No. 12-930

In the Supreme Court of the United States

ALEJANDRO MAYORKAS, DIRECTOR, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ET AL., PETITIONERS

v.

ROSALINA CUELLAR DE OSORIO, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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Over a five-judge dissent, the en banc Ninth Circuit rejected the BIA's reasonable interpretation of 8 U.S.C. 1153(h), which is entitled to *Chevron* deference, and held that the statute unambiguously grants a special immigration preference to all persons seeking immigrant visas who have "aged out" of derivative beneficiary status. Pet. App. 3a, 24a. Respondents do not deny that the circuits are split as to the proper interpretation of Section 1153(h)(3) or that the question presented here is important. Rather, they contend (Br. in Opp. 13-15) that the Court should not resolve the question because pending legislation could address it, the case involves a nationwide class, and the court below reached the correct result. Those contentions lack merit. The provision in a pending Senate bill that respondents cite has not yet even been considered by the full Senate, the fractured state of

the current law creates serious difficulties and inequities, and the decision below wrongly holds a statutory provision that has been the subject of considerable judicial disagreement to be wholly without ambiguity. This Court's review is necessary to clarify the proper interpretation of Section 1153(h)(3)—an issue that significantly affects not only respondents and similarly situated parties seeking relief under Section 1153(h)(3), but also the many thousands of other aliens awaiting immigrant visas.

A. Interpretation Of Section 1153(h)(3) Is An Important Issue

As an initial matter, the mere existence of an unenacted bill addressing the proper treatment of aged-out beneficiaries does not counsel against this Court's review. Respondents correctly state (Br. in Opp. 13) that the Senate Judiciary Committee has reported to the full Senate a bill that amends Section 1153(h)(3). But that bill is not the law of the land: it has not been approved by the full Senate, let alone gained the approval of the House of Representatives. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). And the particular provisions to which respondents point obviously could be deleted or altered while the bill is under consideration. If Section 1153(h)(3) were ultimately amended in a way relevant to this case, this Court could address the new law as necessary in the course of its review.[1]

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[1] Even if the provisions cited by respondents in the Senate bill did become law, it is not clear whether respondents would be directly affected. See S. 744 § 2305(e) ("The amendments made by this section shall take effect on the date of the enactment of this

As the law stands, the need for review is patent. While acknowledging that the circuits are divided, respondents emphasize that the district court in this case "certified a nationwide class." Br. in Opp. 13. The fact that the decision below would have sweeping effects, however, hardly diminishes the need for this Court's review. To the contrary, the district court's decision to certify an expansive class makes this case particularly significant. See 8:08-cv-00688 Docket entry No. (Docket entry No.) 74, at 21 (C.D. Cal.) (certifying class of "[a]liens who became lawful permanent residents as primary beneficiaries" of F3 and F4 petitions that "list[ed] [the aliens'] children as derivative beneficiaries" and who "subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters").

Indeed, as the petition explains (Pet. 28), implementation of the Ninth Circuit's decision would likely require a fundamental overhaul of the immigrant visa system. That kind of change would be difficult to implement and would undoubtedly result in harm to some waiting families, including families who have been separated for longer than respondents have been separated from their adult sons and daughters. See Pet. 28-32; contra Br. in Opp. 14, 33-34.

Moreover, the Ninth Circuit's decision, while sweeping, does not encompass every person in the country potentially affected by Section 1153(h)(3). First, the class includes only aged-out persons whose parents were primary beneficiaries of F3 and F4 petitions, and not those whose parents were primary beneficiaries of family-preference petitions in a different

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Act."); see also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269-270, 280 (1994).

category.[2] Second, the class does not cover aged-out derivative beneficiaries of employment-based immigrant visa petitions who may seek to invoke Section 1153(h)(3). See Pet. 29 n.6 (explaining that employment-based visa petitions operate similarly to family-preference petitions and are covered by Section 1153(b)). Third, the district court limited the class temporally so that it sweeps in only aliens who have already taken certain actions. Docket entry No. 74, at 21 (including in the class those who "*became* lawful permanent residents as primary beneficiaries" and "who subsequently *filed* second-preference petitions") (emphasis added); see *id.* at 5-8 (rejecting definition of class that would have operated prospectively). As a result, the disagreement among the circuits remains salient.[3]

