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.

Respondents.

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

BRIEF OF THE CATHOLIC LEGAL IMMIGRATION NETWORK INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Catholic Legal Immigration Network, Inc. ("CLINIC") is a nonprofit organization established by the United States Conference of Catholic Bishops to advocate on behalf of immigrants and to support a network of faith-based and community-based immigration programs. CLINIC's members include more than 240 diocesan and other immigration programs with 390 field offices in 46 states. The network employs approximately 1,200 attorneys and accredited paralegals and assists some 600,000 clients, parishioners, and community members with immigration matters annually. CLINIC is particularly concerned and involved with family-based immigration matters, and publishes books and provides training on this issue to attorneys and paralegals throughout the United States. Promoting family unity, one of the tenets of the Catholic Church's teachings and works, is one of CLINIC's goals.

The Child Status Protection Act ("CSPA") was designed to preserve family unity by protecting children against the vagaries of the visa backlog and preference system. The Board of Immigration Appeals (BIA) has eviscerated that purpose through its erroneous interpretation of 8 U.S.C. § 1153(h)(3), which addresses how to treat an alien who "ages out" when he/she reaches age 21, and consequently loses "child"

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, no such counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amicus curiae* and their counsel made any such monetary contribution.

status under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, after a relative has filed a visa petition on which the alien is a beneficiary. As a result, untold numbers of children are separated from U.S. citizen and legal resident family members solely because they "age-out," i.e. turn 21, and qualify under preference categories that the BIA has deemed ineligible for the protections of the CSPA.

CLINIC respectfully submits this brief to (1) explain the fundamental role of family unity in both the Catholic Church's teachings and in federal immigration policy; (2) demonstrate—by providing details about the lives of individuals who have been denied the benefit of the CSPA by the BIA's ruling—that the Government position is inconsistent with that interest in family unity; (3) explain more fully the workings of the complex immigrant visa allocation system that the CSPA was intended to ameliorate, and clarify that allowing Respondents to retain their priority dates is not a zero-sum game; and (4) illustrate the fallacy of the Government's premise—that family ties to the citizen and/or lawful permanent resident relative are not sufficiently strong and valuable for individuals such as Respondents—for deferring to the BIA.

SUMMARY OF THE ARGUMENT

I. Family unity is a goal shared by many, including the Catholic Church, which views families as the building blocks of society and recognizes the special need that immigrants have for their families.

Likewise, federal immigration law seeks to keep parents and their children together. Examples of federal laws privileging families are many. For ex-

ample, federal law grants the largest number of annual visas to family members of U.S. citizens and lawful permanent residents, and gives the Attorney General discretion to waive bars on admission out of "family unity" concerns. Immigrants may also seek cancellation of removal where removal would cause exceptional hardship to their families, and, when enforcing the removal provisions, the government has long exercised its prosecutorial discretion in a manner that promotes family unity. It is not surprising that concerns for family would impact the immigration laws. The institution of the family is deeply rooted in this nation's history and traditions, and receives constitutional protection. Promoting family stability, moreover, remains a modern goal, as evidenced by current federal law (outside the immigration context as well), and modern empirical research.

The Government's interpretation of 8 U.S.C. § 1153(h) here undermines the federal policy of keeping families together. A few examples provided in this brief of children who "aged out" due to long delays illustrate the devastating effect the Government's position has on families.

II. The Government is wrong to suggest that allowing Respondents and other similarly situated individuals to retain their priority dates is a zero sum game. Without quantifying the wait for those already in line where Respondents would be added under the Ninth Circuit's reading of the statute, the Government implies that the wait of nine years or longer saved for Respondents will cause the same wait to be added to those already in line. That is not mathematically correct. Rather, while the wait saved is approximately nine years for most applicants, the

wait added to those in the line where Respondents will be placed is likely to be far less, as outlined below.

Furthermore, for the individuals from oversubscribed countries, such as the Philippines and Mexico, the current wait may be 30 and 100 years, respectively, to obtain visas. That is, realistically, those individuals cannot expect to receive visas. Thus, from a practical standpoint, adopting Respondents' views would not result in any disruption of any settled expectations. But, allowing Respondents to retain their priority dates would actually keep many of them with their families.

