UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

DAISY RODRIGUEZ, Plaintiff, v. U.S. DEPARTMENT OF STATE, SECRETARY OF STATE MARCO RUBIO, U.S EMBASSY GUATEMALA CITY, CONSUL GENERAL, U.S. EMBASSY GUATEMALA CITY, CHIEF, IMMIGRANT VISA SECTION, U.S. EMBASSY GUATEMALA CITY, Defendants.	)	No. 3:25-CV-182-KAC-DCP

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiff Daisy Rodriguez ("Ms. Rodriguez") has been separated from her husband, Santos Maudilio Saucedo Rivas ("Mr. Saucedo Rivas"), for two years and counting. Here she raises three claims. In her *Accardi* and Administrative Procedure Act ("APA") claims, the relief she seeks is minimal and does not trigger the consular nonreviewability doctrine, contrary to Defendants' assertion. ECF No. 27 at 4-8. The relief would not require the Court to "look behind" the visa denial as Defendants erroneously claim. *Id.* at 15. Plaintiff simply asks the government to follow its own rules regarding what happens *after* a visa is denied by taking minimal steps to review the weighty exculpatory evidence which Ms. Rodriguez and Mr. Saucedo Rivas submitted within the timeframe set by federal regulations. *See* 22 C.F.R. §§ 40.6, 42.81(e). It is critical these rules be applied here, because the world's foremost experts about the gang "Barrio Azteca" believe it is

impossible that Mr. Saucedo Rivas is a member of that gang. At bottom, the *Accardi* and APA claims do not challenge a consular officer's determination as to Mr. Saucedo Rivas' admissibility, they merely ask whether the U.S. government has an obligation to follow its own rules requiring it endeavor to meaningfully consider exculpatory evidence. Because the answer is "yes," the Court should deny Defendants' motion to dismiss on these claims.

Ms. Rodriguez also has plausibly pleaded that her First Amendment rights have been harmed and that the consular officers acted in bad faith by intimidating Mr. Saucedo Rivas and prejudging him as someone who "looks like" a criminal. While this claim *does* challenge the visa denial itself, and therefore triggers the consular nonreviewability doctrine for constitutional claims, it also triggers the exception to that doctrine because it implicates Ms. Rodriguez's own First Amendment right and was issued in bad faith. Ms. Rodriguez has pleaded with sufficient particularity that both officers prejudged him, accusing him of lying about his past and tattoos; that one officer shouted at Mr. Saucedo Rivas and physically intimidated him and that his looking like a criminal was how the officer knew he was a Barrio Azteca member. Visas denied in bad faith fail the "facially legitimate and bona fide reason" test the Supreme Court introduced in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). The Court should therefore also deny the motion to dismiss as to this constitutional claim.

As to all three claims, the government largely bases its motion to dismiss on the Supreme Court's ruling last term in *Department of State v. Muñoz*, 602 U.S. 899 (2024), a case in which a U.S. citizen challenged a visa denial claiming it violated the Fifth Amendment's Due Process Clause. ECF No. 27 at 10-11. *Muñoz* is not applicable to Ms. Rodriguez's *Accardi* and APA claims. Nor does it bar this Court from considering her constitutional claim because this case, unlike *Muñoz*, involves a citizen whose own First Amendment rights are implicated by a visa denial. The

Supreme Court ruled against the citizen in *Muñoz*, stating that "the bottom line is that [Fifth Amendment] procedural due process is an odd vehicle" and distinguishing it from the First Amendment challenge in *Mandel*. *Muñoz*, 602 U.S. at 919. Contrary to Defendants' assertion that Ms. Rodriguez's allegations are an attempt to circumvent the consular nonreviewability doctrine, ECF No. 27 at 6, Ms. Rodriguez can prevail on each of her claims without disturbing the doctrine and existing caselaw. The Court can therefore deny the motion to dismiss on all claims and order discovery to allow Defendants an opportunity to harness facts to rebut the sufficiently-pleaded bad faith claim.

II. FACTUAL SUMMARY

Ms. Rodriguez married Mr. Saucedo Rivas in 2017 and the couple lived together in their family home in Sweetwater, Tennessee. ECF No. 1 ¶1. Ms. Rodriguez and Mr. Saucedo Rivas embarked on the process for acquiring lawful permanent residency through the "consular process." *Id*. ¶2. As the final step in this process, Mr. Saucedo Rivas traveled to Guatemala to be interviewed at the U.S. Embassy. *Id*. ¶3. During the interviews, Mr. Saucedo Rivas felt intimidated by the consular officers, including physically. The consular officers attempted to entrap him, accusing him of lying and making excuses when he tried to answer their questions. One consular officer told him he looked like a gangster and a "convicto" (in English, a convict) and that he was a member of "Barrio Azteca," which is a transnational gang. The consular officers deemed him inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii), which bars entry to individuals who an officer has "reasonable ground to believe" seeks entry to engage in "any other unlawful activity." *Id*. Following the denial, Defendants refused to meaningfully consider overwhelming exculpatory evidence from highly qualified experts showing Mr. Saucedo Rivas could not have been a member of this particular gang. *Id*.

III. LEGAL STANDARD

In assessing a motion to dismiss for failure to state a claim, Fed. R. Civ. P. 12(b)(6), this Court must construe the complaint in a way most favorable to Ms. Rodriguez and accept all well-pleaded factual allegations as true. *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 274 (6th Cir. 2010). A motion to dismiss should be denied when a complaint includes "either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Eidson v. Tennessee Dep't of Child.'s Servs.*, 510 F.3d 631, 634 (6th Cir. 2007). A complaint is sufficient, and should not be dismissed, when it "contain[s] 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)).

