

Supreme Court Rules That There Is No Constitutional Right to Having an Alien Spouse Admitted to the United States

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On June 21, 2024, the Supreme Court in *Department of State v. Muñoz* [rejected](#) a U.S. citizen’s legal challenge to the denial of her [alien](#) husband’s application for a visa to enter the United States. Under the [doctrine of consular nonreviewability](#), a consular officer’s decision to deny a visa is generally [not subject to judicial review](#). In a prior case, the Supreme Court recognized a [narrow exception](#) in cases where a U.S. citizen argues that the visa denial violates the citizen’s constitutional rights, thereby allowing courts to consider whether the visa denial is supported by a “facially legitimate and bona fide reason.” The Court in *Muñoz* [held](#) that a U.S. citizen spouse does not have a constitutional right in her alien spouse being admitted to the United States, and therefore the narrow exception allowing for judicial review of the denial of her spouse’s visa does not apply. This Legal Sidebar examines the federal government’s broad authority over the admission and exclusion of aliens, the procedural background of the *Muñoz* case, and the Supreme Court’s decision. The Sidebar concludes with considerations for Congress.

The Federal Government’s Power to Admit and Exclude Aliens

The Supreme Court has long recognized that Congress has [“plenary” power over immigration](#) and has interpreted this power to apply with most force to the admission and exclusion of aliens who [seek to enter](#) the United States. The Court has [reasoned](#) that the government has inherent, sovereign authority to admit or exclude aliens and that aliens outside of the United States have no constitutional right to be admitted into the country. In *United States ex rel. Knauff v. Shaughnessy*, the Supreme Court in 1950 [explained](#) that the decision to exclude an alien “is final and conclusive” and “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.” The Court thus rejected an alien’s challenge to her exclusion from the United States without a hearing, declaring that the government has the [“inherent executive power”](#) to deny admission and that “whatever the procedure authorized by Congress is, [it is due process](#) as far as an alien denied entry is concerned.” Similarly, in *Shaughnessy v. United States ex rel. Mezei*, the Court in 1953

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held that an alien could be denied entry without a hearing in light of “the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments.”

In 1972, the Supreme Court held that courts may conduct a limited review of a visa denial if a U.S. citizen shows that the denial implicates the U.S. citizen’s constitutional rights. In *Kleindienst v. Mandel*, the Court considered a First Amendment challenge by a group of professors to the application of a statute barring the admission of an individual (Mandel), who was invited to speak at their universities, on the basis that he advocated communism. The professors alleged that the visa denial limited their First Amendment right to hear Mandel speak. The government refused to waive the ground of inadmissibility for Mandel and grant him a temporary visa to attend an academic conference. The government provided a factual justification for refusing to grant the waiver both at the time and shortly after the visa denial.

Recognizing that “plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established,” the Court held that an alien’s exclusion must be upheld if the executive branch articulates that it exercised its discretion on the basis of “a facially legitimate and bona fide reason.” The Court explained that, when a facially legitimate and bona fide reason is shown, courts would neither “look behind” the government’s exercise of its discretion in denying the applicant’s visa nor “test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.” In this case, because the government provided to Mandel a facially legitimate and bona fide reason for refusing him a waiver, the Court declined to address what grounds may be available to challenge a visa denial when no justification is provided. In *Kerry v. Din*, the Supreme Court in 2015 considered a U.S. citizen’s (Din’s) claim that the denial of her husband’s visa application without adequate explanation denied her due process of law and deprived her of her constitutional right to live with her husband in the United States. The Court rejected this challenge in a 5-4 decision, but the Justices comprising the majority split on the reasoning. Justice Scalia, writing for a plurality of three Justices, determined that Din had no protected fundamental liberty interest under the Due Process Clause in her husband’s ability to come to the United States, and thus did not consider whether the government provided a facially legitimate and bona fide reason for excluding her husband because there was “no process due to her under the Constitution.” In a concurring opinion joined by Justice Alito, Justice Kennedy determined that, even if Din had a protected liberty interest in her husband’s visa application, the government showed a facially legitimate and bona fide reason for its visa denial. Justice Kennedy explained that the consular officer cited the statute barring admission to aliens who engaged in terrorist activities and that the statute specified “discrete factual predicates” for an inadmissibility finding. Justice Kennedy further explained that Din’s statement that her husband “worked for the Taliban government” in her complaint filed with the district court showed “at least a facial connection to terrorist activity.” Justice Kennedy determined that the Court did not need to decide whether a U.S. citizen has a protected liberty interest in an alien spouse’s visa application because, in this case, the government satisfied due process by notifying Din’s husband that his visa was denied under the terrorism bar.

