

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*

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent has neither a constitutionally protected liberty interest implicated by a consular officer's denial of a visa to her alien spouse abroad nor a right to judicial review of that denial, let alone review under the intrusive standard she urges this Court to adopt. Respondent endorses a major shift in the law that would have harmful repercussions not only in the visa context, but also in many others. Under respondent's approach, both the fundamental doctrine of consular nonreviewability and Congress's judgment that the reasons for denial of a visa on terrorism-related grounds need not be disclosed would be meaningless in any case in which the unsuccessful visa applicant has or acquires a U.S.-citizen spouse (or, potentially, other close family member). Courts would have to engage in a close examination of whether there is sufficient evidence to find the applicant inadmissible—

even if that evidence consists of classified or other sensitive information relating to national security. And courts could second-guess the sensitivity of the information and order its disclosure. In addition, a large class of other persons only indirectly affected by government action against third parties would be free to assert similar claims in a wide variety of circumstances. There is no warrant for altering existing law in that dramatic fashion, at the steep cost of weakening the protections that keep terrorists from our shores.

A. Respondent Has No Constitutionally Protected Liberty Interest Implicated By Denial Of A Visa To Her Alien Spouse Abroad

1. The denial of an immigrant visa to respondent's husband in Afghanistan was based on a statutory provision that requires evaluation of the visa applicant's *own* personal history and characteristics—irrespective of whether the alien's ability to apply for a visa rests on a petition by a U.S.-citizen spouse, a petition by an employer, or an applicant's own entry into the visa "lottery." The challenged government action was not directed at respondent or her marriage relationship; it merely carried out Congress's command that *no* alien, whether married to a U.S. citizen or not, is admissible to the United States if he has certain ties to terrorist activity. See 8 U.S.C. 1182(a)(3)(B). Respondent does not dispute that her husband, as an alien outside the United States, has no statutory or constitutional right to notice of the specific basis for the visa denial or to administrative or judicial review of that denial. See Gov't Br. 6-8, 33-37.

Nothing in the Immigration and Nationality Act (INA) gives respondent a legally cognizable stake in

the denial of the visa to her husband abroad, or any right to notice or an additional explanation—or to judicial review, which is barred by the doctrine of consular nonreviewability. Respondent contends, however, that the Due Process Clause itself affords her those rights, even though her husband—the only party to the visa application and the only person directly affected—has no such constitutional rights. That contention is without merit.

This Court has long held 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). Respondent’s contention that the denial of a visa to her alien husband abroad implicates liberty interests of her own under the Due Process Clause is irreconcilable with that principle. Regardless of whether the denial causes her “hardship,” that action simply “does not amount to a deprivation of any interest in life, liberty, or property” of hers under the Fifth Amendment. *Id.* at 784 n.16, 787.

Respondent cannot persuasively distinguish *O’Bannon*. The Court recognized in that case that the government could not withdraw “direct benefits” from nursing home residents (for example, payment of money to the home for their care) “without giving the patients notice and an opportunity for a hearing.” 447 U.S. at 786-787. But the Court held that the government’s decertification of the home did not deny the residents due process, because the government had directed its action against a third party and had not “impose[d] a direct restraint on [the residents’] liberty.” *Id.* at 788. That was true even though the action against the home might have an equally “immediate,

adverse impact” on the residents as withdrawal of direct benefits, including (the Court assumed) “severe emotional and physical hardship” and disruption of “family ties” and other “associational interests.” *Id.* at 784 & n.16, 787. Contrary to respondent’s suggestion, the Court’s holding did not turn solely on an interpretation of the Medicaid statute; it foreclosed the residents’ assertion of “any” liberty interest. *Id.* at 787; see *id.* at 784 (residents asserted property interest under statute and “life or liberty” interest not derived from statute); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766-768 (2005).

