No.

# In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF STATE, ET AL.,
PETITIONERS

*v.*

SANDRA MUÑOZ, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the decision to grant or deny a visa application rests with a consular officer in the Department of State. Under 8 U.S.C. 1182(a)(3)(A)(ii), any noncitizen whom a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in * * * unlawful activity" is ineligible to receive a visa or be admitted to the United States. The questions presented are:

1. Whether a consular officer's refusal of a visa to a U.S. citizen's noncitizen spouse impinges upon a constitutionally protected interest of the citizen.

2. Whether, assuming that such a constitutional interest exists, notifying a visa applicant that he was deemed inadmissible under 8 U.S.C. 1182(a)(3)(A)(ii) suffices to provide any process that is due.

3. Whether, assuming that such a constitutional interest exists and that citing Section 1182(a)(3)(A)(ii) is insufficient standing alone, due process requires the government to provide a further factual basis for the visa denial "within a reasonable time," or else forfeit the ability to invoke consular nonreviewability in court.

## PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are the United States Department of State; Antony J. Blinken, Secretary of State; and Michael Garcia, Consul General of the Consular Section at the United States Embassy, San Salvador, El Salvador.*

Respondents (plaintiffs-appellants below) are Sandra Muñoz and Luis Ernesto Asencio-Cordero.

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* Michael Garcia has been automatically substituted for Brendan O'Brien under Rule 35.3 of the Rules of this Court.

**RELATED PROCEEDINGS**

United States District Court (C.D. Cal.):

*Muñoz* v. *United States Department of State*, No. 17-cv-37 (Mar. 18, 2021)

United States Court of Appeals (9th Cir.):

*Muñoz* v. *United States Department of State*, No. 21-55365 (Oct. 5, 2022)

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The Solicitor General, on behalf of the United States Department of State and two federal officials, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-41a) is reported at 50 F.4th 906. The order of the en banc court denying rehearing and opinions respecting that denial (App., *infra*, 90a-122a) are reported at 73 F.4th 769. The opinion of the district court granting summary judgment for petitioners (App., *infra*, 42a-72a) is reported at 526 F. Supp. 3d 709. A prior opinion of the district court denying petitioners' motion to dismiss is not published in the Federal Supplement but is available at 2017 WL 8230036 (App., *infra*, 73a-89a).

## JURISDICTION

The judgment of the court of appeals was entered on October 5, 2022. A petition for rehearing en banc was denied on July 14, 2023 (App., *infra*, 90a-91a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 126a-136a.

## STATEMENT

### A. Legal Background

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a noncitizen generally may not be admitted to the United States without an immigrant or nonimmigrant visa.[1] 8 U.S.C. 1181(a), 1182(a)(7). When a noncitizen seeks to obtain an immigrant visa on the basis of a family relationship with a citizen or lawful permanent resident of the United States, see 8 U.S.C. 1151(b)(2)(A)(i), 1153(a), the citizen or permanent resident must first file a petition with U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security.[2] If the petition is approved, the

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[1] This petition uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

[2] Various INA functions formerly vested in the Attorney General have been transferred to the Secretary of Homeland Security. Some residual statutory references to the Attorney General that pertain to those functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note; see also *Nielsen* v. *Preap*, 139 S. Ct. 954, 959 n.2 (2019).

noncitizen may (if all other relevant conditions are satisfied) apply for a visa. See 8 U.S.C. 1154(a)(1) and (b), 1202; 22 C.F.R. 42.31, 42.42.

The decision to grant or deny a visa application rests with a consular officer in the Department of State. See 8 U.S.C. 1201(a)(1); 22 C.F.R. 42.71, 42.81; 8 U.S.C. 1361 (providing that the applicant has the burden of proof to establish visa eligibility "to the satisfaction of the consular officer"); see also 6 U.S.C. 236(b)(1) and (c)(1). With certain exceptions not relevant here, no visa "shall be issued to an alien" if "it appears to the consular officer" from the application papers "that such alien is ineligible to receive a visa * * * under section 1182 of this title, or any other provision of law," or if "the consular officer knows or has reason to believe" that the noncitizen is ineligible. 8 U.S.C. 1201(g); see 22 C.F.R. 40.6 (explaining that "[t]he term 'reason to believe' * * * shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa").

Section 1182 identifies various "[c]lasses of aliens ineligible for visas or admission" to the United States. 8 U.S.C. 1182(a). Section 1182(a)(3) bears the heading "Security and related grounds" and includes Section 1182(a)(3)(A)(ii), which renders inadmissible any noncitizen whom a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in * * * any other unlawful activity." 8 U.S.C. 1182(a)(3)(A)(ii).[3] A neighboring provision, Section 1182(a)(3)(B), bears

[3] The phrase "any other" expands upon the preceding clause, which covers "activity" to violate espionage, sabotage, or export laws. 8 U.S.C. 1182(a)(3)(A)(i).

the heading "Terrorist activities" and specifies a variety of terrorism-related grounds of inadmissibility. 8 U.S.C. 1182(a)(3)(B).

As a general matter, a consular officer who denies a visa application "because the officer determines the alien to be inadmissible" must "provide the alien with a timely written notice that * * * (A) states the determination, and (B) lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1). If, however, the consular officer deems the noncitizen inadmissible on "[c]riminal and related grounds" or on "[s]ecurity and related grounds" under Section 1182(a)(2) or (a)(3), then the written-notice requirement "does not apply." 8 U.S.C. 1182(b)(3).

2. "[T]he power to admit or exclude aliens is a sovereign prerogative," *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), that is "exercised by the Government's political departments largely immune from judicial control," *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). As a result, this Court has long recognized the doctrine of consular nonreviewability—the rule that, in the absence of affirmative congressional authorization, a noncitizen cannot assert any right to review of a visa determination. As this Court has explained, an "unadmitted and nonresident alien" has "no constitutional right of entry to this country." *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972); see *Plasencia*, 459 U.S. at 32 (this Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"). Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544

(1950); see *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (noting that the Court "has often reiterated this important rule").

Congress has not provided for even administrative review of a consular officer's decision to deny a visa. See 8 U.S.C. 1104(a)(1); 6 U.S.C. 236(b)(1). Nor has Congress provided for judicial review of visa denials; indeed, in prescribing visa-issuance procedures, Congress has disclaimed any authorization for a "private right of action to challenge a decision of a consular officer * * * to grant or deny a visa." 6 U.S.C. 236(f); see 8 U.S.C. 1201(i) (providing for judicial review of a decision to *revoke* a nonimmigrant visa only in the context of removal proceedings to remove a noncitizen from the United States).

3. Consistent with the doctrine of consular nonreviewability, this Court has not permitted a noncitizen abroad to obtain judicial review of an executive official's decision to deny him entry to the United States. On a handful of occasions, however, the Court has engaged in a limited review when a U.S. citizen claimed that the denial of a visa to a noncitizen abroad violated the citizen's own constitutional rights.

In 1972, the Court considered the case of a Belgian journalist, Ernest Mandel, who had been invited to speak at conferences in the United States; the consular officer in Brussels found Mandel inadmissible, and the Attorney General declined to grant him a discretionary waiver of inadmissibility. *Mandel*, 408 U.S. at 756-760. U.S. citizens who wished to hear Mandel speak asserted a First Amendment challenge. *Id.* at 769-770. The Court did not reach the government's argument that "Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any

reason or no reason may be given." *Id.* at 769. Instead, the Court disposed of the case on the ground that the record included a reason for denying the waiver that was "facially legitimate and bona fide," *i.e.*, that Mandel had abused prior visas. *Id.* at 769-770. The Court explained that when a noncitizen is excluded from the United States based on such a facially legitimate and bona fide reason, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770.

Next, in *Kerry* v. *Din*, 576 U.S. 86 (2015), the Court considered a claim by a U.S. citizen that the exclusion of her noncitizen husband violated her procedural due-process rights. In *Din*, the Ninth Circuit had held that the U.S. citizen, Fauzia Din, had "a protected liberty interest in marriage" that entitled her to review of the State Department's denial of a visa to her husband, an Afghan citizen. *Id.* at 90 (plurality opinion) (citation omitted). The Ninth Circuit had also held that the consular officer's citation of a statutory ground of inadmissibility—in that case, the terrorist-activity provision in Section 1182(a)(3)(B)—was insufficient to justify the denial. *Ibid.* Instead, the Ninth Circuit had required the government to "allege what it believes [Din's husband] did that would render him inadmissible." *Din* v. *Kerry*, 718 F.3d 856, 863 (2013), vacated, 576 U.S. 86 (2015).

After granting review, this Court decided that Din's challenge could not go forward, but no rationale had the support of a majority of the Court. See *Din*, 576 U.S. at 89 (plurality opinion). A three-member plurality, in an opinion by Justice Scalia, concluded that a U.S. citizen

does not have a protected liberty interest in a noncitizen spouse's visa application, such that the Due Process Clause does not apply. *Din*, 576 U.S. at 101. The plurality grounded that holding in the Nation's "long practice of regulating spousal immigration," *id.* at 95, and the Court's "consistent[] recogni[tion]" that judgments about which immigrants to admit into the United States are "'policy questions entrusted exclusively to the political branches of our Government,'" *id.* at 97 (citation omitted). The plurality accordingly concluded that "[t]o the extent that [Din] received any explanation for the Government's decision" to deny her spouse's visa, "this was more than the Due Process Clause required." *Id.* at 101.

Justice Kennedy's opinion concurring in the judgment, joined by Justice Alito, took no position on whether Din possessed a liberty interest in her husband's visa application. *Din*, 576 U.S. at 102. Instead, Justice Kennedy concluded that—even assuming Din had such an interest—the government's citation of the terrorist-activity ground of inadmissibility sufficed to provide any process that was due. *Ibid.* Relying on *Mandel*, Justice Kennedy reasoned that the government need only provide "a facially legitimate and bona fide reason" to explain a visa denial. *Id.* at 104 (citation omitted); see *id.* at 103. The citation of Section 1182(a)(3)(B) met that standard, he found, because it indicated that the officer's determination "was controlled by specific statutory factors"—thus demonstrating its "facial[] legitima[cy]." *Id.* at 104-105. Justice Kennedy also noted that Section 1182(a)(3)(B) sets forth "discrete factual predicates"—thus indicating that the officer had a "bona fide factual basis" for the decision. *Id.* at 105.

In so concluding, Justice Kennedy rejected the Ninth Circuit's view that the government needed to provide "additional factual details" underlying the inadmissibility determination. *Din*, 576 U.S. at 105; see *id.* at 106. He also rejected the argument that the government needed to cite a particular provision within Section 1182(a)(3)(B), which includes numerous subsections and cross-references. *Id.* at 105-106. Invoking Section 1182(b)(3), he recognized that Congress has specifically exempted consular officers from the general obligation to cite a "specific provision * * * of law" when a visa denial is based on Section 1182(a)(3). *Id.* at 106 (quoting 8 U.S.C. 1182(b)(1)).

Four Justices dissented in *Din*, concluding that Din "possesse[d] the kind of 'liberty' interest to which the Due Process Clause grants procedural protection" and that the government was required to do more than cite the terrorist-activity bar to explain the denial. 576 U.S. at 107, 112-113 (Breyer, J., dissenting).[4]

**B. Proceedings Below**

1. Respondent Luis Ernesto Asencio-Cordero is a citizen of El Salvador who is married to respondent Sandra Muñoz, a citizen of the United States. App., *infra*, 4a. Muñoz filed a family-based immigrant visa petition on her husband's behalf, which USCIS approved.

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[4] This Court also reviewed a U.S. citizen's challenge to a decision denying entry to a foreign relative in *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018), which concerned a presidential proclamation barring entry to foreign nationals from particular countries. But the Court did not decide whether consular nonreviewability applied to some of those challenges, see *id.* at 2407, and it declined to decide whether the *Mandel* standard governed the plaintiffs' constitutional claim (based on the government's "sugges[tion]" that a different standard might be appropriate in that case), *id.* at 2420.

*Id.* at 5a. Asencio-Cordero then applied for an immigrant visa and appeared for an interview at the U.S. Consulate in San Salvador. *Ibid.* In December 2015, a consular officer denied Asencio-Cordero's application in a written notice citing Section 1182(a)(3)(A)(ii), the provision that makes a noncitizen inadmissible if the officer believes that he will engage in "unlawful activity" in the United States. *Id.* at 5a-6a.

Respondents protested the denial, and in April 2016, the case was forwarded for further review within the consulate; that review did not change the decision. App., *infra*, 6a. Respondents continued to contact the State Department, and sometime between late April and early May, they submitted a declaration from a "gang expert" who stated that none of Asencio-Cordero's tattoos was "'representative of the Mara Salvatrucha[] gang or any other known criminal street gang.'" *Id.* at 6a-7a & n.9 (citation omitted; brackets in original). On May 18, 2016, a State Department official informed respondents that the Department had concurred in the ineligibility finding, and on May 19, 2016, the consulate notified them that additional reviews had not "revealed any grounds to change the finding of inadmissibility." *Id.* at 7a-8a.

2. In January 2017, respondents filed this suit seeking review of the visa decision. App., *infra*, 8a. As relevant here, respondents argued that the denial of Asencio-Cordero's visa was "not facially legitimate and bona fide" and "infringed on Muñoz's fundamental rights." *Ibid.* The government filed a motion to dismiss, invoking consular nonreviewability. *Id.* at 9a.

In December 2017, the district court granted the government's motion in part and denied it in part. App., *infra*, 73a-89a. Although the court agreed with the

government that consular nonreviewability precludes Asencio-Cordero from challenging his visa denial, the court relied on Ninth Circuit precedent to find that his U.S.-citizen spouse has a liberty interest sufficient to obtain some form of review. *Id.* at 80a-81a. The court also determined, relying on Ninth Circuit precedent treating Justice Kennedy's *Din* concurrence as controlling, that the statutory ground of inadmissibility cited in Asencio-Cordero's case—the unlawful-activity bar in Section 1182(a)(3)(A)(ii)—does not contain "discrete factual predicates." *Id.* at 81a-84a (citation omitted); see *id.* at 79a. The court therefore believed that citing the statute alone was an insufficient explanation under *Mandel*. *Id.* at 86a.

The district court ordered limited discovery. App., *infra*, 10a-11a. In November 2018, the government submitted a declaration of a State Department attorney adviser, Matt McNeil. *Id.* at 10a; see *id.* at 123a-125a (McNeil Declaration). The declaration explained that the consular officer refused Asencio-Cordero's visa application under Section 1182(a)(3)(A)(ii) based on a determination that he was "a member of a known criminal organization identified in 9 [Foreign Affairs Manual] 302.5-4(b)(2), specifically MS-13." App., *infra*, 124a. The declaration also explained that the officer reached that conclusion based on "the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of [his] tattoos." *Ibid.*[5]

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[5] The government also submitted, for *in camera* review, State Department documents containing sensitive information describing the basis for the consular officer's belief that Asencio-Cordero was a member of MS-13. App., *infra*, 12a-13a & n.19. The district court did not rely on that *in camera* material in its summary judgment ruling. *Id.* at 59a n.12.

In March 2021, the district court granted summary judgment to the government. App., *infra*, 42a-72a. The court adhered to its earlier ruling that the citation of Section 1182(a)(3)(A)(ii) was insufficient standing alone. *Id.* at 57a-58a. But the court found that the McNeil Declaration supplied a further factual explanation: the consular officer's finding that Asencio-Cordero was a member of MS-13, "a recognized transnational criminal organization." *Id.* at 58a-59a; see *id.* at 60a. Because the denial was therefore based on a facially legitimate and bona fide reason, the court ruled that consular nonreviewability precludes respondents' challenges to the Department's decision. *Id.* at 64a.

3. A divided panel of the Ninth Circuit vacated and remanded. App., *infra*, 1a-41a.

a. The court of appeals first affirmed the district court's ruling that Muñoz has a protected liberty interest in her husband's visa application sufficient to give rise to certain procedural protections. App., *infra*, 15a-18a. The court adhered to its pre-*Din* precedent holding that, because the Due Process Clause protects "freedom of personal choice in matters of marriage and family life," a U.S. citizen possesses a protected liberty interest in "*constitutionally adequate procedures* in the adjudication of a noncitizen spouse's visa application." *Id.* at 15a-16a (quoting *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008)) (brackets omitted). The court also stated that this Court's decision in *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), had "reinforce[d]" that view. App., *infra*, 16a-17a.

b. Applying the *Mandel* standard, the court of appeals considered whether the government had provided a "facially legitimate and bona fide reason" for the denial of Asencio-Cordero's visa. App., *infra*, 19a. On

appeal, the government had continued to argue that the consular officer's citation of Section 1182(a)(3)(A)(ii) was sufficient under Justice Kennedy's *Din* concurrence and 8 U.S.C. 1182(b)(3). The court acknowledged that Justice Kennedy had found the government's citation of the terrorist-activity provision sufficient in *Din*. App., *infra*, 21a. But the court believed the unlawful-activity provision is different, on the theory that it does not "contain[] discrete factual predicates" because it "does not specify the type of lawbreaking that will trigger a visa denial." *Id.* at 19a.

The court of appeals thus agreed with the district court that the government was required to provide the underlying "factual basis" for the officer's conclusion that the statute applied. App., *infra*, 20a; see *id.* at 21a-22a. The court of appeals further agreed that the explanation in the McNeil Declaration—that the consular officer believed Asencio-Cordero was a member of MS-13—was sufficient. *Id.* at 22a-25a.

c. The court of appeals, however, went on to hold that the necessary factual explanation had not been provided to respondents in a "timely" manner. App., *infra*, 25a-33a. The court reasoned that "due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of [a protected] interest." *Id.* at 29a (citing *Goldberg* v. *Kelly*, 397 U.S. 254, 267-268 (1970)). The court thus determined that the government is required to provide a constitutionally adequate reason for a visa denial, including a further factual explanation if necessary, "within a reasonable time" after the decision itself. *Id.* at 32a; see *id.* at 29a n.33.

Observing that the government had "waited almost three years" after the initial visa denial to provide

respondents with the McNeil Declaration "and did so only when prompted by judicial proceedings," the court of appeals found that the explanation had been untimely. App., *infra*, 25a-26a; see *id.* at 33a. The court declined to decide what would constitute "reasonable timeliness" in future cases, indicating that the cutoff might fall somewhere between 30 days and one year. *Id.* at 33a. The court further concluded that the "failure" to provide a timely explanation resulted in the government's forfeiture of consular nonreviewability—such that the underlying visa decision cannot be "shield[ed] * * * from judicial review," and "[t]he district court may 'look behind' the government's decision." *Ibid.* (citation omitted). The court therefore vacated the judgment and remanded for consideration of the merits of respondents' claims. *Ibid.*

d. Judge Lee dissented. App., *infra*, 34a-41a. He agreed that the government had provided a facially legitimate and bona fide reason for the visa denial, but believed that the majority had "infring[ed] on the Executive Branch's power to make immigration-related decisions" "by grafting a new 'timeliness' due process requirement onto consular officers' duties." *Id.* at 34a. Judge Lee deemed the majority's timeliness requirement "potentially unworkable." *Id.* at 39a; see *id.* at 39a-40a. He also pointed out that the withdrawal of consular nonreviewability on the basis of a delayed explanation was especially unjustified in this case given that, as early as five months after the initial denial, respondents had submitted evidence to the State Department seeking to rebut the apparent conclusion that Asencio-Cordero was a member of MS-13. *Id.* at 38a.

4. The court of appeals denied the government's petition for rehearing en banc. App. *infra*, 90a-91a. Ten judges dissented in two opinions.

a. Judge Bress's dissent, joined by Judge Lee, agreed with the panel dissent and concluded that "the clear legal infirmity in [the panel's] new timing rule—and the confusion it will surely cause—provides more than sufficient reason to conclude * * * that the government should easily prevail." App., *infra*, 91a.

b. Judge Bumatay, whose dissenting opinion was joined in full by six other judges, disagreed with each of the panel majority's three holdings. App., *infra*, 92a-122a. With respect to the first, he explained that the panel erred in "reaffirm[ing]" the Ninth Circuit's "recognition of a U.S. citizen's due process right over an alien spouse's visa denial"—a holding that "reinforces a split with every other circuit to address this issue." *Id.* at 97a; see *id.* at 120a-122a.

Judge Bumatay also disagreed with the panel's holding that the government needed to provide a further factual explanation in addition to citing a statutory ground of inadmissibility. App., *infra*, 112a-113a, 111a-115a. He emphasized that "[o]ther circuits * * * have deferred to the government's citation of valid statutory bars to meet its notice requirements" and that the panel's decision directly conflicts with the D.C. Circuit's intervening decision in *Colindres* v. *United States Department of State*, 71 F.4th 1018, 1024 (2023),[6] which held "that citing the 'unlawful activity' bar alone satis-

[6] On September 21, 2023, the plaintiffs-appellants in *Colindres* served the government with a petition for a writ of certiorari to review the D.C. Circuit's decision. That petition has not appeared on this Court's public docket as of the time this petition is being finalized.

fies the government's notice obligation." App., *infra*, 95a. Agreeing with the D.C. Circuit, Judge Bumatay concluded that the panel had misinterpreted Justice Kennedy's concurrence in *Din* and disregarded Congress's suspension of the statutory notice requirement when a visa is denied based on a security-related ground in Section 1182(a)(3). *Id.* at 112a-114a.

Finally, Judge Bumatay (in a portion of the opinion joined by Judges Collins, Lee, and Bress in addition to the six others) agreed with the panel dissent that the panel's creation of a novel "timeliness" requirement for preserving the availability of consular nonreviewability is "a serious error," App., *infra*, 116a, that "place[s] new burdens on the Executive's discretion without explaining how it can comply with those burdens," *id.* at 119a.

## REASONS FOR GRANTING THE PETITION

The court of appeals erred in all three of its rulings in this case. The Ninth Circuit stands alone, in conflict with several other circuits, in holding that a U.S. citizen has a constitutionally protected liberty interest in the admission of her foreign-national spouse to the United States. This Court previously granted certiorari to settle that conflict in *Kerry* v. *Din*, 576 U.S. 86 (2015), and the issue continues to warrant this Court's review.

In addition, even assuming that a protected interest is implicated here and that limited review is therefore available under the standard in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Ninth Circuit erred in ruling that a consular officer's citation of a valid statutory ground of inadmissibility, 8 U.S.C. 1182(a)(3)(A)(ii), is insufficient to provide a "facially legitimate and bona fide reason" for a visa denial. The unlawful-activity bar is materially similar to the terrorist-activity bar at issue in *Din*, and for the reasons explained in Justice

Kennedy's concurring opinion in that case, the Ninth Circuit erred in once again requiring the government to supply a further factual explanation in addition to the statutory basis of inadmissibility. That ruling is the subject of a direct conflict with the D.C. Circuit that warrants this Court's intervention.

Finally, the Ninth Circuit compounded its first two errors by requiring the government to provide its further factual explanation to respondents within a "reasonable time" after the visa denial, or else forfeit the ability to invoke consular nonreviewability. No other circuit has ever imposed such a requirement, for good reason: The Ninth Circuit's new timeliness mandate has no basis in this Court's consular-nonreviewability cases and represents a serious encroachment on the separation of powers. If allowed to stand, it will cause considerable disruption in U.S. consulates.

### A. Certiorari Is Warranted To Decide Whether A U.S. Citizen Has A Protected Liberty Interest In The Visa Application Of A Noncitizen Spouse

The Ninth Circuit erred in ruling that a U.S. citizen has a liberty interest, protected under the Fifth Amendment Due Process Clause, that is implicated by the denial of a visa to a noncitizen spouse. This Court granted certiorari in *Din* to address that issue, see *Din*, 576 U.S. at 90 (plurality opinion), but it did not resolve the question and the Ninth Circuit continues to disagree with every other circuit that has decided it.

1. This Court has repeatedly recognized that a nonresident noncitizen abroad has no constitutional rights in connection with his application for a visa to enter the United States, and therefore no constitutional basis to obtain judicial review of a visa denial. See, *e.g.*, *Mandel*, 408 U.S. at 762, 766-768; *Trump* v. *Hawaii*, 138 S. Ct.

2392, 2418-2419 (2018). The Ninth Circuit, however, has concluded that a U.S. citizen is nevertheless entitled to judicial review of her spouse's application as a matter of procedural due process. See, *e.g.*, *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1062 (2008). The Ninth Circuit reaffirmed that conclusion in this case by recognizing a "protected liberty interest in '*constitutionally adequate procedures* in the adjudication of a non-citizen spouse's visa application,'" which the court believed follows from this Court's recognition of a fundamental "'right to marry.'" App., *infra*, 16a (brackets and citations omitted). That was error.

This Court has long recognized that foreign nationals may be denied admission in the political branches' complete discretion, as an exercise of those branches' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Mandel*, 408 U.S. at 766 (citation omitted); see, *e.g.*, *Wong Wing* v. *United States*, 163 U.S. 228, 233 (1896) (reaffirming "[t]he power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention"); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (citation and internal quotation marks omitted).

That plenary authority has been respected even when Congress's choices or the Executive's enforcement decisions prevented family members from residing with each other in the United States. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 539,

543-544, 547 (1950) (upholding Executive's power to deny entry to U.S. citizen's noncitizen spouse based on confidential "security reasons" without providing a hearing); see also *Fiallo*, 430 U.S. at 798 (explaining that "we have no judicial authority to substitute our political judgment for that of the Congress," even when "statutory definitions deny preferential status to parents and children who share strong family ties"). As Judge Bumatay's dissent explained, recognizing "a 'liberty interest' for a U.S. citizen over a visa denial" would "directly conflict[] with the political branches' plenary authority" in this area. App., *infra*, 120a-121a.

There is, of course, a fundamental liberty interest in the "rights to marital privacy and to marry and raise a family." *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); see *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997) ("[T]he 'liberty' specially protected by the Due Process Clause includes the right[] to marry."). But a visa denial does not infringe the right to marry. "[T]he Federal Government here has not attempted to forbid a marriage." *Din*, 576 U.S. at 94 (plurality opinion). Nor has it "refused to recognize [Muñoz's] marriage" or to afford the marriage full legal effect. *Id.* at 101. And it has not prohibited a married couple from living together or otherwise intruded on their "marital privacy." *Griswold*, 381 U.S. at 495 (Goldberg, J., concurring). Instead, it has simply exercised its sovereign authority to deny admission to a noncitizen. Muñoz's fundamental right to marry does not entail a right to compel the United States to admit her noncitizen spouse.

For similar reasons, the court of appeals' emphasis on this Court's post-*Din* decision in *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), see App., *infra*, 16a-17a, is

mistaken. In that case, the Court reaffirmed its precedents holding that "the right to marry is protected by the Constitution." 576 U.S. at 664. But the Court did not implicitly resolve a question in the distinct spousal immigration context that the *Din* Court had specifically left open only eleven days earlier. See *Din*, 576 U.S. at 102 (Kennedy, J., concurring in the judgment). And as the court of appeals acknowledged, *Obergefell* was "reiterat[ing] longstanding precedent that 'the right to marry is a fundamental right inherent in the liberty of the person.'" App., *infra*, 16a (citation omitted). As explained, that long-recognized right is not implicated here.

The court of appeals additionally noted that U.S. citizens have a liberty interest in "residing in their country of citizenship," App., *infra*, 17a (citing *Agosto* v. *INS*, 436 U.S. 748, 753 (1978)), and reasoned that the "cumulative effect" of a visa denial to a foreign spouse is to force the citizen to choose between "one fundamental right" and "another," *id.* at 17a-18a. But "[n]either [Muñoz's] right to live with her spouse nor her right to live within this country is implicated here." *Din*, 576 U.S. at 101 (plurality opinion). In insisting otherwise, the court of appeals misunderstood the "simple distinction between government action that directly affects a citizen's legal rights . . . and action that is directed against a third party and affects the citizen only indirectly or incidentally." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 767 (2005) (quoting *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980)).