After *Din*, the Court in 2018 reaffirmed in *Trump v. Hawaii* that judicial review of executive decisions to exclude aliens coming to the United States from abroad “is highly constrained,” focusing on whether the exclusion “burdens the constitutional rights of a U.S. citizen.”

Given the Supreme Court’s recognition of Congress’s broad authority over the admission of aliens, lower courts have long held that, subject to a narrow exception, there is no judicial review of a consular officer’s decision to grant or deny a visa to come to the United States. This general principle is known as the doctrine of consular nonreviewability.

Facts and Procedural History in *Muñoz*

The [plaintiffs](#) in *Muñoz* were a U.S. citizen (Muñoz) and her husband (Asencio-Cordero), who is a native and citizen of El Salvador. Asencio-Cordero [filed](#) an application for an [immigrant visa](#) at the U.S. consulate in San Salvador based on his marriage to Muñoz. A consular officer [denied](#) the visa application, citing the “unlawful activity” ground of inadmissibility under [8 U.S.C. § 1182\(a\)\(3\)\(A\)\(ii\)](#). The officer provided no additional information about the reason for the visa denial, and the statute itself did not specify the factual predicates for an inadmissibility finding. The plaintiffs [believed](#) that the officer, in denying a visa, concluded that Asencio-Cordero was a member of the [MS-13 criminal gang](#) based on his tattoos. They asked the consular officer and other Department of State officials [to either reconsider or review](#) the visa denial, but their efforts were unsuccessful.

The plaintiffs filed a [lawsuit](#) in federal district court, arguing that the Department of State, the Secretary of State, and the United States consul in San Salvador (collectively referred to as the State Department) [violated Muñoz’s constitutional right to due process](#) by infringing on her liberty interest in her husband’s visa application and her right to live with him in the United States. The plaintiffs argued that the agency’s denial of her husband’s visa application implicated her right to due process and that the agency violated her due process by not disclosing why Asencio-Cordero was inadmissible. During the ensuing litigation, the State Department [submitted](#) a declaration to the court explaining that it had identified Asencio-Cordero as a member of the MS-13 gang based on his consular interview, the presence of his tattoos, and confidential law enforcement information.

The district court [granted](#) the State Department’s motion for summary judgment, which was based on the doctrine of consular nonreviewability. Citing Ninth Circuit [precedent](#), the district court [determined](#) that Muñoz had a constitutionally protected liberty interest in the denial of her husband’s visa but [ruled](#) that the State Department provided a “facially legitimate and bona fide reason” for the visa denial under *Mandel*. The court [explained](#) that the consular officer cited a “valid statute of inadmissibility” for the visa denial and, although that statute did not provide the “discrete factual predicates” for denying a visa, the State Department’s “further explanations” for the visa denial showed “at least a facial connection to the statutory ground of inadmissibility.”

On appeal, the Ninth Circuit [reversed](#) the district court. The court [agreed](#) with the district court that Muñoz possessed a liberty interest in her husband’s visa application and further held that U.S. citizens [also possess](#) a liberty interest in residing in their country of citizenship. The court reasoned that the “[cumulative effect](#)” of denying an alien spouse’s visa “is a direct restraint on the citizen’s liberty interests protected under the Due Process Clause.”

As to whether the State Department provided a facially legitimate and bona fide reason for denying Asencio-Cordero’s visa, the court answered this in the negative, [reasoning](#) that, at the time of the visa denial, the agency cited only the statutory ground of inadmissibility without explaining the factual basis. The court [determined](#) that, although the agency later provided more information about the reason for the visa denial during litigation, curing the deficiency “years after the denial” failed to satisfy *Mandel*’s facially legitimate and bona fide reason requirement. The court also [determined](#) that, where a visa denial implicates a U.S. citizen’s constitutional rights, “due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest.” The court thus [held](#) that the State Department’s failure to provide timely notice of the factual basis for the visa denial precluded applying the doctrine of consular nonreviewability, and the court remanded the case to the district court for further proceedings. The Ninth Circuit later [denied](#) the plaintiffs’ request to [rehear the case en banc](#).

The Supreme Court [granted](#) the government’s petition to review the Ninth Circuit’s decision. The Court’s review was [limited to two questions](#): (1) “Whether a consular officer’s refusal of a visa to a U.S. citizen’s

noncitizen spouse impinges upon a constitutionally protected interest of the citizen” and (2) “Whether, assuming that such a constitutional interest exists, notifying a visa applicant that he was deemed inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii) suffices to provide any process that is due.”

The Supreme Court’s Decision

On June 21, 2024, in a 6-3 [decision](#), the Supreme Court reversed the Ninth Circuit’s ruling. In the [majority opinion](#) authored by Justice Barrett (joined by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh), the Court [held](#) that Muñoz failed to show that the denial of her alien husband’s visa implicated a constitutionally protected liberty interest under the [Due Process Clause](#) to warrant judicial review of the visa denial under *Mandel*.

