No. 23-334

In the Supreme Court of the United States

DEPARTMENT OF STATE, ET AL.,
Petitioners,

v.

SANDRA MUÑOZ, ET AL.,
Respondents.

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

BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE AMERICAN IMMIGRATION COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The American Immigration Lawyers Association (AILA), founded in 1946, is a national, nonpartisan, nonprofit association with more than 16,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice. AILA's members practice regularly before the Department of Homeland Security, immigration courts, and the Board of Immigration Appeals, as well as before the federal courts. AILA has participated as *amicus curiae* in numerous cases before the U.S. Courts of Appeals and the U.S. Supreme Court.

The American Immigration Council is a nonprofit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of immigrants in the United States. The Council regularly litigates and advocates around issues involving access to immigration benefits and federal court review.

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents' brief demonstrates that the Government's assertion of limitless and unreviewable discretion to deny visas in all circumstances is inconsistent with fundamental constitutional principles of liberty and due process. *Amici* agree fully with respondents' arguments on those points and will not repeat them here. Instead, *amici* address a different but equally fatal flaw in the Government's theory: Its assertion that judicial review of consular visa denial determinations is completely unavailable cannot be squared with the Administrative Procedure Act (APA), which generally assures affected individuals the right to challenge agency action that departs from the governing statute and agency rules.

In the face of harmful government action, such APA review is presumptively available; exceptions are narrow and rare. But here, the Government makes no attempt at all to demonstrate that the APA is inapplicable. Nor could it. Congress was clear and express in setting the APA reviewability rules, which apply in this case by their plain terms; agency officials have no discretion to simply disregard such statutory mandates. Yet the Government's assertion of absolute Executive Branch authority in the immigration context, on which its position ultimately rests, lacks lawful support. This Court should find that the APA governs and applies to respondents' challenge.

A. The Court has recognized a strong presumption favoring the availability of review under the APA. Such review will be precluded in only narrow circumstances: when (1) the substantive statute itself makes

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review unavailable; or (2) the decision is committed to agency discretion. 5 U.S.C. § 701(a). Neither of these exceptions is present here.

First, the Immigration and Nationality Act (INA) does not preclude review. Nothing in the statutory text even arguably makes consular visa decisions unreviewable. Nor is there any such suggestion in the statutory background. To the contrary, the INA's sponsors were insistent and expressly clear that the statute did *not* displace APA review. And there is no basis to assume that the Congress that enacted the APA and the INA would have intended either statute to incorporate a consular nonreviewability principle as part of the presumed legal background. At the time Congress enacted these statutes, consular nonreviewability was a relatively new, infrequently stated, and largely unsupported doctrine. Such a dubious rule is not presumptively incorporated into legislation.

Second, consular visa decisions are not committed to agency discretion. There *is* law to apply. The INA includes clear language governing how a consular officer is to judge a visa applicant's eligibility. This means that the officer does not have freewheeling discretion in making a decision; rather, the officer's determination must be grounded in specific facts made relevant by the INA's substantive standard.

Third, although a handful of courts have concluded that review of consular visa decisions is barred by 5 U.S.C. § 702(1)—which preserves the authority of courts to dismiss an action "on any other appropriate legal or equitable ground" (5 U.S.C. § 702(1))—that view is insupportable. Section 702(1) does not curtail judicial review; it simply provides that a provi-

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sion eliminating the United States' sovereign immunity in specified circumstances does not otherwise *expand* judicial review.

Moreover, to the extent that case law supports some limitation on courts' ability to hear challenges to consular visa denials, the decisions misconceive the basis for that limitation. The purported doctrine of consular nonreviewability has been persistent, perhaps, not because of reviewability concerns, but because of the presumption that a statute provides a cause of action only to "particular plaintiff[s]" whose claims fall within the zone of interests protected by the law invoked. *Lexmark, Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). In the typical case, the disappointed party is an "unadmitted and nonresident alien" with no adequate basis for asserting a claim in the courts of this country. *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972). Such parties appear to be outside of the zone of interests protected by the INA, and therefore ordinary APA principles forbid their suit. But that concern provides no basis for barring the review sought by a U.S. citizen seeking reunification with her spouse.

