APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-55365

SANDRA MUÑOZ; LUIS ERNESTO ASENCIO-CORDERO,
PLAINTIFFS-APPELLANTS

v.

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

Argued: Feb. 10, 2022
Filed: Oct. 5, 2022

OPINION

Before: MARY M. SCHROEDER, KERMIT V. LIPEZ,* and KENNETH K. LEE, Circuit Judges.

LIPEZ, Circuit Judge. After the government denied the immigrant visa application of plaintiff-appellant Luis Asencio-Cordero under 8 U.S.C. § 1182(a)(3)(A)(ii), Asencio-Cordero and his U.S.-citizen spouse, plaintiff-appellant Sandra Muñoz, sought judicial review of the government's visa decision and challenged the statute as

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

unconstitutionally vague.[1] Concluding that the government was entitled to invoke the doctrine of consular nonreviewability to shield its decision from judicial review, the district court granted summary judgment on all claims to defendants-appellees, the U.S. Department of State, Secretary of State Antony Blinken, and U.S. Consul General in El Salvador, Brendan O'Brien. This appeal followed. Because we conclude that the government failed to provide the constitutionally required notice within a reasonable time period following the denial of Asencio-Cordero's visa application, the government was not entitled to summary judgment based on the doctrine of consular nonreviewability. We therefore vacate and remand to the district court for further proceedings.

I.

Appellants' suit directly implicates the doctrine of consular nonreviewability, the longstanding jurisprudential principle that, "ordinarily, a consular official's decision to deny a visa to a foreigner is not subject to judicial review." *Khachatryan v. Blinken*, 4 F.4th 841, 849 (9th Cir. 2021) (quoting *Allen v. Milas*, 896 F.3d 1094, 1104 (9th Cir. 2018)). As with many judicially created rules, however, consular nonreviewability admits an exception. *See Kleindienst v. Mandel*, 408 U.S. 753, 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972). Where the denial of a visa affects the fundamental rights of a U.S. citizen, judicial review of the visa decision is permitted if the government fails to provide "a facially legitimate

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

and bona fide reason" for denying the visa, *id.*,[2] or if—despite the government's proffer of a facially legitimate and bona fide reason—the petitioner makes an "affirmative showing" that the denial was made in "bad faith," *Kerry v. Din*, 576 U.S. 86, 105, 135 S. Ct. 2128, 192 L. Ed. 2d 183 (2015) (Kennedy, J., concurring in the judgment).[3]

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

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

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

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

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

II.

A. Factual Background

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

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[4] These two alternative methods for fulfilling the "facially legitimate and bona fide reason" standard come from *Cardenas*, where the consular officer relied on a statute lacking discrete factual predicates to deny a visa but the record nevertheless contained information providing a facial connection to the cited ground of inadmissibility. *See* 826 F.3d at 1172. We reasoned that either method would satisfy *Din*, *see id.*, even though in that case the government cited a statutory provision containing discrete factual predicates and the record contained information known to the petitioners that provided a facial connection to the stated ground of exclusion, *see* 576 U.S. at 105, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment).

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

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

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

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

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

States to engage solely, principally, or incidentally in . . . any other unlawful activity" is inadmissible.[8]

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

On April 8, 2016, the Consulate notified Muñoz and Asencio-Cordero that his visa application would be forwarded to the immigration visa unit for review. On April 13, 2016, Consul Taylor notified appellants that "[t]he finding of ineligibility for [Asencio-Cordero] was reviewed by the Department of State in Washington, D.C., which concurred with the consular officer's decision. Per your request, our Immigration Visa Unit took another look at this case, but did not change the decision."

On April 18, 2016, counsel for appellants wrote to the State Department's Office of Inspector General and requested the "reason" for the inadmissibility decision. The letter stated counsel's belief that "an immigration visa application is being denied just for the simple fact that the applicant has tattoos when the rest of the un-

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

derlying evidence and facts demonstrate the applicant has no criminal history and is not a gang member."

