No. 23-334

In the Supreme Court of the United States

DEPARTMENT OF STATE, ET AL.,
PETITIONERS

v.

SANDRA MUÑOZ, ET AL.

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

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, the decision to grant or deny a visa application generally 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.

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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 50 F.4th 906. The order of the en banc court denying rehearing and opinions respecting that denial (Pet. App. 90a-122a) are reported at 73 F.4th 769. The opinion of the district court granting summary judgment for petitioners (Pet. App. 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 (Pet. App. 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 (Pet. App. 90a-91a). The peti-

tion for a writ of certiorari was filed on September 29, 2023, and granted on January 12, 2024. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-12a.

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. 8 U.S.C. 1181(a), 1182(a)(7).[1] When a noncitizen seeks to obtain an immigrant visa on the basis of a close family relationship with a U.S. citizen, the citizen must first file a petition with U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security (DHS) to have the noncitizen classified as an immediate relative. See *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 46-47 (2014) (plurality opinion); 8 U.S.C. 1151(b)(2)(A)(1) and 1154(a)(1)(A); 8 C.F.R. 204.1.[2] If USCIS approves the petition, the noncitizen may (if all other relevant conditions are sat-

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[1] This brief 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), 542 note, 557; 8 U.S.C. 1551 note; see also *Nielsen* v. *Preap*, 139 S. Ct. 954, 959 n.2 (2019).

isfied) apply for an immigrant visa.[3] See *Cuellar de Osorio*, 573 U.S. at 47-48; see also 8 U.S.C. 1154(b), 1202; 22 C.F.R. 42.42.

The visa application "requires an alien to demonstrate in various ways her admissibility to the United States." *Cuellar de Osorio*, 573 U.S. at 48-49 (plurality opinion). The decision to grant or deny the application generally rests with a consular officer in the Department of State. See 8 U.S.C. 1101(a)(9) and (16), 1201(a)(1); 22 C.F.R. 42.71, 42.81.[4] The applicant has "the burden of proof" to establish visa eligibility "to the satisfaction of the consular officer," 8 U.S.C. 1361, and with certain exceptions not relevant here, no visa "shall be issued to an alien" if "it appears to the consular officer" from the application "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 ("[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

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[3] Unless otherwise specified, the discussion of the visa application process in this brief relates to applications for immigrant visas rather than nonimmigrant visas.

[4] See also 6 U.S.C. 236(b)(1) (granting Secretary of Homeland Security authority "to refuse visas in accordance with law," with that authority to be "exercised through the Secretary of State"); 6 U.S.C. 236(c)(1) (reserving Secretary of State's authority to direct a consular officer to refuse a visa if "such refusal" is "necessary or advisable in the foreign policy or security interests of the United States").

"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" certain specified offenses or "any other unlawful activity." 8 U.S.C. 1182(a)(3)(A)(ii).[5] A neighboring provision, Section 1182(a)(3)(B), bears 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 this notice requirement "does not apply." 8 U.S.C. 1182(b)(3).

2. This Court and lower courts have long recognized the doctrine of consular nonreviewability—the rule that, in the absence of affirmative congressional authorization, a noncitizen cannot assert any right to judicial review of a visa determination. See, *e.g.*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972); *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1158-1163 (D.C. Cir. 1999) (tracing history of the doctrine). As this Court has explained, "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 ex-

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[5] The specified offenses include "activity" to violate espionage, sabotage, or export laws. 8 U.S.C. 1182(a)(3)(A)(i) and (ii).

clude a given alien." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950). And there is no such authorization for review of visa denials. To the contrary, Congress has taken care to preserve a significant degree of consular independence. See 8 U.S.C. 1104(a)(1) (excluding from Secretary of State's authority to administer and enforce the immigration laws those powers, duties, and functions conferred on consular officers with respect to visas); 6 U.S.C. 236(b)(1) (barring the Secretary of Homeland Security from "alter[ing] or revers[ing] the decision of a consular officer to refuse a visa"). And Congress has not provided for any form of judicial review over visa denials—in contrast to the judicial review it has provided for orders removing a noncitizen who is present in the United States. See 8 U.S.C. 1252. Indeed, in prescribing visa-issuance procedures, Congress has expressly denied 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).

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 a visa to seek admission the United States. See, *e.g.*, *Mandel*, 408 U.S. at 762. On a handful of occasions, however, the Court has engaged in a limited review, without resolving whether that review was necessary, when a U.S. citizen claimed that the denial of a visa to a noncitizen violated the citizen's own constitutional rights. See *id.* at 762, 769-770; *Kerry* v. *Din*, 576 U.S. 86 (2015); *Trump* v. *Hawaii*, 585 U.S. 667, 682-683, 697-699, 702-704 (2018).

As most relevant to the present case, in *Kerry* v. *Din*, the Court considered a claim by a U.S. citizen that the exclusion of her noncitizen husband violated her proce-

dural due-process rights. In *Din*, the Ninth Circuit had ruled that the U.S. citizen, Fauzia Din, had "a protected liberty interest" that entitled her to review of the denial of a visa to her husband, an Afghan citizen. 576 U.S. 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 bar in Section 1182(a)(3)(B)—was insufficient to justify the visa denial. *Ibid.* Instead, the Ninth Circuit had required the government to "allege what it believes [Din's husband] did that would render him inadmissible" under that provision. *Din* v. *Kerry*, 718 F.3d 856, 863 (2013), judgment vacated, 576 U.S. 86 (2015).

After granting review, this Court decided that Din's constitutional 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, thus rendering the Due Process Clause inapplicable. *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 if she did have a protected interest, the government's citation of the terrorist-activity bar sufficed to provide any process that was due. *Ibid.* Justice Kennedy observed that this Court's 1972 decision in *Mandel* had upheld a decision to withhold a visa from a noncitizen against a constitutional challenge by U.S. citizens, where the government had provided "a facially legitimate and bona fide rea-

son" to explain its action. *Id.* at 102-104 (discussing *Mandel*). In Justice Kennedy's view, the government's citation of the terrorist-activity bar in *Din* provided "a facially legitimate and bona fide reason" to explain the visa denial, and he concluded that no further explanation or judicial inquiry was required. *Id.* at 104 (citation omitted); see *id.* at 103-106.

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 (Breyer, J., dissenting); see *id.* at 112-113.

B. Proceedings Below

1. Respondent Luis Ernesto Asencio-Cordero is a citizen of El Salvador who entered the United States without inspection in 2005. Pet. App. 44a. In 2010, he married respondent Sandra Muñoz, a citizen of the United States. *Ibid.* Muñoz filed a petition to have her husband classified as an immediate relative, which USCIS approved. *Id.* at 5a. Asencio-Cordero then returned to El Salvador, applied for an immigrant visa, and appeared for an interview at the U.S. Consulate in San Salvador in May 2015. *Ibid.*; see 8 U.S.C. 1202(a) and (e); 22 C.F.R. 42.62. In December 2015, after additional interviews, 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. Pet. App. 5a-6a; see J.A. 18.

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. Pet.

App. 6a. Respondents continued to contact the consulate and the Department of State, and in late April, 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 (citation omitted; brackets in original).[6] On May 18, 2016, a Department of State official informed respondents that the Department had concurred in the ineligibility finding, and on May 19, 2016, the consul 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 decision to deny Asencio-Cordero a visa. Pet. App. 8a. As relevant here, respondents argued that the denial was "not facially legitimate and bona fide" and "infringed on Muñoz's fundamental rights." *Ibid.* They asked for a declaration invalidating the consular officer's finding of inadmissibility and other "just and proper" relief. *Id.* at 9a & n.14; J.A. 13. The government filed a motion to dismiss, invoking consular nonreviewability. Pet. App. 9a.

