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8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
11

12 CAROLYN ROBB HOOTKINS, et. al.,) Case No. CV07-5696 CAS (MANx)
13)
14 Plaintiffs-petitioners,) Date: April 20, 2009
15 vs.) Time: 10:00 a.m.
16) Courtroom: 5
17 JANET NAPOLITANO, U.S. Department) Honorable Christina A. Snyder
of Homeland Security, et. al.,)
18) PLAINTIFFS' RESPONSE TO
19 Defendants-respondents.) DEFENDANTS' MOTION FOR
20) PARTIAL SUMMARY JUDGMENT AS
21) TO PLAINTIFFS OUTSIDE THE
22) NINTH CIRCUIT
23)
24) CLASS ACTION
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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. ARGUMENT 1

 A. Robinson Is Fatally Flawed..... 1

 B. Freeman Is Persuasive..... 8

 1. Matter of Varela 12

 2. Terms Spouse and Marriage..... 14

 C. Plaintiffs Standifer, Heard, Lu and Walsh 16

II. CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

Burger v. McElroy, 1999 U.S. Dist. LEXIS 4854 (S.D.N.Y. 1999)..... 18

Choin v. Mukasey, 537 F.3d 1116 (9th Cir. 2008)..... 9

Dabaghian v. Civiletti, 607 F.2d 868 (9th Cir. 1979)..... 13

Freeman v. Gonzales, 444 F.3d 1031, 1042 (9th Cir. 2006) passim

Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 189 (2000).....20

Lockhart v. Chertoff, 2008 U.S. Dist. LEXIS 889 (D. Ohio 2008), *appeal docketed*, No. 08-1179 (6th Cir. 2008) 18

Matter of Alarcon, 20 I&N Dec. 557 (BIA 1992) 13

Matter of Sano, 19 I&N Dec. 299 (BIA 1985) 14, 15

Matter of Varela, 13 I&N Dec. 453 (BIA 1970) 14, 15

Matter of Zaidan, 19 I&N Dec. 297 (BIA 1985)..... 14

Plessy v. Ferguson, 163 U.S. 537 (1896)..... 16

Robinson v. Napolitano, 554 F.3d 358 (3rd Cir. 2009) passim

Rosell v. State Indus. Accident Comm'n, 164 Or. 173, 179, 95 P.2d 726, 729 (Or. 1939)17

Taing v. Chertoff, 2007 U.S. Dist. LEXIS 911411 (D. Mass 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008) 18

Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736 (E.D. Mich. 2006) 18

Statutes

8 U.S.C. § 1101(b) 8

8 U.S.C. § 1101(c)(2) 8

8 U.S.C. § 1154 4, 7

8 U.S.C. §1186a passim

8 U.S.C. § 1151 5, 7

1 8 U.S.C. § 1256 20

2 8 U.S.C. § 1186a (c)(1)(A)..... 5

3 8 U.S.C. § 1186a (c)(4)(B)..... 5

4 8 U.S.C. § 1186a (d)(1)(A)(i)(II) 6

5 8 U.S.C. § 1151(b) 9, 10, 11

6 8 U.S.C. § 1151(b)(2)(A)(i) passim

7 8 U.S.C. § 1154(a)(1)(A)(i)..... 9, 11

8 8 U.S.C. § 1154(a)(1)(A)(ii) 11, 12

9 8 U.S.C. § 1154(b) 12, 13

10 8 U.S.C. § 1154(a)(1)(A)(i)(I)..... 3

11 8 U.S.C. § 1154(a)(1)(A)(i)(II) 3, 7

12 8 U.S.C. § 1186a (b)(1)(A)(ii) 3, 5

13 8 U.S.C. § 1186a (g)..... 6

14 INA 201(b)(2)(A)(i) 9, 10, 11

15 INA 204(a)(1)(A)(ii) 11

16

17 **Other Authorities**

18 Black’s Law Dictionary (4th Ed. 1951) 17

19 Black’s Law Dictionary (6th Ed. 1990) 17

20 Black’s Law Dictionary (8th Ed. 2004) 17

21 **Regulations**

22 8 C.F.R. § 3.1(b) (1985) [now 8 C.F.R. § 1003.1(b)] 15

23 8 CFR § 205.2(a)(3)(i)(C) 21

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1 **I. ARGUMENT**

2 Plaintiffs and Defendants agree that the claims of Plaintiffs Yelena Arias-Angulo,
3 Farah Batool, Sarah Baylor, Agnieszka Bernstein, Maria del Carmen Diaz-Ruiz, Diana G.
4 Engstrom, Dahianna Heard, Stella Standifer, and Gladys Walsh do not arise within the
5 jurisdiction of the Ninth Circuit. The Court is therefore not bound to apply *Freeman v.*
6 *Gonzales*, 444 F.3d 1031 (9th Cir. 2006) to their claims. Defendants are not entitled to
7 summary judgment in their favor, however, because contrary precedent is fundamentally
8 unsound.
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12 **A. Robinson Is Fatally Flawed**