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

On May 18, 2016, the Chief of the Outreach and Inquiries Division of Visa Services replied to appellants' letter, stating that the State Department lacks authority to overturn consular decisions based on INA § 104(a) and that the Department "concurred in the finding of in-

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

[10] The declaration states that Guizar is "an attorney duly licensed to practice law in all courts in California . . . . In addition to being a licensed lawyer, [he is] also a court-approved 'gang expert.'" He has worked as a gang expert since April 2009. Guizar believes he is "the only licensed lawyer in the State of California that provides expert testimony as a gang expert in the local courts of the Southern California State and Federal Jurisdictions." In this capacity, Guizar has "testif[ied] in court as a gang expert on approximately 50 gang cases" and "been consulted on 40 other matters." This role requires him to "evaluate the character of a person alleged to be a gang member to determine if he is in fact a 'gang member,'" and to provide opinions "with regard to tattoos on individuals and whether the individual appears to be a gang member."

eligibility."[11] The following day, Consul Taylor wrote again to appellants, listing the entities that had reviewed Asencio-Cordero's visa application[12] and noting that "[n]one of the above-mentioned reviews have revealed any grounds to change the finding of inadmissibility, and there is no appeal."[13]

B. Procedural History

Appellants initiated this lawsuit in January 2017. The Complaint asserts that (1) the denial of Asencio-Cordero's visa was not facially legitimate and bona fide, such that it infringed on Muñoz's fundamental rights; (2) the denial violated the Equal Protection Clause of the Fifth Amendment; (3) the denial violated the separation of powers; (4) the Consulate denied the visa in bad faith, (5) the denial violated the Administrative Procedure Act

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

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

[13] We understand Consul Taylor's statement that "there is no appeal" to mean that there was no further administrative process that appellants could have pursued. As we discuss *infra*, an initial visa refusal triggers an automatic internal review process, *see* 22 C.F.R. § 42.81; 9 Foreign Affairs Manual 504.11-3(A)(2)(b) [hereinafter, "FAM"], and Consul Taylor's statement was made at the apparent culmination of this internal review process. Administrative limitations on appealability do not, however, preclude judicial review of constitutional claims. *See Allen*, 896 F.3d at 1108 (citing *Webster v. Doe*, 486 U.S. 592, 601–05, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988)).

("APA"); and (6) the statute under which the visa was denied, 8 U.S.C. § 1182(a)(3)(A)(ii), is unconstitutionally vague. Appellants seek a declaration that the adjudication of Asencio-Cordero's visa application was not bona fide, a declaration that § 1182(a)(3)(A)(ii) is unconstitutional, and other just and proper relief.[14]

The government filed a motion to dismiss in September 2017, invoking the doctrine of consular nonreviewability. Two months later, the district court granted the motion with respect to Asencio-Cordero's challenge to the visa adjudication, concluding that he lacked a right to judicial review of the visa denial as an unadmitted, non-resident alien. The court denied the motion with respect to Muñoz, however, stating that she has a constitutional liberty interest in her husband's visa application and that the government had failed to offer a bona fide factual reason for denying the visa. The motion to dismiss did not address appellants' vagueness challenge to § 1182(a)(3)(A)(ii). Appellants subsequently filed, and the district court denied, a motion for judgment on the pleadings.[15]

Appellants sought discovery on the facts supporting the Consulate's denial of Asencio-Cordero's visa application. In a joint Rule 26(f) report filed on September

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

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

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

In April 2019, the district court issued an order permitting limited discovery—in the form of a deposition or Rule 31 deposition[16] of the consular official who denied the visa application—on whether the visa denial relied on "discrete factual predicates." By May 2020, the parties still had not agreed on a discovery plan. The court rejected the government's argument that permitting discovery violated the doctrine of consular nonreviewability and law enforcement privilege but limited appellants to addressing the following five issues:

1. Identify a *fact* in the record that supports the conclusion that Asencio[-Cordero] was a member of MS-13.

2. What specific *fact* provided by Asencio[-Cordero] in his in-person inter-view, if any, provides a facial

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

connection to the conclusion that Asencio[-Cordero] was a member of MS-13[?]

3. What specific *fact* in the criminal review of Asencio[-Cordero], if any, provides a facial connection to the conclusion that Asencio[-Cordero] was a member of MS-13[?]

