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 Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the provisions of the Child Status Protection Act, 8 U.S.C. § 1153(h)(3), apply to all derivative-beneficiary children.

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BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a bipartisan coalition of Members of Congress who were serving in 2002, when the Child Status Protection Act (CSPA) was passed. The Members care deeply about the preservation of family unity among immigrant families and the fairness of our country's immigration procedures. To promote these goals, and cure the harsh and unfair effects of prior immigration procedures, they crafted the CSPA to protect *all* children who seek to immigrate to this country from the consequences of "aging out," that is, turning 21 before a green card is available for them. The Members submit this brief to confirm that this outcome was their unmistakable purpose.

The Members also seek to inform the Court that the language used in the CSPA is unambiguous: *all* derivative-beneficiary children who age out *shall* be entitled to automatic conversion and *shall* retain their original priority date. The Members disagree with the Solicitor General's view that there is "tension" in the statute and that its text should be disregarded in light of current agency practices. This Court should emphasize the duty of all federal agencies to execute the unambiguous mandates of Congress.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Samuel D. Brownback has been the Governor of Kansas since 2011. Before assuming that office, he served as a Republican Member of the House of Representatives from Kansas between 1995 and 1996 and as a Republican Senator from Kansas between 1996 and 2011. Then-Senator Brownback served on the Senate Judiciary Committee from 2001 through 2003 and from 2005 through 2009. He was the Ranking Member of the Subcommittee on Immigration in 2002.

Dianne G.B. Feinstein has been a Democratic Senator from California since 1992 and a member of the Senate Judiciary Committee since 1993. In that role, she introduced the original version of the CSPA in the Senate on April 1, 2001. Senator Feinstein served on the Subcommittee on Immigration in 2002.

Orrin G. Hatch has been a Republican Senator from Utah since 1977. Since joining the Senate, he has been a member of the Senate Judiciary Committee, serving as its Chairman from 1995 through 2001 and from 2003 through 2005, and as its Ranking Minority Member from 1993 through 1995 and from 2001 through 2003.

John S. McCain III has been a Republican Senator from Arizona since 1987 and also served as a Republican Member of the House of Representatives from Arizona between 1983 and 1987.

Robert Menendez has been a Democratic Senator from New Jersey since 2006 and also served as a Democratic Member of the House of Representatives from New Jersey between 1993 and 2006. He was the author of the Reuniting Families Act in the 110th and 111th Congresses.

Charles E. Schumer has been a Democratic Senator from New York since 1999 and also served as a Democratic Member of the House of Representatives from New York between 1981 and 1999. Since

joining the Senate, he has been a member of the Senate Judiciary Committee and has served as Chairman of the Subcommittee on Immigration, Refugees, and Border Security since 2009. Senator Schumer served on the Subcommittee on Immigration in 2002.

SUMMARY OF ARGUMENT

I. Before the CSPA's passage, an alien child who was the derivative beneficiary of a visa petition filed for his parent, but who turned 21 before his parent received that visa, was required to begin the application process anew, losing all credit for the many years spent waiting in line. Because of this rule, families whose children turned 21 before a visa became available faced an impossible choice: either stay with their child and give up the opportunity for a new life in this country, or immigrate to the United States and leave behind any children who had turned 21.

To correct this problem, Congress, with overwhelming bipartisan support and the signature of President George W. Bush, passed the CSPA, which allows alien children who turned 21 before a visa became available to retain their priority date for purposes of a new sponsorship category applicable to adults. In this way, Congress sought to give credit to immigrant children for the years they had waited for a visa and preserve unity among immigrant families. Congress enacted the CSPA to comprehensively serve these goals. As the statute makes clear, all derivative-beneficiary children receive the CSPA's benefits.

II. The language of the CSPA unambiguously provides priority-date retention and automatic con-

version for any derivative-beneficiary child who ages out.

The relevant statutory provision, 8 U.S.C. § 1153(h), contains three paragraphs. The first paragraph provides a modified procedure for calculating an alien child's age that excludes administrative processing delays occurring prior to approval of a petition. The second paragraph, which lists the individuals who receive this modified age calculation, includes *all* derivative-beneficiary children. The third paragraph states that any alien child whose age, after being calculated under paragraph (1), is 21 years or greater shall retain the priority date from his original petition, and his petition will automatically be converted to the appropriate category. Because the age of *every* derivative-beneficiary child is calculated using the paragraph (1) procedure, and because paragraph (3) applies to everyone whose age is calculated under paragraph (1) to be over 21, the plain language of the CSPA requires that any derivative-beneficiary child whose age is calculated to be 21 or older shall receive the full benefits of paragraph (3).

