

No. 11-35277

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DZU CONG TRAN; DANIEL MAI DINH; AUSTIN PETER TRAN,

Plaintiffs-Appellants,

v.

JANET NAPOLITANO et al.,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

Tran et al. v. Napolitano et al., No. 3:10-cv-00724-ST

BRIEF FOR DEFENDANTS-APPELLEES

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I. STATEMENT OF JURISDICTION

Plaintiffs-Appellants (“Plaintiffs”), Dzu Cong Tran (“Dzu Tran”), Daniel Mai Dinh (“Dinh”), and Austin Peter Tran (“Austin Tran”), appeal from the decision of the United States District Court for the District of Oregon adopting Magistrate Judge Stewart’s Findings and Recommendations in its entirety through page 16, and Parts V and VI, and granting the remainder of Defendants-Appellees’ (“Defendants”) Motion to Dismiss Plaintiffs’ First Amended Complaint “[b]ecause plaintiffs failed to state any claim.” ER at 6, 10.¹

Plaintiffs’ First Amended Complaint (“FAC”) alleges jurisdiction under federal question jurisdiction, 28 U.S.C. § 1331, in conjunction with the United States Constitution; the Administrative Procedure Act (“APA”), 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.*

This Court’s jurisdiction arises under 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction over all final decisions of the district courts. The

¹ References to the district court record will be made by citing to the page number of Plaintiffs’ Excerpts of Record (*i.e.*, “ER at ___”). Only ER pages 1-30, 40, 50-51, 57-58, 70, and 76-87 were before the district court. However, Plaintiffs submit over twenty pages of documents on appeal that were never before the district court. Accordingly, pursuant to Cir. R. 30-2, the Court may disregard the extra-record pages or “strike the excerpts and order that they be corrected and resubmitted.”

district court's order was issued on March 29, 2011, and the notice of appeal was time filed on March 30, 2011. ER at 1-3; 4; & 5-11; Fed. R. App. P. 4(a)(1)(B).

II. STATEMENT OF THE ISSUES

1. Whether the claims of Dinh and Peter Tran are moot where Dinh married his fiancée after she was admitted to the United States on an approved K-1 visa, and Peter Tran wed his fiancée in Vietnam and then filed an I-130 immediate relative immigrant petition on her behalf.
2. Whether the doctrine of consular nonreviewability bars the review of consular refusals of K-1 visas where the petitioning U.S. citizens are not precluded from marrying their fiancées outside of the United States and no statute provides an explicit right to a marriage ceremony in the United States.
3. Whether the Department of State is obligated to allow Plaintiffs to rebut decisions to return K-1 petitions to USCIS where no applicable statute or regulation requires such rebuttal and where the actions at issue determine no rights or privileges.
4. Whether USCIS's regulation that establishes a four-month validity on approved K-1 petitions is *ultra vires*, where its promulgation was authorized by statute and it reflects Congressional intent to allow foreign fiancées to enter the United States as expeditiously as foreign spouses.

III. STATEMENT OF THE CASE

On June 24, 2010, Plaintiffs filed their initial complaint in this matter. ER at 83. On August 26, 2010, Plaintiffs filed their FAC seeking review of alleged contradictory and unlawful practices by United States Citizenship and Immigration Services (“USCIS”). ER at 84. Plaintiffs are each the U.S. citizen petitioner of an alleged fiancée for a K-1 nonimmigrant visa. Plaintiffs challenge various aspects of the K-1 petition and visa application process. On appeal, Plaintiffs pursue the following claims:²

First, Plaintiffs challenge consular decisions denying their fiancée’s visas. Discussing the consular officer’s reasons for denying the K-1 visas, each Plaintiff alleges that:

“the denial bases . . . evaded the spirit of due process, evidenced a lack of diligence, revealed a willful rendering of substandard performance, and revealed a wanton abuse of power unbecoming of our civilized nation whose Declaration of Independence shunned the autocratic concept of absolute power vested in any one pair of hands. As such, the denial was issued in bad faith.”

² Issues not raised on appeal and not “specifically and distinctly argued” in an appellant’s opening brief are waived. *See Union of Bricklayers and Allied Craftsmen Local No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). Here, Plaintiffs concede the district court’s dismissal of their Third Claim for Relief regarding alleged unreasonable delays and the portion of Plaintiffs’ First Claim for Relief that challenges Defendants’ use of a “P6C1” marker, at ¶¶ 158-59 of the FAC. Opening Brief at 4 n.2.

FAC ¶¶ 68, 110, 143; SER at 18, 26-27, 32-33;³ *see also* Opening Brief at 10-21.

Second, Plaintiffs allege due process and APA violations regarding consular decisions to return their K-1 petitions to USCIS and seek mandamus and other relief related to those claims. Plaintiffs allege that they should have been afforded: (1) the opportunity to rebut consular findings before a petition is returned USCIS; (2) consular decisions to return K-1 petitions to USCIS that were not based on the consular officers' suspicions of fraud, misrepresentation, or ineligibility; (3) consular returns based on "sufficient written notice supported by the legal and factual basis for the denial and petition return that is not conclusive, speculative, equivocal or irrelevant;" and (4) a mechanism for rebutting consular findings. FAC ¶¶ 161-65, 177-80; SER at 36-37, 39-40; *see also* Opening Brief at 22-25.

Finally, Plaintiffs challenge as *ultra vires* the validity of USCIS's regulation at 8 C.F.R. § 214.2(k)(5) that provides a four-month validity period for K-1 petitions as. FAC ¶ 156-59; SER at 35-36; *see also* Opening Brief at 25-28.

On October 12, 2010, Defendants filed a motion to dismiss the entirety of Plaintiffs' FAC. Dkt. # 17; ER at 84. Plaintiffs opposed Defendants' motion on

³ Because the FAC was not included in Plaintiffs' Excerpts of Record, references to the FAC will be made by citing to the page number of Defendants' Supplemental Excerpts of Record (*i.e.*, "SER at ___").

October 22, 2010, and Defendants replied in support of their motion on November 8, 2010. Dkt. #s 21, 24; ER at 85. After the Court granted Plaintiffs leave to file a surreply, Plaintiffs filed a surreply on November 15, 2010. Dkt. #s 26, 27; ER at 85. The magistrate judge heard argument on Defendants' motion on November 18, 2010. Dkt. # 28; ER at 86.

On December 3, 2010, the magistrate judge issued Findings and Recommendations ("F&R") that recommended the district court grant Defendants' motion in part and deny Defendants' motion in part. Dkt. # 29; ER at 86. All parties filed objections to the F&R on December 20, 2010, and responses were filed on January 3, 2010. Dkt. #s 31, 32; ER at 86. The district court granted Plaintiffs leave to supplement their pleadings, and Plaintiffs filed additional pleadings on March 29, 2010. Dkt. #s 35, 37-38; ER at 86. The district court then issued its opinion and order on the same date, adopting the magistrate judge's F&R in part, and granting the entirety of Defendants' motion to dismiss Plaintiffs' FAC. Dkt. # 39; ER at 86-87.

During the course of the action below, Plaintiffs never moved to certify their claims as a class action. ER at 81-87.

IV. STATEMENT OF FACTS

A. STATUTORY AND REGULATORY BACKGROUND

1. The K Visa

In 1970, Congress created a new nonimmigrant visa, designated K-1, which allows alien fiance(e)s of U.S. citizens to enter the United States to marry their U.S. citizen fiance(e) within ninety days. *See* 8 U.S.C. § 1101(a)(15)(K)(I). Before the K-1 visa, an U.S. citizen would have to marry his or her spouse in a foreign country and then petition for the spouse to immigrate to the United States. With the K-1 visa, Congress leveled the playing field between fiance(e)s and spouses of U.S. citizens, such that fiance(e)s could now enter the United States as expeditiously as a spouse. H.R. Rep. No. 91-851 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2750, 2753.

