No. 13-1402

In the Supreme Court of the United States

JOHN F. KERRY, ET AL., PETITIONERS

v.

FAUZIA DIN

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

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
COLIN A. KISOR
STACEY I. YOUNG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

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

2. Whether respondent is entitled to challenge in court the refusal of a visa to her husband and to require the government, in order to sustain the refusal, to identify a specific statutory provision rendering him inadmissible and to allege what it believes he did that would render him ineligible for a visa.

PARTIES TO THE PROCEEDING

Petitioners, who were defendants in the district court and appellees in the court of appeals, are John F. Kerry, Secretary of State; Jeh Johnson, Secretary of Homeland Security[1]; Eric H. Holder, Jr., Attorney General; Richard Olson, Ambassador of the United States Embassy, Islamabad, Pakistan; Christopher Richard, Consular General of the Consular Section at the United States Embassy, Islamabad, Pakistan; and James B. Cunningham, Ambassador of the United States Embassy, Kabul, Afghanistan.

Respondent, who was plaintiff in the district court and appellant in the court of appeals, is Fauzia Din.

[1] At the time the court of appeals issued its judgment, the Secretary of Homeland Security was Janet A. Napolitano.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 13-1402

JOHN F. KERRY, ET AL., PETITIONERS

v.

FAUZIA DIN

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of State and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 718 F.3d 856. The opinion of the district court (App., *infra*, 37a-49a) is not published in the *Federal Supplement* but is available at 2010 WL 2560492.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2013. A timely petition for rehearing en banc was denied on December 24, 2013 (App., *infra*, 50a-51a). On March 20, 2014, Justice Kennedy extended the time within which to file a petition for a

writ of certiorari to and including April 23, 2014. On April 10, 2014, Justice Kennedy further extended the time to and including May 23, 2014. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 52a-71a.

STATEMENT

1. Under the Immigration and Nationality Act of 1952 (INA), as amended, 8 U.S.C. 1101 *et seq.*, an alien may not be admitted to the United States without having applied for and been issued an immigrant or nonimmigrant visa (except in certain circumstances not relevant to this case). 8 U.S.C. 1181(a) (addressing documentation required for immigrants applying for admission to the United States); 8 U.S.C. 1182(a)(7) (describing documentation requirements for nonimmigrants and immigrants seeking admission to the United States). When an alien seeks to obtain an immigrant visa on the basis of a family relationship with a United States citizen or permanent resident alien, see 8 U.S.C. 1151(b)(2)(A)(i), 1153(a), the citizen or permanent resident must first file a petition with U.S. Citizenship and Immigration Services (USCIS) in the Department of Homeland Security.[2] If the peti-

[2] The INA and other laws relating to the immigration and naturalization of aliens are generally administered by the Secretary of Homeland Security, the Attorney General, and the Secretary of State. See 8 U.S.C. 1103, 1104. Various functions formerly performed by the Immigration and Naturalization Service, or otherwise vested in the Attorney General, have been transferred to officials of the Department of Homeland Security. Some residual statutory references to the Attorney General that pertain to the transferred functions are now deemed to refer to the Secretary of

tion is approved, the alien may (if all other relevant conditions are satisfied) apply for a visa. See 8 U.S.C. 1154(a)(1) and (b), 1202; 22 C.F.R. 42.31, 42.42.

The decision to grant or deny a visa application rests with a consular officer in the Department of State. See 8 U.S.C. 1201(a)(1); 22 C.F.R. 42.71, 42.81; 8 U.S.C. 1361 (providing that the applicant has the burden of proof to establish eligibility for a visa "to the satisfaction of the consular officer"); see also 6 U.S.C. 236(b)(1) (vesting in the Secretary of Homeland Security "the authority to refuse visas in accordance with law"); 6 U.S.C. 236(c)(1) (reserving the Secretary of State's authority to direct a consular officer to refuse to issue a visa if "such refusal" is "necessary or advisable in the foreign policy or security interests of the United States"). With certain exceptions not relevant here, no visa "shall be issued to an alien" if "it appears to the consular officer" from the application papers "that such alien is ineligible to receive a visa * * * under section 1182 of this title, or any other provision of law," or if "the consular officer knows or has reason to believe" that the alien is ineligible. 8 U.S.C. 1201(g); see 22 C.F.R. 40.6 (explaining that "[t]he term 'reason to believe' * * * shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa").[3]

Homeland Security. See 6 U.S.C. 251, 271(b), 557; 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

[3] In addition, the Secretary of Homeland Security may grant a waiver of ineligibility to certain nonimmigrant visa applicants upon recommendation of the Secretary of State or of the consular officer that the alien be admitted temporarily despite his inadmissibility.

Section 1182 identifies various "[c]lasses of aliens ineligible for visas or admission" to the United States. 8 U.S.C. 1182(a). In particular here, Section 1182(a)(3) sets forth "[s]ecurity and related grounds" for visa ineligibility and inadmissibility, including—as described in Section 1182(a)(3)(B)—having engaged in "[t]errorist activities." 8 U.S.C. 1182(a)(3); see also 8 U.S.C. 1182(a)(2) (setting forth "[c]riminal and related grounds" for ineligibility). Such terrorist activities include the knowing provision of material support to a terrorist or terrorist organization; acting as a representative or member of a terrorist organization; endorsing or espousing terrorist activity or persuading others to do so; and receiving military-type training from a terrorist organization. See 8 U.S.C. 1182(a)(3)(B)(i); see also 8 U.S.C. 1182(a)(3)(B)(iii), (iv) and (vi) (defining "terrorist activity," "engage in terrorist activity," and "terrorist organization"). In addition, an alien who is "the spouse or child of an alien who is inadmissible" as a result of terrorist activity that occurred within the last five years is herself inadmissible under Section 1182(a)(3)(B), unless she did not know and should not reasonably have known of the activity or there are reasonable grounds to believe that she has renounced the activity. See 8 U.S.C. 1182(a)(3)(B)(i)(IX) and (ii).

As a general matter, a consular officer who denies an alien's visa application "because the officer deter-

---

See 8 U.S.C. 1182(d)(3)(A). Within specified limits, the INA also permits the Secretary of State or the Secretary of Homeland Security, after consultation with the Attorney General, to "determine in such Secretary's sole unreviewable discretion" that certain bars "shall not apply with respect to an alien within [their] scope." 8 U.S.C. 1182(d)(3)(B)(i).

mines the alien to be inadmissible" must "provide the alien with a timely written notice that * * * (A) states the determination and (B) lists the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1); see 22 C.F.R. 42.81(b). If, however, the consular officer deems the alien inadmissible on "[c]riminal and related grounds" or on "[s]ecurity and related grounds" (which includes "terrorist activity") under 8 U.S.C. 1182(a)(2) or (a)(3), then the statutory written-notice requirement "does not apply." 8 U.S.C. 1182(b)(3).

2. This Court has long recognized the doctrine of consular nonreviewability—the rule that, in the absence of affirmative congressional authorization for an alien to challenge the refusal of a visa, the alien cannot assert any right to review. As this Court has explained, an "unadmitted and nonresident alien" has "no constitutional right of entry to this country," *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1971), and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950); see *Mandel*, 408 U.S. at 766 (Congress has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden") (citation omitted); *Fiallo* v. *Bell*, 430 U.S. 787, 792, 794-795 (1977); see also *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999); Richard D. Steel, *Steel on Immigration Law* § 2:11, at 36 (2012 ed.).

No such congressional authorization for review of visa denials exists. Congress has not provided for administrative review of a consular officer's decision to refuse a visa. See 8 U.S.C. 1104(a)(1) (excluding

even from the Secretary of State's authority to administer and enforce the immigration laws the power to review the duties and functions conferred on consular officers, including the grant or refusal of visas); 6 U.S.C. 236(b)(1) (barring Secretary of Homeland Security from "alter[ing] or revers[ing] the decision of a consular officer to refuse a visa"). Congress also has not provided for judicial review of a visa refusal. See, *e.g.*, 6 U.S.C. 236(f) (providing that the designation of authorities in Section 236 does not give rise to a private right of action against a consular officer to challenge a decision to grant or deny a visa); cf. 8 U.S.C. 1201(i) (providing for judicial review of a decision to *revoke* a nonimmigrant visa only in the context of proceedings to remove an alien from the United States); 8 U.S.C. 1252 (discussing judicial review of removal orders).

Accordingly, this Court has not permitted an alien to obtain review of such a decision. On one occasion, this Court did engage in a limited review at the behest of U.S. citizens of a decision by the Attorney General not to exercise his discretion to grant a waiver of the grounds of exclusion that led a consular officer to deny an alien's application for a nonimmigrant visa. See *Mandel*, 408 U.S. at 754, 769-770. In *Mandel*, U.S. citizens asserted that the failure to grant a waiver implicated their interest under the First Amendment in personally hearing an alien Marxist theoretician speak at "discussion forums." *Id.* at 768. The Court did not reach the government's argument that "Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given." *Id.* at 769; see *id.* at 770. Rather, the Court disposed of the case on

the ground that the record in fact included a reason for denying the waiver that was "facially legitimate and bona fide," *i.e.*, that Mandel had abused prior waivers by exceeding limitations imposed on his activities in the United States. *Id.* at 769-770. When an alien is excluded from the United States on the basis of the Executive's refusal to exercise its discretionary authority to waive applicable grounds of inadmissibility, the Court explained, "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Ibid.* The Court did not address the antecedent non-discretionary decision by the consular officer finding the alien ineligible for a visa based on grounds formulated by Congress. See *ibid.*

3. In 2006, respondent, a naturalized U.S. citizen, married Kanishka Berashk, a native and citizen of Afghanistan who resides in that country. See App., *infra*, 2a-3a, 38a. After the marriage, respondent filed a family-based immigrant visa petition on Berashk's behalf, which USCIS approved. See *id.* at 3a. Berashk then submitted a visa application and appeared at the United States Embassy in Islamabad, Pakistan, for an interview, during which he discussed his employment by the Afghan government while it was under Taliban control. See *ibid.*

In June 2009, a consular officer from the U.S. Embassy in Islamabad denied the visa application. See App., *infra*, 3a. Berashk was informed that the visa refusal was based on his inadmissibility under 8 U.S.C. 1182(a)(3)(B), the provision that covers "[t]errorist activities." See App., *infra*, 4a. In a communi-

cation that cited 8 U.S.C. 1182(b)(3), which makes the requirement of notice of the ground for a visa denial inapplicable to security-based determinations, Berashk was also told that no further explanation was possible. See *ibid.*

4. a. Respondent filed suit in federal district court challenging the denial of Berashk's visa application. She asserted three claims: a claim for a writ of mandamus directing government officials "to adjudicate properly [the] visa application * * * not on the basis of any bad faith or illegitimate reasons"; a claim for a declaratory judgment that 8 U.S.C. 1182(b) is unconstitutional vis-à-vis a U.S. citizen as a violation of procedural due process; and a claim that petitioners had violated the Administrative Procedure Act by arbitrarily misconstruing and misapplying 8 U.S.C. 1182(a)(3)(B). App., *infra*, 5a; 10-cv-533 Docket entry No. (Docket No.) 1, at 10-11 (N.D. Cal. Feb. 5, 2010). Her complaint alleged that "[n]o good faith basis exists that is sufficient to constitute a facially legitimate and bona fide reason for the denial of [the] visa application," because "[t]he fact of Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds of inadmissibility listed in 8 U.S.C. 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist." Docket No. 1, at 8-10.

The district court granted the government's motion to dismiss. See App., *infra*, 37a-49a. First, the court accepted, based on Ninth Circuit precedent, that respondent adequately alleged a violation of her due process rights by asserting that the government had interfered with a protected liberty interest in her

marriage. See *id.* at 43a-44a (citing *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008)). But second, the court ruled that the consular officer's citation of Section 1182(a)(3)(B) constituted a facially legitimate and bona fide reason for the visa denial. The court explained that under 8 U.S.C. 1182(b)(3) "the government may withhold the specific reasons for the denial for aliens who have been determined to be inadmissible under 8 U.S.C. section 1182(a)(2) or (a)(3)," and noted that respondent had not adequately alleged that the consular officer who denied the visa acted in "bad faith." App., *infra*, 45a-48a. Finally, the court ruled that respondent lacked standing to challenge the constitutionality of the statutory provision that renders the notice requirement inapplicable in the case of an alien found inadmissible on security grounds, because that provision applies "only to the alien and not the United States citizen." *Id.* at 49a.

b. A divided panel of the Ninth Circuit reversed. See App., *infra*, 1a-36a.

