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15 UNITED STATES DISTRICT COURT  
 16  
 17 CENTRAL DISTRICT OF CALIFORNIA  
 18  
 19 WESTERN DIVISION

14	CAROLYN ROBB HOOTKINS,	) Case No. CV07-05696 (CAS)
15	et al.,	)
16	Plaintiffs,	) Date: April 20, 2009
17	v.	) Time: 10:00 a.m.
18		) Courtroom: 5
19		) Honorable Christina A. Snyder
20	JANET NAPOLITANO, Secretary,	)
21	U.S. Department of Homeland,	)
22	et al.,	) DEFENDANTS' REPLY
23		) MEMORANDUM IN SUPPORT OF
24	Defendants.	) MOTION FOR PARTIAL
25		) SUMMARY JUDGMENT AS TO
26		) PLAINTIFFS OUTSIDE THE NINTH
27		) CIRCUIT
28		

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1  
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I. INTRODUCTION**

4 Janet Napolitano and Michael Aytes, by and through their undersigned  
5 counsel, respectfully submit this reply memorandum in support of their motion for  
6 partial summary judgment as to the claims of Plaintiffs whose cases arise outside  
7 the jurisdiction of the Ninth Circuit (Plaintiffs).<sup>1</sup> Defendants submit a separate  
8 reply memorandum in support of their motion for partial summary judgment as to  
9 Plaintiffs whose cases arise within the jurisdiction of the Ninth Circuit and who are  
10 therefore identified class members.  
11  
12

13 For the reasons set forth *infra*, in the Memorandum of Points and Authorities  
14 in Support of Defendants’ Motion for Partial Summary Judgment as to Plaintiffs  
15 Outside the Ninth Circuit (Defendants’ Non-Ninth Circuit Summary Judgment  
16 Motion) (dkt #120), and in the Memorandum of Points and Authorities in Support  
17 of Defendants’ Opposition to Plaintiffs’ Renewed Motion for Summary Judgment  
18 (Defendants’ Opposition) (dkt #137), United States Citizenship and Immigration  
19 Services (USCIS or the Agency) correctly concluded that Plaintiffs are not entitled  
20 to "immediate relative" status under 8 U.S.C. § 1151(b)(2)(A)(i). Therefore, the  
21 Agency did not abuse its discretion in denying or revoking the immediate relative  
22 petitions (Form I-130) filed on behalf of the respective Plaintiffs and the adjustment  
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26 <sup>1</sup> Plaintiffs whose cases arise outside the jurisdiction of the Ninth Circuit are Yelena  
27 Arias-Angulo, Farah Batool, Sarah Bayor, Agnieszka Bernstein, Maria del Carmen Diaz-Ruiz,  
28 Diana G. Engstrom, Dahianna Heard, Stella Standifer, and Gladys Walsh.

1 of status applications (Form I-485) filed by Plaintiffs. Accordingly, neither the  
2 Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, nor the Mandamus  
3 Act, 28 U.S.C. § 1361, affords relief to Plaintiffs. Because there is no genuine issue  
4 as to any material fact, Defendants are entitled to judgment as a matter of law. *See*  
5 Fed. R. Civ. P. 56(c).  
6

7 **II. ARGUMENT**

8 **A. Defendants’ Interpretation of 8 U.S.C. § 1151(b)(2)(A)(i) Is**  
9 **Correct.**

10 USCIS correctly interpreted the term "immediate relative" in 8 U.S.C.  
11 § 1151(b)(2)(A)(i) in determining that alien widow(er)s, like Plaintiffs, who have  
12 not yet adjusted status to lawful permanent resident, no longer qualify for  
13 immediate relative status as legally married spouses of United States citizens if their  
14 respective marriages lasted less than two years at the time of the death of the  
15 petitioning U.S. citizen spouses. *See* 8 U.S.C. § 1151(b)(2)(A)(i).  
16

