

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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**REPLY BRIEF FOR PLAINTIFFS-APPELLANTS**

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## **I. The Claims of Daniel Dinh and Peter Tran Are Not Moot**

### **A. Daniel Dinh**

Plaintiff Daniel Dinh maintains a claim for the return of filing fees associated with the second filing and visa application, on behalf of himself and all others similarly situated. Defendants' statement that Mr. Dinh "received the very benefits" he sought is only partly correct. Response Brief at 20. Mr. Dinh's fiancée was indeed granted a K-1 visa, came to the United States, married Mr. Dinh, and applied for adjustment of status based on the second filing. Her adjustment application has now been approved and Mrs. Dinh is a conditional permanent resident with all the attendant rights and privileges. Far from mooting the controversy, however, the ultimate approval raises grave concerns about the negative impact caused by a lack of opportunity to present rebuttal evidence during the first petition and visa application process, and the new petition and visa fees paid to obtain review. While the Dinhs lives are now full in the non-pecuniary sense, it did come at a price they should not have had to pay.

Within the context of this lawsuit, that unjustly paid price cannot include the thousands of dollars spent on travel and related expenses, nor compensate them for the lost time together.<sup>1</sup> That would be considered general

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<sup>1</sup> Plaintiff Dinh paid for a number of trips to Vietnam, with ticket prices in excess of \$1,200 each, in addition to another medical exam and miscellaneous expenses in connection with the second petition.

damages, and against a government defendant is not compensable. Let it not be said that the government, while immune from compensating Mr. Dinh and others for the collateral financial harm caused, is allowed to profit from its wrongdoing. A portion of the relief sought by Daniel Dinh, on behalf of himself and all others similarly situated, is specific relief in the form of a refund of the filing fees associated with the second I-129F petition ( \$455 received by DHS/USCIS) and the second K-1 visa application fee (\$350 received by Department of State). Plaintiff Dinh's request is for return of exactly \$805 from these agencies, an amount he would not have been required to pay had he been given an opportunity to rebut the consular denial during his first petition and application process, for which he also paid.

Defendants argue that "Plaintiff alleges no entitlement to the refund of the second set of fees..." Response Brief at 21, fn 7. That is not true. In Plaintiffs' First Amended Complaint, Plaintiffs respectfully requested that the court "17. Issue a writ of mandamus compelling the State Department and DHS/USCIS, in the case of plaintiffs and class members who filed a new I-129F petition and/or paid a new visa application fee, to refund the unlawfully received additional filing fees to plaintiffs and class members." FAC, Prayer for Relief, ¶ 17, SER 042. That refund request was based on the specific allegation that

Defendants failed to provide any mechanism for rebutting consular findings in violation of law, forcing Plaintiffs to file a new set of filing fees.

“165. Defendants State Department and DHS/USCIS/CSC, by failing to provide any mechanism for rebutting consular findings in violation of Plaintiffs’ right to due process of law under the United States Constitution have forced Plaintiffs to file a new I-129F at the expense of \$455 and face a new visa fee of \$350 for each new application. The failure of Defendants to provide adequate opportunity for rebuttal of consular findings is contrary to Constitutional right, without observance of procedure required by law, arbitrary, capricious, and not in accordance with law and has resulted in unjust enrichment of Defendants through improper receipt of more filing fees.”

FAC, Second Claim for Relief, ¶ 165, SER 037. On March 29, 2011 prior to the dismissal of the lawsuit, Plaintiffs obtained leave of court to file a Supplemental Pleading as permitted by Fed. R. Civ. P. 15(d). The Supplemental Pleading, setting out certain transactions, occurrences, and/or events that happened after the date of the FAC, is produced simultaneously with this filing through Plaintiffs-Appellants’ Supplemental Excerpts of Record (PSER). In that Supplemental Pleading, Plaintiffs alleged that Plaintiff Dinh filed a second Form I-129F with \$455 filing fee (DHS/USCIS), and that the consulate (State Department) collected the second \$350 visa fee. Supplemental Pleading, ¶ 7, 9; PSER03-04. Plaintiffs have therefore alleged entitlement to a refund of the second set of filing fees.

