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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	)
Monica Liliana Teodora ALCOTA	)
I-130 Petition for Alien Relative	)

REQUEST TO APPEAR AS *AMICUS CURIAE*

Pursuant to 8 C.F.R. § 1292.1(d), Lambda Legal Defense & Education Fund ("Lambda Legal") respectfully requests permission from the Board of Immigration Appeals (the "Board") to appear as *amicus curiae* in the matter of Monica Alcota ( ). Ms. Alcota consents to Lambda Legal's participation as *amicus curiae*.

Permitting Lambda Legal to appear for purposes of filing an *amicus curiae* brief will serve the public interest. *See* 8 C.F.R. § 1292.1(d) ("The Board may grant permission to appear, on a case-by-case basis, as amicus curiae, to an attorney or to an organization represented by an attorney, if the public interest will be served thereby.").

The application and interpretation of *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), in this case is a matter of great public interest, and Lambda Legal's constituents are directly harmed by the U.S. Citizenship and Immigration Services' effort to deny immigration protection to Ms. Alcota and similarly-situated spouses of U.S. citizens by thwarting lawful state marriage laws.

Lambda Legal is the oldest and largest legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and those living with HIV in the United States. For over 37 years, Lambda Legal's attorneys have pioneered a groundbreaking strategy to secure civil rights for LGBT and HIV-affected people, and Lambda Legal has established itself as a leading force in the modern day fight for full equality.

Lambda Legal has successfully litigated numerous cases before the U.S. Supreme Court, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal has also been involved in immigration cases, *see Soto Vega v. Gonzales*, 183 Fed. App'x 627 (9th Cir. 2006), and is currently litigating the constitutionality of DOMA, *see*

Golinski v. U.S. Office of Pers. Mgmt., No. 10-CIV-257, 2011 U.S. Dist. LEXIS 34969 (N.D. Cal. Mar. 16, 2011). Through its work, Lambda Legal has become an expert on the legal and policy issues that impact the LGBT community. Lambda Legal respectfully submits this brief to assist the Board of Immigration Appeals ("BIA") in addressing the applicability and scope of *Adams*. The proposed *amicus curiae* brief is submitted herewith.

On behalf of the proposed *amicus curiae*, I respectfully request that the Board grant Lambda Legal leave to appear and file an *amicus curiae* brief in the matter of Monica Alcota.

Dated: July 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 11, 2011, I, Iván Espinoza-Madrigal mailed or delivered a copy of the Request to Appear as *Amicus Curiae* and accompanying Brief of *Amicus Curiae* Lambda Legal Defense & Education Fund to the following parties:

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BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE & EDUCATION FUND

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INTRODUCTION

This brief, in support of Cristina Ojeda's and Monica Alcota's I-130 petition, is respectfully submitted on behalf of *amicus curiae* Lambda Legal Defense and Education Fund ("Lambda Legal").

In this case – where Ms. Alcota legally married Ms. Ojeda under Connecticut state law – the U.S. Citizenship and Immigration Services ("USCIS" or the "agency") denied the I-130 petition, finding that Ms. Alcota is not the alien relative of a U.S. citizen under *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), and the so-called Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. Improperly applying *Adams*, the USCIS found that even in the absence of DOMA, the marriage of a same-sex couple that is valid under state law would be insufficient, for purposes of federal immigration law, to confer a same-sex spouse with immigration relief. The improper application and extension of *Adams* in this case is a matter of great public interest.

Amicus respectfully submits this brief to assist the Board of Immigration Appeals (the "Board") in addressing the applicability and scope of *Adams*. More specifically, this brief explains how *Adams* has been superseded by intervening legal and legislative developments, and apprises the Board of the status of cases challenging the constitutionality of DOMA. *Amicus* urges the Board to administratively close or postpone the adjudication of this proceeding and pending immigration matters involving same-sex couples until DOMA is repealed or declared unconstitutional.

STATEMENT OF INTEREST

Lambda Legal is the oldest and largest legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") people and

those living with HIV in the United States. For over 37 years, Lambda Legal's attorneys have pioneered a groundbreaking strategy to secure civil rights for LGBT and HIV-affected people, and Lambda Legal has established itself as a leading force in the modern day fight for full equality.

Lambda Legal has successfully litigated numerous cases before the U.S. Supreme Court, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal has also been involved in immigration cases, *see Soto Vega v. Gonzales*, 183 Fed. App'x 627 (9th Cir. 2006), and is currently litigating the constitutionality of DOMA, *see Golinski v. U.S. Office of Pers. Mgmt.*, No. 10-CIV-257, 2011 U.S. Dist. LEXIS 34969 (N.D. Cal. Mar. 16, 2011). Through its work, Lambda Legal has become an expert on the legal and policy issues that impact the LGBT community. Lambda Legal's constituents are directly harmed by the USCIS' effort to deny immigration protection to Ms. Alcota and similarly situated spouses of U.S. citizens by thwarting lawful state marriage laws.

