Nos. 09-56786 & 09-56846

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 P. ONG, Individually
and on Behalf of all Others Similarly Situated,
Plaintiffs-Appellants,

v.

JANET NAPOLITANO,
Secretary of the Department Of Homeland Security; *et. al.*
Defendants-Appellees.

BRIEF OF AMERICAN IMMIGRATION COUNCIL AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT UNDER RULE Fed. R. App. P. 26.1

I, Mary Kenney, attorney for *amici curiae*, certify that the American Immigration Council is a non-profit organization that does not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of its stock.

Date: October 24, 2011

s/ Mary Kenney

Mary Kenney

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I. INTRODUCTION

Through this brief, *amici curiae* the American Immigration Council and the American Immigration Lawyers Association (AILA) respectfully submit that the panel erred in deciding to disregard the unambiguous statutory language of the Child Status Protection Act (CSPA), codified at 8 U.S.C. § 1153(h)(3). The panel wrongly found that this case qualifies as one of those rare instances where the plain language of a statute is inconsistent with congressional intent. Significantly, one week after the panel decided this case, the Court of Appeals for the Fifth Circuit issued a decision on the precise issue, demonstrating that the statute could be applied consistently with it plain language without leading to an "impracticability." *Khalid v. Holder*, No. 10-60373, __ F.3d __, 2011 U.S. App. LEXIS 18622 (5th Cir. Sept. 8, 2011). To reconcile the split that now exists with the Fifth Circuit on the meaning of 8 U.S.C. § 1153(h)(3), *amici curiae* urge the Court to grant Plaintiffs' Petition for Rehearing or Rehearing En Banc.

This Court's determination of the meaning of 8 U.S.C. § 1153(h)(3) is of exceptional importance not only because it conflicts with another circuit's determination, but also because it arises in a national class action, likely involving thousands of lawful permanent residents and their sons and daughters whom they seek to sponsor as immigrants to the U.S. When these

sons and daughters were minor children, they all were named as derivative beneficiaries of visa petitions filed on their parent's behalf in the 3rd and 4th family preference categories.[1] Unfortunately, due to the excessive world-wide demand for a limited number of visas in all family-based preference categories, they all "aged-out" before a visa became available for them, even under the favorable age preservation formula found in the CSPA. Plaintiffs and *amici curiae* submit that the panel erred in concluding that these sons and daughters are not eligible for either of the alternate benefits Congress provided for in § 1153(h)(3).

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy and to advance fundamental fairness, due process, and constitutional and human rights in immigration law and administration. The American Immigration Council has a direct interest in ensuring that the CSPA is applied in an ameliorative fashion.

AILA is a national association with more than 10,000 members nationwide, including lawyers and law school professors who practice and

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[1] A 3rd preference visa petition in the family-based categories is one that is filed by a U.S. citizen parent for a married son or daughter. 8 U.S.C. § 1153(a)(3). A 4th preference visa petition is one that is filed by a U.S. citizen for a brother or sister. 8 U.S.C. § 1153(a)(4). In both categories, a child of the principal beneficiary can be named as a derivative beneficiary on the visa petition. 8 U.S.C. § 1153(d).

teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

II. ARGUMENT

A. This is not the "rare and exceptional" case in which the plain language of the statute can be disregarded.

Khalid v. Holder, No. 10-60373, __ F.3d __, 2011 U.S. App. LEXIS 18622 (5th Cir. Sept. 8, 2011), issued one week after the panel decision here, demonstrates the error in not applying the plain language of § 1153(h)(3). In *Khalid,* the Fifth Circuit found that the plain language of 8 U.S.C. § 1153(h)(3)[2] made clear that it applied to derivative beneficiaries of visa petitions filed in *all* family-based visa preference categories, in part because of its explicit reference to 8 U.S.C. § 1153(d).[3] *Id.* at *19-20 (emphasis

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2 This section reads as follows:
(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 purposes of subsections (a)(2)(A) and (d), 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.

3 Section 1153(d) reads as follows:

added). On this point, both *Khalid* and the panel here agree. *See De Osorio v. Mayorkas*, No. 09-56846, __ F.3d __, 2011 U.S. App. LEXIS 18289, at *19 (9th Cir. Sept. 2, 2011) (concluding that the plain language of § 1153(h)(3) applies to "F2A petitions for a child and any family preference petition for which a child is a derivative beneficiary").[4]

Unlike the panel here, however, the Fifth Circuit considered all relevant terms in the statute and, in light of this analysis, concluded that it was bound by § 1153(h)(3)'s unrestricted and unambiguous reference to all visa categories via its reference to § 1153(d). *Khalid*, 2011 U.S. App. LEXIS 18622 at *19-20. As a result, the court held that the petitioner in the case – a derivative beneficiary of a family-based 4th preference category – was eligible for the benefits of § 1153(h)(3). *Id.* at *31. In contrast, *De Osorio* determined that the plain language of § 1153(h)(3) could be disregarded because its application would be "impracticable." *De Osorio*,

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> (d) Treatment of family members.—A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of section 101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join, the spouse or parent.

