

Ninth Circuit Applies Limited First Amendment Exception to Doctrine of Consular Nonreviewability

July 7, 2026

On April 30, 2026, the United States Court of Appeals for the Ninth Circuit [issued](#) an opinion in *Gonzalez v. U.S. Department of State* [resolving the merits](#) of a constitutional challenge to a State Department determination that the Mexican husband of a U.S. citizen was inadmissible to the United States and was therefore unable to receive a visa and enter the United States. Normally, judicial review of visa denials by a State Department consular officer is precluded under a legal principle known as the doctrine of consular nonreviewability, even if the inadmissible person alleges that the decision violated the U.S. Constitution. The Supreme Court has [recognized](#) an exception to consular nonreviewability, however, that enables courts to review consular decisions when those decisions are challenged by a U.S. citizen on the basis of that citizen's own constitutional rights. The scope of this review is [limited](#); the government need show only that the decision was based on "a facially legitimate and bona fide reason." As another Legal Sidebar [has explained](#), in 2024 the Supreme Court further [narrowed](#) that exception in *Department of State v. Muñoz*, ruling that the exception is not triggered when a U.S. citizen spouse alleges that a consular decision violated the citizen's rights under the U.S. Constitution's Fifth Amendment [Due Process Clause](#).

In *Gonzalez*, the Ninth Circuit [distinguished](#) *Muñoz* because the U.S. citizen spouse [asserted](#) a First Amendment right under the U.S. Constitution to have her husband present in person and to hear his speech, and the court [proceeded](#) to examine the merits of the consular officer's determination, ultimately [concluding](#) that the decision satisfied the "facially legitimate and bona fide" standard.

Gonzalez may suggest a path for judicial review of First Amendment challenges to consular officer denials of visas, particularly in the recurring area of suits by U.S. citizens regarding denial of visas for their [alien](#) spouses. This Legal Sidebar offers brief background on the doctrine of consular nonreviewability and the *Muñoz* opinion and then engages with the majority and concurring opinions in *Gonzalez*. The Sidebar concludes with considerations for Congress.

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LSB11451

Consular Nonreviewability and the *Muñoz* Decision

The doctrine of consular nonreviewability has its roots in the long-recognized “plenary” authority of Congress over immigration and the attendant sovereign authority of the government to admit or exclude aliens who seek to enter the United States. In recognition of that authority, the Supreme Court has held that a government decision to exclude an alien is “final and conclusive” and outside the normal scope of judicial review, at least absent authorization from Congress. This principle of consular nonreviewability has long been applied in lower courts to preclude judicial review of visa denials of aliens seeking to enter the United States.

In 1972, the Supreme Court in *Kleindienst v. Mandel* identified a limited exception to consular nonreviewability arising from the constitutional rights of U.S. citizens rather than on the right of an alien to enter the United States. In *Mandel*, the United States government denied a visa to a foreign national on the basis of a statute barring entry of aliens advocating communism and declined to exercise its discretionary waiver authority under that statute, thus excluding the foreign national from entry into the United States. A group of U.S. citizen professors brought suit, asserting among other things that the exclusion of the foreign national infringed on their First Amendment right to hear the foreign national speak in person. The Court agreed that the U.S. citizen professors had a First Amendment right to receive information implicated by the visa denial, but it expressed concern that permitting such a First Amendment claim to prevail over any decision to exclude an alien would render the government’s plenary power over immigration a “nullity.” In light of these considerations, the Court held that, so long as the government’s decision was for “a facially legitimate and bona fide reason,” it would be upheld, and courts should not “look behind” the decision or otherwise try to balance the reason for the decision against the First Amendment interests at stake. The Court expressly left undecided what should be done when no justification under the statute was offered by the government at all.

After *Mandel*, in 2015, the Supreme Court in *Kerry v. Din* rejected an attempt to rely on *Mandel* to claim a spousal right of entry under the Due Process Clause. No opinion commanded a majority of the Court; a plurality of three Justices concluded that there was no such constitutional right, and two concurring Justices concluded that, even assuming such a right, the government had shown that the denial was for “a facially legitimate and bona fide reason” and that there had been no countervailing “affirmative showing of bad faith.”

