No. 23-334

In the

Supreme Court of the United States

DEPARTMENT OF STATE, ET AL.,
Petitioners,

v.

SANDRA MUÑOZ, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

Erwin Chemerinsky
Law Building 215
University of California,
Berkeley School of Law
Berkeley, California 94720
510-642-6483
echemerinsky@berkeley.edu

Charles Roth
National Immigrant Justice Center
224 S. Michigan Ave.
Suite 600
Chicago, Illinois 60604
312-660-1613
croth@heartlandalliance.org

Eric Lee
Counsel of Record
Diamante Law Group
24225 W. 9 Mile Rd.
Suite 140
Southfield, Michigan 48033
213-943-4555
elee@diamantelaw.com

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

When a U.S. citizen marries a non-citizen residing in the U.S. without full legal status, the law creates a path that involves applications both inside the U.S. and at a consulate abroad. The U.S. citizen spouse begins the application process by filing a visa petition; the citizen spouse is known as the "petitioner" throughout the process. The citizen must share financial, medical, and personal information sufficient to allow the government to verify that the marriage is bona fide. In cases where the non-citizen spouse originally entered the U.S. without inspection by immigration authorities, the non-citizen must also acquire a provisional waiver for their unlawful presence. To acquire a waiver, the couple must show the citizen spouse would suffer "extreme hardship" if her spouse were forced to live abroad. The process requires a total payment of $1620 in fees to the federal government. The citizen spouse must also demonstrate financial means to support the non-citizen spouse and must share sensitive financial data with the federal government. The citizen spouse must execute a binding contract with the Government called an "affidavit of support." Finally, at the last step, the non-citizen spouse travels to a consulate abroad where he is interviewed by a consular officer in an adversarial setting without the ability to present a defense, view the underlying evidence or cross-examine witnesses.

The questions presented are:

1. Does any statutory or constitutional provision bar the citizen petitioner spouse or the non-citizen beneficiary spouse from bringing suit in

the United States to challenge agency action in regards to their request for the beneficiary spouse to be granted a visa to return to the United States?

2. Does a U.S. citizen spouse have standing to challenge unlawful government acts resulting in the permanent exclusion of their non-citizen spouse?

3. If executive branch officials deny admittance for a reason allegedly unauthorized by Congress, can any constitutional or statutory rights possessed by either spouse be vindicated in a court of law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

In 2005, Salvadoran citizen Luis Asencio-Cordero entered the United States and met Sandra Muñoz, a U.S. citizen. They married on July 2, 2010. Asencio-Cordero has no criminal record in any country, and he has a minor U.S. citizen daughter who lives in Nevada.

Muñoz filed an immigrant-relative petition to allow Asencio-Cordero to become a lawful permanent resident ("LPR"). The government granted that petition after investigating their marriage and determining it was bona fide. Asencio-Cordero also filed an application for a provisional waiver of his unlawful presence pursuant to 8 U.S.C. 1182(9)(B)(2). The government granted that petition, too, finding Muñoz would "experience extreme hardship" if her husband were denied admission.

Most of this process took place while both Respondents were living the U.S. and entailed correspondence with agency offices and officials located only in the U.S. The final step for Asencio-Cordero was to travel to El Salvador for an interview at the U.S. Consulate, which took place on May 28, 2015. Despite Asencio-Cordero's lack of *any* criminal history—not even an arrest—the consular officer deemed him inadmissible under 8 U.S.C. 1182(a)(3)(A)(ii), which makes a non-citizen inadmissible if the officer has reason to believe he "seeks to enter the United States to engage solely, principally, or incidentally in…unlawful activity." Even after being pressed by Respondents, the consular officer refused to provide *any* reasoning or factual basis to justify this conclusion, depriving Respondents

of the chance to overcome the inadmissibility finding. These actions contravene protocols laid out in the Foreign Affairs Manual ("FAM") and federal regulations.

More than three years later and only after Asencio-Cordero filed the underlying lawsuit, the government disclosed that the consular officer had found that Asencio-Cordero was likely a gang member because of his tattoos. Far from showing gang membership, Asencio-Cordero's four tattoos are expressive of his intellectualism and deeply-held Catholic faith. The tattoos depict (1) Our Lady of Guadalupe, (2) a profile of psychologist Sigmund Freud, (3) an artistic "tribal" pattern and (4) an image of theatrical masks. Respondents submitted an affidavit from a gang expert explaining these tattoos are not gang related, but the government's claim that it "considered" this evidence was found "implausible" by the Ninth Circuit, given that the affidavit was submitted months after the government putatively considered it. Pet. App. 12a, n 19. The district court found as a factual matter that the tattoos were "random" and "not gang related," but nevertheless granted summary judgment to the government on Respondents' challenge to the visa denial under a judge-made exception to the Administrative Procedure Act ("APA") known as the "doctrine of consular non-reviewability." This purported exception to the APA makes *all* consular visa denials unreviewable, regardless how flawed. The Ninth Circuit then reversed, and though it did not dispute that there is a "doctrine of consular non-reviewability," it held that its application on these facts violated the Due Process Clause.

The government offers no convincing reason for this Court to review that decision. The Petition seeks review of an interlocutory order, and the Ninth Circuit held the government abandoned its second Question Presented. The government overstates the differences between the decision below and *Colindres v. United States*, 71 F.4th 1018 (D.C. Cir. 2023), as the two courts reached different conclusions largely due to meaningful factual distinctions between the cases. To the extent there is any one-to-one conflict between these two circuits, it is so nascent and narrow that further percolation is required.

The government is also wrong on the merits. This Court need not disturb its longstanding precedent holding that U.S. citizens like Muñoz have the right to judicial review over visa denials that implicate their fundamental rights and that non-citizens who are long-term U.S. residents do not forfeit due process rights when they leave the U.S. under color of law. The government points to no statute stripping jurisdiction over consular decisions, and it does not explain why the APA should not apply.

The government largely skips over a key question: whether there even is a doctrine of consular non-reviewability. Though the government claims "this Court has long recognized" the doctrine, pet. app. (I), 4, that is simply wrong. Granting certiorari would require this Court to take on not just the questions the government presents, but also the logically predicate question of whether the doctrine of consular non-reviewability exists at all.

