

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 105  
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Washington, D.C.

Tuesday, April 23, 2024

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

APPEARANCES:

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

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

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P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON

ON BEHALF OF THE PETITIONERS

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

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

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

1 not providing an end run around that.

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

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

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

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

5 I welcome the Court's questions.

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

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

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

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

1 cannot challenge that.

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

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

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

16           JUSTICE SOTOMAYOR: Counsel --

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

19           JUSTICE THOMAS: Yeah.

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

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

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

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

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



1 my husband if I can.

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

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

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

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

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

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

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

9 MR. GANNON: We don't disagree that  
10 marriage is an important right and that she has  
11 liberty interests that are implicated there.

12 To step back to the beginning of your  
13 question, we think that the doctrine of consular  
14 nonreviewability is rooted in the political  
15 branch's plenary power to determine which  
16 noncitizens should be admitted to the country  
17 and what procedures are going to be used in  
18 order to make that determination.

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

25 JUSTICE SOTOMAYOR: But that's the

1 second question.

2 MR. GANNON: And so --

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

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

10 MR. GANNON: Even --

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

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

1 Din --

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

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

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

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

16 JUSTICE SOTOMAYOR: All right.

17 MR. GANNON: And --

18 JUSTICE SOTOMAYOR: I disagree.

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

1 JUSTICE KAGAN: I guess what -- what's  
2 confusing me, Mr. Gannon, about the argument is  
3 how your front-line position is compatible with  
4 Mandel. In other words, if your front-line  
5 position is right, why does Mandel exist?

6 MR. GANNON: And --

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

9 MR. GANNON: I -- I --

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

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

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

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

1 was something there --

2 JUSTICE KAGAN: So I take the point --

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

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

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

22 I think Trump against Hawaii --

23 JUSTICE KAGAN: Correct.

24 MR. GANNON: -- involved a different  
25 --

1 JUSTICE KAGAN: I mean, Trump says  
2 it's enough.

3 MR. GANNON: It -- it --

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

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

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

1 happy to go on and talk about whether we satisfy  
2 the -- the standard here, even though we're  
3 relying on a different statute, as Justice  
4 Sotomayor pointed out, than was at issue in Din,  
5 but we --

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

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

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

24 MR. GANNON: Well, I --

25 CHIEF JUSTICE ROBERTS: You know,



1 that's like apples and giraffes.

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

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

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

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

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

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

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

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

22                   MR. GANNON: Well, our -- our basic  
23 position on the Mandel question here is that the  
24 statutory citation is good enough, as Justice  
25 Kennedy concluded in Din, and we think that

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

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

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

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

24 JUSTICE KAVANAUGH: What --

25 MR. GANNON: -- the statutory citation

1 --

2 JUSTICE KAVANAUGH: Explain what sense

3 --

4 MR. GANNON: -- in those cases.

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

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

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

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

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

24 JUSTICE GORSUCH: -- on that score,  
25 Mr. Gannon, though, the -- the Ninth Circuit at

1 least I think held if I remember correctly that  
2 the explanation that you did give later was  
3 sufficient. It just wasn't timely.

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

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

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

17 JUSTICE GORSUCH: No.

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

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

1                   Do you have any objection to that? Is  
2 that wrong?

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

7                   JUSTICE JACKSON: But that was a --

8                   MR. GANNON: And --

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

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

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

25                   JUSTICE SOTOMAYOR: But there were six

1 --

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

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

14 MR. GANNON: We --

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

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

1                   MR. GANNON: That tells you more. I  
2 agree with that.

3                   JUSTICE SOTOMAYOR: Well, but --

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

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

9                   MR. GANNON: -- the fact that somebody  
10 had previously committed a criminal offense. It  
11 requires us to have a reasonable ground to  
12 believe that the person will be committing  
13 unlawful activity once they are in the United  
14 States, and so that is why gang membership has  
15 been considered an indicator for this since  
16 1965.

