

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE**

DAISY RODRIGUEZ,)	
)	
Plaintiff,)	
)	
v.)	No. 3:25-cv-182-KAC-DCP
)	
U.S. DEPARTMENT OF STATE et al.,)	
)	
Defendant.)	

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS’ MOTION TO DISMISS**

Defendants, by and through Francis M. Hamilton III, United States Attorney for the Eastern District of Tennessee and pursuant to Federal Rule of Civil Procedure 12(b)(6), move to dismiss Plaintiff’s Complaint because the doctrine of consular nonreviewability precludes judicial review of her husband’s visa denial, and her complaint fails to adequately allege an exception to the doctrine that would permit judicial review.

STATEMENT OF FACTS

Plaintiff is a United States citizen and resident of Sweetwater, Tennessee. (Doc. 1, ¶ 1.) In 2017, she married Santos Maudilio Saucedo Rivas, a Guatemalan citizen who entered the United States in 2006 without inspection. (*Id.*) Shortly after their marriage, Mr. Saucedo Rivas “embarked on the process for acquiring lawful permanent residency” under the Immigration and Nationality Act (the “INA”), 8 U.S.C. §§ 1154; 1181-82. He “receiv[ed] a waiver of his unlawful presence” and traveled to the United States Embassy in Guatemala City, Guatemala, to undergo an interview for the purpose of obtaining an immigrant visa, which is a part of the INA’s mandatory consular process. (*Id.* at ¶¶ 2-3.)

More specifically, Mr. Saucedo Rivas underwent three consular interviews “on December 8, 2022, March 20, 2023, and April 19, 2023.” (*Id.* at ¶ 9.) Plaintiff alleges that during one or more of these interviews, consular officials “attempted to entrap” Mr. Saucedo Rivas, “accus[ed] him of lying and making excuses when he tried to answer their questions,” “told him he looked like a gangster and a ‘convicto,’” and accused him of being “a member of ‘Barrio Azteca,’ which is a transnational gang.” (*Id.* at ¶ 3.)

After these interviews, the consulate “deemed [Mr. Saucedo Rivas] inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii), which bars entry to individuals who an officer has ‘reasonable ground to believe’ sought entry to engage in ‘any other unlawful activity.’” (*Id.* (quoting 8 U.S.C. § 1182(a)(3)(A)(ii)). Consequently, “[o]n June 30, 2023, a consular officer informed Mr. Saucedo Rivas and Ms. Rodriguez that the visa was denied under 8 U.S.C. §1182(a)(3)(A)(ii)” (*Id.* at ¶ 12.) On July 31, 2023, Mr. Saucedo Rivas, through counsel, “submitted evidence that generally presented Mr. Saucedo Rivas as being of good moral character, and DOS replied that it had not changed its conclusion.” (*Id.* at ¶ 15.) Then, on June 24, 2024, Mr. Saucedo Rivas submitted “statement[s]” from three “experts,” which he claims “show it was factually impossible for [him] to be a gang member.” (*Id.*; *see also generally* Docs. 1-1, 1-2, and 1-3.)

According to Plaintiff, when she and her husband submitted these “statements” to the State Department, they did so with a letter from counsel, “urg[ing] the Embassy to contact” one of her “experts”—Jeffrey Gibson—who had offered to provide additional “information” further showing that Mr. Saucedo Rivas was not affiliated with a gang. (Doc. 1, ¶ 19.) Despite this offer, “Defendants made no attempt to contact any of the experts and the Embassy did not request any information from [Mr.] Gibson about persons affiliated with the Barrio Azteca gang as pertaining

to Mr. Saucedo Rivas.” (*Id.* at ¶ 20.) Rather, “in June 2024, the Embassy reiterated its inadmissibility finding and Mr. Saucedo Rivas remains in Guatemala.” (*Id.*)

Dissatisfied with the outcome, Plaintiff filed this lawsuit on April 29, 2025, challenging her husband’s visa refusal. (*See generally* Doc. 1.) Among other things, she argues that the Defendants “failed to follow DOS regulations” when they declined to contact Mr. Gibson “for the information he offered to provide.” (Doc. 1, ¶¶ 21-26.) She further alleges that the consular officers’ refusal to contact Mr. Gibson, according to Plaintiff, reveals that the Defendants failed to “meaningfully review” her husband’s evidence and therefore entitles her to relief under the Administrative Procedure Act (the “APA”) in the form of an order compelling the Defendants to engage in a “meaningful reconsideration process.” (*Id.* at ¶¶ 27-29.) Lastly, Plaintiff maintains—without legal support—that she “has a First Amendment right to associate and speak in person with her husband” and that those “rights were harmed by the visa denial.” (*Id.* at ¶ 31.) Thus, she argues, the so-called “bad-faith exception” to the consular nonreviewability doctrine applies, and the Court should—contrary to well-settled law—second guess the executive branch’s decision. (*Id.* at ¶¶ 32-35.) Contrary to Plaintiff’s assertions, the doctrine of consular nonreviewability precludes judicial review of her husband’s visa refusal. Additionally, the Complaint fails to identify a valid constitutional interest that the Plaintiff has in her husband’s visa adjudication or to plausibly allege facts sufficient to invoke any so-called “bad-faith exception” to consular nonreviewability. As a result, Plaintiff’s Complaint fails to state a claim upon which relief may be granted and should be dismissed with prejudice.

