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IN THE SUPREME COURT OF THE UNITED STATES

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ALEJANDRO MAYORKAS, DIRECTOR, :
UNITED STATES CITIZENSHIP AND :
IMMIGRATION SERVICES, ET AL., : No. 12-930
Petitioners :

v. :

ROSALINA CUELLAR DE OSORIO, ET AL.:

- - - - - x

Washington, D.C.

Tuesday, December 10, 2013

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:41 a.m.

APPEARANCES:

ELAINE J. GOLDENBERG, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; on
behalf of Petitioners.

MARK C. FLEMING, ESQ., Boston, Massachusetts; on
behalf of Respondents.

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P R O C E E D I N G S

(11:41 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument now in Case 12-930, Mayorkas v. Cuellar de Osorio.

ORAL ARGUMENT OF ELAINE J. GOLDENBERG

ON BEHALF OF THE PETITIONERS

MS. GOLDENBERG: Mr. Chief Justice, and may it please the Court:

The Board of Immigration Appeals reasonably interpreted Section 1153(h)(3) when it ruled that creation of a new petition by a new petitioner did not qualify as automatic conversion of an existing petition to an appropriate family-sponsored category. That interpretation is supported by the text and by the structure of the statutory scheme. Indeed, it avoids destabilizing that scheme by displacing waiting aliens who have long had qualifying relationships with lawful permanent residence, and putting ahead of them in line a large number of adults, aged-out former derivative beneficiaries, who have only just attained a relationship with someone who can sponsor a family member.

JUSTICE GINSBURG: But isn't there -- isn't the effect on the no longer child much more severe? I mean, if everybody has to get bumped down a little way,

1 it'll make a difference of months until they qualify for
2 a hearing.

3 MS. GOLDENBERG: Your Honor, I don't accept
4 the proposition that it would only make a difference of
5 months, although I know Respondents have argued that.
6 It depends how many people --

7 JUSTICE GINSBURG: Well, it's not going to
8 be 27 years.

9 MS. GOLDENBERG: I'm sorry?

10 JUSTICE GINSBURG: It's not going to be 20
11 years.

12 MS. GOLDENBERG: No, Your Honor. It won't
13 be 20 years, but it could be years, and these people in
14 the F2B line have already been waiting for years to get
15 up to the front of that line.

16 JUSTICE GINSBURG: What about all the time
17 this one child has been waiting? It gets no credit for
18 that?

19 MS. GOLDENBERG: I think it's mistaken to
20 think of a derivative beneficiary as waiting in line and
21 being entitled to credit for waiting in line, for a
22 couple of different reasons. First of all, the
23 derivative's rights are, as the name suggests,
24 completely derivative of the principal beneficiary's
25 rights. If the principal beneficiary never becomes a

1 lawful permanent resident, never crosses the border into
2 this country, then the derivative gets nothing for the
3 time that the principal beneficiary spent waiting in
4 line.

5 In addition, there are derivative
6 beneficiaries who, under any understanding of what it
7 means to wait in line, can't be conceived of as having
8 waited -- excuse me -- for the time that the principal
9 beneficiary has waited. And let me give you an example
10 of that.

11 In the (f)(4) line, someone could be waiting
12 in the (f)(4) line as a principal beneficiary for, say,
13 15 years, and right as they're getting up to the front
14 of that line --

15 JUSTICE SCALIA: What's that for? What's
16 that for?

17 MS. GOLDENBERG: I'm sorry.

18 JUSTICE SCALIA: For those of us who don't
19 deal with this as much as you do.

20 MS. GOLDENBERG: I apologize, Your Honor.
21 (F)(4) is siblings of U.S. citizens.

22 JUSTICE SCALIA: Okay.

23 MS. GOLDENBERG: So they could be waiting in
24 the (f)(4) line for 15 years, let's say, as a principal
25 beneficiary; and then just as they get -- they're

1 getting up to the front of that line and their priority
2 date is going to become current, they get married to
3 somebody; and the person they get married to has a
4 17-year-old child at that point in time. That
5 stepchild, that 17-year-old child, under the definition
6 of child in the statute, will count as the principal
7 beneficiary's child. And if, say, a year later the
8 principal beneficiary's priority date becomes current
9 and that principal beneficiary is entitled to immigrate
10 to the United States and become a lawful permanent
11 resident, they're going to be able to bring that
12 17-year-old or at that point 18-year-old stepchild along
13 with them as a derivative beneficiary.

14 That stepchild did not wait in the line for
15 the first 15 years that the principal beneficiary was
16 waiting. And so that example, I think, shows why, when
17 you look at a derivative beneficiary, you want to look
18 at the end of the process; a snapshot in time of when
19 the principal beneficiary is coming to this country.
20 And what the statute says is, principal beneficiary, if
21 at the moment you're coming, do you have a child who
22 would be left behind in another country if you were to
23 come without them, if so, bring them along. But it
24 doesn't make sense to look at a derivative
25 beneficiary --

1 JUSTICE KENNEDY: So you interpret automatic
2 to include immediate.

3 MS. GOLDENBERG: Well, I think that if -- if
4 automatically converted, in the context of this statute,
5 if that's triggered by a particular event, then it has
6 to happen as a result of that event, yes.

7 JUSTICE ALITO: But your reading of this
8 statute gives (h)(3) a very, very narrow scope; isn't
9 that correct? And I just want to see if I understand
10 exactly how narrow it is. It would apply -- first of
11 all, does it apply to any employment-based or
12 diversity-based petitions?

13 MS. GOLDENBERG: No, Your Honor, it does
14 not.

15 JUSTICE ALITO: All right. It applies to an
16 F2A petition filed by a legal permanent resident on
17 behalf of that person's spouse; right? And -- and if
18 that -- if they have a minor child, then the minor child
19 would be a derivative.

20 MS. GOLDENBERG: Right.

21 JUSTICE ALITO: Benefit sharing.

22 MS. GOLDENBERG: Yes. It also would apply
23 to a situation where an F2A petition is filed for a
24 child as the principal beneficiary, and the child ages
25 out of that status. But I'd also like to say that it

1 doesn't actually apply to all aged-out F2A derivative
2 beneficiaries, so it's, perhaps, even slightly narrower
3 than Your Honor has described. It applies to situations
4 where they can be automatic conversion of the existing
5 petition and movement into a new appropriate category
6 without a change in the petitioner. And so for some of
7 the reasons that I discussed before regarding
8 stepchildren, it actually will be the case that some
9 aged-out F2A derivative beneficiaries --

10 JUSTICE BREYER: Can you give me an idea of
11 how -- just to follow up on Justice Alito. Can you -- I
12 don't know if you asked the IRS -- the INS this
13 question; you may; something like it. Let's look at all
14 of the derivative beneficiaries in the (f)s, (f)(1),
15 (2)(A), (2)(B), (f)(3), (f)(4). And for the most part,
16 they're grandchildren, they would be, or children,
17 sometimes nephews and nieces. And now think of the set
18 of all those people who age out. Okay? They started
19 out as children, but it's 15 years later -- they're now
20 aged out.

21 Now think of that set. It's -- call it
22 a certain size. What percent of that set do you think
23 are accounted for by the F2A people, who are the only
24 ones on your interpretation that 3 would apply to?

25 MS. GOLDENBERG: I don't know what

1 percentage.

2 JUSTICE BREYER: Any idea, any rough idea?
3 Because if you just look at it, one's natural instinct
4 is just what Justice Alito said. This is a minuscule
5 component of a set. It's much bigger, and therefore,
6 it's just unlikely that Congress meant (3) to apply to a
7 -- to a -- to a little molecule when there's the whole
8 ocean.

9 Now, that -- that's the kind of argument
10 you're up against, I think, so I wanted to ask you that
11 empirical question. If you can give me any idea of the
12 empirical.

13 MS. GOLDENBERG: Yes, Your Honor. Well,
14 before I get to the question of the numbers and I can
15 give you some numbers, although not perfect numbers,
16 because of how records are kept in this area. I'd just
17 like to say that keep in mind that what Congress was
18 reasonably interpreted to be doing here is picking up on
19 an existing regulation that was targeted specifically at
20 this very group that we're talking about.

21 JUSTICE SOTOMAYOR: I'm going to let you
22 answer his question, but yes, they had a regulation so
23 why didn't they copy the regulation?