4. What specific *fact* in the review of Asencio [-Cordero]'s tattoos, if any, provides a facial connection to the conclusion that Asencio[-Cordero] was a member of MS-13[?]

5. Was the declaration of Humberto Guizar taken into consideration before determining that Asencio [-Cordero] was a member of MS-13[?]

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

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

Cordero was associated with MS-13."[17] The government explained that "the information that is now in the record provides an unambiguous connection to Section 1182(a)(3)(A)(ii), [such that] the visa refusal is facially legitimate and bona fide."

On the same day that it filed its cross-motion for summary judgment, the government responded to appellants' interrogatories. The response to interrogatories one through four was that "[t]he consular officer considered specific information that was obtained from law enforcement operations, along with the other information already identified for the court in the McNeil Declaration, and determined there was a reason to believe Mr. Asencio[-Cordero] was a member of MS-13." In response to interrogatory five, the government represented that it considered the declaration of Humberto Guizar before determining that Asencio-Cordero was a member of MS-13.[18] The government also sought leave

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

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

ex parte to file a declaration from a Senior State Department official for *in camera* review. The government explained that the information contained in the declaration was Sensitive But Unclassified and described sensitive information contained in the Consular Consolidated Database. The district court permitted the government to submit the declaration for *in camera* review but ordered it to submit a redacted version for appellants' review. The files disclosed to appellants contain significant redactions but document, in their unredacted portions, the consular officer's belief that Asencio-Cordero was a member of MS-13.[19]

The district court held a hearing on the cross-motions for summary judgment in January 2021. At the hearing, the government stated that "[t]he tat[t]oos themselves were considered. That is in the record. . . . There were statements by law enforcement officers or authorities provided to the consular officer about Mr. Asencio-Cordero's membership in MS-13. We are not disclosing what those statements were or . . . what

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

was specifically said because that would be precisely the same sort of look behind the government's facially legitimate and bona fide decision-making" protected by the doctrine of consular nonreviewability. The government indicated that it had provided this information in its responses to appellants' interrogatories. Appellants' counsel objected that the government was conflating a "conclusion and a reason to believe" something and suggested that the "facially legitimate and bona fide reason" standard required the government to disclose a specific fact to support its conclusion that Asencio-Cordero was a member of MS-13. The court asked the government if it was arguing "that the consular officer received information from law enforcement that identified Mr. Asencio[-Cordero] as a gang member. Or that they received information from law enforcement which led the consular officer to believe that he was a gang member?" The government clarified that it was making the first argument.

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

uments provided to appellants and the court,[20] and appellants had not affirmatively demonstrated that the government denied the visa in bad faith. Because it reasoned that the statute had been constitutionally applied to exclude Asencio-Cordero based on the consular officer's determination that he was a member of MS-13, the court also rejected appellants' vagueness challenge to the constitutionality of the statute.

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

III.

A. Muñoz's Constitutional Interest

Like the plaintiff in *Din*, *see* 576 U.S. at 101-02, 135 S. Ct. 2128, 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,

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

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

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, 135 S. Ct. 2128 (plurality opinion), Justice Kennedy's controlling concurrence declined to reach this issue, *id.* at 102, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment).[22] It was therefore proper for the district court to conclude that, under the precedent of this circuit, Muñoz possesses a liberty interest in Asencio-Cordero's visa application. *See FTC v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) ("[I]f we can apply our precedent consistently with that of the higher authority, we must do so.").

Subsequent case law, moreover, reinforces this precedent. Eleven days after the Court decided *Din*, Justice Kennedy and the *Din* dissenters comprised the majority in *Obergefell v. Hodges*, which reiterated longstanding precedent that "the right to marry is a fundamental right inherent in the liberty of the person" and subject to protection under the Due Process Clause. 576 U.S. 644, 675, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); *see also id.* at 663, 664, 135 S. Ct. 2584. In so holding, *Obergefell* laid out "a careful description" of

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[22] The four-justice dissent concluded that a U.S. citizen possesses a liberty interest in the visa application of a non-citizen spouse. *Din,* 576 U.S. at 107, 135 S. Ct. 2128 (Breyer, J., dissenting).