Like the residents in *O’Bannon*, respondent claims “severe * * * hardship” and disruption of “family ties,” 447 U.S. 784 n.16, because of government action taken against someone else, not against her. Accordingly, the visa denial “directed against a third party” cannot be characterized as “directly affect[ing]” respondent’s “legal rights, or impos[ing] a direct restraint on h[er] liberty,” but rather affects her “only indirectly or incidentally.” *Id.* at 788.

Respondent nevertheless insists (Br. 28-29) that the denial of the visa amounted to direct government action against her because she can play some role in the visa application process (as distinguished from the petition process, in which she established to the satisfaction of the Department of Homeland Security (DHS) that Berashk is her immediate relative). That is incorrect. Berashk was eligible to *apply* for a visa because of the existence of a valid petition filed by respondent. But that did not make respondent a party to Berashk’s application or make the denial of the application an adjudication of any rights or protected interests of respondent. Neither did the fact that

respondent had the power to bolster Berashk’s application by promising financial assistance or helping gather supporting materials. See, *e.g.*, 8 U.S.C. 1183a(f)(5). The prospect of such aid does not make the decision on the application any less a decision solely about Berashk’s own satisfaction of the relevant statutory requirements. See 8 U.S.C. 1182.¹

More broadly, respondent glancingly suggests (Br. 28) that action taken against one spouse necessarily involves the other in a sufficiently direct way to satisfy the test set forth in *O’Bannon*. But *O’Bannon* itself rejects that proposition. The Court found it self-evident that “members of a family” of an “errant father”—presumably including the father’s wife—“have no constitutional right to participate in his trial or sentencing procedures,” even if those proceedings cause them “serious trauma.” 447 U.S. at 787-788. Spouses are independent human beings who bring their separate legal attributes and disabilities to the marriage, and the legal fictions that once “merged” a

¹ Respondent’s claim (Br. 6) that “it is common to ‘overcome’ a finding of ineligibility by submitting evidence that the stated reason for ineligibility does not apply” misunderstands State Department statistics. The cited statistics cover only cases in which the stated reason for finding ineligibility was correct but a visa could be issued anyway (usually because of a waiver under 8 U.S.C. 1182(d)), not cases in which a stated reason was later shown to have been incorrect. In any event, Section 1182(b)(3) evinces Congress’s unambiguous determination that an applicant need not be told the reasons for a terrorism-related denial, even though that may make it difficult to demonstrate that the relevant statutory ground does not apply. Compare 8 U.S.C. 1182(b)(3) with 8 U.S.C. 1182(a)(3)(B)(i)(VI); see 22 C.F.R. 42.81(b) (providing that “[t]he consular officer shall inform the applicant of the provision of law” on which “the refusal is based,” rather than (as in 8 U.S.C. 1182(b)(1)(B)) the “specific provision”).

married couple’s “existence,” *Thompson v. Thompson*, 218 U.S. 611, 614 (1910) (discussing coverture), have long since been abandoned. The marriage relationship thus does not give rise to a right in one spouse under the Due Process Clause to participate in proceedings to determine the other’s statutory benefits.

Finally, respondent conclusorily asserts (Br. 27-28) that the fundamental due process principle affirmed in *O’Bannon* has no application in a case involving visas in light of *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Fiallo v. Bell*, 430 U.S. 787 (1977). But there is no tension between *O’Bannon* and those decisions. *Mandel* involved a U.S. citizen’s asserted First Amendment interest in receiving ideas, not recognition of a liberty interest under the Fifth Amendment. See 408 U.S. at 762, 764-765. Moreover, *Mandel* did not rule that the asserted interest permitted the citizen to insert himself into the visa application process or to dispute a consular officer’s determination that an alien abroad was inadmissible. *Mandel* involved a waiver decision, not a visa denial, and concluded that a facially legitimate reason already appearing in the record was sufficient (assuming articulation of such a reason was even necessary). Gov’t Br. 38-41. In *Fiallo*, the U.S.-citizen plaintiffs were challenging a statutory provision that effectively prevented them even from petitioning for classification of their parents or children as immediate relatives, see 430 U.S. at 790 n.3, 791; Gov’t Br. at 2-4, 7-10, *Fiallo*, *supra* (No. 75-6297) (citing 8 U.S.C. 1154(a) (1976))—a request equivalent to respondent’s visa petition. Accordingly, nothing in *Fiallo* erodes the fundamental principle of *O’Bannon* that the Due Process Clause does not pro-

tect a person from indirect and incidental effects of government action taken against a third party.

