No. 13-1402

IN THE

Supreme Court of the United States

JOHN F. KERRY, *et al.*,

Petitioners,

v.

FAUZIA DIN,

Respondent.

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

BRIEF IN OPPOSITION

MARK E. HADDAD*
GEOFFREY D. DEBOSKEY
HEIDI LARSON HOWELL
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000
mhaddad@sidley.com

KATHLEEN M. MUELLER
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Respondent Fauzia Din

August 25, 2014

* Counsel of Record

QUESTIONS PRESENTED

1. Whether a consular official'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.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
I. FACTUAL BACKGROUND	3
A. Din's Visa Petition On Behalf Of Her Husband	3
B. Delay And Denial Of The Visa	4
II. COURSE OF PROCEEDINGS	6
REASONS FOR DENYING THE PETITION	10
I. THIS COURT AND COURTS IN SEVERAL CIRCUITS HAVE ENGAGED IN LIMITED JUDICIAL REVIEW OF THE DENIAL OF ALIEN VISAS THAT IMPLICATE THE CONSTITUTIONAL RIGHTS OF AMERICAN CITIZENS, AND THERE IS NO REASON FOR THE COURT TO RECONSIDER THAT PRECEDENT HERE	11
II. THE NINTH CIRCUIT'S HOLDING THAT DENYING A VISA TO THE SPOUSE OF AN AMERICAN CITIZEN IMPLICATES THE CITIZEN'S FUNDAMENTAL RIGHT TO MARRIAGE AND FAMILY LIFE IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS	16

TABLE OF CONTENTS—continued

	Page
III. NOTHING ABOUT THE NINTH CIRCUIT'S APPLICATION OF *MANDEL* TO THIS PARTICULAR DENIAL OF A VISA PRESENTS AN IMPORTANT QUESTION REQUIRING THIS COURT'S REVIEW	25
CONCLUSION	33

TABLE OF AUTHORITIES

CASES Page

Abourezk v. *Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd on other grounds by an equally divided Court*, 484 U.S. 1 (1987) . 12, 26
Adams v. *Baker*, 909 F.2d 643 (1st Cir. 1990) 12, 26
Allende v. *Shultz*, 845 F.2d 1111 (1st Cir. 1988) 26
Am. Acad. of Religion v. *Napolitano*, 573 F.3d 115 (2d Cir. 2009) 12, 23, 26
Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) 7
Bangura v. *Hansen*, 434 F.3d 487 (6th Cir. 2006) 1, 2, 21, 23
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 18
Burrafato v. *U.S. Dep't of State*, 523 F.2d 554 (2d Cir. 1975) 1, 2, 22, 23
Bustamante v. *Mukasey*, 531 F.3d 1059 (9th Cir. 2008) 20, 27
Chiang v. *Skeirik*, 582 F.3d 238 (1st Cir. 2009) 12
Fiallo v. *Bell*, 430 U.S. 787 (1977) ... 14, 15, 20, 27
Garcia v. *Boldin*, 691 F.2d 1172 (5th Cir. 1982) 23
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 18
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) .... *passim*
Li Hing of Hong Kong, Inc. v. *Levin*, 800 F.2d 970 (9th Cir. 1986) 11
Loving v. *Virginia*, 388 U.S. 1 (1967) 19
McNary v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) 27
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 17

TABLE OF AUTHORITIES—continued

Page

Moore v. *City of E. Cleveland*, 431 U.S. 494 (1977) 18, 19

Oforji v. *Ashcroft*, 354 F.3d 609 (7th Cir. 2003) 23

Schware v. *Bd. of Bar Examr's*, 353 U.S. 232 (1957) 29

Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 28, 29

Silverman v. *Rogers*, 437 F.2d 102 (1st Cir. 1970) 24

Superintendent v. *Hill*, 472 U.S. 445 (1985) 29

Swartz v. *Rogers*, 254 F.2d 338 (D.C. Cir. 1958) 24

United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 11, 28, 29

United States v. *Windsor*, 133 S. Ct. 2675 (2013) 17, 20

Zablocki v. *Redhail*, 434 U.S. 374 (1978) 17

STATUTES

8 U.S.C. § 1182(a) .... *passim*

§ 1229(a)(1) 20

§ 1229a 20

INTRODUCTION

If Respondent Fauzia Din were an American college professor, and invited an Afghan national to give a speech at her university, the denial of a visa would implicate her First Amendment right to hear and speak, in person, with the Afghan national. *Kleindienst* v. *Mandel*, 408 U.S. 753, 764-65 (1972). The intrusion on her First Amendment rights would not allow a reviewing court to balance her interests against those of the Executive in denying the visa. But that intrusion would entitle her to have a court determine whether the government's reason for denying the visa was facially legitimate and bona fide. *Id.* at 762, 769-70.

Din is not a professor. She is a United States citizen who applied for a visa for an Afghan national because, after years of knowing him and two years of being engaged to him, she married him and wants him to live with her in America. The Ninth Circuit recognized that the denial of a visa to the spouse of a U.S. citizen implicates that citizen's liberty interests in her marriage and entitles her to the same minimal procedural due process accorded a college professor arranging a conference.

No appellate court has ever denied a United States citizen that minimal due process right. The government points to *Bangura* v. *Hansen*, 434 F.3d 487 (6th Cir. 2006), and *Burrafato* v. *United States Department of State*, 523 F.2d 554 (2d Cir. 1975), as being "directly contrary" (Pet. 18-19), but there is no conflict because there, unlike here, the citizens already knew why their spouses were being excluded or deported, and thus those courts adjudicated and rejected far broader claims. The government told Mr. Bangura that his wife had previously abused the im-

migration system by fraudulently marrying another man in an effort to obtain a visa. *Bangura*, 434 F.3d at 492. In the *Burrafato* case, the government filed an affidavit in the district court stating the reason it denied Mr. Burrafato his visa and the specific subsection of the Immigration and Naturalization Act ("INA") under which he was excludable, and so the Second Circuit, like the Sixth Circuit, never addressed or decided the issue Din raised here. *Burrafato*, 523 F.2d at 555, 556 & nn.2, 3; *see* pages 21-24, *infra*.

