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CHAPTER 1

Nationality, Citizenship, and Immigration

A. NATIONALITY AND CITIZENSHIP

1. *Hizam*: Proof of Citizenship Issued Erroneously

As discussed in *Digest 2013* at 6-14, the United States appealed a district court judgment ordering the State Department to reissue a Consular Report of Birth Abroad (“CRBA”) that was issued in error. *Hizam v. Clinton*, No. 12-3810 (2d Cir.). On March 12, 2014, the U.S. Court of Appeals for the Second Circuit issued its decision on appeal, reversing the district court. * *Hizam v. Kerry*, 747 F.3d 102 (2d Cir. 2014). Excerpts follow (with footnotes omitted) from the opinion of the Court of Appeals for the Second Circuit.

* * * *

There is no dispute that the consular officer issued the CRBA and passport to Hizam in error. Citizenship of a person born abroad is determined by law in effect at the time of birth. *Drozdz v. Immigration and Naturalization Serv.*, 155 F.3d 81, 86 (2d Cir.1998). At the time of Hizam’s birth, the child of a United States citizen born outside of the United States was eligible for citizenship if the parent was present in the United States for at least 10 years at the time of the child’s birth. 8 U.S.C. § 1401(g) (Supp. III 1980). However, the law had changed by the time Hizam’s father sought a CRBA on Hizam’s behalf. The amended law required the parent to be present in the United States for just five years. 8 U.S.C. § 1401(g). It appears that the consular officer erroneously applied the five-year rule in granting Hizam a CRBA.

* Editor’s note: On December 5, 2014, the Court of Appeals issued an order granting the parties’ joint motion seeking remand of this matter to the district court for presentation and entry of a stipulation and order of settlement and dismissal.

* * * *

There are “two sources of citizenship, and two only—birth and naturalization.” *United States v. Wong Kim Ark*, 169 U.S. 649, 702, 18 S.Ct. 456, 42 L.Ed. 890 (1898). A person born outside of the United States becomes a citizen at birth only if the circumstances of birth satisfy the statutory requirements in effect at the time of application. *See Rogers v. Bellei*, 401 U.S. 815, 830, 91 S.Ct. 1060, 28 L.Ed.2d 499 (1971); *Drozdz v. INS*, 155 F.3d 81, 86 (2d Cir.1998). At the time of Hizam’s application, persons born outside of the United States to a citizen parent and a non-citizen parent acquired United States citizenship at birth only if, at that time, the citizen parent had been physically present in the United States or its outlying possessions for at least ten years. 8 U.S.C. § 1401(g) (1982), *amended by* Pub L. 99–653 (1986). At the time of Hizam’s birth, his father had only been present in the United States for seven years. The parties agree Hizam did not meet the statutory requirements for citizenship at the time of his birth.

When the State Department issues a CRBA it does not grant citizenship—it simply certifies that a person was a citizen at birth. Issuing or revoking a CRBA does not change the underlying circumstances of an individual’s birth and does not affect an individual’s citizenship status. *See* 8 U.S.C. § 1504(a) (Cancellation of a CRBA “shall affect only the document and not the citizenship status of the person in whose name the document was issued.”). Revoking Hizam’s CRBA did not change his citizenship status. Instead, it withdrew the proof of a status which he did not possess. *See United States v. Ginsberg*, 243 U.S. 472, 474–75, 37 S.Ct. 422, 61 L.Ed. 853 (1917) (“[E]very certificate of citizenship must be treated as granted upon condition that the government may challenge it ... and demand its cancellation unless issued in accordance with [statutory] requirements.”).

I. Section 1503(a).

Hizam sought relief pursuant to 8 U.S.C. § 1503(a), which provides, in relevant part, as follows:

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States.

8 U.S.C. § 1503(a). While Hizam’s complaint sought “a declaration of U.S. nationality ... to remedy a denial of rights and privileges by the Department of State,” the district court ultimately determined Hizam was seeking a “declaratory judgment finding that the State Department exceeded its authority when it cancelled his CRBA and an order compelling its return.” *Hizam*, 2012 WL 3116026 at *5.

We hold that the district court exceeded the scope of authority granted to it pursuant to Section 1503(a) by ordering the State Department to return Hizam’s CRBA. “A suit under section 1503(a) is not one for judicial review of the agency’s action.” *Richards v. Sec’y of State*, 752 F.2d 1413, 1417 (9th Cir.1985). “Rather, section 1503(a) authorizes a de novo judicial determination of the status of the plaintiff as a United States national.” *Id.* The plain language of

Section 1503(a) authorizes a court only to issue a judgment declaring a person to be a national of the United States. Hizam, by his own admission, cannot satisfy the statutory requirements necessary to have acquired citizenship at birth, and thus cannot be declared a citizen or national of the United States. Once the district court concluded it could not declare Hizam a U.S. national, its inquiry should have ended.

Instead, the district court attempted to distinguish between declaring Hizam a citizen and returning his citizenship documents. In the district court's view, its order served as "an order that the State Department comply with Section 2705, which barred the agency from re-opening its prior adjudication of Mr. Hizam's status or revoking his citizenship documents based on second thoughts." *Hizam*, 2012 WL 3116026, at *8. But nothing in the language of Section 1503(a) allows the district court to provide a plaintiff with such a remedy. And at bottom, the record evidence did not allow the district court to provide Hizam with the only remedy referenced in Section 1503(a): a declaration that Hizam is a U.S. national.

* * * *

2. ***Gonzalez*: Lack of Derivative Citizenship for Child Without Legal Status**

On July 18, 2014, the United States submitted its brief in the U.S. Court of Appeals for the Fifth Circuit in *Gonzalez v. Holder*, an appeal from the Board of Immigration Appeals' affirmance of an immigration judge's order deporting Mr. Gonzalez, denying his claim to U.S. citizenship derived from his father's naturalization. Mr. Gonzalez was fourteen and was living with his father in the United States when his father naturalized. However he had entered the United States at age seven and remained without lawful immigration status. The United States brief argues that the immigration judge and Board properly construed former section 321(a) of the INA to deny Mr. Gonzalez's claim to citizenship based on the fact that Mr. Gonzalez did not "begin[] to reside permanently in the United States while under the age of eighteen years" because he did not enter the United States as a lawful permanent resident ("LPR"). Excerpts follow (with footnotes and citations to the record omitted) from the U.S. brief, which is available in full at www.state.gov/s/l/c8183.htm.

* * * *

A nationality claim is a purely legal question that this Court reviews *de novo*. *Alwan v. Ashcroft*, 388 F.3d 507, 510 (5th Cir. 2004). Citizenship statutes should be narrowly construed, as it is a petitioner's burden to establish that he meets all of the statutory requirements for citizenship. *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 394-95 (5th Cir. 2006).

II. The Board Properly Determined That Mr. Gonzalez Did Not Derive Citizenship Under Former INA § 321(a) Based on His Father’s Naturalization Because he Did Not Acquire Lawful Permanent Resident Status While Under Eighteen Years of Age.

A. The Board’s Construction of Former INA § 321(a), as Examined in *Matter of Nwozuzu*, is Correct.

Former Section 321(a) provides, in relevant part, that, in order to derive United States citizenship from the naturalization of an alien parent, a foreign-born child must, among other things:

resid[e] in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized . . . or *thereafter begin[] to reside permanently* in the United States while under the age of eighteen years.

8 U.S.C. § 1432(a)(5) (repealed) (emphasis added). In *Matter of Nwozuzu*, the Board concluded that the phrase “begins to reside permanently in the United States while under the age of eighteen years” meant that the alien must have acquired [Legal Permanent Resident] LPR status while under the age of eighteen. 24 I&N Dec. at 612-16. In support of this interpretation, the Board referred to the definitions for “permanent” and “residence” in the INA, and determined that the concept of “residing permanently” included the implied requirement that the residence be lawful, as an alien could not reside in the United States permanently if such residence was not lawful. *Id.* at 612-13. In addition, the Board noted that this interpretation was bolstered by the similarity between the phrase “begins to reside permanently” in former INA § 321(a), 8 U.S.C. § 1432(a), and the definition of “lawfully admitted for permanent residence” in INA § 101(a)(20), 8 U.S.C. § 1101(a)(20). *Id.* at 613-14. Finally, the Board explained that the second clause of the provision was not surplusage, because the phrase “clarifie[d] that an alien [did] not have to be a lawful permanent resident at the time his or her parent naturalize[d] to qualify for derivative citizenship” *Id.* at 614. Rather, “as long as the alien [was] admitted as a lawful permanent resident before he or she turn[ed] eighteen, citizenship may be derived from a naturalized parent,” even if the parent naturalized while the alien child was outside the United States. *Id.* Therefore, the Board concluded that the second clause was “not surplusage [because it] is necessary to explain the time by which the lawful permanent residence requirement of section 321(a)(5) must be satisfied.” *Id.* In the present case, the Board properly applied the reasoning of *Matter of Nwozuzu* and concluded that, because Mr. Gonzalez did not acquire LPR status while he was under the age of eighteen years, he could not qualify for derivative citizenship under former INA § 321(a)(5), 8 U.S.C. § 1432(a)(5).

Notably, the Ninth and Eleventh Circuit Courts of Appeals have also interpreted the phrase “begins to reside permanently in the United States while under the age of eighteen years” to require an alien to have acquired LPR status in order to derive citizenship from a naturalized parent. See *United States v. Forey-Quintero*, 626 F.3d 1323, 1326-27 (11th Cir. 2010); *Romero-Ruiz v. Mukasey*, 538 F.3d 1057, 1062-63 (9th Cir. 2008). In reaching its decision, the Ninth Circuit held that, “in order to obtain the benefits of derivative citizenship, a petitioner must not only establish permanent residence, but also demonstrate that he was residing in some lawful status.” *Romero-Ruiz*, 538 F.3d at 1062. The court explained that:

A plain reading of the statute evidences the requirement that the child be residing pursuant to lawful admission either at the time of the parent’s naturalization or at some subsequent time [after the naturalization] while under the age of [eighteen]. The phrase

“or thereafter begins to reside permanently” alters only the timing of the residence requirement, not the requirement of legal residence.

Id. The court rejected the petitioner’s assertion that an individual could meet the statute’s requirements merely by residing in the United States (with or without legal status) at the time of the naturalization, noting that this interpretation “would render the first clause—requiring legal permanent residence—superfluous.” *Id.* Because the petitioner already was residing in the United States at the time of his mother’s naturalization but had not been lawfully admitted as a permanent resident, the Ninth Circuit agreed with the Board that the petitioner could not qualify for derivative citizenship under former INA § 321(a), 8 U.S.C. § 1432(a). *Id.* at 1063.

In *Forey-Quintero*, the Eleventh Circuit noted that it would defer to the Board’s “three-member decision” in *Nwozuzu* if the Court were reviewing that decision directly. *Forey-Quintero*, 626 F.3d at 1326 n.3. The Court nevertheless agreed that the phrase “reside permanently” meant that “a dwelling place [could not] be ‘permanent’ under the immigration laws if it [was] unauthorized,” and that “requiring anything less than the status of lawful permanent resident would essentially render the first clause of subsection [five] ‘mere surplusage.’” *Id.* at 1327 (quoting *Matter of Nwozuzu*, 24 I&N Dec. at 613) (alterations added).

In Mr. Gonzalez’s case, there is no dispute that he did not have any lawful immigration status prior to turning eighteen, and that he entered the United States without inspection. Interpreting the statutory subsection as he suggests would have the perverse effect of essentially “negat[ing] the lawful permanent resident requirement of the first clause,” *Matter of Nwozuzu*, 24 I&N Dec. at 614, because any alien who is not a lawful permanent resident at the time of the qualifying parent’s naturalization would only need to demonstrate “some lesser form of residence [whether lawful or not] . . . before the alien reached the age of [eighteen],” *id.*, combined with some evidence of an intent (whether subjective or objective under Mr. Gonzalez’s interpretation) to reside here permanently, in order to automatically derive United States citizenship. As the Board properly found, this could not have been Congress’s intent. *Id.*; see also *Forey-Quintero*, 626 F.3d at 1327; *Romero-Ruiz*, 538 F.3d at 1062-63. Therefore, the Court should not disturb the agency’s proper determination that Mr. Gonzalez failed to qualify for derivative citizenship under former INA § 321(a), 8 U.S.C. § 1432(a).

B. The Court Should Decline to Follow the Second Circuit’s Decision in *Nwozuzu v. Holder*, as the Court’s Reasoning Misconstrues Legislative History, Obviates Statutory Language, and Ignores Supreme Court Precedent Requiring Strict Interpretations of Citizenship Statutes.

In support of his assertion that he was not required to obtain LPR status before turning eighteen in order to derive citizenship through his father under prior INA § 321(a)(5), 8 U.S.C. § 1432(a)(5), Mr. Gonzalez relies on the decision of the U.S. Court of Appeals for the Second Circuit in *Nwozuzu v. Holder*, *supra*, which overruled the Board’s precedent decision in *Matter of Nwozuzu*, insofar as Second Circuit law is concerned. Respondent submits that the Second Circuit’s analysis is not persuasive authority for several reasons. First, in concluding that it was unnecessary for the petitioner to obtain lawful permanent residence in order to “begin[] residing permanently in the United States,” the Second Circuit relied primarily on Congress’s express inclusion of such a requirement in the first clause of former INA § 321(a)(5), 8 U.S.C. § 1432(a)(5), and the omission of a similar requirement in the second. See *Nwozuzu*, 726 F.3d at 327-28. The court’s conclusion, however, failed to take into account the entire history of the statute. The court recounted how the provision originated from a 1790 statute, noting that, prior to 1907, the law was unclear as to when a child living abroad at the time of his parent’s

naturalization would derive citizenship and be deemed a citizen. See *id.* at 329-30. The court further noted that the law enacted in 1907 created the language at issue in this case, declaring that citizenship “shall begin at the time such minor child begins to reside permanently in the United States.” *Id.* (quoting the Citizenship Act of 1907, Ch. 2534, § 5, 34 Stat. 1228, 1229). As the court observed, Congress “did not . . . significantly alter” this language when enacting former INA § 321(a)(5), 8 U.S.C. § 1432(a)(5), in 1952, see *Nwozuzu*, 726 F.3d at 331, even while it added the express lawful permanent residency requirement for children who were present in the United States at the time of the parents’ naturalizations. The second clause of INA § 321(a)(5), 8 U.S.C. § 1432(a)(5), thus originated amid concerns about children who began to permanently reside in the United States after their parents naturalized, not individuals like Mr. Gonzalez, who entered the United States without inspection prior to his father’s naturalization.

Contrary to the conclusions drawn by the Second Circuit, as well as the interpretation urged by Mr. Gonzalez, the statute’s history underscores the need for an individual’s residence in the United States to be lawful under the second clause of former Section 321(a)(5) in order to derive citizenship. In its analysis of the direct predecessor of the current statute, the United States Supreme Court—using the very language of former section 321(a)(5)—declared that an individual denied lawful admission “never ha[d] begun to reside permanently in the United States. . . .” *Kaplan v. Tod*, 267 U.S. 228, 230 (1925). Congress’s continued use of this phrase shows that it agreed with the existing judicial interpretation of the phrase. See *Bowen v. Massachusetts*, 487 U.S. 879, 892, 896, 900-01 (1988) (noting “the well-settled presumption that Congress understands the state of existing law when it legislates”). Indeed, the Senate Report on the enactment of the Immigration and Nationality Act in 1952 explicitly noted that “[l]awful permanent residence has always been a prerequisite to derivative citizenship.” S. Rep. No. 81-1515, at 707 (1950), available at <http://www.ilw.com/immigrationdaily/news/2008,0701-senatereport81-1515part4of5.pdf>; see also *Matter of M-*, 3 I&N Dec. 815, 816 (BIA 1949) (noting that a “lawful admission for permanent residence [was] required in order for [a minor alien] to establish that she derived citizenship” from her parent under the immigration laws in existence in 1936). Furthermore, in the successor version of the statute, Congress has reiterated the requirement of lawful permanent residence. See INA § 320(a)(3), 8 U.S.C. § 1431(a)(3) (maintaining a “lawfully admitted for permanent residence” criterion for all foreign-born children to derive citizenship based on their parents’ naturalizations). All of this supports the Board’s conclusion, contrary to the Second Circuit’s, that Congress’s use of different terminology in the two clauses of former 8 U.S.C. § 1432(a)(5) was a direct result of the terminology used in the predecessor statutes, which consistently reflected a requirement of lawful permanent residence for all minors whose parents had naturalized in order to derive citizenship. See *Matter of Nwozuzu*, 24 I&N Dec. at 614-15 (noting cases that reviewed the predecessor provisions to the former 8 U.S.C. § 1432(a)(5) that required, “at the very least, an alien . . . to be lawfully admitted to this country before he or she could be considered to be dwelling or residing here permanently”); *Matter of C-*, 8 I&N Dec. 421, 422 (BIA 1959) (“Until one is admitted in conformity with the immigration laws, no rights of citizenship can be acquired.”); see also *id.* (“Lawful permanent residence has always been a prerequisite to derivative citizenship.”) (citing S. Rep. No. 81-1515, at 707 (1950)).

Second, the court’s and Mr. Gonzalez’s construction of the second clause of the provision undermines and renders superfluous the express lawful permanent residence requirement set forth in the provision’s first clause. See *Matter of Nwozuzu*, 24 I&N Dec. at 614; cf. *Romero-Ruiz*, 538 F.3d at 1062 (recognizing the problem of rendering the first clause superfluous);

Forey-Quintero, 626 F.3d at 1327 (same). As noted previously, Mr. Gonzalez entered the United States without inspection and was unlawfully present in the United States before his father's naturalization. By allowing individuals in Mr. Gonzalez's situation to derive citizenship merely by creating (under his construction) any intent to permanently reside in the United States, or (under the Second Circuit's construction) an "official objective manifestation" of an intent to permanently reside after the qualifying parent naturalizes, and without having to legalize their unlawful presence, Mr. Gonzalez's and the Second Circuit's interpretation obviates the first clause of former INA § 321(a). *Nwozuzu*, 726 F.3d at 328-29 (quoting *Ashton v. Gonzales*, 431 F.3d 95, 99 (2d Cir. 2005)).

Finally, in reaching its decision, the Second Circuit disregarded Supreme Court decisions requiring strict interpretation of citizenship statutes. The court properly stated that "doubts should be resolved in favor of the United States and against the claimant," *Nwozuzu*, 726 F.3d at 332 (internal quotations and citations omitted), but failed to consider the important policies underlying the rule of strict construction. In fact, "[a] [p]etitioner has the burden of proving that he qualifies for naturalization, and he must do so in the face of the Supreme Court's mandate that [the Courts] resolve all doubts 'in favor of the United States and against' those seeking citizenship." *Bustamante-Barrera*, 447 F.3d at 394-95 (quoting *Berenyi v. Dist. Dir.*, INS, 385 U.S. 630, 637 (1967)). Indeed, it is the Constitution and the democratically elected branches of government that define this country's citizenry:

An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

INS v. Pangilinan, 486 U.S. 875, 884 (1988) (quoting *United States v. Ginsberg*, 243 U.S. 472, 474 (1917)); accord *Fedorenko v. United States*, 449 U.S. 490, 507 (1981); see also *United States v. Cervantes-Nava*, 281 F.3d 501, 503 (5th Cir. 2002) ("Any right to citizenship must be granted by Congress . . ."). Narrow construction of citizenship statutes not only assures that Congress's naturalization authority is not usurped, but also reduces the chance for conflicts in interpretation among the courts and the need for litigation where (as here) bright-line rules result.

Certainly, adopting an "official objective manifestation of intent to reside permanently in the United States" standard as the Second Circuit has done, or any subjective intent standard as Mr. Gonzalez proposes, as the test for satisfying the second clause of former 8 U.S.C. § 1432(a)(5) is going to lead to a myriad of interpretations in both the administrative and federal courts. But an interpretation that both clauses require a residence pursuant to a lawful permanent admission prior to the age of eighteen is consistent with the overall statutory language, the statutory history, the interpretation of both the Board and two of three circuit courts to have addressed it, and the well-settled principle of strict interpretation of citizenship statutes.

* * * *

Accordingly, because the Board properly determined that, as a matter of law, Mr. Gonzalez did not derive citizenship from his father's naturalization in 1999, this Court should not disturb the Board's correct construction of statute and its denial of Mr. Gonzalez's claim to derivative citizenship. In addition, because there is no genuine issue of material fact regarding Mr. Gonzalez's nationality, the Court need not transfer his case to the U.S. District Court for a new hearing on his nationality claim.

* * * *

On October 21, 2014, the Court of Appeals for the Fifth Circuit issued its opinion, agreeing with the United States that the Board’s denial of Mr. Gonzalez’s claim to citizenship was correct. Excerpts follow from the opinion of the Court of Appeals. *Gonzalez v. Holder*, No. 14-60378 (5th Cir. 2014).

* * * *

On appeal, Gonzalez argues that the BIA misinterpreted § 1432(a)(5). He contends that we should interpret the second clause as having “a continuing or lasting . . . place of general abode in the U.S., even though it is one that [might] be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.” He argues that “permanent” is defined in a manner that does not require that the relationship be “lawful from inception.” Under that interpretation, Gonzalez would meet the requirement in § 1432(a)(5) because he has resided in the United States since 1992.

Alternatively, Gonzalez contends that we should adopt the Second Circuit’s reasoning in *Nwozuzu*. He satisfies the Second Circuit’s interpretation, he argues, because of the I-130 petition filed on his behalf by his father. We decline to decide whether the Second Circuit or the BIA has the correct interpretation of § 1432(a)(5) because Gonzalez does not qualify for derivative citizenship under either interpretation. We also reject Gonzalez’s claim that § 1432(a)(5) does not require an individual to be lawfully present in the country.

a. BIA Interpretation

As Gonzalez concedes, under the BIA’s interpretation, he is not entitled to derivative citizenship under § 1432. The BIA interprets § 1432 as requiring that minors have lawful permanent resident status before receiving derivative citizenship. *Matter of Nwozuzu*, 24 I. & N. Dec. at 616. It is undisputed that Gonzalez did not become a lawful permanent resident until the age of twenty-three. Section 1432 requires that a minor satisfy all eligibility requirements before “the age of eighteen years.” Because Gonzalez’s citizenship claim fails under the BIA’s interpretation, we therefore proceed to evaluate his claim under the Second Circuit’s interpretation.

b. Second Circuit Interpretation

The Second Circuit held that the second clause in § 1432 “requires something less than a lawful admission of permanent residency.” *Nwozuzu*, 726 F.3d at 328. Gonzalez’s argument that he satisfies this test is unavailing. Gonzalez did not exhibit “an objective and official manifestation” of an intent to remain in the country. See *id.* at 334. In *Nwozuzu*, the petitioner’s father filed an I-130 petition on his behalf, and the petitioner filed an application for adjustment of his legal status before he turned eighteen. *Id.* at 325, 334. The court also noted that *Nwozuzu*’s siblings and parents were naturalized. *Id.* at 334. Conversely, although Gonzalez’s father filed an I-130 form on his behalf when he was fourteen, no further action was taken until Gonzalez applied for an adjustment of status at the age of twenty-three. As we have previously noted, an undocumented individual “who has acquired unlawful or illegal status (either by overstaying a visa or illegally crossing the border without admission or parole) cannot relinquish that illegal status until his application for adjustment of status is approved.” *United States v. Elrawy*, 448

F.3d 309, 314 (5th Cir. 2006) (emphasis added). Gonzalez failed to take even the initial step of applying for adjustment of status while he was under the age of eighteen. We are not persuaded that he presented “some objective official manifestation of” a permanent residence. See *Nwozuzu*, 726 F.3d at 333 (citation and internal quotation marks omitted).

c. Gonzalez’s Interpretation

Gonzalez also urges his own interpretation of § 1432, which extends the Second Circuit’s construction of the statute. He contends that an individual may “reside permanently” as contemplated by the statute although the individual does not have legal status. Rather, the person need only have “protection from being forced to leave at any time.” He further argues that a person’s entry into the United States need not be lawful at its inception. Under this interpretation, Gonzalez contends that he resided permanently once his father filed an I-130 petition because he could not be required to leave after that point. We are not persuaded.

