David Froman on

Scialabba v. Cuellar de Osorio: Supremes Deny Young Adults Protection Under CSPA, Overlook Solution

2014 Emerging Issues 7202

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In a plurality decision as deeply flawed as the Board of Immigration Appeals (BIA or Board) decision to which it defers,[1] the Supreme Court[2] last week overturned the en banc, class action decision of the Court of Appeals for the Ninth Circuit that broadly interpreted a section of the Child Status Protection Act (CSPA) designed to give relief to formerly "aged out" principal and derivative beneficiary children of family petitioners and principal beneficiaries. In four separate opinions, the Court split three-plus-two to one-plus-three over this contentious immigration issue. The Court accepted this Ninth Circuit class action on certiorari at the government's behest ostensibly to resolve a "Circuit split" regarding the meaning of 8 U.S.C. § 1153(h)(3).[3] Both the Fifth and the Ninth Circuits had found this statute unambiguous, ignored the Board's decision, and granted the requested relief.[4] Although an earlier Second Circuit decision reached a result contrary to the other two circuits', it also found the statute unambiguous and therefore also declined to follow the

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1 Matter of Wang, 25 I. & N. Dec. 28 (BIA 2009).

2 Scialabba v. Cuellar de Osorio, 2014 U.S. LEXIS 3991 (June 9, 2014).

3 Immigration and Nationality Act (INA) § 203(h)(3). This is the operative part of section 3 of the CSPA, Pub. L. No. 107-20, 116 Stat. 927 (2002), entitled "TREATMENT OF CERTAIN UNMARRIED SONS AND DAUGHTERS SEEKING STATUS AS FAMILY-SPONSORED, EMPLOYMENT-BASED, AND DIVERSITY IMMIGRANTS" (capitalization in original), and codified at 8 U.S.C. § 1153(h). The statute reads as follows:

> (1) In general.—For purposes of subsections (a)(2)(A) and (d), a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 101(b)(1) shall be made using
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> > (A) the age of the alien on the date on which an immigrant visa number becomes available for such alien (or, in the case of subsection (d), the date on which an immigrant visa number became available for the alien's parent), but only if the alien has sought to acquire the status of an alien lawfully admitted for permanent residence within one year of such availability; reduced by
> > (B) the number of days in the period during which the applicable petition described in paragraph (2) was pending.
>
> (2) Petitions described.—The petition described in this paragraph is—
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> > (A) with respect to a relationship described in subsection (a)(2)(A), a petition filed under section 204 for classification of an alien child under subsection (a)(2)(A); or
> > (B) with respect to an alien child who is a derivative beneficiary under subsection (d), a petition filed under section 204 for classification of the alien's parent under subsection (a), (b), or (c).
>
> (3) Retention of priority date.—If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d), the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

4 Khalid v. Holder, 655 F. 3d 363, 365 (2d Cir. 2011); De Osorio v. Mayorkas, 695 F. 3d 1003, 1006 (9th Cir. 2012) (case below).

Board.[5] Indeed, the Second Circuit decision turned on the appellants' *failure of argument*: "Cen has not specified a category that would be appropriate."[6] Contrary to the plurality's implication in footnote 9, which erroneously reports Second Circuit deference to the Board's opinion in *Wang*, all three circuit courts ignored *Wang*. Uniformly, they found the statute in question unambiguous, making deference to the Board unnecessary.

Undeterred, after emphasizing repeatedly how complex the immigration law is, the plurality "punted" the issue by finding a problem with the statute and deferring to a regressive and internally contradictory Board opinion that relied on ambiguity of the statute for its holding. Yet only the concurring justices—two of nine—actually articulated a ground of ambiguity sufficient on its face to trigger deference to the agency under the rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[7] The plurality's two-faced approach—as the concurring Chief Justice pointed out—does not qualify any "ambiguity" for *Chevron* purposes.[8] Moreover, the plurality found unambiguous the very portion of the statute that so confounded the Board in *Wang*.[9] The plurality's decision raises more questions than it answers. It shows discomfort in dealing with a difficult—though ultimately understandable and resolvable—immigration issue. It has an apologetic tone that expects "the reader" to drop out owing to the complexity of the statute. And it produces a decision of questionable validity in light of the authorities cited and—more importantly—the pertinent authorities *not* cited in deciding this important case.

I will turn first to the main points of the four opinions. Then I will assess the means of overcoming this additional hurdle on the path to immigration for derivative sons and daughters of principal aliens under the family-preference immigration scheme by comparing the two-petition approach and the simpler, more efficient one-petition approach that is already supported by existing law and regulations.

THE OPINIONS.

Plurality Opinion of Justice Kagan, in which Justice Kennedy and Justice Ginsburg joined.