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

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

24                   Now they'll say, well, if I'm not an  
25 MS-13 member or if the spouse isn't, I know how



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

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

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

17 JUSTICE JACKSON: But how does  
18 unlawful --

19 JUSTICE ALITO: Mr. -- Mr. --

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

23 MR. GANNON: We think you are --

24 JUSTICE JACKSON: Are going to.

25 MR. GANNON: -- going to commit

1 unlawful activity.

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

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

10 JUSTICE GORSUCH: Well --

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

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

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

17 JUSTICE ALITO: Well, Mr. Gannon --

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

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

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

24 CHIEF JUSTICE ROBERTS: Justice Alito.

25 JUSTICE ALITO: At this point, we've

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

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

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

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

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

1                   And so I don't know where the cause of  
2                   action is, unless it is an implicit Ex parte  
3                   Young-like action that they're asking for  
4                   declaratory judgment on.

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

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

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

24                  And, here, we think that the -- the  
25                  point of -- of this is that -- we cite O'Bannon

1 for the premise that in the due process context,  
2 an enforcement action that is taken against one  
3 person doesn't create a liberty interest in a  
4 third party who is indirectly affected by that.

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

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

22 I'm not clear what those are, what --  
23 what that would look like, and I'm just curious  
24 what you understand -- you think would follow on  
25 remand and if there's a suggestion here perhaps

1 that there's no harm, no foul because everybody  
2 knew exactly what was going on here, everybody  
3 knew it appears that the Respondent filed a  
4 petition for rehearing based on an assumption  
5 that the denial was gang membership, for  
6 example. So there's a lot packed in there, but  
7 if you could help me with that.

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

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

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

1 court has countenanced in the context of  
2 Mandel-type review.

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

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas, anything further?

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

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

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

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

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

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

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

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



1 was a terrorist.

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

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

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

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

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

1 to something that prevents her from -- prevents  
2 him from doing that.

3 And I would also say that would --

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

6 MR. GANNON: Pardon?

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

10 MR. GANNON: It --

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

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

18 JUSTICE SOTOMAYOR: Well, that's --

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

1 in Castle Rock, where the Court relied on  
2 O'Bannon, that was an instance --

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

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

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

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

6 MR. GANNON: I -- I --

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

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

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

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

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

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

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

24 MR. GANNON: Well --

25 JUSTICE KAGAN: -- contest that this

1 constitutional right is any different?

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

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

18 MR. GANNON: Yeah. And --

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

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

1 here.

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

10           JUSTICE KAGAN: Okay. Thank you.

11           CHIEF JUSTICE ROBERTS: Justice  
12 Gorsuch?

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

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

1           Then they want a declaration that the  
2 statute's unconstitutionally vague. That's not  
3 before us. Then they want their -- their costs.  
4 That's not before us.

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

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

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

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

20           JUSTICE GORSUCH: Well, the --

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

24           JUSTICE GORSUCH: So -- so how about  
25 this, that, you know, the -- the declaratory

1 judgment would be you got the Mandel reason  
2 because that's what the Ninth Circuit found. It  
3 just wasn't timely, period.

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

8 JUSTICE GORSUCH: Fine.

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

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

14 MR. GANNON: Well, I --

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

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

19 JUSTICE GORSUCH: Yeah.

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



1 provided, and I understand my friend to be  
2 asking for more information even now.

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

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

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

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

24 JUSTICE GORSUCH: Yeah. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 Justice Barrett?

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

16 Is that right?

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

24 JUSTICE BARRETT: No, I agree, but  
25 it's different. I mean, I think Justice Kagan

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

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

11 JUSTICE BARRETT: Okay.

12 MR. GANNON: And --

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

21 Do you see what I'm saying?

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

1 liberty interest that is sufficient to trigger  
2 that review in Mandel, why isn't this one  
3 equally good?

