NO. 23-_____

In the Supreme Court of the United States

KRISTEN H. COLINDRES AND
EDVIN A. COLINDRES JUAREZ,

Petitioners,

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of consular nonreviewability insulates from judicial review a consular decision that lacks both a facially legitimate and bona fide basis; provides no discrete factual predicate; applies an unconstitutionally vague statutory provision of the Immigration and Nationality Act, to wit: 8 U.S.C. §1182(a)(3)(A)(ii); and transgresses multiple bedrock constitutional limitations, including procedural and substantive due process rights, entitlement to equal protection of the laws, rights to freedom of speech and expressive activity, the fundamental, associational, and marital right to live together as Husband and Wife, and the United States citizen spouse's fundamental liberty interest in residing in her country of citizenship.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Petitioners Below

- Kristen H. Colindres
- Edvin A. Colindres Juarez

Respondents and Defendants-Appellees Below

- United States Department of State
- Antony J. Blinken, in his official capacity as U.S. Secretary of State
- Robert Neus, in his official capacity as Consul General of the United States, U.S. Embassy Guatemala City, Guatemala

LIST OF PROCEEDINGS

U.S. Court of Appeals, District of Columbia Circuit

No. 22-5009

Kristen H. Colindres and Edvin A. Colindres Juarez, *Plaintiffs-Petitioners*, v. United States Department of State, et al., *Defendants-Appellees*.

Date of Final Opinion: June 23, 2023

U.S. District Court, District of Columbia

Civ. Act. No. 1:21-cv-00348

Kristen H. Colindres and Edvin A. Colindres Juarez, *Plaintiff*, v. U.S. Department of State, et al., *Defendants*.

Date of Final Order: December 14, 2021

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PETITION FOR A WRIT OF CERTIORARI

Kristen H. Colindres and Edvin A. Colindres Juarez, by and through undersigned counsel, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for District of Columbia Circuit.

OPINIONS BELOW

The District of Columbia Circuit's Opinion affirming the judgment of the District Court for the District of Columbia in *Kristen H. Colindres and Edvin A. Colindres Juarez v. U.S. Department of State, et al.*, No. 22-5009, is included in the Appendix ("App.") at 1a. The District Court's Order dismissing *Kristen H. Colindres and Edvin A. Colindres Juarez v. U.S. Department of State, et al.*, No. 1:21-cv-00348, is included at App.22a. Both opinions were designated for publication.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court opinion on June 23, 2023. (App.1a). Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) and file within 90 days after entry of the judgment

by the District of Columbia Circuit as required by S. Ct. R. 13.1.

CONSTITUTIONAL PROVISION

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Factual Background

On or about June 26, 2019, Petitioner Edvin A. Colindres Juarez packed a small bag of belongings and flew to Guatemala for what he and his family assumed would be a short trip and the final chapter of rectifying his immigration status in the United States. Over four (4) years later, Petitioner Colindres Juarez remains marooned in Guatemala and separated from his Wife of sixteen (16) years and his fifteen (15) year old daughter by virtue of an arbitrary, capricious, and bad faith consular determination—absent any discrete factual predicate or basis—that he is inadmissible to the United States under 8 U.S.C. §1182(a)(3)(A)(ii) (alien who seeks to enter the United States to engage in unlawful activity).

Petitioner Colindres Juarez has never been a member of a criminal organization. Nor is he seeking to immigrate to the United States to engage in unlawful activity. Rather, Petitioner 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 over twenty-four (24) years, from January 5, 1995 until June 26, 2019, then returned to Guatemala only to properly immigrate to the United States upon approval of his Form I-601A, *Application for Provisional Unlawful Presence Waiver, by U.S. Citizenship and Immigration Services* ("USCIS"), following a complete and thorough background investigation by the Federal Bureau of Investigation ("FBI").

* * *

Petitioner Colindres Juarez is a native and citizen of Guatemala. (App.100a).[1] He was born in 1980. *Id*. Petitioner Colindres Juarez was raised in Guatemala until he entered the United States on or about January 5, 1995, then resided with family in New York, New York, later relocating to Jacksonville, Florida, where he lived until June 26, 2019. (App.100a-101a).

Petitioner Colindres Juarez worked for Tempool, Inc., a top pool finishing company in the United States, beginning on June 15, 2007, until his departure from the United States. (App.101a).

Petitioner Colindres is a United States citizen. *Id*. She was born in 1987. *Id*. Petitioner Colindres is an award-winning Registered Nurse, who graduated *summa cum laude* and as valedictorian of her class at Chamberlain College of Nursing on March 3, 2012; she has worked for Baptist Health in Jacksonville, Florida since April 30, 2012. *Id*. Petitioners married on December 8, 2006. *Id*. Their daughter, S.H.C., was born in 2008. *Id*.

