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CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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| CAROLYN ROBB HOOTKINS, et al.<br><br>Plaintiffs,<br><br>v.<br><br>MICHAEL CHERTOFF, Secretary, U.S. Department of Homeland Security, et al.<br><br>Defendants. | Case No. CV07-05696 (CAS)<br><br>Date: January 28, 2008<br>Time: 10:00 a.m.<br>Courtroom: 5<br>Honorable Christina A. Snyder<br><br>DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS |

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Defendants Michael Chertoff, Emilio Gonzalez, Condoleezza Rice, and Maura Harty (collectively "Defendants" or "Government"), by and through their undersigned counsel, respectfully file this Supplemental Memorandum of Law in Support of their Motion to Dismiss, in which Defendants respectfully move this Court for an Order dismissing Plaintiffs' Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief ("Complaint") because the Court lacks subject matter jurisdiction over Plaintiffs' claims in part, and the Complaint fails to state a claim upon which relief may be granted in part. *See* Fed. R. Civ. P. 12(b)(1), (6). Plaintiffs seek lawful permanent resident status through their prior status as legally married spouses of United States citizens. Complaint, page 1. Plaintiffs seek relief through the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.* (2007). Defendants assert that this Court lacks jurisdiction for failure of the Plaintiffs to exhaust available administrative remedies, the lack of final agency action, and/or the law-of-the-case doctrine. In the alternative, should the Court not dismiss the Plaintiffs residing outside of the Ninth Circuit for lack of jurisdiction, the applicable law requires dismissal of those Plaintiffs' claims for failure to state a claim, as those claims are not governed by Ninth Circuit precedent.

During the hearing on Defendants' Motion to Dismiss dated January 28, 2008, the Court requested the filing of supplemental briefing for Defendants' Motion to Dismiss, set a hearing date and briefing schedule on the supplemental briefing, postponed consideration of Plaintiffs' Motion for Class Certification until

after a decision on the Motion to Dismiss, and indicated that it would re-consider Plaintiffs' Motion for a Preliminary Injunction at the hearing.

**BACKGROUND**

Except for plaintiff Nguyen, the United States Citizen spouses of the alien Plaintiffs filed I-130 petitions on their behalf, pursuant to 8 U.S.C. § 1154(a)(1)(A)(i). Complaint, ¶¶ 17-153. Plaintiff Nguyen was the beneficiary of an approved I-129F fiancee petition, and applied for adjustment of status within three months of her arrival in the United States, after marrying the United States citizen petitioner. Complaint, ¶¶ 123-28. In all but two cases, the United States citizen spouse died after the filing of the I-130 petition, but prior to its adjudication. Complaint, ¶¶ 17-153. Two I-130 petitions filed by the United States citizen spouses were later revoked upon the death of the citizen spouse. See Complaint, ¶¶ 96-104.

All but one of the named plaintiffs residing within the jurisdiction of the Ninth Circuit filed their applications prior to the April 21, 2006, decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), and had their applications initially adjudicated prior to April 21, 2006. Complaint, ¶¶ 17-59, 73-79, 92-103. Of those plaintiffs, plaintiffs Hootkins, Moncayo-Gigax, Brenteson, Win, Poindexter,[1] Rudl, and Nguyen have filed motions to reopen with the Board. Complaint, ¶¶ 22, 28, 53, 79, 116, 122, 128. The motions to reopen for plaintiffs Hootkins, Moncayo-Gigax, Brenteson, Win and Rudl are still pending. Complaint, ¶¶

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[1] Plaintiff Poindexter's application was denied because he failed to appear at a scheduled interview. Complaint, ¶ 116.

22, 28, 53, 79, 122. The motion to reopen for plaintiff Nguyen (whose application for adjustment of status was based upon an approved I-129F fiancee petition) was denied on March 3, 2006 - before the decision in *Freeman*. Complaint, ¶ 128. Plaintiffs DeMailly and Gobeil, whose petition and I-485 adjustment of status applications were denied in 2003 and 2004 respectively, did not appeal the decisions, nor have they filed motions to reopen. *See* Complaint, ¶¶ 29-34, 50-59. Plaintiffs Vargas de Fisher and Lockett have applications that remain pending with USCIS. Complaint, ¶¶ 41, 47.

