No. 12-930

In the Supreme Court of the United States

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
ELIZABETH J. STEVENS
GISELA A. WESTWATER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

The Immigration and Nationality Act (INA) permits United States citizens and lawful permanent resident aliens to petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident alien. The family member sponsored by the petitioner is known as the primary beneficiary. The primary beneficiary's "spouse or child" may be a derivative beneficiary of the petition, "entitled to the same status[] and the same order of consideration" as the primary beneficiary. 8 U.S.C. 1153(d). Section 203(h)(3) of the INA, 8 U.S.C. 1153(h)(3), grants relief to certain persons who reach age 21 ("age out"), and therefore lose "child" status, after the filing of visa petitions as to which they are beneficiaries.

The questions presented are:

1. Whether Section 1153(h)(3) unambiguously grants relief to all aliens who qualify as "child" derivative beneficiaries at the time a visa petition is filed but age out of qualification by the time the visa becomes available to the primary beneficiary.

2. Whether the Board of Immigration Appeals reasonably interpreted Section 1153(h)(3).

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the district court and appellees in the court of appeals, are Alejandro Mayorkas, Director, United States Citzenship Immigration Services; Janet Napolitano, Secretary of Homeland Security; Lynne Skeirik, Director, National Visa Center; Christina Poulos, Acting Director, California Service Center, United States Citizenship and Immigration Services; and Hillary Rodham Clinton, Secretary of State.

Respondents, who were plaintiffs in the district court and appellants in the court of appeals, are Rosalina Cuellar de Osorio, Elizabeth Magpantay, Evelyn Y. Santos, Maria Eloisa Liwag, Norma Uy, Ruth Uy, and Teresita G. Costelo and Lorenzo P. Ong, individually and on behalf of a class of others similarly situated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 12-930

ALEJANDRO MAYORKAS, DIRECTOR, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Attorney General Eric H. Holder, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-35a) is reported at 695 F.3d 1003. The vacated opinion of the court of appeals panel (App., *infra*, 36a-60a) is reported at 656 F.3d 954. One opinion of the district court (App., *infra*, 61a-78a) is reported at 663 F. Supp. 2d 913; the other (App., *infra*, 79a-84a) is not published in the Federal Supplement but is available at 2009 WL 4030516.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 26, 2012. On December 18, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including January 25, 2013. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 87a-109a.

STATEMENT

This case involves the proper interpretation of 8 U.S.C. 1153(h)(3), which addresses how to treat an alien who reaches age 21 ("ages out"), and therefore loses "child" status under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, after the filing of a visa petition as to which he is a beneficiary. The meaning of that provision is a question that split the en banc Ninth Circuit by a vote of 6 to 5, has divided the courts of appeals, and has serious implications for administration of the visa system.

1. a. Under the INA, United States citizens and lawful permanent resident aliens may petition for certain family members to obtain visas to immigrate to the United States or to adjust their status in the United States to that of a lawful permanent resident alien. The INA limits the total number of family-sponsored immigrant visas issued each year, see 8 U.S.C. 1151(c); establishes various "preference" categories that classify and prioritize different types of family members, see 8 U.S.C. 1153(a); caps the number of visas that may be issued in those categories each year, see *ibid.*; and places annual limitations on

the number of natives of any single foreign state who can obtain visas in each category, see 8 U.S.C. 1152(a)(2).

The INA establishes the following "preference" categories for family-sponsored ("F") visas:

> F1: unmarried sons or daughters (age 21 or older) of U.S. citizens
>
> F2A: spouses or children (unmarried, under age 21) of lawful permanent resident aliens
>
> F2B: unmarried sons or daughters (age 21 or older) of lawful permanent resident aliens
>
> F3: married sons or daughters of U.S. citizens
>
> F4: brothers or sisters of U.S. citizens

See 8 U.S.C. 1153(a)(1)-(4); see also 8 U.S.C. 1101(b)(1) (definition of "child").[1]

A citizen or lawful permanent resident seeking an immigrant visa for a family member in one of those categories must file a petition with the United States Citizenship and Immigration Services (USCIS) in the Department of Homeland Security.[2] See 8 U.S.C.

---

[1] Petitions by U.S. citizens on behalf of an "immediate relative"—that is, a spouse, child (under age 21), or parent, see 8 U.S.C. 1151(b)(2)(A)(i)—are not considered "preference" petitions, and are subject to fewer restrictions. The INA also permits the issuance of visas to aliens in employment-based categories, see 8 U.S.C. 1151(d), 1153(b), and aliens from countries with historically low immigration rates to the United States, see 8 U.S.C. 1153(c); see also 8 U.S.C. 1159 (providing for adjustment of status of asylees and refugees).

[2] Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security. Some residual statutory references to the

1154(a)(1); 8 C.F.R. 204.1(a)(1); USCIS, Form I-130, Petition for Alien Relative, http://www.uscis.gov/files/form/i-130.pdf. The family member sponsored by the petitioner is known as the primary (or principal) beneficiary.

When a preference petition is filed, USCIS assesses it and—if it meets applicable requirements—approves it. 8 U.S.C. 1154(b). That approval does not result in immediate issuance of a visa to the primary beneficiary, however. The beneficiary receives a place in line to wait for a visa to become available. Within family-preference categories, the order of the line is determined by the petition's priority date—that is, the date when it was filed with the agency. See 8 U.S.C. 1153(e); 8 C.F.R. 204.1(b); 22 C.F.R. 42.53(a).

Every month, the State Department publishes a visa bulletin with various cut-off dates for each family-preference category. See 8 C.F.R. 245.1(g)(1); 22 C.F.R. 42.51. When the applicable cut-off date is later than the petition's priority date, the priority date is "current," and a visa is available. In order to obtain the visa and become a lawful permanent resident alien, the primary beneficiary must submit an application, pay fees, demonstrate continued eligibility, and complete consular processing (if abroad) or obtain adjustment of status (if present in the United States). See 8 U.S.C. 1153(g), 1201(a), 1255.