Whether Plaintiffs, and all others similarly situated, can receive a return of their filing fees rests on whether the law requires that they be given any opportunity to rebut the consular officers’ bad faith denial. If they should have

been given a chance to rebut, then they may claim a refund. If their cases were properly shut with no opportunity to get a word in edgewise, then no refund would be due. That issue, however, is a controversy. To avoid mootness in an ordinary case, Plaintiffs must “demonstrate a remediable harm that effects their ‘existing interests.’” *Feldman v. Bomar*, 518 F.3d 637, 644 (9th Cir. 2008). Plaintiff Dinh has an existing interest in that \$805, and class members whom Dinh represents have an interest in the numerous illegally received filing fees in Defendants’ possession. Further, the Court can remedy the harm by ordering a refund.

#### **B. Austin Peter Tran**

Austin Peter Tran, while married and no longer eligible to petition for his spouse as a K-1 fiancée, nevertheless has a claim for return of filing fees. Like Plaintiff Dinh, Plaintiff Tran was not provided any mechanism for rebutting consular findings in violation of law, forcing him to pay a new set of filing fees. In the Supplemental Pleading, it was alleged that Mr. Tran paid a \$420 filing fee to DHS/USCIS for a new petition. Supplemental Pleading, ¶ 13; PSER05. He, like Plaintiff Dinh, is entitled to a refund of filing fees unlawfully received by Defendants.

### **C. The Repetition/Evasion Exception to Mootness Applies**

All of Plaintiffs' claims, and claims of others similarly situated, are capable of repetition yet evade review. *Weinstein v. Bradford*, 423 U.S. 147, 148-49, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). A case will not be deemed moot if "(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again." *Alaska Ctr. for Env't v. U.S. Forest Service*, 189 F.3d 851, 854-55 (9th Cir. 1999) citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992). Both the duration and repetition prongs are met in this case, and none of Plaintiffs' claims are moot.

#### **1. Duration**

The Supreme Court has held that 18 months was an insufficient amount of time to complete judicial review. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). In *Alaska Ctr. For Env't*, this Court has found a two-year period insufficient. 189 F.3d at 855. Following the first petition denial at issue here, Plaintiffs filed a second petition. In the case of Mr. Dinh, the second petition was filed on June 14, 2010, and the K-1 visa was issued on February 15, 2011, a period of 8 months. That period of time is insufficient to complete judicial review, and the duration prong of the mootness exception is met.

## 2. Repetition

Defendants' conduct is capable of repetition, because Defendant agencies have policies in place which make it "reasonable to expect that the government will engage in conduct that will once again give rise to the allegedly moot dispute." *Alaska Ctr. for Env't*, 189 F.3d at 856, citing *Miller v. California Pacific Medical Center*, 19 F.3d 449, 454 (9th Cir. 1994). With respect to Defendants DHS/USCIS, the Memorandum from Jonathan R. Scharfen, former Acting Director of USCIS cited in the introduction to the FAC, SER 002, has not been withdrawn. DHS/USCIS continues to terminate cases without action due to the expiration of the four month petition validity without reviewing the evidence or providing any opportunity to rebut the consular findings. Defendants State Department and Consular Officers continue to administratively close cases without providing any opportunity to rebut, and issue denial letters which erroneously advise petitioners and applicants that they will have an opportunity to rebut the consular findings once the case makes it back to DHS/USCIS.<sup>2</sup> Defendants have made no indication that they intend to allow any opportunity to rebut consular findings, nor have they indicated any intent to return unlawfully received filing fees. The Court may find that there is a reasonable expectation that the Defendants

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<sup>2</sup> Undersigned counsel for Plaintiffs and for class members has on file a number of recent State Department denial letters from class members that are identical to the denial letters issued to Plaintiffs.

will engage in the challenged conduct again. The second prong of the mootness exception having been met, the controversy is not moot.

**D. Plaintiffs' Claims Are Transitory and The Relation Back Doctrine of Class Actions Applies**

Most importantly, the instant complaint was filed as a class action. Both the initial complaint (filed June 24, 2010) and the First Amended Complaint (filed August 26, 2010) were styled as a class action. Both complaints included class action allegations, and the Plaintiffs outlined a complete detail of the class claims. FAC ¶¶ 147-154; SER033-034. As part of the Prayer for Relief, Plaintiffs requested the court, "At the earliest practicable time certify this action as a class action." FAC, Prayer for Relief, ¶ 2; SER 040. Early in the litigation during a Rule 16 Conference held November 2, 2010, the parties participating by phone, the district court ordered that discovery would be stayed until the Motion to Dismiss was decided. In order to preserve judicial resources and promote efficiency in the instant action, Plaintiffs determined that a class certification motion would be filed and briefed after the court's ruling on the motion to dismiss, and after some discovery had been completed.<sup>3</sup>