None of the other cases the government cites is on point. They involve the deportation of alien residents, but Congress has already provided for deportation hearings and other procedural protections that go beyond the minimal due process right to a facially legitimate and bona fide reason that *Mandel* and other cases provide in the case of a visa denial. The issue in these other cases typically has been whether a citizen's liberty interest in her marriage trumps the government's right to exclude or deport an alien spouse; it has not been whether the liberty interest is sufficient merely to require the government to provide a legitimate and bona fide explanation for the government's conceded right to deny a spouse a visa when the circumstances Congress has specified for such denial exist.

The government also has not established that this individual case is important enough to warrant this Court's plenary review. The government never asserted that its particular reasons for denying a visa to Din's spouse were of such national security interest that they could not be publicly disclosed or provided to the court using the safeguards and procedures that courts regularly use when classified or sensitive information is needed. Pet. App. 20a. The Ninth Cir-

cuit nonetheless made it "emphatically clear" that "nothing in our opinion compels dangerous disclosure." *Id.* at 18a, 20a. The Ninth Circuit's decision to return this case to the district court for further proceedings, "*in camera*" if need be (*id.* at 21a), for "the limited judicial review established by the Supreme Court in *Mandel*" (*id.* at 9a), is faithful to the decisions of this Court, conflicts with no circuit court decision, and presents no question that warrants this Court's review.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. Din's Visa Petition On Behalf Of Her Husband

Fauzia Din is a United States citizen. Born in Afghanistan, she fled the Taliban occupation in 1996. Pet. App. 38a. She entered the United States as a refugee in 2000, and subsequently became a citizen. *Id.*

In 2004, Din became engaged to Kanishka Berashk, an Afghan native who resides in Afghanistan. Din and Berashk had known each other for many years before their engagement. Pet. App. 38a. Din returned to Afghanistan in September 2006 and married Berashk. *Id.*

On October 11, 2006, Din filed a visa petition (Form I-130, Petition for Alien Relative) on behalf of Berashk. On February 12, 2008, the United States Citizenship & Immigration Services ("USCIS") notified Din that her visa petition for Berashk had been approved and sent to the Department of State National Visa Center for further processing. Pet. App. 38a. On July 29, 2008, the National Visa Center notified Din that it had scheduled an immigrant visa in-

terview for Berashk at the United States Embassy in Islamabad, Pakistan. *Id.* at 38a-39a.

B. Delay And Denial Of The Visa

At his immigrant visa interview in Islamabad on September 9, 2008, Berashk answered all of the consular officer's questions truthfully and accurately, including questions about his marital relationship with Din and his work as a clerk, first in the Afghan Ministry of Social Welfare processing payroll for school teachers, and later in the Afghan Ministry of Education processing other paperwork, before, during, and after the Taliban occupation. Pet. App. 39a. At the conclusion of the interview, the consular officer instructed Berashk to deliver his passport to the Kabul Embassy and handed him a Form 194 letter stating that the Kabul Embassy would send his passport to the Islamabad Embassy, "'which will issue the visa and return [the passport] to the Kabul Embassy.'" *Id.* (alteration in original). Berashk received no indication of any problems with the visa petition. *Id.* Instead, the consular officer said he was pleased with Berashk's paperwork and told him to expect his visa in two to six weeks. *Id.*

Although Berashk followed the consulate's instructions, he did not receive his visa within two to six weeks. Pet. App. 39a. He placed numerous calls to the Islamabad Embassy between October 2008 and January 2009 inquiring about the status of the visa petition, but he received no information in return. *Id.* On January 29, 2009, Berashk sent an email to the Immigration Visa Unit of the Embassy inquiring about his petition. *Id.* He was advised that the "'record indicates that the case is still pending under administrative process.'" *Id.* Din and Berashk placed numerous calls to the Embassy between February and June, 2009, but they did not receive any addi-

tional information about the status of the visa application. *Id.* at 39a-40a.

In early June 2009, Representative Pete Stark, the U.S. Representative from California's 13th District (where Din resides), sent a letter on Din's behalf to the Islamabad Embassy regarding the status of Berashk's visa application. Pet. App. 40a. On June 7, 2009, Berashk received a Form 194 letter from an "American Consular Officer" whose initials appear to be "NP", dated June 5, 2009, which stated that the visa application had been denied under section 212(a) of the Immigration & Nationality Act ("INA") [8 U.S.C. § 1182(a)], and there was "'no possibility of a waiver of this ineligibility.'" *Id.* The letter did not state which subsection of INA section 212(a) applied to Berashk. *Id.*

On June 16, 2009, eleven days after Berashk was told his visa application was denied, Representative Stark received a response from the Consul General stating that "'Mr. Berashk's case continues to undergo administrative processing'" and "'[a]pplicants may have to wait several months or longer before their visas are issued.'" Pet. App. 40a (alteration in original).

On July 11, 2009, Berashk sent an email to the Islamabad Embassy requesting clarification as to why the visa application was denied. Pet. App. 40a. On July 13, 2009, the Embassy responded, stating that the application was denied under INA section 212(a)(3)(B) [8 U.S.C. § 1182(a)(3)(B)]. *Id.* The email further stated that "'[i]t is not possible to provide a detailed explanation of the reasons for the refusal,'" citing INA sections 212(b)(2), and (3) [8 U.S.C. § 1182(b)(2), (3)]. *Id.* at 41a. Din and Berashk's subsequent and repeated requests, including requests on their behalf by Representative Stark and pro bono

counsel, went unanswered. *Id.* at 42a. On January 4, 2010, USCIS sent Din a Form I-797 "Notification of Action" indicating that USCIS had received her visa petition back from the State Department, signaling the finality of denial. *Id.*

II. COURSE OF PROCEEDINGS

On February 5, 2010, Din filed a complaint in the United States District Court for the Northern District of California seeking to compel defendants to adjudicate her husband's visa application "in a manner prescribed by law and not on the basis of any illegitimate or bad faith reasons." ER 13 (Complaint, Prayer for Relief ¶ 1). The complaint alleged that there is no "facially legitimate and bona fide reason for the denial of Mr. Berashk's visa application under 8 U.S.C. § 1182(a)(3)(B)." ER 11 (Complaint ¶ 57). The fact of Mr. Berashk's "low level employment" as a clerk 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." *Id.* In the absence of a facially legitimate and bona fide reason, the complaint alleged that the denial of Berashk's visa violated Din's liberty interest in her marriage. ER 10-11 (Complaint ¶ 56). The complaint also alleged that 8 U.S.C. § 1182(b)(3), which provides that the alien must be given notice of the ground for exclusion except where the alien is excludable under 8 U.S.C. §§ 1182(a)(2) or 1182(a)(3), does "not address notice provisions for *U.S. citizens*" and, to the extent it applies to Din, it is unconstitutional. ER 11-12 (Complaint ¶¶ 62-64). The complaint also alleged violation of the Administrative Procedure Act. ER 12 (Complaint ¶¶ 65-68).

