No. 17-98

In the Supreme Court of the United States

ESMERALDA Y. MORFIN, ET AL., PETITIONERS

v.

REX W. TILLERSON, SECRETARY OF STATE, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a constitutional challenge to a consular officer's decision refusing an immigrant visa to an alien spouse of a U.S. citizen is foreclosed by *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), and *Kerry* v. *Din*, 135 S. Ct. 2128 (2015), because the consular officer's citation of 8 U.S.C. 1182(a)(2)(C)(i), which renders an alien inadmissible if there is "reason to believe" that the alien "is or has been an illicit trafficker in any controlled substance," constitutes a "facially legitimate and bona fide reason" for refusing the visa. *Mandel*, 408 U.S. at 770.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 851 F.3d 710. The order of the district court (Pet. App. 9a-14a) is not published in the *Federal Supplement* but is available at 2015 WL 13439820.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2017. On May 30, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 19, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien generally is inadmissible to the United States unless he or she presents an immigrant or nonimmigrant visa. 8 U.S.C. 1181(a),

1182(a)(7). When an alien seeks to obtain an immigrant visa on the basis of a family relationship with a U.S. citizen or permanent resident alien, see 8 U.S.C. 1153(a), the citizen or permanent resident must first file a petition for an alien relative with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS), and if the petition is approved, the alien may then apply for the visa, see 8 U.S.C. 1154(a)(1) and (b), 1201-1202, 1204; see generally *Kerry* v. *Din*, 135 S. Ct. 2128, 2131 (2015) (opinion of Scalia, J.) (describing two-step process for immigrant-visa issuance).[1]

The decision to issue or refuse a visa to an alien abroad generally rests with a consular officer in the Department of State. See 8 U.S.C. 1201(a)(1); see also 6 U.S.C. 236(b)-(c) and (f). The applicant has the burden of proof to establish eligibility for a visa "to the satisfaction of the consular officer." 8 U.S.C. 1361. With certain exceptions not relevant here, no visa "shall be issued to an alien" if "it appears to the consular officer" from the application, supporting documents, and in-person interview, if required, "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 alien is ineligible. 8 U.S.C. 1201(g); see 22 C.F.R. 40.6 ("The

[1] The INA and other immigration laws are administered principally by DHS, the Attorney General, and the Department of State. See 8 U.S.C. 1103, 1104. Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of DHS. Some residual statutory references to the Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 542 note, 557; 8 U.S.C. 1551 note.

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). In particular, Section 1182(a)(2) sets forth various "[c]riminal and related grounds" for visa ineligibility. 8 U.S.C. 1182(a)(2). Under that section, an alien is deemed inadmissible if a consular officer knows or has "reason to believe" that the alien

> is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of [T]itle 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so.

8 U.S.C. 1182(a)(2)(C)(i).

As a general matter, a consular officer who refuses an alien's application for a visa "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); see 22 C.F.R. 42.81(b). But if the officer deems the alien inadmissible on "[c]riminal and related grounds" under 8 U.S.C. 1182(a)(2) or on "[s]ecurity and related grounds" under 8 U.S.C. 1182(a)(3), then the statutory written-notice requirement "does not apply." 8 U.S.C. 1182(b)(3).

2. In 2001, petitioner Adrian Ulloa, a citizen of Mexico, was indicted for knowingly and intentionally possessing, with the intent to distribute, more than 500

grams of cocaine, a felony in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. The criminal case against Ulloa was dismissed, and Ulloa denies the charge. *Ibid.*

In 2009, petitioner Esmeralda Morfin, a citizen of the United States, married Ulloa. See Pet. App. 1a. Morfin thereafter filed an immigrant petition for an alien relative (Form I-130) for her husband, which USCIS approved. *Id.* at 1a, 11a. Ulloa returned to Mexico to apply for a visa there. *Ibid.*