DISMISSAL STANDARD

Defendants seek dismissal of Plaintiff’s Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). When evaluating a motion under that Rule, courts must construe the

complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations as true. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). The Court “may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant’s motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein.” *Id.* To survive dismissal, a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

LAW & ARGUMENT

I. THE DOCTRINE OF CONSULAR NONREVIEWABILITY PRECLUDES JUDICIAL REVIEW OF MR. SAUCEDO RIVAS’S VISA REFUSAL.

The doctrine of consular non-reviewability precludes judicial review of Mr. Saucedo Rivas’s visa refusal. The Supreme Court has long recognized—and recently reaffirmed—that “the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Dep’t of State v. Muñoz*, 602 U.S. 899, 907 (2024) (quoting *Trump v. Hawaii*, 585 U.S. 667, 702 (2018)) (internal quotation marks omitted). “Congress may delegate to executive officials the discretionary authority to admit noncitizens ‘immune from judicial inquiry or interference.’” *Id.* at 908 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). “The Judicial Branch has no role to play ‘unless expressly authorized by law.’” *Id.* (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)). Because the Immigration and Nationality Act “does not authorize judicial review of a consular officer’s denial of a visa,” courts “cannot review those decisions.” *Id.* at 908. “This principle is known as the doctrine of consular nonreviewability.” *Id.*

The Sixth Circuit, too, has recognized that “[v]isa decisions, as a general matter, fall within the domain of the Legislative and Executive Branches—with Congress setting the terms for acceptance and denial and the President and the Department of State exercising considerable discretion in implementing those requirements through U.S. consulates around the world. *Baaghil v. Miller*, 1 F.4th 427, 432 (6th Cir. 2021) (citing *Kleindienst v. Mandel*, 408 U.S. 753, 754-56 (1972) and *Knauff*, 338 U.S. 542-43).

“This allocation of authority to the First and Second Branches over visa applications rarely permits the Third Branch to police the decisions.” *Id.* Thus, the doctrine of consular nonreviewability is a “no-trespass rule under which the courts rarely second guess the decisions of consulates to deny or grant applications.” *Id.*; *see also Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (noting that the doctrine “holds that a consular official’s decision to issue or withhold a visa is not subject to judicial review, at least until Congress says otherwise”).

The doctrine of consular nonreviewability predates the passage of the APA and is one of the “limitations on judicial review” that supersedes the APA’s general provision permitting challenges to agency action under 5 U.S.C. § 702. *Baaghil*, 1 F.4th at 434; *see also Saavedra Bruno*, 197 F.3d at 1160. Moreover, the doctrine of consular nonreviewability sweeps broadly, “even where it alleged that the consular officer failed to follow regulations, where the applicant challenges the validity of the regulations on which the decision was based, or where the decision is alleged to have been based on a factual error.” *Chun v. Powell*, 223 F. Supp. 2d 204, 206 (D.D.C. 2002) (internal citations omitted).¹ And it applies regardless of the form in which the plaintiff attacks a consular decision. *See id.* at 206-07.

¹ Plaintiff’s Complaint alleges as its first “count” a violation of the *Accardi* doctrine—a principle of administrative law that stands for the unremarkable proposition that an agency must abide by its own regulations.” *Richardson v. Joslin*, 501 F.3d 415, 418 (5th Cir. 2007). But judicial review of whether a consular officer followed regulations in a visa adjudication falls squarely within the doctrine of consular nonreviewability. *See, e.g., Rohani v. Rubio*,

A plaintiff may not “circumvent the doctrine by claiming th[at] he is not seeking a review of the consular officer’s decision, but is challenging some other, related aspect of the decision.” *Malyutin v. Rice*, 667 F. Supp. 2d 43, 46 (D.D.C. 2009); *see also Amiri v. Dep’t Homeland Sec.*, 818 F. App’x 523 (6th Cir. 2020) (rejecting efforts to circumvent the doctrine of consular nonreviewability); *Lihua Xu v. U.S. Dep’t of State*, No. 2:08-cv-1023, 2010 WL 3942723 at *4 (S.D. Ohio Oct. 6, 2010) (explaining that a plaintiff could not circumvent the doctrine of consular nonreviewability by casting claim as a challenge to an underlying legal determination rather than the “ultimate decision” to deny a visa). Thus, “[c]ourts have applied to the doctrine of consular nonreviewability even to suits where a plaintiff seeks to challenge a visa decision indirectly.” *Matushkina v. Nielsen*, 877 F.3d 289, 295 (7th Cir. 2017) (collecting cases and holding that plaintiff’s “indirect attack” on visa denial could not succeed); *see also Capistrano v. Dep’t of State*, 267 F. App’x 593, 595 (9th Cir. 2008) (noting that plaintiffs’ challenge to the consulate’s process did not exempt the case from nonreviewability because “[a]t its core, the relief sought . . . would require the . . . consulate to revisit its decision denying the visa applications”).

