No. 23-334

IN THE

Supreme Court of the United States

DEPARTMENT OF STATE, ET AL.,

Petitioners,

—v.—

SANDRA MUÑOZ, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* FORMER DEPARTMENT OF HOMELAND SECURITY OFFICIALS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae ("*amici")* are former leaders and/or officials of the U.S. Department of Homeland Security ("DHS") and its component or predecessor agencies. In previous roles, *amici* were involved in policy, or were directly involved in adjudicating, supervising, or providing legal guidance on adjudications of visas; applications for adjustment of status to lawful permanent residency; or other immigration benefit applications. In these roles, *amici* were responsible for administering and enforcing our nation's immigration laws.

Amici have an interest in this case because of their concern over the lack of due process parity between the DHS Adjustment of Status process and the Department of State's ("DOS") Consular Processing. Both pathways to obtaining an immigration benefit (in Luis Asencio-Cordero's case, lawful permanent resident ("LPR") status) rely on the same background checks and any available national security information. However, while DHS adjudications afford due process protections that strengthen the application process and U.S. national security, DOS Consular Processing lacks sufficient due process protections. *Amici* know of no resource constraint or national security risk preventing DOS from affording the same due process as DHS provides in Adjustment of Status adjudications.

A list of *amici* appears in Appendix A.

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[1] No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission. *Amici* write to express their personal views and not necessarily the views of their employers.

SUMMARY OF ARGUMENT

As former DHS and INS officials, *amici* have held policy roles, and supervised, conducted, or provided legal guidance on countless LPR (or "Green Card") adjudications. Each of these adjudications afforded applicants due process protections including notice; opportunities to be heard; access to the factual bases for denials; and opportunities to rebut or, in certain cases, appeal unfavorable decisions.

Immigration officials routinely balance due process protections with U.S. national security interests. There is no justification to deny basic due process protections—including by providing the factual basis underlying any denial decision, or any decision prior to a denial decision—to noncitizen spouses of U.S. citizens applying for immigrant visas through DOS Consular Processing, especially when no such reduction in process exists in DHS Adjustment of Status adjudications. Existing DHS Adjustment of Status adjudications, available to applicants physically present in the United States, already balance the constitutional requirement for due process with national security concerns. Standardizing these adjudications—particularly for noncitizen spouses of U.S. citizens who already have significant ties to the United States, like Mr. Asencio-Cordero—would only serve to strengthen the adjudication process by ensuring that noncitizens are afforded consistent due process and adjudicators are afforded all information necessary to do their jobs.

A notice that simply states that a spousal visa applicant was deemed inadmissible and denied a visa under 8 U.S.C. § 1182(a)(3)(A)(ii) is insufficient to

provide due process. Providing a factual basis for the denial determination is lawful, fair, and would not unduly burden the executive branch given the limited scope of applicants who would be impacted.

ARGUMENT

I. INTRODUCTION

From 2000 to 2022, the Department of State ("DOS") denied a total of 1,764 immigrant visas under 8 U.S.C. § 1182(a)(3)(A)(ii), the statute cited as support for Mr. Asencio-Cordero's visa denial.[2] These denials, tallied over a 22-year period, represent less than one percent of the total immigrant visas denied in 2022 alone. *See* TABLE XIX, IMMIGRANT AND NONIMMIGRANT VISA INELIGIBILITIES (2022), https://tinyurl.com/ykstwn86 (demonstrating that 273,926 immigrant visas were denied in 2022).

