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Visa Denied: Why Courts Should Review a Consular Officer's Denial of a U.S.-Citizen Family Member's Visa

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Visa Denied: Why Courts Should Review a Consular Officer's Denial of a U.S.-Citizen Family Member's Visa

COMMENTS

VISA DENIED: WHY COURTS SHOULD REVIEW A CONSULAR OFFICER'S DENIAL OF A U.S.-CITIZEN FAMILY MEMBER'S VISA

GABRIELA BACA*

Before entering the United States for permanent or temporary residence, most noncitizens must complete a series of administrative procedures and background checks. The final step in the process is an interview with a consular officer in the noncitizen's home country. That step, in most cases, determines whether a spouse can permanently rejoin her U.S.-citizen husband or wife in the United States or whether another immediate family member can permanently reside in the same home as her U.S.-citizen family member. After a consular officer decides to admit or deny entry to a noncitizen family member, there are limited opportunities for administrative or judicial review of the consular officer's decision.

*For decades, federal courts have adhered to the doctrine of consular nonreviewability to limit judicial review of a consular officer's visa decision. This doctrine, rooted in the legislative and the executive branches' plenary power over immigration matters, first emerged in *Kleindienst v. Mandel*. Since then, federal courts have interpreted the doctrine—in some instances limiting the doctrine's reach, and in others, allowing for more judicial review.*

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In 2014, the U.S. Supreme Court granted certiorari in Din v. Kerry, a U.S. Court of Appeals for the Ninth Circuit decision, which held that a visa denial impinges on a U.S. citizen's constitutionally protected interest in her marriage to a noncitizen spouse.

Without the opportunity for either an administrative appeal or judicial review of a visa denial, a single consular officer can force a U.S. citizen, like Mrs. Din, to live apart from her closest family member or to relinquish a stable life and employment in the United States to move abroad with her noncitizen family member. This Comment argues that the visa denial of a U.S. citizen's family member implicates that citizen's fundamental Fifth Amendment due process rights—therefore allowing judicial review of the denial—because the Supreme Court has long recognized the liberty interests involved in marriage and in living with one's immediate and extended family.

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INTRODUCTION

Imagine this scenario: a U.S. citizen accurately and timely files all of the required paperwork for her foreign spouse to permanently immigrate to the United States. The U.S. government approves the visa two years later. Several weeks after the approval, at a U.S. consular office overseas, a consular officer denies her spouse’s visa. The embassy and the consular officer refuse to provide a reason for the denial. Without this information, the U.S. citizen and her spouse will not have an opportunity to contest the consular officer’s decision, and they also will not have an opportunity to seek administrative or judicial review. As a result of the consular officer’s visa decision, the U.S. citizen and her spouse will remain separated without recourse.

This is Fauzia Din’s story. In 2006, Din, a U.S. citizen, married Kanishka Berashk, a citizen and resident of Afghanistan.¹ Shortly after their marriage, she submitted an I-130 visa petition to U.S. Citizenship and Immigration Services (USCIS), the U.S. government agency responsible for visa adjudications, so that Berashk could permanently immigrate to the United States.² A year and a half after filing the visa petition, USCIS informed Din that the agency approved her visa petition for Berashk.³ As part of the visa process, USCIS forwarded the approved visa petition to the National Visa Center

1. *Din v. Kerry*, 718 F.3d 856, 858 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014).

2. *Id.*

3. *Id.* The process of filing the petition with USCIS, receiving notification, and interviewing at a consular post can be lengthy. Din submitted a visa petition for Berashk in October 2006. *Id.* USCIS approved the visa petition on February 12, 2008. *Id.* The U.S. Embassy in Islamabad, Pakistan scheduled Berashk’s consular interview for September 9, 2008. *Id.* Nine months after the interview, on June 7, 2009, Berashk received a letter informing him that his visa had been denied. *Id.* at 859.

(NVC) for processing and then on to the U.S. Department of State's (State Department or DOS) consular post in Pakistan, where a consular officer interviewed Berashk to issue his visa.⁴

Two years after Din first submitted Berashk's visa petition to USCIS, the consular officer asked Berashk during the consular interview about his work for the Afghan Ministry of Social Welfare during the period in which the Taliban controlled the country.⁵ The consular officer, suggesting that he had approved the visa, told Berashk that he would receive the visa in two to six weeks.⁶ Nine months later, the Embassy notified Berashk that it denied his visa based on section 212(a) of the Immigration and Nationality Act (INA) and that there were no waivers available to overcome his ineligibility for a visa.⁷ Unsure of the specific reasons for the denial, Din and Berashk sought an explanation from the Embassy.⁸ The Embassy responded that the consular officer denied Berashk's visa under section 212(a)(3)(B), a provision of the INA that bars admission into the United States for terrorist-related activities.⁹ Neither Din nor Berashk received further explanation for the denial because INA section 212(b) exempts denials based on INA section 212(a)(2)–(3) from the requirement that the government explain the basis for the denials.¹⁰ After further requests to the Embassy and

4. *Id.* at 858; see also *The Immigrant Visa Process*, U.S. DEP'T ST., <http://travel.state.gov/content/visas/english/immigrate/immigrant-process.html> (last visited Feb. 28, 2015) (diagramming all of the steps a U.S. citizen must complete after he or she submits a visa petition to USCIS). The case did not specify why Berashk visited the Embassy in Islamabad, Pakistan instead of the Embassy in Kabul, Afghanistan.

5. *Din*, 718 F.3d at 858.

6. *Id.*

7. *Id.* at 859. Known as the grounds for inadmissibility, section 212(a) of the INA is a broad provision that includes all of the grounds that could bar a foreign citizen from entering the United States. See Immigration and Nationality Act of 1952, Pub. L. No. 92-414, § 212(a), 66 Stat. 163, 182–87 (codified as amended at 8 U.S.C. § 1182(a) (2012)) (listing ten broad provisions for inadmissibility, each specifying dozens of specific acts that could make a person inadmissible). Because Berashk's visa denial did not provide a specific ground, the consular officer could have denied Berashk's visa on any one of the grounds listed in the provision, including for health- or security-related reasons, among others.

8. *Din*, 718 F.3d at 859.

9. *Id.* Section 212(a)(3) of the INA is one of ten subcategories under section 212(a) that lists grounds of inadmissibility. See 8 U.S.C. § 1182(a). Section 212(a)(3) includes "security and related grounds" with subparagraphs describing activities related to terrorism, foreign policy, or totalitarian party membership that bar a noncitizen's admission into the United States. *Id.* § 1182(a)(3)(A)–(D).

10. See 8 U.S.C. § 1182(b)(3) (stating that visas denied under section 212(a)(2)–(3) of the INA are not subject to the notice requirements of INA section 212(b)(1),

to the Office of Visa Services at the State Department, Din and Berashk received the same response: the U.S. government would not provide additional facts or reasons for the denial.¹¹ Without the facts underlying the denial, Din and Berashk could not challenge the decision or present evidence to overcome Berashk's ineligibility.

Each year, the State Department, through its overseas consular officers, denies millions of visas.¹² The visas denied range from nonimmigrant tourist or business visas to family-reunification immigrant visas, such as Berashk's immediate relative visa.¹³ After a multi-step process with an array of U.S. government agencies, U.S. consular officers overseas provide the final stamp of approval or denial before a foreign national can travel to the United States.¹⁴ For U.S.-citizen petitioners, visa beneficiaries, and immigration practitioners, Din and Berashk's scenario is all too common: a U.S. consular officer denies a visa without any real explanation, and the

which require a consular officer to provide the applicant with timely written notice of the consular officer's findings and the provision under which denial is based).

11. *Din*, 718 F.3d at 859.

12. In fiscal year 2012, the most recent year for which complete data is available, the State Department issued a combined total of 9,409,390 immigrant and nonimmigrant visas. BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE 2012 tbl.I (2012), *available at* <http://travel.state.gov/content/visas/english/law-and-policy/statistics/annual-reports/report-of-the-visa-office-2012.html> [hereinafter BUREAU OF CONSULAR AFFAIRS, 2012 REPORT OF THE VISA OFFICE]. Of those immigrant visas issued in fiscal year 2012, 235,616 were immediate relative visas and 189,128 were family-sponsored visas. *Id.*

In contrast, DOS refused a combined total of 2,443,984 immigrant and nonimmigrant visas. *Id.* tbl.XX. Applicants may overcome a refusal by (1) providing evidence that an inadmissibility ground did not apply, (2) successfully applying for a waiver, or (3) receiving another form of relief. *Id.* at n.2. Of the 311,835 immigrant visas denied because a consular officer found that an INA ground of ineligibility applied, 215,321 applicants overcame their ineligibility. *Id.* Of the 76 applicants found ineligible for a visa under INA section 212(a)(3)(B) for "terrorist activities," no applicant overcame his or her ineligibility. *Id.* Similarly, of the 223 applicants found ineligible for a visa under section 212(a)(3)(A)(ii), the provision covering applicants who have engaged in "other unlawful activity," no applicant overcame his or her ineligibility. *Id.* By comparison, all visa applicants who were ineligible for a visa under section 212(a)(4), the provision barring a noncitizen who may become a public charge, overcame their ineligibility. *Id.*

13. *See id.* at tbl.xx (detailing the specific grounds under which consular officers denied immigrant and nonimmigrant visas in fiscal year 2012).

14. *See The Immigrant Visa Process*, *supra* note 4 (detailing the steps involved in securing a visa). *But see Administrative Processing Information*, U.S. DEP'T ST., <http://travel.state.gov/content/visas/english/general/administrative-processing-information.html> (last visited Feb. 28, 2015) (indicating that some applicants will need to undergo "further administrative processing," which can take up to sixty days).

U.S. citizen loses a long-awaited opportunity to reunite with a foreign family member. This scenario becomes more pressing for U.S.-citizen family members who have waited decades to nurture a family, share intimacy, or establish familial bonds with a family member from whom they have been separated.

Without any formal recourse, the U.S.-citizen petitioner, the visa beneficiary, and the immigration lawyer are left wondering why the consular officer denied the application despite USCIS's approval of the petition.¹⁵ The State Department does not have a formal review or appeals process for denied visas, and federal courts generally refuse to grant jurisdiction to visa beneficiaries who seek review of a visa denial.¹⁶ This practice, known as consular absolutism or consular nonreviewability, is deeply rooted in the legislative and the executive branches' plenary power over immigration matters.¹⁷ Therefore,

15. See, e.g., Sharon R. Muse, *The Need for Review of Consular Decisions in Visa Determinations*, 13 ADELPHI L.J. 111, 118–19 (2000) (describing the informal procedures available to visa petitioners and beneficiaries, such as an optional advisory opinion on a consulate's interpretation of the law); Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1363 (1972) (criticizing the authority the law grants consular officers to make final, generally unreviewable immigration decisions because it allows them to "arbitrarily and whimsically issue or deny visas").

16. See James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 16–25 (1991) (providing an overview of consular officials' "[i]nformal and non-reviewed decisionmaking"); Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 SAN DIEGO L. REV. 887, 888 (1989) (criticizing a consular officer's "unbridled power" to issue visas); *infra* Part I.A (noting that U.S. citizens and applicants who do not receive notice of the reason their visas have been denied generally have no recourse).

17. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (explaining Congress's plenary power over immigrant admission and exclusion decisions, but noting that Congress has delegated some of its authority in this area to the executive branch). In *Mandel*, the U.S. Supreme Court emphasized that the judiciary's inability to scrutinize a consular officer's decision is based on decades of precedent reaffirming the executive and legislative branches' power in the immigration realm. See *id.* at 766 (insisting that Congress's immigration policy is "enforced exclusively through executive officers, without judicial intervention," and that this practice "is settled by our previous adjudications" (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895))); see also *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927) (holding that there is no formal administrative or judicial review of consular decisions); Nafziger, *supra* note 16, at 16 (acknowledging that section 104(a) of the INA makes visa denials controversial because the section is often cited as curtailing administrative review); Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. REV. 1137, 1155 (1977) (criticizing the Supreme Court's cases involving consular nonreviewability as "divin[ing] from the power to set policy concerning alien entries, a power to implement that policy free

once a consular officer makes a visa decision, it is unlikely that a court or a reviewing officer will reverse the decision.¹⁸

Yet, in some instances, courts can engage in a limited review of a visa denial, despite the prevalence of consular nonreviewability.¹⁹ In 1972, in *Kleindienst v. Mandel*,²⁰ the Supreme Court first identified the possibility of an exception to consular nonreviewability when it reviewed a visa waiver denial because the denial implicated the First Amendment rights of U.S.-citizen professors.²¹ The Court limited review to a determination of whether the government or the consular officer provided a “facially legitimate and bona fide reason” for the visa denial.²²

Courts have interpreted *Mandel* to create an exception to consular nonreviewability, but they disagree about when a U.S.-citizen

from all judicial scrutiny,” and observing that such “reasoning has persisted . . . despite the evolution of a common law presumption in favor of judicial review, the codification of that presumption in the [Administrative Procedure Act], and independent developments in the area of procedural due process”); Maria Zas, Comment, *Consular Absolutism: The Need for Judicial Review in the Adjudication of Immigrant Visas for Permanent Residence*, 37 J. MARSHALL L. REV. 577, 588 (2004) (discussing how the doctrine of consular absolutism “immunizes” consular officers from judicial review). Section 104(a) of the INA suggests that the Secretary of State does not have the power to administratively review consular officers’ decisions. Immigration and Nationality Act of 1952, Pub. L. No. 92-414, § 104(a), 66 Stat. 163, 174–75 (codified as amended at 8 U.S.C. § 1104(a) (2012)).

18. See *infra* text accompanying note 22 (discussing *Mandel*’s limited standard of review). Under *Mandel*, a court can review a consular officer’s decision only to determine whether there was a “facially legitimate and bona fide reason” for the visa denial. *Mandel*, 408 U.S. at 770; see also *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 428 n.25 (D.C. Cir. 1977) (stating that a consular officer’s decision cannot be reversed because the decision will not be reviewed).

19. See, e.g., *Mandel*, 408 U.S. at 770 (finding that if a consular officer offers a “facially legitimate and bona fide reason” for a denial, then a court will not “look behind” the consular officer’s discretion); see also Wildes, *supra* note 16, at 898 (conceding that *Mandel* offers a “minimal standard of judicial scrutiny” but noting that the decision was a “significant departure” from earlier cases that “complete[ly] abdicate[d]” all judicial review of an immigration officer’s discretion).

20. 408 U.S. 753 (1972).

21. See *id.* at 754, 770 (holding that “when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will [not] look behind the exercise of that discretion”). Implicitly, by granting certiorari to the issue, the Supreme Court suggested that when a U.S. citizen’s First Amendment rights may be implicated, a consular officer’s decision must be “facially legitimate and bona fide.” *Id.* at 770.

22. *Id.* at 770.

petitioner can seek review under this exception.²³ For example, the U.S. Court of Appeals for the Ninth Circuit in *Bustamante v. Mukasey*²⁴ and in *Din v. Kerry*²⁵ acknowledged that a foreign spouse's visa denial implicates the fundamental marital and familial rights of a U.S. citizen such that *Mandel*'s limited review applied.²⁶ Other courts, nevertheless, refuse to find that a visa denial implicates such fundamental rights and do not apply *Mandel* review.²⁷ When faced with a visa denial claim, some federal courts either erroneously apply the doctrine of consular nonreviewability or interpret *Mandel* in a manner contradictory to longstanding Supreme Court precedent defending the fundamental right to freedom of personal choice in matters of marriage and family life, the right to live with immediate and extended family, and the constitutional due process protections afforded to U.S. citizens.