In 2014, Ulloa filed an application for an immigrant visa with the U.S. Consulate General in Ciudad Juarez, Mexico. Pet. App. 1a. Following an in-person interview, a consular officer refused Ulloa's application for an immigrant visa on three grounds: (1) conviction for or admission to committing a violation of a law or regulation relating to a controlled substance, under 8 U.S.C. 1182(a)(2)(A)(i)(II); (2) reason to believe the applicant has been involved in drug trafficking, under 8 U.S.C. 1182(a)(2)(C)(i); and (3) having been unlawfully present in the United States for one year or more, under 8 U.S.C. 1182(a)(9)(B)(i)(II). Pet. App. 11a-12a. Ulloa obtained a waiver for the third ground from USCIS (unlawful presence), but no waiver exists for the other two grounds for immigrant visa applicants. *Id.* at 12a. A consular officer subsequently conducted a second interview with Ulloa and reaffirmed the refusal of a visa based on the second ground under Section 1182(a)(2)(C)(i) (reason to believe Ulloa had been involved in drug trafficking) but not on the first ground under Section 1182(a)(2)(A)(i)(II) (conviction for or admission to committing a controlled-substance offense). *Id.* at 12a n.1.

3. a. In 2014, petitioners commenced this action in district court seeking a declaratory judgment that the reasons for the visa refusal were factually incorrect.

Pet. App. 9a. Petitioners alleged that the refusal of a visa to Ulloa violated Morfin's constitutional right to due process. *Id.* at 13a. The district court dismissed petitioners' suit based on *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972). Pet. App. 12a. Under *Mandel*, the court explained, Ulloa, as a nonresident alien, has no constitutional right to entry into the United States. *Id.* at 13a. As to Morfin, assuming without deciding that "[she] had a protectable life, liberty, or property interest here," due process was "satisfied" because "Morfin was notified of a facially legitimate and bona fide reason for the denial of her husband's visa petition" by the citation of 8 U.S.C. 1182(a)(2)(C)(i). Pet. App. 13a-14a (citing *Din*, *supra*).

b. The court of appeals affirmed. Pet. App. 1a-8a. It characterized the district court's decision as dismissing the action for lack of subject-matter jurisdiction under the Administrative Procedure Act (APA), 5 U.S.C. 701(a)(2), on the ground that the decision whether to issue a visa is "committed to agency discretion by law." *Ibid.*; see Pet. App. 2a. The court of appeals held that the district court should not have dismissed petitioners' suit for lack of jurisdiction, but it agreed that petitioners' claims are foreclosed by *Mandel* and *Din*. Pet. App. 2a-8a.

"[F]or more than a hundred years," the court of appeals explained, courts have treated visa decisions as "not subject to judicial review for substantial evidence and related doctrines of administrative law." Pet. App. 2a-3a (citing *Mandel*, 408 U.S. at 765-770). The court of appeals described *Mandel* as addressing a "potential exception" to this rule where exclusion of an alien is alleged to "violate[] the constitutional rights of a U.S. citizen." *Id.* at 3a. In *Mandel*, Congress "had authorized

the Attorney General to waive some speech-related conditions of excludability," and the U.S.-citizen plaintiffs claimed that the Attorney General's exercise of that discretion violated their own First Amendment rights. *Ibid.* *Mandel*, the court noted, "did not decide whether review of a decision" by Executive officials to exclude an alien challenged on such grounds "ever would be proper," because resolving that issue was "unnecessary." *Ibid.* Instead, this Court held that, "when the Executive exercises th[e] power" to exclude aliens "negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests." 408 U.S. at 770; see Pet. App. 3a-4a.

The court of appeals rejected petitioners' contention that *Din* entitled Morfin to obtain review of her due-process challenge to the refusal to issue an immigrant visa to her alien spouse. Pet. App. 3a-6a. In *Din*, a U.S. citizen claimed that she had a due-process right to receive a more extensive explanation for a consular officer's refusal of a visa to her husband, beyond a citation of the statutory ground of inadmissibility for aliens with certain ties to terrorist activities. 135 S. Ct. at 2131 (opinion of Scalia, J.). The Court rejected that claim. See *id.* at 2131-2138 (opinion of Scalia, J.); *id.* at 2139-2141 (Kennedy, J., joined by Alito, J., concurring in the judgment).

