

No. 11-35277

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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DZU CONG TRAN; DANIEL MAI DINH; AUSTIN PETER TRAN, on behalf of  
themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

JANET NAPOLITANO, Secretary, Department of Homeland Security;  
ALEJANDRO MAYORKAS, Director, U.S. Citizenship and Immigration  
Services; DONALD NEUFELD, Associate Director, USCIS Service Center  
Operations Directorate; ROSEMARY LANGLEY MELVILLE, Director, USCIS  
California Service Center; HILLARY RODHAM CLINTON, Secretary of State,  
U.S. Department of State; JANICE L. JACOBS, Assistant Secretary for Consular  
Affairs, U.S. Department of State; CHARLES E. BENNETT, Consular Section  
Chief, U.S. Consulate General, Ho Chi Minh City; JOHN AND JANE DOE U.S.  
CONSULAR OFFICERS,

Defendants-Appellees.

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On Appeal from the United States District Court  
For The District of Oregon  
No. 3:10-cv-00724-ST

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**OPENING BRIEF FOR PLAINTIFFS-APPELLANTS**

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BRENT W. RENISON  
Parrilli Renison LLC  
411 NW Park Avenue Suite 201  
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**CORPORATE DISCLOSURE STATEMENT**

Plaintiffs bring this suit in their individual capacity, and the corporate disclosure rules do not apply.

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## STATEMENT OF JURISDICTION

The District Court entered an Order dismissing all of Plaintiffs' claims with prejudice on March 30, 2011. ER 4. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331; the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*; the Mandamus Act, 28 U.S.C. § 1361; and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* The appeal is from a final judgment that disposes of all parties' claims and a Notice of Appeal was timely filed on March 30, 2011.

This Court has jurisdiction over Plaintiffs-Appellants' appeal pursuant to 28 U.S.C. § 1291. At issue in this appeal, however, is the Doctrine of Consular Nonreviewability, its application, and continuing viability. See *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008) (holding the visa denial must be both facially legitimate and bona fide, and the complaint must make an allegation of bad faith sufficient to withstand dismissal). This Court nevertheless has jurisdiction to determine whether or not the doctrine permits judicial review. *Id.*

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs have a protected liberty interest in a marriage and a shared married life in the United States due to their engagement to their fiancées that gives rise to a right to constitutionally adequate procedures in the adjudication and review of their fiancées' visa applications.

2. Whether Plaintiffs state claims that permit limited review of consular decisions based on bad faith allegations under *Bustamante*.
3. Whether Plaintiffs' claims raise good faith arguments for modifying or reversing existing law, or for establishing new law with respect to the doctrine of consular nonreviewability.
4. Whether Plaintiffs have alleged a duty based on 22 C.F.R. § 42.81(e) sufficient to support an APA claim that provides Plaintiffs an opportunity to rebut the refusals under existing regulations.
5. Whether the regulation at 8 CFR § 214.2(k)(5), which provides for a four-month validity period for K-1 petitions, is *ultra vires*.

### **STATEMENT OF THE CASE**

Each of the three Plaintiffs-Appellants are United States citizens who petitioned for their fiancées to enter under K-1 visas in order to marry in the United States and undergo state-side adjustment of status processing while residing together as husband and wife, rather than living separately through consular processing of an immigrant visa abroad. Plaintiffs-Appellants filed suit as a class action on behalf of others similarly situated to challenge policies and procedures of Defendants in the K-1 visa adjudication process and the termination and return of petitions without action, without rebuttal, and without appeal. The district court

dismissed Plaintiffs-Appellants' claims in part based upon the long standing yet anachronistic Doctrine of Consular Nonreviewability ("the Doctrine").

The Doctrine, also referred to as Consular Absolutism, is a judicial doctrine with roots in the Nineteenth Century, a period in United States history marred by racial discrimination and inequality.<sup>1</sup> While the Ninth Circuit has extended the Supreme Court's exception to the Doctrine announced in *Kleindienst v. Mandel*, 408 U.S. 753 (1972) to cases involving family-based petitions filed by U.S. citizens where it is alleged that the consular officers acted in bad faith, *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008), the district court found that Plaintiffs-Appellees have no protected liberty interest to marry in the United States, following the First Circuit's decision in *Chiang v. Skeirik*, 582 F.3d 238, 242 (1st Cir. 2009). Because the court found that Plaintiffs-Appellees did not meet the threshold requirement necessary to allege a denial of due process, the court concluded that the limited exception to the Doctrine did not apply. Plaintiffs-Appellants' allegations of bad faith, therefore, were not considered by the district court.