4 JUSTICE BARRETT: Right.

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

7 JUSTICE BARRETT: Yeah.

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

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

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

1 MR. GANNON: I -- I don't think you  
2 need to do that. I think the question presented  
3 is based on the idea that there is the  
4 background of --

5 JUSTICE BARRETT: Okay.

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

9 JUSTICE BARRETT: That is what I --

10 MR. GANNON: -- for that reason.

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

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

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

1 opportunity to be heard about why it's wrong.

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

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

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

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

25 But that doesn't mean that -- the

1 point of Mandel isn't actually notice. It's  
2 confirmation that the government had a reason.  
3 And so I -- I'm -- I'm still fighting the  
4 premise that the point of Mandel is to -- to  
5 provide the person who is complaining with some  
6 form of redress. It's instead just a  
7 confirmation that the government had a  
8 legitimate reason to do what it did here.

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

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

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

1 sufficient, that would be kind of the end of it  
2 anyway?

3 MR. GANNON: Yes. As Justice Gorsuch  
4 --

5 JUSTICE BARRETT: Yeah.

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

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

12 MR. GANNON: If -- if --

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

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

23 JUSTICE BARRETT: But would there be  
24 some process in the State Department for letting  
25 them make their case that these MS -- that these



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

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

9 JUSTICE BARRETT: Right.

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

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

16 MR. GANNON: Yeah.

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

19 CHIEF JUSTICE ROBERTS: Justice  
20 Jackson?

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

1 fundamental right to have her spouse live with  
2 her in the United States and that sort of that's  
3 the government's framing and the way in which  
4 you are approaching the first question.

5 Is that -- am I wrong about that?

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

11 JUSTICE JACKSON: All right. But as  
12 --

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

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

1 the First Amendment.

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

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

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

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

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

13                   JUSTICE JACKSON: All right. And have  
14 we --

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

18                   JUSTICE JACKSON: Yeah.

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

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

1 the fundamental right to marriage and raising a  
2 family and that kind of thing. So I think  
3 O'Bannon might be a little bit off in that way.

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

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

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

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

1 him in the United States.

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

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

15 JUSTICE JACKSON: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Mr. Lee.

19 ORAL ARGUMENT OF ERIC T. LEE

20 ON BEHALF OF THE RESPONDENTS

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

23 Over eight years ago, the government  
24 violated Sandra Munoz's right to procedural due  
25 process by denying her husband's visa without

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

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

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

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

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

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

21           And I welcome the Court's questions.

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



1 said that such a liberty interest actually  
2 exists.

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

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

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

18           JUSTICE THOMAS: I understand that.  
19 That's a different case.

20           What I'm interested in is we had this  
21 exact issue in Din. That would have seemed --  
22 that would seem to have been the occasion for  
23 deciding exactly what you're talking about. But  
24 we did not get a court for that.

25           I can think of no other case where the

1 right to have your spouse come to this -- be in  
2 this -- immigrate to this country has been  
3 considered. That's what I'm interested in.

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

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

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

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

1 the issue of the right to daily personal  
2 intimate association was recognized by this  
3 Court as a substantive right.

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

12 So we think that that --

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

19 MR. LEE: So, Your Honor, on the  
20 doctrine of consular nonreviewability, the  
21 government raises this as an exception when the  
22 rights of citizens are implicated. If a case  
23 where a U.S. citizen had been living with her  
24 husband for five years and that they had tried  
25 to go through the legal process and a denial was

1 given without any -- any reason of the basis  
2 why, that's the type of case that -- that there  
3 has to be some level of review over.

4           If the Court acknowledged in Mandel --  
5 and I just want to quote from the decision in  
6 Trump against Hawaii briefly where the Court  
7 said that "this Court has previously considered  
8 the merits of claims asserted by U.S. citizens  
9 regarding violations of their personal rights  
10 allegedly caused by the government's exclusion  
11 of particular foreign nationals." That's at  
12 2416 of the opinion.

