No. 12-930

IN THE

Supreme Court of the United States

ALEJANDRO MAYORKAS, *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 FOR RESPONDENTS

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QUESTION PRESENTED

When a U.S. citizen, a lawful permanent resident, or an employer petitions the government to issue a lawful permanent resident visa to a close relative or prospective employee (the "principal beneficiary"), the principal beneficiary's children under 21 may also receive visas as "derivative beneficiaries." 8 U.S.C. §1153(d). Aliens are allotted visas based on their "priority date" (usually the date of their petition's filing) and either their relationship to the petitioner (family-preference petitions) or their education and skills (employment petitions). Because of backlogs, it may take years or decades for an alien's priority date to become current, such that a visa is available for her. If a child who is a derivative beneficiary turns 21 before that point (known as "aging out"), the child typically cannot be treated as a derivative beneficiary, but rather must seek a visa by another route, often under a different statutory category as the adult son or daughter of a lawful permanent resident.

The Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002), protects derivative beneficiaries from the consequences of aging out while waiting in the visa line by, among other things, allowing them to retain their original priority date in the new statutory category, rather than assigning them a new, later priority date that disregards the length of time already spent in line.

The question presented is:

Whether the protection extended by the Child Status Protection Act, 8 U.S.C. §1153(h)(3), applies to all derivative beneficiary children.

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BRIEF FOR RESPONDENTS

INTRODUCTION

Rosalina Cuellar de Osorio and her family patiently waited seven years for immigrant visas that would allow them to join Ms. Cuellar de Osorio's U.S. citizen mother in the United States. In November 2005, they were notified that they had made it to the front of the visa line. When they appeared at the U.S. Consulate in El Salvador to apply for visas, they were informed that her son Melvin, who had turned 21 in July 2005, could not immigrate to the United States with his family. Ms. Cuellar de Osorio was forced to choose: stay in El Salvador with her son, or pursue the family's dream of immigrating to the United States and hope that Melvin

would soon be reunited with them. Ms. Cuellar de Osorio and her husband are now lawful permanent residents (LPRs); she has petitioned for a visa on behalf of her now-adult son Melvin, but he is still in El Salvador, having waited 15 years and counting.

Congress did not intend for Ms. Cuellar de Osorio to suffer this heartrending separation. Congress enacted Section 3 of the Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927, 928 (2002), to ameliorate the impact of both administrative processing delays and visa backlogs on children who turn 21 while awaiting a visa. Congress created a straightforward solution for *all* derivative beneficiaries. If a derivative beneficiary's age, recalculated using a method specified in the statute, is determined to be under 21, then he can still immigrate as a derivative "child" beneficiary and his visa application is approved. If his age is determined to be 21 or over, then he is treated as if his now-LPR parent had petitioned for him as the adult son of an LPR (automatic conversion) but with the same priority date he had before turning 21 (priority date retention). He thus joins the "F2B" visa line for adult sons and daughters of LPRs and, with his original priority date, is eligible to immigrate close in time to the rest of his family. If Melvin were granted that relief as Congress provided, he would immediately receive a visa and could reunite with his parents and grandmother in the United States.

Largely ignoring the benefit at the heart (and in the title) of the provision at issue in this case—"[r]etention of priority date"—the government argues this case as if it were all about "automatic conversion," an ancillary benefit that saves a filing fee but does not limit the statute's clear statement of its broad scope. The government's argument about automatic conver-

sion is based on a mistaken premise; automatic conversion occurs *after* the derivative beneficiary's parent has become an LPR, not (as the government would have it) the moment the child turns 21. Once the timing is properly understood, there are no statutory or practical barriers to providing automatic conversion to all derivative beneficiaries who age out. The government's emphasis on automatic conversion is also inconsistent with its own guidance and administration of the immigration laws, which recognize that beneficiaries may retain their priority dates regardless of whether a petition is automatically converted to a new category or a new petition is filed.

The government tries to justify its misreading of the statute on policy grounds, primarily by mounting an unusual campaign of narrative degradation against Respondents and their children, calling them "line-jumpers" seeking "special" rights to immigrate "ahead of others" and "undermine the goal of family unity." *See* Br. 15, 19, 32, 33, 38, 40, 42, 44, 47, 51. The government's rhetoric masks (though only thinly) the emptiness of its policy arguments—none of which overrides the statute's plain language and Congress's manifest intent to help all derivative beneficiaries who age out. Indeed, most of the government's policy arguments against granting relief to Melvin would apply equally to the subset of aged-out derivative beneficiaries to whom the government *does* grant relief. The Board of Immigration Appeals (BIA) provided no valid reason for that distinction, and the government's post hoc arguments fail on numerous grounds.

The court of appeals' judgment should be affirmed.

STATEMENT

A. Mechanics Of The Immigration System

The CSPA provides specific, practical relief in the context of an established immigration system—a system the government's brief describes only in part. Family-sponsored immigration generally proceeds in three steps: (1) filing and approval of an immigrant petition by a U.S. citizen or LPR ("petitioner") on behalf of a close relative ("beneficiary" or "principal beneficiary") and, where relevant, the relative's spouse and children ("derivative beneficiaries"); (2) filing and approval of visa applications by the beneficiary and derivative beneficiaries; and (3) inspection and admission as LPRs of the principal and derivative beneficiaries.[1] The government provides an overview of step 1 (Br. 2-5), but largely omits steps 2 and 3. Yet it is at *those* steps that the actions implicated by the CSPA—calculation of a derivative beneficiary's age, automatic conversion to a new category, and priority date retention—take place.

1. Immigrant Petition. Family-based immigration begins when a U.S. citizen or LPR files with U.S. Citizenship and Immigration Services (USCIS) a Form I-130, "Petition for Alien Relative." *See* 8 U.S.C. §1154(a)(1); 8 C.F.R. §204.1(a)(1). If the petition satisfies applicable criteria, USCIS "approve[s]" it. 8 U.S.C. §1154(b). Most beneficiaries, however, must wait to re-

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[1] The adjustment of status process for aliens already within the United States is similar (*see infra* pp.8-9), although it "generally combines into a single process the two steps taken in visa processing—application for a visa to a U.S. consular office abroad; and application for admission to an immigration officer at a U.S. port of entry." 4 Gordon et al., *Immigration Law and Procedure* §51.06[1] (2013).

ceive green cards because annual numerical limits make it impossible to issue visas to all approved beneficiaries immediately. *See id.* §1151(c). The length of an alien's wait depends in part on the preference category for the relationship between the petitioner and the principal beneficiary:

F1:	unmarried adult sons or daughters of U.S. citizens (id. §1153(a)(1))
F2:	F2A: spouses and minor children of LPRs (*id.* §1153(a)(2)(A))
	F2B: unmarried adult sons or daughters of LPRs (*id.* §1153(a)(2)(B))
F3:	married sons or daughters of U.S. citizens (*id.* §1153(a)(3))
F4:	brothers and sisters of U.S. citizens (*id.* §1153(a)(4))

Beneficiaries receive visas within each preference category based on "the order in which a petition in behalf of each such immigrant is filed." *Id.* §1153(e)(1). An alien's place in this "order" is determined by the alien's "priority date," which is the date on which her immigrant petition is filed. 8 C.F.R. §204.1(b); *see, e.g.*, 8 U.S.C. §1153(h)(3). A derivative beneficiary—a spouse or unmarried child under 21—is "entitled to the same status, and the same order of consideration" as the principal beneficiary. 8 U.S.C. §1153(d). A beneficiary may wait decades before a visa becomes available.[2]

[2] The CSPA also applies to employment-based immigration, which follows an analogous course. A labor certification is issued (if required), and the employer files a Form I-140, "Immigrant Petition for Alien Worker," classifying the prospective employee based on educational background and experience; the employee

2. Visa Application. The State Department publishes a monthly bulletin listing a "cut-off date" for visa availability in each family-preference and employment category. 22 C.F.R. §42.51; State Department, *Visa Bulletin for Nov. 2013* (Oct. 9, 2013). A visa is available when the cut-off date reaches the beneficiary's priority date. Before that point, the National Visa Center (NVC) will contact the beneficiary and prompt her to pay the processing fee, complete a visa application, and provide any required documentation. 22 C.F.R. §42.71; State Department, *Immigrants to the United States*; State Department, *Immigrant Visa Processing—The National Visa Center (NVC)*.

Every prospective immigrant, including each derivative beneficiary, must make a separate visa application. 8 U.S.C. §1202(a); *see also* State Department, Form DS-230, "Application for Immigrant Visa and Alien Registration" (now electronic Form DS-260) (instructing principal beneficiary to complete a separate application for herself and "each member of [her] family, regardless of age, who will immigrate with [her]"). A derivative beneficiary may submit his visa application with the principal beneficiary's application if, for example, the derivative beneficiary is "accompanying" the parent. 22 C.F.R. §40.1(a)(1). If the derivative beneficiary is "following to join" the parent, the derivative beneficiary may apply *after* the parent has entered the United States and become an LPR. As USCIS instructs new LPRs: "If you had children who did not obtain permanent residence at the same time you did,

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must wait for a visa if her priority date is not current for the given category. *See* 8 U.S.C. §1153(b). Once her priority date becomes current, she follows the application and admission steps in the same manner as family-based beneficiaries. 4 Gordon §50.01.

they may be eligible for follow-to-join benefits. … [Y]ou may simply notify a U.S. consulate that you are a permanent resident so that your children *can apply* for an immigrant visa." USCIS, *Bringing Spouses to Live in the United States as Permanent Residents* (June 8, 2012) (emphasis added); *see also* Customs and Border Protection, *Inspector's Field Manual* ch. 14.3 (2006) (explaining that "[t]here is not necessarily any time limit involved [in following to join] so long as the required relationship still exists"). The derivative beneficiary "may not precede the principal alien to the United States." 22 C.F.R. §40.1(a)(2).

NVC processes visa applications and schedules interviews at the U.S. Embassy or Consulate in the beneficiaries' home country. State Department, *Immigrant Visa Application and Document Processing*. The visa application is not adjudicated before this interview; only at the interview, when beneficiaries personally appear before the consular officer, is the visa application officially "ma[d]e." 22 C.F.R. §40.1(*l*)(2); *see also id.* §42.62(a). The consular officer determines whether the applicant is "eligibl[e] to receive a visa," *id.* §42.62(b), and must either approve or reject the application at the interview, *id.* §42.81(a). *See also* 8 U.S.C. §1201(a)(1). An issued visa ordinarily is valid for no more than six months. *Id.* §1201(c); 22 C.F.R. §42.72(a).[3]

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[3] Because a consular officer generally "'cannot … hold the visa for future action,'" a case is typically not scheduled for interview "if the documentation is incomplete or the case otherwise unripe for decision." 4 Gordon §55.08[2]. If, however, a visa is refused after the interview on "grounds [that] can be overcome with … additional evidence," the officer may retain the applicant's documents, *id.* §55.09[2], and the case may be reopened within one year without an additional application fee, 22 C.F.R. §42.81(e).

