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"FOLLOWING-TO-JOIN" THE FIFTH AND NINTH CIRCUITS: WHY THE SUPREME COURT IN *SCIALABBA v. CUELLAR DE OSORIO* ERRED IN INTERPRETING THE CHILD STATUS PROTECTION ACT

Justin Youngs∗

I. INTRODUCTION

There are countless hoops to jump through for non-citizens wishing to become legal permanent residents (LPRs) in the United States. Besides figuring out how to obtain LPR status, non-citizens often wonder whether they can bring along those family members closest to them. A common scenario, addressed by this Comment, is one in which a non-citizen parent wishes to immigrate or reunify with his or her non-citizen child. Fortunately for non-citizens, federal laws governing immigration to the United States.[1] provide a path to LPR status for both the non-citizen parent and their child.[2]

However, this path becomes treacherous when a non-citizen parent's child is no longer a child in the eyes of immigration law. Avenues that once seemed navigable turn into dead-ends, and non-citizen parents are left wondering how they will ever be able to reunite with their adult children. In 2002, Congress attempted to relieve this anxiety by passing the Child Status Protection Act (CSPA).[3] Section 3 of the Act ideally provides an avenue for adult children to join their non-citizen parents: a process that allows them

1. 8 U.S.C. §§ 1101–1537 (2012).
2. *See id*. § 1153.
3. Child Status Protection Act, 107 Pub. L. No. 107-208, 116 Stat. 927 (2002) (codified as amended in scattered sections of 8 U.S.C.).

to change visa categories without having to wait in line.[4] Unfortunately, this alternate path does not come without obstacles, and the recent Supreme Court decision in *Scialabba v. Cuellar de Osorio*[5] may have provided the largest obstacle yet.

This Comment argues that the Supreme Court in *Scialabba* incorrectly interpreted Provision (h)(3) of Section 3 of the CSPA as ambiguous and therefore should not have deferred to the Board of Immigration Appeals' (BIA's) interpretation. Part II details the statutory framework surrounding Provision (h)(3). Part III discusses the facts of *Scialabba*. Part IV dissects the reasoning of the Supreme Court's majority ruling. Part V analyzes the various approaches to interpreting Provision (h)(3) and the circuit court split that preceded the Supreme Court's decision in *Scialabba*. Part VI first examines why the Supreme Court in *Scialabba* erred in its interpretation of Provision (h)(3). Second, Part VI explains why the Fifth and Ninth Circuits' approach to interpreting Provision (h)(3), and their actual interpretation of the provision, is correct. Lastly, Part VI addresses the principal concerns the Supreme Court has regarding the Fifth and Ninth Circuits' interpretation. This Comment concludes that the Supreme Court should have adopted the Fifth and Ninth Circuits' interpretation of the Provision (h)(3).

II. STATUTORY FRAMEWORK

A non-citizen parent who wishes to obtain LPR status by either immigrating to the U.S. or switching from a temporary visa to LPR status has a limited number of options. To gain LPR status through one of the family preference visas ("F(#) visas"), a non-citizen must have a qualifying familial relationship with either a U.S. citizen or a current LPR.[6] If such a qualifying relationship exists, the U.S. citizen or LPR, known as a sponsor, can petition for the non-citizen to obtain an immigrant visa, known as a visa petition.[7] When a visa

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4. 8 U.S.C. § 1153(h).
5. 134 S. Ct. 2191 (2014).
6. 8 U.S.C. § 1153(a). This section lists five family preference categories in order of priority, which determines the number of visas each category receives annually. Family preference categories are as follows: [F1] unmarried adult (21 or over) sons and daughters of U.S. citizens; [F2A] spouses and unmarried minor (under 21) children of LPRs; [F2B] unmarried adult sons and daughters of LPRs; [F3] married sons and daughters of U.S. citizens; and [F4] brothers and sisters of U.S. citizens. *Id.*
7. *Scialabba*, 134 S. Ct. at 2196.

then becomes available for the non-citizen, known as the principal beneficiary, a visa subsequently becomes available for the principal beneficiary's minor children, known as derivative beneficiaries.[8] The principal beneficiary and any of their derivative beneficiaries must then separately file their own visa applications demonstrating their admissibility, meet with a consular officer, and pass inspection at the border before they can become LPRs.[9]

Although the process above appears rather seamless, this is rarely the case. One major issue that plagues non-citizens is the wait time between the date their visa petition is approved and the date upon which a visa application becomes available for filing. Not only is the number of visas available for each family preference category capped annually,[10] but the Immigration and Nationality Act (INA) also places a ceiling on the number of visas allotted to each country.[11] These restrictions result in a queue that can last as long as twenty-three years for non-citizens from certain countries.[12] Furthermore, these wait times present a larger issue: they can cause derivative beneficiaries, who must be twenty-one years of age or younger at the time a visa application is submitted,[13] to grow older than twenty-one ("aging out") by the time an application even becomes available.[14]

Fortunately, Congress addressed the issue of aged out beneficiaries in 2002 by adopting the CSPA.[15] Section 3 of the CSPA applies to derivative beneficiaries of prospective LPRs.[16] Provision (h) of Section 3 includes three provisions that work to avoid the

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8. *Id.* at 2198.