2. Respondent’s due process argument fails for another, independently sufficient reason: there is no due-process liberty interest in “the ability to live in the United States with an alien spouse,” Pet. App. 7a n.1, or to have the alien spouse admitted to the United States for that purpose. None of the decisions on which respondent relies has anything to do with such an asserted interest, and Congress’s plenary control over the admission of aliens compels the conclusion that it is not protected under the Due Process Clause.

There is no question that the “right to marry is part of the fundamental ‘right of privacy’ implicit” in the due process guarantee. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); see *id.* at 386; *Loving v. Virginia*, 388 U.S. 1, 12 (1967). But the denial of a visa to respondent’s husband did not impinge on that right, since she traveled to Afghanistan to marry Berashk years ago and their legal relationship remains intact. See J.A. 28.

This Court has recognized a number of protected interests that surround the marital relationship, including the right to make decisions about contraception and bearing children. See Gov’t Br. 22. As respondent concedes (Br. 17), this Court has repeatedly described those as “privacy” interests preventing the government from invading the intimacies associated with the marital bond and from mandating how a married adult orders her life within the confines of her own home. See, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (discussing “the sacred precincts of marital bedrooms”).

The claimed liberty interest at issue here is very different. Although respondent states her claimed interest in far more general terms, when described “precise[ly]” and “careful[ly],” *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Lehr v. Robertson*, 463 U.S. 248, 256 (1983), it can be understood only as an interest in having her alien spouse admitted to the United States so that the couple can both live in this country. Such an interest does not involve a private decision by two people who are entitled to settle anywhere in the country, as U.S. citizens and lawful permanent residents generally are. See *Saenz v. Roe*, 526 U.S. 489, 510-511 (1999). Rather, it involves a sovereign decision by the United States in controlling its borders—a quintessentially *public* decision about how to “defend[] the country against foreign encroachments and dangers,” *Mandel*, 408 U.S. at 765 (citation omitted), and “maintain[] normal international relations,” *ibid.* (citation omitted); see *Fiallo*, 430 U.S. at 795 n.6; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952); see also *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (2012) (immigration laws do not “pursue” family unity “to the *n*th degree”).

Accordingly, this Court’s decisions recognizing an interest in family privacy in no way establish that respondent’s asserted liberty interest in having her husband enter this country in the first place “is deeply rooted in this Nation’s history and tradition.” *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), cited in Resp. Br. 18. To the contrary, the history of Congress’s plenary power to exclude aliens, including spouses and other relatives of U.S. citizens, compels the conclusion that the interest respondent claims as “fundamental” finds no grounding

in “[o]ur Nation’s history, legal traditions, and practices.” *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997); see generally *Galvan v. Press*, 347 U.S. 522, 531 (1954).

Turner v. Safley, 482 U.S. 78 (1987), on which respondent relies (Br. 13, 19, 28), in fact underscores the point. In *Turner*, the contours of an asserted liberty interest in marriage were scrutinized in the specific context in which they were asserted: a prison, where the State physically separated the prisoner and his intended for reasons unrelated to any governmental disapproval of their intimate decisions. In that context, the Court recognized, a marriage could remain meaningful as an “expression of personal dedication,” an “exercise of religious faith,” or a means of obtaining “government benefits.” 482 U.S. at 95-96. The Court never suggested that the right to marry in a prison entailed what respondent calls (*e.g.*, Br. 18) “the associational right of a husband and wife to live together.”