III. The Government urges that the CSPA provision is ambiguous, and so urges the Court to defer to the BIA's interpretation because it is reasonable. However, in advocating the wisdom of the BIA's reading, the Government endorses the BIA's view favoring applicants with both legal permanent resident ("LPR") parents, rather than those who were initially derivative beneficiaries of a citizen grandparent's, aunt's, or uncle's application. Thus, the Government effectively suggests that those with two LPR parents are more worthy to get visas than those with one LPR parent and at least one *U.S. citizen* relative. As a threshold matter, the premise of this assertion is factually incorrect. Frequently, derivative beneficiaries also have two LPR parents, but only one was needed to file after these individuals aged out.

Moreover, the clear implication of the Government's position is that family unity values do not operate across generations or beyond immediate nuclear family units. This is counter to evidence and experience, as this Court has long acknowledged. Indeed,

this Court has repeatedly recognized the paramount role grandparents and other extended family members may play in keeping families functioning. The Court has previously emphasized that such extended families are particularly wide-spread and necessary for the survival of immigrant families: in part because of a tradition in many parts of the world of families being defined in terms wider than nuclear, and also because frequently immigrants start out at the bottom of the socio-economic scale and pooling resources helps them to adjust to the new life in the United States. Likewise the Church views families as extending beyond a narrow nuclear family.

In sum, the Government's interpretation of the CSPA is detrimental to family unity, and relies on incorrect assumptions about the functioning of the visa system and about the nature of family ties.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF THE CSPA IS COUNTER TO THE CATHOLIC CHURCH'S AND FEDERAL GOVERNMENT'S PROMOTION OF FAMILY UNITY

A. Keeping Families Together And Promoting Family Unity Are The Fundamental Guiding Tenets Of The Church's Teachings And Church's Works

The Catholic Church counts over 68 million Americans as members—about 22 percent of all Americans. And it has long shared Congress's dedication to stable families. According to Catholic social teaching, the family is the fundamental building block of society. The 1963 encyclical by Blessed John XXIII, *Pacem in Terris, #16,* states: "The family… must be regard-

ed as the natural, primary cell of human society. The interests of the family, therefore, must be taken very specially into consideration in social and economic affairs, as well as in the spheres of faith and morals. For all of these have to do with strengthening the family and assisting it in the fulfillment of its mission." According to Church teaching, families have a number of natural rights, including "the right to exist and to progress as a family" and the right to a societal structure that allows them "to live together." Holy See, Charter of the Rights of the Family arts. 6, 10 (Oct. 22, 1983), *available at* http://www.vatican.va/roman_curia/pontifical_councils/family/documents/—rc_pc_family_doc_19831022_family-rights_en.html.

The Church also believes that "[t]he families of migrants have the right to the same protection as that accorded other families," including the "*right to see their family united as soon as possible*." *Id*. art. 12 (emphasis added). If anything, family concerns are heightened for immigrants, as they "are even more in need of their own family, since for those who are far from home family support is indispensable." Archbishop Agostino Marchetto, Address in Brussels, Belgium (July 10, 2007), *available at* http://www.vatican.va/roman_curia/secretariat_state/2007/documents/rc_seg-st_20070710_migrazione-sviluppo_en.html.

The U.S. Conference of Catholic Bishops believes that the family preference system in the United States "[c]ontinues to experience considerable backlogs, prolonging the separation of families. The 1996 immigration laws have torn apart families that have established themselves in the United States over many years. . . ." USCCB, *Welcoming the Stranger*

Among Us: Unity in Diversity (Nov. 15, 2000), http://www.usccb.org/issues-and-action/cultural-diver sity/pastoral-care-of-migrants-refugees-and-travelers/ resources/welcoming-the-stranger-among-us-unity-in-diversity.cfm#introduction.

The Church affirms the importance of family unity through a pastoral letter written by the Bishops of the United States and Mexico: "We witness the vulnerability of our people involved in all sides of the migration phenomenon, including families devastated by the loss of loved ones who have undertaken the migration journey and children left alone when parents are removed from them." USCCB, *Strangers No Longer, Together on the Journey of Hope* (Jan. 22, 2003) http://www.usccb.org/issues-and-action/human-life-and-dignity/immigration/strangers-no-longer-toge ther-on-the-journey-of-hope.cfm.