Even if there were such a doctrine, the Ninth Circuit correctly held that applying it on these facts

violates the Due Process Clause. The court of appeals also determined the visa denial implicated Muñoz's fundamental right to marriage.

LEGAL FRAMEWORK

The provisions of the Immigration and Nationalities Act ("INA") governing admissibility are relevant here. *See* 8 U.S.C. 1101 *et seq*. These provisions are based on a deeply rooted history and tradition in U.S. immigration law recognizing and prioritizing spousal immigration. Immediate relatives are exempted from certain numerical limitations on immigration, including for purposes of adjusting to lawful permanent residency status. 8 U.S.C. 1151(b)(2)(A)(i). Non-citizen spouses of a U.S. citizen "shall be classified as an immediate relative under [1151(b)] if the consular officer has received from [the Department of Homeland Security, ("DHS")] an approved Petition to Classify Status of an Alien Relative for Issuance of an Immigrant Visa, filed on the alien's behalf by the U.S. citizen and approved in accordance with [8 U.S.C. 1154], and the officer is satisfied that the alien has the relationship claimed in the petition." 22 C.F.R. 42.21(a).

A. Acquiring Lawful Permanent Residency by Proving "Bona Fide" Marriage

For a U.S. citizen to petition for her spouse to receive a visa and adjust to lawful permanent residency, the citizen must submit "evidence of United States citizenship" and "must also provide evidence of the claimed relationship." 8 C.F.R. 204.2(2). The petitioner bears the burden of establishing the marriage is "bona fide" by a preponderance of

evidence. 8 U.S.C. 1154(a), 8 C.F.R.103.2(b). Section 1154(c) states, "[N]o petition shall be approved if…the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws."

In the immigration context, petitioners and beneficiaries must establish far more than the fact they have gone through "formal marriage ceremonies," which is all that is required to receive the *civil* benefits of marriage. To receive the *immigration* benefits of marriage, spouses must also show they "live together as husband and wife." *Lutwak v. U.S.*, 344 U.S. 604, 607 (1953). The Board of Immigration Appeals ("BIA") has relied on *Lutwak* to adjudicate challenges to I-130 denials. The BIA has held, "[T]he living arrangements of the parties" is "particularly significant" for showing a shared life. *Matter of Peterson*, 12 I&N Dec. 663 (BIA 1968). In some cases, immigration agents even perform home visits, literally entering the marital home to assess whether the petitioner sleeps in the same bed as the beneficiary and whether the couple intermingle their personal effects. *See Matter of P. Singh*, 27 I&N Dec. 598, 600 (BIA 2019); *Sallam v. Hansen*, No. 1:20-CV-1731, 2022 WL 462814, at *3 (N.D. Ohio Feb. 15, 2022). Once a petitioner and beneficiary establish the petitioner is a U.S. citizen and that their marriage is bona fide, USCIS will grant the I-130. The Petitioner must then submit Form I-864, Affidavit of Support, to accept both financial responsibility for the beneficiary and legal responsibility should the beneficiary receive means-tested public benefits. As the instructions state, "[t]his affidavit is a contract between a sponsor and the U.S.

government." *See* Instructions for Form I-864; *see also* 8 U.S.C. 1183a(a)(1)(B), (C).

B. Waiving Unlawful Presence by Proving "Extreme Hardship" to U.S. Citizen Spouse

Next, non-citizen spouses who entered the U.S. without proper inspection are eligible to become LPRs if they obtain a provisional waiver for their unlawful presence. An unlawful presence waiver can be granted if an officer determines the U.S. citizen spouse will "experience extreme hardship" if their spouse is deemed inadmissible, and the officer must make their determination based on the totality of circumstances. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999). USCIS's instructions state that hardship derives from a U.S. citizen either (a) remaining in the U.S. without their non-citizen spouse or (b) abandoning the U.S. to cohabitate with their spouse. *See* Instructions for Form I-130, Petition for Alien Relative. The BIA has held that "extreme hardship" is an extremely high bar and requires far more than commonplace hardship caused by separation. *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (BIA 1984); *See also* USCIS Policy Manual, Volume 9, Part B.

C. Final Step to Lawful Permanent Residency: Non-citizen Spouse's Interview

After USCIS deems a marriage bona fide and grants a provisional waiver based on a finding of extreme hardship, the non-citizen spouse must travel to their country of origin for an interview with the U.S. consulate as the last stage in the process of adjusting

to LPR status. *See* 22 C.F.R. 42.51(a), 42.62(a), (b). The petitioning (citizen) spouse receives notice as well and is generally expected to attend. U.S. State Department, "Immigrant Visa for a Spouse of a U.S. Citizen (IR1 or CR1)" available at https://tinyurl.com/ynsmvy2r.

D. Overcoming Inadmissibility with Exculpatory Evidence

The federal regulations provide applicants with an opportunity to overcome inadmissibility determinations. 22 C.F.R 42.81(e) states: "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."

Denials based on 1182(a)(3)(A)(ii) are also subject to special rules enumerated in the FAM. For example, consular officers "are required to make clear factual findings in the case notes, setting forth in detail all the facts supporting a reason to believe that the applicant is a member of a criminal organization…and [the officer] must identify the organization of which they are a member." 9 FAM 302.5-4(B)(2)(g). "[A]lthough the basis for applying (a)(3)(A)(ii) to active members of criminal organizations makes it a de facto permanent ground of ineligibility," applicants may overcome this presumption by "demonstrat[ing] to [a consular officer's] satisfaction and with clear and compelling evidence, that they are no longer an active member of the organization." 302.5-4(B)(2)(c).

E. The Administrative Procedure Act

Under the plain text of the APA, these proceedings are subject to judicial review. The Department of State qualifies as an agency under 5 U.S.C. 551(1), and no statute precludes judicial review of consular decisions. 5 U.S.C. 701(a)(1). Though the APA prohibits review of actions "committed to agency discretion by law," the government acknowledges the consular officer's decision here was non-discretionary. Pet. App. 25.

