No. 23-334

In the Supreme Court of the United States

DEPARTMENT OF STATE, ET AL.,
Petitioners,

v.

SANDRA MUÑOZ, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS

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INTRODUCTION

Sandra Muñoz, a U.S. citizen from California, met Luis Asencio-Cordero in 2008 and married him two years later. In 2013, to ensure that they could remain together in the United States, Muñoz initiated the immigrant visa process by petitioning for him to receive lawful permanent resident status.

As the Immigration and Nationality Act ("INA") requires, the couple established that their marriage was bona fide. The Department of Homeland Security ("DHS") then conducted a background check on Asencio-Cordero, determined that Muñoz would suffer extreme hardship if separated from him, and granted a provisional waiver for his unauthorized presence in the United States. The next step was a consular interview in El Salvador.

Muñoz and Asencio-Cordero traveled from the United States to El Salvador for the interview, but the State Department denied the visa. The agency cited 8 U.S.C. § 1182(a)(3)(A)(ii), which imposes inadmissibility where a consular official has "reason to believe" that the noncitizen intends to engage in "any . . . unlawful activity," even "incidentally," after entry.[1] The consulate provided no further explanation.

[1] Section 1182(a)(3)(A)(ii) says: "Any [noncitizen] who a consular officer … knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in … any other unlawful activity … is inadmissible."

Guessing that Asencio-Cordero's visa was denied because of his tattoos,[2] Muñoz and Asencio-Cordero submitted an affidavit from a gang expert who reviewed the tattoos and determined they did not indicate gang affiliation. The Government replied that this expert affidavit contained "no new information or reason to question" the inadmissibility finding and that "there is no appeal." J.A. 7, 39.

In the three years following the visa denial, the Government repeatedly rebuffed efforts to learn the basis for the visa denial. Faced with ongoing separation, Muñoz and Asencio-Cordero sued. After the district court denied a motion to dismiss, the Government openly stated for the first time its belief that Asencio-Cordero was a member of the gang MS-13 but did not provide the basis for that conclusion. (He is not and has never been a member of any gang or criminal organization.) By the time the Government informed Muñoz and Asencio-Cordero of that conclusion, the deadline for submitting further exculpatory evidence to overcome the denial had long passed.

Muñoz and Asencio-Cordero have now lived apart for more than eight years. They still do not know how the Government reached its erroneous conclusion. The Government says it is not demeaning Muñoz's right to be married and that she can move elsewhere to live with her husband. It also says that Asencio-Cordero has no legal rights, so it can exclude him without

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[2] The tattoos depict Our Lady of Guadalupe, Sigmund Freud, a "tribal" pattern with a paw print, and theatrical masks with dice and cards.

explanation, and that Muñoz has no ground for complaint because she is just an indirectly affected observer. These arguments fail.

Muñoz has a liberty interest in living in the United States with her husband that is sufficient to implicate procedural due process. Procedural due process requires a reasonable opportunity to respond to the inadmissibility finding and at least some minimum degree of notice of the basis for that finding. A mere citation to a provision as broad as the ground at issue here is inadequate.

STATEMENT OF THE CASE

I. Legal Background

The INA establishes a multi-step process for a married couple to seek permanent resident status for the noncitizen spouse, which in some cases requires consular approval abroad.

1. *Visa Petition.* First, the U.S. citizen files a petition to classify the noncitizen spouse as an "immediate relative." 8 U.S.C. § 1201(a)(1)(A). The citizen must provide evidence of a bona fide marriage. 8 U.S.C. § 1154(a)(1)(A)(i); 8 C.F.R. § 103.2(b). As petitioner, the U.S. citizen grants DHS "the authority to verify" the application through interviews and "unannounced physical site inspections of residences and locations of employment." DHS, Form I-130 Instructions at 11 (2021), https://bit.ly/3ICi5Qi; 8 C.F.R. § 103.2(b). The U.S. citizen must also authorize DHS to "share the information" in the application with "other Federal, state, local and foreign government agencies and authorized organizations." *Id.*

2. *Waiver*. For a noncitizen inadmissible for unlawful presence in the United States, a provisional waiver of inadmissibility is available to, *inter alia*, spouses of U.S. citizens. DHS may grant the waiver only if it determines that the spouse would experience "extreme hardship" in the event of a denial.[3] 8 U.S.C. § 1182(a)(9)(B)(v). This standard requires more than the commonplace hardship caused by separation. *Matter of Ngai*, 19 I. & N. Dec. 245, 246-47 (BIA 1984). An approved provisional waiver is revocable on only four grounds, including where the consulate finds the noncitizen inadmissible on some other ground. 8 C.F.R. § 212.7(e)(14)(i).

3. *Background Check*. Under then-applicable regulations, DHS conducted a full background check "to assess whether an individual may be a threat to national security or public safety" before granting a provisional waiver. Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536, 546-47 (Jan. 3, 2013). If DHS found any reason to conclude that an applicant would be inadmissible "based on another ground of inadmissibility other than unlawful presence," it would deny the waiver. *Id.* at 547.[4]

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[3] The focus on U.S.-citizen family members is not unique to this provision. A noncitizen placed into removal proceedings after a long time living in the United States may avoid removal by showing, "exceptional and extremely unusual hardship" to a U.S.-citizen spouse, parent, or child, among other elements. 8 U.S.C. § 1229b(b)(1).

[4] DHS modified this standard in 2016 but continues to conduct background checks. *See* Expansion of Provisional Unlawful

4. *Affidavit of Support*. The statute requires that the U.S. citizen petitioner must file an Affidavit of Support, which Congress refers to as a "contract" with the government. 8 U.S.C. § 1183a(a)(1). The citizen makes a binding promise to repay the government if the noncitizen obtains certain welfare benefits. *Id.* § 1183a(a)(1)(B)-(C). Once the affidavit becomes a contract, the citizen must notify the government of any address change, on pain of civil penalty. *Id.* § 1183a(d)(1)-(2).

5. *Visa Interview*. After these steps, DHS forwards relevant documentation to the consulate, which schedules an interview with the noncitizen and informs the noncitizen *and the petitioner* about the date and time. U.S. Dep't of State, Bureau of Consular Affairs, *Immigrant Visa Process: Step 10*, https://bit.ly/3IEjRR7 (National Visa Center "will send you, your petitioner, and your agent/attorney (if applicable) an email noting the appointment date and time"). Though the consular interview is focused on the noncitizen, the U.S. citizen's petition can be revisited: Officers are entitled to "review" whether the marriage is bona fide and can request revocation based on evidence relating to the citizen spouse. 9 Foreign Affairs Manual ("FAM") 504.2-8(A).

The consular officer uses the interview to determine the noncitizen's admissibility into the United States and, if appropriate, to issue entry documents. The consulate must review all cases, and its decisions are not discretionary. Pet. 25. Rather, an

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Presence Waivers of Inadmissibility, 81 Fed. Reg. 50244, 50253-54, 50257 (July 29, 2016).

inadmissibility finding must be tethered to an officer's "reasonable ground to believe" the individual is inadmissible. 8 U.S.C. § 1182(a)(3)(A).

6. *Notice of Denial and Regulatory Opportunity to Correct Erroneous Decisions*. If the consulate finds the applicant inadmissible, regulations give the applicant one year to submit rebuttal evidence "tending to overcome" the finding. 22 C.F.R. § 42.81(e). If an applicant does so, "the case *shall* be reconsidered." *Id*. (emphasis added). The FAM further requires written notice, including for denials under Section 1182(a)(2) or (3) absent contrary instructions from the Department. *See* 9 FAM 504.11-3(A)(1)(c).

II. Factual and Procedural Background

1. DHS approved Muñoz's petition and granted the provisional waiver after concluding that she faced "extreme hardship" from the prospect of permanent separation from Asencio-Cordero or relocation to El Salvador. Through the waiver grant and background checks, DHS determined that Asencio-Cordero was neither a threat to national security nor likely to be inadmissible.

With the U.S.-based steps completed and no concerns uncovered, Asencio-Cordero traveled with Muñoz to El Salvador for his consular interview in May 2015. J.A. 48. There, for the first time, government officials asked him about association with a gang, which he denied. J.A. 4, 22.

In December 2015, Muñoz and Asencio-Cordero learned that the State Department had deemed Asencio-Cordero inadmissible. J.A. 49. The notice

cited 8 U.S.C. § 1182(a)(3)(A)(ii) but provided no additional information. *See id.*

2. Muñoz and Asencio-Cordero requested reconsideration in January 2016. J.A. 18-26. That same month, Muñoz's congressional representative contacted the consulate on their behalf; the consulate's response stated, "we cannot continue to process this immigrant visa." J.A. 16. In April, Muñoz and Asencio-Cordero provided evidence of Asencio-Cordero's good moral character and of accolades Muñoz had received in her work as an attorney, and the consulate stated it "took another look" but did not change its decision. J.A. 32-33. Muñoz and Asencio-Cordero submitted additional exculpatory evidence later that month, including an affidavit from a gang expert, which said: "In my opinion, none of the tattoos on Mr. Asencio[-Cordero]'s body represent any gang or criminal organization that I am aware of." J.A. 44. The Department of State replied that this evidence contained "no new information or reason to question the Department's concurrence with the original finding" and that "no further processing" was possible. J.A. 39.

3. Muñoz and Asencio-Cordero sued, and the district court denied the Government's motion to dismiss in December 2017. Pet. App. 73a-89a. In November 2018, the State Department provided a declaration from State Department employee Matt McNeil, who said that a consular officer had "determined that Mr. Asencio-Cordero was a member of a known criminal organization … specifically MS-13" and that this was "based on the in-person interview, a criminal review of Mr. Asencio-Cordero,

and a review of the [sic] Mr. Asencio-Cordero's tattoos." Pet. App. 124a.[5] In addition to never having been charged with a crime, Asencio-Cordero disclaimed gang involvement during the interview, and he was told by the State Department that the expert affidavit regarding his tattoos contained "no new information." J.A. 39, 55. Asencio-Cordero and Muñoz thus remained unaware of the factual basis for the denial. J.A. 55. In August 2020, the Government stated in an interrogatory response that the denial was based on information "obtained from law enforcement operations," but it provided no further information. J.A. 75. The Government provided undisclosed information to the district court in an *in camera* submission. *See* J.A. 84-98.