IV. ARGUMENT

A. The Consular Nonreviewability Doctrine is Not Implicated as to Ms. Rodriguez's *Accardi* and APA Claims and She Can Prevail on the Merits

1. The consular nonreviewability doctrine is not implicated as to the *Accardi* and APA claims

Defendants' lead argument is that the consular nonreviewability doctrine bars review of each of Ms. Rodriguez's claims. ECF No. 27 at 4-8. This is based on a fundamental misunderstanding of the doctrine and its scope and limitations. While the doctrine applies to Ms. Rodriguez's bad faith claim, an exception to the doctrine provides limited review of that claim. *See infra* § IV.B.1-2. But the doctrine does not apply to Ms. Rodriguez's *Accardi* and APA claims.

a) Ms. Rodriguez's *Accardi* and APA claims do not challenge the visa denial

First, and most simply, in her *Accardi* and APA claims, Ms. Rodriguez challenges Defendants' failure to follow the regulations applicable to post-denial exculpatory evidence—not the visa denial itself. ECF No. 1, Counts One and Two, ¶¶21-29. The consular nonreviewability

doctrine applies only to an individual "consular official's decision to issue or withhold a visa," *Bustamante v. Mukasey,* 531 F.3d 1059, 1061 (9th Cir. 2008) (quoting *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986)), not to challenges against a general policy. *See Patel v. Reno,* 134 F.3d 929, 931-32 (9th Cir. 1997) (policy suspending visa applications); *see also Int'l Union of Bricklayers & Allied Craftsmen v. Meese,* 761 F.2d 798, 801 (D.C. Cir. 1985); *cf. United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 543, 545-47 (1950) (noting that an individual decision "to exclude a given alien" may not be reviewable, but reviewing on the merits two statutory claims). And the *Accardi* doctrine provides relief for harm caused by an agency's failure to follow its own regulations—without disturbing or reviewing an agency's exercise of discretion. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

The Court need not "look behind" the denial to rule in her favor on these counts. Rather, Ms. Rodriguez requests that the government conduct a meaningful review of the weighty exculpatory evidence she submitted.[1] Insisting that the government make an effort to determine whether it made a mistake in deeming Mr. Saucedo Rivas a member of Barrio Azteca has no downsides. It could not possibly result in the admission of a potential gang member, because that

[1] The cases Defendants cite (ECF No. 27 at 5-7) are distinguishable because, unlike Ms. Rodriguez's *Accardi* and APA claims, the plaintiffs' claims in those cases challenged the visa refusal itself. *E.g.*, *Capistrano v. Dep't of State*, 267 F. App'x 593, 594-95 (9th Cir. 2008) (affirming consular nonreviewability doctrine barred challenge of pre-visa denial procedures where relief requested would require judicial review of denials, without addressing exceptions to doctrine); *Chun v. Powell*, 223 F. Supp. 2d 204, 206-07 (D.D.C. 2002) (similar, and also mistakenly treating the doctrine as jurisdictional, *contra Muñoz*, 602 U.S. at 908 n.4); *Kolesnikov v. Blinken,* No. 23-1675, 2024 WL 3638345, at *2 (D.D.C. Aug. 2, 2024), (rejecting noncitizens' claims that officers failed to request additional information before denying nonimmigrant visitor visas as barred by doctrine, where plaintiffs did not argue any exception applied), *appeal docketed*, No. 24-5203 (D.C. Cir. Sept. 10, 2024); *Cevallos v. U.S. Dep't of State*, No. 22-2602,2023 WL 6276622, at *4-7 (D.D.C. Sept. 26, 2023) (finding noncitizen's claims challenging pre-visa denial process were barred by the doctrine because claims were inseparable from visa denial and no exception applied).

is not the relief Ms. Rodriguez seeks. The only possible outcome would be Defendants following the regulations and potentially obtaining additional information that will give officers a more ample factual basis for determining Mr. Saucedo Rivas' admissibility or inadmissibility. The fact that the government prefers to shut out rather than accept and consider exculpatory evidence is deeply concerning. All Ms. Rodriguez asks is that the government receive and adequately consider evidence she believes shows she was needlessly separated from her husband for two years and counting.

The government's approach is inconsistent with the Immigration and Nationality Act's ("INA") emphasis on ensuring that consular officers possess the most accurate information so they can make correct "individualized" assessments of visa applications. In *Trump v. Hawaii*, the Supreme Court acknowledged that the INA takes an "individualized approach for determining admissibility." 585 U.S. 667, 689 (2018). Although the Court held that the executive order at issue "supports Congress's individualized approach . . ." *id*., it nevertheless appeared to accept that there is inherent conflict between blanket bans and individualized assessments. The Court explained that the travel bans were justified because the INA's inadmissibility provisions "can only work when the consular officer has sufficient (and sufficiently reliable) information to make that determination." *Id*. There is no justifiable reason why the government insists it has the "right" to effectively ignore or refuse to reasonably pursue exculpatory evidence that may indicate an officer's assumption about an applicant was incorrect.

b) Ms. Rodriguez challenges a policy, not an individualized officer's decision

Second, the consular nonreviewability doctrine does not bar review of challenges to policies as opposed to individualized visa denial decisions. The government's refusal to meaningful consider exculpatory evidence for applicants for immigrant visas denied under

8 U.S.C. §1182(a)(3)(A)(ii) is not individualized as to Ms. Rodriguez and her husband, it is a *de jure* or *de facto* policy. Of the 1,806 visas denied under 8 U.S.C. § 1182(a)(3)(A)(ii) from Fiscal Years 2000-2023, not a single person has been able to overcome the presumption of ineligibility.[2] These statistics present a plausible connection between Ms. Rodriguez's allegations that Defendants have not complied with the regulations for reviewing exculpatory evidence post-visa denial and a policy of noncompliance.