Given the annual limitations on the total number of visas that may be granted for a particular family-preference category (as well as separate limitations on the number of natives of a single country who may

---

Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

receive visas in any given year), the waiting line for visa availability is often quite long. For instance, Filipino F4 primary beneficiaries (brothers and sisters of U.S. citizens) whose priority dates are now current have been waiting for more than 20 years. See U.S. Dept. of State, Visa Bulletin, http://travel.state.gov/visa/bulletin/bulletin1360.html (last visited Jan. 24, 2013).

A primary beneficiary of a preference petition who advances to the head of the line can also aid certain "derivative" beneficiaries—the primary beneficiary's spouse and unmarried children under age 21. Derivative beneficiaries are "entitled to the same status[] and the same order of consideration provided" to the primary beneficiary with respect to a pending petition. 8 U.S.C. 1153(d) (describing derivative beneficiaries as "accompanying or following to join[] the spouse or parent"). Accordingly, if a visa is available to a primary beneficiary, it is available to a derivative beneficiary as well. See *ibid.* But by the time the primary beneficiary's priority date becomes current, a child who qualified as a derivative beneficiary when the petition was originally filed may have "aged out"—that is, passed his or her twenty-first birthday. See 8 U.S.C. 1101(b)(1). If that happens, the aged-out person can no longer claim derivative-beneficiary status. See 8 U.S.C. 1154(e).

b. In 2002, Congress enacted the Child Status Protection Act (Act), Pub. L. No. 107-208, 116 Stat. 927. In a provision now codified at 8 U.S.C. 1153(h), the Act modified the visa system to grant relief to certain aged-out persons.

Section 1153(h)(1) addresses the passage of time between the filing of a visa petition and agency ap-

proval of the petition. It provides that "a determination of whether an alien satisfies the age requirement * * * shall be made using * * * 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 * * * 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); see *ibid.* (conditioning this reduction on the alien having "sought to acquire the status of an alien lawfully admitted for permanent residence within one year of [visa] availability"); see also *Martinez* v. *Department of Homeland Sec.*, 502 F. Supp. 2d 631, 636 (E.D. Mich. 2007) (explaining that prior to enactment of Section 1153(h)(1) the relevant date for purposes of determining an alien's qualification for "child" status was the date of adjudication of an "application for permanent residency" filed after a visa became available).

Section 1153(h)(2), to which Section 1153(h)(1) refers, describes a set of relevant petitions. It states that "[t]he petition described in this paragraph is" an F2A petition naming a child as a primary beneficiary or any petition including a child as a derivative beneficiary and the child's parent as a primary beneficiary. 8 U.S.C. 1153(h)(1); see 8 U.S.C. 1153(a)(2)(A) (providing for F2A petitions); 8 U.S.C. 1153(d) (providing that a child may be a derivative beneficiary of various petitions).

Together, these provisions permit certain aged-out beneficiaries to retain "child" status. For example, if USCIS took three years to approve a visa petition

filed when an alien was age 18 and a visa became available one year after approval, an alien who met the requirements of Section 1153(h)(1) would be treated for purposes of the statute as if he were 19 years old rather than 22 years old.

Section 1153(h)(3), which is the subject of this case, addresses the passage of a distinct period of time—the time between the approval of a petition and the availability of a visa. It provides that "[i]f 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).

c. The Board of Immigration Appeals (Board or BIA) interpreted Section 1153(h)(3) in *Matter of Wang*, 25 I. & N. Dec. 28 (B.I.A. 2009), a decision that helps illustrate how the visa preference system operates in practice. Wang was the primary beneficiary of an F4 visa petition filed by his sister, a U.S. citizen. See *id.* at 29; 8 U.S.C. 1153(a)(4). When the F4 petition was filed, Wang's daughter was a minor and a derivative beneficiary of the petition under 8 U.S.C. 1153(d). The petition was approved after a short while, and Wang and his daughter waited for a visa to become available. Approximately a decade later, Wang received a visa and was admitted to the United States as a lawful permanent resident. See 25 I. & N. Dec. at 29. By that time, however, his daughter was over 21 (even subtracting the small amount of time between the filing of the F4 petition and its approval), and she no longer qualified for derivative-beneficiary

status. See *id.* at 32; see also 8 U.S.C. 1101(b)(1) (definition of "child"), 1153(d) (identifying derivative beneficiaries to include the "child" of the primary beneficiary).

Wang then filed a new petition with USCIS on behalf of his daughter—an F2B petition, in the category that covers filings by lawful permanent residents on behalf of their unmarried sons and daughters who are over age 21. See 8 U.S.C. 1153(a)(2)(B). Immigration authorities approved the F2B petition filed on behalf of Wang's daughter, but gave it a priority date corresponding to the date on which it was filed, not the date on which the earlier F4 petition had been filed by Wang's sister on behalf of Wang himself. See 25 I. & N. Dec. at 29.

The Board rejected the argument that Section 1153(h)(3) dictated a different result. The Board explained that "the language of section [1153(h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates." 25 I. & N. Dec. at 33. The Board also explained that "[i]n immigration regulations, the phrase 'automatic conversion' has a recognized meaning," which includes a requirement that the petitioner be the same before and after conversion. *Id.* at 34 (citing, *inter alia*, 8 C.F.R. 204.2(i)); see *id.* at 35 ("Similarly, the concept of 'retention' of priority dates has always been limited to visa petitions filed by the same family member."). The Board concluded that Congress had acted consistent with the accepted understanding of that term, discerning nothing in the legislative history of the Act signaling an intent to give special priority status to derivative beneficiaries who age out of "child" status

as a consequence of statutory limits on the number of visas issued each year. *Id.* at 37-38.