It is not readily apparent that the phrase “reside permanently” contains a legality requirement. The phrase “reside permanently” is not defined in the INA; however, “permanent” is defined as “a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law.” 8 U.S.C. § 1101(a)(31). The INA defines “residence” as “the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.” *Id.* § 1101(a)(33).

Conversely, “lawfully admitted for permanent residence” is defined in the INA as “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” *Id.* § 1101(a)(20). “[I]n accordance with law” can be read as only modifying the dissolution of the relationship, not the type of relationship. See *Ashton*, 431 F.3d at 98 (“Nothing in the definition of § 1101(a)(31) suggests that to be ‘permanent,’ a ‘relationship’ must be ‘in accordance with law.’”).

We need not decide, however, whether “in accordance with law” modifies the entire definition of “permanent” because Gonzalez entered the country illegally and at no time before his eighteenth birthday did he take action to ensure that his presence was lawful. When construing precursors to § 1432, the Supreme Court has reasoned that an individual must lawfully enter the United States to qualify for derivative citizenship. See *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (“The appellant could not lawfully have landed in the United States. . . and until she legally landed ‘could not have dwelt within the United States’ . . . Still more clearly she never has begun to reside permanently in the United States. . . .”); *Zartarian v. Billings*, 204 U.S. 170, 175 (1907) (noting that the individual “was debarred from entering the United States . . . and, never having legally landed, of course could not have dwelt within the United States”). We acknowledge that the Second Circuit has described these cases as “‘unhelpful’ in interpreting [§ 1432] of the INA.” *Nwozuzu*, 726 F.3d at 330 n.6. However, the Second Circuit ultimately refrained from deciding whether “reside permanently” contains “an implicit ‘lawful entry’ requirement.” *Id.* Moreover, the court reasoned that *Kaplan* and *Zartarian* involved situations where the minor fell within the category of individuals excluded from being admitted into the country. *Id.* The court noted that, in contrast, the petitioner in *Nwozuzu* legally entered the country. *Id.*

We therefore hold that Gonzalez did not reside permanently in the country as contemplated by § 1432 because of his unlawful entry and status until the age of twenty-three. The fact that he has lived in the country since his entry at age seven does not remedy his unlawful entry. Gonzalez’s attempt to distinguish Kaplan is unavailing. He argues that the individual in Kaplan was excluded from entering the country whereas he entered the United States at the age of seven, albeit illegally, and has remained in the country since that time. See *Kaplan*, 267 U.S. at 230. We are not persuaded by his distinction. Similar to the individual in *Kaplan*, Gonzalez was not lawfully permitted to enter the country—a fact Gonzalez concedes. Thus, the Court’s analysis would appear to also apply to Gonzalez.

* * * *

Because Gonzalez is not entitled to derivative citizenship under § 1432, we also deny his motion to stay and transfer his case. See *Chambers v. Mukasey*, 520 F.3d 445, 451 (5th Cir. 2008) (stating that a stay of removal is warranted if the petitioner proves, *inter alia*, “a likelihood of success on the merits”) (internal quotation marks omitted); see also 8 U.S.C. § 1252(b)(5)(B) (stating that a transfer is warranted if “the court of appeals finds that a genuine issue of material fact about the petitioner’s nationality is presented”). We reiterate that we decline to decide whether the proper interpretation of § 1432 is that of the Ninth and Eleventh Circuits or the Second Circuit because Gonzalez’s claim fails under either approach.

* * * *

3. ***Chacoty*: Definition of Residence under the Immigration and Nationality Act**

On October 10, 2014, the United States filed a brief in U.S. District Court for the District of Columbia in support of its motion to dismiss an action brought by several individuals whose claims to U.S. citizenship had been rejected in various ways (either passport or CRBA applications were denied, or previously granted CRBAs were cancelled). *Chacoty v. Kerry*, No. 1:14-764-KBJ (D.D.C. 2014). The U.S. brief argues that the proper vehicle for challenging citizenship determinations is through an action pursuant to 8 U.S.C. § 1503. Further, the brief argues that some of the claims are barred by the statute of limitations. Finally, the brief describes why the statutory residence requirement for parent/s of a child born abroad has been interpreted and applied reasonably to deny citizenship rights in these cases. Under the Immigration and Nationality Act (“INA”), at least one of the parents of an applicant seeking a citizenship record (passport or CRBA) must have had a residence in the United States prior to the applicant’s birth. 8 U.S.C. § 1401(c) (“INA 301(c)”); 7 Foreign Affairs Manual (“FAM”) § 1133.3-1(a)(2). Excerpts follow (with footnotes omitted) from the U.S. brief, which is also available in full at www.state.gov/s/l/c8183.htm.

* * * *

As a threshold matter, Plaintiffs fail to state a claim under the [Administrative Procedure Act or] APA because Congress expressly provided an alternative adequate remedy under the INA for any person denied a right or privilege as a national of the United States. See 8 U.S.C. § 1503. Because Plaintiffs seek review of the Department’s denial of Plaintiffs’ claims to rights or privileges to United States citizenship, they must challenge the Department’s decisions under the INA’s review provisions and may not proceed under the APA. See *Hassan v. Holder*, 793 F. Supp. 2d 440, 445-46 (D.D.C. 2011).⁵

A. Alternative Adequate Remedy Under 8 U.S.C. § 1503

The APA provides a general cause of action to “person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,” 5 U.S.C. § 702, but judicial review is only available where “there is no other adequate remedy in a court,” 5 U.S.C. § 704. The limitation on judicial review shows that “Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action.” *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). In determining if an adequate remedy exists, the D.C. Circuit focuses on whether a statute provides an independent cause of action or an alternative review procedure, see *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004), which exists where a statute affords an opportunity for *de novo* district court review, see *Garcia v. Vilsack*, 563 F.3d 519, 522 (D.C. Cir. 2009). Where an adequate remedy is available, the plaintiff lacks a cause of action under the APA to challenge an agency’s alleged error. See *Washington Legal Foundation v. Alexander*, 984 F.2d 483, 486 (D.C. Cir. 1993); see also *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (plaintiff’s failure to allege a proper cause of action under the judicial review provisions of the APA warrants dismissal of the complaint for failure to state a claim).

Plaintiffs seek relief under the APA based on the Department’s alleged refusal “to follow and correctly apply federal law” and for “wrongfully applying the unfounded and unsubstantiated updates to the FAM.” But Plaintiffs’ claims under the APA must fail because they have another adequate remedy under 8 U.S.C. § 1503, which provides for a *de novo* judicial determination of whether Plaintiffs are United States citizens. See *Kahane*, 700 F. Supp. at 1165. It is established law in this circuit that no APA claim may lie “where a statute affords an opportunity for *de novo* district court review” of the contested agency action. See *Garcia*, 563 F.3d at 522 (citation omitted). The express right of action for *de novo* review under the INA mandates that Plaintiffs pursue this statutory remedy as an alternative to the default APA review. See *Washington Legal Foundation*, 984 F.2d at 486 (plaintiff is required to pursue an implied statutory remedy). Thus, Plaintiffs’ APA claims must be dismissed for failure to state a cause of action under the APA. See *Hassan*, 793 F. Supp. 2d at 445-46.

* * * *

Plaintiffs may argue that they are not required to proceed under 8 U.S.C. § 1503 because they are bringing a system-wide challenge to the manner in which the Department interprets the residence requirement under INA 301(c). It is unclear whether Plaintiffs intend to pursue a system-wide claim, see Second Amend. Compl. ¶¶ 63, 70, 86-87, but such a challenge is nevertheless precluded by the express review provision under 8 U.S.C. § 1503. Where Congress provides for a specific review regime, an allegedly aggrieved party cannot circumvent the

statute's exclusive review provisions by dressing up his claim as a system-wide challenge to an agency's administration of a program. See *Fornaro v. James*, 416 F.3d 63, 67-69 (D.C. Cir. 2005). In this case, Congress channeled all challenges to denials of citizenship claims through individual declaratory judgment actions for a de novo determination of whether the aggrieved party is a United States citizen. See *Rusk*, 369 U.S. at 373; *Kahane*, 700 F. Supp. at 1165. An aggrieved party must challenge a discrete, final agency action to seek relief under 8 U.S.C. § 1503, see *Parham v. Clinton*, 374 F. App'x 503, 504 (5th Cir. 2010), and the relief is limited to a declaration that the aggrieved party is a United States citizen, see *Hizam*, 747 F.3d at 108. Thus, the only remedy available to Plaintiffs under the governing statute is an individualized *de novo* determination regarding each of their citizenship statuses, which precludes a system-wide challenge to the manner in which the Department adjudicates applications for citizenship documentation at the administrative level.

* * * *

C. Failure to State a Claim Under the APA

Even if the remaining Plaintiffs' APA claims were not precluded by the alternative adequate remedy requirement, see 5 U.S.C. § 704, they still fail to state a cause of action under the APA because they do not present any plausible claim that the Department's denials of their applications for CRBAs were arbitrary and capricious or otherwise contrary to law, see 5 U.S.C. § 706(a)(2).

* * * *

2. *Plaintiffs Do Not Allege Sufficient Facts*

With the exception of Kayla and Chana Sitzman, Plaintiffs fail to allege any particularized facts relating to their or their parents' time in the United States or whether they (or one of their parents) had a residence in the United States before the birth of their children outside the United States. ...

The statute provides that a person born abroad to United States citizen parents must show that at least one parent "has had a residence in the United States or one of its outlying possessions, prior to the birth of such person" to establish United States citizenship. 8 U.S.C. § 1401(c); 7 FAM § 1133.3-1(a)(2). Congress defined the term "residence" in the INA as "the place of general abode," which means a person's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). Because the statute distinguishes between physical presence and residence, see 8 U.S.C. §§ 1401(c), (g), the Department has determined, consistent with longstanding Department policy, that a person's residence in the United States is not established solely by the length of time a person spends in a place, but necessarily implicates "the nature and quality of the person's connection to the place," which requires consular officers to apply a "fact-specific test" to the circumstances in each application for a CRBA. See Dep't of State Cable, 12 State 3735, ¶ 2.

Plaintiffs challenge the Department's interpretation as inconsistent with the statutory definition of residence, see Second Amend. Compl. ¶¶ 43, 52, 63, 72, but they fail to allege any facts that arguably demonstrate they had a residence in the United States before the birth of their children overseas, *id.* ¶¶ 2-20, 30, 41-44. Although the government disputes Plaintiffs' reading of the statutory definition, even if the controlling definition were beyond dispute, Plaintiffs fail to marshal sufficient facts to show that they fall within the definition of residence. ...

3. *The Department's Interpretation Controls*

Unlike the other Plaintiffs, the Sitzmans might allege sufficient facts for a claim under the APA based on their exhibits, ... but their claims nevertheless fail as a matter of law because they cannot show that the Department's interpretation of the statute is unreasonable. See 5 U.S.C. § 706(a)(2); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 709 (D.C. Cir. 2008) (agency's interpretation controls as long as it is reasonable). Thus, the Court should dismiss Plaintiffs' APA claims under Rule 12(b)(6). See *Marshall County Health Care Authority*, 988 F.2d at 1226-27.

In matters of statutory interpretation, the Court applies the two-part test under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The first step of this familiar inquiry is considering "the text, structure, purpose, and history of an agency's authorizing statute" to determine whether a provision reveals congressional intent about the precise question at issue. *Hearth, Patio & Barbecue Ass'n v. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013) (internal quotation marks omitted). If the Court cannot readily divine Congress's clear intent, it must defer to the agency's interpretation of the statute so long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

The *Chevron* framework controls in this case because the Department acted pursuant to an express delegation of authority in issuing its interpretation through the consular cable and corresponding FAM sections. See Dep't of State Cable, 12 State 3735. Congress delegated to the Department the responsibility to determine the nationality of persons outside the United States, including establishing regulations and taking other actions necessary to carry out this authority. See 8 U.S.C. § 1104(a). ... The delegation of authority under 8 U.S.C. § 1104(a) indicates that Congress intended the Department to fill in the interstices of the statute with interpretive decisions having the force and effect of law, which decisions warrant *Chevron* deference. See *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1229 (D.C. Cir. 2007).

Even if the controversy in this case did not turn on the Department's interpretation in the consular cable and the FAM guidance, at least two of the Plaintiffs' citizenship claims were resolved by the Deputy Assistant Secretary's formal adjudication through a hearing on the record. See 22 C.F.R. §§ 51.71(a)-(c); Second Amend. Compl. ¶ 49; ECF Nos. 2-1, 2-2. Because the Department announced its interpretation through the Deputy Assistant Secretary after a formal hearing on the record, the *Chevron* framework controls the evaluation of the Department's statutory interpretation. ...

(a) *The Statute Clearly Distinguishes Residence and Physical Presence*

Before addressing the Department's interpretation of the ambiguous aspects of the definition of residence, the Plaintiffs' initial argument that physical presence in the United States alone is sufficient to establish a residence under INA 301(c) ... is easily defeated by the plain meaning of the statute. Although the statutory definition of residence is ambiguous in several respects, on the issue of physical presence in relation to residence, the statute clearly precludes Plaintiffs' position. As the Department explained in its cable to all consular posts, the statute distinguishes between physical presence and residence, see 8 U.S.C. §§ 1401(c), (g), which indicates that Congress intended to distinguish the two concepts. See Dep't of State Cable, 12 State 3735, ¶ 7. The distinction that the Department elaborated is well recognized by the Courts in the context of the INA. See *United States v. Arango*, 670 F.3d 988, 997 (9th Cir. 2012); *De Rodriguez v. Holder*, 724 F.3d 1147, 1151 (9th Cir. 2013). Because Congress did not use the term "physical presence" as a requirement for establishing citizenship under INA 301(c), as it had done in other contexts, the legislature intended "residence" under INA 301(c) to mean something more than simply being physically present in the United States. See *Dean v. United*

States, 556 U.S. 568, 573 (2009) (“when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”). Thus, Congress’s distinction between residence and physical presence undercuts Plaintiffs’ reading of the term residence as equivalent to physical presence alone.

(b) *The Remaining Elements of the Residence Definition Are Ambiguous*

Setting aside the clear distinction between physical presence and residence under the INA, which defeats Plaintiffs’ claims to citizenship, their additional argument that the statute is unambiguous regarding the remaining elements of the residence definition fails. Congress left an ambiguity for the Secretary to resolve in administering the statute based on the legislature’s open-ended use of the term “residence” as “principal, actual dwelling place in fact” to be further determined by the objective facts in each particular case.

Under the INA, a person born abroad to two married United States citizen parents must show that at least one parent “has had a residence in the United States or one of its outlying possessions, prior to the birth of such person” to establish United States citizenship. 8 U.S.C. § 1401(c). Congress defined the term “residence” in the INA as “the place of general abode,” which means a person’s “principal, actual dwelling place in fact, without regard to intent.” 8 U.S.C. § 1101(a)(33). This definition of residence and the stated congressional purpose in adopting the definition only establish that Congress rejected the common law concept of “domicile” in determining a person’s residence. See *Arango*, 670 F.3d at 997. Under the common law, a domicile is the person’s place of residence accompanied with positive proof of an intention to remain there for an unlimited time. See *Mitchell v. United States*, 88 U.S. 350, 352 (1874); *Shafer v. Children’s Hospital Society*, 265 F.2d 107, 112-13 (D.C. Cir. 1959). Because “intent” cannot be a factor in determining residence under the INA, Congress meant to displace the general common law concept of domicile, which indicates that the legislature left it to the Department to determine the permutations of the definition through the empiric process of administration by applying the broad statutory definition to the facts of each individual case. See *Board v. Hearst Publications*, 322 U.S. 111, 124-131 (1944); cf. *Christ the King Manor v. HHS*, 730 F.3d 291, 306 (3d Cir. 2013) (an agency’s application of law to facts is reviewed under the Chevron framework).

Stripped of the intent requirement, the statute nevertheless mandates that a “residence” is determined in terms of a person’s “principal, actual dwelling place in fact.” Congress did not further qualify the scope of “residence” beyond directing the agency to determine the facts surrounding a person’s dwelling place, which renders the term’s connotation ambiguous because the qualities constituting its significance are left open. Congress did not address the issue of what type of relationship to the United States is sufficient to establish a residence, nor did Congress direct the agency to consider specific factors in determining whether a person has established a dwelling place in the United States. See 8 U.S.C. § 1101(a)(33). The statute is silent about these relevant issues, and this lack of clarity regarding the precise connotation of the term “residence” indicates that Congress left an ambiguity for the agency to resolve. See *White Stallion Energy Center v. EPA*, 748 F.3d 1222, 1243 (D.C. Cir. 2014) (ambiguity arises from a statutory phrase’s two possible connotations); *Port of Seattle v. FERC*, 499 F.3d 1016, 1032 (9th Cir. 2007) (same).

Plaintiffs intimate that the statute clearly allows a person to establish a residence by his or her mere physical presence in the United States as a visitor. ... But as the Department explained in its cable to all consular posts, the statute distinguishes between physical presence and residence, see 8 U.S.C. §§ 1401(c), (g), which indicates that Congress did not intend to conflate

the two concepts. See Dep't of State Cable, 12 State 3735, ¶ 7. The distinction that the Department elaborated is well recognized by the Courts in the context of the INA. See *Arango*, 670 F.3d at 997; *De Rodriguez v. Holder*, 724 F.3d 1147, 1151 (9th Cir. 2013). Congress's distinction between residence and physical presence, as recognized by the Secretary, undercuts Plaintiffs' reading of the term residence as equivalent to physical presence alone, but it still leaves unanswered the question of what relationship a person must have to the United States for purposes of establishing a "principal, actual dwelling place in fact."

The only certainty that the statutory definition provides, based on the text and legislative history, is that Congress intended to direct the agency to make a fact-specific inquiry into a person's relationship to a place in the United States to determine whether he or she established a residence or principal dwelling place, and that residence is something more than physical presence. Congress's definition is a codification of judicial construction of the term "residence" as elaborated in *Savorgnan v. United States*, 338 U.S. 491 (1950). See *Arango*, 670 F.3d at 997.

...

(c) *The Department's Interpretation Is Reasonable*

Because there is an ambiguity in the statute for the Secretary to resolve in determining the citizenship of individuals outside the United States, the Court must uphold the Secretary's resolution of the ambiguity as long as the agency's interpretation is not arbitrary and capricious. See *Judulang v. Holder*, 132 S. Ct. 476, 484 n.7 (2011); *Agape Church v. FCC*, 738 F.3d 397, 410 (D.C. Cir. 2013). Under this "deferential standard," *Illinois Public Telecom. Ass'n v. FCC*, 752 F.3d 1018, 1024 (D.C. Cir. 2014), a "reasonable" interpretation is good enough under *Chevron* step two, see *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 709 (D.C. Cir. 2008). Even if the Plaintiffs had a "better" reading of the statute, which they do not, the Secretary's interpretation still controls as long as it is reasonable. See *Gentiva Healthcare Corp. v. Sebelius*, 723 F.3d 292, 295 (D.C. Cir. 2013).

The Department's cable to all consular posts, see Dep't of State Cable, 12 State 3735, and the Deputy Assistant Secretary's interpretation through a formal adjudication, see ECF No. 2-2, are reasonable because they take into account the statutory distinction between physical presence and residence and advance the legislative purpose of ensuring that a residence is tied to a person's objective relationship to the United States. See *Alaska Dep't of Health & Social Serv. v. Centers for Medicare & Medicaid Serv.*, 424 F.3d 931, 942 (9th Cir. 2005) (agency's interpretation that is consistent with the text and purpose of the statute warrants *Chevron* deference).

Based on the text and structure of the statute, the Department determined that a residence requires something more than mere physical presence in the United States. The Department's cable and the Deputy Assistant Secretary's final administrative decision reiterated that a significant distinction between the two concepts turns on the manner in which a person spends time in the United States. See Dep't of State Cable, 12 State 3735, ¶ 8. The distinction is reasonable because it stems from Congress's use of the two concepts in different contexts under the INA, see 8 U.S.C. §§ 1401(c), (g), which is well-recognized by the courts, see *Arango*, 670 F.3d at 997; *De Rodriguez*, 724 F.3d at 1151. Since Congress recognized that a residence is distinct from physical presence, the Department reasonably determined that a residence is not established solely by the length of time a person spends in a place, but necessarily implicates "the nature and quality of the person's connection to the place," which requires consular officers to apply a "fact-specific test" to the circumstances in each application for a CRBA. Dep't of State Cable, 12 State 3735, ¶ 2.

The Department's interpretation also takes into account Congress's purpose in adopting the definition of residence as a person's "principal, actual dwelling place in fact." Congress's definition is a codification of judicial construction of the term "residence," as elaborated in *Savorgnan v. United States*, 338 U.S. 491 (1950). See *Arango*, 670 F.3d at 997. In that case, the plaintiff departed the United States to accompany her foreign national husband in Italy where she lived with him for four years. *Savorgnan*, 338 U.S. at 506. Although the plaintiff may have intended to return to the United States, she established a residence overseas because her "principal dwelling place" or "place of general abode" was in Italy where she established a home with her husband. *Id.* Because the Court determined that the plaintiff's home was in Italy, she no longer resided in the United States. *Id.*

The Department's interpretation of a "residence" tracks the analysis in *Savorgnan*. Underscoring the irrelevance of a person's intent, the Secretary advised consular officers that "[r]esidence is not a state of mind that travels with a person," but depends on the "nature and quality of a person's connection" to the United States. Dep't of State Cable, 12 State 3735, ¶ 2. Just as the *Savorgnan* Court reasoned, see 338 U.S. at 505, the Department re-affirmed that the person's wishes and reasons for being in the United States have no bearing on the essential question, but turn on whether the person in fact established a principal dwelling place in the United States where the person lived and conducted normal daily activities, as opposed to a mere sojourn or visit to the United States, see Dep't of State Cable, 12 State 3735, ¶¶ 3-4. Like the guiding analysis in *Savorgnan*, the Department determined that a person can show a residence if he or she had a home at some point in time in the United States. *Id.* Thus, the Department's interpretation is reasonable because it comports with the legislative purpose in adopting the definition of residence, as reflected in *Savorgnan*.

