No. 18-2110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABDOLSALAM HUSSAIN and
TAHANI HUSSAIN AHMED ABDULRAB,
Plaintiffs-Appellants,

v.

R. STEPHEN BEECROFT and
U.S. STATE DEPARTMENT,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 17-cv-12356

DEFENDANTS-APPELLEES' ANSWERING BRIEF

Nicole P. Grant
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
T: (202) 598-2731
nicole.p.grant@usdoj.gov

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Counsel for Defendants-Appellees does not request oral argument. Counsel believes that the briefs and record adequately present the facts and legal arguments on appeal before this Court, and respectfully submits that this appeal can, and should, be decided without oral argument. If, however, the Court determines argument is necessary, counsel for Defendants-Appellees request the opportunity to participate.

Dated: March 4, 2019

s/ Nicole P. Grant
Nicole P. Grant

Attorneys for Defendants-Appellees

STATEMENT OF JURISDICTION AND VENUE

Plaintiffs-Appellants appeal a decision of the United States District Court for the Eastern District of Michigan dismissing their petition for writ of mandamus for lack of subject matter jurisdiction due to mootness. Opinion and Order Granting Motion to Dismiss; Denying Motion to Amend/Correct ("Order Granting Dismissal"), RE 37. Further, the district court denied Plaintiffs-Appellants' motion to amend as futile. *Id.* The district court entered judgment on July 25, 2018. Judgment, RE 38. Consequently, this Court has jurisdiction under 28 U.S.C. § 1291, which confers jurisdiction on the courts of appeals to decide appeals of all final decisions of the district courts.

Venue is also proper under 28 U.S.C. § 1294(1), which requires appeals to be taken to the court of appeals for the circuit embracing the district.

STATEMENT OF THE ISSUES

I. Whether the district court erred in finding Plaintiffs-Appellants' claims moot and dismissing Plaintiffs-Appellants' mandamus petition pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction following a determination that: (1) Defendants-Appellees provided Plaintiffs-Appellants a facially legitimate and bona fide justification for refusal of Plaintiff-Appellant Tahani Hussein Ahmed Abdulrab's ("Ms. Abdulrab") visa application, *see* Order Granting Dismissal, RE 37 at Page ID # 386-387; (2) "the consular role in the process of reviewing the application fully was performed upon the return of the [petition] to the National Visa Center," *id.* at 391; and (3) "the consular decision denying the application is not open to substantive review by the Court" due to the well-established doctrine of consular nonreviewability. *Id.* at 387.

II. Whether denial of Plaintiffs-Appellants' motion to amend as futile is proper because Plaintiffs-Appellants' proposed amended petition cannot withstand a motion to dismiss.

STATEMENT OF THE CASE

This case arises from the Department of State's refusal of an immigrant visa application filed by Plaintiff-Appellant Abdolsalam Mohamed Hussein ("Mr. Hussein") on behalf of Ms. Abdulrab, his purported wife. Plaintiffs-Appellants filed a Petition for Writ of Mandamus challenging Defendants-Appellees' alleged "failure to adjudicate [Ms. Abdulrab's] Immigrant Visa application." Petition for Writ of Mandamus, RE 1, Page ID # 9. In their mandamus petition, Plaintiffs-Appellants requested that the district court: (1) declare Defendants-Appellees' failure to adjudicate Ms. Abdulrab's immigrant visa application as arbitrary and capricious and in violation of the Administrative Procedure Act ("APA"), *see id.*; (2) declare Defendants-Appellees' failure to adjudicate Ms. Abdulrab's immigrant visa application a violation of her due process rights, *see id.* at 9-10; and (3) order Defendants-Appellees to adjudicate Ms. Abdulrab's immigrant visa application within 30 days. *See id.* at 10. Plaintiffs-Appellants asserted jurisdiction under Federal Question, 28 U.S.C. § 1331, the Mandamus Act, 28 U.S.C. § 1361, and the Administrative Procedure Act, 5 U.S.C. § 551, and named as defendants R. Stephen Beecroft, Ambassador, U.S. Embassy – Cairo, and the U.S. Department of State. *See generally*, RE 1.

On January 31, 2018, following complete briefing on Defendants-Appellees' Motion to Dismiss and one week prior to the Court's scheduled hearing on the motion, Plaintiffs-Appellants filed a motion to amend their mandamus petition. *See* Motion to Amend/Correct Petition for Writ of Mandamus, and to Add Parties ("Mot. to Amend"), RE 22. Following hearings on both the motion to dismiss and motion to amend, on July 25, 2018, the district court issued an Order granting Defendants-Appellees' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, denying Plaintiffs-Appellants' motion to amend and to add parties as futile, and dismissing the mandamus petition. *See* Order Granting Dismissal, RE 37. Plaintiffs-Appellants' are appealing the July 25, 2018, Order. *See* Notice of Appeal, RE 39.

