

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALEJANDRO MAYORKAS, DIRECTOR, :

4 UNITED STATES CITIZENSHIP AND :

5 IMMIGRATION SERVICES, ET AL., : No. 12-930

6 Petitioners :

7 v. :

8 ROSALINA CUELLAR DE OSORIO, ET AL.:

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10 Washington, D.C.

11 Tuesday, December 10, 2013

12

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

16 APPEARANCES:

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19 behalf of Petitioners.

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

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1 P R O C E E D I N G S

2 (11:41 a.m.)

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

5 ORAL ARGUMENT OF ELAINE J. GOLDENBERG

6 ON BEHALF OF THE PETITIONERS

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

9 The Board of Immigration Appeals reasonably
10 interpreted Section 1153(h)(3) when it ruled that
11 creation of a new petition by a new petitioner did not
12 qualify as automatic conversion of an existing petition
13 to an appropriate family-sponsored category. That
14 interpretation is supported by the text and by the
15 structure of the statutory scheme.

16 Indeed, it avoids destabilizing that scheme
17 by displacing waiting aliens, who have long had
18 qualifying relationships with lawful permanent
19 residence, and putting ahead of them in line a large
20 number of adults, aged-out former derivative
21 beneficiaries, who have only just attained a
22 relationship with someone who can sponsor a family
23 member.

24 JUSTICE GINSBURG: But isn't there -- isn't
25 the effect on the no longer child much more severe? I

1 mean, if everybody has to get bumped down a little way,
2 it'll make a difference of months until they qualify for
3 a hearing.

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

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

10 MS. GOLDENBERG: I'm sorry?

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

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

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

20 MS. GOLDENBERG: I think it's mistaken to
21 think of a derivative beneficiary as waiting in line and
22 being entitled to credit for waiting in line, for a
23 couple of different reasons.

24 First of all, the derivative's rights are,
25 as the name suggests, completely derivative of the

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

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

12 In the F4 line, someone could be waiting in
13 the F4 line as a principal beneficiary for, say, 15
14 years, and right as they're getting up to the front of
15 that line --

16 JUSTICE SCALIA: What's F4? What's
17 F4?

18 MS. GOLDENBERG: I'm sorry.

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

21 MS. GOLDENBERG: I apologize, Your Honor.
22 F4 is siblings of U.S. citizens.

23 JUSTICE SCALIA: Okay.

24 MS. GOLDENBERG: So they could be waiting in
25 the F4 line for 15 years, let's say, as a principal

1 beneficiary; and then just as they get -- they're
2 getting up to the front of that line and their priority
3 date is going to become current, they get married to
4 somebody; and the person they get married to has a
5 17-year-old child at that point in time.

6 That stepchild, that 17-year-old child,
7 under the definition of child in the statute, will count
8 as the principal beneficiary's child. And if, say, a
9 year later, the principal beneficiary's priority date
10 becomes current and that principal beneficiary is
11 entitled to immigrate to the United States and become a
12 lawful permanent resident, they're going to be able to
13 bring that 17-year-old -- or, at that point, 18-year-old
14 stepchild along with them as a derivative beneficiary.

15 That stepchild did not wait in the line for
16 the first 15 years that the principal beneficiary was
17 waiting. And so that example, I think, shows why, when
18 you look at a derivative beneficiary, you want to look
19 at the end of the process, a snapshot in time of when
20 the principal beneficiary is coming to this country.

21 And what the statute says is, principal
22 beneficiary, if -- at the moment you're coming, do you
23 have a child who would be left behind in another country
24 if you were to come without them, if so, bring them
25 along. But it doesn't make sense to look at a

1 derivative beneficiary --

2 JUSTICE KENNEDY: So you interpret automatic
3 to include immediate?

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

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

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

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

21 MS. GOLDENBERG: Right.

22 JUSTICE ALITO: Benefit sharing.

23 MS. GOLDENBERG: Yes. It also would apply
24 to a situation where an F2A petition is filed for a
25 child as the principal beneficiary, and the child ages

1 out of that status. But I'd also like to say that it
2 doesn't actually apply to all aged-out F2A derivative
3 beneficiaries, so it's, perhaps, even slightly narrower
4 than Your Honor has described.

5 It applies to situations where there can be
6 automatic conversion of the existing petition and
7 movement into a new appropriate category without a
8 change in the petitioner. And so, for some of the
9 reasons that I discussed before, regarding stepchildren,
10 it actually will be the case that some aged-out F2A
11 derivative beneficiaries --

12 JUSTICE BREYER: Can you give me an idea of
13 how -- just to follow up with Justice Alito. Can you --
14 I don't know if you asked the IRS -- the INS this
15 question, you may, or something like it. Let's look at
16 all of the derivative beneficiaries in the Fs, F1, 2A,
17 2B, F3, F4.

18 And for the most part, they're
19 grandchildren, they would be, or children, sometimes,
20 nephews and nieces. And now, think of the set of all
21 those people who age out. Okay? They started out as
22 children, but it's 15 years later -- what's this thing--
23 they're now aged out.

24 Now, think of that set. It's -- call it
25 a certain size. What percent of that set do you think

1 are accounted for by the F2A people, who are the only
2 ones on your interpretation that (3) would apply to?

3 MS. GOLDENBERG: I don't know what
4 percentage --

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

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

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

24 JUSTICE SOTOMAYOR: I'm going to let you
25 answer his question, but, yes, they had a regulation, so

1 why didn't they copy the regulation?

2 MS. GOLDENBERG: Well --

3 JUSTICE SOTOMAYOR: It would have been much,
4 much simpler to say this is limited to F2A beneficiaries
5 than to write it the way they did and say this is to
6 everybody who ages out.

7 MS. GOLDENBERG: There are two reasons, I
8 think, why they didn't copy the --

9 JUSTICE SOTOMAYOR: Answer him, and then --

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

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

1 And so it is not necessarily a minuscule --

2 JUSTICE BREYER: You -- did you ask --

3 anything that would give me -- that's the total global

4 picture. That's the 2,000, 3,000, sometimes 10,000

5 aging out. All right. But -- but the real relevant

6 thing is if we can get some idea, which seems in the

7 paper, that your interpretation applies to -- only to a

8 subset of those people.

9 And just from reading it, that it's

10 qualitative reading it, it sounds like a tiny subset of

11 those people. Now, we can argue about whether that's

12 for you or against you. I think it's against you, but

13 nonetheless --

14 JUSTICE SCALIA: You do give the subsets.

15 It's not just the general, is it?

16 MS. GOLDENBERG: Yes. There's -- I was

17 going to say, the first number is the F2A -- the

18 aged-out F2A derivatives. So --

19 JUSTICE BREYER: That's F2A. But we want

20 F2B now.

21 MS. GOLDENBERG: No, I think F2A is what's

22 relevant.