The remaining plaintiffs reside outside of the jurisdiction of the Ninth Circuit. Complaint, ¶¶ 61, 68, 81, 87, 93, 100, 106, 130, 136, 142, 148. Plaintiffs Walsh and Lu (the two plaintiffs who sought immigrant visas from a United States Embassy or consular section abroad) had their I-130 petitions approved prior to the death of their spouses, but those petitions were revoked after the death of their citizen spouses. *See* Complaint, ¶¶ 96-98, 102-04. Plaintiffs Fishman-Corman, Arias-Argulo, Bernstein, and Bayor have not filed motions to reopen after the denial of their applications. *See* Complaint, ¶¶ 66, 72, 110, 134, 140. Plaintiff Diaz-Ruiz filed a motion to reopen, which was denied in 2006. Complaint, ¶ 91. Plaintiffs Sandifer and Batool[2] have filed motions to reopen with USCIS, which are still pending. Complaint, ¶¶ 146, 152.

Lastly, Plaintiff Heard should be dismissed from this action because her claims are moot, as USCIS has approved the I-130

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[2] Plaintiff Batool's application was denied because she failed to appear at a scheduled interview. Complaint, ¶ 152.

immigrant visa petition on her behalf. *See* Exhibit A, Form I-797, Notice of Approval of I-130 Petition.

## ARGUMENT

This Court should dismiss Plaintiffs' Complaint, in part, because this Court lacks subject matter jurisdiction over Plaintiffs' claims. Fed. R. Civ. P. 12(b)(1). Plaintiffs have the burden of establishing the jurisdiction of this Court. *See Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (noting that a federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears). Even where a Plaintiff's pleadings are technically sufficient to establish some basis of jurisdiction, a Rule 12(b)(1) motion may also allege that there is an actual lack of jurisdiction. *See, e.g., Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Because Defendants challenge the jurisdiction of the Court, a motion to dismiss under Rule 12(b)(1) is appropriate.

In addition, dismissal for failure to state a claim under Rule 12(b)(6) is appropriate where Plaintiffs' claims fail on the law of their jurisdiction. *See* Fed. R. Civ. P. 12(b)(6).

### I. THIS COURT SHOULD DISMISS PLAINTIFFS' APA CLAIMS FOR LACK OF A FINAL ORDER OR LACK OF EXHAUSTION.

#### A. This Court Should Dismiss the Ninth Circuit Plaintiffs For Failure To Exhaust Available Administrative Remedies.

The APA, by its terms, provides a right to judicial review of all "final agency actions for which there is no other adequate

remedy in a court."[3] 5 U.S.C. § 704. In order for an action to be final, and thus reviewable pursuant to the APA, the action must (1) "mark the 'consummation' of the agency's decision-making process," and (2) the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 178, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). In addition, plaintiffs seeking APA review are generally required to exhaust their administrative remedies.

Defendants agree that exhaustion of administrative remedies is not *statutorily* required. *See Darby v. Cisneros*, 509 U.S. 137, 113 S. Ct. 2539, 125 L. Ed. 2d 113 (1993). However, exhaustion of administrative remedies is *prudentially* required, and must be specifically waived by the Court: "Under the doctrine of exhaustion, 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed . . . remedy has been exhausted.'" *Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004) (quoting *McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)). "Lower courts are, thus, not free to address the underlying merits without first determining [that] the exhaustion requirement has been satisfied or properly waived." *Laing*, 370 F.3d at 998 (citing *Montgomery v. Rumsfeld*, 572 F.2d 250, 254 n.4 (9th Cir. 1978)).

Here, the Court should not waive the exhaustion requirement. For those Plaintiffs residing in the jurisdiction of the Ninth

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[3] A separate mandamus analysis is not required. *See, e.g.*, *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997) (analyzing claim under the APA rather than mandamus where mandamus and APA relief are the same).