24 MS. GOLDENBERG: Well --

25 JUSTICE SOTOMAYOR: It would have been much,

1 much simpler to say this is limited to F2A beneficiaries
2 than to write it the way they did and say this is to
3 everybody who ages out.

4 MS. GOLDENBERG: There are two reasons I
5 think why they didn't copy the --

6 JUSTICE SOTOMAYOR: Answer him, and then --

7 MS. GOLDENBERG: Okay. With respect to the
8 numbers on our -- in our reply brief on page 18 in the
9 footnote, we've given the best numbers that we were able
10 to come up with, and they are not complete numbers,
11 about people who are aging out every year for as long as
12 the State Department's been keeping records about this,
13 which is not all that long. And you can see that
14 there's a series of parentheticals there with respect to
15 each year.

16 The first number in the parenthetical
17 represents age-out derivatives -- derivatives in the F2A
18 category; and the second number represents aged-out
19 derivatives in all family preference categories,
20 including F2A. And the numbers for these F2A age-outs
21 are not tiny; there are thousands of people a year. In
22 some years, they are up in the 20 thousands, and so it
23 is not necessarily a minuscule --

24 JUSTICE BREYER: Did you ask -- anything
25 that would give me -- that's the total global picture.

1 That's the 2,000, 3,000, sometimes 10,000 aging out.
2 All right. But -- but the real relevant thing is if we
3 can get some idea, which seems in the paper, that your
4 interpretation applies to -- only to a subset of those
5 people. And just from reading it, that it's qualitative
6 reading it, it sounds like a tiny subset of those
7 people. Now, we can argue about whether that's for you
8 or against you. I think it's against you, but
9 nonetheless --

10 JUSTICE SCALIA: You do give the subsets.
11 It's not just the general, is it?

12 MS. GOLDENBERG: Yes. There's -- I was
13 going to say, the first number is the F2A, aged-out F2A
14 derivatives. So --

15 JUSTICE BREYER: That's F2A. But we want
16 F2B now.

17 MS. GOLDENBERG: No, I think F2A is what's
18 relevant.

19 JUSTICE BREYER: F2A. You're right. You're
20 right.

21 MS. GOLDENBERG: That's what's covered. And
22 this is not a full universe of the numbers. These are
23 numbers kept by the State Department, but the State
24 Department is only responsible for half of the
25 administration of this program. There are also people

1 who adjust their status to lawful permanent resident in
2 the United States and those numbers just aren't kept.
3 We tried to get them and weren't able to.

4 JUSTICE BREYER: All right. So it looks
5 like it's between 10 percent and sometimes it gets it up
6 to 30 percent --

7 MS. GOLDENBERG: It varies, Your Honor. And
8 as I say, these numbers aren't perfect, but I think it
9 gives you a sense of the universe that we're talking
10 about here to the best of our ability.

11 So if I could turn back to Justice
12 Sotomayor's question about why they wouldn't just go
13 ahead and copy the language of the regulation into the
14 statute and why they didn't just say F2A in the statute,
15 I think the reason gets back to what I was discussing
16 earlier actually with Justice Alito, which is that
17 actually would have been overinclusive if they had just
18 said F2A beneficiaries are covered, because there is a
19 set of F2A derivative beneficiaries who don't benefit
20 from the language of Section 1153(h)(3) because they are
21 the child of the petitioner's spouse, but they don't
22 count as the child of the petitioner, probably for a
23 stepchild kind of situation like I was discussing
24 earlier. If the stepchild is over 18 at the time of the
25 marriage, they don't count as a stepparent's child under

1 the statute.

2 So there is a tiny corner here that would
3 get carved out. And actually Congress did a very good
4 job in this statute of capturing exactly the universe of
5 people that was captured under the preexisting
6 regulation. The preexisting regulation required there
7 to be another petition filed by the same petitioner, and
8 automatic conversion to the appropriate category gets at
9 exactly that same kind of result.

10 The other reason I think why Congress might
11 not have specified F2A in section 1153(h)(3) in addition
12 to just its understanding of automatic conversion as a
13 term of art in this area that was doing the work that it
14 wanted, is that section 1153(h)(3) now functions
15 smoothly if there's a change in the family-sponsored
16 categories, which has happened in the past. Congress
17 has changed up those categories, added categories. And
18 so if, for instance, Congress were now to add a category
19 for grandchildren of U.S. citizens, then aged-out F3
20 beneficiaries like Respondent's sons and daughters,
21 could automatically convert to an appropriate category
22 and section 1153(h)(3) would work just fine.

23 JUSTICE ALITO: Suppose there are two --
24 suppose there are two lawful permanent residents who are
25 exactly the same except that one has a minor child and

1 one has an adult unmarried child. So the latter files
2 an F2B petition and gets in line on a particular date,
3 right? Then the former, the lawful permanent resident
4 who has an unmarried -- who has a minor child, files an
5 F2A petition and gets in that line. But then by the
6 time the date comes up, the child has aged out and so
7 now you would say that would be converted to an F2B
8 petition.

9 MS. GOLDENBERG: Correct.

10 JUSTICE ALITO: But the person would be --
11 the child would be at a much lower point, right, than
12 the first one? Why would Congress have wanted that?

13 MS. GOLDENBERG: I don't think that's
14 necessarily true. It would depend on how the priority
15 dates were working between when they were coming current
16 in the different categories. I do think it's true that
17 the aged-out F2A individual would go into the middle or
18 the back of the F2B line the way that the priority dates
19 currently working out.

20 JUSTICE ALITO: Right. And the other one
21 would be higher up.

22 MS. GOLDENBERG: Well, but they would --
23 yes, I suppose that's true, but the person who ages out
24 would be keeping the original priority date. So they're
25 not entitled to more than that. And the reason Congress

1 might have wanted to put people into the middle or back
2 of the F2B line and not right up to the front of the
3 F2B, line, which would be the effect of Respondent's
4 interpretation --

5 JUSTICE ALITO: Oh, okay. I see. Thank
6 you.

7 MS. GOLDENBERG: -- is that that's extremely
8 disruptive to the line. And I would like to spend a few
9 minutes talking about that because I think it's
10 critically important here --

11 JUSTICE KAGAN: Ms. Goldenberg, before you
12 do that, could I just ask you to respond to a sort of
13 different hypothesis of what Congress was up to here and
14 tell me what, if anything, you think follows from it?
15 Assume you think that Congress actually was not
16 intending this very small category, that Congress was
17 intending for this to be a pretty wide provision, but
18 what Congress was -- it was laboring under a
19 misapprehension. I mean, it thought that you could do
20 this kind of automatic conversion with respect to all of
21 these people, and it turns out Congress was just utterly
22 wrong on that.

23 So -- but Congress includes this language
24 about automatic conversion. So what do I do if I
25 basically have a hunch that that's what Congress was

1 thinking, but yet the language that it adopted talks
2 about automatic conversion, which is impossible for many
3 of this category.

4 MS. GOLDENBERG: Right. I think it's the
5 language that's on the face of the statute that's
6 important and it's ambiguous for the very reason that
7 you just gave, which is that there are a lot of people
8 for whom automatic conversion to the appropriate
9 category just isn't going to work.

10 JUSTICE SCALIA: Do you mean we can't
11 correct congressional mistakes?

12 MS. GOLDENBERG: No, but I think in a
13 situation where the language is ambiguous the agency is
14 entitled to deference, and deference is particularly
15 appropriate in this kind of circumstance. This Court
16 has said before that deference is particularly
17 appropriate in immigration contexts, and I think if any
18 immigration context is appropriate for it, it's this
19 one, because very delicate lines have to be drawn here.
20 If someone is helped, someone else is hurt. And it's
21 something where you have to step very carefully.
22 Otherwise there is going to be real destabilization of
23 the system.

24 And just before I turn to that, let me just
25 say one more thing about what Congress was thinking. To

1 the extent that you look at the legislative history
2 here, there is no indication that Congress was thinking
3 that this would sweep broadly. In fact, there are many
4 statements on the floor about not wanting to displace
5 people who are waiting in line, which would cut in the
6 other direction.

7 So the destabilization that would occur as a
8 result of Respondent's interpretation would be many
9 people -- and we can't quantify exactly how many, but we
10 have reason to think that the number is quite large --
11 would come pouring into, in most cases, the very front
12 of the F2B line and would hold it up for very
13 significant periods of time and perhaps even freeze that
14 line altogether.

