Nos. 09-56786 & 09-56846

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSALINA CUELLAR DE OSORIO; *et al.*,
Plaintiffs-Appellants,
v.
ALEJANDRO MAYORKAS; *et al.*,
Defendants-Appellees.

TERESITA G. COSTELO, and LORENZO ONG, Individually and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellants,
v.
JANET NAPOLITANO, Secretary of Homeland Security; *et al.*,
Defendants-Appellees.

DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

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INTRODUCTION

The original decision in these consolidated cases provided a comprehensive analysis of the proper interpretation of 8 U.S.C. § 1153(h)(3), which was enacted as part of the Child Status Protection Act ("CSPA"), Pub. L. 107-208, 116 Stat. 927 (Aug. 6, 2002). Although other courts of appeals have considered the meaning of Section 1153(h)(3), only this Court in *Osorio* fully considered the text, operation, and context of this provision in determining its ambiguity. *Osorio v. Mayorkas*, 656 F.3d 954, 961-62 (9th Cir. Sept. 2, 2011). Only this Court, in light of its correct finding of ambiguity, has fully considered and deferred to *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), a precedential decision of the Board of Immigration Appeals ("Board") that reasonably interprets Section 1153(h)(3).

In their petition for rehearing and petition for rehearing *en banc*, Plaintiffs-Appellants present no new legal arguments and misconstrue several aspects of the *Osorio* decision. *See generally Osorio v. Mayorkas*, No. 09-56786 (9th Cir.), Appellants' Petition for Rehearing and Petition for Rehearing *En Banc* ("P-A Petition"), ECF. No. 45-1. *Amici curiae* also fail to raise any legal arguments not previously considered and rejected by this Court in *Osorio*. *Id.*, Br. of Am. Immigration Council and the Am. Immigration Lawyers Association as *Amici Curiae* in Supp. of the Pls.-Appellants' Pet. for Reh'g and Pet. for Reh'g *En Banc*

("*Amicus* Brief"), ECF No. 48-2. Instead of raising new legal arguments, Plaintiffs-Appellants and *Amici* principally argue that the contradictory interpretations of 8 U.S.C. § 1153(h)(3) reached by two other courts of appeals militate in favor of rehearing by this Court. However, the decisions of those courts are diametrically opposite and thus do not present a cohesive interpretation of the CSPA. In particular, the other circuits draw contrary conclusions about what they both deem to be an "unambiguous" operative provision of the statute. These conflicting interpretations undermine the validity of those decisions and their underlying statutory analyses. By comparison, this Court's thorough analysis in *Osorio* of the text, context, and congressional history reinforces the correctness of its decision. Rehearing should be denied.

I. BACKGROUND.

This Court in *Osorio* interpreted paragraph (3) of Section 1153(h), which provides that an alien, whose age "is determined . . . to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) shall have his petition automatically convert[] 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). Three basic immigration concepts are implicated in the interpretation of this statute: (1) movement (or "conversion") between various

congressionally-authorized immigrant visa classifications; (2) assignment of visa priority dates and the historical application of transfer between both immigrant visa classifications and petitions; and (3) congressional policies behind immigration classifications.

The Board examined the statute at issue in its *Wang* decision. *Wang*, 25 I. & N. Dec. 25. First, looking at the text of paragraph (3) and its relationship to paragraphs (1) and (2), the Board determined that the scope of the provision is ambiguous. *Id*. at 33. Fully considering the text of the provision, its context within the specific section and the larger statutory scheme of the Act, its general context in immigration law, and the legislative history of the Act, the Board determined that paragraph (3) only applied to aliens classified as primary beneficiaries of an F2A[1] petition and aliens classified under "(d)" as derivative beneficiaries of F2A petitions. *Id.* at 38-39.

After performing its own analysis of the meaning of the statute, this Court in *Osorio* properly found the statute ambiguous (although on different grounds than *Wang*) and granted deference to the Board's reasonable analysis. *Osorio*, 656

[1] "F2A" refers to the family-sponsored immigrant classification for adult sons and daughters of lawful permanent residents. *See* 8 U.S.C. § 1153(a)(2)(A). Throughout this brief, each family-sponsored classification is referred to by the letter "F" and the corresponding statutory authority.

F.3d at 965 (determining that "limiting § 1153(h)(3)'s applicability to F2A petitions is 'a reasonable policy choice for the agency to make.'" (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984))).