Plaintiffs-Appellants respectfully advanced and preserved good faith arguments for modifying or reversing the Doctrine, or for establishing new law,

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<sup>1</sup> For a comprehensive study of the Doctrine's history, application, and current viability, see Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113 (2010).

but the district court held that it was bound to follow the precedent of the Ninth Circuit and the Supreme Court and uphold the Doctrine.

Beyond the reach of the Doctrine are two additional claims.

Plaintiffs-Appellants first alleged a duty based on 22 C.F.R. § 42.81(e) under the APA that provides Plaintiffs an opportunity to rebut the refusals under existing regulations. Second, they challenged the regulation at 8 CFR § 214.2(k)(5), which provides for a limited four-month validity period for K-1 petitions, as *ultra vires*. The district court dismissed both claims, holding that the regulations provide for rebuttal only for immigrant visas and not K-1 visas despite the hybrid nature of the K-1 classification, and holding that the four-month validity period was entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).<sup>2</sup>

## STATEMENT OF FACTS

Each of the three Plaintiffs-Appellants (“Plaintiffs”) in this action seeks to represent others similarly situated pursuant to a class action. The three lead Plaintiffs filed I-129F Petitions accompanied by a \$455 fee with USCIS for their alien fiancées who reside in Vietnam, which were approved by USCIS

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<sup>2</sup> Plaintiffs-Appellants also advanced claims for unreasonable delay and for the use of P6C1 fraud markers. In order to narrow the key issues of greatest concern to Plaintiffs and class members before the Court, Plaintiffs-Appellants waive the claims for unreasonable delay and the use of P6C1 markers, while preserving all other issues.

bearing a four-month validity period. ER 48, 68, 75. The National Visa Center of the U.S. State Department then issued letters advising Plaintiffs<sup>3</sup> that the approved petitions would be sent to the U.S. Consulate in Ho Chi Minh City, Vietnam. ER 47, 67.

Sometime after the four-month petition validity period had lapsed, the Consulate invited each of the alien fiancées to pay a K-1 visa fee of \$131 and be scheduled for an interview in connection with their K-1 visas, based upon the approved I-129F petition.<sup>4</sup> ER 66, 74. At the conclusion of the brief interview of the alien fiancées, the Consulate requested a detailed chronology of the relationship between petitioners and beneficiaries. ER 46, 73. After the submission of this requested information, the alien fiancées were issued conclusory visa refusal letters containing allegations of a sham relationship. ER 45, 63-64, 72. The letters stated that the consulate file was already administratively closed, and that the petition would be returned to USCIS where the parties would have the opportunity to rebut the consular findings. Many months later, Plaintiffs received letters from USCIS stating that the petitions were now expired, as the four-month validity period had passed, and instead of an opportunity to rebut the consular

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<sup>3</sup> Plaintiffs are also referred to as “petitioners” and their alien fiancées are at times referred to as “beneficiaries”, due to the nature of the petitioner-beneficiary relationship in the Immigration and Nationality Act for K-1 fiancées of U.S. citizens.

<sup>4</sup> On July 13, 2010, the State Department increased its non refundable K-1 visa application processing fee from \$131 to \$350.

findings, Plaintiffs could re-file new petitions with new fees. ER 43, 59, 71. Plaintiffs were thus never allowed any opportunity to rebut the conclusory allegations, nor obtain any administrative review.

### **Plaintiff Dzu Cong Tran**

Following the termination of the first petition that was filed August 24, 2009, Plaintiff Dzu Cong Tran submitted a new I-129F Petition with \$455 fee on September 3, 2010, and the petition was approved on May 3, 2011. ER 41-42. On May 11, 2011, the NVC issued a letter advising him that the petition would be forwarded to the Consulate in Ho Chi Minh City. ER 40. While Plaintiff Dzu Cong Tran still intends to marry his fiancée in the United States, he no longer has an option to file a third petition if the second is summarily returned, as it has now been more than two years since he has seen his fiancée.<sup>5</sup>

### **Plaintiff Daniel Mai Dinh**

Following the termination of the first petition that was filed May 8, 2009, Plaintiff Daniel Mai Dinh submitted a new I-129F Petition with \$455 fee on June 14, 2010, which was approved September 1, 2010 with validity dates of September 1, 2010 to December 31, 2010. ER 54-55. On January 19, 2011, the Consulate set January 24, 2011 as the date of his fiancée's K-1 visa interview and

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<sup>5</sup> As a pre-requisite to filing an I-129F, the parties must have met in person within two years of filing the petition. 8 U.S.C. § 1184(d)(1).

collected the \$350 application fee for the second K-1 visa application.<sup>6</sup> ER 53.

