No. 23-334

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF STATE, ET AL.,

Petitioners,

—v.—

SANDRA MUÑOZ, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF SOUTHERN CALIFORNIA, ACLU OF NORTHERN CALIFORNIA, AND ACLU OF SAN DIEGO AND IMPERIAL COUNTIES IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES & REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU, through its Immigrants' Rights Project and state affiliates, engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of noncitizens. The ACLU of Southern California, ACLU of Northern California, and ACLU of San Diego and Imperial Counties are affiliates of the ACLU.

Amici have extensive experience litigating cases concerning both constitutional protections for marriage and constitutional safeguards in the U.S. immigration system. Our cases before this Court as counsel include *Obergefell v. Hodges*, 576 U.S. 644 (2015) and *Loving v. Virginia*, 388 U.S. 1 (1967), and as amici include *Kerry v. Din*, 576 U.S. 86 (2015) and *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

INTRODUCTION

Amici address the first question presented: whether a U.S. citizen has a constitutional interest that is infringed by the government denying her noncitizen spouse a visa. The answer must be yes.

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[1] No party or counsel for a party authored this brief in whole or in part, and no one other than amici, their members, and their counsel have paid for the preparation or submission of this brief.

The Court has long recognized that marriage includes a constitutionally protected liberty interest of spouses to live together and raise a family. And in 1972, the Court held that a citizen's First Amendment interest in meeting face-to-face with a foreign national at an academic conference in the United States triggered due process protections and required the government to provide a facially legitimate and bona fide reason for a visa denial that interfered with that interest. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). If the interest in meeting a person at an academic conference triggers that requirement, surely the interest of a citizen who seeks to live together with the person to whom they have committed to spend their entire life deserves at least as much.

Contravening these precedents on due process, the government asks the Court to eliminate all judicial review here—even limited review under *Mandel*—contending that a citizen has *no liberty interest* in whether she can live with her spouse in her home country, and that denial of a visa at most only affects that right "incidentally." The Court should reject that request. Nine years ago, when this Court considered substantially similar issues in *Kerry v. Din*, only three Justices adopted the position the government urges. Six undertook a due process analysis, either under *Mandel* or a more exacting standard. 576 U.S. 86, 102-105 (2015) (Kennedy, J. and Alito, J., concurring); *see id.* at 112 (Breyer, J., dissenting, with Ginsburg, Kagan, and Sotomayor, JJ.). Similarly, in *Trump v. Hawai'i*, 585 U.S. 667, 703 (2018), the Court explained that some "judicial

inquiry" is appropriate "when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen" and went on to address the citizen plaintiffs' Establishment Clause claim at length. *See id.* at 699-703. And lower courts have followed suit. *See* Part II, *infra*.

The government's position that U.S. citizens have no constitutional interest whatsoever in a decision to exclude their spouses from the country is contrary to the constitutional protections afforded to marriage, and unnecessary to safeguard the government's interests in the visa process. The Court should start its analysis by recognizing that a U.S. citizen who petitions for a visa for her noncitizen spouse has a liberty interest that is implicated by the government's denial of the visa, and that due process requires some form of judicial review.

SUMMARY OF ARGUMENT

Mandel has long guided federal courts' review of the government's denial of visas, and that level of protection should be the minimum afforded here.

The Court should reject the government's suggestion, contrary to *Mandel*, that U.S. citizens have no constitutional liberty interest whatsoever in the admission of their spouse and life partner. The long-recognized liberty interest in marriage includes an interest in choosing to live together as a family. The government's suggestion that Muñoz's interests are not implicated because she can leave her home country and live overseas with her husband does not

comport with this Court's due process precedents. And Muñoz is not merely incidentally affected by the decision. Congress has expressly provided that, as a U.S. citizen married to a foreign national, she has the right to file a petition for her noncitizen husband to seek a visa to live with her. Numerous statutes and regulations make clear that the U.S.-citizen spouse plays a critical part throughout the application process, and rightly so, as Congress recognized that the resolution directly and substantially affects her life.