B. Family Unity Represents The Cornerstone Of The Federal Immigration Policy

a. Federal immigration law similarly values keeping parents and their children together. Both modern provisions, and provisions dating to the original INA, underscore this "intention . . . regarding the preservation of the family unit." H.R. Rep. No. 82-1365, at 29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1681; *see* H.R. Rep. No. 101-723(I), at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6717 (referring to "family reunification" as "the cornerstone of U.S. immigration policy"); S. Rep. No. 89-748, at 13 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3328, 3332 (describing "[r]eunification of families" as "the foremost consideration").

This Court has recently reiterated that this important federal objective infuses myriad aspects of

the immigration law and its judicial interpretation. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Court explained that considerations of family ties and family safety form a substantial part of the discretion in the enforcement of immigration laws:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to *support their families*, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including *whether the alien has children born in the United States*, long ties to the community, ... Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission . . . [where] enduring conditions that *create a real risk that the alien or his family will be harmed upon return*.

Id. at 2499 (emphases added). *See also Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012) ("We agree—indeed, we have stated—that the goals respondents identify [providing relief to aliens with strong ties to the United States and promoting family unity] underlie or inform many provisions of immigration law.") (citing *Fiallo v. Bell*, 430 U.S. 787, 795, n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 (1966)).

Decisions by the Courts of Appeals further illustrate the application of these principles of fostering family unity in various immigration contexts. *See,*

e.g., *Nwozuzu v. Holder*, 726 F.3d 323, 332 (2d Cir. 2013) (holding that petitioner's failure to become a lawful permanent resident before turning eighteen years old does not bar him from claiming derivative citizenship from his parents, and emphasizing that this reading is consistent with the "prevailing purpose of the INA," which is to implement the "underlying intention of our immigration laws regarding the preservation of the family unit"); *Duarte-Ceri v. Holder*, 630 F.3d 83, 90 (2d Cir. 2010) ("It is consistent with Congress's remedial purposes . . . to interpret the statute's ambiguity . . . in a manner that will keep families intact."); *Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996), *vacated on other grounds*, 144 F.3d 248 (3d Cir. 1998) ("Various provisions of the INA reflect Congress's intent to prevent the unwarranted separation of parents from their children."); *Mufti v. Gonzales*, 174 F. App'x 303, 306 (6th Cir. 2006) ("Congress's intent is clear: family unification is one of the highest goals of our immigration law."); *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) ("The [INA] was intended to keep families together," and "should be construed in favor of family units.").

Congressional enactments, especially regarding entry and removal, are notable for reflecting these concerns. With respect to entry, as a general matter and apart from the specific provisions in question here, Congress has long "felt that, in many circumstances, it [is] more important to unite families and preserve family ties than it [is] to enforce strictly" arbitrary numerical quotas on the number of immigrants that may enter this country. *Errico*, 385 U.S. at 220. Thus, Congress preserves the largest number of visas available each year for family members of U.S. citi-

zens and permanent residents. *See* 8 U.S.C. § 1151(a), (c). Federal law generally places no cap on the number of children, spouses, and parents of U.S. citizens that may enter, *id.* § 1151(b)(2)(A)(i), and allocates a substantial percentage of visas to family members of permanent residents and U.S. citizens, *id.* §§ 1151(a)(1), 1153(a).

In addition to this general "[p]reference allocation for family-sponsored immigrants," *id.* § 1153(a), federal law gives the Attorney General additional discretion "to assure family unity" in specific situations. *See, e.g.*, *id.* §§ 1157(c)(3), 1182(d)(11). With respect to an immigrant seeking adjustment of status to lawful permanent resident, for example, the Attorney General may take into account family unity by waiving otherwise applicable bars to admission. *See id.* § 1159(c); *see also id.* § 1182(a)(3)(D)(iv). Likewise, federal law allows the Attorney General to waive the bar against the admission of immigrants who have assisted other undocumented immigrants to enter, if they have assisted only a parent, spouse, or child. *Id.* § 1182(d)(11). "[F]amily unification [was] . . . the motivation behind the creation of [these] waiver[s]." *Mufti*, 174 F. App'x at 306.

Family considerations also affect removal proceedings for immigrants already here. Federal law, for example, permits cancellation of removal for an undocumented immigrant if the removal "would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child." 8 U.S.C. § 1229b(b)(1)(D). And while a lawfully admitted immigrant is removable if he assists in bringing an undocumented immigrant into the United States, the Attorney General may waive this provision if the law-

fully admitted immigrant only assisted an immediate family member. *Id.* § 1227(a)(1)(E)(iii).