Following a second interview, the Consulate issued a K-1 visa to his fiancée valid from February 15, 2011 until July 4, 2011. ER 51. Plaintiff Dinh and his fiancée were married in Washington State on March 20, 2011, and live together as husband and wife in the United States while they apply for adjustment of status. Plaintiff Dinh and Mrs. Dinh (*nee* Vu) filed an I-485 Application for Adjustment of Status and have been scheduled for an interview on July 26, 2011 with USCIS in Seattle. ER 50. They will be interviewed together as is the standard practice for adjustment of status interviews.<sup>7</sup> Mrs. Dinh is eligible to receive interim work and travel authorization.

#### **Plaintiff Austin Peter Tran**

Plaintiff Austin Peter Tran did not file an I-129F petition following the return and termination of his first fiancée petition that had been filed October 13, 2009. Instead, he married his fiancée in Vietnam on November 27, 2010. Since their marriage, however, they have been forced to live apart because Plaintiff must reside in the United States for work,<sup>8</sup> and as an intending immigrant his wife

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<sup>6</sup> See Footnote 4, *supra*, for fee increase effective date.

<sup>7</sup> In contrast, citizen petitioners are not typically even permitted in K-1 or immigrant visa interviews at Consulates and Embassies abroad.

<sup>8</sup> Mr. Tran is a resident of Baldwin Park, California, and is currently employed at NASA Jet Propulsion Laboratory as a Support Analyst for the Remote Operations Center, under Lockheed Martin as a Cardinal Technologies employee. He

is prohibited from obtaining a visa to visit the United States. On January 13, 2011, Plaintiff Austin Peter Tran filed a Form I-130, Petition for Alien Relative on behalf of his wife, accompanied by the \$420 filing fee to USCIS. ER 70. The petition remains pending.

### **SUMMARY OF ARGUMENT**

At the heart of this lawsuit lies the Doctrine of Consular Nonreviewability and its application to Plaintiffs' interests in marrying their fiancées. Plaintiffs have a protected liberty interest, founded in the Constitution and by statute, in a marriage and a shared married life in the United States due to their engagement to their fiancées. This interest provides Plaintiffs a right to constitutionally adequate procedures in the adjudication and review of their fiancées' visa applications, notwithstanding the Doctrine. Plaintiffs allege that consular officers have acted in bad faith in denying their fiancées' visa applications, which permits limited review of consular decisions based on bad faith allegations under Ninth Circuit precedent. Plaintiffs also raise good faith arguments for modifying or reversing existing law, or for establishing new law with respect to the Doctrine.

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previously served with the U.S. Navy from 1994 to 1998 stationed on the USS Normandy, part of USS America Battle Group during the Bosnian War, and later on part of the USS George Washington Battle Group during the Iraq Crisis at the rank of Second Class Petty Officer, Electronics Warfare Technician

Outside the realm of the Doctrine, Plaintiffs have alleged a duty based on regulations at 22 C.F.R. § 42.81(e) sufficient to support an APA claim that provides Plaintiffs an opportunity to rebut the visa refusals under existing regulations without additional fees and new petitions. Plaintiffs have also properly claimed that the regulation at 8 CFR § 214.2(k)(5), which provides for a four-month validity period for K-1 petitions, is impermissible and *ultra vires*.

### **STANDARD OF REVIEW**

The Court reviews *de novo* a district court's dismissal of an action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Cervantes v. U.S.*, 330 F.3d 1186 (9th Cir. 2003). This Court has stated that, "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' ... A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. - , 129 S.Ct. 1937, 1949 (2009), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

## ARGUMENT

### **I. Plaintiffs State Claims That Permit Review Of Consular Decisions Based On Bad Faith Allegations Under *Mandel* And *Bustamante* And Also Based Upon Constitutional Claims of Deprivation of Due Process Implicating A Protected Liberty Interest in Marriage**

#### **A. Plaintiffs Have A Protected Liberty Interest**

The Supreme Court in *Mandel* found that American university professors had the right to receive information from Mandel in the United States in person, as opposed to merely reading books or debating through technological means. *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). In discussing “face-to-face debate, discussion and questioning,” the Court noted that,

“While alternative means of access to Mandel’s ideas might be a relevant factor were we called upon to balance First amendment rights against governmental regulatory interests...we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of appellees in this particular form of access.”

*Id.* In so holding, the Court clarified that alternatives to in-person contact do not deprive a citizen of claiming a constitutional interest in the U.S. physical presence of the individual in question. The district court, however, found that Plaintiffs had no protected liberty interest at all merely because there was an alternative – to be married outside the United States and live a separate married existence while trying to navigate the immigration system and be united. The district court erred in finding that Plaintiffs had no protected liberty interest as a result of the alternative, as opposed to undertaking a balancing of the interests of Plaintiffs in the physical

presence of their fiancées against the governmental regulatory interests in denying them.