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<sup>3</sup> No discovery was ever produced by Defendants. No Certified Administrative Record was ever produced or filed with the court. Instead, Plaintiffs were constrained to simply find whatever documentation had been mailed or handed to them during the course of the visa processing, resulting in a number of missing documents and to this date unknown evidence from the files in Defendants' possession that might aid in their claims. Surely Defendants have reviewed those

This Court has recently held that if a district court were to certify a class, “certification would relate back to the filing of the complaint.” *Pitts v. Terrible Herbst, Inc.*, \_\_F.3d\_\_, No. 10-15965 (9th Cir. August 9, 2011). The Supreme Court has noted in dicta that “whether the certification can be said to ‘relate back’ to the filing of the complaint may depend on the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.” *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975). The reality of the claim in the instant case is that some if not all of the Plaintiffs were likely to have had their new petitions approved and K-1 visas issued prior to the court ruling on a motion for class certification.

It matters not that a formal motion accompanied by briefing was not filed, because it is unlikely that such motion would in any case have been ruled upon by the time the events surrounding the second petition transpired. It is precisely because Plaintiffs have genuine and valid claims of bad faith denial of their first petitions without opportunity to rebut the denials, that their claims have intrinsic merit and would likely be approved within a year or so of a new filing. This time period is insufficient in most cases for litigation to be complete, and under the unique circumstances of this case the Court may find that the controversy is not moot.

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files by this point in the litigation, but Plaintiffs have had no access to any of that information.

Indeed there are a number of class members who, if needed, can step into the shoes of Plaintiffs to pursue these claims. Defendants continue unabated in their policies that produce the results challenged, and a continual stream of harmed United States citizens pours out of our consulates every day and every week that this litigation ensues.<sup>4</sup> As stated in *Pitts*,

“[E]ven if the district court has not yet addressed the class certification issue, mootng the putative class representative’s claims will not necessarily moot the class action. ‘[S]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.’ *McLaughlin*, 500 U.S. at 52 (internal quotation marks omitted). An inherently transitory claim will certainly repeat as to the class, either because ‘[t]he individual could nonetheless suffer repeated [harm]’ or because ‘it is certain that other persons similarly situated’ will have the same complaint.”

*Pitts*, Slip Op. at 10453. While the claims here are in fact inherently transitory claims in the sense that they are likely to be resolved in some measure through a second petition, this Court has not required that claims be *inherently* transitory.

The Court has acknowledged that cases which are “‘acutely susceptible to mootness’ in light of [the defendant’s] tactic of ‘picking off’ lead plaintiffs...” are also considered transitory and thus excepted from the mootness doctrine.

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<sup>4</sup> Plaintiffs have obtained a copy of Department of State statistics through another attorney’s Freedom of Information Act request which reflects a total of 657 cases of “Revocation of...K Visa Applicants during FY2010” through the U.S. Consulate General in Ho Chi Minh alone. Because the Plaintiffs in this class action seek to represent U.S. citizens who have experienced bad faith revocation in other consulates around the world, the total number of revocations continuing to be issued may quite possibly be in the tens of thousands per year.

Defendants approved Plaintiff Dinh's fiancée for a K-1 visa following a second petition, and now argue his claims are moot, in essence picking him off by providing him with some of the relief that he sought. Such conduct cannot serve to moot his claims on behalf of the class under *Pitts*. *Id.*

Finally, with respect to the timing of filing of a motion for class certification, the Court in *Pitts* noted that “It was certainly reasonable for Pitts to await a ruling on his motion to compel the production of documents allegedly crucial to class certification before filing a motion to certify a class. We have previously held that ‘[t]he propriety of a class action cannot be determined in some cases without discovery’”. *Pitts*, Slip Op. at 10457, fn. 5, citing *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975). In the instant case, as previously outlined, the district court stayed discovery during the Rule 16 Conference on November 2, 2010. Docket No. 23, Minutes of Proceedings, ER at 85.<sup>5</sup> With an order staying discovery, Plaintiffs were not in a position to file a motion to compel discovery. Because the motion to dismiss was ultimately granted before that stay was ever lifted, Plaintiffs were never allowed to obtain any discovery, a necessary prerequisite to filing a properly drafted motion for class certification. It was reasonable, therefore, and in fact required by court order, for Plaintiffs to await the