B. The Decision Below Is Incorrect

Respondents argue at length (Br. in Opp. 15-33) that the decision below is correct. Those arguments can and should be fully addressed in the parties' merits briefs. Nevertheless, respondents' various efforts

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[2] Compare Br. in Opp. 14 n.5 (suggesting that the government accepts that "the decision below governs F1 and F2B petitions") with Pet. 29 (explaining only that the Ninth Circuit's decision governing beneficiaries of F3 and F4 petitions would affect the *waiting lines* "for F1, F2B, and F3 visas" because aged-out persons would enter those lines or obtain earlier priority dates within them).

[3] Indeed, without this Court's intervention, this case could produce an unusual situation in which similarly situated persons within a single circuit (such as the Second Circuit, which has concluded that Section 1153(h)(3) unambiguously precludes relief for parties like respondents, see *Li* v. *Renaud*, 654 F.3d 376, 379-380, 385 (2011)) may be subject to different treatment, depending on whether they are members of the class.

to establish that Section 1153(h)(3) unambiguously entitles them to the relief they seek are unavailing.

First, respondents point (Br. in Opp. 15-16) to the cross-references within Section 1153(h) on which the en banc majority relied. See Pet. App. 15a-16a. But respondents do not attempt to grapple with the argument set forth in the petition with respect to those cross-references. See Pet. 19. As the petition explains, there is no question that a person can obtain relief under paragraph (h)(3) only if she is a beneficiary of a petition identified in paragraph (h)(2), has been subjected to the formula in paragraph (h)(1), and has had her age computed as 21 or older. See *ibid.* But that does not mean that *everyone* who meets those conditions necessarily qualifies for the further benefit set forth in paragraph (h)(3). Rather, given that paragraph's requirement that an "appropriate category" exist to which the petition can "automatically be converted" when the age calculation is made, paragraph (h)(3) can reasonably be (and is most sensibly) understood to cover only a subset of beneficiaries of the petitions that paragraph (h)(2) describes. 8 U.S.C. 1153(h)(2) and (h)(3). That reading of the statute does not treat similar language in paragraphs (h)(1) and (h)(3) inconsistently (see Br. in Opp. 16); rather, it takes account of paragraph (h)(3)'s reference to paragraph (h)(1), while giving meaning and force to all parts of Section 1153(h). See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Had Congress wished to extend paragraph (h)(3)'s benefits to all derivative beneficiaries, it could have easily done so in a far more straightforward way. See, *e.g.*, 8 U.SC. 1151(f),

1158(b)(3)(B) (treating age of a child as frozen for various purposes to avoid aging-out problem).[4]

Second, respondents rely heavily (Br. in Opp. 21-26) on the argument that Section 1153(h)(3) makes "conver[sion]" and priority-date retention independent benefits, such that an aged-out derivative beneficiary who does not qualify for "automatic[]" conversion may nevertheless be entitled to "retain the original priority date issued upon receipt of the original petition." 8 U.S.C. 1153(h)(3). The en banc majority did not adopt that argument, and respondents do not identify any court that has accepted it—but the Second Circuit has rejected it in no uncertain terms, explaining that "Section 1153(h)(3) requires both automatic conversion to the appropriate category and retention of the original petition's priority date" and does not apply unless "conversion [is] possible." *Li*, 654 F.3d at 383-384; see also *Matter of Wang*, 25 I. & N. Dec. 28, 33-34, 36 (B.I.A. 2009) (explaining that "the language of section 203(h)(3) does not expressly state which petitions qualify for automatic conversion *and* retention of priority dates") (emphasis added).