As an initial matter, while acknowledging that "[f]ederal courts are generally without power to review the actions of consular officials," the majority concluded that "a citizen has a protected liberty interest in marriage that entitles the citizen to review of the denial of a spouse's visa." App., *infra*, 6a-7a (internal quotation marks, brackets, and citation omitted) (citing *Bustamante*, 531 F.3d at 1062); see *id.* at 7a n.1 (characterizing the interest at stake as "[f]reedom of personal choice in matters of marriage and family life") (internal quotation marks omitted) (brackets in original). The majority characterized that liberty interest as a "more general right" than a possible "liberty interest in the ability to live in the

United States with an alien spouse," which the court said was not the basis for review. *Ibid.*[4]

The majority then concluded that "the reason provided by the consular officials for the denial of Berashk's visa" was not "facially legitimate." App., *infra*, 7a-9a. The majority faulted the government for not giving "any assurance as to what the consular officer believes the alien has done." *Id.* at 9a; see *id.* at 10a (calling for a "reason[] for exclusion that contain[s] some factual elements"); *id.* at 14a ("While the Government need not prove that Berashk performed an activity that renders him inadmissible under the statute, * * * it must at least allege what it believes Berashk did that would render him inadmissible."). The majority also objected to the consular officer's citation to 8 U.S.C. 1182(a)(3)(B) as the basis for inadmissibility, because that provision refers to a number of "different categories of aliens" based on conduct "rang[ing] from direct participation in violent terrorist activities to indirect support of those who participate in terrorist activities." App., *infra*, 11a-12a. "[A]t a minimum," the majority concluded, "the Government must cite to a ground narrow enough to allow us to determine that it has been properly construed." *Id.* at 12a (internal quotation marks omitted).

In the majority's view, Section 1182(b)(3), which eliminates the requirement of timely written notice to the alien in the case of a visa denial based on security grounds, made no difference to the analysis. App.,

---

[4] The majority also ruled that respondent had standing to challenge the notice rules laid out in 8 U.S.C. 1182(b)(3) "[t]o the extent that the Government relies on" that provision "to interfere with" her due process rights. App., *infra*, 24a.

infra, 15a. The majority reasoned that the exception to a statutory right of notice does not speak to whether "the Government has an absolute right to withhold the information from everyone, including a citizen and this Court." *Id.* at 18a. The majority stated that "nothing in [its] opinion compels dangerous disclosure" that would interfere with the task of barring persons connected with terrorist activities from entering the United States. *Id.* at 20a. According to the majority, "[e]xisting procedures," such as *in camera* disclosures, "are adequate to address * * * national security concerns." *Id.* at 21a.

Judge Clifton dissented. Emphasizing the "highly constrained nature of judicial review of a decision to deny a visa application," App., *infra*, 36a, he deemed the reason given for denial of Berashk's visa facially legitimate because it "was based on a statute" that provided a "lawful" basis for denial, *id.* at 26a (citing 8 U.S.C. 1182(a)(3)(B)). He also relied on the statutory provision under which "the Government does not have to disclose" any "specific information about what lies behind a visa denial" related to terrorist activities, concluding that "compelling [the Government] to disclose the information anyway in order to allow 'limited' and 'highly restrained' judicial review cannot be justified." *Id.* at 32a; see *id.* at 33a-36a (discussing 8 U.S.C. 1182(b)(3)).[5]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit clearly erred in ruling that respondent has a liberty interest in her marriage, protected under the Due Process Clause, that is implicat-

---

[5] Judge Clifton also voted to grant the government's petition for en banc rehearing. See App., *infra*, 51a.

ed by denial of a visa to her alien spouse abroad. That ruling directly conflicts with the decisions of numerous other courts of appeals, and could have broad consequences across various areas of immigration law.

The Ninth Circuit also erred in concluding that respondent, as the U.S. citizen spouse of an alien whose visa is denied, has a right to judicial review of the consular officer's decision and to procedural due process in connection with the denial of a visa to the alien. The court then compounded that error by concluding that the government can defend the decision as "facially legitimate" only by providing the specific statutory subsection on which the denial was based and the factual basis for believing that the alien falls within the scope of that subsection. The Constitution confers no such rights, and neither Congress nor this Court has ever authorized such review. In addition, when a visa denial is (as in this case) based on security-related grounds, the review required by the Ninth Circuit conflicts with decisions of this Court and overrides a federal statute intended to protect the confidentiality of intelligence and other sensitive information on which a consular officer may rely in denying a visa to protect the national security. Review by this Court is warranted.

A. This Court's Review Is Warranted To Determine Whether A U.S. Citizen Has A Protected Liberty Interest That Is Implicated By The Denial Of A Visa Application Filed By An Alien Spouse

1. This Court's decision in *Kleindienst* v. *Mandel*, 408 U.S. 753 (1971), made clear that a non-resident alien abroad has no constitutional rights in connection with his application for a visa to enter the United States, and therefore no constitutional basis to insist

upon an explanation for the denial of the visa or to obtain judicial review of the denial. See *id.* at 762, 766-768. The court of appeals ruled, however, that respondent, who has no legally cognizable rights under the INA in the issuance of a visa to Berashk, nevertheless is entitled under the Constitution to procedural due process in her own right in connection with the denial of the visa. The court reached that extraordinary result by reasoning that respondent possesses a substantive "protected liberty interest in marriage," derived directly from the Due Process Clause, in connection with her husband's visa application. See App., *infra*, 7a & n.1 (internal quotation marks omitted); see also *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008). That ruling is deeply flawed.[6]

To qualify for substantive protection under the Due Process Clause, a liberty interest must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno* v. *Flores*, 507 U.S. 292, 303 (1993) (citation omitted); see *id.* at 302-303 (explaining that "mere novelty" is sufficient to cast doubt on whether an asserted right is a fundamental one); see generally *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 572-575 (1972). In ascertaining whether that test is satisfied, this Court has required "a 'careful description' of the asserted fundamental liberty interest." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Flores*, 507 U.S. at 302).

---

[6] The Ninth Circuit made the same error in its earlier decision in *Bustamante*—but because the government prevailed in that case on another ground, see 531 F.3d at 1060, it had no opportunity to seek further review of the threshold liberty-interest issue.

This Court has recognized a deeply rooted liberty interest in "rights to marital privacy and to marry and raise a family." *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965); see *Glucksberg*, 521 U.S. at 720 ("[T]he 'liberty' specially protected by the Due Process Clause includes the right[] to marry.") (citing *Loving* v. *Virginia*, 388 U.S. 1 (1967)); *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-640 (1974) (citing cases regarding the decision to marry and the decision to have children in support of the proposition that the Due Process Clause protects "freedom of personal choice in matters of marriage and family life"); see also *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (explaining that a State cannot enter into the private realm of family life so as to make "a crime of a grandmother's choice to live with her grandson"). Those rights are "of similar order and magnitude as the fundamental rights specifically protected" in the Constitution, and therefore themselves qualify as fundamental. *Griswold*, 381 U.S. at 495.

The court of appeals identified no basis for the notion that a person has a comparably fundamental due process interest in connection with the application for a visa to enter the United States filed by her alien spouse, who is subject to the plenary sovereign power of the United States to bar his admission. Perhaps recognizing that respondent's rights in connection with marriage that have been recognized as protected by the Constitution are far removed from the denial of a visa to Berashk,[7] the court of appeals seized on lan-

[7] The consular officer's denial of Berashk's visa application did not interfere with respondent's decision to marry him—their marriage was solemnized years before the denial took place. See

guage from *Cleveland Board of Education* v. *LaFleur*, *supra*—a case involving the decision whether to "bear or beget a child," 414 U.S. at 639 (internal quotation marks omitted)—that refers to "[f]reedom of personal choice in matters of marriage and family life." App., *infra*, 7a & n.1 (quoting 414 U.S. at 640) (internal quotation marks omitted) (brackets in original). As invoked by the court of appeals here, however, that exceedingly general language hardly qualifies as a "careful description" of a liberty interest that could confer a due process right on a U.S. citizen specifically concerning her spouse's admission to the United States. *Flores*, 507 U.S. at 302.

In reality, there is only one "choice" of respondent's that is directly affected by the denial of a visa to Berashk: her preference that her alien spouse live with her in the United States. The court of appeals resisted the suggestion that the rights to judicial review and procedural due process it fashioned were "predicated on a liberty interest in the ability to live in

---

App., *infra*, 3a. The visa denial did not nullify the marriage, or deprive respondent of its legal benefits, or prevent her from living with her spouse anywhere in the world besides the United States. See *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) ("Even assuming that the federal government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States. It does not attack the validity of the marriage."), cert. denied, 402 U.S. 983 (1971); *Swartz* v. *Rogers*, 254 F.2d 338, 339 (D.C. Cir.) ("[Deportation] would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created."), cert. denied, 357 U.S. 928 (1958). Nor did the visa denial prevent respondent from "rais[ing] a family," either in the United States or elsewhere. *Griswold*, 381 U.S. at 495.

the United States with an alien spouse," insisting that a "more general right" was at issue. App., *infra*, 7a n.1. But the court did not explain any basis for that resistance—and, in light of the vagueness of the "more general right" on which it purported to rely and the fact that the visa denial does not impinge on the marriage-related interests that this Court has previously recognized, no such basis exists. It is apparent that the "freedom of personal choice" perceived by the court of appeals is, at bottom, an asserted constitutionally based liberty interest in having Berashk be present in the United States. See, *e.g.*, *Swartz* v. *Rogers*, 254 F.2d 338, 339 (D.C. Cir.) ("Appellants argue that the due process clause gave her a right, upon marriage, to establish a home, create a family, have the society and devotion of her husband, etc.; and that to deport her husband * * * would unconstitutionally destroy that marital status. But the essence of appellants' claim, when it is analyzed, is a right to live in this country."), cert. denied, 357 U.S. 928 (1958); see also *Silverman* v. *Rogers*, 437 F.2d 102, 107 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971).

There is no history in this Nation of recognizing a constitutionally protected liberty interest in having one's alien spouse enter and reside in the United States, especially when neutral laws of general applicability bar the spouse from entering. To the contrary, there is a long history of recognizing that alien spouses (and other family members) of U.S. citizens may be denied admission to the United States in Congress's complete discretion, as an exercise of that body's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Mandel*,

408 U.S. at 766. For instance, in *Fiallo* v. *Bell*, 430 U.S. 787 (1977), a case involving an attempt by U.S. citizens and lawful permanent residents to obtain visas for alien family members, this Court emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Id.* at 792 & n.4 (internal quotation marks omitted). Significantly, the Court specifically rejected as a "fallacy," contrary to "fundamental principles of sovereignty," the argument that the family-preference visa system gives such "a fundamental right to American citizens"—even while recognizing that "the families of putative immigrants certainly have an interest in their admission." *Id.* at 794-795 & n.6; see also generally *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950)).[8]

The contrary approach adopted by the court of appeals here could have sweeping consequences. Under such a legal regime, any U.S. citizen whose alien spouse is not permitted to enter this country, for any reason, might attempt to assert a constitutional claim. So, too, might any U.S. citizen whose alien spouse is placed in proceedings to remove him from this country because of (for instance) violation of the immigration laws, commission of a serious crime, or ties to terrorist activity. See 8 U.S.C 1227. Cf. *Payne-Barahona* v. *Gonzales*, 474 F.3d 1, 3 (1st Cir. 2007) ("If there were

---

[8] Moreover, as the court below suggested, other courts of appeals have, in decisions stretching back many decades, specifically "repudiated" the existence of a protected liberty interest in living in the United States with an alien spouse (or with other alien relatives). App., *infra*, 7a n.1; see pp. 19-21, *infra*.

such a right, it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service.").

None of those kinds of claims has been given credence by the courts, let alone viewed as implicating a constitutionally protected interest that confers a right to procedural due process and judicial review in connection with the application of the Nation's immigration laws to an alien family member abroad. In ruling otherwise, the Ninth Circuit went seriously astray.[9]

2. The Ninth Circuit's erroneous ruling that respondent has an interest conferred by the Constitution that entitles her to challenge the denial of a visa for her alien spouse is in conflict with the decisions of numerous other courts of appeals.