23 JUSTICE BREYER: F2A. You're right. You're

24 right.

25 MS. GOLDENBERG: That's what's covered. And

1 this is not a full universe of the numbers. These are
2 numbers kept by the State Department, but the State
3 Department is only responsible for half of the
4 administration of this program.

5 There are also people who adjust their
6 status to lawful permanent resident in the United
7 States, and those numbers just aren't kept. We tried to
8 get them and weren't able to.

9 JUSTICE BREYER: All right. So it looks
10 like it's between 10 percent, and sometimes, it gets it
11 up to 30 percent --

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

16 So if I could turn back to Justice
17 Sotomayor's question about why they didn't just go ahead
18 and copy the language of the regulation into the statute
19 and why they didn't just say F2A in the statute? I
20 think the reason gets back to what I was discussing
21 earlier, actually, with Justice Alito, which is that
22 actually would have been overinclusive, if they had just
23 said F2A beneficiaries are covered, because there is a
24 set of F2A derivative beneficiaries who don't benefit
25 from the language of Section 1153(h)(3), because they

1 are the child of the petitioner's spouse, but they don't
2 count as the child of the petitioner, probably for a
3 stepchild kind of situation, like I was discussing
4 earlier. If the stepchild is over 18 at the time of the
5 marriage, they don't count as a stepparent's child under
6 the statute.

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

15 The other reason I think why Congress might
16 not have specified F2A in Section 1153(h)(3), in
17 addition to just its understanding of automatic
18 conversion as a term of art in this area that was doing
19 the work that it wanted, is that Section 1153(h)(3) now
20 functions smoothly, if there's a change in the
21 family-sponsored categories, which has happened in the
22 past.

23 Congress has changed up those categories,
24 added categories. And so if, for instance, Congress
25 were now to add a category for grandchildren of U.S.

1 citizens, then aged-out F3 beneficiaries, like
2 Respondents' sons and daughters, could automatically
3 convert to an appropriate category and Section
4 1153(h)(3) would work just fine.

5 JUSTICE ALITO: Suppose there are two --
6 suppose there are two lawful permanent residents who are
7 exactly the same, except that one has a minor child and
8 one has an adult unmarried child.

9 So the latter files an F2B petition and gets
10 in line on a particular date, right? Then the former,
11 the lawful permanent resident, who has an unmarried --
12 who has a minor child, files an F2A petition and gets in
13 that line.

14 But then by the time the date comes up, the
15 child has aged out, and so, now, you would say that
16 would be converted to an F2B petition.

17 MS. GOLDENBERG: Correct.

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

21 MS. GOLDENBERG: I don't think that's
22 necessarily true. It would depend on how the priority
23 dates were working between when they were coming current
24 in the different categories. I do think it's true that
25 the aged-out F2A individual would go into the middle or

1 the back of the F2B line, the way that the priority
2 dates are currently working out.

3 JUSTICE ALITO: Right. And the other one
4 would be higher up.

5 MS. GOLDENBERG: Well, but they would --
6 yes, I suppose that's true, but the person who ages out
7 would be keeping the original priority date, so they're
8 not entitled to more than that. And the reason Congress
9 might have wanted to put people into the middle or back
10 of the F2B line and not right up to the front of the F2B
11 line, which would be the effect of Respondents'
12 interpretation --

13 JUSTICE ALITO: Oh, okay. I see. Thank
14 you.

15 MS. GOLDENBERG: -- is that that's extremely
16 disruptive to the line. And I would like to spend a few
17 minutes talking about that because I think it's
18 critically important here --

19 JUSTICE KAGAN: Ms. Goldenberg, before you
20 do that, could I just ask you to respond to a sort of
21 different hypothesis of what Congress was up to here and
22 tell me what, if anything, you think follows from it?

23 Assume you think that Congress actually was
24 not intending this very small category, that Congress
25 was intending for this to be a pretty wide provision,

1 but what Congress was -- it was laboring under a
2 misapprehension. I mean, it thought that you could do
3 this kind of automatic conversion with respect to all of
4 these people, and it turns out Congress was just utterly
5 wrong on that.

6 So -- but Congress includes this language
7 about automatic conversion. So what do I do if I
8 basically have a hunch that that's what Congress was
9 thinking, but, yet, the language that it adopted talks
10 about automatic conversion, which is impossible for many
11 of this category.

12 MS. GOLDENBERG: Right. I think it's the
13 language that's on the face of the statute that's
14 important, and it's ambiguous for the very reason that
15 you just gave, which is that there are a lot of people
16 for whom automatic conversion to the appropriate
17 category just isn't going to work.

18 JUSTICE SCALIA: Do you mean we can't
19 correct congressional mistakes?

20 MS. GOLDENBERG: No, but I think, in a
21 situation where the language is ambiguous, the Agency is
22 entitled to deference, and deference is particularly
23 appropriate in this kind of circumstance. This Court
24 has said, before, that deference is particularly
25 appropriate in immigration contexts, and I think, if any

1 immigration context is appropriate for it, it's this one
2 because very delicate lines have to be drawn here.

3 If someone is helped, someone else is hurt.

4 And it's something where you have to step very
5 carefully. Otherwise, there is going to be real
6 destabilization of the system.

7 And just before I turn to that, let me just
8 say one more thing about what Congress was thinking. To
9 the extent that you look at the legislative history
10 here, there is no indication that Congress was thinking
11 that this would sweep broadly. In fact, there are many
12 statements on the floor about not wanting to displace
13 people who are waiting in line, which would cut in the
14 other direction.

15 So the destabilization that would occur as a
16 result of Respondents' interpretation would be many
17 people -- and we can't quantify exactly how many, but we
18 have reason to think that the number is quite large --
19 would come pouring into, in most cases, the very front
20 of the F2B line and would hold it up for very
21 significant periods of time and perhaps even freeze that
22 line altogether.

23 Keep in mind that, in that line, there are
24 only 26,250 visas available per year -- nothing changes
25 that -- and per country, there are only about 1,800

1 visas available per year. So if you envision, say,
2 3,600 people from one country coming into the front of
3 the F2B line, every single person in that line -- that's
4 at least hundreds of thousands of people, based on State
5 Department numbers, and more than that probably, if you
6 had the other numbers, is going to wait for two
7 additional years. And if there are more people who come
8 into the front of the line, all those people are going
9 to wait longer.

10 And the equities here are such that the
11 people who are going to be pushed back really have
12 entitlement to stay where they are, and that's for this
13 reason: The people coming into the front of the line,
14 the aged-out F3 and F4 derivative beneficiaries, have
15 only just, just moments before this has happened,
16 obtained some kind of qualifying relationship with the
17 U.S. citizen or lawful permanent resident that would
18 entitle them to family-sponsored immigration.