I. REFUSAL AND RETURN OF MS. ABDULRAB'S VISA APPLICATION

Mr. Hussein is a U.S. citizen. Petition for Writ of Mandamus, RE 1, Page ID # 2. Ms. Abdulrab, his purported wife, is a citizen of Yemen. *See id.* On July 17, 2012, Mr. Hussein filed a Form I-130 Petition for Alien Relative ("I-130 petition" or "petition") on behalf of Ms. Abdulrab. *Id.* at 3. U.S. Citizenship and Immigration Services ("USCIS") approved the petition on June 6, 2013, and forwarded it to the Department of State's National Visa Center ("NVC"). *Id.* The petition was received by the NVC on June 27,

2013. *See* Defendants-Appellees' Response in Opposition to Motion to Amend ("Opp. to Mot. to Amend"), RE 25 at Page ID # 158-159. On March 14, 2014, the NVC scheduled the beneficiary, Ms. Abdulrab, for an interview at the U.S. Embassy in Cairo, Egypt. *Id.*

On September 29, 2015, Ms. Abdulrab applied for an immigrant visa at the U.S. Embassy in Cairo, Egypt. *See* Opp. to Mot. to Amend, RE 25 at Page ID # 159. At the conclusion of her interview, a consular officer refused the immigrant visa application pursuant to Immigration and Nationality Act ("INA") Section § 221(g), 8 U.S.C. § 1201(g). *Id.* On March 4, 2016, the consular officer entered a case note reflecting that Mr. Hussein and Ms. Abdulrab's purported 1993 marriage was suspicious due to the fact that the marriage document appeared altered, and a 1996 passport application for Mr. Hussein indicated that he was not married. *Id.*

On April 19, 2016, a consular officer contacted Mr. Hussein by phone and recommended that Ms. Abdulrab submit genetic test results for herself, Mr. Hussein, and a third person who they claimed to be their eldest son, Yassin Abdolsalam Hussein ("Yassin"), as potential corroborating evidence of their purported 1993 marriage—the basis upon which the I-130 petition was approved. *See* Opp. to Mot. to Amend, RE 25 at Page ID # 160. While genetic testing could not definitively prove or disprove the alleged marital

relationship between Mr. Hussein and Ms. Abdulrab, the consular officer determined that genetic test results that confirmed a biological relationship between Mr. Hussein and Yassin and Ms. Abdulrab and Yassin would, at the very least, be the most independently-probative evidence of an historical romantic relationship between Mr. Hussein and Ms. Abdulrab, thus making it more likely that they had been in a marital relationship at the time that they claimed to be in 1993. *Id.* Such test results would be especially useful because Yassin was alleged to have been born to Mr. Hussein and Ms. Abdulrab in 1994, approximately 10 months after their purported marriage. *Id.* The consular officer contacted Ms. Abdulrab on April 19, 2016, notifying her that the visa application would be refused for a second time. *See* Opp. to Mot. to Amend, RE 25 at Page ID # 160. On April 20, 2016, the State Department refused the visa application for a second time. *Id.* The refusal was annotated with the term "DNA" to reflect the recommendation that was given to Mr. Hussein and Ms. Abdulrab regarding the submission of genetic test results. *Id.* On June 7, 2016, the consular officer noted in the system that Mr. Hussein and Ms. Abdulrab had not submitted any genetic test results to the Embassy as of that date. *Id.*

In an attempt to provide Plaintiffs-Appellants with another opportunity to overcome the refusal of Ms. Abdulrab's immigrant visa

application, the U.S. Embassy in Cairo contacted Ms. Abdulrab again on October 5, 2017. *See* Opp. to Mot. to Amend, RE 25 at Page ID # 160. The Embassy requested that Ms. Abdulrab schedule an appointment with a consular officer for an additional interview. *Id.* Ms. Abdulrab appeared for this interview on November 9, 2017. *Id.* However, Ms. Abdulrab did not present the consular officer with the recommended genetic test results or any other additional evidence that the consular officer found probative to establish the bona fides of her alleged 1993 marriage to Mr. Hussein. *Id.* Consequently, the consular officer again determined that, based on the evidence that had been presented, Plaintiffs-Appellants failed to meet their burden of establishing the bona fides of the marital relationship upon which the petition approval was based—a prerequisite for the issuance of the requested marriage-based immigrant visa. *Id.* at 160-161. As a result, on November 15, 2017, the U.S. Embassy sent Ms. Abdulrab's I-130 petition to the NVC for return to USCIS for reconsideration and possible revocation. *Id.* at 161.

II. PLAINTIFFS-APPELLANTS' MANDAMUS PETITION

On July 20, 2017, Plaintiffs-Appellants filed a Petition for Writ of Mandamus in the United States District Court for the Eastern District of Michigan. *See* Petition for Writ of Mandamus, RE 1.