In December 2017, the district court denied the government's motion. Pet. App. 73a-89a. Although the court agreed with the government that consular nonreviewability precluded Asencio-Cordero from challenging the visa denial, the court relied on Ninth Circuit precedent to find that his U.S.-citizen spouse, Muñoz, has a liberty interest sufficient to obtain some form of review. *Id.* at 80a-81a. The court also determined that the reason provided for the visa denial—the consular of-

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[6] The Mara Salvatrucha gang is commonly known as MS-13. See *United States* v. *Hernandez-Villanueva*, 473 F.3d 118, 119 (4th Cir. 2007).

ficer's citation of the unlawful-activity bar in Section 1182(a)(3)(A)(ii)—was not sufficient under the standard in *Mandel* and Justice Kennedy's *Din* concurrence. *Id.* at 81a-84a, 86a.

The district court ordered limited discovery. Pet. App. 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 had 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." Pet. App. 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.*[7]

In March 2021, the district court granted summary judgment to the government. Pet. App. 42a-72a. While adhering to its earlier ruling that the citation of Section 1182(a)(3)(A)(ii) was insufficient standing alone, the court found that the McNeil Declaration supplied a sufficient additional explanation: the consular officer's finding that Asencio-Cordero was a member of MS-13, "a recognized transnational criminal organization." *Id.* at 59a; see *id.* at 57a-60a. Having determined that the denial was therefore based on a "facially legitimate and

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

bona fide reason" within the meaning of *Mandel*, the court ruled that consular nonreviewability precluded respondents' challenges to the decision. *Id.* at 64a.

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

a. The court of appeals first affirmed the district court's ruling that Muñoz has a constitutional liberty interest sufficient to give rise to procedural protection. Pet. App. 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 her husband's visa application." *Id.* at 15a-16a (citation and brackets omitted); see *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). The court also stated that this Court's decision in *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), had "reinforce[d]" its circuit precedent on this question. Pet. App. 16a-17a.

b. Applying the *Mandel* standard of review, the court of appeals considered whether the government had provided a "facially legitimate and bona fide reason" for denying Asencio-Cordero a visa. Pet. App. 19a. On appeal, the government continued to argue that the consular officer's citation of the unlawful-activity bar in Section 1182(a)(3)(A)(ii) was sufficient under *Mandel*, Justice Kennedy's *Din* concurrence, and the exception to the notice requirement in Section 1182(b)(3). The court of appeals acknowledged that Justice Kennedy had found the government's citation of the terrorist-activity provision sufficient in *Din*. Pet. App. 21a. But the court believed that the unlawful-activity provision is different, on the theory that the unlawful-activity provision "does not specify the type of lawbreaking that will trig-

ger a visa denial" and therefore does not "contain[] discrete factual predicates." *Id.* at 19a.

The court of appeals thus agreed with the district court that the government was required to provide a "factual basis" for the officer's conclusion that the unlawful-activity bar applied. Pet. App. 21a; see *id.* at 20a-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 based on the interview, a "criminal review," and his tattoos—was sufficient. *Id.* at 24a-25a; see *id.* at 22a. The court went on, however, to hold that this factual explanation had not been provided to respondents in a "timely" manner because 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." *Id.* at 25a-26a; see *id.* at 33a.

The court of appeals further concluded that this "failure" to provide the requisite explanation within a "reasonable time[]" resulted in the government's forfeiture of consular nonreviewability. Pet. App. 33a. This meant, the court explained, that the visa determination cannot be "shield[ed] * * * from judicial review" and "[t]he district court may 'look behind' the government's decision." *Ibid.* (citation omitted). The court accordingly vacated the judgment and remanded for consideration of the merits of respondents' claims. *Ibid.*

c. Judge Lee dissented. Pet. App. 34a-41a. He 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.

d. The court of appeals denied the government's petition for rehearing en banc. Pet. App. 90a-91a. Ten judges dissented in two opinions. *Id.* at 91a (Bress, J.), 92a-122a (Bumatay, J.).

4. The government filed a petition for a writ of certiorari seeking review of the court of appeals' resolution of three questions: (1) whether a refusal of a visa to a U.S. citizen's noncitizen spouse impinges upon a liberty interest of the citizen; (2) whether, under the *Mandel* standard of review, informing a noncitizen that he was deemed inadmissible under Section 1182(a)(3)(A)(ii) is insufficient without a further factual explanation; and (3) whether the government must provide any such explanation within a "reasonable time" after the denial itself, or else forfeit consular nonreviewability. Pet. i. This Court granted the petition limited to the first two questions presented.

SUMMARY OF ARGUMENT

The court of appeals erred in its resolution of both questions presented and its decision should be reversed on either independent ground.

A. At the outset, the court of appeals erred in holding that a U.S. citizen has a liberty interest in her noncitizen-spouse's visa application sufficient to invoke the protections of the Due Process Clause.

Under the doctrine of consular nonreviewability, a noncitizen abroad cannot seek judicial review of a consular officer's decision to refuse a visa unless Congress has so provided. That rule—which is grounded in well-established principles of sovereignty and the separation of powers—accords with this Court's recognition that "[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). In *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), this Court nonetheless engaged in a limited form of review when it was claimed that a visa denial burdened the constitutional rights of U.S. citizens. The court of appeals believed that a constitutional right is implicated here, but that was mistaken.

The Fifth Amendment Due Process Clause protects persons against deprivations of "life, liberty, or property, without due process of law." U.S. Const. Amend. V. But respondent Sandra Muñoz does not have a protected liberty interest in the visa application of her noncitizen spouse. Although the INA grants her the ability to file a petition to have her spouse classified as an immediate relative, it affords her no legally relevant interest in her spouse's separate application to obtain a visa to enter the country—an application that turns on the noncitizen's ability to demonstrate his admissibility to the satisfaction of a consular officer. Nor is the ability to have a foreign spouse enter and live in the United States one of the "guarantees implicit in the word 'liberty.'" *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005). Respondents' assertion to the contrary cannot be reconciled with the political branches' traditional power to exclude or admit foreigners on such terms and conditions as those branches may prescribe. That principle is "as firmly imbedded" in the "tissues of our body politic as any aspect of our government," representing "not merely 'a page of history,' but a whole volume." *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (citation omitted); see *Knauff*, 338 U.S. at 542-543.

The court of appeals was also wrong to describe the relevant interest as a corollary of the fundamental right to marriage. The government has not attempted to forbid, delegitimize, or otherwise regulate respondents'

marriage. Instead, it has enforced a wholly unrelated immigration restriction: the bar on admitting noncitizens who will engage in unlawful activity in the United States. In reasoning otherwise, the court of appeals overlooked 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." *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980). This Court has long recognized that the Due Process Clause does not bear on the latter.

