

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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v.) No. 23-334

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Respondents.)

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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 Muñoz.

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 fiancés.

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's spouse -- wants the noncitizen to
5 be admitted into the United States. As the
6 Kerry against Din plurality concluded in 2015,
7 that is not a liberty interest protected by the
8 Due Process Clause, and the U.S. citizen is
9 affected only indirectly by the government's
10 action against the noncitizen.

11 Thus, Respondent Muñoz 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 Muñoz
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. Muñoz 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 excepting 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: If 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 -- it's one way to read Mandel, I think
8 possibly not the best way, but it's one way to
9 read it. Mandel is a little bit ambiguous on
10 that point. But I think that that's a harder
11 and harder argument to make after Trump
12 v. Hawaii, which pretty clearly talks about
13 Mandel as setting forth a very limited but still
14 existent way to 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 --

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 fiancé?
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 -- it would --
13 it 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

1 how to go about trying to contest that finding.
2 So 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
25 he's entitled to know -- she's entitled to know

1 he 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 -- 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 -- this is the
23 assumption of your question, which is that we
24 think that Mandel didn't actually decide that,
25 which is why it's open for the Court to decide

1 the first QP 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 -- that
14 now 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 --

2 JUSTICE GORSUCH: Yeah, but --

3 MR. GANNON: -- understand my friend
4 to be asking for more information even now.

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

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

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

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

1 JUSTICE GORSUCH: Yeah. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 Justice Barrett?

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

18 Is that right?

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

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

11 MR. GANNON: That is our -- that is
12 our front-line position, I agree.

13 JUSTICE BARRETT: Okay.

14 MR. GANNON: And --

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

23 Do you see what I'm saying?

24 MR. GANNON: That's right. And I
25 was -- I was saying for purposes of the

1 assumption in Justice Kagan's question that if
2 -- if we assume that there is a constitutional
3 liberty interest that is sufficient to trigger
4 that review in Mandel, why isn't this one
5 equally good?

6 JUSTICE BARRETT: Right.

7 MR. GANNON: And our position is that
8 this is not, as the --

9 JUSTICE BARRETT: Yeah.

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

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

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

1 this one not good enough, there's not -- are you
2 asking us to do that?

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

7 JUSTICE BARRETT: Okay.

8 MR. GANNON: -- consular
9 nonreviewability and the exception is not
10 triggered here --

11 JUSTICE BARRETT: That is what I --

12 MR. GANNON: -- for that reason.

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

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

23 You know, as -- as -- as Justice
24 Sotomayor was saying, if -- if you think my
25 husband is John Doe, but he's actually Jack

1 Smith and has no ties to MS-13, the value of
2 that information would be to have some
3 opportunity to be heard about why it's wrong.

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

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

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

24 They could re-file a new application
25 with the State Department. If they have this

1 information, they will know this was the reason
2 for the first denial.

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

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

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

25 JUSTICE BARRETT: Okay. So the

1 government's position is that even if Mandel
2 applies, once you point to a reason, whatever --
3 whatever is required to make that reason
4 sufficient, that would be kind of the end of it
5 anyway?

6 MR. GANNON: Yes. As Justice Gorsuch
7 --

8 JUSTICE BARRETT: Yeah.

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

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

15 MR. GANNON: If -- if --

16 JUSTICE BARRETT: -- to the State
17 Department --

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

1 JUSTICE BARRETT: But would there be
2 some process in the State Department for letting
3 them make their case that these MS -- that these
4 tattoos, for example, didn't actually show an
5 affiliation with MS-13, or is it just like you
6 file for reconsideration and the State
7 Department says, okay, well, that wasn't good
8 enough, but we still think, you know, and maybe
9 just add a little bit more?

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

12 JUSTICE BARRETT: Right.

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

17 JUSTICE BARRETT: I understand that,
18 and they -- they weren't satisfied.

19 MR. GANNON: Yeah.

20 JUSTICE BARRETT: Yeah. Okay. Thank
21 you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: So I'm a little --
25 trying to understand the government's argument

1 about fundamental rights and the way in which
2 Mandel works. In your colloquy with Justice
3 Barrett, I think you said that there is not a
4 fundamental right to have her spouse live with
5 her in the United States and that sort of that's
6 the government's framing and the way in which
7 you are approaching the first question.

8 Is that -- am I wrong about that?

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

14 JUSTICE JACKSON: All right. But as
15 --

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

22 JUSTICE JACKSON: No, I understand
23 that, but I'm just trying to see how your
24 argument maps onto what the Court actually did
25 in Mandel. And as I read that case, as I look

1 at it, the first thing they're asking is whether
2 these professors had some sort of right to
3 receive information and ideas as protected under
4 the First Amendment.

