No. 12-930

IN THE
Supreme Court of the United States

ALEJANDRO MAYORKAS, *et al.*,
Petitioners,
v.

ROSALINA CUELLAR DE OSORIO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a U.S. citizen or lawful permanent resident petitions the government to issue a lawful permanent resident visa to a close relative, the relative's children under 21 may be included in the petition as "derivative beneficiaries." *See* 8 U.S.C. §1153(d). Alien relatives are allotted visas based on their relationship to the petitioner and the date of their petition's filing, known as their "priority date." Because of backlogs, it may take years or decades for an alien's priority date to become current, such that a visa is available for her. If a child who is listed as a derivative beneficiary turns 21 before a visa becomes available (known as "aging out"), he or she is no longer eligible for treatment as a derivative beneficiary, but rather must seek a visa by another route, often under a different statutory category as the adult son or daughter of a lawful permanent resident.

In 2002, Congress enacted the Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927, which protects derivative beneficiaries from the consequences of turning 21 by, among other things, allowing them to retain their original priority date when they move to the new statutory category, rather than assigning them a new, later priority date that disregards the length of time they have already waited.

The question presented is:

Whether the protection extended by the Child Status Protection Act, 8 U.S.C. §1153(h)(3), applies to children included as derivative beneficiaries on petitions filed by U.S. citizens.

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BRIEF IN OPPOSITION

INTRODUCTION

Respondents are law-abiding noncitizens who sought, through their U.S. citizen relatives, to immigrate to this country with their minor children, as the law permits. They waited patiently for years, in some cases decades, for visas to become available, and in that time their sons and daughters turned 21, such that they were no longer able to immigrate under the petition filed by their U.S. citizen relatives. Respondents became lawful permanent residents (LPRs), filed new petitions on behalf of their now-adult sons and daughters, and requested that those children receive credit for the years they had already spent waiting for visas, rather than being required to start again at the back of the

queue. The court of appeals correctly ruled that Congress expressly allowed that credit—known as "retention of priority date"—in the aptly-named Child Status Protection Act (CSPA), Pub. L. No. 107-208, §3, 116 Stat. 927, 928 (2002).

There are several reasons why the Court need not and should not review this case. Congress is currently considering a comprehensive immigration reform bill that would moot the question presented entirely. And while there is a shallow circuit split, it does not produce a risk of different enforcement in different circuits: a final judgment in the nationwide class action in this case would result in national uniformity without this Court's intervention.

Furthermore, the court of appeals' decision is correct. The government urges this Court to treat the plain statutory language as "ambiguous" and to defer to a reading of the CSPA that withholds the "retention of priority date" benefit from derivative beneficiaries (like Respondents' children) included on petitions filed by U.S. citizens. According to the government, Respondents' children must wait many more years before being allowed to reunite with their immediate family in the United States. That interpretation is at odds with the plain text, structure, and history of the CSPA, and the court of appeals was right to reject it.

STATEMENT

A. Background

1. The immigration law has long permitted U.S. citizens and LPRs to sponsor close relatives to immigrate to the United States. The U.S. citizen or LPR files a "Petition for Alien Relative" on Form I-130 (*see* Pet. App. 38a-39a) identifying the alien relative (the

"primary beneficiary"), and also in some circumstances identifying the relative's spouse or children under 21 (known as "derivative beneficiaries"). A primary beneficiary's spouse and children under 21 may receive an immigrant visa (green card) at the same time as the primary beneficiary. 8 U.S.C. §1153(d) (derivative beneficiaries are "entitled to the same status, and the same order of consideration" as the primary beneficiary).

If a petition meets all applicable criteria, then it is "approved," and the primary beneficiary and her derivative beneficiaries are eligible to receive green cards. Most beneficiaries, however, must wait, because annual numerical limits make it impossible to issue visas to all approved beneficiaries immediately.[1] The length of an alien's wait depends in part on the nature of the relationship between the petitioner and the primary beneficiary, which the Immigration and Nationality Act (INA) divides into four "preference categories," the second of which has two subcategories:

F1: unmarried adult sons or daughters of U.S. citizens (8 U.S.C. §1153(a)(1))

F2: F2A: spouses and minor children of LPRs (*id.* §1153(a)(2)(A))

F2B: unmarried adult sons or daughters of LPRs (*id.* §1153(a)(2)(B))

F3: married adult sons or daughters of U.S. citizens (*id.* §1153(a)(3))

[1] The exceptions are spouses, children, and parents of U.S. citizens ("immediate relatives"), who are not subject to numerical limits and may receive visas immediately after the petition is approved. 8 U.S.C. §1151(b)(2); Pet. App. 39a.

F4: brothers and sisters of U.S. citizens (*id.* §1153(a)(4))

Beneficiaries receive visas based on "the order in which a petition in behalf of each such immigrant is filed." *Id.* §1153(e)(1). An alien's place in this "order" is determined by the date on which the petition seeking to permit her to immigrate is filed, referred to as the alien's "priority date." 8 C.F.R. §204.1(b); *see, e.g.*, 8 U.S.C. §1153(h)(3). In some circumstances, a beneficiary may wait decades before a visa becomes available.

2. Respondents' personal histories are varied, but all were the primary beneficiaries of family-based immigration petitions filed by a U.S. citizen parent (F3 petition) or sibling (F4 petition); they also all have children who were under 21 when the petition was filed.[2] When their priority dates became current, however, the children had already passed their twenty-first birthdays and were no longer eligible to receive green cards as derivative beneficiaries—a situation referred to as "aging out." Pet. App. 5a. After receiving their green cards, Respondents sought visas for their (now adult) children under the "F2B" preference category—for the adult son or daughter of an LPR—but their children ran the risk of being assigned a new, later priority date and being placed far behind others who had not been waiting as long as them.

To illustrate, Respondent Rosalina Cuellar de Osorio was the primary beneficiary of an F3 petition

[2] One such child, Ruth Uy, is also a respondent. To reduce complexity, this brief refers to the primary beneficiaries of F3 and F4 petitions as "Respondents" and to the derivative beneficiaries, including Ruth Uy, as "Respondents' children."

filed by her mother, a U.S. citizen. Complaint ¶29, *Cuellar de Osorio* v. *Scharfen*, No. 08-cv-00840 (C.D. Cal. June 23, 2008) (Dkt. No. 1). The petition listed Ms. Cuellar de Osorio's son Melvin, who was thirteen, as a derivative beneficiary. *Id.* The petition was filed in May 1998 and approved a month later, but a visa did not become available until November 2005—four months after Melvin turned 21. *Id.* ¶¶29-30. Ms. Cuellar de Osorio immigrated to the United States in August 2006, leaving Melvin behind in El Salvador. In July 2007, Ms. Cuellar de Osorio filed an F2B petition for Melvin as the adult son of a lawful permanent resident. *Id.* ¶32.

