# NOTE

# The Reality for Noncitizen Widows: Assessing the Widow Penalty in Light of *Lockhart v. Napolitano*

*Melanie Hui Lipana*[*]

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[*] Copyright © 2012 Melanie Hui Lipana. Senior Notes & Comments Editor, UC Davis Law Review; J.D. Candidate, UC Davis School of Law, 2012; B.A. Economics/International Area Studies, UCLA, 2009. Thank you to Katie Briscoe, Mina Choi, and Connor Boyd for their editorial work and insightful comments. Special thanks to Leslie Lao for the dedication and effort she poured into helping me perfect my Note. I'd also like to thank my husband who graciously endured my nights of laborious research and writing. And of course, many thanks to my loving family for all the support throughout the years.

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## INTRODUCTION

In June 2006, Mrs. Nelly Lockhart found herself in an unexpected difficult situation.[1] She was still grieving her husband's sudden death six months earlier from a heart attack and was struggling to care for their two-year old son.[2] Yet, another unanticipated hardship arose: she lost the ability to qualify as a United States legal permanent resident.[3] Mrs. Lockhart's husband had properly submitted her immigration forms identifying her as his spouse following their marriage in 2004.[4] However, United States Citizen and Immigration Services ("USCIS") determined that upon her husband's death, Mrs. Lockhart no longer qualified as his spouse.[5] Accordingly, USCIS denied her immigration petitions for permanent residence.[6]

Mrs. Lockhart's situation embodies what commentators have termed the widow penalty, which arises in the context of immigration law.[7] The widow penalty does not reflect an isolated incident, but rather affects many individuals in similar situations.[8] Recently, the widow penalty generated controversy regarding its impact on immigration and deportation, both of which are contentious topics in contemporary America.[9] Some commentators suggest that the widow

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1 *See* Lockhart v. Napolitano, 573 F.3d 251, 253 (6th Cir. 2009) (describing Mrs. Lockhart's husband's death and denial of her immigration forms).

2 *See id.*

3 *See id.* (describing how USCIS denied Mrs. Lockhart's petitions after death of husband).

4 *See id.*

5 *See id. See generally infra* Part I.C (describing debate surrounding definition of spouse and USCIS's practice to deny spousal status to widows).

6 *See Lockhart*, 573 F.3d at 253.

7 *See* Shaina N. Elias, *From Bereavement to Banishment: The Deportation of Surviving Alien Spouses Under the "Widow Penalty*,*"* 77 GEO. WASH. L. REV. 172, 173 (2008) (describing how USCIS's automatic denial of noncitizen spouse gives rise to widow penalty); Jayme A. Feldheim, *Ending the Widow Penalty: Why Are Surviving Alien Spouses of Deceased Citizens Being Deported?*, 77 FORDHAM L. REV. 1873, 1874 (2009) (noting Mrs. Robinson encountered quirk in immigration law known as widow penalty); Wale Oyejide, *Adding Insult to the Harshest of Injuries: A Critique of the "Widow Penalty*,*"* 19 TEMP. POL. & CIV. RTS. L. REV. 515, 515-16 (2010) (noting widow joined group of women ensnared by widow penalty). Commentators refer to this situation as the widow penalty because prevalent cases involve death of husbands. However, this situation can apply equally to widowers.

8 *See, e.g.*, Elias, *supra* note 7, at 173 (noting that hundreds of widows and widowers across country face automatic deportation because citizen spouse died); Feldheim, *supra* note 7, at 1874 (stating that there are 180 similar cases in country affecting women, mothers, and children); Oyejide, *supra* note 7, at 515-16 (describing one widow who joined large group of women affected by widow penalty).

9 *See, e.g.*, *Lockhart*, 573 F.3d at 253 (showing recent decision regarding widow

penalty, although arguably mandated by immigration statutes, unfairly disadvantages immigrant widows.[10] Despite the seeming injustice, however, many courts adopt the widow penalty and deny immediate relative status to a widow upon the death of her citizen spouse.[11] Other courts reject the widow penalty in favor of the widow, thereby requiring USCIS to grant widows immediate relative status.[12] The Sixth Circuit recently confronted these inconsistent applications of the widow penalty.[13] In *Lockhart v. Napolitano*, the Sixth Circuit rejected the widow penalty and instead granted immediate relative status to the immigrant widow.[14]

This Note argues that *Lockhart* improperly rejected the widow penalty by finding that an immigrant widow who has not yet attained legal permanent resident status constitutes a spouse qualifying for immediate relative status.[15] Part I describes the process for a noncitizen spouse to attain legal permanent residence.[16] This Part also introduces the governing federal statute and theories of deference towards USCIS's practice that favors the widow penalty.[17] Part II more fully presents *Lockhart v. Napolitano* and describes the rationale for its holding.[18] Part III analyzes *Lockhart* and argues that its opposition to the widow penalty does not comport with proper statutory

penalty); Robinson v. Napolitano, 554 F.3d 358, 360 (3d Cir. 2009) (same); Freeman v. Gonzales, 444 F.3d 1031, 1033 (9th Cir. 2006) (same). *See generally* Randal C. Archibold, *Judge Blocks Arizona's Immigration Law*, N.Y. TIMES (July 28, 2010), http://www.nytimes.com/2010/07/29/us/29arizona.html?scp=1&sq=Judge%20Blocks%20Arizona's%20Immigration%20Law&st=cse (describing judge's preliminary injunction on controversial Arizona immigration law).

[10] *See* Elias, *supra* note 7, at 173 (deeming widow penalty as crack in immigration law); Feldheim, *supra* note 7, at 1874 (noting that widow penalty is bizarre quirk in immigration law); Oyejide, *supra* note 7, at 542 (noting usage of terms like unjust to describe widow penalty).

[11] *See, e.g.*, *Robinson*, 554 F.3d 358 (holding that surviving spouse does not qualify for immediate relative status); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736 (E.D. Mich. 2006) (noting that couple did not enter into marriage in good faith, so court did not perform analysis of definition of spouse for immediate relative status); Burger v. McElroy, No. 97 Civ. 8775, 1999 WL 203353 (S.D.N.Y. Apr. 12, 1999) (holding that surviving spouse does not qualify for immediate relative status).

[12] *See, e.g.*, *Lockhart*, 573 F.3d at 263 (holding that surviving spouse can attain immediate relative status); Taing v. Napolitano, 567 F.3d 19 (1st Cir. 2009) (same); Freeman v. Gonzales, 444 F.3d 1031 (9th Cir. 2006) (same).

[13] *See Lockhart*, 573 F.3d at 263.

[14] *See id.* (deciding in favor of widow instead of following USCIS's practice).

[15] *See infra* Part III.A-C.

[16] *See infra* Part I.

[17] *See infra* Part I.

[18] *See infra* Part II.

interpretation, precedential jurisprudence, or public policy.[19] First, *Lockhart* incorrectly applied the plain meaning rule of statutory interpretation because the court failed to construe the statute in its entirety.[20] Second, *Lockhart* should have applied *Chevron* deference because the enforcement of the widow penalty is a reasonable interpretation of the statute.[21] Finally, the *Lockhart* decision ignores immigration law's public policy goal of encouraging family reunification.[22]

## I. BACKGROUND

In 1952, Congress enacted the McCarran-Walter Act, also known as the Immigration and Naturalization Act ("INA").[23] The INA permits Congress to delegate responsibility to various agencies, such as the Immigration and Naturalization Services ("INS"), to enforce immigration law.[24] However, the Homeland Security Act in 2003 effectively eliminated the INS.[25] First, the Homeland Security Act delegated the responsibility of immigration enforcement to the Department of Homeland Security ("DHS").[26] The DHS then assigned INS's former immigration responsibilities to a new agency, USCIS, which replaced INS's role in immigration.[27] The remainder of this Part

[19] *See infra* Part III.

[20] *See infra* Part III.A.

[21] *See infra* Part III.B.

[22] *See infra* Part III.C.

[23] *See* Feldheim, *supra* note 7, at 1877-78 (describing McCarran-Walter Act, otherwise known as Immigration and Nationality Act). *See generally* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1537 (2006)) (providing McCarran-Walter Act and describing its governance over immigration law).

[24] Feldheim, *supra* note 7, at 1877-78 (noting that Congress can determine who it admits or deports); *see* 8 U.S.C.A. § 1103 (West 2009) (noting that Department of Homeland Security has power to administer and execute all laws relating to immigration and naturalization).

[25] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (abolishing Immigration and Naturalization Services); *see also* Aliens and Nationality, Homeland Security, Reorganization of Regulations, 68 Fed. Reg. 9824-01, 9824 (Feb. 28, 2003) (discussing abolishment of Immigration and Nationalization Services).

[26] Feldheim, *supra* note 7, at 1878; *see* Homeland Security Act § 471; *see also* Aliens and Nationality, Homeland Security, Reorganization of Regulations, 68 Fed. Reg. at 9824.

[27] *See* Homeland Security Act § 471; Feldheim, *supra* note 7, at 1878; *see also* Aliens and Nationality, Homeland Security, Reorganization of Regulations, 68 Fed. Reg. at 9824 (stating that Homeland Security Act transferred some functions to DHS

discusses USCIS's current responsibilities regarding the process of obtaining permanent residency, as well as federal statutes governing immigration in the United States.[28]

### A. Obtaining Legal Permanent Residency

USCIS is responsible for processing immigration visa petitions for individuals seeking legal permanent residency in the United States.[29] Many of these visa petitions include petitions for family-based immigration, which permits noncitizens to immigrate if they establish a family relationship to a United States citizen.[30] Obtaining status adjustment for legal permanent residency on grounds of family-based immigration is a two-step process.[31]

First, noncitizens must prove statutory eligibility by establishing that they are an immediate relative of a U.S. citizen.[32] To qualify as an immediate relative, a noncitizen's relative must file a Form I-130 with USCIS.[33] Form I-130 establishes that the noncitizen and the citizen relative have a qualifying relationship, such as that of a child, parent, or spouse.[34] Upon evaluating Form I-130, USCIS decides to grant or deny immediate relative status.[35]

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and some functions to Department of Justice); *History*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov (follow "About Us" hyperlink and "Our History" hyperlink) (last visited Nov. 14, 2011) (providing timeline which shows that USCIS was one agency that replaced INS). For purposes of this Note, USCIS will also refer to INS prior to USCIS's creation. *Compare* Lockhart v. Napolitano, 573 F.3d 251, 253-54 (6th Cir. 2009) (describing USCIS's role to grant or deny immigration petitions), *with* Freeman v. Gonzales, 444 F.3d 1031, 1033 (9th Cir. 2006) (describing same process as INS's role).

[28] *See infra* Part I.A-B.

[29] *What We Do*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/ (last visited Jan. 31, 2011).

[30] *See id.*

[31] *Lockhart*, 573 F.3d at 254.

[32] *Id.*; *see* 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 2009); 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (amended 2009) (noting that 2009 Amendment changed 2006 version of statute); *see also* Elias, *supra* note 7, at 176-79 (describing attainment of immediate relative status as part of process to become legal permanent resident).

[33] 8 U.S.C.A. § 1154(a)(1)(A)(i) (West 2009); *Lockhart*, 573 F.3d at 254; *see* Oyejide, *supra* note 7, at 518 (explaining that Form I-130 begins USCIS's investigation of immigration petitions to determine if widow had valid marriage).

[34] *See* 8 U.S.C.A. § 1154(a)(1)(A)(i); 8 U.S.C.A § 1151(b)(2)(A)(i) (noting that 2009 version of statute defines immediate relative as child, spouse, or parent); 8 U.S.C. § 1151(b)(2)(A)(i) (noting that 2006 version of statute uses same terms to define immediate relative); *see also* Elias, *supra* note 7, at 175 (describing immediate relative in context of statute).

[35] *See* 8 U.S.C.A. § 1154(b) (providing that government investigates facts of each

Second, a noncitizen must file a Form I-485 for adjustment of status to legal permanent resident[36] A noncitizen may file this form concurrently with the citizen family member's Form I-130 or wait until after USCIS processes Form I-130.[37] Similar to Form I-130 determinations, USCIS has discretion to approve or deny legal permanent residency based on information in a noncitizen's Form I-485.[38]

Noncitizens seeking to establish immediate relative status based on marriage face a distinct challenge.[39] Even if USCIS exercises discretion to grant permanent residency, 8 U.S.C. § 1186a ("§ 1186a") renders this status conditional until a couple's two-year marriage anniversary.[40] During this two-year period, USCIS might discover that a couple judicially annulled their marriage or that the marriage was not bona fide.[41] On these grounds, USCIS may terminate an immigrant spouse's permanent resident status.[42] However, during this two-year conditional period, § 1186 explicitly prohibits USCIS from terminating legal permanent resident status because of a spouse's death.[43]

Whether a noncitizen even qualifies as an immediate relative for legal permanent resident status is a contentious issue, particularly

case to determine whether facts stated in petition are true and whether beneficiary is truly immediate relative); *see also* Oyejide, *supra* note 7, at 518 (stating that if government believes that documents are valid and that beneficiary is true immediate relative of petitioner, then government can forward petition).