17 Defendants’ interpretation comports with a straightforward application of the  
18 express terms of section 1151(b)(2)(A)(i), as demonstrated by canons of statutory  
19 interpretation, the importance of verb tenses and related statutory provisions, and  
20 the general rule in the United States that marriage ends with the death of one  
21 spouse. Defendants’ Opposition at 4-13 (dkt #137). Alternatively, even if there is  
22 some ambiguity in the statute, additional factors support the agency’s interpretation  
23 as reasonable: Board of Immigration Appeals (“Board”) precedent directly on  
24 point, *Matter of Varela*, 13 I. & N. Dec. 453 (BIA 1970); subsequent congressional  
25 action; the final affidavit of support rule; long-standing administrative  
26  
27  
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1 interpretations; and the purpose of family-based immigration policy. Defendants'  
2 Opposition at 13-18. Additionally, the Agency's interpretation has been endorsed  
3 by the Third Circuit Court of Appeals in *Robinson v. Napolitano*, 554 F.3d 358 (3rd  
4 Cir. 2009), *rehearing denied* (2009), and at least two federal district courts  
5 considering this precise issue. *See Turek v. Dep't of Homeland Security*, 450 F.  
6 Supp. 2d 736 (E.D. Mich. 2006); *Burger v. McElroy*, 1999 WL 203353 (S.D.N.Y.  
7 1999); *cf. Taing v. Chertoff*, 526 F. Supp. 2d 177 (D. Mass. 2007); *Lockhart v.*  
8 *Chertoff*, 2008 WL 80225 (N.D. Ohio Jan. 7, 2008). The foregoing reasons  
9 necessarily lead to the conclusion that USCIS's interpretation is reasonable.  
10  
11

12 Specifically, the first sentence of section 1151(b)(2)(A)(i) defines the term  
13 "immediate relative" as the spouse, parent, or child of a U.S. citizen. 8 U.S.C.  
14 § 1151(b)(2)(A)(i). The second sentence provides a narrow exception for someone  
15 who "was the spouse of a citizen," but makes an exception applicable only when the  
16 marriage lasted more than two years. *Id.* (emphasis added). Thus, the second  
17 sentence clearly provides the rule that determines whether Plaintiffs qualify as  
18 "immediate relatives" after the death of their spouses. Because Plaintiffs had been  
19 married for less than two years at the time of each citizen spouse's death, Plaintiffs  
20 cannot satisfy the statutory requirements.  
21  
22

23 The Third Circuit in *Robinson* agreed with the Agency's position that the first  
24 sentence in section 1151(b)(2)(A)(i) cannot be divorced from the second, and made  
25 the precise finding that the terms of the statute are clear and unambiguous and do  
26 not permit immediate relative classification to be applied to widow(er)s who were  
27 married to their U.S. citizen spouses for less than two years. *See Robinson*, 554  
28

1 F.3d at 364. If the citizen spouse dies, the two-year marriage requirement applies to  
2 the widow(er), and this rule applies both to surviving spouses whose citizen spouse  
3 filed an immediate relative petition prior to death and to surviving spouses whose  
4 citizen spouse did not file the petition. *Id.*

5  
6 **B. This Court Should Apply *Robinson And Varela* As The**  
7 **Appropriate Choice Of Law.**

8 This Court must determine which law to apply to Plaintiffs' claims. The  
9 Court and the parties agree that Ninth Circuit law does not bind the Court with  
10 respect to these Plaintiffs. *See* Order Re: Motion to Dismiss at 31 (dkt #36);  
11 Plaintiffs' Non-Ninth Circuit Response at 1 (dkt #140). Defendants also agree with  
12 Plaintiffs that this Court is not bound to apply Third Circuit law to claims arising  
13 outside the Third Circuit and may decide those claims based on the Court's analysis  
14 of the statute. *See* Plaintiffs' Non-Ninth Circuit Response at 1 (dkt #140).  
15 Plaintiffs ask this Court to apply *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir.  
16 2006), to Plaintiffs' claims. Plaintiffs' Non-Ninth Circuit Response at 8-12 (dkt  
17 #140). Defendants urge this Court to dismiss this request, in part because Plaintiffs  
18 do not reside in this District, and their claims do not arise in this District, as each  
19 was the subject of immigration benefit adjudications by USCIS offices located  
20 outside the jurisdiction of the Ninth Circuit. To discourage the apparent forum  
21 shopping by Plaintiffs, Defendants urge this Court to conclude that Plaintiffs have  
22 no meaningful contacts with this District and their claims should therefore not be  
23 assessed under *Freeman*.  
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27 Rather, because USCIS is required to apply the Board precedent *Varela* to the  
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1 claims of all aliens similarly situated to Plaintiffs, *see infra* at Part II.C.2, and  
2 because the *Robinson* decision comports with *Varela*, this Court should apply  
3 *Robinson* to Plaintiffs' claims as the law that is applicable to all such administrative  
4 proceedings conducted outside the Ninth Circuit. This approach is consistent with  
5 the venue rule for petitions for review of removal orders, which can only be brought  
6 in the federal court of appeals for the District in which the immigration judge  
7 completed the removal proceedings. *See* 8 U.S.C. § 1252(b)(2). Similarly, the  
8 Board considers itself bound by the law of the circuit in which administrative  
9 removal proceedings are held. *Matter of Cazares-Alvarez*, 21 I. & N. Dec. 188, 192  
10 (BIA 1996) (internal citations omitted). In addition to discouraging forum  
11 shopping, the application by this Court of *Robinson* to Plaintiffs' claims would  
12 result in the consistent application of the immigration laws to all aliens whose  
13 claims arise outside the Ninth Circuit.

