No. 23-348

In the Supreme Court of the United States

KRISTEN H. COLINDRES, ET AL., PETITIONERS

v.

DEPARTMENT OF STATE, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

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

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

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

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellants below) are Kristen H. Colindres and Edvin A. Colindres Juarez.

Respondents (defendants-appellees below) are the United States Department of State; Antony J. Blinken, Secretary of State; and John Wilcock, Consul General at the United States Embassy, Guatemala City, Guatemala.*

* John Wilcock has been automatically substituted for Robert Neus under Rule 35.3 of the Rules of this Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 71 F.4th 1018. The decision of the district court (Pet. App. 22a-54a) is reported at 575 F. Supp. 3d 121.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2023. The petition for a writ of certiorari was filed on September 21, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, a noncitizen generally may not be admitted to the United States without an immigrant or

nonimmigrant visa.[1] 8 U.S.C. 1181(a), 1182(a)(7). When a noncitizen seeks to obtain an immigrant visa on the basis of a family relationship with a citizen or lawful permanent resident of the United States, see 8 U.S.C. 1151(b)(2)(A)(i), 1153(a), the citizen or permanent resident must first file a petition with U.S. Citizenship and Immigration Services (USCIS) within the Department of Homeland Security.[2] If the petition is approved, the noncitizen may (if all other relevant conditions are satisfied) apply for a visa. See 8 U.S.C. 1154(a)(1) and (b), 1202; 8 C.F.R. 204.1; 22 C.F.R. 42.31, 42.42.

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

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

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

shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa").

Section 1182 identifies various "[c]lasses of aliens ineligible for visas or admission" to the United States. 8 U.S.C. 1182(a). Section 1182(a)(3) bears the heading "Security and related grounds" and includes Section 1182(a)(3)(A)(ii), which renders inadmissible any noncitizen whom a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in * * * any other unlawful activity." 8 U.S.C. 1182(a)(3)(A)(ii).[3] A neighboring provision, Section 1182(a)(3)(B), bears the heading "Terrorist activities" and specifies a variety of terrorism-related grounds of inadmissibility. 8 U.S.C. 1182(a)(3)(B).

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

2. "[T]he power to admit or exclude aliens is a sovereign prerogative," *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), that is "exercised by the Government's polit-

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

ical departments largely immune from judicial control," *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). As a result, this Court has long recognized the doctrine of consular nonreviewability—the rule that, in the absence of affirmative congressional authorization, a noncitizen cannot assert any right to review of a visa determination. As this Court has explained, an "unadmitted and nonresident alien" has "no constitutional right of entry to this country." *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972); see *Plasencia*, 459 U.S. at 32 (this Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"). Accordingly, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950); see *DHS* v. *Thuraissigiam*, 140 S. Ct. 1959, 1982 (2020) (noting that the Court "has often reiterated this important rule").

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

3. Consistent with the doctrine of consular nonreviewability, this Court has not permitted a noncitizen

abroad to obtain judicial review of an executive official's decision to deny the noncitizen a visa to enter the United States. On a handful of occasions, however, the Court has engaged in a limited review when a U.S. citizen claimed that the denial of a visa to a noncitizen abroad violated the citizen's own constitutional rights.

In 1972, the Court considered the case of a Belgian journalist, Ernest Mandel, who had been invited to speak at conferences in the United States; the consular officer in Brussels found Mandel inadmissible, and the Attorney General declined to grant him a discretionary waiver of inadmissibility. *Mandel*, 408 U.S. at 756-760. U.S. citizens who wished to hear Mandel speak asserted a First Amendment challenge. *Id.* at 769-770. The Court did not reach the government's argument that "Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given." *Id.* at 769. Instead, the Court disposed of the case on the ground that the record included a reason for denying the waiver that was "facially legitimate and bona fide," *i.e.*, that Mandel had abused prior visas. *Id.* at 769-770. The Court explained that when a noncitizen is excluded from the United States based on such a facially legitimate and bona fide reason, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770.