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, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (citations and internal quotation marks omitted); *Obergefell*, 576 U.S. at 665-676, 135 S. Ct. 2584 (providing the rigorous description and analysis *Glucksberg* requires). *But see Din*, 576 U.S. at 93-94, 135 S. Ct. 2128 (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, 135 S. Ct. 2584 (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, 98 S. Ct. 2081, 56 L. Ed. 2d 677 (1978); *Ng Fung Ho v. White*, 259 U.S. 276, 284-85, 42 S. Ct. 492, 66 L. Ed. 938 (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, 135 S. Ct. 2128 (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, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980), because it conditions enjoyment of one fundamental right (marriage) on the sacrifice of another (residing in one's country of citizenship).

In light of the foregoing, we remain convinced that *Bustamante* correctly recognized that a U.S. citizen possesses a liberty interest in a non-citizen spouse's visa application. Because Muñoz asserts that the government's adjudication of Asencio-Cordero's visa application infringed on this protected liberty interest, we proceed to evaluate whether the government provided "a facially legitimate and bona fide reason" for denying his visa.[23] *See Mandel*, 408 U.S. at 766–70, 92 S. Ct. 2576; *Din*, 576 U.S. at 104, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment).

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[23] At oral argument, the government claimed that, *Mandel* and *Din* notwithstanding, it is not obligated to provide any information upon the denial of a visa. In support of this proposition, the government cited *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S. Ct. 309, 94 L. Ed. 317 (1950), and *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 97 L. Ed. 956 (1953)—cases that address, as the government's counsel recognized, the constitutional rights and process owed to non-citizens seeking to enter the country. *Mandel* and *Din*, on the other hand, concern judicial review in cases where the petitioner is a U.S. citizen who possesses a constitutional interest in a non-citizen's visa application—like the case before us. *Knauff*'s discussion of the process owed to non-citizens at the gate of entry is, at best, peripheral to our evaluation of the process owed to a U.S. citizen whose constitutional rights may have been infringed by the denial of an immigrant visa to a spouse. Moreover, *Din*'s citation to *Knauff* along the way to explicating the criteria for invoking the *Mandel* exception, see *Din*, 576 U.S. at 104–105, 135 S. Ct. 2128 (Kennedy, J., concurring), indicates that *Din* incorporates *Knauff*'s holding to the extent of its relevance in situations involving the visa applications of U.S. citizens' spouses.

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

The parties' disagreement about whether the *Mandel* exception to consular nonreviewability applies centers on (1) whether the government provided "a facially legitimate and bona fide reason" for the visa denial; and (2) whether the government's long delay in providing anything more than a citation to § 1182(a)(3)(A)(ii) was consistent with its obligation under step two of the *Din* framework.[24]

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

As we explained in *Cardenas* and *Khachatryan*, a consular officer who denies a visa satisfies *Mandel*'s requirement to provide a "facially legitimate and bona fide reason" if the statutory basis of exclusion "specifies discrete factual predicates the consular officer must find to exist before denying a visa" or, alternatively, if there exists "a fact in the record that 'provides at least a facial connection to' the statutory ground of inadmissibility." *Khachatryan*, 4 F.4th at 851 (quoting *Cardenas*, 826 F.3d at 1172). On appeal, the government has wisely abandoned the argument that the statute at issue here contains discrete factual predicates. Unlike surrounding provisions, 8 U.S.C. § 1182(a)(3)(A)(ii) does not specify the type of 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.

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

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)."[25] 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, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment) (rejecting *Din*'s claim that "due process requires she be provided with the facts underlying th[e inadmissibility] determination" because the government cited a statute "specif[ying] discrete factual predicates").

Indeed, it was critical in both *Din* and *Mandel* that the government identified the factual basis for the denial,[26] *see id.*; *Mandel*, 408 U.S. at 769-70, 92 S. Ct. 2576 (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

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

[26] The government denied the visa application of Din's husband on June 7, 2009, and notified Din and her husband on July 13, 2009, that the visa had been denied under 8 U.S.C. § 1182(a)(3)(B), which identifies "terrorist activities" as bases for finding a non-citizen inadmissible. *See Din v. Kerry*, 718 F.3d 856, 859 (9th Cir. 2013), *rev'd*, 576 U.S. at 86, 135 S. Ct. 2128. And, although the facts and administrative process differed, Mandel, too, was promptly informed of the reason underlying the initial denial of his visa application, which was again relayed to Mandel when the attorney general declined to exercise his waiver authority to grant the visa. *See Mandel*, 408 U.S. at 758–59, 92 S. Ct. 2576.

decisions identify due-process principles as the foundation of their reasoning, *see Din*, 576 U.S. at 106, 135 S. Ct. 2128 (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, 92 S. Ct. 2576 (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.