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17 Ninth Circuit law supports Defendants' position that this Court should apply  
18 to Plaintiffs' claims the law of the location of the respective USCIS offices that  
19 adjudicated Plaintiffs' petitions and applications, and the goal of discouraging  
20 forum shopping should be a relevant factor in this determination. In an analogous  
21 case involving a petition for review of a deportation order rendered under Fifth  
22 Circuit law, the Ninth Circuit carefully analyzed the petitioner's contacts with both  
23 jurisdictions before applying its own law to prevent INS forum shopping.

24  
25 *Maldonado-Cruz v. INS*, 883 F.2d 788, 790-91 (9th Cir. 1989) (*abrogated on other*  
26 *grounds*) (petitioner was resident of Ninth Circuit prior to and following INS  
27 custody and had contacts with Fifth Circuit only based upon INS custody following

1 INS's unilateral actions of transporting him for deportation proceedings).  
2 Similarly, in another case involving a petition for review of a deportation order  
3 rendered under Fifth Circuit law, the Seventh Circuit was persuaded that neither  
4 party had engaged in forum shopping and applied its own law, which was the  
5 location of the petitioner's residence. *Rosendo-Ramirez v. INS*, 32 F.3d 1085,  
6 1091-92 (7th Cir. 1994); *but see Morel v. INS*, 90 F.3d 833, 837 (3d Cir. 1996),  
7 *vacated on other grounds*, 144 F.3d 248 (3d Cir. 1998) (petition for review of a  
8 deportation order in which the court noted the importance of applying the law of the  
9 court's jurisdiction). By contrast, in the instant case, this Court has reason to  
10 discourage forum shopping by Plaintiffs, and Plaintiffs have no contacts with this  
11 jurisdiction.  
12  
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14 **C. The Court Should Apply *Robinson* to Plaintiffs' Claims.**

15 For the foregoing reasons, Defendants submit that the *Robinson* decision  
16 comports with 8 U.S.C. § 1151(b)(2)(A)(i) and should be applied by this Court to  
17 cases arising outside the Ninth Circuit. In the alternative, even if this Court does  
18 not find the *Robinson* decision persuasive, Defendants are nevertheless entitled to  
19 judgment as a matter of law because Plaintiffs' claims should be rejected pursuant  
20 to a straightforward application of the express terms of the statute. Even if there is  
21 some ambiguity in the statute, the numerous factors set forth *supra* make it clear  
22 that Congress did not intend to enact the interpretation that Plaintiffs invite this  
23 Court to adopt.  
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1           **1.     Robinson Comports with the General Rule in the United**  
2           **States that Marriage Ends with the Death of One Spouse.**

