No. 23-334

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF STATE, et al.,

Petitioners,

v.

SANDRA MUÑOZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF MIGRANT RIGHTS INITIATIVE AND IMMIGRATION, INTERNATIONAL, AND COMPARATIVE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are a research initiative and twenty-six immigration, international, and comparative law scholars from over a dozen countries. *Amici* provide this Court a comparative law analysis demonstrating the widespread availability of meaningful notice and judicial review for family unity visa applicants across the world's major migrant hubs.

Amici are the following institution and scholars[2]:

The Migrant Rights Initiative, founded in 2011, based at Cornell University, conducts cutting-edge, interdisciplinary research on the human rights of migrants and fosters opportunities for innovative action that reshapes the way governments treat people who cross international borders;

Diego Acosta Arcarazo, Professor of European and Migration Law, University of Bristol Law School;

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SUMMARY OF THE ARGUMENT

The substantial majority of the world's most significant migrant hubs, including this country's closest allies, afford due process–including meaningful notice and judicial review–to family unity visa applicants. These countries provide due process even in cases involving security concerns, safeguarding sensitive information, national security, and foreign relations.

This comparative evidence should inform the Court's analysis here for three reasons. First, countries hosting most of the world's migrants afford family

unity visa applicants judicial review, demonstrating its feasibility here. Second, the United States' closest intelligence partners afford these applicants due process even in cases involving security concerns while safeguarding sensitive information and continuing to share intelligence with each other. This shows that international intelligence information sharing is not incompatible with due process. Finally, European countries' laws show that the widespread availability of due process in the context of family unity visa determinations arises in significant part from agreement that the fundamental right to family unity requires such protections.

This consensus reflects a common thread: that spouses who do not share citizenship cannot be deprived of a right to live together without first being able to mount a challenge. A ruling for Petitioners risks leaving the United States as an outlier among its closest peers.

ARGUMENT

Due process–including meaningful notice and judicial review–in the context of family unity visa[3] determinations is an all but ubiquitous feature of immigration law around the world. Holding that the U.S. Constitution guarantees spousal immigrant visa

[3] This brief uses "family unity visa" to refer to visas enabling non-citizens to cross an international border to reside with their citizen and/or migrant spouse in the latter's country of residence.

applicants and their U.S. citizen spouses such process would be consonant with the law of scores of other countries hosting most of the world's migrants, including this country's closest allies.

This Court should consider such comparative evidence here for three reasons. First, comparative law provides this Court a useful tool to evaluate this case's domestic policy ramifications. As **Part A** sets out, that a substantial majority of migrant hubs afford family unity visa applicants due process undermines Petitioners' argument that doing so here would be disruptive and infeasible. *See* Pet'rs' Br. at 46. Second, comparative law can inform this Court about this case's foreign policy implications. **Part B** shows that the United States' closest intelligence partners afford family unity visa applicants due process, even in cases involving security concerns, while safeguarding sensitive information. This undermines Petitioners' argument that providing due process could endanger national security and chill intelligence information sharing, "particularly from foreign partners." Pet'rs' Br. at 15, 45. Finally, comparative law and practice informs this Court, when wrestling with "difficult constitutional issues," how other "countries . . . have dealt with problems analogous to ours[;]" after all, "[w]ise parents do not hesitate to learn from their children." *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (discussing the history of constitutional judicial review and styling other countries as "our constitutional offspring"). **Part C**'s survey of European countries shows that the widespread

availability of due process in the context of family unity visa determinations arises in significant part from consensus that the fundamental right to family unity (derived in part from international law binding on the United States) demands it.

Put simply, evaluating Petitioners' arguments against the backdrop of immigration laws across the world demonstrates that a ruling in their favor would set the United States apart from its friends.

A. A Substantial Majority of Migrant Hubs Afford Family Unity Visa Applicants Judicial Review, Demonstrating its Feasibility Here.

Comparative law can "cast an empirical light" on the domestic policy implications of this Court's decisions. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). Indeed, American jurists "may learn from other distinguished jurists who have given thought to the same difficult issues we face here." Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002). This Court thus has a long history, in interpreting Constitutional provisions, of informing its evaluation of parties' policy arguments by looking to the experiences of other countries. *See Randall v. Sorrell*, 548 U.S. 230, 279 n. 4 (2006) (Stevens, J., dissenting).

A substantial majority of migrant hubs afford family unity visa applicants due process, indicating its practicality here. This is demonstrated by an ongoing study, the Migrant Rights Database (MRD), by the Migrant Rights Initiative. The MRD is the first global data source tracking codification of international obligations in national law. *See* About Us, Migrant Rights Initiative, https://www.migrantrightsinitiative.org/en/about (last visited Mar. 27, 2024). In its most recent iteration, it analyzes the laws of forty-four countries, other than the United States, which together host close to seventy-five percent of the world's migrants. *Id.* The study shows that the majority of these countries protect the right to family unity by providing family unity visas and by affording family unity visa applicants judicial review. *Id.* at *Projects: Research: Protection of the Right to Family Unity*. Forty countries in the study provide a family unity visa either to all migrants or to migrants conditional on their status or some other factor. Thirty-seven countries provide either all or most family unity visa sponsors or applicants a form of judicial review. The countries that provide judicial review are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Denmark, Ethiopia, Ecuador, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Kenya, Lebanon, Mexico, Morocco, the Netherlands, New Zealand, Nigeria, Peru, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.[4] If this Court rules

