No. 13-1402

In the Supreme Court of the United States

JOHN F. KERRY, SECRETARY OF STATE, ET AL.,
PETITIONERS

v.

FAUZIA DIN

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

BRIEF FOR THE PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
COLIN A. KISOR
STACEY I. YOUNG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARY E. MCLEOD
Acting Legal Adviser
Department of State
Washington, D.C. 20520

STEVAN E. BUNNELL
General Counsel
Department of Homeland Security
Washington, D.C. 20528

QUESTIONS PRESENTED

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

2. Whether respondent is entitled to challenge in court the refusal of a visa to her husband and to require the government, in order to sustain the refusal, to identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa.

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the district court and appellees in the court of appeals, are John F. Kerry, Secretary of State; Jeh Johnson, Secretary of Homeland Security*; Eric H. Holder, Jr., Attorney General; Richard Olson, Ambassador of the United States Embassy, Islamabad, Pakistan; Christopher Richard, Consul General of the Consular Section at the United States Embassy, Islamabad, Pakistan; and James B. Cunningham, Ambassador of the United States Embassy, Kabul, Afghanistan.

Respondent, who was plaintiff in the district court and appellant in the court of appeals, is Fauzia Din.

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* At the time the court of appeals issued its judgment, the Secretary of Homeland Security was Janet A. Napolitano.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 718 F.3d 856. The opinion of the district court (Pet. App. 37a-49a) is not published in the Federal Supplement but is available at 2010 WL 2560492.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2013. A timely petition for rehearing en banc was denied on December 24, 2013 (Pet. App. 50a-51a). On March 20, 2014, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 23, 2014. On April 10, 2014, Justice Kennedy further extended the time to May 23, 2014, and the petition was filed on that date.

The petition was granted on October 2, 2014. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien may not be admitted to the United States without having applied for and been issued an immigrant or nonimmigrant visa (except in certain circumstances not relevant to this case). 8 U.S.C. 1181(a) (documentation requirements for immigrants applying for admission); 8 U.S.C. 1182(a)(7) (documentation requirements for nonimmigrants and immigrants seeking admission). When an alien seeks to obtain an immigrant visa on the basis of a family relationship with a United States citizen or lawful permanent resident alien, see 8 U.S.C. 1151(b)(2)(A)(i), 1153(a), the INA sets forth a process involving several distinct steps.

First, the U.S. citizen or lawful permanent resident must file a petition with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security (DHS) to have the alien classified as an immediate relative of a U.S. citizen or a family-preference immigrant.[1] See 8 U.S.C. 1153(f),

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[1] The INA and other laws relating to immigration and naturalization are generally administered by the Secretary of Homeland Security, the Attorney General, and the Secretary 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

1154(a)(1); see also 8 U.S.C. 1151(b)(2)(A)(i); 8 C.F.R. 204.1(a)(1); USCIS, *Form I-130, Petition for Alien Relative* (Dec. 18, 2012), http://www.uscis.gov/sites/default/files/files/form/i-130.pdf. The petitioner must provide USCIS with evidence that she has the claimed familial relationship with the beneficiary. See 8 C.F.R. 204.2(a)(2), (d)(2), (f)(2), and (g)(2). She must also attest that she has not committed any crime that would disqualify her from filing a petition. See 8 U.S.C. 1154(a)(1)(A)(viii) and (B)(i)(II). "USCIS thereafter reviews the petition, and approves it if found to meet all requirements." *Scialabba* v. *Cuellar De Osorio*, 134 S. Ct. 2191, 2197-2198 (2014) (opinion of Kagan, J.) (citing 8 U.S.C. 1154(b)).[2]

Second, if USCIS approves the petition, an alien outside the United States who is the beneficiary of the petition may (if all other relevant conditions are satisfied) apply for a visa.[3] See 8 U.S.C. 1201(a)(1) (consular officer "may issue" immigrant visa under conditions in INA and regulations); 8 U.S.C. 1202(a) ("Every alien applying for an immigrant visa and for alien

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Secretary of Homeland Security. See 6 U.S.C. 251, 271(b), 542 note, 557; 8 U.S.C. 1551 note.

[2] If the beneficiary of an approved petition is a spouse, child (unmarried and under age 21), or parent of a U.S. citizen, that beneficiary will be classified as an "immediate relative[]"—a category for which there are no limits on the number of visas that may be issued in a particular year. See 8 U.S.C. 1151(b)(2)(A)(i).

[3] Unless otherwise specified, the discussion of the visa application process in this brief relates to applications for immigrant visas rather than nonimmigrant visas. The application process is similar in both contexts, however. See, *e.g.*, 8 U.S.C. 1202(c), (d), and (h) (describing requirements for nonimmigrant visa application); 8 U.S.C. 1182(a) (setting forth certain classes of aliens ineligible for either type of visa).

registration shall make application therefor in such form and manner and at such place as shall be by regulations prescribed."); 8 U.S.C. 1202(e) (alien must verify application by oath); 22 C.F.R. 42.31, 42.42; see also *Cuellar De Osorio*, 134 S. Ct. at 2198. The application papers must contain a variety of information about the alien's history and background, including his family relationships, work experience, and criminal record. See, *e.g.*, 8 U.S.C. 1202(b) ("The immigrant shall furnish to the consular officer with his application a copy of a certification by the appropriate police authorities stating what their records show concerning the immigrant; a certified copy of any existing prison record, military record, and record of his birth; and a certified copy of all other records or documents concerning him or his case which may be required by the consular officer."). In addition, a visa applicant located outside the United States must appear at a U.S. consulate for an in-person interview with a consular officer in the Department of State. See 8 U.S.C. 1202(a) and (e); *Cuellar De Osorio*, 134 S. Ct. at 2198; 22 C.F.R 42.62.

The authority to grant or deny a visa application rests with the consular officer. See 8 U.S.C. 1201(a)(1); 22 C.F.R. 42.71, 42.81; 8 U.S.C. 1361 (providing that applicant has burden of proof to establish eligibility for visa "to the satisfaction of the consular officer").[4] No visa "shall be issued to an alien" if

[4] See also 6 U.S.C. 236(b)(1) (vesting in Secretary of Homeland Security "the authority to refuse visas in accordance with law"); 6 U.S.C. 236(c)(1) (reserving Secretary of State's authority to direct consular officer to refuse to issue visa if "such refusal" is "necessary or advisable in the foreign policy or security interests of the United States").

"it appears to the consular officer" from the application papers "that such alien is ineligible to receive a visa * * * under section 1182 of this title, or any other provision of law," or if "the consular officer knows or has reason to believe" that the alien is ineligible. 8 U.S.C. 1201(g); see 22 C.F.R. 40.6 (explaining that "[t]he term 'reason to believe' * * * shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa"); see also 8 U.S.C. 1105(a) (directing the Department of State to "maintain direct and continuous liaison" with the Federal Bureau of Investigation, Central Intelligence Agency, and other security-related agencies to obtain and exchange information).[5]

Section 1182(a) identifies various "[c]lasses of aliens ineligible for visas or admission" to the United States. 8 U.S.C. 1182(a); see, *e.g.*, 8 U.S.C. 1182(a)(1)(A) (health-related reasons for ineligibility); 8 U.S.C. 1182(a)(2) ("[c]riminal and related grounds" for ineligibility). Section 1182(a)(3), at issue in this case, sets forth "[s]ecurity and related grounds" for visa ineligibility and inadmissibility, including—as described in Section 1182(a)(3)(B)—having engaged in "[t]errorist activities." 8 U.S.C. 1182(a)(3). Such terrorist activities include providing material support to a terrorist or terrorist organization; acting as a

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[5] Within specified limits, the INA permits the Secretary of State or the Secretary of Homeland Security, after consultation with each other and the Attorney General, to "determine in such Secretary's sole unreviewable discretion" that certain bars "shall not apply with respect to an alien within [their] scope." 8 U.S.C. 1182(d)(3)(B)(i); see also, *e.g.*, 8 U.S.C. 1182(a)(9)(B)(v), (g), (h), and (i) (discussing waivers of various grounds of inadmissibility).

representative or member of a terrorist organization; endorsing or espousing terrorist activity or persuading others to do so; and receiving military-type training from a terrorist organization. See 8 U.S.C. 1182(a)(3)(B)(i); see also 8 U.S.C. 1182(a)(3)(B)(iii), (iv), (v), and (vi) (defining "terrorist activity," "engage in terrorist activity," "representative," and "terrorist organization"). In addition, an alien who is "the spouse or child of an alien who is inadmissible" as a result of terrorist activity that occurred within the last five years is herself inadmissible under Section 1182(a)(3)(B), unless she did not know and should not reasonably have known of the activity or there are reasonable grounds to believe that she has renounced the activity. 8 U.S.C. 1182(a)(3)(B)(i)(IX) and (ii).

As a general matter, a consular officer who denies a visa application "because the officer determines the alien to be inadmissible" must "provide the alien with a timely written notice that * * * (A) states the determination, and (B) lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1). If, however, the alien is inadmissible on "[c]riminal and related grounds" or on "[s]ecurity and related grounds" (which include "terrorist activity") under 8 U.S.C. 1182(a)(2) or (a)(3), then the statutory written-notice requirement "does not apply." 8 U.S.C. 1182(b)(3).[6]

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[6] Pursuant to statute, the Department of State reports to "the appropriate committees of the Congress" all refusals of visas by consular officers "on the grounds of terrorist activities or foreign policy," including in the report "a factual statement of the basis for such denial." 22 U.S.C. 2723(a)(1). Those reports may be "classified to the extent necessary" and must "protect intelligence sources and methods." 22 U.S.C. 2723(b).