3           The Third Circuit's interpretation in *Robinson* of section 1151(b)(2)(A)(i) is  
4 consistent with the general rule in the United States that a marriage ends upon the  
5 death of one spouse. *See* 52 Am. Jur. 2d Marriage, § 8. In addition, the common,  
6 ordinary meaning of the term "spouse" is a married person. *See* Black's Law  
7 Dictionary 1438-39 (8th ed. 2007) (defining "spouse"). By contrast, Plaintiffs  
8 point to the fact that the Eighth Edition of Black's Law Dictionary (2004) has a  
9 separate entry for "surviving spouse" under the definition of "spouse," and  
10 therefore conclude that the term "surviving spouse" falls within the definition of  
11 "spouse." Plaintiffs' Non-Ninth Circuit Response at 14-15. This factor is not  
12 convincing. The drafters of the dictionary obviously saw a need to differentiate a  
13 "surviving spouse" from a "spouse" with the addition of the adjective "surviving."  
14 Similarly, Plaintiffs' claim to qualify as "immediate relatives" under the first  
15 sentence of the statute must fail because the text does not explicitly include the term  
16 "surviving spouse." *See Robinson*, 554 F.3d at 366 ("The fact that Black's Law  
17 Dictionary's entry for spouse defines "surviving spouse" separately disproves  
18 Robinson's hypothesis," and "to conclude that 'spouse' and 'surviving spouse' have  
19 the identical meaning is illogical and is contrary to our understanding of the legal  
20 effect of death on a marriage.") This supports the *Robinson* court's determination  
21 that, under 8 U.S.C. § 1151(b)(2)(A)(i), Plaintiffs cannot be considered "immediate  
22 relatives" because they are "widow(er)s," not "spouses," nor are they former  
23 spouses to a marriage that lasted more than two years.  
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1                   **2.     Robinson Is Consistent With Board Precedent.**

2                   This Court should adopt the *Robinson* rationale for the additional reason that  
3 the Third Circuit decision comports with Board precedent on the precise issue  
4 presented here – that a widow(er) is not a “spouse” for purposes of an immediate  
5 relative classification. *See Varela*, 13 I. & N. Dec. 453. Decisions of the Board are  
6 binding on the government in the immigration context and apply nation-wide. *See*  
7 8 C.F.R. § 1003.1(g).

9                   Plaintiffs challenge the validity of *Varela* on the merits due to the Board’s  
10 later decision, in *Matter of Sano*, 19 I. & N. Dec. 299 (BIA 1985), that it was  
11 procedurally inappropriate for the panel in *Varela* to reach the merits of the case.  
12 Plaintiffs’ Non-Ninth Circuit Response at 12-14; *Sano*, 19 I. & N. Dec. 299.  
13 Simply because the *Sano* panel made the procedural determination that the  
14 petitioner in *Varela* lacked standing to bring her claim does not mean that the  
15 substantive holding in *Varela* is entitled to no weight at all in this case. Indeed, the  
16 Court in *Turek* found the *Varela* opinion particularly instructive. *See Turek*, 450 F.  
17 Supp. 2d at 740 (citing *Varela* and holding that it is “persuasive that the BIA had  
18 previously determined that the beneficiary of a spousal immediate relative petition  
19 would be ineligible for that status if the petitioning spouse dies before the statutory  
20 two-year time period”); *cf. Robinson*, 554 F.3d at 362 (noting that the District Court  
21 failed to cite *Varela*). It is also noteworthy that the Board in *Sano* did not overrule  
22 *Varela*; rather, it determined that to the extent *Varela* conflicts with *Sano*, “it is  
23 hereby modified.” *Sano*, 19 I. & N. Dec. at 301. By contrast, on an unrelated point  
24 also considered by the Board in *Sano*, the Board did overrule a different Board  
25

1 precedent, *Matter of Arteaga-Godoy*, 14 I. & N. Dec. 226 (BIA 1927), to the extent  
2 it is contrary to *Sano*. Thus, Plaintiffs' contention that *Varela* "is no longer good  
3 law" is erroneous. See Plaintiff's Non-Ninth Circuit Response at 13. Rather,  
4 *Varela* should be given due consideration.  
5

6 Further, *Robinson* is consistent with Board precedent requiring that an alien  
7 seeking relief must satisfy the standards for relief up until the moment relief is  
8 granted. See, e.g., *Matter of Alarcon*, 20 I. & N. Dec. 557, 562 (BIA 1992).  
9 Plaintiffs mistakenly dismiss Defendants' reliance on *Alarcon* and incorrectly  
10 describe its holding as "limited to admissibility issues." See Plaintiffs' Non-Ninth  
11 Circuit Response at 12. Rather, *Alarcon* unambiguously supports Defendants'  
12 point: "[a]n application for admission to the United States is a continuing  
13 application, and admissibility is determined on the basis of the facts and the law at  
14 the time the application is finally considered." *Alarcon*, 20 I. & N. Dec. at 562  
15 (citations omitted).  
16  
17