To avoid the consular nonreviewability doctrine, Plaintiff disavows any attempt to “demand that an immigrant visa be issued to Mr. Saucedo Rivas” and instead contends that she is simply requesting “a *meaningful* reconsideration process.” (Doc. 1, ¶ 29.) Contrary to Plaintiff’s assertions, she cannot avoid consular nonreviewability by recasting her substantive challenge to the denial of her husband’s visa application as a procedural objection. This is precisely the kind of argument courts have rejected.

No. 2:24-cv-00389, 2025 WL 1503950 (W.D. Wash. May 27, 2025); *Bahiraei v. Blinken*, 717 F.Supp.3d 726, 737-38 (N.D. Ill. 2024) (describing *Accardi* as one of a variety of legal theories that is “merely a different route to try to reach the same destination” – judicial review of a consular decision, which is barred by the doctrine of consular nonreviewability).

In *Cevallos v. Dep't of State*, for example, the court rejected on consular nonreviewability grounds the plaintiff's argument that the consular officer "failed to give his visa application an independent or thorough review," citing specifically to evidence that the plaintiff alleged tendered during his interview. No. 22-2602, 2023 WL 6276622, at *4 (D.D.C. Sept. 26, 2023). "While framed as a challenge to the process he received," the court concluded, "the challenge goes to the basis of the decision, which is effectively a challenge to the decision itself." *Id.* The court also observed that the plaintiff's requested remedy—an order vacating the visa denial and instructing the Department of State to consider all information submitted by the plaintiff—would require the consular officer to "review certain documents and revisit her decision," which the Court held would "undoubtedly" interfere with the visa decision itself. *Id.*; *see also, e.g., Capistrano v. Dep't of State*, 267 Fed. App'x. 593, 594–95 (9th Cir. 2008) (holding that claim that consular officer did not follow correct protocol is barred by CNR because "[a]t its core, the relief sought by the [plaintiffs] would require the . . . consulate to revisit its decision denying the visa applications. Issuing such relief would be exactly what the doctrine consular nonreviewability prevents us from doing."); *Kolesnikov v. Blinken*, No. 23-1675, 2024 WL 3638345 (D.D.C. Aug. 2, 2024) (appeal pending) (CNR applies even though the plaintiffs claim to only be seeking an order that the officer request, collect and review applicant information prior to issuing the decision); *Cevallos v. U.S. Dep't of State*, No. 22-2602, 2023 WL 6276622, *5 (D.D.C. Sept. 26, 2023) (dismissing case on grounds on CNR because ordering a consular officer to "collect information" and "exercise actual discretion in processing and adjudicating Plaintiffs' new application for a nonimmigrant visa"—as Plaintiffs request in their complaint—would necessarily require the district court to "step[] inappropriately into the consular officer's shoes.").

The same is true here. Plaintiff challenges the grounds for the consular officers' refusal of Mr. Saucedo Rivas's visa, and her requested relief—i.e., an order compelling the consular officers to reconsider that refusal—would improperly inject the Court into the consular process and directly contravene the doctrine of consular nonreviewability. For those reasons, Plaintiff's Complaint fails to state a claim upon which relief may be granted and should be dismissed with prejudice.

II. PLAINTIFF'S FIRST AMENDMENT CLAIM FAILS.

Plaintiff's First Amendment claim fails both on the pleadings and as a matter of law. Plaintiff never fleshes out how being separated from her husband impacts her ability to associate with him and thus the Complaint may be dismissed on this basis alone. And even if this Court proceeded to the merits of Plaintiff's legal claim, that analysis fares no better: the First Amendment does not give Plaintiff a right to immigrate her noncitizen husband to the United States to "associate with" or otherwise receive information and ideas from him. No Court has ever found that the First Amendment trumps the Executive's ability to preclude an inadmissible foreign national from permanent admission into this country or even attempted to balance a U.S. citizen's First Amendment interest to hear and speak with her noncitizen husband against the government's national security interests. And for good reason; as the Supreme Court stated in *Muñoz*, "it would be remarkable to put the Government to the most demanding test [strict scrutiny review] in constitutional law in the field of immigration, an area unsuited to rigorous judicial oversight." 602 U.S. at 911. Such a result would turn *Mandel* and *Muñoz* on its head: either rendering the Executive's exclusionary powers a nullity or asking the judiciary to somehow determine whether the strength of the audience's interest outweighed the government's national security interests.