13 For Plaintiffs’ cases outside the Ninth Circuit, Defendants urge the Court to adopt
14 the interpretation of the majority in *Robinson v. Napolitano*, 554 F.3d 358 (3rd Cir.
15 2009), an interpretation which the dissent called “fatally flawed.” *Id.* at 367. Just as the
16 Court is not bound to apply *Freeman* to the claims arising outside the Ninth Circuit,
17 however, the Court is not bound to apply *Robinson* to claims arising outside the Third
18 Circuit. Despite the circuit split, the Court may decide the claims not arising out of the
19 Third or Ninth Circuits based on the Court’s own analysis of the statute, as guided by
20 those decisions which the Court deems persuasive.
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25 A misleading exchange during oral argument contributed to a failure of proper
26 analysis by the majority in *Robinson*. The majority opinion also evidenced a
27 misinterpretation of the “two-year rule” and failed to consider key statutes that were
28

1 carefully considered by the Ninth Circuit in *Freeman v. Gonzales*, 444 F.3d 1031 (9th
2 Cir. 2006), the only other court of appeals to have ruled on the issues raised herein.

3
4 Specifically, the *Robinson* majority held that,

5 “We agree with the agency that Robinson’s claim must be rejected,
6 not because of any government bureaucracy but because she does not
7 meet one of the Congress’ requirements for immediate relative status,
8 i.e., that she had been married to her citizen spouse for at least two
9 years.”

10 554 F.3d at 366. This holding is “fatally flawed.” 554 F.3d at 367 (Nygaard, J.,
11 dissenting). The majority was prevented from recognizing that Congress did not impose
12 a requirement that an immediate relative have been married to a citizen spouse for at least
13 two years as a prerequisite to obtaining permanent resident status. Instead, the two year
14 rule was only intended to guard against marriage fraud, and to therefore allow an
15 individualized determination – not automatic termination. There are two separate “two-
16 year rule” sections that were conflated by the majority – 1) 8 U.S.C. § 1186a providing
17 for conditions on permanent resident status granted to alien spouses who entered into the
18 marriage less than two years prior to approval, were beneficiaries of petitions filed by a
19 U.S. citizen spouse under the *first clause* of 8 U.S.C. §1154(a)(1)(A)(i)(I), and subject to
20 the definition found under the *first sentence* of 8 U.S.C. § 1151(b)(2)(A)(i), and 2) the
21 *second clause* of 8 U.S.C. §1154(a)(1)(A)(i)(II) providing a self-petitioning right of alien
22 spouses under the *second sentence* of 8 U.S.C. § 1151(b)(2)(A)(i). These sections refer
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1 to a surviving spouse as an “alien spouse” or “the spouse”, and the two year requirement
2 of the self-petitioning spouse under the *second clause* of 8 U.S.C. §1154(a)(1)(A)(i) does
3 not explicitly or implicitly limit the alien spouse whose U.S. citizen spouse filed a
4 petition under the first clause of U.S.C. §1154(a)(1)(A)(i). The latter is merely subject to
5 the conditions of 8 U.S.C. § 1186a which only allow for termination of status on a basis
6 “other than through the death of a spouse.” 8 U.S.C § 1186a(b)(1)(A)(ii).
7

8
9 The majority in *Robinson* evidenced a fundamental misunderstanding of the
10 routine processing times for administrative adjudication, assuming that the USCIS rarely
11 if ever acts fast enough to grant applications before two years of marriage. During oral
12 argument, Circuit Judge Sloviter, who authored the majority opinion, asked the
13 government about the “rare case” in which the agency acts within two years of marriage.
14 Contrary to the government response, which was to say that they could not say it never
15 happens, it is not the *rare* case that an application is approved where the marriage has not
16 lasted two years, but the norm. It is commonplace for USCIS to grant adjustment of
17 status to applicants who have been married for several months, because the statutory
18 scheme clearly contemplates that the agency is to do so on a routine basis. USCIS
19 processing times have always been under 24 months since detailed backlog reduction
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1 records have been kept, and now average about six months nationwide as a result of
2 earnest backlog reduction efforts initiated in 2003.¹
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4 It is regrettable that the *Robinson* majority did not have accurate information
5 before it. Had the panel known the realities of USCIS practice and procedure, and
6 therefore had been prompted to analyze more closely the interconnected provisions of §
7 1154 and §1186a the importance of which are set out below, the majority would have
8 sided with the dissent and upheld the sound judgment of the District Court. The dissent,
9 after all, was entirely correct that,
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11

