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

REPLY BRIEF FOR THE PETITIONERS

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Respondent Sandra Muñoz does not have a constitutionally protected liberty interest in her noncitizen spouse's visa application. And even if she did, the explanation the consular officer provided—that her spouse was found inadmissible under the unlawful-activity bar in 8 U.S.C. 1182(a)(3)(A)(ii)—suffices to provide any process that was due. To evade those straightforward conclusions, respondents are forced to deny the existence of the consular-nonreviewability doctrine altogether, embrace the extension of the Due Process Clause to merely indirect subjects of government action, and disclaim the applicability of *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), to this case. Those contentions—some of which were not adopted even by the outlier decision below—are not supported by this Court's precedent. And they would be profoundly dis-

ruptive to the efforts of our consular posts abroad to safeguard the Nation's borders.

A. Because A U.S. Citizen Lacks A Protected Liberty Interest In A Noncitizen Spouse's Visa, No Exception To Consular Nonreviewability Applies

1. "[T]he doctrine of consular nonreviewability bars judicial review of visa decisions made by consular officials abroad." *Yafai* v. *Pompeo*, 912 F.3d 1018, 1020 (7th Cir. 2019) (Barrett, J.) (citation and internal quotation marks omitted). Respondents begin (Br. 12-14) with the perplexing contention that the doctrine is not a part of this case. That is wrong. As the government has repeatedly explained, including in the petition for certiorari, consular nonreviewability—which stems from the political branches' sovereign authority over the admission of noncitizens—is the default rule. Pet. 4-8, 16-18, 22; Cert. Reply 9-11; Gov't Br. 16-20. That understanding is reflected in the decision under review. *E.g.*, Pet. App. 2a ("[Respondents'] suit directly implicates the doctrine of consular nonreviewability, the longstanding jurisprudential principle that, ordinarily, a consular official's decision to deny a visa to a foreigner is not subject to judicial review.") (citation and internal quotation marks omitted). The questions presented in this Court—as in *Kerry* v. *Din*, 576 U.S. 86 (2015)—address whether respondent Muñoz's challenge to her husband's visa denial fits within any *exception* to that default rule of nonreviewability. To the extent respondents question the default rule's existence, that issue is fairly encompassed within the questions presented, as respondents themselves previously represented. Br. in Opp. 3, 36.

Contrary to respondents' further contention (Br. 14-18), this Court has repeatedly recognized the default

rule. For instance, in *Mandel*, it was "clear" that "an unadmitted and nonresident alien[] had no constitutional right of entry to this country," making U.S. citizens the only plaintiffs who could even potentially challenge the visa denial. 408 U.S. at 762. In *Din*, five members of the Court agreed that a U.S. citizen had no right to full judicial review of her noncitizen husband's visa denial, see 576 U.S. at 101 (plurality opinion); *id.* at 102 (Kennedy, J., concurring in the judgment), and none suggested that the noncitizen possessed his own right to review, cf. *id.* at 110 (Breyer, J., dissenting). That visa-specific understanding is consistent with the Court's more general 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); see *Wong Wing* v. *United States*, 163 U.S. 228, 233 (1896) ("The 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") (citation omitted) (emphasis added).

That longstanding principle is embodied in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Gov't Br. 5, 18-19. In 8 U.S.C. 1252, Congress established a comprehensive framework for judicial review of decisions concerning the removal of noncitizens who are physically present in the United States. But neither Section 1252 nor any other provision of the INA provides for review of the denial of a visa to a noncitizen abroad. Cf. 8 U.S.C. 1201(*i*) (allowing judicial review of visa *revocations*, but only in proceedings to remove a noncitizen present in the United States and when "rev-

ocation provides the sole ground for removal"). Rather, Congress has specified that it has *not* created a cause of action for judicial review of visa denials. See 6 U.S.C. 236(f). "[B]y explicitly providing that no private rights of action [were] created" by the vesting of limited visa-related responsibilities in the Department of Homeland Security (DHS), see 6 U.S.C. 236, Congress "ensure[d] that denials of visa petitions in our overseas posts *w*[*ould*] *continue to be non-reviewable*." *Homeland Security Act of 2002: Hearing and Markup on H.R. 5005 Before the House Comm. on International Relations*, 107th Cong., 2d Sess. 89 (2002) (emphasis added).

