[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10048

D.C. Docket No. 6:18-cv-01046-GKS-KRS

ALBANA AVULLIJA,

Plaintiff–Appellant,

versus

SECRETARY OF STATE,
U.S. DEPARTMENT OF STATE, ET AL.,

Defendants–Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(November 30, 2020)

Before MARTIN, ROSENBAUM, and TALLMAN,* Circuit Judges.

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* Honorable Richard C. Tallman, United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

MARTIN, Circuit Judge:

Albana Avullija is a U.S. citizen who sought a spousal visa for her noncitizen husband, Leonard Avullija. Although Ms. Avullija's petition conferring eligibility for a visa was initially approved, Leonard's visa application was ultimately denied. Ms. Avullija filed suit in federal court, seeking a writ of mandamus to compel consular authorities to issue Leonard a visa. The District Court dismissed the case for lack of subject matter jurisdiction based on the doctrine of consular nonreviewability. Ms. Avullija appeals, claiming the doctrine does not bar judicial review of her complaint. After oral argument and careful consideration, we conclude the District Court did not lack subject matter jurisdiction, but we nevertheless affirm the dismissal of the complaint for failure to state a claim.

I.

Ms. Avullija and Leonard were married at some point, but divorced in 2001. Leonard then married another U.S. citizen named Alice Marie Spivey ("Alice"). In 2006, Alice filed a Form I-130 Petition for Alien Relative ("I-130")[1] seeking a spousal visa for Leonard. Following the approval of the I-130 petition by the U.S.

[1] "[A]n I-130 beneficiary-petition allows a U.S. citizen to have a qualifying [noncitizen] relative classified as an 'immediate relative' under the INA so that the [noncitizen] relative may then file an application to adjust their immigration status." Williams v. Sec'y, U.S. Dep't of Homeland Sec., 741 F.3d 1228, 1230 (11th Cir. 2014) (citing 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. § 204.1(a)(1)).

Citizenship and Immigration Services ("USCIS"), Leonard applied for an immigrant visa. As part of the application process, he attended an interview with authorities at the U.S. Consular Office in Tirana, Albania. The consular officer denied Leonard's 2006 visa application, saying there was "no evidence of a marital relationship" with Alice, whose marriage he found "was arranged for visa purposes only." Following denial of the visa, USCIS revoked Alice's I-130. Alice appealed the I-130 revocation to the Board of Immigration Appeals ("BIA"), which affirmed. Leonard and Alice then divorced.

On an unknown date after his divorce from Alice, Leonard remarried Ms. Avullija. Ms. Avullija filed a new I-130 petition for Leonard, which USCIS then approved. Leonard was again called to attend an interview with consular authorities in Tirana to obtain the immigrant visa.

The consular officer denied Leonard's second visa application, for two stated reasons. First, the consular officer cited 8 U.S.C. § 1182(a)(6)(C)(i), which renders inadmissible any noncitizen "who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States." Second, the consular officer cited 8 U.S.C. § 1182(a)(4), which renders inadmissible any noncitizen "who, in the opinion of the consular officer at the time of application for a

visa . . . , is likely at any time to become a public charge."[2] In order to overcome this bar, the noncitizen must include an affidavit of support from the sponsoring spouse showing the sponsor's domicile in the United States. See 8 C.F.R. § 213a.2(b), (c)(1)(i)(B). Although Ms. Avullija filed an affidavit of support for Leonard's visa application, "she proffered no evidence to show that she was domiciled in the United States, and the consular officer determined that she was not so domiciled."

Upon denial of the visa, Ms. Avullija filed a complaint in the Middle District of Florida. She sought (1) a declaration that the denial of Leonard's visa was arbitrary and capricious and (2) an injunction and a writ of mandamus compelling the Secretary of State and the U.S. Ambassador to Albania (the "Defendants") to make a determination on Leonard's request for an immigrant visa. The District Court granted Defendants' motion to dismiss, holding that it lacked subject matter jurisdiction under the doctrine of consular nonreviewability to review USCIS's refusal to issue Leonard a visa.