12 As a result of the government's fatally flawed interpretation of §
13 1151(b), Osserritta Robinson will be removed from the United States,
14 in spite of her full compliance with the INA, simply because the
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16 ¹ 10/2003 average times: **21.2** months; 8/2004 average times **21.7** months

17 http://www.uscis.gov/files/article/BEPQ3v2_1.pdf

18 2004 Q3 average times: **22.4** months

19 <http://www.uscis.gov/files/article/BEPQ4v7.pdf>

20 2004 Q4 average times: **19.8** months

21 <http://www.uscis.gov/files/article/BEPQ4v7.pdf>

22 2005 Q1 average times: **18.6** months

23 <http://www.uscis.gov/files/article/BEPQ1FY2005.pdf>

24 2005 Q3 average times: **15.2** months

25 <http://www.uscis.gov/files/article/BEPQ3FY2005.pdf>

26 2005 Q4 average times: **13.9** months

27 <http://www.uscis.gov/files/article/BEPQ4FY2005.pdf>

28 2006 Q1 average times: **13.4** months

<http://www.uscis.gov/files/article/BEPQ1FY2006.pdf>

2006 Q2 average times: **12.5** months

<http://www.uscis.gov/files/article/BEPQ2FY06.pdf>

2006 Q3 average times: **8.3** months

http://www.uscis.gov/files/article/backlog_FY06Q3.pdf

1 petition filed on her behalf by her deceased husband is stuck in the
2 government's bureaucracy.

3
4 554 F.3d at 367 (Nygaard, J., dissenting). The *Robinson* majority overlooked the
5 importance of § 1154 and §1186a.

6 The *Robinson* majority found the so-called "two year rule" to require a marriage of
7 two years as a prerequisite to lawful permanent resident status, but did not analyze or
8 refer to a key statute that directly undermines that holding. The Conditional Residence
9 statute, 8 U.S.C. § 1186a, was enacted in 1986 before the second sentence of 8 U.S.C. §
10 1151 was even inserted in 1990. The provisions of 8 U.S.C. § 1186a specifically address
11 those immediate relative spouses who obtain permanent resident status "by virtue of a
12 marriage which was entered into less than 24 months before the date the alien obtains
13 such status by virtue of such marriage" and further state in five specific sections that
14 termination of that status may not occur "*through the death of a spouse.*" See 8 U.S.C.
15 §1186a(b)(1)(A)(ii); 8 U.S.C. §1186a(c)(1)(A); 8 U.S.C. §1186a(c)(4)(B); 8 U.S.C.
16 §1186a(d)(1)(A)(i)(II); 8 U.S.C. §1186a(g). The Ninth Circuit in *Freeman* stated it thus,
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22 "[T]he government concedes that it had the power to grant the
23 Freemans' application prior to Mr. Freeman's death (and the
24 Freemans' second anniversary). Had it done so, Mrs. Freeman's LPR
25 could not then have been voided by her husband's death, as the statute
26 expressly states. See § 1186a(a), (b)(1) (providing that an alien
27 spouse who receives permanent resident status as an immediate
28 relative before the second anniversary of her qualifying marriage does
so on a conditional basis, and if the Attorney General determines that
prior to the second anniversary of the alien's obtaining status the

1 alien’s marriage ‘has been judicially annulled or terminated, *other*
2 *than through the death of a spouse,*’ the Attorney General ‘shall
3 terminate the permanent resident status of the alien.’ (emphasis
4 added)). This is compelling evidence that Congress did not intend its
5 provision for a widow’s self-petition for adjustment of status to have
6 an implicit collateral consequence of terminating a spouse’s already
7 pending petition – particularly when the effect would be to foreclose a
8 grieving widow from any adjustment at all ‘through the death of [her]
9 spouse.’”