Question presented. Justice Kagan, writing for the plurality, introduces the issue before the Court in the following language:

> The question presented in this case is whether the CSPA grants a remedy to all aliens who have thus outpaced the immigration process—that is, all aliens who counted as child beneficiaries when a sponsoring petition was filed, but no longer do so (even after excluding administrative delays) by the time they reach the front of the visa queue. The Board of Immigration Appeals (BIA or Board) said no. It interpreted the CSPA as providing relief to only a subset of that group—specifically, those aged-out aliens who qualified or could have qualified as principal beneficiaries

5 Li v. Renaud, 654 F. 3d 376, 382-83 (2d Cir. 2011).
6 *Id.* at 385.
7 467 U.S. 837, 843 (1984).
8 Concurring slip opinion at 1, 2014 U.S. LEXIS 3991, at *63-64.
9 Plurality slip opinion at 14, 2014 U.S. LEXIS 3991, at *29-30.

> of a visa petition, rather than only as derivative beneficiaries piggy-backing on a parent. We now uphold the Board's determination as a permissible construction of the statute.[10]

***Wang* and *Chevron*.** Justice Kagan explains that the Board in *Wang* rejected a request to retain the first petition's priority date on the principal alien's "second" petition for his adult daughter for the reason that "the language of [§ 1153(h)(3)] does not expressly state which petitions qualify for automatic conversion and retention of priority dates."[11] Indeed, the Board found clear statements defining "the universe of petitions that qualify for the 'delayed processing formula'" in the first two numbered paragraphs of the statute, but not in § 1153(h)(3).[12] Taking up the matter before the Court, Justice Kagan reviews their facts and establishes the similarity of the respondents' situations to that considered by the Board in *Wang*.[13]

Next she reviews principles of *Chevron* deference, noting, "the statute's plain meaning controls, whatever the Board might have to say."[14] Then she declares § 1153(h)(3) "Janus-faced" for addressing the issue at hand "in divergent ways." "Its first half looks in one direction, toward the sweeping relief the respondents propose, which would reach every aged-out beneficiary of a family preference petition. But . . . the section's second half looks another way, toward a remedy that *can apply* to only a subset of those beneficiaries . . . ."[15]

The practical effect of this finding. By adopting this characterization of the statute, the plurality gets the first half right. Section 1153(h)(3) unambiguously describes the universe to whom its relief applies. However, the plurality goes off track with its second-half analysis. It confuses divergent *practice* with the clear language of relief set forth in the second clause of the statute. The plurality appears to have forgotten the mandate it just quoted, "the statute's plain meaning controls." Difficulty of implementation does not make a statute ambiguous or even divergent. So at this point, the plurality has undercut the application of *Chevron* deference it relies on for its disposition of this case—either by a lack of statutory ambiguity through divergence or through focusing on the

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10 Plurality Opinion at 2, 2014 U.S. LEXIS 3991, at *10-11. While it is true that the Board "interpreted the CSPA as providing relief to only a subset of that group," the Board considered a much narrower question than "whether the CSPA grants a remedy to *all* aliens who have . . . outpaced the immigration process" (emphasis added):

> The issue in this case is whether a derivative beneficiary who has aged out of a fourth-preference visa petition may automatically convert her status to that of a beneficiary of a second-preference category pursuant to section 203(h) of the Act. To answer this question, we must examine whether the CSPA intended for the beneficiary of a second-preference visa petition filed by her father to retain the priority date previously accorded to her as the derivative beneficiary of a fourth-preference visa petition filed by her aunt.

Wang, 25 I. & N. Dec. at 30. The juxtaposition of the all-inclusive, general question considered by the Court with the narrow, specific focus of the Board in *Wang* demonstrates that the Court takes the two-petition approach considered in *Wang* as a given—as the only means of obtaining the benefits of the CSPA for over-21 principal and derivative beneficiaries under § 1153(h). Therefore, despite the plurality's broad statement of the question, the Board interpretation it defers to affects only family derivatives where the principal alien files a second petition in F2B category for a former derivative child.

11 Plurality Opinion at 11, 2014 U.S. LEXIS 3991, at *25 (citing *Wang,* 25 I. & N. Dec. at 33).

12 *Wang,* 25 I. & N. Dec. at 33.

13 Plurality Opinion at 12-13, 2014 U.S. LEXIS 3991, at *26-27.

14 Plurality Opinion at 13-14, 2014 U.S. LEXIS 3991, at *29.

15 Plurality Opinion at 14, 2014 U.S. LEXIS 3991, at *29 (emphasis added).

practicality of implementation rather than the actual remedial language of the statute. Moreover, the plurality's unequivocal declaration of eligibility under the first clause, repeated twice in as many paragraphs, undercuts the source of ambiguity identified in *Wang*, that the statute "does not expressly state which petitions qualify for automatic conversion and retention of priority dates." That is precisely what the first clause does; it defines the universe of petitions whose beneficiaries qualify for the relief the statute provides. Therefore the "ambiguity" *Wang* relied on to range far afield into legislative history and agency institutional practices in order to narrow the window of eligibles to the eye of a needle is unsupportable.[16]

