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 AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is the largest voluntary association of attorneys and legal professionals in the world. ABA members come from all fifty States and beyond. They include, as relevant to this case, attorneys who practice immigration law.

The ABA has actively contributed to immigration reform. It has done so by publishing reports on immigration,[2] founding commissions such as the Commission on Immigration,[3] and establishing pro bono clinics for non-citizens.[4]

The ABA has also passed several policy resolutions concerning due process in immigration proceedings. In 1990, the ABA adopted a resolution calling for the establishment of "increased due process in consular visa adjudications." ABA Resolution 90M103 (adopted Feb. 1990), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-

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[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, ABA, *Reforming the Immigration System; Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf .

[3] *See* ABA, *Commission on Immigration*, https://www.americanbar.org/groups/public_interest/immigration/ (last visited Mar. 26, 2024).

[4] *See* ABA, *Projects and Initiatives*, https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/ (last visited Mar. 26, 2024).

1990/1990_my_103.pdf. This resolution advocated for "a written explanation . . . by the consular officer of the factual and legal grounds for the denial of the immigrant or nonimmigrant visa," administrative review of questions of law and fact involved in the decisions, and a written record of the basis for the decision. *Id.* In 2001, the ABA adopted another policy opposing the use of "secret evidence" in immigration proceedings. ABA Resolution 01M106C (adopted Feb. 2001), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2001/2001_my_106c.pdf. And in 2006, the ABA adopted a policy urging "an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws." ABA Resolution 06M107C (adopted Feb. 2006), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2006/2006_my_107c.pdf.

The second question presented asks the Supreme Court to resolve whether the executive branch can evade judicial review by referencing secret evidence in immigration proceedings. This case thus stands at the intersection of judicial review of executive power and immigration law. Because the ABA has experience with and expertise on these topics, it respectfully submits this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The second question presented assumes the existence of a constitutional liberty interest in an American citizen whose spouse is denied admission to the United States by a consular official. This brief addresses that second question, and offers the ABA's view that merely

notifying visa applicants that they were deemed inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii) because they might engage in some unspecified "other unlawful activity" does not suffice to provide the process that is due. Permitting the government to rely solely on this provision would authorize the government to rely on "secret evidence" in making inadmissibility determinations—evidence unavailable to the applicant, their citizen-spouse, and their attorney tasked with counseling them on the legal ramifications of their decisions. Accordingly, if the government were allowed to point only to this provision when denying a visa, attorneys would not be able to advise their clients properly.

The ABA asks this Court to affirm the Ninth Circuit's decision for three reasons. First, the doctrine of consular non-reviewability does not apply. That doctrine provides that, "ordinarily, a consular official's decision to deny a visa to a foreigner is not subject to judicial review." Pet. App. 2a. This is a substantial protection and one that the government can invoke only if it sufficiently indicates to the non-citizen that the denial was made in good faith and based on evidence. *See Kerry v. Din*, 576 U.S. 86, 104–06 (2015) (Kennedy, J., concurring in the judgment); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Here, the government pointed only to 8 U.S.C. § 1182(a)(3)(A)(ii)—a catch-all provision that can make a non-citizen ineligible for a visa based on mere suspicion that the non-citizen will engage in "any other unlawful activity." Because the government's bare invocation of this provision offers no assurances that its decision was made in good faith or based on evidence, the doctrine of consular non-reviewability cannot shield the government's denial from judicial review.

Second, as the ABA has long recognized, relying on "secret evidence" in immigration proceedings offends

due process. *See* ABA Resolution 01M106C (adopted Feb. 2001), *supra*. At its core, due process requires "notice of the factual basis" supporting a decision and the ability to contest the decision. *Wilkinson v. Austin*, 545 U.S. 209, 225–26 (2005). When the government denies a visa based on secret evidence, non-citizens and their citizen spouses lack notice of the reason for the denial and thus cannot meaningfully challenge it.

