No. 13-1402

In the Supreme Court of the United States

JOHN F. KERRY, SECRETARY OF STATE, *et al.*,
Petitioners,

v.

FAUZIA DIN,
Respondent.

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

BRIEF OF *AMICI CURIAE* LAW SCHOOL PROFESSORS IN SUPPORT OF RESPONDENT

Robert Pauw
Counsel of Record
Gibbs Houston Pauw
1000 Second Ave., Suite 1600
Seattle, WA 98104
(206) 682-1080
rpauw@ghp-law.net

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

A. Origins of the Doctrine of Consular Non-Reviewability: the Early Cases 3

1. London v. Phelps. 5

2. Ulrich v. Kellogg. 7

B. The 1940s and 1950s: the Emergence of a Widely-Cited Non-Reviewability Doctrine. 9

C. *Kleindienst v. Mandel* and Consular Non-Reviewability. 16

D. The "Facially Legitimate and Bona Fide Reason" Standard. 18

1. Review of Claims that an Agency has Exceeded its Authority or Acted Inconsistently with Governing Law. 19

2. Review for the Existence of a Factual Basis for the Decision. 21

3. Review for Fundamentally Fair Procedures. 23

E. *Mandel's* "Facially Legitimate and Bona Fide Reason" Requirement is Consistent with 8 U.S.C. § 1182(b)(3). 27

CONCLUSION 33

APPENDIX

Appendix 1 Appendix of *Amici Curiae* . . . . . App. 1

TABLE OF AUTHORITIES

CASES

Abourezk v. Reagan,
785 F.2d 1043 (D.C. Cir. 1986) . . 18, 19, 20, 25, 29

Adams v. Baker,
909 F.2d 643 (1st Cir. 1990) 22

Allende v. Shultz,
845 F.2d 1111 (1st Cir. 1988) 18

Am. Acad. of Religion v. Napolitano,
573 F.3d 115 (2d Cir. 2009) 18, 21, 28, 30

Am. Sociological Ass'n v. Chertoff,
588 F. Supp. 2d 166 (D. Mass. 2008) 23

Am. Sur. Co. of New York v. Sullivan,
7 F.2d 605 (2d Cir. 1925) 9, 10

Amanullah v. Nelson,
811 F.2d 1 (1st Cir. 1987) 23

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 7

Bowman Transp. v. Arkansas Best Freight Sys.,
419 U.S. 281 (1974) 25

Bustamante v. Mukasey,
531 F.3d 1059 (9th Cir. 2008) 18, 24, 28, 29

Califano v. Sanders,
430 U.S. 99 (1977) 11

Clark v. Martinez,
543 U.S. 371 (2005) 31

Cleveland Bd. of Educ. v. LaFleur,
414 U.S. 632 (1974) 24

Delgado v. Holder,
648 F.3d 1095 (9th Cir. 2011) (en banc) 31

Din v. Kerry,
718 F.3d 856 (9th Cir. 2013) 21, 27

Ekiu v. U.S.,
142 U.S. 651 (1892) 15, 16

Fiallo v. Bell,
430 U.S. 787 (1977) 18

Friedberger v. Shultz,
616 F. Supp. 1315 (E.D. Pa. 1985) 20

Gegiow v. Uhl,
239 U.S. 3 (1915) 15, 30

Greene v. McElroy,
360 U.S. 474 (1959) 25

INS v. St. Cyr,
533 U.S. 289 (2001) 15, 28, 30, 33

Int'l Union of Bricklayers & Allied Craftsmen v. Meese,
761 F.2d 798 (D.C. Cir. 1985) 20

Japan Whaling Ass'n v. Am. Cetacean Soc'y,
478 U.S. 221 (1986) 20

Judulang v. Holder,
132 S. Ct. 476 (2011) 29, 31

Katz v. Comm'r of Immigration,
245 F. 316 (9th Cir. 1917) 15

Kleindienst v. Mandel,
408 U.S. 753 (1972) . . . . . *passim*

Kontrick v. Ryan,
540 U.S. 443 (2004) 7

Kwong Hai Chew v. Colding,
344 U.S. 590 (1953) 24

Landon v. Plasencia,
459 U.S. 21 (1982) 24

Licea-Gomez v. Pilliod,
193 F. Supp. 577 (N.D. Ill. 1960) 11, 12, 14

Loza-Bedoya v. INS,
410 F.2d 343 (9th Cir. 1969) 12, 13, 14

Marczak v. Greene,
971 F.2d 510 (10th Cir. 1992) 22, 23

Marozsan v. United States,
852 F.2d 1469 (7th Cir. 1988) 22

Mathews v. Eldridge,
424 U.S. 319 (1976) 25

Nadarajah v. Gonzales,
443 F.3d 1069 (9th Cir. 2006) 23

Nakamoto v. Ashcroft,
363 F.3d 874 (9th Cir. 2004) 9

Patel v. Reno,
134 F.3d 929 (9th Cir. 1997) 21, 29

Rosenberg v. Fleuti,
374 U.S. 449 (1963) 24

Rusu v. INS,
296 F.3d 316 (4th Cir. 2002) 25

Samirah v. Holder,
627 F.3d 652 (7th Cir. 2010) 16, 31

Seafarers Int'l Union v. Coast Guard,
736 F.2d 19 (2d Cir. 1984) 11

Singh v. Clinton,
618 F.3d 1085 (9th Cir. 2010) 20, 21

In re Spinnella,
3 F.2d 196 (S.D.N.Y. 1924) 6

U.S. ex rel Campbell v. Pate,
401 F.2d 55 (7th Cir. 1968) 22

United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 14, 15

United States ex rel. London v. Phelps,
22 F.2d 288 (2d Cir. 1927) . . . . . *passim*

United States ex rel. Ulrich v. Kellogg,
30 F.2d 984 (D.C. Cir. 1929) . . . . . *passim*

Webster v. Doe,
486 U.S. 592 (1988) 11

Yamataya v. Fisher,
189 U.S. 86 (1903) 31

Zadvydas v. Davis,
533 U.S. 678 (2001) 15, 28

STATUTES AND RULES

5 U.S.C. § 701, *et. seq*. (1946 Administrative Procedure Act) 2, 10

5 U.S.C. § 702 11

8 U.S.C. § 1104(a) (1952) 8, 12

8 U.S.C. § 1105a (1962) 13, 14

8 U.S.C. § 1182(a)(2) 27, 31

8 U.S.C. § 1182(a)(3) 21, 27, 31, 32

8 U.S.C. § 1182(b) 30

8 U.S.C. § 1182(b)(3) . . . . . *passim*

8 U.S.C. § 1201 (INA § 221) 10, 12

8 U.S.C. § 1329 (1952 . . . . . 2, 4, 10

22 C.F.R. § 42.81(b) 26, 33

22 U.S.C. § 1199 9

28 U.S.C. § 1331 . . . . . 7, 14

Act of 1924, 43 Stat. 153, 8 U.S.C. § 202(f) 4

Act of June 27, 1952, 66 Stat. 181, 190, §§ 211, 215 (codified at 8 U.S.C §§ 1181, 1185) 4