Importantly, a derivative beneficiary's eligibility for a visa is "determined definitively" at the time of the derivative beneficiary's visa application—*i.e.*, his consular interview. 22 C.F.R. §§42.68(c), 42.62(a). It is accordingly at that interview (and not before) that the derivative beneficiary's age is calculated for purposes of determining visa eligibility. If he is under 21, he can immigrate as a "child" with the "same status, and the same order of consideration" as his parent. 8 U.S.C. §1153(d). If he has turned 21 in the interim—known as "aging out"—he will need the relief provided by the CSPA to immigrate close in time to his parents. *See infra* pp.10-12.

3. Inspection and Admission. An immigrant with a visa must appear at a U.S. port of entry for inspection before the visa expires and still be eligible for the visa at the time of inspection. *See* 8 U.S.C. §1225(a), (b); *Inspector's Field Manual* ch. 14.1. An alien admitted on a "valid unexpired immigrant visa," 8 U.S.C. §1181(a), becomes an LPR (green card holder) immediately upon entering the country. USCIS, *Green Card for a Family Member of a Permanent Resident*; 3 Gordon et al., *Immigration Law and Procedure* §31.03[2] (2013).

Adjustment of Status. Aliens already in the United States may seek "adjustment of status" to LPR through a similar process. *First*, a close relative or potential employer files an immigrant petition for the principal beneficiary (the same petition that is filed for consular processing if the beneficiary is abroad). *See* 8 U.S.C. §1255(a). *See generally* USCIS, *Adjustment of Status* (Mar. 30, 2011). Once that petition has been approved, the beneficiary often must wait for a visa to become available. *See* 8 C.F.R. §245.1(g)(1). *Second*, when a visa becomes available, the beneficiary and any derivative beneficiaries apply for adjustment of status

on Form I-485, "Application to Register Permanent Residence or Adjust Status." A derivative beneficiary's adjustment application may be filed at the same time as the principal's or "anytime after the principal's Form I-485 application is approved." USCIS, *Instructions for I-485* (June 20, 2013). The applicant is then interviewed, if necessary, and the application is adjudicated. 8 C.F.R. §245.6. A derivative beneficiary's application is never adjudicated before the principal's application because, as with consular visa processing, approval of the derivative application is conditioned on approval of the principal's application. *See* 22 C.F.R. §40.1(a)(2); *Matter of Naulu*, 19 I. & N. Dec. 351, 353 (BIA 1986). *Finally*, the applicant is deemed an LPR when the adjustment application is approved. 8 U.S.C. §1255(b).

B. Respondents And Their Children

Respondents' personal histories are varied, but all were the principal beneficiaries of family-based petitions filed by a U.S. citizen parent (F3 petition) or sibling (F4 petition); they also all have children who were under 21 when the petitions were filed.[4] When their priority dates became current and they applied for visas, however, the children were over 21 and no longer eligible to receive visas as derivative beneficiaries. Pet. App. 5a, 11a-12a. Respondents became LPRs and petitioned for their (now adult) children under the "F2B" category—for the adult son or daughter of an LPR—but their children ran the risk of being assigned

[4] One such child, Ruth Uy, is also a Respondent. To reduce complexity, this brief refers to the principal beneficiaries as "Respondents" and to the derivative beneficiaries, including Ruth Uy, as "Respondents' children."

new, later priority dates and being placed far behind others who had not waited as long as they had.

To illustrate, Ms. Cuellar de Osorio was the principal beneficiary of an F3 petition filed by her mother, a U.S. citizen. Compl. ¶29. The petition listed Ms. Cuellar de Osorio's son Melvin, who was thirteen, as a derivative beneficiary. *Id.* The petition was filed in May 1998 and approved almost two months later, but a visa did not become available until November 2005—four months after Melvin turned 21. *Id.* ¶¶29-30. Ms. Cuellar de Osorio and her husband immigrated in August 2006, leaving Melvin behind in El Salvador. *Id.* ¶30. In July 2007, Ms. Cuellar de Osorio filed an F2B petition for Melvin as the adult son of an LPR. *Id.* ¶32.

Respondent Norma Uy was the principal beneficiary of an F4 petition filed by her U.S. citizen sister in February 1981. Compl. ¶35. The petition listed Norma's daughter Ruth, who was two, as a derivative beneficiary. *Id.* The petition was approved on the day of its filing, but a visa did not become available until more than 21 years later in July 2002, at which point Ruth was 23. *Id.* ¶36. Norma immigrated without Ruth and filed an F2B petition for her. *Id.* ¶¶37-39. The other Respondents are in similar situations.

C. The Child Status Protection Act

Congress recognized and addressed the "aging out" problem when it enacted the CSPA in 2002. Section 3 of the CSPA, entitled "Treatment of Certain Unmarried Sons and Daughters Seeking Status as Family-Sponsored, Employment-Based and Diversity Immigrants," added 8 U.S.C. §1153(h), which tackles the problem in two ways that work together to provide re-

lief for all aged-out derivative beneficiaries. 116 Stat. at 928.

First, paragraph (h)(1) provides that, for purposes of determining eligibility to be a "child" beneficiary—whether principal or derivative—the beneficiary's age is reduced by the time the government took to approve the immigrant petition. (In Melvin Cuellar de Osorio's case, this was almost two months. Pet. App. 11a; Compl. ¶¶29-30.) Paragraph (h)(1) directs the agency to recalculate the derivative beneficiary's age by subtracting the processing delay; if the recalculated age is below 21, then the derivative beneficiary is deemed to "satisf[y] the age requirement" for a "child," 8 U.S.C. §1153(h)(1), and can receive a visa in the same preference category as his parent, *id.* §1153(d), so long as the derivative beneficiary seeks to acquire LPR status within one year of visa availability, *id.* §1153(h)(1)(A).

The child's recalculated age under paragraph (h)(1) is determined when the derivative beneficiary's visa or adjustment application is adjudicated. *See supra* pp.7-8. Specifically, the age recalculation under paragraph (h)(1) occurs *after* "the date on which an immigrant visa number becomes available for such alien (or … became available for the alien's parent)," 8 U.S.C. §1153(h)(1)(A), and *before* the visa is approved (or refused) for the derivative as a "child," *see id.* §1153(h)(1) (citing *id.* §1101(b)(1)). The timing of the age calculation is important to this case: if it occurs after the parent has become an LPR, an aged-out derivative beneficiary will then be the adult son or daughter of an LPR and thus eligible to immigrate as a principal beneficiary under the F2B category.

Paragraph (h)(1) applies to all petitions described in paragraph (h)(2), which in turn describes (i) F2A pe-

titions on which children are listed as *principal* beneficiaries, *see* 8 U.S.C. §1153(a)(2)(A), (h)(2)(A), and (ii) family-preference, employment, and diversity petitions with children listed as *derivative* beneficiaries, *see id.* §1153(d), (h)(2)(B).

Second, paragraph (h)(3), titled "Retention of priority date," provides relief "[i]f the age of an alien is determined under paragraph [(h)](1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." 8 U.S.C. §1153(h)(3); *see also* Pet. App. 15a, 50a. If that condition is satisfied, then paragraph (h)(3) specifies that "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." 8 U.S.C. §1153(h)(3). A petition that is automatically converted "shall be regarded as having been approved" in a different family-preference category. 8 C.F.R. §204.2(i) (describing "[a]utomatic conversion of preference classification"). Retention of priority date allows the alien to keep his original priority date when he moves into the F2B category, which means he will be given credit for the time already spent waiting in line.

D. District Court Proceedings

After being admitted as an LPR, Rosalina Cuellar de Osorio asked the government to permit Melvin to retain his May 1998 priority date and to process his F2B petition using that date, consistent with the CSPA. Compl. ¶32. The other Respondents made similar requests. Had the requests been granted, Respondents' children would have been able to immigrate or adjust status years earlier than they otherwise will. The government refused without explanation. *Id.* ¶¶33, 40, 49, 57, 64. Respondents filed this suit, seeking

to compel the government to allow their sons and daughters to retain their original priority dates. At that time, the BIA had recognized that a child listed on an F4 petition filed by her mother's U.S. citizen sister was entitled, after turning 21, to "retain the … priority date that applied to the original [F4] petition," meaning that "a visa number under the [F2B] category is immediately available to the respondent." *Matter of Garcia*, 2006 WL 2183654 (BIA June 16, 2006).

In June 2009, however, while this litigation was pending, the BIA issued *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), which disapproved *Garcia* and ruled that an aged-out derivative beneficiary on an F4 petition filed by a U.S. citizen relative could not retain her priority date. The BIA first opined that the CSPA "does not expressly state which petitions qualify for automatic conversion and retention of priority dates." *Id.* at 33. The BIA next stated (without explanation or support) that the concept of "automatic conversion" was to be analyzed "at the moment the beneficiary aged out," not at the later moment when the beneficiary applied for a visa. *Id.* at 35. The BIA stated that "automatic conversion" had a "recognized meaning" that applied only where "a visa petition converts from one visa category to another … without the need to file a new visa petition." *Id.* at 34, 35. The BIA also held that "retention" of priority dates applied only to "visa petitions filed by the same family member," whereas a petition "filed by another family member receives its own priority date." *Id.* at 35. The BIA believed that "retention" under the CSPA should be limited to the circumstances in which "retention" was available under prior regulations, which expressly "limited" aging-out relief "to a[n] [LPR]'s son or daughter who was previously eligible as a derivative beneficiary under a second-preference

spousal [F2A] petition filed by that same [LPR]." *Id.* at 34 (discussing 8 C.F.R. §204.2(a)(4)).

The district court treated *Wang* as "dispositive" and granted the government's summary judgment motion. Pet. App. 72a, 83a-84a.

E. Court Of Appeals Proceedings

A panel of the U.S. Court of Appeals for the Ninth Circuit affirmed. The panel observed that paragraph (h)(3)'s plain language makes clear that it applies to all derivative beneficiaries. Pet. App. 50a. Yet the panel concluded that the statute was ambiguous because, in its view, automatic conversion did not "practicably apply" (*id.* 51a) to Respondents' children since "a new petitioner—the LPR parent—is required" (*id.* 53a). The panel also ruled that "Congress did not speak clearly as to whether priority date retention can be applied independently of automatic conversion." *Id.* 54a. The panel concluded that the BIA's decision in *Wang* was reasonable. *Id.* 60a.