It thus is clear, as the courts of appeals have long recognized, that there is no tradition in this Nation of recognizing a liberty interest in having one’s alien spouse enter and reside in the United States. See Gov’t Br. 25-26 & n.9. Respondent suggests (Br. 23) that the relevant court of appeals decisions “fail to address the issue presented here” because they do no more than reject any right “to have a spouse reside in the United States notwithstanding the government’s stated, facially legitimate, and bona fide reason for exclusion or removal.” That is incorrect. See Gov’t Cert. Reply Br. 4-6. Those decisions did not rest on a determination that the government’s reason was legitimate or sufficiently explicated—an issue that would

arise only if a U.S. citizen's constitutional rights were at stake. Rather, the courts of appeals have categorically concluded that the "Constitution does not recognize the right of a citizen spouse to have his or her alien spouse" enter or remain in the country, *Bangura v. Hansen*, 434 F.3d 487, 496 (6th Cir. 2006) (citation omitted), and have relied on the special considerations relevant to the immigration context in doing so.

Respondent contends (Br. 20-22) that *Mandel* and *Fiallo* illustrate that the immigration context is irrelevant to the existence of a U.S. citizen's asserted liberty interest under the Fifth Amendment. But those decisions illustrate no such thing. The plaintiffs in *Mandel*, which did not even involve the Due Process Clause, conceded that Congress could enact a flat prohibition against the entry of aliens falling within the statutory grounds of inadmissibility and that First Amendment rights could not override that decision, 408 U.S. at 767; and in recognition of the special responsibility the INA vested in the Executive, the Court specifically declined to balance the First Amendment interests of the potential audience against those of the government in denying a waiver in a particular case, *id.* at 768-769. *Fiallo* is no more helpful to respondent's cause. Indeed, the Court in *Fiallo* recited these very same limitations on the reach of *Mandel*. See 430 U.S. at 794-795. And contrary to respondent's assertion (Br. 21), *Fiallo* did not recognize a constitutionally protected "liberty interest in family reunification"; to the contrary, it rejected the notion of any such "fundamental right" in light of "fundamental principles of sovereignty" that apply when "admit[ting] or exclud[ing] foreigners in accordance with perceived national interests." 430 U.S. at

795 n.6. While the Court entertained the U.S.-citizen plaintiffs' challenge on equal protection or other grounds to a statute that effectively barred them from filing visa petitions to have their parents or children classified as immediate relatives, the Court resolved the case by ruling that congressional policy choices on such issues are "wholly outside the power of this Court to control." *Id.* at 799 (citation omitted); see *id.* at 791, 793-796, 798.

3. Finally, respondent disputes (Br. 29-30) that a ruling for her would give rise to a flood of new constitutional claims. Respondent is wrong.

Respondent's attempt to minimize the number of possible cases like hers is unavailing. Although the reason for a visa denial is more likely to be known to the alien when a criminal conviction is at stake, there is no reason to assume that in every such case the alien would be candid with a U.S. spouse about that conviction or that the spouse would refrain from challenging the reason for the visa denial. Moreover, even setting aside denials based on criminal convictions or criminal acts under Section 1182(a)(2)(A) and (B), in Fiscal Year 2013 alone more than 400 aliens applied for immigrant visas (and many more for nonimmigrant visas) as the spouse, child under the age of 21, or parent of a U.S. citizen and were refused on Section 1182(a)(2) and (3) grounds. See Gov't Br. 31 n.10 (citing table). If respondent prevails, all such denials could give rise to constitutional claims.