1 Circuit, USCIS has announced that it will follow the *Freeman*
2 decision in the Ninth Circuit. *See* Exhibit B, *Effect of Form I-*
3 *130 Petitioner's Death on Authority to Approve the Form I-130*. As
4 such, the claims of all Plaintiffs residing within the Ninth
5 Circuit with cases pending before the agency -- plaintiffs
6 Hootkins, Moncayo-Gigax, Vargas de Fisher, Lockett, Brenteson,
7 Win, Poindexter, and Rudl should be dismissed for failure to
8 exhaust non-futile, available administrative remedies. Where
9 those Plaintiffs have already filed motions to reopen with USCIS,
10 they should be required to complete the administrative process
11 they have already commenced. The remaining Plaintiffs residing
12 within the Ninth Circuit (Plaintiffs Gobeil, Nguyen, and DeMailly)
13 should seek reopening of their applications before the agency, if
14 they have not done so already. Given the USCIS policy guidance,
15 it is reasonable to assume that the motions will lead to approval
16 of the visa petitions, at least for those plaintiffs who can show
17 that their marriages were bona fide and that they have substitute
18 affidavit of support sponsors. *See* Ex. B.
19 As the plaintiffs residing within the Ninth Circuit have
20 available, non-futile administrative remedies, this Court should
21 dismiss their claims for lack of jurisdiction for lack of
22 exhaustion.
23 In addition, this Court should dismiss the claims of
24 plaintiffs Walsh and Lu for failure to exhaust available
25 administrative remedies, as neither requested humanitarian
26 reinstatement of their I-130 petitions pursuant to 8 C.F.R. §
27 205.1(a)(3)(i)(C)(3). Accordingly, the claims of plaintiffs Walsh
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and Lu should be dismissed for failure to exhaust administrative remedies.

**B. Certain Claims Must Be Dismissed For Lack of Final Agency Action.**

In order for an action to be final, and thus reviewable pursuant to the APA, the action must (1) "mark the 'consummation' of the agency's decision-making process," and (2) the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. at 178.

The first factor is whether the agency "has rendered its last word on the matter." *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 984 (9th Cir. 2006) (citing *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001)). The last word has yet to be given in the cases of plaintiffs Hootkins, Moncayo-Gigax, Vargas de Fisher, Lockett, Brenteson, Win, Engstrom, Poindexter, Rudl, Sandifer, and Batool, as all have either applications or motions to reopen pending before USCIS. Given the USCIS policy guidance, it is reasonable assume that the motions will lead to approval of the visa petitions, at least for those plaintiffs in the Ninth Circuit who can show that their marriages were bona fide and that they have substitute affidavit-of-support sponsors. *See* Ex. B. Therefore it is clear that the "final word" has yet to be given for these Plaintiffs, rendering relief under the APA inappropriate.

**C. Plaintiffs Should be Required To Exhaust Administrative Remedies In Removal Proceedings.**

In addition, aliens who have yet to enter removal proceedings or who are in removal proceedings have failed to exhaust their

administrative remedies. *See Rivera-Durmaz v. Chertoff*, 456 F. Supp. 2d 943, 951-52 (N.D. Ill. 2006) (declining to review plaintiffs eligibility for adjustment of status until they exhausted their administrative remedies - specifically, consideration of the matter by an Immigration Judge and review by the Board); *Soliz v. U.S. Citizenship and Immigration Services*, 2007 WL 1753543 (S.D. W. Va. June 18, 2007) (concluding that Petitioner had failed to exhaust his administrative remedies in regard to his application for adjustment of status until he entered removal proceedings). *But see Chan v. Reno*, 113 F.3d 1068 (9th Cir. 1997) (description of relevant facts does not mention the institution of removal proceedings). In *Rivera-Durmaz*, the court considered the language of the Immigration and Nationality Act ("INA") and the relevant agency regulations, as required by *Darby*. *Rivera-Durmaz*, 456 F. Supp. 2d at 952. While finding no explicit exhaustion requirement in the INA, the court concluded that language contained in the regulations did contain such a requirement. *Id.* Specifically, the court concluded that the language in 8 C.F.R. § 245.2(a)(5)(2) (2006), which governs decisions on I-485 applications, imposes a mandatory exhaustion requirement.[4]

Here, several Plaintiffs are in the same situation as the Plaintiffs in *Rivera-Durmaz*: Their I-485 applications have been

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[4] 8 C.F.R. § 245.2(a)(5)(2) reads, in pertinent part:

> . . . No appeal lies from the denial of an application by the director, but the applicant, if not an arriving alien, retains the right to renew his or her application in proceedings under [8 C.F.R. § 240].

*Id.*

denied but they have yet to be put into removal proceedings. This Court should follow the example of *Rivera-Durmaz*, and decline to rule on plaintiffs' APA claim until they have exhausted their administrative remedies through the renewal of their applications for adjustment of status in removal proceedings. As a result, this Court should dismiss the claims of plaintiffs Nguyen, Fishman-Corman, Arias-Argulo, Bernstein, and Bayor.