Further, the statutory citation provided to Plaintiff in the visa refusal notice satisfied the facially legitimate and bona fide standard. See *Trump v. Hawaii*, 585 U.S. 667, X (2018); *Kerry v.*

Din, 576 U.S. 86, 106 (2015) (Kennedy, J. concurring). Finally, Plaintiff has not adequately pled a bad faith claim, or, for that matter explained what cause of action justifies such a challenge.

A. Plaintiff Fails to Plead a First Amendment Claim.

Plaintiff's barebones First Amendment allegations do not pass the pleadings standard in two respects. First, while "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,'" it must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (*Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Second, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Accordingly, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679.

Plaintiff alleges, "As a U.S. citizen, Ms. Rodriguez has a First Amendment right to associate and speak in person with her husband Mr. Saucedo Rivas. Her First Amendment rights were harmed by the visa denial." (Doc. 1, ¶ 31.) This statement falls short of both of the above-stated principles. First, it fails to provide Defendants notice of the claim—for instance, *how* did the visa denial deprive Plaintiff of her ability to associate and speak in person with her husband? Second, the claim fails to provide any factual allegations whatsoever. Defendants are left to guess at the specifics of Plaintiff's claim and what the supporting grounds could be. Instead, Plaintiff's First Amendment claim provides "[no] more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action," and it must be dismissed on that basis. *Twombly*, 550 U.S. at 555; *see also Morales v. Blinken*, No. 1:21-CV-05726, 2021 WL 5356081, at *6

(D.N.J. Nov. 17, 2021) (“While Plaintiffs allege that Morales has a First Amendment right to ‘petition her husband,’ the Complaint does not plead facts stating that the Government prevented Morales from petitioning on her husband’s behalf. Nor do Plaintiffs allege or cite any law stating that a visa denial—without more—violates First Amendment rights.”) (internal citation omitted).

At best, Plaintiff appears to be asserting a violation of her right to “intimate association—the right ‘encompass[ing] the personal relationships that attend the creation and sustenance of family[.]’” *Colindres v. United States Dep’t of State*, 575 F. Supp. 3d 121, 138 (D.D.C. 2021), *aff’d on other grounds* 71 F.4th 1018, 1025 (D.C. Cir. 2023) (alteration in original). If so, this assertion would signify that this First Amendment claim is actually a repackaged version of a due process claim, “concerning an infringement of their right to marry who they wish without interference from the government.” *Id.* This will not do. As the *Muñoz* Court announced, “a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.” 602 U.S. at 909.

As a practical matter, the government’s refusal of Mr. Saucedo Rivas’s visa application does not impede Plaintiff’s right to “associate” with him. Plaintiff and her husband are free to converse in person outside the United States, or virtually, they just cannot do so while physically together in the United States. *See Muñoz*, 602 U.S. at 911, 916, n.9.² Thus, Plaintiff’s conclusory

² Similarly, Dr. Mandel was never admitted to the United States to deliver his remarks: he gave them telephonically. *Kleindienst v. Mandel*, 408 U.S. 753, 759 (1972). Defendants acknowledge that when the *Mandel* Court, when deciding the case in 1972, dispelled the Government’s argument that as an alternative to Dr. Mandel’s attendance, the litigants there had “free access to [his] ideas through his books and speeches,” and “‘technological developments,’ such as tapes or telephone hook-ups,” which “readily supplant[ed] his physical presence.” *Mandel*, 408 U.S. at 765. The Court reasoned that this argument did not appreciate “particular qualities inherent in sustained, face-to-face debate, discussion and questioning.” *Id.* And while “alternative ... access to Mandel’s ideas might be a relevant factor,” the Court was disinclined to hold that “existence of other alternatives extinguishes” Appellees’ constitutional interest in face-to-face interaction. *Id.* Defendants do not argue that alternate means of communication nullifies a First Amendment interest in receiving information. Instead, this point pushes Plaintiff’s First Amendment allegations towards the realm of “implausible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). For example, Dr. Mandel was applying for temporary admission to speak at a conference. *Mandel*, 408 U.S. at 757-58. Appellees there could enjoy Dr. Mandel’s literature at any point; his in-person attendance at this one-time event provided a different level of audience engagement. Particularly so, where

allegations warrant dismissal. *Pietersen v. U.S. Dep't of State*, No. 22-CV-3544 (DLF), 2024 WL 1239706, at *7 (D.D.C. Mar. 21, 2024) (rev'd on other grounds, 138 F.4th 552) (“To the extent the plaintiffs separately allege the denial of Pietersen’s visa has ‘chill[ed] the speech of’ [her U.S. citizen spouse], this allegation is conclusory and thus insufficient to state a First Amendment claim[.] In any event, the fact that the denial of Pietersen’s visa might indirectly reduce [the spouse’s] writing is not enough to show a First Amendment violation.”) (internal citations omitted).

B. Plaintiff does not have a First Amendment right to associate with or hear her noncitizen spouse speak in person in the United States.