With respect to challenges by family members in other areas, as where a spouse is to be removed or incarcerated, respondent engages in sleight of hand. She contends that such a challenge could never be successful because the process already afforded the

directly affected spouse would satisfy what she calls “*Mandel* review.” See Br. 29-30. But the review afforded in *Mandel* was limited because of considerations specific to the exclusion of aliens, where the political Branches’ powers are at their height. See 408 U.S. at 765-770. It is hard to see why litigants in other contexts would be content with only such limited review in an attempt to vindicate rights they view as fundamental, or why courts would constrain their claims in that fashion. In addition, family members could assert that any process already afforded was insufficient, or challenge a removal order or sentence in which an alien or a convicted defendant has acquiesced.

Thus, respondent’s approach does threaten tremendous disruption. If due process claims like respondent’s could be brought based on the “weight” of a harm without regard to its indirect “*nature*,” *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972), then family members could assert constitutional claims whenever a close relative is ordered removed, imprisoned, drafted, or quarantined. The door would also be opened for patients to challenge on due process grounds a publicly owned utility’s decision to cut off power to a treatment facility because of non-payment of bills, see *O’Bannon*, 447 U.S. at 788; for employees of a government contractor to allege a due process violation when the government’s decision to cancel a contract substantially affects them, cf. *id.* at 788 n.21; and for an attorney’s clients to challenge a government decision that he is no longer qualified to practice. Such consequences would indeed “work a sea change in the law.” Gov’t Br. 31.

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

1. It is firmly established in this Court's precedents that Congress has the power 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." *Wong Wing v. United States*, 163 U.S. 228, 232-234 (1896) (citation omitted). The Ninth Circuit had no basis for imposing extra-statutory procedural requirements and a regime of judicial review of visa denials that is directly contrary to the doctrine of consular nonreviewability.

Respondent ignores the meaningful process that takes place in connection with immigrant visa applications. When a U.S. citizen submits a visa petition to classify an alien as an immediate relative, DHS reviews it. If the petition is approved, the alien submits a visa application; a consular officer scrutinizes that application, interviews the alien in person, and then takes action. In addition, final denial of a visa is subject to review by the principal consular officer at the relevant post (or that officer's designated alternate). See 22 C.F.R. 42.81(c) and (d); see also Gov't Br. 49 (noting that State Department analysts assist consular officers in connection with security-based denials).

Respondent nonetheless asserts that judicial review, and additional legal and factual explanation by the consular officer, are required as a matter of due process to guard against an "arbitrary" interference with the liberty interest she asserts. But the refusal of the visa was an action concerning respondent's husband, not her, and this Court has made clear that

whatever procedure Congress prescribes even for the admission of aliens who have reached our shores is all the process that is due under the Constitution. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). A visa denial following such a process, here augmented by Executive Branch procedures, therefore cannot be deemed “arbitrary” in violation of the Due Process Clause, either for Berashk himself, who is outside the country, or for respondent, who is only indirectly affected.

Respondent struggles in vain to evade that conclusion. She relies (*e.g.*, Br. 33-35, 37-39) on due process cases involving a variety of topics such as prisons, immigration removal, and admissions to the state bar—all cases in which the consular nonreviewability doctrine was not even conceivably at stake. See, *e.g.*, *Knauff*, 338 U.S. at 543 (“Whatever the rule may be concerning deportation * * * , 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 to exclude a given alien.”). And she invokes a general presumption of judicial review (*e.g.*, Br. 35)—but the rule with respect to the denial of a visa is just the opposite. See *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (“When it comes to matters touching on national security or foreign affairs—and visa determinations are such matters—the presumption of review ‘runs aground.’”) (quoting *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988)).