The plurality's prescription for success. After finding that the respondents' sons and daughters "along with every other once-young beneficiary of a family preference petition now on the wrong side of 21" qualify under the statute's "opening clause" the plurality declares: "If the next phrase said something like 'the alien shall be treated as though still a minor' (much as the CSPA did to ensure U. S. citizens' children, qualifying as 'immediate relatives,' would stay forever young …), all those aged-out beneficiaries would prevail in this case."[17] But the next phrase *does* say something like that—tailored to its two different populations. Its broad language accommodates both *primary* beneficiaries in the F2A category and *derivative* beneficiaries in all five family categories. These are like "apples" and "oranges."[18] As explained in more detail in the cited article and below, the Board focused on the system it knew for F2A principal beneficiaries because that system was already established in the regulations. But it threw out the derivatives, because it did not understand how to deal with their established regime of following to join, possibly because no one explained it to them. Suffice it to say, a method exists to do just what the plurality reads the remedial clause to require: convert "that same petition from a category for children to an 'appropriate category' for adults (while letting [the beneficiary] keep the old priority date)."[19]

Wrapping up the plurality opinion. The remainder of the plurality opinion focuses on establishing how "automatic conversion" may occur, when such conversion occurs, whether such conversion is divisible or part and parcel of priority-date retention, whether a sponsor is available, whether the beneficiary has a "legally recognized relationship" with the petitioner, and other details incident to a two-petition approach. The dissenting opinions of Justice Sotomayor and Justice Alito effectively meet the plurality's concerns. Because the plurality has rightly or wrongly effectively disposed of the two-petition approach for the time being, I am focusing here on those attributes of the opinions that may lend themselves to alternative approaches. One such attribute appears in the apparent

16 The government has argued that this statute is ambiguous on various grounds but primarily on practicability. For a discussion of bogus ambiguity arguments, see David Froman on Current Litigation and How to Avoid *Matter of Wang,* 25 I. & N. Dec. 28 (BIA 2009), for "Aged Out" Derivative Beneficiaries Under the Child Status Protection Act (CSPA): An Emerging Perspective, 2011 Emerging Issues 5696, at 5-6 (LexisNexis 2011) (explaining "Class 2 Ambiguity: "I don't see how that is going to work!"). As I explain below, none of the three circuit courts that have considered the statute have found it ambiguous.

17 Plurality Opinion at 15, 2014 U.S. LEXIS 3991, at *31.

18 For a detailed discussion of how the "apples" and "oranges" have different immigration processing schemes and how the statutory language accommodates both, see David Froman on Current Litigation, *supra* note 16, at 5-7, 9.

19 Plurality Opinion at 15, 2014 U.S. LEXIS 3991, at *31. "And so the aliens who may benefit from § 1153(h)(3)'s back half are only those for whom that procedure is *possible*. The clause offers relief not to every aged-out beneficiary, but just to those covered by petitions that can roll over, seamlessly and promptly, into a category for adult relatives." *Id.* at 15-16, 2014 U.S. LEXIS 3991, at *32 (emphasis added). A single petition procedure, detailed below, makes this benefit possible for all those derivatives excluded by *Wang* and the Court in this opinion.

weakness of the plurality's commitment to *Wang*. In explaining its rationale for deferring to the BIA, the plurality tiptoes:

> [W]e hold only that §1153(h)(3) permits—not that it requires—the Board's decision to so distinguish among aged-out beneficiaries. . . . Were there an interpretation that gave each clause full effect, the Board would have been required to adopt it. [T]he only beneficiaries entitled to statutory relief are those capable of obtaining the remedy designated.[20]

With this tepid, almost apologetic, support of the Board's decision in *Wang*, the plurality leaves the door open wide for "an interpretation that [gives] each clause full effect" with the expectation that "the Board would [be] required to adopt it." Far more beneficiaries than the Board (or the plurality) realizes "are capable of obtaining the remedy designated." After reviewing each of the other opinions briefly, I will suggest an approach that avoids the prohibitions of this decision and satisfies the concerns of the plurality and concurrence while remaining compatible with the dissenting opinions.

Opinion of Chief Justice Roberts, joined in by Justice Scalia, concurring in the result.