Even if Plaintiff’s First Amendment claim were adequately pleaded, the claim still fails under the doctrine of consular nonreviewability. To avail herself of the assumed, narrow exception to the doctrine of consular nonreviewability, Plaintiff must demonstrate her unadmitted foreign national-spouse’s visa refusal burdened a constitutional right. If a court does not find the visa refusal burdened a U.S. citizen’s constitutional right, the consular nonreviewability doctrine prohibits *any judicial review of the refusal*—including an examination of whether the government offered a “facially legitimate and bona fide reason” for the refusal. *Muñoz*, 602 U.S. at 908.

While *Muñoz* addressed a challenge to a visa decision under a Fifth Amendment Due Process theory rooted in an alleged right to live with one’s spouse, it has direct and unavoidable implications for a similar challenge under the First Amendment. Plaintiff cannot avoid *Muñoz* simply by swapping “the right to live with her non-citizen spouse” for the right to hear her

technologies like Zoom and Facetime did not exist to facilitate at least virtual face-to-face interaction. Here, Plaintiff is not asking for a one-time, temporary admission to the United States for her husband. Instead, she seeks his *permanent* admission to this country. Importantly, Plaintiff and Mr. Saucedo Rivas can enjoy face-to-face interaction, they just cannot do so while physically in the United States. *See Muñoz*, 602 U.S. at 911, 916, n.9. *Cf. Din*, 576 U.S. at 101 (“Din remains free to live with her husband anywhere in the world that both individuals are permitted to reside”). And that reality, at the very least, dilutes Plaintiff’s allegation that Mr. Saucedo Rivas’s visa refusal deprives her of “her right to associate and speak in person with her husband.” (Doc. 1, ¶ 31.)

husband's "information and ideas" in person. And Plaintiff's alleged right to hear her foreign national spouse does not include the right to have him enter (and remain in) the United States.

To support her First Amendment claim, Plaintiff relies on *Kleindienst v. Mandel*, 408 U.S. 753 (1974). (Doc. 1, ¶ 32.) While the *Mandel* Court appeared to recognize that academics have a First Amendment interest to "hear, speak, and debate with" a foreign scholar temporarily visiting the United States, it did not recognize an interest, let alone an entitlement, under the First Amendment, for a U.S. citizen to bring a noncitizen spouse into the United States to live, so that the U.S. citizen may "hear and debate" their spouse in the United States. A close reading of *Mandel* confirms this very point.

Dr. Mandel was a Belgian national, and an authority on Marxism. *Mandel*, 408 U.S. at 756. In 1962, and in 1968, he was granted temporary admission to the United States, first as a working journalist, and second for speaking engagements at various universities and colleges. *Id.* On both occasions, Dr. Mandel was inadmissible pursuant to 8 U.S.C. § 1182(a)(28), which prohibited alien communists from entering the United States, but the Attorney General exercised his discretion to admit Dr. Mandel temporarily on a waiver pursuant to 8 U.S.C. § 1182(d)(3)(A). *Id.* In 1969, Dr. Mandel again applied for a nonimmigrant visa to enter the United States for six days to participate in a conference at Stanford University. *Id.* at 757-58. The Attorney General declined to grant him a third waiver³ for temporary admission. *Id.* at 757-58. Therefore, Dr. Mandel delivered his planned address "by transatlantic phone." *Id.* at 759.

Dr. Mandel and his citizen colleague counterparts filed a lawsuit challenging the waiver refusal, arguing that it violated their First Amendment right to receive information. *Id.* at 759-60.

³The Attorney General granted the previous two waivers "on condition that Mandel conform to his itinerary and limit his activities to the stated purposes of his trip, but that on his 1968 visit he had engaged in activities beyond the stated purposes." *Id.* at 758. This reasoning informed his decision to decline Mandel's third waiver request. *Id.*

Acknowledging that Dr. Mandel “as an unadmitted and nonresident alien[] had no constitutional right to entry to this country,” the Court narrowed the scope of its review to whether the citizen appellees’ First Amendment rights were burdened. *Id.* at 762.

Ultimately, the Court dismissed the case because the Attorney General provided a “facially legitimate and bona fide” reason for the denial, leaving the waiver refusal intact. *Id.* at 769-70. In so holding, the *Mandel* Court compartmentalized the First Amendment issue from the Executive’s power to exclude noncitizens. *Id.* at 765 (“Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here.”). In balancing these equities, the Court reasoned that if the First Amendment were to override the Executive’s exclusionary powers, “one of two unsatisfactory results would necessarily ensue.” *Id.* at 768. “Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience’s interest against that of the Government [in denying entry] to the particular alien applicant.” *Id.* The Court went on: “The dangers and undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker’s ideas are obvious. Indeed, it is for precisely this reason that the [entry] decision has, properly, been placed in the hands of the Executive.” *Id.*

In the context of the Executive’s exclusionary decisions, the Court declined to balance any asserted First Amendment right against the interest of the foreign national’s exclusion or consider whether the government’s interest could be satisfied by less restrictive means. *Mandel*, 408 U.S. at 770. The same concern about application of the strict scrutiny test expressed by the *Mandel* Court is reflected 52 years later by the *Muñoz* Court: “[I]t would be remarkable to put the Government to the most demanding test [strict scrutiny review] in constitutional law in the field of immigration, an area unsuited to rigorous judicial oversight.” 602 U.S. at 911. And to date, no

court has read *Mandel* or lower court cases applying it to hold that the First Amendment protects a U.S. citizen's ability to immigrate her noncitizen spouse so she may receive his ideas and information on a permanent basis. *Id.* at 768.