**II. PLAINTIFFS SHOULD NOT BE ALLOWED TO COLLATERALLY ATTACK THE PRIOR, FINAL, UNCHALLENGED DECISIONS IN THEIR CASES.**

It is well established that the "consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428, 69 L. Ed. 2d 103 (1981) (emphasis added). "The mere fact that the [agency] made an interpretation error was insufficient to make its order "unlawful." *Avila-Sanchez v. Mukasey*, --- F.3d ----, 2007 WL 4225793, at *3 (9th Cir. Dec. 3, 2007) (citing *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1172-73 (9th Cir. 2001)). Therefore, any Ninth Circuit Plaintiff whose I-485 application for adjustment of status was adjudicated prior to the decision of the *Freeman* case by the Ninth Circuit is bound by that decision, barring any efforts to reopen that decision before USCIS. "[I]t has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule." *Alvarenga*, 271 F.3d at 1173. Of the Plaintiffs residing in the Ninth Circuit, none filed his or her application for adjustment of status after the April

21, 2006, *Freeman* decision, and all but one application was initially denied prior to April 21, 2006.

Similarly, plaintiffs residing outside of the Ninth Circuit with final agency decisions should be barred under the law-of-the-case doctrine, including plaintiffs Fishman-Corman, Arias-Argulo, Bernstein and Bayor. Accordingly, the claims of these plaintiffs should be dismissed.

## III. THE DEPARTMENT OF STATE SHOULD BE DISMISSED AS A DEFENDANT.

### A. The Department of State Does Not Revoke Visa Petitions.

The Department of State has limited authority over visa petitions. *See* 8 U.S.C. § 1154(b). Once a petition has been approved, the consular section may "grant the preference status." *Id.* Once a petition has been revoked, consular sections may only request that DHS consider humanitarian reasons for reinstatement. 9 FAM 42.42 n.2.2-3. In all such matters, the deciding entity is the Secretary of Homeland Security. *See id.* Accordingly, the Department of State should be dismissed as a defendant.

### B. APA Review Of Inadmissibility Determinations Is Unavailable Under The INA.

Insofar as Plaintiffs challenge the decision of consular officers in denying immigrant visas, such determinations are precluded from the subject matter jurisdiction of this Court. APA review is unavailable for alien admissibility determinations. *See Ardestani v. INS*, 502 U.S. 129, 133 112 S. Ct. 515, 116 L. Ed. 2d 496 (1991); *Marcello v. Bonds*, 349 U.S. 302, 310, 75 S. Ct. 757, 99 L. Ed. 1107 (1955). In *Ardestani*, the Supreme Court reviewed plaintiff's attempted recovery under the Equal Access to Justice Act (EAJA) of attorney's fees incurred during plaintiff's

deportation proceedings. Finding that immigration proceedings did not qualify as an "adversary adjudication" within the meaning of the APA's section 554 as required for EAJA recovery, the Court reiterated its holding in *Marcello* that Congress intended the INA "to supplant the APA in immigration proceedings." *Id.* at 132-34 (citing *Marcello*, 349 U.S. at 310). Likewise, the *Marcello* court referred to the INA and emphasized "the background of the 1952 immigration legislation" as a basis for the following decidedly explicit holding:

> Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act, we must hold that the present [INA] statute expressly supersedes the hearing provisions of that Act.

*Marcello*, 349 U.S. at 310. More recently, the District of Columbia Circuit Court of Appeals held that both the legislative and judicial history behind the INA cautioned against extending judicial review under the APA to decisions to exclude aliens. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162-62 (D.C. Cir. 1999) (holding that, in addition to arguments relying on Executive discretion to preclude APA review of plaintiff's visa denial and revocation, the "immigration laws" themselves preclude judicial review under the APA). These decisions and the very language of the INA offer a sufficient basis to conclude that the INA provides "the sole and exclusive procedure" regarding alien admission decisions, thus barring review of such decisions under the APA. *See* INA § 242(b), 8 U.S.C. § 1252(b).

Section 701(a), while defining the applicability of the APA, places the first limitation on such applicability by

stating that the APA "applies . . . except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. 5 U.S.C. § 701(a) (emphasis added). The APA's second self-limiting provision states in section 702 that, "Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702(1).