In March 2021, the district court granted the Government's motion for summary judgment. Pet. App. 42a-72a. It held that Muñoz's due process right to marriage was implicated by the visa denial but concluded that the Government had provided sufficient process. Though the district court had previously ruled that the McNeil declaration was insufficient to connect Asencio-Cordero to Section 1182(a)(3)(A)(ii), J.A. 63-65, it said in two footnotes that it "reached a different conclusion" on summary judgment than in previous orders based on statements made by the government at a hearing affirming that

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[5] The FAM lists 10 "factors" to consider in applying this statute, none of them apply here. For instance, one factor is "the applicant's criminal record," particularly when that record suggests affiliation with gangs or other criminal organizations. 9 FAM 302.5-4(B)(2)(i)(9). It is uncontested that Asencio-Cordero has never been charged with any crime.

"the consular officer received information from law enforcement that identified Mr. Asencio[-Cordero] as a gang member." J.A. 107; *see* Pet. App. 46a, n.7; 60a-61a, n.13.

The Ninth Circuit vacated and remanded. Pet. App. 1a-41a. It affirmed the district court's ruling that Muñoz's due process rights were implicated, reasoning that U.S. citizens have both "a fundamental liberty interest in their marriage" and "a liberty interest in residing in their country of citizenship" and that the denial violated Muñoz's due process rights because "the cumulative effect of" the denial was "a *direct* restraint on [her] liberty interests." Pet. App. 17a.

The Ninth Circuit then distinguished the inadmissibility provision at issue here from Section 1182(a)(3)(B), the terrorism-related statute at issue in *Kerry v. Din*, 576 U.S. 86 (2015). The court noted that, "[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." Pet App. 19a. The Ninth Circuit therefore held that, in the absence of factual predicates in the statute itself, the Government was obligated to place in the record "information ... that provides a facial connection to the consular officer's belief" about Asencio-Cordero's inadmissibility. *Id.* at 20a. The Ninth Circuit, however, concluded that the McNeil declaration contained statements sufficient to satisfy that test. *Id.* at 22a-25a.

That was not the end. The Ninth Circuit concluded that the years-long delay between the time the Government denied Asencio-Cordero's visa and the time it provided the declaration violated Muñoz's right

to due process because "*timely* and adequate notice of the reasons underlying" the deprivation was necessary for Muñoz "to vindicate her liberty interest." Pet. App. 29a. The Ninth Circuit emphasized that because regulations give applicants one year to present exculpatory evidence, that deadline informs what is a "reasonable time." Pet. App. 30a-31a. The court of appeals ordered a remand for the district court to consider the merits of the case, over a dissent. It then denied the Government's petition for rehearing *en banc* over two dissents. Pet. App. 33a (remand); 90a-122a (rehearing denial and dissents).

SUMMARY OF THE ARGUMENT

The Due Process Clause prohibits consular officers from upending the marital home of a U.S. citizen without providing notice or a meaningful opportunity to respond.

1. The Government argues that under the so-called doctrine of consular nonreviewability, the Court should engage in no judicial review of the agency's action. This extreme claim is outside the questions presented, which the Government authored, and lacks statutory support. It runs contrary to the presumption of judicial review, which has both statutory and judicial lineage. This Court has repeatedly reviewed constitutional and legal claims by U.S. citizens, despite any extraterritorial aspects. It should decline the Government's invitation to immunize agencies from such claims.

2. The denial of Asencio-Cordero's visa directly implicates Muñoz's right to marriage, which entails the right to live with and enjoy the society of one's

spouse. For over a century, federal immigration policy has favored spousal unity over all other forms of immigration, rooting the right to cohabitation in natural rights. In addition, the INA gave Muñoz a legitimate claim to entitlement in her husband's visa application by establishing that consular officers can only deny admission for cause.

The Government's suggestion that Muñoz is a mere bystander to the visa process and thus does not possess a protected liberty interest disregards the history of marriage rights in this context and ignores the benefit the citizen spouse seeks in ensuring their noncitizen spouse's presence in the country is lawful and permanent. Muñoz is a central figure to the consular process, from beginning to end. Besides her, there is no other party who can challenge the constitutionality of the agency action, and there is no alternative avenue for relief. The Government also suggests that Muñoz can leave the United States to live with her husband, but because she also has a liberty interest in residing in her country of citizenship, procedural due process is still required before she can be forced to make this choice.

3. As to what process is due, Muñoz was entitled, at minimum, to a summary of the factual grounds for the visa denial sufficient to allow a meaningful opportunity to respond. A mere citation to 8 U.S.C. § 1182(a)(3)(A)(ii) was insufficient. Because the statute requires consular officers have "reasonable grounds to believe" Asencio-Cordero was inadmissible, the "facially legitimate and bona fide test" that the Government advances and that the Court applies to

discretionary visa decisions is insufficient to satisfy due process.

But even under the "facially legitimate and bona fide" test, a citation to the statute here is insufficient because the subsection is unlike its neighboring provisions in that its plain language does not refer to a specific factual predicate sufficient to provide an idea of the barred activity. Rather, the statute covers "any" future unlawful activity and does not specify any parameters for what kind of activity is covered. The Government applies this subsection as a catch-all barring conduct far beyond the national security context. Both regulations and State Department policy grant individuals an opportunity to overcome denials, but agency processes are rendered meaningless by a mere citation to this statutory provision. Instead, a summary of the factual basis is necessary to give U.S. citizens the sort of notice and meaningful opportunity to present exculpatory evidence that is required to prevent due process violations.

ARGUMENT

I. The Government's Nonreviewability Arguments Are Both Outside the Questions Presented And Incorrect.

The Government begins by advancing a broad, atextual argument for what it calls the doctrine of consular nonreviewability. That argument is beyond the scope of the questions presented, and the Court should decline to address it. But if it does entertain the argument, the Court should reject the Government's arguments.

A. Consular nonreviewability is outside the scope of the questions presented and should not be addressed.

The Government's lead argument that consular nonreviewablity "forecloses judicial review," Br. 16, is beyond the scope of this case. When the Government sought certiorari, it did not either suggest that the Court needed to clarify consular nonreviewability or call on the Court to modify or overrule its relevant precedents, discussed below. Rather, the petition assumed that constitutional claims advanced by U.S. citizens were reviewable. Pet. 4-5.

Nor has the Government suggested that this issue is jurisdictional or that it *requires* the Court's attention—for good reason. Arguments about the applicability of the supposed doctrine of consular nonreviewablity are not jurisdictional, so the Court has no independent duty to address them. *See Trump v. Hawaii*, 585 U.S. 667, 682-83 (2018); *Miller v. Albright*, 523 U.S. 420, 433 n.10 (1998) (declining to address claim that noncitizens outside the United States lack substantive rights before proceeding to the merits of the case). Further, the supposed doctrine cannot apply here, because even on the Government's reading, it bars only challenges brought by "a noncitizen." Br. 4-5.

This Court routinely refuses to consider issues that lay beyond the scope of the questions presented.[6] *See*

[6] Muñoz and Asencio-Cordero made additional claims below, including that Asencio-Cordero's long-term residency and ties in the United States provide him with due process rights not

e.g., *Wood v. Allen*, 558 U.S. 290, 304 (2010) ("'[T]he fact that [petitioner] discussed this issue in the text of [his] petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.'") (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993)) (alterations in *Wood*); *Yee v. Escondido*, 503 U.S. 519, 535 (1992). It should do so again here.

B. The Court should reject the Government's consular nonreviewability arguments.

Whatever might be said of a putative tradition of "nonreviewability," the Court has repeatedly considered legal and constitutional claims pertaining to visa and admission decisions abroad. It did so in *Kleindienst v. Mandel*, 408 U.S. 753 (1972)—which the Government calls the "paradigm" case, Br. 19—when it considered the claim of a group of American academics who sought a waiver of inadmissibility for a noncitizen whom they had invited to speak in the United States. And in *Hawaii*, the Court recognized that it "has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen." 585 U.S. at 703.

Other cases follow this practice. *Din* addressed the same constitutional questions presented here,

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vitiated by his departure from the country. Plaintiffs-Appellants' Ninth Cir. Opening Br. 51-56; Reply 14; *see, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953). Because those issues also lay beyond the questions presented, Muñoz and Asencio-Cordero do not advance them.

nonreviewability notwithstanding. 576 U.S. 86; *see also Miller*, 523 U.S. 420 (addressing the constitutionality of differences between unwed mothers and fathers for passing on citizenship even though the child claiming citizenship was abroad); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (considering the merits of statutory claim that INA provision applies to people in international waters); *Rusk v. Cort*, 369 U.S. 367 (1962) (recognizing authority to review statutory claim advanced by U.S. citizen at an embassy, even though the claim arose and the person resided outside the United States), *abrogated in part*, *Califano v. Sanders*, 430 U.S. 99 (1977).[7]

Whatever the merits of its nonreviewability arguments in other contexts, the Government recognizes that this Court has reviewed claims involving the constitutional interests of a U.S. citizen. Br. 19-20. Because this exception applies here, that should be the end of the matter.

Precedent notwithstanding, the Government asserts that the consular nonreviewability doctrine "is a corollary" of the plenary power doctrine. Br. 17. But the cases upon which it relies demonstrate that the doctrines are distinct. In five of those cases, the Court reached legal or constitutional claims brought by noncitizens notwithstanding the plenary power

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[7] The Government cites dicta in *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956). Br. 16-17. If that citation is meant to suggest that consular decisions cannot support review when a citizen is involved, that position is inconsistent with *Rusk*, 369 U.S. at 367, which permitted a declaratory judgment action after a passport application at an embassy was denied.

doctrine. *See Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 210 (1953); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 541 (1950); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, 664 (1892). And the remaining cases cited by the Government involved statutes that explicitly stripped judicial review. *See DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1978-79 (2020); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Lem Moon Sing v. United States*, 158 U.S. 538, 540 (1895). None of these holdings comes close to equating the plenary power doctrine with a doctrine that consular decisions can never be reviewed.