The Second Circuit's reading is correct. If the statute simply provided that "the alien's petition shall automatically be converted to the appropriate catego-

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[4] Respondents' discussion of the title of the provision in which Section 1153(h) was enacted (Br. in Opp. 16-17) adds nothing to the analysis. That title, which speaks only in general terms and "cannot limit the plain meaning of the text," *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-529 (1947); see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 483 (2001), makes clear that some sons and daughters should benefit, but does not specify which ones, Child Status Protection Act, Pub. L. No. 107-208, § 3, 116 Stat. 928 (referring to "Certain Unmarried Sons and Daughters").

ry," it would be unclear whether the converted petition should retain the original priority date or should be given a new priority date corresponding to the date of the conversion. The last clause of Section 1153(h)(3) provides the necessary clarification, rather than conferring some independent benefit—and Section 1153(h)(3) therefore is most naturally read to say that the priority date of the "original petition" shall be "retain[ed]" *when* the conversion takes place, assuming that an "appropriate category" exists and a conversion is possible. 8 U.S.C. 1153(h)(3). That interpretation is bolstered (not undermined, see Br. in Opp. 23) by the provision's statement that it is "the alien" who "shall retain the original priority date." 8 U.S.C. 1153(h)(3). In the absence of conversion of "the alien's petition," the statement would be nonsensical: a priority date is a feature of a petition, and a person ("the alien") who is no longer the proper subject of any petition, due to aging out of "child" status, cannot herself be the bearer of any such date. Section 1153(h)(3) makes sense only if "the alien" retains the original priority date in connection with a converted petition.[5]

As the Second Circuit explained, when Congress wanted to provide for priority-date retention in the absence of conversion of a petition, it did so expressly,

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[5] In this context, respondents' statements about the meaning of the word "and" (Br. in Opp. 22-23) are irrelevant. See *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012). In any event, the bankruptcy provision addressed in *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), cited in Br. in Opp. 22, has no bearing here, since it provides two benefits that operate independently and makes clear through use of the word "any" that the second benefit may not apply in a given case. See 489 U.S. at 241-242 (discussing 11 U.S.C. 506(b)).

as in 8 U.S.C. 1154(k). See *Li*, 654 F.3d at 383. Respondents' reliance (Br. in Opp. 25-26) on the proposition that Section 1154(k) "demonstrates that retention of priority date does *not* invariably accompany automatic conversion" therefore misses the point. The existence of statutory language in which Congress quite clearly made priority-date retention a separate benefit (and explained how the priority date could continue to attach to an operative petition in the absence of conversion, see 8 U.S.C. 1154(k)(2)-(3)) underscores the absence of any such language in Section 1153(h)(3). See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[6]

Third, respondents contend (Br. in Opp. 26) that automatic conversion is available to aged-out derivative beneficiaries of F3 and F4 petitions, because such petitions "can be converted to the F2B category for unmarried sons or daughters of" lawful permanent residents. But that is, to say the least, a strained reading of the operative text. See Pet. 16-17. Section 1153(h)(3) provides that "the alien's petition" shall be "automatically converted," 8 U.S.C. 1153(h)(3)—that is, that an existing petition will move from one family-preference category to another, as if (for example) the

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[6] Respondents also argue (Br. in Opp. 24), contrary to *Wang*, that the "the concept of 'retention' of priority dates" is not "limited to a situation in which there was a successive petition filed by the same petitioner." But respondents' examples prove that *Wang* is correct. Where the regulations provide that an old priority date attaches to the filing of a new petition by a new petitioner, their text sets forth terms other than "retention" or "retain" (except for one regulation involving the distinct situation of employment-based petitions filed by interchangeable employers that both have the same relationship with the beneficiary). See *id.* at 24; see also 8 C.F.R. 204.12(f).

label "F2A" on that petition were replaced with the label "F2B." Such automatic conversion is possible when the existing petition is valid and the petitioner does not change, because someone empowered to file a petition in the newly "appropriate category," 8 U.S.C. 1153(h)(3); see 8 U.S.C. 1153(a)(1)-(4), has already taken the necessary action. But an F3 or F4 petition by a now aged-out person's grandparent, aunt, or uncle cannot be "automatically converted" into an F2B petition by the aged-out person's *parent* (see Pet. 16-17)—someone who had never previously even qualified to file a petition. Indeed, no conversion can possibly take place until that parent becomes a lawful permanent resident and decides to file a petition naming the aged-out person as a beneficiary. Those things may never occur at all, but at the very least require a number of affirmative steps on the part of both the parent and the government. See Pet. 16-18. That is the opposite of respondents' own definition of "automatic." Br. in Opp. 28.[7]