The executive branch of the federal government also gives preferential consideration to family ties in its enforcement of the general removal provisions. "When weighing whether an exercise of prosecutorial discretion may be warranted" in a particular case, federal agents must consider such factors as "the person's . . . family relationships" and "whether the person has a U.S. citizen or permanent resident spouse, child, or parent." John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency* 4 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. Family ties also count as an important discretionary factor when the executive determines whether the Government will grant asylum to an immigrant. *See, e.g.*, *Huang v. I.N.S.*, 436 F.3d 89, 101 (2d Cir. 2006).

Similarly, in its briefs to this Court, the Government acknowledged that immigration laws foster family unity. Most recently, in its brief to this Court in *Arizona v. United States*, the Government confirmed its understanding and endorsement of the "judgment that 'many who enter illegally do so for the best of motives—to seek a better life for themselves and their families.'" Brief for the United States at 24, *Arizona*, 132 S. Ct. 2492 (No. 11-182) (quoting H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 46 (1986)). The Government likewise acknowledged that "the existence of family ties in the United States is a positive factor to be considered in determining whether an alien who is eligible for cancellation of removal should be granted that relief as a matter of discre-

tion. *See In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998)." Brief for Petitioner at 29, *Gutierrez*, 132 S. Ct. 2011 (Nos. 10-1542, 10-1543).

b. The idea that federal law should promote family unity is hardly limited to immigration, but instead reverberates throughout our laws. "The integrity of the family unit has found protection in" our founding document, the Constitution itself. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Court has recognized a right to traditional marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and parents also have a liberty interest in their children's upbringing, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality op.). Numerous historical sources confirm the importance of marriage and family in American tradition. *See, e.g.*, Noah Webster, *An Am. Dict. of the English Language* (1st ed. 1828) (noting purposes of "marriage"); William Blackstone, 1 *Commentaries* 422 (same).

Promoting family stability, moreover, remains a modern goal. It is evident in a diverse array of modern federal legislation, ranging from the Family and Medical Leave Act (which was designed to promote "the stability and economic security of families," 29 U.S.C. § 2601(b)(1)), to the Indian Child Welfare Act (which was passed "to promote the stability and security of Indian tribes and families," 25 U.S.C. § 1902). Current empirical sources confirm the ongoing importance of family stability. *See, e.g.*, Kristen Ander-

son Moore, et al., *Marriage From a Child's Perspective, Child Trends Res. Brief* 6 (2002) ("the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage").

C. The Government's Interpretation of Section 1153(h)(3) Fails To Account For These Important Federal Objectives Of Keeping Families Together

The Government's interpretation of the visa allocation provision at issue here has impacted numerous families, leading to the separation of family members, disruption of family life, and the deportation of long-time U.S. residents who entered as children a decade or more ago. These individuals, some of whose tribulations and struggles are described below, have all been denied the CSPA eligibility under *Matter of Wang*, and would have qualified for an immigrant visa under the Ninth Circuit's interpretation of the CSPA.

1. *C-N-D-D.* In 1979, a decade before C-N-D-D was born, her grandparents, aunts, and uncles fled Vietnam and entered the U.S. as refugees. Of the entire extended family, only C-N-D-D's mother and great-grandmother remained in Vietnam. C-N-D-D's mother was very close to her great-grandmother and refused to leave her. The family accepted her decision but never gave up hope that C-N-D-D's mother would join them in the U.S. The family sent remittances to C-N-D-D's mother which she depended on to survive.

Living in a small cottage in the rural city of Ninh Hoa, C-N-D-D's mother married, gave birth to C-N-D-D in 1989, and divorced. On December 7, 1998, when

C-N-D-D was 10 years old, her grandfather filed an F-2B visa petition for C-N-D-D's mother. C-N-D-D was the derivative beneficiary of the visa petition her grandfather filed on behalf of her mother. In 2008, C-N-D-D's grandfather became a U.S. citizen.