The Board therefore held that Section 1153(h)(3) did not apply to Wang's daughter. See 25 I. & N. Dec. at 38-39. The earlier F4 petition had been filed by Wang's sister, who had no relationship with Wang's adult daughter that would qualify her for a visa—that is, there is no family preference category for nieces (or nephews) of U.S. citizens. Thus, the petition filed by the aunt could not automatically convert to an existing category. Wang's F2B petition also could not retain the priority date of the original F4 petition, because the two petitions were filed by different petitioners. See *id.* at 35.

2. This certiorari petition arises out of suits filed by two groups of plaintiffs in federal district court in 2008 claiming that immigration authorities incorrectly denied relief under Section 1153(h)(3) to aged-out derivative beneficiaries of F3 and F4 petitions. The first suit was brought by parents who were primary beneficiaries of F3 and F4 petitions filed in the 1980s and 1990s, and who sought to retain the priority dates of those petitions with respect to F2B petitions they later filed on behalf of their adult sons and daughters. See App., *infra*, 11a, 68a-69a; see also *id.* at 68a-69a (noting that some of the sons and daughters also joined the suit as plaintiffs). The plaintiffs sought "declaratory and mandamus relief," alleging that USCIS arbitrarily and capriciously failed to grant the requested priority dates in violation of 8 U.S.C. 1153(h)(3). App., *infra*, 43a.

The second suit was brought by similarly situated parents seeking to benefit their aged-out children by forcing the government to assign priority dates from

decades-old F3 and F4 petitions to new F2B petitions. App., *infra*, 11a-12a, 44a. In that case, the district court certified a class consisting of "[a]liens who became lawful permanent residents as primary beneficiaries of [F3 and F4] visa petitions listing their children as derivative beneficiaries, and who subsequently filed [F2B] petitions on behalf of their aged-out unmarried sons and daughters, for whom Defendants have not granted automatic conversion or the retention of priority dates pursuant to § [1153](h)(3)." *Id.* at 81a.

The district court granted summary judgment to the government in both cases. Noting that "[t]he factual circumstances of these cases are similar to those in *Wang*," the court concluded that Section 1153(h)(3) is ambiguous and held that the Board's interpretation of that provision in *Wang* was reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). App., *infra*, 68a, 72a, 83a.

3. The cases were consolidated for appeal, see App., *infra*, 45a, and a Ninth Circuit panel unanimously affirmed the judgments in favor of the government, see *id.* at 60a. The panel found Section 1153(h) ambiguous and deferred to the Board's interpretation of the provision.

The panel rested its holding on a close reading of Section 1153(h)(3) and related provisions. The panel explained that Section 1153(h) could be read to apply to all derivative beneficiaries, but also could be read to exclude some beneficiaries from its reach: those who aged out of derivative-beneficiary status with respect to petitions that cannot "automatically be converted" to a family-preference category that covers a person

over the age of 21, without any need for the filing of a new petition by a different petitioner. App., *infra*, 50a-54a; see *id.* at 54a-55a (explaining that it is "entirely possible" to read Section 1153(h)(3) as granting priority date retention only where automatic conversion is also available). The panel concluded that *Chevron* deference to the Board's interpretation was appropriate. In the panel's view, the agency's reading of Section 1153(h)(3) "accords with the ordinary usage of the word 'automatic' to describe something that occurs without requiring additional input, such as a different petitioner," and represents "a reasonable policy choice for the agency to make." *Id.* at 57a-60a (quoting *Chevron*, 467 U.S. at 845).

4. a. The court of appeals granted rehearing en banc, vacated the panel opinion, and reversed and remanded in a divided 6-5 decision. The majority opinion concluded that "the plain language of the [Act] unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries" and that the Board's contrary interpretation "is not entitled to deference." App., *infra*, 3a; see *id.* at 24a ("Automatic conversion and priority date retention are available to all visa petitions identified in [Section 1153](h)(2).").

The majority primarily relied on cross-references between the various subsections of Section 1153(h). Section 1153(h)(1) sets forth a formula that calculates whether an alien's age is over 21 for purposes of the applicable "age requirement," and covers petitions described in Section 1153(h)(2); the "petition[s] described in [that] paragraph" are F2A petitions under 8 U.S.C. 1153(a)(2)(A) naming a child as a primary beneficiary and any petitions as to which a child is a

derivative beneficiary under 8 U.S.C. 1153(d). 8 U.S.C. 1153(h)(1)-(2). While Section 1153(h)(3) does not refer to paragraph (h)(2), it does refer to paragraph (h)(1), because it applies only if "the age of an alien is determined under paragraph (1) to be 21 years of age or older." 8 U.S.C. 1153(h)(3). The majority concluded that because "[paragraph] (h)(3) * * * cannot function independently," and "[paragraph] (h)(1) explicitly applies to the visas described in [paragraph] (h)(2)," Congress has clearly provided that paragraph (h)(2) defines which petitions are covered by paragraph (h)(3). App., *infra*, 15a-16a. Accordingly, the majority continued, "both aged-out F2A beneficiaries and aged-out derivative visa beneficiaries" may "automatically convert to a new appropriate category (if one is available)" and "retain the priority date of the original petitions for which they were named beneficiaries." *Id*. at 16a.

Having determined that the statutory language was clear, the majority addressed what it identified as questions of "impracticability" concerning the availability of "automatic[]" conversion under its reading of Section 1153(h). App., *infra*, 19a-23a (citing *Demarest* v. *Manspeaker*, 498 U.S. 184, 190 (1991)). The majority acknowledged that "[f]or an aged-out derivative beneficiary of an F3 or F4 petition, a subsequent petition will require a new petitioner"—the aged-out person's parent, assuming that after the parent's visa becomes available she is granted lawful permanent resident status and thus becomes eligible to file a petition for her adult child. App., *infra*, 18a. The majority also acknowledged that it may take some time for a new petition to be filed, and that such a petition might never be filed at all. See *id.* at 21a-22a

& n.4. But the majority did not believe that those issues "render[ed] automatic conversion impracticable," *id.* at 21a; it characterized them instead as merely "present[ing] administrative complexities that may inform USCIS's implementation." *Id.* at 22a; see *id.* at 21a-22a (stating that such complexities include "[t]he lag time while a parent receives his visa and adjusts status" to become a lawful permanent resident and "the possibility that conversion for an aged-out derivative is never possible"). Finally, the majority believed that its reading made more sense than the Board's narrower interpretation because, in the majority's view, Congress likely did not intend to benefit only a small category of aged-out persons and "barely modif[y] the regulatory regime that existed at the time the [Act] was enacted." *Id.* at 22a-23a (citing 8 C.F.R. 204.2(a)(4)).