10 *Freeman v. Gonzales*, 444. F.3d 1031, 1042 (9th Cir. 2006). Simply stated, compelling
11 evidence exists that Congress did not intend a spouse who experienced a quick
12 adjudication of (for example) three months resulting in permanent resident status,
13 followed by the death of her spouse at four months, to be completely insulated from
14 having her permanent resident status terminated (as the government conceded at oral
15 argument in *Robinson* would be the case under 8 U.S.C. § 1186a), and at the same time
16 have intended a spouse who experienced a long bureaucratic delay to have her petition
17 terminated, where the death of her spouse occurred at eight months. The dissent correctly
18 stated,
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21 “[I]t is inconceivable to me that Congress intended an alien’s status to
22 be contingent upon the amount of time that the executive department
23 takes to process a timely and proper petition – a factor completely
24 outside of the control of the alien. This interpretation creates an
25 arbitrary, irrational and inequitable outcome in which approvable
26 petitions will be treated differently depending solely upon when the
27 government grants the approval.”
28

1 *Robinson*, 554 F.3d . 358, 371 (Nygaard, J., dissenting). The panel did not analyze §
2 1186a, the statute which forbids termination of status based on the death of the spouse
3 where the marriage was less than 24 months.
4

5 The dissent in *Robinson* properly analyzed the importance of Congress' usage of
6 the phrase "the spouse" in the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i), and noted
7 the deliberate use of the word "spouse" in 8 U.S.C. §1154(a)(1)(A)(i)(II), which refers to
8 a surviving spouse. *Id.* at p. 19. The majority in *Robinson* failed to consider relevant
9 statutes 8 U.S.C. § 1154 and 8 U.S.C. § 1186a, and viewed 8 U.S.C. § 1151 in a vacuum.
10
11 A review of the entire statutory scheme including the conflict that the government
12 position creates with respect to § 1154 and §1186a, as was undertaken in *Freeman*, yields
13 the conclusion that Congress never intended a duly filed petition to be voided
14 automatically upon the petitioner's death.
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18 Furthermore, the majority relied on an incorrect definition of "child" when
19 reviewing the INA's definitional sections:
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21 Significantly, the INA's definitional section does provide statute-
22 specific definitions of other commonly-used terms such as "child,"
23 which it defines to mean "an unmarried person under twenty-one
24 years of age" who satisfies other specific requirements. 8 U.S.C. §§
25 1101(b)(1), 1101(c)(1). In addition, the INA includes a definition of
26 "parent" that expressly includes a "deceased parent." 8 U.S.C. §
27 1101(c)(2). Congress' choice to include specific definitions of these
28 common family words – child and parent – but not to include such a
definition of spouse strongly suggests that the ordinary meaning of
spouse at the time of the enactment of the immediate relative
provision should control."

1
2 *Robinson*, 554 F.3d 358, 365. The majority found the INA’s reference to
3 “deceased parent,” and the absence of deceased spouse in § 1101(c)(2) significant. Yet §
4 1101(c)(2) is the definitional section relating to Title III of the INA (subchapter III of
5 Title 8 U.S.C.), which is limited to claims of U.S. citizenship, a benefit that does not flow
6 from the spousal relationship. The definition relating to a Title III benefit would never
7 refer to spouse, since U.S. citizenship cannot be derived from a spouse. Titles I and II of
8 the INA (subchapters I and II of Title 8 U.S.C.) deal specifically with immigration
9 benefits sought in the case at bar, and those definitional statements found at § 1101(b)
10 (not (c)) should have been discussed by the majority in *Robinson*. The moorings of the
11 *Robinson* majority decision are unsound. The unanimous *Freeman* decision and its
12 analysis have been followed by a unanimous panel of the Ninth Circuit in *Choin v.*
13 *Mukasey*, 537 F.3d 1116 (9th Cir. 2008).

14 15 16 17 18 **B. Freeman Is Persuasive**

19
20 Family relationships form the large part of immigration under our laws established
21 by Congress, and “immediate relatives” have a special place in the statutes. Immediate
22 relatives are exempt from numerical limitation, meaning that immigrant visas are
23 immediately available to them at any time, and they enjoy exemption from many of the
24 restrictions on other categories. Under section 201(b)(2)(A)(i), of the Immigration and
25 Nationality Act (INA), 8 U.S.C. § 1151(b)(2)(A)(i), 8 U.S.C. § 1154(a)(1)(A)(i), a United
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1 States citizen may petition to have his or her spouse classified as an immediate relative.

2 The language of 8 U.S.C. § 1154(a)(1)(A)(i) is as follows,
3

4 “Any citizen of the United States claiming that an alien is entitled to
5 classification by reason of a relationship described in paragraph (1),
6 (3), or (4) of section 203(a) or to an immediate relative status under
7 section 201(b)(2)(A)(i) may file a petition with the Attorney General
8 for such classification.”

9 Under USCIS rules, the form that the citizen files is Form I-130, Petition for Alien
10 Relative (hereinafter “I-130”). Plaintiffs’ citizen spouses all concluded such filing, with
11 fee, in accordance with the statute. The language of the first sentence of INA
12 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), is succinct:

13 “Immediate Relatives. – For purposes of this subsection, the term
14 “immediate relatives” means the children, spouses, and parents of a
15 citizen of the United States, except that, in the case of parents, such
16 citizens shall be at least 21 years of age.”