[4] *See also* Migrant Rights Initiative, Check the Legislation, https://www.migrantrightsinitiative.org/en/about (last accessed Mar. 27, 2024) (providing a citation for relevant national law).

for Petitioners, the United states would join Bangladesh, India, Indonesia, Jordan, Korea, Senegal, Saudi Arabia, and the United Arab Emirates in failing to provide a judicial remedy for the denial of a family unity visa. *Id.*

Petitioners argue that providing spousal immigrant visa applicants judicial review would "disrupt the government's efforts to enforce the immigration laws." Pet'rs' Br. at 46. But, as the MRD demonstrates, a substantial majority of countries hosting most of the world's migrants provide judicial review to hundreds of thousands if not more[5] family unity visa applicants without disrupting or otherwise overwhelming their legal systems.

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[5] For example, when calculated in proportion to their relative populations, in 2022, Canada issued more than two times the number of family-based immigrant visas as the United States. *See*, *e.g.*, US and World Population Clock, United States Census Bureau, https://www.census.gov/popclock/world (last visited Mar. 25, 2024) (listing the United States population as 336,673,595 and the population of Canada as 38,794,813); 2023 Annual Report to Parliament on Immigration, Government of Canada, https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2023.html#pi (last visited Mar. 25, 2024) (noting Canada issued just under 100,000 family reunification permanent resident visas in calendar year 2023); Report of the Visa Office 2022, U.S. Department of State at Statistical Table 3, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2022AnnualReport/FY22_TableIII.pdf (last visited Mar. 25, 2024) (noting that the United States issued roughly 350,000 immediate relative or family preference immigrant visas in fiscal year 2022).

B. The United States' Closest Allies Afford Family Unity Visa Applicants Notice and Judicial Review, Even When Considering Security Concerns and Safeguarding Sensitive Information, Showing Intelligence Sharing is Not Incompatible with Due Process.

This Court regularly considers the laws and practices of other countries with close relationships with the United States to avoid "adverse foreign policy consequences." *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (citation omitted). To avoid a ruling causing "diplomatic strife," *Kiobel*, 569 U.S. at 124, the Court examines how its decisions may implicate other countries and how they may respond.

Petitioners advocate depriving U.S. citizens with non-citizen spouses due process to protect the United States' foreign policy and national security interests. Pet'rs' Br. at 15, 44. They claim that by affording visa applicants due process, foreign intelligence partners may stop sharing sensitive information with consular officers. *Id.* at 44. But Petitioners provide scant evidence supporting this assertion. *Cf. Jesner v. Arab Bank, PLC*, 584 U.S. 241, 256 (2018) (limiting extraterritorial reach of Alien Tort Statute (ATS) to avoid foreign entanglements, noting purported objections by Canada, the United Kingdom, and Switzerland); *RJR Nabisco v. European Community*, 579 U.S. 325, 347 n. 9 (2016) (limiting reach of RICO statute, citing objections and laws in Canada, the United Kingdom, and Germany). As the analysis below shows, all

members of the Five Eyes,[6] provide meaningful notice and judicial review to family unity visa applicants, even in cases involving security concerns and continue to share intelligence with each other. *Cf. Jesner*, 584 U.S. at 303 (Sotomayor, J., dissenting) (criticizing the majority's use of purported international objections to expansion of the ATS by noting that Canada, the United Kingdom, France, and the Netherlands have similar legal regimes). These allies do so while safeguarding sensitive information, undermining Petitioners' assertion that due process and intelligence sharing are incompatible. *See* Pet'rs' Br. at 44.

1. Canada Requires Family Unity Visa Denials be Justified, Reviews them *De Novo* or for Reasonableness, and Safeguards Sensitive Information.

In general, under section 63(1) of Canada's Immigration and Refugee Protection Act (IRPA), the Canadian citizen or permanent resident spouse (sponsor) of a permanent residence spousal visa applicant (applicant) may appeal the applicant's visa denial to the independent Immigration Appeal Division, a branch of

[6] Formally known as the FVEY (Five Eyes), intelligence-sharing between the United States, the United Kingdom, Canada, Australia, and New Zealand is the "longest recorded formal intelligence relationship in history." Defense Intelligence Agency, This Week in DIA History: Formation of the FVEY Partnership (May 30, 2019) https://www.dia.mil/News-Features/Articles/Article-View/Article/1861392/this-week-in-dia-history-formation-of-the-fvey-partnership/.

the Immigration and Refugee Board. Immigration and Refugee Protection Act, S.C. 2001, c 27, §§ 63(1), 117(a)(1), 130(1), 151 (Can.) [hereinafter IRPA]. The Division decides all issues *de novo*. *Id.* at § 162(1). The sponsor may obtain judicial review of the Division's decision by seeking leave of the Federal Court of Canada. *Id.* at § 72(1).