19 Prior to their parent, the principal
20 beneficiary, becoming a lawful permanent resident, they
21 were just the nieces, nephews, grandchildren, of
22 citizens and --

23 JUSTICE KENNEDY: So that -- that's an
24 expectation argument? I mean, I'm not trying to put
25 words in your mouth, but is that the point you're

1 making?

2 MS. GOLDENBERG: Well, I think the idea is
3 that the people who are going to be pushed have had
4 long-time relationships with a lawful permanent
5 resident, entitling them directly to family-sponsored
6 immigration. They have been waiting in the F2B line,
7 maybe for years.

8 They've been separated from their parents
9 for that entire period of time, most likely. And what
10 Respondents' position would mean would be that these
11 aged-out F3 and F4 derivative beneficiaries would
12 basically experience no period of separation from their
13 parents because they would --

14 JUSTICE BREYER: We don't have numbers on
15 separation from parents. We do know that these people,
16 the ones that would be caught on the broad
17 interpretation, have also been waiting for years and
18 years and years and years. They've all been waiting for
19 years and years and years and years, and it becomes hard
20 to choose among them.

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

23 JUSTICE BREYER: You can find sympathetic
24 stories all over the place, and I mean -- all right. Go
25 ahead.

1 MS. GOLDENBERG: For the reason I gave
2 earlier, though, I don't think it's right to think of
3 derivative beneficiaries as, themselves, waiting in
4 line. I really do think that that's the wrong way to --
5 to look at the problem in this case.

6 The reason that aged-out F2A derivative
7 beneficiaries get the benefit of Section 1153(h)(3) is
8 not that they've been waiting in line. It's that they,
9 themselves, have a relationship to a lawful permanent
10 resident, that either did entitle them or would entitle
11 them to be a principal beneficiary in their own right.

12 JUSTICE ALITO: But is your real quarrel
13 here with -- with the idea of an appropriate category or
14 with the automatic conversion? On the Respondents'
15 view, why isn't there an automatic conversion? Because
16 they say that, as soon as the person ages out, they can
17 be moved into -- into another category. That sounds
18 like it's automatic.

19 MS. GOLDENBERG: I do think you have to look
20 at the phrase as a whole, but I also don't think that
21 that's what Respondents are arguing. They are arguing
22 that --

23 JUSTICE ALITO: Well, why isn't it
24 automatic?

25 MS. GOLDENBERG: Well, I think it's not

1 automatic because at the moment -- let me step back and
2 say I think there are two different problems with
3 Respondents' position. One is the question of whether
4 you can ever have automatic conversion to an appropriate
5 category of an existing petition, when you're subbing in
6 someone new as the petitioner. So that's one issue.

7 And then there's a separate issue --

8 JUSTICE ALITO: But automatic just means
9 something occurs without anybody having to initiate the
10 change.

11 MS. GOLDENBERG: That's true.

12 JUSTICE ALITO: So why isn't there --
13 why isn't it automatic here?

14 MS. GOLDENBERG: Well, I think that -- with
15 respect to the issue that I was just talking about,
16 which is the question of whether you can ever convert a
17 petition to -- make a petition by its -- something
18 that's by a new petitioner. There, there is some action
19 that is required. Do you have to go to the new
20 petitioner, the parent, and say, would you like to
21 petition? Do you have to check that person?

22 Now, keep in mind, they've never been
23 checked at the beginning of this process when petitions
24 are evaluated and approved, to see if they qualify to be
25 a petitioner. For instance, to be a petitioner, you

1 can't have committed certain crimes against minors. And
2 that will never have happened here.

3 So if you have to stop and do that check, at
4 that stage as well, then it's starting to look a lot
5 less automatic. Then there's a separate question, as I
6 say, even if you did think that the statute could
7 unambiguously be read to say that you can take a
8 petition by someone's grandparent and make it into a
9 petition by someone's parent, there's a separate timing
10 question that the parties are disputing here as well and
11 that the board ruled on in its decision in Wang, and
12 that is, what is the moment when automatic conversion is
13 supposed to take place?

14 Respondents' argument is that it's supposed
15 to take place at whatever time the derivative
16 beneficiary is interviewed, essentially at the very end
17 of the process, a consular interview or an adjustment of
18 status interview or evaluation, and that that's when
19 automatic conversion ought to happen.

20 But what the board said, and I think quite
21 recently, is something different, which is the statute
22 gives you a date -- Section 1153(h)(1) gives you a date
23 as of which you are supposed to evaluate the derivative
24 beneficiary's age.

25 And that's the date that the visa number

1 becomes available to a parent.

2 JUSTICE KAGAN: I understand that argument,
3 but that's not the argument that Wang made, is it? Wang
4 suggested that if the -- the appropriate date was at the
5 very date of aging out, so -- so it seems as though you
6 shouldn't be entitled to Chevron deference on that
7 question, given what Wang said about it.

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

14 But, that, I take it to be referring back to
15 the (h)(1) determination that's been made. So it's aged
16 out, not biologically in the sense of turning 21 and
17 celebrating your 21st birthday, but becoming 21 -- over
18 21 -- 21 or over, under (h)(1), as of that date that the
19 visa number becomes available to the parent.

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

25 And so I do think that there's a reasonable

1 reading of the statute that says -- getting back to the
2 question of automatically, the moment -- the key moment
3 is the moment that you're evaluating derivative
4 beneficiary's age as of. And as of that date, they're
5 either under 21 and they can be treated as a child for
6 the rest of the process, or they're 21 or over, and you
7 got to figure out what can you do with them.

8 Can they be automatically converted to an
9 appropriate category or can they not? And if not, then
10 they're out of luck. And that is a way of reading the
11 statute that makes it a very smooth movement from one
12 category to another without any kind of gap in
13 eligibility.

14 And it's a reasonable reading of the
15 statute. So as I say, I think Respondents really do
16 have two --

17 JUSTICE BREYER: What do we do with a
18 reasonable reading of the statute? I looked at the
19 board's opinion here, and it seems to me, in the two
20 paragraphs just prior to Section 5, at the end of
21 Section 4, they have as a critical step in their -- in
22 reaching their conclusion, their belief that the
23 legislative record demonstrates a clear concern on the
24 part of Congress to ameliorate the delays associating
25 with the process of the visa processing.

1 And they say the same thing in the paragraph
2 just above that.

3 MS. GOLDENBERG: Yes, Your Honor.

4 JUSTICE BREYER: So that's what they think
5 this statute is about. But that statute -- that problem
6 is taken care of in (1) (b). And so the question would
7 be, if that problem, which subtracts all the days that
8 there was a processing delay, is taken care of on
9 (1) (b), they can't be right, that that was the purpose
10 of 3.

11 So unless you can say to me how that could
12 possibly be right, that reasoning, then what we should
13 do, I guess, if we think that you have authority in the
14 government to interpret this minor part of the statute,
15 which I do, is generate. Send it back. And -- and
16 maybe give them -- say you ought to do this again
17 because the reason you gave is not good.