In addition to this clear command on the face of the statute, other textual and structural indicia support this interpretation. *First*, Congress omitted language from a pre-CSPA immigration regulation that allowed priority-date retention but restricted it to derivative beneficiaries of one category (F2A) of petitions. Congress's omission of a comparable limitation in the CSPA further confirms that the statute benefits all derivative-beneficiary children. *Second*, Congress used terminology throughout the CSPA that, if read consistently, indicates that the CSPA covers all derivative-beneficiary children. *Third*, the position of the Solicitor General and Board of Immigration Appeals (BIA) would result in providing au-

tomatic conversion and priority-date retention to the families of lawful permanent resident (LPR) aliens to the exclusion of families of United States citizens.

The Solicitor General cannot muddle the clarity of the CSPA's language by arguing that current procedures employed by the BIA do not allow for automatic conversion of F3 and F4 petitions. According to the Solicitor General, there is "tension" in paragraph (3), which first purports to cover all derivative-beneficiary children but then provides automatic conversion, which allegedly cannot be accomplished for F3 and F4 derivative beneficiaries. But Congress intended automatic conversion to apply to the petitions of F3 and F4 derivative-beneficiary children, and in any event the statute's provision of priority-date retention is independent of automatic conversion. This Court should not allow the Solicitor General to introduce ambiguity into the CSPA where none exists.

ARGUMENT

I. CONGRESS PASSED THE CSPA TO CURE THE UNFAIR EFFECTS OF EXISTING IMMIGRATION REGULATIONS AND PRESERVE FAMILY UNITY.

Under the family-sponsored immigration program, *see* 8 U.S.C. § 1153(a), United States citizens and LPR aliens can petition for their close family members to obtain an immigrant visa. In addition to the sponsored family member, known as the "principal beneficiary," any child of the principal beneficiary is also derivatively eligible for a visa as long as the child does not turn 21—"age out"—before the visa becomes available for the principal beneficiary. *See id.* §§ 1101(b)(1), 1153(d). If a derivative-beneficiary child does age out before a visa becomes available for his parent, he cannot immigrate to the

United States as a derivative beneficiary, but instead must obtain a visa under a different category for adults.

Before Congress's passage of the CSPA, this framework presented a difficult choice for many immigrant families. The parents of a derivative-beneficiary child who aged out were forced either to forfeit their chance at a new life in the United States or to leave behind a family member who followed all the proper immigration procedures but had the ill fortune to turn 21 before a visa became available. Even worse was the plight of the derivative-beneficiary child himself, who was required to move to a different category of visa sponsorship, at which point his clock reset and all credit for the years spent waiting as a derivative-beneficiary child was lost.

A. The CSPA's Enactment

In 2002, Congress passed the CSPA, which, as enacted, cures the age-out defect in the immigration system and allows any alien child who turns 21 before obtaining a visa, including derivative beneficiaries, to have his petition "automatically converted" to a new sponsorship category applicable to adults and to retain his original "priority date"—the date on which his parent's petition was filed—in the new category. Under this new system, when the derivative-beneficiary child moved to his new sponsorship category, he would receive full credit for the time he spent waiting for a visa and would obtain a visa much sooner, allowing him to reunite with the rest of his family.

The CSPA was met with overwhelming bipartisan support, originally passing the House by a unanimous vote of 416-0. *See* 147 Cong. Rec. D539 (June 6, 2001). The Senate later sponsored an amendment to the bill, which originated in the Senate Judiciary

Committee with unanimous consent and passed the Senate by a unanimous voice vote. *See* 148 Cong. Rec. S5558-61 (June 13, 2002).

During the House's discussion of the Senate amendment, Representatives voiced strong, bipartisan support for the bill. *See* 148 Cong. Rec. H4991 (July 22, 2002) (statement of Rep. Sensenbrenner) ("This bill is a fine example of how we and the other body can work together in a collaborative fashion. Bringing families together is a prime goal of our immigration system. [The CSPA] facilitates and hastens the reuniting of legal immigrants' families. It is family-friendly legislation that is in keeping with our proud traditions."); *ibid*. (statement of Rep. Jackson-Lee) ("[L]et me rise to support what I think is a very special and important piece of legislation that has come about from the Committee on the Judiciary in a bipartisan manner . . . . I believe this is an important bill that helps those who are aging out and brings families together."). Ultimately, the bill passed the House by a unanimous voice vote, *see id.* at H4992, and was signed into law by President George W. Bush.