Moreover, the Department's interpretation is consistent with the established connection between a residence and a home. See Restatement (First) of Conflict of Laws § 13 (1934). A home is "a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place." *Id.* The concept of a home as a "dwelling place" tracks Congress' use of these terms in defining a residence as a "principal, actual dwelling place in fact." 8 U.S.C. 1101(a)(33). Moreover, the concept of a home turns on a consideration of a number of objective facts in point of a person's relationship to a place, see Restatement (First) of Conflict of Laws § 13, comment a, which involves the same focus on objective facts for determining residence under the INA, see *Savorgnan*, 338 U.S. at 505. The connection of a residence with a home also respects Congress's directive to exclude considerations of intent, or the common law definition of domicile, because a person may have more than one home or dwelling place in addition to a domicile. See Restatement (First) of Conflict of Laws § 12, comment b, § 24, comment a(2).

Finally, the plain language of the Department's cable, and the plain language of the FAM, shows a clear directive to exclude considerations of intent from the determination of residence. See Dep't of State Cable, 12 State 3735, ¶ 2; 7 FAM 1133.5(a)-(b). As such, Plaintiffs' contention that the Department impermissibly imported an intent requirement into the definition of residence... is undercut by the Department's explicit directive and its focus on the objective facts in each particular case. The Department's interpretation does not rely in any way on a person's subjective motives or state of mind, which is consistent with the statutory exclusion of an intent element in the governing definition. See 8 U.S.C. § 1101(a)(33); *Savorgnan*, 338 U.S. at 505. Thus, Plaintiffs' allegation that the Department's interpretation is outside the bounds of the statute fails.

4. *The FAM Codifies a Longstanding Department Interpretation*

Plaintiffs also allege that the interpretation of “residence” under INA 301(c) in the FAM has not risen to the level of Department policy or guidance because various consulates are not following the FAM. . . . Based on the supposed discrepancy in interpretations at various consular posts, Plaintiffs appear to allege that the Department’s interpretation is inconsistent and not entitled to any deference. This argument fails for two reasons.

First, the FAM provisions relating to the meaning of “residence” under INA 301(c) reflect a longstanding interpretation carried over from the Department’s prior interpretation of similar language in the predecessor statute. See 7 FAM 1134.3-2(a) (updated April 1, 1998). The Department has always interpreted the meaning of “residence” and “place of general abode” to exclude visits to the United States. *Id.* The Department referred to this longstanding interpretation when it issued the cable further elaborating the meaning of residence under INA 301(c), see Dep’t of State Cable, 12 State 3735, ¶ 2, and it further stated that the guidance “does not constitute in any respect a change in interpretation,” *id.* ¶ 1. Thus, Plaintiffs’ argument that the FAM provisions interpreting INA 301(c) represent a change in policy fails.

Second, the FAM provisions reflect the Department’s further elaboration of its longstanding policy, which it transmitted through a cable to all consular officers. See Dep’t of State Cable, 12 State 3735; 7 FAM § 1133.5. By statute, the Secretary determines the citizenship of persons outside the United States, see 8 U.S.C. § 1104(a), and the Secretary delegated to consular officers the authority to execute the Department’s interpretations and directives through the adjudication of applications for CRBAs, see 22 C.F.R. §§ 50.2, 50.7. Even if Plaintiffs are correct that some consular officers refuse to follow the Department’s interpretation of the statute or the corresponding FAM provisions, their refusal would at most reflect impermissible conduct outside the scope of the consular officers’ authority. The Department is not bound by the actions of subordinate employees acting outside the scope of their authority. See *Saulque v. United States*, 663 F.2d 968, 976 (9th Cir. 1981). Nor is the Department bound to uphold, adopt, or repeat errors made by subordinate employees who misinterpret the law.

* * * *

Because the Department’s reasonable interpretation of the statute controls, Plaintiffs cannot rely on any decisions or recommendations that are inconsistent with the Department’s official interpretation and its longstanding policy. Plaintiffs cannot show that the Department’s interpretation is arbitrary and capricious or that any particular agency decision following the Department’s interpretation in their cases was inconsistent with the statute, and as such, they fail to state a claim as a matter of law under the APA. See 5 U.S.C. § 706(a)(2).

* * * *

4. **Policy Change Regarding Children Born Abroad Through Assisted Reproductive Technology (“ART”)**

On January 31, 2014, the U.S. Department of State issued new policy guidance to all diplomatic and consular posts regarding citizenship of children born abroad through the

use of assisted reproductive technology (“ART”). 14 State 10952. Prior to the new policy, only genetic mothers were able to transmit citizenship and immigration benefits to children born abroad. Under the new policy, gestational mothers who are also the legal parent of the child will be treated the same as genetic mothers for the purposes of citizenship and immigration benefits. Excerpts follow from the cable sent to all diplomatic and consular posts. On October 28, 2014, the Department of Homeland Security’s U.S. Citizenship and Immigration Services (“USCIS”) issued a policy alert (PA-2014-09) explaining the new policy relating to the use of ART, noting that the policy was developed by USCIS and the Department of State in collaboration. The USCIS policy alert (not excerpted herein) is available at www.uscis.gov/policymanual/Updates/20141028-ART.pdf.

* * * *

2. Transmission of Citizenship at Birth via Genetic or Gestational U.S. Citizen Legal Mothers: The Department of State and the Department of Homeland Security are now interpreting relevant U.S. law to permit acquisition of U.S. citizenship at birth based upon a genetic and/or gestational relationship to a U.S. citizen legal mother at the time and place of birth. See examples in paragraph 6.

3. Transmission After Birth under the Child Citizenship Act: Both departments are further interpreting the Immigration and Nationality Act (INA) Sections 101(c), 320, and 322 (8 U.S.C. Sections 1101(c), 1431, and 1433), such that a “parent” includes a genetic or gestational legal parent, and a “child” includes the child of a genetic or gestational parent who is also a legal parent at the time of the child’s birth. This interpretation allows transmission of citizenship after birth by a U.S. citizen gestational, legal mother who is not the genetic mother of the child to whom she gave birth.

4. Immigration of Children of Gestational, Legal Mothers: Under the new interpretation, INA Section 101(b) (8 U.S.C. Section 1101(b)) treats a child as being born “in wedlock” under INA Section 101(b)(1)(A) when the genetic and/or gestational parents are legally married to each other at the time of the child’s birth and both parents are the legal parents of the child at the time and place of birth. A “child legitimated” and a “legitimizing parent or parents” in INA Section 101(b)(1)(C) includes a gestational mother who is also the legal mother of the child.

The term “natural mother” in INA Section 101(b)(1)(D) includes a gestational mother who is the legal mother of a child at the time and place of birth, as well as a genetic mother who is a legal mother of the child at the time and place of birth.

5. Retroactive Application: The new policy will be retroactive. There will be cases in which children born abroad to a gestational and legal mother were previously denied a citizenship or immigration benefit under the prior interpretation. In such cases, parent(s) must submit a new application for their child, if they wish to apply for a passport, Consular Report of Birth Abroad (CRBA), or other document. The application must include sufficient evidence demonstrating that they meet all relevant statutory and regulatory requirements as well all appropriate fees.

6. Case Examples:

A woman who gives birth abroad to a child that is not genetically related to her (i.e., the child was conceived using a donor egg), and who is also the legal mother of the child at the time

and place of its birth, may transmit U.S. citizenship to the child under Section 301 and Section 309 of the INA (8 U.S.C. Sections 1401 and 1409).

A U.S. citizen who gives birth abroad to a child, but who is not the legal mother at the time and place of birth, (i.e., a gestational surrogate) may not transmit citizenship. In this example, the child also would not be born “in wedlock”. Under the new interpretation, a child is considered to be born “in wedlock” for purposes of applying INA Section 301, when the child is born to persons who are:

- (1) legally married to one another at the time of the child’s birth;
- (2) both the legal parents of the child at the time and place of the child’s birth; and
- (3) the genetic and/or gestational parents of the child.

* * * *

5. Passports as Proof of Citizenship

See discussion in Section 1.B., below, of several cases relating to the interaction between issuance of a passport and the demonstration of citizenship.

B. PASSPORTS

1. Corrected Opinion in *Edwards* relating to Passport as Proof of Citizenship

As discussed in *Digest 2013* at 14-16, the U.S. Court of Appeals for the Third Circuit decided two cases in 2013 involving the issue of whether or when a U.S. passport serves as proof of U.S. citizenship, *Edwards v. Bryson* and *United States v. Moreno*. In 2014, the Third Circuit issued an amended and superseding version of the *Edwards* decision, adding a footnote that substantively amends the conclusion in *Moreno* that a valid passport will serve as conclusive proof of citizenship only if it was issued by the Secretary of State *to a citizen of the United States*. The footnote states that “in some contexts, a passport may serve as conclusive proof of citizenship without a showing that the holder was actually a citizen when the passport was issued. A valid passport, for example, may serve as conclusive proof of citizenship in some administrative proceedings, or when questions of citizenship arise between private parties.” *Edwards*, 578 Fed. Appx. at 83 n.4. The Third Circuit amended its *Edwards* decision after the U.S. Government submitted briefs in January 2014 in opposition to a petition for *en banc* rehearing in *Edwards* and in opposition to a petition for a writ of certiorari in *Moreno*.

Excerpts follow from the U.S. brief in opposition to the petition for certiorari in *Moreno v. United States*, No. 13-457, which is available in full at www.state.gov/s//c8183.htm. The Supreme Court denied the petition for certiorari on February 24, 2014.

* * * *

[22 U.S.C.] 2705 specifies that, “during its period of validity (if such period is the maximum period authorized by law),” a passport issued to a U.S. citizen “shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship.” Like such certificates, an unexpired passport must be accepted as conclusive evidence of citizenship in administrative proceedings and against third parties. A passport does not, however, prevent the United States from disproving the holder’s citizenship in a criminal prosecution. The relatively few authorities interpreting 22 U.S.C. 2705 support both of these propositions.

i. Shortly after the statute’s enactment in 1982, the BIA held that Section 2705 means that a “valid United States passport” must be treated as “conclusive proof” of citizenship “in administrative immigration proceedings.” *In re Villanueva*, 19 I. & N. Dec. 101, 103 (1984). Courts have likewise stated that Section 2705 “makes a passport conclusive proof of citizenship in administrative immigration proceedings.” *Keil v. Triveline*, 661 F.3d 981, 987 (8th Cir. 2011); accord *Vana v. Attorney Gen.*, 341 Fed. Appx. 836, 839 (3d Cir. 2009). And a passport has also been held to preclude a private party from challenging the holder’s citizenship. See *United States v. Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009).

The court of appeals thus wrote too broadly to the extent it interpreted 22 U.S.C. 2705 to mean that a passport cannot be invoked as proof of citizenship unless the holder first establishes that she is a citizen. As Judge Smith’s dissent explains, that interpretation would deprive the statute of much of its practical effect. Pet. App. 12a-13a. Instead, the statutory requirement that the passport must have been issued “to a citizen of the United States” operates to exclude passports issued to noncitizen nationals from proving citizenship in administrative contexts. See *id.* at 14a-15a.

ii. Contrary to Judge Smith’s view, however, a passport is not conclusive proof of citizenship against the government in all circumstances. Like an administrative certificate of citizenship, a passport is subject to revocation by the issuing agency: The State Department is authorized to revoke a passport if the agency concludes it was obtained “illegally, fraudulently, or erroneously.” 8 U.S.C. 1504(a). The Department need only provide notice of the action and an opportunity for the passport holder to seek “a prompt post-cancellation hearing.” *Ibid.*; see 22 C.F.R. 51.62, 51.70-74. And just as 8 U.S.C. 1451(e) makes clear that the government need not cancel a certificate of naturalization before prosecuting the holder for procuring naturalization in violation of law, see p. 11, *supra*, the government is not required to cancel an erroneously issued passport before prosecuting the holder for falsely claiming citizenship in violation of 18 U.S.C. 911. As the Eighth Circuit observed, “no court has held that possession of a passport precludes prosecution under § 911, and there are indications in the case law that it does not.” *Keil*, 661 F.3d at 987; see *ibid.* (“Non-citizens in possession of passports at the time of their arrests have been convicted of violating § 911 for using those passports as proof of citizenship.”). Petitioner provides no sound reason to require the government to revoke a passport through the administrative process before litigating exactly the same citizenship dispute under a higher standard of proof in a criminal prosecution.

* * * *

Similarly, the U.S. brief in opposition to the petition for *en banc* rehearing in *Edwards v. Bryson*, No. 12-3670, (3d Cir. Jan. 17, 2014), explains the contexts in which an unexpired passport can provide proof of citizenship. Excerpts follow from the U.S. brief, which is also available at www.state.gov/s/l/c8183.htm. The Third Circuit

ultimately denied the plaintiff's petition for *en banc* rehearing in the *Edwards* case, but on the same day that it issued the denial decision, it filed the amended and superseding decision with the new footnote described above to clarify its holding in *Moreno* and *Edwards*. See *Edwards v. Bryson*, No. 12-3670, Doc. No. 3111760567 (3d Cir. Oct. 8, 2014) (*en banc*).

* * * *

Edwards' primary argument for rehearing *en banc* is that *Moreno* was wrong to conclude that 22 U.S.C. § 2705 makes a passport "conclusive proof of citizenship only if its holder was actually a citizen of the United States when it was issued." 727 F.3d at 261. Edwards argues that the *en banc* Court should adopt the interpretation of the statute set forth in Judge Smith's dissenting opinion, which would have held that Section 2705 makes a passport conclusive proof of citizenship without "requir[ing] a preliminary showing that the passport holder is a U.S. citizen." *Id.* at 264 (Smith, J., dissenting). As explained below, see *infra* Part III, the government believes that *Moreno* reached the correct result in the context of that criminal case, but acknowledges that, in some other circumstances, a valid, unexpired passport can be used to prove citizenship without a preliminary showing that the holder is a United States citizen. But this question has no bearing on the proper outcome in this case because Section 2705 prescribes the evidentiary force of a passport only "during its period of validity." Here, Edwards' passport was expired at all relevant times, and thus entitled to no weight under any interpretation of Section 2705. And because Edwards could not prevail even if the *en banc* Court adopted the interpretation of the statute Judge Smith advocated in his *Moreno* dissent, *en banc* review is not warranted.

Because Section 2705 has no bearing on the evidentiary weight of Edwards' expired passport, this case presents no occasion to reconsider *Moreno*'s interpretation of the statute. Moreover, *Moreno* correctly concluded that nothing in Section 2705 precludes the criminal prosecution of a passport holder for falsely claiming to be a U.S. citizen in violation of 18 U.S.C. § 911. But as the government explained in its opposition to the pending petition for certiorari in *Moreno*, § 2705 does require that a valid, unexpired passport be given independent effect as proof of citizenship in some contexts, and this Court in *Moreno* wrote too broadly to the extent it suggested otherwise. See Brief for the United States in Opposition at 7-15, *Moreno v. United States*, No. 13-457, 2014 WL 108364 (U.S. Jan. 10, 2014).

Section 2705 links the "force and effect" of a passport to the "force and effect" of "certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction." Such certificates, in turn, are conclusive proof of citizenship in administrative proceedings and against third parties. The government has long taken the position that, in general, "a decree of naturalization or a certificate of naturalization is not subject to impeachment in a collateral proceeding." 41 Op. Att'y Gen. 452, 459 (1960) (citing cases). Such certificates are thus conclusive when questions concerning citizenship arise in private litigation. See, e.g., *Campbell v. Gordon*, 10 U.S. (6 Cranch) 176, 182 (1810). A facially valid certificate of citizenship or naturalization is also conclusive proof of citizenship in administrative proceedings. ...

Although a certificate of citizenship or naturalization is thus conclusive proof of citizenship in many circumstances, it does not bind the government "for all purposes."

Johannessen v. United States, 225 U.S. 227, 236 (1912). For example, the Department of Justice is authorized by statute to bring a suit to “revok[e] and set[] aside the order admitting [a] person to citizenship and cancel[] the certificate of naturalization.” 8 U.S.C. § 1451(a). In addition, the Department of Homeland Security is authorized to cancel an administrative certificate of citizenship or naturalization whenever it finds “that such document or record was illegally or fraudulently obtained.” 8 U.S.C. § 1453. And the government may also pursue a criminal prosecution predicated on the defendant’s non-citizenship or ineligibility for naturalization even if it does not first cancel the defendant’s certificate of citizenship or naturalization. See, e.g., *United States v. Chin Doong Art*, 180 F. Supp. 446, 447 (E.D.N.Y. 1960) (rejecting a claim that the government was required to revoke the defendants’ certificates of citizenship before prosecuting them for “falsely represent[ing] themselves to be citizens”).

Section 2705 provides that, “during its period of validity,” a passport must be given the same force and effect as a certificate of citizenship or naturalization. As Edwards observes, some authorities have concluded that § 2705 means that a “valid United States passport” must be treated as “conclusive proof” of citizenship “in administrative immigration proceedings.” *In re Villanueva*, 19 I. & N. Dec. 101, 103 (1984); *Keil v. Triveline*, 661 F.3d 981, 987 (8th Cir.2011); see also *United States v. Clarke*, 628 F. Supp. 2d 15, 21 (D.D.C. 2009) (a valid passport precludes a private party from challenging the holder’s citizenship). The government agrees that in the context of administrative proceedings and vis-à-vis third parties, a valid passport can be invoked as proof of citizenship without a preliminary showing that the holder is a citizen.

But these precedents provide no assistance to Edwards — and no reason to grant rehearing in this case — because they speak to the force of “valid” passports. *Villanueva*, 19 I. & N. Dec. at 103. And these authorities also do not call into question the result reached in *Moreno* because they address the force and effect of passports in administrative proceedings and against third parties, not criminal prosecutions. Section 2705 only requires that a passport be given “the same force and effect” as a certificate of citizenship or naturalization, and, as explained above, the government is not required to revoke such a certificate before prosecuting the holder for falsely claiming to be a citizen. See also *Keil*, 661 F.3d at 987 (“[N]o court has held that possession of a passport precludes prosecution under § 911 [for falsely claiming to be a citizen], and there are indications in the case law that it does not.”).

* * * *

2. *Tuaua*: Notation on Passports Issued to Non-Citizen U.S. Nationals

On August 11, 2014, the United States filed its brief in the U.S. Court of Appeals for the D.C. Circuit in a case brought by American Samoan individuals and a social services organization that works on their behalf. *Tuaua et al. v. United States*, No. 13-5272 (D.C. Cir.). Plaintiffs brought the action challenging the placement of a notation on their U.S. passports (“Endorsement Code 09”) indicating they are U.S. nationals, but not U.S. citizens, in accordance with INA § 101(a)(29), 8 U.S.C. § 1101(a)(29), which designates American Samoa as an “outlying possession” of the United States. The district court dismissed plaintiffs’ claims, ruling that birthright citizenship based on the Fourteenth Amendment for American Samoans was effectively precluded by a series of early-twentieth century Supreme Court decisions known as the “Insular Cases.” Plaintiffs

appealed. The U.S. brief argues that the plain language of the Fourteenth Amendment, read in context, along with court precedents considering the issue, preclude plaintiffs' argument. The government of American Samoa, as represented by the Congressional representative for American Samoa, intervened on the side of the U.S. government, arguing that application of the Fourteenth Amendment to American Samoa would be anomalous to the American Samoan way of life. Excerpts below are from the section of the U.S. brief explaining why the plaintiffs' claims under the Fourteenth Amendment of the U.S. Constitution must fail and the section of the brief identifying plaintiffs' alternative remedies to seek the rights of U.S. citizenship. The brief is available in full at www.state.gov/s/l/c8183.htm.

* * * *

A. The Constitution and, in Particular, the Plain Language of the Fourteenth Amendment, Do Not Support Plaintiffs' Interpretation.

The first introductory words of Plaintiffs' initial brief reveal the flaw in Plaintiffs' logic and misinterpretation of the Citizenship Clause of the Fourteenth Amendment. Specifically, Plaintiffs selectively quote the Clause, stating: "The Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution provides that '[a]ll persons born . . . in the United States . . . are citizens of the United States . . .'" . . . The words Plaintiffs omitted and replaced with ellipses have meaning, however, and provide context. The entire clause actually reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.

U.S. Const. amend. XIV, § 1, cl. 1. The phrases "or naturalized" and "and subject to the jurisdiction thereof" when read in conjunction with the phrase "in the United States" demonstrate precisely why Plaintiffs' claims fail as a matter of law and why every federal court to examine claims like Plaintiffs' have found them wanting—these phrases contemplate that the grant of birthright citizenship will not simply "follow the flag," but rather will be defined and confined or expanded by Congressional action.

1. The Plain Language of the Amendment

The Fourteenth Amendment's first clause plainly declares that it confers automatic birthright citizenship to persons "born in the United States and subject to the jurisdiction thereof." While the history of American Samoa's relationship with the United States . . . , including its oversight first by the U.S. Navy and now by the Department of Interior, lends itself to placing American Samoa "subject to the jurisdiction" of the United States, it is not "in the United States." Thus, Plaintiffs' selective editing of the Amendment in the first line of their brief cannot alter the plain reading of the full text. . . .

2. The Constitution Places Naturalization and the Definition of the Boundaries of the United States within the Purview of Congress.

The first phrase in the Amendment omitted by Plaintiffs, "or naturalized," refers to Congress's ability to determine under what terms, if any, a person may become a U.S. citizen. In fact, the Constitution vests in Congress the sole power to make laws regarding naturalization, see U.S. Const., Art. I, § 8, cl. 4, which the Supreme Court noted as far back as *Boyd v. State of Nebraska*, 143 U.S. 135, 160 (1892), stating, "The constitution has conferred on congress the

right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so.”

Additionally, the Supreme Court in *Boyd* recognized that the ability to naturalize and obtain citizenship was not a right guaranteed by the Constitution, but rather that “Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen.” *Id.* at 162. Indeed, the Supreme Court has stated that “Citizenship can be granted only on the basis of the statutory right which Congress has created.” *Schneiderman v. United States*, 320 U.S. 118, 165 (1943) (emphasis added). This conclusion, supported by the exclusive grant of naturalization regulation provided to Congress rests on the assumption “that naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit.” *Schneiderman*, 320 U.S. at 131.

Due to the exclusive role of Congress, courts have consistently declined to interfere with Congressional action when taken in this area. As the Supreme Court has noted:

An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

United States v. Ginsberg, 243 U.S. 472, 474 (1917); *Rogers v. Bellei*, 401 U.S. 815, 830-31 (1971) (approving of Congressional scheme to provide path to citizenship for persons born abroad which could then be revoked if certain qualifications were not met). Even more relevantly, the Supreme Court has instructed that if an individual does not qualify for citizenship under a statute, the “court has no discretion to ignore the defect and grant citizenship.” *Fedorenko v. United States*, 449 U.S. 490, 517 (1981) (citations omitted). Thus, when Congress expressly provides a path to naturalization (as it has done for Plaintiffs and all other non-citizen U.S. nationals), the Court cannot simply ignore or bypass that process and declare persons citizens de jure or de facto by operation of judicial decree.

