No. 23-334

IN THE

# Supreme Court of the United States

DEPARTMENT OF STATE, *et al.*,
*Petitioners*,

*v.*

SANDRA MUÑOZ, *et al.*,
*Respondents*.

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

## BRIEF FOR 35 MEMBERS OF CONGRESS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS


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### INTEREST OF AMICI CURIAE[1]

Amici are 35 members of the United States Congress who are familiar with the U.S. immigration system and who regularly engage in outreach on behalf of constituents struggling with that system. Amici have a strong interest in helping their constituents navigate the many layers of the immigrant and non-immigrant visa processes, particularly in ensuring that the executive branch provides constituents with timely immigration

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

determinations that comport with applicable law and are supported by constitutionally sufficient reasoning. Separately, amici have a particular interest in upholding the Constitution's separation of powers by ensuring that the executive branch makes available information that is necessary for Congress to engage in immigration-related outreach, oversight, and other core legislative functions. Finally, amici have a strong interest in ensuring that, where the judiciary has traditionally deferred to congressional decisionmaking—as it has when considering whether it may review exclusionary immigration determinations—that deference correctly reflects Congress' express statements of legislative will.

A full list of amici appears in the Appendix.

## INTRODUCTION AND SUMMARY OF ARGUMENT

From the earliest days of the Republic, one of Congress' core functions has been outreach on behalf of constituents navigating complex federal programs. That outreach often involves contacting officials in other branches to champion constituents' rights and interests as they apply for federal programs.

One of those programs is the U.S. visa system. That system is an "extensive and complex" web of statutes and regulations that involve executive determinations of often opaque admission criteria. *Arizona* v. *United States*, 567 U.S. 387, 395 (2012). When that system fails or stalls, constituents often turn to their congressional representatives for guidance and support.

This was one such case. Respondent Sandra Muñoz, a U.S. citizen, successfully sponsored her husband, Respondent Luis Asencio-Cordero, a Salvadoran citizen, for an immigrant-relative petition and inadmissibility waiver. Subsequently, Mr. Asencio-Cordero's visa was

denied at the U.S. consulate in El Salvador in 2015. Pet. App. 5a. The denial provided no reasoning other than a simple citation to 8 U.S.C. § 1182(a)(3)(A)(ii), which states that non-citizens are inadmissible if "a consular officer or the Attorney General knows, or has reasonable ground to believe" that the non-citizen "seeks to enter the United States to engage solely, principally, or incidentally in … any other unlawful activity." Unlike the surrounding statutory bases for inadmissibility, section 1182(a)(3)(A)(ii) does not specify what "unlawful activities" are encompassed. And Mr. Asencio-Cordero had no criminal history or gang affiliations, *see* Pet. App. 5a, leaving Respondents at a loss to determine how they might "adduce[] further evidence tending to overcome the ground of ineligibility" within the one-year period they had to do so. *See* 22 C.F.R. § 42.81(e).

Like many others in their position, Respondents turned to their congressional representative for help. Representative Judy Chu wrote on Respondents' behalf to the consulate requesting more information about the denial. *See* Pet. App. 6a. The Foreign Affairs Manual required that the consulate provide Representative Chu with a "complete and accurate" response to her request, 601.7-1(b)—meaning at least all information to which Respondents themselves were entitled. Constitutional Due Process principles, moreover, required the consulate to articulate a rationale sufficient to enable meaningful appeal of the adverse decision. *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970). Rather than abide by these requirements, the consulate merely told Representative Chu that Mr. Asencio-Cordero had been determined ineligible under section 1182(a)(3)(A)(ii), and that the Department of State ("the Department") had reaffirmed the consulate's decision. J.A. 15-16. The consulate provided Representative Chu no reasoning for the denial,

rendering the Representative unable to assist her constituents in this case or more generally assess whether there is need for more oversight of visa denials under section 1182(a).

