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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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

vs.

JANET NAPOLITANO, Secretary, Department of Homeland Security; **ALEJANDRO MAYORKAS**, Director, United States Citizenship and Immigration Services ("USCIS"); **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; and **JOHN AND JANE DOE U.S. CONSULAR OFFICERS** 1 through 1,000,
Defendants.

Civil Case No. CV 10-724-ST

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Request for Oral Argument

Defendants submit the following reply in support of their motion to dismiss Plaintiffs' First Amended Complaint ("FAC") for lack of subject matter jurisdiction and failure to state a claim. Plaintiffs' FAC should be dismissed in its entirety because Plaintiffs have failed to meet their burden of establishing subject matter jurisdiction. *See Stock West Inc. v. Confederated Tribes*, 873 F.3d 1221, 1225 (9th Cir. 1989). For any claims where the Court finds that Plaintiffs have established subject matter jurisdiction, Plaintiffs fail to plead sufficient facts to support their claims beyond legal conclusions. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007).[1]

Plaintiffs' FAC and opposition take issue with the decisions and procedures of consular officers and/or U.S. Citizenship and Immigration Services ("USCIS") regarding: (1) the refusal of K-1 visas, and (2) the return of K-1 petitions. This Court's jurisdiction to review each consular or agency decision and each agency's procedures surrounding such actions requires separate and focused analysis. However, the opposition seeks to persuade by puffery. Plaintiffs ambiguous allegations of violations of reasonableness and fair process pervade their pleadings, and Plaintiffs' claims either call for the establishment of new law or disregard and misapply existing law and procedures.

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[1] The Court cannot consider new facts not alleged in the FAC, but asserted in Plaintiffs' opposition papers. *See Schneider v. Calif. Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.").

I. This Court Should Dismiss Plaintiffs' Challenges To The Denial Of Their Fiancees' K-1 Visas Under *Bustamante*.

A. Plaintiffs Have No Protected Interest to Marriage In the United States

This Court should find that Plaintiffs have no protected interest to get married in the United States.[2] In doing so, the Court should dismiss Plaintiffs' challenge to the consular refusals of their fiancees' visas and also dismiss Plaintiffs' challenges to Defendants' procedures that are premised on such constitutional rights.

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

Plaintiffs' opposition to Defendants' motion to dismiss argues that Plaintiffs have standing to challenge consular officers' refusals to issue their fiancees visas because there is a protected liberty interest in the right to get married in the United States. Plaintiffs' Opposition to Defendants' Motion to Dismiss (Opp.), Dkt. 21 at 3-4. Plaintiffs rely primarily on *Zablocki v. Redhail*, 434 U.S. 374 (1978), to support their position. However, Plaintiffs provide no authority, nor are Defendants aware of any authority, to support Plaintiffs' assertion that "they have a protected interest in a marriage ceremony in the United States and the opportunity to enjoy a shared residence as a married couple in this country." Opp. at 8; *see also* Opp. at 5. In fact, in apparent recognition of the obstacles to establishing standing sufficient to raise a challenge to consular decisions under *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2009), Plaintiffs turn to policy arguments and note that "[w]hile Plaintiffs are mindful that this Court may not modify,

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[2] Plaintiffs discussion of perceived burdens if they cannot get married in the United States does not demonstrate that Plaintiff cannot get married elsewhere.

reverse or establish new law where precedent binds it, the time has clearly arrived for the Doctrine [of consular nonreviewability] to be reexamined." Opp. at 10.

Plaintiffs' reliance on *Zablocki* is misplaced. In *Zablocki*, the Supreme Court found that "[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." *Zablocki*, 434 U.S. at 387 (emphasis added). Here, like in *Chiang v. Skeirik*, Plaintiffs can marry their fiancees in Vietnam, in a third country, or possibly in the United States by proxy. *See Chiang*, 582 F.3d 238, 242 (1st Cir. 2009).[3] Additionally, Plaintiffs' assertion that they have a right to "enjoy a shared residence as a married couple in this country," directly conflicts with the Ninth Circuit Court of Appeals' refusal 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). Accordingly, there is no authority that supports Plaintiffs' claims of a constitutional right to marry in the United States.

