

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF STATE, ET AL.,)
 Petitioners,)
 v.) No. 23-334
SANDRA MUNOZ, ET AL.,)
 Respondents.)

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Washington, D.C.

Tuesday, April 23, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

CURTIS E. GANNON, Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Petitioners.

ERIC T. LEE, ESQUIRE, Southfield, Michigan; on behalf
of the Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 23-334, Department of State versus Munoz.

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON

ON BEHALF OF THE PETITIONERS

MR. GANNON: Mr. Chief Justice, and may it please the Court:

Last fiscal year, the Department of State issued 11 million immigrant and nonimmigrant visas. It also refused 62,000 visa applications on the basis of one or more of the inadmissibility grounds in 8 U.S.C. 1182(a), including applications from approximately 5400 noncitizens seeking to live with their U.S. citizen spouses or fiances.

Under the doctrine of consular nonreviewability, a noncitizen outside the United States cannot obtain judicial review of a consular officer's denial of a visa. Congress has not provided for that form of review in the INA, and when it added new visa-related provisions in 2002, it reaffirmed that it was

1 not providing an end run around that.

2 Nor is an end run available when a
3 U.S. citizen family member -- here, the
4 noncitizen spouse -- wants the noncitizen to be
5 admitted into the United States. As the Kerry
6 against Din plurality concluded in 2015, that is
7 not a liberty interest protected by the Due
8 Process Clause, and the U.S. citizen is affected
9 only indirectly by the government's action
10 against the noncitizen.

11 Thus, Respondent Munoz cannot
12 challenge the denial of her husband's visa
13 application any more than she could challenge a
14 decision at the end of a removal proceeding that
15 he will be removed from the United States or at
16 the end of a criminal trial that he would be
17 sent to a prison far across the country.

18 With respect to the second question
19 presented, even assuming that Respondent Munoz
20 has a sufficient constitutional interest to
21 trigger any judicial review, the Court should at
22 the very least hold that the State Department
23 satisfied the Mandel standard. The consular
24 officer provided a facially legitimate and bona
25 fide reason by citing a valid statutory ground

1 of inadmissibility, the unlawful activity bar,
2 just as Justice Kennedy's concurrence had found
3 had been the case in *Din*, where the government
4 cited the neighboring terrorist activities bar.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Just for
7 clarification, would -- if -- assuming that
8 Ms. Munoz does, in fact, have a liberty
9 interest, would the consular nonreviewability
10 preclude her winning here?

11 MR. GANNON: We think that it would.
12 We think that the --

13 JUSTICE THOMAS: And how would that
14 work then?

15 MR. GANNON: The only potential
16 exception there would be if there were a
17 constitutional right that this Court has
18 recognized, that that would be the only
19 potential exception. We otherwise think that
20 the point here is -- of consular
21 nonreviewability is that the person whose
22 interest is directly at stake doesn't have a
23 right to review. And, a fortiori, it seems that
24 somebody who is only indirectly affected by the
25 government's decision in that proceeding also

1 cannot challenge that.

2 And so the second question presented,
3 assuming that she has a constitutional interest,
4 would be that we at least satisfy what --

5 JUSTICE THOMAS: Well, I understand
6 that. I'm just trying to figure, without even
7 getting to Din, whether or not reviewability --
8 nonreviewability would preclude any -- her
9 having any recovery at all, whatsoever, that you
10 wouldn't even have to get to Din.

11 MR. GANNON: Well, the case has been
12 litigated on the presumption that there would be
13 an exception to consular nonreviewability if --
14 if we were to lose on the first QP, and that's
15 what Justice Kennedy's concurrence said in Din.

16 JUSTICE SOTOMAYOR: Counsel --

17 MR. GANNON: I don't know what the
18 cause of action is --

19 JUSTICE THOMAS: Yeah.

20 MR. GANNON: -- that she has in order
21 to bring that. The Ninth Circuit has been
22 assuming that there is one, I guess, under the
23 -- under the Constitution. We think there is
24 not one under the APA. And none of the courts
25 of appeals has found that there is one there.

1 And so we think that there still would be
2 reasons to say that there isn't going to be any
3 review even in those circumstances, but at the
4 least, we would satisfy Mandel.

5 JUSTICE SOTOMAYOR: Counsel, the
6 husband has no right of review, you're correct.
7 And it's a judicially created exception of
8 nonreviewability. So, if we make an exception,
9 it's us accepting something that's not statutory
10 or constitutionally required.

11 Her point is, whether it's her or her
12 husband, they each should have a right to
13 dispute whatever basis it was that formed your
14 denial. And let's assume it was something as
15 simple or -- as misidentification. You thought
16 he was John Doe, and you had a whole criminal
17 record on John Doe. And he's not John Doe; he's
18 John Smith, John Smith Doe, which is another
19 person.

20 So the reason she's asking for an
21 explanation and one that's required is that she
22 says: I have a right equal to the Mandel
23 professor's. They had a First Amendment right
24 to invite a professor to come speak to them. I
25 have an equal constitutional right to live with

1 my husband if I can.

2 The second question is, is that a
3 liberty interest? And you say it's not. So
4 let's take each of your points, okay?

5 As far back as 1888, this Court said
6 in Maynard that getting married is something
7 more than a mere contract, which is your
8 position in your brief, that it's only statutory
9 rights or benefits.

10 In 1923, this Court described in one
11 breath the right "to marry, establish a home,
12 and bring up children." And that right is one
13 long recognized at common law as essential to
14 the orderly pursuit of happiness by free men.
15 That's our Meyer case.

16 In Loving versus Virginia, we said
17 marriage is fundamental. In United States
18 versus Windsor, we said marriage is more than a
19 routine classification for purposes of certain
20 statutory benefits. So -- and Obergefell, I'm
21 not going to cite it, but it said something to
22 that effect.

23 So, if I assume that there's a liberty
24 interest that has to be protected by some sort
25 of process, then the question is, what kind of

1 process is enough? And in Mandel and in Nken,
2 we talked about the statutory -- citing at least
3 a statutory basis for exclusion.

4 Here, you're saying she's entitled to
5 nothing. Why do we have to go that far? Why
6 don't we just address, given all of our
7 centuries of statements about marriage being
8 something more?

9 MR. GANNON: We don't disagree that
10 marriage is an important right and that she has
11 liberty interests that are implicated there. To
12 step back to the beginning of your question, we
13 think that the doctrine of consular
14 nonreviewability is rooted in the political
15 branch's plenary power to determine which
16 noncitizens should be admitted to the country
17 and what procedures are going to be used in
18 order to make that determination.

19 And so that's not just a judicial
20 exception to general principles of
21 reviewability. That's the background against
22 which Congress enacted the INA. It provided for
23 certain remedies in review and did not provide
24 for this.

25 JUSTICE SOTOMAYOR: But that's the

1 second question.

2 MR. GANNON: And so --

3 JUSTICE SOTOMAYOR: No, you -- you
4 start your brief by telling us we're looking
5 only at no constitutional right.

6 Now you're pivoting and saying, yes,
7 if -- there is some sort of interest here, but
8 the only procedure that you're entitled to is
9 the one Congress gave us.

10 MR. GANNON: Even --

11 JUSTICE SOTOMAYOR: And in Nken -- in
12 Nken, we said that's right. You're entitled to
13 the citation of the -- we're going to -- I hope
14 someone else will pick up the second part of
15 this, which is that unlawful is different than
16 terrorizing, so there may be a reason for more
17 specificity in this case than that case, but my
18 question is, why isn't that a separate question
19 from the one that you've been arguing in your
20 brief that there is no constitutionally
21 protected interest by the wife?

22 MR. GANNON: Well, I think that that
23 -- assuming there is a constitutionally
24 protected interest, we think that Mandel sets
25 the ceiling of what would be required. But, in

1 Din --

2 JUSTICE SOTOMAYOR: I -- I said that's
3 separate. But --

4 MR. GANNON: But, in Din, the Court --

5 JUSTICE SOTOMAYOR: -- but you started
6 your argument with saying there's no
7 constitutionally protected right.

8 MR. GANNON: And the constitutionally
9 protected liberty interest that she has not
10 asserted is a liberty interest in having her
11 spouse admitted to the United States. And we
12 think that they need to allege a liberty
13 interest that's sufficiently specific and would
14 need to be rooted in history and tradition.

15 JUSTICE SOTOMAYOR: All right.

16 MR. GANNON: And --

17 JUSTICE SOTOMAYOR: I disagree.

18 MR. GANNON: -- and we think that in
19 Din, even Justice Kennedy's concurring opinion
20 didn't say that they were entitled to that
21 information, the statutory citation. He said
22 that assuming that there were constitutional
23 liberty interests that were implicated, that was
24 enough information. And --

25 JUSTICE KAGAN: I guess what -- what's

1 confusing me, Mr. Gannon, about the argument is
2 how your front-line position is compatible with
3 Mandel. In other words, if your front-line
4 position is right, why does Mandel exist?

5 MR. GANNON: And --

6 JUSTICE KAGAN: Mandel seems to
7 suggest that there is --

8 MR. GANNON: I -- I --

9 JUSTICE KAGAN: -- some kind of
10 reviewability.

11 MR. GANNON: Yes. I -- I -- I -- I
12 take --

13 JUSTICE KAGAN: It's a very -- excuse
14 me. It's a very limited reviewability. But
15 there's something. We ask for a legitimate and
16 bona fide reason. And so doesn't that
17 contradict your front-line primary position?

18 MR. GANNON: No, for this reason,
19 Justice Kagan, because even Mandel doesn't
20 decide that. Mandel assumes that. Mandel did
21 exactly what Justice Kennedy's concurring
22 opinion did. It said we're don't -- we're not
23 going to decide whether this First Amendment
24 interest is sufficient because, even if there
25 was something there --

1 JUSTICE KAGAN: So I take the point --

2 MR. GANNON: -- this is enough
3 information and we're not going to look behind
4 the government's reasoning.

5 JUSTICE KAGAN: I take the point.
6 It's one way to read Mandel, I think possibly
7 not the best way, but it's one way to read it.
8 Mandel is a little bit ambiguous on that point.
9 But I think that that's a harder and harder
10 argument to make after Trump v. Hawaii, which
11 pretty clearly talks about Mandel as setting
12 forth a very limited but still existent way to
13 review these decisions.

14 MR. GANNON: To the extent that Trump
15 against Hawaii addressed this, it didn't address
16 -- it assumed without deciding that consular
17 nonreviewability existed and it said that it --
18 it quoted with approval Justice Kennedy's
19 approach in Din of saying that a statutory
20 citation would be enough in this context.

21 I think Trump against Hawaii --

22 JUSTICE KAGAN: Correct.

23 MR. GANNON: -- involved a different
24 --

25 JUSTICE KAGAN: I mean, Trump says

1 it's enough.

2 MR. GANNON: It -- it --

3 JUSTICE KAGAN: But -- but -- but
4 Trump also suggests that that's the right
5 inquiry, in other words, that we should
6 undertake a Mandel inquiry and then Trump v.
7 Hawaii says, as Justice Kennedy said in Din,
8 that the statutory citation was sufficient.

9 And we can go on to that question.
10 But I was just sort of focusing on the first
11 issue, which is the combination of Mandel and
12 Trump suggests that your first, most dramatic,
13 strongest position is not the right one here,
14 that we, in fact, have recognized a kind of
15 judicial review, although a very limited one.

16 MR. GANNON: I -- I think you have
17 engaged in limited judicial review in a handful
18 of cases without saying that that was required.
19 And there's still nobody who has identified what
20 the cause of action is here or why this would be
21 permissible. Every time the Court says this, it
22 says, well, even assuming you can get review,
23 the government has said enough here. And so we
24 do think we would satisfy that standard, and I'm
25 happy to go on and talk about whether we satisfy

1 the -- the standard here, even though we're
2 relying on a different statute, as Justice
3 Sotomayor pointed out, than was at issue in Din,
4 but we --

5 CHIEF JUSTICE ROBERTS: Well, I think
6 the -- the -- the reason that, I don't know, I
7 can't ascribe reasons to prior courts, but they
8 move fairly quickly to, well, let's assume
9 something and then move onto it as long as it
10 leads to the same result, they don't have to
11 struggle with the far more difficult question.

12 So why isn't that the way we should be
13 looking at this, which is as reflexively, we --
14 the Court moves on to what might be an -- an
15 easier question from the point of view of the
16 Court in terms of the significance of the -- of
17 the constitutional question.

