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OPINION IN RELATED CASE

OPINION, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT (JUNE 23, 2023)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KRISTEN H. COLINDRES AND EDVIN A. COLINDRES JUAREZ,

Appellants,

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,

Appellees.

No. 22-5009

Appeal from the United States District Court
for the District of Columbia
(No. 1:21-cv-00348)

Before: SRINIVASAN, Chief Judge,
WALKER, Circuit Judge, and RANDOLPH,
Senior Circuit Judge.

OPINION FOR THE COURT

WALKER, Circuit Judge: Edvin Colindres Juarez applied for a visa to enter the United States. But the Government denied his application, fearing that he was part of a criminal organization.

Mr. Colindres and his wife—who is an American citizen—filed this suit to challenge that decision. But their suit faced an uphill struggle: With narrow exceptions, a court may not review the government's decision to deny a visa.

To show that their suit fits within an exception, the Colindreses point to a rule allowing American citizens to challenge visa denials that burden their constitutional rights. Mrs. Colindres says the rule applies here because denying her husband a visa interfered with her constitutional right to marriage.

The district court rejected that argument and dismissed. We affirm. Though marriage is a fundamental right, it does not include the right to live in America with one's spouse. So the right is not burdened when the government denies a spouse's visa application.

Plus, even if the exception applied, allowing us to review the Government's visa denial, Mrs. Colindres's challenge would fail on the merits. To survive judicial review, the Government need only cite a statute listing a factual basis for denying a visa. It did that here.

I. Background

Mr. Colindres was born and raised in Guatemala. He entered the United States "without inspection" when he was fourteen. *Colindres v. United States Department of State*, 575 F.Supp.3d 121, 127 (D.D.C. 2021). For more than twenty years, he made his life in America—he got a job working for a pool company, married an American citizen named Kristen, and had a daughter.

But for all that time, Mr. Colindres did not have permission to live or work in the United States. So in 2015, he decided to fix his immigration status.

To do that, he first filed an Application for Provisional Unlawful Presence Waiver. Aliens like Mr. Colindres who are "unlawfully present" in the United States for more than six months are "ineligible to receive visas and ineligible to be admitted to the United States." 8 U.S.C. § 1182(a), (a)(9)(B)(i). An Unlawful Presence Waiver allows the Attorney General to remove that obstacle. *Id.* § 1182(a)(9)(B)(v). Here, the Attorney General granted Mr. Colindres's waiver application.

Even so, the waiver did not give Mr. Colindres permission to live in the United States. To get permission, he had to successfully apply for a visa. *Id.* §§ 1181(a); 1182(a)(7).

Visa applications are adjudicated by consular officers. *Id.* §§ 1201 (authority to issue visas); 1361 (burden of proof to show visa eligibility on the alien). So in July 2019, Mr. Colindres travelled to the U.S. embassy in Guatemala for a visa interview with a consular officer.

The officer did not resolve Mr. Colindres's application at that interview. Instead, the officer asked Mr. Colindres to submit his Guatemalan criminal record. Though his record came back clean, the officer scheduled a second interview. Nearly a year later, the officer denied Mr. Colindres's visa application, finding him ineligible because "there [was] reason to believe" that he was "a member of a known criminal organization." JA 242-43 (citing 8 U.S.C. § 1182(a)(3)

(A)(ii)). That decision meant he could not return to the United States.

Mr. Colindres asked the embassy to reconsider. The embassy's Immigrant Visa Chief "reviewed the evidence" and "reconsider[ed]" the consular officer's decision. JA 248. But "he did not find any compelling new information" to justify a departure from the officer's determination. *Id.*

Unwilling to accept the embassy's decision, Mr. Colindres and his wife sued the Department of State. They asked the district court to "[d]eclare" that Mr. Colindres's visa denial was "contrary to law" and to issue an injunction directing the Government to issue him a visa. JA 257.

The district court dismissed. Though it did "not take lightly" the "hardship" that the embassy's decision had caused the Colindreses, it held that judicial review was unavailable. *Colindres*, 575 F.Supp.3d at 126. The "doctrine of consular non-reviewability" bars judicial review of most visa denials. *Id.* at 140. And though there are narrow exceptions to the doctrine, none allowed the Colindreses' suit to proceed here. *Id.*

The Colindreses appealed. We review the district court's decision to dismiss de novo. *Sanchez v. Office of State Superintendent of Education*, 45 F.4th 388, 395 (D.C. Cir. 2022). Taking as true the factual allegations in the Colindreses' complaint, we agree with the district court that they failed to state a claim. *Id.* at 393. We thus affirm.

II. Analysis

Deciding who is allowed into the United States and who is not can involve hard policy choices. Denying a

visa may "implicate" America's relationship with "foreign powers" or require evaluating "changing political and economic circumstances." *Trump v. Hawaii*, 138 S. Ct. 2392, 2418-19 (2018) (cleaned up). For that reason, "the power to exclude aliens" is "a power to be exercised exclusively by the political branches," with limited judicial review. *Kiyemba v. Obama*, 555 F.3d 1022, 1025 (D.C. Cir. 2009) (cleaned up).

Reflecting the limited role of the judiciary, the consular-non-reviewability doctrine "shields a consular official's decision to issue or withhold a visa from judicial review," with two narrow exceptions. *Baan Rao Thai Restaurant v. Pompeo*, 985 F.3d 1020, 1024-25 (D.C. Cir. 2021). The first exception applies when "a statute expressly authorizes judicial review." *Id.* at 1025 (cleaned up). That exception is not at issue here because the Colindreses have pointed to no statute that allows review. The second exception lets "an American citizen . . . challenge the exclusion of a noncitizen if it burdens the citizen's constitutional rights." *Id.* at 1024.

Even if an exception applies, judicial review is narrow. It is limited to whether the officer gave a "facially legitimate and bona fide reason" for denying a visa. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

Here, the Colindreses claim that the constitutional-rights exception lets them bring this challenge. First, because Mrs. Colindres is a citizen, they argue that the Government's visa denial burdened her "fundamental . . . marital right to live together" with her husband. JA 2. Second, they argue that, if the exception applies, they should prevail on the merits

because the Government did not give sufficient reasons for denying Mr. Colindres's visa.

We disagree with both arguments.

A. The Visa Denial Did Not Burden Mrs. Colindres's Constitutional Right to Marriage

"[M]arriage is a fundamental right." *Obergefell v. Hodges*, 576 U.S. 644, 673 (2015). But a citizen's right to marry is not impermissibly burdened when the government refuses her spouse a visa.

The right to marriage is the right to enter a legal union. *See id.* at 680-81. It does not include the right to live in America with one's spouse. Thus, in *Swartz v. Rogers*, a wife challenged her husband's deportation because it burdened her "right, upon marriage, to establish a home, create a family, [and] have the society and devotion of her husband." 254 F.2d 338, 339 (D.C. Cir. 1958). This court rejected that argument because "deportation would not in any way destroy the legal union which the marriage created. The physical conditions of the marriage may change, but the marriage continues." *Id.*; *see also Rohrbaugh v. Pompeo*, 2020 WL 2610600 (D.C. Cir. May 15, 2020) (relying on *Swartz* to reject a husband's claim that denying his wife a visa burdened his right to marriage).

True, the Supreme Court has said "the right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause."[1] *Zablocki v. Redhail*, 434 U.S. 374,

[1] Though the Supreme Court has repeatedly held that the Fourteenth Amendment's Due Process Clause (which applies to the states) protects the right to marriage, it has not squarely held

384 (1978) (cleaned up). But "constitutional protection" is not triggered "whenever a regulation in any way touches upon an aspect of the marital relationship." *Kerry v. Din*, 576 U.S. 86, 95 (2015) (plurality op.).

Instead, constitutional protection kicks in only when "this Nation's history and practice" show that a government regulation is incompatible with a fundamental liberty interest. *Id.* (cleaned up); *see also Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2248 (2022) (courts must be "guided by . . . history and tradition" when asking what liberty interests are protected by the Fourteenth Amendment).

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that the Fifth Amendment's Due Process Clause (which applies to the federal government) also protects that right. *Cf. Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 702 (D.C. Cir. 2007) (noting in dicta that the Fifth Amendment protects the right to marriage but citing only a case discussing the Fourteenth Amendment); *Kerry v. Din*, 576 U.S. 86, 108 (2015) (Breyer, J., dissenting) (arguing that the Fifth Amendment protects the right to marriage, but citing no case finding such a right under the Fifth Amendment); *see also Lewis v. Mutond*, 62 F.4th 587, 596 (D.C. Cir. 2023) (Rao, J., concurring) ("there are reasons to reconsider whether the personal jurisdiction limits required by the Due Process Clause of the Fifth Amendment are identical to those of the Fourteenth").

Because the Fifth and Fourteenth Amendments—enacted seventy-seven years apart—could have been subject to different "public understanding[s]" at their respective moments of ratification, they may protect different unenumerated rights. *See New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022). Here, the parties did not address whether the Fifth Amendment protects marriage to the same extent as the Fourteenth Amendment. So we assume without deciding that it does. We thus rely on the Supreme Court's Fourteenth Amendment caselaw here, even though Mrs. Colindres's claim arises under the Fifth Amendment.

Here, history and practice cut against Mrs. Colindres's claim that she has a "marital right" to live in America with her husband. JA 2. To paraphrase Justice Scalia's plurality opinion in *Kerry v. Din*, "a long practice of regulating spousal immigration precludes [Mrs. Colindres's] claim that the denial of [Mr. Colindres's] visa application has deprived her of a fundamental liberty interest." 576 U.S. at 95.

From the Founding, the government has had discretion to control entry into the United States. Consider the debates around the Alien Act of 1798. The Act gave the President unfettered discretion to remove "all such aliens as he shall judge dangerous to the peace and safety of the United States." Ch. 58, 1 Stat. 570 (1798).

Though the Act's constitutionality was vigorously debated, its supporters and detractors agreed that the government had discretion to control aliens' entry into the United States—even though they disagreed about which government should wield that power. Supporters argued that the immigration power was federal. George Keith Taylor thus cited Blackstone to show that "by the law of nations, it is left in the power of all states to take such measures about the admission of strangers as they think convenient." Debate on the Virginia Resolutions, *reprinted in The Virginia Report of 1799-1800*, at 31 (1850). For their part, opponents contended that "the power to admit, or to exclude alien[s]" was left "to each individual state." 8 Annals of Cong. 1955 (1798) (Statement of Rep. A. Gallatin). But even James Madison—one of the Act's strongest critics—recognized that some government must have the power to control entry into the United States. James Madison, Report of 1800 (Jan. 7, 1800).

He "allow[ed] the truth" of the notion that the "discretionary power" to admit aliens "into the country [is] of favor [and] not of right." *Id.*

Of course, the Supreme Court eventually held that the power to control immigration was federal. *See Head Money Cases*, 112 U.S. 580 (1884). And when Congress enacted immigration legislation, it generally did not carve out exceptions for spouses.

For example, the Page Act of 1875 gave "consol[s]" at ports in Asia discretion to deny permission to come to the United States to any immigrant who "ha[d] entered into a contract or agreement for a term of service within the United States[] for lewd and immoral purposes." Ch. 141 § 1, 18 Stat. 477, 477-78. Though the Act was designed to stop prostitutes emigrating, consuls unfortunately treated it as a "general restriction of Chinese female immigration." George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875-1882*, 6 J. Am. Ethnic Hist. 28, 42 (1986). As a result, the Act "made the immigration of Chinese wives extremely difficult." *Id.* Our point is not to endorse the Act's policy or application, but simply to note that the Act did not include an exception for spouses and made no provision for judicial review of consuls' decisions. Ch. 141 § 1, 18 Stat. 477, 477-78.

Immigration statutes passed in the decades following the Page Act likewise limited spousal immigration. Take the Immigration Act of 1882. It required the Treasury Secretary to "examine" aliens arriving at United States ports and to deny "permi[ssion] to land" to "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." Ch. 376 § 2, 22 Stat.

214. And the Act contained no exceptions for citizens' spouses. *See also* Immigration Act of 1891, Ch. 551 § 1, 26 Stat. 1084 (expanding grounds of inadmissibility and allowing only administrative review).

Similarly, when Congress started to impose numerical limits on immigration in 1921, those limits applied to citizens' spouses. The Emergency Quota Act of 1921 put a cap on the number of immigrants who could come to the United States each year. Ch. 8 § 2, 42 Stat. 5, 6. Though it gave preferred status to citizens' wives (but not husbands), it did not guarantee them a quota spot. *Id.* "In other words, a citizen could move his spouse forward in the line, but once all the quota spots were filled for the year, the spouse was barred without exception." *Din*, 576 U.S. at 97.

To sum up, from early federal immigration legislation to today, Congress has sometimes limited spousal immigration. To be sure, on other occasions, Congress has facilitated citizens bringing their spouses to America. *See, e.g.*, War Brides Act of 1945, 59 Stat. 659. But Congress's "long practice of regulating spousal immigration" confirms that citizens have no fundamental right to live in America with their spouses. *Din*, 576 U.S. at 95.

Because the Colindreses cannot show that the Government's visa denial burdened Mrs. Colindres's fundamental rights, their suit does not fall within the constitutional-rights exception to the consular-nonreviewability doctrine. *See Baan Rao Thai Restaurant*, 985 F.3d at 1024-25.[2]

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[2] Our conclusion is consistent with *Kleindienst v. Mandel*, 408 U.S. 753 (1972). *Cf.* Concurring Op. 1-2. There, the Supreme Court said that an American professor's First Amendment "right to

B. Even If the Visa Denial Is Reviewable, the Government Met Its Burden

Even if the Colindreses could get judicial review, their claim would fail on the merits.

When the constitutional-rights exception to the consular-non-reviewability doctrine applies, judicial review is "deferential." *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018). Courts ask only whether the government has given "a facially legitimate and bona fide reason" for denying a visa. *Mandel*, 408 U.S. at 770.

That requirement is easy to satisfy. It "mean[s] that the [g]overnment need provide only a statutory citation to explain a visa denial." *Hawaii*, 138 S. Ct. at 2419. Citing a statutory provision that "specifies discrete factual predicates the consular officer must find to exist before denying a visa" is enough. *Din*, 576

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receive information" was "implicated" when the government denied a visa to a Marxist who was due to speak at the professor's university. *Mandel*, 408 U.S. at 764-65. But because the government had adequately explained its visa denial, the Court expressly refused to decide what the First Amendment requires in that context. *Id.* at 770 ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case."). So it may be that the government does not violate the First Amendment when it denies a visa for no reason at all. That is important because the first step in the consular-non-reviewability doctrine is satisfied only if a citizen's rights are "burden[ed]." *Baan Rao Thai Restaurant*, 985 F.3d at 1024-25. Regardless, we need not tackle that question today because the Colindreses do not argue that Mrs. Colindres's First Amendment right to "sustained, face-to-face interaction" with her husband is implicated by the government's visa denial. Concurring Op. 2.

U.S. at 105 (Kennedy, J. concurring). And even if the government fails to cite such a statute, it may still meet its burden by "disclos[ing] the facts motivating [its] decision." *Id.*; *see also Mandel*, 408 U.S. at 769.

Here, the consular officer's decision to deny Mr. Colindres's visa satisfies that standard. The officer refused Mr. Colindres's visa application under 8 U.S.C. § 1182(a)(3)(A)(ii). That provision specifies a factual predicate for denying a visa: The alien must "seek[] to enter the United States to engage . . . [in] unlawful activity." 8 U.S.C. § 1182(a)(3)(A)(ii). And the officer explained why that provision was satisfied here: There was "reason to believe [Mr. Colindres] is a member of a known criminal organization." JA 7-8. That was all the officer was required to do.

To be sure, § 1182(a)(3)(A)(ii) "does not specify the type of lawbreaking that will trigger a visa denial." *Munoz v. Department of State*, 50 F.4th 906, 917 (9th Cir. 2022) (holding that § 1182 does not contain discrete factual predicates). But that level of specificity is not required. In *Din*, Justice Kennedy said that a provision making terrorists inadmissible was detailed enough. *Din*, 576 U.S. at 105 (Kennedy, J., concurring) (citing § 1182(a)(3)(B)). And that provision is written in the same general terms as the provision at issue here. *Compare* § 1182(a)(3)(B)(i)(II) (an alien is inadmissible if "a consular officer . . . has reasonable ground to believe" that the alien "is engaged in or is likely to engage after entry in any terrorist activity"), *with* § 1182(a)(3)(A)(ii) (an alien is inadmissible if "a consular officer . . . has reasonable ground to believe[] [that the alien] seeks to enter the United States to engage . . . [in] unlawful activity").

Thus, here, as in *Din*, the Government's statutory "citation . . . indicates it relied upon a bona fide factual basis for denying" Mr. Colindres's request for a visa. *Din*, 576 U.S. at 105 (Kennedy, J., concurring).

As a fallback, the Colindreses assert that the Government's visa denial was in "bad faith" because its stated reasons for denying the visa were "pretextual" and "not based on the . . . merits." Colindres Br. 51-53. True, an "affirmative showing of bad faith on the part of the consular officer" can demonstrate the government failed to give a "bona fide" reason for its actions. *Din*, 576 U.S. at 105-106 (Kennedy, J. concurring). But because courts "presume" that "public officers" have "properly discharged their official duties," a litigant must provide "clear evidence" of bad faith. *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

The Colindreses do not do that here. Instead, they point to evidence in the record—Mr. Colindres's clean criminal history and his lack of gang tattoos, for example—that they say undercuts the Government's decision. Colindres Br. 51-52. But disagreeing with the Government's decision to discount that evidence falls well short of the kind of clear showing necessary to establish bad faith. *Cf. NRDC. v. SEC*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979) (giving examples of evidence sufficient to rebut the presumption of agency regularity); *Hartman v. Moore*, 547 U.S. 250, 264 (2006) (the similar presumption of prosecutorial regularity can be rebutted when a prosecutor admits to improper "retaliatory thinking" or "rubber stamp[ing]" decisions).

The Colindreses' challenge thus fails on the merits. The Government met its burden by giving a facially

legitimate and bona fide reason for denying Mr. Colindres a visa.

C. The Colindreses' Other Arguments are Not Properly Before the Court

The Colindreses raise two other arguments to challenge the Government's visa denial, but neither is properly before us.

First, the Colindreses assert that the statute under which Mr. Colindres was denied a visa is unconstitutionally vague. *See* 8 U.S.C. § 1182(a)(3)(A)(ii); Colindres Br. 36. But the district court held that they forfeited that argument by "failing to address it" in their opposition to the Government's motion to dismiss. *Colindres v. United States*, 575 F.Supp.3d 121, 130 (D.D.C. 2021). Because the district court did not abuse its discretion by finding forfeiture, we may not address the Colindreses' vagueness argument now. *See Texas v. United States*, 798 F.3d 1108, 1110, 1114-15 (D.C. Cir. 2015) (this Court has "yet to find" that a district court's application of the failure-to-respond forfeiture rule was an abuse of discretion (cleaned up)).

Second, the Colindreses contend that the visa denial violated the Equal Protection Clause. But they forfeited that argument by raising it in a single-sentence footnote of their appellate brief. Colindres Br. 47, n.5; *see also CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) ("hiding an argument" in a footnote "and then articulating it in only a conclusory fashion" is "forfeiture").

* * *

To get judicial review, the Colindreses must show that the Government's decision to deny Mr. Colindres a visa burdened Mrs. Colindres's constitutional rights. They cannot do that here.

And even if they could, the Government would win on the merits. To survive judicial review, it need only cite a statute listing a factual basis for denying a visa. It did that here.

OPINION BY JUSTICE SRINIVASAN CONCURRING IN PART AND CONCURRING IN THE JUDGMENT (JUNE 23, 2023)

SRINIVASAN, Chief Judge, concurring in part and concurring in the judgment: The court today affirms the dismissal of the Colindreses' complaint, and I agree with that ultimate disposition. I also join Part II.C of the court's opinion, which concludes that the Colindreses' unconstitutional vagueness and equal protection challenges are not properly before us. And I join the portion of Part II.B of the opinion that rejects the Colindreses' claim that the government acted in bad faith in denying Mr. Colindres Juarez a visa. *See* Maj. Op. 12. Respectfully, however, I do not join the remainder of Part II.B or Part II.A of the court's opinion, which address the Colindreses' procedural due process challenge.

In Part II.A, my colleagues hold that a person's fundamental constitutional right to marriage does not include any protected liberty interest in living in the United States with her spouse. And because there is no protected interest to which due process protections apply, there is no need to apply any due process scrutiny, even a relaxed form of review. On that view, the government could deny an American citizen's spouse a visa to reenter the country—thus depriving the citizen of the company of her spouse in the country ever again—without any explanation and for a wholly arbitrary reason, and that result would not implicate the fundamental right to marriage so as to trigger due process scrutiny. To be sure, as my colleagues note, our court issued a decision 65 years ago holding that

the deportation of a citizen's spouse did not violate the citizen's right to marriage. *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958). But insofar as that decision rested on the notion that the right to marriage does not include any protected interest in living in the country with one's spouse, we have had no occasion to reassess the issue afresh in the intervening decades.

The Supreme Court has since "acknowledged," though, that when a foreign scholar is denied admission into the country to speak at a conference, an American professor's constitutional "right to receive information" is "implicated," such that some form of constitutional scrutiny applies. *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (quotation marks omitted) (quoting and discussing *Kleindienst v. Mandel*, 408 U.S. 753, 764-65 (1972)). (To the extent my colleagues mean to question whether any scrutiny in fact applies on those facts, *i.e.*, the facts of *Mandel* (Maj. Op. 10 n.2), I understand *Trump v. Hawaii* to confirm that "limited" scrutiny does apply in that situation, 138 S. Ct. at 2419—after all, presumably some manner of constitutional scrutiny applies when a constitutional right is "implicated," *id.*) In the Court's view, American professors have a cognizable right-to-information interest in a foreign scholar's "physical presence" in the country to enable "sustained, face-to-face" interaction with the scholar. *Mandel*, 408 U.S. at 765. My colleagues conclude today, however, that an American citizen has no cognizable right-to-marriage interest in her husband's physical presence in the country to enable sustained, face-to-face interaction with her husband. The upshot is that, whereas the denial of a visa to a foreign scholar triggers at least some due process scrutiny because of an American scholar's

right to receive information, the denial of a visa to a foreign spouse triggers no due process scrutiny at all despite the American spouse's right to marriage.

Notably, when the Supreme Court recently considered the same issue in *Kerry v. Din*, 576 U.S. 86 (2015), a majority of the Court either assumed or concluded that the right to marriage includes a protected interest in living with one's spouse in the country. *Id.* at 102 (Kennedy, J., joined by Alito, J., concurring in the judgment); *id.* at 107-10 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting). In deciding to the contrary, my colleagues rely on the plurality opinion in *Din* joined by three Justices. *See id.* at 88-101 (plurality opinion). But the remaining six Justices expressly declined to join the plurality's resolution of the issue. *Id.* at 102 (Kennedy, J., concurring in the judgment); *id.* at 107 (Breyer, J., dissenting). And in fact, of the Justices who reached the merits of the question, more concluded that an American citizen possesses a cognizable liberty interest in her spouse's physical presence in the country than concluded otherwise. *Compare id.* at 107 (Breyer, J., dissenting), *with id.* at 88 (plurality opinion). The issue then remains an unsettled one in the Supreme Court.

There is no need for us to take up the merits of that constitutional question anew in this case, and I would refrain from doing so. Rather, we can rest our decision solely on the ground my colleagues address in Part II.B of the court's opinion—*i.e.*, that even assuming Mrs. Colindres's fundamental right to marriage includes a protected interest in living in the country with her husband, such that at least some form of due process scrutiny applies, the government's

denial of a visa to him afforded her adequate process. That is precisely how the controlling opinion in *Din* resolved that case. *Id.* at 102 (Kennedy, J., concurring in the judgment). I would follow the same course here.

That brings me to Part II.B of the court's opinion. While I agree with my colleagues' conclusion in that Part that the government provided whatever process may have been due in this case, my route for reaching that conclusion differs in part. As my colleagues explain (Maj. Op. 10), the question is whether the government gave "a facially legitimate and bona fide reason" for denying Mr. Colindres Juarez a visa. *Mandel*, 408 U.S. at 770; *see Din*, 576 U.S. at 103-04 (Kennedy, J., concurring in the judgment). The government's citation of an applicable admissibility statute as its basis for denying a visa establishes that the reason for its denial is "facially legitimate," as it "show[s] that the denial rested on a determination that [the applicant] did not satisfy the statute's requirements." *Din*, 576 U.S. at 104-05 (Kennedy, J., concurring in the judgment). Such a statutory reference can also show that the government "relied upon a bona fide" reason, if the statute "specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Id.* at 105.

In the event the statute speaks in sufficiently broad terms that it does not itself "specif[y] discrete factual predicates" for denying a visa, the government can still satisfy due process by "disclos[ing] the facts motivating [its] decision to deny" the visa under the statute. *Id.* In *Mandel*, for instance, the relevant statute was framed in highly general terms that "granted the Attorney General nearly unbridled discretion," but the government's disclosure of the

underlying "facts motivating [its] decision" under the statute—viz., "Mandel's abuse of past visas"—satisfied due process. *Id.* at 103, 105. Disclosure of such facts shows a "bona fide" basis for denying a visa by conveying why the government believes a broadly framed statute applies in a particular case. *See id.* at 105.

In this case, the statute under which the government denied Mr. Colindres Juarez a visa is 8 U.S.C. § 1182(a)(3)(A)(ii), which renders inadmissible "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . unlawful activity." My colleagues believe that statute specifies a sufficiently discrete factual predicate such that citation of that statute alone is enough to satisfy due process. The Ninth Circuit has held to the contrary, concluding that, when the government denies a visa under that provision, it must disclose a more discrete factual predicate conveying why the government believes the statute applies in the specific case. *See Muñoz v. U.S. Dep't of State*, 50 F.4th 906, 917-18 & n.27 (9th Cir. 2022).