Respondents sued, and it came to light that the consular officer had "'determined that Mr. Asencio-Cordero was a member of a known criminal organization'" by relying on some combination of unspecified information from the in-person interview, a "'criminal review'" of Mr. Asencio-Cordero, and a "'review'" of Mr. Asencio-Cordero's tattoos. Pet. App. 10a. The Department has never publicly refuted Respondents' argument that Mr. Asencio-Cordero has no criminal record in any country. And to this day, the Department still has not disclosed the ultimate reason for the visa denial.[2]

The Department attempted to insulate its decision from review by invoking the principle of consular nonreviewability. Pet. App. 11a. That principle traditionally counseled limited judicial review of executive

[2] With his visa petition still unresolved and the reasons for its initial denial still unclear, Mr. Asencio-Cordero eventually applied for humanitarian parole in December 2022. When that petition similarly stalled, Ms. Muñoz again sought the help of her Representative—Amicus Representative Linda Sánchez, who now represented Ms. Muñoz after a move. A familiar story unfolded. Representative Sánchez's staff first submitted an inquiry through the United States Citizenship and Immigration Services (USCIS) portal regarding Mr. Asencio-Cordero's parole application. When the agency responded with a form letter that provided no actionable information, Representative Sánchez herself placed a call to the USCIS Associate Chief within the Office of Legislative Affairs on January 31, 2024. Again, as with the Department's response to Representative Chu, USCIS refused to provide any substantive information about either Mr. Asencio-Cordero's parole application or his consular visa denial. Representative Sánchez was thus unable to assist her constituent or assess any need for oversight.

immigration denials unless Congress has specifically required otherwise. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 714 (1893). Since the mid-twentieth century, however, Congress has specifically required otherwise: authorizing presumptive judicial review of agency decisions, like the one issued here, as embodied in the Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946); *see also* Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952).

This case implicates many significant aspects of constitutional and statutory law. Amici ("the Members") file this brief to highlight three that bear on Congress' engagement with and oversight of the consular review system. First, the Members provide their perspective on the day-to-day process of assisting constituents with immigration issues and explain that consular refusals to engage with congressmembers are typical and actively hinder Congress' ability to exercise a core function. Second, the Members explain why this Court need not address the Department's invocation of the doctrine of consular nonreviewability, but to the extent the Court finds review of that doctrine necessary, it should conclude that it may review the determination here and should decline to expand the doctrine as the Department requests. Finally, the Members explain that a case like this one undermines respect for the Constitution's separation of powers in two ways: (1) Congress cannot fully uphold its constitutional obligations when the executive deprives it of information to which it is entitled and that is required to perform congressional functions; and (2) the executive branch disregards Congress' expressly stated mandate of presumptive judicial review when it invokes consular nonreviewability in situations where Congress has previously authorized review.

## ARGUMENT

### I. CONGRESS CANNOT PERFORM ITS CONSTITUTIONALLY PRESCRIBED FUNCTIONS WHEN AGENCIES REFUSE TO PROVIDE CONGRESSIONAL OFFICES INFORMATION TO WHICH THEY ARE ENTITLED

#### A. Advocating For Administrative Action On Behalf Of Constituents Has Been A Core Congressional Function Since The Founding

Advocacy for administrative action on behalf of constituents has been a core legislative function since the very first Congress. Following the Revolutionary War, individual congressmen were inundated with requests for assistance with pensions, leading Congress to establish select committees and pass legislation to address constituent claims. Eckman, Cong. Res. Serv., R44726, *Constituent Services: Overview and Resources* 1 (Jan. 23, 2023). In his diary, then-Congressman James K. Polk recorded the "constituent business" he conducted during the 22nd Congress—ranging from assisting with pension claims, writing letters for appointments to West Point, and searching for a letter in a dead-letter office. Bassett, *James K. Polk and His Constituents, 1831-1832*, 28 Am. Hist. Rev. 68, 69-77 (1922). Today, congressional offices are continuously providing these and other constituent services—from nominations for appointment to service academies, to petitions for clemency, to assistance with benefit claims, to aid in navigating the immigration system. Often, as in Ms. Muñoz's case, an appeal to Congress is the last resort for a desperate constituent who has encountered a dead end in navigating a federal program.

As one former Speaker well articulated the responsibility the Members feel toward their constituents:

> For many millions of private citizens, their elected representative is the only person whom they remotely know in the federal government. He is their only intercessor when they encounter difficulties. This particular relationship between a congressman and the individual constituent, struggling for opportunity, is a very sacred one, not to be despised. It is, in fact, essential if we are to keep government accessible and to keep government human.

*Incumbency Advantage and Accountability*, 23 Cumb. L. Rev. 61, 67 (1993).

