No. 10-60373

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOHAMMAD ABUBAKAR KHALID,

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

PETITION FOR PANEL REHEARING

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Mohammed Abubakar Khalid, Petitioner
2. Lawrence E. Rushton, counsel for Petitioner
3. Eric. H, Holder, Attorney General, Respondent
4. Patrick J. Glen, counsel for Respondent

/s/ Patrick J. Glen
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I. INTRODUCTION

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Respondent respectfully petitions for panel hearing in *Khalid v. Holder*, 655 F.3d 363 (5th Cir. 2011).[1] In *Khalid*, the panel held that Petitioner was entitled to retain the visa priority date he had been assigned as a derivative beneficiary of the visa petition filed on his mother's behalf, despite the fact that he aged out of classification as a derivative beneficiary child prior to that petition being granted. In reaching this determination, and on account of the failure of the government to timely raise its affirmative defense of res judicata, the panel did not take into account the contrary holding in *Costelo v. Chertoff*, 2009 WL 4030516 (C.D. Cal. 2009), affirmed on appeal by the Ninth Circuit in *Osorio v. Mayorkas*, 656 F.3d 954 (9th Cir. 2011). The *Costelo* litigation was a mandatory nation-wide class action lawsuit concerning the proper interpretation of 8 U.S.C. § 1153(h)(3), the exact issue presented to the panel in *Khalid*. As such, the determination of the proper interpretation of the statute rendered by the courts in the *Costelo* litigation is entitled to preclusive effect in the instant case, consistent with principles of res judicata. Accordingly, notwithstanding the government's failure, rehearing is

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[1] A copy of the court's decision is not attached to the instant petition, but is included with the petition for rehearing en banc that Respondent is filing concurrently with this petition for panel rehearing. *See* Fifth Cir. R. 40.1.

warranted so that the court may apply the decision in the *Costelo* / *Osorio* litigation to the instant case and deny the petition for review.

II. BACKGROUND AND STATEMENT OF RELEVANT FACTS

Petitioner is a native and citizen of Pakistan, who was admitted to the United States on June 27, 1996, as a nonimmigrant visitor. Subsequently, Petitioner was granted nonimmigrant status as the child of a "Treaty Investor," with authorization to remain in the United States through August 30, 2005, his twenty-first birthday. Petitioner did not depart the United States consistent with the terms of his nonimmigrant admission.

In January 1996, prior to his initial admission to the United States, Petitioner's United States citizen aunt filed a fourth-preference visa petition on behalf of her sister, Petitioner's mother. This petition was approved by USCIS and given a priority date of January 12, 1996, a date that did not become current until February 2007. Petitioner's mother subsequently adjusted her status to that of a lawful permanent resident. Petitioner also filed an application for adjustment of status, claiming that he should be classified as a derivative beneficiary on his mother's petition under 8 U.S.C. § 1153(d). USCIS denied this application, finding that Petitioner was over twenty-one and thus not a child when the priority date became current, and that he was not eligible for benefits under the Child

Status Protection Act.

Following her own adjustment of status on September 6, 2007, Petitioner's mother filed a visa petition on his behalf on November 23, 2007, under the second-preference category for the unmarried sons and daughters of lawful permanent residents. This petition was approved on January 25, 2008, and assigned a priority date of November 23, 2007.

On October 18, 2007, Petitioner was served with a Notice to Appear, charging him with being subject to removal under 8 U.S.C. § 1227(a)(1)(B), as a nonimmigrant who overstayed his period of authorized admission. Petitioner conceded the charge of removal, but argued that he was eligible to adjust his status. He contended that, under 8 U.S.C. § 1153(h)(3), he was entitled to retain the January 1996 priority date he had been assigned as a derivative beneficiary on the visa petition filed by his aunt in conjunction with the second-preference petition filed on his behalf by his mother in 2007. Because the 1996 visa priority date would be deemed current in connection with the approved second-preference petition, he argued that a visa was immediately available and thus he was eligible to adjust his status.

The immigration judge rejected this argument in an oral decision issued on September 17, 2009. In this decision, the immigration judge held that the case was

governed by the Board's precedent decision in *Matter of Wang*, 25 I. & N. Dec. 28 (BIA 2009), where the BIA held that priority-date retention was only available under section 1153(h)(3) in circumstances where the initially filed visa petition automatically converted to a qualifying category when the child aged out. Applying this holding to Petitioner's case, the immigration judge determined that the priority date from the petition filed by his aunt on his mother's behalf could not be retained in connection with the petition filed by his mother on his own behalf, because they were not filed by the same petitioner. Thus, the immigration judge denied Petitioner's application for adjustment of status on the ground that no visa was immediately available to him.