On or about March 20, 2015, Petitioner Colindres filed an I-130, *Petition for Alien Relative*, for the benefit of Petitioner Colindres Juarez, with U.S. Citizenship & Immigration Services ("USCIS"). *Id*. USCIS approved Petitioner Colindres' I-130 Petition on or about August 11, 2015. *Id*.

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[1] The Court must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in favor of Petitioners. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

On or about May 1, 2018, Petitioner 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). *Id.* On or about June 7, 2018, Petitioner Colindres Juarez submitted biometrics to USCIS in connection with his Application. (App.102a). USCIS thereafter conducted background and security checks, including review of criminal history records maintained by the FBI. *Id*. On or about January 28, 2019, USCIS approved Petitioner Colindres Juarez's Form I-601A. *Id*.

On or about April 30, 2019, Petitioner Colindres Juarez filed a Form DS-260*, Immigrant Visa and Alien Registration Application*, with the U.S. Department of State ("State Department"). *Id*. Petitioner Colindres Juarez paid all required fees; Petitioner 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*.

The Embassy then scheduled Petitioner Colindres Juarez for an immigrant visa interview on July 10, 2019, which Petitioner Colindres Juarez attended. *Id*. The Embassy then scheduled Petitioner Colindres Juarez for a follow-up interview on August 8, 2019. *Id*. In the meantime, Petitioner Colindres Juarez submitted, per the Embassy's request, his "*expediente de record criminal*," or criminal record file, from the Public Ministry of Guatemala. (App.103a). Petitioner Colindres Juarez's criminal record was clean. *Id*.

From August 8, 2019, until April 22, 2020, despite repeated inquires on status, Petitioner Colindres Juarez heard only that his application was "undergoing necessary administrative processing." *Id*. Finally, on

May 6, 2020, the Embassy advised that it was refusing 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*. Though not specifically mentioned in the Embassy's notice, it appears—based solely upon Petitioner Colindres Juarez's account of his immigrant visa interviews —that the consular officer found one or more of his tattoos suspicious. *Id*. However, this assumed factual basis is mere conjecture; to date, the Embassy has neither stated nor provided any factual basis or predicate whatsoever for its immigrant visa refusal.

Petitioner Colindres Juarez has no criminal record in Guatemala or the United States; indeed, Mr. Colindres Juarez has no criminal record at all. (App.106a). Petitioner Colindres Juarez's FBI background check initiated by USCIS in connection with his application for relief under 8 U.S.C. §1182(a)(9)(B)(v), presented no issues. *Id*. Likewise, Petitioner Colindres Juarez's "*expediente de record criminal*" obtained from the Public Ministry of Guatemala and presented to the Embassy, revealed no issues. *Id*. This makes infinite sense, given that Mr. Colindres Juarez has not been present in Guatemala since he was fourteen (14) years of age. Simply put, there is no plausible way that Petitioner Colindres Juarez could have affiliated with unlawful activity or be seeking to enter the United States to engage solely, principally, or incidentally in unlawful activity when he was present in the United States for twenty-four (24) years, having arrived in the United States as a child, and arrived back in Guatemala just a few days prior to his consular interview. To put it succinctly, application of the statutory ground

upon which the Embassy's inadmissibility determination is based constitutes a factual impossibility.

There is 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). The Embassy's explanation of the basis for its finding was deficient under 9 FAM 302.5-4(B)(2)(f), as it failed to articulate or rely upon any of the enumerated factors for consideration. *See* 9 FAM 302.5-4(B)(2)(f).

Because the Foreign Affairs Manual ("FAM"), specifically 9 FAM 302.5, leaves open that even past members of known criminal organizations or those still members but traveling to the United States for some other purpose unrelated to the commission of criminal acts may not result in a finding of 3A2 ineligibility, Petitioner Colindres Juarez sought an 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). Accordingly, on September 10, 2020, Petitioner Colindres Juarez submitted a Request for Reconsideration to the Embassy. (App.109a).

Petitioner Colindres Juarez's Request 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. *Id.*

In connection with his Request, Petitioner Colindres Juarez submitted to the Embassy thirty-seven (37) letters of reference, written by Petitioner Colindres Juarez's family and relatives, friends, colleagues, and fellow community members. (App.107a). These letters uniformly provided that Petitioner Colindres Juarez is a peaceful, law-abiding, hard-working, virtuous, loyal, generous, family-loving, devout, and honest person. *Id*. All of these references were universally shocked and surprised to hear of the purported basis for the Embassy's refusal to issue Petitioner Colindres Juarez an immigrant visa. *Id*. This is because Petitioner Colindres Juarez is not and never has been a member of a criminal organization, and everyone who has ever known Petitioner Colindres Juarez realized just how far from the truth the Embassy's blanket allegation was. *Id*.

Nevertheless, on December 14, 2020, the Embassy again refused Petitioner 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)." (App.94a).

B. Summary of Law

This matter implicates procedural and substantive due process rights; entitlements to equal protection of the laws; rights to freedom of speech, expressive activity, and the fundamental, associational, and marital right to live together as Husband and Wife, as well as violations of the Immigration and Nationality Act ("INA") and Administrative Procedure Act ("APA").