In *Bangura* v. *Hansen*, 434 F.3d 487 (6th Cir. 2006), the Sixth Circuit reached a result directly contrary to the Ninth Circuit's decision here. *Bangura* involved claims brought by a U.S. citizen and his alien spouse that denial of a visa petition filed on behalf of the spouse violated their due process rights. The court of appeals ruled that the plaintiffs failed to al-

---

[9] The Ninth Circuit's error in this regard was also the sole basis for another legal error: its ruling that respondent had standing to challenge 8 U.S.C. 1182(b)(3), the statutory provision lifting in certain circumstances the requirement of a written notice of reasons for a visa denial. See App., *infra*, 22a-24a. The court of appeals said that respondent had standing "[t]o the extent" that the government relied on that provision "to interfere with" a "constitutionally protected due process right to limited judicial review of her husband's visa denial." *Id.* at 24a. Accordingly, a ruling by this Court that the visa denial did not implicate respondent's constitutional rights would also resolve that standing question.

lege a liberty interest that would allow them to state a procedural due process claim. See *id.* at 495-497. The court accepted that plaintiffs "have a fundamental right to marry," but explained that "[a] denial of an immediate relative visa does not infringe upon" that right. *Id.* at 496. The court also concluded that "[t]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country." *Ibid.* (internal quotation marks omitted) (citing *Almario* v. *Attorney Gen.*, 872 F.2d 147, 151 (6th Cir. 1989)).[10]

In *Burrafato* v. *United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), the Second Circuit relied on the same principle to reject claims virtually identical to those at issue here: that "the constitutional rights of a citizen wife had been violated by denial of her alien husband's visa application without reason * * * and that failure of the Department of State * * * to specify the reasons for denial of the husband's visa application denied him procedural due process." *Id.* at 554-555. The court refused to review the decision to deny the visa application under the rationale of *Mandel*, distin-

---

[10] In reliance on *Bangura*, the Third Circuit reached the same result in an unpublished decision. See *Fasano* v. *United States*, 230 Fed. Appx. 239, 239-240 (3d Cir. 2007) (explaining that "[t]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country," and affirming dismissal of U.S. citizen's complaint that his civil rights were violated when the government denied his alien spouse a visa) (internal quotation marks omitted); see also *Chiang* v. *Skeirik*, 582 F.3d 238, 242 (1st Cir. 2009) ("There is no authority supporting the view that a United States citizen has a constitutional right to engage in a marriage ceremony in the United States at which the foreign national is present.").

guishing that decision on the ground that "no constitutional rights of American citizens over which a federal court would have jurisdiction are 'implicated' here." *Id.* at 556-557. In particular, the court explained, the claim that denial of the alien's visa application implicated the constitutional rights of the citizen spouse was "foreclosed" by the principle that "no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse." *Id.* at 555 (citing, *inter alia*, *Noel* v. *Chapman*, 508 F.2d 1023, 1027-1028 (2d Cir.), cert. denied, 423 U.S. 824 (1975)).

As *Burrafato* indicates, courts of appeals addressing the issue in removal proceedings, as distinguished from proceedings involving denials of visa applications, have also reached the conclusion that no protected liberty interest is implicated by barring a U.S. citizen's alien spouse from being present in the United States. See, *e.g.*, *Garcia* v. *Boldin*, 691 F.2d 1172, 1183-1184 (5th Cir. 1982) ("Mrs. Garcia and the children are United States citizens. The deportation order has no legal effect upon them. It does not deprive them of the right to continue to live in the United States, nor does it deprive them of any constitutional rights."); *Silverman*, 437 F.2d at 107 (rejecting argument that "the government's action" in seeking to deport an alien spouse of a U.S. citizen "is destroying [the] marriage"); *Swartz*, 254 F.2d at 339 ("[W]e think the wife has no constitutional right which is violated by the deportation of her husband.").[11] That differing

[11] Similar decisions in various courts of appeals have rejected the argument that removal of an alien deprives other citizen relatives of constitutional rights. See, *e.g.*, *Oforji* v. *Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003) (stating in case involving an alien's U.S. citizen children that "[t]he law is clear that citizen family members of

context does not lessen the conflict between the holdings of those cases and the holding of the court below; the question about the existence and status of the relevant liberty interest is the same in both arenas.

In short, numerous decisions from other courts of appeals are irreconcilable with the Ninth Circuit's conclusion that respondent has a fundamental liberty interest implicated by the government's decision to deny her alien spouse a visa for entry into the United States that entitles her to procedural due process in her own right. This Court should grant certiorari to correct the Ninth Circuit's errors and restore nationwide uniformity on this previously settled issue.

B. The Court of Appeals' Imposition Of Judicial Review And Notice Requirements On A Consular Officer's Visa Determination Warrants This Court's Review

1. Even assuming that respondent's own constitutional rights are somehow implicated in this case, the Ninth Circuit decision is wrong. Purporting to apply the statement in *Mandel* that a "facially legitimate" exercise of discretion survives judicial review, the court of appeals authorized a searching inquiry into the reasons for denial of a visa and improperly imposed, as a matter of constitutional law, requirements of detailed notice with respect to aliens denied a visa on national security grounds.

a. As an initial matter, *Mandel* did not authorize judicial review of a consular officer's decision to deny a visa, and—contrary to the ruling below, see App.,

---

illegal aliens have no cognizable interest in preventing an alien's exclusion and deportation"); see also *Payne-Barahona*, 474 F.3d at 2-4 (collecting cases).

infra, 7 n.1—such a decision is not subject to review under *Mandel*'s rationale.

In *Mandel*, this Court assumed (but did not hold) that if a U.S. citizen's First Amendment rights were implicated, then that citizen could obtain review of a discretionary denial by the Attorney General of a waiver of the grounds that required the refusal of an alien's nonimmigrant visa application. In that narrow context, the Court examined the reason for the denial of the waiver that appeared in the record and concluded that because that reason was "facially legitimate and bona fide," it was not appropriate to "look behind the exercise of [the Attorney General's] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 769-770. The Court specifically declined to address whether the Attorney General was required to furnish such a reason. See *id.* at 770 ("What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address or decide in this case.").

Moreover, a rationale that might support such limited review of a discretionary waiver of a ground of inadmissibility by the Attorney General does not extend to the underlying decision by a consular officer that such a ground applies. Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's decision that an alien is not eligible for a visa must, by definition, be tethered to the legal provisions that define such ineligibility. See, *e.g.*, 8 U.S.C. 1182(a), 1201(g). It does not make sense to ask

if the reasons for visa denial set forth in an Act of Congress are "facially legitimate"; those reasons are legitimate on their face by their very nature, and courts are in no position to second-guess Congress's choices about which aliens should and should not be permitted to enter the United States. See generally *Fiallo*, 430 U.S. at 792-795; *Mandel*, 408 U.S. at 765-767.

Accordingly, extension beyond the discretionary waiver context of the approach in *Mandel*—which, in any event, formed the narrow basis for decision in that case simply because a facially legitimate decision already appeared in the record, and not because the approach was deemed constitutionally mandated—is unwarranted. See *Mandel*, 408 U.S. at 767 ("[Plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [statutory provisions], and that First Amendment rights could not override that decision."). Cf. *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1161-1165 (D.C. Cir. 1999) (placing weight on the distinction between a consular officer's visa denial and the Attorney General's refusal to waive the applicable grounds of inadmissibility). But see *American Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009). Because the decision of a consular officer was directly at issue here, the Ninth Circuit erred in subjecting that decision to judicial scrutiny and insisting upon a further explanation for the visa denial.

b. Beyond that basic flaw at the threshold, moreover, the Ninth Circuit erred in ruling that the government must identify the specific subsection of 8 U.S.C. 1182(a)(3)(B) under which the visa application was denied and the factual basis for the determination

of inadmissibility—and must do so not for the benefit of the alien affected, who has no constitutional rights in connection with his visa application, but for his spouse, who has no legally cognizable interest under the INA in issuance of such a visa. There is no basis in the Constitution to require the government to provide such information, and all the more so in a case involving terrorism-related grounds for refusing to admit the alien into the United States.

Congress recognized the special concerns associated with terrorism-related (and crime-related) reasons for a visa denial in 8 U.S.C. 1182(b)(3), which provides that when such reasons are at issue the consular officer need not furnish the alien with a written notice that states the determination and lists "the specific provision or provisions of law under which the alien is inadmissible." 8 U.S.C. 1182(b)(1) and (3).[12] Section 1182(b)(3) reflects Congress's judgment regarding the need for deference to the Executive's national-security determinations, and the real risk that disclosure of the information underlying a visa denial could be harmful to the Nation's security. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001) (noting the "heightened deference to the judgments of the political branches with respect to matters of national security"); see generally *Galvan* v. *Press*, 347 U.S. 522, 530 (1954) ("The power of Congress over the

[12] See also 8 U.S.C. 1202(f) (providing that consular records pertaining to visa decisions "shall be considered confidential" and may "in the discretion of the Secretary of State" be "made available to a court" only in limited circumstances); *Medina-Hincapie* v. *Department of State*, 700 F.2d 737, 744 (D.C. Cir. 1983) (applying Section 1202(f) to "information revealing the thought-processes of those who rule on the [visa] application").

admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.").

The Ninth Circuit's decision permits an end-run around Congress's considered judgment to permit the Executive to shield information related to visa denials in those circumstances. That result turns on its head the established principle that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988); see generally *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("when it comes to * * * drawing factual inferences" in the national security context, "'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate") (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 65 (1981)).

Several decisions of this Court involving provisions similar to Section 1182(b)(3) recognize exactly these concerns. For instance, in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court considered the constitutionality of the exclusion of an alien on security-related grounds. See *id.* at 207. A regulation then in effect provided that the Attorney General could deny a hearing to aliens excludable "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." *Id.* at 211 n.8. The Court emphasized that in an exclusion case Congress dictates the relevant procedures and, "because the action of the executive officer under such authority is final and conclusive,

the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; 'it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government.'" *Id.* at 212 (quoting *Knauff*, 338 U.S. at 543). The Court therefore ruled that "the Attorney General may lawfully exclude respondent without a hearing as authorized by the * * * regulations * * * . Nor need he disclose the evidence upon which that determination rests." *Id.* at 214-215; see, *e.g.*, *Knauff*, 338 U.S. at 544 (rejecting challenge by excluded alien spouse of U.S. citizen to regulations under which the Attorney General could deny a hearing to such an alien when he "concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States" and "the disclosure of the information on which he based that opinion would itself endanger the public security"). Surely the holdings of those cases could not be overcome simply by having the excluded alien's spouse request the information. A fortiori that is true with respect to an alien, like Berashk here but unlike the aliens in *Mezei* and *Knauff*, who has not even reached our shores.

The Ninth Circuit's decision also is inconsistent with *Mandel*, the very decision that the court of appeals purported to be following. Emphasizing that a court should not "look behind" a visa-related determination, 408 U.S. at 771, *Mandel* did not require the government to provide a reason for its actions that did not already appear in the record, or engage in anything resembling the type of review that the decision below dictates. The Ninth Circuit has mandated that

the government list a specific statutory subsection governing ineligibility for a visa and specific facts about what the alien did to fall within that subsection, so that a court could test those facts to "verify" that they "constitute a ground for exclusion under the statute." App., *infra*, 12a. That plainly entails "look-[ing] behind" a consular officer's visa-denial decision.

2. In addition to being inconsistent with this Court's precedent, the Ninth Circuit's decision threatens to interfere with U.S. national-security interests in a number of different respects. Such serious adverse consequences counsel strongly in favor of review by this Court.

First, the disclosure that the Ninth Circuit has mandated could compromise classified or other sensitive information. The information supporting a visa denial pursuant to 8 U.S.C. 1182(a)(3)(B) is often classified or related to a sensitive ongoing law-enforcement or national-security investigation. Furnishing such information to the alien or his U.S. citizen spouse could jeopardize the public safety or the safety of individual operatives in the field by revealing information specific to the alien or classified sources and methods more generally. It is for these reasons—to protect the government's ability to keep confidential information about security- or crime-related investigations from targets or their associates and to protect law-enforcement and intelligence sources and methods—that Congress authorized consular officers to withhold notice of the ground for a visa denial in the first place. See 8 U.S.C. 1182(b)(3); see also 8 U.S.C. 1202(f) (providing that visa records shall be considered confidential); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 55 (1952) (House Report) (describing "infor-

mation of a confidential nature" as being information "the disclosure of which would be prejudicial to the interests of the United States").

Those concerns do not arise only from the Ninth Circuit's requirement that the government disclose "facts" about "what the consular officer believes the alien has done," App., *infra*, 9a, 14a; they are also relevant to that court's insistence that the government reveal the particular subsection of 8 U.S.C. 1182(a)(3)(B) that formed the basis for the visa denial, see App., *infra*, 12a, 14a. For example, the government's disclosure to a U.S. citizen that it has reason to believe that his or her spouse has solicited funds for a terrorist organization (see 8 U.S.C. 1182(a)(3)(B)(i)(I) and (iv)(IV)), or has been to a terrorist training camp (see 8 U.S.C. 1182(a)(3)(B)(i)(VIII)), could well enable anyone who learns the substance of that disclosure to make educated guesses about, or even to identify definitively, the nature and sources of the government's knowledge. That is precisely the type of harm Congress intended to prevent by enacting 8 U.S.C. 1182(b)(3).