[36] *See Lockhart*, 573 F.3d at 254; Oyejide, *supra* note 7, at 518; *see also* 8 U.S.C.A. § 1255(a) (West 2009) (describing process for government to adjust immigrant's status).

[37] *See Lockhart*, 573 F.3d at 253 (describing example of widow who filed Form I-485 concurrently with husband's Form I-130); Feldheim, *supra* note 7, at 1880 (allowing noncitizen spouse to file Form I-485 at same time citizen spouse files Form I-130 to expedite process); Oyejide, *supra* note 7, at 518 (stating that noncitizen spouse may file Form I-485 in conjunction with citizen spouse's Form I-130).

[38] 8 U.S.C.A § 1154(b) (explaining that government can grant petition if facts of petition regarding family relationship are true); 8 U.S.C.A § 1255(a) (explaining that government has discretion to adjust status); *see Lockhart*, 573 F.3d at 254; Oyejide, *supra* note 7, at 518 (stating that government can forward immigration petitions if it determines that information in petitions is valid).

[39] *See* 8 U.S.C.A. § 1186a(b)-(c) (West 2000) (noting two-year marriage requirement); *see also Lockhart*, 573 F.3d at 253 (quoting § 1186a); Freeman v. Gonzales, 444 F.3d 1031, 1042 (9th Cir. 2006) (same).

[40] 8 U.S.C.A. § 1186a(c) (granting only conditional status until couple's second year anniversary).

[41] *Id.* § 1186a(b).

[42] *Id.*

[43] *Id.*

when the citizen spouse dies before USCIS has processed the immigration petitions.[44] When USCIS receives the relevant immigration forms, USCIS has discretion to deny or grant immediate relative status to a noncitizen widow, which either bars or allows USCIS to grant the noncitizen conditional permanent residency.[45] USCIS's traditional practice is to deny immediate relative status to a noncitizen whose citizen spouse dies before two years of marriage.[46] Thus, commentators term this practice as the widow penalty because a citizen spouse's death bars the noncitizen widow from permanent residency.[47] The applicability of the widow penalty hinges on the definition of a spouse in 8 U.S.C. § 1151(b)(2)(A)(i), as discussed in the next section.[48]

### B. *Defining Spouse: The Scope of 8 U.S.C. § 1151(b)(2)(A)(i)*

Section 1151(b)(2)(A)(i) contains two sentences affecting the widow penalty that courts use to determine whether an individual qualifies as a spouse for purposes of immediate relative status.[49] The first sentence explicitly defines an immediate relative as an individual who is a child, spouse, or parent.[50] The second sentence allows a

[44] *See* 8 U.S.C.A § 1151(b)(2)(A)(i) (West 2009) (requiring widow to self-petition within two years of spouse's death); 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (noting two-year marriage requirement in second sentence of statute); *Lockhart*, 573 F.3d at 253; Robinson v. Napolitano, 554 F.3d 358, 360 (3d Cir. 2009); *Freeman*, 444 F.3d at 1033.

[45] *See* 8 U.S.C.A. § 1154(b) (West 2009) (explaining that government can grant petition if facts of petition regarding family relationship are true); 8 U.S.C.A. § 1255(a) (West 2009) (explaining that USCIS has discretion to adjust status); *Lockhart*, 573 F.3d at 254 (describing how USCIS's approval of immigration petitions depends on discretion to determine veracity of facts in petitions); Oyejide, *supra* note 7, at 518 (stating that government has discretion to forward petition if confident that documents are valid and that beneficiary is true immediate relative of petitioner).

[46] *See Lockhart*, 573 F.3d at 253; *Robinson*, 554 F.3d at 360 (noting enforcement of widow penalty when citizen spouse died before two years of marriage); *Freeman*, 444 F.3d at 1033; Feldheim, *supra* note 7, at 1874.

[47] *See* Elias, *supra* note 7, at 173; Feldheim, *supra* note 7, at 1874; Oyejide, *supra* note 7, at 516.

[48] Feldheim, *supra* note 7, at 1882; *see also Lockhart*, 573 F.3d at 254; *Robinson*, 554 F.3d at 361; *Freeman*, 444 F.3d at 1033. Certain cases rely on 2006 version of statute, but Congress amended statute in October 2009. *See generally* 8 U.S.C. § 1151(b)(2)(A)(i) (mentioning conditions for spouse to remain immediate relative after citizen spouse's death).

[49] 8 U.S.C. § 1151(b)(2)(A)(i) (providing 2006 version of statute and describing immediate relative status and self-petition process for widows whose marriages lasted for at least two years).

[50] *Id.*

surviving spouse to self-petition for immediate relative status within two years of the citizen spouse's death, but explicitly limits the self-petition process only to surviving spouses whose citizen spouses die after two years of marriage.[51] However, in October 2009, Congress amended § 1151 ("2009 Amendment") and deleted the two-year marriage requirement for widows to self-petition.[52]

Despite the 2009 Amendment, courts remain split, based on the two relevant sentences in § 1151(b)(2)(A)(i), regarding how to define spouse for purposes of immediate relative status.[53] In particular, courts question whether a spouse includes the surviving spouse, or the widow.[54] The only statutory definition of a spouse is a husband or wife of the opposite sex.[55] As such, the absence of relevant interpretations regarding surviving spouses results in inconsistent holdings concerning the widow penalty.[56] With such little guidance, courts consider interpretations of immigration law statutes and agency deference to resolve ambiguity surrounding the term.[57]

To define a spouse for immediate relative status, courts primarily analyze the statutory language in § 1151(b)(2)(A)(i).[58] Specifically, courts rely on the plain meaning rule, which applies a natural reading of § 1151.[59] Moreover, courts consider the common definitions of spouse as a relevant factor.[60] However, courts differ as to the plain

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[51] *See id.* (requiring that widow self-petition for immediate relative status within two years of citizen spouse's death or before she remarries).

[52] *See* 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 2009) (deleting two-year marriage requirement in 2009 Amendment that is present in 2006 version); Oyejide, *supra* note 7, at 541-42; *cf.* Elias, *supra* note 7, at 210-11 (providing proposed amendments with similar language to 2009 Amendment).

[53] *See Lockhart*, 573 F.3d at 255; *Robinson*, 554 F.3d at 362; *Freeman*, 444 F.3d at 1033.

[54] *See Lockhart*, 573 F.3d at 254; Taing v. Napolitano, 567 F.3d 19, 24-25 (1st Cir. 2009); *Robinson*, 554 F.3d at 362; *Freeman*, 444 F.3d at 1037-38.

[55] 1 U.S.C. § 7 (2006) (defining spouse); *Taing*, 567 F.3d at 24-25; Feldheim, *supra* note 7, at 1882.

[56] *See Lockhart*, 573 F.3d at 263 (holding that surviving spouse is spouse for immigration purposes); *Taing*, 567 F.3d at 21 (holding that widow can attain immediate relative status as spouse); *Robinson*, 554 F.3d at 367 (holding that widow cannot achieve spousal status for immigration purposes); *Freeman*, 444 F.3d at 1043 (holding that widow remains immediate relative of U.S. citizen after spouse's death).

[57] *See Lockhart*, 573 F.3d at 255-56, 262; *Taing*, 567 F.3d at 23-30; *Freeman*, 444 F.3d at 1037-40; *infra* Part I.C; *see also* Feldheim, *supra* note 7, at 1885-89.

[58] *See Taing*, 567 F.3d at 26; *Robinson*, 554 F.3d at 362-67; *Freeman*, 444 F.3d at 1039-43.

[59] *See Taing*, 567 F.3d at 24 (discussing plain meaning rule); *Robinson*, 554 F.3d at 364; *Freeman*, 444 F.3d at 1039-43.

[60] *See Taing*, 567 F.3d at 25 (discussing relevant statutes to determine common

meaning of the definition of a spouse, which results in conflicting decisions regarding the widow penalty.[61]

### 1. Rejecting the Widow Penalty

Some circuit courts hold against the widow penalty in favor of surviving spouses, the beneficiaries of immigration petitions.[62] A prime example is the Ninth Circuit's decision in *Freeman v. Gonzales*.[63] There, a surviving spouse, Mrs. Freeman, held dual citizenship in Italy and South Africa when she married a U.S. citizen.[64] After their marriage, Mr. Freeman properly submitted immigration forms to adjust Mrs. Freeman's status to legal permanent resident based on their spousal relationship.[65] However, Mr. Freeman died during the couple's first year of marriage, and USCIS enforced the widow penalty, denying Mrs. Freeman's immigration forms.[66] Pursuant to its statutory interpretation of § 1151(b)(2)(A)(i), the Ninth Circuit reversed USCIS's decision to apply the widow penalty and granted Mrs. Freeman immediate relative status.[67]

The *Freeman* court applied the plain meaning rule to conclude that the widow penalty did not apply to Mrs. Freeman.[68] The court found that the plain language of the statute suggested that the court review the statute's two sentences separately.[69] The court observed that the first sentence includes spouse as an immediate relative.[70] The first sentence also includes parents, but requires the child to be at least twenty-one years old for the parent to qualify as an immediate

law definition of spouse in context of widow penalty); *Robinson*, 554 F.3d at 364; *Freeman*, 444 F.3d at 1039-43.

[61] *See Lockhart*, 573 F.3d at 263 (holding that under immigration law, surviving spouse is spouse); *Taing*, 567 F.3d at 21 (finding that widow is spouse for immediate relative status purposes); *Robinson*, 554 F.3d at 367 (holding that widow is not immediate relative for immigration purposes); *Freeman*, 444 F.3d at 1043 (finding that surviving spouse qualifies as spouse even after husband's death).

[62] *See Lockhart*, 573 F.3d at 263 (ruling in favor of widow for attainment of immediate relative status); *Taing*, 567 F.3d at 31 (same); *Freeman*, 444 F.3d at 1043 (same).

[63] *Freeman*, 444 F.3d at 1043.

[64] *Id.* at 1032.

[65] *Id.* at 1033.

[66] *Id.*

[67] *Id.* at 1039-43.

[68] *See id.* at 1039-40.

[69] *See id.* at 1039; Feldheim, *supra* note 7, at 1900.

[70] *See Freeman*, 444 F.3d at 1039.

relative.[71] The *Freeman* court concluded that an omission of a similar qualifier for spouse reflects Congress's deliberate intention not to limit the definition of spouse.[72] Without restrictions on the definition of spouse, the court held that a spouse's death does not affect a surviving spouse's qualification for immediate relative status.[73] Consequently, Mrs. Freeman, a surviving spouse, remained a spouse under a broad interpretation of § 1151(b)(2)(A)(i), which precluded application of the widow penalty.[74]

Applying its interpretation of the plain meaning rule, the *Freeman* court next interpreted the statute's second sentence as support for a broad definition of spouse.[75] The second sentence in § 1151(b)(2)(A)(i) contains a two-year marriage requirement for a widow to self-petition.[76] The court perceived the second sentence as a mere procedural requirement for a widow to self-petition for permanent residency.[77] In reaching this decision, the court noted that the statute never explicitly voids a noncitizen widow's spousal status upon the citizen spouse's death.[78] The court concluded that the self-petitioning process described in the second sentence of § 1151(b)(2)(A)(i) only pertains to widows whose citizen spouses do not petition for them before death.[79] Thus, the court interpreted the second sentence as an opportunity for these widows to obtain permanent resident status without their citizen spouse to vouch for them.[80] Therefore, if a citizen spouse already initiated the immigration

[71] *See* 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 2009); § 1151(b)(2)(A)(i) (2006) (amended 2009); *Freeman*, 444 F.3d at 1039.

[72] *See Freeman*, 444 F.3d at 1039.

[73] *See id.* at 1039-40.

[74] *See id.* at 1043.

[75] *See id.* at 1039-40.