In response, on October 10, 2017, Defendants-Appellees filed a Motion to Dismiss the petition. *See* Defendants-Appellees' Motion to Dismiss, RE 12. In the motion, Defendants-Appellees argued that the petition should be dismissed, pursuant to Federal Rule of Civil Procedure 12(b)(1), because Plaintiffs-Appellants' claims were moot as Ms. Abdulrab's visa application had been adjudicated. *See generally id.* Specifically, Defendants-Appellees argued that Ms. Abdulrab's visa application had been adjudicated and refused on two separate occasions, pursuant to INA § 221(g), 8 U.S.C. § 1201(g) : first on September 29, 2015, and again, on April 20, 2016, *see id.* at Page ID # 53-54, both times due to Plaintiffs-Appellants' failure to establish eligibility for an immigrant visa based on a marital relationship. *Id.* at 54. Defendants-Appellees contended that "[b]ecause Plaintiffs [could] identify no specific unperformed nondiscretionary duty to necessitate the extraordinary remedy of mandamus, or show that the agency ha[d] unreasonably delayed the processing of [Ms. Abdulrab's] application which ha[d] been adjudicated since 2015, the Petition [was] moot and should be dismissed as such." *Id.* at 56. The district court scheduled argument on this motion for February 8, 2018.

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III. PLAINTIFFS-APPELLANTS' MOTION TO AMEND MANDAMUS PETITION

On January 31, 2018, one week prior to the hearing on Defendants-Appellees' Motion to Dismiss, Plaintiffs-Appellants filed a motion to amend their mandamus petition. *See* Mot. to Amend, RE 22. In their proposed amended mandamus petition, Plaintiffs-Appellants largely repeated the allegations contained in their original mandamus petition. *See id*., at 22-1. However, Plaintiffs-Appellants newly alleged that they had filed Consular Report of Birth Abroad ("CRBA") documents for five of their children and that "a consular officer interviewed them and made a finding that they had a bona fide relationship and that the child they were registering as a U.S. citizen was born to Plaintiffs in wedlock." *Id.*, at Page ID # 131. Plaintiffs-Appellants also newly alleged that after receiving an email from the U.S. Embassy on or about April 19, 2016, they appeared at the U.S. Embassy and asked if Ms. Abdulrab could submit genetic evidence for herself and two of her children—notably not for the eldest child, Yassin, whose DNA was requested by the consular officer and deemed the only child whose genetic evidence would be probative to establish the purported marriage in 1993. *Id.* at 133. The proposed amended mandamus petition also asserted, for the first time, that in October 2017, Plaintiffs-Appellants had voluntarily submitted

results of familial genetic tests to the U.S. Embassy "to demonstrate their bona fide marriage." *Id.* at 135.

Importantly, in their proposed mandamus petition, Plaintiffs-Appellants acknowledged that "[o]n or about November 14, 2017, the Consular Officer returned the Plaintiffs' Form I-130, Petition for Alien Relative to USCIS for reconsideration." *Id.* at 137. However, while Plaintiffs-Appellants had previously argued that "[t]he consular officer's failure to return the petition to DHS [] deprived the Plaintiffs of nondiscretionary duty owed to the Plaintiffs," *see* Response to Motion to Dismiss, RE 14 at Page ID # 71, Plaintiffs-Appellants now claimed that Defendants-Appellants had "erroneously returned" the petition to USCIS. *See* Mot. to Amend, RE 22 at Page ID # 140, 149. As to their request to add new parties and proposed new claims against the Director of USCIS, L. Francis Cissna, and Department of Homeland Security ("DHS") Secretary, Kirstjen Nielsen, Plaintiffs-Appellants maintained that USCIS and DHS had "unreasonably delayed and withheld a mandatory entitlement" by not acting on the returned petition. *Id.* at 137.

Defendants-Appellees filed an opposition to Plaintiffs-Appellants' motion to amend on February 14, 2018. *See* Opp. to Mot. to Amend, RE 25. In the opposition, Defendants-Appellees argued that amendment to the

mandamus petition would be futile because: (1) Plaintiffs-Appellants had failed to establish that Defendants-Appellees' refusals of Ms. Abdulrab's visa application did not amount to complete, full, and proper adjudications; (2) the doctrine of consular nonreviewability precluded the district court from reviewing the immigrant visa refusals because Defendants-Appellees had provided Plaintiffs-Appellants with a facially legitimate and bona fide reason for the visa refusal (failure to establish the bona fides of their purported 1993 marriage), and Plaintiffs-Appellants had not plausibly alleged a claim of bad faith on the part of the consular officer with any sufficient particularity; (3) Plaintiffs-Appellants request to add new allegations regarding the issuance of CRBAs and the submission of non-relevant and non-probative genetic test results were misleading to the relevant issues; and (4) Plaintiffs-Appellants could not sustain a mandamus claim against the proposed new parties, USCIS and DHS, on the returned petition because Plaintiffs-Appellants could not point to a statutory or regulatory guidance that specified adjudication on the returned petition in a certain amount of time, nor could Plaintiffs-Appellants establish that their returned petition had been delayed longer than other similarly-situated petitions returned at the same time. *See generally id.*

The district court held a hearing on Plaintiffs-Appellants' motion to amend on May 31, 2018. On July 25 2018, the district court issued an Order granting Defendants-Appellees' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, denying Plaintiffs-Appellants' motion to amend and to add parties as futile, and dismissed Plaintiffs-Appellants' mandamus petition. *See* Order Granting Dismissal, RE 37. The district court also entered Judgment, with prejudice. Judgement, RE 38 at Page ID # 393.