In 2024, the Supreme Court again took up the scope of the *Mandel* exception in *Department of State v. Muñoz*. In that case, a consular officer denied a visa to an alien spouse of a U.S. citizen under 8 U.S.C. § 1182(a)(3)(A)(ii), which makes inadmissible “[a]ny alien who a consular officer . . . knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in . . . any . . . unlawful activity.” The couple brought suit in federal court, claiming that the denial violated the U.S. citizen spouse’s Fifth Amendment “fundamental right to live with her spouse in her country of citizenship” and further claimed that the denial was done without “the fair procedure guaranteed by the Fifth Amendment.” The couple ultimately prevailed in the Ninth Circuit, in which a panel held, as a matter of circuit precedent, that the U.S. citizen spouse “had a constitutionally protected liberty interest in her husband’s visa application.” That liberty interest was sufficient to require the government to provide, under *Mandel*, “a facially legitimate and bona fide reason” for the denial, which, the panel further held, the government had failed to do. The Ninth Circuit panel accordingly remanded the case to the district court for a consideration of the merits of the suit.

The Supreme Court reversed. It noted that the Ninth Circuit was alone in recognizing the fundamental liberty interest asserted by the U.S. citizen spouse, and it held that recognition to be in error because “the right to bring a noncitizen spouse to the United States” did not have the requisite historical footing needed to qualify as a “fundamental right” under the Fifth Amendment. Instead, the Court pointed out that restrictions on the entry of alien spouses of U.S. citizens “have long been the norm.” In the Court’s view,

Mandel did not support a procedural due process claim by the U.S. citizen spouse because *Mandel* “had nothing to do with procedural due process.” The *Mandel* plaintiffs instead [asserted](#) that the decision of the government was a direct deprivation of their First Amendment rights, and the Court [described](#) *Mandel* as applying the “facially legitimate and bona fide reason” inquiry as a means of resolving that challenge without having to reach a final determination of the scope of the statutory delegation at issue. *Mandel* thus did not, [according to the Court](#), provide a means for a U.S. citizen to claim a procedural due process right to “a facially legitimate and bona fide reason” with respect to the denial of another person’s visa. “Like the *Din* plurality,” the *Muñoz* Court [held](#) “that a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.”

Facts and Procedural History in *Gonzalez*

The [plaintiffs](#) in *Gonzalez* are a U.S. citizen (Gutierrez) and her husband (Sanchez Gonzalez), a native of Mexico who unlawfully entered the United States at a young age. Gutierrez and Sanchez began the process of securing lawful permanent residency for Sanchez based on their marriage, which, among other steps, required Sanchez to file an application for an immigrant visa and appear at the U.S. consulate in Mexico for an interview with a consular officer. After the interview, the consular officer refused Sanchez’s application. Over a year later, the consular office [issued](#) Sanchez a denial notice “stating that Sanchez was ineligible for an immigrant visa” under 8 U.S.C. § 1182(a)(3)(A)(ii), the same statutory provision at issue in *Muñoz*. The notice indicated that there was reason to believe that Sanchez was “a member of an organized criminal entity,” and he therefore satisfied the statutory standard for inadmissibility. The notice stated that the determination was based on all available evidence, including Sanchez’s interview and other sources of information, but it did not provide any particular facts supporting the decision, and the statute itself does not [specify](#) what facts must support such a decision. Based on questions asked during the interview regarding Sanchez’s tattoos, Sanchez subsequently attempted to demonstrate to the government that his tattoos did not indicate gang affiliation, but the government declined to revisit its denial of Sanchez’s application.

Gutierrez and Sanchez filed a complaint in federal district court in California against the State Department and other federal government entities and persons, asserting in pertinent part that the denial of Sanchez’s visa application violated their respective Fifth Amendment due process rights and their First Amendment rights. As to due process, the plaintiffs argued that the denial deprived Gutierrez of her right to marriage and Sanchez of adequate notice of the reasons for the denial. They further asserted that the denial infringed Sanchez’s First Amendment right to get tattoos and Gutierrez’s right to associate with someone with tattoos.