An applicant denied on security grounds, *see* § 34(1)(c), (d) (excluding foreign nationals "engaging in terrorism" or posing a "danger to the security of Canada"), must directly seek judicial review to the Federal Court. *Id.* at §§ 72(1), 64(1); *see Azizian v. Canada* (2017), [2017] F.C. 379, para. 1 (Can. C.A.). These applicants typically state two claims–first, that the adjudicating visa officer's security-based inadmissibility finding was unreasonable, *see Canada v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, para. 85 (Can.), and second, that the officer deprived them of common-law procedural fairness. The Federal Court finds unreasonable the officer's inadmissibility finding if they failed to base it on an "internally coherent and rational chain of analysis" and failed to justify it "in relation to the facts and law that constrain[ed] them." *Id.* Accordingly, the Federal Court has found unreasonable officers failing to adequately justify their decisions, making factual errors, and applying incorrect standards. *See*, *e.g.*, *Chwah v. Canada* (2009), [2009] F.C. 1036, para. 26 (Can. C.A.); *Varghaei v. Canada* (2020), [2020] F.C. 436, para. 10 (Can. C.A.); *Béké v. Canada* (2022), [2022] F.C. 1489, para. 46, 49 (Can. C.A.).

The Federal Court reviews for procedural fairness by assessing whether the officer subjected the applicant to fair and just process. *See Mohammed v. Canada* (2019), [2019] F.C. 326, para. 24 (Can. C.A.). Officers must ensure that applicants "meaningfully participate in the application process." *Mohammad*, [2019] F.C. at para. 25–26; *see also Varghaei*, [2020] F.C. at para. 5 (officers send applicants procedural fairness letters informing them of their concerns to satisfy procedural fairness). Accordingly, the Federal Court has found officers to have breached this duty by failing to adequately inform applicants of their security concerns prior to interviewing them and adjudicating their application. *See Mohammad*, [2019] F.C. at para. 29 (finding that the officer failed to notify the applicant prior to their interview of their security concerns, of reports by the Canada Border Services Agency (CBSA) and the Canadian Security Intelligence Agency (CSIS) outlining these concerns, and not allowing them to respond after the interview).

That Canada affords applicants due process does not mean the government must expose sensitive information to applicants. *See Azizian*, [2017] F.C. at para. 28 (holding that procedural fairness did not require an officer to turn the CBSA's inadmissibility report over to the applicant). Further, the Minister of Immigration, Refugees and Citizenship, on judicial review, "may apply for the non-disclosure of information." IRPA at § 87. The judge must adjudicate the application away from the applicant and admit it if they find "that its disclosure would be 'injurious to national security.'"

Alemu v. Canada (2004), [2004] F.C. 997, para. 10 (Can. C.A.) (citation omitted). If the judge admits the application, they must include it as part of the Court's record and may not disclose it to the applicant. *Id.* If the judge denies the application, they must return the information to the Minister and the Minister may choose whether to include it as part of the Court's record. *Id.*

2. Australia Provides Family Unity Visa Applicants Reasons for Decisions and Reviews Some Denials *De Novo* and Others for Jurisdictional Error.

A foreign national (applicant), wishing to travel to and live in Australia with their Australian citizen or permanent resident spouse or de facto partner (sponsor) must apply for two visas at the same time. First, they may obtain a Partner (Provisional) visa to enter Australia temporarily. *See Migration Regulations 1994* (Cth) reg 309.2 (Schedule 2) (Austl.) [hereinafter MR]. Second, following two years of obtaining the visa, they may obtain a Partner visa to remain in Australia permanently. *See id.* at § 100.2 (Schedule 2). Throughout these processes, the Minister for Immigration, Citizenship and Multicultural Affairs or the Minister's delegate adjudicating the application may rely on data supplied by domestic and foreign intelligence agencies. *See Migration Act 1958* (Cth) §§ 57, 496(1), 501(6)(g) (Austl.) [hereinafter MA]; *DVE18 v. Minister for Home Affairs* [2020] FCAFC 83, para. 14 (14 May 2020) (Austl.) (government relied on U.S. Department of

Defense intelligence). They must grant the visa if the applicant meets the visa's criteria and are not inadmissible on security grounds. MA at §§ 65(1), 501(1), (3).

Section 501(6) of the MA excludes applicants who the Minister or delegate reasonably believes would engage in criminal conduct in Australia or who the Australian Security Intelligence Organisation determines pose a security risk. *Id.* at §§ 501(6)(d)(i), (g). Where the Minister or delegate denies an application on security grounds, they must specify to the applicant the relevant provision(s) and their reasons. *Id.* at § 501G(1). Where the Minister exercises their personal power to deny an applicant in the "national interest," they must also invite the applicant to comment. *Id.* at §§ 501(3), 501C(3). In either case, they may not disclose any information law enforcement or intelligence agencies requested remain confidential. *Id.* at § 503A(1).

The sponsor may appeal a Provisional visa denial and the applicant their Partner visa denial to the Administrative Appeals Tribunal (AAT). *Id.* at §§ 347(2)(a), (b), 338(1), (2), (5). The sponsor of or an applicant denied on security grounds may only appeal the decision to the AAT when a delegate rendered the denial. *Id.* at § 500(1)(b), (4)(b). The AAT conducts *de novo* review. *See Administrative Appeals Tribunal Act 1975* (Cth) § 43 (Austl.). Accordingly, in *Singh*, the AAT reversed a delegate's denial under section 501(6)(d)(i) of the MA because the Minister failed to present evidence indicating that the applicant had previously been convicted of any offense that formed the basis of the delegate's decision. *Singh v. Minister for*

Immigration, Citizenship, Migrant Services and Multicultural Affairs, [2022] AATA 4800 para. 9 (22 Dec. 2022).

