No. 23-334

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Petitioners,

v.

SANDRA MUÑOZ, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Courts of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FOR FORMER CONSULAR OFFICERS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are former consular officers. They submit this brief to provide the Court with their perspective, based on State Department reports and their own experience, regarding the shortcomings in the visa adjudication process. Because of the significant risk that a visa application may be denied arbitrarily, they support Respondents' position that judicial review is needed to protect the due process rights of Americans impacted by consular visa decisions concerning their spouses.

David Strashnoy is a former Foreign Service Officer from 2006 to 2015, who served consular tours in Guadalajara, Mexico; Moscow, Russia; and Yekaterinburg, Russia.

Erik Finch is a prior Foreign Service Officer with 10 years of consular experience who served in Seoul, South Korea; Hermosillo, Mexico; Shenyang, China; and Guangzhou, China. He also worked at U.S. Citizenship and Immigration Services as an adjudicator at the Portland Field Office from 2019 to 2021.

Christa Byker is a former Consular Officer with tours in Mexico City and Guatemala City (2014-2019). While in Guatemala City, she adjudicated hundreds of

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

immigrant visa petitions and evaluated cases for the 3A2 gang membership ineligibility.

Loren Locke is a former Foreign Service Officer who served as a consular officer in Matamoros, Mexico from 2009 to 2011. Since 2011, she has practiced immigration law in Atlanta, Georgia.

Swati Patel has over 7 years of consular work experience in her nearly 14 years of U.S. Federal Government service. Prior to joining State Department, Swati worked as an U.S. District Adjudication Officer with the Department of Justice and the Department of Homeland Security deciding green card, citizenship, and asylum cases and was involved in other immigration matters. Her Consular assignments as a Foreign Service Officer include Honduras, India, and the Mexico Desk at Department of State Headquarters, where she served as an adjudicator, manager, and policymaker.

Josef Burton is a former Consular Officer who served from 2014 to 2022 in Kolkata, Ankara, Washington D.C., and Mumbai, serving as an immigrant and non-immigrant visa officer. In his assignments in Ankara and Washington D.C., he specialized in screening Iranian visa applicants and Afghan Special Immigrant Visa cases for terrorism, sanctions, and other security concerns.

Bushra Malik is a former Foreign Service Officer who served as a Consular Officer in Seoul in 1999, where she processed thousands of non-immigrant visas. She also worked as a judicial clerk with EOIR at the Chicago Immigration Court and had externships with the

UNHCR in New Delhi, India, and the legacy INS, Office of the General Counsel in Washington, D.C.

Chuck Park is a former Foreign Service Officer, with tours in Mexico, Portugal, and Canada. He adjudicated thousands of immigrant visa petitions as a consular officer in Ciudad Juarez, Mexico from 2011 to 2013, which included screening for gang membership.

SUMMARY OF ARGUMENT

The doctrine of consular nonreviewability is justified on the notion that consular officers' immigration-related decisions reflect the careful exercise of executive branch discretion regarding sensitive matters of national security, foreign policy, and sovereignty and the careful weighing of policy interests that courts are ill-equipped to undertake or even to question. *See* Pet. App. 34a-35a (Lee, J., dissenting).

The reality in today's Department of State is quite different. The overwhelming majority of visa adjudications involve the exercise of individual consular officers' often wide discretion, reflecting their own personal opinions and biases, within the framework of the statute or regulation they are implementing. While most consular officers exercise their discretion reasonably, sometimes consular officers' decisions to deny visas are arbitrary and capricious, based on misinformation or misunderstandings, or grounded in stereotypes. Furthermore, the institutional pressures that consular officers face to process large volumes of visa applications quickly and to avoid erroneous grants incentivize them to take shortcuts and to provide rote

explanations of denials. These incentives present systemic challenges to conducting reasonable adjudications.