Third, unless this Court holds that the government is required to disclose the reasoning for a denial, and not hide behind secret evidence, attorneys cannot provide their clients with meaningful legal advice. Non-citizens seeking visas often must travel abroad for interviews and, when they do so, they risk serious consequences such as being denied re-entry into the United States. Unless the government indicates why it denies visas, attorneys advising non-citizens and their citizen spouses cannot sufficiently gauge these risks or meaningfully challenge visa denials.

ARGUMENT

I. THE DOCTRINE OF CONSULAR NON-REVIEWABILITY DOES NOT APPLY.

The doctrine of consular non-reviewability is not a blank check for government officials to conceal arbitrary and indefensible decisions. As this Court has explained, the doctrine does not apply if a consular officer denies a visa in "bad faith" or fails to provide a "facially legitimate and bona fide reason" for the denial. *Din*, 576 U.S. at 104 (Kennedy, J., concurring in the judgment); *Mandel*, 408 U.S. at 770.

In *Din*, Justice Kennedy's controlling concurrence determined that the government invoked a facially legitimate and bona fide reason by citing 8 U.S.C.

§ 1182(a)(3)(B)'s terrorism bar.[5] *Din*, 576 U.S. at 104–06 (Kennedy, J., concurring in the judgment). Justice Kennedy reached this conclusion because the terrorism bar "establish[ed] specific criteria for determining terrorism-related inadmissibility" and "specifie[d] discrete factual predicates the consular officer must find to exist before denying a visa." *Id.* Accordingly, while consular officials need not justify their judgments in detail, they must provide some indication to the applicant that the decision was made in good faith and based on evidence.

The case currently before this Court is different than *Din* because the government invoked a far broader provision. Section 1182(a)(3)(A)(ii) is a catch-all provision, under which a non-citizen can be deemed inadmissible merely because a consular official has reasonable grounds to believe that the non-citizen seeks to enter the United States to engage "solely, principally, or incidentally" in "any other unlawful activity." Unlike the terrorism bar at issue in *Din*, the catch-all provision here contains no "specific criteria" or "discrete factual predicates." *Din*, 576 U.S. at 104–05 (Kennedy, J., concurring in the judgment). There is nothing "specific" about a provision that encompasses *any* unlawful activity. Nor does merely referencing this general provision provide any indication that the decision was made in good faith or based on evidence.

II. THE USE OF SECRET EVIDENCE IN IMMIGRATION PROCEEDINGS VIOLATES DUE PROCESS.

By pointing only to a catch-all provision, and keeping the evidence underlying its decision to deny a non-

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[5] Justice Kennedy's concurrence is the controlling opinion in *Din* because it set forth the narrowest ground supporting the judgment. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

citizen's visa secret, the government fails to provide all the process that is due to a citizen spouse.

The ABA has long advocated for transparency in immigration proceedings. It has called for consular officials to supply written explanations of the facts and law underlying their decisions to deny visas. ABA Resolution 90M103 (adopted Feb. 1990), *supra*. And the ABA has opposed the practice of denying immigration benefits based on "secret evidence." ABA Resolution 01M106C (adopted Feb. 2001), *supra*.

The ABA has taken these positions because secret evidence is antithetical to due process. The very "essence of due process" is that "a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (cleaned up). The use of secret evidence deprives interested parties of both elements. Where the government refuses to even hint at the reason for a visa denial (beyond vague reference to some "other unlawful activity," 8 U.S.C. § 1182(a)(3)(A)(ii)), noncitizens and their citizen spouses have no notice of why the government denied a visa and no opportunity to confront the denial. *See Wilkinson*, 545 U.S. at 225–26 (explaining that due process requires "notice of the factual basis" underlying a deprivation).