From their positions in policy and in administering and enforcing U.S. immigration law, *amici* understand well the resources that would be required for DOS to provide due process to all noncitizens applying for immigrant visas abroad. However, that question is not before the Court. The question here involves a much narrower scope of applicants—noncitizen spouses of U.S. citizens denied a visa under Section 1182(a)(3)(A)(ii). Given this limited universe of applicants, requiring DOS to provide a Notice of Intent to Deny ("NOID") containing a factual basis for the intended denial of an immigrant visa under Section 1182(a)(3)(A)(ii), and providing such factual basis in the actual denial decision itself,

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[2] Respondents correctly note that none of the applicants denied a visa pursuant to Section 1182(a)(3)(A)(ii) was able to overcome the presumption of ineligibility. *See* Resp. Br. at 38 n.13.

would have minimal impact on the executive branch's efficiency.

In Mr. Asencio-Cordero's case, the lack of parity between the protections that would have been afforded to him if he could have remained in the United States and applied for LPR status domestically through the DHS Adjustment of Status process, and his ultimate experience with DOS's Consular Processing to obtain LPR status, demonstrates the inequitable outcomes faced by noncitizen spouses of U.S. citizens. Under DHS adjudication proceedings, Mr. Asencio-Cordero would have been provided: a notice of intent to deny with the factual basis for the proposed denial; multiple opportunities to be heard and challenge any derogatory information; the factual basis for any denial; and opportunities to rebut or appeal a DHS decision. His departure from the United States, which was intended to be brief and solely for the purpose of completing the immigration process, should not automatically divest him of rights he and his U.S. citizen spouse, Respondent Sandra Muñoz, would have been afforded domestically—particularly when he only traveled abroad after being cleared by a DHS background check after his Form I-601A application was approved by DHS.[3]

II. ADJUDICATIONS WITHIN THE UNITED STATES

A. DHS Adjudication Process: "Adjustment of Status"

Had Mr. Asencio-Cordero been eligible to adjust his status in the United States, he would have received

[3] An I-601A Application for Provisional Unlawful Presence Waiver provides for a provisional waiver of the noncitizen's spouse unlawful presence in the United States.

due process protections including notice and an opportunity to respond. 8 U.S.C. § 1255(a); 8 C.F.R. §§ 245.1(a), (b). Under DHS's Adjustment of Status process, administered through the United States Citizenship and Immigration Services ("USCIS"), a noncitizen spouse of a U.S. citizen who has been "inspected and admitted or paroled" to the United States, or is otherwise eligible, may apply for lawful permanent residency status—i.e., a Green Card—from the U.S. without needing to travel back to their country of origin, even if their period of admission or parole has since expired . 8 U.S.C. § 1255(a).

Seeking adjustment of status for those eligible to "adjust" in the U.S. is a multi-step process. *First*, the U.S. citizen spouse files an I-130 Petition for Alien Relative, to verify the marital relationship, often at the same time that the noncitizen spouse files the I-485 Application to Register Permanent Residence or Adjust Status, though they are not required to be filed at the same time. 8 C.F.R. §§ 245.1(a), 245.2(a)(3)(ii).

Second, as part of the adjudication, officials rely on an exhaustive background check process.[4] This includes, but is not limited to, a criminal background check run through the Federal Bureau of Investigation ("FBI") resulting in a record of state and federal arrests and case dispositions. The FBI background check uses an applicant's name, date of birth, and fingerprints collected during applicant's DHS biometrics appointment to search against state and federal criminal databases. This search includes a review of criminal records and encounters with law

[4] Background security checks were part of the procedure when Mr. Asencio-Cordero started his application. *See* 78 Fed. Reg. 536, 546–47 (2013).

enforcement that did not lead to conviction, such as arrests and other dispositions. Officials also run the applicant's information through a number of databases including: (i) the United States Visitor and Immigrant Status Indicator Technology/Secondary Inspections tool, which shows entries into and exits out of the United States, terrorism watchlist status, recidivist data, and consular records including visa interviews; (ii) an lnteragency Border Inspection System ("IBIS"), which contains "a multi-agency database of lookout information . . . initiated in 1989 to improve border enforcement and facilitate inspection of individuals applying for admission to the United States at ports-of-entry and pre-inspection facilities;"[5] (iii) The Enforcement Communications System, which shows criminal activity or lookouts entered by DHS officials based on their suspicion of possible illegal activity or the suspicion of other law enforcement agencies who have communicated such information to DHS; and (iv) the Known or Suspected Terrorist database. *See, e.g.*, USCIS AFFIRMATIVE ASYLUM PROC. MANUAL, 4 (2016), https://tinyurl.com/m2mb9adu (describing the databases used in various USCIS background check processes, not just for asylum applications).