18 And so going on to the second
19 question, how would you go about weighing, which
20 may have shed some light on the first one -- how
21 would you go about weighing the interest in
22 marriage with the interest in national security?

23 MR. GANNON: Well, I --

24 CHIEF JUSTICE ROBERTS: You know,
25 that's like apples and giraffes.

1 MR. GANNON: Well, I think the point
2 of Mandel, if we're in the second question, is
3 that you don't do weighing. That's exactly what
4 the Court said in Mandel, is that we are not
5 balancing the strength of the government's
6 interests against the constitutional right at
7 issue. It says we're not going to test or look
8 behind the reason or balance it. That's the
9 last paragraph of Mandel.

10 And I -- I understand the -- the --
11 the temptation to say we should decide the easy
12 question here because the government actually
13 did give more information in this case, but that
14 would still leave an entrenched circuit split on
15 the first question presented.

16 Several circuits have said there is no
17 constitutional right in this interest and
18 there's not even Mandel review. Three circuits
19 since Din have assumed the first question and
20 went on to say that the government satisfied the
21 Mandel standard as applied in those cases. The
22 Ninth Circuit is the only circuit on the other
23 side that's saying that there's a constitutional
24 liberty interest here.

25 And I do think that assuming that

1 means that we're going to have to continue to
2 litigate questions over what are the contexts in
3 which there's a sufficient liberty interest. Is
4 it a spouse? Is that enough? Is it a fiance?
5 Is that enough? If a parent and child, is that
6 enough? Does it implicate something other than
7 visa denials?

8 We haven't seen a clean line for
9 distinguishing between the circumstances here
10 and the circumstances there. But, if you're in
11 QP-2, my basic answer is that there's not
12 balancing. It's just --

13 JUSTICE KAVANAUGH: What do you think
14 is --

15 MR. GANNON: -- a question of whether
16 it's a facially legitimate and bona fide reason.

17 JUSTICE KAVANAUGH: What is required
18 by Mandel in your view and what would be the
19 problems from your view in requiring more of an
20 explanation?

21 MR. GANNON: Well, our -- our basic
22 position on the Mandel question here is that the
23 statutory citation is good enough, as Justice
24 Kennedy concluded in Din, and we think that
25 that's similar to what the professors were able

1 to get in the -- in -- in Mandel, to the extent
2 that, there, there had to be a reason of some
3 kind because, otherwise, it was just blanket
4 discretion in the attorney general to grant a
5 waiver or not.

6 In this context, there's additional
7 information that is provided by the citation of
8 -- of the statutory kind of inadmissibility.

9 JUSTICE KAVANAUGH: And why don't you
10 spell out -- spell out, because I think it's
11 helpful, what would be the problems from the
12 government's perspective if more of an
13 explanation were required than just the
14 statutory citation or -- or --

15 MR. GANNON: Well, one problem is that
16 in cases that involve law enforcement and
17 intelligence information, as security-based
18 denials like this arise, that there are
19 sensitivities about being able to share that
20 information. That is why Congress has expressly
21 provided in 1182(b) that the State Department
22 doesn't even have to give --

23 JUSTICE KAVANAUGH: What --

24 MR. GANNON: -- the statutory citation
25 --

1 JUSTICE KAVANAUGH: Explain what sense

2 --

3 MR. GANNON: -- in those cases.

4 JUSTICE KAVANAUGH: -- explain what
5 sensitivities encompasses.

6 MR. GANNON: Well, it -- it -- it
7 encompasses the fact that we'd be sharing
8 information that indicates what we might know
9 about transnational criminal organizations'
10 operations.

11 They would be able to -- in this case,
12 they have said in their red brief that they want
13 not just the statutory citation, which is -- or
14 even the identification of the fact that he
15 was -- we think he was a member of MS-13, they
16 want more than that. They want to know what he
17 said or did that made the government believe
18 that.

19 JUSTICE GORSUCH: Well, Mr. Gannon, on
20 -- on --

21 MR. GANNON: And there is no court
22 that has --

23 JUSTICE GORSUCH: -- on that score,
24 Mr. Gannon, though, the -- the Ninth Circuit at
25 least I think held if I remember correctly that

1 the explanation that you did give later was
2 sufficient. It just wasn't timely.

3 And -- and what the government did
4 give, if -- if that were sufficient, obviously
5 redacted lots of stuff, didn't provide a lot of
6 information. You could simply say we think he's
7 a member of -- of a gang based on our contacts
8 with law enforcement, period.

9 So how would that implicate any
10 serious governmental interest?

11 MR. GANNON: Well, it would -- it
12 would go beyond any of the Court's previous
13 cases and beyond what is often given in cases
14 like that, beyond what Congress requires in
15 cases involving --

16 JUSTICE GORSUCH: No.

17 MR. GANNON: -- denials under (a)(2)
18 and (a)(3).

19 JUSTICE GORSUCH: Of course, it does,
20 but we're asking what due process and Mandel may
21 require, and if the Ninth Circuit says it
22 requires more than a statutory cite but less
23 than revealing your intelligence, a sentence
24 would do, which is what they said.

25 Do you have any objection to that? Is

1 that wrong?

2 MR. GANNON: I -- we do think that the
3 statutory citation ought to be enough for the
4 reasons explained in Justice Kennedy's opinion
5 in Din.

6 JUSTICE JACKSON: But that was a --

7 MR. GANNON: And --

8 JUSTICE JACKSON: -- different
9 statute. It's a totally different statute. I
10 mean, the statute in Din had the kinds of
11 sentences that I think Justice Gorsuch is
12 talking about in it with -- with -- with
13 relation to terrorist activities.

14 It didn't just say, you know,
15 terrorist activities, period. When you
16 identified a subsection, you were into something
17 of a factual basis for that determination. But
18 that's not happening here.

19 MR. GANNON: It -- it -- it would be
20 true if we had identified particular subsections
21 of the terrorist activities bar, but in Din, we
22 just cited the entire terrorist activities bar.
23 And as --

24 JUSTICE SOTOMAYOR: But there were six
25 --

1 MR. GANNON: -- Justice Breyer's
2 dissent talked about --

3 JUSTICE SOTOMAYOR: -- there were six
4 discrete terrorist acts described. Here, the
5 statute says only any other unlawful activity.
6 It is a generalist catch-all for "security and
7 related grounds." In your brief on page 3 to 4,
8 you seem to agree that your ground has to be
9 tied to security in some form, but we don't know
10 security at all, meaning the way it's written,
11 you could say no based on someone's jaywalking
12 conviction --

13 MR. GANNON: We --

14 JUSTICE SOTOMAYOR: -- or for stealing
15 a piece of bread when they were five years old
16 from a store. I don't -- I mean, there are some
17 countries that do criminalize even children
18 acting.

19 So how does a citation to unlawful
20 activity tell anybody anything? Here and in the
21 D.C. Circuit case, you at least said we think
22 he's a member of this organization, of this
23 criminal organization. That tells you
24 something.

25 MR. GANNON: That tells you more. I

1 agree with that.

2 JUSTICE SOTOMAYOR: Well, but --

3 MR. GANNON: We have not applied the
4 statute in contexts involving jaywalking, and
5 this wouldn't just -- this wouldn't cover --

6 JUSTICE SOTOMAYOR: But that -- that's
7 the -- that's --

8 MR. GANNON: -- the fact that somebody
9 had previously committed a criminal offense. It
10 requires us to have a reasonable ground to
11 believe that the person will be committing
12 unlawful activity once they are in the United
13 States, and so that is why gang membership has
14 been considered an indicator for this since
15 1965.

16 JUSTICE JACKSON: Right, but I guess
17 the --

18 JUSTICE KAGAN: I think the point, Mr.
19 Gannon, is that the idea of we think you will
20 commit some kind of criminal activity does not
21 tell a person anything, whereas we think you're
22 an MS-13 member does tell a person something.

23 Now they'll say, well, if I'm not an
24 MS-13 member or if the spouse isn't, I know how
25 to go about trying to contest that finding. So

1 it's a -- there's a big difference between --
2 both are a single sentence, but one sentence
3 gives you a lever to try to contest an
4 inaccuracy in what the government is doing, and
5 the other gives you no lever at all.

6 MR. GANNON: I -- I understand that
7 point, Justice Kagan, but I don't think that's
8 the point of Mandel review. The point of Mandel
9 review is not to fly-speck the agency's reasons
10 and help the agency do a better job of getting
11 to the right answer.

12 The point of Mandel is to confirm that
13 the government had a reason and it was facially
14 legitimate and bona fide. And so it's a spot
15 check. And this is why it's not --

16 JUSTICE JACKSON: But how does
17 unlawful --

18 JUSTICE ALITO: Mr. -- Mr. --

19 JUSTICE JACKSON: -- how does unlawful
20 activity, we think you committed unlawful
21 activity, do that?

22 MR. GANNON: We think you are --

23 JUSTICE JACKSON: Are going to.

24 MR. GANNON: -- going to commit
25 unlawful activity.

1 JUSTICE JACKSON: Excuse me. So how
2 does -- if that's the point of Mandel, how does
3 the kind of statement that you would be giving
4 by just pointing to that one section fulfill
5 that goal?

6 MR. GANNON: Because it indicates that
7 we are invoking a legitimate basis for
8 inadmissibility --

9 JUSTICE GORSUCH: Well --

10 MR. GANNON: -- that is in the statute
11 and the --

12 JUSTICE JACKSON: No. It indicates
13 that you're --

14 MR. GANNON: -- and the fact that
15 we've identified it says that we think that --

16 JUSTICE ALITO: Well, Mr. Gannon --

17 JUSTICE JACKSON: It indicates that
18 you're --

19 JUSTICE GORSUCH: Mr. Gannon -- Mr.
20 Gannon --

21 JUSTICE ALITO: -- at this point,
22 we're --

23 CHIEF JUSTICE ROBERTS: Justice Alito.

24 JUSTICE ALITO: At this point, we've
25 jumped over several preliminary questions.

1 Could -- before your time is up, could you say a
2 little bit more about them? For one thing, do
3 you think that the Respondent has a cause of
4 action and, if so, where does it come from?

5 MR. GANNON: I don't know where it
6 comes from, Justice Alito. The complaint seems
7 to assume that there's probably a constitutional
8 cause of action. That -- that's a pattern --

9 JUSTICE ALITO: Well, is it they --
10 they think it's an Ex parte Young cause of
11 action?

12 MR. GANNON: That's -- that's what is
13 in -- I mean, that -- I think that that's their
14 reasoning. The Ninth Circuit has obviously
15 countenanced that, and so it hasn't been
16 previously explored in this case.

17 We don't think that -- they -- they
18 also assert an APA claim. We think that we have
19 good arguments that the APA does not provide a
20 cause of action here, that this is excepted from
21 judicial review in two different rationales that
22 are explained in decisions that we cite in the
23 reply brief in the D.C. Circuit, the Ninth
24 Circuit, and the Sixth Circuit.

25 And so I don't know where the cause of

1 action is, unless it is an implicit Ex parte
2 Young-like action that they're asking for
3 declaratory judgment on.

4 JUSTICE ALITO: Well, I'll ask your
5 friend about that.

6 If there was a -- a protected liberty
7 interest in Mandel, wouldn't it follow sort of a
8 fortiori that there's a liberty -- a protected
9 liberty interest here? If -- if the Respondent
10 had not said, I -- I want to live with my
11 husband in the United States, but had said, he
12 has a lot of interesting things to say and so I
13 wish he were here so I could listen to what he
14 has to say and therefore exercise my First
15 Amendment right to receive information, would
16 that be sufficient?

17 MR. GANNON: I don't think so. I
18 don't think that the marriage cases can be
19 repleaded as First Amendment cases and -- and --
20 and satisfy Mandel. Again, I would say that
21 Mandel didn't even say that there is a
22 constitutional right there.

23 And, here, we think that the -- the
24 point of -- of this is that -- we cite O'Bannon
25 for the premise that in the due process context,

1 an enforcement action that is taken against one
2 person doesn't create a liberty interest in a
3 third party who is indirectly affected by that.

4 So she is obviously affected by the
5 decision that her husband can't come into the
6 United States. The same thing would be true if
7 this were a removal proceeding, removing him
8 from the United States, and you wouldn't say she
9 has a due process interest in intervening in
10 that case and making arguments that he can't
11 make or arguments that he can make. Either way,
12 she doesn't have an independent due process
13 interest there.