The government filed a motion to dismiss, which the district court granted on June 22, 2010. Pet. App. 37a, 43a, 49a. The court acknowledged that just as in *Bustamante* v. *Mukasey*, Din asserts that the denial of her husband's visa implicates her right to marriage, so she is "'entitled to a limited judicial inquiry into the reason for the decision.'" *Id.* at 44a (quoting 531 F.3d 1059, 1061 (9th Cir. 2008)). "'As long as the reason given is facially legitimate and bona fide it will not be disturbed.'" *Id.* (quoting *Bustamante*, 531 F.3d at 1061). The court found the government's stated reason for denying Berashk's visa met that standard. Although the government did not identify which of the "numerous grounds for inadmissibility" under section 1182(a)(3) applied, the court thought this "granularity" need "not be provided," and a "reference to Section 1182(a)(3) is sufficient to be facially legitimate." *Id.* at 44a-45a. The court also found that although the allegations of the complaint were "'consistent' with a finding of bad faith[,] they do not cross the line from possibility to plausibility of entitlement to relief" as required by *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). Pet. App. 46a. The court acknowledged that Din was in a "catch-22" situation because the government withheld the explanation of the reason for its rejection of the visa application. *Id.* at 48a. Without this information, it is "nearly impossible for Din to obtain and therefore plead any facts that would meet the pleading standard under *Iqbal*." *Id.* Although it "appears that there is effectively no opportunity for review or recourse for spouses of visa applicants who are denied further information," the court felt constrained to dismiss the complaint for failure to state a claim.[1] *Id.* at 48a-49a.

---

[1] The court also held that Din lacks standing to challenge the

On appeal, the United States Court of Appeal for the Ninth Circuit, in a 2-1 ruling, reversed and remanded the case. Both the panel majority and the dissent agreed that Din was entitled to limited judicial review of the visa denial because the denial implicated her "right to [f]reedom of personal choice in matters of marriage and family life." Pet. App. 6a-7a & n.1 (quotations omitted; alteration in original) (panel majority); *id.* at 26a (Clifton, J., dissenting). The panel majority and dissent also agreed that the court's review, drawn from this Court's decision in *Mandel*, is only to determine whether the consular official acted on the basis of facially legitimate and bona fide reason. *Id.* at 6a-7a; *id.* at 26a. In performing that review, the majority stated, "[t]o be clear, we do not 'look behind' exclusion decisions, but we must at least look at them," *id.* at 13a (citation and quotations omitted), and it discussed the limited review courts had provided in the few cases where the issue has arisen, in all of which the government had provided a reason that the courts had found sufficient. *Id.* at 8a-14a & n.2. The majority and dissent differed only on whether the government's bare citation to section 1182(a)(3)(B) met that standard.

The dissent thought that merely identifying a statute that authorized exclusion was sufficient to state a facially legitimate and bona fide reason. Pet. App. 27a-29a. The panel majority disagreed. *Id.* at 9a. Without "factual allegations that would allow [the court] to determine if the specific subsection of § 1182(a)(3)(B) was properly applied," it could not provide review comparable to what other courts had done, and would have no basis on which to find a fa-

notice of denial provisions in 8 U.S.C. § 1182(b)(3), because they "apply only to the alien and not the United States citizen." Pet. App. 49a.

cially legitimate and bona fide reason for the visa denial. *Id.* Although the majority emphasized that the government "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." *Id.* at 14a (emphasis added; citation omitted). Without that explanation, "[a]ny judicial review would be wholly perfunctory," and "it cannot be that Din's constitutional right to review is a right only to a rubber-stamp on the Government's vague and conclusory assertion of inadmissibility." *Id.*

The majority also rejected the dissent's argument that, under section 1182(b)(3), the government "was not required to provide more specific information regarding the denial of Berashk's visa." Pet. App. 17a (quotations omitted). The dissent cited "no authority" that "an alien's lack of an affirmative statutory right to information functions as an implied prohibition on any disclosure to all people," and the majority "decline[d] to adopt such a position." *Id.* at 18a. Allowing the government to withhold the reasons for its action "is inconsistent with any concept of judicial review." *Id.* at 19a.

Finally, the majority emphasized that although the government had "never asserted" that significant national security issues were at stake in this particular case, nothing in its opinion compels the government to make "dangerous disclosure[s]."[2] Pet. App. 20a. If

[2] Because the majority concluded that the government's stated reason for denying Berashk's visa was not facially valid, it found it unnecessary to decide whether the government's reason was bona fide. Pet. App. 21a. The majority also reiterated that "§ 1182(b)(3) does not apply to Din" and does not support the government's motion to dismiss on grounds of consular nonreviewability. *Id.* at 22a. To the extent, however, that the

necessary, the government may disclose the reason for the visa denial *in camera*, as is done in suits challenging the withholding of information under the Freedom of Information Act ("FOIA"). *Id.* at 21a. The majority concluded that "[e]xisting procedures are adequate to address the national security concerns we share with the dissent, and make it unnecessary to eliminate all judicial review and disclosure." *Id.* The court therefore remanded Din's claims to the district court for further proceedings. *Id.* at 25a.

The Government subsequently petitioned the Ninth Circuit for rehearing en banc. The Ninth Circuit declined to rehear the case.

REASONS FOR DENYING THE PETITION

The government seeks review of the court of appeals' holding that "[w]hen the denial of a visa implicates the constitutional rights of an American citizen," such as the right to marry, the court will "exercise 'a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.'" Pet. App. 6a. That narrow holding is correct and does not conflict with any decision of this Court or any appellate court. Further review is not warranted.

Government relies on § 1182(b)(3) to interfere with Din's right to freedom of choice in matters of marriage of family life, "Din has standing to challenge the provision." *Id.* at 24a.

