IN THE

Supreme Court of the United States

OSSERRITTA ROBINSON,

Petitioner,

v.

JANET NAPOLITANO,
Secretary of the Department
of Homeland Security, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, a Jamaican citizen, applied for lawful permanent residence as an "immediate relative" of a U.S. citizen based on her husband's petition. Months later, but before agency officials acted, her citizen husband unexpectedly perished in a ferry accident. Agency officials decided that her husband's death required the summary termination of that petition and raised the threat of deportation. In the decision below, the Third Circuit created a circuit conflict by holding, contrary to the rule now applied in the First, Sixth, and Ninth Circuits, that an alien spouse with a pending petition is disqualified from eligibility for "immediate relative" classification when her citizen spouse dies before completing two years of marriage.

The question presented is whether a non-citizen spouse is automatically disqualified from classification as a "spouse" under the "immediate relative" provision of the INA, 8 U.S.C. § 1151(b)(2)(A)(i)—notwithstanding a duly filed petition by the citizen spouse—where the couple was married for less than two years at the time of the citizen's death and immigration officials had not yet acted on the petition.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Osserritta Robinson, Janet Napolitano, Secretary of the Department of Homeland Security, and Michael Aytes, Acting Deputy Director, U.S. Citizenship and Immigration Services.

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PETITION FOR A WRIT OF CERTIORARI

Osserritta Robinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 554 F.3d 358. The district court's decision finding that Mrs. Robinson was a "spouse" under the "immediate relative" provision of the INA (Pet. App. 29a) is unreported.

JURISDICTION

The district court had jurisdiction over Mrs. Robinson's petition for mandamus and complaint for declaratory and injunctive relief under 28 U.S.C. § 1331. The Court of Appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. The United States Court of Appeals for the Third Circuit entered its judgment and opinion on February 2, 2009, and denied Mrs. Robinson's petition for rehearing or rehearing en banc on March 3, 2009. On May 11, 2009, Justice Souter granted an application to extend time for filing this petition to July 31, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1151(b)(2)(A)(i) of 8 U.S.C. defines an "immediate relative" of a U.S. citizen for immigration purposes as:

> [T]he children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years

> of age. In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien . . . shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after such a date and only until the date the spouse remarries.

8 U.S.C. § 1154 provides the procedural mechanism for filing for "immediate relative" status and states, in relevant part:

> (a) Petitioning procedure
>
> (1)(A)(i) Except as provided in clause (viii), any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 1153(a) of this title or to an immediate relative status under section 1151(b)(2)(A)(i) of this title may file a petition with the Attorney General for such classification.
>
> (ii) An alien spouse described in the second sentence of section 1151(b)(2)(A)(i) of this title also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section.
>
> . . .

> (b) Investigation; consultation; approval; authorization to grant preference status
>
> After an investigation of the facts in each case, . . . the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 1151(b) of this title . . . approve the petition . . . .

STATEMENT

A. Legal Framework

The Immigration and Nationality Act (INA) allows certain relatives of United States citizens to obtain lawful permanent residence (LPR) classification based on a familial relationship. *See* 8 U.S.C. § 1151. A citizen may file to classify an alien spouse or other relative as an "immediate relative." *See* 8 U.S.C. § 1154(a).

If a relative falls within the statutory definition of an "immediate relative," the citizen and his or her relative follow a specific process for the alien to qualify for LPR status, consisting of an I-130 petition for immediate relative status and an I-485 application for LPR status. First, the citizen may file an I-130 petition with the United States Citizenship and Immigration Services (USCIS) on behalf of his or her alien relative. 8 U.S.C. § 1154(a)(1)(A)(i). USCIS must conduct an investigation when adjudicating the I-130 petition to determine that "the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 1151(b)." 8 U.S.C. § 1154(b). If the facts in the

petition are true and the applicant is an "immediate relative," USCIS shall approve the petition. *Id.* In the case of a spousal relationship, approval of an I-130 petition turns on whether the marital relationship was bona fide "at its inception." *Matter of McKee*, 17 I. & N. Dec. 332, 333 (B.I.A. 1980) (establishing that the parties' intent at the time of marriage controls).

If this I-130 application is approved, the alien is deemed an "immediate relative" and classified within that particular immigrant visa class. If the alien relative is present in the United States, he or she may then seek adjustment to LPR status by filing an I-485 application. *See* 8 U.S.C. § 1255; 8 C.F.R. § 245.1(a). The alien relative may file the I-485 concurrently with the citizen's I-130, but approval of the I-485 is contingent on the approval of the I-130.

For purposes of this process, the statute defines the term "immediate relative" as "the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age." 8 U.S.C. § 1151(b)(2)(A)(i). In 1990, Congress added the second sentence to the statute, which provides:

> In the case of an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death and was not legally separated from the citizen at the time of the citizen's death, the alien (and each child of the alien) shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2 years after

> such date and only until the date the spouse remarries.

Id.

Section 1154, referenced above in § 1151, provides the filing mechanism for the "immediate relative" classification. The first clause of § 1154 states that "any citizen . . . claiming that an alien is entitled to classification by reason of . . . an immediate relative status under section 1151(b)(2)(A)(i) . . . may file a petition with the Attorney General . . . ." 8 U.S.C. § 1154(a)(1)(A)(i). Additionally, the second clause of § 1154 gives effect to the second sentence in § 1151(b)(2)(A)(i), by stating that "[a]n alien spouse described in the second sentence"—meaning those alien spouses with deceased citizen spouses, who had been married at least two years —" may [self-]file a petition with the Attorney General . . . for classification . . . ." 8 U.S.C. § 1154(a)(1)(A)(ii).[1]

Pursuant to these statutory provisions, in the normal course of events, a citizen spouse may file an I-130 to classify the alien spouse as an "immediate relative" directly after marriage. Once USCIS approves the I-130, it will consider the alien spouse's I-485 to adjust the alien spouse's immigration status to that of a lawful permanent resident.