Further, no statute strips jurisdiction in this case. The closest the Government can muster is 6 U.S.C. § 236(f), Br. 5, which provides that nothing in "this section shall be construed to create or authorize a private right of action to challenge" the grant or denial of a visa. That provision, not in the INA, does not strip jurisdiction or preclude litigation based on a right of action founded elsewhere.[8]

Congress plainly knows how to draft jurisdiction-stripping provisions; there are dozens in the INA. *See, e.g.*, 8 U.S.C. § 1252. Section 1182 itself contains several provisions that limit judicial oversight expressly. *See*, *e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v). But no statute strips jurisdiction over Section

[8] The Government also cites 8 U.S.C. § 1104, which excludes visa decisions from review by the Secretary of State but says nothing about judicial review.

1182(a)(3)(A)(ii), nor of consular determinations generally.

The absence of a statutory hook is telling. Congress provided that any post-1946 statute "may not be held to supersede or modify" the general rule permitting judicial review of agency action "except to the extent that it does so expressly." 5 U.S.C. § 559; *see also id.* § 702 (providing for judicial review of agency actions); *Marcello v. Bonds*, 349 U.S. 302, 306 (1955) (noting that Congress exempted immigration from some portions of the Administrative Procedure Act but not the provision authorizing judicial review). That Congressional mandate has translated into "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *accord, e.g.*, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012); *see also Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (noting that the Constitution generally "vests the judicial power exclusively in Article III courts, not administrative agencies").[9]

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[9] *Saavedra Bruno v. Albright* adopted a contrary presumption, reasoning that in "matters touching on national security or foreign affairs—and visa determinations are such matters—the presumption of review 'runs aground.'" 197 F.3d 1153, 1162 (D.C. Cir. 1999) (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The presumption … is the opposite of what the APA normally supposes.")). The Court should reject the suggestion that all visa cases so implicate national security as to overshadow other considerations and preclude review. Innumerable matters "touch on" national security and foreign affairs; finding any related claims precluded would immunize large swaths of agency action from review.

The Government also invokes legislative history, leaning on congressional failure to enact law in response to "suggestions to authorize judicial review of visa denials." Br. 18-19. The failure of Congress to enact explicit judicial review proposals cannot bear such weight. *See Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). The Government quotes committee reports on this subject. Br. 18-19. "But legislative history is not the law." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (quotation omitted); *see Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring). Congress primarily speaks through the statutes it enacts, and the Government's concession that there was disagreement within Congress on these points, Br. 18-19, reinforces the primacy of statutory text.

All told, none of the Government's authorities offer "clear and convincing evidence" sufficient to overcome the longstanding presumption in favor of judicial review that applies to administrative agencies. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 64 (1993) (quotation omitted). And whatever limits might be appropriate to that presumption in cases originating abroad, those limits do not extend to cases involving claims that the agency has undermined the rights of a U.S. citizen.

II. As A Citizen, Muñoz Has A Liberty Interest In Marital Cohabitation In The United States.

Muñoz possesses a liberty interest in her marriage, which historically and traditionally includes cohabitation. This liberty interest arises under the Constitution, and both statutory and regulatory provisions inform the contours of that interest. The Government's efforts to obscure Muñoz's liberty interest by suggesting that she is a mere bystander to the visa adjudication process and that she can relocate to El Salvador fail.

A. History and tradition show that cohabitation is essential to marriage, especially in the immigration context.

The Government does not dispute that "[t]he basic foundation of the family in our society" is "the marriage relationship." *Smith v. Org. of Foster Families*, 431 U.S. 816, 843 (1977). Nor does it seem to dispute that the liberty interest in a marriage generally includes cohabitation.[10] Br. 27. And for good

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[10] Both Muñoz and the Government accept and agree with this Court's conclusion that there is a "fundamental right to marry." *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015); *see also id*. at 688 (Roberts, C.J., dissenting) (finding "no serious dispute that … the Constitution protects a right to marry"); Br. 27. *Obergefell* and preceding cases framed marriage as a substantive due process right. Contrary to the Government's implication, however, Muñoz does not advance a substantive right to immigrate one's spouse. The argument that Muñoz advances is procedural. She maintains that her marital right is sufficiently important that it cannot be unduly burdened without procedural due process as to an inadmissibility finding that would block her from residing with her spouse in her country of citizenship.

reason. The Court has said that marriage includes the right to "establish a home and bring up children," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and to "live together as a family," *Moore v. City of East Cleveland*, 431 U.S. 494, 500-06 (1977). The Court has likewise recognized that marriage involves "deep attachments and commitments" between people who share "not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984).

Any suggestion that the marital interests are not implicated by laws that require a couple to reside elsewhere would run afoul of *Loving v. Virginia*, 388 U.S. 1 (1967). No law prevented the Lovings from marrying and living together someplace other than Virginia. The "gravamen" of their offense "was their cohabitation as man and wife" within the state. *Loving v. Commonwealth*, 206 Va. 924, 930 (Va. 1966). The Court held that the Virginia law "deprive[d] the Lovings of liberty without due process of law" because "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness" that "cannot be infringed by the State." *Loving*, 388 U.S. at 12.

The companionship aspect of marriage is particularly salient when the alternative is living thousands of miles apart. The *Mandel* Court recognized that alternatives to face-to-face interaction are a poor substitute in the First Amendment context. 408 U.S. at 765. The same is true in spades for the marital relationship: "[T]he importance of the familial relationship, to the individuals involved and to the

society, stems from the emotional attachments that derive from the intimacy of daily association." *Smith*, 431 U.S. at 844. This understanding of marriage generally includes cohabitation.

In fact, cohabitation is so essential to marriage that it has been found a sufficient basis for inferring the marital relationship. *See Travers v. Reinhardt*, 205 U.S. 423, 436-42 (1907); 1 Bishop, *Commentaries on the Law of Marriage and Divorce*, §§ 434, 438-439, 485 (4th ed. 1864); 2 Kent, *Commentaries on American Law*, *87 (rev. ed. 1889).

In the immigration context, the historical connection between marriage and cohabitation has been paramount, and the Court has held that "the right to rejoin [one's] immediate family" is "a right that ranks high among the interests of the individual." *Plasencia*, 459 U.S. at 34. Though immigration was largely unregulated in the early years of the republic, Congress favored noncitizen wives of U.S. citizens by permitting naturalization without the normal residency requirement. Act of February 10, 1855, § 2, 10 Stat. 604, 604. For instance, Congress made a special provision for wives whose husbands died before they were able to naturalize. *See* Act of March 26, 1804, § 2, 2 Stat. 292, 293. This statute and others like it favored male citizens over female citizens, in keeping with the coverture laws of the time, but they always respected the couple's joint interest in living together.

There have, of course, been periods when Congress restricted immigration, but it has always given special consideration to marriage. In 1888, Congress generally forbade the entry or return of "any Chinese

person" but made an exception for a laborer with "a lawful wife, child, or parent in the United States," so long as the marriage occurred "at least a year prior to the application" and involved "continuous cohabitation." Act of Sept. 13, 1888, §§ 4, 6, 25 Stat. 476, 476-77.

In *United States v. Gue Lim*, 176 U.S. 459 (1900), this Court construed a statute to permit a Chinese merchant's wife to come into the country with him, despite laws generally forbidding Chinese immigration without a labor certificate. *Id.* at 464. The Court adopted the reasoning of *In re Chung Toy Ho*, 42 F. 398 (D. Or. 1890), where the district court upheld the immigration rights of the wife and children of a Chinese merchant, reasoning that "the company of one and the care and custody of the other, are by his natural right; and he ought not to be deprived of either." *Id.* at 400 (cited at *Gue Lim*, 176 U.S. at 464); *see also* Immigration Act of 1917, Pub. L. 64-301, § 3, 39 Stat. 874, 877 (exempting wives of U.S. citizens from restrictions otherwise imposed on immigrants from Asia); *Tsoi Sim v. United States*, 116 F. 920, 925 (9th Cir. 1902).

The plurality opinion in *Din,* 576 U.S. at 96, suggested that U.S.-citizens have no liberty interest in decisions denying visas to their spouses, relying in part on the provision of the Expatriation Act of 1907 requiring U.S.-citizen women to adopt the nationality of their husbands. To the plurality, that Act was perhaps the "[m]ost striking[]" evidence against a liberty interest of the sort that Muñoz advocates. *Id.* That overstates the matter. Though the statute condoned "asymmetric treatment of women" that

would be impermissible today, *id.*, the Expatriation Act also underscored the centrality of cohabitation to the institution of marriage by assigning a single nationality to spouses. *See* Expatriation Act of 1907 § 3, 34 Stat. 1228, 1228; *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915) ("The identity of husband and wife is an ancient principle of our jurisprudence."), *abrogation recognized by Rocha v. INS*, 450 F.2d 946, 947 (1st Cir. 1971). Moreover, the brief duration of this atypical application of the marital-unity principle supports Muñoz's argument as to tradition. The repeal of the expatriation statute led to a series of laws allowing affected women to regain citizenship. *See*, *e.g.*, Pub. L. 67-346, §§ 2(b), 3, 42 Stat. 1021, 1022 (1922); Act of June 25, 1936, Pub. L. 74-793, 49 Stat. 1917; Act of July 2, 1940, 54 Stat. 715. Just as the Court would not read statutes affording fewer rights to disfavored racial groups as illuminating due process principles, the Court should also not read the law's sexist treatment of women in the early twentieth century as an accurate illustration of traditions informing family immigration law.

Further, when Congress imposed quotas on immigration in 1921, it gave "fiancées and wives preferred status" but did not exempt them from the quota. *Din,* 576 U.S. at 96 (plurality op.) (citing Emergency Quota Act of 1921, Pub. L. 67-5, § 2(d), 42 Stat. 5, 6). The *Din* plurality believed that the inclusion of spouses within the quota system undermined the centrality of marriage to the immigration system. *See id.* at 97. But three years after that statute's passage, in the face of "shock[] beyond expression at the thought that the wife of an American citizen should be denied admission,"

Congress exempted noncitizen wives from quotas. Candice Lewis Bredbenner, *A Nationality of Her Own* 119 (1998) (quoting Memorandum from Secretary White to the commissioner of naturalization, Feb. 2, 1924); *see* Immigration Act of 1924, Pub. L. 68-139, § 4(a), 43 Stat. 153, 155.