Unfortunately for the respondents and many other immigrant families, the BIA has applied the CSPA's benefits only to a narrow category of immigrants: principal beneficiaries of F2A petitioners (*i.e.*, minor children of LPR aliens), as well as children who are the derivative beneficiaries of an F2A petition (*i.e.*, a child whose sponsored parent is the spouse of an LPR alien). *See Matter of Wang*, 25 I. & N. Dec. 28, 39 (BIA 2009). The BIA refuses to extend the CSPA's protections to children like those of respondents, who sought derivative eligibility because their sponsored parent is the adult child (F3) or sibling (F4) of a United States citizen. *See ibid*.

The Members disagree with the BIA's narrow interpretation of the CSPA and, as those who drafted and approved the statute, assert that the CSPA, as enacted, awards precisely the sort of protection that respondents now seek and that the Fifth and Ninth Circuits have held the CSPA provides. *See* Pet. App. 24a; *Khalid* v. *Holder*, 655 F.3d 363, 374-75 (5th Cir. 2011).

B. Congress Intended The CSPA To Promote Family Unity And Fairness In Our Immigration System By Extending Its Coverage.

Before the CSPA, a child who was derivatively eligible and who aged out before a visa became available for his parent lost that eligibility. Accordingly, that child could not immigrate contemporaneously with his parent, but had to enter another category of sponsorship and begin anew the years'—sometimes decades'—long wait for a visa.

When she introduced the original version of the CSPA in the Senate, Senator Feinstein stated that "a family whose child's application for admission to the United States has been pending for years may be forced to leave that child behind" simply because of the "growing immigration backlogs [that] caused the visa to be unavailable before the child reached his 21st birthday." 147 Cong. Rec. S3275 (Apr. 2, 2001) (statement of Sen. Feinstein). Immigrant parents thus had to "decide to either come to the United States and leave their child behind, or remain in the country of origin and lose out on their American dream in the United States." *Ibid*. Senator Feinstein emphasized that the CSPA "would correct these inequities and help protect a number of children who, through no fault of their own, face the conse-

quence of being separated from their immediate family." *Id*. at S3276.

Only through the broad coverage of *all* derivative beneficiaries could the CSPA effectively protect family unity and award credit for the years that families had already waited. The statements of House Members directly before the CSPA's passage recognize as much. Representative Sensenbrenner, for example, noted that the CSPA "addresses three . . . situations where alien children lose immigration benefits by 'aging out'" and referenced as one of those situations "[c]hildren of family[-]sponsored immigrants," that is, derivative-beneficiary children who, pre-CSPA, "would have to apply . . . to be put on the [F2]B waiting list" if the child aged out. 148 Cong. Rec. H4990-91 (July 22, 2002). His statement nowhere indicates an arbitrary intent to limit the CSPA's relief only to F2A beneficiaries. Similarly, Representative Jackson-Lee described the CSPA as "expand[ing] age-out protection to cover . . . [c]hildren of family[-]sponsored immigrants," without limitation. *Id*. at 4991.

The Solicitor General's argument that the CSPA covers *only* beneficiaries of F2A petitions directly conflicts with the primary purpose for which the law was enacted. In enacting this legislation, Congress meant to correct the inequities of the pre-CSPA regime in full.

II. THE CSPA UNAMBIGUOUSLY REQUIRES THE BIA TO EXTEND THE CSPA'S PROTECTIONS TO ALL DERIVATIVE-BENEFICIARY CHILDREN.

The text of the CSPA unambiguously directs that all derivative-beneficiary children are entitled to automatic conversion and retention of priority date, precluding further "interpretation" of the statute's scope by the BIA. Nonetheless, the Solicitor General

insists that the CSPA's priority-date-retention provision can be treated as a mere codification of an immigration regulation that existed at the time of the CSPA's passage, even though the language of the CSPA plainly differs from that regulation. The Solicitor General is attempting to inject ambiguity into the CSPA when the language used by Congress is manifestly clear.