17 As the Court in *Freeman* noted, only “parents” are “subject to any limitation, with
18 the grant of immediate relative status being restricted to those whose citizen child is at
19 least 21 years of age. There is no comparable qualifier to be a ‘spouse’—that is, a
20 requirement that the marriage must have existed for at least two years.” *Freeman, supra*,
21 444 F.3d at 1039. Nowhere within the definition of immediate relative spouse is the
22 word marriage, or any quantified time period of marriage. Yet defendants continue to
23 insist that plaintiffs are stripped of the status of spouse, and therefore immediate relative
24 status, upon the death of the citizen spouse where the marriage has existed less than two
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1 years.

2 For alien spouses whose citizen spouses have *not filed an I-130 immigrant petition*,
3 the INA provides a *separate* self-petitioning right:
4

5 “In the case of an alien (and each child of the alien) who was the
6 spouse of a citizen of the United States for at least two years at the
7 time of the citizen’s death and was not legally separated from the
8 citizen at the time of the citizen’s death, the alien shall be considered,
9 for purposes of this subsection, to remain an immediate relative after
10 the date of the citizen’s death but only if the spouse files a petition
under section 204(a)(1)(A)(ii) within two years after such date and
only until the date the spouse remarries.”

11 INA 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (second sentence). The second
12 sentence of the immediate relative definition creates a time limitation (at the time of
13 death, the alien must have been a spouse for at least two years) not found in the second
14 sentence, but allows a self petition to be filed under INA 204(a)(1)(A)(ii), 8 U.S.C. §
15 1154(a)(1)(A)(ii),
16
17

18 “An *alien spouse* described in the *second sentence* of section
19 201(b)(2)(A)(i) *also* may file a petition with the Attorney General
20 under this subparagraph for classification of the alien (and the alien’s
21 children) under such section.” (emphasis supplied)

22 Therefore, the citizen spouse files a petition under clause (i) of 1154(a)(1)(A) to
23 accord immediate relative status to his or her spouse under the *first* sentence of
24 1151(b)(2)(A)(i). Separately, the alien spouse (in the absence of the citizen spouse filing)
25 “*also may file*” a petition under 8 U.S.C. § 1154(a)(1)(A)(ii) (clause (ii) instead of (i)) to
26 accord immediate relative status to him or herself (*and his or her children*) under the
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1 *second* sentence of 1151(b)(2)(A)(i), but only if the alien was a spouse for at least two
2 years at the time of the death of the citizen spouse. Congress clearly created “two
3 different processes, such that one or the other applies – either the citizen spouse petitions
4 or, if he dies without doing so, the alien widow may do so.” *Freeman, supra*, 444 F.3d at
5 1042.
6

7
8 In an attempt to apply the standards of one section to the petition requirements of
9 another, defendants create tragic and anomalous results. The Court in *Freeman* noted
10 that, “[t]he government also tells us that, had DHS addressed the Freemans’ application
11 before Mr. Freeman died, the adjustment of status could have been granted even though
12 they had not been married for two years.” *Freeman, supra*, 444 F.3d at 1040. Congress
13 cannot have intended such strange and unjust results.
14
15

16 In the Aytes Memorandum (See Dkt. # 8, Def. Mot. Ex. 1, “hereinafter
17 Memorandum”), defendant USCIS opines that that 8 U.S.C. § 1154(b) supports its
18 interpretation that an I-130 petition cannot be approved for a spouse of a citizen where
19 the alien spouse has outlived her spouse. That statute states in relevant part,
20
21

22 “After an investigation of the facts in each case...the Attorney
23 General shall, if he determines that the facts stated in the petition are
24 true and that the alien in behalf of whom the petition is made is an
25 immediate relative specified in section 201(b)...approve the
26 petition...” 8 U.S.C. § 1154(b)

26 Defendants’ position, expressed in the Memorandum, makes much of the portion
27 of the statute that states “are true” and “is an immediate relative”, as supporting its view
28

1 that it is no longer true that a surviving spouse remains a spouse for immediate relative
2 purposes. This section begs the question of whether an alien spouse remains an
3 immediate relative specified in section 201(b).
4