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<sup>5</sup> The Minutes of the November 2, 2010 Rule 16 Conference stated, “Discovery is stayed pending the resolution of Defendant’s Motion to Dismiss. After a final ruling has been issued on the motion, the court will schedule another telephone conference to reset the pretrial schedule. ER at 85.

ruling on the motion to dismiss before proceeding through discovery, at which point a class certification motion would be made. For the foregoing reasons the Plaintiffs' claims are not moot.

## **II. The Doctrine of Consular Nonreviewability Does Not Apply Because Plaintiffs Are U.S. Citizens Who Allege Their Constitutionally Protected Liberty Interests In Family Matters Have Been Violated**

### **A. Defendants' Attempt to Distinguish *Mandel* is Unconvincing and Plaintiffs Have A Protected Liberty Interest in Marriage in the United States**

In an attempt to distinguish *Mandel*, Defendants argue that “alternative places to get married is unrelated to the balancing of interests that would occur if a constitutional right was implicated. Rather, the availability of alternative places to wed demonstrates that the governmental actions at issue do not interfere with the right to marriage.” Response Brief at 30, referring to portions of Plaintiffs' Opening Brief citing *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). By Defendants' reasoning, the Court in *Mandel* would have ruled that the availability of alternate means of access to Mandel's ideas – such as reading books or debating through technological means – demonstrates that the governmental actions at issue do not even implicate a protected liberty interest. Such reasoning presents a misreading of *Mandel*.

While conceding that Plaintiffs “correctly note that the *Mandel* Court dismissed alternative means of accessing speech,” Defendants attempt to argue that

*Mandel*'s holding is not analogous in this case because *Mandel* was based on a “specifically recognized First Amendment interest in the particular form of speech, while no Court has recognized a specific liberty interest in the place of marriage.” Response Brief at 30. This reasoning is also flawed. The Court in *Mandel* had before it a particular form of speech – in-person debate – and ruled that alternatives to such speech cannot “extinguish altogether any constitutional interest on the part of appellees in this particular form of access.” *Mandel*, 408 U.S. at 765.

Defendants seem to argue that because the courts have not “recognized a specific liberty interest in the place of marriage,” that *Mandel*'s reasoning should not apply in the right to marriage context. Courts arrive at decisions through a case-by-case adjudication, but their holdings are applicable to analogous situations. Defendants do not argue that the Constitution protects the right to marriage to a lesser degree than the right to access speech. Nor do they argue that *Mandel* was wrongly decided. Instead, Defendants complain that there is no authority directly on point. The Supreme Court rejected a similar government argument in *Moore v. East Cleveland*, 431 U.S. 494, 500-501 (1977): “unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment’s Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.” *Id.*

Paramount in this controversy is whether Plaintiffs have a protected interest in marrying in the United States, that Plaintiffs may require a balancing of that interest against the government's regulatory interests. Finding that a protected liberty interest exists does not compel an indictment of the government processes regulating that interest; it simply allows an inquiry to proceed. The protected liberty interest here is "family choice." *Moore*, 431 U.S. at 501. Shall the person to whom one is engaged to be wed be considered within the realm of family choice? The plaintiff in *Zablocki v. Redhail*, 434 U.S. 374 (1978) was unmarried and the Court identified the particulars of the woman he desired to marry. *Id.* at 379. The fiancée relationship thus comes within the line of family choice cases.

In *Zablocki*, the Court was confronted with a class plaintiff who was barred from becoming married in any location due to his circumstances. 434 U.S. at 387. Yet the Court, in discussing the possible claims of class members, did not require an absolute prohibition on marriage in order to find a liberty interest. The Court stated,

Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry. And even those who can be persuaded to meet the statute's requirements suffer a serious intrusion into their

freedom of choice in an area in which we have held such freedom to be fundamental.