The Court below opined the Embassy decision at issue is insulated from review under the doctrine of consular nonreviewability, and thus ruled it was precluded from evaluating the well-founded claims of both Petitioners that the Government's actions transgress multiple bedrock constitutional limitations. (App. 16a). However, the Embassy's inadmissibility determination not only falls short in the context of the highly constrained review afforded to consular determinations—inasmuch as it provides no discrete factual basis or predicate for the immigrant visa refusal—but also violates multiple constitutional rights of Petitioners.

C. Conflict Amongst the Circuits

The decision at issue by the District of Columbia Court of Appeals is directly in conflict with a recent decision by the Court of Appeals for the Ninth Circuit, to wit: *Muñoz v. U.S. Dep't of State*, 50 F4th 906 (9th Cir. 2022) *reh'g denied* 73 F.4 769 (9th Cir. 2023).[2]

Both Circuits have recognized their split on at least two points: (1) whether 8 U.S.C. §1182(a)(3)(A)(ii) (alien who seeks to enter the United States to engage in unlawful activity) provides a discrete factual predicate sufficient to support application of the doctrine of consular nonreviewability; and (2) whether a United States citizen has a constitutionally protected due process liberty interest in their spouse's visa application or residing in their country of citizenship. *Compare Colindres v. U.S. Dep't of State*, 71 F4th 1018, 1021,

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[2] Upon information or belief, the United States intends to petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for Ninth Circuit in *Muñoz*. Its Petition is due by October 12, 2023.

1024 (D.C. Cir. 2023) ("8 U.S.C. §1182(a)(3)(A)(ii)… specifies a factual predicate for denying a visa… level of specificity is not required" and "citizen's right to marry is not impermissibly burdened when the government refuses her spouse a visa… [t]he right to marriage… does not include the right to live in America with one's spouse") *and Muñoz v. U.S. Dep't of State*, 50 F4th 906, 915-16, (9th Cir. 2022) ("[u]nlike surrounding provisions, 8 U.S.C. §1182(a)(3)(A)(ii) does not specify the type of lawbreaking that will trigger a visa denial, and a consular officer's belief than an applicant seeks to enter the United States for general (including incidental) lawbreaking is not a 'discrete' factual predicate… ." and "a U.S. citizen possesses a protected liberty interest in 'constitutionally adequate procedures in the adjudication of [a non-citizen spouse]'s visa application" and "U.S. citizens also possess a liberty interest in residing in their country of citizenship.").

Regarding whether a United States citizen has a constitutionally protected due process liberty interest in their spouse's visa application or residing in their country of citizenship, Chief Judge Srinivasan noted, in his concurring opinion, the dangers implicit in his Court's ruling:

> [M]y 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.
>
> My colleagues conclude… 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.

(App.16a-17a). Chief Judge Srinivasan also noted the confusion presented by this Court's splintered decision in *Kerry v. Din*, 576 U.S. 86 (2015) on this same issue:

> 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**.

(App.18a) (emphasis added). Based on the above-described circuit split and need for clarity regarding marital liberty interests in connection with visa applications urged by Chief Judge Srinivasan, this Court should issue a writ of certiorari to both review the judgment of the District of Columbia Court of Appeals and resolve the circuit split detailed above and discussed more specifically below.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT AMONGST THE CIRCUITS AS TO WHETHER 8 U.S.C. §1182(a)(3)(A)(ii) PROVIDES A DISCRETE FACTUAL PREDICATE SUFFICIENT TO SUPPORT APPLICATION OF THE DOCTRINE OF CONSULAR NONREVIEWABILITY.

A. Visa Refusals Must Be Facially Legitimate and Bona Fide.

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). As this Court recently noted, "claims otherwise barred by the consular nonreviewability doctrine are subject to judicial review [and] in… narrow circumstances… an American citizen can challenge the exclusion of a noncitizen if it burdens the citizen's constitutional rights." *Baan Rao Thai Rest. v. Pompeo*, 985 F.3d 1020 (D.C. Cir. 2021) *citing Trump v. Hawaii*, ___ U.S. ___, 138 S.Ct. 2392, 2416 (2018) ("an American individual who has "a bona fide relationship with a particular person seeking to enter the country… can legitimately claim concrete hardship if that person is excluded.").

This limited exception traces to the *Mandel* decision. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972). Dr. Ernest Mandel was a Belgian journalist and a self-described revolutionary Marxist, who had been invited by college professors, all of them United States citizens, to speak at a university conference. *Mandel*, 408 U.S. at 756-57. The consulate denied Mandel's visa application, finding him inadmissible under the immigration laws at that time, which barred aliens who advocate world communism, and the Attorney General declined to grant a waiver. *Id.* at 757. Mandel, along with a number of American professors, challenged the denial. *Mandel*, 408 U.S. at 759-60. While the Supreme Court ruled that "Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry," it found that the denial of Mandel's visa implicated the professors' First Amendment rights to receive ideas. *Id.* at 762, 765-66.