I might well side with my colleagues if it were necessary to decide the issue, but we generally "avoid creating circuit splits when possible." *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1201 (D.C. Cir. 2005). And here, the government did more than just cite section 1182(a)(3)(A)(ii) in explaining the basis for its visa denial. It also related why it was denying a visa under that section: because it had "reason to believe [Mr. Colindres Juarez] is a member of a known criminal organization." Compl. ¶ 37, J.A. 242-43.

Under *Din* and *Mandel*, disclosure of that discrete factual predicate, together with citing the statute, shows a bona fide basis for the denial so as to satisfy due process. I would affirm the dismissal of the Colindreses' due process claim on that ground.

MEMORANDUM OPINION, U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (DECEMBER 14, 2021)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KRISTEN H. COLINDRES, ET AL.,

Plaintiffs,

v.

U.S. DEPARTMENT OF STATE, ET AL.,

Defendants.

Case No. 21-cv-348 (GMH)

Before: G. Michael HARVEY,
United States Magistrate Judge.

MEMORANDUM OPINION

Plaintiffs are a long-married couple with a young daughter who lived together in the United States for more than thirteen years. Plaintiff Kristen H. Colindres is a United States citizen. Her spouse, Plaintiff Edvin A. Colindres Juarez ("Colindres Juarez"), is a citizen of Guatemala who, after returning to his native country for a consular interview—one of the final steps in procuring a U.S. immigrant visa—was denied such a visa by the United States Embassy in Guatemala City on the basis that there is a reasonable ground to believe he seeks to enter the United States to

engage in unlawful activity. *See* 8 U.S.C. § 1182(a)(3)(A)(ii).[1] Plaintiffs' primary argument is that the decision denying Colindres Juarez a visa violates their Fifth Amendment right to "[f]reedom of personal choice in matters of marriage and family life" because it was not based on a facially legitimate and bona fide reason (ECF No. 2, ¶¶ 40-45), although they also assert some additional constitutional and statutory claims. In response, Defendants—the Department of State, the Secretary of State, and the Consul General of the United States in Guatemala City (collectively, "Defendants" or the "government") contend that the bulk of Plaintiffs' claims either fail under the doctrine of "consular non-reviewability" or, at the very least, cannot survive the constricted judicial review permitted when there is a plausible claim that the consular decision violated a plaintiff's constitutional rights.

The Court does not take lightly the allegations of hardship that a consular official's decision to deny Colindres Juarez a visa has worked upon Plaintiffs and their child. However, the outcome here is largely dictated by controlling Supreme Court and D.C. Circuit precedent. Defendants' motion to dismiss must therefore be granted.[2]

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[1] The provision under which Colindres Juarez has been deemed inadmissible is also known as Section 212(a)(3)(A)(ii) of the Immigration and Nationality Act ("INA").

[2] The docket entries relevant to the resolution of this motion are (1) Plaintiffs' operative complaint and its exhibits (ECF Nos. 1-2); (2) Defendants' motion to dismiss (ECF No. 10); (3) Plaintiffs' opposition to the motion to dismiss (ECF No. 16); and (4) Defendants' reply in further support of their motion (ECF No.

I. Background

According to the complaint,[3] Colindres Juarez, a Guatemalan citizen born in 1980, was raised in Guatemala until he was fourteen years old, when he entered the United States "without inspection" and moved to New York City to live with family. ECF No. 2, ¶¶ 4, 15-17; ECF No. 1-1 at 2. A few years later, he relocated to Jacksonville, Florida. ECF No. 2, ¶ 17. In December 2006, he married Colindres, who is a United States citizen. *Id.*, ¶¶ 19, 22. They have a daughter who was born in 2008. *Id.*, ¶ 23.

In March 2015, Colindres filed with the U.S. Citizenship and Immigration Service ("USCIS") a Form I-130 for the benefit of her husband, which is the first step in the process of "helping an eligible relative apply to immigrate to the United States and get [a] Green Card." *Id.*, ¶ 24; *I-130, Petition for Alien Relative* (Nov. 24, 2021), https://www.uscis.gov/i-130. That petition was approved in August 2015. ECF No. 2, ¶ 25. In May 2018, Colindres Juarez filed with USCIS a Form I-601A requesting a "provisional waiver of the unlawful presence grounds of inadmissibility" under the INA "before departing the United States to appear at a U.S. Embassy or Consulate for an

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20). Page numbers cited herein are those assigned by the Court's CM/ECF system.

[3] Plaintiffs first filed their complaint and accompanying exhibits on February 8, 2021 (ECF No. 1), but it was rejected by the Clerk of Court for failure to comply with Local Civil Rule 5.1(c)(1), which requires the caption of a complaint to include the full address of each party. Notice of Error (Feb. 9, 2021); *see also* LCvR 5.1(c)(1). Plaintiffs then filed a compliant copy of the complaint (minus the attachments) as directed by the Clerk's Office. ECF No. 2.

immigration visa interview." *Id.*, 1 26; *I-160A, Application for Provisional Unlawful Presence Waiver* (Oct. 18, 2021), https://www.uscis.gov/i-601a. Colindres thereafter submitted to fingerprinting for the purposes of background checks, including a criminal history check against the records of the Federal Bureau of Investigation. ECF No. 2, 1 27. USCIS approved his provisional waiver application in January 2019. *Id.*, 1 28. In April 2019, Colindres Juarez filed with the Department of State a Form DS-260, Immigrant Visa and Alien Registration Application; he paid all required fees, submitted all required additional forms, and responded to all requests for evidence by the National Visa Center. *Id.*, 11 29-30.

In June 2019, Colindres Juarez traveled to Guatemala for the purposes of his consular interview, which was held in early July 2019. *Id.*, 11 30-31. Pursuant to the embassy's request, he submitted his criminal record file from the Public Ministry of Guatemala, which was clean. *Id.*, 11 32, 34-35. He attended a follow-up interview on August 8, 2019. *Id.*, 1 33; ECF No. 1-1 at 83. His counsel inquired about the status of his application repeatedly during the following months. ECF No. 2, 1 36. At the end of April 2020, his counsel sought assistance from the Office of the Legal Advisor for Consular Affairs,[4] noting that Colindres Juarez had been "stuck in Guatemala for nine months

[4] Specifically, Plaintiffs' counsel sent an email to LegalNet@State.gov, a "dedicated email channel" through which "applicants and their representatives of record may pose legal questions regarding pending or recently completed visa cases." 9 Foreign Affairs Manual §§ 103.4-1, 103.4-2, *available at* https://fam.state.gov/fam/09FAM/09FAM010304. html (last visited Dec. 14, 2021); *see also* ECF No. 1-1 at 70.

due to administrative processing" of his visa application and indicating that the hold-up might be "due to a tattoo that an adjudicating officer found suspicious." ECF No. 1-1 at 70. On May 6, 2020, the embassy informed Colindres that her husband had been "formally refused a visa under section 212(a)(3)(A)(ii) of the [INA] as an alien for whom there is reason to believe is a member of a known criminal organization." ECF No. 2, ¶ 37; *see also* ECF No. 1-1 at 68.

Plaintiffs sought reconsideration of the decision denying Colindres Juarez an immigrant visa from the Immigrant Visa Section of the U.S. Embassy in Guatemala in September 2020. ECF No. 1-1. That application included letters of support from numerous members of his family—his wife, his daughter, his mother-and father-in-law, and various aunts, uncles and cousins, including the aunt and uncle who served as guardians for him when he came to the United States (*id.* at 97-100, 104-06, 108-09, 111, 113, 114-21, 123-24, 176-78, 192); family friends, one of whom had known him since high school (*id.* at 95-96, 101-03, 122, 125, 138-39); co-workers (*id.* at 126-136); and his priest (*id.* at 94). It also included a submission asserting that none of his tattoos were gang-related and explaining the meaning of each of them (*id.* at 141-52) and a series of photographs of him with his wife and child (*id.* at 154-72). Plaintiffs' counsel contacted the embassy for an update at the end of November 2020 and was informed that Colindres Juarez's "case [had] been given to the new arrived Immigrant Visa Chief who [would] review it in the coming weeks." ECF No. 1-2 at 2. The request for reconsideration was denied in December 2020. *Id.* at 4.

In February 2021, Plaintiffs filed their complaint in this Court. It alleges that "[t]he Embassy's refusal of [] Colindres Juarez's request for an immigrant visa . . . implicates fundamental constitutional rights," particularly the "[f]reedom of personal choice in matters of marriage and family life" guaranteed to U.S. citizens. ECF No. 2, ¶¶ 42, 45. Based on that "straightforward notion" (*id.*, ¶ 44 (internal quotation marks omitted)), Plaintiffs allege that the government has violated the constitutionally protected rights to substantive due process; procedural due process; equal protection of the laws; and freedom speech, expression, and association. *Id.*, ¶¶ 86-108. They further contend that the decision denying Colindres Juarez a visa was neither facially legitimate nor bona fide, as required by Constitution, but rather made in bad faith; that the decision violates the INA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*; and that the provision pursuant to which Colindres Juarez was deemed inadmissible—8 U.S.C. § 1182(a)(3)(A)(ii), which states that an alien is ineligible for a visa if he or she seeks to enter the United States "to engage solely, principally, or incidentally" in "unlawful activity"—is unconstitutionally vague. *Id.*, *11* 109-141.

The government moved to dismiss the complaint, contending that because Plaintiffs have not plausibly alleged a constitutional violation, the doctrine of consular non-reviewability prohibits judicial review of the decision; that, even if they had plausibly alleged a constitutional violation, the decision was facially legitimate and bona fide, and thus satisfies the limited judicial review allowed of visa denials that burden a constitutional right; that Plaintiffs' statutory claims fail; and that the provision of the INA under

which Colindres Juarez was deemed inadmissible is not unconstitutionally vague. ECF No. 10.

II. Legal Standard

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of a complaint on the basis that it fails to state a claim upon which relief can be granted.[5] Fed. R. Civ. P. 12(b)(6). A court reviewing a 12(b)(6) motion must accept as true the well-pleaded factual allegations contained in the complaint, *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009), and construe those allegations "in the light most favorable to the plaintiff[]," *Vick v. Brennan*, 172 F. Supp. 3d 285, 295 (D.D.C. 2016). While the plaintiff need not make "detailed factual allegations" to avoid dismissal, he or she must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 555 (2007). Rather, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). To meet this standard, the plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In addition to the allegations of the complaint, a court evaluating a motion under Rule 12 (b)(6) may also consider "any documents either

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[5] The D.C. Circuit recently confirmed that a "[d]ismissal based on consular nonreviewability [] is a merits disposition under Federal Rule of Civil Procedure 12(b)(6)," rather than a dismissal for lack of jurisdiction pursuant to Rule 12(b)(1). *Baan Rao Thai Rest. v. Pompeo*, 985 F.3d 1020, 1027 (D.C. Cir. 2021).

attached to or incorporated in the complaint[] and matters of which [the court] may take judicial notice." *Yasaturo v. Peterka*, 177 F. Supp. 3d 509, 511 (D.D.C. 2016) (second alteration in original) (quoting *Equal Emp't Opportunity Comm'n v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)). More, when it is clear that "the facts alleged in a [claim] would not entitle the plaintiff to relief, a court may dismiss those claims *sua sponte*," *James v. District of Columbia*, 869 F. Supp. 2d 119, 122 (D.D.C. 2012), even if the defendant fails to address that claim in its briefing, *see Singh v. District of Columbia*, 881 F. Supp. 2d 76, 87 n.4 (D.D.C. 2012).

III. Discussion

A. Vagueness

Before analyzing whether the consular non-reviewability doctrine insulates the decision at issue, the Court addresses Plaintiffs' allegation that the statutory provision under which Colindres Juarez was denied entry—8 U.S.C. § 1182(a)(3)(A)(ii)—is unconstitutionally vague. ECF No. 2, ¶¶ 138-141. That subsection provides that "[a]ny alien who a consular official or the Attorney General knows, or has reasonable grounds to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity" is ineligible to receive a visa. 8 U.S.C. § 1182(a)(3)(A)(ii).

The government moves to dismiss this claim, citing *Boutilier v. INS*, 387 U.S. 118 (1967). In that case, the Supreme Court rejected a vagueness challenge to a statutory provision that made those "afflicted with psychopathic personality"—a "term of art intended to

exclude homosexuals from entry into the United States"—excludable and therefore authorized the deportation of the appellant. *Id.* at 118-19. The Court asserted that "[t]he constitutional requirement of fair warning has no applicability to standards such as are laid down in [that provision] for admission of aliens to the United States. It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Id.* at 123 (citing The Chinese Exclusion Case, *Ping v. United States*, 130 U.S. 581 (1889)). *Boutilier* (along with The Chinese Exclusion Case on which it relies) has rightfully been criticized as "condon[ing] . . . the most blatant discrimination." *Tineo v. Att'y Gen. of the U.S.*, 937 F.3d 200, 216-17 (3d Cir. 2019). And, indeed, "while continuing to recognize the broad deference owed to Congress in immigration matters, the Supreme Court has in recent years curtailed the plenary-power doctrine's excesses," recognizing that the doctrine "is subject to important constitutional limitations." *Id.* at 217 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001)) (first citing *Sessions v. Morales-Santana*, __ U.S. __, __, 137 S. Ct. 1678, 1693-94 (2017), and then citing *INS v. Chadha*, 462 U.S. 919, 940-41 (1983)); *see also Sessions v. Dimaya*, __ U.S. __, __, 138 S. Ct. 1204, 1213 (2018) (applying the "most exacting vagueness standard" to a provision of the INA). The government's decision to rest its four-sentence argument in favor of dismissal of Plaintiffs' vagueness challenge entirely on the quoted language from *Boutillier* is of questionable merit. *See* ECF No. 10-1 at 17-18. Nevertheless, Plaintiffs' vagueness challenge does not succeed for two independent reasons.

First, Plaintiffs have conceded the government's argument that section 1182(a)(3)(A)(ii) is not impermissibly vague by failing to address it in their opposition. *See, e.g.*, *Bautista-Rosario v. Mnuchin*, __ F. Supp. 3d __, __, 2021 WL 4306093, at *5 (D.D.C. 2021) ("[W]hen a plaintiff files a response to a motion to dismiss but fails to address certain arguments made by the defendant, the court may treat those arguments as conceded." (alteration in original) (quoting *Lockhart v. Coastal Int'l Sec., Inc.*, 905 F. Supp. 2d 105, 118 (D.D.C. 2012))); *Wash. Alliance of Tech. Workers v. Dep't of Homeland Sec.*, 518 F. Supp. 3d 448, 459 n.4 (D.D.C. 2021) (same).

Second, the vagueness challenge fails on the merits. "The void-for-vagueness doctrine 'guarantees that ordinary people have "fair notice" of the conduct a statute proscribes.'" *Muñoz v. Dep't of State*, 526 F. Supp. 3d 709, 723 (C.D. Cal. 2021) (quoting *Dimaya*, __ U.S. at __, 138 S. Ct. at 1212), *appeal filed*, No. 21-55365 (9th Cir. Apr. 16, 2021). "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). A statute threatens First Amendment interests if the conduct it prohibits "implicate[s] First Amendment considerations." *United States v. Kanchanalak*, 192 F.3d 1037, 1041 n.6 (D.C. Cir. 1999); *see also, e.g.*, *United States v. Requena*, 980 F.3d 30, 39 (2d Cir. 2020) ("[A] challenger may raise a facial challenge if the statute implicates rights protected by the First Amendment[.]"). Plaintiffs have made no argument that the provision itself, which makes ineligible for a visa a person whom the government has reason to

believe seeks entry to the United States in order to engage in criminal activity, burdens any rights guaranteed by the First Amendment.[6] Thus any facial challenge to section 1182(a)(3)(A)(ii) fails here. Nor have Plaintiffs shown that the statute is unconstitutionally vague as applied to Colindres Juarez.

A court in the Central District of California recently addressed a strikingly similar issue. The plaintiffs were a citizen of El Salvador and his U.S. citizen spouse; like Colindres Juarez, the El Salvadoran was denied an immigrant visa on the basis of Section 1182(a)(3)(A)(ii). *Munoz*, 526 F. Supp. 3d at 713-14. The couple challenged the denial of his visa asserting, among other things, that the provision was void for vagueness. *Id.* at 723-26. The District Court granted summary judgment for the government, finding that the statute was not unconstitutionally vague as applied to the plaintiffs:

> Although the language of this provision certainly could be construed to encompass innumerable grounds for ineligibility, the consular officer here did not apply the statute because [the non-citizen plaintiff] might incidentally partake in jaywalking, or any other potentially unreasonable grounds for denial of entry. Instead, the officer found

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[6] Plaintiffs have, on the other hand, attempted to raise a claim that the consular official's denial of the visa implicates their First Amendment rights. ECF No. 2, ¶¶ 106-108 (making clear that Plaintiffs challenge the allegedly unlawful denial of a visa as infringing First Amendment rights, rather than arguing that section 1182(a)(3)(A)(ii) infringes on rights guaranteed by the First Amendment). As discussed below, *infra* Section III.B.3, that claim also founders.

> [him] inadmissible under § 1182(a)(3)(A)(ii) because the officer determined that [he] was a member of MS-13, a recognized transnational criminal organization known for posing a threat to the safety and security of U.S. citizens. A person of average intelligence would reasonably understand that membership in such an organization would imply an engagement in unlawful activity, at the very least, and thus render him ineligible for entry under § 1182(a)(3)(A)(ii).

Id. at 726.

So it is here. Colindres Juarez was denied a visa under Section 1182(a)(3)(A)(ii) on the basis that there was reason to believe that he was "a member of a known criminal organization." ECF No. 2, ¶ 37; *see also* ECF No. 1-1 at 68. "[A] person of average intelligence would reasonably understand that the [identified conduct]"—being a member of a known criminal organization who would engage in criminal conduct in the United States—"is proscribed." *United States v. Singhal*, 876 F. Supp. 2d 82, 98 (D.D.C. 2012); *see also Schall v. Martin*, 467 U.S. 253, 278-79 (1984) (rejecting a challenge that a statute was unconstitutionally vague because it authorized detention based on future criminal conduct). The Court therefore rejects Plaintiffs' void-for-vagueness challenge.

B. Consular Non-Reviewability

"Consular nonreviewability shields a consular official's decision to issue or withhold a visa from judicial review, at least unless Congress says otherwise," because "such judgments 'are frequently of a character more appropriate to either the Legislature

or the Executive.'" *Baan Rao Thai Rest.*, 985 F.3d at 1024 (quoting *Trump v. Hawaii*, __ U.S. __, __, 138 S. Ct. 2392, 2418-19 (2018)). In the INA, Congress "partially delegated to the Executive its power to make rules for the admission and exclusion of noncitizens" by "grant[ing] consular officers 'exclusive authority to review applications for visas, precluding even the Secretary of State from controlling their determinations.'" *Id.* (quoting *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1156 (D.C. Cir. 1999)). Notwithstanding that broad shield, courts—including the Supreme Court—have recognized that claims that would otherwise be barred by the doctrine are subject to limited judicial review where a U.S. citizen "challenge[s] the exclusion of a noncitizen [because] it burdens the citizen's constitutional rights." *Id.*; *see, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (assessing "whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to . . . compel the Attorney General to allow Mandel's admission" to the United States). Additionally, a plaintiff may challenge a consular decision denying admission "if a 'statute expressly authoriz[es] judicial review of consular officers' actions.'" *Baan Rao Thai Rest.*, 985 F.3d at 1025 (quoting *Saavedra Bruno*, 197 F.3d at 1159). However, even where the plaintiff has made a plausible claim that the consular decision can be judicially reviewed, that review is limited to a determination of whether the consular official has "exercise[d] [that] power negatively on the basis of a facially legitimate and bona fide reason." *Mandel*, 408 U.S. at 770; *see also Kerry v. Din*, 576 U.S. 86, 104 (2015) (Kennedy, J., concurring in the judgment) ("*Mandel* held that an executive officer's decision

denying a visa that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.'" (quoting *Mandel*, 408 U.S. at 770)).

Plaintiffs' main argument here is that "the consular officer's refusal to issue [] Colindres Juarez an immigrant visa" violates Colindres' Fifth Amendment protection against deprivation of liberty without due process of law, specifically, her right to "[f]reedom of personal choice in matters of marriage and family life."[7] ECF No. 16 at 11-12. The complaint further alleges that the visa denial violates the prohibition of equal protection of the laws; infringes on Plaintiffs' rights "to free speech, expression and association" under the First Amendment; and violates both the INA and the APA. ECF No. 2, ¶¶ 98-124.

1. Due Process

The Constitution safeguards two varieties of due process rights. The guarantee of "[s]ubstantive due process 'prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational [in that] it is not sufficiently keyed to any legitimate state interests.'" *Bellinger v. Bowser*, 288 F. Supp. 3d 71, 85-86 (D.D.C. 2017) (second alteration in original) (quoting *Wash. Local Teacher's Union #6 v. Bd. of Educ. of D.C.*, 109 F.3d 774, 781 (D.C. Cir. 1997)). "To succeed on a substantive due

[7] "[A]s a foreign national residing outside of the United States, [Colindres Juarez] does not have constitutional rights implicated by the denial of [his] visa." *Rohrbaugh v. Pompeo*, 394 F. Supp. 3d 128, 132 (D.D.C. 2019) (collecting cases), *aff'd*, No. 19-5263, 2020 WL 2610600 (D.C. Cir. May 15, 2020) (per curiam).

process claim, a plaintiff must prove 'egregious government misconduct' that deprives [her] of a liberty or property interest." *Id.* at 85 (quoting *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003)). "A procedural due process violation occurs when an official deprives an individual of a liberty or property interest without providing appropriate procedural protections." *Atherton*, 567 F.3d at 689. Both types of due process violations require, "[a]s a threshold matter," an allegation that the plaintiff has been "deprived of a fundamental right or liberty or property interest." *Toms v. Office of the Architect of the Capitol*, 650 F. Supp. 2d 11, 25 n.11 (D.D.C. 2009) (addressing substantive due process claims); *Rangel v. Boehner*, 20 F. Supp. 3d 148, 166 (D.D.C. 2013) ("It is the deprivation of a liberty or property interest [] that triggers procedural due process requirements. . . . "); *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'liberty' or 'property.'"). Plaintiffs' allegations here do not clear that initial hurdle.

In *Swartz v. Rogers*, the D.C. Circuit addressed a claim that a wife's due process rights under the Fifth Amendment prevented the deportation of her husband. 254 F.2d 338, 339 (D.C. Cir. 1958). She argued "that the due process clause gave her a right, upon marriage, to establish a home, create a family, have the society and devotion of her husband, etc.; and that to deport her husband . . . would unconstitutionally destroy that marital status." *Id.* The court rejected that argument, stating:

> Certainly deportation would put burdens on

> the marriage. It would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created. The physical conditions of the marriage may change, but the marriage continues. Under these circumstances we think the wife has no constitutional right which is violated by the deportation of her husband.[8]

Id. Based on the holding in *Swartz*, numerous courts in this District have dismissed the argument raised here, that denial of an alien spouse's visa implicates

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8 A number of other Circuits have come to similar conclusions. *See, e.g.*, *Bangura v. Hansen*, 434 F.3d 487, 496 (6th Cir. 2006) ("Plaintiffs assert that the Constitution grants them a liberty interest in their marriage, and thus, that the government must give them due process before denying Mrs. Bangura a visa. While this Court recognizes that the Banguras have a fundamental right to marry, it does not agree with Plaintiffs' characterization of the nature of the government's infringement. A denial of an immediate relative visa does not infringe on their right to marry."); *Bright v. Parra*, 919 F.2d 31, 34 (5th Cir. 1990) ("United States citizen spouses have no constitutional right to have their alien spouses remain in the United States."); *Burrafato v. Dep't of State*, 523 F.2d 554, 555 (2d Cir. 1975) ("[N]o constitutional right of a citizen spouse is violated by deportation of his or her alien spouse." (citing *Swartz*, 254 F.2d 338)); *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (rejecting the plaintiffs' argument that "to allow the government to refuse [an alien spouse] the right to reside in the United States would deprive [them] of their constitutional rights" (citing *Swartz*, 254 F.2d at 339)); *cf. Bakran v. Sec'y, Dep't of Homeland Sec.*, 894 F.3d 557, 564-65 (3d Cir. 2018) (rejecting the argument that a statutory provision that barred a U.S. citizen from petitioning to adjust his foreign spouse's immigration status infringed on his constitutional rights and citing *Swartz*, 254 F.2d at 339).

the due process rights of a citizen spouse. *See, e.g.*, *Rohrbaugh*, 394 F. Supp. 3d at 133 ("Because the consular officer's decision to deny Mrs. Rohrbaugh's visa application did not interfere with Mr. Rohrbaugh's right to marry, controlling precedent establishes that he has not suffered a violation of his constitutional rights."); *Singh v. Tillerson*, 271 F. Supp. 3d 64, 71 (D.D.C. 2017) ("[W]hile the Constitution protects an individual's right to marry and the marital relationship, these constitutional rights are not implicated when a spouse is removed or denied entry to the United States." (citing *Swartz*, 254 F.2d at 339)); *Udogampola v. Jacobs*, 70 F. Supp 3d 33, 41 (D.D.C. 2014) ("[W]hile . . . the Constitution protects an individual's right to marry and the marital relationship, . . . 'these constitutional rights are not implicated when one spouse is removed or denied entry into the United States.'" (quoting *Udugampola v. Jacobs*, 795 F. Supp. 2d 96, 105 (D.D.C. 2011) (citing, among other cases, *Swartz*, 254 F.2d at 339)); *Jathoul v. Clinton*, 880 F. Supp. 2d 168, 171-72 (D.D.C. 2012) (rejecting a claim that a U.S. citizen's constitutional rights were implicated when her spouse was denied a visa and noting that the court was "bound by *Swartz* . . . , which found no violation of a wife's constitutionally protected liberty interest in her marriage when her husband was deported because deportation would not in any way destroy the legal union which the marriage created'" (quoting *Swartz*, 254 F.2d at 339)); *Mostofi v. Napolitano*, 841 F. Supp. 2d 208, 211-12 (D.D.C. 2012) (rejecting the argument that the denial of her husband's visa application violated the plaintiff's "constitutionally protected liberty interest in 'freedom of personal choice in matters of marriage and family

life'" based on, among other cases, *Swartz* (quoting the complaint)).