*Zablocki*, 434 U.S. at 387. The Court established that freedom of choice in the area of family matters is so fundamental, that even “serious intrusion into their freedom of choice” is sufficient for a liberty interest to be implicated. *Id.*

Therefore, those who have the ability to become married in spite of the restrictions may still seek review because the government’s actions represent a “serious intrusion into their freedom of choice” in the area of family matters. *Id.*

It is undisputed that the freedom of choice that Plaintiffs elected was to become married in the United States, and to then live together as husband and wife in the United States immediately following the wedding ceremony. This was their choice, and one that was duly authorized by the immigration statutes allowing for fiancées to enter under K-1 classification for the purpose of marriage in the United States. Each took significant and meaningful steps toward that goal by filing the necessary forms with fees, and prosecuting their applications dutifully. That choice, to marry in the United States, was seriously intruded upon by the government when the procedures used to adjudicate their request failed to meet basic standards of due process of law. Plaintiffs and their fiancées were recklessly accused of fraud, and their cases were closed without any further recourse. The effect was that they could abandon hope altogether, or re-file a new fiancée petition with additional filing fees and be separated for a significant amount of

time without any assurance they would not receive the same treatment later, or eschew their choice for the alternative – to be married abroad and live as a married couple separately on different continents. As a result of the bad faith denial and the inability to protest in the slightest without starting anew an already lengthy process, their family choice was subject to serious intrusion. The government intrudes here, now, in arguing that they should all be married abroad. Plaintiff Austin Tran was married abroad, but that was not his choice. Plaintiff Dzu Tran has been without significant resources to travel to maintain a relationship with his fiancée, and has been unable to do so for over two years. Sadly, as a result of their continued separation and gradual loss of mutual affection over the past year following visa denial, on or about July 10, 2011, Mr. Dzu Tran and his fiancée broke up and called off their engagement.<sup>6</sup> The lack of a right to rebuttal in Mr. Tran's case has led him to forgo the right to marry.<sup>7</sup>

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<sup>6</sup> Although Dzu Tran has learned that his fiancée has now been scheduled for an interview based on the second approved petition, it comes too late. If allowed to amend the complaint, Plaintiff Tran will allege that the additional period in excess of one year between visa refusal (May 2010) and a new appointment (sometime in September 2011), combined with costs associated with his fiancée's medical needs and Mr. Tran's lack of financial ability to travel to keep up the relationship, was sufficiently burdensome to cause a breakdown in the relationship. Days after the breakup, Mr. Tran obtained temporary employment with the U.S. Postal Service at the rate of \$14.60 per hour.

<sup>7</sup> When We Two Parted, by George Gordon Byron  
When we two parted  
In silence and tears,  
Half broken-hearted  
To sever for years,

In contrast to the summary adjudication without rebuttal policies, there are government rules at play in the K-1 context which are reasonable restrictions on the right to marry. For example, the prerequisites set out in the statute, 8 U.S.C. § 1184(d)(1), requiring that a petition be filed by the U.S. citizen on behalf of the

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Pale grew thy cheek and cold,  
Colder thy kiss;  
Truly that hour foretold  
Sorrow to this.

The dew of the morning  
Sunk chill on my brow--  
It felt like the warning  
Of what I feel now.  
Thy vows are all broken,  
And light is thy fame;  
I hear thy name spoken,  
And share in its shame.

They name thee before me,  
A knell to mine ear;  
A shudder comes o'er me--  
Why wert thou so dear?  
They know not I knew thee,  
Who knew thee too well--  
Long, long shall I rue thee,  
Too deeply to tell.

In secret we met--  
In silence I grieve,  
That thy heart could forget,  
Thy spirit deceive.  
If I should meet thee  
After long years,  
How should I greet thee?--  
With silence and tears.

fiancée with fee, setting out certain facts of their meeting in person, followed by a visa application with fee, are reasonable. If U.S. citizens claimed wholesale exemption from the petition and visa requirement, arguing the right to have their fiancées enter without any formalities whatsoever, their claims would fail. The petition and visa requirements are reasonable and do not intrude in a serious way on the American citizens' choice in family matters. There are sufficiently important state interests and these processes are narrowly tailored to effectuate only those interests, and not because there is no interest in such citizens' choice in family matters. *Zablocki*, 434 U.S. at 388. The family choice itself, to become married in the United States, is a protected interest within the meaning of the Due Process Clause. Whether governmental policies seriously interfere with a family choice is a matter which must be reviewed on a case-by-case basis with particular attention to the facts of the individual case. In speaking of the contours of the Due Process Clause, Justice Harlan stated:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ...and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their

abridgment.” *Moore*, supra, 431 U.S. at 502, citing *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting).

