FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEKSAN KHACHATRYAN; DANIEL DANUNS, *Plaintiffs-Appellants*, v. ANTONY J. BLINKEN, in his official capacity as U.S. Secretary of State; JOHN J. SULLIVAN, in his official capacity as U.S. Ambassador to the Russian Federation; MERRICK B. GARLAND, in his official capacity as Attorney General; ALEJANDRO MAYORKAS, in his official capacity as Secretary of the Department of Homeland Security; U.S. DEPARTMENT OF STATE; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; DOES, 1–10, Consular Officers, American Embassy Visa Section at Moscow, *Defendants-Appellees.*	No. 18-56359 D.C. No. 2:18-cv-01358-MWF-KS OPINION

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Submitted April 14, 2020[*]
Pasadena, California

Filed July 14, 2021

Before: Daniel P. Collins and Kenneth K. Lee, Circuit Judges, and Gregory A. Presnell,[**] District Judge.

Opinion by Judge Collins;
Dissent by Judge Presnell

[*] The panel unanimously concludes that this case is suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2)(C).

[**] The Honorable Gregory A. Presnell, United States District Judge for the Middle District of Florida, sitting by designation.

SUMMARY[***]

Visas/Consular Nonreviewability

Affirming the district court's judgment dismissing for failure to state a claim a civil action brought by Aleksan Khachatryan and Daniel Danuns, respectively a Russian citizen and his U.S. citizen adult son, challenging the Government's decision to deny Khachatryan an immigrant visa, the panel held that (1) Khachatryan has no cause of action to challenge the visa denial because he is an unadmitted and nonresident alien; (2) Danuns's complaint pleaded sufficient facts with particularity to raise a plausible inference that Khachatryan's visa was denied in bad faith in violation of Danuns's Fifth Amendment right to due process; and (3) the district court nevertheless properly dismissed Danuns's claims because he does not have a liberty interest, protected by due process, in living in the United States with his unadmitted and nonresident alien father.

The panel explained that although decisions regarding the admission and exclusion of foreign nationals are subject to the doctrine of consular nonreviewability, the Supreme Court has identified a "circumscribed judicial inquiry" for review of consular decisions that involve a violation of constitutional rights. However, the panel concluded that, as a foreign national seeking admission into the United States, Khachatryan has no constitutional right to entry, and so he personally has no ability to bring a cause of action challenging his denial of admission. The panel explained

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that, in this context, the exception to consular reviewability applies only when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen. The panel therefore concluded that the rule of consular nonreviewability barred all of Khachatryan's claims, and barred Danuns's claims except to the extent his claims were based on a cognizable violation of his own constitutional rights.

Following the approach of Justice Kennedy's concurrence in *Kerry v. Din*, 576 U.S. 86 (2015), the panel first addressed whether, assuming that Danuns has a protected liberty interest, he had sufficiently alleged a due process violation. The panel reasoned that only if it concluded that Danuns had alleged a failure of due process would it then need to address the Government's broader contention that Danuns lacks an underlying liberty interest that is protected by due process. Applying the three-part test set forth in Justice Kennedy's concurrence, the panel held that Danuns had adequately pleaded that the handling of his father's visa application did not satisfy the relevant due process standards. First, the panel concluded that the Government had sufficiently cited a valid statutory provision under which the visa was denied. Second, the panel concluded that the cited statute specifies discrete factual predicates that must exist before the consular officer may deny a visa. The panel explained that because the Government had carried its burden to establish these first two requirements, the burden shifted to Danuns to plead and prove that the cited reason was not bona fide by making an affirmative showing of bad faith on the part of the consular officer who denied the visa. The panel concluded that Danuns had pleaded sufficient facts with particularity to raise a plausible inference of subjective bad faith on the part of the consular official who denied the visa.

Because Danuns had sufficiently pleaded bad faith, the panel concluded that it could not sustain the dismissal on that ground, and thus turned to the issue of whether Danuns lacked a protected liberty interest in the first place. The panel explained that the plurality and dissent in *Din* both agreed—and therefore a majority agreed—that procedural due process at least extends under the Court's current caselaw to any "implied fundamental liberty," but they differed as to whether procedural due process protects some new set of additional "nonfundamental liberty interests." The panel determined that it need not resolve this dispute, however, because Danuns lacks a protected liberty interest under either approach.

The panel wrote that the question before it was whether the "liberty" specially protected by the Due Process Clause includes a right of familial association that itself includes a right of an adult child to bring his or her alien parent into the United States. The panel wrote that it was aware of no precedent that has recognized any such right. Explaining that this court may recognize a new fundamental liberty interest only if it is objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed, the panel concluded that Danuns's claimed right to bring his father to the United States did not meet that standard. Thus, the panel concluded that Danuns has no protected liberty interest under the approach of the *Din* plurality.

The panel found no basis for reaching a different conclusion under the approach of the *Din* dissenters. Explaining that the dissenters also posited a further set of constitutionally based liberty interests entitled to procedural due process protection, but that are not fundamental rights

requiring substantive due process protection, the panel concluded that, even assuming arguendo there are any such liberty interests, there still is no basis for concluding that it would embrace the particular liberty interest Danuns asserts. The panel wrote that none of the reasoning relied upon by the *Din* dissenters extends here, explaining that the relationship of an adult child with his or her parents bears no relationship to the unique institution of marriage (at issue in *Din*), and while the Supreme Court has recognized a constitutionally based liberty interest against arbitrary interference with extended-family living arrangements within the United States, it has never suggested that any such protection entails a constitutionally rooted expectation that one will be allowed to bring one's parents or adult children into the United States.

Dissenting, District Judge Presnell wrote that the majority departs from established Ninth Circuit precedent by concluding that Danuns has no protectable liberty interest to assert—a ruling that effectively eviscerates the exception to consular nonreviewability and makes it virtually impossible for anyone other than a spouse to rectify the Government's bad faith denial of a visa application. Judge Presnell wrote that by claiming that this case involves a novel liberty interest, the majority fails to adhere to this Court's clear precedent recognizing a constitutional liberty interest between parent and child. Because Danuns adequately pled bad faith on the part of the Government, and Danuns has a protected liberty interest in his relationship with his father, Judge Presnell wrote that Danuns is entitled to judicial review of his procedural due process challenge to the Government's denial of Khachatryan's visa.

COUNSEL

H. Henry Ezzati, Ezzati Law P.C., Irvine, California, for Plaintiffs-Appellants.

Nicola T. Hanna, United States Attorney; David M. Harris, Chief, Civil Division; Daniel O. Blau, Assistant United States Attorney; United States Attorney's Office, Los Angeles, California; for Defendants-Appellees.

OPINION

COLLINS, Circuit Judge:

Plaintiffs-Appellants Aleksan Khachatryan and Daniel Danuns, respectively a Russian citizen and his U.S. citizen adult son, appeal the district court's dismissal of their civil complaint challenging the Government's decision to deny Khachatryan an immigrant visa. Because Khachatryan is an unadmitted and nonresident alien, he has no cause of action to challenge the visa denial, and his claims were properly dismissed. Danuns claims that *his* Fifth Amendment right to due process was violated by the denial of his father's visa because a consular officer allegedly denied that visa in bad faith. We agree that Danuns's complaint pleads sufficient facts with particularity to raise a plausible inference that Khachatryan's visa was denied in bad faith. Nevertheless, we conclude that the district court properly dismissed Danuns's claims because he does not have a liberty interest, protected by due process, in living in the United States with his unadmitted and nonresident alien father. We therefore affirm.

I

We begin by recounting Khachatryan's ultimately unsuccessful effort, over a period of more than 14 years, to obtain an immigrant visa to reside in the United States. We then briefly set forth the procedural history leading up to the district court's dismissal of the case at the pleading stage.

A

In reviewing the dismissal of Plaintiffs' operative complaint for failure to state a claim, we take as true the well-pleaded allegations of that complaint, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and "we 'consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice,'" *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation omitted). Applying those standards, we take the following facts as true.[1]

Khachatryan, a native of Armenia, married Karine Galustian in Armenia, in the former Soviet Union, in March 1990. The couple had three children, including Arman Khachatryan, who is now known as Daniel Danuns. At some point, Khachatryan became a citizen of the Russian Federation and moved from Armenia to Moscow. After Khachatryan's marriage to Galustian ended in divorce in

[1] To the extent that some of the facts we recount reflect materials submitted in connection with the Government's motion to dismiss rather than the allegations of the operative complaint itself, we may properly consider such further factual contentions to the extent that they constitute additional matters that Plaintiffs could plead if they were given leave to amend. *See Broidy Cap. Mgmt., LLC v. State of Qatar*, 982 F.3d 582, 586 (9th Cir. 2020).

Moscow in 1999, Galustian moved with the children to the United States.