This Comment argues that the visa denial of a U.S. citizen's family member implicates that citizen's fundamental Fifth Amendment due process rights—therefore allowing judicial review of the denial—because the Supreme Court has long recognized the liberty interests involved in marriage and in living with one's immediate and extended family. Without the opportunity for either an administrative appeal or judicial review of a visa denial, a single consular officer can force a U.S. citizen, like Din, to live apart from her closest family member or to relinquish a stable life and employment in the United States to move abroad with her family member. An erroneous or unjustified visa denial, perhaps with a pretextual reason underlying the decision, could disintegrate a family and lead to financial and emotional hardship for the U.S.-citizen petitioner. Allowing judicial review of visa denials would not entitle a foreign citizen to entry into the United States, nor would it afford a U.S. citizen the right to have his or her foreign family member enter

23. Compare *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 554, 557 (2d Cir. 1975) (denying standing to a U.S.-citizen spouse and asserting consular nonreviewability over a visa review claim), with *Bustamante v. Mukasey*, 531 F.3d 1059, 1061–62 (9th Cir. 2008) (determining that a U.S. citizen had standing to seek review of her foreign spouse's visa denial because the denial implicated the U.S. citizen's fundamental right to “[f]reedom of personal choice in matters of marriage and family life”).

24. 531 F.3d 1059 (9th Cir. 2008).

25. 718 F.3d 856 (9th Cir. 2013), cert. granted, 135 S. Ct. 44 (2014).

26. *Id.* at 868; *Bustamante*, 531 F.3d at 1061–62.

27. See *infra* Part I.B.2 (providing an overview of cases that do and do not recognize that the denial of a U.S. citizen's foreign spouse's visa implicates that citizen's protected liberty interests, thus triggering *Mandel* review (or not)).

the United States. Rather, judicial review of these visas would allow a U.S.-citizen petitioner to receive due process protections when a government action infringes on the fundamental rights of a U.S. citizen. Moreover, the fundamental rights implicated by the denial of a family member's visa involve higher stakes than those involved in *Mandel*, when the Court implicitly accepted that U.S.-citizen professors *could* seek review of a foreign professor's visa waiver denial.

Part I provides an overview of the steps involved in securing an immediate relative and a family-sponsored immigrant visa. It then examines the doctrine of consular nonreviewability, discusses the *Mandel* exception to nonreviewability, and provides an overview of federal court decisions interpreting *Mandel*. This Part also summarizes Supreme Court precedent affirming the individual liberty interests present in marriage and in the right to live together as a family. Part II analyzes how federal courts have expanded *Mandel's* scope. Part II also examines how Supreme Court decisions upholding the liberty interests in marriage and in the right to live together as a family bolster judicial review for family reunification visas. This Comment concludes that the Supreme Court should follow the Ninth Circuit's interpretation of *Mandel* in *Bustamante* and *Din* and allow a U.S.-citizen petitioner to seek review of a spouse's or family member's visa denial because a consular officer's visa denial implicates that U.S. citizen's fundamental marital and familial rights.

I. BACKGROUND

This Part provides an overview of the procedures involved in securing an immediate relative and family-sponsored immigrant visa. It also discusses the origins of the doctrine of consular nonreviewability. After discussing the *Mandel* exception to nonreviewability, this Part also provides an overview of federal court decisions that have applied *Mandel* review. Finally, this Part summarizes the Supreme Court's decisions recognizing the fundamental rights involved in marital and familial relationships and in living with one's extended family.

A. *Overview of Visa Adjudication and Consular Officer Procedures*

Family members of U.S. citizens are eligible for one of two types of family reunification visas: an immediate relative or a family-sponsored visa. A U.S. citizen's spouse, parents, adopted orphan children, and unmarried children under the age of twenty-one are

eligible for an immediate relative visa.²⁸ Immediate relatives are exempt from the statutory provisions that limit the annual number of immigrants that can enter the United States from a specific visa category.²⁹ Thus, an immediate relative can enter the United States as soon as a consular officer approves his or her visa. To qualify for a family-sponsored immigrant visa, a noncitizen must fall into one of four categories specified in the INA: (1) unmarried sons and daughters of U.S. citizens, (2) spouses and unmarried sons and daughter of legal permanent residents (LPRs), (3) married sons and daughters of U.S. citizens, and (4) brothers and sisters of U.S. citizens if the citizens are over the age of twenty-one.³⁰ Family-sponsored immigrant visas, however, are subject to strict statutory provisions that limit the number of visas that may be issued each year.³¹

The procedures for filing an immediate relative visa petition and a family-sponsored visa petition are similar.³² First, the U.S. citizen,

28. See 8 U.S.C. § 1151(b)(2)(A)(i) (2012) (defining “immediate relatives” as the parents, spouse, and child of a U.S. citizen). U.S. citizens who petition for their parents must be at least twenty-one years old at the time they file their applications. *Id.* Children petitioned by U.S.-citizen parents must be under the age of twenty-one and unmarried. *Id.* § 1101(b)(1)(E). An orphan child adopted abroad and an orphan to be adopted in the United States by a U.S. citizen is also eligible for an immediate relative visa. *Id.* § 1101(b)(1)(F).

29. See *id.* § 1151(b) (listing and describing the immigrant categories that are not subject to annual visa limitations, including immediate relatives).

30. See *id.* § 1153(a) (describing the four subcategories of family-sponsored visas and the number of visas annually allocated to each subcategory).

31. See generally *id.* § 1151(c) (detailing the number of family-sponsored visas that may be issued each fiscal year). The annual limit of family-sponsored visas is 480,000 minus the number of immediate relatives who were admitted in the preceding fiscal year plus any employment-based visas that were available but unused during the preceding fiscal year. *Id.*

32. The primary difference between an immediate relative and family-sponsored visa is that family-sponsored visas are subject to annual numerical limitations. See *supra* notes 29–31 and accompanying text (distinguishing between immediate relative and family-sponsored visas); see also 8 C.F.R. § 204.1 (2014) (providing an overview of the processes for obtaining immediate relative and family-sponsored visas). A family-sponsored visa applicant has to wait until a visa becomes available on the Department of State’s Visa Bulletin because of the annual visa limitations. *Visa Bulletin: Immigrant Numbers for March 2014*, U.S. DEP’T ST. 1 (Feb. 7, 2014), http://travel.state.gov/content/dam/visas/Bulletins/visabulletin_march2014.pdf. The Visa Bulletin indicates from which dates of visa submissions the State Department is processing visas. *Id.* USCIS will issue visa applicants a “priority date” that indicates the date on which the application was filed. *Id.* Each month, the Visa Bulletin reflects the priority date from which the Department of State is processing visas. See *id.* For example, if the Visa Bulletin lists August 15, 2001, then the State Department is processing visas submitted to USCIS on that date. See *id.* at 2. If an

commonly referred to as the petitioner, must submit an I-130 form—the visa petition—to USCIS on behalf of the noncitizen, who is often called the beneficiary or intending immigrant.³³ The I-130 establishes the claimed relationship between the petitioner and the beneficiary. Next, after USCIS receives and approves the visa petition, USCIS sends the visa petition to the State Department’s National Visa Center.³⁴ After processing the visa petition, the NVC sends the petition to a consular post in the beneficiary’s home country where the beneficiary must interview with a consular officer to receive final approval of the visa.³⁵ Together, these procedures may take several years.³⁶ In the case of a family-sponsored immigrant who is subject to annual visa limitations, the process may be even longer because the applicant has to wait for a visa to become available.³⁷

The interview with a consular officer is the last step in the series of administrative procedures. The consular officer can approve the visa, request more information from the applicant, or deny the visa.³⁸ If a consular officer denies a visa, the consular officer must inform the denied applicant of the legal provisions under which the denial is

applicant submits an application this year for that same category, the applicant will have to wait almost thirteen years for the State Department to process the visa. *Id.*

33. See 8 U.S.C. § 1154(a) (describing the procedures U.S. petitioners and visa beneficiaries need to complete to file a visa application).

34. See 8 C.F.R. § 204.2(a)(iii)(F)(3) (noting that after USCIS approves the visa petition, USCIS forwards the approved petition to the NVC); see also *The Immigrant Visa Process*, *supra* note 4 (showing the steps a U.S. citizen must complete after he or she submits a visa petition to USCIS).

35. See 8 U.S.C. § 1201(a)(1) (“[A] consular officer may issue . . . to an immigrant who has made proper application therefor, an immigrant visa which shall consist of the application provided for in section 1202 . . .”).

36. See Suzy Khimm, *How Long Is the Immigration “Line”? As Long as 24 Years.*, WASH. POST (Jan. 31, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/31/how-long-is-the-immigration-line-as-long-as-24-years> (describing the long wait times for visas as a result of bureaucratic delays as well as noting, for example, that the visa wait time for a person from Mexico can exceed fifteen years).

37. See *Visa Bulletin: Immigrant Numbers for March 2014*, *supra* note 32, at 2 (showing that the siblings of a U.S.-citizen petitioner from the Philippines will have to wait nearly twenty-four years for their visas to become available whereas the spouse or child of a legal permanent resident will have to wait only six months).

38. See 8 C.F.R. § 204.2(a)(iii)(F)(3) (detailing how the State Department will decide on petitions); 22 C.F.R. § 42.81 (explaining the State Department’s visa refusal procedure); see also *The Immigrant Visa Process: After the Interview*, U.S. DEP’T ST., <http://travel.state.gov/content/visas/english/immigrate/immigrant-process/interview/after.html> (last visited Feb. 28, 2015) (instructing applicants on how to proceed after their petitions have been approved or denied and noting that, for a visa denial, additional administrative processing is sometimes required to conclude the application process).

based and must provide a factual basis for the visa denial in writing.³⁹ An exception to this rule exists for those visas denied under INA section 212(a)(2)–(3), the criminal and security-related inadmissibility provisions.⁴⁰ State Department regulations provide that consular officers must send denied applications to a supervisory officer within the consulate designated to review denials.⁴¹ The supervisory officer must then review the case and affirm or reverse the decision no later than thirty days after the consular officer made her initial decision.⁴²

In practice, it is unclear if these procedures actually occur.⁴³ The Foreign Affairs Manual (FAM), the State Department's organizational

39. 8 U.S.C. § 1182(b); *see also* 22 C.F.R. § 42.81 (stating that if a consular officer denies a visa, he or she must have a basis in either INA section 212(a), which lists the grounds of inadmissibility; INA section 221(g), which concerns missing documents; or another applicable law). All visa denials must conform to 22 C.F.R. § 40.6, which provides:

A visa can be refused only upon a ground *specifically set out in the law or implementing regulations*. The term “reason to believe,” as used in INA 221(g), shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa as provided in the INA and as implemented by the regulations.

22 C.F.R. § 40.6 (emphasis added). *See generally* Nafziger, *supra* note 16, at 20–21 (discussing the State Department's internal review procedures).

40. 8 U.S.C. § 1182(b)(3).

41. *See* U.S. DEP'T OF STATE, 9 FOREIGN AFFAIRS MANUAL 42.81 n.1.2 (2008) [hereinafter U.S. DEP'T OF STATE, 9 FAM]. The Foreign Affairs Manual consists of internal organizational policies that have some practical binding effect on State Department officials. *See* U.S. DEP'T OF STATE, 2 FOREIGN AFFAIRS MANUAL 1111.1 (2013) (stating that the FAM includes “procedures and policies . . . relating to [State] Department management and personnel” which “derive their authority from statutes, Executive orders, . . . and Department policies”). It is, however, unlikely that a court would find a document like this legally binding in a suit from a member of the public against a State Department employee for failure to comply. *See* Email from Jeffrey Lubbers, Professor, Am. Univ. Wash. Coll. of Law, to Gabriela Baca (Feb. 20, 2014, 12:34 a.m. EST) (on file with author).

42. *See* 22 CFR § 42.81(c) (requiring the review occur “without delay”); *see also* U.S. DEP'T OF STATE, 9 FAM, *supra* note 41, at 42.81 n.1.2 (providing the thirty-day requirement).

43. *See* Nafziger, *supra* note 16, at 94–95 (stating that regulations require senior consular officers to review visa denials, but admitting that the “high volume of applications at some posts [has] resulted in review of only a random sample of denials”). Budgetary constraints may also hinder the adequacy of informal procedures. *See id.* at 58 (noting that consular officers have limited time to detail the reasons for a visa denial and observing that a supervisory officer reviewing an informal administrative appeal of a consular officer's decision would not be able to fairly examine the record to determine whether a decision was justified because

guidelines for consular officers overseas, states that if the basis for refusal “is not entirely straightforward, the supervisory officer should review the case immediately.”⁴⁴ To overcome a visa ineligibility, the State Department will consider any new evidence without additional costs to the applicant or petitioner if presented within one year of the visa denial.⁴⁵ This is possible only when the applicant knows the basis for the denial and knows how to produce evidence to refute the government’s evidence. While these internal review provisions may curb a consular officer’s discretion, U.S.-citizen petitioners and foreign applicants who do not receive notice of the grounds for their ineligibility, such as those applicants denied for potential links to terrorism-related activities or those whose visa is denied a second time, have no independent oversight, administrative appeals process, or opportunity for meaningful judicial review.

B. Plenary Power and the Origins of Consular Nonreviewability

Generally, federal courts have considered a consular officer’s decision unreviewable and, thus, have refused to review a visa denial.⁴⁶ Known as the doctrine of consular nonreviewability or consular absolutism, this practice first emerged in two appellate cases in the 1920s and from the INA’s grant of broad discretion to consular officers. In *United States ex rel. London v. Phelps*,⁴⁷ the U.S. Court of Appeals for the Second Circuit, in dicta, refused to review a visa denial because of the diplomatic nature of granting and denying visas.⁴⁸ In *United States ex rel. Ulrich v. Kellogg*,⁴⁹ the U.S. Court of

limited resources prevent consular officers from documenting an extensive record about each visa decision).

44. U.S. DEP’T OF STATE, 9 FAM, *supra* note 41, at 42.81 n.1.2.

45. 22 C.F.R. § 42.81(e).

46. *See, e.g., Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159–60 (D.C. Cir. 1999) (“For the greater part of this century, our court has therefore refused to review visa decisions of consular officials.”); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 970 (9th Cir. 1986) (“The doctrine of nonreviewability of a consul’s decision to grant or deny a visa stems from the Supreme Court’s confirming that the legislative power of Congress over the admission of aliens is virtually complete.”); *Rivera de Gomez v. Kissinger*, 534 F.2d 518, 519 (2d Cir. 1976) (*per curiam*) (affirming a district court’s decision to withhold jurisdiction to review a consular officer’s decision because Supreme Court precedent foreclosed it); *Pena v. Kissinger*, 409 F. Supp. 1182, 1184, 1187–88 (S.D.N.Y. 1976) (recognizing that a lawful permanent resident petitioning for a foreign spouse has standing to seek review but holding that *Mandel* and the doctrine of consular nonreviewability preclude any meaningful review).

47. 22 F.2d 288 (2d Cir. 1927).

48. *See id.* at 290 (“Whether the consul has acted reasonably or unreasonably is not for us to determine. Unjustifiable refusal . . . may be ground for diplomatic

Appeals for the District of Columbia Circuit argued that review was unavailable because the Immigration Act of 1924 lacked a provision granting review over consular officers' decisions.⁵⁰ Section 104(a) of the INA states that

[t]he Secretary of State shall be charged with the administration and the enforcement of the provisions of this chapter and all other immigration and nationality laws relating to (1) the powers, duties, and functions of diplomatic and consular officers of the United States, *except those powers, duties, and functions conferred upon the consular officers relating to the granting or refusal of visas . . .*⁵¹

Courts interpret this provision as granting consular officers broad authority over visa decisions.⁵²

The political branches' plenary power over immigration matters further solidified the practice of consular nonreviewability.⁵³ The Supreme Court's decisions in *Chae Chan Ping v. United States*,⁵⁴

complaint by the nation whose subject has been discriminated against. . . . It is beyond the jurisdiction of the court.”).

49. 30 F.2d 984 (D.C. Cir. 1929).

50. *See id.* at 986 (“We are not able to find any provision of the immigration laws which provides for an official review of the action of the consular officers in such case by a cabinet officer or other authority.”); *see also* Nafziger, *supra* note 16, at 30 (noting that the court's interpretation of the Immigration Act of 1924 later led to a negative inference of review of consular officer's decisions in section 104(a) of the INA).

51. 8 U.S.C. § 1104(a) (2012) (emphasis added).