Next, in *Kerry* v. *Din*, 576 U.S. 86 (2015), the Court considered a claim by a U.S. citizen that the exclusion of her noncitizen husband violated her procedural due-process rights. In *Din*, the Ninth Circuit had held that the U.S. citizen, Fauzia Din, had "a protected liberty in-

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

After granting review, this Court decided that Din's challenge could not go forward, but no rationale had the support of a majority of the Court. See *Din*, 576 U.S. at 89 (plurality opinion). A three-member plurality, in an opinion by Justice Scalia, concluded that a U.S. citizen does not have a protected liberty interest in a noncitizen spouse's visa application, such that the Due Process Clause does not apply. *Id.* at 101. The plurality grounded that holding in the Nation's "long practice of regulating spousal immigration," *id.* at 95, and the Court's "consistent[] recogni[tion]" that judgments about which immigrants to admit into the United States are "'policy questions entrusted exclusively to the political branches of our Government,'" *id.* at 97 (citation omitted). The plurality accordingly concluded that "[t]o the extent that [Din] received any explanation for the Government's decision" to deny her spouse's visa, "this was more than the Due Process Clause required." *Id.* at 101.

Justice Kennedy's opinion concurring in the judgment, joined by Justice Alito, took no position on whether Din possessed a liberty interest in her hus-

band's visa application. *Din*, 576 U.S. at 102. Instead, Justice Kennedy concluded that—even assuming Din had such an interest—the government's citation of the terrorist-activity ground of inadmissibility sufficed to provide any process that was due. *Ibid.* Relying on *Mandel*, Justice Kennedy reasoned that the government need only provide "a facially legitimate and bona fide reason" to explain a visa denial. *Id.* at 104 (citation omitted); see *id.* at 103. The citation of Section 1182(a)(3)(B) met that standard, he found, because it indicated that the officer's determination "was controlled by specific statutory factors"—thus demonstrating its "facial[] legitima[cy]." *Id.* at 104-105. Justice Kennedy also noted that Section 1182(a)(3)(B) sets forth "discrete factual predicates"—thus indicating that the officer had a "bona fide factual basis" for the decision. *Id.* at 105.

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

Four Justices dissented in *Din*, concluding that Din "possesse[d] the kind of 'liberty' interest to which the Due Process Clause grants procedural protection" and that the government was required to do more than cite

the terrorist-activity bar to explain the denial. 576 U.S. at 107, 112-113 (Breyer, J., dissenting).[4]

B. Proceedings Below

1. Because petitioners' case was resolved on a motion to dismiss, this brief recounts the facts as alleged in the complaint. See Pet. App. 24a. Petitioner Edvin Colindres Juarez is a citizen of Guatemala who is married to petitioner Kristen Colindres, a citizen of the United States. *Id.* at 2a. In 2015, Kristen Colindres filed a family-based immigrant visa petition on her husband's behalf, which USCIS approved. *Id.* at 24a. In 2018, Colindres Juarez filed an application for a provisional waiver of the unlawful-presence ground of inadmissibility, which USCIS also approved. *Id.* at 24a-25a.

Colindres Juarez then applied for an immigrant visa and appeared for an interview and follow-up interview at the U.S. Embassy in Guatemala City. Pet. App. 25a. In May 2020, the embassy's visa unit sent Kristen Colindres a written notice stating that her husband's visa application had been denied. *Id.* at 26a. The denial notice cited "section 212(a)(3)(A)(II) of the Immigration and Nationality Act"—*i.e.*, the unlawful-activity bar in 8 U.S.C. 1182(a)(3)(A)(ii)—and explained that the consular officer had "reason to believe" that Colindres Juarez is "a member of a known criminal organization."

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

Pet. App. 92a; see *ibid.* (noting the officer's finding of a "probability, supported by the facts, that the alien is a member of an organized criminal entity"). The notice also stated that the embassy's decision was supported by a formal advisory opinion from the State Department Visa Office. *Ibid.*

Petitioners requested reconsideration and submitted additional materials, including an explanation of Colindres Juarez's tattoos, which petitioners maintained were not gang-related. Pet. App. 26a. In December 2020, the embassy denied the reconsideration request. *Ibid.*; see *id.* at 94a.

