IN THE UNITED STATES CIRCUIT COURT
FOR THE ELEVENTH CIRCUIT
ATLANTA GEORGIA

Angela Del Valle,	X	
Appellant,	X	
	X	Circuit Court Case No. 19-14889
vs.	X	
	X	District Court Case No. 6:19-cv-900
Secretary, Department of State,	X	
et al.,	X	Agency Case No. A 205-358-969
Appellees.	X	

_____/

APPEAL FROM A DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

APPELLANT'S INITIAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I **HEREBY CERTIFY** that the following persons may have an interest in the outcome of this case:

1. Mike Pompeo, Secretary, United States Department of State;
2. John S. Creamer, Charge d'Affairs, United States Embassy, Mexico City, Mexico;
3. Wendy Berger, United States District Judge, Middle District of Florida, Orlando Division;
4. Ralph Hopkins, Assistant United States Attorney, Orlando, Florida;
5. Michelle Thresher Taylor, Assistant United States Attorney, Tampa, Florida;
6. Angela Del Valle, Appellant;
7. Carlos Del Valle, Appellant's spouse;
8. David Stoller, Attorney for Appellant.

By: /s/ David Stoller /s/
David Stoller, Esq.

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests that this Court schedule this matter for oral argument. Appellant contends oral argument will assist the Court in its determination as to the issues to be resolved in this matter.

STATEMENT OF JURISDICTION

These proceedings were commenced in accordance with 8 U.S.C. §1291. The order entered in this case was entered by the district court on November 6, 2019. Pursuant to Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure, a notice of appeal was filed with the district court on December 6, 2019.

STATEMENT OF THE ISSUES

Whether the district court erred when it dismissed Appellant's complaint by relying on the doctrine of consular non-reviewability?

To the extent that the doctrine of consular non-reviewability applies, whether the district court erred by failing to recognize the *Mandel* exception?

I. STATEMENT OF THE CASE

A. Procedural and Factual Background

Appellant is a United States citizen ("USC") who is married to Carlos Del Valle ("Carlos"), a native and citizen of Mexico. After Appellant and Carlos married, Appellant submitted a Form I-130, Petition for Alien Relative ("Form I-130"), to U.S. Citizenship and Immigration Services ("USCIS") to classify Carlos as an "immediate relative" as defined at 8 U.S.C. §1151(b)(2)(A)(i).[1]

When Appellant's Form I-130 was approved, USCIS forwarded the approval to the National Visa Center,[2] which then forwarded the approval to the United States Consular Office ("USCON") in Ciudad Juarez, Mexico. Despite being married to a USC, the only means through which Carlos could use the approved Form I-130 to obtain lawful permanent resident status in the United States was to seek the "consular processing" of his approved petition through the USCON in Ciudad Juarez, Mexico. To this end, Carlos was required to seek an immigrant

[1] Carlos qualifies as an "immediate relative" because he is the spouse of a USC.

[2] The NVC's function is to accept approved immigrant petitions and to forward these petitions to Consular Offices throughout the world. Generally, the NVC is responsible for much of the "front end" processing of an approved petition (i.e. collection and processing of fees, applications, documentation in support of applications, etc.). Once the NVC is satisfied that a beneficiary qualifies for the issuance of an immigrant visa, the NVC forwards the case abroad for an interview to be held before a USCON.

visa outside the United States because he had initially entered the United States without inspection and had accrued "unlawful presence" in the United States.[3]

Before departing the United States, however, Carlos applied for a "waiver" of inadmissibility by submitting a Form I-601A, Application for Provisional Unlawful Presence Waiver, to USCIS. This waiver application was approved and was required because Carlos' departure to seek the "consular processing" of his approved Form I-130 would render him "inadmissible" to the United States as described at 8 U.S.C. §1182(a)(9)(B)(i)(II). This ground of "inadmissibility" applied to Carlos because he had accrued one year or more of "unlawful presence" in the United States.[4]

On January 31, 2018, Carlos departed the United States and appeared for an interview at the USCON in Ciudad Juarez, Mexico. Following the above-mentioned interview, the USCON refused the issuance of an immigrant visa on three separate grounds. A "Refusal Sheet" informed Appellant and Carlos that the application for an immigrant visa was being refused because Carlos : (1) had committed "actionable immigration fraud" in obtaining (or seeking to obtain) a

[3] *See* 8 U.S.C. §1255(a).