These APA provisions are significant when coupled with the knowledge that Congress legislates with regard to aliens in "accord[] with the ancient principle of international law that a nation state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions." *Saavedra Bruno*, 197 F.3d at 1159. The Supreme Court has unequivocally and repeatedly recognized this principle and the longstanding power of a sovereign nation to exclude aliens without providing judicial review of such exclusionary determinations. *Id.* (citing *Kleindeinst v. Mandel*, 408 U.S. 753, 765, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972)). Whether fashioned under the term "consular nonreviewability" or not, the principle remains unassailable that determinations of alien admissibility remain the sole province of the political branches of government – one with which the judiciary should not interfere. *Id.* Furthermore, this principle is one committed by law to agency discretion and thus qualifies as an exception to APA review as defined in sections 701(a) and 702. *Id.* at 1160.

Statutory law other than the APA further reflects the principle that admissibility determinations by the Executive remain unassailable. Consular Officers have nearly complete discretion over the issuance of visas. *See* INA § 104(a), 8 U.S.C. § 1104(a); INA § 221(i), 8 U.S.C. § 1201(i); *Mandel*, 408 U.S. 753; *Saavedra Bruno*, 197 F.3d at 1158 n. 2. The discretionary nature of the agency action at issue here, as shown by the language of the INA, precludes judicial review under the APA since, as outlined supra, the APA specifically exempts from its jurisdiction review of any "agency action . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Controlling precedent and the language of both the INA and APA, as well as judicial deference to agency admissibility determinations and relevant statutes, all point toward preclusion of APA review here and away from Plaintiffs' ability to state a claim under the APA. This Court therefore should dismiss Plaintiffs' APA claims against the Department of State and dismiss the Department of State as a defendant.

## IV. THE CONCEPT OF A LEGAL MARRIAGE CANNOT BE SEPARATED FROM THE LEGAL CONCEPT OF "SPOUSE."

The overall purpose of the "immediate relative" provisions is to promote the goal of family unity on behalf of the United States citizen, a goal which can no longer be achieved once the United States citizen dies. *See Burger v. McElroy*, 1999 WL 787661 at *6 (S.D.N.Y. 1999) ("The purpose of conferring immediate relative status only to alien spouses of living United States citizens is based on the intent of Congress to unite the family.").

Unless Congress clearly intended a specific, technical, meaning, a statute is to be interpreted according to the common, ordinary meaning of the words of the statute at the time of enactment. *See BedRoc Ltd., LLC., v. United States*, 541 U.S. 176, 184, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004); *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81, 95 S. Ct. 1180, 43 L. Ed. 2d 469 (1975). The common, ordinary meaning of the term "spouse" is a married person. *See Black's Law Dictionary* (8th Ed. 2004) (definition of "spouse"). Federal law has adopted this same basic definition of "spouse" for purposes of the administration of every Federal statute and regulation:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, . . . the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (1996). Thus, a person is a "spouse" only if he or she *is* either a husband or a wife. *Id.* The common, ordinary definition of "husband" is "[a] married man; one who has a lawful wife living." *Black's Law Dictionary*, at 741. The common, ordinary definition of "wife" is "[a] woman united to a man by marriage; a woman who has a husband living and undivorced." *Id.* at 1598. In the United States, under the law of *every* State, marriage ends when one spouse dies. *See* 52 Am. Jur. 2d, Marriage, § 8.[5] Because the petitioning United

[5] In particular, California law follows this general rule. *See* West's Ann. Cal. Fam. Code § 310(a) (1994) (death of one spouse dissolves a marriage). Thus, none of the Plaintiffs is a "spouse," under the law of the State in which this Court sits.

States citizens are no longer living, Plaintiffs are no longer "husbands" or "wives," and thus, according to 1 U.S.C. § 7, they are no longer spouses, and thus are no longer "immediate relatives" as defined in section 201(b)(2)(A)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1151(b)(2)(A)(i) (2007). Moreover, the concept of a legal marriage runs throughout the common, ordinary definitions, and cannot be divorced from the discussion. After all, a woman is not prosecuted for bigamy as the "spouse" of the deceased if she remarries after her husband's death.

Second, to the extent that 8 U.S.C. § 1151(b)(2)(A)(i) is ambiguous, the courts are legally obligated to defer to the agency's interpretation -- even where that interpretation differs from prior Court of Appeals precedent. *National Cable & Telecomm. Assn. v. Brand X Internet Services*, 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005); *Gonzalez v. Dept. of Homeland Security*, --- F.3d ---, 2007 WL 4209273 (9th Cir. Nov. 30, 2007). Defendants' conclusion that a person is no longer a "spouse" if the other spouse has died is fully consistent with the law in the United States. *See* 52 Am Jur. 2d, Marriage, § 8. Thus, this Court should defer to the agency interpretation contained within the November 8, 2007 USCIS Memo (attached as Exhibit B).