Act of March 2, 1921, 41 Stat. 1205, 22 U.S.C. § 227 3

Act of March 3, 1911, 36 Stat. 1091, 28 U.S.C. § 41(1) 7

Act of May 22, 1918, 40 Stat. 559, 22 U.S.C. §§ 223–226 3

Pub. L. 79-404, § 10, 60 Stat. 237, 243 (1946) 11

Pub. L. No. 94-574, § 2, 90 Stat. 2721 (Oct. 2, 1976) 10

OTHER AUTHORITIES

3 Moore's Digest 7

9 Foreign Affairs Manual 42.81 N2 27

Exec. Order No. 1,473 (Aug. 8, 1918) 3

R. Fallon, *On Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916 (1988) 29

Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) 28

Judicial Review of Visa Denials: Reexamining Consular Nonreviewability, 52 N.Y.U. L. Rev. 1137 (1977) 7

Stephen H. Legomsky, *Immigration and the Judiciary – Law And Politics In Britain And America* (1987) 5, 9

James Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash. L. Rev. 1 (1991) 9

L. Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 San Diego L. Rev. 887 (1989) 4

INTEREST OF AMICI[1]

This amici curiae brief is submitted on behalf of 73 professors and academics who teach immigration law at law schools throughout the United States ("Amici"). A complete list of amici is provided in Appendix 1.

Amici teach and/or practice in the field of immigration and nationality law. Amici seek to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice for individuals seeking benefits in immigration and naturalization matters.

SUMMARY OF THE ARGUMENT

This brief is submitted to provide the Court with historical background regarding the origins, nature, evolution, and limits of the so-called doctrine of consular non-reviewability. In Part A, we describe the initial adoption by Congress of a visa requirement and describe two important early cases that arose shortly thereafter, *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), and *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929). Although these cases are often cited as the cornerstone of

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[1] The parties were given notice and have consented to the filing of this brief. Their written consents are both included with this filing. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

consular non-reviewability, they do not support the position that consular decisions denying visas are inherently or absolutely unreviewable. As Part B explains, subsequent cases failed to reexamine these premises even in the face of significant statutory developments, such as the enactment of the Administrative Procedure Act and the Immigration and Nationality Act, as well as the later elimination of the amount-in-controversy requirement for general federal question jurisdiction. In Part C, we describe this Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), which recognized limited review of visa decisions to ensure that the action had a "facially legitimate and bona fide" basis. The *Mandel* decision recognizes that judicial review is appropriate when the rights of U.S. citizens are at stake but limits the judicial role because of plenary power concerns. In Part D, we explore the development of this "facially legitimate and bona fide" standard and argue that, consistent with this standard, judicial review can and should include: (1) review of questions of law, to ensure that the decision of the consular officer does not violate the governing statute or regulations; (2) review to ensure that there is a bona fide factual basis for the decision; and (3) review to ensure that minimally fair procedures have been used in making the decision. This limited review respects the plenary power of Congress and the Executive Branch but also provides limited protection for the constitutional rights of U.S. citizens that are at stake. Finally, in Part E, we note that this interpretation of the "facially legitimate and bona fide" standard is fully consistent with 8 U.S.C. § 1182(b)(3), which limits the obligation of the government to provide details behind a denial based on certain grounds of inadmissibility.

ARGUMENT

A. Origins of the Doctrine of Consular Non-Reviewability: the Early Cases

Prior to 1917 noncitizens seeking to enter the United States were not required to obtain a visa. Individuals could present themselves at the border and seek admission; if they were inadmissible, they would be refused entry. In 1917, during World War I, the Department of State and the Department of Labor issued a joint order to diplomatic, consular and immigration officers requiring that noncitizens have a passport and visa before seeking entry into the United States. Joint Order of Department of State and Department of Labor (July 26, 1917). The president designated the Secretary of State as the official in charge of issuing the visas. A year later, as a war time measure, Congress confirmed the visa requirement by authorizing the President to make "reasonable rules, regulations, and orders" for the entry of noncitizens into the United States. Act of May 22, 1918, 40 Stat. 559, 22 U.S.C. §§ 223–226. Shortly thereafter, the President required noncitizens seeking entry to have a visa, and after World War I ended, Congress enacted legislation to continue the passport and visa requirement indefinitely. Exec. Order No. 1,473 (Aug. 8, 1918); Act of March 2, 1921, 41 Stat. 1205, 1217, 22 U.S.C. § 227.

Initially, U.S. consular officers issued visas as a ministerial act without screening for grounds of inadmissibility; they would simply issue the visa and advise the applicant of the various inadmissibility grounds, leaving the determination of inadmissibility

to immigration officers at the port of entry.[2] As a result, noncitizens faced the prospect of making a long and expensive trip to the United States only to be detained at the border and then returned home. In 1924 Congress enacted a provision requiring that consular officers make a determination of admissibility before issuing the visa. Act of 1924, 43 Stat. 153, 8 U.S.C. § 202(f). When Congress enacted the Immigration and Nationality Act in 1952, the visa and passport requirement was included, Act of June 27, 1952, 66 Stat. 181, 190, §§ 211, 215 (codified at 8 U.S.C. §§ 1181, 1185) and it continues to the present day.

During the years immediately after the visa requirement was first established, there was no clear mechanism to challenge consular decisions. If a person wanted to enter the United States, s/he would appear at the border and request entry; if refused, s/he could file a habeas petition challenging the exclusion. However, that would not work as a mechanism for reviewing the consular officer's decision. A habeas petition is filed against the person holding the petitioner in custody—the border officer. The consular officer is not in the picture. In a habeas petition, if the petitioner did not have a visa then the border officer would be acting lawfully in refusing to admit the petitioner into the United States.

The Court did not consider the reviewability of consular decisions during this period. Two circuit court

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[2] *See generally* L. Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 San Diego L. Rev. 887, 892 (1989).

decisions from the 1920s, however, addressed consular visa decisions in response to challenges brought by potential immigrants or their citizen relatives. Although these two cases did not squarely hold that consular decisions were unreviewable, they both contain language cited by later courts for that proposition. Close examination of these decisions reveals that, even in its foundational cases, the "doctrine of consular non-reviewability" was less airtight than later courts have assumed.[3]

1. London v. Phelps.

In *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), the petitioner, Mrs. London, wanted to visit her children in New York City. She applied for a visitor's visa at the U.S. consulate in Montreal, but was refused. She then appeared at the border seeking entry and was refused because she did not have a visa. After being refused entry, Mrs. London filed a habeas petition naming the U.S. immigration inspector as the respondent. She first argued that, as a person seeking entry from Canada, she was not required to have a visa under regulations that had been adopted in 1918. The court rejected that argument, finding that the Act of March 2, 1921, superseded the earlier regulations. *Id.* at 289.

Mrs. London argued further that even if the visa requirement was lawfully imposed, issuing a visa is a ministerial act that the court should deem to have been

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[3] *See also* Stephen H. Legomsky, *Immigration and the Judiciary – Law And Politics In Britain And America* (1987), at 144-51 (discussing early cases on the evolution of consular non-reviewability).

performed.[4] The court rejected that argument as well, stating that "the giving of a visé is not merely a ministerial act" and noting that the consular officer must at least "'satisfy himself of the temporary nature of the visit'." *Id.* at 290. Because Mrs. London did not have a visa, she was properly excluded at the border. *Id*.

That should have been enough to resolve the case, but the court went on to add the following dictum (on which courts have often relied as a basis for the doctrine of consular non-reviewability):

> Unjustifiable refusal to visé a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. It is beyond the jurisdiction of the court.

