THE LONG JOURNEY HOME: *CUELLAR DE OSORIO v. MAYORKAS* AND THE IMPORTANCE OF MEANINGFUL JUDICIAL REVIEW IN PROTECTING IMMIGRANT RIGHTS

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Abstract: In *Cuellar de Osorio v. Mayorkas*, the U.S. Court of Appeals for the Ninth Circuit extended the Child Status Protection Act's ("CSPA") protections to *all* children who age out during the extended process of obtaining a visa as a child derivative beneficiary. In so holding, the court overturned a precedential decision by the Board of Immigration Appeals ("BIA"). In its review of the BIA's decision, the Ninth Circuit applied the two-step test from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the seminal case in administrative law for review of executive agency action. The court exercised a rigorous review in step one of the test, and held that the CSPA unambiguously grants broad protection to all aged-out children. In exercising its constitutional power to say "what the law is," the court protected immigrant families by ensuring the executive agency executes the law accurately and fully, as passed by Congress. As the Supreme Court of the United States considers this case, it should uphold the Ninth Circuit to ensure that the unambiguous protection granted by Congress to all children will be properly implemented by the United States Citizenship and Immigration Services.

INTRODUCTION

Appellants Rosalina Cuellar de Osorio, Teresita Costelo, and Lorenzo Ong petitioned for visas to enter the United States along with their minor children.[1] As a result, the appellants were granted family-based visas and became

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[1] *See* Cuellar de Osorio v. Mayorkas, 695 F.3d 1003, 1010 (9th Cir. 2012) (en banc), *cert. granted*, 133 S. Ct. 2853 (2013) (No. 12-930) (argued Dec. 13, 2013). Petitioners argued that Congress introduced ambiguity to the statute by using the term of art, "automatic conversion," in a context that does not support the understood meaning of the term. *See* Transcript of Oral Argument at 13, 16, *Cuellar de Osorio*, 133 S. Ct. 2853 (No. 12-930). Respondents argued that a plain reading of the text provides an unambiguous meaning, and that under traditional rules of statutory construction, the statute clearly extends its protections to the universe of petitioners described in subsection (h)(1), which is extended to all derivative beneficiaries. *See id.* at 28–30. In addition to briefs from Respondents and Petitioners, former Members of Congress, who were present at passage of the Child Status Protection Act ("CSPA"), submitted an amicus brief urging the Court to hold that the statute unambiguously

lawful permanent residents (LPRs).[2] Their children, however, had aged out of eligibility for their derivative visas by the time they became available because of backlogs in processing and quota lines.[3] Relying on the Child Status Protection Act ("CSPA"), appellants asked the United States Citizenship and Immigration Services ("USCIS") to convert their children's petitions to adult visa petitions and to place them at the front of the adult visa line.[4] USCIS denied the request, stating that the CSPA's statutory language did not apply to the appellants' children because the CSPA did not cover their visa types.[5] As a result, the appellants' children would have to restart the entire visa process, and spend many more years waiting for their adult visas.[6]

The appellants sued the U.S. government, arguing their children should be afforded all protections under the CSPA, including automatic conversion of their derivative visa petitions to adult petitions and retention of their parents' original filing date.[7] The U.S. District Court for the Central District of California, deferring to an earlier decision by the Board of Immigration Appeals ("BIA"), granted the Government's motion for summary judgment in both lower court cases.[8] Cuellar de Osorio, Costelo, and Ong appealed to the U.S. Court of Appeals for the Ninth Circuit where their separate cases were joined.[9] A three-judge panel of the Ninth Circuit heard the initial appeal and affirmed district court's decision.[10]

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covers all derivative beneficiaries, as that was the unanimous and bipartisan intent of Congress at the time. *See* Brief of Current and Former Members of Congress as Amici Curiae in Support of Respondents at 8–10, *Cuellar de Osorio*, 133 S. Ct. 2853 (No. 12-930).

[2] *See Cuellar de Osorio*, 695 F.3d at 1010.

[3] *See id.* at 1007, 1010.

[4] *See* Child Status Protection Act, 8 U.S.C. §§ 1151–1158 (2012); *Cuellar de Osorio*, 695 F.3d at 1010.

[5] *See Cuellar de Osorio*, 695 F.3d at 1009–10.

[6] *See id.* at 1010.