BACKGROUND

Ms. Ojeda, a U.S. citizen, is a social worker who resides with her spouse, Ms. Alcota, in Elmhurst, New York. Ms. Ojeda met Ms. Alcota on May 28, 2008, and they have been in a committed, romantic relationship since July 3, 2008. After finishing graduate school in 2009, Ms. Ojeda found employment in New York City, and began living with Ms. Alcota. They have been living together for over two years. On August 27, 2010, Ms. Ojeda and Ms. Alcota married in Norwalk, Connecticut. This marriage is lawful. *See Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008) ("Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice."); *see also* Conn.

Gen. Stat. § 46b-20 ("marriage means a legal union of two persons" of the same or different sex). It is also valid under New York state law. *See Martinez v. County of Monroe*, 50 A.D.3d 189 (N.Y. App. Div. 2008); *see also* N.Y. Dom. Rel. Law § 10-a ("a marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex").

On September 17, 2010, Ms. Ojeda filed an I-130 petition requesting that Ms. Alcota be classified as the spouse of a U.S. citizen. Although Ms. Alcota is legally married to Ms. Ojeda, the USCIS denied the I-130 petition on May 11, 2011. The USCIS indicated that even in the absence of DOMA, under *Adams*, a marriage of a same-sex couple that is valid under state law would be insufficient for purposes of federal immigration law to confer a same-sex spouse with immigration relief. As explained below, *Adams* is legally irrelevant, and the USCIS' reliance on *Adams* in Ms. Alcota's denial letter is entirely misplaced. If reference to *Adams* is an effort to suggest that even without DOMA – which has already been declared unconstitutional by courts and the Executive Branch – the agency could still deny immigration relief for same-sex couples, then the agency is wrong. The USCIS cannot insulate itself from legal developments surrounding DOMA. If DOMA is repealed or declared unconstitutional,[1] there is no legal impediment to extending immigration protections to Ms. Alcota and similarly-situated same-sex couples. *Adams* has been superseded by intervening and dispositive legal and legislative developments, and does not stand as precedent on the issue before the Board.

[1] *Amicus* agrees with petitioners that DOMA is unconstitutional and should not stand as a legal impediment to relief for Ms. Alcota, and focuses in this brief on the USCIS' inappropriate citation to *Adams*.

ARGUMENT

I. The USCIS' Reliance on *Adams* Is Misplaced and Improper

As a threshold matter, under immigration law, a U.S. citizen may petition for an "immediate relative" immigrant visa for a "spouse." Immigration and Nationality Act ("INA") § 201(b)(2)(A)(i). The term "spouse," along with the terms "husband" and "wife," are not defined in the INA except for a provision that these terms "do not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated." 8 U.S.C. § 1101(a)(35). Even *Adams* acknowledges that the INA does not define the term "spouse." 673 F.2d at 1038 (noting that the term "spouse" is undefined). Since the statute contains no express statement that "marriage" is limited to relationship between a man and a woman, there is no statutory basis in the INA for denying immigration protections to same-sex couples.[2]

Nevertheless, in *Adams*, the district court held that a same-sex couple was not legally married under Colorado law, and that two men were not "spouses" within the meaning of the INA. *Adams v. Howerton*, 486 F. Supp. 1119, 1125 (C.D. Cal. 1980). The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision on the purported basis that marriages of same-sex couples should not confer immigration relief. *Adams*, 673 F.2d at 1042-43. Notably, the Ninth Circuit's interpretation of the INA in *Adams* is not binding precedent

[2] The legislative history of the INA demonstrates that the intent of Congress was to prioritize family ties and unify families separated by immigration laws. As Congress recognized: "(t)he legislative history of the [INA] clearly indicates that the Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." H.R. Rep. No. 1199, 85th Cong., 1st Sess., 6 (1957); *see also* S. Rep. No. 748, 89th Cong., 1st Sess., 21 (1965) ("The Congress today and the Congress in the past has always been responsive to the basic need for retaining the immediate family unit intact."). Clearly, the immigration system aims to unify families where there is a close relationship to a U.S. citizen. These principles should apply with equal force to families of same-sex couples. Family unification is exactly what Ms. Ojeda and Ms. Alcota seek here.

because the Board's decision in this case will be reviewed by the U.S. Court of Appeals for the Second Circuit. In fact, the Second Circuit has never adopted or followed *Adams*.

Moreover, as a federal district court recently held, *Adams* "carries little weight" now given that it "was decided before any state openly and officially recognized marriages between individuals of the same sex." *Commonwealth of Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 251 n.152 (D. Mass. 2010). As discussed below, in the twenty-nine years since *Adams* was decided, its legal reasoning and factual premises have become outdated, and the case should carry no weight here.

II. The USCIS Cannot Rely on *Adams*, Which Has Been Superseded by Intervening Legal and Legislative Developments

Adams used a test – not followed by other courts – "to determine whether a marriage will be recognized for immigration purposes." 673 F.2d at 1038. Specifically, this test asks: first, "whether the marriage is valid under state law," and second, "whether that state-approved marriage qualifies under the [INA]." *Id.* According to *Adams*, "[b]oth steps are required." *Id.*

The Ninth Circuit struggled in *Adams* to determine if the marriage was even valid under Colorado state law, and ultimately found that it was unclear whether a marriage of a same-sex couple was legal in Colorado. *Id.* at 1039 ("Colorado statutory law . . . neither expressly permits nor prohibits homosexual marriages. Some statutes appear to contemplate marriage only as a relationship between a male and a female."). At the time *Adams* was decided, no state, Colorado included, granted statewide marriage rights to same-sex couples. Colorado had no law allowing marriage of same-sex couples. Ms. Alcota is undeniably validly married to Ms. Ojeda under Connecticut state law, in contrast to the uncertain marital status of the Colorado couple in *Adams*. Unlike this case, *Adams* did not "involve[ ] the displacement of a state marital status determination by a federal one." *Massachusetts*, 698 F. Supp. 2d at 251 n.152.