As *Pietersen v. U.S. Dep't of State* demonstrates, when an APA claim does not challenge a visa denial, the consular nonreviewability doctrine does not apply. 138 F.4th 552, 560 (D.C. Cir. 2025). In *Pietersen*, the D.C. Circuit reversed a district court's holding that the consular nonreviewability doctrine barred an APA claim challenging a State Department policy regarding visa denials. *Id*. at 560. The court then vacated and remanded for further consideration the district court's alternative holding that the agency policy was consistent with the INA. *Id*. at 560-61. The court distinguished "forward-looking challenges to the lawfulness of regulations or policies governing consular decisions" which are reviewable from "contesting particular visa determinations by a consular officer." *Id*. at 560. Ms. Rodriguez's allegations demonstrating how Defendants failed to comply with the regulations for post-visa denial review of exculpatory evidence and her inclusion of DOS data as to more than two decades with no applicant overcoming a refusal in the same inadmissibility category as Mr. Saucedo Rivas plausibly presents a policy which can be changed going forward.

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[2] U.S. Dep't of State, Bureau of Consular Affairs, *Report of the Visa Office*, *Immigrant and Nonimmigrant Visa Ineligibilities (by Ground for Refusal under the Immigration and Nationality Act)*, *Table XIX, FY 2020-2023, Table XX FY 2000-2019* (last accessed Apr. 6, 2025), https://tinyurl.com/mt5utchv. ECF No. 1 ¶14.

Other decisions have also concluded that challenges to policies, rather than to a consular officer's individualized visa denial, are not barred by the consular nonreviewability doctrine. In *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1019 (N.D. Cal. 2019), the district court found judicial review of the implementation of a waiver process permissible despite the doctrine because the plaintiffs challenged a blanket policy of denying waivers without giving applicants the opportunity to sustain their burden of proving their eligibility and not individual visa decisions. As in *Emami*, Ms. Rodriguez here challenges a process that she has been denied the opportunity to engage in, not an individual visa decision.

In *Damus v. Nielsen*, 313 F. Supp. 3d 317, 335-38 (D.D.C. 2018), the court permitted an APA claim based on DHS failure to comply with an ICE Parole Directive. Even though boilerplate language disclaiming substantive rights was part of the challenged policy, the claim was reviewable because the policy was binding on the agency and intended to benefit individuals who would otherwise have no protection.

c) Defendants' reading of the doctrine would break with precedent

Third, Defendants' expansive reading would render nonreviewable countless decisions that somehow relate to the consular process. *Pietersen* explained it is "well settled" that policy-based challenges to the consular process are reviewable. 138 F.4th at 560. Other courts have acknowledged that there are many circumstances where review is still proper even where a consular officer's visa decision is involved. *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988) (consular nonreviewability is "inapplicable" where "appellants are not challenging the discretion of consuls in refusing to process applications for non-preference visas filed outside of the dates specified by . . . interim rules. Rather, they are challenging the authority of the Secretary of State to specify those dates."); *Sunny v. Biden*, 573 F. Supp. 3d 759, 771 (E.D.N.Y. 2021) ("not every

legal challenge that touches on the admission or exclusion of foreign nationals is foreclosed by consular non-reviewability," which does not apply where litigation "aims at enjoining a State Department policy . . . . not the discretionary decisions of the consular and embassy staff who are implementing it"). Here, Ms. Rodriguez's APA and *Accardi* claims do not challenge any discretionary decision, because the federal regulations require that officers meaningfully consider exculpatory evidence. 22 C.F.R. §§ 40.6, 42.81(e). Neither *Mandel* nor *Muñoz* applies to *Accardi* or APA challenges to events that take place after the visa is denied and that do not ask the Court to overturn a visa denial.

2. Ms. Rodriguez's *Accardi* and APA Claims Succeed on the Merits

a) Defendants' refusal to meaningfully consider exculpatory evidence violates the *Accardi* doctrine

Defendants violated DOS regulations in refusing to meaningfully consider the exculpatory evidence Ms. Rodriguez and Mr. Saucedo Rivas submitted showing he was not and could not be a member of "Barrio Azteca."

In *U.S. ex rel. Accardi v. Shaughnessy*, the Court reversed the summary denial of a habeas corpus petition for not considering the noncitizen's allegation that the Board of Immigration Appeals failed to comply with regulations establishing a process for the Board's exercise of discretion. 347 U.S. 260, 267-68 (1954). The Court emphasized "we are not here reviewing and reversing the manner in which discretion was exercised." *Id*. at 268.

In this Circuit, *Accardi* is applied as a "rule of federal administrative law." *West v. Kentucky Horse Racing Comm'n*, 972 F.3d 881, 892 (6th Cir. 2020) (citing *Bates v. Sponberg*, 547 F.2d 325, 330 (6th Cir. 1976)). In *Bates*, a tenured faculty member claimed that he was denied procedural due process because he was discharged in violation of a process required by Board of Regents' regulations. 547 F.2d at 328-29. The Sixth Circuit (after assuming the discharge process violated

the regulations), rejected a constitutional claim based on *Accardi*, concluding that an *Accardi* claim rested on agency violation of its regulations. *Id*. at 329-30.

Defendants' reliance on *Rohani v. Rubio*, No. 2:24-cv-00389, 2025 WL 1503950 (W.D. Wash. May 27, 2025) and *Bahiraei v. Blinken*, 717 F. Supp. 3d 726, 737-38 (N.D. Ill. 2024) to defeat Ms. Rodriguez's *Accardi* claim is misplaced. ECF No. 27, at 5 n.1. In *Rohani*, the plaintiffs claimed they were challenging a blanket policy that precluded them from presenting evidence before their visas were refused on a terrorism ground of inadmissibility. They argued that this policy violated the INA and 22 C.F.R. §§ 40.6 and 42.81(a). 2025 WL 1503950, at *3. The court concluded that it would have to assess why the visas were denied and relief would require revisiting the denials. 2025 WL 1503950, at *7-8. In *Bahiraei*, which also involved visas refused on a terrorism inadmissibility ground, the plaintiffs "want[ed] the court to oversee consular officers' consideration of immigrant visa applications from former Islamic Revolutionary Guard members and "invalidate past consular consideration" of their visa applications. 717 F. Supp. 3d at 737.