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

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

21 So I think the parallel structure here
22 would be the recognition that there is, as we've
23 said in so many cases, a fundamental right to
24 marriage, to include cohabitation, to raising
25 your family. Those things exist. And that's

1 implicated by the government's decision not to
2 allow a person to come in -- the spouse to come
3 into the United States.

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

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

16 JUSTICE JACKSON: All right. And have
17 we --

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

21 JUSTICE JACKSON: Yeah.

22 MR. GANNON: -- is a distinction for
23 due process purposes. And so we think that
24 there would --

25 JUSTICE JACKSON: But there was no

1 underlying interest in O'Bannon. I mean, didn't
2 we say there was no right to live in the nursing
3 home of your choice? Whereas we have recognized
4 the fundamental right to marriage and raising a
5 family and that kind of thing. So I think
6 O'Bannon might be a little bit off in that way.

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

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

21 JUSTICE JACKSON: So you're saying
22 there's no --

23 MR. GANNON: -- there needs to be a
24 specific liberty interest that is directly
25 affected. And we don't think that it's a -- a

1 -- a liberty interest that's just in getting
2 information or an explanation. We think it
3 would be a liberty interest in actually having
4 him in the United States.

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

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

18 JUSTICE JACKSON: Okay. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Lee.

22 ORAL ARGUMENT OF ERIC T. LEE

23 ON BEHALF OF THE RESPONDENTS

24 MR. LEE: Mr. Chief Justice, and may
25 it please the Court:

1 Over eight years ago, the government
2 violated Sandra Muñoz's right to procedural due
3 process by denying her husband's visa without
4 providing a reason why. Ms. Muñoz has a
5 constitutional liberty interest in living with
6 her husband. We do not claim that this interest
7 gives her the right to immigrate her husband
8 regardless of his inadmissibility, but the
9 importance of cohabitation to marriage means
10 that the government is required to provide
11 procedural protections when it burdens the
12 underlying right.

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

20 The statute likewise here shows why
21 Ms. Muñoz was herself deprived of that liberty
22 interest and undermines the government's
23 argument that she was a mere bystander. Under
24 the INA, the citizen petitioner must initiate
25 and advance her spouse's application from start

1 to finish, and the very purpose of the consular
2 process for spouses is to benefit the American
3 citizen spouse.

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

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

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

24 And I welcome the Court's questions.

25 JUSTICE THOMAS: Mr. Lee, I know there

1 -- others may want to talk about Mandel, but we
2 confronted this liberty interest in Din, and I
3 can't think of any decision from this Court that
4 said that such a liberty interest actually
5 exists.

6 Would you give your best account of
7 how you get to this liberty interest?

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

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

21 JUSTICE THOMAS: I understand that.
22 That's a different case.

23 What I'm interested in is we had this
24 exact issue in Din. That would have seemed --
25 that would seem to have been the occasion for

1 deciding exactly what you're talking about. But
2 we did not get a court for that.

3 I can think of no other case where the
4 right to have your spouse come to this -- be in
5 this -- immigrate to this country has been
6 considered. That's what I'm interested in.

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

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

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

23 MR. LEE: I see. And in a number of
24 the other substantive due process cases, Meyer,
25 for example, which acknowledged the substantive

1 right to raise a family and establish a home,
2 which certainly has a cohabitational element, in
3 Smith against the Foster Families Organization,
4 the issue of the right to daily personal
5 intimate association was recognized by this
6 Court as a substantive right.

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

15 So we think that that --

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

22 MR. LEE: So, Your Honor, on the
23 doctrine of consular nonreviewability, the
24 government raises this as an exception when the
25 rights of citizens are implicated. If a case

1 where a U.S. citizen had been living with her
2 husband for five years and that they had tried
3 to go through the legal process and a denial was
4 given without any -- any reason of the basis
5 why, that's the type of case that -- that there
6 has to be some level of review over.

7 If the Court acknowledged in Mandel --
8 and I just want to quote from the decision in
9 Trump against Hawaii briefly where the Court
10 said that "this Court has previously considered
11 the merits of claims asserted by U.S. citizens
12 regarding violations of their personal rights
13 allegedly caused by the government's exclusion
14 of particular foreign nationals." That's at
15 2416 of the opinion.

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

22 JUSTICE KAGAN: But then what --

23 CHIEF JUSTICE ROBERTS: What -- what
24 more would -- what more would you be entitled to
25 than what you've gotten? I understand the

1 question of the timeliness of the elaboration,
2 but what else do you think you're entitled to?