[7] *Id.*

[8] *See* Zhang v. Napolitano, 663 F. Supp. 2d 913, 921–22 (C.D. Cal. 2009) (deferring to the BIA and rejecting the plaintiffs' appeal), *aff'd sub nom.*, Cuellar de Osorio v. Mayorkas, 656 F.3d 954 (9th Cir. 2011), *and rev'd en banc,* 695 F.3d 1003 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2853 (2013) (no. 12-930) (argued Dec. 13, 2013); Costelo v. Chertoff, No. SA08-00688-JVS(SHx), 2009 WL 4030516, at *3 (C.D. Cal. Nov. 10, 2009) (deferring to the BIA and rejecting plaintiffs' appeal), *aff'd sub nom.*, 656 F.3d 954 (9th Cir. 2011*), and rev'd en banc*, 695 F.3d 1003 (9th Cir. 2012), *cert. granted,* 133 S. Ct. 2853 (2013). The Appellants in *Cuellar de Osorio* were parties to two separate lower court cases on the same issue of whether their children should retain their priority date on their new, adult visa petitions. *See Cuellar de Osorio*, 656 F.3d at 957. The district court held in both cases that the BIA's decision in *In re Wang* was entitled to deference and therefore controlling on this issue. *Cuellar de Osorio*, 695 F.3d at 1010. Accordingly, the district court granted the Government's motion for summary judgment in each case. *Id.* The cases were later combined upon appeal to the Ninth Circuit. *See Cuellar de Osorio*, 656 F.3d at 957.

[9] *See Cuellar de Osorio*, 656 F.3d at 957.

[10] *See id.* at 955–57.

Upon a rehearing en banc, the Ninth Circuit held that the plain language of the CSPA unambiguously grants automatic conversion and priority date retention to all aged-out derivative beneficiaries of family-based visa petitions.[11] The court applied the well-worn two-step analysis from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* to determine whether it was proper to defer to the BIA's interpretation of the statute.[12] Writing for the majority, Judge Mary H. Murguia held that the statute unambiguously extends its protection to all children who apply as derivative beneficiaries.[13] Therefore, the BIA's interpretation was not entitled to deference under the *Chevron* doctrine, and there was no need for the court to move to step two of the analysis.[14]

The court's willingness to undertake a rigorous inquiry at step one of the *Chevron* analysis is critical to the defense of this highly complex legislation.[15] Judge Murguia's decision relied on plain-language interpretation, in conjunction with statutory construction analysis, and exemplifies how courts should review agency interpretations of complex law and policy.[16] Robust judicial review provides a critical check on agencies that may be resistant to implementation of new policy, or that may seek to undermine hard-won legislation through improper implementation, particularly in the highly complex and politically-charged area of immigration.[17]

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[11] *Cuellar de Osorio*, 695 F.3d. at 1006.

[12] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984); *Cuellar de Osorio*, 695 F.3d at 1011. *Chevron* set up a two-step test for judicial review of executive agency action. 467 U.S. at 842–43. Since that decision, that test has been extensively relied upon to define the relationship between the executive branch's power to interpret and implement laws according to agency expertise, and the judicial branch's power to interpret the scope and meaning of a law. S*ee generally* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Pauley v. Bethenergy Mines, Inc., 501 U.S. 680 (1991); Dole v. United Steelworkers of America, 494 U.S. 26 (1990). Under the *Chevron* test, a court engaged in review of action taken by an executive agency pursuant to the statute that the agency administers determines whether the statute is clear or ambiguous by asking whether Congress "has directly spoken to the precise question at issue." *See Chevron,* 467 U.S. at 842. If the court finds Congress has spoken clearly, it applies the plain meaning of the law to the facts of case and does not move on to step two. *Id.* If the court finds the statute to be ambiguous, it moves to step two of the analysis to determine whether the agency's interpretation of the ambiguous statute is "based on a permissible construction of the statute." *Id.* at 843.

[13] *See Cuellar de Osorio*, 695 F.3d at 1012.

[14] *See id.* at 1015–16.

[15] *See* Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 527–28 (stating that "[a]ggressive [judicial] review serves as a powerful ex ante deterrent to lawless or irrational agency behavior."); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 994, 996–97 (1992) (suggesting that the only effective institutional mechanism for checking the power of executive agencies is judicial review).

[16] *See Cuellar de Osorio*, 695 F.3d at 1013–14; Sunstein, *supra* note 15, at 527.

[17] *See* Brian G. Slocum, *Courts vs. the Political Branches: Immigration "Reform" and the Battle for the Future of Immigration Law*, 5 GEO. J.L. & PUB. POL'Y 509, 512 (2007) (describing how the judiciary pushes back against anti-immigrant legislation or administrative action through meaningful judicial review); Sunstein, *supra* note 15, at 527–28.