Those “substantial arbitrary impositions and purposeless restraints” to which Justice Harlan spoke bring to mind the purposeless policy of Defendants in foreclosing all chance to rebut the consular decision, given the family interests at stake; it is the asserted government needs that require “careful scrutiny...to justify their abridgment.” *Id.* The instant lawsuit was dismissed because the Doctrine of Consular Nonreviewability was applied, and in the absence of an abridgment of a constitutional right, no exception was analyzed. Yet that ruling was in error because Plaintiffs’ interest in matters of family choice provided the constitutional basis for a review and analysis of the competing interests. There has been no analysis of these interests as required.

### **B. The Statute Creates A Protected Liberty Interest**

In their Response Brief, Defendants take issue with the authority cited by Defendants, arguing that cases involving “expectancy of release on parole” are inapposite. Response Brief at 31, fn. 9. The language of the following case is instructive:

“‘Liberty’ and ‘property’ are broad and majestic terms...Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those

privileges long recognizes as essential to the orderly pursuit of happiness by free men.’ *Meyer v. Nebraska*, 262 U.S. 390, 399. For ‘[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.’ *Wisconsin v. Constantineau*, 400 U.S. 433, 437.” Emphasis supplied.

*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572-73 (1972). In this case, the “good name, reputation, honor or integrity” of Plaintiffs are at stake, as they have been accused of engaging in a sham relationship. They have been labeled frauds.<sup>8</sup> In the cases at bar, the one and only woefully inadequate path provided by Defendants for Plaintiffs to clear their good names is to re-file, anew, and subject themselves to the same potential for wrongful charge and summary dismissal. Plaintiffs are instead entitled to notice and the opportunity to be heard. *Id.*

Defendants recite Plaintiffs argument regarding the language of the statute which states, “[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.” Response Brief at 32, citing 8 U.S.C. § 1184(d)(1). The argument of Plaintiffs was that, “[t]he first sentence, however, also uses mandatory language with respect to the K-

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<sup>8</sup> Plaintiff Dinh was stopped at the airport and questioned about his so-called “fraudulent relationship” by Customs officials, a “badge of infamy” having been placed by his name in the computer system. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

1 visa. Stated in the negative, the statute reads, ‘A visa shall not be issued...until the consular officer has received a petition...’ Opening brief at 13. While Defendants went on to cite the entire statute, which includes that first sentence, Defendants failed to address Plaintiffs arguments regarding the first sentence. Defendants merely cited to the judge’s F&R which stated that the statutory language did not address the K-1 visa, and Defendants further stated, “Here, Plaintiffs’ cited language is unrelated to the ultimate benefit conferred by the statute.” Response Brief at 34. Yet, Plaintiffs did argue that the first sentence, stated in the negative, mandated visa issuance upon the approved petition being received by the consulate. Visa issuance is the ultimate benefit conferred by the statute. The K-1 visa enables the applicant to travel to the United States to be married, which is the benefit that Plaintiffs sought. Defendants did not respond to this argument. Just as in the parole cases, the Court need not determine whether the K-1 should ultimately be granted, but due to the mandatory language of the statute a liberty interest is created in a marriage in the United States, and a balancing of the interests should have been undertaken. The government’s interest in a summary adjudication without the opportunity to rebut is overshadowed by Plaintiffs’ right to an opportunity to be heard, the complaint states a claim upon which relief may be granted.<sup>9</sup>

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<sup>9</sup> In this regard, the Court may take into consideration the fact that immigrant visa

### III. Plaintiffs' Claims of Bad Faith State A Claim Under *Bustamante*

Plaintiffs made claims of bad faith denial, and supported the claims with factual allegations sufficient to withstand dismissal. Plaintiffs made these allegations even in the absence of access to the information contained in the files solely in Defendants' possession. Plaintiff Dzu Cong Tran alleged:

48. The denial stated that, "[p]hotographs submitted as evidence of the relationship indicate that Petitioner and Beneficiary have spent only four or five days together.

49. The evidence in the record directly contradicts the conclusory statement contained in paragraph 48, and it is thus conclusive, speculative, equivocal or irrelevant..."