Second, and relatedly, the Ninth Circuit's decision, if allowed to stand, could have a chilling effect on the sharing of national security information among federal agencies and between the United States and foreign countries. When making visa ineligibility determinations, consular officers rely largely on information that other agencies or entities provide to the Department of State. See 8 U.S.C. 1105(a) (directing the Department of State to "maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Gov-

ernment for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States"); see also, *e.g.*, House Report 36 (explaining that Congress intended Section 1105 to "strengthen security screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States"). If the Department of State were compelled to disclose sensitive law-enforcement or intelligence information in connection with the denial of visa applications, consular officers may not receive or be permitted to rely upon the complete information needed to protect the national security. See, *e.g.*, National Commission on Terrorist Attacks Upon the United States, *9/11 Commission Report* 384 (2004) ("For terrorists, travel documents are as important as weapons.").

The Ninth Circuit suggested that any harm to the United States could be ameliorated by providing information about the reasons for a visa denial to a district court *in camera* "if necessary." App., *infra*, 21a. But that proposed solution does not respect the sovereign power of the United States to bar the admission of aliens on security grounds, and does not adequately safeguard the political Branches' ability to make visa decisions in the interest of national security. The panel's ruling is vague about exactly what "procedures" should be followed and under what circumstances, *ibid.*, and courts have sometimes been reluctant to "dispose of the merits of a case on the

basis of *ex parte*, *in camera* submissions." *Abourezk* v. *Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), aff'd by an equally divided Court, 484 U.S. 1 (1987); see, *e.g.*, *American-Arab Anti-Discrimination Comm.* v. *Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995) (rejecting the government's attempt to use *ex parte* information in the context of a visa application case), vacated on jurisdictional grounds, 525 U.S. 471 (1999). But see, *e.g.*, *Jifry* v. *FAA*, 370 F.3d 1174, 1180-1182 (D.C. Cir. 2004), cert. denied, 543 U.S. 1146 (2005). Moreover, any widening of access to sensitive information, even in controlled settings, increases the risk of unauthorized or inadvertent disclosure. The Ninth Circuit's imposition of a regime of judicial review of terrorism-related grounds for barring an alien from the United States is therefore likely to disrupt the government's efforts to safeguard national security and public safety.

3. The difficulties raised by the Ninth Circuit's decision could affect a significant number of visa applications every year. According to the Department of State, between January 1, 2012, and December 31, 2012, consular officers denied 226,761 visa applications under 8 U.S.C. 1182(a), of which approximately 1400 were filed by aliens on the basis of their engagement or marriage to a U.S. citizen and were denied on Section 1182(a)(2) or (3) grounds. While some of those denials do not involve sensitive criminal or national security grounds, a meaningful number of them would.

For these reasons, and because of the serious errors in the Ninth Circuit's decision and the conflicts it creates with decisions of this Court and other courts of appeals, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
COLIN A. KISOR
STACEY I. YOUNG
Attorneys

MAY 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-16772

FAUZIA DIN, PLAINTIFF-APPELLANT

v.

JOHN F. KERRY,* SECRETARY OF STATE; JANET A. NAPOLITANO, SECRETARY OF HOMELAND SECURITY; ERIC H. HOLDER, JR., ATTORNEY GENERAL, ATTORNEY GENERAL OF THE UNITED STATES; RICHARD OLSON, AMBASSADOR OF THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; CHRISTOPHER RICHARD, CONSUL GENERAL OF THE CONSULAR SECTION AT THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; JAMES B. CUNNINGHAM, AMBASSADOR OF THE UNITED STATES EMBASSY, KABUL, AFGHANISTAN, DEFENDANTS-APPELLEES

Argued and Submitted: July 18, 2012
Filed: May 23, 2013

OPINION

---

* John F. Kerry, Richard Olson, and James B. Cunningham are substituted for their predecessors pursuant to Fed. R. App. P. 43(c)(2).

Before: RICHARD R. CLIFTON and MARY H. MURGUIA, Circuit Judges, and RANER C. COLLINS, District Judge.**

MURGUIA, Circuit Judge:

United States citizen Fauzia Din filed a visa petition on behalf of her husband Kanishka Berashk, a citizen and resident of Afghanistan. Nine months later, the visa was denied. Consular officials informed Din and Berashk only that the visa had been denied under 8 U.S.C. § 1182(a)(3)(B), a broad provision that excludes aliens on a variety of terrorism-related grounds. The district court granted the Government's motion to dismiss on the basis of consular nonreviewability, concluding that the Government put forth a facially legitimate and bona fide reason for the visa denial, in accordance with *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008). We disagree. Because the Government has not put forth a facially legitimate reason to deny Berashk's visa, we reverse and remand for further proceedings.

I. Background

The following facts are taken from Din's complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (accepting "all factual allegations in the complaint as true" when reviewing an order granting a motion to dismiss). From 1992 to 2003, Din's husband, Berashk, worked as a payroll clerk for the Afghan Ministry of Social Welfare. Since the Taliban controlled Afghani-

** The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

stan from 1996 to 2001, Berashk's employment necessarily included work for the Taliban government. Since 2003, Berashk has worked as a clerk in the Afghan Ministry of Education, where he performs low-level administrative duties, including processing paperwork.

In September 2006, Din and Berashk married. In October of the same year, Din filed a visa petition on Berashk's behalf. On February 12, 2008, United States Citizenship and Immigration Services ("USCIS") notified Din that the visa petition was approved. Several months later, the National Visa Center informed Din that it completed processing the visa and scheduled a visa interview for Berashk at the Embassy in Islamabad, Pakistan. The interview took place as scheduled on September 9, 2008. Berashk answered all questions truthfully, including inquiries about his work for the Afghan Ministry of Social Welfare during the period of Taliban control and about the difficulty of life under that regime. The interviewing consular officer told Berashk he should expect to receive his visa in two to six weeks. The officer gave Berashk a form to submit at the Kabul Embassy, which he submitted with his passport upon returning to Afghanistan.

Almost nine months later, on June 7, 2009, following several phone calls to the Embassy from both Din and Berashk, Berashk received a Form 194 letter informing him that his visa had been denied under Section 212(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a). The letter also stated that there was "no possibility of a waiver of this ineligibility." On July 11, 2009, Berashk sent an email to the Islamabad Embassy

requesting clarification as to the reason his visa had been denied. On July 13, 2009, the Embassy emailed a response, stating the visa had been denied under INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), a section of the INA that lists a wide variety of conduct that renders an alien inadmissible due to "terrorist activities." The email added that "[i]t is not possible to provide a detailed explanation of the reasons for the denial," citing INA § 212(b)(2), 8 U.S.C. §§ 1182(b)(2)-(3), which makes inapplicable the requirement that the aliens receive notice of the reason for denials involving criminal or terrorist activity.

Din then obtained pro bono counsel and made several inquiries about the visa denial. Din's counsel sent a letter to the Immigrant Visa Unit of the Islamabad Embassy requesting reconsideration, or, alternatively, a statement of facts in support of the Government's position that Berashk was inadmissible. The Embassy responded with an email again referring only to INA § 212(a)(3)(B). Counsel subsequently sent a similar letter to the Office of Visa Services at the State Department. Following several other unsuccessful attempts to contact different State Department officials, counsel received an additional email again stating that the visa had been denied under Section 212(a)(3) and that a more detailed explanation for the refusal was not possible.

In late 2009, Din attempted to obtain answers directly by traveling from the United States to the Kabul Embassy and then the Islamabad Embassy. Officials at both embassies declined to provide her with a more specific explanation of the visa denial.

Din then initiated this action, asserting three claims for relief: (1) a writ of mandamus directing defendants to lawfully adjudicate Berashk's visa application; (2) a declaratory judgment that 8 U.S.C. § 1182(b)(3), waiving the visa denial notice provisions for aliens deemed inadmissible under terrorism grounds, is unconstitutional as applied to Din; and (3) a declaratory judgment that defendants are in violation of the Administrative Procedure Act. The district court granted the Government's motion to dismiss, concluding that Din failed to state a claim because the doctrine of consular nonreviewability barred adjudication of her first and third claims. The district court also dismissed Din's second claim, concluding that Din did not have standing to challenge the visa denial notice provision.

II. Standard of Review

We review de novo the district court's order granting a motion to dismiss. *Knievel*, 393 F.3d at 1072. When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party. *Id.* To survive dismissal, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

III. Discussion

A. Consular nonreviewability and the *Mandel* exception

We begin with the doctrine of consular nonreviewability. An alien has "no constitutional right of entry" to the United States. *Kleindienst v. Mandel*, 408 U.S.

753, 762, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972). The Supreme Court "without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Id.* at 766, 92 S. Ct. 2576 (quoting *Boutilier v. INS,* 387 U.S. 118, 123, 87 S. Ct. 1563, 18 L. Ed. 2d 661 (1967)). Accordingly, "[f]ederal courts are generally without power to review the actions of consular officials." *Rivas v. Napolitano,* 677 F.3d 849, 850 (9th Cir. 2012) (citing *Li Hing of Hong Kong, Inc. v. Levin,* 800 F.2d 970, 971 (9th Cir. 1986)).

However, we have recognized a limited exception to the doctrine of consular nonreviewability. When the denial of a visa implicates the constitutional rights of an American citizen, we exercise "a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason." *Bustamante,* 531 F.3d at 1060. This right to review arises from the Supreme Court's holding in *Mandel,* in which U.S. citizen professors asserted a First Amendment right to "receive information and ideas" from an alien. 408 U.S. at 770, 92 S. Ct. 2576. The *Mandel* Court held that when the Government denies admission "on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 762, 92 S. Ct. 2576. Since *Mandel,* our Court and several of our sister circuits have exercised jurisdiction over citizens' challenges to

visa denials that implicate the citizens' constitutional rights. *Bustamante,* 531 F.3d at 1059; *see also Am. Acad. of Religion v. Napolitano,* 573 F.3d 115, 125 (2d Cir. 2009); *Adams v. Baker,* 909 F.2d 643, 647-48 (1st Cir. 1990); *Abourezk v. Reagan,* 785 F.2d 1043, 1075 (D.C. Cir. 1986). Courts review the denials for "a facially legitimate and bona fide reason." *Bustamante,* 531 F.3d at 1062.

In *Bustamante,* we recognized that a citizen has a protected liberty interest in marriage that entitles the citizen to review of the denial of a spouse's visa. 531 F.3d at 1062.[1] We therefore consider whether the

---

[1] The Government's contention that *Bustamante* is not good law is meritless. First, the Government argues that the text of the INA, as supported by its legislative history, precludes judicial review of consular decisions. This argument is irrelevant to the holding of *Bustamante,* which conditions judicial review on the constitutional rights of citizens, not an interpretation of immigration statutes. *See* 531 F.3d at 1062 ("Presented with a procedural due process claim by a U.S. citizen, we therefore consider the Consulate's explanation for the denial of [the] visa application pursuant to the limited inquiry authorized by *Mandel*."). Second, according to the Government, *Bustamante* is predicated on a liberty interest in the ability to live in the United States with an alien spouse, and because this right has been elsewhere repudiated, *Bustamante* is in conflict with Circuit precedent and should not be followed. The Government misreads *Bustamante;* nowhere does the case mention the right of an alien spouse to live in the United States. Rather, it explains that a citizen spouse's right to judicial review is based on the more general right to "[f]reedom of personal choice in matters of marriage and family life." *Id.* We have neither the power to, nor the interest in questioning *Bustamante*'s authority. *See Montana v. Johnson,* 738 F.2d 1074, 1077 (9th Cir. 1984) (only en banc decisions, Supreme Court deci-

reason provided by the consular officials for the denial of Berashk's visa is "facially legitimate and bona fide." *Id.* This inquiry is extremely narrow. Once the Government offers a facially legitimate and bona fide reason for the denial, courts "have no authority or jurisdiction to go behind the facial reason to determine whether it is accurate." *Chiang v. Skeirik*, 582 F.3d 238, 243 (1st Cir. 2009).

There is little guidance on the application of the "facially legitimate and bona fide" standard. *See Marczak v. Greene*, 971 F.2d 510, 517 (10th Cir. 1992) ("Because the 'facially legitimate and bona fide' standard is used relatively infrequently, its meaning is elusive.") (quoting *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 n.2 (2d Cir. 1990)).[2] We agree with the Second Circuit that "the identification of both a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she 'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category constitutes a facially legitimate reason." *Am. Acad.*, 573 F.3d at 126 (quoting 8 U.S.C. § 1201(g)). This is consistent with *Bustamante*, in which we stated that the

---

sions, or subsequent legislation overrule the decisions of prior panels).

[2] The dearth of cases explaining the "facially legitimate and bona fide" requirement explains why we, and the dissent, cannot cite any authority conclusively resolving whether the Government's rationale is sufficiently detailed to constitute a "facially legitimate" basis. *See* Dissent at 869-70 (asserting, without citation, that "[t]here is nothing facially illegitimate in the identification of section 1182(a)(3)(B) as the basis for the denial of Berashk's application").

visa applicant "was denied a visa on the grounds that the Consulate 'had reason to believe' that he was a controlled substance trafficker." 531 F.3d at 1062.