Since it was unclear "how the Colorado courts would decide this issue," the Ninth Circuit did not reach the question of whether Colorado law permits marriage of same-sex couples, and decided the case "solely upon . . . the second step in our two-step analysis." *Id.* In turning to the second part of its two-step analysis, the Ninth Circuit found that "[e]ven if the Adams[ ] marriage were valid under Colorado law, the marriage might still be insufficient to confer spouse status for purposes of federal immigration law." *Id.* Although the Court recognized that the INA does not define the term "spouse," or expressly assert that "marriage" involves a relationship between a man and a woman, it concluded that Congress did not intend marriages of same-sex couples to confer spousal status. *Id.* at 1039-1040.

In reaching this conclusion the Court relied on four rationales: A) "INS[3], in carrying out its broad responsibilities, has interpreted the term 'spouse' to exclude a person entering a homosexual marriage"; B) "valid marriages entered into by parties not intending to live together as husband and wife are not recognized for immigration purposes"; C) the "traditional and often prevailing societal mores"; and D) Congress has "clearly express[ed] an intent to exclude homosexuals" from entering the country. *Id.* at 1040. All of the bases underlying *Adams* have been superseded by intervening legal and legislative developments. Each rationale is discussed below.

A. *Adams'* Interpretation of the Term "Spouse" Is Unconstitutional and Obsolete

The USCIS cannot rely on *Adams* to hew to a non-statutory federal definition of "marriage" frozen from decades ago and inconsistent with the state definitions to which the federal government otherwise turns. More and more frequently, these state definitions expressly include same-sex couples. The USCIS' interpretation of the term "spouse" to exclude same-sex

[3] The U.S. Immigration and Naturalization Service ("INS") ceased to exist under that name on March 1, 2003, when its functions were transferred to USCIS and other federal agencies. *See* U.S. Dep't of Homeland Security Press Release, *available at* http://www.dhs.gov/xnews/releases/press_release_0100.shtm.

couples who are legally married under state law cannot stand given that: 1) the Obama administration has declared that DOMA, which expressly excludes same-sex couples from federal recognition, is unconstitutional; 2) the U.S. Attorney General, in *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011), asked the Board to determine whether and how the constitutionality of DOMA is implicated in a case involving a same-sex couple; and 3) there are ongoing constitutional challenges to DOMA in federal courts. As explained below, in light of these legal and policy developments, the USCIS cannot continue to rely on *Adams* to support an outdated interpretation of "spouse" excluding same-sex couples. The USCIS' efforts to exclude same-sex couples from immigration protections raise serious constitutional issues which militate strongly against deferring to the agency's narrow and archaic interpretation of the term "spouse."

1. The Obama Administration's Express Declaration That DOMA Is Unconstitutional Undermines *Adams'* Interpretation of the Term "Spouse"

The rationale underlying *Adams* is significantly undermined by recent legal analysis by the Executive Branch and accompanying political developments. Notably, on February 23, 2011, the Obama Administration (through the Attorney General) announced that it had determined Section 3 of DOMA to be unconstitutional and would not defend it in federal court challenges.[4] *See* Letter from Eric H. Holder, Jr., Attorney General, to John H. Boehner, Speaker, U.S. House of Representative, Re: Defense of Marriage Act (Feb. 23, 2011) ("the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is

[4] In pertinent part, Section 3 of DOMA states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7.

unconstitutional"), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.[5] The DOJ has since filed federal court briefing asserting the unconstitutionality of DOMA. *See, e.g.*, Federal Defendants' Brief in Opposition to Motions to Dismiss, *Golinski v. U.S. Office of Pers. Mgmt.*, No. 10-CIV-257, 2011 WL 1044643 (N.D. Cal. filed July 1, 2011) at Dkt. No. 145 (expressly stating, in brief filed by federal government, that DOMA "unconstitutionally discriminates"). The President's conclusion that DOMA is unconstitutional is a significant development that supersedes and undermines the legal rationale underlying *Adams*, and should inform the USCIS' interpretation of the term "spouse."

2. The Attorney General's Request That the Board Clarify the Role of DOMA in a Case Involving a Same-Sex Couple Undermines *Adams'* Interpretation of the Term "Spouse"

Shortly after the President announced that DOMA is unconstitutional, the Attorney General referred an immigration case involving a same-sex couple to himself in order to vacate a removal order and remand the case to the Board to determine "whether and how the constitutionality of DOMA is implicated." *Matter of Dorman*, 25 I&N Dec. 485 (A.G. 2011). The outcome of *Dorman* may affect the instant case. The Board's reassessment of DOMA and immigration protections for a same-sex couple in that case, will undermine *Adams* and its assumptions about the term "spouse."

