No. 24-1253

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Eduardo Teles de Menezes; Carlos Eduardo Rodrigues Menezes,

Plaintiffs - Appellants,

v.

Antony J. Blinken, in his official capacity of Secretary of State; Jacqueline Ward, in her official capacity of Consul General of the United States Consulate General in Rio de Janeiro, Brazil,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 1:22-cv-10970-GAO, Hon. George A. O'Toole, Jr.

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND AMERICAN IMMIGRATION COUNCIL IN SUPPORT OF APPELLANTS AND REVERSAL

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UNDER Fed. R. App. P. 29(a)(4)(A)

Pursuant to Fed. R. App. P. 29(a)(4)(A), I certify that the American Immigration Lawyers Association and the American Immigration Council are non-profit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

Dated: October 16, 2024

/s/ Matthew L. Hoppock
Matthew L. Hoppock

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INTEREST OF AMICI CURIAE

The American Immigration Lawyers Association (AILA), founded in 1946, is a national, non-partisan, non-profit association with more than 16,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice. AILA's members practice regularly before the Department of Homeland Security, immigration courts and the Board of Immigration Appeals, as well as before the U.S. Courts of Appeals and the U.S. Supreme Court.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, and protect the legal rights of noncitizens. The Council regularly litigates and advocates around issues involving access to immigration benefits, including issues of judicial review in the immigration context.[1]

[1] No party's counsel authored this brief in whole or in part, or contributed money intended to fund preparing or submitting this brief. No person other than amici or their counsel contributed money intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF THE ARGUMENT

The consular nonreviewability doctrine does not apply to the agency's action in this case. First, the agency did not announce a visa denial. Second, the consular nonreviewability doctrine shields discretionary or fact-bound decisions *by consular officers.* This case involves no such decision. Rather, the agency's action in withholding a visa at this time was the product of a decision by the Justice Department, binding on other federal government employees, to adopt a particular interpretation of the Immigration and Nationality Act. The consular officers did no more than follow that external mandate. They made no individualized judgment that could be subject to the doctrine of consular nonreviewability.

ARGUMENT

I. The Consular Nonreviewability Doctrine Bars Review of Consular Officers' Individualized Visa Denials

Courts created the consular nonreviewability doctrine to shield consular officers' decision-making from undue judicial interference. *Dep't of State v. Muñoz*, 144 S. Ct. 1812, 1820 (2024). Courts have applied this doctrine to preclude review of consular officers' individualized visa denials. *Id*. The Supreme Court has recognized an exception to the doctrine when a visa denial burdens a U.S. citizen's

constitutional rights. *Id*.[2] But in this case, no exception was necessary — the district court should not have applied the consular nonreviewability doctrine at all. The consular officer's reclassification of Eduardo Teles de Menezes' immigrant visa petition, of which Carlos is the beneficiary, was not a visa denial, and it was not an individualized decision. Rather, it was an application of agency policy that misstates and misunderstands the Child Status Protection Act, substantially delaying Carlos's eligibility for the visa interview.

A review of cases associated with the doctrine confirms that courts have always been centrally concerned with consular officers' individualized, discretionary decisions resulting in visa denials. The two cases from the late 1920's that are considered to be the source of the contemporary doctrine each involved a decision on an individual visa application by a consular officer. *U.S. ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929) (consular officer refused an immigrant visa; court found no immigration law providing for "official review . . . by a cabinet officer or other authority"); *U.S. ex rel. London v. Phelps*, 22 F.2d

[2] The exception derives from *Kleindienst v. Mandel*, where U.S. university professors claimed their constitutional rights were violated when the Attorney General exercised his discretion to deny a waiver after a consular officer denied a noncitizen's visa application based on inadmissibility for communist activity. 408 U.S. 753, 760 (1972). The Court concluded that it would not balance the First Amendment rights the professors asserted against the government's interest in denying a waiver and instead would consider whether the government has provided a "facially legitimate and bona fide" reason for the waiver denial. *Id*. at 768-70.

288, 290 (2d Cir. 1927) (whether the consul officer acted reasonably in denying a visa (by refusing "to vise a passport") was not for the court to determine).

Contemporary consular nonreviewability decisions similarly involve consular officers making discretionary determinations in individual cases. In *Saavedra-Bruno v. Albright*, the D.C. Circuit concluded that the consular nonreviewability doctrine barred judicial review of consular officer decisions to revoke a nonimmigrant visa previously issued in one category, and deny a visa in another nonimmigrant category, by virtue of the officer's belief that the noncitizen was involved in drug trafficking. 197 F.3d 1153, 1156 (D.C. Cir. 1993). Pointing back to the D.C. Circuit's 1929 decision in *Ulrich*, and forward "[u]nder succeeding incarnations of federal immigration law through to the present, this court and other federal courts have adhered to the view that consular visa determinations are not subject to judicial review." *Id*. at 1160.