B. Even if Muñoz does have a liberty interest that is implicated in this context, the court of appeals nevertheless erred in concluding that the consular officer was required to do more than cite the statutory ground of inadmissibility in 8 U.S.C. 1182(a)(3)(A)(ii) to explain the visa refusal. Under the circumscribed *Mandel* standard of review, the government need supply only a "facially legitimate and bona fide reason" to deny a visa. 408 U.S. at 770. Citing the unlawful-activity bar satisfies that lenient inquiry: It demonstrates that the decision has a valid statutory basis and that the officer made the factual determination the statute calls for. By requiring the government to provide a further explanation for *why* it believes that the statutory bar applies in this case, the court of appeals contravened *Mandel*'s instruction that courts may not "look behind" the reason provided "nor test it." *Ibid.*

Justice Kennedy's concurring opinion in *Kerry* v. *Din*, 576 U.S. 86 (2015)—which held that a citation of the terrorist-activity bar in 8 U.S.C. 1182(a)(3)(B) is sufficient standing alone—confirms that citing the neighboring unlawful-activity bar should be enough. Like the unlawful-activity bar, the terrorist-activity bar can be

implicated in a wide variety of distinct ways, and yet Justice Kennedy declined to require the government to provide more than a bare citation to the umbrella provision. In requiring more here, the court of appeals misunderstood his *Din* concurrence—which "reiterated * * * that the Government need provide only a statutory citation to explain a visa denial." *Trump* v. *Hawaii*, 585 U.S. 667, 703 (2018).

The court of appeals also ignored a federal statute, 8 U.S.C. 1182(b)(3), which specifically instructs that a consular officer need *not* provide an explanation when denying a visa on a security-related ground listed in Section 1182(a)(3), including the unlawful-activity bar. In that regard, too, the court improperly substituted its own assessment for the "considered judgment" of the political branches in this "sensitive area." *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment).

C. The visa-issuance process is an integral component of border security and requiring the government to disclose the details of consular officers' determinations that applicants are inadmissible on security-related grounds would have adverse public-safety and foreign-policy consequences. Visa-ineligibility determinations are frequently based on sensitive information that other agencies or entities, including foreign governments and other sources, provide to the Department of State and its consular posts. Requiring consular officers to divulge such information could be expected to have a chilling effect on information-sharing, particularly from foreign partners. The Ninth Circuit seriously erred in disregarding such considerations and in authorizing unwarranted intrusions on the decisionmaking of consular officers abroad.

ARGUMENT

A. The Ninth Circuit Erred In Holding That A U.S. Citizen Has A Protected Liberty Interest In The Visa Application Of A Noncitizen Spouse

1. The doctrine of consular nonreviewability forecloses judicial review of visa denials

The doctrine of consular nonreviewability has deep roots in the law. For virtually as long as Congress has vested authority in consular officers to grant visas, see Immigration Act of 1924, ch. 190, § 2(f), 43 Stat. 154 (providing that "[n]o immigration visa shall be issued to an immigrant if it appears to the consular officer * * * that the Immigrant is inadmissible to the United States under the immigration laws"), courts have recognized that a noncitizen has no right to challenge the refusal of a visa in the absence of affirmative congressional authorization. See *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928); *United States ex rel. Ulrich* v. *Kellogg*, 30 F.2d 984, 986 (D.C. Cir.), cert. denied, 279 U.S. 868 (1929); see also A. Warner Parker, *The Quota Provisions of the Immigration Act of 1924*, 18 Am. J. Int'l L. 737, 742 (1924) ("Absolute authority to refuse the visa is vested in consular officials."); Note, *Right of an Alien to a Fair Hearing in Exclusion Proceedings*, 41 Harv. L. Rev. 522, 522 n.7 (1928) ("The denial of a visa by a consular officer will not be reviewed by the courts."). This Court's cases reflect the same principle. See, *e.g.*, *Trump* v. *Hawaii*, 585 U.S. 667, 702-703 (2018); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972); *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956) (disclaiming the suggestion that "an alien who has never presented himself at the borders of this coun-

try may avail himself of [a] declaratory judgment action by bringing the action from abroad").

a. Powerful justifications support the preclusion of judicial review of decisions made by consular officers abroad relating to noncitizens' admission to the United States. First, consular nonreviewability is a corollary of the principle that the political branches have "plenary authority to decide which aliens to admit" as well as "the power to set the procedures to be followed in determining whether an alien should be admitted." *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020); see, *e.g.*, *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909) ("over no conceivable subject is the legislative power of Congress more complete").

That power is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Mandel*, 408 U.S. at 765 (citation omitted); see *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); see also *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (observing that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"). And it means that, "[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 *Landon* v. *Plasencia*, 459 U.S. 21, 33-33 (1982) (noting this Court's longstanding view that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application").

Accordingly, this Court has long held that "[t]he power of Congress to * * * 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*, is settled"—including in instances in which there is some question about whether the applicant falls within "a class forbidden to enter the United States." *Wong Wing* v. *United States*, 163 U.S. 228, 233 (1896) (citation omitted) (emphasis added); see also *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (reaffirming that this area is "largely immune from judicial control").

Second, Congress has repeatedly acknowledged the nonreviewability of consular visa decisions and chosen to leave that principle undisturbed. When putting the visa system into place in 1924, members of Congress understood that no form of review would be available to challenge a consular officer's denial of a visa. See H.R. Rep. No. 176, 68th Cong., 1st Sess. Pt. 2, at 10 (1924) (view of minority); 65 Cong. Rec. 5466 (1924). When the INA was being drafted in 1952, there were suggestions to authorize judicial review of visa denials or to create "a semijudicial board * * * with jurisdiction to review consular decisions pertaining to the granting or refusal of visas." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 36 (1952). But Congress declined to enact any such procedure. As the Senate Judiciary Committee explained, although "[o]bjection has been made to the plenary au-

thority presently given to consuls to refuse the issuance of visas," allowing "review of visa decisions would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws." S. Rep. No. 1515, 81st Cong., 2d Sess. 622 (1950). The committee concluded that "the question of granting or refusing immigration visas to aliens should be left to the sound discretion of the consular officer." *Ibid.* And again in 1961, when the INA was amended to authorize judicial review of determinations affecting noncitizens already in the United States and subject to deportation or exclusion proceedings, Congress provided no corresponding right to judicial review for those who were outside the United States and claiming a right to enter. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651; see also H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961) ("The sovereign United States cannot give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States[.]"); cf. 8 U.S.C. 1201(*i*) (allowing judicial review of visa *revocations*, but only in proceedings to remove a noncitizen who is present in the United States and when "revocation provides the sole ground for removal").

b. "[A]lthough foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen." *Trump* v. *Hawaii*, 585 U.S. at 703. The paradigm case is this Court's 1972 decision in *Mandel*, which considered a claim by U.S.-citizen professors that the government's refusal to permit a Belgian journalist, Ernest Mandel, to enter the country for the purpose of delivering speeches at conferences violated the

professors' own First Amendment rights. 408 U.S. at 762. The consular officer in Brussels had found Mandel inadmissible and denied him a nonimmigrant visa, and the Attorney General had declined to grant Mandel a discretionary waiver of inadmissibility. *Id.* at 757-758.

On review, this Court did not reach the government's argument that the decision whether to waive Mandel's inadmissibility had been delegated by Congress "to the Executive in its sole and unfettered discretion," and that as a result, the Attorney General could give "any reason or no reason" in support of the refusal, without judicial intervention. *Mandel*, 408 U.S. at 769; see *id.* at 770 (declining to decide that broader question). Instead, the Court disposed of the case on the narrower ground that the record did in fact include a "reason" for denying the waiver that was "facially legitimate and bona fide"—specifically, that Mandel had abused prior visas. *Id.* at 769. The Court explained that at least 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.