In *Dorman*, Mr. Dorman, a citizen of the U.K., entered into a civil union with his same-sex U.S. citizen partner in New Jersey. *See* N.J. Stat. Ann. § 37:1-31(a) ("Civil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage."). An Immigration Judge ("IJ") found Mr.

[5] The Attorney General noted that the U.S. Department of Justice ("DOJ") would still "enforce" DOMA "unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." *Id.*

Dorman removable because he overstayed his visa. Mr. Dorman applied for cancellation of removal under INA § 240A(b). Even though he is in a civil union with a U.S. citizen, the IJ found Mr. Dorman ineligible, denying that he had a "qualifying relative." INA § 240A(b). As a result, the IJ did not schedule an individual hearing on the application for cancellation of removal and summarily denied his application. The Board affirmed the IJ's order, and Mr. Dorman filed a petition for review in the U.S. Court of Appeals for the Third Circuit. On April 26, 2011, before the Third Circuit could decide the petition for review, the Attorney General issued a decision vacating the underlying removal order and remanding the case to the Board "to make such findings as may be necessary to determine whether and how the constitutionality of DOMA is implicated." *Dorman*, 25 I&N Dec. 485.

The Attorney General specified questions for the Board, including whether respondent's same-sex partnership or civil union qualifies him to be considered a "spouse" under New Jersey law, and whether, absent the requirements of DOMA, respondent's same-sex partnership or civil union would qualify him to be considered a "spouse" under the INA. *Id.* The Attorney General's questions address aspects of the case that were not developed factually, require the Board to conduct an analysis of state law, and ask the Board to analyze the validity of the same-sex partnership or civil union absent DOMA. Importantly, the Attorney General indicated that the Board is not limited to addressing solely these issues. *Id.*

Currently, there is no Board precedent addressing DOMA with respect to a state-sanctioned relationship between a U.S. citizen and a same-sex non-citizen. By issuing a decision directing the Board to consider a wide variety of factual and legal issues, it appears that the Attorney General intended for the Board's resolution of *Dorman* to serve as a blueprint for deciding other immigration cases involving DOMA issues. As such, it is likely that the Board's

decision in *Dorman* will affect how Ms. Alcota's case is treated.[6] Instead of summarily denying cases involving same-sex couples by relying on the outdated analysis in *Adams*, the USCIS should look to the Board for new guidance, including, but not limited to, an outcome in *Dorman*.

3. Challenges to the Constitutionality of DOMA in Federal Court Undermine *Adams'* Interpretation of the Term "Spouse"

The USCIS' rote reliance on *Adams* to deprive same-sex couples of immigration protections is particularly inappropriate in the wake of recent federal court challenges to the constitutionality of DOMA. Notably, DOMA has expressly been declared unconstitutional in at least three cases. *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. filed Oct. 18, 2010); *Massachusetts*, 698 F. Supp. 2d at 234; *Matter of Balas*, No. 11-BK-17831, 2011 Bankr. LEXIS 2157, at *1 (Bankr. C.D. Cal. June 13, 2011). These cases undermine *Adams*' assumption that Congress may legitimately treat same-sex couples differently.

In *Gill*, same-sex couples and survivors of same-sex spouses, all married in Massachusetts, filed suit to challenge the constitutionality of Section 3 of DOMA, 1 U.S.C. § 7. 699 F. Supp. 2d at 376-77. The couples contended that because of DOMA "they had been denied certain federal marriage-based benefits that are available to similarly-situated heterosexual couples," including federal health benefits, Social Security benefits, and the ability to file federal income taxes jointly, "in violation of the equal protection principles embodied in

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[6]Unlike Mr. Dorman, Ms. Alcota is lawfully married to a U.S. citizen under state law. *Compare Kerrigan*, 957 A.2d at 482 ("Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice.") *and* Conn. Gen. Stat. § 46b-20 (2009) ("marriage means a legal union of two persons") *with* N.J. Stat. Ann. § 37:1-31(a) ("Civil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage."). New Jersey purports to provide parallel protections, but even if the BIA finds that Mr. Dorman is not the "spouse" of a U.S. citizen under New Jersey state law, there is simply no question that Ms. Alcota's marriage and spousal relationship to a U.S. citizen is legally recognized under Connecticut state law.

the *Due Process Clause of the Fifth Amendment*." *Id.* (emphasis in original). In *Gill*, the Court found that Section 3 of DOMA violated the equal protection principles of the Fifth Amendment because the treatment of same-sex couples differently from opposite-sex couples was the result of irrational prejudice that did not constitute a legitimate government interest. *Id.* at 387 ("there exists no fairly conceivable set of facts that could ground a rational relationship between DOMA and a legitimate government objective") (internal quotation marks and citation omitted).