The result is wide variance in visa adjudications among consular officers assessing the same applicant pool. State Department mechanisms to supervise, standardize and review visa decisions are not always effective. And there is little recourse for an applicant when a visa is refused. Some judicial oversight is therefore needed, at least when a visa refusal implicates the fundamental interests of Americans—such as a decision concerning an immigrant visa for the spouse of a U.S. citizen.

ARGUMENT

I. Background Concerning the Consular Review Process.

Under the Immigration and Nationality Act (INA), consular officers have the sole authority to issue visas. 8 U.S.C. § 1201. There are two main categories of visas: Nonimmigrant visas, for temporary purposes, and immigrant visas, for travel to live permanently in the United States. 9 Foreign Affairs Manual (FAM) 102.1-2.

Consular officers may approve a visa if the applicant qualifies for the visa classification sought and is not otherwise inadmissible or ineligible for a visa. 9 FAM 301.1-2. Visa applications can be denied under three main INA provisions: insufficient information under INA § 221(g); the grounds of inadmissibility under INA

§ 212(a); and, for nonimmigrant applicants, the presumption of seeking permanent residence under INA § 214(b). Inadmissibility grounds under INA § 212(a) include, *inter alia*, criminal grounds ((a)(2)), security and terrorism grounds ((a)(3)), public charge risk ((a)(4)), and previous illegal entry to the United States or violation of U.S. immigration laws ((a)(7)).

Consular officers consider various sources of information when making visa determinations. First, they review the materials in the applicant's case file. For immigrant visas, these materials typically include biographical, medical, and court documents, police certificates, and other documents, as well as the petition filed on the petitioner's behalf by a sponsor, such as a family member or employer. *See* U.S. Dep't of State, *Immigrant Visa Process, Step 7: Collect Civil Documents*, https://bit.ly/4cpqVif (last accessed Mar. 22, 2024); U.S. Citizenship & Immigration Service, *I-130, Petition for Alien Relative*, https://bit.ly/3PAEt0l (last accessed Mar. 22, 2024); *see also* 9 FAM 504.1-3. Second, consular officers screen the applicants using government databases, particularly the Consular Consolidated Database (CCD) and/or the Consular Lookout and Support System (CLASS). These databases hold the State Department's visa, passport, and biometric records, and contain records and case notes about the applicant's past visa adjudications. They facilitate information-sharing with and vetting of the applicant by other federal agencies, including intelligence and law enforcement agencies, who may have information relevant to the applicant's visa eligibility, including information from foreign

governments. Cong. Rsch. Serv., R43589, *Immigration: Visa Security Policies* (updated Nov. 18, 2015), https://bit.ly/3TuCE6t. Third, consular officers interview all immigrant and most nonimmigrant visa applicants at a U.S. consulate or embassy. 9 FAM 504.7, 9 FAM 403.5.

The immigrant visa interview is a critical opportunity for the consular officer to raise with the applicant any concerns the officer may have about the application, such as tattoos noted in the applicant's medical file or the applicant's relationship to the person who petitioned on their behalf. If the consular officer continues to have concerns about the applicant following the interview, the officer may refer the case to the Fraud Prevention Unit (FPU), which generally includes a U.S. citizen supervisor and non-U.S. citizen local experts. *See* Ashlie Tattersall, *Office of Fraud Prevention*, State Mag. (Oct. 2023), https://bit.ly/3IS5JUA; U.S. Gov't Accountability Off., GAO-12-888, *State Could Enhance Visa Fraud Prevention by Strategically Using Resources and Training* at 1 (Sept. 2012), https://bit.ly/3IRcIge. The local experts will then conduct a more in-depth interview of the visa applicant; the U.S. citizen supervisors often do not participate in these interviews due to time limitations or lack of language expertise. Applicants rarely admit to gang membership, so the FPU employee will consider risk factors posed by the applicant, such as the applicant's family structure, neighborhood of residence, demeanor, education, and employment, in making a recommendation to the consular officer about the admissibility of the applicant.