Khachatryan later married Ripsime Akhverdian, a U.S. citizen, in Moscow in June 2001. That same month, Akhverdian filed with the U.S. Immigration and Naturalization Service ("INS"), at the U.S. Embassy in Moscow, a "petition for alien relative" (Form I-130) sponsoring Khachatryan for an immigrant visa.[2] Three months later, the INS "Officer-in-Charge" at the Embassy issued a "Notice of Intent to Deny," asserting that Khachatryan's decree of divorce from Galustian, which had been submitted with the Form I-130, was fraudulent. The notice requested additional documents and set a due date for Akhverdian to respond.

In January 2002, prior to that due date, Akhverdian formally withdrew the petition, explaining that she had not had sufficient time to obtain the requested documents. Nonetheless, the INS Officer-in-Charge at the Embassy thereafter sent a "Decision" denying Akhverdian's petition on January 18, 2002. Although the INS decision acknowledged the agency's receipt of the withdrawal notice, the decision expressly disregarded that withdrawal and proceeded to deny the petition on the ground that the divorce certificate was fraudulent and that there was evidence that

[2] The relevant functions of the INS were subsequently transferred to the Bureau of Citizenship and Immigration Services—now known as United States Citizenship and Immigration Services ("USCIS")—pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2196, 2205. *See* 6 U.S.C. §§ 271(b), 291; *see also* Name Change from the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services, 69 FED. REG. 60938 (Oct. 13, 2004). We discuss the current visa procedures in more detail below. *See infra* at 12–13.

Khachatryan had married Akhverdian "for the purpose of evading" immigration laws. Akhverdian's counsel objected, noting that the INS's actions in disregarding the withdrawal and deciding the petition were directly contrary to *Matter of Cintron*, 16 I. & N. Dec. 9 (B.I.A. 1976). *See id*. at 9 ("Just as any United States citizen or lawful permanent resident may file a visa petition in behalf of an alien, so may he [or she] withdraw the petition before a decision has been rendered. The action of the District Director in refusing to consider the petition withdrawn was erroneous."). On March 5, 2002, the Officer-in-Charge acknowledged the agency's error and affirmed that Akhverdian's petition was deemed "to be withdrawn" rather than denied.

In October 2002, Akhverdian filed a new Form I-130 on Khachatryan's behalf, but this time she did so at the INS office in Los Angeles. In August 2003, the INS's successor agency, USCIS, denied Akhverdian's renewed petition, based solely on its assertion that her previous visa petition had been denied on grounds of fraud on January 18, 2002. Given the INS's earlier acknowledgment that the January 2002 denial was invalid under *Matter of Cintron* and that the previous application had been withdrawn before decision, the stated ground for this denial was plainly erroneous. Nonetheless, USCIS reiterated its denial of the second petition on this ground on October 6, 2003.

Khachatryan and Akhverdian subsequently divorced in 2005. After the divorce, Khachatryan had repeated difficulties in attempting to obtain a tourist visa to visit his children in the United States. In trying to resolve that problem, Khachatryan and his attorneys made numerous administrative inquiries over several years in an effort to correct the administrative record. Those efforts bore fruit when, in January 2009, USCIS, on its own motion, formally

reopened the denial of Akhverdian's 2002 petition. USCIS's reopening decision acknowledged that, in light of *Matter of Cintron*, a "petition that is withdrawn by a petitioner may not be denied," and that, as a result, USCIS's denials of Akhverdian's renewed petition in August 2003 and October 2003 had erred in relying on "a 'previous decision,' which was never made." But the USCIS reopening decision went further and also held that "the Service *did not prove* that the marriage" to Akhverdian "was entered into for the purpose of evading immigration laws" (emphasis added). USCIS's grant of *sua sponte* reopening wiped out the prior USCIS denials and thereby had the effect of allowing the renewed petition to be withdrawn. (In view of Khachatryan's intervening divorce from Akhverdian, there was at that point no basis on which to proceed with that renewed petition on the merits.)

Despite this development, Khachatryan continued to have difficulty obtaining a tourist visa, and his family reached out to their elected representatives for help. In October 2011, the U.S. Customs and Border Protection ("CBP") responded to an inquiry from then-U.S. Senator Barbara Boxer concerning the situation. The CBP's letter acknowledged that the "documentation" the Senator's office had provided "indicates that Mr. Khachatryan has been unable to obtain an immigrant visa due to inaccurate charges contained in U.S. Customs and Border Protection (CBP) records relating to fraud." The CBP stated that, while it could not disclose specific law-enforcement records, it could assure the Senator that "we have undertaken a review of our records, and any required changes or updates have been made." Two months later, however, the U.S. Embassy in Moscow sent a letter by email to U.S. Representative Howard Berman's office, stating that Khachatryan had been denied a tourist visa because he was presumptively an

intending immigrant, and not a tourist, and because he had been denied an immigrant visa in 2003 based on his having presented a fraudulent divorce certificate in support of his application. The Embassy letter to Representative Berman made no reference to USCIS's reopening of the August 2003 and October 2003 denials of an immigrant visa for Khachatryan.

On March 26, 2012, Danuns, who was then a U.S. citizen, filed a new Form I-130 petition seeking to sponsor his father so that the latter could obtain an immigrant visa. Under the Immigration and Nationality Act ("INA"), a parent seeking an immigrant visa ordinarily may be sponsored by a U.S.-citizen child only if that child is "at least 21 years of age," 8 U.S.C. § 1151(b)(2)(A)(i); *see also id.* § 1154(a)(1)(A)(i), and Danuns was 22 years old on the day he filed the application. In its current form, the statute requires the sponsor to file a petition (the I-130 Form) with USCIS in order to "establish[] the sponsor-applicant relationship." *Doe #1 v. Trump*, 984 F.3d 848, 855 (9th Cir. 2020); *see also* 8 U.S.C. § 1154(a)(1)(A)(i).[3] "After an investigation of the facts in each case," USCIS "shall . . . approve the petition and forward one copy thereof to the Department of State," if USCIS "determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made" is a qualifying "immediate relative." 8 U.S.C. § 1154(b). However, "no petition shall be approved" if the alien previously "sought to be accorded" immediate relative status as a spouse of a U.S. citizen "by reason of a marriage determined by [USCIS] to have been

[3] The INA actually says that the petition should be filed with the "Attorney General," but that reference is "deemed to refer to the Secretary" of Homeland Security or to the appropriate agency within that department, *see* 6 U.S.C. § 557, and here that is USCIS, *see id.* § 271(b).

entered into for the purpose of evading the immigration laws." *Id.* § 1154(c)(1). Once the petition is approved by USCIS and forwarded to the Department of State, "the alien then may 'apply for a visa by submitting the required documents and appearing at a United States Embassy or consulate for an interview with a consular officer.'" *Doe #1*, 984 F.3d at 855 (citation omitted); *see also* 8 U.S.C. §§ 1201(a)(1)(A), 1202(a)–(b), (e); 22 C.F.R. § 42.62. The "consular officer then determines whether to issue or refuse the visa application." *Doe #1*, 984 F.3d at 855 (citing 8 U.S.C. § 1201(a)(1)(A), (g); *id.* § 1204; 22 C.F.R. §§ 42.71(a), 42.81(a)).

In October 2012, USCIS approved Danuns's petition. Its approval notice cautioned that approval "does not guarantee that the alien beneficiary will subsequently be found to be eligible for a visa." Khachatryan applied for the immigrant visa, and he appeared for an interview at the U.S. Embassy in Moscow on October 16, 2013. The Embassy, however, thereafter sent the petition back to USCIS for further consideration in light of USCIS's 2003 determination that Khachatryan had presented a fraudulent divorce certificate in support of a prior visa application.

On July 25, 2014, USCIS issued a "Notice of Intent to Revoke" its approval of Danuns's petition sponsoring his father. The notice correctly noted that Akhverdian's first sponsorship petition had been withdrawn, but it nonetheless stated that the "U.S. Embassy, Moscow reviewed the second visa petition and determined that the submitted record failed to reflect any new circumstances or any new information to be considered and the Service adhered to the *previous decision*." The notice did not mention that, because the first petition had been withdrawn, the Officer-in-Charge at the Embassy had acknowledged in March 2002 that there was

no valid "previous decision" on the first petition. Nor did the notice mention that USCIS itself had concluded in 2009 that it had erred in 2003 in relying on the erroneous denial of the first petition. The notice also stated that, "[u]pon review of the entire record," USCIS had "independently conclude[d] that [Khachatryan] entered into the prior marriage for the sole purpose of circumventing immigration laws." This, too, was inconsistent with USCIS's contrary finding in 2009, which the notice did not mention.

After Plaintiffs submitted their response to the notice, USCIS in September 2014 again reversed course and decided to reaffirm its prior approval of Danuns's sponsorship petition. Accordingly, it forwarded the petition to the Department of State. Over the next seven months, counsel for Danuns and his father made repeated inquiries as to the status of the matter, but to no avail. In April 2015, the National Visa Center ("NVC") at the State Department responded that it had never received the petition back from USCIS. After further inquiries, counsel learned a month later that the petition had somehow been sent to "archives" rather than to the State Department. The NVC finally forwarded the petition to the U.S. Embassy in Moscow in July 2015.