II. REASONS WHY REHEARING IS UNNECESSARY AND UNWARRANTED.

A. The current circuit split validates the *Osorio* court's determination that the statute is ambiguous.

Plaintiffs-Appellants argue that rehearing is necessary so this Court may consider the decisions reached by the two other courts of appeals that have interpreted 8 U.S.C. § 1153(h)(3). *See Li v. Renaud*, 654 F.3d 376 (2d Cir. June 30, 2011); *Khalid v. Holder*, 655 F.3d 363 (5th Cir. Sept. 8, 2011). Unlike this Court in *Osorio*, which found the statute ambiguous, both the Second Circuit and the Fifth Circuit determined that 8 U.S.C. § 1153(h)(3) is unambiguous.[2] Paradoxically, although both courts claimed to have only given meaning to the plain language of the statute, they arrived at completely opposite interpretations.

[2] The Second Circuit denied plaintiffs-appellants' petition for rehearing in *Li* on October 26, 2011. *See Li v. Renaud*, No. 10-2560, Oct. 26, 2011, ECF. No. 120 (2d Cir. 2011) (denying petition for rehearing and rehearing *en banc*). On November 28, 2011, the Fifth Circuit requested petitioner respond to the Government's petition for rehearing *en banc*. *See Khalid v. Holder*, No. 10-60373, Nov. 28, 2011 (5th Cir. 2011).

In *Li*, the Second Circuit glossed over the generalized reference to derivative beneficiaries in Section 1153(h)(3) (the "and (d)" language) which formed the basis for the Board's determination in *Matter of Wang* that the statute is ambiguous. The Second Circuit never formally analyzed which petitions are eligible for consideration under Section 1153(h)(3), instead focusing on a more fundamental inquiry concerning which petitions could benefit from the provision. *Li*, 654 F.3d at 382. The Second Circuit determined that "Congress's intent on this point was clear. Section 1153(h)(3) does not entitle an alien to retain the priority date of an aged-out family preference petition if the aged-out family preference petition cannot be 'converted to [an] appropriate category.'" *Id.* at 383. Although declining to defer to the Board's interpretation in *Matter of Wang* on the ground that the relevant parts of the statute are not ambiguous, the Second Circuit nonetheless arrived at the same interpretation as the Board in *Matter of Wang*. *Id.* at 385.

In *Khalid*, the Fifth Circuit took a different approach, focusing first and foremost on the "and (d)" language in the paragraph. The *Khalid* court's interpretation of the entire provision was driven by its finding that the reference to "(d)" in paragraph (3) was unrestricted, such that every type of derivative beneficiary was eligible for consideration under that paragraph irrespective of the

immigrant visa categories. *Khalid*, 655 F.3d at 371. Taking this holding one step further, the *Khalid* court reasoned that Congress must have intended a petition considered under Section 1153(h)(3) to also benefit under Section 1153(h)(3). *Khalid*, 655 F.3d at 373. Despite the conclusions in *Wang*, *Li*, and *Osorio*, that the terms "automatic conversion" and "appropriate category" are immigration-specific terms, the *Khalid* court found their meanings to be clear without regard to their past use in the immigration context and operation in the global statutory scheme. *Id.* The Fifth Circuit dismissed any operational difficulties as irrelevant, narrowing its analysis only to determining which petitions are referenced in Section 1153(h)(3). *Id*. Since its analysis was not grounded in the historical usages of these terms, the *Khalid* court was able to cursorily dismiss the operational difficulties that compelled contrary interpretations in *Wang*, *Li,* and *Osorio*. *Id.* ("Even if the issues the BIA identified would create procedural difficulties, it is not this court's responsibility to resolve them."). The Fifth Circuit then adopted Khalid's "straightforward interpretation" mistakenly finding it provided for the "automatic conversion" of the original petition without any operational difficulties. *Id.* at 372.