I. THIS COURT AND COURTS IN SEVERAL CIRCUITS HAVE ENGAGED IN LIMITED JUDICIAL REVIEW OF THE DENIAL OF ALIEN VISAS THAT IMPLICATE THE CONSTITUTIONAL RIGHTS OF AMERICAN CITIZENS, AND THERE IS NO REASON FOR THE COURT TO RECONSIDER THAT PRECEDENT HERE.

1. This Court has held that "an unadmitted and nonresident alien" has "no constitutional right of entry to this country," and Congress has "'plenary power'" to make rules for the admission and exclusion of aliens. *Mandel*, 408 U.S. at 762, 766 (citing cases); *see also, e.g., United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). From these holdings, the lower courts have developed a "doctrine of consular nonreviewability," where courts presumptively will not entertain an alien's challenge to a consular official's denial of a visa. The Ninth Circuit follows that doctrine. *See, e.g.*, *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986) ("it has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review"). The validity of the doctrine was not questioned by the Ninth Circuit panel below. *See* Pet. App. 6a (acknowledging that under the doctrine of consular nonreviewability, "[f]ederal courts are generally without power to review the actions of consular officials") (quotations omitted; alteration in original).

This case, however, is not brought by an alien. Here, a U.S. citizen seeks judicial review of the government's deprivation of her constitutional rights. Accordingly, this case falls within the "limited excep-

tion to the doctrine of consular nonreviewability" that exists when "the denial of a visa implicates the constitutional rights of an American citizen." Pet. App. 6a. As both the panel majority and the dissent agreed, an American citizen whose constitutional rights are implicated may obtain "'a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason.'" *Id.* (quoting *Bustamante*, 531 F.3d at 1060); *id.* at 26a (Clifton, J., dissenting) (same).

The Ninth Circuit is not alone in allowing limited judicial review when a consular official's denial of a visa implicates the constitutional rights of an American citizen. As the panel explained (and the Petition nowhere disputes), the other circuits that have addressed the issue likewise "have exercised jurisdiction over citizens' challenges to visa denials that implicate the citizens' constitutional rights." Pet. App. 6a-7a; *see Am. Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 123-26 (2d Cir. 2009) (suit by American citizens whose First Amendment rights were implicated by denial of visa to Islamic scholar invited to speak in the United States); *Adams* v. *Baker*, 909 F.2d 643, 647 & n.3 (1st Cir. 1990) (finding it "beyond peradventure" that an "unadmitted and non-resident alien" may not obtain judicial review of denial of visa, but allowing suit by American citizens to address "the possibility of impairment of [their] First Amendment rights through the exclusion of the alien"); *Abourezk* v. *Reagan*, 785 F.2d 1043, 1050-51 & n.6 (D.C. Cir. 1986) (allowing American citizens to challenge denial of visas to foreigners they invited to speak in the United States), *aff'd on other grounds by an equally divided Court,* 484 U.S. 1 (1987) (per curiam); *see also Chiang* v. *Skeirik*, 582 F.3d 238, 242-43 (1st Cir.

2009) (suit by citizen claiming that denial of visa to fiancé violated constitutional right to marry).

2. In permitting limited judicial review in the rare case where the denial of a visa implicates the constitutional rights of an American citizen, the Ninth Circuit and other circuits have faithfully followed this Court's decision in *Mandel*. Mandel was a self-described "revolutionary Marxist" who was denied a visa to travel to the United States to attend a conference and speak at universities because the consular official found he advocated for "world communism," a statutory ground for denial of a visa. 408 U.S. at 755-57. The Attorney General declined to grant him a waiver.

Mandel and college professors who invited him to speak filed suit, alleging that the visa denial violated the First Amendment. This Court found it "clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country." *Id.* at 762. But the Court also found that the visa denial implicated the professors' First Amendment right to "'receive information and ideas,'" *id.*, even though the Court recognized that the professors also could receive Mandel's ideas "through his books and speeches," or "tapes and telephone" without his physical presence in the United States, *id.* at 765. While it was similarly true that the professors could have traveled abroad in order to communicate with Mandel in person, the Court was "loath to hold on this record that existence of other alternatives *extinguishes* altogether *any* constitutional interest on the part of the appellees in *this particular form of access*." *Id.* (emphases added).

Significantly, this Court also declined the government's request for a "broad decision" that the Attorney General could act for "any reason or no reason" at

all. *Id.* at 769. Instead, the Court took a more measured approach. The Attorney General had declined to waive Mandel's ineligibility because, during a prior visit to the United States, Mandel had engaged in activities beyond the stated purpose of his trip. *Id.* at 759. Mandel had "accept[ed] more speaking engagements than his visa application indicated," and had spoken at a reception where money was raised for some French students who had engaged in political demonstrations even though he had "'assured the Consul by letter'" that he would "'not appear at any assembly in the United States at which money was solicited for any political cause.'" *Id.* at 758 n.5. The Court held that these "previous abuses" gave the Attorney General a "facially legitimate and bona fide reason" to deny Mandel another waiver, and affirmed that denial. *Id.* at 769-70. The Court held that when the Executive exercises authority conferred by Congress to exclude an alien "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770.

This Court has since held that U.S. citizens have a sufficient interest in the immigration of family members to trigger judicial review under the *Mandel* standard to the denial of visas and immigration preferences to certain family members. In *Fiallo* v. *Bell*, 430 U.S. 787 (1977), this Court entertained a constitutional challenge brought by American citizens to an INA provision that denied special preference immigration status to natural fathers and their illegitimate children. This Court expressly *rejected* the government's contention that plaintiffs' constitutional challenge to the denial of visas to their family mem-

bers was "'not an appropriate subject for judicial review.'" *Id.* at 793 n.5. The Court explained that its "cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." *Id.; see also id.* at 795-96 n.6 (reiterating that Congress's broad authority to formulate immigration policy does not mean that "the Government's power in this area is never subject to judicial review").

To be sure, as the Government notes, this Court ultimately rejected the citizens' claims on the merits, and upheld Congress's exercise of its broad authority to determine which family-member classes of aliens should be admitted and excluded. *See* Pet. 17; *see also Fiallo*, 430 U.S. at 798-99. But the pertinent point here, which the government ignores, is that in *Fiallo* this Court not only affirmed that federal courts retain the power to hear a U.S. citizen's constitutional challenge to final agency action that excludes family members who wish to immigrate, but both acknowledged "that the families of putative immigrants certainly have an interest in their admission," *and* applied the "*Mandel*" standard of "limited judicial review" to that interest. 430 U.S. at 795, 795-96 n.6, 799.