Respondent Norma Uy was the primary beneficiary of an F4 petition filed by her U.S. citizen sister in February 1981. Compl. ¶35. The petition listed Norma's daughter Ruth Uy, who was two, as a derivative beneficiary. *Id.* The petition was approved on the day of its filing, but a visa did not become available until over 21 years later, in July 2002, at which point Ruth was 23. *Id.* ¶36. Norma immigrated and filed a new F2B petition for Ruth. *Id.* ¶¶37-39. The remaining Respondents are in similar situations.

3. Congress recognized and addressed this "aging out" problem when it enacted the CSPA in 2002. Section 3 of the CSPA, entitled "Treatment of Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based and Diversity Immigrants," added 8 U.S.C. §1153(h), which addresses the problem in two ways. CSPA §3, 116 Stat. at 928.

First, paragraph (h)(1) provides that, for purposes of determining eligibility to be a derivative beneficiary, a child's age is reduced by the amount of time the government took to approve the petition (in Melvin Cuellar

de Osorio's case, this was one month (Pet. App. 11a); in Ruth Uy's case, one day (Compl. ¶¶35-36)). *See* 8 U.S.C. §1153(h)(1) (reducing the alien's age by "the number of days in the period during which the applicable petition … was pending"). Paragraph (h)(1) applies to all petitions described in paragraph (h)(2), which in turn describes (i) F2A petitions on which children are listed as *primary* beneficiaries (*see id.* §1153(a)(2)(A), (h)(2)(A)), and (ii) family-preference, employment, and diversity petitions with children listed as *derivative* beneficiaries (*see id.* §1153(d), (h)(2)(B)).

Second, paragraph (h)(3) provides that, if the calculation in paragraph (h)(1) still yields an age over 21, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3).

Rosalina Cuellar de Osorio accordingly asked the government to permit Melvin to retain the same May 1998 priority date that he had when the original F3 petition was filed and to process his F2B petition using that date. Compl. ¶32. The other Respondents made similar requests. Had the requests been granted and the original priority dates used, Respondents' children would have been able to immigrate or adjust their status immediately. Instead, the government, without explanation, did not make visas available. *Id.* ¶¶33, 40, 49, 57, 64. Respondents filed suit, seeking to compel the government, in processing the F2B petitions, to allow their sons and daughters to keep the original priority date of the F3 or F4 petition that listed them as derivative beneficiaries.

B. District Court Proceedings

The district court addressed this issue in two separate opinions: *Zhang* v. *Napolitano*, which involved claims by individual Respondents only (Pet. App. 61a-78a), and *Costelo* v. *Chertoff*, a class action in which Respondents Costelo and Ong are lead plaintiffs (Pet. App. 79a-84a). The certified class consists of aliens who became LPRs as primary beneficiaries of F3 or F4 petitions that listed their children as derivative beneficiaries and who subsequently filed F2B petitions for their aged-out unmarried sons and daughters, for whom the government refused to allow automatic conversion or priority date retention under Section 1153(h)(3). *See* Pet. App. 77a.

In *Zhang*, Respondents initially relied on an unpublished decision of the Board of Immigration Appeals (BIA), which held that a child listed on an F4 petition filed for her mother by her mother's U.S. citizen sister was entitled, after she turned 21, to "retain the … priority date that applied to the original fourth-preference petition," meaning that "a visa number under the second-preference category is immediately available to the respondent." *Matter of Garcia*, 2006 WL 2183654, at *4 (BIA June 16, 2006).

In June 2009, the BIA issued *Matter of Wang*, 25 I. & N. Dec. 28 (2009), which disapproved *Garcia* and ruled that a child listed as a derivative beneficiary on an F4 petition filed by a U.S. citizen relative could not retain her priority date for purposes of a later F2B petition filed by her parent. Mr. Wang was the primary beneficiary of an F4 petition filed on December 28, 1992, by his U.S. citizen sister, which listed his minor daughter as a derivative beneficiary. By the time a visa became available, Mr. Wang's daughter had turned

21. Mr. Wang filed an F2B petition for his daughter and asked that she be allowed, under Section 1153(h)(3), to retain the 1992 priority date. *Id.* at 29.

The BIA held that the CSPA "does not expressly state which petitions qualify for automatic conversion and retention of priority dates." 25 I. & N. Dec. at 33. The BIA concluded, however, that the phrase "automatic conversion" had a "recognized meaning" that applied only where "a visa petition converts from one visa category to another … without the need to file a new visa petition," and only where the petitioner remained the same. *Id.* at 34-35. The BIA also held that "retention" of priority dates applied only to "visa petitions filed by the same family member," whereas a petition "filed by another family member receives its own priority date." *Id.* The BIA believed that the CSPA's use of "retention" should be interpreted in light of prior regulations, under which retention of priority dates was expressly "limited to a[n] [LPR]'s son or daughter who was previously eligible as a derivative beneficiary under a second-preference spousal [F2A] petition filed by that same [LPR]." *Id.* at 34 (discussing 8 C.F.R. §204.2(a)(4)). Because Mr. Wang's adult daughter had been a derivative beneficiary on an F4 petition filed by a U.S. citizen (Mr. Wang's sister), not an F2A petition filed by an LPR parent, the BIA ruled that Mr. Wang's daughter could not benefit from the CSPA's date-retention provision to retain the 1982 priority date. Accordingly, Mr. Wang's daughter was given a much later priority date of September 5, 2006—the date Mr. Wang filed his daughter's F2B petition. *Id.* at 39.