The Members disagree with the Solicitor General's assertion that, because of supposed "tension" in the CSPA, the BIA can reinterpret the meaning of otherwise unambiguous language. This position is an unacceptable effort to revise the plain meaning of a statute under the guise of expert interpretation. This Court should reemphasize the importance of federal agencies' consistent adherence to clearly articulated congressional commands.

A. The Plain Language Of The CSPA Is Unambiguous And Precludes The BIA From Modifying The Statute's Scope.

The language and structure that Congress used to draft the CSPA leaves no room for interpretation as to its scope. All three paragraphs of 8 U.S.C. § 1153(h) should be read together "as a symmetrical and coherent regulatory scheme," *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 569 (1995), that "fit[s] . . . into an harmonious whole," *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959); *see also*, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

The first paragraph of Section 1153(h) provides:

> For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement [of being under 21 years of age] shall be made using—

> (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d) of this section, the date on which an immigrant visa number became available for the alien's parent) . . . ; reduced by
>
> (B) the number of days in the period during which *the applicable petition described in paragraph (2)* was pending.

8 U.S.C. § 1153(h)(1) (emphasis added). This paragraph provides a form of protection for alien children, including derivative beneficiaries, by excluding the time that a petition is being processed from the calculation of a derivative-beneficiary child's age.

Notably, paragraph (1) states that this modified age calculation applies to any child who seeks a visa under a "petition described in paragraph (2)." 8 U.S.C. § 1153(h)(1)(B). Paragraph (2), in turn, expressly includes all petitions where a child "is a derivative beneficiary under subsection (d)" and that are filed "under subsection (a)," which is the subsection authorizing, *inter alia*, F2A, F3, and F4 petitions. *Id.* § 1153(h)(2)(B); *see also id.* § 1153(a). Congress did not include in paragraph (2) any restriction on which types of derivative-beneficiary children receive the modified age calculation outlined in paragraph (1). Indeed, the Solicitor General acknowledges that paragraph (2) requires *all* derivative-beneficiary children's ages to be calculated in accordance with paragraph (1). *See* Pet. Br. 6.

Paragraph (1), while excluding the time that a petition is being processed from a derivative-beneficiary child's age, does not exclude the time that a derivative-beneficiary child and his parent must

wait for a visa to become available after their petition is approved. Thus, despite the protection of this provision, there is still a significant danger that a derivative-beneficiary child could age out. This is where paragraph (3)—the priority-date-retention provision—becomes relevant.

Paragraph (3) states:

> (3) Retention of priority date
>
> *If the age of an alien is determined under paragraph (1) to be 21 years of age or older* for the purposes of subsections (a)(2)(A) and (d) of this section, 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). Paragraph (3) contains only one condition for a child to receive the paragraph's benefits: his age must be determined under paragraph (1) to be 21 years or older. Once this condition is satisfied, automatic conversion and priority-date retention are mandatory. *See ibid*. ("[T]he 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." (emphases added)).

Subsection (h) therefore provides a double layer of protection against aging out. Paragraph (1) outlines a new way to calculate a child's age in order to ameliorate the effects of administrative delay and will prevent some children from aging out altogether. Paragraph (2) states that this modified calculation applies to, *inter alia*, all derivative-beneficiary children. And paragraph (3) then requires that any child whose age is calculated under the paragraph

(1) formula and still ages out even after that modified calculation *shall* retain his original priority date.

The Members cannot see any ambiguity in the language of paragraph (3). That paragraph explicitly states that it applies to any "alien [whose age] is determined under paragraph (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). As the Solicitor General concedes, *see* Pet. Br. 6, the ages of *all* derivative-beneficiary children are calculated under paragraph (1). Thus, the automatic-conversion and priority-date-retention provisions of paragraph (3) unambiguously apply to *any* derivative-beneficiary child whose age is calculated to be over 21.

Under this Court's jurisprudence, "Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Accordingly, "the inquiry is at an end," and "the [C]ourt 'must give effect to the unambiguously expressed intent of Congress.'" *Brown & Williamson*, 529 U.S. at 132 (quoting *Chevron*, 467 U.S. at 843).

B. Other Indicia In The Text And Structure Of The CSPA Further Demonstrate That All Derivative-Beneficiary Children Are Entitled To Automatic Conversion and Priority-Date Retention.

Other aspects of the CSPA's text and structure further demonstrate statutory coverage of all derivative-beneficiary children and not only those connected with F2A petitions.