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[4] *See In re Spinnella*, 3 F.2d 196 (S.D.N.Y. 1924) (where visa was not issued because the consular officer did not have the appropriate forms, "this court will look upon that as done which ought to have been done, and holds that the alien had that which the law required").

Id. (citing 3 Moore's Digest, 996).[5] That statement may have been correct in the context of that case. The habeas petition named the immigration inspector as the respondent, not the Department of State. And at the time, the federal question jurisdictional statute, 28 U.S.C. § 1331, gave district courts jurisdiction over claims "arising under the Constitution, laws, or treaties of the United States," but only subject to a $3,000 amount-in-controversy requirement that was not met in this case. Act of March 3, 1911, 36 Stat. 1091, 28 U.S.C. § 41(1). Thus, the *Phelps* court lacked jurisdiction to order the consular officer to issue a visa. But nothing in the case indicates that consular decisions are inherently unreviewable.

2. Ulrich v. Kellogg.

In *United States ex. rel. Ulrich v. Kellogg*, 30 F.2d 984, 985 (D.C. Cir. 1929), the petitioner, a U.S. citizen, filed a petition for writ of mandamus asking the court to order the U.S. consulate in Berlin to issue a visa on

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[5] 3 Moore's Digest provides no authority for the proposition that courts lack jurisdiction to review consular decisions; it simply reports one instance where the United States objected to Russia concerning the practice of consulate officers who refused visas to Jewish U.S. citizens seeking to travel to Russia to claim property. Thus, it appears that the *London* court was "less than meticulous" in its use of the term "jurisdiction". *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (describing such "unrefined dispositions" as "'drive-by jurisdictional rulings' that should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit"); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004); *see also Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. Rev. 1137, 1143-44 (1977) (describing the court's dicta about lack of jurisdiction as a "gratuitous afterthought").

behalf of his wife, a German citizen. The consulate had denied his wife's application for a visa on the ground that she had been convicted of larceny, a crime of moral turpitude. Ulrich named the Secretary of State as respondent and sought an order declaring that the conviction was not a crime of moral turpitude and requiring, inter alia, the Secretary of State to instruct the U.S. consul in Berlin to issue a visa. *Id.*

The court did not find that it lacked jurisdiction to review decisions of consular officers. Indeed, the court reached the merits of the substantive question, holding that the conviction for larceny did constitute a crime of moral turpitude that made the petitioner's wife inadmissible. *Id*. at 986. Thus, according to the court, the consular officer had properly denied the visa.

The court went on to consider whether, even if the decision of the consular officer was incorrect, the court could order the Secretary of State to instruct a consular officer to issue a visa. The problem, according to the court, was that the statute vested the authority to issue visas with consular officers, not with the Secretary of State, and there was no provision in the immigration laws for "an official review of the action of the consular officers in such case by a cabinet officer or other authority." *Id*.[6] The court, therefore, concluded that it

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[6] The statute was later amended to provide explicitly that the Secretary of State does not have authority over the administration of the immigration laws relating to "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." 8 U.S.C. §1104(a) (1952). Although the legislative history is unclear, it appears that this provision was adopted in order to confirm that the Attorney General – rather than the Secretary of State – has the power to review consular

could not order the Secretary of State to issue a visa, nor could it order that he direct a consular officer to issue a visa, because the statute did not authorize the Secretary of State to do so. The court did not address how it might decide the case if the appropriate consular official had been properly named as a respondent. And, as in *London*, the court did not indicate that consular decisions are for any reason inherently unreviewable.[7] In fact, given that the court reached the merits of the inadmissibility decision, the opinion implies that consular decisions are reviewable.

B. The 1940s and 1950s: the Emergence of a Widely-Cited Non-Reviewability Doctrine.

In the early years, it proved difficult or even impossible for a person refused a visa to obtain judicial review of the consular officer's decision.[8] There was no

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decisions, not in order to preclude administrative review altogether. *See* James Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash. L. Rev. 1, 24-25 (1991).

[7] The court did refer to statutory language giving discretion to the consular officer. 30 F.2d at 986. However, "the limited discretion of consular officers does not support the idea that courts cannot review visa denials." S. Legomsky, supra n. 3, at 147. *See also Nakamoto v. Ashcroft*, 363 F.3d 874, 879–880 (9th Cir. 2004) (concluding that "the phrases 'to the satisfaction of the Attorney General' and 'in the opinion of the Attorney General' . . . specify the identity of the decision-maker, indicating that it is the Attorney General who is authorized to determine the facts in the first instance," not that the decision is "entirely discretionary").

[8] It was possible to sue a consular officer for money damages, and the consular officer would be liable if guilty of an abuse of power. *See* 22 U.S.C. § 1199; *Am. Sur. Co. of New York v. Sullivan*, 7 F.2d

case law holding that consular officer decisions were inherently unreviewable, but nor was there a workable mechanism to obtain review. The statutory provision establishing district court jurisdiction over general federal questions included a $3,000 amount-in-controversy requirement.[9] A habeas petition brought against the detainee's custodian could not name the consular officer as the respondent. And a petition for a writ of mandamus was not viable because courts like *Phelps* had held that the granting of a visa was not a simple ministerial act but instead involved some level of discretion.

That situation potentially changed with the enactment of the Administrative Procedure Act in 1946 and the Immigration and Nationality Act in 1952. Section 279 of the INA gave courts jurisdiction over "all causes" arising under Title II of the statute,[10] while Section 10 of the APA permitted judicial review for any person "adversely affected or aggrieved" by an agency

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605 (2d Cir. 1925) (finding the consular officer liable for the failure to issue a visa).

[9] The amount in controversy requirement was subsequently eliminated. *See* Pub. L. No. 94-574, § 2, 90 Stat. 2721 (Oct. 2, 1976).

[10] The original version of INA Section 279 provided that "district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title." 8 U.S.C. § 1329 (1952). The "provisions of this title," sections 201–292 of the INA, included INA § 221, 8 U.S.C. § 1201, governing issuance of visas. Thus, section 279 potentially impacted subject matter jurisdiction over claims involving the denial of visas. This provision was later amended in 1996, making it applicable only to suits brought by the government.

action.[11] These provisions therefore afforded courts the opportunity to examine the origin and appropriate scope of the consular non-reviewability doctrine if they chose to do so in conjunction with potential claims brought under the new statutes.

Cases from this period, however, largely failed to examine the doctrine in any depth or to consider potential alternative bases for judicial review. Instead, courts largely relied on broad invocations of Congressional plenary power over immigration and on broadly-worded dicta from cases that had been decided before the APA and INA, in the context of an amount-in-controversy requirement for general federal question jurisdiction. Thus, the doctrine of consular non-reviewability became entrenched with little examination of its underpinnings or limitations.