2. This Court has long recognized the doctrine of consular nonreviewability—the rule that, in the absence of affirmative congressional authorization for an alien to challenge the refusal of a visa, the alien cannot assert any right to review. As this Court has explained, an "unadmitted and nonresident alien" has "no constitutional right of entry to this country," *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972), and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950); see *Mandel*, 408 U.S. at 766 (Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (citation omitted); see also *Fiallo* v. *Bell*, 430 U.S. 787, 792, 794-795 (1977); *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1162-1163 (D.C. Cir. 1999) (tracing the history of the doctrine); Richard D. Steel, *Steel on Immigration Law* § 2:11, at 36 (2012 ed.).

No such congressional authorization for review of visa denials exists. Congress has not provided even for administrative review of a consular officer's refusal of a visa. See 8 U.S.C. 1104(a)(1) (excluding from the Secretary of State's authority to administer and enforce the immigration laws those powers, duties, and functions conferred on consular officers with regard to the grant or refusal of visas); 6 U.S.C. 236(b)(1) (barring the Secretary of Homeland Security from "alter[ing] or revers[ing] the decision of a consular officer to refuse a visa"). Congress likewise has not provided for judicial review of a visa refusal. See, *e.g.*, 6 U.S.C. 236(f) (providing that the designation of authorities in Section 236 does not give rise to a pri-

vate right of action against a consular officer to challenge a decision to grant or deny a visa); 8 U.S.C. 1201(i) (providing for judicial review of a decision to *revoke* a nonimmigrant visa only in proceedings to remove an alien from the United States, where revocation is the sole basis for removal); 8 U.S.C. 1252 (discussing judicial review of removal orders).

Accordingly, this Court has not permitted an alien to obtain review of such a decision. On one occasion, this Court considered the availability of judicial review at the behest of U.S. citizens of a decision by the Attorney General not to exercise his discretion to grant a waiver of the grounds of exclusion that had led a consular officer to deny an alien's application for a nonimmigrant visa. See *Mandel*, 408 U.S. at 754, 769-770. In *Mandel*, U.S. citizens asserted that the failure by the Attorney General to grant a waiver implicated their interest under the First Amendment in personally hearing the alien speak at "discussion forums." *Id.* at 768; see *id.* at 767, 769. The Court did not reach the government's argument that "Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given." *Id.* at 769; see *id.* at 770. Rather, the Court disposed of the case on the ground that the record in fact included a reason for denying the waiver that was "facially legitimate and bona fide," *i.e.*, that the alien had abused prior waivers by exceeding limitations imposed on his activities in the United States as a condition of those waivers. *Id.* at 758, 769-770. When an alien is excluded from the United States on the basis of the Executive's refusal to exercise its discretionary authority to waive applicable grounds of inadmissibility, the Court explained, "the courts will

neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770. The Court did not address the antecedent decision by the consular officer finding the alien ineligible for a visa under the Act.

3. In 2006, respondent, a naturalized U.S. citizen, married Kanishka Berashk, a native and citizen of Afghanistan who resides in that country. See Pet. App. 2a-3a, 38a. After the marriage, respondent filed an immigrant visa petition to have Berashk classified as an immediate relative, which USCIS approved. See *id.* at 3a. Berashk then submitted a visa application and appeared at the United States Embassy in Islamabad, Pakistan, for an interview. See *ibid.*

In June 2009, a consular officer from the U.S. Embassy in Islamabad denied the visa application. See Pet. App. 3a. Berashk was informed that the visa refusal was based on his inadmissibility under 8 U.S.C. 1182(a)(3)(B), which covers "[t]errorist activities." Pet. App. 4a. In a communication that cited 8 U.S.C. 1182(b)(3), which makes the requirement of notice of the ground for a visa denial inapplicable to security-based determinations, Berashk was also told that no further explanation was possible. See Pet. App. 4a.

4. a. Respondent filed suit in federal district court challenging the denial of Berashk's visa application. She asserted three claims: a claim for a writ of mandamus directing government officials "to adjudicate properly [the] visa application * * * not on the basis of any bad faith or illegitimate reasons"; a claim for a declaratory judgment that 8 U.S.C. 1182(b)(3), the exception from the notice requirement, is uncon-

stitutional vis-à-vis a U.S. citizen as a violation of procedural due process; and a claim that petitioners had violated the Administrative Procedure Act by arbitrarily misconstruing and misapplying 8 U.S.C. 1182(a)(3)(B). J.A. 37; see Pet. App. 5a; J.A. 36-39. Her complaint alleged that "[n]o good faith basis exists that is sufficient to constitute a facially legitimate and bona fide reason for the denial of [the] visa application," contending that "[t]he fact of Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds of inadmissibility listed in 8 U.S.C. § 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist." J.A. 37.

The district court granted the government's motion to dismiss. See Pet. App. 37a-49a. The court observed that, under Ninth Circuit precedent, respondent's due process interest in her marriage gave rise to a right to challenge the constitutionality of the procedures used in considering her husband's visa application. See *id.* at 43a-44a (citing *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008)). But the court then ruled that the consular officer's citation of Section 1182(a)(3)(B) constituted a facially legitimate and bona fide reason for the visa denial. The court explained that under 8 U.S.C. 1182(b)(3) "the government may withhold the specific reasons for the denial for aliens who have been determined to be inadmissible under 8 U.S.C. section 1182(a)(2) or (a)(3)," and noted that respondent had not adequately alleged that the consular officer who denied the visa acted in "bad faith." Pet. App. 45a; see *id.* at 46a-49a. Finally, the court ruled that respondent lacked standing to

challenge the constitutionality of 8 U.S.C. 1182(b)(3), which renders the notice requirement inapplicable when an alien is found inadmissible on security grounds, because that provision applies "only to the alien and not the United States citizen." *Id.* at 49a.

b. A divided panel of the Ninth Circuit reversed. See Pet. App. 1a-36a.

i. As an initial matter, while acknowledging that "[f]ederal courts are generally without power to review the actions of consular officials," the majority concluded that, under *Mandel*, "a citizen has a protected liberty interest in marriage that entitles the citizen to review of the denial of a spouse's visa." Pet. App. 6a-7a (citations omitted; brackets in original) (citing *Bustamante*, 531 F.3d at 1062). The majority stated that the right of review was not predicated on a "liberty interest in the ability to live in the United States with an alien spouse." *Id.* at 7a n.1. Rather, it relied on what it described as a "more general right" to "[f]reedom of personal choice in matters of marriage and family life." *Ibid.* (quoting *Bustamante*, 531 F.3d at 1062).[7]

The majority then concluded that "the reason provided by the consular officials for the denial of Berashk's visa" was not "facially legitimate." Pet. App. 7a-9a. The majority faulted the government for not giving "any assurance as to what the consular officer believes the alien has done." *Id.* at 9a; see *id.* at 10a (calling for a "reason[] for exclusion that contain[s] some factual elements"); *id.* at 14a ("While the Gov-

[7] The majority also ruled that respondent had standing to challenge the notice rules laid out in 8 US.C. 1182(b)(3) "[t]o the extent that the Government relies on" that provision "to interfere with" her due process rights. Pet. App. 24a.

ernment need not prove that Berashk performed an activity that renders him inadmissible under the statute, * * * it must at least allege what it believes Berashk did that would render him inadmissible."). The majority also found insufficient the consular officer's citation to 8 U.S.C. 1182(a)(3)(B) as the basis for inadmissibility, because that provision refers to a number of "different categories of aliens" based on conduct "rang[ing] from direct participation in violent terrorist activities to indirect support of those who participate in terrorist activities." Pet. App. 11a-12a. "[A]t a minimum," the majority concluded, "the Government must cite to a ground narrow enough to allow us to determine that it has been properly construed." *Id.* at 12a (internal quotation marks omitted).

In the majority's view, Section 1182(b)(3), in which Congress eliminated the requirement of timely written notice to the alien of the reasons for a visa denial based on security grounds, made no difference to the analysis. Pet. App. 15a. The majority reasoned that that provision does not speak to whether "the Government has an absolute right to withhold the information from everyone, including a citizen and this [c]ourt." *Id.* at 18a. The majority also stated that "nothing in [its] opinion compels dangerous disclosure" that would interfere with the task of barring persons connected with terrorist activities from entering the United States. *Id.* at 20a. According to the majority, "[e]xisting procedures," such as in camera disclosures to a court, "are adequate to address * * * national security concerns." *Id.* at 21a.

ii. Judge Clifton dissented. See Pet. App. 25a-36a. Emphasizing the "highly constrained nature of judicial review of a decision to deny a visa application," *id.*

at 36a, he deemed the reason given for denial of a visa to Berashk facially legitimate because it "was based on a statute" that provided a "lawful" basis for denial, *id.* at 27a (discussing 8 U.S.C. 1182(a)(3)(B)). In addition, he relied on 8 U.S.C. 1182(b)(3), under which "the Government does not have to disclose" any "specific information about what lies behind a visa denial" related to terrorist activities, concluding that "compelling [the Government] to disclose the information anyway in order to allow 'limited' and 'highly restrained' judicial review cannot be justified." Pet. App. 32a; see *id.* at 33a-36a.