9. *Id.* at 2198–99.

10. 8 U.S.C. § 1153(a)(1)–(4).

11. *Id.* § 1152(a)(2) ("[T]he total number of immigrant visas made available to natives of any single foreign state . . . in any fiscal year may not exceed 7 percent . . . of the total number of such visas made available under such subsections in that fiscal year.").

12*. Visa Bulletin for October 2014*, U.S. DEP'T OF STATE BUREAU OF CONSULAR AFFAIRS (Sept. 8, 2014), http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa -bulletin-for-october-2014.html (showing a twenty-three-year wait time for non-citizens from the Philippines, as indicated by the current priority date being visa petitions filed in April 1991).

13. 8 U.S.C. § 1153(d) (referring to 8 U.S.C. § 1101(b)(1), which defines "child" as "an unmarried person under twenty-one years"); *id.* § 1153(h) (explaining that a derivative beneficiary's age is determined "on the date on which an immigrant visa number becomes available for such alien").

14. *See Scialabba*, 134 S. Ct. at 2199.

15. *See* Child Status Protection Act, 107 Pub. L. No. 107-208, 116 Stat. 927 (2002) (codified as amended in scattered sections of 8 U.S.C.); *Scialabba*, 134 S. Ct. at 2199.

16. *See* 8 U.S.C. § 1153(h).

aging out problem.[17] The first provision ("Provision (h)(1)") provides a formula that allows an aged out beneficiary to subtract from his or her age the amount of time it took for a sponsor's visa petition to be approved and the time it took for the actual submitted visa application to be approved.[18] The second provision ("Provision (h)(2)") explains that the Provision (h)(1) applies to any non-citizen seeking an F2A visa (spouses and unmarried children of LPRs) or a derivative beneficiary seeking any other family preference category.[19] Although this formula undoubtedly helps to reduce an aged out beneficiary's age, it does not relieve the most laboring part of the administrative process: the time spent waiting for a visa to become available.[20] As a result, there are still derivative beneficiaries who remain aged out despite the first provision formula.

The third provision of section 3 ("Provision (h)(3)") of the CSPA attempts to rectify this problem through two distinct measures. Provision (h)(3) states that if a derivative beneficiary remains aged out despite the Provision (h)(1) formula, his or her visa petition should (1) automatically convert to an appropriate family preference category while (2) retaining the parent's visa application priority date.[21] Provision (h)(3) is the one at issue in *Scialabba*.[22]

III. STATEMENT OF THE CASE

Scialabba began at the district court level as two separate suits.[23] In both cases, the district court granted summary judgment against the plaintiff, deferring to the BIA's interpretation of Provision (h)(3) in *Matter of Wang*.[24] The cases were consolidated on appeal where the Ninth Circuit affirmed the district court's ruling.[25] The Ninth Circuit then reversed the district court's ruling when it granted rehearing en banc.[26] The Ninth Circuit concluded that the language of the CSPA was unambiguous in providing "automatic conversion

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17. *Id.* §§ 1153(h)(1)–(3).
18. *Id.* § 1153(h)(1).
19. *Id.* §§ 1153(h)(1)–(2) (referencing subsections (a)(2)(a) and (d) of § 1153).
20. *Scialabba*, 134 S. Ct. at 2201.
21. 8 U.S.C. § 1153(h)(3).
22. *Scialabba*, 134 S. Ct. at 2201.
23. *Id.* at 2202.
24. *Id.* (discussing Matter of Wang, 25 I. & N. Dec. 28, 29 (B.I.A. 2009)).
25. *Id.*
26. *Id.*

and priority date retention to aged out derivative beneficiaries."[27] The Supreme Court then granted writ of certiorari to resolve the circuit court split on the interpretation of Provision (h)(3).[28] In holding that Provision (h)(3) does not apply to all aged out beneficiaries, the Court reversed the Ninth Circuit judgment and remanded the case for further proceedings.[29]