18 Or why not?

19 MS. GOLDENBERG: I don't think there's a
20 problem with the reason they gave, and I would like to
21 explain why, but even if there were a problem with the
22 reason they gave, I don't think that it would
23 appropriate to send it back. And let me talk about each
24 of those.

25 With respect to the reasoning on the

1 legislative history, the way that I read the board
2 decision is totally consistent with my own reading of
3 legislative history, which is to say that Congress'
4 overwhelming concern and the thing that Congress talked
5 about, by far, the most in the fairly sparse legislative
6 history here, there's no pertinent report, really, there
7 are just a couple of days of debate.

8 And the thing that Congress talked about the
9 most was the administrative delays. That was Congress'
10 overarching concern. And Congress didn't really talk
11 about (h) (3). They didn't really say what they were
12 doing there. They didn't really say what they were
13 getting up to. And so I think, under those
14 circumstances, the board is reasonable in saying it
15 makes sense to think that what Congress was doing was
16 not some kind of big change and destabilization of the
17 whole immigrant visa system, in the way that I described
18 earlier.

19 It was doing something pretty small. And it
20 was taking an existing regulation and putting it into
21 the statute. And by doing that, it could be certain
22 that it wasn't going to cause disruption. And it wasn't
23 going to upset --

24 JUSTICE SOTOMAYOR: That is strange because
25 I look at (h) (3), which talks about automatic conversion

1 of battered spouses, of widowed spouses, and I think,
2 under your reading, you're basically saying Congress was
3 not intending to let those people jump the line.

4 Am I correct.

5 MS. GOLDENBERG: No, Your Honor.

6 JUSTICE SOTOMAYOR: Because you have to
7 change names?

8 MS. GOLDENBERG: No.

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

10 MS. GOLDENBERG: There -- there is automatic
11 conversion for self-petitioners and their derivatives.
12 It's provided for in a provision that preexisted the
13 Child Status Protection Act, and a very complete and
14 total age-out protection is provided in that provision --

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

18 MS. GOLDENBERG: Well, Congress --

19 JUSTICE SOTOMAYOR: That they -- that they
20 were entitled to the same benefits of automatic
21 conversion as (h) (3)?

22 MS. GOLDENBERG: Congress added (h) (4) a
23 couple of years after the Child Status Protection Act, I
24 think, basically, just to ensure that battered women,
25 people who are subject to abuse, could get whatever

1 benefit the Child Status Protection Act offered them,
2 even though they already had this other very good
3 protection that I'm talking about against aging out, in
4 Section 1154(a)(1)(d)(1), (1) and (3).

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

12 JUSTICE SOTOMAYOR: So you can have
13 automatic --

14 MS. GOLDBERG: Exactly.

15 JUSTICE SOTOMAYOR: You can have automatic
16 conversion only in the situations that give you other --
17 other statutes.

18 MS. GOLDENBERG: Exactly. If I could
19 reserve the remainder of my time?

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Fleming.

23 ORAL ARGUMENT BY MARK C. FLEMING

24 ON BEHALF OF THE RESPONDENTS

25 MR. FLEMING: Mr. Chief Justice, and may it

1 please the Court:

2 The government began at step 2 of Chevron,
3 but I would submit that this case can and should be
4 resolved at step 1. The government is asking this Court
5 to read the statute in a highly disfavored way, such
6 that it is not harmonious, but at war with itself, and
7 nothing in the language requires that. In fact, I would
8 recommend that the Court turn to the back page of the
9 government's brief, where the statute is actually set
10 forth.

11 And we can see that provision (h)(3)
12 consists of one sentence, and that sentence consists of
13 two parts, separated by a comma. Before the comma, the
14 language sets forth one and only one eligibility
15 criterion. After the comma, the language sets forth two
16 things that shall be done if the eligibility criterion
17 is satisfied.

18 Now, importantly, the government does not
19 contend that there is any ambiguity in the language
20 before the comma. Everyone agrees that it contemplates
21 and includes all derivative beneficiaries. There's no
22 dispute about that. And a bedrock rule at the step 1
23 inquiry is that the Court reads the statute as a
24 harmonious whole.

25 That goes double when we're talking about a

1 single sentence. So if there is a possible reading of
2 this sentence that is harmonious with the clear opening
3 clause that applies to all derivative beneficiaries
4 under step 1 of Chevron. That is the reading the Court
5 gives to the statute.

6 It's especially important here because the
7 precise question at issue in this case is a question of
8 eligibility and scope. Who gets the benefit of the two
9 benefits set forth -- the two duties set forth by the
10 shalls in the language after the comma? And Congress
11 spoke to that directly in the language before the comma,
12 all derivative beneficiaries who have gone through the
13 (h) (1) formula and whose age is determined to be over
14 21.

15 Now, the government's claim of ambiguity
16 here depends on asking the Court to read one of the
17 benefits after the comma, automatic conversion, in such
18 a narrow and limited way, a way not required by the
19 plain language, a way that even the BIA actually did not
20 adopt, but such that it is incompatible with the broad
21 scope set forth before the comma.

22 The Court should be very suspicious of that
23 reading because it is exactly the contrary of the
24 traditional tool of statutory construction going back to
25 Brown & Williamson and FTC v. Mandel that says the Court

1 reads a statute holistically as a harmonious whole.

2 For the government's argument to work, the
3 Court would have to be satisfied that we were in a
4 situation like National Association of Home Builders v.
5 Defenders of Wildlife, which is the only case that they
6 cite for their ambiguity claim, but there, the Court
7 faced two different statutes and acted at different
8 times that were clearly contradictory.

9 You could not comply with both of them at
10 the same time. You had to pick one or other the other.
11 And in that context, this Court said that opens the door
12 to Agency interpretation.

13 So in order for the --

14 JUSTICE KENNEDY: Under your view, does
15 automatic conversion cover someone who has to file a
16 new petition?

17 MR. FLEMING: Automatic conversion does not
18 require the filing of a new petition. It obviates a new
19 piece of paper. That is the purpose. When the board
20 addressed what conversion --

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

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

1 JUSTICE SCALIA: But under -- under her
2 theory, the -- the petition is -- is still coming from
3 the same person. Under yours, it would be coming from a
4 different person. How can you -- how can you even know
5 that that person now wants this -- this -- this new
6 adult to come in, much less go ahead without a petition
7 from that person?

8 MR. FLEMING: Well, a couple of points on
9 that, Justice Scalia.

10 First of all, if in the highly hypothetical
11 situation, that you have a parent who has immigrated and
12 does not want an aged-out child to come and join them in
13 the United States, then it is easy for the parent -- the
14 lawful permanent resident parent to withdraw a petition.
15 Also, the child cannot immigrate.