First, Congress specifically declined to use the restrictive language employed by an immigration regulation in place at the time the CSPA was passed. When Congress drafts legislation, it takes notice of agency regulations connected with that legislation

and often adopts language from those regulations if such language achieves the result that Congress seeks to advance. If, however, a regulation's language is contrary to Congress's goals, that language is often omitted.

A pre-CSPA age-out regulation contained language limiting its scope, yet Congress omitted any such limitation when drafting the CSPA. Before passage of the CSPA, that immigration regulation (which is still in effect today) permitted derivative beneficiaries of an F2A petition to retain their priority date—but only if the same petitioner filed a subsequent F2B petition:

> [I]f the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, a separate petition will be required. In such a case, the original priority date will be retained if the subsequent petition is filed by the same petitioner. *Such retention of priority date will be accorded only to a son or daughter previously eligible as a derivative beneficiary under a second preference spousal petition.*

8 C.F.R. § 240.2(a)(4) (emphasis added). This regulation contains clear language limiting its reach to derivative-beneficiary children under "a second preference spousal" (*i.e.*, F2A) petition. Congress was aware of this regulation, yet did not insert its limiting language, or any other limiting language, into the CSPA. *See*, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 581-82 (1978) (holding that Congress's decision to omit pertinent regulatory limitations shows its intent to exclude them).

Second, both paragraph (1) and paragraph (3) state that they are to be used "for the purposes of

subsectio[n] . . . (d)," which is the subsection of Section 1153 that specifically permits derivative eligibility. 8 U.S.C. § 1153(h)(1) & (3); *see also id.* § 1153(d). As the Solicitor General concedes, and as the Members agree, paragraph (1) covers all derivative-beneficiary children, and so the reference to subsection (d) in paragraph (1) encompasses all derivative-beneficiary children as well. *See* Pet. Br. 6. When Congress then used the same phrase in paragraph (3), only a few lines down the page, it clearly meant for that phrase to encompass the same individuals as it did in paragraph (1), thus bringing all derivative-beneficiary children within the scope of paragraph (3). The Court has acknowledged this commonsense principle of crafting legislation. *See Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (discussing the "presumption that a given term is used to mean the same thing throughout a statute").

Third, the Solicitor General's position would impute to Congress an intent to discriminate against United States citizens in favor of LPR aliens. The principal beneficiary of an F2A petition is the spouse (or minor child) of an LPR alien. *See* 8 U.S.C. § 1153(a)(2)(A). Any derivative-beneficiary children of an F2A petition are thus also the relatives of an LPR alien. In contrast, the principal beneficiary of an F3 or F4 petition is, respectively, the adult child or the sibling of a United States citizen. *See id.* § 1153(a)(3)-(4). Accordingly, the children who benefit derivatively from those petitions are the relatives of actual United States citizens.

The Solicitor General argues that paragraph (3)'s features inure only to the benefit of principal and derivative beneficiaries of F2A petitions, and that F3 and F4 derivative beneficiaries, who are the relatives of United States citizens, receive no such benefits. In

other words, the Solicitor General's position would view Congress as having prioritized the interests of LPR aliens and their relatives over the interests of United States citizens. But there is no reason to believe that Congress would have treated relatives of United States citizens less favorably than relatives of LPR aliens. Instead, through the CSPA, Congress extended *the same rights* to both LPR aliens and United States citizens by granting them both the benefits of automatic conversion and priority-date retention for derivative-beneficiary children.

C. The Solicitor General's Attempt To Manufacture Ambiguity Erodes Congress's Ability To Effect Its Will Through Clear, Unambiguous Draftsmanship.

The Solicitor General argues that, despite its clarity, Section 1153(h)(3) is subject to reinterpretation by the BIA because there is "tension" between the clear language requiring coverage of all derivative-beneficiary children and the mandatory requirement that those enjoying this coverage receive automatic conversion of their petitions to the appropriate category. *See* Pet. Br. 17 ("[I]t is precisely the tension between the two halves of Section 1153(h)(3)'s single sentence that makes the provision ambiguous . . . ."); *see also* 8 U.S.C. § 1153(h)(3).

The "tension" that the Solicitor General identifies, however, is not some unavoidable conflict with another clear statutory command such that otherwise unambiguous language extending the CSPA's protections to all derivative-beneficiary children "must give way." *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007). Rather, the Solicitor General simply argues that, under the BIA's current procedures, automatic conversion cannot be bestowed on children who are derivative beneficiaries of F3 and F4 petitions, and thus they cannot

qualify for *any* CSPA protection—neither automatic conversion nor priority-date retention. *See* Pet. Br. 25-26.