In his brief concurrence in the result, Chief Justice Roberts, joined by Justice Scalia, explains that he holds a "different view of what makes this provision 'ambiguous' under *Chevron*." He counsels that "deference . . . because of a direct conflict between . . . clauses . . . is wrong": "*Chevron* is not a license for an agency to repair a statute that does not make sense." In contrast to the plurality's opposing-faces characterization, he "see[s] no conflict, or even 'internal tension' . . . in section 1153(h)(3)."[21] With the plurality, he finds that the first clause of § 1153(h)(3) "states a condition . . . that beneficiaries from any preference category can meet."[22] But he disagrees that the first clause points toward any relief.[23] After conducting grammatical analysis via a Tax Code example, he zeroes in on the *practicality* of the statute's operative language in the second clause that confers "automatic conversion" and "priority date retention" on eligible beneficiaries: "But automatic conversion is not possible for every beneficiary in every preference category, as the plurality convincingly demonstrates."[24] Focusing on this "automatic conversion" language of the second clause, Chief Justice Roberts constructs an incomplete syllogism, built on a statement of Justice Sotomayor, to conclude that the statute is ambiguous based on what he perceives as a disparity between the size of the population offered benefits and the smaller number receiving them.[25]

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20 Plurality Opinion at 21, 2014 U.S. LEXIS 3991, at *41-42. This represents a decided retreat from Justice Kagan's characterization of the other side of the "Circuit split" that prompted this whole inquiry: *"Li v. Renaud*, 654 F. 3d 376, 385 (CA2 2011) (holding that §1153(h)(3) not merely permits, *but requires* the Board's contrary interpretation)." Plurality Opinion at 13 n.9, 2014 U.S. LEXIS 3991, at *28 n.9 (emphasis added). (*Li* actually found no ambiguity and ignored *Wang*, but denied relief for lack of proof of an 'appropriate category' for the beneficiary.)

21 Concurring Opinion at 2, 2014 U.S. LEXIS 3991, at *64-65.

22 *Id*., 2014 U.S. LEXIS 3991, at *65.

23 *Id.* at 3, 2014 U.S. LEXIS 3991, at *66.

24 Concurring Opinion at 4, 2014 U.S. LEXIS 3991, at *68.

25 *Id.* at note 4. Expanded, the syllogism underlying note 4 goes something like this: A statute is ambiguous if the relief promised to all cannot be given to all. Here Justice Sotomayor is wrong that the relief promised can be given to all. Therefore the statute is ambiguous.

Chief Justice Roberts' ambiguity conclusion arises not from the language of the statute, but from the perceived difficulty of its implementation. He finds not that the plain language of the statute is ambiguous about what benefits it affords. Rather, he finds ambiguity by impracticality or impossibility of implementation—which he assumes, based on the plurality's analysis, inheres in the choice of statutory language. These are different matters. In the end, his definition of ambiguity points to the same defect as the plurality's dualistic view: not that the statute's language is unclear, but that the Justices cannot perceive based on their experience and the law cited to them how to implement the statute to provide the promised benefits to all. It is the Janus-faced analysis by a different name. Chief Justice Roberts echoes *Wang*: "Congress did not speak clearly to which petitions can 'automatically be converted.'"[26] So he invokes *Chevron* and defers to the deeply flawed Board opinion that totally writes out the § 1153(d) derivative population from the statute and provides such a meager result of this important legislation that it barely exceeds what was already available by regulations prior to the statute. In effect, the Board nullified § 1153(h) in *Wang*. The plurality and concurring Justices have just blessed that result.

Caution to practitioners: In submitting a CSPA case to the USCIS, be prepared to encounter any or all of the following: assumption that your client has aged out and is not entitled to benefits; subordination of the CSPA to traditional procedures; denial that Congress meant what it said; overbroad application of this and the *Wang* decision; denying relief because there is no category to convert to; assuming the "appropriate category" has to be a *different* category; saying that the derivative has no "legal relation" to the petitioner. Patience and information gathering should feature prominently in your toolbox for these encounters!

Dissenting Opinion of Justice Alito.

Summary. Justice Alito, dissenting, agrees with the Chief Justice that direct conflict is not ambiguity: "an agency administering the statute is [not] free to decide which half it will obey."[27] He also agrees with many of Justice Sotomayor's criticisms of the plurality opinion. For him the key question is:

> whether there is or is not an "appropriate category" to which the petitions for respondents' children may be converted. If there is, the agency was obligated by the clear text of 8 U.S.C. § 1153(h)(3) to convert the petitions and leave the children

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26 Concurring Opinion at 4, 2014 U.S. LEXIS 3991, at *68. The Chief Justice found it was reasonable among all the other possibilities for the Board to provide relief only to a child of a principal alien under the F2A preference category. This "statutory" interpretation, however, rests not on the plain language of the statute, but on underlying considerations of bureaucratic inertia where an existing regulatory scheme was permitted to overrule a new, conflicting statute:

> That interpretation is consistent with the ordinary meaning of the statutory terms, with the established meaning of automatic conversion in immigration law, and with the structure of the family-based immigration system. *Ante*, at 15-20 [2014 U.S. LEXIS 3991, at *31-40]. It also avoids the problems that would flow from respondents' proposed alternative interpretations, including the suggestion that retention of the original priority date provides a benefit wholly separate from automatic conversion. *Ante*, at 18-19, 22-32 [2014 U.S. LEXIS 3991, at *37-39, 43-62].