Counsel for Danuns and his father thereafter followed up with the Embassy in Moscow to find out about the status of the matter, and counsel was told on November 11, 2015 that the Embassy had denied Khachatryan's visa petition. Counsel was provided with a "Refusal Worksheet" that was actually dated more than six weeks earlier—"30-Sep-2015"—but which had not previously been received by Khachatryan or his counsel. The Refusal Worksheet was a barebones check-the-box form, and it simply stated that the visa was denied under INA "Section 212(a)(6C) 1 [*sic*]" due

to "Fraud or Misrepresentation" of an unspecified nature. *See* 8 U.S.C. § 1182(a)(6)(C)(i) (INA § 212(a)(6)(C)(i)) (providing that any alien who has sought a visa "by fraud or willfully misrepresenting a material fact" is inadmissible); *id*. § 1361 (visa generally may not be issued to an inadmissible alien). Dissatisfied with this terse explanation, counsel requested additional information from the Embassy. In response, counsel received an email on November 25, 2015 stating as follows:

> Dear Ms. Gambourian,
>
> Your client, Mr. Aleksan Khachatryan, was found ineligible for a visa under INA [§] 212(a)(6)(C)(1), for fraud and misrepresentation. Mr. Khachatryan was found to have applied for and received U.S. visas three times under a false identity from 2000–2002. He was also found to have submitted a false divorce certificate in support of a previous immigrant visa petition. [Section] 212(a)(6)(C)(1) [ineligibility] is a permanent ineligibility, and under U.S. immigration law no waiver is available for Mr. Khachatryan's visa classification.

B

Khachatryan and Danuns filed this lawsuit on February 18, 2018, naming as defendants USCIS, the Departments of State and Homeland Security, the heads of those Departments, the U.S. Ambassador to Russia, the Attorney General, and unnamed "Doe" Embassy consular officers (collectively, "the Government"). After the district court dismissed Plaintiffs' original complaint with leave to amend,

Plaintiffs filed their operative First Amended Complaint. That complaint alleges three causes of action. First, both Danuns and Khachatryan sought to challenge, under the Administrative Procedure Act ("APA"), the determination that Khachatryan was inadmissible under INA § 212(a)(6)(C)(i). Second, Danuns alleged that his due process rights were violated by the denial of a visa to his father, and he sought appropriate declaratory relief for that alleged violation. Third, Danuns and Khachatryan asserted that the Government violated their Fifth and Sixth Amendment rights by denying the visa in bad faith and by refusing to allow them to examine the evidence on which the Government relied.

The district court dismissed the First Amended Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In doing so, the court assumed *arguendo* that Danuns had an "interest in being reunited with his father in the United States" that was protected by the Due Process Clause, but the court concluded that Danuns nonetheless had failed to plead sufficient facts to raise a plausible inference of a due process violation under the applicable legal standards. Because the court concluded that the denial of a visa to Khachatryan was otherwise not subject to judicial review, it dismissed the action with prejudice.

Danuns and Khachatryan timely appealed. We have jurisdiction under 28 U.S.C. § 1291. We review dismissals for failure to state a claim de novo. *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 938 (9th Cir. 2018).

II

Decisions regarding the admission and exclusion of foreign nationals are a "'fundamental sovereign attribute exercised by the Government's political departments.'"

Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (citation omitted); *see also Ventura-Escamilla v. INS*, 647 F.2d 28, 30 (9th Cir. 1981) ("[T]he power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative branches of government."). Given this broad authority of the political branches over the admission and exclusion of foreigners, we "have long recognized" and applied the "doctrine of consular nonreviewability," under which "'ordinarily, a consular official's decision to deny a visa to a foreigner is not subject to judicial review.'" *Allen v. Milas*, 896 F.3d 1094, 1104–05 (9th Cir. 2018) (citation omitted). Although Congress could conceivably create by statute some mechanism for review of individual consular decisions, it has not seen fit to take any such action to displace the rule of consular nonreviewability. *See id*. at 1108 (holding that "the APA provides no avenue for review of a consular officer's adjudication of a visa on the merits").

Nonetheless, the Supreme Court has recognized a "circumscribed judicial inquiry" for review of consular decisions that involve a violation of constitutional rights. *Trump v. Hawaii*, 138 S. Ct. at 2419 (tracing this exception to *Kleindienst v. Mandel*, 408 U.S. 753 (1972)); *see also Allen*, 896 F.3d at 1097 ("[T]he only standard by which we can review the merits of a consular officer's denial of a visa is for constitutional error.").[4] However, as a "foreign national[] seeking admission" into the United States,

[4] In *Allen*, we recognized that 28 U.S.C. § 1331 would provide jurisdiction over a non-statutory cause of action for declaratory and equitable relief against alleged unconstitutional conduct in the denial of a visa, but subject to the substantive constraints of the consular nonreviewability doctrine. *See* 896 F.3d at 1102; *see also id*. at 1108 ("[W]e have assumed that the courts will be open to review of constitutional claims, even if they are closed to other claims.").

Khachatryan has "no constitutional right to entry," and so he personally has no ability to bring a cause of action challenging his denial of admission. *Trump v. Hawaii*, 138 S. Ct. at 2419; *see also Kerry v. Din*, 576 U.S. 86, 88 (2015) (plurality) ("[B]ecause Berashk is an *unadmitted and nonresident* alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission." (emphasis added)); *Mandel*, 408 U.S. at 762 ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise."). Accordingly, where, as here, the denial of a visa to an unadmitted and nonresident alien is at issue, the exception to consular reviewability involving constitutional claims only applies "when the denial of a visa allegedly burdens the constitutional rights *of a U.S. citizen*." *Trump v. Hawaii*, 138 S. Ct. at 2419 (emphasis added).

It follows that the rule of consular nonreviewability bars all of Khachatryan's claims and that it also bars Danuns's claims *except* to the extent that his claims are based on a cognizable violation of his own constitutional rights.[5] Indeed, Plaintiffs do not meaningfully contest these points in their briefs in this court. Instead, they contend only that Danuns adequately pleaded that the denial of a visa to his father was done in bad faith and that, as a result, the visa denial violated his rights under the Due Process Clause, which he asserts protects his interest in being reunited with

[5] As the Government correctly notes, in light of our decision in *Allen*, neither Khachatryan nor Danuns has a cause of action under the APA. 896 F.3d at 1108.

his father in the United States.[6] The Government contests both of these points, arguing that Danuns failed to plead bad faith and that, in any event, Danuns is not entitled to due process here because he has no constitutionally protected interest in having his father immigrate to the United States.

The Supreme Court addressed a similar set of questions in *Kerry v. Din*, in which a U.S. citizen (Fauzia Din) asserted that her due process rights were violated in connection with the denial of a visa to her husband, an Afghan citizen living in Afghanistan. 576 U.S. at 88 (plurality). A plurality of three Justices held that the denial of a visa to Din's husband did not implicate any "fundamental liberty interest" of Din and that, as a result, "there is no process due to her under the Constitution" with respect to that denial. *Id*. at 97, 101. However, two concurring Justices—Justice Kennedy and Justice Alito—found it unnecessary to reach the constitutional question of whether Din "has a protected liberty interest in the visa application of her alien spouse," because they concluded that, "even assuming she has such an interest, the Government satisfied due process" in denying the visa. *Id*. at 102 (Kennedy, J., concurring in the judgment).

Confronted with the novel constitutional question of whether Danuns has a protected liberty interest in his father's visa application, we conclude that we should follow the same approach as Justice Kennedy's *Din* concurrence, and that we should first address whether, *assuming* that Danuns has such a protected interest, he has sufficiently alleged a violation of due process under the standards set

[6] Plaintiffs have thus abandoned any claims in their complaint that are based on any other asserted constitutional right.

forth by that concurrence.[7] *See Cardenas v. United States*, 826 F.3d 1164, 1167 (9th Cir. 2016) (holding that, under *Marks v. United States*, 430 U.S. 188 (1977), "Justice Kennedy's concurrence in *Din* is the controlling opinion"). Only if we conclude that Danuns *has* alleged a failure of due process would we then need to address the Government's broader contention that persons such as Danuns lack an underlying liberty interest that is protected by due process.

III

We therefore turn first to the question of whether, assuming Danuns has a constitutionally protected liberty interest, he has adequately pleaded that the handling of his father's visa application did not satisfy the relevant due process standards. We conclude that he has.