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

This information is quite similar to the information we held in *Cardenas* was sufficient to satisfy *Din* step two. In that case,[27] the government initially did not

[27] *Cardenas* is the only case from this circuit post-dating *Din* in which the government invoked a statute without discrete factual

provide Cardenas or her non-citizen spouse, Mora, any information beyond citing § 1182(a)(3)(A)(ii) to explain the denial of Mora's visa. 826 F.3d at 1168.[28] Within three weeks of the denial, however—after Mora sought additional information[29]—a consular official provided the following explanation by email:

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

Id. On appeal, we reasoned that the denial of Mora's visa complied with *Mandel*'s "facially legitimate and

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predicates—§ 1182(a)(3)(A)(ii), the same statute at issue here—to justify the denial of a visa to a non-citizen spouse of a U.S. citizen. An appeal currently pending in the D.C. Circuit also involves a challenge to a visa denial under this subsection. *See Colindres v. U.S. Dep't of State*, 575 F. Supp. 3d 121, 126 (D.D.C. 2021), *appeal filed* (Jan. 20, 2022).

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

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

bona fide reason" requirement because "[t]he consular officer . . . cited a valid statute of inadmissibility, § 1182(a)(3)(A)(ii)" and informed Cardenas and Mora that the visa was denied based on the government's "belief that Mora was a 'gang associate' with ties to the Sureno gang," as documented in the email to Mora three weeks after the visa denial. *Id.* at 1172; *see also id.* at 1167–68.

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

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

officer reached based on the visa interview, a criminal review, and a review of Asencio-Cordero's tattoos—and the cited statute of inadmissibility, § 1182(a)(3)(A)(ii).[30] Under *Cardenas*, this information suffices as a "facially legitimate and bona fide reason" for denying a visa. *See* 826 F.3d at 1172.

Appellants also contend, however, that the government's failure to provide them with "the specific factual basis of the denial *at the time of the denial*" means that the proffered information is insufficient to satisfy the "facially legitimate and bona fide reason" requirement. This argument carries much more force. In reaching our conclusion in *Cardenas*, we noted that the consular officer himself "provided" the reason within three weeks of the denial. *See* 826 F.3d at 1172 ("He also provided a bona fide factual reason that provided a 'facial connection' to the statutory ground of inadmissibility: the belief that Mora was a 'gang associate' with ties to the Sureno gang."). Similarly, the visa applicant in *Din* was apprised of the reason for the denial—by reference to a statutory provision containing discrete factual predicates—within about a month of the denial. *See Din v. Kerry*, 718 F.3d 856, 859 (9th Cir. 2013), *rev'd*, 576 U.S. 86, 135 S. Ct. 2128. In this case, the government waited almost three years to provide comparable infor-

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

mation to appellants and did so only when prompted by judicial proceedings.[31]

At oral argument, the government suggested that the long delay in apprising appellants of the factual basis for denying Asencio-Cordero's visa does not matter because appellants now know that the visa was denied due to the consular officer's belief that Asencio-Cordero is a member of MS-13. That position is far too facile. Even if the government would have satisfied *Mandel* had it disclosed the fact of Asencio-Cordero's suspected gang membership at the time of the visa denial, it does not necessarily follow that citing § 1182(a)(3)(A)(ii) at the time of the denial and then providing the supporting factual basis years after the denial fulfills *Mandel*'s "facially legitimate and bona fide reason" requirement.[32]

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

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

Indeed, the government cites no case law supporting that proposition.