Courts have since treated the analysis undertaken in *Mandel* as a limited "exception" to consular nonreviewability, permitting a circumscribed inquiry when a U.S. citizen can show that a visa denial implicates her own constitutional rights. See, *e.g.*, Pet. App. 2a; *Baaghil* v. *Miller*, 1 F.4th 427, 432 (6th Cir. 2021); but see p. 32 n.10, *infra*. In the decision under review, the court of appeals applied *Mandel* review because it believed that the decision to deny a visa to Asencio-Cordero burdened the rights of his U.S.-citizen spouse under the Fifth

Amendment Due Process Clause. Pet. App. 18a. For the reasons explained below, that premise was erroneous. There was no justification for departing from consular nonreviewability in this context.

2. A U.S. citizen has no statutory or constitutional right to have a noncitizen spouse admitted to the United States

The Due Process Clause protects persons against deprivations of "life, liberty, or property, without due process of law." U.S. Const. Amend. V. Those who seek to invoke its protection "must establish that one of these interests is at stake." *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005). Moreover, "[w]hen that Clause is invoked in a novel context," the inquiry must begin "with a determination of the precise nature of the private interest that is threatened by the State." *Lehr* v. *Robertson*, 463 U.S. 248, 256 (1983).

Here, the court of appeals held that Muñoz has a qualifying liberty interest entitling her to judicial review. Pet. App. 15a-16a, 18a; see *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). The court varied, however, in its descriptions of the precise liberty interest at stake. It referred most frequently to Muñoz's liberty interest "in her husband's visa application." Pet. App. 15a; see *id.* at 16a, 18a & n.23. While a protected liberty interest can derive from extant "laws or policies," *Wilkinson*, 545 U.S. at 221, Muñoz cannot locate such an interest in the federal immigration laws or in the Due Process Clause itself.

a. As a "citizen of the United States," 8 U.S.C. 1154(a)(1), Muñoz was afforded access to certain procedures under the INA in connection with her own petition, at the first step of the visa process, for classification of Asencio-Cordero as an immediate relative to

whom a visa could be made available if he was later found admissible. See pp. 2-3, *supra*. The decision by USCIS whether to approve such a petition generally turns on an assessment of whether the U.S. citizen is qualified to file it and whether the citizen actually has the claimed family relationship to the noncitizen. See 8 U.S.C. 1154(a) and (b); 8 C.F.R. 204.1-204.2. If the petition is denied, the U.S. citizen can seek administrative reopening or reconsideration, 8 C.F.R. 103.5, and can appeal an adverse decision to the Board of Immigration Appeals, 8 C.F.R. 103.3(a), 1003.1(b)(5).

But approval of a U.S. citizen's petition is only the first step. It is not sufficient for the issuance of a visa to the noncitizen beneficiary—it merely makes the noncitizen eligible to submit his own application for a visa. See 8 U.S.C. 1201(a), 1202(a) and (e); 22 C.F.R. 42.42; see also *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 47-48 (2014). And regardless of whether the noncitizen's ability to apply for a visa rests on an approved petition filed by a family member—or on some other basis, such as an approved petition filed by a prospective employer, see 8 U.S.C. 1151(d), 1153(b)—the consular officer's adjudication of the visa application is based on an independent examination of the noncitizen's own history, health, criminal record, and other characteristics to determine whether any of the INA's grounds of inadmissibility apply. See 8 U.S.C. 1182(a), 1201(a), (d), and (g), 1202(a), (b), and (e).

A U.S.-citizen petitioner accordingly has no rights under the INA with respect to the consular officer's decision to grant the noncitizen's visa application. The citizen has no right to be present at the noncitizen's consular interview and is not entitled to notice regarding the denial. See 8 U.S.C. 1182(b); 22 C.F.R. 42.62. Nor

does the citizen possess any basis in law to insist or expect that the noncitizen's visa application will be granted, nor any statutory or regulatory right to challenge the application's denial. Thus, in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), the Court explained that, even though "the families of putative immigrants certainly have an interest in their admission," it is a "fallacy" to conclude that the INA's provisions for petitions by U.S. citizens "grant a 'fundamental right' to American citizens" that limits how Congress may exercise "the Nation's sovereign power to admit or exclude foreigners." *Id.* at 795 n.6; cf. *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999) (concluding that once the U.S. sponsors' own "petition was granted," their "cognizable interest" under the INA "terminated").

b. Rather than identify any statutory foundation for the purported liberty interest here, the court of appeals appeared to reason that a U.S. citizen's protected interest in the visa application of her husband is one that "arise[s] from the Constitution itself, by reason of guarantees implicit in the word 'liberty.'" *Wilkinson*, 545 U.S. at 221; see Pet. App. 15a-18a. That conclusion is mistaken.[8]

The suggestion that a U.S. citizen has an inherent right to have her noncitizen spouse admitted to the

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[8] The decision below also referred to Muñoz's "protected liberty interest in '*constitutionally adequate procedures* in the adjudication of a non-citizen spouse's visa application' to the extent authorized in *Mandel*." Pet. App. 16a (brackets and citation omitted). But "[p]rocess is not an end in itself," *District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 67 (2009), and reasoning that U.S. citizens have a constitutionally protected liberty interest in constitutional procedures is circular. Such logic must rest on an understanding that Muñoz and her husband are entitled to the visa itself, see *ibid.*—which is incorrect.

country clashes with the long-established principle that a sovereign nation has inherent power to exclude or admit foreigners on such terms and conditions as it may prescribe. That principle was familiar to the Founders. See, *e.g.*, 2 *The Records of the Federal Convention of 1787*, at 238 (Max Farrand ed., rev. ed. 1966) (reporting Gouverneur Morris's observation that "every Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted"); 1 Emer de Vattel, *The Law of Nations*, bk. II, ch. VII, § 94, at 151 (1760) ("The sovereign may forbid the entrance of his territory either in general, to every stranger, or in a particular case, or [to] certain persons, on account of certain affairs, according as he shall find it most for the advantage of the State."). And it has been recognized by this Court for over a hundred years. See, *e.g.*, *Wong Wing*, 163 U.S. at 233; *Nishimura Ekiu*, 142 U.S. at 659. Given that "fundamental proposition[]," *Thuraissigiam*, 140 S. Ct. at 1982, it is implausible that the political branches are obliged to permit a noncitizen to enter and live in the United States because he or she is married to a U.S. citizen. See *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (the principle that "the formulation of * * * policies [pertaining to the entry of noncitizens] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government," representing "not merely 'a page of history,' but a whole volume") (citation omitted).

Indeed, this Court has previously respected the political branches' plenary authority over immigration even when Congress's choices or the Executive's enforcement decisions prevented family members from residing with each other in the United States. In

Knauff, for instance, the Court upheld the Executive's power to deny entry to a U.S. citizen's noncitizen spouse based on confidential "security reasons" and to do so without providing a hearing. 338 U.S. at 543-544, 547. And in *Fiallo*, the Court reiterated that it has "no judicial authority to substitute [its] political judgment for that of Congress," even when "statutory definitions deny preferential status to parents and children who share strong family ties." 430 U.S. at 798. Notwithstanding the "consequences of the congressional decision not to accord preferential status" to certain parent-child relationships, that decision "remains one 'solely for the responsibility of the Congress and wholly outside the power of this Court to control.'" *Id.* at 799 (quoting *Harisiades*, 342 U.S. at 597 (Frankfurter, J., concurring)).