18 Plaintiffs erroneously cite to the Ninth Circuit's judgment in *Dabaghian v.*  
19 *Civiletti*, 607 F.3d 868 (9th Cir. 1979), for the proposition that "eligibility issues"  
20 are decided "at inception," meaning, presumably, at the time of filing the Form  
21 I-130. See Plaintiffs' Non-Ninth Circuit Response at 12, citing *Dabaghian*, 607  
22 F.2d 868. The *Freeman* court also cited *Dabaghian*. *Freeman*, 444 F.3d at 1040.  
23 *Dabaghian*, however, does not stand for the proposition for which it is cited, nor  
24 does it support the *Freeman* decision. The holding in *Dabaghian* is that a legally  
25 valid, non-fraudulent marriage continues to form the basis for granting adjustment  
26 of status "until it is legally dissolved." *Dabaghian*, 607 F.2d at 869 ("If a marriage  
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1 is not sham or fraudulent from its inception, it is valid for the purposes of  
2 determining eligibility for adjustment of status under s. 245 of the Act until it is  
3 legally dissolved.”) With respect to Plaintiffs in the instant case, by contrast, their  
4 respective marriages were legally dissolved by the death of their citizen spouses.  
5

6 **3. The Analysis of the Two-Year Rule in *Robinson* Is Sound.**

7 In urging this Court to reject *Robinson*, Plaintiffs assert that the Third Circuit  
8 decision is “fundamentally unsound” and “fatally flawed” but fail to offer adequate  
9 support for this assertion. *See* Plaintiffs’ Non-Ninth Circuit Response at 1.

10 Plaintiffs mischaracterize both Defendants’ position and the *Robinson* decision,  
11 which do not interpret section 1151(b)(2)(A)(i) as requiring that a citizen and an  
12 alien must be married for at least two years in order for the alien to immigrate. *See*  
13 Plaintiffs’ Non-Ninth Circuit Response at 1-3, 5, *quoting Robinson*, 554 F.3d at 366.

14 To the contrary, assuming the citizen spouse does not die, the petitioner and alien  
15 need not be married for any length of time in order for the alien to immigrate as an  
16 immediate relative. Rather, the alien must still be a spouse when the Form I-130 is  
17 adjudicated, in order for the alien to qualify as an “immediate relative.” *See* 8

18 U.S.C. § 1151(b)(2)(A)(i). If the couple has been married for less than two years,  
19 the alien is eligible for immediate relative status and the Form I-130 is approvable,  
20 and, provided the Form I-485 is also approved, the alien possesses the status of an  
21 alien lawfully admitted for permanent residence, but on a conditional basis initially  
22 due to the short duration of the marriage. *See* 8 U.S.C.

23 §§ 1186a(a)(1) & (g)(1). Thus, if the citizen spouse is alive and still married to the  
24 alien, the duration of the marriage affects whether the conditions apply, not whether  
25

1 the alien can immigrate.

2       The duration of the marriage becomes critical, however, if the marriage ends  
3 with the citizen's death while the Form I-485 is pending. The Agency's position is  
4 that the alien is no longer a spouse under the first sentence of section  
5 1151(b)(2)(A)(i), and cannot immigrate unless under the second sentence the alien  
6 and the citizen were married for at least two years. Upon the death of the citizen  
7 spouse, the alien's status is that s/he "was the spouse of a citizen," under the second  
8 sentence. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (emphasis added). Therefore, the second  
9 sentence is controlling as to Plaintiffs, who cannot immigrate because their  
10 marriages lasted less than two years. This premise is also the basis of the *Robinson*  
11 decision. *Robinson*, 554 F.3d at 364 (the second sentence governs a widow(er)'s  
12 claim as long as s/he was the spouse of the citizen for at least two years). Contrary  
13 to Plaintiffs' argument, *Robinson* does not suggest that an alien in a current  
14 marriage with a living citizen spouse cannot immigrate unless they have been  
15 married for at least two years.