There is nothing to suggest that automatic conversion is impossible for F3 and F4 derivative-beneficiary children. The Solicitor General notes that the original sponsor in an F3 or F4 petition is either the parent or sibling of the principal beneficiary; thus, the original sponsor would be the grandparent or aunt/uncle of the petition's derivative-beneficiary child. *See* Pet. Br. 25. There is no category of petition for grandparents or aunts/uncles to sponsor their grandchild or niece/nephew. The Solicitor General argues, therefore, that under current BIA procedures, a new petition—*i.e.*, an F2B petition in which an LPR alien directly sponsors an adult child, *see* 8 U.S.C. § 1153(a)(2)(B)—would need to be filed by the derivative-beneficiary child's parent once the parent has become an LPR alien. *See* Pet. Br. 25-26. According to the Solicitor General, the need for this new petition filed by a different individual prevents automatic conversion. *See ibid*.

But neither the Solicitor General nor the BIA has offered any reason that an F3 or F4 petition could not "automatically" be converted into an F2B petition. Once the parent of the derivative-beneficiary child receives a visa, that parent is an LPR alien. At that point, the agency could automatically regard the derivative-beneficiary child's old petition, originally approved as an F3 or F4, as having been approved as an F2B. This may not be how the agency currently conducts its business, but that is immaterial: Agencies are expected to conform their procedures to law.

Additionally, Section 1153(h)(3) bestows two distinct benefits. In the event that an alien meets the only condition of that paragraph—that his age, as calculated under paragraph (1), is at least 21—"the

alien's petition shall automatically be converted to the appropriate category *and* the alien shall retain the original priority date." 8 U.S.C. § 1153(h)(3) (emphasis added). Congress used the word "and" to indicate two separate benefits, neither of which is dependent on the other. *Cf. United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (holding that, when the word "and" separates two types of recovery, "[b]y the plain language of the statute, the two types of recovery are distinct"). Thus, even assuming that automatic conversion is not available for derivative-beneficiary children of F3 and F4 petitions, the independent benefit of priority-date retention would nevertheless endure. There is no reason that priority-date retention "must give way" in the face of allegedly impossible automatic conversion.

The Solicitor General's continuing insistence that the CSPA is ambiguous raises serious institutional concerns. While Congress can and often does rely on agency expertise to fill intentionally placed gaps in statutory language, it does not typically give an agency *carte blanche* to rewrite statutory language that is clear simply because the agency declares that the statute contains "tension." The Solicitor General's attempt to read ambiguity into a statute simply because the requirements of the statute diverge from preexisting agency procedures undermines the authority of Congress. This Court should reject that attempt and reaffirm the agency's duty to carry out the mandates of a congressional statute.

* * *

Congress's unmistakable purpose for enacting the CSPA was to restore fairness to immigration procedures and to preserve the unity among immigrant families. The CSPA, as enacted, serves these twin goals by extending the statute's benefits to all derivative-beneficiary children.

The plain language of the CSPA requires that the BIA allow all children who age out, including derivative beneficiaries, to automatically convert their petition and retain their priority date. The statute clearly indicates that, so long as "the age of [a derivative beneficiary] is determined under paragraph (1) to be 21 years of age or older," that individual's petition "shall automatically be converted to the appropriate category," and the individual "shall retain the original priority date issued upon receipt of the original petition." 8 U.S.C. § 1153(h)(3). Because the ages of *all* beneficiary children are calculated under paragraph (1) of the CSPA, the statute requires automatic conversion and priority-date retention for any of those children who age out by exceeding the 21-year age limit.

Furthermore, the omission of language from an existing regulation that limited priority-date retention to F2A derivative beneficiaries buttresses the conclusion that the CSPA unambiguously contains no such limitation. Congress also used terminology throughout the CSPA that, if read consistently, as Congress expected it would be, indicates that the CSPA covers all beneficiary children. Otherwise, the CSPA's protections would extend only to the relatives of LPR aliens, while denying those same protections to the family members of United States citizens.

In the face of such an unambiguous congressional mandate, the existence of alleged "tension" between the statute and preferred agency procedure is not sufficient to generate ambiguity where none exists. Congress has enacted a law that is clear on its face; the agency must act to faithfully carry it out.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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