No. 12-930

IN THE

Supreme Court of the United States

LORI SCIALABBA, *et al.*,
Petitioners,

v.

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

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

PETITION FOR REHEARING

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Pursuant to Rule 44.1, 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 (collectively "Respondents") respectfully petition for rehearing of the Court's June 9, 2014 decision.

GROUNDS FOR REHEARING

The plurality's decision in this case was based on a mistake that cuts to the heart of its analysis.

The plurality acknowledged that if an aged-out child could retain his original priority date without automatic conversion then the BIA "would have been required to" make priority date retention available to "every aged-out beneficiary of a family preference petition." Slip op. 21; *see also id.* at 22 (identifying this as an "independent reason[]" "to overturn the Board's judgment"). According to the plurality, however, "context compels" the conclusion that priority date retention and automatic conversion "work in tandem." *Id.* at 29. In particular, the plurality pointed to its belief that, "[a]s far as we know, immigration law nowhere else allows an alien to keep in his pocket a priority date untethered to any existing valid petition." *Id.* at 30.

Respondents' merits brief, however, cited a major statutory provision that allows exactly that. The Western Hemisphere Savings Clause permits an alien formerly classified as a Western Hemisphere immigrant to retain his "previously established" priority date for use with "[*a*]*ny* petition" later filed on his behalf. Immigrant and Nationality Act Amendments of 1976, Pub. L. No. 94-571, § 9(b), 90 Stat. 2703, 2707 (emphasis added), *cited and quoted in* Resp. Br. 45; *see*

also U.S. Department of State, 9 *Foreign Affairs Manual*, ch. 42.53 n.4.1 (a Western Hemisphere immigrant "retains" his priority date and "may use that priority date for the purpose of *any* preference petition subsequently filed in his or her behalf." (emphasis added)). Such an alien may, in other words, "keep in his pocket a priority date untethered to any existing valid petition." Slip op. 30.

The Western Hemisphere Savings Clause grants exactly the sort of "open-ended, free-floating entitlement" that the plurality believed did not exist. Slip op. 30 & n.16. To this day, Western Hemisphere immigrants may rely on the provision to retain priority dates obtained prior to January 1, 1977—nearly 40 years ago. *See* 9 *Foreign Affairs Manual*, ch. 42.53 & n.4.1.

This provision is, moreover, no minor feature of immigration law: When enacting the Clause, Congress knew that it was granting priority date retention to approximately 300,000 visa applicants. *See* H.R. Rep. No. 94-1553, at 6 (1976). And, as noted, the government continues to administer the benefit today. *See* 9 *Foreign Affairs Manual*, ch. 42.53 & n.4.1.

Because the Western Hemisphere Savings Clause calls the plurality's analysis into question, Respondents respectfully submit that rehearing is warranted.

I. THE COURT SHOULD GRANT REHEARING BECAUSE THE PLURALITY OVERLOOKED TEXT AND REGULATORY CONTEXT THAT REQUIRE A DIFFERENT RESULT

The plurality felt "compel[led]" to conclude that priority date retention and automatic conversion "work in tandem" for two reasons: (1) permitting an alien to retain a priority date "untethered to any existing valid

petition" would "engender unusual results;" and (2) "by far the more natural understanding of §1153(h)(3)'s text is that retention follows conversion." Slip op. 29-30. The plurality, however, overlooked text and regulatory context that materially undermine both rationales.

A. The Western Hemisphere Savings Clause Shows That A Priority Date May Be Retained Even If Untethered To Any Existing Petition

Immigration law contains numerous provisions granting priority date retention independent of automatic conversion. Before the CSPA, the government's own age-out protection regulation required an alien to file a new petition to take advantage of his retained priority date (*i.e.*, retention of priority date without automatic conversion). *See* 8 C.F.R. § 204.2(a)(4). The same is true of 8 C.F.R. §§ 204.5(e) and 204.12(f)(1). Another provision of CSPA (section 6) provided priority date retention "[r]egardless of whether a petition is converted." 8 U.S.C. § 1154(k)(3). And for years even *after* CSPA was enacted, the government continued to require a "separate petition" for an aged-out beneficiary to retain his original priority date. Resp. Br. 42-44.