Unlike other nonimmigrant visas, Congress did not permit aliens seeking to be classified in K-1 status to simply apply for the visa at a consular office or embassy abroad. Rather, Congress created a two-step process whereby the U.S. citizen is required to file a petition and obtain the approval of the Secretary of Homeland Security prior to the beneficiary applying for a nonimmigrant visa abroad. *See* 8 U.S.C. § 1184(d)(1). The separate petition requirement for this nonimmigrant visa was created by Congress to “provide[] safeguards against abuse . . . by requiring . . . that before classification under the new subparagraph

(K), the alien fiancé must be the subject of a petition approved by the Attorney General after he is satisfied as to the bona fides of the parties and their ability legally to conclude the marriage.” 1970 U.S.C.C.A.N. at 2757. The Congressional Record indicates that the Department of State favored the proposal because “a petition requirement would provide a useful safeguard against attempt fraudulent use of the classification.” *Id.* at 2758. On April 10, 1970, the Immigration and Naturalization Service promulgated regulations relating to the filing and approval of petitions required by 8 U.S.C. § 1184(d). Miscellaneous Amendments to Chapter, 35 Fed. Reg. 5,958, 5,958 (April 30, 1970).

2. The K Petition and Visa Application Process

To begin the application process, a U.S. citizen fiancée files a Petition for Alien Fiancee (“K-1 petition”) on Form I-129F for his or her fiancée with USCIS. 8 C.F.R. § 214.2(k)(1); 22 C.F.R. § 41.81(a)(1). When adjudicating a K-1 petition, United States Citizenship and Immigration Services (“USCIS”) assesses – based solely on the documents submitted by petitioner – whether: (1) the petitioner is a U.S. citizen; (2) the couple intends to marry within 90 days of the fiancée entering the United States; (3) the petitioner and fiancée are both free to marry and any previous marriages must have been legally terminated by divorce, death, or annulment; and (4) the petitioner and fiancée met each other, in person,

at least once within two years of filing the petition. 8 U.S.C. § 1101(a)(15)(K)(I); 8 C.F.R. §§ 214.2(k)(2) & (5). If USCIS determines to approve the K-1 petition, it is valid for four months. 8 C.F.R. § 214.2(k)(5).⁴

USCIS then sends the K-1 petition to the National Visa Center (“NVC”). See U.S. Dept. of State, 9 Foreign Affairs Manual (“FAM”) § 41.81 N3. The NVC conducts appropriate criminal background checks and sends the petition to the embassy or consulate in the country where the fiancée resides. *Id.*; 9 FAM § 41.81 N4. Upon receipt of the approval notice from the NVC, the consulate sends out an instruction package to the K-1 visa applicant.⁵ 9 FAM § 41.81 N6.1, PN3.2. K-1

⁴ 8 C.F.R. § 214.2(k)(5) was promulgated in 1970. See Miscellaneous Amendments to Chapter, 35 Fed. Reg. 12,268, 12,268 (July 31, 1970). It provides that:

The approval of a petition under this paragraph shall be valid for a period of 4 months. A petition which has expired due to the passage of time may be revalidated by a district director or an American consular officer for a period of 4 months from the date of revalidation upon a finding that the petitioner and beneficiary are free to marry and intend to marry each other within 90 days of the beneficiary’s entry into the United States.

8 C.F.R. § 214.2(k)(5).

⁵ There is a substantive difference between a visa petition and an actual visa. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984) (“It is important to note that a visa petition is not the same thing as a visa. An approved visa petition is merely a preliminary step in the visa application process. It does not guarantee that a visa will be issued, nor does it grant the alien any right to remain in the United States.”) (citations omitted).

visa applicants are scheduled for an interview only when: “(1) the alien has reported that all of the necessary documents have been collected; and (2) the medical examination has been completed and the report is or will be available before the interview.” 9 FAM § 41.81 PN3.4. At the interview, the consular officer assesses the alien’s eligibility for the visa, including the bona fides of the fiancée relationship. 9 FAM § 41.81 PN3.4; 9 FAM § 41.81 N6.5.⁶

Based on the application, submitted documents, and visa interview, the consular officer either issues or refuses the visa. 22 C.F.R. §§ 41.81, 41.121. If the consular officer determines that the applicant is eligible for K-1 visa status pursuant to 22 C.F.R. §§ 41.81(a), (d) and 41.101- 41.122, the officer will issue a single-entry visa valid for a period of six months. 9 FAM § 41.81 PN 3.6(b). If the consular officer determines that the applicant for a K-1 visa is ineligible for the visa, the consular officer can refuse to issue the visa. In such cases, the consular officer is required to inform the applicant of the reason for the refusal and whether there is a mechanism to overcome the refusal. 22 C.F.R. § 41.121(b)(1). A refusal is subject to mandatory review by the principal consular officer. 22 C.F.R.

⁶ If the consular post has not issued a K-1 visa prior to the expiration of the four-month validity of the I-129F petition, the consular officer may revalidate the petition for an additional four-month period. *See* 8 C.F.R. §214.2(k)(5) & 9 FAM § 41.81 PN6.

§ 41.121(c) . One ground for visa refusal is found at 8 U.S.C. § 1201(g), which provides, in part, that:

“[n]o visa or other documentation shall be issued to an alien if — (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 212, or any other provision of law.”

If a consular officer determines that the relationship on which the K-1 petition is based is not *bona fide*, the consular officer must return the petition to the appropriate USCIS office, through the NVC, with a memorandum providing the specific facts supporting that conclusion. 9 FAM § 41.81 N6.5. Although the Department of State refers to its return of K-1 petitions to USCIS in terms of “revocation,” FAC ¶¶ 46, 89, 128; SER at 13, 22, 30, only USCIS may revoke visa petitions, and it only may revoke immigrant visa petitions. *See* 8 U.S.C. § 1155; 8 C.F.R. § 205.2. K-1 petitions are petitions for nonimmigrant visas. 8 U.S.C. § 1101(a)(15)(K). Upon the return of a K-1 petition to USCIS, USCIS will not reaffirm or reopen a returned K-1 petition. *See* Dkt. # 17, Exhibit A to the Memorandum in Support of Defendants’ Motion to Dismiss, USCIS web guidance, “Fiance(e) Visas.” Such action does not preclude petitioners from filing another petition. *Id.*

B. Plaintiff Dzu Cong Tran

On August 24, 2009, Dzu Tran, a naturalized U.S. citizen, filed a Form I-129F petition on behalf of Trinh Thi Tuyet Pham (“Ms. Pham”), his alleged fiancée. FAC ¶¶ 35, 38; SER at 11-12. USCIS approved the petition on October 27, 2009, valid through February 26, 2010. FAC ¶ 41; SER at 12. On November 4, 2009, the NVC issued a letter noting that the petition would be forwarded to the U.S. consulate in Ho Chi Minh City, Vietnam. FAC ¶ 42; SER at 12-13.

On March 9, 2010, the U.S. consulate notified Ms. Pham that it was ready to begin processing the visa and scheduled her for an interview on April 14, 2010. FAC ¶ 43; SER at 13. Following the interview with a U.S. consular officer, Ms. Pham was given a letter on May 12, 2010, requesting that she submit a notarized statement and detailed chronology regarding the relationship and certain other biographical information from Dzu Tran. FAC ¶ 44; SER at 13. After the additional documents were submitted, Ms. Pham received a letter denying her request for a visa pursuant to 8 U.S.C. § 1201(g). FAC ¶ 46; SER at 13-14. The consular officer found that:

- (1) photographs submitted as evidence of the relationship indicated that Dzu Tran and Ms. Pham had only spent four or five days together;

- (2) no evidence was submitted regarding an engagement celebration, which contradicts local social and cultural norms, and has been established as one of the key elements of a sham relationship to evade U.S. immigration laws;
- (3) it did not appear that the claimed relationship was ongoing, in part, because Dzu Tran has not returned to visit Ms. Pham since September 2008;
- (4) Ms. Pham was unaware of basic facts regarding Dzu Tran's occupation, livelihood and/or worklife, including that Ms. Pham did not know the name of Dzu Tran's company;
- (5) Ms. Pham was unable to provide basic facts regarding the claimed planned marriage in the U.S., she was unaware of the requirement to marry within 90 days of admission to the U.S., and that it appeared that the "relationship is a sham or that [Ms. Pham] has no actual intent to marry within 90 days of admission to the U.S. (or both)."