If a consular officer decides to deny an immigrant visa, a supervisory officer must review the refusal within 30 days. In practice, this generally involves reading the case notes written by the refusing officer. 9 FAM 504.11-3(A)(2). Depending on the ground for ineligibility and the visa type, the consular officer may also be required to request an advisory opinion describing the rationale for denial, which consists of a two-to-four-page document summarizing the case and the officer's findings and is reviewed by the Visa Office and the Legal Adviser's office in Washington. For nonimmigrant visas, a supervisory officer must review no fewer than 10 percent of refusals. 9 FAM 403.12-3(A).[2] When a consular officer denies an immigrant visa, the officer also generally must inform the denied applicant of the legal provisions on which the refusal is based. 9 FAM 504.11-3(A)(1). (For visas denied under INA § 212(a)(2)–(3), the criminal and security-related inadmissibility provisions, there is no notice requirement, though the FAM in most cases still instructs the officers to provide information regarding

[2] Supervisory officers must also review nonimmigrant visa issuances "with a view to enhancing U.S. border security and ensuring consistent adjudication standards." 9 FAM 403.12-4. They should likewise review no fewer than 10 percent of nonimmigrant visa issuances. *Id.* The supervisory officer is required to "review the case and either confirm or disagree with the issuance and, in the case of disagreement with the issuance, explain the decision clearly in the review form and add a case note." *Id.* If the supervisory officer does not concur with the issuance, the officer may assume responsibility and re-adjudicate the case. *Id.* There is not a similar procedure for immigrant visa issuances, although all visas may be revoked in certain circumstances. *See* 9 FAM 504.12; 9 FAM 403.11.

the statutory basis for refusal, as the consular officer did in this case. 9 FAM 504.11-3(A)(1)(c).) The refusal notice must also include information about any relief available to overcome the refusal, such as a waiver of ineligibility. 9 FAM 504.11-3(A)(1)(b)(5).

Little recourse is available to applicants whose visa applications have been denied. While legal errors may be corrected through an inquiry to the State Department's LegalNet service, visa refusals based on a consular officer's finding of fact, which account for the bulk of visa refusals, are not reviewable, and are not subject to reconsideration, except on the presentation of additional evidence tending to overcome the ground of ineligibility on which the refusal was based. 22 C.F.R. § 42.81; 9 FAM 504.11-4(A). Visa ineligibility can also be waived in some cases, depending on the grounds for refusal. There is no administrative appeals process or opportunity for meaningful judicial review, even with respect to immigrant visas sponsored by U.S. citizen spouses or children.

II. Consular Visa Decisions Show Indicia of Arbitrariness.

Rather than reflecting a policy-informed determination based on a careful balancing of various policy interests, consular officers' visa decisions are often hampered by a lack of information and inconsistent training, causing officers to rely on stereotypes or tropes. Decisions can even stem from bias or bad faith. Similarly situated visa applicants can experience disparate outcomes based on nothing more than the luck

or misfortune of which diplomatic post and consular officer to whom they happen to be assigned.

The problem starts with consular officers' training. That training begins with an initial six-week course in Washington, which includes numerous consular topics in addition to visa adjudications. *See* U.S. Dep't of State, "Basic Consular Course," *Functional Training for Foreign Service Family Members*, *archived at* https://bit.ly/3Tpg92A. Given the complexity of the visa process, which includes different standards and requirements for dozens of types of visas, *see* 9 FAM 402.1-2; 9 FAM 502, such compressed training time is inadequate. Once at post, consular officers receive additional training that varies widely depending on the types of training materials available at post, the quality of the individual managers, and the extent to which the training is tailored to the needs of the post. In *amici*'s experience, the reality is that consular officers learn on the job, at the visa window. There, however, consular officers will decide a large number of visa applications while still developing the knowledge and experience to feel fully confident about their determinations.