SUMMARY OF ARGUMENT

By statute, an alien need not be given an explanation of the basis for a consular officer's denial of his application for a visa if the visa is denied on security-related grounds. See 8 U.S.C. 1182(b)(1) and (3). Under the long-established doctrine of consular non-reviewability, a non-resident alien outside the United States has no right to judicial review of a consular officer's denial of a visa. And under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), a non-resident alien abroad has no constitutional rights in connection with his application for a visa to seek entry to the United States, and therefore no constitutional basis to insist upon an explanation for the denial of the visa or to obtain judicial review of the denial. See *id.* at 762, 766-768; see also, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32-33 (1982).

The Ninth Circuit ruled in this case, however, that respondent—a U.S. citizen who is the spouse of an alien whose visa application was denied on security-related grounds—has a due process right that is implicated by a consular officer's denial of a visa to the

alien. That right, the court reasoned, entitles her to obtain judicial review of the denial of her alien spouse's visa application and to a fuller explanation of the basis for the denial, even though the alien himself has no such rights. Indeed, under the Ninth Circuit's ruling respondent would be entitled not only to learn the specific legal basis for the terrorism-related denial of a visa to her alien spouse but also to discover the "facts" of "what the consular officer believes the alien has done," so that a court can "verify" that a ground for visa ineligibility exists. Pet. App. 9a, 14a.

That ruling is deeply flawed, for several reasons. First, the Ninth Circuit erred in ruling that respondent has a liberty interest, protected by the Due Process Clause, that is implicated by the denial of a visa to her alien spouse abroad. Respondent can derive no such interest from the INA and its implementing regulations. Those provisions establish a two-step process under which a U.S.-citizen spouse has access to procedures in connection with her own petition to USCIS in the United States to classify an alien as a family member who may apply for a visa, but not with respect to the alien's subsequent and distinct application for a visa, which is acted upon by a consular officer abroad based on the alien's own history, health, and other characteristics.

Nor can respondent derive any such interest from the Due Process Clause itself. The denial of an alien's visa application does not interfere with any recognized marriage-related right of his U.S.-citizen spouse. And in the immigration context, where Congress exercises plenary control, there is no basis for claiming constitutional protection for any asserted right to obtain a visa or seek admission for an alien spouse so as to

enable him to be present in the United States and thereby reside with the U.S.-citizen spouse in this country. In addition, because the harm that respondent claims to have experienced is solely "an indirect and incidental result of the Government's enforcement action" with respect to her alien spouse abroad, it "does not amount to a deprivation of any interest in life, liberty, or property" that she possesses in her own right. *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980). Any other conclusion would have sweeping implications, opening the door to constitutional claims by a spouse—or perhaps a child, parent, or even a sibling—whose family member has been removed from the country or convicted of a crime.

Second, even if respondent did have a liberty interest that is implicated in this context, the Ninth Circuit nevertheless erred in concluding that she has a right to judicial review of the consular officer's visa-denial decision and that the government can defend the decision only by providing the specific statutory subsection on which the denial was grounded and the factual basis for believing that the alien falls within the scope of that subsection. Such review has no foundation in the Constitution, and neither Congress nor this Court has ever authorized it. Scrutiny of a consular officer's denial of a visa application simply cannot be reconciled with the deeply rooted doctrine of consular nonreviewability, which bars courts from second-guessing Congress's choices about which aliens abroad should be granted visas and from revisiting decisions about whether aliens who appear before consular officers at far-off posts satisfy the conditions Congress has decreed.

When a visa denial is (as in this case) based on security-related grounds, the review required by the Ninth Circuit is especially unjustified. Such review would fly in the face of the traditional reluctance to intrude on the political Branches' authority in the areas of national security and foreign relations. It also would override Congress's judgment in 8 U.S.C. 1182(b)(3) to protect the confidentiality of sensitive information on which a consular officer may rely in denying a visa, as well as decisions of this Court upholding similar judgments in the immigration context. Moreover, the review mandated by the court of appeals would have serious adverse consequences, leaving an "unprotected spot in the Nation's armor," *Zadvydas* v. *Davis*, 533 U.S. 678, 695-696 (2001) (citation omitted), by threatening disclosure of classified or other sensitive information and by chilling the willingness of various agencies and foreign governments to share with the State Department the kind of intelligence that allows consular officers to prevent terrorists from obtaining visas.

Finally, even if this Court's decision in *Mandel* could somehow be extended to cover the very different circumstances of this case, the disclosure envisioned by the Ninth Circuit could play no proper role in any *Mandel* analysis. That decision emphasized that any attempt to "look behind the exercise of [the Executive's] discretion," *Mandel*, 408 U.S. at 770, was impermissible, and respondent here seeks exactly the kind of inquiry that *Mandel* itself refused to allow.

ARGUMENT

A. The Court Of Appeals Erred In Holding That A U.S. Citizen Has A Protected Liberty Interest That Is Implicated By The Denial Of A Visa Application Filed By An Alien Spouse

The Ninth Circuit ruled that respondent—a U.S. citizen who is the spouse of a non-resident alien—has a due process right that is implicated by a consular officer's denial of the alien's visa application. That right, the court held, entitles her to judicial review of the denial of the alien's visa application and a fuller explanation of the basis for the denial—even though the alien himself has no such rights. That ruling is deeply flawed. The INA confers no legally cognizable interest on a U.S. citizen if her alien spouse abroad is denied a visa because he has been found personally ineligible on terrorism (or other) grounds under the INA. Nor does the Due Process Clause itself confer such an interest.[8]

1. Respondent was afforded access to certain procedures under the INA in connection with her own petition, at the first step of the visa process, for classification of Berashk as an immediate relative to whom

[8] The Ninth Circuit's error in finding that respondent had a constitutionally protected liberty interest implicated by the denial of a visa to Berashk was also the basis for another legal error: its ruling that respondent had standing to challenge the exception in 8 U.S.C. 1182(b)(3). See Pet. App. 22a-24a. The court said that respondent had standing "[t]o the extent" the government relied on that provision "to interfere with" a "constitutionally protected due process right to limited judicial review of her husband's visa denial." *Id.* at 24a. Accordingly, a ruling by this Court that respondent had no constitutional right to judicial review and a more complete explanation of the basis for the visa denial would also resolve that standing question.

a visa could be made available if he was later found admissible in his own right. But she cannot derive from the INA or its implementing regulations any protected interest in connection with Berashk's subsequent and distinct application on his own behalf.

If a qualified "citizen of the United States" files a petition with USCIS to obtain immediate-relative status for an alien, 8 U.S.C. 1154(a)(1); see *Scialabba* v. *Cuellar De Osorio*, 134 S. Ct. 2191, 2197-2198 (2014) (opinion of Kagan, J.), and USCIS determines that "the facts stated in the petition are true," then (absent circumstances not at issue here) USCIS "shall * * * approve the petition," 8 U.S.C. 1154(b); see 8 U.S.C. 1151(b). With respect to such a petition, the U.S. citizen is the party who is seeking action from the government. The decision whether to approve the petition generally turns on an assessment of whether the U.S. citizen is qualified to file it, and whether the U.S. citizen in fact has the claimed family relationship to the alien. If the petition is denied, the U.S. citizen can seek administrative reopening or reconsideration, see 8 C.F.R. 103.5, and can appeal an adverse decision to the Board of Immigration Appeals, see 8 C.F.R. 103.3(a), 1003.1(b)(5), 1003.5(b). In this case, respondent's petition was approved, and she therefore received all of the process that she was due under the INA and pertinent regulations with respect to her petition.

But approval of a U.S. citizen's visa petition is not sufficient for the actual issuance of a visa to the alien beneficiary; it merely makes the alien eligible to submit his own application for a visa. See 8 U.S.C. 1201(a), 1202(a) and (e); 22 C.F.R. 42.31, 42.42; see also *Cuellar De Osorio*, 134 S. Ct. at 2198. A consular

officer's decision to grant or deny a visa application filed by an alien abroad, see 8 U.S.C. 1201(a)(1), does not turn on the status of the original petitioner (here, the alien's U.S.-citizen family member), or on the nature of the petitioner's relationship to the alien or her reasons for filing the petition in the first instance. Rather, regardless of whether the alien's ability to *apply* for a visa rests on an approved petition filed by a family member—or on some other basis (such as an approved petition filed by a prospective employer, see 8 U.S.C. 1151(d), 1153(b))—the adjudication of the visa application by a consular officer is based on a close examination of the *alien's* own history, health, associations, criminal record, and other characteristics, in order to determine whether one of the grounds of inadmissibility in the INA might bar the alien's entry into the United States. See 8 U.S.C. 1182, 1201(a), (c), (d), and (g), 1202(a), (b), and (e).

The U.S.-citizen petitioner has no rights under the INA or implementing regulations with respect to the submission and consideration of the alien's visa application. An alien who is the subject of an approved petition need not, of course, apply for a visa at all. If he does apply, the citizen is not entitled under the INA or its implementing regulations to be present at the visa interview, or to obtain notice that the visa has been denied, see 8 U.S.C. 1182(b), or to review any "records of the Department of State and of diplomatic and consular offices of the United States pertaining to the * * * refusal" of the visa, 8 U.S.C. 1202(f). Indeed, in some cases information an alien discloses in his application, or the reasons for the ultimate refusal of a visa, may be of such a sensitive nature that the alien would not wish to reveal them to his own spouse

or family members. See 8 U.S.C. 1182. Nor does the petitioner possess any basis in law to insist or expect that the alien's application will be granted, or any statutory or regulatory right to challenge or appeal a consular officer's denial of the application.