The Members view their roles as constituent advocates as integral to their congressional function, particularly when constituents face difficulties in navigating the byzantine and stressful immigration system. The Members were motivated to seek office by a desire to use their power to assist constituents through direct constituent service. The Members allocate significant portions of their limited resources to ensure that their offices can efficiently and effectively advocate for constituent needs, particularly those involving the immigration system.

For example, Amicus Representative Jayapal, who sits on the Judiciary committee, and serves a district including over 780,000 people, has just seventeen full-time staffers serving in multiple offices across Washington D.C. and her district. Of those seventeen staffers, two or three are devoted solely to constituent services and an additional one or two are devoted principally to immigration matters. And in general, "constituent communications account for twenty to thirty per cent of the budget for every congressional office on Capitol Hill." Schulz, *What Calling Congress Achieves*, The New

Yorker (Feb. 26, 2017), https://www.newyorker.com/magazine/2017/03/06/what-calling-congress-achieves.

One of the most common requests for congressional assistance involves visa and immigration issues. The Members estimate that their offices assist with over 1,000 requests for help with immigration difficulties every year. Immigration-related requests, even more so than other types of assistance, are typically born of desperation—wives, like Ms. Muñoz, facing the terrible choice of either leaving their country or living separately from their spouses, or war-zone interpreters caught in bureaucratic limbo and physical danger for months after applying for special immigrant visas. *E.g.*, Herb *et al.*, *Inside the scramble to help Americans and Afghans escape Afghanistan*, CNN (Aug. 20, 2021), https://www.cnn.com/2021/08/20/politics/congressional-nongovernmental-efforts-to-help-escape-afghanistan/index.html.

Common immigration-related constituent calls for help range from requests to expedite visa petitions, to requests for a status update, to clarification of agency determinations and help correcting erroneous decisions. When responding to an outreach request, congressional staff first assess the constituent's issue to determine whether (1) the request requires intervention; and (2) the constituent needs information or advocacy. Often, such as in the case of complaints regarding delays in visa processing, the staff simply listens and provides background information. But other times, such as in Ms. Muñoz's case, advocacy is required. Staff then contact the relevant agencies, through formal and informal channels. Staff may call the agency, question agency representatives during briefings and hearings, or write formal oversight letters.

When they contact an agency, congressional staff may have multiple goals. Ideally, the agency will resolve the constituent's problem by taking (or refraining from taking) some action. For example, in 2021, Senators Catherine Cortez Masto and Jacky Rosen helped expedite a stalled consular visa process in Pakistan to reunite a wife who had been separated from her husband, who held a special immigrant visa. Hynes, *After escaping the Taliban, would a young Afghan couple reunite in Las Vegas?*, Las Vegas Rev.-J. (Oct 8, 2022), https://www.reviewjournal.com/local/local-las-vegas/after-escaping-the-taliban-would-a-young-afghan-couple-reunite-in-las-vegas-2653981/; *see also* Herb *et al.*, *Inside the scramble to help*, *supra* p.8 ("Congressional offices across the country" took on "thousands of cases" from constituents with ties to Afghanistan, "including American citizens fearful of trying to escape, Afghan interpreters who worked with the U.S. military and Afghan wom[e]n now at risk under Taliban rule."). Many constituent problems may not be immediately redressable, however. In those cases, staff seek information to provide the constituent so that the constituent can seek further relief or at the very least understand the agency's decisionmaking. Too often, the relevant agency sends a boilerplate letter that provides no additional actionable information—as both the Department and USCIS did in response to Representatives Chu and Sánchez's inquiries on behalf of Ms. Muñoz.

### B. Advocating On Behalf Of Constituents Furthers Congress' Core Legislative And Oversight Functions

Beyond its obvious importance to individual constituents, constituent service is a key tool that enables Congress effectively to perform its constitutionally assigned legislative and oversight functions—functions that have

increased in importance as the federal government has expanded through a comprehensive administrative state. Indeed, congressmembers' role as constituent advocates is inherent in the constitutional structure, which contemplates that consistent communication and back and forth between the branches advances the public good. *See e.g.* Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 Mich. L. Rev. 1, 8 (1996).[3]