To be sure, in *Bustamante v. Mukasey*, the Ninth Circuit held otherwise, finding that the denial of a visa to an alien spouse implicates a citizen's "[f]reedom of personal choice in matters of marriage and family." 531 F.3d 1059, 1062 (9th Cir. 2008). That court reaffirmed the principle in its decision in *Din v. Kerry*. *See* 718 F.3d 856, 860 (9th Cir. 2013) ("In *Bustamante*, we recognized that a citizen has a protected liberty interest in marriage that entitles the citizen to review of the denial of a spouse's visa."), *vacated and remanded*, 576 U.S. 86 (2015). The Supreme Court granted *certiorari* in that case and could have settled the Circuit split. *Kerry v. Din*, 573 U.S. 990 (2014) (granting *cert.*). However, "the Court fractured and ultimately left the question unresolved." *Rohrbaugh*, 394 F. Supp. 3d at 133. A plurality of three Justices who voted to reverse the Ninth Circuit squarely asserted that the denial of an alien's visa application does not deprive a citizen spouse of any constitutionally protected interest. *Din*, 576 U.S. at 101 (Scalia, J., announcing the judgment of the court and delivering an opinion). A concurrence in the judgment of two Justices explicitly refused to address that question, voting to reverse on the ground that the government had given a "facially legitimate and bona fide reason" for the denial, and thus provided all the process that was due. *Id.* at 104-06 (Kennedy, J. concurring in the judgment); *see also id.* at 102 ("Today's disposition should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her alien spouse."). The four dissenting Justices would have found a

liberty interest in a citizen's "freedom to live together with her [spouse] in the United States" and also found that the government had not provided a facially legitimate and bona fide basis for the denial of the visa. *Id.* at 107, 113-16 (Breyer, J., dissenting). Thus, neither the Ninth Circuit's position that a citizen has the right to judicial review of a decision denying her spouse a visa nor the D.C. Circuit's contrary position garnered the support of a majority of the Justices. Therefore, "this Court is bound by Circuit precedent" to find that Plaintiffs have failed to allege the deprivation of a constitutionally protected interest. *Rohrbaugh*, 394 F. Supp. 3d at 133; *see also Zandieh v. Pompeo*, Civil Action No. 20-919, 2020 WL 4346915, at *7 (D.D.C. July 29, 2020) (stating, post-*Din*, that "courts in [this] Circuit are bound by *Swartz*"); *Singh*, 271 F. Supp. 3d at 71-72 (concluding, post-*Din*, "that the defendants' denial of Plaintiff's family members' visas did not implicate a liberty interest protected by the Fifth Amendment," relying on *Swartz*); *cf. Critical Mass Energy Project v. Nuclear Regul. Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) ("[Circuit precedent] bind[s] the circuit 'unless and until overturned by the court en banc or by Higher Authority." (quoting *Save Our Cumberland Mts., Inc. v. Hodel*, 826 F.2d 43, 54 (D.C. Cir. 1987))).[9]

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[9] It is worth noting that the D.C. Circuit has not displayed an appetite to revisit the holding of *Swartz*. Indeed, in 2020, the Circuit affirmed Judge Cooper's decision in *Rohrbaugh* relying (as did Judge Cooper) on *Swartz*. *Rohrbaugh*, 2020 WL 2610600, at *1 ("This court has previously concluded that where the 'physical conditions of the marriage may change, but the marriage continues' a U.S. citizen has 'no constitutional right which is violated by the deportation of her husband.' Thus, in the absence of a constitutionally protected interest that was violated

Because Plaintiffs have not alleged that they were deprived of a constitutionally protected liberty interest, the due process clause of the Fifth Amendment cannot be the basis for applying the exception to consular non-reviewability for the exclusion of a non-citizen that "burdens [a] citizen's constitutional rights." *Baan Rao Thai Rest.*, 985 F.3d at 1024.

2. Equal Protection

Plaintiffs' equal protection argument fares no better.

Although the Fifth Amendment does not contain an equal protection clause, its due process clause "makes the Fourteenth Amendment's guarantee of equal protection applicable to federal entities." *Kim v. Brownlee*, 344 F. Supp. 2d 758, 760-61 (D.D.C. 2004) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 204 (1995), and *Bolling v Sharpe*, 347 U.S. 497 (1954)). As noted, the operative complaint rests its constitutional claims primarily on the allegation that Colindres has a protected interest in "[f]reedom of personal choice in matters of marriage and family life." ECF No. 2, ¶ 45; *see also id.*, ¶ 43 ("United States citizens have a 'protected liberty interest in marriage

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by the consular officer's decision to deny Mrs. Rohrbaugh a visa, that decision is not subject to judicial review." (internal citation omitted) (quoting *Swartz*, 254 F.2d at 339)). To be sure, that decision is unpublished. However, it is also a summary disposition, which is appropriate only "where the merits of the appeal or petition for review are so clear that 'plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the] decision.'" *Cascade Broad. Grp. Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (quoting *Sills v. Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985)). Thus, *Swartz*'s holding remains settled law in the D.C. Circuit.

that gives rise to a right to constitutionally adequate procedures in the adjudication' of a visa application." (quoting *Bustamante*, 531 F.3d at 1062)). Those allegations have little to say about the Constitution's guarantee of equal protection.[10] In any case, courts have held that "no constitutional right of a citizen spouse is violated by deportation or denial of a visa application of his or her alien spouse." *Gogliashvili v. Holder*, No. 11-CV-01502, 2012 WL 2394820, at *5 (E.D.N.Y. June 25, 2012) (emphasis added) (citing, among other cases, *Udugampola*, 795 F. Supp. 2d at 104-06); *see also, e.g.*, *Bright*, 919 F.2d at 34 ("United States citizen spouses have no constitutional right to have their alien spouses remain in the United States." (emphasis added)); *Burrafato*, 523 F.2d at 555 ("[N]o constitutional right of a citizen spouse is violated by deportation of his or her alien spouse." (emphasis added)). If the denial of a visa to a non-citizen spouse does not infringe on any constitutional right of the citizen spouse, no equal protection claim can be made here. *See, e.g.*, *Singh*, 271 F. Supp. 3d at 71 ("[T]here is no statutory or constitutional right to familial association with a person trying to immigrate to the

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[10] Perhaps in light of this fact, the government's motion to dismiss appears to focus on Plaintiffs' due process arguments. Plaintiffs recognize, however, that the government has moved to dismiss all of their claims pursuant to the doctrine of consular non-reviewability, no matter which constitutional guarantee is allegedly offended. ECF No. 16 at 8 n.2 ("[T]he Government relies upon the doctrine of consular nonreviewability to wholesale argue Plaintiffs fail to state claims upon which relief can be granted. . . . "); *see also* ECF No. 10-1 at 11-12 (supporting the government's motion to dismiss with citations standing for the proposition that "no constitutional rights" are violated by the denial of an immigrant visa (emphasis added)); ECF No. 20 at 3-4 (same).

United States. On the contrary, various cases have shown that neither United States citizens nor lawful permanent residents have any due process or equal protection rights insofar as the deportation of their spouses or other family members." (quoting *Movimiento Democracia, Inc. v. Chertoff*, 417 F. Supp. 2d 1350, 1353 (S.D. Fla. 2006))); *see also, e.g.*, *Al Khader v. Pompeo*, No. 18-cv-1355, 2020 WL 550606, at *9 (N.D. Ill. Feb. 4, 2020) (denying leave to amend the plaintiffs' equal protection claim as "legally barred" by the doctrine of consular non-reviewability).

Even if an equal protection claim were cognizable in these circumstances, Plaintiffs have not sufficiently pleaded one. The complaint mentions equal protection only once in passing (ECF No. 2 at 1) before attempting to set out cause of action for a violation of the Fifth Amendment's guarantee with the following paragraphs:

> 98. The United States Constitution prohibits the denial of equal protection of the laws based on national origin, nationality, alienage and/or being a member of a discrete and insular minority.
>
> 99. There is no substantial justification for the Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa, which was based solely on his national origin, nationality, alienage and/or being a member of a discrete and insular minority.
>
> 100. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa is neither necessary nor the lease restrictive means to achieve any compelling purpose.

101. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa based solely on his purely aesthetic tattoos is discriminatory.

102. There is no rational relationship between the Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa based on his purely aesthetic tattoos and any legitimate state interest.

103. As a direct and proximate result of the Embassy's unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa, Plaintiffs have suffered and will continue to suffer injury.

Id., ¶¶ 98-103. Those paragraphs are a paradigmatic example of the kind of pleading the Supreme Court rejected in *Twombly* and *Iqbal*: they comprise mere "labels and conclusions," in "a formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555, devoid of "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

In fact, the claim fails even to provide an accurate or complete "recitation of the elements of [an equal protection] cause of action." *Twombly*, 550 U.S. at 555. For example, invoking the terms "national origin," "nationality," and "alienage," Plaintiffs seek application of heightened scrutiny, stating that the government's action was without "substantial justification" and was "neither necessary nor the least restrictive means to achieve any compelling purpose." ECF No. 2, ¶¶ 99-100. But that ignores the fact that "[d]istinctions on the basis of nationality may be drawn in the immigration

field by the Congress or the Executive. So long as such distinctions are not wholly irrational they must be sustained."[11] *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (internal citations omitted); *see also Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981) (rejecting an equal protection challenge because "[w]hen the government classifies aliens on the basis of nationality, the classification must be sustained if it has a rational basis"); *CASA de Md., Inc. v. Trump*, 355 F. Supp. 3d 307, 324-25 (D. Md. 2018) ("In the immigration context, a government's classifications on the basis of nationality are sensibly reviewed deferentially, as nearly all immigration policies involve some degree of classification on the basis of nationality."). The same is true of distinctions based on alienage. *See, e.g.*, *Korab v. Fink*, 797 F.3d 572, 579 (9th Cir. 2014) ("Although aliens are protected by the Due Process and Equal Protection Clauses, this protection does not prevent Congress from creating legitimate distinctions either between citizens and aliens or among categories of aliens and allocating benefits on that basis." (citing *Matthews v. Diaz*, 426 U.S. 67, 78 (1976))); *McLean v. Crabtree*, 173 F.3d 1176, 1186 n.11 (9th Cir. 1999) ("[I]n cases where federal interests predominate, judicial scrutiny of

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[11] In *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, the D.C. Circuit found that "nationality-based regulations [ran] athwart" of 8 U.S.C. § 1152 (a), which states that the government "has no authority to discriminate on the basis of national origin, except by promulgating regulations in a time of national emergency." 45 F.3d 469, 473 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). In doing so, however, the court recognized the government's power under the Constitution "to make nationality-based distinctions." *Id.* (discussing *Narenji*).

alienage classifications is relaxed to a 'rational basis' standard." (citing *Matthews*, 426 U.S. at 83)); *Abreu v. Callahan*, 971 F. Supp. 799, 810-11 (S.D.N.Y. 1997) ("[T]he level of judicial scrutiny of federal classifications involving alienage is far more deferential than that applied to the state. This difference is rooted in part in the difference in the language of the constitutional provisions applicable to the federal and state governments, respectively. It is grounded also in the national interest in regulating the circumstances in which aliens are permitted to reside in the United States, an interest which derives from uniquely federal foreign relations and war power concerns and which finds no counterpart at the state level." (footnotes omitted)). Beyond misidentifying the proper standard of review, Plaintiffs have not suggested any way in which any such distinction made in this case was "wholly irrational," *Narenji*, 617 F.2d at 747, as is their burden at this stage of the proceedings. *See, e.g.*, *Hettinga v. United States*, 677 F.3d 471, 479 (D.C. Cir. 2012) (per curiam) ("Even at the motion to dismiss stage, a plaintiff alleging an equal protection violation must plead facts that establish that there is not 'any reasonable conceivable state of facts that could provide a rational basis for the classification.'" (quoting *Dumaguin v. Sec'y of Health & Human Servs.*, 28 F.3d 1218, 1222 (D.C. Cir. 1994))).[12] Nor do they so much as hint at what "discrete and insular" minority Colindres Juarez might belong to that would invite more searching scrutiny.

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[12] To the extent that Plaintiffs attempt to make a "class of one" equal protection claim based on Colindres Juarez's tattoos, the same pleading standard applies. *See, e.g.*, *XP Vehicles, Inc. v. Dep't of Energy*, 118 F. Supp. 3d 38, 75 (D.D.C. 2015).

Furthermore, "a viable equal protection claim . . . must allege that similarly situated persons were intentionally treated differently and the facts pled must be specific." *Nurriddin v. Acosta*, 327 F. Supp. 3d 147, 160 (D.D.C. 2018) (ellipses in original) (quoting *Ramirez v. Walker*, 199 F. App'x 302, 307 (5th Cir. 2006)). The complaint fails to allege that "similarly situated persons were intentionally treated differently" and contains no facts—let alone specific facts— that would support such an inference. In short, even if it is legally permissible to state a claim for an equal protection violation arising from the denial of a spouse's visa application, Plaintiffs have failed to do so here.

In the absence of a plausible equal protection or due process claim, Plaintiffs do not fit within the exception for consular non-reviewability for decisions that burden a constitutionally protected right unless they can show a putative violation of the First Amendment.

3. First Amendment

In *Mandel*, the Supreme Court recognized that a visa denial that burdened a First Amendment right could be subject to a limited judicial inquiry into whether the decision was facially legitimate and bona fide. 408 U.S. at 770. More specifically, the plaintiffs in *Mandel* claimed that the denial of a visa to a journalist seeking to participate in an academic conference in the United States burdened their "right to receive information and ideas." *Id.* at 756-57, 762 (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)). That is, *Mandel* dealt with "[t]he right of expressive association—the freedom to associate for the purpose of engaging in activities protected by the

First Amendment, such as speech, assembly, petition for the redress of grievances, and the exercise of religion." *McCabe v. Sherrett*, 12 F.3d 1558, 1563 (11th Cir. 1994). Here, the complaint does not assert with sufficient factual particularity any violation of a right of "*expressive* association." *Id.* (emphasis added). Indeed, like their equal protection claim, the complaint's articulation of Plaintiffs' First Amendment claim is conclusory; it alleges only that "[t]he First Amendment to the United States constitution prohibits infringement upon the rights to free speech, expression, and association" and that the government's "refusal to issue Colindres Juarez an immigrant visa infringes upon and suppresses the rights of Plaintiffs to free speech, expression, and association." ECF No. 2, ¶¶ 105-106. As such, the claim provides "[no] more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action," and is dismissed on that basis. *Twombly*, 550 U.S. at 555.

At best, Plaintiffs appear to be asserting a violation of Colindres' right to intimate association—the right "encompass[ing] the personal relationships that attend the creation and sustenance of family," which some courts have grounded in the First Amendment. *McCabe*, 12 F.3d at 1563 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-20 (1984). Notably, then, Plaintiffs do not allege an infringement of "[t]he right of expressive association" that was at issue in *Mandel*. Rather, the claim is merely a rehash of Plaintiffs' due process claims concerning an infringement of their right to marry who they wish without interference from the government. *See* Section III.B.1, *supra*. Courts have held that a claim that government action burdens the right to marriage is analyzed

identically whether it has been cast as a due process right or an associational right—that is, "[t]he nominal source of th[e] right . . . does not alter [the] analysis." *Muir v. Decatur Cty.*, 917 F.3d 1050, 1053-54 (8th Cir. 2019) (final alteration added) (quoting *Singleton v. Cecil*, 133 F.3d 631, 635 (8th Cir. 1998)); *see also Montgomery v. Carr*, 101 F.3d 1117, 1131 (6th Cir. 1996) ("[S]tate action impinging on the right to marry is to be reviewed in the same fashion whether advanced on the theory that it violates substantive due process or advanced on the theory that it violates the First Amendment's right to intimate association."); *Parks v. City of Warner Robins*, 43 F.3d 609, 616 (11th Cir. 1995) (asserting that "[a]lthough the right to marry enjoys independent protection under both the First Amendment and the Due Process Clause, the Supreme Court has held that the same analysis applies in each context"). And, as noted, the D.C. Circuit has rejected the argument that a citizen spouse's constitutional rights are burdened when the government denies an alien spouse the right to live in this country. *See Swartz*, 254 F.2d at 339; *see also Mostofi*, 841 F. Supp. 2d at 209, 212 (applying the doctrine of consular non-reviewability to claims under both the First Amendment and the Fifth Amendment because the "plaintiff's constitutional rights [were] not implicated by defendants' decision to deny her alien spouse entry into the United States").

Because Plaintiffs have failed to allege "a cognizable constitutional violation on which to hang their hats," that exception to the doctrine of consular non-reviewability cannot save their complaint. *Rohrbaugh*, 394 F. Supp. 3d at 134.

4. Statutory Claims

Plaintiffs have also alleged that the denial of Colindres Juarez's visa violated their rights under the APA and the INA. As noted, generally, a statutory claim based on an adverse consular decision is also barred by the doctrine of consular non-reviewability. *See, e.g.*, *Saavedra Bruno*, 197 F.3d at 1164 ("With respect to purely statutory claims, courts have made no distinction between aliens seeking review of adverse consular decisions and the United States citizens sponsoring their admission; neither is entitled to judicial review."). However, there is also an exception where a "statute expressly authoriz[es] judicial review of consular officers' actions." *Baan Rao Thai Rest.*, 985 F.3d at 1025 (quoting *Saavedra Bruno*, 197 F.3d at 1159). The D.C. Circuit has expressly held that the APA does not authorize review of consular visa decisions. *See Saavedra Bruno*, 197 F.3d at 1158; *see also Rohrbaugh*, 394 F. Supp. 3d at 131 (stating, "The APA [] does not provide the [plaintiffs] a vehicle for judicial review" and collecting cases); *Udugampola*, 70 F. Supp. 3d at 42 n.7 ("[T]he APA does not provide the plaintiffs with a cause of action to assert a claim otherwise barred by the doctrine of consular non-reviewability."). As to the INA, Plaintiffs cite only two provisions in the operative complaint: 8 U.S.C. § 1151 (b)(2)(A)(i) and 8 U.S.C. § 1152(a)(1)(A). Section 1151 (b)(2)(A)(i) states that "immediate relatives," defined generally as "the children, spouses, and parents of a citizen," are "not subject to the worldwide levels or numerical limitations" on certain categories of immigrants set in sections 1151(c), (d), and (e).[13]

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[13] For example, section 1151(c)(1)(A) sets the "worldwide level of family-sponsored immigrants" based on a specific calculation:

Section 1152(a)(1)(A) is a non-discrimination provision stating that, "except as specifically provided" elsewhere in the statute, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." As an initial matter, the D.C. Circuit has stated, categorically, that "the immigration laws"—of which sections 1151(b)(2)(A)(i) and 1152(a)(1)(A) are indisputably a part—"preclude judicial review of consular visa decisions." *Saavedra Bruno*, 197 F.3d at 1162. Rather, section 1104(a) of the INA itself "confers on consular officers *exclusive authority* to review applications for visas, precluding even the Secretary of State from controlling their determinations." *Id.* at 1156 (emphasis added) (citing 8 U.S.C. §§ 1104(a), 1201(a)); *see also, e.g.*, *Jafari v. Pompeo*, 459 F. Supp. 3d 69, 74 (D.D.C. 2020) (stating, "The doctrine of consular non-reviewability recognizes that Congress has empowered consular officers with the exclusive authority to review a proper application for a visa when made overseas" and citing, as support, three provisions of the INA). Given those statements, it seems clear that, if a statutory provision providing for judicial review of consular visa decisions currently exists, it will not be found in the INA.

480,000 minus "the sum of the number computed under [section 1151(c)(2)] and the number computed under [section 1151(c)(4)]," plus "the number (if any) computed under [section 1151(c)(3)]," but in no event shall the number be less than 226,000. 8 U.S.C. § 1151(c)(1)(A). Similar calculations are set out for worldwide levels of employment-based immigrants and of diversity immigrants. *See* 8 U.S.C. § 1151(d), (e).

More, nothing in the INA provisions cited by Plaintiffs could be construed as meeting the stringent requirement that a statute "expressly authoriz[e] judicial review of consular officers' actions." *Saavedra Bruno*, 197 F.3d at 1159 (emphasis added). For example, in *Baan Rao Thai*, the D.C. Circuit held that a treaty between Thailand and the United States that, among other things, provided for a "'qualified right of entry' for Thai and U.S. nationals into one another's country" as well as a right to "free access to courts" did not meet that high bar, stating that "[a]lthough 'free access' to courts 'both in defense and in the pursuit of their rights' has a broad sound, it by no means overrides the longstanding limit on judicial review." 985 F.3d at 1025. Section 1152(a)(1)(A) provides even less of a hook—it simply fails to address judicial review (or even mention courts) at all.

This outcome is hardly surprising. Plaintiffs have failed to point to a single case finding statutory authorization for judicial review of a consular visa decision, and the Court has found none. *See Saavedra Bruno*, 197 F.3d at 1159-60 ("In view of the political nature of visa determinations and the lack of any statute expressly authorizing judicial review of consular officers' actions, courts have applied . . . the doctrine of consular nonreviewability." (emphasis added)); *cf., e.g.*, *Aboutalebi v. Dep't of State*, No. 19-CV-2605, 2019 WL 6894046, at *4 (D.D.C. Dec. 18, 2019) ("Aboutalebi has not pointed to any law that would permit this Court to review her visa denial."). Therefore, Plaintiffs' statutory claims shall be dismissed pursuant to the doctrine of consular non-reviewability.

* * * * *

Because Plaintiffs have not shown either that the decision denying Colindres Juarez's visa application burdened Colindres' constitutional rights or that a statute expressly authorized judicial review of the decision, the claims do not fall into any exception to the doctrine of consular non-reviewability. *See Baan Rao Thai Rest.*, 985 F.3d at 1025. It is therefore unnecessary to analyze whether Colindres Juarez's visa application was denied on the basis of a facially legitimate and bona fide reason or any allegation of bad faith. *See, e.g.*, *Rohrbaugh*, 394 F. Supp. 3d at 134 ("Thus ends this case. Without a cognizable constitutional violation [or statutory provision] on which to hang their hats, the [plaintiffs] cannot avoid the doctrine of consular non-reviewability."); *see also Polyzopoulos v. Garland*, Civil Action No. 20-0804, 2021 WL 1405883, at *6-7 (D.D.C. Apr. 14, 2021) (noting that a plaintiff must plausibly allege that the visa denial is encompassed within the exception to consular non-reviewability before a court must assess any claim of bad faith), *appeal dismissed*, No. 21-5110, 2021 WL 4768118 (D.C. Cir. Oct. 5, 2021).

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss (ECF No. 10) will be GRANTED. An order dismissing this case will be filed concurrently with this Memorandum Opinion.

/s/ G. Michael Harvey
United States Magistrate Judge

Date: December 14, 2021

ORDER DENYING PETITION FOR REHEARING, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT (JULY 14, 2023)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDRA MUNOZ;
LUIS ERNESTO ASENCIO-CORDERO,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF STATE; ANTONY J. BLINKEN, UNITED STATES SECRETARY OF STATE; BRENDAN O'BRIEN, UNITED STATES CONSUL GENERAL, SAN SALVADOR, EL SALVADOR,

Defendants-Appellees.

No. 21-55365

D.C. No. 2:17-cv-00037-AS

Before: Mary M. SCHROEDER, Kermit V. LIPEZ,* and Kenneth K. LEE, Circuit Judges.

* The Honorable Kermit V. Lipez, United States Circuit Judge for the First Circuit, sitting by designation.

ORDER

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc, Docket No. 39, is DENIED.

DISSENTING OPINION BY JUSTICE BRESS JOINED BY JUSTICE LEE (JULY 14, 2023)

BRESS, Circuit Judge, joined by LEE, Circuit Judge, dissenting from the denial of rehearing en banc:

I respectfully dissent from the denial of rehearing en banc because our court seriously overstepped its bounds in requiring the government, as a matter of due process, to provide its reasons for denying a visa within a "reasonable" time. When, as here, there is no showing of bad faith and the government has provided a facially legitimate and bona fide reason for denying a visa, there is no further requirement that it provide the valid reason within a set time. Our court's novel timeliness rule has no proper legal grounding. And it is inconsistent with the traditional deference we give to the Executive in this area, as embodied in the doctrine of consular nonreviewability and the separation of powers principles that are its foundation.

I therefore agree with Judge Lee's dissent at the panel level, *see Muñoz v. U.S. Dep't of State*, 50 F.4th 906, 924-27 (9th Cir. 2022) (Lee, J. dissenting), and concur in Part III.B of Judge Bumatay's dissent from the denial of rehearing en banc. As Judge Bumatay lays out, there may well be other reasons why the plaintiffs' challenge in this case should fail. *See also Kerry v. Din*, 576 U.S. 86, 97, 101 (2015) (plurality op.); *Colindres v. U.S. Dep't of State*, ___ F.4th ___, 2023 WL 4140277, at *3-6 (D.C. Cir. June 23, 2023). But in this case, the clear legal infirmity in our court's new timing rule—and the confusion it will surely cause—provides more than sufficient reason to conclude both

that the government should easily prevail and that en banc review was warranted.