Accordingly, we must determine if the Government's citation to a broad section of the INA that contains numerous categories of proscribed conduct, without any assurance as to what the consular officer believes the alien has done, is also a facially legitimate reason. Because we conclude that the Government's position would eliminate the limited judicial review established by the Supreme Court in *Mandel* and recognized by this Court in *Bustamante,* and we find no authority to support eliminating this review, we conclude that it is not.

The first problem is that the Government has offered no reason at all for denying Berashk's visa; it simply points to a statute. While the statute might demonstrate that a particular reason is legitimate, in this case there are no factual allegations that would allow us to determine if the specific subsection of § 1182(a)(3)(B) was properly applied. Din alleges that neither she nor Berashk has any idea what Berashk could have done to be found inadmissible on terrorism grounds, and the Government provides no reason other than its citation to § 1182(a)(3)(B).

In this regard, Din and Berashk's case is distinguishable from *Bustamante* and other visa denial challenges by a citizen. In *Bustamante,* the visa applicant was informed that the consulate had reason to believe he was trafficking illegal drugs and therefore inadmissible, but that the evidence supporting this conclusion

was secret. 531 F.3d at 1060. DEA officials later asked the applicant to become an informant, stating that if he did, his visa problems "would go away." *Id.* at 1061. The applicant refused and his application was denied. In response to an inquiry from counsel for the Bustamantes, the consular official referenced a letter "written by the 'Resident Agent-in-Charge of our local Drug Enforcement Administration Office,' that contained 'derogatory information' to support the finding that there was reason to believe that Jose was a controlled substance trafficker." *Id.* We upheld the visa denial, noting that "the Bustamantes' allegation that Jose was asked to become an informant in exchange for immigration benefits fails to allege bad faith; if anything, it reflects the official's sincere belief that Jose had access to information that would be valuable in the government's effort to combat drug trafficking." *Id.* at 1063.

We specifically held, "Jose [Bustamante] was denied a visa on the grounds that the Consulate 'had reason to believe' that he was a controlled substance trafficker. This is plainly a facially legitimate reason, as it is a statutory basis for inadmissibility. 8 U.S.C. § 1182(a)(2)(C)." 531 F.3d at 1062. The *reason* for exclusion in *Bustamante* was that "the Consulate 'had reason to believe' that he was a controlled substance trafficker." *Id.* The statute gave the reason legitimacy, but the statute standing alone was not the reason.

Other circuits reviewing a citizen's challenge to a visa denial have also relied on reasons for exclusion that contained some factual elements. For example, in

Adams, the First Circuit observed that "[t]he evidence of Adams' involvement in the violent activities of the [Irish Republican Army], both as a policy maker and as a field commander, provides a 'facially legitimate and bona fide reason' for his exclusion." 909 F.2d at 649; *see also Allende v. Shultz,* 845 F.2d 1111, 1120 (1st Cir. 1988) (concluding that the speaking engagements Allende planned for her time in the United States were not a basis for exclusion because 8 U.S.C. § 1182(a)(27), prior to its repeal, excluded aliens seeking to engage in activities that would be harmful to the United States, and required an activity other than speech). The record here is completely void of any similar allegations in support of the Government's denial of Berashk's visa.

The first problem is compounded by the sweeping nature of the cited section of the INA. Section 1182(a)(3)(B) exceeds 1,000 words. It contains ten subsections identifying different categories of aliens who may be inadmissible for terrorism reasons.[3] The section defines "terrorist activities" with reference to six different subsections, containing different kinds

---

[3] The subsections cover aliens who: (1) have engaged in terrorist activities; (2) are now or will be engaged in terrorist activities; (3) have incited terrorist activities; (4) are representatives of terrorist organizations or other groups that espouse terrorism; (5) are members of a recognized terrorist organization; (6) are members of an informal terrorist organization; (7) endorse or espouse terrorist activity; (8) have received military-type training from or on behalf of a terrorist organization; (9) are the spouse or child of a person found inadmissible under the subsection; or (10) are officers, officials, representatives, or spokespersons of the Palestinian Liberation Organization. 8 U.S.C. § 1182(a)(3)(B).

of conduct. It defines "engage in terrorist activity" in seven subsections, some of which are divided into further subsections. The conduct described in § 1182(a)(3)(B) ranges from direct participation in violent terrorist activities to indirect support of those who participate in terrorist activities. The citation to § 1182(a)(3)(B) contrasts with the much narrower ground of inadmissibility at issue in *Bustamante*.

It appears that, at a minimum, the Government must cite to a ground narrow enough to allow us to determine that it has been "properly construed." *See Am. Acad.*, 573 F.3d at 126 ("[T]he identification of both a properly construed statute that provides a ground of exclusion and the consular officer's assurance that he or she 'knows or has reason to believe' that the visa applicant has done something fitting within the proscribed category constitutes a facially legitimate reason. . . ."). The Government's citation here is so broad that we are unable to determine whether the consular officer "properly construed" the statute. Unlike the dissent, Dissent at 870-71, we are unwilling to assume that the statute has been properly construed without knowing *what* is being construed, let alone *how* it is being construed. By contrast, the Second Circuit analyzed three distinct issues of statutory construction in reviewing a challenge to a visa denial based on § 1182(a)(3)(B)(i)(I), one of the subsections that could be relevant here. *Am. Acad.*, 573 F.3d at 125-35. Given the breadth of the encompassed conduct and the sheer number of grounds of inadmissibility under § 1182(a)(3)(B) it is impossible to know if these, or any

other, issues of statutory interpretation are at issue here.

Additionally, some of the subsections in § 1182(a)(3)(B) confer upon an alien the right to present evidence to rebut the cited reason for inadmissibility. For activity in support of organizations that have not been designated by the Secretary of State as terrorist organizations, an alien may offer "clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization." *See* 8 U.S.C. §§ 1182(a)(3)(B)(i)(VI); 1182(a)(3)(B)(iv)(IV)(cc); 1182(a)(3)(B)(iv)(V)(cc); 1182(a)(3)(B)(iv)(VI)(dd). The Second Circuit read this language to require a consular officer to present the alien with the evidence of inadmissibility and permit him to offer a rebuttal. *Am. Acad.*, 573 F.3d at 131-32. Without knowing the specific subsection applicable to Berashk, we cannot determine whether the consular officer was required to give Berashk an opportunity for rebuttal.

To be clear, we do not "'look behind' exclusion decisions," *Am. Acad.*, 573 F.3d at 137, but we must at least look at them, *see SEC v. Chenery Corp.*, 332 U.S. 194, 197, 67 S. Ct. 1575 (1947) ("We must know what a decision means before the duty becomes ours to" review it.). The Second Circuit, recognizing, as do we, that no evidentiary inquiry is appropriate, explained that "a reviewing court need only satisfy itself that the conduct alleged fits within the statutory provisions relied upon as the reason for the visa denial." *Am. Acad.*, at 134 (concluding that visa applicant's alleged donations to a group that provided material support to terrorists fits

with the statutory basis for denying the visa). Absent evidence of bad faith, we accept the Government's allegations as facts. *Bustamante,* 531 F.3d at 1062-63 ("It is not enough to allege that the consular official's information was incorrect.").

While the Government need not prove that Berashk performed an activity that renders him inadmissible under the statute, *see Adams,* 909 F.2d at 649, it must at least allege what it believes Berashk did that would render him inadmissible. We seek only to verify that the facts asserted by the Government, however bare, constitute a ground for exclusion under the statute. *See Am. Acad.,* 573 F.3d at 126-29 (reviewing whether facts alleged by the Government were grounds for exclusion, but declining to conduct any review of the facts themselves).

The Government's citation to § 1182(a)(3)(B), when combined with its failure to assert *any* facts, is not a facially legitimate ground for denying Berashk's visa. Should we conclude that citation to § 1182(a)(3)(B) is a facially legitimate reason for the denial of Berashk's visa, then citation to § 1182(a), which lists *all* grounds of inadmissibility, would be sufficient. Any judicial review would be wholly perfunctory requiring only that we ensure the Government has properly said nothing more than "8 U.S.C. § 1182(a)." Limited as our review may be, it cannot be that Din's constitutional right to review is a right only to a rubber-stamp on the Government's vague and conclusory assertion of inadmissibility. *Cf. United States v. DeGeorge,* 380 F.3d 1203, 1215 (9th Cir. 2004) (courts should "not simply rub-

berstamp the government's request, but hold the government to its burden").[4]

The dissent does not alleviate our concern that the Government's approach would essentially eliminate all judicial review, even when the constitutional right of a U.S. citizen is implicated. According to the dissent, decisions to exclude aliens are made "exclusively by executive officers, without judicial intervention." Dissent at 871 (quoting *Mandel*, 408 U.S. at 766, 92 S. Ct. 2576). This ignores, of course, that "courts have identified a limited exception to the doctrine where the denial of a visa implicates the constitutional rights of American citizens." *Bustamante*, 531 F.3d at 1061. The dissent's only attempt to give meaning to the exception recognized in *Mandel* and *Bustamante* is to state, "[t]here is nothing facially illegitimate in the identification of section 1182(a)(3)(B) as the basis for the denial of Berashk's application." Dissent at 869-70. We do not think that even the most limited judicial review is so restrained as to ask only if the Government has successfully provided a citation to the U.S.Code.

We are similarly not persuaded by the argument advanced by the dissent that § 1182(b)(3) supports the Government's position. Dissent at 871-73. Section 1182(b) requires that the consular officer notify aliens if their visa is denied and provide the "specific provision

---

[4] While the dissent correctly notes that *DeGeorge* arose in a different context, we do not think that any form of judicial review, whether a product of statute or precedent, should be a rubber-stamp for the Government.

or provisions of law under which the alien is inadmissible." 8 U.S.C. § 1182(b)(1). In 1996, as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress amended § 1182 and added (b)(3), which states that the disclosure requirement in § 1182(b)(1) does not apply if the alien is inadmissable for a reason stated in § 1182(a)(2) or (a)(3). Pub. L. No. 104-132, § 421, 110 Stat 1214 (1996) (codified at 8 U.S.C. § 1182(b)(3)).[5]

Despite this provision, State Department regulations require consular officers to "inform the applicant of the provision of law or implementing regulation on which the refusal is based and of any statutory provision of law or implementing regulation under which administrative relief is available," 22 C.F.R. § 42.81(b), and make no exception for denials based on § 1182(a)(2) or (a)(3). As a result, consular officers appear to regularly disclose information to aliens, even if the denial is

---

[5] The rationale for this provision was explained by the House Committee on the Judiciary:

> Currently, all foreign nationals who are denied a visa are entitled to notice of the basis for the denial. This creates a difficult situation in those instances where an alien is denied entry on the basis, for example, of being a drug trafficker or a terrorist. Clearly, the information that U.S. government officials are aware of such drug trafficking or terrorist activity would be highly valued by the alien and may hamper further investigation and prosecution of the alien and his or her confederates. An alien has no constitutional right to enter the United States and no right to be advised of the basis for the denial of such a privilege. Thus, there is no constitutional impediment to the limitation on disclosure in this section.

H.R. Rep. 104-383, 102-03 (1995).

based on § 1182(a)(2) or (a)(3). *See, e.g.*, Complaint at 6 (describing email from Islamabad Embassy disclosing statutory basis for Berashk's visa denial); *Bustamante,* 531 F.3d at 1061 (describing letter from Consulate explaining basis for visa denial); *Am. Acad.*, 573 F.3d at 118 (describing telephone call from Government to applicant explaining that visa was denied because the applicant provided material support to a terrorist organization).[6]

According to the dissent, § 1182(b)(3) means that "the Government was not required to provide more specific information regarding" the denial of Berashk's visa. Dissent at 872. This is correct as a matter of statutory interpretation. Under the statutory scheme, aliens have a statutory right to certain information if their visa is denied for most reasons; aliens have no such statutory right if the denial is based on 1182(a)(3) or (a)(2). This lack of an alien's statutory right to information is, however, not helpful in resolving the question we face: whether Berashk's visa was denied for "a facially legitimate and bona fide reason." *Bustaman-*

---

[6] The U.S. Department of State Foreign Affairs Manual explicitly recognizes that the statute only establishes the minimum amount of disclosure and states that "although 212(b) also exempts findings of ineligibility under INA 212(a)(2) and (3) from the written notice requirement, we expect that such notices will be provided to the alien in all 212(a)(2) and (3) cases unless: (1) We instruct you not to provide notice; (2) We instruct you to provide a limited legal citation (i.e., restricting the legal grounds of refusal to 212(a)); or (3) You request permission from us not to provide notice." 9 Foreign Affairs Manual 42.81 N2.

te, 531 F.3d at 1060. To make that determination, a court needs some information.