If a U.S. citizen spouse dies after two years of marriage and before filing the I-130 form, the alien spouse may file the petition on his or her own to be classified as an immediate relative pursuant to the second sentence quoted above. *See* 8 U.S.C. § 1154(a)(1)(A)(ii) ("An alien spouse described in the

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[1] In this event, an alien's self-petition is filed on Form I-360, not Form I-130. 8 C.F.R. §§ 204.1(a)(2), 204.2(b).

second sentence of section 1151(b)(2)(A)(i) . . . may file a petition with the Attorney General . . . .").

At issue in this case is the situation where a citizen spouse properly files an I-130 petition for the alien spouse, but dies before USCIS approves the form and before two years of marriage. The meaning of the statute in this situation is contested and is the subject of the circuit split discussed below.

B. Relevant Facts

The relevant facts have never been in dispute. Mrs. Robinson is a citizen of Jamaica and was lawfully admitted to the United States in 2002 as a non-immigrant visitor. Pet. App. 2a. In February 2003, she married Louis Robinson, a United States citizen. *Id.* In March 2003, Mr. Robinson filed an I-130 immigrant petition on behalf of Mrs. Robinson for her classification as his "immediate relative." *Id.* At the same time, Mrs. Robinson filed an I-485 application to adjust her status to LPR. *Id.* USCIS thereafter issued employment authorization to Mrs. Robinson, which reflected her lawful status and eligibility to work.

However, in October 2003, Mr. Robinson was killed in the Staten Island Ferry disaster, Pet. App. 2a, as he was returning home from work at the Renaissance New York Hotel, where he had been employed as a chef for more than ten years. There is no allegation, and nothing in the record to suggest, that the Robinsons' marriage was anything but in good faith.

Mrs. Robinson's petition, as well as the corresponding application for adjustment of status, had not been acted upon at the time of her husband's death despite the immediate availability of a visa

number for "immediate relatives." Rather than adjudicating the petition, USCIS determined that upon Mr. Robinson's death, the I-130 Petition automatically terminated. Pet. App. 2a. According to USCIS, Mrs. Robinson was no longer a spouse because her husband died before the couple had been married for two years. *Id.* USCIS then denied Mrs. Robinson's I-485 application, because without an approved I-130, she was ineligible for an adjustment to LPR status. *Id.* at 30a; *see* 8 U.S.C. § 1255(a)(2).

C. The District Court's Decision

After USCIS's action, Mrs. Robinson sued the Director of Homeland Security and the Director of USCIS in United States District Court for the District of New Jersey. Pet. App. 29a. Mrs. Robinson's complaint asked the court to issue a writ of mandamus, ordering USCIS to reopen her applications and to consider her as an "immediate relative" for the purposes of adjudicating those applications. *Id.* at 2a.

The district court found that the case hinged on the interpretation of 8 U.S.C. § 1151(b)(2)(A)(i), the statutory definition of an "immediate relative." Pet. App. 33a. Relying on the Ninth Circuit's decision in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006), the district court found that Mrs. Robinson remained an "immediate relative" under the statute. Pet. App. 35a-39a. The district court reasoned that the second sentence of the subsection merely "extends the definition of an immediate relative" by granting a separate self-petition filing right to an alien spouse married at least two years, and does not limit the definition of "spouse" under the statute. *Id.* at 35a. The court therefore rejected the government's

argument that because the citizen spouse died while his petition and his wife's application were pending, the surviving spouse was no longer a "spouse." *Id.* at 35a-39a.

While acknowledging that § 1154(b) was written in the present tense, the district court "decline[d] to stretch the language of [§ 1154(b)] to the point where agency inaction may disqualify an applicant simply because the passage of time renders obsolete information that was true and accurate at the time the I-130 petition was filed." Pet. App. 36a-37a. The district court reasoned that any other interpretation would lead to strange results, noting that "[t]he fortuity of the citizen spouse's untimely death is too arbitrary and random a circumstance to serve as a basis for denying the petition." *Id.* at 37a. The court could not "imagine that Congress intended the time of death combined with the pace of adjudication, rather than the petitioner's conscious decision to promptly file an I-130 petition, to be the proper basis for [determining] whether the alien qualifies as an immediate relative." *Id.* at 37a-38a.

The district court also found that the government's own procedures, allowing an alien widow married for at least two years to self-petition, supported this conclusion by indicating that the second sentence of § 1151(b)(2)(A)(i) confers an additional right and does not otherwise limit the definition of "immediate relative." Pet. App. 38a. Therefore, the court held that Mrs. Robinson was eligible to be considered for immediate relative status under the statute, and the court ordered USCIS to consider her application as an immediate relative. *Id.* at 39a.

D. The Third Circuit's Decision

A divided panel of the Third Circuit rejected the reasoning of the district court and the Ninth Circuit, the only other circuit that had addressed this issue at that time. Recognizing and departing from the Ninth Circuit's detailed analysis of the same issue in *Freeman*, Pet. App. 7a-9a, the Third Circuit held "that eligibility for an immediate relative visa depends upon the alien's status at the time USCIS adjudicates the I-130 petition, not when the petition was filed," *id.* at 11a.