The Court [determined](#) that Muñoz’s asserted unenumerated liberty interest in having her husband enter the United States and reside with her does not implicate her right to due process under the Fifth Amendment, because her asserted right is not a fundamental right or liberty that is “deeply rooted in this Nation’s history and tradition.” Citing early federal laws and [U.S. founding documents](#), the Court [explained](#) that “the through line of history is recognition of the Government’s sovereign authority to set the terms governing the admission and exclusion of noncitizens.” The Court [observed](#) that, while Congress has sometimes eased restrictions on admission for aliens married to U.S. citizens, it “has never made spousal immigration a matter of right.” Instead, “qualifications and restrictions have long been the norm,” including inadmissibility bars based on criminal activity.

The Court cited *Knauff* as a “[striking example](#)” where it has recognized, in comparable circumstances, the federal government’s broad authority to impose limitations on admission with no judicial oversight. The Court [observed](#) that *Knauff* involved a U.S. citizen who challenged his wife’s denial of admission for security-related reasons and that the Court [held](#) that the wife had no right to a hearing, because “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”

The Court also [cautioned](#) that creating a procedural due process right in another person’s legal proceeding “would have unsettling collateral consequences.” The Court [considered](#), for example, whether a wife could challenge her spouse’s transfer to a remote prison or an overseas military deployment, or whether a U.S. citizen could assert procedural rights in her spouse’s removal proceedings. In the Court’s [view](#), creating such due process rights “would usher in a new strain of constitutional law, for the Constitution does not ordinarily prevent the government from taking actions that ‘indirectly or incidentally’ burden a citizen’s legal rights.” The Court [explained](#) that, although Muñoz suffered indirect harm from the denial of her husband’s visa application, that harm provides her no constitutional right to participate in the visa process, because the State Department’s decision did not impose a direct restraint on her liberty.

Lastly, the Court [clarified](#) that “*Mandel* does *not* hold that citizens have procedural due process rights in the visa proceedings of others.” The Court [explained](#) that, in *Mandel*, the Court had applied the facially legitimate and bona fide reason standard to consider a First Amendment challenge to the denial of a visa because the government had informed Mandel of the reason for denying his visa. The Court further explained that the *Mandel* Court “expressly declined” to decide whether the statute at issue could withstand a constitutional challenge concerning the executive branch’s discretion to deny admission when no justification was provided. The Court [held](#) that *Mandel*’s application of the facially legitimate and bona fide reason standard in that case “had nothing to do with procedural due process.”

Writing separately and [concurring in the judgment](#) of the Court, Justice Gorsuch argued that it was unnecessary to consider whether Muñoz had a constitutional interest in her husband’s visa application, because the State Department revealed the factual basis for its visa denial during the litigation, and Muñoz could again seek her husband’s admission to the United States and respond to that information. Justice Gorsuch [stated](#) that the constitutional questions “no longer have any practical relevance here.”

In a [dissenting opinion](#), Justice Sotomayor (joined by Justices Kagan and Jackson) [argued](#) that Muñoz had a constitutionally protected interest in her husband's visa application because the visa denial burdened her fundamental right to marriage and therefore was entitled to procedural due process protections outlined in *Mandel* in her husband's visa denial. Thus, according to Justice Sotomayor, Muñoz was [entitled](#) to consideration of whether the State Department provided a facially legitimate and bona fide reason for her husband's visa denial. Justice Sotomayor [claimed](#) that "by leaving U.S. citizens without even a factual basis for their spouses' exclusion, the majority paves the way for arbitrary denials of a right this Court has repeatedly held among the most important to our Nation."

Considerations for Congress

The *Muñoz* decision reaffirms the Supreme Court's long-standing recognition that Congress has broad power to determine whether aliens may be admitted into the United States and that a decision to exclude an alien is generally not subject to judicial review. The Supreme Court has [held](#) that review of an exclusion decision "is not within the province of any court, *unless expressly authorized by law*," suggesting that Congress can determine the extent to which review in such a situation as presented in *Muñoz* is available. In the past, legislation has been introduced that would allow for at least some review of visa denials. For example, in the 113th Congress, the [Save America Comprehensive Immigration Act of 2013](#) (H.R. 1525) would have created within the State Department a "Board of Visa Appeals" with authority to review a consular officer's denial of certain family-based immigrant visas. An earlier proposal, the [Immigration Exclusion and Deportation Amendments of 1987](#), as originally introduced in the 100th Congress, would have permitted judicial review of visa denials based on security-related reasons in some cases. The bill was later [amended](#) and reintroduced, excluding the judicial review provision and, instead, requiring the government to report to Congress if an alien was denied a visa on national security grounds.

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