASYLUM IN THE UNITED STATES § 5:2 (2023 ed.) (providing context for nexus requirement and evaluating United States courts’ interpretation of standard).}
\item \textsuperscript{89} \textit{Id.} (highlighting BIA’s history of asserting conflicting standards in its approach to nexus requirement).
\item \textsuperscript{90} \textit{Id.} (providing requirements for establishing persecution).
\item \textsuperscript{91} \textit{Id.} (highlighting BIA’s history of asserting conflicting standards in its approach to nexus requirement).
\item \textsuperscript{92} \textit{See Capric v. Ashcroft}, 355 F.3d 1075, 1085 (7th Cir. 2004) (holding that generalized conditions of hardship which affect entire populations do not rise to “persecution” under INA).
\item \textsuperscript{93} 646 F.3d 964, 972 (6th Cir. 2011) (explaining that generalized conditions do not necessarily meet definition of persecution).
\item \textsuperscript{94} \textit{Id.} (quoting \textit{Gilaj v. Gonzales}, 408 F.3d 275, 285 (May 9, 2005)) (indicating that indiscriminate treatment does not amount to “on account of” language under INA).
\end{itemize}
million Venezuelans left the country due to violent crime and poverty, but because they did not leave to escape persecution, these displaced individuals were not considered refugees under the INA.\textsuperscript{95} This example underscores the disparity between the colloquial use of the term “refugee” and its legal definition, for displacement due to the inhabitability of a region does not necessarily create conditions where the definition of refugee is satisfied under the established interpretation of the INA.\textsuperscript{96}

Moreover, even if an individual meets the strict definition of “refugee” under the INA, asylum is still a discretionary status under the law.\textsuperscript{97} This means that despite overcoming the statutory requirements, asylum-seekers may be lawfully denied asylum by the DHS Secretary, including the Secretary’s delegate or designees, or the Attorney General.\textsuperscript{98} Asylum officers consider the following factors when considering whether to grant asylum: whether the alien passed through any other countries or arrived in the United States directly; whether orderly refugee procedures were in fact available to help the alien in any country he or she passed through; whether the alien made any attempts to seek asylum before coming to the United States; the length of time the alien remained in the third country; the living conditions, safety and potential for long-term residency in the third country; relatives legally living in or other personal ties to the United States; ties to any other countries where alien does not fear persecution; whether the alien engaged in fraud to circumvent orderly refugee procedures and the seriousness of the fraud; and, finally, general humanitarian considerations such as the alien’s age and health.\textsuperscript{99} Significantly, however, this discretion must not be exercised arbitrarily; denials and reasons for denials must be in writing.\textsuperscript{100}

\textsuperscript{95} See An Overview, supra note 69 (providing example where displaced individuals from Venezuela did not meet “refugee” definition because dire socioeconomic conditions and violence these individuals fled did not constitute persecution).

\textsuperscript{96} See id. (providing distinction between legal and colloquial definitions of “refugee”).

\textsuperscript{97} See Seltzer, supra note 44, at 776 (describing how grants of asylum rely on discretion of immigration judges).

\textsuperscript{98} See Immigr. and Nationality Act, 8 U.S.C. § 1101(a) (42)(A) (codifying designated officials’ discretion to grant or deny asylum when reviewing applications).

\textsuperscript{99} Farbakhsh v. Immigr. & Nationality Serv., 20 F.3d 877, 881 (8th Cir. 1994) (providing factors for consideration when government entities assess individuals’ applications for asylum). In evaluating the seriousness of the fraud, the court noted that fleeing with fraudulent documents, for example, is not considered as serious as entering the United States under the assumed identity of a United States citizen with a United States passport, especially if the passport was fraudulently obtained from the United States. Id. (explaining how seriousness of fraud is analyzed).

\textsuperscript{100} Osorio v. Immigr. & Nationality Serv., 18 F.3d 1017, 1023 (2d Cir. 1994) (explaining extent of discretion); 8 C.F.R. § 208.19 (2000) (providing that “[t]he decision of an asylum officer to grant or to deny asylum or to refer an asylum
B. A “Protection Gap”: The Definitional Limits of “Refugee” for Climate-Displaced Individuals

The INA does not explicitly mention climate migrants in the definition of “refugee.”[^101] As a result, climate-displaced communities are hard-pressed to demonstrate persecution based on one of the INA’s enumerated protected grounds.[^102] People forced to migrate due to a combination of drought, violence, and economic instability, for example, will face significant challenges establishing persecution.[^103] This is because United States circuit courts have interpreted persecution rather narrowly, such that asylum-seekers must show that they have experienced or will experience specific targeting based on one of the INA’s protected categories.[^104] In other words, to prove persecution, asylum-seekers must show that the protected category motivated or will likely motivate the persecutor’s infliction of harm.[^105] This requirement makes it difficult to establish a government as a persecutor under the INA because the negative effects of climate change – due to the collective action problems at its core – cannot be attributed to a single government’s actions.[^106] These challenges in identifying a persecutor compound the difficulties climate migrants face when attempting to prove that their persecution is motivated by race, religion, nationality, political


[^102]: Wyman, supra note 44, at 179 (arguing that greenhouse gas emissions are unlikely to support findings of persecution); see also Jane McAdam, From Economic Refugees to Climate Refugees?, 10 Melb. J. Int’l L. (2009) (explaining how climate change’s negative impacts, which may spur relocation, “will be felt generally by the population as a whole, not by particular sectors as a result of discriminatory or targeted government policies”).