Third, a USCIS officer determines whether an interview is required. If required, the interview takes

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[5] In addition to DHS, "law enforcement and regulatory personnel from 20 other federal agencies or bureaus use IBIS, [including] FBI, Interpol, DEA, ATF, IRS, FAA, and Secret Service . . . . Also, information from IBIS is shared with [DOS] for use by Consular Officers at U.S. Embassies and Consulates." USCIS AFFIRMATIVE ASYLUM PROC. MANUAL 4 (2016), https://tinyurl.com/m2mb9adu; *see also* CUSTOMS AND BORDER PROT. INSPECTOR'S FIELD MANUAL, CH.33 (2006), https://tinyurl.com/4s8dk6a9.

place in the United States and the noncitizen is not required to travel back to his or her country of origin. 8 C.F.R. § 245.6. Typically, the U.S. citizen spouse is required to be present because the interview relates to both the I-130 petition and the I-485 application. *Id.* ("Each applicant for adjustment of status under this part shall be interviewed by an immigration officer."). Unlike a consular interview, counsel is permitted to be present in the interview. During the interview itself, the adjudicator will often identify adverse information to the applicant and raise questions or concerns that arose in their review of the application materials and ask for responses.

Fourth, if more information is necessary, a USCIS officer may file either a Request for Additional Evidence ("RFE") or a NOID. If an officer needs additional information to determine eligibility, or to aid them in their exercise of discretion to adjust status, the officer may then issue an RFE. 8 C.F.R. § 103.2(b)(8); USCIS POL'Y MANUAL, VOL. 1, CH. 6 (2024), https://tinyurl.com/2daun48r (describing procedures for gathering evidence). "An officer should issue an RFE or NOID when the facts and the law warrant; an officer should not avoid issuing an RFE or NOID when one is needed." USCIS POL'Y MANUAL, VOL. 1, CH. 6 (2024), https://tinyurl.com/2daun48r; *see also* 8 C.F.R. § 103.2(b)(8). A NOID must contain "the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond" with certain exceptions for classified information. 8 C.F.R. § 103.2(b)(8)(iv). The applicant is then afforded an opportunity to review, respond to, and/or rebut all evidence relied upon in the RFE and/or NOID. 8 C.F.R. § 103.2(b)(16). Neither

RFEs nor NOIDs are provided by consular officers during DOS consular interviews.

If the background check reveals derogatory information about the applicant, the applicant will be questioned about this information in an interview. If the derogatory information is classified and thus critical to national security, DHS regulations already contemplate nondisclosure by banning classified information, thereby protecting intelligence community sources and methods. *See* 8 C.F.R. § 103.2(b)(16)(iii). However, in the same section, DHS recognizes the importance of providing a factual basis and opportunity to respond, even to classified information. The regulatory scheme provides that whenever an officer "believes he/she can [share the nature of classified information] consistently with safeguarding both the information and its source, the USCIS Director or [Director's] designee should direct that the applicant or petitioner be given notice of the general nature of the information and an opportunity to offer opposing evidence." 8 C.F.R. § 103.2(b)(16)(iv). Thus, DHS recognizes and balances the importance of due process protections on the one hand and national security on the other in the adjudication of immigration benefits.

If a USCIS officer bases a decision in whole or in part on information of which the applicant is unaware or could not reasonably be expected to be aware, the officer must issue a NOID. *See* 8 C.F.R. § 103.2(b)(16)(i). The NOID provides the applicant an opportunity to review and respond to the information, unless the information is classified and not subject to waiver by the USCIS Director. *See* 8 C.F.R. § 103.2(b)(16)(iv).