Defendants acknowledge that this Court must follow the precedential decisions of the Ninth Circuit Court of Appeals in cases pertaining to those who reside within its jurisdiction. Although Defendants disagree with the decision and preserve that disagreement here, Defendants are following

1 the decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir.
2 2006), in cases arising within the Ninth Circuit. *See* Exhibit
3 B. That guidance specifies that, for cases arising in the
4 Ninth Circuit, adjudicators of the United States Citizenship
5 and Immigration Services ("USCIS") may, under *Freeman*, approve
6 a Form I-130 after the petitioner has died, if the case
7 involves the same essential facts, including the fact that the
8 alien filed the adjustment application before the petitioner
9 died, that the now-terminated marriage was legally valid, and
10 that the spouses did not marry to confer an immigration
11 benefit on the alien. Ex. B at 6-7. If the Form I-130 is
12 approved, USCIS will not deem the approval automatically
13 revoked on the petitioner's death under 8 C.F.R. §
14 205.1(a)(3)(i)(C) (2007), if there is a person who is willing
15 and able to file an affidavit of support (Form I-864) on the
16 alien's behalf, in place of the Form I-864 that the citizen
17 spouse would have been required to submit. Ex. B at 7.

18 **V. WHERE PLAINTIFFS RESIDE OUTSIDE OF THE NINTH CIRCUIT, NINTH CIRCUIT LAW DOES NOT APPLY.**

19 In the immigration context, determinations by the Board
20 of Immigration Appeals are binding on the government and apply
21 nation-wide. *See* 8 C.F.R. § 1003.1(g). If, however, a court
22 of appeals comes to a position contrary to the Board in a
23 precedent decision, the government follows that position only
24 within the jurisdiction of that particular Court of Appeals.
25 *Matter of Anselmo*, 20 I. & N. Dec. 25 (BIA 1989); *see Singh v.*
26 *Ilchert*, 63 F.3d 1501, 1508 (9th Cir. 1995) ("A federal agency
27 is obligated to follow circuit precedent in cases originating
28 within that circuit".). Defendant USCIS is proceeding

similarly and it is following *Freeman* within the jurisdiction of the Ninth Circuit Court of Appeals. *See* Ex. B.

Plaintiffs, however, ask this Court to apply *Freeman* to cases that do not arise within the jurisdiction of the Ninth Circuit Court of Appeals. Accordingly, similar to federal choice-of-law rules for class actions involving other jurisdictions, this Court should apply the law as it exists in the various jurisdictions outside of the Ninth Circuit. *See Restatement (Second) of Conflicts of Law* § 6 (1971); *see generally*, *Huynh v. Chase Manhattan Bank*, 465 F.3d. 992 (9th Cir. 2006) (applying federal choice-of -law rules); *Huber v. Taylor*, 469 F.3d 67 (3d Cir. 2006) (same). Similarly, in a class action where a federal court has diversity jurisdiction, the district courts must apply the laws of the various states to residents of those states. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985).

In this case, USCIS has reviewed various Congressional statutes, and administrative and court decisions. *See* Ex. 1. For the following reasons, USCIS has determined that *Freeman* should not be followed outside the jurisdiction of the Ninth Circuit Court of Appeals.

The governing Board precedents specify that a Form I-130 is to be denied if the citizen petitioner has died. *Matter of Sano*, 19 I. & N. Dec. 299 (BIA 1985); *Matter of Varela*, 13 I. & N. Dec. 453 (BIA 1970). The precedents, of course, are subject to the exceptions that Congress has enacted more recently, which permit only a narrow subset of widowed aliens,