In a decision issued in the *Zhang* case, the district court treated *Wang* as "dispositive." Pet. App. 72a. The court concluded that Section 1153(h)(3) was ambiguous, based on the BIA's statement that the provision

by itself did not "'expressly state which petitions qualify for automatic conversion and retention of priority dates.'" *Id.* 73a (quoting *Wang*, 25 I. & N. Dec. at 33) (emphasis omitted). The court then concluded that the BIA acted "reasonabl[y]" in deciding that the only derivative beneficiaries who could benefit from the date-retention provision in Section 1153(h)(3) were "beneficiaries of derivative F2A petitions" filed by LPRs. *Id.* 75a-76a. The court accordingly deferred to *Wang* under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The same judge later granted summary judgment in *Costelo* on the same grounds. Pet. App. 83a-84a.[3]

C. Court Of Appeals Proceedings

A panel of the U.S. Court of Appeals for the Ninth Circuit affirmed.[4] The court summarized the issue as "whether an aged-out derivative beneficiary of an F3 petition … or F4 petition … is entitled to automatic conversion and priority date retention, or either of them separately, under the CSPA." Pet. App. 42a.

Notably, the panel "reject[ed] any contention that the word 'petition' in paragraph [(h)](3) is ambiguous because it is not defined by express reference to paragraph [(h)](2)." Pet. App. 50a. As the panel observed, paragraph (h)(3) is triggered only if application of paragraph (h)(1) yields a calculated age for the derivative beneficiary that is over 21. *Id.* 50a & n.4 (when a visa

[3] The court ruled that the BIA's reasoning applied to derivative beneficiaries listed on F3 and F4 petitions "with equal vigor." Pet. App. 68a n.3.

[4] The two litigations were consolidated before the Ninth Circuit. *See* Pet. App. 1a.

was available for Respondent Cuellar de Osorio, her son Melvin was considered 21 years, 50 days old under the paragraph (h)(1) calculation, thus "paragraph [(h)](3) is triggered"). Accordingly, the panel ruled that paragraph (h)(3) applies to "*any* family preference petition for which a child is a derivative beneficiary." *Id.* 51a (emphasis added).

"Despite this plain language, however," the panel concluded that paragraph (h)(3) was ambiguous because it did not "practicably apply" to Respondents' situations. Pet. App. 51a. The panel held that the phrase "the alien's petition shall automatically be converted to the appropriate category" (8 U.S.C. §1153(h)(3)) could not apply where "a new petitioner—the LPR parent—is required" (Pet. App. 52a-53a). Thus, "despite the fact that the word 'petition' in paragraph [(h)](3) can be read to encompass all petitions in paragraph [(h)](2)," including F3 and F4 petitions listing derivative beneficiaries, the panel found "paragraph [(h)](3)'s meaning to be unclear." *Id.* 54a.

The panel also ruled that "Congress did not speak clearly as to whether priority date retention can be applied independently of automatic conversion." Pet. App. 54a. The panel believed it "certainly possible" to read the "two grammatically independent clauses" as "conferring automatic conversion and priority date retention as independent benefits," but also thought it possible that the benefits were conferred "jointly." *Id.*

Turning to the BIA's interpretation, the panel confirmed that the "effect of *Matter of Wang* is to limit §1153(h)(3)'s applicability to only one petition type: F2A," *i.e.*, petitions filed by LPRs for their spouses or minor children. Pet. App. 57a. But children listed on petitions filed by U.S. citizens, "such as F3 or F4, can-

not qualify." *Id.* The panel found the BIA's conclusion reasonable. *Id.* 60a.

The court of appeals granted rehearing en banc and reversed, finding that the BIA's interpretation "conflicts with the plain language of the CSPA," which "unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries." Pet. App. 3a. The en banc court framed the question as "whether the automatic conversion and date retention benefits provided by subsection (h)(3) apply only to aged-out F2A petition beneficiaries," *i.e.*, beneficiaries of certain petitions filed by LPRs, "or whether they also apply to derivative beneficiaries of the other family visa categories," *e.g.*, derivative beneficiaries of petitions filed by U.S. citizens. *Id.* 9a.

The en banc court rejected the government's request that paragraph (h)(3) be considered "in a vacuum." Pet. App. 14a-15a. Like the panel, the en banc court concluded that paragraph (h)(3) "cannot function independently" of the rest of Section 1153(h) and that, when viewed in its statutory context, it applied to all derivative beneficiaries, not simply F2A beneficiaries. *Id.* 16a. "The plain language of the statute thus conclusively resolve[d] the question[.]" *Id.*

The court also noted Congress's use of an identical phrase in paragraphs (h)(1) and (h)(3): "for [the] purposes of subsections (a)(2)(A) and (d)." Pet. App. 16a. The words "and (d)" refer to "derivative visas for the children of primary beneficiaries of *all* visa categories" (*id.* (discussing 8 U.S.C. §1153(d)) (emphasis added))—an interpretation the government did not dispute as to paragraph (h)(1)'s reference to "and (d)." *Id.* The court rejected the government's argument that the phrase

"and (d)" be given a different meaning in paragraph (h)(3) from the one it has in paragraph (h)(1). *Id.*

The court also rejected the government's argument that applying paragraph (h)(3) to derivative beneficiaries of petitions filed by U.S. citizens would be "impracticable" because it supposedly required a new person (the beneficiary's LPR parent) to file a petition. Pet. App. 19a ("The language of the CSPA contains no indication that Congress intended the identity of the petitioner to be relevant."). While the statute's plain language directed a change in policy, it "cannot be impracticable just because it is a change or because it does not specify how exactly that change is to be implemented." *Id.* The court rejected the government's arguments that difficulties in implementation constituted a "'rare and exceptional circumstance'" warranting deviation from the CSPA's plain language. *Id.* (quoting *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991)).

Judge Smith dissented, joined by four other judges. Judge Smith acknowledged that the court's reading of the statute was "reasonabl[e]," but believed that the phrase regarding automatic conversion "complicate[d] matters." Pet. App. 27a-28a. The dissent also believed that paragraph (h)(3) "ties automatic conversion and retention of an original priority date together," such that the paragraph was ambiguous as to whether the two benefits were distinct. *Id.* 32a. Because the dissent believed that "th[e] provision's plain terms do not yield a clear and consistent answer," it would have deferred to the BIA's interpretation in *Wang*. *Id.* 33a.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT WARRANT THIS COURT'S REVIEW

Congress is now considering a comprehensive immigration reform bill that would moot this case. On May 21, 2013, the Senate Judiciary Committee reported to the full Senate a bill that, among other things, rewrites the provision at issue here. S. 744, 113th Cong., §2305(d)(5)(C) (2013). The new language leaves no doubt that *all* derivative beneficiaries who age out—including derivative beneficiaries of F3 and F4 petitions—retain their original priority dates. *See id.* (adding 8 U.S.C. §1153(h)(3)(A)). The bill also adds a new sub-paragraph 1153(h)(3)(B), which guarantees that "[t]he beneficiary of any petition shall retain his or her earliest priority date … regardless of the category of subsequent petitions." *Id.* The bill thus renders this Court's review unnecessary. *Cf. United States* v. *Varca*, 896 F.2d 900 (5th Cir.), *cert. denied*, 498 U.S. 878 (1990) (denying certiorari despite a 5-4 circuit split over the interpretation of a repealed statute).