B. This case offers a quintessential example of the circumstances in which APA review is valuable, judicially manageable, and an essential safeguard against arbitrary or capricious agency action. The governing statute sets out a familiar factual standard that governs the agency action, establishing specific, judicially determinable factual grounds for inadmissibility. And here, for all that appears in the public record, the consular officer did not properly apply that standard (or, indeed, make any serious attempt to apply it at all).

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Accordingly, there are strong grounds to believe that judicial review would find error in the agency action.

C. The Government appears to suggest that the consular nonreviewability doctrine has some independent constitutional basis that overrides the ordinary rules of judicial review. But that is not so. Contrary to the Government's suggestion, the consular nonreviewability doctrine has no basis in the text, history, or structure of the Constitution. Rather, it is a creature of lower court decisions that place it on no substantial constitutional grounding. If there is to be such a doctrine, it must be created by Congress—which, far from recognizing a general consular nonreviewability principle, subjected Executive Branch authority to the limits set by the APA.

ARGUMENT

I. There is a strong presumption in favor of APA review of administrative actions, and the narrow exceptions to APA review do not apply here.

At the outset, it has long been settled that APA review of administrative actions is available in all but the most unusual circumstances. The APA itself makes this clear: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. And this Court has repeatedly emphasized that there is a "strong presumption favoring judicial review of administrative action." *Salinas* v. *U.S. R.R. Ret. Bd.*, 592 U.S. 188, 197 (2021) (quoting *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 486 (2015)). Although this presumption is rebuttable, agencies bear a

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"'heavy burden' in attempting to show that Congress 'prohibit[ed] all judicial review' of the agency's compliance with a legislative mandate." *Mach Mining*, 575 U.S. at 486 (quoting *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975)). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Lab'ys* v. *Gardner*, 387 U.S. 136, 141 (1967) (quoting *Rusk* v. *Cort*, 369 U.S. 367, 379 (1962)).

There are only two exceptions to the presumption of reviewability under the APA: when (1) the underlying substantive statute precludes review; or (2) the action is committed to agency discretion. 5 U.S.C. § 701(a). Neither of these exceptions applies here.

A. The INA does not preclude judicial review.

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, does not preclude judicial review of agency action. As a general matter, the "well-settled" and "strong presumption" in favor of judicial review "has consistently been applied to immigration statutes." *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 222 (2020). This presumption of reviewability is so strong that the Government must provide "clear and convincing evidence" that Congress intended the INA to modify this default principle. *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993). But there is no such evidence here: both the text and history of the INA demonstrate the availability of APA review.

1. The INA's text supports judicial review.

Most obviously, there is no textual hook in the INA for eliminating APA review. The statutory language makes no reference to the doctrine of consular

nonreviewability, on which the Government rests its argument against review. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51 (1955).[2] Indeed, if anything, the statutory text affirmatively supports the availability of review in this context. Thus, Congress specified that a consular officer "may at any time, in his discretion, revoke * * * visa[s]" and that "[t]here shall be no means of judicial review" of that visa revocation decision. 8 U.S.C. § 1201(i). This denial-of-review provision, which is limited to the visa revocation context, would be unnecessary if *all* consular decisions were unreviewable, as the Government postulates.[3] Because a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (*Corley* v. *United States*, 556 U.S. 303, 314 (2009)), the INA's structure suggests that it does not incorporate the doctrine of consular nonreviewability. See *Biden* v. *Texas*, 597 U.S. 785, 799 (2022) ("where Congress intended to deny subject matter jurisdiction over a par-

[2] Even courts that have sharply limited review of visa determinations have recognized that Congress did not limit review "expressly." See *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999).

[3] The Government has suggested that decisions to grant and to revoke visas are equally subject to the consular nonreviewability doctrine. See Petition for a Writ of Certiorari at 14, *Trump* v. *Int'l Refugee Assistance Project*, 583 U.S. 912 (2017) (No. 16-1436), 2017 WL 2391562, at *14 (consular nonreviewability means "that the Executive's decision to issue or revoke a visa for an alien abroad 'is not subject to judicial review'"). If that is so, that Congress denied review expressly in the revocation but not in the issuance context suggests that Congress did not intend to make the APA unavailable in the setting of this case.

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ticular class of claims [in the INA], it did so unambiguously"). And certainly, there is no clear and convincing evidence of nonreviewability in the INA text.