For example, in *Licea-Gomez v. Pilliod*, 193 F. Supp. 577 (N.D. Ill. 1960), the petitioner was excluded for lacking a visa. The petitioner then filed a complaint for declaratory judgment under the APA challenging the exclusion order and the consular officer's refusal to issue a visa. The court acknowledged that, under the APA, the petitioner was able to challenge the exclusion

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[11] Section 10 of the APA provides that "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." Pub. L. 79-404, § 10, 60 Stat. 237, 243 (1946) (currently codified at 5 U.S.C. § 702). Although the APA does not provide an independent basis for jurisdiction, *see Califano v. Sanders*, 430 U.S. 99 (1977), it created "a cause of action for 'persons' ... aggrieved by agency action." *Seafarers Int'l Union v. Coast Guard*, 736 F.2d 19, 25 (2d Cir. 1984). *See also Webster v. Doe*, 486 U.S. 592, 599 (1988).

order in a declaratory judgment action. 193 F. Supp. at 579. However, although the declaratory judgment action potentially included review of the consular officer's decision, the court declined to consider arguments relating to the denial of the visa, citing three provisions of the immigration code as well as the *Ulrich* case. 193 F. Supp. at 582 (citing 8 U.S.C. §§ 1104(a), 1151 & 1201).

The three immigration law provisions cited by the court, however, did not address reviewability of consular visa denials. Section 1104(a) provides that the Secretary of State does not have power over the decisions of consular officers relating to the granting or denial of visas but does not address the district court's ability to review consular decisions. Section 1151 sets forth categories of immigration visas but does not limit review of decisions relating to those visas. Section 1201 merely states that a consular officer "may issue" a visa to a visa applicant but does not restrict judicial review. Thus, rather than consider the actual authority behind the doctrine of consular non-reviewability or the potential impact of the new statutes on that doctrine, the court largely assumed the existence of the doctrine.

Similarly, *Loza-Bedoya v. INS*, 410 F.2d 343 (9th Cir. 1969), addressed consular decisions, but only in the context of a petition for review of an order of deportation. Before the petitioner entered the United States, he had applied for an immigrant visa, which was denied. *Id*. at 346. The INS had incorrectly informed the consulate that Loza-Bedoya was ineligible because he had previously been involved in an alien smuggling scheme, and acting on that information, the

consulate denied the visa. After being denied the visa, Loza-Bedoya entered the United States without inspection and later was placed in deportation proceedings and ordered deported. He subsequently filed a motion to reopen, which was denied, and then filed a petition for review under 8 U.S.C. § 1105a (1962), seeking judicial review of the denial of the motion to reopen.

The court held that judicial review under § 1105a(a) is limited to the administrative record created in the deportation proceedings. *Id*. Thus, the only issue before the court was whether the denial of the petitioner's motion to reopen by the Board of Immigration Appeals constituted an abuse of discretion. Because the Board did not abuse its discretion, the court affirmed that decision. *Id*. at 347.

As to the petitioner's argument that the consular officer's decision had been based on incorrect information provided by INS concerning a charge of alien smuggling, the court stated:

> Congress has conferred upon consular officers authority to issue or withhold a visa. Such determination is not subject to either administrative or judicial review. As harsh as the conclusions are here, a correction of the record could not in any manner affect the deportation petitioner seeks to avoid. … Though erroneous this Court is without jurisdiction to order an American consular official to issue a visa to any alien whether excludable or not.

Id. (*citing* 8 U.S.C. § 1201(a); *Ulrich*, 30 F.2d 984; *London*, 22 F.2d 288).

The court's conclusion that it had no jurisdiction to review the consular officer's decision was correct in the context of that particular case. The petitioner sought review under 8 U.S.C. § 1105a(a) of the order of deportation issued by the BIA, and therefore the court's review was necessarily limited to the administrative record relating to the motion to reopen. But the court did not examine the authority cited in support of the consular non-reviewability doctrine or consider whether jurisdiction to review a consular officer's decision might be available outside the context of review under § 1105a. Nonetheless, *Loza-Bedoya* contributed to the growing body of case law reciting the doctrine of consular non-reviewability.

By the early 1970s, there was no firm basis for the commonly recited statement that decisions of consular officers were inherently unreviewable. Instead, the cases typically cited from this period, such as *Licea-Gomez* and *Loza-Bedoya*, largely invoked earlier recitations of the same general sentiment, without carefully examining the scope of reviewability or the potential sources of subject matter jurisdiction. Furthermore, these cases were decided when general federal question jurisdiction required a minimum amount in controversy. With the elimination of that requirement in 1976, general federal question jurisdiction under 28 U.S.C. § 1331 provided an additional basis for subject matter jurisdiction.

At the same time, this Court's cases addressing the plenary power of Congress to set the conditions for entry and exclusion, with limited judicial review, did not generally analyze consular decisions in particular. *See, e.g.*, *United States ex rel. Knauff v. Shaughnessy*,

338 U.S. 537, 543 (1950) (rejecting challenge to denial of permission to enter the country and holding that "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 to exclude a given alien"). Even these general plenary power cases, however, recognized the availability of judicial review for constitutional and statutory claims and to determine whether the executive official had acted pursuant to valid authority. *E.g.*, *id.* at 543-46 (rejecting petitioner's claims that the regulations were unreasonable or that the War Brides Act required a hearing, and acknowledging that the Attorney General had acted pursuant to valid regulations).[12] Examining this authority, Judge Posner later recognized that the

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[12] Indeed, recognition of the limits on plenary power is almost as old as recognition of the doctrine itself. *See*, *e.g.*, *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (Holmes, J.) ("The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus."); *Ekiu v. U.S.*, 142 U.S. 651, 660 (1892) (even though the political branches have plenary power, a noncitizen denied entry into the United States "is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful"); *Katz v. Comm'r of Immigration*, 245 F. 316, 319 (9th Cir. 1917) ("where there is substantially no evidence competent to establish the charge preferred, it then becomes a question of law for the court"). This Court has recognized this history in recent years. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301, 311 (2001) (judicial review is available "as a means of reviewing the legality of [the order of removal]", even where the statute "preclud[es] judicial review to the maximum extent possible under the Constitution"); *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (noting that plenary power "is subject to important constitutional limitations").

doctrine of "consular nonreviewability, . . . like most general legal principles it is qualified." *Samirah v. Holder*, 627 F.3d 652, 662 (7th Cir. 2010).

C. *Kleindienst v. Mandel* and Consular Non-Reviewability.

In 1972, the Court issued an important decision often cited in support of the doctrine of consular non-reviewability. In *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), the Court held that Congress could delegate the power to exclude would-be immigrants to the Executive Branch and that courts could not "look behind" a legitimate exercise of that discretion. *Mandel* involved review of the Attorney General's discretionary decision not to grant a nonimmigrant waiver for Mr. Mandel, who was found inadmissible on ideological grounds. The Court based its decision on plenary power concerns, but its focus was primarily on the plenary power of *Congress*, not the 'plenary power of the agency implementing Congress's policy choices. *See, e.g.*, *id*. at 766 (pointing to "Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden'").[13] With respect to the agency's position on whether a discretionary waiver of the grounds of inadmissibility should be granted, the Court did not hold that the agency decision is beyond

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[13] The Court also cited *Ekiu v. U.S.*, 142 U.S. 651 (1892), which recognizes that noncitizens—even noncitizens seeking entry at the border—have the right to challenge an administrative decision as inconsistent with the law passed by Congress. *See id.* at 660 (a person barred from entering the United States "is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful").

judicial review. Instead, the Court explicitly recognized that the agency decision is subject to at least limited judicial review.