There are other reasons to deny certiorari. Although there is a narrow circuit split, not every nominal circuit split deserves review, especially where the decision appealed from is correct and uniformity in the administration of federal law can be achieved without this Court's review. *E.g.*, *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991) (declining to decide issue notwithstanding circuit split because the Sentencing Commission was likely to resolve the issue). Here, the district court certified a nationwide class. Order Certifying Class, *Costelo* v. *Chertoff*, No. 08-cv-00688 (C.D. Cal. July 16, 2009) (Dkt. No. 74). There is thus no dan-

ger that similarly situated individuals will be treated differently based on where they live.[5]

The uniformity imposed by the nationwide class also undermines the government's complaint (Pet. 28-32) about administrative challenges in implementing the judgment below. The government can comply with the judgment using a single system nationwide. To the extent that means the system must "be overhauled" (*id.* 28), that is simply the consequence of the agency's failure so far to adhere to Congress's clear mandate.

In any event, the government's assertions about the difficulties of implementing paragraph 1153(h)(3) as properly interpreted are unsupported and largely exaggerated. The Fifth Circuit reached the same result in 2011 as the Ninth Circuit did here, and the government did not petition for certiorari. *See Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011). The government presumably has complied with that precedent as to all applications originating in the immigrant-heavy Fifth Circuit. It is significant, therefore, that rather than cite specific problems it has had complying with *Khalid*,

[5] Although the current class includes only beneficiaries of F3 and F4 petitions, the government appears to agree (Pet. 28-29 & n.6) that the decision below governs F1 and F2B petitions as well. In any event, the *Costelo* plaintiffs intend to seek to expand the class on remand to all family-preference petitions, which is yet another reason to deny the petition. *Cf. Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari) (observing that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (noting that the interlocutory nature of an order "alone furnishe[s] sufficient ground for the denial of the application").

the government's petition complains only of hypothetical challenges.

Accordingly, the government has shown no "compelling reason[]" for this Court's intervention (S. Ct. R. 10), given Congress's imminent attention to the very provision at issue and the ability to secure nationwide uniformity without this Court's review. Moreover, as the balance of this brief explains, the court of appeals correctly decided the issue.

II. THE COURT OF APPEALS' DECISION IS CORRECT

A. The CSPA's Text, Structure, And History Unambiguously Foreclose The BIA's Interpretation

1. The plain language of 8 U.S.C. §1153(h)(3) makes clear that the paragraph's benefits are available to *all* derivative beneficiaries who age out.

Paragraph (h)(3) defines the relevant eligibility criteria that "an alien" must meet to fall within its terms by cross-referencing other provisions: "paragraph [(h)](1)" and "subsections (a)(2)(A) and (d) of this section." Paragraph (h)(1), in turn, repeats paragraph (h)(3)'s reference to "subsections (a)(2)(A) and (d) of this section," and also directs the reader to "the applicable petition described in paragraph [(h)](2)." These cross-references each cover the same set of petitions: F2A petitions on which children are listed as *primary* beneficiaries (*see* 8 U.S.C. §1153(a)(2)(A), (h)(2)(A)) and all family-preference, employment, and diversity petitions with children listed as *derivative* beneficiaries (*see id.* §1153(d), (h)(2)(B)). The benefits set forth in paragraph (h)(3) then apply to those aliens within that set whose age is determined to be 21 or older using the formula described in paragraph (h)(1). *Id.* §1153(h)(3).

As both the panel and the en banc court recognized, these cross-references unambiguously indicate that the benefits provided in paragraph (h)(3) apply to "all visa petitions identified in subsection (h)(2)" filed on behalf of beneficiaries "determined under paragraph [(h)](1) to be 21 years of age or older" (8 U.S.C. §1153(h)(3)). Pet. App. 24a; *see id.* 50a-51a. When an alien falls within paragraph (h)(1)'s scope, but the relief provided in that paragraph proves insufficient, the statute directs that the alien receive the relief provided in paragraph (h)(3)—namely, that the alien's petition "automatically be converted to the appropriate category" and that the alien "retain the original priority date issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3).

This interpretation is the only one that treats paragraph (h)(3) consistently with the remainder of subsection 1153(h). *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Congress used the same terminology—"for the purposes of subsections (a)(2)(A) and (d)"—in both paragraphs (h)(1) and (h)(3). The government has not disputed that this language, when used in paragraph (h)(1), indicates that relief under that paragraph is available not only to derivative beneficiaries of F2A petitions, but to *all* derivative beneficiaries. *See* Pet. App. 16a. The government's argument, however, would give the words "and (d)" a different, narrower meaning in paragraph (h)(3) compared to paragraph (h)(1), contrary to the "presumption that a given term is used to mean the same thing throughout a statute." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

Additionally, the provision adding subsection (h) has a title that suggests broad application to all derivative beneficiaries. CSPA §3, 116 Stat. at 928 ("Treat-

ment of Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based and Diversity Immigrants"). Nothing in the provision's text indicates that Congress intended it to have a far narrower scope than its title describes. *See Porter* v. *Nussle*, 534 U.S. 516, 527-528 (2002) (interpreting statute consistently with its title).

Furthermore, had Congress intended to provide only the narrow relief that the government advocates, "Congress could easily have said so." *Kucana* v. *Holder*, 558 U.S. 233, 248 (2010). Indeed, Congress elsewhere identified the *specific class of people* to whom the government now wishes to limit paragraph (h)(3). *See* 8 U.S.C. §1101(a)(15)(V) (limiting certain visas to "an alien who is the beneficiary (including *a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section [1153](a)(2)(A)*" (emphasis added)). That Congress did not use such language in paragraph (h)(3) indicates that no comparable limitation was intended. *Nken* v. *Holder*, 556 U.S. 418, 430 (2009).