52. *See* Nafziger, *supra* note 16, at 30 (arguing that it is incorrect to infer nonreviewability from section 104(a) of the INA because that section merely confirms a consular officer's powers rather than points to nonreviewability or even broad discretion).

53. *See, e.g.,* Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972) (“[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.”); Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (interpreting the plenary power doctrine to preclude judicial review over “the political nature of visa determinations”); *see also* Nafziger, *supra* note 16, at 30–31, 38–49 (chronicling the various interpretations of and rationales for the plenary power doctrine to explain why courts limit judicial review over consular decisions); Tatyana E. Delgado, Note, *Leaving the Doctrine of Consular Absolutism Behind*, 24 GEO. IMMIGR. L.J. 55, 55–56 (2010) (explaining that in granting or denying a visa, a consular officer is exercising power delegated by Congress, which has the power “to exclude [noncitizens] altogether from the United States”); Edward B. Quist, Note, *Justice for the Alien: The Adequacy of the Consular Visa Issuance System*, 1986 IMMIGR. & NAT'LITY L. REV. 457, 460 (1986) (describing the origins of consular nonreviewability as “puzzling”); Zas, *supra* note 17, at 590–91 (conceding that courts that rely on consular nonreviewability often state that Congress's plenary power over immigration precludes review). *But see* Mandel, 408 U.S. at 783 (Marshall, J., dissenting) (“There were no rights of Americans involved in any of the old alien exclusion cases, and therefore their broad counsel about deference to the political branches is inapplicable.”).

54. (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

Nishimura Ekiu v. United States,⁵⁵ and *Fong Yue Ting v. United States*⁵⁶ held that the political branches' power over immigration matters is rooted in sovereignty (delegated by the Constitution), their war powers, and their powers over international relations.⁵⁷ Scholars interpret the plenary power doctrine to establish that Congress can prescribe the terms for the admission and removal of noncitizens and that the executive branch has unreviewable discretion to act within those terms.⁵⁸ As a result, courts have deferred to Congress and the executive branch to define the due process rights available to noncitizens and, oftentimes, citizens affected by federal immigration law.⁵⁹ As one scholar notes, however, courts also adhere to the plenary power doctrine to refuse standing to noncitizens and U.S. citizens asserting constitutional challenges to immigration laws.⁶⁰

1. *Plenary power and noncitizen standing in federal courts*

The Supreme Court has relied on the plenary power doctrine to limit judicial review over constitutional challenges to immigration

55. 142 U.S. 651 (1892).

56. 149 U.S. 698 (1893).

57. See *Fong Yue Ting*, 149 U.S. at 713–14, 721–22, 724 (extending the Court's reasoning in *Chae Chan Ping* and *Nishimura Ekiu* to deportation and relying on the political branches' power over foreign policy decisions to justify its reasoning); *Nishimura Ekiu*, 142 U.S. at 659 (underscoring that an essential element of a nation's sovereignty is the ability to decide the conditions for who may or may not enter the nation); *Chae Chan Ping*, 130 U.S. at 602–03 (recognizing Congress's implied sovereign power to exclude foreigners even though the Court was ambivalent about the precise source of this power).

58. See, e.g., *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 329–30, 339 (1909) (stating that Congress has complete power over decisions to admit aliens); *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895) (reiterating that Congress has the power to “to prescribe the terms” for the admission and exclusion of foreigners, while the executive branch has the power to enforce the terms “without judicial intervention”); see also Nafziger, *supra* note 16, at 30–31, 39 (chronicling the late 18th century and early 19th century cases which established the plenary power doctrine and stating that “[a]fter these pronouncements . . . the apotheosis of Congress and the genuflection of the courts continued”).

59. See Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 375 (2004) (suggesting that most scholars interpret the plenary power doctrine “to reflect judicial deference to, or a lack of constitutional limitations on, Congress's exercise of its immigration power,” but arguing that courts have incorrectly interpreted the plenary power doctrine to preclude citizens from challenging the constitutionality of immigration laws); Nafziger, *supra* note 16, at 30–31 (indicating that courts have applied the doctrine by deferring to Congress and the executive branch).

60. See Cox, *supra* note 59, at 386 (explaining that courts use the plenary power doctrine as a standing doctrine to insulate themselves from claims by noncitizens by arguing that the noncitizens do not have a right to be in court or to raise such claims).

laws.⁶¹ While courts have recognized that *some* procedural due process protections are available to noncitizens,⁶² the extent of those protections depends on whether the noncitizen is within the territorial bounds of the United States, at the border, or outside of the country.⁶³ The Supreme Court has held that noncitizens already in the United States are entitled to more due process protections than noncitizens at the border or those outside of the country and applying for admission.⁶⁴

For example, the Supreme Court in *Yamataya v. Fisher*⁶⁵ found that a noncitizen who entered the United States unlawfully but was present in the United States for four days could not be deported without an opportunity to be heard.⁶⁶ By contrast, in *United States ex*

61. *Id.* at 381 (stating that “the Supreme Court has invoked the doctrine to reject constitutional challenges to wide-ranging policies, including the statutory exclusion of Chinese nationals; the indefinite detention, without a hearing, of an alien seeking to enter America; and the ideological exclusion of scholars” (footnotes omitted)).

62. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21, 22 (1982) (affording a legal permanent resident procedural due process protections); *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977) (affirming that the Court’s precedent indicates “limited judicial responsibility” despite Congress’s power over admission and exclusion of noncitizens); *Yamataya v. Fisher* (*The Japanese Immigrant Case*), 189 U.S. 86, 98, 100–02 (1903) (granting procedural due process protections for a noncitizen unlawfully present in the United States for four days but still finding her deportable because the government did not deny her due process).

63. *Compare Yamataya*, 189 U.S. at 100–02 (finding that a noncitizen who unlawfully entered the United States could be deported because she had an opportunity to be heard and was not denied due process), *with* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207, 214–15 (1953) (holding that an immigration officer could indefinitely exclude, without a hearing, a legal permanent resident who had lived in the United States for twenty-five years but who posed a national security threat); *see also* *Cox*, *supra* note 59, at 380 n.20 (“While it may seem straightforward to distinguish aliens inside the United States from those outside, it is important to note that the ‘entry fiction’ doctrine in immigration law permits the government to treat some aliens who are physically present in the United States as though they stand at the threshold of entry.”). *But see* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 1004–10 (1995) (suggesting that judicial review and due process for noncitizens should not rely on the plenary power doctrine and outdated theories of “territorial fiction” because all people, regardless of their geographic location, should be deemed “persons” under the Due Process Clause).

64. *See, e.g.*, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539–40, 542–43 (1950) (protecting from judicial scrutiny a discretionary executive branch decision that barred a noncitizen spouse who arrived at a port of entry and sought admission).

65. 189 U.S. 86 (1903).

66. *See id.* at 100 (explaining that administrative officers may not deny due process when executing a statute that implicates a person’s liberty interests).

rel. Knauff v. Shaughnessy,⁶⁷ the Supreme Court held that the foreign spouse of a U.S. citizen detained at a port of entry was not entitled to an evidentiary hearing to contest the reasons for her exclusion.⁶⁸ Mrs. Knauff's admission was perceived to be prejudicial to U.S. interests during wartime, but the Court still reasoned that the executive branch reasonably applied the provisions barring her admission and stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."⁶⁹ In *Harisiades v. Shaughnessy*,⁷⁰ the Court found three legal permanent residents deportable as a result of their former affiliations with the Communist Party.⁷¹ The Supreme Court held that immigration laws supporting their deportation were constitutional, reasoning that immigration policies should be "immune from judicial inquiry."⁷² And, in *Kleindienst v. Mandel*, the Court refused to grant standing to a noncitizen visa applicant who the government had excluded for his ideological beliefs because he had "no constitutional right of entry."⁷³

These decisions underscore the Supreme Court's adherence to the legislative and executive branches' plenary power over immigration matters. Importantly, however, the decisions highlight what one scholar has identified as the three manifestations of the plenary power doctrine: to justify judicial deference to the political branches, to grant unlimited power over immigration matters to Congress and the executive branch, and to exclude noncitizens from standing in

67. 338 U.S. 537 (1950).

68. *See id.* at 544, 546 ("Under the immigration laws and regulations applicable to all aliens seeking entry into the United States during the national emergency, she was excluded by the Attorney General without a hearing [and] . . . we have no authority to retry th[at] determination . . .").

69. *See id.* at 544. Although the Supreme Court's decision ultimately prevented Mrs. Knauff from entering the United States, pressure from congressional officials and the public later convinced the Attorney General to reopen Mrs. Knauff's case. *See* Weisselberg, *supra* note 63, at 958 n.127, 961. Eventually, the Board of Immigration Appeals (BIA) allowed Mrs. Knauff to present evidence that she did not pose a national security threat. *Id.* at 963. The BIA determined that there was no substantial evidence to justify her exclusion and ultimately allowed her to seek permanent residence in the United States. *Id.* at 963–64.

70. 342 U.S. 580 (1952).

71. *Id.* at 581.

72. *See id.* at 589, 591 (exercising judicial restraint and stating that a court must tolerate Congress's policies even if the court disagrees with Congress).

73. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *see infra* Part I.B.2 (discussing how the Court in *Mandel* instead granted standing to the U.S. citizens who were petitioning for Mr. Mandel's visa).

federal courts.⁷⁴ As such, federal courts have used the plenary power doctrine to justify consular nonreviewability largely by refusing noncitizens, and sometimes U.S. citizens, standing in court.⁷⁵ As the Supreme Court's reasoning in *Mandel* demonstrated, however, the Court avoided granting the noncitizen standing by instead granting the U.S. citizens standing because the U.S. citizens' fundamental rights were implicated in the visa denial.⁷⁶

2. *Mandel exception to consular nonreviewability*

Despite longstanding adherence to consular nonreviewability, in 1972, the Supreme Court in *Mandel* first recognized that a denial of a visa waiver might sometimes merit limited judicial review.⁷⁷ In *Mandel*, a group of U.S.-citizen professors invited Ernest Mandel, a Belgian journalist and author, to speak at a conference at Stanford University.⁷⁸ Although Mr. Mandel was not a member of the Communist Party, he was known as "a revolutionary Marxist" who advocated for world communism.⁷⁹ The Consul in Belgium denied Mr. Mandel's visa, and the Attorney General refused to grant him a waiver because Mr. Mandel had violated the conditions of a previous entry into the United States.⁸⁰ Soon after, Mr. Mandel and the U.S.-citizen professors who invited him to the U.S. filed a complaint in

74. See Cox, *supra* note 59, at 381–82 (insisting that courts and immigration scholars generally do not divide the plenary power doctrine into this clear-cut typology).

75. See, e.g., *Mandel*, 408 U.S. at 762 (asserting that Mr. Mandel lacks standing because he has "no constitutional right of entry" and is thus a "symbolic" plaintiff (internal quotation marks omitted)); *Adams v. Baker*, 909 F.2d 643, 647 n.3 (1st Cir. 1990) (citing *Centeno v. Shultz*, 817 F.2d 1212 (5th Cir. 1987) (per curiam)) (expressing that a visa applicant does not "have standing to seek either administrative or judicial review of the consular officer's decision to deny him a visa"); *Allende v. Shultz*, 845 F.2d 1111, 1114 n.4 (1st Cir. 1988) (interpreting *Mandel* to hold that a noncitizen does not have standing to bring a constitutional challenge to a visa denial in U.S. federal courts).

76. *Mandel*, 408 U.S. at 762.

77. *Id.* at 769.

78. *Id.* at 756–57.

79. *Id.* at 756 (internal quotation marks omitted).

80. *Id.* at 759. The plaintiffs alleged that the Attorney General's stated reason for finding that Mr. Mandel violated the terms of a previous entry into the United States was not the real basis for the government's decision to deny Mr. Mandel a visa waiver. *Id.* at 760. The plaintiffs believed that the Attorney General excluded Mr. Mandel because of his ideological beliefs and, therefore, asserted that the visa denial was not based on a facially legitimate and bona fide reason. *Id.* In a dissenting opinion, Justice Marshall agreed with the plaintiff and argued that the visa waiver denial was a "sham" to cover the government's real basis for excluding Mr. Mandel: his political ideology. See *id.* at 778–79 (Marshall, J., dissenting).

federal court alleging that the statutes barring Mr. Mandel's entry and the Attorney General's refusal to grant a visa waiver deprived the professors, all U.S. citizens, of their First and Fifth Amendment rights.⁸¹

In finding that it could review Mr. Mandel's visa denial, the Supreme Court implicitly engaged in a two-part inquiry. First, it determined that the U.S. plaintiffs had standing in federal court to seek review of the visa waiver denial because the government's actions implicated their First Amendment rights to have Mr. Mandel enter and speak in the United States.⁸² Second, after finding such rights implicated, the Court stated that it could review the decision to ensure that the government had provided a "facially legitimate and bona fide reason" for the denial.⁸³ Ultimately, the Court in *Mandel* found that the government's reasoning—that Mr. Mandel had violated a previous condition of admission—was a facially legitimate reason for denying the visa waiver and, thus, that no further review was necessary.⁸⁴

While subsequent cases and scholars have interpreted the Court's decision in *Mandel* as having carved out an exception to consular nonreviewability, the Court rooted its limited holding in the plenary power doctrine. In his dissent, Justice Marshall cautioned against the majority's reliance on the plenary power doctrine to limit the review

81. See *Mandel v. Mitchell*, 325 F. Supp. 620, 622 (E.D.N.Y. 1971), *rev'd sub nom. Kleindienst v. Mandel*, 408 U.S. 753 (1972) (arguing that the statutory provisions in question and visa denial failed to provide the professors adequate due process protections or to guard against arbitrary executive branch actions).

82. See *Mandel*, 408 U.S. at 769–70 (recognizing that First Amendment protections and the right to free speech includes a U.S. citizen's right to receive information from foreign speakers); cf. Judy Wurtzel, Note, *First Amendment Limitations on the Exclusion of Aliens*, 62 N.Y.U. L. REV. 149, 161 n.89 (1987) (distinguishing *Mandel* and *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904), where the Supreme Court held that a noncitizen could not contest his deportation on First Amendment grounds because a noncitizen does not have "an independent constitutional right to enter and speak").

83. See *Mandel*, 408 U.S. at 769–70. The Court stated it could "neither look behind the exercise of [a consular officer's] discretion, nor test it by balancing its justification against the First Amendment interests" of the U.S. citizen plaintiffs where the official offers "a facially legitimate and bona fide reason" for his negative use of discretion. *Id.* at 770. The Court emphasized the limited procedural due process protections available to noncitizens and cited the Court's long line of cases endorsing the plenary power doctrine. *Id.* at 766–67.

84. See *id.* at 769 (finding that the immigration officer validly exercised his powers when he denied Mr. Mandel's visa waiver after he concluded that Mr. Mandel violated the terms of entry on a visa previously issued to him).

given to the U.S. citizens' claims.⁸⁵ Justice Marshall, with the majority of the Court seeming to agree, argued that Mr. Mandel's case was easily distinguishable from the "old" plenary power cases because none of those cases involved the rights of U.S. citizens.⁸⁶ Even in the aftermath of *Knauff*—the plenary power case decided twenty years before *Mandel* that *did* involve the rights of a U.S.-citizen spouse—Congress, the public, and the Department of Justice demonstrated their disagreement with an immigration official's raw and absolute power to deny admission to a foreign national with strong ties to the United States.⁸⁷ Despite Justice Marshall's dissent, the majority stated that it would not balance the U.S. citizens' rights with the reasons given for the denial and held that the government offered a valid reason.⁸⁸

In sum, *Mandel* offered a two-part inquiry for when review applies: first, a court must determine whether a U.S. citizen's First Amendment rights are affected by a visa waiver denial, and second, if such rights are implicated, the court must then determine if the denial was based on a facially legitimate and bona fide reason.⁸⁹ The Court in *Mandel* did not provide further guidance about the scope of its decision.⁹⁰ Does the decision apply only to visa waivers or to all consular decisions? After *Mandel*, it became well settled that

85. See *id.* at 777–79 (Marshall, J., dissenting) (finding that the government has not provided a “*compelling governmental interest*” to justify infringing on U.S. citizens’ First Amendment rights (emphasis added)). Justice Marshall argued that a “legitimate governmental interest[] cannot override” the long-established standard for justifying a burden on a U.S. citizen’s fundamental rights. *Id.* at 777 (internal quotation marks omitted).