On September 21, 2018, Plaintiffs-Appellants filed the instant appeal. Notice of Appeal, RE 39.

SUMMARY OF THE ARGUMENT

The district court properly dismissed Plaintiffs-Appellants' mandamus petition because it lacked subject matter jurisdiction over Plaintiffs-Appellants' claims. Inasmuch as Ms. Abdulrab sought review of the consular officer's determination to refuse her visa application, the doctrine of consular nonreviewability as laid out in *Kerry v. Din*, 135 S. Ct. 2128 (2015), "precluded the court all of the putative claims and arguments by the plaintiffs that invite[d] the Court to look beyond the facial basis for the refusal . . . since the consular decision denying the application is not open to substantive review by the Court." Order Granting Dismissal, RE 37 at Page

ID # 387. Defendants-Appellees provided Plaintiffs-Appellants with a facially legitimate and bona fide reason for refusal of Ms. Abdulrab's visa application: Plaintiffs-Appellants "failed to meet the burden of establishing the bona fides of the marital relationship upon which the petition approval was based—a prerequisite for the immigrant visa." Opp. to Mot. to Amend, RE 25 at Page ID # 161.

Further, unlike what appears to be the case in the instant filing before this Court, Plaintiffs-Appellants did not dispute before the district court that the I-130 petition had been sent to the NVC for return to USCIS for reconsideration and possible revocation. *Compare* Mot. to Amend, RE 22 at Page ID# 136 ("On or about November 14, 2017, the Consular Officer returned the Plaintiffs' Form I-130, Petition for Alien Relative to USCIS for reconsideration.") *and* Plaintiffs-Appellants' Opening Brief at 15 ("[O]n or about December 29, 2017, Plaintiffs' Form I-130, Petition for Alien Relative was sent to USCIS for further adjudication by Defendant United States Embassy in Cairo, Egypt.") *with* Plaintiffs-Appellants' Opening Brief at 11 ("The consular officer's failure to return the petition to DHS has deprived the Plaintiffs of nondiscretionary duty owed to the Plaintiffs and constitutes an action without observance of procedure required by law."). As shown here, Plaintiffs-Appellants are even inconsistent on their position of return of

the petition within the same filing, their Opening Brief. However, the record reflects that the I-130 petition was sent to the NVC in November 2017 to return to USCIS with a memo to USCIS explaining the reason for the return. *See* Order Granting Dismissal, RE 37 at Page ID # 381, 387; *see also* Opp. to Mot. to Amend, RE 25 at Page ID # 161, 176. Thus, even assuming, arguendo, the district court had found the refusal of the visa application and the doctrine of consular nonreviewability insufficient to strip it of subject matter jurisdiction, the district court correctly determined Plaintiffs-Appellants' claims were moot "because the consular role in the process of reviewing the application fully was performed upon the return" of the petition to the NVC to return to USCIS. *See* Order Granting Dismissal, RE 37 at Page ID # 391. Consequently, this court should affirm the district court's grant of dismissal of the mandamus petition.

In the same manner, this Court should find denial of Plaintiffs-Appellants' motion to amend their mandamus petition proper, as amendment is futile. As the district court found, "the amended petition could not withstand a motion to dismiss." Order Granting Dismissal, RE 37 at Page ID # 392. Plaintiffs-Appellants move to amend to add claims that will not change the outcome that the district court lacks jurisdiction over claims against the existing Department of State defendants. *Id.* at 391-392. Further,

Plaintiffs-Appellants' request to add new parties and new claims against USCIS and the DHS was—and remains—futile because Plaintiffs-Appellants have pointed to no statute or regulation that requires that USCIS move them to the front of the line of petition returns, or that USCIS must act on a returned petition in any specified period of time. Therefore, this Court should also find that Plaintiffs-Appellants' motion to amend was rightfully denied.

ARGUMENT

I. STANDARDS OF REVIEW

a. Review of 12(b)(1) Dismissal for Mootness

This Court generally reviews a district court's dismissal for lack of subject matter jurisdiction de novo. *Howard v. Whitbeck*, 382 F.3d 633, 636 (6th Cir. 2004). However, "[w]here the district court does not merely analyze the complaint on its face, but instead inquires into the factual predicates for jurisdiction, the decision on the Rule 12(b)(1) motion resolves a 'factual' challenge rather than a 'facial' challenge, and [the Court] review[s] the district court's factual findings for clear error." *Id.* (citing *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1133–35 (6th Cir. 1996)); *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). A

factual finding is clearly erroneous when, "although there is evidence to support that finding, 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *United States v. Russell*, 595 F.3d 633, 646 (6th Cir. 2010) (quoting *United States v. Ware*, 282 F.3d 902, 907 (6th Cir. 2002)). In this case, the record before this Court includes the complaint, declarations and motions filed during motion practice, and the transcript of hearings held on February 8, 2018, and May 31, 2018.

b. Denial of Motion to Amend

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." However, leave to amend may be denied where the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

When a district court denies a plaintiff's motion for leave to amend a complaint/petition, this Court generally reviews the decision for an abuse of discretion. *Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776, 783 (6th Cir. 2000). However, when the district court bases its decision to deny leave to amend on a legal conclusion that amendment would be futile, this Court reviews the decision de novo. *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002).