These provisions make clear that the INA and implementing regulations create no legally protected interest in the petitioning U.S. citizen with respect to the alien's separate visa application. See *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999) (when U.S. sponsors' "petition was granted," their "cognizable interest" under the INA "terminated"); cf. *Fiallo* v. *Bell*, 430 U.S. 787, 795 n.6 (1977) (rejecting argument that INA provisions relating to petitions by U.S. citizens "grant a 'fundamental right' to American citizens," and characterizing that argument as a "fallacy * * * rooted deeply in fundamental principles of sovereignty" given the "sovereign power to admit or exclude foreigners in accordance with perceived national interests"). To the contrary, the INA and applicable regulations recognize that spouses are independent actors responsible for their own actions and for establishing their own eligibility for government benefits, such as admission to the United States.

2. In ruling that respondent is entitled to due process in her own right with respect to the denial of Berashk's visa application, the court of appeals did not rely on any provision of immigration law. Instead, the court reasoned that respondent possesses a substantive "protected liberty interest in marriage," derived directly from the Due Process Clause, in connection with her alien husband's visa application. Pet. App. 7a; see *id.* at 7a n.1; see also *Bustamante* v. *Mukasey*,

531 F.3d 1059, 1062 (9th Cir. 2008); Br. in Opp. 17-19 (relying on substantive due process cases in asserting that a fundamental liberty interest in marriage is at stake). Although "[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,'" *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005), no such fundamental interest is implicated by this case. In light of Congress's plenary control over the admission of aliens—and Congress's exercise of that power in the INA, which confers no legally cognizable interest in a U.S. citizen with respect to an alien's visa application—there is simply no history in this Nation of recognizing a liberty interest in "the ability to live in the United States with an alien spouse." Pet. App. 7a n.1. And any indirect harm experienced by respondent as a result of the government's denial of Berashk's visa application does not deprive respondent herself of an interest protected by the Due Process Clause.

a. The range of liberty interests protected by the Due Process Clause "is not infinite." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 570 (1972); see *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). Under either a procedural or substantive due process analysis, determining whether an asserted liberty interest is "[a]mong the historic liberties" encompassed by the Clause, *Ingraham* v. *Wright*, 430 U.S. 651, 673 (1977), requires examination of "[o]ur Nation's history, legal traditions, and practices." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997); see *Reno* v. *Flores*, 507 U.S. 292, 303 (1993) (explaining that to qualify for substantive protection under the Due Process Clause, a liberty interest must be "so rooted in the traditions and conscience of our people

as to be ranked as fundamental") (citations omitted); *Ingraham*, 430 U.S. at 672-675 (citing *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923)). Such an assessment can be made only by first ascertaining "the precise nature of the private interest" that is allegedly threatened; merely stating a claimed interest in vague or general terms is not sufficient. *Lehr* v. *Robertson*, 463 U.S. 248, 256 (1983); see *Glucksberg*, 521 U.S. at 721 (requiring "a 'careful description' of [an] asserted fundamental liberty interest" for purposes of substantive due process analysis) (quoting *Flores*, 507 U.S. at 302); see also *Roth*, 408 U.S. at 570-571.

This Court has recognized a deeply rooted liberty interest, protected by the Due Process Clause, in "rights to marital privacy and to marry and raise a family." *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965); see *Glucksberg*, 521 U.S. at 720 ("[T]he 'liberty' specially protected by the Due Process Clause includes the right[] to marry.") (citing *Loving* v. *Virginia*, 388 U.S. 1 (1967)); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-640 (1974) (citing cases regarding decisions to marry and have children to support the proposition that the Due Process Clause protects "freedom of personal choice in matters of marriage and family life"); see also *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 499 (1977) (opinion of Powell, J.). Those rights are "of similar order and magnitude as the fundamental rights specifically protected" in the Constitution. *Griswold*, 381 U.S. at 495.

Those recognized rights, however, are not implicated here. The consular officer's denial of Berashk's visa application did not interfere with respondent's ability to marry him—their marriage was solemnized years before the denial took place. See Pet. App. 3a.

The visa denial did not nullify the marriage, or deprive respondent of the legal benefits the marriage created, or prevent her from living with her spouse anywhere in the world besides the United States. See *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) ("Even assuming that the federal government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States. It does not attack the validity of the marriage."), cert. denied, 402 U.S. 983 (1971); cf. *Swartz* v. *Rogers*, 254 F.2d 338, 339 (D.C. Cir.) ("[Deportation] would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created."), cert. denied, 357 U.S. 928 (1958). Nor did the denial of a visa to Berashk prevent respondent from "rais[ing] a family," either in the United States or elsewhere. *Griswold*, 381 U.S. at 495.

Perhaps appreciating that respondent's rights in connection with marriage that have been recognized as protected by the Constitution are far removed from the denial of a visa to Berashk, the court of appeals seized on language from *Cleveland Board of Education* v. *LaFleur*, *supra*—a case involving the decision whether to "bear or beget a child," 414 U.S. at 640—that refers to "[f]reedom of personal choice in matters of marriage and family life." Pet. App. 7a & n.1 (citing *Bustamante*, 531 F.3d at 1062 (citing *LaFleur*, 414 U.S. at 639-640)). That vaguely worded passage cannot properly be divorced from the specific issue before this Court. See *Cohens* v. *Virginia*, 19 U.S. (6

Wheat.) 264, 399 (1821) ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used"). As invoked by the court of appeals in the wholly distinct context here, that exceedingly general language hardly qualifies as a "precise" or "careful" description of a liberty interest that could confer a due process right on a U.S. citizen specifically concerning her spouse's admission to the United States. *Flores*, 507 U.S. at 302; *Lehr*, 463 U.S. at 256.

In reality, there is only one "choice" of respondent's that is directly affected by the denial of a visa to Berashk: her preference that he be admitted to the United States so that she can live in this country with him. See Br. in Opp. 17 (asserting "a constitutionally protected liberty interest in choosing where to live with [one's] spouse"). The court of appeals resisted the suggestion that the review it fashioned was "predicated on a liberty interest in the ability to live in the United States with an alien spouse," insisting that a "more general right" was at issue. Pet. App. 7a n.1. But the court did not explain any basis for its resistance to that suggestion. And in light of the vagueness of the "more general right" on which it purported to rely—and the fact that the visa denial does not impinge on the marriage-related interests that this Court has previously recognized—no such basis exists. The "freedom of personal choice" perceived by the court of appeals is, at bottom, an asserted constitutionally based liberty interest in having Berashk be present in the United States. See, *e.g.*, *Swartz*, 254 F.2d at 339 ("[T]he essence of appellants' claim, when it is analyzed, is a right to live in this country."); see also *Silverman*, 437 F.2d at 107.

There is no history in this Nation of recognizing a liberty interest in having one's alien spouse enter and reside in the United States, especially when neutral laws of general applicability bar the alien from entering. To the contrary, there is a long history of recognizing that alien spouses (and other family members) of U.S. citizens may be denied admission to the United States in Congress's complete discretion, as an exercise of Congress's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Mandel*, 408 U.S. at 766 (citation omitted); see generally *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (explaining that the principle "that the formulation" of policies pertaining to the entry of aliens and their right to remain here "is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government," representing "not merely a page of history, but a whole volume") (citation and internal quotation marks omitted).

That power has often been recognized even when Congress's choices or the Executive's enforcement decisions result in separation of family members. See, *e.g.*, *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 539, 543-544, 547 (1950) (upholding Executive's right to deny entry to U.S. citizen's alien spouse based on confidential "security reasons" without providing a hearing); see also *Fiallo*, 430 U.S. at 798 (disclaiming any "authority to substitute our political judgment for that of the Congress," even when "statutory definitions deny preferential status to parents and children who share strong family ties"); see generally *Shaughnessy* v. *United States ex rel. Mezei*,

345 U.S. 206, 212 (1953); *Wong Wing* v. *United States*, 163 U.S. 228, 232-234 (1896). Accordingly, in the immigration context, an asserted liberty interest in having an alien spouse admitted to the United States cannot be counted among the "historic liberties," *Ingraham*, 430 U.S. at 673, arising directly from the Fifth Amendment. Decisions of the courts of appeals stretching back many decades have reached the same conclusion, "repudiat[ing]" the existence of a protected liberty interest in living in the United States with an alien spouse (or other alien relative). Pet. App. 7a n.1.[9]

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[9] See, *e.g.*, *Bangura* v. *Hansen*, 434 F.3d 487, 495-497 (6th Cir. 2006) (stating that the "Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country" and that "[a] denial of an immediate relative visa does not infringe upon their right to marry"); *Burrafato* v. *United States Dep't of State*, 523 F.2d 554, 555-557 (2d Cir. 1975) (ruling that "the claim that denial of [the alien's] visa application violated the constitutional rights of [the U.S.-citizen spouse]" was "foreclosed" and that "the failure of the Department of State * * * to specify the reasons for denial of [the alien's] visa application" did not "implicate[]" any "constitutional rights of American citizens over which a federal court would have jurisdiction"), cert. denied, 424 U.S. 910 (1976); see also *Fasano* v. *United States*, 230 Fed. Appx. 239, 240 (3d Cir. 2007) (per curiam). Courts of appeals addressing the issue in removal proceedings have likewise concluded that barring a U.S. citizen's alien spouse from being present in the United States does not implicate any protected liberty interest. See, *e.g.*, *Oforji* v. *Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) ("The law is clear that citizen family members of illegal aliens have no cognizable interest in preventing an alien's exclusion and deportation."); *Garcia* v. *Boldin*, 691 F.2d 1172, 1183-1184 (5th Cir. 1982) ("Mrs. Garcia and the children are United States citizens. The deportation order has no legal effect upon them. It does not deprive them of the right to continue to live in the United States, nor does it deprive them of any constitutional rights."); *Swartz*, 254 F.2d at