2. Due Process and Timeliness

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

The doctrine of consular nonreviewability is a rule of decision, formulated by courts and informed by judicial respect for the separation of powers, *Allen*, 896 F.3d at 1101, that curtails judicial review of procedural due process challenges to visa denials in light of "the political branches' broad power over the creation and administration of the immigration system," *Din*, 576 U.S. at 106, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment); *see also Mandel*, 408 U.S. at 766, 770, 92 S. Ct. 2576. Instead of evaluating whether the procedures attendant on the deprivation of a spouse's liberty interest were "constitutionally sufficient"—which we do in other contexts by carefully balancing the private interests, the risk of an erroneous deprivation, and the governmental interests at stake, *see, e.g., Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989); *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)—*Mandel* and *Din* instruct courts not to proceed to this balancing test if the government proffers "a facially legitimate and bona fide reason" for denying the visa, *see Din*, 576 U.S.

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vided this information promptly to appellants after the court's December 2017 order on the motion to dismiss, at least two years elapsed between the government's denial of Asencio-Cordero's visa application and appellants' receipt of information providing a factual basis for the denial.

at 104, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment) ("*Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.' Once this standard is met, 'courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate." (citation omitted)); *see also Mandel*, 408 U.S. at 766–70, 92 S. Ct. 2576.

However, even though *Din* and *Mandel* establish that the substance of the notice is constitutionally adequate when the government produces "a facially legitimate and bona fide reason" for the visa denial, these decisions do not foreclose application of other core due-process requirements. *See Din*, 576 U.S. at 106, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment) (discussing the "constitutional[ ] adequa[cy]" of the notice given). It is a long-standing due process requirement that the government provide any required notice in a timely manner. *See Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (holding that "timely and adequate notice" of the reasons underlying the deprivation of a right guaranteed by the Due Process Clause is a key requirement of due process). Timeliness of notice was not at issue in *Mandel* or *Din* because in both cases the government identified the reason for the denial soon after the denial. *See Mandel*, 408 U.S. at 757–59, 769, 92 S. Ct. 2576; *Din*, 718 F.3d at 859, *rev'd*, 576 U.S. at 86, 135 S. Ct. 2128. Yet in *Din*, Justice Kennedy contemplated that petitioners will use the information contained in the notice of a visa denial to "mount a challenge to [the] visa denial." 576 U.S. at

105, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment). Such a challenge is impossible if the petitioner is not timely provided with the reason for the denial.

We thus conclude that, where the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest. *Goldberg*, 397 U.S. at 267–68, 90 S. Ct. 1011; *Wright v. Beck*, 981 F.3d 719, 727–30 (9th Cir. 2020).[33] As we have explained, the denial of an immigrant visa to the spouse of a U.S. citizen deprives that citizen of the ability to enjoy the benefits of her marriage and to live in her country of citizenship. Her ability to vindicate her liberty interest, whether through the presentation of additional evidence or initiation of a new petition,[34] depends on *timely* and adequate notice of the reasons underlying the initial denial.

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

[34] The Code of Federal Regulations and the FAM prescribe the procedure consular officials must follow in refusing an immigrant visa. *See* 22 C.F.R. § 42.81; 9 FAM 504.11; *see also infra*. The

The administrative process for visa applications and approvals informs our understanding of what constitutes timely notice. *See Mathews*, 424 U.S. at 334, 96 S. Ct. 893 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972))). The Code of Federal Regulations provides that, "[i]f a visa is refused, and the applicant within one year from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered." 22 C.F.R. § 42.81(e).[35] Moreover, the Foreign Affairs Manual instructs consular officers that all visa refusals "must" be submitted for supervisory review within 30 days of the denial, 9 FAM 504.11-3(A)(2)(b), and the Manual recognizes that some visa decisions can "be overcome by the presentation of additional evidence," 9 FAM 504.11-3(A)(2)(a)(2).[36]

FAM contains more granular detail on the internal processes the State Department and consular officials follow when denying immigrant visa applications.