COURSE OF THE PROCEEDINGS BELOW

A. The Government Approved Respondents' Immediate Relative Petition and Unlawful Presence Waiver but Denied Admission Without Explanation

Respondents submitted an immigrant relative petition, Form I-130, which the government granted. Muñoz then sponsored Asencio-Cordero and submitted an "affidavit of support" to the State Department's National Visa Center (Form I-864). By its terms, once Muñoz signed that form and it was submitted to the Government, "these actions create a contract between you and the U.S. Government." USCIS, *Affidavit of Support Under Section 213A of the INA* 6, https://www.uscis.gov/sites/default/files/document/forms/i-864.pdf. Muñoz thus agreed to be financially responsible for her husband. Asencio-Cordero was interviewed at the U.S. Consulate in El Salvador on May 28, 2015. *Id.* at 5a. During his interview, Asencio-Cordero denied ever being associated with a criminal gang. *Id.* at 46a.

On or about December 28, 2015, the consulate denied Asencio-Cordero's visa application. *Id.* at 44a-45a. The notice stated he was inadmissible under 8 U.S.C. 1182(a)(3)(A)(ii), but provided no additional information. His counsel made several attempts to determine the factual basis, to no avail. *Id.* On January 20, 2016, Congressperson Judy Chu wrote the State Department on Muñoz's behalf asking for the factual basis for the denial. *Id.* at 6a. Consul Landon Taylor responded on January 21, 2016, by repeating the reference to 8 U.S.C. 1182(a)(3)(A)(ii) and providing nothing further. *Id.* at 45a.

B. Respondents Blindly Attempted to Submit Exculpatory Evidence to Overcome the Inadmissibility Finding

Desperate to correct what they believed was a mistake, Asencio-Cordero and Muñoz submitted an affidavit on or shortly after April 27, 2016 from Humberto Guizar, a gang expert, who reviewed photographs of each of Asencio-Cordero's tattoos. *Id.* at 7a, n.9.

The declaration stated: "I have reviewed photographs of all of the tattoos that are located on Mr. Asencio's body" and "most of the tattoos that I observed are merely commonly known images, such as images of Catholic icons, clowns and other non-gang related tattoos… Mr. Luis Ernesto Asencio is not a gang member, nor is there anything that I am aware of that can reasonably link him to any known criminal organization." 17-cv-37, Dkt. 77-1 Exhibit M at 4.

On May 18-19, 2016, the government informed Respondents that the denial would not be reversed

and "there is no appeal," although the one-year period in which Respondents could present exculpatory evidence under the federal regulations had not yet passed *Id*. at 8a.

C. Respondents Sued for Declaratory Relief

On December 28, 2016, the one-year period expired. One week later, on January 3, 2017, Muñoz and Asencio-Cordero filed a complaint for declaratory relief in the U.S. District Court for the Central District of California. *Id*. at 42a. The district court denied Petitioners' motion to dismiss on December 11, 2017. *Id.* at 43a. On November 8, 2018, over three years after the consular interview and nearly three years after the denial, the State Department produced a declaration by attorney advisor Matt McNeil, who asserted: "[B]ased on the in-person interview, a criminal review of Mr. Asencio-Cordero, and a review of the [sic] Mr. Asencio-Cordero's tattoos, the consular officer determined that Mr. Asencio-Cordero was a member of a known criminal organization identified in 9 FAM 302-5-4(b)(2), specifically MS-13." *Id*.

D. The Government's Response to Interrogatories

In August 2020, during discovery, the government responded to Respondents' interrogatories, stating: "The consular officer considered specific information that was obtained from law enforcement operations, along with the other information already identified for the court in the McNeil Declaration, and determined there was a reason to believe Mr. Asencio was a member of MS-13." *Id.* at 12a. The response did not indicate that the officer ever considered the

exculpatory evidence, however. In response to the question, "Was the declaration of Humberto Guizar taken into consideration before determining that Asencio[-Cordero] was a member of MS-13?," Petitioners answered, "yes," even though the affidavit was dated five months after the denial, rendering this answer inaccurate. *Id*. On July 27, 2020, Respondents filed a motion for summary judgment, and on August 10, Petitioners filed a cross-motion for summary judgment and an *ex parte* application for leave for *in camera* review of records purportedly related to Asencio-Cordero's visa denial. *Id*. at 11a-12a. The court granted this latter motion in part and denied it in part, ruling that no law enforcement privilege applied but that the court would allow the State Department to produce documents *ex parte* for *in camera* review. *Id*. at 13a.

E. The District Court Granted the Government's Motion for Summary Judgment

In March 2021, the district court granted the government's motion for summary judgment. *Id.* at 42a-72a. The court held that Muñoz's fundamental right to marriage was implicated by the visa denial. *Id.* at 56a. Applying this Court's tests in *Kleindienst v. Mandel*, 408 U.S. 753 (1972) and *Kerry v. Din*, 576 U.S. 86 (2015) (Kennedy, J., concurring), the district court also held that a mere citation to 1182(a)(3)(A)(ii) does not satisfy *Mandel's* "facially legitimate and bona fide test" because unlike the statute at issue in *Din*, the text of 1182(a)(3)(A)(ii) does not contain "discrete factual predicates" that specify the type of activity proscribed by that subsection sufficient to notify the

applicant of the factual basis of the denial. *Id.* at 56a-58a. The district court held that the government was therefore obligated to provide a "fact in the record" that provides a "facial connection" between Asencio-Cordero and 1182(a)(3)(A)(ii). *Id.* at 60a-61a. However, the court concluded that the government met its burden through the McNeil Declaration combined with the purported law enforcement report, which provided a "facial connection" to 1182(a)(3)(A)(ii) and contained sufficient facts to show the officer had a reason to believe Asencio-Cordero was a member of MS-13. *Id.* at 60a. In so ruling, the district court said it considered the material submitted *in camera* in issuing its ruling. *Id.* at 60a-61a, n. 13.

F. The Ninth Circuit Reversed and Remanded for Further Proceedings

The Ninth Circuit vacated and remanded. *Id.* at 1a-41a. The Ninth Circuit affirmed the district court's ruling that Muñoz has a protected liberty interest in her husband's visa application. *Id.* at 15a-18a. Reasserting that a U.S. citizen has a liberty interest in "residing in their country of citizenship," pet. app. 17a (citing *Agosto v. INS*, 436 U.S. 748, 753 (1978) and *Ng Fung Ho v. White*, 259 U.S. 276 (1922)), the Ninth Circuit held that the denial violated Muñoz's fundamental rights "because it conditions enjoyment of one fundamental right (marriage) on the sacrifice of another (residing in one's country of citizenship)." Pet. App. 17a-18a.