*First*, information that congressmembers gain from constituent work often serves as a warning signal for problems that Congress might not otherwise discover through other channels. Constituent complaints often lead directly to formal oversight and, when necessary, remedial legislation. *See e.g.* Levin, 95 Mich. L. Rev. at 20-21. Crucial legislation often emanates from constituent complaints. For example, in 2007, reports surfaced regarding toys and other children's products that contained dangerous levels of lead and other hazardous materials. Constituent complaints flooded into congressional offices, prompting extensive oversight hearings. *E.g.*, *Protecting Our Children: Current Issues In Children's Product Safety*: *Hearing Before the Subcomm. on*

[3] The Constitution specifically guarantees the people the right to petition Congress for redress of grievances, U.S. Const. amend. I, and provision of constituent services is core to the function of a representative democracy. The system of single-member congressional districts reflects the judgment that representative democracy works best when voters can identify with a representative and when a representative is responsive to their constituency. *See* Gould, *The Law of Legislative Representation*, 107 Va. L. Rev. 765, 779 (2021)*;* Chambers, Jr., *Enclave Districting*, 8 Wm. & Mary Bill Rts. J. 135, 146 (1999)*; Vieth* v. *Jubelirer*, 541 U.S. 267, 357 (2004) (Breyer, J. dissenting) (single-member districts "make[] it easier for voters to identify which party is responsible for government decisionmaking (and which rascals to throw out)").

*Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 100th Cong. 44 (2007). Those hearings ultimately led to the passage of the bipartisan Consumer Product Safety Improvement Act in 2008, which strengthened safety standards for children's products and enhanced the authority of the Consumer Product Safety Commission.

*Second*, work in response to constituent requests for assistance often gives a congressmember an opportunity to determine whether executive agency programs are functioning in accordance with congressional mandates and, if not, take measures to fix the problem. For example, in 2014, constituent complaints about long wait times, inadequate medical care, and mismanagement within the Department of Veterans Affairs (VA) healthcare system prompted congressional oversight and legislative action. *A Continued Assessment of Delays in VA Medical Care and Preventable Veterans Deaths: Hearing Before the H. Comm. on Veterans' Affairs*, 113th Cong. (2014). The result was passage of the Veterans Access, Choice, and Accountability Act of 2014, aimed at improving access to care for veterans and holding VA officials accountable for misconduct. *See also* 142 Cong. Rec. 19,015, 19,016 (1996) (statement of Rep. Lee Hamilton) (reporting from his experience as a Congressman that "[m]any programs, ranging from veterans benefits to regulatory policy, have been amended by Congress because of problems first brought to our attention by constituents asking for help").

*Third*, even if constituent complaints do not lead directly to formal oversight hearings or legislation, problems uncovered during constituent service work often form bases for questions to agency administrators during congressional hearings. When agency leadership learns of potential problems—and congressional

interest—the agency may conduct internal oversight and adjust regulations or procedures in response, thereby improving their functioning. Johannes, *Casework as a Technique of U.S. Congressional Oversight of the Executive*, 4 Legis. Studies Q. 325, 332 (1979).

*Fourth*, work on behalf of constituents can give congressmembers information they need for direct outreach to agencies to influence the agencies to improve their internal procedures. As explained *supra* section I.A., congressional staff routinely request information from agency personnel, ask them to take action on behalf of their constituents, or direct criticism at agency personnel for actions the agency has (or has not) taken. An informal congressional inquiry can spur executive agencies to improve regulations or procedures. This process is not always adversarial: Congressional staffers who notice specific recurring problems may reach out directly to their agency contacts and provide them with data and information in a collaborative effort to improve agency function. A congressional inquiry tied to a specific case may, moreover, prompt agency personnel to handle the next similar case with particular care. *See* Johannes, 4 Legis. Studies Q. at 334-335.

*Finally*, constituent service may act as a direct corrective to agency delay, mistake, or abuse. When successful in resolving a case, correcting an error, or catching an abuse of power, constituent service work advances the core oversight goal of ensuring a functioning and responsive executive branch.

### C. Ms. Muñoz's Case Is Typical—It Is Impossible For Congress To Play Its Constitutional Role When Executive Agencies Refuse To Provide Information To Which Congress Is Entitled

Constituent service cannot effectively support Congress' legislative and oversight functions when executive agencies fail to comply with their obligations to provide information to which Congress is entitled. These obligations are well understood but often ignored, hampering constituent service, frustrating efforts to address systemic problems—and, in the case of Ms. Muñoz, leading to significant individual hardship.