Importantly, though, *Saavedra-Bruno*'s focus was on determinations by *consular* officers. That same court found no bar to reviewability in a suit challenging a consular visa denial where the key choices were "the decisions of State Department officials rather than consular officers abroad." *Abzourek v. Reagan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986), *aff'd by an equally divided Cour*t, 484 U.S. 1 (1987) (per curiam). The policies underlying the consular nonreviewability doctrine were not implicated there.

Similarly, in *Mulligan v, Schultz*, 848 F.2d 655 (5th Cir. 1988), the Fifth Circuit was clear that the consular nonreviewability doctrine was inapplicable when plaintiffs—instead of challenging "decisions of United States consuls on visa matters"—were instead challenging a decision by the Secretary of State specifying the law that all U.S. consuls were bound to apply. *See id*. at 657. The Ninth Circuit, for its part, has made clear that "when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion" the doctrine does not apply. *Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997); *see also Rivas v. Napolitano*, 714 F.3d 1108, 1111 (9th Cir. 2013). More recently, in *Allen v. Milas*, the Ninth Circuit described the nonreviewability doctrine as "foreclosing review of the merits of consular visa decisions" unless required by a legal source like the Constitution, the Administrative Procedure Act, or the Immigration and Nationality Act (INA). 896 F.3d 1094, 1105 (9th Cir. 2018). Following these parameters, the court concluded that the consular nonreviewability doctrine precluded review of a consular officer's denial of an immigrant visa to the spouse of a U.S. citizen. Crucially, though, the court distinguished that reviewability bar from the availability of judicial review when lawsuits challenged the State Department's failure to follow the INA, or when the consular officer had failed to adjudicate a visa application. *Id*. at 1108.

Recent caselaw has emphasized two points. First, the consular nonreviewability doctrine applies only to final visa denials—not to decisions that substantially delay visa availability. *See, e.g., Janay v. Blinke*n, --- F. Supp. 3d ---, Civ. No. 23-3737 (RDH), 2024 WL 3432379, at *8-9 (D.D.C. July 16, 2024); *Ebrahimi v. Blinken*, --- F. Supp. 3d ---, No. 23 C 3867, 2024 WL 2020038, at *7 (N.D. Ill. May 3, 2024) (collecting cases); *Sharifi v. Blinken*, --- F. Supp. 3d ---, No. 1:23-cv-5112-OEM, 2024 WL 1798185, at *3 (E.D.N.Y. Apr. 25, 2024).

Second, the doctrine is inapplicable where the key decision underlying the denial was made by someone other than the consular officer. *See*, *e.g.*, *Ranjan v. Dep't of Homeland Sec.*, Civ. No. 23-2453 (LLA), 2024 WL 3835355, at *7 (D.D.C. Aug. 15, 2024) ("DHS has offered nothing to suggest that the inadmissibility finding was made by a consular officer—and there is therefore no reason to believe that consular nonreviewability attaches").

The court in *Sunny v. Biden*, 573 F. Supp. 3d 759, 771 (E.D.N.Y. 2021), summed it up well, in the specific context of a challenge like this one: "Plaintiffs' challenge does not seek to expedite individual cases or litigate a specific deferral. Instead, it aims at enjoining a State Department policy that plaintiffs believe violates the INA and the Administrative Procedures Act. This position contests the Department's authority to promulgate the policy at issue, not the discretionary decisions of the consular and embassy staff who are implementing it."

Judicial review is available in this case because plaintiffs do not challenge any individualized decision by a consular officer on Carlos Menezes' immigrant visa application. To begin, this case challenges the consul's authority to reclassify Eduardo Teles de Menezes' immigrant visa petition — of which Carlos is the beneficiary — and thus to delay Carlos's receipt of a visa. No final denial has taken place, and thus the consular nonreviewability doctrine does not apply.

And second, plaintiffs' attack is not directed at any choice made by a consular officer. Rather, as in *Sunny v. Biden*, "it aims at enjoining a State Department policy that plaintiffs believe violates the INA." 573 F. Supp. 3d at 771. The consular nonreviewability doctrine does not extend to such a suit.

II. The Consular Officer Made No Decision That Could Be Shielded From Review.

In this case, the consulate did not issue a visa denial, and it made no individualized decision. As the District Court acknowledged, the action that the plaintiffs are challenging is the State Department's "reclassifi[cation of] Carlos's visa petition to a category with a longer processing time" after Eduardo became a naturalized citizen. *Teles de Menezes v. Blinken*, No. CV 22-10970-GAO, 2024 WL 218465, at *1 (D. Mass. Jan. 18, 2024) (Carlos is the beneficiary of the visa petition Eduardo filed for him). And that action was based solely on the Executive's interpretation of the law, described in its Foreign Affairs Manual

(FAM) at 9 FAM 502.1-1(D)(6)(2).[3] That is, the only issue before the lower court was whether the Executive correctly understands the statutory law.