DISSENTING OPINION BY JUSTICE BUMATAY JOINED BY JUSTICES CALLAHAN, IKUTA, BENNETT, R. NELSON, BADE, AND VANDYKE, COLLINS, LEE, AND BRESS, CIRCUIT JUDGES, IN PART III-B (JULY 14, 2023)

BUMATAY, Circuit Judge, joined by CALLAHAN, IKUTA, BENNETT, R. NELSON, BADE, and VANDYKE, Circuit Judges; COLLINS, LEE, and BRESS, Circuit Judges, in Part III-B, dissenting from the denial of rehearing en banc:

Under the doctrine of consular nonreviewability, the federal government generally doesn't need to justify its visa decisions in court. Grounded in the separation of powers, the century-old doctrine provides that courts should not look behind the Executive's exercise of its discretion to exclude aliens from our nation. As Justice John Marshall Harlan wrote long ago, Congress may entrust the "final determination" of whether an alien may enter the United States "to an executive officer," and "if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted or to controvert its sufficiency." *Lem Moon Sing v. United States*, 158 U.S. 538, 545 (1895). That's because visa denials are a "fundamental sovereign attribute exercised by the Government's political departments," *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)), and we largely defer to the decisions of those branches.

To be sure, consular nonreviewability yields to constitutional error. *See Khachatryan v. Blinken*, 4 F.4th 841, 849 (9th Cir. 2021). If a visa denial burdens the constitutional right of a U.S. citizen, we may engage in a "circumscribed judicial inquiry" over the denial. *Id.* (quoting *Trump*, 138 S. Ct. at 2419). But this doesn't mean that courts may second-guess a visa denial every time it's somehow connected to a citizen. Instead, we've cabined this narrow exception to non-reviewability in two important ways. First, U.S. citizens may mount a constitutional attack on a visa denial in only a narrow category of circumstances. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (recognizing that a visa denial may implicate the First Amendment right of U.S. citizens). Second, even when a constitutional right is implicated, the government only needs to give a "facially legitimate and bona fide reason" for the visa denial. *Id.* And the Supreme Court has set a rather low bar to meet this requirement: "respect for the political branches' broad power over the creation and administration of the immigration system mean[s] that the Government need provide only a statutory citation to explain a visa denial." *Trump*, 138 S. Ct. at 2419 (simplified). In other words, citing a statutory bar to admission under 8 U.S.C. § 1182(a) ("Classes of Aliens Ineligible for Visas or Admission") usually satisfies constitutional concerns.

In this case, Luis Ernesto Asencio-Cordero, a native and citizen of El Salvador, was denied an immigrant visa. The government told him and his U.S. citizen wife, Sandra Muñoz, that the visa was denied because the Department of State believes that Ascencio-Cordero will enter the United States to commit "unlawful activity"—a statutory bar to admis-

sion. *See* 8 U.S.C. § 1182(a)(3)(A)(ii). Asencio-Cordero and Muñoz sued, alleging a violation of their constitutional rights and demanding that the visa denial be overturned. Under the doctrine of consular nonreviewability, this should have been an easy case. Even assuming a constitutional right was implicated, we should have dismissed the case because citing the "unlawful activity" statutory bar was enough to justify the government's decision.

Instead, we violated the separation of powers by granting ourselves greater authority to interfere with the Executive's visa processing decisions. Under our newly arrogated powers, we may now peek over the government's shoulder every time it denies a visa on security grounds if the government's explanation does not come quickly enough. *Muñoz v. U.S. Dep't of State*, 50 F.4th 906, 917, 920-24 (9th Cir. 2022). We got there by first recognizing that an American citizen has a "liberty interest" in her husband's visa application—a view of substantive due process not shared by any other circuit court. *Id.* at 916. Then, we held that citing the "unlawful activity" bar is not enough, and that the government must always disclose the facts underlying a visa denial under § 1182(a)(3)(A)(ii). *Id.* at 917. We ended by creating a "timeliness" requirement for the doctrine of consular nonreviewability. *Id.* at 920-24. Under this new rule, if we think the government's justification for a visa denial comes too late, we can strip the government of its nonreviewability protection and order courts to "look behind" the visa denial. *Id.* at 924.

Each one of these steps should have been reversed on en banc review.

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First, we should have ruled that citing the "unlawful activity" bar satisfied any notice requirement. Under our precedent, we only require the government to explain a visa denial by citing a statutory provision that "specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Khachatryan*, 4 F.4th at 851 (simplified). Here, the government did exactly that. It told Asencio-Cordero and Muñoz that Ascencio-Cordero's visa was denied because it believes he will enter the country to engage in "unlawful activity." *See* 8 U.S.C. § 1182(a)(3)(A)(ii). The Supreme Court has already ruled that the adjacent "terrorist activities" bar under § 1182(a)(3)(B)—which, in part, similarly bars those "likely to engage after entry in any terrorist activity"—provides sufficient factual predicates and thus citing that bar satisfies any judicial inquiry. *Kerry v. Din*, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring). If factual predicates are indeed necessary here, we should have treated these similar statutory bars similarly and held that citing the "unlawful activity" bar was enough.

By requiring more for the "unlawful activity" bar, we start down a road not traveled by our sister courts. The D.C. Circuit recently ruled that citing the "unlawful activity" bar alone satisfies the government's notice obligation. *Colindres v. U.S. Dep't of State*, No. 22-5009, 2023 WL 4140277, at *6 (D.C. Cir. June 23, 2023). Other circuits, including our own, have deferred to the government's citation of valid statutory bars to meet its notice requirements. *See Khachatryan*, 4 F.4th at 852 (citing the "visa fraud" bar under § 1182(a)(6)(C)(i) was enough); *Yafai v. Pompeo*, 924 F.3d 969, 970 (7th Cir. 2019) (Barrett, J., concurring with denial of rehearing) (citing the "alien-smuggling" bar under

§ 1182(a)(6)(E) was enough); *Del Valle v. Sec'y of State*, 16 F.4th 832, 841-42 (11th Cir. 2021) (citing the "false representation of citizenship" bar under § 1182 (a)(6)(C)(ii) or the "unlawful presence" bar under § 1182(a)(9)(B)(i)(II) was enough). Two other circuits have gone so far as to hold that citing any valid statute of inadmissibility—regardless of its reference to factual predicates—is enough. *Baaghil v. Miller*, 1 F.4th 427, 432-34 (6th Cir. 2021) ("Even a 'statutory citation' to the pertinent restriction, without more, suffices."); *Sesay v. United States*, 984 F.3d 312, 316 (4th Cir. 2021) ("The Supreme Court has unambiguously instructed that absent some clear directive from Congress or an affirmative showing of bad faith, the government must simply provide a valid ineligibility provision as the basis for the visa denial.").

Indeed, aside from this case, no federal appellate court has ever ruled that a statutory citation fails to provide sufficient factual predicates to satisfy the government's notice obligations. So, at a minimum, we've strayed far from the center of judicial gravity on this issue. And we should have taken this case en banc to recenter our court.

* *

Second, our novel "timeliness" requirement has no basis in the law. In the hundred-year history of consular nonreviewability, no court has invented the rule that the government must act within a certain timeframe to gain its protection. Our reformulation of the doctrine not only bucks history but flouts the will of Congress—Congress has explicitly said that the government has no duty to give timely notice to an alien excluded on security-related grounds, as here. *See* 8 U.S.C. § 1182(b)(3). And, as a practical matter,

this new speedy-notice requirement will be an administrative nightmare. Now consular officers will have to sift through countless visa applications to determine who is entitled to the heightened notice by relation to some citizen. And besides, the officer will not know how quickly to act to avoid defying the Ninth Circuit. That's because our court failed to even set clear parameters for the time limits, opting instead to opaquely provide that timing must be "reasonable." *Muñoz*, 50 F.4th at 922-23. Respect for a co-equal branch of government means that we should have at least explained how the Executive can comply with our dictates.

* * *

Third, our court stands alone as the only circuit to hold that a U.S. citizen has a "liberty interest" in his or her spouse's visa denial. The Supreme Court has repeatedly warned that we should be circumspect in divining unenumerated substantive rights from the Constitution's guarantee of "due process." *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247-48 (2022) ("We must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))) (simplified). Here, contrary to the text, history, and structure of the Constitution, we reaffirm our recognition of a U.S. citizen's due process right over an alien spouse's visa denial. We should not have doubled down on our position, which reinforces a split with every other circuit to address this issue. *See Colindres*, 2023 WL 4140277, *5 ("[C]itizens have no

fundamental right to live in America with their spouses."); *Baaghil*, 1 F.4th at 433 ("American residents—whether citizens or legal residents—do not have a constitutional right to require the National Government to admit noncitizen family members into the country."); *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (similar); *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 555 (2d Cir. 1975) (similar); *Fasano v. United States*, 230 F. App'x 239, 239-40 (3d Cir. 2007) ("The Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country." (simplified)) (unpublished); *Garcia v. Boldin*, 691 F.2d 1172, 1183-84 (5th Cir. 1982) (similar).

And we didn't need to reach this issue. If we had properly ruled that citing the "unlawful activity" bar was sufficient or that there's no such thing as a timeliness requirement for consular nonreviewability, we could have avoided this weighty constitutional issue entirely. We could have instead assumed that Muñoz possessed a constitutional interest over her husband's visa denial, but the government had still satisfied its due process obligations. *See Din* 576 U.S. 86 at 101-06 (Kennedy, J., concurring) (assuming—without deciding—that a constitutional interest over a visa denial exists); *see also Khachatryan*, 4 F.4th at 850 (similar).

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Because our decision conflicts with the constitutional design on multiple fronts, we should have reheard this case en banc.

I thus respectfully dissent from the denial of rehearing en banc.

I.

A.

Let's start with an immigration backgrounder. Under the Immigration and Nationality Act ("INA"), an alien must obtain a visa before entering and permanently residing in the United States. 8 U.S.C. § 1181(a). The INA creates a special visa-application process for aliens sponsored by "immediate relatives" in the United States. *Id.* §§ 1151(b)(2)(A)(i), 1153(a). Under this process, the citizen-relative first petitions on behalf of the alien, asking to have the alien classified as an immediate relative. *Id.* §§ 1151(f), 1154(a)(1). If a petition is approved, the alien may apply for a visa by submitting the required documents and appearing at a United States embassy or consulate for an interview with a consular officer. *Id.* §§ 1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of immigration law. *Id.* § 1361.

B.

Now the facts. Sandra Muñoz is a citizen and lifelong resident of the United States. In July 2010, Muñoz married Luis Ernesto Asencio-Cordero, a native and citizen of El Salvador, who arrived in the United States in March 2005. In April 2015, after their "immediate relative" petition was approved, Asencio-Cordero left the United States to obtain his immigrant visa from the U.S. Consulate in El Salvador. In May 2015, Asencio-Cordero had his initial consular interview. During that interview, Asencio-Cordero denied any association with criminal gangs.

In December 2015, the U.S. Consulate denied Asencio-Cordero's visa application on the grounds that he was inadmissible under § 1182(a)(3)(A)(ii). Recall this provision bars "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any other unlawful activity." 8 U.S.C. § 1182(a)(3)(A)(ii). Aside from citing the "unlawful activity" bar, the U.S. Consulate did not provide any further explanation for Asencio-Cordero's visa denial.

After multiple attempts to overturn the visa denial, Muñoz and Asencio-Cordero sued the State Department in federal court in January 2017, alleging that the visa denial was not facially legitimate and bona fide and was decided in bad faith. The government moved to dismiss the case under the doctrine of consular nonreviewability. The district court ruled that Asencio-Cordero, as an unadmitted, non-resident alien, lacked a right of judicial review and dismissed him from the suit. On the other hand, because Muñoz was a U.S. citizen, the district court refused to dismiss her claim.

In September 2018, the government provided a joint discovery report that explained that the government denied Asencio-Cordero's visa application "after determining that [he] was a member of a known criminal organization." In November 2018, a State Department declaration further explained: based on interviews, a criminal review, and a review of Asencio-Cordero's tattoos, the government believed that he was a member of MS-13, a singularly brutal gang. The State Department considers MS-13 to be a national security threat. *See* U.S. Dep't of State, 9 Foreign

Affairs Manual 302.5-4(B)(2)(a)(5).[1] The government later warned that this gang information was gathered from law enforcement sources and that it was "extremely dangerous" to force the government to reveal its sources.

Muñoz and the government cross-moved for summary judgment. In March 2021, the district court ruled for the government. First, the district court found that Muñoz, as a U.S. citizen married to Asencio-Cordero, had a protected liberty interest in the visa denial. Second, the district court reasoned that the government could invoke the doctrine of consular nonreviewability because the government offered a bona fide reason for the visa denial. The district court rejected the government's initial argument that citing the "unlawful activity" statutory bar itself satisfied due process. But based on the State Department's declaration and other government information, the district court found that the government adequately explained the visa denial—the government's belief that Asencio-Cordero was a member of MS-13. Finally, the district court found that Muñoz had not shown that the government denied the visa in bad faith.

C.

On appeal, a divided panel of this court reversed.

The majority first reaffirmed Muñoz's ability to sue, holding that "U.S. citizens possess a liberty interest in a non-citizen spouse's visa application," and that the government's denial of Asencio-Cordero's

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[1] https://perma.cc/QV6Y-EG3Q

visa application infringed on that interest. *Muñoz*, 50 F.4th at 916.

Second, the majority said that citing the "unlawful activity" bar, § 1182(a)(3)(A)(ii), could not provide a legitimate and bona fide reason for the visa denial. *Id.* at 917. But like the district court, the majority concluded that the State Department's declaration explaining the connection to MS-13 provided enough information to meet the government's due process obligations. *Id.* at 918.

Even so, the majority ruled that this information was provided too late. The majority held that "where the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest." *Id.* at 921. Because the government didn't provide the facts justifying the visa denial for nearly three years, the majority held that the government did not meet this "timeliness" requirement and thus the government could not claim the protection of consular nonreviewability. *Id.* at 923-24. The majority then vacated and remanded for the district court to "look behind" the government's decision and decide the merits of Muñoz's claim. *Id.* at 924.

Judge Lee dissented. Because the State Department advised Muñoz that it believed her husband to be connected to MS-13 and, in Judge Lee's view, Muñoz could not show bad faith, "[t]hat should be the end of the story." *Id.* at 925 (Lee, J., dissenting). He found no reason to "craft[] an exception to the longstanding consular non-reviewability doctrine" by creating a timeliness requirement. *Id.* Finally, Judge

Lee expressed concern that the timeliness requirement was unclear and unworkable and would lead to confusion in the lower courts and at government agencies. *Id.* at 926-27.

II.

Before getting into the many ways that our court gets this case wrong, it's worth providing some background on the doctrine of consular non-reviewability. So here goes:

A. Plenary Authority of the Political Branches

Our deference to the political branches on immigration matters dates back over a century to at least the time of the Chinese Exclusion Act. In 1889, the Supreme Court held that the "power of exclusion of foreigners" was "an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution." *Ping v. United States*, 130 U.S. 581, 609 (1889). The Court made clear that the admissibility of aliens is not "for judicial determination." *Id.* Instead, the issue was reserved "to the political department of our government, which is alone competent to act upon the subject." *Id. Ping* was the first of several late nineteenth-century cases granting the political branches significant deference when enacting and enforcing immigration laws. *See also Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Lem Moon Sing*, 158 U.S. 538; *United States v. Ju Toy*, 198 U.S. 253 (1905).

After the modernization of our country's immigration system, the political branches' plenary power

in immigration was wielded by consular officers. Starting in 1917, consular officers became responsible for granting and denying visas. *See* Russell Wolff, *The Nonreviewability of Consular Visa Decisions: An Unjustified Aberration from American Justice*, 5 N.Y.L. Sch. J. Int'l & Compar. L. 341, 342 (1984). A pair of circuit court cases has often been credited as the beginning of our refusal to review a consular officer's visa denial. *See, e.g.*, 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, 603 (2015). In *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), the Second Circuit stated it was "beyond the jurisdiction of the court" to review a visa denial because the "[u]njustifiable refusal" of a visa was a matter of "diplomatic complaint." Similarly, in *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929), the D.C. Circuit noted Congress did not authorize "official review of the action of the consular officers," which made those decisions unreviewable.

The Supreme Court inaugurated the doctrine of consular nonreviewability in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). There, the German wife of a naturalized U.S. citizen and World War II veteran challenged her exclusion from the country based on the Attorney General's determination that she posed a security concern under a 1941 immigration provision. *Id.* at 539-40. The Court ruled for the government, holding that the Court has "no authority to retry the determination of the Attorney General." *Id.* at 546.

To begin, the Court emphasized that "[t]he exclusion of aliens is a fundamental act of sovereignty." *Id.*

at 542. And so when a government official acts to exclude an alien based on immigration law, "[t]he right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Id*. The Executive may then delegate that authority to "a responsible executive officer of the sovereign," whose authority is "final and conclusive." *Id.* at 543. The Court disclaimed any authority to review consular decisions: "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* In other words, "[w]hatever the procedure authorized by Congress is," the Court said, "it is due process as far as an alien denied entry is concerned." *Id.* at 544.

B. The *Mandel* Exception

While *Shaughnessy*'s sweeping expression of the nonreviewability of consular decisions still governs, courts have recognized a "limited exception" to the doctrine when the denial of a visa implicates the constitutional rights of American citizens. *Andrade-Garcia v. Lynch*, 828 F.3d 829, 834 (9th Cir. 2016) (simplified).

The first articulation of the limited exception to nonreviewability came in *Kleindienst v. Mandel*, 408 U.S. 753, 756 (1972). There, Ernest Mandel, a non-resident alien and "revolutionary Marxist," sought to enter the United States as a journalist and public speaker. *Id.* He was found ineligible for admission as an advocate of communism, but the Attorney General gave him a discretionary waiver to enter the United States in 1962 and 1968. *Id.* at 756-57. Mandel

attempted to enter again in 1969. *Id.* at 756. This time, the Attorney General declined to give him a third waiver because Mandel's 1968 trip "went far beyond the stated purposes of his trip" and "represented a flagrant abuse of the opportunities afforded him to express his views in this country." *Id.* at 759. Mandel sued alongside American professors who had invited him to, or expected to hear him, speak. *Id.* at 759-60. While the Court held that Mandel "had no constitutional right of entry," it noted that the denial of Mandel's visa implicated the professors' First Amendment rights. *Id.* at 762.

The Court first re-affirmed the "ancient principles of the international law of nation-states" that "the power to exclude aliens is inherent in sovereignty," and "a power to be exercised exclusively by the political branches of government." *Id.* at 765 (simplified). The Court then reiterated Justice Harlan's words:

> The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.

Id. at 766 (quoting *Lem Moon Sing*, 158 U.S. at 547).

Yet the Court's analysis laid the groundwork for a future limitation to the doctrine of consular nonreviewability. The professors argued that the government must give a justification for the denial of Mandel's waiver. *Id.* at 769. In response, the govern-

ment argued that the waiver decision was in the Executive's "sole and unfettered discretion, and any reason or no reason may be given." *Id*. The Court said it didn't need to reach this question because the Attorney General did inform Mandel of the reason for the waiver denial and "that reason was facially legitimate and bona fide." *Id*.

In concluding, the Court re-affirmed the "firmly established" rule that Congress has "plenary . . . power to make policies and rules for exclusion of aliens." *Id*. at 769-70. And "when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770.

From this, courts have required that the government give a "facially legitimate and bona fide reason" for a visa denial whenever the constitutional rights of a U.S. citizen are implicated. *See Cardenas*, 826 F.3d at 1167. In *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008), our circuit became the first to recognize that visa denial may burden more than a citizen's First Amendment right. There, we held that a U.S. citizen had a "protected liberty interest in her marriage that gives rise to a right to constitutionally adequate procedures in the adjudication of her husband's visa application." *Id*. at 1062. We claimed this was a "straightforward" application of the Due Process Clause's "substantive right[]" to "life, liberty, and property." *Id*.

C. *Kerry v. Din* and the Limits of the *Mandel* Exception

The Supreme Court recently limited the scope of the *Mandel* exception in *Kerry v. Din*, 576 U.S. 86, 105 (2015), and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). In both cases, even assuming a visa denial implicated the constitutional interest of a U.S. citizen, the Court showed that the government can satisfy its constitutional obligations to provide a "facially legitimate and bona fide reason" for the denial by citing a valid statutory bar to admission.

In *Din*, a United States citizen sought to have her Afghani husband classified as an immediate relative and granted an immigrant visa. 576 U.S. at 86. But the Afghani citizen was formerly a civil servant in the Taliban regime, and his application was denied under 8 U.S.C. § 1182(a)(3)(B)—the exclusion for aliens who have participated in "[t]errorist activities." *Id.* at 88-90. In the Ninth Circuit, we concluded that the U.S. citizen "ha[d] a protected liberty interest in marriage that entitle[d] [her] to review of the denial of [her] spouse's visa," and that merely citing § 1182(a)(3)(B) could not satisfy due process. *Din v. Kerry*, 718 F.3d 856, 860, 868 (9th Cir. 2013).

The Supreme Court reversed, but the Justices did not agree on the grounds for doing so. The plurality opinion, authored by Justice Scalia and joined by Chief Justice Roberts and Justice Thomas, rejected the threshold premise that an American citizen could be injured under the Due Process Clause based on the denial of a spouse's visa. *Din*, 576 U.S. at 88-101 (plurality). The concurrence, written by Justice Kennedy and joined by Justice Alito, assumed that a U.S. citizen could assert a constitutional injury from

a spouse's visa denial, but concluded that citing the "terrorist activities" bar was a "facially legitimate and bona fide reason" under *Mandel*. *Id.* at 101-06 (Kennedy, J., concurring). And the dissent, penned by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, would have held that the government's refusal to provide a clear reason for denying a visa violated a citizen spouse's due process right. *Id.* at 107-16 (Breyer, J., dissenting).

In our court, Justice Kennedy's concurrence turned out to be the most important. *See Cardenas*, 826 F.3d at 1171 (finding that "Justice Kennedy's concurrence controls"). Relying on *Mandel*, the *Din* concurrence reiterated that "an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made on the basis of a facially legitimate and bona fide reason." 576 U.S. at 104 (Kennedy, J., concurring) (simplified). So the key constitutional question is whether the government supplied a "facially legitimate and bona fide reason" for the visa denial. And on that question, the concurrence concluded that citing § 1182(a)(3)(B)'s "terrorist activities" statutory bar satisfies the government's burden. *Id.* Justice Kennedy's concurrence first reasoned that the statutory bar "establish[ed] specific criteria for determining terrorism-related inadmissibility" and thus exclusion under that provision showed a "facially legitimate" reason. *Id.* at 104-05. The concurrence also held that merely citing the "terrorist activities" bar established a "bona fide reason" because "§ 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Id.* at 105.

In *Trump v. Hawaii*, the Court further limited the *Mandel* exception and adopted Justice Kennedy's view that statutory citation is enough to satisfy our review. In that case, the Court reviewed President Trump's order temporarily suspending entry of foreign nationals from seven countries based on risks of terrorism. *Trump*, 138 S. Ct. at 2403. The Court applied the *Mandel* framework to the case but emphasized its "narrow" and "deferential" standard of review. *Id*. at 2419. Most importantly, the Court seemingly coalesced around Justice Kennedy's view that citing a statutory provision is enough to satisfy due process: "In *Din*, Justice Kennedy reiterated that 'respect for the political branches' broad power over the creation and administration of the immigration system' meant *that the Government need provide only a statutory citation to explain a visa denial*." *Id.* (simplified) (emphasis added). Thus, the Court embraced the view that only limited notice—such as a statutory citation—is needed to justify a visa denial when a citizen's due process rights are implicated.

After *Din* and *Trump*, our court adopted a three-step inquiry to determine whether a visa denial violates the due process rights of a U.S. citizen based on Justice Kennedy's concurrence. *Khachatryan*, 4 F.4th at 851. "First, we examine whether the consular officer denied the visa under a valid statute of inadmissibility." *Id*. (simplified). If so, that satisfies the "facial legitimacy" step. Second, we consider whether the consular officer (1) cited a statutory bar to admissibility that "specifies discrete factual predicates the consular officer must find to exist before denying a visa," *or* (2) provided a "fact in the record that provides at least a facial connection to the

statutory ground of inadmissibility." *Id.* (simplified). If the consular officer complies with either alternative, the government meets its burden on this step. *Id.* At the third step, we ask whether the plaintiff carried her burden of proving that the government's stated reason "was not bona fide by making an affirmative showing of bad faith on the part of the consular officer who denied the visa." *Id.* (simplified).

III.

With this legal background in mind, it is easy to see how we erred in piercing the doctrine of consular nonreviewability here. Although the Supreme Court has recognized a limited exception to the doctrine, we greatly expanded judicial interference with visa denials—jettisoning the respect we must afford to the political branches in their protection of our borders. By aggrandizing our role, we diminish the separation of powers.

We made three significant errors in ruling for Muñoz. First, we improperly ruled that citing the "unlawful activity" bar is not enough to satisfy the government's notice obligations. Second, we invented a new dimension to the consular nonreviewability doctrine: a time window that bars the application of the doctrine. These two errors lead to the third—having to resolve whether an American citizen has a "liberty interest" in the visa application of his or her spouse under the Fifth Amendment's Due Process Clause. If we resolved the first two questions properly, we didn't need to reach this difficult question.

I turn to each error in this order.

A. Citing the "Unlawful Activity" Statutory Bar Satisfies Due Process

Even assuming Muñoz has a "liberty interest" in her husband's visa denial, the government satisfied its constitutional notice obligations here by citing the "unlawful activity" statutory bar and our court erred by holding otherwise.

To begin, we wrongly claimed that the government had "abandoned" the argument that the "unlawful activity" bar contains discrete factual predicates. *Muñoz*, 50 F.4th at 917. This is incorrect. In both the district court and the answering brief in our court, the government repeatedly argued that citing § 1182(a)(3)(A)(ii) was sufficient because that provision contained adequate factual predicates.