The Department's Foreign Affairs Manual (FAM), with which the Department must comply, recognizes that "[c]lose relations with Congress are essential to CAs' [Consular Affairs'] success." 9 FAM 602.2-4(A)(a). The FAM instructs consular officers to anticipate "congressional requests on visa applicants," *id.* 603.2-5(a), and sets forth a baseline expectation that consular officials will provide congressmembers with enough information to adequately assess a constituent's situation. As stated in the FAM, replies to congressional inquiry "should be complete and accurate," *id.* 601.7-1(b), to avoid "the embarrassing position of trying to explain a refusal with very little background information on hand," *id.* 601.7-1(d). Consular officials are to "take[] every opportunity to … inform Members of Congress and Congressional staff about CA's work." *Id.* 602.2-4(A)(a).

In this case, when Representative Chu requested information about Mr. Asencio-Cordero's visa status, the consulate had a duty to provide, at minimum, all information that they were constitutionally and statutorily obligated to provide Respondents. 9 FAM 601.7-1(b)

(responses to Congress must be "complete and accurate"); *id.* 603.2-10(a)(1)-(2) (responses to Congress must include "information that may be shared directly with the visa applicant themselves" (emphasis omitted)). The INA required that the consulate provide timely written notice of its determination, 8 U.S.C. § 1182(b), and the Constitution required "notice of the factual basis" for the denial in order to provide meaningful opportunity to appeal, *Wilkinson* v. *Austin*, 545 U.S. 209, 211 (2005); *see* Resp. Br. 37-38.[4]

In the Members' view, "[c]lose relations with Congress," 9 FAM 602.2-4(A)(a), and proper deference to Congress' advocative (and by extension legislative) role entails sharing information far beyond the one-sentence explanation that the consulate gave Representative Chu—the typical response to these kinds of inquiries in the Members' experience.

The Constitution and federal law envision a better approach. Had the consulate replied to Representative Chu's letter with a simple additional clause explaining why specifically Mr. Asencio-Cordero was found permanently ineligible under section 1182(a)(3)(A)(ii), that information would have been enough for Representative Chu to successfully perform her constituent and oversight duties. With the simple addition of an explanatory

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[4] The Department argues (Br. 38-39) that it was not statutorily required to provide Respondents (and by extension Representative Chu) a timely written decision under 8 U.S.C. § 1182(b)(3), which exempts consular officers from the notice requirements when it denies a visa pursuant to sections 1182(a)(2) or (a)(3). To the extent that provision applies here, *but see* Resp. Br. 41-42, it does not speak to the Department's obligation under the *Constitution* to render its administrative reconsideration process meaningful by providing sufficient information to appeal. *See id.*; 22 C.F.R. § 42.81(e).

clause—i.e. "complete" information as contemplated by 9 FAM 601.7-1(b) and Due Process—Representative Chu would have known what was preventing her constituents from obtaining visas. In response, she could have taken the following actions: *First*, she could have notified Respondents of the reason for their denial, providing them the information necessary to mount a case for reconsideration under 22 C.F.R. § 42.81(e). Respondents are currently uncertain which factors—misinterpretation of Mr. Asencio-Cordero's tattoos, erroneous information in his criminal review, or others—caused the denial. Representative Chu could have also learned that she should inform constituents in similar situations that they should prepare to provide explanations for any prominent tattoos or other potentially detrimental ambiguities in their applications. *Second*, now aware of at least one potential issue—a possible erroneous evaluation of tattoos—Representative Chu could have taken any one of the actions discussed in section I.A., *supra*: from placing a friendly phone call to the Salvadoran consulate to take special care when evaluating an applicant's tattoos to proposing legislation requiring certain foreign service officers to receive training on what constitutes a gang tattoo.

Because the Department failed to provide information consistent with the expectations set out in the Constitution and the FAM, Representative Chu was prevented from effectively performing one of her core congressional duties—resulting in great hardship for her constituents. As a similar result of agency stonewalling, Representative Sánchez was also prevented from providing meaningful help to her constituents and was deprived of an opportunity to assess the need for additional oversight. *See supra* section I.A.