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

[36] The Code of Federal Regulations notes that "[i]f the grounds of ineligibility . . . cannot be overcome by the presentation of additional evidence, the principal consular officer . . . shall review the case without delay . . . . If the grounds of ineligibility may be overcome by the presentation of additional evidence and the applicant indicates the intention to submit such evidence, a review of the refusal may be deferred." 22 C.F.R. § 42.81(c). The addition-

These provisions for review—including the submission and consideration of additional evidence—provide contextual support for the proposition that receiving timely notice of the reason for the denial is essential for effectively challenging an adverse determination. *See Goldberg*, 397 U.S. at 267, 90 S. Ct. 1011 ("'The fundamental requisite of due process of law is the opportunity to be heard' . . . 'at a meaningful time and in a meaningful manner.'" (first quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914); and then quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965))). By this standard, the government's nearly three-year delay in providing appellants with the reason for the denial of Asencio-Cordero's visa—and only after being prompted by court order—was clearly beyond the pale.[37] *Cf. Wright*, 981

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al evidence must be submitted within one year of the initial denial. *See id.* § 42.81(b), (e).

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

We strongly disagree with the dissent's suggestion that speculation as to why a visa was denied is an adequate substitute for notice

F.3d at 728 ("[O]utright failures to even attempt to provide notice violate due process.").

Although the doctrine of consular nonreviewability imposes a limited disclosure requirement on the government, and essentially gives its rationale the benefit of the doubt in our truncated due-process inquiry, *see Din*, 576 U.S. at 104, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment), the government must first comply, within a reasonable time, with *Mandel*'s requirement to provide a facially legitimate and bona fide reason for denying a visa.[38] We can determine whether the gov-

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of the "discrete factual" basis for exclusion, *Din*, 576 U.S. at 105, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment), and the submission of the Guizar Declaration by appellants near the end of the administrative review of Asencio-Cordero's visa is as consistent with last-resort guesswork as it is informed advocacy. This interpretation is reinforced by the government's dubious description of how the Declaration entered its decision-making process, *see supra*, and the absence of any record evidence indicating that the government notified appellants of the reason for the denial until after litigation commenced.

[38] The government's failure to timely comply with this requirement is especially striking given the existence of FAM provisions that impose specific recordkeeping requirements and evidentiary standards for visa refusals under § 1182(a)(3)(A)(ii) based on asserted membership in a known criminal organization, including MS-13. See 9 FAM § 302.5-4(B)(2). In particular, consular officers "are required to make clear factual findings in the case notes, setting forth in detail all the facts supporting a reason to believe that the applicant is a member of a criminal organization . . . and [the officer] must identify the organization of which they are a member." *Id.* § 302.5-4(B)(2)(g). And "although the basis for applying [§ 1182](a)(3)(A)(ii) to active members of criminal organizations makes it a de facto permanent ground of ineligibility," the FAM contemplates that an applicant may overcome this presumption by "demonstrat[ing], to [a consular officer's] satisfaction and with clear and compelling evi-

ernment provided such a justification without evaluating the substantive merits of the reason advanced. *See Din*, 576 U.S. at 105, 135 S. Ct. 2128 (Kennedy, J., concurring in the judgment) ("The Government . . . was not required, as Din claims, to point to a more specific provision within § 1182(a)(3)(B)."), *vacating* 718 F.3d at 862 ("It appears that . . . the Government must cite to a ground narrow enough to allow us to determine that [the statute] has been 'properly construed.'"). Our understanding of reasonable timeliness is informed by the 30-day period in which visa denials must be submitted for internal review and the 1-year period in which reconsideration is available upon the submission of additional evidence.

Because no "fact in the record" justifying the denial of Asencio-Cordero's visa was made available to appellants until nearly three years had elapsed after the denial, and until after litigation had begun, we conclude that the government did not meet the notice requirements of due process when it denied Asencio-Cordero's visa. This failure means that the government is not entitled to invoke consular nonreviewability to shield its visa decision from judicial review. The district court may "look behind" the government's decision. *Mandel*, 408 U.S. at 770, 92 S. Ct. 2576.

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

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dence, that they are no longer an active member of the organization." *Id.* § 302.5-4(B)(2)(c).

IV.

VACATED and **REMANDED** for further proceedings consistent with this decision.