But Ms. Rodriguez is challenging Defendants' failure to comply with the regulations for review post-visa refusal, which does not trigger the consular nonreviewability doctrine. The regulations state: "[c]onsideration *shall* be given to any evidence submitted indicating that the ground for a prior refusal of a visa may no longer exist." 22 C.F.R. § 40.6 (emphasis added) and "[i]f a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, *the case shall be reconsidered*. In such circumstance, an additional application fee shall not be required." 22 C.F.R. § 42.81(e) (emphasis added).

Here, Defendants failed to follow up with any of the experts whose information addressed in great detail the many reasons why Mr. Saucedo Rivas' personal history makes it a factual

impossibility that he was or is a Barrio Azteca member. The officers' disinterest in the evidence cannot be reconciled with the regulatory text, which explains that exculpatory evidence "*shall* be reconsidered." 22 C.F.R.§ 42.81(e) (emphasis added); e.*g.*, *Ghannad-Rezaie v. Laitinen*, 757 F. Supp. 3d 148, 153 (D. Mass. 2024) (and cases cited) ("[M]ost courts that have confronted this regulation [§ 42.81(e)] have construed it to create a mandatory duty on the part of the consular officer to reconsider the refusal of a visa application when the applicant presents new evidence tending to overcome the basis for the refusal."). *But see Ramizi v. Blinken*, 745 F. Supp. 3d 244, 263 (E.D.N.C.), *appeal voluntarily dismissed*, No. 24-2008, 2024 WL 5509498 (4th Cir. Dec. 9, 2024) (considering the regulatory text "tending to overcome" in § 42.81(e) as "impl[ying] the exercise of discretionary judgment"). However, the court also said that the only nondiscretionary duty in § 42.81(e) would be the duty to review the additional evidence submitted in order to determine if it tended to overcome the refusal. *Id*. Unlike in Ms. Rodriguez's lawsuit, the court noted that the visa application in *Ramizi* remained under review. *Id*. at 264. Section 40.6 likewise underscores that review must be meaningful as "[c]onsideration shall be given to any evidence submitted indicating that the ground for a prior refusal of a visa may no longer exist."

Defendants failed to ask Jeffrey Gibson for the information he offered to provide, "in reference to gang affiliation" of Mr. Saucedo Rivas, as he had done in the past for Defendant DOS "as to those seeking an entry visa." There is no bona fide reason why Defendants would not, at a bare minimum, inquire with Mr. Gibson as to whether the information he offered to share included Mr. Saucedo Rivas as affiliated with Barrio Azteca or not.

The Sixth Circuit's decision in *Baaghil v. Miller* is distinguishable and does not bar judicial review of Ms. Rodriguez's *Accardi* claim. 1 F.4th 427 (6th Cir. 2021). In *Baaghil*, Mr. Ahmed, a U.S. lawful permanent resident, and his wife and children appealed the dismissal of their lawsuit

after a consular officer denied the family members' immigrant visa applications and returned the family-based immigrant visa petition to USCIS for "review and possible revocation." *Id*. at 431. After several interviews, consular officers requested additional proof of identity and placed the visa applications into administrative processing. *Id*. The applicants submitted additional documentation, but in November 2019 their applications were denied and the immigrant petition returned. *Id*. Mr. Ahmed and his family members filed a motion to amend the complaint to challenge the immigrant visa denials and a "possible future revocation" of Mr. Ahmed's U.S. lawful permanent resident status. *Id*. at 432. Concluding that no relief was available, the district court denied amendment as "futile" and dismissed the case. *Id*. at 432, 435.

In affirming the dismissal, the Sixth Circuit concluded that the consular nonreviewability doctrine barred judicial review. But it did so after determining that Mr. Ahmed, the lawful permanent resident, had failed to establish any Fifth Amendment procedural or substantive due process violation[3] from the visa denials. *Id*. at 433-34.[4] The Sixth Circuit considered the fact that the applicant family members could present evidence before the visa refusals to address the officer's concerns as to their identity as "undercut[ting] his [Mr. Ahmed's] submission that the *process* was unfair." *Id*. at 434 (emphasis in original). The Court also said that Mr. Ahmed was attacking the visa denials (*id*.), which absent the exception addressed *infra* § IV.B.1-2, the consular nonreviewability doctrine bars from review. In contrast, Ms. Rodriguez asserts that consular

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[3] The Sixth Circuit concluded that as noncitizens living abroad, the family members could not assert any U.S. constitutional rights. *Id*. at 432-33. As discussed *infra*, this lawsuit is distinguishable because Ms. Rodriguez is a U.S. citizen.

[4] In dicta, the Sixth Circuit also said, even assuming Mr. Ahmed had asserted a procedural due process violation, the consular officer had provided a "facially legitimate reason" for the visa denials. *Id*. at 434. As discussed *infra*, this lawsuit is distinguishable because Ms. Rodriguez has sufficiently alleged a First Amendment violation and that the consular officers acted in bad faith.

officers failed to comply with the regulations. If her claim is successful, the relief will be an order requiring the officers to meaningfully review the evidence submitted after the visa denial.

b) Defendants' refusal to meaningfully consider exculpatory evidence violates the APA

Defendants violated the APA by refusing to meaningfully consider the exculpatory evidence Ms. Rodriguez and Mr. Saucedo Rivas submitted showing he was not and could not be a member of "Barrio Azteca."