The two-judge majority relied on Congress's use of the present tense in § 1154(b), which "makes plain that the facts in the petition—including the alien's spousal status—must be true at the time USCIS decides the petition." Pet. App. 9a. According to the panel, "[t]he second sentence qualifies the definition of spouse by including as an immediate relative the widow or widower of a citizen spouse who died as long as s/he had been the spouse of the United States citizen for at least two years at the time of the citizen spouse's death." *Id.* at 12a. The panel majority held that "the two-year marriage requirement applies to both groups of surviving spouses, those for whom the citizen spouse had filed the petition before his death and those for whom the citizen spouse had not filed the petition." *Id.* The Third Circuit thus held that only alien spouses of U.S. citizens who were married for two years before the death of the citizen remain "spouses," as defined by the statute. *Id.* at 17a.

The panel majority also determined that the term "spouse" is distinct from the term "surviving spouse" and believed that the language of the immediate relative provision distinguishing between a living

and surviving spouse supported its reading. Pet. App. 16a-17a. Although the majority noted that a thirty-five year old Bureau of Immigration Appeals (BIA) opinion, *Matter of Varela*, 13 I. & N. Dec. 453, 453-54 (B.I.A. 1970), held that an alien spouse is stripped of her spousal status where the citizen spouse dies prior to a determination on an I-130 petition, it did not expressly defer to that decision. Pet. App. 6a-7a.

In so holding, the majority recognized both its split from the Ninth Circuit's holding in *Freeman* and that "the result of our holding is that Robinson is ineligible for LPR status as a result of a tragic accident that neither she nor her citizen spouse could have avoided or anticipated." Pet. App. 17a.

Judge Nygaard dissented from the panel decision on the basis that the plain language of the statute dictates a contrary result. Pet. App. 19a. He explained that, as a result of the panel majority's "fatally flawed" decision, Osserritta Robinson "will be removed from the United States, in spite of her full compliance with the INA, simply because the petition filed on her behalf by her deceased husband is stuck in the government's bureaucracy." *Id.* Taking issue with the majority's narrow definition of the term "spouse," Judge Nygaard explained that it "is obvious . . . that Congress used 'spouse' [in the statute] to refer to a continuing marital bond between the deceased petitioner and a surviving husband or wife." *Id.* at 23a.

Judge Nygaard also criticized the majority's structural interpretation of the statute. Pet. App. 24a. He emphasized that "the first sentence [of the statute] lists spouse, without any qualifying terms, as

one type of relationship that enables an alien to be given an immediate relative classification." *Id.* He explained that this sentence stands independent of the second sentence, and therefore, the "statute does not mandate the termination of I-130 petitions upon the death of a petitioner . . . ." *Id.* Accordingly, "the two sentences are to be read as describing two distinct tracks for an alien spouse to obtain an immediate relative classification: petition by a living spouse, or self-petitioning." *Id.* at 25a. Furthermore, Judge Nygaard explained that, even if the language were not clear, the BIA's decision in *Varela* was not entitled to deference because it was extra-jurisdictional. *Id.* at 19a-21a.

Judge Nygaard recognized that "[t]he practical effect of the majority's opinion is not only that Mrs. Robinson's I-130 will be terminated because of the government's dilatory action—or inaction—on her husband's petition, but also that she will be removed from the country, since no other relief is available to her under the INA." Pet. App. 26a-27a. He explained that the panel majority's interpretation "creates an arbitrary, irrational and inequitable outcome in which approvable petitions will be treated differently depending solely upon when the government grants the approval." *Id.* at 27a.

Mrs. Robinson filed a petition for rehearing and rehearing en banc, which was denied on March 3, 2009. *Id.* at 40a. On May 11, 2009, Justice Souter granted an application to extend time for filing this petition to July 31, 2009.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for several reasons. *First*, the Third Circuit's decision below

expressly conflicts with decisions of the First, Sixth, and Ninth Circuits—all the other circuits that have addressed the issue.

Second, this conflict is of national importance. This Court has recognized the necessity of the nation speaking with a unified voice in immigration law. Furthermore, the conflict is exceedingly important because it affects the lawful residency of a substantial number of grieving spouses, whose immigration fate now depends solely upon the circuit in which they reside. Mrs. Robinson faces deportation from the United States because she resides in the Third Circuit, whereas widows or widowers in the exact circumstances in other areas of the country not only are immune from deportation, but also will become lawful permanent residents of the United States.

Third, in addition to creating a circuit split that will lead to disparate treatment of aliens, the decision below is wrong on the merits. The plain language and structure of the statute indicate that an alien spouse whose citizen spouse properly files paperwork to classify the alien as an immediate relative remains eligible for such classification following the death of the citizen spouse, regardless of the length of marriage.

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE FIRST, SIXTH, AND NINTH CIRCUITS

There is a clear split in the courts of appeals as to whether the surviving alien spouse of a U.S. citizen, whose citizen-spouse died before the couple had been married for two years, remains a "spouse" for purposes of 8 U.S.C. § 1151(b)(2)(A)(i). Unanimous

panels of the First, Sixth, and Ninth Circuits have held that such an alien remains a spouse. In contrast, the Third Circuit held that an alien who was married to a U.S. citizen for less than two years at the time of the citizen-spouse's death does not remain a "spouse" within the meaning of § 1151(b)(2)(A)(i). According to the opinion of the court below, the second sentence of the provision conditions spousal status by requiring the surviving spouse to "ha[ve] been the spouse of the United States citizen for at least two years at the time of the citizen spouse's death." Pet. App. 12a.