In April 2011, C-N-D-D's mother became a legal resident of the U.S. However, C-N-D-D was over 21 at the time her mother immigrated and was no longer a derivative beneficiary of the 1998 visa petition filed by her grandfather. In August 2011, C-N-D-D's mother filed an F-2B petition for C-N-D-D. *See* State Department Correspondence (on file at CLINIC office). Under *Matter of Wang*, C-N-D-D is unable to retain the 1998 priority date established when her grandfather filed the visa petition; therefore she will be subject to an additional waiting period of more than five years. The October 2013 Department of State Visa Bulletin indicates that immigrant visas are available for F-2B beneficiaries in the World-Wide category whose visa petitions were filed before March 1, 2006. C-N-D-D's petition was filed in August 2011.

The family of C-N-D-D has struggled to reunite in the U.S. after being separated for decades. Most of the family is composed of U.S. citizens, and one of C-N-D-D's uncles is a Los Angeles Deputy Sheriff, while another is an employee of the U.S. Postal Service. All plan to assist C-N-D-D integrate into U.S. life. The family found community college nursing and English classes for C-N-D-D to take in the U.S. C-N-D-D's mother is distraught and worried about her daughter who is isolated and alone in Vietnam.

2. *M-M-G-M:* Due to deep historical and cultural links between the U.S. and the Philippines, migra-

tion from the Philippines is significant. *See* Migration Policy Institute, "The Philippines' Culture of Migration," January 2006; Asian Pacific American Legal Center of Southern California, "A Devastating Wait: Family Unity and the Immigration Backlogs" (2008). Filipinos like M-M-G-M seeking to immigrate to the U.S. experience interminable waiting periods. The October 2013 Department of State Visa Bulletin indicates that the waiting period for immigrant visas is longer for the Philippines in all preference categories with the exception of Mexican beneficiaries in the F-1, F-2A, and F-2B categories. *See* October 2013 Visa Bulletin, *available at* http://travel.state.gov/visa/bulletin/bulletin_6062.html.

In January 1984, when M-M-G-M was one year old, his U.S. citizen aunt filed a visa petition on behalf of M-M-G-M's mother. M-M-G-M, his siblings, and his father were derivative beneficiaries of that petition.

In December 2006, M-M-G-M's parents and three siblings obtained legal residency and immigrated to the U.S. based on the petition M-M-G-M's aunt had filed nearly 23 years earlier. M-M-G-M was not permitted to immigrate with the rest of his family because he had turned 21 in 2003. Instead M-M-G-M lived alone in the family home in the Philippines and worked as a teacher.

M-M-G-M traveled to the U.S. on a visitor's visa in 2007. Relying on the January 1984 priority date his mother had established through the visa petition his aunt filed, on July 31, 2007 M-M-G-M's mother filed a visa petition for him and at the same time M-M-G-M filed for adjustment of status. Upon filing for adjustment and receiving employment authorization,

M-M-G-M began working at a warehouse company. On August 29, 2012, his application for adjustment was denied by the USCIS Los Angeles Field Office Director. *See* Notice of Decision on I-485, USCIS Acting Field Office Director Ana Chau. (August 29, 2012) (on file in the CLINIC office). The USCIS decision determined, in accord with *Matter of Wang*, that M-M-G-M was unable to retain the January 1984 priority date and therefore must continue to wait until a visa becomes available for a July 2007 priority date. Following the Ninth Circuit's *en banc* opinion in *Cuellar de Osorio,* M-M-G-M's adjustment application was reopened. The application is now held in abeyance pending this Court's opinion.

If M-M-G-M- is treated as having a priority date of July 2007, a visa likely will not be available for him for many years. According to the October 2013 Department of State Visa Bulletin, immigrant visas are available for F-2B beneficiaries from the Philippines who filed petitions before February 8, 2003. At the very least, the wait for the visa will be another four years, but likely longer because the backlog does not progress linearly. *See* pages 20-21 below.

3. *R-M-B*. R-M-B's family is from the Philippines as well. In November 1989, when R-M-B was nine years old, his U.S. citizen grandfather filed a visa petition on behalf of R-M-B's mother. R-M-B, his three siblings and his father were derivative beneficiaries of that petition. In January 2003, R-M-B's parents and three siblings obtained legal residency and immigrated to the U.S. based on the petition R-M-B's grandfather had filed 14 years earlier.

R-M-B was not permitted to join the rest of his family because he had turned 21 in 2001. Instead R-

M-B lived with his cousins in Manila waiting to immigrate to the U.S. through a new F-2B visa petition filed for him in January 2004 by his mother. During the time R-M-B stayed behind in the Philippines, he attended college, becoming a nurse.