The liberty interest that Muñoz claims also cannot be reconciled with this Court's recognition that foreign citizens abroad do not enjoy U.S. constitutional rights—even foreigners who are "closely identified" or "affiliated" with a U.S. person asserting the same interest. *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2088-2089 (2020) (emphasis omitted). As with respect to the U.S. nongovernmental organizations and their foreign affiliates in *Agency for International Development*, a husband and wife "are legally separate" from one another, meaning that one cannot claim a constitutional interest in governmental policies regulating the other. *Id.* at 2089.

c. Tellingly, the Ninth Circuit stands alone in recognizing the kind of liberty interest that Muñoz asserts in this case. See Pet. App. 97a (Bumatay, J., dissenting from denial of rehearing en banc). Other courts of appeals have rejected claims by U.S. citizens that their

spouses' immigration proceedings implicated the citizens' own constitutional rights in decisions dating back to the mid-twentieth century and continuing after *Din*. See, *e.g.*, *Swartz* v. *Rogers*, 254 F.2d 338, 339 (D.C. Cir.), cert. denied, 357 U.S. 928 (1958); *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971); *Burrafato* v. *United States Dep't of State*, 523 F.2d 554, 554-557 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976); *Bright* v. *Parra*, 919 F.2d 31, 34 (5th Cir. 1990) (per curiam); *Bakran* v. *Secretary, United States Dep't of Homeland Sec.*, 894 F.3d 557, 564-565 (3d Cir. 2018); *Baaghil*, 1 F.4th at 433-434 (6th Cir.); *Colindres* v. *United States Dep't of State*, 71 F.4th 1018, 1021 (D.C. Cir. 2023), petition for cert. pending, No. 23-348 (filed Sept. 21, 2023).[9] This Court should agree with that near-consensus.

3. A visa denial based on a security-related ground of inadmissibility does not impinge on the right to marry

The court of appeals alternatively suggested that the constitutional interest at stake is Muñoz's "right to marry." Pet. App. 17a; see *id.* at 16a. Of course, "the 'liberty' specially protected by the Due Process Clause includes the right[] to marry." *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997); see *Obergefell* v. *Hodges*, 576 U.S. 644, 663-664 (2015). But denying a visa to a noncitizen based on a security-related ground of inadmissibility does not infringe that right.

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[9] Since *Din*, some circuits have avoided deciding the liberty-interest question, instead applying *Mandel* and holding that the government's explanation for a denial was sufficient. 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.).

a. "[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. Nor has it prohibited a married couple from cohabitating or making "personal" decisions about "matters of marriage and family life." *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639 (1974). The government has simply exercised its sovereign authority to deny admission to a noncitizen on a generally applicable ground that is unrelated to the marriage. See pp. 23-25, *supra*. Muñoz's fundamental right to marry does not entail the very different right to compel the United States to admit her noncitizen spouse.

For similar reasons, the court of appeals was mistaken in relying on this Court's post-*Din* decision in *Obergefell*. See Pet. App. 16a-17a (reasoning that *Obergefell* "reinforce[d]" the Ninth Circuit's position in *Din* and *Bustamante*). In *Obergefell*, 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 immigration context that the *Din* Court had specifically left open only "[e]leven days" earlier. Pet. App. 16a; see *Din*, 576 U.S. at 102 (Kennedy, J., concurring in the judgment). To the contrary, as the decision below acknowledged, *Obergefell* was "reiterat[ing] longstanding precedent that 'the right to marry is a fundamental right inherent in the liberty of the person.'" Pet. App. 16a (citation omitted). Neither that precedent nor *Obergefell* speaks to the prerogative being claimed here.

b. The court of appeals additionally observed that U.S. citizens have a liberty interest in "residing in their

country of citizenship," Pet. App. 17a (citing *Agosto* v. *INS*, 436 U.S. 748, 753 (1978)), and reasoned that the "cumulative effect" of a visa denial to a citizen's 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)); see *Din*, 576 U.S. at 101 (plurality opinion).

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 (citing *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870) (stating that the Fifth Amendment Due Process Clause "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals")). As a result, the Court has rejected the notion that an action's incidental or indirect effects can be said to have interfered with the citizen's constitutionally protected liberty or property interests. *Id.* at 788-789; see *Town of Castle Rock*, 545 U.S. at 766-768.

The plaintiffs in *O'Bannon* were nursing-home residents who claimed that their liberty interests had been violated when the government decertified the home in which they lived, thereby forcing them to move, without affording them a hearing on the decertification decision.

447 U.S. at 777-781, 784, 787. The Court recognized that decertification could have "an immediate, adverse impact" on the residents, including (the Court assumed) "severe emotional and physical hardship" and disruption of "family ties" and other "associational interests." *Id.* at 784 & n.16, 787. The Court nonetheless ruled that the government's enforcement of "valid regulations" *against the nursing home* "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 787, 790; see *id.* at 787 (contrasting such an indirect impact with "the withdrawal of direct benefits" to the residents themselves). In the Court's view, the residents were analogous to "members of a family who have been dependent on an errant father." *Id.* at 788. Although "they may suffer serious trauma if he is deprived of his liberty or property as a consequence of criminal proceedings," such family members "*surely * * * have no constitutional right to participate in his trial or sentencing procedures*." *Ibid.* (emphasis added).

For similar reasons, Muñoz has not been deprived of any protected interest: The "indirect and incidental result of the Government's enforcement action" against her husband "does not amount to a deprivation of any interest in life, liberty, or property." *O'Bannon*, 447 U.S. at 787. The challenged government action was not directed at Muñoz or her marriage relationship. It merely carried out Congress's command that *no* nonresident noncitizen, whether married to a U.S. citizen or not, is admissible to the United States when there is reasonable ground to believe that the noncitizen will engage in unlawful activity after entry. See 8 U.S.C. 1182(a)(3)(A)(ii), 1201(g). And adhering to *O'Bannon*'s

established distinction between direct and indirect governmental action is all the more important in light of the foreign-policy and national-security concerns that undergird deference to the political branches in this context. See pp. 17-18, *supra.*

Accepting the Ninth Circuit's view of the secondary implications of the fundamental right to marriage, by contrast, would threaten tremendous disruption. Under such a legal regime, any U.S. citizen whose noncitizen spouse is not permitted to enter the country, for any reason, might assert a due-process claim in court. So too might any U.S. citizen whose noncitizen spouse is deemed inadmissible at the border or is placed in removal proceedings because of (for instance) a violation of the immigration laws or the commission of serious crimes. See, *e.g.*, 8 U.S.C. 1227. Such demands for judicial intervention would likely extend beyond procedural claims to encompass substantive challenges to provisions of immigration law if those laws have the effect of keeping family members apart or making the path to unification more difficult. See, *e.g.*, *Morales-Izquierdo* v. *DHS*, 600 F.3d 1076, 1079-1080, 1091 (9th Cir. 2010). And affirmance could open the door to constitutional claims outside the immigration context. If spouses have a due-process right to challenge their partner's exclusion from the country, it is not readily apparent why they would not, for instance, "also have a constitutional right to object to a [spouse's] being sent to prison." *Payne-Barahona* v. *Gonzáles*, 474 F.3d 1, 3 (1st Cir. 2007) (making the point with respect to parents and children).

O'Bannon correctly recognized that due process "surely" does not require such results. 447 U.S. at 788. The Court should reaffirm that conclusion here.