The court of appeals granted rehearing en banc and reversed. Joining the Fifth Circuit in *Khalid* v. *Holder*, 655 F.3d 363 (5th Cir. 2011), the en banc court ruled that the BIA's interpretation "conflicts with the plain language of the CSPA," which "unambiguously grants automatic conversion and priority date retention to aged-out derivative beneficiaries." Pet. App. 3a. Like the panel, the en banc court concluded that paragraph (h)(3) "cannot function independently" of the rest of Section 1153(h) and that, when viewed in context, it applied to all derivative beneficiaries, not simply F2A beneficiaries as the BIA had ruled. *Id.* 16a.

The court rejected the government's argument that applying paragraph (h)(3) to F3 or F4 derivative bene-

ficiaries would be "impracticable" because it supposedly required a change in petitioner (from the original U.S. citizen relative to the principal-beneficiary parent who became an LPR). Pet. App. 19a. While the statute's plain language directed a change in policy, it "cannot be impracticable just because it is a change or because it does not specify how exactly that change is to be implemented." *Id.*[5]

SUMMARY OF ARGUMENT

I. Congress unambiguously answered the precise question at issue: paragraphs (h)(1) and (h)(3) provide relief to the same set of beneficiaries, including *all* derivative beneficiaries. Paragraph (h)(1) allows children who have aged out as a result of administrative processing delays to retain their "child" status, and paragraph (h)(3) provides that children who have aged out due to visa backlogs may enjoy priority date retention and automatic conversion benefits. The government agrees that paragraph (h)(1) applies to all derivative beneficiaries who age out. Paragraph (h)(3), in turn, has only one eligibility requirement: the alien's age has been "determined under paragraph (1) to be 21 years of age or older." Thus, any alien who does not qualify for relief under paragraph (h)(1) because his age is determined to be over 21 may obtain paragraph (h)(3)'s benefits, the most important of which is the one reflected in its title—"[r]etention of priority date." By mandating that "*the alien shall* retain the original priority date," paragraph (h)(3) ensures that aged-out derivative bene-

[5] Five judges dissented. Pet. App. 27a, 28a (Smith, J., dissenting) (acknowledging that the majority's interpretation was "reasonabl[e]," but believing that the "automatic conversion" phrase "complicate[d] matters").

ficiaries will keep their original priority dates when they move into the F2B category as the adult sons and daughters of LPRs, thus receiving credit for the time already spent waiting for a visa.

This plain language interpretation of paragraph (h)(3)'s scope is reinforced by Congress's use of the same terminology in paragraphs (h)(1) and (h)(3) to refer to *all* derivative beneficiaries ("subsection[] … (d)"). Congress could have imposed the specific limitation the government now favors, but it did not. Although a pre-existing regulation confined aging-out relief to F2A derivative beneficiaries whose new F2B petition was filed by the same petitioner, Congress notably *omitted* any such limitations from paragraph (h)(3), which strongly suggests that those limitations do not apply. The provision's title and legislative history confirm Congress's goal to protect *all* derivative beneficiaries from the consequences of turning 21, not to confine that relief in a way not mentioned in the statute.

II. The government nonetheless seeks ambiguity by asserting a "tension" between paragraph (h)(3)'s sole eligibility requirement and its automatic conversion benefit. But this Court does not stretch to find that Congress enacted a provision at war with itself; rather, it construes statutory provisions to work harmoniously where at all possible. The government accordingly must show both: (1) that it *cannot* provide F3 and F4 derivative beneficiaries with the automatic conversion benefit; and (2) that those derivative beneficiaries *cannot* retain their priority dates without automatic conversion. Both arguments fail.

First, the government is fundamentally wrong in asserting that automatic conversion must occur (if at all) at the moment an alien turns 21. As paragraph

(h)(3)'s initial clause makes clear, automatic conversion does not occur until *after* the alien's age "is determined under paragraph [(h)](1) to be 21 years of age or older." That determination happens when the alien's visa or adjustment application is adjudicated, not before. Accordingly, when properly understood, automatic conversion need not occur until after the derivative beneficiary's parent has become an LPR. At that point, the alien qualifies for the "appropriate" F2B category without the need for a new petition, which is all that is legitimately needed to "automatically … convert[]" the original petition to the F2B category.

The government's attempts to impose additional requirements for automatic conversion are also unsupported by the statute's plain language and agency practice. The conversion may happen "automatically" even if it is not triggered until an appropriate category is available. And nothing in the word "conversion" excludes the comparably minor change involved in treating an F3 or F4 petition as an F2B petition; it involves a change in petitioner, as do other automatic conversion provisions, but the petition seeks the same benefit for the same person through the same means and is simply regarded as having been filed in a different category. Indeed, the agency has had no trouble implementing automatic conversion in cases indistinguishable from this one.

Second, Respondents' children are entitled to retain their priority dates regardless of whether their original petitions are automatically converted to the F2B category. The statute envisions that the two benefits be treated distinctly: "In the case of A, then B shall be done and C shall be done." Benefit C (priority date retention) thus "shall" be provided if condition A is satisfied (the beneficiary's recalculated age is deter-

mined to be over 21); it is not dependent on B (automatic conversion). No one disputes that Respondents' children satisfy condition A: their ages have been determined to be 21 years or older under paragraph (h)(1). The government's instructions to the public and its personnel confirm that it knows how to grant retention of priority date without automatic conversion.

III. Finally, the BIA's interpretation of paragraph (h)(3) is unreasonable and arbitrary and capricious and would not deserve deference even if paragraph (h)(3) were ambiguous. The BIA favors only derivative beneficiaries of F2A petitions, who are closely related to two LPRs, while disfavoring all family-based derivative beneficiaries who are closely related to at least one *U.S. citizen* and one LPR (and often two LPRs). The agency's justifications for this upside-down preference are based on mistaken premises and unsound analysis. The government's post hoc policy justifications fare no better: The government's complaints about granting relief to F3 and F4 derivatives would apply equally to the F2A derivatives the government favors. The government's apparent desire to limit the scope of paragraph (h)(3) to as few aliens as possible cannot justify the particular line the BIA drew.

ARGUMENT

I. THE CSPA UNAMBIGUOUSLY APPLIES TO ALL DERIVATIVE BENEFICIARIES

The BIA's interpretation of the CSPA is reviewed under the doctrine established in *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). "Under *Chevron*, a reviewing court must first ask 'whether Congress has directly spoken to the precise question at issue.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (quoting *Chevron*, 467 U.S. at 842).

"If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). In determining whether Congress has answered that question, the Court "[e]mploy[s] traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), "begin[ning], as always, with the language of the statute," *Duncan* v. *Walker*, 533 U.S. 167, 172 (2001).

The "precise question at issue" here is whether 8 U.S.C. §1153(h)(1) and (h)(3) have the same scope and provide relief to the same set of beneficiaries. The government agrees (Br. 6, 32-33) that paragraph (h)(1) applies to all derivative beneficiaries, but insists that paragraph (h)(3) has a more limited scope that excludes Respondents' children. The statute's plain text forecloses that argument.

The subject of Section 1153(h) is "an alien" who has two opportunities to obtain relief from aging out. The alien's first opportunity arises in paragraph (h)(1), which provides relief for delays caused by agency processing of the immigrant petition. Under paragraph (h)(1), the alien's age is recalculated "[f]or purposes of subsections (a)(2)(A) and (d)"; specifically, the alien's age is reduced by "the number of days in the period during which the applicable petition described in paragraph (2) was pending." 8 U.S.C. §1153(h)(1), (h)(1)(B). If the recalculated age is below 21, the alien is still considered a "child" and can immigrate as a principal beneficiary (under "subsection[] (a)(2)(A)") or a derivative beneficiary (under "subsection[] … (d)"), *id.* §1153(h)(1), so long as he "has sought to" do so within one year, *id.* §1153(h)(1)(A).

Paragraph (h)(1) relief is available to aliens who seek visas under "any petition" described in paragraph (h)(2), which in turn describes two types of petitions where being under 21 matters: (i) an F2A petition for a child as a *principal* beneficiary (child of an LPR), 8 U.S.C. §1153(h)(2)(A); and (ii) a petition where a child "is a *derivative* beneficiary under subsection (d)," and the petition is filed "under subsection (a) [family], (b) [employment], or (c) [diversity]," *id.* §1153(h)(2)(B) (emphasis added). The government does not dispute this interpretation of paragraphs (h)(1) and (2). Br. 6, 32-33.

If the alien's recalculated age under paragraph (h)(1) is still over 21, the statute provides a second opportunity for relief—paragraph (h)(3). Paragraph (h)(3), by its plain language, has only one eligibility requirement: the alien's age has been "determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." 8 U.S.C. §1153(h)(3); *see* Pet. App. 50a ("[p]aragraph [(h)](3)'s initial clause makes it contingent upon the operation of paragraph (1)"). Thus, paragraph (h)(3) covers all aliens seeking a visa under a petition described in paragraph (h)(2) for whom the paragraph (h)(1) recalculation yielded an age over 21, not just—as the government would have it—beneficiaries of F2A petitions.

The most important benefit provided by paragraph (h)(3) to a derivative beneficiary like Respondents' children is the one captured by its enacted title: "Retention of priority date." By providing that "the alien shall retain the original priority date issued upon receipt of the original petition," paragraph (h)(3) allows "the alien" to keep his priority date in a visa category for adult immigrants (typically F2B, adult son or daughter of an LPR). Paragraph (h)(3) also provides

that the "alien's petition shall automatically be converted to the appropriate category." *See infra* Part II.B (explaining that Respondents' children may practicably benefit from "automatic conversion").

Congress's answer to the precise question at issue—that paragraph (h)(3)'s scope encompasses all derivative beneficiaries whose age is "determined under paragraph [(h)](1)" to be over 21, as opposed to a limited subset of that group—is reinforced by several other "traditional tools of statutory construction." *Cardoza-Fonseca*, 480 U.S. at 446, 448.

First, Congress used the same cross-reference—"subsection[] … (d)"—in both paragraphs (h)(1) and (h)(3). The government agrees (Br. 6, 33) that paragraph (h)(1)'s reference to "subsection[] … (d)" encompasses *all* derivative beneficiaries, consistent with the undisputed scope of subsection (d), *see* 8 U.S.C. §1153(d). Paragraph (h)(3)'s cross-reference to subsection (d) should be presumed "to mean the same thing," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), especially when used in such proximity within the statute, *Mohamed* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1708 (2012). Paragraph (h)(2) has the same broad scope, specifically including all petitions under which children can seek a derivative visa. 8 U.S.C. §1153(h)(2)(B) (cross-referencing §1153(d)). These cross-references unambiguously show that paragraph (h)(3) applies to "all visa petitions identified in subsection (h)(2)," if the beneficiary's recalculated age under paragraph (h)(1) exceeds 21. Pet. App. 24a; *id.* 15a-16a, 50a-51a.