Similarly, the responsibility of Congress to govern this nation’s territories has long been recognized and respected by the Courts. The “principles of constitutional liberty . . . restrain all the agencies of government” from impeding upon territories’ citizens. *Murphy v. Ramsey*, 114 U.S. 15, 44-45 (1885). But it is instead Congress which has the “legislative discretion” to grant “privileges” upon those born in the outlying possessions as they see fit. *Id.* Congress “has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments [and] may do for the Territories what the people, under the Constitution of the United States, may do for the States. *First Nat. Bank v. Yankton Cnty.*, 101 U.S. 129, 133 (1879) (emphasis added).

Critically, the Supreme Court has never found that the Congress *must* bestow all of the same panoply of privileges upon those born in the outlying possessions that the Constitution bestows on those born in the United States. Plaintiffs and the *amici* argue that this Court *must* bestow the privileges of birthright citizenship upon persons born in American Samoa, but such a holding would run counter to over a century of jurisprudence affirming the preeminence of Congress in guaranteeing the rights of those in the outlying possessions.

In fact, Plaintiffs’ and *amici*’s reliance on an overextension of the principle of *jus soli* and English common law has already been directly rejected by the Supreme Court in *Rogers* where the Court stated:

We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli*, that is, that the place of birth governs citizenship status except as modified by statute.

401 U.S. at 828 (emphasis added). Thus, even if Plaintiffs were correct that their interpretation of the Fourteenth Amendment should generally confer birthright citizenship pursuant to *jus soli* on non-citizen American Samoans, Congress's direct modification of that status by statute trumps that interpretation under Supreme Court interpretation. See INA § 101(a)(29), 8 U.S.C. § 1101(a)(29); INA § 308(1), 8 U.S.C. § 1408(1); see also *Rogers*, 401 U.S. at 828.

* * * *

B. Every Court to Examine Claims Similar to Plaintiffs' Has Dismissed Them and Found No Basis in the Fourteenth Amendment for the Expansive View of Birthright Citizenship Urged by Plaintiffs.

Whether the Citizenship Clause applied or applies to an outlying, unincorporated territory of the United States has been examined and decided in a series of cases. In each case that courts have held that they could examine the issue, those courts have held that where Congress has not specifically enumerated that the outlying territory is subject to the territorial scope of the Citizenship Clause, the clause does not apply to those territories. Here, as outlined above, Congress has properly exercised its Constitutional duty to legislate the naturalization status for American Samoa, an unincorporated, outlying territory. And every federal court to examine similar claims to the ones Plaintiffs raised below has found them wanting.

* * * *

IV. CONTRARY TO PLAINTIFFS' ALLEGATIONS OF INCONVENIENCE, PLAINTIFFS HAVE OTHER REMEDIES WHICH DO NOT REQUIRE JUDICIAL INTERVENTION.

Plaintiffs' complaint fails as a matter of law and Plaintiffs' brief provides no reason to disturb the District Court's dismissal of it. Simply stated, the plain language of the Constitution, the overwhelming weight of statutory and case law authority, as well as the practical implications of Plaintiffs' requested relief prevent Plaintiffs' claims from surviving. In their complaint and their initial brief here, Plaintiffs have attempted to buttress their claims with descriptions of alleged opportunities lost and concern for their progeny due to their status as non-citizen U.S. nationals. Plaintiffs, however, not only downplay their current and ongoing ability to naturalize as U.S. citizens, overlook their affirmative choices not to attain citizenship, but also ignore the manner in which all other outlying possessions have achieved birthright citizenship—Congressional action.

First, as Plaintiffs acknowledge, they are eligible to apply for naturalization at any time of their choosing through travel to the United States and successful completion of the naturalization process. In fact, several of the individual Plaintiffs resided or currently reside in the United States and can undertake this process at any time. ... Further, Plaintiffs' claims of concern for their children and grandchildren's status could have been alleviated through their own naturalization as persons born on American Samoa to U.S. citizen parents qualify for birthright citizenship. 8 U.S.C. § 1401(e).

Additionally, Plaintiffs repeatedly refer to both their own military service and the service of other American Samoans, particularly during times of armed conflict. ... But Plaintiffs ignore the fact that federal law provides a pathway to citizenship for persons serving in the military

during times of conflict, 8 U.S.C. § 1440(a), and that those stationed in the United States during peacetime are immediately eligible for naturalization due to their status as U.S. nationals.

Finally, the manner in which the entire territory's inhabitants could acquire birthright citizenship would be to follow the path beaten by others: Congressional action. As the elected American Samoan representative to the U.S. Congress, Congressman Eni Faleomavaega has made plain, he stands ready to introduce and lobby for such legislation should the people of American Samoa determine that birthright citizenship is in their interests. Congress has not hesitated to provide this right when called upon. In fact, Congress affirmatively acted to bestow automatic, birthright citizenship on: (1) Puerto Rico, 8 U.S.C. § 1402; (2) the Panama Canal Zone during its period as a U.S. territory, 8 U.S.C. § 1403; (3) pre-statehood Alaska, 8 U.S.C. § 1404; (4) pre-statehood Hawaii, 8 U.S.C. § 1405; (5) the U.S. Virgin Islands, 8 U.S.C. § 1406; (6) Guam, 8 U.S.C. § 1407; and (7) the Commonwealth of the Northern Mariana Islands, Pub. L. No. 94-241, § 301, 90 Stat. 263, 265-66. Thus, it was action by Congress that granted citizenship to the citizens of the unincorporated, outlying territories, not mere exercise of authority by the United States Government over its physical territory.

Plaintiffs' arguments not only overlook this process, but their requested relief invites impractical results. First, as discussed immediately above, Plaintiffs ignore the history of every other similarly-situated outlying possession of the United States, each of which gained birthright citizenship for its inhabitants through Congressional action only. Second, Plaintiffs' argument invites an utterly impractical result. When would a U.S. territory suddenly shift from an outlying possession to one whose inhabitants receive automatic birthright citizenship—a period of years to be determined by a Court? Indeed, the only practical and efficient process of making this determination is the one in place: each individual territory decides for itself when it wishes for its inhabitants to receive birthright citizenship and Congress responds by deciding whether to issue a statutory grant of this privilege. Therefore, because this process not only comports with the Constitution, but also preserves the ability of territories to work with Congress to determine their own levels of integration into the United States, it is not only proper, but the preferred method to judicial determinations made by courts sitting thousands of miles away. Thus, the judgment of the District Court was plainly correct and should be affirmed.

* * * *

C. IMMIGRATION AND VISAS

1. *De Osorio*: Status of “Aged-Out” Child Aliens Who Are Derivative Beneficiaries of a Visa Petition

As discussed in *Digest 2013* at 16-19, the United States appealed to the U.S. Supreme Court the judgment of the U.S. Court of Appeals for the Ninth Circuit (*en banc*) in *Mayorkas v. De Osorio*, No. 12-930. The Supreme Court issued its opinion in the case on June 9, 2014, reversing the judgment of the Court of Appeals that the Board of Immigration Appeals (“BIA” or “Board”) had misinterpreted a provision of the INA, as amended by the Child Status Protection Act (“CSPA”), 8 U.S.C. § 1153(h)(3). *Scialabba v. Cuellar de Osorio*, 134 S.Ct. 2191 (2014). Section 1153(h)(3) addresses how to treat an alien who reaches age 21 (“ages out”), and therefore loses “child” status under the INA.

The BIA determined that, if a new petition and petitioner were required, the alien's priority date for a visa would be determined by the date of a subsequently-filed visa petition, and not the date of the original petition as to which the alien was a derivative beneficiary. See *Digest 2013 at 16-19* for further background on the case. Excerpts follow (with most footnotes omitted) from the plurality opinion of the U.S. Supreme Court.**

* * * *

Principles of *Chevron* deference apply when the BIA interprets the immigration laws. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–425, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). Indeed, “judicial deference to the Executive Branch is especially appropriate in the immigration context,” where decisions about a complex statutory scheme often implicate foreign relations. *Id.*, at 425, 119 S.Ct. 1439. . . . Under *Chevron*, the statute’s plain meaning controls, whatever the Board might have to say. See 467 U.S., at 842–843, 104 S.Ct. 2778. But if the law does not speak clearly to the question at issue, a court must defer to the Board’s reasonable interpretation, rather than substitute its own reading. *Id.*, at 844, 104 S.Ct. 2778.

* * * *

Begin by reading the statute from the top—the part favoring the respondents. Section 1153(h)(3)’s first clause—“If the age of an alien is determined under paragraph (1) to be 21 years of age or older for the purposes of subsections (a)(2)(A) and (d)” —states a condition that every aged-out beneficiary of a preference petition satisfies. That is because all those beneficiaries have had their ages “determined under paragraph (1)” (and have come up wanting): Recall that the age formula of § 1153(h)(1) applies to each alien child who originally qualified (under “subsections (a)(2)(A) and (d)”) as the principal beneficiary of an F2A petition or the derivative beneficiary of any family preference petition. On its own, then, § 1153(h)(3)’s opening clause encompasses the respondents’ sons and daughters, along with every other once-young beneficiary of a family preference petition now on the wrong side of 21. If the next phrase said something like “the alien shall be treated as though still a minor” (much as the CSPA did to ensure U.S. citizens’ children, qualifying as “immediate relatives,” would stay forever young, see *supra*, at 2199 – 2200), all those aged-out beneficiaries would prevail in this case.

But read on, because § 1153(h)(3)’s second clause instead prescribes a remedy containing its own limitation on the eligible class of recipients. “[T]he alien’s petition,” that part provides, “shall automatically be converted to the appropriate category and the alien shall retain the

** Editor’s note: the plurality opinion, in a portion not excerpted herein, sets forth the family preference categories for family-sponsored immigrants as follows:

- F1: the unmarried, adult (21 or over) sons and daughters of U.S. citizens;
- F2A: the spouses and unmarried, minor (under 21) children of LPRs;
- F2B: the unmarried, adult (21 or over) sons and daughters of LPRs;
- F3: the married sons and daughters of U.S. citizens;
- F4: the brothers and sisters of U.S. citizens.

8 U.S.C. §§ 1151(a)(1), 1153(a)(1)-(4).

original priority date.” That statement directs immigration officials to take the initial petition benefitting an alien child, and now that he has turned 21, “convert[]” that same petition from a category for children to an “appropriate category” for adults (while letting him keep the old priority date). The “conversion,” in other words, is merely from one category to another; it does not entail any change in the petition, including its sponsor, let alone any new filing. And more, that category shift is to be “automatic”—that is, one involving no additional decisions, contingencies, or delays. See, e.g., Random House Webster’s Unabridged Dictionary 140 (2d ed. 2001) (defining “automatic” as “having the capability of starting, operating, moving, etc., independently”); The American Heritage Dictionary 122 (4th ed. 2000) (“[a]cting or operating in a manner essentially independent of external influence”). The operation described is, then, a mechanical cut-and-paste job—moving a petition, without any substantive alteration, from one (no-longer-appropriate, child-based) category to another (now-appropriate, adult) compartment. And so the aliens who may benefit from § 1153(h)(3)’s back half are only those for whom that procedure is possible. The clause offers relief not to every aged-out beneficiary, but just to those covered by petitions that can roll over, seamlessly and promptly, into a category for adult relatives.

That understanding of § 1153(h)(3)’s “automatic conversion” language matches the exclusive way immigration law used the term when Congress enacted the CSPA. For many years before then (as today), a regulation entitled “Automatic conversion of preference classification” instructed immigration officials to change the preference category of a petition’s principal beneficiary when either his or his sponsor’s status changed in specified ways. See 8 CFR §§ 204.2(i)(1)-(3) (2002). For example, the regulation provided that when a U.S. citizen’s child aged out, his “immediate relative” petition converted to an F1 petition, with his original priority date left intact. See § 204.2(i)(2). Similarly, when a U.S. citizen’s adult son married, his original petition migrated from F1 to F3, see § 204.2(i)(1)(i); when, conversely, such a person divorced, his petition converted from F3 to F1, see § 204.2(i)(1)(iii); and when a minor child’s [Legal Permanent Resident or] LPR parent became a citizen, his F2A petition became an “immediate relative” petition, see § 204.2(i)(3)—all again with their original priority dates. Most notable here, what all of those authorized changes had in common was that they could occur without any change in the petitioner’s identity, or otherwise in the petition’s content. In each circumstance, the “automatic conversion” entailed nothing more than picking up the petition from one category and dropping it into another for which the alien now qualified.

Congress used the word “conversion” (even without the modifier “automatic”) in the identical way in two other sections of the CSPA. See *Law v. Siegel*, 571 U.S. —, —, 134 S.Ct. 1188, 1195, 188 L.Ed.2d 146 (2014) (“[W]ords repeated in different parts of the same statute generally have the same meaning”). Section 2 refers to occasions on which, by virtue of the above-described regulation, a petition “converted” from F2A to the “immediate relative” category because of the sponsor parent’s naturalization, or from the F3 to the F1 box because of the beneficiary’s divorce. 8 U.S.C. §§ 1151(f)(2), (3). Then, in § 6, Congress authorized an additional conversion of the same nature: It directed that when an LPR parent-sponsor naturalizes, the petition he has filed for his adult son or daughter “shall be converted,” unless the beneficiary objects, from the F2B to the F1 compartment—again with the original priority date unchanged. 8 U.S.C. §§ 1154(k)(1)-(3). (That opt-out mechanism itself underscores the otherwise mechanical nature of the conversion.) Once again, in those cases, all that is involved is a recategorization—moving the same petition, filed by the same petitioner, from one preference

classification to another, so as to reflect a change in either the alien's or his sponsor's status. In the rest of the CSPA, as in the prior immigration regulation, that is what "conversion" means.

And if the term meant more than that in § 1153(h)(3), it would undermine the family preference system's core premise: that each immigrant must have a qualified sponsor. Consider the alternative addressed in Wang—if "automatic conversion" were also to encompass the substitution of a new petitioner for the old one, to make sure the aged-out alien's petition fits into a new preference category. In a case like Wang, recall, the original sponsor does not have a legally recognized relationship with the aged-out derivative beneficiary (they are aunt and niece); accordingly, the derivative's father—the old principal beneficiary—must be swapped in as the petitioner to enable his daughter to immigrate. But what if, at that point, the father is in no position to sponsor his daughter? Suppose he decided in the end not to immigrate, or failed to pass border inspection, or died in the meanwhile. Or suppose he entered the country, but cannot sponsor a relative's visa because he lacks adequate proof of parentage or committed a disqualifying crime. See § 1154(a)(1)(B)(i)(II); 8 CFR § 204.2(d)(2); *supra*, at 2197. Or suppose he does not want to—or simply cannot—undertake the significant financial obligations that the law imposes on someone petitioning for an alien's admission. See 8 U.S.C. §§ 1183a(a)(1)(A), (f)(1)(D); *supra*, at 2198. Immigration officials cannot assume away all those potential barriers to entry: That would run counter to the family preference system's insistence that a qualified and willing sponsor back every immigrant visa. See §§ 1154(a)-(b). But neither can they easily, or perhaps at all, figure out whether such a sponsor exists unless he files and USCIS approves a new petition—the very thing § 1153(h)(3) says is not required.

Indeed, in cases like [*Matter of Wang*, 25 I. & N. Dec. 28 (2009) or] *Wang*, the problem is broader: Under the statute's most natural reading, a new qualified sponsor will hardly ever exist at the moment the petition is to be "converted." Section 1153(h)(3), to be sure, does not explicitly identify that point in time. But § 1153(h)(1) specifies the date on which a derivative beneficiary is deemed to have either aged out or not: It is "the date on which an immigrant visa number became available for the alien's parent." See §§ 1153(h)(1)(A)-(B). Because that statutory aging out is the one and only thing that triggers automatic conversion for eligible aliens, the date of conversion is best viewed as the same. That reading, moreover, comports with the "automatic conversion" regulation on which Congress drew in enacting the CSPA, see *supra*, at 2204 – 2205: The rule authorizes conversions "upon" or "as of the date" of the relevant change in the alien's status (including turning 21)—regardless when USCIS may receive notice of the change. 8 CFR § 204.2(i); but cf. *post*, at 2224 (SOTOMAYOR, J., dissenting) (wrongly stating that under that rule conversion occurs upon the agency's receipt of proof of the change). But on that date, no new petitioner will be ready to step into the old one's shoes if such a substitution is needed to fit an aged-out beneficiary into a different category. The beneficiary's parent, on the day a "visa number became available," cannot yet be an LPR or citizen; by definition, she has just become eligible to *apply* for a visa, and faces a wait of at least several months before she can sponsor an alien herself. Nor, except in a trivial number of cases, is any hitherto unidentified person likely to have a legally recognized relationship to the alien. So if an aged-out beneficiary has lost his qualifying connection to the original petitioner, no conversion to an "appropriate category" can take place at the requisite time. As long as immigration law demands some valid sponsor, § 1153(h)(3) cannot give such an alien the designated relief.

On the above account—in which conversion entails a simple reslotting of an original petition into a now-appropriate category—§ 1153(h)(3)'s back half provides a remedy to two groups of aged-out beneficiaries. First, any child who was the principal beneficiary of an F2A

petition (filed by an LPR parent on his behalf) can take advantage of that clause after turning 21. He is, upon aging out, the adult son of the same LPR who sponsored him as a child; his petition can therefore be moved seamlessly—without the slightest alteration or delay—into the F2B category. Second, any child who was the derivative beneficiary of an F2A petition (filed by an LPR on his *spouse's* behalf) can similarly claim relief, provided that under the statute, he is not just the spouse's but also the petitioner's child. Such an alien is identically situated to the aged-out *principal* beneficiary of an F2A petition; indeed, for the price of another filing fee, he could just as easily have been named a principal himself. He too is now the adult son of the original LPR petitioner, and his petition can also be instantly relabeled an F2B petition, without any need to substitute a new sponsor or make other revisions. In each case, the alien had a qualifying relationship before he was 21 and retains it afterward; all that must be changed is the label affixed to his petition.

In contrast, as the Board held in *Wang*, the aged-out derivative beneficiaries of the other family preference categories—like the sons and daughters of the respondents here—cannot qualify for “automatic conversion.” Recall that the respondents themselves were principal beneficiaries of F3 and F4 petitions; their children, when under 21, counted as derivatives, but lacked any qualifying preference relationship of their own. The F3 derivatives were the petitioners' grandsons and granddaughters; the F4 derivatives their nephews and nieces; and none of those are relationships Congress has recognized as warranting a family preference. See 8 U.S.C. §§ 1153(a)(3)-(4). Now that the respondents' children have turned 21, and they can no longer ride on their parents' coattails, that lack of independent eligibility makes a difference. For them, unlike for the F2A beneficiaries, it is impossible simply to slide the original petitions from a (no-longer-appropriate) child category to a (now-appropriate) adult one. To fit into a new category, those aged-out derivatives, like *Wang's* daughter, must have new sponsors—and for all the reasons already stated, that need means they cannot benefit from “automatic conversion.”

All that said, we hold only that § 1153(h)(3) permits—not that it requires—the Board's decision to so distinguish among aged-out beneficiaries. . . . Section 1153(h)(3)'s first part—its conditional phrase—encompasses every aged-out beneficiary of a family preference petition, and thus points toward broad-based relief. But as just shown, § 1153(h)(3)'s second part—its remedial prescription—applies only to a narrower class of beneficiaries: those aliens who naturally qualify for (and so can be “automatically converted” to) a new preference classification when they age out. Were there an interpretation that gave each clause full effect, the Board would have been required to adopt it. But the ambiguity those ill-fitting clauses create instead left the Board with a choice—essentially of how to reconcile the statute's different commands. The Board, recognizing the need to make that call, opted to abide by the inherent limits of § 1153(h)(3)'s remedial clause, rather than go beyond those limits so as to match the sweep of the section's initial condition. On the Board's reasoned view, the only beneficiaries entitled to statutory relief are those capable of obtaining the remedy designated. When an agency thus resolves statutory tension, ordinary principles of administrative deference require us to defer. See *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (When a statutory scheme contains “a fundamental ambiguity” arising from “the differing mandates” of two provisions, “it is appropriate to look to the implementing agency's expert interpretation” to determine which “must give way”).

* * * *

2. Consular Nonreviewability

As discussed in *Digest 2013* at 19-22, the United States sought, but was not granted, rehearing at the court of appeals in *Din v. Kerry*, in which a panel of the U.S. Court of Appeals for the Ninth Circuit held that the government’s identified statutory basis for a visa denial was insufficient for the American citizen spouse of the visa applicant and remanded to the district court for further proceedings. *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013). Plaintiff in the lower court, an American citizen named Fauzia Din, had petitioned for her husband, Kanishka Berashk, a native and citizen of Afghanistan, to immigrate to the United States. Mr. Berashk’s visa application was refused by a U.S. consular officer under the statutory provision covering terrorist activities (8 U.S.C. 1182(a)(3)(B)). On May 23, 2014, the United States filed a petition for writ of certiorari in the U.S. Supreme Court. Excerpts follow from the petition (with footnotes omitted).

* * * *

The Ninth Circuit clearly erred in ruling that respondent has a liberty interest in her marriage, protected under the Due Process Clause, that is implicated by denial of a visa to her alien spouse abroad. That ruling directly conflicts with the decisions of numerous other courts of appeals, and could have broad consequences across various areas of immigration law.

The Ninth Circuit also erred in concluding that respondent, as the U.S. citizen spouse of an alien whose visa is denied, has a right to judicial review of the consular officer’s decision and to procedural due process in connection with the denial of a visa to the alien. The court then compounded that error by concluding that the government can defend the decision as “facially legitimate” only by providing the specific statutory subsection on which the denial was based and the factual basis for believing that the alien falls within the scope of that subsection. The Constitution confers no such rights, and neither Congress nor this Court has ever authorized such review. In addition, when a visa denial is (as in this case) based on security-related grounds, the review required by the Ninth Circuit conflicts with decisions of this Court and overrides a federal statute intended to protect the confidentiality of intelligence and other sensitive information on which a consular officer may rely in denying a visa to protect the national security. Review by this Court is warranted.

A. This Court’s Review Is Warranted To Determine Whether A U.S. Citizen Has A Protected Liberty Interest That Is Implicated By The Denial Of A Visa Application Filed By An Alien Spouse

1. This Court’s decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1971), made clear that a non-resident alien abroad has no constitutional rights in connection with his application for a visa to enter the United States, and therefore no constitutional basis to insist upon an explanation for the denial of the visa or to obtain judicial review of the denial. See *id.* at 762, 766-768. The court of appeals ruled, however, that respondent, who has no legally cognizable rights under the INA in the issuance of a visa to Berashk, nevertheless is entitled under the Constitution to procedural due process in her own right in connection with the denial of the visa. The court reached that extraordinary result by reasoning that respondent possesses a substantive “protected liberty

interest in marriage,” derived directly from the Due Process Clause, in connection with her husband’s visa application.... That ruling is deeply flawed.

To qualify for substantive protection under the Due Process Clause, a liberty interest must be “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Reno v. Flores*, 507 U.S. 292, 303 (1993) (citation omitted); In ascertaining whether that test is satisfied, this Court has required “a ‘careful description’ of the asserted fundamental liberty interest.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Flores*, 507 U.S. at 302).