This Court recognized "[o]ver a century ago" that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon*, 447 U.S. at 789. That

principle holds even where those incidental effects impose substantial hardships on marital or other family relationships. "[M]embers of a family," for example, "may suffer serious trauma" if an "errant father" is sentenced to prison, but those family members "surely * * * have no constitutional right to participate in his trial or sentencing." *Id.* at 788. The same is true here.

2. As the government explained when successfully seeking certiorari in *Din*, see Pet. at 18-21, *Din*, *supra* (No. 13-1402), the Ninth Circuit's recognition of a U.S. citizen's constitutional interest in immigration decisions affecting a noncitizen spouse conflicts with numerous decisions from other courts of appeals. In the years after *Din* failed to resolve the question, that conflict has not dissolved; to the contrary, courts on both sides have reaffirmed their positions.

For example, in *Bangura* v. *Hansen*, 434 F.3d 487 (2006), the Sixth Circuit ruled that the plaintiffs (a U.S. citizen and his noncitizen wife) failed to allege a liberty interest in a spousal immigration petition that would allow them to state a procedural due process claim. See *id.* at 495-497. The court accepted that plaintiffs "have a fundamental right to marry," but explained that "[a] denial of an immediate relative visa does not infringe upon" that right. *Id.* at 496. And after *Din*, Chief Judge Sutton's opinion for the court in *Baaghil* v. *Miller*, 1 F.4th 427 (6th Cir. 2021), reaffirmed that U.S. citizens "do not have a constitutional right to require the National Government to admit noncitizen family members into the country." *Id.* at 433-434.

Similarly, in *Swartz* v. *Rogers*, 254 F.2d 338, cert. denied, 357 U.S. 928 (1958), the D.C. Circuit considered a U.S. citizen's claim that her husband's deportation burdened her constitutional "right, upon marriage, to

establish a home, create a family, [and] have the society and devotion of her husband." *Id.* at 339. The D.C. Circuit rejected that argument, pointing out that "deportation would not in any way destroy the legal union which the marriage created"; the "physical conditions of the marriage may change, but the marriage continues." *Ibid.* And since the Ninth Circuit's decision below, the D.C. Circuit has reaffirmed its position, explaining that "'[m]arriage is a fundamental right,'" but "a citizen's right to marry is not impermissibly burdened when the government refuses her spouse a visa." *Colindres* v. *United States Dep't of State*, 71 F.4th 1018, 1021 (2023) (quoting *Obergefell*, 576 U.S. at 673).

Decisions from the First, Second, Third, and Fifth Circuits have reached the same conclusion in visa-denial, removal, and other immigration contexts. See, *e.g.*, *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (rejecting U.S. citizen's claim of constitutional interest in noncitizen spouse's relief from deportation and explaining that the federal government "has done nothing more than to say that the residence of one of the marriage partners may not be in the United States"), cert. denied, 402 U.S. 983 (1971); *Burrafato* v. *United States Dep't of State*, 523 F.2d 554, 554-557 (2d Cir. 1975) (rejecting argument that "the constitutional rights of a citizen wife had been violated by denial of her alien husband's visa application without reason" and declining to apply *Mandel*), cert. denied, 424 U.S. 910 (1976); *Bakran* v. *Secretary, United States Dep't of Homeland Sec.*, 894 F.3d 557, 564-565 (3d Cir. 2018) (agreeing, based on "Congress's plenary authority to set the conditions for an alien's entry into the United States," that a U.S. citizen does not have "a constitutional right to have his or her alien spouse reside in the United States"); *Bright* v.

*Parra*, 919 F.2d 31, 34 (5th Cir. 1990) (per curiam) ("United States citizen spouses have no constitutional right to have their alien spouses remain in the United States").[7] That conflict warrants this Court's review.

### B. Certiorari Is Warranted To Review The Ninth Circuit's Requirement That The Government Do More Than Cite A Valid Statutory Ground of Inadmissibility To Explain A Visa Denial

The Court should also review the Ninth Circuit's further ruling that, assuming a liberty interest supports a judicial inquiry into a visa denial in this context, a consular officer's citation of the unlawful-activity bar in 8 U.S.C. 1182(a)(3)(A)(ii) does not qualify under *Mandel* as a "facially legitimate and bona fide reason," 408 U.S. at 770, to explain the denial. The Ninth Circuit's decision contravenes *Mandel* and Justice Kennedy's concurrence in *Din* applying that limited standard of review to a materially similar statutory provision. It also overrides Congress's determination, in 8 U.S.C. 1182(b)(3), that consular officers need not provide specific explanations when denying visas on security-related grounds. And it squarely conflicts with the D.C. Circuit's intervening decision in *Colindres* regarding a visa denial based on the very same statutory ground of inadmissibility.

1. a. The *Mandel* standard represents a "modest exception" to the rule of consular nonreviewability. *Baaghil*, 1 F.4th at 432. Under *Mandel*, when the

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[7] Since *Din*, some circuits have avoided deciding the question, instead applying *Mandel* and ruling in the government's favor. See *Del Valle* v. *Secretary of State*, 16 F.4th 832, 838, 840 n.3, 841 (11th Cir. 2021); *Sesay* v. *United States*, 984 F.3d 312, 315-316 & n.2 (4th Cir. 2021); *Yafai* v. *Pompeo*, 912 F.3d 1018, 1021 (7th Cir. 2019) (Barrett, J.).

government provides a "facially legitimate and bona fide reason" to explain a visa denial, a court may "neither look behind the exercise of that discretion, nor test it by balancing its justification against the [constitutional] interests of those who seek" the applicant's admission. *Mandel*, 408 U.S. at 770. The second question presented in *Din*—as in this petition—was whether the government's citation of a valid statutory ground of inadmissibility, standing alone, was sufficient to meet that standard. See 576 U.S. at 102 (Kennedy, J., concurring in the judgment). In *Din*, Justice Kennedy and Justice Alito concluded that it was. *Ibid.*

The decision below accordingly focused on Justice Kennedy's analysis in *Din* to assess whether the citation of Section 1182(a)(3)(A)(ii) was sufficient in this case. App., *infra*, 3a & n.3, 19a-21a.[8] But the court of appeals misinterpreted that opinion. It seized upon Justice Kennedy's statement that the government did

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[8] As the opinion in *Din* that supported the judgment on the narrowest grounds, Justice Kennedy's concurrence is controlling on the lower courts under *Marks* v. *United States*, 430 U.S. 188, 193 (1977). See, *e.g.*, App., *infra*, 3a & n.3; see also *Trump* v. *Hawaii*, 138 S. Ct. at 2440 (Sotomayor, J., dissenting) (calling the *Din* concurrence "controlling"). This Court has not always treated such opinions as equally controlling on this Court as a matter of horizontal stare decisis. See, *e.g.*, *Hughes* v. *United States*, 138 S. Ct. 1765, 1771-1772 (2018) (deciding an issue on which this Court had failed to reach a majority in *Freeman* v. *United States*, 564 U.S. 522 (2011), without first deciding which of the *Freeman* opinions had been controlling under *Marks*); cf. *United States* v. *Duvall*, 740 F.3d 604, 611 n.2 (D.C. Cir. 2013) (Kavanaugh, J., concurring in denial of rehearing) (noting that "[w]hen the Supreme Court itself applies *Marks*, it is not bound in the same way that lower courts are"). Regardless of whether Justice Kennedy's concurrence is formally binding or merely persuasive, the government's citation of Section 1182(a)(3)(A)(ii) in this case satisfies the concurrence's analysis.

not have to provide a factual explanation in addition to the citation of the terrorist-activity bar in Section 1182(a)(3)(B) because that provision "specifies discrete factual predicates." *Din*, 576 U.S. at 105; see App., *infra*, 3a, 19a. The court of appeals then reasoned that the unlawful-activity bar in Section 1182(a)(3)(A)(ii) does not have "discrete factual predicates" because the provision is not limited to a specified type of lawbreaking. App., *infra*, 19a-20a.

That conclusion is mistaken. As the D.C. Circuit recently explained, Section 1182(a)(3)(A)(ii) *does* "specif[y] a factual predicate for denying a visa: The alien must 'seek[] to enter the United States to engage . . . [in] unlawful activity.'" *Colindres*, 71 F.4th at 1024 (quoting 8 U.S.C. 1182(a)(3)(A)(ii)) (second and third sets of brackets in original).[9]

It is true that different kinds of lawbreaking could serve as the basis for a finding that the statutory bar applies. But that was also the case with respect to the terrorist-activity bar in *Din*. See *Colindres*, 71 F.4th at 1024-1025. As Justice Kennedy acknowledged—and as the dissent in *Din* emphasized—the terrorist-activity bar has ten subsections, with many cross-references, covering a wide variety of terrorism-related grounds of inadmissibility. See 576 U.S. at 105; see also *id.* at 113-

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[9] In this case, the court of appeals stated that the government had "abandoned the argument that the statute at issue here contains discrete factual predicates." App., *infra*, 19a. As Judge Bumatay explained in his dissent from denial of rehearing, that was wrong: "In both the district court and the answering brief in [the court of appeals], the government repeatedly argued that citing § 1182(a)(3)(A)(ii) was sufficient because that provision contained adequate factual predicates." *Id.* at 111a; see Gov't C.A. Br. 15-16, 20-21, 25-28.

114 (Breyer, J., dissenting) (noting that Section 1182(a)(3)(B) sets forth "not one reason, but dozens," which "cover a vast waterfront of human activity"). Justice Kennedy nevertheless declined to require the government to be any more specific about which ground supported the visa refusal, even though Din may have had very little idea what finding had been made regarding her husband's inadmissibility. See *id.* at 105-106.

Instead, as Judge Bumatay's dissent correctly explained, Justice Kennedy's concurrence was simply contrasting the terrorist-activity bar—which required the consular officer to make *some* kind of fact-based finding—with the wholly discretionary basis for the waiver denial that was at issue in *Mandel*. App., *infra*, 112a; see *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment). Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's decision that a noncitizen is not eligible for a visa must be tethered to the legal provisions that define such ineligibility. See, *e.g.*, 8 U.S.C. 1182(a), 1201(g). In other words, when a consular officer cites an inadmissibility provision that requires a fact-based determination, the citation itself "indicates" that the government "relied upon a bona fide factual basis for denying a visa." *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment).

Because a citation of Section 1182(a)(3)(A)(ii) thus supplies a facially legitimate and bona fide reason within the meaning of the *Din* concurrence and *Mandel*, the Ninth Circuit was wrong to require the government to provide any further explanation of the basis for its finding that Asencio-Cordero is inadmissible. If there were any doubt, this Court dispelled it in *Trump* v.

*Hawaii*, when it explained that "[i]n *Din*, Justice Kennedy reiterated that respect for the political branches' broad power over the creation and administration of the immigration system meant that the Government need provide only a statutory citation to explain a visa denial." 138 S. Ct. at 2419 (citation and internal quotation marks omitted).

b. In addition to contravening this Court's cases, the court of appeals' holding also conflicts with a federal statute, 8 U.S.C. 1182(b)(3)—a provision that the court did not even mention. See App., *infra*, 114a-115a (Bumatay, J., dissenting from denial of rehearing).

Section 1182(b)(3) provides that if a consular officer bases a visa refusal on any of the security-related grounds in Section 1182(a)(2) or (3)—including the unlawful-activity ground at issue here—then the officer is not obligated to provide "timely written notice" of the specific basis for the refusal. 8 U.S.C. 1182(b)(1) and (3). Congress enacted that protection out of concern that releasing such information to foreign-national applicants could have serious law-enforcement or national-security consequences. See H.R. Rep. No. 383, 104th Cong., 1st Sess. 101-102 (1995); see also *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment). Such concerns are not eliminated when the noncitizen happens to have a U.S.-citizen spouse. Yet without even acknowledging Section 1182(b)(3), the Ninth Circuit has countermanded Congress's "considered judgment" based on its own weighing of the costs and benefits in this "sensitive area." *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment). The court of appeals' implicit nullification of a federal statute in this context is itself reason for this Court to step in. See *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001) (noting the "heightened

deference to the judgments of the political branches with respect to matters of national security").

2. The Ninth Circuit's requirement that the government provide a further factual explanation under these circumstances also diverges from its sister circuits.

As noted, the holding in this case directly conflicts with the D.C. Circuit's decision in *Colindres* regarding the same unlawful-activity ground of inadmissibility. That court squarely held that, under the limited *Mandel* standard of review, "the Government need only cite a statute listing a factual basis for denying a visa," and it found that the government had done so by citing Section 1182(a)(3)(A)(ii). *Colindres*, 71 F.4th at 1020; see *id.* at 1024 (explaining that Section 1182(a)(3)(A)(ii) supplies "a factual predicate for denying a visa"). All members of the D.C. Circuit panel acknowledged the Ninth Circuit's contrary decision. See *id.* at 1024; see also *id.* at 1028 (Srinivasan, C.J., concurring in part and concurring in the judgment) (noting the majority's creation of a circuit split).[10]

In addition to that square conflict regarding the government's invocation of Section 1182(a)(3)(A)(ii), the decision below stands in significant tension with other circuits' approach to the *Mandel* standard. See App., *infra*, 95a-96a (Bumatay, J., dissenting from denial of rehearing). No other court of appeals in a post-*Din* case has ever faulted the government for failing to provide a further factual explanation when citing a statutory ground of inadmissibility in Section 1182(a). See *id.* at 96a. And two other circuits, taking their cue from

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[10] Chief Judge Srinivasan disagreed with the majority's decision to reach this question, but indicated that he "might well side with [his] colleagues if it were necessary to decide." *Colindres*, 71 F.4th at 1028 (concurring in part and concurring in the judgment).

Justice Kennedy and this Court's later paraphrase of his *Din* opinion in *Trump* v. *Hawaii*, have held that "a 'statutory citation' to the pertinent restriction, without more, suffices." *Baaghil*, 1 F.4th at 432 (citation omitted); see *Sesay* v. *United States*, 984 F.3d 312, 316 (4th Cir. 2021) (Wilkinson, J.) ("The Supreme Court has unambiguously instructed that absent some clear directive from Congress or an affirmative showing of bad faith, the government must simply provide a valid ineligibility provision as the basis for the visa denial."); cf. *Yafai* v. *Pompeo*, 924 F.3d 969, 970 (7th Cir. 2019) (Barrett, J., respecting the denial of rehearing) ("The Supreme Court has held that, absent a showing of bad faith, a consular officer need only cite to a statute under which the application is denied.").

In the absence of a definitive resolution of the threshold question whether any form of review should take place at all, see pp. 16-22, *supra*, the State Department will be under different notice obligations depending on where a visa applicant's U.S.-citizen spouse files suit. This Court has previously stepped in when the Ninth Circuit required the government to provide the "factual allegations" underlying its security-related inadmissibility determinations, see *Din* v. *Kerry*, 718 F.3d 856, 861 (2013), vacated, 576 U.S. 86 (2015), and the Court should do so again here.

### C. The Ninth Circuit's Decision To Condition Consular Nonreviewability On A Novel And Vague Requirement For Timely Notice Independently Warrants Review

Finally, even assuming that a visa refusal could implicate a U.S. citizen's due-process rights *and* that a consular officer must provide a further factual explanation when refusing such a visa under Section 1182(a)(3)(A)(ii), the court of appeals badly erred in

holding that the State Department must provide that additional explanation within a "reasonable time" after the denial or else forfeit the rule of consular nonreviewability in later litigation about the decision. App., *infra*, 28a-33a. Even if the court were correct in asserting that "receiving timely notice of the reason for the [visa] denial is essential for effectively challenging an adverse determination," *id.* at 31a, but see p. 30, *infra*, a failure to receive the *Mandel*-required explanation within a particular timeframe cannot justify the Ninth Circuit's unprecedented willingness to permit judicial review of the merits of the denial.

As the three dissents in this case all emphasized, the Ninth Circuit's requirement that the government provide a *Mandel*-compliant "facially legitimate and bona fide" reason for a visa denial within a set period of time after the decision is entirely unprecedented; neither this Court nor any other circuit has ever imposed such a condition on the government's ability to invoke consular nonreviewability in court. See App., *infra*, 94a, 96a, 115a, 118a-119a (Bumatay, J., dissenting from denial of rehearing); see also *id.* at 34a, 36a, 39a (Lee, J., dissenting); *id.* at 91a (Bress, J., dissenting from denial of rehearing). Nor does the requirement have any statutory basis. To the contrary, Congress specifically *exempted* consular officers from the obligation to provide "timely written notice" of the ground for an inadmissibility decision that is based on Section 1182(a)(3)(A)(ii). 8 U.S.C. 1182(b)(3); see App., *infra*, 117a-118a (Bumatay, J., dissenting from denial of rehearing).

The Ninth Circuit grounded its novel timeliness requirement in what it described as "core due-process requirements," invoking *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)—a decision about the process due when a State

terminates public-assistance benefits. App., *infra*, 28a; see *id.* at 29a, 31a. But *Goldberg* is inapposite. In that case, the Court emphasized that the public-assistance benefits were "a matter of statutory entitlement for persons qualified to receive them," *Goldberg*, 397 U.S. at 262, and held that "timely and adequate notice" was necessary to enable a recipient to mount a "'meaningful'" pre-termination challenge, *id.* at 267-268 (citation omitted).

Here, by contrast, there is no statutory entitlement to a visa, and consular nonreviewability forecloses any argument that an applicant is entitled to a "meaningful" review of a denial. See pp. 3-5, *supra*. Nor is *Mandel*'s "deferential standard" meant to enable U.S. citizens to "'probe and test the justifications'" of entry decisions. *Trump* v. *Hawaii*, 138 S. Ct. at 2419 (citation omitted). Again, Justice Kennedy's analysis in *Din* illustrates the point: He declined to require the consular officer to cite a specific subsection within the terrorist-activity bar even though providing such information would have enabled Din to "more easily * * * mount a challenge to her husband's visa denial." 576 U.S. at 105-106 (Kennedy, J., concurring in the judgment).

The penalty that the court of appeals imposed for a violation of its new timeliness requirement—that "the government is not entitled to invoke consular nonreviewability to shield its visa decision from judicial review"—is even more ill-considered. App., *infra*, 33a. The court had already found the reason given in the McNeil Declaration—that the consular officer believed Asencio-Cordero to be a member of MS-13—sufficient under *Mandel*. *Id.* at 22a, 23a-24a. Unless the delay suggests impermissible bad faith (which none of the courts below found, see *id.* at 61a-64a; *id.* at 36a (Lee,

J., dissenting)), there is no basis for instructing the district court to "look behind" the determination, *id.* at 33a (citation omitted), or for requiring the State Department to meet a substantively higher standard to sustain the visa refusal itself. See *id.* at 91a (Bress, J., dissenting from denial of rehearing). The court of appeals' new rule thus represents a remarkable encroachment upon the separation of powers. See *id.* at 36a, 39a (Lee, J., dissenting); *id.* at 96a, 116a (Bumatay, J., dissenting from denial of rehearing).[11]

### D. The Questions Presented Are Important And This Court's Intervention Is Necessary

In addition to their legal infirmities, the Ninth Circuit's holdings will have serious adverse consequences for visa adjudications in U.S. consulates worldwide and for the Nation's national-security interests. Those considerations also counsel strongly in favor of this Court's review on all three questions presented.

If left to stand, the decision below will cause considerable disruption in U.S. consulates around the world as the State Department attempts to adhere to the Ninth Circuit's requirement that consular officers timely provide additional explanations for a subset of visa denials implicating the rulings in this case. Compounding that "confusion," App., *infra*, 40a (Lee, J., dissenting); *id.* at 91a (Bress, J., dissenting from denial of rehearing), the

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[11] The court of appeals' imposition of that remedy was especially unjustified in this case, where there was evidence that respondents had long been aware of the likely basis for the consular officer's citation of Section 1182(a)(3)(A)(ii)—the belief that Asencio-Cordero was a member of MS-13. Around five months after the original visa denial, respondents sent the State Department a declaration from a "gang expert" contesting that very conclusion. App., *infra*, 38a (Lee, J., dissenting); see *id.* at 7a.

court of appeals declined to set the outer bounds of what it considers "timely"—even while suggesting that the deadline could be as short as 30 days. See *id.* at 33a; see also *id.* at 119a (Bumatay, J., dissenting from denial of rehearing).

In addition, many visa refusals—including the refusal in this case, cf. note 5, *supra*—are based on law-enforcement-sensitive information or intelligence information. See, *e.g.*, 8 U.S.C. 1105(a) (directing the State Department to "maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States"); 8 U.S.C. 1187(c)(2)(F) (describing agreements with foreign countries to share information about individuals who "represent a threat to the security or welfare of the United States or its citizens"); 8 U.S.C. 1722 (requiring a data system "to provide current and immediate access to information in databases of Federal law enforcement agencies and the intelligence community that is relevant to determine whether to issue a visa"); 8 U.S.C. 1733 (establishing "terrorist lookout committees" within U.S. missions abroad to increase information-sharing).

A judicially imposed requirement that the government disclose the underlying factual basis for a security-related ground of inadmissibility to the applicant or the applicant's spouse is likely to have a chilling effect on the willingness of interagency and foreign-government partners to share information. Certain foreign sources of information, in particular, may have strong interests in avoiding any action that might tend to reveal their

assistance to the United States. And the Ninth Circuit's timeliness requirement only heightens those risks, since the government can no longer wait to divulge sensitive information in an *in camera* submission in court (which was already an inadequate solution, see *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment)).

For those reasons, and because of the serious errors in the Ninth Circuit's decision and the conflicts it creates with the decisions of this Court and of other courts of appeals, this Court's intervention is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2023

# APPENDIX

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 21-55365

SANDRA MUÑOZ; LUIS ERNESTO ASENCIO-CORDERO,
PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES DEPARTMENT OF STATE; ANTONY J. BLINKEN, UNITED STATES SECRETARY OF STATE; BRENDAN O'BRIEN, UNITED STATES CONSUL GENERAL, SAN SALVADOR, EL SALVADOR,
DEFENDANTS-APPELLEES

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Argued: Feb. 10, 2022
Filed: Oct. 5, 2022

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**OPINION**

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Before: MARY M. SCHROEDER, KERMIT V. LIPEZ,* and KENNETH K. LEE, Circuit Judges.

LIPEZ, Circuit Judge. After the government denied the immigrant visa application of plaintiff-appellant Luis Asencio-Cordero under 8 U.S.C. § 1182(a)(3)(A)(ii), Asencio-Cordero and his U.S.-citizen spouse, plaintiff-appellant Sandra Muñoz, sought judicial review of the government's visa decision and challenged the statute as

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* The Honorable Kermit V. Lipez, United States Circuit Judge for the First Circuit, sitting by designation.

unconstitutionally vague.[1] Concluding that the government was entitled to invoke the doctrine of consular nonreviewability to shield its decision from judicial review, the district court granted summary judgment on all claims to defendants-appellees, the U.S. Department of State, Secretary of State Antony Blinken, and U.S. Consul General in El Salvador, Brendan O'Brien. This appeal followed. Because we conclude that the government failed to provide the constitutionally required notice within a reasonable time period following the denial of Asencio-Cordero's visa application, the government was not entitled to summary judgment based on the doctrine of consular nonreviewability. We therefore vacate and remand to the district court for further proceedings.

## I.

Appellants' suit directly implicates the doctrine of consular nonreviewability, the longstanding jurisprudential principle that, "ordinarily, a consular official's decision to deny a visa to a foreigner is not subject to judicial review." *Khachatryan v. Blinken*, 4 F.4th 841, 849 (9th Cir. 2021) (quoting *Allen v. Milas*, 896 F.3d 1094, 1104 (9th Cir. 2018)). As with many judicially created rules, however, consular nonreviewability admits an exception. *See Kleindienst v. Mandel*, 408 U.S. 753, 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972). Where the denial of a visa affects the fundamental rights of a U.S. citizen, judicial review of the visa decision is permitted if the government fails to provide "a facially legitimate

[1] A variety of government officials and entities engaged with appellees during the visa process. We refer to them collectively as "the government."

and bona fide reason" for denying the visa, *id.*,[2] or if—despite the government's proffer of a facially legitimate and bona fide reason—the petitioner makes an "affirmative showing" that the denial was made in "bad faith," *Kerry v. Din*, 576 U.S. 86, 105, 135 S. Ct. 2128, 192 L. Ed. 2d 183 (2015) (Kennedy, J., concurring in the judgment).[3]

This circuit has distilled the analytic framework articulated in *Din* for evaluating whether the *Mandel* exception to consular nonreviewability applies to a petitioner's claim into a three-step inquiry. At steps one and two, we consider whether the government carried its burden of providing a "facially legitimate and bona fide reason" for the visa denial:

> First, we examine whether the consular officer denied the visa "under a valid statute of inadmissibility." Second, we consider whether, in denying the visa, the consular officer "cite[d] an admissibility statute that specifies discrete factual 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."

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[2] Although *Mandel* involved a visa waiver rather than a consular visa denial, its "holding is plainly stated in terms of the power delegated by Congress to 'the Executive[,]'" and this circuit has understood its reasoning to govern review of consular visa denials, too. See *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 n.1 (9th Cir. 2008).

[3] No opinion in *Din* garnered a majority. The Ninth Circuit has recognized and applied Justice Kennedy's concurrence as the controlling opinion. *Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016); *see also Allen*, 896 F.3d at 1106; *Khachatryan*, 4 F.4th at 851.

*Khachatryan*, 4 F.4th at 851 (citations omitted) (quoting *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016)).[4] Only if we conclude that the government gave a facially legitimate and bona fide reason for denying the visa do "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'" by the consular officials in-volved in the visa denial. *Id.* (quoting *Cardenas*, 826 F.3d at 1172).

## II.

### A. Factual Background

The following facts in this case are undisputed. Sandra Muñoz is a U.S. citizen. She married Luis Asencio-Cordero, a citizen of El Salvador, on July 2, 2010. Asencio-Cordero first arrived in the United States in 2005.[5] Together, he and Muñoz have a child, who is a U.S. citizen. Asencio-Cordero has multiple tattoos.

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[4] These two alternative methods for fulfilling the "facially legitimate and bona fide reason" standard come from *Cardenas*, where the consular officer relied on a statute lacking discrete factual predicates to deny a visa but the record nevertheless contained information providing a facial connection to the cited ground of inadmissibility. *See* 826 F.3d at 1172. We reasoned that either method would satisfy *Din*, *see id.*, even though in that case the government cited a statutory provision containing discrete factual predicates and the record contained information known to the petitioners that provided a facial connection to the stated ground of exclusion, *see* 576 U.S. at 105, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment).

[5] The record lacks detail about the circumstances of his arrival to the United States.

Muñoz filed an immigrant-relative petition for Asencio-Cordero,[6] which was approved along with an inadmissibility waiver. In April 2015, Asencio-Cordero returned to El Salvador for the purpose of obtaining his immigrant visa from the U.S. Consulate in San Salvador. He attended an initial interview at the Consulate on May 28, 2015. At all times, including during his visa interview, he has denied any association with a criminal gang.

In December 2015, the Consular Section denied Asencio-Cordero's visa application by citing 8 U.S.C. § 1182(a)(3)(A)(ii),[7] which states that "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United

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[6] The Immigration and Nationality Act ("INA") exempts immediate relatives from certain numerical limitations on immigration. INA § 201, 8 U.S.C. § 1151(b)(2)(A)(i). A non-citizen spouse of a U.S. citizen "shall be classified as an immediate relative under INA 201(b) if the consular officer has received from [the Department of Homeland Security, ("DHS")] an approved Petition to Classify Status of Alien Relative for Issuance of an Immigrant Visa, filed on the alien's behalf by the U.S. citizen and approved in accordance with INA 204, and the officer is satisfied that the alien has the relationship claimed in the petition." 22 C.F.R. § 42.21(a). Once DHS approves an immigrant-relative petition, the immediate relative must appear at the consular office in his or her place of residence, *id.* § 42.61(a), for an in-person interview with a consular officer, *id.* § 42.62(a), (b).