2. The correctness of giving the statute its plain meaning is reinforced by the fact that, under the government's contrary reading, the only derivative beneficiaries who could seek relief under Section 1153(h)(3) would be those who did not need it. Regulations promulgated 20 years earlier already protected children of F2A primary beneficiaries from aging out. 8 C.F.R. §204.2(a)(4) (aged-out F2A derivative beneficiaries retain their original priority dates); *see* 57 Fed. Reg. 41053, 41059 (Sept. 9, 1992)). The government ventures (Pet. 22) that the CSPA might have been intended merely to codify that regulation, but there is no support for that speculation; if anything, the legislative history reveals that Congress meant to *change* the status quo

by providing protection not previously available. *See infra* p. 19.

Indeed, had Congress wished simply to codify the regulation, it would have included the regulation's requirements that a separate petition be filed for an aged-out derivative beneficiary and that the subsequent petition be filed by the original petitioner. *See* 8 C.F.R. §204.2(a)(4). The failure to include those requirements confirms that paragraph (h)(3) was not meant to codify the regulations, but instead to set forth a new system in which the regulations' restrictions were no longer applicable. *See* Pet. 22-23 n.5 (admitting that paragraph (h)(3) "superseded" the regulation's requirement that "a new petition be filed for an aged-out derivative beneficiary").[6]

3. The Ninth Circuit's reading of the CSPA, unlike the BIA's, fulfills Congress's purpose and "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Congress's goal in passing the CSPA was to "facilitate[] and hasten[] the reuniting of legal immigrants' families." 148 Cong. Rec. H4989, H4991 (daily ed. July 22, 2002) (Rep. Sensenbrenner); *see also id.* ("It is family-friendly legislation that is in keeping with our proud traditions."); *id.* (Rep. Jackson-Lee) ("[W]here we can correct situations to bring families together, this is ex-

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[6] The government cites *Kucana*, 558 U.S. 233, with a "cf." and without elaboration. Pet. 22. The statute in *Kucana* followed an extensive dialogue between Congress and the agency about particular regulations, which strongly suggested that codification was what Congress had in mind. *See Dada* v. *Mukasey*, 554 U.S. 1, 12-15 (2008). No comparable evidence exists here.

tremely important …. [T]his is an important bill that helps those who are aging out and brings families together."). Paragraph (h)(3) achieves that goal by ensuring that sons and daughters who have already waited in line for many years can immigrate with or shortly after their parents, instead of being separated from their families for years or decades more. The government's interpretation of Section 1153(h) undermines the legislation's very purpose by consigning the vast majority of aged-out derivative beneficiaries to more years of waiting, often apart from their families. While a statute's plain text might be ignored if it would produce an absurdity, there is nothing absurd about Congress deciding that a form of relief that regulations previously afforded to aliens whose only demonstrated tie to this country was LPR parents should be made available to others who not only have an LPR parent, but also an additional U.S. citizen relative.

The government suggests (Pet. 20) that Congress meant to achieve its family-reunification goal by addressing only processing delays, not delays caused by immigration backlogs. That is a curious suggestion given that Congress added similarly worded provisions to address each problem separately—(h)(1) for processing delays and (h)(3) for immigration backlog delays. Senator Feinstein, who sponsored the original Act and who added subsection (h) to the version that was ultimately enacted, voiced the intent to address both problems and to do so for *all* derivative children beneficiaries, regardless of whether they were listed on "a family-based, employment-based, or diversity visa" application. 147 Cong. Rec. S3275, S3275 (daily ed. Apr. 2, 2001); *see also id.* (identifying two problems caused by the aging-out anomaly: (1) "the INS was unable to adjudicate the application before the child's 21st birth-

day" and (2) "growing immigration backlogs in the immigration visa category caused the visa to become unavailable before the child reached his 21st birthday").[7] And other provisions of the Act clearly address backlog delay, not processing delays. *See* CSPA §6, 116 Stat. at 929 (codified at 8 U.S.C. §1154(k)) (permitting F2B petitions eligible for conversion to F1 to remain as F2B petitions when the F1 backlog is longer than the F2B backlog). The government's interpretation thus ignores both the object and the scope of Congress's goals in passing the CSPA.

B. The Government's Claim Of Ambiguity Lacks Merit

The government's contention (Pet. 16-22) that paragraph (h)(3) is ambiguous is unfounded. First, while a shallow circuit split has arisen on the meaning of paragraph (h)(3), no circuit has accepted the government's argument that the statute is ambiguous. The government ventures (*id.* 24) that the circuit split itself evidences ambiguity, but this Court has held otherwise. *See Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1355 n.4, 1363 n.12 (2012) (concluding that the term "newly awarded compensation" is unambiguous despite a circuit split over its meaning); *cf. Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1706, 1709 (2012); *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995) ("A statute is not ambiguous for purposes of lenity merely because there is a

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[7] Although the Senate ultimately amended the House bill rather than enact Senator Feinstein's original bill, the Senate's amendments served the same purposes, as evidenced by the inclusion of both paragraphs (h)(1) and (h)(3).

division of judicial authority over its proper construction." (citation and quotation marks omitted)).

In any event, the government's claim of ambiguity is meritless.

1. The government's principal claim is that derivative beneficiaries of F2A petitions are the only derivative beneficiaries whose petitions can "automatically be converted to the appropriate category." *See* Pet. 17-18, 22. But even if this argument were correct (which it is not, *see infra* pp. 26-29), that would not justify disturbing the judgment below. "Retention of priority date"—the remedy mentioned in paragraph (h)(3)'s heading—is available to all derivative beneficiaries who have aged-out after application of the formula set forth in paragraph (h)(1), regardless of whether the beneficiary's petition is automatically converted to a different category. Notably, the BIA never considered whether the retention of priority date and automatic conversion benefits are independent; as a result, no deference is owed the government on this question. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("declin[ing] to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question").[8]

a. Paragraph (h)(3) does not condition the alien's retention of her priority date upon the automatic conversion of the alien's petition. The statute contains on-

[8] Accordingly, Respondents need not show—as the government appears to suggest (Pet. 18-19 n.4)—that paragraph (h)(3) "unambiguously" provides that the retention of priority date and automatic conversion benefits are separate. Regardless, however, the language makes clear that those benefits *are* separate as discussed in the text.

ly one eligibility criterion: "the age of [the] alien is determined under paragraph [(h)](1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." 8 U.S.C. §1153(h)(3). Once that condition is satisfied, two separate benefits accrue: First, "the alien's petition shall automatically be converted to the appropriate category." *Id.* Second, "the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* In other words, the statute contains the following structure: "In the case of A, then B shall be done and C shall be done." This sentence structure shows that B and C are not dependent on one another. (Were a ski lodge director to instruct her grounds crew: "If it snows on a cabin, then you shall shovel the cabin's sidewalk and you shall keep the cabin's heat above 65 degrees," she would be justifiably angry if the crew let the pipes freeze in cabins lacking a sidewalk.)