[4] In 2013, USCIS promulgated a regulation providing a means through which Carlos could apply for a "waiver of inadmissibility" ("waiver") *before* his departure to attend an interview at a USCON abroad. 78 Fed. Reg. 536 (Jan. 3, 2013). This rule created a process to adjudicate the waiver Carlos would require upon his departure from the United States *before* said departure. *See* 8 C.F.R. §212.7(e); *see also* 81 Fed. Reg. 50244 (Jul. 29, 2016).

visa or other entry document through fraud [8 U.S.C. §1182(a)(6)(C)(i)] ; (2) had accrued one year or more of "unlawful presence" in the United States prior to his departure [8 U.S.C. §1182(a)(9)(B)(i)(II)][5] ; and (3) had made a "false representation" that he was a USC [8 U.S.C. §1182(a)(6)(C)(ii)].

Appellant filed suit in the district court seeking *in camera* review of the underlying evidence that Carlos had committed "actionable immigration fraud" or a made a "false representation" to being a USC. In her complaint, Appellant explained that the USCON had mistaken Carlos' identity for an individual who had made an "actionable" "false representation" to being a USC at a designated port-of-entry ("POE") in 1995 and 2002. Ultimately, Appellant limited her complaint to the allegation that Carlos made a "false representation" in 2002,[6] and did not seek to review the evidence herself. Instead, Appellant requested the

[5] Although Carlos had departed the United States with an approved "provisional waiver" to overcome his inadmissibility under 8 U.S.C. §1182(a)(9)(B)(i)(II), this "provisional waiver" was automatically revoked when the USCON determined that additional grounds of inadmissibility applied. *See* 8 C.F.R. §212.7(e)(14)(i).

[6] The undersigned notes that 8 U.S.C. §1182(a)(6)(C)(ii) was added to the Immigration and Nationality Act through enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Division C, Pub. L. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996). Although the general effective date of IIRIRA was April 1, 1997, an "actionable" "false representation" can occur on or after September 30, 1996, the date of IIRIRA's enactment. Accordingly, a "false representation" made in 1995 could render an alien inadmissible pursuant to §1182(a)(6)(C)(i) for "actionable" "immigration fraud" if the "false representation" were made before an immigration officer at a POE. However, a waiver could overcome this ground as provided at 8 U.S.C. §1182(i). As such, it is the "false representation" made in 2002 that "makes or breaks" Carlos' eligibility to return to the United States through Plaintiff's approved Form I-130.

district court to review *in camera* any evidence the USCON had relied upon to deny Carlos' immigrant visa. Appellant requested *in camera* review of the biometrics captured at the POE in 2002 when the individual made an "actionable" "false representation."[7]

Appellant argued before the district court that the USCON violated her rights to Due Process inasmuch as the refusal of an immigrant visa to Carlos affects her fundamental right to family unity without providing any process or procedure aimed at ensuring the correct identification of someone alleged to have made an "actionable" "false representation." Appellant's action before the district court arises from the lack of any "notice" and "right to respond" to the USCON's determination that Carlos made an "actionable" "false representation."[8]

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[7] Generally, an individual who makes a false representation as a USC at a POE is subject to expedited removal and summarily deported in accordance with 8 U.S.C. §1225(b)(1)(A)(i). Information about this deportation would be uploaded to databases available to officers at USCONs, POEs and officials conducting interior enforcement of the nation's immigration laws. The Department of Homeland Security would create an "A" file for any foreign national subjected to "expedited removal." An "A" file is an individual "alien" file maintained by the Department of Homeland Security to document actions taken by the Department (such as a foreign national who is removed from the United States through "expedited removal"). Paperwork collected and created during the "expedited removal" process would be maintained in the foreign national's "A" file and this would ordinarily include a paper copy of the individual's fingerprints, a photograph of said individual and some type of narrative about how an "actionable" "false representation" was made so as to justify the individual's removal.