II. LAW REGARDING VISA REFUSALS AND RETURNS TO USCIS

a. Visa Application Refusal for Failure to Establish Eligibility

The INA allows certain relatives of U.S. citizens to apply for immigrant visas based on certain family relationships. *See* 8 U.S.C. § 1151(a)(1). A United States citizen may file an I-130 Petition on behalf of an "immediate" alien relative. 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. §§ 204.1(a)(1), 204.2(a). If the petition is approved, the alien may apply for an immigrant visa. *See* 22 C.F.R. § 42.42. An immigrant visa application is executed at the interview before the consular officer. *See* 22 C.F.R. § 42.67. At the conclusion of the interview, a consular officer *must either issue or refuse* the visa. *See* 22 C.F.R. § 42.81 (emphasis added). The burden of proof is upon the applicant to establish eligibility to receive the visa. 8 U.S.C. § 1361. If the applicant fails to establish to the satisfaction of the consular officer that he or she is eligible for the visa, the consular officer *must* refuse the visa. *See* 8 U.S.C. §§ 1201(g), 1361 (emphasis added).

b. Petition Returns

The Department of State should "suspend [an] action in a petition case and return the petition, with a report of the facts, for reconsideration by DHS . . . if the [consular] officer knows or has reason to believe that . . . the beneficiary is not entitled, for some . . . reason, to the status approved." *See*

22 C.F.R. § 42.43(a). Upon return, USCIS "may revoke the approval of [a] petition upon notice to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service." *See* 8 C.F.R. § 205.2(a). "Revocation of the approval of a petition . . . under paragraph (a) of this section will be made only on notice to the petitioner . . . . The petitioner . . . must be given the opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation of the approval." *Id.* at § 205.2(b).

III. DISCUSSION

a. The district court did not err in dismissing Plaintiffs-Appellants' mandamus petition for lack of subject matter jurisdiction

Federal courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute." *Kokkenen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *Id.* The plaintiff bears the burden of establishing subject matter jurisdiction. *Cartwright v. Garner*, 751 F. 3d 752, 760 (6th Cir. 2014) (citing *DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004)).

A district court may resolve a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) in two ways. Defendants may assert

either a facial or a factual challenge to jurisdiction by filing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). *Garner*, 751 F. 3d at 759. In a facial attack, the district court assumes that the allegations in the complaint are true and does not look beyond them to evaluate jurisdiction. *Id.* When a defendant launches a factual attack, the district court may look beyond the allegations in the complaint and consider whether external facts call jurisdiction into question. *Id.* If a district court lacks subject matter jurisdiction, it *must* dismiss the suit. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (emphasis added).

The mootness doctrine is based on Article III of the Constitution, which limits the exercise of federal judicial power to actual cases or controversies. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). Federal courts do not have subject matter jurisdiction to adjudicate moot claims. *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997). "The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *Id.* In other words, "a case is moot . . . where no effective relief for the alleged violation can be given." *Coalition for Gov't Procurement v. Fed. Prison Ind., Inc.*, 365 F.3d 435, 458 (6th Cir. 2004); *see, e.g.*, *Mamigonian v. Biggs*, 710 F.3d 936, 942 (9th Cir. 2013) (holding that a mandamus request was mooted when USCIS rendered

a decision on an adjustment-of-status application); *Bouguettaya v. Chertoff*, 472 F. Supp. 2d 1, 2 (D.D.C. 2007) (holding that an alien's request for a writ of mandamus to compel processing an application was moot because the application was denied following filing of the action).

Here, the district court lacked subject matter jurisdiction to hear Plaintiffs-Appellants' claims regarding refusal of Ms. Abdulrab's immigrant visa application because Defendants-Appellants fulfilled their duty to Plaintiffs-Appellants when the consular officer provided Plaintiffs-Appellants with a facially legitimate and bona fide reason for refusing the immigrant visa: their failure to establish the bona fides of the purported 1993 marriage. *See Din*, 135 S. Ct. 2128 (affirming the Supreme Court's previous decision in *Kleindienst v. Mandel*, 408 U.S. 753, where it limited a court's inquiry on a visa denial to whether the Government had provided a facially legitimate and bona fide reason for its action and precluding judicial review of consular decisions regarding the issuance or denial of visas).