86. See *id.* at 781–82 (challenging the majority’s plenary power reasoning and observing that the majority’s use of the cases to limit review was misplaced because all of the cases to which the majority cited involved the rights of noncitizens).

87. See *supra* note 69 and accompanying text (grappling with the irony in the final outcome of *United States ex rel. Knauff v. Shaughnessy*, which, despite the Supreme Court’s holding, ultimately resulted in the executive branch recognizing that it did not have substantial evidence to exclude Mrs. Knauff).

88. See *Mandel*, 408 U.S. at 770 (holding that the government need only provide a “facially legitimate and bona fide reason” for denying a visa and explaining that in the presence of such a justification, a court does not need to balance the strength of the government’s reason against a U.S. citizen’s First Amendment rights).

89. See *supra* text accompanying notes 82–84 (describing the Supreme Court’s findings in *Mandel*).

90. See Nafziger, *supra* note 16, at 33–34 (asserting that, although unclear, the Court in *Mandel* has simultaneously promoted judicial abstention when it reiterated the doctrine of consular nonreviewability and encouraged review by finding that *some* review exists through the “facially legitimate and bona fide reason” standard (internal quotation marks omitted)); Wurtzel, *supra* note 82, at 163 (“*Mandel* leaves many questions unanswered.”).

noncitizens, alone, do not have a right to review of a visa denial.⁹¹ But, does review apply when a U.S. citizen's "constitutionally protected rights" are implicated? This question has become a source of disagreement among federal courts.

a. Rights recognized under Mandel's first inquiry

The Court in *Mandel* exclusively addressed the U.S.-citizen professors' First Amendment claims.⁹² The Court neither limited nor elaborated on what other rights would trigger review.⁹³ Subsequent cases have widely recognized similar First Amendment claims as triggering *Mandel* review,⁹⁴ but courts are in conflict about whether *Mandel* applies to plaintiffs who assert a violation of their constitutionally protected interests in the Fifth Amendment Due Process Clause, such as the right to marriage.⁹⁵ Some courts recognize that a visa denial involving a foreign spouse and a U.S. citizen, implicates a protected interest in marriage and family life, thereby allowing for *Mandel* review.⁹⁶ However, other courts have held that such denial does not implicate the marriage rights of a U.S. citizen spouse and, therefore, does not trigger *Mandel* review.⁹⁷

i. First Amendment cases triggering Mandel review

Courts have consistently recognized that visa denials implicating the First Amendment rights of U.S. citizens merit *Mandel* review. The

91. *Mandel*, 408 U.S. at 762; see *Allende v. Shultz*, 845 F.2d 1111, 1114 n.4 (1st Cir. 1988) (stating that *Mandel* held that a noncitizen cannot challenge the denial of a visa on constitutional grounds and that a noncitizen's participation in visa denial litigation is "purely symbolic").

92. *Mandel*, 408 U.S. at 759, 762.

93. See *supra* note 90 and accompanying text (noting the Court's ambiguity concerning whether *Mandel* applies to more than First Amendment claims).

94. See, e.g., *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 118 (2d Cir. 2009) (applying *Mandel* review to a First Amendment claim); *Allende*, 845 F.2d at 115–16 (same); *Abourezk v. Reagan*, 785 F.2d 1043, 1074–76 (D.C. Cir. 1986) (same), *aff'd*, 484 U.S. 1 (1987) (per curiam).

95. Compare *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 555–57 (2d Cir. 1975) (refusing to recognize a U.S. citizen's fundamental right to marriage as a trigger for *Mandel* review), with *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (finding that a U.S. citizen's fundamental rights are implicated by the denial of her foreign spouse's visa).

96. E.g., *Bustamante*, 531 F.3d at 1062.

97. See, e.g., *Burrafato*, 523 F.2d at 556–57 (asserting that a U.S. citizen lacks standing to bring a *Mandel* claim based on the right to marriage); *Hermina Sague v. United States*, 416 F. Supp. 217, 220 (D.P.R. 1976) (same).

U.S. Court of Appeals for the First Circuit held in *Allende v. Shultz*⁹⁸ that U.S. citizens who invited Hortensia de Allende, the widow of a former Chilean president, to speak in the United States were entitled to judicial review of the visa denial because the denial violated their First Amendment rights to “receive information.”⁹⁹ The First Circuit extended *Mandel* review to Allende’s claim and implicitly recognized that *Mandel* review applies to both visa denials and visa waiver denials.¹⁰⁰

Similarly, the Second Circuit in *American Academy of Religion v. Napolitano*¹⁰¹ held that *Mandel* review applied to a consular officer’s denial of a Swiss-born Islamic scholar’s visa because the U.S.-citizen plaintiffs who invited him to speak asserted a valid First Amendment claim.¹⁰² In *Abourezk v. Reagan*,¹⁰³ the D.C. Circuit found that the plaintiffs raised valid statutory and First Amendment claims challenging the visa denials of three foreign citizens that the U.S.-citizen plaintiffs had invited to speak in the United States.¹⁰⁴ Furthermore, the D.C. Circuit in *Saavedra Bruno v. Albright*¹⁰⁵ reiterated *Abourezk*’s holding that judicial review is appropriate under *Mandel* only when U.S. citizens claim that a visa denial has violated their constitutional rights.¹⁰⁶ In *Bruno*, a consular officer denied the visa of a Bolivian national who was employed by a U.S. citizen because of the Bolivian national’s alleged ties to drug trafficking.¹⁰⁷ The plaintiffs contended that the consular officer’s denial violated the Administrative Procedure Act’s (APA) presumption of judicial review.¹⁰⁸ In contrast to *Abourezk*, the court in *Bruno* held that the U.S.-citizen plaintiffs, the noncitizen’s U.S. employers, had not suffered a cognizable injury that would trigger review under the APA

98. 845 F.2d 1111 (1st Cir. 1988).

99. *See id.* at 1112, 1114, 1120–21 (applying *Mandel* to a visa denial instead of a denial of a waiver of inadmissibility as in *Mandel*).

100. *Id.* at 1120–21.

101. 573 F.3d 115 (2d Cir. 2009).

102. *See id.* at 117, 119, 125 (“We conclude that, where a plaintiff, with standing to do so, asserts a First Amendment claim to have a visa applicant present views in this country, we should apply *Mandel* to a consular officer’s denial of a visa.”).

103. 785 F.2d 1043 (D.C. Cir. 1986), *aff’d*, 484 U.S. 1 (1987) (per curiam).

104. *Id.* at 1048–50.

105. 197 F.3d 1153 (D.C. Cir. 1999).

106. *Id.* at 1163.

107. *Id.* at 1155.

108. *Id.*

or *Mandel* because the plaintiffs had not asserted a violation of their constitutional rights.¹⁰⁹

ii. Cases endorsing the fundamental right to marriage as a trigger for Mandel review

The Ninth Circuit has repeatedly confirmed that a denial of a foreign spouse's visa triggers *Mandel* review. In *Bustamante v. Mukasey*, a U.S. citizen asserted that she had a protected liberty interest in her marriage to a foreign spouse and that this preexisting interest allowed her to seek *Mandel* review after a consular officer denied her husband's visa because the denial impinged on her liberty interest.¹¹⁰ The court held that *Mandel* review applied because the plaintiff was a U.S. citizen "raising a constitutional challenge" to a visa denial, which entitled her to review.¹¹¹ The court tacitly endorsed the view that physical separation from a foreign spouse infringes on a U.S. citizen's right to freedom of personal choice in marriage and family matters.¹¹² Once the court declared that the spouse's liberty interest was implicated by the visa denial, it asserted that the court was entitled to engage in a limited review of the reasons offered for the denial.¹¹³

Similarly, in *Din v. Kerry*, the Ninth Circuit considered a U.S.-citizen spouse's claim for review of her husband's visa denial.¹¹⁴ In *Din*, a consular officer denied the U.S. citizen's spouse's visa on account of the spouse's alleged ties to the Taliban in Afghanistan.¹¹⁵ The consular officer cited a broad provision in the terrorism inadmissibility grounds to justify the spouse's exclusion but did not include further facts or an explanation supporting the denial.¹¹⁶ In

109. *See id.* at 1163–64 (arguing that the U.S.-citizen petitioners' interests terminated as soon as the petitioners filed a successful application with USCIS).

110. *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).

111. *See id.* (following a similar analysis as the First, Second, and D.C. Circuits to conclude that a U.S. citizen's constitutional challenge to a visa denial triggers *Mandel* review).

112. *See id.* (acknowledging but not elaborating on the idea that "[f]reedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause").

113. *See id.* (arguing that the government cannot infringe on liberty interests without "constitutionally adequate procedures" (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985))).

114. *Din v. Kerry*, 718 F.3d 856, 858 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014).

115. *Id.*

116. *Id.* at 859. A visa denial based on a terrorism-related inadmissibility ground is exempt from the INA's notice provisions. Thus, the consular officer did not have to explain the reasons for the denial to the denied applicant. *See supra* notes 39–40 and accompanying text.

reviewing Mrs. Din's claims, the Ninth Circuit confirmed that she had a protected interest in marriage to a foreign spouse and applied *Mandel* review.¹¹⁷ Unlike the Ninth Circuit's decision in *Bustamante*, which held that the consular officer had provided a facially legitimate reason for the visa denial, the Ninth Circuit in *Din* determined that the consular officer's bare citation to a broad statute was not a sufficient reason for the denial.¹¹⁸ Despite the Ninth Circuit's unequivocal acceptance that the consular officer's decisions implicated Mrs. Din's and Mrs. Bustamante's constitutionally protected interests, other circuits have been less willing to find that such interests are at stake.

iii. Cases rejecting the fundamental right to marriage as a trigger for Mandel review

The fundamental right to marriage and freedom of personal choice in family life provides only a tenuous avenue into *Mandel* review in other federal courts. In *Burrafato v. U.S. Department of State*,¹¹⁹ an Italian citizen waiting for a visa unlawfully entered the United States.¹²⁰ The State Department denied his visa before explaining the reasons for the denial.¹²¹ His U.S.-citizen wife alleged that the denial of his visa implicated her constitutional rights.¹²²

The Second Circuit declined to review her claim that the State Department had not complied with its own regulations when it failed to notify her and her spouse of the reasons for the denial.¹²³ Although the court declared that *Mandel* requires a justification before excluding a noncitizen, it ultimately determined that it did not have jurisdiction to review the claim because it interpreted *Mandel* as only applying to First Amendment claims, and the U.S.-citizen spouse only asserted a general violation of her constitutional

117. See *Din*, 718 F.3d at 860–61. The court in *Din* approvingly cited to *Bustamante* and stated that Mrs. Din's spouse's right to judicial review was rooted in Mrs. Din's more general right to marriage. *Id.* at 860; cf. *Atiffi v. Kerry*, No. Civ. S-12-3002 LKK/DAN, 2013 WL 5954818 (E.D. Cal. Nov. 6, 2013) (recognizing that a "a citizen has a protected liberty interest in marriage that entitles the citizen to review of the denial of a spouse's visa" (internal quotation marks omitted)).

118. See *Din*, 718 F.3d at 862 (criticizing the government for not providing a facially legitimate reason for denying Mrs. Din's spouse's visa and chastising the visa denial because it was "completely void" of a justification).

119. 523 F.2d 554 (2d Cir. 1975).

120. *Id.* at 555.

121. *Id.*

122. *Id.* at 554–55.

123. *Id.* at 555–56.

rights.¹²⁴ Similarly, in *Hermina Sague v. United States*,¹²⁵ a U.S. citizen alleged that her spouse's visa denial "deprived [her] of her right to live within the territory of the United States with her husband and her family."¹²⁶ Unlike in *Burrafato*, where the U.S. citizen asserted a general violation of her constitutional rights, in *Hermina Sague*, the U.S. citizen identified a specific constitutional right that the government infringed upon when it denied her spouse's visa.¹²⁷ Still, the U.S. District Court for the District of Puerto Rico held that a U.S.-citizen spouse did not have a constitutional right to have her foreign spouse enter the United States and refused to recognize that *Mandel* review applied.¹²⁸

Likewise, recent decisions by the U.S. District Court for the District of Columbia have refused to recognize that a U.S.-citizen spouse's rights are implicated by the denial of his or her spouse's visa. In *Udugampola v. Jacobs*,¹²⁹ a consular officer denied Mr. Udugampola's visa because of his perceived ties to terrorism.¹³⁰ Mr. Udugampola, a Sri Lankan citizen, and his U.S.-citizen wife and U.S.-citizen daughter sought review of the visa denial under *Mandel*, asserting that the Fifth Amendment protects against arbitrary government actions that infringe on his wife and daughter's liberty interests.¹³¹ Mr. Udugampola's wife alleged that she had a constitutionally protected interest in her right to marry and in her marital relationship.¹³² Further, Mr. Udugampola's daughter contended that she had a constitutionally protected interest in maintaining a relationship with her father.¹³³ The court rejected both claims, reasoning that his daughter's rights were not implicated because the visa denial was not aimed specifically at interfering with Mr. Udugampola's relationship

124. *Id.* at 555–57 (distinguishing *Burrafato*'s case from other consular nonreviewability cases after *Mandel*, all of which involved First Amendment claims within the federal courts' jurisdictional purview, because *Burrafato* did not "implicate[]" constitutional rights over which the federal courts have jurisdiction).

125. 416 F. Supp. 217 (D.P.R. 1976).

126. *Id.* at 220.

127. *Id.*

128. *Id.* (asserting that a U.S.-citizen spouse "who voluntarily chooses to marry" a foreign citizen lacks a right "to have her alien spouse enter the United States" because to possess that right would contravene U.S. sovereignty to decide who may enter the United States).

129. 795 F. Supp. 2d 96 (D.D.C.), *appeal dismissed*, No. 11-5215, 2011 WL 5903822 (D.C. Cir. Nov. 17, 2011).

130. *Id.* at 98.

131. *Id.* at 98, 104–05.

132. *Id.* at 105.

133. *Id.* at 104.

with her and that his wife's rights were not implicated when her husband was denied entry.¹³⁴

Like in *Udugampola*, the U.S. District Court for the District of Columbia in *Jathoul v. Clinton*¹³⁵ found that a U.S.-citizen spouse's marriage rights are not implicated by a denial of her spouse's visa, and, therefore, held that Mrs. Jathoul failed to present a valid constitutional claim.¹³⁶ In *Jathoul*, a consular officer found Mr. Jathoul inadmissible under terrorism-related inadmissibility grounds.¹³⁷ Mrs. Jathoul, a U.S. citizen, argued that her husband had never engaged in terrorist activities and that he was not given an opportunity to present evidence to the contrary.¹³⁸ Mrs. Jathoul alleged that the consular officer and the State Department violated her due process rights by failing to provide her with their reasons for denying her husband's visa and, thereby, burdened her constitutionally protected interest in her marriage.¹³⁹ The court rejected *Bustamante*, which recognized that a foreign spouse's visa denial implicated a U.S. citizen's liberty interests in marriage, because it believed *Bustamante* conflicted with D.C. Circuit precedent.¹⁴⁰

b. Standard of review under Mandel's second inquiry

When a court finds that a visa denial implicates a U.S. citizen's rights,¹⁴¹ thus triggering *Mandel* review, courts then determine if the

134. See *id.* at 105 ("Courts have repeatedly held that these constitutional rights are not implicated when one spouse is removed or denied entry into the United States . . ."). The court further stated that the denial did not infringe on Mrs. Udugampola's marital relationship with her husband because the government had "done nothing more than to say that the residence of one of the marriage partners may not be in the United States." *Id.* at 106 (quoting *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970)).

135. 880 F. Supp. 2d 168 (D.D.C. 2012).

136. *Id.* at 169.

137. *Id.* (internal quotation marks omitted).