To be sure, the government rightly points out that visa denials sometimes turn on sensitive information. *See* Pet. Br. at 41–47. But those situations do not absolve the government of its responsibility to provide due process. The government can preserve its legitimate national security interests *and* indicate what sort of evidence a denial was based on by supplying summaries of information or by submitting information *in camera* to a judge. *See, e.g.*, ABA Resolution 01M106C (adopted Feb. 2001), *supra* (concluding that

"where there are legitimate national security concerns, the noncitizen and the court . . . should . . . be provided with an unclassified summary of the classified information").

III. DISCLOSURE IS NECESSARY FOR MEANINGFUL LEGAL ADVICE.

The government's use of secret evidence also prevents attorneys from providing meaningful legal advice concerning the consular process. The statutory scheme controlling that process is littered with dire risks to non-citizens and their citizen spouses. And if the government could invoke—without any additional specificity—a catch-all provision implicating *any* potential unlawful activity when denying a visa, attorneys would have no means to gauge those risks and advise their clients accordingly.

A. The Statutory Scheme Presents Unique Risks.

U.S. citizens can petition for their non-citizen spouse to receive a visa. 8 C.F.R. § 204.2(a)(1). This process involves several steps.

First, the citizen must show that the marriage is bona fide and was entered into in good faith. 8 U.S.C. § 1154(a); *In re Peterson*, 12 I&N Dec. 663, 665 (B.I.A. 1968). If the citizen makes this showing, the Department of Homeland Security ("DHS") will classify the non-citizen spouse as an immediate relative. 8 U.S.C. § 1151(b)(2)(A)(1).

Second, if the non-citizen spouse entered the country without proper inspection, the non-citizen spouse must depart the United States to attend a consular interview abroad. That event, in turn, requires the non-citizen spouse to obtain a waiver of inadmissibility excusing the non-citizen spouse's prior unlawful presence.

The non-citizen spouse can obtain a waiver of this ground of inadmissibility by showing that the U.S. citizen spouse will experience "extreme hardship" absent a waiver. *In re Cervantes-Gonzalez*, 22 I&N Dec. 560, 561 (B.I.A. 1999).

Previously, a non-citizen spouse could not apply for a waiver of inadmissibility while still in the United States. As a result, the non-citizen spouse had to travel abroad to apply, risking permanent exile from that spouse's U.S. citizen family. 78 Fed. Reg. 536 (Jan. 3, 2013). But in 2013, DHS amended the rule to allow non-citizens to obtain waivers in the United States to "significantly reduce the time that U.S. citizens are separated from their immediate relatives." *Id.* at 536.

In theory, DHS's amended rule provides non-citizens and their U.S. citizen spouses a relative degree of certainty about their prospects for reentry into the United States following a consular interview. Before DHS can grant a waiver, it must determine that—apart from the non-citizen's prior unlawful entry—the non-citizen would be admissible to the United States and therefore eligible for a visa. 8 C.F.R. § 212.7(e)(3)(iii). And because a non-citizen would be ineligible for a visa if the non-citizen planned to enter the United States to commit unlawful activity, 8 U.S.C. § 1182(a)(3)(A), DHS necessarily concludes when it grants a waiver that a spouse is not intending to commit unlawful activity.

Third, once a non-citizen spouse obtains a waiver, that spouse must return to his or her home country for an interview at a Department of State consular office. 22 C.F.R. § 42.62(a)–(b). Here too a non-citizen may be found ineligible for a visa if the non-citizen is deemed likely to engage in unlawful activity. 8 U.S.C. § 1182(a)(3)(A). And if that happens, the non-citizen remains doubly-stuck in the home country. Not only is

the non-citizen inadmissible due to the suspicion of future criminal activity, but the previously-accrued and provisionally-waived unlawful presence now means the non-citizen cannot return to the United States for years—if at all. *See id.* § 1182(a)(9)(B)(i) (establishing three-year and ten-year bars depending on length of unlawful presence).

The winding road that a non-citizen must travel to obtain a visa thus contains significant risks. Careful thought and planning are required, with the assistance of counsel, to ensure that the non-citizen has maximized the chances of success and that the citizen-spouse is not deprived of the non-citizen's companionship for an extended period of time.