3 MR. LEE: What we received, what the
4 Ninth Circuit said was sufficient, is far better
5 than the "any other unlawful activity." And so,
6 to answer Your Honor's question --

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

9 MR. LEE: That's correct, after that
10 one-year deadline had passed. That's at 22
11 C.F.R. 48.

12 CHIEF JUSTICE ROBERTS: So you think
13 you're entitled to more just because the
14 deadline had passed?

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

20 JUSTICE KAVANAUGH: In court?

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

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

1 JUSTICE KAVANAUGH: I mean, what
2 happens in court then? You say reasonable
3 opportunity to contest so you can force the
4 government to provide more evidence behind the
5 reasoning, or what -- what happens?

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

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

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

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

24 JUSTICE GORSUCH: I don't -- I mean, I
25 don't see anything in your prayer for relief or

1 your causes of action, and I'm not sure what the
2 cause of action here is either, I'm -- I'm with
3 Justice Alito on that, maybe you can help me.
4 But it seems from the prayer for relief you've
5 got everything you asked for.

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

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

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

14 JUSTICE GORSUCH: Okay. So Mr. Gannon
15 suggested you -- you can go ahead and file a new
16 application.

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

25 JUSTICE GORSUCH: So you want a

1 declaratory judgment that it was insufficient?

2 MR. LEE: I don't think that there's a
3 way around that, Your Honor, because, otherwise,
4 we're going to be fighting an impossible battle
5 of trying to disprove that Mr. Asencio-Cordero
6 -- or rather trying to say that he is no longer
7 a gang member when that would require accepting
8 this false premise in the first place. What
9 we --

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

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

21 And so my clients reasonably
22 understood that the determination of
23 inadmissibility became permanent, I believe it
24 was in May of 2016. We still had seven months
25 in the one-year deadline, which the government

1 says is -- in the regulations is an individual
2 has the opportunity to overcome the denial.

3 But that's meaningless, and it puts
4 people in a Kafkaesque situation if the
5 regulations say, well, sure, you have the
6 opportunity to overcome the denial, but we're
7 not going to tell you why.

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

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

21 JUSTICE KAVANAUGH: Well, all three --
22 sorry to interrupt.

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

24 JUSTICE KAVANAUGH: All three cases
25 suggest that a facially legitimate bona fide

1 reason is enough and you stop there and you
2 don't go on.

3 And -- and that was elaborated on in
4 Trump versus Hawaii, that that's -- that's it.
5 "Courts will neither look behind the exercise of
6 that discretion nor test it by balancing its
7 justification against the asserted
8 constitutional interest." That's kind of it --

9 MR. LEE: So --

10 JUSTICE KAVANAUGH: -- for purposes of
11 judicial.

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

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

1 Here, the government claims as though
2 it's operating at the peaks of plenary power.
3 But the amicus brief from the congressmen which
4 was submitted says at page 23 that the
5 department's position is that this decision
6 should have been left to one political branch,
7 the executive.

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

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

17 JUSTICE KAVANAUGH: Well, it seems to
18 me --

19 JUSTICE KAGAN: So --

20 JUSTICE KAVANAUGH: -- that's what
21 you're trying to do, is replace Mandel and the
22 Justice Kennedy concurrence and Trump versus
23 Hawaii with a Mathews v. Eldridge test, which
24 would then in turn as you would apply it require
25 substantially more process than our precedents

1 have previously required. I'm not sure why we'd
2 do that.

3 MR. LEE: Well, don't get me wrong.
4 We think we can prevail under the facially
5 legitimate and bona fide test as well, and if I
6 can turn to that and the second part of Your
7 Honor's question. Din, there were a number of
8 important distinctions from here before I get to
9 the statutory ones which the Court touched on
10 already.

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

15 There was reference earlier to
16 1182(b)(3), which the government treats as a
17 broad nondisclosure provision. That is not the
18 position that they took in Din against Kerry,
19 where they said at page 50 and 51 of their
20 merits brief that when the court does -- when
21 the executive does disclose -- disclose
22 additional material, that reflects a considered
23 determination that the information provided does
24 not require invoking the protections of
25 1182(b)(3).

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

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

12 MR. LEE: Sure. And I think the
13 answer is more simple than the government lets
14 on because the regulations which the Department
15 of Homeland Security applies in the domestic
16 context to the same exact statutory framework,
17 the same grounds of inadmissibility, 8 C.F.R.
18 103.2 says that an applicant shall be advised of
19 the facts --

20 CHIEF JUSTICE ROBERTS: Well, I don't
21 mean to --

22 MR. LEE: -- leading to denial.

23 CHIEF JUSTICE ROBERTS: Well, I guess
24 I do mean to interrupt. I mean, it's -- it's --
25 you say in the domestic context. That's kind of

1 a pretty dramatic premise if you're going to
2 say, well, it's the same as it's going to be in
3 the domestic context. The whole point of
4 consular nonreviewability is that it's not in
5 the domestic context.