DOMA was similarly declared unconstitutional in *Massachusetts*. 698 F. Supp. 2d at 234. In this case, Massachusetts argued that Section 3 of DOMA, 1 U.S.C. § 7, violated the Tenth Amendment and the Spending Clause, U.S. Const. art. I, § 8, and that DOMA compelled the state to violate the Equal Protection Clause of the Fourteenth Amendment by requiring that the state deny certain marriage-based benefits to same-sex married couples. *Massachusetts*, 698 F. Supp. 2d at 248. The Court held that Congress exceeded the scope of its authority under the Spending Clause because DOMA induced Massachusetts "to violate the equal protection rights of its citizens" by conditioning the receipt of federal funding on the denial of marriage-based benefits to same-sex married couples even though the same benefits were provided to similarly-situated heterosexual couples. *Id.* at 248-49. The Court similarly held that DOMA violated the Tenth Amendment impermissibly interfering with Massachusetts's ability to define the marital status of its citizens, a sovereign attribute of statehood. *Id.* at 253.

Finally, in *Balas*, DOMA was declared unconstitutional as applied to a married same-sex couple seeking to discharge their debts in federal bankruptcy court. 2011 Bankr. LEXIS 2157, at *3. In *Balas*, the DOJ informed the Court that it will no longer seek dismissal of bankruptcy petitions filed jointly by same-sex debtors who are married under state law. In fact, there were ultimately "no [ ] pleadings and no challenge[s] from the government to any issue raised by the

Debtors." *Id.* at *5 (noting that "[t]he government's non-response to the Debtors' challenges is noteworthy"). The Court held that preventing a legally married same-sex couple from filing a joint bankruptcy filing served "no valid, defensible governmental interest," *id.* at *19, and concluded that "no legally married couple should be entitled to fewer bankruptcy rights than any other legally married couple" on the basis of sexual orientation, *id.* at *3. The Court also held that "that there is no valid governmental basis for DOMA." *Id.* at *31. Acting collectively, 20 judges – nearly all of the bankruptcy court's judges – signed the *Balas* decision suggesting that as a matter of policy they would rule similarly in future cases involving same-sex couples.

Together, *Gill*, *Massachusetts*, and *Balas* strongly militate in favor of finding that DOMA is unconstitutional, and that same-sex couples should have the same benefits, privileges, protections and responsibilities – including access to immigration relief – as different-sex couples. *Adams* is significantly undermined by these legal developments. In fact, in its analysis of DOMA, the court in *Massachusetts* clarified that *Adams* "carries little weight" because the "case was decided before any state openly and officially recognized marriages between individuals of the same sex," and did not "involve[ ] the displacement of a state marital status determination by a federal one." *Id.* at 251 n.152.

In light of *Gill*, *Massachusetts*, *Balas* and numerous other constitutional challenges to DOMA working through the courts,[7] it is highly likely that the U.S. Supreme Court will

[7] *Gill*, *Massachusetts*, and *Balas* are not alone in challenging DOMA. The constitutionality of DOMA is the subject of significant ongoing litigation. *See, e.g.*, *In re Golinski*, 587 F.3d 901, 903 (9th Cir. 2009) (Kozinski, J.) (finding that same-sex spouse was wrongfully denied health insurance coverage based solely on sex and sexual orientation, construing "the Federal Employee Health Benefits Act to permit the coverage of same-sex spouses," and ordering that "[a]ny future health benefit forms are also to be processed without regard to the sex of a listed spouse"), *mandamus sought in Golinski*, 2011 U.S. Dist. LEXIS 34969 (action *sub judice*); *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (finding that same-sex spouse was wrongfully denied health insurance coverage in violation of "prohibition on discrimination based on sex and sexual orientation") *remedy sought in* 587 F.3d 925, 927 (9th Cir. 2009) (granting "request for a monetary award"); *Dragovich v. U.S. Dep't of the Treasury*, No. 10-CIV-1564, 2011 U.S. Dist. LEXIS 4859 (N.D. Cal. Jan. 18, 2011) (finding that same-sex spouses of public employees in California who were refused retirement and health benefits from the California Public Employees' Retirement System satisfied

ultimately render "a definitive verdict against the law's constitutionality." Letter from Eric H. Holder, Jr., Attorney Gen., to John H. Boehner, Speaker, U.S. House of Representative (Feb. 23, 2011). Although none of these federal court cases directly involve immigration protections, their resolution will have impact – and perhaps be dispositive – on the application of DOMA in immigration cases.

4. The USCIS' Outdated Interpretation of the Term "Spouse" Raises Serious Constitutional Concerns

As discussed above, the USCIS cannot continue to interpret the term "spouse" to exclude same-sex couples who are legally married under state law, because the Obama administration and at least two federal court cases have expressly declared that DOMA is unconstitutional, and the Board will address how DOMA is implicated in an immigration case of a same-sex couple in *Dorman*, 25 I&N Dec. 485. In light of these developments, the USCIS' continued reliance on an outdated interpretation of the term "spouse" raises significant constitutional concerns.