[2] The consular officer initially cited 8 U.S.C. § 1182(a)(5)(A), but amended the refusal worksheet to cite to 8 U.S.C. § 1182(a)(4).

II.

The existence of subject matter jurisdiction as well as the question of whether a complaint states a claim on which relief can be granted are both legal questions the Court reviews de novo. See Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260, 1269 n.19 (11th Cir. 2009), abrogated on other grounds by Mohamad v. Palestinian Auth., 566 U.S. 449, 132 S. Ct. 1702 (2012); Mesa Valderrama v. United States, 417 F.3d 1189, 1194 (11th Cir. 2005). The Court likewise reviews de novo a district court's determination of whether a defect in the pleadings deprives the court of subject matter jurisdiction or, rather, whether it is an aspect of the case's merits. See Sinaltrainal, 578 F.3d at 1269. When it comes to a motion to dismiss, "this Court may affirm on any basis in the record." Henley v. Payne, 945 F.3d 1320, 1333 (11th Cir. 2019).

A. Subject Matter Jurisdiction

Article III of the Constitution confers subject matter jurisdiction to federal courts over "all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States." U.S. Const. Art. III, § 2, cl. 1. This general grant of authority is subject to "such Exceptions, and under such Regulations as the Congress shall make." Id. cl. 2. See Bowles v. Russell, 551 U.S. 205, 212, 127 S. Ct. 2360, 2365 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.").

In an unpublished (and therefore nonbinding) decision, this Circuit previously held that federal courts lack subject matter jurisdiction to review a consular officer's decision to issue or withhold a visa under the doctrine of consular nonreviewability. De Castro v. Fairman, 164 F. App'x 930, 933–34 (11th Cir. 2006) (per curiam) (unpublished). Now with the benefit of additional review, we conclude De Castro wrongly decided the jurisdictional issue. Our holding here is that the doctrine of consular nonreviewability is an aspect of the merits, not jurisdiction.

We begin with the text of the relevant immigration statutes. The Supreme Court has had occasion to observe that nothing in the Immigration and Nationality Act ("INA") explicitly divests the courts of jurisdiction. In Trump v. Hawaii, 585 U.S. ___, 138 S. Ct. 2392 (2018), the government raised the doctrine of consular nonreviewability as an affirmative defense. Id. at 2407. Noting that, in a prior case, the Court proceeded to the merits on a statutory claim without addressing the government's argument that no judicial review was available, id. (citing Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 113 S. Ct. 2549 (1993)), the Hawaii Court did the same. It "assume[d] without deciding that plaintiffs' statutory claims are reviewable." Id. In so doing, the Supreme Court emphasized that the government "does not argue that the doctrine of consular nonreviewability goes to the Court's jurisdiction, nor does it point to any provision of the INA that expressly

strips the Court of jurisdiction over plaintiffs' claims." Id. (citations omitted). Although the Supreme Court did not expressly state that the doctrine of consular nonreviewability is not an aspect of subject matter jurisdiction, its merits analysis is strong support for the conclusion that the doctrine poses no jurisdictional bar. Cf. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012 (1998) (stating the general rule that "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting Ex parte McCardle, 74 U.S. 506, 514, 7 Wall. 506, 514 (1868)) (quotation marks omitted)).

Our sister courts have also offered reasons for why the doctrine of consular nonreviewability is non-jurisdictional. First, the doctrine of consular nonreviewability was judicially created and not imposed by Congress. See Allen v. Milas, 896 F.3d 1094, 1101 (9th Cir. 2018). Without a "statute [that] purports to strip us of jurisdiction over consular decisions," Article III continues to confer subject matter jurisdiction over these cases. Id. Federal courts have found it appropriate to decline to review consular decisions out of "respect for the separation of powers," but this "deference goes to our willingness, not our power, to hear these cases." Id. In other words, "a rule of decision is different from a constraint on subject matter jurisdiction, even if the result is roughly the same for

the parties." Id. Instead, the doctrine of consular nonreviewability speaks in "language of the discretion courts afford consular officers." Id. at 1102; see also Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161, 130 S. Ct. 1237, 1243–44 (2010) (noting that courts "have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis").