The Ninth Circuit then determined the text of 1182(a)(3)(A)(ii) did not contain a discrete factual predicate like 1182(a)(3)(B), the terrorism statute

analyzed by Justice Kennedy in his concurrence in *Din*. The court of appeals noted, "Unlike surrounding provisions, 8 U.S.C 1182(a)(3)(A)(ii) does not specify the type of lawbreaking that will trigger a visa denial." Pet App. 19a. The Ninth Circuit, like the district court, thereby determined the government was obligated to provide a fact on the record showing Asencio-Cordero was inadmissible, *id.* at 20a, and held that by providing Respondents with the McNeil Declaration, the government satisfied the test. *Id*. at 22a.

The court of appeals concluded, however, that the more than one-year delay between the time the government denied Asencio-Cordero's visa and the time it provided Respondents with the factual basis for the denial violated Muñoz's rights under the Due Process Clause. The court of appeals referenced Justice Kennedy's opinion in *Din* discussing "the 'constitutional adequacy' of the notice given," *id*. (quoting *Din*, 576 U.S. at 106 (Kennedy, J., concurring), and cited *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) for "holding that 'timely and adequate notice' of the reasons underlying the deprivation of a right guaranteed by the Due Process Clause is a key requirement of due process." Pet. App. 28a. The court of appeals held that because the federal regulations require consular officers to accept exculpatory evidence up to one year after the visa application, decisions are not "reasonably timely" if given long after this one-year deadline. Pet. App. 30a-31a; *see* 8 C.F.R. 42.81(b), (e). The court vacated and remanded the district court's decision, leaving open several issues, including whether the government acted in bad faith, whether the district court violated Respondents' due process rights by relying on information presented

ex parte and *in camera* and whether 1182(a)(3)(A)(ii) is unconstitutionally vague. On July 14, 2023, the Ninth Circuit denied the government's petition for rehearing *en banc*. Pet. App. 91a.

REASONS FOR DENYING THE PETITION

I. REVIEW IS PREMATURE BECAUSE THE ORDER IS INTERLOCUTORY AND ANY APPARENT CIRCUIT SPLIT IS NARROW AND FACT-INTENSIVE

A. The Court Does Not Generally Review Interlocutory Orders

The Ninth Circuit held that "the government is not entitled to invoke consular non-reviewability to shield its visa decision from judicial review" and that "[t]he district court may 'look behind' the government's decision." *Id*. at 33a (quoting *Mandel*, 408 U.S. at 770). It concluded: "We therefore vacate the judgment of the district court and remand for the district court to consider the merits of [Respondents'] claims." *Id*. The lower court resolved one aspect of the case, but the precise effect of its holding may become clarified on remand. The interlocutory nature of the Ninth Circuit's decision suggests that the case is not yet ripe for this Court's review.

It is a well-established rule that "except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application." *Id*. As Justice Roberts explained in *Abbott v. Veasey*, certiorari is not proper when a "claim is in an interlocutory posture, having been remanded

for further consideration" and where petitioners can raise the issues "after an entry of final judgment" because "[t]he issues will be better suited for certiorari review at that time." 137 S. Ct. 612, 613 (2017). *See also Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535 (2012) (Alito, J. concurring) (denying certiorari where "no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take"); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court");*Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (this Court "generally await[s] final judgment in the lower courts before exercising … certiorari jurisdiction.")

This case does not warrant deviation from the Court's ordinary practice of deferring review until a final judgment is rendered. On remand, the district court will have to resolve complex factual and legal questions about the circumstances of the visa denial, including whether the government actually considered Respondents' exculpatory evidence. The district court will also balance the government's interests against the impact on Respondents' rights.

Justice Brennan's rationale applies here: "allowing the case to proceed to its final disposition might produce a result that makes it unnecessary to address an important and difficult constitutional question. Surely we should discipline ourselves … not to address constitutional issues if there is a way properly to avoid doing so." Justice Brennan, *Some Thoughts on the*

Supreme Court's Workload, 66 Judicature 230, 231-32 (1983).

The interlocutory nature of the review might also tend to obscure some of the issues. The Court explained in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959), "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [issue in question] can await a day when the issue is posed less abstractly." As such, the Court should not grant certiorari.

B. The Difference in Outcomes Between *Muñoz* and *Colindres* Is the Product of Meaningful Factual Differences Between the Cases Which Limits the Significance of the Split

The difference in outcomes between the Ninth Circuit and D.C. Circuit's decisions is due largely to the meaningful factual differences between the cases. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

In *Colindres*, the consular officer performed a consular interview and promptly informed the non-citizen spouse that the government needed additional information about his criminal background. The plaintiffs submitted that information as well as an affidavit from a gang expert asserting the non-citizen spouse's tattoos were not gang related. The officer

then conducted a second interview to investigate the matter further, rather than ignoring the affidavit as they did in this case. The government immediately informed the plaintiffs in *Colindres* that the visa was denied under 1182(a)(3)(A)(ii) and *also* provided the factual basis for the denial: the consular officer's belief that the applicant was a gang member. 71 F.4th at 1020.

The instant case presents diametrically different outcome-determinative facts. Here, the government waited three years after Asencio-Cordero's interview to inform him it believed he was a gang member. The government claims it "considered" exculpatory evidence but the Ninth Circuit found this answer "dubious" given the Guizar Declaration was submitted months after the government putatively considered it. Pet. App. 12a, n.19. If the facts in *Colindres* were applied to the standards enumerated by the Ninth Circuit here, the court below would have denied relief because no due process violation would have occurred.

The decisions could have conflicted to the extent the D.C. Circuit became the first appellate court to hold that 1182(a)(3)(A)(ii) does contain discrete factual predicates. That question is not properly before this Court, however, because the Ninth Circuit determined the government abandoned that argument below. *Id.* at 19a.

Other purported conflicts listed by the Solicitor General are not conflicts at all. Although the D.C. Circuit held that no marital right exists, Petitioners vastly overstate the differences between the Ninth Circuit's decision and other circuit decisions on this question.