The Ninth Circuit was the first to address this issue in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006). The panel unanimously held that, "under the express terms of the statute," the alien widow "qualified as the *spouse* of a U.S. citizen when she and her husband petitioned for [an immigrant visa and] adjustment of status, and absent a clear statutory provision voiding her spousal status upon her husband's untimely death, she remains a *surviving* spouse." *Id.* at 1039-40 (emphasis in original). Therefore, "[n]either the definition of immediate relative nor the text and structure of the adjustment of status regime provides support for the government's position that [the widow] should be stripped of her spousal status." *Id.* at 1040. The court explained that the "logical and statutorily substantiated interpretation of the second sentence [of § 1151(b)(2)(A)(i)] is that it applies to those aliens whose citizen spouses did not initiate an adjustment of status proceeding before they died," granting them a right to self-petition. *Id.* at 1041. Therefore, the court held that the widow remained an immediate relative. *Id.* at 1043.

The Third Circuit next addressed the issue in this case. Pet. App. 1a-28a. The divided panel recognized, yet explicitly departed from the Ninth Circuit's reasoning and holding in *Freeman*, thus creating a circuit split. *Id.* at 7a-9a.

After the Third and Ninth Circuits came down on opposite sides, the Sixth Circuit next decided the issue earlier this year. In *Lockhart v. Napolitano*, ___ F.3d ___, No. 08-3321, 2009 WL 2137192 (6th Cir. July 20, 2009), *amending* 561 F.3d 611 (6th Cir. 2009), the Sixth Circuit aligned itself with the Ninth Circuit's view, concluding "that the second sentence expands 'immediate relative' status to include a surviving alien-spouse whose citizen spouse failed to file an application on his or her behalf prior to the citizen-spouse's death." *Id.* at *6. The court emphasized: "[T]hat sentence has no effect on the status of a surviving alien spouse whose citizen spouse filed a petition for immediate relative status prior to his or her death." *Id.* The Sixth Circuit recognized but rejected the Third Circuit's decision and held that a widow whose citizen-spouse filed the paperwork before death remains eligible for "immediate relative" classification.

Most recently, the First Circuit addressed the issue in *Taing v. Napolitano*, 567 F.3d 19 (1st Cir. 2009). The panel expressly recognized the circuit split and aligned itself with the Sixth and Ninth Circuits. *Id.* at 24. The court explained that "the plain language of § 1151(b)(2)(A)(i) confirms that 'spouse' includes surviving spouse," in part because "[t]he second sentence of this section refers to a surviving spouse simply as 'spouse' without using any qualifying terms." *Id.* at 26. Addressing the government's

argument that the second sentence of the provision limits the first, the court explained that "[t]he second sentence, rather than modifying the first as the government contends, creates a separate and independent right for certain alien spouses to self-petition for 'immediate relative' status." *Id.* at 26-27.

The split among the courts of appeals is unlikely to be resolved by further development in the lower courts. In the opinion below, the Third Circuit explicitly rejected the Ninth Circuit's interpretation of § 1151(b)(2)(A)(i). Pet. App. 7a-9a. Similarly, the First and Sixth Circuits considered the conflicting interpretations advanced by the Third and Ninth Circuits and agreed that the Ninth Circuit's interpretation is correct. *Taing*, 567 F.3d at 24; *Lockhart*, 2009 WL 2137192, at *3.

II. THE CIRCUIT SPLIT IS OF NATIONAL IMPORTANCE AND RESULTS IN DISPARATE TREATMENT OF ALIENS DEPENDING ON THE CIRCUIT IN WHICH THEY RESIDE

The need for resolution of this conflict is acute. For these grieving alien spouses and their children, it is vital for "the Nation[ ] [to] speak with one voice." *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (internal quotation marks omitted). The issue presented in this case is one that recurs frequently and affects the rights of a significant number of alien-spouses of deceased U.S. citizens, as well as citizen children. As Judge Nygaard recognized dissenting below, the interpretation of this statute has the practical consequence of determining whether Mrs. Robinson and like-situated widows and widowers may be deported from the United States following the deaths of their spouses. Pet. App. 26a-27a.

This Court has compared deportation to "banishment" and "exile." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *I.N.S. v. Errico*, 385 U.S. 214, 225 (1966). In upholding an alien's due process rights in deportation proceedings, the Court noted the profound consequences of deportation: "[Deportation] visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). Since Mrs. Robinson and like-situated widows and widowers have no other avenue of relief available, the Third Circuit's construction of the statute could lead to their deportation.

Moreover, the Third Circuit's decision means that the application of immigration laws will differ sharply among the circuits. The government has expressly acknowledged this disparate treatment in a 2007 USCIS memorandum from the Associate Director of Domestic Operations.[2] In this

[2] USCIS Interoffice Memorandum re: Effect of Form I-130 Petitioner's Death on Authority to Approve the Form I-130, http://www.uscis.gov/files/pressrelease/I130AFMAD0804_110807.pdf (last visited July 23, 2009). Despite this policy, the Department of Homeland Security undertook a review of this issue and has announced "interim relief" for widows of U.S. citizens, consisting of two years of deferred action. *See* DHS Establishes Interim Relief for Widows of U.S. Citizens, http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm (last visited July 18, 2009). However, the DHS memorandum makes clear that DHS has not changed its underlying policy, calling this relief a "short-term arrangement" and noting that deferred action "does not confer or alter any immigration status." *Id.* In fact, DHS has again made clear their position that only legislation can change the policy. Although the Senate has recently passed an amendment to the Department of

memorandum, the Associate Director noted that "if a Form I-130 visa petitioner dies before USCIS acts on the Form I-130, USCIS must deny the Form I-130" in every jurisdiction other than the Ninth Circuit. USCIS Memorandum, *supra* n.2. At the time the Associate Director wrote the memorandum, only the Ninth Circuit had decided the issue. Therefore, in accord with this policy, USCIS must deny the visas to all petitioners outside the First, Sixth, and Ninth Circuits, and accord petitioners residing within these three circuits different rights to LPR status.