138. *Id.*

139. *Id.*

140. See *id.* at 172 (following the D.C. Circuit's decision and reasoning from *Swartz v. Rogers*, where the court did not find a violation of a liberty interest in marriage when the petitioner's husband was deported, and arguing that the court in *Bustamante* accepted the plaintiff's claims "at face value and did not consider whether the visa denial actually implicated the plaintiff's constitutional rights" (internal quotation marks omitted)).

141. Recognizing that courts are split about when *Mandel* review applies, the use of "rights" in this sentence assumes that a court has recognized that either a First Amendment claim or Fifth Amendment due process claim is present and proceeds to the next step of *Mandel* review.

visa denial was based on a facially legitimate and bona fide reason.¹⁴² The *Mandel* decision did not identify what constitutes a facially legitimate and bona fide reason for denying a visa, and prior and subsequent cases provide minimal guidance on what the standard means.¹⁴³ In a number of cases finding the First Amendment rights of U.S. citizens implicated, some courts have stated that a consular officer can offer “almost any reason, even if it is conclusory,” or can offer a reason that is “supported by neither evidence nor argumentation.”¹⁴⁴

For example, in *Adams v. Baker*,¹⁴⁵ the First Circuit determined that “facially legitimate and bona fide” reasons include sufficient evidence from which a consular officer could form a “reasonable ground to believe” that a noncitizen has engaged in terrorism-related activities.¹⁴⁶ In *Baker*, the State Department denied an Irish citizen’s visa because he was the president of an organization that the government believed engaged in terrorist activities.¹⁴⁷ The First Circuit found that the U.S.-citizen plaintiffs raised a valid First Amendment claim and applied *Mandel* review.¹⁴⁸ The court ultimately agreed with the district court and held that the government had sufficient evidence to link Mr. Adams with terrorist

142. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (finding that the government had offered a “facially legitimate and bona fide reason” for denying Mr. Mandel’s visa waiver and stating that this was all the review necessary); *Burrafato v. U.S. Dep’t of State*, 523 F.2d 554, 556 (2d Cir. 1975) (interpreting *Mandel*’s second inquiry to “require justification for an aliens exclusion”).

143. Compare *Allende v. Shultz*, 845 F.2d 1111, 1116 (1st Cir. 1988) (stating that the government cannot exclude a noncitizen with a “bare assertion” that the noncitizen’s presence contravenes U.S. foreign policy interests), with *Marczak v. Greene*, 971 F.2d 510, 517 (10th Cir. 1992) (finding that the facially legitimate standard is “used relatively infrequently, [so] its meaning is elusive,” and that therefore a consular officer’s decision must be reasonably supported by the record). See generally *Nafziger*, *supra* note 16, at 75–76 (stating that *Mandel*’s standard of review is ambiguous); *Wurtzel*, *supra* note 82, at 163 (suggesting that *Mandel*’s unclear and “elastic” standard of review results in “divergent” interpretations).

144. See *Wurtzel*, *supra* note 82, at 163–64 (denouncing the “facially legitimate and bona fide” standard as “toothless” because it allows the government to offer almost any reason for a denial, making it “impossible to differentiate between legitimate and pretextual reasons”).

145. 909 F.2d 643 (1st Cir. 1990).

146. *Id.* at 649 (internal quotation marks omitted).

147. *Id.* at 645.

148. *Id.* at 647–50.

activity such that the visa denial was based on facially legitimate and bona fide reasons.¹⁴⁹

The Ninth Circuit's interpretation of the *Mandel* standard is ambiguous. Like the First Circuit in *Baker*, the Ninth Circuit in *Bustamante* determined that a consular officer "had reason to believe" that the U.S. citizen's spouse had engaged in drug trafficking because the consular officer had received evidence from the Drug Enforcement Agency (DEA) linking the noncitizen spouse to drug trafficking.¹⁵⁰ The court found the link to be sufficient to meet the *Mandel* standard.¹⁵¹ In *Din*, however, the Ninth Circuit found that a consular officer's citation to a provision in a statute alone, without accompanying factual allegations, was *not* sufficient to meet the facially legitimate and bona fide standard.¹⁵² Although the *Mandel* standard is also a source of disagreement among federal circuits, this Comment will not examine *Mandel's* second inquiry and instead will focus on *Mandel's* first inquiry.

C. *Supreme Court Cases Protecting the Fundamental Right to Marital Relationships and the Right to Live with One's Extended Family*

The Fifth Amendment Due Process Clause protects against arbitrary government actions that deprive an individual of "life, liberty, or property, without due process of law."¹⁵³ When an individual asserts a procedural due process claim, the individual must demonstrate that the government has deprived him or her of a liberty or property interest.¹⁵⁴ A liberty or property interest exists if an individual can demonstrate that courts uphold it as a constitutionally protected interest or if a federal statute grants an individual a protected interest.¹⁵⁵ The Supreme Court has long afforded

149. *See id.* at 649–50 (noting that a consular officer's decision regarding a visa applicant's relationship with terrorism and the information used to reach that conclusion is "subject only to a very narrow review").

150. *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (internal quotation marks omitted).

151. *Id.*

152. *Din v. Kerry*, 718 F.3d 856, 861, 867 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014).

153. U.S. CONST. amend. V.

154. *See Paul v. Davis*, 424 U.S. 693, 710 (1976) ("It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property' as meant in the Due Process Clause.").

155. *See Uduogampola v. Jacobs*, 795 F. Supp. 2d 96, 104 (D.D.C.) ("[T]he interests that are comprehended within the meaning of either liberty or property, as covered

protections to the family and has declared that unreasonable or arbitrary government actions interfering with an individual's right to marry and to raise a family, to choose where to reside, and to live with extended family members merit close scrutiny. This section provides an overview of the Supreme Court cases guaranteeing that these rights are fundamental liberty interests and therefore deserve heightened procedural due process protection.

1. Supreme Court cases protecting the fundamental right to marriage and to raise a family

Courts have long protected against unwarranted government intrusion in matters of marriage and family life. In 1923, the Supreme Court in *Meyer v. Nebraska*¹⁵⁶ held that the right “to marry [and] establish a home and bring up children” is a long-recognized privilege “essential to the orderly pursuit of happiness by free men.”¹⁵⁷ Since *Meyer*, the Supreme Court has reaffirmed the right to marry and experience family life in several cases.¹⁵⁸ For example, in *Skinner v. Oklahoma ex rel. Williamson*,¹⁵⁹ the Court considered the constitutionality of an Oklahoma law that allowed for the sterilization of all men convicted of two or more crimes involving moral turpitude and sentenced in an Oklahoma penal institution.¹⁶⁰ In finding that “[m]arriage and procreation are fundamental to the very existence and survival of the race,” the Court struck down the law on equal

by the due process clause of the Constitution, are those interests which have attain[ed] constitutional status by virtue of the fact that they have been initially recognized or protected by state law or federal law.” (alterations in original) (quoting *Doe v. U.S. Dep’t. of Justice*, 753 F.2d 1092, 1124 (D.C. Cir. 1985)), *appeal dismissed*, No. 11-5215, 2011 WL 5903822 (D.C. Cir. Nov. 17, 2011).

156. 262 U.S. 390 (1923).

157. *Id.* at 399; *see also* *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (identifying marriage as the “most important relation in life”).

158. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that a Texas statute that criminalized intimate sexual conduct between persons of the same sex violated the Due Process Clause); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (emphasizing that state regulations cannot invade the intimacies of family life); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (stating that the decision to have a child is a freedom protected by the Constitution); *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (finding that due process prohibits a state from denying couples from getting a divorce solely because of their inability to pay for one); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating a state ban on interracial marriages for violating the appellants’ right to marry under the Due Process Clause).

159. 316 U.S. 535 (1942).

160. *Id.* at 536.

protection grounds because the law did not apply to individuals convicted of similar crimes.¹⁶¹ Similarly, in *Griswold v. Connecticut*,¹⁶² the Supreme Court found unconstitutional a state law that imposed criminal liability against any person who used or assisted in the use of contraceptives.¹⁶³ The Court found that the state law violated the fundamental right to marital privacy.¹⁶⁴ In *Boddie v. Connecticut*,¹⁶⁵ the Court recognized that “marriage involves interests of basic importance in our society” and struck down a state law that barred spouses unable to pay for divorce proceedings from getting a divorce.¹⁶⁶

After the Supreme Court decided *Mandel* in 1972, the Court continued to solidify the broad protections available to married couples and families. In 1974, the Supreme Court in *Cleveland Board of Education v. LaFleur*¹⁶⁷ struck down a school board regulation that required teachers to take maternity leave five months before childbirth.¹⁶⁸ The Court cited decades of precedent recognizing “freedom of personal choice in matters of marriage and family life,” such as choices related to “whether to bear . . . a child.”¹⁶⁹ In 1978, in *Zablocki v. Redhail*,¹⁷⁰ the Supreme Court held unconstitutional a Wisconsin statute that prohibited granting marriage licenses to individuals who had failed to pay child support for their noncustodial children.¹⁷¹ The Court found the Wisconsin statute unreasonably interfered with the plaintiff’s desire to marry, stating that “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.”¹⁷²

161. *See id.* at 541 (stating that sterilization violates a basic liberty and declaring that when two crimes are “intrinsicly” similar but the law imposes sterilization on one crime and not the other, there is an unequal application of the law); *see also Loving*, 388 U.S. at 12 (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” (quoting *Skinner*, 316 U.S. at 541)).

162. 381 U.S. 479 (1965).

163. *Id.* at 486.

164. *See id.* (stating that marriage is an intimate association “that promotes a way of life, . . . a harmony in living, . . . a bilateral loyalty”); *see also id.* at 493 (Goldberg, J., concurring) (explaining that to determine whether a right is fundamental, the issue is whether the right can be denied without violating fundamental principals of liberty).

165. 401 U.S. 371 (1971).

166. *Id.* at 376, 383.

167. 414 U.S. 632 (1974).

168. *Id.* at 642.

169. *Id.* at 639–40 (internal quotation marks omitted).

170. 434 U.S. 374 (1978).

171. *Id.* at 375, 390–91.

172. *Id.* at 386.

Then, in 1987, in *Turner v. Safley*,¹⁷³ the Supreme Court struck down a prison regulation that required the prison superintendent to determine if there was a “compelling reason” for a marriage between an inmate and another inmate or a civilian before the superintendent could approve the marriage.¹⁷⁴ The Court stated that marriage can be an expression of “emotional support and public commitment” and that “marriage [can have] spiritual significance” because it can demonstrate a couple’s religious faith.¹⁷⁵ The Court held that, regardless of the prison context, inmates have a constitutionally protected interest in marriage and that the existing permission requirements were not reasonably related to the expressed penological interests of maintaining prisoner safety.¹⁷⁶

Similarly, in 1996 in *M.L.B. v. S.L.J.*¹⁷⁷ and in 2003 in *Lawrence v. Texas*,¹⁷⁸ the Supreme Court again emphasized that decisions about marriage, family life, and raising children are some of the most basic and important liberty interests in U.S. society that merit protection.¹⁷⁹ Recently, in *United States v. Windsor*,¹⁸⁰ the Supreme Court struck down the Defense of Marriage Act (DOMA) and highlighted how failing to legally recognize marriage between same-sex couples burdens financial, emotional, and other vital personal relations between married couples.¹⁸¹ Noting that DOMA prevents the children of same-sex couples from “understand[ing] the integrity and closeness of their own family,” the Court stated that DOMA confers same-sex couples with a “second-tier marriage” that is “otherwise . . . unworthy of federal recognition.”¹⁸² This line of cases—from 1923 to present—affirming the rights to marriage, family relationships, and procreation demonstrates the Supreme Court’s undeviating protection of these institutions and activities.

173. 482 U.S. 78 (1987).

174. *See id.* at 97–98 (striking down the regulation because it was “not reasonably related” to the security concerns with permitting an inmate to marry).

175. *Id.* at 95–96.

176. *Id.* at 96.

177. 519 U.S. 102 (1996).

178. 539 U.S. 558 (2003).

179. *Id.* at 573–74; *see M.L.B.*, 519 U.S. at 113, 116 (repeating that choices related to marriage, familial relationships, and raising children are among the most important).

180. 133 S. Ct. 2675 (2013).

181. *Id.* at 2694–95.

182. *Id.* at 2694.

2. *Supreme Court cases recognizing the fundamental right to live with one's extended family*

The Supreme Court has also held that an individual has a fundamental right to live with his or her immediate or extended family in one household. In *Moore v. City of East Cleveland*,¹⁸³ the Court struck down a Cleveland ordinance that prohibited a grandson from living with his grandmother because they did not qualify as members of the same "family" under the ordinance's definition of the term.¹⁸⁴ The Court reasoned that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."¹⁸⁵ The Court relied on the traditional role of the family in U.S. society to bolster its arguments against the regulation.¹⁸⁶ Justice Powell, writing for the plurality of the Court, stated that the right to live with one's nuclear and extended family is deeply rooted in the value U.S. society has placed in shared support between family members and in passing down family values between generations.¹⁸⁷ He acknowledged that either "[o]ut of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home."¹⁸⁸ According to the Court, these traditions and the family's central role in society merit constitutional protection.¹⁸⁹ In his concurrence, Justice Brennan underscored the duties of courts

183. 431 U.S. 494 (1977) (plurality opinion).

184. *See id.* at 498 (criticizing Cleveland's ordinance because it "slic[es] deeply into the family" by arbitrarily "select[ing] certain categories of relatives who may live together"). The city established the ordinance purportedly to reduce overcrowding, minimize traffic congestion, and ensure the financial stability of the school system. *Id.* at 499-500. The Court dismissed the city's proffered reasons for the ordinance because the ordinance would do little to enable them. *Id.* at 500.

185. *Id.* at 499. Justice Powell distinguished the Court's earlier decision in a similar case by stating that the ordinance in the earlier case did not affect related individuals. *Id.* at 498.

186. *See id.* at 503-05 ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."); *see id.* at 507 (Brennan, J., concurring) (indicating that cities should not be permitted to manipulate their exercise of the zoning power to intrude into the privacy of the family).

187. *Id.* at 503-05 (plurality opinion).

188. *Id.* at 505.

189. *Id.* at 503-06.

and of the government to protect against any arbitrary intrusions into family interests, and he included extended families in such interests.¹⁹⁰

Even in cases involving adoption, the Supreme Court has recognized a fundamental right to reside with one's immediate family members. In *Smith v. Organization of Foster Families for Equality and Reform*,¹⁹¹ the Court considered the validity of New York state procedures that removed foster children from their foster families.¹⁹² The New York state procedures entitled foster parents to ten days notice before the state would remove a child from their custody, as well as an opportunity for an administrative hearing at their request.¹⁹³ In evaluating the state's actions, the Court suggested that families—including foster families—have a liberty interest in remaining together as a family unit and, therefore, are entitled to some procedural due process before a state can remove foster children from their care.¹⁹⁴ Ultimately, the Court determined that New York's procedures were adequate to support the liberty interests that the plaintiffs asserted.¹⁹⁵

190. *Id.* at 511 (Brennan, J., concurring).

191. 431 U.S. 816 (1977).

192. *See id.* at 829–32 (detailing the limited procedures foster parents have to contest an abrupt decision by a state child placement agency to remove the child from the foster family's care as a result of a finding by that agency that the child should be transferred to another foster family or returned to his or her birth parents).

193. *Id.* at 829.

194. *See id.* at 843 (reasoning that biological parent-child relationships, which typically do not exist between foster parents and foster children, are not the sole determinants of the existence of a family unit and that “[t]he basic foundation of the family in our society, the marriage relationship, is of course not a matter of blood relation”). The Court cited to the line of marriage cases recognizing that marriage is a fundamental right that deserves constitutional protection and then added that

the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promot[ing] a way of life through the instruction of children as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.

Id. at 843–44 (alteration in original) (emphasis added) (citation omitted) (internal quotation marks omitted).

195. *Id.* at 855–56.