The plurality distinguished these examples based on its apparent belief that an alien may retain a priority date only if the priority date remains "[]tethered to an[] existing valid petition" because "[a]s far as we know, immigration law nowhere else allows an alien" to retain a priority date without an existing valid petition. Slip op. 30 & n.16. The Western Hemisphere Savings Clause, cited at Resp. Br. 45, establishes that the plurailty was mistaken. A qualifying Western Hemisphere immigrant might, for example, have obtained his original priority date by way of a labor certification. Under the Western Hemisphere Savings Clause, the

immigrant nonetheless "may use that priority date for the purpose of *any* preference petition subsequently approved in his or her behalf"—even a *family* preference petition, filed years or decades later. 9 *Foreign Affairs Manual*, ch. 42.53 n.4.1 (emphasis added).

The Western Hemisphere Savings Clause also belies the plurality's concern that an "untethered" priority date would produce "unusual" or unadministrable results. *See* slip op. 29. The Clause possesses the very features that concerned the plurality. A Western Hemisphere immigrant "could hold on to a priority date for years or even decades while waiting for a relative to file a new petition." *Id.* And "[e]ven if that filing happened, say, 20 years" later, the Western Hemisphere immigrant "could take out his priority-date token, and assert a right to spring to the front of any visa line." *Id.* at 30.

Experience has shown that these features do not unduly interfere with the immigration system. The government has been able to adopt sensible procedures for "confirming the old priority date." *Compare* slip op. 30 (expressing concern that "USCIS could well have a hard time confirming the old priority date," especially for "derivative beneficiaries"); *with* 9 *Foreign Affairs Manual*, ch. 42.53 n.4.2 (listing four different ways an "alien may establish entitlement to a Western Hemisphere priority date," including a procedure for a derivative beneficiary). And there is no evidence that the Western Hemisphere Savings Clause has seriously "impede[d] USCIS's publication of accurate waiting times." Slip op. 30. The Western Hemisphere Savings Clause thus casts considerable doubt on the plurality's administrability concerns about "untether[ing]" a priority date from "an[] existing valid petition."

B. Section 1153(h)(3)'s Text Confirms That A Priority Date Belongs To The "Alien," Not The "Petition"

Section 1153(h)(3)'s text further undermines the plurality's belief that a priority date must remain "[]tethered to an[] existing valid petition." Slip op. 30. While the statute states that "the alien's *petition*" is automatically converted, it is "*the alien*" who retains the priority date. 8 U.S.C. § 1153(h)(3) (emphasis added). The priority date, in other words, belongs to "the alien;" it is not a feature of the petition. The import of this textual clue is clear: because the statute associates the priority date with the alien, not the petition, the alien is free to carry his original priority date with him ("in his pocket," so to speak) to a new petition, just as the Western Hemisphere Savings Clause allows. The plurality, however, rejected that interpretation without ever having grappled with this feature of the text. Indeed, the plurality appears to have misapprehended the text in this respect, inasmuch as it stated that the second phrase "clarifies that *such a converted petition* will retain the original priority date." Slip op. 29 (emphasis added). Of course, the text does not so provide; it states that "the alien," not any petition, retains the priority date.

C. Rehearing Is Warranted To Avoid The Plurality's Anomalous "Janus-faced" Interpretation

We respectfully submit that the plurality's misapprehensions regarding the statutory requirement that "the alien" retain the priority date, and Congress's prior enactment, in effect to this day, permitting aliens to do just that regardless of whether they are subject to a valid petition, meets the demanding threshold for rehearing.

Granting rehearing would provide an opportunity to "interpret the statute 'as a … coherent regulatory scheme' and 'fit, if possible, all parts into [a] harmonious whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000). Ordinarily, of course, courts strive to do just that. But here the plurality concluded that the statute Congress wrote was "through and through perplexing," "Janus-faced," wracked by "internal tension," and "self-contradictory." Slip op. 8, 14, 33. Once the points stated above are correctly considered, the statute may—and accordingly should—be interpreted in accordance with the ordinary presumption that Congress enacts statutes that are not at war with themselves.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted.

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