To be sure, this tradition of favoring marriage-based immigration has never been a blank check. Citizens and their spouses must undergo background checks, pay filing fees, and the noncitizen must be "admissible" or able to waive inadmissibility. Muñoz and Asencio-Cordero do not argue that the government may not impose these or other requirements on marriage-based immigration, or that there is a substantive due process right to reside with one's spouse in the United States. Rather, history and tradition confirm that citizens have an interest in living with their spouse in the United States, and that this interest is sufficiently established and important to qualify for procedural due process protections before the government prohibits a citizen from residing with her spouse in the United States.

B. Statutes and regulations inform Muñoz's liberty interest.

The history discussed above informed and is illustrated by Congress's decision to afford marriage between citizens and noncitizens additional legal protections in the INA, enacted in 1952. *See* Pub. L. 82-414, § 101(a)(27)(A), 66 Stat. 163, 169 (1952). The INA's legislative history noted the "underlying intention of our immigration laws regarding the preservation of the family unit." H.R. Rep. No. 82-1365, at 29 (Feb. 14, 1952).

Then, when Congress abolished the national origins system in 1965, it repeated its intent to ensure "that the family unit may be preserved as much as possible." S. Rep. No. 89-748, at 13 (1965); *accord* H.R. Rep. No. 89-745, at 12 (1965); *see* H.R. Rep. No. 101-723(I), at 38 (1990) ("[F]amily unification should remain the cornerstone of U.S. immigration policy.") To this day, spouses of U.S. citizens are exempt from quotas, which means they do not have to wait in lines that can take a decade or more for other types of immigration. 8 U.S.C. § 1151(b)(2)(A)(i); *id.* § 1151(c).

In addition to these overarching principles that have informed the family-based immigration system, the INA contains specific protections for citizen-spouses that create an expectation that the government may only prevent a citizen from living with a noncitizen spouse in the United States when the noncitizen is inadmissible. These statutory provisions, along with their implementing regulations, substantiate Muñoz's expectation that marriage-based immigration will proceed under applicable legal principles.

Such an expectation exists where the person has "more than an abstract need or desire" and instead possesses a "legitimate claim of entitlement" to the underlying benefit. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Under this standard, many "varied" and "intangible" interests "relating to the whole domain of social and economic fact" have given rise to protected interests. *Logan v. Zimerman Brush Co.*, 455 U.S. 422, 430 (1982) (quotation omitted); *see, e.g.*, *Barry v. Barchi*, 443 U.S. 55 (1979) (horse training licenses); *Memphis Light, Gas & Water*

Div. v. Craft, 436 U.S. 1, 11-12 (1978) (utility services); *Goss v. Lopez*, 419 U.S. 565, 573-574 (1975) (freedom from arbitrary school suspension); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (drivers' licenses); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits). Though these cases relate to interests in property, this Court has recognized that legislation and regulation alike can inform "a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 710 (1976); *see, e.g.*, *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979); *Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972); *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974).

Several statutory and regulatory provisions inform the expectation in question here. First, the INA requires that a visa be denied only for cause. Section 1182(a)(3)(A) requires the consular official have "reasonable ground to believe" that the intending immigrant "seeks to enter the United States to engage" in "unlawful activity." Section 1201(g) similarly instructs consular officers to deny visas if the officer "knows or has reason to believe" that the applicant for admission is inadmissible. Neither of these provisions, nor any other, permits consular officers to deny visas at will.

These provisions gave Muñoz "a legitimate claim to entitlement" that her husband would only be permanently barred from living with her if he was inadmissible. The fact that Asencio-Cordero was not *guaranteed* admission is irrelevant; the due process

interest flows from the right to be free of a deprivation without an opportunity to mount a challenge. Because Muñoz has "a right or expectation that adverse action will not be taken against [her] except upon the occurrence of specified behavior, 'the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.'" *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (quoting *Wolff*, 418 U.S at 558); *see also Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972). Muñoz had a legitimate expectation that the consulate would refuse a visa, if at all, only "for cause."

Next, the statute and regulations that governed the application for a waiver of unlawful presence demonstrate that Muñoz herself had a personal interest in the outcome of Asencio-Cordero's visa application. The waiver application required a showing of extreme hardship to Muñoz, not Asencio-Cordero, 8 U.S.C. § 1182(a)(9)(B)(v), and Asencio-Cordero obtained a provisional waiver while in the United States before attending the consular interview abroad. That provisional waiver could only be granted on a finding from DHS that it identified no potential grounds of inadmissibility other than unlawful presence, 78 Fed. Reg. 536, 546-47 (2013), and it could be revoked only on limited grounds, one of which was a finding of inadmissibility, exactly what DHS had concluded likely did not exist. 8 C.F.R. § 212.7(e)(14)(i); DHS, Form I-601A Instructions at 3-4 (2021), https://bit.ly/3vft27r. Once that waiver was granted based on extreme hardship, it further supported Muñoz's expectation in her husband's visa application. *See Bell*, 402 U.S. at 539; *see also*

Morrissey, 408 U.S. at 482; *Flemming v. Nestor*, 363 U.S. 603, 611 (1960); Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1975) ("[T]here is a human difference between losing what one has and not getting what one wants.").

Muñoz's expectation is also supported by visa rules that affected her financial interests. She was required to sign an affidavit of support that functions "as a contract" if the noncitizen is admitted, becoming "legally enforceable against the sponsor." 8 U.S.C. § 1183a(a)(1), (a)(1)(B). While the affidavit has not (yet) turned into a contract here, it is evidence that Congress understands spouses to have valid interests regarding the immigration of their spouses. Congress called this affidavit of support a contract, and when Congress transplants a legal term from common law, "'it brings the old soil with it.'" *Hall v. Hall*, 584 U.S. 59, 73 (2018) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). Muñoz's undertaking to pay potentially large sums of money in the future is the consideration she offers. The only thing she stood to gain in exchange was permission for her spouse to immigrate unless he was inadmissible. *See* Affidavit of Support, Form I-864 at 6 (2021), https://bit.ly/3IGBLTq (noncitizen "becoming a lawful permanent resident is the consideration"). Muñoz's interest in the immigration of her spouse was understood by Congress and the agency as having value *to her*.

Finally, the Government argues that 8 U.S.C. § 1182(b)(3) does not require notice for someone found inadmissible, but as discussed in detail below, *infra*

Part III.B, that provision did not preclude more robust notice. *Din*, 576 U.S. at 106 (Kennedy, J., concurring); *id.* at 116 (Breyer, J. dissenting). Current regulations require more in two ways. First, the regulations require that the consulate inform the applicant of the basis for any visa denial, no matter the ground for the denial. *See* 22 C.F.R. § 42.81(b). Second, the regulations permit an opportunity to rebut any inadmissibility findings for one year. *Id.* § 42.81(e). As long as those regulations are in effect, the agency is bound by them. *See U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954). But the rebuttal opportunity was not provided here because the denial, which included a statutory citation alone, provided no information for Muñoz and Asencio-Cordero to rebut until well after the one-year term had expired.[11]

C. The Government's attempts to refute Muñoz's liberty interest fail.

The Government's two primary efforts to undermine Muñoz's liberty interest described above are to assert that she is a mere bystander to Asencio-

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[11] The Government cites *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2086-87, 2089 (2020), suggesting that spouses are like independent corporations. Br. 25. That vastly overstates the holding that foreign affiliates of U.S. organizations do not have First Amendment rights. *Agency for Int'l Dev.*, 140 S. Ct. at 2087. That case primarily turned on the reasoning that American organizations are *not* directly involved when federal grants to their foreign affiliates contain provisions conditioning receipt of funds. *Id.* at 2087. Spouses maintain separate legal identities, but longstanding legal rules and tradition confirm that spouses are not "separate" in the way that corporations may be.

Cordero's immigration process, Br. 27-28, and that she could eliminate any harm she faces by relocating abroad, Br. 27. Both fail.

1. Muñoz was directly affected by Asencio-Cordero's visa denial.

The Government, relying on *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), claims that Muñoz is only indirectly impacted by the visa denial and asserts that recognizing Muñoz's interests would create a slew of new spousal rights in broader circumstances. Br. 28-30. Three major distinctions separate the Medicare-recipient patients of the decertified nursing home at issue in *O'Bannon* from spouses in the consular process and belie the Government's arguments.

First, as discussed above, the consular process demands that citizen spouses play an active role from start to finish. The nursing home patients in *O'Bannon* did not "petition" for nursing homes to be certified; they did not sign affidavits of support for their nursing homes; nor could they force decertification by withdrawing a certification request. 447 U.S. at 787-88.

The spousal visa process, in contrast, starts with the filing of a visa petition by a U.S.-citizen spouse, who is the "petitioner." 8 C.F.R. § 103.2(a). The petitioner's role continues well beyond the initial filing. She may withdraw the visa petition *at any time*, even after its approval, until the noncitizen's admission into the country. *Id.* § 103.2(b)(6).

The decertification process in *O'Bannon* did not turn on individual nursing home patients or require

them to testify or otherwise be involved. By contrast, a U.S. citizen who files a visa petition opens the door to intrusive government investigation. A couple must prove a bona fide relationship, inviting inquiry into their "living arrangements." *Matter of Phillis*, 15 I. & N. Dec. 385, 387 (BIA 1975); *Lutwak v. United States,* 344 U.S. 604, 608-09 (1953) (marriage not valid for immigration purposes where couples did not "live[] together as husband and wife"). The central question is whether the couple intended to "establish a life together." *Matter of Laureano*, 19 I. & N. Dec. 1, 2-3 (BIA 1983). Immigration agents may enter the couple's home without warning to assess the legitimacy of the relationship. *See Matter of P. Singh*, 27 I. & N. Dec. 598, 600 (BIA 2019); *Zyapkov v. Lynch*, 817 F.3d 556, 558 (7th Cir. 2016). A finding that the marriage is not bona fide exposes both parties to criminal liability. 8 U.S.C. § 1325(c); 18 U.S.C. § 1546. Even after a case reaches the consulate, officers look for indicia of marriage fraud and may initiate a process to reopen the initial visa petition. 22 C.F.R. § 42.43(a); 9 FAM 504.2-2(B).