A

In *Cardenas*, we held that Justice Kennedy's concurrence in *Din* was the controlling opinion and that, as a result, the standards he articulated for determining what process was "due" in the visa-denial context were binding. 826 F.3d at 1171–72. We described those standards as establishing a three-part inquiry. First, we examine whether the consular officer denied the visa "under a valid statute of inadmissibility." *Id*. at 1172. Second, we consider whether, in denying the visa, the consular officer "cite[d] an admissibility statute that 'specifies discrete factual

[7] The question of whether a U.S. citizen "has a protected liberty interest in the visa application of her alien spouse" was a novel one for the Supreme Court in *Din*, *see* 576 U.S. at 102 (Kennedy, J., concurring in the judgment), but that question had previously been answered in the affirmative by this court in *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).

predicates the consular officer must find to exist before denying a visa'" or whether, alternatively, there is "a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." *Id*. (quoting *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment)). The Government has the burden to establish that these two elements are satisfied. *Id*. If it carries that burden, then we proceed to the third step, which requires us to determine whether the plaintiff has carried his or her "burden of proving that the [stated] reason was not bona fide by making an 'affirmative showing of bad faith on the part of the consular officer who denied [the] visa.'" *Id*. (quoting *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment)).

The Government contends, however, that the three-part framework described in the *Din* plurality and *Cardenas* was abrogated by the Supreme Court in *Trump v. Hawaii*. We disagree. The Government notes that, in *Trump v. Hawaii*, the Court described Justice Kennedy's concurrence in *Din* as establishing "that the Government need provide only a statutory citation to explain a visa denial," *see* 138 S. Ct. at 2419, and the Court did not mention the additional portions of the *Din* concurrence that addressed the need for "discrete factual predicates" or the possibility of making "an affirmative showing of bad faith." But this dog-that-didn't-bark theory provides no basis for concluding that the five-Justice majority in *Trump v. Hawaii*—which included Justice Kennedy and Justice Alito—thereby silently jettisoned these other aspects of the *Din* plurality.

The Government overlooks the fact that *Trump v. Hawaii* did not involve review of a discrete individual visa denial, but rather, a broad-based challenge to a presidential proclamation that imposed certain generally applicable restrictions on the entry of aliens from specified countries.

Id. at 2405–07. It is therefore unsurprising that, in adapting the standards set forth in the *Din* plurality and in earlier cases to the context of a broad policy established in a presidential proclamation, the Court did not recite the portions of the *Din* plurality's test that are specifically tailored to addressing the review of a *particular* visa denial decision involving an individual alien. Nothing in *Trump v. Hawaii* suggests that, in the context of the review of an individual visa denial, as in *Din*, the standards set forth by the *Din* concurrence would not continue to apply.

B

We therefore proceed to apply the three-part framework of the *Din* concurrence, as set forth in our decision in *Cardenas*. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc).

1

First, we conclude that the Government sufficiently cited a valid statutory provision under which the visa was denied. Although it would seemingly be a very easy task to supply a statutory citation, the Embassy nonetheless managed to mis-identify the relevant provision in both of its communications with Khachatryan's counsel. In the initial "Refusal Worksheet," the Embassy identified INA "Section 212(a)(6C) 1" as the relevant provision that rendered Khachatryan inadmissible, and in its follow-up email to counsel, it cited the provision as section "212(a)(6)(C)(1)." The actual provision is § 212(a)(6)(C)(i) of the INA, which declares inadmissible any alien who engages in specified forms of fraud in connection with an application for a visa or other benefit under the INA. *See* 8 U.S.C. § 1182(a)(6)(C)(i). Plaintiffs were not prejudiced by these minor errors, because the Embassy's communications also

confirmed that the basis for the denial was alleged fraud, and Plaintiffs' complaint expressly confirms that they understood that the asserted basis for the visa denial was "INA § 212(a)(6)(C)(i)."

Second, § 212(a)(6)(C)(i) is a statute that "specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment). As relevant here, the factual predicate is that the alien "sought to procure or has procured[] a visa, other documentation, or admission into the United States" by "fraud or willfully misrepresenting a material fact." 8 U.S.C. § 1182(a)(6)(C)(i). Alternatively, there are "fact[s] in the record that 'provide[] at least a facial connection to' the statutory ground of inadmissibility." *Cardenas*, 826 F.3d at 1172 (quoting *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment)). Specifically, the Embassy's follow-up email to counsel states that Khachatryan was "found" to "have submitted a false divorce certificate in support of a previous immigrant visa petition" and to "have applied for and received U.S. visas three times under a false identity from 2000–2002." Thus, the Government has satisfied both of the alternatives for meeting the second element of the *Din* test.

Because the Government has carried its burden to establish these first two requirements, the burden shifts to Danuns to plead and prove that the cited reason "was not bona fide by making an 'affirmative showing of bad faith on the part of the consular officer who denied [the] visa.'" *Cardenas*, 826 F.3d at 1172 (quoting *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment)).

2

Because this case was decided at the pleading stage, Danuns's burden was to affirmatively allege facts "with sufficient particularity" to raise a "plausibl[e]" inference that the consular officer acted in "bad faith." *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment); *see also Cardenas*, 826 F.3d at 1173. In *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008), we construed this requirement as imposing a burden to allege *subjective* "bad faith," *i.e.*, that "the consular official did not in good faith *believe* the information he [or she] had" or that the "Consulate acted upon information it *knew* to be false." *Id*. at 1062–63 (emphasis added). Consequently, it "is not enough to allege that the consular official's information was incorrect." *Id*. But that does not mean that the objective unreasonableness of a stated reason for a visa denial is irrelevant, particularly at the pleading stage. On the contrary, the more objectively unreasonable a stated basis for denying a visa is, the more plausible is the inference that the consular officer who accepted it acted in subjective bad faith. The unreasonableness of a consular officer's actions thus remains a factor to consider in assessing whether the plaintiff has pleaded facts with sufficient particularity to give rise to a plausible inference of subjective bad faith. *Cf. CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1112 (9th Cir. 2007) (fact that litigant's claim was "objectively specious" was a factor that permitted district court to "infer subjective bad faith" in litigant's persisting in asserting the claim).

In evaluating Danuns's allegations, we begin by addressing the Embassy's reliance on the ground that Khachatryan had assertedly submitted a false divorce certificate in connection with his earlier visa application in

2001. We find two sets of particularized allegations to be especially pertinent on this score.

First, on at least three separate occasions, USCIS specifically examined the allegation that Khachatryan had committed marriage fraud and had submitted a false divorce certificate, and each time USCIS concluded that this charge was unsubstantiated. Specifically, USCIS in 2009 formally reopened its prior denial of Khachatryan's second visa application, and in doing so USCIS expressly concluded that "the Service did not prove that [Khachatryan's] marriage was entered into for the purpose of evading immigration laws." The 2009 reopening order also expressly mentioned the prior allegation of a fraudulent divorce certificate and necessarily found that allegation unsupported as well. USCIS evidently reached the same conclusion again in October 2012, when it approved Danuns's sponsorship petition, because the applicable statute governing such petitions expressly forbids approval if the sponsored relative engaged in marriage fraud. *See* 8 U.S.C. § 1154(c). And USCIS adhered to that same conclusion in September 2014 when it expressly reaffirmed its approval of Danuns's petition after the Embassy sent it back to USCIS. The Embassy had returned the petition to USCIS precisely so that it could reconsider the matter in light of the earlier supposed decision that Khachatryan had presented a fraudulent divorce certificate. After initially issuing an error-filled "Notice of Intent to Revoke,"[8] USCIS subsequently

[8] As noted earlier, *see supra* at 13–14, the notice contained several serious mistakes. First, the notice relied on adherence to a "previous decision," when in fact the prior (unlawful) decision had been withdrawn. Second, the notice failed to acknowledge that USCIS itself had concluded in 2009 that it had erred in 2003 in relying on the same supposed previous decision. Third, the notice purported to conclude that

reviewed the information presented by Khachatryan's counsel and instead reaffirmed its decision to approve the petition.

Thus, on three separate occasions, the *other* agency charged with reviewing the same marriage-fraud allegations—USCIS—specifically examined the matter and concluded that the charges were unsubstantiated.[9] In *Bustamante*, we concluded that a consular official's reliance upon information supplied by another agency was a factor that weighed strongly against a finding of bad faith. *See* 531 F.3d at 1063. Conversely, the Embassy's persistent and unexplained *refusal* to accept the repeated conclusions of USCIS—and to do so even after the Embassy had specifically asked USCIS to take another look at the matter—is a factor that weighs in favor of an inference of bad faith.

Second, in addition to stubbornly refusing to accept USCIS's contrary conclusions, the Embassy erroneously continued to assert that Khachatryan's prior visa application had been denied rather than withdrawn. In a declaration from a State Department attorney submitted to the district court, the Government explained that, after receiving the reaffirmed approval from USCIS, the Embassy then "reviewed the basis for the *prior finding* of ineligibility under INA § 212(a)(6)(C)(i)" (emphasis added). But as we have explained, the first such finding was withdrawn in 2002

Khachatryan had engaged in marriage fraud, but without mentioning USCIS's expressly contrary finding in 2009.