First, the statute simply creates a statutory right to information, and limits the scope of that right. The dissent suggests that because the alien does not have a statutory right to information, by implication, the Government has an absolute right to withhold the information from everyone, including a citizen and this Court. Dissent at 872-73. The dissent cites no authority to support its assertion that an alien's lack of an affirmative statutory right to information functions as an implied prohibition on any disclosure to all people, and we decline to adopt such a position.

While we want to make it emphatically clear that the Government's obligation to provide information in this context is not even remotely close to the Government's obligation under *Brady v. Maryland,* 373 U.S. 83, 91, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), drawing an analogy to *Brady* exposes the fault in the Government's argument. The Jencks Act provides an affirmative statutory right to information and requires the Government to produce "any statement (as hereinafter defined) of the [testifying] witness in the possession of the United States." 18 U.S.C. § 3500. *Brady* requires, at the defendant's request, that the prosecution disclose "[material] evidence favorable to an accused." 373 U.S. at 87, 83 S. Ct. 1194. *Brady* is not limited by the Jencks Act and it "exists as an independent foundation to preserve evidence." *United States v. Bernard,* 623 F.2d 551, 556 (9th Cir. 1979). It would be implausible to suggest that the Government need not disclose *Brady* evidence that is outside the scope of the Jencks At because the

defendant lacks a statutory right to the information. In fact, it is taken for granted that *Brady* material can exist outside the scope of the Jencks Act. *See United States v. Cerna*, 633 F. Supp. 2d 1053, 1056 (N.D. Cal. 2009) (discussing, without controversy, "non-Jencks *Brady* information").

Similarly, the fact that Congress created a limited disclosure obligation in the context of visa denials does not mean that Congress otherwise prohibited the disclosure of all other information. We agree that "[i]t makes no sense to read the statute to *require* disclosure for such denials," dissent at 873 (emphasis added), but we do not read the statute that way. It would also make no sense to read the statute to prohibit the release of any information regarding certain visa denials, because if it did, the executive branch appears to violate the statute regularly. *See, e.g.*, 22 C.F.R. § 42.81(b); Complaint at 6; *Bustamante*, 531 F.3d at 1061; *Am. Acad.*, 573 F.3d at 118. The statute does not compel nor prohibit disclosure in this case.

Second, the dissent's reading of the statute is inconsistent with any concept of judicial review—including the dissent's reading of *Bustamante*. Because of § 1182(b)(3), when a visa denial is based on (a)(2) or (a)(3), the Government is not statutorily required to disclosure "the specific provision or provisions of law under which the alien is inadmissible," 8 U.S.C. § 1182(b)(1)(B). By implication, the dissent suggests that "[n]o disclosure of information is required," dissent at 872, and therefore no information can ever be required by a reviewing court. But even the dissent reads *Bustamante* to require the Government to pro-

vide the exact information listed in § 1182(b)(1)(B)—the statutory provision under which the alien is inadmissible—to demonstrate that the visa denial is "facially legitimate." Dissent at 869. By the dissent's own logic, that reading of *Bustamante* is "directly contradict[ed]" by the statute. Dissent at 873. If the statute allows the Government to decline to provide more information in this case, then it must allow the Government to decline to provide *any* information. This would decisively eliminate judicial review and this reading of the statute is therefore precluded by *Bustamante*, which guarantees some review, no matter how limited.

The dissent's concern about "this nation's desire to keep persons connected with terrorist activities from entering the country," dissent at 872, is, of course, valid, but the Government never asserted such an argument here. And even if it had, nothing in our opinion compels dangerous disclosure. Another imperfect analogy to criminal procedure exposes the fault in relying on the statute's purpose to justify withholding information. For the same reason that Congress added § 1182(b)(3)—the desire to not jeopardize an ongoing investigation by announcing its existence—subjects of criminal investigations are routinely not informed that they are being investigated. For example, search warrant proceedings are "necessarily *ex parte,* since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence." *Franks v. Delaware,* 438 U.S. 154, 169, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The need for secrecy does not, however, change the fact that the constitution guarantees a judicial determination of probable cause

prior to the issuance of a search warrant. *United States v. Grubbs,* 547 U.S. 90, 99, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006). It is inconceivable that the Government would argue that it could not provide the factual basis supporting probable cause based on the need to keep the investigation a secret—an *ex parte* hearing conceals the investigation, while still allowing judicial review.

In this case, if necessary, the Government could, as it does in other contexts, disclose the reason for Berashk's visa denial *in camera. See, e.g., Hunt v. C.I.A.*, 981 F.2d 1116, 1118 (9th Cir. 1992) (reviewing *in camera* affidavits justifying the decision to withhold information from Freedom of Information Act disclosure on national security grounds); *see also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079-90 (9th Cir. 2010) (en banc) (describing the history and procedure of the state secrets doctrine and dismissing case). Existing procedures are adequate to address the national security concerns that we share with the dissent, and make it unnecessary to eliminate all judicial review and disclosure.

Because the Government has not offered a facially legitimate reason for the visa denial, the first part of the *Mandel* test is not met, and the decision is not subject to the prohibition on consular review. It is not necessary to address the second part of the test, whether the citation to § 1182(a)(3)(B) is bona fide. It is worth noting, however, that in *Bustamante,* we held that to prevail under the bona fide prong of the *Mandel* test a plaintiff must "allege that the consular official did not in good faith believe the information he had," 531 F.3d at

1062-63, and the dissent argues that "it would be impossible for plaintiff to plead [bad faith] because she did not know the particular basis for the denial of her husband's visa application." Dissent at 869. The "bona fide" inquiry is therefore eliminated under the dissent's approach because the Government can simply cite a statute—and only a statute—and because the plaintiff is not informed what the consular official believes, she can never allege that the belief is held in bad faith. This suggests that the dissent has come to the incorrect conclusion that a bare citation to a statute is a facially legitimate ground for exclusion. Because the Supreme Court articulated that the Government must put forward a "facially legitimate *and* bona fide reason," *Bustamante*, 531 F.3d at 1062 (citing *Mandel*, 408 U.S. at 770, 92 S. Ct. 2576) (emphasis added), it is unlikely that the "facially legitimate" requirement should be interpreted to allow the Government to withhold information and make an inquiry into the "bona fide" requirement "impossible."

B. Din's standing to challenge § 1182(b)(3)

The district court held that Din lacks standing to seek a declaratory judgment that 8 U.S.C. § 1182(b)(3) is unconstitutional as applied to her because the notice provisions apply to aliens, not to citizens with an interest in an alien's visa. As discussed above, we agree with the conclusion that § 1182(b)(3) does not apply to Din, and, for that reason, we do not think it supports the Government's motion to dismiss on consular nonreviewability grounds. When the case is resolved on the merits, it is possible that the court may conclude that it can avoid reaching Din's constitutional challenge to the

statute by determining that the statute, by its own terms, does not apply to her. *See Nw. Austin Mun. Util. Dist. No. One v. Holder,* 557 U.S. 193, 205, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009) (constitutional issues should be avoided if a statutory issue resolves the case). But in reviewing a motion to dismiss, we cannot project a specific outcome on the merits in order to decide the question of standing. *See Maya v. Centex Corp.,* 658 F.3d 1060, 1068 (9th Cir. 2011) (noting that standing is distinct from the merits). For the purposes of evaluating standing, we "must construe the complaint in favor of the complaining party." *Id.* Here, the complaint alleges that the Government is using the statute to justify an action that is injuring Din. If the Government is doing so based on a flawed reading of the statute, that might provide a narrower ground to decide this case on the merits later, but it does not deprive Din of standing to challenge the law. *See Nw. Austin,* 557 U.S. at 205, 129 S. Ct. 2504.

To satisfy Article III's standing requirements, Din must show "(1) [she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 180-81, 129 S. Ct. 2504. Further, a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife,*

504 U.S. 555, 573 n. 7, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Din has a constitutionally protected due process right to limited judicial review of her husband's visa denial, which stems from her "[f]reedom of personal choice in matters of marriage and family life." *Bustamante,* 531 F.3d at 1061-62. To the extent that the Government relies on 8 U.S.C. § 1182(b)(3) to interfere with this right, Din has standing to challenge the provision. Din alleges that the Government has deprived her of due process by refusing to provide either her or her husband with a facially legitimate and bona fide reason for denying his visa. In so refusing, the Government in part relies on 8 U.S.C. § 1182(b)(3). A court's decision that 8 U.S.C. § 1182(b)(3) cannot defeat Din's claim could redress her injury. Therefore, § 1182(b)(3) appears to injure Din, and she has standing to challenge it.

IV. Conclusion

We decline the Government's invitation to turn our limited review into a mere formality. We conclude that the Government's citation to § 1182(a)(3)(B), in the absence of any allegations of proscribed conduct, is not a facially legitimate reason to deny Berashk's visa. Because the Government has not proffered a facially legitimate reason, Din's claims for a writ of mandamus directing the Government to adjudicate Berashk's visa application and for a declaratory judgment under the APA survive dismissal. Accordingly, we also conclude that Din has standing to challenge 8 U.S.C. § 1182(b)(3)

as it has been applied to her. We remand Din's claims for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLIFTON, Circuit Judge, dissenting:

The majority opinion acknowledges the doctrine of consular nonreviewability and the "highly constrained" nature of our judicial review of the denial of a visa *see Bustamante v. Mukasey,* 531 F.3d 1059, 1060 (9th Cir. 2008), but in practice it fails to accept that doctrine and act within that constraint. Instead, assuming that judicial review must be more robust, it imposes upon the Government an obligation to provide information about a visa denial that, by statute, the government is specifically not required to provide when it denies a visa based on concerns for national security or terrorism. I respectfully dissent.

I. The Limited Nature of Judicial Review

The visa application of plaintiff's husband, Kanishka Berashk, a citizen and resident of Afghanistan, was denied by consular officials under 8 U.S.C. § 1182(a)(3)(B). Section 1182(a) identifies "classes of aliens ineligible for visas or admission" into the United States. The statute lists ten different categories of ineligible aliens, including one "miscellaneous" provision, subsection 1182(a)(10), which encompasses several unrelated grounds. One of the identified categories within section 1182(a) is subsection 1182(a)(3), entitled "Security and related grounds," one part of which, subsection 1182(a)(3)(B), is captioned "Terrorist activi-

ties." That provision was identified as the basis for the denial of Berashk's visa application.

As the majority opinion notes, at 7, we may review the denial of a visa only when the constitutional rights of an American citizen are implicated and then only by way of "a highly constrained review solely to determine whether the consular official acted on the basis of a facially legitimate and bona fide reason." *Bustamante*, 531 F.3d at 1060. Those two elements—facially legitimate and bona fide—were drawn directly from the Supreme Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753, 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972).

We specifically held in *Bustamante* that denial of a visa based upon a statutory basis for inadmissibility is a denial for "a facially legitimate reason." 531 F.3d at 1062. We also made clear that the inquiry into whether the reason for the visa denial was bona fide is limited to the question of whether the decision was made in good faith. Whether the decision to deny the visa was correct is not the issue. Rather, a plaintiff must "allege that the consular official did not in good faith believe the information he had. It is not enough to allege that the consular official's information was incorrect." *Id.* at 1062-63.

The district court dismissed the action based upon its application of *Bustamante*. It concluded that reliance upon a statute, specifically section 1182(a)(3)(B), provided a facially legitimate reason for denying the visa application. As for the bona fide element, the district court noted that plaintiff had not alleged in her complaint that the consular officials acted in bad faith

or without a good faith belief in the information on which the denial was based. Further, the court held that it would be impossible for plaintiff to plead to that effect because she did not know the particular basis for the denial of her husband's visa application and thus would necessarily be unable to satisfy the plausible pleading requirements of *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 569, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The district court was right.

The majority opinion bases its conclusion on what it describes as the lack of a facially legitimate reason to deny Berashk's application and says that it does not reach the question of whether the reason given was bona fide. Majority op. at 866-67. The denial here was based on a statute, however. That statute provided a lawful reason for denying the application. The relevant definition of "legitimate" is "accordant with law." *Webster's Third New International Dictionary* 1291 (2002). Because the denial of Berashk's application was based on law, the reason was at least "facially legitimate."

Although the majority opinion interprets *Bustamante* differently, by my reading that decision held that a statutory basis for inadmissibility is a facially legitimate reason. It stated:

> As set forth in the complaint, Jose was denied a visa on the grounds that the Consulate "had reason to believe" that he was a controlled substance trafficker. This is plainly a facially legitimate reason,

> as it is a statutory basis for inadmissibility. 8 U.S.C. § 1182(a)(2)(C).