Plaintiffs have a liberty interest in freedom of personal choice in matters of marriage and family, *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion). The Supreme Court has consistently ruled that the Due Process Clause provides “heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the *Bill of Rights*, the ‘liberty’ specially protected by the Due Process Clause includes the right[] to marry.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)(citations omitted). The Court has explained that “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967)(citations omitted). Whom to marry and where is a matter of personal choice involving marriage and family, and a liberty interest protected by the Due Process Clause.

The district court outlined the “logistical and financial disadvantages” of marrying abroad, but found the disadvantages did not prevent or deter the marriage itself. See F&R p. 10, ER 20. While the right to marry is not absolute, government regulations of this right must be reasonable and not significantly

interfere with the decision to enter into marriage. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978)(state government may enforce “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship”) Plaintiffs agree that the district court was entitled to consider whether the government’s regulations and procedures regarding the K-1 process – foreclosing any rebuttal evidence or right to administrative review - were reasonable in light of the interests of Plaintiffs in marrying their fiancées in the United States. In finding that Plaintiffs had no protected liberty interest in marriage in the United States as a threshold matter, however, the district court did not properly undertake a balancing of the interests as required.

An American citizen has a liberty interest in the manner and form of their marriage ceremony, a solemn occasion, and also the enjoyment of that relationship through the sharing of a residence together. In recognition of this liberty interest, Congress has specifically provided a process for Plaintiffs and their fiancées to marry in the United States. *See* 8 U.S.C. § 1184(d)(1) (stating “[the petition] *shall* be approved” in order for the parties “... to conclude a valid marriage *in the United States...*”)(emphasis supplied). This mandatory statutory language independently gives rise to a protected liberty interest in a marriage ceremony in the United States. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); *Board of Pardons v. Allen*, 482 U.S. 369 (1987). The statute sets

out specific criteria such as filing a petition and the requirement that the parties have met within two years before the date the petition is filed, utilizes mandatory language, “shall be approved,” and specifically refers to a marriage “in the United States.” 8 U.S.C. § 1184(d)(1). Congress’ use of the mandatory ‘shall’ indicates a specific obligation to permit foreign-born fiancées to marry in the United States once they have met the minimum criteria established in the statute. *See Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007)(“the CWA provides... that the EPA ‘shall approve’ a transfer application unless it determines that the State lacks adequate authority . . . . By its terms, the statutory language is mandatory . . . Congress’ “use of a mandatory ‘shall’ . . . to impose discretionless obligations”)(citations omitted).

The district court held that the statutory language of 8 U.S.C. § 1184(d)(1) “says nothing about the obligation of a consular officer to issue a K-1 visa.” F&R p. 12. A complete reading of the statute does not support this finding. The fourth sentence uses mandatory language with respect to the K-1 petition. The first sentence, however, also uses mandatory language with respect to the K-1 visa. Stated in the negative, the statute reads, “A visa shall not be issued...until the consular officer has received a petition filed in the United States by the fiancée or fiancé of the applying alien and approved by the Secretary of Homeland Security.” 8 U.S.C. § 1184(d)(1). It is undisputed that the consular officers in each case

received a petition filed in the United States by the fiancé of the applying alien and that each petition was approved. The contingency of the statute having been met, the mandatory language becomes operative. Thus, the statute also creates a constitutional right to marriage in the United States.

The district court outlined the obstacles erected in the path of Plaintiffs and their fiancées due to governmental action in the decision:

“The number of persons able and willing to attend the marriage ceremony outside the United States would be reduced due to cost and travel document restrictions. After marrying, the citizen spouse would be required to file a new and different type of visa petition for the alien spouse (Form I-130 Petition for Alien Relative) which requires proof of a bona fide marriage and takes longer to process than a K-1 petition. That proof is made more difficult when a couple is forced to live apart for perhaps years rather than together in the United States or abroad. In order to live together with an alien spouse abroad, the citizen spouse would face the prospect of terminating his or her employment in the United States and finding comparable employment abroad.”

See F&R p. 10; ER 20. The standard for the I-130 petition and immigrant visa or adjustment of status is that the marriage must be documented as bona fide and not entered into for the purpose of evading the immigration laws. 8 U.S.C. § 1154(c).

The bride and groom must establish that they intend to establish a life together.

*Lutwak v. U.S.*, 344 U.S. 604 (1954); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975);

*Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002). If Plaintiffs are required to marry

while they live on separate continents, they will be significantly discouraged by the prior fraud finding that they were not allowed to rebut, and by the fact that they are

physically separated and cannot show the typical indicia of a life together such as a joint residence or shared financial resources. The practical difficulties in proving a bona fide marriage in this scenario is in sharp contrast to that of a couple living together either in the United States or abroad.<sup>9</sup> The process to obtain approval for an immigrant visa also takes longer than the fiancé(e) visa process, in many cases well over a year, making the new process a significantly discouraging hurdle to establishing a married life together. Further, there is no guarantee that Defendants will not deny Plaintiffs' spouses in the same manner as they did as fiancées.