The decision below does not conflict with the Sixth Circuit's decisions in *Bangura v. Hansen*, 434 F.3d 487 (2006) or *Baaghil v. Miller*, 1 F.4th 427 (2021), as Petitioners claim. Pet. App. 20. In *Bangura*, the Sixth Circuit recognized a U.S. citizen spouse could obtain APA review of a visa denial and that procedural due process rights apply in challenges to visa denials. In both cases the U.S. citizen immediate relatives of non-citizen applicants were told in writing that the immigration petitions were denied because of evidence of past fraud. *Bangura*, 434 F.3d at 492, *Baaghil*, 1 F.4th at 434.

Petitioners also claim the decision below conflicts with *Swartz v. Rogers*, 254 F.2d 338 (D.C. Cir. 1957), though *Swartz* merely stands for the rule that a U.S. citizen spouse cannot challenge her husband's *deportation*. Pet. App. 20. The Ninth Circuit's decision does not alter this clearly-established rule; and that rule does not render the issue unreviewable, since non-citizens have the right to an administrative hearing to determine whether the non-citizen is deportable.

C. Any Narrow Split Is Months Old and Further Percolation Is Required

To the extent there is a split, it is hardly six months old. This Court should allow the decisions below to percolate further before ruling.

In *Gilliard v. Mississippi*, the Court denied certiorari because at least six Justices believed they "should postpone consideration of the issue until more state supreme courts and federal courts have experimented with substantive and procedural

solutions to the problem and until a consensus emerges on how best to deal with" the admittedly important issues involved. 464 U.S. 867 (1983) (Marshall, J., dissenting) (denying certiorari even where postponement would result in execution of prisoner). Many Justices have explained the rationale of allowing for lower courts to consider the issues more fully before this Court issues a nationally binding rule. Justice Brennan wrote, "There is already in place, and has been ever since I joined the Court, a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983). Justice Stevens also explained:

> Although one of the Court's roles is to ensure the uniformity of federal law, we do not think that the Court must act to eradicate disuniformity as soon as it appears. . . Disagreement in the lower courts facilitates percolation—the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to eradicate disuniformity when further percolation or experimentation is desirable

California v. Carney, 471 U.S. 386, 400 n. 11 (1985) (Stevens, J., dissenting). *See also McCray v. New York*, 461 U.S. 961, 963 (1983); *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

The Solicitor General's insistence that any nascent, narrow split must be resolved immediately contradicts the position the Solicitor General routinely takes in cases involving splits involving even more than two circuits. Several months ago, the Solicitor General took the position that "this Court's review of [a] 2-1 conflict would be premature." *See* Brief for Respondent at 21, *Diaz-Rodriguez v. Garland* (No. 22-863). *See also* Brief for Respondents at 14-15 in *Missouri v. Yellen*, 139 S. Ct. 734 (2023) (No. 22-352) ("[R]eviewing the merits of Missouri's challenge to the offset provision would be premature at this juncture given the lack of percolation in the courts of appeals"); at 20 in *Moore v. U.S.A.*, cert. granted, (No. 22-800) ("At the very least, then, this Court should await further percolation before resolving the [mandatory repatriation tax's] constitutionality") (case pending). *See also* Brief for Respondent at 5 in *Cooke v. U.S.A.*, 139 S. Ct. 2748 (2019) (No. 18-1260); at 23 in *Teva Pharmaceuticals Inc. v. Superior Court of California, Orange County*, 135 S. Ct. 1152 (2015) (No. 13-956); at 8 in *CSU, L.L.C. v. Xerox Corp.*, cert. denied, 121 S. Ct. 1077 (2001) (No. 00-62); at 9 in *United Airlines, Inc. v. EEOC,* cert. denied, 133 S. Ct. 2734 (2013) (No. 12-707); at 24 in *Robinson v. Dep't of Educ.*, 140 S. Ct. 1440 (2020) (No. 19-512); at 24-25 in *Arapahoe Cty. Public Airport Auth. v. F.A.A.*, cert. denied (Nos. 1-226 and 1-230); and in the U.S. Government's Amicus Curiae Brief at 17, cert. granted, in *Lawson et al. v. FMR LLC, et al.*, 571 U.S. 429 (2014) (No. 12-3).

II. THE NINTH CIRCUIT'S DECISION POSES NO THREAT OF DISRUPTION

Petitioners' concerns that the Ninth Circuit's decision is producing "disruption" and may lead to the disclosure of sensitive national security information are not grounds for review. Pet. App. 31.

First, the issues and facts here arise only rarely, as only three appellate decisions have ever been published relating to 1182(a)(3)(A)(ii). The decision does not apply to any inadmissibility ground except the catch-all "any other unlawful activity" section and will have no impact whatsoever on terrorist-related or other grounds.

Second, the ruling below does not require consulates to identify any concrete fact in the record supporting their denials, so there will be no unwanted disclosures. The Ninth Circuit held the consulate need only state the general manner in which it believes that a particular visa applicant implicates the "any other unlawful activity" language of the statute. The contents of the purported law enforcement report remained secret below, with no risk of any unwanted disclosures.

The government suggests that so-called consular non-reviewability implicates national security. Even if one were to assume good faith for executive invocations of national security, *but cf. Korematsu v. United States*, 323 U.S. 214 (1944), those general concerns are misplaced in application here. There is no suggestion that this family's separation implicates national security, and the lower court interpreted the statute to exclude terrorism grounds.

The government suggests that the lower court decision could be harmful to information sharing with foreign governments. This alarming contention, if anything, cuts in favor of judicial review. Any presumption of regularity applicable to U.S. government officials is unlikely to apply to foreign governments, which may use law enforcement for other purposes. *See Sealed Petitioner v. Sealed Respondent*, 829 F.3d 379, 386 (5th Cir. 2016) (foreign government invoked terrorism and law enforcement mechanisms pretextually against members of disfavored clan). If, as the Petition suggests, consular suspicions arose from Salvadoran government sources, this highlights the importance of giving American citizens and families the opportunity to respond. The State Department reports that El Salvador's gang crackdown and "state of exception" has led to arbitrary detention and false accusations of gang membership. U.S. Department of State, *El Salvador 2022 Human Rights Report 9*, available at https://tinyurl.com/y2chw3mt [this is https://www.state.gov/wp-content/uploads/2023/02/415610_EL-SALVADOR-2022-HUMAN-RIGHTS-REPORT.pdf] ("Local news sources and human rights groups alleged security forces frequently arrested persons for gang membership based solely on anonymous denunciations through a government hotline [or] for having tattoos"); *see also id.* at 10 (police union complaining of daily quota); *see generally* Amnesty International, *El Salvador: One year into state of emergency, authorities are systematically committing human rights violations* (Apr. 3, 2023), available at https://tinyurl.com/237xj36y. The suggestion that a U.S. citizen could be arbitrarily denied the

opportunity to live in her country with her spouse based on unsupportable allegations of gang membership from a foreign government illustrates the shocking breadth of the government's argument.