15 Keep in mind that in that line there are
16 only 26,250 visas available per year -- nothing changes
17 that -- and per country, there are only about 1800 visas
18 available per year. So if you envision, say, 3600
19 people from one country coming into the front of the F2B
20 line, every single person in that line -- that's at
21 least hundreds of thousands of people based on State
22 Department numbers and more than that probably if you
23 had the other numbers, is going to wait for two
24 additional years. And if there are more people who come
25 into the front of the line, all those people are going

1 to wait longer.

2 And the equities here are such that the
3 people who are going to be pushed back really have
4 entitlement to stay where they are, and that's for this
5 reason: The people coming into the front of the line,
6 the aged-out F3 and F4 derivative beneficiaries, have
7 only just, just moments before this has happened,
8 obtained some kind of qualifying relationship with the
9 U.S. citizen or lawful permanent resident that would
10 entitle them to family-sponsored immigration. Prior to
11 their parent, the principal beneficiary, becoming a
12 lawful permanent resident, they were just the nieces,
13 nephews, grandchildren of --

14 JUSTICE KENNEDY: So that -- that's an
15 expectation argument? I mean, I'm not trying to put
16 words in your mouth, but is that the point you're
17 making?

18 MS. GOLDENBERG: Well, I think the idea is
19 that the people who are going to be pushed have had
20 long-time relationships with a lawful permanent resident
21 entitling them directly to family-sponsored immigration.
22 They have been waiting in the F2B line, maybe for years.
23 They've been separated from their parents for that
24 entire period of time most likely. And what
25 Respondent's position would mean would be that these

1 aged-out F3 and F4 derivative beneficiaries would
2 basically experience no period of separation from their
3 parents, because they would --

4 JUSTICE BREYER: We don't have numbers on
5 separation from parents. We do know that these people,
6 the ones that would be caught on the broad
7 interpretation, have also been waiting for years and
8 years and years and years. They've all been waiting for
9 years and years and years and years, and it becomes hard
10 to choose among them.

11 MS. GOLDENBERG: Well, I do think that there
12 are sympathetic stories on both sides, but --

13 JUSTICE BREYER: You can find sympathetic
14 stories all over the place, and I mean -- all right. Go
15 ahead.

16 MS. GOLDENBERG: For the reason I gave
17 earlier, though, I don't think it's right to think of
18 derivative beneficiaries as themselves waiting in line.
19 I really do think that that's the wrong way to look at
20 the problem in this case.

21 The reason that aged-out F2A derivative
22 beneficiaries get the benefit of section 1153(h)(3) is
23 not that they've been waiting in line. It's that they
24 themselves have a relationship to a lawful permanent
25 resident that either did entitle them or would entitle

1 them to be a principal beneficiary in their own right.

2 JUSTICE ALITO: Is your real quarrel here
3 with the idea of an appropriate category or with the
4 automatic conversion? On the Respondent's view, why
5 isn't there an automatic conversion? Because they say
6 that as soon as the person ages out they can be moved
7 into -- into another category. That sounds like it's
8 automatic.

9 MS. GOLDENBERG: I do think you have to look
10 at the phrase as a whole, but I also don't think that
11 that's what Respondents are arguing. They are arguing
12 that --

13 JUSTICE ALITO: Well, why isn't it
14 automatic?

15 MS. GOLDENBERG: Well, I think it's not
16 automatic because at the moment -- let me step back and
17 say I think there are two different problems with
18 Respondent's position. One is the question of whether
19 you can ever have automatic conversion to an appropriate
20 category of an existing petition when you're subbing in
21 someone new as the petitioner. So that's one issue.

22 And then there's a separate issue --

23 JUSTICE ALITO: Automatic just means
24 something occurs without anybody having to initiate the
25 change.

1 MS. GOLDENBERG: That's true.

2 JUSTICE ALITO: So why isn't there --
3 why isn't it automatic here?

4 MS. GOLDENBERG: Well, I think that, with
5 respect to the issue that I was just talking about,
6 which is the question of whether you can ever convert a
7 petition to -- make a petition by itself required. Do
8 you have to go to the new petitioner, the parent and say
9 would you like to petition? Do you have to check that
10 person? Keep in mind, they've never been checked at the
11 beginning of this process when petitions are evaluated
12 and approved to see if they qualify to be a petitioner.
13 For instance, to be a petitioner, you can't have
14 committed certain crimes against minors. And that will
15 never have happened here.

16 So if you have to stop and do that check at
17 that stage as well, then it's starting to look a lot
18 less automatic. Then there's a separate question, as I
19 say, even if you did think that the statute could
20 unambiguously be read to say that you can take a
21 petition by someone's grandparent and make it into a
22 petition by someone's parent. There's a separate timing
23 question that the parties are disputing here as well,
24 and that the board ruled on in its decision in Wang, and
25 that is, what is the moment when automatic conversion is

1 supposed to take place.

2 Respondent's argument is that it's supposed
3 to take place at whatever time the derivative
4 beneficiary is interviewed, essentially at the very end
5 of the process. A consular interview or an adjustment
6 of status interview or evaluation, and that that's when
7 automatic conversion ought to happen. But what the
8 board said, and I think quite recently, is something
9 different, which is, the statute gives you a date,
10 Section 1153(h)(1) gives you a date as of which you are
11 supposed to evaluate the derivative beneficiary's age,
12 and that's the date that the visa number becomes
13 available to a parent.

14 JUSTICE KAGAN: I understand that argument,
15 but that's not the argument that Wang made, is it? Wang
16 suggested that if the -- the appropriate date was at the
17 very date of aging out. So -- so it seems as though you
18 shouldn't be entitled to Chevron deference on that
19 question, given what Wang said about it.

20 MS. GOLDENBERG: I don't think that's true,
21 Your Honor. I think, as I read Wang in any event, that
22 it says on page 33 you get automatic conversion if the
23 beneficiary is 21 years or older pursuant to (h)(1), and
24 then later in the decision on page 35, it talks about
25 the moment the beneficiary aged out. But that I take it

1 to be referring back to the (h)(1) determination that's
2 been made. So it's aged out not biologically in the
3 sense of turning 21 and celebrating your 21st birthday,
4 but becoming 21 -- over 21 -- 21 or over under (h)(1) as
5 of that date that the visa number becomes available to
6 the parent.

7 I think that's how Wang is best interpreted.
8 There may be separate questions about whether people are
9 entitled to the protections of (h)(1), but those aren't
10 being raised in this case, and that's not something that
11 Wang itself ruled on.

12 And so I do think that there's a reasonable
13 reading of the statute that says, getting back to the
14 question of automatically, the moment, the key moment is
15 the moment that you're evaluating derivative
16 beneficiary's age as of. And as of that date, they're
17 either under 21 and they can be treated as a child for
18 the rest of the process, or they're 21 or over, and you
19 got to figure out what can you do with them.

20 Can they be automatically converted to an
21 appropriate category or can they not? And if not, then
22 they're out of luck. And that is a way of reading the
23 statute that makes it a very smooth movement from one
24 category to another without any kind of gap in
25 eligibility. And it's a reasonable reading of the

1 statute. So as I say, I think Respondents really do
2 have two --

3 JUSTICE BREYER: What do we do with a
4 reasonable reading of the statute? I looked at the
5 board's opinion here, and it seems to me in the two
6 paragraphs just prior to Section 5, at the end of
7 Section 4, they have as a critical step in their -- in
8 reaching their conclusion, their belief that the
9 legislative record demonstrates a clear concern on the
10 part of Congress to ameliorate the delays associating
11 with the process of the visa processing. And they say
12 the same thing in the paragraph just above that.

13 MS. GOLDENBERG: Yes, Your Honor.

14 JUSTICE BREYER: So that's what they think
15 this statute is about. But that statute -- that problem
16 is taken care of in (1)(b). And so the question would
17 be, if that problem, which subtracts all the days that
18 there was a processing delay, is taken care of on
19 (1)(b), they can't be right that that was the purpose of
20 3.