See FAC ¶¶ 48, 51, 54, 58, 61, 64, 67; SER at 14-18.

The letter also indicated that the U.S. consulate was returning the petition to USCIS with the recommendation that it be revoked, that revocation would result in Ms. Pham's ineligibility for a visa under 8 U.S.C. § 1182(a)(6)(C)(I), and that USCIS would contact Dzu Tran, who would have an opportunity to rebut the consular officer's findings. FAC ¶¶ 46, 71; SER at 14-15, 19. The U.S. consulate returned the visa petition to USCIS on July 31, 2010. USCIS notified Dzu Tran on October 1, 2010, that because the validity period of the visa petition expired

pursuant to 8 C.F.R. § 214.2(k)(5), “all USCIS action on this petition is concluded as of the date of this notice.” ER at 43.

C. Plaintiff Daniel Mai Dinh

On May 8, 2009, Dinh, a U.S. citizen by birth, filed a Form I-129F petition on behalf of Vinh Ngoc Vu (“Ms. Vu”), his alleged fiancée. FAC ¶¶ 77, 78, 82; SER at 20-21. USCIS approved the petition on August 25, 2009, valid through December 24, 2009. FAC ¶ 83; SER at 21. On August 31, 2009, the NVC issued a letter noting that the petition would be forwarded to the U.S. consulate in Ho Chi Minh City, Vietnam. FAC ¶ 84; SER at 21.

Thereafter, the U.S. consulate notified Ms. Vu that it was ready to begin processing the visa and scheduled her for an interview on November 25, 2009. FAC ¶ 85; SER at 21. Following the interview with a U.S. consular officer, Ms. Vu was given a letter on December 23, 2009, requesting that she submit a notarized statement containing a detailed chronology of the relationship from plaintiff Dinh. FAC ¶ 87; SER at 22. After the additional documents were submitted, Ms. Vu received a letter denying her request for a visa pursuant to 8 U.S.C. § 1201(g). FAC ¶ 88-89; SER at 22. The consular officer found that:

- (1) photographs submitted as evidence of the relationship indicated that Dinh and Ms. Vu had only spent three or four days together;

- (2) no evidence was submitted regarding an engagement celebration, which contradicts local social and cultural norms, and has been established as one of the key elements of a sham relationship to evade U.S. immigration laws;
- (3) Dinh's and Ms. Vu's chronologies of the claimed relationship contradicted each other regarding when they were introduced;
- (4) Ms. Vu was unable to provide basic facts regarding the claimed planned marriage in the United States, including the names of guests or the approximate costs, and that it appeared that the "relationship is a sham or that [Ms. Vu] has no actual intent to marry within 90 days of admission to the U.S.";
- (5) Ms. Vu's account of basic facts regarding the claimed relationship were not credible, including her inability to provide basic details (hotel, destination, duration, approximate costs) of the claimed planned honeymoon;
- (6) Ms. Vu was unaware of the requirement to marry within 90 days of admission to the U.S.;
- (7) Ms. Vu was unaware of basic facts regarding Dinh, including his current boss or where he worked previous to his current job.

See FAC ¶¶ 92, 94, 97, 100, 103, 106, 109; SER at 23-26.

The letter also indicated that the U.S. consulate was returning the petition to USCIS with the recommendation that it be revoked, that revocation would result in Ms. Vu's ineligibility for a visa under 8 U.S.C. § 1182(a)(6)(C)(I), and that USCIS would contact Dinh who would have an opportunity to rebut consular findings concerning the case. FAC ¶¶ 89, 113; SER at 22, 27.

The U.S. consulate returned the visa petition to USCIS. FAC ¶ 114; SER at 27. USCIS subsequently notified Dinh on June 24, 2010, that because the validity period of the visa petition expired pursuant to 8 C.F.R. § 214.2(k)(5), “all USCIS action on this petition is concluded as of the date of this notice.” ER at 59.

Dinh filed a second I-129F petition on behalf of his fiancée. Opening Brief at 6. After appearing for an interview at the consulate, Ms. Vu received a K-1 visa, entered the United States on that visa, married Dinh, and subsequently applied for adjustment of status to that of a lawful permanent resident. Opening Brief at 7.

D. Plaintiff Austin Peter Tran

On October 13, 2009, Austin Tran, a U.S. citizen by birth, filed a Form I-129F petition on behalf of Mai Thanh Nguyen (“Ms. Nguyen”), his alleged fiancée. FAC ¶¶ 119, 121-122; SER at 28-29. USCIS approved the petition on March 19, 2010, valid through July 18, 2010. FAC ¶ 123; SER at 29. The NVC issued a letter noting that the petition would be forwarded to the U.S. consulate in Ho Chi Minh City, Vietnam. FAC ¶ 124; SER at 29.

Thereafter, the U.S. consulate notified Ms. Nguyen that it was ready to begin processing the visa and scheduled her for an interview on July 14, 2010. FAC ¶ 125; SER at 29. Following the interview with a U.S. consular officer, Ms.

Nguyen was given a letter on August 11, 2010, requesting that she submit a notarized statement containing a detailed chronology of the relationship from Austin Tran. FAC ¶ 126; SER at 29-39. After the additional documents were submitted, Ms. Nguyen received a letter denying her request for a visa pursuant to 8 U.S.C. § 1201(g). FAC ¶ 127-28; SER at 30. The consular officer found that:

- (1) photographs submitted as evidence of the relationship indicated that Austin Tran and Ms. Nguyen had only spent four or five days together;
- (2) Ms. Nguyen's chronology of the claimed relationship was not credible, including her inability to recall the day when Austin Tran proposed to her;
- (3) Ms. Nguyen was unaware of basic facts regarding Austin Tran's occupation, livelihood, and/or worklife, including that Ms. Nguyen did not know with whom Austin Tran resided;
- (4) Ms. Nguyen's account of basic facts regarding the claimed relationship were not credible, including her inability to provide basic details (hotel, destination, duration, approximate costs) of the claimed planned honeymoon;
- (5) Ms. Nguyen's statements were not credible and indicated an attempt to cut off a line of inquiry, including Ms. Nguyen's statement in a notarized affidavit that she had never been the derivative in a different spousal or familial visa petition, when in fact she was the derivative of an I-130 immediate relative immigrant petition filed by her paternal aunt.

See FAC ¶¶ 130, 133, 136, 139, 142; SER at 30-32.

The letter also indicated that the U.S. consulate was returning the petition to USCIS with the recommendation that it be revoked, that revocation would result in Ms. Vu's ineligibility for a visa under 8 U.S.C. § 1182(a)(6)(C)(I), and that USCIS would contact Austin Tran who would have an opportunity to rebut consular findings concerning the case. FAC ¶¶ 128, 146; SER at 30, 33.

The U.S. consulate returned the visa petition to USCIS, and USCIS subsequently notified Austin Tran on October 1, 2010, that because the validity period of the visa petition expired pursuant to 8 C.F.R. § 214.2(k)(5), "all USCIS action on this petition is concluded as of the date of this notice." ER at 71.

On November 27, 2010, Austin Tran and his fiancée wed in Vietnam and then filed with USCIS an I-130, immediate relative immigrant visa petition. Opening Brief at 7-8.

V. STANDARD OF REVIEW

This Court reviews the district court's dismissal for lack of subject matter jurisdiction and failure to state a claim *de novo*. *Gruver v. Lesman Fisheries Inc.*, 489 F.3d 978, 982 (9th Cir. 2007). This Court may also affirm the decisions of the district court on any alternative bases fairly supported by the record. *See Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003). Additionally, where an issue was not addressed by the district court, and it is not critical to the court's

disposition of an appeal, it should be left for the consideration of the district court on remand. *See Forester v. Chertoff*, 500 F.3d 920 (9th Cir. 2007); *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149 (9th Cir. 1992).

VI. SUMMARY OF ARGUMENT

First, the claims of Dinh and Peter Tran should be dismissed as moot because of events that occurred subsequent to the district court's decision. During the pendency of this appeal, USCIS approved Dinh's fiancée K-1 visa and they wed in the United States. USCIS also approved the immigrant visa petition that Peter Tran filed on behalf of his fiancée after they wed in Vietnam.

