23-334

No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF STATE, ET AL.,
PETITIONERS

v.

SANDRA MUÑOZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the decision to grant or deny a visa application rests with a consular officer in the Department of State. Under 8 U.S.C. 1182(a)(3)(A)(ii), any noncitizen whom a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in * * * unlawful activity" is ineligible to receive a visa or be admitted to the United States. The questions presented are:

1. Whether a consular officer's refusal of a visa to a U.S. citizen's noncitizen spouse impinges upon a constitutionally protected interest of the citizen.

2. Whether, assuming that such a constitutional interest exists, notifying a visa applicant that he was deemed inadmissible under 8 U.S.C. 1182(a)(3)(A)(ii) suffices to provide any process that is due.

3. Whether, assuming that such a constitutional interest exists and that citing Section 1182(a)(3)(A)(ii) is insufficient standing alone, due process requires the government to provide a further factual basis for the visa denial "within a reasonable time," or else forfeit the ability to invoke consular nonreviewability in court.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellees below) are the United States Department of State; Antony J. Blinken, Secretary of State; and Michael Garcia, Consul General of the Consular Section at the United States Embassy, San Salvador, El Salvador.*

Respondents (plaintiffs-appellants below) are Sandra Muñoz and Luis Ernesto Asencio-Cordero.

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* Michael Garcia has been automatically substituted for Brendan O'Brien under Rule 35.3 of the Rules of this Court.

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

Muñoz v. *United States Department of State*, No. 17-cv-37 (Mar. 18, 2021)

United States Court of Appeals (9th Cir.):

Muñoz v. *United States Department of State*, No. 21-55365 (Oct. 5, 2022)

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The Solicitor General, on behalf of the United States Department of State and two federal officials, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-41a) is reported at 50 F.4th 906. The order of the en banc court denying rehearing and opinions respecting that denial (App., *infra*, 90a-122a) are reported at 73 F.4th 769. The opinion of the district court granting summary judgment for petitioners (App., *infra*, 42a-72a) is reported at 526 F. Supp. 3d 709. A prior opinion of the district court denying petitioners' motion to dismiss is not published in the Federal Supplement but is available at 2017 WL 8230036 (App., *infra*, 73a-89a).

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2022. A petition for rehearing en banc was denied on July 14, 2023 (App., *infra*, 90a-91a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 126a-136a.

STATEMENT

A. Legal Background

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a noncitizen generally may not be admitted to the United States without an immigrant or nonimmigrant visa.[1] 8 U.S.C. 1181(a), 1182(a)(7). When a noncitizen seeks to obtain an immigrant visa on the basis of a family relationship with a citizen or lawful permanent resident of the United States, see 8 U.S.C. 1151(b)(2)(A)(i), 1153(a), the citizen or permanent resident must first file a petition with U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security.[2] If the petition is approved, the

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[1] This petition uses "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

[2] Various INA functions formerly vested in the Attorney General have been transferred to the Secretary of Homeland Security. Some residual statutory references to the Attorney General that pertain to those functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note; see also *Nielsen* v. *Preap*, 139 S. Ct. 954, 959 n.2 (2019).

noncitizen may (if all other relevant conditions are satisfied) apply for a visa. See 8 U.S.C. 1154(a)(1) and (b), 1202; 22 C.F.R. 42.31, 42.42.

The decision to grant or deny a visa application rests with a consular officer in the Department of State. See 8 U.S.C. 1201(a)(1); 22 C.F.R. 42.71, 42.81; 8 U.S.C. 1361 (providing that the applicant has the burden of proof to establish visa eligibility "to the satisfaction of the consular officer"); see also 6 U.S.C. 236(b)(1) and (c)(1). With certain exceptions not relevant here, no visa "shall be issued to an alien" if "it appears to the consular officer" from the application papers "that such alien is ineligible to receive a visa * * * under section 1182 of this title, or any other provision of law," or if "the consular officer knows or has reason to believe" that the noncitizen is ineligible. 8 U.S.C. 1201(g); see 22 C.F.R. 40.6 (explaining that "[t]he term 'reason to believe' * * * 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").

Section 1182 identifies various "[c]lasses of aliens ineligible for visas or admission" to the United States. 8 U.S.C. 1182(a). Section 1182(a)(3) bears the heading "Security and related grounds" and includes Section 1182(a)(3)(A)(ii), which renders inadmissible any noncitizen whom 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." 8 U.S.C. 1182(a)(3)(A)(ii).[3] A neighboring provision, Section 1182(a)(3)(B), bears

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[3] The phrase "any other" expands upon the preceding clause, which covers "activity" to violate espionage, sabotage, or export laws. 8 U.S.C. 1182(a)(3)(A)(i).

the heading "Terrorist activities" and specifies a variety of terrorism-related grounds of inadmissibility. 8 U.S.C. 1182(a)(3)(B).

As a general matter, a consular officer who denies a visa application "because the officer determines the alien to be inadmissible" must "provide the alien with a timely written notice that * * * (A) states the determination, and (B) lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1). If, however, the consular officer deems the noncitizen inadmissible on "[c]riminal and related grounds" or on "[s]ecurity and related grounds" under Section 1182(a)(2) or (a)(3), then the written-notice requirement "does not apply." 8 U.S.C. 1182(b)(3).

2. "[T]he power to admit or exclude aliens is a sovereign prerogative," *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), that is "exercised by the Government's political departments largely immune from judicial control," *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). As a result, this Court has long recognized the doctrine of consular nonreviewability—the rule that, in the absence of affirmative congressional authorization, a noncitizen cannot assert any right to review of a visa determination. As this Court has explained, an "unadmitted and nonresident alien" has "no constitutional right of entry to this country." *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972); see *Plasencia*, 459 U.S. at 32 (this Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"). Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544

(1950); see *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (noting that the Court "has often reiterated this important rule").

Congress has not provided for even administrative review of a consular officer's decision to deny a visa. See 8 U.S.C. 1104(a)(1); 6 U.S.C. 236(b)(1). Nor has Congress provided for judicial review of visa denials; indeed, in prescribing visa-issuance procedures, Congress has disclaimed any authorization for a "private right of action to challenge a decision of a consular officer * * * to grant or deny a visa." 6 U.S.C. 236(f); see 8 U.S.C. 1201(i) (providing for judicial review of a decision to *revoke* a nonimmigrant visa only in the context of removal proceedings to remove a noncitizen from the United States).