Similarly, the certification process in *O'Bannon* did not turn on hardship to the nursing home patients. By contrast, Asencio-Cordero's prior unlawful presence in the United States meant that his visa process could not proceed without a waiver under 8 U.S.C. § 1182(a)(9)(B)(v), which centered on "extreme hardship" to Muñoz. And Muñoz (not her husband) had to sign an Affidavit of Support, which would become a binding promise to repay welfare payments that Asencio-Cordero might receive after immigrating. 8 U.S.C. § 1183a(a)(1)(B).

The Government asks the Court to focus on the visa interview alone, rather than this entire process. But the State Department's own instructions are to the contrary; they describe the ongoing role of the U.S. citizen and refer to that person as the "petitioner" throughout. *See* U.S. Dep't of State, Bureau of Consular Affairs, *Immigrant Visa for a Spouse of a U.S. Citizen,* https://bit.ly/49UWG11. And "interview preparation" instructions explain that the National Visa Center "will send you, *your petitioner,* and your agent/attorney" an email noting "the appointment date and time," which belies the Government's elliptical suggestion that Muñoz was not entitled to notice of the interview, Br. 22. *See* U.S. Dep't of State, Bureau of Consular Affairs, *Immigrant Visa Process: Step 10*, https://bit.ly/3IEjRR7 (emphasis added). Ignoring the context of the visa interview obscures the centrality of the U.S. citizen. The process is begun by the citizen spouse, designed to advance the interests of that spouse, focused on the needs of the spouse, and proceeds only with the spouse's active and continued support. Indeed, if Muñoz divorced Asencio-Cordero prior to the adjudication of the visa, the application would no longer have been viable, and Asencio-Cordero would no longer have been eligible for the visa he sought. 8 C.F.R. § 205.1(a)(3)(D).

The second distinction from *O'Bannon* is that the Court determined that nursing home patients lacked a due process interest in the decertification of their nursing home because they retained "the right to choose among a range of qualified providers, without government interference." 447 U.S. at 785. In contrast, the visa denial left Muñoz without any choice by depriving her of the ability to live with her husband

in their marital home. The only alternative would require her to forfeit her right as a citizen to live in the United States, and, as discussed below, Part II.C.2, it is impermissible for the Government to force citizens to make exercising one right dependent upon sacrificing another without due process.

Finally, the Court found it relevant in *O'Bannon* that *some* party could advance the patients' interests. The Court noted that the nursing home had both the right to a hearing before its own decertification and "a strong financial incentive to contest its enforcement decision." *O'Bannon,* 447 U.S. at 789 n.22. The nursing home "had the opportunity and incentive to make the very arguments that patients might make" before decertification. *Id.* at 797 (Blackmun, J., concurring). And the patients themselves had a potential "claim against the nursing home." *Id.* at 787, 789 n.22, 790. Here, in contrast, the Government argues that no one may raise due process arguments and that Muñoz has no alternative legal path for asserting her rights. *See id.* at 797-98 (Blackmun, J., concurring) (recognizing that nursing home had "the opportunity and incentive to make the very arguments the patients might make," rendering the patients' interest "in accurate and informed decisionmaking" largely "satisfied").

These distinctions from *O'Bannon* show why finding a liberty interest for Muñoz in the consular process would not create "tremendous disruption," as the Government suggests. Br. 30. Unlike the statutes and regulations here, criminal cases, upon which the Government relies, Br. 30, afford spouses no role in preventing another's incarceration. And as in

O'Bannon, a spouse's interests are protected in the criminal context by the defendant's own due process rights. Perhaps in a case where a defendant was not permitted to advance those interests due to "lack of access to court," a different rule would apply. Indeed, there is an "ancient tradition" in common law allowing family members to intervene as "next friends" where a prisoner is incapacitated or unable to defend their interests. *Whitmore v. Arkansas*, 495 U.S. 149, 164-65 (1990).

The Government also implies that because Asencio-Cordero is the subject of the inadmissibility determination, his wife is an indirect bystander. Br. 28-29. That implication does not follow. The fact that a legal provision targets one individual does not render the impact on their spouse indirect. In the First Amendment context, the Court has recognized that an incarcerated person's spouse may be directly affected by provisions that are primarily directed against the incarcerated. "[T]he interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him." *Procunier v. Martinez*, 416 U.S. 396, 409 (1974). In *Turner v. Safley*, the Court likewise acknowledged preventing marriage between incarcerated and non-incarcerated people may implicate "the interests of nonprisoners," though the Court deemed it unnecessary to reach that question. 482 U.S. 78, 97 (1987).

2. Muñoz's interest in living in her country of citizenship renders relocation an impermissible solution.

Muñoz's separate liberty interest in her ability to live in the United States means the Government cannot avoid a due process problem by instructing her to move abroad.

Article One of the Fourteenth Amendment states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This provision, "the Citizenship Clause," thus "expressly equates citizenship with residence." *Saenz v. Roe*, 526 U.S. 489, 506 (1999). Further, unless "voluntarily relinquishe[d]," the right of citizenship cannot "be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit." *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967). "The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898). A citizen's rights may not be diluted due to family relations with a noncitizen. *Oyama v. California*, 332 U.S. 633, 647 (1948) (holding that "the rights of a citizen may not be subordinated merely because of his father's country of origin").

A citizen's ability to exercise the rights attendant to citizenship is largely meaningless if one is forced to reside outside the United States, where the

Constitution does not apply. This possibility is more than an abstract concern to Muñoz. By the Government's own admission, she would be directly placed in harm's way and forced to endure "extreme hardship" in El Salvador, a country that the State Department itself describes as being plagued with widespread violence. *See* U.S. Dep't of State, Bureau of Consular Affairs, *El Salvador Travel Advisory*, https://bit.ly/3TiUjOp. She would also be forced to relinquish her legal practice.

Muñoz does not argue that the Government may never require citizens to decide between living in the United States or cohabitating with their spouses abroad, only that it may not do so without providing sufficient process before imposing such a burden. Because Muñoz possesses a liberty interest in remaining in her country of citizenship as well as in cohabitating with her husband, the Government's suggestion that she leave the United States does not absolve the Government of its obligation to provide adequate process before denying the visa.

This Court has repeatedly refused to condone state action that forces citizens to sacrifice one right to exercise another. "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593-94 (1926); *see, e.g.*, *Simmons v. United States*, 390 U.S. 377, 394 (1968) (deeming it "intolerable that one constitutional right should have to be surrendered in order to assert

another"); *accord Garrity v. New Jersey*, 385 U.S. 493, 497 (1967); *Aptheker v. Sec'y of State*, 378 U.S. 500, 507 (1964).

* * *

History and tradition make clear that a U.S. citizen has a liberty interest in marriage, which entails living with her spouse in the United States. This interest is further supported by the INA and regulations, which gave Muñoz an expectation in her husband's visa application by requiring that she play a direct and indispensable role in a visa application that could only be denied for cause. Because Muñoz also has a right to live in her country of citizenship, she was entitled to procedural due process before the Government denied Asencio-Cordero's visa.

III. Citing Section 1182(a)(3)(A)(ii) Does Not Provide Sufficient Notice To Satisfy Due Process.

The Government argues that citing 8 U.S.C. § 1182(a)(3)(A)(ii) satisfies due process because the citation provided a "facially legitimate and bona fide" reason for the denial. Br. 31 (citing *Mandel*, 408 U.S. at 770). But this Court has typically not applied the "facially legitimate and bona fide" test, which predates the general due process test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to a situation involving a claim that an agency has violated Congress's chosen immigration policies. Further, that test has no place where, as here, a U.S. citizen argues that the consulate has misapplied an exceptionally broad inadmissibility statute. State Department regulations also provide an opportunity for Muñoz and her

husband to challenge the decision by providing exculpatory evidence—an opportunity they cannot pursue without understanding the reason for the denial. 22 C.F.R. § 42.81(e). Thus, in the narrow circumstances presented here, due process requires a summary statement of the factual basis underlying the decision—a statement of what the applicant did to cause the consular official to make an inadmissibility determination.

The constitutional minimum of a factual statement is not preempted by statutory language in 8 U.S.C. § 1182(b)(3) granting consular officers authority to avoid even stating the pertinent ground of inadmissibility. And the concurrence in *Din*, which spoke to a different, more-specific statutory ground of inadmissibility and involved a factual record tying the denial to the statutory ground, does not support—much less compel—a contrary conclusion. 576 U.S. at 104-06.

A. The "facially legitimate and bona fide" test should not apply here.

The Ninth Circuit applied the "facially legitimate and bona fide" test to determine what process is due to Muñoz. Br. 31. But that test is inapposite where a visa denial is based on a statute that permits denials only where there is reason to believe the individual is inadmissible, and where such a denial compromises the interests of a U.S.-citizen spouse.

The "facially legitimate and bona fide" test traces to *Mandel*, where American professors challenged the denial of a waiver of inadmissibility to a foreign professor on First Amendment grounds. Emphasizing

that Congress had committed the waiver decision to the discretion of the executive branch, *Mandel* held 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." *Mandel,* 408 U.S. at 770.

The "facially legitimate" standard permits circumscribed review where the political branches speak with one voice. It applies where a challenged executive-branch decision is one that Congress has made discretionary. *See Hawaii*, 585 U.S. at 683, 703 (applying rational basis review but suggesting the facially legitimate standard in situations where Congress conferred "broad discretion" to the executive on immigration issues).[12] It also applies where a challenge is brought to "broad congressional policy judgments" regarding the availability of a preferential immigration status. *Fiallo v. Bell*, 430 U.S. 787, 795 (1977). The "facially legitimate" test thus circumscribes judicial review where Congress has delegated discretion to the executive or where a plaintiff challenges the legality of congressional visa policies.