The Ninth Circuit took the same measured approach in addressing Din's claim. In remanding for further proceedings in the district court, the Ninth Circuit expressly followed this Court's guidance in *Mandel* (Pet. App. 9a-10a, 13a-14a), acted consistently with *Fiallo*, and cautioned the district court to be responsive should the government raise national security concerns on the facts of this case. *Id.* at 20a-21a. As shown further below, neither the fact that this case involves a different constitutional right than

that at issue in *Mandel*, nor the fact that the consular official's visa denial here was not subsequently followed by an explanation of the denial of a waiver, is grounds for this Court's review.

II. THE NINTH CIRCUIT'S HOLDING THAT DENYING A VISA TO THE SPOUSE OF AN AMERICAN CITIZEN IMPLICATES THE CITIZEN'S FUNDAMENTAL RIGHT TO MARRIAGE AND FAMILY LIFE IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The government perfunctorily acknowledges that respondent has "a deeply rooted liberty interest in 'rights to marital privacy and to marry and raise a family.'" Pet. 14 (citing *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965)). The government nevertheless contends "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" her husband. *Id.* In the government's view, this case raises, "at bottom, an asserted constitutionally based liberty interest in having [an alien spouse] be present in the United States." *Id.* at 15-16. The government then argues that this narrowly defined interest is supported by "no history" and thus merits no constitutional protection whatsoever. *Id.* at 16.

The government's argument conflates two separate issues. The first is whether the Constitution provides some protection to an American citizen's choice of whether and where to live with her spouse; the second is whether that protection, if it exists, is sufficiently strong to outweigh a competing governmental interest that restricts that liberty. The distinction between the two questions is important and readily illustrated. The Court has long-recognized "that the

right to marry is of fundamental importance for all individuals", *Zablocki* v. *Redhail*, 434 U.S. 374, 384, 384-86 (1978), yet whether the government validly may restrict that liberty in a particular instance is a separate inquiry. *Id.* at 386-87; *see id.* at 392 ("Surely, for example, a State may legitimately say that no one can marry his or her sibling, . . . or that no one can marry who has a living husband or wife.") (Stewart, J., concurring in the judgment). Such restrictions may overcome, but do not "extinguish[] altogether" (*Mandel*, 408 U.S. at 765), the liberty interest in marriage.

The threshold question here, therefore, is whether Din has a constitutionally protected liberty interest in choosing where to live with her spouse. This Court's prior decisions make clear that she does.

1. The government asserts that the denial of Berashk's visa does not implicate any liberty interest of Din's because it does not "nullify the marriage or deprive her of its legal benefits." Pet. 4-15 n.7. That argument ignores that "marriage is more than a routine classification for purposes of certain statutory benefits." *United States* v. *Windsor*, 133 S. Ct. 2675, 2692 (2013). It is an "intimate relationship between two people." *Id.* It is well-established that the marital relationship includes the choices of whether and where to live together.

Almost a century ago, this Court found "[w]ithout doubt" that the liberty protected by the Constitution includes the freedom "to marry, *establish a home*, and bring up children." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added). In subsequent cases, the Court confirmed that this protection extends to many aspects of marital privacy for which the choices of whether and where to "establish a home" together are but a predicate.

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), which the government claims not to challenge (Pet. 14), the Court found the rights of a married couple to use contraceptives to be inherent in the "constitutional rights of . . . married people" and their right of privacy in their marriage. 381 U.S. at 481, 484-86. The right recognized in *Griswold* presupposed that "the marriage relationship" included the right to privacy and repose in the "the sacred precincts of marital bedrooms" because marriage was, at its core, "an association for as noble a purpose as any involved in our prior decisions." *Id.* at 485-86. *Griswold* necessarily recognizes a right to live with one's spouse; the dissent would have prevailed were the liberty interests in marriage limited to a recognition of legal status.[3]

The government also argues that there is "no history" to support a liberty interest in choosing where to live with one's spouse. Pet. 16. In the government's view, because Din may live with Berashk in Afghanistan, she has no constitutionally protected liberty interest at stake. That, too, is incorrect.

In *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion), the Court relied on a "host of cases, tracing their lineage to *Meyer* v. *Nebraska*," to find a liberty interest in where a family (there, a grandmother, son, and grandsons) chooses to live. *Id.* at 499, 500-03 (plurality opinion); *id.* at 520 (Stevens, J., concurring in judgment on separate constitutional grounds (finding a deprivation of a property interest)). In so holding, the Court rejected the very ar-

---

[3] *See also Boddie* v. *Connecticut*, 401 U.S. 371, 383 (1971) (fundamental right to marry includes right of access to courts to dissolve the marriage and thus vindicate the choice no longer to live with one's spouse).

gument the government raises here: that East Cleveland's ordinance could be upheld because it restricted only the grandmother's liberty "to live with all her children in this particular suburb; she is free to do so in other parts of the Cleveland metropolitan area." *Id.* at 550 (White, J. dissenting). In *Moore*, the Court thus held that the ability to exercise a constitutionally protected interest in some other jurisdiction does not negate the existence of that interest. Similarly, because marriage is "one of the basic civil rights of man'" *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (quotations omitted), there is no doubt that this Court would find a liberty interest at stake were the Commonwealth of Virginia to resurrect its anti-miscegenation policy with a law that allowed interracial couples to marry so long as they chose to live in a different state.

It is thus no answer for the government to say that Din can live "with her spouse anywhere in the world besides the United States." Pet. 14-15 n.7. Married people typically choose a place in which to "establish a home," and that choice is intrinsically part of the liberty interest in marriage that the constitution protects. The government's denial of Din's freedom to live with her spouse in this country thus implicates a constitutionally protected liberty interest. The Ninth Circuit therefore did not err in finding that the right to freedom of choice in marriage and family life is implicated when the government denies a visa to a citizen's alien spouse.