Courts have found that, although, "in general, the Attorney General's interpretation of the immigration laws is entitled to substantial deference, . . . *Chevron* principles are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe."[8] *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1105 n.15 (9th Cir. 2001) (citations omitted). Courts should not apply *Chevron* deference to an agency's interpretation that

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Article III standing requirements, and sufficiently stated a claim that DOMA violates the Fifth and Fourteenth Amendment guarantees of equal protection and substantive due process) (action *sub judice*); *Windsor v. United States*, 10-CIV-8435, 2011 U.S. Dist. LEXIS 60282, at *3-4 (S.D.N.Y. June 2, 2011) (complaint arguing that the IRS refusal to apply the estate tax marital deduction on the ground that DOMA restricts the definition of "spouse" to "a person of the opposite sex" discriminates against same-sex couple on the basis of sexual orientation in violation of the equal protection clause of the Fifth Amendment) (action *sub judice*); *Pedersen v. Office of Pers. Mgmt.*, No. 10-1750 (D. Conn. filed Nov. 9, 2010) (complaint seeking determination that DOMA violates the U.S. Constitution by refusing to recognize lawful marriages for various federal benefits) (action *sub judice*).

[8] *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . [But], if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

"raises serious constitutional concerns." *Williams v. Babbitt*, 115 F.3d 657, 662-63 (9th Cir. 1997); *see also Edwards v. INS*, 393 F.3d 299, 308 (2d Cir. 2004) ("[a]n agency interpretation that serves to cast doubt on the constitutionality of a statute" is a possible grounds for declining deference); *Black v. Carbone*, 489 F.3d 88, 100 (2d Cir. 2007) (rejecting deference to the Board's interpretation of the statutory counterpart rule to avoid constitutional infirmities); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1249 (10th Cir. 2008) ("It is well established that the canon of constitutional avoidance does constrain an agency's discretion to interpret statutory ambiguities, even when *Chevron* deference would otherwise be due."); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("This canon of constitutional avoidance trumps *Chevron* deference, and we will not submit to an agency's interpretation of a statute if it presents serious constitutional difficulties.") (internal quotation marks and citation omitted)); *Taing v. Chertoff*, 526 F. Supp. 2d 177, 180-81 (D. Mass. 2007) (refusing to recognize Board decision because "deference to an agency's interpretation of the law does not equate with blind faith").

Since the USCIS' interpretation of the term "spouse" in this case "raise[s] grave constitutional doubts," it should not be accorded deference. *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) (declining to defer to DHS regulation interpreting immigration detention provision). Therefore, the Board should not accept an interpretation of the term "spouse" that is not informed by significant recent legal developments. Rubber-stamping the USCIS' unsupported and antiquated interpretation of the term "spouse" will continue to wrongfully harm Ms. Alcota and similarly situated same-sex spouses of U.S. citizens.

B. *Adams* Recognizes the USCIS' Authority to Determine Marital Bona Fides, But Does Not Expand the USCIS' Authority to Make Independent Judgments About the Validity of State-Sanctioned Marriages

The USCIS' interpretation of *Adams* wrongfully suggests that the USCIS has the authority to make independent judgments about the validity of state-sanctioned marriages. Simply put, the USCIS does not have a valid interest in advancing its own definition of marriage separate from state law. Under well-established concepts of federalism, "[t]he whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States." *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (internal quotation marks and citation omitted); *see also Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("domestic relations" have "long been regarded as a virtually exclusive province of the States," and "[t]he State . . . has absolute right" to regulate marriage) (internal quotation marks and citation omitted).

Contrary to the USCIS' position, nothing in *Adams* changes this long-standing principle. The USCIS cannot make its own judgment about the validity of a state-sanctioned marriage independent of state law. Congress – and the Ninth Circuit in *Adams* – never intended to provide this unprecedented and overbroad authority to immigration officials. *See, e.g.*, *Gill*, 699 F. Supp. 2d at 392 ("Importantly, the passage of DOMA marks the *first* time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage-or any other core concept of domestic relations, for that matter.") (emphasis in original).

At most, *Adams* should continue to stand only for the important, but uncontroversial, proposition that the USCIS may review marital bona fides. 673 F.2d at 1039-40 (citing 8 U.S.C. § 1101(a)(35) for the proposition that a couple must "intend[ ] to live together" as a married couple); *see also United States v. Katkhordeh*, 477 F.3d 624, 627 (8th Cir. 2007) (narrowly construing *Adams* and cases cited in *Adams* as "simply recogniz[ing] that where an alien entered

into a 'sham' marriage with an American citizen for purposes of evading the immigration laws of the United States, the alien will not be eligible for benefits accorded to certain 'married' aliens").

There is no dispute that immigration officials are empowered to determine marital bona fides and screen for fraudulent or sham marriages entered to attempt to evade immigration law. *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1238 (9th Cir. 1979) ("[i]t is within the authority of the INS to make inquiry into the marriage to the extent necessary to determine if it was entered for the purpose of evading the immigration laws") (citation omitted). However, if the marriage is valid in the place where it was celebrated,[9] the only remaining issue for the USCIS is to confirm the marital bona fides. *Adams* does not empower or authorize the USCIS to make an independent judgment about the legal validity of a state-sanctioned marriage.