3. Consistent with the doctrine of consular nonreviewability, this Court has not permitted a noncitizen abroad to obtain judicial review of an executive official's decision to deny him entry to the United States. On a handful of occasions, however, the Court has engaged in a limited review when a U.S. citizen claimed that the denial of a visa to a noncitizen abroad violated the citizen's own constitutional rights.

In 1972, the Court considered the case of a Belgian journalist, Ernest Mandel, who had been invited to speak at conferences in the United States; the consular officer in Brussels found Mandel inadmissible, and the Attorney General declined to grant him a discretionary waiver of inadmissibility. *Mandel*, 408 U.S. at 756-760. U.S. citizens who wished to hear Mandel speak asserted a First Amendment challenge. *Id.* at 769-770. The Court did not reach the government's argument that "Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any

reason or no reason may be given." *Id.* at 769. Instead, the Court disposed of the case on the ground that the record included a reason for denying the waiver that was "facially legitimate and bona fide," *i.e.*, that Mandel had abused prior visas. *Id.* at 769-770. The Court explained that when a noncitizen is excluded from the United States based on such 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." *Id.* at 770.

Next, in *Kerry* v. *Din*, 576 U.S. 86 (2015), the Court considered a claim by a U.S. citizen that the exclusion of her noncitizen husband violated her procedural due-process rights. In *Din*, the Ninth Circuit had held that the U.S. citizen, Fauzia Din, had "a protected liberty interest in marriage" that entitled her to review of the State Department's denial of a visa to her husband, an Afghan citizen. *Id.* at 90 (plurality opinion) (citation omitted). The Ninth Circuit had also held that the consular officer's citation of a statutory ground of inadmissibility—in that case, the terrorist-activity provision in Section 1182(a)(3)(B)—was insufficient to justify the denial. *Ibid.* Instead, the Ninth Circuit had required the government to "allege what it believes [Din's husband] did that would render him inadmissible." *Din* v. *Kerry*, 718 F.3d 856, 863 (2013), vacated, 576 U.S. 86 (2015).

After granting review, this Court decided that Din's challenge could not go forward, but no rationale had the support of a majority of the Court. See *Din*, 576 U.S. at 89 (plurality opinion). A three-member plurality, in an opinion by Justice Scalia, concluded that a U.S. citizen

does not have a protected liberty interest in a noncitizen spouse's visa application, such that the Due Process Clause does not apply. *Din*, 576 U.S. at 101. The plurality grounded that holding in the Nation's "long practice of regulating spousal immigration," *id.* at 95, and the Court's "consistent[] recogni[tion]" that judgments about which immigrants to admit into the United States are "'policy questions entrusted exclusively to the political branches of our Government,'" *id.* at 97 (citation omitted). The plurality accordingly concluded that "[t]o the extent that [Din] received any explanation for the Government's decision" to deny her spouse's visa, "this was more than the Due Process Clause required." *Id.* at 101.

Justice Kennedy's opinion concurring in the judgment, joined by Justice Alito, took no position on whether Din possessed a liberty interest in her husband's visa application. *Din*, 576 U.S. at 102. Instead, Justice Kennedy concluded that—even assuming Din had such an interest—the government's citation of the terrorist-activity ground of inadmissibility sufficed to provide any process that was due. *Ibid.* Relying on *Mandel*, Justice Kennedy reasoned that the government need only provide "a facially legitimate and bona fide reason" to explain a visa denial. *Id.* at 104 (citation omitted); see *id.* at 103. The citation of Section 1182(a)(3)(B) met that standard, he found, because it indicated that the officer's determination "was controlled by specific statutory factors"—thus demonstrating its "facial[] legitima[cy]." *Id.* at 104-105. Justice Kennedy also noted that Section 1182(a)(3)(B) sets forth "discrete factual predicates"—thus indicating that the officer had a "bona fide factual basis" for the decision. *Id.* at 105.

In so concluding, Justice Kennedy rejected the Ninth Circuit's view that the government needed to provide "additional factual details" underlying the inadmissibility determination. *Din*, 576 U.S. at 105; see *id.* at 106. He also rejected the argument that the government needed to cite a particular provision within Section 1182(a)(3)(B), which includes numerous subsections and cross-references. *Id.* at 105-106. Invoking Section 1182(b)(3), he recognized that Congress has specifically exempted consular officers from the general obligation to cite a "specific provision * * * of law" when a visa denial is based on Section 1182(a)(3). *Id.* at 106 (quoting 8 U.S.C. 1182(b)(1)).

Four Justices dissented in *Din*, concluding that Din "possesse[d] the kind of 'liberty' interest to which the Due Process Clause grants procedural protection" and that the government was required to do more than cite the terrorist-activity bar to explain the denial. 576 U.S. at 107, 112-113 (Breyer, J., dissenting).[4]

B. Proceedings Below

1. Respondent Luis Ernesto Asencio-Cordero is a citizen of El Salvador who is married to respondent Sandra Muñoz, a citizen of the United States. App., *infra*, 4a. Muñoz filed a family-based immigrant visa petition on her husband's behalf, which USCIS approved.

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[4] This Court also reviewed a U.S. citizen's challenge to a decision denying entry to a foreign relative in *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018), which concerned a presidential proclamation barring entry to foreign nationals from particular countries. But the Court did not decide whether consular nonreviewability applied to some of those challenges, see *id.* at 2407, and it declined to decide whether the *Mandel* standard governed the plaintiffs' constitutional claim (based on the government's "sugges[tion]" that a different standard might be appropriate in that case), *id.* at 2420.

Id. at 5a. Asencio-Cordero then applied for an immigrant visa and appeared for an interview at the U.S. Consulate in San Salvador. *Ibid.* In December 2015, a consular officer denied Asencio-Cordero's application in a written notice citing Section 1182(a)(3)(A)(ii), the provision that makes a noncitizen inadmissible if the officer believes that he will engage in "unlawful activity" in the United States. *Id.* at 5a-6a.