## II. THIS COURT NEED NOT ADDRESS CONSULAR NONREVIEWABILITY, BUT IF IT DOES, IT SHOULD DECLINE THE DEPARTMENT'S INVITATION TO EXPAND THE DOCTRINE

The Department (Br. 16, 32 n.10) asks this Court to hold generally that "[t]he doctrine of consular nonreviewability forecloses judicial review of visa denials" and suggests that, to the extent consular visa denials are reviewable at all, the Department may proffer "any reason or no reason" in support of them. The Court should reject both arguments.

*First*, the Court need not reach the doctrine of consular nonreviewability. That is because this Court already confirmed that courts may review consular visa denials, like the one in this case, "when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen." *Trump* v. *Hawaii*, 585 U.S. 667, 703 (2018); *Kleindienst* v. *Mandel*, 408 U.S. 753, 769-770 (1972).

*Second*, should the Court find the question of nonreviewability properly before it, *but see* Resp. Br. 11-12, it should reject the Department's arguments—which rely on incorrect readings of congressional intent—and instead honor the APA's and INA's authorization of presumptive judicial review in cases like this one.[5]

### A. Congress Has Authorized Presumptive Judicial Review Of Consular Visa Denials Under Section 1182(a)

Consular nonreviewability stems from the proposition that courts require "express[] authoriz[ation] … to review the determination of the political branch" to

[5] This brief addresses neither the doctrine of consular nonreviewability generally, nor its application to exclusionary determinations under other statutes not at issue in this case.

exclude non-citizens. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950) (citing *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892)). Congress has expressly authorized presumptive judicial review of consular visa denials issued pursuant to 8 U.S.C. § 1182(a)(3)(A). The Administrative Procedure Act of 1946 provides for broad judicial review of agency actions unless either "statutes preclude judicial review" or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). On its face, the APA applies to the Department's consular visa denials issued under section 1182(a)(3)(A) of the INA: The Department is an "agency" within the meaning of the APA, 5 U.S.C. § 551(1), consular visa denials are not "discretionary" decisions, Dep't Br. 37, and no statute "preclude[s]" judicial review of those denials. 5 U.S.C. § 701(a)(1).

To the contrary, the INA contains many, explicit jurisdiction-stripping provisions, but has not prohibited review of the consular visa denials at issue here. When passing the original 1952 Act, Congress went so far as to carefully explain whether it was exempting certain determinations from judicial review alone, *e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v), (d)(12)(B), (n)(2)(G)(vii), whether it was exempting determinations from both "administrative [and] judicial review," *e.g.*, *id.* § 1182(a)(5)(C)(iii); *see also id.* § 1182(n)(5)(D)(i), (a)(10)(C)(ii)(III), (a)(10(C)(iii)(II); whether it was limiting judicial or administrative review to only certain subjects, *e.g.*, *id.* § 1182(n)(5)(D)(iii), (d)(1)(3)(B)(i), (n)(1)(G), (t)(2)(C); whether it was permitting review only under certain conditions, *e.g.*, *id.* § 1182(n)(5)(D)(ii), or whether it was affirmatively proscribing processes for further review, *e.g.*, *id.* § 1182(n)(5)(B). Pub. L. 82-414, 66 Stat. 163 (1952). And when Congress amended the INA in 1996, it clarified that the statute no longer affirmatively

"provid[ed] jurisdiction for suits against the United States," but did not *preclude* that jurisdiction—as did that same 1996 amendment with other provisions of the INA. *See* Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009, 3009-577, 3009-650 (1996) (clarifying that "[n]o court shall have jurisdiction to review" certain immigration-waiver determinations, removal orders, voluntary-departure requests, denials of discretionary relief, criminal removal orders, requests for injunctive relief, and various exclusionary decisions issued by the Attorney General); *see also* REAL ID Act, Pub. L. No. 109-13, 119 Stat. 302, 310 (2005) (further limiting jurisdiction under unrelated provisions of the INA). It is a cardinal principle of "the business of interpreting statutes" that "differences in language convey differences in meaning." *Henson* v. *Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017). Congress knows how to strip jurisdiction of consular denials under section 1182(a)(3)(A), and it has not done so.