5 Defendants mistakenly rely upon a Board of Immigration Appeals decision, *Matter*
6 *of Alarcon*, 20 I&N Dec. 557 (BIA 1992) for the proposition that “cases are decided
7 based on the facts as they exist on the date of the decision.” Memorandum, p. 4. The
8 holding in *Alarcon*, however, was limited to admissibility issues. Admissibility issues
9 are determined on a discretionary basis with respect to adjustment of status or entry
10 pursuant to an immigrant visa. Eligibility issues, on the other hand, are determined with
11 respect to the citizen’s petition, and are determined at inception. *Dabaghian v. Civiletti*,
12 607 F.2d 868 (9th Cir. 1979). As noted above, the Attorney General *shall* approve a
13 petition if the facts stated in the petition are true. The language of the statute governing I-
14 130 petitions is mandatory, rather than discretionary.
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19 **1. Matter of Varela**

20 Defendants’ position flows from an extra-jurisdictional decision of the Board of
21 Immigration Appeals, *Matter of Varela*, 13 I&N Dec. 453 (BIA 1970) (see Exhibit 1).
22 The Board in *Varela* “summarily ruled that by the time the non-citizen wife’s adjustment
23 of status petition was being determined, she was no longer [the] spouse of a United States
24 citizen under §1151 because her husband’s ‘death had stripped her of that status.’”
25
26 *Freeman, supra*, 444 F.3d at 1038 (citing *Varela, supra*, 13 I&N Dec. at 454). *Varela*,
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28

1 however, is no longer good law. The Board modified *Varela* in a critical respect in
2 *Matter of Sano*, 19 I&N Dec. 299 (BIA 1985) (See Exhibit 2). The Board in *Sano*
3
4 determined that the BIA itself, due to regulatory restraints as a court of limited and not
5 general jurisdiction, lacked jurisdiction to hear an appeal from an individual other than
6 the petitioner. 19 I&N Dec. 299. The Board stated,

8 “As we recently stated in *Matter of Zaidan*, 19 I&N Dec. 297 (BIA
9 1985), the Board’s appellate jurisdiction is defined by the regulations
10 set forth in 8 C.F.R. § 3.1(b) (1985) [now 8 C.F.R. § 1003.1(b)] .
11 Unless the regulations affirmatively grant us power to act in a
12 particular matter, we have no appellate jurisdiction over it... We
13 therefore conclude that we lack jurisdiction to address an appeal by
14 the beneficiary from the denial of a visa petition. *Cf. Matter of*
15 *Zaidan, supra*. To the extent that our decision in *Matter of Varela*,
16 *supra*, conflicts with this conclusion, it is hereby modified.” *Matter of*
17 *Sano*, 19 I&N Dec. at 300-01.

18 The Board itself determined that its review in *Matter of Varela* was
19 “inappropriate.” *Sano, supra*, at 300. According to the Board, therefore, its previous
20 ruling in *Varela* on the meaning of the word spouse should not have been issued, and
21 modified the decision to accord with *Sano*. Contrary to Defendants’ statement that “The
22 Board reaffirmed the result in *Varela* in a later decision,” the Board never reaffirmed
23 *Varela* but instead stated *Varela* was inappropriate. Def. Mot. Partial S.J. Non-9th at 6
24 (Dkt # 120).

25 The Ninth Circuit Court of Appeals discussed the level of deference owed to
26 *Varela*. *Freeman*, 444 F.3d at 1038. The Court explained that *Varela* is an “extra-
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1 jurisdictional” decision, suffers from a “lack of statutory analysis” and is “not a
2 permissible construction of the statute.” *Id.* Further, because the Board has decided it
3 has no jurisdiction to ever review this question again, any interpretation giving life to the
4 decision in *Varela* necessarily seals for time immemorial that erroneous interpretation.
5 What an odious world we might live in had *Plessy v. Ferguson*, 163 U.S. 537 (1896)
6 enjoyed such absolute immunity from re-evaluation.
7

9 **2. Terms Spouse and Marriage**

10 Defendants’ motion and Memorandum (Dkt # 8) are littered with the word
11 “marriage”, a word not found in the statute. A close review of 8 U.S.C. §
12 1151(b)(2)(A)(i) reveals that the word marriage is not in the first sentence. Instead, the
13 word “spouse” is found. The term spouse is a common term of ordinary usage, and is
14 found in the Eighth Edition of Black’s Law Dictionary (2004): “Spouse. One’s husband
15 or wife by lawful marriage; a married person....Surviving spouse. A spouse who outlives
16 the other spouse.” Spouse is thus defined to include the term surviving spouse, which
17 refers to a “spouse” who has outlived the other spouse.
18