[76] *See* 8 U.S.C. § 1151(b)(2)(A)(i) (noting second sentence's language); Robinson v. Napolitano, 554 F.3d 358, 364 (3d Cir. 2009) (interpreting two-year marriage requirement differently than that in *Freeman*); *Freeman*, 444 F.3d at 1039 (noting that *Freeman* court considered two-year requirement as time period within which widow must file petition).

[77] *See id.* at 1039, 1041 (noting that second sentence provides guidelines and requirements if widow is to self-petition).

[78] *See id.* at 1041 (describing second sentence as self-petition process for widows whose husbands cannot vouch for them).

[79] *See Freeman*, 444 F.3d at 1039, 1041-42; Oyejide, *supra* note 7, at 525 (considering statute's second sentence as safety net for widows whose husbands never filed petition on their behalf); *see also* Feldheim, *supra* note 7, at 1901 (describing how plaintiffs in widow penalty cases describe second sentence as broadening rather than narrowing scope of immediate relative).

[80] *See* sources cited *supra* note 79.

process, the self-petition process and its two-year marriage requirement are inapplicable to a surviving spouse.[81] Because Mr. Freeman had filed the immigration petitions after their marriage, his death did not affect Mrs. Freeman's eligibility for immediate relative status.[82]

To further support the interpretation that the second sentence does not affect a widow's qualification for immediate relative status, the court considered analogous federal regulations.[83] Under 8 C.F.R. §§ 204.1-.2, a noncitizen spouse has two distinct avenues to become a legal permanent resident.[84] The citizen spouse can either petition for legal permanent residency or the widow can self-petition.[85] Moreover, these regulations do not void a noncitizen spouse's immigration petitions upon the citizen spouse's death.[86] By analogy, the *Freeman* court concluded that Congress intended the two sentences of § 1151(b)(2)(A)(i) to refer to two separate processes.[87] Therefore, despite a citizen spouse's death, the surviving spouse still remains eligible to obtain permanent residency so long as the citizen spouse already initiated the immigration process.[88]

The *Freeman* court also analyzed permanent residency under 8 U.S.C. § 1186a to support its conclusion that a widow is eligible for immediate relative status.[89] Section 1186a provides that if USCIS grants permanent residency based on a spousal relationship, the status

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[81] *See Freeman*, 444 F.3d at 1041; Feldheim, *supra* note 7, at 1901-03 (describing how according to the government, plaintiffs like Mrs. Freeman qualify for spouse in first sentence but do not qualify for self-petition process in second sentence of statute); Oyejide, *supra* note 7, at 525 (describing one court that found second sentence as applicable only when noncitizen surviving spouse petitions on own behalf).

[82] *See Freeman*, 444 F.3d at 1041.

[83] *See id.*

[84] *See id.* at 1041-42; 8 C.F.R. §§ 204.1-.2 (2007); *cf.* Feldheim, *supra* note 7, at 1901 (interpreting plaintiffs' assertions that two sentences refer to different processes).

[85] *See Freeman*, 444 F.3d at 1041-42; 8 C.F.R. §§ 204.1-.2 (noting that there are two different procedures, one for citizen spouse to petition and one for widow to self-petition); *see also* Lockhart v. Napolitano, 573 F.3d 251, 257 (6th Cir. 2009) (borrowing *Freeman*'s reasoning regarding these federal regulations).

[86] *See Freeman*, 444 F.3d at 1041-42; *see also Lockhart*, 573 F.3d at 257 (supporting its decision with language from 8 U.S.C. § 1154). *See generally* 8 C.F.R. §§ 204.1-.2 (discussing two different procedures for citizen spouse and widow to petition without voiding either petition upon death).

[87] *See Freeman*, 444 F.3d at 1041-42.

[88] *See id.*; *see also Lockhart*, 573 F.3d at 257. *But see* Robinson v. Napolitano, 554 F.3d 358, 364 (3d Cir. 2009) (discussing these regulations as merely procedures by which citizen spouse petitions for relative status).

[89] *See Freeman*, 444 F.3d at 1042.

is conditional until the couple's two-year anniversary.[90] However, § 1186a specifies that the citizen spouse's death, even if it occurs during the two-year period, is not grounds for terminating permanent resident status.[91] Accordingly, the *Freeman* court denounced the widow penalty as unfair treatment towards widows with pending petitions for permanent residency.[92] Thus, the court concluded that based on § 1186a, a citizen spouse's death does not affect a widow's eligibility for immediate relative status.[93]

Similar to the Ninth Circuit's decision in *Freeman*, the First Circuit in *Taing v. Napolitano*, as well as other courts rejecting the widow penalty, considered common-usage meanings to support their interpretation that a widow constitutes a spouse for purposes of § 1151.[94] At the time of the INA's enactment, *Black's Law Dictionary* defined spouse to be a husband or wife.[95] This entry also defined a surviving spouse as a husband or wife who outlives the other spouse.[96] Thus, widows as surviving spouses are eligible for immediate relative status because the common-usage meaning of a spouse also includes a surviving spouse.[97] However, not all courts follow this interpretation of § 1151.[98]

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90 *See* 8 U.S.C.A. § 1186a(b) (West 2000).

91 *See id.* (noting that USCIS can terminate status if marriage was not bona fide or if couple annulled or terminated marriage, but not if citizen spouse died).

92 *See Freeman*, 444 F.3d at 1042; *see also Lockhart*, 573 F.3d at 260 (determining that Congress could not intend arbitrary, irrational, and inequitable treatment for petitions depending on when government grants approval); Taing v. Napolitano, 567 F.3d 19, 31 (1st Cir. 2009) (describing court's public policy rationale of fairness towards widows regardless of when USCIS reviewed petitions).

93 *See Freeman*, 444 F.3d at 1042.

94 *See Taing*, 567 F.3d at 25; *see also Lockhart*, 573 F.3d at 258-60; Feldheim, *supra* note 7, at 1914-15 (discussing common meanings of spouse).

95 *See Lockhart*, 573 F.3d at 258-60; BLACK'S LAW DICTIONARY 1574 (4th ed. 1951); *see also* Feldheim, *supra* note 7, at 1914-15.

96 *See Lockhart*, 573 F.3d at 258-60; Rosell v. State Indus. Accident Comm'n, 95 P.2d 726, 729 (Or. 1939) (describing definition of surviving spouse that is also in dictionary); BLACK'S LAW DICTIONARY, *supra* note 95, at 1574.

97 *See Lockhart*, 573 F.3d at 258; *Taing*, 567 F.3d at 25; Feldheim, *supra* note 7, at 1914-15. *But see* Robinson v. Napolitano, 554 F.3d 358, 367 (3d Cir. 2009).

98 *See* Feldheim, *supra* note 7, at 1914-16 (describing conflict between widows' and government's interpretation). *Compare Lockhart*, 573 F.3d at 258 (providing one interpretation of entry of spouse in *Black's Law Dictionary*), *with Robinson*, 554 F.3d at 367 (providing another interpretation of *Black's Law Dictionary* entry).

2. Enforcing the Widow Penalty

USCIS's practice is to enforce the widow penalty and deny immediate relative status to a widow whose citizen spouse dies before two years of marriage.[99] Some courts follow USCIS's policy and find that the plain meaning rule favors the widow penalty in immigration disputes.[100] A Third Circuit case, *Robinson v. Napolitano,* illustrates the reasoning of courts that adopt the widow penalty.[101] In *Robinson*, Mrs. Robinson, a Jamaican citizen, married Louis Robinson, an American citizen.[102] Mr. Robinson immediately filed petitions to establish his wife as an immediate relative and legal permanent resident.[103] However, Mr. Robinson died before USCIS processed the petitions.[104] After his death, USCIS denied Mrs. Robinson immediate relative status upon review of the petitions because Mrs. Robinson no longer qualified as a spouse of a citizen.[105]

The *Robinson* court relied on statutory interpretation and congressional intent to affirm USCIS's denial of Mrs. Robinson's petitions.[106] Like other courts adopting the widow penalty, the *Robinson* court applied the plain meaning rule to find a narrow definition of spouse in § 1151(b)(2)(A)(i).[107] The court determined that the statute's language implies that the two sentences regarding spouses are dependent upon each other, and therefore, must be read together.[108] The court viewed the second sentence's two-year marriage requirement as clarifying eligibility for an immediate relative in the

[99] *See Lockhart*, 573 F.3d at 253-54 (discussing USCIS's denial of Mrs. Lockhart's immigration forms upon death of her spouse); *Robinson*, 554 F.3d at 360 (following USCIS's determination that Mrs. Robinson no longer qualified as spouse when citizen spouse died); Freeman v. Gonzales, 444 F.3d 1031, 1033 (9th Cir. 2006) (determining that Mrs. Freeman, as widow, no longer qualified as spouse); Oyejide, *supra* note 7, at 515 (noting that USCIS initiated widow's deportation process).

[100] *See Robinson*, 554 F.3d at 366; Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 740 (E.D. Mich. 2006); *see also* Final Reply Brief for Respondents-Appellants at 1-2, Lockhart v. Chertoff, 573 F.3d 251 (6th Cir. 2009) (No. 08-3321).

[101] *See Robinson*, 554 F.3d at 367.

[102] *Id.* at 360.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See id.* at 362-68; Feldheim, *supra* note 7, at 1900-03 (describing government's assertion in widow penalty cases, upon which *Robinson* relied); *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 2-8 (describing rationale contrary to *Lockhart*'s holding but consistent with *Robinson*).

[107] *See Robinson*, 554 F.3d at 364.

[108] *See id.* (stating that courts should not divorce first sentence of statute from second sentence).

first sentence.[109] In other words, the second sentence limits a widow from qualifying as a spouse for immediate relative status under § 1151 if her husband dies before two years of marriage.[110] Moreover, the *Robinson* court did not distinguish between widows whose spouses filed petitions before their death and those whose spouses had not.[111] Accordingly, the two-year marriage requirement pertains to all surviving spouses regardless of whether their spouses filed petitions on their behalf, and it precludes all widows married short of two years from self-petitioning for legal permanent residence.[112]

The *Robinson* court also determined that the usage of present tense in similar statutes supports USCIS's enforcement of the widow penalty.[113] Both 8 U.S.C. § 1154, which governs immigrant visas, and 8 U.S.C. § 1255(a), which describes eligibility for adjustment of status, use the present tense.[114] The use of present tense suggests that a marriage must currently exist to gain immediate relative status under § 1151(b)(2)(A)(i).[115] Because surviving spouses are no longer in a present marriage, they cannot qualify for immediate relative status.[116]

The *Robinson* court also considered the common-usage meaning of spouse to support USCIS's practice.[117] Contrary to *Freeman*, *Robinson* held that a distinction between spouses and surviving spouses in *Black's Law Dictionary* implies an inherent difference between the

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[109] *See id.*

[110] *See id.* at 364-65 (suggesting that reading second sentence in conjunction with first sentence implies second sentence limits spouse in first sentence); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 740 (E.D. Mich. 2006); *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 4-6.

[111] *See Robinson*, 554 F.3d at 364.

[112] *See id.*

[113] *See id.* at 363-67. *Compare id.* at 363 (describing significance of relevant statutes' usage of present tense), *with* Taing v. Napolitano, 567 F.3d 19, 28 (1st Cir. 2009) (disagreeing with government's interpretation that usage of present tense is persuasive), *and* Freeman v. Gonzales, 444 F.3d 1031, 1042 (9th Cir. 2006) (focusing analysis on interpretation of other statutes without reference to issue of present tense).

[114] *Robinson*, 554 F.3d at 363 (concluding that USCIS determines eligibility when it adjudicates petition, which requires individual to have valid marriage to living person when government adjusts status); *see* 8 U.S.C.A. § 1154(b) (West 2009) (utilizing present tense, requiring that facts are currently true); 8 U.S.C.A. § 1255(a) (West 2009) (utilizing present tense and permitting government to adjust noncitizen's permanent resident status if noncitizen currently qualifies as immediate relative).

[115] *Robinson*, 554 F.3d at 363.

[116] *See id. See generally* 8 U.S.C.A. § 1154(b) (requiring that information in petitions is current); 8 U.S.C.A. § 1255(a) (allowing government to adjust permanent resident status if noncitizen is currently eligible for immigrant visa).