[7] Section 1182 of the U.S. Code codifies INA § 212. Section 1182(a) sets forth "[c]lasses of aliens ineligible for visas or admission," on "[h]ealth-related grounds," 8 U.S.C. § 1182(a)(1); "[c]riminal and related grounds," *id.* § 1182(a)(2); "[s]ecurity and related grounds," *id.* § 1182(a)(3), which encompasses the statutory provision at issue here; and "[p]ublic charge" grounds, *id.* § 1182(a)(4), among others. *See generally* 8 U.S.C. § 1182(a).

States to engage solely, principally, or incidentally in . . . any other unlawful activity" is inadmissible.[8]

Muñoz sought assistance from Congresswoman Judy Chu, who sent a letter on Muñoz's behalf to the State Department on January 20, 2016. The following day, Consul Landon R. Taylor responded to Congresswoman Chu's letter by again citing 8 U.S.C. § 1182(a)(3)(A)(ii). Counsel for Muñoz contacted the State Department on January 29, 2016, and again in April 2016, requesting the factual basis for the Consulate's determination that Asencio-Cordero was inadmissible.

On April 8, 2016, the Consulate notified Muñoz and Asencio-Cordero that his visa application would be forwarded to the immigration visa unit for review. On April 13, 2016, Consul Taylor notified appellants that "[t]he finding of ineligibility for [Asencio-Cordero] was reviewed by the Department of State in Washington, D.C., which concurred with the consular officer's decision. Per your request, our Immigration Visa Unit took another look at this case, but did not change the decision."

On April 18, 2016, counsel for appellants wrote to the State Department's Office of Inspector General and requested the "reason" for the inadmissibility decision. The letter stated counsel's belief that "an immigration visa application is being denied just for the simple fact that the applicant has tattoos when the rest of the un-

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[8] Section 1182(a)(3)(A)(ii) refers to "any other unlawful activity" because the preceding provision provides that a non-citizen is ineligible for a visa or admission if the government knows or has reason to believe that the non-citizen will engage in various specific crimes. *See* 8 U.S.C. § 1182(a)(3)(A)(i).

derlying evidence and facts demonstrate the applicant has no criminal history and is not a gang member."

At some point,[9] appellants submitted a declaration from Humberto Guizar, an attorney and court-approved gang expert, who attested that Asencio-Cordero "does not have any tattoos that are representative of the Mara Salvatrucha[ ] gang or any other known criminal street gang," and that none of his tattoos "are related to any gang or criminal organization in the United States or elsewhere."[10] Guizar explained that "[m]ost of the tattoos . . . are merely commonly known images, such as images of Catholic icons, clowns, and other non-gang related tattoos."

On May 18, 2016, the Chief of the Outreach and Inquiries Division of Visa Services replied to appellants' letter, stating that the State Department lacks authority to overturn consular decisions based on INA § 104(a) and that the Department "concurred in the finding of in-

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[9] The declaration is dated April 27, 2016, but the record does not identify the exact date on which appellants submitted the declaration to the government.

[10] The declaration states that Guizar is "an attorney duly licensed to practice law in all courts in California . . . . In addition to being a licensed lawyer, [he is] also a court-approved 'gang expert.'" He has worked as a gang expert since April 2009. Guizar believes he is "the only licensed lawyer in the State of California that provides expert testimony as a gang expert in the local courts of the Southern California State and Federal Jurisdictions." In this capacity, Guizar has "testif[ied] in court as a gang expert on approximately 50 gang cases" and "been consulted on 40 other matters." This role requires him to "evaluate the character of a person alleged to be a gang member to determine if he is in fact a 'gang member,'" and to provide opinions "with regard to tattoos on individuals and whether the individual appears to be a gang member."

eligibility."[11] The following day, Consul Taylor wrote again to appellants, listing the entities that had reviewed Asencio-Cordero's visa application[12] and noting that "[n]one of the above-mentioned reviews have revealed any grounds to change the finding of inadmissibility, and there is no appeal."[13]

**B. Procedural History**

Appellants initiated this lawsuit in January 2017. The Complaint asserts that (1) the denial of Asencio-Cordero's visa was not facially legitimate and bona fide, such that it infringed on Muñoz's fundamental rights; (2) the denial violated the Equal Protection Clause of the Fifth Amendment; (3) the denial violated the separation of powers; (4) the Consulate denied the visa in bad faith, (5) the denial violated the Administrative Procedure Act

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[11] Section 104(a) of the INA charges the Secretary of State with administering and enforcing INA provisions "relating to . . . the powers, duties, and functions of diplomatic and consular officers of the United States, *except* those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas." 8 U.S.C. § 1104(a) (emphasis added).

[12] These entities include a consular officer, consular supervisors, the Bureau of Consular Affairs, the Immigration Visa Unit, and Consul Taylor.

[13] We understand Consul Taylor's statement that "there is no appeal" to mean that there was no further administrative process that appellants could have pursued. As we discuss *infra*, an initial visa refusal triggers an automatic internal review process, *see* 22 C.F.R. § 42.81; 9 Foreign Affairs Manual 504.11-3(A)(2)(b) [hereinafter, "FAM"], and Consul Taylor's statement was made at the apparent culmination of this internal review process. Administrative limitations on appealability do not, however, preclude judicial review of constitutional claims. *See Allen*, 896 F.3d at 1108 (citing *Webster v. Doe*, 486 U.S. 592, 601–05, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988)).

("APA"); and (6) the statute under which the visa was denied, 8 U.S.C. § 1182(a)(3)(A)(ii), is unconstitutionally vague. Appellants seek a declaration that the adjudication of Asencio-Cordero's visa application was not bona fide, a declaration that § 1182(a)(3)(A)(ii) is unconstitutional, and other just and proper relief.[14]

The government filed a motion to dismiss in September 2017, invoking the doctrine of consular nonreviewability. Two months later, the district court granted the motion with respect to Asencio-Cordero's challenge to the visa adjudication, concluding that he lacked a right to judicial review of the visa denial as an unadmitted, non-resident alien. The court denied the motion with respect to Muñoz, however, stating that she has a constitutional liberty interest in her husband's visa application and that the government had failed to offer a bona fide factual reason for denying the visa. The motion to dismiss did not address appellants' vagueness challenge to § 1182(a)(3)(A)(ii). Appellants subsequently filed, and the district court denied, a motion for judgment on the pleadings.[15]

Appellants sought discovery on the facts supporting the Consulate's denial of Asencio-Cordero's visa application. In a joint Rule 26(f) report filed on September

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[14] In their motion for summary judgment, appellants asked the district court to order the government to re-adjudicate Asencio-Cordero's visa application without relying on § 1182(a)(3)(A)(ii) and for the reinstatement of any inadmissibility waiver that was revoked due to the denial.

[15] The court reasoned that granting the motion before the parties "fully develop[ed] the record" would be "hasty and imprudent" because "the record may establish a facial connection to the statutory ground of inadmissibility."

11, 2018, the government asserted for the first time that "the consular officer who denied Mr. Asencio-Cordero's visa application did so after determining that Mr. Asencio-Cordero was a member of a known criminal organization." The government filed a supplemental brief in November 2018, which included a declaration by State Department attorney adviser Matt McNeil stating that the consular officer denied Asencio-Cordero's visa application under 8 U.S.C. § 1182(a)(3)(A)(ii) because, "based on the in-person interview, a criminal review of Mr. Asencio[-]Cordero and a review of [ ] Mr. Asencio [-]Cordero's tattoos, the consular officer determined that Mr. Asencio[-]Cordero was a member of a known criminal organization . . . specifically MS-13."

In April 2019, the district court issued an order permitting limited discovery—in the form of a deposition or Rule 31 deposition[16] of the consular official who denied the visa application—on whether the visa denial relied on "discrete factual predicates." By May 2020, the parties still had not agreed on a discovery plan. The court rejected the government's argument that permitting discovery violated the doctrine of consular nonreviewability and law enforcement privilege but limited appellants to addressing the following five issues:

1. Identify a *fact* in the record that supports the conclusion that Asencio[-Cordero] was a member of MS-13.

2. What specific *fact* provided by Asencio[-Cordero] in his in-person inter-view, if any, provides a facial

[16] Federal Rule of Civil Procedure 31 permits a party to depose any person by written questions.

connection to the conclusion that Asencio[-Cordero] was a member of MS-13[?]

3. What specific *fact* in the criminal review of Asencio[-Cordero], if any, provides a facial connection to the conclusion that Asencio[-Cordero] was a member of MS-13[?]

4. What specific *fact* in the review of Asencio [-Cordero]'s tattoos, if any, provides a facial connection to the conclusion that Asencio[-Cordero] was a member of MS-13[?]

5. Was the declaration of Humberto Guizar taken into consideration before determining that Asencio [-Cordero] was a member of MS-13[?]

Appellants filed a motion for summary judgment in July 2020 after the government failed to respond to the five interrogatories. Appellants argued that they were entitled to judgment because the government failed to provide a bona fide factual reason for denying a visa to Asencio-Cordero, and because the government acted in bad faith in adjudicating Asencio-Cordero's visa application.

In August 2020, the government filed its own motion for summary judgment, arguing that it was entitled to invoke the doctrine of consular nonreviewability because, "even if there were no evidence in the record of Mr. Asencio-Cordero's association with MS-13, the consular officer's citation to § 1182(a)(3)(A)(ii) provided a facially legitimate and bona fide basis" for denying his visa application. The government also argued that "the consular officer provided a citation to 8 U.S.C. § 1182(a)(3)(A)(ii) *and* this citation was supported by the *fact* that the consular officer determined Mr. Asencio-

Cordero was associated with MS-13."[17] The government explained that "the information that is now in the record provides an unambiguous connection to Section 1182(a)(3)(A)(ii), [such that] the visa refusal is facially legitimate and bona fide."

On the same day that it filed its cross-motion for summary judgment, the government responded to appellants' interrogatories. The response to interrogatories one through four was that "[t]he consular officer considered specific information that was obtained from law enforcement operations, along with the other information already identified for the court in the McNeil Declaration, and determined there was a reason to believe Mr. Asencio[-Cordero] was a member of MS-13." In response to interrogatory five, the government represented that it considered the declaration of Humberto Guizar before determining that Asencio-Cordero was a member of MS-13.[18] The government also sought leave

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[17] The government's brief below noted that "the State Department has *now* made Mr. Asencio-Cordero aware of the factual basis underlying the Section 1182(a)(3)(A)(ii) finding during the adjudication process—that is, the consular officer's reason to believe that Mr. Asencio-Cordero had participated in gang activity in the past and would likely continue to do so if he were admitted to the United States." (Emphasis added.)

[18] Specifically, in response to the question "Was the declaration of Humberto Guizar taken into consideration *before* determining that Asencio[-Cordero] was a member of MS-13[?]," the government answered "Yes." (Emphasis added.) We note that this answer is implausible, as the date on the Guizar Declaration, April 27, 2016, is several months after the date on which the consular officer initially denied Asencio-Cordero's visa, December 28, 2015. The government's claim that it considered the Guizar Declaration thus raises questions about the carefulness of the government's visa decision.

*ex parte* to file a declaration from a Senior State Department official for *in camera* review. The government explained that the information contained in the declaration was Sensitive But Unclassified and described sensitive information contained in the Consular Consolidated Database. The district court permitted the government to submit the declaration for *in camera* review but ordered it to submit a redacted version for appellants' review. The files disclosed to appellants contain significant redactions but document, in their unredacted portions, the consular officer's belief that Asencio-Cordero was a member of MS-13.[19]

The district court held a hearing on the cross-motions for summary judgment in January 2021. At the hearing, the government stated that "[t]he tat[t]oos themselves were considered. That is in the record. . . . There were statements by law enforcement officers or authorities provided to the consular officer about Mr. Asencio-Cordero's membership in MS-13. We are not disclosing what those statements were or . . . what

[19] For example, a document labeled "SAO Response"—a "Security Advisory Opinion," *see Ibrahim* v. *Dep't of Homeland Sec.*, 912 F.3d 1147, 1160 (9th Cir. 2019)—indicates that "the consular officer identified several facts that form the basis of reasonable grounds to believe that the applicant is a member of MS-13 and thus is likely to engage in unlawful activity in the United States. According to the factual findings in this case: [REDACTED] . . . For these reasons, the Department concurs in a finding of ineligibility under [§ 1182](a)(3)(A)(ii) based on the applicant's active membership in a street gang." A declaration accompanying the State Department Advisory Opinion explains that the Opinion "sets out the consular officer's factual findings regarding the applicability of the ineligibility ground to the visa applicant and the basis for such findings," including the "findings therein that led the consular officer to determine Mr. [Asencio-Cordero]'s membership in MS-13."

was specifically said because that would be precisely the same sort of look behind the government's facially legitimate and bona fide decision-making" protected by the doctrine of consular nonreviewability. The government indicated that it had provided this information in its responses to appellants' interrogatories. Appellants' counsel objected that the government was conflating a "conclusion and a reason to believe" something and suggested that the "facially legitimate and bona fide reason" standard required the government to disclose a specific fact to support its conclusion that Asencio-Cordero was a member of MS-13. The court asked the government if it was arguing "that the consular officer received information from law enforcement that identified Mr. Asencio[-Cordero] as a gang member. Or that they received information from law enforcement which led the consular officer to believe that he was a gang member?" The government clarified that it was making the first argument.

In March 2021, the court granted the government's motion for summary judgment and denied appellants' motion. In a written order, the court reiterated its prior conclusion that the government's citation to 8 U.S.C. § 1182(a)(3)(A)(ii) alone did not provide a "facially legitimate and bona fide reason" for denying Asencio-Cordero's visa application. Nevertheless, the court concluded that the government was entitled to invoke the doctrine of consular nonreviewability to shield the consular decision from judicial review because, subsequent to the initial denial, "the Government has offered further explanations for the consulate officer's decision," including the consular officer's "determin[ation] that Asencio-Cordero was a member of MS-13" documented in the McNeil declaration and the redacted doc-

uments provided to appellants and the court,[20] and appellants had not affirmatively demonstrated that the government denied the visa in bad faith. Because it reasoned that the statute had been constitutionally applied to exclude Asencio-Cordero based on the consular officer's determination that he was a member of MS-13, the court also rejected appellants' vagueness challenge to the constitutionality of the statute.

Appellants timely appealed.[21] We have jurisdiction under 28 U.S.C. § 1291, and we review the grant of summary judgment de novo. *Kohler v. Bed Bath & Beyond of Cal., LLC*, 780 F.3d 1260, 1263 (9th Cir. 2015).

## III.

### A. Muñoz's Constitutional Interest

Like the plaintiff in *Din*, *see* 576 U.S. at 101-02, 135 S. Ct. 2128, Muñoz asserts that she has a protected liberty interest in her husband's visa application. We first recognized the existence of this constitutional interest in *Bustamante v. Mukasey*, where we held that,

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[20] Although the court noted, in a footnote, that it was not "consider[ing] the redacted material[s] in ruling on the substantive issues in this case," the opinion referred to the government's "later clarifi[cation], at the hearing on January 6, 2021, that the tattoos specifically contributed to the determination, as did law enforcement information which identified Asencio-Cordero as an MS-13 gang member."

[21] Appellants do not argue on appeal that Asencio-Cordero possesses an independent right to judicial review of the visa denial. Both appellants, however, appeal the grant of summary judgment on their constitutional vagueness claim. They also assert that the district court violated both appellants' due process rights in its adjudication of their claims by improperly considering redacted documents submitted for *in camera* review.

because "[f]reedom of personal choice in matters of marriage and family life is . . . one of the liberties protected by the Due Process Clause," a U.S. citizen possesses a protected liberty interest in "*constitutionally adequate procedures* in the adjudication of [a non-citizen spouse]'s visa application" to the extent authorized in *Mandel*. 531 F.3d 1059, 1062 (9th Cir. 2008) (emphasis added). Although a plurality of the Supreme Court in *Din* would have held that a U.S. citizen does not have such a protected liberty interest, 576 U.S. at 101, 135 S. Ct. 2128 (plurality opinion), Justice Kennedy's controlling concurrence declined to reach this issue, *id.* at 102, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment).[22] It was therefore proper for the district court to conclude that, under the precedent of this circuit, Muñoz possesses a liberty interest in Asencio-Cordero's visa application. *See FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) ("[I]f we can apply our precedent consistently with that of the higher authority, we must do so.").

Subsequent case law, moreover, reinforces this precedent. Eleven days after the Court decided *Din*, Justice Kennedy and the *Din* dissenters comprised the majority in *Obergefell v. Hodges*, which reiterated longstanding precedent that "the right to marry is a fundamental right inherent in the liberty of the person" and subject to protection under the Due Process Clause. 576 U.S. 644, 675, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); *see also id.* at 663, 664, 135 S. Ct. 2584. In so holding, *Obergefell* laid out "a careful description" of

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[22] The four-justice dissent concluded that a U.S. citizen possesses a liberty interest in the visa application of a non-citizen spouse. *Din,* 576 U.S. at 107, 135 S. Ct. 2128 (Breyer, J., dissenting).

how the right to marry constitutes a fundamental liberty interest that 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 was] sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (citations and internal quotation marks omitted); *Obergefell*, 576 U.S. at 665-676, 135 S. Ct. 2584 (providing the rigorous description and analysis *Glucksberg* requires). *But see Din*, 576 U.S. at 93-94, 135 S. Ct. 2128 (plurality opinion) (arguing that *Glucksberg* does not support the right Din asserted). *Obergefell* recognized that "[t]he right to marry, establish a home[,] and bring up children" are "varied rights" comprising a "unified whole" that are "a central part of the liberty protected by the Due Process Clause." 576 U.S. at 668, 135 S. Ct. 2584 (internal quotation marks omitted).

In addition to having a fundamental liberty interest in their marriage, U.S. citizens also possess a liberty interest in residing in their country of citizenship. *See, e.g.*, *Agosto v. INS*, 436 U.S. 748, 753, 98 S. Ct. 2081, 56 L. Ed. 2d 677 (1978); *Ng Fung Ho v. White*, 259 U.S. 276, 284-85, 42 S. Ct. 492, 66 L. Ed. 938 (1922). Consequently, even though denying a visa to the spouse of a U.S. citizen does not necessarily represent the government's "refus[al] to recognize [the U.S. citizen]'s marriage to [a non-citizen]," and the citizen theoretically "remains free to live with [the spouse] anywhere in the world that both individuals are permitted to reside," *Din*, 576 U.S. at 101, 135 S. Ct. 2128 (plurality opinion), the cumulative effect of such a denial is a *direct* restraint on the citizen's liberty interests protected under the Due Process Clause, *see O'Bannon v. Town Ct. Nursing*

*Ctr.*, 447 U.S. 773, 788, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980), because it conditions enjoyment of one fundamental right (marriage) on the sacrifice of another (residing in one's country of citizenship).

In light of the foregoing, we remain convinced that *Bustamante* correctly recognized that a U.S. citizen possesses a liberty interest in a non-citizen spouse's visa application. Because Muñoz asserts that the government's adjudication of Asencio-Cordero's visa application infringed on this protected liberty interest, we proceed to evaluate whether the government provided "a facially legitimate and bona fide reason" for denying his visa.[23] *See Mandel*, 408 U.S. at 766–70, 92 S. Ct. 2576; *Din*, 576 U.S. at 104, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment).

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[23] At oral argument, the government claimed that, *Mandel* and *Din* notwithstanding, it is not obligated to provide any information upon the denial of a visa. In support of this proposition, the government cited *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S. Ct. 309, 94 L. Ed. 317 (1950), and *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 97 L. Ed. 956 (1953)—cases that address, as the government's counsel recognized, the constitutional rights and process owed to non-citizens seeking to enter the country. *Mandel* and *Din*, on the other hand, concern judicial review in cases where the petitioner is a U.S. citizen who possesses a constitutional interest in a non-citizen's visa application—like the case before us. *Knauff*'s discussion of the process owed to non-citizens at the gate of entry is, at best, peripheral to our evaluation of the process owed to a U.S. citizen whose constitutional rights may have been infringed by the denial of an immigrant visa to a spouse. Moreover, *Din*'s citation to *Knauff* along the way to explicating the criteria for invoking the *Mandel* exception, see *Din*, 576 U.S. at 104–105, 135 S. Ct. 2128 (Kennedy, J., concurring), indicates that *Din* incorporates *Knauff*'s holding to the extent of its relevance in situations involving the visa applications of U.S. citizens' spouses.

### B. The "Facially Legitimate and Bona Fide Reason" Requirement

The parties' disagreement about whether the *Mandel* exception to consular nonreviewability applies centers on (1) whether the government provided "a facially legitimate and bona fide reason" for the visa denial; and (2) whether the government's long delay in providing anything more than a citation to § 1182(a)(3)(A)(ii) was consistent with its obligation under step two of the *Din* framework.[24]

#### 1. Satisfying *Din* Step Two in the Absence of Discrete Factual Predicates in the Statute

As we explained in *Cardenas* and *Khachatryan*, a consular officer who denies a visa satisfies *Mandel*'s requirement to provide a "facially legitimate and bona fide reason" if the statutory basis of exclusion "specifies discrete factual predicates the consular officer must find to exist before denying a visa" or, alternatively, if there exists "a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." *Khachatryan*, 4 F.4th at 851 (quoting *Cardenas*, 826 F.3d at 1172). On appeal, the government has wisely abandoned the argument that the statute at issue here contains discrete factual predicates. Unlike surrounding provisions, 8 U.S.C. § 1182(a)(3)(A)(ii) does not specify the type of lawbreaking that will trigger a visa denial, and a consular officer's belief that an applicant seeks to enter the United States for general (including incidental) lawbreaking is not a "discrete" factual predicate.

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[24] Although appellants challenge § 1182(a)(3)(A)(ii) as unconstitutionally vague, we assume for present purposes that the statute constitutes a valid statute of inadmissibility under *Din*.

*Compare id.*, with *id.* § 1182(a)(3)(E)(ii), (iii) (deeming inadmissible any alien who has participated in genocide or extrajudicial killings), *id.* § 1182(a)(2)(C) (deeming inadmissible any alien who has engaged in the illicit trafficking of controlled substances), *and id.* § 1182(a)(3)(B) (identifying discrete terrorism-related bases for inadmissibility). Therefore, the government can satisfy its burden at *Din* step two only if the record contains information—what *Cardenas*, 826 F.3d at 1172, and *Khachatryan*, 4 F.4th at 851, referred to as "a fact in the record"—that provides a facial connection to the consular officer's belief that Asencio-Cordero "s[ought] to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity," 8 U.S.C. § 1182(a)(3)(A)(ii).

The government contends that it complied with *Cardenas*'s "fact in the record" requirement because, when a visa is denied under § 1182(a)(3)(A)(ii) and "the factual basis for the prediction of criminality [required by the statute] . . . is the applicant's membership in a gang," all that matters is whether the *consular officer* "understood . . . the predicate factual basis" for denying the visa. To make this argument, which implies that the government can comply with *Mandel* without disclosing any factual justification for a visa denial to a petitioner, the government invokes *Din*, which—it claims—"[n]owhere . . . suggested that there needs to be evidence in the record of an [applicant]'s association with terroristic activities for a citation to § 1182(a)(3)(B) to be sufficient." The government contends that "[t]he same is true in the context of members of transnational

gangs under 8 U.S.C. 1182(a)(3)(A)(ii)."[25] But the government's argument misreads *Din*, where the statutory citation to § 1182(a)(3)(B) was deemed sufficient *because* that statute contains discrete factual predicates. *Din*, 576 U.S. at 105, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment) (rejecting *Din*'s claim that "due process requires she be provided with the facts underlying th[e inadmissibility] determination" because the government cited a statute "specif[ying] discrete factual predicates").

Indeed, it was critical in both *Din* and *Mandel* that the government identified the factual basis for the denial,[26] *see id.*; *Mandel*, 408 U.S. at 769-70, 92 S. Ct. 2576 (emphasizing that "the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver" and declining to address the scenario in which "no justification whatsoever is advanced"), and both

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[25] At oral argument, the government suggested that the location of § 1182(a)(3)(B) "right next to" the statutory provision at issue here is relevant to our analysis. But *Din* did not announce a blanket rule about 8 U.S.C. § 1182(a)(3), whose subsections (A) through (G) contain numerous subsections of varying degrees of discrete specificity. *See id.* Instead, *Din* spoke of a statute containing "discrete factual predicates," which—as we have explained—§ 1182(a)(3)(A)(ii) lacks.

[26] The government denied the visa application of Din's husband on June 7, 2009, and notified Din and her husband on July 13, 2009, that the visa had been denied under 8 U.S.C. § 1182(a)(3)(B), which identifies "terrorist activities" as bases for finding a non-citizen inadmissible. *See Din v. Kerry*, 718 F.3d 856, 859 (9th Cir. 2013), *rev'd*, 576 U.S. at 86, 135 S. Ct. 2128. And, although the facts and administrative process differed, Mandel, too, was promptly informed of the reason underlying the initial denial of his visa application, which was again relayed to Mandel when the attorney general declined to exercise his waiver authority to grant the visa. *See Mandel*, 408 U.S. at 758–59, 92 S. Ct. 2576.

decisions identify due-process principles as the foundation of their reasoning, *see Din*, 576 U.S. at 106, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment) (identifying the issue of whether "the notice given was constitutionally adequate" as relevant for assessing the government's compliance with the "facially legitimate and bona fide reason" requirement); *Mandel*, 408 U.S. at 766-70, 92 S. Ct. 2576 (explaining that, in the realm of consular decision making, the production of a "facially legitimate and bona fide reason" is a substitute for the standard balancing of interests in the procedural due process framework). From these cases, we understand notice to be a key concern of *Mandel*'s facially legitimate and bona fide reason standard. We thus reject the government's suggestion that it can comply with *Cardenas*'s "fact in the record" formulation without providing the operative fact to a petitioner.

Despite contesting its obligation to provide the factual basis for the denial to petitioners, the government, in fact, eventually provided them with information supporting the denial. Specifically, the government explained that the consular officer denied Asencio-Cordero's visa application "after considering [his] in-person interview, a review of his tattoos, and the information provided by law enforcement saying that he was a member of MS-13." The record contains the November 2018 declaration of attorney adviser Matt McNeil attesting to this information.

This information is quite similar to the information we held in *Cardenas* was sufficient to satisfy *Din* step two. In that case,[27] the government initially did not

[27] *Cardenas* is the only case from this circuit post-dating *Din* in which the government invoked a statute without discrete factual

provide Cardenas or her non-citizen spouse, Mora, any information beyond citing § 1182(a)(3)(A)(ii) to explain the denial of Mora's visa. 826 F.3d at 1168.[28] Within three weeks of the denial, however—after Mora sought additional information[29]—a consular official provided the following explanation by email:

> At the time of Mr. Mora's June 16, 2008 arrest [preceding his removal proceedings and subsequent visa application], Mr. Mora was identified as a gang associate by law enforcement. The circumstances of Mr. Mora's arrest, as well as information gleaned during the consular interview, gave the consular officer sufficient "reason to believe" that Mr. Mora has ties to an organized street gang.