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

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

21 JUSTICE ALITO: Well, counsel --

22 CHIEF JUSTICE ROBERTS: That seems --

23 JUSTICE ALITO: I'm sorry, Chief.

24 CHIEF JUSTICE ROBERTS: I -- I was
25 just going to say that seems to be flatly

1 contrary to what -- you know, the quote from
2 Justice Frankfurter, which I don't remember. He
3 said that's something that's been in the body
4 politic from the very beginning, that the United
5 States has control over its borders with respect
6 to noncitizens who seek to come in.

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

16 Let me --

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

22 MR. LEE: But at the same time, Your
23 Honor ---

24 CHIEF JUSTICE ROBERTS: That's a
25 different question.

1 MR. LEE: Not entirely, Your Honor,
2 because the government cannot dilute an American
3 citizen's citizenship by forcing them to -- by
4 giving them the chance to exercise their liberty
5 interests only by forfeiting the protection of
6 the Constitution.

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

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

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

1 satisfies that demand for a bona fide legitimate
2 reason.

3 But you didn't get it in time as I
4 understand the issue. You didn't get it in time
5 to invoke the reconsideration processes that the
6 State Department usually has for exactly this
7 purpose. Is that correct?

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

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

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

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

1 information became untimely, is that correct?

2 MR. LEE: In order to be able to
3 harness the facts to overcome that
4 determination, that's right, Your Honor.

5 JUSTICE GORSUCH: So the only relief
6 you seek is the opportunity to file a motion for
7 reconsideration at the consulate? Is that it?

8 MR. LEE: Yes, with the caveat that
9 the government's inadmissibility determination
10 would have to be declared to be incorrect.

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

21 Now you didn't know all the details,
22 but you did understand that fact, and if that
23 fact alone sufficed to provide the Mandel
24 notice, is this harmless error?

25 MR. LEE: No, and let me try and take

1 the second part of Your Honor's question first.
2 We actually -- Ms. Muñoz and Mr. Asencio-Cordero
3 did not guess correctly. The government -- at
4 page 107 and 108 of the Joint Appendix below,
5 the government said that the tattoos were merely
6 the suspicion which triggered the inquiry.

7 So there was no correct guess of the
8 factual basis for the denial at all.

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

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

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

1 JUSTICE GORSUCH: Does Mandel require
2 specificity of the particular gang that he was
3 affiliated with? Wouldn't it be enough for the
4 government to say he's affiliated with an
5 international gang that conducts violence and --
6 and drug-trafficking operations, for example?

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

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

14 MR. LEE: Then, yes, that would be the
15 end of the -- but -- but --

16 JUSTICE GORSUCH: End of the case?
17 That would be harmless error then?

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

23 JUSTICE GORSUCH: No, no, but I think
24 --

25 MR. LEE: -- who's never been

1 convicted or charged of any crime --

2 JUSTICE GORSUCH: I understand that.
3 I appreciate that fact. But, if your client
4 understood that gang membership were -- was the
5 problem and if the government said gang
6 membership, if that were enough to satisfy
7 Mandel, why doesn't it follow that -- that any
8 error here is harmless?

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

16 In almost all cases, there's going to
17 be facts that can --

18 JUSTICE GORSUCH: I don't know whether
19 it would implicate national security. I'm
20 positing it might satisfy Mandel.

21 MR. LEE: Well, I think, based on the
22 facts here, you would at the very least need the
23 name of the gang because -- and I -- let me come
24 back to the point about what we would have done
25 differently, because had we known MS-13 was the

1 gang, at page 44 of the Joint Appendix, there's
2 a declaration from a gang expert which was
3 submitted in April 2016.

4 That affidavit only mentions MS-13, I
5 think, in two or three sentences in passing. It
6 makes -- it uses MS-13 as an example. It makes
7 no attempt to actually analyze how these tattoos
8 might have been related to that gang.

9 I am not a gang expert, but when we go
10 back on remand, we will be able to provide this
11 is Our Lady of Guadalupe, a tattoo of Sigmund
12 Freud --

13 JUSTICE BARRETT: Sigmund Freud.

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

15 JUSTICE BARRETT: I thought that was
16 interesting.

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

18 JUSTICE BARRETT: But, counsel, let me
19 follow up --

20 MR. LEE: -- doesn't like
21 psychoanalysts.

22 JUSTICE BARRETT: -- on Justice
23 Gorsuch's question here. I mean, Mandel doesn't
24 require that much. And so you are -- and this
25 kind of goes to what Justice Kavanaugh was

1 asking. You are asking for significantly more.