The government complains (Br. 32) that Congress chose a "round-about way" of defining paragraph (h)(3)'s scope. The government may believe itself capable of choosing "far more direct" formulations (*id.*), but

that does not establish ambiguity. *See Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) ("The statute is awkward, and even ungrammatical; but that does not make it ambiguous on the point at issue."); *see also Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 706 (1991) (Scalia, J., dissenting) ("The disputed regulatory language is complex, but it is not ambiguous[.]"); *Bath Iron Works Corp.* v. *Director, Office of Workers' Comp. Programs*, 942 F.2d 811, 819 (1st Cir. 1991) (Breyer, C.J.) ("The statute, while complex with operative language placed in different sections, is not ambiguous or unclear once its different parts are unscrambled.").[6]

Second, Congress notably omitted from paragraph (h)(3) certain limitations included in an earlier aging-out regulation. A 1992 regulation provided that a derivative beneficiary of an *F2A* petition—the subset of derivatives now favored by the government—could retain his original priority date after aging out "if the subsequent petition is filed *by the same petitioner*." 8 C.F.R. §204.2(a)(4) (emphasis added); 57 Fed. Reg. 41,053, 41,059 (Sept. 9, 1992). But Congress did not limit paragraph (h)(3)'s reach to F2A derivatives in that way; it included petitions under "subsection[] … (d)," reaching all derivative beneficiaries. Nor did Congress require that a subsequent petition be "filed by the same

[6] Division among circuits (Br. 20 n.6) does not show ambiguity either. *See RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2070-2073 (2012) (affirming Seventh Circuit's interpretation of bankruptcy code provision and finding "no textual ambiguity," despite Third Circuit's ruling that the same provision unambiguously provided the contrary, *see In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 301 (3d Cir. 2010)); *Roberts* v. *Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1355-1356 n.4, 1363 n.12 (2012) ("newly awarded compensation" is unambiguous despite circuit split over its meaning).

petitioner." Congress's omission of these regulatory limitations "strongly suggests" that they do not apply to the CSPA. *See Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978).

Had Congress intended paragraph (h)(3) to benefit only F2A derivative beneficiaries, "Congress could easily have said so." *Kucana* v. *Holder*, 558 U.S. 233, 248 (2010); *see also Nken* v. *Holder*, 556 U.S. 418, 430 (2009). Indeed, Congress elsewhere identified the specific class of people to whom the government now wishes to limit paragraph (h)(3). 8 U.S.C. §1101(a)(15)(V) (limiting certain visas to "an alien who is the beneficiary (including a child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of a petition to accord a status under section 1153(a)(2)(A)").

Third, the CSPA provision's title expressly indicates that the provision applies to aged-out derivative beneficiaries seeking status as "Employment-Based" immigrants. 116 Stat. at 928. Yet under the government's theory, paragraph (h)(3) does not apply to derivative beneficiaries of employment petitions at all. *See Matter of Patel*, A089726558 (BIA Jan. 11, 2011) (pursuant to *Wang*, derivative beneficiary of an employment petition "would not benefit by the provisions of [paragraph (h)(3)]"). Nothing in the statutory text indicates that Congress intended paragraph (h)(3) to have a far narrower scope than the title of the section adding it describes. *See Porter* v. *Nussle*, 534 U.S. 516, 527-528 (2002) (interpreting statute consistently with its title). To the contrary, paragraph (h)(3) cross-references paragraph (h)(1), which applies to derivative beneficiaries of employment petitions, 8 U.S.C. §1153(h)(1)(B), (h)(2), and paragraph (h)(3) itself expressly applies "for the purposes of *subsection*[] … *(d)*,"

which likewise includes derivative beneficiaries of employment petitions.

Fourth, the legislative history indicates intent to provide age-out relief to all derivative beneficiaries regardless of whether the age-out problem was caused by processing delays (paragraph (h)(1)) or visa backlogs (paragraph (h)(3)). The legislation's purpose was to "provide a child, whose timely filed application for a family-based, employment-based, or diversity visa was submitted before the child reached his or her 21st birthday, the opportunity to remain eligible for that visa until the visa becomes available." 147 Cong. Rec. S3275, S3275 (Apr. 2, 2001) (Sen. Feinstein); *see also* H.R. Rep. No. 107-807, at 55 (2003) ("The [CSPA] also extends age-out protection to cover … Children of Family and Employer-Sponsored Immigrants and Diversity Lottery Winners" (emphasis omitted)). Congress thus intended to address two problems: (1) "the INS was unable to adjudicate the application before the child's 21st birthday" and (2) "growing immigration backlogs in the immigration visa category caused the visa to become unavailable before the child reached his 21st birthday." 147 Cong. Rec. at S3275.[7]

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[7] The government admits (Br. 48) that paragraph (h)(3) addresses "'delay' that results from Congress's own yearly limits on admission." Its efforts to downplay the importance of that goal fail. The government argues (Br. 49 n.16) that Senator Feinstein's reference to visa backlogs occurred before Section 1153(h)(3) was added to the bill, but that is immaterial. The Senator's statement shows that Congress—and the Senate in particular—was concerned with remedying aging-out due to visa backlogs, and there is no reason to think that Congress *changed* its purpose before adding paragraph (h)(3) to the Senate bill. And while the original House bill addressed only administrative processing delay (Br. 48), the House sponsor recognized that the Senate bill broadened the legislation's scope and "ma[d]e it even better," 148 Cong. Rec.

Accordingly, paragraph (h)(3) applies broadly to all derivative beneficiaries who satisfy the paragraph's single condition precedent—their recalculated age is "determined under paragraph [(h)](1)" to be over 21. Pet. App. 15a-16a, 24a; *Khalid* v. *Holder*, 655 F.3d 363, 370-371 (5th Cir. 2011). Respondents' children undisputedly fall into that category.

Indeed, the agency has had no difficulty implementing the statute to allow derivative beneficiaries of F3 and F4 petitions to retain their priority dates and immigrate close in time to their families. *See, e.g.*, *Matter of Motong*, A89620887 (IJ Oct. 3, 2008) (immigration judge explaining that "CSPA allows the [derivative beneficiary of F3 petition] to retain her original visa petition priority date" and "'automatically convert[s]'" her petition to "family 2B category"); *Vithalani Welcome Notice*, A089365136 (USCIS Sept. 9, 2008) (granting aged-out derivative beneficiary of F4 petition retention of priority date and adjustment of status in F2B category); *Matter of Garcia*, 2007 WL 2463913 (BIA July 24, 2007) (granting aged-out derivative beneficiary of F4 petition retention of priority date "by virtue of section [1153](h)(3)"); *Matter of M.K.*, A96196186 (IJ June 18, 2007) (granting adjustment of status in F2B category based on retention of priority date for aged-out derivative beneficiary of F4 petition); *Matter of Garcia*, 2006 WL 2183654 (BIA June 16, 2006) (holding that F4 petition was "automatically converted" into an F2B petition and the derivative beneficiary was "entitled to

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H4989, H4992 (July 22, 2002) (Rep. Gekas). Another CSPA provision also addresses backlog delay, not just processing delays. 116 Stat. at 929 (codified at 8 U.S.C. §1154(k) (addressing visa backlogs by allowing married son or daughter to retain priority date when parent naturalizes and either to move from F2B to F1 or to remain in F2B category to avoid longer F1 backlogs)).

retain the … priority date that applied to the original [F4] petition, and therefore a visa number under the [F2B] category is immediately available"). And after the Fifth Circuit held in 2011 that paragraph (h)(3)'s benefits unambiguously apply to all derivative beneficiaries, *see Khalid*, 655 F.3d at 370-371, the government did not seek this Court's review; it has presumably complied with that precedent as to aged-out derivative beneficiaries in that immigrant-rich circuit.

As the remainder of this brief shows, the government's efforts to create "tension" or ambiguity in Congress's statutory scheme fail.

II. THE GOVERNMENT'S CLAIM OF AMBIGUITY LACKS MERIT

A. The Government Must Show That Implementing Congress's Plain Command Regarding Paragraph (h)(3)'s Scope Would Necessarily Conflict With Another Clear Statutory Directive

The government does not argue that Congress left a "gap" for the BIA to fill or used a general term for the BIA to make more specific through adjudication. Congress specified what "an alien" needs to do to qualify for paragraph (h)(3) relief: he must have had his age "determined under paragraph [(h)](1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d) of this section." 8 U.S.C. §1153(h)(3). Thus, as even the vacated panel decision below recognized, any ruling that paragraph (h)(3)'s scope is narrower than all derivative beneficiaries meeting that criterion would have to be reached "[d]espite this plain language." Pet. App. 51a.

The government claims (Br. 17) the agency may limit paragraph (h)(3)'s scope based on "tension" it identifies "between the two halves of Section 1153(h)(3)" (*see id.* 33). Congress, however, does not ordinarily enact a single provision with "tension between [its] two halves" (Br. 17; *see id.* 33), which is why, "'if possible,'" courts will construe a statute to "'fit … all parts into an harmonious whole,'" *Brown & Williamson Tobacco*, 529 U.S. at 133 (quoting *FTC* v. *Mandel Bros.*, 359 U.S. 385, 389 (1959)). Even in cases involving distinct provisions enacted at different times, this Court has found such "tension" only where two *unambiguous* statutory commands conflict so squarely that applying the plain meaning of one would effectively repeal the other. *See National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 664-666 (2007); *see also id.* at 669-671 (a statute granting discretion must yield when it conflicts with the clear command of another statute). Thus, the government's asserted "tension" exists only if implementing Congress's clear directive regarding paragraph (h)(3)'s scope causes some unavoidable conflict with another equally clear statutory command, such that one of them "must give way." *Id.* at 666; *see also* Pet. App. 51a (panel finding statute ambiguous only after concluding that the statute's "plain language … 'leads to unreasonable or impracticable results'"). The government accepts that burden, promising to show that the judgment below "cannot be reconciled" (Br. 21 (argument heading)) with other aspects of the paragraph.

The government rests its claim of "tension" almost entirely on paragraph (h)(3)'s reference to "automatic conversion," from which it draws two propositions: (1) that F3 and F4 derivative beneficiaries cannot benefit from automatic conversion at all; and (2) that only de-

rivative beneficiaries who can benefit from automatic conversion may benefit from retention of priority date. For the government to drag Congress's plain statement of paragraph (h)(3)'s scope into ambiguity, *both* of those propositions must *necessarily* be correct.