21 So unless you can say to me how that could
22 possibly be right, that reasoning, then what we should
23 do, I guess, if we think that you have authority in the
24 government to interpret this minor part of the statute,
25 which I do, is generate. Send it back. And -- and

1 maybe give them -- say you ought to do this again
2 because the reason you gave is not good. Or why not?

3 MS. GOLDENBERG: I don't think there's a
4 problem with the reason they gave, and I would like to
5 explain why, but even if there were a problem with the
6 reason they gave, I don't think that it would
7 appropriate to send it back. And let me talk about each
8 of those.

9 With respect to the reasoning on the
10 legislative history, the way that I read the board
11 decision is totally consistent with my own reading of
12 legislative history, which is to say that Congress's
13 overwhelming concern and the thing that Congress talked
14 about by far the most in the fairly sparse legislative
15 history here, there's no pertinent report really, there
16 are just a couple of days of debate. And the thing that
17 Congress talked about the most was the administrative
18 delays. That was Congress's overarching concern.

19 And Congress didn't really talk about
20 (h)(3). They didn't really say what they were doing
21 there. They didn't really say what they were getting up
22 to. And so I think under those circumstances, the board
23 is reasonable in saying it makes sense to think that
24 what Congress was doing was not some kind of big change
25 and destabilization of the whole immigrant visa system

1 in the way that I described earlier.

2 It was doing something pretty small. And it
3 was taking an existing regulation and putting it into
4 the statute. And by doing that, it could be certain
5 that it wasn't going to cause disruption. And It wasn't
6 going to upset --

7 JUSTICE SOTOMAYOR: That is strange because
8 I look at (h)(3), which talks about automatic conversion
9 of battered spouses, of widowed spouses, and I think
10 under your reading, you're basically saying Congress was
11 not intending to let those people jump the line. Am I
12 correct?

13 MS. GOLDENBERG: No, Your Honor.

14 JUSTICE SOTOMAYOR: Because you have to
15 change names?

16 MS. GOLDENBERG: No.

17 JUSTICE SOTOMAYOR: Oh, there's automatic --

18 MS. GOLDENBERG: There -- There is automatic
19 conversion for self-petitioners and their derivatives.
20 It's provided for in a provision that preexisted the
21 Child Status Protection Act, and a very complete and
22 total age-out protection is provided in that --

23 JUSTICE SOTOMAYOR: So why did Congress need
24 to add (h) -- (h)(4), using exactly the same language
25 that it used for (h)(3)?

1 MS. GOLDENBERG: Well, Congress --

2 JUSTICE SOTOMAYOR: That they -- that they
3 were entitled to the same benefits of automatic
4 conversion as (h)(3).

5 MS. GOLDENBERG: Congress added (h)(4) a
6 couple of years after the Child Status Protection Act, I
7 think, basically just to ensure that battered women,
8 people who are subject to abuse, could get whatever
9 benefit the Child Status Protection Act offered them,
10 even though they already had this other, very good
11 protection that I'm talking about against aging out in
12 Section 1154 (a)(1)(d)(1), (1) and (3).

13 But in addition, it is possible to envision
14 a situation where a self-petitioner could qualify under
15 Section 1153 (h)(3). I don't know that anyone would
16 ever go that route, because they have this other
17 provision that they can rely on. But if you think of a
18 self-petitioner who is the child of an abuser that's,
19 like an F2A --

20 JUSTICE SOTOMAYOR: So you can have
21 automatic --

22 MS. GOLDBERG: Exactly.

23 JUSTICE SOTOMAYOR: You can have automatic
24 conversion only in the situations that give you other --
25 other statutes.

1 MS. GOLDENBERG: If I could reserve the
2 remainder of my time. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. Fleming.

5 ORAL ARGUMENT BY MARK C. FLEMING
6 ON BEHALF OF THE RESPONDENTS

7 MR. FLEMING: Mr. Chief Justice, and may it
8 please the Court:

9 The government began at Step 2 of Chevron,
10 but I would submit that this case can and should be
11 resolved at Step 1. The government is asking this Court
12 to read the statute in a highly disfavored way such that
13 it is not harmonious but at war with itself, and nothing
14 in the language requires that. In fact, I would
15 recommend that the Court turn to the back page of the
16 government's brief where the statute is actually set
17 forth.

18 And we can see that provision (h)(3)
19 consists of one sentence, and that sentence consists of
20 two parts separated by a comma. Before the comma, the
21 language sets forth one and only one eligibility
22 criterion. After the comma, the language sets forth two
23 things that shall be done if the eligibility criterion
24 is satisfied.

25 Now, importantly, the government does not

1 contend that there is any ambiguity in the language
2 before the comma. Everyone agrees that it contemplates
3 and includes all derivative beneficiaries. There's no
4 dispute about that. And a bedrock rule at the Step 1
5 inquiry is that the Court reads the statute as a
6 harmonious whole. That goes double when we're talking
7 about a single sentence. So if there is a possible
8 reading of this sentence that is harmonious with the
9 clear opening clause that applies to all derivative
10 beneficiaries under Step 1 of Chevron, that is the
11 reading the Court gives to the statute.

12 It's especially important here because the
13 precise question at issue in this case is a question of
14 eligibility and scope. Who gets the benefit of the two
15 benefits set forth, the two duties set forth by the
16 shalls in the language after the comma. And Congress
17 spoke to that directly in the language before the comma.
18 All derivative beneficiaries who have gone through the
19 (h)(1) formula and whose age is determined to be over
20 21.

21 Now, the government's claim of ambiguity
22 here depends on asking the Court to read one of the
23 benefits after the comma, automatic conversion, in such
24 a narrow and limited way, a way not required by the
25 plain language, a way that even the BIA actually did not

1 adopt, but such that it is incompatible with the broad
2 scope set forth before the comma. The Court should be
3 very suspicious of that reading, because it is exactly
4 the contrary of the traditional tool of statutory
5 construction going back to *Brown & Williamson* and *FTC v.*
6 *Mandel* that says the Court reads a statute holistically
7 as a harmonious whole.

8 For the government's argument to work, the
9 Court would have to be satisfied that we were in a
10 situation like *National Association of Home Builders v.*
11 *Defenders of Wildlife*, which is the only case that they
12 cite for their ambiguity claim, but there the court
13 faced two different statutes and acted at different
14 times that were clearly contradictory. You could not
15 comply with both of them at the same time. You had to
16 pick one or other the other.

17 And in that context, this Court said that
18 opens the door to agency interpretation. So in order
19 for the --

20 JUSTICE KENNEDY: Under your view, does
21 automatic conversion cover someone who has to filed a
22 new petition?

23 MR. FLEMING: Automatic conversion does not
24 require the filing of a new petition. It obviates a new
25 piece of paper. That is the purpose. When the board

1 addressed what conversion --

2 JUSTICE KENNEDY: So the way this works, you
3 don't have to file a new petition?

4 MR. FLEMING: That's common ground between
5 us. Automatic conversion means that the old petition is
6 deemed to have been approved in a different category.

7 JUSTICE SCALIA: But under -- under her
8 theory, the -- the petition is -- is still coming from
9 the same person. Under yours, it would be coming from a
10 different person. How can you -- how can you even know
11 that that person now wants this -- this -- this new
12 adult to come in, much less go ahead without a petition
13 from that person?

14 MR. FLEMING: Well, a couple of points on
15 that, Justice Scalia.

16 First of all, if in the highly hypothetical
17 situation that you have a parent who has immigrated and
18 does not want an aged-out child to come and join them in
19 the United States, then it is easy for the parent the
20 lawful person to withdraw a petition. Also the child
21 cannot immigrate.

22 JUSTICE SCALIA: It would file a petition in
23 that person's name without that person's consent?

24 MR. FLEMING: Well, the immigration, the
25 ultimate moment of immigration, when the child comes in,

1 cannot happen without the parent's consent. The parent,
2 under a provision that the government cites --

3 JUSTICE SCALIA: And you're saying that this
4 automatically gives the consent of that parent?

5 MR. FLEMING: No, I'm not saying that,
6 Justice Scalia.

7 JUSTICE SCALIA: Well, you must be if it can
8 automatically convert.

9 MR. FLEMING: The conversion can happen to a
10 petition in the F2B category, but in order for a visa
11 actually to be given and for the child to immigrate,
12 first of all, the child would have to provide proof the
13 parent is, in fact, a permanent resident, and would also
14 have to provide an affidavit of support, under a
15 provision that the government cites in its reply brief,
16 agreeing to support the child so that he or she does not
17 become a public charge. That can't happen without the
18 consent of the petitioner. So if there ever were a
19 situation --

20 JUSTICE KAGAN: I'm sorry.

21 MR. FLEMING: I'm sorry, Justice Kagan.

22 JUSTICE KAGAN: Please.

23 MR. FLEMING: Well, I was just going to
24 finish the thought. If there ever were to be a highly
25 hypothetical situation where the converted petition put

1 into the position of petitioner, someone who did not
2 want the child to come in, there are plenty of off-ramps
3 that that petitioner can take in order to avoid that
4 outcome. So that is not an impediment to our argument
5 at all.