The respondents in *Scialabba* were three families with similar circumstances. A principal beneficiary was seeking either an F3 (married sons or daughters of U.S. citizens) or F4 visa (brothers and sisters of U.S. citizens) wanting his or her son or daughter to gain legal status along with them.[30] Each child of the principal beneficiary was under twenty-one at the time the sponsor's visa petition was filed, qualifying them as derivative beneficiaries.[31] However, by the time the actual visa applications became available, the derivative beneficiaries had aged out.[32] The principal beneficiaries then immigrated to the United States without his or her son or daughter and filed subsequent F2B petitions (unmarried adult sons and daughters of LPRs) on their behalf.[33] Instead of allowing these derivative beneficiaries to simply convert to the F2B category without waiting in line for a visa application to become available, United States Citizenship and Immigration Services (USCIS) refused to do so and applied current priority dates to the F2B petitions.[34] In doing so, the USCIS ensured that the derivative beneficiaries would have to wait years to join their parents in the U.S.[35]

IV. Reasoning of the Court

The Supreme Court's decision in *Scialabba* to reverse the judgment of the Ninth Circuit turns on the majority's interpretation of Provision (h)(3).[36] The Court explained that if the Provision (h)(3) did "not speak clearly to the question at issue," the Court was

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27. *Id.*
28. *Id.*
29. *Id.* at 2213.
30. *Id.*; de Osorio v. Mayorkas, 695 F.3d 1003, 1010 (9th Cir. 2012), *rev'd sub nom.* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).
31. *Scialabba*, 134 S. Ct. at 2202.
32. *Id.*
33. *Id.*
34. *Id.*
35. *See de Osorio*, 695 F.3d at 1010.
36. *See Scialabba*, 134 S. Ct. at 2202.

required to defer to the BIA's interpretation.[37] Since the provision did not "speak unambiguously to the issue" because it had two divergent clauses, the Court concluded it was ambiguous.[38]

The first clause of Provision (h)(3) states, "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)."[39] In referencing beneficiaries of an F2A visa (subsection (a)(2)(A)) and all other family preference visas (subsection (d)), the Court saw this clause as being satisfied by all aged out beneficiaries.[40] The second clause states, "the alien's petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date."[41] In contrast to the first clause, the Court viewed the second clause as providing a remedy that applies only to certain eligible derivative beneficiaries rather than to all of them.[42]

The Court emphasized that because the second clause of Provision (h)(3) directs officials to automatically convert a derivative beneficiary's visa petition from one family category to another, the petition should not be changed in any way, such as having a new sponsor.[43] Thus, the second clause only applies to those derivative beneficiaries who can seamlessly move from one family category to another without having their petition altered.[44] The Court therefore reasoned that since the first clause applies to all derivative beneficiaries, but the second clause does not, Provision (h)(3) as a whole is ambiguous.[45]

After concluding that Provision (h)(3) is ambiguous, the Court then explained the BIA's interpretation of the provision and its rationale for agreeing with the BIA's interpretation. Specifically, the Court examined the BIA's interpretation of the phrase "automatic conversion."[46] The BIA concluded in *Matter of Wang* that "automatic conversion" is available to non-citizens when their visa

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37. *Id.* at 2203 (citing Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

38. *Id.*

39. 8 U.S.C. § 1153(h)(3) (2012); *Scialabba*, 134 S. Ct. at 2203.

40. *Scialabba*, 134 S. Ct. at 2203.

41. 8 U.S.C. § 1153 (h)(3); *Scialabba*, 134 S. Ct. at 2203.

42. *Scialabba*, 134 S. Ct. at 2203–04.

43. *Id.* at 2204.

44. *Id.*

45. *Id.* at 2203.

46. *Id.* at 2204.

petition can move from one preference category to another without the need for a new sponsor.[47] In agreeing with this interpretation, the *Scialabba* Court first pointed out that this understanding of "automatic conversion" is consistent with the way the phrase was used in other immigration laws at the time the Congress passed the CSPA.[48]

The Court then explained the consequence of allowing "automatic conversion" to apply in situations that require a new sponsor for the derivative beneficiary.[49] If "automatic conversion" were allowed in such circumstances, the Court reasoned, it would undermine the core premise of the family preference system that every beneficiary must have a qualified sponsor.[50] According to the Court, this would undermine the premise because a new qualified sponsor will rarely exist at the time a visa petition is to be automatically converted.[51]

Additionally, the Court explained that even if a new sponsor could exist, his or her visa petition on behalf of the aged out derivative beneficiary could be declined for several reasons.[52] As a result, the derivative beneficiary could not automatically convert and would be left with no qualifying sponsor.[53] The Court's rationale for upholding the BIA's interpretation therefore rested on consistency with other immigration laws and the negative consequence of the opposing interpretation.

