No. 23-334

In the
Supreme Court of the United States

DEPARTMENT OF STATE, ET AL.,
Petitioners,

v.

SANDRA MUNOZ, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

Christopher J. Hajec
Counsel of Record
Gina M. D'Andrea
Immigration Reform Law Institute
25 Massachusetts Ave NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org
gdandrea@irli.org

Counsel for Amicus Curiae
Immigration Reform Law Institute

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed amicus curiae briefs in a wide variety of cases, including: *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); and *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

[1] Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel contributed monetarily to preparing or submitting this brief.

SUMMARY OF ARGUMENT

Despite the plenary authority of Congress to regulate the entry and admission of aliens, as exercised via enactment of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101, *et seq.*, and the long-accepted doctrine of consular non-reviewability, the United States Court of Appeals for the Ninth Circuit has effectively created a new category of automatically admissible aliens: spouses of United States citizens. The court below held that a U.S. citizen has a liberty interest in his or her alien spouse's visa application that requires judicial review of its denial. Pet. App. 15a-16a, 18a. This erroneous holding disregards Congress's determinations regarding admissibility. This Court must reverse the holding below and make clear that United States citizens cannot invoke familial-based fundamental rights to evade the admissions criteria and other immigration laws and procedures enacted by Congress.

First, the fundamental right to marry under the Due Process Clause of the Fifth Amendment is not infringed by the exclusion of an alien. The enforcement of admissibility requirements is tangential to a citizen's right to marry and in no way bars, blocks, or terminates a marriage.

Second, there is no other liberty interest related to marriage that would require an alien be admitted to the United States. A U.S. citizen does not have a fundamental right to live in the United States with an alien spouse, nor a fundamental right in having his or her alien spouse granted a visa or other status. Liberty interests protected by the Due Process Clause must be

deeply rooted in the history and tradition of the nation, and the claimed rights are not so rooted. Rather, what is deeply rooted in history and tradition is that Congress controls the admission of aliens without recognition of such alleged rights.

Finally, even were this Court to determine that Respondent Munoz has a protected liberty interest in this case, the doctrine of consular non-reviewability applies and precludes review. The plain language of the INA is clear that reference to the inadmissibility statute itself is sufficient explanation in most cases, and that in cases where security grounds of inadmissibility are implicated, no such explanation is required. Therefore, because Respondent Ascencio-Cordero was denied on security-related grounds, the doctrine of consular non-reviewability applies.

ARGUMENT

I. U.S. Citizens Cannot Claim a Fundamental Liberty Interest to Usurp the Plenary Power of Congress Over the Admission of Aliens.

A. The fundamental right to marriage is not implicated in this case.

The Due Process Clause of the Fifth Amendment ensures that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. Amend. V. Due process protections, based "in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting

Hurtado v. California, 110 U.S. 516, 532 (1884)). It has long been recognized that "[t]he Due Process Clause guarantees more than fair process, and the liberty it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Accordingly, the Due Process Clause "also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington*, 521 U.S. at 720 (citing *Reno v. Flores*, 507 U.S. 292, 301-302 (1993)); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)). *See also Poe,* 367 U.S. at 543 ("The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.").

Among such protected liberty interests are those related to marriage. As this Court stated in *Loving v. Virginia*, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. 1, 12 (1967) (striking down a state law barring interracial marriage because it "deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment."). *See also Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (recognizing the "rights to marital privacy and to marry and raise a family."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (recognizing that the Due Process Clause protects "freedom of personal choice in matters of marriage and family rights.").

These recognized fundamental marriage rights, however, are not implicated by federal immigration laws. Visa denials do not infringe on the marriage rights of U.S. citizens. *See Bangura v. Hansen*, 434 F.3d 487, 496 (6th Cir. 2006) ("A denial of an immediate relative visa does not infringe upon their right to marry."); *Makransky v. Johnson*, 176 F. Supp. 3d 217, 227 (E.D.N.Y. 2016) ("Plaintiff, to be sure, has a constitutional right to marry—and he has done just that. But what he does not have is a constitutional right to receive a visa for his wife."). This is because "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980).

Thus, while an alien's "exclusion from the United States may impose burdens on [Respondents'] marriage, it does not 'destroy the legal union which the marriage created.'" *Ruiz-Herrera v. Holder*, No. 1:12-cv-0194-JEC, 2013 U.S. Dist. LEXIS 35837, at *14 (N.D. Ga. Mar. 15, 2013) (quoting *Jathoul v. Clinton*, 880 F. Supp. 2d 168, 172 (D.D.C. 2012)). By denying a visa, Petitioner "has done nothing more than to say that the residence of one of the marriage partners may not be in the United States. It does not attack the validity of the marriage." *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970), *cert. denied*, 402 U.S. 983 (1971).