1 who were married less than two years, to retain their
2 "immediate relative" status after the death of their spouses.
3 These later exceptions clearly indicate Congress's intent
4 that aliens married less than two years at the time their U.S.
5 citizen spouse dies are no longer entitled to "immediate
6 relative" status. *See* Pub. L. 107-56, 115 Stat. 272, §§
7 421(a), (b)(1)(B)(i) (2001) (creating a specific exception to
8 the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) for
9 "surviving spouses" of those who died in the 9/11 terrorist
10 attacks in the United States); Pub. L. 108-36, 117 Stat. 1693,
11 Div. A, Title XVII, § 1703(a)-(e) (2003) (creating a specific
12 exception to 8 U.S.C. § 1151(b)(2)(A)(i) for spouses of those
13 who were active-duty military and died as a result of injury
14 or disease incurred in or aggravated by combat). Section 421
15 of Pub. L. 107-56 is particularly telling on this point. For
16 family-sponsored and immediate relative cases, Congress
17 intended section 421 to benefit an alien relative whose
18 relative's visa petition "was revoked or terminated (or
19 otherwise rendered null)" by the petitioner's death. Pub. L.
20 107-56, § 421(b)(1)(B)(i), 115 Stat. at 356. There would be
21 no need for the enactment of section 421 if, as the *Freeman*
22 panel found, the petitioner's death does not render the visa
23 petition invalid.
24 In addition, the final affidavit of support rule, 71 *Fed.*
25 *Reg.* 35732 (June 21, 2006), also supports the Government's
26 interpretation. This rule provides regulations to administer
27 INA § 213A, 8 U.S.C. § 1183a. The Government received several
28 comments on the prior interim rule, dealing with the validity

of a visa petition once the petitioner has died. 71 *Fed. Reg.* at 35735. In response to comments, the Attorney General and the Secretary of Homeland Security specifically endorsed the Board's holding in *Matter of Varela* that the visa petitioner's death requires denial of the Form I-130. *Id.* The Government also crafted a special humanitarian exception for those with previously-approved I-130 petitions in cases with special humanitarian circumstances, by providing for the conversion of a spousal I-130 petition into a widow's I-360 petition, if the requirements of the second sentence in § 1151(b)(2)(A)(i) are met when the citizen spouse dies. 8 C.F.R. §§ 204.2(b)(1)(i)-(iv) (2006); 8 C.F.R. § 205.1(a)(3)(i)(C)(2).

Requiring an I-864 from a substitute sponsor in order to reinstate a revoked approval is not a matter of "importing" an inadmissibility issue into the adjudication of the I-130. Rather, this requirement is a limit on the discretion not to revoke a petition. The substitute sponsor provision, itself, provides support for the view that the petitioner's death is a proper basis for revoking approval of the visa petition. This conclusion flows from the fact that the statute permits a substitute sponsor only if the Secretary decides not to revoke the petition's approval. INA § 213A(f)(5)(B)(ii), 8 U.S.C. § 1183a(f)(5)(B)(ii).[6]

[6] Each Plaintiff will require a new affidavit of support, even if the deceased spouse filed one. Section 1182(a)(4)(C) of Title 8 U.S. Code specifically requires a valid affidavit of support under section 1183a for all immediate relative and family preference cases (with some exceptions, such as for battered spouses and 2-year married widows), and not just for those who, under the factors in section 1182(a)(4)(B), are "likely to become a public charge." The argument that a deceased spouse's estate can take on the deceased

1 Plaintiffs misconstrue the Board's precedents in *Matter*
2 *of Sano* and *Matter of Varela*. The actual result in each case
3 was exactly the same: the Board affirmed the decisions
4 denying the respective Forms I-130 due to the petitioner's
5 death. The only difference between these two decisions was
6 the reason given. In *Matter of Varela*, the Board assumed it
7 had jurisdiction and decided the case on the merits, holding
8 that the visa petitioner's death required denial of the Form
9 I-130 because the beneficiary was no longer the spouse of a
10 citizen. 13 I. & N. Dec. at 454. The Board did not, in *Sano*,
11 question its conclusion in *Varela* that a person is no longer a
12 "spouse" after the other spouse had died. Rather, the Board
13 held that the beneficiary's lack of standing would have been
14 the more proper basis for the decision in *Varela*. *Matter of*
15 *Sano*, 19 I. & N. Dec. at 300-01. The Secretary and the
16 Attorney General, moreover, have specifically endorsed the
17 conclusion from *Varela* that "[t]here is no authority to
18 approve a visa petition after the petitioner dies." 71 Fed.
19 Reg. at 35,735.
20 Hence, the law as it exists outside of the Ninth Circuit
21 is that an alien married less than two years at the time of
22 his or her United States citizens spouse’s death automatically
23 loses “immediate relative” status if the I-130 petition has
24

25 spouse's obligation is contrary to the affidavit of support rule,
since the sponsor must be an individual, and so cannot be a
26 juridical person. 8 C.F.R. 213a.1 (definition of "sponsor"). Also,
the sponsor's obligation does not begin until the alien becomes a
27 lawful permanent resident, 8 C.F.R. 213a.2(e), and ends when the
sponsor dies, 8 C.F.R. 213a.2(e)(2)(ii). Thus, if the sponsor dies
28 before the alien becomes an lawful permanent resident, there is not
a valid I-864, and a substitute sponsor is needed.

not been approved. Accordingly, this Court should apply the law as it exists outside of the jurisdiction of the Ninth Circuit to those plaintiffs residing elsewhere, and dismiss their claims for failure to state a claim upon which relief may be granted.