The Seventh Circuit has likewise explained that the consular nonreviewability goes to the merits and not jurisdiction. See Morfin v. Tillerson, 851 F.3d 710, 711 (7th Cir. 2017); see also Matushkina v. Nielsen, 877 F.3d 289, 294 n.2 (7th Cir. 2017) (citing Morfin and stating that the Seventh Circuit treats the doctrine "as a matter of a case's merits"). "Commitment of a topic to agency discretion is a reason to decide in the agency's favor but does not imply that a court lacks adjudicatory competence." Morfin, 851 F.3d at 711.

Finally, in the case before us, the government concedes that the District Court erred in treating the doctrine as jurisdictional. Of course, a party's concession is not a substitute for the Court's proper interpretation of the scope of federal jurisdiction, see Bourdon v. U.S. Dep't of Homeland Sec., 940 F.3d 537, 547 n.6 (11th Cir. 2019), but we adopt the position because it is correct.

Therefore we hold, contrary to this Court's prior unpublished decision in De Castro, 164 F. App'x at 933–34, and the District Court's conclusion in this case, that the doctrine of consular nonreviewability goes towards the merits of a case, and does not divest the court of subject matter jurisdiction.

B. Doctrine of Consular Nonreviewability

Having resolved the threshold issue of subject matter jurisdiction, we proceed to the central merits question. That is, whether the doctrine of consular nonreviewability requires dismissal of Ms. Avullija's action for failure to state a claim. Ms. Avullija argues the doctrine does not apply because, she submits, Leonard's visa was not denied for a facially legitimate or bona fide reason. She argues that the consular officer's denial on the basis of Leonard's prior marriage was legally inconsistent with USCIS's approval of Ms. Avullija's I-130. She also argues the consular officer's conclusion that she "failed to establish the requisite 'domicile' in the United States is . . . unsupported by the record."

Both arguments fail. Ms. Avullija has not shown that the denial of Leonard's visa application was not facially legitimate and bona fide because she has not demonstrated that the stated reasons of the consular officer were unsupported by the record. We explain first what the "facially legitimate and bona fide" standard requires, and then address why Ms. Avullija has failed to show the consular officer did not meet it here. We then consider Ms. Avullija's contention

that the consular officer's conclusion that she failed to establish the requisite domicile in the United States is unsupported by the record.

1. Facially Legitimate and Bona Fide

In Kleindienst v. Mandel, 408 U.S. 753, 92 S. Ct. 2576 (1972), the Supreme Court addressed a First Amendment challenge brought by a noncitizen scholar who sought to attend academic meetings in the United States, but was deemed ineligible for an immigrant visa and denied a discretionary waiver of that ineligibility. Id. at 754, 92 S. Ct. at 2577. The Court evaluated the government's justification for refusing Mr. Mandel a waiver for whether the stated reason was "facially legitimate and bona fide." Id. at 769, 92 S. Ct. at 2585. However, the Mandel Court did not explain what the "facially legitimate and bona fide" standard required. It observed only that on the record before it, the government's reason passed muster. Id.

The modern understanding of the facially legitimate and bona fide standard is now informed by Justice Anthony Kennedy's concurrence in the judgment in Kerry v. Din, 576 U.S. 86, 135 S. Ct. 2128 (2015). In Din, a U.S. citizen wife of an Afghan national brought suit challenging the denial of her spouse's immigrant visa application. Id. at 88, 135 S. Ct. at 2131. Writing for a plurality, Justice Antonin Scalia concluded that Ms. Din lacked a protected due process interest under which to bring suit. Id. at 101, 135 S. Ct. at 2138. In his concurrence in the

judgment, Justice Kennedy (who supplied the fifth vote supporting the judgment) observed there was no need to decide the constitutional question, because even assuming Ms. Din had a protected liberty interest in the visa application of her noncitizen spouse, the process she received was all she was due. Id. at 102, 135 S. Ct. at 2139 (Kennedy, J., concurring in the judgment). Explaining the Supreme Court's prior approach in Mandel, Justice Kennedy noted the Court there did not address the First Amendment challenge to the visa denial. Id. at 103, 135 S. Ct. at 2139–40 (Kennedy, J., concurring in the judgment). Instead, the Mandel Court resolved the appeal by asking only whether the government had provided a "facially legitimate and bona fide" explanation for the action. Id. at 103, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). The "reasoning and the holding in Mandel control." Id. (Kennedy, J., concurring in the judgment).