The APA provides for judicial review when a person is adversely affected by agency action. 5 U.S.C. § 702; ECF No. 1, ¶28. Defendants' reconsideration of the visa denial without meaningful review is final agency action, per 5 U.S.C. § 704, as a "definitive position" which caused injury to Ms. Rodriguez. *See Darby v. Cisneros*, 509 U.S. 137, 144 (1993). She has been adversely affected by Defendants' failure to meaningfully review exculpatory evidence in reconsideration of the denial of Mr. Saucedo Rivas' immigrant visa, which is a final agency decision that is arbitrary and capricious or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

"An agency decision is arbitrary and capricious if the agency fails to examine relevant evidence . . ." *Bangura v. Hansen*, 434 F.3d 487, 502 (6th Cir. 2006) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co*., 463 U.S. 29, 42-43 (1983)). *Cf. Elliott v. Met. Life Ins. Co.*, 473 F.3d 613, 618, 620 (6th Cir. 2006) (denials arbitrary and capricious under ERISA when the record included numerous medical evaluations but the denials included no application of the record evidence to the ability to work standard); *Spangler v. Lockheed Martin Energy Sys., Inc.*, 313 F.3d 356, 362 (6th Cir. 2002) (insurer sending only one doctor's report from several to a vocational consultant for analysis as to work capacity was arbitrary and capricious under ERISA).

For the reasons discussed *supra* in § IV.A.2.a, *Baaghil* also does not bar Ms. Rodriguez's APA claim because unlike Mr. Ahmed, the lawful permanent resident who sponsored his family,

she is not attacking "the substance of the decision" to deny the visa. 1 F.4th at 434. The Sixth Circuit has concluded that the consular nonreviewability doctrine was incorporated by Congress when it provided that the APA does not "affect[] other limitations on judicial review . . ." 5 U.S.C. § 702(1) (1976) (Pub. L. 94-574 § 1, 90 Stat. 2721 (1976)); *see* 1 F.4th at 434-35. The Sixth Circuit rejected Mr. Ahmed's claim that he could "challenge visa denials" under the APA because of the court's conclusion that the APA preserved the doctrine's limitation on judicial review of the denial decision. *Id*. at 434-35. Since Ms. Rodriguez's APA claim does not challenge the visa denial, the consular nonreviewability doctrine is inapplicable, and APA relief remains available. Decisions outside of the Sixth Circuit support the propriety of an APA cause of action on the ground that the consular officers acted "arbitrarily and capriciously" when they failed to comply with the requirements of 22 C.F.R. §§ 40.6 and 42.81(e). *See Singh v. Clinton*, 618 F.3d 1085, 1092 (9th Cir. 2010) (directing the district court to enter judgment for a U.S. citizen petitioner and his noncitizen brother after concluding DOS acted arbitrarily and capriciously when it violated the statutory requirement to provide notice to the brother before cancelling his visa registration); *Emami*, 365 F. Supp 3d at 1019-21 (motion to dismiss denied as to claim DOS acted arbitrarily when it disregarded its procedures and rules); *Damus*, 313 F. Supp. 3d at 335-38 (motion to dismiss denied of APA claims that DHS failed to follow an ICE directive).

APA review is proper under *Bangura* because the remedies Ms. Rodriguez requests do not include a demand that an immigrant visa be issued to Mr. Saucedo Rivas. Instead, Ms. Rodriguez seeks a meaningful reconsideration process as the agency's regulations require. For these reasons the government's refusal to meaningfully consider exculpatory evidence violates the APA.

B. The Exception to Consular Nonreviewability Elaborated in *Mandel* and *Muñoz* Applies to Ms. Rodriguez's Bad Faith Claim, which She Has Plead with Sufficient Particularity

Mandel and *Muñoz* set the framework for adjudicating the constitutional claim.[5] As explained *supra*, both cases refer specifically to decisions by consular officers to deny visas, and therefore do not establish any "nonreviewability" principles as to post-denial regulations like those at issue in Ms. Rodriguez's *Accardi* and APA claims. *Mandel* and *Muñoz* do, however, speak to the Court's ability to review Ms. Rodriguez's constitutional claim.

In *Mandel*, the Supreme Court heard a constitutional challenge to a discretionary decision by the Attorney General denying a waiver of inadmissibility after a noncitizen, left-wing Professor Ernest Mandel, was refused a visa. 408 U.S. at 754. The Court held that Professor Mandel's American colleagues possessed a First Amendment "right to receive information" but that the waiver denial satisfied a "facially legitimate and bona fide reason" test because Professor Mandel had violated the terms of a prior visa, so no further review was available. *Id.* at 764, 770. The Court acknowledged there are limits to the government's power over visa denial decisions. *See id*. at 769. The government argued for the power to deny noncitizens admission for engaging in free speech, claiming the consular nonreviewability doctrine provided the executive branch with authority to deny visas for "any reason or no reason." *Id*. The Court declined this invitation, instead holding (1) while noncitizens with no connection to the United States cannot challenge visa denials, citizens whose First Amendment rights are implicated *can*, and (2) courts are to review such

[5] Defendants' sweeping presentation of plenary power, ECF No. 27 at 4, omits the fact that the political branches cannot violate the Constitution in exercising that power. Whatever deference this Court owes the political branches over matters of immigration remains "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). Congress must choose "a constitutionally permissible means of implementing" the plenary power. *INS v. Chadha*, 462 U.S. 919, 941-42 (1983); *Chae Chan Ping v. U.S.*, 130 U.S. 581, 604 (1889).

challenges to ensure they at least facially comport with the First Amendment and are "facially legitimate and bona fide." *Id.*

The *Muñoz* Court acknowledged *Mandel* last term, stating, "[w]e have assumed that a narrow exception to this bar exists 'when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen.'" 602 U.S. at 908 (quoting *Trump v. Hawaii*, 585 U.S. 667, 703 (2018) (discussing *Mandel*)). The *Muñoz* Court continued: "In that event, the Court has considered whether the Executive gave a 'facially legitimate and bona fide reason' for denying the visa." *Id*. at 908 (quoting *Kerry v. Din*, 576 U.S. 86, 103-04 (2015) (Kennedy, J., concurring)). Last term, the Supreme Court in *Murthy v. Missouri* also quoted *Mandel* to explain "we have recognized a First Amendment right to 'receive information and ideas.'" 603 U.S. 43, 75 (2024);[6] *see also Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 743-44 (9th Cir. 2021) (acknowledging First Amendment right to hear/receive where listener was in the United States, even though speakers were noncitizens located extraterritorially).