Concurring Opinion at 4, 2014 U.S. LEXIS 3991, at *69.

27 J. Alito Dissent (slip opinion) at 1, 2014 U.S. LEXIS 3991, at *69.

> with their original priority dates. . . . If there is not an appropriate category, then the agency was not required to convert the petitions.[28]

Finding the relief clause clear and emphasizing the word "*shall*" preceding each of the two benefits it contains, he declares: "The Board was not free to disregard this clear statutory command."[29]

Hitting the bull's-eye. Justice Alito succinctly zeroes in on the key to understanding this statute, the "appropriate category." Failure to identify one for derivatives underlies the Board's decision in *Wang*, the Third Circuit's decision in *Li*, and the plurality and concurring opinions here. This is not an issue of ambiguity, but one of *implementation*. As I explain below, an appropriate category exists for each derivative under existing statutes and regulations. Therefore, "the agency [is] obligated by the clear text of 8 U.S.C. § 1153(h)(3) to convert the petitions and leave the children with their original priority dates."

Dissenting Opinion of Justice Sotomayor, with whom Justice Breyer joined, and with whom Justice Thomas joined, except as to footnote 3.

Justice Sotomayor authors a cogent, coherent alternative to the strained logic of the plurality and the concurring opinions. She treats Congress's words with respect and endeavors to apply them in ways that make the statute operate as a coherent whole. She cites the "eligibility clause" of § 1153(h)(3) and notes the plurality's concurrence that it "states a condition that every aged-out beneficiary of a preference petition satisfies."[30] She correctly observes (in relation to the underlying ambiguity finding of *Wang*) that the "eligibility clause answers the precise question in this case: Aged-out beneficiaries within all five categories are entitled to relief."[31] Citing *Chevron*,[32] she concludes, " '[T]he intent of Congress is clear,' so 'That is the end of the matter.'"

Having found the statute unambiguous, Justice Sotomayor proceeds to dismantle the plurality opinion issue by issue. On statutory interpretation, she cites a text by Justice Scalia and quotes principles that he does not appear to follow in this case.[33] On deference, she observes, "As judicious as it can be to defer to administrative agencies, our foremost duty is, and always has been, to give effect to the law as drafted by Congress."[34] She finds two alternative readings of the statute that would treat the statute as a coherent whole, a feat deemed impossible by the plurality and concurring justices.[35] She meets the plurality's policy and contextual arguments and explains why automatic conversion and priority-date retention are separate benefits.[36] By page 13 of her slip opinion, the two-petition approach is introduced, and Justice Sotomayor does an admirable job of countering the arguments of the plurality on each aspect of this question.[37]

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28 *Id.* at 1-2, 2014 U.S. LEXIS 3991, at *70.
29 *Id.* at 2, 2014 U.S. LEXIS 3991, at *72.
30 J. Sotomayor Dissent (slip opinion) at 5, 2014 U.S. LEXIS 3991, at *78.
31 *Id.* at 6, 2014 U.S. LEXIS 3991, at *79.
32 467 U.S. 837, 842 (1984).
33 J. Sotomayor Dissent at 7, 2014 U.S. LEXIS 3991, at *82.
34 *Id.* at 8, 2014 U.S. LEXIS 3991, at *83.
35 *Id.* at 8-9, 2014 U.S. LEXIS 3991, at *83-84.
36 *Id.* at 10-12, 2014 U.S. LEXIS 3991, at *86-90.
37 *Id*. at 13-22, 2014 U.S. LEXIS 3991, at *92-108.

In closing, she finds the plurality's view that Congress delegated the choice of implementation of this unambiguous statute "untenable." For her, "a commonsense approach to statutory interpretation" that uses "traditional tools of statutory construction" and seeks "to give effect to a statute's clear text before concluding that Congress has legislated in conflicting and unintelligible terms" reveals "straightforward interpretations of § 1153(h)(3) that allow it to function as a coherent whole. Because the BIA and the Court ignore these interpretations and advance a construction that contravenes the language Congress wrote, I respectfully dissent."[38]

DISCUSSION.

Missed opportunity. Owing to a lack of critical background information, the Court missed the opportunity to support Congress in its quest to provide relief for families caught in the long delays in our clogged family-preference quota system.