The majority recognized the existence of a circuit conflict on the proper interpretation of Section 1153(h)(3). As the majority explained, its ruling accorded with that of the Fifth Circuit, while the Second Circuit reached the opposite result, ruling that Section 1153(h)(3) unambiguously bars relief for any alien whose existing petition cannot be "automatically converted," without the need for a new petitioner. App., *infra*, 12a-13a (citing *Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011), and *Li* v. *Renaud*, 654 F.3d 376 (2d Cir. 2011)). The majority concluded, however, that "[t]he existence of a circuit split does not itself establish ambiguity in the text of the [Act]." *Id.* at 17a.

The majority also acknowledged that its ruling would have a substantial adverse effect on aliens who receive no benefit from Section 1153(h)(3). If aged-out beneficiaries are permitted to "retain their priori-

ty dates when they join new preference category lines," the majority noted, that "will necessarily impact the wait time for other aliens in the same line," who will suddenly find more people ahead of them in the quest for visas that are made available only in small, "statutorily fixed" numbers. App., *infra*, 23a. The majority did not attempt to assess the equities of that result or to read the language of the statute in light of those equities. See *ibid.*

b. Five judges dissented in an opinion authored by Judge Milan Smith, Jr. The dissent agreed that Section 1153(h)(3) could be read to "include F3 and F4 derivative beneficiaries because this provision references the age-calculation formula in § 1153(h)(1), which covers derivative beneficiaries of F3 and F4 petitions through § 1153(h)(2)." App., *infra*, 27a-28a. But in the dissent's view, such a reading could not be squared with three other aspects of Section 1153(h)(3): "(1) that a petition must be converted 'to the appropriate category[';] (2) that only 'the alien's petition' may be converted; and (3) that the conversion process has to occur 'automatically.'" *Id.* at 28a. Automatic conversion is not possible, the dissent explained, because "[t]he children eligible to enter as derivative beneficiaries of their parents' visa petitions are the grandchildren, nieces, and nephews of United States citizens. When those children turn 21 and are no longer eligible to enter with their parents, there is no section 1153(a) category into which they fit on their own." *Id.* at 29a. The dissent also explained that although the majority relied on the assumption that the aged-out person's parent would become a lawful permanent resident and file a new petition naming that person, such a filing may not happen for some

time or at all, and "[a]n action cannot be 'automatic' if it depends on what a person *can* or *may* do, not what he or she definitely *will* do." *Id.* at 30a. The dissent criticized the majority for "ignoring statutory language contrary to its interpretation before finding the plain meaning clear." *Id.* at 28a, 31a-32a.

Finally, the dissent recognized the real-world implications of the majority's ruling, which would "shuffle the order in which individual aliens get to immigrate," and therefore require a change in the administration of visa waiting lists and a substantial increase in many aliens' already protracted wait times for visas, App., *infra*, 34a-35a: "If F3 and F4 derivative beneficiaries can retain their parents' priority date, they will displace other aliens who themselves have endured lengthy waits for a visa. What's more, these derivative beneficiaries—who do not have one of the relationships in section 1153(a) that would independently qualify them for a visa—would bump aliens who *do* have such a qualifying relationship." *Id.* at 35a.[3]

REASONS FOR GRANTING THE PETITION

By a 6-5 margin, the en banc Ninth Circuit has held that Section 1153(h)(3) grants special priority status to all aged-out derivative beneficiaries, refusing to defer to the contrary interpretation of the Board of Immigration Appeals. That ruling misinterprets the provision's text and misapplies *Chevron*—and, in doing so, deepens an existing conflict among the circuits.

---

[3] The court of appeals stayed its mandate pursuant to Federal Rule of Civil Procedure 41, pending the filing and disposition of a petition for certiorari. 09-56786 Docket entry Nos. 100, 102 (9th Cir. 2012).

It also threatens serious disruption of the visa program by which relatives of U.S. citizens and lawful permanent residents immigrate to this country or adjust their status. This Court should grant review and correct the Ninth Circuit's error.

A. The Ninth Circuit Incorrectly Refused to Grant *Chevron* Deference to the Board's Interpretation Of Section 1153(h)(3)

1. a. The Ninth Circuit's conclusion that Section 1153(h) is unambiguous does not withstand scrutiny. Congress has not "unambiguously expressed" an intent to grant special priority status to aged-out derivative beneficiaries like those who seek relief in this case. *Chevron*, 467 U.S. at 842-843.

The en banc majority reached its conclusion without coming to terms with the text of Section 1153(h)(3) providing that "the alien's petition shall automatically be converted to the appropriate category." The existence of that specification of the manner in which Section 1153(h)(3) is to operate refutes the Ninth Circuit's conclusion that the provision unambiguously applies to all derivative beneficiaries. With respect to a derivative beneficiary named in an F3 or F4 petition who ages out, there is no "appropriate category" to which "the alien's petition"—that is, the *existing* petition covering the alien—can be "converted." In the case of an F3 petition (for married sons and daughters of U.S. citizens), the original petitioner is the aged-out person's U.S. citizen grandparent, and Congress has not provided for a citizen to file a petition to obtain an immigrant visa on behalf of a grandson or granddaughter. See 8 U.S.C. 1153(a). In the case of an F4 petition (for a U.S. citizen's brother or sister), the original petitioner is the aged-out person's U.S. citizen

aunt or uncle, and there likewise is no statutory category that allows a citizen to petition for a visa on behalf of a niece or nephew. See *ibid.*