[^103]: Bergeron, supra note 43, at 24 (describing how United States refugee law is ill-equipped to grant protection to those facing generalized violence, harm, and famine, including climate migrants); see also Lustgarten, supra note 2 (reporting complex, multi-causal nature of climate-driven migration).

[^104]: See, e.g., Hussain v. Rosen, 985 F.3d 634 (9th Cir. 2021), cert. denied, 142 S. Ct. 1121 (2022) (finding that general violence and absence of individualized threats did not constitute persecution under INA).

[^105]: Kristina E. Music Biro et al., 3A C.J.S. Aliens § 895 (2023) (explaining that generalized violence, upheaval, and chaos are not sufficient to establish persecution on protected ground enumerated by INA); see also Hernandez Garmendia v. Att’y Gen, United States, 28 F.4th 476 (3d Cir. 2022) (holding that “[a]n asylum claim requires a nexus between the alleged protected grounds and the feared or past persecution” and “[s]uch a nexus entails showing an alleged persecutor’s motive, that the persecutor knows or believes that the applicant possesses the protected characteristic, and that this knowledge or belief motivates the harm feared”).

[^106]: See McAdam, supra note 102 (describing difficulties climate migrants face in identifying persecutor).
opinion, or membership in a particular social group. Without a clear persecutor, asylum-seekers are left without good evidence demonstrating that the motivation for their persecution stems from a protected ground.

Moreover, climate change itself affects people rather indiscriminately. That is, global temperature increases do not target individuals because of their characteristics, and climate change itself cannot necessarily be deemed a persecutor under the language of the INA. Thus, the definition of refugee does not account for the complexity of climate change-related harms. The persecution requirement was designed to govern and prevent a simpler, bad actor story—one where governments target individuals based on certain, protected categories. Crises stemming from climate change, however, are not reflective of discriminatory, bad actors, and the INA’s refugee classification fails to adequately account for this fact. Despite recognition from the United Nations High Commissioner for Refugees—the UN Refugee Agency responsible for protecting people forced to flee their homes due to conflict and persecution—that a connection exists between persecution and harm related to climate change, the link has yet to be broadly applied in United States immigration courts considering the definition of refugee across asylum applications.

107. See generally id. (suggesting that asylum-seekers may struggle to provide connection between individualized persecution and protected ground).

108. Id. (explaining how displaced communities from Kiribati and Tuvalu failed to demonstrate their refugee status in Australia and New Zealand because governing bodies did not identify climate change as persecution).

109. See OHCHR & PDD Report, supra note 1, at 36 (acknowledging that, while impacts of climate change are indiscriminate, they will have most extreme effect on already vulnerable populations due to economic, social, or geographic conditions).

110. See McAdam, supra note 102 (noting challenges when assigning persecutor in cases of climate displacement).

111. See Wyman, supra note 44, at 172-73 (explaining challenges “attribut[ing] a migration decision to climate change, as migration decisions often are a response to a combination of factors”).

112. See McAdam, supra note 102 (characterizing refugee law as “chunky tool” for addressing climate migration).

113. Id. (highlighting obstacles associated with failure to identify clear persecutor in cases of climate migration).

The above factors indicate that climate migrants often fall into a protection gap when seeking legal immigration status in the United States.\textsuperscript{115} The INA’s definition of refugee does not lend itself to protecting people who are forcibly displaced due to a combination of complex, climate change-related factors.\textsuperscript{116} This leaves climate-displaced communities without access to the legal safeguards provided under refugee and asylum law.\textsuperscript{117}

As Part III will illustrate, the climate migration protection gap underscores the power of the TPS program in providing a protective legal mechanism for climate-displaced people.\textsuperscript{118} Critically, individuals are not required to meet the INA’s definition of refugee to qualify for TPS.\textsuperscript{119} The following section will provide background on TPS and underscore its strengths and weaknesses when applied to cases of climate change-driven, cross-border movement.\textsuperscript{120}

III. TPS: A Practical, But Imperfect, Protective Legal Mechanism for the Climate-Displaced

Congress enacted TPS as an amendment to the INA in 1990.\textsuperscript{121} Federal legislators created TPS in response to President Ronald Reagan’s refusal to grant humanitarian relief to Salvadoran immigrants who fled unsafe living conditions in their home country during a violent civil war.\textsuperscript{122} TPS derived largely from an existing, uncodified procedure called Extended Voluntary Departure (EVD), a practice designed to fill the protective gaps perpetuated by United States