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

19           JUSTICE KAGAN: But then what --

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

25           MR. LEE: What we received, what the

1 Ninth Circuit said was sufficient, is far better  
2 than the "any other unlawful activity." And so,  
3 to answer Your Honor's question --

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

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

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

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

17 JUSTICE KAVANAUGH: In court?

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

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

23 JUSTICE KAVANAUGH: I mean, what  
24 happens in court then? You say reasonable  
25 opportunity to contest so you can force the

1 government to provide more evidence behind the  
2 reasoning, or what -- what happens?

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

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

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

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

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

1 seems from the prayer for relief you got  
2 everything you asked for.

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

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

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

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

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

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

24 MR. LEE: I don't think that there's a  
25 way around that, Your Honor, because, otherwise,

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

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

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

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

25 But that's meaningless, and it puts



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

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

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

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

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

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

25 And that was elaborated on in Trump

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

6 MR. LEE: So --

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

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

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

23 Here, the government claims as though  
24 it's operating at the peaks of plenary power.  
25 But the amicus brief from the congressmen which

1 was submitted says at page 23 that the  
2 department's position is that this decision  
3 should have been left to one political branch,  
4 the executive.

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

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

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

16 JUSTICE KAGAN: So --

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

25 MR. LEE: Well, don't get me wrong.

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

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

12           There was reference earlier to  
13 1182(b)(3), which the government treats as a  
14 broad nondisclosure provision. That is not the  
15 position that they took in Din against Kerry,  
16 where they said at page 50 and 51 of their  
17 merits brief that when the court does -- when  
18 the executive does disclose -- disclose  
19 additional material, that reflects a considered  
20 determination that the information provided does  
21 not require invoking the protections of  
22 1182(b)(3).

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

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

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

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

19 MR. LEE: -- leading to denial.

20 CHIEF JUSTICE ROBERTS: Well, I guess  
21 I do mean to interrupt. I mean, it's -- it's --  
22 you say in the domestic context. That's kind of  
23 a pretty dramatic premise if you're going to  
24 say, well, it's the same as it's going to be in  
25 the domestic context. The whole point of

1 consular nonreviewability is that it's not in  
2 the domestic context.

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

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

18 JUSTICE ALITO: Well, counsel --

19 CHIEF JUSTICE ROBERTS: That seems --

20 JUSTICE ALITO: I'm sorry, Chief.

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

1 from the very beginning, that the United States  
2 has control over its borders with respect to  
3 noncitizens who seek to come in.

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

13 Let me --

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

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

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

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

1 giving them the chance to exercise their liberty  
2 interests only by forfeiting the protection of  
3 the Constitution.

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

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

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

25 But you didn't get it in time as I



1 understand the issue. You didn't get it in time  
2 to invoke the reconsideration processes that the  
3 State Department usually has for exactly this  
4 purpose. Is that correct?

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

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

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

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

24 MR. LEE: In order to be able to  
25 harness the facts to overcome that

1 determination, that's right, Your Honor.

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

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

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

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

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

1 the government said that the tattoos were merely  
2 the suspicion which triggered the inquiry.

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

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

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

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

22 JUSTICE GORSUCH: Does Mandel require  
23 specificity of the particular gang that he was  
24 affiliated with? Wouldn't it be enough for the  
25 government to say he's affiliated with an

1 international gang that conducts violence and --  
2 and drug-trafficking operations, for example?

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

8 JUSTICE GORSUCH: Let's just suppose  
9 that it were enough for the government.

10 MR. LEE: Then, yes, that would be the  
11 end of the -- but -- but --

12 JUSTICE GORSUCH: End of the case?  
13 That would be harmless error then?

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

19 JUSTICE GORSUCH: No, no, but I think  
20 --

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

23 JUSTICE GORSUCH: I understand that.  
24 I appreciate that fact. But, if your client  
25 understood that gang membership were -- was the

1 problem and if the government said gang  
2 membership, if that were enough to satisfy  
3 Mandel, why doesn't it follow that -- that any  
4 error here is harmless?