Second, the Court should affirm the dismissal of Plaintiffs' challenges to decisions by consular officers regarding visa issuance because those consular decisions are immune from judicial review under the doctrine of consular nonreviewability. Although there is a narrow exception to this doctrine when a visa refusal implicates a U.S. citizen's constitutional rights, Plaintiffs lack standing to raise due process claims on behalf of their alleged fiancées and Plaintiffs' unsupported allegations of "bad faith" are insufficient to support the Court allowing even limited review of whether the consular refusals in this case were facially legitimate and bona fide. Moreover, Plaintiffs cannot circumvent the

doctrine of consular nonreviewability by classifying their claims as a challenge to the visa petition return process.

Third, the Court should affirm the dismissal of Plaintiffs' challenges to alleged improper practices regarding visa issuance by the Department of State and the handling of petition returns by the Department of State and USCIS. The actions that Plaintiffs seek to compel under the Administrative Procedure Act ("APA") and Mandamus Act are not required by law nor are they final agency actions. The actions in question are therefore not subject to judicial review pursuant to the terms of the APA or the Mandamus Act.

Finally, the Court should affirm the dismissal of Plaintiffs' challenge to USCIS's regulations that establish a four-month validity for K-1 petitions. The regulations are not *ultra vires* because Congress specifically granted Defendants authority to promulgate such regulations. Moreover, Plaintiffs cannot show that the regulations are unreasonable because the regulations mirror Congressional intent and should be afforded *Chevron* deference.

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VII. ARGUMENT

A. **Events Subsequent To The District Court's Dismissal Of Plaintiffs' First Amended Complaint Have Mooted The Claims Of Dinh and Peter Tran.**

Article III of the Constitution limits the jurisdiction of federal courts to “Cases” or “Controversies.” U.S. Const. art. III, § 2, cl. 1. A case becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome” of the litigation. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Thus, events that occur subsequent to the filing of a case can moot a party’s claims. *See Stratman v. Leisnoi, Inc.*, 545 F.3d 1161, 1167 (9th Cir. 2008). Mootness is a jurisdictional issue that may be raise at anytime, even for the first time on appeal. *See, e.g., Laub v. U.S. Dept. of Interior*, 342 F.3d 1080, 1085 (9th Cir. 2003).

Here, during the pendency of this appeal, Dinh and Peter Tran’s claims have become moot. Following a second I-129F petition, Dinh’s fiancée was granted a K-1 visa, she came to the United States, married Dinh, and applied for adjustment of status to that of a lawful permanent resident. Opening Brief at 6-7. Accordingly, because Dinh and his fiancée have received the very benefits they originally challenged, Dinh no longer has a live claim or controversy before this

Court.⁷ Peter Tran’s fiancée was not granted a K-1 visa, but he and his fiancée were married in Vietnam, and he filed an I-130 immigrant relative petition on her behalf. Opening Brief at 7-8. Because Peter Tran has now married his fiancée, she is no longer able to meet the statutory requirements for a K-1 visa and can no longer state a claim regarding eligibility for a K-1 visa or challenge the processing of the K-1 visa or K-1 petition return. *See* 8 U.S.C. § 1101(a)(15)(K).

B. This Court Should Affirm The District Court’s Dismissal Of Plaintiffs’ Challenges To The Denial Of Their Fiances’ K-1 Visas.

In their Opening Brief, Plaintiffs argue that they should be allowed to challenge consular refusals to issue their fiances’ K-1 visas under *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008), because, they allege, “[a]n American citizen has a liberty interest in the manner and form of their marriage ceremony . . . and also the enjoyment of that relationship through the sharing of a residence together.” Opening Brief at 12. Plaintiffs argue that, in the event the Court agrees

⁷ To the extent that Dinh argues that his claim is not moot because he is entitled to a refund of the fees he had to pay in support of his second K-1 petition and visa application, *see* FAC Prayer for Relief ¶ 17; SER at 42, that claim is without merit. The APA does not provide for monetary damages, although it does allow “specific relief,” including the payment of money to which a plaintiff is entitled. *Western Radio Services Co. v. U.S. Forest Service*, 578 F.3d 1116, 1123 (9th Cir. 2009) (citing *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988)). However, Plaintiff alleges no entitlement to the refund of the second set of fees, and as discussed below, he has not shown that the processing of the first K-1 visa and K-1 petition return pursuant to 22 C.F.R. § 41.121 was improper. *See supra* section VII.2.C.

with their position on constitutional standing, that their allegations of “bad faith” are sufficient to permit limited review of the consular refusals under *Bustamante*. Opening Brief at 17. Finally, Plaintiffs offer policy arguments why the Court should reexamine the doctrine of consular nonreviewability, while noting that “Plaintiffs are mindful that this Court may not modify, reverse or establish new law where precedent binds it” Opening Brief at 20.

The district court correctly adopted the magistrate judge’s F&R, which held that the doctrine of consular nonreviewability barred review of Plaintiffs’ challenges to consular decisions refusing their fiancées’ K-1 visas. Because “[P]laintiffs have no protected liberty interest to marry in the United States, they have not met the threshold requirement necessary to allege a denial of due process.” ER 22.

1. Consular Decisions On Visa Applications Are Generally Immune From Review.

This Court has consistently affirmed the doctrine of consular nonreviewability as a bar against courts substituting their own judgment for that of consular officials either to grant or deny visas. *See, e.g., Bustamante v. Mukasey*, 531 F.3d 1059, 1060 (9th Cir. 2008) (“It has been consistently held that the consular official's decision to issue or withhold a visa is not subject to either administrative or judicial review.”) (internal quotations and citations omitted); *Li*

Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 970 (9th Cir. 1986) (“The doctrine of nonreviewability of a consul’s decision to grant or deny a visa stems from the Supreme Court’s confirming that the legislative power of Congress over the admission of aliens is virtually complete.”); *Ventura-Escamilla v. INS*, 647 F.2d 28, 30 (9th Cir. 1981) (holding that courts lack jurisdiction when “the relief sought is a review of the Consul’s decision denying their application for a visa”). By enacting the Immigration and Nationality Act (“INA”), Congress intended to confer upon consular officials the exclusive authority to issue or withhold visas. *Li Hing of Hong Kong, Inc.*, 800 F.2d at 971. The exercise of this power is not subject to judicial review or intervention. *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Li Hing of Hong Kong, Inc.*, 800 F.2d at 971.

In holding that courts have no jurisdiction to review consular visa denials, this Court explained:

The scope of judicial review is necessarily limited by the recognition that the power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative branches of government As such, judicial intervention has been restricted to those matters the review of which has been authorized by treaty or statute, or is required by the paramount law of the Constitution.

Ventura, 647 F.2d at 30 (internal quotations and citations omitted); *Capistrano v. Department of State*, 267 Fed. Appx. 593, 594 (9th Cir. 2008).

No statutory or other authority exists that authorizes judicial review of a consular officer's refusal of a visa. Rather, the INA confers upon consular officers the authority to issue or refuse to issue a visa and specifically exempts the exercise of this power from review by the Secretary of State. *See* 8 U.S.C. §§ 1104(a), 1201(a); *Ventura*, 647 F.2d at 30. The legislative history establishes that before the enactment of the INA, Congress considered and rejected the suggestion that the consular officer's decision be administratively or judicially reviewable:

Consular decisions – Although many suggestions were made to the committee with a view toward creating in the Department of State a semijudicial board, similar to the Board of Immigration Appeals, with jurisdiction to review consular decisions pertaining to the granting or refusals of visas, the committee does not feel that such body should be created by legislative enactment, nor that the power, duties and functions conferred upon consular officers by the instant bill should be made subject to review by the Secretary of State

Ventura, 647 F.2d at 30-31, citing H. Rep. No. 82-1365, *reprinted at* 1952 U.S.C.C.A.N. 1653, 1688 (1952).