FAC ¶ 49; SER014. The remaining facts alleged in paragraph 49 of the FAC recount the numerous trips that the couple spent together, proof of which was in the record but disregarded by Defendants. Plaintiffs allege with some specificity in Paragraphs 52, 54, 56, 59, 62, 65, 68, 72, 93, 95, 98, 101, 104, 107, 110, 131, 134, 137, 140, and 143, the facts that contradicted the charges of sham relationship, which were present in the administrative file. This level of specificity is sufficient to make out a claim of bad faith under *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008).

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applicants are afforded a right to rebut consular findings within one year of the denial by regulation discussed in Section IV, *infra*, such that it would be little imposition, given the important family interests at stake, to afford some chance to rebut in a hybrid category such as the K-1.

In *Bustamante*, the Court noted that “[t]he Bustamantes do not allege that...the Consulate acted upon information it knew to be false. On the record before us, there is no reason to believe that the consular officer acted on this information in anything other than good faith.” 531 F.3d at 1063. In contrast, Plaintiffs allege that the consular officers blatantly disregarded evidence in the record, which constitutes actions which are “anything other than good faith.” *Id.*

#### **IV. Visa Return Procedures**

As a separate matter from constitutional due process guarantees, Plaintiffs claim that the regulations also require an opportunity to rebut the consular decision. Defendants argue that the regulation is to no avail because it is reserved for immigrant visa applicants, and because Plaintiffs never adduced evidence after the denials. Yet when confronted with the Board of Immigration Appeals own pronouncement in *Matter of Le*, 25 I&N Dec. 541 (BIA 2011),<sup>10</sup> that the fiancée category is a hybrid which combines both immigrant and nonimmigrant attributes, it argues that the lower protections of the nonimmigrant be afforded applicants while the higher fees and longer processing of the immigrant be levied against them. Response Brief at 42. The regulations do not specify that K-1

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<sup>10</sup> Defendants complain that this case was cited for the first time on appeal. Response Brief at 42. While it is true that *Matter of Le* was decided June 23, 2011, and thus not available when the case was briefed before the district court, the court relied on *Friedberger v. Schultz*, 616 F. Supp 1315, 1318 (ED Pa 1985) to reach the exact conclusion. See F&R, p. 17, ER 27. The hybrid status of the K-1 is not a new concept.

applicants be given a specific procedure, but instead use the terms nonimmigrant or immigrant. Because K-1 visa applicants are treated as immigrants in the myriad ways described by the magistrate in the F&R, pages 17-18, ER 27-28, and have been declared hybrid immigrant visas, the immigrant regulations relating to the opportunity to rebut are fairly applied to the category.

While the district court did not, as Defendants point out, address the issue of final agency action because it found that the Doctrine of Consular Nonreviewability barred all claims against the State Department, the magistrate judge in the F&R did address the issue. On pages 19 and 20 of the F&R the magistrate recommended against adopting the Defendants “no final agency action” defense. ER 29-30. As the magistrate judge found, “When recommendations are returned, the USCIS allows the petitions to ‘remain expired’ and neither reaffirms nor reopens them. As a result, the K-1 petitions are effectively denied, and the fiancées are denied K-1 visas. This nonaction by the USCIS is the same as an implied revocation of the K-1 petitions which requires plaintiffs to file new K-1 petitions. Thus, the recommendation by a consular officer can and should be construed as a ‘final action’ sufficient to support an APA claim. *Id.* The magistrate’s analysis of the final agency action issue is sound.

## V. Four-Month Validity Period

Plaintiffs maintain that the four-month validity period of 8 CFR § 214.2(k)(5) frustrates rather than facilitates the intent of Congress because it is wholly inadequate to accommodate a time-frame during which one might reasonably expect to proceed through the K-1 process, and that it further provides an illegitimate excuse to foreclose the right to rebut the consular findings when the file is returned to USCIS, leading to summary termination. Opening Brief at 27-28. Plaintiffs claim that the agency's four-month validity period is thus an impermissible construction of the statute. *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Defendants argue the opposite. Specifically, Defendants urge the Court to find that the four-month validity period agrees with "Congress' express intent to have immigrant fiancées, who are in bona fide relationships, formalize their marriages quickly." Response Brief at 49. The district court agreed, reasoning,

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 logic advanced by Defendants and adopted by the district court is flawed. If the four-month period required Defendants to complete adjudication within four months, including a fair opportunity to rebut a negative finding with State Department and USCIS, and take administrative appeal, such period may promote Congressional intent. Defendants have argued in this lawsuit, however, that neither the statutory language nor the regulatory time limit requires Defendants to act in any particular time period. The four-month period, standing as a time limit to receive the benefit as opposed to receive action on the case is therefore an inadequate period.