2. There Is No Statutory Obligation Allowing Foreign Born Fiancees To Marry In The United States.

Plaintiffs also argue 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 fiancees to marry in the United States once they have met the minimum criteria

[3] Plaintiffs' attempts to distinguish *Chiang* is without merit. A party's standing to raise a claim of a constitutional tort under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), is no different than their standing to assert a constitutional right in order to invoke *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2009). That Chiang eventually married his fiancee has no bearing on whether he had standing to file the complaint. Similarly, even if Chiang was *pro se* in the district court, he was represented on appeal.

established in the statute." Opp. at 5, *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). However, *Defenders of Wildlife* involves the propriety of a regulations, 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 for 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 . . . .").

Even if this Court determined that it was 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 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).[4] Here, in Plaintiffs'

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[4] 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").

attempted analogy, they cite the statue in question as stating that "'[the petition] *shall* be approved' in order for the parties ' . . . to conclude a valid marriage *in the United States* . . .'". Opp. at 5, citing 8 U.S.C. § 1184(d)(1). However, Plaintiffs omit significant portions from the statute. The entirety of 8 U.S.C. § 1184(d)(1) provides:

> 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).

Three particular omissions by Plaintiffs demonstrate that the statute creates no constitutional right to marry in the United States. First, the statutory language relates only to USCIS's adjudication of K-1 petitions, and it says nothing about the obligation of a consular officer to issue a visa, except there must be an approved petition. *Id.*[5] Second, even USCIS's adjudication of K-1 petitions is not conditioned on a set of static eligibility criteria like in the parole cases. Rather, USCIS's adjudication of K-1 petitions is premised on an exercise of

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[5] There is no law that mandates the issuance of a K-1 visa. Rather, it is for each consular officer to determine "it appears to the consular officer . . . that such alien is ineligible to receive a visa . . . ." 8 U.S.C. § 1201(g).

USCIS's assessment as to whether "satisfactory evidence is submitted by the petitioner." *Id.* Finally, even if the approval of a K-1 petition was deemed to be mandatory based on the satisfaction of certain statutory criteria, such approval does not give rise to a right to have a marriage ceremony in the United States. Unlike the parole statutes considered by the Supreme Court, the statutory language cited by Plaintiffs here is different. Here, the statutory language cited by Plaintiffs as mandatory is not 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." *Id.* Thus, any benefit arising from the statute in question does not allow petitioner to marry his fiancee 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 marriage in the United States.

Where there is no constitutional right to get married in the United States, the Court should dismiss Plaintiffs' challenge to consular officers' refusals of their fiancees' visas for lack of jurisdiction.

B. 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 Court should still dismiss Plaintiffs' unsupported allegations for failure to state a claim.[6] Under *Bustamante*, when a party raises a valid constitutional challenge to a consular

[6] Even if the Court allows Plaintiffs' claims to proceed, Plaintiffs do not oppose the dismissal of Defendants Clinton, Jacobs, and Bennet from this action.

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 fiancees' K-1 visas. Plaintiffs do, however, allege that the visa refusals were in bad faith. FAC ¶¶ 45-76, 88-118, 127-46.

In their opposition, 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." Opp at 8. Contrary to Plaintiffs' assertions, this is the first time that Plaintiffs allege that consular officers have 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. 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. . . ." Opp. at 8. The FAC may allege that consular officers disregarded certain evidence and engaged in some speculation in their adjudicative role,[7] but Defendants are

[7] 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'

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.*

In apparent recognition that their pleading lacks specific factual allegations of bad faith, Plaintiffs argue that "[t]he 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*." Opp. at 8 (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." Opp. at 8-9, citing Black's Law Dictionary, 8th Ed. (2004), pp. 149, 713. Since Plaintiffs' pleading lacks specific factual allegaions of bad faith, the Court should dismiss Plaintiffs' challenge to the consular officers' refusal to issue visas to their fiancees for failure to state a claim. *See Iqbal*, 129 S.Ct. at 1940 (2009).