Respondents protested the denial, and in April 2016, the case was forwarded for further review within the consulate; that review did not change the decision. App., *infra*, 6a. Respondents continued to contact the State Department, and sometime between late April and early May, they submitted a declaration from a "gang expert" who stated that none of Asencio-Cordero's tattoos was "'representative of the Mara Salvatrucha[] gang or any other known criminal street gang.'" *Id.* at 6a-7a & n.9 (citation omitted; brackets in original). On May 18, 2016, a State Department official informed respondents that the Department had concurred in the ineligibility finding, and on May 19, 2016, the consulate notified them that additional reviews had not "revealed any grounds to change the finding of inadmissibility." *Id.* at 7a-8a.

2. In January 2017, respondents filed this suit seeking review of the visa decision. App., *infra*, 8a. As relevant here, respondents argued that the denial of Asencio-Cordero's visa was "not facially legitimate and bona fide" and "infringed on Muñoz's fundamental rights." *Ibid.* The government filed a motion to dismiss, invoking consular nonreviewability. *Id.* at 9a.

In December 2017, the district court granted the government's motion in part and denied it in part. App., *infra*, 73a-89a. Although the court agreed with the

government that consular nonreviewability precludes Asencio-Cordero from challenging his visa denial, the court relied on Ninth Circuit precedent to find that his U.S.-citizen spouse has a liberty interest sufficient to obtain some form of review. *Id.* at 80a-81a. The court also determined, relying on Ninth Circuit precedent treating Justice Kennedy's *Din* concurrence as controlling, that the statutory ground of inadmissibility cited in Asencio-Cordero's case—the unlawful-activity bar in Section 1182(a)(3)(A)(ii)—does not contain "discrete factual predicates." *Id.* at 81a-84a (citation omitted); see *id.* at 79a. The court therefore believed that citing the statute alone was an insufficient explanation under *Mandel*. *Id.* at 86a.

The district court ordered limited discovery. App., *infra*, 10a-11a. In November 2018, the government submitted a declaration of a State Department attorney adviser, Matt McNeil. *Id.* at 10a; see *id.* at 123a-125a (McNeil Declaration). The declaration explained that the consular officer refused Asencio-Cordero's visa application under Section 1182(a)(3)(A)(ii) based on a determination that he was "a member of a known criminal organization identified in 9 [Foreign Affairs Manual] 302.5-4(b)(2), specifically MS-13." App., *infra*, 124a. The declaration also explained that the officer reached that conclusion based on "the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of [his] tattoos." *Ibid.*[5]

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[5] The government also submitted, for *in camera* review, State Department documents containing sensitive information describing the basis for the consular officer's belief that Asencio-Cordero was a member of MS-13. App., *infra*, 12a-13a & n.19. The district court did not rely on that *in camera* material in its summary judgment ruling. *Id.* at 59a n.12.

In March 2021, the district court granted summary judgment to the government. App., *infra*, 42a-72a. The court adhered to its earlier ruling that the citation of Section 1182(a)(3)(A)(ii) was insufficient standing alone. *Id.* at 57a-58a. But the court found that the McNeil Declaration supplied a further factual explanation: the consular officer's finding that Asencio-Cordero was a member of MS-13, "a recognized transnational criminal organization." *Id.* at 58a-59a; see *id.* at 60a. Because the denial was therefore based on a facially legitimate and bona fide reason, the court ruled that consular nonreviewability precludes respondents' challenges to the Department's decision. *Id.* at 64a.

3. A divided panel of the Ninth Circuit vacated and remanded. App., *infra*, 1a-41a.

a. The court of appeals first affirmed the district court's ruling that Muñoz has a protected liberty interest in her husband's visa application sufficient to give rise to certain procedural protections. App., *infra*, 15a-18a. The court adhered to its pre-*Din* precedent holding that, because the Due Process Clause protects "freedom of personal choice in matters of marriage and family life," a U.S. citizen possesses a protected liberty interest in "*constitutionally adequate procedures* in the adjudication of a noncitizen spouse's visa application." *Id.* at 15a-16a (quoting *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008)) (brackets omitted). The court also stated that this Court's decision in *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), had "reinforce[d]" that view. App., *infra*, 16a-17a.

b. Applying the *Mandel* standard, the court of appeals considered whether the government had provided a "facially legitimate and bona fide reason" for the denial of Asencio-Cordero's visa. App., *infra*, 19a. On

appeal, the government had continued to argue that the consular officer's citation of Section 1182(a)(3)(A)(ii) was sufficient under Justice Kennedy's *Din* concurrence and 8 U.S.C. 1182(b)(3). The court acknowledged that Justice Kennedy had found the government's citation of the terrorist-activity provision sufficient in *Din*. App., *infra*, 21a. But the court believed the unlawful-activity provision is different, on the theory that it does not "contain[] discrete factual predicates" because it "does not specify the type of lawbreaking that will trigger a visa denial." *Id.* at 19a.

The court of appeals thus agreed with the district court that the government was required to provide the underlying "factual basis" for the officer's conclusion that the statute applied. App., *infra*, 20a; see *id.* at 21a-22a. The court of appeals further agreed that the explanation in the McNeil Declaration—that the consular officer believed Asencio-Cordero was a member of MS-13—was sufficient. *Id.* at 22a-25a.

c. The court of appeals, however, went on to hold that the necessary factual explanation had not been provided to respondents in a "timely" manner. App., *infra*, 25a-33a. The court reasoned that "due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of [a protected] interest." *Id.* at 29a (citing *Goldberg* v. *Kelly*, 397 U.S. 254, 267-268 (1970)). The court thus determined that the government is required to provide a constitutionally adequate reason for a visa denial, including a further factual explanation if necessary, "within a reasonable time" after the decision itself. *Id.* at 32a; see *id.* at 29a n.33.

Observing that the government had "waited almost three years" after the initial visa denial to provide

respondents with the McNeil Declaration "and did so only when prompted by judicial proceedings," the court of appeals found that the explanation had been untimely. App., *infra*, 25a-26a; see *id.* at 33a. The court declined to decide what would constitute "reasonable timeliness" in future cases, indicating that the cutoff might fall somewhere between 30 days and one year. *Id.* at 33a. The court further concluded that the "failure" to provide a timely explanation resulted in the government's forfeiture of consular nonreviewability—such that the underlying visa decision cannot be "shield[ed] * * * from judicial review," and "[t]he district court may 'look behind' the government's decision." *Ibid.* (citation omitted). The court therefore vacated the judgment and remanded for consideration of the merits of respondents' claims. *Ibid.*

d. Judge Lee dissented. App., *infra*, 34a-41a. He agreed that the government had provided a facially legitimate and bona fide reason for the visa denial, but believed that the majority had "infring[ed] on the Executive Branch's power to make immigration-related decisions" "by grafting a new 'timeliness' due process requirement onto consular officers' duties." *Id.* at 34a. Judge Lee deemed the majority's timeliness requirement "potentially unworkable." *Id.* at 39a; see *id.* at 39a-40a. He also pointed out that the withdrawal of consular nonreviewability on the basis of a delayed explanation was especially unjustified in this case given that, as early as five months after the initial denial, respondents had submitted evidence to the State Department seeking to rebut the apparent conclusion that Asencio-Cordero was a member of MS-13. *Id.* at 38a.