According to the Court, the agency is called on to weigh competing interests (the interests of U.S. citizens in associating with the noncitizen on the one hand and the interests of the government in excluding the noncitizen on the other). Although the balancing of these interests "has, properly, been placed in the hands of the Executive," this does not mean that the Executive has "sole and unfettered discretion." *Id*. at 769. Instead, the Court reviewed the decision to ensure that there was at least a "facially legitimate and bona fide reason" for the agency's exercise of discretion. *Id*. Thus, the Court indicated that the agency must interpret the statute correctly (that is, the reason given by the agency must be "facially legitimate") and must have at least some factual basis for its decision (the reason given must be "bona fide"). Indeed, the Court held that the power delegated to the Executive was *conditioned* on the Executive acting on the basis of a facially legitimate and bona fide reason. *Id.* at 770. As the Court noted, "the official empowered to make the decision stated that he denied a waiver because he concluded that previous abuses by Mandel made it inappropriate to grant a waiver again" and, in light of this facially legitimate and bona fide reason, the Court believed that "the Attorney General validly exercised the plenary power that Congress delegated to the Executive." *Id*. at 769. To the extent that there is a "take away" from *Mandel*, it is not that decisions regarding visa issuance are unreviewable, but rather that at least some judicial review is available to ensure

that the agency has acted in a manner consistent with the policies adopted by Congress.[14]

Subsequent decisions have recognized that the holding of *Mandel* embraces consular visa decisions. *See, e.g.*, *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir 1986). Many courts have also acknowledged the limitation on the doctrine of consular non-reviewability recognized by *Mandel*, explicitly permitting inquiry into whether the Executive has provided a facially legitimate and bona fide reason in support of the consular visa decision. *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); *Allende v. Shultz*, 845 F.2d 1111 (1st Cir. 1988). Close examination of the "facially legitimate and bona fide reason" standard reveals three aspects of limited judicial review that may be applied to consular visa denials.

D. The "Facially Legitimate and Bona Fide Reason" Standard.

The "facially legitimate and bona fide reason" standard reflects the concern that courts should respect

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[14] In *Fiallo v. Bell*, 430 U.S. 787, 795 (1977), the Court rejected a challenge to the denial of preferential immigration status for illegitimate children of U.S. citizen fathers after concluding that "[w]e can see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*." *See also id*. at 793 n.5 (rejecting the government's argument that the case was "not an appropriate subject for judicial review" and noting that "[o]ur cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens").

the plenary power of the political branches of government over immigration. However, this plenary power is not absolute. Many cases have both recognized this plenary power and nonetheless provided for judicial review. Most notably, judicial review has often been available despite the plenary power doctrine when the petitioner claims that the agency has exceeded its authority or acted in a manner inconsistent with congressional intent, where the agency has no reasonable factual basis for its decision, or where there is a viable procedural challenge based on due process concerns.

1. *Review of Claims that an Agency has Exceeded its Authority or Acted Inconsistently with Governing Law.*

Under the "facially legitimate and bona fide reason" standard, courts may review an agency's action to ensure that it has acted according to properly interpreted statutory authority. For example, in *Abourezk*, the D.C. Circuit accepted jurisdiction to review whether the denial of a visitor's visa was consistent with the statute. At issue was whether the consular officer had properly found the noncitizen inadmissible based on a reason to believe that he would engage in activities prejudicial to the public interest. The Court of Appeals recognized jurisdiction "to insure that the challenged government action is within the statutory and constitutional authority of the State Department." 785 F.2d at 1062. As explained by then-Circuit Court Judge Ruth Bader Ginsburg:

> The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far

> as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie.

Id. at 1061.[15]

Likewise, in *Singh v. Clinton*, 618 F.3d 1085, 1088 (9th Cir. 2010), the Ninth Circuit held that the court could review the consular officer's action to see whether under the APA it was "'not in accordance with law'." The petitioner alleged that the consular office had failed to follow the governing regulations regarding termination of an immigrant visa. That question, said the court was one "of statutory interpretation, rather than an assessment of reasonableness in the instant

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[15] This accords more generally with the central role the judiciary always must play in interpreting statutes governing executive action. "Under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Judicial review of questions of law is appropriate in order to correct decisions that are inconsistent with Congressional intent. *See Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 801 (D.C. Cir. 1985) (reviewing INS internal operating procedures regarding the issuance of visas and noting "federal courts have jurisdiction over this type of case to assure that the executive departments abide by the legislatively mandated procedures"); *Friedberger v. Shultz*, 616 F. Supp. 1315, 1318 (E.D. Pa. 1985) (stating that, in reviewing the statutory and regulatory scheme to determine whether the consular officer acted lawfully in denying a visa, "[w]e do not understand the government to assert that the doctrine of sovereign prerogative allows the Executive to act in a manner contrary to Congressional mandate").

case." *Id*. at 1088. Thus, the doctrine of consular non-reviewability did not apply. *See also Patel v. Reno*, 134 F.3d 929, 931-32 (9th Cir. 1997) (noting jurisdiction exists "when the suit challenges the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion").

In *American Academy*, 573 F.3d 115, three U.S. organizations challenged the decision of the U.S. consulate to deny a visa to a well-known Islamic scholar on the ground that he had provided "material support" to a terrorist organization. *See* 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). The Second Circuit held that even if the "facially legitimate and bona fide reason" standard is designed to respect the "plenary power" of the political branches, the standard allows review to ensure that the consular officer has "properly construed and applied [the relevant] statutory provisions." 573 F.3d at 126. In other words, if the decision of the consular officer is based on an incorrect interpretation of the statute, or if the consular officer applies the statute in a legally improper manner, then the decision may be reversed. *Accord Din v. Kerry*, 718 F.3d 856, 860 (9th Cir. 2013).

2. Review for the Existence of a Factual Basis for the Decision.

In addition, under the "facially legitimate and bona fide reason" standard, courts may review a consular officer's decision to ensure that it is supported by at least some reasonable factual basis. Without at least some factual basis for the decision, it can hardly be supported by a "bona fide reason." For example, there would be no "bona fide reason" present if a government

official assessed a penalty or denied a benefit based on wholly arbitrary factors.[16]

In *Adams v. Baker*, 909 F.2d 643 (1st Cir. 1990), the First Circuit engaged in a limited review of the evidence to determine "whether there was sufficient evidence to form a 'reasonable ground to believe' that the alien had engaged in terrorist activity." *Id*. at 649. In *Marczak v. Greene*, 971 F.2d 510 (10th Cir. 1992), the court considered the denial of parole to individuals facing exclusion proceedings and concluded that under the "facially legitimate and bona fide reason" standard, the court must review the agency decision to ensure that it is "at least reasonably supported by the record." *Id.* at 517 As the court noted:

> It is tempting to conclude from the broad language of the test that a court applying the "facially legitimate and bona fide" standard would not even look to the record to determine whether the agency's statement of reasons was in any way supported by the facts . . . This has not, however, been the practice of any of the courts that have adopted the standard in immigration matters.

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[16] This comports with general legal principles governing review of agency actions. Cf. *Marozsan v. United States*, 852 F.2d 1469, 1478 (7th Cir. 1988) (rejecting interpretation of statute governing review of Veterans Administration decisions that would preclude review of "obviously unconstitutional decisions" like eligibility based on whether someone was born on the Fourth of July); *U.S. ex rel Campbell v. Pate*, 401 F.2d 55, 57 (7th Cir. 1968) ("the relevant facts ... must not be so capriciously or unreliably determined that, in effect, the [individual] is deprived of equal protection of the laws").