This holds true in the present case where the denial of an alien visa in no way interfered with Respondents' ability to marry the person of their choosing, nullified the marriage, deprived them of the legal benefits attendant to that marriage, or prevented the couple

from residing together as a married couple in El Salvador (Respondent Ascencio-Cordero's country of origin) or anywhere else in the world. Indeed, even the deportation or removal of Respondent Ascencio-Cordero would not infringe upon Respondent Munoz's marriage rights. *See, e.g., Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) ("Certainly deportation would put burdens upon 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."); *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."). Thus, the recognized liberty interest of U.S. citizens regarding marriage is not implicated in this case.

B. No liberty interest in residing in the United States with an alien spouse exists.

Nor is any other liberty interest implicated by the denial of a visa to an inadmissible alien. Unenumerated liberty interests are "not infinite." *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972). This Court has set out a two-step process for analyzing substantive due process claims:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, 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 they were sacrificed. Second, we have required in substantive-due-process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decisionmaking, that direct and restrain our exposition of the Due Process Clause.

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (quotation marks and internal citations omitted) (emphasis in original). *See also Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (explaining that a court must 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."). The due process protection for a previously unrecognized liberty interest requires "a careful description of the asserted right, for the 'doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). *See also Abigail All. For Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695, 701 n.5 (D.C. Cir. 2007) (explaining that the "threshold

requirement" for substantive due process is "a carefully described right").

Respondent Munoz claims—and the court below found—a liberty interest in her husband's visa application and in residing with him in the United States. As explained above, however, no such right exists. Respondents cannot point to a deeply-rooted history of having one's alien spouse admitted to the United States. Decades of enforcement of immigration laws reflect a long history of denying admission to various family members of U.S. citizens. In fact, federal courts have repeatedly refused to recognize a protected liberty interest in having an alien family member admitted to the United States. *See, e.g., Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) ("[W]e think the wife has no constitutional right which is violated by the deportation of her husband."); *Noel v. Chapman*, 508 F.2d 1023, 1027 (2d Cir. 1975) ("It is equally clear that their wives as resident aliens have no constitutional right to keep them here on the theory that the integrity of the family is protected by equal protection principles."); *Almario v. Attorney General*, 872 F.2d 147, 151 (6th Cir. 1989) ("[T]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country."); *Mostofi v. Napolitano*, 841 F. Supp. 2d 208, 212 (D.D.C. 2012) (holding that U.S. citizen "plaintiff's constitutional rights are not implicated by defendants' decision to deny her alien spouse entry into the United States."); *Jathoul v. Clinton*, 880 F. Supp. 2d 168, 172 (D.D.C. 2012) ("While it may be true that exclusion of her husband imposes burdens on their married life, the Court cannot find any constitutional violation."). The

absence of a carefully defined, deeply rooted historical liberty interest dooms Respondents' claims, and requires this Court to reverse the holding below.

II. THE PLENARY POWER OF CONGRESS OVER ADMISSIBILITY AND REMOVAL DECISIONS CANNOT BE OVERCOME BY THE ALLEGED FUNDAMENTAL INTEREST.

Because "[t]he power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government," *United States v. Valezuela-Bernal*, 458 U.S. 858, 864 (1982), there is "no conceivable subject [over which] the legislative power of Congress [is] more complete than . . . the admission of aliens." *Fiallo v. Bell*. 430 U.S. 787, 792 (1977) (citation and quotation marks omitted). In other words, Congress has broad "plenary power to make rules for the admission of aliens *and to exclude those who possess those characteristics which Congress has forbidden*." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (emphasis added) (citation omitted). Congress exercised this power by enacting the INA, "a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents." *Elkins v. Moreno*, 435 U.S. 647, 664 (1978).

Congress defined several "[c]lasses of aliens ineligible for visas or admission" to the United States. 8 U.S.C. § 1182(a). For example, an alien may be inadmissible due to criminal convictions, 8 U.S.C. § 1182(a)(2), or for security related reasons such as

gang or terror activities. § 1182(a)(3). Congress provided that such inadmissible aliens must be provided "timely written notice that states the determination, and lists the specific provision or provisions of law under which the alien is inadmissible or [ineligible for] adjustment of status." 8 U.S.C. § 1182(b)(1). When, as here, an alien is inadmissible due to either "[c]riminal and related grounds" or "[s]ecurity and related grounds" the INA's requirement of written notice "does not apply." 8 U.S.C. § 1182(b)(3).

The INA allows for U.S. citizens and permanent residents to file a petition for admission on behalf of an alien family member. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a). That family member, however, must still go through the required entry and admission procedures contained in the INA. Congress only provided an *opportunity* to seek admission of an alien family member, it in no way granted a right to such admission—the alien family member must establish his or her admissibility to be granted a visa.

As this Court explained,

> [the] long practice of regulating spousal immigration precludes [a citizen]'s claim that the denial of [a spousal] visa application has deprived her of a fundamental liberty interest. . . . [A]s soon as Congress began legislating in this 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.

Kerry v. Din, 576 U.S. 86, 95-96 (2015) (citation omitted). Accordingly, decisions about immigrant admissibility are "policy questions entrusted exclusively to the political branches of our Government," *id.* at 97 (citation omitted).