\begin{itemize}
  \item \textsuperscript{115} See IRAP, \textit{supra} note 114, at 12-16 (describing methods for eliminating humanitarian protection gap affecting climate migrants within current legal framework).
  \item \textsuperscript{116} See McAdam, \textit{supra} note 102 (reporting difficulties climate migrants face when confronted with meeting definition of “refugee” in order to receive humanitarian protection).
  \item \textsuperscript{117} For a discussion of the protection gap climate migrants face as asylum-seekers, see \textit{supra} notes 100-19.
  \item \textsuperscript{118} For a discussion of TPS as a legal mechanism for climate displaced individuals, specifically, see \textit{infra} notes 120-71 and accompanying text.
  \item \textsuperscript{119} See Bergeron, \textit{supra} note 43, at 25 (underscoring power of TPS in providing “blanket” form of relief for individuals who fail to meet legal definition of refugee).
  \item \textsuperscript{120} See IRAP, \textit{supra} note 114, at 13 (providing recommendations for leveraging TPS to protect climate-displaced individuals).
  \item \textsuperscript{121} See Immigr. and Nationality Act, 8 U.S.C. § 1254a (codifying TPS provision).
  \item \textsuperscript{122} Dara Lind, \textit{Biden Opened Temporary Legal Status to Thousands of Immigrants. Here’s How They Could End Up Trapped}, \textsc{ProPublica} (March 16, 2021, 11:15 AM), https://www.propublica.org/article/biden-opened-temporary-legal-status-to-thousands-of-immigrants-heres-how-they-could-end-up-trapped (noting TPS’s historical and political context).
\end{itemize}
refugee and asylum law. Generally speaking, EVD and TPS protect individuals facing broader safety threats who do not necessarily meet the INA’s persecution standard. Such individuals, therefore, do not benefit from asylum status. For over three decades since its inception, TPS has provided legal status for nationals of designated countries and served as a critical form of humanitarian protection in the United States.

TPS confers a number of legal benefits on migrants. For example, individuals granted TPS are eligible for employment authorization and travel authorization. Perhaps most critically, TPS holders are not removable from the United States, nor can DHS detain them due to their immigration status. Put simply, TPS is a powerful tool because once an individual is classified as a TPS holder, they have lawful status to work and live in the United States instead of being vulnerable to removal and deportation.

A. TPS Designation Requirements

Under the INA’s TPS provision, DHS is authorized to designate certain countries for TPS due to one or more of the following conditions: ongoing armed conflict (such as civil war), environmental disaster (such as an earthquake or hurricane), epidemic, or other extraordinary and temporary conditions. Since an environmental disaster, environmental disaster (such as an earthquake or hurricane), epidemic, or other extraordinary and temporary conditions.

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123. See Seltzer, supra note 44, at 777 n.5 (noting that Congress justified EVD – despite its absence in text of INA – by claiming that it was related to Attorney General’s power to suspend noncitizens’ deportation).
124. See id. at 783 (providing support for EVD and TPS).
125. See id. at 783-84 (describing congressional recognition of gaps in United States refugee and asylum law).
126. See id. (specifying qualifying conditions underlying DHS Secretary’s grant of TPS); see also Bergeron, supra note 43, at 22 (demonstrating how TPS serves as protection against deportation for hundreds of thousands of non-citizens); see also Seltzer, supra note 44, at 774 (describing how TPS provisions provide avenue for broader immigration relief for displaced individuals excluded from narrow definition of “refugee” in international and United States law).
128. See id. (noting TPS’s protective functions).
129. See id. (detailing more TPS benefits).
131. IMMIGR. and Nationality Act, 8 U.S.C. § 1254(a) (b) (noting reasons for TPS designation); see also Temporary Protected Status, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/temporary-protected-status (last visited Aug. 15, 2023) (providing examples of conditions in foreign states warranting TPS designation from DHS).
disaster is a legitimate reason for TPS designation, TPS is in a position to be a legal mechanism that can offer protection to climate migrants – especially when considering the inadequacy of United States refugee and asylum law as a protective measure for the climate-displaced.132 In the case of TPS designation for environmental disaster, however, a foreign state must request a TPS designation from the United States government before DHS has the authority to issue the TPS designation.133 This limitation imposes a bureaucratic restriction on protecting the climate-displaced.134

B. TPS and Citizenship

Unlike asylee or refugee status, TPS does not provide a clear path to LPR status or United States citizenship.135 In order to be eligible for LPR status, TPS holders must be “inspected or admitted” upon entry into the United States.136 A grant of TPS, however, does not require an applicant to be inspected and admitted at a United States port of entry.137 Consequently, TPS holders who were not inspected and admitted, but who are nonetheless living and working legally in the United States under TPS, operate in a perpetual “limbo state” because they cannot apply for LPR status and, subsequently, United States citizenship.138 Still, the TPS provision states that, “for purposes of adjustment of status under section 1255,” a TPS holder “shall be considered as being in, and maintaining, lawful

132. See IRAP, supra note 114, at 13 (explaining how broader application of TPS would provide protection for climate-displaced individuals); see also Bergeron, supra note 43, at 23-24 (discussing narrow definition of “refugee” at core of United States refugee and asylum law and challenges associated with granting asylum status).

133. 8 U.S.C. § 1254a(b) (codifying TPS’s foreign state request requirement prior to TPS designation for environmental disaster).

134. For a discussion about how to broaden TPS’s applicability and eliminate this bureaucratic restriction, see infra notes 198-215 and accompanying text.