II. This Court Should Dismiss Plaintiffs' Challenges To Alleged Improper Agency Actions In The Second Claim For Relief.

This Court should also dismiss Plaintiffs' challenges in the second claim for relief to alleged improper agency actions by the Department of State and USCIS because Plaintiffs seek to compel actions that are not required by law and are not final. Plaintiffs' opposition argues that their challenges to alleged improper agency actions in the second claim for relief should not be

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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.

dismissed because: (1) Defendants have a regulatory duty to provide Plaintiffs with an opportunity to rebut a consular officer's decision; (2) "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;" and (3) consular officer's decisions to return K-1 petitions to USCIS are reviewable final agency actions because "[t]he result of the return of the petition is that Plaintiffs are foreclosed any further consideration or review, absent a completely new filing." Opp. at 12, 13.[8]

A. There Is No Requirement That Plaintiffs Or Their Fiancees Be Allowed To Rebut Consular Decisions.

The Court should dismiss Plaintiffs' claims regarding the Department of State's duty to provide Plaintiffs with an opportunity to rebut consular decisions because such actions are not required by law. *See W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006). Plaintiffs argue that 22 C.F.R. § 42.81(e) imposes a duty on Defendants to reconsider consular refusals of K-1 visas. Opp. at 12. However, Congress has classified K-1 visas are as non-immigrant 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. Moreover, contrary to the allegations in Plaintiffs' opposition, K-1 visa applicants do not complete the application form for immigrant vias, Form

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[8] Plaintiffs offer no opposition to Defendants' arguments that: (1) USCIS is not obligated to provide a mechanism for rebutting consular findings because USCIS has no authority over visa issuance; (2) USCIS is not obligated to provide a mechanism to rebut consular returns; and (3) the nature of the discretionary authority granted to consular officers does not prohibit speculation in consular decisions to refuse visas. *See* Defendants' Motion to Dismiss, Dkt. 20, at 25-27. Accordingly, the Court should dismiss these claims.

DS-240, they complete Form DS-156. *See* Department of State, Nonimmigrant Visa for a Fiance(e) (K-1), *available at* http://travel.state.gov/visa/immigrants/types/types_2994.html (last visited Nov. 8, 2010). Accordingly, 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).

Those procedures provide:

> 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 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 these non-immigrant visa review regulations adopted by the Department State is any language that requires the opportunity to rebut visa refusals. *Id.* This non-mandatory procedure for the rebuttal of a consular decision is consistent

with the Ninth Circuit'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.

Additionally, any rebuttal of the consular decision is limited to cases where: (1) the ground of ineligibility may be overcome, and (2) the applicant has indicated the intention to

submit such evidence. *Id.* Here, Plaintiffs allege for the time in their opposition that "they promptly inquired about providing evidence." Opp. 12. While such allegations are not properly considered at this time, the new allegation that Plaintiffs' visa applications were immediately closed indicates a ground of ineligibility that could not be overcome. 22 C.F.R. § 41.121(c).

Accordingly, the Court should dismiss Plaintiffs' claims regarding the Department of State's duty to provide Plaintiffs with an opportunity to rebut consular decisions because such actions are not required by law. *See W. Watersheds Project*, 468 F.3d at 1110.

B. Consular Returns of K-1 Petitions Are Not Final Agency Actions.

The Court should also dismiss Plaintiffs' claims challenging the use of improper standards and alleging a requirement that the Department of State provide a mechanism to rebut such determinations because those determinations are not final agency actions.[9] Plaintiffs argue that the determination to return a K-1 petition to USCIS is a reviewable final agency action because "Plaintiffs are foreclosed any further consideration or review . . ." and that there is harm "in the absence of an opportunity to rebut consular findings, and also the end result." Opp. At 13.

On this point, Plaintiffs fail to address that the consular findings they purportedly seek to rebut – the return of K-1 petitions to USCIS with recommendations for revocation – determine no rights or obligations, and there are no legal consequences for petitioners or their fiancees as a

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[9] To the extent Plaintiffs assert, without support, that "Plaintiffs also have a due process right to rebut the consular officer's finding of a sham relationship" "because a fundamental liberty interest is implicated," Opp. at 13, such claim should be dismissed for lack of standing and failure to state a claim. As discussed *supra*, the Court should find that no fundamental liberty interest is implicated by Plaintiffs relationships with their fiancees. Even if the Court recognized such an interest, Plaintiffs provide no basis for extending such interest to create a right to rebut a consular officer's decision to return K-1 petitions to USCIS.

result of the decision to return a K-1 petition to USCIS. *See Bennet v. Spear*, 520 U.S. 154, 178 (1997). To the extent Plaintiffs actually seek to challenge the refusal of their fiancees' visas, review is precluded by the doctrine of consular nonreviewability. To the extent Plaintiffs seek to challenge USCIS's actions on the returned petitions, USCIS already approved each petition once, and Plaintiffs allege 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). Accordingly, Plaintiffs' allegations regarding improprieties in the return of K-1 petitions to USCIS should be dismissed for lack of subject matter jurisdiction. *Id.*