Respondent Munoz, a United States citizen, received a fair opportunity to file a petition for her husband. Respondent Ascencio-Cordero, an illegal alien, then received a fair opportunity to be considered for a visa, and was provided written notification that he was denied that visa. Pet. for Cert. at 7. The consular officer cited 8 U.S.C. § 1182(a)(3)(A)(ii) in the written denial, finding Respondent Ascencio-Cordero was "a member of a known criminal organization . . . specifically MS-13[,]" *id.* at 9, and therefore inadmissible based on the consular officer's belief that Ascencio-Cordero would engage in unlawful activity in the United States if admitted. *Id.* Both Respondents received all the process they were due throughout the application process, and the visa denial was "facially legitimate and bona fide." *Mandel*, 408 U.S. at 769-70. Therefore, no review of that decision is permissible.

As the facts of this case themselves amply illustrate, the Ninth Circuit's holding, if allowed to stand, will have sweeping and disastrous implications for the immigration system. It would allow any U.S. citizen whose spouse was denied entry for any reason to assert a constitutional claim and have that spouse admitted—even in cases where the alien was deemed inadmissible for serious criminal or terror-related reasons.

Such sweeping changes to the immigration system are solely the province of the political branches. Any changes to immigration laws "should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities." *Harisiades v. Shaugnessy*, 342 U.S. 580, 591 (1952).

Allowing the Ninth Circuit's holding to stand would usurp the plenary power of Congress to regulate immigration by creating a new constitutionally protected immigration preference for aliens who have U.S. citizen spouses. Such a holding interferes with the immigration authority of the political branches by elevating an asserted liberty interest in family immigration into the penumbra of due process rights relating to freedom of personal choice in marriage and family matters. A holding that the Fifth Amendment compels Congress to grant visas or status to otherwise inadmissible aliens as a derivative beneficiary of a U.S. citizen's liberty interest directly contradicts the political rights of American citizens and the plenary authority of their elected officials.

As this Court once noted:

> an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. *Such privilege is granted to an alien only upon such terms as the United States shall prescribe.* It must be exercised in

> accordance with the procedure which the United States provides.

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (emphasis added) (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) and *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893)). Thus, although "marriage is a fundamental right protected by the Constitution, . . . [the inadmissibility] statute involves the plenary power of the legislature to establish policies in the area of immigration and naturalization." *Almario v. Attorney General*, 872 F.2d 147, 152 (6th Cir. 1989). The federal government's interest in protecting its plenary authority and controlling immigration is sufficient to overcome any alleged fundamental interest in this case. And this Court "may not invoke a higher standard of review than is normally employed in analyzing constitutional challenges to immigration statutes." *Id.* (quotation marks and citation omitted).

Regardless of the reason for denial, moreover, "the doctrine of consular non-reviewability bars judicial review of most visa denials." *Colindres v. United States Dep't of State*, 71 F.4th 1018, 1020 (D.C. Cir. 2023) (citation omitted). As Justice Kennedy explained in *Kerry v. Din*:

> 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 behind the exercise of that discretion, nor test it by balancing its justification against the

> constitutional interests of citizens the visa denial might implicate. This reasoning has particular force in the area of national security, for which Congress has provided specific statutory directions pertaining to visa applications by [aliens] who seek entry to this country.

576 U.S. 86, 103-04 (2015) (Kennedy, J., concurring).

The doctrine has been applied from the time of the first immigration statutes, with federal courts continuously finding that aliens do not have any right to challenge a visa denial by a consular officer. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)) (citing *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); and *The Chinese Exclusion Case*, 130 U.S. 581 (1889)); *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), *cert denied*, 276 U.S. 630 (1928) ("Whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to vise a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. It is beyond the jurisdiction of the court.") (internal citation omitted); *Colindres v. United States Dep't of State*, 71 F.4th 1018, 1021 (D.C. Cir. 2023) ("Reflecting the limited role of the judiciary, the consular-nonreviewability doctrine

'shields a consular official's decision to issue or withhold a visa from judicial review,' with two narrow exceptions.") (quoting *Baan Rao Thai Restaurant v. Pompeo*, 985 F.3d 1020, 1024-25 (D.C. Cir. 2021)). The power of the political branches to grant or deny entry cannot—and should not—be altered by this Court.

An expansion of the limited judicial review of visa denials would aggrandize federal judiciary power vis-à-vis Congress by undermining a key obstacle to asserting jurisdiction over visa applications by aliens. Accordingly, any expansion of due process to create a new category of admissible aliens and to require review of visa denials will weaken both political branches. A holding that a due process right to family unity requires the admission of otherwise inadmissible aliens and requires review of any visa denials will disadvantage U.S. citizens and further incentivize the flood of illegal immigrants at the southern border.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be REVERSED.

Respectfully submitted,

Christopher J. Hajec
Counsel of Record
Gina M. D'Andrea
Immigration Reform Law Institute
25 Massachusetts Ave NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org
gdandrea@irli.org

Counsel for Amicus Curiae
Immigration Reform Law Institute