The Supreme Court of the United States should uphold the decision of the Ninth Circuit.[18] Any other outcome would award enormous deference to the BIA and set a precedent delegating both legislative and judicial powers to executive agencies, even in the face of clear and contrary congressional intent.[19] Such precedent would endanger any future attempt by Congress to afford immigrant families new rights and protections.[20]

I. DENIAL OF CHILDREN'S VISAS

Appellants Cuellar de Osorio, Costelo, and Ong were the primary beneficiaries of family-sponsored visa petitions for entry into the United States.[21] The issue in this case involves the appellants' now adult children.[22] Appellants listed their minor children as derivative beneficiaries on their petitions, meaning that the children would receive visas for entry upon approval and issuance of their parents' visas.[23] The appellants' visa petitions were approved and they and their children, who were under twenty-one at the time, were placed in line to receive a visa.[24]

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[18] Brief for Respondents at 15–16, *Cuellar de Osorio*, 133 S. Ct. 2853, (No. 12-930) (arguing that Congress unambiguously answered the question at issue, standard statutory interpretation reveals the unambiguous intent of Congress, and any contrary interpretation by the BIA is arbitrary and capricious).

[19] *See id.* at 18; *see also* Slocum, *supra* note 17, at 514 (administrative agencies have tried circumventing robust judicial review to the detriment of immigrant rights).

[20] *See* Brief for Respondents, *supra* note 18, at 55–56 (contending that the Court should not allow the BIA to circumvent the will of Congress because it disagrees with it).

[21] *See* Cuellar de Osorio v. Mayorkas, 695 F.3d 1003, 1010 (9th Cir. 2012) (en banc), *cert. granted*, 133 S. Ct. 2853 (2013) (No. 12-930) (argued Dec. 13, 2013). To come to the United States an alien must have a visa. *See id.* at 1006. In order to acquire a visa, an eligible party must petition on behalf of the alien. *Id.* Often this is a family member that is already either a U.S. citizen or an LPR. *Id.* Those types of petitions are called family-sponsored petitions. *Id.* In any family-sponsored visa petition, the alien named on the petition is called the "primary beneficiary." *Id.* at 1007.

[22] *See id.* at 1006.

[23] *See* Child Status Protection Act, 8 U.S.C. § 1153(d) (2012) ("A spouse or child . . . shall . . . 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."); *Cuellar de Osorio*, 695 F.3d at 1007, 1010. If the primary beneficiary has a child under the age of twenty-one upon filing the petition, the primary beneficiary-parent may ask that the child also receive a visa when the parent does. 8 U.S.C. § 1153(d); *Cuellar de Osorio*, 695 F.3d at 1007, 1010. The child's visa petition is called a derivate visa petition. 8 U.S.C. § 1153(d); *Cuellar de Osorio*, 695 F.3d at 1007, 1010.

[24] *See Cuellar de Osorio*, 695 F.3d at 1007, 1010. Once a visa petition has been submitted, USCIS reviews the petition. *See id.* at 1010. Appellants' petitions were approved, meaning they were cleared for entry on the merits of their respective petitions, however, due to quotas and a backlog of petitions, visas for appellants were not immediately available. *Id.* at 1006. The process of waiting for a visa once approved is often referred to as being "in line." *Id.* at 1007. An alien's place in line is determined by the date his or her petition was originally submitted, this is called the priority date. *Id.* An alien will get a visa after everyone with an earlier priority date has received a visa. *Id.* This process can take years. *See id.* at 1007.

Due to statutory annual limits on the number of visas issued in each category, there is a substantial backlog in the number of aliens approved for entry, but who are still waiting for visas.[25] In this case Ms. Cuellar de Osorio waited seven years between filing her petition and receiving a visa, Ms. Costelo waited fourteen years, and Mr. Ong waited twenty-one years to receive his visa.[26] As a result of this extended waiting period, the appellants' children were over twenty-one by the time the visas became available, and had thus aged out of eligibility for child derivative visas.[27] After receiving their visas, the appellants filed adult visa petitions on behalf of their children and, relying on the CSPA, asked USCIS to retain their original filing dates (known as priority dates).[28] USCIS denied their requests and placed their children at the end of the line for adult visas, thereby effectively requiring them to begin the entire immigration process over again.[29]