3. *Supreme Court and circuit court cases addressing family matters in the immigration context*

The Supreme Court has consistently reaffirmed the importance of family reunification and has recognized the fundamental rights involved in marriage as well as in living with one's immediate and extended family members. However, when evaluating family matters in the context of immigration laws, the Court and some circuit courts have used disparate language. For example, in *Fiallo v. Bell*,¹⁹⁶ unwed U.S.-citizen fathers challenged the constitutionality of a section of the INA preventing them and their illegitimate children from receiving the special preferences of "parent" and "child" because it impinged on their fundamental right to a "familial relationship."¹⁹⁷ Although the Court found that the INA provision implicated the U.S.-citizen fathers' constitutional rights, the Supreme Court ultimately disagreed with the U.S.-citizen fathers and applied a limited review.¹⁹⁸ The Court relied on *Mandel's* plenary power reasoning to constrain any further review of the fathers' claims but accepted that the Court had "limited judicial responsibility."¹⁹⁹ Justice Marshall, in his forceful dissent, declared that the plenary power precedents upon which the majority relied were outdated.²⁰⁰ He argued that cases involving

196. 430 U.S. 787 (1977).

197. *See id.* at 794 (explaining that the fathers sought to distinguish prior Supreme Court immigration opinions from the instant case by arguing that none of the other cases dealt with sex discrimination and a child's illegitimacy or otherwise implicated citizens' and permanent residents' fundamental rights respecting the family).

198. *See id.* at 792-95 (noting that immigration legislation is subject to limited review because the plenary power doctrine suggests that Congress and the executive branch have complete control over admission and exclusion decisions).

199. *Id.* at 793 n.5 ("Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens..."). *But see id.* at 794-95 (reasoning that no reason existed to apply a different standard than that from *Mandel*, where the Court had held that "when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant" (alteration in original) (internal quotation marks omitted)).

200. *See id.* at 805-06 (Marshall, J., dissenting) (arguing that the government does not have unreviewable discretion and that the "old immigration cases" upon which the majority relied "[were] not the strongest precedents in the United States Reports" (internal quotation marks omitted)).

family matters are distinguishable from *Mandel*—which did not involve family members—and that these cases deserve more review.²⁰¹

The Supreme Court and the U.S. Court of Appeals for the Third Circuit have also emphasized the fundamental right of a U.S. citizen to choose in what country to reside. In *Schneider v. Rusk*,²⁰² the Supreme Court considered the constitutionality of a statute that stripped citizenship from a U.S. citizen who had continuously resided abroad for three years in her country of birth.²⁰³ The Court struck down the statute as a violation of the citizen's due process, reasoning that a U.S. citizen has a fundamental right to reside wherever he chooses, whether in the United States or abroad.²⁰⁴ Similarly, in *Acosta v. Gaffney*,²⁰⁵ the Third Circuit evaluated whether an infant U.S. citizen was entitled to a stay of her parents' deportation because deporting them would deny her the right to reside in the United States.²⁰⁶ The Third Circuit held that the district court erred when it decided that a stay of deportation would be appropriate.²⁰⁷ The court reasoned that a refusal to grant a stay of deportation would not violate the infant's right to choose her residence because, as an infant, she could not make a conscious choice about where to live and must reside with her parents.²⁰⁸ The court, however, still recognized that "[t]he right of an American citizen to fix and change his residence is a continuing one which he enjoys throughout his life."²⁰⁹

201. *Id.* at 808–10. Justice Marshall also distinguished *Fiallo* from *Mandel*, arguing that unlike in *Mandel*, the interests involved in *Fiallo* directly affected U.S.-citizen family members. *See id.* at 808 (suggesting that *Mandel* was focused on the government's interest in admitting or not admitting noncitizens whereas the purpose of the statutory provision at issue in *Fiallo* was to give rights to U.S. citizens).

202. 377 U.S. 163 (1964).

203. *Id.* at 164.

204. *Id.* at 168–69.

205. 558 F.2d 1153 (3d Cir. 1977).

206. *See id.* at 1155 (explaining that the infant's parents, who had added themselves as plaintiffs with their daughter, argued that a deportation order or denial of stay would destroy their family relationship and deny the U.S.-citizen child equal protection because her parents were not U.S. citizens).

207. *Id.* at 1158.

208. *See id.* (finding that an infant is incapable of exercising the "right of choice of residence"). The plaintiffs interpreted the child's liberty interest as her right to reside in her country of birth. *Id.* at 1157. However, the court argued that the cognizable liberty interest was even broader, stating that "[i]t is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad . . ." *Id.*

209. *Id.* at 1158 (reasoning that the plaintiff will be able to assert her right as soon as she reaches the age of "discretion").

The Supreme Court has, in subsequent years, continued to uphold familial ties even when an immigration issue was involved. For example, in *Landon v. Plasencia*,²¹⁰ the Supreme Court gave considerable weight to a noncitizen's familial ties to the United States to grant her more due process protections.²¹¹ Mrs. Plasencia, a legal permanent resident, left the United States for a few days and was caught smuggling noncitizens into the United States.²¹² The Supreme Court held that Mrs. Plasencia was entitled to procedural due process protections in an exclusion proceeding as an admitted, continuously present resident of the United States.²¹³ The Court recognized that the level of process due would vary depending on the interests at stake but reasoned that the "right to rejoin her immediate family, [is] a right that ranks high among the interests of the individual."²¹⁴ Thus, in *Plasencia*, the Court recognized that Mrs. Plasencia had a constitutionally protected liberty interest in rejoining her family.

Relatedly, the Ninth Circuit has recognized that a U.S. citizen has a liberty interest in remaining in the same country with his or her spouse. In *Ching v. Mayorkas*,²¹⁵ a U.S.-citizen spouse who filed a visa petition for his noncitizen spouse argued that he had a protected liberty interest that was implicated by the denial of his wife's visa petition.²¹⁶ The Ninth Circuit agreed and applied the *Mathews v. Eldridge*²¹⁷ balancing test to determine whether the couple had received adequate procedural due process protections.²¹⁸ The *Mathews* balancing test asks courts to consider the individual's liberty interests, the cost to the government of additional due process procedures, and the risk of an erroneous deprivation of the individual's liberty interests as a result of the deficient procedures.²¹⁹ In evaluating the first prong of the *Mathews* test, the court in *Ching*

210. 459 U.S. 21 (1982).

211. *See id.* at 30–32 (noting that past precedent has held that "a resident alien returning from a brief trip has a right to due process just as would a continuously present resident alien" and that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly").

212. *Id.* at 23.

213. *Id.* at 31–33.

214. *Id.* at 34.

215. 725 F.3d 1149 (9th Cir. 2013).

216. *Id.* at 1153.

217. 424 U.S. 319 (1976).

218. *Ching*, 725 F.3d at 1157–59.

219. *Mathews*, 424 U.S. at 334–35.

determined that “[t]he right to marry and to enjoy marriage are unquestionably liberty interests protected by the Due Process Clause.”²²⁰ The court also reasoned that the “right to live with and not be separated from one’s immediate family is a ‘right that ranks high among the interests of the individual’ and cannot be taken away without procedural due process.”²²¹ Thus, the court in *Ching* recognized that spousal separation or a foreign spouse’s imminent exclusion from the United States would impose a considerable hardship on the fundamental right to enjoy marriage and the right to not be separated from close family members.²²²

Joining the Second Circuit in *Burrafato*,²²³ the D.C. Circuit and the U.S. Court of Appeals for the Sixth Circuit have held that the government does not violate a U.S.-citizen spouse’s constitutional rights when it denies his or her foreign spouse’s visa because the courts have determined that there is no constitutionally protected interest implicated by the separation or exclusion of a noncitizen family member as a result of a visa denial.²²⁴ In *Swartz v. Rogers*,²²⁵ the D.C. Circuit held that the deportation of the foreign spouse of a U.S. citizen did not impinge on that U.S. citizen’s constitutional rights.²²⁶ The court stated, “[D]eportation would not in any way destroy the legal union which the marriage created. The physical conditions of the marriage may change, but the marriage continues.”²²⁷ In *Almario v. Attorney General*,²²⁸ the Sixth Circuit considered the constitutionality of an immigration statute that imposed a two-year foreign residence requirement for noncitizens who are in deportation proceedings and marry a U.S. citizen.²²⁹ The court held that the statute was valid and

220. See *Ching*, 725 F.3d at 1157 (indicating that protected liberty interests include “the right of the individual . . . to marry, establish a home and bring up children” (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923))).

221. *Id.* (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)) (arguing that the first prong of the *Mathews* test favors the plaintiffs).

222. See *id.* at 1157–59 (remanding the case for an evidentiary hearing because two parts of the *Mathews* test weighed in the petitioners’ favor).

223. See *supra* text accompanying notes 119–24 (discussing the Second Circuit’s denial of jurisdiction to review a visa denial in *Burrafato*).

224. See, e.g., *Almario v. Attorney Gen.*, 872 F.2d 147 (6th Cir. 1989); *Swartz v. Rogers*, 254 F.2d 338 (D.C. Cir. 1958).

225. 254 F.2d 338 (D.C. Cir. 1958).

226. *Id.* at 339.

227. *Id.*

228. 872 F.2d 147 (6th Cir. 1989).

229. *Id.* at 149.

reasoned that the U.S. citizen did not have a right to have his or her noncitizen spouse remain in the United States.²³⁰

The decisions from the Second, Sixth, and D.C. Circuits are in conflict with the Ninth Circuit's decisions and the long-established Supreme Court precedent, which provides that the rights to enter and maintain a marital relationship and the rights to live with, rejoin, and remain with family members are fundamental liberty interests that require procedural due process protections.

II. THE DENIAL OF AN IMMEDIATE RELATIVE OR FAMILY-SPONSORED VISA OF A U.S. CITIZEN'S FAMILY MEMBER IMPLICATES THAT U.S. CITIZEN'S FUNDAMENTAL RIGHTS, THEREBY ALLOWING AN OPPORTUNITY FOR JUDICIAL REVIEW

The Supreme Court has carved out an exception to consular nonreviewability. This exception allows federal courts to apply a limited review of a visa denial when the visa denial implicates the First Amendment rights of a U.S. citizen. Scholars have recognized that *Mandel* provides a weak test because the Court offered unclear reasoning and poor guidance for how subsequent courts should interpret the decision.²³¹ Since first recognizing this exception in *Mandel*, federal courts have continued to expand review—first, by extending the grounds covered by *Mandel*, and second, by recognizing that some claims beyond the First Amendment may trigger judicial review.²³² The Supreme Court has not addressed consular nonreviewability since its decision in *Mandel* in 1972, and several federal courts of appeals are in conflict about which rights

230. *Id.* at 151; *see also* *Bangura v. Hansen*, 434 F.3d 487, 496 (6th Cir. 2006) (discussing *Almario* and again refusing to agree with a plaintiff's characterization of the fundamental right implicated by the denial of an immediate relative petition). In *Bangura*, the Sixth Circuit found that a denial of an immediate relative visa does not infringe upon the right to marry and further stated that a U.S. citizen does not have a right to have his or her noncitizen spouse remain in the country. *Id.*

231. *See* Nafziger, *supra* note 16, at 75 (“The intended scope of the *Mandel* test of a ‘facially legitimate and bona fide reason’ for an immigration decision is anything but clear.”).

232. *See supra* text accompanying notes 110–17 (discussing cases extending *Mandel* to U.S. citizens claiming that denial impinges on their fundamental rights to marriage and concerning family relations); *see also* Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113, 130–31 (2010) (criticizing the Supreme Court's holding in *Mandel* for not providing plaintiffs with guidance about which type of due process violation they must assert to be eligible for *Mandel* review).

trigger *Mandel* review.²³³ Subpart A, below, analyzes the First, Second, Ninth, and D.C. Circuits' interpretations of *Mandel* review. Applying the Supreme Court's precedents recognizing marriage as a fundamental right, subpart B argues that federal courts should extend *Mandel* review to claims by U.S. citizens married to foreign spouses. Finally, subpart C applies the Supreme Court's precedents establishing that families have a right to live together and argues that federal courts should extend *Mandel* review to all immediate relative and family-sponsored visa denials.

A. *The First, Second, Ninth, and D.C. Circuits Broadly Interpret when Mandel Review Applies*

The Supreme Court in *Mandel* failed to specify when *Mandel* review would apply.²³⁴ As a result, over the past four decades, federal courts have interpreted *Mandel* to fill the Court's void.²³⁵ Although *Mandel* involved a visa waiver denial, federal courts have expanded the application of *Mandel* review to include visa denials involving U.S. citizens' First Amendment and Fifth Amendment due process rights.²³⁶ Following the First, Second, and D.C. Circuits, which apply a broad interpretation of *Mandel*'s original holding, the Ninth Circuit in *Bustamante* and *Din* correctly found that *Mandel* review extends to a

233. See *Centeno v. Shultz*, 817 F.2d 1212, 1214 (5th Cir. 1987) (per curiam) (referring to *Mandel* and holding that a Filipino citizen's nonimmigrant visa was not subject to judicial review); *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 556–57 (2d Cir. 1975) (refusing to review a foreign spouse's visa, citing *Mandel*).

234. See *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (“What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address or decide in this case.”). Compare *Burrafato*, 523 F.2d at 554 (declining to hold that a U.S. citizen's fundamental rights to marriage or to live with her spouse triggers *Mandel* review), with *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (holding that a U.S. citizen's fundamental rights to marriage and in family relations are implicated when a consular officer denies her foreign spouse's visa and that the decision is entitled to judicial review).

235. See, e.g., *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 124–25 (2d Cir. 2009) (expanding *Mandel* to include visa denials and not only visa waiver denials); *Adams v. Baker*, 909 F.2d 643, 647–48 (1st Cir. 1990) (choosing to apply *Mandel* review only in instances of “clear error” and without a “facially legitimate and bona fide reason” for such a denial (internal quotation marks omitted)); *Abourezk v. Reagan*, 785 F.2d 1043, 1075 (D.C. Cir. 1986) (same), *aff'd*, 484 U.S. 1 (1987) (per curiam).

236. *Din v. Kerry*, 718 F.3d 856, 860 (9th Cir. 2013), *cert. granted*, 135 S. Ct. 44 (2014); *Bustamante*, 531 F.3d at 1061–62; *Baker*, 909 F.2d at 645; *Allende v. Shultz*, 845 F.2d 1111, 1116 (1st Cir. 1988); *Burrafato*, 523 F.2d at 555; see also *Delgado*, *supra* note 53, at 66–67 (stating that the “practical effect of [*Bustamante* and *American Academy*] is an abandonment of the doctrine of consular absolutism”).

visa denial that implicates a U.S. citizen's protected liberty interests in marriage and family life.²³⁷ When the Supreme Court decides *Din*, it should follow these four courts of appeals, which allow a limited judicial review of a U.S.-citizen spouse's or family member's denied visa.

The First, Second, Ninth, and D.C. Circuits have broadly applied *Mandel*—first, by extending *Mandel* review to visa denials (rather than limiting review only to visa waiver denials as in *Mandel*), and second, by not explicitly limiting the scope of *Mandel* to only U.S. citizens' First Amendment claims.²³⁸ In *Bruno*, the D.C. Circuit broadly interpreted *Mandel* as holding that review applies when a U.S. citizen asserts a violation of *his or her constitutional rights* as a result of the noncitizen's visa denial.²³⁹ The D.C. Circuit did not limit its interpretation of *Mandel* to U.S. citizens raising First Amendment claims.²⁴⁰ Although the court ultimately found that the U.S.-citizen petitioners lacked standing because they did not assert a constitutional violation as a result of the noncitizen's visa denial,²⁴¹ its decision suggests that if the petitioners *had* asserted a valid violation of a fundamental right, the D.C. Circuit would have reviewed the noncitizen's visa denial.

The First and Second Circuits reached similar conclusions in *Baker* and *Burrafato*, respectively.²⁴² Although *Baker* involved only First

237. See *Din*, 718 F.3d at 860 (“Since *Mandel*, our Court and several of our sister circuits have exercised jurisdiction over citizens’ challenges to visa denials that implicate the citizens’ constitutional rights.”); *Bustamante*, 531 F.3d at 1062 (“Joining the First, Second, and D.C. Circuits, we hold that under *Mandel*, a U.S. citizen raising a constitutional challenge to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision.”).