[117] *See Robinson*, 554 F.3d at 366.

terms.[118] Distinguishing spouse from surviving spouse demonstrates that the former does not include the latter for immediate relative status purposes.[119] Thus, the *Robinson* court held that the widow penalty applies to surviving spouses because surviving spouses are not spouses according to common-usage meanings.[120]

### C. Agency Deference: Chevron Deference

In addition to conflicting statutory interpretation of § 1151(b)(2)(A)(i), courts differ as to the appropriate level of agency deference regarding USCIS's practices.[121] *Chevron* deference examines an agency's interpretation by applying a two-step process to determine whether a court should adopt an agency's interpretation rather than substitute its own interpretation.[122] *Chevron* Step One considers whether congressional intent exists regarding a particular statute.[123] If Congress's intent is clear, then both courts and agencies must follow the expressed intent in applying the law.[124] If, however, the statute's language is ambiguous, *Chevron* Step Two directs courts to defer to the

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[118] *See id.*; *see also* Dibble v. Dibble, 100 N.E.2d 451, 461 (Ohio Ct. App. 1950) (stating that marriage is valid only until death, indicating that surviving spouse differs from spouse); 52 AM. JUR. 2D *Marriage* § 10 (2000) (stating that death, divorce, dissolution, or annulment terminates marriage).

[119] *See Robinson*, 554 F.3d at 366.

[120] *See id.*; *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 8-10. *But see* Oyejide, *supra* note 7, at 537 (interpreting surviving spouses as spouses under common law).

[121] *See* Lockhart v. Napolitano, 573 F.3d 251, 262 (6th Cir. 2009); Freeman v. Gonzales, 444 F.3d 1031, 1038 (9th Cir. 2006); Feldheim, *supra* note 7, at 1893-99.

[122] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) (describing two-step process for court to review agency's construction of statute); Feldheim, *supra* note 7, at 1893-99; *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14 (discussing importance of deference to agency's interpretation).

[123] *Chevron*, 467 U.S. at 842-43 (describing two-pronged test to determine whether courts will defer to agency's construction of statute); *see* Elias, *supra* note 7, at 191-92; Feldheim, *supra* note 7, at 1893-99.

[124] *Chevron*, 467 U.S. at 842-43 (describing first step as determining whether congressional intent is clear); *see* Feldheim, *supra* note 7, at 1893-99; *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14 (requiring deference to USCIS's interpretation if congressional intent is not clear).

agency's interpretation of the statute.[125] However, the agency's interpretation of the statute must be reasonable to satisfy Step Two.[126]

Commentators suggest adding an initial step, *Chevron* Step Zero, which would ask whether the analysis for *Chevron* deference applies at all.[127] *Chevron* deference is inapplicable if the agency lacks the power to interpret the statute or if the agency's decision lacks the force of law.[128] Policy statements, agency manuals, opinion letters, and other such agency decisions generally lack the force of law and, therefore, do not merit *Chevron* deference.[129] On the other hand, an agency's formal adjudication qualifies for *Chevron* deference.[130] Thus, under Step Zero, courts would proceed to *Chevron*'s two-pronged analysis only once they determine that *Chevron* properly applies.[131]

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[125] *See Lockhart*, 573 F.3d at 262 (directing courts to defer to agency interpretation if statute is ambiguous, although *Lockhart* found statute clear and so did not defer); *Freeman*, 444 F.3d at 1038; Feldheim, *supra* note 7, at 1893-99. *See generally Chevron*, 467 U.S. 837 (requiring analysis to proceed to Step Two if congressional intent is unclear).

[126] *See* Burger v. McElroy, No. 97 Civ. 8775, 1999 WL 203353, at *5 (S.D.N.Y. Apr. 12, 1999) (discussing importance of agency's permissible interpretation). *See generally Chevron*, 467 U.S. 837 (noting second prong allows deference to agency's interpretation if permissible); Feldheim, *supra* note 7, at 1893-99.

[127] Feldheim, *supra* note 7, at 1894-1900; Thomas W. Merrill & Kristin E. Hickman, Chevron's *Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006).

[128] *See* Feldheim, *supra* note 7, at 1886; Merrill & Hickman, *supra* note 1277, at 837 (noting that extending *Chevron* deference to less formal interpretations would nullify procedural safeguards); Sunstein, *supra* note 127, at 209 (stating that when agency interprets statute it administers, interpretation falls under *Chevron* framework). *But see* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that courts can consider rulings, interpretations, and opinions of various federal bodies to determine if deference is proper).

[129] *See* Feldheim, *supra* note 7, at 1886; *see also* Sunstein, *supra* note 127, at 211 (noting that *Chevron* deference pertains to judgments involving formal rulemaking and agency decisions that have force of law); *cf. Skidmore*, 323 U.S. at 140 (holding that rulings, interpretations, and opinions of various federal bodies are relevant to determine if deference is proper); Merrill & Hickman, *supra* note 127, at 836 (describing *Skidmore* deference as multi-factor approach).

[130] *See* Feldheim, *supra* note 7, at 1886; Merrill & Hickman, *supra* note 127, at 837 (requiring deference to agency's decision that results from legislative rulemaking or binding adjudication); Sunstein, *supra* note 127, at 211 (noting that *Chevron* deference pertains to decisions that have force of law).

[131] *See Chevron*, 467 U.S. at 842-43; Feldheim, *supra* note 7, at 1894; *cf.* Lockhart v. Napolitano, 573 F.3d 251, 262 (6th Cir. 2009) (determining that analysis of *In re Varela* implies failure of *Chevron* Step Zero, which precludes court from conducting *Chevron* analysis).

In the context of the widow penalty, *Chevron* deference inquires as to whether courts will defer to USCIS's interpretation.[132] USCIS's traditional policy denies a surviving spouse immediate relative status if the citizen spouse dies within two years of marriage.[133] USCIS's practice results from a formal administrative adjudication.[134] In the *In re Varela* decision, an immigrant's citizen spouse filed the necessary petitions for the immigrant to attain permanent residency, but the citizen spouse died a few months after the couple's wedding.[135] After USCIS denied the noncitizen widow's immigration petitions, she appealed to the Board of Immigration Appeals ("BIA").[136] The BIA held that the citizen spouse's death stripped the widow of immediate relative status.[137] *In re Varela* serves as USCIS's precedential interpretation of an immediate relative and provides a framework for enforcing the widow penalty.[138]

*In re Sano*, however, disputed *In re Varela*'s legitimacy as USCIS's foundation for the widow penalty.[139] *In re Sano* held that the BIA has jurisdiction to review appeals only by a petitioner or a citizen spouse,

[132] *See* Freeman v. Gonzales, 444 F.3d 1031, 1038-39 (9th Cir. 2006); Feldheim, *supra* note 7, at 1893-1919 (describing *Chevron* deference in context of widow penalty and USCIS's role as relevant agency); *see, e.g.*, *Lockhart*, 573 F.3d at 262. *See generally Chevron*, 467 U.S. at 844 (holding that administrative agency's interpretation has controlling weight unless it is arbitrary or capricious, or contradicts statute).

[133] *See, e.g.*, *Lockhart*, 573 F.3d at 255 (noting USCIS's policy to deny immediate-relative status upon death of citizen spouse); *Freeman*, 444 F.3d at 1033 (same). *See generally* Feldheim, *supra* note 7, at 1875-76 (describing USCIS's theory that statute permits it to deny immigration petitions if citizen spouse dies before USCIS adjudicates petition).

[134] *In re* Varela, 13 I. & N. Dec. 453, 453 (B.I.A. 1970) (holding that surviving spouse is not spouse for immediate-relative status); *see* Robinson v. Napolitano, 554 F.3d 358, 362 (3d Cir. 2009) (describing *In re Varela* in context of widow penalty); Feldheim, *supra* note 7, at 1887-88.

[135] *In re Varela*, 13 I. & N. Dec. at 453; Feldheim, *supra* note 7, at 1887-88.

[136] *See In re Varela*, 13 I. & N. Dec. at 453; Feldheim, *supra* note 7, at 1887-88 (noting that *In re Varela* widow, as beneficiary of petitions, appealed denial of immigrant petitions in BIA).

[137] *In re Varela*, 13 I. & N. Dec. at 454 (holding that citizen spouse's death stripped noncitizen surviving spouse of immediate relative status); *see also* Feldheim, *supra* note 7, at 1887-88.

[138] *See* Burger v. McElroy, No. 97 Civ. 8775, 1999 WL 203353, at *5 (S.D.N.Y. Apr. 12, 1999) (describing adherence to decision of *In re Varela* as deference to USCIS's practice); Feldheim, *supra* note 7, at 1888 (describing *In re Sano* decision as modifying *In re Varela*). *See generally In re Varela*, 13 I. & N. Dec. at 453 (describing USCIS's default interpretation).

[139] *See In re* Sano, 19 I. & N. Dec. 299, 300-01 (B.I.A. 1985); *see also* Lockhart v. Napolitano, 573 F.3d 251, 262 (6th Cir. 2009) (discussing *In re Varela*'s legitimacy after *In re Sano*); Feldheim, *supra* note 7, at 1888.

rather than by a noncitizen surviving spouse.[140] Because *In re Varela* involved a widow's appeal to the BIA, *In re Sano* dismissed the *In re Varela* decision as inappropriate because the widow lacked standing with the BIA.[141] Consequently, some courts question whether *In re Varela* properly satisfies *Chevron* Step Zero to warrant deference to USCIS's practice of enforcing the widow penalty.[142]

Courts that follow USCIS's practice of enforcing the widow penalty find that *In re Varela* satisfies *Chevron* Step Zero.[143] Proceeding with the two-pronged test, these courts find that *Chevron* Step One fails because of a lack of clear congressional intent behind § 1151.[144] Such courts defer to USCIS's practice to apply the widow penalty under Step Two, finding that USCIS's practice is reasonable.[145] Conversely, courts holding against the widow penalty argue that *Chevron* deference is inapplicable because *In re Varela* fails Step Zero under *In re Sano*, which dismissed *In re Varela* as an appropriate precedent for USCIS to follow.[146] Moreover, clear congressional intent to allow immediate relative status satisfies Step One, based on the statute's language.[147]

[140] *See In re Sano*, 19 I. & N. Dec. at 300-01; Feldheim, *supra* note 7, at 1888 (noting that *In re Sano* forced subsequent widows to resort to federal courts for recovery).

[141] *See In re Sano*, 19 I. & N. Dec. at 300-01.

[142] *See Lockhart*, 573 F.3d at 262; Robinson v. Napolitano, 554 F.3d 358, 362 (3d Cir. 2009) (showing deference to *In re Varela*); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 738 (E.D. Mich. 2006).

[143] *See Robinson*, 554 F.3d at 362; Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14; Feldheim, *supra* note 7, at 1893-99; *see also* Sunstein, *supra* note 127, at 211 (noting that *Chevron* deference is applicable when agency judgments have force of law).

[144] *See Robinson*, 554 F.3d at 362; Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14 (implying that there is lack of clear congressional intent to satisfy *Chevron* Step One by instead deferring to agency's interpretation under Step Two); Feldheim, *supra* note 7, at 1893-99. *See generally* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) (requiring clear congressional intent to satisfy Step One).

[145] *See* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 13-14; Feldheim, *supra* note 7, at 1893-99; *see also Robinson*, 554 F.3d at 362 (criticizing district court for not citing *In re Varela*, implying that *In re Varela* is reasonable).

[146] *See Lockhart*, 573 F.3d at 262 (holding that congressional intent is clear so deference to *In re Varela* under *Chevron* is inappropriate); Taing v. Napolitano, 567 F.3d 19, 30 (1st Cir. 2009) (holding that *In re Varela* does not apply because *In re Sano* rendered it nonprecedential); Feldheim, *supra* note 7, at 1898-1905 (describing *Chevron* Step Zero and Step One in context of widow penalty).

[147] *See* Freeman v. Gonzales, 444 F.3d 1031, 1038-39 (9th Cir. 2006) (ending analysis at Step One because intent is ascertainable); Feldheim, *supra* note 7, at 1898-1905 (considering *Chevron*'s first prong and whether Congress has directly spoken on issue). *See generally Chevron*, 467 U.S. at 842-43 (describing *Chevron*'s two-pronged

Thus, under this interpretation, reaching *Chevron* Step Two to defer to USCIS's interpretation is unnecessary.[148] The dispute regarding deference to USCIS's enforcement of the widow penalty leads courts to utilize judicial interpretation of the statute, as discussed in *Lockhart*.[149]

## II. *LOCKHART V. NAPOLITANO*

*Lockhart v. Napolitano* is a recent Sixth Circuit decision confronting and rejecting USCIS's practice to enforce the widow penalty.[150] Mrs. Lockhart, a citizen of the Philippines, married a U.S. citizen.[151] The Lockharts timely filed Forms I-130 and I-485 to classify Mrs. Lockhart as Mr. Lockhart's immediate relative and to petition for adjustment of residency status, respectively.[152]

During their second year of marriage, however, Mr. Lockhart died from a heart attack.[153] USCIS had yet to review either of the immigration petitions.[154] Six months later, USCIS denied both petitions on the grounds that Mrs. Lockhart was no longer Mr. Lockhart's spouse.[155] Mrs. Lockhart appealed, alleging that her husband's death did not preclude her from obtaining immediate relative status.[156]

On appeal, the Sixth Circuit affirmed the lower court's ruling against USCIS's decision, holding that a widow qualifies as a spouse for immediate relative status.[157] In its decision against the widow penalty, the Sixth Circuit considered the plain meaning of § 1151(b)(2)(A)(i).[158] Relying on *Freeman*, the *Lockhart* court reviewed the two sentences pertaining to spouses in § 1151(b)(2)(A)(i) as distinct provisions because they are separate sentences.[159] Because the first sentence does not contain a qualifier for

test).