III. The Court Should Dismiss Plaintiffs' Claims That The Department Of State And USCIS Unreasonably Delayed Action.

The Court should dismiss Plaintiffs' allegations of unreasonable delays by the Department of State and USCIS because Plaintiffs allegations of delay are moot and the timeliness of the actions that Plaintiffs seek to compel is not required by law. Plaintiffs' opposition argues that alleged unreasonable delays by the Department of State and USCIS are not moot because the challenged conduct if capable of repetition and yet evades review, and that "Defendants' delays in processing the visa applications submitted by Plaintiffs and their fiancees is in direct conflict with Congressional intent, and goes to the unreasonableness of the delay." Opp. at 14-15.

First, where only Plaintiff Dinh alleges that he has filed a new K-1 petition, FAC ¶ 117, neither Plaintiffs Dzu Tran or Austin Train can demonstrate that the challenged conduct is capable of repetition, and their claims regarding Defendants' allegedly unreasonable delays should be dismissed. Second, even if the Court finds that the alleged adjudicatory delays are

capable of repetition in the case of Plaintiff Dinh, those claims should still be dismissed because the deadlines for the actions Plaintiffs seek to compel are not required by law.

In response to Defendants' motion to dismiss, Plaintiffs generally assert that "defendants may not unreasonably delay the process." Opp. at 15. However, Plaintiffs fail to specify statutory requirements or other standards regarding the various adjudicatory delays alleged in the FAC. Rather, Plaintiffs derive the requirement from an unenforceable Congressional enactment that states that:

> [i]t shall be the policy of the Department of State to process immigrant visa applications of immediate relatives of United States citizens and nonimmigrant K-1 visa applications of fiancees of United States citizens within 30 days of the receipt of all necessary documents from the applicant and the Immigration and Naturalization Service.

Pub. L. 107-222, Div. A, § 223, 116 Stat. 1373. Plaintiffs argue that this provision "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."

At most, this provision provides a guideline to assess the timing of consular decisions following the receipt of all necessary documents from the applicant and USCIS. Here, the facts alleged by Plaintiff support that in each case, the consulate issued a decision within thirty days of the fiancees' interviews, which marks the time at which all necessary documents are submitted in most cases. *See* FAC ¶¶ 44-45, 87-88, 126-27; 9 FAM § 41.81 PN3.4. Accordingly, Plaintiffs' claims of consular delays in the issuance of decisions following the receipt of all documents should be dismissed for failure to state a claim.

With regard to Plaintiffs' other allegations, Plaintiffs fail to demonstrate the applicability of this "30 days" provision to: (1) consulate's scheduling of visa interviews within a reasonable

period of the National Visa Center's receipt of an approved K-1 petition from USCIS; (2) consulate's notification of the petitioner and beneficiary regarding a decision to return petitions to USCIS; (3) consulate's delivery of a returned petition to the National Visa Center; (4) USCIS's notification regarding the consular recommendation; (5) and USCIS's further actions, if any, on the returned petitions. *See* FAC ¶¶ 170-175. Where Plaintiffs fail to assert that the actions they seek to compel are lawfully required to be completed in a certain amount of time, Plaintiffs' remaining allegations in the third claim for relief should be dismissed for failure to state a claim. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004); *see also Luo v. Coultice*, 178 F. Supp. 2d 1135, 1140 (C.D. Cal. 2001) (courts have found "[no] statutory language obligating the INS to approve or reject petitions returned by consulate official . . . . If the INS has no obligation to act on the returned petition at all, it certainly has no obligation to act within a certain period of time.").

IV. The Court Should Dismiss Plaintiffs' Ultra Vires Challenge To Defendants' Regulation Establishing A Four-Month Validity Period For K-1 Petitions Because Its Promulgation Was Authorized By Law.

Plaintiffs fail to state a claim that Defendants' regulation establishing a four-month validity period for K-1 petitions is *ultra vires* because the promulgation of the regulation was authorized by law. In their opposition, Plaintiffs argue that "*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." Opp. at 16, citing *Nagahi v. INS*, 219 F.3d 1166 (10th Cir. 2000).