[8] Notably, Appellant does not challenge the substance of the USCON's refusal inasmuch as she concedes that someone who made an "actionable" "false representation" is indeed ineligible for the issuance of an immigrant visa.

The government moved to dismiss Appellant's complaint for lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The government argued that the doctrine of consular non-reviewability divested the district court of jurisdiction to review the denial of Carlos' visa. Appellant argued that the doctrine did not apply as she only sought *in camera* review of the evidence underlying the decision to deny the visa and was not challenging the determination itself. Nevertheless, the district court categorized Appellant's suit as a request to "review the factual predicate for the consular official's decision" and cited the doctrine of consular non-reviewability in support of an order dismissing Appellant's complaint without prejudice. This appeal follows.

II. SUMMARY OF THE ARGUMENT

The doctrine of consular non-reviewability addresses the scope of review and not a court's power to hear a case. As such, the district court erred by dismissing Appellant's compliant for lack of subject matter jurisdiction.

To the extent that the doctrine of consular non-reviewability applies, the district court erred by failing to recognize the *Mandel* exception. This exception provides the court with limited review to determine whether the USCON's denial of an immigrant visa infringed upon constitutional rights. The limited review

provided through the *Mandel* exception allows the court to determine whether the denial was facially legitimate and bona fide.

Appellant submits that the complaint alleged sufficient facts through which the district court could conclude that the refusal of the immigrant visa in question infringed upon a Constitutionally protected interest. Moreover, the consular officer failed to provide a valid factual predicate underlying two of the three grounds provided in support of the refusal. The absence of a factual predicate denied Appellant her right to due process. As such, the doctrine of consular non-reviewability did not preclude limited judicial review of the consular officer's decision.

Because the district court erred in ordering the dismissal of the complaint, the Circuit Court should vacate that decision and remand proceedings to the lower tribunal for further proceedings consistent with this Court's order.

III. ARGUMENT

A. Standard of Review

A district court's dismissal pursuant to Rule 12(b)(1) or Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed *de novo*.[9] The factual allegations

[9] *Lord Abbett Mun. Income Fund, Inc. v. Tyson*, 671 F.3d 1203, 1205–06 (11th Cir. 2012).

supporting a claim are accepted as true and the Court draws all reasonable inferences in favor of the nonmovant.[10]

A civil complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[11] To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[12] The plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[13]

Appellant's complaint satisfied Rule 8. The complaint provided a plain statement containing sufficient factual matter to apprise the opposing party of the claims made. Appellant requested the district court's mandamus authority to compel the government "to properly complete review of an application for an immigrant visa." Appellant plead factual content to allow the district court to draw a reasonable inference that the government had mistaken Carlos' identity when reviewing his application for an immigrant visa. It is this mistake with regards to

[10] *West v. Warden, Comm'r, Ala. DOC*, 869 F.3d 1289, 1296 (11th Cir. 2017).
[11] Fed., R. Civ. P. 8(a)(2).
[12] *Am. Dental Ass'n v. Cigna Corp*., 605 F.3d 1283, 1289 (11th Cir. 2010); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
[13] *Brooks v. Warden*, 800 F.3d 1295, 1300 (11th Cir. 2015) (quotation marks omitted).

Carlos' identity and the concomitant denial of a visa to him as a result that is central to Appellant's claims herein.

B. The district court erred when it dismissed Appellant's complaint by relying on the doctrine of consular non-reviewability.

The doctrine of consular non-reviewability limits a district court's authority to review decisions made by consular officers abroad, but does not foreclose the tribunal's authority to intervene when presented with the appropriate circumstances.[14] The doctrine proscribes a very narrow avenue of reviewing the decisions of a consular officer, but does not outright constrain a federal court's subject matter jurisdiction.[15]

Moreover, the district court retained subject matter jurisdiction to review Appellant's complaint under 28 U.S.C. §1331.[16] Notwithstanding the existence of this authority to address the matters discussed in the complaint, the district court foreclosed any possibility of review by employing the doctrine of consular non-reviewability rather than identifying the limits of the Court's authority and then delineating the limits of the Court's authority under the circumstances presented.[17]