The government's contention that Muñoz's liberty interest is not implicated because its denial of her husband's visa only "incidentally" or "indirectly" affects any interest in marriage is without merit. The exact same argument could be made about the U.S.-citizen scholars who petitioned for a visa for Mandel. The government denied Mandel a visa waiver based on his failure to conform to restrictions on a prior visa; its reason had nothing to do with the scholar plaintiffs' speech and association rights. Yet the Court held that because the denial had the *effect* of interfering with their First Amendment right to meet with Mandel face to face, the scholars' rights were implicated and they were entitled to be heard. Just as the U.S. citizens who invited Mandel to meet in the United States had a constitutional interest that triggered due process and judicial review, Muñoz has *at least* as strong a constitutional interest triggering judicial review. In both cases, the government's reason for denying the visa was not aimed at interfering with the relationship between the U.S.-citizen petitioner and

the noncitizen seeking the visa; nonetheless, the Court rejected the government's effort to erase the liberty interest from the analysis in *Mandel*, and it should do so here.

Muñoz's constitutional liberty interest does not mean, of course, that she can compel the government to issue her husband's visa—no more than the scholars in *Mandel* could compel the admission of the economist they invited to their conference. *Mandel* recognized the government's substantial interest in controlling its borders and the discretionary nature of the waiver at issue, and therefore required only a facially legitimate and bona fide reason in that case. Certainly no less than that minimal requirement should apply here.

The government proffers no sound reason to depart from precedent and deny judicial review here. The sort of inquiry undertaken by the courts below imposes little burden on the government, whose actions here deeply affect the constitutional rights of a U.S. citizen. The government's alternative—that U.S. citizens' lives and families can be upended by a consular official for any reason or no reason at all, and with no judicial review—does not comport with due process.

ARGUMENT

The liberty interest in marriage has long been understood to encompass the right to choose to live with one's family, and in doing so to "establish a home." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923);

see also Obergefell v. Hodges, 576 U.S. 644, 668 (2015) (quoting *Meyer* for this proposition). Congress itself has long recognized this interest by permitting U.S. citizens to petition for their spouses to be eligible for immigrant visas, which would allow the citizen to live with her spouse in her home country. To protect this right, Sandra Muñoz petitioned for her noncitizen spouse to be eligible to apply for an immigrant visa. When his visa was denied notwithstanding her approved petition, she asked for the reason. This Court has long required the government to provide such a reason to a U.S. citizen whose constitutional interests are implicated by a visa denial. Because Muñoz had at least as strong a constitutional interest in the admission of her life partner as the academics who sought to meet Mandel at a conference, she should receive protections that are at least as strong as those afforded to the professors in *Mandel*.

In *Mandel*, U.S. citizens who had invited a Belgian Marxist economist to speak at academic events in the U.S. challenged the denial of his visa, arguing that the denial infringed their First Amendment rights. 408 U.S. at 754-56. The government had denied Mandel a waiver of his ground of inadmissibility, citing his alleged violations of the terms of prior visas. *Id.* at 757-59. Then, as now, the government claimed that no constitutional right was implicated at all, in light of the government's sovereign power to control admission decisions, *id.* at 764-66; that any harm to U.S. citizens was merely incidental to regulating the border; and that, in any event, no constitutional rights were infringed because

the citizen plaintiffs had alternatives: they could read Mandel's writings or speak to him by phone. *Id.* Then, as now, the government claimed that it could deny the visa for "any reason or no reason." *Id.* at 769.