R-M-B traveled to the U.S. on a visitor's visa in 2007. After living apart from his family for three years, R-M-B settled down with his family in the U.S. Relying on the November 1989 priority date his mother had established through the visa petition his grandfather filed, R-M-B filed for adjustment of status. Upon filing for adjustment of status and receiving employment authorization, R-M-B began working as a nurse in a hospital. On April 27, 2011 his application for adjustment was denied by the USCIS District Director for San Diego. *See* Notice of Decision on I-485, USCIS District Director Paul M. Pierre (Apr. 27, 2011) (on file in the CLINIC office). The USCIS decision determined, in accord with *Matter of Wang*, that R-M-B was unable to retain the November 1989 priority date and therefore must continue to wait until a visa becomes available based on a January 2004 priority date.

R-M-B moved to San Antonio in June 2012, and filed his I-485 petition in February 2013. He was interviewed at the San Antonio Field Office on May 28, 2013, and was approved that same day, in accordance with *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011), where the Fifth Circuit interpreted the CSPA in the same manner as the Ninth Circuit did. And although R-M-B did get his green card eventually, he spent a number of years unnecessarily separated from his family and then living a shadow existence at the risk of deportation—an ordeal that could have been

avoided had the BIA only interpreted, from the outset, the CSPA properly.

R-M-B's story is an illustration that, contrary to the Government's warnings, *see, e.g.*, SG Br. at 36, 38, there is nothing "odd," let alone "destabiliz[ing]," about applying the CSPA in accordance with the Fifth and Ninth Circuit's interpretation. As further shown below (Part II), the Government's assertions of inevitable "substantial[] disrupt[ions]" to the statutory scheme under the Ninth Circuit's interpretation, *id.* at 38, are mere speculations without factual basis.

* * *

These examples are representative of numerous other cases that CLINIC has encountered through its nationwide programs. In each, families have been needlessly kept apart by the BIA's refusal to implement the CSPA according to its terms.

II. CONTRARY TO THE GOVERNMENT'S ASSERTION, ALLOWING RESPONDENTS TO RETAIN THEIR PRIORITY DATES IS NOT A ZERO-SUM GAME AND WOULD NOT LEAD TO SIGNIFICANT BETRAYED EXPECTATIONS

A. Proper Calculation Of The Delays Illustrates That Allowing Respondents To Retain Their Original Priority Dates, Thereby Avoiding A Nine Year Or Longer Wait, Would Not Impose The Same Wait On Others In Line

The Government claims that changing priority dates for respondents is a "zero-sum game," which would push other aliens back in line. SG Br. at 40. *See also id.* at 41 ("Aliens pushed back in the line

might see their waiting times increase substantially."); *id.* at 51 ("The en banc majority's contrary reading of the statute . . . would 'not permit more aliens to enter the country or keep more families together,' but would negatively affect many aliens who have been waiting in visa lines for long periods of time."). Although the Government does not quantify the alleged push-back in the waiting time, it suggests that it is likely to be "significant" and therefore, will create "significant unfairness." *Id.*

The implication of that position is that allowing each of the individuals, such as respondents, to retain their priority dates, thereby avoiding an additional nine years or longer wait, also adds the same number of years to everyone else's wait in line. But this implication obscures the truth. Doing the math, examining how visas are allocated, and analyzing how the wait is calculated in light of the backlog reveals that the Government's implication is flat wrong. Below is the analysis of the currently available statistics to make an assessment of the effect of adopting the Ninth Circuit's position.

To determine whether a visa applicant in a family-based preference category is "current," one must compare the applicant's priority date with the date listed in the monthly Department of State Visa Bulletin. The priority date is the official date that the USCIS has determined that the applicant's petition was filed. To be current, the priority date must be earlier than the date listed on the Visa Bulletin that corresponds to the preference category and country of nationality.

The Department of State determines visa availability based on statutory limits for each preference cate-

gory, per country caps, and estimated demand. For example, in the F-2A category, there is an annual limit of 87,900 visas that can be used in any fiscal year, but no per country caps. In contrast, the F-2B category has both a much smaller annual limit of 26,266 visas that can be used in any fiscal year, as well as a per country limit of 7 percent of this number (1,838 visas).