[148] *See Lockhart*, 573 F.3d at 262; *Taing*, 567 F.3d at 30; Feldheim, *supra* note 7, at 1897-98.

[149] *See Lockhart*, 573 F.3d at 262; *Taing*, 567 F.3d at 30; *Freeman*, 444 F.3d at 1038-39; Feldheim, *supra* note 7, at 1897-1905; *infra* Part II.

[150] *See Lockhart*, 573 F.3d 253.

[151] *Id.* at 253.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 254 (discussing Mrs. Lockhart's appeal).

[157] *Id.* at 263.

[158] *Id.* at 255.

[159] *Id.* at 256.

spouse — unlike parents who only qualify if their citizen child is at least twenty-one years old — the court reasoned that Congress did not intend to limit the definition of a spouse.[160] Additionally, the court considered the second sentence as a separate procedural requirement to self-petition for widows whose spouses did not initiate the immigration process.[161] Finally, the court determined that a single *Black's Law Dictionary* entry to define both spouse and surviving spouse suggests no distinction between the terms.[162] Thus, *Lockhart*'s plain reading of § 1151(b)(2)(A)(i) resulted in the interpretation that a citizen spouse's death does not disqualify the noncitizen widow from obtaining immediate relative status.[163]

In addition to the plain meaning of a statute, courts consider the applicability of *Chevron* deference when an agency interpretation of a statute is present.[164] The *Lockhart* court chose not to apply *Chevron* deference to USCIS's decision to enforce the widow penalty under *In re Varela*'s interpretation of § 1151(b)(2)(A)(i).[165] *Lockhart* held that the statute clearly indicates congressional intent for the definition of spouse to include surviving spouses.[166] Because the statute's clear congressional intent satisfies *Chevron* Step One, the court chose not to defer to the *In re Varela* decision to deny widows immediate relative status.[167]

However, even if congressional intent were unclear pursuant to Step One, *Lockhart* held that Step Zero precludes courts from deferring to *In re Varela.*[168] *In re Sano* found that the *In re Varela* court lacked jurisdiction, thus precluding *Chevron* deference to USCIS's practice

[160] *Id.*; *see* 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (amended 2009) (comparing first sentence with second sentence, noting that first sentence contains qualifier for parents but omits similar qualifier for spouse); Freeman v. Gonzales, 444 F.3d 1031, 1040 (9th Cir. 2006).

[161] *Lockhart*, 573 F.3d at 256-57.

[162] *Id.* at 258 (noting that court considered *Black's Law Dictionary* and, like *Freeman*, noted that dictionary defines surviving spouse under same heading as spouse).

[163] *Id.*

[164] *See id.* at 262; Feldheim, *supra* note 7, at 1885-88 (considering *Chevron*'s first step and whether Congress's intent is clear). *See generally* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) (describing *Chevron* deference to agency interpretation).

[165] *Lockhart*, 573 F.3d at 262.

[166] *Id.*

[167] *Id.*

[168] *Id.*; *see, e.g.*, *In re* Sano, 19 I. & N. Dec. 299, 300-01 (B.I.A. 1985) (noting that *In re Sano* precludes deference to *In re Varela*); *see also* Feldheim, *supra* note 7, at 1886 (describing types of decisions that qualify for *Chevron* deference under Step Zero).

under Step Zero.[169] Because *Lockhart* found *In re Varela* inapplicable, the court independently evaluated the widow penalty and ruled against its applicability.[170]

## III. Analysis

The *Lockhart* decision incorrectly refused to apply the widow penalty, allowing a noncitizen to attain immediate relative status after her citizen spouse's death.[171] The court erred because its holding does not comport with principles of statutory interpretation, precedential jurisprudence, or public policy.[172] First, *Lockhart* incorrectly interpreted the plain meaning of § 1151(b)(2)(A)(i) by failing to read together the two sentences pertaining to spouses.[173] Second, the court should have applied *Chevron* deference because USCIS's interpretation of the statute is a reasonably permissible construction of the statute.[174] Finally, the *Lockhart* decision is inconsistent with the public policy rationale of immigration statutes as promoting family reunification.[175]

### *A.* Lockhart *Incorrectly Interpreted the Plain Meaning of 8 U.S.C. § 1151(b)(2)(A)(i)*

*Lockhart* incorrectly held that the statutory language of § 1151(b)(2)(A)(i) permitted Mrs. Lockhart to obtain immediate relative status after her husband's death.[176] The court misapplied the plain meaning rule in interpreting § 1151(b)(2)(A)(i) to imply that the definition of a spouse includes a surviving spouse.[177] First,

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[169] *See Lockhart*, 573 F.3d at 262; *see, e.g.*, *In re Sano*, 19 I. & N. Dec. at 300-01 (noting that *In re Sano* precludes deference to *In re Varela*). *See generally* Merrill & Hickman, *supra* note 127, at 837 (noting that extending *Chevron* deference to less formal interpretations nullifies safeguards currently in place); Sunstein, *supra* note 127, at 209 (determining that *Chevron* deference is applicable when agency makes interpretation of statute that it administers).

[170] *Lockhart*, 573 F.3d at 262.

[171] *Id.* at 262-63. *See generally supra* Part II (providing background on *Lockhart* decision).

[172] *See infra* Part III.A-C.

[173] *See infra* Part III.A.

[174] *See infra* Part III.B.

[175] *See infra* Part III.C.

[176] *See infra* Part III.A. *But see Lockhart*, 573 F.3d at 255-61; Feldheim, *supra* note 7, at 1890-91 (discussing *Freeman*'s decision, which *Lockhart* followed to conclude that surviving spouse is spouse).

[177] *See Lockhart*, 573 F.3d at 255-61; U. S. *ex rel.* A+ Homecare v. Medshares Mgmt. Grp., Inc., 400 F.3d 428, 442 (6th Cir. 2005) (stating that courts must first consider natural reading of text, then common law meaning of statutory terms, and lastly

*Lockhart* disregarded the second sentence of § 1151(b)(2)(A)(i) instead of recognizing its qualifying limitation on the definition of a spouse that appears in the first sentence.[178] Second, the court improperly ignored common-usage meanings that contradict a surviving spouse's characterization as a spouse.[179] Consequently, the *Lockhart* court erroneously refused to enforce the widow penalty and inappropriately granted immediate relative status to the surviving spouse.[180]

First, *Lockhart*'s interpretation that the two sentences are distinct from each other, warranting individual analysis, does not comport with a plain reading of the statute.[181] A plain reading of the two sentences pertaining to spouses in § 1151(b)(2)(A)(i) requires reading the two sentences together comprehensively.[182] Although a period at the end of a sentence signals a pause, it does not necessarily complete the writer's entire thought.[183] Further, a sentence usually does not contain everything that is necessary to fully understand its meaning, making outside sources, such as surrounding sentences, particularly helpful.[184] Because surrounding sentences often bear on a statute's true meaning, a plain reading of § 1151(b)(2)(A)(i) requires courts to examine the provision in its entirety to glean its proper meaning.[185]

statutory and legislative history); *see also* Feldheim, *supra* note 7, at 1899 (suggesting that starting point for statutory interpretation is always statute's language).

[178] *See generally Lockhart*, 573 F.3d at 256 (describing rationale for interpretation of two relevant sentences); Robinson v. Napolitano, 554 F.3d 358, 364 (3d Cir. 2009) (stating that courts should read two sentences together); Oyejide, *supra* note 7, at 527-28 (describing *Turek* court's decision to read two sentences comprehensively to define spouse in first sentence).

[179] *See* BLACK'S LAW DICTIONARY, *supra* note 95, at 1574; *see also* 52 AM. JUR. 2D *Marriage* § 8 (2000) (stating that death, decree of divorce, dissolution, or annulment terminates marriage). *But see Lockhart*, 573 F.3d at 259-60.

[180] *Lockhart*, 573 F.3d at 263.

[181] *See generally Robinson*, 554 F.3d at 364 (stating that courts should read two sentences of statute together); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 738-39 (E.D. Mich. 2006) (describing statute's second sentence as imposing limitations on first sentence); Oyejide, *supra* note 7, at 527-28 (describing *Turek* court's decision to read two sentences comprehensively to define spouse).

[182] *See generally* sources cited *supra* note 181 (suggesting that courts should read two sentences of statute together to determine definition of spouse).

[183] *See generally* sources cited *supra* note 181 (describing rationale for courts to read two sentences of statute together, which limits definition of spouse in first sentence).

[184] *See generally* sources cited *supra* note 181 (determining that two sentences are not separate because part of same provision).

[185] *See Robinson*, 554 F.3d at 364 (stating that natural reading of statute cannot divorce two sentences from each other); *see also* Final Reply Brief for Respondents-

The first sentence of § 1151(b)(2)(A)(i) clearly delineates individuals who qualify as an immediate relative and suggests that a widow is not a spouse.[186] Notably, the first sentence does not include a surviving spouse in its enumeration of immediate relatives.[187] Moreover, courts should find that the second sentence provides an exception to the eligible immediate relatives listed in the first sentence.[188] This exception grants immediate relative status to widows who self-petition, but only if the marriage lasted for at least two years at the time of the citizen spouse's death.[189] The language of the two-year marriage requirement demonstrates that Congress contemplated a premature death and addressed this possibility in the second sentence.[190] Thus, the marriage requirement clarifies the definition of spouse by providing that surviving spouses cannot attain spousal status after the citizen spouse's death if the marriage lasted for less than two years.[191]

Additionally, the second sentence of § 1151(b)(2)(A)(i) does not distinguish between widows whose spouses initiated the immigration process and those whose spouses did not.[192] Like *Freeman*, the *Lockhart* court held that the second sentence's two-year marriage requirement does not apply to widows whose spouses initiated the

Appellants, *supra* note 100, at 2-4 (stating that two sentences are dependent on each other); Oyejide, *supra* note 7, at 527-28 (describing *Turek* court's finding that two sentences are dependent on each other in order to glean meaning).

[186] *See* 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 2009); 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (amended 2009) (noting that 2009 Amendment altered 2006 version, but first sentence did not change); *Robinson*, 554 F.3d at 364; *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 2-4 (describing two sentences as unfragmented whole).

[187] *See* sources cited *supra* note 186.

[188] *See Robinson*, 554 F.3d at 365; Final Reply Brief for Respondents-Appellants, *supra* note 100, at 4-6 (showing how second sentence applies to all widows and limits surviving spouses from qualifying as spouses); *see also* 8 U.S.C. § 1151(b)(2)(A)(i) (providing 2006 version of statute).

[189] *See* sources cited *supra* note 188.

[190] *See Robinson*, 554 F.3d at 364-65 (concluding that two-year requirement in second sentence results in spouse losing immediate relative status when citizen spouse dies); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 738-39 (E.D. Mich. 2006) (stating that Congress contemplated citizen spouse's premature death in second sentence, which imposes limitation on surviving spouse qualifying as immediate relative); Final Reply Brief for Respondents-Appellants, *supra* note 100, at 4-6 (describing second sentence as pertaining to all widows).

[191] *See* sources cited *supra* note 190.

[192] *See Robinson*, 554 F.3d at 364; Elias, *supra* note 7, at 195 (describing second sentence as limitation); Feldheim, *supra* note 7, at 1902 (summarizing Government's argument).

immigration process.[193] However, without a clear statement in the statute to this effect, such interpretation is an improper and unsupported inference that contradicts a plain reading of the statute.[194] Consequently, Congress intended the two-year marriage requirement to limit all widows seeking immediate relative status.[195] This limitation applies regardless of whether the citizen spouse had petitioned on behalf of the noncitizen spouse.[196] By applying the plain meaning rule and reading the statute in its entirety, the second sentence's exception clarifies the definition of immediate relative status.[197] Therefore, a noncitizen surviving spouse can only attain status as an immediate relative if the marriage lasted two years and the surviving spouse self-petitions for immediate relative status.[198]

Had the *Lockhart* court properly applied the plain meaning rule to interpret the statute, the court would have found that the second sentence limits the definition of spouse in the first sentence, thus requiring enforcement of the widow penalty.[199] Mrs. Lockhart's marriage lasted for less than two years before her U.S. citizen spouse died.[200] As such, Mrs. Lockhart does not qualify for the self-petition exception.[201] The conclusion remains the same even though Mrs.