*Id.* On appeal, we reasoned that the denial of Mora's visa complied with *Mandel*'s "facially legitimate and

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predicates—§ 1182(a)(3)(A)(ii), the same statute at issue here—to justify the denial of a visa to a non-citizen spouse of a U.S. citizen. An appeal currently pending in the D.C. Circuit also involves a challenge to a visa denial under this subsection. *See Colindres v. U.S. Dep't of State*, 575 F. Supp. 3d 121, 126 (D.D.C. 2021), *appeal filed* (Jan. 20, 2022).

[28] In addition to § 1182(a)(3)(A)(ii), the government also initially cited § 1182(a)(9)(A)(i) and § 1182(a)(9)(B)(i)(II) as bases for the denial. *See* 8 U.S.C. § 1182(a)(9)(A)(i) (classifying as inadmissible aliens who previously have been ordered removed under 8 U.S.C. 1225(b)(1)); *id.* § 1182(a)(9)(B)(i)(II) (classifying as inadmissible for ten years aliens who were unlawfully present in the United States for one year or more). The former statutory basis was withdrawn and the government may waive the latter, so only § 1182(a)(3)(A)(ii) was relevant on appeal. *Cardenas*, 826 F.3d at 1168 n.3.

[29] *See Cardenas v. United States*, No. CIV. A. 12-00346-S, 2013 WL 4495795, at *2 (D. Idaho Aug. 19, 2013) (noting the dates of the denial and subsequent email), *aff'd*, 826 F.3d 1164.

bona fide reason" requirement because "[t]he consular officer . . . cited a valid statute of inadmissibility, § 1182(a)(3)(A)(ii)" and informed Cardenas and Mora that the visa was denied based on the government's "belief that Mora was a 'gang associate' with ties to the Sureno gang," as documented in the email to Mora three weeks after the visa denial. *Id.* at 1172; *see also id.* at 1167–68.

Appellants nonetheless argue that the record information in this case—though similar in content to the information we held in *Cardenas* was "a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility," 826 F.3d at 1172—falls short of what *Mandel* and *Din* require. Specifically, appellants contend that the information contained within the McNeil Declaration constitutes "conclusions, not facts," and is therefore inadequate under *Cardenas*.

We reject this argument, elaborated over many pages of appellants' opening brief. Although appellants insist that "[n]o court has accepted the government's mere conclusion [regarding inadmissibility] as a substitute for the discrete fact required by *Mandel*," their focus on labeling information as either a "fact" or a "conclusion" overlooks the purpose served by the "fact in the record" requirement. Whether information in the record is characterized as a "fact" or a "conclusion" is ultimately less relevant than whether the information provides a facial connection to the statutory ground of inadmissibility, thereby giving a petitioner notice of the reason for the denial. The McNeil Declaration contains information that provides a facial connection between the reason for the denial—the consular officer's belief that Asencio-Cordero is a member of MS-13, which the

officer reached based on the visa interview, a criminal review, and a review of Asencio-Cordero's tattoos—and the cited statute of inadmissibility, § 1182(a)(3)(A)(ii).[30] Under *Cardenas*, this information suffices as a "facially legitimate and bona fide reason" for denying a visa. *See* 826 F.3d at 1172.

Appellants also contend, however, that the government's failure to provide them with "the specific factual basis of the denial *at the time of the denial*" means that the proffered information is insufficient to satisfy the "facially legitimate and bona fide reason" requirement. This argument carries much more force. In reaching our conclusion in *Cardenas*, we noted that the consular officer himself "provided" the reason within three weeks of the denial. *See* 826 F.3d at 1172 ("He also provided a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility: the belief that Mora was a 'gang associate' with ties to the Sureno gang."). Similarly, the visa applicant in *Din* was apprised of the reason for the denial—by reference to a statutory provision containing discrete factual predicates—within about a month of the denial. *See Din v. Kerry*, 718 F.3d 856, 859 (9th Cir. 2013), *rev'd*, 576 U.S. 86, 135 S. Ct. 2128. In this case, the government waited almost three years to provide comparable infor-

[30] The Foreign Affairs Manual identifies MS-13 as one of a number of criminal organizations in which a visa applicant's "active" membership, as determined by a consular official, must give rise to a finding of inadmissibility and subsequent review by State Department personnel. *See* 9 FAM 302.5-4(B)(2). At oral argument, counsel for the government indicated that MS-13 has been identified as such an organization since 2005.

mation to appellants and did so only when prompted by judicial proceedings.[31]

At oral argument, the government suggested that the long delay in apprising appellants of the factual basis for denying Asencio-Cordero's visa does not matter because appellants now know that the visa was denied due to the consular officer's belief that Asencio-Cordero is a member of MS-13. That position is far too facile. Even if the government would have satisfied *Mandel* had it disclosed the fact of Asencio-Cordero's suspected gang membership at the time of the visa denial, it does not necessarily follow that citing § 1182(a)(3)(A)(ii) at the time of the denial and then providing the supporting factual basis years after the denial fulfills *Mandel*'s "facially legitimate and bona fide reason" requirement.[32]

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[31] At the time appellants filed this lawsuit, the only information in the record supporting the visa denial was the denial itself, which included the consular officer's citation of § 1182(a)(3)(A)(ii) but no other factual details. The government maintained, throughout its briefing on the motion to dismiss, that this statutory citation satisfied its obligation. At oral argument, the government's counsel again suggested that a citation to § 1182(a)(3)(A)(ii) was all that was constitutionally required at the time it denied Asencio-Cordero's visa application.

[32] At a scheduling conference held by the district court in September 2018—nearly three years after the denial of the visa in December 2015—the government disclosed that the visa was denied because "Mr. Asencio[-]Cordero was determined to be a member of a known criminal organization." At the scheduling conference, counsel for the government suggested that the State Department had provided this information, via email, prior to the conference (on September 18, 2018) but after the district court denied the government's motion to dismiss (on December 11, 2017) for failure to provide a "bona fide factual basis" for denying the visa. The record lacks any documentation of such an email. In any case, even if the government pro-

Indeed, the government cites no case law supporting that proposition.

**2. Due Process and Timeliness**

To understand the significance of timing to *Mandel*'s disclosure requirement, we revisit the purpose served by that requirement and its relationship to the Due Process Clause.

The doctrine of consular nonreviewability is a rule of decision, formulated by courts and informed by judicial respect for the separation of powers, *Allen*, 896 F.3d at 1101, that curtails judicial review of procedural due process challenges to visa denials in light of "the political branches' broad power over the creation and administration of the immigration system," *Din*, 576 U.S. at 106, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment); *see also Mandel*, 408 U.S. at 766, 770, 92 S. Ct. 2576. Instead of evaluating whether the procedures attendant on the deprivation of a spouse's liberty interest were "constitutionally sufficient"—which we do in other contexts by carefully balancing the private interests, the risk of an erroneous deprivation, and the governmental interests at stake, *see, e.g., Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989); *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)—*Mandel* and *Din* instruct courts not to proceed to this balancing test if the government proffers "a facially legitimate and bona fide reason" for denying the visa, *see Din*, 576 U.S.

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vided this information promptly to appellants after the court's December 2017 order on the motion to dismiss, at least two years elapsed between the government's denial of Asencio-Cordero's visa application and appellants' receipt of information providing a factual basis for the denial.

at 104, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment) ("*Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.' Once this standard is met, 'courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate." (citation omitted)); *see also Mandel*, 408 U.S. at 766–70, 92 S. Ct. 2576.

However, even though *Din* and *Mandel* establish that the substance of the notice is constitutionally adequate when the government produces "a facially legitimate and bona fide reason" for the visa denial, these decisions do not foreclose application of other core due-process requirements. *See Din*, 576 U.S. at 106, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment) (discussing the "constitutional[ ] adequa[cy]" of the notice given). It is a long-standing due process requirement that the government provide any required notice in a timely manner. *See Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (holding that "timely and adequate notice" of the reasons underlying the deprivation of a right guaranteed by the Due Process Clause is a key requirement of due process). Timeliness of notice was not at issue in *Mandel* or *Din* because in both cases the government identified the reason for the denial soon after the denial. *See Mandel*, 408 U.S. at 757–59, 769, 92 S. Ct. 2576; *Din*, 718 F.3d at 859, *rev'd*, 576 U.S. at 86, 135 S. Ct. 2128. Yet in *Din*, Justice Kennedy contemplated that petitioners will use the information contained in the notice of a visa denial to "mount a challenge to [the] visa denial." 576 U.S. at

105, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment). Such a challenge is impossible if the petitioner is not timely provided with the reason for the denial.

We thus conclude that, where the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest. *Goldberg*, 397 U.S. at 267–68, 90 S. Ct. 1011; *Wright v. Beck*, 981 F.3d 719, 727–30 (9th Cir. 2020).[33] As we have explained, the denial of an immigrant visa to the spouse of a U.S. citizen deprives that citizen of the ability to enjoy the benefits of her marriage and to live in her country of citizenship. Her ability to vindicate her liberty interest, whether through the presentation of additional evidence or initiation of a new petition,[34] depends on *timely* and adequate notice of the reasons underlying the initial denial.

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[33] Justice Kennedy's opinion in *Din* recognized the need for timeliness. As we have explained, the opinion observed that notice is provided at least in part so that petitioners may assess, and potentially challenge, a visa denial. In both *Mandel* and *Din*, the government provided its reasons soon after the denial. In this case, the government provided no adequate explanation until after petitioner felt compelled to commence litigation and confront the government with interrogatories. The delay deprived the petitioner of an opportunity to assess the basis for the denial before challenging it. The dissent's suggestion that we are "grafting" a new requirement onto the duties of consular officers as outlined in *Mandel* and *Din* is incorrect. Notice within a reasonable time is part of the process that was due.

[34] The Code of Federal Regulations and the FAM prescribe the procedure consular officials must follow in refusing an immigrant visa. *See* 22 C.F.R. § 42.81; 9 FAM 504.11; *see also infra*. The

The administrative process for visa applications and approvals informs our understanding of what constitutes timely notice. *See Mathews*, 424 U.S. at 334, 96 S. Ct. 893 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972))). The Code of Federal Regulations provides that, "[i]f a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered." 22 C.F.R. § 42.81(e).[35] Moreover, the Foreign Affairs Manual instructs consular officers that all visa refusals "must" be submitted for supervisory review within 30 days of the denial, 9 FAM 504.11-3(A)(2)(b), and the Manual recognizes that some visa decisions can "be overcome by the presentation of additional evidence," 9 FAM 504.11-3(A)(2)(a)(2).[36]

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FAM contains more granular detail on the internal processes the State Department and consular officials follow when denying immigrant visa applications.

[35] Section 42.81(b) suggests that some, but not all, grounds of ineligibility can be overcome in this manner. *See* 22 C.F.R. § 42.81(b)("*If* the ground of ineligibility *may* be overcome by the presentation of additional evidence . . . ").

[36] The Code of Federal Regulations notes that "[i]f the grounds of ineligibility . . . cannot be overcome by the presentation of additional evidence, the principal consular officer . . . shall review the case without delay . . . . If the grounds of ineligibility may be overcome by the presentation of additional evidence and the applicant indicates the intention to submit such evidence, a review of the refusal may be deferred." 22 C.F.R. § 42.81(c). The addition-

These provisions for review—including the submission and consideration of additional evidence—provide contextual support for the proposition that receiving timely notice of the reason for the denial is essential for effectively challenging an adverse determination. *See Goldberg*, 397 U.S. at 267, 90 S. Ct. 1011 ("'The fundamental requisite of due process of law is the opportunity to be heard' . . . 'at a meaningful time and in a meaningful manner.'" (first quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914); and then quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965))). By this standard, the government's nearly three-year delay in providing appellants with the reason for the denial of Asencio-Cordero's visa—and only after being prompted by court order—was clearly beyond the pale.[37] *Cf. Wright*, 981

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al evidence must be submitted within one year of the initial denial. *See id.* § 42.81(b), (e).

[37] We reject as inadequate as a matter of due process the government's suggestion that, "[i]n the course of the parties' communication and interview of Mr. Asencio-Cordero, the consular officer made clear that he was concerned Mr. Asencio-Cordero would engage in criminal activity related to the MS-13 gang . . . if he entered the United States." The government does not explain how these concerns were "made clear," and the documentation in the record of appellants' significant efforts to uncover more than a statutory citation as the basis of the visa denial belies the government's assertion that the consular officer's concerns were "made clear." Moreover, the government nowhere asserts that it informed Asencio-Cordero, prior to the commencement of litigation, that his visa was denied because of his purported membership in MS-13. Indeed, the government's briefing elsewhere recognizes that the factual basis for the denial was only added to the record after prompting from the court.

We strongly disagree with the dissent's suggestion that speculation as to why a visa was denied is an adequate substitute for notice

F.3d at 728 ("[O]utright failures to even attempt to provide notice violate due process.").

Although the doctrine of consular nonreviewability imposes a limited disclosure requirement on the government, and essentially gives its rationale the benefit of the doubt in our truncated due-process inquiry, *see Din*, 576 U.S. at 104, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment), the government must first comply, within a reasonable time, with *Mandel*'s requirement to provide a facially legitimate and bona fide reason for denying a visa.[38] We can determine whether the gov-

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of the "discrete factual" basis for exclusion, *Din*, 576 U.S. at 105, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment), and the submission of the Guizar Declaration by appellants near the end of the administrative review of Asencio-Cordero's visa is as consistent with last-resort guesswork as it is informed advocacy. This interpretation is reinforced by the government's dubious description of how the Declaration entered its decision-making process, *see supra*, and the absence of any record evidence indicating that the government notified appellants of the reason for the denial until after litigation commenced.

[38] The government's failure to timely comply with this requirement is especially striking given the existence of FAM provisions that impose specific recordkeeping requirements and evidentiary standards for visa refusals under § 1182(a)(3)(A)(ii) based on asserted membership in a known criminal organization, including MS-13. See 9 FAM § 302.5-4(B)(2). In particular, consular officers "are required to make clear factual findings in the case notes, setting forth in detail all the facts supporting a reason to believe that the applicant is a member of a criminal organization . . . and [the officer] must identify the organization of which they are a member." *Id.* § 302.5-4(B)(2)(g). And "although the basis for applying [§ 1182](a)(3)(A)(ii) to active members of criminal organizations makes it a de facto permanent ground of ineligibility," the FAM contemplates that an applicant may overcome this presumption by "demonstrat[ing], to [a consular officer's] satisfaction and with clear and compelling evi-

ernment provided such a justification without evaluating the substantive merits of the reason advanced. *See Din*, 576 U.S. at 105, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment) ("The Government . . . was not required, as Din claims, to point to a more specific provision within § 1182(a)(3)(B)."), *vacating* 718 F.3d at 862 ("It appears that . . . the Government must cite to a ground narrow enough to allow us to determine that [the statute] has been 'properly construed.'"). Our understanding of reasonable timeliness is informed by the 30-day period in which visa denials must be submitted for internal review and the 1-year period in which reconsideration is available upon the submission of additional evidence.

Because no "fact in the record" justifying the denial of Asencio-Cordero's visa was made available to appellants until nearly three years had elapsed after the denial, and until after litigation had begun, we conclude that the government did not meet the notice requirements of due process when it denied Asencio-Cordero's visa. This failure means that the government is not entitled to invoke consular nonreviewability to shield its visa decision from judicial review. The district court may "look behind" the government's decision. *Mandel*, 408 U.S. at 770, 92 S. Ct. 2576.

We therefore vacate the judgment of the district court and remand for the district court to consider the merits of appellants' claims.

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dence, that they are no longer an active member of the organization." *Id.* § 302.5-4(B)(2)(c).

**IV.**

**VACATED** and **REMANDED** for further proceedings consistent with this decision.

LEE, Circuit Judge, dissenting:

Sandra Muñoz, a U.S. citizen, has not seen her husband, Luis Asencio-Cordero, an El Salvadoran, for several years because the U.S. Department of State denied him a visa. The couple also have an American citizen child, who has been deprived of a father. She claims that the government kept her in the dark for three years about why he is being excluded from the United States. And even now, she alleges that the government has provided only a conclusory reason for barring her husband.

The government responds that law enforcement has reason to believe that her husband is a member of MS-13, a notoriously violent gang. The government also relies on the consular non-reviewability doctrine—which generally bars courts from meddling with visa decisions made by consular officers—for not saying more about its reason for finding Asencio-Cordero inadmissible.

The majority opinion tries to thread the needle and implicitly balance the competing interests in this difficult case: it recognizes that courts generally cannot review the government's visa decisions but holds that we can review it here because the government did not give Muñoz its reason for the visa denial within a "reasonable" time. But by grafting a new "timeliness" due process requirement onto consular officers' duties, we are infringing on the Executive Branch's power to make immigration-related decisions and effectively weighing

policy interests. Those determinations are fraught with national security, foreign policy, and sovereignty implications that we are ill-equipped to evaluate. I thus respectfully dissent.

## I. We should not impose a "timeliness" due-process requirement on consular officers' visa decisions.

As the majority recognizes, courts have long held that a consular officer's decision to deny a visa is not reviewable when it is made "on the basis of a facially legitimate and bona fide reason." *Kerry v. Din*, 576 U.S. 86, 104, 135 S. Ct. 2128, 192 L. Ed. 2d 183 (2015) (Kennedy, J., concurring in the judgment). Once the court identifies a bona fide reason, it "will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate." *Id.* (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972)); *see also Cardenas v. United States*, 826 F.3d 1164, 1170 (9th Cir. 2016). Thus, if a consular officer denies a visa under a valid statute of inadmissibility and there is "a fact in the record that 'provides at least a facial connection to' the statutory ground," a court cannot review the visa denial, absent an affirmative showing of bad faith. *Khachatryan v. Blinken*, 4 F.4th 841, 851 (9th Cir. 2021) (quoting *Cardenas*, 826 F.3d at 1172).

Here, the State Department—despite its delay—has met its burden of identifying a valid statute of inadmissibility and "a fact in the record that 'provides at least a facial connection to' "the statutory ground. *Id.* It advised Muñoz that the government believes that her husband has connections to the MS-13 gang and notified her of the statutory provision that bars him from enter-

ing the United States. Muñoz, for her part, has not shown bad faith. That should be the end of the story.

The majority opinion, however, has crafted an exception to the longstanding consular non-reviewability doctrine: consular officers now must provide a facially legitimate and bona fide reason for denying a visa—within a reasonable time. But that conflicts with the separation-of-powers principle that "Congress may 'prescribe the terms and conditions upon which aliens may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.'" *Allen v. Milas*, 896 F.3d 1094, 1104–05 (9th Cir. 2018) (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547, 15 S. Ct. 967, 39 L. Ed. 1082 (1895)). And here, Congress has imposed no time limit for a consular officer to inform a foreigner the reason that his or her visa is being denied.

Nor has the Supreme Court imposed such a time limit, given the deference that courts owe to the political branches in the realm of foreign affairs. See *Fiallo v. Bell*, 430 U.S. 787, 794–96, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977). Justice Kennedy's opinion in *Din* contemplated the type of travails suffered by Muñoz, but the opinion decided against requiring more robust notice, recognizing the political branches' vast discretion over our immigration system. 576 U.S. at 105-06, 135 S. Ct. 2128.[1] The majority emphasizes that, in *Cardenas* and

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[1] Justice Kennedy explained:

> To be sure, the statutory provision the consular officer cited covers a broad range of conduct. And Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on which the consular officer relied. Congress understood this problem, however . . . . Under *Man-*

*Din*, the consular officers provided the visa applicants with the reason for their decisions within three weeks and about a month, respectively. But just because the government provided prompt notice in those two cases does not mean that it is constitutionally required. *See Cardenas*, 826 F.3d at 1172; *Din*, 576 U.S. at 104–05, 135 S. Ct. 2128.

To be sure, we do not turn a blind eye to the government's behavior. We review consular decisions when "a consular officer acted in subjective bad faith rather than out of a 'desire to get it right.'" *Khachatryan*, 4 F.4th at 854–55 (quoting *Yafai v. Pompeo*, 912 F.3d 1018, 1022 (7th Cir. 2019)). Prolonged delays may show that the consular officer's reason for the denial is not genuine. *See id.* For example, in *Khachatryan*, the petitioner's father tried to obtain a visa for 14 years, but the Embassy "repeatedly relied on the legally and factually invalid" reasons to deny the visa. *Id.* at 854. After Citizenship and Immigration Service's several attempts to tell the Embassy that its finding was unsupported, the Embassy "suddenly for the first time over that 14-year period hauled out" a new basis for denying the visa. *Id.* The government insisted that we must take the "new allegation at face value." *Id.* But we declined. We concluded that "the overall pattern of troubling behavior over such an extended period of time is enough to raise a *plausible* contrary inference that the consular of-

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> *del*, respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa to an alien abroad.

*Din*, 576 U.S. at 105–06, 135 S. Ct. 2128.

ficer acted in subjective bad faith." *Id.* at 852, 854–55. Thus, the timing of the government's disclosure to the visa applicant was relevant only for the bad-faith inquiry, not for the issue of timely notice.

Finally, as a practical matter here, Muñoz suffered no real harm despite the government's delay in notifying her of the reason for the visa denial. Muñoz suggests that she did not know for three years why the government considered her husband inadmissible. The majority opinion homes in on that allegation in ruling that the government violated her supposed due process right to be timely notified of that reason for denial. But Muñoz seemingly knew that the United States suspected her husband of being a MS-13 gang member. Within five days of the U.S. Consulate advising Muñoz that the State Department concurred with the consular officer's decision, her former lawyer wrote to the State Department that "an immigration visa application is unjustly being denied just for the simple fact that that the applicant has tattoos," even though he "is not a gang member." Then she submitted a declaration from a gang expert who contended that "none of the tattoos on Mr. Asencio[']s body represent any gang or criminal organization that I am aware of."

So Muñoz's real complaint is *not* that she did not know for a long time why the government considers her husband inadmissible. She apparently knew. Rather, the crux of her complaint is that the government did not provide evidence for its belief that her husband is affiliated with the MS-13 gang. But that objection runs aground the consular non-reviewability doctrine. There is no judicial right to demand evidence supporting the government's denial of a visa. *Din*, 576 U.S. at 104, 135

S. Ct. 2128 (2015) (Kennedy, J., concurring in the judgment) (noting that courts do not "look behind the exercise of that discretion" to deny a visa). And for good reason: The government here may be relying on confidential information derived from, say, a covert operation in El Salvador, or perhaps it is acting based on a secret diplomatic initiative. We cannot require the Executive Branch to disclose such information because "the 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." *Allen*, 896 F.3d at 1104 (quoting *Ventura-Escamilla* v. *Immigr. & Naturalization Serv.*, 647 F.2d 28, 30 (9th Cir. 1981)).

In short, it is "[t]he political branches—not the courts—[that] have authority to create the administrative process for visa decisions." *See Allen*, 896 F.3d at 1105. We are thus powerless to dictate the consular officers' visa decision-making process, even if we may doubt their judgment.

**II. The majority's new standard is potentially unworkable.**

I also fear that this new standard may be practically difficult for consular officials to implement. The majority opinion requires consular officers to provide this new "timeliness" due process right only when a U.S. citizen's rights are burdened. This is so because foreign citizens have no legitimate claim of entitlement to a visa. *See Din*, 576 U.S. at 88, 135 S. Ct. 2128; *Mandel*, 408 U.S. at 762, 92 S. Ct. 2576 ("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.").

The majority opinion assumes that consular officials will know when U.S. citizens' rights are burdened. But this will not always be clear from the visa application. For example, not all family-sponsored visas will require notification because there may be no protected rights or relationships involved. *See Khachatryan*, 4 F.4th at 855 (holding that a U.S. citizen son did not have "a protected liberty interest in having his father come to the United States"). The inquiry becomes even less clear outside of family-sponsored visas. And even where courts have provided guidance, it may be murky when a liberty interest is burdened by a visa denial.

Adding to the confusion will be what constitutes a "reasonable time period." The majority does not define "reasonable" but suggests a 3-to-12-month range. The majority opinion ties this standard to an internal review deadline in the Foreign Affairs Manual (FAM) and the deadline for a visa applicant to request reconsideration under the Code of Federal Regulations. Neither guidepost, however, is particularly relevant for due process rights of a U.S. citizen seeking judicial review. FAM, for example, exempts notice in some cases. *See* 9 FAM 504.11-3(A)(1)(c). The regulations relied on by the majority opinion also do not place a time constraint on consular officials. The Code of Federal Regulations requires only that the consular officer "inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory provision of law or implementing regulation under which administrative relief is available." 22 C.F.R. § 42.81. That the regulations give "the applicant [ ] one year from the date of refusal" to gather more evidence to overcome his inadmissibility, 22 C.F.R. § 42.81(e), is

separate from a constitutional due process right for U.S. citizens.

* * * * *

Muñoz requested that we vacate the district court's decision because the State Department "failed to provide any fact to support its" decision and thus acted in bad faith. The majority opinion recognizes that the State Department met that burden but still vacates the district court's well-reasoned decision, creating a new due process right that raises separation-of-powers concerns. I respectfully dissent.

**APPENDIX B**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 17-0037 AS

SANDRA MUÑOZ AND LUIS ERNESTO ASENCIO-CORDERO, PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF STATE ET AL., DEFENDANTS

Signed: Mar. 18, 2021

**MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

On January 3, 2017, Sandra Muñoz and Luis Ernesto Asencio-Cordero filed a Complaint for Declaratory Relief against the U.S. Department of State ("DOS"); Antony Blinken, the U.S. Secretary of State; and Brendan O'Brien, the U.S. Consul General in San Salvador, El Salvador,[1] challenging the denial of Asencio-Cordero's

[1] The Complaint originally named John F. Kerry as U.S. Secretary of State and Mark Leoni as U.S. Consul General. Antony Blinken, the current U.S. Secretary of State, and Brendan O'Brien, Consul General at the U.S. Embassy in San Salvador, have been substituted for their predecessors. Fed. R. Civ. P. 25(d).

visa application. (Dkt. No. 1). The Complaint raises six causes of action: (1) the visa denial was not facially legitimate and bona fide (Count One); (2) the visa denial violates the Equal Protection Clause of the Fifth Amendment (Count Two); (3) the visa denial violates the separation of powers (Count Three); (4) the visa denial was made in bad faith (Count Four); (5) the visa denial without judicial review violates the Administrative Procedures Act (Count Five); and (6) 8 U.S.C. § 1182(a)(3)(A)(ii) is unconstitutionally vague (Count Six). (Compl. ¶¶ 34-51). Plaintiffs seek a declaration that the DOS's reason for denying Asencio-Cordero's visa application was not bona fide and 8 U.S.C. § 1182(a)(3)(A)(ii) is unconstitutionally vague. (Id. at 12). The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 25, 27, 29).

On September 29, 2017, Defendants filed a Motion to Dismiss, which the Court denied on December 11, 2017. (Dkt. Nos. 37, 47). On December 26, 2017, Defendants answered the Complaint (Dkt. No. 48), and on January 2, 2018, they filed an amended answer (Dkt. No. 49). On April 4, 2018, Plaintiffs filed a Motion for Judgment on the Pleadings, which the Court denied on June 8, 2018. (Dkt. No. 52, 59). On April 2, 2019, the Court granted Plaintiffs the authority to conduct limited discovery. (Dkt. No. 82).

Currently pending before the Court are the parties' cross-motions for summary judgment, which have been fully briefed. (See Dkt. Nos. 101 ("Plaintiffs' Motion"), 103 ("Defendants' Motion"), 115 ("Defendants' Opposition"), 116 ("Plaintiffs' Opposition") 117 (Defendants' statement of genuine disputes of material facts), and 118

(Plaintiffs' statement of genuine disputes of material facts)).[2] On January 6, 2021, the Court held a telephonic hearing on the motions. (Dkt. No. 119).[3] For the reasons discussed below, Defendants' Motion is GRANTED, Plaintiffs' Motion is DENIED, and the case is DISMISSED.