19 Black’s Law Dictionary, Sixth Edition, published in 1990 and available at the time
20 of the 1990 INA amendments (which added the self-petitioning rule), defines spouse as
21 “[o]ne’s husband or wife, and ‘surviving spouse’ is one of a married pair who outlives the
22 other.” Black’s Law Dictionary (6th Ed. 1990). The Fourth Edition of Black’s, which
23 was published in 1951 and was the most up-to-date edition available to the drafters of the
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1 1952 Act (the source of the current immediate relative definition), broadly defines spouse
2 as “[o]ne’s husband or wife,” a phrase it specifically derives from *Rosell v. State Indus.*
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4 *Accident Comm’n*, 164 Or. 173, 179, 95 P.2d 726, 729 (Or. 1939). Black’s Law
5 Dictionary (4th Ed. 1951). *Rosell*, in turn, defines a widow as “a married woman whose
6 husband is dead” and a spouse as “one’s wife or husband.” It then defines a surviving
7 spouse as “the one, of a married pair, who outlives the other.” 164 Or. at 173.
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9
10 Whether one turns to the most recent 2004 Edition of Black’s Law Dictionary, the
11 1990 Edition available at the time of the 1990 amendments, or the 1951 Edition that was
12 most current when Congress drafted the INA in 1952, “surviving spouse” falls within the
13 definition of “spouse.” Plaintiffs have outlived their spouses, though spouses they
14 remain.
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16
17 Two District Courts outside the Ninth Circuit have found that the clear
18 language of the statute supports Plaintiffs’ claims for relief when reviewing claims of
19 surviving spouses similarly situated to Plaintiffs; *Taing v. Chertoff*, 2007 U.S. Dist.
20 LEXIS 911411 (D. Mass 2007), *appeal docketed*, No. 08-1179 (1st Cir. Feb. 11, 2008);
21 *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889 (D. Ohio 2008), *appeal docketed*, No.
22 08-1179 (6th Cir. 2008). When evaluating other cases which have not followed
23 *Freeman*, this Court stated,
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26 “While other districts courts have adopted interpretations contrary to
27 *Freeman*, see e.g., *Turek v. Dep’t of Homeland Sec.*, 450 F. Supp. 2d 736
28 (E.D. Mich. 2006); *Burger v. McElroy*, 1999 U.S. Dist. LEXIS 4854

1 (S.D.N.Y. 1999), these decisions have been criticized. For example, in
2 *Lockhart*, the district court criticized both *Turek* and *Burger*: [I]n light of the
3 plain language and grammatical structure of the statute, *Turek* and *Burger*
4 improperly apply *Chevron* deference. *Turek* and *Burger* thus grossly over-
5 emphasize the precedential value of *In re Varela*, the agency opinion
6 interpreting § 1151(b)(2)(A)(i). In addition, *Turek* is factually
7 distinguishable given that the marriage at issue in *Turek* was subject to an
8 automatic presumption of invalidity because, unlike Ms. Lockhart's
9 marriage, it was entered into while the alien-spouse was in removal
proceedings. *Id.*, at *32; see also *Taing*, at *29 (criticizing *Turek* and
Burger); *Robinson*, 2007 U.S. Dist. LEXIS 34956, at *10-13 (same). This
Court finds *Lockhart's* reasoning to be persuasive.

10 *Hootkins*, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss at
11 32 (Dkt. # 36).

13 C. Plaintiffs Standifer, Heard, Lu and Walsh

14 Defendants argue that Plaintiff Standifer's claims should be heard by a court sitting
15 in the Third Circuit. Def. Mot. Partial S.J. Non-9th at 8 (Dkt # 120). Counsel for
16 Plaintiffs could not locate authority which would prevent this Court from applying the
17 Third Circuit's ruling in *Robinson v. Napolitano*, 554 F.3d 358 (3rd Cir. 2009) to Plaintiff
18 Standifer's claim.
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20
21 Defendants argue that Plaintiff Heard's approval of Lawful Permanent Resident
22 (LPR) status under a separate provision entitles Defendants to summary judgment in their
23 favor. Def. Mot. Partial S.J. Non-9th at 9 (Dkt # 120). Plaintiff Heard's claim is not
24 moot and Plaintiff Heard is entitled to summary judgment in her favor because the
25 doctrine of voluntary cessation applies. The Supreme Court has explained, "It is well
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1 settled that a defendant's voluntary cessation of a challenged practice does not deprive a
2 federal court of its power to determine the legality of the practice. If it did, the courts
3 would be compelled to leave the defendant to return to his old ways." *Friends of the*
4 *Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (internal quotation
5 omitted). Only where the government meets its heavy burden of demonstrating that
6 "subsequent events make it absolutely clear that the allegedly wrongful behavior could
7 not reasonably be expected to recur" may a case be dismissed for mootness. *Id.*
8 (quotation omitted). Defendants are authorized to rescind Plaintiff Heard's LPR status
9 for a period of five years from February 6, 2008. See 8 U.S.C. § 1256. Defendants have
10 not met their heavy burden to show Plaintiff Heard's claim is moot, and judgment should
11 be entered in her favor.