The doctrine of consular nonreviewability has withstood efforts to distinguish or overcome it on many grounds, including allegations that a consular visa decision was erroneous, contrary to law, or arbitrary and capricious. Courts have held that a consular officer's visa determination is not subject to review, even if: (1) the officer allegedly failed to follow Department regulations, *Burrafato v. Department of State*, 523 F.2d 554, 556 (2d Cir. 1975); (2) the applicant

challenges the validity of the regulations on which the decision was based, *Ventura*, 647 F.2d at 30 (9th Cir. 1981); (3) the decision was alleged to have been based on a factual or legal error or was contrary to the INA, *Centeno v. Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987); *Loza-Bedoya v. INS*, 410 F.2d 343 (9th Cir. 1969); *Grullon v. Kissinger*, 417 F. Supp. 337 (E.D.N.Y. 1976), *aff'd without op.*, 559 F.2d 1203 (2d Cir. 1977); (4) the applicant claims the decision is reviewable under the APA, *Romero v. Consulate of Barranquilla*, 860 F. Supp. 319, 322, 324 (E.D. Va. 1994); *Haitian Refugee Center v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992); or (5) the applicant challenges the reasonableness of the determination, *U.S. ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927); *Hermina Sague v. United States*, 416 F. Supp. 217, 220-21 (D.P.R. 1976).

Further, the “characteriz[ation] of the complaint as one challenging the process followed by the consulate rather than its ultimate decision does not exempt the case from th[e] well-settled doctrine” of consular nonreviewability. *Capistrano*, 267 Fed. Appx. at 594. This Court explained that “[a]t its core, the relief sought . . . would require the [] consulate to revisit its decision denying the visa applications.” *Id.*; *see also Wong v. Leavitt*, No. 07-cv-2019, 2008 WL 2774448, *2 (E.D. Cal. Jun. 27, 2008) (dismissing case on consular

nonreviewability grounds where plaintiffs argued that they challenged only the process, not the Consulate's decision).

Accordingly, where no exception to the doctrine of consular nonreviewability applies to Plaintiffs, their invitation for the courts to interfere with the visa-issuing process must fail, and this Court should affirm the decision of the district court granting Defendants' motion to dismiss Plaintiffs' FAC in its entirety.

2. No Exception To The Doctrine Of Consular Nonreviewability Applies To Plaintiffs Because They Have No Protected Interest To Marriage In the United States.

In *Bustamante*, this Court held that the doctrine of consular nonreviewability has a limited exception "where the denial of a visa implicates the rights of American citizens." 531 F.3d at 1061. In this case, however, the Court should find that the Plaintiffs, each the U.S. citizen petitioner of a Vietnamese fiancée, have no protected interest to have their marriage ceremony in the United States. In doing so, the Court should affirm the district court's dismissal of Plaintiffs' challenge to the consular refusals of their fiancées' visas and also affirm the district court's dismissal of Plaintiffs' challenges to Defendants' procedures that are premised on such alleged constitutional rights.

A. No Authority Explicitly or Implicitly Supports A Protected Interest To Marriage In the United States.

As a threshold requirement to any due process claim, every plaintiff must show that he has a protected liberty interest. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972) (“[t]he requirement of procedural due process apply only to the deprivation of interests encompassed by the [Due Process Clause’s] protection of liberty and property”); *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (due process claimant “must, as a threshold matter, show government deprivation of life, liberty, or property”). To have a protected property or liberty interest in a benefit, “a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” *Roth*, 408 U.S. at 577; *see also Roberts v. Spaulding*, 783 F.2d 867, 870 (9th Cir. 1986) (“A mere expectation of receiving a benefit is not enough to create a protected interest”). A statutory grant of a procedural right cannot itself give rise to a liberty interest. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280 n.2 (1998); *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (an “expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause”); *FDIC v. Henderson*, 940 F.2d 465, 475 (9th Cir. 1991) (“[A] substantive property right cannot exist exclusively by virtue of a procedural right”).

The Supreme Court has recognized freedom of personal choice in matters of marriage and family as a liberty interest. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion). However, the Supreme Court’s rulings regarding the “right to marriage” focus on infringements to the actual ability to establish or dissolve a marriage. *See Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978) (distinguishing a case that did not interfere with the freedom to marry because “Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged, let alone made ‘practically impossible,’ any marriages.”).

“There is no authority supporting the view that a United States citizen has a constitutional right to engage in a marriage ceremony in the United States at which the foreign national is present.” *Chiang v. Skeirik*, 582 F.3d 238, 242 (1st Cir. 2009) (dismissing challenge to a consular decision denying a K-1 visa for lack of standing, and finding that the petitioner there was free to marry his fiancée “in China, in a third country, or possibly, in the United States by proxy.”). In an analogous decision, this Court refused to recognize a “right to family unity” to reside in the United States “simply because other members of their family are citizens or lawful permanent residents.” *De Mercado v. Mukasey*, 566 F.3d 810,

816 (9th Cir. 2009); *cf. Bustamante, et al. v. Mukasey et al.*, 531 F.3d 1059, 1062 (9th Cir. 2008) (recognizing that a U.S. citizen *spouse* would have standing to challenge a consular officer's denial of her Mexican husband's visa, but not addressing the issue of fiancée petitions) (citations omitted) (emphasis added).

Here, Plaintiffs argue – without citation to any authority – that a protected liberty interest in marriage itself extends to the location of that marriage, the “manner and form of [the] marriage ceremony,” and “the enjoyment of [the] relationship through the sharing of a residence together.” Opening Brief at 11-12. Plaintiffs thus argue that the district court erred because it did not “properly undertake a balancing of the interests required.” Opening Brief at 12. However, the balancing test that Plaintiffs reference determines the propriety of Government conduct that is alleged to interfere with an established constitutional interest – but no established constitutional interest is implicated here.

In *Zablocki*, the Supreme Court found that a Wisconsin law requiring certain residents to seek a court order to marry improperly interfered with the right to marriage because “[u]nder the challenged statute, no Wisconsin resident in the affected class may marry in Wisconsin *or elsewhere* without a court order, and marriages contracted in violation of the statute are both void and punishable as a criminal offense.” 434 U.S. at 387 (emphasis added). Here, as in *Chiang v.*

Skeirik, the specific liberty interest in marriage is not implicated because “plaintiffs can marry their fiancées in Vietnam, in a third country, or possibly in the United States by proxy.” *See Chiang*, 582 F.3d at 242.

The discussion of 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. Plaintiffs’ reference to *Mandel* for the proposition that alternatives are not sufficient to extinguish a constitutional interest is without merit. Opening Brief at 17, citing *Mandel*, 408 U.S. at 765. Unlike the Supreme Court’s recognition of a constitutionally protected interest in the right to be married, the Court in *Mandel* recognized a specific First Amendment interest in a particular form of access to speech, that is, face-to-face debate, discussion, and questioning. *See Mandel*, 408 U.S. at 765. Thus, while Plaintiffs correctly note that the *Mandel* Court dismissed alternative means of accessing speech, that holding is not analogous here because *Mandel*’s holding 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. *See Chiang*, 582 F.3d at 242.⁸

⁸ In fact, in apparent recognition of the obstacles to establishing standing sufficient to raise a challenge to consular decisions under *Bustamante*, Plaintiffs

B. There Is No Statutory Obligation Allowing Foreign Born Fiances To Marry In The United States.

Plaintiffs Opening Brief also argues that a liberty interest in the right to marry in the United States is created because “Congress’ use of the mandatory ‘shall’ indicates a specific obligation to permit foreign-born fiances to marry in the United States once they have met the minimum criteria established in the statute.” Opening Brief at 13, *citing Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661 (2007); *see also Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979).⁹

Even if this Court is compelled to follow the cases that recognize the creation of a due process interest in the expectancy of criminal release on parole, the statutory language at issue here is distinguishable. In *Greenholtz*, the Supreme Court found a constitutionally protected interest in the expectancy of parole based

turn to policy arguments and note that “[w]hile 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 [of consular nonreviewability] to be reexamined.” Opening Brief at 19-21.