2. In February 2021, petitioners filed this suit seeking judicial review of the embassy's visa decision. Pet. App. 27a. Among other claims, petitioners alleged that the visa denial violated their constitutional rights to due process, equal protection, and freedom of speech and association. *Ibid.* They also alleged that the unlawful-activity bar in Section 1182(a)(3)(A)(ii) is unconstitutionally vague. *Ibid.* The government filed a motion to dismiss, invoking consular nonreviewability. *Ibid.*

The district court granted the government's motion. Pet. App. 22a-54a. The court noted that consular nonreviewability is a "broad shield" that ordinarily bars any judicial review of claims challenging a visa denial unless, per *Mandel*, the denial burdens the constitutional rights of a U.S. citizen. *Id.* at 33a-34a. And the court found that none of petitioners' alleged constitutional claims qualified for even limited review under the *Mandel* standard. *Id.* at 53a. With respect to the due-process claims, the court determined, in reliance on D.C. Circuit precedent, that U.S. citizens do not possess a protected liberty interest in a noncitizen spouse's visa application. *Id.* at 36a-41a (citing *Swartz* v. *Rogers*, 254

F.2d 338, 339 (D.C. Cir.), cert. denied, 357 U.S. 928 (1958)). The court accordingly determined that the due-process claims failed on that threshold ground. *Id.* at 41a.

The district court also found petitioners' alternative constitutional theories insufficient to overcome consular nonreviewability. The court rejected petitioners' argument that the denial of Colindres Juarez's visa violated the couple's First Amendment rights, finding that the complaint offered only a "conclusory" articulation of those claims and that petitioners failed to plead any violation of a right of "'*expressive* association.'" Pet. App. 48a (citation omitted); see *id.* at 47a-49a. The court found that petitioners' equal-protection claim (which the complaint based on Colindres Juarez's "'national origin, nationality, alienage, and/or being a member of a discrete and insular minority'") was also insufficiently pleaded. *Id.* at 43a-47a (citation omitted). And the court likewise rejected petitioners' vagueness challenge to Section 1182(a)(3)(A)(ii), finding, *inter alia*, that petitioners had forfeited that claim by failing to address it in their brief opposing the government's motion to dismiss. *Id.* at 29a-33a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-21a.

a. The court of appeals first held that Kristen Colindres lacks a constitutionally protected liberty interest in her husband's visa application. Pet. App. 6a-10a. Reaffirming its circuit precedent, see *Swartz*, 254 F.2d at 339, the court reiterated that "[t]he right to marriage is the right to enter a legal union," but "does not include the right to live in America with one's spouse," Pet. App. 6a. Likewise, the court explained, "'constitutional protection' is not triggered 'whenever a regulation in any

way touches upon an aspect of the marital relationship.'" *Id.* at 7a (quoting *Din*, 576 U.S. at 95 (plurality opinion)). The court also reasoned that recognition of a constitutional interest in a noncitizen spouse's immigration proceeding would be inconsistent with Congress's "long practice of regulating spousal immigration." *Id.* at 10a (quoting *Din*, 576 U.S. at 95 (plurality opinion)). Having thus determined that the visa denial did not burden Kristen Colindres's due-process rights, the court concluded that petitioners' suit "does not fall within [*Mandel*'s] constitutional-rights exception to the consular-non-reviewability doctrine." *Ibid.*

The court of appeals then went on to decide, in the alternative, that even assuming the *Mandel* standard of review applied, the government had satisfied that limited standard in petitioners' case. Pet. App. 11a-14a. Relying on Justice Kennedy's concurrence in *Din*, the court observed that "[c]iting a statutory provision that 'specifies discrete factual predicates the consular officer must find to exist before denying a visa' is enough." *Id.* at 11a (quoting 576 U.S. at 105). The government's citation of the unlawful-activity bar in Section 1182(a)(3)(A)(ii) met that test, the court explained, because that provision "specifies a factual predicate for denying a visa: The alien must 'seek to enter the United States to engage . . . in unlawful activity.'" *Id.* at 12a (quoting 8 U.S.C. 1182(a)(3)(A)(ii)) (brackets omitted). And the court rejected the view, recently articulated by the Ninth Circuit, that Section 1182(a)(3)(A)(ii) is insufficiently "discrete" because it "'does not specify the type of lawbreaking that will trigger a visa denial.'" *Ibid.* (quoting *Muñoz* v. *United States Dep't of State*, 50 F.4th 906, 917 (9th Cir. 2022), petition for cert. pending, No. 23-334 (filed Sept. 29, 2023)). The court of appeals

explained that the *Din* concurrence had rejected a materially similar argument in finding the government's citation of the terrorist-activity bar sufficient in that case. *Id.* at 12a-13a.