The Court need not take *amici*'s word for it—these observations have been substantiated by various State Department Inspector General (OIG) reports. In its December 2017 report on the consular mission in China, OIG found inconsistent policies and processes with respect to nonimmigrant visa adjudication standards across posts. Office of Inspector General, ISP-I-18-04, *Inspection of Embassy Beijing and Constituent Posts, China*, at 12 (Dec. 2017), https://bit.ly/49YhgNX. This

included the use of different processes to interview visa applicants who required more detailed interviews. *Id.* A December 2018 OIG report on Embassy New Delhi found that despite frequent communication and robust information-sharing designed to ensure uniform and correct application of Department standards, Mission India's consular team lacked common training and professional development programs and universal criteria for referring visa cases to fraud prevention units. Office of Inspector General, ISP-I-19-10, *Inspection of Embassy New Delhi and Constituent Posts, India*, at 20 (Dec. 2018), https://bit.ly/3TvqOZF. A May 2018 OIG report on the State Department mission in Guatemala City found that consular employees were unaware of where to find a definitive list of mandatory and recommended training, and that many had completed mandatory training more than five years prior, and much of that training had become obsolete. Office of Inspector General, ISP-I-18-16, *Inspection of Embassy Guatemala City, Guatemala*, at 14 (May 2018), https://bit.ly/3Tp9dm4. OIG reports offer numerous other examples of inconsistent standards and training. *See, e.g.*, Office of Inspector General, ISP-I-09-33A, *Report of Inspection Embassy Bridgetown, Barbados*, at 35 (June 2009), https://bit.ly/3VBwoMP; Office of Inspector General, ISP-I-19-03, *Inspection of Embassy Dakar, Senegal* at 11 (Nov. 2018), https://bit.ly/4avhoo1; Office of Inspector General, ISP-I-17-17, *Inspection of Embassy Accra, Ghana*, at 11(June 2017), https://bit.ly/43zQZmB.

Inadequate or inconsistent training is compounded by consular officers' heavy workloads, due to which they

spend only minutes reviewing a visa application. In its April 2019 inspection of the Bogota embassy, OIG found that consular managers required nonimmigrant visa adjudicators to maintain an average of 30 in-person interviews per hour. Office of Inspector General, ISP-I-19-14, *Inspection of Embassy Bogota, Colombia*, at 16 (Apr. 2019), https://bit.ly/3PYL4lN ("April 2019 Bogota OIG Report"). That pressure to speed up adjudications, OIG found, "risked inadequately justified decisions and rushed security reviews, and adversely affected staff morale." *Id.* In a May 2023 OIG report on Brussels, "consular staff told OIG that they were unable to keep up with the workload and that backlogs in certain tasks—such as completing the back-office processing of nonimmigrant visa applications—made for a stressful work environment. In addition, staff told OIG they believed consular managers did not fully comprehend the effect the heavy workload, including extra duties assigned to them, had on their morale and ability to complete their work." Office of Inspector General, ISP-I-23-11, *Inspection of Embassy Brussels, Belgium*, at 10 (May 2023), https://bit.ly/3VygfaV.

Consular officers' decision making is also hampered when they do not speak the local language or are not familiar with local customs. According to a 2017 Government Accountability Office report, as of September 2016, 23 percent of language-designated positions were filled by Foreign Service Officers who did not meet the positions' language proficiency requirements, with the greatest gaps in the Near East (37 percent) and Africa (34 percent)—regions that are a significant source of national security concern. U.S.

Gov't Accountability Off., GAO-17-318, *Foreign Language Proficiency Has Improved, but Efforts to Reduce Gaps Need Evaluation* (Mar. 2017), https://bit.ly/4cxqi62. According to Foreign Service Officers interviewed for the report, those language proficiency gaps have, in some cases, affected the State Department's ability to properly adjudicate visa applications, address security concerns, and perform other critical diplomatic duties. *Id.* For example, consular officers at two posts said that they had witnessed cases in which visas had been incorrectly granted or denied because officers had not understood applicants' responses. *Id.* at 14.