Read together, the APA and INA paint a clear picture of congressional intent. The APA presumptively requires review of administrative action. 5 U.S.C. § 701(a). And although Congress has specifically clarified in the INA where certain exclusionary immigration decisions are subject to limited review or no review at all, consular visa denials under 1182(a)(3)(A) are not on that considered list. This Court has thus recently assumed without deciding that it could review a challenge under the INA "notwithstanding consular nonreviewability or any other statutory nonreviewability issue" in part because the Government did not "point to any provision of the INA that expressly strips the Court of

jurisdiction"—which is also the case here. *Trump*, 585 U.S. at 682.[6]

Finally, this Court should separately decline nonreview here because this case implicates the rights of Mr. Asencio-Cordero's U.S.-citizen spouse, Ms. Muñoz. *Mandel*, on which the Department primarily relies (*e.g.*, Br. 4-5), specifically *authorized* review—consular nonreviewability notwithstanding—where a U.S. citizen's rights were directly impacted. 408 U.S. at 770; *Trump*, 585 U.S. at 703. *Mandel* additionally declined to adopt the Department's proposed sweeping position here, that it may provide, in its "sole and unfettered discretion, … any reason or no reason" for a visa denial. 408 U.S. at 769. Further, in the plurality case *Kerry* v. *Din*, this Court considered an American citizen's constitutional interest in the consular denial of her husband's visa under

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[6] Separately, this Court has held time and time again that the APA applies to the INA. In *Shaughnessy* v. *Pedreiro*, the Court reviewed a challenge to a deportation order issued under the newly passed 1952 INA. 349 U.S. 48 (1955). The Court acknowledged that the previous "Immigration Act of 1917 … had long been interpretated as precluding any type of judicial review except by habeas corpus." *Id.* at 50. The purpose of the APA, however, "was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act." *Id.* at 51. This Court held that the APA presumptively applies to the INA because "the subsequent 1952 Immigration and Nationality Act [contains] no language which 'expressly' supersedes or modifies the expanded right of review granted by" the APA. *Id.* This Court reaffirmed that decision in *Brownell* v. *We Shung*, 352 U.S. 180, 185 (1956), *superseded on unrelated grounds*, 8 U.S.C. § 1105a(b). Recently, this Court reaffirmed that the APA applies to the INA unless "targeted [statutory] language" says otherwise. *See Department of Homeland Sec.* v. *Regents of Univ. of Cal.*, 140 S.Ct. 1891, 1907 (2020); *Guerrero-Lasprilla* v. *Barr*, 589 U.S. 221, 229 (2020) ("We have 'consistently applied' the presumption of reviewability to immigration statutes.").

section 1182(a). Although no single opinion garnered a majority, all justices save two would have reached directly for the merits of the U.S. citizen's claim. 576 U.S. 86, 90-91 (2015) (Scalia, J., Roberts, C.J., and Thomas, J.), *see also id.* at 107-108 (Breyer, Ginsburg, Sotomayor, and Kagan, JJ., dissenting), *but see id.* at 102-103 (Kennedy and Alito, JJ., concurring in judgment). The Members strongly believe that this case, which affects the rights of a U.S. citizen, is not the proper vehicle to determine whether consular nonreviewability—a doctrine stemming from cases impacting only non-citizens, *see Mandel*, 408 U.S. at 781-782 (Marshall and Brennan, JJ., dissenting)—should be expanded to severely cabin judicial review despite congressional authorization to the contrary.

### B. The Department's Arguments Suggesting Congressional Support For An Expanded Consular Nonreviewability Doctrine Are Wrong[7]

*First*, the Department (Br. 18-19) makes much of Congress' alleged failure to affirmatively authorize judicial or "semijudicial" review of visa denials specifically, either in the INA itself or in the decades since the INA's passing. But such "'inaction'" "'lacks persuasive significance'" when determining congressional intent "'because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation *already incorporated the offered change*.'" *Central Bank of Denver, NA*, v. *First Interstate Bank of Denver, NA*, 511 U.S. 164, 187 (1994) (emphasis added) (quoting *Pension Benefit Guar. Corp.* v.

[7] The Members limit their responses to certain of the Department's arguments that specifically impact congressional intent. The Members should not be understood to endorse any arguments to which they do not respond.

*LTV Corp.*, 496 U.S. 633, 650 (1990)); *Star Athletica, LLC* v. *Varsity Brands, Inc.*, 580 U.S. 405, 423-424 (2017).