The Court rejected each of the government's contentions, holding that the U.S citizens' First Amendment rights were implicated by the denial of Mandel's visa. *See id.* at 764-65; *see also id.* at 773 (Douglass, J., dissenting) (agreeing with majority on this point), 776 (Marshall, J., dissenting) (same). Rejecting the government's argument that it owed the U.S. citizens nothing, but acknowledging the government's interest in controlling admission, the Court required *some* process—namely, that the government must have and give a facially legitimate and bona fide reason for the decision. *Id.* at 769. Muñoz's interest in the admission of her husband is at least as strong, if not stronger, than the American professors' interests in Mandel's in-person attendance at a conference. If it was no answer to say to academics that they could speak by phone, it is certainly no answer to Muñoz to say that she can live with her husband only if she leaves her home country. The government's view—that it may provide "any reason or no reason" at all—was properly rejected in *Mandel* and should be rejected here as well. *Id.*

I. DENYING A VISA TO MUÑOZ'S NONCITIZEN SPOUSE BURDENS MUÑOZ'S CONSTITUTIONAL INTEREST IN HER MARRIAGE.

This Court has long recognized that the Constitution protects the liberty interest in marriage. *See* Part I.A, *infra*. That interest encompasses, among other things, the right to make certain personal decisions about one's family, including whom to marry, whether to have children, how to raise them, and whether to live together. The Constitution also protects the right of U.S. citizens to live in the United States. *Agosto v. INS*, 436 U.S. 748, 753 (1978) (recognizing liberty interest in residing in country of citizenship). When the government denies a visa to a citizen's spouse, the denial forces the citizen to choose between two constitutionally protected interests: living in her home country or living with her spouse. Like virtually all constitutional interests, these interests are not absolute. They can be overridden in appropriate circumstances. But the interest in living with one's lawfully wedded spouse should at a bare minimum give rise to the same basic protection that *Mandel* conferred on the right of an academic to meet face-to-face with a foreign national.

A. The Court and Congress have long recognized that the right to marry includes a right to live with one's spouse.

Few decisions are more consequential and personal than whether and whom to marry. For

many, marriage is "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (internal citation omitted). The right to marry, and to live with one's spouse and family, has long been recognized as protected by the Constitution. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause"). The denial of a visa to a U.S. citizen's spouse implicates a core element of the "right to marry": the right to choose to live with family, and in doing so to "establish a home." *Meyer*, 262 U.S. at 399; *see also Obergefell*, 576 U.S. at 668 (same); *Loving*, 388 U.S. at 4, 12 (law prohibiting interracial "cohabitating as man and wife" infringes "one of the 'basic civil rights of man,' fundamental to our very existence and survival") (quotations and citations omitted); *Zablocki v. Redhail*, 434 U.S. 374, 384-86 (1978) ("reaffirming the fundamental character of the right to marry"); *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 501 (1977) (plurality) ("But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under . . . the Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice [to live together]"); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (marriage is "a right of privacy older than the Bill of Rights").

Thus, the decision to marry and the decision to live together, while distinct, are nonetheless traditionally intertwined. Just as this Court has recognized in its precedents that living together with

one's spouse is a "basic civil right[]," *Loving*, 388 U.S. at 12, Congress and the executive branch recognize this in the immigration laws. Congress has long made marriage to a U.S. citizen a prioritized basis for eligibility to immigrate or gain legal status, so that citizens can live together in their home country with their chosen spouse. *See* Act of Feb. 10, 1855, § 2, 10 Stat. 604, 604 (naturalization without the usual residency requirement for noncitizen wives); Act of May 26, 1924, Pub. L. No. 139, § 4(a), 43 Stat. 153, 155 (citizens' wives and unmarried children exempt from immigration quotas); Act of July 11, 1932, Pub. L. No. 277, § 1(a), 471 Stat. 656, 656 (similar for noncitizen husbands). This has included carving out exceptions to laws that would otherwise have kept spouses apart. For example, when Congress enacted an early immigration exclusion for "persons afflicted with . . . a dangerous contagious disease," it excepted the wife or minor children of a U.S. citizen or legal permanent resident. Act of Mar. 3, 1903, Pub. L. No. 162, §§ 2, 37, 32 Stat. 1213, 1214, 1221. And when making major revisions to immigration law, Congress has made clear that "family unification [is] the cornerstone of American immigration law and policy." 136 Cong. Rec. H12358-03; H.R. Rep. No. 101-723 (1990); *see also* H.R. Rep. No. 82-1365, at 39 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1691 (noting "the well-established policy of maintaining the family unit wherever possible"). Today, spouses of U.S. citizens are not subject to quotas. *See, e.g.*, 8 U.S.C. §§ 1151(b), 1151(b)(2)(A)(i).