135. Temporary Protected Status: An Overview, supra note 127 (noting absence of path to United States citizenship within TPS’s statutory framework). This Comment will focus primarily on the inspected and admitted requirement due to its connection to extensive federal litigation. See, e.g., Sanchez v. Mayorkas, 595 U.S. 409, 414 (2021) (holding that individuals who entered United States without inspection and admittance, but were later granted TPS, are not eligible for adjustment to LPR status because grants of TPS do not constitute admissions under INA).

136. See 8 U.S.C. § 1101(a)(13)(A) (imposing “admission” requirement for LPR eligibility); see also id. § 1255(a) (necessitating individual be “inspected and admitted” to become LPR).

137. See id. § 1254a(f)(4) (allowing for grants of TPS absent formal inspection and admission into United States).

status as a nonimmigrant.”139 Thus, even those who enter the United States unlawfully are not necessarily precluded from the lawful status imparted under TPS.140

In its 2021 decision Sanchez v. Mayorkas,141 the Supreme Court settled a circuit split over whether obtaining status through TPS establishes that an individual has been “inspected and admitted” under the INA for the purpose of LPR eligibility.142 Sanchez, the plaintiff, had entered the United States without being inspected and admitted at a lawful point of entry.143 He then applied for and received TPS after the United States designated El Salvador for TPS when the country suffered dangerous earthquakes.144 Thirteen years later, in 2014, Sanchez applied for an adjustment of status to LPR.145 USCIS denied Sanchez’s application, citing his initial entry into the United States and claiming it was unlawful under Section 1255(a) of the INA.146 Section 1255(a) provides that an “adjustment of status” is available only to non-citizens who were “inspected and admitted or paroled into the United States.”147 Sanchez responded by citing Section 1254a(f)(4) of the INA, which provides in relevant part: “[f]or purposes of adjustment of status under Section 1255,” a TPS holder “shall be considered as being in, and maintaining, lawful status as a nonimmigrant.”148 Justice Elena Kagan drafted the unanimous opinion for the Supreme Court, which held that the conferral of TPS does not result in an “admission” of the TPS holder into the United States under the INA.149 The Court took a textual approach, reasoning that a

139. 8 U.S.C. § 1254a(f)(4) (governing TPS holders’ options for adjustment of status).
140. See generally id. (allowing for grants of TPS absent formal inspection and admission into United States).
141. 593 U.S. 409, 414 (2021) (analyzing connection between TPS and immigration status).
142. Id. (addressing circuit split over INA’s interpretation of “inspected and admitted” language).
143. Id. (providing relevant facts).
144. Id. (explaining Sanchez’s decision to apply for TPS).
145. Id. (describing Sanchez’s desire to apply for LPR after over decade of living and working legally in United States under TPS).
146. Sanchez, 593 U.S. at 414 (outlining USCIS’s reasoning when denying Sanchez’s application for adjustment of status).
147. 8 U.S.C. § 1255(a) (governing TPS holders’ eligibility for adjustment of status).
148. Id. § 1254a(f)(4) (clarifying that INA provides TPS holders with lawful nonimmigrant status).
149. See Sanchez, 593 U.S. at 415 (reasoning that INA allows for TPS holders’ adjustment of status only if applicant was formally inspected and admitted to United States).
distinction exists between lawful admission and lawful status. More specifically, the Court found that eligibility for LPR requires lawful admission; since an individual’s lawful status from TPS does not necessarily point to that individual’s lawful admission, TPS holders may not apply for LPR absent formal inspection and admission. This conclusion reinforces TPS holders’ disadvantages when attempting to engage in adjustment of status – particularly if TPS holders entered the United States without formal inspection and admission.

C. Is TPS Really Temporary?

Statutorily speaking, the protections associated with grants of TPS are temporary: designations can only be made for six, twelve, or eighteen months at a time. “Temporary” is not defined in the TPS provision, however, and Congress gives DHS broad discretion to terminate, extend, re-extend, or re-designate current TPS country designations. Once DHS decides to terminate a TPS designation, affected TPS holders with no alternative legal immigration status or permission to stay in the United States return to undocumented status. If former TPS holders fail to leave the country after the termination of their country’s TPS designation, they risk deportation.

Despite DHS’s power to terminate TPS designations, many Salvadorans, Hondurans, and Nicaraguans have been living in the United States.
States under TPS for more than twenty years. In fact, on average, TPS holders have lived in the United States for twenty-two years. They have started families, they are the parents of hundreds of thousands of American citizens, and they have contributed dramatically to the American labor force and economy. Ninety percent of TPS holders pay taxes, and many are homeowners. Even so, TPS holders who have been living and working in the United States for many years live in a state of perpetual unease because DHS has the power and discretion to abruptly terminate TPS designation.

This current landscape demonstrates how TPS, practically speaking, offers a more permanent legal status for those facing humanitarian crises in their countries of origin. Again, however, TPS provides no guarantees or pathways to United States citizenship, specifically for those who do not meet the inspected and admitted requirement. Therefore, while TPS provides an illusion of permanence – especially when considering the decades-long protection offered to individuals from El Salvador, Honduras, and Nicaragua – this illusion of permanence is precarious. Today, many TPS holders feel that the repeated failure of comprehensive immigration reform bills leaves them vulnerable and without protection from deportation.