As it happens, neither of the government's propositions is correct. There is nothing impractical about applying automatic conversion to F3 and F4 derivative beneficiaries. And even if it were otherwise, reading the statute as an "'harmonious whole,'" *Brown & Williamson*, 529 U.S. at 133, requires construing paragraph (h)(3) to provide for priority date retention separately from automatic conversion, which the statute readily permits. The government's search for ambiguity thus fails, and the statute should be applied over its full scope as written.

B. Automatic Conversion Can Be Applied To F3 And F4 Derivative Beneficiaries

1. The BIA identified no valid reason why F3 and F4 petitions cannot be automatically converted to another category

The BIA identified three and only three features that it believed were essential to "automatic conversion" under paragraph (h)(3). However, one of them—the notion that conversion happens, if at all, "at the moment the beneficiary age[s] out," *Matter of Wang*, 25 I. & N. Dec. 28, 35 (BIA 2009)—is inconsistent with the statutory language and the visa process. The BIA's error led it to conclude mistakenly that "no category exists" into which a non-F2A derivative beneficiary's petition could be converted. *Id.* Properly understood, however, automatic conversion occurs after the principal beneficiary becomes an LPR. At that time, F3 and F4 derivative beneficiaries plainly satisfy the BIA's

two remaining criteria—that the derivative beneficiary's visa petition can move "from one visa category to another … without the need to file a new visa petition" and that the derivative beneficiary qualifies for an appropriate visa category, *id.*

Nothing in the words "automatically be converted" or the CSPA's use of them requires that conversion occur only "at the moment" when a derivative beneficiary turns 21. Indeed, the statute provides the contrary: Paragraph (h)(3) does not operate, and so automatic conversion cannot occur, until after the derivative's age "*is determined under paragraph (1)* to be 21 years of age or older." 8 U.S.C. §1153(h)(3) (emphasis added). That "determin[ation]" does not happen on the derivative's twenty-first birthday; the statute provides that it *cannot* be calculated until after "the date on which an immigrant visa number became available for the alien's parent." *Id.* §1153(h)(1)(A). And the government's practice is to perform the paragraph (h)(1) determination only when the derivative beneficiary's visa or adjustment of status application is adjudicated. *See* State Department, 9 *Foreign Affairs Manual* ch. 42.42 n.12.4 (directing consular officials when adjudicating visa petitions, 22 C.F.R. §42.42, to calculate a derivative beneficiary's "CSPA age" as of the date the visa became available); USCIS, *Adjudicator's Field Manual* ch. 21.2(e) (2013) (same for adjustment of status).

Thus, the *earliest* that automatic conversion can occur is when a derivative beneficiary's visa or adjustment application is adjudicated and his age is recalculated under paragraph (h)(1). That often happens *after* the derivative beneficiary's parent becomes an LPR, and can always be delayed until then. Once that happens, the two other requirements the BIA identified are easily met by F3 and F4 derivative beneficiaries.

First, the derivative beneficiary has a qualifying F2B relationship as the adult son or daughter of an LPR, thus there is an "appropriate" visa category for his or her petition to move into. *See Wang*, 25 I. & N. Dec. at 35. *Second*, no "new visa petition" need be filed, *id.*: The derivative beneficiary's original F3 or F4 petition can simply be "regarded as having been approved" as an F2B petition, *see* 8 C.F.R. §204.2(i).

There are, moreover, several options for ensuring that automatic conversion does not happen before the principal-beneficiary parent becomes an LPR. The derivative may apply for adjustment of status or for a "following to join" visa, neither of which is *ever* adjudicated before the principal beneficiary becomes an LPR. *See supra* pp.6-7, 8-9; *Matter of Naulu*, 19 I. & N. Dec. 351, 353 (BIA 1986); *see also* 22 C.F.R. §40.1(a)(2). Or the derivative beneficiary can apply for an "[a]ccompanying" visa *after* the principal beneficiary has already immigrated. 22 C.F.R. §40.1(a)(1); Customs and Border Protection, *Inspector's Field Manual* ch. 14.3 (2006). Even if the derivative beneficiary's visa application is received before the principal beneficiary has immigrated, no interview need be scheduled until after the parent becomes an LPR. *See* 4 Gordon et al., *Immigration Law and Procedure* §55.08[2] (2013) ("[I]f the documentation is incomplete or the case otherwise unripe for decision, the case is not normally scheduled for interview."); *cf. Adjudicator's Field Manual* ch. 21.2(e)(4) (instructing officials to defer adjudication of adjustment application in certain circumstances); *see also supra* n.3. Or the official could reject the application and the derivative beneficiary could reapply after the principal beneficiary immigrates. *See* 22 C.F.R. §42.81(e); *Foreign Affairs Manual* ch. 42.81 n.4.3; *see also supra* n.3.

Accordingly, once automatic conversion is properly understood as happening *after* the principal beneficiary is an LPR, nothing prevents the agency from automatically converting the derivative beneficiary's F3 or F4 petition to an F2B petition under paragraph (h)(3).

This implementation is consistent with the ordinary meaning of the statutory language and longstanding regulatory practice. "Automatic" typically means "having the capability of starting, operating, moving, etc., independently." *Random House Dictionary of the English Language* 140 (2d ed. 1987). Benefits available automatically are thus provided without the beneficiary having to request them, as, for example, when a federal employee is automatically enrolled in a health care or retirement plan. *E.g.*, 5 U.S.C. §8432. "Automatic conversion" relieves the beneficiary of the need to arrange for a new petition, instead allowing the agency to "regard" the original F3 or F4 petition "as having been approved" in the F2B category. *See* 8 C.F.R. §204.2(i).[8]

The statute provides, moreover, for conversion "to the *appropriate* category." 8 U.S.C. §1153(h)(3) (emphasis added). As relevant here, "appropriate" means "suitable or fitting for a particular purpose." *Random House Dictionary* 103. In the family immigration system, whether a family-preference category is suitable or fitting depends on the alien's age and marital status

[8] The government expends substantial energy (Br. 21-26, 30-31) explaining why automatic conversion is inconsistent with the filing of a new petition. While automatic conversion should make a new petition *unnecessary*, that does not mean that the filing of a new petition makes automatic conversion *impossible*. Indeed, the government itself appears to *require* new petitions even from the F2A derivative beneficiaries *it concedes* can benefit from automatic conversion. *See infra* pp.42-43.

and whether he has a qualifying relationship. *See* 8 U.S.C. §1153(a)(1)-(4). Because aged-out derivative beneficiaries of F3 and F4 petitions can satisfy the F2B criteria as soon as their parent becomes an LPR, they have a new category "appropriate" to them at that point.

2. The government's newly minted "requirements" for automatic conversion are unsupported

The government fashions a pair of additional "requirements" for automatic conversion not mentioned in *Wang*. *First*, the government contends (Br. 24-27) that there can be no "gap" in the beneficiary's eligibility between his twenty-first birthday and when automatic conversion occurs. *Second*, the government argues (*id.* 22, 24-27) that conversion may not involve any change in the "fundamental" or "essential character" of the petition, by which the government appears to mean that conversion cannot require a new petitioner. Neither new "requirement" is supported by the statute's language or immigration practice.

a. The government invokes a "gap" in "eligibility for a family-preference category" (Br. 24) that exists for F3 and F4 derivative beneficiaries but not for F2A derivative beneficiaries during the period between the derivative's twenty-first birthday and his parent's immigration. It is true that an F2A derivative beneficiary could potentially qualify for the F2B category during this time. But that has no practical effect. After reaching age 21, *no* derivative beneficiary (even an F2A derivative) is eligible to immigrate on the only petition that has been approved (the F2A, F3, F4, or employment petition) because he is no longer a "child." Only after becoming subject to an F2B petition, whether

through automatic conversion or the LPR parent's filing of a new petition, is any aged-out derivative beneficiary eligible to obtain a visa on an approved petition. And automatic conversion occurs not when the derivative beneficiary turns 21, but rather after the derivative beneficiary's age is "determined" using paragraph (h)(1)'s formula. *See supra* pp.29-30. Thus, to the extent any eligibility "gap" could be relevant, it exists in every case, including F2A cases. The government does not view that gap as disqualifying in the case of F2A derivative beneficiaries; there is no reason to treat it as disqualifying for F3 and F4 derivative beneficiaries.

The government finds its new "requirement" that beneficiaries experience no "gap" in eligibility from the statute's use of the word "automatically," which the government urges (Br. 26) should mean that conversion happens "immediately." But even accepting that meaning, there are several ways to ensure that an F3 or F4 derivative's petition can be converted immediately by managing the timing of the "determin[ation]" of the alien's age under paragraph (h)(1). *See supra* p.30; 4 Gordon §55.08[2]; *see* 22 C.F.R. §42.81(e).

In any event, the government's equation of "automatically" and "immediately" is mistaken. Although something "automatic" may happen right away, it also may be triggered at a "predetermined point" in the future. *See Webster's Third New International Dictionary* 148 (3d ed. 2002) (defining "automatic" to mean "having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation"). An automatic sprinkler does not go off until it detects excess heat or smoke. Automatic payments for a mortgage are not made until the beginning of each month. An automatic enrollment benefit may not be available until after a thirty-day probationary

period. The same is true under "automatic conversion" regulations that preceded the CSPA: before an F2A petition's "[a]utomatic conversion" to an immediate relative petition after the petitioner's naturalization, 8 C.F.R. §204.2(i)(3), the petitioner must first submit proof of U.S. citizenship, State Department, *If You Were an LPR and Are Now a U.S. Citizen; Upgrading a Petition*. Thus, any need to wait until an "appropriate category" becomes available would not make the later conversion any less automatic; it simply means that, at that time, no new petition need be filed.[9]

b. The government conjures (Br. 22) a further "requirement" from the word "converted," which it interprets to preclude any "alteration in the essential character" of the "alien's petition." But treating an F3 or F4 derivative beneficiary's petition like an F2B petition is not a radical change. Pre- and post-conversion, the petition seeks the same benefit (permanent residency for the child) through the same means (family-sponsored immigration) involving two of the same people (parent and child). The only difference is that the parent and child take on new roles—the parent as petitioner, the child as principal beneficiary. Yet it preserves "the same basic relationship" relied upon by the former derivative prior to conversion. *Cf.* Br. 22.

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[9] The government does not argue that the use of "shall" in "shall automatically be converted" means that conversion must occur immediately, and properly so: as this Court has held *at the government's urging*, the use of "shall," even when paired with an express deadline, does not preclude later action. *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158-159 (2003); U.S. Reply Br. 4-10, *Barnhart*, Nos. 01-705 & 01-715 (July 22, 2002).