In denying Plaintiffs the ability to marry in the United States and go through the adjustment of status process together in the United States as a co-habiting married couple, as opposed to the consular process where they are worlds apart and maintaining separate residences, Defendants significantly interfere with Plaintiffs' liberty interest in marriage. Plaintiffs have gainful employment and opportunity in the United States.<sup>10</sup> When forced to marry their

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<sup>9</sup> The issuance of the fiancé(e) visa allows the couple to unite in marriage but does not end the scrutiny the Plaintiffs and their fiancées face. Rather it marks the beginning of a process that assures that Plaintiffs and their fiancées must demonstrate that their marriages are bona fide, but allows them to do so while living in marital union in the United States. See FAC at ¶¶ 18-34 for a description of the process.

<sup>10</sup> Daniel Mai Dinh is employed by Boeing as a Software Engineer in Washington State; and Austin Peter Tran is employed at NASA Jet Propulsion Laboratory in California as a Support Analyst under Lockheed Martin as a Cardinal Technologies employee. At the time the complaint was filed, Dzu Cong Tran was employed by Leupold & Stevens, a precision optics company headquartered in Oregon. He is now seeking employment in his field of information technology. See FAC at ¶¶ 36, 78, and 120.

fiancées abroad, they will face the prospect of either terminating employment and trying to join their spouses abroad where they are not likely to find comparable employment even if permitted as a foreigner (which could make them ineligible to sponsor their spouses under the I-864 Affidavit of Support Requirements of 8 U.S.C. § 1183a), or remaining separated for perhaps years while the immigrant visa processing is started anew. After suffering separation from their fiancées when they expected to be reunited, they will face yet another period of separation. Their fiancées will not be able to obtain nonimmigrant visitor visas to visit Plaintiffs in the United States, as they have “immigrant intent” and a P6C1 fraud marker in their file. See 8 U.S.C. § 1184(b). Plaintiffs have only limited vacation time to travel due to employment. This is significantly discouraging for even the strongest relationships.

The case of *Chiang v. Skeirik*, 582 F.3d 238 (1st Cir. 2009), which rested its holding on the alternative of a marriage outside the United States, should not be followed. The court in *Chiang* undertook no analysis of the Constitutional issue other than to state that there was no authority directly on point. *Id.* at 242. *Zablocki* requires only that the government action “significantly interfere” with the “exercise of a fundamental right” in order for the court to proceed with the next step of analyzing whether there exist “sufficiently important [governmental] interests” that are “closely tailored to effectuate only those interests.” *Zablocki*,

supra, 434 U.S. at 388. The interest of the government in closing the file without allowing rebuttal evidence and providing no means of review was never analyzed against the extent of interference. The Court in *Mandel* held that “alternatives” such as those raised in *Chiang* are not sufficient to “extinguish altogether any constitutional interest”, as opposed to engaging in a balancing of the competing interests. *Mandel*, supra, 408 U.S. at 765.

Plaintiffs’ complaint states a claim, inherent in freedom of personal choice in matters of marriage and family, and also founded on statutory authority, to a protected liberty interest in a marriage ceremony in the United States and the opportunity to enjoy a shared residence as a married couple in this country. The district court erred in finding otherwise, and declining to balance the governmental interests against Plaintiffs’ interests.

**B. Plaintiffs’ Allegations Of Bad Faith Permit Limited Review Under *Bustamante***

In addition to challenging the process followed, Plaintiffs alleged in the First Amended Complaint (“FAC”) that Defendants have lied and misled, blatantly disregarded evidence in the record, engaged in careless speculation, intentionally and systematically failed to decide cases based on the evidence submitted, preferring instead to issue boilerplate denials and to impermissibly delegate decision making to Vietnamese national employees. The Ninth Circuit has held that under *Mandel*, “a U.S. citizen raising a constitutional challenge to the

denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision.” *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008)(holding the visa denial must be both facially legitimate and bona fide, and the complaint must make an allegation of bad faith sufficient to withstand dismissal). The bad faith alleged in the FAC extends to a pattern and practice of failure to consider cases in good faith.

Bad faith is defined in Black’s Law Dictionary:

“bad faith, n. 1. Dishonesty of belief or purpose...A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.” Citing Restatement (second) of Contracts.