⁹ The cases cited by Plaintiffs are inapposite. *Defenders of Wildlife* involves the propriety of a regulation, not whether a statutorily mandated obligation gives rise to a constitutional right. 551 U.S. at 644. Moreover, the Supreme Court’s line of cases involving criminal release on parole, represented by *Allen* and *Greenholtz*, are distinguishable because they involve questions regarding the expectancy of release for inmates who have already been deprived of their liberty. *See Greenholtz*, 442 U.S. at 7 (“the conviction, with all its procedural safeguards, has [constitutionally] extinguished that liberty right . . .”).

on the significance of the “statute’s mandatory language – the use of the word ‘shall’ – and the presumption created – that parole release must be granted unless one of four designated justifications for deferral is found.” *Allen*, 482 U.S. at 374, citing *Greenholtz*, 442 U.S. at 11-12. However, if a statute does not mandate a particular outcome, there is no legitimate claim of entitlement and, hence, no liberty interest. *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002).¹⁰ Plaintiffs’ attempt to shoehorn their claim into *Valdez* by citing the statute in question as follows: “[the petition] *shall* be approved’ in order for the parties ‘ . . . to conclude a valid marriage *in the United States* . . .”]. Opening Brief at 12, citing 8 U.S.C. § 1184(d)(1). Plaintiffs also rely on similar language stating that “[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 salien and approved by the Secretary of Homeland Security.” Opening Brief at 13, citing 8 U.S.C. § 1184(d)(1). Plaintiffs omit significant portions from the statute. The entirety of 8 U.S.C. § 1184(d)(1) provides:

¹⁰ The Supreme Court has clearly ruled that the statutory grant of a procedural right cannot itself give rise to a liberty interest. See *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280 n.2 (1998); *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (an “expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause”); *FDIC v. Henderson*, 940 F.2d 465, 475 (9th Cir. 1991) (“[A] substantive property right cannot exist exclusively by virtue of a procedural right”).

A visa shall not be issued under the provisions of section 1101(a)(15)(K)(I) of this title 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. The petition shall be in such form and contain such information as the Secretary of Homeland Security shall, by regulation, prescribe. Such information shall include information on any criminal convictions of the petitioner for any specified crime. *It shall be approved only after satisfactory evidence is submitted by the petitioner to establish that the parties have previously met in person within 2 years before the date of filing the petition, have a bona fide intention to marry, and are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien's arrival, except that the Secretary of Homeland Security in his discretion may waive the requirement that the parties have previously met in person.* In the event the marriage with the petitioner does not occur within three months after the admission of the said alien and minor children, they shall be required to depart from the United States and upon failure to do so shall be removed in accordance with sections 1229a and 1231 of this title.

8 U.S.C. § 1184(d)(1) (emphasis added).

Here, the magistrate judge's F&R, as adopted by the district court, correctly held that:

“the statutory language says nothing about the obligation of a consular officer to issue a K-1 visa. Instead, it refers only to the obligation of the USCIS to grant the K-1 petition after ‘satisfactory evidence is submitted by petition.’ And even if a K-1 petition must be granted once such evidence is submitted, the only benefit conferred is the right to proceed to the second step in the process, namely, to forward the approved petition to a consular for further review. It does not require that the K-1 visa be approved and, absent that approval, no marriage can occur in the United States. Accordingly, the statute creates no constitutional right to marriage in the United States.”

F&R at 12; ER at 22.

Unlike the parole statutes considered by the Supreme Court, the statutory language cited by Plaintiffs here is different. Here, Plaintiffs' cited language is unrelated to the ultimate benefit conferred by the statute. Rather, the statutory language is one of the eligibility criteria – that the petitioner and beneficiary “are legally able and actually willing to conclude a valid marriage in the United States within a period of ninety days after the alien’s arrival.” 8 U.S.C. § 1184(d). Thus, any benefit arising from the statute in question does not allow petitioner to marry his fiancée in the United States, it merely allows them to go to the next step in the process – the forwarding of their approved petition to the consulate for further review. Accordingly, there is no statutory obligation that creates a constitutional right to a marriage ceremony in the United States. Where there is no constitutional right to get married in the United States, the Court should affirm the district court’s dismissal of Plaintiffs’ challenge to consular officers’ refusals of their fiancées’ visas for lack of jurisdiction.

3. Plaintiffs’ Unsupported Allegations of Bad Faith Are Insufficient To State A Claim Under *Bustamante*.

Even if this Court finds that Plaintiffs have standing to assert a constitutional claim under *Bustamante*, the record supports this Court’s affirmance of the district court’s dismissal of Plaintiffs’ unsupported allegations for failure to

state a claim. Under *Bustamante*, when a party raises a valid constitutional challenge to a consular officer's refusal to issue a visa, the party is entitled to review of whether the refusal is facially legitimate and bona fide. 531 F.3d at 1060-62 (“we undertake a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.”). Plaintiffs do not challenge whether the consular officers had facially legitimate reasons to refuse the fiancées' K-1 visas. Plaintiffs do, however, allege that the visa refusals were in bad faith. FAC ¶¶ 45-76, 88-118, 127-46; SER at 13-20, 22-28, 30-33; Opening Brief at 17-19.

Plaintiffs argue that the FAC alleges 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.”

Opening Brief at 17. Contrary to Plaintiffs' assertions, the FAC contains no allegations that consular officers issued boilerplate denials and impermissibility delegated decision making to Vietnamese national employees. Moreover, Plaintiffs allegations regarding alleged lies only relate to the consular return process – not the consular decisions themselves. See FAC ¶¶ 46-47, 72, 89-90, 128-29; SER at 14-15, 19, 22, 30. Finally, Plaintiffs fail to show which facts

alleged in the FAC support their claims that the consular officers “blatantly disregarded evidence, engaged in careless speculation, [and] intentionally and systematically failed to decide cases based on the evidence submitted. . . .”

Opening Brief at 17. The FAC may allege that consular officers disregarded certain evidence and engaged in some speculation in their adjudicative role,¹¹ but Defendants are not aware of any allegations in the FAC that support “blatant disregard[]” of evidence, “careless speculation,” and “intentional[] and systematic[] fail[ures] to decide cases based on the evidence submitted.” *Id.*

Absent such factual allegations, Plaintiffs cannot show that the consular officers’ refusals were in bad faith and not bona fide. *See Amer. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (holding that a consular officer’s facially legitimate decision was non-reviewable “in the absence of a well-supported allegation of bad faith, which would render the decision not bona fide”); *Bustamante*, 531 F.3d at 1062-63 (“[i]t is not enough to allege that the

¹¹ Congress has empowered consular officers to weigh evidence and exercise their judgment. “No visa or other documentation shall be issued to an alien if (1) *it appears to the consular officer, from statements in the application, or in the papers submitted therewith*, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law” 8 U.S.C. § 1201(g)(1) (emphasis added). Plaintiffs’ citation to 9 FAM 4[3] PN1a to suggest that consular officers violated an internal adjudicatory standard is without merit because the standard prohibiting conclusive, speculative, equivocal or irrelevant observations” applies only to the return of petitions to USCIS for possible revocation. *See* 9 FAM 43 PN1a.

consular official's information was incorrect. . . . the allegation that the Consulate was mistaken about [the alien's] involvement with drug trafficking, and offered to make a deal with [the alien] in the basis of this mistaken belief, fails to state a claim upon which relief could be granted."); *see also Din v. Clinton*, No. C 10-0533 MHP, 2010 WL 2560492 at * 4 (N.D. Cal. June 22, 2010), citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("while the facts that Din has pled may be 'consistent' with a finding of bad faith; they do not cross the line from possibility to plausibility of entitlement to relief.").

In apparent recognition that their pleading lacks specific factual allegations of bad faith, Plaintiffs argue that "[t]he bad faith alleged in the FAC extends to a pattern and practice of *failure to consider cases in good faith*." Opening Brief at 18 (emphasis added). No court assessing whether a consular decision was *bona fide* has applied a "good faith" standard. Plaintiffs own pleading recognizes the difference between a "bad faith" allegation: "lack of diligence and slacking off," a "willful rendering of imperfect performance," or "abuse of power," versus a "not in good faith" allegation: lacking "honesty in belief of purposes," or lacking "faithfulness to one's duty or obligation." Opening Brief at 18, citing Black's Law Dictionary, 8th Ed. (2004), pp. 149, 713. Since Plaintiffs' pleading lacks specific factual allegations of bad faith, the Court should affirm the district court's

dismissal for failure to state a claim – on alternative grounds – of Plaintiffs’ challenge to the consular officers’ refusal to issue visas to their fiancées. *See Iqbal*, 129 S. Ct. at 1940 (2009).