Moreover, the government itself defines "converted" as "to be transformed in some way." Br. 22. And "transform" clearly can encompass significant changes. *Webster's Third New International Dictionary* 2427 ("to change completely or essentially in composition or structure"). While we cannot "convert" water into stone or wood as a matter of science (Br. 22), we can "convert" wood into stone (petrifaction) and water into hydrogen and oxygen gas (electrolysis). *See McGraw-Hill Dictionary of Scientific and Technical Terms* 1481 (5th ed. 1994) ("petrifaction" involves "*converting* [organic materials] to a stony substance"); de Levie, *The Electrolysis of Water*, 476 J. Electroanalytical Chem. 92, 92 (1999); *see also* National Park Service, *History, Petrified Forest National Park* (upon discovering Arizona's Petrified Forest in 1853, Lt. Amiel Weeks Whipple wrote: "Quite a forest of petrified trees was discovered to-day … They are *converted* into beautiful specimens of variegated jasper." (emphasis altered)); *see also Corn Prods. Ref. Co.* v. *FTC*, 324 U.S. 726, 744 (1945) (equating "the conversion of dextrose into candy" with "treatment of materials to be transformed or reduced to a different state or thing"); *Campbell* v. *United States*, 107 U.S. 407, 411 (1883) (referring to linseeds "converted into cake"). Treating an F3 or F4 petition as approved in the F2B category is far less of a transformation than these "conversions."

The government objects (Br. 27) that converting to an F2B petition requires "'editing the original petition,'" but no actual editing (in the sense of crossing out or adding words) is required. Automatic conversion has always been *constructive*: When adjudicating an alien's visa or adjustment application, the relevant official simply "regard[s] [the original petition] as having been approved" in the new category. 8 C.F.R. §204.2(i).

Even if converting from the F3 or F4 category to the F2B category required actual editing, it would be comparable to what the government already does in other contexts. To convert an F2A derivative beneficiary's petition to an F2B petition (which the government agrees paragraph (h)(3) allows), the government must "cross out" information describing the former principal beneficiary under F2A (the LPR petitioner's spouse) and fill in equivalent information about the new principal beneficiary under F2B (the now-adult son or daughter). Similarly, "[a]utomatic conversion" of a spousal petition to a widow(er) petition upon the petitioner's death requires conversion to an entirely new form with a different petitioner. *See* 8 C.F.R. §204.2(i)(1)(iv) (spousal Form I-130 petition "must be regarded, upon the death of the petitioner, as having been approved as a Form I-360" widow(er) self-petition).[10]

The government's contention that "conversion" cannot involve a change in petitioner fails for similar reasons. Indeed, paragraph (h)(4)—which extends paragraph (h)(3)'s automatic conversion and priority date retention benefits to "derivatives of self-petitioners"—necessarily envisions conversions with a change in petitioner. For example, if a battered spouse includes her child as a derivative beneficiary on a self-petition, the petition converts to a self-petition for the child when he ages out. *See* 8 U.S.C. §1154(a)(1)(D)(i)(III); *see also* Mem. from Yates to Regional Directors, regarding Age-Out Protections Afforded Battered Children Pur-

[10] The government's dubious suggestion (Br. 27-28) that immigrating parents might not want all of their children to immigrate with them is no reason to construe the CSPA narrowly. As the government acknowledges (*id.* 28), if any such situation arises, the parent may simply withdraw the converted petition. *See* 8 C.F.R. §103.2(b)(6).

suant to The Child Status Protection Act and the Victims of Trafficking and Violence Protection Act, HQOPRD 70/6.1.1 (Aug. 17, 2004).[11] Similarly, if a U.S. citizen dies before a spousal petition is approved, converting the petition to a widow(er) petition requires substituting the surviving spouse as the petitioner. 8 C.F.R. §204.2(i)(1)(iv). That regulation, promulgated a few years after CSPA's enactment (*see* 71 Fed. Reg. 35,732, 35,749 (June 21, 2006)), strongly suggests that "automatic conversion" had no settled meaning requiring that the petitioner remain the same.

The government ignores these provisions, relying instead (Br. 28-31) on provisions where the petitioner does remain the same. But these usages show only that the petitioner is the same in those specific contexts; they do not show that automatic conversion *cannot work* with different petitioners where the provision so directs. *See Carcieri* v. *Salazar*, 555 U.S. 379, 391 (2009) ("[T]he susceptibility of [a] word … to alternative meanings 'does not render the word … whenever it is used, ambiguous,' particularly where 'all but one of

[11] Below, the government sought to avoid paragraph (h)(4) by arguing that the Battered Immigrant Women Protection Act of 2000 (BIWPA), which first provided age-out protections to derivatives of self-petitions, does not use the word "conversion." Appellee's C.A. Br. 43-44. But BIWPA plainly employs the same *mechanism* as 8 C.F.R. §204.2(i), the very title of which provides for "[a]utomatic conversion." *Compare* BIWPA, Pub. L. No. 106-386, §1503(d)(2), 114 Stat. 1464, 1522 ("Any derivative child who attains 21 years of age … *shall be considered* … a petitioner for preference status under … [the] applicable [visa category]" (emphasis added)) (codified at 8 U.S.C. §1154(a)(1)(D)(i)(III)), *with* 8 C.F.R. §204.2(i)(2) (2000) (an immediate relative petition "*shall be regarded* as having been approved for preference status under [1153(a)(1)] as of the beneficiary's twenty-first birthday" (emphasis added)).

the meanings is ordinarily eliminated by context.'" (quoting *Deal* v. *United States*, 508 U.S. 129, 131-132 (1993)).

Once automatic conversion is examined at the correct moment in time—when the visa or adjustment application is adjudicated and the derivative beneficiary's parent has become an LPR—all legitimate requirements of automatic conversion are satisfied. There is accordingly no "tension" between automatic conversion and Congress's directive that paragraph (h)(3) be applied to all derivative beneficiaries, and certainly no clear conflict that would require that directive to "give way." *National Ass'n of Home Builders*, 551 U.S. at 666.

C. Paragraph (h)(3) Allows Retention Of Priority Date Without Automatic Conversion

The second pillar of the government's proposed "tension" is its claim that only aliens who can enjoy "automatic conversion" can enjoy retention of priority date. That pillar does not bear any weight either. "Retention of priority date"—the remedy mentioned in paragraph (h)(3)'s heading—is available to all derivative beneficiaries whose recalculated age under paragraph (h)(1) is at least 21, regardless of whether the beneficiary's petition is automatically converted. For this reason, even if the government is right about automatic conversion (which it is not), Respondents' children are entitled to retain their original priority dates with respect to their more recently filed F2B petitions.[12]

[12] Because the BIA never considered whether retention of priority date is independent of automatic conversion, no deference

Paragraph (h)(3) contains only one eligibility criterion: "the age of [the] alien is determined under paragraph [(h)](1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)." Once that condition is satisfied, two separate benefits accrue: *First*, "the alien's petition shall automatically be converted to the appropriate category." 8 U.S.C. §1153(h)(3). *Second*, "the alien shall retain the original priority date issued upon receipt of the original petition." *Id.* In other words, the statute provides: "In the case of A, then B shall be done and C shall be done." This sentence structure shows that C is not dependent on B. (A ship's captain who instructs the crew "if the boat takes on water, then you shall operate the bilge pump and you shall distribute life jackets" is not directing that life jackets be withheld if the bilge pump is inoperable.)

Where the word "and" connects two clauses conferring distinct benefits, those clauses operate independently. In *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989), this Court considered Section 506(b) of the Bankruptcy Code, which provides: "'[T]here shall be allowed to the holder of such claim, [1] interest on such claim, and [2] any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.'" (First alteration in original.) But even though a creditor was not entitled to the second benefit—"'reasonable fees, costs, or charges provided for under the agreement'"—because the claim did not arise under an agreement, the creditor was entitled to the first benefit (interest) because, "[b]y the plain language of the statute, the two types of recovery are distinct." *Id.* at 242; *see also Chisom* v. *Roemer*,

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is owed on this question. *See Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (the conjunction "and" may mean "*either*" as in "the First Amendment—which reads 'Congress shall make no law … abridging … the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,' … [but] has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances").

The government cites *Crooks* v. *Harrelson*, 282 U.S. 55 (1930), but the statute at issue there had the following structure: If A and B and C and D, then E shall be done. *Id.* at 57-59. It is, of course, correct that multiple *conditions precedent* joined by "and" must all be satisfied to produce the consequence; that is the basis for *Crooks*' holding. *See id.* at 59 (emphasizing that the statute's "*conditions* [were] expressed conjunctively" (emphasis added)). But paragraph (h)(3)'s structure is entirely different: In the case of A, then B shall be done and C shall be done. A provision making B and C contingent on A does not make C contingent on A and B.

The fact that an alien's retention of his priority date can be a "distinct" benefit from automatic conversion of a petition is reinforced by three further textual features. *First*, Congress used the word "shall" twice, distributing its mandate separately to both benefits ("the alien's petition *shall* automatically be converted to the appropriate category and the alien *shall* retain the original priority date" (emphases added)). This syntax emphasizes that retention of priority date is separately mandated from automatic conversion. *See National Ass'n of Home Builders*, 551 U.S. at 661 (use of "shall" is "mandatory" and "generally indicates a command that admits of no discretion on the part of the

person instructed to carry out the directive" (internal quotation marks omitted)).

Second, the two clauses have different subjects. While "the alien's *petition*" is automatically converted, it is "*the alien*" who retains his priority date. 8 U.S.C. §1153(h)(3) (emphases added). The government ignores this statutory language, claiming without basis (Br. 36) that "[a] priority date is a feature of a petition"—an assertion not even supported by the provision the government cites, which simply states that the petition's filing date "will constitute the priority date." 8 C.F.R. §204.1(b). Even the government does not observe its own usage, referring in unguarded moments to priority dates as belonging to people: "*the principal beneficiary* receives a place in line," "beneficiaries … *whose* priority dates," "*principal beneficiary's* priority date," "*her* original priority date," "an *alien* … with a priority date." Br. 4, 5, 9, 41 (emphases added).[13]

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[13] Other examples abound. *See, e.g.*, 8 C.F.R. §204.2(a)(4) ("The child will be accorded … the same priority date as the principal alien. … Such retention of priority date will be accorded only to a son or daughter[.]"); 8 U.S.C. §1154(k)(3) ("[I]f an unmarried son or daughter … was assigned a priority date … he or she may maintain that priority date."); 22 C.F.R. §42.51(b) ("priority dates of visa applicants"); *id.* §42.53(a) ("[t]he priority date of a preference visa applicant"); *id.* §42.53(c) ("A spouse or child … shall be entitled to the priority date of the principal alien[.]"); 8 C.F.R. §204.2(i)(1)(i) ("[t]he beneficiary's priority date"); *id.* §214.15(g)(4)(i) (referring to an alien who "has a current priority date but does not have a pending immigrant visa abroad or application for adjustment of status"); *id.* §1245.9(j) ("[t]he applicant's priority date"); *see also Visa Bulletin for Nov. 2013* ("Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below." (emphasis omitted)).