To counter that conclusion, respondent has pointed (Br. in Opp. 14-15, 20) to this Court's decision in *Fiallo* v. *Bell*, *supra*, which involved constitutional challenges to statutory provisions governing the system under which U.S. citizens and permanent residents can petition for immediate-relative or other family-related classifications for their alien parents or children. 430 U.S. at 791. But *Fiallo* does not aid respondent's cause. It did not concern review of a consular officer's decision denying an alien's visa application based on the distinct grounds on which an alien may be inadmissible because of his own circumstances. Moreover, as noted above, the decision soundly rejected the proposition that U.S. citizens have a "fundamental right" under the INA to have their alien family members admitted to the United States. *Id.* at 795 n.6; see p. 20, *supra*. The decision also emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." 430 U.S. at 792 & n.4 (citation and internal quotation marks omitted). While *Fiallo* recognizes that Congress's decisions embodied in immigration statutes are not always immune from judicial review, it does not suggest the existence of a constitutionally protected liberty interest in marriage that extends to having one's alien spouse admitted to the United States. See *id.* at 793-795 & nn.5-6, 798.

Respondent has also placed heavy reliance (Br. in Opp. 18-19) on *Moore*, *supra*, which recognizes a substantive due process right for a U.S.-citizen grandmother to live in the same household as her U.S.-

339 ("[W]e think the wife has no constitutional right which is violated by the deportation of her husband."); see also *Payne-Barahona* v. *Gonzáles*, 474 F.3d 1, 2-3 (1st Cir. 2007).

citizen grandson. See 431 U.S. at 499 (opinion of Powell, J.) (explaining that a State cannot enter into the private realm of family life so as to make "a crime of a grandmother's choice to live with her grandson"). But *Moore* does not speak to the nature of a citizen's liberty interests in an immigration context. To the contrary, the purported liberty interest in living in this country with a non-resident alien who has been deemed inadmissible and denied a visa "is one far removed from the right of United States citizens to live together as a family." *Morales-Izquierdo* v. *DHS*, 600 F.3d 1076, 1091 (9th Cir. 2010). *Moore*'s holding is grounded in history and tradition. See 431 U.S. at 503-505 & n.12 (opinion of Powell, J.) (finding "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children" to be "deserving of constitutional recognition" because of its "venerable" roots) (footnote omitted). No such grounding exists with respect to the wholly distinct liberty interest that respondent claims.

That analysis does not, as respondent has insisted (Br. in Opp. 16-17), erroneously conflate the question of the existence of an asserted liberty interest with the question of the strength of the government's regulatory interest. Rather, it recognizes that where the government's regulatory powers have "tradition[ally]" been absolute, as is true of the admission of aliens, the asserted interest could never have taken sufficient "root[]" in the first place to enjoy protection arising directly from the text of the Due Process Clause itself. *Ingraham*, 430 U.S. at 672-675; *Flores*, 507 U.S. at 303; see generally *Mandel*, 408 U.S. at 770 (stating that in the visa context there is no call to "balanc[e]"

the government's "justification" for its action against the interests of a U.S. citizen).

b. Respondent's contention that the denial of a visa to her alien spouse implicates her own liberty interests under the Due Process Clause suffers from another fatal flaw: it cannot be reconciled with the longstanding principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980).

As this Court explained in *O'Bannon*, due process jurisprudence has long drawn a "simple distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally," and has rejected the notion that the latter sort of action can be said to have interfered with the citizen's constitutionally protected liberty or property interests. *O'Bannon*, 447 U.S. at 788-789 (citing *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870)) (stating that the Fifth Amendment "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals").

The plaintiffs in *O'Bannon* were nursing home residents who claimed that their liberty interests under the Due Process Clause had been violated when the government decertified the home in which they lived, thereby forcing them to move, without affording them a hearing on the decertification decision. See 447 U.S. at 777-781, 784, 787. The Court recognized that decertification could have "an immediate, adverse impact on some residents," but ruled that the government's enforcement of "valid regulations" against the nursing

home "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 787, 790; see *id.* at 787 (contrasting such an indirect impact with "the withdrawal of direct benefits" to the residents themselves). In the Court's view, the residents were in a position "comparable to that of members of a family who have been dependent on an errant father; they may suffer serious trauma if he is deprived of his liberty or property as a consequence of criminal proceedings, *but surely they have no constitutional right to participate in his trial or sentencing procedures*." *Id.* at 788 (emphasis added); see, *e.g.*, *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 766-768 (2005).

The principle that "an indirect and incidental result of the Government's enforcement action * * * does not amount to a deprivation of any interest in life, liberty, or property," *O'Bannon*, 447 U.S. at 787, is fully applicable to this case, and it defeats respondent's claim that she has been deprived of any protected liberty interest. The United States has taken no adverse action against respondent herself; indeed, DHS approved respondent's petition to have Berashk classified as an alien who may apply for an immigrant visa. Respondent's only complaint is that an adverse decision solely concerning her spouse—the denial of his visa application, based on his own failure to satisfy the qualifications for obtaining a visa under the INA—has had a ripple effect, depriving her of her husband's company so long as she elects to remain within the borders of the United States. That is exactly the kind of "indirect and incidental" harm, *ibid.*, that this Court has held "does not amount to a deprivation of any interest in life, liberty, or property," *ibid.*; see *id.*

at 789-790. In the face of this Court's precedents, the Ninth Circuit's ruling that "the denial of a spouse's visa" impinges upon a U.S. citizen's "protected liberty interest in marriage" under the Due Process Clause, Pet. App. 7a, cannot be sustained.

c. The Ninth Circuit's due process ruling would have sweeping implications. Under such a legal regime, any U.S. citizen whose alien spouse is not permitted to enter this country, for any reason, might assert a constitutional claim. So, too, might any U.S. citizen whose alien spouse is deemed inadmissible at the border or is placed in proceedings to remove him from this country because of (for instance) violation of the immigration laws, commission of serious crimes, or ties to terrorist activity. See, *e.g.*, 8 U.S.C 1227. And, because the constitutional right that the Ninth Circuit posited covers "personal choice" not just in "marriage" but also in "family life" more generally, Pet. App. 7a n.1 (citation omitted), such claims might also be asserted by U.S.-citizen children, parents, or even siblings whose alien family members have been deemed inadmissible to or removed from the United States. That result would work a sea change in the law, creating obstacles to the government's exercise of its plenary power over the Nation's borders and burdening the courts. See, *e.g.*, *Morales-Izquierdo*, 600 F.3d at 1091.[10]

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[10] According to the Department of State, during fiscal year 2013, consular officers denied 112,405 visa applications under 8 U.S.C. 1182(a), *Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds for Refusal Under the [INA]), Fiscal Year 2013, Table XX*, http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXX.pdf (last visited Nov. 19, 2014), of which more than 1200 were filed

Moreover, by breaking down the long-accepted "distinction between government action that directly affects a citizen's legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally," *O'Bannon*, 447 U.S. at 788, the Ninth Circuit's ruling would open the door to a host of constitutional claims outside the immigration context. If government action directed solely at respondent's alien spouse gave rise to a claim on respondent's part that her protected liberty interests have been infringed, "it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service." *Payne-Barahona* v. *Gonzáles*, 474 F.3d 1, 3 (1st Cir. 2007); cf. *Flores*, 507 U.S. at 301-303. Indeed, in support of her position in this case, respondent has embraced the very notion that such due process rights exist and that such claims may be brought. See Br. in Opp. 21 n.4 (stating that children "certainly would have" a constitutional right to challenge a parent's imprisonment). That state of affairs would overturn more than a century of precedent, see *O'Bannon*, 447 U.S. at 788-789, and flood the courts with suits by plaintiffs who claim a species of constitutional injury that has never previously been cognizable.

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by aliens on the basis of their engagement or marriage to a U.S. citizen and were denied on Section 1182(a)(2) or (3) grounds.

B. The Court Of Appeals Erred In Imposing Judicial Review And Notice Requirements On A Consular Officer's Visa Determination

The Ninth Circuit's decision is fundamentally flawed for additional reasons. Relying on the conclusion in *Mandel* that a "facially legitimate" exercise of discretion is sufficient (assuming that some judicial review of the denial of a waiver of inadmissibility is available at all), the court of appeals imposed, as a matter of constitutional law, requirements of detailed notice with respect to aliens denied a visa on security and related grounds identified by Congress. The court mandated a disclosure that would permit plaintiffs like respondent to obtain information not only about the legal basis for a terrorism-related denial of a visa to an alien spouse but also about the "facts" of "what the consular officer believes the alien has done." Pet. App. 9a, 14a. That ruling cannot be reconciled with this Court's precedents, including *Mandel* itself, or with Congress's judgment that visas refusals are not to be subject to judicial review or that the reasons for such refusals may remain undisclosed. Moreover, the notice requirements imposed by the court of appeals would give rise to serious national-security-related harms.