4. The court of appeals denied the government's petition for rehearing en banc. App. *infra*, 90a-91a. Ten judges dissented in two opinions.

a. Judge Bress's dissent, joined by Judge Lee, agreed with the panel dissent and concluded that "the clear legal infirmity in [the panel's] new timing rule—and the confusion it will surely cause—provides more than sufficient reason to conclude * * * that the government should easily prevail." App., *infra*, 91a.

b. Judge Bumatay, whose dissenting opinion was joined in full by six other judges, disagreed with each of the panel majority's three holdings. App., *infra*, 92a-122a. With respect to the first, he explained that the panel erred in "reaffirm[ing]" the Ninth Circuit's "recognition of a U.S. citizen's due process right over an alien spouse's visa denial"—a holding that "reinforces a split with every other circuit to address this issue." *Id.* at 97a; see *id.* at 120a-122a.

Judge Bumatay also disagreed with the panel's holding that the government needed to provide a further factual explanation in addition to citing a statutory ground of inadmissibility. App., *infra*, 112a-113a, 111a-115a. He emphasized that "[o]ther circuits * * * have deferred to the government's citation of valid statutory bars to meet its notice requirements" and that the panel's decision directly conflicts with the D.C. Circuit's intervening decision in *Colindres* v. *United States Department of State*, 71 F.4th 1018, 1024 (2023),[6] which held "that citing the 'unlawful activity' bar alone satis-

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[6] On September 21, 2023, the plaintiffs-appellants in *Colindres* served the government with a petition for a writ of certiorari to review the D.C. Circuit's decision. That petition has not appeared on this Court's public docket as of the time this petition is being finalized.

fies the government's notice obligation." App., *infra*, 95a. Agreeing with the D.C. Circuit, Judge Bumatay concluded that the panel had misinterpreted Justice Kennedy's concurrence in *Din* and disregarded Congress's suspension of the statutory notice requirement when a visa is denied based on a security-related ground in Section 1182(a)(3). *Id.* at 112a-114a.

Finally, Judge Bumatay (in a portion of the opinion joined by Judges Collins, Lee, and Bress in addition to the six others) agreed with the panel dissent that the panel's creation of a novel "timeliness" requirement for preserving the availability of consular nonreviewability is "a serious error," App., *infra*, 116a, that "place[s] new burdens on the Executive's discretion without explaining how it can comply with those burdens," *id.* at 119a.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in all three of its rulings in this case. The Ninth Circuit stands alone, in conflict with several other circuits, in holding that a U.S. citizen has a constitutionally protected liberty interest in the admission of her foreign-national spouse to the United States. This Court previously granted certiorari to settle that conflict in *Kerry* v. *Din*, 576 U.S. 86 (2015), and the issue continues to warrant this Court's review.

In addition, even assuming that a protected interest is implicated here and that limited review is therefore available under the standard in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), the Ninth Circuit erred in ruling that a consular officer's citation of a valid statutory ground of inadmissibility, 8 U.S.C. 1182(a)(3)(A)(ii), is insufficient to provide a "facially legitimate and bona fide reason" for a visa denial. The unlawful-activity bar is materially similar to the terrorist-activity bar at issue in *Din*, and for the reasons explained in Justice

Kennedy's concurring opinion in that case, the Ninth Circuit erred in once again requiring the government to supply a further factual explanation in addition to the statutory basis of inadmissibility. That ruling is the subject of a direct conflict with the D.C. Circuit that warrants this Court's intervention.

Finally, the Ninth Circuit compounded its first two errors by requiring the government to provide its further factual explanation to respondents within a "reasonable time" after the visa denial, or else forfeit the ability to invoke consular nonreviewability. No other circuit has ever imposed such a requirement, for good reason: The Ninth Circuit's new timeliness mandate has no basis in this Court's consular-nonreviewability cases and represents a serious encroachment on the separation of powers. If allowed to stand, it will cause considerable disruption in U.S. consulates.

A. Certiorari Is Warranted To Decide Whether A U.S. Citizen Has A Protected Liberty Interest In The Visa Application Of A Noncitizen Spouse

The Ninth Circuit erred in ruling that a U.S. citizen has a liberty interest, protected under the Fifth Amendment Due Process Clause, that is implicated by the denial of a visa to a noncitizen spouse. This Court granted certiorari in *Din* to address that issue, see *Din*, 576 U.S. at 90 (plurality opinion), but it did not resolve the question and the Ninth Circuit continues to disagree with every other circuit that has decided it.

1. This Court has repeatedly recognized that a nonresident noncitizen abroad has no constitutional rights in connection with his application for a visa to enter the United States, and therefore no constitutional basis to obtain judicial review of a visa denial. See, *e.g.*, *Mandel*, 408 U.S. at 762, 766-768; *Trump* v. *Hawaii*, 138 S. Ct.

2392, 2418-2419 (2018). The Ninth Circuit, however, has concluded that a U.S. citizen is nevertheless entitled to judicial review of her spouse's application as a matter of procedural due process. See, *e.g.*, *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1062 (2008). The Ninth Circuit reaffirmed that conclusion in this case by recognizing a "protected liberty interest in '*constitutionally adequate procedures* in the adjudication of a non-citizen spouse's visa application,'" which the court believed follows from this Court's recognition of a fundamental "'right to marry.'" App., *infra*, 16a (brackets and citations omitted). That was error.

This Court has long recognized that foreign nationals may be denied admission in the political branches' complete discretion, as an exercise of those branches' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Mandel*, 408 U.S. at 766 (citation omitted); see, *e.g.*, *Wong Wing* v. *United States*, 163 U.S. 228, 233 (1896) (reaffirming "[t]he power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention"); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (citation and internal quotation marks omitted).