2. The INA's history supports judicial review.

The legislative history and background confirms the availability of APA review. When enacting the INA, Congress legislated against a well-established background rule of reviewability under the APA. Congress enacted the INA in 1952, just six years after passage of the APA; the drafters of the INA therefore surely would have had the APA in mind. Lacking a textual basis for denying APA review of visa denials, the Government must make a clear showing that Congress nevertheless affirmatively intended to reject APA review. But the legislative history shows the opposite: key sponsors and opponents of the INA *agreed* almost universally that judicial review would exist for consular decisions.

Opponents of the INA, including Senator (and future Vice President) Hubert Humphrey and Senator Herbert Lehman, expressed concern that the bill that became the INA did not permit such review. See 98 Cong. Rec. 5419, 5779 (1952) (statement of Sen. Humphrey); *id.* at 5604 (statement of by Sen. Lehman). Senator Paul Douglas likewise worried that the bill did "not provide the administrative procedures which Congress and the Nation thought were being put into effect when we enacted the Administrative Procedure Act." *Id.* at 5410; see also *id.* at 5604 (statement of Sen. Lehman) ("It continues the present exemption of immigration proceedings from the terms of

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the Administrative Procedure Act, thus blocking correction by the courts of erroneous or unfair judgments of immigration officials.").

But the bill's sponsor, Senator Patrick McCarran, could not have been clearer that the INA preserved review: "[A] perusal of the bill would convince any fair-minded man that the bill is 100 percent within the framework of the Administrative Procedure Act." 98 Cong. Rec. at 5329. Indeed, as Sen. McCarran took care to remind the Senate, he was not only a principal sponsor of the INA, but the primary sponsor and author of the APA. Likewise, Representative Francis Walter, Sen. McCarran's cosponsor of both the APA and INA, explicitly addressed the criticism that "H.R. 5678 [the INA's predecessor bill] would emasculate judicial review and authorize arbitrary administrative practices of the very sort which the Administrative Procedure[] Act sought to correct and guard against." *Id.* at 4302. Rep. Walter refuted the claim:

> Instead of destroying the Administrative Procedures Act, we undo what the Congress did in a deficiency appropriation bill several years ago when it legislated to overturn a decision of the Supreme Court, which ruled that the Administrative Procedures Act is applicable in deportation proceedings. We undo that. *So here, instead of our destroying the Administrative Procedures Act, we actually see that it is reinstated in every instance.*

Ibid. (emphasis added). See also *Pedreiro*, 349 U.S. at 52 (recounting legislative history and role of Sen. McCarran and Rep. Walter).[4]

When some critics, including Senators Blair Moody and Humphrey, proposed amendments that would make APA protections more explicit (see 98 Cong. Rec. at 5778-5781), Sen. McCarran and Rep. Walter repeatedly countered that such provisions were superfluous. In rebutting the Moody/Humphrey amendment, Sen. McCarran declared that the APA "is made applicable to the bill * * * it prevails now." *Id.* at 5778. "Any aggrieved immigrant, *or any aggrieved applicant for entry into this country* can and now does resort to the courts; and that is separate and apart from the Department of Justice, and in no wise under the control of the Attorney General." *Ibid.* (emphasis added). The amendment was rejected shortly thereafter, following this assurance that the APA made judicial review available. See *id*. at 5781. *That* should be taken as the intent underlying the INA.[5]

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[4] One supporter of the INA did suggest that maintaining judicial review was unmanageable for reasons of judicial economy. 98 Cong. Rec. 4431 (1952) (statement of Rep. Graham). This concern, however, was not shared by the bill's sponsors. And notably, this is not the rationale now advanced by the Government in support of the consular nonreviewability doctrine, which (as we discuss below) is said to rest on vague concerns of executive power and national security. See *infra* at 24-27.

[5] In amending the INA in 1961, Congress would clarify that the only pathway to judicial review of exclusion proceedings is the writ of habeas corpus. H.R. Rep. No. 1086, 87th Cong., 1st Sess. 31 (1961). Exclusion proceedings, however, are distinct from re-

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3. Congress would not have intended the APA or INA to incorporate the consular nonreviewability doctrine.