In addition, as the en banc dissent explained (App., *infra*, 29a-31a), a change in classification could not take place "automatically" in those circumstances. If the parent of an aged-out derivative beneficiary of an F3 or F4 petition receives a visa and becomes a lawful permanent resident, the parent might then choose to file a new F2B petition naming the now adult son or daughter as a primary beneficiary. See 8 U.S.C. 1153(a). But such a new petition, filed by a new petitioner, cannot possibly be filed immediately after the derivative beneficiary ages out, see 8 U.S.C. 1153(h)(1); App., *infra*, 21a n.4, because some time must necessarily elapse between the date when the visa becomes available to the parent and the date when he or she establishes eligibility (if all requirements are met) and actually is granted lawful permanent resident status. See, *e.g.*, 8 U.S.C. 1153(g) (allowing up to one year for an alien to apply for a visa after one becomes available); 8 U.S.C. 1201(a), 1255 (governing processes by which an alien who qualifies for a visa can attain the right to reside in the country as a lawful permanent resident). Indeed, a new petition might never be filed at all; the aged-out person's parent might not submit an F2B petition even when capable of doing so. It is difficult to see how a shift from an F3 or F4 petition filed by one person to a new F2B petition that might or might not be filed later by a different person can reasonably be characterized as "automatic[]"—let alone as a "conver[sion]" of "the alien's petition." 8 U.S.C. 1153(h)(3); see App., *infra*, 30a.

That conclusion is reinforced by the well-understood meaning of the term "convert[]" in this area of immigration law: a seamless reclassification of a single petition from one currently valid category to another currently valid category. See *Agosto* v. *INS*, 436 U.S. 748, 754 (1978) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels the contrary." (citation omitted)). For instance, 8 C.F.R. 204.2(i), which was in place years before the Act was passed, provides for "[a]utomatic conversion of preference classification" from one category to another under circumstances (for example, a change in the beneficiary's marital status, or the naturalization of the petitioner) that do not require the filing of a new petition. And 8 U.S.C. 1151(f)(2), which was enacted alongside Section 1153(h), expressly contemplates "conversion" in that very sort of situation (naturalization of the parent). See also 8 U.S.C. 1151(f)(3), 1154(k)(1). The Board, with its extensive expertise in this area, agreed that "the term 'conversion' has consistently been used" to refer to a move from one visa category to another without the filing of a new petition. *Wang*, 25 I & N. Dec. at 35.[4]

---

[4] Section 1153(h)(3) provides that "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). That language cannot be read to provide unambiguously that priority-date retention and automatic conversion are separate benefits, such that retention is available even when conversion is not. See App., *infra*, 32a-33a, 54a. That is particularly true in light of the fact that Congress expressly unyoked those two benefits elsewhere in the Act. See

The cross-references in Section 1153(h) on which the en banc majority relied (App., *infra*, 15a-16a) do not provide an unambiguous statement of congressional intent that trumps these considerations. To qualify for relief under paragraph (h)(3), an aged-out person must have been subjected to the formula set out in paragraph (h)(1) and had his age computed as 21 or older. But it does not follow that every person whose age is computed under paragraph (h)(1)—that is, every beneficiary of a petition identified in paragraph (h)(2)—must also qualify for the distinct form of relief described in paragraph (h)(3). Rather, the persons who qualify for that further benefit can reasonably be understood to be a subset of beneficiaries of the persons covered by paragraph (h)(2). Particularly in light of the statutory language referring to "automatic[]" conversion, Section 1153(h)(3) cannot be said clearly to encompass the broader group.

Finally, there is no extra-textual reason to believe that Congress intended to grant the distinct benefit and preferred status of "grandfathered" priority dates to all aged-out former beneficiaries. Nothing in the legislative history indicates such an intent—a silence that would be surprising if Congress truly meant to enact a far-reaching change in immigration policy with substantial effects on aliens waiting for visas. See App., *infra*, 34a-35a; *Wang*, 25 I & N. Dec. at 36-38; pp. 28-32, *infra* (discussing effects of Ninth Circuit's

---

8 U.S.C. 1154(k)(3) (stating that certain petitioners may retain their priority dates "[r]egardless of whether a petition is converted under this subsection or not"). In any event, "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. *Wang*, 25 I & N. Dec. at 35; see, *e.g.*, 8 C.F.R. 204.2(a)(4).

interpretation of the statute). Rather, Congress was focused on ameliorating the effects of a particular problem relating to administrative delays in approving petitions, see *Wang*, 25 I. & N. Dec. at 36 (explaining that "the drive for the legislation was the then-extensive administrative delays in the processing of visa petitions and applications"); H.R. Rep. No. 45, 107th Cong., 1st Sess. 2 (2001), while avoiding "displac[ement]" with respect to aliens who were already "waiting patiently," *Wang*, 25 I. & N. Dec. at 37 (quoting 148 Cong. Rec. H4992 (daily ed. July 22, 2002)); see 147 Cong. Rec. H2902 (daily ed. June 6, 2001); see generally *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012).

b. The en banc majority was able to conclude that Section 1153(h)(3) is unambiguous only by shunting the discussion of any statutory language undermining that conclusion into a separate analysis of whether USCIS would be able to implement the different priority system the court's interpretation would mandate. See App., *infra*, 19a-23a. That was a misapplication of *Chevron*. In order to determine whether a statute is unambiguous to begin with, a court must employ the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including examination of *all* of a provision's language as well as consideration of the statutory and regulatory structure into which it fits, see, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"). The court of appeals erred in breaking the provision into pieces and deeming it unambiguous on

the ground that one of the pieces, considered in isolation, appeared to have a clear meaning. That is especially true because the provision being interpreted here, 8 U.S.C. 1153(h)(3), consists of a single unitary sentence. To be sure, one tool of construction is an analysis of whether an interpretation is so unworkable or "so bizarre that Congress 'could not have intended' it," *Demarest* v. *Manspeaker*, 498 U.S. 184, 191 (1991) (citing *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982))—but that inquiry does not substitute for the basic requirement of a close reading of the entirety of the language that Congress chose.