To the same end, when examining whether a marriage between a U.S. citizen and a foreign national is bona fide for purposes of extending this privilege, immigration officials often inquire as to whether the couple lives together or plans to do so. *See* 8 U.S.C. § 1430; Adjudicator's Field Manual, ch. 21, § 21.3 ("No cohabitation" is an indicator of an invalid marriage).[2]

Government actions that impede marital unity—like the visa denial at issue here—burden the marital right and therefore trigger due process protections. A visa denial burdens this interest even if the government action does not "forbid," or "refuse[] to recognize" a marriage. *See* Pet. Br. 27 (arguing to the contrary, relying on *Din* plurality, 576 U.S. at 94, 101). For example, mandatory maternity leave rules for school employees place too "heavy [a] burden on the exercise" of "personal choice in matters of marriage and family life," even though the challenged rules do not forbid the family relationships or deny legal recognition. *See Cleveland Bd. Of Educ.*, 414 U.S. at 639-40. Likewise, a law that prohibits the provision of information and medical advice on contraception has a "destructive impact" on "the marriage relationship" even though it does not directly regulate or prohibit marriage. *Griswold*, 381 U.S. at 480, 485-86. S*ee also Turner v. Safley*, 482 U.S. 78, 99 (1987) (requiring prison superintendent's permission for prisoners to marry is an impermissible burden); *Boddie v. Connecticut*, 401 U.S. 371, 374, 383

[2] https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm21-external.pdf, at 87.

(1971) (fees to file for divorce violate due process right to alter the "fundamental human relationship" of marriage); *United States v. Windsor*, 570 U.S. 744, 774 (2013) ("demean[ing] those persons who are in a lawful same-sex marriage" infringes "the liberty of the person" to marry).

The government's argument that laws that only "incidentally" affect marriage do not implicate the liberty interest in marriage, Pet. Br. 27-28, cannot be squared with this long and consistent line of authority. In those precedents, this Court has held repeatedly that the interest in marriage is implicated even when the government is not regulating marriage as such, but nonetheless impeded the basic rights of married couples to live together and make basic decisions about their families.

The government notes that *Obergefell* did not directly resolve the question here. Pet. Br. 27. But central to the Court's rationale in *Obergefell* was a rejection of government defendants' efforts to narrowly define the right to marry:

> *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.

576 U.S. at 671. Muñoz's liberty interests in her marriage exist, regardless of the government's rationale for impinging on them. The interests in marriage may support different rules in different contexts, depending on the strength of the government interests in whatever rule or regulation impinges on the right. But the existence of the right cannot be gainsaid. *See also id.* at 665-66 (*Loving* held "the right to marry is of fundamental importance for *all* individuals") (emphasis added) (quoting *Zablocki*, 434 U.S. at 384).

As in all of these cases, "acknowledg[ing] that [Muñoz's] constitutional 'right[]'" is 'implicated,'" *Hawai'i*, 585 U.S. at 703 (quoting *Mandel*, 408 U.S. at 764-65), does not end the inquiry; it begins it. In particular, that Muñoz has a constitutional interest does not mean that the government must issue her husband a visa. But under this Court's precedents, it does mean that Muñoz is owed *some* process.

B. Muñoz does not assert a right to "compel" entry, but only a right to a fair process.

The government argues that "Muñoz's fundamental right to marry does not entail the very different right to compel the United States to admit her noncitizen spouse." Pet. Br. 27. But neither Muñoz nor amici argue that the existence of a liberty interest means that her husband must be admitted—only that the government must provide a minimally fair process.