Nevertheless, the Supreme Court "declined to balance the First Amendment interest of the professors against Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Kerry v. Din*, 576 U.S. 86, 103 (2015) (Kennedy, J., concurring) *citing Mandel*, 408 U.S. at 766) (other citation and quotations omitted). Instead, the Supreme Court in *Mandel* "limited its inquiry to the question whether the Government had provided a 'facially legitimate and bona fide' reason for its action." *Din*, 576 U.S. at 103; *see also Mandel*, 408 U.S. at 770 ("We hold that 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.").

The Supreme Court most recently examined the doctrine of consular nonreviewability in *Din*. Fauzia Din, a United States citizen, was married to Kanishka Berashk, an Afghan citizen and former civil servant in the Taliban regime. *Din*, 576 U.S. at 88. The consulate denied Berashk's visa application, finding him inadmissible under 8 U.S.C. §1182(a)(3), a "statutory provision prohibiting the issuance of visas to persons who engage in terrorist activities," "but provided no further explanation." *Id.* at 89-90, 102. The *Din* concurrence "assumed without deciding that Din's constitutional rights were burdened by the visa denial but held that the reasons for the visa denial given by the Government satisfied *Mandel*'s 'facially legitimate and bona fide' standard." *Cardenas v. United States*, 826 F.3d 1164, 1170 (9th Cir. 2016) *citing Din*, 135 S. Ct. at 103; *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 589 (4th Cir.), *as amended* (May 31, 2017), *as amended* (June 15, 2017), *cert. granted*, 137 S. Ct. 2080 (2017), and vacated and remanded on other grounds, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017) ("Courts have continuously applied *Mandel*'s 'facially legitimate and bona fide' test to challenges to individual visa denials."); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009) ("We conclude that, where a plaintiff, with standing to do so, asserts a First Amendment claim to have a visa applicant present views in this country, we should apply *Mandel* to a consular officer's denial of a visa."); *see also Cardenas*, 826 F.3d at 1171-72 (determining

that the Kennedy concurrence in *Din* "represents the holding of the Court").

Accordingly, despite the "long recognized… power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control," *Cardenas*, 826 F.3d at 1169, "courts have identified a limited exception to the doctrine where the denial of a visa implicates the constitutional rights of American citizens," *Bustamante*, 531 F.3d at 1061. "[U]nder *Mandel*, a U.S. citizen raising a constitutional challenge to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision." *Bustamonte*, 531 F.3d at 1062. That inquiry is to determine whether the consular officer acted on the basis of a "facially legitimate and bona fide reason." *Mandel*, 408 U.S. at 762. Accordingly, Embassy's decision at issue must have been supported by a "facially legitimate and bona fide reason." *Mandel*, 408 U.S. at 770.

B. Citation to 8 U.S.C. §1182(a)(3)(A)(ii) Alone Does Not Provide Sufficient Factual Predicate for a Visa Refusal.

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); *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016).

In *Din*, the Supreme Court laid out a two-part test for determining whether the denial of a visa to the spouse of a U.S. citizen provides the "facially legitimate and bona fide reason" required by *Mandel*. *See Cardenas*, 826 F.3d at 1172 ("Under the *Din* concurrence, the facially legitimate and bona fide reason test has two components."). "First, the consular officer must deny the visa under a valid statute of inadmissibility." *See Din*, 576 U.S. at 104 (consular officer's citation to 8 U.S.C. §1182(a)(3)(B) "suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements," and "the Government's decision to exclude an alien it determines does not satisfy one or more of [the statutory conditions for entry] is facially legitimate under *Mandel*."). Second, the consular officer must cite an admissibility statute that "specifies discrete factual predicates the consular officer must find to exist before denying a visa," or there must be a fact in the record that "provides at least a facial connection to" the statutory ground of inadmissibility. *Cardenas*, 826 F.3d at 1172 *quoting Din*, 576 U.S. at 105.

Petitioners specifically acknowledge that the consular officer's citation to 8 U.S.C. §1182(a)(3)(A)(ii) was sufficient to demonstrate that the visa refusal relied on a valid statute of inadmissibility. *See Din*, 576 U.S. at 105 (consular officer's citation to 8 U.S.C. §1182(a)(3)(B) "suffices to show that the denial rested on a determination that Din's husband did not satisfy the statute's requirements."). However, Petitioners aver that the mere citation to 8 U.S.C. §1182 (a)(3)(A)(ii) in this instance fails to provide any

discrete factual predicates necessary to refuse Petitioner Colindres Juarez's immigrant visa.