19                   **4. Robinson Did Not Overlook 8 U.S.C. § 1186(a).**

20       Further, the Court should dismiss Plaintiffs' claim that the Third Circuit in  
21 *Robinson* did not consider an unrelated marriage fraud provision, 8 U.S.C. § 1186a,  
22 which was analyzed in *Freeman*. *See* Plaintiffs' Non-Ninth Circuit Response at 2-  
23 7. Plaintiffs cite the *Freeman* court's analysis of the marriage fraud statute, which  
24 provides that a conditional resident whose U.S. citizen spouse dies within two years  
25 of marriage does not lose permanent residence status, and the court's conclusion  
26 that this evidences Congress's intent that a widow does not lose her potential for  
27

1 immediate relative status under § 1151(b)(2)(A)(i) when her U.S. citizen spouse  
2 dies within two years of marriage and prior to the adjudication of the I-130. *Id.* at  
3 5-6, *citing Freeman*, 444 F.3d at 1042.

4  
5 These statutes are distinguishable, however, because the widow(er)  
6 contemplated by 8 U.S.C. § 1186a is the recipient of a previously adjudicated I-130  
7 petition and I-485 application, while the widow(er) contemplated by section  
8 1151(b)(2)(A)(i) is awaiting adjudication of her I-130 and I-485. Although it is true  
9 that the results of a prompt adjudication would result in the first widow(er)  
10 maintaining status despite the death of the citizen petitioner, the widow(er) in the  
11 second situation cannot remain eligible for immediate relative classification because  
12 the Agency never made an eligibility determination on the Form I-130 and I-485.  
13 When the citizen petitioner is still alive, USCIS has the opportunity to fully test the  
14 *bona fides* of the marriage by completing an investigation, including an interview of  
15 the applicant and, if necessary, the citizen spouse. *See* 8 U.S.C.  
16 § 1154(b) (Congress required that the Secretary investigate every visa petition  
17 case); 8 C.F.R. § 245a.19 (all aliens filing adjustment of status applications must be  
18 personally interviewed by an immigration officer). By contrast, once the citizen  
19 petitioner has died, USCIS is unable to fully investigate the *bona fides* of the  
20 marriage, and the statute therefore imposes a two-year marriage requirement to  
21 ensure that only surviving spouses in *bona fide* marriages adjust status to Lawful  
22 Permanent Resident. 8 U.S.C. § 1151(b)(2)(A)(i); *see Robinson*, 554 F.3d at 367  
23 (“A marriage that lasted two years can be presumed to have been bona fide....”)  
24  
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1           **D. Plaintiff Standifer's Claim Must Be Heard By the Third Circuit.**

2           For the reasons set forth earlier, *Robinson* applies to the claims of Plaintiff  
3 Standifer, a resident of Pennsylvania, which is located within the jurisdiction of the  
4 Third Circuit. *See* Defendants' Opposition at Part II.G. (dkt #137), which is  
5 incorporated by reference herein. Plaintiffs concede this point. *See* Plaintiffs' Non-  
6 Ninth Circuit Response at 1, 16.

8           **E. Plaintiff Heard Was Granted Adjustment of Status.**

9           For the reasons set forth earlier, Plaintiff Heard's claims are moot because  
10 USCIS has granted her lawful permanent resident status. *See* Defendants'  
11 Opposition at Part II.H (dkt #137), which is incorporated by reference herein.  
12 Plaintiffs assert nevertheless that Plaintiff Heard's claims are not moot because the  
13 "doctrine of voluntary cessation" purportedly applies. *See* Plaintiffs' Non-Ninth  
14 Circuit Response at 16. Plaintiffs base this argument on the fact that USCIS  
15 possesses the authority to rescind lawful permanent resident status for a period of  
16 five years. *Id.*, *citing* 8 U.S.C. § 1256.

17           However, USCIS approved Plaintiff Heard's claim under section 1703 of  
18 FY2004 National Defense Authorization Act, Pub. L. No. 108-136, Division A, 117  
19 Stat. 1392, 1693-96 (2003). Defendants' Non-Ninth Circuit Summary Judgment  
20 Motion at 9 (dkt #120). Therefore, she immigrated as the widow of a citizen, not as  
21 a spouse. Thus, the current dispute about whether a citizen spouse's death while a  
22 Form I-130 is pending requires denial of the Form I-130 is wholly irrelevant to her  
23 case. Plaintiffs have not suggested the existence of any fact that would indicate  
24 that Plaintiff Heard was not eligible for adjustment. Ineligibility for adjustment is

1 the only basis for rescission. 8 U.S.C. § 1256. The prospect of rescission in her  
2 case is sheer speculation.