C. This Court Should Affirm The District Court’s Dismissal Of Plaintiffs’ Challenges To Alleged Improper Agency Actions In The Second Claim For Relief.

The district court’s order adopting the magistrate judges F&R, in part, correctly found that Plaintiffs “fail to identify any relevant duty of either the State Department or USCIS that has been breached,” with regard to the *visa return procedures* of the Department of State and USCIS. ER at 6 (emphasis added).¹²

In its analysis, the district court held:

in my view the controlling statute, 8 U.S.C. § 1101(a)(15)(K), classifies the K-1 applicant as a nonimmigrant. It is 22 C.F.R. § 41.121(c) that explicitly applies to nonimmigrant visa petitions, while section 42.81(e) applies only to immigrant visas. Section 41.121(c) does not provide plaintiffs any right to offer rebuttal evidence regarding consular officials’ visa refusal or revocation recommendations I do not find any basis upon which I might override the plain statutory language of 8 U.S.C. § 1101(a)(15)(K).

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¹² To the extent that Plaintiffs’ Opening Brief only asserts that the Department of State has an obligation to reconsider the *refusal of a visa*, such claims are precluded by the doctrine of consular nonreviewability. Opening Brief at 23; *see, e.g., Burrafato v. Department of State*, 523 F.2d 554, 556 (2d Cir. 1975) (applying the doctrine of consular nonreviewability where an officer allegedly failed to follow Department regulation); *cf. Davila v. Holder*, C-09-5058, 2010 WL 1264670, *6 (N.D. Cal. Mar. 30, 2010).

ER at 7.¹³ The district court also correctly held that even if Plaintiffs could establish a legal right to rebuttal evidence, “any such right would only apply if plaintiffs adequately alleged that they ‘adduced’ such evidence. Plaintiffs did not allege in the [FAC] that they indicated to anyone their intention to submit rebuttal evidence.” ER at 7 (citations omitted). Finally, the district court chose not to reach the question of whether consular officers’ decisions to return a K-1 petition are final agency actions; although, Defendants maintain that an additional basis to affirm the district court’s dismissal of Plaintiffs’ Second Claim for Relief is because the consular return process is not final agency action.

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¹³ In contrast to Plaintiffs’ FAC, the issues briefed before the district court and on appeal were more limited. Accordingly, this Court should also find that Plaintiffs have waived their the claims in the Second Claim for Relief related to: Constitutional Claims (which they also lack standing to raise, as discussed *infra*); USCIS (which is not controlled by the Department of State’s regulations); the content of the Department of State’s notices supporting visa refusals and petition returns; and decisions by consular officials to return K-1 petitions to USCIS where fraud, misrepresentation, or ineligibility is merely suspected, and that fail to provide notice that is “not conclusive, speculative, equivocal, or irrelevant.” *See Union of Bricklayers and Allied Craftsmen Local No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985) (Issues not raised on appeal, and not “specifically and distinctly argued” in an appellant’s opening brief are waived). In fact, the only claim that Plaintiffs appear to preserve is that the Department of State has an obligation to provide a mechanism for rebutting consular findings.

The APA allows courts to compel agency action that is unlawfully withheld or unreasonably delayed.¹⁴ See 5 U.S.C. § 706(1). However, “the only agency action that can be compelled under the APA is action legally *required*.” See *Norton v. Southern Utah Wilderness Alliance (“SUWA”)*, 542 U.S. 55, 63 (2004) (emphasis in original); see also *San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 885-86 (9th Cir. 2002) (finding there could be no “unreasonable delay” under the APA where EPA did not have a present statutory duty to act). Claims alleging an agency’s “failure to regulate” “must be based upon a clearly imposed duty to take some discrete action.” *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006).

The APA also provides a right to judicial review of all “final agency actions for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. With certain exceptions, the Court can set aside final agency action only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

¹⁴ There is no need to separately address Plaintiffs’ claims under the Mandamus Act in their Fourth Claim for Relief, where the Third Claim for Relief uses the APA as a cause of action, because the Ninth Circuit has “recognized that mandamus relief and relief under the APA are ‘in essence’ the same,” and “as a result,” has elected “analyze the [mandamus] claim under the APA where there is an adequate remedy under the APA.” *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997). When analyzed on its own, mandamus relief is an extraordinary remedy, and “exists when a plaintiff has a clear right to relief, a defendant has a clear duty to act and no other adequate remedy is available.” *Piledrivers’ Local Union No. 2375 v. Smith*, 695 F.2d 390, 392 (9th Cir. 1982).

law.” 5 U.S.C. § 706(2)(A). Standing to raise a claim under the APA exists “only if the plaintiff can show that his injury has been caused by the conduct of which he complains and that it is redressable by the remedy he seeks.” *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992) (citations omitted). In order for an action to be final, and thus reviewable pursuant to the APA, the action must: (1) “mark the ‘consummation’ of the agency’s decision-making process,” and (2) the action “must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

1. The Actions Plaintiffs Seek To Compel – Namely The Ability To Rebut Consular Decisions To Return Their K-1 Petitions to USCIS – Are Not Required By Law.

Plaintiffs’ Opening Brief argues that 22 C.F.R. § 42.81(e) imposes a duty on Defendants to reconsider consular refusals of K-1 visas. Opening Brief at 22-25. However, 22 C.F.R. § 42.81(e) corresponds to immigrant visas, and Congress has classified K-1 visas as nonimmigrant visas. *See* 8 U.S.C. § 1101(a)(15)(K). In furtherance of this classification, the Department of State’s regulations discuss the requirements for K-1 visas in Part 41, which is entitled “Visas: Documentation of Non-Immigrants Under the Immigration and Nationality Act, As Amended.” *See* 22 C.F.R. § 41.81.

In contrast, Plaintiffs argue that the “hybrid” nature of K-1 visas should compel a finding that the immigrant visa regulations at 22 C.F.R. § 42.81(e) be applied to K-1 visa processing. “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 regulations would be applicable.” Opening Brief at 22-23, citing F&R at 17, ER at 29. The only authority Plaintiffs cite, and for the first time on appeal, is a decision of the Board of Immigration Appeals, *Matter of Le*, 25 I. & N. Dec. 541 (BIA 2011). Opening Brief at 22. That decision interprets whether the derivative child of a K-1 visa recipient becomes ineligible to adjust status to that of a lawful permanent resident if the child reaches the age of twenty-one after they are admitted to the United States, but before the application for adjustment of status to that of a lawful permanent resident is filed or adjudicated. *Matter of Le*, 25 I. & N. at 541.

Plaintiffs are correct in that the decision briefly discusses that “[t]he fiance(e) visa petition and adjustment process are hybrid in the sense that they combine both immigrant and nonimmigrant attributes” *Id.* at 544. However, the decision does nothing to suggest that the clear intent of Congress should be ignored and the immigrant visa procedures of 22 C.F.R. § 42.81(e) should apply to the return of K-1 petitions. Similarly on this point, the magistrate judge’s F&R

notes that following further discovery and development of the facts, “defendants may be correct that the State Department should process [K-1 visas] with only the review allowed by 22 C.F.R. § 41.121(c). However that determination cannot be made at this juncture.” F&R at 19; ER at 29. Contrary to the F&R, however, the question of which rules and regulations apply is a question of law and not a question of fact. Accordingly, the district court was correct in its finding that the review procedures of 22 C.F.R. § 41.121 apply to K-1 visa refusals, not the review procedures of 22 C.F.R. § 42.81(e).¹⁵

The procedures of 22 C.F.R. § 41.121 provide that:

Nonimmigrant refusals must be reviewed, in accordance with guidance by the Secretary of State, by consular supervisors, or a designated alternate, to ensure compliance with laws and procedures. If the ground(s) of ineligibility upon which the visa was refused cannot be overcome by the presentation of additional evidence, the refusal must be reviewed without delay; that is, on the day of the refusal or as soon as it is administratively possible. *If the ground(s) of ineligibility may be overcome by the presentation of additional evidence, and the applicant has indicated the intention to submit such evidence, a review of the refusal may be deferred for not more than 120 days.* If the reviewing

¹⁵ Moreover, the district court also correctly held that even were the Court to find that 22 C.F.R. § 42.81(e) was the operative regulation, Plaintiffs’ FAC fails to allege sufficient facts to support their claims. The FAC is silent with regard to whether each Plaintiff “has indicated the intention to submit such [rebuttal] evidence.” 22 C.F.R. § 42.81(e). Accordingly, Plaintiffs’ failure to state a claim in their Second Claim for Relief is another alternative basis for this Court to affirm the dismissal of Plaintiffs’ Second Claim for Relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007); *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1988).

officer disagrees with the decision and he or she has a consular commission and title, the reviewing officer can assume responsibility and readjudicate the case. If the reviewing officer does not have a consular commission and title, he or she must consult with the adjudicating officer, or with the Visa Office, to resolve any disagreement.