2 If we think you don't get that much
3 more under Mandel, I guess I don't see why
4 Justice Gorsuch isn't right that this is just
5 game over.

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

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

1 MR. LEE: Because, in almost all of
2 these cases, Your Honor, there's going to be
3 factual information like DHS tells individuals
4 in the domestic context that can be provided
5 without damaging national security.

6 So, for example, the State Department
7 lists in its foreign affairs manual the 10
8 factors that officers are supposed to consider.
9 Whether they --

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

12 MR. LEE: Certainly.

13 JUSTICE ALITO: And I don't think you
14 can answer this question by referring to
15 regulations. It's a constitutional question.

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

22 How do we weigh that? In -- if
23 Respondent's husband were a citizen, it wouldn't
24 matter whether he was a member of MS-13 or any
25 other gang or whatever the government suspected

1 him of being involved in criminal activities.
2 She could live with him unless he were in
3 prison, right? So it's an absolute -- it's a --
4 it's a very, very extensive right.

5 Now you're translating it into the --
6 the situation where it's -- it's the opportunity
7 to come here. How do we -- you know, how do we
8 figure out how much she gets?

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

17 JUSTICE ALITO: Again, I don't think
18 you can answer this constitutional question by
19 citing statutes.

20 MR. LEE: Well, but --

21 JUSTICE ALITO: There's a -- you say
22 there's a balancing. And you're -- you've got
23 on one side a right that would be very, very
24 weighty were they both U.S. citizens living in
25 the United States. And then you've -- you're

1 willing to dilute it so that it's only this big
2 when the person is -- is -- wants to come into
3 the United States.

4 MR. LEE: And -- and I think the Court
5 has addressed a similar context in the
6 prison-type cases, Vitek against Jones, Harper
7 against Washington, where the Court recognized
8 an underlying substantive constitutional
9 interest, for example, in not being forced to
10 take psychotropic drugs or not being removed to
11 a mental facility, and yet it -- the way it
12 balanced those interests was by providing a
13 minimal level of procedural due process.

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

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

23 JUSTICE ALITO: But what if a -- just
24 let me --

25 JUSTICE KAGAN: No, go ahead.

1 JUSTICE ALITO: If I could follow up.
2 What if an American citizen wants to have a
3 child who is a noncitizen admitted to the United
4 States? Would the same thing apply there? Or
5 an American citizen wants to have a noncitizen
6 parent admitted or an American citizen who
7 doesn't believe in marriage wants to have a
8 noncitizen admitted to the United States so that
9 person can live in an intimate relationship with
10 that person in the United States?

11 What about all those situations?

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

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

1 But -- so the point I'm trying to make
2 is that -- and the Court understands that
3 immigration law is quite complicated, I don't
4 want to go on too long on this, but you have --
5 citizens can only petition immediate relatives
6 and citizens have to be adults to petition
7 immediate relatives.

8 So the Court -- so all those other
9 floodgates concerns are exaggerated because the
10 only person who's going to both be statutorily
11 involved enough to have been directly deprived
12 and have an underlying liberty interest in
13 marital cohabitation --

14 JUSTICE ALITO: Well --

15 JUSTICE KAGAN: Mr. --

16 JUSTICE ALITO: Well, is there a
17 liberty -- do those people have a liberty
18 interest? And if they do, then how can it be
19 deprived by statute? How can it be taken away
20 by a statute?

21 MR. LEE: So, for example, a
22 grandparent and a grandchild, they certainly
23 would have an underlying liberty interest.
24 That's from the Moore case. But they wouldn't
25 be able to petition each other. So my point is

1 that you have to have both these elements.

2 And -- and that's going to be my
3 answer to all the floodgates concerns that Your
4 Honor posits because you need to both -- and
5 there is no -- the Court has not recognized a
6 substantive --

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

8 MR. LEE: -- liberty interest in adult
9 cohabitation.

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

18 MR. LEE: Well, this is a case about
19 marriage, Your Honor, and this is a case about
20 the importance of marriage. And this Court has
21 recognized this. Congress for over 200 years
22 has recognized this even in the immigration
23 context.

24 1804 was the first time immigration
25 benefits passed through citizenship. 1888, at

1 the peak of Chinese exclusion, Congress passed
2 the Scott Act, which exempted Chinese laborers
3 who had wives in the United States.