The Fifth Circuit erroneously determined that the conversion would not cause conflict since, at the time a visa number becomes available to the primary

beneficiary, "there would be another category to convert to based on the derivative's relationship with the primary beneficiary." *Id.* *See also* P-A Pet. at 19-20 and *Amicus* Br. at 9 (both citing this finding approvingly and arguing that it was error for the *Osorio* panel to reject this position). The Fifth Circuit's holding, and Plaintiffs-Appellants and *Amici*'s arguments, all rest on a faulty premise. On the date that a visa number becomes available to the primary beneficiary of an F3 or F4 petition, that aged-out derivative beneficiary is still the son or daughter of an intending immigrant -- not the son or daughter of a lawful permanent resident eligible for classification under F2B. Eligibility for that category, at a minimum, is still months away, and contingent upon the satisfaction of separate admissibility requirements. A visa number becoming available to the primary beneficiary only means that the primary beneficiary is entitled to apply to begin consular processing (if outside the United States) or to adjust status (if within the United States). *See Ogbolumani v. USCIS*, 523 F. Supp. 2d 864, 869-70 (N.D. Ill. 2007) (general discussion of immigration procedures). There is therefore at least a several month gap between the time the age calculation is triggered under 8 U.S.C. § 1153(h)(1) and the time that the aged-out derivative beneficiary may become eligible for an F2B classification. 8 U.S.C. § 1153(a)(2)(B) (classifying adult sons and daughters of lawful permanent residents). This gap in classification certainly

manifests the operational ambiguity identified by this Court in *Osorio*. *Osorio*, 656 F.3d at 962.

The Government is seeking rehearing in *Khalid* precisely because of that court's incomplete analysis of the statute and the faulty premise underlying its adoption of Khalid's "straightforward interpretation." *See Khalid v. Holder*, No. 10-60373 (5th Cir.), Petition for Rehearing *En Banc*, Nov. 14, 2011, at 8-9 ("Ambiguity remains in the statute, however, as the Ninth Circuit properly acknowledged, when the whole of section [1153(h)(3)] is examined. *Osorio v. Mayorkas*, 656 F.3d 954, 962-63 (9th Cir. 2011). Rather than undertake this assessment, the panel focused on the first half of the provision in undertaking its *Chevron* analysis."). Given the shortcomings of the *Khalid* analysis, rehearing by this Court in order to address the *Khalid* decision is not warranted.[3]

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[3] Plaintiffs-Appellants and *Amici* both argue that the statute is unambiguous. Plaintiffs-Appellants, like the Fifth Circuit, claim that "automatic conversion" takes place when a visa number becomes available to the primary beneficiary. P-A Br. at 19-20. Yet, *Amici* advocate a totally different position, claiming that the trigger for the "automatic conversion" is "the subsequent visa petition which the parent of the derivative beneficiary files on his or her behalf" [after the parent gains lawful permanent resident status]. *Amicus* Br. at 13. Plaintiffs-Appellants and *Amici* fail to acknowledge that, by proffering different triggers for automatic conversion, they are proving that the statute is inherently ambiguous. Additionally, since the filing of a second petition is not explicitly referenced in the statute but the statute does specifically refer to the availability of a visa as a triggering date, the *Osorio* panel was justified in rejecting *Amici*'s position. *Osorio*, 656 F.3d at 963.

In support of rehearing, Plaintiffs-Appellants also cite the need for "national uniformity in immigration laws." P-A Pet. at 6. Yet, reconsideration by the panel or even a panel *en banc* will not resolve the circuit split. Reconsideration could only maintain the *status quo* or create a circuit split in the opposite direction. The goals of uniformity are more easily met by reconsideration and reversal of the *Khalid* decision in the Fifth Circuit because such a reversal would result in agreement among the courts of appeal.[4] In light of this Court's inability to cure a circuit split, reconsideration should be denied.

B. Deference to *Matter of Wang* is particularly appropriate in light of the circuit split.

Plaintiffs-Appellants argue that because the statute is unambiguous, reconsideration is needed to reverse this Court's grant of deference in *Osorio* to *Wang*. P-A Petition at 7. Yet, the Second and Fifth Circuits' diametrically opposite interpretations of the "plain language" of the paragraph support the *Osorio* determination that the statute is indeed ambiguous. *See Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (disagreement among courts suggests ambiguity); *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004) ("Judicial

[4] The Second Circuit has already denied rehearing in *Li*. *Li*, No. 10-2560 (2d Cir. Oct. 26, 2011). The Fifth Circuit is currently considering rehearing *en banc* in *Khalid*. Khalid, No. 10-60373 (5th Cir. November 28, 2011).

decisions that differ on the proper interpretation of [a statute] reflect this ambiguity."); *State Ins. Fund v. S. Star Foods (In re Southern Star Foods)*, 144 F.3d 712, 715 (10th Cir. 1998) ("The split in the circuits is, in itself, evidence of the ambiguity of the phrase."). Thus, the panel was correct in finding the statute ambiguous and then deferring to the Board's interpretation. Rehearing is not needed. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (U.S. 1999) (published Board decisions are accorded *Chevron* deference, so long as they are reasonable).