Respondents nonetheless contend (Br. 16-17) that Congress provided for judicial review of visa denials in the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* No court of appeals embraces that theory. Consular nonreviewability is a "limitation[] on judicial review" displacing the APA's review provisions under 5 U.S.C. 702(1). See *Allen* v. *Milas*, 896 F.3d 1094, 1102-1108 (9th Cir. 2018); *Baaghil* v. *Miller*, 1 F.4th 427, 434-435 (6th Cir. 2021); *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1158, 1162-1163 (D.C. Cir. 1999). Moreover, the APA does not apply "to the extent that * * * statutes preclude judicial review," 5 U.S.C. 701(a)(1), which is "determined not only from [a statute's] express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). Here, the INA's text, structure, and history preclude judicial review of consular visa decisions. See p. 3, *supra*; *Saavedra Bruno*, 197 F.3d at 1162.

Indeed, the one time this Court held that noncitizens physically present in the United States could seek review of their exclusion orders under the APA, the Court emphasized that it was "of course" not "suggest[ing]" that "an alien who has never presented himself at the borders of this country may avail himself of the [APA] action by bringing the action from abroad." *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956). Congress then intervened to foreclose APA review even for noncitizens already physically present, see *Saavedra Bruno*, 197 F.3d at 1161-1162, because allowing such suits would "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 against the U.S. Government as a defendant," H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961).

2. Accordingly, the only basis for even limited judicial review of the decision to refuse a visa to respondent Luis Asencio-Cordero would be the constitutional rights of Muñoz, his U.S.-citizen spouse. See *Trump* v. *Hawaii*, 585 U.S. 667, 703 (2018) ("[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."); *Mandel*, 408 U.S. at 762-763, 769-770; but see Gov't Br. 20, 32 n.10 (explaining that this Court has not resolved whether even that limited review is required).

Here, respondents claim (Br. 10) that the denial violates Muñoz's due-process rights. But they have not carried their burden to establish an interest protected by the Due Process Clause. See *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005). They contend that Muñoz possesses a "liberty interest in marital cohabitation in the

United States." Resp. Br. 19 (capitalization altered). But they fail to locate such an interest in either "the INA," *id.* at 11, or the "[h]istory and tradition" of immigration policy, *id.* at 19.

a. Respondents contend (Br. 11) that "the INA gave Muñoz" a liberty interest "in her husband's visa application." Not even the Ninth Circuit—the only court of appeals to recognize any due-process interest in this context—located such an interest in statutory immigration law. See Pet. App. 15a-18a. For good reason. To have a constitutionally protected interest in a governmentally conferred benefit, a person must have "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756 (2005) (citation omitted).

Muñoz does not have a legitimate claim of entitlement to an immigrant visa for her husband in El Salvador. See *Fiallo* v. *Bell*, 430 U.S. 787, 795 n.6 (1977) (rejecting the proposition that the INA grants any "fundamental right" to U.S. citizens petitioning on behalf of family members seeking entry) (citation omitted). The visa denial was based on a statutory provision, 8 U.S.C. 1182(a), requiring evaluation of Asencio-Cordero's own history and characteristics—irrespective of whether his application rested on a petition by a spouse or employer, or on his own entry in a visa lottery. See 22 C.F.R. 42.41. And contrary to respondents' suggestion (Br. 25-27), visa issuance is not mandatory. The INA provides that a consular officer "*may* issue" a visa "to an immigrant who has made proper application therefor." 8 U.S.C. 1201(a)(1)(A) (emphasis added); see 22 C.F.R. 42.71(a). And it further provides that if a visa applicant "fails to establish to the satisfaction of the consular officer that

he is eligible to receive a visa," no visa shall issue. 8 U.S.C. 1361; see 8 U.S.C. 1201(g).

Respondents emphasize (Br. 28, 30-32) Muñoz's involvement in other parts of Asencio-Cordero's immigration process. But approval by U.S. Citizenship and Immigration Services (USCIS) of a U.S.-citizen spouse's petition to classify a noncitizen as an immediate relative is merely a prerequisite for the noncitizen's seeking an immigrant visa from the Department of State; at that separate stage, the noncitizen still must demonstrate his own eligibility for admission. Gov't Br. 2-3, 21-22.[1] Muñoz's ability to effect a *denial* of Asencio-Cordero's visa application through, for instance, divorce (Resp. Br. 32) cannot give rise to a legitimate or cognizable expectation that the visa application will be *granted*. Similarly, Muñoz's obligation to execute an affidavit of support on Asencio-Cordero's behalf (Resp. Br. 28) is immaterial. As respondents acknowledge, that document is not enforceable until the noncitizen actually becomes a lawful permanent resident. See 8 C.F.R. 213a.2(d) and (e)(1).