Respondent also asserts (Br. 36-37) that the consular nonreviewability doctrine applies only to review sought by aliens, not by a U.S. citizen. That cannot be correct. If the doctrine bars review at the behest of

the unsuccessful visa applicant himself, then *a fortiori* it bars review at the behest of a U.S.-citizen relative, whose interests are indirect and derivative of those of the alien applicant. If respondent were correct, then a significant subset of aliens could evade the doctrine by using their family members to obtain the intervention of U.S. courts, contrary to the statutory scheme. See Gov't Br. 36-37. Moreover, a number of the Court's decisions in this area would have essentially turned on a litigating mistake or a technicality, because they would have come out differently if only an obviously interested U.S.-citizen family member had brought his or her own claim. See, *e.g.*, *Knauff*, 338 U.S. at 543, 546-547 (involving "war bride" of U.S. citizen); *id.* at 551 (Jackson, J., dissenting) (stating that the U.S. citizen "went to court and sought a writ of *habeas corpus*" for his alien wife). This Court's statements about the political Branches' plenary powers in this area are not limited to suits brought by aliens, see, *e.g.*, *Wong Wing*, 163 U.S. at 232-234; *Knauff*, 338 U.S. at 543, and the nonreviewability doctrine reaches much more deeply into the fabric of the law than respondent allows, see generally *Ingraham v. Wright*, 430 U.S. 651, 679 (1977) (emphasizing the important role that history and tradition play in determining what procedures are required).

Mandel does not suggest a different result. That decision accepted as sufficient a very limited review of an individualized admissibility *waiver* denial challenged on First Amendment grounds, without holding that such review was required, and it emphasized the broad scope of Congress's plenary power in this area. See 408 U.S. at 765-767, 769-770. Whatever review might be afforded under 8 U.S.C. 1182(d)(3)(A)(i) in

that context would not carry over to the denial of a visa to an alien abroad by a consular officer. Contrary to respondent's argument, a consular officer acting on a visa application does not exercise any discretion to bestow or withhold a visa, but simply carries out statutory commands that are themselves "facially legitimate" as *Mandel* defined that concept. See *id.* at 769-770.

Respondent and her amici (Br. 4-5; Former Consular Officers Amicus Br. 4-26) try to undermine the doctrine of consular nonreviewability by suggesting that other agencies have taken over the function of deciding whether an alien is eligible for a visa. That suggestion is incorrect, and in any event irrelevant to the long-established bar to judicial review. When reviewing visa applications, consular officers do draw on various sources of information available to the federal government, as would be expected in protecting the national security. See 8 U.S.C. 1105; Gov't Br. 5. But consular officers do not automatically deny a visa application pursuant to Section 1182(a)(3)(B) when there is a "hit" in the terrorist screening database (or another database). Inclusion in the terrorist screening database merely gives an indication that the government may be in possession of information that would support such a denial, and therefore initiates a review of the underlying information to determine whether the applicant is admissible. See, *e.g.*, *Ibrahim v. DHS*, 2014 WL 6609111, at *9 (N.D. Cal. Jan. 14, 2014); see also *id.* at *5, *19 (explaining that visa denial by consular officer was based on classified information that was separate and apart from mistaken inclusion of plaintiff on no-fly list); 9 *Foreign Affairs Manual* § 40.6 nn.1, 3.1-3.5 (explaining that DHS

determinations are subject to reexamination except when the alien has previously sought admission at a port of entry and been definitively found inadmissible by DHS on a permanent basis, in which case the consular officer will tell the alien to raise the issue with DHS).²

2. Even if some judicial review of the visa denial were required in this case, the decision below would still be wrong. The Ninth Circuit held that the government cannot defend a visa denial as facially legitimate without identifying the specific subsection of Section 1182 under which there was reason to believe the alien was inadmissible and the factual information on which the denial rested. There is no warrant in the Constitution for requiring provision of that detailed information, and such a requirement would threaten