238. See cases cited *supra* note 237; see also Burt Neuborne & Steven R Shapiro, *The Nylon Curtain: America’s National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 750–52 (1985) (suggesting that some lower courts have interpreted *Mandel* liberally).

239. See *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1163 (D.C. Cir. 1999) (interpreting *Abourezk* to hold that when a U.S.-citizen visa petitioner asserts a violation of his or her constitutional rights as a result of the Department of State’s visa denial, judicial review is “proper”).

240. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 428 n.25 (D.C. Cir. 1977) (interpreting *Mandel* as requiring the government to show a “facially legitimate and bona fide reason” for a visa refusal when there is a constitutionally protected interest involved).

241. See *Saavedra Bruno*, 197 F.3d at 1163–64 (“Unlike *Abourezk*, Saavedra’s American sponsors . . . asserted no constitutional claims. Furthermore, in our view, [Saavedra’s American sponsors do not] have standing to challenge the denial . . .”).

242. *Adams v. Baker*, 909 F.2d 643, 650 (1st Cir. 1990) (holding that there was in fact a facially legitimate and bona fide reason for denying the visa application at

Amendment rights of U.S. citizens,²⁴³ the court expressly stated that immigration decisions “based upon constitutional rights and interests of United States citizens” were at least subject to limited review.²⁴⁴ In doing so, the court implicitly rejected the notion that First Amendment claims are the only constitutional claims that allow for *Mandel* review. Likewise, the Second Circuit in *Burrafato* did not limit *Mandel*’s holding to only First Amendment claims. Rather, the court denied review in that case because of Second Circuit precedent that visa denials do not implicate spousal rights to marriage.²⁴⁵

In *American Academy*, the Second Circuit extended *Mandel* review to U.S. citizens asserting First Amendment claims over a consular officer’s visa denial.²⁴⁶ The Second Circuit, following the Ninth Circuit’s decision in *Bustamante*, rejected the government’s claim that *Mandel* review applies only to visa waivers and interpreted *Mandel* review as applying to a consular officer’s visa denial where a U.S. citizen asserts a constitutional claim.²⁴⁷ The Second Circuit distinguished *Burrafato* by stating that the court in that case did not reach the question of whether *Mandel* applied to visa denials because it found that the U.S.-citizen spouse lacked standing to assert her claim.²⁴⁸

In *Bustamante*, the Ninth Circuit became the first court of appeals to declare that a non-First Amendment claim can trigger *Mandel* review. Relying on First, Second, and D.C. Circuit precedent, the court interpreted *Mandel*’s holding to apply where a visa denial implicates any U.S. citizen’s constitutionally protected interests.²⁴⁹

issue); *Burrafato v. U.S. Dep’t of State*, 523 F.2d 554, 557 (2d Cir. 1975) (concluding the nonresident did not have standing to bring a claim in federal court).

243. *Baker*, 909 F.2d at 647.

244. *Id.* (emphasis added).

245. See *Burrafato*, 523 F.2d at 555 (explaining that the court precedent “foreclosed” the decision in the instant case).

246. *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 124 (2d Cir. 2009) (“We conclude that, where a plaintiff, with standing to do so, asserts a First Amendment claim to have a visa applicant present views in this country, we should apply *Mandel* to a consular officer’s denial of a visa.”); see also Margaret Laufman, Comment, *American Academy of Religion v. Napolitano*, 55 N.Y.L. SCH. L. REV. 1173, 1175 (2011) (arguing that the Second Circuit’s decision in *American Academy* “could provide the basis for courts to recognize a broader exception that would allow judicial review of visa denials that implicate any constitutional interest of U.S. citizens”).

247. See *Am. Acad. of Religion*, 573 F.3d at 124 (adding that “[t]he case law in the aftermath of *Mandel* favors such review”).

248. See *id.* at 124–25 (asserting that the Second Circuit has not addressed the question of whether *Mandel* review applies to visa denials).

249. *Bustamante v. Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008).

The court correctly relied on *Cleveland Board of Education v. LaFleur*, a substantive due process case recognizing the freedom of personal choice in marriage and family life, to find that a consular officer's visa denial implicated the U.S. citizen's liberty interest in her marriage and, thus, triggered *Mandel* review.²⁵⁰ Other federal courts have critiqued the *Bustamante* court for accepting the U.S. citizen's assertion of her liberty interest at face value.²⁵¹ This characterization of *Bustamante* is incorrect because the Ninth Circuit correctly relied on *Cleveland Board of Education v. Loudermill*,²⁵² a Supreme Court procedural due process decision, and held that "the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."²⁵³ In *Din*, decided five years after *Bustamante*, the Ninth Circuit appropriately rejected the government's argument that *Bustamante* was not good law because it was in conflict with D.C.

250. See *id.* at 1062 ("Freedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause." (citing *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–640 (1974))).

251. See, e.g., *Jathoul v. Clinton*, 880 F. Supp. 2d 168, 172 (D.D.C. 2012) (alleging that *Bustamante* does not apply because the Ninth Circuit in that case did not explain why the plaintiff's constitutional rights were actually implicated); *Udugampola v. Jacobs*, 795 F. Supp. 2d 96, 105–06 (D.D.C.) (stating that the physical separation of deportation does not diminish the constitutional right to marriage), *appeal dismissed*, No. 11-5215, 2011 WL 5903822 (D.C. Cir. Nov. 17, 2011). Despite these arguments, the court in *Bustamante* may have implicitly deemed unwarranted any explanation of why a U.S.-citizen spouse had a liberty interest in her marriage because it may have determined the existence of that liberty interest incontrovertible. The issue is not necessarily that the constitutional right is diminished, as the court in *Udugampola* argues, but rather that the government action impinges on the U.S. citizen's ability to consummate a marriage or reside in the same home as her foreign spouse. The U.S.-citizen petitioner's point is not that her right to marriage or to raise a family absolves as a result of the visa denial but that a visa denial could severely affect the result of the marriage, and because of that, *some* procedural protections should exist, even if a court ultimately determines that all the process due is a facially legitimate and bona fide reason.

252. 470 U.S. 532 (1985).

253. See *Bustamante*, 531 F.3d at 1062 (alteration in original) (quoting *Loudermill*, 470 U.S. at 541). In *Loudermill*, the Supreme Court determined that public employees who were terminated had a property interest in their employment and, thus, that they could not be terminated without the opportunity for a hearing or notice and an opportunity to respond. See *Loudermill*, 470 U.S. at 546. The plaintiffs in *Bustamante* similarly raised a procedural due process claim, and the Ninth Circuit determined that the Supreme Court's reasoning in *Loudermill*—which provides that when a liberty or property interest is at stake, some procedural protections should exist—also applied in the instant case. *Bustamante*, 431 F.3d at 106.

and Second Circuit precedent.²⁵⁴ The court in *Din* accurately asserted that a U.S.-citizen spouse's right to review is grounded in a broader right to "[f]reedom of personal choice in matters of marriage and family life."²⁵⁵

Despite refusing to strike down the doctrine of consular nonreviewability, the Supreme Court in *Mandel* signaled that a consular officer's decision was not absolute by allowing *some* review of a consular officer's decision when the denial implicated the First Amendment rights of the U.S.-citizen professors involved in the case.²⁵⁶ The decisions from the First, Second, Ninth, and D.C. Circuits demonstrate how federal courts have correctly interpreted *Mandel* to expand access to judicial review overall. By reviewing a consular officer's visa denial and not solely a visa waiver denial, these federal courts have expanded the grounds under which *Mandel* review applies. The First, Second, and D.C. Circuits' readiness to recognize a role for the judiciary in consular decisions where the constitutional interests of a U.S. citizen are at stake—beyond First Amendment claims—paved the way for the Ninth Circuit's decisions in *Bustamante* and *Din*.

Together, these cases demonstrate that the Supreme Court should not limit *Mandel* to First Amendment claims when other types of fundamental rights—such as the right to marriage, to raise a family, and the right to live with one's extended family members—are equally important. The court in *Bustamante* appropriately recognized that there are higher stakes involved when a consular officer's decision threatens a U.S. citizen's marriage. Moreover, *Bustamante* demonstrates that the doctrine of consular nonreviewability does not rigorously bind federal courts as it did in the 1970s when the Supreme Court initially decided *Mandel* and *Burrafato*. The lower courts' perpetual acknowledgment of *some* judicial responsibility over consular decisions, combined with decades of Supreme Court precedent guaranteeing the fundamental rights associated with marriage, raising a family, and living together as a family demonstrates that U.S. citizens should have an avenue for formal—

254. See *Din v. Kerry*, 718 F.3d 856, 860 n.1 (9th Cir. 2013) (dismissing the government's articulation of the liberty interest at stake in *Bustamante*), cert. granted, 135 S. Ct. 44 (2014).

255. See *id.* (alteration in original) (quoting *Bustamante*, 531 F.3d at 1062) (stressing that the liberty interest in *Bustamante* should not be interpreted as "the ability to live in the United State with an alien spouse").

256. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

even if limited—judicial review of their spouse’s or immediate family member’s visa denial.

B. A U.S. Citizen’s Rights Are Implicated by the Denial of His or Her Spouse’s Visa

In *Mandel*, the U.S.-citizen professors alleged that Mr. Mandel’s exclusion violated their First Amendment right of free speech and their Fifth Amendment due process rights. Neither the Supreme Court nor the lower court specifically addressed whether their holdings included all constitutionally protected rights (thereby triggering Fifth Amendment protections) or whether their holdings merely addressed the plaintiffs’ First Amendment claims. This ambiguity has contributed to federal courts’ divergent applications of *Mandel* review. Thus, courts are in conflict about whether a visa denial impinges on a U.S.-citizen plaintiff’s rights to marry and to raise a family and thus about whether a U.S. citizen can assert a Fifth Amendment due process violation claim as a result of the denial.

The Supreme Court should follow the Ninth Circuit and extend *Mandel* review to claims by U.S.-citizen spouses because the Supreme Court has long recognized marriage as a fundamental right and has held that government intrusions on an individual’s ability to enter into, preserve, or dissolve a marriage deserve judicial protection and constitutionally adequate procedures. When a consular officer denies a foreign spouse’s visa, the consular officer could prevent a U.S.-citizen spouse from consummating his or her marriage, establishing a home, and raising a unified family. While the denial of a visa may not prevent a couple from legally “entering” into a marriage, establishing a home abroad, or raising a child abroad, separation does make engaging in these activities together more difficult and could in fact pose a threat to other essential aspects of married and family life that the Supreme Court has identified as constitutionally protected. Moreover, even if a foreign family member of a U.S. citizen has been deemed a national security risk, some information should be revealed either to the foreign national or the U.S. citizen to understand the allegations against the individual.²⁵⁷

257. See, e.g., *Ibrahim v. Dep’t of Homeland Sec.*, No. C 06-00545 WHA, 2014 WL 6609111, at *16 (N.D. Cal. Jan. 14, 2014) (stating that government interference with certain fundamental rights and liberty interests merits some judicial responsibility, but also recognizing that “[d]ue process . . . is a flexible concept that varies with the particular situation” (alterations in original) (quoting *Zinermon v. Burch*, 494 U.S. 113, 127 (1990))). Thus, a court could determine that limited protections are due because a noncitizen spouse poses a threat to national security.

When the Supreme Court decided *Mandel*, the Court had amply upheld the liberty interests involved in marriage and family life. In 1923, the Supreme Court in *Meyer v. Nebraska* found that the rights to marry, to establish a home, and to raise a family were constitutionally protected interests.²⁵⁸ The Court recognized that the government could not infringe on these liberties in an arbitrary and unreasonable manner even if the purpose of the government's action was to protect the public interest.²⁵⁹ By declining a foreign spouse's visa, a consular officer is effectively impeding a U.S. citizen's opportunity to establish a home and raise a family in the United States. If the denial is based on legitimate and judicious reasons, then a U.S. citizen will have to bear the results of the denial. Unfortunately, a consular officer could deny a visa based on false information, a mistake, or pretext, and neither the U.S.-citizen petitioner nor the visa applicant will have a fair opportunity to contest the allegations or appeal the denial.²⁶⁰ When a denial is based on classified information, as in many no-fly list cases, a U.S. citizen, on behalf of his or her spouse, should be given the opportunity to review that information—even on a sealed or limited basis—to give the U.S. citizen and the applicant an opportunity to rebut the allegations against the applicant.²⁶¹

There are currently no independent administrative or judicial oversight provisions in place to ensure that a consular officer does not act arbitrarily or unreasonably.²⁶² As one scholar notes, this raw, absolute power raises the potential for abuse, particularly in the wake of September 11th, when administrative officials, especially those charged with immigration duties, are responsible for guarding the country against terrorist threats.²⁶³ The Court in *Meyer* specifically

258. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

259. *Id.* at 399–400.

260. See Zas, *supra* note 17, at 587–88 (explaining that the doctrine of consular nonreviewability applies “even if the consul acts capriciously, arbitrarily, or maliciously”).

261. Cf. *Ibrahim*, 2014 WL 6609111, at *19–21 (denying challenges to visa denials under the state secrets privilege but concluding that a consular officer erred in not advising the noncitizen applicant of her right to apply for a waiver). In *Ibrahim*, the court stated that when an executive branch official makes a “reviewable, concrete adverse action” or a nondiscretionary action, then a court would be able to adjudicate the extent to which it could provide the plaintiff access—in a sealed or classified manner—to the information that exists against her. *Id.* at *21. However, the court determined that a decision on a visa denial is unreviewable. *Id.*

262. See Zas, *supra* note 17, at 588 (disparaging the absolute power granted to consular officers). See generally Nafziger, *supra* note 16, at 16–25, 95–102 (analyzing existing visa review procedures and proposing a new review mechanism).

263. See Zas, *supra* note 17, at 589 nn.98–99 (highlighting Justice Jackson's concurrence in *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146–47 (1948), which

cautioned that government actions could not infringe on the liberties to establish a home and raise a family even under the pretense of protecting the public interest.²⁶⁴ Relatedly, the Court in *Skinner*, in striking a down a forced sterilization law, reasoned that public safety was not a compelling reason to limit even the “most elementary notions of due process.”²⁶⁵ Therefore, absent a countervailing national interest and even given the heightened responsibilities of consular officials aimed at protecting national security, consular officers should not have absolute power to dictate the private lives of U.S. citizens with strong ties to foreign nationals.²⁶⁶

The D.C. Circuit’s reasoning in *Swartz*, the Second Circuit’s decision in *Burrafato*, and the Sixth Circuit’s decision in *Almario* misconstrue the rights implicated by the removal or exclusion of a foreign spouse. These circuits interpret the U.S. citizen’s right as the right to have his or her spouse reside or remain in the United States or as the right to live in the United States with a foreign spouse.²⁶⁷ These interpretations are incorrect. In deciding *Din*, the Supreme Court should not interpret the right at stake as the U.S. citizen’s right to have his or her spouse live in the United States as the Sixth Circuit did in *Almario*, nor should it brazenly disregard the constitutionally protected interests implicated by a family member’s exclusion or removal from the United States, as the Second Circuit did in *Burrafato*.²⁶⁸ Rather, the Supreme Court should interpret the right at

cautioned against “decisions made in the heat of a war atmosphere because patriotic fervor makes moderation unpopular”).

264. See *Meyer*, 262 U.S. at 399–400 (stating that courts have the responsibility and authority to evaluate a legislature’s determination of the scope of the police power).

265. See *Skinner v. Oklahoma*, 316 U.S. 535, 545 (1942) (Stone, J., concurring) (conceding that the government may need to occasionally act to protect the public interest but should still protect an individual’s liberty interests as well).

266. See *Zas*, *supra* note 17, at 589 (intimating that low ranking consular officials may be “negatively influence[d]” by national security prerogatives and may have “more incentives to deny, rather than issue a visa”).