Moreover, there is no basis to assume that the Congress that enacted either the APA or the INA would have intended the statute to incorporate a consular nonreviewability principle as part of the presumed legal background. At the time Congress enacted those statutes, consular nonreviewability was an obscure, infrequently stated, and largely unsupported doctrine. In particular, there existed "no longstanding judicial practice of refusing to review claims like those raised here," and the Government has "not produced a single case * * * in which this kind of claim [had been] found to be outside the province of the federal courts" at the time the relevant statutes were enacted. *Abourezk* v. *Regan*, 785 F.2d 1043, 1051 n.6 (D.C. Cir. 1986). Such a dubious rule is not presumptively incorporated into legislation.

In its modern incarnation, the consular nonreviewability doctrine first arose in two court of appeals decisions issued during the late 1920s: (1) *U.S. ex rel. Ulrich* v. *Kellogg*, 30 F.2d 984, 986 (D.C. Cir. 1929), in which the court indicated that it was "not able to find any provision of the immigration laws which provides

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fusals to grant a visa, and Congress specified that the writ applied only when an immigrant sought to secure release from custody. *Ibid.*

Congress again amended the INA in 1996 to curtail judicial review of *removal proceedings*. Once again, Congress did nothing to bar judicial review of decisions by consular officers to deny visas. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996).

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for an official review of the action of the consular officers in such case by a cabinet officer or other authority"; and (2) *U.S. ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), in which the court held that "[w]hether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal to vise a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. * * * It is beyond the jurisdiction of the court." Notably, these decisions rested on different rationales (lack of statutory authority in one, lack of jurisdiction in the other), and neither discussed the basis for nonreviewability in any detail—the courts simply declared that they would refrain from judicial review. See also *Ex parte Seid Soo Hong*, 23 F.2d 847, 848 (N.D. Cal. 1928) ("The granting or denying of a visa involves the exercise of discretion by consular officers with which the courts will not interfere * * *").

With a few minor exceptions, these two courts' discussions of consular nonreviewability were almost entirely disregarded until the 1960s.[6] In fact, the term "consular non-reviewability" did not appear in the scholarly literature until 1955. See Harry N. Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolutism*, 41 ABA J. 1109 (1955) (calling it an "anomaly in American jurisprudence"). This is hardly, as the Government characterizes it, a principle with "deep roots." U.S. Br. 16. The obscurity

[6] Courts began paying substantial attention to the doctrine only in subsequent decades, *after* enactment of the INA. See, *e.g.* *Licea-Gomez* v. *Pilliod*, 193 F. Supp. 577, 582 (N.D. Ill. 1960) (dicta without analysis); *Estrada* v. *Ahrens*, 296 F.2d 690, 701 n.2 (5th Cir. 1961) (same); *Loza-Bedoya* v. *Immigr. & Naturalization Serv.*, 410 F.2d 343, 347 (9th Cir. 1969) (same)..

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of the doctrine thus refutes any assumption that Congress either (1) meant to integrate the consular nonreviewability doctrine into the APA in 1946 or (2) acquiesced in 1952 to a pattern of nonreviewability in judicial decisions post-dating enactment of the APA.[7] No such pattern existed.

Moreover, both *Ulrich* and *London* long predated enactment of the APA, which created an express mechanism for, and gave a strong endorsement to, judicial review. And those decisions also predated enactment of the INA by more than two decades, so surely would not have been top of mind for the enacting Congress. It therefore is plain that no default presumption of nonreviewability existed at the time of the INA's enactment.

To be sure, prior to enactment of the INA this Court declined to review a decision by the Attorney General to exclude permanently, without a hearing, a noncitizen from admission to the United States in *U.S. ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950). But that case did not involve a consular decision at all, and therefore says nothing about a principle of consular nonreviewability. Moreover, the Court there understood the usual rule—that courts could review exclusion decisions as "authorized by law"—to have been displaced "during a time of national emergency" by the statute's wartime provisions. *Id.* at 543.

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[7] Although a few courts have suggested that Congress intended to remove the INA from the ambit of the APA (see *Licea-Gomez*, 193 F. Supp. at 582; *Hermina Sague* v. *United States*, 416 F. Supp. 217, 219 (D.P.R. 1976), they proffered no evidence for this proposition; the contrary statements of Sen. McCarran and Rep. Walter prove otherwise.