Three Justices (Justice Scalia, joined by the Chief Justice and Justice Thomas) concluded that the U.S.-citizen plaintiff had no due-process right concerning the entry of her alien husband. *Din*, 135 S. Ct. at 2131-2138. Justice Kennedy joined by Justice Alito assumed without deciding that a U.S. citizen has a protected liberty

interest in the visa application of her alien spouse, but in their view the U.S.-citizen plaintiff's claim failed under *Mandel* because the government provided a facially legitimate and bona fide reason for denying her husband a visa. *Id.* at 2140-2141. They observed that the government's citation of a statutory ground of inadmissibility involving terrorism indicates that the visa applicant "did not satisfy the statute's requirements." *Id.* at 2140. Justice Kennedy and Justice Alito then stated: "Absent an affirmative showing of bad faith on the part of the consular officer who denied [the] visa—which [the U.S.-citizen plaintiff] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to 'look behind' the Government's exclusion of [the husband] for additional factual details beyond what its express reliance on [the statute] encompassed." *Id.* at 2141. As the court of appeals explained, the concurring Justices in *Din* thus "left things as *Mandel* had left them," and "*Mandel* tells us not to go behind a facially legitimate and bona fide explanation." Pet. App. 6a.

The court of appeals held that petitioners' claim fails for the same reasons as the claim in *Din*. Pet. App. 6a-8a. "The consular officer in Ciudad Juarez gave Ulloa a facially legitimate and bona fide explanation" for denying the visa. *Id.* at 6a. The consular officer cited 8 U.S.C. 1182(a)(2)(C)(i), indicating that Ulloa was inadmissible because the officer "ha[d] reason to believe" that Ulloa "is or has been an illicit trafficker in any controlled substance." *Ibid.*; Pet. App. 6a. And petitioners did not assert that "the consular official [sic] had concluded that the indictment's charges were false" or that "Ulloa had presented strong evidence of innocence that the consular officer refused to consider." Pet. App. 7a. Moreover, the court reasoned, "the record forecloses

any contention that the State Department was imagining things," because Ulloa's prior indictment "conclusively establishes probable cause to believe that the accusation is true." *Id.* at 6a-7a (citing *Kaley* v. *United States*, 134 S. Ct. 1090 (2014)). In any event, the court held, "*Mandel* prevents the judiciary from reweighing the facts and equities," and "the denial of [Ulloa's] visa application is not a question open to review by the judiciary." *Id.* at 8a.

ARGUMENT

Petitioners contend (Pet. 9-21) that the court of appeals adopted an erroneous interpretation of 8 U.S.C. 1182(a)(2)(C)(i), which renders inadmissible an alien whom a consular officer has "reason to believe" is or was involved in illicit drug trafficking, and that its holding implicates a disagreement among the courts of appeals on the meaning of that provision. This case, however, does not present that question. Instead, the court of appeals held that petitioner Morfin's constitutional challenge to the decision to refuse a visa to petitioner Ulloa—an unadmitted, nonresident alien abroad—is foreclosed because the decision rests on a facially legitimate and bona fide reason, and that therefore no further review of the consular officer's decision is available. That conclusion is correct and does not conflict with any decision of another court of appeals. Further review is not warranted.

1. a. The court of appeals correctly determined that petitioners' challenge to the consular officer's denial of a visa to Ulloa is foreclosed by this Court's decisions in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), and *Kerry* v. *Din*, 135 S. Ct. 2128 (2015), and the principles that those cases embody.

i. "The exclusion of aliens is a fundamental act of sovereignty" that the Constitution entrusts to the political

branches. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). "The right to" exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Ibid.* This Court thus "ha[s] long recognized the power to * * * exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)). "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

In accordance with this constitutional foundation, this Court has long recognized Congress's "plenary power to make rules for the admission of aliens," including by establishing statutory grounds of inadmissibility. *Mandel*, 408 U.S. at 766. Indeed, "[t]his Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo*, 430 U.S. at 792 (citation and internal quotation marks omitted). "The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power of this Court to control." *Id.* at 796 (citation omitted). Through the INA, Congress has "confer[red] upon consular officers exclusive authority to review applications for visas * * * subject to the eligibility requirements in the statute and corresponding regulations." *Saavedra Bruno* v.

Albright, 197 F.3d 1153, 1156-1157 (D.C. Cir. 1999). The Department of State's regulations provide that "[a] visa can be refused only upon a ground specifically set out in the law or implementing regulations." 22 C.F.R. 40.6.