The Federal Court of Australia has original jurisdiction to review all security-based visa denials by the Minister personally. *See* MA at § 476A(1)(c); *see also id.* at § 476(1)(b) (permitting the Federal Court to similarly review decisions by the AAT). The Federal Court may determine whether the Minister committed "jurisdictional error." *See*, *e.g.*, § 476(1)(b)*; Djokovic v. Minister of Immigration, Citizenship, Migrant Services and Multicultural Affairs*, [2022] FCAFC 3, para. 30–35 (16 Jan. 2022) (Austl.). The Minister commits jurisdictional error when they render a decision so "lacking" of "rational or logical foundation" such that "no rational or logical decision-maker" could have arrived at the same conclusion. *Id.*

Throughout these proceedings, the government is not required to divulge sensitive information to applicants. For example, on administrative review, the Minister may certify in writing that the disclosure of certain information before the AAT to the applicant "would prejudice the security, defence or international relations of Australia." *See* MA at §§ 375, 375A. In that case, the AAT "must do all things necessary to ensure that the . . . information is not disclosed to any person other than a member of the [AAT]." *Id.* And on judicial review, section 38A of the National Security Information Act permits Australia's Attorney General to apply to the Federal Court for *in camera* review of non-disclosable security-related information. *See*

National Security Information Act 2004 (Cth) § 38A (Austl.).

3. New Zealand Informs Family Unity Visa Applicants of Potentially "Prejudicial" Information and Reviews Some Denials *De Novo*.

A New Zealand partner residence class visa applicant (applicant) may appeal their denial to the Immigration and Protection Tribunal (IPA) even where they are denied on security grounds.[7] *See* Immigration Act 2009, §§ 187(1), 16(1) (N.Z.) [hereinafter NZIA] (permitting the Minister of Immigration or the adjudicating officer to deny an applicant because they have reason to believe that the applicant is likely to be "a threat or risk to security"); *see*, *e.g.*, *UR (Skilled Migrant)* [2018] NZIPT 204488, para 4 (15 June 2018); *YV (Skilled Migrant)* [2018] NZIPT 204878, para 4 (29 Aug. 2018). The IPA is administered by the Minister of Justice, chaired by a District Court judge, and consists of 18 members. NZIA at § 219(1)(a); *see* Immigration & Protection Tribunal, New Zealand Ministry of Justice, https://www.justice.govt.nz/tribunals/immigration/immigration-and-protection/ (last visited Mar. 25, 2024).

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[7] Notably, however, temporary entry class visa applicants may not appeal their denial to the IPA, nor can any visa applicant where the Minister, rather than an officer, denied their visa application not based on classified information. NZIA at §§ 186(3)(a), 187(1)(a)(ii), (2)(a). New Zealand thus affords the least broad protections of any member of the Five Eyes.

The applicant carries the burden to establish their claims and must provide the IPA their submissions and evidence before it renders its decision. NZIA at § 226(1). The IPA may seek information from any source, including the Minister. *Id.* at §§ 228, 229(1). The IPA must also disclose prejudicial information to the applicant that it intends to rely on. *Id.* at § 230(1). It must also provide reasonable time for the applicant to respond. *Id.* at § 230(2).

The IPA reviews each visa denial *de novo*, and may overturn or remand the Minister or officer's decision (even when they are made on security grounds) for incorrectness. *Id.* at § 187(4). Accordingly, the IPA has reversed or remanded the Minister or officer's decision because the Minister or officer failed to provide any evidence that the applicant committed past offenses or was likely to commit future offenses. *See*, *e.g.*, *UR (Skilled Migrant)* [2018] NZIPT at para. 75; *YV (Skilled Migrant)* [2018] NZIPT at para. 56. An applicant may also appeal a decision by the IPA on questions of law by seeking leave of the New Zealand High Court. NZIA at § 245(1).

New Zealand has special rules for proceedings involving classified information. The head of the relevant agency that supplied the information must present it to the IPA at a closed preliminary hearing. *Id.* at § 241(2). The relevant agency may also nominate for the applicant three security-cleared special advocates (of which the applicant appoints one) to question the head of the relevant agency about the information during the closed hearing. *Id.* at §§ 241(3), 265(2).

While the IPA must provide a summary of prejudicial classified information to the applicant, agreed upon by the head of the relevant agency, *see* § 242(2)–(3), the summary need not include information whose disclosure the head of the relevant agency determined would (1) "prejudice the security or defense of New Zealand or the international relations of New Zealand," (2) "prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country, an agency of a government of another country, or an international organization," (3) "prejudice the maintenance of the law, including the prevention, investigation, and detection of offenses, and the right to a fair trial," or (4) "endanger the safety of any person." *Id.* at § 242(3), 7(3). The High Court must also adhere to a similar procedure. *See id*. at § 252–262.

4. The United Kingdom Mandates Procedural Fairness and Permits Judicial Review of Denials of Family Unity Visa Determinations as a "Human Rights Claim."