The composition of the circuit split regarding this issue highlights the need for its resolution. The First, Sixth, and Ninth Circuits accounted for 37% of LPR admissions for immediate relatives in 2008.[3] There is no reason to believe that those circuits' percentage of LPR admissions for spouses is significantly lower. Therefore, as a result of this circuit split and government policy on this issue, it is likely that roughly 37% of widows in Mrs. Robinson's circumstance are granted LPR status—those in the First, Sixth, and Ninth Circuits—while the

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(continued...)

Homeland Security Appropriations Act, H.R. 2892, 111th Cong. (2009), which would amend 8 U.S.C. § 1151(b)(2)(A)(i), the amendment was not included in the House version of the Act. The bill is now in conference committee, and the outcome is far from certain.

[3] USCIS granted 180,892 applications for LPR status based on "immediate relative" classification in these three circuits and granted 488,483 such applications nationwide. Profiles on Legal Permanent Residents: 2008, http://www.dhs.gov/ximgtn/statistics/data/DSLPR08s.shtm (last visited July 21, 2009).

remaining 63% are granted no relief at all and are then amenable to removal.

In addition to Mrs. Robinson and the petitioners in the other three circuits, litigation is proceeding in at least nine states subsequent to the denial or cancellation of LPR petitions.[4] One court recognized the scope of the problem by certifying, under Fed. R. Civ. P. 23(a)(1), a plaintiff class of surviving spouses who were challenging the denial of their petitions. *Hootkins v. Chertoff*, No. CV 07-5696 CAS, 2009 U.S. Dist. LEXIS 3243 (C.D. Cal. Jan. 6, 2009) (Order Granting Plaintiffs' Motion for Class Certification). The Department of Homeland Security did not disagree, implicitly endorsing the court's determination that the plaintiffs were "so numerous that joinder of all of the class members would be impracticable." *Id.* at *14.

In October 2008, the House Judiciary Committee reported that there were "at least 100" surviving spouses whose citizen-spouses had died while petitions for legal permanent resident ("LPR") status

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[4] *See, e.g.*, Jayme A. Feldheim, Note, *Ending the Widow Penalty: Why Are Surviving Alien Spouses of Deceased Citizens Being Deported?*, 77 Fordham L. Rev. 1873, 1874 and n.6 (forthcoming, Mar. 2009), *available at* http://law.fordham.edu/publications/articles/500flspub17328.pdf ("[T]here are currently over 180 of these cases across the country."); Hernán Rozemberg, *Widowed Immigrants Also Could Lose New Homeland*, San Antonio Express-News, Mar. 9, 2009, at A1 (reporting "at least 200 [cases] across the country involving immigrants facing deportation because their U.S. citizen spouses died before the government approved the couples' immigration applications"); Kirk Semple, *Losing a Partner, and a Foothold*, N.Y. Times, Feb. 2, 2009, at A15.

were pending.[5] In fact, the number is known to exceed 200 and is likely much higher given the numerosity of LPR applications for the spouses of citizens. In 2008, 265,671 spouses attained LPR status.[6] With the sheer scale involved, it can be presumed that the citizen-spouses of many aliens died before the couples had been married for two years, meaning that Mrs. Robinson's situation is not out of the ordinary.

This disparity, moreover, is occurring in an area of law in which national uniformity is vitally important. *See Zadvydas*, 533 U.S. at 700.

III. THE OPINION BELOW REJECTS THE WELL-REASONED APPROACH OF THREE SISTER CIRCUITS AND IS WRONG ON THE MERITS

A. The Plain Language of the Statute Makes Clear That Petitioner Is an "Immediate Relative" Under § 1151(b)(2)(A)(i)

1. The plain language of 8 U.S.C. § 1151(b)(2)(A)(i) makes clear that Mrs. Robinson is an "immediate relative." "The starting point for . . . interpretation of a statute is always its language." *Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the

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[5] H.R. Rep. No. 110-911 at 2 (Oct. 3, 2008), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr911.110.pdf.

[6] Randall Monger & Nancy Rytina, *Office of Immigration Statistics Annual Flow Report: U.S. Legal Permanent Residents 2008, Table 2* (Mar. 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2008.pdf.

analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). Additionally, the statutory scheme should be interpreted coherently and internally consistently. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

The first sentence of the relevant provision plainly states that spouses are "immediate relatives": "For purposes of this subsection, the term 'immediate relatives' means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age." 8 U.S.C. § 1151(b)(2)(A)(i).

Whereas the first sentence qualifies the eligibility of the parents of a citizen, there is no limit on spouses. "Where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Thus, the fact that the exception of the first sentence circumscribes the eligibility only of parents indicates that they are the only group Congress intended to limit. Had Congress intended to limit the eligibility of spouses, it likely would have done so in the first sentence, using language similar to that of the parental limitation. This interpretation is consistent with 8 U.S.C. § 1186a, which provides for termination of LPR status granted on the basis of marriages entered into less than two years before the grant of status, but expressly excepts the death of a spouse as a basis for

termination of LPR status. *Id.* at § 1186a(b)(1)(A)(ii).[7]

The second sentence of § 1151(b)(2)(A)(i) was added to the INA in 1990, decades after Congress first defined "immediate relatives." Immigration Act of 1990, Pub. L. No. 101-649, § 201(b)(2)(A)(i), 104 Stat. 4978 (1990). This provision does not circumscribe the meaning of "spouse" as it is used in the first sentence. Specifically, it says nothing about an alien whose citizen-spouse died *before* the couple had been married for two years. Instead, it addresses only "an alien who was the spouse of a citizen of the United States for at least 2 years at the time of the citizen's death . . . ." 8 U.S.C. § 1151(b)(2)(A)(i). This descriptive phrase does not condition the meaning of "spouse" in the first sentence. Just as a statute that conditions a benefit on having been a resident of a state for two years does not render a person who has not fulfilled the time requirement to be a non-resident, the language imposing a time requirement here does not alter the plain definition of the word "spouse."