1. The doctrine of consular nonreviewability has deep roots in the law. For virtually as long as Congress has required immigrants to present documentation when arriving at a port of entry, see Immigration Act of 1924, Pub. L. No. 68-139, § 2(f), 43 Stat. 154 ("No immigration visa shall be issued to an immigrant if it appears to the consular officer * * * that the immigrant is inadmissible to the United States under the immigration laws."), courts have recognized that

an alien has no right to challenge the refusal of a visa by a consular officer in the absence of affirmative congressional authorization. See, *e.g.*, *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928); *United States ex rel. Ulrich* v. *Kellogg*, 30 F.2d 984, 986 (D.C. Cir.), cert. denied, 279 U.S. 868 (1929); see also, *e.g.*, A. Warner Parker, *The Quota Provisions of the Immigration Act of 1924*, 18 Am. J. Int'l L. 737, 742 (1924) ("Absolute authority to refuse the visa is vested in consular officials."); Note, *Right of an Alien to a Fair Hearing in Exclusion Proceedings*, 41 Harv. L. Rev. 522, 522 n.7 (1928) ("The denial of a visa by a consular officer will not be reviewed by the courts."). That principle has become deeply embedded in judicial decisions, including decisions by this Court. See, *e.g.*, *Mandel*, 408 U.S. at 769-770; *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956) (declining to suggest that "an alien who has never presented himself at the border of this country may avail himself of [a] declaratory judgment action by bringing the action from abroad"); see also, *e.g.*, *Knauff*, 338 U.S. at 543; *Saavedra Bruno*, 197 F.3d at 1160, 1162 (discussing nonreviewability doctrine's history and collecting cases).

Powerful justifications support the preclusion of judicial second-guessing of decisions made by consular officers abroad relating to aliens' qualifications for admission to the United States. First, the consular nonreviewability doctrine is a necessary corollary of the principle that the political Branches have plenary power to make rules for the admission of aliens and to exclude those who do not qualify under those rules. See pp. 7, 25-26, *supra*; see also, *e.g.*, *Oceanic Steam*

Navigation Co. v. *Stranahan*, 214 U.S. 320, 339 (1909) (stating that "over no conceivable subject is the legislative power of Congress more complete"); see also *Knauff*, 338 U.S. at 542, 544 (stating that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," and that "[w]hen Congress prescribes a procedure concerning the admissibility of aliens," it is not only "dealing * * * with a legislative power" but also "implementing an inherent executive power"); *Mezei*, 345 U.S. at 210 (stating that this area of the law is "largely immune from judicial control"). That power is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Mandel*, 408 U.S. at 765; see *Knauff*, 338 U.S. at 542; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892); see also *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (explaining that "any 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").

This Court has therefore long held—including in decisions that predate the visa system—that "[t]he power of Congress to * * * prescribe the terms and conditions upon which [aliens] may come to this country, *and to have its declared policy in that regard enforced exclusively through executive officers*, without judicial intervention, is settled by our previous adjudications," even in cases in which there is some question about whether the alien falls within "a class forbidden to enter the United States." *Wong Wing*,

163 U.S. at 232-234 (emphasis added); see *Harisiades*, 342 U.S. at 588-589.

Second, Congress has repeatedly acknowledged the consular nonreviewability doctrine and chosen to leave it undisturbed. When putting the visa system into place in 1924, Congress understood that no form of review would be available to challenge a consular officer's denial of a visa. See H.R. Rep. No. 176, 68th Cong., 1st Sess. Pt. 2, at 10 (1924) (view of minority); 65 Cong. Rec. 5466 (1924). When Congress drafted the INA in 1952, there were suggestions to authorize judicial review of visa denials or to create "a semijudicial board * * * with jurisdiction to review consular decisions pertaining to the granting or refusal of visas," H.R. Rep. No. 1365, 82d Cong., 2d Sess. 36 (1952) (House Report); see S. Rep. No. 1515, 81st Cong., 2d Sess. 622 (1950). But Congress declined to enact any such procedure. As a Senate Report explained, although "[o]bjection has been made to the plenary authority presently given to consuls to refuse the issuance of visas," allowing "review of visa decisions would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws. * * * [T]he question of granting or refusing immigration visas to aliens should be left to the sound discretion of the consular officer." S. Rep. No. 1515, at 622. And in 1961, when the INA was amended to authorize judicial review of determinations affecting aliens in the United States subject to deportation or exclusion proceedings, Congress provided no corresponding right to judicial review for aliens outside the United States claiming some right to enter. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651; see also

H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961) (stating that "[t]he sovereign United States cannot give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States"); see also 8 U.S.C. 1201(i) (allowing judicial review of visa revocations, as distinguished from initial visa denials, but only in proceedings to remove an alien who is in the United States and when "revocation provides the sole ground for removal").[12]

It is within Congress's power to provide for some judicial (or administrative) review of a consular officer's refusal of a visa. But no statutory provision of that nature exists, see pp. 7-8, *supra*, or has ever existed, and the whole history of the immigration laws therefore reflects a congressional judgment that no such judicial examination should take place. "[U]nless expressly authorized by law," it is "not within the province of any court * * * to review the determina-

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[12] Congress has also made clear that various subsequent enactments should not be interpreted to provide a basis for judicial review of consular officers' visa decisions. See, *e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, § 428(b), (e), and (f), 116 Stat. 2187-2190 ("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 United States official or employee to grant or deny a visa."); Visa Waiver Permanent Program Act, Pub. L. No. 106-396, § 206, 114 Stat. 1643-1644 (amending 8 U.S.C. 1187(c)). And Congress has failed to enact numerous bills proposing to establish a board within the Department of State to review consular officers' visa decisions. See, *e.g.*, H.R. 3305, 103d Cong., 1st Sess. (1993); H.R. 2975, 104th Cong., 2d Sess. (1996); H.R. 4539, 105th Cong., 2d Sess. (1998); H.R. 1345, 107th Cong., 1st Sess. (2001).

tion of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543.

2. *Mandel* was decided against the backdrop of—and articulated justifications for—the long-standing consular nonreviewability doctrine. See 408 U.S. at 765-767. Contrary to the ruling below, see Pet. App. 6a-7a & n.1, *Mandel* did not authorize judicial review of a consular officer's denial of a visa, and there is no basis for recognizing any right to judicial review of such a decision.

In *Mandel*, this Court assumed (but did not hold) that if a U.S. citizen's First Amendment rights were implicated, then that citizen could obtain very limited review of the Attorney General's discretionary denial of a waiver of the grounds that required the refusal of an alien's nonimmigrant visa application by a consular officer. See 408 U.S. at 765, 770. In that narrow context, the Court concluded that the reason for the Attorney General's denial of the waiver that appeared in the record was "facially legitimate and bona fide" and that it was not appropriate to "look behind the exercise of [the Attorney General's] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 769-770. The Court specifically declined to address whether the Attorney General was required to furnish such a reason at all. See *id.* at 770 ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case.").

That narrow decision cannot be transmuted into a warrant for judicial review of a decision made by a

consular officer abroad to deny an alien a visa. A rationale that might support limited judicial review of a discretionary waiver of a ground of inadmissibility by the Attorney General—and the Court in *Mandel* did not hold that there was a right of judicial review even then—simply does not extend to the underlying decision that such a ground for denying a visa applies. 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 not to issue a visa because an alien is ineligible must, by definition, be tethered to the legal provisions that define the alien's ineligibility. See, *e.g.*, 8 U.S.C. 1182(a), 1201(g). It does not make sense to ask if the reasons for visa denial set forth in an Act of Congress are "facially legitimate"; those reasons are legitimate on their face by their very nature because Congress has prescribed them.

Attempting to examine the "facial[] legitima[cy]" of a statutorily grounded determination by a consular officer would ultimately put courts in the untenable position of second-guessing Congress's choices about which aliens abroad should and should not be granted visas as well as decisions by consular officers at distant posts about whether individual aliens who appear before them satisfy the conditions Congress has laid down. Such a task is outside the judiciary's realm; it cannot be reconciled with the consular nonreviewability doctrine and the fundamental principles that undergird it. That conclusion is not altered by the fact that Congress's choices might have an indirect effect on an alien's U.S-citizen family members or other persons in this country. A congressional decision to permit some aliens to be admitted and require other

aliens to be excluded—and consular officers' application of those criteria—is a line-drawing exercise that will keep some family members apart and prevent some citizens who "would wish to meet and speak with" an ineligible alien from fulfilling that goal. *Mandel*, 408 U.S. at 768; see *id.* at 765-767; *Fiallo*, 430 U.S. at 792-795. That incidental consequence has never been thought to undermine Congress's plenary power to make those kinds of decisions or to vest consular officers with the authority to make final determinations in such matters abroad.

Accordingly, extension beyond the discretionary waiver context of the language in *Mandel* is not justified. See 408 U.S. at 767 ("[Plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [statutory provisions], and that First Amendment rights could not override that decision."); cf. *Saavedra Bruno*, 197 F.3d at 1161-1165 (acknowledging distinction between consular officer's visa denial and Attorney General's refusal to waive applicable grounds of inadmissibility); but see *American Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009). Because the decision of a consular officer to refuse a visa was directly at issue here, the Ninth Circuit erred in subjecting that decision to judicial scrutiny.