Two-petition problems. The two-petition approach considered here presents certain conceptual problems that figured prominently in the reversal of the Ninth Circuit's decision: the force of bureaucratic inertia and existing rules, the problem of a second petitioner, the timing of the eligibility determination, the "place in line" objection, and the "through and through perplexing" nature of matching automatic conversion and priority date retention for four of the five family preference categories.[39] The plurality counters each of the respondents' arguments and concludes that the proper course is to defer to the "immigration experts" by upholding the BIA's *Wang* decision as a permissible interpretation of the statute—subject to the caveat: "Were there an interpretation that gave each clause full effect, the Board would have been required to adopt it."[40]

Practitioner Note: Such an interpretation based on existing statutes and regulations does exist, but it was not presented to the Board, nor to the Court. That interpretation reconciles the two seemingly divergent parts of the relief clause so that together they face in a single direction: directly toward the broad-based relief forecast in the entitlement clause. Because this solution stands outside the purview of the decision, it continues as a valid way for over-twenty-one derivative family beneficiaries to continue to qualify for immigration as "CSPA-protected" derivative beneficiaries. More on this below.

Unintended and likely untenable consequences. The two-petition approach can work with priority-date retention, and there has been some recognition of this argument. The main drawback of the two-petition approach, however, not explicitly mentioned in any decision, but broadly hinted at by the government's concern about pushing others to the back of the second petition line,[41] is the funneling effect of all those second petitions pouring numerous over-twenty-one derivative beneficiaries from the F1, F3, & F4 preference categories (in addition to those already automatically spilling over from F2A) into the F2B category for the over-twenty-one, unmarried sons and

38 J. Sotomayor Dissent at 22, 2014 U.S. LEXIS 3991, at *108.
39 Plurality Opinion at 8, 2014 U.S. LEXIS 3991, at *20.
40 Plurality Opinion at 21, 2014 U.S. LEXIS 3991, at *42.
41 *Wang,* 25 I. & N. Dec. at 38; Plurality Opinion at 32, 2014 U.S. LEXIS 3991, at *60-62.

daughters of lawful permanent residents. For a small number of individual cases, this might look like a good idea, and the beneficiaries will pass unnoticed. But if the permanent resident principal aliens of every "aged out" derivative beneficiary petitioned for them—and they retained their original priority dates per the statute, as requested in both *Wang* and this case—the F2B category would soon be overwhelmed, creating massive retrogression of priority dates. And this would, as predicted, redound to the detriment of many who have already been waiting in that line. This unintended consequence is unfortunate, but not irremediable. Certainly, it offers no ground to call the statute "ambiguous." Ill advised, hard to implement, a sweeping change—it may be any or all these things, but *not* ambiguous.

One-petition solution. A single-petition approach is compatible with the express language of all four opinions, relies on an unambiguous reading of the statute—so *Chevron* deference is not an issue—and is supported by existing immigration laws and regulations. It is consistent with the logic of both the prior decisions holding that a two-petition approach is unacceptable and the circuit court decisions holding that a two-petition approach is acceptable.[42] It accounts for the differences between § 1153(a)(2)(A) principals and § 1153(d) derivatives and the differing regimes in effect for each. It shows that they require different treatment regarding "automatic conversion" and "appropriate category." Owing to those differences, the language of the statute was drawn more broadly to accommodate these two differing regimes in one statutory mandate. The F2A conversion scheme was already well known and enshrined in regulations. The Board locked onto what it knew and jettisoned the rest—all the § 1153(d) derivatives—because it had no existing regime to accommodate these new over-twenty-one beneficiaries. In doing so, the Board subordinated the new statute to existing regulations in the guise of looking for guidance in interpreting what it had already labeled as ambiguous. Rather, the Board obsessed over implementation issues and threw out the derivatives because it was too hard to figure out how they could be handled. They didn't fit into existing forms. No thought was given to needing *new* forms of dealing with them—per the statute!

New paradigm: Out with "age-out." In with "CSPA-protected." The new statute breaks the "age out" paradigm of the old immigration law for all specified derivatives. Combined with the following-to-join regulation of the Foreign Affairs Manual, derivatives who benefit from the CSPA are permitted to follow to join their principals so long as their relationship with the principal continues to exist, even after they turn twenty-one.[43] Although neither term appears in the statute, its clear

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42 For analysis of the three courts of appeals decisions on the CSPA, see David Froman on *De Osorio v. Mayorkas,* 2012 U.S. App. LEXIS 20177 (9th Cir. Sept. 26, 2012) (en banc): Suggestions for Implementing Court's Ruling Upholding Child Status Protection Act Coverage for Over-Twenty-One Derivative Beneficiaries: An Emerging Perspective, 2012 Emerging Issues 6736 (LexisNexis 2012).

43 Such a child may "follow to join" the principal alien according to 9 Foreign Affairs Manual (FAM) 40.1 N7.1 (emphasis added):

> The term "following to join," as used in . . . INA 203(d), permits an alien to obtain a[n] . . . immigrant visa (IV) and the priority date of the principal alien as long as the alien following to join has the required relationship with the principal alien. There is no statutory time period during which the following to join alien must apply for a visa and seek admission into the United States. However, if the principal has died or lost status, or the relationship between the principal and derivative has been terminated, there is no longer a basis to following to join. As an example, a person would no longer qualify as a child "following to join" upon reaching the age of 21 years (*unless they qualify for the benefits of the Child Status Protection Act*) or by entering into a marriage. There is no

mandate supports only one: "CSPA-protected." This appears all the more clearly when we consider the CSPA as a whole.