Id. (examining cases exploring record support under the "facially legitimate and bona fide" standard); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1082–83 (9th Cir. 2006) (rejecting the agency's decision because it was "based on facially implausible evidence, and ignores [evidence in the record]"); *Amanullah v. Nelson*, 811 F.2d 1, 17 (1st Cir. 1987) (indicating that at least some inquiry into the factual basis for the agency decision is necessary to ensure that the decision is not lacking at least some factual support).

In *American Sociological Ass'n v. Chertoff*, 588 F. Supp. 2d 166 (D. Mass. 2008), the plaintiffs challenged the consular officer's decision to deny a visitor's visa on the basis of INA § 212(a)(3)(B)(i)(I) (inadmissibility for having engaged in a "terrorist activity"). The court rejected the government's argument that there was no review permitted even if no reason for the decision was given. According to the court: "The incentive the defendants' proposed interpretation would give the government would be perverse: better to give no reason for a denial so that it would be unreviewable than to give a reason and be second-guessed by a court." 588 F. Supp. 2d at 170. The court denied the government's motion to dismiss, recognizing that the court can require the consular officer to provide a factual basis for the decision.

3. Review for Fundamentally Fair Procedures.

Although the exact scope of constitutionally protected rights at stake in the context of consular visa decisions is beyond the scope of this brief, courts have recognized that such constitutionally protected interests exist and warrant the protection of fundamentally fair procedures. *E.g.*, *Mandel*, 408 U.S.

at 762-765 (First Amendment rights of association); *Bustamante*, 531 F.3d at 1062, (Fifth Amendment liberty interests in marriage and family life); *see* also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974) (freedom of personal choice in matters of marriage and family life is a liberty interest protected by the Due Process Clause). To the extent a U.S. citizen claimant has a cognizable liberty or constitutional interest in a consular visa decision, review must be available under the "facially legitimate and bona fide reason" standard to ensure that such liberty interests receive procedural protections.

The Court has recognized the need for procedural protections in the context of a non-citizen resident returning to the United States after a visit abroad. Such a non-citizen has a protectable liberty interest that requires the United States to provide fundamentally fair procedures before blocking reentry. For example, in *Landon v. Plasencia*, 459 U.S. 21, 33 (1982), where the Immigration and Naturalization Service was attempting to exclude a returning resident, the Court held that "a continuously present permanent resident alien has a right to due process in such a situation." *See also Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963) ("the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 593-595 (1953) (noncitizen resident entitled to constitutional due process hearing after exclusion following a five-month voyage abroad). Under *Mandel*, a U.S. citizen who has filed a non-citizen visa petition (such as, for example, a U.S. citizen seeking to exercise constitutional rights of association or a U.S. citizen who has filed a petition

for a noncitizen spouse) should also have basic procedural protections, as would a non-citizen returning from abroad.

Several basic procedural protections are relevant here. The most "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Rusu v. INS*, 296 F.3d 316, 321 (4th Cir. 2002) (applying "the principles of *Mathews v. Eldridge*" to immigration proceedings). Courts have uniformly recognized that this means at least that before the government deprives a person of a liberty or property interest, the person must be apprised of adverse evidence and given a reasonable opportunity to rebut the adverse evidence.[17]

Similarly, where guidelines exist for assessing penalties or denying benefits (as there are when a consular officer makes a decision to exclude a person from the United States), the government must actually consider the relevant evidence in applying those guidelines. See *Abourezk*, 785 F.2d at 1051 (noting

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[17] As the Court stated in *Greene v. McElroy*, "[c]ertain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." 360 U.S. 474, 496 (1959); *see also Bowman Transp. v. Arkansas Best Freight Sys.*, 419 U.S. 281, 288, n.4 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it.")

"thirty-three distinctly delineated categories that conspicuously provide standards to guide the Executive in its exercise of the exclusion power" and concluding that the "statutory language thus channels the Secretary of State's discretion and . . . the constraints Congress imposed are judicially enforceable").

Indeed, the regulations governing the review and denial of a visa application provide a process for an applicant to learn the reason for a refusal and ascertain whether there is a way such reason can be overcome with the submission of additional evidence. 22 C.F.R. § 42.81(b) ("The consular officer shall 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.")

Thus, in order to comport with Due Process for protected constitutional interests, a decision that denies an applicant the opportunity to enter the United States requires the consular officer to (1) provide notice of the adverse evidence (taking appropriate account of national security concerns as explained below); (2) provide the applicant with an opportunity to respond to the adverse evidence; and (3) give actual consideration to any evidence that is offered. Ensuring that these basic requirements of due process are satisfied does not interfere with any governmental interest protected by the plenary power doctrine. Ultimately, the decision to grant or deny the visa remains with the consular officers, who may exercise their discretion reasonably with respect to individuals whom they have reason to believe pose a danger to the community or to security.

E. *Mandel's* "Facially Legitimate and Bona Fide Reason" Requirement is Consistent with 8 U.S.C. § 1182(b)(3)

The limited judicial review of consular visa denials permitted by *Mandel* is not in any way inconsistent with 8 U.S.C. § 1182(b)(3), which allows the decision-maker in certain cases to withhold evidence on which it relies from the applicant. Section 1182(b)(3) does not bar the disclosure of an explanation either to a court for purposes of limited *Mandel* review, or to other persons challenging a visa denial. Instead, § 1182(b)(3) provides that, unlike other grounds of inadmissibility, the decision-maker need not "state the determination" for its decision under § 1182(a)(2) or § 1182(a)(3) through a written decision provided to the inadmissible individual. A requirement that the decision-maker provide some information—a facially legitimate and bona fide reason for its decision, with an opportunity for the record to be supplemented in response—does not interfere with the government's right to withhold a full explanation of its decision in order to protect valid national security concerns. Indeed, as the court below recognized, such information is often revealed to the applicant, even in cases involving §§ 1182(a)(2) or (a)(3). *Din v. Kerry*, 718 F.3d at 864-65.[18] Because the principles described above supporting judicial review still apply, and because the limited disclosure required to facilitate that review need not jeopardize the government's legitimate security or law enforcement

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[18] Indeed, as the court below also recognized, the Department of State Foreign Affairs Manual recognizes that standard written notices will still be provided in 1182(a)(2) and (3) cases unless otherwise authorized. 9 Foreign Affairs Manual 42.81 N2.

concerns, § 1182(b)(3) should not be interpreted as an exception to the requirement of a facially legitimate and bona fide reason for the decision.

First, to the extent that the protected liberty interests of a U.S. citizen lie behind a *Mandel* challenge, a statute preventing the court from determining whether the government had a facially legitimate and bona fide reason for impinging on those interests would raise serious constitutional questions. This Court has consistently interpreted immigration statutes so as to avoid raising such questions. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (concluding that "[a] construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions" and noting that "where an alternative interpretation of the statute is fairly possible … we are obligated to construe the statute to avoid such problems") (citations omitted); *Zadvydas v. Davis*, 533 U.S. 678, 680 (2001) (construing statute to avoid constitutional invalidation); *see also* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1380-1383 (1953). The nature of the constitutional rights at stake in consular cases is beyond the scope of this brief, though courts have recognized that significant Constitutional interests are often at stake. *Am. Acad.*, 573 F.3d at 125 (First Amendment); *Bustamante*, 531 F.3d at 1062, (marriage and family life). When constitutional liberty interests are at issue, a U.S. citizen is entitled to at least minimal judicial review. A statutory provision aimed solely at limiting obligatory disclosure to a non-citizen

should not be read to preclude the minimal disclosure required under the *Mandel* standard.