Still, hundreds of thousands of people benefit from the legal protection provided by the TPS program. At present, the United

160. See id. (describing long-term United States residence, and even homeownership, stemming from repeated TPS extensions).
161. See id. (demonstrating insecurity associated with TPS due to possibility of TPS termination).
162. See id. (providing additional examples of TPS operating semi-permanently in United States while also leaving TPS holders without path to citizenship).
163. See Temporary Protected Status: An Overview, supra note 127 (noting immigration protection for TPS holders but also recognizing disadvantages associated with lack of formal path to United States citizenship).
164. Id. (describing countries with numerous re-designations for TPS).
165. See Valdes, supra note 159 (reporting TPS holders’ vulnerability amid fights for sweeping reform bills that do not pass).
166. See Temporary Protected Status: An Overview, supra note 127 (providing total number of potential TPS holders based on United States government’s current TPS designation statistics).
States has provided TPS to approximately 400 thousand foreign nationals because DHS has designated their home countries unsafe for their return, including Afghanistan, Burma (Myanmar), Cameroon, El Salvador, Ethiopia, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, Ukraine, Venezuela, and Yemen. In the spring of 2023, about 610,630 TPS holders were living in the United States.

Regardless of the statute’s weaknesses, the TPS provision of the INA offers a protective legal mechanism uniquely situated to tackle the effects of climate migration. Since climate-displaced people do not generally fall under the INA’s narrow definition of “refugee,” they face significant challenges when applying for asylum. The TPS program offers a viable alternative, or starting point, for climate migrants. Still, despite the benefits TPS offers, TPS holders face precarity concerning their legal status in the United States, especially since many do not have a clear path to LPR status and citizenship.

IV. Revising the INA to Enhance the Protection of Climate-displaced Communities in the United States

This Comment proposes altering the INA’s TPS and adjustment of status provisions to accommodate climate-displaced individuals. First, in the TPS provision, the “environmental disaster” TPS designation option should be incorporated under the “extraordinary and temporary conditions” TPS designation option to increase the likelihood of designations for countries vulnerable to the effects of climate migration. Second, Congress should revise the INA’s adjustment of status provision to allow long-term TPS holders to

167. Id. (listing countries designated for TPS).
168. Temporary Protected Status, supra note 46 (noting current number of TPS holders within United States).
169. See Bergeron, supra note 43, at 24 (discussing narrow definition of “refugee” at core of United States refugee and asylum law and listing challenges associated with granting asylum status).
170. See Wyman, supra note 44, at 178 (describing issues surrounding narrow refugee definition for climate-displaced individuals).
171. Temporary Protected Status: An Overview, supra note 127 (presenting TPS’s advantages and disadvantages).
172. See id. (highlighting how TPS holders are not automatically permitted to pursue adjustment of status under INA).
173. For a discussion of this Comment’s proposed changes to TPS, see infra notes 174–216 and accompanying text.
adjust their status to LPR. Both proposals have statutory and practical support, as discussed in Parts IV(A) and IV(B).

A. Dissolve TPS Provision’s “Environmental Disaster” Designation Into the “Extraordinary and Temporary Conditions” Designation

Congress should revise the TPS provision of the INA by dissolving environmental disaster TPS designations (Section 1254a(b)(1)(B)) into extraordinary and temporary designations (Section 1254a(b)(1)(C)). Environmental disaster-based TPS designations require that the foreign state officially request a TPS designation from the United States, which adds another decision-making authority to an already complicated and discretionary process for granting humanitarian relief. Extraordinary and temporary conditions-based TPS designations, however, do not require foreign states to officially request a TPS designation. More specifically, extraordinary and temporary conditions-based designations are permitted unless the Attorney General or DHS Secretary determines that allowing the noncitizens to stay in the United States temporarily runs “contrary to the national interest of the United States.” While this part of the statute still poses a bureaucratic obstacle to TPS designation, it does not introduce another decision-maker, which is precisely what environmental disaster-based TPS designations require by including the foreign state request requirement. Incorporating environmental disaster-based TPS designations would streamline TPS designations by eliminating the collective action problems that may emerge when foreign leaders are required to request a TPS designation amid environmental disasters.

175. See id. § 1255 (governing adjustment of status for TPS holders).
176. See id. § 1254(a)(b)(3) (allowing TPS extensions, re-extensions, and re-designations).
177. Id. § 1254(a)(b)(1)(B)-(C) (allowing extraordinary and temporary conditions-based TPS designations and environmental disaster-based TPS designations).
178. Id. § 1254(a)(b)(1)(B)(iii) (adding additional statutory requirements for TPS designations based on environmental disasters).
179. 8 U.S.C. § 1254a(b)(1)(C) (codifying extraordinary and temporary conditions-based TPS designation).
180. See id. (providing caveat in extraordinary and temporary conditions-based TPS designations).
181. See id. (requiring foreign state to request TPS designation in designations due to environmental disaster).
182. See IRAP, supra note 114, at 14 (noting foreign state request requirement for environmental disaster-based TPS designation); see also Bill Frelick, What’s Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime, 8 J. ON MIGRATION & HUM. SEC. 42, 47 (2020) (explaining that "[m]any governments would be loath to admit their failings and ask the United States to provide TPS for its nationals in situations of their own making, such as a Chernobyl-like environmental disaster, generalized lawlessness,
Furthermore, despite their environmental nature, climate change-driven crises have already prompted extraordinary and temporary conditions-based designations. Notably, Haiti was designated for TPS based on extraordinary and temporary conditions after a 2010 earthquake resulted in devastating regional damage, and it has been extended multiple times since the earthquake. By extension, environmental disaster-based TPS designations can fall under the broader umbrella of extraordinary and temporary conditions. Again, the comparative statutory flexibility surrounding extraordinary and temporary conditions-based designations will likely benefit climate migrants by streamlining the designation process amid multi-causal environmental disasters.