III. THE NINTH CIRCUIT'S DECISION IS CORRECT ON THE MERITS

A. The Ninth Circuit Correctly Applied this Court's Precedent Regarding Due Process and Timely Notice to the Distinct Context of Spousal Immigration

In determining that a U.S. citizen petitioner has the right to timely notice of the factual reason for the denial of her husband's visa, the Ninth Circuit relied on *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 U.S. 319, 347 (1976). *See also Greene v. McElroy*, 360 U.S. 474 (1959). The government cites no case holding that basic notions of fair notice that apply to receipts of welfare benefits and those dismissed from employment by government oversight boards should not apply when an agency permanently banishes a U.S. citizen-petitioner's spouse with longstanding ties to the U.S.

B. The Ninth Circuit Correctly Applied Justice Kennedy's Test in *Din* to the Specific Statutory Section in Question Here

The Ninth Circuit determined as a factual matter that the government "wisely abandoned" its second Question Presented regarding whether 1182(a)(3)(A)(ii) contains discrete factual predicates. Pet. App. 19a. The government offers no reason for the Court to review that factual question. *See Graver*

Tank & Nfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949). Even if the Court were to forgive the government's abandonment, the Ninth Circuit correctly applied Justice Kennedy's *Din* concurrence in ruling that the catch-all subsection of the inadmissibility statute does not contain discrete factual predicates built-in to its statutory language. In contrast to 1182(a)(3)(A)(ii)'s catch-all "any other unlawful activity" language, courts of appeals have held that several other sections of the inadmissibility statute do specify such predicates. Courts of appeals often *also* require the government provide a fact on the record, even where the statutory language clearly specifies the activity leading to the inadmissibility finding.

In *Yafei v. Pompeo*, 912 F.3d 1018 (7th Cir. 2019), the government explained that the applicant had been involved in child smuggling, sufficiently indicating the type of activity the applicant had engaged in to be deemed inadmissible under 1182(a)(6)(E). That statute, unlike 1182(a)(3)(A)(ii), does specify the type of activity that leads to inadmissibility: "alien smuggling." In *Hazama v. Tillerson*, 851 F.3d 705 (7th Cir. 2017), it was undisputed that the applicant had thrown rocks at Israeli soldiers and was found inadmissible under 1182(a)(3)(B) (terrorism-related grounds), which contains built-in factual predicates. In *Morfin v. Tillerson*, 851 F.3d 710 (7th Cir. 2017), the applicant had been indicted for possession of cocaine with intent to distribute, rendering her inadmissible under 1182(a)(2)(C) (controlled substance traffickers). *Cardenas v. United States*, 826 F.3d 1164 (9th Cir. 2016) is the only other appellate decision involving the "any other unlawful activity"

provision beyond the Ninth Circuit's decision below and the D.C. Circuit's decision in *Colindres*, and in *Cardenas* the court of appeals explained there was a fact on the record connecting the non-citizen to 1182(a)(3)(A)(ii): he had been arrested in the presence of a known Sureño gang member. *Muñoz* also comports with *Din* and *Mandel*. In *Din*, the government not only provided a citation to a statute that includes discrete factual predicates (1182(a)(3)(B)), but it also explained that the applicant had been a civil servant in the Afghan government at the time the Taliban controlled the Afghan state. 576 U.S. at 105. In *Mandel*, the Court determined the visa denial was proper because the applicant had previously violated the terms of a visa which had prohibited him from soliciting funds while in the U.S. 408 U.S. at 769.

C. The Ninth Circuit Correctly Applied this Court's Precedent Regarding the Right to Marriage in the Distinct Context of Spousal Immigration

The government admits there is a "distinct spousal immigration context" compared with the purely civil setting. Pet. App. 19. The Ninth Circuit correctly applied this Court's precedent to the distinct immigration context and determined that Muñoz's fundamental right to marriage was implicated by the visa denial.

Petitioners assert the "long-recognized right [to marriage] is not implicated here" because Muñoz and Asencio-Cordero remain married on paper. Pet. App. 18-19. This argument is unavailing. While a marriage in the civil context may be valid so long as it is legal in

form only, the government required Respondents to meet burdens much higher than this to establish their marriage was "bona fide" in order to receive a grant of their I-130 immediate relative petition.

Here, Muñoz and Asencio-Cordero were obligated to subject themselves to a highly invasive process to prove to the government that they "lived together as husband and wife." *Lutwak v. U.S.*, 344 U.S. 604, 607 (1953). For immigration purposes, the issue is not whether the couple is married on paper, "[t]he central question is whether the bride and groom *intended to establish a life together* at the time they were married." *Matter of McKee*, 17 I&N Dec. at 333. (Emphasis added.)

The government investigated Respondents' marriage and their personal lives to an extent that citizens would consider shockingly intrusive in the civil context. Muñoz was required to present proof of her cohabitation with Asencio-Cordero, proof of their common finances, and other evidence of their "shared life" together. The process gives the government the power to enter their bedroom and investigate their belongings. *See Matter of P. Singh*, 27 I&N Dec. 598 (BIA 2019). Muñoz was also required to prove she would suffer "extreme hardship" if Asencio-Cordero were either not physically with her in the U.S. or if she was forced to move to El Salvador. To meet this burden, she shared highly personal medical, financial and family information that would contravene this Court's ruling in *Griswold v. Connecticut*, 381 U.S. 479 (1965) if required in the civil marriage context. Here, the fact that the government approved Respondents' I-130 petition and unlawful presence waiver amounts

to a legal acknowledgment that its actions have both (a) transformed Muñoz's marriage from a "bona fide" one into a mere paper formality, and (b) directly caused her extreme hardship.