In any event, the majority's attempt to explain why there are no difficulties associated with its understanding of how Section 1153(h)(3) operates is unconvincing. First, the majority stated that the reference in Section 1153(h)(3) to an "original petition" could be read to "suggest[] the possibility of a new petition," indicating that "automatic conversion could require more than just a change in visa category." App., *infra*, 20a. But the phrase "original petition" is most naturally read as a way of referring to a single petition *prior to* its conversion. 8 U.S.C. 1153(h)(3). Under that reading, Section 1153(h)(3) provides that when "the alien's petition" is transformed through conversion, it nevertheless "retain[s]" the priority date that was "issued upon receipt" of the petition in its "original" state. *Ibid.*

Second, the majority tried to brush past the difficulties associated with "automatic[]" conversion of a new F2B petition that might be filed on behalf of an adult son or daughter sometime after the date when that person had aged out as a derivative beneficiary under category F3 or F4. App., *infra*, 21a-22a. The

majority was forced to acknowledge, however, that uncertainty and "lag time" associated with the prospect of a new filing create "administrative complexities" and "unresolved procedural questions." *Ibid.* That is a source of statutory ambiguity—since the conversion that the majority envisioned would not be "automatic[]" within the ordinary meaning of that word—and not simply a problem of administration for the agency to surmount as best it may. See *id.* at 22a ("It is the agency's task to resolve these complications, not the court's.").

Finally, the majority expressed concern that an interpretation of Section 1153(h)(3) that gives force to the "automatic[]" conversion language would not significantly "modif[y] the regulatory regime that existed" when the provision was enacted. App., *infra*, 22a-23a. But there is no reason to believe that Congress wanted to make a major shift in policy, rather than to take the more modest step of giving statutory force to the agency's existing practices—including by use of terms with a recognized meaning in the immigration field. Cf. *Kucana* v. *Holder*, 130 S. Ct. 827, 838 (2010). The narrower interpretation adopted by the Board does add to the benefits already expressly conferred by regulation, making conversion "automatic[]," without requiring any additional petition (and corresponding fee), for aged-out derivative beneficiaries moving from the F2A category (which covers a lawful permanent resident's spouse and minor child) to the F2B category (which covers a lawful permanent resident's unmarried adult son or daughter). See 8 U.S.C. 1153(h)(3).[5]

---

[5] See also, *e.g.*, Gov't C.A. Br. 38-39 (explaining that "[u]nder *Wang*, lawful permanent residents are no longer required to file

2. Because the en banc majority resolved the appeal at *Chevron* step one, it did not address whether the Board's interpretation of Section 1153(h)(3) in *Wang* is a reasonable one that is entitled to deference. See *Chevron*, 467 U.S. at 843-844; see also *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009) (according *Chevron* deference to Board's interpretation of a provision of the INA); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (same). The standard for what constitutes an expert agency's reasonable interpretation for *Chevron* purposes is broad, 467 U.S. at 843, and courts ordinarily defer to the Board's interpretation of immigration laws unless the interpretation is "clearly contrary to the plain and sensible meaning of the statute," *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted).

As the en banc dissent (and the original Ninth Circuit panel) correctly explained, the Board's decision is indeed a reasonable one—a conclusion that follows

---

separate petitions once their sons and daughters turn 21 years old"); Gov't C.A. Br. at 34 n.4, *Li* v. *Renaud*, *supra* (No. 10-2560-cv) (same). Prior to enactment of Section 1153(h)(3), the available relief was more limited. See 8 C.F.R. 204.2(a)(4) ("[I]f the [derivative beneficiary of an F2A petition] 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."). Although this regulation has not been revised following the enactment of the Act, its requirement that a new petition be filed for an aged-out derivative beneficiary of an F2A petition has been superseded by Section 1153(h)(3). This Office has been informed by the Department of Homeland Security and Department of State that administration of these provisions by agency personnel in the field in the wake of the Act has not always been uniform, but their position is, as required by Section 1153(h), that no separate petition is needed.

naturally from the interpretation of Section 1153(h)(3) set forth above. App., *infra*, 34a-35a, 57a-60a. The Board's reading of the provision gives meaning to the reference to automatic conversion, and does so in a manner consistent with past practice in immigration statutes and regulations. See *Wang*, 25 I. & N. Dec. at 39 (explaining that Section 1153(h)(3) affords relief to primary and derivative beneficiaries of F2A petitions who become eligible for F2B classification when they age out of child status). That reading also recognizes that a contrary interpretation would "not permit more aliens to enter the country or keep more families together," but would negatively affect many aliens who have been patiently waiting in visa lines for long periods of time. App., *infra*, 35a. And it makes a "reasonable policy choice," *Chevron*, 467 U.S. at 845, not to depart from past practice and disrupt visa administration in order to reduce the wait times for independent adults, see App., *infra*, 35a.

B. The Courts Of Appeals Are Split On The Meaning Of Section 1153(h)(3)

The ambiguity in Section 1153(h)(3) is highlighted by the varying interpretations reached by the courts of appeals that have considered its significance. The circuits are divided over whether Section 1153(h)(3) should be read to afford relief to derivative beneficiaries like the ones in this case, and review by this Court's is therefore warranted.