Defendants argue that the reasonableness of the four months is bolstered by the Defendants' discretionary authority to extend the petition validity if necessary. Response Brief at 49, fn. 17. Defendants can therefore choose whether or not Plaintiffs' petitions will be extended precisely when they are seeking an opportunity to rebut the consular findings, and through blanket policy announced by the Scharfen Memorandum elect to terminate the petition due to its expiration. Regulations which are "arbitrary, capricious, or manifestly contrary to the statute" cannot stand. *Chevron*, 467 U.S. at 844. In placing the decision whether to extend the four-month period in the hands of the officials whose actions are being challenged, the result is arbitrary and capricious. In assessing the reasonableness of the statute, the Court may review other nonimmigrant

classifications without statutorily mandated petition periods and the corresponding periods of petition validity contained in the regulations, none of which is remotely as short as four months.<sup>11</sup> A petition validity period must at a minimum accomplish the purpose for which it is established. Here, it has been shown that the period is wholly inadequate, and any extension of the period is subject to the whim of the agency.

Defendants argue that “K-1 petitions are nonimmigrant petitions not subject to revocation authority.” Response Brief at 48, citing 8 U.S.C. § 1155. The regulations specifically provide, however, for the revocation of nonimmigrant petitions.<sup>12</sup> Revoked nonimmigrant petitions require a notice of intent to revoke, and provide a period of 30 days to submit rebuttal evidence.<sup>13</sup> Additionally, nonimmigrant petitions which have been revoked may be appealed.<sup>14</sup> If the government can provide an adequate petition period for foreign specialty workers, intracompany transferees, and artists and entertainers, along with notice of intent to revoke, a 30 day rebuttal period, and corresponding administrative appeal rights,

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<sup>11</sup> H-1B petition validity is up to three years (8 CFR § 214.2(h)(9)(iii)(A)(1)); H-3 petition validity is up to two years (8 CFR § (h)(9)(C)(1)); L-1 petition validity is up to three years (8 CFR § 214.2(l)(7)(i)(A)(2)); O-1 petition “shall be valid for a period of time determined by the Director to be necessary to accomplish the event or activity, not to exceed 3 years.” (8 CFR § 214.2(o)(6)(1)(iii));

<sup>12</sup> See 8 CFR § 214.2(h)(11); 8 CFR § 214.2(l)(9); 8 CFR § 214.2(o)(8)

<sup>13</sup> See 8 CFR § 214.2(h)(11)(iii)(B); 8 CFR § 214.2(l)(9)(iii)(B); 8 CFR § 214.2(o)(8)(iii)(B)

<sup>14</sup> See 8 CFR § 214.2(h)(12)(ii); 8 CFR § 214.2(l)(10); 8 CFR § 214.2(o)(9)

then surely the interests of American citizens in their fiancées presence here can be accomodated with comparable treatment.<sup>15</sup>

### 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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<sup>15</sup> Defendants argue in two footnotes that Plaintiffs have waived certain claims by failing to raise them. Response Brief at 39, fn. 13; Response Brief at 46, fn. 16. The claims involving Defendant State Department hinge upon the Doctrine of Consular Nonreviewability, which formed the basis of the district court's decision to grant the motion to dismiss. Plaintiffs did not waive any claims against State Department apart from those specifically waived. The claims involving DHS/USCIS regarding a failure to provide a mechanism to rebut consular findings relate to the basis on which the petitions were terminated without action pursuant to 8 CFR § 214.2(k)(5), which was argued in the opening brief. USCIS was specifically identified at the beginning of that argument. Opening Brief at 25. Plaintiffs did not waive any claims against DHS/USCIS aside from those specifically waived. The only claims waived are contained on page 4, footnote 2 of the Opening Brief.

### **CERTIFICATE OF SERVICE**

I, Brent Renison, certify that on September 2, 2011, I electronically filed the Reply 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 monofaced typeface of 10.5 characters or fewer per inch and contains 6,862 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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