2. To recognize that a liberty interest exists is not to say that it is absolute or cannot be regulated by the government. "Of course, the family is not beyond regulation." *City of E. Cleveland*, 431 U.S. at 499 (plurality opinion). The states and federal government have long regulated the institution of marriage

and the rights and responsibilities it entails. *See, e.g.*, *Windsor*, 133 S. Ct. at 2689-93. And when the government acts in "the exercise of its broad power over immigration," its regulatory authority is particularly strong. *Fiallo*, 430 U.S. at 792.

Nevertheless, the government still must have a rational reason for the regulation and for applying it to restrict a particular citizen's liberty interest. As *Mandel* and *Fiallo* make clear, citizens are entitled to limited judicial review to ensure that such a reason exists. *See Mandel*, 408 U.S. at 770; *Fiallo*, 430 U.S. at 795-99 (applying standard of review drawn from *Mandel* and rejecting due process challenge to denial of preferential visas for illegitimate children and their natural fathers). Where the government has a legitimate and bona fide reason to exclude an alien spouse, it may do so notwithstanding the spouse's liberty interest. *See Bustamante,* 531 F.3d at 1062-63 (applying *Mandel* and denying spouse's claim that government's explanation for visa denial was insufficient to satisfy due process).

It is thus a gross exaggeration for the government to say that the Ninth Circuit's decision could have "sweeping consequences." Pet. 17. The government cites few cases involving challenges to the denial of a visa to an alien spouse, and in all prior appellate decisions the spouse has received notice consistent with *Mandel.* As for removal proceedings, the government not only must provide the alien with written notice of the statutory grounds for removal and the acts or conduct by the alien that allegedly violate the law, but allow the alien a hearing before an administrative law judge to contest those grounds. 8 U.S.C. §§ 1229(a)(1), 1229a. These procedures exceed what

Mandel requires and ensure that a spouse will know the reasons for removal.[4]

3. The decision below does not conflict with the Sixth Circuit's decision in *Bangura,* with the Second Circuit's decision in *Burrafato*, or with any of the circuit court decisions holding that the removal of an alien does not violate any liberty interest of the alien's citizen spouse. Pet. 18-21. None of these cases addressed or decided the issue presented here. The government suggests otherwise only by quoting sentences out-of-context that, like the Petition itself, conflate the existence of a liberty interest with the separate issue of whether the government has shown valid grounds for denying a visa or deporting a spouse.

In *Bangura,* the Immigration and Naturalization Service ("INS") advised Mr. Bangura in writing that it was denying his immigration petition for his alien spouse because his spouse had "'entered into a prior marriage for the purpose of evading the immigration laws'" and hence "'is statutorily ineligible for the benefit sought.'" *Bangura*, 424 F.3d at 492 (emphasis omitted) (quoting INS letter ruling). The Sixth Circuit recounted in some detail the facts underlying the INS's determination. *Id.* The Sixth Circuit thus never had occasion to address whether "the fundamental right to marriage" (*id.* at 493) would have allowed the INS to deny Mr. Bangura's petition without any ex-

---

[4] The government also finds it "difficult to see why children would not have a constitutional right to object to a parent being sent to prison" (Pet. 18), but children certainly would have such a right were a parent summarily imprisoned without explanation; of course, if the parent was first convicted pursuant to the procedures due process requires, then any *Mandel*-lawsuit would be pointless because the government already would have provided far more than a facially legitimate and bona fide reason for the imprisonment.

planation of why his spouse was "statutorily ineligible," because Mr. Bangura had already received ample explanation of why the visa was denied. *Bangura* instead addresses a broader issue, not raised here, of whether the fundamental right to marriage trumps an exclusion decision made for a facially legitimate and bona fide reason that satisfies *Mandel.*

The same is true of the nearly 40-year old Second Circuit decision in *Burrafato*. There, too, the Second Circuit had no occasion to address a U.S. citizen's demand for an explanation that would satisfy *Mandel*, because the government provided that explanation in an "affidavit" filed with the district court stating that the denial was based on the alien spouse's "'association with organized criminal society'" and citing the specific subsection of section 212(a) under which he was excludable. 523 F.2d at 556 n.3. Any claim the spouse may have brought under *Mandel* was thus moot on appeal, and so the Second Circuit's discussion of her constitutional right to marry was limited to her broader argument that her right was "violated by deportation of . . . her alien spouse." *Id.* at 555. The Second Circuit summarily rejected that broad claim, which is not at issue here.

The remainder of *Burrafato* addressed claims of denial of due process in connection with the deportation proceedings of the alien spouse. These claims also are irrelevant here, not only because the appellants knew why his visa was denied, but because the Second Circuit expressly noted that no challenge was raised to the consular official's denial of the visa, *id.* at 555 n.2 (appellants do not seek "review of the denial of the visa application by the United States Consul in Palermo on grounds of lack of due process"). In a subsequent Second Circuit case, where American citizens *did* challenge a consular official's denial of a

visa to an alien, the Second Circuit agreed with all other courts to have addressed the issue and held that a visa denial is reviewable under *Mandel*. *Am. Acad.*, 573 F.3d at 124-25.

The decisions in *Bangura* and *Burrafato* thus do not address the issues presented here. Instead, they reject a different and far broader right than Din has claimed, one to have their spouses be allowed to stay in the United States notwithstanding the government's stated reason for excluding or deporting them. *See Bangura*, 434 F.3d at 495-96 (the "'Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country'" when the spouse previously and fraudulently attempted to immigrate via marriage); *Burrafato*, 523 F.3d at 555 & n.2, 556 & n.3 (holding that "no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse" where spouse had entered America illegally, been denied a visa due to organized crime activity, and did not challenge the consular official's visa denial).

The government cites to other deportation cases (Pet. 20-21), but in these cases the U.S. citizen did not raise, and the courts did not address, whether the citizen was entitled to an explanation for removal consistent with *Mandel*. Instead, the courts rejected attempts by citizens to prevent altogether the removal of their spouses (or parents) on the ground that the removal infringed the citizens' liberty interests in marriage and family life. *See Oforji* v. *Ashcroft*, 354 F.3d 609, 617-18 (7th Cir. 2003) (rejecting argument that the "potential hardship to citizen children arising from the mother's deportation should allow an otherwise unqualified mother to append to the children's right to remain in the United States"); *Garcia* v. *Boldin*, 691 F.2d 1172, 1183 (5th Cir. 1982) (affirm-

ing denial of writ of habeas corpus to set aside a final order of deportation because, among other grounds, "Mrs. Garcia and the children cannot use their citizenship to stop the deportation of Mr. Garcia"); *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (reversing district court injunction against commencement of deportation proceedings and rejecting argument that deportation violates citizen spouse's right to marry); *Swartz* v. *Rogers*, 254 F.2d 338, 338-39 (D.C. Cir. 1958) (affirming denial of injunctive relief against order of deportation of an alien who was convicted of a violation of the Narcotics Act because "the wife has no constitutional right which is violated by the deportation of her husband").