However, the Embassy's mere citation to 8 U.S.C. §1182(a)(3)(A)(ii) did not itself provide both the "facially legitimate and bona fide reason" required by *Mandel*. (R.1-2). This is because *Din* requires both a "facially legitimate" reason and a "bona fide factual basis" for denying a visa. *See Din*, 576 U.S. at 105. Satisfying the second part of the *Din* test requires either a citation to "an admissibility statute that 'specifies discrete factual predicates the consular officer must find to exist before denying a visa,' or there must be a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." *Cardenas*, 826 F.3d at 1172 *citing Din*, 576 U.S. at 105. Section 1182(a)(3)(A)(ii) does not provide the "discrete factual predicates" necessary to deny a visa because the statute merely precludes admission, without further edification, to an alien who a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage… in… any other unlawful activity." *See* 8 U.S.C. §1182(a)(3)(A)(ii).

The Embassy did not identify any fact in the record that provides a facial connection to 8 U.S.C. §1182(a)(3)(A)(ii). App.92a-93a. As such, this Court should ultimately hold that the Embassy failed to provide a bona fide factual reason for denying Petitioner Colindres Juarez's request for an immigrant visa and rule the Court below erred in affirming the District Court's dismissal of the instant action for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

C. The District of Columbia Circuit Held That Mere Citation to 8 U.S.C. §1182 (a)(3)(A)(ii) Provides Sufficient Factual Predicate Underlying Visa Refusals; the Ninth Circuit Held It Does Not.

1. The District of Columbia Circuit Opined That Section 1182(a)(3)(A)(ii) Implies a Discrete Factual Predicate.

The Court below held "the consular officer's decision to deny [Petitioner's] visa satisfies [the facially legitimate] standard" due to the consular officer's citation of 8 U.S.C. §1182(a)(3)(A)(ii). (App.12a). The Court went on to hold the consular officer's specification that Petitioner Colindres Juarez was "a member of a known criminal organization"—despite all evidence to the contrary and the factual impossibility of the same—was enough.[3] *Id.*

In so holding, the Court below conceded: "[t]o be sure, §1182(a)(3)(A)(ii) 'does not specify the type of lawbreaking that will trigger a visa denial'… [b]ut that level of specificity is not required." *Id. citing Muñoz v. Dep't of State*, 50 F.4th 906, 917 (9th Cir. 2022) (noting the Ninth Circuit's holding that Section 1182(a)(3)(A)(ii) does not contain discrete factual predicates). The Court below reasoned, "[i]n *Din*, Justice Kennedy said that a provision making terrorists inadmissible was detailed enough." *Id. citing Din*, 576 U.S. at 105 (Kennedy, J., concurring). The Court

[3] Reference to membership in a known criminal organization suffers from the same fatal ambiguity as mere citation to 8 U.S.C. §1182(a)(3)(A)(ii). Neither terminology adequately identifies any discrete factual basis for a consular officer's inadmissibility determination.

then erroneously concluded "that provision is written in the same general terms as the provision at issue here." As a result, it concluded, "as in *Din*, the Government's statutory "citation… indicates it relied upon a bona fide factual basis for denying" [Petitioner's] request for a visa." App.13a *citing Din*, 576 U.S. at 105 (Kennedy, J., concurring).

2. Contrary to the District of Columbia Circuit's Holding, Section 1182(a)(3)(A)(ii) Does Not Apply Any Discrete Factual Predicate; It Is Inherently Vague.

The District of Columbia Circuit's reliance on this Court's determination that citation of the terrorism ground of inadmissibility provides an adequate factual predicate is misplaced. In *Din*, the Supreme Court found that 8 U.S.C. §1182(a)(3)(B)—proscribing admission to an alien who a consular officer believes will engage in terrorist activities—provides the requisite "discrete factual predicates," subsection (B) includes literally dozens of subparagraphs that describe in detail what "terrorist activity," "engag[ing] in terrorist activity," and "terrorist organization" entail. Because 8 U.S.C. §1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa, this Court held that, in the context of Section 1182(a)(3)(B), it is not necessary for there to also be a fact in the record providing a "facial connection" to the statutory ground of inadmissibility. *See Din*, 576 U.S. at 105.

In contrast, subsection (A) provides no such factual predicates for what "unlawful activity" entails. Indeed, almost anything, including parking violations, jay-

walking, or driving without a seatbelt, could be included within the ambit of "unlawful activities." Accordingly, citation of subsection (A) standing alone grants the consular officer "nearly unbridled discretion," which *Mandel* and *Din* cautioned against. *See Din*, 576 U.S. 105 ("But unlike the waiver provision at issue in *Mandel*, which granted the Attorney General nearly unbridled discretion, Section 1182(a)(3)(B) specifies discrete factual predicates the consular officer must find to exist before denying a visa."); *see also Cardenas*, 826 F.3d at 1172 ("[T]here must be a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility.") *citing Din*, 576 U.S. at 105.