In *Mandel*, the Court rejected a parallel argument. There, the government argued that the U.S. scholars did not have a right to compel Mandel's entrance to the country. *See Mandel* U.S. Reply Br. at *9, 1972 WL 135748 (arguing that the U.S. citizens who wanted to hear Mandel speak had "no First Amendment rights to compel an alien's admission"); *Mandel* U.S. Br. at *31-*32, 1972 WL 135747 ("appellees' desire to inform themselves further about Mandel's Marxist philosophy gives them no First Amendment right to compel his admission into the United States."). This Court rejected that framing and held that the U.S. citizens' "right to receive information and ideas" did not compel Mandel's entry, but did require the government to provide a facially legitimate and bona fide reason for Mandel's exclusion, reviewable in court. *Mandel*, 408 U.S. at 762, 770. The Court noted that even in the context of visa issuance, where the government's powers are at their height, "the Executive Branch of the Government must respect the *procedural* safeguards of due process." *Id.* at 767 (quoting *Galvan v. Press*, 347 U.S. 522, 531-32 (1954)) (emphasis added). That is precisely what Muñoz seeks: the procedural safeguards of due process.

C. Muñoz's liberty interest in her marriage is impeded if the government conditions her enjoyment of that right on the abandonment of another constitutional right.

The government concedes that there is a liberty interest in the right to marry. Pet. Br. 26. It does not dispute that that interest includes the right to choose to live with one's spouse, or that a visa denial impedes a U.S. citizen's interest in living with her noncitizen spouse. The government nonetheless contends that "neither [Muñoz's] right to live with her spouse nor her right to live within this country is implicated here." Pet. Br. 28 (quoting *Din*, 576 U.S. at 101) (plurality). Its view appears to be that Muñoz's marriage right is not "implicated" because she "remains free to live with her husband anywhere in the world that both individuals are permitted to reside." *Din*, 576 U.S. at 101 (plurality). But the Hobson's choice of abandoning her country or abandoning her spouse does not extinguish these rights. One might just as well have said that the scholars who challenged Mandel's exclusion could meet with him "anywhere in the world" they were permitted to gather. But this Court rejected that argument—even though it was possible for the U.S. citizens to vindicate their constitutional interest by leaving the United States, the fact remained that denying Mandel's entry implicated their First Amendment interest in meeting with him *in the United States*. *Mandel*, 408 U.S. at 770. Muñoz's situation is no different.

The right of a U.S. citizen to live in this country is fundamental, and its loss can be catastrophic. *See Mandoli v. Acheson*, 344 U.S. 133, 139 (1952) (fundamental attribute of United States citizenship is a "right to . . . remain in this country"); *Agosto*, 436 U.S. at 753 (recognizing liberty interest in residing in country of citizenship); *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922) (same).

This Court has deemed it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). In *Simmons,* this Court held that a defendant who chose to assert his Fourth Amendment rights could not be held to surrender his Fifth Amendment right by doing so. *Id.* To the same effect, the Court rejected the proposition that a U.S. citizen could be required to forfeit his right to associate with the Communist Party as a condition of obtaining a passport; the government was not permitted to force a choice between the right to travel and the right of association. *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964) ("[t]he restrictive effect . . . cannot be gainsaid by emphasizing, as the Government seems to do, that a member of a registering organization could recapture his freedom to travel by simply in good faith abandoning his membership in the organization"); *see also United States v. Robel*, 389 U.S. 258, 264-65 (1967) (government cannot condition right to a job on abandoning association with Communist Party).