The Court found the procedures under review "reasonable in the circumstances of the period for which they were authorized, namely, the national emergency of World War II." *Id.* at 544. Emphasizing the case's national-security implications, the Court relied on *Ludecke v. Watkins*, 335 U.S. 160, 171-72 (1948) (upholding the President's war-power authority to deport citizens of hostile governments during wartime), for its conclusion that it could not "retry the determination of the Attorney General" that Knauff was a security risk. *Id.* at 546. This is not that case: It is not wartime, and the government makes no national-security claim. The Congress that enacted the INA thus would not have understood *Knauff* as precluding ordinary APA review in the circumstances of this case.[8]

Finally, it bears emphasis that the decisions in *Ulrich*, *London*, and *Knauff* relied on the *Chinese Exclusion Cases* of the late-nineteenth century as the principal evidence of Congress's plenary power to imbue consular officers with ultimate, unreviewable discretion. See *Chae Chan Ping* v. *United States*, 130 U.S. 581 (1889); *Lem Moon Sing* v. *United States*, 158 U.S. 538 (1895). But the *Chinese Exclusion Cases* are now generally understood to reflect racist and xenophobic

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[8] We also note that, even so, when the facts of *Knauff* were mentioned during debate on the INA, critics and sponsors of the bills that became the INA both criticized Ms. Knauff's exclusion. This background strongly suggests that Congress did *not* acquiesce in the decision when enacting the INA. See, *e.g.*, 98 Cong. Rec. 4302 (1952) (statement of Rep. Walter); *id.* at 4401 (statement of Rep. Celler); *id.* at 5154 (statement of Sen. Benton). Indeed, as noted, the legislative history indicates that the INA's sponsors intended the APA to govern determinations made under the INA. See *supra*, at 8-10.

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premises that are inconsistent with currently recognized constitutional values; the decisions have largely been repudiated by historians, lawyers, and political scientists. See Amicus Br. Fred T. Korematsu Center for Law and Equality *et al.* 4-12.. The Court should hesitate before extending these decisions' dubious legacy here.

* * *

In short, the lack of a clear textual or historical hook for eliminating APA review means that this is not a case in which "statutes preclude judicial review." 5 U.S.C. § 701(1).

B. This was not an action "committed to agency discretion."

It is equally apparent that the decision to deny the visa application here did not fall within the APA's second review exception: it is not an action "committed to agency discretion."

To "honor the presumption of [APA] review," this Court reads "quite narrowly" the exception for "agency action [that] is committed to agency discretion by law." *DHS* v. *Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020); 5 U.S.C. § 701(a)(2). This exception is confined to "those rare 'administrative decision[s] traditionally left to agency discretion." *Ibid.* (quoting *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993)). It should be invoked only when there is "no law to apply." *Dep't of Com.* v. *New York*, 139 S. Ct. 2551, 2569 (2019) (citing *Citizens to Pres. Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971)). The instances in which this exception has been held to govern are extremely rare: employment decisions at the CIA (*Webster* v. *Doe*, 486 U.S. 592, 601 (1988)); the allocation of

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lump-sum appropriations (*Lincoln*, 508 U.S. at 192); and decisions to not undertake certain enforcement actions (*Heckler* v. *Chaney*, 470 U.S. 821, 837-838 (1985)).

Here, however, there *is* law to apply. The INA includes clear language governing how a consular officer is to judge a visa applicant's eligibility. The provision relevant to Asencio-Cordero's case specifically requires that the consular officer have "reasonable ground to believe" that the applicant "seeks to enter the United States to engage solely, principally, or incidentally in * * * any other unlawful activity." 8 U.S.C. § 1182(a)(3)(A)(ii). The officer does not have freewheeling discretion in making this decision; rather, it must be grounded in specific facts made relevant by the INA's substantive standard. In particular, relevant agency guidance explains that the "reason to believe" standard means that the consular officer "must have more than a mere suspicion; there must exist a probability, supported by evidence," that the inadmissibility ground applies to the applicant. 9 *Foreign Affairs Manual* 302.4-3(B)(3). This "might be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports." *Ibid.*

The United States appears to agree on this point: "Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's decision that a noncitizen is not eligible for a visa *must be tethered to the legal provisions that define such ineligibility*." U.S. Br. 25 (emphasis added). As such, the deci-

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sion to deny Asencio-Cordero's spousal visa is not committed to agency discretion and therefore not barred from review.