Indeed, Section 1182(a)(3)(A)(ii) is impermissibly vague as applied to Petitioners. The text of 8 U.S.C. §1182(a)(3)(A)(ii), which bars admission to those seeking to enter the United States to commit "any other unlawful activity," gives immigrants no notice of the type of conduct that could subject them to an inadmissibility finding.[4]

As recognized by Chief Judge Srinivasan, *see* App.16a, a consular officer could conceivably bar 100 percent of applicants for immigrant visas on the grounds a consular officers purports to know or have reason to believe the alien is entering the United States to incidentally engage in "any other unlawful activity," because Section 1182(a)(3)(A)(ii) encompasses

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[4] The *mens rea* standard in Section 1182(a)(3)(A)(ii) makes inadmissible aliens who seek to enter the United States to engage "incidentally" in "any other unlawful activity." In other words, a consular officer may deny admission to an alien on the grounds that they may accidentally engage in an unlawful act at some point in the United States.

conduct that even the most law-abiding people engage in incidental to everyday life. For example, an alien who an officer believes may conduct the unlawful activity of jaywalking incidental to picking up their child at school can be barred under Section 1182(a)(3)(A)(ii). The same applies to an alien who may smoke a cigarette twenty-four (24) feet away from the door of a federal building in violation of Executive Order 13058 (which bars smoking within 25 feet of a federal building). Certainly, there are few people who have gone their entire lives without unintentionally, but unlawfully, overstayed their parking meter. But those among us who happen to be intending immigrants seeking admission to the United States are liable to be barred under Section 1182(a)(3)(A)(ii). In this way, Section 1182(a)(3)(A)(ii) invites arbitrary enforcement by consular officers, who are unaccountable and have free reign to interpret the statutory provision at issue however they see fit.

It is impossible to determine the meaning of "any other unlawful activity" under Section 1182(a)(3)(A)(ii). First, the term "any other" could be read broadly to refer to "any" conduct "other" than the other two Subsections of 8 U.S.C. §1182(a)(3)(A), namely, (i) and (iii). Since Section 1182(a)(3)(A)(i) relates to espionage and smuggling and (iii) refers to revolutionary anti-government activity, "any other unlawful activity" could be read to refer to any unlawful activity that is not espionage, smuggling, or revolutionary activity.

The term "any other unlawful activity" could be interpreted under the doctrine of *eiusdem generis* to refer to conduct that is of the same kind, class, or nature as the conduct outlined in Subsections 1182(a)(3)(A)(i) and (ii). This reading would limit "any other

unlawful activity" to unlawful activity related only to espionage, smuggling, or revolutionary activity.

Under the rule, maxim, and doctrine against surplusage, the "any other unlawful activity" language in Section 1182(a)(3)(A)(ii) could be read to exclude or overlap with "criminal and related grounds" in Section 1182(a)(2), which refers to "criminal and related grounds." Under this reading, the "unlawful activity" in 8 U.S.C. §1182(a)(3)(A)(ii) would only include "unlawful activity" which is not criminal.

Finally, the header of the umbrella of Section 1182(a)(3), which reads "security and related grounds," could limit the meaning of "any other unlawful activity." Though it is not clear what either "security" or "related grounds" mean, Subheading (B) refers to "terrorist activity," (C) to "foreign policy," (D) to "immigrant membership in totalitarian party," (E) to participation in Nazi persecution, (F) to "association with terrorist organizations," and (G) to "recruitment and use of child soldiers." Employing a broader application of *eiusdem generis* and the rule against surplusage, this could limit "any other unlawful activity" to "security" activity related to but not overlapping with the conduct outlined in subheadings (A)-(G). It is by no means clear what type of activity this would constitute.

Of course, for the second, third, and fourth interpretations, use of the word "any" in "any other unlawful activity" would seem to indicate that the Subsection overlaps with all of the other types of unlawful conduct outlined in Section 1182(a). These conflicting interpretations of the statute flow from the vagueness of its text.

* * *

Section 1182(a)(3)(A)(ii) is so sweeping and vague that it provides consular officers with power to act absent any accountability based on their own *ad hoc*, subjective criteria, without being subject to any right of review or appeal. In *Grayned v. City of Rockford*, this Court cautioned that, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

Consequently, if the District of Columbia Circuit's holding is upheld, each consular officer will be their own judge of what statutory interpretation of Section 1182(a)(3)(A)(ii) is warranted or should apply under the circumstances. For this reason, the statute invites arbitrary enforcement. All of these dangers are amplified by the fact that the doctrine of consular non-reviewability makes it nearly impossible for visa applicants to effectively challenge decisions by consular officers, who are not subject to any public accountability mechanisms.

3. The Ninth Circuit Opined That Section 1182(a)(3)(A)(ii) Lacks Any Discrete Factual Predicate.

In direct conflict with the District of Columbia Circuit, the Ninth Circuit in *Muñoz v. U.S. Dep't of State*, 50 F.4th 906 (9th Cir. 2022), a matter detailed further *infra* at II.B., opined as follows:

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 lawbreaking 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 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)." But the government's argument misreads *Din*, 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, *see 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 legitimate 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.