14 JUSTICE GORSUCH: Mr. Gannon, you did
15 ultimately provide a lot of information to -- to
16 the Respondent, and the Ninth Circuit didn't
17 fault that. It found that you gave plenty of
18 information in the end. It just said it wasn't
19 timely, and, therefore, it remanded to the
20 district court to conduct further proceedings.

21 I'm not clear what those are, what --
22 what that would look like, and I'm just curious
23 what you understand -- you think would follow on
24 remand and if there's a suggestion here perhaps
25 that there's no harm, no foul because everybody

1 knew exactly what was going on here, everybody
2 knew it appears that the Respondent filed a
3 petition for rehearing based on an assumption
4 that the denial was gang membership, for
5 example. So there's a lot packed in there, but
6 if you could help me with that.

7 MR. GANNON: Yeah, I -- I -- I don't
8 think my friend would say that the Ninth Circuit
9 correctly concluded that we provided enough
10 information. I don't read the red brief as
11 acknowledging that.

12 JUSTICE GORSUCH: Let's -- let's put
13 that aside.

14 MR. GANNON: And I'm not sure what the
15 Ninth Circuit thinks is going to happen on
16 remand. This is sort of, you know, terra
17 incognita for the courts to say that giving that
18 much information is enough, but, nevertheless,
19 we want there to be a full-bore review. The --
20 the Ninth Circuit seemed to suggest that -- that
21 there's going to be some type of independent
22 judicial confirmation that the government was
23 correct about its reasons. I think that goes
24 far beyond anything that any court -- other
25 court has countenanced in the context of

1 Mandel-type review.

2 And so, at the end of the day, we
3 don't think that the district court would be
4 able to order the issuance of a visa. And the
5 complaint doesn't ask for anything other than a
6 declaration that the reason that had been given
7 before we provided the -- the -- the additional
8 details about MS-13 was -- was not legitimate
9 and bona fide.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas, anything further?

13 JUSTICE THOMAS: Mr. Gannon, what does
14 -- exactly does the doctrine of consular
15 nonreviewability do?

16 MR. GANNON: We think that it prevents
17 a non-citizen outside the United States from
18 challenging a decision to deny a visa and also
19 prevents a third party from attacking that
20 decision. To the extent that there's an
21 exception that the Court wants to acknowledge,
22 that would then get into whether there is a
23 constitutional liberty interest, and that --
24 that's the first QP here.

25 But, otherwise, it protects the

1 political branch's ability to protect the
2 nation's borders and decide who is going to be
3 admitted to the United States without judicial
4 oversight for cases involving foreign citizens
5 who are outside the United States.

6 JUSTICE THOMAS: So, without more, it
7 is simply a doctrine that prevents all judicial
8 review of these decisions?

9 MR. GANNON: It -- yes. All judicial
10 review that Congress has not provided for.

11 CHIEF JUSTICE ROBERTS: Justice Alito?
12 Justice Sotomayor?

13 JUSTICE SOTOMAYOR: As I see the
14 question my way, she has a liberty interest in
15 her marriage and having her husband visit. She
16 doesn't have a liberty interest in having the
17 visa granted, but she does have a liberty
18 interest in knowing why and an opportunity to
19 oppose it if there is an opposition that can be
20 had.

21 But the review would be very limited.
22 In Din, we said the process due is just knowing
23 the reason and a statutory citation because he's
24 entitled to know -- she's entitled to know he
25 was a terrorist.

1 In a conviction, the husband has
2 gotten full notice, all the grounds have been
3 told to the wife because there's been a public
4 adjudication of that ground.

5 Similarly, with all the other examples
6 you provide, full process has been provided.
7 But what you're saying is I have a right and,
8 judicially created, we're going to say, there is
9 no process whatsoever you're entitled to.

10 Now you're saying you're entitled to
11 what Congress permits you to have. And so the
12 question is, what's that?

13 MR. GANNON: In -- in this context,
14 that's not even Mandel. Congress has
15 specifically said that we don't have to give a
16 reason at all if this is the reason for the
17 denial.

18 But I would say that we don't think
19 that there is a separate category of liberty
20 interests for getting information as opposed to
21 the underlying liberty interest. And so the
22 fact that she wants to live with her husband in
23 the United States doesn't mean that she has a
24 liberty interest in having information related
25 to something that prevents her from -- prevents

1 him from doing that.

2 And I would also say that would --

3 JUSTICE SOTOMAYOR: Makes little sense
4 to me in the example I gave.

5 MR. GANNON: Pardon?

6 JUSTICE SOTOMAYOR: Makes little sense
7 to me in the example I gave about the mistaken
8 identity.

9 MR. GANNON: It --

10 JUSTICE SOTOMAYOR: She would be
11 seeking to exercise her right to live with him
12 on the ground that you don't have a statutory
13 basis to exclude him.

14 MR. GANNON: But she doesn't have a
15 constitutional right to participate in that
16 proceeding and say you got this decision wrong.

17 JUSTICE SOTOMAYOR: Well, that's --

18 MR. GANNON: And that is not unusual
19 that there are instances where nobody is able to
20 get review. As Justice Kennedy's concurring
21 opinion pointed out, we give the examples of the
22 prisoner who was not able to challenge a
23 transfer to a different prison, the soldier who
24 is not able to challenge a military deployment,
25 in Castle Rock, where the Court relied on

1 O'Bannon, that was an instance --

2 JUSTICE SOTOMAYOR: But they held no
3 constitutional --

4 MR. GANNON: -- where nobody was able
5 to get enforcement of that judicial -- of
6 that -- of that restraining order.

7 JUSTICE SOTOMAYOR: You're not
8 mentioning independent constitutional rights.
9 All right. Thank you, counsel.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: I think I just want to
12 understand the conversation that you had with
13 Justice Alito before about the nature of the
14 constitutional interest here versus in Mandel.

15 So assume for purposes of this
16 question that Mandel does require some kind of
17 limited judicial review -- in other words, this
18 legitimate and bona fide state explanation -- in
19 the case where there is a constitutional right
20 implicated, as there was in Mandel, and the
21 question that I thought I heard Justice Alito
22 asking was: If you assume that, why would this
23 constitutional right be less important than the
24 constitutional right that was implicated in
25 Mandel? In other words, the right of a few

1 professors to listen to some guy for a few
2 hours, why would that be more important than the
3 right of a person to be able to live with their
4 spouse in this country?

5 MR. GANNON: I -- I --

6 JUSTICE KAGAN: And are you saying
7 that it is, or are you saying that once we --
8 once we think of Mandel in that way, yes, this
9 constitutional right is just as important?

10 MR. GANNON: Yeah, I don't think that
11 we've tried to compare the constitutional rights
12 in that regard. I think that we would say that
13 Mandel hasn't decided the one --

14 JUSTICE KAGAN: Yeah, I -- I get that.

15 MR. GANNON: -- and, therefore, we're
16 just making a separate argument --

17 JUSTICE KAGAN: But if we assume that
18 Mandel --

19 MR. GANNON: -- about this liberty
20 interest.

21 JUSTICE KAGAN: If we assume that
22 Mandel has decided the one, you would not --

23 MR. GANNON: Well --

24 JUSTICE KAGAN: -- contest that this
25 constitutional right is any different?

1 MR. GANNON: I -- I -- I would suggest
2 that there could be a difference between First
3 Amendment rights and -- and the Due Process
4 Clause and the third-party interests that are at
5 stake in the due process analysis under
6 O'Bannon, but, as -- as I said to Justice Alito,
7 I still don't think that that means that a
8 spouse could come in and have a better claim
9 because they want to talk in person with their
10 spouse instead of, you know, over the telephone.

11 JUSTICE KAGAN: Right. Well, she
12 wouldn't need a better claim if you were willing
13 to say, yes, this -- the right -- the right of
14 marriage and the burden that this places on that
15 right is just as important as the right of
16 listening to, you know, a lecturer ---

17 MR. GANNON: Yeah. And --

18 JUSTICE KAGAN: -- that was at issue
19 in Mandel.

20 MR. GANNON: And I think my basic
21 answer to that, Justice Kagan, is the assumption
22 of your question, which is that we think that
23 Mandel didn't actually decide that, which is why
24 it's open for the Court to decide the first QP
25 here.

1 If it wants to assume that there's a
2 liberty interest here that is equal to what the
3 Court assumed was at stake in Mandel and sort of
4 assumed was at issue in -- in -- in Trump
5 against Hawaii and therefore gave a very limited
6 form of review, then -- then -- then you'd be
7 doing Mandel analysis and we think that we would
8 win.

9 JUSTICE KAGAN: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 JUSTICE GORSUCH: One level, this is a
13 very large case about fundamental liberty
14 interests. At another level, I wonder if it's a
15 small case. We talked about remedies a little
16 bit a moment ago, you and I, and I'm -- I'm just
17 curious, what remedy does the plaintiff seek
18 here?

19 I know they wanted originally a
20 declaration that there wasn't a bona fide
21 reason, seeming to take Mandel as given. I'm
22 looking at page 13 of their -- in their -- in
23 their complaint. But they got that. They got
24 that reason. They got the Mandel reason.

25 Then they want a declaration that the

1 statute's unconstitutionally vague. That's not
2 before us. Then they want their -- their costs.
3 That's not before us.

4 And I guess, you know, of course, the
5 usual catch-all, grant such further relief, but
6 if a district court can't order the husband into
7 the country, what other relief remains that's
8 available for a court to issue?

9 MR. GANNON: We -- we don't think
10 there is any. I think that they've asked for
11 declaratory judgment, that the reason that was
12 given was not good enough. I think that now
13 they -- they would say that if this Court --

14 JUSTICE GORSUCH: I mean, if they
15 wanted --

16 MR. GANNON: -- says that the Ninth
17 Circuit is wrong about the -- what we did give,
18 then -- then --

19 JUSTICE GORSUCH: Well, the --

20 MR. GANNON: -- they would be entitled
21 to more, I guess, is what they would be saying
22 on remand.

23 JUSTICE GORSUCH: So -- so how about
24 this, that, you know, the -- the declaratory
25 judgment would be you got the Mandel reason

1 because that's what the Ninth Circuit found. It
2 just wasn't timely, period.

3 MR. GANNON: Well, the Court didn't
4 grant review on the third QP. We think that the
5 timeliness analysis is wrong and we think it's
6 particularly odd to say that --

7 JUSTICE GORSUCH: Fine.

8 MR. GANNON: -- that this lawsuit
9 needs to churn along at this point.

10 JUSTICE GORSUCH: Would the government
11 oppose a declaratory judgment that it wasn't
12 timely in its Mandel statement?

13 MR. GANNON: Well, I --

14 JUSTICE GORSUCH: And what harm would
15 that do?

16 MR. GANNON: -- without knowing what
17 the consequences of that are, I -- I -- I --

18 JUSTICE GORSUCH: Yeah.

19 MR. GANNON: -- I understand your
20 point. And -- and so I -- I don't know what
21 else they would get out of a declaration that
22 it's untimely. The Ninth Circuit obviously
23 wanted there to be further proceedings and they
24 wanted there to be more information that was
25 provided, and I understand my friend to be

1 asking for more information even now.

2 JUSTICE GORSUCH: But you wouldn't
3 know what -- well, if the court's correct in the
4 Ninth Circuit that they got all the information
5 they were due at least at the Mandel stage and
6 the Ninth Circuit's remanding to pierce that to
7 conduct some sort of due process analysis about
8 whether it was good enough, what could the Ninth
9 Circuit or district court do at the end of that
10 proceeding that would be lawful?

11 MR. GANNON: We -- we don't think
12 anything, but I don't think that's a reason to
13 affirm what the Ninth Circuit said here. I
14 think that would be a reason to reverse and say
15 that -- that this case is --

16 JUSTICE GORSUCH: Well, counsel, I'm
17 not fighting you. I'm just asking some
18 questions.

19 MR. GANNON: Yeah, and -- and I agree
20 with you, that I -- I don't know what they -- I
21 don't think there is anything that the court
22 ought to be able to do on remand.

23 JUSTICE GORSUCH: Yeah. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 Justice Barrett?

2 JUSTICE BARRETT: So, Mr. Gannon, I
3 had understood the government -- this goes to
4 the threshold question. I had understood the
5 government to essentially be asking us to take
6 Justice Scalia's position in *Din*, but based on
7 some of your colloquies with my colleagues
8 today, I'm thinking that maybe what the
9 government's first order position is, and I had
10 not gotten this from the brief, I thought you
11 just mentioned it in a footnote, is to say that
12 Mandel should never have assumed that there was
13 an exception if there was a fundamental right
14 implicated.