² The former consular officers' amicus brief inaccurately portrays *Ibrahim* as well as DHS's role in the visa process. The Secretary of Homeland Security can direct refusal of a visa, see 6 U.S.C. 236(b), but that is a rare occurrence—and the provision granting that power makes clear that Congress intended no alteration of the consular nonreviewability doctrine. See 6 U.S.C. 236(f); *Homeland Security Act of 2002: Hearing and Markup on H.R. 5005 Before the House Comm. on International Relations*, 107th Cong., 2d Sess. 89 (2002) (“By transferring to the Secretary of Homeland Security exactly these authorities currently vested in the Secretary of State, and by explicitly providing that no private rights of action are created, our amendment will ensure that denials of visa petitions in our overseas posts will continue to be non-reviewable.”). DHS also provides personnel at some posts who can make recommendations to consular officers about visa decisions, but those recommendations are not binding. See H.R. Doc. No. 131, 108th Cong., 1st Sess. § 6(e) and (f), at 10-11 (2003); Statement of Edward J. Ramotowski, *Hearing before the Subcomm. on National Security of the House Comm. on Oversight and Government Reform*, 113th Cong., 1st Sess. 44-45 (2013).

significant harm to national security at a time when the risk of undetected terrorist incursions into this Nation is high.

The review mandated by the Ninth Circuit calls for a far more intrusive inquiry than the “facially legitimate” standard deemed sufficient in *Mandel*. Respondent repeatedly tries to blur that point (*e.g.*, Br. 14, 31-32) by asserting that “facially legitimate” is equivalent to “supported by some evidence,” such that the denial cannot be sustained unless its underlying factual basis is established to the satisfaction of a court. But those standards are not at all equivalent. In *Mandel* itself, the Court deemed the government’s reason for the waiver *facially* legitimate without asking whether there was any evidence supporting the reason provided. See Gov’t Br. 53. And the cases on which respondent relies to show the asserted equivalency between the two standards illustrate their differences. See *Superintendent v. Hill*, 472 U.S. 445, 455-456 (1985), cited in *Hamdi v. Rumsfeld*, 542 U.S. 507, 527-528 (2004) (opinion of O’Connor, J.).

By expanding the scope of review to include a requirement that the government explain the legal and factual basis for a visa denial, the Ninth Circuit has rendered Congress’s judgment in Section 1182(b)(3)—that when a denial is based on national-security grounds no specific reason need be provided to the alien—essentially meaningless for any alien with a U.S.-citizen spouse. See 8 U.S.C. 1182(b)(3); see also 8 U.S.C. 1202(f) (mandating confidentiality of visa records). The new requirement also would work an end-run around this Court’s decisions permitting information relating to the entry of aliens to be withheld if it would “endanger the public security.”

Knauff, 338 U.S. at 544. Respondent virtually ignores those authorities; she says (*e.g.*, Br. 49) that they do not apply directly to a claimant like her, without grappling with the fact they do not contemplate that a claim like hers could ever be permitted to proceed in the first place. See, *e.g.*, 338 U.S. at 544 (permitting security analysis based on “confidential information”); *id.* at 547 (stating that when “members” of the “armed forces” married abroad, their alien spouses “had to stand the test of security”).

Although respondent attempts (Br. 46-52) to downplay any national-security risks that would result from ignoring established bars to disclosure and judicial review, such risks, and the intrusion on the responsibilities of the political Branches, are very real indeed. The fact that this Court has allowed certain other constitutional claims to proceed in the face of national-security concerns (see Br. 46-47) says nothing about judicial scrutiny and procedural oversight of the denial of a visa to an alien outside the United States who has no constitutional rights in seeking admission. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (stating that “when it comes to collecting evidence and drawing factual inferences” with regard to “national security and foreign policy concerns,” the “lack of competence on the part of the courts is marked, * * * and respect for the Government’s conclusions is appropriate”) (citation and internal quotation marks omitted); see also *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-492 (1999) (stating that “[t]he Executive should not have to disclose its ‘real’ reasons” for removing an alien believed to be a member of a terrorist organization, thereby “disclos[ing] * * * foreign-policy ob-

jectives and * * * foreign-intelligence products and techniques,” and noting that courts are “ill equipped” to evaluate such reasons and “utterly unable to assess their adequacy”). Requiring the kind of disclosure detailed by the Ninth Circuit would carry a significant risk that classified or sensitive information would fall into the wrong hands. It would also likely discourage the sources of such information from providing it to the State Department in the first place, thus increasing the chances that terrorists would gain admission to the United States. See Gov’t Br. 45-50.