Fifth, the USCIS officer reviews and considers anything submitted in response to the RFE and/or NOID and then renders a decision. If the decision is a denial, the decision will discuss why any rebuttal evidence submitted did not overcome the decision to deny. "The applicant shall be notified of the decision of the director and, if the application is denied, the reasons for the denial." 8 C.F.R. § 245.2(a)(5)(i). When someone who is found ineligible to adjust status, for example, and if he or she is determined to be inadmissible under 8 U.S.C. § 1182, the officer is required to "[e]xplain what eligibility requirements are not met and why they are not met." USCIS POL'Y MANUAL, VOL. 7, PART A, CH. 11 (2024), https://tinyurl.com/5ehzb65x; *see* 8 U.S.C. § 1182.

Finally, while applicants to adjust status based on family-based visa petitions do not have a right to appeal the Form I-485 to USCIS's Administrative Appeals Office ("AAO"), applicants whose Form I-485 was denied because USCIS deemed them statutorily inadmissible and denied their Form I-601 inadmissibility waiver can appeal their Form I-601 denial to the AAO and have the statutory inadmissibility ground and the decision to deny the waiver reviewed. USCIS AAO PRACTICE MANUAL, CH. 1 (2018), https://tinyurl.com/4f2umxf5. Adjustment of Status applicants may file a motion to reopen or a motion to reconsider. 8 C.F.R. §§ 245.2(a)(5)(ii), 103.5.

B. Process Due in Removal Proceedings

Noncitizens who are denied adjustment of status may also renew their application in removal proceedings before an immigration court and thereafter the federal courts of appeals. In removal

proceedings, even if DHS proved that a noncitizen was deportable, the noncitizens would still have an opportunity to apply for adjustment of status before the immigration court and be confronted with any derogatory evidence against them in adversarial proceedings. *See* 8 U.S.C. §§ 1229(a), 1229a(b)(4)(B).

Noncitizens in removal proceedings before the immigration court are afforded a number of due process protections. First, noncitizens are given written notice that includes: the nature of the proceedings; the conduct alleged to be in violation of law; the charges against them; and the statutory provisions alleged to have been violated. 8 U.S.C. § 1229(a). Second, noncitizens in removal proceedings may be represented by counsel. 8 U.S.C. § 1229(b). Third, noncitizens are provided a trial-like, adversarial process during the removal proceeding, where the government has the burden of establishing its position with clear and convincing evidence, including by offering statements under oath and cross-examining opponents. 8 U.S.C. § 1229a(b)–(c); 8 C.F.R. § 1240.8.

Further, noncitizens in removal proceedings are offered the opportunity to apply for "Adjustment of Status" to LPR status before an immigration court and are offered multiple opportunities to appeal. If a noncitizen is ordered to be removed from the United States, he or she is entitled to file a motion to reconsider and may appeal the decision to the Board of Immigration Appeals ("BIA"). 8 U.S.C. § 1229a(c)(6); 8 C.F.R. § 1003.1 (granting appellate jurisdiction to the BIA over removal proceedings). BIA appeals include briefing on the merits, a record, an opportunity for oral argument, and may include a transcript of the

proceedings. BIA, PRACTICE MANUAL, 58–59, (2024), https://tinyurl.com/3re6xdkk. Appellants receive other due process protections during this adjudication, including the ability to be represented by counsel and potential equitable tolling. *Id.* at 61; *Matter of Morales-Morales*, 28 I&N Dec. 714 (BIA 2023).

If a noncitizen receives an unfavorable decision from the BIA, he or she can, in certain circumstances, appeal the BIA decision to a Circuit Court of Appeals. 8 U.S.C. § 1252(a)(5); *see Patel v. Garland*, 596 U.S. 328, 331 (2022) (holding federal courts lack jurisdiction to "review factual findings that underline" a removal decision, but have authority to review "legal and constitutional questions").