Plaintiffs reliance on *Nagahi* is misplaced. There Tenth Circuit Court of Appeals considered whether a regulation that set a time limit to petition for review of a denial of

naturalization in district court was ultra vires. *See Nagahi*, 219 F.3d at 1169, citing 8 U.S.C. § 1421(c) and 8 C.F.R. § 336.9(b). *Nagahi* held that broad grants of authority to regulate found at 8 U.S.C. §§ 1103(a)(3) and 1443(a) did "not extend to creating limits upon judicial review." *Nagahi*, 219 F.3d at 1170 ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate [limits on judicial review] unless that power is conveyed by Congress in express terms," quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); and *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1994) ("Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction'") (citations omitted). Tellingly, the court in *Nagahi* distinguished *Nagahi's* facts from two other cases where the establishment of time limits relating to administrative claims, rather than judicial claims, was proper. *See Nagahi*, 219 F.3d at 1171, citing *District Lodge 64 v. NLRB*, 949 F.2d 441, 444-45 (D.C. Cir. 1991), and *United Mine Workers v. Kleppe*, 561 F.2d 1258, 1260-62 (7th Cir. 1977).

Here, the regulation in question serves an administrative purpose and it does not curtail judicial claims in federal court. *See* 8 U.S.C. § 214.2(k)(5). Additionally, while Plaintiffs challenge the relevance of 8 U.S.C. § 1184(a) to regulations limiting the validity of an approved K-1 petition,[10] Plaintiffs do not oppose similar language at 8 U.S.C. § 1103(a)(3) that authorizes the Attorney General to "establish such regulations . . .; and perform other acts as he deems

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[10] While 8 U.S.C. § 1184(a) authorizes regulations regarding admission to the United States, 8 U.S.C. § 1184(d) provides that "[t]he petition shall be in such form and contain such information as the Secretary of Homeland Security shall, but regulation, prescribe." 8 U.S.C. § 1184(d).

necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3). Courts must "respect the agency's construction of the statute so long as it is permissible" *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (citations omitted). Because the regulations in question were promulgated pursuant to statutory grants of authority, and where those regulations do not legislate beyond the statutory authority to "establish such regulations . . . necessary for carrying out the [Attorney General's] authority . . . ," Plaintiffs are unable to support their claim that the four-month validity period is ultra vires, and the Court should dismiss the claim.

V. The Court Should Dismiss Plaintiffs' Challenge To The Department Of State's Use Of P6C1 Markers Because Plaintiffs Can Demonstrate No Injury And Use Of The Marker Is Not A Final Agency Action.

Finally, the Court should dismiss Plaintiffs' challenge to the Department of State's use of P6C1 markers because Plaintiffs' opposition applies an incorrect standard to the motion to dismiss, fails to establish an actual injury to support Plaintiffs' standing, and fails to establish that the use of the P6C1 marker is a final agency action. In their opposition, Plaintiffs argue that their challenge to the Department of State's use of P6C1 markers should not be dismissed because the alleged confusion regarding the use of the marker results in, "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." Opp. at 19.

Plaintiffs correctly note a discrepancy between the language used by consular officers on their visa refusal notices and lack of legal authority for USCIS to revoke K-1 petitions. Opp. at 19. However, this discrepancy is of no consequence to the dismissal Plaintiffs' claims. Here, Plaintiffs cannot demonstrate an actual injury stemming from allegations of improper conduct

regarding the implementation and application of 9 FAM § 40.63 N10.1. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992). Absent the revocation of the underlying petition, the notation has no effect. *See, e.g.*, 9 FAM § 40.63 N10.1. Even if USCIS had the authority to revoke the K-1 petitions at issue, USCIS has determined not to take any further action on the K-1 petition returns, and to let them expire in accordance with 8 C.F.R. § 214.2(k)(5). Accordingly, Plaintiffs allegations regarding the Department of State's potential finding of inadmissibility pursuant to 8 U.S.C. § 1182(a)(6)(C)(i) are unfounded – Plaintiffs lack an actual injury, and the claim should be dismissed for lack of jurisdiction. Similarly, where the Department of State's internal use of the P6C1 does not result in a determination of right or obligation, as in the cases of Plaintiffs' fiancees, the Department of State's use of the P6C1 marker is not subject to review because it is not final. *See Bennett*, 520 U.S. at 178.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

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Respectfully submitted,

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