B. The Ninth Circuit Erred In Requiring The Government To Do More Than Cite A Statutory Ground Of Inadmissibility To Explain A Visa Denial

Even assuming that a liberty interest supports any 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) qualifies as a "facially legitimate and bona fide reason" to explain the denial under *Mandel*, 408 U.S. at 770. The Ninth Circuit's contrary conclusion contravenes *Mandel* itself and Justice Kennedy's concurrence in *Din*, which applied the *Mandel* standard to uphold the government's citation of a materially similar statutory ground of inadmissibility. The Ninth Circuit's requirement that the government provide more detail also overrides Congress's determination in 8 U.S.C. 1182(b)(3) that a consular officer need not provide an explanation when denying a visa on a security-related ground. For this independent reason, the judgment below cannot stand. Cf. *Din*, 576 U.S. at 102, 106 (Kennedy, J., concurring in the judgment).

1. Notice of the noncitizen's inadmissibility under the unlawful-activity bar qualifies as a "facially legitimate and bona fide" reason under Mandel *and the* Din *concurrence*

Courts have held that the *Mandel* inquiry represents a "modest exception" to the rule of consular nonreviewability. *Baaghil*, 1 F.4th at 432; see, *e.g.*, *Pak* v. *Biden*, 91 F.4th 896, 901 (7th Cir. 2024) ("narrow exception"). Under *Mandel*, even when a visa denial implicates a constitutional right of a U.S. citizen, the court will ask no more than whether the government has provided a "facially legitimate and bona fide reason" for the decision. 408 U.S. at 770; see *Trump* v. *Hawaii*, 585 U.S. at

703-704.[10] If such a reason is present, the court may "neither look behind" the visa decision, "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 result is a "circumscribed judicial inquiry" that is less demanding than even rational-basis review. *Trump* v. *Hawaii*, 585 U.S. at 703; see *id.* at 704.

a. Here, the consular officer's explanation for denying a visa to Asencio-Cordero—that his admission was barred under 8 U.S.C. 1182(a)(3)(A)(ii), which deems 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 * * * unlawful activity"—is a sufficient reason under *Mandel*. The reason is "facially legitimate" because Section 1182(a)(3)(A)(ii) is a valid statutory ground of inadmissibility. *Din*, 576 U.S. at 104-105 (Kennedy, J., concurring in the judgment). And the

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[10] Indeed, *Mandel* did not hold that the government must satisfy even that limited inquiry. See p. 20, *supra*. Although the Court noted the government's argument that "any reason or no reason may be given" for the Attorney General's decision not to grant a waiver of inadmissibility, the Court explained that it had no need to address that broader argument since a facially legitimate and bona fide reason was present in the record and sufficient to affirm the denial of the waiver in that case. *Mandel*, 408 U.S. at 769; see *id.* at 770 (explaining that what "grounds may be available for attacking [an] exercise of discretion for which no justification whatsoever is advanced is a question *we neither address nor decide in this case*") (emphasis added); see also *Din*, 576 U.S. at 103 (Kennedy, J., concurring in the judgment) (noting this caveat in *Mandel*). And because this Court has never found an explanation or justification for an immigration determination insufficient under the *Mandel* inquiry, it has not had occasion to decide the question that *Mandel* left open.

content of the statutory citation "indicates [that the officer] relied upon a bona fide factual basis" for the decision: a factual determination that there is at least reasonable ground to believe that Asencio-Cordero intends to engage in unlawful activity in the United States. *Id.* at 105.

Any requirement that the consular officer explain *why* the noncitizen is believed to be inadmissible under Section 1182(a)(3)(A)(ii) would contravene *Mandel*'s instruction that courts neither "look behind" the decision nor "test" its "justification." 408 U.S. at 770. In that regard, *Mandel* represents a particularly robust application of the presumption of regularity afforded to executive determinations. See *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). Moreover, the *Mandel* standard should be applied with particular deference when it comes to security-based grounds of inadmissibility, of which the unlawful-activity bar is one. See 8 U.S.C. 1182(a)(3); see pp. 37-41, *infra*. As this Court has observed, "*Mandel*'s narrow standard of review 'has particular force' in admission and immigration cases that overlap with 'the area of national security.'" *Trump* v. *Hawaii*, 585 U.S. at 704 (quoting *Din*, 576 U.S. at 104 (Kennedy, J., concurring in the judgment)).

b. Justice Kennedy's concurring opinion in *Din* confirms that a consular officer's citation of the unlawful-activity ground of inadmissibility is enough, standing alone, to supply a facially legitimate and bona fide reason satisfying *Mandel*.

The second question presented in *Din*—as here—was whether the government's citation of a statutory ground of inadmissibility was sufficient to provide whatever process was due to a U.S. citizen, assuming arguendo that she had a protected liberty interest in her spouse's visa application. See 576 U.S. at 102 (Kennedy, J., concurring in the judgment). Justice Kennedy (who was joined by Justice Alito) concluded that the government's general citation to the terrorist-activity bar in 8 U.S.C. 1182(a)(3)(B) was indeed sufficient. He thus rejected the contentions that the government needed to provide a further explanation or at least cite a specific subclause within Section 1182(a)(3)(B). 576 U.S. at 102, 105-106. Justice Kennedy reasoned that the citation to the terrorist-activity bar, even if undifferentiated, "suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements" and "indicates [that the government] relied upon a bona fide factual basis for denying a visa." *Id.* at 104-105.

The decision below accepted Justice Kennedy's analysis and his conclusion that a bare citation of the *terrorist*-activity bar satisfies *Mandel* review. Pet. App. 3a-4a & n.4, 20a.[11] The court of appeals nonetheless concluded

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[11] 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.*, Pet. App. 3a & n.3. 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*, 584 U.S. 675, 679-680 (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 rehear-

that a citation to the unlawful-activity bar in the adjacent subparagraph is insufficient without an explanation of why the consular officer believed that the provision applies. *Id.* at 20a. The court seized upon Justice Kennedy's statement that the terrorist-activity provision "specifies discrete factual predicates." *Din*, 576 U.S. at 105; see Pet. App. 3a, 19a. In the court's view, the unlawful-activity bar lacks such "discrete factual predicates" because it is not limited to a specified type of lawbreaking. Pet. App. 19a.

The court of appeals' basis for distinguishing the two statutory grounds of inadmissibility lacks merit. As the D.C. Circuit has explained, Section 1182(a)(3)(A)(ii) *does* specify "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 and adding brackets to 8 U.S.C. 1182(a)(3)(A)(ii)). Nor can the two provisions be distinguished on the basis that Section 1182(a)(3)(A)(ii) requires the officer to make a predictive judgment about what the visa applicant may do in the future. The terrorist-activity bar covers, *inter alia*, any noncitizen "who * * * a consular officer * * * has reasonable ground to believe[] * * * is likely to engage after entry in any terrorist activity," thus calling for a parallel predictive judgment. 8 U.S.C. 1182(a)(3)(B)(i)(II).

It is true that many different kinds of lawbreaking could serve as the basis for applying the unlawful-activity bar. But that is also true for the terrorist-activity bar. See *Colindres*, 71 F.4th at 1024-1025. As

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ing en banc) (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, its application of *Mandel* is satisfied by the government's citation of Section 1182(a)(3)(A)(ii) in this case.

Justice Kennedy acknowledged—and as the dissent in *Din* emphasized—the terrorist-activity bar comprises several different subparts, including many statutory cross-references, and it can be triggered by "a broad range of conduct." 576 U.S. at 105 (Kennedy, J., concurring in the judgment); see also *id.* at 113-114 (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 particular subclause supported the visa refusal—even though Din may have had very little idea what finding had been made regarding her husband's inadmissibility and could have difficulty rebutting it. See *id.* at 105-106.