C. The consular nonreviewability doctrine finds no support in Section 702(1).

Although the inapplicability of the exceptions statutory exceptions to APA review should be the end of the matter, a few courts have understood Section 702(1)—which provides that "[n]othing herein affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground" (5 U.S.C. § 702(1))—to somehow incorporate the consular nonreviewability doctrine into the APA. See *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1160 (D.C. Cir. 1999); *Allen* v. *Milas*, 896 F.3d 1094, 1107 (9th Cir. 2018). That conclusion is incorrect.

1. As this Court noted in *Darby* v. *Cisneros*, Congress added Section 702(1) to the APA through the statute's 1976 amendments, limiting sovereign immunity while "simply * * * mak[ing] clear that '[a]ll other than the law of sovereign immunity remain unchanged.'" 509 U.S. 137, 153 (1993) (quoting S. Rep. No. 94-996, at 11 (1976)). That is, the amendments' "elimination of the defense of sovereign immunity *did not affect* any other limitation on judicial review that would otherwise apply under the APA." *Ibid.* (emphasis added).The provision therefore creates no new limits on judicial review; it simply confirms that the amendment did not further expand judicial review. If it is correct that the INA does not itself foreclose review and that there is law to apply, Section 702(1) offers the Government no further support.

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With seeming disregard of *Darby*, the D.C. and Ninth Circuits in *Saavedra Bruno* and *Milas* held that Section 702(1) retroactively incorporated consular nonreviewability as a basis for barring APA review. But as we have already established, that doctrine did not exist in any meaningful form when Congress enacted the APA. The phrase "consular nonreviewability" had not yet been coined. There was dicta in a few old decisions suggesting the unavailability of review, but those comments did not constitute a well-established understanding. Legislators would have thought that immigration decision-making was subject to review, as the Supreme Court would reaffirm four years later in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47, 53 (1950) ("We find no basis * * * for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies.").[9] Consequently, as Section 702(1) left the law of reviewability unchanged, it did not incorporate an unstated doctrine of consular nonreviewability into the APA.

Indeed, in *Abourezk* v. *Reagan*, then-Judge Ginsburg wrote for the D.C. Circuit that the APA "endow[s] plaintiffs with a right of action" to challenge visa denials so long as the plaintiffs "suffer injury in fact by reason of the challenged agency action and are arguably within the zone of interests to be protected or regulated under a relevant statute." 785 F.2d 1043,

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[9] While the Court in *Marcello* v. *Bonds*, 349 U.S. 302 (1955), held that enactment of the INA displaced the APA's applicability in certain deportation proceedings, the Court would swiftly rule that the APA was available to prospective immigrants seeking to challenge their exclusion. See *Brownell* v. *We Shung*, 352 U.S. 180 (1956); see also *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955).

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1050 (D.C. Cir. 1986) (internal quotation marks and citations omitted). The court of appeals labeled "insubstantial" the Government's assertion that authority to review the visa denial was unavailable under the APA. *Ibid.*; see *id.* at 1051 (specifically rejecting suggestions that the INA precludes review or that visa determinations are committed to agency discretion). An equally divided Court upheld that decision. *Reagan v. Abourezk*, 484 U.S. 1, 1 (1987) (mem.).

2. To the extent that case law supports some limitation on courts' ability to hear challenges to consular visa denials, it misconceives the basis for that limitation. As Judge Leventhal wrote for the court of appeals: "In past decisions refraining from judicial review courts have summoned, and often confused, a variety of concepts, finding a lack in one or another of the elements a suitor must provide to obtain judicial review." *Nat'l Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689, 692 (D.C. Cir. 1971). Those concepts, including standing and reviewability, "are separable [but] * * * are intermeshed in the overall determination of the appropriate occasion for judicial review." *Ibid.*

Courts' refusals to hear challenges to consular visa determinations have often been couched in terms of nonreviewability. As we have shown, though, there is no basis for such a bar. The purported doctrine of consular nonreviewability therefore has been persistent, perhaps, because of concerns relating not to reviewability, but to the presumption that a statute provides a cause of action only to "particular plaintiff[s]" whose claim falls within the zone of interests protected by the law invoked. *Lexmark, Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). In

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the typical visa denial case, the disappointed party is an "unadmitted and nonresident alien" with no adequate basis for asserting a claim in the courts of this country. *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972). Such parties appear to be outside of the zone of interests protected by the INA, and therefore ordinary law forbids their suit. But that concern provides no basis for barring the review sought by a U.S. citizen seeking reunification with her spouse.