The government's contention thus goes against this Court's precedents on marriage, too. Mildred and Richard Loving presumably could have moved out of Virginia to escape the commonwealth's law prohibiting interracial marriage; indeed, they were married in the District of Columbia and could have returned there. *Loving*, 388 U.S. at 2. But this Court did not use that fact to hold that the Lovings' fundamental interests in marriage were not infringed by the Virginia law. If a state or municipality refused to allow a married couple to cohabitate, but otherwise recognized the marriage, it would not be a sufficient answer to the couple's due process challenge to say that they are "free to live . . . anywhere . . . that both individuals are permitted to reside." *Din*, 576 U.S. at 101 (plurality); *see also Moore*, 431 U.S. at 499, 550 (East Cleveland ordinance restricting a family's right to live together harmed that liberty interest despite the fact the family was "free" to live together "in other parts of the Cleveland metropolitan area"). But that is the faulty reasoning the government presses here to say that Muñoz has no liberty interest at stake.

There may also be practical obstacles to moving elsewhere. The Department of State currently has formal guidance that cautions Americans against travel in (much less relocation to) more than 40 countries—including El Salvador, where Muñoz's

spouse has citizenship—because of the danger to life and safety merely from visiting there.[3]

Thus, in law and fact, it is no answer to Muñoz's complaint to say that she can leave the United States and move to El Salvador to be with her husband. Like the scholars in *Mandel*, she has a constitutionally protected interest *here*, and while that interest does not override the government's sovereign authority to determine admission, it does require, at a minimum, that the government comply with the requirements of the Due Process Clause.

D. Muñoz is directly affected by the visa denial.

The government argues that where its actions only "incidentally" or "indirectly" affect a citizen's rights, those rights are not implicated at all. Pet. Br. 14. But that is plainly wrong, as *Mandel* itself illustrates. In that case, the government sought to deny Mandel a visa based on his prior failure to adhere to the conditions of his visa. 408 U.S. at 758-59. That ground did not *directly* target Mandel's speech or association, much less the speech or association of the U.S.-citizen plaintiffs who sought to meet with him. It infringed on the citizens' speech and association only indirectly and incidentally. Yet the Court held that the denial implicated the U.S.-citizen

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[3] *See, e.g.*, https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/ (U.S. Department of State currently has advisories warning Americans not to travel to 19 countries and urging them to "reconsider" travel to an additional 24 countries).

scholars' First Amendment rights and evaluated whether the government had given a "facially legitimate and bona fide reason." *Id.* at 770.

Here, the denial of a visa to Muñoz's spouse is not directly aimed at interfering with her marriage, just as the denial of a waiver to Mr. Mandel was not aimed at preventing him from speaking with his hosts in the U.S. But the denial will indisputably impinge on Muñoz's right to live with her husband in her home country, just as the denial of Mandel's visa impinged on the right of the scholars to meet Mandel face-to-face in the United States. Accordingly, if denying Mandel a visa implicated the scholars' First Amendment rights, so too the denial of a visa to Muñoz's husband implicates her right to marry.

The government's reliance on *O'Bannon v. Town Court Nursing Center*, is unpersuasive. Pet. Br. 28 (citing 447 U.S. 773 (1980)). *O'Bannon* is distinguishable both on its facts and with respect to the governing statutory regime. Most important, here Congress has recognized the central role of marriage in the family-based visa system and conferred rights on U.S.-citizen spouses that were simply inapplicable in *O'Bannon*.

In *O'Bannon*, the Court held that residents of a nursing home receiving government assistance for nursing care had no procedural due process rights with respect to a decision by state and federal agencies to revoke the home's certification to provide care at government expense, resulting in the home's closure. 447 U.S. at 775. The Court explained that the

residents had little to no role in any aspect of certification or decertification, and thus were completely "incidental" to that process. *See id.* at 785-86. In addition, the Court emphasized that the assistance residents received for such housing was not "reduce[d] or terminate[d]" and they were free to use another provider. *Id.* at 786. Nor was any of the hardship the residents might face from having to move based on a specific "decision to transfer a particular patient or to deny him . . . benefits, based on his individual needs or financial situation." *Id.* at 786-87. As the Court noted, *every* person at the nursing home—about 180 residents—was affected in roughly the same way, including residents who did not depend on government benefits at all. *Id.* at 787.