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[193] *See* Lockhart v. Napolitano, 573 F.3d 251, 256 (6th Cir. 2009); Freeman v. Gonzales, 444 F.3d 1031, 1041 (9th Cir. 2006). *But see Robinson*, 554 F.3d at 364.

[194] *See* sources cited *supra* note 190.

[195] *See* sources cited *supra* note 190.

[196] *See* sources cited *supra* note 190.

[197] *See Robinson*, 554 F.3d at 365 (describing how second sentence's effect qualifies spouse, just as last clause of first sentence qualifies parents). *See generally* 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (amended 2009) (providing relevant statute); Final Reply Brief for Respondents-Appellants, *supra* note 100, at 2-6 (discussing necessity of reading statute in entirety).

[198] *See* 8 U.S.C. § 1151(b)(2)(A)(i) (noting two-year marriage requirement in second sentence of statute in 2006 version of statute); *Robinson*, 554 F.3d at 364-65 (concluding that two-year requirement in second sentence implies that surviving spouse ceases status as immediate relative upon citizen spouse's death); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 738-39 (E.D. Mich. 2006) (stating that limitation on surviving spouse exists because Congress contemplated citizen spouse's death in second sentence); Final Reply Brief for Respondents-Appellants, *supra* note 100, at 4-6 (describing applicability of second sentence's marriage requirement to all widows).

[199] *See Robinson*, 554 F.3d at 364-65; *Turek*, 450 F. Supp. 2d at 738-39. *See generally* Lockhart v. Napolitano, 573 F.3d 251, 256 (6th Cir. 2009) (discussing *Lockhart*'s application of plain meaning rule to hold in opposition to widow penalty).

[200] *Lockhart*, 573 F.3d at 253.

[201] *See Robinson*, 554 F.3d at 365; Elias, *supra* note 7, at 195. *See generally* 8 U.S.C. § 1151(b)(2)(A)(i) (noting that self-petition process requires marriage of at least two years in 2006 version of statute); *Lockhart*, 573 F.3d at 253 (stating that Mrs.

Lockhart's spouse filed the immigration petitions prior to his death because the self-petition exception pertains to all surviving spouses equally, regardless of whether the citizen spouse filed the immigration petitions.[202] Consequently, a plain reading of § 1151(b)(2)(A)(i) lawfully precludes a noncitizen widow like Mrs. Lockhart from attaining immediate relative status for purposes of obtaining permanent residence.[203]

Second, contrary to *Lockhart*'s plain reading of § 1151(b)(2)(A)(i), the common-usage meaning of spouse does not include a surviving spouse.[204] At the time of the INA's enactment, *Black's Law Dictionary* distinguished a surviving spouse from a spouse, although the terms appeared within the same entry.[205] This distinction implies that the terms carry different meanings, thereby suggesting they should not be treated as the same for immigration purposes.[206] Additionally, *Lockhart* ignored state common law interpretations providing that marriage terminates upon death.[207] Because congressional intent and federal statutes do not explicitly define spouse, state law can help guide the court's interpretation of the term.[208] Pursuant to state common law definitions and laws, an immediate relative only includes spouses of living individuals.[209] Therefore, because Mrs. Lockhart's husband was dead, Mrs. Lockhart did not qualify as a spouse for purposes of immediate relative status.[210]

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Lockhart's marriage lasted one year and eleven months before citizen spouse's death).

[202] *See Lockhart*, 573 F.3d at 256; *see also* 8 U.S.C. § 1151(b)(2)(A)(i) (discussing 2006 version of statute and noting that second sentence contains no provision stating that sentence only applies to certain widows); Freeman v. Gonzales, 444 F.3d 1031, 1040 (9th Cir. 2006).

[203] *See Robinson*, 554 F.3d at 365; Elias, *supra* note 7, at 195; Feldheim, *supra* note 7, at 1905.

[204] *See Robinson*, 554 F.3d at 366. *But see Lockhart*, 573 F.3d at 258-60. *See generally* BLACK'S LAW DICTIONARY, *supra* note 95, at 1574 (defining spouse and surviving spouse separately although terms are within same entry).

[205] *See Lockhart*, 573 F.3d at 258; *Robinson*, 554 F.3d at 366. *See generally* BLACK'S LAW DICTIONARY, *supra* note 95, at 1574 (making distinction between definition of spouse and surviving spouse).

[206] *See Robinson*, 554 F.3d at 366; Feldheim, *supra* note 7, at 1914-15. *But see Lockhart*, 573 F.3d at 258; Taing v. Napolitano, 567 F.3d 19, 25-26 (1st Cir. 2009).

[207] *See Lockhart*, 573 F.3d at 259-60.

[208] *See* 1 U.S.C. § 7 (2006) (providing statutory definition of spouse as someone of opposite sex who is husband or wife); *Robinson*, 554 F.3d at 366; Feldheim, *supra* note 7, at 1917-18. *But see Lockhart*, 573 F.3d at 258-60.

[209] *See Robinson*, 554 F.3d at 366; Final Reply Brief for Respondents-Appellants, *supra* note 100, at 8-11. *But see Lockhart*, 573 F.3d at 258-60.

[210] *See* sources cited *supra* note 209.

Critics may argue that the 2009 Amendment removes any limitation on the definition of spouse and now allows widows to attain immediate relative status.[211] The 2009 Amendment to § 1151(b)(2)(A)(i) omitted the two-year marriage requirement for self-petitioning.[212] This omission implies that there is also no limitation on surviving spouses whose petitions are pending with USCIS.[213] After 2009, any widow, regardless of length of marriage, and whether her spouse had already petitioned, can self-petition for immediate relative status.[214] Thus, because surviving spouses can still attain immediate relative status by self-petitioning, critics claim the widow penalty does not apply to deny widows immediate relative status.[215]

However, this counterargument fails because the 2009 Amendment does not change the interpretation of the statute.[216] Even without the two-year marriage requirement to self-petition, the 2009 Amendment still requires a surviving spouse to petition for immediate relative status within two years after the citizen spouse dies.[217] This

[211] *See* 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 2009); Oyejide, *supra* note 7, at 541-42; *see also* Feldheim, *supra* note 7, at 1923 (describing proposed amendment with similar language to 2009 Amendment that would have abolished widow penalty).

[212] *See* Oyejide, *supra* note 7, at 541-42. *Compare* 8 U.S.C.A. § 1151(b)(2)(A)(i) (noting removal of two-year marriage requirement after 2009 Amendment), *with* 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (amended 2009) (noting two-year marriage requirement in 2006 version of statute).

[213] *See* 8 U.S.C.A. § 1151(b)(2)(A)(i) (discussing 2009 amended version of statute); Oyejide, *supra* note 7, at 541-42; *cf.* Elias, *supra* note 7, at 210-11 (describing proposed amendment with similar language to 2009 Amendment that would grant relief to widows).

[214] Oyejide, *supra* note 7, at 541-42. *Compare* 8 U.S.C.A. § 1151(b)(2)(A)(i) (deleting two-year marriage requirement in second sentence's self-petition process after 2009 Amendment), *with* 8 U.S.C. § 1151(b)(2)(A)(i) (requiring two-year marriage for widow to self-petition in 2006 version of statute).

[215] *See* Oyejide, *supra* note 7, at 541-42; *see also* Elias, *supra* note 7, at 210-11 (mentioning proposed amendment that appears similar to 2009 Amendment and would allow widows to escape widow penalty). *See generally* 8 U.S.C.A. § 1151(b)(2)(A)(i) (deleting two-year marriage requirement after 2009 Amendment, which tends to suggest that all surviving spouses can automatically attain immediate relative status).

[216] *See generally* 8 U.S.C.A. § 1151(b)(2)(A)(i) (noting that 2009 version only deletes two-year marriage requirement); Final Reply Brief for Respondents-Appellants, *supra* note 100, at 6-8 (noting that marriage involves living people, so approach that immediate relative status persists forever is incorrect); BLACK'S LAW DICTIONARY, *supra* note 95, at 1574 (noting that separate sentences in this entry does not change with 2009 Amendment).

[217] *See* Lockhart v. Napolitano, 573 F.3d 251, 257 (6th Cir. 2009) (discussing requirements for self-petitioning); Robinson v. Napolitano, 554 F.3d 358, 364 (3d Cir.

requirement creates an inference that a surviving spouse does not automatically gain immediate relative status.[218] Instead of automatically granting status, the court should have waited for Mrs. Lockhart to self-petition for immediate relative status within the two-year statute of limitations.[219] Thus, even with the 2009 Amendment, the court incorrectly decided *Lockhart* based on a flawed statutory interpretation of § 1151(b)(2)(A)(i).[220] Rather, the *Lockhart* court should have given *Chevron* deference to USCIS's interpretation in enforcing the widow penalty.[221]

### *B. Chevron Deference Applies in Lockhart*

The *Lockhart* court failed to apply *Chevron* deference to USCIS's decision to follow *In re Varela*'s interpretation of an immediate relative.[222] Instead, the court held that *Chevron* deference did not apply because *In re Varela* lacked sufficient precedential value to satisfy *Chevron* Step Zero.[223] However, the *Lockhart* court's refusal to apply *Chevron* deference to USCIS's practice was erroneous because *In re Varela* both constitutes the force of law and reasonably interprets § 1151(b)(2)(A)(i).[224]

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2009) (same). *Compare* 8 U.S.C.A. § 1151(b)(2)(A)(i) (noting that second sentence of 2009 version, while deleting two-year marriage requirement, still contains two-year statute of limitations for widow to self-petition), *with* 8 U.S.C. § 1151(b)(2)(A)(i) (describing 2006 version of statute and noting two-year statute of limitations for widow to self-petition).

[218] *See* sources cited *supra* note 217.

[219] *Compare* 8 U.S.C.A. § 1151(b)(2)(A)(i) (noting that 2009 version of statute maintains two-year statute of limitations for widow to self-petition although deletes two-year marriage requirement), *with* 8 U.S.C. § 1151(b)(2)(A)(i) (recognizing that 2006 version of statute contains two-year statute of limitations for widow to self-petition). *But see* Oyejide, *supra* note 7, at 541-42.

[220] *See Lockhart*, 573 F.3d at 262. *But see* Elias, *supra* note 7, at 210-11 (arguing that removal of two-year requirement will remove USCIS's basis for revoking widows' petitions); Oyejide, *supra* note 7, at 541-42.

[221] *See Lockhart*, 573 F.3d at 262; *supra* Part III.A. *See generally In re Varela*, 13 I. & N. Dec. 453, 453 (B.I.A. 1970) (describing USCIS's practice to enforce widow penalty); Feldheim, *supra* note 7, at 1887-88 (discussing USCIS's practice).

[222] *See Lockhart*, 573 F.3d at 262. *See generally In re Varela*, 13 I. & N. Dec. 453 (establishing agency's interpretation of statute); Feldheim, *supra* note 7, at 1887-88 (describing *In re Varela* decision).

[223] *See* sources cited *supra* note 222.

[224] *Compare* Robinson v. Napolitano, 554 F.3d 358, 362 (3d Cir. 2009) (determining that courts should not defer to USCIS's interpretation), *with Lockhart*, 573 F.3d at 262 (refusing to apply *Chevron* deference because *In re Varela* lacks force of law). *See generally* Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) (holding that courts should defer to agency's interpretation).

*Chevron* Step Zero requires courts to inquire as to whether *Chevron* deference even applies to an agency's interpretation.[225] *Lockhart* incorrectly held that *In re Varela* did not merit *Chevron* deference on the grounds that the BIA lacked jurisdiction to hear the case.[226] However, *In re Varela* constitutes the force of law under *Chevron* Step Zero because *In re Sano*, although seemingly contradictory, did not overrule *In re Varela*'s interpretation of a spouse for purposes of establishing immediate relative status.[227] *In re Sano* did not reach the question of who qualifies as a spouse for immediate relative status.[228] Rather, *In re Sano* merely addressed a procedural issue and concluded that the BIA may not hear appeals from an immigration petition's beneficiary.[229] Moreover, as a published BIA opinion supported by a subsequent affidavit, *In re Varela* remains the force of law and warrants *Chevron* deference for spousal determinations.[230] Therefore,

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[225] *See* Elias, *supra* note 7, at 191-92; Feldheim, *supra* note 7, at 1886; *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14.