To be sure, Congress generally "may, if it sees fit, * * * authorize the courts to" review a decision to exclude an alien based on the eligibility requirements that it has created. *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). Absent such affirmative authorization, however, judicial review of the exclusion of aliens outside the United States is ordinarily unavailable. Cf. *Knauff*, 338 U.S. at 542-547 (holding that the Attorney General's decision to exclude at the border the alien wife of a U.S. citizen "for security reasons" was "final and conclusive"). Courts have distilled from these fundamental and longstanding principles the rule—sometimes referred to in shorthand as "the doctrine of consular nonreviewability"—that the denial or revocation of a visa for an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno*, 197 F.3d at 1159; see *id.* at 1157-1162 (tracing history of nonreviewability doctrine).[2]

Congress has not "sa[id] otherwise," *Saavedra Bruno*, 197 F.3d at 1159, but instead has declined to provide for judicial review of decisions to exclude aliens abroad. It has not authorized any judicial review of visa refusals—even by the alien affected, much less by third parties like Morfin here. *E.g.*, 6 U.S.C. 236(f) ("Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other

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[2] Aliens detained at a port of entry traditionally could obtain limited review through habeas corpus, see *Nishimura Ekiu*, 142 U.S. at 660, but that avenue obviously is unavailable for aliens abroad, who are not in custody.

United States official or employee to grant or deny a visa."); see 6 U.S.C. 236(b)(1) and (c)(1). Congress also has expressly forbidden any "judicial review" of the revocation of a visa (subject to a narrow exception if the alien is in removal proceedings in the United States and the only ground of removal is revocation of the visa, an exception inapplicable to aliens abroad). 8 U.S.C. 1201(i).

Indeed, when this Court once held that aliens physically present in the United States—but not aliens abroad—could seek review of their exclusion orders under the APA, see *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184-186 (1956), Congress intervened to foreclose such review. Congress expressly precluded APA suits challenging exclusion orders and permitted review only through habeas corpus—a remedy that is unavailable to an alien seeking entry from abroad. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651-653 (8 U.S.C. 1105a(b) (1994)).[3] And even in *Tom We Shung*, the Court took it as given that review by aliens abroad was unavailable. See 352 U.S. at 184 n.3 ("We do not suggest, of course, that an alien who has never presented himself at the borders of this country may avail himself of the declaratory judgment action by bringing the action from abroad.").[4]

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[3] Congress subsequently replaced 8 U.S.C. 1105a (1994) with 8 U.S.C. 1252, which similarly curtails review (of what are now termed removal orders) outside a specific process established by statute.

[4] See also *Tom We Shung*, 352 U.S. at 185 n.5 (the omission of language in predecessor bills that review of exclusion orders should be subject to judicial review only in habeas corpus "[wa]s not intended to grant any review of determinations made by consular officers" (quoting S. Rep. No. 1137, 82d Cong., 2d Sess. 28 (1952), accompanying the enactment of the INA)).

To be sure, Congress has created in the APA, 5 U.S.C. 702, "a general cause of action" for "persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.'" *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984) (citation omitted). But that cause of action does not permit review of the denial of entry to an alien abroad because the APA does not displace the general rule barring review of decisions to exclude such aliens. See *Saavedra Bruno*, 197 F.3d at 1157-1162. The APA does not apply at all "to the extent that * * * statutes preclude judicial review," 5 U.S.C. 701(a)(1), and the conclusion is "unmistakable" from the historical context that "the immigration laws 'preclude judicial review' of the consular visa decisions," *Saavedra Bruno*, 197 F.3d at 1160 (citation omitted). In addition, Section 702 itself contains a "qualifying clause" providing that "'[n]othing herein'—which includes the portion of § 702 from which the presumption of reviewability is derived—'affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground.'" *Id.* at 1158 (quoting 5 U.S.C. 702(1)). "[T]he doctrine of consular nonreviewability—the origin of which predates passage of the APA—thus represents one of the 'limitations on judicial review' unaffected by [Section] 702's opening clause granting a right of review to persons suffering 'legal wrong' from agency action." *Id.* at 1160 (citation omitted). In short, Congress has emphatically maintained the bar to judicial review of the denial of entry to aliens abroad. See *id.* at 1157-1162.

ii. The exclusion of aliens abroad typically raises no constitutional questions because aliens abroad lack any constitutional rights regarding entry. "[A]n alien who

seeks admission to this country may not do so under any claim of right"; instead, "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government," and "only upon such terms as the United States shall prescribe." *Knauff*, 338 U.S. at 542; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Mandel*, 408 U.S. at 762.