Moreover, in determining marital bona fides, the USCIS cannot subject married same-sex couples to a higher degree of scrutiny than their different-sex counterparts. *See Lawrence*, 539 U.S. at 578 (holding that same-sex couples have the constitutional right to engage in intimate relationships "without intervention of the government"); *Massachusetts*, 698 F. Supp. 2d at 249 (holding that "DOMA plainly intrudes on a core area of state sovereignty—the ability to define the marital status of its citizens"). The possibility of abusing the immigration system by entering into fraudulent or sham marriages is a concern that applies across the board to all married couples regardless of their sexual orientation, and same-sex couples should not be singled out for additional scrutiny when they request immigration protections. Since the USCIS has not argued

[9] It is well-established that in determining the validity of a marriage for immigration purposes, the USCIS looks to the law of the place where the marriage was celebrated. *See In re Perez*, No. A089991573, 2009 WL 3250456, at *1 (BIA 2009) ("the validity of a marriage is determined according to the law of the place of celebration") (citing *In re Levine*, 13 I&N Dec. 244 (BIA 1969)); *In re Ali*, No. A88129989, 2007 WL 4707517, at *1 (BIA 2007) ("the validity of a marriage is determined by the law of the place where it is contracted or celebrated") (citing *In re Arenas*, 15 I&N Dec. 174 (BIA 1975)); *In re Akridge*, No. A71836933, 2006 WL 1558753, at *2 (BIA 2006) ("the validity of a marriage is determined by the place of celebration") (citing *In re De La Cruz*, 14 I&N Dec. 686 (BIA 1974)). The Ojeda-Alcota marriage is unquestionably valid both in Connecticut, where it was celebrated, and in New York, where the couple resides. *See* Conn. Gen. Stat. § 46b-20; *see also* N.Y. Dom. Rel. Law § 10-a.

that the marriage at issue in this case was undertaken for the purpose of evading the immigration laws, precedent concerning sham marriages, including *Adams*, is simply not applicable here. *Adams* should not play a role in the adjudication of this case because Ms. Alcota's marriage was the culmination of a legitimate relationship and sanctioned by Connecticut state law.

C. The "Traditional and Often Prevailing Societal Mores" on Which *Adams* Relied Have Been Superseded by Legal and Legislative Developments, and Are an Unconstitutional Basis for Discrimination

In *Adams*, the Ninth Circuit justified its decision to exclude same-sex couples from immigration protections on the grounds that "homosexual marriages never produce offspring, because they are not recognized in most, if any states, or because they violate traditional and often prevailing societal mores." 673 F.2d at 1043. These outdated rationales have been superseded by legal and legislative developments in the twenty-nine years since *Adams* was decided.

For example, no state recognized marriage of same-sex couples at the time when Congress drafted the INA, or when the *Adams* couple married in Colorado. *Adams*, 673 F.2d at 1043 (same-sex relationships "are not recognized in most, if in any, of the states"). By contrast, today, same-sex couples can marry in Connecticut, Iowa, Massachusetts, New Hampshire, New York (effective July 24, 2011), Vermont, and the national capital, the District of Columbia.[10] *Cf.*

[10] Today, several legislatures have approved marriage of same-sex couples, including New York (*see* N.Y. Dom. Rel. Law § 10-a); New Hampshire (*see* N.H. Rev. Stat. Ann. § 457:1-a); Vermont (*see* Vt. Stat. Ann. tit. 15, § 8); and Washington, D.C. (*see* D.C. Code § 46-401). State courts have also approved marriage of same-sex couples, including Connecticut (*see Kerrigan*, 957 A.2d at 482 ("our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection. Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice")); Iowa (*see Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) ("the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage"); and Massachusetts (*see Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 349 (2003) ("as matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families"). Through civil unions and domestic partnerships, other states purport to provide

Adams v. Howerton, 486 F. Supp. at 1125 (predicting, in part, that "a time may come, far in the future, when contracts and arrangements between persons of the same sex who abide together will be recognized and enforced under law").

Equally important are legal developments in the LGBT civil rights movement. In *Lawrence*, 539 U.S. at 558, the U.S. Supreme Court in 2003 invalidated a Texas statute criminalizing sodomy between partners of the same sex. The Supreme Court expressly overruled its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which emphasized that same-sex conduct has been condemned as immoral for centuries, and concluded that ethical and moral principles "do not answer the question before us." *Lawrence*, 539 U.S. at 571. The Supreme Court expressly held that: "Our obligation is to define the liberty of all, not to mandate our own moral code." *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)). Furthermore, the Court held that states could not justifiably forbid sodomy between same-sex partners based on moral disapproval of gay people which was not a legitimate state interest. *Id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."). By overturning *Bowers*, *Lawrence* implicitly forecloses the outdated traditional and prevailing social mores invoked in *Adams*. *Lawrence,* 539 U.S. at 567 ("counsel[ing] against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.").

Similarly, in *Romer*, the Supreme Court found that the "desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." 517 U.S. at 634

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the same rights, benefits, protections, and responsibilities to same-sex couples as married persons under state law, including California (*see* Cal. Fam. Code § 297.5); Delaware (*see* Del. Code Ann. tit. 13, § 202); Hawaii (S.B. 232, 26th Leg., Reg. Sess. (Haw. 2011)); Illinois (*see* 750 Ill. Comp. Stat. 75/5); New Jersey (*see* N.J. Stat. Ann. § 37:1-28d); Oregon (*see* Or. Rev. Stat. § 106.300), and Rhode Island (R.I. Gen. Laws § 15-3. 1-1).