Finally, the court of appeals held that petitioners' remaining constitutional arguments were not properly before the court. It observed that petitioners had not attempted to invoke the kind of First Amendment right at issue in *Mandel*. Pet. App. 10a-11a n.2. The court of appeals also held that the district court had not abused its discretion in finding that petitioners forfeited their vagueness challenge to Section 1182(a)(3)(A)(ii). *Id.* at 14a. And the court concluded that petitioners had likewise forfeited their equal-protection challenge on appeal by addressing the argument in only a single-sentence footnote in their appellate brief. *Ibid.*

b. Chief Judge Srinivasan concurred in part and concurred in the judgment. Pet. App. 16a-21a. He agreed that petitioners' due-process claim should be dismissed based on consular nonreviewability, but he reached that conclusion through a different route than the majority. *Id.* at 16a, 19a-21a. He observed that, regardless of whether due process obligated the government to provide any explanation for the visa denial, and regardless of whether providing the statutory basis of inadmissibility was sufficient to satisfy any such obligation, "the government did more than" that here. *Id.* at 20a. Specifically, in addition to citing Section 1182(a)(3)(A)(ii), the government "also related why it was denying a visa under that section: because it had 'reason to believe [Mr. Colindres Juarez] is a member of a known criminal organization.'" *Ibid.* (citation omitted). In Chief Judge Srinivasan's view, that "discrete factual predicate," together with the statutory citation,

sufficed "to satisfy due process" under the *Din* concurrence and *Mandel*. *Id.* at 21a.

Because he would have resolved petitioners' challenge on that narrower ground, Chief Judge Srinivasan would not have addressed the threshold question about Kristen Colindres's liberty interest. Pet. App. 18a. He also would have refrained from addressing the further question whether providing a statutory citation alone would have sufficed, in part because the majority's holding on that question created a split with the Ninth Circuit. *Id.* at 20a (citing *Muñoz*, *supra*). But Chief Judge Srinivasan indicated that he "might well side with [his] colleagues [in the majority] were it necessary to decide [that] issue." *Ibid.* He also agreed that petitioners' vagueness and equal-protection challenges were not properly before the court. *Id.* at 16a.[5]

DISCUSSION

Petitioners contend (Pet. 28-37) that a U.S. citizen possesses a constitutionally protected liberty interest in the visa application of a noncitizen spouse, such that the limited standard of review in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), applies. Petitioners further contend (Pet. 13-27) that, under *Mandel*, the government's citation of the unlawful-activity ground of inadmissibility in 8 U.S.C. 1182(a)(3)(A)(ii) is insufficient to provide a "facially legitimate and bona fide reason" for a visa denial. Those two questions are the subject of the gov-

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[5] While petitioners' appeal was pending in the D.C. Circuit, Colindres Juarez applied for another immigrant visa and appeared for another interview before a consular officer. Gov't C.A. Br. 15 n.5. In June 2022, the embassy gave written notice that the application had been denied. *Ibid.* The parties have not addressed how that second visa denial might affect petitioners' ability to obtain effective relief with respect to the earlier denial that is at issue in this Court.

ernment's pending petition for a writ of certiorari in *United States Department of State* v. *Muñoz*, No. 23-334 (filed Sept. 29, 2023) (*Muñoz* Pet.).[6] For the reasons explained in that petition (at 16-20, 22-27), the court of appeals properly resolved both questions against petitioners in this case. Petitioners are correct, however (Pet. 9-10), that there are square circuit splits on both questions and that this Court's resolution is necessary. See *Muñoz* Pet. at 15-16, 20-22, 27-28, 31-33. Accordingly, the government respectfully requests that the Court hold this petition pending the Court's disposition of *Muñoz*, and then dispose of this petition as appropriate.