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47. *Id.* at 2201.

48. *Id.* at 2204. The Court points to 8 CFR sections 204.2(i)(1)–(3) as an example of another immigration law that provided for "automatic conversion" only when the conversion "entailed nothing more than picking up the petition from one category and dropping it into another." *Id.*

49. *Id.* at 2205.

50. *Id.*

51. *Id.* The date of conversion is the date a visa becomes available for the principal beneficiary. Since the principal beneficiary would be the new sponsor for the aged out derivative beneficiary, the principal beneficiary would not qualify as a new sponsor on that date because he or she must file a new visa petition on behalf of the aged out derivative beneficiary. *Id.*

52. *Id.* Reasons for declining a visa petition include lack of adequate proof of parentage, committing a disqualifying crime, and failing to undertake required financial obligations. *See* 8 U.S.C. §§ 1154, 1183 (2012).

53. *See Scialabba*, 134 S. Ct. at 2205.

V. The Varying Interpretations of Provision (h)(3)

The BIA's decision in *Matter of Wang* is the first judicial interpretation of Provision (h)(3).[54] In that case, Wang, a non-citizen father immigrating on an F4 visa petition (brother or sister of a U.S. citizen) filed by his U.S. citizen sister, listed his young daughter as a derivative beneficiary.[55] Unfortunately, Wang had to endure a twelve-year wait time before his visa application became current.[56] Consequently, his daughter aged out during that period and no longer qualified as a derivative beneficiary.[57] Wang then filed a new petition on his daughter's behalf for an F2B visa (unmarried adult sons and daughters of LPRs) and requested the priority date of his original F4 visa petition filed by his sister.[58] Although the F2B visa was approved, an immigration official denied the request for Wang's original priority date.[59] As a result, Wang's daughter was assigned a priority date corresponding to the date the F2B visa was approved, forcing her to endure another long wait.[60]

The case reached the BIA after the immigration official requested to have her decision certified.[61] The issue the BIA considered was whether Provision (h)(3) allowed Wang's daughter to automatically convert from an F4 visa to an F2B visa while still retaining the priority date of her father's F4 visa.[62] In examining the language of Provision (h)(3), the BIA concluded that the language was ambiguous because it did not "expressly state which petitions qualify for automatic conversion and retention of priority dates."[63]

To resolve the ambiguity, the BIA looked to legislative intent and prior usage of the concept of "automatic conversion" in other immigration regulations.[64] In doing so, the BIA made two important conclusions: (1) aged out derivative beneficiaries could

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54. Dianne Milner, Note, *No Child Left Unprotected: Adopting the Ninth Circuit's Interpretation of the Child Status Protection Act in* de Osorio v. Mayorkas, 46 CORNELL INT'L L.J. 683, 692 (2013).

55. Matter of Wang, 25 I. & N. Dec. 28, 29 (B.I.A. 2009).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 29–30.

61. *Id.* at 30.

62. *Id.*

63. *Id.* at 33.

64. *Id.* at 33, 35.

automatically convert from one family preference visa to another only when they did not require a new visa petition, and (2) the retention of the principal beneficiary's priority date only applies to visa petitions filed by the same family member.[65] Since Wang's daughter required a new visa petition to convert to the F2B visa, and Wang (not Wang's sister) filed this petition, the BIA upheld the decision to disallow automatic conversion with priority date retention for Wang's daughter.[66]

A second judicial interpretation of Provision (h)(3) occurred in *Li v. Renaud*,[67] heard in the U.S. Court of Appeals for the Second Circuit. In *Li*, the Second Circuit reviewed the district court's decision to dismiss the appellants' complaint alleging their unmarried adult son was entitled to priority date retention.[68] The Second Circuit first determined whether deference should have been given to the BIA's interpretation of Provision (h)(3) in *Matter of Wang*.[69] In contrast to the Supreme Court in *Scialabba*, the Second Circuit found that Provision (h)(3) unambiguously expressed the intent of Congress, and therefore the BIA should not have been given deference.[70] The Second Circuit reasoned that because the language of the provision called for both automatic conversion *and* priority date retention, Congress intended to bestow both benefits on aged out derivative beneficiaries.[71] However, the Second Circuit qualified this interpretation by concluding that automatic conversion only applies to visa petitions that can change categories without the need to file a new petition.[72] Thus, the Second Circuit interpreted Provision (h)(3) to allow priority date retention and automatic conversion, but only when automatic conversion does not require filing a new visa petition on behalf of the derivative beneficiary.[73]