The CSPA's structure supports the broadest possible relief. As part of a larger plan, Congress established a new benefit for the children of family, employment, and diversity beneficiaries. To properly understand the nature of this statute, we should examine the provisions and organization of the Act that brought it into being. The CSPA contains provisions for determining and preserving the status of the immediate-relative children of U.S. citizens (§ 2), unmarried sons and daughters seeking status as family-sponsored, employment-based, and diversity immigrants (§ 3), asylees (§ 4), refugees (§ 5), and for creating an election for unmarried sons and daughters of U.S. citizens (§ 6). Sections 2, 4, and 5 treat homogeneous classes. Each of these preserves the child status of children under twenty-one at the time of filing. No matter how old they get, these children will—if otherwise qualified—be entitled to immigrate based on their preserved status as a child.

Section 3, on the other hand treats a diverse population of five family, seven employment, and the diversity visa categories. It includes both principal aliens under the family F2A category and derivative beneficiaries in all the other categories.[44] Owing to such a diverse population of beneficiaries, the language granting relief must be broad and flexible. The homogeneous provisions granted relief to all potential recipients. Granting similar relief to this larger, diverse population required a provision that would accommodate the pre-existing family category-shifting scheme while at the same time according a commensurate benefit to the heretofore hapless derivatives who "aged out" because of long visa-availability delays.

The need for tailoring. A simple provision preserving "child" status for all beneficiaries[45] would create confusion as applied to the family category-shifting scheme. Instead, allowing these derivatives to continue waiting in their "appropriate category" and preserving their priority dates would accomplish the same purpose as the forever-"child" designations do for the homogeneous populations. Confirmation of congressional intent to provide broad and flexible relief appears in the remaining provision, § 6, treating unmarried sons and daughters of naturalized citizens. This is another homogeneous population of principal aliens from the F2B category (unmarried sons and

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> requirement that the "following to join" alien must take up residence with the principal alien in order to qualify for the visa. (See 9 FAM 42.42 N11.) The term "following to join," also applies to a spouse or child following to join a principal alien who has adjusted status in the United States.

The cross-referenced provision, 9 FAM 42.42 N11, "Derivative Status for Spouse or Child," provides in part as follows (emphasis added):

> a. A spouse or child acquired prior to the principal alien's admission to the United States or the alien's adjustment to legal permanent resident (LPR) status, or a child born of a marriage, which existed prior to the principal alien's admission, or adjustment, who is following-to-join the principal alien, should be accorded derivative status under INA 203(d). *No second preference petition is required.*

44 The differences between "principal" and "derivative" beneficiaries and between the two statutes § 1153(h) relies on, § 1153(a)(2)(A) and § 1153(d) are critical to understanding the questioned clause. For further discussion of these differences, see David Froman, *Properly Applying INA §203(h) of the Child Status Protection Act: When the "Appropriate Category" Remains the Same Category*, 15 Bender's Immigr. Bull. 1145, 1147 (Aug. 15, 2010), and David Froman on Current Litigation, *supra* note 16, at 5-7.

45 As suggested by Justice Kagan for the second clause of the statute. Plurality Opinion at 15, 2014 U.S. LEXIS 3991, at *31.

daughters of permanent residents). When the parent naturalizes, these principal beneficiaries can elect either to move to the F1 preference category or to remain in the F2B category based upon how the differential delays of the two categories may offer the shortest wait. This section also provides for priority-date retention: "Regardless of whether a petition is converted under this subsection or not, if an unmarried son or daughter described in this subsection was assigned a priority date with respect to such petition before such naturalization, he or she may maintain that priority date."[46]

This portion of the CSPA offers maximum flexibility and priority-date protection.

The "structural" take-away. Analyzing the main provisions of the CSPA shows that—across the board—the statute provides *full* benefits commensurate with its eligible populations. It offers flexibility where needed and simplicity where possible. Each of its provisions is tailored to *serve* the population described. The methods of service differ, but they are all designed to achieve the fullest degree of protection for all beneficiaries. Section 3, appearing as 8 U.S.C. § 1153(h), is part of this larger, coherent whole. The BIA missed its opportunity to support the clear intent of Congress, and so did the Court.