It is therefore clear that the *Din* concurrence's description of Section 1182(a)(3)(B) as containing "discrete factual predicates" was not intended to set forth a mandatory requirement that the statutory ground of inadmissibility be narrow or precise. This Court has "chide[d] people for treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling." *Gundy* v. *United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting); see, *e.g.*, *National Pork Producers Council* v. *Ross*, 598 U.S. 356, 373-374 (2023). And here, in context, it is evident that the *Din* 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 denial of a waiver that was at issue in *Mandel*. See 576 U.S. at 105; see also Pet. App. 112a (Bumatay, J., dissenting from denial of rehearing en

banc). Unlike the discretionary decision to *waive* a ground of ineligibility in *Mandel*, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's determination that a noncitizen is inadmissible in the first instance must be tethered to the reasons contained in the statutory provision defining such inadmissibility. See 8 U.S.C. 1182(a), 1201(g). That is why, 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).

c. Finally, the Court has already embraced the government's reading of the *Din* concurrence. In *Trump* v. *Hawaii*, the Court 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*." 585 U.S. at 703 (quoting *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment) (emphasis added); see *Pak*, 91 F.4th at 901 ("The Supreme Court repeatedly has held that the government need only provide a citation to a valid statutory provision to support a visa denial."). The decision below ignored that clarification by stretching to interpret *Mandel* and *Din* as requiring more.

2. The decision below overrides Congress's determination that a consular officer need not provide an explanation when denying a visa on a security-related ground

The Ninth Circuit's requirement that the government provide further details in support of a visa denial

under the unlawful-activity bar also conflicts with a federal statute, 8 U.S.C. 1182(b)(3).

a. The INA generally requires a consular officer who refuses a visa based on inadmissibility to "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). But Congress has provided an express exception to that notice requirement when a noncitizen is deemed inadmissible under Section 1182(a)(2) (enumerating "[c]riminal and related grounds") or Section 1182(a)(3) (enumerating "[s]ecurity and related grounds"). For denials based on those grounds, Section 1182(b)(3) instructs that Section 1182(b)(1)'s notice requirement—including its requirement of specificity—"does not apply." 8 U.S.C. 1182(b)(3).

That exception was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 412, 110 Stat. 1269. See H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 116 (1996) (explaining that Section 1182(b)(3) "provides that no explanation of the denial need be given to aliens excluded on the basis of their terrorist or other criminal activity"). As the accompanying report by the House Judiciary Committee explained, the exception stemmed from the recognition that providing notice of the reasons for a visa denial may harm law-enforcement and national-security interests:

> Currently, all foreign nationals who are denied a visa are entitled to notice of the basis for the denial. This creates a difficult situation in those instances where an alien is denied entry on the basis, for example, of being a drug trafficker or a terrorist. Clearly, the information that U.S. government officials are aware

> of such drug trafficking or terrorist activity would be highly valued by the alien and may hamper further investigation and prosecution of the alien and his or her confederates.

H.R. Rep. No. 383, 104th Cong., 1st Sess. 102 (1995). The committee also explained that there would be "no constitutional impediment to the limitation on disclosure" because "[a]n alien has no constitutional right to enter the United States and no right to be advised of the basis for the denial of such a privilege." *Ibid.*

Thus, Congress—aware of its constitutional latitude in this area—"evaluated the benefits and burdens of notice" under these circumstances and "assigned discretion to the Executive to decide when more detailed disclosure is appropriate." *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment). The law-enforcement and security concerns that Congress identified do not vanish whenever the noncitizen in question happens to have a U.S.-citizen spouse. Yet, in the decision below, the court of appeals countermanded Congress's "considered judgment" based on its own weighing of the costs and benefits in this "sensitive area." *Ibid.* In doing so, the court overstepped its bounds. See *Ziglar* v. *Abbasi*, 582 U.S. 120, 142 (2017) ("National-security policy is the prerogative of the Congress and President.").[12]

b. The decision below did not acknowledge Section 1182(b)(3). See Pet. App. 114a (Bumatay, J., dissenting

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[12] The court of appeals' additional requirement that the government provide its factual explanation "within a reasonable time" after the denial, Pet. App. 2a, also conflicts with Section 1182(b)(3), which exempts Section 1182(a)(3)(A)(ii)-based denials from the requirement that notice of the inadmissibility determination be "timely." 8 U.S.C. 1182(b)(1) and (3).

from denial of rehearing en banc). In its vacated decision in *Din*, however, the Ninth Circuit had dismissed the provision as merely "limit[ing]" a "statutory right to information," suggesting that the Constitution could require detailed explanations even when the INA does not. *Din* v. *Kerry*, 718 F.3d 856, 865 (2013), judgment vacated, 576 U.S. 86 (2015); see *id.* at 865-866; see also *Din*, 576 U.S. at 116 (Breyer, J., dissenting) (arguing that Section 1182(b)(3) "leaves open the question whether other law requires a reason" to be given). But that too-readily disregards Congress's judgment that disclosure should not be mandated in these circumstances. At the very least, the judgment by a coequal branch of government—indeed, the one better suited to make these kinds of assessments in areas of foreign affairs and national security, see, *e.g.*, *Fiallo*, 430 U.S. at 796—lends "additional support to the independent conclusion that the notice given" in accordance with Section 1182(b)(3) "was constitutionally adequate." *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment).

The Ninth Circuit's vacated opinion in *Din* also suggested that in practice, the Department of State often provides additional information to explain visa denials based on grounds listed in Sections 1182(a)(2) and (3). See 718 F.3d at 864. But that merely demonstrates that the government has judiciously wielded the authority Congress has granted, not that the authority should be displaced. Although "the Government is not prohibited from offering more details when it sees fit, * * * the statute expressly refrains from requiring it to do so." *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment).

For their part, respondents have contended (Br. in Opp. 31 n.1) that Section 1182(b)(3) does not apply here

at all on the theory that Congress "did not intend for 1182(b)(3) to apply to [visa denials based on] 1182(a)(3)(A)(ii) specifically." But respondents' sole support is the observation (*ibid.*) that a different provision of the INA about a different subject—expedited removal procedures applicable to certain arriving noncitizens—provides that such individuals may be subject to removal without a further hearing if they are suspected of being inadmissible under certain parts of Section 1182(a)(3), including "subparagraph (A) (other than clause (ii))." 8 U.S.C. 1225(c)(1); see Immigration Act of 1990, Pub. L. No. 101-649, § 603(a)(11), 104 Stat. 5083 (enacting the relevant language in Section 1225(c)(1)). To state the obvious, the text of the later-enacted exception in Section 1182(b)(3) does not contain any carveout for Section 1182(a)(3)(A)(ii)–based findings. Instead, it specifies that the notice requirement "does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a)," full stop. 8 U.S.C. 1182(b)(3). Respondents offer no sound basis to rewrite Section 1182(b)(3)'s plain language.

C. The Ninth Circuit's Approach Would Interfere With The National-Security And Foreign-Policy Interests Of The United States

"The visa issuance process is widely recognized as an integral part of immigration control and border security." Ruth Ellen Wasem, Cong. Research Serv., R43589, *Immigration: Visa Security Policies* 1 (Nov. 18, 2015) (CRS Report); see *Crisis of Confidence: Preventing Terrorist Infiltration Through U.S. Refugee and Visa Programs: Hearing Before the House Committee On Homeland Security*, 104th Cong., 2d Sess. 24 (Feb. 3, 2016) (testimony of Michele Thoren Bond, Assistant Secretary of State for Consular Affairs) ("Every

visa decision is a national security decision."). By requiring the government to provide a further factual explanation for a security-based visa refusal when the applicant has a U.S.-citizen spouse, the decision below threatens to interfere with critical national-security and foreign-policy interests. Those adverse consequences further counsel in favor of reversal.