* * * *

The court of appeals identified no basis for the notion that a person has a comparably fundamental due process interest in connection with the application for a visa to enter the United States filed by her alien spouse, who is subject to the plenary sovereign power of the United States to bar his admission. Perhaps recognizing that respondent’s rights in connection with marriage that have been recognized as protected by the Constitution are far removed from the denial of a visa to Berashk, the court of appeals seized on language from *Cleveland Board of Education v. LaFleur*, *supra*—a case involving the decision whether to “bear or beget a child,” 414 U.S. at 639 (internal quotation marks omitted)—that refers to “[f]reedom of personal choice in matters of marriage and family life.” App., *infra*, 7a & n.1 (quoting 414 U.S. at 640) (internal quotation marks omitted) (brackets in original). As invoked by the court of appeals here, however, that exceedingly general language hardly qualifies as a “careful description” of a liberty interest that could confer a due process right on a U.S. citizen specifically concerning her spouse’s admission to the United States. *Flores*, 507 U.S. at 302.

In reality, there is only one “choice” of respondent’s that is directly affected by the denial of a visa to Berashk: her preference that her alien spouse live with her in the United States. The court of appeals resisted the suggestion that the rights to judicial review and procedural due process it fashioned were “predicated on a liberty interest in the ability to live in the United States with an alien spouse,” insisting that a “more general right” was at issue. App., *infra*, 7a n.1. But the court did not explain any basis for that resistance—and, in light of the vagueness of the “more general right” on which it purported to rely and the fact that the visa denial does not impinge on the marriage-related interests that this Court has previously recognized, no such basis exists. It is apparent that the “freedom of personal choice” perceived by the court of appeals is, at bottom, an asserted constitutionally based liberty interest in having Berashk be present in the United States. ...

There is no history in this Nation of recognizing a constitutionally protected liberty interest in having one’s alien spouse enter and reside in the United States, especially when neutral laws of general applicability bar the spouse from entering. To the contrary, there is a long history of recognizing that alien spouses (and other family members) of U.S. citizens may be denied admission to the United States in Congress’s complete discretion, as an exercise of that body’s “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.” *Mandel*, 17 408 U.S. at 766. ...

The contrary approach adopted by the court of appeals here could have sweeping consequences. Under such a legal regime, any U.S. citizen whose alien spouse is not permitted to enter this country, for any reason, might attempt to assert a constitutional claim. So, too, might any U.S. citizen whose alien spouse is placed in proceedings to remove him from this country

because of (for instance) violation of the immigration laws, commission of a serious crime, or ties to terrorist activity. See 8 U.S.C 1227. Cf. *Payne-Barahona v. Gonzales*, 474 F.3d 1, 3 (1st Cir. 2007) (“If there were such a right, it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service.”). None of those kinds of claims has been given credence by the courts, let alone viewed as implicating a constitutionally protected interest that confers a right to procedural due process and judicial review in connection with the application of the Nation’s immigration laws to an alien family member abroad. In ruling otherwise, the Ninth Circuit went seriously astray.

2. The Ninth Circuit’s erroneous ruling that respondent has an interest conferred by the Constitution that entitles her to challenge the denial of a visa for her alien spouse is in conflict with the decisions of numerous other courts of appeals.

In *Bangura v. Hansen*, 434 F.3d 487 (6th Cir. 2006), the Sixth Circuit reached a result directly contrary to the Ninth Circuit’s decision here. *Bangura* involved claims brought by a U.S. citizen and his alien spouse that denial of a visa petition filed on behalf of the spouse violated their due process rights. The court of appeals ruled that the plaintiffs failed to allege a liberty interest that would allow them to state a procedural due process claim. See *id.* at 495-497. The court accepted that plaintiffs “have a fundamental right to marry,” but explained that “[a] denial of an immediate relative visa does not infringe upon” that right. *Id.* at 496. The court also concluded that “[t]he Constitution does not recognize the right of a citizen spouse to have his or her alien spouse remain in the country.” *Ibid.* (internal quotation marks omitted) (citing *Almarino v. Attorney Gen.*, 872 F.2d 147, 151 (6th Cir. 1989)).

In *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert. denied, 424 U.S. 910 (1976), the Second Circuit relied on the same principle to reject claims virtually identical to those at issue here: that “the constitutional rights of a citizen wife had been violated by denial of her alien husband’s visa application without reason * * * and that failure of the Department of State * * * to specify the reasons for denial of the husband’s visa application denied him procedural due process.” *Id.* at 554-555. The court refused to review the decision to deny the visa application under the rationale of *Mandel*, distinguishing that decision on the ground that “no constitutional rights of American citizens over which a federal court would have jurisdiction are ‘implicated’ here.” *Id.* at 556-557. In particular, the court explained, the claim that denial of the alien’s visa application implicated the constitutional rights of the citizen spouse was “foreclosed” by the principle that “no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse.” *Id.* at 555 (citing, inter alia, *Noel v. Chapman*, 508 F.2d 1023, 1027-1028 (2d Cir.), cert. denied, 423 U.S. 824 (1975)).

As *Burrafato* indicates, courts of appeals addressing the issue in removal proceedings, as distinguished from proceedings involving denials of visa applications, have also reached the conclusion that no protected liberty interest is implicated by barring a U.S. citizen’s alien spouse from being present in the United States. See, e.g., *Garcia v. Boldin*, 691 F.2d 1172, 1183-1184 (5th Cir. 1982) (“Mrs. Garcia and the children are United States citizens. The deportation order has no legal effect upon them. It does not deprive them of the right to continue to live in the United States, nor does it deprive them of any constitutional rights.”); *Silverman*, 437 F.2d at 107 (rejecting argument that “the government’s action” in seeking to deport an alien spouse of a U.S. citizen “is destroying [the] marriage”); *Swartz*, 254 F.2d at 339 (“[W]e think the wife has no constitutional right which is violated by the deportation of her husband.”). That differing context does not lessen the conflict between the holdings of those cases and the holding of the court

below; the question about the existence and status of the relevant liberty interest is the same in both arenas.

In short, numerous decisions from other courts of appeals are irreconcilable with the Ninth Circuit's conclusion that respondent has a fundamental liberty interest implicated by the government's decision to deny her alien spouse a visa for entry into the United States that entitles her to procedural due process in her own right. This Court should grant certiorari to correct the Ninth Circuit's errors and restore nationwide uniformity on this previously settled issue.

B. The Court of Appeals' Imposition Of Judicial Review And Notice Requirements On A Consular Officer's Visa Determination Warrants This Court's Review

1. Even assuming that respondent's own constitutional rights are somehow implicated in this case, the Ninth Circuit decision is wrong. Purporting to apply the statement in *Mandel* that a "facially legitimate" exercise of discretion survives judicial review, the court of appeals authorized a searching inquiry into the reasons for denial of a visa and improperly imposed, as a matter of constitutional law, requirements of detailed notice with respect to aliens denied a visa on national security grounds.

a. As an initial matter, *Mandel* did not authorize judicial review of a consular officer's decision to deny a visa, and—contrary to the ruling below, see App., *infra*, 7 n.1—such a decision is not subject to review under *Mandel*'s rationale.

In *Mandel*, this Court assumed (but did not hold) that if a U.S. citizen's First Amendment rights were implicated, then that citizen could obtain review of a discretionary denial by the Attorney General of a waiver of the grounds that required the refusal of an alien's nonimmigrant visa application. In that narrow context, the Court examined the reason for the denial of the waiver that appeared in the record and concluded that because that reason was "facially legitimate and bona fide," it was not appropriate to "look behind the exercise of [the Attorney General's] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 769-770. The Court specifically declined to address whether the Attorney General was required to furnish such a reason. See *id.* at 770 ("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.").

Moreover, a rationale that might support such limited review of a discretionary waiver of a ground of inadmissibility by the Attorney General does not extend to the underlying decision by a consular officer that such a ground applies. Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer's decision that an alien is not eligible for a visa must, by definition, be tethered to the legal provisions that define such ineligibility. See, e.g., 8 U.S.C. 1182(a), 1201(g). It does not make sense to ask if the reasons for visa denial set forth in an Act of Congress are "facially legitimate"; those reasons are legitimate on their face by their very nature, and courts are in no position to second-guess Congress's choices about which aliens should and should not be permitted to enter the United States. See generally *Fiallo*, 430 U.S. at 792-795; *Mandel*, 408 U.S. at 765- 767.

Accordingly, extension beyond the discretionary waiver context of the approach in *Mandel*—which, in any event, formed the narrow basis for decision in that case simply because a facially legitimate decision already appeared in the record, and not because the approach was

deemed constitutionally mandated—is unwarranted. See *Mandel*, 408 U.S. at 767 (“[Plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [statutory provisions], and that First Amendment rights could not override that decision.”). . . . Because the decision of a consular officer was directly at issue here, the Ninth Circuit erred in subjecting that decision to judicial scrutiny and insisting upon a further explanation for the visa denial.

b. Beyond that basic flaw at the threshold, moreover, the Ninth Circuit erred in ruling that the government must identify the specific subsection of 8 U.S.C. 1182(a)(3)(B) under which the visa application was denied and the factual basis for the determination of inadmissibility—and must do so not for the benefit of the alien affected, who has no constitutional rights in connection with his visa application, but for his spouse, who has no legally cognizable interest under the INA in issuance of such a visa. There is no basis in the Constitution to require the government to provide such information, and all the more so in a case involving terrorism-related grounds for refusing to admit the alien into the United States.

Congress recognized the special concerns associated with terrorism-related (and crime-related) reasons for a visa denial in 8 U.S.C. 1182(b)(3), which provides that when such reasons are at issue the consular officer need not furnish the alien with a written notice that states the determination and lists “the specific provision or provisions of law under which the alien is inadmissible.” 8 U.S.C. 1182(b)(1) and (3).¹² Section 1182(b)(3) reflects Congress’s judgment regarding the need for deference to the Executive’s national security determinations, and the real risk that disclosure of the information underlying a visa denial could be harmful to the Nation’s security. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting the “heightened deference to the judgments of the political branches with respect to matters of national security”); see generally *Galvan v. Press*, 347 U.S. 522, 530 (1954) (“The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.”).

The Ninth Circuit’s decision permits an end-run around Congress’s considered judgment to permit the Executive to shield information related to visa denials in those circumstances. That result turns on its head the established principle that “unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.” *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988); see generally *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (“when it comes to * * * drawing factual inferences” in the national security context, “the lack of competence on the part of the courts is marked,” and respect for the Government’s conclusions is appropriate”) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981)).

Several decisions of this Court involving provisions similar to Section 1182(b)(3) recognize exactly these concerns. For instance, in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court considered the constitutionality of the exclusion of an alien on security-related grounds. See *id.* at 207. A regulation then in effect provided that the Attorney General could deny a hearing to aliens excludable “on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.” *Id.* at 211 n.8. The Court emphasized that in an exclusion case Congress dictates the relevant procedures and, “because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; ‘it is not within the province of any court, unless expressly authorized by law,

to review the determination of the political branch of the Government.” *Id.* at 212 (quoting *Knauff*, 338 U.S. at 543). The Court therefore ruled that “the Attorney General may lawfully exclude respondent without a hearing as authorized by the * * * regulations * * *. Nor need he disclose the evidence upon which that determination rests.” *Id.* at 214-215; see, e.g., *Knauff*, 338 U.S. at 544 (rejecting challenge by excluded alien spouse of U.S. citizen to regulations under which the Attorney General could deny a hearing to such an alien when he “concluded upon the basis of confidential information that the public interest required that petitioner be denied the privilege of entry into the United States” and “the disclosure of the information on which he based that opinion would itself endanger the public security”). Surely the holdings of those cases could not be overcome simply by having the excluded alien’s spouse request the information. A fortiori that is true with respect to an alien, like Berashk here but unlike the aliens in *Mezei* and *Knauff*, who has not even reached our shores.

The Ninth Circuit’s decision also is inconsistent with *Mandel*, the very decision that the court of appeals purported to be following. Emphasizing that a court should not “look behind” a visa-related determination, 408 U.S. at 771, *Mandel* did not require the government to provide a reason for its actions that did not already appear in the record, or engage in anything resembling the type of review that the decision below dictates. The Ninth Circuit has mandated that the government list a specific statutory subsection governing ineligibility for a visa and specific facts about what the alien did to fall within that subsection, so that a court could test those facts to “verify” that they “constitute a ground for exclusion under the statute.” App., *infra*, 12a. That plainly entails “look[ing] behind” a consular officer’s visa-denial decision.

2. In addition to being inconsistent with this Court’s precedent, the Ninth Circuit’s decision threatens to interfere with U.S. national-security interests in a number of different respects. Such serious adverse consequences counsel strongly in favor of review by this Court.

First, the disclosure that the Ninth Circuit has mandated could compromise classified or other sensitive information. The information supporting a visa denial pursuant to 8 U.S.C. 1182(a)(3)(B) is often classified or related to a sensitive ongoing law-enforcement or national-security investigation. Furnishing such information to the alien or his U.S. citizen spouse could jeopardize the public safety or the safety of individual operatives in the field by revealing information specific to the alien or classified sources and methods more generally. It is for these reasons—to protect the government’s ability to keep confidential information about security- or crime-related investigations from targets or their associates and to protect law-enforcement and intelligence sources and methods—that Congress authorized consular officers to withhold notice of the ground for a visa denial in the first place. See 8 U.S.C. 1182(b)(3); see also 8 U.S.C. 1202(f) (providing that visa records shall be considered confidential); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 55 (1952) (House Report) (describing “information of a confidential nature” as being information “the disclosure of which would be prejudicial to the interests of the United States”).

Those concerns do not arise only from the Ninth Circuit’s requirement that the government disclose “facts” about “what the consular officer believes the alien has done,” App., *infra*, 9a, 14a; they are also relevant to that court’s insistence that the government reveal the particular subsection of 8 U.S.C. 1182(a)(3)(B) that formed the basis for the visa denial, see App., *infra*, 12a, 14a. For example, the government’s disclosure to a U.S. citizen that it has reason to believe that his or her spouse has solicited funds for a terrorist organization (see 8 U.S.C. 1182(a)(3)(B)(i)(I) and (iv)(IV)), or has been to a terrorist training camp (see 8 U.S.C.

1182(a)(3)(B)(i)(VIII)), could well enable anyone who learns the substance of that disclosure to make educated guesses about, or even to identify definitively, the nature and sources of the government's knowledge. That is precisely the type of harm Congress intended to prevent by enacting 8 U.S.C. 1182(b)(3).

Second, and relatedly, the Ninth Circuit's decision, if allowed to stand, could have a chilling effect on the sharing of national security information among federal agencies and between the United States and foreign countries. When making visa ineligibility determinations, consular officers rely largely on information that other agencies or entities provide to the Department of State. See 8 U.S.C. 1105(a) (directing the Department of State to "maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States"); see also, *e.g.*, House Report 36 (explaining that Congress intended Section 1105 to "strengthen security screening of aliens coming to the United States, or residing therein, by providing for a continuous flow of information between agencies of the Government charged with the administration of immigration and naturalization laws, and those agencies whose duty it is to gather intelligence information having a bearing on the security of the United States"). If the Department of State were compelled to disclose sensitive law-enforcement or intelligence information in connection with the denial of visa applications, consular officers may not receive or be permitted to rely upon the complete information needed to protect the national security. See, *e.g.*, National Commission on Terrorist Attacks Upon the United States, *9/11 Commission Report* 384 (2004) ("For terrorists, travel documents are as important as weapons.").

The Ninth Circuit suggested that any harm to the United States could be ameliorated by providing information about the reasons for a visa denial to a district court in camera "if necessary." App., *infra*, 21a. But that proposed solution does not respect the sovereign power of the United States to bar the admission of aliens on security grounds, and does not adequately safeguard the political Branches' ability to make visa decisions in the interest of national security. The panel's ruling is vague about exactly what "procedures" should be followed and under what circumstances, *ibid.*, and courts have sometimes been reluctant to "dispose of the merits of a case on the basis of ex parte, in camera submissions." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd* by an equally divided Court, 484 U.S. 1 (1987); ... Moreover, any widening of access to sensitive information, even in controlled settings, increases the risk of unauthorized or inadvertent disclosure. The Ninth Circuit's imposition of a regime of judicial review of terrorism-related grounds for barring an alien from the United States is therefore likely to disrupt the government's efforts to safeguard national security and public safety.

3. The difficulties raised by the Ninth Circuit's decision could affect a significant number of visa applications every year. According to the Department of State, between January 1, 2012, and December 31, 2012, consular officers denied 226,761 visa applications under 8 U.S.C. 1182(a), of which approximately 1400 were filed by aliens on the basis of their engagement or marriage to a U.S. citizen and were denied on Section 1182(a)(2) or (3) grounds. While some of those denials do not involve sensitive criminal or national security grounds, a meaningful number of them would.

For these reasons, and because of the serious errors in the Ninth Circuit's decision and the conflicts it creates with decisions of this Court and other courts of appeals, this Court's intervention is warranted.

* * * *

The Supreme Court granted the petition for certiorari on October 2, 2014 and the United States filed its brief on the merits on November 26, 2014. *Kerry v. Din*, No. 13-1402. Excerpts follow from the brief of the United States (with footnotes omitted).

* * * *

A. The Court Of Appeals Erred In Holding That A U.S. Citizen Has A Protected Liberty Interest That Is Implicated By The Denial Of A Visa Application Filed By An Alien Spouse

The Ninth Circuit ruled that respondent—a U.S. citizen who is the spouse of a non-resident alien—has a due process right that is implicated by a consular officer’s denial of the alien’s visa application. That right, the court held, entitles her to judicial review of the denial of the alien’s visa application and a fuller explanation of the basis for the denial—even though the alien himself has no such rights. That ruling is deeply flawed. The INA confers no legally cognizable interest on a U.S. citizen if her alien spouse abroad is denied a visa because he has been found personally ineligible on terrorism (or other) grounds under the INA. Nor does the Due Process Clause itself confer such an interest.⁸

1. Respondent was afforded access to certain procedures under the INA in connection with her own petition, at the first step of the visa process, for classification of Berashk as an immediate relative to whom a visa could be made available if he was later found admissible in his own right. But she cannot derive from the INA or its implementing regulations any protected interest in connection with Berashk’s subsequent and distinct application on his own behalf. If a qualified “citizen of the United States” files a petition with USCIS to obtain immediate-relative status for an alien, 8 U.S.C. 1154(a)(1); see *Scialabba v. Cuellar De Osorio*, 134 S. Ct. 2191, 2197-2198 (2014) (opinion of Kagan, J.), and USCIS determines that “the facts stated in the petition are true,” then (absent circumstances not at issue here) USCIS “shall * * * approve the petition,” 8 U.S.C. 1154(b); see 8 U.S.C. 1151(b). With respect to such a petition, the U.S. citizen is the party who is seeking action from the government. The decision whether to approve the petition generally turns on an assessment of whether the U.S. citizen is qualified to file it, and whether the U.S. citizen in fact has the claimed family relationship to the alien. If the petition is denied, the U.S. citizen can seek administrative reopening or reconsideration, see 8 C.F.R. 103.5, and can appeal an adverse decision to the Board of Immigration Appeals, see 8 C.F.R. 103.3(a), 1003.1(b)(5), 1003.5(b). In this case, respondent’s petition was approved, and she therefore received all of the process that she was due under the INA and pertinent regulations with respect to her petition.

But approval of a U.S. citizen’s visa petition is not sufficient for the actual issuance of a visa to the alien beneficiary; it merely makes the alien eligible to submit his own application for a visa. See 8 U.S.C. 1201(a), 1202(a) and (e); 22 C.F.R. 42.31, 42.42; see also *Cuellar De Osorio*, 134 S. Ct. at 2198. A consular officer’s decision to grant or deny a visa application filed by an alien abroad, see 8 U.S.C. 1201(a)(1), does not turn on the status of the original petitioner (here, the alien’s U.S.-citizen family member), or on the nature of the petitioner’s relationship to the alien or her reasons for filing the petition in the first instance. Rather, regardless of whether the alien’s ability to apply for a visa rests on an approved petition filed by a family member—or

on some other basis (such as an approved petition filed by a prospective employer, see 8 U.S.C. 1151(d), 1153(b))—the adjudication of the visa application by a consular officer is based on a close examination of the alien’s own history, health, associations, criminal record, and other characteristics, in order to determine whether one of the grounds of inadmissibility in the INA might bar the alien’s entry into the United States. See 8 U.S.C. 1182, 1201(a), (c), (d), and (g), 1202(a), (b), and (e).

The U.S.-citizen petitioner has no rights under the INA or implementing regulations with respect to the submission and consideration of the alien’s visa application. An alien who is the subject of an approved petition need not, of course, apply for a visa at all. If he does apply, the citizen is not entitled under the INA or its implementing regulations to be present at the visa interview, or to obtain notice that the visa has been denied, see 8 U.S.C. 1182(b), or to review any “records of the Department of State and of diplomatic and consular offices of the United States pertaining to the * * * refusal” of the visa, 8 U.S.C. 1202(f). Indeed, in some cases information an alien discloses in his application, or the reasons for the ultimate refusal of a visa, may be of such a sensitive nature that the alien would not wish to reveal them to his own spouse or family members. See 8 U.S.C. 1182. Nor does the petitioner possess any basis in law to insist or expect that the alien’s application will be granted, or any statutory or regulatory right to challenge or appeal a consular officer’s denial of the application.

These provisions make clear that the INA and implementing regulations create no legally protected interest in the petitioning U.S. citizen with respect to the alien’s separate visa application. See *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1164 (D.C. Cir. 1999) (when U.S. sponsors’ “petition was granted,” their “cognizable interest” under the INA “terminated”); To the contrary, the INA and applicable regulations recognize that spouses are independent actors responsible for their own actions and for establishing their own eligibility for government benefits, such as admission to the United States.

2. In ruling that respondent is entitled to due process in her own right with respect to the denial of Berashk’s visa application, the court of appeals did not rely on any provision of immigration law. Instead, the court reasoned that respondent possesses a substantive “protected liberty interest in marriage,” derived directly from the Due Process Clause, in connection with her alien husband’s visa application. . . . Although “[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), no such fundamental interest is implicated by this case. In light of Congress’s plenary control over the admission of aliens—and Congress’s exercise of that power in the INA, which confers no legally cognizable interest in a U.S. citizen with respect to an alien’s visa application—there is simply no history in this Nation of recognizing a liberty interest in “the ability to live in the United States with an alien spouse.” Pet. App. 7a n.1. And any indirect harm experienced by respondent as a result of the government’s denial of Berashk’s visa application does not deprive respondent herself of an interest protected by the Due Process Clause.

a. The range of liberty interests protected by the Due Process Clause “is not infinite.” *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972); see *Meachum v. Fano*, 427 U.S. 215, 224 (1976). Under either a procedural or substantive due process analysis, determining whether an asserted liberty interest is “[a]mong the historic liberties” encompassed by the Clause, *Ingraham v. Wright*, 430 U.S. 651, 673 (1977), requires examination of “[o]ur Nation’s history, legal traditions, and practices.” *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); see *Reno v. Flores*, 507 U.S. 292, 303 (1993) (explaining that to qualify for substantive

protection under the Due Process Clause, a liberty interest must be “so rooted in the traditions and conscience of our people as to be ranked as fundamental”) (citations omitted); *Ingraham*, 430 U.S. at 672-675 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Such an assessment can be made only by first ascertaining “the precise nature of the private interest” that is allegedly threatened; merely stating a claimed interest in vague or general terms is not sufficient. *Lehr v. Robertson*, 463 U.S. 248, 256 (1983); see *Glucksberg*, 521 U.S. at 721 (requiring “a ‘careful description’ of [an] asserted fundamental liberty interest” for purposes of substantive due process analysis) (quoting *Flores*, 507 U.S. at 302); see also *Roth*, 408 U.S. at 570-571.