The "derivative statute" and "following to join" permit implementing the broadest possible relief. The "derivative statute," § 1153(d), plays a central role in §1153(h).[47] It contains key language that shows the seemingly "Janus-faced" statute to possess but a single visage. Yet the Court failed to investigate and apply key concepts from that statute. Section 1153(d) confers the status and priority of the principal alien upon the derivative spouse or child who has no beneficiary status in her own right. It further provides that the derivative may accompany or follow to join the principal alien. "Following to join" bridges the gaps the court found too far to leap when considering two petitions. The combination of § 1153(d) and following to join links the derivative to the original petitioner. It preserves the original petition and a "legally recognized relationship" between the petitioner and the derivative beneficiary, who, by virtue of § 1153(d), stands in the shoes of the principal alien. Moreover, the derivative should "ride" on the same affidavit of support as the principal alien, without need for an additional sponsor. This meets the procedural and policy objections on which the plurality relies.[48]

CSPA-protected derivative status looks a lot like derivative spouse status. Rather than attempting to shoehorn over-twenty-one derivative children into another category for the sake of change, the better approach is to leave all the *derivatives* affected by §1153(h)(3) in their own "appropriate category." This avoids clogging the F2B category, leaves them with the priority dates they are already entitled to, and converts them from "aged out" to "CSPA-protected" derivative

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46 Pub. L. No. 107-20, 116 Stat. 927, § 6 (2002), codified at 8 U.S.C. § 1154(k)(3).

47 Section 1153(d) provides:

> A spouse or child as defined in subparagraph (A), (B), (C), (D), or (E) of [1]101(b)(1) shall, if not otherwise entitled to an immigrant status and the immediate issuance of a visa under subsection (a), (b), or (c), be entitled to the same status, and the same order of consideration provided in the respective subsection, if accompanying or following to join the spouse or parent.

48 Plurality Opinion at 17-19, 2014 U.S. LEXIS 3991, at *34-39.

beneficiaries per the statutory mandate. This conversion to "adult status" does not require further implementation because it takes place automatically, by operation of law, in consonance with the unambiguous wording of the statute. It recognizes that §1153(d) derivatives operate in a different regime than the more familiar F2A principals and derivatives with their pre-existing hierarchy of conversion opportunities. The §1153(d) derivative regime is much simpler: The conversion is one of status, not category. These beneficiaries are already situated in their "appropriate category" by virtue of their right of "following to join" their principal with the same status and order of consideration. This places them in the shoes of their principal and maintains the relation to the petitioner and the necessary sponsorship that the plurality found lacking in the two-petition approach. Moreover, the following-to-join regulation specifically recognizes CSPA beneficiaries as exceptions to the over-twenty-one cutoff. Finally, this approach offers the "administrative simplicity" that figured prominently in the plurality's opinion.[49] A model for this solution already exists in the treatment of derivative spouses. CSPA-protected, unmarried, derivative sons and daughters can be handled in virtually the same way. They may stay in the same ("appropriate") category until they can apply to immigrate by following to join the principal alien or his spouse.[50]

Simple, direct, clear, fair, and implementing an unambiguous statute: the single-petition approach.[51] Unfortunately, the Court proceeded on incomplete data. Even though §1153(d) featured prominently in each of the three numbered paragraphs of §1153(h), no discussion of its preservation of rights for derivatives or the seminal benefit of "following to join" the principal alien appears in the opinion. Rather, across the board the Court started with the assumption that when a child hit twenty-one years old, he or she "aged out," period. But the CSPA inoculates all those covered by §1153(h)(3) from the harsh effects of aging out. The statute provides broad relief exactly commensurate with the plurality's repeated declaration of full application of the eligibility clause.[52]

Practice Tip: When preparing a CSPA case remember:

- This case and *Wang* dealt only with *family* immigration.
- This case and *Wang* considered only the two-petition approach.
- A single-petition approach exists that satisfies the clear mandate of this CSPA statute.
- USCIS adjudicators are likely to resist for the time being because, even though they may agree with the above information, they have not received guidance on it.

Be courteous and persistent.

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49 Plurality Opinion at 31, 2014 U.S. LEXIS 3991, at *59-60.

50 See David Froman on De Osorio v. Mayorkas, 2012 U.S. App. LEXIS 20177 (9th Cir. Sept. 26, 2012) (en banc): Suggestions for Implementing Court's Ruling Upholding Child Status Protection Act Coverage for Over-Twenty-One Derivative Beneficiaries: An Emerging Perspective, 2012 Emerging Issues 6736, at 13 (LexisNexis 2012), for further elaboration of the spouse comparison. The article reviews each of the three CSPA decisions of the circuit courts and discusses their relative merits (to follow Justice Kagan's lead, Plurality Opinion at 8 n.8, 2014 U.S. LEXIS 3991, at *20-21 n.8) "for the masochists among th[e] readers."

51 Those interested in a flow chart of the process may visit http://www.getvisas.com/revised-cspa-flow-chart-ss-203h-immigration-and-nationality-act.

52 Plurality Opinion at 14, 21, 2014 U.S. LEXIS 3991, at *29-30, 40-42.

A comprehensive discussion of the CSPA is at 3 Charles Gordon et al., Immigration Law and Procedure § 36.04.

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