In the United Kingdom (UK), the Immigration Act 1971 (UKIA) provides for Immigration Rules (UKIR) to enable the spouses of British citizens and others settled in the UK to obtain "leave to enter" or "leave to remain"; the UKIA empowers the Secretary of State to make rules governing the entry of persons into, and their stay in, the UK. *See* Immigration Act 1971 § 3(2) [hereinafter UKIA]. Under Appendix FM of the UKIR,

the spouse of a UK citizen seeking entry (applicant) must apply for a visa and meet certain suitability, relationship, English-speaking and financial requirements. *See* Immigration Rules, Appendix FM, § EC-P Entry clearance as a partner [hereinafter UKIR].

An applicant in certain cases has the right to appeal their visa denial, especially when the Secretary of State has decided to refuse either a protection or human rights claim made by the applicant, or they have revoked an applicant's protection status. *See* Nationality, Immigration and Asylum Act 2002, § 82(1)(b). Applications for entry clearance to join a spouse in the UK are treated as a human rights claim (Immigration Rules, Appendix AR, paragraph AR5.2, the refusal of such an application is treated as an appealable decision to refuse a human rights claim. Baihinga (r. 22; human rights appeal; requirements) [2018] UKUT 90 (IAC). Appeals are heard by the Special Immigration Appeals Commission ('SIAC') instead of the tribunal if the decision under appeal involves security-based grounds, the UK's relationship with another country, sensitive information not deemed fit for public disclosure by the Secretary of State for national security reasons, or a need for safeguarding of the UK's foreign policy. Nationality, Immigration and Asylum Act 2002, §§ 97 & 99; Special Immigration Appeals Act 1997, § 2. SIAC proceedings enable 'closed' material to be relied on by the Secretary of State, i.e., evidence supporting a decision that is not disclosed to the subject of the decision but may be tested by "special advocates." SIAC (Procedure) Rules 2003, SI 2003/1034, rule 37.

Applicants denied a leave to enter the UK for security-based reasons, are entitled to judicial review of that decision. *See Alo & Ors, R. (On the Application Of) v. Secretary of State for the Home Department* [2022] EWHC 2380, [10] (holding that the Secretary's assessment that the claimant's presence in the UK was not conducive to the public good on security-based grounds, was not based on a reasonable enquiry and open to judicial review). The UK balances security-based concerns in judicial review proceedings through the Justice and Security Act 2013 (JSA), which allows the Secretary of State to apply for a closed material proceeding in order to protect against the disclosure of sensitive information, while still administering justice fairly. *See* JSA 2013, Part 2, paragraph (2)–(4).

* * *

That each member of the Five Eyes continues to share intelligence with each other and that the United States continues to share raw intelligence with the other members–despite the due process protections operative in their respective immigration laws–suggests that intimate intelligence sharing partnerships are not incompatible with recognizing due process in the context of family unity visas.

C. Comparative Evidence Indicates That Due Process in the Context of Family Unity Visa Determinations is Required to Effectuate the Fundamental Right to Family Unity.

This Court regularly looks to foreign and international law when interpreting Constitutional rights. In *Roper v. Simmons*, Justice O'Connor stated that "[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency." 125 S. Ct. 1183, 1215 (2005) (O'Connor, J., dissenting). The international community generally recognizes that the right to family unity includes an obligation to ensure family reunification across borders, including as an application of human rights law binding on the United States.

In particular, the United States has often looked to other "liberal democracies," and given particular weight to consensus on international norms by "the legal materials of democracies [rather] than [] those nondemocracies[,] without neglecting the latter." Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 Stan. L. Rev. 131, 159–60 (2006). Here, as shown below, other liberal democracies have protected the fundamental right to family unity by affording denied visa applicants due process (as have various other countries, which, together, host most of the world's migrants *see supra* **Part A**) as a consequence of their recognition of this fundamental right to family unity. Denying Respondents due process would thus deprive

U.S. citizens and migrants of internationally-recognized rights and depart from widely-accepted international principles.

1. International Human Rights Law, Including Law Binding on the United States, Protects the Right to Family Unity and Applies that to Require Due Process in the Migration Context.

International human rights law recognizes broad protection of the right to family unity. The International Covenant on Civil and Political Rights ("ICCPR") provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. . . ." ICCPR art. 17, Dec. 16, 1966, 999 U.N.T.S. 171. *See also* Universal Declaration of Human Rights, art. 12, Dec. 10, 1948, U.N. Doc A/810 at 71 (same language as the ICCPR); Convention on the Rights of the Child, arts. 9, 10, Nov. 20, 1989, 1577 U.N.T.S. 3. Several decisions of the Human Rights Committee, the body of experts created by the ICCPR, have found that inadequate process in the context of adjudication of family unity visas and/or expulsion of immediate relatives violates the treaty's protection of family. *See*, *e.g.*, *El Dernawi et al. v. Libya*, Case No. 1143/2002 Para. 6.3; *Leghaei et al. v. Australia*, Case No. 1937/2010 para 10.5. This right is also robustly protected by similar provisions in regional human rights treaties. European Convention on Human Rights, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221

[hereinafter ECHR] (discussed infra); American Convention on Human Rights, art. 11, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights, art. 18, June 27, 1981, 1520 U.N.T.S. 217 (1982). Experts have observed that this right has risen to the level of customary international human rights and humanitarian law. VINCENT CHETAIL, INTERNATIONAL MIGRATION LAW, 124–31 (2019); *see also* Customary IHL, International Humanitarian Law Databases (ICRC), rule 105, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule105 (including the obligation to "facilitate reunion of dispersed families" across borders).