6 JUSTICE KAGAN: In the usual case, a
7 petitioner has to show a bunch of things, right? You
8 have to come in and say, I'm a legal permanent resident,
9 and, you know, I file an affidavit of support and show
10 that you haven't committed any offenses against minors
11 and all of this stuff, right?

12 But you're suggesting that we can just
13 ignore all of those requirements that usually have to be
14 shown at the threshold for a petition to be accepted;
15 isn't that right?

16 MR. FLEMING: That's not right at all,
17 Justice Kagan. Certainly not that they have to be
18 ignored. There is an adjudicated petition on file by
19 the U.S. citizen relative, but in order for the child to
20 immigrate, the new petitioner, the lawful permanent
21 resident parent, has to meet all those requirements,
22 which are assessed at the moment that the child's visa
23 application is adjudicated. That is also when the
24 determination of the age happens under the child's
25 status for protection. That's where that conversion

1 happens.

2 JUSTICE SOTOMAYOR: Is that for F2A children
3 as well?

4 MR. FLEMING: I think --

5 JUSTICE SOTOMAYOR: These steps, are they
6 applied to F2A?

7 MR. FLEMING: Derivatives, who age out?

8 JUSTICE SOTOMAYOR: Not derivatives. I'm
9 talking about the children of spouses.

10 MR. FLEMING: Yes, Justice. The answer is,
11 yes, Justice Sotomayor.

12 JUSTICE SOTOMAYOR: Everything happens at
13 visa issuance moment?

14 MR. FLEMING: The visa application stage,
15 the officer who is adjudicating the application has to
16 ensure the qualifications of the petitioner to make sure
17 they actually are a U.S. citizen or permanent resident
18 entitled to petition, and the qualifications of the
19 beneficiary to make sure that they have met all of the
20 requirements.

21 JUSTICE SOTOMAYOR: Direct or derivative?

22 MR. FLEMING: Yes. Derivative or principal
23 inside the United States or outside of the United
24 States.

25 JUSTICE ALITO: So you're saying that these

1 things would happen -- do I understand you correctly,
2 these things or most of these same things would happen
3 in the cases in which the government says there is
4 automatic conversion?

5 MR. FLEMING: Most certainly, Justice Alito.
6 Yes, that is exactly right. And the issue of time -- I
7 mean, I think maybe it's worth backing up and talking
8 about how we think automatic conversion is supposed to
9 function.

10 What happens is, you have the petition
11 originally filed, it gets approved, and then wait until
12 the visa number becomes current and then they each, each
13 beneficiary has to file a visa application which gets
14 adjudicated. Now, that could be adjudicated in one of
15 two ways, depending on whether the beneficiaries in the
16 United States or outside.

17 Notably, if the beneficiaries are inside the
18 United States, they go through adjustment of status, and
19 there is no claim on the government side that there's
20 any obstacle to automatic conversion at that point. Why
21 is that? Because they both go in at the same time,
22 parent and child. The officer always adjudicates the
23 principal beneficiary's file first. It will approve the
24 application, and then the parent becomes a lawful
25 permanent resident on the spot. And then nothing

1 prevents the officer from looking at the child and
2 saying, while I'm doing the H1 calculation, your age
3 turns out to be over 21 under this formula.

4 Nonetheless, I can treat your petition as automatically
5 converting to F2B because you are the adult son or
6 daughter of a newly minted lawful permanent resident
7 parent who's sitting right here.

8 No difficulty at all. Certainly no
9 impossibility.

10 JUSTICE KAGAN: Mr. Fleming, to accept that
11 argument, don't you have to accept your understanding of
12 what the appropriate date is? I mean, let's suppose
13 that the government is right, that the date is the one
14 that's actually specified in the statute which says the
15 date on which an immigrant visa number becomes
16 available. At that date, the parent is not even going
17 to be a legal permanent resident; isn't that right?

18 MR. FLEMING: Two answers to that, Justice
19 Kagan.

20 First of all, your answer to Ms. Goldenberg
21 was completely right, which is that is not the approach
22 that the Board of Immigration Appeals took in Wang. The
23 board thought wrongly, and the government now does not
24 even try to defend it, that the conversion had to
25 happen, if at all, at the date that the -- at the moment

1 that the beneficiary aged out. That's what they say.
2 They say, Look to see which category the petition
3 converted to at the moment the beneficiary aged out.
4 That's on Page 35. They tried to defend that in front
5 of --

6 JUSTICE KAGAN: But let's assume that this
7 is the right date, the one that's actually specified in
8 the statute. Can you win if that's the right date?

9 MR. FLEMING: It is -- well, we don't think
10 that is the right date. It's a --

11 JUSTICE KAGAN: I know, but can you win if
12 it is the right date?

13 MR. FLEMING: Well, I think at that point,
14 the question then becomes, does the conversion have to
15 happen immediately at that time, or as long as it's
16 converted at some point in the future, are we still
17 interpreting the statute in a harmonious way? It
18 automatically doesn't have to be immediately.

19 Now, we think it can mean immediately, if
20 that's how the Court chooses to interpret it, and still
21 win, because we think the determination happens when the
22 adjudication happens, which is when, under their current
23 procedures, they do the age calculations.

24 But even if the Court disagrees with me on
25 that and thinks that the statute requires the

1 determination to happen sooner, all that means is at
2 some point after the determination, the petition shall
3 be converted; but that doesn't mean it has to be done
4 right at the time of the determination.

5 I'd like to back up, though, and take on the
6 premise of the question, which is that H1 somehow says
7 the conversion in H3 has to happen on the date that the
8 visa becomes available, because that's not what the
9 statute says.

10 H3 does not say that the conversion has to
11 happen on that date. It could have said that. There
12 are regulations in 204.2(i) that specify when the
13 conversion happens as of a particular time or upon a
14 particular occurrence. Congress could have taken
15 language like that and put it into H3. It didn't.

16 All that H1 is doing is setting out the
17 particular formula that gets applied to determine the
18 age of the derivative beneficiary for purposes of
19 Subsection (d) and it sets it out by having two -- by
20 setting out two numbers that get subtracted.

21 First number is in H1(a). The second number
22 is in H1(b). And the first number is the age of the
23 child on the date the visa became available, and that is
24 reduced by the number in (b), which is the number of
25 days that the petition was pending.

1 Nothing in H1 says, You have to do this
2 calculation at a particular time. It just says, When
3 you do this calculation, here are the numbers you use.
4 But the determination itself is a matter of agency
5 procedure and under their current procedures, it's not
6 disputed what happens -- this happens at the time after
7 the visa application has been filed and it is ready for
8 adjudication when the officer sits down, whether it's a
9 State Department consulate officer outside the country
10 or a CIS officer in the country, sits down with the
11 applicant and makes sure that all the eligibility
12 criteria are met, including this one.

13 JUSTICE BREYER: But how does -- can I try
14 an example because I think it's easier to --

15 MR. FLEMING: Of course.

16 JUSTICE BREYER: All right. Imagine Steven
17 is a citizen. His brother Charles is not. So under
18 4 -- and Charles has a son Joseph who is not. That will
19 help you think about it.

20 All right. So we're under F4. Steven files
21 a petition, the beneficiary is Charles. Charles has a
22 minor son Joseph. Visa is granted, et cetera, for --
23 not visa, you know, he's given -- everything is in order
24 and now Charles has to wait about ten years or so. By
25 the time he gets -- at the time his number becomes

1 current, the number becomes available for the alien,
2 namely for Charles, at that moment, we calculate
3 Joseph's age and it's 24.