15 Is that right?

16 MR. GANNON: Well, I -- I think that
17 the -- the point of Justice Kennedy's -- I mean
18 Justice Scalia's plurality opinion in *Din* would
19 be that there wouldn't be an exception to
20 consular nonreviewability that applied anyway,
21 so I think it would get there one way or the
22 other.

23 JUSTICE BARRETT: No, I agree, but
24 it's different. I mean, I think Justice Kagan
25 called it a much more dramatic holding. It

1 would be different. I -- I guess I see you
2 potentially asking us to do one of two things.
3 One would be to say there's no fundamental right
4 here, she doesn't have a fundamental right in
5 having her spouse live with her in the United
6 States, and so the Mandel exception isn't
7 triggered and she's not entitled to anything.

8 MR. GANNON: That is our -- that is
9 our front-line position, I agree.

10 JUSTICE BARRETT: Okay.

11 MR. GANNON: And --

12 JUSTICE BARRETT: So you're not asking
13 us to say and, by the way, people shouldn't have
14 an opportunity to show that there's a
15 fundamental right implicated because, after all,
16 Mandel had just assumed that. It didn't say
17 that you are entitled to get a Mandel
18 explanation if you can point to the existence of
19 a fundamental right?

20 Do you see what I'm saying?

21 MR. GANNON: That's right. And I
22 was -- I was saying for purposes of the
23 assumption in Justice Kagan's question that if
24 -- if we assume that there is a constitutional
25 liberty interest that is sufficient to trigger

1 that review in Mandel, why isn't this one
2 equally good?

3 JUSTICE BARRETT: Right.

4 MR. GANNON: And our position is that
5 this is not, as the --

6 JUSTICE BARRETT: Yeah.

7 MR. GANNON: -- plurality concluded in
8 Kerry against Din, not a sufficient liberty
9 interest to trigger any exception to consular
10 nonreviewability that would look like Mandel
11 review. So we think you don't get to Mandel
12 review one way or the other.

13 JUSTICE BARRETT: No, no, and I
14 understand that, but I guess I'm -- I'm still
15 not quite sure what your position is.

16 I understand that. I'm just asking
17 you, are you asking us to say, to go still
18 further than that and say and, by the way,
19 Mandel just assumed that there would be an
20 exception to consular nonreviewability if there
21 was a fundamental right implicated, but we think
22 there's no such exception at all. So not only
23 is this one not good enough, there's -- are you
24 asking us to do that?

25 MR. GANNON: I -- I don't think you

1 need to do that. I think the question presented
2 is based on the idea that there is the
3 background of --

4 JUSTICE BARRETT: Okay.

5 MR. GANNON: -- consular
6 nonreviewability and the exception is not
7 triggered here --

8 JUSTICE BARRETT: That is what I --

9 MR. GANNON: -- for that reason.

10 JUSTICE BARRETT: Okay. That is what
11 I understood you to be asking from your brief,
12 and I thought you were asking for more in the
13 course of the argument. Okay.

14 This goes to Justice Gorsuch's
15 questions about what might happen and this is
16 something that I'll ask the other side as well,
17 but what do you understand the further process
18 to be? Because it doesn't do someone all that
19 much good just to know what the reason was.

20 You know, as -- as -- as Justice
21 Sotomayor was saying, if -- if you think my
22 husband is John Doe, but he's actually Jack
23 Smith and has no ties to MS-13, the value of
24 that information would be to have some
25 opportunity to be heard about why it's wrong.

1 But Mandel really is just about notice. And
2 none of the Court's cases, which are really just
3 kind of Mandel and Din, have gotten into what
4 would happen after that.

5 What is your understanding? Would
6 they have to go back to the State Department?
7 Go back to the consular official? Is the idea
8 that the district court would hear -- have some
9 opportunity to hear why this is wrong and why
10 the tattoos didn't really show an MS-13
11 affiliation?

12 MR. GANNON: They -- they might
13 contemplate that that's what they would be
14 getting because they want the information that
15 is what he said or what he did. We don't -- we
16 don't think that that's appropriate. I think
17 that if -- if the Court were to say that -- I --
18 so I'm not -- I'm not sure what -- what they
19 think is going to happen with respect to that.

20 They could re-file a new application
21 with the State Department. If they have this
22 information, they will know this was the reason
23 for the first denial.

24 But that doesn't mean that -- the
25 point of Mandel isn't actually notice. It's

1 confirmation that the government had a reason.
2 And so I -- I'm -- I'm still fighting the
3 premise that the point of Mandel is to -- to
4 provide the person who is complaining with some
5 form of redress. It's instead just a
6 confirmation that the government had a
7 legitimate reason to do what it did here.

8 There are procedures within the State
9 Department that there were multiple levels of
10 review of this decision. Anytime that there is
11 a denial, that has to be reviewed by a
12 supervisor. This particular basis for
13 inadmissibility needs to be based on an advisory
14 opinion from Washington, D.C.

15 And so there are lots of other ways in
16 which the State Department can be asked to go
17 back and approve this decision. We don't think
18 that that should be done at the behest of -- of
19 judicial review and a court saying you have to
20 do this and I want to see all of your evidence.

21 JUSTICE BARRETT: Okay. So the
22 government's position is that even if Mandel
23 applies, once you point to a reason, whatever --
24 whatever is required to make that reason
25 sufficient, that would be kind of the end of it

1 anyway?

2 MR. GANNON: Yes. As Justice Gorsuch

3 --

4 JUSTICE BARRETT: Yeah.

5 MR. GANNON: -- was just quoting from
6 the prayer for relief in the complaint, it would
7 be a declaration that that's not a good enough
8 reason.

9 JUSTICE BARRETT: And then you go on
10 your way, and if you want to try to go back --

11 MR. GANNON: If -- if --

12 JUSTICE BARRETT: -- to the State
13 Department --

14 MR. GANNON: -- if they want to
15 re-file, since they're past the time for
16 reconsideration of this decision, they would
17 have a judicial decision that says that that
18 reason wasn't good enough on the basis of what
19 the -- what was before the agency at the time.
20 And -- and -- and it might come out differently
21 the next time.

22 JUSTICE BARRETT: But would there be
23 some process in the State Department for letting
24 them make their case that these MS -- that these
25 tattoos, for example, didn't actually show an

1 affiliation with MS-13, or is it just like you
2 file for reconsideration and the State
3 Department says, okay, well, that wasn't good
4 enough, but we still think, you know, and maybe
5 just add a little bit more?

6 MR. GANNON: I mean, they did provide
7 that information from the State Department.

8 JUSTICE BARRETT: Right.

9 MR. GANNON: The consul -- the -- the
10 officers looked at that information and
11 concluded that it didn't change their answer
12 here.

13 JUSTICE BARRETT: I understand that,
14 and they -- they weren't satisfied.

15 MR. GANNON: Yeah.

16 JUSTICE BARRETT: Yeah. Okay. Thank
17 you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: So I'm a little --
21 trying to understand the government's argument
22 about fundamental rights and the way in which
23 Mandel works. In your colloquy with Justice
24 Barrett, I think you said that there is not a
25 fundamental right to have her spouse live with

1 her in the United States, and that's sort of --
2 that's the government's framing and the way in
3 which you are approaching the first question.

4 Is that -- am I wrong about that?

5 MR. GANNON: I would -- I'd phrase it
6 slightly different, that there is no liberty
7 interest in getting your spouse admitted into
8 the United States, notwithstanding immigration
9 law restrictions. So --

10 JUSTICE JACKSON: All right. But as
11 --

12 MR. GANNON: -- yes, she has a liberty
13 interest in living with -- living in the United
14 States and in living with her spouse, but we
15 don't think that that is a -- a liberty interest
16 that allows her to overcome immigration
17 determinations.

18 JUSTICE JACKSON: No, I understand
19 that, but I'm just trying to see how your
20 argument maps onto what the Court actually did
21 in Mandel. And as I read that case, as I look
22 at it, the first thing they're asking is whether
23 these professors had some sort of right to
24 receive information and ideas as protected under
25 the First Amendment.

1 They weren't saying at the level that
2 you're saying now do they have a right to have
3 this particular person -- or do they have a
4 liberty interest in having this individual come
5 to the United States as their first question.

6 It looks as though the way this
7 opinion is structured, Justice Blackmun starts
8 off by saying, in a variety of contexts, this
9 Court has referred to a First Amendment right to
10 receive information and ideas, and he goes on
11 and talks about that. And then he gets to the
12 point that you're talking about when he says,
13 "Recognition that First Amendment rights are
14 implicated, however, is not dispositive of our
15 inquiry." And then he goes on to do the rest of
16 the inquiry.

17 So I think the parallel structure here
18 would be the recognition that there is, as we've
19 said in so many cases, a fundamental right to
20 marriage, to include cohabitation, to raising
21 your family. Those things exist. And that's
22 implicated by the government's decision not to
23 allow a person to come in -- the spouse to come
24 into the United States.

25 And then you go on to determine

1 whether or not, even though you have this right
2 that's implicated, the other aspects of the
3 test. What's -- what's wrong with thinking
4 about it that way? Because I -- I hear you
5 shifting the fundamental right at the beginning
6 in answer to -- to the QP.

7 MR. GANNON: Well, I think that's in
8 part because this is a due process case and not
9 a First Amendment case, and so the Court is
10 looking for a liberty or property interest that
11 is directly impinged by --

12 JUSTICE JACKSON: All right. And have
13 you --

14 MR. GANNON: -- the government's
15 action here. And -- and O'Bannon tells us that
16 the fact that it is directed at a third party --

17 JUSTICE JACKSON: Yeah.

18 MR. GANNON: -- is a distinction for
19 due process purposes. And so we think that
20 there would --

21 JUSTICE JACKSON: But there was no
22 underlying interest in O'Bannon. I mean, didn't
23 we say there was no right to live in the nursing
24 home of your choice? Whereas we have recognized
25 the fundamental right to marriage and raising a

1 family and that kind of thing. So I think
2 O'Bannon might be a little bit off in that way.

3 MR. GANNON: Yeah, but, I -- I mean, I
4 don't think that that analysis carries the day
5 here because the Court would -- would never
6 apply that analysis for purposes of the removal
7 proceeding or any of the other proceedings here.
8 The -- the Court would not say that she has a
9 due process right to participate in her
10 husband's removal proceeding because it might
11 take him out of the country.

12 And so the -- the fact that there --
13 there is this long tradition of no judicial
14 review of these types of decisions about what
15 noncitizens will be admitted into the country,
16 we think, creates a high bar here and that --

17 JUSTICE JACKSON: So you're saying
18 there's no --

19 MR. GANNON: -- there needs to be a
20 specific liberty interest that is directly
21 affected. And we don't think that it's a -- a
22 -- a liberty interest that's just in getting
23 information or an explanation. We think it
24 would be a liberty interest in actually having
25 him in the United States.

1 JUSTICE JACKSON: So is it your
2 position that there isn't a liberty interest in
3 -- it has to be more specific than the liberty
4 interest in cohabitation with your spouse to
5 begin with that would then trigger some sort of
6 due process in this situation, and whether or
7 not the government is satisfied, that is another
8 question?

9 MR. GANNON: Yes. Ultimately, this --
10 the point here is that being able to live with
11 your spouse in the United States is not the same
12 thing as being able to get your spouse admitted
13 to the United States.

14 JUSTICE JACKSON: Okay. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Lee.

18 ORAL ARGUMENT OF ERIC T. LEE

19 ON BEHALF OF THE RESPONDENTS

20 MR. LEE: Mr. Chief Justice, and may
21 it please the Court:

22 Over eight years ago, the government
23 violated Sandra Munoz's right to procedural due
24 process by denying her husband's visa without
25 providing a reason why. Ms. Munoz has a

1 constitutional liberty interest in living with
2 her husband. We do not claim that this interest
3 gives her the right to immigrate her husband
4 regardless of his inadmissibility, but the
5 importance of cohabitation to marriage means
6 that the government is required to provide
7 procedural protections when it burdens the
8 underlying right.

9 The statute also informs what process
10 is required. There's nothing unusual about
11 this. When government action burdens a
12 substantive right, the Court often relies on
13 procedural protections to balance the
14 implications of that burden against the
15 government's countervailing interest.