Black’s Law Dictionary, 8th Ed. (2004), p. 149. Good faith, on the other hand, involves “honesty in belief or purpose” and “faithfulness to one’s duty or obligation”, the absence of which are alleged in the actions and omissions of Defendants. See Black’s, 8th Ed. (2004), p. 713. The act of issuing denials because each Plaintiff is accused of only spending “three or four” or “four or five” days together, where abundant contrary evidence was submitted in the record in the form of photographs, notarized timelines, email records, phone records, and travel records, does not involve honesty in belief or purpose, nor does it reflect

faithfulness to one's duty or obligation.<sup>11</sup>

Defendants have a duty to adjudicate cases in a manner that is not based on mere speculation. Indeed, the State Department's Foreign Affairs Manual ("FAM") section regarding returning petitions for possible revocation states: "The report must be comprehensive, clearly showing factual and concrete reasons for revocation. The report must be well reasoned and analytical rather than conclusory. Observations made by you cannot be conclusive, speculative, equivocal or irrelevant." 9 FAM 42.42 PN1a, available at <http://www.state.gov/documents/organization/87853.pdf> (last visited July 6, 2011). Defendants are alleged to have issued denials which are based on observations that are conclusive, speculative, equivocal or irrelevant, and in doing so, have failed to act with honesty of purpose. Defendants have not abided by their own rules, and their actions and inactions do not reflect faithfulness to their duty and obligation. Because the district court did not reach the issue of bad faith, the case should be remanded for consideration of this claim.

**C. Plaintiffs' Claims Raise Good Faith Arguments For Modifying Or Reversing Existing Law, Or For Establishing New Law**

Plaintiffs respectfully submit that the Doctrine of Consular

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<sup>11</sup> Defendants declined to submit a Certified Administrative Record or otherwise provide any documents from the USCIS or State Department files. The Excerpts of Record consist of documents handed or mailed to Plaintiffs by Defendants in connection with each application or petition.

Nonreviewability is not viable as applied to decisions implicating the Constitutional rights of United States citizens in light of modern notions of fairness. While Plaintiffs are mindful that this Court may not modify, reverse or establish new law where precedent binds it, the time has clearly arrived for the Doctrine to be reexamined.

Scholarship on the Doctrine is highly critical.<sup>12</sup> The Doctrine has its roots in racist policy, and has allowed racist policies to flourish within the Department of State, yet the branch of government best suited to address matters of discrimination, the Judicial Branch, has largely disavowed responsibility to curb abuse.<sup>13</sup> The Doctrine has been framed as an expression of deference to the political branch, and rooted in international relations. Domestic matters involving U.S. citizens are not primarily a political issue, however, and a political branch

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<sup>12</sup> See Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1620 (2000) (noting, “consular absolutism has been particularly striking and (not surprisingly) the object of persistent scholarly derision.”).

<sup>13</sup> See Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy; Race, Class and Reason*, 41 B.C. L. REV. 755, 762 (2000) (Harvard Professor Charles Ogletree notes, “Some consular offices have used openly racist criteria in visa decisions. In *Olsen v. Albright*, a consular officer stationed in Brazil sued the State Department because he was fired for refusing to follow the consulate’s racist visa eligibility policies. n39 The manual he refused to follow established fraud profiles which were based on factors such as race and national origin. n40 The manual instructed consular officers to scrutinize Korean and Chinese applicants for fraud and declared anyone from certain predominately black cities ‘suspect unless older, well-traveled, etc.’ n41 The consular section head had further stated that ‘Filipinos and Nigerians have high fraud rates, and their applications should be viewed with extreme suspicion, while British and Japanese citizens rarely overstay, and generally require less scrutiny.’”). See also *Olsen v. Albright*, 990 F.Supp. 31 (D.D.C. 1997) (outlining discriminatory practices in detail).

does not effectively exercise control over activities of government workers who apparently are not even accountable to the Secretary of State on visa issues. The excuses justifying the Doctrine do not exist as applied to U.S. citizen petitioners such as Plaintiffs.

Supporters of the Doctrine raise the floodgates argument, were the courts to allow judicial review of consular officers' denials. Such alarm is unwarranted, as only a limited number of U.S. resident petitioners would have the financial ability and resolve to seek judicial review. Further, judicial review would curb future abuse by consular officers and ensure fair adjudication of cases implicating the interests of U.S. citizens.<sup>14</sup> Modifying, reversing or establishing a new standard for the Doctrine would have the beneficial effect of requiring State Department consular officials to self-police their own ranks, thereby increasing professionalism among the consular corps. The Doctrine must be reexamined to protect the presumption that administrative decisions should be reviewable, and so that American citizens' rights may be safeguarded against autocratic abuse.<sup>15</sup>

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<sup>14</sup> See *Developments in the Law Immigration; Policy and the Rights of Aliens, part 2 of 2*, 96 HARV. L. REV. 1286, 1360-61 (1983) (describing the unfortunate consequences of the Doctrine, and the benefits of a system that places checks on autocratic power).