3 **F. The Petition Filed On Behalf Of Plaintiff Lu Was Properly Revoked.**

4 For the reasons set forth earlier, the I-130 petition filed on behalf of Plaintiff  
5 Lu was properly revoked, and she resides outside the United States. Therefore,  
6 Defendants are entitled to summary judgment with respect to her claims. *See*  
7 Defendants' Opposition at Part II.I (dkt #137), which is incorporated by reference  
8 herein. Contrary to Plaintiffs' assertions, the automatic revocation regulation  
9 located at 8 C.F.R. § 205.1(a)(3)(i)(C) and the requirement that a substitute sponsor  
10 file an affidavit of support are not *ultra vires*. *See* Plaintiffs' Non-Ninth Circuit  
11 Response at 17; *see* Defendants' Opposition at Part II.B, which is incorporated by  
12 reference herein.  
13  
14

15 **G. Plaintiff Walsh Was Granted Adjustment of Status.**

16 For the reasons set forth earlier, Defendants are entitled to summary  
17 judgment with respect to Plaintiff Walsh because she now possesses lawful  
18 permanent resident status and her claims are therefore moot. *See* Defendants'  
19 Opposition at Part II.J (dkt #137), which is incorporated by reference herein.  
20 Plaintiffs are mistaken that the USCIS grant of Plaintiff Walsh's Form I-485  
21 somehow "undermines [the Agency's] position" by granting adjustment to a  
22 widow(er) who is no longer the spouse of a U.S. citizen. *See* Plaintiffs' Non-Ninth  
23 Circuit Response at 18-19. To the contrary, USCIS appropriately granted Plaintiff  
24 Walsh's application for adjustment of status, following the reinstatement of the I-  
25 130 petition filed on her behalf under the regulatory authority located at 8 C.F.R.  
26  
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1 § 205.1(a)(3)(i)(C)(2). The Agency exercised its discretion in determining that for  
2 humanitarian reasons, following the submission by a substitute sponsor of an  
3 affidavit of support, reinstatement of the petition was appropriate. *See* 8 C.F.R.  
4 § 205.1(a)(3)(i)(C)(2). The statute itself, 8 U.S.C. § 1183a(f)(5)(B), endorses the  
5 long-settled regulatory practice under which, as a matter of discretion, USCIS may  
6 leave undisturbed the approval of a visa petition that was approved while the  
7 petitioner was alive and the beneficiary was still the petitioner's spouse. This result  
8 does not lead to the conclusion that USCIS now considers Plaintiff Walsh to be the  
9 "spouse" of a U.S. citizen.  
10  
11

### 12 III. CONCLUSION

13 For the foregoing reasons, Defendants urge this Court to grant summary  
14 judgment in favor of Defendants because Plaintiffs' claims should be decided under  
15 *Robinson and Varela*. In the alternative, if this Court declines to apply *Robinson* to  
16 Plaintiffs' claims, Defendants are nonetheless entitled to judgment as a matter of  
17 law because it is clear that USCIS correctly interpreted the term "immediate  
18 relative" and appropriately required a substitute affidavit of support following the  
19 death of the citizen spouses. Because USCIS did not abuse its discretion, neither  
20 the APA nor the Mandamus Act afford relief to Plaintiffs. Further,  
21 Plaintiff Standifer's claims should be rejected for the additional reason that she  
22 resides within the jurisdiction of the Third Circuit. Plaintiff Heard's and Plaintiff  
23 Walsh's respective claims are now moot because both have been granted  
24 adjustment of status by USCIS. Finally, Defendants are entitled to judgment as a  
25 matter of law with respect to Plaintiff Lu because the petition filed on her behalf  
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28

1 was properly revoked.

2  
3 Date: April 6, 2009  
4

5 Respectfully Submitted,

6 MICHAEL F. HERTZ  
7 United States Department of Justice  
8 Acting Assistant Attorney General  
9 Civil Division

10 /s/Elizabeth J. Stevens  
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1  
2 **CERTIFICATE OF SERVICE**  
3

4  
5 Case No. CV07-05696 (CAS)

6 I hereby certify that on this 6th day of April 2009, true and correct copies of  
7 the foregoing **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF**  
8 **MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO NINTH**  
9 **CIRCUIT CLASS PLAINTIFFS** was served pursuant to the district court's ECF  
10 system as to ECF filers on April 6, 2009, to the following ECF filers:  
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