On the contrary, the second sentence provides for the particular class of spouses described therein an additional avenue to LPR status, namely, the opportunity to self-petition. Those spouses described "shall be considered, for purposes of this subsection, to remain an immediate relative after the date of the citizen's death but only if the spouse files a petition under section 1154(a)(1)(A)(ii) of this title within 2

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[7] If USCIS had granted Mrs. Robinson LPR status prior to her husband's untimely death, 8 U.S.C. § 1186a(b)(1)(A)(ii) would have shielded her status from termination on the basis of her husband's death.

years after such date and only until the date the spouse remarries."[8] *Id.*

Accordingly, an alien spouse whose citizen spouse did not file a petition has two years after the death of the citizen-spouse to self-petition, an opportunity limited to an alien who was the spouse of a citizen for at least two years prior to the spouse's death. The second sentence thereby grants aliens whose marriages lasted at least two years an option unavailable to others. That additional option does not limit the definition of "spouse" for purposes of the first sentence, because that part of the provision deals with an entirely different procedure, specifically, a petition by the citizen-spouse. *Cf.* 8 U.S.C. § 1154(a)(1)(A)(i) (citizen provision) with 8 U.S.C. § 1154(a)(1)(A)(ii) (alien self-petition).

2. The Third Circuit's narrow definition of the term "spouse" is inconsistent with the common understanding of that term as inclusive of surviving spouses. Courts have repeatedly referred to a widow as a decedent's "spouse" following the event of death. When the "immediate relative" definition was originally introduced in 1952, "spouse" was defined as

[8] The language "but only" must be read in conjunction with § 1154(a)(1)(A)(ii) to merely provide a time limitation on the right to self-file, not a bar on considering I-130 applications filed by deceased spouses before their deaths. Any other reading would provide absurd results. For example, an alien spouse who had been married for five years and whose citizen spouse filed a petition immediately before an unexpected and accidental death would have no relief available if the processing time on the I-130 were over two years, a not uncommon occurrence. This is because if USCIS were to reject the petition on the ground that the citizen spouse had died and require self-filing by the alien, over two years would have passed since the citizen spouse's death, and the self-filing option would not be available.

"[o]ne's husband or wife," a phrase expressly adopted from *Rosell v. State Industrial Accident Commission*, 95 P.2d 726, 729 (Or. 1939). *Black's Law Dictionary* (4th ed. 1951). *Rosell* had defined a spouse as "one's wife or husband;" a widow as "a married woman whose husband is dead;" and a surviving spouse as "the one, of a married pair, who outlives the other." 95 P.2d at 729. Likewise, at the time the self-petitioning rule of the second sentence was added to § 1151(b)(2)(A)(i), "spouse" was defined as "[o]ne's husband or wife" and "surviving spouse" was defined as "one of a married pair who outlives the other." *Black's Law Dictionary* (6th ed. 1990).

This Court and multiple federal courts of appeals have used "spouse" in a similar manner. In this exact context, the Ninth Circuit concluded in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) that with regard to 8 U.S.C. § 1151(b)(2)(A)(i), "[t]o the extent the second sentence the government invokes is relevant, it simply grants an *alien spouse whose deceased citizen spouse* had *not* filed an I-130 the right to self-petition so long as the parties were married for two years prior to the citizen's death." *Id.* at 1038 (first emphasis added).

The Ninth Circuit's interpretation of the term is not unique. In a variety of legal contexts, courts have endorsed the common understanding of "spouse" as encompassing surviving spouses. For example, reviewing a worker compensation statute that referred to "widows" and "widowers," this Court used the word "spouse" to refer to surviving spouses. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 147 (1980) ("The benefits, therefore, that the working woman can expect to be paid to her spouse in the case

of her work-related death are less than those payable to the *spouse of the deceased male wage earner*.") (emphasis added).

In the labor and employment context, several of the courts of appeals have used "spouse" to refer to surviving spouses, just as this Court did in *Wengler*. *See Noe v. PolyOne Corp.*, 520 F.3d 548, 562 (6th Cir. 2008) (reasoning that, in support of its holding that an employer's termination of retiree health benefits violated the Labor Management Relations Act, "[a]s with the promises made in § 12.15(h), holding that Plaintiffs' health benefits have not vested would render § 12.14's promise of health benefits until death or remarriage illusory for the *spouses of deceased retirees* in violation of precedent") (emphasis added).[9]

Likewise, in the tort context, in *McCarthy v. Olin Corp.*, 119 F.3d 148 (2d Cir. 1997), the court used "spouse" to refer to a surviving spouse: "Robert C. Phillips, the spouse of surviving victim Maryanne Phillips, and Carolyn McCarthy, in her individual capacity, the *spouse of deceased victim* Dennis McCarthy, are also named plaintiffs in the action."

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[9] *See Bloemer v. Northwest Airlines, Inc.*, 401 F.3d 935, 939 (8th Cir. 2005) (holding that the Railway Labor Act preempted state-law claims to shares of stock resulting from the demutualization of an insurance company, the court noted that, "[o]nce applicable, RLA preemption extends to the *spouses of deceased employees*") (emphasis added); *E.E.O.C. v. Westinghouse Electric Corp.*, 869 F.2d 696, 700 n.6 (3d Cir. 1989), *vacated on other grounds*, 493 U.S. 801 (1989) (describing a case brought under the Age Discrimination in Employment Act as involving plans "limiting death-prior-to-retirement benefits to *spouses of deceased employees* who were actually eligible for retirement benefits at the time of death") (emphasis added).