The consular officer refused Ms. Abdulrab's immigrant visa application under 8 U.S.C. § 1201(g), which instructs that no visa can issue if, *inter alia*, the consular officer has reason to believe that the alien is ineligible for visa under section 212 of the INA or any other provision of

law.[1] The INA places the burden of proof squarely on the applicant to establish they are eligible for the visa for which they are applying. *See* 8 U.S.C. 1361. In this case, Plaintiffs-Appellants failed to establish that their purported 1993 marriage was bona fide, allowing for a consular officer to issue a visa on the basis of a marital relationship. The consular officer had legitimate reason to question the validity of the purported 1993 marriage between Plaintiffs-Appellants: (1) the marriage document that Plaintiffs-Appellants submitted as evidence of their 1993 marriage appeared to have been altered; and (2) a 1996 passport application submitted by and on the behalf of Mr. Hussein indicated that he was not married. *See* Defendants-Appellees' Response in Opposition to Motion to Amend, RE 25 at Page ID # 159. Upon refusal of Ms. Abdulrab's visa application and numerous opportunities for Plaintiffs-Appellants to overcome the refusal—including the opportunity for Plaintiffs-Appellants to submit the genetic test results of a purported shared child born in 1994 as independent corroborating

[1] The district court considered and rejected Plaintiffs'-Appellants' INA Section § 221(g), 8 U.S.C. § 1201(g) arguments, noting the relevant legal framework, including 22 C.F.R. § 42.43(a), and concluding that "it now is beyond dispute that [plaintiffs] fully have been informed of the specific factual basis for the denial, based on the attestation of the government's consular legal officer stating that the refusal was based on failure to establish the bona fides of the marriage." Order Granting Dismissal, RE 37, Page ID # 386.

evidence, which they declined to submit—Defendants-Appellees returned the I-130 petition to USCIS with a memo describing that the petition was returned because "information was unavailable to USCIS at the time of the petition's approval which indicates that there is insufficient evidence to support a finding by preponderance of the evidence that the marriage is valid for immigration purposes." *Id.* at 176.

Following briefing and two hearings, the district court found: (1) Defendants-Appellees provided Plaintiffs-Appellants with a facially-legitimate and bona fide justification for refusal of the visa application, *see* Order Granting Dismissal, RE 37 at Page ID # 386-387; (2) "the consular role in the process of reviewing the application fully was performed upon the return of the [petition] to the National Visa Center," *id.* at 391; and (3) "the consular decision denying the application is not open to substantive review by the Court" due to the well-established doctrine of consular nonreviewability. *Id.* at 387. On appeal, Plaintiffs-Appellants have failed to demonstrate clear error in the district court's factual findings. *See Whitbeck*, 382 F.3d at 636 (6th Cir. 2004). Consequently, this Court should affirm the district court's dismissal of Plaintiffs-Appellants' mandamus petition.

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b. Denial of Plaintiffs-Appellants' Motion to Amend was Proper Because Amendment Will be Futile

Plaintiffs-Appellants also sought amendment of their mandamus petition to "add Defendants: (1) USCIS; (2) Director USCIS, [L. Francis] Cissna; (3) United States Department of Homeland Security [], and; (4) Secretary of DHS, Kirstjen Nielsen as parties." Plaintiffs-Appellants' Opening Brief at 15. Plaintiffs-Appellants contend that "Defendants and the proposed additional Defendants are jointly and severally responsible for delaying the adjudication of Plaintiff Abdulrab's Immigrant Visa." *Id.* at 16. As an initial matter, Plaintiffs-Appellants muddle their claims before this Court for the need for amendment by making the same arguments and claims deemed moot regarding the refusal and return of Ms. Abdulrab's immigrant visa application as a basis for why amendment would be proper. However, as explained *supra*, ARGUMENT III.a, Plaintiffs-Appellants' claims regarding the refusal of Ms. Abdulrab's immigrant visa application and return of the I-130 petition have been properly dismissed for lack of subject matter jurisdiction as Defendants-Appellees provided a facially legitimate and bona fide reason for refusal, and have returned the petition to USCIS. Because Plaintiffs-Appellants have failed to establish clear error in the district court's finding of facts regarding jurisdiction and mootness, Defendants-Appellees contend that these arguments should not be considered in this Court's

determination of whether amendment of Plaintiffs-Appellants' mandamus petition would be proper.

What is truly at issue before this Court regarding the requested amendment is Plaintiffs-Appellants' claim of unreasonable delay of USCIS's adjudication of Ms. Abdulrab's returned petition. However, as the district court concluded, this Court should find denial of Plaintiffs- Appellants' request to amend proper, and deny Plaintiffs-Appellants' request for remand, as their proposed amended petition cannot withstand a motion to dismiss.[2]

Plaintiffs-Appellants have also failed to articulate a duty owed by which a mandamus claim is justified. The federal mandamus statute provides courts with "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. A writ of mandamus is an extraordinary remedy. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). Mandamus is available only if: (1) the plaintiff has a clear right

[2] In their conclusion, Plaintiffs-Appellants' summarily request that this Court remand "with instruction to allow discovery." Plaintiffs-Appellants' Opening Brief at 17. However, upon any potential remand from this Court, Defendants-Appellees would have the opportunity to request dismissal of an amended complaint, should leave be granted. *See* Fed. R. Civ. P. 15(a)(3). Further, Plaintiffs-Appellants have not provided any practical or legal basis to engage in discovery. Thus, any request for discovery is premature at this time, is likely beyond the scope of review of any reviewable claim, and should be disregarded.

to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff. *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 491 (6th Cir. 2011) (internal quotations omitted); *see also Pittston Coal Group v. Sebben*, 488 U.S. 105, 121 (1988) (courts can only "compel the performance of a clear non-discretionary duty").