The Board subsequently dismissed Petitioner's administrative appeal on April 15, 2010. It held that the immigration judge correctly determined that *Matter of Wang* foreclosed Petitioner's argument that he could retain the priority date from the visa petition filed on his mother's behalf. Moreover, the BIA found no merit to any of Petitioner's contentions that the holding of *Matter of Wang* should be revisited or reconsidered. Accordingly, as Petitioner did not have a visa immediately available to him, the immigration judge properly denied the application for adjustment of status.

A petition for review of the Board's decision was timely filed with this

court on May 12, 2010. The court granted the petition for review on September 8, 2011, holding "that the plain language of the [CSPA] is unambiguous and that the BIA's interpretation of the statute [] contravenes the plain language[.]" *Khalid*, 655 F.3d at 365. For review purposes, the court of appeals deemed the relevant inquiry as whether there is any ambiguity regarding the petitions covered by section 203(h)(3) of the INA, 8 U.S.C. § 1153(h)(3). It answered that question in the negative. For purposes of section 203(h), section 203(h)(2) contains a list of the relevant petitions, those filed under sections 203(a)(2)(A) and (d). The court held that although section 203(h)(3) does not reference subsection (h)(2) directly, it clearly and unambiguously applies to all petitions in that section: "reading the subsection as a whole confirms that Congress intended (h)(3) to apply to any alien who 'aged out' under the formula in (h)(1) with respect to the universe of petitions described in (h)(2)." *Id*. at 371. The court held that the relevant inquiry could be resolved at *Chevron* step one, and thus afforded no deference to the contrary interpretation of the Board.

In holding that the entire universe of petitions described by subsection (h)(2) was entitled to the benefits of subsection (h)(3), the court also discounted the Board's reliance on legislative history and on the traditional definitions of "conversion" and "retention." The court held that resort to legislative history was

unnecessary in light of the plain language of the statute, and ambiguous in any event. *Khalid*, 655 F.3d at 371-72. The court also held that the Board's observations regarding the traditional definitions were unavailing in light of the plain language of the statute. *Id.* at 372. Under the INA and regulations, "automatic conversion" refers to the change "from one preference classification to another preference classification upon the occurrence of certain events." *Matter of Wang*, 25 I. & N. Dec. at 34. "Retention" of a priority date refers to a beneficiary's ability to retain the priority date from an earlier visa petition in conjunction with a later filed petition. *Id.* at 34-35. Regarding automatic conversion, the court held that the relevant conversion was from the fourth-preference category Petitioner enjoyed as a derivative beneficiary, to the second-preference visa category of which he was a primary beneficiary pursuant to the petition filed by his mother. *Khalid*, 655 F.3d at 372. The court also noted that Congress can mandate the retention of priority dates even without an identity of petitioner, and that it seemed to have done just that in the context of the CSPA. *Id.* at 372-73. These points aside, however, the court again noted that its task was solely to ascertain whether Congress had clearly spoken and, if so, to apply that clear language to the facts of the case. *Id.* at 373. The court thus held that the benefits of section 203(h)(3) unambiguously extend to all petitions contemplated

by section 203(h)(2), including Petitioner's. *Id.*

III. DISCUSSION

This court should grant rehearing and apply the holding of *Costelo v. Chertoff* to this case, as that holding is entitled to preclusive effect in the instant litigation. The petition should then be denied, as Petitioner is not entitled to retention of his priority date under the court's holding in the class action.

A. This Court's Interpretation of the INA is Precluded by the Contrary Final Merits Decision on the Identical Issue in the Mandatory Nation-Wide Class Action in *Costelo v. Chertoff*

The issue addressed by this court in *Khalid* has already been resolved via a mandatory nation-wide class action lawsuit, and thus Petitioner's claim should be deemed precluded on application of res judicata. In *Costelo v. Chertoff*, the District Court for the Central District of California, certified the following class pursuant to Federal Rule of Civil Procedure 23(b)(2): "Aliens who became lawful permanent residents as primary beneficiaries of third- and fourth-preference visa petitions listing their children as derivative beneficiaries, and who subsequently filed second-preference petitions on behalf of their aged-out unmarried sons and daughters for whom [DHS has] not granted automatic conversion or the retention of priority dates pursuant to § 203(h)(3)." 258 F.R.D. 600, 610 (C.D. Cal. 2009). This class action is mandatory, as unnamed class members are not permitted to

opt-out of inclusion within the named class. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011).