And so we follow that reasoning here. In assessing whether the stated reason for visa denial was facially legitimate and bona fide, the reviewing court must first ask whether the consular officer cited to a particular statute in support of the denial. See id. at 104–05, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). A statutory citation "suffices to show that the denial rested on a determination that [the visa applicant] did not satisfy" the requirements of that provision. Id. at 104, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment).

After confirming that a statutory citation was provided, a court must ask if there is "at least a facial connection" between the "discrete factual predicates the consular officer must find to exist before denying a visa" mentioned in the statutory ground for inadmissibility and the "factual details" of the visa applicant. Id. at 105, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment); see also Mandel, 408 U.S. at 769, 92 S. Ct. at 2585 (declining to adopt the government's position that the government could have provided "no reason" for the denial of the visa waiver, and concluding on the basis of "[t]his record" that the "reason [given] was facially legitimate and bona fide"). "[I]f the undisputed record includes facts that would support [the cited] ground, our task is over," and the court may not inquire further into the decision. Matushkina, 877 F.3d at 294 (quotation marks omitted). This task may be satisfied by confirming that the provided reason squares, even if only plausibly and minimally—that is, "facially"—with the record.[3]

[3] Contrary to my concurring colleague's position, I do not read Din as prohibiting a court from checking the reason provided against the factual record absent a showing of bad faith. After all, there is a difference between engaging with the existing factual record and seeking to unearth facts not already known to the visa applicant. That was the precise issue Justice Kennedy responded to when explaining that all was required in the review was to confirm a "facial connection" to the factual record. Din argued that "due process requires she be provided with the facts underlying [the] determination," and Justice Kennedy rejected this argument because Din "admits in her Complaint that [the noncitizen] worked for the Taliban government, which, even if itself insufficient to support exclusion, provides at least a facial connection to terrorist activity." Din, 576 U.S. at 105, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). In disposing of this argument, Justice Kennedy confirmed that the appropriate inquiry is on the given factual record and that the facially legitimate and bona fide standard asks only whether there is "at least a facial connection" between the reason provided and the facts at

Having set out the standard for determining whether a visa was denied for a facially legitimate and bona fide reason, we turn to the two grounds the consular officer gave to explain the denial of the visa here.

2. Prior Visa Fraud, 8 U.S.C. § 1182(a)(6)(C)(i)

The consular officer first cited 8 U.S.C. § 1182(a)(6)(C)(i), which is the ground for inadmissibility that applies to any noncitizen "who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa . . . or admission into the United States." Ms. Avullija argues the consular officer did not have a facially legitimate or bona fide reason for denying Leonard's visa under this provision. We believe he did.

Leonard's previous visa application when married to Alice was denied because consular officers concluded he entered a fraudulent marriage "for visa

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hand. Therefore, I read Justice Kennedy's "facial connection" language as further explanation of the holding in Din, which on the one hand rejects a requirement of affirmative governmental justification beyond the statutory citation provided, but on the other checks that the citation squares with the factual context.

Similarly, in Trump v. Hawaii, 585 U.S., 138 S. Ct., the Supreme Court assumed without deciding that it "may look behind" the governmental reason provided to decide whether the challenged proclamation passed rational basis review. Id. at 2420 ("We need not define the precise contours of that inquiry [of whether a facially legitimate and bona fide reason exists] in this case . . . For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review."). Certainly, the standard does not require courts to "look behind" reasons provided by a consular officer as a matter of course—that exercise was justified by the unusual circumstances of Hawaii. But in light of this precedent, I believe it to be a bridge too far to say that the inquiry set out by the Court today is prohibited under Supreme Court authority, when the Supreme Court has itself conducted at least this limited review in Mandel, Din, and Hawaii. A simple citation to a statute that is completely untethered to the record cannot properly be all the process that is due.

purposes only." Ms. Avullija acknowledges that the consular officer's conclusion that § 1182(a)(6)(C)(i) applies to Leonard's previous attempt to "procure . . . a visa." Cf. Zyapkov v. Lynch, 817 F.3d 556, 560 (7th Cir. 2016) (stating that § 1182(a)(6)(C)(i) renders inadmissible a noncitizen who has made "misrepresentations about his marriage"). Ms. Avullija argues, however, that the visa denial was legally inconsistent with the approval of the I-130 petition she later filed on behalf of Leonard. This argument is without merit.