The district court granted the government’s motion to dismiss. The district court held that Sanchez’s constitutional claims must be dismissed because the doctrine of consular nonreviewability squarely foreclosed review of the denial of Sanchez’s visa application based on alleged violation of Sanchez’s constitutional rights. The district court further held, applying the Ninth Circuit precedent that the Supreme Court later reversed in *Muñoz*, that Gutierrez had a protected liberty interest in Sanchez’s visa application under the Due Process Clause and that the government must therefore provide “a facially legitimate and bona fide reason” for its visa denial. The district court additionally noted that its due process holding meant it did not have to examine separately whether Gutierrez’s other constitutional rights were violated.

In assessing the government’s reasons for denying the visa, the district court explained that 8 U.S.C. § 1182(a)(3)(A)(ii) did “not contain discrete factual predicates” that the consular officer must find supporting denial of the visa, and so the government would prevail if there was “a fact in the record that provides a facial connection to the consular officer’s belief” supporting the determination under the statute. The district court concluded that the notification’s recitation that there was reason to believe Sanchez was a member of a criminal organization, based on all of the evidence reviewed by the consular

officer, provided a satisfactory facial connection. The district court accordingly found that the government articulated “a facially legitimate and bona fide reason” for denying Sanchez’s visa.

The plaintiffs also urged that the consular officer nevertheless acted in bad faith, an argument that the Ninth Circuit, [relying](#) on the concurring opinion in *Din*, has [recognized](#) may undercut a facially legitimate reason for a visa denial. Under that precedent, the burden falls on the plaintiff, who must show that the consular officer either did not believe the information undergirding the decision or acted on information the officer knew to be false. An error by a consular officer is not sufficient, although an objectively unreasonable basis for a denial may give rise to an inference that the denial was in bad faith. The district court held that the plaintiffs did not carry their burden, finding that the plaintiffs’ allegations of an insufficient factual basis for the decision could not constitute bad faith and that the plaintiffs’ demands for further information regarding the decision constituted the kind of second-guessing that the doctrine of consular nonreviewability was designed to prevent. Nor did the district court find plaintiffs’ allegations concerning the consular officer’s reliance on Sanchez’s tattoos compelling. Instead, the district court determined that “it was not objectively unreasonable for the consular officer to conclude that Sanchez was ineligible for a visa under [8 U.S.C. § 1182(a)(3)(A)(ii)] because [Sanchez] has tattoos determined to be associated with gang membership.” Even mistaken findings, the district court held, do not of their own demonstrate bad faith.

The Ninth Circuit Decision

The Ninth Circuit [affirmed](#) the district court, although the panel divided on the rationale supporting that decision. The two panelists forming the majority agreed with the district court that Sanchez was precluded from challenging the denial of his visa in court by the doctrine of consular nonreviewability. The majority [held](#) that Sanchez’s long-standing presence in the United States, his marriage to a U.S. citizen, and his U.S. citizen children did not [alter](#) the “foundational rule” that a nonresident alien who has not been admitted to the United States “has no constitutional right of entry.” Such connections had, [according to the majority](#), never served “to provide a constitutional claim to reentry to those who unlawfully entered the United States.”

Gutierrez’s claims [presented](#) the court with a different question insofar as they centered on the visa denial “implicat[ing] Gutierrez’s First Amendment right to receive information.” The majority [agreed](#) that *Mandel* permitted it to ascertain whether the government provided “a facially legitimate and bona fide reason” for the denial of her husband’s visa application. In coming to this conclusion, the majority opinion first [rejected](#) the government’s argument that *Muñoz* prohibited such review. The majority [noted](#) that the U.S. citizen spouse in *Muñoz* never advanced a “claim that she had a First Amendment right to hear her husband’s speech” and that, as a result, *Muñoz* had determined only that due process claims were insufficient to overcome consular nonreviewability. The exception in *Mandel* for First Amendment claims, [according to the majority](#), remained fully applicable.