[9] Moreover, another component of DHS—CBP—also represented in a letter to Senator Boxer that the fraud "charges" against Khachatryan were "inaccurate" and in that same letter it reassured her that the relevant records had been updated to reflect as much. *See supra* at 11.

as plainly unlawful under *Matter of Cintron*, and both agencies thereafter kept mistakenly treating that prior decision as valid. *See supra* at 9–11, 13–14. Moreover, the stated basis for the Embassy's return of the petition to USCIS in 2013 was the supposed "2003 finding" that Khachatryan had presented a fraudulent divorce certificate, but the referenced 2003 USCIS decision had been formally withdrawn in 2009, on the grounds that it was substantively wrong and that it had relied on an invalid (and also withdrawn) prior decision of the INS Officer-in-Charge at the Embassy. USCIS thus ultimately corrected itself twice on this point, once in 2009 and again in 2014, but the Embassy in 2015 again inexplicably reverted to acting as if there had been a valid "prior finding."

The Government nonetheless insists that, even if such considerations might support an adverse inference with respect to the Embassy's reliance upon prior marriage fraud in denying Khachatryan's visa, that does not affect the Embassy's alternative conclusion that Khachatryan had obtained visas under a false name in 2000–2002. We disagree.

Our obligation in reviewing the motion to dismiss is to examine the allegations of the complaint as a whole and to draw all reasonable inferences in favor of Danuns. *See Dowers v. Nationstar Mortg., LLC*, 852 F.3d 964, 969 (9th Cir. 2017). We conclude that, when considered against the backdrop of the other factual allegations set forth above, the Embassy's much-belated and out-of-the-blue assertion that Khachatryan had committed a *different* form of fraud more than 13 years earlier supports, rather than defeats, a reasonable inference of bad faith. Taken as a whole, the allegations establish that Khachatryan engaged in a 14-year effort to obtain a visa during which the Embassy continually

disregarded the findings of USCIS and instead repeatedly relied on the legally and factually invalid contention that he had already previously been found to have engaged in marriage fraud. After USCIS for the third time reaffirmed that the marriage fraud finding was unsupported, the Embassy suddenly for the first time over that 14-year period hauled out the contention that Khachatryan used a false name to obtain a visitor's visa in the 2000–2002 time frame, and the Government now insists we must take this new allegation at face value.[10] The Government may be right in suggesting that the very belated discovery of this new allegation was simply an "administrative oversight," but the overall pattern of troubling behavior over such an extended period of time is enough to raise a *plausible* contrary inference that the consular officer acted in subjective bad faith rather than out of a "desire to get it right." *Yafai v. Pompeo*, 912 F.3d 1018, 1022 (7th Cir. 2019).

We hold that Danuns has carried his substantial burden to plead sufficient facts with particularity to raise a plausible inference of subjective bad faith on the part of the consular official who denied Khachatryan's visa.

IV

Because Danuns has sufficiently pleaded bad faith, we cannot sustain the dismissal in this case on that ground that, even assuming that Danuns has a protected liberty interest at stake, he received whatever process was "due." We therefore turn to the Government's argument that the

[10] Khachatryan has specifically pleaded that the Embassy's new fraud allegation is false, and he also submitted a declaration averring under penalty of perjury that he has never committed identity fraud.

judgment should be affirmed on the alternative ground that Danuns lacks a protected liberty interest in the first place.

A majority of the Supreme Court reaffirmed in *Din* that procedural due process rights attach to "liberty interests" that are based on "nonconstitutional law, such as a statute" or that are properly recognized as constitutionally based. *Din*, 576 U.S. at 97–98 (plurality); *id*. at 108 (Breyer, J., dissenting). Here, Danuns does not point to any statute or other source of nonconstitutional law that would grant him a protected liberty interest in having his father come to the United States. Rather, his contention is that he possesses a *constitutionally based* liberty interest similar to the one that we recognized for spouses in *Bustamante*. *See Bustamante*, 531 F.3d at 1062; *see also supra* note 7.

The plurality and the dissent in *Din* nonetheless differed in articulating the standards for determining what constitutionally based liberty interests are entitled to procedural due process protection. Both agreed—and therefore a majority of the Court agreed—that procedural due process at least extends under the Court's current caselaw to any "implied *fundamental* liberty," *i.e.*, to any liberty that is protected against *substantive* deprivation by the Constitution. *Din*, 576 U.S. at 93 (plurality) (emphasis added); *id*. at 107–08 (Breyer, J., dissenting).[11] But they differed as to whether procedural due process protects some new set of additional "nonfundamental liberty interests"—*i.e.*, liberty interests that are assertedly based in the

[11] To be sure, the plurality did not endorse what it described as the "textually unsupportable doctrine of implied fundamental rights," but it acknowledged that the Court had recognized such rights, and the plurality concluded that a logical consequence of such a recognition would be that procedural due process protections would attach to such rights. *Din*, 576 U.S. at 93 (plurality).

Constitution (rather than in statute or other nonconstitutional law) but that did not constitute a "*fundamental*" right. *Compare id*. at 99 (plurality), *with id*. at 107–10 (Breyer, J., dissenting). We need not resolve this dispute here because we conclude that Danuns lacks a protected liberty interest under either approach.

A

Under the applicable standards that the Supreme Court has articulated for assessing whether a claimed unenumerated right is fundamental, Danuns lacks any relevant fundamental right in having his father admitted into the United States.

1

Danuns's due process claim is based on the contention that his "freedom to make personal choices in family life" is a constitutionally protected liberty interest and that the denial of his father's visa deprives him of that liberty so as to trigger procedural due process protections. We think that Danuns defines the asserted interest at too high a level of generality.

The Supreme Court has instructed us to "exercise the utmost care" before "break[ing] new ground" in the area of unenumerated fundamental rights, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), and the Court has insisted on "a 'careful description' of the asserted fundamental liberty interest," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation omitted). Thus, new fundamental rights ordinarily "must be defined in a most circumscribed manner, with central reference to specific historical practices." *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (citing *Glucksberg*, 521 U.S. at 721). The only

exception that the Court has recognized from *Glucksberg*'s insistence on "central reference to specific historical practices" is for fundamental rights involving "marriage and intimacy." *Id*.; *see also id*. (Court has rejected *Glucksberg*'s strict emphasis on historical tradition "with respect to the right to marry and the rights of gays and lesbians"). Unlike *Din* and *Bustamante*, which involved a marital relationship, *see Din*, 576 U.S. at 88 (plurality); *Bustamante*, 531 F.3d at 1062, this case does not involve marriage or any comparable relationship of sexual intimacy. As the Court in *Obergefell* recognized, the marital relationship is "unlike any other in its importance to the committed individuals," and its unique legal status rests on "related rights of childrearing, procreation, and education." 576 U.S. at 666–67.[12] The relationship between a parent and an adult child lacks these distinctive features. Accordingly, *Glucksberg*'s general rule—*i.e.*, that new fundamental rights should be narrowly defined and rooted in historical practice—is what governs here, rather than *Obergefell*'s exception. *Glucksberg*, 521 U.S. at 721.

Because we must thus define the asserted fundamental right at issue here "in a most circumscribed manner," *see Obergefell*, 576 U.S. at 671, we cannot ignore the fact that what Danuns claims here is a right to a *particular* type of relationship with his father—namely, one in which both he and his nonresident alien father will both physically live in the United States. As a result, the "question before us is whether the 'liberty' specially protected by the Due Process Clause includes" a right of familial association that "itself includes" a right of an adult child to bring his or her alien

[12] *Obergefell* thus belies the dissent's suggestion that, from a constitutional perspective, marital relationships are no different from parent/adult-child relationships. *See* Dissent at 48 n.4.

parent *into* the United States. *Glucksberg*, 521 U.S. at 723. We are aware of no precedent from this court or from the Supreme Court that has recognized any such right.

The dissent contends that we have already recognized the relevant liberty interest on which Danuns relies, because we have held "'that a parent has a fundamental liberty interest'" in the "'companionship and society'" of his or her adult child, *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004) (citation omitted), and we have also stated that this "'constitutional interest in familial companionship and society logically extends to protect children'"—including adult children—"'from unwarranted state interference with their relationships with their parents,'" *Lee v. City of Los Angeles*, 250 F.3d 668, 676, 685 (9th Cir. 2001) (citation omitted) (applying this principle in the context of an adult child with significant mental difficulties).[13] *See also Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1169 (9th Cir. 2013); *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1992); *Smith v. City of Fontana*, 818 F.2d 1411, 1418–19 (9th Cir. 1987), *overruled in part on other grounds by Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999) (en banc). But in each of these cases, the state actors at issue allegedly directly interfered with a parent/adult-child relationship that already existed *within* the United States, either by causing the death of the plaintiff's adult child or parent, *see Johnson*, 724 F.3d at 1164 (son shot and killed during arrest); *Toguchi*, 391 F.3d at 1055 (son died under care of prison doctor); *Ward*, 967 F.2d at 283 (son

[13] Several of our sister circuits have disagreed and concluded that any fundamental liberty interests only extend to a relationship between a parent and a *minor* child. *See*, *e.g.*, *McCurdy v. Dodd*, 352 F.3d 820, 828–30 (3d Cir. 2003); *Butera v. District of Columbia*, 235 F.3d 637, 654–56 (D.C. Cir. 2001).

shot and killed during encounter with police); *Smith*, 818 F.2d at 1413–14 (father shot and killed during encounter with police), or by physically separating, and precluding contact with, the plaintiff's adult child, *see Lee*, 250 F.3d at 685–86 (mentally ill son was wrongfully extradited to New York based on misidentification, and for two years conservator mother was falsely told "his whereabouts were unknown"). Here, unlike in those cases, Danuns does *not* contend that the Government has directly interfered with an existing domestic relationship within the United States; on the contrary, he contends only that the United States has denied him the ability to *create* such a living arrangement within the United States.