Just weeks after the Second Circuit decided *Li v. Renaud*, the Fifth Circuit interpreted Provision (h)(3) in *Khalid v. Holder*.[74] In *Khalid*, the Fifth Circuit reviewed a case in which a Pakistani citizen

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65. *Id.* at 35–36.
66. *Id.* at 39.
67. 654 F.3d 376 (2d Cir. 2011); Milner, *supra* note 54, at 693.
68. *Li*, 654 F.3d at 377.
69. *Id.* at 382.
70. *Id.* at 382–83.
71. *Id.*
72. *Id.* at 384.
73. *See id.* at 382–84.
74. 655 F.3d 363 (5th Cir. 2011).

had aged out and no longer qualified as a derivative beneficiary under his mother's F4 (brother or sister of U.S. citizen) visa application.[75] Similar to the Second Circuit, the Fifth Circuit concluded that the language of Provision (h)(3) was not ambiguous.[76] However, the Fifth Circuit's rationale was different; it found that the language of the other two provisions in section 3 clarified any ambiguities in Provision (h)(3).[77] Specifically, because Provision (h)(2) provides that derivative beneficiaries under all family preference categories can benefit from the age formula in Provision (h)(1), and because Provision (h)(3) references Provision (h)(1), priority date retention applies automatic conversions to any of the family preference categories.[78] The Fifth Circuit therefore disagreed with the Second Circuit because it did not interpret Provision (h)(3) as restricting priority date retention.

The final judicial interpretation of Provision (h)(3) prior to *Scialabba* was the Ninth Circuit's interpretation in *de Osorio v. Mayorkas*.[79] *De Osorio* was the precursor to *Scialabba* and involved three similarly situated families arguing for priority date retention to apply to an aged out derivative beneficiary.[80] The Ninth Circuit followed the Fifth Circuit's analysis and found that Provision (h)(3) was unambiguous because of the provision's references to Provisions (h)(1) and (h)(2).[81] The Ninth Circuit believed the interrelatedness of the three provisions expressed Congress's "intent to extend automatic conversion and priority date retention to all family-sponsored derivative beneficiaries."[82] Moreover, the Ninth Circuit concluded that if the intent of Provision (h)(3) was to limit automatic conversion to situations where a new visa petition was not required, Congress would have used that language.[83]

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75. *Id.* at 365–66.

76. *Id.* at 370–71.

77. *Id.*

78. *Id.*

79. 695 F.3d 1003 (9th Cir. 2012), *rev'd sub nom.* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191 (2014).

80. *Id.* at 1010.

81. *Id.* at 1012.

82. *Id.*

83. *Id.* at 1015–16. The court notes that Congress used such specific language under 8 C.F.R. section 204.2(a)(4), which predated the CSPA. Since this language was not implemented into Provision (h)(3), Congress did not intend for automatic conversion to apply only when a new visa petition is not required. *Id.*

VI. ANALYSIS: THE SUPREME COURT SHOULD HAVE FOLLOWED THE APPROACH OF THE FIFTH AND NINTH CIRCUITS

The Supreme Court in *Scialabba* erred in its approach to interpreting Provision (h)(3). First, the Court wrongly determined that the provision was ambiguous and should not have deferred to the BIA's interpretation of the provision. In applying principles of administrative statutory interpretation governed by *Chevron U.S.A v. National Resources Defense Council*,[84] the Supreme Court mistakenly concluded that Congress did not speak directly to the question at issue.[85] Moreover, the Court failed to read Provision (h)(3) in the context of the overall statutory scheme. Second, the Fifth and Ninth Circuits' approach to interpreting Provision (h)(3) and their actual interpretation of the provision are correct. The Fifth and Ninth Circuits' approach is correct because it considered the overall statutory scheme of section 3 of the CSPA. In turn, their interpretation of Provision (h)(3) is correct because it avoids the negative implications of the BIA's interpretation and is good public policy. Third, the Court's concerns regarding automatic conversion and priority date retention are misguided and easily rectified.

A. *The Supreme Court Erred in Interpreting Provision (h)(3)*

The Supreme Court in *Scialabba* should not have deferred to the BIA's interpretation of Provision (h)(3) because the provision is unambiguous. Statutes written by the BIA are subject to the principles of interpretation outlined in *Chevron*.[86] First, a court must decide whether "Congress has directly spoken to the precise question at issue."[87] In doing so, a court should consider the language of the statute in the context of the overall statutory scheme.[88] Additionally, a court should attempt to fit all parts of a statute into one coherent whole.[89] After these considerations, if the intent of Congress is clear, the analysis is over, and the statute's unambiguous language will

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84. 467 U.S. 837 (1984). Interpretation of "an administrative agency's construction of a statute that it administers" is governed by *Chevron*. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).