Second, irrespective of the disclosure required to be provided an individual applicant, the court has an obligation to ensure that the agency is acting within the scope of Congress' authority. *See, e.g. Abourezk*, 785 F.2d at 1061 (in the context of consular visa decisions, it is the duty of the courts to say where the statutory boundaries lie). Without such review, there is no rule of law. *See Judulang v. Holder*, 132 S. Ct. 476, 484 (2011) (in the context of discretionary immigration decisions, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking"); R. Fallon, *On Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916, 938 (1988) ("The underlying constitutional conception is that wielders of governmental power must be subject to the limits of law, and that the applicable limits should be determined, not by those institutions whose authority is in question, but by an impartial judiciary.")

Thus, a court can demand a limited showing to ensure that the agency is not acting outside the boundary of its authority as established by Congress or acting in a wholly arbitrary or capricious manner. *E.g. Patel*, 134 F.3d at 931-32 (noting jurisdiction to hear challenges to the authority of the consul to take or fail to take an action). Given the limited nature of the showing required, and the ability to review affidavits or documents *in camera*, this review need not impinge on legitimate security concerns. *See, e.g.*, *Bustamante*, 531 F.3d at 1062 (upholding "facially legitimate reason" for denial of visa on the grounds that the Consulate

"had reason to believe" that applicant was a controlled substance trafficker based on information received from another agency); *Am. Acad.*, 573 F.3d at 126 (holding 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").

This limited review of whether officials were acting within their statutory authority is also consistent with how courts have protected due process rights in other immigration contexts, even when courts have stressed that they may not review the substance of the immigration decisions themselves. *St. Cyr*, 533 U.S. at 306-07 (noting that district courts traditionally reviewed immigration-related legal determinations through habeas corpus and "regularly answered questions of law that arose in the context of discretionary relief"); *Gegiow*, 239 U.S. at 9 (recognizing that "[t]he conclusiveness of the decisions of immigration officers" was limited to questions of fact).

Such review would also permit consistent interpretation of the key statutory provision. Section 1182(b) applies not only to consular visa decisions but also to individuals who are in the United States applying for adjustment of status. 8 U.S.C. § 1182(b)(1). In general, § 1182(b)(1) requires the decision-maker to provide applicants (including applicants for adjustment of status) with the reasons for an adverse decision. Section 1182(b)(3) states that the full explanation need not be given to persons

inadmissible under § 1182(a)(2) or (a)(3). However, it is well established that individuals in the United States applying for discretionary relief (including adjustment of status) are entitled to minimal procedural protections against arbitrary removal. *See, e.g.*, *Judulang*, 132 S. Ct. at 485, (noting that policies regarding discretionary relief "must be based on non-arbitrary, relevant factors"); *Samirah*, 627 F.3d at 658, ("Advance parole entitled him to return to the United States for the sole purpose of pressing his application for adjustment of status. . . By refusing to grant him a visa, the government is arbitrarily preventing him from exercising the right granted to him by the advance-parole regulation."); *see also Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) ("this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law ….'"). Thus, § 1182(b)(3) cannot be interpreted to prohibit courts reviewing adjustment-of-status applications from requiring an explanation sufficient to allow for judicial review. *Cf. Delgado v. Holder*, 648 F.3d 1095, 1107-08 (9th Cir. 2011) (en banc) ("Without knowing the basis of the Board's decision, we cannot conduct a meaningful review"). Given the need for such review for non-citizens in the context of adjustment of status applications, § 1182(b)(3) must be interpreted to accommodate otherwise permissible *Mandel* review of consular decisions in order to provide consistent treatment of the same statutory language. *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one").

Similarly, this interpretation of § 1182(b)(3) is consistent with other statutory provisions that allow an applicant to rebut certain grounds of inadmissibility under § 1182(a)(3). For example, § 1182(a)(3)(B) provides for inadmissibility of an applicant who is a member of a terrorist organization, § 1182(a)(3)(B)(i)(VI), has solicited funds for a terrorist organization, § 1182(a)(3)(B)(iv)(IV), has recruited individuals to join such an organization, § 1182(a)(3)(B)(iv)(V), or has otherwise provided material support, § 1182(a)(3)(B)(iv)(VI). Each of these provisions expressly provides that it does not apply if an applicant presents "clear and convincing evidence" that he or she "did not know, and should not reasonably have known" that the relevant organization was a terrorist organization.

In addition, State Department regulations impose an independent duty to supply reasons to a visa applicant, and those regulations, unlike the statute, contain no exception for § 1182(a)(3) cases.[19] The regulations provide that an applicant has the right to contest inadmissibility under certain provisions of § 1182(a)(3). Consular officers who deny a visa application must "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

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[19] The State Department's decision to require consular officers to disclose the reasons for visa denials even in cases where the statute may not expressly require disclosure is not *ultra vires*, because even the most expansive interpretation of § 1182(b)(3) would not *prohibit* the State Department from providing reasons in § 1182(a)(3) cases.

relief is available." 22 C.F.R. § 42.81(b); *see also id*. ("If the ground of ineligibility may be overcome by the presentation of additional evidence and the applicant indicates an intention to submit such evidence, all documents may, with the consent of the alien, be retained in the consular files for a period not to exceed one year."). These regulations contain no exception for visas denied on national security or criminal grounds.

If review for a "facially legitimate and bona fide" reason under *Mandel* could be satisfied merely by citing § 1182(b)(3)(B) – without providing the specific provision under which the official believes the alien inadmissible or even an assertion that facts exist to support that belief – then it would, as a practical matter, prevent applicants who are entitled to offer evidence rebutting the grounds of their inadmissibility from doing so. *Cf. St. Cyr*, 533 U.S. at 307 (observing that "courts [have] recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand," and that legal errors resulting in denial of an alien's right to consideration for discretionary relief are subject to judicial review). A consular official's reason for denial cannot be facially legitimate and bona fide if it prevents applicants and their U.S. citizen family members from providing information or pursuing relief when they are legally entitled to do so.

CONCLUSION

The doctrine of absolute consular non-reviewability has never had any basis in case law. To the contrary, this Court's case law allows for meaningful judicial review of consular decisions. Such review – including at least review to ensure that the consular officer

follows the governing statutes and regulations, that there is some factual basis for findings made by the consular office, and that fundamentally fair procedures are used – is essential to ensure that the laws passed by Congress are followed.

Respectfully submitted.

Robert Pauw
Counsel of Record
Gibbs Houston Pauw
1000 Second Ave., Suite 1600
Seattle, WA 98104
(206) 682-1080
rpauw@ghp-law.net

Hiroshi Motomura
UCLA School of Law
385 Charles E. Young Dr.
Los Angeles, CA 90095
(310) 206-5676
motomura@law.ucla.edu

Jeff Bowen
Perkins Coie LLP
1 East Main St., Suite 201
Madison, WI 53703
(608) 663-7461
jbowen@perkinscoie.com

Counsel for Amici Curiae

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix 1 Appendix of *Amici Curiae* . . . . . App. 1

APPENDIX 1

APPENDIX OF *AMICI CURIAE*

David Abraham is Professor of Law at University of Miami School of Law.