4 All right. So your idea is that Charles is
5 current. Everything is fine. He goes to the port or
6 the office, wherever he's supposed to go, and he brings
7 Joseph with him. At that point, Joseph, since he's no
8 longer a child, has to come in under another category,
9 and that category is going to be, I guess, 2B because
10 Charles will be now -- and Joseph will be unmarried over
11 21, right? Am I right so far?

12 MR. MITCHELL: I'm NOT comfortable referring
13 to Your Honor by your first name or your brother by his
14 first name.

15 (Laughter.)

16 JUSTICE BREYER: This is an imaginary -- he
17 spells it with a V.

18 MR. FLEMING: Your Honor, has it right.

19 JUSTICE BREYER: Okay. Now, if I have it
20 right --

21 MR. FLEMING: With one tweak, which is, I
22 think you're positing that your brother and his son are
23 outside the country, not going through adjustment of
24 status.

25 JUSTICE BREYER: Yes.

1 MR. FLEMING: -- where the situation is a
2 bit different, because then --

3 JUSTICE BREYER: All right.

4 MR. FLEMING: -- your brother would become a
5 permanent resident immediately. There's no problem
6 going to a port.

7 JUSTICE BREYER: Okay.

8 MR. FLEMING: But for consular processing,
9 -- I think what would happen is when you go to the
10 consular office --

11 JUSTICE BREYER: Yes?

12 MR. FLEMING: -- Judge Breyer's application
13 would be accepted and the calculation would be done for
14 the son, and it would be -- all right.

15 JUSTICE BREYER: All right. Now the --

16 MR. FLEMING: You now no longer qualify as a
17 derivative, because you are 24.

18 JUSTICE BREYER: All right. But there is
19 one thing missing. Charles has not filed a petition for
20 Joseph. So what do we do about that?

21 MR. FLEMING: What happens then is what can
22 happen already under the agency procedures, which is
23 they deny Joseph's application without prejudice to
24 reapplication within a year, which they can do. They do
25 it already. Judge Breyer immigrates to the United

1 States, he goes over to the port. He is admitted as a
2 lawful permanent resident, and the moment that happens
3 and the moment Joseph gets proof of that happening, he
4 goes back into the consulate and says: All right.

5 JUSTICE BREYER: And doesn't -- doesn't
6 Charles as a lawful permanent resident have to file a
7 piece of paper called the petition --

8 MR. FLEMING: No.

9 JUSTICE BREYER: -- in which Joseph is named
10 primary beneficiary?

11 MR. FLEMING: I mean, we have two arguments
12 on this. Our principal position is no, because at that
13 point there can be automatic conversion from Your
14 Honor's petition --

15 JUSTICE BREYER: Yes.

16 MR. FLEMING: -- with respect to -- to an
17 F2B petition on --

18 JUSTICE BREYER: But there is no --there is
19 no F2B petition, because Charles never filed it.

20 MR. FLEMING: But that's --

21 JUSTICE BREYER: I mean, yes; right.

22 MR. FLEMING: He -- you don't need to a
23 piece -- that's where automatic --

24 JUSTICE BREYER: That's what I want to know.
25 You don't need --

1 MR. MITCHELL: You don't need to file a
2 piece of paper.

3 JUSTICE BREYER: We do all this, and --

4 MR. FLEMING: It's done constructively, and
5 that's what automatic conversion is. The petition is
6 deemed as though it had been filed for purposes of a
7 different category, and even in the situations where the
8 government agrees it applies, the F2A case, not only the
9 category changes; the principal beneficiary changes.
10 Because the original F2A position was for a spouse, it
11 converts to an F2B petitioner for the child or the
12 aged-out child. There is no reason -- now, the
13 government asserts that there's something in the nature
14 of the word "conversion" that makes it impossible for
15 the petitioner to change, that that is somehow a
16 barrier. Now, there's no reason to think that that's
17 the case.

18 First of all, the BIA never said that that
19 was the case. When the BIA talks about the meaning of
20 conversion in the Wang opinion, it says the conversion
21 is used when, quote, "a visa petition converts from one
22 visa category to another" -- not a problem here -- "and
23 the beneficiary of that petition then falls within a new
24 classification without the need to file a new visa
25 petition."

1 Nothing about the identity of the
2 petitioner, and conversion just means a transformation.
3 There's no reason that a change which can already, the
4 government agrees, involve a change to a different
5 category for a different principal beneficiary, can't
6 also involve a new -- a change in the petitioner.

7 Conversion isn't defined in the Act's
8 glossary. The INA has a detailed glossary in Section
9 1101. Conversion isn't given a special meaning. The
10 identity of the petitioner is not mentioned in (h)(3) at
11 all, unlike the preexisting regulation, Justice
12 Sotomayor, which clearly did say that a new petition has
13 to be filed and it has to be filed by the same
14 petitioner.

15 JUSTICE SCALIA: If I understand you, the --
16 the parent will be deemed to have filed a petition for
17 admission of this now-adult, right?

18 MR. FLEMING: That is correct.

19 JUSTICE SCALIA: And -- but the parent can
20 withdraw that petition?

21 MR. FLEMING: If he or she would ever wish
22 to do so, yes. And the child cannot immigrate without
23 the parent taking additional steps, most notably the
24 filing of an affidavit --

25 JUSTICE SCALIA: All of this flows from the

1 word "automatic"?

2 MR. FLEMING: From the phrase "automatic
3 conversion," yes. And the fact that Congress in the
4 opening clause, before the comma of this provision, made
5 very clear that it is to apply to all derivative
6 beneficiaries, because it says if you go through the
7 calculation of (h)(1), which everyone agrees -- even the
8 vacated panel opinion Ninth Circuit agreed with this,
9 and even the government agrees, that (h)(1) applies to
10 all derivative beneficiaries. And if you go through
11 that calculation and your age is still over 21 when you
12 come through it, then your petition shall automatically
13 be converted to the appropriate category, and if for
14 some reason, Justice Scalia, the parent has a problem
15 with that, there are plenty of ways for the parent to
16 stop the immigration of the child, although I've never
17 heard of a situation where that might actually happen.

18 One thing I would like to back up to, just
19 because we have at Chevron step 1, and one of the issues
20 that this Court indicated in Brown and Williamson is
21 important for that analysis, is a modicum of common
22 sense as to the manner in which Congress would have been
23 likely to delegate this particular question to the
24 agency. The question here isn't some interstitial
25 matter or some filling of a gap that Congress is not

1 likely to have turned its mind to. It is a foundational
2 question: Who gets the benefit of these mandates after
3 the -- the automatic conversion and the retention of
4 priority --

5 It's unlikely Congress didn't think about
6 something as basic as that; and if they did mean to
7 delegate that to the Board of Immigration Appeals, it's
8 a very strange way of doing it. Because --

9 JUSTICE KAGAN: Based on -- another
10 understanding of Chevron is sometimes Congress writes
11 confusing statutes that point in two different
12 directions at once, and then there's a choice. Does the
13 Court make the best of it or does the agency make the
14 best of it? And the agency knows a lot about the
15 subject matter, and especially this agency, and so
16 irrespective of whether Congress meant to delegate
17 something in some very self-conscious way, this is a
18 confusing statute, it's a kind of the muddle. The --
19 the agency gets to do it.

20 MR. FLEMING: I would certainly agree,
21 Justice Kagan, as a general matter that the immigration
22 law is confusing, but I don't think it's any more
23 confusing than other statutes where this Court worked
24 through and found the -- the ultimate provision at issue
25 to be clear on the question at issue.

1 And here the question is who gets the
2 benefit of it? And we have an opening clause that is
3 undisputed in its meaning that covers all derivative
4 beneficiaries. We also have benefits, automatic
5 conversion, retention priority date, that clearly can be
6 applied -- possibly, not only possibly, but easily -- to
7 the full scope set out in the clause before the comma.

8 And we have an omission, presumably
9 deliberate, of specific limitations not only in the
10 regulations but also in the V visa provision which we
11 cite, which specifically call out the very group that
12 the government now is trying to favor. If Congress had
13 meant to say this only goes to F2A beneficiaries, it had
14 two easy example of how to do that. It deliberately,
15 presumably, chose not to do that. As the Fifth Circuit
16 observed and as the questioning earlier in the argument
17 indicated, if all that the Congress was trying to do
18 here was codify an existing regulation, it was very easy
19 for them to say so, but this is a ameliorative
20 provision. Even the BIA acknowledged that.