That plenary authority has been respected even when Congress's choices or the Executive's enforcement decisions prevented family members from residing with each other in the United States. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 539,

543-544, 547 (1950) (upholding Executive's power to deny entry to U.S. citizen's noncitizen spouse based on confidential "security reasons" without providing a hearing); see also *Fiallo*, 430 U.S. at 798 (explaining that "we have no judicial authority to substitute our political judgment for that of the Congress," even when "statutory definitions deny preferential status to parents and children who share strong family ties"). As Judge Bumatay's dissent explained, recognizing "a 'liberty interest' for a U.S. citizen over a visa denial" would "directly conflict[] with the political branches' plenary authority" in this area. App., *infra*, 120a-121a.

There is, of course, a fundamental liberty interest in the "rights to marital privacy and to marry and raise a family." *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring); see *Washington* v. *Glucksberg*, 521 U.S. 702, 720 (1997) ("[T]he 'liberty' specially protected by the Due Process Clause includes the right[] to marry."). But a visa denial does not infringe the right to marry. "[T]he Federal Government here has not attempted to forbid a marriage." *Din*, 576 U.S. at 94 (plurality opinion). Nor has it "refused to recognize [Muñoz's] marriage" or to afford the marriage full legal effect. *Id.* at 101. And it has not prohibited a married couple from living together or otherwise intruded on their "marital privacy." *Griswold*, 381 U.S. at 495 (Goldberg, J., concurring). Instead, it has simply exercised its sovereign authority to deny admission to a noncitizen. Muñoz's fundamental right to marry does not entail a right to compel the United States to admit her noncitizen spouse.

For similar reasons, the court of appeals' emphasis on this Court's post-*Din* decision in *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), see App., *infra*, 16a-17a, is

mistaken. In that case, the Court reaffirmed its precedents holding that "the right to marry is protected by the Constitution." 576 U.S. at 664. But the Court did not implicitly resolve a question in the distinct spousal immigration context that the *Din* Court had specifically left open only eleven days earlier. See *Din*, 576 U.S. at 102 (Kennedy, J., concurring in the judgment). And as the court of appeals acknowledged, *Obergefell* was "reiterat[ing] longstanding precedent that 'the right to marry is a fundamental right inherent in the liberty of the person.'" App., *infra*, 16a (citation omitted). As explained, that long-recognized right is not implicated here.

The court of appeals additionally noted that U.S. citizens have a liberty interest in "residing in their country of citizenship," App., *infra*, 17a (citing *Agosto* v. *INS*, 436 U.S. 748, 753 (1978)), and reasoned that the "cumulative effect" of a visa denial to a foreign spouse is to force the citizen to choose between "one fundamental right" and "another," *id.* at 17a-18a. But "[n]either [Muñoz's] right to live with her spouse nor her right to live within this country is implicated here." *Din*, 576 U.S. at 101 (plurality opinion). In insisting otherwise, the court of appeals misunderstood the "simple distinction between government action that directly affects a citizen's legal rights . . . and action that is directed against a third party and affects the citizen only indirectly or incidentally." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 767 (2005) (quoting *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 788 (1980)).

This Court recognized "[o]ver a century ago" that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon*, 447 U.S. at 789. That

principle holds even where those incidental effects impose substantial hardships on marital or other family relationships. "[M]embers of a family," for example, "may suffer serious trauma" if an "errant father" is sentenced to prison, but those family members "surely * * * have no constitutional right to participate in his trial or sentencing." *Id.* at 788. The same is true here.

2. As the government explained when successfully seeking certiorari in *Din*, see Pet. at 18-21, *Din*, *supra* (No. 13-1402), the Ninth Circuit's recognition of a U.S. citizen's constitutional interest in immigration decisions affecting a noncitizen spouse conflicts with numerous decisions from other courts of appeals. In the years after *Din* failed to resolve the question, that conflict has not dissolved; to the contrary, courts on both sides have reaffirmed their positions.

For example, in *Bangura* v. *Hansen*, 434 F.3d 487 (2006), the Sixth Circuit ruled that the plaintiffs (a U.S. citizen and his noncitizen wife) failed to allege a liberty interest in a spousal immigration petition that would allow them to state a procedural due process claim. See *id.* at 495-497. The court accepted that plaintiffs "have a fundamental right to marry," but explained that "[a] denial of an immediate relative visa does not infringe upon" that right. *Id.* at 496. And after *Din*, Chief Judge Sutton's opinion for the court in *Baaghil* v. *Miller*, 1 F.4th 427 (6th Cir. 2021), reaffirmed that U.S. citizens "do not have a constitutional right to require the National Government to admit noncitizen family members into the country." *Id.* at 433-434.

Similarly, in *Swartz* v. *Rogers*, 254 F.2d 338, cert. denied, 357 U.S. 928 (1958), the D.C. Circuit considered a U.S. citizen's claim that her husband's deportation burdened her constitutional "right, upon marriage, to

establish a home, create a family, [and] have the society and devotion of her husband." *Id.* at 339. The D.C. Circuit rejected that argument, pointing out that "deportation would not in any way destroy the legal union which the marriage created"; the "physical conditions of the marriage may change, but the marriage continues." *Ibid.* And since the Ninth Circuit's decision below, the D.C. Circuit has reaffirmed its position, explaining that "'[m]arriage is a fundamental right,'" but "a citizen's right to marry is not impermissibly burdened when the government refuses her spouse a visa." *Colindres* v. *United States Dep't of State*, 71 F.4th 1018, 1021 (2023) (quoting *Obergefell*, 576 U.S. at 673).

Decisions from the First, Second, Third, and Fifth Circuits have reached the same conclusion in visa-denial, removal, and other immigration contexts. See, *e.g.*, *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (rejecting U.S. citizen's claim of constitutional interest in noncitizen spouse's relief from deportation and explaining that the federal government "has done nothing more than to say that the residence of one of the marriage partners may not be in the United States"), cert. denied, 402 U.S. 983 (1971); *Burrafato* v. *United States Dep't of State*, 523 F.2d 554, 554-557 (2d Cir. 1975) (rejecting argument that "the constitutional rights of a citizen wife had been violated by denial of her alien husband's visa application without reason" and declining to apply *Mandel*), cert. denied, 424 U.S. 910 (1976); *Bakran* v. *Secretary, United States Dep't of Homeland Sec.*, 894 F.3d 557, 564-565 (3d Cir. 2018) (agreeing, based on "Congress's plenary authority to set the conditions for an alien's entry into the United States," that a U.S. citizen does not have "a constitutional right to have his or her alien spouse reside in the United States"); *Bright* v.