Susan M. Akram is Clinical Professor and Supervising Attorney at the International Human Rights Program at Boston University School of Law.

Raquel Aldana is Professor of Law, Associate Dean for Faculty Scholarship and Director of Inter-American Program at University of the Pacific, McGeorge School of Law.

Deborah Anker is Clinical Professor of Law and Director of the Harvard Immigration and Refugee Clinic at Harvard Law School.

David C. Baluarte is Assistant Clinical Professor of Law and Director of the Immigrant Rights Clinic at Washington and Lee University School of Law.

Janet B. Beck is Clinical Assistant Professor at University of Houston Law Center Immigration Clinic.

Virginia Benzan is Immigration Clinic Fellow at Suffolk University Law School.

Linda Bosniak is Distinguished Professor of Law at Rutgers University School of Law.

Richard A. Boswell is Professor of Law and Associate Dean at University of California, Hastings College of the Law.

Jason A. Cade is Assistant Professor of Law and Director of Community Health Law Partnership at University of Georgia Law School.

Janet M. Calvo is Professor of Law at CUNY School of Law.

Jennifer M. Chacón is Professor of Law at University of California, Irvine, School of Law.

Michael J. Churgin is Raybourne Thompson Centennial Professor at University of Texas at Austin School of Law.

Dree K. Collopy is Lecturer and Co-Director if the Immigration Litigation Clinic at The Catholic University of America Columbus School of Law.

Evelyn Cruz is Clinical Law Professor at Sandra Day O'Connor College of Law, Arizona State University.

Philip A. Eichorn is Professor of Immigration Law at Cleveland State University School of Law.

Stella Burch Elias is Associate Professor of Law at University of Iowa College of Law.

Jill E. Family is Professor of Law at Widener University School of Law.

Niels Frenzen is Clinical Professor of Law at Gould School of Law, University of Southern California.

Maryellen Fullerton is Professor of Law at Brooklyn Law School.

Pratheepan Gulasekaram is Associate Professor at Santa Clara University Law School.

Susan R. Gzesh is Senior Lecturer at University of Chicago.

Dina Francesca Haynes is Professor of Law and Director of Human Rights and Immigration Law Project at New England Law | Boston.

Geoffrey Heeren is Assistant Professor and Director of the Immigration Clinic at Valparaiso University Law School.

Geoffrey A. Hoffman is Clinical Associate Professor and Director of University of Houston Law Center Immigration Clinic.

Mary Holper is Associate Clinical Professor at Boston College Law School.

Alan Hyde is Distinguished Professor of Law and Sidney Reitman Scholar at Rutgers School of Law.

Kit Johnson is Associate Professor of Law at The University of Oklahoma College of Law.

Anil Kalhan is Associate Professor of Law at Thomas R. Kline School of Law, Drexel University.

Elizabeth Keyes is Assistant Professor of Law at University of Baltimore School of Law.

Won Kidane is Associate Professor of Law at Seattle University School of Law.

David C. Koelsch is Associate Professor and Director of the Immigration Law Clinic at University of Detroit Mercy School of Law.

Jennifer Lee Koh is Associate Professor of Law and Director of the Immigration Clinic at Western State College of Law.

Christopher N. Lasch is Associate Professor of Law at University of Denver Sturm College of Law.

Stephen Legomsky is John S. Lehmann University Professor at Washington University School of Law.

Peter L. Markowitz is Associate Clinical Professor of Law at Cardozo School of Law.

M. Isabel Medina is Ferris Family Distinguished Professor of Law at Loyola University New Orleans College of Law.

Kathleen A. Moccio is Adjunct Professor at University of St. Thomas School of Law, Minneapolis.

Nancy Morawetz is Professor of Clinical Law at New York University School of Law.

Hiroshi Motomura is Susan Westerberg Prager Professor of Law at University of California, Los Angeles, School of Law.

Karen Musalo is Bank of America Foundation Chair in International Law and Professor and Director of the Center for Gender & Refugee Studies at University of California, Hastings College of the Law.

James Nafziger is Thomas B. Stoel Professor of Law and Director of International Law Programs at Willamette University College of Law.

Mariela Olivares is Associate Professor of Law at Howard University School of Law.

Michael A. Olivas is William B. Bates Distinguished Chair in Law at University of Houston Law Center.

Jayesh Rathod is Associate Professor of Law and Director of the Immigrant Justice Clinic at American University Washington College of Law.

Renee C. Redman is Adjunct Professor of Law at University of Connecticut School of Law.

Sarah Rogerson is Associate Professor of Law, Co-Director of the Law Clinic & Justice Center and Director of Family Violence Litigation Clinic & Immigration Project at Albany Law School.

Ediberto Román is Professor of Law and Director of Citizenship and Immigration Initiatives at Florida International University College of Law.

Victor C. Romero is Maureen B. Cavanaugh Distinguished Faculty Scholar and Professor of Law at Pennsylvania State School of Law.

Joseph Rosen is Adjunct Professor at Atlanta's John Marshall Law School.

Carrie Rosenbaum is Professor of Immigration Law at Golden Gate University School of Law.

Ted Ruthizer is Lecturer in Law at Columbia Law School.

Tuan Samahon is Professor of Law at Villanova University School of Law.

Heather Scavone is Director of the Humanitarian Immigration Law Clinic and Assistant Professor of Law at Elon University School of Law.

Irene Scharf is Director of the Immigration Law Clinic at University of Massachusetts School of Law.

Andrew I. Schoenholtz is Director of the Center for Applied Legal Studies, Director of the Human Rights Institute, and Professor from Practice at Georgetown University Law Center.

Philip G. Schrag is Director of the Center for Applied Legal Studies and Delaney Family Professor of Public Interest Law at Georgetown University Law Center.

Bijal Shah is Acting Assistant Professor at New York University School of Law.

Rebecca Sharpless is Clinical Professor at University of Miami School of Law.

Bryn Siegel is Professor of Law at Pacific Coast University School of Law.

Gemma Solimene is Clinical Associate Professor of Law at Fordham University School of Law.

Jayashri Srikantiah is Professor of Law and Director of the Immigrants' Rights Clinic at Stanford Law School.

Juliet Stumpf is Professor of Law at Lewis and Clark Law School.

Maureen A. Sweeney is Law School Associate Professor at University of Maryland Carey School of Law.

David B. Thronson is Associate Dean for Academic Affairs and Professor of Law at Michigan State University College of Law.

Scott Titshaw is Associate Professor of Law at Mercer University Walter F. George School of Law.

Enid Trucios-Haynes is Professor of Law and Interim Director of the Muhammad Ali Institute for Peace and Justice at Louis D. Brandeis School of Law, University of Louisville.

Rose Cuison Villazor is Professor of Law at University of California at Davis School of Law.

Olsi Vrapi is Adjunct Professor of Law at University of New Mexico School of Law.

Deborah M. Weissman is Reef C. Ivey II Distinguished Professor of Law at University of North Carolina School of Law.

Anna Welch is Associate Clinical Professor at University of Maine School of Law.

Michael J. Wishnie is William O. Douglas Clinical Professor of Law and Deputy Dean for Experiential Education at Yale Law School.

Stephen Yale-Loehr is Adjunct Professor of Law at Cornell University Law School.