Bustamante, 531 F.3d at 1062. The majority opinion asserts, at 11, that citation to the statute was not enough by itself, and that "[t]he *reason* for exclusion in *Bustamante* was that 'the Consulate "had reason to believe" that he was a controlled substance trafficker.'" But that portion of our opinion in *Bustamante* simply repeated what the complaint in that case had alleged was the stated reason, one that the plaintiffs disputed. There was no finding or determination by the court. The "facial" legitimacy rested upon the citation to the statute. This case is no different. There is nothing facially illegitimate in the identification of section 1182(a)(3)(B) as the basis for the denial of Berashk's application.

Nor is there any factual basis for us to conclude or for plaintiff to allege that the reason for the denial was not bona fide because the consular official who made the decision acted in bad faith. Plaintiff alleges in her complaint that Berashk was not engaged in any terrorist activity and that no facts exist to support a conclusion that he is inadmissible under the statute. The Bustamantes similarly alleged that Jose Bustamante was not a drug trafficker and asked that the case be remanded for factual development, but we held that their complaint must be dismissed because they did not allege that the consular official did not in good faith believe the information he possessed. *Bustamante,* 531 F.3d at 1062-63. The factual basis of the consular's decision is not within our highly limited review. As we held in *Bustamante,* quoted above, it is simply

not enough to allege that the consular official's decision was wrong. That is not for us to decide.

The majority opinion holds that the reason given for excluding Berashk was inadequate in two ways, statutory and factual. Neither is persuasive.

First, it complains that the Government's reference to section 1182(a)(3)(B) is not sufficiently specific. It contends that the Government must cite to a statutory subsection narrow enough to permit the court to determine that it has been properly construed. Majority op. at 862-63. It observes that the statutory subsection cited in denying Berashk's application, section 1182(a)(3)(B), is longer than the statutory subsection cited in the denial of the application in *Bustamante,* section 1182(a)(2)(C). Majority op. at 862-63. But the length of a statute does not make it any less of a statute.[1]

Nor does it provide a principled justification for denying the facial legitimacy of the consular official's decision. It is the Government's application of the statute to Berashk—its assessment of the facts, not any "construction" of the statute—that is disputed by plaintiff here. The key allegation of plaintiff's complaint is that:

---

[1] The citation was not as unspecific as the majority opinion suggests. Section 1182(a)(3)(B) contains several subsections, but all pertain to "terrorist activities." The Government did not simply cite to section 1182(a) as a whole. As discussed below, at 871-72, the Government is generally required to provide some explanation for a visa denial, but the statute explicitly provides that denials under section 1182(a)(3)(B) are different.

> No good faith basis exists that is sufficient to constitute a facially legitimate and bona fide reason for the denial of Mr. Berashk's visa application under 8 U.S.C. § 1182(a)(3)(B). The fact of Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds of inadmissibility listed in 8 U.S.C. § 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist.

Plaintiff has argued that the cited subsection is an "umbrella" statute that is not specific enough for Berashk to know what to try to rebut, but plaintiff has not argued that the State Department might have misinterpreted this statute committed to its authority by Congress, and there is nothing in the record that suggests that it has.

The second reason given by the majority opinion is that the plaintiff and the court have not been provided by the Government with enough factual information to "allow us to determine if the specific subsection of § 1182(a)(3)(B) was properly applied." Majority op. at 861. That gets closer to what I perceive to be the majority opinion's actual concern. The majority opinion is premised on the assumption that the court must be provided with whatever additional information we deem necessary to permit us to conduct a more thorough review and on the corollary that we have the power to require the Government to provide that additional information. Thus, the majority opinion holds that the Government "must at least allege what it believes Berashk did that would render him inadmissible." *Id.* at

863. Otherwise, the majority opinion asserts, our review would be only a "rubber-stamp."[2]

We must recognize, however, that "[t]he power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country and to have its declared policy in that regard enforced exclusively by executive officers, without judicial intervention, is settled by our previous adjudications." *Kleindienst v. Mandel,* 408 U.S. 753, 766, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972) (quoting *Lem Moon Sing v. United States,* 158 U.S. 538, 547, 15 S. Ct. 967, 39 L. Ed. 1082 (1895)) (internal quotations omitted). Analysis of the applicant's underlying conduct has "been placed in the hands

---

[2] The majority opinion supports this statement with a citation with a "cf." signal to *United States v. DeGeorge,* 380 F.3d 1203, 1215 (9th Cir. 2004), describing that case as holding that "courts should 'not simply rubber-stamp the government's request, but hold the government to its burden.'" That citation provides no support for the majority opinion's conclusion here. To begin with, that criminal appeal had nothing whatsoever to do with the issue in this case. It made no mention of the doctrine of consular nonreviewability nor any reference to the highly constrained review that we are to apply here. Rather, it addressed a court order issued at the request of the government to toll the statute of limitations because evidence was located in a foreign country, based on a statute that authorized such tolling, 18 U.S.C. § 3292. Moreover, as our decision noted, the judicial review in that case was expressly required by that statute. *DeGeorge,* 380 F.3d at 1213-14 (citing 18 U.S.C. § 3292(a)(1)). When a statute requires that the district court make a given finding before issuing an order, it is no surprise that in reviewing the district court's order we held that the Government must be held to its burden. No similar authorization for judicial review exists here.

of the Executive." *Mandel,* 408 U.S. at 769, 92 S. Ct. 2576. Our review here is supposed to be highly restrained.

That does not mean that our review is purely a formality or, as the majority opinion describes it, a rubber stamp. In many instances there will be more specific information available about the basis for a visa denial. When there is more information available, it is appropriate for a court to examine that information, as our court did in *Bustamante,* albeit still in the course of a limited review. But, as discussed below, Congress has specifically provided that the Government is not required to provide specific information about what lies behind a visa denial under subsection 1182(a)(3), the basis for the denial of Berashk's application. When the statute says that the Government does not have to disclose that information, compelling it to disclose the information anyway in order to allow "limited" and "highly restrained" judicial review cannot be justified.

II. 8 U.S.C. § 1182(b)

By requiring the Government to disclose more specific information about the denial of Berashk's visa application, the majority opinion effectively disregards the statute that says that the government is not obligated to disclose that information.

After the categories of aliens deemed ineligible for visas are identified in 8 U.S.C. § 1182(a), the next part of the statute, section 1182(b), provides for the notice to be given following the denial of a visa application. For denials based on most of the subsections of section 1182(a), some notice of the determination and its statu-

tory basis is required.[3] But the statute, in section 1182(b)(3), explicitly carves out denials based on two subsections: 1182(a)(2) ("Criminal and related grounds") and 1182(a)(3) ("Security and related grounds"). No disclosure of information is required when a visa denial is based on one of those subsections.

The denial of Berashk's visa was based on subsection 1182(a)(3). Under section 1182(b)(3), the Government was not required to provide more specific information

---

[3] 8 U.S.C. § 1182(b) provides:

> (b) Notices of denials
>
> (1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—
>
> (A) states the determination, and
>
> (B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment of status.
>
> (2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.
>
> (3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a) of this section.

The United States Code Annotated notes that the language quoted above from section 1182(b)(1)(B) is presented that way in the statute but that the word "adjustment" should probably be preceded by "ineligible for."

regarding that denial.[4] The majority holds otherwise without giving serious consideration to the impact of section 1182(b)(3).

Plaintiff realizes that this statute poses a serious obstacle to her claim, and in her complaint, she presents as a separate claim for relief a challenge to the constitutionality of section 1182(b) as applied to her. The constitutional basis for the challenge is only vaguely described in the complaint as "procedural due process under the Fifth Amendment." The district court held that the notice provision only applies to the alien applicant for the visa, in this case Berashk, and not to his U.S. citizen wife, the plaintiff in this case, so it concluded that plaintiff lacked standing to challenge the statute. The majority opinion disagrees and reverses that part of the district court's order as well.

The majority opinion does not conclude that the statute is unconstitutional, however. Plaintiff has not yet presented her argument to that effect on the merits. The proposition that this nation's desire to keep persons connected with terrorist activities from entering the country must be subordinated to plaintiff's desire

---

[4] Contrary to the majority's assumption, at 865, the lack of an affirmative right to compel disclosure does not "function[] as an implied prohibition" against disclosure. Rather, courts are prohibited from demanding disclosure, in this context, and our cases say it explicitly. *See Bustamante*, 531 F.3d at 1062 (rejecting Bustamante's argument for remand in order to require the government "to present specific evidence to substantiate the assert[ed]" basis for the visa denial). Accordingly, the majority's inapposite discussion of *Brady* obligations, an area of law requiring robust judicial review of due process, lends no support to its holding.

for the information based on "procedural due process" strikes me as highly unlikely, particularly when there is no allegation that the Government failed to provide plaintiff or her husband the process that is required by the applicable statute.

What matters for now, though, is that the majority opinion effectively nullifies the statute simply by asserting that it "does not apply to Din." Majority op. at 867.[5] That misses the point. Even if the limitation on disclosure does not apply to Din, nothing else gives her the right to demand that the Government provide the information to her. More broadly, Congress has required disclosure to applicants of information regarding visa denials, except for denials based on criminal or security grounds. It makes no sense to read the statute to require disclosure for such denials simply because there might be a U.S. citizen interested in the application.

That statute should not be ignored. It directly contradicts the majority opinion's holding that the Government must provide more information about the denial of Berashk's visa. The statute says otherwise.

---

[5] The majority opinion describes this as a concession by the Government. Actually, it is the reason why the Government has argued, as the district court concluded, that Din does not have standing to challenge the exclusions under the statute. The majority opinion concludes that Din does have standing, but its broader conclusion that the statute can be disregarded because it does not apply to Din means that Din's procedural due process challenge is irrelevant—in which case she actually would lack standing.

In my view, the majority opinion has gone astray in two different ways. It fails to honor the highly constrained nature of judicial review of a decision to deny a visa application. And, in the process, it orders the government to disclose information that the relevant statute says that the government does not have to provide. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

C 10-0533 MHP

FAUZIA DIN, PLAINTIFF-APPELLANT

v.

HILARY CLINTON, SECRETARY OF STATE, JANET NAPOLITANO, SECRETARY OF HOMELAND SECURITY, ERIC HOLDER, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., DEFENDANTS

June 22, 2010

MEMORANDUM & ORDER

MARILYN HALL PATEL, District Judge.

Plaintiff Fauzia Din ("Din") filed the instant action against various governmental defendants seeking review of the government's determination that her husband, Kanishka Berashk, is inadmissible into the United States under Section 212(a)(3)(B) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(a)(3)(B). Having considered the parties' arguments and submissions, the court enters the following memorandum and order.

BACKGROUND

Unless otherwise noted, the following facts are taken from plaintiff's complaint. Docket No. 1 (Complaint). Din was born in Kabul, Afghanistan but fled to Pakistan in 1996 to escape the Taliban regime. She entered the United States in 2000 as a refugee, and became a naturalized citizen of the United States on November 20, 2007.

In September 2006, Din returned to Afghanistan to marry Kanishka Berashk, whom she had known for many years. Berashk was born in Kunduz, Afghanistan and currently lives in Kabul. Since 2003, he has been employed as a government clerk in the Afghan Ministry of Education, where his duties primarily involve processing paperwork. Prior to 2003, Berashk served as a payroll clerk in the Afghan Ministry of Social Welfare, where he processed payroll for school teachers. Plaintiff alleges that during the Taliban occupation of Afghanistan from 1996-2001, Berashk never implemented, nor was asked to implement, any policy changes on behalf of the Taliban. In addition, plaintiff attests that Berashk never had direct contact with the Taliban regime.

Shortly after her marriage, Din returned to the United States and filed a visa petition for Berashk. On February 12, 2008, the United States Citizenship and Immigration Services ("USCIS") informed Din that her petition had been approved and had been forwarded to the National Visa Center for processing. On July 29, 2008, the National Visa Center informed Din that it had completed the necessary processing. It then sched-

uled an interview with Berashk at the Islamabad Embassy. On September 9, 2008, Berashk appeared at the Islamabad Embassy for the visa interview and answered all questions asked of him both truthfully and accurately. After the interview, the consular officer gave Berashk a Form 194 letter stating that "Mr. Yaqubi" of the Kabul Embassy would send his passport to the Islamabad Embassy "which will issue the visa and return [the passport] to the Kabul Embassy." The consular officer instructed Berashk to deliver his passport to the Kabul Embassy. During this exchange, Berashk was given no indication of any impediments to his visa application. The consular officer told Berashk that Berashk could expect to receive his visa in two to six weeks, and that the officer was pleased with Berashk's paperwork.