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[12] *See also Purkett v. Elem*, 514 U.S. 765, 769 (1995) (facially legitimate reasons sufficient for peremptory juror challenge); *Ricci v. DeStefano*, 557 U.S. 557, 596 (2009) (Alito, J., concurring) (in disparate treatment claim, where employer gives "facially legitimate reason," not liable unless it is "just a pretext for discrimination").

This case differs critically from *Mandel* in two ways. First, it involves the marital relationship. In the First Amendment context, this Court has treated as "plain" the interest of spouses to communicate, and it juxtaposed that interest against the "difficult questions" produced in *Mandel* as a "so-called 'right to hear'" case. *Procunier*, 416 U.S. at 409 (discussing *Mandel*).

Second, this case does not fit within either of the categories to which the Court has applied *Mandel*. Congress has the authority to exclude noncitizen spouses who would commit criminal acts in the United States. Congress, however, chose not to give consular officers the free rein it gave the Attorney General to issue waivers in *Mandel*. Rather, it enacted an objective test requiring the officer to have a "reasonable ground to believe" the applicant is inadmissible. 8 U.S.C. § 1182(a)(3)(A); *accord id.* § 1201(g) ("reason to believe"). That standard, which is akin to probable cause in the criminal context, *see, e.g., Ludecke v. U.S. Marshal*, 15 F.3d 496, 497 (5th Cir. 1994); *Prushinowski v. Samples*, 734 F.2d 1016, 1018 (4th Cir. 1984), "require[s] a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa," 22 C.F.R. § 40.6. As the FAM explains, "[t]he essence of the [reason to believe] standard is that you must have more than a mere suspicion; there must exist a probability, supported by evidence" that the inadmissibility ground applies to the applicant. 9 FAM 302.4-3(B)(3) (defining standard as applied to drug trafficking); *see also id.* 302.9-4(B)(3) (misrepresentations).

"A visa can be refused only upon a ground specifically set out in the law or implementing regulations." 22 C.F.R. § 40.6. And regulations provide applicants with an opportunity to show that no such probability exists by presenting exculpatory evidence. *Id.* § 42.81(e). Ultimately, then, either inadmissibility bars admission, or the issuance of a visa is mandatory. *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (Holmes, J.) ("The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases.").

Here, Muñoz's due process claim differs from *Fiallo* in that it is not a facial challenge to a statute, and it differs from *Mandel* and cases like it in that the underlying visa denial was not discretionary. Her underlying case, by contrast, is about the proper application of Section 1182(a)(3)(A)(ii) to Asencio-Cordero. The claim is that the agency violated its statutory duties, not that the agency erred in the exercise of discretion. Muñoz is therefore not asking the Court to overrule fundamental policy choices made by the political branches. Rather, she asks the Court to provide her with a basis for determining whether the agency erred in its application of the statute setting forth congressional policy. And this Court has long held that greater judicial scrutiny is required when Congress has "provide[d] statutory standards" for determining eligibility for a benefit than when it has granted discretionary power as "a matter of grace." *Jay v. Boyd*, 351 U.S. 345, 353-54 (1956); *see also Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 462 (1989) ("'[A] State creates a protected liberty interest by placing substantive limitations on official

discretion.'") (quoting *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)).

B. In the narrow situation presented here, the Constitution requires a factual basis for an inadmissibility determination.

Given these differences, Muñoz is entitled to more process than the academics in *Mandel*. To satisfy due process, notice must be "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Typically, this test requires "notice of the factual basis" justifying a deprivation. *Wilkinson v. Austin*, 545 U.S. 209, 225-26 (2005). This Court has accordingly required disclosure of the factual basis for agency determinations in a wide range of settings, including settings that directly implicate public safety and national security. *See, e.g.*, *id.* (placement at supermax facility); *Greenholtz,* 442 U.S. at 15-16 (adverse parole decisions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (classification as enemy combatant); *Wolff*, 418 U.S. at 563 (prison disciplinary proceedings); *see also, e.g.*, *Superintendent, Mass. Correctional Institution v. Hill*, 472 U.S. 445, 454 (1985) (requiring "some evidence" to support denial of good time credits); *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (evidence necessary to support parole revocation); *U.S. ex rel. Vajtauer v. Comm'r of Immigration*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process."); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 246-47 (1957) (holding that state had

provided insufficient evidence to deny bar license to former Communist party member on grounds of bad moral character).

At a minimum, Muñoz is entitled to a statement providing the factual basis for applying the ground of inadmissibility. State Department regulations provide a procedure under which Muñoz and her husband could challenge the decision excluding him from the United States. *See* 22 C.F.R. § 42.81(e). A statement of facts is necessary to make that challenge meaningful in the context of a denial under a statute as wide-ranging and generic as Section 1182(a)(3)(A)(ii). Here, for instance, the Government was obligated to state what Asencio-Cordero said or did to make them think he is inadmissible as a gang member. Otherwise, a U.S. citizen like Muñoz seeking to vindicate her interests would face the impossible task of proving the negative that her husband would never commit any kind of future illegal act.[13]

The traditional balancing test in *Mathews*, 424 U.S. at 335, which considers the private interest at issue, the risk of erroneous deprivation, and the Government's interest, confirms that the agency must at minimum provide some factual predicate for the inadmissibility finding. The private interests affected here are, as shown above, the significant rights of living with one's spouse in one's country of citizenship

[13] The impossibility of this task is borne out in the results: Of the 1,764 immigrant visas denied under this statutory provision from 2000 to 2022, not a single person was able to overcome the presumption of ineligibility. *See Bureau of Consular Affairs, Annual Reports, Table XIX*, 2000-2022, https://bit.ly/49RmMSv.

and an interest in being free from having to choose between these rights.

The risk of erroneous deprivation is high both because of the significant risk that attends closed proceedings like the visa application process at issue here, *Boumediene v. Bush*, 553 U.S. 723, 785 (2008), and because the application of Section 1182(a)(3)(A)(ii) turns on the assessment of whether someone is likely to commit unspecified illegality in the future, rather than any past bad act. And adequate notice, such as "a brief summary of the factual basis" for a decision is among "the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Wilkinson*, 545 U.S. at 226.

As to the final factor, the Government asserts that it must preserve secrecy across the board because "[e]very visa decision is a national security decision" and because, in the Government's telling, providing *any* reason for a determination "could compromise sensitive and even classified information." Br. 41-42.[14]

The Government's own practices belie that assertion: Section 1182(a)(3)(A)(ii) applies domestically and abroad, and whenever the Government finds a person in the country inadmissible under that provision, it explains its reasoning and provides an opportunity for a response. 8 C.F.R. § 103.2(b)(16). Indeed, even in cases involving

[14] The Government cannot rely on the financial costs of additional procedures because applicants bear those costs. *Schedule of Fees for Consular Services*, 86 Fed. Reg. 74018, 74019 (Dec. 29, 2021); *see* 31 U.S.C. § 9701.

classified information and potential terrorism, when those case are adjudicated within the United States, the Government must provide an unclassified summary of any secret evidence. *See* 8 U.S.C. § 1534(e)(3)(B).

If the Government can provide summaries in those situations without compromising national security—and it can—it follows that it can likewise do so with respect to denials under Section 1182(a)(3)(A)(ii) that happen to involve people outside the United States. After all, much of the potential future conduct covered by the statute has no connection to national security. The FAM, for instance, describes one "of the more common situations involving 'other unlawful activity'" as including "travel to a state where the applicant's marriage to a first cousin … violates that state's criminal law." 9 FAM 302.5-4(A).

The Government trots out a parade of horribles, asserting that disclosure of any factual basis for denials under Section 1182(a)(3)(A)(ii) would reveal confidential information to transnational gangs and chill both inter-agency and international communications. Br. 42-44. If those issues existed in any meaningful number of cases involving people outside the United States found inadmissible under Section 1182(a)(3)(A)(ii), they surely would already have arisen in cases involving people *inside the United States* whose visas were denied on the same ground. Yet the Government cites not a single situation in which it was unable to provide a required factual basis to such an applicant—or even an applicant charged with inadmissibility on terrorism-related grounds—

without compromising national security. That absence is glaring.

It is also unsurprising, given that the minimal requirement to disclose a summary factual basis leaves ample room for the Government to withhold information under the state secrets privilege, *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953), the law enforcement privilege, *In re The City of New York*, 607 F.3d 923, 948-49 (2d Cir. 2010), and related doctrines. There is no reason that the State Department could not create administrative mechanisms similar to those that DHS uses for visa applicants inside the country. *See* 8 C.F.R. § 103.2(b)(16)(iv) (When agency can provide notice of adverse evidence "consistently with safeguarding both the information and its source … the applicant or petitioner [should] be given notice of the general nature of the information and an opportunity to offer opposing evidence.").

The Government also relies on 8 U.S.C. § 1182(b)(3), which exempts Sections 1182(a)(2) and (a)(3) from the general rule that the agency must identify the inadmissibility ground when denying a visa, as authority for its position that it need provide no notice or effective opportunity to be heard. Br. 37-41. The Government's reliance on this provision is curious, given that the consular official in this case declined to invoke Section 1182(b)(3), voluntarily citing Section 1182(a)(3)(A)(ii), though Section 1182(b)(3) gave it authority not to do so. As that choice illustrates, Section 1182(b)(3) sets a floor rather than a ceiling. *See Din*, 576 U.S. at 106 (Kennedy, J., concurring); *id.* at 116 (Breyer, J., dissenting).

Moreover, the State Department has bound itself to do more. Regulations require the consulate to inform the applicant of the basis for any visa denial and do not exempt denials under Sections 1182(a)(2) and (a)(3). 22 C.F.R. § 42.81(b). The FAM states that "although [1182](b) also exempts findings of ineligibility under [1182](a)(2) and (3) from the written notice requirement, it is expected that such notices will be provided to the applicant in all [1182](a)(2) and [1182](a)(3) cases unless" the officer receives express instruction from the Department. 9 FAM 504.11-3(A)(1)(c). And crucially, the State Department has also provided an administrative reconsideration process that can be meaningful only if the applicant understands the factual basis for a denial. 22 C.F.R. § 42.81(e). The Department itself therefore proceeds as if denials under Section 1182(a)(3)(A)(ii) have little connection to national security.[15]

In the circumstances of the exclusion of a U.S.-citizen's spouse under Section 1182(a)(2)(A)(ii), the citizen has a constitutional right to a written determination and factual summary. Otherwise, the regulatory right to rebuttal is meaningless.

