No. 23-334

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

REPLY BRIEF FOR THE PETITIONERS

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The Ninth Circuit held in this case that respondent Sandra Muñoz has a protected liberty interest that is infringed by a consular officer's denial of her noncitizen spouse's visa application. On that basis, the court of appeals—purporting to apply this Court's decision in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972)—required the government not only to identify the statutory ground for the denial but also to supply a further explanation of her spouse's inadmissibility. And even though the court found that the government's additional explanation was *sufficient*, it decided that further judicial review is required because that explanation came too long after the denial itself. The court erred in all three holdings; its decision implicates two square circuit splits and countermands a federal statute; and this Court has already granted certiorari once, in *Kerry* v. *Din*, 576 U.S.

86 (2015), to review the Ninth Circuit's treatment of essentially the same issues. For those reasons, and because *Din* left those important questions unresolved, the petition for a writ of certiorari should be granted.

A. The Court Should Grant Certiorari In This Case Without Delay

Respondents' primary argument against certiorari (Br. in Opp. 14-16) is that the court of appeals' decision is "interlocutory" and therefore "not yet ripe for this Court's review." An interlocutory posture may well justify denial where, for instance, the petitioner might obtain its desired result on an alternative ground, or where the proceedings on remand may aid in the Court's consideration of the question presented. See Stephen M. Shapiro et al., *Supreme Court Practice* 4-55 & n.72 (11th ed. 2019) (*Supreme Court Practice*). But such circumstances are not present here, which is presumably why the Court granted certiorari over a similar objection in *Din*. See Br. in Opp. at 32, *Din*, *supra* (No. 13-1402).

1. The decision below will have "immediate consequences for the petitioner[s]." *Supreme Court Practice* 4-55. The purpose of the doctrine of consular nonreviewability is to preclude judicial scrutiny of visa determinations. Pet. 4-5, 16-17. Because visa decisions "fall within the domain of the Legislative and Executive Branches"—with Congress "setting the terms for acceptance and denial" and the Department of State "implementing those requirements through U.S. consulates around the world"—courts should not "second guess the decisions of consulates to deny or grant applications." *Baaghil* v. *Miller*, 1 F.4th 427, 432 (6th Cir. 2021); see, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950) ("[I]t is not within the

province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government.").

By instructing the district court to "'look behind' the government's decision" to deny respondent Luis Asencio-Cordero a visa, Pet. App. 33a (citation omitted), the court of appeals ordered the kind of intrusive second-guessing that consular nonreviewability prevents. Precisely because the court remanded for resolution of "complex factual and legal questions about the circumstances of the visa denial," Br. in Opp. 15, this Court should intervene now, before government officials are improperly "compelled to disclose the evidence underlying [their] determinations," *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). Otherwise, the encroachment upon the separation of powers —and the potential revelation of sensitive information— cannot be undone even if the visa denial is upheld.

2. Further proceedings on remand would not clarify matters relevant to the questions presented or render the questions "less abstract[]." Br. in Opp. 16 (citation omitted). All three questions relate to the threshold issue whether respondents are entitled to judicial review. The court of appeals conclusively resolved that issue against the government and ordered full-fledged review. That determination would not be revisited on remand.[1] Respondents suggest that the court "le[ft]

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[1] Respondents reference (Br. in Opp. 10-11, 15, 17, 29) the Ninth Circuit's discussion of an interrogatory response in which the government represented that it "considered the declaration of [respondents' expert] Humberto Guizar before determining that Asencio-Cordero was a member of MS-13." Pet. App. 12a. The Ninth Circuit thought that answer was "implausible" because the Guizar declaration post-dated "the date on which the consular officer initially denied Asencio-Cordero's visa." *Id.* at 12a n.18. But

open" the question whether the government "acted in bad faith." *Id.* at 13. But the district court found that respondents had *not* made an affirmative showing of bad faith, Pet. App. 61a-64a—which could defeat consular nonreviewability, see *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment)—and Judge Lee's dissent interpreted the majority to leave that finding undisturbed, see Pet. App. 36a, 41a. In any event, the court of appeals remanded the case not for the district court to reconsider that narrow question, but instead to "look behind" the visa decision generally, shorn of the consular-nonreviewability "shield." *Id.* at 33a (citation omitted). Respondents have offered no reason why the Court should postpone its review of the decision below.