Third, the priority date retained is the one "issued upon receipt of the original petition." 8 U.S.C. §1153(h)(3). The government reads "original petition" (Br. 26-27 n.7) to refer to a "single petition *prior to* its conversion … in its 'original' state." But as the Ninth Circuit explained, "original petition" actually "suggests the possibility of a new petition." Pet. App. 20a. Because, as all agree, automatic conversion obviates the filing of a new petition, the suggestion that retention of priority date may involve a *new* petition reinforces the conclusion that retention is distinct from automatic conversion.

The government never argues that retention of priority date *could not possibly* be a distinct benefit, and for good reason. Before CSPA, the only age-out protection available to any family-preference derivative beneficiary was retention of priority date *without* automatic conversion. 8 C.F.R §204.2(a)(4). Other provisions likewise decouple the two. *See, e.g.*, 8 C.F.R. §§204.2(h)(2), 204.5(e), 204.12(f)(1); USA PATRIOT Act, Pub. L. No. 107-56, §421(c), 115 Stat. 272, 357 (2001); *see also* Br. 36 n.12. Section 6 of CSPA itself added 8 U.S.C. §1154(k), which guarantees priority date retention but makes conversion optional.

Indeed, the government's own implementation of paragraph (h)(3) confirms that priority date retention can occur without automatic conversion. Responding to a question about paragraph (h)(3), USCIS has instructed the public:

> In regards to F2A preference cases, … when the child reaches the age of twenty-one prior to the issuance of a visa to the principal alien parent, *a separate petition will be required.* In such a case, the original priority date will be re-

> tained if the subsequent petition is filed by the same petitioner.

USCIS, *Question & Answer, USCIS National Stakeholder Meeting* 1 (May 27, 2008) (emphasis added). The government instructs its own officials similarly. *Adjudicator's Field Manual* ch. 21.2(c)(5) (requiring "a separate petition" for an aged-out "second preference beneficiary" to "retain the original priority date").[14] In other words, the government is essentially denying *everyone* the benefit of automatic conversion, requiring even F2A derivative beneficiaries to procure a "separate petition" in order to retain their priority date. Whether or not this is proper—it suggests that the government may be collecting additional filing fees from F2A derivative beneficiaries who, by its own argument, should not have to pay (Br. 45-46)—there is no reason why this decoupling of paragraph (h)(3)'s two benefits cannot be applied to F3 and F4 derivatives without the sky falling. The government's assertion that the "[f]irst" benefit of paragraph (h)(3) is to relieve F2A derivative beneficiaries of the need to file an "additional petition (and corresponding fee)" (*id.*) is strange, given that the structure, title, purpose, and history of the provision make clear that Congress sought to

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[14] This guidance predates CSPA's enactment and was apparently first meant to implement 8 C.F.R §204.2(a)(4). Since the CSPA was enacted, the government has repeatedly updated its manuals and provided guidance on paragraph (h)(1), but has never offered any new direction regarding paragraph (h)(3). *See, e.g.*, Mem. from Neufeld to Field Leadership, HQ DOMO 70/6.1 (2008); State Department, Cable, 03-State-144246 (May 2003); Mem. from Williams to Regional Directors et al., HQADN 70/6.1.1 (Sept. 20, 2002); State Department, Cable, 02-State-163054 (Sept. 8, 2002).

remedy far more than a filing fee. Indeed, Respondents would pay (and have already paid) the extra filing fee for an F2B petition in order to retain their children's priority dates and hasten their families' reunification, regardless of automatic conversion.[15]

The government contends (Br. 35) that automatic conversion without retention of priority date would leave a beneficiary's priority date "unclear." That is a red herring; Respondents have never suggested that someone might qualify for automatic conversion under paragraph (h)(3) but not priority date retention. Nor is there any reason to believe that any beneficiary would want the former without the latter: at best, automatic conversion saves a few hundred dollars, whereas retention of priority date avoids years of separation from loved ones. And even if automatic conversion must carry retention of priority date with it, that does not prove that retention of priority date cannot also travel alone.

Finally, the government argues (Br. 37) that it has "'*always*'" conditioned retention of priority date on there being no change in petitioner between the original and any successive petition. (Emphasis added.) That is simply false. Several regulations allow beneficiaries to retain their priority dates

[15] The government's considerable experience with aliens' retaining their priority dates for use with a newly filed petition casts doubt on its ominous prediction (Br. 36) that allowing retention here would create "considerable uncertainty" and "odd results." If allowing individuals to retain their priority dates without automatic conversion is so dangerous, one would have expected some evidence of this "oddity," at least in the Fifth Circuit after *Khalid* and nationwide between the BIA decisions in *Garcia* (2006) and *Wang* (2009).

even with a change in petitioner. *See, e.g.*, 8 C.F.R. §204.2(h)(2) (permitting an alien whose abusive parent or spouse petitioned on her behalf "to transfer the visa petition's priority date to [a later-submitted] self-petition"); *id.* §204.5(e) ("A petition approved on behalf of an alien under sections 203(b)(1), (2), or (3) of the Act accords the alien the priority date of the approved petition for *any subsequently filed petition* for any classification under sections 203(b)(1), (2), or (3) of the Act for which the alien may qualify." (emphasis added)); *id.* §204.12(f)(1) (providing that a "physician beneficiary" who finds a *new employer* or establishes her own practice must submit a new Form I-140 but "will retain the priority date from the initial Form I-140"); Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571, §9(b), 90 Stat. 2703, 2707 ("Any petition filed by, or in behalf of, [an alien formerly classified as a 'Western Hemisphere' immigrant] to accord him a preference status under section 203(a) shall, upon approval, be deemed to have been filed as of the priority date previously established by such alien.").

There is, accordingly, no reason why aged-out beneficiaries may not "retain," *i.e.*, "hold or continue to hold," what they already have—the priority date they were entitled to as derivative beneficiaries of the original petition. *See Board of Trs. of Leland Stanford Jr. Univ.* v. *Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2197 (2011) (the "common meaning of 'retain'" is simply "'to hold or continue to hold in possession or use'" (quoting *Webster's Third New International Dictionary* 1938)).

Importantly, to prove the "tension" with which the government seeks to taint paragraph (h)(3) (Br. 17), the government cannot simply assert that the statute *could* be read to condition priority date retention on automat-

ic conversion. In order to render ambiguous the statute's plain language regarding its scope, the government must show that priority date retention *cannot* exist without automatic conversion. Otherwise, the answer is simple: the agency must apply priority date retention in a way that comports with the breadth that Congress plainly gave to paragraph (h)(3)—namely by allowing all derivative beneficiaries to retain their priority dates, even if they cannot benefit from "automatic conversion" and must file new petitions. *See National Ass'n of Home Builders*, 551 U.S. at 664-666; *Carcieri*, 555 U.S. at 391. As shown above, there is no reason why the government cannot do just that here.

III. THE BIA'S INTERPRETATION IS UNREASONABLE

The government spends a remarkable ten pages on policy arguments, claiming the mantle of "family unity" (Br. 37-47) even as it separates Respondents and their children for years. The government's policy assertions are no reason to disregard the CSPA's plain language; if anything, they only confirm that the BIA's interpretation of paragraph (h)(3) is unreasonable and arbitrary and capricious and therefore not entitled to deference. *Chevron*, 467 U.S. at 843-844; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-44 (1983).[16]

[16] Whether analyzed under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), or the second step of *Chevron*, 467 U.S. at 843, the standard is the "same": whether the BIA's policy is "arbitrary or capricious in substance." *Judulang* v. *Holder*, 132 S. Ct. 476, 483 n.7 (2011) (internal quotation marks omitted)

A. The BIA's Stated Rationales Are Erroneous And Inadequate

The BIA's interpretation of paragraph (h)(3) grants relief to certain aliens who are closely related to two LPRs (the F2A sponsor and the principal F2A beneficiary) while excluding all family-based derivative beneficiaries who are closely related to at least one U.S. citizen and one LPR (the citizen sponsor and the LPR principal beneficiary). As this Court recently emphasized, the BIA may disfavor a particular class of aliens—in this case, children with a demonstrated relationship to a U.S. citizen—only if it grounds the decision in "the purposes and concerns of the immigration laws." *Judulang* v. *Holder*, 132 S. Ct. 476, 490 (2011). The BIA has failed to do that.

Ordinarily, the "purposes and concerns of the immigration laws" place the interests of U.S. citizen-sponsors ahead of the interests of LPR-sponsors. Only citizens may petition for parents, married children, and siblings. *See* 8 U.S.C. §§1151(b)(2)(A)(i), 1153(a)(1), (3)-(4). And U.S. citizens may petition for spouses, unmarried minor children, and parents without regard to direct numerical limits, allowing immigration without substantial delay. *Id.* §1151(b)(2)(A)(i). The BIA's decision to treat derivative beneficiaries of citizen-filed petitions *less* favorably than derivative beneficiaries of LPR-filed petitions turns the typical "purposes and concerns of the immigrations laws" upside down. Moreover, in many cases, including Melvin Cuellar de Osorio's, Respondents' children are closely related to *two* LPRs (the principal beneficiary and her spouse), as well as a U.S. citizen grandparent, aunt, or uncle.

The BIA could not have grounded its decision in the "purposes and concerns" of the CSPA, *Judulang*,

132 S. Ct. at 490, if it ignored Congress's intent in passing the law, which was to "facilitate[] and hasten[] the reuniting of legal immigrants' families," 148 Cong. Rec. H4989, H4991 (July 22, 2002) (Rep. Sensenbrenner); *see supra* p.24 & n.7. Congress's manifest intent was to allow *all* derivative beneficiaries to immigrate close in time to their families—not just the small subset of derivative beneficiaries that the agency favors. *See supra* p.24 & n.7.[17] That is consistent with the immigration law's broader values, which include promoting family unity, *see, e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 795 n.6 (1977) (recognizing immigration law's concern with "'preservation of the family unit'"), and inconsistent with the BIA's decision to give the majority of aged-out derivative beneficiaries no credit for their wait.

The BIA's primary justifications for its decision are simply erroneous. As the government acknowledges (Br. 50-51), the BIA asserted that its distinction is necessary to ensure "consisten[cy] with past practice in immigration statutes and regulations." But "the concept of 'retention' of priority dates" has *not*, contrary to the BIA's belief, "always been limited to" successive petitions filed by the same petitioner, *Wang*, 25 I. & N. Dec. at 35; *see supra* pp.44-45 (collecting examples).