3. In any event, *Mandel* did not require the government to supply a reason that did not already appear in the record of a case so that a court could scrutinize that reason and determine whether it was sufficiently valid. See 408 U.S. at 769-770. But that is exactly what the Ninth Circuit required here when it ruled that the government must identify the precise subsection of 8 U.S.C. 1182(a)(3)(B) under which the

visa application was denied and the factual basis for the determination of inadmissibility. Pet. App. 7a-21a. There is no basis in the Constitution to mandate disclosure or judicial review of such information.

a. By statute, the government is generally required to provide an alien whose visa application has been denied with a statement of the determination and "the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1). That notice provision does not apply, however, when the alien is found inadmissible on "[s]ecurity and related grounds," which include "terrorist activity," or on "[c]riminal and related grounds." See 8 U.S.C. 1182(a)(2), (a)(3), and (b)(3). Congress adopted that exception to the statutory notice requirement as part of a subtitle of the Antiterrorism and Effective Death Penalty Act of 1996 entitled "Exclusion of Members and Representatives of Terrorist Organizations," Pub. L. No. 104-132, Tit. IV, Subtit. B, 110 Stat. 1268, in order to ensure that "no explanation of the denial need be given to aliens excluded on the basis of their terrorist or other criminal activity," H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 116 (1996).[13]

When the government invokes the protections of Section 1182(b)(3) to limit the information supplied to an alien whose visa application has been denied under

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[13] Other statutory provisions also protect from disclosure records pertaining to visa decisions. See 8 U.S.C. 1202(f) (providing that such records "shall be considered confidential" and may "in the discretion of the Secretary of State" be "made available to a court" only in limited circumstances); *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 744 (D.C. Cir. 1983) (applying Section 1202(f) to "information revealing the thought-processes of those who rule on the [visa] application").

Section 1182(a)(3) on security or related grounds, it does so for national-security or foreign-policy reasons. Deference to the political Branches is at its zenith in matters of national security and foreign affairs. See *Wayte* v. *United States*, 470 U.S. 598, 611-612 (1985) (stating that "[f]ew interests can be more compelling than a nation's need to ensure its own security"); see also *Zadvydas* v. *Davis*, 533 U.S. 678, 695-696 (2001) (recognizing that "terrorism or other special circumstances" can warrant "heightened deference to the judgments of the political branches with respect to matters of national security"); cf. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ("[J]udicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations") (citation and internal quotation marks omitted). "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988); *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981)); *Harisiades*, 342 U.S. at 588-589 (noting that the political Branches' immigration-related powers are "intricately interwoven" with foreign relations and war powers).

In keeping with that principle, decisions of this Court recognize that the government is entitled to shield information relating to the entry of aliens that "would itself endanger the public security," *Knauff*, 338 U.S. at 544—the very concern on which Section 1182(b)(3) is based. For instance, in *Mezei*, *supra*, the

Court considered the constitutionality of the exclusion of an alien on security-related grounds. See 345 U.S. at 207. A regulation then in effect provided that the Attorney General could deny a hearing to aliens excludable "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." *Id.* at 212 n.8. The Court emphasized that in an exclusion case Congress dictates the relevant procedures. See *id.* at 212. And "because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; 'it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government.'" *Ibid.* (quoting *Knauff*, 338 U.S. at 543). The Court therefore ruled that "the Attorney General may lawfully exclude [the alien] without a hearing as authorized by the * * * regulations * * * . Nor need he disclose the evidence upon which that determination rests." *Id.* at 214-215; see, *e.g.*, *Knauff*, 338 U.S. at 544 (rejecting challenge by excluded alien spouse of U.S. citizen to regulations under which the Attorney General could deny a hearing to such an alien when he "concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States" and "the disclosure of the information on which he based that opinion would itself endanger the public security").

A fortiori, disclosure is not required when, unlike in *Mezei* and *Knauff*, the alien has not reached our shores and has simply applied for a visa abroad. See H.R. Rep. No. 383, 104th Cong., 1st Sess. 102 (1995)

("An alien has no constitutional right to enter the United States and no right to be advised of the basis for the denial of such a privilege.") (quoted in Pet. App. 16a n.5).

In the face of Section 1182(b)(3) and this Court's precedents, the court of appeals supported its requirement that the government come forward with detailed information about the denial by citing to *Mandel*, which it characterized as holding that "the Government *must* put forward a 'facially legitimate *and* bona fide reason'" when a U.S. citizen's constitutional rights are implicated. Pet. App. 22a (first emphasis added). But *Mandel* held no such thing. Indeed, the Court was careful to explain that its decision in that case "neither address[ed] nor decide[d]" what constitutional grounds may be available for attacking a waiver decision "for which no justification whatsoever is advanced." 408 U.S. at 770. *Mandel* therefore does not supply any authority for requiring the government to divulge information it has deemed too sensitive to disclose.

Nor is there any basis to expand the ruling in *Mandel* to require that national-security information (or other sensitive information) relating to denial of a visa to the alien himself be provided to a third party, including a U.S. citizen claiming an interest in the visa denial. Any right of such a citizen that could conceivably be implicated in such a circumstance is not powerful enough to overcome the traditional reluctance to intrude on the political Branches' authority in the areas of national security and foreign relations. See, *e.g.*, *Egan*, 484 U.S. at 530; Resp. Br. at 16, *Mandel*, *supra* (No. 71-16) (concession by U.S.-citizen plaintiffs that when Congress or the Secretary of State "de-

cide[s] to exclude an alien to achieve a national security or foreign policy objective, First Amendment rights of citizens cannot override that decision"). In that setting, all of the justifications for the consular nonreviewability doctrine apply with special force.

Any other conclusion would amount to an end run around Section 1182(b)(3) and this Court's decisions in *Mezei* and *Knauff*, and would ultimately vitiate the rule those authorities establish. A significant number of aliens whose visas are denied under Section 1182(a)(2) or (a)(3) have U.S.-citizen family members who might assert the same purported due process right on which respondent relies. See, *e.g.*, note 10, *supra*; see also *Mandel*, 408 U.S. at 768. Surely when Congress enacted Section 1182(b)(3), it did not envision that an alien would be able to obtain the very information that the statute seeks to shield from the alien's knowledge merely through the expedient of having a U.S. citizen—a spouse, or perhaps even another family member—request it. And surely the holdings of *Mezei* and *Knauff* could not be overcome simply by having the alien's spouse seek judicial aid in obtaining "information of a confidential nature, the disclosure of which would be prejudicial to the public interest," *Mezei*, 345 U.S. at 212 n.8, to which the alien himself is not entitled. That is especially so where the alien, like Berashk here but unlike the aliens in *Mezei* and *Knauff*, remains outside the United States and is not seeking admission at a port of entry. The restrictions reflected in those authorities are grounded in security concerns too vital to be so easily circumvented.

b. By requiring the government to come forward with a detailed reason for the visa refusal that has

been properly withheld from the alien himself, the Ninth Circuit's decision threatens to interfere with U.S. national-security and foreign-policy interests in a number of different respects. Those serious adverse consequences, which would leave an "unprotected spot in the Nation's armor," *Zadvydas*, 533 U.S. at 695-696 (citation omitted), counsel strongly against creating a disclosure requirement that the *Mandel* Court did not adopt and then subjecting the consular decision-making to judicial scrutiny.

First, the type of disclosure that the Ninth Circuit has mandated could compromise classified or other sensitive information. The information supporting a visa denial pursuant to 8 U.S.C. 1182(a)(3)(B) is often classified or related to a sensitive ongoing national-security or law-enforcement investigation. Furnishing such information to an alien's U.S.-citizen spouse (or perhaps even his parent, child, or sibling)—who is very likely to pass on the information to the alien and his associates—could jeopardize the national security, the public safety, or the safety of individual intelligence or other personnel in the field by revealing information specific to the alien or classified sources and methods more generally. See generally *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320-321 (1936) ("[The President] has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."). Even small pieces of information that may appear innocuous in isolation can be fitted into a bigger picture by a terrorist or criminal organization, providing insight into the gov-

ernment's patterns of investigation and its knowledge (or lack of knowledge) of a particular group's activities or plans. See generally *CIA* v. *Sims*, 471 U.S. 159, 178 (1985) ("What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.") (citations omitted). It is for these reasons—to protect the government's ability to keep confidential information about security- or crime-related investigations from targets or their associates and to protect law-enforcement and intelligence sources and methods—that Congress authorized consular officers to withhold notice of the ground for a visa denial in the first place. See 8 U.S.C. 1182(b)(3); see H.R. Rep. No. 383, at 101-102; see also 8 U.S.C. 1202(f) (providing that visa records "shall be considered confidential"); House Report 55 (describing "information of a confidential nature" as being information "the disclosure of which would be prejudicial to the interests of the United States").

Those concerns arise not only from the Ninth Circuit's requirement that the government disclose "facts" about "what the consular officer believes the alien has done," Pet. App. 9a, 14a, but also from its insistence that the government reveal the particular subsection of 8 U.S.C. 1182(a)(3)(B) that formed the basis for the visa denial, see Pet. App. 12a-15a. For example, the government's disclosure to a U.S. citizen that it has reason to believe that her spouse has solicited funds for a terrorist organization (see 8 U.S.C. 1182(a)(3)(B)(i)(I) and (iv)(IV)), or has been to a terrorist training camp (see 8 U.S.C. 1182(a)(3)(B)(i)(VIII)), could well enable anyone who learns the substance of that disclosure to make edu-

cated guesses about, or even to identify definitively, the nature and sources of the government's knowledge. That is precisely the type of harm Congress intended to prevent by enacting 8 U.S.C. 1182(b)(3).