C. A mere citation to Section 1182(a)(3)(A)(ii) cannot satisfy the "facially legitimate and bona fide" test.

Even if the Court were to accept the Government's invitation to apply the "facially legitimate and bona fide" test from *Mandel*, a mere citation to Section

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[15] If some factual summary were disclosed below, it would foster a sense of fairness, permit an effective response, and forestall the need for *in camera* review. *See* Br. 45-46.

1182(a)(3)(A)(ii) would be insufficient to satisfy due process. While this Court has not given a precise definition to the meaning of "facially legitimate and bona fide," it has offered various indications of circumstances when such a standard is not met. For example, in *Mandel*, the Government posited that "any reason or no reason may be given" for a discretionary visa denial, but the Court did not adopt that lenient standard. 408 U.S. at 769.

A citation to Section 1182(a)(3)(A)(ii), standing alone, is so broad as to be effectively equivalent to "any reason." Given its placement within 1182(a)(3) ("Security and related grounds"), as highlighted by the Government, Br. 3-4, Section 1182(a)(3)(A)(ii) might be understood under *ejusdem generis* principles to relate only to security-related illegality. The plain text of the provision, however, sweeps much more broadly. The agency reads the statute expansively as applying to any kind of illegal future activity, illustrated by detailed FAM application to those intending to unlawfully marry a cousin. 9 FAM 302.5-4(A). A statute of such breadth invites arbitrary enforcement, particularly if consular officers need not explain themselves.[16] *See Smith v. Goguen*, 415 U.S. 566, 576 (1974).

Section 1182(a)(3)(A)(ii) thus sweeps in an unimaginably broad range of future-looking potential

[16] The broad view of Section 1182(a)(3)(A)(ii) also seems to render other inadmissibility grounds surplusage. Section 1182 covers a wide range of conduct, including future offenses, and none of those provisions would be necessary if "any" activity covered the entire spectrum of unlawful conduct. *See*, *e.g.*, 8 U.S.C. § 1182(a)(2)(D); *id.* § 1182(a)(2)(I)(i).

conduct by reaching anything that gives a "reasonable ground to believe" that a person will engage in "any … unlawful activity" that might even "incidentally" be committed during their time in the United States. A citation to the statute thus provides no factual predicate that could possibly put a person on notice of the reason for their exclusion from the United States or give them an opportunity to rebut the application of that provision. That is not enough even under the lenient standard in *Mandel*.[17] The Ninth Circuit correctly found it insufficient and that belated additions in litigation did not give Muñoz a fair opportunity to respond. Pet. App. 33a.

D. The concurrence in *Din* does not compel a contrary result.

The Government relies on the concurring opinion in *Din*, arguing that it held due process is satisfied whenever the consulate has cited *any* statutory provision.[18] Br. 32. This overreads the concurrence.

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[17] Muñoz and Asencio-Cordero argued before both the district court and the court of appeals that Section 1182(a)(3)(A)(ii) is unconstitutionally vague. *See* Plaintiff-Appellants' Ninth Cir. Opening Br. 41-51. The Ninth Circuit did not address that issue, and it is not before the Court. No matter its ruling on the questions presented, the Court should remand the case for further proceedings on that issue, which does not turn on whether Muñoz has a cognizable liberty interest at stake or how much process she is due.

[18] The *Din* concurrence is not controlling because its analysis concerning what process is sufficient cannot be seen as a "logical subset" of the plurality opinion's conclusion that no liberty interest exists. *Morfin v. Tillerson*, 851 F.3d 710, 713 (7th Cir. 2017). Moreover, as the Government all but concedes, Br. 34-35

The concurrence gave several reasons for its conclusion that due process was satisfied in that case: (a) the determination was based on "specific statutory factors," which contained "discrete factual predicates," *Din*, 576 U.S. at 104-05; (b) the government has particularly sensitive needs in the terrorism context, *id*. at 106; (c) Din admitted facts that provided a "facial connection" to terrorist activity, *id*. at 105, and (d) while Din sought to know the specific subpart of the terrorism ground at issue, the statute says the agency need not provide such specificity. *Id*. at 105-06.[19]

Those considerations are absent here. First, Section 1182(a)(3)(A)(ii) has no specific factual predicates. The contrast with Section 1182(a)(3)(B) could not be more stark. The terrorist ground enumerates granular types of activity, listing hijacking, sabotage, kidnapping, assassination, violent attacks, use of biological or chemical weapons, as well as soliciting funds for terrorist organizations. Moreover, to avoid overapplication, Section 1182(a)(3)(B) provides detailed definitions of terms such as "material support," "terrorist activity,"

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n.11, the concurrence in *Din* would not bind this Court under stare decisis principles. *See, e.g.*, *Hughes v. United States*, 584 U.S. 675, 679-80 (2018).

[19] The Government argues that the first reason was the "real" reason, citing to shorthand in this Court's decision in *Hawaii*, such that any statutory citation is sufficient reason. Br. 37 (citing 585 U.S. at 703). But Justice Kennedy concluded that due process had been satisfied "[f]or *these reasons*," *Din*, 576 U.S. at 106 (emphasis added), not for just the first reason. The Government provides no reason to believe that the shorthand reference in *Hawaii* was intended to alter *Din*.

"engage in terrorist activity," "terrorist organization" and "representative" thereof. It cross-references other statutes to define terms such as "military-type training." Section 1182(a)(3)(A)(ii) is neither "specific" nor "discrete." These significant statutory differences between Sections 1182(a)(3)(B) and (a)(3)(A)(ii) call for different treatment.[20]

Second, as discussed above, the tie between the ground of inadmissibility and national security is much weaker for Section 1182(a)(3)(A)(ii) than for the terrorism-based grounds in Section 1182(a)(3)(B). Third, unlike in both *Mandel* and *Din*, the Government has pointed to no "fact on the record" that would provide a "facial connection" between Asencio-Cordero and the inadmissibility ground. Finally, unlike Din, Muñoz does not seek further specificity as to the portion of the inadmissibility statute at issue, which makes the fourth factor from the concurrence materially different here.

The concurrence in *Din* thus has little bearing on the outcome of this case.

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[20] The Government cites *Colindres v. U.S. Dep't of State*, 71 F.4th 1018, 1024-25 (D.C. Cir. 2023), for the proposition that the terrorism ground is, in some places, as broad as the provision at issue here. Br. 35. The point, however, is not that Section 1182(a)(3)(A)(ii) covers much ground but that it does so in a sweeping manner rather than enumerating discrete actions that trigger inadmissibility. To the extent *Colindres* disagrees with the *Din* concurrence's understanding of the terrorism ground as "discrete" and "specific," the concurrence has the better of the argument.

* * *

Due process requires the agency to provide the factual basis for a visa denial. Indeed, without such notice, the State Department's own administrative reconsideration process would be meaningless. Even if the Constitution required nothing more than application of the "facially legitimate and bona fide" standard from *Mandel*, a citation to Section 1182(a)(3)(A)(ii) fails to offer either a factual predicate for a visa denial or an opportunity to respond to it.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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APPENDIX

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APPENDIX

Code of Federal Regulations

1. 8 C.F.R. § 103.2(b)(6) provides:

* * *

(6) Withdrawal. An applicant or petitioner may withdraw a benefit request at any time until a decision is issued by USCIS or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition. However, a withdrawal may not be retracted.

2. 8 C.F.R. § 212.7(e)(14) provides:

(e) Provisional unlawful presence waivers of inadmissibility. The provisions of this paragraph (e) apply to certain aliens who are pursuing consular immigrant visa processing.

* * *

(14) Automatic revocation. The approval of a provisional unlawful presence waiver is revoked automatically if:

(i) The Department of State denies the immigrant visa application after completion of the immigrant visa interview based on a finding that the alien is ineligible to receive an

immigrant visa for any reason other than inadmissibility under section 212(a)(9)(B)(i)(I) or (II) of the Act. This automatic revocation does not prevent the alien from applying for a waiver of inadmissibility for unlawful presence under section 212(a)(9)(B)(v) of the Act and 8 CFR 212.7(a) or for any other relief from inadmissibility on any other ground for which a waiver is available and for which the alien may be eligible;

(ii) The immigrant visa petition approval associated with the provisional unlawful presence waiver is at any time revoked, withdrawn, or rendered invalid but not otherwise reinstated for humanitarian reasons or converted to a widow or widower petition;

(iii) The immigrant visa registration is terminated in accordance with section 203(g) of the Act, and has not been reinstated in accordance with section 203(g) of the Act; or

(iv) The alien enters or attempts to reenter the United States without inspection and admission or parole at any time after the alien files the provisional unlawful presence waiver application and before the approval of the provisional unlawful presence waiver

> takes effect in accordance with paragraph (e)(12) of this section.

3. 22 C.F.R. § 40.6 provides:

> Basis for refusal. A visa can be refused only upon a ground specifically set out in the law or implementing regulations. The term "reason to believe", as used in INA 221(g), shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa as provided in the INA and as implemented by the regulations. Consideration shall be given to any evidence submitted indicating that the ground for a prior refusal of a visa may no longer exist. The burden of proof is upon the applicant to establish eligibility to receive a visa under INA 212 or any other provision of law or regulation.

4. 22 C.F.R. § 42.81 provides:

Procedure in refusing immigrant visas.

> (a) Grounds for refusal. When a visa application has been properly completed and executed before a consular officer in accordance with the provisions of the INA and the implementing regulations, the consular officer must issue the visa, refuse the visa under INA 212(a) or 221(g) or other applicable law or, pursuant to an outstanding order under INA 243(d), discontinue granting the visa.