[226] *See Robinson*, 554 F.3d at 362; *In re* Sano, 19 I. & N. Dec. 299, 301 (B.I.A. 1985); *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14; Feldheim, *supra* note 7, at 1895-99. *See generally Lockhart*, 573 F.3d at 262 (describing how *In re Sano* held that *In re Varela* court did not have jurisdiction to hear case).

[227] *See Robinson*, 554 F.3d at 362 (discussing government's argument that *In re Varela* is controlling); *In re Sano*, 19 I. & N. Dec. at 301; *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14 (noting that *In re Sano* did not question *In re Varela*'s holding that surviving spouse is not spouse); Feldheim, *supra* note 7, at 1886, 1895-99 (suggesting that *In re Varela* is not policy statement, agency manual, or opinion letter, all of which USCIS does not have power to interpret).

[228] *See In re Sano*, 19 I. & N. Dec. at 301 (dismissing the case because of lack of jurisdiction).

[229] *See id.* at 301; Feldheim, *supra* note 7, at 1888; *see also* Burger v. McElroy, No. 97 Civ. 8775, 1999 WL 203353, at *6 (S.D.N.Y. Apr. 12, 1999) (making no mention of *In re Sano* overruling *In re Varela*'s interpretation, but rather requiring deference to *In re Varela*).

[230] *See* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14; *see also* Barnhart v. Walton, 535 U.S. 212, 213 (2002) (stating that courts should not ignore agency's longstanding interpretation simply because agency reached interpretation through less formal rulemaking); Merrill & Hickman, *supra* note 127, at 837 (noting that extending *Chevron* deference to less formal interpretations would nullify safeguards currently in place); Sunstein, *supra* note 127, at 209 (stating that agency's interpretation of statute that it administers falls under *Chevron* framework). *But see* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (providing more flexible ways to determine if deference is proper, which would make analysis under *Chevron* Step Zero unnecessary); *Lockhart*, 573 F.3d at 262 (disallowing *Chevron* deference to *In re Varela*); Elias, *supra* note 7, at 194 (describing *In re Varela* as not deserving *Chevron* deference). *See generally* Affidavits of Support on Behalf of Immigrants, 71 Fed. Reg. 35,732 (June 21, 2006) (stating in Part G that there is no authority to grant immigrant visas after petitioner dies).

*In re Varela* satisfies *Chevron* Step Zero, which entitles courts to pursue the *Chevron* two-pronged test.[231]

Following *Chevron*'s two-pronged analysis, *Chevron* Step One considers whether congressional intent is clear.[232] Federal regulations that mention *In re Varela* and decisions, such as *Robinson*, that interpret § 1151(b)(2)(A)(i), support Congress's intent to withhold authority for USCIS to approve a noncitizen spouse's immigration petitions following the citizen spouse's death.[233] Therefore, Congress's intent regarding 8 U.S.C. § 1151(b)(2)(A)(i) clarifies that a surviving spouse is not a spouse.[234] Thus, the *Lockhart* court should have denied Mrs. Lockhart immediate relative status because clear congressional intent satisfies *Chevron* Step One.[235]

Even if the court found ambiguity such that the statute fails to meet *Chevron* Step One, *Chevron* Step Two applies to enforce the widow penalty according to USCIS's interpretation.[236] An agency's

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[231] *See Robinson*, 554 F.3d at 362; Feldheim, *supra* note 7, at 1895-99. *But see Lockhart*, 573 F.3d at 262 (concluding that *Chevron* deference is inapplicable to *In re Varela*).

[232] Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) (stating that courts must always first ask whether Congress has directly spoken on issue); *see* Elias, *supra* note 7, at 192 (determining that congressional intent is clear so courts do not need to defer to *In re Varela*); Feldheim, *supra* note 7, at 1899.

[233] *See Robinson*, 554 F.3d at 362 (opposing district court's finding that congressional intent is clear that surviving spouse is spouse). *But see Lockhart*, 573 F.3d at 262 (determining that congressional intent is clear that surviving spouse is spouse but providing no congressional support for this view). *See generally* Affidavits of Support on Behalf of Immigrant Communities, 71 Fed. Reg. 35,732 (mentioning *In re Varela* in Section G but providing no authority to approve immigration petition after petitioner dies).

[234] *See Robinson*, 554 F.3d at 362 (opposing district court's finding that congressional intent is clear that surviving spouse is spouse); S. REP. NO. 89-748, at 4 (1965) (Conf. Rep.) (describing congressional intent as conforming to immigration law's purpose of reuniting families by admitting close relatives into country); *see, e.g.*, Affidavits of Support on Behalf of Immigrant Communities, 71 Fed. Reg. 35,732 (evidencing congressional intent because section G mentions *In re Varela* and states that there is no authority to approve immigration petition after petitioner dies). *But see Lockhart*, 573 F.3d at 262 (determining that congressional intent is clear in finding that surviving spouse is spouse); Elias, *supra* note 7, at 192 (determining that congressional intent is clear so courts do not need to defer to *In re Varela*).

[235] *See* Freeman v. Gonzales, 444 F.3d 1031, 1038 (9th Cir. 2006) (describing how courts must give effect to unambiguously expressed intent of Congress). *But see Lockhart*, 573 F.3d at 262 (finding that congressional intent is clear for opposite position). *See generally Chevron*, 467 U.S. at 843 (describing how courts must follow congressional intent if it is clear).

[236] *Chevron*, 467 U.S. at 843 (stating that courts should defer to agency's interpretation because agency administers statute); *see Freeman*, 444 F.3d at1038;

interpretation is controlling unless it is arbitrary, capricious, or manifestly contrary to the statute.[237] USCIS's practice of enforcing the widow penalty stems from statutory interpretation of immigration statutes and common law definitions of a spouse.[238] USCIS's interpretation that widows are not spouses embodies precedential jurisprudence from *In re Varela*.[239] Therefore, due to reasonable inferences, USCIS's interpretation is not arbitrary.[240] Thus, according to *Chevron* Step Two, *Lockhart* should have deferred to USCIS's reasonable interpretation of the widow penalty and denied immediate relative status to the noncitizen surviving spouse.[241]

Critics may argue that the 2009 Amendment makes *Chevron* inapplicable.[242] The 2009 Amendment affects *Chevron* Step One, which inquires about congressional intent.[243] The 2009 Amendment omits the two-year marriage requirement for a surviving spouse to self-petition.[244] Critics argue that even if congressional intent was previously unclear, the 2009 Amendment indicates congressional intent to allow all widows to attain immediate relative status, regardless of the marriage's duration.[245] With clear congressional

Feldheim, *supra* note 7, at 1894, 1914.

[237] *Chevron*, 467 U.S. at 844; *see* Elias, *supra* note 7, at 191-92 (requiring courts to consider language of immigration law, and if it is ambiguous, then courts should defer to USCIS's interpretation if reasonable); Feldheim, *supra* note 7, at 1885-86 (allowing deference if agency's determination follows permissible construction of statute in light of underlying law).

[238] *See* BLACK'S LAW DICTIONARY, *supra* note 95, at 1574; *see also* 8 U.S.C. § 1151(b)(2)(A)(i) (2006) (amended 2009); Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14; 52 AM. JUR. 2D *Marriage* § 8 (2000).

[239] *See In re* Varela, 13 I. & N. Dec. 453, 453 (B.I.A. 1970); *see also Robinson*, 554 F.3d at 362 (discussing *In re Varela* and following USCIS's rationale to hold in favor of widow penalty); Burger v. McElroy, No. 97 Civ. 8775, 1999 WL 203353, at *5 (S.D.N.Y. Apr. 12, 1999) (following USCIS's practice in favor of widow penalty).

[240] *See Robinson*, 554 F.3d at 362, 367; *In re Varela*, 13 I. & N. Dec. at 453; Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14.

[241] *See Chevron*, 467 U.S. at 843; Final Reply Brief for Respondents-Appellants, *supra* note 100, at 11-14; Feldheim, *supra* note 7, at 1914 (discussing deference as appropriate when agency interpretation is reasonable).

[242] *See* 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 2009); Elias, *supra* note 7, at 210-11 (describing amendment with similar language to 2009 Amendment, which suggests that USCIS has no basis to revoke petitions); Oyejide, *supra* note 7, at 516 (describing broad effects of 2009 Amendment).

[243] *See* § 1151(b)(2)(A)(i) (describing 2009 Amendment); Elias, *supra* note 7, at 210-11 (discussing similar amendment to 2009 amendment that deletes two-year marriage requirement); Oyejide, *supra* note 7, at 541-42.

[244] *See* § 1151(b)(2)(A)(i) (providing 2009 Amendment).

[245] *See id.* (showing 2009 Amendment); Feldheim, *supra* note 7, at 1921-23 (describing proposed amendments with similar language to 2009 Amendment that

intent satisfying *Chevron* Step One, critics contend that deference to *In re Varela*'s enforcement of the widow penalty under Step Two is unnecessary.[246]

However, this counterargument fails because the 2009 Amendment does not affect the application of *Chevron* deference to *In re Varela* in *Lockhart*.[247] Although the 2009 Amendment grants relief for widows who self-petition, it does not otherwise automatically evidence Congress's intent to include a surviving spouse as a spouse for immediate relative status.[248] Without an explicit congressional statement, courts cannot assume that Congress intended to change the definition of spouse with the 2009 Amendment.[249] Thus, the *Chevron* analysis does not satisfy Step One because intent for the 2009 Amendment to include a widow as a spouse remains unclear.[250] Therefore, courts should defer to USCIS's decision to follow *In re Varela* pursuant to *Chevron* Step Two and hold in favor of the widow penalty.[251] By failing to apply *Chevron* deference to USCIS's policy, the *Lockhart* court improperly allowed Mrs. Lockhart to gain immediate

would abolish widow penalty); Oyejide, *supra* note 7, at 541-42.

[246] *See* § 1151(b)(2)(A)(i) (considering language of 2009 Amendment); Freeman v. Gonzales, 444 F.3d 1031, 1038 (9th Cir. 2006) (describing two-step process for *Chevron*); *see also Chevron*, 467 U.S. at 842-43 (explaining first prong of *Chevron* regarding whether Congress's intent is clear); Oyejide, *supra* note 7, at 534.

[247] *See* § 1151(b)(2)(A)(i) (providing statute after 2009 Amendment). *But see* Oyejide, *supra* note 7, at 523-24 (noting that because author wrote article after 2009 Amendment, *Chevron* does apply). *See generally In re* Sano, 19 I. & N. Dec. 299, 301 (B.I.A. 1985) (noting that 2009 Amendment does not change *In re Sano*'s holding that *In re Varela* was inappropriate based on improper jurisdiction).

[248] *See* § 1151(b)(2)(A)(i) (showing language of 2009 Amendment). *But see* Oyejide, *supra* note 7, at 523-24 (stating that *Chevron* does apply because author wrote article after 2009 Amendment). *See generally Chevron*, 467 U.S. at 842-43 (noting that analysis under *Chevron* Step Two is unnecessary if congressional intent is clear, pursuant to Step One).

[249] *See, e.g.*, Dep't of Homeland Sec. Appropriations Act of 2010, Pub. L. No. 111-83, § 568(c)(1), 123 Stat. 2186 (2009), *available at* http://www.ssad.org/images/Pub_L_No_111-83.pdf (discussing 2009 Amendment as striking language pertaining to two-year marriage requirement, but not changing definition of spouse); FREQUENTLY ASKED QUESTIONS ON THE HISTORIC PASSAGE OF THE BILL TO END THE WIDOW PENALTY, *Surviving Spouses Against Deportation*, 1 (Oct. 29, 2009), *available at* http://ssad.org/images/Legislation_Passed_FAQ.pdf (describing self-petition process for all widows after 2009 Amendment without explicitly changing definition of spouse); *see also* Oyejide, *supra* note 7, at 541-42 (implying that congressional intent is unclear because there is only predictive information on 2009 Amendment's effect).

[250] *See* sources cited *supra* note 249.

