No. 13-1402

In the Supreme Court of the United States

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

v.

FAUZIA DIN

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

REPLY BRIEF FOR THE PETITIONERS

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The Ninth Circuit held in this case that respondent, a U.S. citizen, has a fundamental liberty interest that is implicated by a consular officer's denial of her alien spouse's visa application. On that basis, the court of appeals—purporting to apply this Court's decision in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1971)—required the government to provide respondent with a detailed explanation of the factual and statutory grounds for that denial, thereby circumventing the statute (8 U.S.C. 1182(b)(3)) that shields the government from giving notice to the alien himself of the basis for the denial when it is related to terrorism or criminal activity. As the petition explains, that decision is incorrect, and it cannot be reconciled with decisions of this Court or of other courts of appeals. Respondent's defense of the Ninth Circuit's decision on the merits is seriously flawed, and her attempt to paper over the

conflict in authority fails. She also greatly underestimates the threat to national security and foreign relations that Congress recognized in enacting 8 U.S.C. 1182(b)(3). The petition for a writ of certiorari therefore should be granted.

A. Whether a U.S. Citizen Has A Protected Liberty Interest Implicated By Denial Of An Alien Spouse's Visa Application Warrants This Court's Review

1. Contrary to respondent's contentions (Br. in Opp. (Opp.) 16-21), the court of appeals erred in ruling that a U.S. citizen has a fundamental liberty interest implicated by denial of her alien spouse's application for a visa. Spouses are independent human beings responsible for their own actions and for establishing their own eligibility for government benefits such as admission to the United States. The Immigration and Nationality Act confers no legally cognizable interest on a U.S. citizen if her alien spouse abroad is denied a visa because a consular officer has found him statutorily ineligible on terrorism or other grounds. A fortiori the Due Process Clause itself does not confer such a liberty interest on a U.S. citizen.

This Court has made clear that "a careful description of [an] asserted fundamental liberty interest," *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks and citation omitted), is required to ascertain whether the interest is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Reno* v. *Flores*, 507 U.S. 292, 303 (1993) (quoting *United States* v. *Salerno*, 481 U.S. 739, 751 (1987)). Respondent says that she "has a constitutionally protected liberty interest in choosing where to live with her spouse" (Opp. 17), and cites in support various cases finding that U.S. citizens have a

liberty interest in marrying, raising a family, and deciding where in the United States they wish to live with other U.S. citizens (Opp. 17-18). But her description of her asserted interest is vague and general, not "careful" and contextual. None of the marriage-related decisions on which she relies has anything to do with the liberty interest she asserts in "the ability to live in the United States with an alien spouse," Pet. App. 7a n.1, and therefore to have the alien spouse admitted to the United States for that purpose. Congress's plenary control over the admission of aliens compels the conclusion that the asserted right cannot be deemed fundamental. See Pet. 16-17; see also, *e.g.*, *Morales-Izquierdo* v. *Department of Homeland Sec.*, 600 F.3d 1076, 1091 (9th Cir. 2010) (recognizing that an alleged right for an alien to reside with U.S.-citizen family members "is one far removed from the right of United States citizens to live together as a family espoused in [*Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977)]"); see generally *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (with respect to congressional prerogatives over admission of aliens, there is "not merely a page of history, but a whole volume") (internal quotation marks and citation omitted).[1]

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[1] Respondent erroneously relies (Opp. 14-15, 20) on *Fiallo* v. *Bell*, 430 U.S. 787 (1977). As the petition states, *Fiallo*—which involved a number of different constitutional challenges to statutory provisions, not review of a consular officer's individualized decision—rejected the proposition that U.S. citizens have a "fundamental right" to be united in this country with their alien family members, describing that notion as a "fallacy." *Id.* at 794-795 & n.6; see Pet. 17. While *Fiallo* recognizes that Congress's decisions embodied in immigration statutes are not always immune from judicial review, it contains not a line suggesting the existence of a fundamental liberty interest in marriage that extends to having

That analysis does not, as respondent insists (Opp. 16-17), erroneously conflate the question of the existence of an asserted liberty interest with the question of the strength of the government's regulatory interest. Rather, it recognizes that where the government's regulatory powers have "tradition[ally]" been absolute, as is true of the admission of aliens, the asserted interest could never have taken sufficient "root[]" to be recognized as fundamental. *Flores*, 507 U.S. at 303 (citation omitted); see generally *Mandel*, 408 U.S. at 770 (stating that in the visa context there is no call to "balanc[e]" the government's "justification" for its action against the interests of a U.S. citizen).

2. The Ninth Circuit's erroneous decision conflicts with the decisions of several other courts of appeals on the liberty-interest issue, and respondent's arguments to the contrary (Opp. 21-23) are incorrect.