B. The Lower Courts Are Divided On The Questions Presented

As explained in the petition (Pet. 15-16), the court of appeals' holdings on the first two questions presented implicate square conflicts. On the first—whether a refusal of a visa to a noncitizen impinges upon a constitutionally protected interest of his U.S.-citizen spouse—the Ninth Circuit hewed to its outlier position, which remains in conflict with several other circuits. Pet. 20-22. On the second question—whether, assuming such a constitutional interest exists, notifying a visa applicant that

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the government read the interrogatory as asking whether the Guizar declaration was considered before a *final* decision on Asencio-Cordero's application was made, after respondents' various requests for further review. See Pet. 9; Pet. App. 6a-8a. If respondents did not share the same understanding, it is unclear why they posed the interrogatory in the first place—since there is no dispute that they submitted the declaration after the initial denial in December 2015. See Pet. 9; Br. in Opp. 9. In any event, contrary to respondents' assertions (Br. in Opp. 15, 17), the Guizar declaration is irrelevant to the applicability of consular nonreviewability.

he was found inadmissible under 8 U.S.C. 1182(a)(3)(A)(ii) suffices to provide any process that is due—the decision below has been rejected by the D.C. Circuit's decision in *Colindres* v. *United States Department of State*, 71 F.4th 1018, 1024 (2023), petition for cert. pending, No. 23-348 (filed Sept. 21, 2023). Pet. 27. The pending petition in *Colindres* agrees that both splits exist. Pet. at 9-10, 24-27, 32-37, *Colindres*, *supra* (No. 23-348).

1. With respect to the liberty-interest question, respondents contend (Br. in Opp. 17) that the petition "vastly overstate[s] the differences between the Ninth Circuit's decision and other circuit decisions." But they fail to address four of the six circuits that fall on the government's side of the divide. See Pet. 21-22. And their attempts (Br. in Opp. 18) to distinguish the positions of the other two are unpersuasive.

In *Bangura* v. *Hansen*, 434 F.3d 487 (2006), the Sixth Circuit rejected the argument that a U.S. citizen possessed a liberty interest in his marriage to a noncitizen giving rise to a procedural-due-process claim. *Id.* at 495-496. It is of no moment that *Bangura* considered a distinct claim, involving a challenge to the denial of an I-130 immediate-relative petition based on fraud. See *id.* at 492-493, 502-503. Moreover, the Sixth Circuit's decision in *Baaghil* reaffirmed the government's understanding of *Bangura*, and likewise held that "[a]n American resident has no right to have his noncitizen spouse enter or remain in the country." 1 F.4th at 432-434. That the visa denial in *Baaghil* included more information (Br. in Opp. 18) had no bearing on the threshold question of the U.S. citizen's constitutional interest. And while respondents quibble (*ibid.*) with the government's reliance on the D.C. Circuit's decision in *Swartz* v. *Rogers*, 254 F.2d 338, cert. denied, 357 U.S. 928 (1958), because it arose in the deportation context, they

ignore that *Colindres* applied *Swartz* in the visa-denial context. See *Colindres*, 71 F.4th at 1021-1023 ("a citizen's right to marry is not impermissibly burdened when the government refuses her spouse a visa").

More fundamentally, respondents offer no reason why the Court should not resolve the same conflict that it was precluded from resolving in *Din*. See Pet. 15, 20.

2. Even respondents acknowledge (Br. in Opp. 17) that the decision below and *Colindres* "conflict[]" over whether the same statutory ground of inadmissibility, 8 U.S.C. 1182(a)(3)(A)(ii), contains "discrete factual predicates" within the meaning of Justice Kennedy's *Din* concurrence applying the *Mandel* exception to consular nonreviewability. Respondents instead contend (Br. in Opp. 17) that the government forfeited this argument. But as the petition explained (Pet. 24 n.9)—and as Judge Bumatay recognized in his dissent from the denial of rehearing, Pet. App. 111a—the panel was wrong in stating that the government had abandoned the point. See Gov't C.A. Br. 15-16, 20-21, 25-28.

Respondents also suggest (Br. in Opp. 16-17) that the different outcome in *Colindres* was the result of distinct facts. The government's initial denial letter in *Colindres* did provide a further factual explanation, in addition to citing Section 1182(a)(3)(A)(ii). See Gov't Resp. Br. at 8, 12-14, *Colindres*, *supra* (No. 23-348). But that was the ground on which only one member of the D.C. Circuit panel would have ruled against the plaintiffs in *Colindres*. See 71 F.4th at 1028 (Srinivasan, C.J., concurring in part and concurring in the judgment). The majority instead disagreed with the Ninth Circuit by holding that (1) Kristen Colindres lacks any constitutionally protected interest in the issuance of a visa to her husband, and (2) the citation of Section

1182(a)(3)(A)(ii) alone provided whatever process was due. *Id.* at 1020, 1023-1025.