In *Mandel*, a matter arising from a *non-immigrant* visa application for Dr. Mandel's *temporary admission*, the Supreme Court left the Executive's exclusionary powers undisturbed, despite acknowledging the First Amendment interests of the academic U.S. citizen plaintiffs. 408 U.S. at 770. Here, *Mandel* affirms that this Court should not disrupt the consular officer's decision on Mr. Saucedo Rivas's *immigrant* visa application for *permanent* admission. If the Supreme Court was unwilling to review a visa application with provisional admission consequences notwithstanding First Amendment implications, surely, this Court cannot evaluate a visa denial under the First Amendment with permanent repercussions. The *Muñoz* Court said as much when it explained that "judicial review of an inadmissibility finding and a court order requiring the State Department to reconsider [the applicant's] visa application" would be "a significant extension of our precedent." *Muñoz*, 602 U.S. at 907 n.2.

To that end, "[w]hile 'families of putative immigrants certainly have an interest in their admission,' it is a 'fallacy' to leap from that premise to the conclusion that United States citizens have a 'fundamental right' that can limit how Congress exercises 'the Nation's sovereign power to admit or exclude foreigners.'" *Muñoz*, 602 U.S. at 915-16. Although unity of the immigrant family is a consideration, "the Constitution does not *require* this result[.]" *Id.* at 916 (emphasis in original). And "Congress's generosity with respect to spousal immigration has always been subject to restrictions, including bars on admissibility. This is an area in which more than family unity is at play: Other issues, including national security and foreign policy, matter too." *Id.* For example, in *Fiallo v. Bell*, the Court emphasized that it has "no judicial authority to substitute [its] political

judgment for that of Congress,” even when “statutory definitions deny preferential status to parents and children who share strong family ties.” 430 U.S. at 798. Notwithstanding the “consequences of the congressional decision not to accord preferential status” to certain parent-child relationships, that decision “remains one ‘solely for the responsibility of the Congress and wholly outside the power of this Court to control.’” *Id.* at 799 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring)).

In short, there is no support for Plaintiff’s position that her First Amendment rights override a consular officer’s visa refusal, or that the First Amendment provides this Court an avenue to look behind the curtain of that decision. In the First Amendment context, the most the government has been required to present is a facially legitimate and bona fide reason underlying a decision to deny a noncitizen entry, when that decision allegedly implicates a citizen’s First Amendment interests. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). But *Muñoz* closed the narrow “facially legitimate and bona fide” exception lower courts had read into *Mandel* in the visa denial context. It held that “[w]hatever else it may stand for, *Mandel* does not hold that a citizen’s independent constitutional right (say, a free speech claim) gives that citizen a procedural due process right to a ‘facially legitimate and bona fide reason’ for why someone else’s visa was denied.” *Muñoz*, 602 U.S. at 919.

Indeed, allowing First Amendment claims to proceed in this context would have wide-reaching implications: *any* U.S. citizen could plead a First Amendment right to hear a noncitizen’s speech in person, and try to challenge the government’s reason for the denial. In other words, Plaintiff’s request for relief has no limit: under this paradigm, she (or any other U.S. citizen) could proceed on this claim with another family member, or a friend, or even any person. But the First

Amendment does not contemplate that, and this result would make the doctrine of consular nonreviewability a nullity.

Further, allowing First Amendment claims to proceed in this context would open the door to claims by any U.S. citizen whose foreign national spouse is deemed inadmissible at the border or is placed in removal proceedings because of (for instance) a violation of the immigration laws or the commission of serious crimes. *See, e.g.*, 8 U.S.C. 1227. And recognizing this right for the first time could open the door to constitutional claims outside the immigration context. *Muñoz*, 602 U.S. at 916–17 (“As the State Department observes, Muñoz’s claim to a procedural due process right in *someone else’s* legal proceeding would have unsettling collateral consequences...Muñoz’s position would usher in a new strain of constitutional law, for the Constitution does not ordinarily prevent the government from taking actions that ‘indirectly or incidentally’ burden a citizen’s legal rights.”) (positing examples of how individuals may insert themselves in another’s legal proceedings outside an immigration context.).