Fourth, respondents assert (Br. in Opp. 17-20) that Congress intended Section 1153(h)(3) to have a broad reach. But it would be curious indeed for Congress to

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[7] The situations that respondents cite (Br. in Opp. 26-27) to support their understanding of automatic conversion do not aid their cause. If Section 1153(h)(3) meant what respondents say it does, then Congress would not have later specified separately that the provision should be deemed to cover "derivatives of self-petitioners" under the Violence Against Women Act of 1994. 8 U.S.C. 1153(h)(4); see 8 U.S.C. 1154(a)(1)(D)(i)(I) and (III) (providing that no new petition need be filed for an aged-out derivative beneficiary of such a self-petition). Also, 8 C.F.R. 204.2(i)(1)(iv) involves a situation in which a petition filed by a widow or widower is based on the same spousal relationship with a U.S. citizen as a prior petition.

revamp the visa allocation system, causing upheaval for tens of thousands of waiting aliens and their families, with virtually no discussion of the issue. It is more likely that Congress, which was focused on the administrative delays in petition approval addressed by Section 1153(h)(1), see *Wang*, 25 I. & N. Dec. at 36; cf. 8 U.S.C. 1151(f), 1158(b)(3), intended in Section 1153(h)(3) to take the more modest step of codifying an existing regulatory practice while also providing a limited additional benefit not already found in the regulation itself. See Pet. 19-22; *Matter of Wang*, Decision on Mot. for Recons. 3 (No. A088 484 947 May 21, 2010).

The floor statements that respondents cite (Br. in Opp. 18-19) do not establish otherwise. Those statements—which are weak evidence of congressional intent at best, see *Graham County Soil & Water Conserv. Dist.* v. *United States ex rel. Wilson*, 130 S. Ct. 1396, 1408 (2010)—are so general as to be unhelpful in choosing between competing interpretations of Section 1153(h)(3). See Br. in Opp. 18 (citing statements by individual legislators that it is good to bring families together); *id.* at 19-20 (citing statement of Sen. Feinstein, made in connection with earlier bill that was not enacted, that one aspect of aging-out problem to be addressed is "growing immigration backlogs in the immigration visa category"). They therefore do not render the text of the statute unambiguous.

Finally, respondents attack the BIA's decision in *Wang* (Br. in Opp. 29-33). That attack largely echoes respondents' argument that they have identified the only possible construction of Section 1153(h)(3), and is equally without merit. The Board gave Section

1153(h)(3) a close and careful reading, and considered the whole statutory and regulatory scheme relevant to the interpretation of that provision (including the use of the terms "retention" and "conversion" in the pertinent statutes and regulations, which the Board correctly described). See *Wang*, 25 I. & N. Dec. at 30-39; see also *Wang*, Decision on Mot. for Recons. 1-4. In light of the text and the purpose of Section 1153(h)(3), as well as Congress's choice not to provide any preference for grandchildren, nieces, or nephews of U.S. citizens, the Board rationally concluded that adult sons and daughters of lawful permanent residents like those involved in this case—capable of carrying on lives independent from their parents—should not be entitled to jump ahead of others who have been patiently waiting in line. See *Wang*, 25 I. & N. Dec. at 38-39.[8] Accordingly, as the en banc dissenters stated, the Board's decision is a reasonable one that should have been accorded *Chevron* deference and sustained. See Pet. 23-24; Pet. App. 34a-35a.

[8] Respondents' suggestion (Br. in Opp. 31-32) that the BIA's analysis conflicts with an instruction on a government form is incorrect; that instruction does not preclude a petitioner from listing a spouse as a primary beneficiary and a child as a derivative beneficiary, and the practice is common because it "save[s] filing fees." Pet. App. 57a n.6; see 8 C.F.R. 204.2(a)(4).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

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