Ms. Avullija relies on 8 U.S.C. § 1154(c)(1), which instructs that "no [I-130] petition shall be approved" if the noncitizen spouse previously attempted to secure a visa "by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws." Because the I-130 screening process also includes a review for fraudulent marriages, Ms. Avullija reasons that the fact that the I-130 petition was approved means the government is somehow estopped from concluding in its visa review that Leonard had entered into a marriage to circumvent immigration laws.

Not so. Section 1154(c)(1) prohibits the agency from approving a I-130 petition only if it already knows the beneficiary engaged in covered behavior. The provision does not, however, prevent the consular officer from conducting further factfinding. Neither does it prevent the officer from denying a visa application upon discovery of disqualifying information. Indeed, the INA entrusts consular

officers reviewing visa applications with factfinding duties, and places the burden on the noncitizen applicant to prove that a ground for inadmissibility does not apply following the approval of an I-130 petition. See 8 U.S.C. § 1201(g)(1) (prohibiting grant of visa if "it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law"); id. § 1361 (placing the burden of proof on the noncitizen applicant); see also id. § 1202(d) ("All nonimmigrant visa applications shall be reviewed and adjudicated by a consular officer."). By contrast, the agency's adjudication of an I-130 does not involve any factfinding. Therefore, the approval of the I-130 did not preclude USCIS from later denying Leonard's visa on the ground that he was previously denied admission for marriage fraud. The consular officer's denial of Leonard's visa under 8 U.S.C. § 1182(a)(6)(C)(i) was facially legitimate and bona fide.

3. Public Charge, 8 U.S.C. § 1182(a)(4)

Ms. Avullija also says the finding that she failed to establish her domicile in the United States is unsupported by the record, and thus not a proper inadmissibility ground. 8 U.S.C. § 1182(a)(4)(A) bars any noncitizen "who, in the opinion of the consular officer at the time of application for a visa, . . . is likely at any time to become a public charge." When analyzing this inadmissibility ground,

the consular officer may "consider any affidavit of support under section 1183a of this title for purposes of exclusion under this paragraph." Id. § 1182(a)(4)(B)(ii). DHS regulations establish that the affidavit of support must be sponsored by a U.S. citizen or lawful permanent resident who is "[d]omiciled in the United States." 8 C.F.R. § 213a.2(c)(1)(i)(B).

True, Ms. Avullija filed an affidavit in support of Leonard's visa application. But she does not say this affidavit established her domicile in the United States. Even if Ms. Avullija could show the visa denial was not facially legitimate and bona fide merely because she plausibly alleged she was domiciled in the United States, she has failed to do so. Her complaint contains a conclusory statement that "she met the definition of 'domicile'" without specifying how that is the case. She has not shown the consular officer's denial of Leonard's visa on this basis was without record support. Without a plausible allegation that the consular officer ignored or misread a statement of domicile in Ms. Avullija's affidavit, she fails to establish that the denial on this ground was not facially legitimate and bona fide.

* * *

Therefore, we conclude that the District Court erred in holding that it lacked subject matter jurisdiction. Nevertheless, the dismissal of the complaint was proper because Ms. Avullija failed to state a claim.

AFFIRMED.

TALLMAN, Circuit Judge, concurring in part and concurring in the judgment:

I agree with the majority's conclusion in part II.A that the doctrine of consular nonreviewability presents an issue going to the merits of a case rather than the court's jurisdiction to hear the case. I write separately to articulate my concern that the majority's formulation of the "facially legitimate and bona fide" test in part II.B exceeds the scope of the limited inquiry established by the Supreme Court in *Kerry v. Din* and may create confusion for district courts going forward as to how far into the underlying facts they may go in assessing the application of the doctrine.