This Court has recognized a deeply rooted liberty interest, protected by the Due Process Clause, in “rights to marital privacy and to marry and raise a family.” *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965); see *Glucksberg*, 521 U.S. at 720 (“[T]he ‘liberty’ specially protected by the Due Process Clause includes the right[] to marry.”) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-640 (1974) (citing cases regarding decisions to marry and have children to support the proposition that the Due Process Clause protects “freedom of personal choice in matters of marriage and family life”); see also *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (opinion of Powell, J.). Those rights are “of similar order and magnitude as the fundamental rights specifically protected” in the Constitution. *Griswold*, 381 U.S. at 495.

Those recognized rights, however, are not implicated here. The consular officer’s denial of Berashk’s visa application did not interfere with respondent’s ability to marry him—their marriage was solemnized years before the denial took place. See Pet. App. 3a. 23 The visa denial did not nullify the marriage, or deprive respondent of the legal benefits the marriage created, or prevent her from living with her spouse anywhere in the world besides the United States. See *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (“Even assuming that the federal government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States. It does not attack the validity of the marriage.”), cert. denied, 402 U.S. 983 (1971); cf. *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir.) (“[Deportation] would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created.”), cert. denied, 357 U.S. 928 (1958). Nor did the denial of a visa to Berashk prevent respondent from “rais[ing] a family,” either in the United States or elsewhere. *Griswold*, 381 U.S. at 495.

Perhaps appreciating that respondent’s rights in connection with marriage that have been recognized as protected by the Constitution are far removed from the denial of a visa to Berashk, the court of appeals seized on language from *Cleveland Board of Education v. LaFleur*, *supra*—a case involving the decision whether to “bear or beget a child,” 414 U.S. at 640—that refers to “[f]reedom of personal choice in matters of marriage and family life.” Pet. App. 7a & n.1 (citing *Bustamante*, 531 F.3d at 1062 (citing *LaFleur*, 414 U.S. at 639-640)). That vaguely worded passage cannot properly be divorced from the specific issue before this Court. See *Cohens v. Virginia*, 19 U.S. (6 24 Wheat.) 264, 399 (1821) (“general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used”). As invoked by the court of appeals in the wholly distinct context here, that exceedingly general language hardly qualifies as a “precise” or “careful” description of a liberty interest that could confer a due process right on a U.S. citizen specifically concerning her spouse’s admission to the United States. *Flores*, 507 U.S. at 302; *Lehr*, 463 U.S. at 256.

In reality, there is only one “choice” of respondent’s that is directly affected by the denial of a visa to Berashk: her preference that he be admitted to the United States so that she can live in this country with him. See Br. in Opp. 17 (asserting “a constitutionally protected liberty interest in choosing where to live with [one’s] spouse”). The court of appeals resisted the suggestion that the review it fashioned was “predicated on a liberty interest in the ability to live in the United States with an alien spouse,” insisting that a “more general right” was at issue. Pet. App. 7a n.1. But the court did not explain any basis for its resistance to that suggestion. And in light of the vagueness of the “more general right” on which it purported to rely—and the fact that the visa denial does not impinge on the marriage-related interests that this Court has previously recognized—no such basis exists. The “freedom of personal choice” perceived by the court of appeals is, at bottom, an asserted constitutionally based liberty interest in having Berashk be present in the United States. See, e.g., *Swartz*, 254 F.2d at 339 (“[T]he essence of appellants’ claim, when it is analyzed, is a right to live in this country.”); see also *Silverman*, 437 F.2d at 107.

There is no history in this Nation of recognizing a liberty interest in having one’s alien spouse enter and reside in the United States, especially when neutral laws of general applicability bar the alien from entering. To the contrary, there is a long history of recognizing that alien spouses (and other family members) of U.S. citizens may be denied admission to the United States in Congress’s complete discretion, as an exercise of Congress’s “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.” *Mandel*, 408 U.S. at 766 (citation omitted); see generally *Galvan v. Press*, 347 U.S. 522, 531 (1954) (explaining that the principle “that the formulation” of policies pertaining to the entry of aliens and their right to remain here “is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government,” representing “not merely a page of history, but a whole volume”) (citation and internal quotation marks omitted).

That power has often been recognized even when Congress’s choices or the Executive’s enforcement decisions result in separation of family members. See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539, 543-544, 547 (1950) (upholding Executive’s right to deny entry to U.S. citizen’s alien spouse based on confidential “security reasons” without providing a hearing); see also *Fiallo*, 430 U.S. at 798 (disclaiming any “authority to substitute our political judgment for that of the Congress,” even when “statutory definitions deny preferential status to parents and children who share strong family ties”); see generally *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 232-234 (1896). Accordingly, in the immigration context, an asserted liberty interest in having an alien spouse admitted to the United States cannot be counted among the “historic liberties,” *Ingraham*, 430 U.S. at 673, arising directly from the Fifth Amendment. Decisions of the courts of appeals stretching back many decades have reached the same conclusion, “repudiat[ing]” the existence of a protected liberty interest in living in the United States with an alien spouse (or other alien relative). Pet. App. 7a n.1.

To counter that conclusion, respondent has pointed (Br. in Opp. 14-15, 20) to this Court’s decision in *Fiallo v. Bell*, *supra*, which involved constitutional challenges to statutory provisions governing the system under which U.S. citizens and permanent residents can petition for immediate-relative or other family-related classifications for their alien parents or children. 430 U.S. at 791. But *Fiallo* does not aid respondent’s cause. It did not concern review of a consular officer’s decision denying an alien’s visa application based on the distinct grounds on which an

alien may be inadmissible because of his own circumstances. Moreover, as noted above, the decision soundly rejected the proposition that U.S. citizens have a “fundamental right” under the INA to have their alien family members admitted to the United States. *Id.* at 795 n.6; see p. 20, *supra*. The decision also emphasized that “over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” 430 U.S. at 792 & n.4 (citation and internal quotation marks omitted). While *Fiallo* recognizes that Congress’s decisions embodied in immigration statutes are not always immune from judicial review, it does not suggest the existence of a constitutionally protected liberty interest in marriage that extends to having one’s alien spouse admitted to the United States. See *id.* at 793-795 & nn.5-6, 798.

Respondent has also placed heavy reliance (Br. In Opp. 18-19) on *Moore, supra*, which recognizes a substantive due process right for a U.S.-citizen grandmother to live in the same household as her U.S.-citizen grandson. See 431 U.S. at 499 (opinion of Powell, J.) (explaining that a State cannot enter into the private realm of family life so as to make “a crime of a grandmother’s choice to live with her grandson”). But *Moore* does not speak to the nature of a citizen’s liberty interests in an immigration context. To the contrary, the purported liberty interest in living in this country with a non-resident alien who has been deemed inadmissible and denied a visa “is one far removed from the right of United States citizens to live together as a family.” *Morales-Izquierdo v. DHS*, 600 F.3d 1076, 1091 (9th Cir. 2010). *Moore*’s holding is grounded in history and tradition. See 431 U.S. at 503-505 & n.12 (opinion of Powell, J.) (finding “[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children” to be “deserving of constitutional recognition” because of its “venerable” roots) (footnote omitted). No such grounding exists with respect to the wholly distinct liberty interest that respondent claims.

That analysis does not, as respondent has insisted (Br. in Opp. 16-17), erroneously conflate the question of the existence of an asserted liberty interest with the question of the strength of the government’s regulatory interest. Rather, it recognizes that where the government’s regulatory powers have “tradition[ally]” been absolute, as is true of the admission of aliens, the asserted interest could never have taken sufficient “root[.]” in the first place to enjoy protection arising directly from the text of the Due Process Clause itself. *Ingraham*, 430 U.S. at 672-675; *Flores*, 507 U.S. at 303; see generally *Mandel*, 408 U.S. at 770 (stating that in the visa context there is no call to “balanc[e]” the government’s “justification” for its action against the interests of a U.S. citizen).

b. Respondent’s contention that the denial of a visa to her alien spouse implicates her own liberty interests under the Due Process Clause suffers from another fatal flaw: it cannot be reconciled with the longstanding principle that “the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action.” *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980).

As this Court explained in *O’Bannon*, due process jurisprudence has long drawn a “simple distinction between government action that directly affects a citizen’s legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally,” and has rejected the notion that the latter sort of action can be said to have interfered with the citizen’s constitutionally protected liberty or property interests. *O’Bannon*, 447 U.S. at 788-789 (citing *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870)) (stating that the Fifth Amendment “has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals”).

* * * *

The principle that “an indirect and incidental result of the Government’s enforcement action * * * does not amount to a deprivation of any interest in life, liberty, or property,” *O’Bannon*, 447 U.S. at 787, is fully applicable to this case, and it defeats respondent’s claim that she has been deprived of any protected liberty interest. The United States has taken no adverse action against respondent herself; indeed, DHS approved respondent’s petition to have Berashk classified as an alien who may apply for an immigrant visa. Respondent’s only complaint is that an adverse decision solely concerning her spouse—the denial of his visa application, based on his own failure to satisfy the qualifications for obtaining a visa under the INA—has had a ripple effect, depriving her of her husband’s company so long as she elects to remain within the borders of the United States. That is exactly the kind of “indirect and incidental” harm, *ibid.*, that this Court has held “does not amount to a deprivation of any interest in life, liberty, or property,” *ibid.*; see *id.* at 789-790. In the face of this Court’s precedents, the Ninth Circuit’s ruling that “the denial of a spouse’s visa” impinges upon a U.S. citizen’s “protected liberty interest in marriage” under the Due Process Clause, Pet. App. 7a, cannot be sustained.

c. The Ninth Circuit’s due process ruling would have sweeping implications. Under such a legal regime, any U.S. citizen whose alien spouse is not permitted to enter this country, for any reason, might assert a constitutional claim. So, too, might any U.S. citizen whose alien spouse is deemed inadmissible at the border or is placed in proceedings to remove him from this country because of (for instance) violation of the immigration laws, commission of serious crimes, or ties to terrorist activity. See, e.g., 8 U.S.C 1227. And, because the constitutional right that the Ninth Circuit posited covers “personal choice” not just in “marriage” but also in “family life” more generally, Pet. App. 7a n.1 (citation omitted), such claims might also be asserted by U.S.-citizen children, parents, or even siblings whose alien family members have been deemed inadmissible to or removed from the United States. That result would work a sea change in the law, creating obstacles to the government’s exercise of its plenary power over the Nation’s borders and burdening the courts. See, e.g., *Morales-Izquierdo*, 600 F.3d at 1091.

Moreover, by breaking down the long-accepted “distinction between government action that directly affects a citizen’s legal rights, or imposes a direct restraint on his liberty, and action that is directed against a third party and affects the citizen only indirectly or incidentally,” *O’Bannon*, 447 U.S. at 788, the Ninth Circuit’s ruling would open the door to a host of constitutional claims outside the immigration context. If government action directed solely at respondent’s alien spouse gave rise to a claim on respondent’s part that her protected liberty interests have been infringed, “it is difficult to see why children would not also have a constitutional right to object to a parent being sent to prison or, during periods when the draft laws are in effect, to the conscription of a parent for prolonged and dangerous military service.” *Payne Barahona v. Gonzáles*, 474 F.3d 1, 3 (1st Cir. 2007); cf. *Flores*, 507 U.S. at 301-303. Indeed, in support of her position in this case, respondent has embraced the very notion that such due process rights exist and that such claims may be brought. See Br. in Opp. 21 n.4 (stating that children “certainly would have” a constitutional right to challenge a parent’s imprisonment). That state of affairs would overturn more than a century of precedent, see *O’Bannon*, 447 U.S. at 788-789, and flood the courts with suits by plaintiffs who claim a species of constitutional injury that has never previously been cognizable.

B. The Court Of Appeals Erred In Imposing Judicial Review And Notice Requirements On A Consular Officer’s Visa Determination

The Ninth Circuit's decision is fundamentally flawed for additional reasons. Relying on the conclusion in *Mandel* that a "facially legitimate" exercise of discretion is sufficient (assuming that some judicial review of the denial of a waiver of inadmissibility is available at all), the court of appeals imposed, as a matter of constitutional law, requirements of detailed notice with respect to aliens denied a visa on security and related grounds identified by Congress. The court mandated a disclosure that would permit plaintiffs like respondent to obtain information not only about the legal basis for a terrorism-related denial of a visa to an alien spouse but also about the "facts" of "what the consular officer believes the alien has done." Pet. App. 9a, 14a. That ruling cannot be reconciled with this Court's precedents, including *Mandel* itself, or with Congress's judgment that visas refusals are not to be subject to judicial review or that the reasons for such refusals may remain undisclosed. Moreover, the notice requirements imposed by the court of appeals would give rise to serious national-security-related harms.

1. The doctrine of consular nonreviewability has deep roots in the law. For virtually as long as Congress has required immigrants to present documentation when arriving at a port of entry, see Immigration Act of 1924, Pub. L. No. 68-139, § 2(f), 43 Stat. 154 ("No immigration visa shall be issued to an immigrant if it appears to the consular officer * * * that the immigrant is inadmissible to the United States under the immigration laws."), courts have recognized that an alien has no right to challenge the refusal of a visa by a consular officer in the absence of affirmative congressional authorization. See, e.g., *United States ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928); That principle has become deeply embedded in judicial decisions, including decisions by this Court. See, e.g., *Mandel*, 408 U.S. at 769-770; *Brownell v. Tom We Shung*, 352 U.S. 180, 184 n.3, 185 n.6 (1956) (declining to suggest that "an alien who has never presented himself at the border of this country may avail himself of [a] declaratory judgment action by bringing the action from abroad"); see also, e.g., *Knauff*, 338 U.S. at 543; *Saavedra Bruno*, 197 F.3d at 1160, 1162 (discussing nonreviewability doctrine's history and collecting cases).

Powerful justifications support the preclusion of judicial second-guessing of decisions made by consular officers abroad relating to aliens' qualifications for admission to the United States. First, the consular nonreviewability doctrine is a necessary corollary of the principle that the political Branches have plenary power to make rules for the admission of aliens and to exclude those who do not qualify under those rules. That power is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Mandel*, 408 U.S. at 765; see *Knauff*, 338 U.S. at 542; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659-660 (1892); see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952) (explaining that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government").

This Court has therefore long held—including in decisions that predate the visa system—that "[t]he power of Congress to * * * prescribe the terms and conditions upon which [aliens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications," even in cases in which there is some question about whether the alien falls within "a class forbidden to enter the United States." *Wong Wing*, 163 U.S. at 232-234 (emphasis added); see *Harisiades*, 342 U.S. at 588-589.

Second, Congress has repeatedly acknowledged the consular nonreviewability doctrine and chosen to leave it undisturbed. When putting the visa system into place in 1924, Congress

understood that no form of review would be available to challenge a consular officer's denial of a visa. See H.R. Rep. No. 176, 68th Cong., 1st Sess. Pt. 2, at 10 (1924) (view of minority); 65 Cong. Rec. 5466 (1924). When Congress drafted the INA in 1952, there were suggestions to authorize judicial review of visa denials or to create "a semijudicial board * * * with jurisdiction to review consular decisions pertaining to the granting or refusal of visas," H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952) (House Report); see S. Rep. No. 1515, 81st Cong., 2d Sess. 622 (1950). But Congress declined to enact any such procedure. As a Senate Report explained, although "[o]bjection has been made to the plenary authority presently given to consuls to refuse the issuance of visas," allowing "review of visa decisions would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws. * * * [T]he question of granting or refusing immigration visas to aliens should be left to the sound discretion of the consular officer." S. Rep. No. 1515, at 622. And in 1961, when the INA was amended to authorize judicial review of determinations affecting aliens in the United States subject to deportation or exclusion proceedings, Congress provided no corresponding right to judicial review for aliens outside the United States claiming some right to enter. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651; see also 37 H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961) (stating that "[t]he sovereign United States cannot give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he may litigate in the courts of the United States"); see also 8 U.S.C. 1201(i) (allowing judicial review of visa revocations, as distinguished from initial visa denials, but only in proceedings to remove an alien who is in the United States and when "revocation provides the sole ground for removal").

It is within Congress's power to provide for some judicial (or administrative) review of a consular officer's refusal of a visa. But no statutory provision of that nature exists, see pp. 7-8, *supra*, or has ever existed, and the whole history of the immigration laws therefore reflects a congressional judgment that no such judicial examination should take place. "[U]nless expressly authorized by law," it is "not within the province of any court * * * to review the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543.

2. *Mandel* was decided against the backdrop of—and articulated justifications for—the long-standing consular nonreviewability doctrine. See 408 U.S. at 765-767. Contrary to the ruling below, see Pet. App. 6a-7a & n.1, *Mandel* did not authorize judicial review of a consular officer's denial of a visa, and there is no basis for recognizing any right to judicial review of such a decision.

In *Mandel*, this Court assumed (but did not hold) that if a U.S. citizen's First Amendment rights were implicated, then that citizen could obtain very limited review of the Attorney General's discretionary denial of a waiver of the grounds that required the refusal of an alien's nonimmigrant visa application by a consular officer. See 408 U.S. at 765, 770. In that narrow context, the Court concluded that the reason for the Attorney General's denial of the waiver that appeared in the record was "facially legitimate and bona fide" and that it was not appropriate to "look behind the exercise of [the Attorney General's] discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 769-770. The Court specifically declined to address whether the Attorney General was required to furnish such a reason at all. See *id.* at 770 ("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 nor decide in this case.").

That narrow decision cannot be transmuted into a warrant for judicial review of a decision made by a consular officer abroad to deny an alien a visa. A rationale that might support limited judicial review of a discretionary waiver of a ground of inadmissibility by the Attorney General—and the Court in *Mandel* did not hold that there was a right of judicial review even then—simply does not extend to the underlying decision that such a ground for denying a visa applies. Unlike a discretionary waiver decision, which could be based on a wide range of considerations deemed relevant by the Executive, a consular officer’s decision not to issue a visa because an alien is ineligible must, by definition, be tethered to the legal provisions that define the alien’s ineligibility. See, e.g., 8 U.S.C. 1182(a), 1201(g). It does not make sense to ask if the reasons for visa denial set forth in an Act of Congress are “facially legitimate”; those reasons are legitimate on their face by their very nature because Congress has prescribed them.

Attempting to examine the “facial[] legitima[cy]” of a statutorily grounded determination by a consular officer would ultimately put courts in the untenable position of second-guessing Congress’s choices about which aliens abroad should and should not be granted visas as well as decisions by consular officers at distant posts about whether individual aliens who appear before them satisfy the conditions Congress has laid down. Such a task is outside the judiciary’s realm; it cannot be reconciled with the consular nonreviewability doctrine and the fundamental principles that undergird it. That conclusion is not altered by the fact that Congress’s choices might have an indirect effect on an alien’s U.S.-citizen family members or other persons in this country. A congressional decision to permit some aliens to be admitted and require other aliens to be excluded—and consular officers’ application of those criteria—is a line-drawing exercise that will keep some family members apart and prevent some citizens who “would wish to meet and speak with” an ineligible alien from fulfilling that goal. *Mandel*, 408 U.S. at 768; see *id.* at 765-767; *Fiallo*, 430 U.S. at 792-795. That incidental consequence has never been thought to undermine Congress’s plenary power to make those kinds of decisions or to vest consular officers with the authority to make final determinations in such matters abroad.

Accordingly, extension beyond the discretionary waiver context of the language in *Mandel* is not justified. See 408 U.S. at 767 (“[Plaintiffs] concede that Congress could enact a blanket prohibition against entry of all aliens falling into the class defined by [statutory provisions], and that First Amendment rights could not override that decision.”); cf. *Saavedra Bruno*, 197 F.3d at 1161-1165 (acknowledging distinction between consular officer’s visa denial and Attorney General’s refusal to waive applicable grounds of inadmissibility); but see *American Acad. of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009). Because the decision of a consular officer to refuse a visa was directly at issue here, the Ninth Circuit erred in subjecting that decision to judicial scrutiny.

3. In any event, *Mandel* did not require the government to supply a reason that did not already appear in the record of a case so that a court could scrutinize that reason and determine whether it was sufficiently valid. See 408 U.S. at 769-770. But that is exactly what the Ninth Circuit required here when it ruled that the government must identify the precise subsection of 8 U.S.C. 1182(a)(3)(B) under which the 41 visa application was denied and the factual basis for the determination of inadmissibility. Pet. App. 7a-21a. There is no basis in the Constitution to mandate disclosure or judicial review of such information.

a. By statute, the government is generally required to provide an alien whose visa application has been denied with a statement of the determination and “the specific provision or provisions of law under which the alien is inadmissible.” 8 U.S.C. 1182(b)(1). That notice provision does not apply, however, when the alien is found inadmissible on “[s]ecurity and

related grounds,” which include “terrorist activity,” or on “[c]riminal and related grounds.” See 8 U.S.C. 1182(a)(2), (a)(3), and (b)(3). Congress adopted that exception to the statutory notice requirement as part of a subtitle of the Antiterrorism and Effective Death Penalty Act of 1996 entitled “Exclusion of Members and Representatives of Terrorist Organizations,” Pub. L. No. 104-132, Tit. IV, Subtit. B, 110 Stat. 1268, in order to ensure that “no explanation of the denial need be given to aliens excluded on the basis of their terrorist or other criminal activity,” H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 116 (1996).

When the government invokes the protections of Section 1182(b)(3) to limit the information supplied to an alien whose visa application has been denied under Section 1182(a)(3) on security or related grounds, it does so for national-security or foreign-policy reasons. Deference to the political Branches is at its zenith in matters of national security and foreign affairs. See *Wayte v. United States*, 470 U.S. 598, 611-612 (1985) (stating that “[f]ew interests can be more compelling than a nation’s need to ensure its own security”). . . .

In keeping with that principle, decisions of this Court recognize that the government is entitled to shield information relating to the entry of aliens that “would itself endanger the public security,” *Knauff*, 338 U.S. at 544—the very concern on which Section 1182(b)(3) is based. . . .

* * * *

b. By requiring the government to come forward with a detailed reason for the visa refusal that has been properly withheld from the alien himself, the Ninth Circuit’s decision threatens to interfere with U.S. national-security and foreign-policy interests in a number of different respects. Those serious adverse consequences, which would leave an “unprotected spot in the Nation’s armor,” *Zadvydas*, 533 U.S. at 695-696 (citation omitted), counsel strongly against creating a disclosure requirement that the *Mandel* Court did not adopt and then subjecting the consular decision-making to judicial scrutiny.