Congress passed the CSPA in 2002 for the purpose of protecting children of immigrating families from aging out of eligibility before their visas became available, a common occurrence due to the length of the visa process.[30] The CSPA prevents children, whose parents had previously included them on their visa petitions, from having to reapply for adult visas if they age out during the waiting period.[31] The specific provision at issue in *Cuellar de Osorio v. Mayorkas* is subsection (h)(3) of the CSPA, which provides that aliens who are determined to be over twenty-one years old by the time their visa becomes available shall have their petitions automatically converted to adult petitions and shall retain their original priority date from the original petition filed with their parents.[32] The question addressed by the court in this case is whether this provision applies to a subset of visa petitions, or to all derivative visa petitions.[33]

Following USCIS's denial of their request, appellants filed suit against USCIS in the U.S. District Court for the Central District of California.[34] They argued that section (h)(3) of the CSPA applies to all child derivative visas, including their own children.[35] In its decision, the district court deferred to the

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[25] *Id.*
[26] *See id.* at 1010.
[27] *See id.*
[28] *See id.*
[29] *See id.*
[30] *See id.* at 1007–08.
[31] *See id.*
[32] *See* Child Status Protection Act, 8 U.S.C. § 1153(h)(3) (2012); *Cuellar de Osorio*, 695 F.3d at 1008.
[33] *See Cuellar de Osorio*, 695 F.3d at 1009.
[34] *Id.* at 1010.
[35] *See id*. Subsection (h)(3) states:

BIA's previous decision in the 2009 case, *In re Wang*, and granted the Government's motion for summary judgment.[36] The BIA in *In re Wang* held that the CSPA affords the benefits of (h)(3) to a narrow subsection of petitions, which did not include the appellants' children.[37]

Cuellar de Osorio, Costelo, and Ong appealed the district court's decision to the Ninth Circuit, contending that the district court was wrong to defer to the BIA's interpretation.[38] They argued that the statute unambiguously grants its protection to all child derivative visa petitions, and further alleged that the BIA's interpretation of the language of the CSPA was not based on a reasonable construction of the statute.[39] The Ninth Circuit affirmed the district court's decision, holding the statutory language to be ambiguous and the BIA's interpretation to be reasonable.[40]

At a rehearing en banc, the Ninth Circuit reviewed the grant of summary judgment under a de novo standard of review.[41] The court reversed the district court's decision in an opinion written by Judge Murguia.[42] The majority held the language of the statute to be unambiguous, and therefore the BIA's interpretation was not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[43] Judge Murguia used traditional tools of statutory construction to find that subsection (h)(3) applied to all child derivative beneficiaries because it uses identical language to subsection (h)(1), which was well established as applying to all child derivative beneficiaries.[44]

> 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) of this section, the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.

8 U.S.C. § 1153(h)(3).

[36] *Cuellar de Osorio*, 695 F.3d at 1010.

[37] *See id.* at 1009 (citing *In re Wang*, 25 I. & N. Dec. 28 (BIA 2009)). In *In re Wang*, the BIA determined that the statutory language of the CSPA limits the benefits of automatic conversion to an adult visa and retention of the priority date to F2A petitions, which would not include the appellants' children. *See* Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 964 (9th Cir. 2011); *In re Wang*, 25 I. & N. Dec. at 38–39. *In re Wang* presented a case of first impression and is the precedential decision that the court is reviewing in *Cuellar de Osorio*. *See Cuellar de Osorio*, 695 F.3d at 1011; *In re Wang*, 25 I. & N. Dec. at 38–39.

[38] *See Cuellar de Osorio,* 695 F.3d at 1006; Opening Brief for Plaintiffs-Appellants at 19, 36, *Cuellar de Osorio*, 695 F.3d 1003 (No. 09-56786).

[39] Opening Brief for Plaintiffs-Appellants, *supra* note 38, at 19, 36.

[40] *See Cuellar de Osorio*, 656 F.3d at 955, 965–66; *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that when statutory language speaks clearly to the intent of Congress, the plain meaning of the language is controlling over an agency's interpretation).

[41] *Cuellar de Osorio*, 695 F.3d at 1011.

[42] *Id.* at 1006.

[43] *See id.* at 1015.