**STATEMENT OF FACTS**[4]

Plaintiff Asencio-Cordero is a native and citizen of El Salvador who arrived in the United States in March 2005. (Compl. ¶ 15). In July 2010, he married Plaintiff Muñoz, a U.S. citizen by birth. (Compl. ¶ 16). In April 2015, Asencio-Cordero departed the United States to pursue an immigrant visa. (Compl. ¶¶ 3, 18). The following month, after Muñoz's immigrant relative petition was approved, Asencio-Cordero was interviewed for an immigrant visa at the U.S. Consulate in El Salvador. (Compl. ¶¶ 18, 19).

On or about December 28, 2015, the Consular Section denied Asencio-Cordero's visa application by citing 8 U.S.C. § 1182(a)(3)(A)(ii), which states that "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity" is ineli-

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[2] On January 5, 2021, Defendants filed a notice of supplemental authority, and Plaintiffs filed a response. (Dkt. Nos. 120-121).

[3] On February 17, 2021, Defendants filed a notice of supplemental authority, and Plaintiffs filed a response. (Dkt. Nos. 122-123).

[4] Based on the parties' respective statements of undisputed facts, the following facts are undisputed. (See Dkt. Nos. 101-1, 103-1, 117, 118). Citations to the Complaint and declarations are consistent with the parties' citations.

gible to receive a visa and is ineligible to be admitted to the United States. (Compl. ¶¶ 20, 22).

On January 20, 2016, Congresswoman Judy Chu sent the DOS a letter on Muñoz's behalf, and Consul Landon R. Taylor responded on January 21, 2016, by citing § 1182(a)(3)(A)(ii), with no further information. (Compl. ¶¶ 23, 24). In April 2016, the Consulate forwarded the case to the immigration visa unit for review. (Compl. ¶ 26). On April 13, 2016, Taylor reported to Plaintiffs: "[T]he finding of ineligibility for [Asencio-Cordero] was reviewed by the [DOS], which concurred with the consular officer's decision. Per your request, our Immigration Visa Unit took another look at this case, but did not change the decision." (Compl. ¶ 28).

Plaintiffs wrote to the DOS's Office of Inspector General, requesting that a reason be given for the inadmissibility decision. (Compl. ¶ 30). Plaintiffs submitted a declaration from Humberto Guizar, an attorney and court-approved gang expert, who reviewed photographs of Asencio-Cordero's tattoos and opined that "Asencio does not have any tattoos that are representative of the Mara Salvatrucha gang [(MS-13)] or any other known criminal street gang" in either El Salvador or the United States.[5] (Dkt. No. 77-1, Exh. M (Guizar Decl.) at ¶¶ 1, 7-9). Guizar concluded that "Asencio is not a gang member, nor is there anything that I am aware of that can reasonably link him to any known criminal organization." (Id. ¶ 10). At his May 2015 interview with the consular officer, moreover, Asencio-Cordero had denied

[5] Guizar's declaration is dated April 27, 2016, and seems to have been submitted around that date, in support of Plaintiffs' request for DOS's reconsideration of the visa denial. (See Dkt. No. 77-1, Exh. M).

ever being associated with a criminal gang. (Compl. ¶¶ 20-21). However, on May 18, 2016, Christine Parker, the DOS's Chief of the Outreach and Inquiries Division of Visa Services, responded merely that the DOS "concurred in the finding of ineligibility." (Compl. ¶ 33).

On November 8, 2018, during this litigation, DOS attorney advisor Matt McNeil, who reviewed DOS's electronic database, asserted in a declaration: "[B]ased on the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of the [sic] Mr. Asencio-Cordero's tattoos, the consular officer determined that Mr. Asencio-Cordero was a member of a known criminal organization identified in 9 FAM 302-5-4(b)(2), specifically MS-13."[6] (Dkt. No. 76-1 (McNeil Decl.) at ¶¶ 1-3).

At the telephonic hearing before the Court on January 6, 2021, counsel for Defendants clarified on the record that Asencio-Cordero's tattoos were a basis for the consular officer's decision, in addition to information provided by law enforcement which identified Asencio-Cordero as a member of the MS-13 gang.[7]

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[6] The Foreign Affairs Manual (FAM) "is published by the Department of State and . . . contains the functional statements, organizational responsibilities, and authorities of each of the major components of the U.S. Department of State, including Consular Officers." Sheikh v. U.S. Dep't of Homeland Sec., 685 F. Supp. 2d 1076, 1090 (C.D. Cal. 2009).

[7] Because counsel made these statements at the January 6 hearing, they were not addressed in the parties' statements of facts, but the Court considers them as representations made on behalf of the Government on the record in this case, which partially illuminate the Government's redacted filings.

**SUMMARY OF THE PARTIES' ARGUMENTS**

Plaintiffs argue that they are entitled to summary judgment because the government gave no "bona fide factual reason" for denying Asencio-Cordero's visa application. (Plaintiffs' Motion at 4-5; Plaintiffs' Opposition at 10-13). Plaintiffs also assert that Defendants acted in bad faith, including by failing to respond to Plaintiffs' evidence rebutting the consular officer's apparent determination that Asencio-Cordero is a gang member. (Plaintiffs' Motion at 6-8; Plaintiffs' Opposition at 15-20). Plaintiffs further contend that Defendants' conduct violates the APA because it is arbitrary and capricious. (Plaintiffs' Motion at 14-16; see Plaintiffs' Opposition at 13). In addition, Plaintiffs assert that 8 U.S.C. § 1182(a)(3)(A)(ii) is unconstitutionally vague, and they have standing to challenge it. (Plaintiffs' Motion at 9-14; Plaintiffs' Opposition at 20-25).

Defendants argue that Plaintiffs' claims, including the APA claim, are foreclosed by the doctrine of consular nonreviewability. (Defendants' Motion at 10-22; Defendants' Opposition at 4-12, 17-19). Defendants contend that the consular officer's decision satisfied the requisite standard because the officer cited a legitimate statutory admissibility ground, 8 U.S.C. § 1182(a)(3)(A)(ii), which was applicable because the officer assertedly had reason to believe, based on information received from law enforcement, that Asencio-Cordero was associated with the MS-13 gang, an organized transnational criminal organization listed in 9 FAM 302.5-4(B)(2). (Defendants' Motion at 13-14; Defendants' Opposition at 1-2, 5-8). Defendants maintain that Plaintiffs were not entitled to any further information for the decision other than the mere citation to § 1182(a)(3)(A)(ii).

(Defendants' Motion at 15; Defendants' Opposition at 4-6). Defendants thus assert that by disclosing any information regarding Asencio-Cordero's suspected association with MS-13, they have given Plaintiffs "far more" than the law requires. (Defendants' Motion at 17-18). Defendants further assert that Plaintiffs have not made any affirmative showing of bad faith, and there is no evidence to suggest that the consulate officer's decision was based on knowingly false or improper grounds. (Defendants' Motion at 18-21; Defendants' Opposition at 9-12). Defendants additionally argue that Plaintiffs' vagueness challenge to § 1182(a)(3)(A)(ii) fails for lack of standing and on the merits. (Defendants' Motion at 22-25; Defendants' Opposition at 2, 12-16).

**STANDARD OF REVIEW**

Rule 56(a) of the Federal Rules of Civil Procedure authorizes the granting of summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The standard for granting a motion for summary judgment is essentially the same as for granting a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Judgment must be entered "if, under the governing law, there can be but one reasonable conclusion as to the verdict." Id. at 250, 106 S. Ct. 2505.

The moving party has the initial burden of identifying relevant portions of the record demonstrating the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265

(1986). "Material facts are those which may affect the outcome of the case." Long v. Cnty. of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); In re Caneva, 550 F.3d 755, 760 (9th Cir. 2008). "A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party." Long, 442 F.3d at 1185; Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010). "When presented with cross-motions for summary judgment, [a court] review[s] each motion for summary judgment separately, giving the nonmoving party for each motion the benefit of all reasonable inferences." Center for Bio-Ethical Reform, Inc. v. L.A. County Sheriff Dep't, 533 F.3d 780, 786 (9th Cir. 2008).

If the moving party sustains its burden, the burden then shifts to the nonmovant to cite to "particular parts of materials in the record" demonstrating a material fact is "genuinely disputed." Fed. R. Civ. P. 56(c)(1); Celotex Corp., 477 U.S. at 324, 106 S. Ct. 2548; Anderson, 477 U.S. at 256, 106 S. Ct. 2505. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 106 S. Ct. 2548; see also Anderson, 477 U.S. at 252, 106 S. Ct. 2505 (parties bear the same substantive burden of proof as would apply at a trial on the merits).

"[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" Hunt v. Cromartie, 526 U.S. 541, 552, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999) (quoting Anderson,

477 U.S. at 255, 106 S. Ct. 2505); Groh v. Ramirez, 540 U.S. 551, 562, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004). However, summary judgment cannot be avoided by relying solely on "conclusory allegations [in] an affidavit." Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (more than a "metaphysical doubt" is required to establish a genuine dispute of material fact). "The mere existence of a scintilla of evidence in support of the plaintiff's position" is insufficient to survive summary judgment; "there must be evidence on which the [fact finder] could reasonably find for the plaintiff." Anderson, 477 U.S. at 252, 106 S. Ct. 2505.

**DISCUSSION**

## A. The Visa Denial Did Not Violate Plaintiffs' Rights

### 1. Applicable Law

"Although the Constitution contains no direct mandate relating to immigration matters, the Supreme Court has long recognized that the political branches of the federal government have plenary authority to establish and implement substantive and procedural rules governing the admission of aliens to this country." Jean v. Nelson, 727 F. 2d 957, 964 (11th Cir. 1984), aff'd, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985). "The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542, 70 S. Ct. 309, 94 L. Ed. 317 (1950). "In practice, however, the comprehensive character of the [Immigration and National-

ity Act (INA)] vastly restricts the area of potential executive freedom of action, and the courts have repeatedly emphasized that the responsibility for regulating the admission of aliens resides in the first instance with Congress." Jean, 727 F. 2d at 965. "Thus, as a result of the existence of inherent executive power over immigration and the broad delegations of discretionary authority in the INA, the separation-of-powers doctrine places few restrictions on executive officials in dealing with aliens who come to this country in search of admission or asylum." Id. at 967. "The Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." Kleindienst v. Mandel, 408 U.S. 753, 766, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972) (citation omitted). "When Congress delegates this plenary power to the Executive, the Executive's decisions are likewise generally shielded from administrative or judicial review." Andrade–Garcia v. Lynch, 828 F.3d 829, 834 (9th Cir. 2016); see Knauff, 338 U.S. at 544, 70 S. Ct. 309 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

Nevertheless, the Government's plenary power "does not mean that it is wholly immune from judicial review." Jean, 727 F. 2d at 975; see Hazama v. Tillerson, 851 F.3d 706, 708 (7th Cir. 2017) ("the Court has never entirely slammed the door shut on review of consular decisions on visas"). Rather, "courts have identified a limited exception to the doctrine of consular nonreviewability where the denial of a visa implicates the constitutional rights of American citizens." Bustamante v. Mukasey, 531 F.3d 1059, 1061 (9th Cir. 2008).

This limited exception to the doctrine of consular nonreviewability traces to the Mandel decision. Dr. Ernest Mandel was a Belgian journalist and a self-described revolutionary Marxist, who had been invited by college professors, all of them U.S. citizens, to speak at a university conference. Mandel, 408 U.S. at 756-57, 92 S. Ct. 2576. The consulate denied Mandel's visa application, finding him inadmissible under the immigration laws at that time, which barred non-citizens who advocate world communism, and the Attorney General declined to grant a waiver. Id. at 757, 92 S. Ct. 2576; see Cardenas v. United States, 826 F.3d 1164, 1169 (9th Cir. 2016). Mandel, along with a number of American professors, challenged the denial. Mandel, 408 U.S. at 759-60, 92 S. Ct. 2576. While the Supreme Court ruled that "Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry," the Court found that the denial of Mandel's visa implicated the professors' First Amendment right to receive ideas. Id. at 762, 765-66, 92 S. Ct. 2576. Nevertheless, the Supreme Court "declined to balance the First Amendment interest of the professors against 'Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" Kerry v. Din, 576 U.S. 86, 103, 135 S. Ct. 2128, 192 L. Ed. 2d 183 (2015) (Kennedy, J., concurring) (quoting Mandel, 408 U.S. at 766, 92 S. Ct. 2576) (other citation omitted). Instead, the Mandel Court "limited its inquiry to the question whether the Government had provided a 'facially legitimate and bona fide' reason for its action." Id.; see Mandel, 408 U.S. at 770, 92 S. Ct. 2576 ("We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither

look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.").

The Supreme Court recently returned to the nonreviewability issue in Din. Fauzia Din, a U.S. citizen, was married to Kanishka Berashk, an Afghan citizen and former civil servant in the Taliban regime. Din, 576 U.S. at 89, 135 S. Ct. 2128. The consulate denied Berashk's visa application, finding him inadmissible under 8 U.S.C. § 1182(a)(3), a "statutory provision prohibiting the issuance of visas to persons who engage in terrorist activities," but the consulate gave no further explanation. Id. at 90, 102, 135 S. Ct. 2128. When Din challenged the decision in court, the United States District Court for the Northern District of California granted the Government's motion to dismiss the complaint. The Ninth Circuit then reversed the district court's decision. The court noted, based on its earlier holding in Bustamante v. Mukasey, 531 F.3d at 1062, that as a U.S. citizen, Din had a protected liberty interest in marriage that entitled her to review of the denial of her spouse's visa. Din v. Kerry, 718 F.3d 856, 860 (9th Cir. 2013), vacated, 576 U.S. 86, 135 S. Ct. 2128, 192 L. Ed. 2d 183 (2015). The Court held that the government's visa denial did not satisfy the standard under Mandel because it did not offer a factual basis or cite to a narrow enough ground to permit the court to determine that the government had properly construed the applicable statute. Id. at 861–62.

The Supreme Court reversed the Ninth Circuit in a plurality opinion. Din, 576 U.S. 86, 135 S. Ct. 2128. While a three-justice plurality concluded that a citizen,

such as Din, had no due process right with respect to her spouse's visa denial, that view did not garner a majority of the Court.[8] Instead, the two-justice concurrence, which the Ninth Circuit subsequently held to be the controlling Din analysis, assumed without deciding that Din's constitutional rights were burdened by the visa denial, but held that the reasons given by the Government satisfied Mandel's "facially legitimate and bona fide" standard. Din, 576 U.S. at 102-06, 135 S. Ct. 2128 (Kennedy, J., concurring);[9] see also Cardenas, 826 F.3d at 1171-72 (determining that the Kennedy concurrence in Din "represents the holding of the Court"). Specifically, Justice Kennedy, joined by Justice Alito, concluded that the Government's citation to § 1182(a)(3)(B) alone sufficed as a "facially legitimate and bona fide reason" because, "unlike the waiver provision at issue in Mandel, which granted the Attorney General nearly unbridled discretion, § 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa."[10] Din, 576 U.S. at 105, 135 S. Ct. 2128.

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[8] The four-justice dissent concluded that Din had a due process liberty interest in the matter, Din, 576 U.S. at 107-10, 135 S. Ct. 2128 (Breyer, J., dissenting), and the two-justice concurrence "assumed without deciding" that she had this right, id. at 103, 135 S. Ct. 2128 (Kennedy, J., concurring). It therefore appears that the Ninth Circuit's Bustamante holding remains intact, such that a U.S. citizen has a protected liberty interest with respect to the denial of her spouse's visa application. See Bustamante, 531 F.3d at 1062.

[9] All subsequent citations to Din refer to Justice Kennedy's concurrence.

[10] Section 1182(a)(3)(B) precludes visas for non-citizens who have engaged in, incited, or endorsed, or are believed to be likely to engage in, any terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(i). How-

As construed by the Ninth Circuit in Cardenas, the Supreme Court's controlling Din concurrence laid out a two-part test for determining whether the denial of a visa provides the "facially legitimate and bona fide reason" required by Mandel. "First, the consular officer must deny the visa under a valid statute of inadmissibility." Cardenas, 826 F.3d at 1172. "Second, the consular officer must cite an admissibility statute that 'specifies discrete factual predicates the consular officer must find to exist before denying a visa,' or there must be 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, 135 S. Ct. 2128). "Once the government has made that showing, the plaintiff has the burden of proving that the reason was not bona fide by making an 'affirmative showing of bad faith on the part of the consular officer who denied [ ] a visa.'" Id. (quoting Din, 576 U.S. at 105, 135 S. Ct. 2128). This test is the only recognized exception to consular nonreviewability; there is no separate right under the APA to review a consular officer's visa denial. See Allen v. Milas, 896 F.3d 1094, 1108 (9th Cir. 2018) ("We join the D.C. Circuit in holding that the APA provides no avenue

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ever, the statute sets forth the specific types of facts needed to constitute "terrorist activity" and to qualify as "engag[ing] in terrorist activity." Id. § 1182(a)(3)(B)(iii)-(iv). In contrast, the statute at issue in Mandel generally precluded visas for non-citizens "who advocate[d] the economic, international, and governmental doctrines of World communism," 8 U.S.C. § 1182(a)(28)(D) (1964 ed.), but it also gave the Attorney General broad discretion to grant individual exceptions, allowing the alien to obtain a temporary visa, id. § 1182(d)(3); see Din, 576 U.S. at 102-03, 135 S. Ct. 2128 (discussing Mandel).

for review of a consular officer's adjudication of a visa on the merits.").

In Cardenas, the Ninth Circuit concluded that the test, under Mandel and Din, was satisfied because the consular officer (1) cited a valid statute of inadmissibility, § 1182(a)(3)(A)(ii), and (2) "provided a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility: the belief that [the visa applicant] was a 'gang associate' with ties to the Sureno gang." Id. The officer's gang-association finding was expressly based on facts provided in the record, including the fact that the alien had been identified by police as a Sureno gang associate when arrested in June 2008 as a passenger in a vehicle owned and driven by a known Sureno gang member. Id. at 1167–68. When the alien's visa application was denied, the consulate informed the alien, in writing, that "the circumstances of [the June 2008] arrest, as well as information gleaned during the consular interview, gave the consular officer sufficient 'reason to believe' that [the alien] has ties to an organized street gang." Id. at 1168.

**2. Analysis**

Plaintiff Muñoz, as a U.S. citizen married to Plaintiff Asencio-Cordero, has a protected liberty interest in the denial of Asencio-Cordero's visa. See Bustamante, 531 F.3d at 1062.[11] The Court therefore applies the two-part test for determining whether a "facially legitimate and bona fide reason" was provided, as required by Mandel. The first part is clearly satisfied here, since it

[11] As noted above, this holding in Bustamante, which the Ninth Circuit also relied on in Din, 718 F.3d at 860, was not overturned by a majority of the Supreme Court.

is undisputed that the consular officer's citation to § 1182(a)(3)(A)(ii) was sufficient to demonstrate that the visa denial relied on a valid statute of inadmissibility. See Din, 576 U.S. at 104, 135 S. Ct. 2128 (consular officer's citation to § 1182(a)(3)(B) "suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements"); Cardenas, 826 F.3d at 1172 ("The consular officer gave a facially legitimate reason to deny Mora's visa because he cited a valid statute of inadmissibility, § 1182(a)(3)(A)(ii)."). Less clear is whether the Government satisfied the second part of the test, which requires either (a) that the consular officer "cite an admissibility statute that 'specifies discrete factual predicates the consular officer must find to exist before denying a visa,'" or (b) that there be "a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." Cardenas, 826 F.3d at 1172 (quoting Din, 576 U.S. at 105, 135 S. Ct. 2128).

Defendants argue that mere citation to the statute sufficed. (Defendants' Opposition at 4-6). The Court has already rejected that argument. (See Dkt. No. 59 at 11-15). Unlike the provision at issue in Din, § 1182(a)(3)(A)(ii) does not provide the "discrete factual predicates" necessary to deny a visa because the statute merely precludes admission to a non-citizen who a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage . . . in . . . any other unlawful activity." 8 U.S.C. § 1182(a)(3)(A)(ii); see also Din, 576 U.S. at 105, 135 S. Ct. 2128 ("But unlike the waiver provision at issue in Mandel, which granted the Attorney General nearly unbridled discretion, § 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist be-

fore denying a visa."); Cardenas, 826 F.3d at 1172 ("[T]here must be a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility.") (quoting Din, 576 U.S. at 105, 135 S. Ct. 2128).

Defendants cite to the Supreme Court's decision in Trump v. Hawaii, — U.S. —, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018), as support for their contention that the mere citation to § 1182(a)(3)(A)(ii) sufficed. (See Defendants' Opposition at 5). In dicta, the Hawaii Court provided a limited summary of the Supreme Court's ruling in Din, stating that "the Government need provide only a statutory citation to explain a visa denial." 138 S. Ct. at 2419. However, the Hawaii Court cited the very page in Din where the Supreme Court explicitly noted that the consular officer must *either* cite an inadmissibility statute that specifies discrete factual predicates or there must be a fact in the record that provides at least a facial connection to the statutory ground of inadmissibility. Id. (citing Din, 135 S. Ct. at 2141). Further, there is no indication in Hawaii that the Supreme Court intended to overrule Din. Indeed, no court has concluded that Hawaii overruled either Din or the Ninth Circuit's opinion in Cardenas, which carefully summarized the Din decision. This Court follows Cardenas and Justice Kennedy's reasoning in Din to conclude that the mere citation to § 1182(a)(3)(A)(ii) did not suffice.

However, the Government has offered further explanations for the consulate officer's decision. First, Defendants have informed Plaintiffs that the visa was denied based on § 1182(a)(3)(A)(ii) because the consulate officer determined that Asencio-Cordero was a member

of MS-13, a recognized transnational criminal organization. Defendants submitted a declaration stating that the officer made this determination "based on the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of the [sic] Mr. Asencio-Cordero's tattoos." (Dkt. No. 76-1 (McNeil Decl.) at ¶ 5). Defendants also provided to Plaintiffs' counsel and the Court several redacted documents from the Consolidated Consular Database regarding the officer's determinations in Asencio-Cordero's case, although the redactions encompass essentially all material portions of the documents.[12] (See Dkt. No. 112). To the extent these documents and other representations still left unclear whether the consular officer's investigation yielded any *facts* that "provide[d] at least a facial connection to" the consular officer's determination, Defendants' counsel later clarified, at the hearing on January 6, 2021, that the tattoos specifically contributed to the determination, as did law enforcement information

[12] The documents include an October 2015 memorandum from the Fraud Prevention Unit at the U.S. Embassy in El Salvador, as well as an Advisory Opinion request submitted by a consular officer and the Visa Office's response to that request. Defendants submitted unredacted copies to the Court for *in camera* review. (See Dkt. No. 112). Since Plaintiffs have been unable to view these copies, the Court agrees with Plaintiffs that it cannot consider the redacted material in ruling on the substantive issues in this case. See Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1069-70 (9th Cir. 1995) (noting "the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions"; further stating that the "use of undisclosed information in adjudications should be presumptively unconstitutional," and "[o]nly the most extraordinary circumstances could support one-sided process").

which identified Asencio-Cordero as an MS-13 gang member.

Plaintiffs maintain that this still does not suffice, and that Defendants have failed to identify any facts supporting the decision. Among other things, Plaintiffs contend that at the January 6 hearing, Defendants "conceded" that law enforcement merely gave the consular officer its *conclusion* that Asencio-Cordero was an MS-13 gang member, "without providing the consular officer with any factual basis that led them to that conclusion." (Dkt. No. 123 at 5). However, Plaintiffs wrongly assume they have a right to examine or dispute the officer's assessment of evidence underlying the decision. To the contrary, within the Court's limited jurisdiction to review consular decisions, it is enough for the Government to have disclosed that the officer relied on these *facts*—specifically, (1) that the tattoos signaled to the officer that Asencio-Cordero was an MS-13 member, and (2) that law enforcement also identified him as one. Although Defendants have declined to publicly disclose any further information on this issue (on the grounds of consular nonreviewability and law enforcement privilege), the Court finds that these facts in the record satisfy the government's obligation under Cardenas and Din by "'provid[ing] at least a facial connection to' the statutory ground of inadmissibility."[13] Car-

[13] Defendants' counsel's clarifications in the January 6 hearing differed from the government's prior statements on the record—and to some extent account for why the Court reaches a different conclusion here than in previous orders (see Dkt. Nos. 82, 93)—insofar as the Government's prior statements, as phrased, expressed only that the officer had reviewed and considered all the facts in making the determination. In contrast, the Government has now clarified that

denas, 826 F.3d at 1172 (quoting Din, 576 U.S. at 105, 135 S. Ct. 2128); see also 9 FAM 302.5-4(B)(2) (listing MS-13 as a criminal organization whose members are ineligible for visas under § 1182(a)(3)(A)(ii)); Cardenas, 826 F.3d at 1172 ("[The consular officer] provided a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility [under § 1182(a)(3)(A)(ii)]: the belief that Mora was a 'gang associate' with ties to the Sureno gang."); Burris v. Kerry, 2014 WL 1267272, at *5 (E.D. Tex. Mar. 27, 2014) (Government sufficiently identified basis of visa denial under § 1182(a)(3)(A)(ii) based on consular officer's finding that applicant had "numerous tattoos, some of which are consistent with gang membership and a history of drug use").

Because Defendants have shown that there were facts that provided at least a facial connection to the statutory ground of inadmissibility, Plaintiffs have "the burden of proving that the reason was not bona fide by making an 'affirmative showing of bad faith on the part of the consular officer who denied [Asencio-Cordero] a visa.'" Cardenas, 826 F.3d at 1172 (quoting Din, 576 U.S. at 105, 135 S. Ct. 2128). Subsequent conduct by other actors does not demonstrate bad faith by the officer who made the original decision. See id. ("[A]llegations about the second interview obviously cannot raise a plausible inference that the officer acted in bad faith in making the original decision.").

Plaintiffs argue that the Government acted in bad faith here by withholding the factual basis for the visa

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the tattoos and law enforcement information actually connected Asencio-Cordero to MS-13.

denial, and thus depriving Plaintiffs of "the opportunity to argue against it." (Plaintiffs' Opposition at 10, 17-18). The Court disagrees. The consular officer did not demonstrate bad faith by explaining the decision with nothing more than a citation to § 1182(a)(3)(A)(ii). Consular officers are not required to give applicants any further explanation.

The statute, for example, requires only that consular officers provide denial notices that "list[ ] the specific provision or provisions of law under which the alien is inadmissible"—and this notice requirement does not even apply to non-citizens, such as Asencio-Cordero, who are found inadmissible under § 1182(a)(2) or § 1182(a)(3). 8 U.S.C. § 1182(b); see Din, 576 U.S. at 105–06, 135 S. Ct. 2128 (noting that while "Din perhaps more easily could mount a challenge to her husband's visa denial [(which was based on § 1182(a)(3)(B))] if she knew the specific subsection on which the consular officer relied," the requirement to provide notice of the specific subsection "does not apply when, as in this case, a visa application is denied due to terrorism or national security concerns") (citing § 1182(b)(3)). Also, to the extent that DOS's own Foreign Affairs Manual may direct officers to give more information,[14] a failure to adhere to such guidelines does not demonstrate bad faith. see Baluch v. Kerry, 2016 WL 10636362, at *3 (C.D. Cal. Nov. 14, 2016) ("Even if the officer did not

[14] DOS's Foreign Affairs Manual requires consular officials to provide "[t]he factual basis for the refusal" unless the DOS instructs the consular official "not to provide notice" or the consular official "receive[s] permission from the [DOS] not to provide notice." 9 FAM 504.11-3(A)(1)(b)-(c).

abide by the FAM's suggestions, the departure from them is not plausible evidence of bad faith.").

