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UNITED STATES DISTRICT COURT

**DISTRICT OF OREGON
PORTLAND DIVISION**

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

Civil No. **CV'10-724 ST**

PLAINTIFF,

**RESPONSE IN OPPOSITION TO
MOTION TO DISMISS**

v.

CLASS ACTION

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; **CHRISTINA POULOS**,
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 1 through
1000,**

DEFENDANTS.

The Doctrine of Consular Nonreviewability (“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.¹ Defendants ask this Court to dismiss Plaintiffs’ claims in part based upon this long standing yet anachronistic Doctrine, and foreclose all review of U.S. government decisions that directly impact the domestic lives of United States citizens. Dismissal of Plaintiffs’ consular claims is not required, however, because 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). Plaintiffs’ complaint alleges bad faith sufficient to withstand dismissal.

Additionally, Plaintiffs respectfully advance and preserve good faith arguments for modifying or reversing existing law, or for establishing new law, should the Court determine for reasons of *stare decisis*, that Plaintiffs’ claims must be dismissed in whole or in part based upon the Doctrine. U.S. citizen Plaintiffs dutifully complied with statutory and regulatory processes established by Congress designed to facilitate their fiancées entrance to the United States for marriage, only to be carelessly accused of fraud through a willful rendering of substandard official performance, denied any opportunity to respond to the accusations, lied to about the ability to respond, subjected to inordinate delays, and told a year later they must start the process all over again with new fees. This autocratic sham should not be allowed operation through judicial doctrine where U.S. citizens’ fundamental liberty interests are at stake.

¹ 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).

Finally, dismissal of Plaintiffs' claims regarding Defendants' treatment of returned petitions, including the validity of challenged regulations for petition expiration dates, are not subject to dismissal based on the Doctrine, and present a federal question to be decided by the Court on the merits.

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

A. Plaintiffs Have A Protected Liberty Interest

After establishing that they had met their fiancées in person within two years, Plaintiffs each filed I-129F petitions to enable their fiancées to enter the country so that they could marry in the United States. As Defendants concede, "The Supreme Court has recognized 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)." Mem. Supp. MTD at 21. Plaintiffs' complaint meets the threshold requirement for any due process claim because it alleges that Plaintiffs have a protected liberty interest in the fundamental right to marry.

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). In this vein, 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.

Even if Defendants are correct in the assertion that the Supreme Court’s “rulings regarding a ‘right to marriage’ focus on infringements of the actual ability to establish” a marriage, Defendants’ unreasonable denials of Plaintiffs’ fiancée petitions run afoul of this focus because they place a “direct legal obstacle in the path of persons desiring to get married.” Mem. Supp. MTD at 21, citing *Zablocki*, 434 U.S. at 387. 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”) The unlawful manner of Defendants’ denials of Plaintiffs’ fiancée visas does not fall within the realm of permissible government regulation of the right to marry established in *Zablocki*. *Id.* at 386. The denials are unreasonable because they bear no basis to the evidence submitted in support of the fiancée petitions, and constituted impermissible interference. The federal government, which commands lesser dominion over the decision to marry than the states, cannot significantly discourage the decisions surrounding marriage.

Defendants argue that “because Plaintiffs and their fiancées have not entered into a marital relationship that gives rise to standing, and because Defendants’ actions do not infringe on Plaintiffs’ ability to marry their fiancées elsewhere, the Court should dismiss Plaintiffs’ due process claims for lack of standing.” Mem. Supp. MTD at 21. Yet it is the American citizens’ 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 that provides

standing. 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 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).

Considering the marriage ceremony alone, requiring U.S. citizens to marry abroad in a foreign country would significantly limit the number of friends and family who may attend the ceremony due to cost and travel document restrictions. This could have a disparate impact on the elderly or infirm, the handicapped, or those with limited means. Arranging for the international travel and lodging of hundreds of people, as opposed to just the fiancée who will ultimately reside in the United States with the U.S. citizen, is not insignificant. These factors place significant strain on a relationship. The Supreme Court has ruled that state government

may enforce “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship.” *Zablocki*, 434 U.S. at 386.

Moreover, if Plaintiffs were to marry their fiancées abroad, Plaintiffs would be required to file a new and different type of petition for their new spouses – a Form I-130 Petition for Alien Relative. The standard for this petition 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.² 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

² Defendants omit from their description of the K-1 process the fact that 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.

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.³ If forced to marry their 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, particularly where there really seems to be no end in sight.