[44] *See id.* Subsection (h)(1) states:

II. APPLICATION OF THE *CHEVRON* TEST PRECLUDES ANY DEFERENCE TO THE BIA'S STATUTORY INTERPRETATION

In its review of the BIA's determination that subsection (h)(3) applies to only a subset of child derivative visas, the Ninth Circuit applied the *Chevron* two-step analysis.[45] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* was decided by the Supreme Court in 1984 to determine whether regulations promulgated by the Environmental Protection Agency (EPA) were a valid implementation of the Clean Air Act.[46] The Court held that the EPA was entitled to deference in its interpretation because the statute was ambiguous.[47] Consequently, the *Chevron* decision set up a two-part test that has since been used by courts to review executive agency action taken pursuant to the statute it administers.[48]

When analyzing a statute under *Chevron*, a court must first determine whether the language of the statute is clear or ambiguous.[49] If the language of the statute is clear, *Chevron* dictates that its plain meaning controls and requires the court to apply that meaning directly to the facts of the case.[50] In the alternative, if the wording of the statute is ambiguous, *Chevron* states that the court should defer to the executive agency's interpretation, provided that it is based on a reasonable construction of the statute.[51] The Court reasoned that,

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> (1) In general: For purposes of subsections (a)(2)(A) and (d) of this section, a determination of whether an alien satisfies the age requirement in the matter preceding subparagraph (A) of section 1101(b)(1) of this title shall be made using— (A) [formula described] . . . (B) the number of days in the period during which the applicable petition *described in paragraph (2)* was pending."

Child Status Protection Act, 8 U.S.C. § 1153(h)(1) (2012) (emphasis added). Subsection (h)(2) states:

> (2) Petitions described: The petition described in this paragraph is— (A) with respect to a relationship described in subsection (a)(2)(A) of this section, a petition filed under section 1154 of this title for classification of an alien child under subsection (a)(2)(A) of this section; or (B) with respect to an alien child who is a derivative beneficiary under subsection (d) of this section, a petition filed under section 1154 of this title for classification of the alien's parent under subsection (a), (b), or (c) of this section.

Id.

[45] *See* Cuellar de Osorio v. Mayorkas, 695 F.3d 1003, 1010 (9th Cir. 2012) (en banc), *cert. granted*, 133 S. Ct. 2853 (2013) (No. 12-930) (argued Dec. 13, 2013).

[46] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 840 (1984).

[47] *See id.* at 844–45.

[48] *See id.* at 842–43; *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Pauley v. Bethenergy Mines, Inc., 501 U.S. 680 (1991); Dole v. United Steelworkers of America, 494 U.S. 26 (1990).

[49] *See Chevron*, 467 U.S. at 842–43.

[50] *Id.*

[51] *See id.* at 843.

where Congress is silent or ambiguous as to its intent in the statute, it has purposefully left interpretation to the expert agencies.[52]

The Ninth Circuit en banc majority in *Cuellar de Osorio v. Mayorkas* applied traditional tools of statutory interpretation and found the plain language of the CSPA to be unambiguous.[53] The majority held that the language of subsection (h)(3) is dependent on the other two subsections and so it must apply to all aged-out family-based visa petitions as described in subsection (h)(2).[54]

Judge Murguia began her discussion by examining the plain language of section (h) of the CSPA.[55] She acknowledged that the subsection at issue, (h)(3), does not itself list the visa types to which it applies.[56] The judge, however, rejected the Government's contention that this observation should be the extent of the court's inquiry into the ambiguity of the statutory language.[57] Instead, the court read the subsection in its full statutory context.[58]

By reading the statutory language in context, the court concluded that subsection (h)(3) only has effect because it relies on the formula laid out in subsection (h)(1), which explicitly applies to the visas described in subsection (h)(2).[59] In her reasoning, Judge Murguia showed that subsection (h)(3) is the third leg of a three-part section that works together to provide comprehensive instructions for how to deal with children who have aged out during the waiting period.[60] Based on this analysis, the majority concluded that the plain language of the statute requires that the protections laid out in subsection (h)(3) apply to appellants' children, and all other derivative beneficiaries because they are included under subsection (h)(2).[61]

Judge Murguia did not, however, end her analysis with this holding.[62] She went on to "bolster" the majority's interpretation by looking at rules of statutory construction.[63] She noted the repeated use of the phrase "for [the] purposes of subsections (a)(2)(A) and (d)" within subsections (h)(1) and (h)(3).[64] Applying the presumption that identical language within the same statutory provision

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[52] *See id.* at 844, 865.

[53] *See Cuellar de Osorio*, 695 F.3d at 1011–12. Although the three-judge panel found the language to be ambiguous, it deferred to the BIA's interpretation because not adopting the BIA's interpretation would lead to impracticable results. *See* Cuellar de Osorio v. Mayorkas, 656 F.3d 954, 961–62 (9th Cir. 2011).