16 The statute likewise here shows why
17 Ms. Munoz was herself deprived of that liberty
18 interest and undermines the government's
19 argument that she was a mere bystander. Under
20 the INA, the citizen petitioner must initiate
21 and advance her spouse's application from start
22 to finish, and the very purpose of the consular
23 process for spouses is to benefit the American
24 citizen spouse.

25 Given this interest, judicial review

1 is required. This Court has repeatedly
2 acknowledged that the constitutional rights of
3 U.S. citizens can be implicated by visa denials,
4 and when they are, that review is necessary.

5 Procedural due process, therefore,
6 requires notice sufficient to allow a meaningful
7 opportunity to respond. A mere citation to a
8 broad statute that encompasses any other
9 unlawful activity forced Ms. Munoz to guess at
10 the reason for the denial and provided only a
11 mere gesture at due process, which this Court
12 said was insufficient in *Mullane*.

13 The information Ms. Munoz ultimately
14 learned came after the one-year deadline to
15 respond had passed and after the government had
16 informed them that the -- its inadmissibility
17 finding was permanent. We now ask that
18 Ms. Munoz be given the chance to respond to that
19 information now.

20 And I welcome the Court's questions.

21 JUSTICE THOMAS: Mr. Lee, I know
22 others may want to talk about *Mandel*, but we
23 confronted this liberty interest in *Din*, and I
24 can't think of any decision from this Court that
25 said that such a liberty interest actually

1 exists.

2 Would you give your best account of
3 how you get to this liberty interest?

4 MR. LEE: Yes. So there is a liberty
5 interest in marital cohabitation which arises
6 under the Constitution. This is something which
7 the Court has addressed in multiple occasions in
8 the past. In Loving against Virginia, for
9 example, cohabitation was at the very heart of
10 that case.

11 That was a couple that was married in
12 Washington, D.C., and the anti-miscegenation
13 statute in the Commonwealth of Virginia
14 prohibited them from living together as man and
15 wife. The state court of appeals there said
16 that the --

17 JUSTICE THOMAS: I understand that.
18 That's a different case. What I'm interested in
19 is we had this exact issue in Din. That would
20 have seemed -- that would seem to have been the
21 occasion for deciding exactly what you're
22 talking about. But we did not get a court for
23 that.

24 I can think of no other case where the
25 right to have your spouse come to this -- be in

1 this -- immigrate to this country has been
2 considered. That's what I'm interested in.

3 MR. LEE: I see. To clarify, that's
4 not the procedural due process right that we're
5 advancing. We do not claim that Ms. Munoz has a
6 right to do what she wants, live with her
7 husband in the U.S., even if her husband is
8 inadmissible.

9 We're -- we're merely asking for a
10 reasonable and workable solution, which is that
11 some basis for the denial be given so that we
12 can correct the possibility that there was a
13 mistake. And so --

14 JUSTICE THOMAS: No, I'm interested in
15 the liberty interest that requires the
16 procedural right, the underlying liberty
17 interest that we could not find in Din. That's
18 all I'm interested in.

19 MR. LEE: I see. In a number of the
20 other substantive due process cases, Meyer, for
21 example, which acknowledged the substantive
22 right to raise a family and establish a home,
23 which certainly has a cohabitational element, in
24 Smith against the foster families organization,
25 the issue of the right to daily personal

1 intimate association was recognized by this
2 Court as a substantive right.

3 Even in the immigration context, Your
4 Honor, at the peak of Chinese exclusion, in the
5 United States against Gue Lim, the Court
6 acknowledged even without any statutory hook
7 that a noncitizen had the right to bring his
8 wife to the country even though she did not
9 herself possess a certificate which was required
10 at the time.

11 So we think that that --

12 CHIEF JUSTICE ROBERTS: Well, none of
13 those address the central issue, which is the
14 consular nonreviewability, which sort of seems
15 to me to be an entirely different order of
16 magnitude than the cases that you've -- you've
17 cited.

18 MR. LEE: So, Your Honor, on the
19 doctrine of consular nonreviewability, the
20 government raises this as an exception when the
21 rights of citizens are implicated. If a case
22 where a U.S. citizen had been living with her
23 husband for five years and that they had tried
24 to go through the legal process and a denial was
25 given without any -- any reason of the basis

1 why, that's the type of case that -- that there
2 has to be some level of review over.

3 If the Court acknowledged in Mandel --
4 and I just want to quote from the decision in
5 Trump against Hawaii briefly where the Court
6 said that "this Court has previously considered
7 the merits of claims asserted by U.S. citizens
8 regarding violations of their personal rights
9 allegedly caused by the government's exclusion
10 of particular foreign nationals." That's at
11 2416 of the opinion.

12 We do not think that the Court would
13 be breaking any new ground by acknowledging that
14 there is no doctrine of consular
15 nonreviewability as applied to the implicated
16 liberty interests of U.S. citizens, especially
17 without --

18 JUSTICE KAGAN: But then what --

19 CHIEF JUSTICE ROBERTS: What -- what
20 more would -- what more would you be entitled to
21 than what you've gotten? I understand the
22 question of the timeliness of the elaboration,
23 but what else do you think you're entitled to?

24 MR. LEE: What we received, what the
25 Ninth Circuit said was sufficient is far better

1 than the "any other unlawful activity." And so,
2 to answer Your Honor's question --

3 CHIEF JUSTICE ROBERTS: Well, yeah,
4 but as you said, what you've received.

5 MR. LEE: That's correct, after that
6 one-year deadline had passed. That's at 22
7 C.F.R. 48.

8 CHIEF JUSTICE ROBERTS: So you think
9 you're entitled to more just because the
10 deadline had passed?

11 MR. LEE: No, but we think that we're
12 entitled to a reasonable opportunity to respond
13 to the allegation with enough information so
14 that we're not trying to fight back with our
15 hands tied behind our backs.

16 JUSTICE KAVANAUGH: In court?

17 JUSTICE GORSUCH: Well, can't -- yeah.
18 Can't you -- I'm sorry.

19 MR. LEE: No, but -- if I may because
20 this certainly came up at the colloquy with my
21 friend, that we are -- we are --

22 JUSTICE KAVANAUGH: I mean, what
23 happens in court then? You say reasonable
24 opportunity to contest. So you can force the
25 government to provide more evidence behind the

1 reasoning, or what -- what happens?

2 MR. LEE: Well, no, Your Honor. What
3 we think is the way that -- what we think is the
4 most appropriate way to proceed would be to take
5 what the Department of Homeland Security applies
6 in the domestic context, which is a general
7 level factual summary of the basis for the
8 denial excluding material that is sensitive for
9 national security purposes.

10 What that would do is it would mean --
11 I don't think any party in this case wanted
12 eight years of litigation. This -- a rule like
13 that would allow these cases to be determined at
14 the agency level.

15 JUSTICE GORSUCH: But, counsel --
16 counsel, you got that. I mean, the Ninth
17 Circuit said that's exactly what you got. So
18 why are we here?

19 MR. LEE: Because what we're asking --

20 JUSTICE GORSUCH: I don't -- I mean, I
21 don't see anything in your prayer for relief or
22 your causes of action, and I'm not sure what the
23 cause of action here is either, I'm with Justice
24 Alito on that, maybe you can help me. But it
25 seems from the prayer for relief you got

1 everything you asked for.

2 MR. LEE: So let me try and clarify
3 that because what we are asking for now is the
4 chance to go back to the consulate and try to
5 overcome the denial with the information that we
6 now have.

7 JUSTICE GORSUCH: Okay. Okay. So
8 you're not asking for further judicial process?

9 MR. LEE: That's correct, Your Honor.

10 JUSTICE GORSUCH: Okay. So Mr. Gannon
11 suggested you -- you can go ahead and file a new
12 application.

13 MR. LEE: And the problem with that is
14 that at page 16 of the Joint Appendix, the
15 government informed my clients that its
16 determination, its false determination of
17 Mr. Asencio-Cordero's inadmissibility was
18 permanent. So I do not think that without an
19 order from a court saying that the basis for
20 that denial was insufficient --

21 JUSTICE GORSUCH: So you want a
22 declaratory judgment that it was insufficient?

23 MR. LEE: I don't think that there's a
24 way around that, Your Honor, because, otherwise,
25 we're going to be fighting an impossible battle

1 of trying to disprove that Mr. Asencio-Cordero
2 -- or rather trying to say that he is no longer
3 a gang member when that would require accepting
4 this false premise in the first place. What
5 we --

6 JUSTICE GORSUCH: So -- so just a
7 second. I -- I would like to know where in the
8 record that the government told you that it's
9 permanent and you can't reapply, and I'd like to
10 hear from Mr. Gannon about that too.

11 MR. LEE: Yes. That is at page 16 of
12 the Joint Appendix, Your Honor. That was far
13 before we learned any of the additional factual
14 material. Again, keep in mind that that came
15 only three years after the denial and two years
16 into litigation.

17 And so my clients reasonably
18 understood that the determination of
19 inadmissibility became permanent, I believe it
20 was in May of 2016. We still had seven months
21 in the one-year deadline, which the government
22 says is -- in the regulations is an individual
23 has the opportunity to overcome the denial, but
24 that's meaningless.

25 And it puts people in a Kafkaesque

1 situation if the regulations say, well, sure,
2 you have the opportunity to overcome the denial,
3 but we're not going to tell you why.

4 JUSTICE KAVANAUGH: But what do --
5 what do you do with Mandel and -- and Trump
6 versus Hawaii and Justice Kennedy's concurrence
7 in Kerry versus Din, which suggested that you're
8 not entitled to more information, this is what
9 you're entitled to, and it's up to Congress if
10 they want to provide more elaborate procedures
11 or require more elaborate procedures in
12 situations like this?

13 MR. LEE: Right. Well, there are many
14 differences from Din, and -- and in the colloquy
15 with my friend previously, there was discussion
16 on some of the language differences --

17 JUSTICE KAVANAUGH: Well, all three --
18 sorry to interrupt.

19 MR. LEE: No, that's fine.

20 JUSTICE KAVANAUGH: All three cases
21 suggest that a facially legitimate bona fide
22 reason is enough and you stop there and you
23 don't go on.

24 And that was elaborated on in Trump
25 versus Hawaii, that that's -- that's it. Courts

1 will neither look behind the exercise of that
2 discretion nor test it by balancing its
3 justification against the asserted
4 constitutional interest. That's kind of it --

5 MR. LEE: So --

6 JUSTICE KAVANAUGH: -- for purposes of
7 judicial.

8 MR. LEE: Right. And so I can -- I
9 can get to some of the distinctions with Din and
10 Justice Kennedy's concurrence, but I want to say
11 first that the Court has applied that facially
12 legitimate and bona fide test in two types of
13 situations unlike the situation here.

14 The first is the Trump v. Hawaii type
15 situation or the Mandel type where Congress has
16 expressly granted to the executive branch a -- a
17 discretionary ability to deny or grant some
18 benefit or -- or in the case of Fiallo and Bell
19 type situation, where that was a substantive
20 direct challenge to a broad congressional policy
21 choice.

22 Here, the government claims as though
23 it's operating at the peaks of plenary power,
24 but the amicus brief from the congressmen which
25 was submitted says at page 23 that the

1 department's position is that this decision
2 should have been left to one political branch,
3 the executive.

4 The point I'm driving at, Your Honor,
5 is that the Congress here has required that
6 consular officers have a reason to believe an
7 individual is inadmissible.

8 The regulations refer to that as a
9 standard which is akin to probable cause. So we
10 think, under a Mathews-Eldridge analysis, the
11 risk of arbitrary deprivations and along with
12 the --

13 JUSTICE KAVANAUGH: Well, it seems to
14 me --

15 JUSTICE KAGAN: So --

16 JUSTICE KAVANAUGH: -- that's what
17 you're trying to do is replace Mandel and the
18 Justice Kennedy concurrence and Trump versus
19 Hawaii with a Mathews v. Eldridge test, which
20 would then in turn as you would apply it require
21 substantially more process than our precedents
22 have previously required. I'm not sure why we'd
23 do that.

24 MR. LEE: Well, don't get me wrong.
25 We think we can prevail under the facially

1 legitimate and bona fide test as well, and if I
2 can turn to that and the second part of Your
3 Honor's question. Din, there were a number of
4 important distinctions from here before I get to
5 the statutory ones which the Court touched on
6 already.