The zone-of-interests test has no precise definition; rather, courts look broadly to legislative text, intent, and history to determine whether a plaintiff's injury "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Air Courier Conf. of Am.* v. *Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 523 (1991) (quoting *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)). That surely describes the circumstances here. Congress has long legislated favorably towards U.S. citizens seeking to bring their noncitizen spouses (and children) to the United States, granting them substantial legal protection in the INA. That is clear from statutory text, in a wide range of contexts. See, *e.g.*, 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(b); Resp. Br. 18-22.

Legislative history confirms that a primary goal of the INA is to "implement[] the underlying intention of our immigration laws regarding the preservation of the family unit." H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29 (1952). In furtherance of that goal, Congress intended to permit "[a]n American citizen [to] have the right to bring his [non-citizen] spouse (wife or husband) as a nonquota immigrant." *Ibid.* And more recently, in the Immigration Act of 1990, Congress

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sought to affirm that "family reunification should remain the cornerstone of U.S. immigration policy." H.R. Rep. No. 723, pt. 1, 101st Cong., 2d Sess. 38 (1990). During debate on that provision, legislators decried "the separation of nuclear families" as "antithetical to the national objective of preserving the integrity of the family unit." *Id.* at 39-40. Today, the INA continues to provide exemptions from quotas for the noncitizen spouses of U.S. citizens and provides them with preferential status. 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(b).

In light of this, U.S. citizens seeking admission of their noncitizen spouses to the United States clearly fall within the zone of interests that the INA protects. To the extent that modern decisions denying review of consular decisions are rooted in zone-of-interests concerns, nothing in those decisions supports denying review to Ms. Muñoz and others in her position.

II. APA review would be meaningful here.

APA review is presumptively available for a reason; it guards against arbitrary action taken by an agency bureaucracy, "set[ting] forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Regents of the Univ. of Cal.* 140 S. Ct. at 1905. This case offers a quintessential example of the circumstances in which APA review is valuable, judicially manageable, and an essential safeguard against agency action that is arbitrary, capricious, or otherwise not in accordance with law. Here, there is good reason to believe that judicial review could change the outcome and prevent a patently wrongful result.

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First, as has been noted, the governing statute sets out a familiar factual standard that governs the agency action. In relevant part, the statute provides that a noncitizen is inadmissible if the consular officer "knows, or has reasonable ground to believe," that the applicant "seeks to enter the United States to engage solely, principally, or incidentally in * * * unlawful activity." 8 U.S.C. § 1182(a)(3)(A)(ii). This states specific, judicially determinable factual grounds for inadmissibility, as well as the standard to be applied in making that determination: "reason to believe." And although this standard is sufficient to offer a clear guidepost for decision, we also explain above that agency guidance describes "reason to believe" standard as requiring that the consular officer "must have more than a mere suspicion; there must exist a probability, supported by evidence," that the inadmissibility ground applies to the applicant. 9 Foreign Affairs Manual 302.4-3(B)(3). This "might be established by a conviction, an admission, a long record of arrests with an unexplained failure to prosecute by the local government, or several reliable and corroborative reports." *Ibid.*

Second, for all that appears in the public record, the consular officer did not properly apply that standard (or, indeed, make any serious attempt to apply it at all). As respondents explain, it is uncontested that Asencio-Cordero has no criminal history. Resp. Br. 8. His tattoos were not gang-related and instead depicted Our Lady of Guadalupe, Sigmund Freud, an artistic "tribal" pattern, and theatrical masks. See *id.* at 2, 7-8. Against this background, the consular officer did not provide *any* reasoning or factual basis to justify the conclusion that Asencio-Cordero's visa should be denied, simply citing the controlling statutory

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standard. Accordingly, there are strong grounds to believe that review would find error in the agency action.

Nor is there anything in cases like this that would make judicial review especially difficult or unreliable. Courts routinely review numerous sorts of agency immigration decisions under the arbitrary, capricious, or otherwise not-in-accordance-with-law standard. See, *e.g.*, *Perez* v. *Cuccinelli*, 949 F.3d 865, 872 (4th Cir. 2020) (en banc); *Innova Solutions, Inc.* v. *Baran*, 983 F.3d 428, 431 (9th Cir. 2020). It would not be problematic or overly burdensome to apply APA review to this context, especially if review of consular visa denials were confined to instances where the individual seeking review is a U.S. citizen whose claim falls within the INA's zone of interests.