In addition, environmental disaster-based TPS designations (Section 1254a(b)(1)(B)) should be dissolved into extraordinary and temporary conditions-based TPS designations (Section 1254a(b)(1)(C)) because the effects of climate change might not always look like a cut and dry environmental disaster. As Cortez’s story illustrates, climate change can amplify and reinforce social and economic factors driving migration. Moreover, since climate displacement is multi-causal, it might fall more neatly under Section 1254a(b)(1)(C), which permits TPS designation based on extraordinary and temporary conditions in other states that prevent foreign nationals’ safe return to their home countries.

Indeed, DHS has already cited climate change-driven factors as evidence of extraordinary and temporary conditions warranting TPS designation. For example, in the USCIS Federal Register

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183. See IRAP, supra note 114, at 14 (using Haiti as example of situation where extraordinary and temporary conditions justified TPS designations when earthquakes are environmental in nature).

184. See id. (explaining that Haiti’s TPS designation fell under “extraordinary conditions” prong and not “environmental disaster” prong).

185. See 8 U.S.C. § 1254a (creating bases with varying levels of specificity and requirements as grounds for TPS designation, and identifying extraordinary and temporary conditions as basis for TPS absent foreign state request requirement).

186. See id. (providing fewer administrative hurdles for extraordinary and temporary conditions-based TPS designations).

187. See Lustgarten, supra note 2 (demonstrating multi-causal nature of climate migration).

188. See OHCHR & PDD Report, supra note 1, at 38 (exploring connection between different contributing factors to climate migration, like employment issues, drought, and crop loss).

189. See Lustgarten, supra note 2 (describing how climate migration stems from overlapping economic, social, and environmental factors).

190. See IRAP, supra note 114, at 14 (describing DHS’s decision to designate Haiti due to extraordinary and temporary conditions after 2010 earthquake).
Notice Citation designating Ethiopia for TPS in 2022, the DHS cited “drought, flooding, food insecurity, displacement of persons, and other humanitarian concerns” as extraordinary and temporary conditions.\textsuperscript{191} These factors, taken together, demonstrate the multi-causal nature of climate migration — and DHS recognizes their cumulative effect as extraordinary and temporary conditions warranting TPS designation.\textsuperscript{192} Similarly, when DHS designated Afghanistan for TPS in 2023, the agency recognized that “lack of access to food, clean water, and healthcare, as well as destroyed infrastructure, internal displacement, and economic instability” contributed to extraordinary and temporary conditions.\textsuperscript{193} These Federal Register notices exemplify DHS’s awareness of the cumulative effects of climate-driven migration drivers and its willingness to provide TPS designations based on the multi-causal hardships preventing foreign nationals’ safe return to their home countries.\textsuperscript{194}

In sum, Congress should amend the TPS provision by dissolving environmental disaster-based TPS designations into extraordinary and temporary conditions-based TPS designations.\textsuperscript{195} This change would benefit climate migrants by eliminating the requirement that the foreign state officially request a TPS designation and streamlining the designation process.\textsuperscript{196} And since the reasons underpinning climate displacement are multi-causal, climate migration falls more neatly under Section 1254a(b)(1)(C), which permits TPS designation based on extraordinary and temporary conditions in other states that prevent foreign nationals’ safe return to their home countries.\textsuperscript{197} DHS has already demonstrated its willingness to look at

\textsuperscript{191} Designation of Ethiopia for Temporary Protected Status, 87 Fed. Reg. 76074, 76078 (Dec. 12, 2022) (establishing legitimate connection between environmental conditions like drought and temporary and extraordinary conditions-based TPS designations).

\textsuperscript{192} See id. (assigning climate-driven factors label of extraordinary and temporary conditions).

\textsuperscript{193} Extension and Redesignation of Afghanistan for Temporary Protected Status, 88 Fed. Reg. 65728, 65731 (Sept. 25, 2023) (listing environmental issues amounting to temporary and extraordinary conditions).

\textsuperscript{194} See id. (recognizing overlapping and cumulative effects of environmental, climate-driven factors like resource shortages, infrastructure concerns, and economic instability).

\textsuperscript{195} For a discussion of this Comment’s proposal to dissolve environmental disaster-based TPS designations into extraordinary and temporary conditions-based TPS designations, see \textit{supra} notes 178-95 and accompanying text.