As for automatic conversion, the BIA observed correctly that "the term 'conversion' has consistently been used to mean" that the beneficiary "falls within a

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[17] The government asserts that, had Congress wished to include *all* derivative beneficiaries, it could simply have frozen their ages as certain other provisions do. Br. 44. The government's argument is illogical. Congress's choice to provide a different form of relief—retention of priority date rather than age-freezing—says nothing about which derivative beneficiaries are eligible to receive it.

new classification without the need to file a new visa petition." 25 I. & N. Dec. at 35. But as discussed above, the BIA misread the statute to trigger automatic conversion "at the moment" a beneficiary ages out, which led the BIA mistakenly to conclude that "no category exists" into which a non-F2A derivative beneficiary's petition could be converted. *Id.* at 35, 36. Had the BIA instead heeded the statute's clear instruction that a petition is only converted after the "determin[ation] under paragraph [(h)](1)" that the alien's age is at least 21, it would have realized that the petitions of F3 and F4 derivatives *can* seamlessly "fall[] within a new classification"—the F2B category—"without the need to file a new visa petition." *See supra* pp.29-32. Consistency with past practice (as the BIA defined it) can thus be preserved without excluding *any* derivative beneficiaries.

Wang's second justification also is mistaken. Analyzing the CSPA's legislative history, the BIA concluded that Congress's *sole* purpose was "to alleviate the consequences of administrative delays." 25 I. & N. Dec. at 38. The BIA found "no indication … that Congress intended to create a mechanism to avoid the natural consequence of a child aging out of a visa category because of the length of the visa line." *Id.* Even the government does not defend that manifestly incorrect proposition. The "consequences of administrative delays" are addressed by paragraph (h)(1), but paragraph (h)(3) provides relief from the very backlog delays the BIA claimed were irrelevant. Indeed, the BIA's own interpretation of paragraph (h)(3) grants F2A derivative beneficiaries relief when they age out due to visa backlogs, so its explanation cannot justify the line it drew.

The BIA thought it necessary to exclude citizen-sponsored derivatives to avoid "displac[ing] other aliens who have already been in [the F2B] line for years before" them. 25 I. & N. Dec. at 38. That is likewise incoherent, as the BIA allows *some* people to move into the F2B line from another line (F2A). The BIA's bare desire to limit the number of people who move into the F2B line cannot, by itself, justify the BIA's particular substantive limitation. *Judulang*, 132 S. Ct. at 490. The BIA has failed to tie its policy judgment to some other "purpose[] and concern[] of the immigration laws." *Id.*

In the interest of preserving family unity, Congress made the policy decision to allow aged-out derivative beneficiaries to retain their priority dates and move into the F2B line with credit for the time already spent waiting. But the judgment in this case will not result in Respondents' children receiving visas before anyone whose petition was filed earlier than theirs; it only means that they will receive credit for their family's long wait, as Congress directed, rather than resetting the clock to zero, as the BIA would. The government cites an idiosyncratic example from a student note (Br. 42), but the example actually illustrates how aged-out beneficiaries only ever receive visas ahead of those whose petitions have been pending for less time. Pryor, Note, *"Aging Out" of Immigration: Analyzing Family Preference Visa Petitions Under the Child Status Protection Act*, 80 Fordham L. Rev. 2199, 2235 (2012) ("Alice's son," who has been the subject of a petition since 1994, receives a visa before "Rose's daugh-

ter," who has only been waiting since, at the earliest, 2000).[18]

The BIA (and the government's brief) also "exaggerates" the impact of moving beneficiaries between visa lines. *Judulang*, 132 S. Ct. at 490. The government speculates (Br. 17) that affirming the Ninth Circuit would allow "likely tens of thousands of people" to advance their priority dates and "would substantially increase the wait times" for visas (*id.* 18). Those claims are untethered to any facts, as are the government's threats of "large number[s]" (*id.* 41) of beneficiaries "substantially disrupt[ing]" and "destabliz[ing] the immigrant-visa system" (*id.* 38) and causing "significant unfairness" (*id.* 41) by "increas[ing] the wait times for thousands and thousands of intending immigrants" (*id.* 49). Indeed, the government admits (*id.* 38-39) that it has no idea how many aged-out beneficiaries would benefit from paragraph (h)(3) in a given year under the decision below. While many aged-out derivatives would be able to retain earlier priority dates that have been denied them, that impact is entirely caused by the agency's failure to implement Congress's clear instructions for over a decade. That is not a reason to continue denying benefits to a group clearly covered by the statutory language. Moreover, the government has presumably complied with the Fifth Circuit's precedent in

[18] The government also fashions two uncommon scenarios in an attempt to demonstrate the potential unfairness of the Ninth Circuit's holding. Br. 43 n.14 (suggesting that a stepchild should not get credit for the time her new parent waited in line and pointing out that siblings may be divided if one was already over 21 when the petition was filed). But the fact that *Congress* had to make difficult policy choices in crafting the statute does not justify the *BIA's* decision to draw a different, arbitrary line among derivative beneficiaries that Congress did *not* draw.

Khalid and made retention of priority date available to aged-out derivative beneficiaries in that circuit without any demonstrated hardship.

Even accepting the government's dubious assumption that thousands would enter the F2B line each year, the impact on individuals already in the F2B line would be far more limited than the government suggests. Approximately 26,250 aliens are admitted annually in the F2B category.[19] Each aged-out child who moves into that line therefore delays those with later priority dates by only approximately 2/100ths of a day.[20] Even if 5,000 aged-out derivatives moved into the F2B line at once, an individual in the F2B line would move back by under three months. This additional delay is of course unfortunate, but the contrast between the impact on those already in the F2B line and the far more significant impact on each of those 5,000 aged-out derivatives and their families is striking. Melvin Cuellar de Osorio would be saved approximately nine years of family separation, Ruth Uy approximately twenty-seven years. Congress was well within its rights to determine that the best choice under the circumstances was to save those people multiple years of anguish by allowing them to move into the F2B line and keep their priority dates.[21]

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[19] State Department, *Annual Report of Immigrant Visa Applications in the Family-Sponsored and Employment-Based Preferences Registered at the National Visa Center as of Nov. 1, 2012*, at 6.

[20] The delay is longer for oversubscribed countries, but it is still less than a day.

[21] The government can hardly fault the Ninth Circuit for "not attempt[ing] to assess the significance of [its] result" (Br. 13); the

Additionally, the "expectations" of aliens waiting in a visa line are far less "settled" than the government represents (Br. 44). Movement between preference lines is a regular feature of the immigration system, not some anomaly introduced by the judgment below. *See, e.g.*, 8 U.S.C. §1154(k); 8 C.F.R. §§204.2(i), 204.5(e). The membership of each preference line also fluctuates constantly. New derivative beneficiaries enter each line as principal beneficiaries get married and give birth or adopt. Other aliens leave the lines as petitioners die or lose LPR status and as principal beneficiaries divorce or become widowed. And each preference category influences the others: If some allotted F3 visas are unclaimed, they can be taken by F4 beneficiaries. *See* 8 U.S.C. §1153(a)(4). Cut-off dates thus regularly leap forward or retrogress. The State Department warns that visa availability dates "cannot be predicted for individual cases with any accuracy." State Department, *Family-based Immigrant Visas*.[22]

The line the BIA drew between F2A derivative beneficiaries and all others cannot be justified in "the purposes and concerns of the immigration laws,"

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government failed to provide that court (or this Court) with any data or facts from which to make such an assessment.

[22] *See, e.g.*, State Department, *Visa Bulletin for Sept. 2013* (Aug. 12, 2013) ("[A] sudden surge in demand could require the retrogression of a cut-off date at any time."); State Department, *Worldwide Cut-off Dates* (noting that, in 2002, "[i]t was necessary to retrogress the F1 cut-off date in an attempt to hold issuances within the annual numerical limit"). The State Department even facilitates changes to cut-off dates for policy reasons. *Visa Bulletin for Sept. 2013* ("F2A: This category was made 'Current' in an effort to generate new demand for the upcoming fiscal year.").

Judulang, 132 S. Ct. at 490; it is based on mistaken premises, faulty logic, and unsound analysis, and deserves no deference. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (conditioning deference on "the thoroughness, validity, and consistency of an agency's reasoning").

B. The Government Cannot Salvage *Wang* Through Post Hoc Policy Rationales First Offered In Court

The government's attempt to salvage *Wang* through a parade of policy arguments never adopted by the BIA fares no better. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained."); *see also Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

Moreover, government's post hoc litigation arguments suffer from a fundamental flaw: they equally disfavor granting paragraph (h)(3) relief to F2A derivatives, whom the government concedes *can* receive such relief. While it is true that "former derivative beneficiaries might continue to surface" because "[a] person claiming derivative-beneficiary status as a 'child' need not have actually been named" in the original petition (Br. 28 n.8, 41, 43), that is also true of children of principal beneficiaries in the F2A category. F2A derivative beneficiaries who are allowed to retain their original priority dates will also "almost always vault ahead of other aliens already waiting in the F2B line." *Id.* 40. The government bemoans "giving former derivative beneficiaries 'credit for the years' in which they qualified as a 'child'—a period during which they and their parents were not separated from each other" (*id.* 43 (ci-

tation omitted))—yet it happily gives F2A derivative beneficiaries that very credit. The government asserts that Section 1153(d) is designed "to ensure that at the moment the parent comes to this country" she "need not leave behind a child under the age of 21, who cannot be expected to live independently" (*id.* 42-43), but aged-out F2A derivative beneficiaries are no different from aged-out F3 and F4 beneficiaries in this regard. Summarizing its complaints, the government protests (*id.* 44) that the Ninth Circuit's interpretation would supposedly "reshuffle the statutorily prescribed waiting lines, disrupt the settled expectations of a large number of intending immigrants …, introduce unwarranted tensions among the categories of aliens, … and undermine the perception of fairness." Yet *all* of these consequences—to the extent they arise at all—arise when F2A beneficiaries age out and retain their priority dates in the F2B line, which the government concedes is permissible. The government's policy arguments accordingly do not support discriminating between F2A derivative beneficiaries and Respondents' children.

The reality appears to be that the government, for its own unfathomable reasons, disapproves of Congress's decision to allow *any* aged-out derivative beneficiaries to retain their priority dates when they move into the F2B category. Although it cannot argue that paragraph (h)(3) provides no relief to anyone, it argues the next worst thing: that it should be limited to as few derivative beneficiaries as possible.

The Court should not allow the government to circumvent the statute and certainly not in such an arbitrary and unjustifiable way. Congress made a clear choice to allow *all* derivative beneficiaries to retain their priority date after aging out. The government

should implement the statute as written, whether or not it agrees with it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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