[4] An "F-2A" petition is one filed by a lawful permanent resident for his or her spouse or children under the family-based visa category specified in 8 U.S.C. § 1153(a)(2).

2011 U.S. App. LEXIS 18289 at *20. In reaching this conclusion, the panel focused only on one term in the statute – "automatically" – and concluded that this term "suggested" that the original petition and the converted petition would be one and the same. *Id.* at *21 (noting that the "same petition can simply be reclassified 'automatically.'").[5]

Amici curiae respectfully submit that § 1153(h)(3) is not one of the "rare and exceptional case[s]," *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991), that require an interpretation at odds with the statute's plain language. To the contrary, *Khalid* demonstrates that a review of § 1153(h) as a whole compels an interpretation consistent with the statute's plain language.

This Court has repeatedly emphasized the importance of adhering strictly to Congress' intent as expressed in unambiguous language. *See, e.g.*, *Singh v. Holder*, 649 F.3d 1161 (9th Cir. 2011) (*en banc*). "There is a strong presumption that the plain language of the statute expresses congressional intent, which is 'rebutted only in rare and exceptional circumstances, when a

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[5] *Khalid* considered the meaning of several terms in § 1153(h)(3), including "convert," "original petition," and "original priority date." 2011 U.S. App. LEXIS 18622 at *22-27. While *De Osorio* discusses the meaning of the "retention" clause, it does so only after determining that – due solely to the word "automatically" in the "conversion" clause – application of the plain language would be impracticable. *De Osorio*, 2011 U.S. App. LEXIS 18289 at *24-25. Moreover, it never considered the significance of the terms "original petition" and "original priority date."

contrary legislative intent is clearly expressed.'" *Royal Foods Co. Inc. v. RJR Holdings Inc.*, 252 F.3d 1102, 1108 (9th Cir. 2001) (quoting *Ardestani*, 502 U.S. at 135-36). Here, there is no question that an interpretation consistent with the plain language also is consistent with legislative intent. As *De Osorio* specifically recognizes, "[i]t is clear that Congress wanted the CSPA to provide some measure of age-out relief to *all* derivative beneficiaries of family preference petitions." *De Osorio*, 2011 U.S. App. LEXIS 18289 at *30 (emphasis in original).[6]

The result of the panel's decision is that it ignores Congress' explicit reference to § 1153(d), which unambiguously includes derivatives of *all* family-based petitions. Instead, *De Osorio* affirms the interpretation of the Board of Immigration Appeals (Board or BIA) in *Matter of Wang*, 25 I&N Dec. 28 (BIA 2009), which reads the reference to § 1153(d) as if it included

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[6] The panel also determined that the opposite interpretation of the statute did not contradict Congress' intent because this interpretation preserved some meaning – although not the plain meaning – of Congress' reference to § 1153(d). *Id.* The fact that this non-literal interpretation is not inconsistent with Congress' intent says nothing about whether a "literal application of a statute will produce a result demonstrably at odds with the intention of its drafters," the standard for disregarding a statute's plain meaning. *Nuclear Information and Resource Service v. U.S. DOT Research and Special Programs Administration*, 457 F.3d 956, 961 (9th Cir. 2006) (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Here, the legislative record reveals several purposes to be served by the statute; as noted, one of these purposes – providing age-out protection to derivatives of all family preference categories – would be served by a literal interpretation.

only one subset of family based visa petitions, the family 2A preference category. *See De Osorio*, 2011 U.S. App. LEXIS 18289 at *27 ("The effect of *Matter of Wang* is to limit § 1153(h)(3)'s applicability to only one petition type: F2A.").

As *Khalid* explains, however:

> it seems unlikely that Congress would exclude an entire class of derivative beneficiaries from subsection (h)(3)'s benefits by silent implication based on the unwritten assumption that the petitioner must remain the same. Rather one would expect any such exclusion to be express, since it would effectively operate categorically.

2011 U.S. App. LEXIS 18622 at *28. The Fifth Circuit's observation is particularly true where the regulation that the Board believed Congress was codifying is, itself, explicit in its reference to petitions filed under § 1153(a)(2), thus demonstrating how simple it would have been for Congress to be equally direct had this been the intended result. *See* 8 C.F.R. § 208.2(a)(4).

Moreover, an examination of the language about retention of the original priority date supports a broad interpretation, consistent with Congress' unrestricted reference to § 1153(d), that derivatives of all visa preference categories are eligible for the benefits of § 1153(h)(3). The panel did not consider this language. Instead, *De Osorio's* impracticability determination hinges entirely on its consideration of one word,

"automatically," and its conclusion that this word suggests that the "*same* petition, filed by the *same* petitioner for the *same* beneficiary, converts to the new category." 2011 U.S. App. LEXIS 18289 at *20 (emphasis in original).