<sup>15</sup> See James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash L. Rev. 1, 27 (1991) (arguing that "Non-reviewability or limited reviewability is court-made law. It is a judicial construct, a legal fiction and, in effect, a violation of the APA."). But see *Saavedra-Bruno v. Albright*, 197 F.3d 1153, (D.C. Cir. 1999) ("the doctrine of consular nonreviewability – the origin of which predates passage of the APA – thus represents one of the 'limitations on judicial review'").

## **II. Plaintiffs Seek To Compel Actions That Are Required By Law And Are Final Agency Action**

The district court found that Plaintiffs failed to establish a right to offer rebuttal evidence under regulations providing for such a process, explicitly declining to follow the F&R issued by the magistrate, which had concluded 22 C.F.R. § 42.81(e) provides Plaintiffs with a right of rebuttal. The district court instead reasoned that a different regulation, 22 C.F.R. § 41.121(c) applied to K-1 cases because they are “nonimmigrant” petitions, whereas 22 C.F.R. § 42.81(e) applies only to immigrant visas. Judgment p. 2; ER 6. The Board of Immigration Appeals recently held that,

The fiancé(e) visa petition and adjustment processes are hybrid in the sense that they combine both immigrant and nonimmigrant visa attributes – the fiancé(e)s and their derivatives are not perfect matches for either category.

*Matter of Le*, 25 I&N Dec. 541 (BIA 2011). The district court erred in declining to adopt the part of the F&R which found the mandatory rebuttal regulations of 22 C.F.R. § 42.81(e) apply to K-1 petitions due to their hybrid nature. The F&R outlined the myriad ways in which K-1 visa applicants are treated as immigrant visa applicants. See F&R p. 17-18; ER 27-28. Because consular officers must “determine eligibility as if the alien were applying for an immigrant visa (IV) in the immediate relative category,” it follows that the immigrant visa rebuttal

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unaffected by 702’s opening clause granting a right of review to persons suffering ‘legal wrong’ from agency action.”)

regulations would be applicable. F&R p. 17, citing the Foreign Affairs Manual. Defendants are required by law to provide Plaintiffs with an opportunity to rebut a consular officer's decision pursuant to regulations at 22 C.F.R. § 42.81(e), which create a duty to reconsider the refusal.

That regulation states, "If a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be considered. In such circumstance, an additional application fee shall not be required." *Id.* See also *Davila v. Holder*, 2010 U.S. Dist. LEXIS 30541, \*11 (N.D. Cal. 2010) (finding doctrine of consular nonreviewability inapplicable to the mandatory reconsideration process established in 22 C.F.R. § 42.81(e), and denying motion to dismiss). The district court found that Plaintiffs did not adequately allege that they "adduced" evidence as required by 22 C.F.R. § 42.81(e). Plaintiffs' cases were closed, however, by the consular officers the same day they were refused. ER 45, 63-64, 72. Plaintiffs, unrepresented by counsel at the time, allege in the FAC that when they immediately inquired about their denials, Defendants instead immediately communicated to Plaintiffs that the files were already returned to USCIS and that no further action would be taken, thereby unlawfully

circumventing the mandatory reconsideration regulations.<sup>16</sup>

The regulations provide a clearly imposed duty to reconsider, and a failure to faithfully execute that duty may be reviewed. *See Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997)( Consular officer's duty to act is not subject to the Doctrine of Nonreviewability, “[n]ormally a consular official's discretionary decision to grant or deny a visa petition is not subject to judicial review. . . . . However, when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion, jurisdiction exists.”). This claim goes to the consular officers’ failure to take an action that is legally required.

Because the district court did not adopt the part of the F&R that recommended allowing Plaintiffs’ regulatory claims to proceed, the court did not address the issue of final agency action. Nevertheless, the F&R properly recommended a finding that final agency action was met because the recommendation by the consular officer is sufficiently final as to be construed as final action. See F&R p. 20. The consular officer’s decision to return the K-1 petition to USCIS is final agency action. The denial letters from the consulate in

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<sup>16</sup> The allegations in the FAC that the consulate lied about the file being returned when it is alleged that the file had not in fact been returned until months later is not only an indication of bad faith, but may be fairly inferred from the facts to be an attempt to skirt the mandatory reconsideration regulations in violation of law. This also supports the allegations of bad faith.

all three of Plaintiffs' cases state unequivocally, "Your case has been administratively closed." ER 45, 63-64, 72. At no point have Defendants averred any further action that they intend to take on the cases. The result of the return of the petition is that Plaintiffs are foreclosed any further consideration or review, absent a completely new filing. Instead of being afforded a process whereby they are allowed to rebut consular findings with no additional fee, they are lied to and then months or years later instructed that they may simply file all over again with new filing fees and a new bureaucratic processing period. Plaintiffs and class members also state a claim for return of filing fees and visa application fees for the second petition process for which they should not have been required to pay under 22 C.F.R. § 42.81(e). FAC at ¶¶ 117-118, 165; Prayer for Relief ¶ 17

### **III. Plaintiffs State Claims That Permit Review of The Disputed Four-Month Petition Validity Regulations And Permit Review of Defendants Actions and Inactions Causing Plaintiffs To Re-File New Petitions With New Unlawful Fees**

Citing the deference owed under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984), the district court dismissed Plaintiffs' claims relating to USCIS's four-month validity period for K-1 petitions. The district court erred in deferring to the agency's construction of the statute because it is not permissible.