In *Li* v. *Renaud*, 654 F.3d 376 (2d Cir. 2011), the Second Circuit reached a result directly contrary to the Ninth Circuit's decision here. The plaintiff in *Li* was the primary beneficiary of an F2B family-preference petition filed by her father in 1994, at a time when her son was 15 years old; by the time a visa

became available, however, her son was 26 years old, and thus had aged out of derivative-beneficiary status. See *id.* at 379. Because there is no family-preference category under which a grandfather can seek a visa for his grandson, a new petition was required. See *id.* at 381. When the plaintiff—by then a lawful permanent resident—filed a separate F2B petition in 2008 naming her adult son as the primary beneficiary, she argued that he was entitled to the priority date associated with her father's earlier petition filed on her behalf. See *id.* at 379. The Second Circuit rejected that argument, ruling that Section 1153(h) did not create "a statutory right to have [the] 2008 petition receive a 1994 priority date." *Id.* at 380; see *id.* at 382-383.

The Second Circuit read Section 1153(h)(3) to unambiguously *reject* the very reading adopted by the Ninth Circuit, and thus to *deny* special relief to aged-out derivative beneficiaries who seek to "retain" a priority date "to use for a different family preference petition filed by a different petitioner." *Li*, 654 F.3d at 382-383. The court first explained that automatic conversion and retention of priority date are not "distinct and independent" statutory "benefits," noting that Congress knew how to "decouple" those benefits but had "clearly" chosen not to do so in the provision at issue. *Id.* at 383-384 (citing 8 U.S.C. 1154(k)). The court then considered whether the plaintiff's petition could automatically be "converted to the appropriate category," 8 U.S.C. 1153(h)(3), and concluded that it could not. The court pointed out that "[a]s used in the [Act] and prior regulations," that phrase "refers to a petition in which the category is changed, but not the petitioner." 654 F.3d at 384; see also *id.* at 384-385.

In the court's view, then, that language "unambiguously expressed" Congress's intent to include only "a change—without need for an additional petition—from one classification to another, not from one person's family sponsored petition to another." *Id.* at 384-385.

In sharp contrast, in *Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011), the Fifth Circuit expressly rejected the Second Circuit's reasoning in *Li* and reached the same conclusion as the en banc Ninth Circuit in the decision below. See *id.* at 374-375. The case involved a typical aging-out fact pattern: Khalid's mother was named as the primary beneficiary of an F4 petition filed by Khalid's aunt in 1996, at which time Khalid was 11 years old. See *id.* at 365. His mother did not reach the front of the visa line until 2007, however, and by the time she became a lawful permanent resident Khalid was 22 years old. See *id.* at 366. Immigration authorities denied Khalid's request to assign a priority date of 1996 to the new F2B petition his mother filed on his behalf in 2007. See *ibid.*; see also *id.* at 368 (stating that "[t]he facts of *Matter of Wang* are essentially identical to the facts of this case").

Because the Fifth Circuit found that Section 1153(h)(3) unambiguously entitled Khalid to the relief he sought, the court of appeals did not progress beyond step one of the *Chevron* analysis. The court acknowledged that Section 1153(h)(3) does not internally define which petitions qualify for automatic conversion and priority-date retention, since that provision "refers only to 'the alien's petition' and 'the original petition.'" 655 F.3d at 370. Like the Ninth Circuit en banc majority, however, the court placed

heavy reliance on the fact that Section 1153(h)(3) refers to the formula set forth in Section 1153(h)(1), and Section 1153(h)(2) defines which petitions are covered under Section 1153(h)(1): any F2A petition naming a child as a primary beneficiary as well as any petition under which a child is a derivative beneficiary. See *ibid.*; see also 8 U.S.C. 1153(h)(2). The court concluded that paragraph "(h)(3) must operate on this same set of petitions"—and that the Second Circuit had erred by failing to recognize that point. 655 F.3d at 371, 373-375; see *id.* at 371 (noting various "parallels" between the subsections of Section 1153(h)); *id.* at 372 (stating that "past practices regarding conversion and retention" might "factor into the analysis" if "the text were more murky"). The Fifth Circuit was also skeptical of the Second Circuit's reading because it would confer only a "meager benefit." *Id.* at 374 (citing 8 C.F.R. 204.2(a)(4)).

These various court of appeals decisions, which arrive at such different conclusions about the purportedly "unambiguous" meaning of Section 1153(h)(3), cannot be reconciled with each other. Cf. *Robles-Tenorio* v. *Holder*, 444 Fed. Appx. 646, 649 (4th Cir. 2011). This Court's review is warranted to clarify the meaning of Section 1153(h)(3) and to determine whether the Board's considered interpretation of that provision is entitled to *Chevron* deference. See *Negusie* v. *Holder*, 555 U.S. 511, 517 (2009) ("Judicial deference in the immigration context is of special importance."); *Chen* v. *Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008) (stating that national uniformity is "paramount" in applying immigration laws (quoting *Kaganovich* v. *Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006)).

C. The Ninth Circuit's Rule, If Allowed To Stand, Would Have A Substantial Effect On The Administration Of The Immigration Laws And The Availability of Visas To Other Aliens

If the Ninth Circuit's decision were put into effect, the consequences would be serious and far-reaching. It does not appear to be possible, as a practical matter, to implement that decision in a limited way. Rather, to carry out the Ninth Circuit's instructions as to the proper operation of Section 1153(h)(3), the visa-waiting system would likely have to be overhauled. Accordingly, the priority dates of thousands of aliens awaiting visas would have to be adjusted, and as a result other aliens would experience significantly increased waiting times, thus disrupting the settled expectations of those aliens and their U.S.-citizen or lawful-permanent-resident family members. The reordering of the visa waiting lines and the processing of a large number of petitions with new, earlier priority dates would also place a tremendous administrative burden on the responsible agencies.

The number of aliens who could obtain earlier priority dates under the Ninth Circuit's interpretation of Section 1153(h)(3) could be in the tens of thousands, or even higher. See generally U.S. Dept. of State, Immigrant Waiting List by Country 6-7, http://www.travel.state.gov/pdf/WaitingListItem.pdf (last visited Jan. 24, 2013) (stating that approximately 90,000 aliens immigrate in the F3 and F4 categories every year). There is, however, no mechanism in place to track which pending petitions include as derivative beneficiaries persons who have since aged out, and no way of knowing how many new visa petitions or applications naming them would be filed in the future. Indeed, one

consequence of the Ninth Circuit's ruling might be that there is no time limit on an aged-out beneficiary's ability to claim an "original" priority date; under that ruling, years or even decades could pass between the time that the beneficiary aged out and the time that the claim is asserted. See App., *infra*, 74a; see also 8 U.S.C. 1153(g).