Muñoz, unlike *Mandel*, involved a citizen bringing a Fifth Amendment Due Process challenge to a consular officer's decision denying her husband a visa. *See Muñoz,* 602 U.S. at 903. The Court clarified that *due process* is not the proper avenue for reaching the *Mandel* test, but it did not scale back the "facially legitimate and bona fide reason" test as it applies in the First Amendment context. The Court explained: "The bottom line is that procedural due process is an odd vehicle for Muñoz's argument, and *Mandel* does not support it." *Id.* at 919. By acknowledging *Mandel*, *Muñoz* suggested that the First Amendment *is* the proper vehicle for *Mandel* claims. *Id*. at 918-19. The *Muñoz* Court concluded by explaining that "*Mandel* does not hold that a citizen's *independent* constitutional right (say, a free speech claim) gives that citizen a *procedural due*

[6] Justice Barrett delivered the opinion of the Court in *Murthy* within days of doing so in *Muñoz*.

process right to a 'facially legitimate and bona fide reason' for why someone *else's* visa was denied." *Id.* at 919 (emphasis added). But this concern is not present here, because Ms. Rodriguez's *own* First Amendment interest is implicated by the consular officers' bad faith denial of her husband's visa. *Mandel* and *Muñoz* leave this path open.

1. Ms. Rodriguez has a First Amendment interest sufficient to trigger the *Mandel* test

Ms. Rodriguez possesses a "right to hear" speech in person that is protected by the First Amendment. If *Mandel* is good law, and if Professor Mandel's American colleagues had a sufficient interest to trigger the "facially legitimate and bona fide reason" test, then Ms. Rodriguez does too.[7]

The *Mandel* Court applied basic First Amendment principles to the merits of the Attorney General's refusal to waive an inadmissibility finding. The Court reiterated the proposition that: "[T]he Constitution protects the right to receive information and ideas." 408 U.S. at 762 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). As *Stanley* recognized: "This right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society." 394 U.S. at 564 (internal citation omitted). The *Mandel* Court then applied this basic First Amendment principle to the consular process. It also cited *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965), which upheld the First Amendment right of citizens to receive subversive publications sent from abroad by foreign speakers. Cases following *Mandel* further protected the "right to hear," explaining it applies to all kinds of speech and not only political speech. *See Va. State Bd. of*

[7] The Sixth Circuit's decision in *Baaghil* is distinguishable because the court did not consider whether a visa denial harmed a U.S. citizen's First Amendment interest. As discussed *supra* in § IV.A.2.a, the court concluded that Mr. Ahmed, a lawful permanent resident, had no Fifth Amendment procedural or substantive due process claim as to the denial of his family's immigrant visas. 1 F.4th at 433-34.

Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) ("[W]here a speaker exists . . . the [First Amendment] protection afforded is to the communication, to its source and to its recipients both."); *Procunier v. Martinez,* 416 U.S. 396, 409 (1974), *overruled to extent it applied to incoming prison mail by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989) (holding that wives have a First Amendment right to read uncensored correspondence from their imprisoned husbands despite compelling state interests in maintaining prison security).

The type of speech Ms. Rodriguez wishes to hear from her husband is just as constitutionally sacrosanct as the speech Professor Mandel's American colleagues wanted to hear. The *Mandel* Court was explicit that its test was not intended to bar "normal" Americans from asserting a sufficient First Amendment interest in a noncitizen's visa denial. Although Professor Mandel cited the "special role of the university" to seek heightened First Amendment protections for academic applicants and their citizen colleagues, the Court ruled: "The ideas of most such [noncitizens] might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well-known, and the popular." 408 U.S. at 768.

Ms. Rodriguez may not be a public figure like Professor Mandel or his American colleagues, but the First Amendment protects her speech and associational rights just the same. There is no valid reason why professors would have a "right to hear" a colleague while a wife would not have a right to hear her husband, because the "First Amendment protects [intimate] relationships, including family relationships." *Bd. of Directors of Rotary Intern v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). In *Roberts v. U.S. Jaycees*, for example, the Supreme Court found that individuals in relationships "that attend the creation and sustenance of a family," including marriage, have a greater claim to First Amendment protections in the form of freedom

of association, including speech, than a "large and basically unselective group" like the local Jaycees chapters. 468 U.S. 609, 618-19, 621 (1984).

Here, the visa denial leaves Ms. Rodriguez with no alternative to exercise her rights. *Mandel* rejected the notion that a citizen's First Amendment rights can be satisfied other than through face-to-face interaction inside the United States. The Supreme Court made clear it was "loath" to hold that the ability of professors to communicate via telephone or radio would provide a lawful alternative:

> The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books and speeches, and because "technological developments," such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests–a balance we find unnecessary here . . . [W]e are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

408 U.S. at 765. Contrary to Defendants' argument (ECF No. 27 at 10-11 n.2), periodic Zoom calls are not enough. Ms. Rodriguez does not assert that she has a "right" to guarantee her husband's admission to the United States. Rather, under *Mandel* and *Muñoz* her First Amendment rights trigger application of the "facially legitimate and bona fide reason" test.

Finally, Defendants advance what is essentially a floodgates argument in an attempt to defeat Ms. Rodriguez's First Amendment rights. *See* ECF No. 27 at 15 ("[A]llowing First Amendment claims to proceed in this context would have wide-reaching implications: any U.S. citizen could plead a First Amendment rights to hear a noncitizen's speech in person . . ."). This argument fails for several reasons.