First, the type of disclosure that the Ninth Circuit has mandated could compromise classified or other sensitive information. The information supporting a visa denial pursuant to 8 U.S.C. 1182(a)(3)(B) is often classified or related to a sensitive ongoing national-security or law-enforcement investigation. Furnishing such information to an alien’s U.S.-citizen spouse (or perhaps even his parent, child, or sibling)—who is very likely to pass on the information to the alien and his associates—could jeopardize the national security, the public safety, or the safety of individual intelligence or other personnel in the field by revealing information specific to the alien or classified sources and methods more generally. . . .

Those concerns arise not only from the Ninth Circuit’s requirement that the government disclose “facts” about “what the consular officer believes the alien has done,” Pet. App. 9a, 14a, but also from its insistence that the government reveal the particular subsection of 8 U.S.C. 1182(a)(3)(B) that formed the basis for the visa denial, see Pet. App. 12a-15a. For example, the government’s disclosure to a U.S. citizen that it has reason to believe that her spouse has solicited funds for a terrorist organization (see 8 U.S.C. 1182(a)(3)(B)(i)(I) and (iv)(IV)), or has been to a terrorist training camp (see 8 U.S.C. 1182(a)(3)(B)(i)(VIII)), could well enable anyone who learns the substance of that disclosure to make educated guesses about, or even to identify definitively, the nature and sources of the government’s knowledge. That is precisely the type of harm Congress intended to prevent by enacting 8 U.S.C. 1182(b)(3).

Second, the requirement imposed by the Ninth Circuit would have a chilling effect on the sharing of national-security information among federal agencies and between the United States and foreign countries. Visa ineligibility determinations are frequently based on information that

other agencies or entities, including foreign governments and officials, provide to the Department of State. See, e.g., 8 U.S.C. 1105(a) (directing the Department of State to “maintain direct and continuous liaison with the Directors of the Federal Bureau of Investigation and the Central Intelligence Agency and with other internal security officers of the Government for the purpose of obtaining and exchanging information * * * in the interest of the internal and border security of the United States”); House Report 36 ...

Some of that information is reflected in State Department records that are routinely consulted when adjudicating visa applications, or are provided to consular officers by sources local to the consular post. Consular officers encountering visa applicants who might have terrorism-related or other security-related ineligibilities also obtain additional information needed to adjudicate the visa application by requesting a Security Advisory Opinion from the State Department, which undertakes an extensive review of all relevant information—including classified information—known to the Department or other agencies or sources. ...

If consular officers were compelled to disclose sensitive law-enforcement or intelligence information in connection with the denial of visa applications, the State Department might well never receive all of the information relevant to enforcing the INA and protecting the national security. Certain foreign sources of information, in particular, may have strong interests in avoiding any action that might tend to reveal their assistance to the United States. ... If consular officers were then forced to act upon aliens’ visa applications without the Department of State or consular posts receiving pertinent information, the ineligibility criteria established by Congress would not be rigorously enforced, and the threat to national security would be grave indeed...

Respondent has noted (Br. in Opp. 31) that consular officers sometimes do disclose information to aliens whose visas are denied for terrorism-related (or crime-related) reasons. But that hardly suggests that the Constitution requires the government to make a particularized disclosure in every case in which a U.S.-citizen spouse demands one, even when it is the view of those who are familiar with intelligence reporting and terrorism trends and patterns that such a disclosure would cause harm to national security or foreign relations. See *Humanitarian Law Project*, 561 U.S. at 34. When disclosure of information to the alien is made, it reflects a considered determination that the information provided does not require invoking the protections of Section 1182(b)(3).

Contrary to the Ninth Circuit’s suggestion (Pet. App. 21a), harm to the United States caused by the court of appeals’ new disclosure requirements could not be ameliorated by providing information about the reasons for a visa denial to a district court in camera “if necessary.” ...

c. In this case, finally, the consular officer did supply a “facially legitimate” reason for the denial of Berashk’s visa application: the fact that he is ineligible under Section 1182(a)(3)(B). *Mandel*, 408 U.S. at 769-770; see Pet. App. 27a-28a (Clifton, J., dissenting); *id.* at 44a. For all the reasons set forth above, there is no basis for requiring the government to detail why the consular officer decided that the provision was applicable. And the prospect of such disclosure—with all of its attendant harms—could not in any event play any proper role in a *Mandel* analysis. Any determination by a court that the information in the government’s hands was actually insufficient to give the consular officer “reason to believe” that Berashk fell into one of the statutory categories of visa ineligibility, 8 U.S.C. 1201(g), would amount to exactly the kind of review that the *Mandel* Court deemed impermissible.

Respondent here seeks exactly what Mandel refused to allow—a “peek behind” the challenged decision, 408 U.S. at 778 (Marshall, J., dissenting), in the hope that she will be able to muster an argument that the consular officer reached an erroneous decision, see Pet. App. 14a (calling for courts to “verify” that facts of a particular case “constitute a ground for exclusion under the statute”). Under Mandel, a court is not entitled to “look behind” the exercise of the consular officer’s responsibilities in that fashion. See *Humanitarian Law Project*, 561 U.S. at 34 (characterizing tasks that involve drawing “factual inferences” in the “national security” context as ones as to which “the lack of competence on the part of the courts is marked”) (citation omitted). Because the visa application submitted by respondent’s alien spouse abroad was denied by the consular officer on the basis of a nondiscretionary reason set forth in Section 1182(b)(3)(B), neither Mandel nor any other relevant authority permits any further inquiry—even if, contrary to our submission, respondent had a right to obtain judicial review of the consular officer’s decision at all.

* * * *

3. Addition of Chile to the Visa Waiver Program

On February 28, 2014, the Secretary of Homeland Security, in consultation with the Secretary of State, designated Chile for participation in the Visa Waiver Program (“VWP”). The Department of Homeland Security (“DHS”) issued the final rule adding Chile to the list of countries designated for participation in the VWP in the Federal Register on March 31, 2014. 79 Fed. Reg. 17,852 (Mar. 31, 2014). In general, travelers from designated VWP participants may apply for admission to the United States at U.S. ports of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. The Secretary of Homeland Security determined, after consulting with the Secretary of State, that Chile meets all requirements for participation in the VWP under section 217 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1187, including: (1) A U.S. Government determination that the country meets the applicable statutory requirement with respect to nonimmigrant visitor visa refusals for nationals of the country; (2) an official certification that it issues machine-readable passports that comply with internationally accepted standards; (3) a U.S. Government determination that the country’s designation would not negatively affect U.S. law enforcement and security interests; (4) an agreement with the United States to report, or make available through other designated means, to the U.S. Government information about the theft or loss of passports; (5) a U.S. Government determination that the government accepts for repatriation any citizen, former citizen, or national not later than three weeks after the issuance of a final executable order of removal; and (6) an agreement with the United States to share information regarding whether citizens or nationals of the country represent a threat to the security or welfare of the United States or its citizens.

4. Visa Restrictions and Limitations

a. Human Rights Abusers in Venezuela

On June 30, 2014, the U.S. Department of State announced the imposition of restrictions pursuant to the INA on travel by certain Venezuelan government officials responsible for human rights abuses. The press statement making the announcement appears below and is available at www.state.gov/r/pa/prs/ps/2014/07/229928.htm.

* * * *

Venezuela in recent months has witnessed large-scale protests by demonstrators concerned about deteriorating economic, social, and political conditions. Government security forces have responded to these protests in many instances with arbitrary detentions and excessive use of force. We have seen repeated efforts to repress legitimate expression of dissent through judicial intimidation, to limit freedom of the press, and to silence members of the political opposition.

Taking this into consideration and pursuant to Section 212(a)(3)(C) of the Immigration and Nationality Act, the Secretary of State has decided to impose restrictions on travel to the United States by a number of Venezuelan government officials who have been responsible for or complicit in such human rights abuses.

With this step we underscore our commitment to holding accountable individuals who commit human rights abuses. While we will not publicly identify these individuals because of visa record confidentiality, our message is clear: those who commit such abuses will not be welcome in the United States.

We emphasize the action we are announcing today is specific and targeted, directed at individuals responsible for human rights violations and not at the Venezuelan nation or its people.

* * * *

On December 18, 2014, the President signed into law S.2142, the Venezuela Defense of Human Rights and Civil Society Act of 2014. The Act imposes economic sanctions and provides for exclusion from the United States and the revocation of visas held by individuals involved in certain human rights abuses and other actions. Steps taken to implement the Act will be discussed in *Digest 2015*.

b. Visa Determinations Concerning Proposed Representatives to the UN

On April 18, 2014, the President signed into law S.2195, an act concerning visa restrictions if the President makes certain determinations with respect to proposed representatives to the United Nations. The legislation was passed after Iran nominated, as its proposed permanent representative to the UN, Hamid Aboutalebi, an individual involved in the 1979 seizure of the U.S. Embassy in Tehran. The President issued a signing statement explaining why legislation such as S.2915 must not be interpreted as

presenting any constraint on the exclusive executive authority under the U.S. Constitution to receive foreign ambassadors. The signing statement, which follows, is available at www.whitehouse.gov/the-press-office/2014/04/18/statement-president:

Today I have signed into law S. 2195, an Act concerning visa limitations for certain representatives to the United Nations. S. 2195 amends section 407 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, to provide that no individual may be admitted to the United States as a representative to the United Nations, if that individual has been found to have been engaged in espionage or terrorist activity directed against the United States or its allies, and if that individual may pose a threat to United States national security interests. As President Bush observed in signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, this provision “could constrain the exercise of my exclusive constitutional authority to receive within the United States certain foreign ambassadors to the United Nations.” (Public Papers of the President, George Bush, Vol. I, 1990, page 240). Acts of espionage and terrorism against the United States and our allies are unquestionably problems of the utmost gravity, and I share the Congress's concern that individuals who have engaged in such activity may use the cover of diplomacy to gain access to our Nation. Nevertheless, as President Bush also observed, “curtailing by statute my constitutional discretion to receive or reject ambassadors is neither a permissible nor a practical solution.” I shall therefore continue to treat section 407, as originally enacted and as amended by S. 2195, as advisory in circumstances in which it would interfere with the exercise of this discretion.

Following the White House statement at a press briefing on April 11, 2014, that “[w]e have informed the United Nations and Iran that we will not issue a visa to Mr. Abutalebi,” the UN Host Country Committee met on April 22, 2014, to discuss issues concerning entry visas issued by the host country. The UN “Report of the Committee on Relations with the Host Country,” available at <http://usun.state.gov/documents/organization/235945.pdf>, summarizes the U.S. statement as follows.

* * * *

21. The representative of the host country stressed that the United States took its responsibilities as host country seriously and was mindful of the provisions of the Headquarters Agreement. The United States received thousands of applications annually for entry visas to transit to and from the Headquarters district and had an excellent track record of issuing such visas. Some applications required further administrative processing, which took additional time, she said, stressing that applicants were advised of that requirement when they applied. When administrative processing was required, the timing varied according to the circumstances of each case. The visa request for Mr. Aboutalebi had been taken extremely seriously.

22. She referred to events in 1979, when Iranian students had seized and taken over the United States embassy in Tehran and held United States diplomats hostage for 444 days. The hostage crisis had been a painful event in the history of the United States. At that time, Mr. Aboutalebi had been a member of the group responsible for the takeover. While he had claimed not to have been in Tehran when the embassy was seized, whether that was the case or not, he had acknowledged publicly that, after the storming of the embassy, he had later entered the premises on a couple of occasions to help to translate for the hostage-takers, including in public press conferences. When travelling to Algeria in 1979, Mr. Aboutalebi had claimed to have represented the group holding the diplomats hostage. At that time, he had been travelling with Abbas Abdi, who had admitted to taking part in the seizure. While in Algeria, Mr. Aboutalebi had boasted of his support for terrorist actions, specifically student activities that had resulted in the seizure of the embassy.

23. She said that her Government had given careful thought to how the request fit with its responsibilities under the Headquarters Agreement. It was a very rare and exceptional case when a participant in the hostage crisis sought to come to the United States. The position of her Government not to grant visas to participants in the crisis was not new. She assured the Committee that the United States had given the matter the most prompt and careful consideration at the highest levels in order to make a timely decision. Her Government had raised its concerns with the Government of the Islamic Republic of Iran some time previously and made its views clear in the hope of a quiet resolution. In past cases, the United States had advised the Secretariat at high levels that it found the presence of such individuals in the United States to be intolerable. It had done so in the case at issue. Her Government found it intolerable that persons involved in depriving United States diplomats of diplomatic protection should themselves be cloaked with that protection. The United States did not consider its position to be a violation of the Headquarters Agreement, she said, assuring the Committee that the host country had taken, and would continue to take, its obligations under the Agreement seriously. She reiterated that the current situation was exceptional in that it concerned a unique and painful event in the history of her country.

* * * *

5. Visa and Immigration Information-Sharing Agreements

Australia

On August 27, 2014, representatives of the governments of the United States and Australia signed an agreement “For the Sharing of Visa and Immigration Information.” The full text of the agreement is available at www.state.gov/s/l/c8183.htm. The stated purpose of the agreement is “to assist in the administration and enforcement of the respective immigration laws of the Parties” by sharing information that would help with immigration enforcement, detecting and preventing crime, and making visa and removal determinations, among other things. The U.S.-Australia agreement entered into force on December 12, 2014, in accordance with Article 14 of the agreement, after an exchange of diplomatic notes confirming that both parties had completed all internal procedures necessary for entry into force of the agreement.

6. **Certain Limited Exemptions for Applicants Who Provided De Minimis or Incidental Material Support for Tier III Groups**

On February 5, 2014, the Departments of State and Homeland Security published in the Federal Register notices of their determination to exercise discretion under INA section 212(d)(3)(B)(i), 8 U.S.C. 1182(d)(3)(B)(i), as amended, to allow exemptions from inadmissibility provisions relating to Tier III terrorist organizations. These two limited material support exemptions to certain terrorism-related grounds for inadmissibility under the INA address a range of cases of individuals whom the U.S. government does not consider to be threats but have been adversely affected by the broad terrorism bars of the INA. These exemptions cover discrete kinds of limited material support that have adversely affected refugees, asylum seekers, immigrants and other travelers: material support to undesignated terrorist organizations that was insignificant in amount, provided incidentally in the course of everyday social, commercial, or humanitarian interactions, or provided under significant pressure.

The exemption for de minimis material support allows that:

paragraphs 212(a)(3)(B)(iv)(VI)(bb) and (dd) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb) and (dd), shall not apply with respect to an alien who provided *insignificant material support* to an organization described in section 212(a)(3)(B)(vi)(III) of the INA, 8 U.S.C. 1182(a)(3)(B)(vi)(III), or to a member of such an organization, or to an individual described in section 212(a)(3)(B)(iv)(VI)(bb) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb),

provided that the alien satisfies certain other criteria, including not having the intent to assist any terrorist organization or activity. 79 Fed. Reg. 6913 (Feb. 5, 2014) (emphasis added).

The exemption for incidental material support allows that:

paragraphs 212(a)(3)(B)(iv)(VI)(bb) and (dd) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb) and (dd), shall not apply with respect to an alien who provided *limited material support* to an organization described in section 212(a)(3)(B)(vi)(III) of the INA, 8 U.S.C. 1182(a)(3)(B)(vi)(III), or to a member of such an organization, or to an individual described in section 212(a)(3)(B)(iv)(VI)(bb) of the INA, 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb), that involves (1) certain routine commercial transactions or certain routine social transactions (*i.e.*, in the satisfaction of certain well-established or verifiable family, social, or cultural obligations), (2) certain humanitarian assistance, or (3) substantial pressure that does not rise to the level of duress,

provided that the alien also satisfies other criteria, including not having the intent to assist any terrorist organization or activity. 79 Fed. Reg. 6914 (Feb. 5, 2014) (emphasis added).

D. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES

1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act (“INA” or “Act”), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status (“TPS”) after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240-47; *Digest 2004* at 31-33; *Digest 2010* at 10-11; *Digest 2011* at 6-9; *Digest 2012* at 8-14; and *Digest 2013* at 23-24. In 2014, the United States extended TPS designations for Haiti, Honduras, Nicaragua, South Sudan, and Sudan and designated Liberia, Sierra Leone, and Guinea, as discussed below.

a. Haiti

On March 3, 2014, the Department of Homeland Security (“DHS”) announced the extension of the designation of Haiti for TPS for 18 months from July 23, 2014 through January 22, 2016. 79 Fed. Reg. 11,808 (March 3, 2014). The extension was based on the determination that the conditions in Haiti that prompted the original TPS designation continue to exist, specifically the effects of the 7.0-magnitude earthquake that occurred on January 12, 2010 continue to cause a substantial, but temporary, disruption of living conditions in Haiti and Haiti remains unable, temporarily, to adequately handle the return of its nationals. *Id.*

b. South Sudan and Sudan

On September 2, 2014, DHS announced the extension of the designation of South Sudan for TPS for 18 months from November 3, 2014 through May 2, 2016, and the redesignation of South Sudan for TPS for 18 months, effective November 3, 2014 through May 2, 2016. 79 Fed. Reg. 52,019 (Sept. 2, 2014). The basis for the extension

and redesignation is the persistence of the ongoing armed conflict and other extraordinary and temporary conditions that prompted the 2013 TPS redesignation, which would pose a serious threat to the personal safety of South Sudanese nationals if they were required to return to their country.

Also on September 2, 2014, DHS announced the extension of the designation of Sudan for TPS for 18 months from November 3, 2014 through May 2, 2016. 79 Fed. Reg. 52,027 (Sept. 2, 2014). The extension was based on the determination that the conditions in Sudan that prompted TPS designation continue to be met, specifically, Sudan continues to experience ongoing armed conflict and other extraordinary and temporary conditions that prevent its nationals from returning in safety.

c. *Honduras and Nicaragua*

On October 16, 2014, DHS announced the extension of the designation of Honduras for TPS for 18 months from January 6, 2015 through July 5, 2016. 79 Fed. Reg. 62,170 (Oct. 16, 2014). The extension is based on the determination that the conditions in Honduras that prompted the original TPS designation continue to be met, namely, there continues to be a substantial, but temporary, disruption of living conditions in Honduras resulting from Hurricane Mitch, and Honduras remains unable, temporarily, to handle adequately the return of its nationals.

Also on October 16, 2014, DHS announced the extension of the designation of Nicaragua for TPS for 18 months from January 6, 2015 through July 5, 2016. 79 Fed. Reg. 62,176 (Oct. 16, 2014). The extension for Nicaragua is likewise based on the continuing disruption resulting from Hurricane Mitch.

d. *Liberia, Sierra Leone, and Guinea*

Effective November 21, 2014, DHS designated Liberia, Sierra Leone, and Guinea for TPS for 18 months due to the Ebola Virus Disease (“EVD”) outbreak in those countries. 79 Fed. Reg. 69,502, 69,506, and 69,511 (Nov. 21, 2014). The basis for the determination from the Liberia notice is excerpted below, and is similar in the Sierra Leone and Guinea notices.

* * * *

The Secretary has determined, after consultation with the Department of State (DOS) and other appropriate Government agencies, that there exist extraordinary and temporary conditions in Liberia that prevent Liberian nationals (and persons having no nationality who last habitually resided in Liberia) from returning in safety. The Secretary also has determined that permitting such aliens to remain temporarily in the United States would not be contrary to the national interest of the United States.

On November 7, 2014 the World Health Organization (WHO) reported that as of November 4, 2014 there had been 13,241 cases of EVD in Guinea, Liberia, and Sierra Leone, with 4,950 deaths, making the 2014 EVD epidemic the largest in history. The outbreak began in Guinea in March 2014 and spread to Liberia and Sierra Leone.

The course of the EVD epidemic currently cannot be predicted accurately as cases of EVD continue to rise every day. As of November 4, 2014 there are numerous areas in each of the three countries where transmission continues to occur at high rates. Large scale efforts to control the epidemic in Guinea, Liberia, and Sierra Leone are ongoing to address these hotspots. As of November 4, 2014, the WHO reported a total of 6,619 cases occurring in Liberia, resulting in 2,766 deaths. Ebola is a highly infectious, severe, and acute viral illness with a high fatality rate. Although experimental treatments and vaccines are under development, there are currently no approved vaccines or approved antivirals for treatment of the disease. It is unlikely that a medical vaccine or cure could be produced on a large scale in the near future.

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The EVD epidemic has overwhelmed the already weak health care systems in Liberia and Sierra Leone, and placed Guinea's system under great strain. As of November 4, 2014, the WHO reports that, 545 health care workers are known to have developed EVD (88 in Guinea, 318 in Liberia, 11 in Nigeria, and 128 in Sierra Leone). Three hundred and eleven health care workers have died as a result of EVD infection. Fears of transmission, overcrowding, and inadequate medical and protective supplies have resulted in patients refraining from seeking care and doctors and nurses refusing to work. Individuals in these countries are increasingly unable to get treatment for preventable or treatable conditions, such as malaria, diarrheal diseases, and pregnancy complications. Maternal and child health care is being especially undermined. Attempted containment measures such as cancellation of airline flights, international trade restrictions, and disruption to agriculture threaten future food shortages and have added to the suffering caused by the EVD epidemic.

Based upon this review and after consultation with appropriate Government agencies, the Secretary finds that:

Liberian nationals (and persons without nationality who last habitually resided in Liberia) cannot return to Liberia in safety due to extraordinary and temporary conditions. See INA section 244(b)(1)(C), 8 U.S.C. 1254a(b)(1)(C);

It is not contrary to the national interest of the United States to permit nationals of Liberia (and persons without nationality who last habitually resided in Liberia) who meet the eligibility requirements of TPS to remain in the United States temporarily. See INA section 244(b)(1)(C), 8 U.S.C. 1254a(b)(1)(C);

The designation of Liberia for TPS will be for an 18-month period from November 21, 2014 through May 21, 2016. See INA section 244(b)(2), 8 U.S.C. 1254a(b)(2)

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An estimated 4,000 Liberian nationals (and persons without nationality who last habitually resided in Liberia) are (or are likely to become) eligible for TPS under this designation.

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2. Programs and Policies regarding Unaccompanied Minor Migrants from Central America

The United States and the international community became increasingly concerned in 2014 about the growing number of minors from El Salvador, Guatemala and Honduras who crossed, or attempted to cross, the border into the United States. For example, on July 25, 2015, the Permanent Council of the Organization of American States (“OAS”) adopted Resolution CP/DEC. 54 (1979/14) expressing concern about the problem of unaccompanied minors from Central America and calling on countries to take steps to ensure these minors’ safety and address the problem in other ways. U.S. Ambassador to the OAS, Carmen Lomellin, delivered a statement on July 24 at the regular session of the OAS Permanent Council commenting on the resolution. Her comments appear below. The remainder of this section describes U.S. responses in 2014 to the problem of unaccompanied migrant children from Central America.

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We welcome the opportunity to provide comments on behalf of the United States Government regarding the declaration presented today by the Governments of El Salvador, Guatemala, and Honduras regarding unaccompanied children.

We have consulted closely with each government’s delegation, and look forward to the timely approval of the text before us this morning.