(App.141a-143a). This analysis is diametrically opposed to the District of Columbia Circuit's reasoning in this matter. As a result, there exists an inconsistency between holdings of United States Courts of Appeal of a character to warrant review by this Court under S. Ct. R. 10(a).

II. THERE IS A CONFLICT AMONGST THE CIRCUITS AS TO WHETHER A UNITED STATES CITIZEN HAS A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN THEIR SPOUSE'S VISA APPLICATION OR RESIDING IN THEIR COUNTRY OF CITIZENSHIP.

A. The District of Columbia Circuit Opined That Visa Refusals Do Not Implicate Any Constitutionally Protected Liberty Interests.

The Court below found that a United States citizen does not have a protected liberty interest in their spouse's visa application or a right to reside in their country of citizenship. (App.6a-8a). The Court reasoned:

> "[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 re-fuses 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).[5] This court

[5] Chief Judge Srinivasan appears to question his colleague's reliance on *Swartz*: "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

> 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).
>
> . . .
>
> 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.

(App.6a-8a). As detailed below, the District of Columbia Circuit's holding ignores the fundamental nature of the due process protected liberty interest in marriage.[6]

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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." (App.16a-17a). Separately, it is noteworthy that *Swartz* involved deportation proceedings, wherein the spouse involved received an abundance of due process as compared to Petitioner Colindres Juarez.

[6] Judge Walker's opinion also ignores uncontroverted record evidence—which this Court must accept as true—that Petitioner Colindres suffers from an acute medical condition requiring medical treatment and medication that she cannot obtain in

B. Contrary to District of Columbia Circuit's Ruling, Visa Removals Do Implicate Fundamental Rights.

The Embassy's refusal of Petitioner 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. 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. 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 except pursuant to constitutionally adequate procedures." *Id. citing Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

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.*, 414 U.S. at 639-640; *see also Meyer*, 262 U.S. at 399 (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

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Guatemala. (App.110a). Further, the couple's daughter, S.H.C., suffers from medical ailments of her own. *Id.* In light of the inability of Petitioner Colindres and S.H.C. to obtain adequate medical treatment in Guatemala for documented medical conditions, the visa denial in this instance not only affects the "physical conditions of the marriage" between Petitioners, but the actual possibly of their marriage itself. This distinguishes this matter from *Swartz* and its progeny.

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); *see also Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) *citing Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("[T]he 'liberty' specially protected by the Due Process Clause includes the right[ ] to marry…. [which] has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness… [that] is… fundamental to our very existence and survival."); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) ("The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."). Over the centuries, scholars, political leaders, and Courts alike have celebrated the tradition of married couples sharing a home together as the backbone of American society. That marriage constitutes a fundamental right is beyond debate.

Moreover, this matter does not involve a newly arriving alien or novel spousal immigration process. Petitioner Colindres Juarez lived and worked in the United States for nearly a quarter-century and was, by all accounts, a law-abiding Husband and Father. (App.101a). He perpetrated no offense for his exile and banishment. (App.106a). Add to this that Petitioner Colindres paid a $535.00 filing fee for her Form I-130, *Petition for Alien Relative*, which the Government approved. (App.101a). Petitioner Colindres Juarez then paid a $630.00 filing fee for his Form I-601A, *Application for Provisional Unlawful Presence Waiver*,

which the Government approved (necessarily determining "the refusal of admission to such immigrant alien would result in extreme hardship to the citizen [spouse]… of such alien." *See* 8 U.S.C. §1182(a)(9)(B)(v); *see also* 8 C.F.R. §217.7(e); (App.101-102a). Then, and only then, did Petitioner Colindres Juarez—as required by law—proceed to depart the United States and seek admission. To state that Petitioners are on the same footing in connection with their fundamental liberty interests as an immigrant standing on the border for the very first time is a gross oversimplification of the circumstances involved.

C. The Ninth Circuit Opined That Visa Refusals Constitute Direct Restraints on Liberty Interests of United States Citizen Spouses.

In *Muñoz v. U.S. Dep't of State*, 50 F.4th 906 (9th Cir. 2022), the Court of Appeals for the Ninth Circuit entered an Order vacating a District Court judgment in circumstances eerily similar to those involved in the instant proceedings. (App.155a). The Ninth Circuit subsequently affirmed its holding by denying the Government's petition for rehearing en banc. (App.56a).