I do not read *Din* to support dividing the "facially legitimate and bona fide" test into a two-part inquiry that considers a facial connection to the factual record. Rather, Justice Kennedy's *Din* concurrence, which is the controlling opinion for the plurality decision, *see Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977), instructs that the "facially legitimate and bona fide" standard itself is quite limited. *Kerry v. Din*, 576 U.S. 86, 104, 135 S. Ct. 2128, 2140 (2015). In his concurrence, Justice Kennedy observed that the consular officer's denial in that case explicitly cited a statutory bar for terrorism related activities, which "specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Id.* at 105, 135 S. Ct. at 2141. By citing to the specific statutory basis for

the visa denial, Justice Kennedy reasoned, "it follows that the Government's decision to exclude an alien it determines does not satisfy one or more of those conditions is facially legitimate under *Mandel*." *Id.*, 135 S. Ct. at 2140. He continued, "[t]he Government's citation of § 1182(a)(3)(B) also indicates it relied upon a *bona fide factual basis* for denying a visa to [the noncitizen]." *Id.* (emphasis added).

Justice Kennedy's discussion of a "facial connection" to the factual record is a specific response to Din's argument that "due process requires she be provided with the facts underlying this determination, arguing *Mandel* required a similar factual basis." *Id.*, 135 S. Ct. at 2141. In dismissing this particular due process argument, he noted that the statutory terrorism bar for visa approval required certain factual findings and that the allegations in Din's own complaint "provide[] at least a facial connection to terrorist activity." *Id.* Ultimately, Justice Kennedy concluded that "[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the noncitizen] a visa . . . *Mandel* instructs us not to 'look behind' the Government's exclusion of [the noncitizen] for additional factual details beyond what its express reliance on § 1182(a)(3)(B) encompassed." *Id.*

The majority's articulation of a two-part "facially legitimate and bona fide with a facial connection to the record" test impermissibly expands this narrow reading of *Din*. Instead, I read Justice Kennedy's concurrence to hold that a

consular officer's citation to a specific statutory provision as the basis for ineligibility is *itself* a facially legitimate and bona fide reason for a visa denial, and it is only when a plaintiff makes an affirmative showing of bad faith by the consular officer that the court should engage with the underlying factual record. *Din*, 576 U.S. at 104–05, 135 S. Ct. at 2140. This formulation of the test is consistent with the language of *Din* and with the overarching premise that consular nonreviewability is a doctrine that discourages the courts from reviewing an exercise of "substantial" executive discretion except in rare circumstances. *Id.* at 104, 135 S. Ct. at 2140. It might be a high bar for a plaintiff to allege bad faith underlying a consular decision, but this is by design of the doctrine.

It is important to remember we are addressing issuance of a visa to an alien outside the United States not seeking asylum or who is already here with ties to this country. Ms. Avullija did not dispute that Leonard had previously sought an entry visa through a fraudulent marriage.

I am also concerned that the majority's two-part "facially legitimate and bona fide with a facial connection to the record" test will be problematic for district courts to apply. Requiring courts to consider a "facial connection" to the factual record before determining whether they should apply a doctrine that bars them from "looking behind" the factual record will only cause confusion.

This case illustrates the point. The consular officer cited two separate statutory provisions to justify denial of Leonard's visa application, both of which provided facially legitimate and bona fide reasons for the denial. Ms. Avullija otherwise makes no allegation of the consular officer's bad faith, so the doctrine of consular nonreviewability applies and our inquiry ends. Ms. Avullija's argument that the consular officer's findings were estopped by initial approval of the Form I-130 by USCIS, which triggered the overseas State Department interview here challenged, and her argument that the consular officer's findings were unsupported by the record, are the type of inquiry we cannot make under controlling Supreme Court authority.

The District Court erred in holding that it lacked subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), but the dismissal of the complaint was still proper because Ms. Avullija failed to state a claim under Fed. R. Civ. P. 12(b)(6). Accordingly, I concur in the judgment.