Unlike the nursing home residents in *O'Bannon*, who played no role in the certification process at issue, Congress has provided that a U.S.-citizen spouse such as Muñoz plays a central and indeed necessary role in the visa process. Her husband could not even begin to apply for an immigrant visa without her. Under federal statutes and regulations, Muñoz has an inextricable role in her husband's eligibility and throughout the process. *See generally* Resp. Br. 3-5 (Sections I.1-5).

- First, Congress has provided that the U.S.-citizen spouse must initiate the visa process by filing a petition to classify her husband as an immediate relative. 8 U.S.C. § 1201(a)(1)(A).

- Second, Congress has provided that the U.S.-citizen spouse must demonstrate that her marriage is bona fide, 8 U.S.C. § 1154(a)(1)(A)(i), and then the noncitizen spouse must apply for a waiver of unlawful presence in the United States. To obtain that waiver, the U.S.-citizen spouse must show that she would suffer "extreme hardship" if the waiver were denied. 8 U.S.C. § 1182(a)(9)(B)(v).
- Third, Congress requires the U.S.-citizen spouse to provide continued support in order for her husband to receive a visa. *See* 8 U.S.C. § 1183a(a)(1). Under federal regulations, a U.S.-citizen spouse may withdraw the initial petition and terminate the noncitizen spouse's visa application at any time prior to admission. 8 C.F.R. § 103.2(b)(6).[4]

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[4] Outside the specific context of family-based immigrant visas, the Immigration and Nationality Act is replete with sections recognizing the importance of the marital relationship and conferring rights on spouses. For example, even before beginning the immigrant visa application process, Congress has provided that noncitizens who are married to U.S. citizens may be temporarily admitted to the country as "nonimmigrant" visitors while they undergo that process, in the interest of "assur[ing] family unity." *See* 8 U.S.C. § 1182(d)(1), (11), (12). When an individual is granted refugee or asylum status, their spouse is also admitted, even if that spouse does not qualify independently. *See* 8 U.S.C. § 1157(c)(2)(A); 8 U.S.C. § 1158(b)(3)(A). For certain

In short, Congress and the implementing federal agencies have placed U.S.-citizen spouses at the center of the visa process. This alone categorically distinguishes this case from *O'Bannon*, as "the contours" of the rights at issue are markedly different. *O'Bannon*, 447 U.S. at 786.

But *O'Bannon* is also distinguishable because the harm to Muñoz's liberty interests is neither indirect nor speculative. *O'Bannon* compared the risk of harm the nursing home residents proffered to a "random" possibility of harm that "may" occur at the end of a "chain of events." *Id.* at 789 (quoting *Martinez v. California*, 444 U.S. 277, 281 (1980)). Here the burden on Muñoz's marriage is direct and immediate because the denial of the visa prevents her from living with her husband as a family in her country of nationality. *See* Part I.A, C, *supra*. Once again, the government's bald assertion that the visa denial here was "not directed at Muñoz or her marriage relationship," Pet. Br. 29, is irrelevant under the numerous due process precedents above, including *Mandel*, where the Court rejected a similar effort by the government to define away Mandel's U.S.-citizen

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grounds of exclusion (such as membership in the Communist Party) there are exceptions for spouses of family members who are citizens or legal permanent residents. *See* 8 U.S.C. § 1182(a)(3)(D)(i)-(iv); 8 U.S.C. § 1182(a)(6)(E)(i)-(ii). Conditional permanent resident status is available for spouses in order to maintain family unity. *See* 8 U.S.C. § 1186a(1). And it is simpler for spouses of U.S. citizens to naturalize than for people who are not married to U.S. citizens. *See, e.g.*, 8 U.S.C. § 1430.

would-be hosts' interests as only indirectly harmed by the visa denial. *See Mandel*, 408 U.S. at 764-65.