It is impossible to gauge future visa availability by looking only at the Visa Bulletin for a specific month, because one must take into account the actual size of the backlog in each category. That is best determined by looking at the Department of State's Annual Immigrant Visa Waiting List Report, as well as a history of visa advancement in that particular category. For example, looking only at the Visa Bulletin for October 2013 would reveal that applicants in the F-2B category for countries other than Mexico and the Philippines are "current," i.e. currently eligible for visas, if they have a priority date before March 1, 2006. But that seven-year and seven-month period between that date and October 1, 2013 does not mean that applicants covered by petitions in the F-2B category filed today will become current in that same period of time. Similarly, priority dates prior to March 8, 1994 are now current for Mexicans in the F-2B category, but that does not mean that applicants covered by such petitions filed today will be current in 19 years. In other words, the backlog does not progress linearly.[2] In fact, the actual time delays are quite astounding.

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[2] Furthermore, the State Department cautions in several of its publications that visa applicants should be aware that cut-off

There are only 26,266 visas available each year in the F-2B category. And there are three oversubscribed countries—Mexico, the Philippines and Dominican Republic—that are at or above the 7 percent per-country cap. *See* State Department, Annual Numerical Limits FY 2013, available at http://www.travel.state.gov/pdf/WaitingListItem.pdf. To determine the number of visas available "worldwide" to non-oversubscribed countries in the F-2B category, one must first calculate those designated to the three over-subscribed countries. Each country is allowed a maximum of 7 percent of the total number of visas available in the F-2B category (26,266 x .07 = 1,838). Thus, the number designated to the three over-subscribed countries is 5,514 (3 x 1,838). Therefore, the number of visas available to other countries is 20,752 (26,266 - 5,514). The total number of pending F-2B applicants worldwide as of November 1,

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dates may change. *See, e.g.*, Dep't of State, The Operation of the Immigrant Numerical Control System, *available at* http://www.travel.state.gov/pdf/Immigrant%20Visa%20Control%20System_operation%20of.pdf ("Fluctuations can cause cut-off date movement to slow, stop, or even retrogress. Retrogression is particularly possible near the end of the fiscal year as visa issuance approaches the annual limitations."); Dep't of State, Visa Bulletin For November 2013, *available at* http://travel.state.gov/visa/bulletin/bulletin_6168.html (noting that it may "become[] necessary during the monthly allocation process to retrogress a cut-off date"); *see also id.* ("There would be no expectation . . . that sufficient numbers would be available for the processing of cases which subsequently became eligible for final action during that month. . . . The availability of additional numbers is subject to change at any time and should never be taken for granted. This is especially true late in the fiscal year when numerical allocations are often close to or at the annual limits.").

2012 was 486,597, according to the Annual Immigrant Visa Waiting List Report. The number of pending F-2B applicants from the three oversubscribed countries was 307,547. Therefore the number of pending F-2B applicants from the non-oversubscribed countries is 179,050 (486,597 – 307,547). To arrive at an estimate of the length of time it will take for these pending applicants to become current, divide the number of applicants by the annual limit available to non-oversubscribed countries (179,050 ÷ 20,752 = 8.6 years). Thus, an F-2B applicant from a non-oversubscribed country who filed a petition today is likely to become current in April 2022.

This is a fairly accurate assessment of the length of time it will take to get through the present backlog in that category. While some F-2B visa applicants during that time will die, marry, withdraw their applications, or convert to a more advantageous category, this decrease will be offset to some extent by the number of children born to these applicants, who will be added to that backlog as after-acquired derivative beneficiaries.

Annually, the F-3 category is allocated 23,400, and the F-4 category, 65,000, visas. *See* Dep't of State, Annual Numerical Limits FY 2013, *available at* http://www.travel.state.gov/pdf/Web_Annual_Numerical_Limits.pdf. Most of these visas go to principals, and only some to their derivatives. The derivatives who age out are but a small part of that total number of the F-3 and F-4 categories (88,400). That class is likely to have a very significant attrition rate, as those denied the retention of their priority dates either gave up the idea of immigrating or found an al-

ternative way to obtain a visa, such as through F-1 family first preference category.