First, respondent mischaracterizes the Second Circuit's decision in *Burrafato* v. *United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976). There, the Second Circuit first held that "the claim that denial of [the alien's] visa application violated the constitutional rights of [the U.S. citizen spouse]" was "foreclosed" by circuit precedent. *Id.* at 555. The court of appeals then addressed whether "the failure of the Department of State * * * to specify the reasons for denial of [the alien's] visa application denied [the alien] procedural due process." *Ibid.* The court held that it did not. And although the alien's U.S.-citizen spouse was also one of the plaintiffs, the court of appeals distin-

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one's alien spouse live in the United States. See 430 U.S. at 793-795 & nn.5-6; see also *id.* at 798.

guished *Mandel* on the ground that "no constitutional rights of American citizens over which a federal court would have jurisdiction are 'implicated.'" *Id.* at 556-557.

That decision is therefore in direct conflict with the Ninth Circuit's decision here. Respondent's argument that the alien in *Burrafato* already "knew why his visa was denied" (Opp. 22) is wrong; the alien and his spouse claimed that he had not been given an adequate reason under *Mandel*, and the reason provided to him was no more specific than the reason respondent's alien spouse was given here. See *Burrafato*, 523 F.2d at 556 n.3 ("association with organized criminal society"). Respondent's assertion that "no challenge was raised to the consular officer's denial of the visa" in *Burrafato* (Opp. 22) is misleading; the challenge raised was to an allegedly insufficient reason for the visa denial, 523 F.2d at 555 & n.2, the same challenge as in this case. And respondent's statement that "a subsequent Second Circuit case" came out a different way (Opp. 22) is entirely off point, because that case involved a direct assertion of U.S. citizens' own First Amendment interests and not an asserted due process right of a U.S. citizen to notice of the factual and legal basis for the denial of a visa to her alien spouse. See *American Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 124-125 (2d Cir. 2009).

Second, respondent's attempt (Opp. 21-22) to narrow the decision in *Bangura* v. *Hansen*, 434 F.3d 487 (6th Cir. 2006), to its facts is unavailing. In *Bangura*, the Sixth Circuit rejected the argument that a U.S. citizen and his alien spouse had a fundamental marriage-related right that entitled them to challenge on due process grounds the government's denial of the

U.S. citizen's visa petition on behalf of the alien spouse. See *id.* at 496. Contrary to respondent's assertion, the court of appeals did not rest its ruling on the exact nature of the review that the plaintiffs sought or on some weighing of the government's interest against the plaintiffs' interests; rather, the court flatly concluded that "[t]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country." *Ibid.* (internal quotation marks and citation omitted); see *ibid.* ("A denial of an immediate relative visa does not infringe upon their right to marry."). The fact that the government provided a more detailed rationale for the denial of the visa petition in *Bangura* than it provided for the denial of the visa application in this case is therefore irrelevant. *Bangura* rejected the very liberty interest that the Ninth Circuit recognized in this case.[2]

3. Although respondent suggests (Opp. 20) that the Ninth Circuit's constitutional holding, if allowed to stand, would have limited effects, its implications are in fact "sweeping." Pet. 17. It would permit any U.S. citizen to claim that her constitutional rights have been violated by a physical separation from an alien family member—even where, as here, the alien himself has no cognizable rights in the matter, see

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[2] The same is true of the cases cited in the petition (Pet. 20-21) reaching that result in the removal context. Those cases did not turn on whether the U.S. citizen asserting the interest asked for "an explanation for removal consistent with *Mandel*" (Opp. 23) or some more searching inquiry. See, *e.g.*, *Oforji* v. *Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) ("The law is clear that citizen family members of illegal aliens have no cognizable interest in preventing an alien's exclusion or deportation."); *Garcia* v. *Boldin*, 691 F.2d 1172, 1183-1184 (5th Cir. 1982); see also Pet. 20-21.

Zadvydas v. *Davis*, 533 U.S. 678, 693 (2001). That would work a sea change in the law, creating obstacles to the government's exercise of its plenary power over the Nation's borders and burdening the courts.

B. Whether A Consular Officer's Visa Determination Is Subject To Judicial Review And Notice Requirements Warrants This Court's Review

1. As the petition explains (Pet. 27-30), the Ninth Circuit's decision mandates a disclosure that would permit plaintiffs like respondent and their alien spouses to obtain information not only about the legal basis for a terrorism-related denial of a visa to the alien spouse but also about the "facts" of "what the consular officer believes the alien has done." Pet. App. 9a, 14a. Those facts are often classified or otherwise sensitive, and disclosure would have a chilling effect on the willingness of various agencies and foreign governments to share with the Department of State the kind of intelligence that allows consular officers to prevent terrorists from obtaining visas. See, *e.g.*, 8 U.S.C. 1105(a).

Respondent protests (Opp. 31) that consular officers sometimes do disclose information to aliens whose visas are denied for terrorism-related (or crime-related) reasons. But that hardly suggests that the Constitution *requires* the government to make a particularized disclosure in every case in which a U.S.-citizen family member demands one, including cases in which it is the view of those who are familiar with intelligence reporting and terrorism trends and patterns that such a disclosure would cause harm to national security or foreign relations. See *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010). When disclosure of information to the alien is made, it

reflects a considered determination that the information provided in the particular case—such as the limited information given to respondent's alien spouse in this case, see Pet. App. 17a—does not require invoking the protections of Section 1182(b)(3).