The majority then [found](#) that the *Mandel* exception applied to the particular claim advanced by Gutierrez of a First Amendment right “to hear her noncitizen husband’s speech.” The majority [observed](#) that *Mandel* did not suggest that the exception it articulated was limited to only “core political speech,” and the majority thus [viewed](#) the appropriate “limiting principle” on the exception not to be scrutiny of the characteristics of the speech that was at issue, but rather “the judiciary’s deference to the government’s bona fide and facially legitimate reason.”

The majority accordingly [examined](#) the reasons for the visa denial that were proffered by the government and determined that they were sufficient under that deferential standard. Like the district court, the majority [decided](#) that the consular officer’s determination that Sanchez was “a member of a known criminal organization” amounted to “a facially legitimate and bona fide reason” for denial of Sanchez’s visa. The majority [acknowledged](#) that the notice supplied by the government contained only the “barest of

explanations” and did not “elaborate on facts underlying that explanation,” but held it was nevertheless sufficient under *Mandel*, particularly given the consular officer’s stated reliance on the evidence in the record. The majority also rejected the plaintiffs’ argument that the consular officer’s decision was made in bad faith. Like the district court, the majority was [unmoved](#) by the plaintiffs’ allegations that the consular officer incorrectly used Sanchez’s tattoos as a basis for the visa denial. The majority [held](#) that these allegations “[a]t most” amounted to a claim that the consular officer was incorrect in concluding that Sanchez was a member of criminal organization, but “that, without more, does not qualify as bad faith.”

The third panelist [concurred](#) in judgment only. The concurrence [argued](#) that the First Amendment claim advanced by the plaintiffs was a “fanciful . . . end-run attempt around” *Muñoz*, which was decided on “virtually identical” facts. [According](#) to the concurrence, plaintiffs in both cases “essentially assert a substantive due process right to demand entry of a foreign national spouse into the United States but have dressed up that claim under the garb of another constitutional right—procedural due process (in *Muñoz*) and the First Amendment (in this case).” The concurrence, while agreeing with the majority’s bottom line that the plaintiffs should lose their claim, [took the view](#) that consular nonreviewability, as applied in *Muñoz*, precluded judicial review of plaintiffs’ First Amendment claim in the first instance.

The concurrence [rejected](#) the distinction that the majority, relying on *Mandel*, drew from *Muñoz* with respect to First Amendment claims by citizen spouses. Although the concurrence [acknowledged](#) that *Mandel* “did not expressly limit judicial review to cases involving core political speech,” the concurrence [expressed](#) deep skepticism that *Mandel* nevertheless contemplated First Amendment protection for spouses to “speak in person about the private affairs of their family life.” Additionally, the concurrence [pointed](#) to potential practical consequences of applying *Mandel* to permit those claims, namely that such a holding would allow further claims of a First Amendment right for the admission of “foreign nationals who are friends, mentors, or distant relatives.” For that reason, the concurrence [would have held](#) that the court “lack[ed] authority to review” the visa denial, regardless of the First Amendment claim advanced by Gutierrez.

Considerations for Congress

Congress could choose to address the procedural and substantive elements of consular decisions. With respect to procedure, as CRS has previously [explained](#), the Supreme Court has suggested that Congress may provide for judicial review of exclusion decisions. Over the years, there occasionally have been legislative efforts to provide review of consular decisions, such as [a bill](#) introduced in the 115th Congress that would have provided for a formalized administrative review process within the State Department. To date, Congress has not acted on these measures. Congress could also address the [specific provision at issue](#) in *Muñoz* and *Gonzalez* to require that consular officers make specific findings of fact. In addition, as the *Muñoz* Court [noted](#), Congress has at times “extended special treatment to marriage” in the context of alien spouses. In this regard, Congress could consider providing a separate immigration path for alien spouses. One such [bill](#), introduced in the 117th Congress, would have required admission of alien spouses, parents, or guardians of U.S. citizens who had been removed or ordered removed and who met other criteria.

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