Parra, 919 F.2d 31, 34 (5th Cir. 1990) (per curiam) ("United States citizen spouses have no constitutional right to have their alien spouses remain in the United States").[7] That conflict warrants this Court's review.

B. Certiorari Is Warranted To Review The Ninth Circuit's Requirement That The Government Do More Than Cite A Valid Statutory Ground of Inadmissibility To Explain A Visa Denial

The Court should also review the Ninth Circuit's further ruling that, assuming a liberty interest supports a judicial inquiry into a visa denial in this context, a consular officer's citation of the unlawful-activity bar in 8 U.S.C. 1182(a)(3)(A)(ii) does not qualify under *Mandel* as a "facially legitimate and bona fide reason," 408 U.S. at 770, to explain the denial. The Ninth Circuit's decision contravenes *Mandel* and Justice Kennedy's concurrence in *Din* applying that limited standard of review to a materially similar statutory provision. It also overrides Congress's determination, in 8 U.S.C. 1182(b)(3), that consular officers need not provide specific explanations when denying visas on security-related grounds. And it squarely conflicts with the D.C. Circuit's intervening decision in *Colindres* regarding a visa denial based on the very same statutory ground of inadmissibility.

1. a. The *Mandel* standard represents a "modest exception" to the rule of consular nonreviewability. *Baaghil*, 1 F.4th at 432. Under *Mandel*, when the

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[7] Since *Din*, some circuits have avoided deciding the question, instead applying *Mandel* and ruling in the government's favor. See *Del Valle* v. *Secretary of State*, 16 F.4th 832, 838, 840 n.3, 841 (11th Cir. 2021); *Sesay* v. *United States*, 984 F.3d 312, 315-316 & n.2 (4th Cir. 2021); *Yafai* v. *Pompeo*, 912 F.3d 1018, 1021 (7th Cir. 2019) (Barrett, J.).

government provides a "facially legitimate and bona fide reason" to explain a visa denial, a court may "neither look behind the exercise of that discretion, nor test it by balancing its justification against the [constitutional] interests of those who seek" the applicant's admission. *Mandel*, 408 U.S. at 770. The second question presented in *Din*—as in this petition—was whether the government's citation of a valid statutory ground of inadmissibility, standing alone, was sufficient to meet that standard. See 576 U.S. at 102 (Kennedy, J., concurring in the judgment). In *Din*, Justice Kennedy and Justice Alito concluded that it was. *Ibid.*

The decision below accordingly focused on Justice Kennedy's analysis in *Din* to assess whether the citation of Section 1182(a)(3)(A)(ii) was sufficient in this case. App., *infra*, 3a & n.3, 19a-21a.[8] But the court of appeals misinterpreted that opinion. It seized upon Justice Kennedy's statement that the government did

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[8] As the opinion in *Din* that supported the judgment on the narrowest grounds, Justice Kennedy's concurrence is controlling on the lower courts under *Marks* v. *United States*, 430 U.S. 188, 193 (1977). See, *e.g.*, App., *infra*, 3a & n.3; see also *Trump* v. *Hawaii*, 138 S. Ct. at 2440 (Sotomayor, J., dissenting) (calling the *Din* concurrence "controlling"). This Court has not always treated such opinions as equally controlling on this Court as a matter of horizontal stare decisis. See, *e.g.*, *Hughes* v. *United States*, 138 S. Ct. 1765, 1771-1772 (2018) (deciding an issue on which this Court had failed to reach a majority in *Freeman* v. *United States*, 564 U.S. 522 (2011), without first deciding which of the *Freeman* opinions had been controlling under *Marks*); cf. *United States* v. *Duvall*, 740 F.3d 604, 611 n.2 (D.C. Cir. 2013) (Kavanaugh, J., concurring in denial of rehearing) (noting that "[w]hen the Supreme Court itself applies *Marks*, it is not bound in the same way that lower courts are"). Regardless of whether Justice Kennedy's concurrence is formally binding or merely persuasive, the government's citation of Section 1182(a)(3)(A)(ii) in this case satisfies the concurrence's analysis.

not have to provide a factual explanation in addition to the citation of the terrorist-activity bar in Section 1182(a)(3)(B) because that provision "specifies discrete factual predicates." *Din*, 576 U.S. at 105; see App., *infra*, 3a, 19a. The court of appeals then reasoned that the unlawful-activity bar in Section 1182(a)(3)(A)(ii) does not have "discrete factual predicates" because the provision is not limited to a specified type of lawbreaking. App., *infra*, 19a-20a.

That conclusion is mistaken. As the D.C. Circuit recently explained, Section 1182(a)(3)(A)(ii) *does* "specif[y] a factual predicate for denying a visa: The alien must 'seek[] to enter the United States to engage ... [in] unlawful activity.'" *Colindres*, 71 F.4th at 1024 (quoting 8 U.S.C. 1182(a)(3)(A)(ii)) (second and third sets of brackets in original).[9]

It is true that different kinds of lawbreaking could serve as the basis for a finding that the statutory bar applies. But that was also the case with respect to the terrorist-activity bar in *Din*. See *Colindres*, 71 F.4th at 1024-1025. As Justice Kennedy acknowledged—and as the dissent in *Din* emphasized—the terrorist-activity bar has ten subsections, with many cross-references, covering a wide variety of terrorism-related grounds of inadmissibility. See 576 U.S. at 105; see also *id.* at 113-

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[9] In this case, the court of appeals stated that the government had "abandoned the argument that the statute at issue here contains discrete factual predicates." App., *infra*, 19a. As Judge Bumatay explained in his dissent from denial of rehearing, that was wrong: "In both the district court and the answering brief in [the court of appeals], the government repeatedly argued that citing § 1182(a)(3)(A)(ii) was sufficient because that provision contained adequate factual predicates." *Id.* at 111a; see Gov't C.A. Br. 15-16, 20-21, 25-28.