Respondents additionally suggest (Br. 27) that a legally protected expectation was created by USCIS's earlier approval of a provisional waiver of the inadmissibility stemming from Asencio-Cordero's prior unlawful presence in the United States. See 8 U.S.C. 1182(a)(9)(B)(i) and (v). But although USCIS would

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[1] Respondents quote (Br. 32) a State Department website stating that the visa-processing office will notify the applicant and the spousal "petitioner" of a visa interview's date and time. But that same website states that the "sponsor/petitioner does not attend the visa interview." Bureau of Consular Affairs, U.S. Dep't of State, *Immigrant Visa Process*, *Step 11: Applicant Interview*, https://perma.cc/6UWY-AD3F.

have run certain background checks in adjudicating that request for an unlawful-presence waiver, see 78 Fed. Reg. 536, 546-547 (Jan. 3, 2013), it would not have made a conclusive determination that no other inadmissibility ground applied, see *ibid.*; 8 C.F.R. 212.7(e)(4)(i) and (12)(iii) (2014). And USCIS's failure to identify any such ground was not binding on the Department of State when it later considered Asencio-Cordero's visa application. See 81 Fed. Reg. 50,244, 50,253 (July 29, 2016) ("It is [State], and not USCIS, that generally determines admissibility under INA section 212(a), 8 U.S.C. 1182(a), as part of the immigrant visa process, which includes an in-depth, in-person interview conducted by [State] consular officers."). Indeed, USCIS's waiver was "provisional" in part because it could be revoked based on a consular finding that the noncitizen is inadmissible on another ground. See 8 C.F.R. 212.7(e)(14)(i) (2014); see also 8 C.F.R. 212.7(e)(12)(i) (2014).[2]

b. Nor can respondents derive a protected liberty interest in the admission of a noncitizen spouse from "[h]istory and tradition" in "the immigration context." Resp. Br. 19. To the contrary, the history of Congress's plenary power to exclude noncitizens, including spouses and other relatives of U.S. citizens, compels the conclusion that the interest respondents claim cannot plausibly be inherent in the "liberty" secured by the Due Process Clause. Gov't Br. 23-25; see, *e.g.*, *Galvan* v. *Press*,

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[2] Respondents note (Br. 4) that when Asencio-Cordero applied for an unlawful-presence waiver in 2014, USCIS had a policy of denying such waivers if it had reason to believe another inadmissibility ground applied. But that policy contemplated only a "limited review" for other inadmissibility grounds, 78 Fed. Reg. at 547, on which USCIS's assessment was "at best, advisory in nature," 81 Fed. Reg. at 50,253-50,254.

347 U.S. 522, 531 (1954) (describing Congress's power as "about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

Respondents virtually ignore those well-established norms and instead point to early immigration laws that furthered family-unification policies. But their evidence is not compelling. They primarily rely on a handful of 19th- and early-20th-century laws in which Congress bestowed immigration benefits on U.S.-citizen men and their foreign wives. Resp. Br. 21-24; see Act of Feb. 10, 1855 (1855 Naturalization Act), ch. 71, § 2, 10 Stat. 604 (automatically naturalizing U.S. citizens' foreign wives "who might lawfully be naturalized under the existing laws"); Act of Mar. 26, 1804, ch. 47, § 2, 2 Stat. 293 (allowing widows of noncitizens who did not complete the naturalization process before death to become citizens); Immigration Act of 1917, ch. 29, §§ 3, 22, 39 Stat. 877, 891-892 (exempting U.S. citizens' foreign wives from a literacy test and rules related to contagious disease); Immigration Act of 1924, ch. 190, § 4(a), 43 Stat. 155 (classifying U.S. citizens' foreign wives as nonquota immigrants). Notably, Congress did not simultaneously extend the same benefits to U.S.-citizen *women*. See *ibid.*; Resp. Br. 21. Which indicates that such laws are better explained by the now-obsolete doctrine of coverture—*i.e.*, "the legal notion that a husband and wife are one, and the one is the husband"—than by a widely shared understanding of individual liberty. Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. Ill. U. L. Rev. 153, 160 (2004); see *id.* at 154, 166.[3]