There obviously is no conflict between any of these decisions and the Ninth Circuit's decision below. A finding that the right to marriage is not "so protected by the due process clause of the Fifth Amendment that [a spouse] could not be deported" pursuant to a valid act of Congress, *Swartz*, 254 F.2d at 339, is qualitatively different than a finding that the right to marriage is not implicated at all, and that the government has unreviewable discretion to deny a spousal visa for any reason, regardless of how arbitrary or improper it may be, and without any role for judicial review.

This is precisely the distinction this Court drew in *Mandel*. Because the Court found that the citizens' "First Amendment rights are *implicated*," it subjected the government's reason for infringing those rights to limited judicial review, and refused to accept the government's argument that the Executive could deny the visa "in its sole and unfettered discretion" for "any reason or no reason." *Mandel*, 408 U.S. at 765, 769 (emphasis added). The Ninth Circuit's decision follows *Mandel*, much as this Court did in *Fiallo*,

when the denial of a visa implicates a citizen's freedom of choice in marriage and family life. No further review is warranted.

III. NOTHING ABOUT THE NINTH CIRCUIT'S APPLICATION OF *MANDEL* TO THIS PARTICULAR DENIAL OF A VISA PRESENTS AN IMPORTANT QUESTION REQUIRING THIS COURT'S REVIEW.

Finally, the government's concerns that the Ninth Circuit has applied *Mandel* to a case that involves a consular official's denial of a visa, and not the Attorney General's explanation for denying a waiver, and the government may be required to disclose sensitive information in the future, provide no ground for further review.

1. The government claims that the Ninth Circuit misread *Mandel* to apply to a consular official's denial of a visa. Pet. 21. According to the government, this Court merely "assumed (but did not hold) [in *Mandel*] that if a citizen's First Amendment rights were implicated, then that citizen could obtain review of a discretionary denial by the Attorney General of a waiver of the grounds" for the denial, and the Court did not address whether the Attorney General was constitutionally required to furnish a "facially legitimate and bona fide" reason. *Id.* at 22 (quotations omitted). These arguments provide no basis for further review by this Court.

First, the government never questioned below that Din could obtain limited judicial review under *Mandel* if she could demonstrate a "cognizable constitutional interest in the visa denial."[5] Appellees' An-

[5] The government's opposition to review was based instead on its assertion that the denial of the visa did not implicate any

swering Br. at 1, *Din* v. *Clinton*, No. 10-16772 (9th Cir. Mar. 4, 2011). In both the initial briefing to the panel and the petition for rehearing en banc, the government accepted the proposition that if Din "has a cognizable constitutional interest in the visa denial," then "the denial is subject to a limited juridical inquiry to determine whether it is 'facially legitimate' and '*bona fide*.'" *Id.*; *see also* Petition for Rehearing En Banc at 4. The government's argument that *Mandel* is limited to cases where the Attorney General has provided an explanation for denying a waiver thus was never presented below.

Second, the government's argument has not persuaded any other appellate court. This Court, over the government's objection, used *Mandel* as its point of departure in *Fiallo*, and no appellate court has read *Mandel* as limited to its unique facts. On the contrary, courts have read *Mandel* to authorize limited judicial review to determine whether there was a facially legitimate and bona fide reason for denying a visa that implicates the constitutional rights of an American citizen, and have done so when the plaintiff challenged only the consular official's decision to deny the visa. *See Am. Acad.*, 573 F.3d at 124 (agreeing with *Bustamante* and explaining that "[i]t seems counterintuitive to review a cabinet officer's discretionary decision, but not a consular officer's decision as to statutory ineligibility."); *Adams*, 909 F.2d at 647-50; *Allende* v. *Shultz*, 845 F.2d 1111, 1114-21 (1st Cir. 1988); *Abourezk*, 785 F.2d at 1050. As the Ninth Circuit explained in *Bustamante*, the decision in

---

constitutional right, and that the consular official's statement that the denial was based on terrorism-related grounds under 8 U.S.C. § 1182(a)(3)(B) constituted a "'facially legitimate and bona fide reason.'" Appellees' Answering Br. at 13-21; Petition for Rehearing En Banc at 6-13.

Mandel is phrased in terms of the "power delegated by Congress to 'the Executive.'" 531 F.3d at 1062 n.1. As consular officials serve in the executive branch, there is no reason "the outcome should vary according to which executive officer is exercising the Congressionally-delegated power to exclude." *Id.* Those decisions are correct, and comport with this Court's subsequent decisions on judicial review of claims that executive agencies have exceeded constitutional bounds. Even in the area of immigration law, this Court has been reluctant to interpret federal statutes as precluding judicial review of constitutional challenges to agency actions. *See McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-99 (1991).

Third, reading either *Mandel* or the INA to preclude judicial review of a consular official's visa-denial would be extraordinary. The government makes no claim that the INA itself precludes judicial review of such an action. Rather, it claims that the statute does not expressly authorize such judicial review, and that "in the absence of affirmative congressional authorization," the judge-made doctrine of consular nonreviewability bars review. Pet. 5-6. That doctrine, however, evolved in the context of demands by aliens, not U.S. citizens. Where citizens raise constitutional claims concerning the denial of family visas, this Court has provided review. *See Fiallo* v. *Bell*, 430 U.S. at 793 n.5, 795-96 n.6, discussed at pages 14-15, *supra*.

2. The government also complains that, by requiring the government to do more than merely cite the statute that authorizes a consular official to deny a visa to those who engage in certain "terrorist activities," the Ninth Circuit has overstepped the limited bounds permitted for judicial review. Pet. 23-24.

This argument also provides no basis for granting the Petition.