[54] *See Cuellar de Osorio*, 695 F.3d at 1012.

[55] *See id.* at 1011; *see also Cuellar de Osorio*, 656 F.3d at 961.

[56] *See Cuellar de Osorio*, 695 F.3d at 1011.

[57] *See id.* at 1012.

[58] *See id.* (citing *Brown & Williamson,* 529 U.S. at 132).

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *Id.*

[63] *See id*.

[64] *Id.*

carries the same meaning, she concluded that where the initial use of the language in subsection (h)(1) unambiguously means that it applies to any child derivative visa, the subsequent use of that identical phrase in subsection (h)(3) must necessarily retain that same meaning.[65] The majority held that this repetition extends the protection of automatic conversion and priority date retention given in subsection (h)(3) to all child derivative visas.[66] Having discerned a clear meaning from the statutory text, the court did not need to move on to step two of the *Chevron* test to address the reasonableness of the BIA's interpretation.[67] The court reversed the three-judge panel, holding that the CSPA unambiguously extends automatic conversion and retention of priority date to all derivate beneficiaries.[68]

III. THE IMPORTANCE OF A RIGOROUS *CHEVRON* STEP ONE IN PROTECTING THE RIGHTS OF IMMIGRANT FAMILIES

Judge Murguia conducted an in-depth analysis of the statutory language to conclusively hold that the provision of the CSPA at issue was unambiguous.[69] There is some disagreement among courts as to whether the first step in a *Chevron* analysis should entail a limited reading of the isolated language at issue, or whether it should involve a more in-depth inquiry.[70] Indeed, the dis-

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[65] *Id.* (citing Brown v. Gardner, 513 U.S. 115, 118 (1994) (holding there is a presumption that a given term is used to mean the same thing throughout a statute)); *see also Dole*, 494 U.S. at 36 (holding statutory interpretation is not guided by a single sentence, but rather undertaken in the context of the statute as a whole).

[66] *See Cuellar de Osorio*, 695 F.3d at 1012.

[67] *See Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter . . . ."); *Cuellar de Osorio*, 695 F.3d at 1015. The Fifth and Second Circuits have similarly found that the statutory language of the CSPA is unambiguous in their analyses under step one of the *Chevron* step test. *See Cuellar de Osorio*, 695 F.3d at 1010 (citing Khalid v. Holder, 655 F.3d 363, 374 (5th Cir. 2011) and Li v. Renaud, 654 F.3d 376, 382–83 (2d Cir. 2011)). Similarly to the Ninth Circuit, the Fifth Circuit held that the language unambiguously covers all family-based derivative beneficiaries. *See Khalid*, 655 F.3d at 374. The Second Circuit disagreed, holding that the language unambiguously applies only to a narrow subset of derivative beneficiaries. *Li*, 654 F.3d at 382–83. The Second Circuit did not consider the interrelatedness of subsections (h)(1)–(3) in its analysis. *See id.* It found that a broad reading of the statute, as the Ninth and Fifth Circuits have interpreted it, would create a conflict with the previous visa system of categories. *See id.* at 385; *see also Cuellar de Osorio*, 695 F.3d at 1018; *Khalid*, 655 F.3d at 374. Based on this conflict, the Ninth Circuit held the meaning of the text unambiguously creates narrow benefits to fit within the old framework. *Cuellar de Osorio*, 695 F.3d at 1018. Judge Murguia rejected the Second Circuit's reading based on principles of statutory construction described above. *See Cuellar de Osorio*, 695 F.3d at 1014; *Li*, 654 F.3d at 385. The dissent in *Cuellar de Osorio* touched on this circuit split, suggesting such disagreement among the circuits may lend credence to those that argue that the language is ambiguous, but is not dispositive of statutory ambiguity. *See Cuellar de Osorio*, 695 F.3d at 1016 (Smith, J., dissenting).

[68] *Cuellar de Osorio*, 695 F.3d at 1015–16.

[69] *See* Cuellar de Osorio v. Mayorkas, 695 F.3d 1003, 1010 (9th Cir. 2012) (en banc), *cert. granted*, 133 S. Ct. 2853 (2013) (No. 12-930) (argued Dec. 13, 2013).