II. JUDICIAL REVIEW OF VISA DENIALS PROVIDES AN IMPORTANT BACKSTOP FOR U.S. CITIZENS' RIGHTS.

The government seeks to eliminate any oversight over a consulate denying a visa for a U.S. citizen's noncitizen spouse. Pet. Br. 17. This Court has never endorsed this extreme view, and certainly not where a U.S. citizen's fundamental constitutional right is implicated. It should not do so now.

There is nothing to back the government's claims that its interests will be harmed by even an iota of judicial review. To the contrary, lower courts have reviewed visa denials under *Mandel* without undermining in any way the government's national security or law enforcement interests. *See Hawai'i*, 585 U.S. at 704 ("*Mandel*'s narrow standard of review 'has particular force' in admission and immigration cases that overlap with the 'area of national security.") (quoting *Din*, 576 U.S. at 104) (Kennedy, J., concurring). Indeed, it is telling that the government cites no instance whatsoever in which such review led to the harms it warns against.

Federal courts across the country have evaluated challenges to visa denials under *Mandel*. Courts have denied challenges where they found no constitutional interest implicated. *See, e.g.*, *ZigZag, LLC v. Kerry*, No. 14–14118–DJC, 2015 WL 1061503, at *6 (D. Mass. Mar. 10, 2015). And courts have often

rejected challenges where reasonable minds could differ about whether an inadmissibility statute should be applied on the relevant facts. *See, e.g.*, *Hazama v. Tillerson*, 851 F.3d 706, 709 (7th Cir. 2017).

But, crucially, U.S. citizens have sometimes prevailed. *See, e.g.*, *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 133 (2d Cir. 2009) (government did not comply with requirements of the statute of inadmissibility); *Allende v. Shultz*, No. 83–3984–C, 1987 WL 9764, at *6 (D. Mass. Mar. 31, 1987), *aff'd*, 845 F.2d 1111 (1st Cir. 1988) (same); *see also City of New York v. Baker*, 878 F.2d 507, 512 (D.C. Cir. 1989) (clarifying and affirming that district court had the power to issue a declaratory judgment that visa could not be denied on grounds found to be unlawful, but that it lacked the power to order issuance of the visa).

Muñoz advocates for application of the *Mathews v. Eldridge*, 424 U.S. 319 (1976) balancing standard to determine the process she is owed. Resp. Br. 43-44. If the Court adopts that approach the agency's failure here is stark. But even under *Mandel*'s facially legitimate and bona fide standard, the government's actions—only asserting a "reasonable ground to believe" that Muñoz's husband intended to engage at least "incidentally" in "any . . . unlawful activity," Pet. Br. 32 (quoting 8 U.S.C. § 1182(a)(3)(A)(ii))—cannot satisfy that test, as the court of appeals correctly held, Pet. App. 33a.

Without at least some minimum process, American citizens could be arbitrarily denied the

opportunity to start or continue their married lives with their spouses on the unreviewable say-so of a consular official. The government's argument rests on the notion that foreign nationals outside our borders have no rights vis-à-vis entry. But when a U.S. citizen's rights are infringed upon—whether the First Amendment right to meet face-to-face or the due process right to marry—the calculus changes. The government's interests may be accorded due and even heavy weight, but due process requires it to provide at least a sufficient rationale for its action. If this Court eliminates even the minimal protection of judicial review, consular officials could deny visas to the spouses of U.S. citizens based on race, religion, sex, or wholly arbitrary decision making. And even mere errors or oversights are far more likely to go uncorrected with *no* possibility of court review, "irrespective of how mistaken [those decisions] might be." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 236 (2020). The Court has long recognized this—since at least *Mandel*—and the right to live with one's spouse in one's country merits at least the same protection as the right to have a foreign colleague attend an academic conference. Accordingly, the Court should reject the government's contention that Muñoz has no constitutional interest and no right to court review of a decision that so deeply affects her.

CONCLUSION

The Court should reject the government's proposal to jettison the longstanding requirement of judicial review and should affirm the decision of the court of appeals.

March 28, 2024

Respectfully submitted,

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