Moreover, the test under Mandel and Din requires only that the officer cite the statute of inadmissibility and, at most, that there be "a fact *in the record* that 'provides at least a facial connection to' the statutory ground of inadmissibility." Cardenas, 826 F.3d at 1172 (quoting Din, 576 U.S. at 105, 135 S. Ct. 2128) (emphasis added). There is no indication that the consular officer needs to have given notice of this fact, only that it be "in the record," for the purpose of review. Although more information was made available to applicants in Cardenas and other cases, those cases do not suggest that such additional information was needed to satisfy due process or that the absence of such information was evidence of bad faith. Plaintiffs here were not given conflicting reasons for the officer's decision, and there is no evidence showing that the officer had an improper motive or basis for the decision. Moreover, even without further information, Plaintiffs were nonetheless able to submit a gang expert's assessment disputing the finding that Asencio-Cordero was a gang member, [15] and Defendants have asserted that Plaintiffs' evidence was taken into consideration in the decision. (See Dkt. No. 77-1, Exh. M (Guizar Decl.); Dkt. No. 103-2 at 7).

Because Plaintiffs' only arguments for bad faith are based on the lack of information given by the consular officer, or on Defendants' subsequent withholding of further information, they fail to make the requisite af-

[15] The gang expert's sworn declaration states that none of Asencio-Cordero's tattoos are associated with known gangs, and nothing the expert is aware of "can reasonably link [Asencio-Cordero] to any known criminal organization." (Guizar Decl. ¶¶ 7-10).

firmative showing of bad faith. Absent that affirmative showing, Plaintiffs have no right to look behind the officer's decision or to contest the evidence or inferences on which it was based. See, e.g., Sesay v. United States, 984 F.3d 312, 316 (4th Cir. 2021) ("For the doctrine of consular nonreviewability to have any meaning, we may not peer behind the decisional curtain and assess the wisdom of the consular determination."); Baluch, 2016 WL 10636362, at *2 ("Baluch essentially asks us to do what Justice Kennedy's controlling opinion in Din forbids—'look behind' the government's 'exclusion of [her husband] for additional factual details[.]'"). Viewing the evidence in the light most favorable to Plaintiffs, the Court concludes that Plaintiffs have failed to create a genuine issue of material fact as to whether the consular officer's decision violated their rights. Plaintiffs' claims challenging that decision (Counts 1-5) therefore merit dismissal pursuant to Defendants' Motion.[16]

## B. Section 1182(a)(3)(A)(ii) Is Not Unconstitutionally Vague

### 1. Applicable Law

The void-for-vagueness doctrine "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes." Sessions v. Dimaya,— U.S.—, 138 S. Ct. 1204, 1212, 200 L. Ed. 2d 549 (2018). The doctrine "guards against arbitrary or discriminatory law

[16] This includes Plaintiffs' claim under the APA. As noted above, the APA offers no separate right to challenge consular officers' decisions because the test under Din and Cardenas is the only recognized exception to consular nonreviewability. See Allen, 896 F.3d at 1108.

enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." Id. "The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

"It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed. 2d 706, (1975); accord Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 946 (9th Cir. 2013); United States v. Dang, 488 F.3d 1135, 1141 (9th Cir. 2007) ("[A] party challenging the facial validity of [a regulation] on vagueness grounds outside the domain of the First Amendment must demonstrate that the enactment is impermissibly vague in all of its applications. Of course, under this rubric, if the statute is constitutional as applied to the individual asserting the challenge, the statute is facially valid.") (internal quotation and citations omitted); see also Moreno v. Attorney Gen. of United States, 887 F.3d 160, 165 (3d Cir. 2018) ("Because vagueness challenges are evaluated on a case by case basis, we must examine 8 U.S.C. § 1182(a)(2)(A)(i)(I) to determine whether the statute is vague as applied to Moreno.") (citations omitted).

**2. Analysis**

As an initial matter, the parties dispute whether Plaintiffs have standing and a legal right to raise a constitutional void-for-vagueness claim against an admissibility statute. (Defendants' Motion at 22-24; Plaintiffs'

Opposition at 20-25). The answer is unclear. It appears, for example, that both Plaintiffs have suffered an actual injury that is fairly traceable to the statute, since the visa denial has deprived Asencio-Cordero of the right to live in the country he considered home for ten years, and it has also deprived Muñoz of her right to live with her husband in their home. see Bernhardt v. Cnty. of Los Angeles, 279 F.3d 862, 868-69 (9th Cir. 2002) (standing requires (1) that a plaintiff "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) that "the injury is fairly traceable to the challenged action of the defendant"; and (3) that the injury would likely be "redressed by a favorable decision.") (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)); see also Trump, 138 S. Ct. at 2416 ("We agree that a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact."). Both Plaintiffs, moreover, appear to have Fifth Amendment due process rights regarding the visa decision, at least to some extent. Although Defendants contend that Asencio-Cordero lacks such rights because he was outside the border at the time (See Defendants' Motion at 23; Defendants' Opposition at 13-14), that fact is not necessarily determinative here. Instead, the Ninth Circuit has held that the proper approach for ascertaining whether non-citizens have constitutional rights outside the United States is the "functional approach" that the Supreme Court applied in Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008), and the "significant voluntary connection" test used in United States v. Verdugo–Urquidez, 494 U.S. 259, 271,

110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990). Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012); see Verdugo-Urquidez, 494 U.S. at 271, 110 S. Ct. 1056 ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."). In Ibrahim, the Ninth Circuit held that the plaintiff, a Malaysian citizen, "established 'significant voluntary connection' with the United States," such that she could assert First and Fifth Amendment claims regarding her no-fly list designation, because she had been attending a doctoral program at Stanford University for four years, and was denied a visa to return only after traveling to attend a conference in Malaysia.[17] Id. at 987, 997. Here, prior to his visa denial, Asencio-Cordero spent ten years in the United States, and he lived with his wife and child, who are U.S. citizens, until he departed in 2015 to pursue an immigrant visa. (See Dkt. No. 59 at 4-5). Based on these facts, Asencio-Cordero appears to have established a "significant voluntary connection" with this country, which entitles him to certain Fifth Amendment due process rights, even though he was on a trip to El Salvador when the visa decision occurred. See Ibrahim, 669 F.3d at 997 (noting that the purpose of the plaintiff's trip abroad "was to further, not to sever, her connection to the United States," and she "intended her stay abroad to be brief").[18]

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[17] The claims in Ibrahim concerned only the plaintiff's designation on a no-fly list, not specifically the revocation or denial of her visa. Ibrahim, 669 F.3d at 991.

[18] More recent Supreme Court cases cited by Defendants do not seem to undermine this conclusion, as such cases draw a distinction

However, the *scope* of Plaintiffs' due process rights remains unclear. Specifically, it is unclear whether either Plaintiff's liberty interest entitles him or her to raise a void-for-vagueness challenge to the admissibility statute. See, e.g., Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823 n.8 (9th Cir. 2003) ("while the Supreme Court has allowed aliens to bring vagueness challenges to deportation statutes, an alien may not have the same right to challenge exclusion provisions") (citation omitted); Boggala v. Sessions, 866 F.3d 563, 569 n.5 (4th Cir. 2017) ("It is unclear whether an alien is allowed to bring a vagueness challenge to admissibility laws."); Beslic v. INS, 265 F.3d 568, 571 (7th Cir. 2001) ("it is questionable whether [a void-for-vagueness] challenge to an admissibility statute would be cognizable"); see also Boutilier v. INS, 387 U.S. 118, 87 S. Ct. 1563, 18 L. Ed. 2d 661 (1967) (non-citizen could not challenge his deportation by asserting vagueness claim against admissibility statute in part because he was "not being deported for conduct engaged in after his entry into the United

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between non-citizens seeking *initial* entry and those in deportation proceedings who have established connections in the United States. see Dep't of Homeland Sec. v. Thuraissigiam, —— U.S. ——, 140 S. Ct. 1959, 1963-64, 207 L. Ed. 2d 427 (2020) ("While aliens who have established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause."). Asencio-Cordero was not "at the threshold of *initial* entry" when his visa was denied, since he had already "established connections in this country" while living here for ten years.

States, but rather for characteristics he possessed at the time of his entry").[19]

Regardless, the Court need not determine whether either Plaintiff has a legal right to bring the vagueness claim because Plaintiffs fail to demonstrate that the challenged statute, 8 U.S.C. § 1182(a)(3)(A)(ii), is unconstitutionally vague. They fail to do so particularly because they have not shown that the statute is vague as applied in this case. see Kashem v. Barr, 941 F.3d 358, 375 (9th Cir. 2019) ("[V]agueness challenges to statutes that do not involve First Amendment violations must be examined as applied to the defendant. . . . [A]s a general matter, a defendant who cannot sustain an as-applied vagueness challenge to a statute cannot be the one to make a facial vagueness challenge to the statute.") (internal quotations and citations omitted).

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[19] As Plaintiffs point out, non-citizen plaintiffs have been permitted to raise void-for-vagueness claims against admissibility statutes in some cases. (See Plaintiffs' Opposition at 22-24). In such cases, however, the plaintiffs were in the United States challenging their removal, and the purported basis for their exclusion concerned criminal acts committed within the United States. see Martinez-de Ryan v. Whitaker, 909 F.3d 247 (9th Cir. 2018); Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957). Here, Plaintiff was denied entry while outside the United States, and that denial was based on his gang membership—which, as opposed to the discrete, U.S.-based actions underlying the decisions in Martinez-de Ryan and other cases, was a *status* that presumably continued at the time of the officer's visa decision. These differences may indeed be material. see Martinez-de Ryan, 909 F.3d at 251 (distinguishing Boutilier because the petitioner in that case was being deported for "a status or condition ('psychopathic personality')" that he was determined to have possessed at the time of his entry, rather than for conduct engaged in after his entry).

The challenged statute provides that "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity" is ineligible to receive a visa and to be admitted to the United States. Although the language of this provision certainly could be construed to encompass innumerable grounds for ineligibility, the consular officer here did not apply the statute because Asencio-Cordero might incidentally partake in jaywalking, or any other potentially unreasonable grounds for denial of entry. Instead, the officer found Asencio-Cordero inadmissible under § 1182(a)(3)(A)(ii) because the officer determined that Asencio-Cordero was a member of MS-13, a recognized transnational criminal organization known for posing a threat to the safety and security of U.S. citizens. See also 9 FAM 302.5-4(B)(2) (listing MS-13 as a criminal organization whose members are ineligible for visas under § 1182(a)(3)(A)(ii)); U.S. Department of Treasury, Treasury Sanctions Latin American Criminal Organization (Oct. 11, 2012), available at http://www.treasury.gov/press-center/press-releases/pages/tg1733.aspx (press release announcing designation of MS-13 as a transnational criminal organization, and characterizing MS-13 as "an extremely violent and dangerous gang responsible for a multitude of crimes that directly threaten the welfare and security of U.S. citizens");[20] United States v. Lopez,

[20] The treasury secretary's designation was made pursuant to Executive Order 13581, which defines a "transnational criminal organization" as one that, among other things, "engages in an ongoing pattern of serious criminal activity involving the jurisdictions of at least two foreign states" and "threatens the national security,

957 F.3d 302, 304 (1st Cir. 2020) (referencing the "notorious criminal gang, famously known as MS-13"); Solomon-Membreno v. Holder, 578 F. App'x 300, 302 n.2 (4th Cir. 2014) ("The plague that is MS–13 . . . has made significant inroads into the United States. A complete list of federal criminal cases involving MS–13 members would be prohibitively long. A cursory sample, however, reveals something of the breadth of the gang's criminal activity.") (collecting cases). A person of average intelligence would reasonably understand that membership in such an organization would imply an engagement in unlawful activity, at the very least, and thus render him ineligible for entry under § 1182(a)(3)(A)(ii). see United States v. Williams, 441 F.3d 716, 724 (9th Cir. 2006) ("In examining a statute for vagueness, we must determine whether a person of average intelligence would reasonably understand that the charged conduct is proscribed."). Moreover, even though the officer's determination on this point basically requires a prediction of future unlawful conduct, and does not depend on whether the applicant has a criminal record, that does not render the statute unconstitutionally vague. see Kashem, 941 F.3d at 364 (noting challenged provisions are "not impermissibly vague merely because they require a prediction of future criminal conduct") (citations omitted); see also Schall v. Martin, 467 U.S. 253, 279, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984) ("[A] prediction of future criminal conduct is 'an experienced prediction based on a host of variables' which cannot be readily codified.") (quoting Greenholtz v. Neb. Penal

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foreign policy, or economy of the United States." Exec. Order No. 13581, 76 Fed. Reg. 44,757 (July 24, 2011).

Inmates, 442 U.S. 1, 16, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979)).

Because Plaintiffs have not demonstrated that the statute is vague as applied, their vagueness claim merits dismissal. See Kashem, 941 F.3d at 364 ("Because we conclude the [challenged provisions] are not vague as applied, we decline to reach the plaintiffs' facial vagueness challenges.") (citing Hoffman Estates, 455 U.S. at 495, 102 S. Ct. 1186).

**CONCLUSION**

For the reasons stated above, the Court GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiffs' Motion. Judgment shall be entered against Plaintiffs on all claims.

LET THE JUDGMENT BE ENTERED ACCORDINGLY

**APPENDIX C**

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

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No. CV 17-0037 AS

SANDRA MUÑOZ; LUIS ERNESTO ASENCIO-CORDERO,
PLAINTIFFS

*v.*

UNITED STATES DEPARTMENT OF STATE, ET AL.,
DEFENDANTS

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Signed: Dec. 11, 2017

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**ORDER**

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ALKA SAGAR, United States Magistrate Judge.

**INTRODUCTION**

On January 3, 2017, Sandra Muñoz ("Muñoz") and Luis Ernesto Asencio-Cordero ("Asencio" and collectively, "Plaintiffs") filed a Complaint for Declaratory Relief ("Complaint") against the U.S. Department of State ("DOS"), John F. Kerry, the U.S. Secretary of State, and Mark Leoni, the U.S. Consul General in San Salvador, El Salvador ("Defendants"), challenging the denial of Asencio's visa application. (Dkt. No. 1). The parties have consented to the jurisdiction of the under-

signed United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 25, 27, 29).

On September 29, 2017, Defendants filed a Motion to Dismiss ("Motion") pursuant to Federal Rules of Procedure 12(b)(1) and 12(b)(6). (Dkt. No. 37). On October 23 and 24, 2017, Plaintiffs filed an Opposition to the Motion ("Opp'n"). (Dkt. Nos. 39, 40; see Dkt. Nos. 41-43). On November 9, 2017, Defendants filed a Reply ("Reply"). (Dkt. No. 46). On December 6, 2017, the Court conducted a hearing on the Motion, heard argument from the parties and took the matter under submission.

For the reasons set forth below, the Motion is DENIED.

**PLAINTIFF'S ALLEGATIONS**

Asencio is a native and citizen of El Salvador, who arrived in the United States in March 2005. (¶ 15).[1] In July 2010, he married Muñoz, who is a U.S. citizen by birth. (¶ 16). In April 2015, Asencio departed the United States to pursue an immigration visa with the DOS, based on the approved immigrant relative petition that Muñoz filed.[2] (¶¶ 3, 18). In May 2015, Asencio

[1] All citations to Plaintiffs' factual allegations are to the relevant paragraph numbers in the Complaint.

[2] Immigrating to the United States is typically a two-step process. First, the person sponsoring the foreign national files a petition with the U.S. Citizenship and Immigration Service ("USCIS"). 22 C.F.R. § 42.41. If the petition is approved, the USCIS forwards it to the respective U.S. consulate for the requisite visa interview. Id. § 42.62.

had an initial interview with the U.S. Consulate in El Salvador. (¶ 19).

On December 28, 2015, the Consular Section denied Asencio's visa application. (¶ 20). Asencio was denied lawful permanent residence status on the grounds that he was inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii), which states that "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity" is ineligible to receive a visa and is ineligible to be admitted to the United States. (¶ 22). Muñoz contacted Congresswoman Judy Chu, who sent a letter on Muñoz's behalf to the DOS on January 20, 2016. (¶ 23). Consul Landon R. Taylor responded to Chu's letter on January 21, 2016, citing § 1182(a)(3)(A)(ii), but provided no specific facts for finding Asencio inadmissible. (¶ 24). (Id.). In April 2016, the Consulate forwarded the case to the immigration visa unit for review. (¶ 26). On April 13, 2016, Taylor reported to Plaintiffs: "the finding of ineligibility for [Asencio] was reviewed by the [DOS], which concurred with the consular officer's decision. Per your request, our Immigration Visa Unit took another look at this case, but did not change the decision." (¶ 28). Plaintiffs wrote to the Office of Inspector General for the DOS, requesting that a reason be given for the inadmissibility decision. (¶ 30). On May 18, 2016, Christine Parker, the Chief of the Outreach and Inquiries Division of Visa Services at the DOS, stated that the DOS "concurred in the finding of ineligibility." (¶ 33).

**STANDARD OF REVIEW**

A Rule 12(b)(6) motion to dismiss for failure to state a claim should be granted if a plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678; Hartmann v. Cal. Dep't of Corr. & Rehab., 707 F.3d 1114, 1121-22 (9th Cir. 2013). Although a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," Twombly, 550 U.S. at 555; Iqbal, 556 U.S. at 678, "[s]pecific facts are not necessary; the [complaint] need only give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests," Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (citations and internal quotation marks omitted); Twombly, 550 U.S. at 555.

In considering whether to dismiss a complaint, the Court must accept the allegations of the complaint as true, Erickson, 551 U.S. at 93-94; Albright v. Oliver, 510 U.S. 266, 267 (1994), construe the pleading in the light most favorable to the pleading party, and resolve all doubts in the pleader's favor, Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Berg v. Popham, 412 F.3d 1122, 1125 (9th Cir. 2005). The Court "need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice." Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2006). Dismissal for failure to

state a claim can be warranted based on either a lack of a cognizable legal theory or the absence of factual support for a cognizable legal theory. See Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint may also be dismissed for failure to state a claim if it discloses some fact or complete defense that will necessarily defeat the claim. Franklin v. Murphy, 745 F. 2d 1221, 1228-29 (9th Cir. 1984).

**A. Doctrine of Consular Nonreviewability**

The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citation omitted). "The Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (citation omitted). "When Congress delegates this plenary power to the Executive, the Executive's decisions are likewise generally shielded from administrative or judicial review." Andrade–Garcia v. Lynch, 828 F.3d 829, 834 (9th Cir. 2016); see U.S. ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

"Despite these rulings, 'courts have identified a limited exception to the doctrine of consular nonreviewability where the denial of a visa implicates the constitutional rights of American citizens.'" Andrade–Garcia, 828 F.3d at 834 (quoting Bustamante v. Mukasey, 531 F.3d 1059, 1061 (9th Cir. 2008)) (alteration omitted).

This limited exception traces to the Mandel decision. Dr. Ernest Mandel was a Belgian journalist and a self-described revolutionary Marxist, who had been invited by college professors, all of them U.S. citizens, to speak at a university conference. Mandel, 408 U.S. at 756-57. The consulate denied Mandel's visa application, finding him inadmissible under the immigration laws at that time, which barred aliens who advocate world communism, and the Attorney General declined to grant a waiver. Id. at 757; see Cardenas v. United States, 826 F.3d 1164, 1169 (9th Cir. 2016). Mandel, along with a number of American professors, challenged the denial. Mandel, 408 U.S. at 759-60. While the Supreme Court ruled that "Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry," the Court found that the denial of Mandel's visa implicated the professors' First Amendment rights to receive ideas. Id. at 762, 765-66. Nevertheless, the Supreme Court "declined to balance the First Amendment interest of the professors against 'Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" Kerry v. Din, 135 S. Ct. 2128, 2139 (2015) (Kennedy, J., concurring) (quoting Mandel, 408 U.S. at 766) (other citation omitted). Instead the Mandel Court "limited its inquiry to the question whether the Government had provided a 'facially legitimate and bona fide' reason for its action." Din, 135 S. Ct. at 2140; see Mandel, 408 U.S. at 770 ("We hold that when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First

Amendment interests of those who seek personal communication with the applicant.").

The Supreme Court recently returned to the nonreviewability issue in Din. Fauzia Din, a U.S. citizen, was married to Kanishka Berashk, an Afghan citizen and former civil servant in the Taliban regime. Din, 135 S. Ct. at 2131. The consulate denied Berashk's visa application, finding him inadmissible under 8 U.S.C. § 1182(a)(3), a "statutory provision prohibiting the issuance of visas to persons who engage in terrorist activities," "but provided no further explanation." Id. at 2132, 2139. The Din concurrence "assumed without deciding that Din's constitutional rights were burdened by the visa denial, but held that the reasons for the visa denial given by the Government satisfied Mandel's 'facially legitimate and bona fide' standard." Cardenas, 826 F.3d at 1170 (9th Cir. 2016) (citing Din, 135 S. Ct. at 2140); see Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 589 (4th Cir.), as amended (May 31, 2017), as amended (June 15, 2017), cert. granted, 137 S. Ct. 2080 (2017), and vacated and remanded on other grounds, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017) ("Courts have continuously applied Mandel's 'facially legitimate and bona fide' test to challenges to individual visa denials."); Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 125 (2d Cir. 2009) ("We conclude that, where a plaintiff, with standing to do so, asserts a First Amendment claim to have a visa applicant present views in this country, we should apply Mandel to a consular officer's denial of a visa."); see also Cardenas, 826 F.3d at 1171-72 (determining that the Kennedy concurrence in Din "represents the holding of the Court").

**B. Analysis**

**1. The Doctrine Of Consular Nonreviewability Precludes Asencio From Obtaining Judicial Review**

Defendants argue that Asencio has no right to judicial review of his visa denial. (Motion at 4). The Court agrees. As an unadmitted and nonresident alien, Asencio has no right to judicial review of the visa denial at issue. See Din, 135 S. Ct. at 2131 ("[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."); 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."). In their Opposition, Plaintiffs do not address Defendants' argument and, thus, have waived the issue. Zaklit v. Glob. Linguist Sols., LLC, No. CV 13-8654, 2014 WL 12521725, at *13 (C.D. Cal. Mar. 24, 2014) (failure of party in its opposition brief to address argument waives the issue).

**2. The Court Has Subject Matter Jurisdiction Over This Case**

Defendants contend that the Court lacks subject matter jurisdiction over this case. (Motion at 9). Rule 12(b)(1) authorizes a court to dismiss a complaint for lack of subject matter jurisdiction. "An attack on subject matter jurisdiction may be facial or factual." Edison v. United States, 822 F.3d 510, 517 (9th Cir. 2016); Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the

truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." Edison, 822 F.3d at 517 (citation omitted).

Despite the "long recognized . . . power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control," Cardenas, 826 F.3d at 1169, "courts have identified a limited exception to the doctrine where the denial of a visa implicates the constitutional rights of American citizens," Bustamante, 531 F.3d at 1061. "[U]nder Mandel, a U.S. citizen raising a constitutional challenge to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision." Bustamonte, 531 F.3d at 1062. A U.S. citizen "has a protected liberty interest in her marriage that gives rise to a right to constitutionally adequate procedures in the adjudication of her husband's visa application." Id. Thus, because Muñoz is entitled to judicial review for the denial of Asencio's visa application, the Complaint sufficiently invokes federal jurisdiction.[3]

**3. The Government Failed To Provide A Bona Fide Factual Reason For Denying Asencio's Visa Application**

While the government's denial of a visa to Asencio implicates Muñoz's protected liberty interest in her marriage, the Court's review "is limited to ensuring that the decision was supported by a 'facially legitimate and bona fide reason.'" Cardenas, 826 F.3d at 1167 (quoting Mandel, 408 U.S. at 770). Din laid out a two-part

[3] Defendants conceded at the hearing, that as a U.S. citizen, Munoz was entitled to judicial review of the denial of her husband's visa application.

test for determining whether the denial of a visa to the spouse of a U.S. citizen provides the "facially legitimate and bona fide reason" required by Mandel. See Cardenas, 826 F.3d at 1172 ("Under the Din concurrence, the facially legitimate and bona fide reason test has two components."). "First, the consular officer must deny the visa under a valid statute of inadmissibility." Id.; see Din, 135 S. Ct. at 2140 (consular officer's citation to § 1182(a)(3)(B) "suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements," and "the Government's decision to exclude an alien it determines does not satisfy one or more of [the statutory conditions for entry] is facially legitimate under Mandel"). "Second, the consular officer must cite an admissibility statute that 'specifies discrete factual predicates the consular officer must find to exist before denying a visa,' or there must be a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." Cardenas, 826 F.3d at 1172 (quoting Din, 135 S. Ct. at 2141).

Plaintiffs acknowledge that the consular officer's citation to § 1182(a)(3)(A)(ii) was sufficient to demonstrate that the visa denial relied on a valid statute of inadmissibility. (Opp'n at 6-7); see Din, 135 S. Ct. at 2140 (consular officer's citation to § 1182(a)(3)(B) "suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements"); Cardenas, 826 F.3d at 1172 ("The consular officer gave a facially legitimate reason to deny Mora's visa because he cited a valid statute of inadmissibility, § 1182(a)(3)(A)(ii)."). Plaintiffs contend, however, that the mere citation to § 1182(a)(3)(A)(ii) fails to provide

the "discrete factual predicates" necessary to deny a visa. (Opp'n at 7). The Court agrees.

Defendants contend that the consular officer's citation to § 1182(a)(3)(A)(ii) provides the "facially legitimate and bona fide reason" required by Mandel. (Reply at 2-3). Defendants argue that "Plaintiffs mistakenly read a two-part test into Din that does not exist." (Id. at 3). However, Din requires both a "facially legitimate" reason and a "bona fide factual basis" for denying a visa. 135 S. Ct. at 2140-41. The Ninth Circuit has explicitly held that satisfying the second part of the Din test requires either a citation to "an admissibility statute that 'specifies discrete factual predicates the consular officer must find to exist before denying a visa,' or there must be a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." Cardenas, 826 F.3d at 1172 (quoting Din, 135 S. Ct. at 2141).

The Court finds that § 1182(a)(3)(A)(ii) does not provide the "discrete factual predicates" necessary to deny a visa because the statute merely precludes admission, without further edification, to an alien who a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage . . . in . . . any other unlawful activity." 8 U.S.C. § 1182(a)(3)(A)(ii). Defendants contend that "this ground is far narrower" than § 1182(a)(3)(B), which the Din court found to provide the requisite "discrete factual predicates." (Reply at 4-5). Section 1182(a)(3)(B) proscribes admission to an alien who a consular officer believes will engage in "terrorist activities." But paragraph (B) includes literally dozens of subparagraphs that describe in detail what "terrorist activity,"

"engag[ing] in terrorist activity," and "terrorist organization" entail. See Chehade v. Tillerson, — F. App'x —. No. 16-55236, 2017 WL 4966863, at *1 (9th Cir. Oct. 27, 2017) ("Because '§ 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa,' it is not necessary for there to also be a fact in the record providing a facial connection to the statutory ground of inadmissibility.") (quoting Din, 135 S. Ct. at 2141). In contrast, paragraph (A) provides no such factual predicates for what "unlawful activity" entails. Indeed, almost anything, including parking violations, jay walking, or driving without a seatbelt, could be included within the ambit of "unlawful activities." Thus, paragraph (A) grants the consular officer "nearly unbridled discretion," which the Mandel and Din courts cautioned against. See Din, 135 S. Ct. at 2140-41 ("But unlike the waiver provision at issue in Mandel, which granted the Attorney General nearly unbridled discretion, § 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa."); see also Cardenas, 826 F.3d at 1172 ("[T]here must be a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility.") (quoting Din, 135 S. Ct. at 2141).