267. See *Almario v. Att’y Gen.*, 872 F.2d 147, 151 (6th Cir. 1989) (holding that a U.S. citizen does not have a right to have her alien spouse reside in the U.S.); *Burrafato v. U.S. Dep’t of State*, 523 F.2d 554, 555 (2d Cir. 1975) (affirming the rule in the circuit that citizens do not have a constitutional right that is infringed when his or her alien spouse is deported); *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) (same).

268. See *Almario*, 872 F.2d at 151 (citing *Burrafato*, 523 F.2d at 555) (declaring that a U.S. citizen lacks a right to have a foreign spouse remain in the United States); *Burrafato* 523 F.2d at 555–57 (citing *Swartz*, 254 F.2d 338) (stating that a U.S. citizen’s constitutional rights are not violated by the removal of her spouse). These cases

stake as the U.S. citizen's right to marry an individual of his or her choice, to preserve his or her marriage, and to raise a family. The Supreme Court should instead affirm the Ninth Circuit's decision in *Din*, which noted that the U.S. citizen's right is predicated on a more general right to "[f]reedom of personal choice in matters of marriage and family life."²⁶⁹ This reasoning parallels the Supreme Court's decision in *Griswold*, which acknowledged that private marital decisions are entitled to constitutional protection.²⁷⁰ In *Swartz*, the decision on which *Almario* and *Burrafato* rely, the D.C. Circuit reasoned that removal of a foreign spouse from the United States would not in any way interfere with the couple's ability to enter into or remain in a legal union.²⁷¹ While that may be true, the Supreme Court in *Griswold* interpreted the fundamental right to marriage more broadly: the Court held that there is a fundamental right to decisions made *while* married and not merely a fundamental right to *entering into a marriage*.²⁷² Thus, the Supreme Court has determined that government actions infringing on decisions made *while* married or that affect elements of married and family life are constitutionally protected. Those decisions may become more unstable when the government action—perhaps without a proffered reason—separates a couple across borders.

After *Mandel*, the Supreme Court continued to afford even greater protections to an individual's decisions involving marriage and family matters. In 1974, the Court in *LaFleur* affirmed decades of Supreme

offer weak precedents. *Almario*, more recently decided, relies on *Burrafato*, which relies on *Swartz*, a case decided fourteen years *before Mandel*.

269. See *Din v. Kerry*, 718 F.3d 856, 860 n.1 (9th Cir. 2013) (alteration in original) (quoting *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008)) (rebutting the government's argument that *Bustamante* provides an alien spouse with a right to live in the U.S.), *cert. granted*, 135 S. Ct. 44 (2014); see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society." (alteration in original) (internal quotation marks omitted)).

270. See *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) ("Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole private realm of family life it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." (quoting *Poe v. Ullman*, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting))).

271. *Swartz*, 254 F.3d at 339.

272. *Griswold*, 381 U.S. at 485–86.

Court precedent and recognized a liberty interest in matters related to marriage and family life, such as the decision to bear a child.²⁷³ Likewise, in 1978, the Supreme Court in *Zablocki* broadly interpreted the right to marry.²⁷⁴ The Court equated the right to marry with bearing and raising children and maintaining family relationships and held that governmental decisions that unreasonably interfere with these rights deserve scrutiny because these relationships are the foundation of U.S. society.²⁷⁵ More recently, in 2013 in *Windsor*, the Supreme Court acknowledged that there are “mundane [and] profound” elements of married and family life that should not be burdened.²⁷⁶ The Court further suggested that “diminishing the stability and predictability of basic personal relations [such as marriage]” erodes the significance of those institutions.²⁷⁷ These decisions demonstrate that the Supreme Court has broadly interpreted the fundamental right to marriage and family life to encompass those choices made within the marriage, those involved with entering or dissolving a marriage, and those involved with bearing and raising children.

A consular officer’s decision would undoubtedly impinge on the foregoing choices. Beyond preventing a U.S. citizen from residing in the United States with her foreign spouse, an unfounded, erroneous, or pretextual visa denial would compromise a U.S. citizen’s decisions about bearing and raising children as well as other intimate familial and marital decisions. While these decisions can still be made across borders, the separation of two individuals who are unable to make both mundane and profound decisions in person makes the discussions, decisions, and the process of raising a family far more difficult. The preceding cases highlight the constitutional

273. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974).

274. *See Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (striking down a state statute that required noncustodial parents to pay past due child support payments before the noncustodial parents could obtain a marriage license).

275. *Id.* at 386; *see also LaFleur*, 414 U.S. at 639 (rejecting a school board’s policy requiring pregnant teachers to take maternity leave during the final months of pregnancy because it overly burdened the teachers’ freedom of choice in marriage and family decisions).

276. *See United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013) (listing some benefits of married life such as those available for healthcare purposes and responsibilities such as supporting each other during educational endeavors).

277. *See id.* at 2694 (stating that DOMA produces an unpredictable “differentiation” for same-sex married couples—where their marriage is recognized by a state, but not by the federal government—that derogates the choices the Constitution is designed to protect).

protections afforded to couples and the family, and these protections should not yield to the plenary power doctrine merely because immigration law governs the foreign spouse's ability to reside within the United States.²⁷⁸ As Justice Marshall and Justice Brennan forcefully articulated in their dissent in *Mandel*, the line of cases supporting the plenary power doctrine did not implicate U.S. citizens' rights.²⁷⁹ Those decisions, dealing exclusively with the rights of noncitizens, now encourage absolute discretion by consular officers and prevent federal courts from engaging in review when a visa denial clearly implicates the rights of a U.S. citizen. This approach is contradictory to longstanding Supreme Court precedent and the Supreme Court should no longer follow such precedent.

C. *A U.S. Citizen's Rights Are Implicated by the Denial of His or Her Immediate or Extended Family Member's Visa*

For decades the Supreme Court has supported the fundamental right of family members to live with each other, much like it has protected individuals' fundamental right to marriage. In 2013, the Ninth Circuit, citing to *Landon v. Plasencia*, correctly stated that the "right to live with and not be separated from one's immediate family is 'a right that ranks high among the interests of the individual' and that cannot be taken away without procedural due process."²⁸⁰ The Ninth Circuit's interpretation of this right accurately applies the Supreme Court's decisions in *Moore v. City of East Cleveland* and *Landon v. Plasencia*, which recognize that a U.S. citizen has a fundamental right to live with extended family members and which implicitly recognize that separation from or the inability to rejoin

278. See Cox, *supra* note 59, at 391–92 (“Immigration law regularly injures citizens by expelling or excluding people with whom citizens associate. . . . [A]ssociational interests represent one well-established interest of American citizens that immigration policy can affect in legally cognizable ways.”).

279. See *Kleindienst v. Mandel*, 408 U.S. 753, 782 (1972) (Marshall, J., dissenting) (arguing that the plenary power precedents upon which the *Mandel* majority relied were distinguishable from *Mandel* because none of those cases involved the rights of U.S. citizens). Justice Marshall further emphasized that where “the rights of Americans are involved, there is no basis for concluding that the power to exclude . . . is absolute.” *Id.* at 282–83 (adding that the courts should not “blindly defer” to the legislative and executive branches when personal liberty is at issue”).

280. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); see also *supra* text accompanying notes 215–22 (discussing *Ching*, where the court, applying the *Mathews v. Eldridge* balancing test, reasoned that the U.S.-citizen spouse had a substantial interest at stake in remaining with his foreign-citizen wife).

family members infringes on such right.²⁸¹ When the Supreme Court considers whether a U.S. citizen's rights are implicated by the denial of his or her family member's visa, it should follow its reasoning in *Moore* and *Plasencia* as well as the Ninth Circuit's reasoning in *Ching*. The D.C. Circuit's decision in *Swartz* and the Second Circuit's decision in *Burrafato* are not reliable precedents: the D.C. Circuit decided *Swartz* before the Supreme Court decided *Mandel*, and the Second Circuit decided *Burrafato* before the Supreme Court had developed its jurisprudence declaring that marriage, decisions made while married, and decisions to raise a family are constitutionally protected interests. For the reasons that follow, the Supreme Court should acknowledge that a U.S. citizen has a constitutionally protected interest in living, reuniting with, and not being separated from foreign family members.

First, courts have consistently found that separation from family members can result in a legally cognizable injury. In *Fiallo*, the Supreme Court recognized that the INA's classification of "parent" and "child" that prevented U.S.-citizen fathers from claiming their illegitimate children as a "child" for purposes of a visa petition impinged on the U.S. citizen's rights.²⁸² Although the Court ultimately applied a limited rational basis review to uphold the INA's classification, the Court nonetheless recognized that the U.S. citizen's rights were implicated such that they had standing to seek *some* review.²⁸³ This is precisely what the Court did in *Mandel*: the Court recognized that the noncitizen visa beneficiary lacked standing but that because U.S. citizens' rights were implicated, the U.S.-citizen petitioners *could*, in fact, seek *some* review over the noncitizen's visa waiver denial.²⁸⁴ A citizen's constitutionally protected interest in remaining with a family member, therefore, should not be insulated

281. Compare *Plasencia*, 459 U.S. at 34 (citing *Moore* and finding that Mrs. Plasencia had a right to rejoin her immediate family), with *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013) (discussing *Plasencia* and identifying this right as "the right to live with and not be separated from one's immediate family" (emphasis added)).

282. See *Fiallo v. Bell*, 430 U.S. 787, 788–90, 794–95 (1977) (granting standing to U.S.-citizen fathers).

283. See *id.* at 795 (referring to *Mandel*, the Court held that there was a limited role for judicial scrutiny in congressional and executive decisions related to immigration law).

284. See *Cox*, *supra* note 59, at 412–16 (describing the cases in which citizens have asserted constitutional challenges against immigration laws).

from constitutional scrutiny merely because the immigration action targets the noncitizen.²⁸⁵

Second, as noted in the preceding section, the D.C. Circuit's decision in *Swartz* is not reliable precedent. The court in *Swartz* argued that deportation did not affect a U.S.-citizen wife's constitutional rights because spousal separation did not destroy the legal basis of a marriage but only affected the physical conditions of the marriage.²⁸⁶ This reasoning is contradictory to the Supreme Court's reasoning in *Moore* and *Mandel*. In *Moore*, the Supreme Court recognized that government interference with the physical conditions of family relations, such as restrictions on living arrangements, impinges on an individual's fundamental rights.²⁸⁷ In these instances, the Court in *Moore* argued that "the usual judicial deference to the legislature is inappropriate."²⁸⁸ Analogously, in *Mandel*, the government stressed to the Court that the U.S. citizens' First Amendment rights were not implicated because the professors would still have access to Mr. Mandel's views in other media forms.²⁸⁹ The government urged the Court to disregard the physical separation that would result from the professor's visa waiver denial.²⁹⁰ The Court flatly rejected the government's argument, finding that there are "particular qualities inherent in sustained, face-to-face-debate, discussion and questioning."²⁹¹ Thus, the Court in *Mandel* recognized that the physical separation of the U.S.-citizen petitioners and the foreign visa applicant burdened the U.S. citizens' constitutionally protected interests.

A consular officer's visa denial would instantly prevent a U.S. citizen and a foreign family member from living together. Although this may be temporary, the result may be permanent if the visa is ultimately never approved, such as when a consular officer finds that there is an alleged terrorism-related ground of inadmissibility that

285. *Id.* at 390–91, 412 (finding that courts have regularly recognized that immigration laws can interfere with a U.S. citizen's legally cognizable rights and stressing that immigration decisions should not be sequestered from constitutional adherence).

286. *See Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) (rationalizing that the marriage itself would continue even though the noncitizen spouse would not live in the U.S.).

287. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499–501 (1977) (plurality opinion).

288. *Id.* at 499.

289. *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972).

290. *Id.*

291. *See id.* (adding that the Court was unwilling to hold that the existence of alternative means of access to Mandel's teachings was sufficient to overcome the U.S. citizens' First Amendment rights to hear him speak in person).

applies. The U.S. citizen is then either forced to leave the United States to live with her foreign family members abroad or to live without them in the United States, a result that could lead to economic and emotional hardship for the U.S. citizen. As mentioned in the previous section, if the visa denial is a result of a judicious and reasonable government action, then the U.S. citizen will have to bear the consequences. If, however, the visa denial is based on frivolous or erroneous facts, then the current system does not allow for any form of independent review, and the U.S. citizen may be arbitrarily deprived of a long protected liberty interest. The Supreme Court in *Moore* and *Mandel*, in contrast to the D.C. Circuit in *Swartz*, recognized that physical separation burdens a U.S. citizen's constitutionally protected interest, even if the legal relationship between the parties remained unchanged.

Third, substantive and procedural due process protections have greatly expanded since the D.C. Circuit decided *Swartz* in 1958 and the Second Circuit decided *Burrafato* in 1975. Notably, the Supreme Court decided *Moore* and subsequent cases recognizing that family members have a fundamental right to live with each other nearly two decades after *Swartz*.²⁹² Even more important, at the time of *Swartz*, the Court had not decided *Mandel*, but federal courts have continued to cite *Swartz* as if it were binding authority on review of visa denials. Additionally, the Second Circuit decided *Burrafato*, another case courts rely on to decline foreign spouses and family members review of a visa denials, only three years after *Mandel*.²⁹³ At that time, few courts had applied *Mandel*.

CONCLUSION

By denying a U.S. citizen's spouse's or family member's visa, a single consular officer can force a U.S. citizen to live without this family member or force the U.S. citizen to abdicate his or her life in the United States to live with this family member abroad. As a result of the doctrine of consular nonreviewability, a U.S. citizen does not have an avenue to seek independent review of this denial. In *Mandel*, the Supreme Court carved out an exception to consular nonreviewability when it granted U.S. citizens standing to assert a constitutional claim

292. See *Moore*, 431 U.S. at 499 (plurality opinion) (emphasizing that courts must carefully evaluate the importance of a governmental interest when the government's action intrudes on familial living decisions).

293. See Laufman, *supra* note 247, at 1187 n.120 (adding that substantive due process was a new concept when the Second Circuit decided *Burrafato*).

against an immigration official's action. By identifying this exception, the Court implicitly asserted that a consular officer's decision is not wholly immune from a constitutional challenge. Although the Court provided little guidance about the breadth of its decision, over the past four decades, federal courts have interpreted and altered the *Mandel* test to fill the Court's void.

The Ninth Circuit in *Bustamante* and *Din* provides sound guidance for federal courts reviewing a visa denial of a U.S. citizen's family member. Implicitly acknowledging the increasing interconnectedness of people across borders and the burdens familial separation places on a U.S. citizen while explicitly identifying a U.S. citizen's fundamental right to personal choice in matters of marriage and family life, the Ninth Circuit correctly determined that the denial of a foreign spouse's visa merits more review. The Ninth Circuit's reasoning in *Bustamante* and *Din* is buttressed by decades of Supreme Court precedent protecting married couples and families. The First, Second, and D.C. Circuits' decisions finding that *Mandel* review applies when a visa denial implicates a U.S. citizen's constitutional rights also support a broader interpretation of *Mandel*.

When a visa denial implicates a U.S. citizen's fundamental right to marriage or family life, as in the case of immediate relative and family-sponsored immigrant visas, a limited judicial review of visa denials should apply. Extending judicial review to all visa applicants is inefficient and contrary to long-established precedent limiting the protections afforded to noncitizens seeking admission into the United States. Review of immediate relative and family-sponsored immigrant visas, moreover, does not mean that a visa applicant is entitled to enter the United States or that a U.S. citizen has a right to have his or her spouse enter the United States. Review of these visas merely allows a U.S.-citizen petitioner to receive the due process protections that the Supreme Court has recognized exist when a government action infringes on the fundamental rights of a U.S. citizen. Longstanding Supreme Court decisions have affirmed the traditional role the family plays in U.S. society, and these decisions have protected against unwarranted government actions that burden individual decisions involving marriage and family matters. The Supreme Court should follow the Ninth Circuit's lead and permit *Mandel* review for immediate relative and family-sponsored visa denials. In these visa denials, a U.S. citizen has substantial interests at stake, and courts should grant that U.S. citizen as much or more review than U.S.-citizen professors who wish to invite a foreign speaker to a conference in the United States.