The United States is bound by customary international law and has signed and ratified the ICCPR without reservation as to the right to family unity. S. Exec. Doc. No. E, 95-2; ICCPR, signed on behalf of the U.S. (Oct. 5, 1977), https://www.congress.gov/treaty-document/95th-congress/20/resolution-text#:~:text=TEXT%20OF%20RESOLUTION%20OF%20ADVICE,on%20Civil%20and%20Political%20Rights%2C. This Court should thus interpret the U.S. Constitution in a manner consistent with its international law duties and these evolving standards of decency worldwide and avoid putting the United States in breach of its obligations.[8] *Cf. The Paquete Habana*, 175 U.S. 677, 707 (1900); *Murray v. The Charming Betsy*, 6 U.S. 64 (1804).

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[8] While Article 17 of the ICCPR may be non-self-executing and therefore not provide a rule of decision for this Court in Respondents' case, a decision inconsistent with a U.S. international law duty would still put the United States in breach of its obligations.

2. European States Provide Due Process in the Context of Family Unity Visa Determinations as a Matter of Fundamental Rights.

The European Union (EU) provides a salient example of guaranteeing meaningful notice and judicial review in all cases as a means of protecting the fundamental right to family unity.

European human rights law robustly provides for the right to family life; the treaty also provides the right to an effective remedy when protected rights are violated. ECHR, arts. 8, 13. Ensuring the right to family reunification across borders, and with it the right to judicial review, is deemed necessary to protect the right to family life. *See Strand Lobben & Others v. Norway*, App. No. 37283/13, ¶ 205 (Sep. 20, 2019), https://hudoc.echr.coe.int/eng?i=001-195909; Guide on Article 8 of the European Convention on Human Rights, European Court of Human Rights, 1, 77 (updated Aug. 31, 2022). Courts, applying the ECHR, have found that the ability to live together is required to protect family unity. *M. & M. v. Croatia*, App. No. 10161/13, ¶ 169 (Sep. 3, 2015) https://hudoc.echr.coe.int/eng?i=001-156522.

Consistent with these ECHR obligations, which bind all EU members.[9] EU directives establish the basic due process rights that Member States must

[9] All members of the EU, as well as nineteen other European countries, are State parties to the ECHR.

secure in family unity visa determinations. However, the directives give Member States discretion to set specific requirements for family unity visas, consistent with this floor, as well as for the standard of review of appellate authorities. States have exercised this discretion in various ways. For example, the Netherlands and France have statutory rights to family unity as well as statutory rights of appeal. In the Netherlands appellate courts apply a proportionality test when reviewing visa denials, whereas French courts provide for *de novo* review.[10] Italy, on the other hand, applies a constitutional provision to mandate due process in family unity visa determinations. Finally, Switzerland is an example of a non-EU Member State that utilizes

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[10] The constitution of Ireland, Bunreacht na hÉireann, "recognizes the Family as the natural primary and fundamental unit group of Society . . . [and] therefore guarantees to protect the Family in its constitution and authority." *See* Constitution of Ireland, art. 41. Under Irish immigration law, spouses of Irish citizens can apply for a Joint Family Member (D) visa and these applications are adjudicated on a discretionary basis by the Minister of Justice and Equality (Minister), or immigration officers acting on the minister's behalf. *See* Immigration Act 2004, § 4. Other EU members also provide for due process via statute. Spain codifies the ability for sponsors to file for a visa application of their immediate family members in national law. Article 21 of Organic Law 4/2000; Royal Decree 557/2011. The Administrative Judicial Procedures Act of 1998, allows for judicial review of these immigration decisions. In Germany, denied visa applicants may appeal the decision to a German Administrative Court. Code of Administrative Court Procedure, §§ 40(1), 42(1), 45. The Court examines whether the denial was unlawful because the relevant authority overstepped its statutory limits of discretion or used its discretion in a manner not corresponding to the purpose of its empowerment. *Id.* at § 114.

EU law principles in order to protect a right to family life and unity in the migration context.

i. European Union Directives Mandate that all Member States Provide Due Process in the Context of Family Unity Visa Determinations.

Through EU directives, EU citizens utilizing their freedom of movement right and third country nationals with a residence permit in a Member State (sponsors) have a right to family unity through reunification with their third country national spouse (applicant). *See* Council Directive 2003/86, 2003 O.J. (L 251/12) 12 (EC) [hereinafter EC Directive 2003/86]; Council Directive 2004/38, art. 3, 2004 O.J. (L 158) 77 (EC) [hereinafter EC Directive 2004/38]; Consolidated Version of the Treaty on the Functioning of the European Union art. 21, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. Under the EU system, limiting the rights of an applicant to return to their spouse's home Member State is seen to impede the right of the Union citizen or permanent resident themself. Case C-89/17, *Sec'y of State for the Home Dep't v. Rozanne Banger*, ECLI:EU:C:2018:507, ¶ 29 (Apr. 10, 2018).