III. Consular nonreviewability is not a free-floating constitutional doctrine independent of congressional authorization.

Against all this, the Government appears to suggest that the consular nonreviewability doctrine has some independent constitutional basis that overrides the ordinary rules of judicial review. But that is not so. Contrary to the Government's suggestion, the doctrine finds no independent basis in the text, history, or structure of the Constitution. Rather, the doctrine is the creation of a handful of lower courts.

If there is to be a consular nonreviewability doctrine, it would have to be derived from *congressional* plenary power over agency decision-making, not *executive* authority over foreign affairs. See *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 343 (1909) (discussing "the plenary power of Congress as

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to the admission of aliens"). The Government attempts to obscure this distinction by repeatedly referring to the plenary power of the "political branches" (U.S. Br. 17-18), but the Executive Branch holds no such authority independent of congressional delegation—nothing in the "executive power" gives consular officers, or even the President, such authority. Their actions must be congressionally sanctioned. This Court recognized that distinction even before *Ulrich* and *London* first articulated the consular nonreviewability doctrine. See *Lem Moon Sing*, 158 U.S. at 545-46 ("Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain has undoubtedly the right * * * to take all proper means to carry out the system which it provides."); *Oceanic Steam Nav. Co.*, 214 U.S. at 336 (1909) ("[The] [P]ower of Congress to legislate concerning the exclusion of aliens, and to intrust the enforcement of legislation of that character to administrative officers" is "complete," provided only that such legislation is not "repugnant to the Constitution.").

Indeed, the decisions that defenders of consular nonreviewability cite as foundational did not ground it in the Constitution. Rather, courts rejecting the claims of immigrants seeking to enter the United States uniformly found any applicable bar to review in the text of relevant statutes. That was true without regard to whether the decision for which review was sought was that of a consular officer (see *Ulrich*, 30 F.2d at 986 (invoking Section 2(a) of the Immigration Act of 1922)), or that of an immigration officer at an exclusion hearing (see, *e.g.*, *Knauff*, 338 U.S. at 546 (invoking the War Brides Act of 1941); *Licea-Gomez*, 193 F. Supp. at 582 (invoking Section 104(a) of the

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INA)). Those decisions invoked statutory bars (enacted by Congress), not constitutional concerns.

Instead they premise nonreviewability on supposed statutory authorization. See, *e.g.*, *Licea-Gomez*, 193 F. Supp. at 582 (invoking Section 104(a) of the INA). These decisions thus relied on statutory bars (enacted by Congress), not constitutional concerns. See, *e.g.*, *Knauff*, 338 U.S. at 546 (invoking the War Brides Act of 1941); *Ulrich*, 30 F.2d at 986 (invoking Section 2(a) of the Immigration Act of 1922).

And although courts generally do not question the scope of executive plenary power in the sphere of foreign affairs and national security (see, *e.g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Zivotofsky* v. *Kerry*, 576 U.S. 1 (2015)), the executive's exercise of authority delegated to it by Congress may be subject to judicial review to assure that the executive acted in accord with legal limits. Because Congress has the authority to regulate immigration and determine the level of executive autonomy in the area, Congress may either permit or deny judicial review of consular decisions. Here, Congress has chosen to delegate power to executive officials on the condition that certain consular visa decisions remain subject to the APA's system of review. Such a limit serves a separation-of-powers function—it prevents the Executive Branch from undermining Congress's plenary power over immigration.

Additionally, viewing consular nonreviewability as a free-floating constitutional doctrine that precludes judicial review of consular visa denials conflicts with this Court's decisions. In *Kerry* v. *Din*, the Court reached the merits of a visa denial challenged by a U.S. citizen spouse without addressing the doctrine of

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consular nonreviewability. 576 U.S. 86, 101 (2015). And in *Trump* v. *Hawaii*, the Court highlighted the possibility of "circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen." 585 U.S. 667, 703 (2018).

Here, Congress permitted judicial review through the APA and did not clearly withdraw such review in the INA. Thus, asserting its plenary power to regulate immigration, Congress predicated consular authority over the award of visas on the availability of judicial review, rejecting a strict policy of nonreviewability.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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