"Floodgates" concerns cannot overcome a U.S. citizen's rights under the Constitution. Also, as the Supreme Court recently clarified, in order to assert a First Amendment right to hear, there must be "a concrete, specific connection" between the U.S. citizen and the speaker. *Murthy*, 603 U.S. at 75 (quoting *Mandel*, 408 U.S. at 762). Thus, it is not true that "any" U.S. citizen could challenge a visa refusal on First Amendment grounds. Moreover, the executive has a minimal burden to meet to avoid judicial scrutiny of visa refusals. It must not act in bad faith. And in situations where the inadmissibility statute has built in factual predicates, it must only cite the inadmissibility ground. *See, e.g.*, *De Valle v. Secretary of State*, 16 F.4th 832, 842 (11th Cir. 2021) (refusal based on misrepresentation); *Yafai v. Pompeo*, 924 F.3d 969, 971 (7th Cir. 2019) (terrorism-related inadmissibility grounds). As discussed in § IV.B.2.a *infra*, the ground given for refusing Mr. Saucedo Rivas' visa application does not have any built-in factual predicates so citing the statute alone is insufficient.

Defendants similarly claim *Mandel* review is limited to challenges to nonimmigrant visa waiver decisions. ECF No. 27 at 13-14. Such a distinction is absent from the holding in *Mandel*. If anything, the fact that Mr. Saucedo Rivas' visa was refused under 8 U.S.C. § 1182(a)(3)(A)(ii) militates for more strenuous review. Unlike the purely discretionary statutory grant of waiver power at issue in *Mandel*, § 1182(a)(3)(A)(ii) requires that officers have a "reason to believe" the individual is inadmissible under a specific statutory ground of inadmissibility—officers lack "discretion" to deny admission for reasons not enumerated in the statute. Likewise, the "permanence" of the immigrant visa denial here does not suggest that less review is proper. On the contrary, unlike Professor Mandel, who was free to re-apply for a visa at any time in the future, Mr. Saucedo Rivas now faces a permanent ban on entry to the country where he lived for years. Nothing about the facts of this case indicates *less* review is warranted than in *Mandel*.

Importantly, Ms. Rodriguez does not need to establish that her First Amendment rights "trump" the general plenary power over immigration or that her husband has some constitutional or statutory "right of entry" in order to prevail here. *See* ECF. No. 27 at 8. The "facially legitimate and bona fide reason" test of *Mandel* exists to ensure that basic constitutional principles still apply to visa denials that implicate the First Amendment, without requiring either party establish their interests "trump" those of the opposing party. This is a threshold test, not a balancing one. *See Mandel*, 408 U.S. at 770.

The First Amendment protects all the deeply personal speech and association involved in marriage. Because Ms. Rodriguez's own First Amendment interest is implicated by the visa denial, the Court should apply the "facially legitimate and bona fide reason" test.

2. The visa denial fails the "facially legitimate and bona fide reason" test

a) A mere citation to 8 U.S.C. §1182(a)(3)(A)(ii) does not satisfy the "facially legitimate and bona fide reason" test

Defendants' argument that Justice Kennedy's concurrence from *Kerry v. Din*, 576 U.S. 86 (2015), establishes that a mere citation to §1182(a)(3)(A)(ii) ("any other unlawful activity") satisfies the "facially legitimate and bona fide reason" test is unavailing. ECF No. 27 at 17-18. Such an interpretation contradicts *Mandel*, where the Court declined to consider the government's argument that "any reason or no reason may be given" for a visa denial. 408 U.S. at 769. Moreover, Justice Gorsuch's concurrence in *Muñoz* implies that a mere citation to the "any other unlawful activity" statute is not sufficient to satisfy the test, and the majority opinion made no comment as to the sufficiency of a citation to this statutory provision alone. 602 U.S. at 920 (Gorsuch, J., concurring). It is "these developments"—i.e. the provision of discrete factual predicates—that

"should end this case," (*id*.), not a mere citation to §1182(a)(3)(A)(ii).[8] A mere citation to this "catch-all" provision does not satisfy the "facially legitimate and bona fide reason" test.

b) A visa denial is not for a "facially legitimate and bona fide reason" where reached through intimidation, duplicity, and prejudice

At the pleading stage, Ms. Rodriguez's claim that consular officers intimidated, prejudged and attempted to set interrogative traps for Mr. Saucedo Rivas and refused to consider overwhelming exculpatory evidence shows bad faith and renders the visa denial illegitimate and not bona fide.

In contesting Ms. Rodriguez's bad faith claim, Defendants assert that the "legal basis upon which a 'bad faith' exception was constructed has disintegrated," because Justice Kennedy's concurring opinion in *Din* was "abrogated" by *Muñoz*. ECF No. 27 at 18. First, Defendants cannot cherry-pick what they like from Justice Kennedy's *Din* concurrence, *see supra* at § IV.B.2.a and discard the rest. Second, Defendants misstate the implications of the *Muñoz* decision, as abrogating Justice Kennedy's concurring opinion. ECF No. 27 at 33. Instead, *Muñoz* answered the question left open in *Din*, explaining that, "Today, we resolve the open question. Like the *Din* plurality, we hold that a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country." *Muñoz*, 602 U.S. at 909.