85. *See* Scialabba v. Cueller de Osario, 134 S. Ct. 2191, 2213 (2014).

86. *Id.* at 2203.

87. *Chevron*, 467 U.S. at 842.

88. *Brown*, 529 U.S. at 132–33.

89. *Id.* at 133 (quoting Fed. Trade Comm'n v. Mandel Bros., Inc., 359 U.S. 385, 389 (1959)).

govern the question at issue.[90] However, if Congress has failed to directly address the question at issue, a court must defer to the administrative agency that authored the statute unless that interpretation is impermissible.[91]

The Supreme Court in *Scialabba* erred in concluding that Provision (h)(3) is ambiguous because it did not properly decide whether Congress spoke directly to the question at issue. The question at issue here was whether Provision (h)(3) provides for automatic conversion and priority date retention for derivative beneficiaries of all family preference categories. In determining whether Congress spoke to this question, the Supreme Court should have considered Provision (h)(3) in the statutory context of all of section 3 of the CSPA. Instead, the Court read only Provision (h)(3) and concluded that it answered the question at issue "in divergent ways."[92] The only time the Court looked outside of Provision (h)(3) was when it attempted to explain the meaning of "conversion" by comparing Provision (h)(3) to previous laws or other CSPA sections.[93] However, "conversion" is only one aspect of Provision (h)(3) and does not encompass the meaning of the provision. Therefore, the Court's effort to interpret Provision (h)(3) could hardly be considered as attempting to fit all pieces of the statute into one coherent whole.

B. *The Fifth and Ninth Circuits Were Correct in Their Approach and Interpretation of Provision (h)(3)*

The Fifth and Ninth Circuits' approach to interpreting Provision (h)(3) was correct because it considered the underlying statutory framework of section 3 of the CSPA. In following the principles prescribed by *Chevron*,[94] both courts found that Provision (h)(3) was unambiguous because of the way Provision (h)(3) fit with the other sections of Provision (h).[95] The two courts noted that although Provision (h)(3) does not specifically state which family preference categories qualify for automatic conversion and priority date

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90. *Chevron*, 467 U.S. at 842–43.
91. *Id.* at 843.
92. Scialabba v. Cueller de Osario, 134 S. Ct. 2191, 2203 (2014).
93. *Id.* at 2203–05.
94. de Osorio v. Mayorkas, 695 F.3d 1003, 1011 (9th Cir. 2012); Khalid v. Holder, 655 F.3d 363, 366–67 (5th Cir. 2011).
95. *de Osorio*, 695 F.3d at 1012; *Khalid*, 655 F.3d at 370.

retention, Provision (h)(3) does reference Provision (h)(1).[96] Since Provision (h)(1) expressly references Provision (h)(2), which states that the formula in Provision (h)(1) applies to all family preference categories, Provision (h)(3) must be read to apply to all family preference categories.[97] The Fifth and Ninth Circuits agreed that reading Provision (h) as a whole confirms that Provision (h)(3) was intended to apply to all family preference categories.[98]

The Fifth and Ninth Circuits' actual interpretation of Provision (h)(3) is correct because it avoids the negative implications of the Supreme Court's interpretation and is good public policy. One negative implication of the BIA's interpretation is that it limits Provision (h)(3)'s application to only one scenario: where the original sponsor is one parent of the derivative beneficiary, and the principal beneficiary is the other parent.[99] This scenario is uncommon because the would-be derivative beneficiary already qualifies for an F2B visa (unmarried son/daughter of an LPR) and therefore does not have to be a derivative beneficiary. Moreover Provision (h)(3) would have nearly the same effect as the previous regulation that spoke on this issue.[100] For these reasons, this interpretation can hardly be what Congress intended in adopting CSPA.

Another negative implication of the Supreme Court's interpretation of Provision (h)(3) is that it establishes a dangerous precedent in interpreting immigration laws. Provision (h)(3) was determined to be ambiguous because it addressed the issue of automatic conversion and priority date retention in "divergent ways."[101] Similar to Provision (h) of the CSPA, many provisions in immigration laws are complex and include cross-references to other provisions.[102] If the Supreme Court's standard of ambiguity is that a provision could be read in "divergent ways," there could be countless provisions that would be considered ambiguous.