[70] *Compare* Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991) ("Judicial deference to agency . . . reflects a sensitivity to the proper roles of the political and judicial branches . . . the resolu-

trict court in *Cuellar de Osorio v. Mayorkas* conducted a much less rigorous inquiry into the statutory language.[71] Finding it to be ambiguous when read in isolation, the district court subsequently deferred to the BIA's interpretation of the statute's true meaning.[72] In so holding, the district court afforded deference to the executive agency in determining which rights are embodied in this complex legislation.[73] On appeal, Judge Murguia was evidently unwilling to cede this role to the BIA.[74]

In addition, Judge Murguia in *Cuellar de Osorio* acknowledged the Government's concern with the practicality of the law.[75] Specifically, the Government contended that the logistics of implementing these changes within an already cumbersome and overly complicated immigration system makes the statute impracticable to the point of ambiguity.[76] Judge Murguia concluded, however, that neither a change in policy—even if difficult to implement—nor unresolved procedural questions make the statute impracticable.[77]

While Judge Murguia did not undertake an analysis of the legislative history in her opinion, such an analysis would have been useful for the Ninth Circuit to consider, and the Supreme Court should consider it in its deliberations, particularly in light of the amicus brief submitted by a bipartisan group of congressmen who voted for the CSPA.[78] The CSPA passed both houses of Congress by unanimous vote, even after the addition of an amendment in the Senate, which expanded the scope of the bill.[79] The legislative history demon-

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tion of ambiguity in a statutory text is often more a question of policy than of law . . . the extent of judicial review of the agency's policy determinations is limited."), *with* Dole v. United Steelworkers of America, 494 U.S. 26, 35 (1990) ("'[I]n expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'") (quoting Massachusetts v. Morash, 490 U.S. 107, 115 (1989)).

[71] *See* Zhang v. Napolitano, 663 F. Supp. 2d 913, 919–20 (C.D. Cal. 2009) (deferring to the BIA and rejecting the plaintiffs' appeal), *aff'd sub nom.* Cuellar de Osorio v. Mayorkas, 656 F.3d 954, (9th Cir. 2011), *and rev'd en banc*, 695 F.3d 1003 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2853 (2013) (No. 12-930) (argued Dec. 13, 2013).

[72] *See id.*

[73] *See id.* at 921.

[74] *See Cuellar de Osorio*, 695 F.3d at 1012–16.

[75] *See id.* at 1013–15.

[76] *See id.*

[77] *See id.*

[78] *See* Brief of Current and Former Members of Congress as Amici Curiae in Support of Respondents, *supra* note 1, at 1 ("To promote . . . goals [of preserving family unity] . . . [Congress] crafted the CSPA to protect *all* children who seek to immigrate . . . from the consequences of 'aging out.'"); *see also Cuellar de Osorio*, 695 F.3d at 1013–14 (holding that no language of the CSPA indicates that Congress intended for the identity of the petitioner to be relevant, nor that the drafters had envisioned a system involving more than one petitioner); 148 Cong. Rec. H4991 (daily ed. Jul. 22, 2002) (statements of Rep. Sensenbrenner and Rep. Jackson-Lee) ("The Child Status Protection Act . . . is the culmination of a bipartisan agreement of both the House and the Senate . . .").

[79] *See* Brief of Current and Former Members of Congress as Amici Curiae in Support of Respondents, *supra* note 1, at 6–7 (noting that CSPA met with overwhelming bipartisan support and

strates that the BIA interpreted the statute contrary to Congress's intent, which was to protect all families with aged-out children.[80] This misinterpretation on the part of the BIA demonstrates the importance of the Ninth Circuit's role in affirming the intent of the legislation.[81] This decision reaffirms the judicial role of interpreting the law as written by Congress, while leaving to the executive agency the task of proper implementation of that law.[82]

The Supreme Court should affirm Judge Murguia's holding that the statute's plain language conveys Congress's unambiguous intent to provide all aged-out derivative beneficiaries with automatic conversion of their petition and retention of their original priority date.[83] The Court should further affirm the Ninth Circuit's reasoning that statutory provisions must be read in context.[84] This sets important precedent for courts faced with interpreting complex statutes that represent Congress's efforts to craft legislation that extends rights to marginalized populations, particularly in the area of immigration.[85] As the debate over reform of the U.S. immigration system continues in Congress, any resulting legislation will almost certainly be highly complex and embody compromises between competing interests.[86] Without oversight by the courts, USCIS and other executive agencies will determine how and to what extent any protections passed by Congress are implemented.[87] This would leave the

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passed both houses before and after amendments with unanimous votes); 148 Cong. Rec. H4992 (2002) (unanimous vote to suspend the rules and pass the Senate amendment).