4 JUSTICE KAGAN: Mr. Lee, I -- I -- I
5 guess what I'm not seeing, to me, there's no
6 weighing at issue here. The way I understand
7 the analysis worked -- as working is that if you
8 come forward with a constitutional right,
9 whether it's the right to listen to ideas from
10 somebody overseas or -- or certainly whether
11 it's the right to associate with your spouse who
12 is overseas, if you come forward with a
13 constitutional right of that kind in cohabiting
14 or associating with a person who is not getting
15 a visa, that gets you something, but it doesn't
16 get you weighing.

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

25 So what weighing are we talking about?

1 MR. LEE: No, I think Your Honor put
2 it better than I did. I mean, we have here a
3 very important constitutional interest. It
4 would certainly not make sense if Mr.
5 Asencio-Cordero could ask a professor to get his
6 next visa and get in that way but not because he
7 had lived with his wife for five years and --

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

11 MR. LEE: Right.

12 JUSTICE KAGAN: -- that they were
13 excluding the spouse because of gang activities.
14 And then that brings us back to Justice
15 Gorsuch's questions about why isn't this whole
16 thing over because you got what you wanted.

17 MR. LEE: Because now, for the first
18 time, we're going to have the opportunity to go
19 back and harness the facts that's necessary to
20 try and prove the government wrong.

21 We don't have the right to win on
22 remand. We'll go back to the consulate. We'll
23 do our very best. There is a lot of information
24 that we can do with the reasons that were
25 ultimately given. It doesn't give us any

1 guarantee, but that's what due process requires.

2 JUSTICE BARRETT: But Mandel -- and --
3 and this is just a question about the
4 constitutional argument. This is -- kind of
5 goes back to the questions I was asking before.

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

12 So where do we get the constitutional
13 right to an opportunity to be heard in this
14 Mandel context?

15 MR. LEE: Well, keep in mind that in
16 Mandel there was a broad discretionary grant.
17 We think that that's a foundational difference
18 between Mandel and this case.

19 And so, because this is a -- this is a
20 nondiscretionary decision which Congress has
21 established, officers must have this reason to
22 believe, we think that that does a lot to get us
23 to where we need to be, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 I understood you to indicate that what
2 you thought the relief you were seeking was just
3 limited judicial review. Is that right? Or
4 exactly what is the relief you're seeking?

5 MR. LEE: We do not need any
6 additional judicial review here, Your Honor. I
7 think, on remand, this will go quickly to the
8 consulate so that we can finally respond to the
9 information that we've been given.

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

17 MR. LEE: Well, we get to it because
18 Ms. Muñoz is directly implicated, and that's
19 where the statute comes in.

20 CHIEF JUSTICE ROBERTS: But that gives
21 her some sort of standing, but you said when you
22 -- I don't want to give it away -- when you look
23 at the -- the marriage interest and the
24 international interest on the United States,
25 what you'd conclude is that you get this limited

1 judicial review.

2 MR. LEE: I see, yes, going forward,
3 that's the rule.

4 CHIEF JUSTICE ROBERTS: And you do
5 that by doing what?

6 MR. LEE: Well, we do that by
7 requiring that there is -- I mean, we've had
8 some discussion as to whether the facially
9 legitimate and bona fide test applies or whether
10 something slightly more strenuous applies.

11 CHIEF JUSTICE ROBERTS: I don't care
12 what the test is. What is it that the tests
13 entail?

14 MR. LEE: The test is entailed at
15 determining that the government did not make a
16 decision which either has no basis in reality or
17 which was violative of the rights of a U.S.
18 citizen. And so, here --

19 CHIEF JUSTICE ROBERTS: Does it
20 involve weighing the interest -- the marriage
21 interest and the international interest?

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

25 CHIEF JUSTICE ROBERTS: Okay. Does it

1 involve the weighing of that interest as well?

2 MR. LEE: Well, I -- I don't -- we
3 don't see it that way, Your Honor. We see it as
4 we have a marital interest in cohabitation in
5 the United States and -- and --

6 CHIEF JUSTICE ROBERTS: On the one
7 hand, and --

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

15 So I -- I -- I take Your Honor's
16 point. We -- we sort --

17 CHIEF JUSTICE ROBERTS: What -- what
18 -- what is it?

19 MR. LEE: Well, I -- we do not think
20 -- we do not see it as a sort of explicit
21 balancing issue. We see it as you have the --

22 CHIEF JUSTICE ROBERTS: Well, that is
23 -- my point is that if you're going to take two
24 competing interests and come to a conclusion
25 about what -- who -- how the competition comes

1 out, I don't see how you can avoid the
2 conclusion that that involves weighing what I at
3 least see as totally disparate and perhaps
4 unweighable interests.