The dissent contends that, under *Bustamante* and the panel opinion that the Supreme Court reviewed in *Din*, we are obligated to define the relevant liberty interest at the very highest level of generality, so that it would include adult-child relationships and presumably many others as well. *See* Dissent at 46, *see also id*. at 50 & n.7. That is wrong. Neither decision even considered, much less decided, whether there is a relevant cognizable liberty interest in the visa application of any family member other than a *spouse*. *See Din v. Kerry*, 718 F.3d 856, 860 (9th Cir. 2013) ("In *Bustamante*, we recognized that a citizen has a protected liberty interest *in marriage* that entitles the citizen to review of the denial of a *spouse's* visa." (emphasis added)). Likewise, in describing the limited review of visa denials that emerged from the Supreme Court's fractured decision in *Din*, we held in *Cardenas* only that the narrow review afforded by Justice Kennedy's *Din* concurrence applies "at least in a case *only* raising the due process rights of a citizen *spouse*." 826 F.3d at 1171 (emphasis added). The dissent's suggestion that our precedent has already decided that visa-

review rights extend to all family relationships is demonstrably incorrect.

Moreover, the dissent's broader framing of the liberty interests at stake cannot be reconciled with the Supreme Court's decision in *Din*. Although the Court was sharply divided as to whether the plaintiff there had a relevant liberty interest, no member of the Court employed the highly generalized analysis that Danuns and the dissent advocate here. Applying *Glucksberg*'s requirement of a "'careful description of the asserted fundamental liberty interest,'" the *Din* plurality defined the liberty interest at issue as a "right to live in the United States with [one's] spouse" and concluded that "[t]here is no such constitutional right." 576 U.S. at 88, 93 (plurality) (quoting *Glucksberg*, 521 U.S. at 721). While disagreeing as to whether Din actually had a protected liberty interest, the dissenters in *Din* did not differ as to the proper level of generality for framing that question: they likewise defined the liberty interest involved as the ability to live together as spouses in the United States. *See id*. at 107 (Breyer, J., dissenting) (stating that the "liberty interest" at issue was Din's "freedom to live together with her husband *in the United States*" (emphasis added)); *id*. at 108 (noting that the "institution of marriage . . . encompasses the right of spouses to *live together* and to raise a family" (emphasis added)); *id*. at 110 (concluding that the Constitution protects a citizen's "freedom to live together with her spouse *in America*" (emphasis added)). And in assuming *arguendo* that Din had a protected liberty interest, Justice Kennedy's concurrence similarly defined that interest as being "a protected liberty interest in the visa application of her alien spouse." *Id*. at 102 (Kennedy, J., concurring in the judgment); *see also id*. at 101 (characterizing the right asserted as the "constitutional right to live in this country with [her] husband"). But in all events,

every member of the Court in *Din* framed the liberty interest in question as tied specifically to the *marital* relationship. As we have explained, the relationship between an adult child and parent is not comparable to marriage and is not exempt from *Glucksberg*'s general rule that fundamental liberty interests must be carefully and narrowly defined. *See supra* at 31–32.

Accordingly, the question presented here is whether, under the standards set forth in applicable Supreme Court precedent, we should now recognize a fundamental liberty interest of an adult child to bring an alien parent into the United States. For the reasons explained in the next section, the answer to that question is no.

2

Under *Glucksberg*, we may recognize a new fundamental liberty interest only if it is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Glucksberg*, 521 U.S. at 720–21 (citations and internal quotation marks omitted). Danuns's claimed right to bring his father to the United States does not meet this standard.

As an initial matter, we note that the right that Danuns asserts finds no support from the original understanding of the "liberty" protected against deprivation, without adequate procedures, by the Fifth Amendment's Due Process Clause.[14] As the *Din* plurality explained, "at the time of the

[14] The *Din* plurality did not suggest, nor do we, that all of the rights that were originally understood to be protected by *procedural* due process are also fundamental rights that receive *substantive* due process

Fifth Amendment's ratification, the words 'due process of law' were understood 'to convey the same meaning as the words "by the law of the land"' in Magna Carta." 576 U.S. at 91 (plurality) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1856)). Contemporary "description[s] of the rights protected by Magna Carta" from authorities such as Edward Coke and William Blackstone emphasized property rights, as well as rights of physical security and mobility *within* one's country, but not a right to bring adult relatives *into* one's country. *Id.* at 91–92.

Magna Carta itself mentioned the right not to "'be taken, or imprisoned, or be disseised of his [or her] freehold . . . or be outlawed, or exiled, or any otherwise destroyed.'" *Id.* at 91 (quoting Magna Carta, ch. 29 (1225 ed.)). Coke elaborated on these rights as including the liberty to pursue one's "livelihood" and "franchises," as well as the rights to not be "forejudged of life, or limbe, disherited, or put to torture, or death." Edward Coke, The Second Part of the Institutes of the Laws of England 46–48 (W. Rawlins, 6th ed. 1681), *quoted in Din*, 576 U.S. at 91 (plurality). Blackstone's articulation included "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." 1 William Blackstone, Commentaries *134.

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protection. Rather, as in the *Din* plurality opinion, it is helpful first to set forth that traditional understanding of procedural due process before turning to the question of whether, under *substantive* due process principles, we should recognize a new right that would then, in turn, trigger procedural due process protection under the *Din* plurality's approach.

The only mention of transnational movement in this original understanding of the underlying rights protected by procedural due process consists of Coke's reference to the right not to be "exiled," *see* Coke, *supra*, at 46, and Blackstone's reference to the "right to abide in [one's] own country so long as [one] pleases; and not to be driven from it unless by the sentence of the law," 1 Blackstone, *supra*, at *137. This right not to be *expelled* from one's country, of course, does not include a right to have one's adult relatives immigrate to one's country.

Against this backdrop, we perceive little basis for concluding that the right claimed by Danuns satisfies *Glucksberg*'s test for recognizing a new "fundamental liberty interest," which requires a grounding in "[o]ur Nation's history, legal tradition, and practices." 521 U.S. at 721. Nor does Danuns's claimed liberty interest find any support in historical practices specifically relating to the immigration of relatives. On the contrary, the relevant history confirms that, "[a]lthough Congress has tended to show 'a continuing and kindly concern . . . for the unity and the happiness of the immigrant family,' this has been a matter of legislative grace rather than fundamental right." *Din*, 576 U.S. at 97 (plurality) (citation omitted).

For example, a 1790 statute automatically naturalized the *resident minor children* of naturalizing parents, but made no provision for nonresident parents of naturalized adults. *See* Act to Establish an Uniform Rule of Naturalization, ch. 3, § 1, 1 Stat. 103, 104 (1790). Regarding parent/adult-child relationships specifically, our immigration laws have often given parents of adult citizen children "preference" in admission, but they have also sometimes subjected them to annual quotas, reflecting congressional "ambivalence toward family members outside the nuclear family, such as

siblings and adult children." *See* Kerry Abrams, *What Makes the Family Special?,* 80 U. Chi. L. Rev. 7, 16 (2013); *see also id*. at 10–16; An Act to Limit the Immigration of Aliens into the United States, Pub. L. No. 67-5, § 2(a), (d), 42 Stat. 5, 5–6 (1921); Immigration Act of 1924, Pub. L. No. 68-139, §§ 4–6, 43 Stat. 153, 155–56; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 205(b), 66 Stat 163, 180. Indeed, adult children of U.S. citizens were given no immigration preference between 1924 and 1952. *See* Abrams, *supra*, at 13–14. In view of this history and practice, it is impossible to conclude that an adult citizen's asserted right to live with his or her parent in the United States is "'deeply rooted in this Nation's history and tradition'" or that it is essential to "'ordered liberty.'" *See Glucksberg*, 521 U.S. at 721 (citations omitted).