21 They were trying to solve a problem that
22 happened when people had been waiting for a long period
23 of time, and not just the beneficiary but also the --
24 just not the derivative beneficiary but also the
25 principal beneficiary. I mean. The lead Respondent in

1 this case, Rosario Cuellar de Osorio, had been waiting a
2 long time to emigrate with her husband and her family,
3 and then when the time came, she was told you can all go
4 except Melvin; because he happened to turn 21 months
5 before the visa number became available. Congress
6 recognized that was a problem and tried to fix it. And
7 they did fix it, clearly.

8 That is the common sense reading of this
9 provision, that the clear language up front before the
10 comma sets out the scope, and that Congress meant the
11 remainder of the provision to be read consistently,
12 harmoniously, and holistically, as this Court has said
13 it always does, with that scope. Not to read it in
14 tension, in some kind of irretrievable hostility with
15 itself, which is the argument that the Government needs
16 to convince this Court of in order to even get to Step
17 2.

18 Now, of course, we do have an alternative
19 argument, with -- which is, you know, independent, even
20 if this Court were to agree that our respondents'
21 children are not entitled to automatic conversion,
22 although we think they clearly are, that at the very
23 least there is another way to read the statute
24 harmoniously, which is that they're entitled to the
25 retention of priority date. That is the main benefit

1 that is provided by (h)(3).

2 It's the benefit that is mentioned in the
3 inactive title of the statute, and it's all that's
4 needed to affirm the judgment here.

5 And again, remember the standard. All we
6 need to show for our purposes to affirm the court of
7 appeals is that the language after the comma can be read
8 in a way that is consistent with the language before the
9 comma that sets out the broad scope of the provision.
10 It's at least possible to read the retention language as
11 an independent benefit.

12 Congress repeated the word "shall," meaning
13 that it is an independent mandate. The object of the
14 mandate is different. It is the alien who retains the
15 priority date, whereas it's the alien's petition that is
16 converted. And we know from Ron Pair that a statute
17 that says that there is a duty to do A and a duty to do
18 B can be at least read reasonably and possibly --

19 JUSTICE SCALIA: Well, this is all upside
20 down. I thought it's the agency that we deferred to.
21 If it can be read in the way the agency wants, we affirm
22 the agency's position.

23 MR. FLEMING: That is --

24 JUSTICE SCALIA: You're saying that's not
25 true, that if it can be read the way the court of

1 appeals would like it to be read, we must affirm the
2 court of appeals on it.

3 MR. FLEMING: This is a important question,
4 Justice Scalia. I want to make sure --

5 JUSTICE SCALIA: It sure is. I never heard
6 of that proposition.

7 MR. FLEMING: What I have been -- what I
8 have been trying to note is the fact that what we're
9 talking about here is a statute that the Government is
10 trying to argue is hopelessly internally inconsistent.
11 That is a Step 1 argument that we think gets rejected at
12 Step 1 because the statute can be read holistically and
13 harmoniously.

14 And if there is any possible reading -- this
15 is the language of Brown & Williamson and FTC versus
16 Mandel -- if the benefits after the comma can be read in
17 a way that is consistent with the broad scope that
18 Congress said this statute is to apply to, that is the
19 reading to be given.

20 JUSTICE SCALIA: That would depend entirely
21 upon how much weight you want to give to the word
22 "automatically." I frankly find it hard to think that
23 all the things that you say are going to happen flow
24 from the word "automatic." And once you have a more
25 narrow view of automatically, it isn't -- you're

1 holistic argument does not carry the day and you're left
2 with an ambiguity that it seems to me we would defer to
3 the agency on, not -- not to the Ninth Circuit.

4 MR. FLEMING: This -- I'm not seeking
5 deference to the Ninth Circuit by any means, Justice
6 Scalia. I'm seeking defences to Congress and its plain
7 language. And that's precisely the point.

8 Now, going back to "automatic," since Your
9 Honor wanted to focus on that. I mean, "automatic" just
10 means it happens without any further interaction by the
11 -- by the alien. All it means in the regulations is
12 that the agency regards the petition as being approved
13 in a different category. And that certainly can happen
14 in our case. The government doesn't actually dispute
15 that it happens in the adjustment of status context.
16 They just argue that somehow the difference in
17 petitioner is relevant.

18 JUSTICE KENNEDY: Suppose -- suppose
19 everybody knows that for the group that's covered by the
20 Ninth Circuit's opinion, the nephews, that there's going
21 to be a 3 or 4-year wait. Doesn't a new petition have
22 to be filed so that BIA knows that this person's in
23 line?

24 MR. FLEMING: What -- what fundamentally
25 happens is that the petition gets filed by the U.S.

1 citizen relative, and then after it's approved just by
2 basically checking that the relative is entitled to file
3 that petition, then everybody awaits until the
4 petition -- until the priority date of the beneficiary
5 becomes current according to the State Department lines.
6 It's not as though there's a constantly re-updating to
7 see if anyone has aged out or anyone has naturalized or
8 anyone's gotten married or anything like that.

9 If somebody wants to do that, then obviously
10 they can send something in. But it's not as though
11 there is a continuous updating of the file, until the
12 time comes when a visa application is submitted. And
13 when a visa application is submitted, then it is
14 adjudicated and then all of these things are checked and
15 the determination of age under age one happens, and that
16 is the point where the automatic conversion is going to
17 happen.

18 And as long as that happens while the parent
19 is already a lawful permanent resident, there is no
20 obstacle to conversion and no obstacle to it being
21 automatic, because nothing else needs to be done. All
22 that has to happen is the officer has to regard it as
23 having been approved in the --

24 JUSTICE BREYER: Can I ask you a quick
25 question --

1 MR. FLEMING: Yes.

2 JUSTICE BREYER: -- about your alternative
3 argument with you and Justice Scalia. I take it your
4 argument is: Look at the words; the part before the
5 comma defines a group and that group is not in dispute.
6 It's all the F derivatives.

7 MR. FLEMING: Yes.

8 JUSTICE BREYER: All right. Then look at
9 the first part. It says the petition shall
10 automatically be converted.

11 MR. FLEMING: Yes.

12 JUSTICE BREYER: See, if I lose on that,
13 then look at the second part. It says, the alien shall
14 retain the original priority date. And you say as to
15 that, that has an independent life.

16 MR. FLEMING: That's -- that is --

17 JUSTICE BREYER: So, it's either A or B.

18 And we think we win on A and B, but if not we at least
19 win on B. Now, has the agency ever expressed a view in
20 respect to whether you are right or wrong about your
21 independent B.

22 MR. FLEMING: I don't think so. The
23 government may think so, but I don't --

24 JUSTICE BREYER: No. So wouldn't the right
25 thing to do there be, in respect to B, send it back to

1 the agency so that they can express a view in respect to
2 that?

3 MR. FLEMING: I think that's certainly --

4 JUSTICE SCALIA: How can you possibly
5 qualify for B without qualifying for A? How can you
6 retain your original priority if you have not been
7 converted to another category?

8 MR. FLEMING: The way the government --

9 JUSTICE SCALIA: That's quite impossible.
10 The two are obviously conjunctive and not dysjunctive.

11 MR. FLEMING: The way the government has
12 been applying this provision since its enactment, for
13 over 10 years, Justice Scalia, has been to require
14 everybody, even the people, the F2A beneficiaries whom
15 the government is now contending are entitled to
16 automatic conversion, it has required them to file to
17 get a new petition filed. It has been denying automatic
18 conversion to everybody and it did that up through the
19 filing of our red brief.

20 It was only after we pointed this out, a
21 week before the government filed its reply brief in this
22 Court CIS issued new guidance saying: Okay,
23 henceforward, you don't need to file a new petition
24 anymore. As far as I know, for consular processing
25 cases they are still doing it the old way. You still

1 cannot get automatic conversion, but you do get to
2 retain your priority date.

3 They are clearly implementable as separate
4 benefits. That is how this has been done over the last
5 10 or 11 years, until the government came time to file
6 its brief, its reply brief in this Court.