On consideration of the merits of the issue in *Costelo*, the district court deferred to the reasonable interpretation of 8 U.S.C. § 1153(h)(3) provided by the Board in *Matter of Wang*, that derivative beneficiaries of third- and fourth-preference visa petitions could not convert their petitions and retain the priority dates in conjunction with newly filed second-preference category petitions. *Costelo*, 2009 WL 4030516 at **2-3 (C.D. Cal. 2009) (citing *Zhang v. Napolitano*, 663 F.Supp.2d 913 (C.D. Cal. 2009)). This decision, contrary to that reached by this court in *Khalid*, was affirmed on appeal to the Ninth Circuit in *Osorio v. Mayorkas*. *See Osorio*, 656 F.3d 954 (9th Cir. 2011).

In *Osorio*, the Ninth Circuit, like this court, held that the language of section 203(h)(3) references the petitions described in section 203(h)(2). *Osorio*, 656 F.3d at 961. The Ninth Circuit nevertheless discerned ambiguity in section 203(h)(3)'s language, because not all the petitions referenced in section 203(h)(2) can be automatically converted to an appropriate category, as the term "conversion" is understood under the INA. *Id.* at 961-63. Moreover, the court held that the statute was not unambiguous regarding whether a priority date can be retained in the absence of conversion. *Id.* at 963. The court accordingly

proceeded to the second step of the *Chevron* framework and held that the Board's interpretation of the statute was reasonable, permissible, and entitled to deference on review. *Id.* at 963-65. Under that interpretation, the derivative beneficiaries of third- and fourth-preference category visas will be ineligible for relief under 203(h)(3), as there is no available category to which to automatically convert their existing petitions. *Id.* at 965-66.

This decision is entitled to preclusive effect in the instant case. Res judicata applies to bar relitigation of decided issues when: "1) the parties are identical or in privity; 2) the judgment in the prior action was rendered by a court of competent jurisdiction; 3) the prior action was concluded to a final judgment on the merits; and 4) the same claim or cause of action was involved in both actions." *In re: Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999). The U.S. District Court for the Central District of California is unquestionably a court of competent jurisdiction, and its decision constitutes a final judgment on the merits of the claim raised by the class action litigants. Likewise, the same claim that was raised in *Costelo* is at issue in this case: whether derivative beneficiaries of third- or fourth-preference visa petitions may retain their priority date after they age out of derivative status when a second-preference visa petition is subsequently filed on their behalf. *Compare Costelo*, 2009 WL 4030516 at *1 *with Khalid*, 655 F.3d at

365-66.

The only remaining question is the identity of parties or their privies. The named respondent in *Khalid* was Attorney General Holder, who was not party to the *Costelo* litigation. The named defendants in the *Costelo* litigation were the Departments of Homeland Security and State, and USCIS. Nonetheless, as the Supreme Court has held, "[t]here is privity between officers of the same government in that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940). Thus, there is privity between the respondents / defendants as between *Khalid* and *Costelo*.

Likewise, there is privity between Khalid and his mother, an unnamed class member in the *Costelo* litigation. Khalid's mother falls within the certified class, *compare Khalid*, 655 F.3d at 365-66 (facts of the case) *with Costelo*, 258 F.R.D. at 610 (describing certified class); *Costelo*, 2009 WL 4030516 at *1 (same), and would be unable to raise any collateral challenge to the *Costelo* litigation in her own right. *See*, *e.g.*, *Shutts v. Champion Int'l Corp.*, 35 F.3d 1056, 1059 (6th Cir. 1994). Khalid is in privity with his mother because his interests, as the beneficiary of the visa petition, are subordinate to and contingent on his mother's interests as

the visa petitioner. *Wright v. INS*, 379 F.2d 275, 276 (6th Cir. 1967) ("An alien does not obtain a vested right upon approval of a visa petition."). The relationship between petitioners, beneficiaries, and petitions is defined by statute and regulation. *See generally* 8 U.S.C. § 1154; 8 C.F.R. § 103.3(a)(1)(iii)(B). These provisions, together with DHS and State Department provisions pertaining to adjustment of status and consular processing of immigrant visas, show that petitioners control the petitioning process and beneficiaries control the "separate and distinct" adjustment of status process. *See* 8 U.S.C. § 1202(a); 8 C.F.R. §§ 245.1(a), (g); 22 C.F.R. §§ 42.41, 42.61, 42.62, 42.63, 42.65, 42.81; *see also Ogbolumani v. USCIS*, 523 F. Supp. 2d 864, 870 (N.D. Ill. 2007) (describing in detail the difference in rights of the petitioner and the beneficiary vis-à-vis the petition). The "rights" created by statute and regulation regarding the petition are vested in the petitioner.