Requiring the government to make disclosures about security-related visa denials—including the basis for the consular officer's belief that an applicant will engage in unlawful activity in the United States, cf. Pet. App. 22a, 24a-25a—could compromise sensitive and even classified information. "Transnational organized crime," in particular, "poses a significant and growing threat to national and international security, with dire implications for public safety, public health, democratic institutions, and economic stability across the globe." National Security Council, *Strategy to Combat Transnational Organized Crime* 5 (July 2011) (*Transnational Organized Crime Strategy*), available at https://perma.cc/8NE6-AX4B. And transnational organized criminal organizations "depend on * * * fraudulently obtained documents, such as * * * visas" to gain entry into the United States. *Id.* at 8.

The information supporting a visa denial under Section 1182(a)(3)(A)(ii) accordingly could be derived from a law-enforcement or intelligence source, cf. Pet. App. 22a, 59a-60a, or be related to an ongoing law-enforcement or intelligence investigation or operation. Furnishing such information to a noncitizen's U.S.-citizen spouse (which essentially means disclosing it to the noncitizen) could well jeopardize the safety of consular or law-enforcement personnel at home and abroad. See *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S.

304, 320-321 (1936) ("[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."). Even small pieces of information that may appear innocuous in isolation can be fitted into a bigger picture by a large criminal organization, providing insight into the government's patterns of investigation and its knowledge (or lack thereof) about the organization and its members. Protecting the government's ability to keep such information and sources confidential underlies Congress's express authorization for consular officers to withhold notice of security-based grounds for visa denials. See 8 U.S.C. 1182(b)(3); see also pp. 38-40, *supra*.

For similar reasons, the Ninth Circuit's disclosure requirements could be expected to have a chilling effect on information-sharing among federal agencies and between the United States and foreign countries. Visa ineligibility determinations are frequently based on information that other agencies or entities, including foreign governments and officials, provide to the Department of State. See, *e.g.*, 8 U.S.C. 1105(a) (directing the Department of State 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 cit-

izens"); 8 U.S.C. 1202(f)(2) (authorizing the Secretary of State to provide to foreign governments information in the Department's visa lookout database and other records "on the basis of reciprocity"); 8 U.S.C. 1733 (establishing "terrorist lookout committees" within U.S. missions abroad to increase information-sharing); see also *Transnational Organized Crime Strategy* 17-18 (discussing the importance of domestic and foreign information-sharing and the need for even greater coordination). Some of that information is reflected in State Department records and other resources that are routinely consulted when adjudicating visa applications; some of it is provided to consular officers by sources local to the consular post. Consular officers encountering a visa applicant who might have security-related ineligibilities may also obtain additional information needed to adjudicate the application by requesting a Security Advisory Opinion from the Department of State's Bureau of Consular Affairs, which undertakes an extensive review of all relevant information—including classified information—known to the Department or other agencies or sources. See CRS Report 9-10.

If consular officers were compelled to disclose sensitive law-enforcement or intelligence information in connection with the denial of visa applications, they and the Department might well never receive all of the information relevant to enforcing the immigration laws and safeguarding national security. 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. Cf. *CIA* v. *Sims*, 471 U.S. 159, 175 (1985) ("If potentially valuable intelligence sources come to think that the [CIA] will be unable to maintain the confidentiality of its relationship to

them, many could well refuse to supply information to the Agency in the first place."). If consular officers were forced to act upon visa applications without pertinent information, the enforcement of statutory ineligibility criteria would be compromised along with public safety. See, *e.g.*, *Visa Issuance and Homeland Security: Hearings Before the Subcomm. On Immigration, Border Security and Citizenship of the Senate Comm. On the Judiciary*, 108th Cong., 1st Sess. 141 (July 15, 2003) (testimony of Janice L. Jacobs, Deputy Assistant Secretary of State for Visa Services) ("swift provision of all the best information known to the US government from whatever source to our line visa officers is essential to ensure that we stop * * * dangerous persons" from entering the United States).

Those threats would not be ameliorated by allowing the government to provide evidence supporting security-based reasons for visa denials *in camera*, as some have suggested. See *Din*, 576 U.S. at 115 (Breyer, J., dissenting). To begin with, the Ninth Circuit's requirement that a constitutionally sufficient reason for a visa denial be presented to the noncitizen's spouse "within a reasonable time" after the denial—in order to allow the noncitizen to contest the decision through administrative channels—would appear to require disclosure even *before* any litigation. Pet. App. 32a; see *id.* at 26a, 29a-31a. As a result, if the government waits to provide a further explanation in later litigation under appropriate safeguards, it risks forfeiting consular nonreviewability altogether. Cf. *id.* at 33a (holding that, because a proper explanation for the visa denial was not provided "until after litigation had begun," "the government is not entitled to invoke consular nonreviewability" and "[t]he

district court may 'look behind' the government's decision") (citation omitted).

That obstacle aside, visa applicants and their spouses are unlikely to acquiesce in a court's consideration of *in camera* submissions to decide their challenges. Indeed, in this very case, the government submitted for the district court's *in camera* review Department of State documents providing further information about the basis for the consular officer's finding that Asencio-Cordero is inadmissible. See p. 9 n.7, *supra*. Even though the district court did not rely on that submission in granting summary judgment to the government, see Pet. App. 59a n.12, respondents sought to overturn the judgment on that basis, arguing that the court's review of the documents constituted a due-process violation. Resp. C.A. Br. 6, 56-58. And even when the government could overcome such objections, widening access to sensitive information, even in controlled settings, would necessarily increase the risk of unauthorized or inadvertent disclosure. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 412 n.4 (2013); *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment).

The volume of visa-denial challenges brought in court, which would only increase if the Ninth Circuit's approach became the law nationwide, would further disrupt the government's efforts to enforce the immigration laws and secure the Nation. The Department of State has informed this Office that in fiscal year 2023, consular officers abroad denied approximately 5,400 visas to applicants seeking to live with a U.S.-citizen spouse or fiancé(e) based on a ground of inadmissibility

in Section 1182(a).[13] The Department has also informed this Office that visa litigation has increased substantially in recent years, going from approximately 250 new cases in 2018 to more than 2,000 in 2022. Many such cases, including some denials under the unlawful-activity bar, implicate the security and information-sharing concerns highlighted above. The Ninth Circuit seriously erred in disregarding those risks and overruling the contrary judgment of the political branches.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[13] In some of those instances, the applicant may have been able to overcome the inadmissibility determination and ultimately receive a visa.

APPENDIX

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APPENDIX

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) provide:

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) provide:

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. 1225(c)(1) and (2) provide:

(c) Removal of aliens inadmissible on security and related grounds

(1) Removal without further hearing

If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, the officer or judge shall—

(A) order the alien removed, subject to review under paragraph (2);

(B) report the order of removal to the Attorney General; and

(C) not conduct any further inquiry or hearing until ordered by the Attorney General.

(2) Review of order

(A) The Attorney General shall review orders issued under paragraph (1).

(B) If the Attorney General—

(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, and

(ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security,

the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

(C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.

6. 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 issued 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.