That the APA already permitted broad judicial review of agency decisions was one of Congress' rationales for declining to add separate affirmative jurisdictional grants. As this Court explained nearly seventy years ago, the 1952 Congress determined that additional amendments to the INA "provid[ing] for liberal judicial review" were unnecessary "[because] the Administrative Procedure Act is made applicable to the bill." *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51-52 (1955) (quoting 98 Cong. Rec. 4416 (1952) and 98 Cong. Rec. 5578 (1952)); *see also Brownell* v. *We Shung*, 352 U.S. 180, 186 (1956) ("The House managers reported that after careful consideration of 'the problem of judicial review' they were satisfied that the procedures provided in the [INA] remain within the framework and the pattern of the Administrative Procedure Act."). Further, it is particularly "inappropriate to give weight to 'Congress' unenacted opinion' when construing judge-made doctrines"—such as consular nonreviewability—"because doing so allows the Court to create law and then 'effectively codify' it 'based only on Congress' failure to address it.'" *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 299 (2014) (Thomas, J., concurring in judgment).

*Second*, The Department conflates (Br. 5) Congress' "express[] deni[al]" of a "private right of action to challenge a decision of a consular officer to grant or deny a visa," 6 U.S.C. § 236(f), with evidence that "Congress has not provided for any form of judicial review over visa denials." But this is no evidence at all: that the INA does not specifically provide a cause of action for review of visa denials has nothing to do with whether Congress intended visa denials to be presumptively *reviewable*; Congress expressly did. 5 U.S.C. § 701(a); 8 U.S.C.

§§ 1101 *et seq*. Regardless, "statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms," such as "other public causes of action[]." *Davis* v. *Passman*, 442 U.S. 228, 241 (1979). The APA is its own cause of action. 5 U.S.C. § 704. As is, of course, the Constitution. *Passman*, 442 U.S. at 244.

## III. Information-Sharing With Congress And Reviewing Consular Decisions As Presumptively Required By Law Respects Congressional Intent And Honors The Separation Of Powers

If adopted, the Department's position would leave Congress twice wronged. Strict nonreviewability contravenes Congress' mandate that administrative decisions presumptively require review. *See supra* section II. And insulating the Department from the requirement that visa denials be accompanied by enough information to adequately assess a petitioner's situation impedes Congress' ability to fulfill its legislative mandate. *See supra* section I. Without the prospect of judicial intervention, and free to stonewall congressional and petitioner inquiry, consular officials can violate constitutional and statutory mandates without consequence or opportunity for the wronged parties to seek external relief. Such unaccountability, in which the executive functionally "operate[s] with absolute independence," *United States* v. *Nixon*, 418 U.S. 683, 707 (1974), is inconsistent with "the carefully defined limits on the power of each Branch." *See INS* v. *Chadha*, 462 U.S. 919, 957-958 (1983).

*First*, all three branches of government have an important role to play in determining how to define,

enforce, and review the power to exclude non-citizens. This Court articulated the contours of that partnership in 1893:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of [C]ongress, and to be executed by the executive authority according to the regulations so established, except so far [as] the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution, to intervene.

*Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893). The APA and INA provide clear congressional "authoriz[ation]" for judicial review in this case, and this Court has already held that it will review consular visa denials that impact the rights of U.S. citizens. *See supra* section II. As such, this Court need not address consular nonreviewability. But to the extent it does, at minimum, this Court should decline the Department's invitation (Br. 16, 32 n.10) to completely deny review or to expand the doctrine to encompass consular denials for "any reason or no reason."

*Second*, Congress cannot fully uphold its constitutional obligations when the executive deprives it of information to which it is entitled. The Department states (Br. 13) that decisions about whether to admit or exclude foreigners are best left to the political branches. But Congress, as a co-equal "political branch," has explicitly authorized judicial review for cases like Ms. Muñoz's. *See supra* section II. Thus, at base, the Department's position is that this decision should have been left to one political branch—the executive. When one political

branch fails to provide information to the other, and then disclaims review from the apolitical judiciary, the result is a total concentration of power in the executive. This concentration violates the separation of powers, *see Chadha*, 462 U.S. at 957-958; *Nixon*, 418 U.S. at 707, and fails to honor the historic immigration partnership among all three branches of government. *See Fong Yue Ting*, 149 U.S. at 713.

## CONCLUSION

The court of appeals should be affirmed.

Respectfully submitted.

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# APPENDIX

## APPENDIX

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