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[3] See also, *e.g.*, Kerry Abrams, *What Makes the Family Special?*, 80 U. Chi. L. Rev. 7, 10 (2013) (arguing that family-unification laws

Respondents' reliance (Br. 23) on the Expatriation Act of 1907, ch. 2534, § 3, 34 Stat. 1228-1229, is similarly flawed. That law stripped women of their U.S. citizenship, compelling them to take their foreign husbands' citizenship. See *ibid.* Respondents argue (Br. 23) that the Act "underscored the centrality of cohabitation to the institution of marriage by assigning a single nationality to spouses." But the Act instead reflected a view that "[t]he identity of husband and wife is an ancient principle" that "worked in many instances for her protection" and justifies "giv[ing] dominance to the husband." *Mackenzie* v. *Hare*, 239 U.S. 299, 311 (1915); see *Din*, 576 U.S. at 96 (plurality opinion) (noting the Act was "premised on * * * a legacy of the law of coverture").

Respondents additionally invoke (Br. 21-22) an 1888 law forbidding return entry to "Chinese laborers" while exempting those with a wife, child, or parent in the United States. Act of Sept. 13, 1888, ch. 1015, §§ 5 and 6, 25 Stat. 477. But that provision also exempted any laborer with "property [in the United States] of the value of one thousand dollars, or debts of like amount due him," § 6, 25 Stat. 477—weakening any inference

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"began as part and parcel of coverture," as "a man had the right to determine the domicile of his wife and children"); Candice Lewis Bredbenner, *A Nationality of Her Own* 18-19 (1998) (arguing, with respect to the 1855 Naturalization Act, that "[r]equiring a woman to assume her spouse's nationality harmonized well with the single-identity theory of marriage expressed through the doctrine of coverture"); S. Rep. No. 1515, 81st Cong., 2d Sess. 414 (1950) (describing early immigration laws as "a legislative enactment of the common-law theory that the husband is the head of the household").

that Congress was uniquely solicitous of the marital relationship.[4]

In short, respondents' evidence of a "tradition of favoring marriage-based immigration" (Br. 24) is limited and equivocal. Cf. *Din*, 576 U.S. at 97 (plurality opinion) (concluding that Congress's "'concern . . . for the unity and happiness of the immigrant family' * * * has been a matter of legislative grace rather than fundamental right") (citation omitted). The historical record is certainly not so convincing as to justify the effective overruling, via the Due Process Clause, of Congress's consistent choice to withhold judicial review of consular visa determinations. See Gov't Br. 16-19.

3. Respondents rely (Br. 20-21, 35-36) more generally on Muñoz's constitutional rights to marriage and to live in the United States. But none of this Court's precedents on either score establish the very different right to a noncitizen-spouse's admission into the United States. See *Din*, 576 U.S. at 94-95 (plurality opinion); Gov't Br. 27-28. And here, the government has simply exercised its sovereign authority to deny admission to a

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[4] Respondents also cite (Br. 22) *United States* v. *Mrs. Gue Lim*, 176 U.S. 459 (1900), in which this Court interpreted a statute and treaty to permit the wife of a lawfully admitted Chinese merchant to enter the country without a required certificate. Respondents point to this Court's general statement, after observing that lower courts were split, that it "agree[d] with the reasoning contained in" *In re Chung Toy Ho*, 42 F. 398 (C.C.D. Or. 1890). *Gue Lim*, 176 U.S. at 464. The *Chung Toy Ho* decision noted a Chinese merchant's "natural right" to the "company" of "his wife." 42 F. at 400. But there is no indication that this Court embraced that particular sentence; the Court's analysis dovetailed with other portions of *Chung Toy Ho* but included no reasoning about the merchant's "natural right." See *Gue Lim*, 176 U.S. at 464-468.

noncitizen on a generally applicable ground that in no way targets Muñoz or her marriage.

Respondents must therefore contend that the enforcement of immigration laws against Muñoz's spouse *indirectly* burdens her marriage and citizenship rights. But as the *Din* plurality recognized, see 576 U.S. at 101, "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980); see Gov't Br. 28-30.