Here, on November 15, 2017, the U.S. Embassy sent Ms. Abdulrab's I-130 petition to the NVC for return to USCIS for reconsideration and possible revocation. *See* Opp. to Mot. to Amend, RE 25 at Page ID # 176. USCIS received the returned petition on December 29, 2017. *Id.* While Defendants-Appellees do not dispute that Plaintiffs-Appellants have a right to adjudication and USCIS has a duty to adjudicate the returned petition, Plaintiffs-Appellants have failed to establish that USCIS has a non-discretionary duty to adjudicate Plaintiffs-Appellants' petition immediately, ahead of any petitions returned earlier in time, or within any articulated timeframe. As noted in Defendants-Appellees' Opposition to Plaintiffs-Appellants' Motion to Amend, there remain thousands of petitions that were returned to USCIS prior to Plaintiffs-Appellants'. *Id.* at 177. When a Plaintiff-Appellant cannot "show[] that the defendants owe the plaintiff a clear nondiscretionary duty that they have failed to perform," the mandamus claim is moot and must be dismissed. *Oo v. Jenifer*, No. 07-cv-12030, 2008 WL 785924, at *3 (E.D. Mich. Mar. 20,

2008). Defendants-Appellees owe Plaintiffs-Appellants no duty to move their returned petition to the front of the line and ahead of those returns that were submitted before it. Thus, amendment to add Plaintiffs-Appellants' proposed new parties as Defendants on a mandamus claim would be futile and their motion to amend was properly denied.

Similarly, amendment to add the proposed additional Defendants on the basis of an unreasonable delay claim under the APA would also be futile. With respect to the proposed additional Defendants, the APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). It further provides that courts shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Such a claim "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). To determine whether an agency's adjudication delay is reasonable under the APA, courts regularly apply the six factors set forth *in Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (the "TRAC factors"). They are:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable . . . in the enabling statute . . . [it] may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human

> health and welfare are at stake; (4) . . . the effect of expediting delayed action on agency activities of a higher or competing priority; (5) . . . the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Id. at 80.

In applying the "competing priority" TRAC factor, the D.C. Circuit has held that it is appropriate to "refuse[] to grant relief, even though all the other factors considered in TRAC favor[] it, where a judicial order putting the petitioner at the head of the queue would simply move all others back one space and produce no net gain." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991)) (internal quotation marks omitted), *rev'g*, 180 F. Supp. 2d 130 (D.D.C. 2001). The Court in *Mashpee* noted that there was "no evidence the agency had treated the petitioner differently from anyone else, or that officials not working on [the petitioner]'s matters were just twiddling their thumbs." *Norton* at 1100-01. The D.C. Circuit Court approvingly noted that the district court recognized this concern when it found that "[n]ot only must [the agency] juggle competing duties . . . but the injury claimed by [the plaintiff] is applicable to all groups petitioning for [the same

relief].” *Id.* at 1101 (quoting *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 180 F. Supp. 2d at 136 (D.D.C. 2001)).

Because Plaintiffs-Appellants’ claims with respect to the existing Defendants are not reviewable under the APA, and because Plaintiffs-Appellants cannot state a claim with respect to the proposed additional Defendants that any delay in the adjudication of the petition is unreasonable, have pointed to no statutory or regulatory guidance that specifies USCIS adjudicate returns in a certain amount of time, and, have not established that their returned petition has been delayed longer than other similarly-situated petitions returned at the same time, amendment to add their proposed new parties for claims pursuant to the APA should also fail. The reasonableness of an agency’s actions “cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful,” but must be evaluated in the context of competing priorities, the complexity of the issue, and the agency’s resources. *Mashpee*, 336 F.3d at 1102. Plaintiffs-Appellants fail to provide support that would lead this Court to believe that their returned petition will not be processed as all other returned petitions in the ordinary course of USCIS business. *See, e.g.*, *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) (recognizing in a case involving an asylum applicant that USCIS “operates in an environment of

limited resources, and how it allocates those resources to address the burden of increasing claims is a calculation that courts should be loathe to second guess"); *L.M. v. Johnson*, 150 F. Supp. 3d 202, 214 (E.D.N.Y. 2015) (dismissing an unreasonable delay claim involving an asylum application, finding "[i]t is not unreasonable for delays to occur and a backlog to develop where an agency with limited resources is attempting to adjudicate an ever-increasing number of applications. . . .While two years of delay is not insubstantial, the court cannot find, as a matter of law, that Plaintiffs have alleged facts that would entitle them to the relief requested under the APA"); *Luo v. Coultice*, 178 F.Supp.2d 1135, 1139 (C.D. Cal. 2001) ("If the INS has no obligation to act on the returned petitions at all, it certainly has no obligation to act within a certain period of time. Because the INS has no duty to act, this Court has no jurisdiction to issue a writ of mandamus."); *Patel v. Rodriguez*, No. 15-CV-486, 2015 WL 6083199, at *6 (N.D. Ill. Oct. 13, 2015) (dismissing plaintiff's unreasonable-delay claim regarding a pending U-visa where "(1) the INA caps the number of U-visas that may be issued each year; (2) U-visa applicants on the waiting list are processed according to the date their petitions are filed; and (3) Plaintiffs have remained on the waiting list because there is a long line of applicants ahead of them."). Consequently, adding USCIS and DHS as new Defendants on a claim they violated of the