Muñoz is a superior vehicle for this Court's review because that case presents a third question that this case does not: whether, if a U.S. citizen has a constitutional interest in her noncitizen spouse's visa application, and if a citation to Section 1182(a)(3)(A)(ii) is insufficient standing alone, due process requires the government to provide a further factual basis for the visa denial "within a reasonable time," or else forfeit consular nonreviewability. See *Muñoz* Pet. at I; see also *id.* at 12-13, 28-31. Because the D.C. Circuit ruled against petitioners on the first two issues here, it had no occasion to consider the Ninth Circuit's novel holding on the third. And the timeliness question would not have been implicated in this case in any event because the government provided a further factual explanation for Colindres Juarez's visa denial contemporaneous with the denial itself. See pp. 8-9, *supra*; see also Pet. App. 20a-21a (Srinivasan, C.J., concurring in part and concurring in the judgment).

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[6] We have served petitioners with a copy of the government's petition in *Muñoz*.

Petitioners' phrasing of the question presented alludes (Pet. i) to several additional issues that are not the subject of the government's petition in *Muñoz*. But none of those issues is properly presented in this case either. Petitioners refer to their First Amendment and equal-protection challenges. But the lower courts found that those claims were either insufficiently developed or forfeited; indeed, it is not clear that the court of appeals understood petitioners to be raising a First Amendment challenge on appeal at all. See Pet. App. 10a-11a n.2, 14a, 16a, 43a-44a, 48a. Petitioners also contend (Pet. i, 20-24) that Section 1182(a)(3)(A)(ii) is unconstitutionally vague. But both lower courts deemed that claim forfeited as well. Pet. App. 14a, 16a, 31a. In any event, none of those arguments is the subject of a circuit conflict, and none would independently warrant this Court's review.

Nor does there appear to be any compelling reason why the Court would benefit from full merits briefing and argument in both cases on the questions that are actually presented. If certiorari is granted, the *Muñoz* case could potentially be resolved in the government's favor on the basis of the third question presented in that petition (the timeliness issue), thereby obviating the need for the Court to address the first two questions—continuing the greater legal uncertainty that has plagued this area of the law since this Court's fractured decision in *Kerry* v. *Din*, 576 U.S. 86 (2015). But granting certiorari in this case alongside *Muñoz* would not necessarily require the Court to address those first two questions either. If this case were considered on the merits, the government would maintain its position—consistent with the alternative holding in Chief Judge Srinivasan's concurrence—that even assuming that due

process requires the government to supply more than a statutory citation, a further factual explanation was in fact provided here. See Pet. App. 20a-21a.[7] Because petitioners' due-process challenge would accordingly fail in this case regardless of the Court's answers to the two questions presented, the Court could affirm the decision below without resolving them. For that reason, while the government supports holding this case pending the Court's disposition in *Muñoz*, it does not recommend that petitioners' case receive plenary review alongside *Muñoz*.

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[7] Petitioners do not address Chief Judge Srinivasan's alternative rationale for affirmance in this case, nor suggest that any other circuit would have deemed the further factual explanation provided here insufficient. Cf. *Muñoz* v. *United States Dep't of State*, 50 F.4th 906, 912, 918 (9th Cir. 2022) (finding the explanation in a State Department declaration sufficient when it stated that the consular officer believed the applicant to be "a member of a known criminal organization . . . specifically MS-13"), petition for cert. pending, No. 23-334 (filed Sept. 29, 2023); *Cardenas* v. *United States*, 826 F.3d 1164, 1168, 1172 (9th Cir. 2016) (finding an explanation in a consular communication sufficient when it stated that the officer had reason to believe that the applicant "has ties to an organized street gang").

CONCLUSION

The Court should hold this petition for a writ of certiorari pending disposition of *United States Department of State* v. *Muñoz*, No. 23-334, and then dispose of the petition as appropriate in light of the Court's disposition in that case.

Respectfully submitted.

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NOVEMBER 2023