7 JUSTICE SCALIA: Well, all that proves is
8 that you need either automatic conversion or the filing
9 of a separate petition. But you obviously need either
10 one or the other of those two --

11 MR. FLEMING: Yes.

12 JUSTICE SCALIA: -- before the B part, "the
13 alien shall retain the original priority," makes any
14 sense.

15 MR. FLEMING: We don't disagree with that,
16 Justice Scalia, but we have new petitions that were
17 filed as a protective matter in these cases. That --
18 that's not a problem. These -- precisely because the
19 government was requiring everyone to file a new
20 petition, all of the Respondents' children in this case
21 have F2B petitions pending. We don't think we need
22 them. Our primary argument is they should have had the
23 original petition converted.

24 But if for some reason this Court disagrees,
25 we have F2B petitions there as to which the priority

1 date can and should be retained. So either of these is
2 a sufficient basis to affirm the court of appeals.

3 I haven't spoken much about Step 2 of
4 Chevron because I think it can and should be resolved at
5 Step 1. But I would like to address the question
6 that -- the response that was made in -- in response to
7 Justice Ginsburg's question at the beginning.

8 The -- the point about the categories here,
9 it is a natural phenomenon of these categories that they
10 are fluid. People are coming in and out of them at
11 various times depending on naturalization, on marriage,
12 on termination of marriage, as people adopt children, as
13 people decide not to immigrate, as people pass away.
14 There is -- these aren't hermetically sealed categories.

15 Also, there is no way to apply (h)(3)
16 without some kind of movement. Even the government's
17 theory of (h)(3) means that some people are going to go
18 out of the F2A category into the F2B category. And so
19 the question is, under Chevron Step 2, which again, we
20 don't think the Court needs to address, has the BIA
21 drawn a rational line here within this group of
22 beneficiaries who are all F2B, all children of lawful
23 permanent residents.

24 And the line the BIA drew is it says we are
25 going to say treat better people who have two lawful

1 permanent resident parents than people who have one
2 lawful permanent resident parent, often two, and a U.S.
3 citizen relative. Is there a rational line for that?
4 The BIA certainly hasn't provided one.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Ms. Goldenberg, four minutes.

7 REBUTTAL ARGUMENT OF ELAINE J. GOLDENBERG
8 ON BEHALF OF THE PETITIONERS

9 MS. GOLDENBERG: Thank you, Your Honor.
10 The Respondents were trying to put far too
11 heavy a burden on the government in the Chevron
12 deference case. So long as the agency has arrived at a
13 reasonable reading of this very complicated statute, the
14 agency is entitled to deference here. And the
15 Respondents' idea that some kind of internal
16 inconsistency is absolutely required here is wrong.

17 Automatic conversion -- the phrase about
18 automatic conversion is ambiguous, and it renders the
19 whole provision ambiguous.

20 And let me address the idea that everyone
21 before the comma, everyone in the "if" clause of Section
22 1153(h)(3) necessarily qualifies here. That's not true
23 under respondents' own reading, and it can't be true
24 because there are going to be situations where someone
25 has their age calculated as over 21 as of the date the

1 visa becomes available to the parent, and the parent
2 never becomes a lawful permanent resident. They don't
3 qualify. They come to the border, and they are not let
4 through the border. And so in that situation, there are
5 going to be people who are named in that first part of
6 the clause who would not be entitled to automatic
7 conversion.

8 JUSTICE SOTOMAYOR: What he's saying -- but
9 what he's saying is that's true of everybody. FBA, any
10 of these categories don't get converted until the visa
11 is actually issued --

12 MS. GOLDENBERG: No, that's not --

13 JUSTICE SOTOMAYOR: -- until you go to the
14 consular order -- office and apply. That's true no
15 matter what.

16 MS. GOLDENBERG: It's not true with respect
17 to F2A derivatives, because they have an existing
18 relationship with the existing petitioner. They don't
19 need the primary beneficiary to become a lawful
20 permanent resident in order to get automatic conversion.

21 But the broader point is that we are talking
22 about --

23 JUSTICE SOTOMAYOR: They can come in before
24 their parent?

25 MS. GOLDENBERG: No, it's not that they can

1 come in --

2 JUSTICE SOTOMAYOR: Their parent has to
3 become a citizen and then they can come in, correct?

4 MS. GOLDENBERG: Yes, Your Honor, but they
5 don't -- to get automatic conversion, they are not
6 relying on that new lawful permanent resident. They are
7 relying on their existing relationship with somebody
8 else.

9 But the broader point here is we aren't
10 necessarily talking about a subcategory of people who
11 are deemed in that "if" clause who are going to benefit
12 from automatic conversion. There's another example, as
13 well, in the diversity visa context. Diversity visas
14 don't have priority dates. So it's awfully hard to see
15 the derivative beneficiaries of diversity visas who are
16 named in the (h)2) definitional section are going to be
17 able to necessarily benefit from Section 1153(h)(3).

18 And even if you did think that everybody had
19 to sort of run through the 1153(h)(3) analysis, the
20 answer you come up with with respect to certain people
21 is it's a null category. There is no appropriate
22 category for them, so the category is nothing.

23 I'd like to talk a little bit as well about
24 the retention issue that Respondents discussed. And the
25 implication of Respondents' argument is, as I think

1 Justice Scalia recognized in his question, that somebody
2 can get a priority date and just walk around with it,
3 even if there is no valid petition pending as to them
4 and even if their parent never becomes a lawful
5 permanent resident.

6 So that would mean that aged-out derivative
7 beneficiaries, under Respondents' interpretation, would
8 be better off than children whose parents never become a
9 lawful permanent resident. They would have a priority
10 date somehow in their pocket that they could walk around
11 with and use 20 years later when somebody filed a
12 different petition on their behalf, an employment
13 petition --

14 CHIEF JUSTICE ROBERTS: Well, it's not so
15 odd to say they've got a priority date in their pocket
16 when the statute says the original priority date --
17 they'll retain the original priority date.

18 MS. GOLDENBERG: Yes, but the statute is
19 most reasonably read to say, as all other automatic
20 conversion provisions do, that they retain the priority
21 date if the automatic conversion is possible, so that
22 there's a specific petition being identified that that
23 priority date is going to attach to, and not that you
24 just somehow have a priority date, which is, keep in
25 mind, a filing date that you're just going to kind of

1 hold and walk around with and use it if you want.

2 CHIEF JUSTICE ROBERTS: Hold or maybe
3 retain.

4 MS. GOLDENBERG: Well, but in a situation in
5 which the parent never becomes a lawful permanent
6 resident, that would mean -- that would turn the -- the
7 notion of a derivative beneficiary upside down. That
8 would mean that someone could, in effect, be a
9 derivative beneficiary and use that priority date in the
10 future, even if --

11 JUSTICE SOTOMAYOR: I am so confused. You
12 better unconfuse me, okay, on this argument.

13 MS. GOLDENBERG: Sorry, Your Honor.

14 JUSTICE SOTOMAYOR: It's an original date
15 basically to the original petition, meaning there has --
16 it is that that's being converted. If that hasn't been
17 granted, there's nothing to convert. If that person
18 hasn't become a citizen, there is nothing to attach any
19 change to.

20 MS. GOLDENBERG: But Respondents' argument
21 is that you don't need automatic conversion, that
22 retention of priority date --

23 JUSTICE SOTOMAYOR: You're talking about his
24 second step.

25 MS. GOLDENBERG: It's the -- exactly. It's

1 the separate step.

2 JUSTICE SOTOMAYOR: All right. We're
3 talking about his second step.

4 MS. GOLDENBERG: You just explained exactly
5 why that can't be right because you do need something to
6 attach it to.

7 JUSTICE SOTOMAYOR: You're only talking
8 about his second argument.

9 MS. GOLDENBERG: Exactly. But I would like
10 to go back to automatic conversion, if I could, and just
11 make a few more points. And one is that the idea that
12 Wang didn't say that the petitioner --

13 CHIEF JUSTICE ROBERTS: You can finish --
14 finish that sentence.

15 MS. GOLDENBERG: Thank you, Your Honor. The
16 idea that the board in the matter of Wang didn't say
17 that the petitioner couldn't change is simply wrong.
18 The board very, very clearly on page 35 of its decision
19 says that conversion means that you don't need a new
20 petitioner.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 The case is submitted.

23 (Whereupon, at 12:42 p.m., the case in the
24 above-entitled matter was submitted.)

25

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