114 (Breyer, J., dissenting) (noting that Section 1182(a)(3)(B) sets forth "not one reason, but dozens," which "cover a vast waterfront of human activity"). Justice Kennedy nevertheless declined to require the government to be any more specific about which ground supported the visa refusal, even though Din may have had very little idea what finding had been made regarding her husband's inadmissibility. See *id.* at 105-106.

Instead, as Judge Bumatay's dissent correctly explained, Justice Kennedy's concurrence was simply contrasting the terrorist-activity bar—which required the consular officer to make *some* kind of fact-based finding—with the wholly discretionary basis for the waiver denial that was at issue in *Mandel*. App., *infra*, 112a; see *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment). Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's decision that a noncitizen is not eligible for a visa must be tethered to the legal provisions that define such ineligibility. See, *e.g.*, 8 U.S.C. 1182(a), 1201(g). In other words, when a consular officer cites an inadmissibility provision that requires a fact-based determination, the citation itself "indicates" that the government "relied upon a bona fide factual basis for denying a visa." *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment).

Because a citation of Section 1182(a)(3)(A)(ii) thus supplies a facially legitimate and bona fide reason within the meaning of the *Din* concurrence and *Mandel*, the Ninth Circuit was wrong to require the government to provide any further explanation of the basis for its finding that Asencio-Cordero is inadmissible. If there were any doubt, this Court dispelled it in *Trump* v.

Hawaii, when it explained that "[i]n *Din*, Justice Kennedy reiterated that respect for the political branches' broad power over the creation and administration of the immigration system meant that the Government need provide only a statutory citation to explain a visa denial." 138 S. Ct. at 2419 (citation and internal quotation marks omitted).

b. In addition to contravening this Court's cases, the court of appeals' holding also conflicts with a federal statute, 8 U.S.C. 1182(b)(3)—a provision that the court did not even mention. See App., *infra*, 114a-115a (Bumatay, J., dissenting from denial of rehearing).

Section 1182(b)(3) provides that if a consular officer bases a visa refusal on any of the security-related grounds in Section 1182(a)(2) or (3)—including the unlawful-activity ground at issue here—then the officer is not obligated to provide "timely written notice" of the specific basis for the refusal. 8 U.S.C. 1182(b)(1) and (3). Congress enacted that protection out of concern that releasing such information to foreign-national applicants could have serious law-enforcement or national-security consequences. See H.R. Rep. No. 383, 104th Cong., 1st Sess. 101-102 (1995); see also *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment). Such concerns are not eliminated when the noncitizen happens to have a U.S.-citizen spouse. Yet without even acknowledging Section 1182(b)(3), the Ninth Circuit has countermanded Congress's "considered judgment" based on its own weighing of the costs and benefits in this "sensitive area." *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment). The court of appeals' implicit nullification of a federal statute in this context is itself reason for this Court to step in. See *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001) (noting the "heightened

deference to the judgments of the political branches with respect to matters of national security").

2. The Ninth Circuit's requirement that the government provide a further factual explanation under these circumstances also diverges from its sister circuits.

As noted, the holding in this case directly conflicts with the D.C. Circuit's decision in *Colindres* regarding the same unlawful-activity ground of inadmissibility. That court squarely held that, under the limited *Mandel* standard of review, "the Government need only cite a statute listing a factual basis for denying a visa," and it found that the government had done so by citing Section 1182(a)(3)(A)(ii). *Colindres*, 71 F.4th at 1020; see *id.* at 1024 (explaining that Section 1182(a)(3)(A)(ii) supplies "a factual predicate for denying a visa"). All members of the D.C. Circuit panel acknowledged the Ninth Circuit's contrary decision. See *id.* at 1024; see also *id.* at 1028 (Srinivasan, C.J., concurring in part and concurring in the judgment) (noting the majority's creation of a circuit split).[10]

In addition to that square conflict regarding the government's invocation of Section 1182(a)(3)(A)(ii), the decision below stands in significant tension with other circuits' approach to the *Mandel* standard. See App., *infra*, 95a-96a (Bumatay, J., dissenting from denial of rehearing). No other court of appeals in a post-*Din* case has ever faulted the government for failing to provide a further factual explanation when citing a statutory ground of inadmissibility in Section 1182(a). See *id.* at 96a. And two other circuits, taking their cue from

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[10] Chief Judge Srinivasan disagreed with the majority's decision to reach this question, but indicated that he "might well side with [his] colleagues if it were necessary to decide." *Colindres*, 71 F.4th at 1028 (concurring in part and concurring in the judgment).

Justice Kennedy and this Court's later paraphrase of his *Din* opinion in *Trump* v. *Hawaii*, have held that "a 'statutory citation' to the pertinent restriction, without more, suffices." *Baaghil*, 1 F.4th at 432 (citation omitted); see *Sesay* v. *United States*, 984 F.3d 312, 316 (4th Cir. 2021) (Wilkinson, J.) ("The Supreme Court has unambiguously instructed that absent some clear directive from Congress or an affirmative showing of bad faith, the government must simply provide a valid ineligibility provision as the basis for the visa denial."); cf. *Yafai* v. *Pompeo*, 924 F.3d 969, 970 (7th Cir. 2019) (Barrett, J., respecting the denial of rehearing) ("The Supreme Court has held that, absent a showing of bad faith, a consular officer need only cite to a statute under which the application is denied.").

In the absence of a definitive resolution of the threshold question whether any form of review should take place at all, see pp. 16-22, *supra*, the State Department will be under different notice obligations depending on where a visa applicant's U.S.-citizen spouse files suit. This Court has previously stepped in when the Ninth Circuit required the government to provide the "factual allegations" underlying its security-related inadmissibility determinations, see *Din* v. *Kerry*, 718 F.3d 856, 861 (2013), vacated, 576 U.S. 86 (2015), and the Court should do so again here.

C. The Ninth Circuit's Decision To Condition Consular Nonreviewability On A Novel And Vague Requirement For Timely Notice Independently Warrants Review

Finally, even assuming that a visa refusal could implicate a U.S. citizen's due-process rights *and* that a consular officer must provide a further factual explanation when refusing such a visa under Section 1182(a)(3)(A)(ii), the court of appeals badly erred in

holding that the State Department must provide that additional explanation within a "reasonable time" after the denial or else forfeit the rule of consular nonreviewability in later litigation about the decision. App., *infra*, 28a-33a. Even if the court were correct in asserting that "receiving timely notice of the reason for the [visa] denial is essential for effectively challenging an adverse determination," *id.* at 31a, but see p. 30, *infra*, a failure to receive the *Mandel*-required explanation within a particular timeframe cannot justify the Ninth Circuit's unprecedented willingness to permit judicial review of the merits of the denial.