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96. *de Osorio*, 695 F.3d at 1012; *Khalid*, 655 F.3d at 370.

97. *de Osorio*, 695 F.3d at 1012; *Khalid*, 655 F.3d at 370–71.

98. *de Osorio*, 695 F.3d at 1012; *Khalid*, 655 F.3d at 371.

99. *Khalid*, 655 F.3d at 374. The derivative beneficiary could therefore automatically convert to an F2B visa (unmarried adult son or daughter of LPR) without a new visa petition and keep the principal beneficiary's priority date. *Id.*

100. *See id.* at 374 (referencing 8 C.F.R. § 204.2(a)(4) (2012)).

101. Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203 (2014).

102. *See, e.g.*, 8 U.S.C. § 1153(b)(2)(B) (2012) (noting exceptions to an employment-based category of immigration visas with several cross-references to other provisions).

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Lastly, the Fifth and Ninth Circuits' interpretation of Provision (h)(3) is good public policy because it comports with the overall intent of the CSPA. When it was introduced in the Senate, the CSPA's goal was to address the aging out issue.[103] Senator Feinstein, who introduced the CPSA, spoke of the aging out problem being caused by agency delay and visa demand.[104] The Fifth and Ninth Circuits' interpretation of Provision (h)(3) addresses both of these causes in providing for automatic conversion and priority date retention. In recognizing the consequences of agency delay, Provision (h)(3) allows for automatic conversion even if the derivative beneficiary cannot avoid aging out through the formula in Provision (h)(1). Similarly, Provision (h)(3) realizes the high demand for family preference visas by allowing derivative beneficiaries to retain their parent's priority date so they avoid the long wait times caused by high demand. In short, the Fifth and Ninth Circuits' interpretation of Provision (h)(3) addresses the concerns that Congress contemplated in adopting the CSPA.

C. The Supreme Court's Concerns Are Misguided and Easily Rectified

The *Scialabba* Court had three principal concerns about interpreting Provision (h)(3) to allow priority date retention and automatic conversion for all family preference visas. One concern is that allowing automatic conversion to all family preference visas would undermine the requirement that each non-citizen must have a qualified sponsor.[105] The second concern is that a qualified sponsor would rarely exist at the time of automatic conversion.[106] The third concern is that allowing automatic conversion and priority date retention is not the automatic process intended by Provision (h)(3).[107]

1. Undermining the Qualified Sponsor Requirement

Allowing automatic conversion to all family preference visas would not undermine the qualified sponsor requirement because this requirement would still be in effect. If automatic conversion to all

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103. *See Scialabba*, 134 S. Ct. at 2199; 147 CONG. REC. 5239 (statement of Sen. Feinstein).
104. *Khalid*, 655 F.3d at 371; 147 CONG. REC. 5239 (statement of Sen. Feinstein).
105. *Scialabba*, 134 S. Ct. at 2205.
106. *Id.*
107. *Id.* at 2209.

family categories were allowed, the principal beneficiary (the derivative beneficiary's parent) would step in as the new sponsor for the derivative beneficiary.[108] Once the principal beneficiary officially becomes an LPR, they can petition for the derivative beneficiary (the unmarried adult son or daughter) to enter the United States under an F2B visa.[109] The Supreme Court's concern is that this new sponsor might not qualify as a sponsor for a number of reasons: failing to pass border inspection, deciding not to immigrate, or not meeting the requirements to petition for the derivative beneficiary.[110]

However, this concern is easily addressed if USCIS requires derivative beneficiaries to simply wait until the new sponsor is qualified. To become qualified, the new sponsor merely has to confirm their LPR status by passing border inspection,[111] and file a visa petition on behalf of the derivative beneficiary. Unlike waiting for a visa to become available, the process of filing and accepting a visa petition takes months instead of years.[112] Should the sponsor not qualify, the derivative beneficiary would have to find another way to immigrate. The concern about undermining the qualified sponsor requirement is easily rectified by having the derivative beneficiary wait a short period for the new sponsor to qualify.