Danuns relies on the Supreme Court's decision in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), but *Moore* provides no support for the fundamental right claimed here. In *Moore*, the Supreme Court invalidated, on substantive due process grounds, an ordinance that applied criminal penalties to a grandmother for living in the same household with her two grandsons, who were cousins. 431 U.S. at 496–99, 503–06 (plurality); *id*. at 520–21 (Stevens, J., concurring in the judgment) (relying upon property rights rather than familial rights). In reaching this conclusion, the plurality explained that "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id*. at 504. But the *Moore* plurality was referring only to a tradition of extended family members *who are already in the United States* choosing to live together. *Id*. at 501 (affording constitutional protection "to the family choice involved in this case"). It framed its constitutional holding in terms of a prohibition on the city's

"forcing all to live in certain narrowly defined family patterns," *id*. at 506, and it did not even remotely advert to, or suggest, that there was a comparable constitutional interest in having one's extended family come to the United States so that one could then choose to live together here.

Because an adult citizen has no fundamental right to have his or her unadmitted nonresident alien parent immigrate into the United States, Danuns has no constitutional liberty interest that is protected by the Due Process Clause under the approach set forth in the *Din* plurality.

B

We find no basis for reaching a different conclusion under the approach set forth by the *Din* dissenters.[15] The *Din* dissenters differed with the plurality as to the circumstances in which "nonconstitutional law" might create "'an expectation'" that a particular liberty will not be taken away "without fair procedures," 576 U.S. at 108 (Breyer, J., dissenting) (citation omitted); *id*. at 98–99 (plurality) (criticizing the dissent's position as erroneously expansive), but we need not address that particular debate here given that Danuns does not rely upon any such

[15] The concurring Justices in *Din* did not address the underlying question as to how to identify constitutionally based liberty interests that would be protected by procedural due process. 576 U.S. at 102 (Kennedy, J., concurring in the judgment); *cf. Fiallo v. Bell*, 430 U.S. 787, 788, 794–95 (1977) (holding that legislative classification addressing which parents of U.S. citizens qualify for "special preference immigration status" survived *Mandel* scrutiny, but without addressing whether plaintiffs were correct in claiming that the statute infringed various constitutional interests, including the asserted "fundamental constitutional interests of United States citizens and permanent residents in a familial relationship").

nonconstitutional law. The dissenters also posited that there is a further set of constitutionally based liberty interests that are entitled to "procedural due process protection" but that are *not* "fundamental rights requiring substantive due process protection." *Id*. at 108 (Breyer, J., dissenting); *but see id*. at 99 (plurality) (asserting that "[t]he dissent fails to cite a single case supporting its novel theory of implied nonfundamental rights"). Assuming *arguendo* that there are any such liberty interests, there still is no basis for concluding that it would embrace the particular liberty interest that Danuns asserts here.

In describing this asserted category of nonfundamental liberty interests "arising under the Constitution," the *Din* dissent pointed to the following cases, which it described using the following parentheticals:

> *Paul v. Davis*, 424 U.S. 693, 701 (1976) (right to certain aspects of reputation; procedurally protected liberty interest arising under the Constitution); *Goss v. Lopez*, 419 U.S. 565, 574–575 (1975) (student's right not to be suspended from school class; procedurally protected liberty interest arising under the Constitution); *Vitek v. Jones*, 445 U.S. 480, 491–495 (1980) (prisoner's right against involuntary commitment; procedurally protected liberty interest arising under the Constitution); *Washington v. Harper*, 494 U.S. 210, 221–222 (1990) (mentally ill prisoner's right not to take psychotropic drugs; procedurally protected liberty interest arising under the Constitution).

576 U.S. at 109–10 (Breyer, J., dissenting). The dissenters concluded that, because "the institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys community support, and plays a central role in most individuals' 'orderly pursuit of happiness,'" Din's asserted liberty interest in having her unadmitted nonresident spouse come to the United States was protected by procedural due process even if she did not have a fundamental right in that regard. *Id*. at 108 (citation omitted). Thus, the *Din* dissenters drew upon both "a citizen's [fundamental] right to live within this country" and the "strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure" in order to conclude that Din had a protected liberty interest in "liv[ing] together with her husband in the United States." *Id*. at 107–09.

None of the reasoning relied upon by the *Din* dissenters extends to Danuns's claimed liberty interest here. As noted earlier, the relationship of an adult child with his or her parents bears no relationship to the unique "institution of marriage." 576 U.S. at 108 (Breyer, J., dissenting).[16] Adult

[16] Because *Din* leaves in place this court's recognition of procedural due process rights in the context of *spousal* visas, *see* 576 U.S. at 102 (Kennedy, J., concurring in the judgment) (assuming such a right *arguendo*); *id*. at 107 (Breyer, J., dissenting) (recognizing such a right); *Bustamante*, 531 F.3d at 1062, the dissent is wrong in suggesting that our decision "effectively eliminates the *Mandel* exception to the doctrine of consular non-reviewability." *See* Dissent at 49. Had the plaintiff here been a U.S. citizen spouse rather than a U.S. citizen adult child, the outcome would necessarily have been different under *Din* and *Bustamante*. *See supra* at 33–35. And, as we have noted, the Supreme Court has held that marital relationships are "unlike any other" and

children do not ordinarily have responsibility for their parents' debts; while such relationships can be close and important, they do not involve the unique physical and emotional intimacy of the marital relationship; and such relationships do not entail a comparable expectation that these persons will "live together" and "raise a family" together. *Id*. To be sure, the Supreme Court has recognized a constitutionally based liberty interest against arbitrary interference with extended-family living arrangements *within* the United States, *see Moore*, 431 U.S. at 502–06 (plurality); *cf. Smith v. Organization of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 844 (1977) (emphasizing that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from *the intimacy of daily association*" (emphasis added)), but the Court has never suggested that whatever protection applies to extended-family relationships entails a constitutionally rooted expectation that one will be allowed to bring one's parents or adult children *into* the United States. *See supra* at 38–39.

The other cases cited by the *Din* dissenters are likewise dissimilar in a way that confirms the weakness of Danuns's claim to a constitutionally based liberty interest here. These cases involved intrusions on physical integrity, *Harper*, 494 U.S. at 221–22 (forced administration of antipsychotic drugs); *Vitek*, 445 U.S. at 491–94 (involuntary commitment in mental hospital), and reputational harms, *Paul*, 424 U.S. at 701–02 (declining to recognize a relevant liberty interest in "reputation alone"); *Goss*, 419 U.S. at 574–75 (reputational interests associated with suspension from school, which also deprived the student of state-law

therefore have a special constitutional status. *Obergefell*, 576 U.S. at 666–67.

education rights). None of these liberty interests bears the remotest similarity to Danuns's asserted right to bring his father from Russia to the United States.

* * *

We hold that an adult citizen lacks a constitutionally protected liberty interest, protected by the Fifth Amendment's Due Process Clause, in the Government's decision whether to admit the citizen's unadmitted nonresident alien parent into the United States. Danuns's claims were therefore properly dismissed for failure to state a claim. And because Khachatryan lacks any cause of action to contest the denial of his request for a visa, his claims were properly dismissed as well. We therefore affirm the judgment of the district court.

AFFIRMED.

PRESNELL, District Judge, dissenting:

The doctrine of consular non-reviewability is a substantial barrier for a U.S. citizen to overcome when asserting a due process challenge to the denial of a family member's visa application. The only avenue for relief is reliance on the *Mandel* exception, which requires a showing of bad faith on the part of the consular official and the implication of a constitutional right. Needless to say, this exception is extremely difficult to sustain and is rarely successful.

This is, therefore, a rare case because it makes the remarkable finding (with which I agree) that the petitioner has met his burden of pleading bad faith. Unfortunately, this

is also an exceptional case because the majority departs from established Ninth Circuit precedent by concluding that the petitioner has no protectable liberty interest to assert—a ruling that effectively eviscerates the *Mandel* exception and makes it virtually impossible for anyone other than a spouse to rectify our government's bad faith denial of a visa application. I therefore respectfully dissent.

In *Din v. Kerry*, this Court held that "Din has a constitutionally protected due process right to limited judicial review of her husband's visa denial, which stems from her '[f]reedom of personal choice in matters of marriage and family life,'" 718 F.3d 856, 868 (9th Cir. 2013) (citing *Bustamante v. Mukasey*, 531 F.3d 1059, 1061–62 (9th Cir. 2008)). The Supreme Court's ruling in *Kerry v. Din*, 576 U.S. 86 (2015) did not disturb the Ninth Circuit's holding as to *Bustamante*. Indeed, this Court later held in *Cardenas v. United States*, 826 F.3d 1164 (9th Cir. 2016) that Justice Kennedy's opinion—which declined to comment on whether Din's constitutional rights were implicated—controls. *See Din*, 576 U.S. at 104–06 (Kennedy, J., concurring) (determining that the Government provided adequate process without deciding whether Din's constitutional rights were implicated). We are therefore bound to apply our holding in *Bustamante* and must adhere to our interpretation of that holding in *Din*. *See Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984) (only en banc decisions, Supreme Court decisions, or subsequent legislation overrule the decisions of prior panels).

The majority concedes, as it must, the precedential effect of *Bustamante* and this Court's opinion in *Din*. *See Cardenas*, 826 F.3d at 1171–72. This Circuit clearly recognizes a protected liberty interest between spouses in the immigration context. What the majority fails to do is adhere

to *Smith* and its progeny, which also recognize a constitutional liberty interest as between parent and child.