Defendants, however, insist that because "§ 1182(a)(3)(A)(ii) is the *same* section that the Ninth Circuit in Cardenas determined was 'facially legitimate' for the visa refusal in that case," (Reply at 5) (emphasis in original), the citation to that provision, alone, provides the facial connections and no more is needed. But this case is distinguishable from Cardenas, in which the consular officer "provided a 'facial connection' to the statutory ground of inadmissibility: the belief that Mora was a 'gang associate' with ties to the Sureno gang."

826 F.3d at 1172. Defendants' argument that the consular officer *necessarily* had a factual basis for believing that Ascencio-Cordero was seeking to enter the United States to engage in unlawful activity by citing to § 1182(a)(3)(A)(ii) finds no support in the available case law. See Morfin v. Tillerson, 851 F.3d 710, 714 (7th Cir. 2017), cert. denied, No. 17-98, 2017 WL 3136962 (U.S. Oct. 30, 2017) (any due process right alien's wife had to an explanation of the grounds for denial of alien's visa request was satisfied by consular officer's explanation that there was reason to believe alien trafficked in cocaine); Hazama v. Tillerson, 851 F.3d 706, 709-10 (7th Cir. 2017) (consular officer's decision to deny alien's visa application on ground that alien previously engaged in terrorist acts was facially legitimate and bona fide, as it was undisputed that when alien was 13 years old he threw rocks at armed Israeli soldiers); Allen v. Milas, No. 15 CV 0705, 2016 WL 704353, at *3 (E.D. Cal. Feb. 23, 2016) ("[T]he consular office determined that she was ineligible for a visa . . . because she was convicted in a German court of theft . . . [and] for illicit acquisition of narcotics."); cf. Singh v. Tillerson, — F. Supp. 3d —, No. CV 16-922 (CKK), 2017 WL 4232552, at *6 (D.D.C. Sept. 21, 2017) (Any fifth amendment right spouse and father had to review denial of visa requests satisfied by consular officer's explanation that each child was "found ineligible to receive an immigrant visa" under 8 U.S.C. § 1182(a)(6)(C)(i), which prohibits a visa to anyone who has tried to obtain one by fraudulent means or misrepresentation. Plaintiff's wife was also found ineligible for an immigrant visa, pursuant to 8 U.S.C. § 1182(a)(6)(E), on grounds that she made material misrepresentations for the purpose of aiding and abetting aliens who were trying to enter the United

States.); Santos v. Lynch, No. 15 CV 0979, 2016 WL 3549366, at *4 (E.D. Cal. June 29, 2016) ("Even if the Court was to find that Plaintiff stated a liberty interest in living in the United States as an adult child with her parents, Plaintiff has failed to allege that the reasons offered by the consular official for denying her parents' visa applications were not facially legitimate and bona fide. . . . Here, the consular officer . . . determined that they were ineligible for visas . . . because they lived unlawfully in the United States for a period exceeding 1 year. The consular officer also denied Mr. Santos's visa application . . . because as an alien, Mr. Santos knowingly encouraged, induced, assisted, abetted, or aided an alien to enter or to try to enter the United States in violation of law."). Here, neither the consular officer nor the DOS has identified any fact in the record that provides a facial connection to § 1182(a)(3)(A)(ii). (Compl. ¶¶ 5, 6, 22, 24, 33). Accordingly, the Court finds that the government has failed to provide a bona fide factual reason for denying Asencio's visa application.[4]

**4. Bad Faith**

Plaintiffs contend that even if the Court were to find that the mere citation to § 1182(a)(3)(A)(ii) was a bone

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[4] Defendants contend that pursuant to 8 U.S.C. § 1182(b)(3), "a consular officer is not required to provide an explanation of an alien's visa denial if it is premised on the alien's inadmissibility on criminal or security-related grounds." (Reply at 5 n.2; see Motion at 7). But paragraph (b) merely precludes disclosure of "the specific provision or provisions of *law* under which the alien is inadmissible." 8 U.S.C. § (b)(1)(B) (emphasis added). Here, Plaintiffs are seeking the *factual* predicates for the denial, as required by the Supreme Court in Mandel and Din.

fide reason for denying Asencio's visa application, Plaintiffs have plausibly alleged bad faith on the part of the consular officer who denied the visa. "Once the government has made [a bona fide] showing, the plaintiff has the burden of proving that the reason was not bona fide by making an 'affirmative showing of bad faith on the part of the consular officer who denied [ ] a visa.'" Cardenas, 826 F.3d at 1172 (quoting Din, 135 S. Ct. at 2141). To make an affirmative showing of bad faith, a plaintiff must "plausibly allege[ bad faith] with sufficient particularity." Din, 135 S. Ct. at 2141.

Here, Asencio denies ever being associated with a criminal gang. (Compl. ¶ 20). While he has "multiple tattoos," he submitted testimony from an expert witness, who opined that Asencio does not "have any tattoos that are representative of any known criminal street gang." (Id. ¶ 21; see id. ¶ 30). Plaintiff contends that despite this evidence, the consular official rejected Asencio's visa application, finding that he means to enter the United States with the intent to engage in "unlawful activity." (Id. ¶ 4). The official's failure to identify any information contrary to the expert's statements calls into question whether the visa denial was based on any factual predicates.

In Cardenas, the court found no plausible allegations of bad faith given that the visa applicant was both informed of the specific unlawful activity the consular official was concerned about and "given the opportunity to argue that he had no ties to the Sureno gang." 826 F.3d at 1172. Here, the consular official neither informed Asencio of the specific "unlawful activity" he intended to engage in nor provided him with the "opportunity to argue" otherwise.

Defendants argue that Plaintiffs' bad faith argument is "nothing more than unsubstantiated speculation," and request that "this Court do precisely that which the doctrine of consular unreviewability precludes: to 'look behind' the visa refusal for the factual details." (Reply at 6). Defendants are mistaken. The issue is not whether Plaintiffs are entitled to "look behind" the visa refusal or second-guess the consular official's decision—they are not; instead, the question is whether the consular official's given reason for denying the visa application—suspicion of unlawful activity—was his true, bona fide reason. Bustamante, 531 F.3d at 1062.

At the hearing, both parties agreed that if the Court found that the government's denial of Asencio-Cordero's visa application was not supported by a facially legitimate and bona fide reason, the Court need not make a finding regarding bad faith. Given the Court's finding that Defendants have not provided a bona fide reason for denying Asencio's visa. see Macias v. Kerry, No. 13 CV 0201, 2013 WL 3807891, at *5 (S.D. Cal. July 18, 2013) ("Unlike the plaintiff in Bustamante, there are no factual allegations that the government relied upon evidence" to conclude that the visa applicant was a drug trafficker. "Under the facts of this case, the Court is not prepared to make the bona fide inquiry an impossible hurdle for the plaintiffs to state a claim."), the Court finds it unnecessary to address whether, at this stage of the proceedings, Plaintiff have plausibly alleged bad faith with sufficient particularity.

**CONCLUSION**

Defendants' Motion to Dismiss is DENIED. Defendants are ordered to Answer the Complaint within 14 days of the date of this Order.

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55365

SANDRA MUÑOZ; LUIS ERNESTO ASENCIO-CORDERO,
PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES DEPARTMENT OF STATE; ANTONY J. BLINKEN, UNITED STATES SECRETARY OF STATE; BRENDAN O'BRIEN, UNITED STATES CONSUL GENERAL, SAN SALVADOR, EL SALVADOR,
DEFENDANTS-APPELLEES

Filed: July 14, 2023

**ORDER**

Before: MARY M. SCHROEDER, KERMIT V. LIPEZ,* and KENNETH K. LEE, Circuit Judges.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

* The Honorable Kermit V. Lipez, United States Circuit Judge for the First Circuit, sitting by designation.

The petition for rehearing en banc, Docket No. 39, is **DENIED**.

BRESS, Circuit Judge, joined by LEE, Circuit Judge, dissenting from the denial of rehearing en banc:

I respectfully dissent from the denial of rehearing en banc because our court seriously overstepped its bounds in requiring the government, as a matter of due process, to provide its reasons for denying a visa within a "reasonable" time. When, as here, there is no showing of bad faith and the government has provided a facially legitimate and bona fide reason for denying a visa, there is no further requirement that it provide the valid reason within a set time. Our court's novel timeliness rule has no proper legal grounding. And it is inconsistent with the traditional deference we give to the Executive in this area, as embodied in the doctrine of consular nonreviewability and the separation of powers principles that are its foundation.

I therefore agree with Judge Lee's dissent at the panel level, *see Muñoz v. U.S. Dep't of St*ate, 50 F.4th 906, 924–27 (9th Cir. 2022) (Lee, J. dissenting), and concur in Part III.B of Judge Bumatay's dissent from the denial of rehearing en banc. As Judge Bumatay lays out, there may well be other reasons why the plaintiffs' challenge in this case should fail. *See also Kerry v. Din*, 576 U.S. 86, 97, 101 (2015) (plurality op.); *Colindres v. U.S. Dep't of State*, ___ F.4th ___, 2023 WL 4140277, at *3-6 (D.C. Cir. June 23, 2023). But in this case, the clear legal infirmity in our court's new timing rule—and the confusion it will surely cause—provides more than sufficient reason to conclude both that the government should easily prevail and that en banc review was warranted.

BUMATAY, Circuit Judge, joined by CALLAHAN, IKUTA, BENNETT, R. NELSON, BADE, and VANDYKE, Circuit Judges; COLLINS, LEE, and BRESS, Circuit Judges, in Part III-B, dissenting from the denial of rehearing en banc:

Under the doctrine of consular nonreviewability, the federal government generally doesn't need to justify its visa decisions in court. Grounded in the separation of powers, the century-old doctrine provides that courts should not look behind the Executive's exercise of its discretion to exclude aliens from our nation. As Justice John Marshall Harlan wrote long ago, Congress may entrust the "final determination" of whether an alien may enter the United States "to an executive officer," and "if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted or to controvert its sufficiency." *Lem Moon Sing v. United States*, 158 U.S. 538, 545 (1895). That's because visa denials are a "fundamental sovereign attribute exercised by the Government's political departments," *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)), and we largely defer to the decisions of those branches.

To be sure, consular nonreviewability yields to constitutional error. *See Khachatryan v. Blinken*, 4 F.4th 841, 849 (9th Cir. 2021). If a visa denial burdens the constitutional right of a U.S. citizen, we may engage in a "circumscribed judicial inquiry" over the denial. *Id.* (quoting *Trump*, 138 S. Ct. at 2419). But this doesn't mean that courts may second-guess a visa denial every time it's somehow connected to a citizen. Instead, we've cabined this narrow exception to nonreviewability

in two important ways. First, U.S. citizens may mount a constitutional attack on a visa denial in only a narrow category of circumstances. *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (recognizing that a visa denial may implicate the First Amendment right of U.S. citizens). Second, even when a constitutional right is implicated, the government only needs to give a "facially legitimate and bona fide reason" for the visa denial. *Id.* And the Supreme Court has set a rather low bar to meet this requirement: "respect for the political branches' broad power over the creation and administration of the immigration system mean[s] that the Government need provide only a statutory citation to explain a visa denial." *Trump*, 138 S. Ct. at 2419 (simplified). In other words, citing a statutory bar to admission under 8 U.S.C. § 1182(a) ("Classes of Aliens Ineligible for Visas or Admission") usually satisfies constitutional concerns.

In this case, Luis Ernesto Asencio-Cordero, a native and citizen of El Salvador, was denied an immigrant visa. The government told him and his U.S. citizen wife, Sandra Muñoz, that the visa was denied because the Department of State believes that Ascencio-Cordero will enter the United States to commit "unlawful activity"—a statutory bar to admission. See 8 U.S.C. § 1182(a)(3)(A)(ii). Asencio-Cordero and Muñoz sued, alleging a violation of their constitutional rights and demanding that the visa denial be overturned. Under the doctrine of consular nonreviewability, this should have been an easy case. Even assuming a constitutional right was implicated, we should have dismissed the case because citing the "unlawful activity" statutory bar was enough to justify the government's decision.

Instead, we violated the separation of powers by granting ourselves greater authority to interfere with the Executive's visa processing decisions. Under our newly arrogated powers, we may now peek over the government's shoulder every time it denies a visa on security grounds if the government's explanation does not come quickly enough. *Muñoz v. U.S. Dep't of State*, 50 F.4th 906, 917, 920–24 (9th Cir. 2022). We got there by first recognizing that an American citizen has a "liberty interest" in her husband's visa application—a view of substantive due process not shared by any other circuit court. *Id.* at 916. Then, we held that citing the "unlawful activity" bar is not enough, and that the government must always disclose the facts underlying a visa denial under § 1182(a)(3)(A)(ii). *Id.* at 917. We ended by creating a "timeliness" requirement for the doctrine of consular nonreviewability. *Id.* at 920-24. Under this new rule, if we think the government's justification for a visa denial comes too late, we can strip the government of its nonreviewability protection and order courts to "look behind" the visa denial. *Id.* at 924.

Each one of these steps should have been reversed on en banc review.

*

First, we should have ruled that citing the "unlawful activity" bar satisfied any notice requirement. Under our precedent, we only require the government to explain a visa denial by citing a statutory provision that "specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Khachatryan*, 4 F.4th at 851 (simplified). Here, the government did exactly that. It told Asencio-Cordero and Muñoz that Ascencio-Cordero's visa was denied because

it believes he will enter the country to engage in "unlawful activity." *See* 8 U.S.C § 1182(a)(3)(A)(ii). The Supreme Court has already ruled that the adjacent "terrorist activities" bar under § 1182(a)(3)(B)—which, in part, similarly bars those "likely to engage after entry in any terrorist activity"—provides sufficient factual predicates and thus citing that bar satisfies any judicial inquiry. *Kerry v. Din*, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring). If factual predicates are indeed necessary here, we should have treated these similar statutory bars similarly and held that citing the "unlawful activity" bar was enough.

By requiring more for the "unlawful activity" bar, we start down a road not traveled by our sister courts. The D.C. Circuit recently ruled that citing the "unlawful activity" bar alone satisfies the government's notice obligation. *Colindres v. U.S. Dep't of State*, No. 22-5009, 2023 WL 4140277, at *6 (D.C. Cir. June 23, 2023). Other circuits, including our own, have deferred to the government's citation of valid statutory bars to meet its notice requirements. *See Khachatryan*, 4 F.4th at 852 (citing the "visa fraud" bar under § 1182(a)(6)(C)(i) was enough); *Yafai v. Pompeo*, 924 F.3d 969, 970 (7th Cir. 2019) (Barrett, J., concurring with denial of rehearing) (citing the "alien-smuggling" bar under § 1182(a)(6)(E) was enough); *Del Valle v. Sec'y of State*, 16 F.4th 832, 841–42 (11th Cir. 2021) (citing the "false representation of citizenship" bar under § 1182(a)(6)(C)(ii) or the "unlawful presence" bar under § 1182(a)(9)(B)(i)(II) was enough). Two other circuits have gone so far as to hold that citing any valid statute of inadmissibility—regardless of its reference to factual predicates—is enough. *Baaghil v. Miller*, 1 F.4th 427, 432–34 (6th Cir. 2021) ("Even a 'statutory citation' to the pertinent restriction,

without more, suffices."); *Sesay v. United States*, 984 F.3d 312, 316 (4th Cir. 2021) ("The Supreme Court has unambiguously instructed that absent some clear directive from Congress or an affirmative showing of bad faith, the government must simply provide a valid ineligibility provision as the basis for the visa denial.").

Indeed, aside from this case, no federal appellate court has ever ruled that a statutory citation fails to provide sufficient factual predicates to satisfy the government's notice obligations. So, at a minimum, we've strayed far from the center of judicial gravity on this issue. And we should have taken this case en banc to recenter our court.

* *

Second, our novel "timeliness" requirement has no basis in the law. In the hundred-year history of consular nonreviewability, no court has invented the rule that the government must act within a certain timeframe to gain its protection. Our reformulation of the doctrine not only bucks history but flouts the will of Congress—Congress has explicitly said that the government has no duty to give timely notice to an alien excluded on security-related grounds, as here. *See* 8 U.S.C. § 1182(b)(3). And, as a practical matter, this new speedy-notice requirement will be an administrative nightmare. Now consular officers will have to sift through countless visa applications to determine who is entitled to the heightened notice by relation to some citizen. And besides, the officer will not know how quickly to act to avoid defying the Ninth Circuit. That's because our court failed to even set clear parameters for the time limits, opting instead to opaquely provide that timing must be "reasonable." *Muñoz*, 50

F.4th at 922–23. Respect for a co-equal branch of government means that we should have at least explained how the Executive can comply with our dictates.

* * *

Third, our court stands alone as the only circuit to hold that a U.S. citizen has a "liberty interest" in his or her spouse's visa denial. The Supreme Court has repeatedly warned that we should be circumspect in divining unenumerated substantive rights from the Constitution's guarantee of "due process." *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247–48 (2022) ("We must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))) (simplified). Here, contrary to the text, history, and structure of the Constitution, we reaffirm our recognition of a U.S. citizen's due process right over an alien spouse's visa denial. We should not have doubled down on our position, which reinforces a split with every other circuit to address this issue. *See Colindres*, 2023 WL 4140277, *5 ("[C]itizens have no fundamental right to live in America with their spouses."); *Baaghil*, 1 F.4th at 433 ("American residents—whether citizens or legal residents—do not have a constitutional right to require the National Government to admit noncitizen family members into the country."); *Silverman v. Rogers*, 437 F. 2d 102, 107 (1st Cir. 1970) (similar); *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 555 (2d Cir. 1975) (similar); *Fasano v. United States*, 230 F. App'x 239, 239–40 (3d Cir. 2007) ("The Constitution does not recognize the right of a citizen

spouse to have his or her alien spouse remain in the country." (simplified)) (unpublished); *Garcia v. Boldin*, 691 F.2d 1172, 1183–84 (5th Cir. 1982) (similar).

And we didn't need to reach this issue. If we had properly ruled that citing the "unlawful activity" bar was sufficient or that there's no such thing as a timeliness requirement for consular nonreviewability, we could have avoided this weighty constitutional issue entirely. We could have instead *assumed* that Muñoz possessed a constitutional interest over her husband's visa denial, but the government had still satisfied its due process obligations. *See Din* 576 U.S. 86 at 101–06 (Kennedy, J., concurring) (assuming—without deciding—that a constitutional interest over a visa denial exists); *see also Khachatryan*, 4 F.4th at 850 (similar).

Because our decision conflicts with the constitutional design on multiple fronts, we should have reheard this case en banc.

I thus respectfully dissent from the denial of rehearing en banc.

**I.**

**A.**

Let's start with an immigration backgrounder. Under the Immigration and Nationality Act ("INA"), an alien must obtain a visa before entering and permanently residing in the United States. 8 U.S.C. § 1181(a). The INA creates a special visa-application process for aliens sponsored by "immediate relatives" in the United States. *Id.* §§ 1151(b)(2)(A)(i), 1153(a). Under this process, the citizen-relative first petitions on behalf of the alien, asking to have the alien classified as an immediate relative. *Id.* §§ 1151(f), 1154(a)(1). If a

petition is approved, the alien 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. *Id.* §§ 1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of immigration law. *Id.* § 1361.

**B.**

Now the facts. Sandra Muñoz is a citizen and lifelong resident of the United States. In July 2010, Muñoz married Luis Ernesto Asencio-Cordero, a native and citizen of El Salvador, who arrived in the United States in March 2005. In April 2015, after their "immediate relative" petition was approved, Asencio-Cordero left the United States to obtain his immigrant visa from the U.S. Consulate in El Salvador. In May 2015, Asencio-Cordero had his initial consular interview. During that interview, Asencio-Cordero denied any association with criminal gangs.

In December 2015, the U.S. Consulate denied Asencio-Cordero's visa application on the grounds that he was inadmissible under § 1182(a)(3)(A)(ii). Recall this provision bars "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any other unlawful activity." 8 U.S.C. § 1182(a)(3)(A)(ii). Aside from citing the "unlawful activity" bar, the U.S. Consulate did not provide any further explanation for Asencio-Cordero's visa denial.

After multiple attempts to overturn the visa denial, Muñoz and Asencio-Cordero sued the State Department in federal court in January 2017, alleging that the visa

denial was not facially legitimate and bona fide and was decided in bad faith. The government moved to dismiss the case under the doctrine of consular nonreviewability. The district court ruled that Asencio-Cordero, as an unadmitted, non-resident alien, lacked a right of judicial review and dismissed him from the suit. On the other hand, because Muñoz was a U.S. citizen, the district court refused to dismiss her claim.

In September 2018, the government provided a joint discovery report that explained that the government denied Asencio-Cordero's visa application "after determining that [he] was a member of a known criminal organization." In November 2018, a State Department declaration further explained: based on interviews, a criminal review, and a review of Asencio-Cordero's tattoos, the government believed that he was a member of MS-13, a singularly brutal gang. The State Department considers MS-13 to be a national security threat. *See* U.S. Dep't of State, 9 Foreign Affairs Manual 302.5-4(B)(2)(a)(5).[1] The government later warned that this gang information was gathered from law enforcement sources and that it was "extremely dangerous" to force the government to reveal its sources.

Muñoz and the government cross-moved for summary judgment. In March 2021, the district court ruled for the government. First, the district court found that Muñoz, as a U.S. citizen married to Asencio-Cordero, had a protected liberty interest in the visa denial. Second, the district court reasoned that the government could invoke the doctrine of consular nonreviewability because the government offered a bona fide

[1] https://perma.cc/QV6Y-EG3Q

reason for the visa denial. The district court rejected the government's initial argument that citing the "unlawful activity" statutory bar itself satisfied due process. But based on the State Department's declaration and other government information, the district court found that the government adequately explained the visa denial—the government's belief that Asencio-Cordero was a member of MS-13. Finally, the district court found that Muñoz had not shown that the government denied the visa in bad faith.

**C.**

On appeal, a divided panel of this court reversed.

The majority first reaffirmed Muñoz's ability to sue, holding that "U.S. citizens possess a liberty interest in a non-citizen spouse's visa application," and that the government's denial of Asencio-Cordero's visa application infringed on that interest. *Muñoz*, 50 F.4th at 916.

Second, the majority said that citing the "unlawful activity" bar, § 1182(a)(3)(A)(ii), could not provide a legitimate and bona fide reason for the visa denial. *Id.* at 917. But like the district court, the majority concluded that the State Department's declaration explaining the connection to MS-13 provided enough information to meet the government's due process obligations. *Id.* at 918.

Even so, the majority ruled that this information was provided *too late*. The majority held that "where the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest." *Id.* at 921. Because the

government didn't provide the facts justifying the visa denial for nearly three years, the majority held that the government did not meet this "timeliness" requirement and thus the government could not claim the protection of consular nonreviewability. *Id.* at 923–24. The majority then vacated and remanded for the district court to "look behind" the government's decision and decide the merits of Muñoz's claim. *Id.* at 924.

Judge Lee dissented. Because the State Department advised Muñoz that it believed her husband to be connected to MS-13 and, in Judge Lee's view, Muñoz could not show bad faith, "[t]hat should be the end of the story." *Id.* at 925 (Lee, J., dissenting). He found no reason to "craft[] an exception to the longstanding consular non-reviewability doctrine" by creating a timeliness requirement. *Id.* Finally, Judge Lee expressed concern that the timeliness requirement was unclear and unworkable and would lead to confusion in the lower courts and at government agencies. *Id.* at 926-27.

**II.**

Before getting into the many ways that our court gets this case wrong, it's worth providing some background on the doctrine of consular nonreviewability. So here goes:

**A. Plenary Authority of the Political Branches**

Our deference to the political branches on immigration matters dates back over a century to at least the time of the Chinese Exclusion Act. In 1889, the Supreme Court held that the "power of exclusion of foreigners" was "an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution." *Ping*

*v. United States*, 130 U.S. 581, 609 (1889). The Court made clear that the admissibility of aliens is not "for judicial determination." *Id.* Instead, the issue was reserved "to the political department of our government, which is alone competent to act upon the subject." *Id.* *Ping* was the first of several late nineteenth-century cases granting the political branches significant deference when enacting and enforcing immigration laws. *See also Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Lem Moon Sing*, 158 U.S. 538; *United States v. Ju Toy*, 198 U.S. 253 (1905).

After the modernization of our country's immigration system, the political branches' plenary power in immigration was wielded by consular officers. Starting in 1917, consular officers became responsible for granting and denying visas. *See* Russell Wolff, *The Nonreviewability of Consular Visa Decisions: An Unjustified Aberration from American Justice*, 5 N.Y.L. Sch. J. Int'l & Compar. L. 341, 342 (1984). A pair of circuit court cases has often been credited as the beginning of our refusal to review a consular officer's visa denial. *See, e.g.*, Gabriela Baca, *Visa Denied: Why Courts Should Review a Consular Officer's Denial of a U.S.-Citizen Family Member's Visa*, 64 Am. U. L. Rev. 591, 603 (2015). In *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), the Second Circuit stated it was "beyond the jurisdiction of the court" to review a visa denial because the "[u]njustifiable refusal" of a visa was a matter of "diplomatic complaint." Similarly, in *United States ex rel. Ulrich v. Kellogg*, 30 F. 2d 984, 986 (D.C. Cir. 1929), the D.C. Circuit noted Congress did not authorize "official review of the action of the consular officers," which made those decisions unreviewable.

The Supreme Court inaugurated the doctrine of consular nonreviewability in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). There, the German wife of a naturalized U.S. citizen and World War II veteran challenged her exclusion from the country based on the Attorney General's determination that she posed a security concern under a 1941 immigration provision. *Id.* at 539-40. The Court ruled for the government, holding that the Court has "no authority to retry the determination of the Attorney General." *Id.* at 546.

To begin, the Court emphasized that "[t]he exclusion of aliens is a fundamental act of sovereignty." *Id.* at 542. And so when a government official acts to exclude an alien based on immigration law, "[t]he right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Id.* The Executive may then delegate that authority to "a responsible executive officer of the sovereign," whose authority is "final and conclusive." *Id.* at 543. The Court disclaimed any authority to review consular decisions: "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* In other words, "[w]hatever the procedure authorized by Congress is," the Court said, "it is due process as far as an alien denied entry is concerned." *Id.* at 544.

**B. The *Mandel* Exception**

While *Shaughnessy's* sweeping expression of the nonreviewability of consular decisions still governs, courts have recognized a "limited exception" to the doctrine when the denial of a visa implicates the consti-

tutional rights of American citizens. *Andrade-Garcia v. Lynch*, 828 F.3d 829, 834 (9th Cir. 2016) (simplified).

The first articulation of the limited exception to non-reviewability came in *Kleindienst v. Mandel*, 408 U.S. 753, 756 (1972). There, Ernest Mandel, a nonresident alien and "revolutionary Marxist," sought to enter the United States as a journalist and public speaker. *Id.* He was found ineligible for admission as an advocate of communism, but the Attorney General gave him a discretionary waiver to enter the United States in 1962 and 1968. *Id.* at 756–57. Mandel attempted to enter again in 1969. *Id.* at 756. This time, the Attorney General declined to give him a third waiver because Mandel's 1968 trip "went far beyond the stated purposes of his trip" and "represented a flagrant abuse of the opportunities afforded him to express his views in this country." *Id.* at 759. Mandel sued alongside American professors who had invited him to, or expected to hear him, speak. *Id.* at 759–60. While the Court held that Mandel "had no constitutional right of entry," it noted that the denial of Mandel's visa implicated the professors' First Amendment rights. *Id.* at 762.

The Court first re-affirmed the "ancient principles of the international law of nation-states" that "the power to exclude aliens is inherent in sovereignty," and "a power to be exercised exclusively by the political branches of government." *Id.* at 765 (simplified). The Court then reiterated Justice Harlan's words:

> The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without

> judicial intervention, is settled by our previous adjudications.