C. The *Osorio* court was justified in finding that the initially plain meaning of "and (d)" had to be analyzed deeper given its conflict with other terms of the statute.

Plaintiffs-Appellants argue that rehearing is warranted because the panel failed to give meaning to the "plain language" of the terms "and (d)." P-A Pet. at 9. This Court in *Osorio* correctly recognized, however, that language which appears unambiguous must be further analyzed if it leads to absurd results. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context."). The problem with Plaintiffs-Appellants' argument is that the supposedly "plain term" "and (d)" is in tension with other seemingly plain terms of the statute. Such instances of internal conflict manifest a statute's ambiguity and the need for an agency to reconcile the terms of

the statute in such a way as to further congressional intent. *See Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1141 (9th Cir. 2001) (finding statute "inherently ambiguous [where] it appears to use language in a manner in some tension with ordinary usage"). This Court in *Osorio* noted two impracticalities resulting from Plaintiffs-Appellants's position: first, automatic conversion could not occur smoothly for aged-out derivative beneficiaries of F3 and F4 petitions; and second, derivative interests would be raised on par with primary interests without any clear guidance that Congress intended such a fundamental change in the immigration scheme. *Osorio*, 656 F.3d at 962, 965. Given these significant difficulties in applying "and (d)," this Court in *Osorio* correctly entered into a deeper analysis of the entire statutory provision.

Plaintiffs-Appellants and *Amici* further argue that rehearing is needed because this Court in *Osorio* failed to give meaning to the term "original petition," which connotes that there is more than one petition at issue. P-A Br. at 18-19; *Amicus* Br. at 8. What Plaintiffs-Appellants and *Amici* fail to acknowledge is that under the interpretations adopted by the Board, the Second Circuit, and this Court in *Osorio*, the term "original petition" is given meaning. When the derivative beneficiary of an F2A petition automatically converts, his or her parent, the primary beneficiary, still has an interest in the "original petition." Thus, this

original petition "splits" into two: the original petition for the parent (spouse of a lawful permanent resident) and a petition for the aged-out derivative beneficiary who is now the primary beneficiary (as an adult son or daughter of a lawful permanent resident) of an independent petition. The notional spin-off petition is now entitled to the same priority date as the parent has on the "original petition." Since the *Osorio* decision gives meaning to the term "original petition," there is no need for rehearing of this matter.

Plaintiffs-Appellants also fault this Court for failing to read the statute broadly enough to benefit all categories of aliens included under the terms "and (d)." P-A Pet. at 9-10. Broad reading of ameliorative statutes such as the CSPA, however, is meant to further Congress' intent to benefit a certain group of individuals, not to read a statute to apply a benefit to a group outside of Congress' zone of interest in passing the legislation. Despite the Ninth Circuit's endorsement of a broad reading of the CSPA generally, the Ninth Circuit has consistently declined to expand the CSPA beyond the literal limits established by Congress. *Compare Padash v. INS*, 358 F.3d 1161 (9th Cir. 2004) ("adopting a restrictive reading of the statute in order to limit relief, would contravene Congress's intent, and the purpose and objective of the law") *with Flores del Toro v. Mukasey*, 286 Fed. Appx. 425 (9th Cir. 2008) (CSPA does not impute parent's

continued presence in the United States to children); *Alonso-Varona v. Mukasey*, 319 Fed. Appx. 502, 504 (9th Cir. 2009) (CSPA does not revive terminated petitions); *Ochoa-Amaya v. Gonzales*, 479 F.3d 989, 992-93 (9th Cir. 2007) (CSPA does not encompass the time spent awaiting visa availability); *Catalan-Zacarias v. Ashcroft*, 73 Fed. Appx. 284 (9th Cir. 2003) (CSPA did not apply to derivative deportation relief). *See also Perez-Olano v. Gonzales*, No. 05-03604, 2008 U.S. Dist LEXIS 85675 (C.D. Cal. Jan. 8, 2008) (CSPA does not apply to special immigrant juveniles); *Corea v. Att'y Gen.*, 170 F. App'x 700 (11th Cir. 2006) (CSPA does not protect aliens who are under 21 when they enter the United States and age-out during processing for benefits under the Nicaraguan Adjustment and Central American Relief Act); *Midi v. Holder*, 2009 WL 1298651 (4th Cir. May 12, 2009) (CSPA does not apply to some Haitian refugees even though Congress affords CSPA protection "to the children of many other refugees"). Moreover, when applied across the board as Plaintiffs-Appellants and *Amici* advocate, the statute is not ameliorative for everyone: since available visas are finite, primary beneficiaries who have been independently-classifiable under the immigration laws for several years will be displaced by these aged-out grandchildren and nieces and nephews of United States citizens who were never eligible for independent classification. *See Wang*, 25 I & N. Dec. at 38 ("If we