One of *amici*, who was stationed in Western Asia, personally observed the types of errors that can occur when consular officers have an insufficient command of the local language. In one instance, an applicant was denied because the name of his employer sounded similar to the name of an entity known to be controlled by the Iranian Revolutionary Guard Corps (IRGC), a designated terrorist group. The similarity was due to the fact that the name of each entity included the generic Farsi word for bank.

Where consular officers' knowledge and expertise is lacking, whether because of inadequate training, overwork, or lack of local language familiarity, tropes and stereotypes often fill the gap. According to the Bogota OIG report, for example, adjudicators told OIG they believed that training programs advocated relying on stereotypes to facilitate quick decision making. April 2019 Bogota OIG Report, at 16. To be sure, the Foreign

Affairs Manual warns against the tendency among consular officers to rely on stereotypes. "Fitting a certain demographic profile ('young', 'single', etc.)," it states, "is not grounds for a visa refusal." 9 FAM 403.10-3(A)(1)(d). But in the experience of one of the *amici* who served in Central America, precisely those grounds were commonly the basis for visa denials. Applicants were denied for superficial reasons like the color of the applicant's shirt, the fact that they had tattoos, or the neighborhood in which they lived. One of *amici*, who was stationed in Western Asia, said he was told by another consular officer that, because the IRGC was known to be a major player in the Iranian real estate sector, that meant *any* Iranian working in real estate was a member of the IRGC and should be denied a visa as such.

Visa decisions can also be motivated by consular officers' risk aversion and desire to take the path of least resistance. In the post-9/11 environment, consular officers would rather err on the side of an erroneous denial than inadvertently admit someone who proves to be dangerous. Refusals rarely draw scrutiny. Refusals are also often an easier alternative to undertaking the level of review necessary to make a properly informed adjudicatory decision. In such cases, consular officers can offer pretextual grounds for the refusal, even when they are supported by little evidence. In *amici*'s experience, these approaches to visa decision making are common in consular officer ranks.

Sometimes, visa denials are even made in bad faith. One of the *amici*, who was stationed in Central America,

learned of a rogue officer in Guatemala who for two years sought to disqualify as many eligible visa applicants as possible. The officer was motivated by anti-immigrant animus and would reverse-engineer the refusals so they would appear to be legitimate. The officer's conduct was eventually discovered only because the conduct occurred for so long and because the number of refusals was so high. In the meantime, the many individuals who were erroneously denied had no recourse.

In sum, there is inconsistency in how consular officers apply ineligibility grounds. Consular officers often lack sufficient training, may not speak the local language, generally are overworked and pressed to move more quickly, and may rely on stereotypes or even deny applications in bad faith. When these things occur, resulting visa adjudications do *not* reflect the careful policy determinations of the executive branch. And when there is no recourse, the fundamental rights of a U.S. citizen spouse—whose ability to reunite with a husband or wife depends on the accuracy of a consular officer's determination—are insufficiently protected.

III. The State Department Lacks Adequate Mechanisms for Overseeing Consular Officer Decision Making.

The lack of adequate State Department quality control mechanisms exacerbates the arbitrariness in visa adjudications, enhancing the need for judicial oversight when the fundamental interests of U.S. citizens are at stake.

First, there is little direct oversight of visa adjudications. For immigrant visas, the Foreign Affairs Manual requires supervisory review of most refusals, depending on the grounds, within 30 days of the refusal. 9 FAM 504.11-3(A)(2). In the event the supervisor disagrees with the refusal, the supervisor is expected to discuss the case with the refusing officer before taking further action. 9 FAM 504.11-3(A)(3). For nonimmigrant visas, the Foreign Affairs Manual requires supervisory review of as many nonimmigrant refusals as time allows, but no fewer than 10 percent. 9 FAM 403.12-3(A).