Respondents cannot evade *O'Bannon*'s applicability to Muñoz's constitutional claim. The Court recognized that the government could not withdraw "direct benefits" from nursing-home residents (*e.g.*, payment for their care) without affording due process. *O'Bannon*, 447 U.S. at 786-787. But the home's decertification did not implicate the residents' due-process rights, because the government's action against the home had not "impose[d] a direct restraint on [the residents'] liberty." *Id.* at 788. That was true even though 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 "associational interests." *Id.* at 784 & n.16, 787; see *id.* at 788; cf. *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976) (the "determining factor" for whether an interest warrants due-process protection is its "nature," not "its weight").

Like the *O'Bannon* plaintiffs, Muñoz claims "severe * * * hardship" and disruption of "family ties," 447 U.S. 784 n.16, because of governmental action taken against someone other than her. The visa denial "directed against a third party" cannot be characterized as "directly affect[ing]" Muñoz's "legal rights, or impos[ing]

a direct restraint on h[er] liberty"—which means the Due Process Clause is not implicated. *Id.* at 788.

Contrary to respondents' assertion (Br. 33), *O'Bannon*'s principle applies even where there is no directly affected individual with his own due-process rights, as this Court's subsequent decision in *Town of Castle Rock* demonstrates. There, the Court held that the beneficiary of a restraining order had no protected property interest in police enforcement of the order against her estranged husband, even though nobody else had the ability to compel enforcement either. See *Town of Castle Rock*, 545 U.S. at 760-768.[5]

4. Adherence to *O'Bannon*'s principle avoids the disruptive consequences that respondents' position would invite. Otherwise, family members could assert a constitutional right to process in other kinds of government enforcement actions—like removal proceedings, or the criminal prosecution of an "errant father" on whom his children depend. *O'Bannon*, 447 U.S. at 788; see *Payne-Barahona* v. *Gonzáles*, 474 F.3d 1, 3 (1st Cir. 2007). Family members might also challenge their relative's assignment to a remote prison or to an overseas military deployment, even though prisoners and service members themselves cannot bring such challenges. See *Meachum*, 427 U.S. at 223-225; *Orloff* v. *Willoughby*, 345 U.S. 83, 94-95 (1953). Respondents' approach would additionally encourage substantive challenges to immigration-law provisions that prevent fam-

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[5] Respondents rely (Br. 34) on the statement in *Procunier* v. *Martinez*, 416 U.S. 396, 409 (1974), that a spouse has a First Amendment interest in receiving mail from her imprisoned husband. But the *O'Bannon* principle applies to due-process claims, not First Amendment claims.

ily members from living together in the United States. See Gov't Br. 30.

Respondents tell the Court not to worry about such ramifications, but their efforts are not reassuring. They insist (Br. 19 n.10, 24, 36) that the right they ask the Court to recognize is merely procedural. But by grounding Muñoz's interest in the substantive right to marry and raise a family, *id.* at 10, 19, 35, respondents' arguments defy any tidy limitation. Even if respondents are content to ask only for a spousal right to further process in visa proceedings, others could invoke similar reasoning to say that, because the right to "marriage * * * includes cohabitation," *id.* at 19, Congress has a constitutional obligation to remove other burdens on family reunification—for instance, by exempting spouses of lawful permanent residents from visa quotas to which they are subject, see 8 U.S.C. 1152(a)(4), 1153(a)(2).

Nor do respondents dispute that the procedural right they claim here could theoretically apply outside the immigration context in at least some circumstances. See Resp. Br. 34. And while they assert that "a spouse's interests are protected in the criminal context by the defendant's own due process rights," *ibid.*, they do not explain what would happen if the defendant failed to take advantage of those rights or elected to forgo them. This Court should not open the gate to such challenges.

B. Citing A Valid Statutory Ground Of Inadmissibility Provides Any Process That Is Due

Even if the Court finds that Muñoz possesses a protected liberty interest implicated by the denial of her husband's visa application, respondents' suit should proceed no further. Muñoz would be entitled, at most, to review under the standard in *Mandel*—which asks

only whether the government provided a "facially legitimate and bona fide reason" for the decision. 408 U.S. at 770. Under that standard, the consular officer's citation of a valid statutory ground of inadmissibility—the unlawful-activity bar in 8 U.S.C. 1182(a)(3)(A)(ii)—sufficed to provide all the process that would be due. Gov't Br. 31-37.