16 JUSTICE SCALIA: You're going to file a petition in
17 that person's name, without that person's consent?

18 MR. FLEMING: Well, the immigration -- the
19 ultimate moment of immigration, when the child comes in,
20 cannot happen without the parent's consent. The parent,
21 under a provision that the government cites --

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

24 MR. FLEMING: No, I'm not saying that,
25 Justice Scalia.

1 JUSTICE SCALIA: Well, you must be if it can
2 automatically convert.

3 MR. FLEMING: The conversion can happen to a
4 petition in the F2B category, but in order for a visa
5 actually to be given and for the child to immigrate,
6 the -- first of all, the child would have to provide
7 proof the parent is, in fact, a permanent resident, and
8 would also have to provide an affidavit of support,
9 under a provision that the government cites in its reply
10 brief, agreeing to support the child, so that he or she
11 does not become a public charge.

12 That can't happen without the consent of the
13 petitioner. So if there ever were a situation --

14 JUSTICE KAGAN: I'm sorry.

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

16 JUSTICE KAGAN: Please.

17 MR. FLEMING: Well, I was just going to
18 finish the thought. If there ever were to be a highly
19 hypothetical situation, where the converted petition put
20 into the position of petitioner someone who did not want
21 the child to come in, there are plenty of off-ramps that
22 that petitioner can take, in order to avoid that
23 outcome. So that is not an impediment to our argument
24 at all.

25 JUSTICE KAGAN: In the usual case, a

1 petitioner has to show a bunch of things, right? You
2 have to come in and say, I'm a legal permanent resident,
3 and -- you know, I file an affidavit of support and show
4 that you haven't committed any offenses against minors
5 and all of this stuff, right?

6 So -- but you're suggesting that we can just
7 ignore all of those requirements that usually have to be
8 shown at the threshold for a petition to be accepted;
9 isn't that right?

10 MR. FLEMING: That's not right at all,
11 Justice Kagan, certainly not that they have to be
12 ignored. There is an adjudicated petition on file by
13 the U.S. citizen relative, but in order for the child to
14 immigrate, the -- the new petitioner -- the lawful
15 permanent resident parent, has to meet all those
16 requirements, which are assessed at the moment that the
17 child's visa application is adjudicated.

18 That is also when the determination of the
19 age happens under the child's status for protection.
20 That's where that conversion happens.

21 JUSTICE SOTOMAYOR: Is that for F2A children
22 as well?

23 MR. FLEMING: I think --

24 JUSTICE SOTOMAYOR: These steps, are they
25 applied to F2A?

1 MR. FLEMING: Derivatives -- who age out?
2 JUSTICE SOTOMAYOR: Yes -- not derivatives.
3 I'm talking about the children of spouses.
4 MR. FLEMING: Yes, Justice. The answer is,
5 yes, Justice Sotomayor.
6 JUSTICE SOTOMAYOR: Everything happens at
7 visa issuance moment?
8 MR. FLEMING: The visa -- the visa
9 application stage -- the officer who is adjudicating the visa
10 application has to ensure the qualifications of the
11 petitioner, to make sure they actually are a U.S.
12 citizen or permanent resident entitled to petition, and
13 the qualifications of the beneficiary, to make sure that
14 they have met all of the requirements.
15 JUSTICE SOTOMAYOR: Direct -- direct
16 or derivative?
17 MR. FLEMING: Yes. Derivative or principal
18 inside the United States or outside of the United
19 States.
20 JUSTICE ALITO: So you're saying -- you're
21 saying that these things would happen -- do I understand
22 you correctly, these things -- or most of these same
23 things would happen in the cases in which the government
24 says there is automatic conversion?
25 MR. FLEMING: Most certainly, Justice Alito.

1 Yes, that is exactly right. And the -- the issue of
2 time -- I mean, I think maybe it's worth backing up and
3 talking about how we think automatic conversion is
4 supposed to function.

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

12 Notably, if the beneficiaries are inside the
13 United States, they go through adjustment of status, and
14 there is no claim on the government side that there's
15 any obstacle to automatic conversion at that point. Why
16 is that? Because they both go in at the same time,
17 parent and child.

18 The officer always adjudicates the principal
19 beneficiary's file first. It will approve the
20 application, and then the parent becomes a lawful
21 permanent resident on the spot.

22 And then nothing prevents the officer from
23 looking at the child and saying, while I'm doing the
24 (h) (1) calculation, your age turns out to be over 21
25 under this formula. Nonetheless, I can treat your

1 petition as automatically converting to F2B because you
2 are the adult son or daughter of a newly minted lawful
3 permanent resident parent, who's sitting right here.

4 No difficulty at all. Certainly no
5 impossibility.

6 JUSTICE KAGAN: Mr. Fleming, to accept that
7 argument, don't you have to accept your understanding of
8 what the appropriate date is? I mean, let's suppose
9 that the government is right, that the date is the one
10 that's actually specified in the statute, which says the
11 date on which an immigrant visa number becomes
12 available.

13 At that date, the parent is not even going
14 to be a legal permanent resident; isn't that right?

15 MR. FLEMING: Two answers to that, Justice
16 Kagan. First of all, your answer to Ms. Goldenberg was
17 completely right, which is that is not the approach that
18 the Board of Immigration Appeals took in Wang. The
19 board thought, wrongly, and the government now does not
20 even try to defend it, that the conversion had to
21 happen, if at all, at the date that the -- at the moment
22 that the beneficiary aged out.

23 That's what they say. They say, we look to see
24 which category the petition converted to at the moment
25 the beneficiary aged out. That's on Page 35. They

1 tried to defend that in front of --

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

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

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

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

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

20 But even if the Court disagrees with me on
21 that and thinks that the statute requires the
22 determination to happen sooner, all that means is, at
23 some point after the determination, the petition shall
24 be converted; but that doesn't mean it has to be done
25 right at the time of the determination.

1 I'd like to back up, though, and take on the
2 premise of the question, which is that (h)(1) somehow
3 says that the conversion in (h)(3) has to happen on the
4 date that the visa becomes available because that's not
5 what the statute says.

6 H(3) does not say that the conversion has to
7 happen on that date. It could have said that. There
8 are regulations in 204.2(i) that specify when the
9 conversion happens as of a particular time or upon a
10 particular occurrence. Congress could have taken
11 language like that and put it into (h)(3). It didn't.

12 All that (h)(1) is doing is setting out the
13 particular formula that gets applied to determine the
14 age of the derivative beneficiary for purposes of
15 Subsection (d), and it sets it out by having two -- by
16 setting out two numbers that get subtracted.

17 First number is in (h)(1)(a). The second
18 number is in (h)(1)(b). And the first number is the age
19 of the child on the date the visa became available, and
20 that is reduced by the number in (b), which is the
21 number of days that the petition was pending.