In practice, however, visa refusals often do not receive serious review. As an initial matter, sometimes these refusals receive *no* required review. In its June 2019 report on the Port-au-Prince embassy, for example, OIG found that "[t]he embassy did not review all of the refused immigrant visa cases required by [State] Department [guidelines]." Office of Inspector General, ISP-I-19-18, *Inspection of Embassy Port-au-Prince, Haiti*, at 13 (June 2019), https://bit.ly/3PArwnu. In its July 2019 report on the Santo Domingo embassy, OIG found that "managers did not review 284 (23 percent) of the refusals that should have been reviewed between April 1 and June 30, 2018," and warned that "[f]ailure to complete required reviews increases the risk of denying the immigration benefit to an eligible applicant." Office of Inspector General, ISP-I-19-17, *Inspection of Embassy Santo Domingo, Dominican Republic*, at 12 (July 2019), https://bit.ly/3vxFZtm. As for nonimmigrant visa refusals, up to 90 percent may never be reviewed without violating State Department

guidelines. But sometimes supervisors fail to clear even that low bar: A September 2016 OIG report on the Ankara embassy operations found that consular supervisors were not consistently reviewing the minimum required number of visa denials. Office of Inspector General, ISP-I-16-24A, *Inspection of Embassy Ankara, Turkey*, at 20 (Sept. 2016), https://bit.ly/3TPC1Wj ("Sept. 2016 Ankara OIG Report").

Even when a review does occur, supervisors are at an informational disadvantage compared to the adjudicating officer. The review occurs after the officer has finished interviewing the applicant, and the review is reliant upon the adjudicating officer's report about the facts and the demeanor of the applicant. And because refusal rationales are sometimes conclusory and supported by scant evidence, even searching reviews may fail to discover problems with the refusal. In its Ankara report, for example, OIG found that in preparing case notes in the automated visa system, consular officers used abbreviations and references that would not be understandable to system users outside Turkey. Sept. 2016 Ankara OIG Report at 20. There is also the problem of inertia. Reviews occur only after applicants have been notified of the refusal. In *amici*'s experience, supervisors frequently provide feedback focused on speeding up adjudications, which inevitably leads consular officers to write fewer case notes, making effective after-the-fact review even more challenging.

Lack of review is not just a problem for visa refusals. In its January 2024 report on the Baghdad embassy, for

example, OIG found that the consular section had failed to conduct required validation studies on issued nonimmigrant visas to determine whether the visa holders used their visas appropriately, as required by State Department standards. Office of Inspector General, ISP-I-24-06, *Inspection of Embassy Baghdad and Constituent Post, Iraq*, at 16 (Jan. 2024), https://bit.ly/43vUcUo. As a result, the embassy was not able to determine whether consular officers were adjudicating visa applications appropriately or if additional training was needed. *Id.*

There is also a lack of meaningful opportunity for administrative review of visa refusals. Applicants cannot challenge consular officers' factual determinations; they may only sometimes provide new evidence that may change the officer's opinion as to their eligibility. 9 FAM 306.2-2(A). But the presentation of new evidence does not solve consular officers' potential misunderstanding of facts that have already been presented.

IV. The Court Should Ensure Meaningful Judicial Review When a Visa Refusal Affects the Fundamental Interests of a U.S. Citizen.

When a visa refusal affects the fundamental rights of a U.S. citizen—for example, the ability to reunite with a spouse—some judicial oversight of the visa adjudication process is warranted. At the very least, the State Department should be required to set forth the factual basis for applying a ground of inadmissibility, so that manifest errors can be identified and corrected through

a meaningful administrative review process.[3] While visa decisions do sometimes rely on national security information, nothing in the government's brief shows that national security imperatives make it impossible for the government to provide a reasoned basis for a denial. The private interests at stake here are too profound, and the probability of error too great, to allow the government to escape any accountability for its decision making. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); Resp. Br. 37-42. To the extent that the opportunity to examine the basis for a denial and seek review is unavailable through an administrative process, it should be available through a judicial one.

[3] *Compare* 8 C.F.R. § 103.3 (review of USCIS determinations).

CONCLUSION

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

Respectfully submitted,

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