Articles 15 and 31 of EC Directive 2004/38 and Article 18 of EC Directive 2003/86 establishes the right to judicial review of a denial of a family unity visa. EC Directive 2004/38, at arts. 15(1) & 31(1) ("The persons concerned shall have access to judicial and . . . ,

administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security, or public health."); EC Directive 2003/86, at art. 18. Such judicial review procedures must include an examination of the facts and circumstances as well as the legality of the decision. *Id.* at art. 31(3). The EU has made it clear that Member States have some discretion when making visa determinations and establishing judicial review procedures. But such discretion is not a "black box;" it is required that judicial review "is based on a sufficiently solid factual basis and . . . compli[ance] with [] procedural guarantees." Case C-89/17, *Rozanne Banger*, at ¶ 51. The EU directive requires three elements for judicial review to be effective, (i) the decision must be the result of an "extensive examination," (ii) such examination must be reflected in the motivation provided to justify any determination, (iii) the examination must have been based on "personal circumstances," including the relationship with the Union citizen and the situation of dependence. Case C-89/17, *Rozanne Banger*, at ¶ 38–41.

If any decision is made based on public policy and public security, the applicant must be notified in writing, the notification must explain "precisely and in full" the grounds for the denial–unless contrary to State security–and must notify the applicant of the court or administrative authority competent to hear an appeal. EC Directive 2004/38, at art. 30. Furthermore, even when public security is at stake, Member States must

comply with the principle of proportionality[11] and decisions must be based on the personal conduct of the individual involved. *See id.* at art. 27(2). An applicant may not be denied on public security grounds based solely on their previous criminal convictions. *Id.* at art. 27(2).

ii. The Netherlands Requires Immigration Agents to Provide Meaningful Notice to Applicants and Uses a Proportionality Test in Judicial Review of Family Unity Determinations.

The right to family reunification in the Netherlands is codified in the Alien Act of 2000. Art. 15 (elaborated by Aliens Decree (2000)). An applicant may reunite with their sponsor. Aliens Decree 2000, at arts. 13–15 (Neth.). In the Netherlands, the same provisions apply for Dutch citizens as they do for Dutch permanent residents. *Id.* at art. 15.[12] Under EU law, Member

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[11] Consolidated Version of the Treaty on European Union, Jul. 6, 2016, 2012 O.J. (C 202/18) art. 5(4) ("the content and form of the Union action shall not exceed what is necessary to achieve the objectives of the Treaties.").

[12] To qualify for family reunification, the third country national must apply for a residence permit. *Id.* The Minister of Justice (Minister) is authorized to "grant, reject or not process an application for the issue of a residence permit for a fixed period." *Id.* at art. 14(1)(a). The Minister may reject an application based on certain statutory requirements, including some national security related concerns. *Id.* at art. 16(1). Some requirements can be waived if the third country national is from a nationality

States may not treat those deriving their rights from purely domestic law more favorably than those deriving their rights from EU law. Case C-89/17, *Rozanne Banger*, at ¶ 32. This, however, does not require the reverse.

Once an applicant submits their application, the Immigration and Naturalisation Services must respond to the application within ninety days, with the possibility of an extension up to six months. Aliens Act, at art. 25(1). If any application is denied, the applicant or the sponsor can appeal to Immigration Services within four weeks; if the application is denied again, the applicant or sponsor may seek judicial review at the District Court of the Hague. *Id.* at arts. 69(1), 71(1).

Under the Dutch General Administrative Law Act, an administrative authority "shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised." Art. 3:4 para. 1 Awb. (Neth.). Under this provision, the adverse consequences of a decision for one of the interested parties "may not be disproportionate" to the purposes the decision would serve. *Id.* at para. 2. This provision has been interpreted as seeking to align the Dutch system of judicial review with the EU principle of proportionality. ECLI:NL:RVS:2022:285; Council of State (Feb. 2, 2022), ¶ 7. The purpose of a proportionality principle is to "prevent unnecessary adverse consequences" and

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designated by the Minister of Foreign Affairs (the United States, the United Kingdom, Australia, New Zealand, etc.). *Id.* at art. 17.

arbitrariness on the part of the decision-maker. *Id.* at ¶ 7.4. This kind of review requires the administrative court to have access to all relevant facts and circumstances used in the original decision-making process. *Id.* The court will not reweigh the factors relied on by the decision-maker, rather they will assess the suitability, necessity, and balance of the decision. *Id.* at ¶ 7.10.

iii. France Provides Family Unity Visa Applicants Meaningful Notice and *De Novo* Review During Appeals of Family Unity Determinations.

The right to family unity and the right to judicial remedy are both statutory rights in France. *See* Code de l'entrée et du séjour des étrangers et du droit d'asile [CESEDA] [Code of entry and stay of foreigners and the right to asylum], L312-3, L434-2, D312- (Fr.). Under French law, decisions made by consular officers must be motivated. *See* Code des relations entre le public et l'administration [CRPA] [Code of relations between the public and the administration], L211-2, L211-5 (Fr.) ("the motivation . . . must be written and include a statement of the legal and factual considerations which constitute the basis of the decision."). Additionally, under the CRPA, "the administration decides on the appeal filed against decision creating rights on the basis of the factual and legal situation prevailing on the date of this decision." L411-4.