This Court, however, has twice engaged in limited judicial review when a U.S. citizen contended that the refusal of a visa to an alien abroad impinged upon the citizen's *own* constitutional rights. In *Mandel*, the Executive denied admission—through the denial of a waiver of an inadmissibility—to a Belgian journalist, Ernest Mandel, who wished to speak about communism. 408 U.S. at 756-759. As the Court explained, the alien himself could not seek review because he "had no constitutional right of entry to this country." *Id.* at 762. The Court addressed (and rejected) only the claim of U.S. citizens that the alien's exclusion violated their own constitutional rights. *Id.* at 770. That claim necessarily failed, the Court held, because the Attorney General (through his delegee) gave "a facially legitimate and bona fide reason" for Mandel's exclusion: Mandel had violated the conditions of a previous visa. *Ibid.*; see *id.* at 759, 769. When the Executive supplies such a reason, *Mandel* concluded, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the" asserted constitutional rights of U.S. citizens. *Id.* at 770. The Court expressly did not decide whether review would be available even where no reason was given for denial of a visa. *Id.* at 769.

In *Din*, the Court considered but denied a claim by a U.S. citizen that due process entitled her to a more extensive explanation for the denial of a visa to her alien

husband. 135 S. Ct. at 2131-2138 (opinion of Scalia, J.); *id.* at 2139-2141 (Kennedy, J., concurring in the judgment). The plurality concluded that the claim failed because the U.S. citizen had no due-process right in this context. *Id.* at 2131-2138. Concurring in the judgment, Justice Kennedy (joined by Justice Alito) concluded that, assuming without deciding that the U.S. citizen had some liberty interest in her spouse's visa application, any requirements of due process were satisfied because the government provided a facially legitimate and bona fide reason for denying her husband a visa. *Id.* at 2140-2141 (finding that the government's citation of the statutory basis for the refusal provided a facially legitimate reason under *Mandel* and "indicate[d]" that it "relied upon a bona fide factual" basis for denying the visa). The concurring Justices then stated that, "[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the] visa—which [the U.S.-citizen plaintiff] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to 'look behind' the Government's exclusion of [the husband] for additional factual details beyond what its express reliance on [the statute] encompassed." *Id.* at 2141.

Mandel and *Din* reflect the Constitution's "exclusive[]" vesting of power over the admission of aliens in the "political branches." *Mandel*, 408 U.S. at 765 (citation omitted); see *Fiallo*, 430 U.S. at 792-796 (applying *Mandel*'s test to an equal-protection challenge to a statute governing admission of aliens). They also reflect that aliens abroad seeking a visa and initial admission have no constitutional rights at all regarding entry into the country.

iii. The court of appeals correctly applied these principles in rejecting petitioners' claims here. Although

much of petitioners' argument is directed to whether the consular officer correctly applied the INA in finding that there was "reason to believe" that Ulloa was involved in drug trafficking, 8 U.S.C. 1182(a)(2)(C)(i); see Pet. 9-21, such statutory challenges to a decision to deny a visa are not reviewable at all. See pp. 8-12, *supra*. And as an alien abroad, Ulloa himself has no constitutional rights in connection with entry into this country. See pp. 12-13, *supra*.

The only contention that the lower courts arguably could entertain (and did entertain) was Morfin's assertion that the decision to deny a visa to Ulloa violated Morfin's own due-process rights. See Pet. App. 3a-8a, 13a-14a. The court of appeals correctly held that—assuming arguendo that any such due-process rights exist, a question *Din* did not resolve—Morfin's claim fails under *Mandel* and *Din* because the consular officer gave a "facially legitimate and bona fide reason," which courts "will n[ot] look behind." *Mandel*, 408 U.S. at 770; see *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). As in *Din*, the consular officer's citation of Section 1182(a)(2)(C)(i) "indicates" that the officer "relied upon a bona fide factual basis for denying a visa." 135 S. Ct. at 2140. Indeed, the consular officer's invocation of that provision—which was even more specific than the statutory provision cited by the consular officer in *Din*, see *id.* at 2141 (addressing 8 U.S.C. 1182(a)(3)(B))—reflects a determination that there was "reason to believe" that Ulloa had been involved in illicit drug trafficking, rendering him inadmissible. 8 U.S.C. 1182(a)(2)(C)(i); see Pet. App. 6a-7a.