Respondent’s primary answer (Br. 47-51) is to suggest that the government can protect classified (or other sensitive) information by filing under seal or asserting privilege and that courts can review such information in camera and ex parte. But even if such procedures were appropriate, courts may be willing to employ them only in limited circumstances. See Gov’t Br. 51. Because consular officers are required to deny a visa if they have reason to believe an alien falls within an inadmissibility category in Section 1182, the government could not, through the use of discretion, avoid having particularly sensitive cases brought to court. In addition, even if appropriate safeguards existed and were in place, there would be a danger that they would fail, which alone could have a chilling effect on sources that provide the United States with intelligence critical to enforcement of Section 1182(a)(3)(B).

All of these considerations lead to one conclusion: if the Court were now to fashion a judicial exception to the long-established consular-nonreviewability doctrine, review should be no more expansive than that found sufficient in *Mandel*. In that case, the Court

made clear that a balancing of the government's interests against the citizen's interests was not permitted. See 408 U.S. at 765-769 (describing the “dangers and the undesirability” of such balancing). Respondent traveled to Afghanistan to marry Berashk knowing that there was no guarantee that he could obtain an immigrant visa; her interest in the visa decision is indirect and derivative of the interest of a person who has no constitutional rights at all in connection with his request for the privilege of admission to the United States. In contrast, the government's sovereign interest in controlling admission of aliens to the United States and ensuring that terrorists are excluded is an “urgent objective of the highest order,” *Humanitarian Law Project*, 561 U.S. at 28, and one that the review envisioned by the Ninth Circuit would threaten.

Moreover, any additional scrutiny of a visa denial would be of little benefit. Although amici suggest that consular officers “frequently” make errors in cases like Berashk's, that is pure speculation. See NIJC Amicus Br. 11-12 (citing law review articles, including several pointing to an analysis of procedures in 1978); see also *Mackey v. Montrym*, 443 U.S. 1, 14 (1979) (stating that consideration of “risk of error” should look to “the generality of cases” and not “rare exceptions”) (citation omitted). Consular officers employ a statutory “reason to believe” standard that is designed to err on the side of caution and can be applied in an ex parte manner. Cf. *Gerstein v. Pugh*, 420 U.S. 103, 121-122 (1975) (contrasting probable cause with preponderance standard and emphasizing reliability of ex parte determination of probable cause); *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). The statutory

grounds for national-security-related inadmissibility are broadly stated. See 8 U.S.C. 1182(a)(3); Pub. L. No. 107-56, 115 Stat. 272 (broadening grounds in wake of 9/11 attacks); see also, *e.g.*, *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298-299 (3d Cir. 2004). And a reviewing court could not order the issuance of a visa, as respondent concedes (Br. 41); at most, the court could remand for further consideration, and might do so (in respondent's view, Br. 51-52) based on ex parte submissions that a plaintiff would never see or evaluate.

If the narrow "facially legitimate" standard applied in *Mandel* were applied to this case, the reason for visa denial that the consular post provided to Berashk—a citation to Section 1182(a)(3)(B), indicating that the denial was based on terrorist activities—clearly suffices. Respondent's plea for disclosure of evidence underlying a reason to believe that Berashk fits within the Section 1182(a)(3)(B) admissibility bar is contrary to the very limited scope of the facial-legitimacy review that disposed of *Mandel*, and would impermissibly "look behind" the consular officer's decision, opening the way to substitution of a court's assessment for the expert officer's. *Mandel*, 408 U.S. at 770. So, too, would an attempt to assess interpretation of the statutory criteria, since that would occur in the abstract and lack the very analysis of underlying facts in which the *Mandel* Court refused to engage.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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