Ms. Rodriguez has alleged bad faith with sufficient particularity. The most recent published

[8] This approach is consistent with Justice Kennedy's concurrence in *Din*, which does not give the government any basis for claiming a mere citation to §1182(a)(3)(A)(ii) satisfies the facially legitimate and bona fide reason test. *Din* involved 8 U.S.C. §1182(a)(3)(B), and Justice Kennedy's concurrence acknowledged that this statute contains "discrete factual predicates" built into the statutory text. *Din*, 576 U.S. at 104-05. The contrast between the "any other unlawful activity" language of §1182(a)(3)(B) and §1182(a)(3)(B) could not be starker. The terrorist ground enumerates granular types of activity, listing hijacking, sabotage, kidnapping, assassination, violent attacks, use of biological or chemical weapons, as well as soliciting funds for terrorist organizations.

appellate decision relating to the standard for showing "bad faith" is *Khachatryan v. Blinken*, in which the Ninth Circuit held that while "it is not enough to allege that the consular official's information was incorrect[, b]ut that does not mean that the objective unreasonableness of a stated reason for a visa denial is irrelevant, particularly at the pleading stage." 4 F.4th 841, 852-53 (9th Cir. 2021) (citation omitted). The Court ruled, "[t]he unreasonableness of a consular officer's actions thus remains a factor to consider in assessing whether the plaintiff has pleaded facts with sufficient particularity to give rise to a plausible inference of subjective bad faith." *Id*. at 853.

Several federal courts of appeals have considered what would constitute bad faith by a consular officer. *See Yafai v. Pompeo*, 912 F.3d 1018, 1022 (7th Cir. 2019) (noting in *dicta* that "evidence of behind-the-scenes bad faith" might be enough, but plaintiffs had provided none, as the record contained only evidence "reflect[ing] a good-faith evaluation" of the visa application); *Morfin v. Tillerson*, 851 F.3d 710, 713-14 (7th Cir. 2017) (Easterbrook, J.) (remarking that indictment of noncitizen plaintiff for cocaine possession with intent to distribute, with no knowledge that the charges were false or strong evidence of innocence, "forecloses any contention that the State Department was imagining things" in deeming him inadmissible under 8 U.S.C. § 1182(a)(2)(C) (drug smuggling)); *Bustamante*, 531 F.3d at 1062 (plaintiffs "failed to allege that the consular officer did not in good faith believe the information he had"). Whether a denial is "objectively unreasonable" is a factor for courts to consider in determining whether it was issued in bad faith. *Khachatryan*, 4 F.4th at 853. A plaintiff need not definitively establish bad faith, but only plead it "with sufficient particularity" to survive a motion to dismiss. *Id* at 852 (quoting *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment)).[9]

[9] Defendants cite *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) and *Burris v. Kerry*, No. 4:12-CV-728, 2014 WL 1267272, at *5 (E.D. Tex. Mar. 27, 2014) in an attempt to equate Ms. Rodriguez's bad faith claim with the conclusive and factually unsupported bad faith

The Sixth Circuit's dicta in *Baaghil* that the consular officer had provided a "facially legitimate reason for the visa denials," 1 F.4th at 434, does not foreclose this Court's consideration of Ms. Rodriguez's bad faith claim. First, as discussed *supra* in § IV.A.2.a., in *Baaghil*, Mr. Ahmed, the lawful permanent resident, had not demonstrated a constitutional claim, so there was no basis for the Sixth Circuit to consider whether the reason for the denial was bona fide. *See* 1 F.4th at 433-34. Second, Mr. Ahmed asserted that consular officers had requested additional information about his and his family's identities—and the Sixth Circuit said "concerns about Ahmed and his putative family's identity" constituted a facially legitimate reason. *Id*. at 434. Unlike Ms. Rodriguez, Mr. Ahmed made no affirmative showing of bad faith.

Here, as Ms. Rodriguez explained in her complaint, the consular officers prejudged Mr. Saucedo Rivas, intimidated him, and assumed the worst without conducting any bona fide investigation. Consular officer actions included:

- Telling him he looked like a gangster and a "convicto" (in English, a convict).
- Attempting to entrap him into making false statements, saying that things would go better for him if he confessed to things he did not do.
- Telling him to stop lying and stop giving excuses, and refusing to listen to his answers when he was telling the truth.
- Shouting at him and physically intimidating him, pounding hands on the desk and making Mr. Saucedo Rivas fear for his physical safety.

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claims advanced in those cases. ECF No. 27 at 20-21. Contrary to Defendants' straw man argument, Ms. Rodriguez does not assert that failure to consider evidence, in a vacuum, constitutes bad faith, as the plaintiffs in *Cardenas* and *Burris* claimed. Instead, she argues that the bad faith is evidenced by officers' attempts to physically intimidate Mr. Saucedo Rivas, their statements pre-judging him based on his looks, and their repeated statements that he must be lying if he did not admit to being a Barrio Azteca member (which he is not). This information, in addition to the consulate's refusal to consider detailed, credible exculpatory evidence, distinguishes the particularly plead bad faith claim from the general and conclusive claims put forward in *Cardenas* and *Burris*.

ECF No. 1 ¶34. After issuing the denial, Defendants failed to meaningfully consider the substantial exculpatory evidence. The three experts documented their qualifications and provided a high degree of detail as to the characteristics of members of Barrio Azteca and the factual impossibility that Mr. Saucedo Rivas could be a member, past or present. *Id.* ¶35. Defendants did not contact any of the experts—not even Jeffrey Gibson who had offered to provide evidence about Mr. Saucedo Rivas "in reference to gang affiliation," as he had done in the past for Defendant DOS "as to those seeking an entry visa." *Id*. This blatant disregard is a continuation of the bad faith demonstrated during the interviews.

By holding Defendants accountable for their clear bad faith here, the Court would strengthen the consular process, strengthen the rule of law, and correct any public perception that unfairness in the consular process should lead otherwise eligible families of mixed immigration status to remain in the shadows rather than pursuing the *lawful* pathway to lawful permanent residency and citizenship.

V. CONCLUSION

For the reasons set forth above, the Court should construe the facts in the light most favorable to Ms. Rodriguez and deny Defendants' Motion to Dismiss.

Dated: August 6, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on this 6th day of August, 2025, via the Court's e-filing system on the following:

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