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[14] *Kleindienst v. Mandel*, 408 U.S. 753, 767 (1972).
[15] *See Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976); *see also Matushkina v. Nielsen*, 877 F.3d 289, 294 n.2 (7th Cir. 2017); *Fiallo v. Bell*, 430 U.S. 787, 795–96 n.6 (1977).
[16] *See Allen v. Milas*, No. 16-15728, 14 (9th Cir. Jul. 24, 2018).
[17] *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010); *see also Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)

i. The doctrine of consular non-reviewability

Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."[18] Congress delegated this plenary power to the Executive and the Supreme Court has for centuries continuously recognized the Executive's "power to expel or exclude aliens as a fundamental sovereign attribute […] largely immune from judicial control."[19]

In 1950, the Supreme Court encapsulated this "immunity" by establishing the doctrine of consular non-reviewability.[20] Notably, the origins of the doctrine stem from case law developed during the Cold War era and during a period of our history when we discriminated against individuals of Asian descent.[21] Despite our nation's social advancement, the doctrine remains viable today.

ii. Kerry v. Din[22]

The most recent decision from the Supreme Court on the issue of consular non-reviewability" is *Kerry v. Din*. This case involved a factual scenario

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[18] *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).
[19] *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).
[20] in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 210 (1950).
[21] *Kleindienst v. Mandel*, 408 U.S. 753 (1972). Cf. *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927); *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 985 (D.C. Cir. 1929); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).
[22] 576 U.S. __ (2015), 135 S. Ct. 2128 (2015)

somewhat similar to that presented herein, with a USC filing a petition on behalf of her spouse and a refusal of the spouse's immigrant visa application at a USCON. A plurality of the Court agreed on the vacatur of the Circuit Court's decision, however the reasons underpinning the plurality decision are of utmost importance when discussion the reach of consular non-reviewability.

This plurality consisted of the Judgment of the Court penned by Justice Scalia to which Chief Justice Roberts and Justice Thomas joined. The Judgment of the Court determined that no Constitutional right was violated when the spouse's immigrant visa was refused. The doctrine of consular non-reviewability is barely mentioned in this portion of the Court's opinion.

Justice Kennedy issued a concurring opinion joined by Justice Alito. These two Justices determined that the Circuit Court's opinion must be vacated under the doctrine of consular non-reviewability. Important to Appellant's claim is that the concurring opinion did not conclude the absence of a Constitutional right in the refusal of an immigrant visa to the foreign national spouse.

Justice Breyer issued a dissenting opinion joined by Justice Ginsburg, Justice Sotomayor and Justice Kagan. This opinion found a Constitutional right infringed upon under the circumstances presented and would have upheld the Circuit Court's opinion finding that the doctrine of consular non-reviewability did not foreclose review of the denial of the immigrant visa.

Appellant submits that the math here is important because while a 5-4 decision supported vacatur of the Circuit Court's conclusion that the consular non-reviewability did not foreclose judicial review of the USCON's decision, a 6-3 majority assumed (or outright concluded) the possibility that a Constitutional right was infringed when the foreign national's immigrant visa was refused. While Justice Kennedy's opinion concurred in the vacatur of the lower court's ruling, its two votes did not confirm the non-infringement of a Constitutional right in the denial of the spouse's visa. Discounting the concurring opinion outright still provides a 4-3 majority for the proposition that a Constitutional right is involved in the denial of the spouse's visa.

Consistent then with the plurality in *Din* finding the existence of a Constitution right under the circumstances presented, or perhaps better stated as the non-existence of a lack of a Constitutional right mandating outright dismissal of the claim as contemplated by the Judgment of the Court, Appellant submits that consular non-reviewability cannot be used to sweep away her claims as was done by the district court. As stated *supra*, consular non-reviewabililty can limit a district court's authority to conduct judicial review but is not an *ipso facto* prohibition against subject matter jurisdiction.