The district court distinguished *Nagahi v. INS*, 219 F.3d 1166 (10th Cir. 2000), which held that a regulation establishing a 120-day time period for

filing a petition in district court for review of a denial of naturalization was impermissible because the statute providing broad grants of authority to regulate did “not extend to creating limits upon judicial review.” F&R p. 24, ER 34. The district court found that, unlike the case in *Nagahi*, Defendants here were free to set a four-month time limit on the validity of a K-1 petition:

By setting a time limit on the validity of a K-1 petition, the USCIS arguably promotes the Congressional intent to resolve such petitions quickly to enable citizens to marry their alien fiancées. This is consistent with the 90-day requirement for marriage upon entry in the United States. The lack of any expiration date would allow K-1 petitions to linger, contrary to the policy of a speedy resolution of determining the existence of a bona fide relationship.

F&R p. 25, ER 35. The four-month validity period for K-1 petitions has no specific statutory authority, other than the general statute at 8 U.S.C. § 1184(a) which provides “the admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations proscribe”.*Id.* However, 8 U.S.C. § 1184(a) governs the admission of aliens into the United States after the visa has been issued and the nonimmigrant seeks to enter the United States, not validity period of a K-1 petition. Admission period and petition validity period are two entirely different periods. Indeed, the only statutory limitation is the requirement in 8 U.S.C. § 1184(d) that the parties intend to marry within ninety days of admission and that the marriage occur within three months after admission of the K-1 nonimmigrant. Pursuant to this statutory language, U.S. Customs and Border Protection limits the K-1 visa holder’s

admission upon entry to 90 days.<sup>17</sup> The validity period of K-1 petitions, however, is not statutorily proscribed.

The four-month validity period frustrates rather than facilitates the intent of Congress. In order to effect its Congressionally intended purpose, the petition must be valid for a period during which one might reasonably expect to proceed through the K-1 process from start to finish. Since the evidence in the record reflects that not one of the K-1 visa applicants involved in this lawsuit was even interviewed within the four-month validity period for a K-1 visa, the period is wholly inadequate. The four-month period provides USCIS with a handy excuse not to provide a right to rebut the consular findings when the file is returned to USCIS. The period also conveniently provides USCIS with additional revenue, since the only option available to a petitioner at the return stage is to re-file a new petition with new fee, as Plaintiffs were made to do.

If the four-month period were in the order of an appeal period deadline, it may be permissible, as it is fixed by a date-certain – a denial date. In this case, the four month period is set at the beginning of the process – petition approval – and then it is apparently a race to get the rest of the many processes completed by the deadline. Unfortunately for Plaintiffs, by the time the process

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<sup>17</sup> See *U.S. Customs and Border Protection Inspector's Field Manual*, 15.4(k)(1), 2008 Distributed by AILA Publications, ISBN 978-1-57370-235-5. (“Terms of admission: Admit K-1 for 90 days.”)

came to an end – at the petition return stage – the petition was no longer valid, and with it every right to speak even a word of objection. The limitation does nothing to ensure speedy adjudication, and only serves as a very effective limit on any administrative review. Operating thus, it has no basis in statute.

Because the four-month validity period of a K-1 petition frustrates the intent of Congress and is wholly inadequate to accommodate a time-frame during which one might reasonably expect to proceed through the K-1 process, it is impermissible and not entitled to *Chevron* deference.

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the judgment of the district court and remand for further proceedings.

Respectfully submitted,

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Dated: July 7, 2011

## CERTIFICATE OF SERVICE

I, Brent Renison, certify that on July 7, 2011, I electronically filed the Opening Brief for Plaintiffs-Appellants with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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**STATEMENT OF KNOWN AND RELATED CASES**

I, Brent Renison, certify that to the best of my knowledge there are no cases pending in this Court or another court that are directly related to the present proceedings in the Ninth Circuit.

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**CERTIFICATE OF COMPLIANCE WITH FORMAT**

I, Brent Renison, certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this brief is double spaced, using moonfaced typeface of 10.5 characters or fewer per inch and contains 7,028 words (not including the table of contents, table of citations, certificate of service, certificate of compliance, and statement of related cases).

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