The case of *Chiang v. Skeirik*, 582 F.3d 238 (1st Cir. 2009) is not binding on this Court, and should not be followed. The Plaintiff in *Chiang* filed his complaint in District Court pro se, and had married his fiancée by the time of his amended complaint. See *Chiang v. Skeirik*, 2008 U.S. Dist. LEXIS 110126 (D.Mass. 2008). Additionally, his claims were under *Bivens*, and therefore not analyzed under the same criteria. The case is distinguishable, and the plaintiff did

³Daniel 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. Until recently Dzu Cong Tran was employed by Leupold & Stevens, a precision optics company headquartered in Oregon, and is now seeking employment in his field of information technology. See FAC at ¶¶ 36, 78, and 120.

not make the same arguments as are advanced here. The Court's reasoning in *Chiang* is inapposite and fails to persuade.

Plaintiffs' complaint establishes that in addition to a Constitutional right, inherent in freedom of personal choice in matters of marriage and family, they also have 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.

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

It is alleged in the First Amended Complaint ("FAC") that Defendants have lied and misled, blatantly disregarded evidence, 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 stands not upon any one fact, but upon the 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 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.

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 Oct 19, 2010). 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.

The Ninth Circuit has held that, “jurisdictional dismissals in cases premised on federal-question jurisdiction are exceptional” and appropriate only where the claims are “patently without merit.” *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Whether Defendants’ motion to dismiss on 12(b)(1) grounds is facial or factual, the Court may treat the matter like a 12(b)(6) motion “[w]here the question of jurisdiction is intertwined with the merits...” *Davila v. Holder*, 2010 U.S. Dist. LEXIS 30541, *8 (N.D. Cal. 2010) (“a court must

consider the allegations in the complaint as true, unless controverted by undisputed facts in the record, and must draw all reasonable inferences in favor of the plaintiff.”) citing *Roberts*, 812 F.2d at 1177. It cannot be said that Plaintiffs’ claims are patently without merit, and drawing all reasonable inferences in favor of Plaintiffs, a claim is stated for bad faith.

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 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.⁴ 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.⁵ The Doctrine has been framed as an expression of

⁴ 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.”).

⁵ 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).

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 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.⁶ 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 so that the presumption that administrative decisions should be reviewable may be protected, and so that American citizens' rights may be safeguarded against autocratic abuse.⁷

⁶ 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).

⁷ 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' unaffected by 702's opening clause granting a right of review to persons suffering 'legal wrong' from agency action.")

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

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).⁸ Plaintiffs' cases were closed by the consular officers the same day they were refused. See Ex. A. Plaintiffs allege in the FAC that when they promptly inquired about providing evidence, 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.⁹ 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

⁸ If Defendants respond for some reason that this procedure for refusal of individual visas only applies to immigrant visas, this argument should be rejected. Despite K-1 visas being non-immigrant visas, the State Department has voluntarily treated them as immigrant visas in all material respects (including requiring that K-1 visa applicants complete the DS-230 immigrant forms instead of the DS-160 nonimmigrant forms) and should be estopped from denying they are really considered immigrant visas. No other nonimmigrant visa utilizes the immigrant forms, nor does any other require the completion of a medical examination, both indicia of immigrant visas.

⁹ 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 left the consulate 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.

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. Additionally, because a fundamental liberty interest is implicated, Plaintiffs also have a due process right to rebut the consular officer’s finding of a sham relationship.

The consular officer’s decision to return the K-1 petition to USCIS is indeed final agency action. The denial letters from the consulate in all three of Plaintiffs’ cases state unequivocally, “Your case has been administratively closed.” See Ex. A. Defendants do not aver 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, and again unreasonably delayed, bureaucratic processing period.¹⁰ To state that this is not final agency action is not credible.

There is harm alleged here, in the absence of an opportunity to rebut consular findings, and also the end result. Here, all of Plaintiffs’ petitions were summarily allowed to “expire” and nothing more was done with them. Defendants charitably state that Plaintiffs “are not precluded from filing new K-1 petitions with new evidence that might convince a consular officer to issue

¹⁰ 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.

the K-1 visas.” Mem. Supp. MTD at 27. Yet the challenge is to the harm already suffered by the initial refusal and return, an unlawful process so devoid of reasonableness and fair process as to be unbecoming our Nation. These injuries are concrete results of the unlawful and challenged consular abuses alleged in the FAC, and may be reviewed by this Court under settled principles.

III. Plaintiffs Allegations Of Unreasonable Delays Are Not Moot Because The Challenged Conduct Is Capable Of Repetition And Yet Evades Review

Plaintiffs’ claims are not moot because they have been provided with no remedy for their injuries and the challenged conduct is capable of repetition and evades judicial review.