Thus, the consequences of recognizing that a U.S. citizen has a constitutional right in another’s visa application, as expressed in *Muñoz*, apply equally here. So even if the Court were to find that Plaintiff adequately pled a First Amendment claim, it should still decline to find that it states a claim and dismiss the Complaint.

III. THE VISA REFUSAL WAS FACIALLY LEGITIMATE AND BONA FIDE.

Even if Plaintiff established that her spouse’s visa refusal burdened one of her constitutional rights (which she has not), the only judicial review available would be extremely limited. Under *Mandel*, even when a visa denial implicates a constitutional right of a U.S. citizen, the court asked no more than whether the government has provided a “facially legitimate and bona fide reason” for the decision. 408 U.S. at 770. If such a reason is present, the court may “neither

look behind” the visa decision, “nor test it by balancing its justification against the [constitutional] interests of those who seek” the applicant’s admission. *Id.* The result is a “circumscribed judicial inquiry” that is less demanding than even rational-basis review. *Trump v. Hawaii*, 585 U.S. at 703-04. To meet this burden the government “need only provide a statutory citation to explain a visa denial.” *Trump*, 585 U.S. at 703; *Baaghil*, 1 F.4th at 434 (noting that “a bare citation to a statute suffices”). In this case, the consular officer clearly met this standard by providing Mr. Saucedo Rivas with a notice citing the statute under which he had been refused.

This analysis does not change, regardless of the alleged impinged right. *See, e.g., Hawaii*, 585 U.S. at 703 (Establishment Clause); *Din*, 576 U.S. at 104–05 (Kennedy, J., concurring) (procedural due process); *Fiallo*, 430 U.S. at 791 (First Amendment freedom of association and Fifth Amendment equal protection and due process); *Mandel*, 408 U.S. at 760 (First Amendment freedom of speech). For example, in *Fiallo*, the Supreme Court applied the same analysis to the plaintiffs’ multiple constitutional claims when reviewing the challenged statute under *Mandel*. 430 U.S. at 798–99. The *Mandel* standard therefore applies equally to Plaintiff’s alleged First Amendment claim. Indeed, “*Mandel*’s narrow standard of review ‘has particular force’ in admission and immigration cases that overlap with ‘the area of national security.’” *Hawaii*, 585 U.S. at 704 (quoting *Din*, 576 U.S. at 104 (Kennedy, J., concurring in the judgment)).

In short, Mr. Saucedo Rivas received what the Supreme Court and the Sixth Circuit require under any exceptions to consular nonreviewability doctrine (even assuming those exceptions apply here). *Baaghil*, 1 F.4th at 432. Plaintiff is not entitled to any further information related to the consular officers’ refusal of her spouse’s visa application. *See Din*, 576 U.S. at 106 (Kennedy, J., concurring) (“[T]he Government satisfied any obligation it might have had to provide Din with a facially legitimate and bona fide reason for its action when it provided notice that her husband was

denied admission to the country under § 1182(a)(3)(B). By requiring the Government to provide more, the Court of Appeals erred in adjudicating Din’s constitutional claims.”). Accordingly, Plaintiff has not plausibly alleged that the government lacked a facially legitimate and bona fide reason for refusing Mr. Saucedo Rivas’s visa, and her Complaint should be dismissed for failure to state a claim.

IV. PLAINTIFF HAS NOT ADEQUATELY ALLEGED THAT THE CONSULAR OFFICER ACTED IN BAD FAITH.

Plaintiff also alleges, without adequate facts, that the consular officer acted in bad faith when denying Mr. Saucedo Rivas’s visa application. (Doc. 1, ¶¶ 34-35.) Prior to *Muñoz*, courts in the Ninth Circuit allowed limited review of consular decisions when a U.S. citizen spouse showed that the refusal burdened her constitutional rights and affirmatively demonstrated bad faith in the visa refusal. But without a constitutionally protected interest, U.S. citizens may not pursue bad-faith claims related to visa refusals of their family members. *See Khachatryan v. Blinken*, 4 F.4th 841, 851-52 (dismissing bad faith allegations of U.S. citizen adult child notwithstanding their sufficiency because the U.S. citizen plaintiff lacked a due process right in their noncitizen adult parent’s visa refusal). More broadly, whether a litigant stated a bad faith claim was built on Justice Kennedy’s concurring opinion in *Din*, which was abrogated by the *Muñoz* Court’s adoption of the *Din* plurality opinion. *Muñoz*, 602 U.S. at 909.⁴ As such, the legal basis upon which a “bad faith” exception was constructed has disintegrated, and because Plaintiff has failed to show that the visa refusal here burdened her constitutional rights, she can no longer pursue a bad-faith claim.