interpret section [1153](h) as the petitioner advocates, the beneficiary, as a new entrant in the second-preference visa category line, would displace other aliens who have already been in that line for years before her."); *Osorio*, 656 F.3d at 965 (Plaintiffs-Appellants' interpretation "would effectively treat an aged-out derivative beneficiary of an F3 or F4 petition as if he or she had been independently entitled to his or her own priority date based on his or her status as the grandchild, niece, or nephew of a citizen."). Thus, this Court in *Osorio* correctly followed Ninth Circuit guidance in identifying the intended scope of the benefit intended by Congress.[5]

D. All issues raised by Plaintiffs-Appellants and *Amici* were fully briefed, considered, and decided by the *Osorio* panel.

Plaintiffs-Appellants argue that rehearing is needed because this Court in *Osorio* failed to give meaning to "and (d)" since derivative beneficiaries of F2A

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[5] Plaintiffs-Appellants' erroneously state that the panel "offers no plausible reason why Congress would choose to benefit a small subset" of the aliens originally classified under Section 1153(d). P-A Pet. at 15. To the contrary, the panel noted that the "small subset" of aliens receiving relief under the Board's interpretation are not similarly situated to aged-out derivative beneficiaries of F3 and F4 petitions. Only primary beneficiaries of F2A petitions and derivative beneficiaries under Section 1153(d) of F2A petitions are independently classifiable as children of lawful permanent residents. Only these same individuals eligible for follow-on classifications. *Osorio*, 656 F.3d at 962. Congress could provide this limited benefit without fundamentally changing the family preference scheme. *Id.* at 965. These are sufficient reasons for Congress to limit a benefit to this group.

petitions are actually classified under F2A and not "(d)". P-A Pet., ECF No. 45-1 at 17-20. This argument is neither new nor availing. Given the methodology used by Congress in this provision, all derivatives are referenced under the "and (d)" language - including derivative beneficiaries of F2A petitions because derivative beneficiaries of F2A petitions are aliens "determined under paragraph (1) to be 21 years of age or older for the purposes of subsection[] (d)." 8 U.S.C. § 1153(h)(3). *Osorio*, 656 F.3d at 964 (Board's "construction does not render § 1153(h)(3)'s reference to § 1153(d) meaningless."). All courts (including the *Wang*, *Khalid*, *Li*, and *Osorio* courts) have found that "and (d)" refers to aliens classified under any family, employment, or diversity category on the basis of a parent-child relationship described in Section 1153(d). Accordingly, rehearing is not merited on this point.

Rehearing likewise is not merited to reconsider *Amici*'s argument that the "unambiguous" text of the statute provides "conversion" and "priority date retention" as two separate benefits. *Amicus* Brief at 13. The *Osorio* court already considered this position and determined that while it may be a possible construction of the statute, it is not compelled by the plain meaning of the statute. *Osorio*, 656 F.3d at 963. Further review of this argument is not warranted.

CONCLUSION

While there is conflicting language in paragraph (3) of Section 1153(h), the Board has reconciled the language -- a responsibility specifically left to the agency, not Plaintiffs-Appellants or *Amici*. *See* 8 C.F.R. § 1003.1(d)(1). Because the Board filled the gaps in a reasonable manner, the *Osorio* court correctly granted deference to the Board's interpretation. Rehearing and rehearing *en banc* are not warranted.

November 29, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the Government's Brief:

(1) was prepared using 14-point Times New Roman font;

(2) is proportionally spaced; and

(3) consists of 3,723 words and 16 pages, excluding portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), consistent this Court's order of November 8, 2011 (ECF No. 50).

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2011, I electronically filed the foregoing DEFENDANTS-APPELLEES' BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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