This Court has recognized that where the word "and" connects two clauses that confer distinct benefits, those clauses operate independently. In *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), this Court considered Section 506(b) of the Bankruptcy Code, which provides: "[T]here shall be allowed to the holder of such claim, [1] interest on such claim, and [2] any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." (First alteration in original.) In *Ron Pair*, a creditor was not entitled to the statute's second benefit—"reasonable fees, costs, or charges provided for under the agreement"—because the claim did not arise under an agreement. The Court nonetheless held that the creditor was entitled to recover the first benefit—interest on the claim—because, "[b]y the plain language of the statute, the two types of recovery are distinct." *Id.* at 242.

The same is true here. Paragraph (h)(3)'s two benefits—automatic conversion of a petition and an alien's retention of her priority date—are "distinct" benefits, a point reinforced by two further textual features. Congress distributed the mandate "shall" separately to paragraph (h)(3)'s two benefits. If the derivative beneficiary's age is calculated to be over 21, "the alien's petition *shall* automatically be converted to the appropriate category and the alien *shall* retain the original priority date issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3) (emphases added). This syntax emphasizes that automatic conversion and retention of priority dates are separately mandated.

Relatedly, the two clauses have different subjects. While "the alien's *petition*" is automatically converted, it is "*the alien*" who retains her priority date. 8 U.S.C. §1153(h)(3) (emphases added). The government misstates the provision when it asserts that the statute "provides that when 'the alien's petition' is transformed through conversion, *it* nevertheless 'retain[s]' the priority date." Pet. 21 (emphasis added). Only through that subtle but critical mischaracterization of the statutory language—replacing "the alien" with a pronoun ("it") that has a different antecedent ("the alien's petition")—can the government avoid Congress's mandate that "the alien," and not "the alien's petition," retain the priority date. Thus, even if a new petition must be filed for the aged-out derivative beneficiary, "the alien" is the same, and it is she who retains her original priority date.

b. In a footnote, the government advances two responses to this construction of paragraph (h)(3). *See* Pet. 18-19 n.4. Neither has merit.

First, the government contends that "'the concept of "retention" of priority dates has always been limited' to a situation in which there was a successive petition filed by the same petitioner." Pet. 18-19 n.4 (quoting *Wang*, 25 I. & N. Dec. at 35). That premise is incorrect: several other provisions permit an alien to retain her priority date despite a change in petitioner. *See, e.g.*, 8 C.F.R. §204.2(h)(2) (permitting an alien whose abusive parent or spouse petitioned on her behalf "to transfer the visa petition's priority date to [a later-submitted] self-petition"); *id.* §204.5(e) ("A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for *any subsequently filed petition* for any classification under sections 203(b)(1), (2), or (3) of the Act for which the alien may qualify." (emphasis added)); *id.* §204.12(f) (providing that a "physician beneficiary" who finds a *new employer* or establishes her own practice must submit a new Form I-140 (Immigrant Petition for Alien Worker) but "will retain the priority date from the initial Form I-140"); Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, §9, 90 Stat. 2703, 2707 ("Any petition filed by, or in behalf of, [an alien formerly classified as a 'Western Hemisphere' immigrant] to accord him a preference status under section 203(a) shall, upon approval, be deemed to have been filed as of the priority date previously established by such alien.").

The error of the government's premise—that an alien can only retain her priority date when the petitioner remains the same—is compounded by the fact that the pre-CSPA regulation providing relief for aged-out beneficiaries saw fit to require that expressly. 8 C.F.R. §204.2(a)(4) ("the original priority date will be retained" only where "the subsequent petition is filed by the

same petitioner"). That language would have been superfluous if, as the government now argues, priority date retention necessarily required a petition by the same petitioner.

Second, the government argues (Pet. 18-19 n.4) that paragraph (h)(3) cannot be read to confer two separate benefits because Congress "unyoked" the two benefits in another section of the CSPA, 8 U.S.C. §1154(k)(3). That is a classic *post hoc* litigation position. As noted above, the BIA has never passed on whether paragraph (h)(3)'s benefits are independent, and the government cannot claim deference to such an argument. *See Bowen*, 488 U.S. at 212.

In any event, the government's Section 1154(k) argument is incorrect. Section 1154(k) provides that, where a petition is initially filed by an LPR on behalf of her unmarried son or daughter (an F2B petition), and the LPR petitioner naturalizes while the petition is pending, the F2B beneficiary son or daughter may "elect[]" whether to have his or her petition "conver[ted]" to the F1 category (as an unmarried son or daughter of a citizen). 8 U.S.C. §1154(k)(1)-(2). Congress provided for this "election" because the F1 category for immigrants from certain countries had a longer waiting period than the F2B category. *Matter of Zamora-Molina*, 25 I. & N. Dec. 606, 614 (BIA 2011). Congress thus sought to address the "troubling anomaly" in which "certain immigrants were in effect … penalized for becoming citizens." *Id.* (quotation marks omitted). Importantly, however, the statute provides that "[r]egardless of whether" the beneficiary elects to convert the petition, "he or she may maintain [his or her original] priority date." 8 U.S.C. §1154(k)(3).

Section 1154(k) thus allows beneficiaries to opt out of the automatic conversion benefit and clarifies that, *whether or not* the beneficiary exercises that option, she retains her priority date. Section 1154(k) thus demonstrates that retention of priority date does *not* invariably accompany automatic conversion of the petition to a new category. *See also* 8 C.F.R §204.2(a)(4) (providing for priority date retention without automatic conversion); *id.* §204.2(h)(2) (same); *id.* §204.5(e) (same); *id.* §204.12(f)(1) (same); USA PATRIOT Act §421(c), Pub. L. No. 107-56, 115 Stat. 272, 357 (2001) (same).