The concurring Justices in *Din* stated that, "[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the alien spouse] a visa—

which [the U.S.-citizen plaintiff] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to 'look behind' the Government's exclusion of [the alien] for additional factual details beyond what its express reliance on [the statute] encompassed." *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). Petitioners have made no showing of bad faith here. See Pet. App. 7a. Petitioners have not shown that the consular officer lacked a "bona fide factual basis" for his decision. *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). To the contrary, as the court of appeals explained, the consular officer clearly identified such a basis. Pet. App. 6a. Accordingly, even assuming that Morfin has a protected due-process interest in this context, there is no occasion to consider that situation here.

b. Petitioners' counterarguments lack merit. Petitioners contend (Pet. 24) that *Mandel* and *Din* do not preclude "visa denials at consulates from review for legal error." See Pet. 22-25. That is incorrect. Nothing in either decision says or suggests that review is generally available for any purported legal error in a consular officer's decision to refuse a visa. And the limited judicial review of constitutional claims of U.S. citizens conducted in *Mandel* and *Din*—which only assumed but did not decide that the constitutional provisions at issue required some explanation for the visa denial—was rooted in an acceptance of the longstanding principle that such decisions generally are *not* reviewable at all. See pp. 12-14, *supra*; Pet. App. 2a-6a; *Saavedra Bruno*, 197 F.3d at 1157-1162. Petitioners do not grapple with this principle or its history. Moreover, *Mandel*'s rule restricting review of First Amendment challenges by U.S. citizens to the exclusion of aliens abroad—limiting

review to at most determining whether the responsible official gave a facially legitimate and bona fide reason—would make no sense if garden-variety claims of legal error by consular officers were universally subject to judicial review.

Petitioners assert (Pet. 25) that this understanding of *Mandel* and *Din* would create an incongruity in the immigration laws by making the same alleged error reviewable in removal proceedings (and other matters involving aliens in the United States) but not where an alien abroad challenges the refusal of a visa. But that simply reflects that both the general rule of consular nonreviewability, and *Mandel*'s holding that a constitutional challenge must be rejected at least where a "facially legitimate and bona fide reason" is given, 408 U.S. at 770, applies to the denial of entry to aliens abroad. See pp. 12-14, *supra*. That distinction also reflects the underlying principle that aliens abroad have no constitutional rights regarding their initial admission to the United States. See pp. 12-13, *supra*. Moreover, the fact that Congress *has* provided for limited review of certain issues in the removal context, see 8 U.S.C. 1201(i), 1252, but has provided no review of a consular officer's visa-denial decisions abroad, shows that what petitioners criticize as an inconsistency is in fact a basic feature of the statutory scheme.

Petitioners' related contention (Pet. 25) that "there is no reason to believe that Congress intended to prevent courts from engaging in review of consular determinations for legal error" similarly disregards the relevant history. Petitioners focus (Pet. 25-26) on the express preclusion of judicial review in 8 U.S.C. 1252(a)(2)(B) of certain discretionary matters. But that preclusion is

included in a section of the INA addressing judicial review of removal orders, see 8 U.S.C. 1252(a)(1), which are entered against aliens in the United States or stopped at the border; it makes clear that discretionary determinations in that setting are not reviewable. Section 1252 does not provide for judicial review of the denial of visas to aliens abroad at all, so subsection (a)(2)(B) of that provision is irrelevant here. And indeed, the fact that Congress did not at the same time affirmatively provide for judicial review of such visa denials reinforces the conclusion that such review is foreclosed.

In pointing to Section 1252(a)(2)(B), moreover, petitioners again do not grapple with the decades-long historical backdrop, which makes clear that "[t]here was no reason for Congress to" preclude review of consular decisions "expressly." *Saavedra Bruno*, 197 F.3d at 1162. "Given the historical background against which it has legislated over the years * * * , Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions." *Ibid.*

Petitioners further assert (Pet. 26) that review is available here, notwithstanding *Mandel* and *Din*, because their suit arises under the APA. As explained above, see p. 12, *supra*, however, the APA does not authorize review here for multiple reasons—including because the immigration laws generally "preclude judicial review" of decisions to exclude aliens abroad, 5 U.S.C. 701(a)(1), and the general rule of consular nonreviewability is one of the background "limitations on judicial review" that the APA did not displace, 5 U.S.C. 702(1); see *Saavedra Bruno*, 197 F.3d at 1157-1162. Because the APA does not provide for judicial review of

consular decisions, limited review is available if at all only to the extent undertaken in *Mandel* and *Din*; under those cases, petitioners' claim fails. Petitioners do not address these barriers to APA review.