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

11 In almost all cases, there's going to  
12 be facts that can --

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

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

24 That affidavit only mentions MS-13, I  
25 think, in two or three sentences in passing. It

1 makes -- it uses MS-13 as an example. It makes  
2 no attempt to actually analyze how these tattoos  
3 might have been related to that gang.

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

8 JUSTICE BARRETT: Sigmund Freud.

9 MR. LEE: You know, I mean --

10 JUSTICE BARRETT: I thought that was  
11 interesting.

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

13 JUSTICE BARRETT: But, counsel, let me  
14 follow up --

15 MR. LEE: -- doesn't like  
16 psychoanalysts.

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

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

1           MR. LEE: Well, let me answer that by  
2 coming back to Justice Kennedy's concurrence in  
3 Din, because that concurrence -- and I'm  
4 operating under the assumption that we're  
5 working with Mandel here -- that concurrence  
6 specified at page 105 that the -- that the  
7 terrorism bar contained discrete factual  
8 predicates. There were six or seven types of  
9 activity that there --

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

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

1                   So, for example, the State Department  
2 lists in its foreign affairs manual the 10  
3 factors that officers are supposed to consider.  
4 Whether they --

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

7                   MR. LEE: Certainly.

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

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

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

25                   Now you're translating it into the --



1 the situation where it's -- it's the opportunity  
2 to come here. How do we -- you know, how do we  
3 figure out how much she gets?

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

12 JUSTICE ALITO: Again, I don't think  
13 you can answer this constitutional question by  
14 citing statutes.

15 MR. LEE: Well, but --

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

24 MR. LEE: And -- and I think the Court  
25 has addressed a similar context in the

1 prison-type cases, Vitek against Jones, Harper  
2 against Washington, where the Court recognized  
3 an underlying substantive constitutional  
4 interest, for example, in not being forced to  
5 take psychotropic drugs or not being removed to  
6 a mental facility, and yet it -- the way it  
7 balanced those interests was by providing a  
8 minimal level of procedural due process.

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

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

18           JUSTICE ALITO: But what if a -- just  
19 let me --

20           JUSTICE KAGAN: No, go ahead.

21           JUSTICE ALITO: If I could follow up.  
22 What if an American citizen wants to have a  
23 child who is a noncitizen admitted to the United  
24 States? Would the same thing apply there? Or  
25 an American citizen wants to have a noncitizen

1 parent admitted or an American citizen who  
2 doesn't believe in marriage wants to have a  
3 noncitizen admitted to the United States so that  
4 person can live in an intimate relationship with  
5 that person in the United States?

6 What about all those situations?

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

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

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

1 and citizens have to be adults to petition  
2 immediate relatives.

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

9 JUSTICE ALITO: Well --

10 JUSTICE KAGAN: Mr. --

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

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

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

1 substantive --

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

3 MR. LEE: -- liberty interest in adult  
4 cohabitation.

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

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

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

24 JUSTICE KAGAN: Mr. Lee, I -- I -- I  
25 guess what I'm not seeing, to me, there's no

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

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

20           So what weighing are we talking about?

21           MR. LEE: No, I think Your Honor put  
22 it better than I did. I mean, we have here a  
23 very important constitutional interest. It  
24 would certainly not make sense if Mr.  
25 Asencio-Cordero could ask a professor to get his

1 next visa and get in that way but not because he  
2 had lived with his wife for five years and --

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

6 MR. LEE: Right.

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

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

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

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

1                   Mandel talks about notice and giving  
2                   you the basis, but it doesn't talk about Mullane  
3                   and an opportunity to be heard. And your  
4                   weighing, I take it, is probably coming from  
5                   Mathews versus Eldridge, which I don't think is  
6                   the standard here.

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

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

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

19                  CHIEF JUSTICE ROBERTS: Thank you,  
20                  counsel.

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

25                  MR. LEE: We do not need any



1 additional judicial review here, Your Honor. I  
2 think, on remand, this will go quickly to the  
3 consulate so that we can finally respond to the  
4 information that we've been given.