Respondent also contends (Opp. 31-32) that "established procedures" for handling classified information are sufficient to ameliorate any concerns and that the issue would arise in only a small number of cases. Neither contention is correct. There are no "established procedures" for mandated disclosures in this setting, and the Ninth Circuit did not attempt to identify any. The decision below therefore could heighten the risk of unauthorized or inadvertent disclosure of classified or sensitive terrorism-related information pertaining to aliens abroad who have no rights under the United States Constitution concerning their admission. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210-215 (1953). As the petition states (Pet. 30), a significant number of visa applications every year could be affected—and the number of claims like respondent's could be expected to increase significantly if the decision below were permitted to stand.

2. The Ninth Circuit's ruling that further disclosure was required in this case flies in the face of this Court's precedents. Respondent's defense of that ruling (Opp. 25-30), which persistently overstates the scope of the narrow holding in *Mandel* (see, *e.g.*, *id.* at 24, 28), is unsound.

a. *Mandel* addressed the Attorney General's discretionary denial of a waiver of an alien's inadmissibility after the alien was found by a consular officer to be ineligible for a visa, and did not involve review of the

consular officer's underlying finding of ineligibility. Even in that waiver context, the Court did not hold that the Attorney General was required to furnish a "facially legitimate and bona fide reason" for denial of the waiver. See Pet. 22-23 (citing *Mandel*, 408 U.S. at 769-770). The Court found it unnecessary to reach that question because such a reason in fact appeared in the record. In this case, because the visa application submitted by respondent's alien spouse was denied on the basis of a non-discretionary reason set forth in 8 U.S.C. 1182(a)(3) itself, *Mandel* neither requires any further inquiry into whether the reason was "facially legitimate and bona fide" nor suggests the need for any additional justification.[3]

Respondent also contends (Opp. 27; see *id.* at 28, 30) that *Mandel* must be read to require that she have a right to some judicial review of the denial of a visa to her husband abroad, because any other result would be "extraordinary." That is exactly backwards. It has long been the case that a consular officer's visa decision is presumptively unreviewable. 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

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[3] Respondent asserts (Opp. 25-26) that the government did not previously argue that she cannot obtain review under the rationale of *Mandel* even if she demonstrates that she has some cognizable constitutional interest. The government's arguments below were constrained by the Ninth Circuit's earlier decision in *Bustamante* v. *Mukasey*, 531 F.3d 1059 (2008), which incorrectly applied *Mandel* to a visa-denial decision, see *id.* at 1060, 1062. In any event, the government did take the position that the disclosure respondent sought was not justified by this Court's decision in *Mandel*, and the argument in the text concerning review of the ineligibility determination is a subset of that broader argument.

are such matters—the presumption of review 'runs aground.'") (quoting *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988)); see also, *e.g.*, *Mezei*, 345 U.S. at 210, 212. In seeking to circumvent consular nonreviewability and expand the very limited holding of *Mandel* to cover the very different circumstances of this case, it is respondent who seeks an "extraordinary" result.

b. Even if *Mandel* were applicable to the visa denial in this case, the Ninth Circuit erred in holding that the government must provide respondent with the factual basis for the denial and the specific subsection of Section 1182(a)(3)(B) that authorized that decision. *Mandel* emphasized that a court should not "look behind" a visa-related determination, 408 U.S. at 770, and other decisions of this Court recognize that the government is entitled to shield information relating to the entry of aliens that "would itself endanger the public security," *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)—the same concerns underlying Section 1182(b)(3).

Respondent argues (Opp. 30) that the disclosure required by the Ninth Circuit does not impermissibly "look behind" the government's visa-denial decision, but merely enables some "semblance of judicial review." In the same breath, however, respondent insists that a consular officer's decision must be supported by "evidence" so that a court can be certain that the government had a reason to believe that the statutory standard for inadmissibility was satisfied. Opp. 29 (quoting *Superintendent* v. *Hill*, 472 U.S. 445, 455 (1985)). It is the latter statement that characterizes what the Ninth Circuit required in this case: information that would allow a court to "verify" the

ground for exclusion. Pet. App. 14a. That is exactly the kind of task as to which "the lack of competence on the part of the courts is marked" and "respect for the government's conclusions is appropriate." *Humanitarian Law Project*, 561 U.S. at 34 (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981)). Even if *Mandel* required some opportunity for judicial review in this case, the government's statement to respondent's alien spouse that he was inadmissible on terrorism-related grounds is a sufficient basis for a court to assess the visa denial for facial legitimacy. The far more searching review mandated by the Ninth Circuit is impermissible.

Respondent also characterizes as irrelevant (Opp. 28-29) any authority that relates to a request for information by an alien rather than by a U.S. citizen. But this Court's decisions in *Mezei* and *Knauff*, and the restrictions on disclosure that Congress set forth in Section 1182(b)(3), vividly demonstrate that the due process right granted by the Ninth Circuit in this case amounts to an end-run around restrictions that apply to the alien himself—restrictions that are grounded in security concerns too vital to be so easily circumvented.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2014