1. As the court of appeals explained, the upshot of its determination that Muñoz possesses a constitutional interest is that the "facially legitimate and bona fide" standard applies. Pet. App. 2a-3a, 18a. Respondents now argue—for the first time in this litigation—that *Mandel*'s circumscribed standard does not apply here, and that the balancing test from *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), should instead govern in the first instance. Resp. Br. 37-44. That argument is not properly before the Court and is foreclosed in any event.

In flat contrast to their current contention that the *Mandel* test is "inapposite," Resp. Br. 38, respondents agreed below and at the certiorari stage that *Mandel* applies. Br. in Opp. 23 ("The Ninth Circuit Correctly Applied Justice Kennedy's Test in *Din* to the Specific Statutory Section in Question Here."); see Resp. C.A. Br. 3, 5, 16-17, 35, 58; Resp. C.A. Reply 2-3, 7-8, 27-28.[6] Because a brief in opposition must "address any perceived misstatement of * * * law in the petition that bears on what issues properly would be before the Court if certiorari were granted," respondents have forfeited their ability to argue for a test other than *Mandel*. Sup. Ct. R. 15.2; see *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004).

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[6] Justice Kennedy's test in *Din* was the *Mandel* standard. 576 U.S. at 102-104.

In any event, respondents' new argument is meritless. Although *Mandel* reviewed a discretionary decision whether to waive a ground of inadmissibility and not the underlying inadmissibility finding, subsequent "opinions have reaffirmed and applied [*Mandel*'s] deferential standard of review across different contexts and constitutional claims." *Trump* v. *Hawaii*, 585 U.S. at 703. As Justice Kennedy's *Din* concurrence (joined by Justice Alito) concluded, "[t]he reasoning and the holding in *Mandel* control" even when it comes to statutory inadmissibility determinations. 576 U.S. at 103-104. Three years later, a majority of this Court referenced that conclusion approvingly, noting that "'respect for the political branches' broad power over the creation and administration of the immigration system' meant [in *Din*] that the Government need provide only a statutory citation *to explain a visa denial*." *Trump* v. *Hawaii*, 585 U.S. at 703 (emphasis added) (quoting *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment)).

No court of appeals has held that any standard stricter than *Mandel* applies. See, *e.g.*, Pet. App. 3a n.2; *Baaghil*, 1 F.4th at 432 (under that "modest exception" to consular nonreviewability, "[i]f a consulate's [visa] decision implicates the constitutional rights of United States citizens," it may be reviewed "solely to determine whether the consulate provided a facially legitimate reason"); *Yafai*, 912 F.3d at 1021 ("even" when "the visa denial implicates a constitutional right of an American citizen, * * * a court may not disturb the consular officer's decision if the reason given is 'facially legitimate and bona fide'") (citation omitted). Respondents' untimely request for an unprecedented standard of review should be rejected.

2. When respondents finally address how to apply the *Mandel* standard here, they contend (Br. 47-51) that citing the unlawful-activity bar in Section 1182(a)(3)(A)(ii) was insufficient. In their view (Resp. Br. 38), the consular officer was required to provide "a summary statement of the factual basis underlying the decision," *i.e.*, "a statement of what the applicant did to cause the consular official to make an inadmissibility determination."[7]

The "facially legitimate and bona fide reason" standard does not require officers to disclose such details, as the *Din* concurrence recognized. 576 U.S. at 104-106. *Mandel* itself was clear that its standard does *not* allow a court to "look behind" the proffered reason nor to "test it." 408 U.S. at 770. That "circumscribed" inquiry, *Trump* v. *Hawaii*, 585 U.S. at 703—which this Court has described as less searching than even rational basis review, *id.* at 704—is a spot-check. In the absence of an affirmative showing of bad faith, citation of the statutory ground of inadmissibility is sufficient to confirm that a denial had a "facially" legitimate basis.