2. The government further asserts that paragraph (h)(3) is ambiguous because "automatic conversion" supposedly cannot be made available to Respondents. The government is wrong.

a. The government contends that Respondents cannot take advantage of paragraph (h)(3)'s benefits because "there is no 'appropriate category' to which 'the alien's petition' … can be 'converted.'" Pet. 16. Not so; F3 and F4 petitions listing derivative beneficiaries who have aged out can be converted to the F2B category for unmarried sons or daughters of LPRs.

The premise of the government's argument—that automatic conversion can only occur if petitions in the original and "converted" categories are filed by the same petitioner—is inconsistent with how Congress understood "automatic conversion" in subsection (h). Paragraph (h)(4) provides that "[paragraph (h)](3) shall apply to … derivatives of self-petitioners." 8 U.S.C. §1153(h)(4). Under this provision, when a derivative beneficiary of an LPR self-petition filed pursuant to the Violence Against Women Act turns 21, the original petition (with her parent as petitioner) is automatically

converted into a self-petition (with herself as petitioner). *See* 8 U.S.C. §1154(a)(1)(D)(i)(III). Likewise, 8 C.F.R. §204.2(i)(1) provides for "[a]utomatic conversion of preference classification" when, *inter alia*, a U.S. citizen petitioner who filed for an alien spouse dies before the petition is approved. 8 C.F.R. §204.2(i)(1)(iv). In that situation, the earlier petition is treated as a "widow(er) petition" in which the alien becomes the petitioner.

Accordingly, nothing prevents an F3 or F4 petition from "automatically be[ing] converted to the appropriate [F2B] category," even though the LPR parent replaces the U.S. citizen relative as the petitioner. 8 U.S.C. §1153(h). Indeed, where a benefit is intended to be restricted to cases where the petitioner remains the same, the regulations have stated so explicitly. *See* 8 C.F.R. §204.2(a)(4). Congress did not so specify here.

b. The government also claims that Respondents' sons' and daughters' petitions cannot be converted under paragraph (h)(3) because doing so would run counter to the supposedly "well-understood meaning of the term 'convert[]'" (Pet. 18): "that a visa petition converts from one visa category to another … without the need to file a new visa petition," *Wang*, 25 I. & N. Dec. at 35. This objection, however, is circular. The only reason that aged-out F3 and F4 derivative beneficiaries have thus far filed new petitions under the F2B category is because the government has erroneously withheld from them the automatic conversion benefit that the CSPA provides. The government cannot justify its interpretation of the statute by pointing to circumstances that only exist by virtue of that interpretation. *See* *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 222 (1991) (rejecting similarly "circular reasoning"). Indeed, unlike other contexts such as conversion to a widow(er) peti-

tion (where the petitioner's death must be ascertained through information outside the immigration files), *see* 8 C.F.R. §204.2(i)(1)(iv), the government has all the information it needs to automatically convert an F3 or F4 petition into an F2B petition: the derivative beneficiary's age is listed on the original petition, and the government itself knows when the primary beneficiary becomes an LPR.

The government further contends (Pet. 17) that the conversion of F3 and F4 derivative petitions cannot occur "automatically" because "the aged-out person's parent might not submit an F2B petition" and because there is often a time lag between the date on which a visa becomes available to the parent and the date on which she receives LPR status. Again, however, nothing in the CSPA—as properly interpreted—requires the filing of a new petition on behalf of aged-out F3 and F4 derivative beneficiaries, as opposed to merely treating the prior petition as an F2B petition. And the government's concern about time lag results entirely from its mistaken assumption that "automatic" defines *when* conversion occurs, as opposed to simply *how* it occurs. As even the dissent below observed, "[a] process is 'automatic' if it is 'self-acting or self-regulating,' or occurs 'without thought or conscious intention.'" Pet. App. 30a (quoting *Webster's Third New International Dictionary* 148 (2002)). Nothing in that definition prevents the government from recognizing automatic conversion at the time the primary beneficiary becomes an LPR, in which case there is no time lag at all. And a system that automatically converted F3 and F4 petitions into F2B petitions when the primary beneficiary became an LPR could be done through a "self-acting" or "self-regulating" system; that the government has so far

failed to do so is a reason to enforce the CSPA, not for this Court to rewrite it.

The problems the government has identified (Pet. 17-18) at most demonstrate that paragraph (h)(3) does not set forth the particular mechanics the agency should use to implement the conversion. But a mere failure to specify a mode of implementation does not mean that implementation is *impracticable*, much less absurd; it certainly is not a reason to disregard clear statutory language or to find ambiguity where none exists. This is not to say that the Court need involve itself in the logistics of implementing the statute, which is the agency's role. *See INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). But the fact that there are mechanisms available to the agency to administer the congressional mandate underscores that this is not the sort of "rare and exceptional circumstance[] … where the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters.'" *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991). Providing the benefits of automatic conversion and priority date retention for all derivative beneficiaries is far from being "so bizarre that Congress 'could not have intended it.'" *Id.* at 191.

C. The BIA's Interpretation Is Unreasonable

Even if the statute itself did not plainly resolve the question presented, the BIA's interpretation of paragraph (h)(3) is unreasonable and arbitrary and capricious and so not entitled to deference. *Chevron*, 467 U.S. at 843-844; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983).