APA would be futile. Defendants-Appellees ask that this Court allow the process to proceed in its regular course and find futile Plaintiffs-Appellants' request to amend because their proposed amended petition cannot withstand a motion to dismiss.

CONCLUSION

For the foregoing reasons, Defendants-Appellees request that the Court: (1) affirm the district court's dismissal of this case for lack of subject matter jurisdiction on the ground that Plaintiffs-Appellants' claims for mandamus and relief under the APA against the Defendants-Appellants are moot, because the consular role in the process of reviewing the application was fully performed at the time the visa applications were refused, and certainly upon NVC returning the I-130 petition to USCIS; and (2) affirm due to lack of mandamus or APA jurisdiction, as the doctrine of consular non-reviewability explained in *Din* precludes the Court from asserting subject matter jurisdiction over review of the consular officer's decision to refuse the visa application in the absence of a plausible showing of bad faith, which has not been established here. *See Din*, 135 S. Ct. at 2141. Further, Defendants-Appellees request that this Court find that amendment is improper because Plaintiffs-Appellants' proposed amended petition could

not withstand a motion to dismiss, and therefore any amendment would be futile.

Dated: March 4, 2019

JOSEPH H. HUNT
Assistant Attorney General
United States Department of Justice
Civil Division

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation,
District Court Section

ANTHONY D. BIANCO
Senior Litigation Counsel

By: *s/ Nicole P. Grant*
Nicole P. Grant
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
T: (202) 598-2731
nicole.p.grant@usdoj.gov

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(4), (5), and (6), because the brief is proportionately spaced using Times New Roman 14-point typeface and contains 6,437 words exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Undersigned counsel used Microsoft Word 2016 to prepare this brief.

Dated: March 4, 2019

s/ Nicole P. Grant
NICOLE P. GRANT
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Telephone: (202) 598-2731
Fax: (202) 305-7000
Email: nicole.p.grant@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 4, 2019, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: March 4, 2019

s/ Nicole P. Grant
NICOLE P. GRANT
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
Telephone: (202) 598-2731
Fax: (202) 305-7000
Email: nicole.p.grant@usdoj.gov

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6th Cir. R. 30(g)(1), Defendants'-Appellees' Counsel designates the following record documents as relevant:

Record Entry Number	Description of Entry	Date Document Entered	Page ID # Range
1	Petition for a Writ of Mandamus	July 20, 2017	1-10
12	Defendants' Motion to Dismiss	October 10, 2017	41-59
12-1	Declaration of Ellen Eiseman, Attorney Advisor, Visa Office of Legal Affairs (dated October 10, 2017)	October 10, 2017	60-62
14	Plaintiffs' Response to Defendants' Motion to Dismiss	November 1, 2017	64-77
15	Reply in Support of Defendants' Motion to Dismiss	November 15, 2017	78-85
15-1	Notice of Refusal	November 15, 2017	88
15-3	Declaration of Ellen Eiseman, Attorney Advisor, Visa Office of Legal Affairs (dated November 15, 2017)	November 15, 2017	94-95
22	Motion to Amend /Correct Petition for Writ of Mandamus, and to Add Parties	January 31, 2018	117-124
22-1	Plaintiffs' Proposed First Amended Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief	January 31, 2018	125-152

25	Defendants' Response to Motion to Amend /Correct Petition for Writ of Mandamus, and to Add Parties	February 14, 2018	157-181
25-2	Declaration of Ellen Eiseman, Attorney Advisor, Visa Office of Legal Affairs, Department of State (dated February 14, 2018)	February 14, 2018	184-188
25-3	Declaration of Christine J. Sung, Supervisory Immigration Services Officer, California Service Center (dated February 12, 2018)	February 14, 2018	190-191
30	Plaintiffs' Reply in Support of Motion to Amend /Correct Petition for Writ of Mandamus, and to Add Parties	February 28, 2018	200-230
35	Transcript of Motion to Dismiss hearing held on February 8, 2018	April 10, 2018	344-373
37	Opinion and Order Granting Motion to Dismiss and Denying Motion to Amend/Correct	July 25, 2018	378-392
38	Judgment	July 25, 2018	393
39	Plaintiffs' Notice of Appeal	September 21, 2018	
41	Transcript of Motion to Amend/Correct Petition for Writ of Mandamus, and to Add Parties hearing held on May 31, 2018	October 26, 2018	396-419