*Id.* at 766 (quoting *Lem Moon Sing*, 158 U.S. at 547).

Yet the Court's analysis laid the groundwork for a future limitation to the doctrine of consular nonreviewability. The professors argued that the government must give a justification for the denial of Mandel's waiver. *Id.* at 769. In response, the government argued that the waiver decision was in the Executive's "sole and unfettered discretion, and any reason or no reason may be given." *Id.* The Court said it didn't need to reach this question because the Attorney General did inform Mandel of the reason for the waiver denial and "that reason was facially legitimate and bona fide." *Id.*

In concluding, the Court re-affirmed the "firmly established" rule that Congress has "plenary . . . power to make policies and rules for exclusion of aliens." *Id.* at 769-70. And "when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770.

From this, courts have required that the government give a "facially legitimate and bona fide reason" for a visa denial whenever the constitutional rights of a U.S. citizen are implicated. *See Cardenas*, 826 F.3d at 1167. In *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008), our circuit became the first to recognize that visa denial may burden more than a citizen's First Amendment right. There, we held that a U.S. citizen

had a "protected liberty interest in her marriage that gives rise to a right to constitutionally adequate procedures in the adjudication of her husband's visa application." *Id.* at 1062. We claimed this was a "straightforward" application of the Due Process Clause's "substantive right[]" to "life, liberty, and property." *Id.*

### C. *Kerry v. Din* and the Limits of the *Mandel* Exception

The Supreme Court recently limited the scope of the *Mandel* exception in *Kerry v. Din*, 576 U.S. 86, 105 (2015), and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). In both cases, even assuming a visa denial implicated the constitutional interest of a U.S. citizen, the Court showed that the government can satisfy its constitutional obligations to provide a "facially legitimate and bona fide reason" for the denial by citing a valid statutory bar to admission.

In *Din*, a United States citizen sought to have her Afghani husband classified as an immediate relative and granted an immigrant visa. 576 U.S. at 86. But the Afghani citizen was formerly a civil servant in the Taliban regime, and his application was denied under 8 U.S.C. § 1182(a)(3)(B)—the exclusion for aliens who have participated in "[t]errorist activities." *Id.* at 88-90. In the Ninth Circuit, we concluded that the U.S. citizen "ha[d] a protected liberty interest in marriage that entitle[d] [her] to review of the denial of [her] spouse's visa," and that merely citing § 1182(a)(3)(B) could not satisfy due process. *Din v. Kerry*, 718 F.3d 856, 860, 868 (9th Cir. 2013).

The Supreme Court reversed, but the Justices did not agree on the grounds for doing so. The plurality opinion, authored by Justice Scalia and joined by Chief Justice Roberts and Justice Thomas, rejected the

threshold premise that an American citizen could be injured under the Due Process Clause based on the denial of a spouse's visa. *Din*, 576 U.S. at 88–101 (plurality). The concurrence, written by Justice Kennedy and joined by Justice Alito, *assumed* that a U.S. citizen could assert a constitutional injury from a spouse's visa denial, but concluded that citing the "terrorist activities" bar was a "facially legitimate and bona fide reason" under *Mandel*. *Id.* at 101–06 (Kennedy, J., concurring). And the dissent, penned by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, would have held that the government's refusal to provide a clear reason for denying a visa violated a citizen spouse's due process right. *Id.* at 107–16 (Breyer, J., dissenting).

In our court, Justice Kennedy's concurrence turned out to be the most important. *See Cardenas*, 826 F.3d at 1171 (finding that "Justice Kennedy's concurrence controls"). Relying on *Mandel*, the *Din* concurrence reiterated that "an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made on the basis of a facially legitimate and bona fide reason." 576 U.S. at 104 (Kennedy, J., concurring) (simplified). So the key constitutional question is whether the government supplied a "facially legitimate and bona fide reason" for the visa denial. And on that question, the concurrence concluded that citing § 1182(a)(3)(B)'s "terrorist activities" statutory bar satisfies the government's burden. *Id.* Justice Kennedy's concurrence first reasoned that the statutory bar "establish[ed] specific criteria for determining terrorism-related inadmissibility" and thus exclusion under that provision showed a "facially legitimate" reason. *Id.* at 104–05. The concurrence also held that merely citing the "terrorist activities" bar established a "bona fide

reason" because "§ 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Id.* at 105.

In *Trump v. Hawaii*, the Court further limited the *Mandel* exception and adopted Justice Kennedy's view that statutory citation is enough to satisfy our review. In that case, the Court reviewed President Trump's order temporarily suspending entry of foreign nationals from seven countries based on risks of terrorism. *Trump*, 138 S. Ct. at 2403. The Court applied the *Mandel* framework to the case but emphasized its "narrow" and "deferential" standard of review. *Id.* at 2419. Most importantly, the Court seemingly coalesced around Justice Kennedy's view that citing a statutory provision is enough to satisfy due process: "In *Din*, Justice Kennedy reiterated that 'respect for the political branches' broad power over the creation and administration of the immigration system' meant *that the Government need provide only a statutory citation to explain a visa denial." Id.* (simplified) (emphasis added). Thus, the Court embraced the view that only limited notice—such as a statutory citation—is needed to justify a visa denial when a citizen's due process rights are implicated.

After *Din* and *Trump*, our court adopted a three-step inquiry to determine whether a visa denial violates the due process rights of a U.S. citizen based on Justice Kennedy's concurrence. *Khachatryan*, 4 F.4th at 851. "First, we examine whether the consular officer denied the visa under a valid statute of inadmissibility." *Id.* (simplified). If so, that satisfies the "facial legitimacy" step. Second, we consider whether the consular officer (1) cited a statutory bar to admissibility that "specifies

discrete factual predicates the consular officer must find to exist before denying a visa," or (2) provided a "fact in the record that provides at least a facial connection to the statutory ground of inadmissibility." *Id.* (simplified). If the consular officer complies with either alternative, the government meets its burden on this step. *Id.* At the third step, we ask whether the plaintiff carried her burden of proving that the government's 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.* (simplified).

**III.**

With this legal background in mind, it is easy to see how we erred in piercing the doctrine of consular nonreviewability here. Although the Supreme Court has recognized a limited exception to the doctrine, we greatly expanded judicial interference with visa denials—jettisoning the respect we must afford to the political branches in their protection of our borders. By aggrandizing our role, we diminish the separation of powers.

We made three significant errors in ruling for Muñoz. First, we improperly ruled that citing the "unlawful activity" bar is not enough to satisfy the government's notice obligations. Second, we invented a new dimension to the consular nonreviewability doctrine: a time window that bars the application of the doctrine. These two errors lead to the third—having to resolve whether an American citizen has a "liberty interest" in the visa application of his or her spouse under the Fifth Amendment's Due Process Clause. If we resolved the first two questions properly, we didn't need to reach this difficult question.

I turn to each error in this order.

### A. Citing the "Unlawful Activity" Statutory Bar Satisfies Due Process

Even assuming Muñoz has a "liberty interest" in her husband's visa denial, the government satisfied its constitutional notice obligations here by citing the "unlawful activity" statutory bar and our court erred by holding otherwise.

To begin, we wrongly claimed that the government had "abandoned" the argument that the "unlawful activity" bar contains discrete factual predicates. *Muñoz*, 50 F.4th at 917. This is incorrect. In both the district court and the answering brief in our court, the government repeatedly argued that citing § 1182(a)(3)(A)(ii) was sufficient because that provision contained adequate factual predicates.

But, more importantly, we were mistaken in finding that § 1182(a)(3)(A)(ii) does not "specif[y] discrete factual predicates the consular officer must find to exist before denying a visa." *Id.* We reasoned that "[u]nlike surrounding provisions, § 1182(a)(3)(A)(ii) does not specify the type of lawbreaking that will trigger a visa denial." *Id.* To reach this conclusion, we ruled, without authority, that "a consular officer's belief that an applicant seeks to enter the United States for general (including incidental) lawbreaking is not a 'discrete' factual predicate." *Id.* Thus, we held that the government could *only* satisfy its burden to prove a "bona fide reason" by showing "a fact in the record" that provides "a facial connection to the consular officer's belief" that Asencio-Cordero sought to enter the United States to engage in unlawful activity. *Id.*

There are at least three problems with our ruling.

First, the "unlawful activity" bar under § 1182(a)(3)(A)(ii) provides sufficient "discrete factual predicates," and thus citing it provides a "bona fide" reason for denial. We have never precisely described what level of "factual predicates" a statute must have to provide adequate reason for a visa denial. But Justice Kennedy's analysis of the visa waiver provision at issue in *Mandel* provides us a point of reference. In that case, the Supreme Court examined the Attorney General's authority to waive inadmissibility "in [his] discretion." 408 U.S. at 754. Because the provision conferred the Attorney General with "unfettered discretion"—meaning he could deny waiver for "any reason or no reason"—the Supreme Court *had* to consider whether some underlying facts showed that the waiver denial in that particular case was "legitimate and bona fide." *Id.* at 769–70. Otherwise, the Court would have no basis to understand why Mandel had been denied admission. But compared to the "nearly unbridled discretion" in the *Mandel* provision, Justice Kennedy's concurrence observed that the "terrorist activities" bar "specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Din*, 576 U.S. at 105 (Kennedy, J., concurring). So, by the term "discrete factual predicates," Justice Kennedy meant to distinguish between a statutory waiver provision lacking any factual predicates from one, like the terrorism bar, "controlled by specific statutory factors." *Id.* at 104.

Like the "terrorist activities" bar, the "unlawful activity" bar is controlled by specific statutory factors—that the alien "seeks to enter the United States to engage . . . in any . . . unlawful activity."

8 U.S.C. § 1182(a)(3)(A)(ii). Surrounding provisions exclude from this "unlawful activity" bar any conduct that constitutes espionage, sabotage, export violations, or activity to overthrow the government of the United States. *Id.* § 1182(a)(3)(A)(i), (iii). While a range of lawbreaking may fit these "statutory factors," it is more limited than the "unbridled discretion" found in *Mandel* and nearly as broad as the "terrorist activities" bar approved by the *Din* concurrence. *See Colindres*, 2023 WL 4140277, at *6 (holding that the "terrorist activities" bar is "written in the same general terms" as the "unlawful activity" provision here). Indeed, given Justice Kennedy's focus on *any* kind of factual predicate, perhaps citing *any* statutory bar satisfies our inquiry here. *See Trump*, 138 S. Ct. at 2419; *Baaghil*, 1 F.4th at 432-34; *Sesay*, 984 F.3d at 316.

Second, our belief that the "unlawful activity" bar is too broad to establish a "bona fide" reason echoes the argument made by the *Din* dissenters and rejected by the *Din* concurrence. In dissent, Justice Breyer asserted that the terrorism bar is so capacious that it provides no notice of the factual predicates for inadmissibility:

> [Section] 1182(a)(3)(B)[] sets forth, not one reason, but dozens. It is a complex provision with 10 different subsections, many of which cross-reference other provisions of law. . . . Some parts cover criminal conduct that is particularly serious, such as hijacking aircraft and assassination. . . . Other parts cover activity that, depending on the factual circumstances, cannot easily be labeled "terrorist." . . . At the same time, some subsections provide the visa applicant with a defense; others do not. . . . Taken

> together the subsections, directly or through cross-reference, cover a vast waterfront of human activity potentially benefitting, sometimes in major ways, sometimes hardly at all, sometimes directly, sometimes indirectly, sometimes a few people, sometimes many, sometimes those with strong links, sometimes those with hardly a link, to a loosely or strongly connected group of individuals, which, through many different kinds of actions, might fall within the broad statutorily defined term "terrorist."

*Din*, 576 U.S. at 113-14 (Breyer, J., dissenting) (simplified). Justice Kennedy understood that § 1182(a)(3)(B) "covers a broad range of conduct," but still maintained that citing the provision was sufficient. *Id.* at 105 (Kennedy, J., concurring). Thus, contrary to our view here, the breadth of the "unlawful activity" bar is no basis to find that it lacks factual predicates sufficient to satisfy the "bona fide reason" prong. *See Colindres*, 2023 WL 4140277, at *6 ("[T]hat level of specificity is not required.").

Third, we ignore that Congress has already determined that aliens subject to the "unlawful activity" bar are not entitled to *any* form of notice. *See* 8 U.S.C. § 1182(b)(3). In *Din*, Justice Kennedy looked to the scope of the INA's notice provision, § 1182(b)(3), to inform the scope of a citizen's due process rights. *Id.* at 105–06. Recall that § 1182(b)(1) generally requires the government to provide "timely written notice" to aliens found inadmissible, but notice is *not* required when aliens are barred on grounds related to terrorism or security. 8 U.S.C. § 1182(b)(3). Because § 1182(b)(3) expressly excluded the "terrorist activities" bar from any notice requirement, Justice Kennedy deferred to

Congress's "considered judgment" "in this sensitive area" to determine that merely citing the terrorism provision was "constitutionally adequate." *Id.* at 106.

We disregard this analysis and skip the fact that § 1182(b)(3) *also* eliminates any notice requirement for aliens found inadmissible under the "unlawful activity" bar. See 8 U.S.C. § 1182(b)(3). If we are truly following Justice Kennedy's analysis, then citing the "unlawful activity" bar should also be constitutionally adequate. After all, as the Court said long ago, when the Executive branch excludes an alien under a grant from the Legislative branch, the "*order was due process of law*," and "no other tribunal . . . [may] re-examine the evidence" underlying the order. *Lem Moon Sing*, 158 U.S. at 545 (simplified) (emphasis added).

So like the terrorism bar, we should have found that citing the "unlawful activity" bar *alone* complies with due process. This would have ended our inquiry because the government told Asencio-Cordero that he was denied admission under § 1182(a)(3)(A)(ii). And because Muñoz hasn't shown that this justification was made in bad faith, her due process claim must fail.

As problematic as this analysis proves, our court's next error may be even more significant.

### B. Due Process Does Not Place a Time Limit on the Consular Nonreviewability Doctrine

For the first time in any circuit, our court holds that the doctrine of consular nonreviewability applies only if the government provides notice of the reason for a visa denial "within a reasonable time." *Muñoz*, 50 F.4th at 923. We base this new requirement on the view that due process requires that the "government provide *any*

required notice in a timely manner." *Id.* at 921 (citing *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)) (emphasis added). We then *suggest* that a "reasonable time" might range between 30 days to one year. *Id.* at 923 ("Our understanding of reasonable timeliness is informed by the 30-day period in which visa denials must be submitted for internal review and the 1-year period in which reconsideration is available upon the submission of additional evidence."). Outside that window, we declare, the government is "not entitled to invoke consular nonreviewability to shield its visa decision from judicial review" and a court "may 'look behind' the government's decision." *Id.* at 924 (simplified). This is a serious error.

Given that the doctrine of consular nonreviewability is rooted in the separation of powers, we should reject efforts to create—out of whole cloth—novel burdens on the Executive branch. As explained by Judge Lee, our court's decree "conflicts with the separation-of-powers principle that Congress may prescribe the terms and conditions upon which aliens may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention." *Id.* at 925 (Lee, J., dissenting) (simplified). To impose a categorical time limit for consular nonreviewability has no basis in the text or history of the Constitution, Supreme Court precedent, or statute.

First, our court's timeliness requirement ignores that due process is context specific. When it comes to the exclusion of aliens, courts have "largely defer[red] to the political branches" on what process is due. *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1215 (9th Cir. 2022) (Bumatay, J., concurring). That's because we

must recognize that "the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Trump*, 138 S. Ct. at 2418 (simplified). Thus, it's firmly established that "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522 (2003) (simplified).

Here, our court imports due process protections from a case about the termination of public assistance payments to the denial of visas. *See Goldberg*, 397 U.S. at 267-68 (holding that a welfare recipient must receive "timely and adequate notice" of the reasons for the proposed termination of welfare benefits). But there's no reason to tie the procedural protections required to end a citizen's public benefits to the process to deny an alien entry into the country. Even assuming that American spouses of aliens have a liberty interest in their spouse's admission protected by due process, that doesn't mean they are entitled to the full panoply of rights afforded to citizens in the domestic setting. Indeed, the *Goldberg* court talked about how those due process protections were necessary in the "present context" of welfare terminations. *Id.* Though the exclusion of an alien is serious, the rights involved are not the same as in domestic proceedings. After all, unlike in the welfare termination setting, a citizen cannot obtain judicial review of a visa denial unless the government acted in "bad faith." And so there's no basis to transfer procedural protections one-for-one here.

Second, our court's decision ignores the will of Congress. Remember, Congress has established that consular officers must give an alien "timely written notice"

of the grounds for a visa denial. *See* 8 U.S.C. § 1182(b)(1)(B). But Congress has expressly exempted aliens found inadmissible under the "unlawful activity" bar from this timely notice requirement. *Id.* § 1182(b)(3); *see also Din*, 576 U.S. at 106 (Kennedy, J., concurring) ("[T]his notice requirement does not apply, when . . . a visa application is denied due to terrorism or national security concerns.") (simplified). As Justice Kennedy viewed it, § 1182(b)'s statutory notice provision was highly probative of the bounds of constitutional notice owed to citizen spouses in the visa context:

> Congress evaluated the benefits and burdens of notice in this sensitive area and assigned discretion to the Executive to decide when more detailed disclosure is appropriate. This considered judgment gives additional support to the independent conclusion that the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. . . . Under *Mandel*, respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa to an alien abroad.

*Id.* While the *Din* concurrence addressed the substance of the notice needed under due process, the analysis applies with equal force to the *timing* of the notice.

Third, as a practical matter, our brand-new timeliness requirement is both burdensome and vague. Because the timeliness requirement applies only when certain "U.S. citizens' rights are burdened," *Muñoz*, 50 F.4th at 926 (Lee, J., dissenting), consular officers may not know

which visas will be implicated. Will consular officers need to process every visa under the new timeliness regime to avoid a court later saying that it was handled too late thanks to the alien's connection to some American citizen? And we do not establish what constitutes timely notice. The only thing we know for sure is that three years is too late. *Id.* at 923 (majority opinion). But we merely *suggest* that notice is safe if given between 30 days to one year. *Id.* Expect an explosion of litigation to determine the true deadline to meet due process. That we have placed new burdens on the Executive's discretion without explaining how it can comply with those burdens makes matters worse. At a minimum, we should have taken this case en banc to clarify the government's obligations under our new regime.

Our court's creation of new hurdles for the Executive in the security context is troubling. Respect for the government's interest in protecting our security should give us more pause before inventing new due process regimes. As Judge Lee pointed out, government delays in providing notice may come into play when deciding whether it acted in bad faith, *id.* at 925 (Lee, J., dissenting), but no reason exists to categorically strip the government of consular nonreviewability when dealing with security threats based on our arbitrary (and vague) deadlines.

### C. A Visa Denial Does Not Implicate the Due Process Rights of the Alien's U.S. Citizen Spouse

Thanks to the other rulings in the case, our court needed to make a weighty substantive due process decision—whether Muñoz has a protected liberty interest in her husband's visa application. Pre-*Din*, we recognized

that a citizen possesses a protected liberty interest in "constitutionally adequate procedures in the adjudication of [a non-citizen spouse's] visa application." *Bustamante*, 531 F.3d at 1062. But we acknowledged in *Muñoz* that a plurality of the Supreme Court has rejected such a protected liberty interest. *Muñoz*, 50 F.4th at 915 (citing *Din*, 576 U.S. at 101 (plurality)). Despite this, relying on the fundamental right of marriage and the liberty interest of U.S. citizens to reside in their country of citizenship, we said that "the cumulative effect" of the denial of a citizen's spouse's visa was "a *direct* restraint on the citizen's liberty interests protected under the Due Process Clause." *Id.*

Repeatedly, the Supreme Court has cautioned lower courts from casually finding substantive rights under either the Fifth or Fourteenth Amendments' Due Process Clauses. Indeed, "we must guard against the natural human tendency to confuse what [due process] protects with our own ardent views about the liberty that Americans should enjoy." *Dobbs*, 142 S. Ct. at 2247. To avoid these concerns, we must be "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty." *Id.* at 2248. In other words, we ask "whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Id.* (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019)).

Unfortunately, we did not heed these concerns in recognizing Muñoz's liberty interest here. While no one seriously questions the fundamental nature of the right of marriage, it is quite a stretch to extrapolate from that right a concomitant right over the adjudication of a

spouse's visa. Indeed, our court failed to recognize the strong constitutional crosswinds here—that a "liberty interest" for a U.S. citizen over a visa denial directly conflicts with the political branches' plenary authority over the exclusion of aliens. Given the separation of powers concerns at play, we should have been more exacting before finding a new substantive right.

And as a historical matter, the view that an American citizen has a liberty interest in the visa application of her alien spouse is highly suspect. The *Din* plurality explained that such a proposed liberty interest is not a right "objectively, deeply rooted in this Nation's history and tradition." *Id.* at 92–93 (plurality). As Justice Scalia recounted, "as soon as Congress began legislating in [the immigration] area[,] it enacted a complicated web of regulations that erected serious impediments to a person's ability to bring a spouse into the United States." *Id.* at 96 (citing Kerry Abrams, *What Makes the Family Special?*, 80 U. Chi. L. Rev. 7, 10–16 (2013)). The *Din* plurality relied on a "long practice of regulating spousal immigration," including the Expatriation Act of 1907, which provided that "any American woman who marries a foreigner shall take the nationality of her husband," and the Immigration Act of 1921, which subjected fiancées and wives of citizens to strict quota requirements when minor children were granted non-quota status. *Id.* at 95-97. *See also Colindres*, 2023 WL 4140277, at *4-5 (surveying the immigration statutes passed at the turn of the 20th century that "limited spousal immigration").

To be sure, some contest this history. *See, e.g.*, Kerry Abrams, *The Rights of Marriage: Obergefell, Din, and the Future of Constitutional Family Law*, 103

Cornell L. Rev. 501, 540, 542 (2018) (suggesting that the *Din* plurality "uses history selectively to paint a picture of the past that, while technically accurate, misses the larger picture" and showing evidence that some immigration laws support a "strong preference for spousal immigration").

But this misunderstands the requirement that unenumerated rights be deeply rooted. Even if history shows that Congress has promoted family reunification at times, it has also sought to achieve different policy ends at other times. This contradictory legislation demonstrates, at a minimum, that any liberty interest in a spouse's visa application has shallow roots. And given the deep foundation of the political branches' plenary authority here, we shouldn't let such sparse evidence define a new substantive right.

**IV.**

We violated the separation of powers in three distinct ways here. First, by recognizing that citizens have a "liberty interest" in their spouse's visa denial. Second, by declaring that the government must divulge evidence supporting why an alien should be barred for "unlawful activity." And third, by demanding that the government act under our vague new timeline. Any one of these errors deserved en banc review.

For these reasons, I dissent from the denial of rehearing en banc.

**APPENDIX E**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Case No. 2:17-CV-0037-AS

SANDRA MUNOZ AND
LUIS ERNESTO ASENCIO-CORDERO,
PLAINTIFFS

*v.*

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

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Filed: Nov. 8, 2018

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**DECLARATION OF MATT MCNEIL**

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I, Matt McNeil, hereby declare under penalty of perjury:

1. I am employed by the U.S. Department of State as an attorney adviser in the Advisory Opinions Division, Office of Legal Affairs of the Visa Office, Bureau of Consular Affairs. In that capacity I am authorized to search the electronic Consular Consolidated Database ("CCD") of the U.S. Department of State, Bureau of Consular Affairs, for records of immigrant and nonimmigrant visas.

2. The CCD contains electronic data recording visa applications and visas issued and refused at U.S. diplomatic and consular posts worldwide, including the U.S. Embassy in San Salvador, EI Salvador.

3. The CCD reflects that the immigrant visa petition assigned case number SNS2013690038 was filed by Sandra MUNOZ on behalf of Luis Ernesto ASENCIO CORDERO, place of birth: EI Salvador.

4. The CCD reflects that on May 28, 2015, Mr. Asencio Cordero appeared for an interview and applied for an immigrant visa at the U.S. Embassy in San Salvador. The CCD further reflects that the consular officer refused the immigrant visa application under INA section 212(a)(9)(B)(i)(II) (8 U.S.C. section 1182(a)(9)(B)(i)(II)), and INA section 221(g) (8 U.S.C. section 1201(g)).

5. The CCD also reflects on February 1, 2016, a consular officer further refused the immigrant visa application of Mr. Asencio Cordero under INA section 212(a)(3)(A)(ii) (8 U.S.C. section 1182(a)(3)(A)(ii)). The CCD also reflects that based on the in-person interview, a criminal review of Mr. Asencio Cordero, and a review of the Mr. Asencio Cordero's tattoos, the consular officer determined that Mr. Asencio Cordero was a member of a known criminal organization identified in 9 FAM 302.5-4(b)(2), specifically MS-13.

I declare under the penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge.

/s/ MATT MCNEIL

MATT MCNEIL

Washington, DC
November 8, 2018

## APPENDIX F

1. U.S. Const. Amend. V provides in pertinent part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

2. 8 U.S.C. 1182(a)(3)(A) and (B) provides:

**Inadmissible aliens**

**(a) Classes of aliens ineligible for visas or admission**

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

**(3) Security and related grounds**

**(A) In general**

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of,

the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

**(B) Terrorist activities**

**(i) In general**

Any alien who

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

**(ii) Exception**

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

**(iii) "Terrorist activity" defined**

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

**(iv) "Engage in terrorist activity" defined**

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have

known, that the organization was a terrorist organization.

**(v) "Representative" defined**

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

**(vi) "Terrorist organization" defined**

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

3. 8 U.S.C. 1182(b) provides:

**(b) Notices of denials**

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a), the officer shall provide the alien with a timely written notice that—

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment[4] of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a).

4. 8 U.S.C. 1201(a)(1) and (g) provides:

**Issuance of visas**

**(a) Immigrants; nonimmigrants**

(1) Under the conditions hereinafter prescribed and subject to the limitations prescribed in this chapter or regulations issued thereunder, a consular officer may issue

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[4] So in original. Probably should be preceded by "ineligible for".

(A) to an immigrant who has made proper application therefor, an immigrant visa which shall consist of the application provided for in section 1202 of this title, visaed by such consular officer, and shall specify the foreign state, if any, to which the immigrant is charged, the immigrant's particular status under such foreign state, the preference, immediate relative, or special immigrant classification to which the alien is charged, the date on which the validity of the visa shall expire, and such additional information as may be required; and

(B) to a nonimmigrant who has made proper application therefor, a nonimmigrant visa, which shall specify the classification under section 1101(a)(15) of this title of the nonimmigrant, the period during which the nonimmigrant visa shall be valid, and such additional information as may be required.

* * * * *

**(g) Nonissuance of visas or other documents**

No visa or other documentation shall be issued to an alien if (1) 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, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe 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: *Provided*, That a visa or other documentation may be issued to an alien who is within the purview of section 1182(a)(4) of this title, if such alien is otherwise entitled

to receive a visa or other documentation, upon receipt of notice by the consular officer from the Attorney General of the giving of a bond or undertaking providing indemnity as in the case of aliens admitted under section 1183 of this title: *Provided further*, That a visa may be issued to an alien defined in section 1101(a)(15)(B) or (F) of this title, if such alien is otherwise entitled to receive a visa, upon receipt of a notice by the consular officer from the Attorney General of the giving of a bond with sufficient surety in such sum and containing such conditions as the consular officer shall prescribe, to insure that at the expiration of the time for which such alien has been admitted by the Attorney General, as provided in section 1184(a) of this title, or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 1258 of this title, such alien will depart from the United States.

5. 8 U.S.C. 1361 provides:

**Burden of proof upon alien**

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this chapter, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be is-

sued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this chapter. In any removal proceeding under part IV of this subchapter against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.