III. ADJUDICATIONS OUTSIDE OF THE UNITED STATES – THE DEPARTMENT OF STATE'S "CONSULAR PROCESSING"

Amici refer the Court to Respondents' merits brief for a fulsome discussion of Consular Processing. *See* Resp. Br. at 3–6. *Amici* briefly discuss the process that exists when a noncitizen spouse is denied a visa to the United States through Consular Processing.

If a noncitizen spouse of a U.S. citizen is denied a visa to enter the United States by a DOS consulate ("consulate") abroad, a consular officer(s) must provide notice to the applicant of the denial. The consulate is statutorily required to "provide the [noncitizen] with a timely written notice that . . . states the determination and . . . lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. § 1182(b)(1). However, the type of notice required is not specified, nor is notice *prior* to a denial required that would otherwise offer the applicant an opportunity to rebut adverse information. Moreover, DOS regulations

do not appear to specify that the factual basis for the finding of inadmissibility be disclosed. DHS adjudications should be a guide. 8 C.F.R. § 103.2(b)(8)(iv) (requiring a NOID to provide notice of adverse information before denial); *see* 8 C.F.R. § 245.2(a)(5) ("The applicant shall be notified of the decision of the director and, if the application is denied, the reasons for the denial."); *see also* USCIS POL'Y MANUAL, VOL. 7, PART A, CH. 11 (2024), https://tinyurl.com/5ehzb65x (requiring the officer to "[e]xplain what eligibility requirements are not met and why they are not met" when someone is found not eligible to adjust status).

A noncitizen has one year from the date of the denial to submit more evidence and request reconsideration. 22 C.F.R § 42.81(e). Beyond the ability to submit additional evidence, visa denial decisions made by the consulate are not appealable within DOS and through the federal court system. The inability for agencies or federal courts to review consulate visa denials is referred to as the "doctrine" of consular non-reviewability. Many commentators recommend ending or limiting the "doctrine" of consular non-reviewability.[6] *Amici* support limiting consular non-reviewability.

As discussed in Part II, *supra*, many DHS adjudications are subject to judicial review, which does not compromise national security and is a valuable

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[6] *See, e.g.*, Alexandra Burroughs, *Constitutional Law-Till A Visa Denial Do Us Part: How A Consular Officer's Discretion Can Frustrate Due Process*—Yafai v. Pompeo, 924 F.3d 969 (7th Cir. 2019), 43 SUFFOLK TRANSNAT'L L. REV. 441 (2020); Gabriela Baca, *Visa Denied: Why Courts Should Review A Consular Officer's Denial of A U.S.-Citizen Family Member's Visa*, 64 AM. U. L. REV. 591 (2015).

mechanism to ensure the proper administration of immigration laws.

IV. CONSULATES AND DHS FACE THE SAME NATIONAL SECURITY AND EFFICIENCY CONCERNS

A. Consulates and DHS Face the Same National Security Concerns, But Afford Different Process

Consulates abroad and DHS at home face the same national security concerns when issuing visas to noncitizen spouses of U.S. citizens. While DHS affords due process protections in its Adjustment of Status process, DOS consulates do not afford due process in Consular Processing. This incongruity treats a noncitizen spouse applicant of a U.S. citizen differently based only on geographical happenstance. Such different treatment of the same individual produces incongruous results that are harmful to U.S. policy objectives and to the fundamental rights of both the noncitizen and the U.S. citizen spouse.