3. Respondents suggest (Br. in Opp. 21) that the issues presented in this case arise infrequently. If so, that is because most circuits have not recognized the right to judicial review of a noncitizen spouse's visa application that the Ninth Circuit has now reaffirmed—and, since *Din*, no court of appeals, other than the Ninth Circuit, has held the government's citation of a statutory inadmissibility ground insufficient. See Pet. App. 96a-97a (Bumatay, J., dissenting from denial of rehearing). Even so, in addition to this case and *Colindres*, there are five cases currently pending in the lower courts challenging Section 1182(a)(3)(A)(ii)-based visa denials, including one in which the district court denied the government's motion to dismiss based substantially on the decision below. See *Arias* v. *Garland*, No. 22-cv-5248 D. Ct. Doc. 27, at 11-12, 15-19, 21 (W.D. Ark. Aug. 10, 2023); see also *Sanchez Gonzalez* v. *United States Dep't of State*, No. 23-cv-459 (C.D. Cal. Nov. 15, 2023), notice of appeal filed (Dec. 11, 2023); *Hernandez* v. *Blinken*, No. 23-cv-1848 (E.D. Pa.); *Reyes* v. *Blinken*, No. 23-cv-1143 (W.D. Tex.); *Sintigo* v. *Blinken*, No. 19-cv-465 (D. Nev.). This Court should halt that trend.

C. The Ninth Circuit Erred In All Three Rulings Below

Respondents' defenses of the merits of the court of appeals' rulings are also unpersuasive.

1. With respect to the holding that Muñoz possesses a protected liberty interest in her husband's visa application, respondents argue that such an interest was created by the "burdens" they undertook to establish that their marriage was bona fide for purposes of Muñoz's immediate-relative petition. Br. in Opp. 25-27; see Pet. 2-3, 8. But the legitimacy of respondents' marriage—

which the visa decision did not purport to call into question—is beside the point: "[t]he Government has not refused to recognize [Muñoz's] marriage." *Din*, 576 U.S. at 101 (plurality opinion). And respondents' suggestion (Br. in Opp. 28) that the Court's decision in *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), implicitly resolved the question that *Din* left open two weeks earlier is not persuasive. See Pet. 19.

2. As for the second question presented, respondents offer little reason to conclude that the consular officer's citation of Section 1182(a)(3)(A)(ii) was insufficient. See Br. in Opp. 24-25. In particular, respondents provide no reason why, if the terrorist-activity bar in Section 1182(a)(3)(B) contains "built-in factual predicates" —which they concede, *id.* at 24—the unlawful-activity bar in Section 1182(a)(3)(A)(ii) does not. Both provisions call for factual determinations (as opposed to wholly discretionary ones), see Pet. 24-25; both encompass a wide array of potential grounds, see *ibid.*; and both allow an officer to base an inadmissibility finding on a predictive judgment, see 8 U.S.C. 1182(a)(3)(A)(ii) and (a)(3)(B)(i)(II).

Like the court of appeals, respondents give short shrift (Br. in Opp. 31 n.1) to 8 U.S.C. 1182(b)(3), the provision instructing that consular officers need not provide specific explanations when denying visas on security-related grounds in Section 1182(a)(3). See Pet. 4, 26. Respondents do not dispute that, if Section 1182(b)(3) applies to Section 1182(a)(3)(A)(ii)-based denials, then the decision below has effectively invalidated Section 1182(b)(3) on an as-applied basis. Instead, they claim that Section 1182(b)(3) does not apply to such denials. But that is simply mistaken: Section 1182(b)(3) states that Section 1182(b)(1)'s notice requirements "do[] not apply to any alien inadmissible under paragraph (2) or

(3) of subsection (a)"—a cross-reference that clearly encompasses Section 1182(a)(3)(A)(ii). 8 U.S.C. 1182(b)(3). And respondents' theory that the cross-reference is implicitly limited by the fact that a different provision concerning a different topic, 8 U.S.C. 1225(c)(1), *expressly* excludes from its scope noncitizens found inadmissible under Section 1182(a)(3)(A)(ii) makes little sense.