The government errs in claiming the Ninth Circuit's ruling conflicts with *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005) and *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980). Pet. App. 19-20. Muñoz remains very much "directly" affected by her husband's visa denial. The government likens Muñoz's liberty interest to that of a child claiming a right "to participate in his trial or sentencing" in preventing their parent's incarceration, *id.* at 20, but Muñoz was statutorily obligated to "participate" in her husband's I-130 application and provisional unlawful presence waiver; after all, she was the petitioner. The government's determination that its actions would cause "extreme hardship" to her shows the impact was as direct as can be. Pursuant to statute, she was obliged to sign a "contract" with the U.S. Government when she filled out her affidavit of support for her husband's visa petition.

It is this Court's long-established precedent that the right to marriage and family unity includes the right to "establish a home and bring up children," *Meyer v. Nebraska*, 262 U.S. 390 (1923). Citizens have the right to decide one's place of residence with their immediate family. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Spouses have the right to dissolve their marriage in order to *end* cohabitation. *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971). In *Loving v. Virginia*, the Virginia anti-miscegenation law which the Lovings had violated barred "any white and

colored person" from "cohabitating as man and wife" after being married in the District of Columbia. 388 U.S. 1, 4 (1967). The state law did not technically prohibit the couple from becoming married in another state, but it did determine they could not live together in Virginia. *Id*. This is also consistent with the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), which was decided 11 days after *Din*. In *Obergefell* this Court reiterated longstanding precedent that "the right to marry is a fundamental right inherent in the liberty of the person" and subject to protection under the Due Process Clause. 576 U.S. at 675.

D. The Visa Denial Violated Respondents' Prudential and Statutory Rights

"It is a familiar rule of administrative law that an agency must abide by its own regulations." *Ft. Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 654 (1990). In the immigration context, this Court held that an immigration agency "must comply, at a minimum, with its own internal procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). *See also Mantena v. Johnson*, 809 F.3d 721, 730 (2d. Cir. 2015) (Calabresi, J., holding that that the non-citizen beneficiary of an I-140 immigrant petition had "Article III and prudential, as well as statutory, standing to raise her claims in the federal courts" because of procedural defects.)

The visa denial here was the product of serious procedural defects. The government failed to "identify the organization of which they are a member" at the time of the denial per 9 FAM 302.5-4(B)(2). This deprived Respondents of the ability to present clear

and compelling evidence that Asencio-Cordero is not "a member of the organization," since it did not notify Respondents of the organization to which the government claimed he belonged. 9 FAM 302.5-4(B)(2)(c). More importantly, the government's over one-year-delay in providing even the name of the gang to which Asencio-Cordero purportedly belonged, as well as its dishonest response to an interrogatory inquiring whether it considered the exculpatory evidence before making the finding, shows it failed to follow 22 C.F.R. 42.81(e), which guarantees Respondents' the opportunity to overcome the inadmissibility ground within that time period. The government slammed the door on Respondents before the end of the one-year time limit set in 22 C.F.R. 42.81(e), telling them: "there is no appeal." Pet. App. 8a.

Both Respondents also have prudential and statutory standing, since they were each "adversely affected or aggrieved by agency action." 5 U.S.C. 702. This test "is not meant to be especially demanding" because of Congress's "evident intent" when enacting the APA "to make agency action presumptively reviewable." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). The government cannot claim its actions are non-reviewable under 8 U.S.C. 1252 which strips jurisdiction for "discretionary" decisions, because its Petition acknowledges the visa denial here was not discretionary: "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 non-citizen is not eligible for a visa must be tethered to the legal provisions that define

such ineligibility." Pet. App. 25. This is required by statute and regulation. See 8 U.S.C. 1201 and 22 CFR 42.81.

IV. THIS COURT HAS NOT ACKNOWLEDGED THE "DOCTRINE OF CONSULAR NON-REVIEWABILITY" AND SHOULD NOT DO SO HERE

This Court has not previously acknowledged the purported "doctrine of consular non-reviewability." In *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Court noted that the government "rel[ied] on the doctrine of consular nonreviewability" but held that the government failed to "point to any provision of the INA that expressly strips the Court of jurisdiction" to review visa denials, adding that it was not prepared to accept the doctrine. 138 S. Ct. at 2407. The Court then issued a decision "notwithstanding consular nonreviewability…" *Id.*

This Court has long expressed hesitancy to strip judicial review over executive and administrative decision making. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-99 (1991). In *Bowen v. Michigan Academy of Family Physicians*, a suit seeking judicial review under the APA, this Court explained, "We begin with the strong presumption that Congress intends judicial review of administrative action. From the beginning our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that

such was the purpose of Congress." 476 U.S. 667, 670 (1986) (citation omitted).[1]

This Court should decline to accept the government's invitation to adopt any "doctrine" of non-reviewability here. The government's atextual argument flouts the plain language of the APA, whose default rule providing for judicial review of agency action applies unless another statute expressly bars judicial review. 5 U.S.C. 559; *see also Shaughnessy v. Pedreiro*, 349 U.S. 48, 50-51 (1955) and *Brownell v. Tom We Shung*, 352 U.S. 180 (1956). In *Webster v. Doe*, this Court by a 7-1 margin explicitly rejected Justice Scalia's dissent arguing the plenary power doctrine was incorporated as a limitation on the APA's protection of the right to judicial review. 486 U.S. 592, 603 (1988). *See also Darby v. Cisneros*, 509 U.S. 137, 146 (1993), where the Court rejected a "doctrine" created by the lower courts without statutory support and held that "dicta [that] might be claimed to lend support to [the government's] interpretation" cannot

---

[1] The Solicitor General argues 1182(b)(3) contradicts the Ninth Circuit's holding there is a due process violation where notice is not timely. But this would mean the government has no obligation to provide *any* notice, which is inconsistent with Justice Kennedy's *Din* concurrence. Congress cannot by statute take away procedural protections guaranteed by the Due Process Clause, and Congress clearly did not intend for 1182(b)(3) to apply to 1182(a)(3)(A)(ii) specifically. In 8 U.S.C. 1225(c)(1), Congress denied the right to a hearing to all non-citizens subject to expedited removal under the clauses contained in 1182(a)(3)(A) "other than clause ii." This shows Congress viewed the "any other unlawful activity" language of clause (ii) as sufficiently vague to require a hearing even for expedited removal, and also did not believe this clause gives rise to security concerns.

trump "the text of the APA." This Court affirmed the D.C. Circuit's decision in *Abourezk v. Reagan* holding that the APA applies to challenges to visa denials. 785 F.2d 1043 (D.C. Cir 1986) (R.B. Ginsburg, J.) *aff'd by an equally divided Court*, 484 U.S. 1 (1987) (per curiam). *See also Rusk v. Cort*, 359 U.S. 367, 379-380 (1962); *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948); *Delgadillo v. Carmichael*, 332 U.S. 388 (1947).