2. No Qualified Sponsor at Time of Automatic Conversion

The Supreme Court's concern that a qualified sponsor will not exist at the time of automatic conversion is misguided because there is no such legal requirement. According to the Court, the time of automatic conversion is "the date on which a derivative beneficiary is deemed to have either aged out or not."[113] The date on which a derivative beneficiary's age is determined is the date that a visa becomes available for the principal beneficiary (the derivative beneficiary's parent).[114] In the Court's eyes, this is a problem because the potential new sponsor (the principal beneficiary) could

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108. *See id.*
109. *See id.*
110. *Id.*
111. *Id.* at 2199.
112. *See id.*; *see also USCIS Processing Time Information*, US CITIZENSHIP AND IMMIGR. SERVS., https://egov.uscis.gov/cris/processTimesDisplayInit.do (last visited Feb. 19, 2015) (providing estimated processing times at USCIS offices).
113. *Scialabba*, 134 S. Ct. at 2205.
114. 8 U.S.C. §§ 1153(h)(1)(A)–(B) (2012); *Scialabba*, 134 S. Ct. at 2205.

not possibly be a qualified sponsor before he or she is even able to file his or her visa application.[115]

Despite the Court's insistence on having a qualified sponsor at the time of automatic conversion, there is no provision that mandates this. The family preference system requires a sponsor to obtain a family preference visa,[116] but nothing in the CSPA requires that a sponsor exist at the moment of automatic conversion.[117] Moreover, there is no practical effect to having a qualified sponsor at the time of automatic conversion. As long as a qualified sponsor exists at the time a visa petition is filed for a derivative beneficiary, he or she can qualify for automatic conversion. The Supreme Court's concern over having a qualified sponsor at the time of automatic conversion is misguided because it is a requirement that simply does not exist in immigration law.

3. Automatic Conversion and Priority Date Retention Are Not Automatic Processes

The Supreme Court's final principal concern is that allowing automatic conversion and priority date retention would create a burdensome process that is not automatic. The Court's contention is that having a new sponsor file a visa petition on behalf of the derivative beneficiary creates logistical problems. According to the Court, if the USCIS were to allow derivative beneficiaries to wait for a new qualified sponsor, this would require "administrative juggling to hold off the derivative beneficiary's visa adjudication."[118] Such maneuvering would include deferring the derivative beneficiary's consular interview and disregarding the original visa petition filed by the principal beneficiary's sponsor.[119] The Court concluded that such a process does not conform to the idea of "automatic conversion" because it requires "special intervention, purposeful delay, and deviation from standard administrative practice."[120]

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115. *Scialabba*, 134 S. Ct. at 2206. Before the principal beneficiary could be a qualified sponsor, he or she would have to file his or her visa application, have it be accepted, pass border inspection, and be granted LPR status, then file a new petition for the derivative beneficiary. *Id.* at 2199.

116. *See* 8 U.S.C. § 1151(a)(1)(A).

117. *See* Child Status Protection Act, Pub. L. No. 107-208, 116 Stat. 927 (2002) (codified as amended in scattered sections of 8 U.S.C.).

118. *Scialabba*, 134 S. Ct. at 2209.

119. *See id.*

120. *Id.*

Delaying consular interviews and other procedural steps is not so burdensome as to negate the idea of "automatic conversion." Despite the fact that "automatic conversion" has been interpreted in other immigration laws to preclude delays or deviations,[121] the changes required here are minute. Delays in examining a derivative beneficiary's visa application would total a handful of months,[122] and could easily be shortened by having the principal beneficiary prepare the derivative's visa petition while filing his or her own visa application. Moreover, a minor change to the visa petition form could be made to allow the new sponsor (principal beneficiary) to note that the derivative beneficiary qualifies under the CSPA for automatic conversion and priority date retention. Thus, when USCIS receives this petition, officials would know which category to slot the derivative beneficiary and could easily move on to the process of consular interviews and examination of the visa application. At most, the USCIS would be dealing with minor changes to the petition form and a delay of several months.

VII. Conclusion

The Supreme Court in *Scialabba* erred in interpreting Provision (h)(3). The Court failed to consider Provision (h)(3) in the overall statutory context of Provision (h) and therefore mistakenly concluded that Provision (h)(3) was ambiguous. In doing so, the Court wrongly deferred to the BIA's interpretation of the provision. Instead, the Supreme Court should have followed the Fifth and Ninth Circuits' approach to interpreting Provision (h)(3). This approach correctly fit Provision (h)(3) within the other provisions of Provision (h) to create a harmonious whole.

Furthermore, the Supreme Court should have adopted the Fifth and Ninth Circuits' interpretation of Provision (h)(3). This interpretation is correct because it avoids the negative implications of the BIA's interpretation of the provision, and is good public policy because it comports with the overall goal of the CSPA. For these reasons, the Supreme Court should have followed the Fifth and Ninth Circuits in their approach to interpreting, and in their actual interpretation, of Provision (h)(3).

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121. *See* Milner, *supra* note 54, at 703.
122. *Scialabba*, 134 S. Ct. at 2199.