[80] *See* 148 Cong. Rec. H4991 (daily ed. Jul. 22, 2002) (statements of Rep. Sensenbrenner) ("This bill is a fine example of how we and the other body can work together in a collaborative fashion. Bringing families together is a prime goal of our immigration system. H.R. 1209 facilitates and hastens the reuniting of legal immigrants' families.").

[81] *See Cuellar de Osorio*, 695 F.3d at 1013; Merrill, *supra* note 15, at 996–97 (noting that judicial review is the only meaningful check on agency power); Slocum, *supra* note 17, at 512 (describing how the judiciary fights back against anti-immigrant legislation and agency action); Sunstein, *supra* note 15, at 527–28 (stating that judicial review serves as an important shield against irrational agency behavior).

[82] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Cuellar de Osorio*, 695 F.3d at 1012–16.

[83] *Cuellar de Osorio*, 695 F.3d at 1015–16.

[84] *See id.* at 1012.

[85] *See id.* at 1009 ("The BIA . . . concluded that 'there is no indication in the . . . legislative history of the CSPA that Congress intended to create a mechanism to avoid the . . . consequence of a child aging out of a visa category because of the length of the visa line.'" (quoting *In re Wang*, 25 I. & N. Dec. 28, 38 (BIA 2009))); 148 Cong. Rec. H4991 (2002); *see also* Slocum, *supra* note 17, at 527 (stating that when extreme deference is given to immigration agencies, it allows the executive branch to easily circumvent the actual law).

[86] *See* Michael A. Olivas, *The Political Economy of the Dream Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1789 (2009) (noting that the legislative process for immigration reform involves complex and interlocking issues of varying coalitions).

[87] *See* Brief for Respondents, *supra* note 18, at 55–56; Slocum, *supra* note 17, at 513–14 (arguing that the executive branch has taken great liberties with immigration legislation that the judiciary has sought to check through preservation of judicial review).

lives of too many people vulnerable to the whims of an ever-changing executive branch.[88]

Holding the language as written to be unambiguous does not usurp USCIS's prerogative to determine immigration policy.[89] Rather, it affirms the role of the courts to interpret immigration law that has been set down by Congress, and holds USCIS to its obligation to faithfully execute the protections that Congress has deemed necessary.[90] In the absence of a decision affirming the Ninth Circuit, immigrants who waited more than ten years to legally enter the United States would be forced to restart the process simply because no USCIS classification previously existed to accommodate these families and the Agency is unwilling to modify its procedures to do so.[91] Such a ruling would allow the BIA to impermissibly ignore the unanimous decision of Congress to protect families that have waited years to immigrate together to the United States.[92]

CONCLUSION

In *Cuellar de Osorio v. Mayorkas*, the Ninth Circuit, sitting en banc, reversed the district court and a precedential decision by the BIA when it found that the CSPA unambiguously extended automatic conversion and priority date retention to all derivate beneficiaries who age out while waiting for their visas to become available. The Ninth Circuit applied the two-part *Chevron* test to its review of the BIA's decision. In her step one analysis, Judge Murguia engaged in a plain text reading of the statute and found the language to be unambiguous. She bolstered her analysis by using standard tools of statutory construction to hold that the language of the statute, when read in context, extends the protections of the CSPA to the appellants' children and to all aged-out derivative beneficiaries.

The Supreme Court granted certiorari and heard oral arguments in December 2013. The Court should now follow the reasoning laid out in the Ninth Circuit majority opinion and find the statute to unambiguously grant its protection to all aged-out derivative beneficiaries. The Court should exercise its responsibility to say "what the law is" and should reject the executive branch's

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[88] *See* Shruti Rana, "*Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 833–35 (stating that following September 11, 2001 the Justice Department began streamlining administrative review and attempting to circumvent judicial review, resulting in an erosion of immigrant rights); Slocum, *supra* note 17, at 514 (describing the high number of immigrants deported since the executive branch implemented expedited administrative review).

[89] *See Marbury*, 5 U.S. (1 Cranch) at 177; *Cuellar de Osorio*, 695 F.3d at 1011–14.

[90] *See Marbury*, 5 U.S. (1 Cranch) at 177; *Cuellar de Osorio*, 695 F.3d at 1011–14.

[91] *See Cuellar de Osorio*, 695 F.3d at 1010, 1013.

[92] *See* Brief for Respondents, *supra* note 18, at 16–17.

effort to reinterpret the CSPA contrary to the clear intent of Congress. Robust judicial review is essential to the survival of hard-fought, complex legislation common in the field of immigration. The Court should affirm the Ninth Circuit and preserve the rights that Congress has provided to immigrant families.