22 Nothing in (h)(1) says, you have to do this
23 calculation at a particular time. It just says, when
24 you do this calculation, here are the numbers you use.
25 But the determination itself is a matter of Agency

1 procedure, and under their current procedures, it's not
2 disputed what happens -- this happens at the time after
3 the visa application has been filed, and it is ready for
4 adjudication when the officer sits down, whether it's a
5 State Department consular officer outside the country or
6 a CIS officer in the country, sits down with the
7 applicant and makes sure that all the eligibility
8 criteria are met, including this one.

9 JUSTICE BREYER: But how does -- how -- can
10 I try an example? Because I find it easier.

11 MR. FLEMING: Of course, Justice Breyer.

12 JUSTICE BREYER: All right. Imagine Steven
13 is a citizen. His brother Charles is not. So under
14 4 -- and Charles has a son, Joseph, who is not. That
15 will help you think about it.

16 All right. So we're under F4. Steven files
17 a petition. The beneficiary is Charles. Charles has a
18 minor son, Joseph. Visa is granted, et cetera, for --
19 not visa -- you know, he's given -- everything is in
20 order, and now, Charles has to wait about ten years or
21 so.

22 By the time he gets -- at the time his
23 number becomes current -- the number becomes available
24 for the alien, namely for Charles, at that moment, we
25 calculate Joseph's age, and it's 24.

1 All right. So your idea is that Charles is
2 current. Everything is fine. He goes to the port or
3 the office, wherever he's supposed to go, and he brings
4 Joseph with him.

5 At that point, Joseph, since he's no longer
6 a child, has to come in under another category, and that
7 category is going to be, I guess, 2B because Charles
8 will be now an LPR, and Joseph will be unmarried over
9 21, right?

10 Am I right so far?

11 MR. MITCHELL: I'm uncomfortable referring
12 to Your Honor by your first name or your brother by his
13 first name.

14 (Laughter.)

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

17 MR. FLEMING: But Your Honor has it right --

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

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

24 JUSTICE BREYER: Yes.

25 MR. FLEMING: -- where the situation is a

1 bit different because then --

2 JUSTICE BREYER: All right.

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

6 JUSTICE BREYER: Okay.

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

10 JUSTICE BREYER: Yes.

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

14 JUSTICE BREYER: All right. Now the --

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

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

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

25 Judge Breyer immigrates to the United

1 States. He goes up 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: Well, that -- but that's --

21 JUSTICE BREYER: I mean, yes; right.

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

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

1 MR. MITCHELL: It means that you don't need
2 to file a 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
11 spouse, it converts to an F2B petition for the child --
12 or the 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 -- that a new
13 petition has to be filed and it has to be filed by the
14 same 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 of the Ninth Circuit agreed with
9 this, and even the government agrees, that (h)(1)
10 applies to all derivative beneficiaries.

11 And if you go through that calculation and
12 your age is still over 21 when you come through it, then
13 your petition shall automatically be converted to the
14 appropriate category, and if, for some reason, Justice
15 Scalia, the parent has a problem with that, there are
16 plenty of ways for the parent to stop the immigration of
17 the child, although I've never heard of a situation
18 where that might actually happen.

19 One thing I would like to back up to, just
20 because we are at Chevron step 1, and one of the issues
21 that this Court indicated in Brown and Williamson is
22 important for that -- for that analysis, is a modicum of
23 common sense as to the manner in which Congress would
24 have been likely to delegate this particular question to
25 the Agency.

1 The question here isn't some interstitial
2 matter or some filling of a gap that Congress is not
3 likely to have turned its mind to. It is a foundational
4 question, who gets the benefit of these mandates after
5 the comma, the automatic conversion and the retention of
6 priority dates.

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

11 JUSTICE KAGAN: Based on -- another
12 understanding of Chevron is, sometimes, Congress writes
13 confusing statutes that point in two different
14 directions at once, and then there's a choice. Does the
15 Court make the best of it, or does the Agency make the
16 best of it?

17 And the Agency knows a lot about the subject
18 matter, and especially this Agency, and so irrespective
19 of whether Congress meant to delegate something in some
20 very self-conscious way, this is a confusing statute,
21 it's a kind of a muddle. The -- the Agency gets to do
22 it.

23 MR. FLEMING: I would certainly agree,
24 Justice Kagan, as a general matter, that the immigration
25 law is confusing, but I don't think it's any more

1 confusing than other statutes, where this Court worked
2 through and found the -- the ultimate provision at issue
3 to be clear on the question at issue.

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

12 And we have an omission, presumably
13 deliberate, of specific limitations not only in the
14 regulations, but also in the V visa provision, which we
15 cite, which specifically call out the very group that
16 the government now is trying to favor. If Congress had
17 meant to say, this only goes to F2A beneficiaries, it
18 had two very easy example of how to do that.

19 It deliberately, presumably, chose not to do
20 that. As the Fifth Circuit observed and as the
21 questioning earlier in the argument indicated, if all
22 that the Congress was trying to do here was codify an
23 existing regulation, it was very easy for them to say
24 so, but this is a ameliorative provision. Even the BIA
25 acknowledged that.

1 They were trying to solve a problem that
2 happened when people had been waiting for a long period
3 of time, and not just the beneficiary, but also the --
4 just not the derivative beneficiary, but also the
5 principal beneficiary.

6 I mean, the lead Respondent in this case,
7 Rosario Cuellar de Osorio, had been waiting a long time
8 to emigrate with her husband and her family, and then
9 when the time came, she was told, you can all go, except
10 Melvin; because he happened to turn 21 four months
11 before the visa number became available. Congress
12 recognized that was a problem and tried to fix it. And
13 they did fix it, clearly.

14 That is the common-sense reading of this
15 provision, that the clear language up front, before the
16 comma, sets out the scope, and that Congress meant the
17 remainder of the provision to be read consistently,
18 harmoniously, and holistically, as this Court has said
19 it always does, with that scope, not to read it in
20 tension -- in some kind of irretrievable hostility with
21 itself, which is the argument that the government needs
22 to convince this Court of in order to even get to step
23 2.

24 Now, of course, we do have an alternative
25 argument, with -- which is -- you know, independent,

1 even if this Court were to agree that our Respondents'
2 children are not entitled to automatic conversion,
3 although we think they clearly are, then, at the very
4 least, there is another way to read the statute
5 harmoniously, which is that they're entitled to the
6 retention of priority date. That is the main benefit
7 that is provided by (h) (3).

8 It's the benefit that is mentioned in the
9 inactive title of the statute, and it's all that's
10 needed to affirm the judgment here.

11 And, again, remember the standard. All
12 we -- all we need to show, for our purposes, to affirm
13 the court of appeals, is that the language after the
14 comma can be read in a way that is consistent with the
15 language before the comma that sets out the broad scope
16 of the provision. It's at least possible to read the
17 retention language as an independent benefit.