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

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

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

22 MR. LEE: I see, yes, going forward,  
23 that's the rule.

24 CHIEF JUSTICE ROBERTS: And you do  
25 that by doing what?

1           MR. LEE: Well, we do that by  
2 requiring that there is -- I mean, we've had  
3 some discussion as to whether the facially  
4 legitimate and bona fide test applies or whether  
5 something slightly more strenuous applies.

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

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: On the one  
2 hand, and --

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

10 So I -- I -- I take Your Honor's  
11 point. We -- we sort --

12 CHIEF JUSTICE ROBERTS: What -- what  
13 -- what is it?

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

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

25 MR. LEE: Well, but that -- I don't

1 mean to be hard-headed, Your Honor, but that's  
2 what this -- this either facially legitimate and  
3 bona fide test or the slightly higher standard  
4 that we're asking for gets us, because, again,  
5 it's -- we recognize -- we are certainly  
6 solicitous of the government's concern in  
7 keeping individuals who are inadmissible out of  
8 the United States. But individuals who are  
9 admissible should be admitted to the United  
10 States. And so --

11 CHIEF JUSTICE ROBERTS: Thank you.  
12 Thank you.

13 MR. LEE: Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Thomas?

16 Justice Alito?

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

1 member of a particular gang. D, we believe he's  
2 a member of MS-13. E, this is why we believe  
3 that he's a member of MS-13. F, if I'm getting  
4 my numbers straight, we believe that, and you  
5 have an opportunity to rebut it.

6 Now how do we determine which of those  
7 is what you get, unless we're weighing one thing  
8 against another?

9 MR. LEE: By looking to what the  
10 Department of Homeland Security does  
11 domestically. And that's what those --

12 JUSTICE ALITO: Okay. Thanks. That  
13 -- I mean, that's -- it doesn't tell me anything  
14 about what the Constitution requires.

15 One final question. Where -- where  
16 does your cause of action come from?

17 MR. LEE: From the Due Process Clause  
18 of the Constitution.

19 JUSTICE ALITO: Is it an Ex parte  
20 Young cause of action?

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

25 JUSTICE ALITO: Under -- directly

1 under the Constitution?

2 MR. LEE: That's correct.

3 JUSTICE ALITO: It's not Ex parte  
4 Young?

5 MR. LEE: It arises from the Due  
6 Process Clause.

7 JUSTICE ALITO: It's not APA?

8 MR. LEE: We raised an APA claim  
9 below. If the Court wants to remand on that  
10 issue, they may. But we think it's a  
11 constitutional case, Your Honor.

12 JUSTICE ALITO: Okay. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Sotomayor?

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

21 If they believe that, does Ex parte  
22 Young help you?

23 MR. LEE: Your Honor, I am not  
24 prepared to discuss Ex parte Young because this  
25 did not come up below. We think that our cause

1 of action arises under the Constitution. We --  
2 we think it comes from 702 of the APA as well,  
3 which provides a different route, but that's our  
4 position.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?  
6 Justice Gorsuch?  
7 Justice Kavanaugh?

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

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

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

22 The government's citation of  
23 1182(a)(3)(B) also indicates it relied on a bona  
24 fide factual basis. And it's also facially  
25 legitimate. That's on page 105. Then he says:

1 "Mandel instructs us not to look behind the  
2 government's explanation for additional factual  
3 details beyond what it" -- "its express reliance  
4 on 1182(a)(3)(B) encompassed."

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

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

24           So you put all that together, I -- I  
25 think that's very problematic for you if we



1 follow that. And that, in turn, was explicating  
2 what -- what Mandel meant and what Trump versus  
3 Hawaii then relied on this -- this opinion. So  
4 that's a problem for you, I think, so tell me  
5 why it's not.

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

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

1 terrorist organization, language defining  
2 terrorist activity, an intent requirement.