But, more importantly, we were mistaken in finding that § 1182(a)(3)(A)(ii) does not "specif[y] discrete factual predicates the consular officer must find to exist before denying a visa." *Id.* We reasoned that "[u]nlike surrounding provisions, § 1182(a)(3)(A)(ii) does not specify the type of lawbreaking that will trigger a visa denial." *Id*. To reach this conclusion, we ruled, without authority, that "a consular officer's belief that an applicant seeks to enter the United States for general (including incidental) lawbreaking is not a 'discrete' factual predicate." *Id*. Thus, we held that the government could only satisfy its burden to prove a "bona fide reason" by showing "a fact in the record" that provides "a facial connection to the consular officer's belief" that Asencio-Cordero sought to enter the United States to engage in unlawful activity. *Id*.

There are at least three problems with our ruling.

First, the "unlawful activity" bar under § 1182(a)(3)(A)(ii) provides sufficient "discrete factual predicates," and thus citing it provides a "bona fide" reason for denial. We have never precisely described what level of "factual predicates" a statute must have to provide adequate reason for a visa denial. But Justice Kennedy's analysis of the visa waiver provision at issue in *Mandel* provides us a point of reference. In that case, the Supreme Court examined the Attorney General's authority to waive inadmissibility "in [his] discretion." 408 U.S. at 754. Because the provision conferred the Attorney General with "unfettered discretion"—meaning he could deny waiver for "any reason or no reason"—the Supreme Court had to consider whether some underlying facts showed that the waiver denial in that particular case was "legitimate and bona fide." *Id.* at 769- 70. Otherwise, the Court would have no basis to understand why Mandel had been denied admission. But compared to the "nearly unbridled discretion" in the *Mandel* provision, Justice Kennedy's concurrence observed that the "terrorist activities" bar "specifies discrete factual predicates the consular officer must find to exist before denying a visa." *Din*, 576 U.S. at 105 (Kennedy, J., concurring). So, by the term "discrete factual predicates," Justice Kennedy meant to distinguish between a statutory waiver provision lacking any factual predicates from one, like the terrorism bar, "controlled by specific statutory factors." *Id.* at 104.

Like the "terrorist activities" bar, the "unlawful activity" bar is controlled by specific statutory factors—that the alien "seeks to enter the United States to engage . . . in any . . . unlawful activity." 8 U.S.C. § 1182(a)(3)(A)(ii). Surrounding provisions exclude from

this "unlawful activity" bar any conduct that constitutes espionage, sabotage, export violations, or activity to overthrow the government of the United States. *Id.* § 1182(a)(3)(A)(i), (iii). While a range of lawbreaking may fit these "statutory factors," it is more limited than the "unbridled discretion" found in *Mandel* and nearly as broad as the "terrorist activities" bar approved by the *Din* concurrence. *See Colindres*, 2023 WL 4140277, at *6 (holding that the "terrorist activities" bar is "written in the same general terms" as the "unlawful activity" provision here). Indeed, given Justice Kennedy's focus on any kind of factual predicate, perhaps citing any statutory bar satisfies our inquiry here. *See Trump*, 138 S. Ct. at 2419; *Baaghil*, 1 F.4th at 432-34; *Sesay*, 984 F.3d at 316.

Second, our belief that the "unlawful activity" bar is too broad to establish a "bona fide" reason echoes the argument made by the *Din* dissenters and rejected by the *Din* concurrence. In dissent, Justice Breyer asserted that the terrorism bar is so capacious that it provides no notice of the factual predicates for inadmissibility:

> [Section] 1182(a)(3)(B)[] sets forth, not one reason, but dozens. It is a complex provision with 10 different subsections, many of which cross-reference other provisions of law. . . . Some parts cover criminal conduct that is particularly serious, such as hijacking aircraft and assassination. . . . Other parts cover activity that, depending on the factual circumstances, cannot easily be labeled "terrorist." . . . At the same time, some subsections provide the visa applicant with a defense; others do not. . . . Taken together

> the subsections, directly or through cross-reference, cover a vast waterfront of human activity potentially benefitting, sometimes in major ways, sometimes hardly at all, sometimes directly, sometimes indirectly, sometimes a few people, sometimes many, sometimes those with strong links, sometimes those with hardly a link, to a loosely or strongly connected group of individuals, which, through many different kinds of actions, might fall within the broad statutorily defined term "terrorist."

Din, 576 U.S. at 113-14 (Breyer, J., dissenting) (simplified). Justice Kennedy understood that § 1182 (a)(3)(B) "covers a broad range of conduct," but still maintained that citing the provision was sufficient. *Id*. at 105 (Kennedy, J., concurring). Thus, contrary to our view here, the breadth of the "unlawful activity" bar is no basis to find that it lacks factual predicates sufficient to satisfy the "bona fide reason" prong. *See Colindres*, 2023 WL 4140277, at *6 ("[T]hat level of specificity is not required.").

Third, we ignore that Congress has already determined that aliens subject to the "unlawful activity" bar are not entitled to <u>any</u> form of notice. *See* 8 U.S.C. § 1182(b)(3). In *Din*, Justice Kennedy looked to the scope of the INA's notice provision, § 1182(b)(3), to inform the scope of a citizen's due process rights. *Id*. at 105-06. Recall that § 1182(b)(1) generally requires the government to provide "timely written notice" to aliens found inadmissible, but notice is <u>not</u> required when aliens are barred on grounds related to terrorism or security. 8 U.S.C. § 1182(b)(3). Because § 1182(b)(3) expressly excluded the "terrorist activities" bar from

any notice requirement, Justice Kennedy deferred to Congress's "considered judgment" "in this sensitive area" to determine that merely citing the terrorism provision was "constitutionally adequate." *Id*. at 106.

We disregard this analysis and skip the fact that § 1182(b)(3) also eliminates any notice requirement for aliens found inadmissible under the "unlawful activity" bar. *See* 8 U.S.C. § 1182(b)(3). If we are truly following Justice Kennedy's analysis, then citing the "unlawful activity" bar should also be constitutionally adequate. After all, as the Court said long ago, when the Executive branch excludes an alien under a grant from the Legislative branch, the "*order was due process of law*," and "no other tribunal . . . [may] re-examine the evidence" underlying the order. *Lem Moon Sing*, 158 U.S. at 545 (simplified) (emphasis added).

So like the terrorism bar, we should have found that citing the "unlawful activity" bar alone complies with due process. This would have ended our inquiry because the government told Asencio-Cordero that he was denied admission under § 1182(a)(3)(A)(ii). And because Muñoz hasn't shown that this justification was made in bad faith, her due process claim must fail.

As problematic as this analysis proves, our court's next error may be even more significant.

B. Due Process Does Not Place a Time Limit on the Consular Nonreviewability Doctrine

For the first time in any circuit, our court holds that the doctrine of consular nonreviewability applies only if the government provides notice of the reason

for a visa denial "within a reasonable time." *Muñoz*, 50 F.4th at 923. We base this new requirement on the view that due process requires that the "government provide any required notice in a timely manner." *Id.* at 921 (citing *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970)) (emphasis added). We then suggest that a "reasonable time" might range between 30 days to one year. *Id.* at 923 ("Our understanding of reasonable timeliness is informed by the 30-day period in which visa denials must be submitted for internal review and the 1-year period in which reconsideration is available upon the submission of additional evidence."). Outside that window, we declare, the government is "not entitled to invoke consular nonreviewability to shield its visa decision from judicial review" and a court "may 'look behind' the government's decision." *Id.* at 924 (simplified). This is a serious error.

Given that the doctrine of consular nonreviewability is rooted in the separation of powers, we should reject efforts to create—out of whole cloth—novel burdens on the Executive branch. As explained by Judge Lee, our court's decree "conflicts with the separation-of-powers principle that Congress may 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." *Id.* at 925 (Lee, J., dissenting) (simplified). To impose a categorical time limit for consular nonreviewability has no basis in the text or history of the Constitution, Supreme Court precedent, or statute.

First, our court's timeliness requirement ignores that due process is context specific. When it comes to the exclusion of aliens, courts have "largely defer[red]

to the political branches" on what process is due. *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1215 (9th Cir. 2022) (Bumatay, J., concurring). That's because we must recognize that "the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Trump*, 138 S. Ct. at 2418 (simplified). Thus, it's firmly established that "Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 522 (2003) (simplified).

Here, our court imports due process protections from a case about the termination of public assistance payments to the denial of visas. *See Goldberg*, 397 U.S. at 267-68 (holding that a welfare recipient must receive "timely and adequate notice" of the reasons for the proposed termination of welfare benefits). But there's no reason to tie the procedural protections required to end a citizen's public benefits to the process to deny an alien entry into the country. Even assuming that American spouses of aliens have a liberty interest in their spouse's admission protected by due process, that doesn't mean they are entitled to the full panoply of rights afforded to citizens in the domestic setting. Indeed, the *Goldberg* court talked about how those due process protections were necessary in the "present context" of welfare terminations. *Id.* Though the exclusion of an alien is serious, the rights involved are not the same as in domestic proceedings. After all, unlike in the welfare termination setting, a citizen cannot obtain judicial review of a visa denial unless the government acted in "bad faith."

And so there's no basis to transfer procedural protections one-for-one here.

Second, our court's decision ignores the will of Congress. Remember, Congress has established that consular officers must give an alien "timely written notice" of the grounds for a visa denial. *See* 8 U.S.C. § 1182(b)(1)(B). But Congress has expressly exempted aliens found inadmissible under the "unlawful activity" bar from this timely notice requirement. *Id.* § 1182(b)(3); *see also Din*, 576 U.S. at 106 (Kennedy, J., concurring) ("[T]his notice requirement does not apply, when . . . a visa application is denied due to terrorism or national security concerns.") (simplified). As Justice Kennedy viewed it, § 1182(b)'s statutory notice provision was highly probative of the bounds of constitutional notice owed to citizen spouses in the visa context:

> 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. This considered judgment gives additional support to the independent conclusion that the notice given was constitutionally adequate, particularly in light of the national security concerns the terrorism bar addresses. . . . Under *Mandel*, respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa to an alien abroad.

Id. While the *Din* concurrence addressed the substance of the notice needed under due process, the analysis applies with equal force to the timing of the notice.

Third, as a practical matter, our brand-new timeliness requirement is both burdensome and vague. Because the timeliness requirement applies only when certain "U.S. citizens' rights are burdened," *Muñoz*, 50 F.4th at 926 (Lee, J., dissenting), consular officers may not know which visas will be implicated. Will consular officers need to process every visa under the new timeliness regime to avoid a court later saying that it was handled too late thanks to the alien's connection to some American citizen? And we do not establish what constitutes timely notice. The only thing we know for sure is that three years is too late. *Id.* at 923 (majority opinion). But we merely suggest that notice is safe if given between 30 days to one year. *Id.* Expect an explosion of litigation to determine the true deadline to meet due process. That we have placed new burdens on the Executive's discretion without explaining how it can comply with those burdens makes matters worse. At a minimum, we should have taken this case en banc to clarify the government's obligations under our new regime.

Our court's creation of new hurdles for the Executive in the security context is troubling. Respect for the government's interest in protecting our security should give us more pause before inventing new due process regimes. As Judge Lee pointed out, government delays in providing notice may come into play when deciding whether it acted in bad faith, *id.* at 925 (Lee, J., dissenting), but no reason exists to categorically strip the government of consular nonreviewability when dealing with security threats based on our arbitrary (and vague) deadlines.

C. A Visa Denial Does Not Implicate the Due Process Rights of the Alien's U.S. Citizen Spouse

Thanks to the other rulings in the case, our court needed to make a weighty substantive due process decision—whether Muñoz has a protected liberty interest in her husband's visa application. Pre-*Din*, we recognized that a citizen possesses a protected liberty interest in "constitutionally adequate procedures in the adjudication of [a non-citizen spouse's] visa application." *Bustamante*, 531 F.3d at 1062. But we acknowledged in *Muñoz* that a plurality of the Supreme Court has rejected such a protected liberty interest. *Muñoz*, 50 F.4th at 915 (citing *Din*, 576 U.S. at 101 (plurality)). Despite this, relying on the fundamental right of marriage and the liberty interest of U.S. citizens to reside in their country of citizenship, we said that "the cumulative effect" of the denial of a citizen's spouse's visa was "a direct restraint on the citizen's liberty interests protected under the Due Process Clause." *Id.*

Repeatedly, the Supreme Court has cautioned lower courts from casually finding substantive rights under either the Fifth or Fourteenth Amendments' Due Process Clauses. Indeed, "we must guard against the natural human tendency to confuse what [due process] protects with our own ardent views about the liberty that Americans should enjoy." *Dobbs*, 142 S. Ct. at 2247. To avoid these concerns, we must be "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty." *Id.* at 2248. In other words, we ask "whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of

ordered liberty.'" *Id.* (quoting *Timbs v. Indiana*, 139 S.Ct. 682, 686 (2019)).

Unfortunately, we did not heed these concerns in recognizing Mufioz's liberty interest here. While no one seriously questions the fundamental nature of the right of marriage, it is quite a stretch to extrapolate from that right a concomitant right over the adjudication of a spouse's visa. Indeed, our court failed to recognize the strong constitutional crosswinds here—that a "liberty interest" for a U.S. citizen over a visa denial directly conflicts with the political branches' plenary authority over the exclusion of aliens. Given the separation of powers concerns at play, we should have been more exacting before finding a new substantive right.

And as a historical matter, the view that an American citizen has a liberty interest in the visa application of her alien spouse is highly suspect. The *Din* plurality explained that such a proposed liberty interest is not a right "objectively, deeply rooted in this Nation's history and tradition." *Id.* at 92-93 (plurality). As Justice Scalia recounted, "as soon as Congress began legislating in [the immigration] area[,] it enacted a complicated web of regulations that erected serious impediments to a person's ability to bring a spouse into the United States." *Id.* at 96 (citing Kerry Abrams, *What Makes the Family Special?*, 80 U. Chi. L. Rev. 7, 10-16 (2013)). The *Din* plurality relied on a "long practice of regulating spousal immigration," including the Expatriation Act of 1907, which provided that "any American woman who marries a foreigner shall take the nationality of her husband," and the Immigration Act of 1921, which subjected fiancées and wives of citizens to strict quota requirements when minor children were granted non-quota status. *Id.* at

95-97. *See also Colindres*, 2023 WL 4140277, at *4-5 (surveying the immigration statutes passed at the turn of the 20th century that "limited spousal immigration").

To be sure, some contest this history. *See, e.g.*, Kerry Abrams, *The Rights of Marriage: Obergefell, Din, and the Future of Constitutional Family Law*, 103 Cornell L. Rev. 501, 540, 542 (2018) (suggesting that the *Din* plurality "uses history selectively to paint a picture of the past that, while technically accurate, misses the larger picture" and showing evidence that some immigration laws support a "strong preference for spousal immigration").

But this misunderstands the requirement that unenumerated rights be deeply rooted. Even if history shows that Congress has promoted family reunification at times, it has also sought to achieve different policy ends at other times. This contradictory legislation demonstrates, at a minimum, that any liberty interest in a spouse's visa application has shallow roots. And given the deep foundation of the political branches' plenary authority here, we shouldn't let such sparse evidence define a new substantive right.

IV.

We violated the separation of powers in three distinct ways here. First, by recognizing that citizens have a "liberty interest" in their spouse's visa denial. Second, by declaring that the government must divulge evidence supporting why an alien should be barred for "unlawful activity." And third, by demanding that the government act under our vague new timeline. Any one of these errors deserved en banc review.

For these reasons, I dissent from the denial of rehearing en banc.

INITIAL DETERMINATION OF INELIGIBILITY, AMERICAN EMBASSY GUATEMALA IMMIGRANT VISA UNIT (MAY 6, 2020)

From: Guatemala, IV <GUATEMALAIV@state.gov>
Sent: Wednesday, May 6, 2020 1:33:45 PM
To: Colindres, Kristen Helen
Subject: RE: GTM2015744011

Dear Mrs. Colindres,

On April 22, 2020, Mr. Edvin Alonzo Colindres Juarez was formally refused an immigrant visa under section 212(a) (3)(A) (II) of the Immigration and Nationality Act (INA) as an alien for whom there is reason to believe is a member of a known criminal organization.

The "reason to believe" standard refers to more than just mere suspicion, it is a probability, supported by the facts, that the alien is a member of an organized criminal entity. In making the decision, the consular officer reviewed all evidence available, including Mr. Colindres' statements made during the visa interview, information provided by law enforcement, and all documents submitted by the applicant,

Please note that this decision was done in accordance with supervisory review and a formal advisory opinion from the State Department Visa Office supports this decision. Consequently, Mr. Colindres is

permanently ineligible for a visa under section 212(a)(3)(A) (II) and has no recourse to a waiver.

Sincerely,

Immigrant Visa Unit
Embassy of the United States of America
Guatemala

DENIAL OF REQUEST FOR RECONSIDERATION, AMERICAN EMBASSY GUATEMALA IMMIGRANT VISA UNIT (DECEMBER 14, 2020)

Fw: Edvin and Kristen Colindres, GTM2015744011

Guatemala, IV <GUATEMALAIV@state.gov>
Mon, Dec 14, 2020 at 12:26 AM
To: chris@cdempseylaw.com <chris@cdempseylaw.com>

Dear Representative,

Thank you for your email. The Immigrant Visa Chief has reviewed the evidence presented to reconsider the 3A2 finding, but he did not find any compelling new information to present to the Department. As a result, Mr. Colindres Juarez remains ineligible under Section INA 212(a)(3)(A)(ii).

Regards,

Immigrant Visa Section
American Embassy Guatemala

From: Christopher Dempsey <chris@cdempseylaw.com>
Sent: Monday, November 30, 2020 2:12 PM
To: Guatemala, IV <GUATEMALAIV@state.gov>
Cc: NVC Attorney, Mailbox <nvcattorney@state.gov>
Subject: Re: Edvin and Kristen Colindres, GTM2015744011

Sir or Ma'am,

I am writing to request a status update regarding the above-referenced matter as it has been over sixty (60) days since your last correspondence. For your reference, I have attached my initial packet dated September 10, 2020, requesting reconsideration of your Embassy's IR1 refusal dated April 22, 2020. Thank you in advance for your consideration.

Respectfully,

Christopher W. Dempsey
DEMPSEY LAW, PLLC
221 N Hogan Street, Suite 368
Jacksonville, Florida 32202
Tele: 904.760.6272
Fax: 904.587.0372
chris@cdempseylaw.com
www.cdempseylaw.com

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (FEBRUARY 9, 2021)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KRISTEN H. COLINDRES and
EDVIN A. COLINDRES JUAREZ
12668 ARROWLEAF LANE JACKSONVILLE,
FLORIDA 32225,

Plaintiffs,

v. Civil Action No. 1:21-cv-348

U.S. DEPARTMENT OF STATE 2201
C STREET NW WASHINGTON, DC 20520,

ANTONY J. BLINKEN, IN HIS OFFICIAL)
CAPACITY AS U.S. SECRETARY OF STATE,
2201 C STREET NW WASHINGTON, DC 20520,

ROBERT NEUS, IN HIS OFFICIAL CAPACITY
AS CONSUL GENERAL OF THE UNITED STATES,
U.S. EMBASSY GUATEMALA CITY
AVENIDA REFORMA 7-01, ZONA 10
GUATEMALA CITY, GUATEMALA,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW, Plaintiffs Kristen H. Colindres and Edvin A. Colindres Juarez, wife and husband, and respectfully bring this Complaint for Declaratory Relief challenging the unfounded and unsupported finding made in bad faith and without any facially legitimate and bona fide basis by U.S. Department of State officials. Specifically, Plaintiffs challenge the finding by U.S. Department of State officials that Plaintiff Colindres Juarez is ineligible to immigrate to the United States pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii), as an alien who seeks to enter the United States to engage solely, principally, or incidentally in unlawful activity, based solely on his purely aesthetic tattoos, in violation of, *inter alia*, their procedural and substantive due process rights; entitlement to equal protection of the laws; right to freedom of speech, expressive activity, and fundamental, associational, and marital right to live together as husband and wife; the Immigration and Nationality Act; and the Administrative Procedure Act.

PREFATORY STATEMENT

1. Plaintiffs Kristen H. Colindres and Edvin A. Colindres Juarez bring this action to challenge the refusal by U.S. Department of State officials to issue Plaintiff Colindres Juarez an immigrant visa.

2. Specifically, on April 22, 2020, and again on December 14, 2020, the U.S. Embassy in Guatemala City, Guatemala ("the Embassy") formally refused to issue Plaintiff Colindres Juarez an immigrant visa as a spouse of a United States citizen, notwithstanding his approved Form I-130, Petition for Alien Relative,

and Form I-601A, Application for Provisional Unlawful Presence Waiver, on the grounds that he is permanently ineligible for a visa under 8 U.S.C. § 1182(a)(3)(A)(ii) [INA 212(a)(3)(A)(ii)], as an alien who seeks to enter the United States to engage solely, principally, or incidentally in unlawful activity.

3. The Embassy's refusal was erroneous, made in bad faith, lacks a facially legitimate and bona fide basis, and violates fundamental and constitutionally protected rights of both Plaintiffs, principally: marriage, family life, procreation, establishing a home, and bringing up children, as well as travel, speech, expression, and association.

4. Plaintiff Colindres Juarez is not and never has been a member of a criminal organization. Nor is he seeking to immigrate to the United States to engage in unlawful activity. Rather, Plaintiff Colindres Juarez entered the United States without inspection when he was fourteen (14) years old, and thereafter lived, worked, married, and raised a family in the United States without incident for twenty-four (24) years, from January 5, 1995 until June 26, 2019, when he returned to Guatemala only in order to properly immigrate to the United States.

5. This Complaint and the supporting documentation, letters of reference, statements, and explanations submitted herewith constitute not only clear and convincing but overwhelming evidence that Plaintiff Colindres Juarez is eligible for an immigrant visa.

6. Plaintiffs therefore respectfully request that this Court declare that the Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa as a

spouse of a United States citizen was contrary to law and further mandate that the U.S. Department of State issue Plaintiff Colindres Juarez an immigrant visa forthwith so that he can reunite with his wife of fourteen (14) years and twelve (12) year old daughter living here in the United States, thus ending their prolonged and unwarranted family separation of nearly twenty (20) months to date.

JURISDICTION AND VENUE

7. This Court has jurisdiction over the present action pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1346(a)(2) (claim against United States); 5 U.S.C. §§ 701-706 (Administrative Procedure Act); 8 U.S.C. § 1101, *et seq*. (Immigration and Nationality Act); and 28 U.S.C. § 2201-02 (declaratory judgment).

8. There exists an actual and justiciable controversy between Plaintiffs and Defendants requiring resolution by this Court. Plaintiffs have no other adequate remedy at law.

9. Venue is properly before this Court pursuant to 28 U.S.C. § 1391(e) because this is an action against an agency of the United States and its officers in their official capacity brought in the district where the Defendant agency resides and where a substantial part of the events or omissions giving rise to the Complaint occurred.

PARTIES

10. Plaintiff Kristen H. Colindres is a United States citizen by birth and has been married to Plaintiff Edvin A. Colindres Juarez since December 8,

2006. She has resided in the United States her entire life and presently resides in Jacksonville, Florida.

11. Plaintiff Edvin A. Colindres Juarez is a native and citizen of Guatemala.

12. Defendant U.S. Department of State is the federal agency responsible for granting and denying of immigrant visas for applicants outside the United States. *See* 8 U.S.C. § 1104.

13. Defendant Antony J. Blinken is sued in his official capacity as the Secretary of the U.S. Department of State. Defendant Blinken is the highest ranking official within the U.S. Department of State and is responsible for the actions of his agency.

14. Defendant Robert Neus is sued in his official capacity as the U.S. Consul General, in Guatemala City, Guatemala. Defendant Neus is directly responsible for the denial of Plaintiff Colindres Juarez's application for an immigrant visa. *See* 8 U.S.C. § 1104 (a)(1); 22 C.F.R. § 42.61(a).

FACTS & BACKGROUND

Good Faith Efforts to Rectify Immigration Status

15. Plaintiff Edvin A. Colindres Juarez is a native and citizen of Guatemala. *See* Request for Reconsideration dated September 10, 2020 (attached hereto as Exhibit A) at pp. 8-12.

16. Plaintiff Colindres Juarez was born in 1980. *Id.*

17. Plaintiff Colindres Juarez lived and was raised in Guatemala until he entered the United States on or about January 5, 1995, to live with family

in New York, New York, until he relocated to Jacksonville, Florida a few years later, where he resided up until June 25, 2019.

18. Plaintiff Colindres Juarez has worked for Tempool, Inc., a top pool finishing company in the United States, since June 15, 2007. *Id*. at p. 14.

19. Plaintiff Kristen H. Colindres is a United States citizen. *Id.* at p. 17.

20. She was born in 1987. *Id.* at p. 16.

21. Plaintiff Colindres is an award-winning Registered Nurse, who graduated summa cum laude and as the valedictorian of her class at Chamberlain College of Nursing on March 3, 2012, who has worked for Baptist Health in Jacksonville, Florida since April 30, 2012. *Id.* at pp. 18-21.

22. Plaintiffs married on December 8, 2006. *Id.* at pp. 23.

23. Their daughter, S.H.C., was born in 2008. *Id.* at p. 25.

24. On or about March 20, 2015, Plaintiff Colindres filed an I-130, Petition for Alien Relative, for the benefit of Plaintiff Colindres Juarez, with U.S. Citizenship and Immigration Services ("USCIS"). *Id.* at pp. 27-28.

25. USCIS approved Plaintiff Colindres' I-130 Petition on or about August 11, 2015. *Id.* at p. 30.

26. On or about May 1, 2018, Plaintiff Colindres Juarez filed a Form I-601A, Application for Provisional Unlawful Presence Waiver, seeking a discretionary waiver of his inadmissibility due to unlawful presence

under 8 U.S.C. § 1182(a)(9)(B)(v) [INA § 212(a)(9)(B)(v)]. *Id.* at pp. 32-40.