(emphasis in original) (citation omitted). In *Romer*, the Supreme Court held that an amendment to the Colorado constitution that prohibited civil rights protections for LGBT people was unconstitutional. The stated basis for that amendment was "moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that [the Supreme Court] held constitutional in [*Bowers*, 478 U.S. at 186, *overruled by Lawrence*, 539 U.S. at 558]." *Romer*, 517 at 644 (Scalia, J., dissenting). The Court held that a law that "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else" lacks a rational basis. *Id.* at 635 (majority opinion). Implicit in this conclusion is that disapproval of homosexuality is not a proper legislative end. Thus, to the extent that the USCIS purports to rely on traditional and prevailing social mores to deny immigration benefits to same-sex couples, this rationale is unavailing and foreclosed by both *Lawrence* and *Romer*.

Similarly, same-sex couples cannot be excluded from immigration protections on the grounds that "homosexual marriages never produce offspring." *Adams*, 673 F.2d at 1043. Many same-sex couples do rear children together. *See, e.g.*, *Goodridge*, 440 Mass. at 335 ("No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit."); *see also* R. Bradley Sears *et al.*, The Williams Institute, *Same-Sex Couples and Same-Sex Couples Raising Children in the United States* at 1 (2005) ("More than 39% of same-sex couples in the United States aged 22-55 are raising children; they are raising more than 25,000 children under age 18.").

Moreover, courts have widely recognized that access to marriage rights has never been contingent on having children. *See, e.g.*, *Lawrence*, 539 U.S. at 567 (majority opinion) ("it would demean a married couple were it to be said marriage is simply about the right to have

sexual intercourse"), *id.* at 605 (Scalia, J., dissenting) (noting, "what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry"); *Goodridge*, 440 Mass. at 332 ("While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.") (citation omitted); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010) ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."); *Gill*, 699 F. Supp. 2d at 388 ("readily dispos[ing] of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation"). Clearly, there is no support for the contention that same-sex couples should be treated differently because they do not produce offspring. The USCIS' continued reliance on *Adams* – an atavist case that is both outdated and legally erroneous – is, frankly, an embarrassment.

D. *Adams* is Superseded by Congress' 1990 Removal of the Ban on Lesbian and Gay Immigrants

In *Adams*, the Ninth Circuit pointed to the ban on lesbian and gay immigrants as a reason for denying immigration relief to the same-sex couple. With the repeal of the so-called "homosexual exclusion" in 1990, this rationale in *Adams* is now irrelevant and obsolete. *See* Philip J. Hilts, *Landmark Accord Promises to Ease Immigration Curbs*, N.Y. TIMES, Oct. 26, 1990, *available at* http://www.nytimes.com/1990/10/26/us/landmark-accord-promises-to-ease-immigration-curbs.html (noting removal of the immigration ban on lesbian and gay immigrants).

In 1975, when the couple in *Adams* applied for immigration relief, an immigrant could have been barred from even entering the United States on the basis of sexual orientation. Indeed, the U.S. Supreme Court had ruled that the so-called "homosexual exclusion" was both intended by Congress and permissible under the U.S. Constitution. *Boutilier v. INS*, 387 U.S. 118, 122 (1967) (affirming the exclusion of a foreign gay man because gay men were, at the time, thought to be "afflicted with psychopathic personality" under the INA).[11] The INA would be internally inconsistent if it barred lesbian and gay individuals from entering the United States while recognizing a right to immigrate on the basis of a same-sex relationship. However, the 1990 amendment removed any express textual basis in the INA for excluding lesbian and gay immigrants. Since lesbian and gay people are no longer barred from entering the United States based on sexual orientation, the rationale underlying *Adams* has also been superseded by legislative developments. Therefore, there is no obstacle under immigration law preventing the USCIS from providing Ms. Alcota and other similarly situated same-sex couples with immigration relief.

CONCLUSION

As discussed above, the USCIS' reliance on *Adams* is misplaced because that case has been superseded by intervening legal and legislative developments. The USCIS cannot use *Adams* to insulate itself from significant developments concerning the constitutionality of DOMA which support providing immigration relief to Ms. Alcota and similarly situated same-sex couples.

[11] Prior to 1973, homosexuality was classified as a mental disease by the American Psychiatric Association ("APA"). In 1973, however, the APA deleted "homosexual" from its Diagnostic and Statistical Manual. *See, e.g.*, *In re Hill*, 775 F.2d 1037, 1039 (9th Cir. 1985) (concluding that homosexuality is no longer considered a mental illness).

Amicus urges the Board to administratively close or grant continuances in cases involving same-sex couples pending a judicial resolution or legislative repeal of DOMA. *Amicus* respectfully requests that, at a minimum, the Board should hold these cases in abeyance until the Board decides *Dorman*. Indeed, the Board has a history of staying cases in circumstances analogous to the current situation. In 2001, the INS issued a proposed rule that would amend the asylum regulations. Subsequently, the Attorney General vacated the Board's decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999; A.G. 2001) (a case concerning asylum eligibility), and directed the Board to stay the case pending issuance of a final asylum rule. The Board not only stayed *Matter of R-A-*, but also stayed a number of similar cases. *Amicus* respectfully submits that this approach is warranted here in light of recent legal developments and ongoing challenges to the constitutionality of DOMA.

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