\textsuperscript{197} See Extension and Redesignation of Afghanistan for Temporary Protected Status, \textit{supra} note 193, at 65731 (listing environmental issues amounting to temporary and extraordinary conditions permitting TPS designation); see also Designation of Ethiopia for Temporary Protected Status, \textit{supra} note 191, at 76078 (citing “extraordinary and temporary conditions resulting from drought, flooding, food
the hardships leading to extraordinary and temporary conditions cumulatively, which benefits climate migrants who leave their home countries due to a combination of overlapping social, economic, and environmental factors.198

B. Allow TPS Holders Who Have Experienced at Least One Extension, Re-extension, or Re-designation of TPS to Apply for LPR

This Comment also proposes amending Section 1255 of the INA to create a pathway to citizenship for TPS holders who experience extensions, re-extensions, or re-designations.199 This statutory change would benefit climate-displaced communities in the United States by eliminating long-term TPS holders’ fears about losing their legal status after creating homes in the United States.200 Both statutory and practical arguments exist for extending a path to citizenship for certain TPS holders.201 First, the plain language of the INA allows for extensions, re-extensions, and re-designations of TPS – and this indicates that Congress intended to allow certain TPS holders to stay in the United States for longer than eighteen months.202 Second, while this takeaway might be implicit in the statutory text, DHS’s demonstrated practice of extending, re-extending, and re-designating countries for TPS also points to the government’s explicit endorsement of TPS holders’ longer-term residence in the

insecurity, displacement of persons, and other humanitarian concerns” and therefore drawing connection between extraordinary and temporary conditions and climate crises).198. See, e.g., Designation of Ethiopia for Temporary Protected Status, supra note 191, at 76078 (demonstrating DHS’s willingness to assess multi-causal displacement and label resulting conditions as extraordinary and temporary).

199. 8 U.S.C. § 1255 (codifying adjustment of status requirements for TPS holders).

200. See Valdes, supra note 159 (describing instability and unease perpetrated by absence of path to citizenship for long-term TPS holders); see also Frelick, supra note 182, at 51 (suggesting that “[a]llowing qualified current TPS beneficiaries to adjust to lawful permanent resident status would recognize they are not to blame for the unwieldy system that resulted in their permanent-temporary status” and indicating that such proposal would “acknowledge that after many years they have accrued genuine ties to the United States and that they and their close US citizen and lawful permanent resident (LPR) family members would experience significant hardship if they were to be deported”).

201. See 8 U.S.C. § 1254a(b)(3) (permitting extensions, re-extensions, and re-designations of TPS); see also Extension and Redesignation of Afghanistan for Temporary Protected Status, supra note 193, at 65732 (providing TPS extension and redesignation for Afghanistan based on “ongoing humanitarian crisis” constituting “an extraordinary and temporary condition that makes it difficult for Afghan nationals to safely return to their country”).

202. 8 U.S.C. § 1254a(b)(3) (allowing DHS to extend, re-extend, and re-designate countries for TPS after initial legal protection period ends).
United States.203 Again, TPS holders from El Salvador, Honduras, and Nicaragua have had legal status to live and work in the United States for over two decades.204

Under the current INA framework, however, TPS holders are powerless if the political party benefitting from executive power issues TPS terminations.205 In fact, DHS issued terminations for El Salvador, Honduras, Nepal, and Nicaragua during the Trump Administration, which prompted a series of lawsuits in federal court.206 While these TPS terminations were rescinded under the Biden Administration in 2023, the language under the INA still leaves TPS holders at the whim of changing political tides.207

Climate-displaced TPS holders are particularly vulnerable to deportation and removal concerns because DHS has extended, re-extended, and re-designated TPS for countries with climate change-driven migration factors, resulting in years of legal United States residence.208 Both El Salvador and Honduras were originally designated for TPS due to environmental disasters, indicating that TPS holders from those countries suffered some level of climate change-induced displacement.209 Now, since so many have

203. See Valdes, supra note 159 (reporting stories from TPS holders who have lawfully resided in United States for over two decades).

204. See id. (demonstrating DHS’s practical use of TPS as longer-term solution for displaced individuals who fail to meet requirements for asylum or refugee status).

205. See Hallstein, supra note 152, at 1002 (explaining that TPS “may be revoked freely at the discretion of the Executive Branch”).

206. See Valdes, supra note 159 (providing information on lawsuits brought by long-term TPS holders facing threat of deportation).

207. See Dara Lind, Trump Tells 57,000 Hondurans Who’ve Lived in the US for 20 Years to Get Out, Vox (May 4, 2018, 4:25 PM), https://www.vox.com/2018/5/4/17320392/tps-honduras-cancel-trump-temporary-protected-status (describing executive branch’s power to strip TPS designations and turn long-term United States residents into unauthorized immigrants lacking legal protection from deportation); see also Hallstein, supra note 152, at 1009 (describing how Biden Administration’s TPS extensions, while providing short-term safety, do little to permanently protect TPS holders from TPS termination moving forward).

208. See Valdes, supra note 159 (providing examples of TPS holders with families, jobs, and lives in United States); see also Lind, supra note 207 (reporting that “[n]early a quarter of Hondurans with TPS were younger than 15 when they came to the US, meaning they’ve spent more of their lives here than there” and further detailing that “an estimated 53,000 US-born kids had at least one parent who benefits from Honduras’s TPS designation”).