[251] *See, e.g.*, Robinson v. Napolitano, 554 F.3d 358, 362 (3d Cir. 2009); Final Reply Brief of Respondents-Appellants, *supra* note 100, at 11-14; *see also In re* Varela, 13 I. & N. Dec. 453, 453 (B.I.A. 1970).

relative status.[252] In addition to ignoring agency interpretation, rejecting USCIS's interpretation also violates settled public policy underlying family-based immigration.[253]

### *C.* Lockhart *Contradicts Immigration Law's Goal to Bring Families Together*

Public policy underlying family-based immigration seeks to reunite noncitizen family members with their citizen family members.[254] *Lockhart*'s position to grant immediate relative status to all noncitizen widows contradicts the goal of family reunification.[255] Because the qualifying spouse is not alive, the widow no longer has a family to reunite with in the United States.[256] Other relationships, such as a parent or child, must exist for the widow to qualify for immediate relative status.[257] Without a qualifying relationship, the widow stands in the same position as any other individual who desires to immigrate.[258] As a result, granting automatic permanent residency to widows creates a slippery slope that permits individuals without a qualifying relationship to immigrate to the United States.[259]

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[252] *Compare* Lockhart v. Napolitano, 573 F.3d 251, 262 (6th Cir. 2009) (allowing widow immediate relative status because court opposed widow penalty), *with Robinson*, 554 F.3d at 364 (disallowing widow immediate relative status because court deferred to USCIS's practice). *See generally Chevron*, 467 U.S. 837 (holding that courts should defer to agency's interpretation).

[253] *See Robinson*, 554 F.3d at 367; S. REP. NO. 89-748, at 4 (1965) (Conf. Rep.) (showing that reunification of families is foremost consideration); *see also* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 15-16 (describing purpose of immigration policy as promoting unity within families).

[254] *See* sources cited *supra* note 253.

[255] *See* sources cited *supra* note 253. *But see Lockhart*, 573 F.3d at 263.

[256] *See* sources cited *supra* note 253.

[257] *See* 8 U.S.C.A. § 1151(b)(2)(A)(i) (West 2009) (noting characterization of qualifying relationships as parent, child, or spouse even after 2009 Amendment); *cf.* Elias, *supra* note 7, at 173 (describing widows' deportation upon husbands' death); Feldheim, *supra* note 7, at 1874 (describing many cases across country of family members who face immediate deportation when qualifying relationship no longer exists).

[258] *Cf.* Elias, *supra* note 7, at 173 (discussing deportation of widows upon citizen spouse's death); Feldheim, *supra* note 7, at 1874 (noting situations where individuals face deportation upon death of qualifying family member); Oyejide, *supra* note 7, at 515 (indicating that widow has nothing to live for).

[259] *See* 8 U.S.C.A. § 1151(a)-(b) (describing quotas for immigration); *cf.* Robinson v. Napolitano, 554 F.3d 358, 367 (3d Cir. 2009) (describing how individuals without qualifying relationship cannot attain legal permanent resident status); Feldheim, *supra* note 7, at 1874. *See generally* 8 U.S.C.A. § 1154 (West 2009) (requiring immediate-relative relationship to gain legal permanent resident status, which implies that not

Conversely, the two-year marriage requirement to qualify as an immediate relative under § 1151(b)(2)(A)(i) promotes the public policy goal of family reunification.[260] A two-year marriage allows a widow sufficient time to establish family ties in the United States.[261] During this time, the widow can build relationships with the citizen spouse's relatives or have children within the marriage.[262] Ignoring the two-year marriage requirement essentially ignores the purpose for changing immigrant status of noncitizen spouses.[263] *Lockhart*'s decision to grant surviving spouses immediate relative status without the safeguard of the two-year marriage disregards the purpose of family-based immigration: family reunification.[264]

Even assuming that the 2009 Amendment was in effect during the *Lockhart* decision, an automatic grant of immediate relative status does not comport with public policy of promoting marriage for the purpose of establishing genuine families.[265] For USCIS to confer immediate relative status to a surviving spouse who self-petitions, a surviving spouse must submit evidence that the marriage was sincere.[266] Family-based immigration only protects genuine marriages, not sham

everyone can immigrate).

[260] *See* Final Reply Brief for Respondents-Appellants, *supra* note 100, at 15-16; *see also* S. REP. NO. 89-748, at 4 (1965) (Conf. Rep.). *But see Robinson*, 554 F.3d at 367 (stating that allowing immediate relative status to widows generally does not promote immigration's purpose).

[261] *See Robinson*, 554 F.3d at 367; Final Reply Brief for Respondents-Appellants, *supra* note 100, at 15-16 (describing how ability to immigrate only extends to qualifying individuals); *cf.* Oyejide, *supra* note 7, at 520 (determining how two-year period protects against threat of sham marriages).

[262] *See* sources cited *supra* note 261.

[263] *See* sources cited *supra* note 261.

[264] *See Robinson*, 554 F.3d at 367; Final Reply Brief for Respondents-Appellants, *supra* note 100, at 15-17; S. REP. NO. 89-748, at 4. *See generally* Lockhart v. Napolitano, 573 F.3d 251, 257 (6th Cir. 2009) (describing court's decision to ignore two-year language in statute's second sentence).

[265] S. REP. NO. 89-748, at 4 (describing immigration's purpose to reunite families); *see also Green Card for an Immediate Relative of a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis (follow "Green Card through Family" hyperlink and "Green Card for an Immediate Relative of a U.S. citizen" hyperlink) (last visited Feb. 28, 2012) (stating that promoting family unity is purpose of family-based immigration). *See generally Robinson*, 554 F.3d at 367 (emphasizing reunification of families as essential to immigration law).

[266] *See* 8 U.S.C.A. § 1186a (West 2000) (describing legal permanent resident status as conditional for two years); *see also* Freeman v. Gonzales, 444 F.3d 1031, 1042 (9th Cir. 2006); Oyejide, *supra* note 7, at 520 (describing consequences if USCIS establishes marriage was fraudulent).

marriages.[267] *Lockhart*'s decision, however, permits surviving spouses to obtain immediate relative status without providing USCIS the chance to confirm that the marriage was bona fide.[268] Thus, *Lockhart*'s decision ignores important safeguards and defeats immigration's public policy rationale of reuniting families and ensuring genuine bases for immigration.[269]

## CONCLUSION

The widow penalty has elicited much debate and criticism over the years.[270] At first glance, the widow penalty may seem unfair, subjective, and arbitrary, as widows receive different treatment depending on when USCIS adjudicates her immigration petition.[271] Mrs. Lockhart's situation was unfortunate, as she lost both her husband and her opportunity to become a legal permanent resident in the United States.[272] By holding against the widow penalty, the *Lockhart* decision contemplates fairness considerations and mitigates many of these criticisms.[273]

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[267] *See Robinson*, 554 F.3d at 367; *see also* § 1186a; Oyejide, *supra* note 7, at 519-20.

[268] *See* § 1186a (requiring conditional status of permanent residency to ensure genuine marriages); Oyejide, *supra* note 7, at 519-20 (discussing danger of sham marriages to immigration). *But see Lockhart*, 573 F.3d at 263 (allowing surviving spouse immediate relative status without considering impact on immigration law).

[269] *See Robinson*, 554 F.3d at 367; S. REP. NO. 89-748, at 4 (showing that reunification of families is foremost consideration). *See generally Lockhart*, 573 F.3d 251 (disregarding immigration laws' purpose because there is no mention within opinion).

[270] *See Lockhart*, 573 F.3d at 260 (stating that widow penalty creates arbitrary, irrational, and inequitable outcome depending on when government decides to grant petition); Feldheim, *supra* note 7, at 1873 (noting that some courts describe USCIS's policy as unreasonable); Oyejide, *supra* note 7, at 541-42 (deeming widow penalty as unjustly casting widows out of country).

[271] *See Lockhart*, 573 F.3d at 260 (concluding that widow penalty creates unfair results for widows based on when government decides to grant petition); Taing v. Napolitano, 567 F.3d 19, 30-31 (1st Cir. 2009) (suggesting that Congress did not intend inequitable treatments among widows); Feldheim, *supra* note 7, at 1873 (noting that some courts deem widow penalty unreasonable); Oyejide, *supra* note 7, at 541-42 (stating that widow penalty unjustly forces deportation of widows).

[272] *See Lockhart*, 573 F.3d at 253 (describing death of Mrs. Lockhart's husband and denial of her immigration forms); *see also* Elias, *supra* note 7, at 173 (showing how widows suffered from grief, despair, and regret because of fear of deportation); Oyejide, *supra* note 7, at 515 (discussing how citizen spouse's death crushed all of widow's dreams).

[273] *See Lockhart*, 573 F.3d at 260 (suggesting that widow penalty creates arbitrary result depending on when government decides to grant petition); *see also Taing*, 567 F.3d at 31 (denouncing USCIS's practice as arbitrary); Freeman v. Gonzales, 444 F.3d

However, the *Lockhart* decision was erroneous because it contradicts principles of statutory interpretation, precedential jurisprudence, and public policy.[274] First, *Lockhart* incorrectly applied the plain meaning rule by reading separately the relevant sentences of § 1151(b)(2)(A)(i).[275] Rather, the court should have reviewed the sentences conjunctively to determine that the second sentence creates a limitation on surviving spouses attaining immediate relative status.[276] Second, *Lockhart* should have applied *Chevron* deference to USCIS's practice of following *In re Varela* because USCIS's interpretation of § 1151(b)(2)(A)(i) is a reasonable construction of the statute.[277] Finally, *Lockhart*'s decision fails to promote the public policy that underlies family-based immigration.[278] *Lockhart*'s faulty statutory interpretation and common law interpretations of the definition of a spouse ignore the reality that family-based immigration relies largely on the goal of family reunification.[279] Despite the 2009 Amendment, courts should enforce the widow penalty and deny immediate relative status to widows in marriages that last less than two years.[280] Although the 2009 Amendment and other recent congressional initiatives may indicate movements toward abolishing the widow penalty, Congress has not yet clearly abandoned current statutory language that supports adherence to the widow penalty.[281] Until Congress explicitly provides

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1031, 1041 (9th Cir. 2006) (implying that USCIS's practice is unjust by referring to *Freeman*'s rationale as logical).

[274] *See supra* Part III.

[275] *See supra* Part III.A.

[276] *See* Robinson v. Napolitano, 554 F.3d 358, 364-65 (3d Cir. 2009) (concluding that two-year requirement in second sentence results in spouse ceasing to be immediate relative when citizen spouse dies); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736, 738-39 (E.D. Mich. 2006) (stating that second sentence of statute indicates that Congress contemplated citizen spouse's premature death, which imposes limitation on surviving spouse qualifying as immediate relative); Final Reply Brief for Respondents-Appellants, *supra* note 100, at 4-6 (describing second sentence as pertaining to all widows).

[277] *See supra* Part III.B.

[278] *See supra* Part III.C.

[279] *See Robinson*, 554 F.3d at 367 (discussing how court's interpretation of statute is consistent with purpose of immigration); *see also* Lockhart v. Napolitano, 573 F.3d 251, 255-60 (2009); Feldheim, *supra* note 7, at 1899-1903.

[280] *See* Feldheim, *supra* note 7, at 1885 (discussing deference to USCIS's interpretation unless Congress's intent is clear); *supra* Part III. *But see* Elias, *supra* note 7, at 210-11 (describing proposed amendment similar to 2009 Amendment, which describes congressional intent as clear so courts should no longer follow widow penalty); Oyejide, *supra* note 7, at 541-42 (suggesting that 2009 Amendment abolishes widow penalty).

[281] *See* Dep't of Homeland Sec. Act of 2010, Pub. L. No. 111-83, 123 Stat. 2142,

for a different interpretation, USCIS's practice reflects proper statutory interpretation, deference to precedent, and commitment to public policy.[282]

2186 (2009) (describing deletion of two-year marriage requirement from second sentence of statute); Reuniting Families Act, S. 3514, 110th Cong. § 3(a) (2008) (proposing bill to grant relief to widows married for less than two years); H.R. 6034, 110th Cong. (2nd Sess. 2008) (describing proposed McGovern-Udall Bill which would have allowed widows whose citizen spouses died before two years of marriage to self-petition); Oyejide, *supra* note 7, at 541-42 (suggesting that new law may provide relief for widows of citizens).

[282] *See supra* Part III.A-C. *See generally Robinson*, 554 F.3d 358 (providing example of court that followed USCIS's practice); Turek v. Dep't of Homeland Sec., 450 F. Supp. 2d 736 (E.D. Mich. 2006) (same); Burger v. McElroy, No. 97 Civ. 8775, 1999 WL 203353 (S.D.N.Y. Apr. 12, 1999) (same).