5 MR. LEE: Well, but that -- I -- I
6 don't mean to be hard-headed, Your Honor, but
7 that's what this -- this either facially
8 legitimate and bona fide test or the slightly
9 higher standard that we're asking for gets us,
10 because, again, it's -- we recognize -- we are
11 certainly solicitous of the government's concern
12 in keeping individuals who are inadmissible out
13 of the United States. But individuals who are
14 admissible should be admitted to the United
15 States. And so --

16 CHIEF JUSTICE ROBERTS: Thank you.
17 Thank you.

18 MR. LEE: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas?

21 Justice Alito?

22 JUSTICE ALITO: Well, I don't want to
23 beat a dead horse, but I am going to beat it a
24 little bit. Now there are a number of possible
25 answers. Suppose -- there's a liberty interest,

1 Okay? You need -- you say you're entitled to
2 something. And that something could be, A, the
3 -- the State Department says we believe he's
4 involved in criminal activity. B, we believe
5 he's a member of a gang. C, we believe he's a
6 member of a particular gang. D, we believe he's
7 a member of MS-13. E, this is why we believe
8 that he's a member of MS-13. F, if I'm getting
9 my numbers straight, we believe that, and you
10 have an opportunity to rebut it.

11 Now how do we determine which of those
12 is what you get, unless we're weighing one thing
13 against another?

14 MR. LEE: By looking to what the
15 Department of Homeland Security does
16 domestically. And -- and that's what those --

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

20 One final question. Where -- where
21 does your cause of action come from?

22 MR. LEE: From the Due Process Clause
23 of the Constitution.

24 JUSTICE ALITO: Is it an Ex parte
25 Young cause of action?

1 MR. LEE: I mean, this issue hasn't
2 been an issue below, so our -- our cause of
3 action arises under the Constitution, Your
4 Honor.

5 JUSTICE ALITO: Under -- directly
6 under the Constitution?

7 MR. LEE: That's correct.

8 JUSTICE ALITO: It's not Ex parte
9 Young?

10 MR. LEE: It arises from the Due
11 Process Clause.

12 JUSTICE ALITO: It's not APA?

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

17 JUSTICE ALITO: Okay. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: There are some --
21 there are some of my colleagues who believe that
22 the Constitution doesn't, on its face, provide a
23 cause of action. We have a legion of cases
24 suggesting that and many of my colleagues taking
25 that position.

1 If they believe that, does Ex parte
2 Young help you?

3 MR. LEE: Your Honor, I am not
4 prepared to discuss Ex parte Young because this
5 did not come up below. We think that our cause
6 of action arises under the Constitution. We --
7 we think it comes from 702 of the APA as well,
8 which provides a different route, but that's our
9 position.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?
11 Justice Gorsuch?

12 Justice Kavanaugh?

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

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

23 JUSTICE KAVANAUGH: And then the
24 question becomes what does that entail, I think.
25 Justice Kennedy says a number of things about

1 that in Kerry versus Din.

2 The government's citation of
3 1182(a)(3)(B) also indicates it relied on a bona
4 fide factual basis. And it's also facially
5 legitimate. That's on page 105. Then he says:
6 "Mandel instructs us not to look behind the
7 government's exclusion for additional factual
8 details beyond what" it -- "its express reliance
9 on 1182(a)(3)(B) encompassed."

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

21 And then concludes, I think, with the
22 closer here that's problematic for you: "Under
23 Mandel, respect for the political branches'
24 broad power over the creation and administration
25 of the immigration system extends to

1 determinations of how much information the
2 Government is obliged to disclose about a
3 consular officer's denial of a visa to an alien
4 abroad."

5 So you put all that together, I -- I
6 think that's very problematic for you if we
7 follow that. And that, in turn, was explicating
8 what -- what Mandel meant and what Trump versus
9 Hawaii then relied on this -- this opinion. So
10 that's a problem for you, I think, so tell me
11 why it's not.

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

23 But the main distinction, if I
24 understand the line of Your Honor's questioning,
25 is the statutory text. And -- and, here, I want

1 to make a couple of points about the terrorism
2 bar because not only does this draw a line
3 around a distinct finite range of activity that
4 the officer must have found to have existed to
5 have a reasonable -- reason to believe, pardon
6 me, also, there's language in there defining a
7 terrorist organization, language defining
8 terrorist activity, an intent requirement.

9 And so we think that that's -- that's
10 a lot more --

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

22 MR. LEE: The critical phrase -- sure.
23 The critical phrase in Justice Kennedy's
24 analysis of the statute is that it contained
25 discrete factual predicates. "Any other

1 unlawful activity" is the text of this statute.
2 There is no way to read that statute to have a
3 discrete factual predicate.