I would like to begin by reiterating the Obama Administration’s concern over the rise in unaccompanied children crossing into the United States. These children are some of the most vulnerable—becoming in some cases victims of violent crime or sexual abuse along the dangerous journey to our southern border.

The United States has taken steps to increase our capacity to receive and provide services to unaccompanied children under our immigration laws, and coordinate with their countries of origin for return when appropriate.

Madam Chair, the United States is working closely with the Central American and Mexican governments to address the underlying factors of migration, which has directly impacted the increase of unaccompanied children. Together, we are working towards a regional solution to what is a regional problem.

This regional response, Madam Chair, seeks to address the shortfalls in security, economic prosperity, and governance that contribute to emigration from the region. In addition to current programs, the President has sought supplementary funding from Congress for this purpose.

With this in mind, we appreciate the initiative undertaken today to adopt an OAS declaration on the issue of unaccompanied children. This effort serves to recognize and underscore the importance we all place on resolving this complex issue in a comprehensive and cooperative fashion.

Let me be clear—the United States clearly shares with countries of origin and transit the responsibility to address this issue. We are working diligently to ensure that these children are treated as humanely as possible once they reach the U.S. border.

The United States also recognizes that it shares a commitment with partners in the region to inform potential migrants and their families of the dangers of putting children in the hands of criminal smugglers, and to combat misinformation being spread by criminal networks.

To this end, Madam Chair, we are actively working to disseminate this information throughout the region to reach as many people as possible—through service announcements throughout the region.

With these points in mind, Madam Chair, we hope that today’s discussion helps advance a mutually beneficial resolution to this extremely important matter.

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a. *Refugee/Parole Program for Minors with Parents Lawfully Present in the United States*

On November 14, 2014, the U.S. Department of State, Bureau of Population, Refugees, and Migration, issued a fact sheet on the establishment of an in-country refugee/parole program in El Salvador, Guatemala, and Honduras to provide an alternative to children traveling unaccompanied to the United States. The fact sheet is excerpted below and available at www.state.gov/j/prm/releases/factsheets/2014/234067.htm. The Department also issued an announcement of the launch of the program on December 3, 2014, available at www.state.gov/r/pa/prs/ps/2014/12/234655.htm (not excerpted herein).

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The United States is establishing an in-country refugee/parole program in El Salvador, Guatemala, and Honduras to provide a safe, legal, and orderly alternative to the dangerous journey that some children are currently undertaking to the United States. This program will allow certain parents who are lawfully present in the United States to request access to the U.S. Refugee Admissions Program for their children still in one of these three countries. Children who are found ineligible for refugee admission but still at risk of harm may be considered for parole on a case-by-case basis. The refugee/parole program will not be a pathway for undocumented parents to bring their children to the United States, but instead, the program will provide certain vulnerable, at-risk children an opportunity to be reunited with parents lawfully [present] in the United States.

Applications for this program are initiated in the United States. Beginning in December 2014, a parent lawfully present in the United States will be able to file Department of State form DS-7699 requesting a refugee resettlement interview for unmarried children under 21 in El Salvador, Guatemala, or Honduras. Under certain circumstances, if the second parent resides with the child in the home country and is currently married to the lawfully present parent in the United States, the second parent may be added to the child’s petition and considered for refugee status, and if denied refugee status, for parole. Form DS-7699 must be filed with the assistance of a designated resettlement agency that works with the U.S. Department of State’s Bureau of Population, Refugees, and Migration to help resettle refugees in the United States. The form will

not be available on the Department of State website to the general public and cannot be completed without the assistance of a Department of State-funded resettlement agency. These resettlement agencies are located in more than 180 communities throughout the United States. When the program is launched, the Department of State will provide information on how to contact one of these agencies to initiate an application.

Once a form DS-7699 has been filed, the child in his/her home country will be assisted through the program by the International Organization for Migration (IOM), which manages the U.S. Resettlement Support Center (RSC) in Latin America. IOM personnel from the RSC will contact each child directly and in the order in which the forms filed by lawfully present parents have been received by the U.S. Department of State. IOM will invite the children to attend pre-screening interviews in their country of origin in order to prepare them for a refugee interview with the Department of Homeland Security (DHS). DNA relationship testing will be required to confirm the biological relationship between the parent in the United States and the in-country child. After the IOM pre-screening interview but before the DHS interview, the lawfully present parent in the United States will be notified by IOM via the resettlement agency about how to submit DNA evidence of the relationship with their claimed child(ren) in El Salvador, Guatemala, or Honduras. If DNA relationship testing confirms the claimed relationship(s), IOM will schedule the DHS refugee interview.

DHS will conduct interviews with each child to determine whether he or she is eligible for refugee status and admissible to the United States. All applicants must complete all required security checks and obtain a medical clearance before they are approved to travel as a refugee to the United States. IOM will arrange travel for the refugee(s) to the United States. The parent of the child will sign a promissory note agreeing to repay the cost of travel to the United States. Approved refugees will be eligible for the same support provided to all refugees resettled in the United States, including assignment to a resettlement agency that will assist with reception and placement, and assistance registering children in school.

Applicants found by DHS to be ineligible for refugee status in the United States will be considered on a case-by-case basis for parole, which is a mechanism to allow someone who is otherwise inadmissible to come to the United States for urgent humanitarian reasons or significant public benefit. In order for the applicant(s) to be considered for parole, the parent in the United States will need to submit a Form I-134, Affidavit of Support, with supporting documentation to DHS. An individual considered for parole may be eligible for parole if DHS finds that the individual is at risk of harm, he/she clears all background vetting, there is no serious derogatory information, and someone has committed to financially support the individual while he/she is in the United States. Those children and any eligible parent considered for parole will be responsible for obtaining and paying for a medical clearance. An individual authorized parole will not be eligible for a travel loan but must book and pay for the flight to the United States. Parole is temporary and does not confer any permanent legal immigration status or path to permanent legal immigration status in the United States. Parolees are not eligible for medical and other benefits upon arrival in the United States, but are eligible to attend school and/or apply for employment authorization. Individuals authorized parole under this program generally will be authorized parole for an initial period of two years and may request renewal.

It is anticipated that a relatively small number of children from Central America will be admitted to the United States as refugees in FY 2015, given the anticipated December launch and the length of time it takes to be processed for U.S. refugee admission. Any child or parent admitted as a refugee will be included in the Latin America/Caribbean regional allocation of the

U.S. Refugee Admissions Program, which is 4,000 for FY 2015. If needed, there is some flexibility within the U.S. Refugee Admissions Program to accommodate a higher than anticipated number from Latin America in FY 2015.

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b. U.S. Response to Special Rapporteurs

On November 25, 2014, the U.S. Mission to the UN in Geneva provided a letter to several UN special rapporteurs in response to their request for answers to eight questions about the detention of unaccompanied children and possible human rights violations they experienced while in detention. The response was addressed to the special rapporteurs on the human rights of migrants; on the sale of children, child prostitution, and child pornography; on trafficking in persons, especially women and children; and on violence against women, its causes and consequences. The U.S. response appears below.

* * * *

Dear [Special Rapporteur []]:

Thank you for your letter to Ambassador Hamamoto dated July 7, 2014. The United States supports the mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on the sale of children, child prostitution and child pornography; the Special Rapporteur on trafficking in persons, especially women and children; and the Special Rapporteur on violence against women, its causes and consequences. In your letter, you expressed concern about information you had received regarding unaccompanied children in the United States and sought additional information from the United States government. We appreciate the opportunity to respond to the eight questions you posed in your letter.

1. Please provide any additional information and any comment you may have on the above mentioned allegations.

The U.S. Government is focused on maximizing every available resource to process safely unaccompanied migrant children apprehended by U.S. Customs and Border Protection (CBP) officers, in accordance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), the Immigration and Nationality Act, the Homeland Security Act of 2002, and other applicable laws. The Department of Homeland Security (DHS) conducts a basic health screening during the unaccompanied children's processing, and provides initial shelter, emergency medical care, access to telephones and other basic necessities for these children until they are transferred to the care and custody of the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR).

The role of CBP, a component of the U.S. Department of Homeland Security (DHS), at the border is as follows: (1) CBP officers and Border Patrol agents encounter and identify the

individual as an unaccompanied child; (2) CBP officers and Border Patrol agents process the administrative case for the unaccompanied child; and (3) at the completion of processing, CPB either transfers the child to ORR's care and custody or, if permitted under the limited circumstances provided by law, arranges for the child's voluntary return.

For an unaccompanied child to be permitted to withdraw his or her application for admission and return voluntarily, the child must be a national or habitual resident of a contiguous country (*i.e.*, Canada or Mexico), and CBP must determine that the child: (1) does not have a fear of return to his or her country of nationality or country of last habitual residence owing to a credible fear of persecution; (2) is not a victim of a severe form of trafficking or at risk of being trafficked upon return to his or her country of nationality of last habitual residence; and (3) is able to make an independent decision to withdraw his or her application for admission.

As required by law, DHS screens all unaccompanied children who are nationals or habitual residents of a contiguous country (Mexico or Canada) upon apprehension to determine if they meet these criteria. DHS also screens unaccompanied children from noncontiguous countries for persecution or trafficking concerns as a matter of policy. Mexican unaccompanied children are returned to Mexico in coordination with Mexican authorities and in accordance with repatriation agreements between the United States and Mexico, as required by the TVPRA. These repatriation agreements include specific arrangements regarding the time, location and notification instructions for the repatriation for members of vulnerable populations.

Unaccompanied children from contiguous countries who do not withdraw their application for admission, as well as unaccompanied children from noncontiguous countries, are transferred to the care and custody of ORR and generally are referred for removal proceedings before an immigration judge. After transfer, ORR places unaccompanied children in the least restrictive setting that is in the best interest of the child, as required by law. HHS gives each child a complete medical exam within 48 hours and provides them with medical care, dental care, opportunities for extracurricular activities, and access to educational programs. Children are also screened separately to determine if they are victims of abuse, crime, or human trafficking, or if there are any immediate mental health needs that require special services. ORR then seeks to release the child to U.S. sponsors, including family members.

Once placed in removal proceedings, children may apply for asylum or seek other forms of relief from removal. Asylum applications filed by unaccompanied children are considered in the first instance by U.S. Citizenship and Immigration Services (USCIS) asylum officers

The United States fully honors its obligations, as a party to the 1967 Protocol to the 1951 Refugee Convention, and is committed to the protection of those whom U.S. authorities have determined to have a well-founded fear of persecution, or have suffered past persecution, in their home country based on race, religion, nationality, membership in a particular social group, or political opinion and who do not fall within one or more of the exclusion or cessation grounds under the convention.

Following the large influx of unaccompanied children into the United States earlier this year, several U.S. government agencies worked together to improve conditions for children awaiting transfer to HHS custody, following their initial apprehension, by opening alternate facilities with appropriate food service, recreation, and other services.

2. Please provide information about the measures being implemented by your Excellency's Government to protect the rights of these unaccompanied migrant children.

As noted above, upon apprehension, DHS screens all unaccompanied children for protection concerns, including to identify victims of human trafficking as required by TVPRA

2008 and to determine whether the child has a fear of persecution upon return to his or her home country. Furthermore, all USCIS asylum officers receive specialized training on child-appropriate interview techniques and guidelines for assessing children's asylum claims. Subsequent to apprehension, DHS serves all minors with a Form I-770, Notice of Rights and Request for Disposition for Minors, and explains their rights as minors, including the right to use the telephone, be represented by a lawyer, and have a hearing before an immigration judge. Under U.S. law, barring exceptional circumstances, federal agencies must transfer an unaccompanied child to ORR care and custody within 72 hours of determining that the child is unaccompanied.

Unaccompanied children in HHS custody are given information on their legal rights and are provided legal screenings and legal representation in certain cases. They also are provided access to legal counsel to the greatest extent practicable. Custodians of unaccompanied children receive legal orientation trainings provided through the Department of Justice's Legal Orientation Program (LOP) and administered by the Executive Office for Immigration Review (EOIR). Providers of a legal orientation program for custodians of unaccompanied children (LOPC) offer general group orientations, individual orientations, self-help workshops, and assistance with pro bono referrals. Additionally, LOPC providers are able to assist with school enrollment and make referrals to providers of social services to help ensure the well-being of the child. EOIR issues guidance to LOPC providers designed to assist them in identifying victims of mistreatment, exploitation, and trafficking; protecting the victims from further harm; and connecting the victims to needed social services.

DOJ and the Corporation for National and Community Service (CNCS), which administers AmeriCorps national service programs, have awarded \$1.8 million in grants to increase the effective and efficient adjudication of immigration proceedings involving certain children who have crossed the U.S. border without a parent or legal guardian and whose parent or legal guardian is not in the United States or is in the United States but unavailable to provide care and physical custody. The grants will be disbursed through "justice AmeriCorps" and will enable legal aid organizations to enroll approximately 100 lawyers and paralegals to represent children in immigration proceedings. The "justice AmeriCorps" members will also help to identify children who have been victims of human trafficking or abuse and, as appropriate, refer them to support services and authorities responsible for investigating and prosecuting the perpetrators of such crimes. In addition, DOJ will be providing limited funding through EOIR for other direct representation initiatives for children.

3. As the issue of unaccompanied migrant children affects countries of origin, transit and destination, please provide information with regard to any regional protection measures in place that provide protection to migrant children.

The United States is committed to working closely with the governments of El Salvador, Guatemala, Honduras, and Mexico to find a solution to this humanitarian crisis and to address the underlying factors that affect migration from Central America.

For instance, the Department of State (DOS) and DHS recently attended the 19th Regional Conference on Migration (RCM), which took place in Managua, Nicaragua in June 2014, and included representatives from the countries of Central America, Mexico, Canada, and the Dominican Republic. The RCM is an informal, state-led, consensus-based body that allows for non-political discussions of regional migration themes. Vice-ministers and heads of delegation jointly issued the "Managua Extraordinary Declaration" on unaccompanied children that, *inter alia*, endorses the creation of an *ad hoc* working group on migrant children, calls for

countries to counter misinformation propagated by smugglers about immigration benefits, calls on member countries to take actions to discourage irregular migration and combat smuggling and human trafficking, and calls for cooperation with civil society and international organizations in providing protection to children.

CBP has initiated and run public campaigns in Central America to help convey that there is no pathway to U.S. citizenship. CBP has also run campaigns in the U.S. aimed at having individuals in the U.S. discourage their family members in Central America from making the journey to the United States.

In addition, DOS has partnered with the International Organization for Migration (IOM) to implement programs that build the capacity of Central American governments to identify, screen, protect, and refer unaccompanied child migrants to appropriate services. And through its partnership with IOM, United States Agency for International Development (USAID) is working with government officials, civil society organizations, and other partners in Honduras, Guatemala, and El Salvador, to provide immediate care, child protection services, and onward assistance for returning families and unaccompanied children.

4. Please explain all measures that have been taken, or are intended to be taken, by US Customs and Border Protection (CBP) and US Border Patrol to ensure adequate protection safeguards for unaccompanied children upon arriving at the US South Texas border and during their transfer and detention, including their right to seek asylum.

Note: The Office of the Border Patrol is a component of CBP.

DHS is required by the TVPRA 2008 to screen all unaccompanied children who are nationals or habitual residents of a contiguous country to determine if they have been victims of human trafficking, are at risk of being trafficked upon return, or have a fear of persecution if they return to their home country. DHS also screens unaccompanied children from noncontiguous countries for persecution or trafficking concerns as a matter of policy. Unaccompanied children from contiguous countries who present these factors or who do not voluntarily withdraw their applications for admission or lack the capacity to do so, as well as unaccompanied children from noncontiguous countries, are transferred to ORR's care and custody. In accordance with law, they generally are placed in removal proceedings before an immigration judge. In removal proceedings, the children are provided full opportunity to apply for asylum or seek other protections available under U.S. laws that would permit them to remain in the United States. Through internal policies and procedures and related training for its employees, DHS ensures adequate protection safeguards for unaccompanied children from the time they are encountered by CBP officers and Border Patrol agents until they are transferred to HHS custody.

5. As no child should be detained and because there is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum, what alternatives rather than alternative forms of detention or alternatives to release – has your Excellency's Government considered for migrant unaccompanied children irregularly entering the country, bearing in mind that alternatives have been found to be significantly more cost-effective than traditional detention regimes.

Under U.S. law, DHS and other federal agencies must transfer an unaccompanied child to HHS custody within 72 hours of determining that child is unaccompanied, unless exceptional circumstances apply. HHS is required by law to promptly place these children in the least restrictive setting that is in the best interest of the child. Ninety-five percent of children who enter HHS custody are placed with a parent, relative, or non-relative sponsor within approximately 35 days, and HHS is working to reduce that time. Placement of children who are

identified as victims of trafficking may include placement in the Unaccompanied Refugee Minor program if a suitable family member is not available to provide care.

6. Please inform us as to whether individual assessments are carried out in each case, and whether the child or a representative is allowed to submit the reasons why he or she should not be deported, and to have the case reviewed by the competent authorities.

The U.S. government makes individualized determinations as to whether each unaccompanied child is eligible for protection. Upon apprehension, DHS screens all unaccompanied children to determine protection concerns, including to identify victims of human trafficking as required by the Trafficking Victims Protection Reauthorization Act of 2008 and to determine whether the child has fear of persecution upon return to the home country.

Unaccompanied migrant children from noncontiguous countries, as well as children from contiguous countries who do not withdraw their application for admission, are placed in removal proceedings where their cases are individually reviewed by an immigration judge. These proceedings provide unaccompanied children the opportunity to assert a claim of asylum or seek other protections available. The children have the right to be represented by legal counsel in the proceedings, and there are various programs available to assist them with access to legal counsel to the greatest extent practicable.

7. Please inform us as to whether each child is quickly provided with a legal guardian who is competent and able to represent them in any ensuing legal proceedings, as well as a competent lawyer able to defend their rights in such proceedings.

HHS usually places unaccompanied children in short term shelters with child welfare specialists. During this time, HHS facilitates the child's safe and timely release to live with a parent or family member in the United States. During that time the children will be subject to removal proceedings and required to appear before an immigration judge. HHS has streamlined and accelerated this process by reducing the average length of stay for released unaccompanied children from 54 days in 2012 to 35 days in 2014. These children are provided with legal services, which includes information about their legal rights, screenings for legal relief eligibility, direct representation for certain cases, and access to legal counsel to the greatest extent practicable. HHS also ensures that all sponsors know that they have a responsibility to bring children to immigration court proceedings.

Furthermore, HHS is authorized to appoint independent child advocates for trafficking victims and other vulnerable unaccompanied children to promote the best interests of the child. The U.S. government is taking steps to facilitate legal representation for this vulnerable population. For example, as mentioned above, DOJ and the Corporation for National and Community Service (CNCS) have awarded \$1.8 million in grants to enroll approximately 100 lawyers and paralegals to represent children in immigration proceedings. The "justice AmeriCorps" members will also help to identify children who have been victims of human trafficking or abuse and, as appropriate, refer them to support services and authorities responsible for investigating and prosecuting the perpetrators of such crimes. The Administration has also taken steps to encourage the private Bar to assist by providing pro bono representation to unaccompanied children.

8. Please provide us the details, and where available the results, of the procedures put in place for the rapid identification, provision of assistance and protection of potential child victims of trafficking and exploitation among these unaccompanied migrant children. If no such measures have been taken, please explain why?

As discussed above, although relevant laws and regulations do not require immediate

screening of unaccompanied children from noncontiguous countries, DHS, as a matter of policy, screens all unaccompanied children at a land border or port of entry to determine if they have been victims of human trafficking, are at risk of being trafficked upon return, or have a fear of persecution if they return to their home country. Unaccompanied children may also apply to DHS and DOJ for immigration relief that would permit them to remain in the United States, including asylum for those who have a well-founded fear of persecution in their country of nationality.

All unaccompanied children in HHS custody are screened by trained child welfare specialists for trafficking concerns. Any suspected child trafficking victim is referred to HHS's Anti-Trafficking in Persons office. If there is credible information that indicates the child may be a victim of trafficking, the child may be granted an eligibility letter and provided federally funded benefits and services. As part of its sponsor assessment process, HHS will conduct a home study on any potential sponsor of a victim of trafficking to ensure that the child is released in a safe and supportive environment.

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3. Resettling Syrian Refugees

On December 9, 2014, Assistant Secretary of State Anne C. Richard of the Bureau of Population, Refugees, and Migration, delivered remarks in Geneva on U.S. plans to resettle Syrian refugees. Her remarks are excerpted below and available at www.state.gov/j/prm/releases/remarks/2014/234855.htm.

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We applaud the generosity of Syria's neighbors. They opened their borders and took in Syrian refugees. Like the High Commissioner I have visited all the host countries represented here today. These countries have helped save millions of lives.

As the flow of refugees has grown to a mass exodus, countries hosting refugees in the region have contended with overcrowded hospitals and schools, shortages of everything from housing to water, economic pressures and recent evidence of mounting public resentment.

But these very real burdens must pale in comparison to the daily struggles of Syrians themselves.

* * * *

For Syrians and for other victims of violence and persecution—resettlement offers not just an escape, but a chance to start over.

A family from Homs, a shop owner, his wife, and their six children, experienced this flight and rescue. In August of 2010, the father was standing in a crowd of peaceful protesters when the Syrian military arrived and opened fire. Bodies piled up in front of his shop, shells reduced it to rubble, neighbors disappeared, and soldiers ransacked the family's apartment and made threats. The family fled to Jordan, and they were eventually resettled in the United States.

The parents say one of their dreams has already come true. All of their children are back in school.

Only a small fraction of those who want to be resettled can be—only about one hundred thousand refugees per year, worldwide. There are more than six times that many Syrian refugees in Jordan alone.

But war's true cost is measured in human suffering. Resettlement can help—one person at a time—to bring that suffering to an end.

We applaud the 25 countries that have agreed to resettle Syrian refugees, including some who will be accepting UNHCR refugee referrals for the first time. The United States accepts the majority of all UNHCR referrals from around the world. Last year, we reached our goal of resettling nearly 70,000 refugees from nearly 70 countries. And we plan to lead in resettling Syrians as well. We are reviewing some 9,000 recent UNHCR referrals from Syria. We are receiving roughly a thousand new ones each month, and we expect admissions from Syria to surge in 2015 and beyond.

Like most other refugees resettled in the United States, they will get help from the International Organization for Migration with medical exams and transportation to the United States. Once they arrive, networks of resettlement agencies, charities, churches, civic organizations and local volunteers will welcome them. These groups work in 180 communities across the country and make sure refugees have homes, furniture, clothes, English classes, job training, health care and help enrolling their children in school. They are now preparing key contacts in American communities to welcome Syrians.

I am inspired both by the resilience of refugees we resettle, and the compassion of those who help them. Resettlement cannot replace what refugees have lost or erase what they have endured. But it can renew hope and help restart lives. That can make all the difference.

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Cross References

ILC's Work on Expulsion of Aliens, **Chapter 7.D.5.**

Diplomatic relations, **Chapter 9.A.**

Suit seeking to record Israel as place of birth on passport (Zivotofsky), **Chapter 9.C.**