Respondents' contrary arguments are not persuasive. They acknowledge (Br. 50) the *Din* concurrence's conclusion that generally citing the terrorist-activity bar in 8 U.S.C. 1182(a)(3)(B)—without a specific subsec-

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[7] It is unclear whether respondents agree with the court of appeals that the information in the McNeil Declaration—that the consular officer believed Asencio-Cordero was a member of MS-13 based on the visa interview, a criminal review, and a review of his tattoos—was sufficient. See Pet. App. 22a, 24a-25a; *id.* at 124a; but see Resp. Br. 43 (arguing that the government was required to state "what Asencio-Cordero said or did to make them think he is inadmissible as a gang member").

tion or additional factual explanation—was sufficient.[8] They seek to distinguish the terrorist-activity bar as including more specific grounds than Section 1182(a)(3)(A)(ii)'s reference to future engagement in "unlawful activity."

But respondents cannot explain why that rationale applies when the government cites the *entirety* of the terrorist-activity bar—as it did in *Din*, where the dissenters emphasized that the provision incorporates "not one reason, but dozens," and those reasons cover "a vast waterfront of human activity." 576 U.S. at 113-114 (Breyer, J., dissenting). A visa applicant supplied with an undifferentiated Section 1182(a)(3)(B) citation does not know whether he has been found, for instance, likely to engage after entry in the "sabotage of any conveyance"; or to be a "representative" of "a political, social, or other group that endorses or espouses terrorist activity"; or to have "received military-type training" from a "terrorist organization"; or to have "commit[ted] an act" that "affords material support," including "funds," "to a terrorist organization"; and so on. 8 U.S.C. 1182(a)(3)(B)(i)(IV)(bb) and (VIII), (iii)(I), and (iv)(VI)(cc). Such an individual is not meaningfully distinct from an applicant who is informed of the government's reliance on the unlawful-activity bar.

Respondents also protest (Br. 47, 49, 52) that a standalone citation of the unlawful-activity bar may not

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[8] Respondents briefly suggest (Br. 49 n.18) that the Court should not adhere to the *Din* concurrence's analysis. Even if the concurrence is not binding on this Court under stare decisis, it is at the very least persuasive as to what *Mandel* requires, as indicated by this Court's reliance on the *Din* concurrence in *Trump* v. *Hawaii*. 585 U.S. at 703-704; cf. *id.* at 740 (Sotomayor, J., dissenting) (calling the *Din* concurrence "controlling").

provide an applicant with sufficient information to rebut the finding, including through administrative reconsideration. But the same is true of an undifferentiated citation of the terrorist-activity bar, as Justice Kennedy acknowledged. *Din*, 576 U.S. at 105-106; see *id.* at 113-114 (Breyer, J., dissenting). Notably, the terrorist-activity bar contains some grounds that can be rebutted with a particular showing. *E.g.*, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(dd). Yet Congress granted consular officers discretion about whether to provide notice of the basis for a denial even in that circumstance, see 8 U.S.C. 1182(b)(3), foreclosing any inference that specificity is needed whenever it would be necessary to enable the applicant to mount a better-informed challenge.

Respondents observe (Br. 51) that there was a "fact on the record" in *Din* that provided a "facial connection" between the terrorist-activity bar and the visa applicant: his previous work for the Taliban government. See 576 U.S. at 105 (Kennedy, J., concurring in the judgment). But that fact came from Fauzia Din's own complaint, not the consulate. See *ibid.* There is no indication that Justice Kennedy would have found the citation of Section 1182(a)(3)(B) insufficient had Din omitted that allegation. Regardless, the record here includes an analogous facial connection: Upon receiving the initial visa denial, respondents reacted to the citation of Section 1182(a)(3)(A)(ii) by providing a declaration from a "gang expert" that Asencio-Cordero is not a member of MS-13. See Pet. App. 38a (Lee, J., dissenting); see also J.A. 41-45.

3. The conclusion that the government may cite the unlawful-activity bar without supplying additional factual details is reinforced by Congress's determination, in Section 1182(b)(3), that consular officers need not

provide even that citation. Gov't Br. 37-41. As the *Din* concurrence explained, "Congress evaluated the benefits and burdens of notice in this sensitive area and assigned discretion to the Executive to decide when more detailed disclosure is appropriate"—a "considered judgment" that lends additional support to the conclusion that a standalone citation of one of the security-based grounds in Section 1182(a)(3) is "constitutionally adequate." 576 U.S. at 106.