In its decision, the district court concluded that "this Court is bound by the doctrine of consular non-reviewability to deny such a request." The district court's

conclusion sweeps so broadly that it acts as an outright bar to any review of any decision by any consular officer for any reason. While Appellant concedes that the doctrine acts in such a way that it necessarily forestalls review of many decisions made by consular officers, the doctrine is not the equivalent of an outright lack of subject matter jurisdiction. If the district court's conclusion werecorrect, then the following part of the analysis would not be part of the case law developed on the question of whether a consular officer's decisions are subject to review in a federal court.

C. The district court erred by failing to recognize the *Mandel* exception to the doctrine of consular non-reviewability.

i. Exceptions to the doctrine of consular non-reviewability

The Supreme Court recognizes certain narrow exceptions to the doctrine of consular non-reviewability, such as review of constitutional claims.[23] When a visa denial implicates a U.S. citizen's constitutional rights, courts have engaged in judicial review and will generally defer to a consular officer's decision where a "facially legitimate and bona fide" reason exists.[24]

[23] *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972); *Fiallo v. Bell*, 430 U.S. 787, 792, (1977); *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018); *Kerry v. Din*,135 S. Ct. 2128, 2140-41 (2015).
[24] *Mandel*, 408 U.S. at 769; *Hawaii*, 138 S. Ct. 2419; *Din*,135 S. Ct. at 2140-41.

Courts have used a two-prong test to determine whether a consular officer's decision is facially legitimate and bona fide.[25] Specifically, when assessing the decision, courts focus on (1) whether the consular officer has identified "a valid statute of inadmissibility"[26] and (2) whether the consular officer has identified the "discrete factual predicates that must exist before denying a visa."[27] The second prong may also be satisfied when there are facts providing a "facial connection" to the cited statute of inadmissibility.[28] When a decision satisfies the "facially legitimate and bona fide" test, the court's review ends unless there is an "affirmative showing of bad faith […] plausibly alleged with sufficient particularity.[29]

ii. Application of the *Mandel* exception

Here, the district court erred by barring the possibility of addressing Appellant's due process claim as an exception to the doctrine. Appellant plead sufficient factual information for the district court to understand that her claim was based on the proposition that the refusal of Carlos' visa was not based on a

[25] *Din*,135 S. Ct. at 2140-41; *see also Yafai v. Pompeo*, No. 18-1205, 5 (7th Cir. Jan. 4, 2019); *Morfin v. Tillerson*, 851 F.3d 710, 713-14 (7th Cir. 2017); *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Din*,135 S. Ct. at 2141; *see Morfin*, 851 F.3d at 713-14.

"facially legitimate and bona fide" reason and thus infringed Appellant's constitutional rights.

Appellant acknowledges that the consular officer identified "a valid statute of inadmissibility."[30] The consular officer provided Carlos with a "Refusal Sheet" informing Appellant and Carlos that the application for an immigrant visa was being refused because Carlos had committed "actionable immigration fraud" in obtaining (or seeking to obtain) a visa or other entry document through fraud in violation of 8 U.S.C. §1182(a)(6)(C)(i) and 8 U.S.C. §1182(a)(6)(C)(ii).

However, the identification of a valid statute of inadmissibility—§1182(a)(6)(C)(i) and §1182(a)(6)(C)(ii)—does not necessarily apprise Appellant as to when and where Carlos committed the alleged fraud deemed "actionable" by the consular officer. Moreover, the Refusal Sheet failed to identify the "discrete factual predicate" necessary to deny the immigrant visa.[31] Unlike the USC spouse in *Din*, Appellant has thus far been provided no notice of the "when and where" relied upon to refuse Carlos' application for a visa. Justice Kennedy notes in his concurring opinion that

> "Din, moreover, admits in her Complaint that [her foreign spouse] worked for the Taliban government, which, even if itself insufficient to support exclusion, provides at least a facial connection to [the refusal ground]."

[30] *See Din*,135 S. Ct. at 2140-41; *see also Yafai v. Pompeo*, No. 18-1205, 5 (7th Cir. Jan. 4, 2019); *Morfin*, 851 F.3d at 713-14; *Cardenas*, 826 F.3d at 1172.
[31] *See id.*

Thus, *Din* stands for the proposition that the language of the ground of inadmissibility can be sufficient to provide sufficient notice if that ground is joined with some element of prior knowledge. While Appellant can reason that the refusal of Carlos' visa is based on claims of "actionable" fraud, the Refusal Sheet provides no notice of the factual predicate for the consular officer's refusal other than the language of the grounds of inadmissibility at issue.