The State Department follows the Attorney General's interpretation of the Child Status Protection Act (CSPA), as described in *Matter of Zamora-Molina*, 25 I. & N. Dec. 606, 614 (BIA 2011). Indeed, it must—under 8 U.S.C. § 1103(a)(1), the Attorney General's interpretation is binding on the State Department.

Yet both the Second Circuit and the Ninth Circuit have rejected the Attorney General's interpretation of the statute. In *Cuthill v. Blinken*, the Second Circuit decided that "the text, structure, purpose, and legislative history of the CSPA" refuted the agency's interpretation of the law. 990 F.3d 272, 285 (2d Cir. 2021). And the Ninth Circuit in *Tovar v. Sessions* concluded that *Matter of Zamora-Molina* had ignored part of the statute and therefore that its interpretation of the CSPA produced "absurd results." 882 F.3d 895, 904 (9th Cir. 2018).

The District Court erred here by invoking the doctrine of consular nonreviewability when the only relevant question was whether the BIA and the Foreign Affairs Manual misread the statute, an error of law the consular officer had no discretion to ignore and mandatorily applied. The agency's action on review was its reclassification of Eduardo's visa petition for his son, after Eduardo

[3] State Dep't, FAM, "Conversion of Petition Status, Visa Classification Under a Preference Category:" 9 FAM 502.1-1(D)(6)(2), https://fam.state.gov/fam/09FAM/09FAM050201.html (last visited Oct. 14, 2024).

naturalized. The agency's own guidance calls that reclassification "automatic[]"—not discretionary. 9 FAM 502.1-1(D)(6)(2). The BIA's decision in *Matter of Zamora-Molina* similarly describes the reclassification as an "automatic" requirement of the statute itself, not a discretionary judgment made by a consular officer. 25 I. & N. Dec. at 612-15.

Comparing that to the "consular judgment" at issue in *Adams v. Baker*, 909 F.2d 643, 649 (1st Cir. 1990), the difference is stark. In *Adams*, the consular officer exercised discretion found in the statute, which permits an officer to refuse a visa to someone who "a consular official . . . knows or has reasonable ground to believe has engaged, in an individual capacity or as a member of an organization, in a terrorist activity . . . ." *Id.* at 646 *citing* Temporary Prohibition on Exclusion or Deportation of Aliens For Certain Beliefs, Statements, or Associations, 101 Stat. 1399, § 901(b)(2) (1988), *reprinted in* 8 U.S.C.A. § 1182 note, at 143 (West Supp.1990). This statute bestows on the "consular official" discretion to act on their knowledge or belief about the visa applicant's past terrorist activity. *Id*.

In other consular nonreviewability decisions, courts have relied on the government's unlimited discretion to exclude noncitizens in "defending the country against foreign encroachments and dangers." *Muñoz*, 144 S. Ct. at 1825 (quoting *Mandel*, 408 U.S. at 765); *see also Kerry v. Din*, 576 U.S. 86, 103–04 (2015) (Kennedy concurring) (describing Congress's intent to grant "substantial

discretion" to the Attorney General to exclude noncitizens, especially "in the area of national security."). But the doctrine of consular nonreviewability does not extend to cases where the consular officer has made no individualized determination. As the court put it in *Sunny v. Biden*, plaintiffs are attacking "a State Department policy that plaintiffs believe violates the INA, . . . not the discretionary decisions of the consular and embassy staff," and so the nonreviewability bar does not apply. 573 F. Supp. 3d 759, 771 (E.D.N.Y. 2021).

Certainly consular officers, deciding whether to issue visas to specific individuals, must make decisions about their eligibility and whether they should be excluded. That is not what happened here. The agency automatically reclassified the immigrant visa petition from one category to another and that automatic reclassification resulted in a consular officer finding that Carlos was not yet eligible for a consulate interview. And it did so not based on knowledge or belief about Carlos's worthiness to receive a visa or be admitted but rather solely based on a decision about statutory interpretation made by the Board of Immigration Appeals in the Washington, D.C metropolitan area. The doctrine of consular nonreviewability does not make such matters of statutory interpretation immune from judicial review. The District Court erred in dismissing the suit.

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CONCLUSION

For these reasons, the Court should reverse the decision of the district court and remand the case.

Dated: October 16, 2024

Respectfully submitted,
/s/ Matthew L. Hoppock

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), as the brief contains 3,255 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

Dated: October 16, 2024

/s/Matthew L. Hoppock
Matthew Hoppock

CERTIFICATE OF CONSENT

I hereby certify, pursuant to Fed. R. App. P. 29(a)(2), that counsel for the Appellant and counsel for Appellees consented to *amici curiae* filing a brief in this matter.

Dated: October 16, 2024

/s/Matthew L. Hoppock
Matthew Hoppock

CERTIFICATE OF SERVICE

The undersigned certifies that on this 16th day of October 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: October 16, 2024

/s/Matthew L. Hoppock
Matthew Hoppock