**VI. THE COURT SHOULD SEVER THE CLAIMS OF THOSE NOT RESIDING WITHIN THE JURISDICTION OF THE NINTH CIRCUIT.**

Should the Court not dismiss the Complaint for lack of jurisdiction or for failure to state a claim, the Court should sever the claims of all individuals not currently within the jurisdiction of the Ninth Circuit under Fed. R. Civ. P. 21. *See Coughlin v. Rogers*, 130 F.3d 1348, 1350-51 (9th Cir. 1997) (finding joinder inappropriate due to unique nature of each application). As in *Coughlin*, severance is appropriate in this case on the basis that *Freeman* has created a situation that requires the application of "different legal standards" to different Plaintiffs' claims, depending on the residence of the individual. Therefore, since "different legal standards" would be applied to different Plaintiffs' claims this case does not present common questions of law and fact and the claims of Plaintiffs residing outside of the Ninth Circuit must be severed under Fed. R. Civ. P. 21.

**VII. THE AGENCY'S AUTOMATIC REVOCATION REGULATION IS NOT ULTRA VIRES.**

The revocation of visa petitions is governed by 8 U.S.C. § 1155. That statute states:

> The Secretary of Homeland Security may, at any time, for what he determines to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title.

8 U.S.C. § 1155. Pursuant to that broad and discretionary statutory authority, the agency promulgated 8 C.F.R. § 205.1, mandating automatic revocation of visa petitions when certain events occur. Among the events that require automatic revocation are the death of the immediate relative petitioner, the termination of the qualifying marriage for marriage-based immediate relative petitions, and, in instances where self-petitions are permitted, the re-marriage of the self-petitioner. 8 C.F.R. § 205.1(a)(i) (2006). The general holding that a relative petition remains valid for the duration of the relationship to the petitioner is long-standing. *See, e.g.*, former 8 C.F.R. § 204.4(a) (1976). Similarly long-standing is the regulation requiring revocation of a relative petition where the relationship ends prior to admission. *See, e.g.*, 41 Fed. Reg. 248 (Dec. 23, 1976). As a result, the Court should find that the long-standing automatic revocation provisions of 8 C.F.R. § 205.1(a) are entirely appropriate, and not *ultra vires*.

Moreover, in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Supreme Court adopted a two-step test for judicial review of agency regulations that interpret federal statutes. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. *Id.* "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* Where, however, the statute is ambiguous

with respect to the issue, "the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The Agency's interpretation will be permissible unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. That the regulation at issue here, 8 C.F.R. § 205.1, is not arbitrary, capricious, or manifestly contrary to the statute is manifest from the fact that since at least 1976, the Department of Homeland Security (and the former Immigration and Naturalization Service) has consistently applied the same interpretation. *See Barnhart v. Walton*, 535 U.S. 212, 220, 122 S. Ct. 1265, 152 L. Ed. 2d 330 (2002) (noting that courts should normally accord particular deference to an agency interpretation of "longstanding" duration) (citing *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 522, n. 12 (1982)). Where, as here, the Agency has, for over twenty years, uniformly construed section 1155 to permit automatic revocation of petitions in certain instances, the Agency's longstanding interpretation is entitled to, and should have been accorded, this Court's deference. *Id.*

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## CONCLUSION

Plaintiffs' Complaint should be dismissed for lack of jurisdiction in part, and for failure to state a claim in part. Alternatively, the Court should dismiss the Department of State as a Defendant.

Respectfully Submitted,

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Dated: 11 February 2008

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**CERTIFICATE OF SERVICE**

Case No. C-07-5696-CAS

I hereby certify that on this 11th day of February 2008, true and correct copies of the Defendants' **SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** were served pursuant to the district court's ECF system as to ECF filers on February 11, 2008, to the following ECF filers:

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