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16 Defendants argue that the petition filed on behalf of Plaintiff Lu was properly
17 revoked, and request summary judgment in their favor. Def. Mot. Partial S.J. Non-9th at
18 9 (Dkt # 120). For the reasons discussed in Plaintiffs' Response to Defendants' Motion
19 for Partial Summary Judgment as to Ninth Circuit Class Plaintiffs, pp. 2-15 (Dkt. #),
20 Plaintiffs maintain that the automatic revocation regulations found at 8 CFR §
21 205.2(a)(3)(i)(C) are *ultra vires* and unlawful, including the substitute affidavit of support
22 sponsor requirement. Plaintiff Lu is entitled to summary judgment in her favor.

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26 Defendants argue that Plaintiff Walsh's APA claim should fail because of a lack of
27 final agency action. Def. Mot. Partial S.J. Non-9th at 10 (Dkt # 120). On the same day
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1 that Defendants filed their Motion, however, Defendants approved Plaintiff Walsh's
2 application for adjustment of status that was filed in 2008, after the filing of the instant
3 lawsuit. See Exhibit A, attached. Plaintiff Walsh is now an LPR, having recently been
4 given the classification of an immediate relative spouse of a United States citizen who
5 adjusted status (Class of Admission ("COA") IR6). See Exh. A, (entry in upper right-
6 hand corner of approval letter).
7
8

9 Plaintiff Walsh's case does not arise within the Ninth Circuit's jurisdiction. Her
10 husband filed an I-130 petition on her behalf, but Plaintiff Walsh did not file an I-485
11 application with the I-130 petition, but instead applied with Form DS-230 with the U.S.
12 State Department at the Embassy abroad. It is undisputed that, at the time that her later-
13 filed I-485 adjustment of status application was approved on March 13, 2009, that her
14 husband was deceased. Defendants' own action in Plaintiff Walsh's case to approve an I-
15 485 application for an alien who Defendants apparently believe is no longer the spouse of
16 a United States citizen undermines their position. Defendants will no doubt argue that
17 they possess the authority to reinstate the approval of the petition and treat Plaintiff
18 Walsh as an immediate relative because the timing of the I-130 adjudication happened to
19 occur prior to her husband's death, but that ignores the fact that they also feel authorized
20 to approve the I-485 despite their position that she no longer is the spouse of a citizen. It
21 defies logic that Defendants can approve an I-485 application for adjustment of status for
22 an alien spouse who they deem not to be a spouse any longer, and automatically deny or
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1 revoke an I-130 petition under the same circumstances. Contrary to Defendants'
2 position, therefore, it must be because Defendants deem Plaintiff Walsh *to be* and *to*
3 *remain* a spouse for purposes of immediate relative classification. Additionally, for the
4 reasons stated above, Plaintiff Walsh's claim is not moot.
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6
7 **II. CONCLUSION**

8 For the foregoing reasons, Plaintiffs respectfully request that summary judgment
9 be entered in Plaintiffs' favor.
10

11 DATED March 27, 2009.

12 By /s/ Brent W. Renison
13 BRENT W. RENISON, Oregon SBN. 96475
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15 5285 SW Meadows Rd., Ste 175
16 Lake Oswego, Oregon 97035
17 (503) 597-7190
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19 *Admitted pro hac vice*
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1 PROOF OF SERVICE

2 I, the undersigned, say: On March 27, 2009, true and correct copies of the
3 plaintiffs': PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL
4 SUMMARY JUDGMENT AS TO PLAINTIFFS OUTSIDE THE NINTH CIRCUIT,
5 were served pursuant to the district court's ECF system as to ECF filers to the following
6 ECF filers:

7 Elizabeth Stevens
8 Office of Immigration Litigation
9 USDOJ Civil Division
10 P.O. Box 878
11 Ben Franklin Station
12 Washington, DC 20044

13 Patricia E. Bruckner
14 Office of Immigration Litigation
15 USDOJ Civil Division
16 P.O. Box 878
17 Ben Franklin Station
18 Washington, DC 20044

19 I declare under penalty of perjury under the laws of the United States of America
20 that the foregoing is true and correct.

21 EXECUTED on March 27, 2009, at Lake Oswego, Oregon.

22 /s/ Brent W. Renison
23 Brent W. Renison, Declarant
24
25
26
27
28