27. On or about June 7, 2018, Plaintiff Colindres Juarez submitted biometrics to USCIS in connection with his Application, and USCIS thereafter conducted background and security checks, including a check of criminal history records maintained by the Federal Bureau of Investigation ("FBI"). *Id.* at p. 42.

28. On or about January 28, 2019, USCIS approved Plaintiff Colindres Juarez's Form I-601A, Application for Provisional Unlawful Presence Waiver. *Id.* at p. 44.

29. On or about April 30, 2019, Plaintiff Colindres Juarez filed a Form DS-260, Immigrant Visa and Alien Registration Application, with the U.S. Department of State. *Id.* at pp. 47-48.

30. Plaintiff Colindres Juarez paid all required fees; Plaintiff Colindres submitted a Form I-864, Affidavit of Support; and both parties promptly responded to all requests for evidence by the National Visa Center. *Id.* at pp. 49-62.

31. On or about June 26, 2019, Plaintiff Colindres Juarez departed the United States and traveled to Guatemala for purposes of his consular interview.

32. The Embassy scheduled Plaintiff Colindres Juarez for an immigrant visa interview on July 10, 2019, which Plaintiff Colindres Juarez attended. *Id.* at p. 64-65.

33. The Embassy then scheduled Plaintiff Colindres Juarez for a follow-up immigrant visa interview on August 8, 2019. *Id.* at p. 84.

34. In the meantime, Plaintiff Colindres Juarez submitted, per the Embassy's request, his "expediente de record criminal," or criminal record file, from the Public Ministry of Guatemala. *Id.* at pp. 87-91.

35. Plaintiff Colindres Juarez's criminal record was clean. *Id.*

36. Thereafter, from August 8, 2019 until April 22, 2020, despite repeated inquires on status, Plaintiff Colindres Juarez and his attorney heard only that Plaintiff Colindres Juarez's application was "undergoing necessary administrative processing." *Id.* at pp. 69-85.

37. Finally, on May 6, 2020, the Embassy advised that on April 22, 2020, it refused Mr. Colindres Juarez an immigrant visa "under section 212(a)(3)(A)(ii) of the Immigration and Nationality Act (INA) as an alien for whom there is reason to believe is a member of a known criminal organization." *Id.* at p. 67.

38. Though not specifically mentioned in the Embassy's notice, it appears based on Plaintiff Colindres Juarez's account of his immigrant visa interviews, the assigned consular officer found one or more of Plaintiff Colindres Juarez's tattoos suspicious. *Id.* at p. 69.

39. Plaintiff Colindres Juarez has now been marooned in Guatemala for nearly twenty (20) months, all the while separated from his wife of fourteen (14) years and twelve (12) year old daughter, away from his home for the past twenty-four (24) years, and unable to earn an adequate living in support of his family vis-à-vis his long-term employment at Tempool, Inc., causing extreme and undue hardship on all concerned, without any supporting, facially legitimate

or bona fide basis for the Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa.

Visa Refusals Must Be Facially Legitimate and Bona Fide

40. When the denial of a visa implicates the constitutional rights of a United States citizen, the Courts exercise review to determine whether the consular officer acted on the basis of a "facially legitimate and bona fide reason." *See Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *see also Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009); *Adams v. Baker*, 909 F.2d 643, 647-48 (1st Cir. 1990); *Abourezk v. Reagan*, 785 F.2d 1043, 1075 (D.C. Cir. 1986).

41. The lack of any factual allegations to determine whether a specific subsection of 8 U.S.C. § 1182(a)(3)(A) properly applies does not constitute a facially legitimate and bona fide reason for denying an immigrant visa. In other words, there must be some factual element. *Bustamante*, 531 F.3d at 1062; *Adams*, 909 F.2d at 649; *see also Allende v. Shultz*, 845 F.2d 1111, 1120 (1st Cir. 1999).

42. The Embassy's refusal of Plaintiff Colindres Juarez's request for an immigrant visa, based on his approved discretionary waiver under 8 U.S.C. § 1182(a)(9)(B)(v), implicates fundamental constitutional rights.

43. United States citizens have a "protected liberty interest in marriage that gives rise to a right to constitutionally adequate procedures in the adjudication" of a visa application. *Bustamante*, 531 F.3d at 1062.

44. The Supreme Court has deemed "straightforward" the notion that "[t]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived expect pursuant to constitutionally adequate procedures." *Id. citing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

45. Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty guaranteed by the Due Process Clause denotes "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, [and] worship God according to the dictates of his own conscience.") (emphasis added).

Plaintiff Colindres Juarez Is Not Seeking to Enter the United States to Engage in Unlawful Activity

46. The Embassy's refusal to issue an immigrant visa to Mr. Colindres Juarez because he is purportedly seeking to enter the United States to engage solely, principally, or incidentally in unlawful activity, and is therefore inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii), is without a facially legitimate and bona fide basis and unsupported by the totality of circumstances present in this matter.

No Criminal Record

47. Plaintiff Colindres Juarez has no criminal record in Guatemala or the United States; indeed, Mr. Colindres Juarez has no criminal record whatsoever. *Id.* at pp. 42, 87-91.

48. Plaintiff Colindres Juarez's FBI background check initiated by U.S. Citizenship and Immigration Services ("USCIS") in connection with his application for relief under 8 U.S.C. § 1182(a)(9)(B)(v), presented no issues or concerns. *Id.* at pp. 42, 44.

49. Likewise, Plaintiff Colindres Juarez's "expediente de record criminal" obtained from the Public Ministry of Guatemala and presented to the Embassy, revealed no issues or concerns. *Id.* at pp. 87-91.

50. Of course, this makes infinite sense, given that Mr. Colindres Juarez has not been present in Guatemala since he was fourteen (14) years of age.

51. Simply put, there is no plausible way that Plaintiff Colindres Juarez could have possibly affiliated with unlawful activity or be seeking to enter the United States to engage solely, principally, or incidentally in unlawful activity when he has been present in the United States for the last twenty-four (24) years, having arrived in the United States as a child.

52. There is absolutely no credible evidence in the record that Mr. Colindres Juarez is or was a member of a known criminal organization. *See* 9 FAM 302.5-4(B)(2)(h).

53. The Embassy's explanation of the basis for its finding was deficient under 9 FAM 302.5-4(B)(2)(f), as it fails to articulate or rely upon any of the

enumerated factors for consideration. *See* 9 FAM 302.5-4(B)(2)(f).

Character References

54. The best evidence of Mr. Colindres Juarez's character is the attestations of those who know him best.

55. Plaintiff Colindres Juarez submitted to the Embassy thirty-seven (37) letters of reference, written by Plaintiff Colindres Juarez's family and relatives, friends, colleagues, and fellow community members. *Id.* at 93-138.

56. These letters uniformly provide that Plaintiff Colindres Juarez is a peaceful, law-abiding, hard-working, virtuous, loyal, generous, family-loving, devout, and honest person. *Id.*

57. All of these references were universally shocked and surprised to hear of the purported basis for the Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa. *Id.*

58. This is because Plaintiff Colindres Juarez is not and never has been a member of a criminal organization, and everyone who has ever known Plaintiff Colindres Juarez realizes just how far from the truth the Embassy's allegation is. *Id.*

Tattoos are Purely Aesthetic

59. To the extent Plaintiff Colindres Juarez's tattoos formed the basis for the Embassy's belief that he is or was a member of a known criminal organization, that conclusion is erroneous.

60. Plaintiff Colindres Juarez obtained all of his tattoos in the United States, upon becoming the age of majority, as required by local law. *Id.* at pp. 140-151.

61. Plaintiff Colindres Juarez got his first tattoo in the year 2000, in Jacksonville, Florida, five (5) years after leaving Guatemala, when he was twenty (20) years old. *Id.*

62. Plaintiff Colindres Juarez's tattoos do not reflect any affiliation with nefarious or criminal organizations. *Id.*

63. Plaintiff Colindres Juarez's tattoos merely depict Mr. Colindres Juarez's personal priorities in spirituality, religion, family, heritage, optimism, and humor. *Id.*

64. Any assertion that Plaintiff Colindres Juarez's tattoos reflect membership in a criminal organization is misplaced and without merit. *Id.*

65. Plaintiff Colindres Juarez's sole purpose in seeking an immigrant visa is to live with and support his family in the United States. *Id.* at pp. 189-90.

Request for Reconsideration

66. Given that the Foreign Affairs Manual ("FAM"), to wit: 9 FAM 302.5, leaves open that even past members of known criminal organizations or those still yet members but travelling to the United States for some other purpose unrelated to the commission of criminal acts may not result in a finding of 3A2 ineligibility, Plaintiff Colindres Juarez should have at least been afforded the opportunity to demonstrate, to the Embassy's "satisfaction and with clear and compelling evidence, that he . . . [is not] an active

member of [a known criminal] organization." *See* 9 FAM 302.5-4(B)(2)(b), (d).

67. On September 10, 2020, by and through undersigned counsel, Plaintiff Colindres Juarez submitted a Request for Reconsideration to the Embassy. *Id.* at pp. 1-206.

68. Plaintiff Colindres Juarez's Request for Reconsideration established there is no reason to believe he is either a member of a known criminal organization or that he seeks to immigrate to the United States for any other purpose than to reunite with his wife, child, and extended family, and to rejoin a business enterprise at which he has endeavored for over twenty (20) years in order to financially provide for his loved ones, but this time with a legitimized immigration status and the opportunity, in time, to realize his dream of becoming a naturalized United States citizen.

69. On December 14, 2020, the Embassy again refused Plaintiff Colindres Juarez an immigrant visa, stating: "The Immigrant Visa Chief has reviewed the evidence presented to reconsider the 3A2 finding, but he did not find any compelling new information to present to the Department. As a result, Mr. Colindres Juarez remains ineligible under Section INA 212(a)(3)(A)(ii)." *See* Embassy Correspondence dated Dec. 14, 2020 (attached hereto as Exhibit B) at p. 3.

Extended Family Separation Is Causing Undue, Extreme, and Unnecessary Hardship

70. This whole process has become a nightmare for Plaintiff Colindres Juarez and his family.

71. What began as a good faith endeavor to rectify Plaintiff Colindres Juarez's immigration status has now evolved into a prolonged and potentially endless separation of a close-knit and loving family unit to the significant emotional, financial, and psychological detriment of all concerned.

72. The love, affection, and joy Plaintiffs Colindres and Colindres Juarez and their daughter S.H.C. share as a family is palpable. *See* Exhibit A at pp. 153-171, 175-191.

73. They deserve to be together.

74. The anguish and loss felt by the Colindres family in light of their extended separation is excruciating. *Id.* at pp. 175-191.

75. Inexplicably the Colindres family's separation transpired by virtue of an honorable interest in perfecting Plaintiff Colindres Juarez's immigration status but has now gone unexpectedly and bizarrely awry.

76. The Colindres family is in a catch-22 situation. Plaintiff Colindres Juarez is now indefinitely stuck in Guatemala. But Plaintiff Colindres cannot travel to Guatemala to be with him.

77. Putting aside the COVID-19 pandemic, Plaintiff Colindres suffers from an acute medical condition requiring medical treatment and medication that she cannot obtain in Guatemala. *Id.* at pp. 173.

78. Further, the couple's daughter, S.H.C., suffers from medical ailments of her own, is well-established in a local school, and has never been outside the United States. *Id.* at p .186, ¶¶ 42-43.

79. Both Plaintiff Colindres and S.H.C. are suffering mightily with psychological symptoms related to family separation. *Id*. at pp. 175-91, 193-97.

80. The Colindres family has been financially wrecked by Plaintiff Colindres Juarez's absence and inability to work.

81. Plaintiff Colindres has been forced to survive on her resources alone all the while parenting S.H.C. by herself.

82. By virtue of the Embassy's bad faith refusal to issue Plaintiff Colindres Juarez an immigrant visa without any facially legitimate and bona fide basis, the Colindres family had to retain undesigned counsel and incur legal expenses.

83. The Colindres family is in dire straits. The Embassy could have ended their painful separation with the stroke of a pen. Everyone concerned was desperately hoping and praying that the Embassy did just that. But on December 14, 2020, these hopes were crushed when the Embassy affirmed its unfounded refusal to issue Plaintiff Colindres Juarez an immigrant visa. *See* Exhibit B at p. 3.

84. The Colindres family now has no other recourse but to seek judicial intervention by this Court in hopes of ending their prolonged, painful, unjustified, indefinite, and unconstitutional separation.

85. Plaintiffs averred each and every fact stated and provided every proof of evidence and legal authority referenced in Paragraphs 15-64 and 69-80 above in their Request for Reconsideration to the Embassy.

CLAIMS FOR RELIEF

COUNT I
PROCEDURAL DUE PROCESS

86. Plaintiffs adopt and reallege all foregoing allegations as if stated herein.

87. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.

88. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa implicates certain protected liberty interests, to wit: marriage, family life, procreation, to establish a home, bring up children, as well as travel, engage in expressive speech, and associate.

89. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa was and is in violation of the Due Process rights of both Plaintiffs to constitutionally adequate procedures—nominally notice and an opportunity to be heard—considering the private interests affected, the risk of erroneous deprivation of those interests, and the government interest at stake, and the basic entitlement by Plaintiffs to procedures that minimize substantively unfair or mistaken deprivations.

90. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa lacks evidentiary support, is entirely conclusory, and without a facially legitimate and bona fide reason; additionally, the Embassy's refusal was lacking in constitutionally adequate procedures.

91. As a direct and proximate result of the Embassy's unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa without constitutionally adequate procedures, Plaintiffs have suffered and will continue to suffer injury.

COUNT II
SUBSTANTIVE DUE PROCESS

92. Plaintiffs adopt and reallege all foregoing allegations as if stated herein.

93. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa implicates certain protected liberty interests, to wit: marriage, family life, procreation, establish a home, and bring up children, as well as travel, engage in expressive speech, and associate.

94. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa is neither necessary nor the lease restrictive means to achieve any compelling purpose.

95. There is no rational relationship between the Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa and any legitimate state interest.

96. As a direct and proximate result of the Embassy's unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa, Plaintiffs have suffered and will continue to suffer injury.

COUNT III
EQUAL PROTECTION

97. Plaintiffs adopt and reallege all foregoing allegations as if stated herein.

98. The United States Constitution prohibits the denial of equal protection of the laws based on national origin, nationality, alienage and/or being a member of a discrete and insular minority.

99. There is no substantial justification for the Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa, which was based solely on his national origin, nationality, alienage and/or being a member of a discrete and insular minority.

100. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa is neither necessary nor the lease restrictive means to achieve any compelling purpose.

101. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa based solely on his purely aesthetic tattoos is discriminatory.

102. There is no rational relationship between the Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa based on his purely aesthetic tattoos and any legitimate state interest.

103. As a direct and proximate result of the Embassy's unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa, Plaintiffs have suffered and will continue to suffer injury.

COUNT IV
FIRST AMENDMENT

104. Plaintiffs adopt and reallege all foregoing allegations as if stated herein.

105. The First Amendment to the United States Constitution prohibits infringement upon the right to free speech, expression, and association.

106. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa infringes upon and suppresses the rights of Plaintiffs to free speech, expression, and association.

107. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa and concomitant suppression of Plaintiffs' protected rights of free speech, expression, and association is neither necessary nor the lease restrictive means to achieve any compelling purpose.

108. As a direct and proximate result of the Embassy's unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa, Plaintiffs have suffered and will continue to suffer injury.

COUNT V
IMMIGRATION AND NATIONALITY ACT

109. Plaintiffs adopt and reallege all foregoing allegations as if stated herein.

110. Section 1152(a)(1)(A), Title 8, United States Code, explicitly forbids discrimination in issuance of visas based on race, nationality, place of birth, or place of residence. *See* 8 U.S.C. § 1152(a)(1)(A).

111. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa was discriminatory because it was based on Plaintiff Colindres Juarez's race, nationality, place of birth, or place of residence.

112. Section 1151(b)(2)(A)(i), Title 8, United States Code, provides that spouses of United States citizens are entitled to immediately available visas to ensure family unity. *See* 8 U.S.C. § 1151(b)(2)(A)(i).

113. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa denies and precludes the entitlement of Plaintiffs to enjoy the protected liberty interest of family unity.

114. As a direct and proximate result of the Embassy's unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa, Plaintiffs have suffered and will continue to suffer injury.

COUNT VI
ADMINISTRATIVE PROCEDURE ACT

115. Plaintiffs adopt and reallege all foregoing allegations as if stated herein.

116. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa constitutes a final agency action that is arbitrary and capricious.

117. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa constitutes an abuse of discretion.

118. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa is not in accordance with the law.

119. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa is unsupported by substantial evidence and the facts.

120. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa was a result of the Embassy's failure to investigate.

121. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa is contrary to constitutional right, power, privilege, or immunity.

122. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

123. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa was without observance of procedure required by law.

124. As a direct and proximate result of the Embassy's unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa, Plaintiffs have suffered and will continue to suffer injury.

COUNT VII
BAD FAITH

125. Plaintiffs adopt and reallege all foregoing allegations as if stated herein.

126. Section 1182(a)(3)(A)(ii), Title 8, United States Code, provides that in order to find an alien inadmissible for "security and related grounds" a consular officer must know or have "reasonable ground to believe" the alien "seeks to enter the United States "to engage solely, principally, or incidentally in . . . other unlawful activity." *See* 8 U.S.C. § 1182(a)(3)(A)(ii).

127. Plaintiff Colindres Juarez is legally eligible for an immigrant visa, has no criminal record, and merely seeks to enter the United States in order to reunite with his family.

128. The Embassy has no reasonable basis for its refusal to issue Plaintiff Colindres Juarez an immigrant visa.

129. The Embassy's decision that Plaintiff Colindres Juarez is admissible to the United States pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii) was made in a conscious effort to bypass the statutory requirement than any decision be "reasonable" as evidenced by the Embassy's repeated failure to provide any underlying factual justification for its inadmissibility finding.

130. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa was pretextual, a product and remnant of the misguided politics and anti-immigrant policies of the prior administration, and not based on the underlying merits of Plaintiff Colindres Juarez's matter.

131. As a direct and proximate result of the Embassy's unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa, Plaintiffs have suffered and will continue to suffer injury.

COUNT VIII
REFUSAL NOT FACIALLY LEGITIMATE AND BONA FIDE

132. Plaintiffs adopt and reallege all foregoing allegations as if stated herein.

133. Refusals by consular officers to issue immigrant visas must be facially legitimate and bona fide.

134. Consular officers do not have wide latitude to deny visa applications without providing a factual basis for an inadmissibility determination.

135. Consular officers must find specific discrete factual predicates to exist before refusing to issue immigrant visas or the consular officer must prove there is a fact on the record that constitutes a facial connection to a statutory ground of inadmissibility.

136. The Embassy's refusal to issue Plaintiff Colindres Juarez an immigrant visa lacks evidentiary support, is entirely conclusory, without any facial connection to the statutory basis for its determination that Plaintiff Colindres Juarez is inadmissible to the United States, and without a facially legitimate and bona fide reason.

137. As a direct and proximate result of the Embassy's unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa, Plaintiffs have suffered and will continue to suffer injury.

COUNT IX
UNCONSTITUTIONALLY VAGUE

138. Plaintiffs adopt and reallege all foregoing allegations as if stated herein.

139. Section 1182(a)(3)(A)(ii), Title 8, United States Code, fails to give ordinary people fair notice of conduct under its purview, is so standardless that it

invites arbitrary enforcement, and does not protect against a standardless sweep.

140. The Embassy's unlawful refusal to issue Plaintiff Colindres Juarez an immigrant visa is a product of the enforcement of an unconstitutionally vague statute, to wit: 8 U.S.C. § 1182(a)(3)(A)(ii), which permitted the Embassy to arbitrarily refuse Plaintiff Colindres Juarez an immigrant visa without any reasonable or factual basis.

141. As a direct and proximate result of the unconstitutional vagueness of 8 U.S.C. § 1182(a)(3)(A)(ii) and the Embassy's resulting unlawful refusal under color of law to issue Plaintiff Colindres Juarez an immigrant visa, Plaintiffs have suffered and will continue to suffer injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court grants the following relief:

(1) Declare the finding by U.S. Department of State that Plaintiff Edvin A. Colindres Juarez is ineligible to immigrate to the United States is contrary to law and that Plaintiff Edvin A. Colindres Juarez is not inadmissible pursuant to 8 U.S.C. § 1182(a)(3)(A)(ii);

(2) Mandate that Defendants issue Mr. Colindres Juarez an immigrant visa forthwith so that he can reunite with his wife and daughter living here in the United States;

(3) Award costs and reasonable attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(b); and

(4) Grant such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Christopher W. Dempsey
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Date: February 8, 2021

OPINION,
***MUNOZ ET AL. V. UNITED STATES DEPARTMENT OF STATE*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, NO. 21-55365 (OCTOBER 5, 2022)**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDRA MUNOZ;
LUIS ERNESTO ASENCIO-CORDERO,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF STATE; ANTONY J. BLINKEN, UNITED STATES SECRETARY OF STATE; BRENDAN O'BRIEN, UNITED STATES CONSUL GENERAL, SAN SALVADOR, EL SALVADOR,

Defendants-Appellees.

No. 21-55365

D.C. No. 2:17-cv-00037-AS

Before: Mary M. SCHROEDER, Kermit V. LIPEZ,* and Kenneth K. LEE, Circuit Judges.

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* The Honorable Kermit V. Lipez, United States Circuit Judge for the First Circuit, sitting by designation.

OPINION

LIPEZ, Circuit Judge:

After the government denied the immigrant visa application of plaintiff-appellant Luis Asencio-Cordero under 8 U.S.C. § 1182(a)(3)(A)(ii), Asencio-Cordero and his U.S.-citizen spouse, plaintiff-appellant Sandra Muñoz, sought judicial review of the government's visa decision and challenged the statute as unconstitutionally vague.[1] Concluding that the government was entitled to invoke the doctrine of consular nonreviewability to shield its decision from judicial review, the district court granted summary judgment on all claims to defendants-appellees, the U.S. Department of State, Secretary of State Antony Blinken, and U.S. Consul General in El Salvador, Brendan O'Brien. This appeal followed. Because we conclude that the government failed to provide the constitutionally required notice within a reasonable time period following the denial of Asencio-Cordero's visa application, the government was not entitled to summary judgment based on the doctrine of consular nonreviewability. We therefore vacate and remand to the district court for further proceedings.

I.

Appellants' 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." *Khachatryan v. Blinken*, 4

[1] A variety of government officials and entities engaged with appellees during the visa process. We refer to them collectively as "the government."

F.4th 841, 849 (9th Cir. 2021) (quoting *Allen v. Milas*, 896 F.3d 1094, 1104 (9th Cir. 2018)). As with many judicially created rules, however, consular nonreviewability admits an exception. *See Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). Where the denial of a visa affects the fundamental rights of a U.S. citizen, judicial review of the visa decision is permitted if the government fails to provide "a facially legitimate and bona fide reason" for denying the visa, *id.*,[2] or if—despite the government's proffer of a facially legitimate and bona fide reason—the petitioner makes an "affirmative showing" that the denial was made in "bad faith," *Kerry v. Din*, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring in the judgment).[3]

This circuit has distilled the analytic framework articulated in *Din* for evaluating whether the *Mandel* exception to consular nonreviewability applies to a petitioner's claim into a three-step inquiry. At steps one and two, we consider whether the government carried its burden of providing a "facially legitimate and bona fide reason" for the visa denial:

> First, we examine whether the consular officer denied the visa "under a valid statute of

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[2] Although *Mandel* involved a visa waiver rather than a consular visa denial, its "holding is plainly stated in terms of the power delegated by Congress to 'the Executive[,]'" and this circuit has understood its reasoning to govern review of consular visa denials, too. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062 n.1 (9th Cir. 2008).

[3] No opinion in *Din* garnered a majority. The Ninth Circuit has recognized and applied Justice Kennedy's concurrence as the controlling opinion. *Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016); *see also Allen*, 896 F.3d at 1106; *Khachatryan*, 4 F.4th at 851.

> inadmissibility." Second, we consider whether, in denying the visa, the consular officer "cite[d] an admissibility statute that specifies discrete factual predicates the consular officer must find to exist before denying a visa" or whether, alternatively, there is "a fact in the record that provides at least a facial connection to the statutory ground of inadmissibility."

Khachatryan, 4 F.4th at 851 (citations omitted) (quoting *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016)).[4] Only if we conclude that the government gave a facially legitimate and bona fide reason for denying the visa do "we proceed to the third step, which requires us to determine whether the plaintiff has carried his or her 'burden of proving that the [stated] reason was not bona fide by making an affirmative showing of bad faith'" by the consular officials involved in the visa denial. *Id.* (quoting *Cardenas*, 826 F.3d at 1172).

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[4] These two alternative methods for fulfilling the "facially legitimate and bona fide reason" standard come from *Cardenas*, where the consular officer relied on a statute lacking discrete factual predicates to deny a visa but the record nevertheless contained information providing a facial connection to the cited ground of inadmissibility. *See* 826 F.3d at 1172. We reasoned that either method would satisfy *Din*, *see id.*, even though in that case the government cited a statutory provision containing discrete factual predicates *and* the record contained information known to the petitioners that provided a facial connection to the stated ground of exclusion, *see* 576 U.S. at 105 (Kennedy, J., concurring in the judgment).

II.

A. Factual Background

The following facts in this case are undisputed. Sandra Muñoz is a U.S. citizen. She married Luis Asencio-Cordero, a citizen of El Salvador, on July 2, 2010. Asencio-Cordero first arrived in the United States in 2005.[5] Together, he and Muñoz have a child, who is a U.S. citizen. Asencio-Cordero has multiple tattoos.

Muñoz filed an immigrant-relative petition for Asencio-Cordero,[6] which was approved along with an inadmissibility waiver. In April 2015, Asencio-Cordero returned to El Salvador for the purpose of obtaining his immigrant visa from the U.S. Consulate in San Salvador. He attended an initial interview at the Consulate on May 28, 2015. At all times, including

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[5] The record lacks detail about the circumstances of his arrival to the United States.