By analogy, Khalid's subordinate and inchoate interest in the I-130 petition renders his relationship to his mother similar to those of a successor-in-interest to an insurance policy, estate, or contract. *Cf. Saylor v. United States*, 315 F.3d 664, 668-69 (6th Cir. 2003) ("Even if the descendants [] are not directly successors in interest to the parties actually present at the 1990 hearing, their interests were adequately represented. Arvil's heirs' interest in the land is based on precisely the

same claim rejected on the merits by the district court in the prior action."); *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) ("a judgment that is binding on a guardian or trustee may also bind the ward or the *beneficiaries* of the trust"). Khalid has the same interest in litigating the matter as his mother: both want him to be able to obtain lawful permanent resident status at the earliest date.

As there is privity between the parties, and as the other requirements of res judicata are met in this case, Khalid's claim was precluded by the prior, contrary holding in the *Costelo* litigation. Such was the result in the only two district court cases to date where cases have been dismissed in like circumstances, *i.e.*, where visa beneficiaries sought to proceed apart from the visa petitioners who were themselves bound by *Costelo*. *See Yan Won Liao v. Holder*, 691 F.Supp.2d 344 (E.D.N.Y. 2010); *Patel v. USCIS*, 3:08-cv-02235-DAK (N.D. Ohio 2010); *cf. Obiri v. Holder*, 2011 WL 1157471 at *9 (S.D. Tex. 2011). Thus, rehearing is warranted so that this court may apply res judicata to the issue raised and thereby deny the petition for review.

B. The Court Should Consider the Res Judicata Argument Notwithstanding the Government's Waiver

The government did not argue the preclusive effect of the *Costelo* litigation before the panel. Usually, issues not raised and argued at the panel stage are

deemed waived for purposes of petitions for rehearing. *See Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990). Although the government technically waived its argument of preclusion, waiver should not be applied to foreclose consideration of the preclusive effect of the *Costelo* litigation in light of the important policy and judicial goals meant to be fostered by the doctrine of res judicata.

The Supreme Court has noted that the doctrine of res judicata does not exist solely to protect parties from the multiple defense of certain actions, "but is also based on the avoidance of unnecessary judicial waste." *Arizona*, 530 U.S. at 412 (citation omitted). As the Third Circuit has reasoned, the courts of appeals have "an interest in the consistent application, where appropriate, of preclusion doctrines. Out of concern for judicial economy and respect for the conclusions reached by other courts considering the same issues, courts have traditionally attached additional importance to the application of res judicata principles." *United States v. 5 Unlabeled Boxes*, 572 F.3d 169, 175 (3d Cir. 2009) (citation and internal quotation marks omitted). In that case, the Third Circuit declined to apply waiver when the res judicata argument was not raised until just prior to oral argument. *Id.* Succinctly expressing its rejection of the waiver argument, the court held that "the same dispute, between the same parties . . . is now before this court, and there is no reason to permit relitigation of issues already resolved." *Id.*

at 176. "Strong considerations of comity" also led the First Circuit to apply res judicata, despite the contention that it had been waived by failure to raise it earlier in the proceedings. *See Berrios-Romero v. Estado Libre Asociado de Puerto Rico*, 641 F.3d 24, 27-28 (1st Cir. 2011).

The need to preserve judicial uniformity constitutes an extraordinary circumstance that would argue against applying the doctrine of waiver to the government's preclusion argument, even if this argument was technically waived. *See French v. Allstate Indem. Co.*, 637 F.3d 571, 582-83 (5th Cir. 2011) (a waived argument may be considered if a party demonstrates extraordinary circumstances) (citation omitted). Accordingly, in the circumstances of this case, the panel should address this argument on rehearing, notwithstanding the fact that it was not argued to the panel at the briefing stage.

IV. CONCLUSION

For the foregoing reasons, this Court should grant the petition for panel rehearing and deny the petition for review.

Respectfully submitted,

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Dated: November 14, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 14, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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