3 And so we think that that's -- that's  
4 a lot more --

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

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

23 JUSTICE KAVANAUGH: Thank you.

24 MR. LEE: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: No.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Jackson?

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

8 MR. LEE: Correct.

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

20 MR. LEE: Correct. All we're asking  
21 for is the chance.

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

1 MR. LEE: Correct.

2 JUSTICE JACKSON: All right. So let  
3 me ask you, do -- do you need to -- do we need  
4 to roll back or change the doctrine of consular  
5 nonreviewability in order for you to win in this  
6 case?

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

10 JUSTICE JACKSON: Why is that? Say a  
11 little bit more.

12 MR. LEE: Because the doctrine -- the  
13 doctrine of consular nonreviewability does not  
14 apply to American citizens. The government --  
15 the executive branch cannot restrict review  
16 without a statutory provision granting it the  
17 ability to strip review. This is not a case  
18 where Congress has gone anywhere near that. The  
19 citations which the government pulls up in its  
20 brief have no -- do not make --

21 JUSTICE JACKSON: So we have never  
22 applied the doctrine of consular  
23 nonreviewability in the context of an American  
24 citizen you're saying?

25 MR. LEE: The Court has always

1 reviewed the merits of claims brought by  
2 American citizens, constitutional claims, that's  
3 correct, Your Honor.

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

12 MR. LEE: It's a pretty important  
13 exception from the standpoint of separation of  
14 powers, but, yes, Your Honor.

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

20 MR. LEE: Because -- I'm sorry, Your  
21 Honor.

22 JUSTICE JACKSON: Yes.

23 MR. LEE: Because, here, unlike in  
24 Mandel -- in that case, the professor had  
25 violated a prior visa. The Court held that

1       there was a factual basis for the Attorney  
2       General's denial of a fully discretionary  
3       waiver. Here, you have a non-discretionary  
4       statute requiring reason to believe there's no  
5       factual basis for the denial, and, therefore,  
6       the government hasn't established that the  
7       denial was facially legitimate and bona fide.

8                   JUSTICE JACKSON: Final question.  
9       Would you be okay with an analysis that assumed  
10      the first question presented?

11                   MR. LEE: If we were to prevail on the  
12      second question?

13                   (Laughter.)

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

17                   JUSTICE JACKSON: You think we have to  
18      say. We can't just assume it and then --

19                   MR. LEE: Right.

20                   JUSTICE JACKSON: Right? Because you  
21      can't assume it in the same way.

22                   MR. LEE: I don't think it would be  
23      breaking --

24                   JUSTICE JACKSON: Yeah.

25                   MR. LEE: -- any new ground to

1 recognize the importance of marriage in this  
2 case, though, Your Honor.

3 JUSTICE JACKSON: Thank you.

4 MR. LEE: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Rebuttal, Mr. Gannon?

8 REBUTTAL ARGUMENT OF CURTIS E. GANNON  
9 ON BEHALF OF THE PETITIONERS

10 MR. GANNON: Thank you, Mr. Chief  
11 Justice. If I could just make three points.

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

17 My friend said that no one else other  
18 than a spouse would have the right to petition  
19 under the statute as it currently exists for  
20 this type of relief. But, if this is a  
21 constitutional liberty interest underlying this,  
22 I'm not sure why people wouldn't be able to say  
23 the inability to make those petitions is  
24 unconstitutional, and so -- and no court has  
25 countenanced that type of argument in any other

1 context.

2           Second, my friend talks about the  
3 domestic context, talks about what DHS does when  
4 there are proceedings in the United States,  
5 which obviously implicate different interests  
6 because somebody is here and they -- there is a  
7 mechanism for some judicial review there.

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

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



1 16 of the Joint Appendix.

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

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

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

1 review.

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

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

20           We urge the Court to reverse the  
21 judgment of the Ninth Circuit.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. The case is submitted.

24           (Whereupon, at 11:37 a.m., the case  
25 was submitted.)

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