The statutory language does not contain these restrictions, however. While use of the term "automatically" does indicate that the conversion occurs by operation of law, this says nothing about the mechanics of how such a conversion is to happen. The word "automatically" does not mean that there are no procedural mechanisms at play. For example, when a vehicle goes on "automatic pilot," there is a trigger that starts this function. Here, the subsequent visa petition which the parent of the derivative beneficiary files on his or her behalf is simply the trigger that puts into operation the automatic conversion.

Moreover, *De Osorio's* interpretation renders the "retention" benefit redundant. Had Congress intended that there be only one petition, "there would be no need for the statute to explicitly state that the alien 'retains the *original* priority date issued upon the receipt of the *original* petition'" because, with only one petition, there would be only one, "unchanged priority date." *Khalid*, 2011 U.S. App. LEXIS 18622 at *25 (emphasis added). Additionally, as *Khalid* also notes, reference to the "original" petition indicates that there is another, non-original petition involved. *Id.*

Because the retention provision contradicts the assumption that § 1153(h)(3) does not encompass the filing of a new petition, it undercuts the central basis for the panel's decision to take the rare step of ignoring the plain language of a statute.

B. Because the BIA never considered whether § 1153(h)(3)'s two benefits operated independently, there is no agency interpretation warranting the Court's deference.

Even were the panel correct in finding that the automatic conversion language of § 1153(h)(3) is ambiguous, it made the further mistake of declining to find that this benefit operated independently of the priority date retention benefit. The panel did find that these two benefits were contained in "two grammatically independent clauses" and that, as a result, the provision could be read as "conferring automatic conversion and priority date retention as independent benefits." *De Osorio*, 2011 U.S. App. LEXIS 18289 at *24. Because the panel also found that the provision could be read as conferring joint benefits, however, it determined that the statute was ambiguous in this respect. It then deferred, under step two of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), to what it perceived to be the Board's conclusion that "priority date retention could *not* operate separately from automatic conversion." *De Osorio*, 2011 U.S.

App. LEXIS 18289 at *26-27 (emphasis in original) (citing *Matter of Wang*, 25 I&N Dec. at 36).

Amici curiae respectfully submit that the Board never addressed the question of whether § 1153(h)(3) could be interpreted as providing two independent benefits. Instead, in *Matter of Wang*, the Board *assumed* without analysis that the two benefits were entirely dependant upon one another. Because the Board did not address this question, there is "no binding agency precedent on-point" and *Chevron* deference is inapplicable. *Retuta v. Holder*, 591 F.3d 1181, 1187 (9th Cir. 2010) (citations omitted); *see also Barber v. Thomas*, 130 S. Ct. 2499, 2508 (2010) ("Because the Commission has expressed no view on the question before us, we need not decide whether it would be entitled to deference had it done so"); *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1196 (9th Cir. 2006) (declining to give *Chevron* deference to the Board's interpretation of the statute where it did not address Sinotes-Cruz's actual claim).

The panel notes that *Matter of Wang* "rejected the contention that 'all children who were derivative beneficiaries would gain favorable priority date status, even with regard to a new visa petition that is wholly independent of the original petition and that may be filed without any time limitation in the future.'" *De Osorio*, 2011 U.S. App. LEXIS 18289 at *26-

27 (quoting *Matter of Wang*, 25 I&N Dec. at 36). The panel relies upon this statement to conclude that the Board expressly found that the two benefits could not operate independently. *Id.* In fact, however, the Board was rejecting Wang's argument that both benefits should be applied to him. *Matter of Wang*, 25 I&N Dec. at 36. Neither here nor elsewhere in its decision did the Board address the grammatical question of whether the two benefits could be read as operating independently.

Thus, there is no Board decision to defer to on this point. Moreover, the only interpretation that allows all the words in the statute to be given their entire, plain meaning, is one that reads the benefits as operating independently. Under such an interpretation, the panel's interpretation of "automatically" could stand, with the conversion benefit being limited to only the family 2A visa category. In turn, the retention of priority date benefit would apply to all visa categories, thus giving full meaning to Congress' unrestricted reference to § 1153(d) and to its choice of the word "original" in the phrases the "original priority date" and the "original visa petition."

III. CONCLUSION

For all of the reasons stated, *amici curiae* respectfully urge the Court to grant Plaintiffs' Petition for Rehearing or Rehearing En Banc and to issue

a new decision finding that § 1153(h)(3) applies to derivative beneficiaries of all family-based visa categories.

Respectfully submitted,

s/ Mary Kenney

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Dated: October 24, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 29-2(c)(2), I hereby certify that the attached brief of *amici curiae* is proportionately spaced, has a typeface of 14 points or more and, according to computerized count, contains 2,150 words.

Date: October 24, 2011

s/ Mary Kenney

Mary Kenney

CERTIFICATE OF SERVICE

When All Case Participants are Registered
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U.S. Court of Appeals Docket Nos. 09-56786 & 09-56846

I, Mary Kenney, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 24, 2011.

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s/ Mary Kenney

Mary Kenney
American Immigration Council

Date: October 24, 2011