While the government claims that every visa or legal status decision is a national security decision, not every ground of inadmissibility has national security implications. Mr. Asencio-Cordero's inadmissibility determination was based on 8 U.S.C. § 1182(a)(3)(A)(ii), which refers to an intention to engage in "any other unlawful activity." The grounds for inadmissibility under this statute—which is applied by both DHS in Adjustment of Status adjudications and by the DOS in Consular Processing—are unspecified and include reasons unrelated to national security. For example, the DOS outlines the protocol for considering the inadmissibility grounds in its Foreign Affairs Manual

("FAM"). The FAM includes as examples of "unlawful activity" from 8 U.S.C. § 1182(a)(3)(A)(ii) unrelated to national security, such as marrying a cousin. 9 FAM 302.5-4(A) (2024), https://tinyurl.com/yc7dh5h5.

DHS regulations require adjudicators to afford opportunities to applicants for immigration benefits to confront derogatory evidence compiled in their applications or during the adjudicators' background checks to the extent such information was intended to support a denial. These regulations provide applicants with the opportunity to rebut any adverse information prior to a decision being made. Any such adverse information would be outlined again, along with how the rebuttal information was considered, in the decision itself. Requiring a factual basis for a denial in the Consular Processing setting, so that applicants are properly equipped to address the reasons in any response, does nothing to jeopardize national security, and conforms with process due in other immigration contexts.

In its brief, the government claims that such a factual declaration could reveal "a law-enforcement or intelligence source" and would stymie intra-agency information sharing on this basis. Br. at 42. The government's claim that federal agencies would stop sharing information between themselves or with foreign countries is unfounded. Current practices and procedures permit due process in DHS adjudications while protecting intelligence sources. *See* 8 C.F.R. § 103.2(b)(16)(iv) ("Whenever [the USCIS officer] can do so consistently with safeguarding both the information and its source, the USCIS Director or [the Director's] designee should direct that the applicant or petitioner be given notice of the general nature of the information

and an opportunity to offer opposing evidence."). Adjudicators undertake this balancing on every case they are presented with.

Moreover, Respondents' request is not for the sources and methods used to determine Mr. Asencio-Cordero's ineligibility, but solely for the facts behind why ineligibility for a spouse of a U.S. citizen was determined in the first instance.[7]

B. Providing Basic Information About the Basis of Visa Application Denials Would Be Efficient and Would Not Implicate National Security Concerns

Given the narrow universe of immigrant visas denied pursuant to Section 1182(a)(3)(A)(ii), *see* Part I, *supra*, providing basic process by including the factual basis underlying any denial would not pose national security or efficiency risks.

First, a balancing of national security and constitutionally mandated due process is readily achievable in the immigration context. The extensive background check process, described in Part II.A,

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[7] In practice, securing facts from DHS via a Freedom of Information Act ("FOIA") request is possible. If faced with an error, there are senior officials who may be amenable to hearing an attorney of record's complaint, and possibly either (a) reversing its decision or (b) reconsidering the decision after additional arguments or evidence is submitted. However, FOIAs to DOS routinely go unanswered for years, and there is no mechanism for additional information. The only existing resource, Legalnet@state.gov—an email address where an attorney can submit inquiries about a DOS decision—rarely generates a response and, when a response is generated, it is typically perfunctory with a citation to the statute that is the basis for inadmissibility and nothing else.

supra, already provides intra-agency and cross-country assistance to officers charged with making these critical national security determinations. Indeed, DHS contemplates and accounts for an applicant's right to due process—including being afforded a factual reason for denial—while balancing national security concerns in the Adjustment of Status process.

Second, providing minimal due process for immigrant visa applicants denied under Section 1182(a)(3)(A)(ii) would not impact efficiency. In practice, both DHS and DOS officers protect due process rights while protecting national security on a daily basis. DHS has already tasked immigration officers with the responsibility of weighing due process protections and national security concerns as part of regular practice in the Adjustment of Status adjudications, with no apparent adverse impact on efficiency.