[6] The Immigration and Nationality Act ("INA") exempts immediate relatives from certain numerical limitations on immigration. INA § 201, 8 U.S.C. § 1151(b)(2)(A)(i). A non-citizen spouse of a U.S. citizen "shall be classified as an immediate relative under INA 201(b) if the consular officer has received from [the Department of Homeland Security, ("DHS")] an approved Petition to Classify Status of Alien Relative for Issuance of an Immigrant Visa, filed on the alien's behalf by the U.S. citizen and approved in accordance with INA 204, and the officer is satisfied that the alien has the relationship claimed in the petition." 22 C.F.R. § 42.21(a). Once DHS approves an immigrant-relative petition, the immediate relative must appear at the consular office in his or her place of residence, *id.* § 42.61(a), for an in-person interview with a consular officer, *id.* § 42.62(a), (b).

during his visa interview, he has denied any association with a criminal gang.

In December 2015, the Consular Section denied Asencio-Cordero's visa application by citing 8 U.S.C. § 1182(a)(3)(A)(ii),[7] which states that "[a]ny alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity" is inadmissible.[8]

Muñoz sought assistance from Congresswoman Judy Chu, who sent a letter on Muñoz's behalf to the State Department on January 20, 2016. The following day, Consul Landon R. Taylor responded to Congresswoman Chu's letter by again citing 8 U.S.C. § 1182(a)(3)(A)(ii). Counsel for Muñoz contacted the State Department on January 29, 2016, and again in April 2016, requesting the factual basis for the Consulate's determination that Asencio-Cordero was inadmissible.

On April 8, 2016, the Consulate notified Muñoz and Asencio-Cordero that his visa application would be forwarded to the immigration visa unit for review.

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[7] Section 1182 of the U.S. Code codifies INA § 212. Section 1182(a) sets forth "[c]lasses of aliens ineligible for visas or admission," on "[h]ealth-related grounds," 8 U.S.C. § 1182(a)(1); "[c]riminal and related grounds," *id.* § 1182(a)(2); "[s]ecurity and related grounds," *id.* § 1182(a)(3), which encompasses the statutory provision at issue here; and "[p]ublic charge" grounds, *id.* § 1182(a)(4), among others. *See generally* 8 U.S.C. § 1182(a).

[8] Section 1182(a)(3)(A)(ii) refers to "any other unlawful activity" because the preceding provision provides that a non-citizen is ineligible for a visa or admission if the government knows or has reason to believe that the non-citizen will engage in various specific crimes. *See* 8 U.S.C. § 1182(a)(3)(A)(i).

On April 13, 2016, Consul Taylor notified appellants that "[t]he finding of ineligibility for [Asencio-Cordero] was reviewed by the Department of State in Washington, D.C., which concurred with the consular officer's decision. Per your request, our Immigration Visa Unit took another look at this case, but did not change the decision."

On April 18, 2016, counsel for appellants wrote to the State Department's Office of Inspector General and requested the "reason" for the inadmissibility decision. The letter stated counsel's belief that "an immigration visa application is being denied just for the simple fact that the applicant has tattoos when the rest of the underlying evidence and facts demonstrate the applicant has no criminal history and is not a gang member."

At some point,[9] appellants submitted a declaration from Humberto Guizar, an attorney and court-approved gang expert, who attested that Asencio-Cordero "does not have any tattoos that are representative of the Mara Salvatrucha[] gang or any other known criminal street gang," and that none of his tattoos "are related to any gang or criminal organization in the United States or elsewhere."[10] Guizar explained that "[m]ost

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[9] The declaration is dated April 27, 2016, but the record does not identify the exact date on which appellants submitted the declaration to the government.

[10] The declaration states that Guizar is "an attorney duly licensed to practice law in all courts in California. . . . In addition to being a licensed lawyer, [he is] also a court-approved 'gang expert.'" He has worked as a gang expert since April 2009. Guizar believes he is "the only licensed lawyer in the State of California that provides expert testimony as a gang expert in the local courts of the Southern California State and Federal

of the tattoos . . . are merely commonly known images, such as images of Catholic icons, clowns, and other non-gang related tattoos."

On May 18, 2016, the Chief of the Outreach and Inquiries Division of Visa Services replied to appellants' letter, stating that the State Department lacks authority to overturn consular decisions based on INA § 104(a) and that the Department "concurred in the finding of ineligibility."[11] The following day, Consul Taylor wrote again to appellants, listing the entities that had reviewed Asencio-Cordero's visa application[12] and noting that "[n]one of the above-mentioned reviews have revealed any grounds to change the finding of inadmissibility, and there is no appeal."[13]

Jurisdictions." In this capacity, Guizar has "testif[ied] in court as a gang expert on approximately 50 gang cases" and "been consulted on 40 other matters." This role requires him to "evaluate the character of a person alleged to be a gang member to determine if he is in fact a 'gang member,'" and to provide opinions "with regard to tattoos on individuals and whether the individual appears to be a gang member."

[11] Section 104(a) of the INA charges the Secretary of State with administering and enforcing INA provisions "relating to . . . the powers, duties, and functions of diplomatic and consular officers of the United States, except those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas." 8 U.S.C. § 1104(a) (emphasis added).

[12] These entities include a consular officer, consular supervisors, the Bureau of Consular Affairs, the Immigration Visa Unit, and Consul Taylor.

[13] We understand Consul Taylor's statement that "there is no appeal" to mean that there was no further administrative process that appellants could have pursued. As we discuss *infra*, an initial visa refusal triggers an automatic internal review process, *see* 22 C.F.R. § 42.81; 9 Foreign Affairs Manual 504.11-3(A)(2)(b)

B. Procedural History

Appellants initiated this lawsuit in January 2017. The Complaint asserts that (1) the denial of Asencio-Cordero's visa was not facially legitimate and bona fide, such that it infringed on Muñoz's fundamental rights; (2) the denial violated the Equal Protection Clause of the Fifth Amendment; (3) the denial violated the separation of powers; (4) the Consulate denied the visa in bad faith, (5) the denial violated the Administrative Procedure Act ("APA"); and (6) the statute under which the visa was denied, 8 U.S.C. § 1182(a)(3)(A)(ii), is unconstitutionally vague. Appellants seek a declaration that the adjudication of Asencio-Cordero's visa application was not bona fide, a declaration that § 1182(a)(3)(A)(ii) is unconstitutional, and other just and proper relief.[14]

The government filed a motion to dismiss in September 2017, invoking the doctrine of consular nonreviewability. Two months later, the district court granted the motion with respect to Asencio-Cordero's challenge to the visa adjudication, concluding that he lacked a right to judicial review of the visa denial as an unadmitted, non-resident alien. The court denied the motion with respect to Muñoz, however, stating

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[hereinafter, "FAM"], and Consul Taylor's statement was made at the apparent culmination of this internal review process. Administrative limitations on appealability do not, however, preclude judicial review of constitutional claims. *See Allen*, 896 F.3d at 1108 (citing *Webster v. Doe*, 486 U.S. 592, 601-05 (1988)).

[14] In their motion for summary judgment, appellants asked the district court to order the government to re-adjudicate Asencio-Cordero's visa application without relying on § 1182(a)(3)(A)(ii) and for the reinstatement of any inadmissibility waiver that was revoked due to the denial.

that she has a constitutional liberty interest in her husband's visa application and that the government had failed to offer a bona fide factual reason for denying the visa. The motion to dismiss did not address appellants' vagueness challenge to § 1182(a)(3)(A)(ii). Appellants subsequently filed, and the district court denied, a motion for judgment on the pleadings.[15]

Appellants sought discovery on the facts supporting the Consulate's denial of Asencio-Cordero's visa application. In a joint Rule 26(f) report filed on September 11, 2018, the government asserted for the first time that "the consular officer who denied Mr. Asencio-Cordero's visa application did so after determining that Mr. Asencio-Cordero was a member of a known criminal organization." The government filed a supplemental brief in November 2018, which included a declaration by State Department attorney adviser Matt McNeil stating that the consular officer denied Asencio-Cordero's visa application under 8 U.S.C. § 1182(a)(3)(A)(ii) because, "based on the in-person interview, a criminal review of Mr. Asencio[-]Cordero and a review of [] Mr. Asencio[-]Cordero's tattoos, the consular officer determined that Mr. Asencio[-]Cordero was a member of a known criminal organization . . . specifically MS-13."

In April 2019, the district court issued an order permitting limited discovery—in the form of a

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[15] The court reasoned that granting the motion before the parties "fully develop[ed] the record" would be "hasty and imprudent" because "the record may establish a facial connection to the statutory ground of inadmissibility."

deposition or Rule 31 deposition[16] of the consular official who denied the visa application—on whether the visa denial relied on "discrete factual predicates." By May 2020, the parties still had not agreed on a discovery plan. The court rejected the government's argument that permitting discovery violated the doctrine of consular nonreviewability and law enforcement privilege but limited appellants to addressing the following five issues:

1. Identify a fact in the record that supports the conclusion that Asencio[-Cordero] was a member of MS-13.
2. What specific fact provided by Asencio [Cordero] in his in-person interview, if any, provides a facial connection to the conclusion that Asencio[-Cordero] was a member of MS-13[?]
3. What specific fact in the criminal review of Asencio[-Cordero], if any, provides a facial connection to the conclusion that Asencio[-Cordero] was a member of MS-13[?]
4. What specific fact in the review of Asencio[-Cordero]'s tattoos, if any, provides a facial connection to the conclusion that Asencio[-Cordero] was a member of MS-13[?]
5. Was the declaration of Humberto Guizar taken into consideration before determining that Asencio[-Cordero] was a member of MS-13[?]

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[16] Federal Rule of Civil Procedure 31 permits a party to depose any person by written questions.

Appellants filed a motion for summary judgment in July 2020 after the government failed to respond to the five interrogatories. Appellants argued that they were entitled to judgment because the government failed to provide a bona fide factual reason for denying a visa to Asencio-Cordero, and because the government acted in bad faith in adjudicating Asencio-Cordero's visa application.

In August 2020, the government filed its own motion for summary judgment, arguing that it was entitled to invoke the doctrine of consular nonreviewability because, "even if there were no evidence in the record of Mr. Asencio-Cordero's association with MS-13, the consular officer's citation to § 1182(a)(3)(A)(ii) provided a facially legitimate and bona fide basis" for denying his visa application. The government also argued that "the consular officer provided a citation to 8 U.S.C. § 1182(a)(3)(A)(ii) and this citation was supported by the fact that the consular officer determined Mr. Asencio-Cordero was associated with MS-13."[17] The government explained that "the information that is now in the record provides an unambiguous connection to Section 1182(a)(3)(A)(ii), [such that] the visa refusal is facially legitimate and bona fide."

On the same day that it filed its cross-motion for summary judgment, the government responded to

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[17] The government's brief below noted that "the State Department has now made Mr. Asencio-Cordero aware of the factual basis underlying the Section 1182(a)(3)(A)(ii) finding during the adjudication process—that is, the consular officer's reason to believe that Mr. Asencio-Cordero had participated in gang activity in the past and would likely continue to do so if he were admitted to the United States." (Emphasis added.)

appellants' interrogatories. The response to interrogatories one through four was that "[t]he consular officer considered specific information that was obtained from law enforcement operations, along with the other information already identified for the court in the McNeil Declaration, and determined there was a reason to believe Mr. Asencio[Cordero] was a member of MS-13." In response to interrogatory five, the government represented that it considered the declaration of Humberto Guizar before determining that Asencio-Cordero was a member of MS-13.[18] The government also sought leave *ex parte* to file a declaration from a Senior State Department official for *in camera* review. The government explained that the information contained in the declaration was Sensitive But Unclassified and described sensitive information contained in the Consular Consolidated Database. The district court permitted the government to submit the declaration for *in camera* review but ordered it to submit a redacted version for appellants' review. The files disclosed to appellants contain significant redactions but document, in their unredacted portions,

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[18] Specifically, in response to the question "Was the declaration of Humberto Guizar taken into consideration before determining that Asencio[-Cordero] was a member of MS-13[?]," the government answered "Yes." (Emphasis added.) We note that this answer is implausible, as the date on the Guizar Declaration, April 27, 2016, is several months after the date on which the consular officer initially denied Asencio-Cordero's visa, December 28, 2015. The government's claim that it considered the Guizar Declaration thus raises questions about the carefulness of the government's visa decision.

the consular officer's belief that Asencio-Cordero was a member of MS-13.[19]

The district court held a hearing on the cross-motions for summary judgment in January 2021. At the hearing, the government stated that "[t]he tat[t]oos themselves were considered. That is in the record. . . . There were statements by law enforcement officers or authorities provided to the consular officer about Mr. Asencio-Cordero's membership in MS-13. We are not disclosing what those statements were or . . . what was specifically said because that would be precisely the same sort of look behind the government's facially legitimate and bona fide decision-making" protected by the doctrine of consular nonreviewability. The government indicated that it had provided this information in its responses to appellants' interrogatories. Appellants' counsel objected that the government was conflating a "conclusion and a reason to believe" something and suggested that the "facially legitimate and bona fide reason" standard required

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[19] For example, a document labeled "SAO Response"—a "Security Advisory Opinion," *see Ibrahim v. Dep't of Homeland Sec.*, 912 F.3d 1147, 1160 (9th Cir. 2019)—indicates that "the consular officer identified several facts that form the basis of reasonable grounds to believe that the applicant is a member of MS-13 and thus is likely to engage in unlawful activity in the United States. According to the factual findings in this case: [REDACTED] . . . For these reasons, the Department concurs in a finding of ineligibility under [§ 1182](a)(3)(A)(ii) based on the applicant's active membership in a street gang." A declaration accompanying the State Department Advisory Opinion explains that the Opinion "sets out the consular officer's factual findings regarding the applicability of the ineligibility ground to the visa applicant and the basis for such findings," including the "findings therein that led the consular officer to determine Mr. [Asencio-Cordero]'s membership in MS-13."

the government to disclose a specific fact to support its conclusion that Asencio-Cordero was a member of MS-13. The court asked the government if it was arguing "that the consular officer received information from law enforcement that identified Mr. Asencio[-Cordero] as a gang member. Or that they received information from law enforcement which led the consular officer to believe that he was a gang member?" The government clarified that it was making the first argument.

In March 2021, the court granted the government's motion for summary judgment and denied appellants' motion. In a written order, the court reiterated its prior conclusion that the government's citation to 8 U.S.C. § 1182(a)(3)(A)(ii) alone did not provide a "facially legitimate and bona fide reason" for denying Asencio-Cordero's visa application. Nevertheless, the court concluded that the government was entitled to invoke the doctrine of consular nonreviewability to shield the consular decision from judicial review because, subsequent to the initial denial, "the Government has offered further explanations for the consulate officer's decision," including the consular officer's "determin[ation] that Asencio-Cordero was a member of MS-13" documented in the McNeil declaration and the redacted documents provided to appellants and the court,[20] and appellants had not

[20] Although the court noted, in a footnote, that it was not "consider[ing] the redacted material[s] in ruling on the substantive issues in this case," the opinion referred to the government's "later clarifi[cation], at the hearing on January 6, 2021, that the tattoos specifically contributed to the determination, as did law enforcement information which identified Asencio-Cordero as an MS-13 gang member."

affirmatively demonstrated that the government denied the visa in bad faith. Because it reasoned that the statute had been constitutionally applied to exclude Asencio-Cordero based on the consular officer's determination that he was a member of MS-13, the court also rejected appellants' vagueness challenge to the constitutionality of the statute.

Appellants timely appealed.[21] We have jurisdiction under 28 U.S.C. § 1291, and we review the grant of summary judgment de novo. *Kohler v. Bed Bath & Beyond of Cal., LLC*, 780 F.3d 1260, 1263 (9th Cir. 2015).

III.

A. Muñoz's Constitutional Interest

Like the plaintiff in *Din*, *see* 576 U.S. at 101-02, Muñoz asserts that she has a protected liberty interest in her husband's visa application. We first recognized the existence of this constitutional interest in *Bustamante v. Mukasey*, where we held that, because "[f]reedom of personal choice in matters of marriage and family life is . . . one of the liberties protected by the Due Process Clause," a U.S. citizen possesses a protected liberty interest in "constitutionally adequate procedures in the adjudication of [a non-citizen spouse]'s visa application" to the extent authorized in

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[21] Appellants do not argue on appeal that Asencio-Cordero possesses an independent right to judicial review of the visa denial. Both appellants, however, appeal the grant of summary judgment on their constitutional vagueness claim. They also assert that the district court violated both appellants' due process rights in its adjudication of their claims by improperly considering redacted documents submitted for in camera review.

Mandel. 531 F.3d 1059, 1062 (9th Cir. 2008) (emphasis added). Although a plurality of the Supreme Court in *Din* would have held that a U.S. citizen does not have such a protected liberty interest, 576 U.S. at 101 (plurality opinion), Justice Kennedy's controlling concurrence declined to reach this issue, *id.* at 102 (Kennedy, J., concurring in the judgment).[22] It was therefore proper for the district court to conclude that, under the precedent of this circuit, Muñoz possesses a liberty interest in Asencio-Cordero's visa application. *See FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) ("[I]f we can apply our precedent consistently with that of the higher authority, we must do so.").

Subsequent case law, moreover, reinforces this precedent. Eleven days after the Court decided *Din*, Justice Kennedy and the *Din* dissenters comprised the majority in *Obergefell v. Hodges*, which reiterated longstanding precedent that "the right to marry is a fundamental right inherent in the liberty of the person" and subject to protection under the Due Process Clause. 576 U.S. 644, 675 (2015); *see also id.* at 663, 664. In so holding, *Obergefell* laid out "a careful description" of how the right to marry constitutes a fundamental liberty interest that is "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and internal quotation marks

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[22] The four-justice dissent concluded that a U.S. citizen possesses a liberty interest in the visa application of a non-citizen spouse. *Din*, 576 U.S. at 107 (Breyer, J., dissenting).

omitted); *Obergefell*, 576 U.S. at 665-676 (providing the rigorous description and analysis *Glucksberg* requires). *But see Din*, 576 U.S. at 93-94 (plurality opinion) (arguing that *Glucksberg* does not support the right Din asserted). *Obergefell* recognized that "[t]he right to marry, establish a home[,] and bring up children" are "varied rights" comprising a "unified whole" that are "a central part of the liberty protected by the Due Process Clause." 576 U.S. at 668 (internal quotation marks omitted).

In addition to having a fundamental liberty interest in their marriage, U.S. citizens also possess a liberty interest in residing in their country of citizenship. *See, e.g.*, *Agosto v. INS*, 436 U.S. 748, 753 (1978); *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922). Consequently, even though denying a visa to the spouse of a U.S. citizen does not necessarily represent the government's "refus[al] to recognize [the U.S. citizen]'s marriage to [a non-citizen]," and the citizen theoretically "remains free to live with [the spouse] anywhere in the world that both individuals are permitted to reside," *Din*, 576 U.S. at 101 (plurality opinion), the cumulative effect of such a denial is a direct restraint on the citizen's liberty interests protected under the Due Process Clause, *see O'Bannon v. Town Ct. Nursing Ctr.*, 447 U.S. 773, 788 (1980), because it conditions enjoyment of one fundamental right (marriage) on the sacrifice of another (residing in one's country of citizenship).

In light of the foregoing, we remain convinced that *Bustamante* correctly recognized that a U.S. citizen possesses a liberty interest in a non-citizen spouse's visa application. Because Muñoz asserts that the government's adjudication of Asencio-Cordero's visa

application infringed on this protected liberty interest, we proceed to evaluate whether the government provided "a facially legitimate and bona fide reason" for denying his visa.[23] *See Mandel*, 408 U.S. at 766-70; *Din*, 576 U.S. at 104 (Kennedy, J., concurring in the judgment).

B. The "Facially Legitimate and Bona Fide Reason" Requirement

The parties' disagreement about whether the *Mandel* exception to consular nonreviewability applies centers on (1) whether the government provided "a facially legitimate and bona fide reason" for the visa denial; and (2) whether the government's long delay in providing anything more than a citation to § 1182

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[23] At oral argument, the government claimed that, *Mandel* and *Din* notwithstanding, it is not obligated to provide any information upon the denial of a visa. In support of this proposition, the government cited *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950), and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)—cases that address, as the government's counsel recognized, the constitutional rights and process owed to *non-citizens* seeking to enter the country. *Mandel* and *Din*, on the other hand, concern judicial review in cases where the petitioner is a U.S. citizen who possesses a constitutional interest in a non-citizen's visa application—like the case before us. *Knauff*'s discussion of the process owed to non-citizens at the gate of entry is, at best, peripheral to our evaluation of the process owed to a U.S. citizen whose constitutional rights may have been infringed by the denial of an immigrant visa to a spouse. Moreover, *Din*'s citation to *Knauff* along the way to explicating the criteria for invoking the *Mandel* exception, *see Din*, 576 U.S. at 104-105 (Kennedy, J., concurring), indicates that *Din* incorporates *Knauff*'s holding to the extent of its relevance in situations involving the visa applications of U.S. citizens' spouses.

(a)(3)(A)(ii) was consistent with its obligation under step two of the *Din* framework.[24]

1. Satisfying *Din* Step Two in the Absence of Discrete Factual Predicates in the Statute

As we explained in *Cardenas* and *Khachatryan*, a consular officer who denies a visa satisfies *Mandel*'s requirement to provide a "facially legitimate and bona fide reason" if the statutory basis of exclusion "specifies discrete factual predicates the consular officer must find to exist before denying a visa" or, alternatively, if there exists "a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." *Khachatryan*, 4 F.4th at 851 (quoting *Cardenas*, 826 F.3d at 1172). On appeal, the government has wisely abandoned the argument that the statute at issue here contains discrete factual predicates. Unlike surrounding provisions, 8 U.S.C. § 1182(a)(3)(A)(ii) does not specify the type of law-breaking that will trigger a visa denial, and a consular officer's belief that an applicant seeks to enter the United States for general (including incidental) lawbreaking is not a "discrete" factual predicate. *Compare id.*, with *id.* § 1182(a)(3)(E)(ii), (iii) (deeming inadmissible any alien who has participated in genocide or extrajudicial killings), *id.* § 1182(a)(2)(C) (deeming inadmissible any alien who has engaged in the illicit trafficking of controlled substances), *and id.* § 1182(a)(3)(B) (identifying discrete terrorism-related bases for inadmissibility). Therefore, the government

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[24] Although appellants challenge § 1182(a)(3)(A)(ii) as unconstitutionally vague, we assume for present purposes that the statute constitutes a valid statute of inadmissibility under *Din*.

can satisfy its burden at *Din* step two only if the record contains information—what *Cardenas*, 826 F.3d at 1172, and *Khachatryan*, 4 F.4th at 851, referred to as "a fact in the record"—that provides a facial connection to the consular officer's belief that Asencio-Cordero "s[ought] to enter the United States to engage solely, principally, or incidentally in . . . any other unlawful activity," 8 U.S.C. § 1182(a)(3)(A)(ii).

The government contends that it complied with *Cardenas*'s "fact in the record" requirement because, when a visa is denied under § 1182(a)(3)(A(ii) and "the factual basis for the prediction of criminality [required by the statute] . . . is the applicant's membership in a gang," all that matters is whether the consular officer "understood . . . the predicate factual basis" for denying the visa. To make this argument, which implies that the government can comply with *Mandel* without disclosing any factual justification for a visa denial to a petitioner, the government invokes *Din*, which—it claims—"[n]owhere . . . suggested that there needs to be evidence in the record of an [applicant]'s association with terroristic activities for a citation to § 1182(a)(3)(B) to be sufficient." The government contends that "[t]he same is true in the context of members of transnational gangs under 8 U.S.C. § 1182(a)(3)(A)(ii)."[25] But the government's argument misreads *Din*,

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[25] At oral argument, the government suggested that the location of § 1182(a)(3)(B) "right next to" the statutory provision at issue here is relevant to our analysis. But *Din* did not announce a blanket rule about 8 U.S.C. § 1182(a)(3), whose subsections (A) through (G) contain numerous subsections of varying degrees of discrete specificity. *See id.* Instead, *Din* spoke of a statute containing "discrete factual predicates," which—as we have explained—§ 1182(a)(3)(A)(ii) lacks.

where the statutory citation to § 1182(a)(3)(B) was deemed sufficient because that statute contains discrete factual predicates. *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment) (rejecting Din's claim that "due process requires she be provided with the facts underlying th[e inadmissibility] determination" because the government cited a statute "specif[ying] discrete factual predicates").

Indeed, it was critical in both *Din* and *Mandel* that the government identified the factual basis for the denial,[26] s*ee id.*; *Mandel*, 408 U.S. at 769-70 (emphasizing that "the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver" and declining to address the scenario in which "no justification whatsoever is advanced"), and both decisions identify due-process principles as the foundation of their reasoning, *see Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment) (identifying the issue of whether "the notice given was constitutionally adequate" as relevant for assessing the government's compliance with the "facially legitimate and bona fide reason" requirement); *Mandel*, 408 U.S. at 766-70 (explaining that, in the realm of consular decision making, the production of a "facially legit-

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[26] The government denied the visa application of Din's husband on June 7, 2009, and notified Din and her husband on July 13, 2009, that the visa had been denied under 8 U.S.C. § 1182(a)(3)(B), which identifies "terrorist activities" as bases for finding a non-citizen inadmissible. *See Din v. Kerry*, 718 F.3d 856, 859 (9th Cir. 2013), *rev'd*, 576 U.S. at 86. And, although the facts and administrative process differed, Mandel, too, was promptly informed of the reason underlying the initial denial of his visa application, which was again relayed to Mandel when the attorney general declined to exercise his waiver authority to grant the visa. *See Mandel*, 408 U.S. at 758-59.

imate and bona fide reason" is a substitute for the standard balancing of interests in the procedural due process framework). From these cases, we understand notice to be a key concern of *Mandel*'s facially legitimate and bona fide reason standard. We thus reject the government's suggestion that it can comply with *Cardenas*'s "fact in the record" formulation without providing the operative fact to a petitioner.