(b) Refusal procedure. A consular officer may not refuse an immigrant visa until either Form DS–230, Application for Immigrant Visa and Alien Registration, or Form DS–260, Electronic Application for Immigrant Visa and Alien Registration, has been executed by the applicant. When an immigrant visa is refused, an appropriate record shall be made in duplicate on a form prescribed by the Department. The form shall be signed and dated by the consular officer. The consular officer shall 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. Each document related to the refusal shall then be attached to Form DS–230 for retention in the refusal files. Alternatively, each document related to the refusal shall be electronically scanned and electronically attached to Form DS–260 for retention in the electronic refusal files. Any documents not related to the refusal shall be returned to the applicant. The original copy of a document that was scanned and attached to the DS–260 for the refusal file shall be returned to the applicant. If the ground of ineligibility may be overcome by the presentation of additional evidence and the applicant indicates an intention to submit such evidence, all documents may, with the consent of the alien, be retained in the consular files for a period not to exceed one year. If the refusal as not been overcome within one year, any

documents not relating to the refusal shall be removed from the file and returned to the alien.

(c) Review of refusal at consular office. If the grounds of ineligibility upon which the visa was refused cannot be overcome by the presentation of additional evidence, the principal consular officer at a post, or a specifically designated alternate, shall review the case without delay, record the review decision, and sign and date the prescribed form. 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. If the principal consular officer or alternate does not concur in the refusal, that officer shall either (1) refer the case to the Department for an advisory opinion, or (2) assume responsibility for final action on the case.

(d) Review of refusal by Department. The Department may request a consular officer in an individual case or in specified classes of cases to submit a report if an immigrant visa has been refused. The Department will review each report and may furnish an advisory opinion to the consular officer for assistance in considering the case further. If the officer believes that action contrary to an advisory opinion should be taken, the case shall be resubmitted to the Department with an explanation of the proposed action. Rulings of

the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, are binding upon consular officers.

(e) Reconsideration of refusal. If 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. In such circumstance, an additional application fee shall not be required.

Foreign Affairs Manual

5. 9 FAM 302.4-3(B)(3) provides:

(U*) "Reason to Believe"

(a) (U) Under INA 212(a)(2)(C), if you have "reason to believe" that the applicant is or has been engaged in trafficking or has assisted another in trafficking as described in 9 FAM 302.4-3(B)(2) above, the standard of proof is met and you should make a finding of ineligibility.

(b) (U) "Reason to believe" might be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports. The essence of the standard is that you must have more than a mere suspicion; there must exist a probability, supported by evidence, that the applicant is or has been engaged in trafficking. You are required to assess independently any evidence relating to a finding of ineligibility.

6. 9 FAM 302.5-4(A) provides:

(U) Intent to Engage in Unlawful Activity in the United States INA 212(A)(3)(A)(II)

(U) Grounds. INA 212(a)(3)(A)(ii) makes a visa applicant ineligible, and thus ineligible for a visa, if

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* The "(U)" in FAM citations indicates unclassified material.

> you know or have reason to believe that the applicant is traveling to the United States solely, principally, or incidentally to engage in "any other unlawful activity." Some of the more common situations involving "other unlawful activity" include travel to a state where the applicant's marriage to a first cousin or a minor violates that state's criminal law (see 9 FAM 302.5-4(B)(3)), or travel to engage in business activities related to the marijuana industry that violate federal criminal law (see 9 FAM 302.5-4(B)(4)). An applicant also may be found ineligible under this section if they are an active member of an identified criminal organization described in 9 FAM 302.5-4(B)(2).

7. 9 FAM 504.2-2(B) provides:

(U) Establishing Relationship Between Petitioner and Beneficiary.

> (U) An approved petition under INA 204 establishes that the requirements for the visa classification, which were examined by USCIS during the petition process, have been met. However, the approval of a petition by USCIS does not relieve the applicant of the burden of establishing visa eligibility. You should confirm that the facts claimed in the petition are true during the visa interview. Remember that USCIS interacts solely with the petitioner; the interview is the first point during the petition-based visa process where a USG representative has the opportunity to interact with the beneficiary of the petition. Additionally, you benefit from cultural and local knowledge that adjudicators at USCIS do not

possess, making it easier to spot misrepresentation in qualifications. While validity of the relationship between the petitioner and the beneficiary, familial or employer and/or employee, is presumed to exist, if you have specific, substantial evidence of misrepresentation in the petition process or discover facts unknown to DHS when the petition was approved, you should consider returning the petition to DHS. See 9 FAM 504.2-1 and 22 CFR 42.43. Unless a petition has been automatically revoked under INA 203(g), a properly approved petition remains valid indefinitely if the familial or employer and/or employee relationship exists.

8. 9 FAM 504.2-8(A) provides:

(U) Suspending Action and Returning Petitions

(a) (U) DHS possesses exclusive authority over the approval and denial of IV petitions (except for those filed for beneficiaries classifiable under INA 203(c) or INA 101(a)(27)(D).
(b) (U) Therefore, it is your responsibility to review, not to readjudicate petitions. However, if during that review you obtain sufficient facts so that you know or have reason to believe that the beneficiary is not entitled to the status approved in the petition you will return the petition to USCIS through NVC. DHS regulations governing the revocation of petitions are provided in 9 FAM 504.2-1 above.
(c) (U) Petitions being returned to NVC for processing should be sent following the procedures in 9 FAM 601.13-3(D).

9. 9 FAM 504.2-8(A)(1) provides:

(U) Termination of Action

(a) (U) You Must Terminate Action on a Visa Petition:

(1) (U) Upon receipt of notification from USCIS that the petition has been revoked under 8 CFR 205.2;

(2) (U) If the petition is automatically revoked under 8 CFR 205.1; or

(3) (U) If the petition is automatically revoked under INA 203(g). See paragraphs b and c below.

(d) (U) When a Registration is Terminated Under INA 203(g), Consular Sections Must Do the Following:

(1) (U) Send the applicant Final Notice of Cancellation of Registration, under Section 203(g). See 9 FAM 504.13; and

(2) (U) Destroy the petition (see 9 FAM 504.13-4(A)).

10. 9 FAM 504.2-8(A)(2) provides:

(U) When to Suspend Action and Return Petitions

(U) You will suspend action and return the petition to USCIS (see 9 FAM 504.2-8(B)(1) below through NVC if:

(1) (U) The petitioner requests suspension of action;

(2) (U) You know, or have reason to believe the petition approval was obtained by fraud, misrepresentation, or other unlawful means; or

(3) (U) You know or have reason to believe that, despite the absence of fraud, due to changed circumstances or clear error in approving the petition the beneficiary is not entitled to the approved status.

(4) (U) "Reason to Believe": In general, knowledge and reason to believe must be based upon evidence that USCIS did not have when it approved the petition and a determination that such evidence, if available, would have resulted in the petition being denied. This evidence often arises during the interview of the beneficiary. Reason to believe must be more than mere conjecture or speculation—there must exist the probability, supported by evidence, that the beneficiary is not entitled to status.

(5) (U) Cases of Sham Marriages: USCIS has minimum evidentiary standards that must be established before a petition may be returned for revocation proceedings based upon a marital relationship. These minimum evidentiary standards are:

(a) (U) A written statement from one or both of the parties to the marriage that the marriage was entered into primarily for immigration purposes;

(b) (U) Documentary evidence that money changed hands under circumstances such that a reasonable person would conclude the marriage was a paid arrangement for immigration purposes; or

(c) (U) Extensive factual evidence developed by the consular officer that would convince a reasonable person that the marriage was a sham marriage entered into to evade immigration laws.

11. 9 FAM 504.7-2 provides:

Requirement for an Interview

(a) Interview Requirement: Although the regulation permits the waiver of the personal appearance for a child under the age of 14, the principal beneficiary, regardless of age, of any IV petition must appear in person.

(b) Timeliness of Interview: The interview with you is the most significant part of the visa issuing process to ensure the full and correct application of the law. Section 237 of Public Law 106-113 and subsequent legislation require that the Department establish a policy under which immediate relative (and fiancé(e)) visas be processed within 30 days of receipt of

the necessary information from the applicant and the Department of Homeland Security (DHS); all other family-based IVs must be processed within 60 days. The Department expects all IV units to strive to meet the 30/60-day requirements.

12. 9 FAM 504.11-3(A)(1) provides:

(U) Inform the Applicant Orally and in Writing

(a) (U) Manner in Refusing Applicants:

(1) (U) You should convey visa refusals in a sympathetic but firm manner. The way visa applications are refused can be very important in relations between the post and the population of the host country. You must be careful not to appear insensitive.

(2) (U) You should aim for a measured, sympathetic but firm style which will convince the ineligible applicant that the treatment accorded was fair. You should refer to pertinent statements of the applicant, written or oral, or to a conviction, medical report, false document, previous refusal, or the like, as the basis of the refusal. You should then explain the law simply and clearly.

(b) (U) INA 212(b) requires you to provide timely written notice that the applicant is ineligible. The written notification should provide the applicant (and the attorney of record) with:

(1) (U) The provision(s) of law on which the refusal is based;

(2) (U) The factual basis for the refusal unless the refusal in based on an INA 212(a)(2) or (3) grounds; see "Exceptions to Notice Requirements" below;

(3) (U) Any missing documents or other evidence required;

(4) (U) What procedural steps must be taken by you or the Department; and

(5) (U) Any relief available to overcome the refusal. See 9 FAM 302 for information about the availability of waivers of ineligibility.

(c) (U) Exceptions to Notice Requirement: INA 212(b), which requires you to provide the applicant with a timely written notice in most cases involving an INA 212(a) refusal, also provides for a waiver of this requirement. However, only the Department may grant a waiver of the written notice requirement. Furthermore, although INA 212(b) also exempts findings of ineligibility under INA 212(a)(2) and (3) from the written notice requirement, it is expected that such notices will be provided to the applicant in all INA 212(a)(2) and INA 212(a)(3) cases unless:

(1) (U) The Department instructs you not to provide notice;

(2) (U) The Department instructs you to provide a limited legal citation (i.e., restricting the legal grounds of refusal to INA 212(a)); or

(3) (U) In response to a request, you receive permission from the Department not to provide notice.