209. Reconsideration and Rescission of Termination of the Designation of Honduras for Temporary Protected Status; Extension of the Temporary Protected Status Designation for Honduras, 88 Fed. Reg. 40304, 40305 (June 21, 2023) (discussing Honduras’s original TPS designation due to environmental disaster); see also Reconsideration and Rescission of Termination of the Designation of El Salvador for Temporary Protected Status; Extension of the Temporary Protected Status Designation for El Salvador, 88 Fed. Reg. 40282, 40283 (June 21, 2023) (noting that “El Salvador was initially designated for TPS on the basis of environmental disaster, following two separate massive earthquakes in 2001 . . . ”).
communities, homes, and families in the United States, the consequences of deportation have amplified.210

Revising Section 1255 of the INA to allow TPS holders who have experienced at least one extension, re-extension, or re-designation of TPS to apply for LPR would bring security and recognition to certain climate-displaced communities.211 It would also legitimize the INA itself by ensuring that TPS holders can adjust to LPR status once their status is, in effect, no longer temporary.212 Again, the statutory support for this revision comes primarily from the TPS provision, which allows for TPS extensions, re-extensions, and re-designations.213 Support also comes from the DHS’s demonstrated practice of providing extensions, re-extensions, and re-designations.214 While the Supreme Court’s holding in Mayorkas shut the door on certain TPS holders’ LPR eligibility, Congress can still revisit and amend the INA to protect climate-displaced communities in the United States.215 Congress also has the power to carve out a more permanent path to citizenship for climate-displaced communities – a path that is insulated from the increasingly polarizing changes that occur when a new president enters the Oval Office and has the power to strip the protections afforded by TPS.216

V. LOOKING AHEAD: THE URGENT NEED FOR COMPREHENSIVE CLIMATE MIGRATION POLICIES

Even when TPS is factored into the current climate justice and immigration equation, the protective legal mechanisms for climate-displaced individuals seeking shelter within United States

210. See Valdes, supra note 159 (illustrating dire effects of TPS termination after TPS holders’ decades-long United States residence).

211. See id. (demonstrating unease and uncertainty that go along with TPS’s illusory permanence).

212. See 8 U.S.C. § 1254a(a)(1)(a) (indicating that conferral of TPS is intended to be temporary).

213. Id. § 1254a(b)(3) (permitting extensions, re-extensions, and re-designations of TPS).


215. See Hallstein, supra note 152, at 1009 (acknowledging role of politics on TPS designations and terminations). For a discussion of the Supreme Court’s holding in Mayorkas, see supra notes 142-53 and accompanying text.

216. See id. at 1007-08 (recounting Trump Administration’s extension of TPS eligibility “to only six of the ten then-TPS-eligible countries” in November 2019).
borders remain inadequate.\textsuperscript{217} This inadequacy stems primarily from the protection gaps in refugee and asylum law; however, TPS does not provide long-term security for climate migrants in the United States, either.\textsuperscript{218} Fortunately, despite the program’s weaknesses, TPS provides a form of protection for involuntary migrants who do not fit within the narrow definition of “refugee.”\textsuperscript{219} And the proposed revisions to the INA advocated in this Comment have the potential to enhance and broaden TPS’s protective capabilities for those who leave their home countries for climate change-driven reasons.\textsuperscript{220}

Still, as the threat of climate migrations becomes more difficult to ignore, policymakers must pursue alternatives to TPS in its current form.\textsuperscript{221} As this Comment reinforces, climate change constitutes a “threat multiplier” when it comes to the factors that promote destruction, destabilization, and displacement.\textsuperscript{222} But in the meantime, TPS provides a protective – if only temporary – legal window for climate-displaced people in the United States.\textsuperscript{223}

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\textsuperscript{217.} For a discussion on current protective legal mechanisms for climate displaced individuals seeking shelter in the United States, see supra notes 42-99, 120-71 and accompanying text.  
\textsuperscript{218.} For a discussion on protection gaps in refugee and asylum law, see supra notes 100-19 and accompanying text.  
\textsuperscript{219.} For a discussion of TPS, see supra notes 120-71 and accompanying text.  
\textsuperscript{220.} For a discussion of this Comment’s proposed changes to the INA, see supra notes 172–215 and accompanying text.  
\textsuperscript{221.} See Hallstein, supra note 152, at 1032 (underscoring need for laws addressing climate migration and, more specifically, laws allowing for adjustment of status from TPS to LPR status).  
\textsuperscript{222.} See Balsari et al., supra note 7 (highlighting intersection of climate change, displacement, and social unrest).  
\textsuperscript{223.} See IRAP, supra note 114, at 13-14 (noting benefits of TPS for climate-displaced individuals).  
\textsuperscript{*} J.D. Candidate, May 2024, Villanova University Charles Widger School of Law; B.A., Political Science, 2021, Gettysburg College. I dedicate this Comment to Joseph Phelan – thank you for making me feel loved, seen, and known. And thank you for making me laugh. Laughter is key during the writing process. This Comment is also for Meggie McCarthy-White and Mylon Medley – you two make everything brighter. To the Villanova Environmental Law Journal’s Staff Writers and Executive Board members, who believed in this piece from the beginning – I have so much gratitude for your insights and support. And last, but certainly not least, thank you to my family – through it all, you have given me a safe space to land.