3. Respondents devote only two sentences (Br. in Opp. 23) to defending the court of appeals' holding that the government forfeited consular nonreviewability by providing a further factual explanation for the visa denial in litigation, rather than within an undefined time after the denial itself. See Pet. 12-13, 28-31. Their reluctance is understandable; as three dissents emphasized below, that "novel" timeliness requirement is a "serious error" that "place[s] new burdens on the Executive's discretion without explaining how it can comply with those burdens." Pet. App. 116a, 119a (Bumatay, J., dissenting from denial of rehearing); see *id.* at 34a-35a, 39a-40a (Lee, J., dissenting); *id.* at 91a (Bress, J., dissenting from denial of rehearing); see also Pet. 31-33.

4. Respondents spend most of their efforts arguing that the doctrine of consular nonreviewability does not exist at all. Br. in Opp. 30-36.[2] But they fully recognized

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[2] Respondents' argument that they have standing (Br. in Opp. ii, 28-29) is a sideshow; the government is not arguing that consular nonreviewability is a rule of standing. Similarly, respondents miss the mark in arguing (*id.* at 30-32) that they have a cause of action under the Administrative Procedure Act (APA). As the district court noted, the Ninth Circuit has squarely held that "the APA provides no avenue for review of a consular officer's adjudication of a visa on the merits." Pet. App. 55a-56a (citation omitted); see *Allen* v. *Milas*, 896 F.3d 1094, 1097, 1107-1109 (9th Cir. 2018) (agreeing with the D.C. Circuit on this point).

the doctrine's existence below. *E.g.*, Resp. C.A. Br. 5 ("Under the doctrine of consular non-reviewability, the State Department can shield itself from judicial review into the constitutionality of a visa denial only if * * * the denial was 'facially legitimate and bona fide.'") (citation omitted); *id.* at 35 (explaining that in *Mandel*, "[t]he Court wrote that the doctrine of consular non-reviewability was properly invoked"); see also Pet. App. 15a n.21. Instead, respondents argued that Muñoz's challenge fell within what they repeatedly described as *Mandel*'s "narrow exception" to that doctrine. Resp. C.A. Br. 3, 28, 31-32.

Regardless, respondents' new theory falls flat. "Courts have 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." *Mezei*, 345 U.S. at 210. "To that end, the doctrine of consular nonreviewability bars judicial review of visa decisions made by consular officials abroad." *Yafai* v. *Pompeo*, 912 F.3d 1018, 1020 (7th Cir. 2019) (Barrett, J.) (citation and internal quotation marks omitted). That is why, in *Mandel*, the Court deemed it "clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country," and focused only on the possible constitutional rights of U.S.-citizen parties to obtain limited review. 408 U.S. at 762. That the Court did not use the phrase "consular nonreviewability" hardly undermines its recognition of the principle.

The same goes for *Din*, where five Members of the Court agreed that a U.S. citizen had no right to judicial review of her noncitizen husband's visa denial, see 576 U.S. at 101 (plurality opinion); *id.* at 102 (Kennedy, J., concurring in the judgment), and none suggested that the noncitizen possessed his own right to review, cf. *id.*

at 107-108, 110 (Breyer, J., dissenting). And in *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018), the Court reiterated that "the admission and exclusion of foreign nationals" is "'largely immune from judicial control'" except when the limited *Mandel* standard applies. *Id.* at 2418-2419 (citation omitted). Although the Court declined to apply consular nonreviewability to the challenges to a presidential proclamation in that case (instead rejecting them on other grounds), *id.* at 2407, it expressly noted that, in the context of individual visa denials, "the Government need provide only a statutory citation to explain a visa denial," *id.* at 2419.

Finally, respondents suggest (Br. in Opp. 33-35) that consular nonreviewability should apply differently to the denial of entry to a noncitizen who has previously spent time in the United States. But respondents rely on cases involving *lawful permanent residents*, not noncitizens like Asencio-Cordero who lack lawful status. See *Landon* v. *Plasencia*, 459 U.S. 21, 22, 32-34 (1982); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 591-592, 601-602 (1953); *Rosenberg* v. *Fleuti*, 374 U.S. 449, 450-452, 457-462 (1963). Respondents also err in invoking constitutional rights that noncitizens enjoy when already inside the Nation's borders. Noncitizens do not possess the same rights abroad, even when they have connections to the United States. See *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086-2087, 2089 (2020).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition.

Respectfully submitted.

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