22 C.F.R. § 41.121(c) (emphasis added).

Absent from this nonimmigrant visa review regulation (and also absent from the immigrant visa review regulations) is any language that requires the opportunity to rebut or otherwise challenge a consular decision to return a visa petition. *Id.* Also notably absent from this nonimmigrant review regulation is any language that requires the opportunity to rebut visa refusals. *Id.* Rather, the non-mandatory procedure for administrative review of consular decisions on nonimmigrant visas is consistent with this Court's findings in *Ventura-Escamilla v. Immigration and Naturalization Service*, 647 F.2d 28 (9th Cir. 1981), that Congress considered and rejected the suggestion that consular officer's decisions be administratively or judicially reviewable. *Id.* at 30-31, citing H. Rep. No. 82-1365, 1952 U.S.C.C.A.N. 1688. Because such actions are not subject to a clearly imposed duty to act, the APA does not provide a basis of jurisdiction, and this Court should affirm the district court's dismissal of Plaintiffs' Second Claim for Relief. *See W. Watersheds Project*, 468 F.3d at 1110.

2. Consular Decisions To Return K-1 Petitions to USCIS Are Not Reviewable Because They Are Not Final Agency Actions.

Although not addressed by the district court, this Court may also affirm the district court's dismissal of Plaintiffs' Second Claim for Relief because the processes surrounding the return of K-1 petitions to USCIS by consular officials are not final agency actions. Plaintiffs' Opening Brief argues that the determination to return a K-1 petition to USCIS is a reviewable final agency action because letters from the consulate to the Plaintiffs state "[y]our case has been administratively closed," and "[t]he result of the return of the petition is that Plaintiffs are foreclosed any further consideration or review, absent a completely new filing." Opening Brief at 24-25. Plaintiffs offer no authority in support of this proposition.

It is not enough to say that a consular officer's decision to return of a K-1 petition to USCIS is a final agency action because it is not subject to review. Rather, the return of a K-1 petition to USCIS is not a final agency action because it determines no rights or obligations, and there are no legal consequences for petitioners or their fiancées as a result of the decision to return a K-1 petition to USCIS. *See Bennet v. Spear*, 520 U.S. 154, 178 (1997). The consular return of visa petitions involve only *recommendations* from the consular officer. *See* 9

FAM § 41.81 N6.5.¹⁶ Accordingly, this Court should affirm the district court's dismissal of Plaintiffs' Second Claim for Relief on alternative grounds supported by the record.

D. This Court Should Affirm The District Court's Dismissal Of Plaintiffs' *Ultra Vires* Challenge To Defendants' Regulation Establishing A Four-Month Validity Period For K-1 Petitions Because Its Promulgation Was Authorized By Law And Its Content Is Reasonable.

This Court should affirm the district court's dismissal of Plaintiffs' *ultra vires* challenge to USCIS's regulation that establishes a four-month validity period for K-1 petitions – a regulation that was first promulgated in 1970 for two reasons. First, the regulation is not *ultra vires* because its promulgation was authorized by law. Second, the content of the regulation reasonably fills the gaps left by Congress and, accordingly; is entitled to *Chevron* deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984).

¹⁶ Although Plaintiffs have waived any claims with regard to USCIS in their opening brief, to the extent Plaintiffs seek to challenge USCIS's actions on the returned petitions, USCIS already approved each petition once, and Plaintiffs can show no legal consequences that flow from USCIS's decision to allow the petitions to expire pursuant to 8 C.F.R. § 214.2(k)(5). Further, where USCIS has ultimately determined not to take any further action on the K-1 petition returns and permitted them to expire in accordance with 8 C.F.R. § 214.2(k)(5), then Plaintiffs cannot demonstrate that their alleged injuries stem from allegations of improper conduct regarding the process of returning K-1 petitions to USCIS. *See Idaho Conservation League*, 956 F.2d at 1517.

USCIS's regulation at 8 C.F.R. § 214.2(k)(5) is not *ultra vires* because it was promulgated under both specific and general statutory grants of authority. Specifically, "[t]he petition shall be in such form and contain such information as the Secretary of Homeland Security shall, by regulation, prescribe." 8 U.S.C. § 1184(d). Generally, the Attorney General (now the Secretary of Homeland Security) is authorized to "establish such regulations . . . ; and perform other acts as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3). Accordingly, on these authorities alone, this Court may affirm the district court's dismissal of Plaintiffs' *ultra vires* challenges to USCIS's regulation.

The content of USCIS's regulation at 8 C.F.R § 214.2(k)(5) is otherwise reasonable and is entitled to *Chevron* deference. Under *Chevron*, courts consider first "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'" *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (quoting *Chevron*, 467 U.S. at 843). If, after conducting such an analysis, the court concludes that Congress has not addressed the issue, the court "must respect the agency's construction of the statute so long as it is permissible." *Id.* at 130

(citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)). If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *Chevron*, 467 U.S. at 843-844, n.11. Here, Congress has not spoken on the precise question at issue – the validity period of a K-1 petition. *See* 8 U.S.C. §§ 1101(a)(15)(K)(I); 1184(d). The question then turns to whether the agency's construction of the statute is permissible. *Id.*

Although Congress has provided no specific authority limiting the validity period of approved visa petitions, Congress has set a ninety-day time limit for the alien fiancée of a U.S. citizen admitted to the United States on a K-1 visa to marry their U.S. citizen fiancée. *See* 8 U.S.C. § 1101(a)(15)(K)(I). However, in those cases where K-1 petitions are returned to USCIS, USCIS lacks the authority to revoke the petitions. Although Congress has provided authority to revoke certain approved immigrant visa petitions, K-1 petitions are nonimmigrant petitions not subject to revocation authority. *See* 8 U.S.C. § 1155 (providing authority to revoke immigrant visa petitions approved under 8 U.S.C. § 1154); 8 C.F.R. § 205.2 (same). In fact, there is no authority regarding the revocation of K-1 petitions.

Accordingly, absent the four-month validity period established for K-1 petitions, petitions returned to USCIS would remain approved, and fiances could attempt to return to the consulate months or years later to seek a visa. Such a result does not agree with Congress's express intent to have immigrant fiances, who are in bona fide relationships, formalize their marriages quickly. Because the four-month validity period for K-1 petitions mirrors Congress's intent to allow U.S. citizens and their fiances to remain together while ensuring that they have a bona fide attempt to formalize their relationship, this Court should affirm the district court's dismissal of Plaintiffs' claim that USCIS's regulation is *ultra vires*.¹⁷

¹⁷ Further, the reasonableness of the regulation is supported by the fact that the regulations in question do not serve as a absolute bar, and the four-month validity period may be extended by the Department of State or USCIS. *See* 8 C.F.R. § 214.2(k)(5).

VIII. CONCLUSION

For all the foregoing reasons, this Court should affirm the decision of the district court and deny the appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) & (C), I certify that the text of the answering brief is double spaced, proportionately spaced 14 point Times New Roman type; the footnotes are single spaced, proportionately spaced 14 point Times New Roman; and the brief contains 12,237 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2011, I electronically filed the foregoing **Brief for Defendants-Appellees** with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system.

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

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