At the certiorari stage, respondents claimed that Section 1182(b)(3)'s authorization to dispense with specific notice does not apply to unlawful-activity-bar denials. Br. in Opp. 31 n.1. But that position was textually untenable. Gov't Br. 40-41. Respondents now have only two rejoinders. First, they note (Resp. Br. 46) that the consular officer here did not take advantage of the full scope of Section 1182(b)(3)'s authorization to supply *no* explanation for a security-based denial. But the statute is not an all-or-nothing choice; "the Government is not prohibited from offering more details when it sees fit." *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment). Second, respondents contend (Br. 47), based on a State Department regulation and the *Foreign Affairs Manual* (FAM), that the Department "has bound itself to do more." That is incorrect: The FAM provision expressly authorizes a consular officer to withhold an explanation from an applicant deemed inadmissible under Section 1182(a)(3) if the officer receives permission or an order from the Department to do so. 9 FAM 504.11-3(A)(1)(c) (2024) (citing 8 U.S.C. 1182(b)).

C. Requiring Consular Officers To Provide The Factual Bases For Visa Denials Would Raise Significant Security Concerns

As explained in the government's opening brief (at 41-43), requiring consular officers abroad to make disclosures about security-related visa denials to foreign applicants who have U.S.-citizen spouses or other qualifying relatives could require the revelation of sensitive information. That could tip off transnational criminal and terrorist organizations about law-enforcement and intelligence techniques and sources, enable circumvention of measures designed to detect immigration fraud and criminality, and have a chilling effect on domestic and foreign agencies' sharing of information with the Department of State—all to the detriment of national security. Gov't Br. 42-45; see, *e.g.*, J.A. 93; see also Exec. Order No. 14,060, § 1 (Dec. 15, 2021) (describing the "direct and escalating threat" that transnational criminal organizations pose "to public health, public safety, and national security"). Such revelations could also pose safety concerns for consular officers, who may be issuing security-related denials in countries where (for instance) transnational criminal organizations may be operating with higher levels of influence, control, and legal impunity. See Exec. Order No. 14,060, § 1; J.A. 91 (noting Embassy's 2020 estimate that "up to 94% of El Salvador has some gang presence").

Respondents suggest (Br. 46) that the government may be able to withhold sensitive information under the law-enforcement privilege or state-secrets privilege. But that is what the government attempted to do in this litigation, see Pet. App. 59a & n.12; J.A. 82, 86-94, and respondents claimed that the district court's *ex parte* review of such materials constituted a due-process vio-

lation, Resp. C.A. Br. 6, 56-58; see Gov't Br. 46. Nor do respondents explain how the government is supposed to invoke such privileges and still comply with the court of appeals' newfound requirement that a further factual explanation be provided to the noncitizen's spouse within a "reasonable time" after the denial itself. Pet. App. 32a-33a; see Gov't Br. 45-46.

Preserving consular officers' authority to withhold more detailed explanations from visa applicants when appropriate does not mean that there would be no checks on arbitrary decisionmaking. State Department policy charges consular managers at each post with establishing visa-adjudication standards, ensuring that adjudications are "appropriate, fair, and uniform," and monitoring the standards' application. 9 FAM 601.4-2(a) and (b) (2023). A line officer's refusal of an immigrant visa is subject to mandatory review by the principal consular officer at the post (or a designated alternate). 22 C.F.R. 42.81(c); see 9 FAM 504.11-3(A)(2) (2022). In addition, the Department may review an immigrant-visa refusal and provide an advisory opinion to the consular officer to assist in the case's further consideration. 22 C.F.R. 42.81(d). And with exceptions for only limited circumstances, the Department requires an officer to obtain such an opinion before denying a visa on the basis of membership in certain criminal organizations, including MS-13. 9 FAM 302.5-4(B)(2)(a) and (b) (2023); see J.A. 90; see also J.A. 88 (noting that an advisory opinion about Asencio-Cordero was obtained); J.A. 97-98 (redacted advisory opinion). Moreover, the Department's pronouncements on issues of law, including the proper interpretation of the INA's inadmissibility provisions, are binding. 22 C.F.R. 42.81(d).

Judicial superintendence of those processes, in contravention of congressional judgment, is neither constitutionally required nor appropriate. To the extent the Court determines that the Fifth Amendment requires any explanation to be provided to U.S.-citizen spouses of visa applicants when visas are refused, but see pp. 5-14, *supra*, the Court should require no more than identification of the statutory inadmissibility ground.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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