Defendants assert that the Court should dismiss Plaintiffs’ claims as moot: “the satisfaction of the remedy sought by a plaintiff may remove an issue from the ‘case or controversy’ requirement of Article III of the Constitution, and result in the dismissal of the claim as moot.” Mem. Supp. MTD at 37-38. There has been no satisfaction of the remedy sought by Plaintiffs. Plaintiffs seek to have their fiancée visa applications adjudicated by Defendants based on facts and the evidence presented by Plaintiffs and their fiancées and not based on speculation and equivocation. See *supra* page 9 outlining adjudication standards in 9 FAM 42.42 PN1a. Defendants have not provided this remedy within a reasonable time nor have they taken steps indicating that this remedy will be provided in the future within a reasonable time.

Defendants also assert that review of Plaintiffs complaints regarding delays in processing fiancé(e) visas is not appropriate because Congress did not intend to give fiancé(e) visa petitions preferential treatment. Mem. Supp. MTD at 29. Defendants cite Note 6, INA Sec. 221, which mandates Defendants’ policy to process visa applications for fiancé(e)s within 30 days of receipt of all necessary documents. *Id.* Pub. L. 107-222, Div. A, § 223, 116 Stat. 1373. Defendants contend that this policy is unenforceable. Regardless of whether the Congressionally mandated

policy is judicially enforceable, Defendants may not unreasonably delay the process. Congress explicitly granted preferential treatment to visa applicants who are spouses and fiancé(e)s of U.S. citizens. Note 6 for INA Sec. 221, provides two timelines for visa processing: 30 days for fiancé(e) visas and immediate relatives (quoted by Defendants) and 60 days for all other cases (not quoted by Defendants). Pub. L. 107-222, Div. A, § 223, 116 Stat. 1373.¹¹ This is a clear indication that Congress intended fiancé(e) visa applicants to receive preferential processing at U.S. Consulates compared with the myriad of other visa types. The Defendants' delays in processing the visa applications submitted by Plaintiffs and their fiancées is in direct conflict with Congressional intent, and goes to the unreasonableness of the delay.

Even if Defendants were to change their adjudication policies, the Plaintiffs claims are not moot because “the case will be moot only ‘if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur’ The ‘*heavy burden* of persuading’ the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.” *United States v. Brandau*, 578 F.3d 1064, 1068 (9th Cir. 2009)(citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S.167, 189 (2000)(discussion the principle of voluntary cessation and mootness)(emphasis in original). Defendants suggest that Plaintiffs' claims should not receive judicial review because Plaintiffs can re-file their fiancée petitions (at additional expense and

¹¹ The section reads, “(a) In general. It shall be the policy of the Department to process each visa application from an alien classified as an immediate relative or as a K-1 nonimmigrant within 30 days of the receipt of all necessary documents from the applicant and the Immigration and Naturalization Service. In the case of an immigrant visa application where the petitioner is a relative other than an immediate relative, it should be the policy of the Department to process such an application within 60 days of the receipt of all necessary documents from the applicant and the Immigration and Naturalization Service.” (note “shall” language for K-1 and “should” for all other applicants). *Id.*

time). Mem. Supp. MTD at 27. The invitation to re-file a fiancé(e) petition is clearly not a remedy, and even if it were, subsequent petitions face the same speculative and unreasonable adjudication procedures that gave rise to this complaint. In addition to a lack of specific remedy for these Plaintiffs, the claims named in the complaint remain viable because Plaintiffs challenge policies and regulations, and the individualized decisions regarding Plaintiffs and class members are capable of repetition and yet evade review. See *United States v. W.T. Grant*, 345 U.S. 629 (1953).

Defendants have failed to demonstrate that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,” therefore, Plaintiffs claims are not moot. *Brandau*, 578 F.3d at 1068.

IV. 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

Defendants ask the court to dismiss Plaintiffs’ claims relating to USCIS’s four-month validity period for K-1 petitions. Defendants argue dismissal is appropriate because the validity period is a regulation entitled to *Chevron* deference; therefore “Plaintiffs fail to state a claim as a matter of law.” Mem. Supp. MTD at 31. Defendants do not provide any authority on which the court should grant the dismissal outside of *Chevron*. The motion to dismiss this claim must be rejected. *Chevron* is not a basis for dismissing this claim because agency regulations imposing time limits outside of those statutorily mandated are subject to judicial review. *Nagahi v. INS*, 219 F.3d 1166 (10th Cir. 2000).

In the Ninth Circuit, a court will not dismiss a claim “unless it appears to a certainty that the plaintiff would not be entitled to relief.” *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir.