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

25 JUSTICE SCALIA: Well, this is all upside

1 down. I thought it's the Agency that we deferred to.
2 If it can be read in the way the Agency wants, we affirm
3 the Agency's position.

4 MR. FLEMING: That is --

5 JUSTICE SCALIA: You're saying that that's
6 not true, that if it can be read the way the court of
7 appeals would like it to be read, we must affirm the
8 court of appeals on it.

9 MR. FLEMING: This is a very important
10 question, Justice Scalia. I want to make sure --

11 JUSTICE SCALIA: It sure is. I never
12 heard --

13 (Laughter.)

14 JUSTICE SCALIA: I never heard of that
15 proposition.

16 MR. FLEMING: What I have been -- what I
17 have been trying to note is the fact that what we're
18 talking about here is a statute that the government is
19 trying to argue is hopelessly internally inconsistent.
20 That is a step 1 argument that we think gets rejected at
21 step 1 because the statute can be read holistically and
22 harmoniously.

23 And if there is any possible reading -- this
24 is the language of Brown and Williamson and FTC versus
25 Mandel -- if the benefits after the comma can be read in

1 a way that is consistent with the broad scope that
2 Congress said this statute is to apply to, that is the
3 reading to be given.

4 Now, this --

5 JUSTICE SCALIA: That would depend entirely
6 upon how much weight you want to give to the word
7 "automatically." I frankly find it hard to think that
8 all the things that you say are going to happen flow
9 from the word "automatic." And once you have a more
10 narrow view of automatically, it isn't -- your holistic
11 argument does not carry the day, and you're left with an
12 ambiguity that, it seems to me, we would defer to the
13 Agency on, not -- not to the Ninth Circuit.

14 MR. FLEMING: This -- I'm not seeking
15 deference to the Ninth Circuit by any means, Justice
16 Scalia. I'm seeking deference to Congress and its plain
17 language. And that's precisely the point.

18 Now, going back to "automatic," since Your
19 Honor wanted to focus on that, I mean, "automatic" just
20 means it happens without any further interaction by
21 the -- by the alien. All it means in the regulations is
22 that the Agency regards the petition as being approved
23 in a different category. And that certainly can happen
24 in our case.

25 The government doesn't actually dispute that

1 it happens in the adjustment of status context. They
2 just argue that, somehow, the difference in petitioner
3 is relevant.

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

10 MR. FLEMING: What -- what fundamentally
11 happens is that the -- the petition gets filed by the
12 U.S. citizen relative, and then, after it's approved,
13 just by basically checking that the relative is entitled
14 to file that petition, then everybody awaits until the
15 petition -- until the priority date of the -- of the
16 beneficiary becomes current, according to the State
17 Department lines.

18 It's not as though there's a constantly
19 re-updating, to see if anyone has aged out or anyone has
20 naturalized or anyone's gotten married or anything like
21 that.

22 If somebody wants to do that, then,
23 obviously, they can send something in. But it's not as
24 though there is a continuous updating of the file, until
25 the time comes when a visa application is submitted.

1 And when a visa application is submitted, then it is
2 adjudicated, and then all of these things are checked,
3 and the determination of age under age one happens, and
4 that is the point where the automatic conversion is
5 going to happen.

6 And as long as that happens while the parent
7 is already a lawful permanent resident, there is no
8 obstacle to conversion and no obstacle to it being
9 automatic because nothing else needs to be done. All
10 that has to happen is the officer has to regard it as
11 having been approved in the --

12 JUSTICE BREYER: Can I ask you a quick
13 question --

14 MR. FLEMING: Yes.

15 JUSTICE BREYER: -- about your alternative
16 argument, with you and Justice Scalia. I take it your
17 argument is, look at the words; the part before the
18 comma defines a group, and that group is not in dispute.
19 It's all the F derivatives.

20 MR. FLEMING: Yes.

21 JUSTICE BREYER: All right. Then look at
22 the first part. It says, the petition shall
23 automatically be converted.

24 MR. FLEMING: Yes.

25 JUSTICE BREYER: See, if I lose on that,

1 then look at the second part. It says, the alien shall
2 retain the original priority date. And you say, as to
3 that, that has an independent life.

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

5 JUSTICE BREYER: That's the B. So it's
6 either A or B. And we think we win on A and B, but if
7 not, we at least win on B. Now, has the Agency ever
8 expressed a view in respect to whether you are right or
9 wrong about your independent B?

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

12 JUSTICE BREYER: No. So wouldn't the right
13 thing to do there be, in respect to B, send it back to
14 the Agency so that they can express a view in respect to
15 that?

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

17 JUSTICE SCALIA: How can you possibly
18 qualify for B, without qualifying for A? How can you
19 retain your original priority if you have not been
20 converted to another category?

21 MR. FLEMING: The way the government --

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

24 MR. FLEMING: The way the government has
25 been applying this provision since its enactment, for

1 over 10 years, Justice Scalia, has been to require
2 everybody, even the people -- the F2A beneficiaries whom
3 the government is now contending are entitled to
4 automatic conversion, it has required them to file to
5 get a new petition filed. It has been denying automatic
6 conversion to everybody, and it did that up through the
7 filing of our Red Brief.

8 It was only after we pointed this out, a
9 week before the government filed its reply brief in this
10 Court, CIS issued new guidance saying, okay,
11 henceforward, you don't need to file a new petition
12 anymore. As far as I know, for consular processing
13 cases, they are still doing it the old way. You still
14 cannot get automatic conversion, but you do get to
15 retain your priority date.

16 They are clearly implementable as separate
17 benefits. That is how this has been done over the last
18 10 or 11 years, until the government came time to file
19 its brief -- its reply brief in this Court.

20 JUSTICE SCALIA: Well, all that proves is
21 that you need either automatic conversion or the filing
22 of a separate petition. But you obviously need either
23 one or the other of those two --

24 MR. FLEMING: Yes.

25 JUSTICE SCALIA: -- before the -- the B

1 part, "the alien shall retain the original priority,"
2 makes any sense.

3 MR. FLEMING: We don't disagree with that,
4 Justice Scalia, but we have new petitions that were
5 filed as a protective matter in these cases. That --
6 that's not a problem. These -- precisely because the
7 government was requiring everyone to file a new
8 petition, all of the Respondents' children in this case
9 have F2B petitions pending. We don't think we need
10 them. Our primary argument is they should have had the
11 original petition converted.

12 But if, for some reason, this Court
13 disagrees, we have F2B petitions there, as to which the
14 priority date can and should be retained, so either of
15 these is a sufficient basis to affirm the court of
16 appeals.