Appellant notes that the regulations governing Carlos' provisional "unlawful presence" waiver limit the application of that waiver only to applications where the sole ground of inadmissibility is one covered by 8 U.S.C. §1182(a)(9)(B)(i). The regulation governing the waiver application limits its reach to aliens who "[u]pon departure, would be inadmissible only under [8 U.S.C. §1182(a)(9)(B)(i)] at the time of the immigrant visa interview."[32] Had Appellant and/or Carlos been aware of his having in the past engaged in any "actionable" fraud or "actionable" "false representation" to being a USC, reason dictates that Carlos' application for a provisional "unlawful presence" waiver would have been denied.[33] Arguably, the same information relied upon by the consular officer would have been available to an immigration officer reviewing Carlos' application

[32] 8 C.F.R. §212.7(e)(3)(iii).

[33] Pursuant to 8 C.F.R. §212.7(e)(3)(ii), an alien seeking a provisional "unlawful presence" waiver must provide biometrics to USCIS. These biometrics would include a digital fingerprint exemplar and a digital photo. *See* 8 C.F.R. §103.16.

for a provisional "unlawful presence" waiver and should have created a mandatory denial of that application. Yet no such denial was issued.

One of the concerns raised in *Din* was the management of sensitive or classified information involved with inadmissibility involving terrorist activities. While Justice Kennedy concluded that "respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa," any such limitation would necessarily depend on the ground of inadmissibility at issue. Although Appellant claims that she lacks the specific "when and where" relied upon to refuse Carlos' visa, she can surmise by the language of the statutes cited in the Refusal Sheet that the factual predicate in support of refusal is neither sensitive nor likely to involve considerations of national security. As such, the issues of national security and the management of sensitive information presented in *Din* are inapplicable as applied to the refusal of Carlos' visa.

Rather, Appellant merely asked the district court to inspect biographical information (fingerprints and photographs) *in camera* to identify the "discrete factual predicate" used by the consular officer in support of refusal. To this end, Appellant's complaint included a specific allegation that the district court was authorized to engage in a limited review of such "biographical data" pursuant to

8 U.S.C. §1202(f)(1) and 22 C.F.R. §42.81. A comparison of Carlos' fingerprints and photographs with the individual alleged to have made the false representation would quickly establish the discrete factual predicate at issue.

iii. Dismissal was in error and the matter should be remanded to the district court

Returning to the question of whether dismissal was proper, Appellant submits that the district court erred when it granted the government's motion to dismiss. The doctrine of consular non-reviewability does not insulate every consular officer's decision from judicial review. With that said, Appellant recognizes the limitations the doctrine places on a district court's authority to question decisions falling within the scope of Congressionally mandated delegation of authority over aliens to the political branches. Notwithstanding, the district court's conclusion that Appellant "has not pointed [the] Court to any legal authority allowing [the] Court to look beyond the citation to a statutory predicate that sets forth the factual predicates for the finding," no case known to Appellant stands for the proposition that all consular decisions are immune from judicial review.

While Appellant has conceded throughout the proceedings below and in this brief that the doctrine acts with strict limitations on how much judicial review is available to consular decisions, subject matter jurisdiction exists to consider the claims made in the complaint. The lack of a viable factual predicate in support of

the refusal is such that the district court was bound to deny the motion to dismiss and to order the government to respond to answer the complaint. While it may be true that the Court may ultimately determine that the doctrine forecloses judicial review of the refusal of Carlos' visa, Appellant plead sufficient facts to overcome the motion to dismiss.

IV. CONCLUSION

WHEREFORE, Appellant respectfully requests this Court to:

1. SUSTAIN the instant appeal;
2. REMAND these proceedings to the district court for further proceedings consistent with this Court's order;
3. GRANT any and all additional relief and/or remedies which this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,368 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

/s/ David Stoller /s/
David Stoller, Esquire
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of Appellant's Initial Brief were placed in the US mail, postage pre-paid on May 26, 2020 and sent to:

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