The family-preference visa waiting lines that would be affected by the Ninth Circuit's interpretation of Section 1153(h)(3) are those for F1, F2B, and F3 visas.[6] Most of the aged-out beneficiaries who would directly benefit by obtaining an earlier priority date would likely do so via the F2B line, which covers petitions filed by lawful permanent residents on behalf of their unmarried adult sons and daughters. See 8 U.S.C. 1153(a). Some of those beneficiaries are already waiting in that line as a result of new F2B petitions filed on their behalf, but would now claim an earlier priority date than the one they are currently accorded. Others would join the line for the first time and claim the priority date under which their parents gained visas, because some number of new lawful

---

[6] Although the cases before the Ninth Circuit involved family-preference petitions, the language in the en banc decision could be read to extend to employment-based visa petitions, which operate similarly and which are covered by subsection (b) of Section 1153. See App., *infra*, 24a; 8 U.S.C. 1153(h)(2) (describing with respect to derivative beneficiaries "a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section"); *Matter of Jyoti R. Patel*, No. A089 726 558, at 1-3 (B.I.A. Jan. 11, 2011) (unpub.) (relying on *Wang* to reject argument made by aged-out derivative beneficiary of employment-based petition filed on his mother's behalf). Under such a reading, the effects described below would be even more pronounced.

permanent residents never filed at all for an F2B preference visa for their now adult sons and daughters because the waiting times were too long. See generally Immigrant Waiting List by Country, *supra*. Other aged-out beneficiaries who would claim their parents' old priority dates are waiting in or would newly join the F1 line (for unmarried adult sons and daughters of U.S. citizens) or the F3 line (for married sons and daughters of U.S. citizens), see 8 U.S.C. 1153(a), because their parents originally qualified as lawful permanent residents but subsequently became naturalized citizens, see 8 U.S.C. 1154(k); 8 U.S.C. 1427(a); App., *infra*, 82a n.1.

The result would be that many aliens waiting in those lines would have their places in line pushed back. As the en banc dissent pointed out, changing priority dates is a "zero-sum game," App., *infra*, 35a; for every person who would be inserted closer to the front of the line as a result of the Ninth Circuit's decision, another person would be moved back. As of November 1, 2012, there were 288,705 F1 petitions, 486,597 F2B petitions, and 830,906 F3 petitions designated for consular processing overseas for which beneficiaries are awaiting visa numbers—many of which could be subject to reordering. See Immigrant Waiting List by Country, *supra*, at 2. Additional F1, F2B, and F3 petitions designated for processing in the United States (because their beneficiaries are already present in this country) would be subject to the same treatment.

Aliens pushed back in the line might see their waiting times increase substantially. Congress has made 226,000 family-sponsored visas available each year, of which only approximately 26,000 are F2B visas, and

has imposed additional per-country limits for each category. See 8 U.S.C. 1151-1153; see also 8 U.S.C. 1151(c) (explaining calculation governing available number of family-sponsored visas). Currently, for instance, visas are not available to Mexican nationals in the F2B category unless they have a priority date of November 22, 1992, or earlier. See U.S. Dept. of State, Visa Bulletin for Jan. 2013, http://travel.state.gov/visa/bulletin/ bulletin_5834.html (last visited Jan. 24, 2013). If a large number of Mexican nationals who now have priority dates after November 1992 were suddenly entitled to earlier priority dates under the Ninth Circuit's reading of Section 1153(h)(3) because they aged out under some earlier petition, then the cut-off date would retrogress in order to allow those persons to be processed without exceeding the yearly limit on F2B visas. That means that an alien outside the scope of Section 1153(h)(3) with a priority date of December 1992, whose priority date was about to become "current" and who has already been waiting for two decades, would have to wait an additional (and likely significant) amount of time.

There are undoubtedly inequities associated with such a reshuffling. See, *e.g.*, Christina A. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199, 2233-2236 (2012) (setting out an example in which application of the Ninth Circuit's interpretation would mean that A's son gets a visa number before B's son, even though B became a lawful permanent resident years earlier than A and filed a petition naming her son earlier than A did, and even though B and her son have been separated longer than A and her son have).

It is clear, moreover, that allowing aged-out beneficiaries to retain "original" priority dates indefinitely would represent a significant shift in immigration policy. See App., *infra*, 59a. Derivative beneficiaries who are under the age of 21 are entitled only to "accompany[]" or "follow[] to join" their parents, so that parents and minor children are not separated. 8 U.S.C. 1153(d); see *Santiago* v. *INS*, 526 F.2d 488, 491 (9th Cir. 1975) ("If Congress had wished to equate derivative preferences with actual preferences, the words 'accompanying, or following to join' would be absent from this statute."), cert. denied, 425 U.S. 971 (1976). The Ninth Circuit's ruling, however, treats aged-out derivative beneficiaries as if they were independently entitled to a preference based on their status as a grandchild, niece, or nephew of a U.S. citizen—relationships that do not fall into any existing family-preference category established by Congress. See App., *infra*, 34a-35a, 59a-60a.

In short, implementing the Ninth Circuit's ruling would likely create substantial disruptions to the administration of the visa system and the settled expectations of many aliens who are beneficiaries of approved visa petitions and have been waiting for a visa to become available. There is nothing that the relevant agencies could do to ameliorate that problem. In particular, the additional delay that many aliens would face would result from application of the strict statutory limits on the number of visas that are available each year, and not from any agency action (or inaction). This Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
ELIZABETH J. STEVENS
GISELA A. WESTWATER
Attorneys

JANUARY 2013