As part of the DHS Adjustment of Status process, due process protections, including an opportunity to know about and respond to any adverse information, are already afforded to the numerous applicants who apply domestically through the RFE and/or NOID process. 8 U.S.C. § 1255(a); 8 C.F.R. §§ 245.1(a), (b), 103.2(b)(16). The only instance in which an applicant may not be provided the factual basis for denial is when the denial is based on classified information. 8 C.F.R. § 103.2(b)(16)(iii).

Indeed, even in cases where the information is designated classified, whenever the officer can provide the factual basis for denial and "can do so consistently with safeguarding both the information and its source . . . the applicant [should] be given notice of the general

nature of the information and an opportunity to offer opposing evidence." 8 C.F.R. § 103.2(b)(16)(iv).

In cases where *amici* handled or provided legal advice in Adjustment of Status adjudications, efficiency did not suffer through affording adequate due process. In fact, providing such process up-front helped to ensure fewer wrongful denials or reconsiderations. Providing the factual basis underlying a denial of an immigrant visa under Section 1182(a)(3)(A)(ii) at Consular Processing would be similarly efficient and would subject the government to minimal costs for a significant due process benefit to the applicant and their U.S. citizen spouse.

C. Affording Visa Applicants Due Process Is Sound Public Policy

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotations omitted). Providing this minimal process is in the spirit of the procedures this Court articulated in *Mathews*[8]. Providing the factual basis for denial and an opportunity to respond is sound public policy.

First, such process helps to ensure that adjudicators have reviewed all relevant information. If adjudicators are permitted to simply cite the statute for inadmissibility, applicants, in their rebuttal, will

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[8] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that due process generally requires the balancing of the "private interest" impacted by the official decision; the "risk" of "erroneous deprivation of such interest" and "probable value" of additional "procedural safeguards"; and the "[g]overnment's interest," including "fiscal and administrative burdens").

be unable to provide information that is relevant to the actual denial. For example, in Mr. Asencio-Cordero's case, Section 1182(a)(3)(A)(ii) is broad and unspecific. As a result, he had no actual notice as to why he was denied a visa and therefore had no meaningful opportunity to rebut the adjudicator's reason for denial.

Second, providing a factual basis for denial promotes fairness in the process. This provides applicants with adequate notice of the reason for denial, and helps applicants properly explain or refute the adverse information in the file.

Noncitizens who avail themselves of Consular Processing are entitled to submit evidence and request reconsideration for up to one year from the date of their denial. 22 C.F.R § 42.81(e). Without specific information regarding the reasons of their denial, noncitizens are denied an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. By failing to receive notice of the underlying reasons, applicants cannot meaningfully address the reasons why their application was denied.

Third, providing a factual basis for denial promotes fairness and legitimacy for the immigration process. In Mr. Asencio-Cordero's case, the Ninth Circuit found that the over one-year delay between his visa denial and the government's provision of a factual basis violated the Due Process Clause. The Ninth Circuit cited *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) for the principle that "'timely and adequate notice' of the reasons underlying the deprivation of a right guaranteed by the Due Process Clause is a key requirement of due process." Pet. App. 28a (citation

omitted). Such a delay leads to uncertainty both regarding the factual basis and reasoning for why an applicant's visa is denied.

Creating parity between Consular and Adjustment of Status processes promotes fairness within the immigration system. For example, had Mr. Asencio-Cordero been eligible to apply within the United States, he would have been provided notice and an opportunity to rebut any evidence presented against him. But because he had to apply outside of the United States, he was not afforded the same due process protections.

Finally, providing the factual basis for denial also protects the liberty interest of citizen spouses. *Kerry v. Din*, 576 U.S. 86, (2015) (Breyer, J., dissenting). Armed with additional information, citizen spouses will have a better opportunity to assist their noncitizen spouses explain any deficiencies in their applications.