Despite contesting its obligation to provide the factual basis for the denial to petitioners, the government, in fact, eventually provided them with information supporting the denial. Specifically, the government explained that the consular officer denied Asencio-Cordero's visa application "after considering [his] in-person interview, a review of his tattoos, and the information provided by law enforcement saying that he was a member of MS-13." The record contains the November 2018 declaration of attorney adviser Matt McNeil attesting to this information.

This information is quite similar to the information we held in *Cardenas* was sufficient to satisfy *Din* step two. In that case,[27] the government initially did not provide Cardenas or her non-citizen spouse, Mora, any information beyond citing § 1182(a)(3)(A)(ii) to

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[27] *Cardenas* is the only case from this circuit post-dating *Din* in which the government invoked a statute without discrete factual predicates—§ 1182(a)(3)(A)(ii), the same statute at issue here—to justify the denial of a visa to a non-citizen spouse of a U.S. citizen. An appeal currently pending in the D.C. Circuit also involves a challenge to a visa denial under this subsection. *See Colindres v. U.S. Dep't of State*, 575 F. Supp. 3d 121, 126 (D.D.C. 2021), *appeal filed* (Jan. 20, 2022).

explain the denial of Mora's visa. 826 F.3d at 1168.[28] Within three weeks of the denial, however—after Mora sought additional information[29]—a consular official provided the following explanation by email:

> At the time of Mr. Mora's June 16, 2008 arrest [preceding his removal proceedings and subsequent visa application], Mr. Mora was identified as a gang associate by law enforcement. The circumstances of Mr. Mora's arrest, as well as information gleaned during the consular interview, gave the consular officer sufficient "reason to believe" that Mr. Mora has ties to an organized street gang.

Id. On appeal, we reasoned that the denial of Mora's visa complied with *Mandel*'s "facially legitimate and bona fide reason" requirement because "[t]he consular officer . . . cited a valid statute of inadmissibility, § 1182(a)(3)(A)(ii)" and informed Cardenas and Mora that the visa was denied based on the government's "belief that Mora was a 'gang associate' with ties to the Sureno gang," as documented in the email to Mora

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[28] In addition to § 1182(a)(3)(A)(ii), the government also initially cited § 1182(a)(9)(A)(i) and § 1182(a)(9)(B)(i)(II) as bases for the denial. *See* 8 U.S.C. § 1182(a)(9)(A)(i) (classifying as inadmissible aliens who previously have been ordered removed under 8 U.S.C. § 1225(b)(1)); *id.* § 1182(a)(9)(B)(i)(II) (classifying as inadmissible for ten years aliens who were unlawfully present in the United States for one year or more). The former statutory basis was withdrawn and the government may waive the latter, so only § 1182(a)(3)(A)(ii) was relevant on appeal. *Cardenas*, 826 F.3d at 1168 n.3.

[29] *See Cardenas v. United States*, No. CIV. A. 12-00346-S, 2013 WL 4495795, at *2 (D. Idaho Aug. 19, 2013) (noting the dates of the denial and subsequent email), *aff'd*, 826 F.3d 1164.

three weeks after the visa denial. *Id.* at 1172; *see also id.* at 1167-68.

Appellants nonetheless argue that the record information in this case—though similar in content to the information we held in *Cardenas* was "a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility," 826 F.3d at 1172—falls short of what *Mandel* and *Din* require. Specifically, appellants contend that the information contained within the McNeil Declaration constitutes "conclusions, not facts," and is therefore inadequate under *Cardenas*.

We reject this argument, elaborated over many pages of appellants' opening brief. Although appellants insist that "[n]o court has accepted the government's mere conclusion [regarding inadmissibility] as a substitute for the discrete fact required by *Mandel*," their focus on labeling information as either a "fact" or a "conclusion" overlooks the purpose served by the "fact in the record" requirement. Whether information in the record is characterized as a "fact" or a "conclusion" is ultimately less relevant than whether the information provides a facial connection to the statutory ground of inadmissibility, thereby giving a petitioner notice of the reason for the denial. The McNeil Declaration contains information that provides a facial connection between the reason for the denial—the consular officer's belief that Asencio-Cordero is a member of MS-13, which the officer reached based on the visa interview, a criminal review, and a review of Asencio-Cordero's tattoos—and the cited statute of

inadmissibility, § 1182(a)(3)(A)(ii).[30] Under *Cardenas*, this information suffices as a "facially legitimate and bona fide reason" for denying a visa. *See* 826 F.3d at 1172.

Appellants also contend, however, that the government's failure to provide them with "the specific factual basis of the denial at the time of the denial" means that the proffered information is insufficient to satisfy the "facially legitimate and bona fide reason" requirement. This argument carries much more force. In reaching our conclusion in *Cardenas*, we noted that the consular officer himself "provided" the reason within three weeks of the denial. *See* 826 F.3d at 1172 ("He also provided a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility: the belief that Mora was a 'gang associate' with ties to the Sureno gang."). Similarly, the visa applicant in *Din* was apprised of the reason for the denial—by reference to a statutory provision containing discrete factual predicates—within about a month of the denial. *See Din v. Kerry*, 718 F.3d 856, 859 (9th Cir. 2013), *rev'd*, 576 U.S. 86. In this case, the government waited almost three years to provide comparable information to appellants and did so only when prompted by judicial proceedings.[31]

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[30] The Foreign Affairs Manual identifies MS-13 as one of a number of criminal organizations in which a visa applicant's "active" membership, as determined by a consular official, must give rise to a finding of inadmissibility and subsequent review by State Department personnel. *See* 9 FAM 302.5-4(B)(2). At oral argument, counsel for the government indicated that MS-13 has been identified as such an organization since 2005.

[31] At the time appellants filed this lawsuit, the only information in the record supporting the visa denial was the denial itself,

At oral argument, the government suggested that the long delay in apprising appellants of the factual basis for denying Asencio-Cordero's visa does not matter because appellants now know that the visa was denied due to the consular officer's belief that Asencio-Cordero is a member of MS-13. That position is far too facile. Even if the government would have satisfied *Mandel* had it disclosed the fact of Asencio-Cordero's suspected gang membership at the time of the visa denial, it does not necessarily follow that citing § 1182 (a)(3)(A)(ii) at the time of the denial and then providing the supporting factual basis years after the denial fulfills *Mandel*'s "facially legitimate and bona fide reason" requirement.[32] Indeed, the government cites no case law supporting that proposition.

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which included the consular officer's citation of § 1182(a)(3)(A)(ii) but no other factual details. The government maintained, throughout its briefing on the motion to dismiss, that this statutory citation satisfied its obligation. At oral argument, the government's counsel again suggested that a citation to § 1182 (a)(3)(A)(ii) was all that was constitutionally required at the time it denied Asencio-Cordero's visa application.

[32] At a scheduling conference held by the district court in September 2018—nearly three years after the denial of the visa in December 2015—the government disclosed that the visa was denied because "Mr. Asencio[-]Cordero was determined to be a member of a known criminal organization." At the scheduling conference, counsel for the government suggested that the State Department had provided this information, via email, prior to the conference (on September 18, 2018) but after the district court denied the government's motion to dismiss (on December 11, 2017) for failure to provide a "bona fide factual basis" for denying the visa. The record lacks any documentation of such an email. In any case, even if the government provided this information promptly to appellants after the court's December 2017 order on the motion to dismiss, at least two years elapsed between the government's denial of Asencio-Cordero's visa

2. Due Process and Timeliness

To understand the significance of timing to *Mandel*'s disclosure requirement, we revisit the purpose served by that requirement and its relationship to the Due Process Clause.

The doctrine of consular nonreviewability is a rule of decision, formulated by courts and informed by judicial respect for the separation of powers, *Allen*, 896 F.3d at 1101, that curtails judicial review of procedural due process challenges to visa denials in light of "the political branches' broad power over the creation and administration of the immigration system," *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment); *see also Mandel*, 408 U.S. at 766, 770. Instead of evaluating whether the procedures attendant on the deprivation of a spouse's liberty interest were "constitutionally sufficient"—which we do in other contexts by carefully balancing the private interests, the risk of an erroneous deprivation, and the governmental interests at stake, *see*, *e.g.*, *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)—*Mandel* and *Din* instruct courts not to proceed to this balancing test if the government proffers "a facially legitimate and bona fide reason" for denying the visa, *see Din*, 576 U.S. at 104 (Kennedy, J., concurring in the judgment) ("*Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.' Once this standard is met, 'courts will neither look

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application and appellants' receipt of information providing a factual basis for the denial.

behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate." (citation omitted)); *see also Mandel*, 408 U.S. at 766-70.

However, even though *Din* and *Mandel* establish that the substance of the notice is constitutionally adequate when the government produces "a facially legitimate and bona fide reason" for the visa denial, these decisions do not foreclose application of other core due-process requirements. *See Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment) (discussing the "constitutional[] adequa[cy]" of the notice given). It is a long-standing due process requirement that the government provide any required notice in a timely manner. *See Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (holding 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). Timeliness of notice was not at issue in *Mandel* or *Din* because in both cases the government identified the reason for the denial soon after the denial. *See Mandel*, 408 U.S. at 757-59, 769; *Din*, 718 F.3d at 859, *rev'd*, 576 U.S. at 86. Yet in *Din*, Justice Kennedy contemplated that petitioners will use the information contained in the notice of a visa denial to "mount a challenge to [the] visa denial." 576 U.S. at 105 (Kennedy, J., concurring in the judgment). Such a challenge is impossible if the petitioner is not timely provided with the reason for the denial.

We thus conclude that, where the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the

citizen of that interest. *Goldberg*, 397 U.S. at 267-68; *Wright v. Beck*, 981 F.3d 719, 727-30 (9th Cir. 2020).[33] As we have explained, the denial of an immigrant visa to the spouse of a U.S. citizen deprives that citizen of the ability to enjoy the benefits of her marriage and to live in her country of citizenship. Her ability to vindicate her liberty interest, whether through the presentation of additional evidence or initiation of a new petition,[34] depends on timely and adequate notice of the reasons underlying the initial denial.

The administrative process for visa applications and approvals informs our understanding of what constitutes timely notice. *See Mathews*, 424 U.S. at 334 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))). The Code of Federal Regulations provides

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[33] Justice Kennedy's opinion in *Din* recognized the need for timeliness. As we have explained, the opinion observed that notice is provided at least in part so that petitioners may assess, and potentially challenge, a visa denial. In both *Mandel* and *Din*, the government provided its reasons soon after the denial. In this case, the government provided no adequate explanation until after petitioner felt compelled to commence litigation and confront the government with interrogatories. The delay deprived the petitioner of an opportunity to assess the basis for the denial before challenging it. The dissent's suggestion that we are "grafting" a new requirement onto the duties of consular officers as outlined in *Mandel* and *Din* is incorrect. Notice within a reasonable time is part of the process that was due.

[34] The Code of Federal Regulations and the FAM prescribe the procedure consular officials must follow in refusing an immigrant visa. *See* 22 C.F.R. § 42.81; 9 FAM 504.11; *see also infra.* The FAM contains more granular detail on the internal processes the State Department and consular officials follow when denying immigrant visa applications.

that, "[i]f a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered." 22 C.F.R. § 42.81(e).[35] Moreover, the Foreign Affairs Manual instructs consular officers that all visa refusals "must" be submitted for supervisory review within 30 days of the denial, 9 FAM 504.11-3(A)(2)(b), and the Manual recognizes that some visa decisions can "be overcome by the presentation of additional evidence," 9 FAM 504.11-3 (A)(2)(a)(2).[36]

These provisions for review—including the submission and consideration of additional evidence—provide contextual support for the proposition that receiving timely notice of the reason for the denial is essential for effectively challenging an adverse determination. *See Goldberg*, 397 U.S. at 267 ("'The fundamental requisite of due process of law is the opportunity to be heard' . . . 'at a meaningful time and in a meaningful manner.'" (first quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); and then quoting

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[35] Section 42.81(b) suggests that some, but not all, grounds of ineligibility can be overcome in this manner. *See* 22 C.F.R. § 42.81(b) ("If the ground of ineligibility may be overcome by the presentation of additional evidence . . . ").

[36] The Code of Federal Regulations notes that "[i]f the grounds of ineligibility . . . cannot be overcome by the presentation of additional evidence, the principal consular officer . . . shall review the case without delay. . . . If the grounds of ineligibility may be overcome by the presentation of additional evidence and the applicant indicates the intention to submit such evidence, a review of the refusal may be deferred." 22 C.F.R. § 42.81(c). The additional evidence must be submitted within one year of the initial denial. *See id.* § 42.81(b), (e).

Armstrong v. Manzo, 380 U.S. 545, 552 (1965))). By this standard, the government's nearly three-year delay in providing appellants with the reason for the denial of Asencio-Cordero's visa—and only after being prompted by court order—was clearly beyond the pale.[37] *Cf. Wright*, 981 F.3d at 728 ("[O]utright failures to even attempt to provide notice violate due process.").

Although the doctrine of consular nonreviewability imposes a limited disclosure requirement on the

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[37] We reject as inadequate as a matter of due process the government's suggestion that, "[i]n the course of the parties' communication and interview of Mr. Asencio-Cordero, the consular officer made clear that he was concerned Mr. Asencio-Cordero would engage in criminal activity related to the MS-13 gang . . . if he entered the United States." The government does not explain how these concerns were "made clear," and the documentation in the record of appellants' significant efforts to uncover more than a statutory citation as the basis of the visa denial belies the government's assertion that the consular officer's concerns were "made clear." Moreover, the government nowhere asserts that it informed Asencio-Cordero, prior to the commencement of litigation, that his visa was denied because of his purported membership in MS-13. Indeed, the government's briefing elsewhere recognizes that the factual basis for the denial was only added to the record after prompting from the court.

We strongly disagree with the dissent's suggestion that speculation as to why a visa was denied is an adequate substitute for notice of the "discrete factual" basis for exclusion, *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment), and the submission of the Guizar Declaration by appellants near the end of the administrative review of Asencio-Cordero's visa is as consistent with last-resort guesswork as it is informed advocacy. This interpretation is reinforced by the government's dubious description of how the Declaration entered its decision-making process, *see supra*, and the absence of any record evidence indicating that the government notified appellants of the reason for the denial until after litigation commenced.

government, and essentially gives its rationale the benefit of the doubt in our truncated due-process inquiry, *see Din*, 576 U.S. at 104 (Kennedy, J., concurring in the judgment), the government must first comply, within a reasonable time, with *Mandel*'s requirement to provide a facially legitimate and bona fide reason for denying a visa.[38] We can determine whether the government provided such a justification without evaluating the substantive merits of the reason advanced. *See Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment) ("The Government . . . was not required, as Din claims, to point to a more specific provision within § 1182(a)(3)(B)."), *vacating* 718 F.3d at 862 ("It appears that . . . the Government must cite to a ground narrow enough to allow us to determine that [the statute] has been 'properly construed.'"). Our understanding of reasonable timeliness is informed by the 30-day period in which

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[38] The government's failure to timely comply with this requirement is especially striking given the existence of FAM provisions that impose specific recordkeeping requirements and evidentiary standards for visa refusals under § 1182(a)(3)(A)(ii) based on asserted membership in a known criminal organization, including MS-13. *See* 9 FAM § 302.5-4(B)(2). In particular, consular officers "are required to make clear factual findings in the case notes, setting forth in detail all the facts supporting a reason to believe that the applicant is a member of a criminal organization . . . and [the officer] must identify the organization of which they are a member." *Id.* § 302.5-4(B)(2)(g). And "although the basis for applying [§ 1182](a)(3)(A)(ii) to active members of criminal organizations makes it a de facto permanent ground of ineligibility," the FAM contemplates that an applicant may overcome this presumption by "demonstrat[ing], to [a consular officer's] satisfaction and with clear and compelling evidence, that they are no longer an active member of the organization." *Id.* § 302.5-4(B)(2)(c).

visa denials must be submitted for internal review and the 1-year period in which reconsideration is available upon the submission of additional evidence.

Because no "fact in the record" justifying the denial of Asencio-Cordero's visa was made available to appellants until nearly three years had elapsed after the denial, and until after litigation had begun, we conclude that the government did not meet the notice requirements of due process when it denied Asencio-Cordero's visa. This failure means that the government is not entitled to invoke consular nonreviewability to shield its visa decision from judicial review. The district court may "look behind" the government's decision. *Mandel*, 408 U.S. at 770.

We therefore vacate the judgment of the district court and remand for the district court to consider the merits of appellants' claims.

IV.

VACATED and REMANDED for further proceedings consistent with this decision.

DISSENTING OPINION BY JUSTICE LEE (OCTOBER 5, 2022)

LEE, Circuit Judge, dissenting:

Sandra Muñoz, a U.S. citizen, has not seen her husband, Luis Asencio-Cordero, an El Salvadoran, for several years because the U.S. Department of State denied him a visa. The couple also have an American citizen child, who has been deprived of a father. She claims that the government kept her in the dark for three years about why he is being excluded from the United States. And even now, she alleges that the government has provided only a conclusory reason for barring her husband.

The government responds that law enforcement has reason to believe that her husband is a member of MS-13, a notoriously violent gang. The government also relies on the consular non-reviewability doctrine—which generally bars courts from meddling with visa decisions made by consular officers—for not saying more about its reason for finding Asencio-Cordero inadmissible.

The majority opinion tries to thread the needle and implicitly balance the competing interests in this difficult case: it recognizes that courts generally cannot review the government's visa decisions but holds that we can review it here because the government did not give Muñoz its reason for the visa denial within a "reasonable" time. But by grafting a new "timeliness" due process requirement onto consular officers' duties, we are infringing on the Executive Branch's power to make immigration-related decisions and effectively weighing policy interests. Those determinations are

fraught with national security, foreign policy, and sovereignty implications that we are ill-equipped to evaluate. I thus respectfully dissent.

I. We Should Not Impose a "Timeliness" Due-Process Requirement on Consular Officers' Visa Decisions

As the majority recognizes, courts have long held that a consular officer's decision to deny a visa is not reviewable when it is made "on the basis of a facially legitimate and bona fide reason." *Kerry v. Din*, 576 U.S. 86, 104 (2015) (Kennedy, J., concurring in the judgment). Once the court identifies a bona fide reason, it "will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate." *Id.* (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)); *see also Cardenas v. United States*, 826 F.3d 1164, 1170 (9th Cir. 2016). Thus, if a consular officer denies a visa under a valid statute of inadmissibility and there is "a fact in the record that 'provides at least a facial connection to' the statutory ground," a court cannot review the visa denial, absent an affirmative showing of bad faith. *Khachatryan v. Blinken*, 4 F.4th 841, 851 (9th Cir. 2021) (quoting *Cardenas*, 826 F.3d at 1172).

Here, the State Department—despite its delay—has met its burden of identifying a valid statute of inadmissibility and "a fact in the record that 'provides at least a facial connection to'" the statutory ground. *Id.* It advised Muñoz that the government believes that her husband has connections to the MS-13 gang and notified her of the statutory provision that bars him from entering the United States. Muñoz, for her

part, has not shown bad faith. That should be the end of the story.

The majority opinion, however, has crafted an exception to the longstanding consular non-reviewability doctrine: consular officers now must provide a facially legitimate and bona fide reason for denying a visa—within a reasonable time. But that conflicts with the separation-of-powers principle that "Congress may '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.'" *Allen v. Milas*, 896 F.3d 1094, 1104-05 (9th Cir. 2018) (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895)). And here, Congress has imposed no time limit for a consular officer to inform a foreigner the reason that his or her visa is being denied.

Nor has the Supreme Court imposed such a time limit, given the deference that courts owe to the political branches in the realm of foreign affairs. *See Fiallo v. Bell*, 430 U.S. 787, 794-96 (1977). Justice Kennedy's opinion in *Din* contemplated the type of travails suffered by Muñoz, but the opinion decided against requiring more robust notice, recognizing the political branches' vast discretion over our immigration system. 576 U.S. at 105-06.[39] The majority emphasizes

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[39] Justice Kennedy explained:

> To be sure, the statutory provision the consular officer cited covers a broad range of conduct. And Din perhaps more easily could mount a challenge to her husband's visa denial if she knew the specific subsection on which the consular officer relied. Congress understood this problem, however. . . . Under *Mandel*,

that, in *Cardenas* and *Din*, the consular officers provided the visa applicants with the reason for their decisions within three weeks and about a month, respectively. But just because the government provided prompt notice in those two cases does not mean that it is constitutionally required. *See Cardenas*, 826 F.3d at 1172; *Din*, 576 U.S. at 104-05.

To be sure, we do not turn a blind eye to the government's behavior. We review consular decisions when "a consular officer acted in subjective bad faith rather than out of a 'desire to get it right.'" *Khachatryan*, 4 F.4th at 854-55 (quoting *Yafai v. Pompeo*, 912 F.3d 1018, 1022 (7th Cir. 2019)). Prolonged delays may show that the consular officer's reason for the denial is not genuine. *See id.* For example, in *Khachatryan*, the petitioner's father tried to obtain a visa for 14 years, but the Embassy "repeatedly relied on the legally and factually invalid" reasons to deny the visa. *Id.* at 854. After Citizenship and Immigration Service's several attempts to tell the Embassy that its finding was unsupported, the Embassy "suddenly for the first time over that 14-year period hauled out" a new basis for denying the visa. *Id.* The government insisted that we must take the "new allegation at face value." *Id.* But we declined. We concluded that "the overall pattern of troubling behavior over such an extended period of time is enough to raise a plausible

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> respect for the political branches' broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer's denial of a visa to an alien abroad.

Din, 576 U.S. at 105-06.

contrary inference that the consular officer acted in subjective bad faith." *Id.* at 852, 854-55. Thus, the timing of the government's disclosure to the visa applicant was relevant only for the bad-faith inquiry, not for the issue of timely notice.

Finally, as a practical matter here, Muñoz suffered no real harm despite the government's delay in notifying her of the reason for the visa denial. Muñoz suggests that she did not know for three years why the government considered her husband inadmissible. The majority opinion homes in on that allegation in ruling that the government violated her supposed due process right to be timely notified of that reason for denial. But Muñoz seemingly knew that the United States suspected her husband of being a MS-13 gang member. Within five days of the U.S. Consulate advising Muñoz that the State Department concurred with the consular officer's decision, her former lawyer wrote to the State Department that "an immigration visa application is unjustly being denied just for the simple fact that that the applicant has tattoos," even though he "is not a gang member." Then she submitted a declaration from a gang expert who contended that "none of the tattoos on Mr. Asencio[']s body represent any gang or criminal organization that I am aware of."

So Muñoz's real complaint is <u>not</u> that she did not know for a long time why the government considers her husband inadmissible. She apparently knew. Rather, the crux of her complaint is that the government did not provide evidence for its belief that her husband is affiliated with the MS-13 gang. But that objection runs aground the consular non-reviewability doctrine. There is no judicial right to demand evidence supporting the government's denial of a visa. *Din*, 576

U.S. at 104 (2015) (Kennedy, J., concurring in the judgment) (noting that courts do not "look behind the exercise of that discretion" to deny a visa). And for good reason: The government here may be relying on confidential information derived from, say, a covert operation in El Salvador, or perhaps it is acting based on a secret diplomatic initiative. We cannot require the Executive Branch to disclose such information because "the power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative branches of government." *Allen*, 896 F.3d at 1104 (quoting *Ventura-Escamilla v. Immigr. & Naturalization Serv.*, 647 F.2d 28, 30 (9th Cir. 1981)).

In short, it is "[t]he political branches—not the courts—[that] have authority to create the administrative process for visa decisions." *See Allen*, 896 F.3d at 1105. We are thus powerless to dictate the consular officers' visa decision-making process, even if we may doubt their judgment.

II. The Majority's New Standard Is Potentially Unworkable

I also fear that this new standard may be practically difficult for consular officials to implement. The majority opinion requires consular officers to provide this new "timeliness" due process right only when a U.S. citizen's rights are burdened. This is so because foreign citizens have no legitimate claim of entitlement to a visa. *See Din*, 576 U.S. at 88; *Mandel*, 408 U.S. at 762 ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise.").

The majority opinion assumes that consular officials will know when U.S. citizens' rights are burdened. But this will not always be clear from the visa application. For example, not all family-sponsored visas will require notification because there may be no protected rights or relationships involved. *See Khachatryan*, 4 F.4th at 855 (holding that a U.S. citizen son did not have "a protected liberty interest in having his father come to the United States"). The inquiry becomes even less clear outside of family-sponsored visas. And even where courts have provided guidance, it may be murky when a liberty interest is burdened by a visa denial.

Adding to the confusion will be what constitutes a "reasonable time period." The majority does not define "reasonable" but suggests a 3-to-12-month range. The majority opinion ties this standard to an internal review deadline in the Foreign Affairs Manual (FAM) and the deadline for a visa applicant to request reconsideration under the Code of Federal Regulations. Neither guidepost, however, is particularly relevant for due process rights of a U.S. citizen seeking judicial review. FAM, for example, exempts notice in some cases. *See* 9 FAM 504.11-3(A)(1)(c). The regulations relied on by the majority opinion also do not place a time constraint on consular officials. The Code of Federal Regulations requires only that the consular officer "inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory provision of law or implementing regulation under which administrative relief is available." 22 C.F.R. § 42.81. That the regulations give "the applicant [] one year from the date of refusal" to gather more evidence to overcome his inad-

missibility, 22 C.F.R. § 42.81(e), is separate from a constitutional due process right for U.S citizens.

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Muñoz requested that we vacate the district court's decision because the State Department "failed to provide any fact to support its" decision and thus acted in bad faith. The majority opinion recognizes that the State Department met that burden but still vacates the district court's well-reasoned decision, creating a new due process right that raises separation-of-powers concerns. I respectfully dissent.