APA review is available even if the agency has crossed no constitutional line; it is sufficient to allege legal error. 5 U.S.C. 706(2). The government cites no case holding that consular non-reviewability overrides the APA. No statute precludes judicial review of consular decisions. The government notes that the procedural statute creates no private right of action, *see* 6 U.S.C. 236(f); but this only means that review is limited to that permitted by the APA, which provides a cause of action. *Lexmark, Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014). Congress made visa revocations unreviewable, but this supports review here; after all, if no consular decisions were reviewable, then 8 U.S.C. 1201(i) would be surplusage. In short, there is no clear and convincing evidence in the statutory text of Congress's intention to preclude review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 n.2 (1967) (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946)). The judge-made "doctrine of consular non-reviewability" cannot bar judicial review here.

The government cites *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Landon v. Plasencia*, 459 U.S. 21 (1982), to support the existence of the

purported doctrine. As a preliminary matter, the right to marriage was not in question in these cases. There was no spouse in *Mezei*, and the spousal plaintiffs did not raise a claim to marital rights in *Plasencia* or *Knauff*, nor did any plaintiff raise a statutory rights claim or a claim under the APA. These cases therefore do not restrict such rights.

Nevertheless, the government quotes *Plasencia* to assert Asencio-Cordero has no constitutional rights: "[T]his 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.'" Pet. App. 4 (quoting *Plasencia*, 459 U.S. at 32) (emphasis added). In *Plasencia*, however, this Court held that a non-citizen *did* have a due process right to challenge her inadmissibility finding even though she had been convicted of alien smuggling and had lived in the U.S. for half as long as Asencio-Cordero. The Court held that in its prior decisions "[w]e did not suggest that no returning resident alien has a right to due process" and recognized that a returning resident non-citizen's interest in gaining admission is a "weighty one." 459 U.S. at 34. Noncitizen residents "stand to lose the right to stay and live and work in this land of freedom," and be separated from their immediate family. *Id*. at 34. The Court called this "a right that ranks high among the interests of the individual." *Id*. If Mrs. Plasencia had due process rights, then Asencio-Cordero must as well.

Plasencia, *Knauff* and *Mezei* involved non-immigrants arriving at the U.S. border where agents must make immediate decisions based on the limited facts before them. In contrast, the officials working in

offices at the U.S. Consulate in El Salvador had no similar time pressure and were restrained in their actions by regulations and internal policies. Expanding *Knauff*, *Plasencia* and *Mezei* to apply to consular processing would take their reasoning far beyond the original context.

This Court has never held that a non-citizen with a long period of U.S. residency who departs the U.S. for consular processing has no due process rights in that process. "Governmental action abroad is performed under both the authority and the restrictions of the Constitution." *Reid v. Covert*, 354 U.S. 1, 96 (1957). Low-level government officials like consular officers are "like all others bound by the provisions of the Constitution." *Jean v. Nelson*, 472 U.S. 846, 857 (1985). The government fails to cite a single case from this Court showing that either a petitioner or beneficiary forfeits the right to due process when the beneficiary leaves the U.S. to attend an interview at a U.S. consulate abroad. Muñoz is a U.S. citizen who has resided in the United States during the entire process. Asencio-Cordero has substantial voluntary connections to the U.S. and therefore is "invested with the rights guaranteed by the Constitution to all people within our borders." *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

The fact that Asencio-Cordero left the country in order to *strengthen* those voluntary connections does not divest him of his rights. In *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), a U.S. resident who had been granted lawful status by an act of Congress left the U.S. on his own volition and was denied entry upon his return. The Court overturned the denial on

the grounds that it would be "capricious" to deny Chew the right to due process under the Fifth Amendment simply because he was a non-citizen located physically outside the country. The Court explained, "We do not regard the constitutional status which petitioner indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien…" 344 U.S. at 600. "To simplify the issue," the Court explained, "we consider first what would have been his constitutional right to a hearing had he not undertaken his voyage to foreign ports but had remained continuously within the territorial boundaries of the United States." *Id*. at 596. By that logic, it is significant that Asencio-Cordero had due process rights before leaving the U.S. to comply with U.S. law and draw closer to his wife, child and community in the U.S. Under the government's theory, after granting the I-130 petition and I-601A waiver, the government effectively induced Asencio-Cordero into a trap where he forfeited all constitutional protections he previously enjoyed.

Applying these consequences to his brief departure under color of law would be at least in tension with *Rosenberg v. Fleuti* where the Court declined to apply "harsh results" to a brief departure from the country. 374 U.S. 449, 458 (1963). Furthermore, the broad language in *Mezei* and *Knauff* comes from *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), two cases of dubious applicability today. Neither case involved a U.S. citizen plaintiff, and neither provides the government with the authority it claims here vis-

à-vis each Respondent. In *Nishimura Ekiu*, Justice Gray affirmed the denial of entry without judicial review to a Japanese woman who, unlike Respondents here, had never "acquired domicil [sic] or residence within the United States." 142 U.S. at 660. In *Fong Yue Ting*, Justice Gray upheld the deportation of Chinese nationals because they could not produce "at least one white witness" to vouch for them. Referring to these cases, Justice Harlan wrote in *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903): "[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

Should the Court grant certiorari, the questions presented would encompass these complex issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Erwin Chemerinsky
Law Building 215
University of California,
Berkeley School of Law
Berkeley, California 94720
510-642-6483
echemerinsky@berkeley.edu

Charles Roth
National Immigrant Justice
Center
224 S. Michigan Ave.
Suite 600
Chicago, Illinois 60604
312-660-1613
croth@heartlandalliance.org

Eric Lee
Counsel of Record
Diamante Law Group
24225 W. 9 Mile Rd.
Suite 140
Southfield, Michigan 48033
213-943-4555
elee@diamantelaw.com

Counsel for Respondents