4 JUSTICE KAVANAUGH: Thank you.

5 MR. LEE: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: No.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

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

14 MR. LEE: Correct.

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

1 MR. LEE: Correct. All we're asking
2 for is the chance.

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

7 MR. LEE: Correct.

8 JUSTICE JACKSON: All right. So let
9 me ask you, do -- do you need to -- do we need
10 to roll back or change the doctrine of consular
11 nonreviewability in order for you to win in this
12 case?

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

16 JUSTICE JACKSON: Why is that? Say a
17 little bit more.

18 MR. LEE: Because the doctrine -- the
19 doctrine of consular nonreviewability does not
20 apply to American citizens. The government --
21 the executive branch cannot restrict review
22 without a statutory provision granting it the
23 ability to strip review. This is not a case
24 where Congress has gone anywhere near that. The
25 citations which the government pulls up in its

1 brief have no -- do not make --

2 JUSTICE JACKSON: So you -- we have
3 never applied the doctrine of consular
4 nonreviewability in the context of an American
5 citizen you're saying?

6 MR. LEE: The Court has always
7 reviewed the merits of claims brought by
8 American citizens, constitutional claims, that's
9 correct, Your Honor.

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

18 MR. LEE: It's a pretty important
19 exception from the standpoint of separation of
20 powers, but, yes, Your Honor.

21 JUSTICE JACKSON: All right. So we're
22 into Mandel even if there is the doctrine of
23 nonreviewability. And so why would you say that
24 you win given the Mandel standard? I mean, they
25 didn't win in that case.

1 MR. LEE: Because -- I'm sorry, Your
2 Honor.

3 JUSTICE JACKSON: Yes.

4 MR. LEE: Because, here, unlike in
5 Mandel -- in that case, the professor had
6 violated a prior visa. The Court held that
7 there was a factual basis for the Attorney
8 General's denial of a fully discretionary
9 waiver. Here, you have a non-discretionary
10 statute requiring reason to believe there's no
11 factual basis for the denial, and, therefore,
12 the government hasn't established that the
13 denial was facially legitimate and bona fide.

14 JUSTICE JACKSON: Final question.
15 Would you be okay with an analysis that assumed
16 the first question presented?

17 MR. LEE: If we were to prevail on the
18 second question?

19 (Laughter.)

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

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

25 MR. LEE: I don't --

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

3 MR. LEE: I don't think it would be
4 breaking --

5 JUSTICE JACKSON: Yeah.

6 MR. LEE: -- any new ground to
7 recognize the importance of marriage in this
8 case, though, Your Honor.

9 JUSTICE JACKSON: Thank you.

10 MR. LEE: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Rebuttal, Mr. Gannon?

14 REBUTTAL ARGUMENT OF CURTIS E. GANNON
15 ON BEHALF OF THE PETITIONERS

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

18 First, I still haven't heard a clear
19 explanation as to why this constitutional right,
20 whether it's a procedural or a substantive one,
21 should be limited to spouses or the effects on
22 visas.

23 My friend said that no one else other
24 than a spouse would have the right to petition
25 under the statute as it currently exists for

1 this type of relief. But, if this is a
2 constitutional liberty interest underlying this,
3 I'm not sure why people wouldn't be able to say
4 the inability to make those petitions is
5 unconstitutional, and so -- and no court has
6 countenanced that type of argument in any other
7 context.

8 Second, my friend talks about the
9 domestic context, talks about what DHS does when
10 there are proceedings in the United States,
11 which obviously implicate different interests
12 because somebody is here and they -- there is a
13 mechanism for some judicial review there.

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

1 unlawful activity while they are here in the
2 United States.

3 And, third, if I could get to the
4 colloquy with Justice Gorsuch and my friend
5 talked about the determination that this ground
6 of inadmissibility was permanent and cited page
7 16 of the Joint Appendix.

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

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

25 He said that he wants our

1 inadmissibility finding to be declared
2 incorrect. And so we would disagree that that's
3 -- that's what any court should be doing on
4 remand here. The point of Mandel is not to
5 allow for meaningful opportunities to respond or
6 further internal appeals or further judicial
7 review.

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

18 The majority said we're not testing or
19 looking behind the government's assertion. This
20 is not about allowing courts to police whether
21 the government's reasoning is correct. The
22 consular officer has to have a reason to believe
23 that this person is inadmissible in order to
24 deny the visa, but that is not judicially
25 reviewable.

1 We urge the Court to reverse the
2 judgment of the Ninth Circuit.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. The case is submitted.

5 (Whereupon, at 11:37 a.m., the case
6 was submitted.)

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