The BIA's interpretation extends paragraph (h)(3)'s benefits to certain derivative beneficiaries who are closely related to two LPRs (the F2A sponsor and

the primary F2A beneficiary) but excludes all derivative beneficiaries who are closely related to at least one U.S. citizen and one LPR (the citizen sponsor and the LPR primary beneficiary). Nothing in *Wang* "tie[s], even if loosely," this decision to disfavor children with a demonstrated relationship to a U.S. citizen "to the purposes of the immigration laws or the appropriate operation of the immigration system." *Judulang* v. *Holder*, 132 S. Ct. 476, 485 (2012). Ordinarily, the immigration laws adopt the opposite preference. *E.g.*, 8 U.S.C. §1153(a)(1)-(4) (making family-preference visas available to more categories of U.S. citizen-relatives than of LPR-relatives). The BIA's apparent desire to confine the CSPA's impact cannot justify such an arbitrary limit. 25 I. & N. Dec. at 38. And the BIA's only other rationale—consistency with past practice—is based on false premises. According to the BIA, (1) "the concept of 'retention' of priority dates has *always* been limited to" successive visa petitions filed by the same petitioner, and (2) "the term 'conversion' has *consistently* been used to mean" that the beneficiary "falls within a new classification without the need to file a new visa petition." *Id.* at 35 (emphases added). As explained above, however, sometimes a beneficiary retains her priority date or has her petition converted to a new classification with a new petitioner. *See supra* pp. 23-24. And there is no reason why derivative beneficiaries of non-F2A petitions would need to have a new F2B petition filed, as opposed to having the petition convert automatically to an F2B petition. *See supra* pp. 26-28. Thus, none of the BIA's explanations justifies arbitrarily withholding benefits from children who are demonstrably related to U.S. citizens while providing those benefits to children who are not.

In addition, the BIA's analysis in *Wang* is replete with analytical gaps and errors. The BIA failed to address the phrase "for the purposes of subsection (a)(2)(A) and (d)," which appears in both paragraphs (h)(1) and (h)(3), yet would receive different meanings in each section under the BIA's interpretation. *See* C.A. ER 505 (highlighting this text to the BIA). Nor does *Wang* acknowledge that paragraph (h)(3) cross-references the formula set forth in paragraph (h)(1). *See supra* pp. 15-16. The BIA simply pronounced, without explanation, that "the language of section 203(h)(3) does not expressly state which petitions qualify for" its benefits (*Wang*, 25 I. & N. Dec. at 33)—a proposition that even the panel below rejected (Pet. 50a-51a) and that the government does not press in its petition.

The BIA's consideration of priority-date retention and automatic conversion was equally flawed. *Wang* contains no analysis of whether priority-date retention and automatic conversion are independent benefits. And the BIA did not even acknowledge, much less distinguish, the examples that contradict its overstated conclusion about the consistency of past agency practice. *See supra* pp. 21-29.

Further, the BIA's interpretation conflicts with the government's instructions to LPRs about how to petition for a family-preference visa. *Wang* interprets the phrase "and (d)" in paragraph 1153(h)(3) to extend age-out protection to a single type of derivative beneficiary: the child of an LPR petitioner. But such a child can be a derivative beneficiary under subsection (d) only if the petitioner lists the child as a derivative beneficiary on a petition filed for a spouse; otherwise the child is a *primary* beneficiary under subsection (a)(2)(A), not a derivative beneficiary under subsection (d). Form I-130,

however, directs LPRs *not* to list children as derivative beneficiaries in this way, but instead to file a separate Form I-130 for each child as a *primary* beneficiary in the F2A category. *See* Instructions for Form I-130, Petition for Alien Relative, at 1 (stating that an LPR petitioner "*must* file a separate Form I-130 for each eligible relative" (emphasis added)), *available at* http://www.uscis.gov/files/form/i-130instr.pdf.[9] Thus, under the government's instructions, *none* of the aliens whom the government contends are eligible for age-out protection under paragraph (h)(3) as derivative beneficiaries would even be listed as derivative beneficiaries; they would be listed as primary beneficiaries on a separate F2A petition. *Wang* does not explain why Congress would have extended protection to a class that the agency's own instructions suggest should not exist.

In sum, *Wang* does not rationally connect its interpretation to the purposes of immigration law, its textual analysis is incomplete, its discussion of the regulatory context is incorrect, and it does not even analyze actual agency practice. Thus, even if the BIA's interpretation were not foreclosed by the statutory language, it should be rejected as unreasonable and arbitrary and

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[9] By contrast, the Form I-130 expressly permits an LPR petitioner to treat the unmarried, under-21 children of the petitioner's unmarried son or daughter as derivative beneficiaries by listing them on the same F2B petition as their parent. The same is true for U.S. citizen petitioners who seek to include the unmarried, under-21 children of their brother, sister, or married son or daughter as derivative beneficiaries of an F3 or F4 petition. *See* Instructions for Form I-130, at 1 (exempting such children from the separate-form requirement and stating that they "will be able to apply for an immigrant visa along with" their parent—*i.e.*, as a derivative beneficiary).

capricious. *See AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 387-388 (1999) (rejecting under *Chevron* an interpretation that was not "rationally related to the goals of" the statute); *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (conditioning deference on "the thoroughness, validity, and consistency of an agency's reasoning"); *State Farm*, 463 U.S. at 43 (agency decision is arbitrary and capricious if agency "entirely fail[s] to consider an important aspect of the problem" or "offer[s] an explanation for its decision that runs counter to the evidence").

D. The Equities Support The Judgment Below

The government also asserts (Pet. 29-31) that the Ninth's Circuit's ruling produces inequity. But Congress has already balanced the equities. In enacting the CSPA, Congress concluded that parents should not be forced to immigrate separately from their children due to the mere passage of time and delay of visa availability, and children ought not to lose credit for the years they have already waited in line solely because they reach adulthood. *See supra* pp. 18-20. The Ninth Circuit's holding will not result in Respondents' children receiving visas before anyone whose petition was filed earlier than theirs; it only means that they will receive credit for their long wait, as Congress directed, rather than having it reset to zero, as the government now insists.[10]

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[10] The government cites (Pet. 31) an idiosyncratic example from a student note, but the example actually illustrates how aged-out beneficiaries only ever receive visas ahead of aliens who have been waiting in line for *less* time. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199,

The fact that obeying Congress's mandate would require the agency to "reshuffl[e]" its lists (Pet. 31) is a construct of the government's own making. Had the agency complied with Congress's instructions in 2002, no change would now be needed. Respondents sympathize with all who are seeking to immigrate to the United States and have been frustrated with the pace of the process. But in a system that favors those who wait patiently in line, Respondents' children are no less deserving than anyone else who has waited as long as they have.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

2235 (2012) ("Alice's son," who has been the subject of a petition since 1994, receives a visa before "Rose's daughter," who has only been waiting since, at the earliest, 2000).

[11] Moreover, the pending immigration reform bill guarantees that a visa be made available by 2021 (or sooner) to any petitioner whose family-based petition is currently pending, S. 744, 113th Cong., §2302—a provision that would diminish the impact of any supposed "reshuffling."

Respectfully submitted.

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