1986). Plaintiffs' *ultra vires* claim regarding the four-month validity period of K-1 petitions is supported by authority which establishes that Plaintiffs' have a basis for relief; therefore, the claim cannot be dismissed. *Nagahi*, 219 F.3d. In *Nagahi* the court rejected the assertion by INS that its regulation imposing a 120-day time limit was beyond judicial review under *Chevron*, stating that, "it is axiomatic that an agency cannot create regulations which are beyond the scope of its delegated authority," and found the INS time-limit beyond the scope of statutory authority. *Id.* at 1169 and 1171. See also *Zilkic v. USCIS*, 2009 U.S. Dist. LEXIS 31380, *7 (N.D. Cal. 2009).

Defendants admit that the specific four-month validity period for K-1 petitions has no statutory authority. Mem. Supp. MTD at 32. Defendants point to 8 U.S.C. § 1184(a) ("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") as the general statutory basis for the K-1 petition validity period. *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 validity period are two entirely different things. 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.¹² The validity period of K-1 petitions,

¹² 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.")

however, is not statutorily proscribed, and *Chevron* does not shield this USCIS regulation from judicial review. Therefore, Defendants' motion to dismiss cannot be granted.

Apart from the fact that this issue is more properly decided at the summary judgment stage, Defendants' argument that striking the four-month validity period "does not agree with Congress' express intent to have immigrant fiancées, who are in bona fide relationships, formalize their marriages quickly" is disingenuous at best. Mem. Supp. MTD at 32. Due to the unlawful bureaucratic delays occasioned by Defendants' challenged conduct, the process hardly comports with Congress' intent to allow marriages to be formalized in the United States quickly. The four-month validity period is an invention, not sanctioned by Congress, that frustrates rather than facilitates the intent of Congress.

V. Plaintiffs' Allege Injury By Department of State's Use of P6C1 Markers, And Use Of The Marker Is A Final Agency Action

Defendants state in the boilerplate denials issued to Plaintiffs' fiancées that, "If USCIS revokes the petition, beneficiary will become ineligible for a visa under section 212(a)(6)(C)(i) of the Act." See Ex. A. The language used was "will become ineligible", not "may" or "might" become ineligible. The INA section quoted reads as follows:

(C) Misrepresentation

(i) In General

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

INA Sec. 212(a)(6)(C)(i); 8 U.S.C. § 1182(a)(6)(C)(i). This is a permanent bar to receiving a visa, other documentation, or admission into the United States, with only a limited discretionary

waiver available. This is a serious sanction.¹³ Counsel for Defendants' states that "there are no legal consequences for petitioners or their fiancées as a result of any use of the P6C1 marker." Mem. Supp. MTD at 34. Yet the State Department's Foreign Affairs Manual citation challenged in the FAC states, "If the petition is revoked, the materiality of the misrepresentation is established." 9 FAM 40.63 N10.1. Defendants purport to send the petitions back to USCIS for "revocation;" however, counsel for Defendants states that there is no authority to revoke fiancé(e) petitions. Compare counsel's arguments, Mem. Supp. MTD at 32 ("USCIS lacks the authority to revoke the petitions"), with Exhibit A ("recommendation that it be revoked", "if USCIS revokes the petition"). Defendants advised Plaintiffs that if USCIS revokes the petition, then the beneficiary will become permanently inadmissible, but Defendants' counsel here argues there are no legal consequences as a result of the marker. Defendants do not support this argument with testimony or declarations, or say why a marker is needed if no legal consequences flow from it. Defendants do not explain why their consular officers say one thing, their regulations and guidance another, and their counsel yet something else. One is left to wonder which is the truth. Defendants do not assure Plaintiffs there will be no negative impact. As a result of this confusion, there is a genuine issue for a trier of fact with respect to this issue, and the Court may find that Defendants have not carried their burden for dismissal.

¹³ The State Department's Foreign Affairs Manual states, "In applying the provisions of 212(a)(6)(C)(i), keep in mind the severe nature of the penalty the alien incurs: lifetime inadmissibility, unless a waiver is obtained... When considering whether to impose such a dire penalty, keep in mind the words quoted by the Attorney General in his landmark opinion on this matter... 'Shutting off the opportunity to come to the United States actually is a crushing deprivation to many prospective immigrants. Very often it destroys the hopes and aspirations of a lifetime, and it frequently operates not only against the individual immediately but also bears heavily upon his family in and out of the United States.'" 9 FAM 40.63 N1.3

PROOF OF SERVICE

On October 22, 2010, true and correct copies of the Plaintiffs': RESPONSE IN OPPOSITION TO MOTION TO DISMISS, were served pursuant to the district court's ECF system as to ECF filers, to the following ECF filers:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on October 22, 2010, at Portland, Oregon.

S/ Brent W. Renison
Brent W. Renison, Declarant