In *Muñoz*, a United States citizen, Sandra Muñoz, and her Husband, Luis Asencio-Cordero, a native and citizen of El Salvador, brought a challenge to the refusal of Mr. Asencio-Cordero's immigrant visa. (App.123a). As in this matter, Ms. Muñoz's immediate-relative petition and Mr. Asencio-Cordero's inadmissibility waiver were both approved by USCIS. *Id.* In April 2015, Mr. Asencio-Cordero thus returned to El

Salvador for the purpose of obtaining an immigration visa from the U.S. Consulate in San Salvador. *Id.*

As in this matter, the consular officer refused Mr. Asencio-Cordero an immigrant visa citing 8 U.S.C. §1182(a)(3)(A)(ii). *Id*. While not expressly stated as a factual basis for its immigrant visa refusal, the Parties inferred Mr. Asencio-Cordero's multiple tattoos were somehow related to refusal of his immigrant visa. *Id*. Efforts by Ms. Muñoz and Mr. Asencio-Cordero to achieve favorable administrative reconsideration of the Consulate's refusal were unsuccessful; additionally, their submission of credible evidence that Mr. Asencio-Cordero's tattoos are unrelated "to any gang or criminal organization in the United States or elsewhere," fell on deaf ears. *Id*. As such, Ms. Muñoz and Mr. Asencio-Cordero brought a lawsuit in the U.S. District Court for the Central District of California. *Id*.

The Government initially filed a motion to dismiss invoking the doctrine of consular nonreviewability. *Id*. The District Court granted the Government's motion to dismiss as to Mr. Asencio-Cordero, concluding that he lacked a right to judicial review of the visa refusal as an unadmitted, non-resident alien; however, it denied the Government's motion as to Ms. Muñoz upon finding 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 refusing the visa at issue. *Id*.

The District Court then allowed limited discovery wherein the Government first presented a Declaration from a State Department attorney advisor providing that Mr. Asencio-Cordero's visa application was refused under 8 U.S.C. §1182(a)(3)(A)(ii) because "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 consular officer concluded Mr. Asencio-Cordero was a member of a known criminal organization. *Id.*

The Parties then proceeded to file cross-motions for summary judgment. *Id.* The District Court ultimately entered summary judgment in the Government's favor on the basis that, subsequent to the initial refusal of Mr. Asencio-Cordero's immigrant visa, "the Government has offered further explanations for the consulate officer's decision," and based upon the explanation proffered, Ms. Muñoz had not affirmatively demonstrated the Government refused her Husband's visa in bad faith. *Id.* Ms. Muñoz and Mr. Asencio-Cordero then appealed.

In examining the merits, the Ninth Circuit first held that Ms. Muñoz sufficiently alleged a constitutionally protected liberty interest in her non-citizen Husband's visa application. The Ninth's Circuit's extensive, well-reasoned, and legally correct analysis bears repeating in total here:

> 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

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). 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 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. *See Mandel*, 408 U.S. at 766–70; *Din*, 576 U.S. at 104 (Kennedy, J., concurring in the judgment).

(App.137a). By this same reasoning, Petitioner Colindres sufficiently alleged a constitutionally protected liberty interest in Petitioner Colindres Juarez's visa application. Further, the Embassy failed to provide "a facially legitimate and bona fide reason" for its refusal of Petitioner Colindres Juarez's immigrant visa, in particular, because its blanket reference to Section 1182(a)(3)(A)(ii) did not afford Petitioners with any "discrete factual predicate" providing at least a facial connection to any specific statutory ground of inadmissibility. *Cardenas*, 826 F.3d at 1172 *citing Din*, 576 U.S. at 105.

CONCLUSION

What began as a good faith endeavor to rectify Petitioner 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. The love, affection, and joy Petitioners Colindres, Colindres Juarez and their daughter S.H.C. share as a family is palpable. They deserve to be together. The anguish and loss felt by the Colindres Family in light of their extended separation is excruciating. Inexplicably, the Colindres Family's separation transpired by virtue of an honorable interest in perfecting Petitioner Colindres Juarez's immigration status but has now gone unexpectedly and bizarrely awry.

The Colindres Family is in a Catch-22 situation. Petitioner Colindres Juarez is now indefinitely stuck in Guatemala. But Petitioner Colindres cannot travel to Guatemala to live with him. She suffers from an acute medical condition requiring medical treatment and medication that she cannot obtain in Guatemala. (App.110a). Further, the couple's daughter, S.H.C., suffers from medical ailments of her own and is well-established in a local school. *Id.* Both Petitioner Colindres and S.H.C. are suffering mightily with psychological symptoms related to family separation. The Colindres Family has been financially wrecked by Petitioner Colindres Juarez's absence and inability to work. By virtue of the Embassy's bad faith refusal to issue Petitioner Colindres Juarez an immigrant visa without any facially legitimate and bona fide

basis, Petitioner Colindres has been forced to survive on her own income alone all the while parenting S.H.C. by herself.

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 and unsupported refusal to issue Petitioner Colindres Juarez an immigrant visa on a factually impossible and capricious basis. Petitioners have been fighting to reunite their Family since then.

For the foregoing reasons, Kristen H. Colindres and Edvin A. Colindres Juarez, a Husband and Wife, respectfully and humbly request that this Court issue a writ of certiorari to review the judgment of the District of Columbia Court of Appeals. All hopes now rest on this Court's conscience and its fair administration of justice.

Respectfully submitted,

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