7 Number one, there was a factual basis
8 in that case on the record, the -- the fact that
9 Ms. Din's husband was working for the Afghan
10 government when the Taliban began was in power.

11 There was reference earlier to
12 1182(b)(3), which the government treats as a
13 broad nondisclosure provision. That is not the
14 position that they took in Din against Kerry,
15 where they said, at page 50 and 51 of their
16 merits brief, that when the court does -- when
17 the executive does disclose -- disclose
18 additional material, that reflects a considered
19 determination that the information provided does
20 not require invoking the protections of
21 1182(b)(3).

22 They did not invoke 1182(b)(3) now, at
23 the time of the denial. And so we think that
24 that militates for at least enough --

25 CHIEF JUSTICE ROBERTS: But that's --

1 that's an implicit weighing of the competing
2 interests, right? I mean, you have to have that
3 at some point, given your claim. And I just
4 want to know how you do that. How do you weigh
5 the interest in cohabitation and marriage
6 against the security values under consular
7 non-reviewability?

8 MR. LEE: Sure. And I think the
9 answer is more simple than the government lets
10 on. Because the regulations, which the
11 Department of Homeland Security applies in the
12 domestic context to the same exact statutory
13 framework, the same grounds of inadmissibility,
14 8 C.F.R. 103.2 says that an applicant shall be
15 advised of the facts --

16 CHIEF JUSTICE ROBERTS: Well, I don't
17 mean to --

18 MR. LEE: -- leading to denial.

19 CHIEF JUSTICE ROBERTS: Well, I guess
20 I do mean to interrupt. I mean, it's -- it's --
21 you say in the domestic context. That's kind of
22 a pretty dramatic premise, if you're going to
23 say, well, it's the same as it's going to be in
24 the domestic context. The whole point of
25 consular non-reviewability is that it's not in

1 the domestic context.

2 MR. LEE: Well, but by the same token,
3 Your Honor, it wouldn't make sense if this -- if
4 these due process regulations apply in the
5 domestic context to non-citizens but they don't
6 apply when a U.S. citizen's rights are
7 implicated at the consular level.

8 The amicus brief submitted by former
9 DHS officials suggests that this is a
10 reasonable, workable proposal. And they cite
11 this provision, which I'd just like to quote
12 briefly, which says that the applicant "shall be
13 advised of the facts and offered an opportunity
14 to rebut the information and present information
15 in his or her own behalf before the decision is
16 rendered."

17 JUSTICE ALITO: Counsel --

18 CHIEF JUSTICE ROBERTS: That may be --

19 JUSTICE ALITO: I'm sorry, Chief.

20 CHIEF JUSTICE ROBERTS: I was just
21 going to say that seems to be flatly contrary to
22 what -- you know, the quote from Justice
23 Frankfurter, which I don't remember. He said
24 that's something that's been in the body politic
25 from the very beginning, that the United States

1 has control over its borders with respect to
2 non-citizens who seek to come in.

3 MR. LEE: But not, Your Honor, when
4 the rights of a U.S. citizen are implicated.
5 And the position that the government has put
6 Ms. Munoz in is that she's been permanently
7 separated from the man that she loves for eight
8 years without having any basis, any chance when
9 there was an opportunity to respond under the
10 regulations, to try and convince them that they
11 made a mistake.

12 Let me --

13 CHIEF JUSTICE ROBERTS: Just pause
14 very briefly. She's not been permanently
15 separated from the man that she loves. That
16 person is not allowed to be admitted into the
17 United States.

18 MR. LEE: But at the same time, Your
19 Honor.

20 CHIEF JUSTICE ROBERTS: That's a
21 different question.

22 MR. LEE: Not entirely, Your Honor,
23 because the government cannot dilute an American
24 citizen's citizenship by forcing them to -- by
25 giving them the chance to exercise their liberty

1 interests only by forfeiting the protection of
2 the Constitution.

3 El Salvador is under martial law. The
4 State Department warns American citizens not to
5 travel there. And Ms. Munoz was born and raised
6 in this country. She has a successful law
7 practice here. Her father served in the U.S.
8 Army in World War II in Germany.

9 JUSTICE KAGAN: Mr. Lee, I -- I guess
10 I want you to assume a few things for me, and
11 some of the assumptions you'll like and some of
12 the assumptions you won't like. But I just want
13 you to assume them, and then I'll ask my
14 questions.

15 So assume that you get Mandel review
16 because you have a constitutionally protected
17 liberty interest in cohabiting with a spouse.
18 Assume that that review is limited and asks only
19 for a bona fide and legitimate reason. Assume
20 that the information that you got eventually,
21 not in a timely way, but eventually, perfectly
22 satisfies that demand for a bona fide legitimate
23 reason.

24 But you didn't get it in time, as I
25 understand the issue. You didn't get it in time

1 to invoke the reconsideration processes that the
2 State Department usually has for exactly this
3 purpose. Is that correct?

4 MR. LEE: That's correct, Your Honor.

5 JUSTICE KAGAN: So if I think that the
6 simple statement, he was an MS-13 member, is
7 sufficient under Mandel, but you didn't get it
8 in time to invoke the reconsideration process to
9 say no, you got that wrong, he wasn't an MS-13
10 member, what do we do now?

11 MR. LEE: Then I think the Court would
12 have to remand so that the individual could have
13 an opportunity to try and prove to the consulate
14 that they may have made a mistake. And there's
15 a big, big difference between any other unlawful
16 activity --

17 JUSTICE KAGAN: You're saying that
18 what we should do now, given that the
19 information that satisfies Mandel was untimely,
20 is essentially to tell everybody they should be
21 put back in the box they were in before that
22 information became untimely; is that correct?

23 MR. LEE: In order to be able to
24 harness the facts to overcome that
25 determination, that's right, Your Honor.

1 JUSTICE GORSUCH: So the only relief
2 you seek is the opportunity to file a motion for
3 reconsideration at the consulate? Is that it?

4 MR. LEE: Yes, with the caveat that
5 the government's inadmissibility determination
6 would have to be declared to be incorrect.

7 JUSTICE GORSUCH: Now, if that's the
8 case, I don't see that in your complaint, number
9 one. And, number two, what do we do with Judge
10 Lee's observations that, as a practical matter,
11 it appears your client understood, before the
12 motion for reconsideration deadline passed, that
13 that was indeed the basis of the government's
14 denial, that -- that she understood that the
15 gang membership and MS-13 was the hang-up.

16 Now, you didn't know all the details,
17 but you did understand that fact. And if that
18 fact alone sufficed to provide the Mandel
19 notice, is this harmless error?

20 MR. LEE: No, and let me try and take
21 the second part of Your Honor's question first.
22 We actually -- Ms. Munoz and Mr. Asencio-Cordero
23 did not guess correctly. The government -- at
24 page 107 and 108 of the Joint Appendix below,
25 the government said that the tattoos were merely

1 the suspicion which triggered the inquiry.

2 So there was no correct guess of the
3 factual basis for the denial at all.

4 JUSTICE GORSUCH: No, but I -- I think
5 that's slicing the baloney a little thinly,
6 counsel, because, yes, you thought the tattoos
7 were the basis. But you thought the tattoos
8 were the basis because they suggested gang
9 membership, which is exactly what the government
10 thought too.

11 MR. LEE: But even there, there is a
12 very significant difference between gang
13 membership, there are hundreds of these gangs,
14 and the specific gang that they ultimately
15 provided three years later.

16 Now, I'll be very concrete with how we
17 would have done this differently if we'd have
18 even known that bit of information, in a brief
19 aside to say that I think if there was --

20 JUSTICE GORSUCH: Does Mandel require
21 specificity of the particular gang that he was
22 affiliated with? Wouldn't it be enough for the
23 government to say he's affiliated with an
24 international gang that conducts violence and --
25 and drug-trafficking operations, for example?

1 MR. LEE: It wouldn't be enough if
2 there was additional facts that did not
3 implicate national security, like the facts
4 which were ultimately provided here, that it was
5 based on a criminal review --

6 JUSTICE GORSUCH: Let's just suppose
7 that it were enough.

8 MR. LEE: Then, yes, that would be the
9 end of the -- but -- but --

10 JUSTICE GORSUCH: End of the case?
11 That would be harmless error, then?

12 MR. LEE: But there -- well, no,
13 because, again, this -- it wasn't enough here
14 because there's no additional fact on the record
15 that would have allowed Mr. Asencio-Cordero and
16 Ms. Munoz to have any idea how this man --

17 JUSTICE GORSUCH: No, no, but I think
18 --

19 MR. LEE: -- who's never been
20 convicted or charged of any crime --

21 JUSTICE GORSUCH: I understand that.
22 I appreciate that fact. But if your client
23 understood that gang membership were -- was the
24 problem and if the government said gang
25 membership, if that were enough to satisfy

1 Mandel, why doesn't it follow that any error
2 here is harmless?

3 MR. LEE: Well, to -- to clarify, and
4 I don't want to put too fine a point on it, but
5 that would only be enough if the other -- if
6 you're talking about such a significant figure
7 that even indicating what gang he may belong to
8 is not -- would implicate national security.

9 In almost all cases, there's going to
10 be facts that can --

11 JUSTICE GORSUCH: I don't know whether
12 it would implicate national security. I'm
13 positing it might satisfy Mandel.

14 MR. LEE: Well, I think, based on the
15 facts here, you would at the very least need the
16 name of the gang because -- and I -- let me come
17 back to the point about what we would have done
18 differently, because had we known MS-13 was the
19 gang, at page 44 of the Joint Appendix, there's
20 a declaration from a gang expert which was
21 submitted in April 2016.

22 That affidavit only mentions MS-13, I
23 think, in two or three sentences in passing. It
24 makes -- it uses MS-13 as an example. It makes
25 no attempt to actually analyze how these tattoos

1 might have been related to that gang.

2 I am not a gang expert, but when we go
3 back on remand, we will be able to provide --
4 this is Our Lady of Guadalupe, a tattoo of
5 Sigmund Freud --

6 JUSTICE BARRETT: Sigmund Freud.

7 MR. LEE: You know -- I mean --

8 JUSTICE BARRETT: I thought that was
9 interesting.

10 MR. LEE: Yeah. Maybe MS-13 --

11 JUSTICE BARRETT: But let me follow up
12 --

13 MR. LEE: -- doesn't like
14 psychoanalysts.

15 JUSTICE BARRETT: -- on Justice
16 Gorsuch's question here. I mean, Mandel doesn't
17 require that much. And so you are -- and this
18 kind of goes to what Justice Kavanaugh was
19 asking. You are asking for significantly more.

20 If we think you don't get that much
21 more under Mandel, I guess I don't see why
22 Justice Gorsuch isn't right, that this is just
23 game over.

24 MR. LEE: Well, let me answer that by
25 coming back to Justice Kennedy's concurrence in

1 Din, because that concurrence -- and I'm
2 operating under the assumption that we're
3 working with Mandel here -- that concurrence
4 specified at page 105 that the -- that the
5 terrorism bar contained discrete factual
6 predicates. There were six or seven types of
7 activity that there --

8 JUSTICE BARRETT: But you know a gang
9 here, like -- Justice Gorsuch -- the premise of
10 his question was not just that you knew the
11 general statute. I understand you think that's
12 not enough. But he said if you knew further
13 that it was because of international gang
14 membership, membership in an international gang
15 that conducts violence and would likely conduct
16 violence in the United States, why isn't that
17 enough? That's different than just a statutory
18 citation.

19 MR. LEE: Because in almost all of
20 these cases, Your Honor, there's going to be
21 factual information, like DHS tells individuals
22 in the domestic context, that can be provided
23 without damaging national security.

24 So, for example, the State Department
25 lists in its foreign affairs manual the 10

1 factors that officers are supposed to consider.

2 Whether they --

3 JUSTICE ALITO: Mr. -- Mr. Lee, can I
4 take you back to the Chief Justice's question?

5 MR. LEE: Certainly.

6 JUSTICE ALITO: And I don't think you
7 can answer this question by referring to
8 regulations. It's a constitutional question.

9 And his question as I understood it,
10 and I have the same question, is how do you
11 weigh the liberty interests that you are
12 asserting against the government's interest in
13 denying visas to people who would present a
14 danger when they get to the United States?