As explained above, after *Muñoz*, Plaintiff lacks a constitutional interest in her husband’s visa refusal and cannot invoke any bad-faith exception to the doctrine of consular non-

⁴ Until *Muñoz*, Justice Kennedy’s concurrence in *Din* was regarded as *Din*’s controlling opinion. *See, e.g., Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016). But a majority in *Muñoz* adopted Justice Scalia’s *Din* plurality opinion. *Muñoz*, 602 U.S. at 909. Thus, precedential value now rests with the *Din* plurality, not the concurrence.

reviewability. But, even if such a claim were available, she fails to adequately invoke it even under the pre- *Muñoz* case law. To state a claim of bad faith in this context, the U.S. citizen must make an “affirmative showing” of bad faith. *Din*, 576 U.S. 86, 105 (Kennedy, J., concurring in the judgment). To start, courts “presume” that “public officers” have “properly discharged their official duties.” *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). “[A]n allegation of bad faith must be ‘plausibly alleged with sufficient particularity,’” *Del Valle v. Sec’y of State*, 16 F.4th 832, 843 n.6 (11th Cir. 2021) (citing *Din*, 576 U.S. at 105)), and the allegations must be “well supported.” *Baluch v. Sullivan*, 719 F. App’x 725, 726 (9th Cir. 2018).

Specifically, to state a bad faith claim, Plaintiff must articulate that “‘the consular official did not in good faith *believe* the information he [or she] had’ or that the ‘Consulate acted upon information it *knew* to be false.’” *Khachatryan v. Blinken*, 4 F.4th 841, 852-53 (9th Cir. 2021) (emphasis in original) (citing *Bustamante v. Mukasey*, 531 F.3d 1059, 1062-63 (9th Cir. 2008)). Therefore, it “is not enough to allege that the consular official’s information was incorrect.” *Id.* Indeed “[m]aking an ‘affirmative showing of bad faith’ requires a plaintiff to point to something more than an unfavorable decision.” *Yafai v. Pompeo*, 912 F.3d 1018, 1022 (7th Cir. 2019); *Calvary Albuquerque, Inc. v. Blinken*, 720 F. Supp. 3d 1138, 1154 (D.N.M. 2024) (“However, bad faith is not shown by an officer’s honest assessment that an applicant’s testimony and documentation were not credible or a plaintiff’s conclusory allegations that a factual determination led to an unfavorable decision.”).

Here, the only “facts” alleged in Plaintiff’s Complaint to support her claim of bad faith are that the consular officers (a) told Mr. Saucedo Rivas “he looked like a gangster and a ‘convicto’”; (b) “[a]ttempt[ed] to entrap him into making false statements, saying that things would go better for him if he confessed to things he did not do; (c) told “him to stop lying and stop giving excuses,

and refusing to listen to his answers when he was telling the truth”; (d) “[s]hout[ed] at him and physically intimidate[ed] him, pounding hands on the desk and making Mr. Saucedo Rivas fear for his physical safety”; and (e) failed to call or speak with any of the “experts” whose statements were submitted in reconsideration of the initial refusal. (Doc. 1, ¶¶ 34-35.)

Simply put, none of these allegations—even accepted as true for purposes of deciding this motion—meet the Plaintiff’s heightened burden of “an affirmative showing of bad faith.” As to the allegations indicating a hostile interview environment, they fall short of alleging that the adjudicating consular officer refused the visa application based on information that they knew or believed to be false. *Saleh v. Tillerson*, 293 F. Supp. 3d 419, 433 (S.D.N.Y. 2018) (dismissing a bad faith claim in a challenge to a visa application refusal because the plaintiff did not plead “that the consular official did not in good faith believe the information he had.”). Likewise, Plaintiff does not allege that the consular officer failed to act in good faith upon information they did have. *See Bustamante*, 531 F.3d at 1062-63 (stating that to establish bad faith, a plaintiff must “allege that the consular official did not in good faith believe the information he had”).

As to Plaintiff’s assertions that the officer failed to adequately consider the evidence, courts have found that similar allegations do not rise to the level of bad faith. *See, e.g., Yafai v. Pompeo*, 912 F.3d 1018, 1022 (7th Cir. 2019) (“But the fact that the officer did not believe Ahmed and Yafai’s evidence does not mean that the officer was dishonest or had an illicit motive.”); *Colindres*, 71 F.4th at 1025 (collecting cases and explaining that “disagreeing with the Government’s decision . . . falls well short of the kind of clear showing necessary to establish bad faith.”); *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (finding that refusal to consider expert opinion was not bad faith); *Burris v. Kerry*, 2014 WL 1267272, at *5 (E.D. Tex. Mar. 27, 2014) (even where an applicant has submitted evidence against an ineligibility finding—such as character

references and official records demonstrating a lack of criminal history—is not sufficient to allege that “no reasonable person could believe” that the applicant is ineligible).

In sum, because Plaintiff has not sufficiently pleaded a bad-faith claim, her Complaint should be dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

For the reasons set forth more fully above, Plaintiff’s Complaint fails to state a claim upon which relief may be granted and should be dismissed with prejudice. Defendants request any additional relief to which the Court finds them entitled.

Respectfully submitted,

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