Berashk, however, did not receive his visa within two to six weeks. Berashk placed numerous calls to the Islamabad Embassy between October 2008 and January 2009 to inquire about the status of his application. He was unable to receive any information from the Embassy. On January 28, 2009, Berashk sent an email to the Immigration Visa Unit of the Embassy inquiring about his application. He received the following response: "Our record indicates that the case is still pending under administrative process and we will contact the applicant(s) upon completion of this process. Also, time duration for the process is always approximated [sic] therefore [sic] cannot be predicted." Berashk and Din waited five more months to receive a response. Although they both contacted the Embassy numerous times during this time to determine the sta-

tus of the visa application, they did not receive any additional information.

In early June 2009, United States Congressman Pete Stark sent a letter on Din's behalf to the Islamabad Embassy inquiring about the status of Berashk's application. Before Stark received a response, on June 7, 2009, Berashk received a Form 194 letter stating that his application had been denied pursuant to Section 212(a) of the INA and that there was "no possibility of a waiver of this ineligibility." The form did not indicate which subsection of the statute applied to Berashk. The letter also included an instruction to refer to Form DSL-851A for further details; however, the referenced form was not included with the denial. Berashk never received the DSL-851A form. On June 16, 2009, Representative Stark received a response from Christopher J. Richard, Consul General, which stated: "Mr. Berashk's case continues to undergo administrative processing . . . . [a]pplicants may have to wait several months or longer before their visas are issued." Although the letter was dated eleven days after Berashk's application was denied, it nonetheless noted that the application was still pending.

On July 11, 2009 Berashk sent an email to the Islamabad Embassy asking why, specifically, his application had been denied. On July 13, 2009 the Embassy responded, stating that Berashk's application was denied under INA section 212(a)(3)(B), which specifies terrorism-related grounds for inadmissibility.[1] The

[1] INA section 212(a)(3)(B), codified as 8 U.S.C. section (a)(3)(B) states that an alien is admissible who:

email also stated that "[i]t is not possible to provide a detailed explanation of the reasons for refusal" and cited INA subsections (b)(2)-(3), codified at 8 U.S.C. sections 1182(b)(2)-(3). 8 U.S.C. section 1182(b)(3) al-

---

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years

. . . .

lows the government to withhold the specific reasons for the denial for aliens who have been determined to be inadmissable under 8 U.S.C. section 1182(a)(2) or (a)(3). Din then unsuccessfully attempted to get further information from numerous sources, including the Kabul Embassy, the Islamabad Embassy, LegalNet, the Office of Visa Services, and the Public Inquiries Division of the U.S. State Department. On January 4, 2010, USCIS sent Din a Form I–797 "Notification of Action," signaling the finality of denial.

Din brings this action seeking a writ of mandamus directing defendants to "properly adjudicate" Berashk's visa application.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal may be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988). A motion to dismiss should be granted if a plaintiff fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, —, 129 S. Ct. 1937, 1949,

173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 556). Allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept as true pleadings that are no more than legal conclusions or the "formulaic recitation of the elements" of a cause of action. *Iqbal*, 129 S. Ct. at 1940; *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950.

DISCUSSION

Defendants have moved to dismiss asserting a lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). Din counters, arguing that the government must provide a facially legitimate and bona fide reason for the denial of her husband's visa application.

Din's allegation that the government violated her constitutional rights to due process by denying her husband's visa application satisfies the subject matter jurisdiction requirements of 28 U.S.C. section 1331. In *Bustamante v. Mukasey*, the Ninth Circuit held that although "it has been consistently held that the consular official's decision to issue or withhold a visa is not subject either to administrative or judicial review, . . . courts have identified a limited exception to

the doctrine where the denial of a visa implicates the constitutional rights of American citizens." 531 F.3d 1059, 1061 (9th Cir. 2008). Just as in *Bustamante*, Din asserts that she has a protected interest in her marriage, which gives rise to a right to challenge the constitutionality of the procedures used in the consideration of her husband's visa application. *Id.* ("Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause."). Thus, just as in *Bustamante*, "a U.S. citizen raising a constitutional challenge to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision. As long as the reason given is facially legitimate and bona fide the decision will not be disturbed." *Id.* The court considers each prong—facially legitimate and bona fide—in turn.

I. *Facially legitimate*

The government cites to 8 U.S.C. section 1182(a)(3)(B) as the reason for the denial of Berashk's visa. In *Bustamante*, plaintiff's visa was denied pursuant to section 1182(a)(2)(c), and the court held that "[t]his is plainly a facially legitimate reason, as it is a statutory basis for inadmissability." *Id.* at 1062. Similarly here, the citation to 8 U.S.C. section 1182(a)(3)(B) is a facially legitimate reason.

Din argues that Section 1182(a)(3)(B) is comprised of numerous grounds for inadmissability and that she was not informed about which particular ground the government applied here. Consequently, she contends that the lack of granularity renders the reason facially

illegitimate. This granularity, however, need not be provided. According to 8 U.S.C. section 1182(b)(3), the government may withhold the specific reasons for the denial for aliens who have been determined to be inadmissable under 8 U.S.C. section 1182(a)(2) or (a)(3). Consequently, a reference to Section 1182(a)(3) is sufficient to be facially legitimate.

II. *Bona fide reason*

Din argues that the government must demonstrate that its reason for denying Berashk's visa was bona fide. Din confuses the burden of proof on the issue. A valid statutory basis also qualifies as a bona fide reason for denial unless the plaintiff "[makes] an allegation of bad faith sufficient to withstand dismissal." *Bustamante*, 531 F.3d at 1062-63; *see also Amer. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (holding that a consular officer's facially legitimate decision was non-reviewable "in the absence of a well-supported allegation of bad faith, which would render the decision not bona fide"). Din therefore bears the burden of pleading a well-supported allegation of bad faith sufficient to withstand dismissal.

Din claims that "[t]he fact that Mr. Berashk's low-level employment in the Afghan Ministry of Social Welfare before, during, and after the Taliban occupation of Afghanistan alone cannot trigger any of the grounds for inadmissibility listed in 8 U.S.C. § 1182(a)(3)(B), and no other facts relevant to those grounds of inadmissibility exist." Complaint ¶ 57. This assertion, which the court will assume is true for the purposes of this motion, is insufficient to allege bad faith. "Under *Man-*

del's limited inquiry, the allegation that the Consulate was mistaken about [the visa applicant's] involvement with [illegal activities] . . . fails to state a claim upon which relief could be granted." *Bustamante*, 531 F.3d at 1063. Although Din's allegation suggests that the government may have been mistaken in failing to grant the visa on terrorism-related grounds, it does not suggest that the "consular official did not in good faith believe the information he had." *Id.* at 1062. Nor does it allege that the consular official did not receive the pertinent information from other governmental o-ganizations or acted upon information she knew to be false. *Id.* at 1063. In this respect, the situation here is indistinguishable from *Bustamante*, where "the Bustamantes alleged in their complaint that Jose is not and never has been a drug trafficker," except that Din alleges that Berashk has never engaged in terrorism-related activities. *Id.* In sum, while the facts that Din has pled may be "consistent" with a finding of bad faith; they do not cross the line from possibility to plausibility of entitlement to relief. *Iqbal*, 129 S. Ct. at 1949.

For the same reasons, Din's allegation that the Form 194 letter states that the Islamabad embassy will issue Berashk's visa does not suggest bad faith. Din does not allege that Berashk was told that the visa would be granted, simply that if it were to be granted, it would be issued by the Islamabad embassy. Morever, this allegation suggests simply that the statements in the letter may have been made either improvidently or prematurely, not in bad faith. Din's blanket assertion that "[n]o good faith exists that is sufficient to constitute a

facially legitimate and bona fide reason for the denial of Mr. Berashk's visa application under 8 U.S.C. § 1182(a)(3)(B)" is also insufficient. Complaint ¶ 57. Under *Iqbal*, a pleading that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). Therefore, Din has failed to state a claim upon which relief can be granted.

Din urges the court to delve deeper into the factual issues here. She cites to various parole denial cases to support this contention. However, as the Second Circuit has held, the reasoning in these cases cannot be used when assessing the legitimacy of a visa denial:

> We doubt that the judicial decisions reviewing administrative denial of parole are even applicable to the consular denial of a visa. Although several courts purport to apply the *Mandel* standard when reviewing denials of parole, the parole and visa decisions are significantly different. Parole concerns release from determination; a visa concerns admission into this country. It is understandable that some courts exercising habeas jurisdiction would make at least a limited factual inquiry as to a local District Director's ground for confining an alien. But a similar inquiry does not seem appropriate concerning the visa decision of consular officers stationed throughout the world.

Amer. Acad. of Religion, 573 F.3d at 136. This court agrees with the Second Circuit's rationale. Din's attempt to draw support from *Allende v. Shultz* is like-

wise unpersuasive because "that decision declared a visa denial invalid because the supporting affidavit made clear that the denial had been based on the applicant's prior speeches, activity that the Court ruled was an impermissible basis under then-existing law." *Id.* (citing *Allende v. Shultz*, 845 F.2d 1111, 1120-21 (1st Cir. 1988)). This court therefore declines to undertake a more sweeping factual inquiry.

The court is aware that because the government invoked its statutory right under 8 U.S.C. section 1182(b)(3) to withhold explanation of its rejection of Berashk's visa application, Din possesses little relevant information with which to meet the requirements of Rule 8. Although the burden is on plaintiff to make a well-supported allegation of bad faith, here, because of Section 1182(b)(3), it is nearly impossible for Din to obtain and therefore plead any facts that would meet the pleading standard under *Iqbal*. Indeed, Din does not even know the particular basis for the rejection of the visa application. Nor does Din know the information the government relied upon when making its determination. Consequently, Din cannot plead that the Consulate did not receive the relevant information from other governmental agencies, or that the "Consulate acted upon information it knew to be false." *Bustamante*, 531 F.3d at 1063. It therefore appears that there is effectively no opportunity for review or recourse for spouses of visa applicants who are denied further information about their rejections under Section 1182(b)(3). Nevertheless, the catch-22 created by Section 1182(b)(3) cannot be resolved by a mere incantation that the government acted in bad faith. Thus,

on the record before the court, there is no reason to believe that the consular officer acted in bad faith. Therefore, the first and third causes of action are dismissed.

III. *Notice provision*

Din also seeks, as her second cause of action, a judicial declaration that the notice of denial provisions in 8 U.S.C. section 1182(b)(3) are unconstitutional as applied to her. The notice provisions, however, apply only to the alien and not the United States citizen; consequently, Din lacks standing to challenge the statute.

CONCLUSION

Defendants' motion to dismiss is GRANTED. The Clerk of the Court shall close the file.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-16772
D.C. No. 3:10-cv-00533-MHP
Northern District of California
San Francisco

FAUZIA DIN, PLAINTIFF-APPELLANT

v.

JOHN F. KERRY, SECRETARY OF STATE; JANET A. NAPOLITANO, SECRETARY OF HOMELAND SECURITY; ERIC H. HOLDER, JR., ATTORNEY GENERAL, ATTORNEY GENERAL OF THE UNITED STATES; RICHARD OLSON, AMBASSADOR OF THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; CHRISTOPHER RICHARD, CONSUL GENERAL OF THE CONSULAR SECTION AT THE UNITED STATES EMBASSY, ISLAMABAD, PAKISTAN; JAMES B. CUNNINGHAM, AMBASSADOR OF THE UNITED STATES EMBASSY, KABUL, AFGHANISTAN, DEFENDANTS-APPELLEES

[Filed: Dec. 24, 2013]

ORDER

Before: CLIFTON and MURGUIA, Circuit Judges, and COLLINS, Chief District Judge.*

Judge Clifton has voted to grant the petition for rehearing en banc. Judge Murguia has voted to deny the petition for rehearing en banc and Judge Collins so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellees' petition for rehearing en banc, filed September 9, 2013, is DENIED.

---

* The Honorable Raner C. Collins, Chief United States District Judge for the District of Arizona, sitting by designation.

APPENDIX D

1. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the of-

fenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of Title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the

United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of Title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of Title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of Title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or col-

luder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland

Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi) (III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and

convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's

past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any

other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the

party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of Title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of Title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the

Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of Title 18, is inadmissible.

* * *

(b) Notices of denials

(1) Subject to paragraphs (2) and (3), if an alien's application for a visa, for admission to the United States, or for adjustment of status is denied by an immigration or consular officer because the officer determines the alien to be inadmissible under subsection (a) of this section, the officer shall provide the alien with a timely written notice that—

(A) states the determination, and

(B) lists the specific provision or provisions of law under which the alien is inadmissible or adjustment[4] of status.

(2) The Secretary of State may waive the requirements of paragraph (1) with respect to a particular alien or any class or classes of inadmissible aliens.

---

[4] So in original. Probably should be preceded by "ineligible for".

(3) Paragraph (1) does not apply to any alien inadmissible under paragraph (2) or (3) of subsection (a) of this section.