Id. at 151 n.1 (emphasis added). And finally, in the trusts and estates context, in *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865 (11th Cir. 1988), the court used "spouse" to refer to a surviving spouse: "Under the terms of the trust, the income from the trust properties is to be distributed to the children of the A.K. Sessoms, *spouses of deceased male children*, and descendants of deceased children until 21 years after the death of the last child." *Id.* at 866 (emphasis added).

3. Viewing this statutory scheme as a whole, it is clear that Congress's use of "spouse" is consistent with common usage and encompasses "surviving spouse." First, the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) uses the term "spouse" to refer to a surviving spouse. Second, 8 U.S.C. § 1154(a)(1)(A)(ii), which is the filing mechanism for those individuals described in the second sentence, states that "alien spouses described in the second sentence of section 1151(b)(2)(A)(i) of this title" may self-file their I-130 forms. The only individuals described in this sentence are individuals whose spouses have died, yet the self-filing provision still refers to these individuals as "alien spouses," not some other term of art. This again suggests that the term "spouse" in the first sentence of 8 U.S.C. § 1151(b)(2)(A)(i) encompasses individuals whose spouses have died.

Congress's use of "spouse" in place of "surviving spouse" elsewhere in the INA also bolsters the common legal understanding that the former term encompasses the latter. *See* 8 U.S.C. § 1183a(a)(3)(B)(ii) (crediting an alien for the time period of Social Security coverage for "all of the

qualifying quarters worked by a spouse of such alien during their marriage and the alien remains married to such spouse or such spouse is deceased.").

However, Congress's use of "spouse" in this manner has not been limited to this statutory scheme. *See* 5 U.S.C. § 8341(e)(3) ("On the death of the *surviving spouse* or former spouse or termination of the annuity of a child, the annuity of any other child or children shall be recomputed and paid as though the *spouse*, former spouse, or child had not survived the employee or Member.") (emphasis added); 25 U.S.C. § 2206(j)(2)(A)(i) ("[I]f the *surviving spouse* of a testator married the testator after the testator executed the will of the testator, the *surviving spouse* shall receive the intestate share in the decedent's trust or restricted land and trust personalty that the *spouse* would have received if the testator had died intestate.") (emphasis added). The same is true of administrative regulations. *See* 22 C.F.R. § 42.21(b) ("The *spouse of a deceased U.S. citizen*, and each child of the spouse, will be entitled to immediate relative status after the date of the citizen's death . . . .") (emphasis added).

4. The court below misconstrued the statute and employed circular reasoning to justify its conclusions. Its holding that immediate relative classification depends upon an alien's "spousal status" at the time the petition is adjudicated merely begs the question of whether Mrs. Robinson remains eligible for "immediate relative" classification as a "spouse" following her husband's death. By erroneously framing the key issue as whether the time of filing or the time of adjudication controls—a red-herring—the court below embarked down a path of specious legal

analysis and relied upon circular reasoning to justify its holding. Instead, the plain language controls and mandates a different outcome.

B. Legislative History Affirms That Petitioner Is an "Immediate Relative" Under § 1151(b)(2)(A)(i)

The statutory backdrop that existed when Congress added the second sentence to § 1151(b)(2)(A)(i) is inconsistent with any intent to circumscribe the meaning of "spouse." When the sentence was introduced in 1990, Congress had already acted to protect alien spouses identical to Mrs. Robinson in all relevant respects, except for the fact that their petitions had already been approved. In 1986, Congress enacted the Conditional Residence statute, which provided that alien spouses who obtained permanent resident status and who had not been married for two years could not have their LPR status terminated "through the death of a spouse." Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2, 100 Stat. 3537 (codified at 8 U.S.C. § 1186a(b)(1)(A)(ii), (c)(1)(A), (4)(B), (d)(1)(A)(i)(II), (g) (2006)). As the Ninth Circuit wrote, Congress's protection of alien spouses who had already attained LPR status, but were otherwise indistinguishable from alien spouses such as Mrs. Robinson, "is compelling evidence that Congress did not intend its provision for a widow's self-petition for adjustment of status to have an implicit collateral consequence of terminating a spouse's already pending petition . . . ." *Freeman v. Gonzales*, 444 F.3d 1031, 1042 (9th Cir. 2006).

Construing § 1151(b)(2)(A)(i) as the Third Circuit did leads to the absurd result that an alien spouse's

LPR status hinges solely on the amount of time it takes for a petition to be processed, a factor that is completely out of the spouse's control. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Moreover, it leads to an outcome where an alien whose spouse died after the couple had been married for a relatively long time (within the two-year window) could be denied LPR status because of processing delays, while an alien whose petition had been processed quickly and whose spouse died after the couple had been married for only a few months would be guaranteed LPR status and protected from termination of that status through death of the spouse.

A restrictive interpretation of the second sentence of § 1151(b)(2)(A)(i) is also inconsistent with the purpose of the 1990 amendments to the Immigration and Nationality Act. Among the goals of the amendments was "maintaining the priority we have traditionally given to those with family connections to the United States—and without departing from any of the basic goals of fairness established in the 1965 reforms." 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy). Moreover, the amendments were intended to "ease certain current U.S. immigration law restrictions." H.R. Rep. No. 101-723(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6779, 6780. It is unreasonable to conclude that a Congress purporting to promote values of family and fairness intended to subject an entire class of widowed spouses to denial of LPR status resulting from bureaucratic vicissitudes.