Petitioners finally argue (Pet. 26-27) that *Mandel* and *Din* did not "limit[] review of inadmissibility determinations to the government's mere identification of a statutory ground," and that they instead "considered whether the facts relied on by immigration officials were legally sufficient." That is incorrect. The Court in *Mandel* did not second-guess the government's determination that the asserted prior violations by the alien of the terms of previously issued visas were sufficient to support the decision to deny the waiver of inadmissibility and thereby exclude him. To the contrary, despite the dissent's contention that the record did not support the government's stated justification, see 408 U.S. at 778 (Marshall, J., dissenting), the majority refused to "look behind" the stated reason, *id.* at 770 (majority opinion). Likewise, in *Din*, the concurring Justices assumed arguendo that the alien's concession that he previously worked for the Taliban government might be "itself insufficient to support exclusion." 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). It was, however, the citation of the relevant ground of inadmissibility that the concurring Justices found sufficient and would not, under *Mandel*, look behind. See *ibid.*

Petitioners briefly suggest (Pet. 27) that the decision below is inconsistent with rulings of other courts of appeals that have required more than the citation of a statutory basis for exclusion. But petitioners do not identify any decision of another court of appeals holding that *Mandel* and *Din* require more than a citation of

Section 1182(a)(2)(C)(i)'s "reason to believe" provision *and* a prior indictment for a drug-related offense. The court of appeals' determination that petitioners' only arguably cognizable claim fails under *Mandel* and *Din* is correct and does not warrant further review.

2. Petitioners principally argue (Pet. 9-21) that review is warranted because the court of appeals misread Section 1182(a)(2)(C)(i)'s "reason to believe" standard, and that the decision below implicates an existing conflict on that question. Petitioners are mistaken.

a. The court of appeals' holding concerned only Morfin's constitutional challenge to the denial of a visa to Ulloa—the only claim petitioners could arguably assert. Pet. App. 3a-8a. The court was not confronted with the statutory question whether the consular officer was correct to find Ulloa inadmissible. No such statutory claim would have been reviewable at all. See pp. 8-12, *supra*. Instead, the court of appeals decided only that, as a constitutional matter, the consular officer's stated reason was facially legitimate and bona fide, which under *Mandel* and *Din* required rejection of Morfin's due-process claim. See Pet. App. 3a-8a.

Petitioners seize (Pet. 15-21) on the court of appeals' passing observation that "[a]ll [Section] 1182(a)(2)(C) requires is 'reason to believe' that the applicant is or was a drug dealer," and that an indictment for a drug-related offense "conclusively establishes probable cause." Pet. App. 7a. In making that observation, the court did not adopt a new legal standard. It had no occasion to do so because the constitutional question before it did not turn on whether an indictment necessarily satisfies Section 1182(a)(2)(C)(i). The constitutional analysis concerned only whether the government provides a reason that is

facially legitimate and bona fide, not on whether that reason was factually correct. Like the concurrence in *Din*, the court of appeals merely highlighted an additional fact beyond the consular officer's citation of the relevant statute that "provide[d] at least a facial connection" to the basis for the inadmissibility finding. *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). To the extent the court's decision can be read as passing on the meaning of Section 1182(a)(2)(C)(i) more generally, its statement was merely dictum unnecessary to its decision. Because "this Court reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), petitioners' challenge to a passing comment in the court of appeals' decision that did not affect the result does not warrant review.

b. Petitioners' contention (Pet. 10-15) that the decision below implicates an existing conflict among the courts of appeals on the correct interpretation of Section 1182(a)(2)(C)(i) fails for the same reason. The court of appeals' holding here did not squarely address that issue of statutory interpretation. Any inconsistency in other courts' articulation of the standard therefore is not relevant here. Cf. *Pacific Coast Supply, LLC* v. *NLRB*, 801 F.3d 321, 334 n.10 (D.C. Cir. 2015) ("[D]icta does not a circuit split make.").

In any event, the court of appeals' commentary on Section 1182(a)(2)(C)(i) does not implicate the purported conflict petitioners assert. The cases petitioners cite addressing Section 1182(a)(2)(C)(i)'s "reason to believe" standard involved the distinct context of removal proceedings, not consular decisions refusing visas to aliens

abroad.[5] That difference in context is highly significant for present purposes.