Second, the requirement imposed by the Ninth Circuit would have a chilling effect on the sharing of national-security information among federal agencies and between the United States and foreign countries. Visa ineligibility determinations are frequently based on information that other agencies or entities, including foreign governments and officials, provide to the Department of State. See, *e.g.*, 8 U.S.C. 1105(a) (directing the Department of State to "maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States"); House Report 36 (explaining that Congress intended Section 1105 to "strengthen security screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States").[14]

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[14] See also, *e.g.*, 8 U.S.C. 1105(b)(1) (giving the State Department access to criminal history information maintained by other U.S. agencies); 8 U.S.C. 1187(c)(2)(F) (discussing information sharing with foreign countries with respect to individuals who "represent a threat to the security or welfare of the United States or its citizens"); 8 U.S.C. 1202(f)(2) (confidentiality of visa records);

Some of that information is reflected in State Department records that are routinely consulted when adjudicating visa applications, or are provided to consular officers by sources local to the consular post. Consular officers encountering visa applicants who might have terrorism-related or other security-related ineligibilities also obtain additional information needed to adjudicate the visa application by requesting a Security Advisory Opinion from the State Department, which undertakes an extensive review of all relevant information—including classified information—known to the Department or other agencies or sources. See, *e.g.*, *Eleven Years Later: Preventing Terrorists from Coming to America: Hearing Before the Subcomm. on Border and Maritime Security of the House Comm. on Homeland Security*, 112th Cong., 2d Sess. 29-36 (Sept. 11, 2012) (statement of Edward J. Ramotowski).

If consular officers were compelled to disclose sensitive law-enforcement or intelligence information in connection with the denial of visa applications, the State Department might well never receive all of the information relevant to enforcing the INA and protecting the national security. Certain foreign sources of information, in particular, may have strong interests in avoiding any action that might tend to reveal their assistance to the United States. Cf. *Sims*, 471 U.S. at 175 ("If potentially valuable intelligence sources come to think that the [CIA] will be unable to maintain the confidentiality of its relationship to them,

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22 U.S.C. 4807 (program for visa and passport security); H.R. Doc. No. 131, 108th Cong., 1st Sess. (2003); Exec. Order No. 13,388, 3 C.F.R. 198 (2006); Exec. Order No. 13,354, 3 C.F.R. 214 (2005).

many could well refuse to supply information to the Agency in the first place."). If consular officers were then forced to act upon aliens' visa applications without the Department of State or consular posts receiving pertinent information, the ineligibility criteria established by Congress would not be rigorously enforced, and the threat to national security would be grave indeed. See, *e.g.*, Nat'l Comm'n on Terrorist Attacks Upon the U.S., *The 9/11 Commission Report* 384 (July 22, 2004) ("For terrorists, travel documents are as important as weapons."); *Visa Issuance and Homeland Security: Hearings Before the Subcomm. on Immigration, Border Security and Citizenship of the Senate Comm. on the Judiciary*, 108th Cong., 1st Sess. 141 (July 15, 2003) (testimony of Janice L. Jacobs) (stating that "swift provision of all the best information known to the US government from whatever source to our line visa officers is essential to ensure that we stop * * * dangerous persons" such as the 9/11 hijackers from entering the United States).

Respondent has noted (Br. in Opp. 31) that consular officers sometimes do disclose information to aliens whose visas are denied for terrorism-related (or crime-related) reasons. But that hardly suggests that the Constitution requires the government to make a particularized disclosure in every case in which a U.S.-citizen spouse demands one, even when it is the view of those who are familiar with intelligence reporting and terrorism trends and patterns that such a disclosure would cause harm to national security or foreign relations. See *Humanitarian Law Project*, 561 U.S. at 34. When disclosure of information to the alien is made, it reflects a considered determination that the

information provided does not require invoking the protections of Section 1182(b)(3).

Contrary to the Ninth Circuit's suggestion (Pet. App. 21a), harm to the United States caused by the court of appeals' new disclosure requirements could not be ameliorated by providing information about the reasons for a visa denial to a district court in camera "if necessary." There are no established procedures for mandated disclosures in this setting, and the panel's ruling is vague about exactly what "procedures" should be followed and under what circumstances. *Ibid.* The use of classified information poses various substantive and procedural issues. Courts have been reluctant to "dispose of the merits of a case on the basis of *ex parte, in camera* submissions," and questions would arise concerning access to the information by plaintiffs or their counsel. See, *e.g.*, *Abourezk* v. *Reagan*, 785 F.2d 1043, 1060-1061 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987); see also, *e.g.*, *Jifry* v. *FAA*, 370 F.3d 1174, 1180-1182 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005). Widening of access to sensitive information, even in controlled settings, increases the risk of unauthorized or inadvertent disclosure. See *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 n.4 (2013) (recognizing inherent risks of disclosures of sensitive information even through in camera proceedings).

The sort of regime of judicial review of terrorism-related grounds for barring an alien from the United States envisioned by the Ninth Circuit would therefore likely disrupt the government's efforts to enforce the immigration laws and to safeguard national security. Notably, while even one mandated disclosure of sensitive information could be very damaging, a sig-

nificant number of visa applications every year could be affected. See note 10, *supra*. While some refusals of visas on Section 1182(a)(2) or (a)(3) grounds to aliens with U.S.-citizen spouses do not involve sensitive criminal or national-security information, a meaningful number of them would. Under these circumstances, the risks created by the Ninth Circuit's ruling—risks that neither Congress nor this Court has ever previously been willing to accept—are too great to be countenanced.

c. In this case, finally, the consular officer did supply a "facially legitimate" reason for the denial of Berashk's visa application: the fact that he is ineligible under Section 1182(a)(3)(B). *Mandel*, 408 U.S. at 769-770; see Pet. App. 27a-28a (Clifton, J., dissenting); *id.* at 44a. For all the reasons set forth above, there is no basis for requiring the government to detail why the consular officer decided that the provision was applicable. And the prospect of such disclosure—with all of its attendant harms—could not in any event play any proper role in a *Mandel* analysis. Any determination by a court that the information in the government's hands was actually insufficient to give the consular officer "reason to believe" that Berashk fell into one of the statutory categories of visa ineligibility, 8 U.S.C. 1201(g), would amount to exactly the kind of review that the *Mandel* Court deemed impermissible.

In *Mandel*, the Court noted that "the official empowered to make the decision stated that he denied a waiver because he concluded that previous abuses by [the alien]" in connection with previous waivers "made it inappropriate to grant a waiver again." 408 U.S. at 769; see *id.* at 758 (noting assertion that previous

waivers had required the alien to "limit his activities to the stated purposes of his trip" but that "he had engaged in activities beyond the stated purposes"). "With this," the Court explained, "we think the Attorney General validly exercised the plenary power that Congress delegated to the Executive." *Id.* at 769. The Court did not require any further explanation, or inquire whether the alien had indeed engaged in the claimed bad acts—even in the face of a vigorous dissent contending that "the briefest peek behind the Attorney General's reason for refusing a waiver in this case would reveal that it is a sham." *Id.* at 778 (Marshall, J., dissenting); see *ibid.* ("There is *no* basis in the present record for concluding that [the alien's] behavior on his previous visit was a 'flagrant abuse'—or even willful or knowing departure—from visa restrictions. * * * In these circumstances, the Attorney General's reason cannot possibly support a decision for the Government in this case."). Rather, the Court emphasized that it was inappropriate to "look behind the exercise of [the Executive's] discretion." *Mandel*, 408 U.S. at 770.

Respondent here seeks exactly what *Mandel* refused to allow—a "peek behind" the challenged decision, 408 U.S. at 778 (Marshall, J., dissenting), in the hope that she will be able to muster an argument that the consular officer reached an erroneous decision, see Pet. App. 14a (calling for courts to "verify" that facts of a particular case "constitute a ground for exclusion under the statute"). Under *Mandel*, a court is not entitled to "look behind" the exercise of the consular officer's responsibilities in that fashion. See *Humanitarian Law Project*, 561 U.S. at 34 (characterizing tasks that involve drawing "factual inferences" in the

"national security" context as ones as to which "the lack of competence on the part of the courts is marked") (citation omitted). Because the visa application submitted by respondent's alien spouse abroad was denied by the consular officer on the basis of a nondiscretionary reason set forth in Section 1182(b)(3)(B), neither *Mandel* nor any other relevant authority permits any further inquiry—even if, contrary to our submission, respondent had a right to obtain judicial review of the consular officer's decision at all.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
COLIN A. KISOR
STACEY I. YOUNG
Attorneys

MARY E. MCLEOD
Acting Legal Adviser
Department of State

STEVAN E. BUNNELL
General Counsel
Department of Homeland Security

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APPENDIX

1. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the

aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 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; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder

with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to

believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organi-

zation that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the

United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States un-

der clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for

admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or

sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is inadmissible.

* * * * *

(b) Notices of denials

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a) of this section, the officer shall 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 or adjustment[4] of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a) of this section.

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[4] So in original. Probably should be preceded by "ineligible for".