15 How do we weigh that? In -- if
16 Respondent's husband were a citizen, it wouldn't
17 matter whether he was a member of MS-13 or any
18 other gang or whatever the government suspected
19 him of being involved in criminal activities.
20 She could live with him unless he were in
21 prison, right? So it's an absolute -- it's a --
22 it's a very, very extensive right.

23 Now you're translating it into the --
24 the situation where it's -- it's the opportunity
25 to come here. How do we -- you know, how do we

1 figure out how much she gets?

2 MR. LEE: I -- I think that has
3 everything to do with the text of the statute
4 that the government cites when they make that
5 decision, separating the couple. So, in this
6 case, as -- as the Court knows, it was this very
7 broad language. It was -- it was -- I will
8 concede that the terrorism statute also has some
9 broad language.

10 JUSTICE ALITO: But, again, I don't
11 think you can answer this constitutional
12 question by citing statutes.

13 MR. LEE: Well, but --

14 JUSTICE ALITO: There's a -- you say
15 there's a balancing. And you're -- you've got
16 on one side a right that would be very, very
17 weighty were they both U.S. citizens living in
18 the United States. And then you've -- you're
19 willing to dilute it so that it's only this big
20 when the person is -- is -- wants to come into
21 the United States.

22 MR. LEE: And -- and I think the Court
23 has addressed a similar context in the
24 prison-type cases. Vitek against Jones, Harper
25 against Washington, where the Court recognized

1 an underlying substantive constitutional
2 interest, for example, in not being forced to
3 take psychotropic drugs or not being removed to
4 a mental facility, and yet it -- the way it
5 balanced those interests was by providing a
6 minimal level of procedural due process.

7 And I think one of the points that is
8 important to consider thematically here, Your
9 Honor, is consular officers work very hard.
10 They have very heavy caseloads. They're working
11 under very difficult conditions. And what we're
12 asking for is for them to give us enough
13 information to help them make a decision that's
14 going to foster the government's --

15 JUSTICE KAGAN: So, Mr. -- Mr. Lee --

16 JUSTICE ALITO: But what if a -- just
17 let me --

18 JUSTICE KAGAN: No, go ahead.

19 JUSTICE ALITO: If I could follow up.
20 What if an American citizen wants to have a
21 child who is a non-citizen admitted to the
22 United States? Would the same thing apply
23 there? Or an American citizen wants to have a
24 non-citizen parent admitted or an American
25 citizen who doesn't believe in marriage wants to

1 have a non-citizen admitted to the United States
2 so that person can live in an intimate
3 relationship with that person in the United
4 States? What about all those situations?

5 MR. LEE: So the only person that's
6 going to have both the -- and I want to take a
7 half step back in answering that and try and
8 define the interest precisely as well. The only
9 person who's going to have an interest directly
10 deprived is going to be a spouse.

11 You have to have both an underlying
12 liberty interest, which we get from the
13 Constitution, and you have to have a direct
14 deprivation, which we get from the statute. It
15 totally distinguishes the facts here from
16 O'Bannon, where the -- the home care patients
17 had no statutory role to play whatsoever in the
18 certification process, et cetera.

19 But -- so the point I'm trying to make
20 is that -- and the Court understands that
21 immigration law is quite complicated, I don't
22 want to go on too long on this, but you have --
23 citizens can only petition immediate relatives
24 and citizens have to be adults to petition
25 immediate relatives.

1 So the Court -- so all those other
2 floodgates concerns are exaggerated because the
3 only person who's going to both be statutorily
4 involved enough to have been directly deprived
5 and have an underlying liberty interest in
6 marital cohabitation --

7 JUSTICE ALITO: Well --

8 JUSTICE KAGAN: Mr. --

9 JUSTICE ALITO: Well, is there a
10 liberty -- do those people have a liberty
11 interest? And if they do, then how can it be
12 deprived by statute? How can it be taken away
13 by a statute?

14 MR. LEE: So, for example, a
15 grandparent and a grandchild, they certainly
16 would have an underlying liberty interest.
17 That's from the Moore case. But they wouldn't
18 be able to petition each other. So my point is
19 that you have to have both these elements.

20 And -- and that's going to be my
21 answer to all the floodgates concerns that Your
22 Honor posits because you need to both -- and
23 there is no -- the Court has not recognized a
24 substantive --

25 JUSTICE ALITO: It's not a flood --

1 MR. LEE: -- liberty interest in adult
2 cohabitation.

3 JUSTICE ALITO: -- it's not a flood --
4 it's not a floodgates argument. It's a
5 constitutional argument. It's how we determine
6 which interests are sufficient to allow the
7 citizen, the American citizen, to contest the
8 denial of a visa for a -- a close relative or
9 a -- a person with whom the person has a close
10 relationship who's not an American citizen.

11 MR. LEE: Well, this is a case about
12 marriage, Your Honor, and this is a case about
13 the importance of marriage. And this Court has
14 recognized this. Congress for over 200 years
15 has recognized this even in the immigration
16 context.

17 1804 was the first time immigration
18 benefits passed through citizenship. 1888, at
19 the peak of Chinese exclusion, Congress passed
20 the Scott Act, which exempted Chinese laborers
21 who had wives in the United States.

22 JUSTICE KAGAN: Mr. Lee, I -- I -- I
23 guess what I'm not seeing, to me, there's no
24 weighing at issue here. The way I understand
25 the analysis worked -- as working is that if you

1 come forward with a constitutional right,
2 whether it's the right to listen to ideas from
3 somebody overseas or -- or certainly whether
4 it's the right to associate with your spouse who
5 is overseas, if you come forward with a
6 constitutional right of that kind in cohabiting
7 or associating with a person who is not getting
8 a visa, that gets you something, but it doesn't
9 get you weighing.

10 It gets you this very limited judicial
11 review which says the government now has to say
12 why it's excluding that person. So that's all
13 it gets you. It's just like you come forward
14 with a right. We don't weigh that right. It
15 just gives you the ability to force the
16 government to say one or two sentences about why
17 they're excluding that person.

18 So what weighing are we talking about?

19 MR. LEE: No, I think Your Honor put
20 it better than I did. I mean, we have here a
21 very important constitutional interest. It
22 would certainly not make sense if Mr.
23 Asencio-Cordero could ask a professor to get his
24 next visa and get in that way but not because he
25 had lived with his wife for five years and --

1 JUSTICE KAGAN: Right. But that
2 brings us back to this question of, okay, you
3 got what you wanted. You got the information --

4 MR. LEE: Right.

5 JUSTICE KAGAN: -- that they were
6 excluding the spouse because of gang activities.
7 And then that brings us back to Justice
8 Gorsuch's questions about why isn't this whole
9 thing over because you got what you wanted.

10 MR. LEE: Because now for the first
11 time we're going to have the opportunity to go
12 back and harness the facts that's necessary to
13 try and prove the government wrong.

14 We don't have the right to win on
15 remand. We'll go back to the consulate. We'll
16 do our very best. There is a lot of information
17 that we can do with the reasons that were
18 ultimately given. It doesn't give us any
19 guarantee, but that's what due process requires.

20 JUSTICE BARRETT: But Mandel -- and --
21 and this is just a question about the
22 constitutional argument, this is -- kind of goes
23 back to the questions I was asking before.

24 Mandel talks about notice and giving
25 you the basis, but it doesn't talk about Mullane

1 and an opportunity to be heard. And you're
2 weighing, I take it, is probably coming from
3 Mathews versus Eldridge, which I don't think is
4 the standard here.

5 So where do we get the constitutional
6 right to an opportunity to be heard in this
7 Mandel context?

8 MR. LEE: Well, keep in mind that in
9 Mandel there was a broad discretionary grant.
10 We think that that's a foundational difference
11 between Mandel and this case.

12 And so, because this is a -- this is a
13 nondiscretionary decision which Congress has
14 established, officers must have this reason to
15 believe, we think that that does a lot to get us
16 to where we need to be, Your Honor.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 I understood you to indicate that what
20 you thought the relief you were seeking was just
21 limited judicial review. Is that right? Or
22 exactly what is the relief you're seeking?

23 MR. LEE: We do not need any
24 additional judicial review here, Your Honor. I
25 think, on remand, this will go quickly to the

1 consulate so that we can finally respond to the
2 information that we've been given.

3 CHIEF JUSTICE ROBERTS: And how do you
4 come to the fact or the conclusion that that is
5 what you're entitled to when you're discussing
6 the right of a married couple to have one of
7 them come in, you know, across -- across the
8 border? How do you get to the determination
9 that that's what you're entitled to?

10 MR. LEE: Well, we get to it because
11 Ms. Munoz is directly implicated, and that's
12 where the statute comes in.

13 CHIEF JUSTICE ROBERTS: But that gives
14 her some sort of standing, but you said when you
15 -- I don't want to give it away -- when you'd
16 look at the marriage interest and the
17 international interest on the United States,
18 what you'd conclude is that you get this limited
19 judicial review.

20 MR. LEE: I see. Yes. Going forward,
21 that's the rule.

22 CHIEF JUSTICE ROBERTS: And you do
23 that by doing what?

24 MR. LEE: Well, we do that by
25 requiring that there is -- I mean, we've had

1 some discussion as to whether the facially
2 legitimate and bona fide test applies or whether
3 something slightly more strenuous applies.

4 CHIEF JUSTICE ROBERTS: I don't care
5 what the test is. What is it that the tests
6 entail?

7 MR. LEE: The test is entailed at
8 determining that the government did not make a
9 decision which either has no basis in reality or
10 which was violative of the rights of a U.S.
11 citizen. And so, here --

12 CHIEF JUSTICE ROBERTS: Does it
13 involve weighing the interest -- the marriage
14 interest and the international interest?

15 MR. LEE: Well, I -- I think there's
16 another government interest, which is in uniting
17 American citizens with their spouses.

18 CHIEF JUSTICE ROBERTS: Okay. Does it
19 involve the weighing of that interest as well?

20 MR. LEE: Well, I -- I don't -- we
21 don't see it that way, Your Honor. We see it as
22 we have a marital interest in cohabitation in
23 the United States and --

24 CHIEF JUSTICE ROBERTS: On the one
25 hand, and --

1 MR. LEE: Well, and then the
2 government's got to provide sufficient
3 information. We acknowledge it's a low level of
4 information. It's what DHS does domestically to
5 ensure that the citizen at least had the
6 opportunity to try and correct a mistake that
7 the officer had.

8 So I -- I -- I take Your Honor's
9 point. We -- we sort --

10 CHIEF JUSTICE ROBERTS: What -- what
11 -- what is it?

12 MR. LEE: Well, we do not think -- we
13 do not see it as a sort of explicit balancing
14 issue. We see it as you have the --

15 CHIEF JUSTICE ROBERTS: Well, that is
16 -- my point is that if you're going to take two
17 -- the competing interests and come to a
18 conclusion about what -- how the competition
19 comes out, I don't see how you can avoid the
20 conclusion that that involves weighing what I,
21 at least, see as totally disparate and perhaps
22 unweighable interests.

23 MR. LEE: Well, but that -- I don't
24 mean to be hard-headed, Your Honor, but that's
25 what this -- this either facially legitimate and

1 bona fide test or the slightly higher standard
2 that we're asking for gets us, because, again,
3 it's -- we recognize -- we are certainly
4 solicitous of the government's concern in
5 keeping individuals who are inadmissible out of
6 the United States, but individuals who are
7 admissible should be admitted to the United
8 States. And so --

9 CHIEF JUSTICE ROBERTS: Thank you.

10 MR. LEE: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Justice
12 Thomas?

13 Justice Alito?

14 JUSTICE ALITO: Well, I don't want to
15 beat a dead horse, but I am going to beat it a
16 little bit. Now, there are a number of possible
17 answers. Suppose -- there's a liberty interest.
18 Okay? You need -- you say you're entitled to
19 something. And that something could be, A, the
20 -- the State Department says we believe he's
21 involved in criminal activity. B, we believe
22 he's a member of a gang. C, we believe he's a
23 member of a particular gang. D, we believe he's
24 a member of MS-13. E, this is why we believe
25 that he's a member of MS-13. F -- if I'm

1 getting my numbers straight -- we believe that,
2 and you have an opportunity to rebut it.

3 Now, how do we determine which of
4 those is what you get, unless we're weighing one
5 thing against another?

6 MR. LEE: By looking to what the
7 Department of Homeland Security does
8 domestically. And that's what the --

9 JUSTICE ALITO: Okay. Thanks. I
10 mean, that's -- that doesn't tell me anything
11 about what the Constitution requires.