As the three dissents in this case all emphasized, the Ninth Circuit's requirement that the government provide a *Mandel*-compliant "facially legitimate and bona fide" reason for a visa denial within a set period of time after the decision is entirely unprecedented; neither this Court nor any other circuit has ever imposed such a condition on the government's ability to invoke consular nonreviewability in court. See App., *infra*, 94a, 96a, 115a, 118a-119a (Bumatay, J., dissenting from denial of rehearing); see also *id.* at 34a, 36a, 39a (Lee, J., dissenting); *id.* at 91a (Bress, J., dissenting from denial of rehearing). Nor does the requirement have any statutory basis. To the contrary, Congress specifically *exempted* consular officers from the obligation to provide "timely written notice" of the ground for an inadmissibility decision that is based on Section 1182(a)(3)(A)(ii). 8 U.S.C. 1182(b)(3); see App., *infra*, 117a-118a (Bumatay, J., dissenting from denial of rehearing).

The Ninth Circuit grounded its novel timeliness requirement in what it described as "core due-process requirements," invoking *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)—a decision about the process due when a State

terminates public-assistance benefits. App., *infra*, 28a; see *id.* at 29a, 31a. But *Goldberg* is inapposite. In that case, the Court emphasized that the public-assistance benefits were "a matter of statutory entitlement for persons qualified to receive them," *Goldberg*, 397 U.S. at 262, and held that "timely and adequate notice" was necessary to enable a recipient to mount a "'meaningful'" pre-termination challenge, *id.* at 267-268 (citation omitted).

Here, by contrast, there is no statutory entitlement to a visa, and consular nonreviewability forecloses any argument that an applicant is entitled to a "meaningful" review of a denial. See pp. 3-5, *supra*. Nor is *Mandel*'s "deferential standard" meant to enable U.S. citizens to "'probe and test the justifications'" of entry decisions. *Trump* v. *Hawaii*, 138 S. Ct. at 2419 (citation omitted). Again, Justice Kennedy's analysis in *Din* illustrates the point: He declined to require the consular officer to cite a specific subsection within the terrorist-activity bar even though providing such information would have enabled Din to "more easily * * * mount a challenge to her husband's visa denial." 576 U.S. at 105-106 (Kennedy, J., concurring in the judgment).

The penalty that the court of appeals imposed for a violation of its new timeliness requirement—that "the government is not entitled to invoke consular nonreviewability to shield its visa decision from judicial review"—is even more ill-considered. App., *infra*, 33a. The court had already found the reason given in the McNeil Declaration—that the consular officer believed Asencio-Cordero to be a member of MS-13—sufficient under *Mandel*. *Id.* at 22a, 23a-24a. Unless the delay suggests impermissible bad faith (which none of the courts below found, see *id.* at 61a-64a; *id.* at 36a (Lee,

J., dissenting)), there is no basis for instructing the district court to "look behind" the determination, *id.* at 33a (citation omitted), or for requiring the State Department to meet a substantively higher standard to sustain the visa refusal itself. See *id.* at 91a (Bress, J., dissenting from denial of rehearing). The court of appeals' new rule thus represents a remarkable encroachment upon the separation of powers. See *id.* at 36a, 39a (Lee, J., dissenting); *id.* at 96a, 116a (Bumatay, J., dissenting from denial of rehearing).[11]

D. The Questions Presented Are Important And This Court's Intervention Is Necessary

In addition to their legal infirmities, the Ninth Circuit's holdings will have serious adverse consequences for visa adjudications in U.S. consulates worldwide and for the Nation's national-security interests. Those considerations also counsel strongly in favor of this Court's review on all three questions presented.

If left to stand, the decision below will cause considerable disruption in U.S. consulates around the world as the State Department attempts to adhere to the Ninth Circuit's requirement that consular officers timely provide additional explanations for a subset of visa denials implicating the rulings in this case. Compounding that "confusion," App., *infra*, 40a (Lee, J., dissenting); *id.* at 91a (Bress, J., dissenting from denial of rehearing), the

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[11] The court of appeals' imposition of that remedy was especially unjustified in this case, where there was evidence that respondents had long been aware of the likely basis for the consular officer's citation of Section 1182(a)(3)(A)(ii)—the belief that Asencio-Cordero was a member of MS-13. Around five months after the original visa denial, respondents sent the State Department a declaration from a "gang expert" contesting that very conclusion. App., *infra*, 38a (Lee, J., dissenting); see *id.* at 7a.

court of appeals declined to set the outer bounds of what it considers "timely"—even while suggesting that the deadline could be as short as 30 days. See *id.* at 33a; see also *id.* at 119a (Bumatay, J., dissenting from denial of rehearing).

In addition, many visa refusals—including the refusal in this case, cf. note 5, *supra*—are based on law-enforcement-sensitive information or intelligence information. See, *e.g.*, 8 U.S.C. 1105(a) (directing the State Department to "maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States"); 8 U.S.C. 1187(c)(2)(F) (describing agreements with foreign countries to share information about individuals who "represent a threat to the security or welfare of the United States or its citizens"); 8 U.S.C. 1722 (requiring a data system "to provide current and immediate access to information in databases of Federal law enforcement agencies and the intelligence community that is relevant to determine whether to issue a visa"); 8 U.S.C. 1733 (establishing "terrorist lookout committees" within U.S. missions abroad to increase information-sharing).

A judicially imposed requirement that the government disclose the underlying factual basis for a security-related ground of inadmissibility to the applicant or the applicant's spouse is likely to have a chilling effect on the willingness of interagency and foreign-government partners to share information. Certain foreign sources of information, in particular, may have strong interests in avoiding any action that might tend to reveal their

assistance to the United States. And the Ninth Circuit's timeliness requirement only heightens those risks, since the government can no longer wait to divulge sensitive information in an *in camera* submission in court (which was already an inadequate solution, see *Din*, 576 U.S. at 106 (Kennedy, J., concurring in the judgment)).

For those reasons, and because of the serious errors in the Ninth Circuit's decision and the conflicts it creates with the decisions of this Court and of other courts of appeals, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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