Unlike consular officers' decisions to refuse visas to aliens overseas, of which Congress has not provided any review, courts of appeals generally have subject-matter jurisdiction to review Board of Immigration Appeals (BIA) decisions concerning aliens in the United States who are subject to final orders of removal. See 8 U.S.C. 1252(a)(1). Although 8 U.S.C. 1252(a)(2)(C) strips courts of jurisdiction to review "any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in [8 U.S.C.] 1182(a)(2)," they retain the authority to conduct a threshold jurisdictional inquiry—*i.e.*, whether an alien has in fact committed a covered "criminal offense" under Section 1182(a)(2) that triggers that preclusion of review. See, *e.g.*, *Garces* v. *United States Att'y Gen.*, 611 F.3d 1337, 1343 (11th Cir. 2010); *Alarcon-Serrano* v. *INS*, 220 F.3d 1116, 1119 (9th Cir. 2000). Appellate courts also retain jurisdiction to review de novo constitutional claims or questions of law. 8 U.S.C. 1252(a)(2)(D). In the

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[5] See *Westover* v. *Reno*, 202 F.3d 475, 477 (1st Cir.), cert. denied, 531 U.S. 813 (2000); *Nowak* v. *Lynch*, 648 Fed. Appx. 45, 47 (2d Cir. 2016); *Yusupov* v. *Attorney Gen. of U.S.*, 650 F.3d 968, 972 (3d Cir. 2011); *Cuevas* v. *Holder*, 737 F.3d 972, 973-974 (5th Cir. 2013); *Alarcon-Serrano* v. *INS*, 220 F.3d 1116, 1117-1119 (9th Cir. 2000); *Mena-Flores* v. *Holder*, 776 F.3d 1152, 1155 (10th Cir. 2015); *Garces* v. *United States Att'y Gen.*, 611 F.3d 1337, 1138-1139, 1343 (11th Cir. 2010); *Castano* v. *INS*, 956 F.2d 236, 237 (11th Cir. 1992); see also *Igwebuike* v. *Caterisano*, 230 Fed. Appx. 278, 281-282 (4th Cir. 2007) (per curiam) (appeal of district court's dismissal of habeas petition by alien in the United States seeking judicial review of denial of application for adjustment of status on ground that alien was inadmissible under 8 U.S.C. 1182(a)(2)(C) and thus ineligible for adjustment of status).

removal cases petitioners cite, the applicable legal framework thus permitted somewhat more searching review of certain issues, and the courts generally addressed the BIA's underlying determinations of ineligibility or inadmissibility—and the related "reason to believe" standard—as part of the scope of such review.[6]

In contrast, there is no statutory authority for judicial review of the refusal of a visa at all, and to the extent review of constitutional challenges to such refusals is available at all, it is sharply circumscribed. See pp. 8-14, *supra*. A court may not "look behind" a consular officer's "facially legitimate and bona fide reason" for refusing a visa even if a U.S. citizen asserts a constitutional interest. *Mandel*, 408 U.S. at 770; see *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring in the judgment). In that setting, to the extent a court could consider whether a consular officer had "reason to believe" a particular fact at all, 8 U.S.C. 1182(a)(2)(C)(i), the nature of the judicial inquiry would be inherently different from the analysis a court would conduct in the removal context. This case thus does not implicate the purported disagreement petitioners allege regarding the precise requirements of the "reason to believe" standard in the removal context where the scope of judicial review is broader.

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[6] *Westover*, cited in note 5, *supra*, dealt with a slightly different inquiry but is similarly inapposite here. In that case, the First Circuit addressed the "reason to believe" standard in determining whether an alien's warrantless arrest violated 8 U.S.C. 1357(a)(2). 202 F.3d at 479. Section 1357(a)(2) provides, in relevant part, that an Immigration and Naturalization Service officer "shall have power without warrant * * * to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States [unlawfully] and is likely to escape before a warrant can be obtained for his arrest."

c. Even if the question petitioners present otherwise warranted review, this case would be an unsuitable vehicle to resolve it. Because the court of appeals' constitutional holding that the consular officer supplied a facially legitimate and bona fide reason for refusing Ulloa a visa does not depend on the meaning of 8 U.S.C. 1182(a)(2)(C)(i), a decision in petitioners' favor on the interpretation of that statute would be unlikely to affect the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2017