17 I haven't spoken much about step 2 of
18 Chevron because I think it can and should be resolved at
19 step 1. But I would like to address the question
20 that -- the response that was made in -- in response to
21 Justice Ginsburg's question at the beginning.

22 The -- the point about the categories here,
23 it is a natural phenomenon of these categories that they
24 are fluid. People are coming in and out of them at
25 various times, depending on naturalization, on marriage,

1 on termination of marriage, as people adopt children, as
2 people decide not to immigrate, as people pass away.
3 There is -- these aren't hermetically sealed categories.

4 Also, there is no way to apply (h)(3)
5 without some kind of movement. Even the government's
6 theory of (h)(3) means that some people are going to go
7 out of the F2A category into the F2B category.

8 And so the question is, under Chevron step
9 2, which, again, we don't think the Court needs to
10 address, has the BIA drawn a rational line here, within
11 this group of beneficiaries who are all F2B, all
12 children of lawful permanent residents?

13 And the line the BIA drew is it says we are
14 going to treat better people who have two lawful
15 permanent resident parents than people who have one
16 lawful permanent resident parent, often, two, and a U.S.
17 citizen relative. Is there a rational line for that?
18 The BIA certainly hasn't provided one.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Ms. Goldenberg, four minutes.

22 REBUTTAL ARGUMENT OF ELAINE J. GOLDENBERG

23 ON BEHALF OF THE PETITIONERS

24 MS. GOLDENBERG: Thank you, Your Honor.

25 The Respondents were trying to put far too

1 heavy a burden on the government in the Chevron
2 deference case. So long as the Agency has arrived at a
3 reasonable reading of this very complicated statute, the
4 Agency is entitled to deference here. And the
5 Respondents' idea that some kind of internal
6 inconsistency is absolutely required here is wrong.

7 Automatic conversion -- the phrase about
8 automatic conversion is ambiguous, and it renders the
9 whole provision ambiguous.

10 And let me address the idea that everyone
11 before the comma, everyone in the "if" clause of Section
12 1153(h)(3) necessarily qualifies here. That's not true
13 under Respondents' own reading, and it can't be true
14 because there are going to be situations where someone
15 has their age calculated as over 21 as of the date the
16 visa becomes available to the parent, and the parent
17 never becomes a lawful permanent resident.

18 They don't qualify. They come to the
19 border, and they are not let through the border. And
20 so, in that situation, there are going to be people who
21 are named in that first part of the clause who are not going to be
22 be entitled to automatic conversion.

23 JUSTICE SOTOMAYOR: What he's saying -- but
24 what he's saying is that's true of everybody. FBA, any
25 of these categories don't get converted until the visa

1 is actually issued --

2 MS. GOLDENBERG: No, but that's not --

3 JUSTICE SOTOMAYOR: -- until you go to the
4 consular order -- office and apply. That's true no
5 matter what.

6 MS. GOLDENBERG: It's not true with respect
7 to F2A derivatives because they have an existing
8 relationship with the existing petitioner. They don't
9 need the primary beneficiary to become a lawful
10 permanent resident in order to get automatic conversion.

11 But the broader point is that we are talking
12 about --

13 JUSTICE SOTOMAYOR: They can come in before
14 their parent?

15 MS. GOLDENBERG: No, it's not that they can
16 come in --

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

19 MS. GOLDENBERG: Yes, Your Honor, but they
20 don't -- to get automatic conversion, they are not
21 relying on that new lawful permanent resident. They are
22 relying on their existing relationship with somebody
23 else.

24 But the broader point here is we aren't
25 necessarily talking about a subcategory of people who

1 are named in that "if" clause who are going to benefit
2 from automatic conversion.

3 There's another example, as well, in the
4 diversity visa context. Diversity visas don't have
5 priority dates. So it's awfully hard to see the
6 derivative beneficiaries of diversity visas who are
7 named in the (h)(2) definitional section are going to be
8 able to necessarily benefit from Section 1153(h)(3).

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

14 I'd like to talk a little bit as well about
15 the retention issue that Respondents discussed. And the
16 implication of Respondents' argument is, as I think
17 Justice Scalia recognized in his question, that somebody
18 can get a priority date and just walk around with it,
19 even if there is no valid petition pending as to them
20 and even if their parent never becomes a lawful
21 permanent resident.

22 So that would mean that aged-out derivative
23 beneficiaries, under Respondents' interpretation, would
24 be better off than children whose parents never become a
25 lawful permanent resident. They would have a priority

1 date somehow in their pocket, that they could walk
2 around with and use 20 years later, when somebody filed
3 a different petition on their behalf, an employment
4 petition --

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

9 MS. GOLDENBERG: Yes, but the statute is
10 most reasonably read to say, as all other automatic
11 conversion provisions do, that they retain the priority
12 date if the automatic conversion is possible, so that
13 there's a specific petition being identified that that
14 priority date is going to attach to, and not that you
15 just somehow have a priority date, which is, keep in
16 mind, a filing date, that you're just going to kind of
17 hold and walk around with and use it if you want.

18 CHIEF JUSTICE ROBERTS: Hold or maybe
19 retain.

20 MS. GOLDENBERG: Well -- but in a situation
21 in which the parent never becomes a lawful permanent
22 resident, that would mean -- that would turn the -- the
23 notion of a derivative beneficiary upside down. That
24 would mean that someone could, in effect, be a
25 derivative beneficiary and use that priority date in the

1 future, even if --

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

4 MS. GOLDENBERG: Sorry, Your Honor.

5 JUSTICE SOTOMAYOR: It's an original date,
6 basically, to the original petition, meaning there
7 has -- it is that that's being converted. If that
8 hasn't been granted, there's nothing to convert. If
9 that person hasn't become a citizen, there is nothing to
10 attach any change to.

11 MS. GOLDENBERG: But Respondents' argument
12 is that you don't need automatic conversion, that
13 retention of priority date --

14 JUSTICE SOTOMAYOR: You're talking about his
15 second step.

16 MS. GOLDENBERG: It's the -- exactly. It's
17 the separate step.

18 JUSTICE SOTOMAYOR: All right. We're
19 talking about his second step.

20 MS. GOLDENBERG: You just explained exactly
21 why that can't be right because you do need something to
22 attach it to.

23 JUSTICE SOTOMAYOR: All right. You're only
24 talking about his second argument.

25 MS. GOLDENBERG: Exactly. But I would like

1 to go back to automatic conversion, if I could, and just
2 make a few more points. And one is that the idea
3 that -- that Wang didn't say that the petitioner --

4 CHIEF JUSTICE ROBERTS: You can finish --
5 finish that sentence.

6 MS. GOLDENBERG: Thank you, Your Honor.

7 The idea that the board in the matter of
8 Wang didn't say that the petitioner couldn't change is
9 simply wrong. The board very, very clearly, on page 35
10 of its decision, says that conversion means that you
11 don't need a new petitioner.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

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

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