CONCLUSION

This Court should create parity between the immigration processes by holding that, in the case of a noncitizen spouse of a U.S. citizen, due process requires consular officials to provide the visa applicant with the factual basis for any proposed denial both prior to and in the denial decision itself. A visa applicant should also have an opportunity to rebut and respond both prior to and after the denial. This process conforms with the imperative to balance the applicant's due process rights and national security. It would create consistency between the Adjustment of Status and Consular Review processes. And it would promote fairness in the immigration process without adding a significant burden to DOS officials.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Dated: March 28, 2024

Respectfully submitted,

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APPENDIX A: LIST OF *AMICI CURIAE*

Leon Rodriguez. Leon Rodriguez is a Partner at Seyfarth Shaw LLP. From 2014 to 2017, Leon served as the Director of US Citizenship and Immigration Services (USCIS), following a more than two-decade career as a prosecutor, law firm partner, and government agency leader. From 2011 to 2014, Leon served as the Director of the US Department of Health and Human Services, Office for Civil Rights.

Reena Parikh. Reena Parikh is an Assistant Clinical Professor at Boston College Law School. Prior to beginning her teaching career, she served as Associate Counsel with the United States Citizenship and Immigration Services (USCIS) Office of Chief Counsel for five years, from 2012-2017. She spent the first 3 years in the Chicago Field Office of USCIS, providing legal guidance to adjudicators on immigration benefit applications including adjustment of status applications and the last 2 years as part of the Refugee and Asylum Law Division when she was embedded in the New York Asylum Office.

Patricia M. Corrales. Patricia M. Corrales is an attorney at law, practicing primarily in the fields of criminal and immigration defense with a focus on complex citizenship issues that have a criminal component. Before entering private practice, she was an attorney for the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) (1995-2012). She began her career as a Deputy District Attorney in Denver, Colorado. She then went on to join the former U.S. Immigration and Naturalization Service, and continued as a prosecutor with the creation of ICE. As a Senior Attorney, Ms. Corrales was on the team that handled complex National Security cases. As a Senior Attorney with ICE, she worked closely with special agents from ICE, the FBI, and other law enforcement agencies, as well as various U.S. Attorneys' Offices nationwide.

Sonia Figueroa-Lee. Sonia S. Figueroa is a sole practitioner at SSFL Law, APC. She has been practicing immigration law exclusively since 2014 focusing on family immigration, humanitarian relief and citizenship. She is a US Army veteran and former USCIS immigration service officer. Sonia regularly volunteers at local legal clinics. She also serves as the Secretary of the Los Angeles County Bar Association Immigration Section.

Cindy Heidelberg. Cindy Heidelberg is a partner at Breskin Johnson & Townsend, PLLC, in Seattle, Washington. She litigates civil cases and appeals in state and federal court, focusing on individual and class action employment and consumer protection cases. Ms. Heidelberg previously worked for the Department of Justice as a Judicial Law Clerk in the Newark Immigration Court, and for the Office of Chief Counsel for U.S. Citizenship and Immigration Services in Manhattan. She is a co-author of *Moncrieffe v. Holder*: Exploring the Legal Landscape of Section 101(a)(43)(B) of the Act. She graduated *magna cum laude* from Georgetown Law with a certificate in Refugee studies through Georgetown's Institute for the Study of International Migration.

Carl Shusterman. Carl Shusterman has over 40 years of experience. He served as an attorney for the U.S. Immigration and Naturalization Service from 1976 until 1982, when he entered private practice. He is a former Chairman of the American Immigration Lawyers Association ("AILA"), Southern California Chapter and served as a member of Shusterman AILA's national Board of Governors (1988–97). He has also served as a member of the Immigration and Nationality Law Advisory Commission for the State Bar.

Lindsay A. Smith. Lindsay A. Smith is a Senior Associate Attorney at Brill Immigration. For several years Ms. Smith was Associate Counsel at the US Citizenship and Immigration Services Field Office in Miami serving the agency across South Florida and the Caribbean by providing legal advice to adjudications officers, leading training sessions, liaising with other federal agencies, and representing the government before Federal Courts and the Board of Immigration Appeals.