The Ninth Circuit correctly recognized that by citing a statutory provision that allows for exclusion, the government merely establishes that Congress has provided the government with some authority to deny a visa. It is one thing for the Executive to have such authority, however, and another for it to have a facially legitimate and bona fide reason to invoke it in a given case. Pet. App. 9a. Requiring the government to provide an explanation sufficient to satisfy the *Mandel* standard in no way exceeds what procedural due process requires. Without some minimal explanation of the sort given in *Mandel* and other cases, a court cannot provide judicial review of any kind. Pet. App. 9a-20a.

The government notes that the statute does not require the consular official to provide the alien with written notice of the determination and the statutory provision on which the official relied if the official deems the alien inadmissible under section 1182(a)(2) (criminal-related grounds) or section 1183(a)(3) (security-related grounds). Pet. 24-25. That would be a sufficient answer if petitioner were an alien; it is insufficient when a U.S. citizen seeks an explanation consistent with this Court's limited grant of review in *Mandel*.

The government also cites *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), and *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), which upheld the authority of the Attorney General to deny entry to an alien whose admission he deemed prejudicial to the interests of the United States based on confidential information and without a hearing. Pet. 25-26. Those cases, however, were brought solely by aliens who were outside the United

States and had no right to enter the country. *See Mezei*, 345 U.S. at 208, 210-12; *Knauff*, 338 U.S. at 539, 542. For those aliens, "'[w]hatever the procedure authorized by Congress is, it is due process . . . .'" *Mezei*, 345 U.S. at 212 (quoting *Knauff*, 338 U.S. at 544). But citizens and aliens who are in the United States stand on a "different footing." *Id.* Citizens have rights that may be restricted "only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.* The complete denial of due process that this Court has deemed acceptable for aliens abroad is thus not applicable to claims brought by U.S. citizens.

As explained above, Din's right, as an American citizen, to freedom of choice in marriage and family life was implicated by the consular official's denial of the visa she petitioned for on behalf of her alien husband. Thus, due process requires at least that there be a facially legitimate and bona fide reason for denying the visa and infringing upon Din's right. *See supra* at pages 16-20. The government responds that it need not state the reason for the consular official's decision because "by definition" the reason must be "tethered" to the statutory grounds for ineligibility, and those grounds were enacted by Congress and thus "are legitimate on their face by their very nature." Pet. 22-23. That ignores, however, that due process requires more than a rational basis for the statute. It also requires that government officials who implement the statute have some reason for finding that the standards are met in individual cases. *See, e.g.*, *Superintendent* v. *Hill*, 472 U.S. 445, 455 (1985) ("a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence"); *Schware* v. *Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957) ("Even in ap-

plying permissible standards, officers of a State" cannot infringe a liberty interest without a factual basis).

The government's assertion that it need not identify the specific statutory provision or any facts on which the visa application was denied is incompatible with not only with that due process principle, but with any semblance of judicial review of the constitutionality of visa denials. As the panel majority explained, the statute "contains ten subsections identifying different categories of aliens who may be inadmissible for terrorism reasons," defines "terrorist activities" differently in different subsections, and provides for some categories a right to present rebuttal evidence. Pet. App. 11a-13a. A court cannot provide even the most limited judicial review of whether a visa denial is "tethered to the legal provisions that" authorize denial (Pet. 22) without having the government identify the subsection it thinks applies and "at least allege what it believes Berashk did that would render him inadmissible" under that subsection. Pet. App. 12a, 14a. Only then could the court look at (but not "behind") the government's reason for denying the visa to determine if it is facially legitimate and bona fide under *Mandel* and *Fiallo*. *Compare* Pet. 26-27, *with* Pet. App. 13a-14a.

3. Finally, the government claims that the Ninth Circuit "mandated" disclosures that "could compromise classified or other sensitive information" or "have a chilling effect on the sharing of national security information among federal agencies and between the United Sates and foreign countries." Pet. 27-28. The government "never asserted" in this case, however, that national security reasons preclude giving an explanation that comports with *Mandel*. Pet. App. 20a. Instead, the government generally alleges that "information supporting a visa denial" on security-

related grounds is "often classified" or related to "sensitive ongoing" investigations such that any requirement of disclosure, in any case, is unwarranted. Pet. 27.

The Ninth Circuit opinion addressed the government's general concerns, however, and the Petition says little in response. The government does not deny, for example, either that "consular officials appear to regularly disclose information to aliens" who are excluded under section 1182(a)(2) or (a)(3) (Pet. App. 16a), or that the U.S. Department of State Foreign Affairs Manual explicitly directs consular officials to provide written explanations to aliens excluded in "'all . . . cases'" under sections 1182(a)(2) and (a)(3), and to do so even though the INA does not require such explanations, unless a superior instructs them otherwise (*id.* at 17a n.6).

While noting the "dearth of cases" in which the issue arises (Pet. App. 8a n.2), the Ninth Circuit nonetheless emphasized that "nothing in our opinion compels dangerous disclosure." *Id.* at 20a. It described how the few other cases involving denials under section 1182(a)(2) or (a)(3) requiring *Mandel* review had been resolved without problematic disclosures of confidential information (*id.* at 9a-10a, 12a-13a), and explained that, if the government does raise a national security concern with respect to Berashk's denial on remand, the district court should respond with appropriate safeguards, such as having the government disclose its reasons *in camera*, as it does in criminal and FOIA litigation in which highly sensitive classified information is at issue. *Id.* at 21a.

The government's speculation that the courts' established procedures for dealing with classified information might increase the risk of "unauthorized or inadvertent disclosure" (Pet. 30) provides no reason

for this Court to grant certiorari now. This case is in an interlocutory posture and the government created no record below that *in camera* procedures would be needed, let alone that they would not suffice. If that changes on remand, and the government is uncomfortable with the risk entailed with the procedures for *in camera* review or other steps or disclosures the district court might provide or require, it can decline to provide the information to the district court, and there will be ample opportunity to address that issue on appeal of a final judgment.

A question that arises so rarely, is consistent with this Court's decisions, does not involve a circuit split, and is interlocutory and may be dealt with adequately on remand by well-established processes such as *in camera* review, does not warrant this Court's review.

CONCLUSION

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

Respectfully submitted,

MARK E. HADDAD*
GEOFFREY D. DEBOSKEY
HEIDI LARSON HOWELL
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000
mhaddad@sidley.com

KATHLEEN M. MUELLER
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Respondent Fauzia Din

August 25, 2014

* Counsel of Record