We are not aware of any published statistics as to the number of people who would be added to the F-2B line in the event of affirmance of the Ninth Circuit's decision. However, even if we assume that 10,000 aged-out children are added to the F-2B line, that would push others in the F-2B line back by about six months, as the F-2B category has 26,266 visas available annually. *Id.* That is less than 1/17 of the wait that these individuals would be spared. Moreover, once that backlog clears up, there will likely be only a few thousand per year joining the F-2B line due to the CSPA; that would affect those already waiting by just a few months.

B. Recent Filers From The Oversubscribed Countries Are Not Realistically Affected

Individuals from oversubscribed countries who have just filed their papers and are in the line where respondents would be placed are currently expecting to wait around 100 years to obtain visas.

The number of F-2B visas available to Mexico is 1,838. As of November 1, 2012, the number of pending F-2B applicants from Mexico was 201,225. The length of time it will take to clear up the current backlog is approximately 109 years (201,225 ÷ 1,838). Thus, a Mexican who files a petition today in the F-2B category can expect it to become current at the end of 2122.

The number of F-2B visas available to the Philippines is also 1,838. The number of pending F-2B applicants from the Philippines as of November 1, 2012 was 50,099. The length of time it will take to clear up the current backlog is approximately 27 years

(50,099 ÷ 1,837). Thus, a Filipino who files a petition today in the F-2B category can expect it to become current at the end of 2040.

Therefore, from the practical standpoint, contrary to the Government's assertion, adopting Respondents' arguments would not cause any "disrupt[ion of] the settled expectations" (SG Br. at 44) of obtaining a visa for citizens of these countries.

III. THE GOVERNMENT'S *CHEVRON* STEP TWO ARGUMENT RELYING ON THE RELATIVE STRENGTH OF FAMILY TIES FOR THE FAVORED GROUP IS INCORRECT

Claiming that the provision is ambiguous, the Government asks the Court to defer to the agency's interpretation. In urging that the agency interpretation is reasonable, the Government effectively suggests that those with two LPR parents are more worthy to get visas in terms of protecting family integrity than those with one LPR parent and one U.S. citizen grandparent or aunt or uncle. *See* SG Br. at 45-47; 50-52.

As a threshold matter, the premise of this assertion is factually incorrect. Frequently, individuals, such as Respondents' children, also have two LPR parents, but only one was needed to file after these individuals aged out.

Moreover, the clear implication of the Government's position is that family unity values do not operate across generations or immediate nuclear family units. This is counter to evidence and experience, as this Court has long acknowledged. Indeed, this Court has repeatedly recognized the paramount role grandparents and other extended family members may play in keeping families functioning. In *Moore*

v. City of East Cleveland, 431 U.S. 494 (1977), the Court invalidated an ordinance which made it a crime for a homeowner to have living with her a son and a grandson, as well as the second grandson who was the cousin of the first grandson. The plurality emphasized the tradition of extended families in the history of our Nation: "The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504. The Court noted that even with the decline of an extended family in modern times, "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family," has not been erased. *Id.* at 505. The Court observed that "[o]ut of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home." *Id.* The Court further acknowledged that its child rearing decisions have recognized that grandparents or other relatives may take on major responsibilities in the household especially in times of adversity. *Id.* ("the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life").

Concurring opinions have made similar observations, emphasizing the importance of extended families for ethnic and racial minority groups, including immigrants and those with limited economic means. *Id.* at 508 (Brennan, J., Marshall, J., concurring) (examining historical and sociological evidence). *See also Troxel*, 530 U.S. at 64 (plurality op.) (examining statistics from the U.S. Department of Commerce and

explaining that "grandparents and other relatives undertake duties of a parental nature in many households" and "play an important role" in children's lives).

Similarly, the Church has recognized the importance of the extended family. The Church has instructed that "[t]he family should live in such a way that its members learn to care and take responsibility for the young, the old, the sick, the handicapped, and the poor." Catechism 2208, available at http://www.vatican.va/archive/ENG0015/__P7T.HTM. Likewise, the Church explained that "[t]he fourth commandment illuminates other relationships in society," which means that families are interconnected and extend beyond the narrow definition of a nuclear family: "In our brothers and sisters we see the children of our parents; in our cousins, the descendants of our ancestors . . . ." *Id.* at 2212.

In sum, the Government's interpretation of the CSPA is detrimental to family unity—the goal that both Congress and the Church recognize and foster, and relies on incorrect assumptions about the functioning of the visa system and about the nature of family ties.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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