A 1994 amendment to § 1151(b)(2)(A)(i) provides further evidence of Congress's intent to protect spouses such as Mrs. Robinson. The amendment extended the coverage of the second sentence of the provision to the children of alien spouses covered by the sentence. Immigration and Nationality Technical Corrections Act of 1994, H.R. 783, 103d Cong. § 219(b) (1994). The purpose of the amendment was "to conform with the treatment accorded spouses . . . ." 139 Cong. Rec. S8555 (daily ed. July 1, 1993). Given that the purpose of the amendment was to conform the treatment of children and spouses, accepting the government's argument would have the logical consequence of the statute only applying to children over the age of two. This is because, if the treatment of children and spouses is indeed uniform, and a spouse must have been married to a citizen for at least two years prior to the citizen's death to remain an "immediate relative," then likewise, a child must be the child of a deceased citizen for at least two years to remain an immediate relative. Congress plainly did not intend this result.

C. The Decision Below Ignores This Court's Directives Regarding the Rule of Lenity in the Immigration Context

There is a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *I.N.S. v. St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). This is because "[d]eportation is always a harsh measure . . . ." *Cardoza-Fonseca*, 480 U.S. at 449. While this case does not involve an interpretation of the deportation statute, the Third Circuit's interpretation of § 1151(b) will determine

whether Mrs. Robinson may remain in the United States or whether she will be subject to deportation. As with deportation, the stakes are high for Mrs. Robinson, and the rule of lenity is applicable.

The Court's understanding of this issue has remained steady since it considered the meaning of the phrase "sentenced more than once," as used in the Immigration Act of 1917, in *Fong Haw Tan v. Phelan*, 333 U.S. 6, 8 (1948). The phrase was significant because deportability hinged on its interpretation. Some courts of appeals had construed the provision against aliens, concluding that aliens given multiple sentences at the same time had been "sentenced more than once." However, the Court agreed with the Fifth Circuit's view that "an alien is 'sentenced once when, after a conviction or plea of guilty, he is called before the bar and receives judgment, whether for one or several crimes, with one or several terms of imprisonment. He is sentenced more than once when that happens again.'" *Id.* at 9 (quoting *Wallis v. Tecchio*, 65 F.2d 250, 252 (5th Cir. 1933)). The Court reasoned,

> To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Id. at 10.

One rationale for application of the rule of lenity in the deportation context is that ambiguities in statutes that impose punishments should be interpreted in favor of the alien, just as ambiguities

in criminal statutes are interpreted in favor of the accused. According to the Court in *Fong Haw Tan*, "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." *Id.* (citation omitted). Here, Mrs. Robinson has done nothing wrong, and there has been no misconduct. Nevertheless, she is being punished by the agency's construction of the statute, so the effect is the same.

Furthermore, in *St. Cyr*, this Court recognized the need to protect "unpopular groups or individuals." *See* 533 U.S. at 315 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994)). The Court rejected the idea that immigrants were not such a group, and endorsed the argument that their exclusion from the political process made them "particularly vulnerable to adverse legislation." *Id.* at n.39 (citing Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 Texas L. Rev. 1615, 1626 (2000)). As such, consistent with the rule of lenity, this Court protected aliens from the harsh retroactive effect of a statute where the statute did not unambiguously mandate retroactivity. *Id.* at 315.

In the instant case, the court below interpreted 8 U.S.C. § 1151(b)(2)(A)(i) in a way that directly contradicted the words of the provision. However, if those words were to be considered ambiguous, *i.e.*, if it were possible to read the provision and conclude that Mrs. Robinson may or may not be a "spouse," the ambiguity would have to be resolved in Mrs. Robinson's favor. As Judge Nygaard explained

below, "[t]he same department whose delay or inaction forecloses [Osserritta] Robinson's chance of becoming an American, now so diligently pursues the avenues of her expulsion. It contends that the statute is ambiguous and then urges upon us the least reasonable and least humane alternative." Pet. App. 27a. The rule of lenity requires a contrary result.

D. The Agency's Extra-Jurisdictional Construction of the Statute Is Not Entitled to Deference

A 1970 administrative adjudication cited by the majority below, *Matter of Varela*, 13 I. & N. Dec. 453 (B.I.A. 1970), is the sole case law in support of the panel majority's decision. *Varela*, however, is not entitled to deference.[10] The BIA's reasoning was limited to two sentences: "Simply stated, at the time of his decision the beneficiary was not the spouse of a United States citizen. His death had stripped her of that status." *Id.* at 454. This analysis is not thorough. In addition to offering only cursory reasoning, the Board later deemed its decision in *Varela* to be extra-jurisdictional. Accordingly, it is entitled to no deference.

This Court has advised that "[t]he weight [accorded to an administrative judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citation omitted). The two sentences quoted

[10] While the court below discussed *Varela* and noted that the government argued it should be granted deference, Pet. App. 6a-7a, the majority did not explicitly defer to the decision.

above represent the totality of analysis in *Varela* on this issue. Therefore, the reasoning certainly is not "thorough," and for the reasons discussed above, the reasoning goes directly against the plain meaning of the statute and is not valid. Therefore, the decision should be accorded no weight.

Moreover, in *Matter of Sano*, 19 I. & N. Dec. 299 (B.I.A. 1985), the Board held that it had exceeded its jurisdiction in *Varela* and that an alien widow lacked standing to challenge the summary denial of a petition filed on her behalf by her deceased spouse. The BIA noted that "[t]o the extent that our decision in *Matter of Varela*, *supra*, conflicts with this conclusion, it is hereby modified." *Id.* at 301. Therefore, even the BIA's own case law recognizes that the decision has been undermined. Granting deference to *Varela* is thus inappropriate because the BIA has held that it had no jurisdiction over that case when it was decided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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