12 One final question. Where -- where
13 does your cause of action come from?

14 MR. LEE: From the Due Process Clause
15 of the Constitution.

16 JUSTICE ALITO: Is it an Ex parte
17 Young cause of action?

18 MR. LEE: I mean, this issue hasn't
19 been an issue below, so our -- our cause of
20 action arises under the Constitution, Your
21 Honor.

22 JUSTICE ALITO: Under -- directly
23 under the Constitution?

24 MR. LEE: That's correct.

25 JUSTICE ALITO: It's not Ex parte

1 Young?

2 MR. LEE: It arises from the Due
3 Process Clause.

4 JUSTICE ALITO: It's not APA?

5 MR. LEE: We raised an APA claim
6 below, if the Court wants to remand on that
7 issue, they may, but we think it's a
8 constitutional case, Your Honor.

9 JUSTICE ALITO: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: There are some --
13 there are some of my colleagues who believe that
14 the Constitution doesn't, on its face, provide a
15 cause of action. We have a legion of cases
16 suggesting that and many of my colleagues taking
17 that position.

18 If they believe that, does Ex parte
19 Young help you?

20 MR. LEE: Your Honor, I am not
21 prepared to discuss Ex parte Young because this
22 did not come up below. We think that our cause
23 of action arises under the Constitution. We --
24 we think it comes from 702 of the APA as well,
25 which provides a different route, but that's our

1 position.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 JUSTICE KAVANAUGH: So just to follow
6 up on, I think, Justice Alito's questions and
7 others, if there's a liberty interest, then the
8 Mandel standard applies. The Mandel standard
9 was applied in Justice Kennedy's opinion in --
10 in Kerry versus Din and also in Trump versus
11 Hawaii. That requires a facially legitimate
12 basis and a bona fide factual basis, right?
13 Facially legitimate and bona fide.

14 MR. LEE: That's the test, yes.

15 JUSTICE KAVANAUGH: And then the
16 question becomes what does that entail, I think.
17 Justice Kennedy says a number of things about
18 that in Kerry versus Din.

19 The government's citation of
20 1182(a)(3)(B) also indicates it relied on a bone
21 side factual basis. And it's also facially
22 legitimate. That's on page 105. Then he says
23 Mandel instructs us not to look behind the
24 government's exclusion for additional factual
25 details beyond what it -- its express reliance

1 on 1182(a)(3)(B) encompassed.

2 It goes on. The government
3 furthermore was not required, as Din claims, to
4 point to a more specific provision within
5 1182(a)(3)(B), even though the statutory
6 provision the consular officer cited covers a
7 broad range of conduct, and then says, notes the
8 government is not prohibited from offering more,
9 but the statute expressly refrains from
10 requiring it to do so. It says Congress
11 evaluated the benefits and burdens here and
12 assigned discretion to the executive.

13 And then concludes, I think, with the
14 closer here that's problematic for you, under
15 Mandel, respect for the political branch's broad
16 power of the creation and administration of the
17 immigration system extends to determinations of
18 how much information the government is obliged
19 to disclose about a consular officer's denial of
20 a visa to an alien abroad.

21 So you put all that together, I -- I
22 think that's very problematic for you, if we
23 follow that. And that, in turn, was explicating
24 what -- what Mandel meant and what Trump versus
25 Hawaii then relied on this -- this opinion. So

1 that's a problem for you, I think. So tell me
2 why it's not.

3 MR. LEE: Yeah, we don't think it's a
4 problem for us, Your Honor, because of the
5 distinctions here and with Din. So, number one,
6 that was a case where there was -- the
7 government had decided to invoke 1182(b)(3).
8 Justice Kennedy does refer to the reasons for
9 the denial in that case. There was the Taliban
10 fact. The government had there invoked (b)(3).
11 The plaintiffs in that case were required to
12 make an as-applied substantive challenge to that
13 statute. We don't have to do so here.

14 But the main distinction, if I
15 understand the line of Your Honor's questioning,
16 is the statutory text. And -- and here I want
17 to make a couple of points about the terrorism
18 bar because not only does this draw a line
19 around a distinct finite range of activity that
20 the officer must have found to have existed to
21 have a reasonable -- reason to believe, pardon
22 me. Also there's language in there defining a
23 terrorist organization, language defining
24 terrorist activity, an intent requirement.

25 And so we think that that's -- that's

1 a lot more --

2 JUSTICE KAVANAUGH: That's your big
3 distinction, but the problem for you is they
4 wanted a more specific identification there.
5 And he said, in that opinion, the government was
6 not required to point to a more specific
7 provision, even though the statutory provision
8 the consular officer cited covers a broad range
9 of conduct, which seems -- I mean it's slicing
10 it very thin, then, to say that's a distinction
11 between that case and this case. I'll leave --
12 well, give a brief response.

13 MR. LEE: Sure. The critical phrase
14 in Justice Kennedy's analysis of the statute is
15 that it contained discrete factual predicates.
16 "Any other unlawful activity" is the text of
17 this statute. There is no way to read that
18 statute to have a discrete factual predicate.

19 JUSTICE KAVANAUGH: Thank you.

20 MR. LEE: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: No.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 JUSTICE JACKSON: So you're not here
2 petitioning this Court for any orders related to
3 future hearings or anything else, right?

4 MR. LEE: Correct.

5 JUSTICE JACKSON: I mean, you got the
6 reasons in this case, but I thought we were here
7 because it's the government's argument that they
8 shouldn't have had to have given them, given the
9 fact that Ms. Munoz in the government's view has
10 no liberty interest and therefore no procedural
11 due process rights. And that -- those are the
12 questions that we would be answering, not
13 anything about how you would use this
14 information that you now have to try to
15 vindicate her rights in the consulate?

16 MR. LEE: Correct, all we're asking
17 for is the chance.

18 JUSTICE JACKSON: You're the
19 Respondent. The government has petitioned. And
20 if we did nothing, you'd be fine, right, because
21 you didn't want us to take this case?

22 MR. LEE: Correct.

23 JUSTICE JACKSON: All right. So let
24 me ask you, do -- do you need to -- do we need
25 to roll back or change the doctrine of consular

1 non-reviewability in order for you to win in
2 this case?

3 MR. LEE: No. I think that the
4 Court's position in Trump against Hawaii gets us
5 where we need to be on that.

6 JUSTICE JACKSON: Why is that? Say a
7 little bit more.

8 MR. LEE: Because the doctrine -- the
9 doctrine of consular non-reviewability does not
10 apply to American citizens. The government --
11 the executive branch cannot restrict review
12 without a statutory provision granting it the
13 ability to strip review.

14 This is not a case where Congress has
15 gone anywhere near that. The citations which
16 the government pulls up in its brief have no --
17 do not --

18 JUSTICE JACKSON: So we have never
19 applied the doctrine of consular
20 non-reviewability in the context of an American
21 citizen, you're saying?

22 MR. LEE: The Court has always
23 reviewed the merits of claims brought by
24 American citizens, constitutional claims, that's
25 correct, Your Honor.

1 JUSTICE JACKSON: And any such review
2 in this situation -- so let's say we disagree
3 with you on that. Let's say we disagree. The
4 doctrine of consular non-reviewability applies,
5 but it appears from Mandel that we have
6 recognized an exception to it. Is that how you
7 understand at least the government's secondary
8 argument in this case?

9 MR. LEE: It's a pretty important
10 exception from the standpoint of separation of
11 powers but, yes, Your Honor.

12 JUSTICE JACKSON: All right. So we're
13 into Mandel even if there is the doctrine of
14 non-reviewability. And so why would you say
15 that you win, given the Mandel standard? I
16 mean, they didn't win in that case.

17 MR. LEE: Because -- I'm sorry, Your
18 Honor.

19 JUSTICE JACKSON: Yes.

20 MR. LEE: Because here, unlike in
21 Mandel -- in that case, the professor had
22 violated a prior visa. The Court held that
23 there was a factual basis for the Attorney
24 General's denial of a fully discretionary
25 waiver. Here you have a non-discretionary

1 statute requiring reason to believe there's no
2 factual basis for the denial. And, therefore,
3 the government hasn't established that the
4 denial was facially legitimate and bona fide.

5 JUSTICE JACKSON: Final question:
6 Would you be okay with an analysis that assumed
7 the first question presented?

8 MR. LEE: If we were to prevail on the
9 second question?

10 (Laughter.)

11 MR. LEE: I -- I do think, honestly,
12 that the Court has to reach the -- the first
13 question in order to rule in favor of us.

14 JUSTICE JACKSON: You think we have to
15 say; we can't just assume it and then --

16 MR. LEE: Right.

17 JUSTICE JACKSON: Right? Because you
18 can't assume it --

19 MR. LEE: I don't think it would be
20 breaking --

21 JUSTICE JACKSON: Yeah.

22 MR. LEE: -- any new ground to
23 recognize the importance of marriage in this
24 case, though, Your Honor.

25 JUSTICE JACKSON: Thank you.

1 MR. LEE: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Rebuttal, Mr. Gannon?

5 REBUTTAL ARGUMENT OF CURTIS E. GANNON

6 ON BEHALF OF THE PETITIONERS

7 MR. GANNON: Thank you, Mr. Chief
8 Justice.

9 If I could just make three points.

10 First, I still haven't heard a clear explanation
11 as to why this constitutional right, whether
12 it's a procedural or a substantive one, should
13 be limited to spouses or the effects on visas.

14 My friend said that no one else, other
15 than a spouse would have the right to petition
16 under the statute as it currently exists for
17 this type of relief, but if this is a
18 constitutional liberty interest underlying this,
19 I'm not sure why people wouldn't be able to say
20 the inability to make those petitions is
21 unconstitutional.

22 And so -- and no Court has
23 countenanced that type of argument in any other
24 context.

25 Second, my friend talks about the

1 domestic context, talks about what DHS does when
2 there are proceedings in the United States,
3 which obviously implicate different interests
4 because somebody is here and they -- there is a
5 mechanism for some judicial review there but
6 it's important to recall here that state is the
7 first line of defense on these issues.

8 And if they deny a visa on the basis
9 of somebody being inadmissible and that person
10 doesn't come here, then there isn't going to be
11 any judicial inquiry. If they deny a visa and
12 that person does come here and DHS wants to
13 remove that person, then the fact that they came
14 here without a visa is an independent ground of
15 inadmissibility. And so they'd be much more
16 likely to be charged with that than the -- than
17 the expectation that they would be engaged in
18 unlawful activity while they are here in the
19 United States.

20 And, third, if I could get to the
21 colloquy with Justice Gorsuch and my friend
22 talked about the determination that this ground
23 of inadmissibility was permanent and cited page
24 16 of the joint appendix.

25 The letter that is included there is

1 one that simply said that this determination of
2 inadmissibility is not waivable. So there's not
3 a procedure for getting us to consider whether
4 we're going to make an exception the way DHS had
5 done here on the ground of inadmissibility
6 associated with his previous unlawful presence
7 in the United States.

8 That doesn't say that this is a
9 permanent basis of inadmissibility. He can
10 reapply for a visa and present whatever evidence
11 he wants to persuade us that we were wrong the
12 first time around but that's not the same thing
13 as saying that there is a judicially overseen
14 procedure for rehearing that would allow the --
15 the courts to consider whether our reasons are
16 correct.

17 He said that he wants our
18 inadmissibility finding to be declared
19 incorrect, and so we would disagree that that's
20 -- that's what any court should be doing on
21 remand here. The point of Mandel is not to
22 allow for meaningful opportunities to respond or
23 further internal appeals or further judicial
24 review.

25 The Court in Mandel was clear.

1 Justice Kennedy's concurrence in Din was clear
2 that there's no testing or looking behind the
3 court's decision. And my friend said that in
4 Mandel the government showed that there was the
5 fact that he had previously violated the terms
6 of previous entries. That was a hotly contested
7 issue in the case. The dissent said that was a
8 sham and there was no evidence in the record to
9 support it.

10 The majority said we're not testing or
11 looking behind the government's assertion. This
12 is not about allowing courts to police whether
13 the government's reasoning is correct. The
14 consular officer has to have a reason to believe
15 that this person is inadmissible in order to
16 deny the visa but that is not judicially
17 reviewable.

18 We urge the Court to reverse the
19 judgment of the Ninth Circuit.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted.

22 (Whereupon, at 11:37 a.m., the case
23 was submitted.)

24
25

Official - Subject to Final Review

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