B. The Circumstances of This Case Illustrate the Need for Disclosure to Ensure the Ability to Provide Meaningful Legal Advice.

Without at least some disclosure on the government's part, attorneys cannot begin to engage in the careful thought and planning necessary to gauge the risks created by the statutory scheme governing visas.

As the facts of this case illustrate, the government can provisionally grant an unlawful presence waiver, induce a non-citizen spouse—who had been living with the citizen spouse in the United States—to leave, and then refuse to let the non-citizen spouse return. When DHS granted the waiver excusing Luis Asencio-Cordero's unlawful presence, it determined that he was otherwise admissible—in part because it necessarily concluded that he was *not* likely to engage in unlawful activity. Asencio-Cordero and his U.S. citizen spouse, Sandra Muñoz, relied upon this finding when they decided that he would leave her and their U.S. citizen child and return to El Salvador. After Asensio-

Cordero arrived at his consular interview, however, the Department of State reached the opposite conclusion and determined that he *was* likely to engage in unlawful activity.

At that point, the *only* information Asensio-Cordero and Muñoz had was that the government had at one time concluded that there was no likelihood of future unlawful activity, and then later flipped its determination. With only the bare invocation of the statute to guide them, both the applicant and his citizen-spouse had no way of determining what had changed or why. Without more to work with, Asencio-Cordero cannot return to the United States—and to his wife and child—for at least ten years and possibly indefinitely. *See* 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Whether viewed from the perspective prior to the consular denial or after, immigration attorneys cannot meaningfully advise clients of risks under these circumstances. DHS's initial determination that a non-citizen is not likely to engage in future unlawful conduct is, apparently, inconsequential. It cannot be used as a guide of future conduct by the Department of State consular official. And the consular official's later determination that a non-citizen *is* likely to engage in future unlawful conduct is entirely opaque. The "other unlawful activity" supporting the decision could be anything.

Consider the position that counsel faces when advising a client of the risks of leaving the country. Knowing *why* the government denies visas is essential to analyzing *whether* the government is likely to grant the visa of a given client. Inadmissibility for unlawful activity includes a dizzying array of potential future-oriented misconduct. It is no doubt true that consular officials are more sensitive to some potential unlawful

activity than other agencies. Yet allowing bare invocation of the statute keeps that critical information secret from attorneys who need the information to conduct risk assessments.

Moreover, the same vagueness shrouding government action will inhibit counsel's ability to advise applicants of how to address any potential issues that might arise in their interview. Without any indication of what may be in applicants' backgrounds that might raise concerns in a consular official, counsel is left to guess, leaving applicants woefully unprepared for an interview that will determine whether they can return to their U.S. citizen spouse and, potentially, children. Nor can counsel advise what—if any—rebuttal documentation should be brought to an interview.

After the consular decision is announced, the situation is the same. Attorneys cannot challenge consular decisions if the government does not cite anything beyond some unspecified "unlawful activity." *See* 8 U.S.C. § 1182(a)(3)(A)(ii). True, the attorney could ask the Department of State to reconsider. *See* 22 C.F.R. § 42.81(e) (explaining that an applicant may seek reconsideration within one year). Or the attorney could help the client sue in federal court. But the attorney could not *meaningfully* challenge the government's action in either proceeding, because the attorney would have no knowledge of the "discrete factual predicates" on which the denial was based. *See Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment). The attorney could not show that the government's decision was facially illegitimate, grounded in inaccurate facts, or based on "bad faith," as *Mandel* and *Din* contemplated. *See id.* at 105–06.

CONCLUSION

The ABA respectfully asks this Court to hold that the government did not satisfy due process by citing only to 8 U.S.C. § 1182(a)(3)(A)(ii) after denying Asencio-Cordero's visa application.

Respectfully submitted,

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