France allows for multiple levels of appeal: for foreigners applying for a visa for family reunification purposes, an original appeal to the Commission de Recours contre les Décisions de Refus de visa (The Commission), which can recommend a decision to the Minister of Foreign Affairs, as well as further appeal to the Tribunal Administratif de Nantes. CESEDA, at D312-3, D312-7; CRPA, L411-7, L431-1. On appeal, the court may review the motivation provided, the underlying facts of the case, and the assessment of those facts by the consular agent. Tribunal Administratif de Nantes, 10ème chambre [Administrative Court of Nantes] Bus. Num. 2203324, (Nov. 7, 2022), at 1, 4; *see also* Tribunal Administratif de Nantes, 8ème chambre, Bus. Num. 2215798, (Sep. 29, 2023), at 2.

French administrative and consular authorities may reject an application for family reunification, or a visa application for family reunification purposes on public security grounds. CESEDA, at L-312-3; *see*, *e.g.*, Cour Administrative d'Appel de Bordeaux, 10BX01453 (Apr. 26, 2011); Conseil d'Etat, 151959 (Jan. 19, 1996). Additionally, an applicant is given the right to appeal any decision, including those based on security grounds. CRPA, at L431-1.

iv. Italy Provides Family Unity Visa Applicants with Meaningful Notice and a Constitutional Right to Appeal all Administrative Decisions.

The Italian Constitution provides that "[a]nyone may bring cases before a court of law in order to protect

their rights under civil and administrative law." Art. 24 COSTITUZIONE [COST.] (It.). Italian law provides for broad protections for family unity. Decreto legislativo, 25 luglio 1998, n. 286, in G.U. Aug. 18, 1998, n.139/L, art. 28(1),(2) (It.) (as modified by act n. 189/2002, art. 23). The Italian government does not state that third country nationals have a right to obtain a visa, but rather, that they have a "legitimate interest" in obtaining a visa. *Visa Refusal*, Ministero degli Affari Esteri e della Cooperazione Internazionale (last visited Mar. 18, 2024), https://www.esteri.it/en/servizi-consolari-e-visti/ingressosoggiornoinitalia/visto_ingresso/diniego_visto/. This legitimate interest creates a right to a "reasoned and motivated" decision that is provided in a language that the applicant can understand. *Id.*

Generally, applications for appeals must be lodged with the Regional Administrative Court of Lazio within 60 days. *Id.* However, this requirement does not apply to refusals of family reunification visas where there is no time limit. *Id.*

Such broad judicial review also applies to visas denied on grounds of public security. In evaluating a potential threat to security, the prefecture will look at the possible criminal sentences that would ensue if the applicant was convicted under articles 380(1) & (2) and 407(2) of the Italian Code of Criminal Procedure. D.Lgs. n. 286/1998 at art. 5(5-bis).[13] If the applicant is

[13] Article 380 of the Italian Code of Criminal Procedure refers to crimes that carry a life sentence or a penalty that is at minimum 5 years and at maximum 20 years, it also lists specific crimes that include crimes against the State, crimes against

denied for security reasons, they still have the ability to appeal using the same judicial processes. *Id.* at art. 30(6).

v. Switzerland Utilizes EU Law to Provide Meaningful Notice and Judicial Review in the Context of Family Unity Visa Determinations.

The Swiss Constitution provides that "[e]very person has the right to privacy in their private and family life and in their home. . . ." Constitution Fédérale [Cst] [Constitution] Apr. 18, 1999, RO 101, art. 13 (Switz.). Although Switzerland is not a member of the EU, they adopted the EU directives addressing family unity and the right to appeal family unity determinations. Swiss citizens, permanent residents, and residence permit holders (sponsors) may bring an applicant to Switzerland under a family reunification visa. LEGGE FEDERALE SUGLI STRANIERI E LA LORO INTEGRAZIONE [LSTRL] [FEDERAL ACT ON FOREIGN NATIONALS AND INTEGRATION] Dec. 16, 2005, RS 101, arts. 42–45 (Switz.).[14]

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public safety, etc. Article 407 sets out the time limits for preliminary investigations.

[14] Applicants may apply for family reunification with their Swiss citizen spouse if they live with their sponsor (cohabitation). *Id.* at art. 42. Applicants for family reunification with their Swiss permanent resident or resident permit spouse must meet a cohabitation and other statutory requirements. *Id.* at arts. 43 & 44. If the applicant can show the "family household continues to exist" and good cause, then the cohabitation requirement is waived. *Id.* at art. 49.

The immigration authority of the canton in which the application was submitted ensures compliance with these requirements. *Id.* at arts. 6 & 12. A decision denying a visa can be appealed, without regard for the reason for the denial. *Id.* at art. 6(2-bis). Under article 310 of the Cantonal Procedural Provisions, the sponsor or applicant may appeal on two grounds: "incorrect application of the law," or "incorrect establishment of the facts." Codice Civile [CC] [Civil Code] Dec. 20, 1907, RS 210, art. 310 (Switz.).

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International law and consistent national practice indicate that a right to family unity requires a right to due process in the migration context. This Court should provide for due process in this case in order to secure the fundamental right to family unity, to adhere to U.S. international law obligations, and because comparative practice across myriad liberal democracies, among them this country's closest intelligence-sharing partners, shows that provision for family reunification is accompanied by due process, including notice and judicial review. Such systems operate to prevent family separation without process each day, around the world, without disrupting the enforcement of immigration law, foreign relations, or national security.

CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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