LEE, Circuit Judge, dissenting:

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

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

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

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

I. We should not impose a "timeliness" due-process requirement on consular officers' visa decisions.

As the majority recognizes, courts have long held that a consular officer's decision to deny a visa is not reviewable when it is made "on the basis of a facially legitimate and bona fide reason." *Kerry v. Din*, 576 U.S. 86, 104, 135 S. Ct. 2128, 192 L. Ed. 2d 183 (2015) (Kennedy, J., concurring in the judgment). Once the court identifies a bona fide reason, it "will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests of citizens the visa denial might implicate." *Id.* (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972)); *see also Cardenas v. United States*, 826 F.3d 1164, 1170 (9th Cir. 2016). Thus, if a consular officer denies a visa under a valid statute of inadmissibility and there is "a fact in the record that 'provides at least a facial connection to' the statutory ground," a court cannot review the visa denial, absent an affirmative showing of bad faith. *Khachatryan v. Blinken*, 4 F.4th 841, 851 (9th Cir. 2021) (quoting *Cardenas*, 826 F.3d at 1172).

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

ing the United States. Muñoz, for her part, has not shown bad faith. That should be the end of the story.

The majority opinion, however, has crafted an exception to the longstanding consular non-reviewability doctrine: consular officers now must provide a facially legitimate and bona fide reason for denying a visa—within a reasonable time. But that conflicts with the separation-of-powers principle that "Congress may 'prescribe the terms and conditions upon which aliens may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.'" *Allen v. Milas*, 896 F.3d 1094, 1104–05 (9th Cir. 2018) (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547, 15 S. Ct. 967, 39 L. Ed. 1082 (1895)). And here, Congress has imposed no time limit for a consular officer to inform a foreigner the reason that his or her visa is being denied.

Nor has the Supreme Court imposed such a time limit, given the deference that courts owe to the political branches in the realm of foreign affairs. See *Fiallo v. Bell*, 430 U.S. 787, 794–96, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977). Justice Kennedy's opinion in *Din* contemplated the type of travails suffered by Muñoz, but the opinion decided against requiring more robust notice, recognizing the political branches' vast discretion over our immigration system. 576 U.S. at 105-06, 135 S. Ct. 2128.[1] The majority emphasizes that, in *Cardenas* and

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[1] Justice Kennedy explained:

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

Din, the consular officers provided the visa applicants with the reason for their decisions within three weeks and about a month, respectively. But just because the government provided prompt notice in those two cases does not mean that it is constitutionally required. *See Cardenas*, 826 F.3d at 1172; *Din*, 576 U.S. at 104–05, 135 S. Ct. 2128.

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

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

Din, 576 U.S. at 105–06, 135 S. Ct. 2128.

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

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

So Muñoz's real complaint is *not* that she did not know for a long time why the government considers her husband inadmissible. She apparently knew. Rather, the crux of her complaint is that the government did not provide evidence for its belief that her husband is affiliated with the MS-13 gang. But that objection runs aground the consular non-reviewability doctrine. There is no judicial right to demand evidence supporting the government's denial of a visa. *Din*, 576 U.S. at 104, 135

S. Ct. 2128 (2015) (Kennedy, J., concurring in the judgment) (noting that courts do not "look behind the exercise of that discretion" to deny a visa). And for good reason: The government here may be relying on confidential information derived from, say, a covert operation in El Salvador, or perhaps it is acting based on a secret diplomatic initiative. We cannot require the Executive Branch to disclose such information because "the power to exclude or expel aliens, as a matter affecting international relations and national security, is vested in the Executive and Legislative branches of government." *Allen*, 896 F.3d at 1104 (quoting *Ventura-Escamilla* v. *Immigr. & Naturalization Serv.*, 647 F.2d 28, 30 (9th Cir. 1981)).

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

II. The majority's new standard is potentially unworkable.

I also fear that this new standard may be practically difficult for consular officials to implement. The majority opinion requires consular officers to provide this new "timeliness" due process right only when a U.S. citizen's rights are burdened. This is so because foreign citizens have no legitimate claim of entitlement to a visa. *See Din*, 576 U.S. at 88, 135 S. Ct. 2128; *Mandel*, 408 U.S. at 762, 92 S. Ct. 2576 ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise.").

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

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

separate from a constitutional due process right for U.S. citizens.

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