In *Smith*, this Court held that "a parent has a constitutionally protected liberty interest in the companionship and society of his or her child" and that "this constitutional interest . . . logically extends to protect children from unwarranted state interference with their relationships with their parents." *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987) *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (determining that adult children have this protected interest); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 685 (9th Cir. 2001) (recognizing that a parent's fundamental liberty interest in the companionship of a child is "well established" and logically extends to protect a child's interest in a parent's companionship); *Ward v. City of San Jose*, 967 F.2d 280, 283 (9th Cir. 1991) (recognizing that familial relationship between parent and child gave rise to due process action in *Smith*); *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1058 (9th Cir. 2018) ("[C]hildren's Fourteenth Amendment rights to companionship with their parents have been interpreted as reciprocal to their parents' rights."); *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1169 (9th Cir. 2013). Therefore, Danuns plainly has a constitutionally protected liberty interest in his father's companionship.[1]

[1] We are not, as the majority contends, fabricating a new constitutional right. Nor are we suggesting that every type of familial relationship can support a *Mandel* challenge. Rather, we are simply applying well-established Ninth Circuit precedent, recognizing a liberty interest between a parent and a child, in the immigration context.

When applying *Bustamante* to *Smith*, the answer is obvious. Danuns has a liberty interest in rectifying the Government's bad faith denial of his father's visa application.

In *Bustamante*, this Court held that when considering a *Mandel* challenge, we must look to the general right that is implicated. *See Bustamante*, 531 F.3d at 1062. Bustamante, a U.S. citizen, sought to obtain a visa for her husband, a Mexican citizen. *Id.* at 1060. Bustamante claimed that the denial of her petition violated her "protected liberty interest in her marriage." *Id.* at 1062. Applying *Mandel*, this Court first determined that the "[f]reedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause." *Id.* This Court then determined that this liberty interest encompassed her interest in her husband's visa and, therefore, was sufficient to support her due process challenge.[2] *Id.*

Smith establishes that Danuns has a constitutionally protected liberty interest in his father's companionship. *See Smith*, 818 F.2d at 1418. Taken with this Court's analysis in *Bustamante*, the general liberty interest identified by *Smith* clearly encompasses Danuns' petition for his father to enter the United States and is therefore sufficient to support his due process claim.

Instead of applying *Bustamante* to this case, the majority disregards *Smith* and contends that we must apply *Glucksberg* to analyze a new fundamental right. The Government contends that it did not interfere with Danuns'

[2] This Court proceeded to affirm on the basis that the Government had established a facially legitimate and bona fide reason for its denial. *Bustamante*, 531 F.3d at 1062.

right to his father's companionship when it denied his I-130 Petition. The majority agrees and states that this is because the only right implicated was the novel right of "an adult child to bring his or her alien parent *into* the United States."[3] This analysis is fundamentally flawed because, by claiming that this case involves a novel liberty interest, the majority fails to adhere to this Court's clear precedent.

This Court held in *Bustamante* that the general liberty interest in personal choice in marriage and family life was sufficient to support a *Mandel* claim. *Bustamante*, 531 F.3d at 1062. We did not limit that interest by redefining it as a separate, previously unrecognized right to bring one's spouse into the United States. Indeed, the majority's approach is almost identical to the Government's argument in *Din*, which we rejected as an attempt to overturn *Bustamante*. *Din v. Kerry*, 718 F.3d 856, 860 n.1 (9th Cir. 2013) ("The Government's contention that *Bustamante* is not good law is meritless."). *Bustamante* held that a citizen family member's right to judicial review under *Mandel* is based on a more general liberty interest, rather than a limited right of an alien to reside in the United States. *Id.* Neither *Bustamante*'s holding, nor this Court's interpretation of that holding were overturned by the Supreme Court's ruling in *Din*. *See Cardenas*, 862 F.3d at 1171–72 (holding that Justice Kennedy's concurrence represents the holding in *Kerry v. Din*).

The majority attempts to circumvent our holding in *Smith* by noting that *Bustamante* did not address a parent-

[3] In support of its position, the Government cites to several unpublished and out-of-circuit district court cases that have no bearing on our analysis. The majority (rightfully) declined to rely on these cases in addressing the constitutional question before us.

child relationship.[4] Rather than apply *Bustamante*'s holding to the parent-child companionship right already recognized in this Circuit, the majority looks to Justice Scalia's non-binding plurality opinion in *Din* to guide its analysis.

Justice Scalia reasoned that the right to marriage does not extend to immigration decisions. *Din*, 576 U.S. at 101. The majority similarly determines that Danuns' liberty interest in his father's companionship is not implicated by the Government's denial of Khachatryan's visa. The majority then frames Danuns' claim here as the right of "an adult child to bring his or her alien parent *into* the United States." But Justice Scalia's plurality opinion does not control here and, as confirmed by *Cardenas*, did not overturn *Bustamante*. We are bound by *Bustamante* and we must therefore recognize that Danuns' right to companionship with his father supports his right to judicial review under *Mandel*.[5]

[4] The majority claims that a marital relationship is entitled to a higher level of protection under the Constitution than the relationship between a parent and child. But there is no legal support for this claim, let alone any sociological basis for this distinction.

[5] The majority contends that the Supreme Court's fractured *Din* opinion compels its framing of the constitutional right in this case. But this is incorrect for two reasons. First, the narrow framing that Justice Scalia discussed did not command a majority in *Din*. In his dissent, Justice Breyer did not narrowly frame the right at issue, but instead, he stated that the fact pattern before the court fell within the broad right to marriage. *See Din*, 576 U.S. at 108 (Breyer, J., dissenting) ("the institution of marriage . . . encompasses the right of spouses to live together"). And Justice Kennedy specifically disclaimed any intent to consider the constitutional question before the Court. *Id.* at 102 (Kennedy, J., concurring). Second, this Circuit already held in *Cardenas* that *Din* did not provide any binding constitutional analysis.

The majority's limited approach to framing constitutional rights in the immigration context effectively eliminates the *Mandel* exception to the doctrine of consular non-reviewability. Here, Danuns has sufficiently pled bad faith.[6] And his relationship with his father is constitutionally protected. However, if the Government's bad faith decision to deny his father's visa does not impact his right in the way *Mandel* requires, then it is difficult to see how any case could satisfy this standard.

The majority's approach not only contravenes our own precedent; it undermines the Supreme Court's intent in establishing the *Mandel* exception in the first place. Indeed, the majority seems to implicitly acknowledge its error here by admitting that it would decide this case differently if it involved a spousal relationship. This statement is not consistent with the majority's approach to framing the constitutional issue in this case and is detached from this Circuit's analysis in *Bustamante*. It is unclear why the majority would recognize spousal rights in a *Mandel* claim aside from the simple reason that this Court already did so in *Bustamante*.

In an effort to elide *Smith*, the majority notes that *Smith* and its progeny involved pre-existing relationships in the United States. But those were not immigration cases, so that distinction has questionable relevance to the issue here.

[6] It should be noted that *Mandel* already imposes a stringent burden on plaintiffs—"an affirmative showing of bad faith on the part of the consular officer." *Din*, 576 U.S. at 105 (Kennedy, J., concurring). Without reaching the constitutional question, plaintiffs rarely succeed in pleading bad faith. To date, no circuit court has made or upheld a finding of bad faith. Only one circuit court has ruled against the Government under *Mandel* and that ruling was not based on a bad faith finding. *See Allende v. Shultz*, 845 F.2d 1111, 1116 (1st Cir. 1988).

Bustamante and *Din* were immigration cases that recognized the constitutional liberty interest, even though they involved foreign spouses with no pre-existing relationship in the United States.[7]

Moreover, even if this were a valid distinction, it would not apply here because Khachatryan has an extensive history of his relationship with Danuns in the United States. Khachatryan has been involved in Danuns' life since an early age and has a history of visiting Danuns in this country. Khachatryan visited the United States twelve times before his initial application was denied, including a 35 day visit to spend time with his children. As recognized by the majority, there is not a shred of evidence that Khachatryan engaged in any untoward behavior or that there is anything else going on here aside from Danuns' attempt to enjoy a meaningful relationship with his father. It is unclear what else the parties could do for their relationship to find protection under the majority's test.

Khachatryan has spent nearly twenty years attempting to lawfully reside with his son in this country, thwarted by the Government's errors and bad faith. Since he has adequately pled bad faith on the part of the Government, and because he has a protected liberty interest in his relationship with his father, Danuns is entitled to judicial review of his procedural due process challenge to the Government's denial of Khachatryan's visa. I would therefore reverse and remand

[7] In framing the marital right that was implicated, this Court looked to constitutional precedent without regard to whether the right had previously been applied in an immigration context. *See Bustamante*, 531 F.3d at 1062 (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

this case to the district court for proceedings consistent with this opinion.