No. 23-334

IN THE

Supreme Court of the United States

DEPARTMENT OF STATE, ET AL.,
Petitioners,

v.

SANDRA MUÑOZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization with members in all fifty states. Public Citizen regularly appears before Congress, administrative agencies, and courts to advocate for laws and policies that protect consumers, workers, and the general public. Reflecting its longstanding interest in preserving access to justice for individuals, Public Citizen has in several cases addressed questions concerning due process.

This amicus brief focuses on the second question presented in this case: Assuming that a consular officer's refusal of a visa to a U.S. citizen's non-citizen spouse impinges upon a constitutionally protected interest of the citizen, does the notification of a visa applicant that he was deemed inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii) provide the process due? Public Citizen submits this brief to explain that the government's position—that a consular officer may support her decision to deny a spousal visa by citing a broad statutory ground of inadmissibility without providing specificity—is inconsistent with constitutional due process principles. If this Court were to accept the government's view, it would fail to enforce the Constitution's requirement of vital procedural safeguards against the risk of arbitrary or otherwise unlawful government action.

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[1] This brief was not written in any part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Sandra Muñoz is a citizen of the United States who, fourteen years ago, married a Salvadoran citizen, Luis Ascencio-Cordero. Ms. Muñoz wishes to live here, in her own country, with her husband and daughter. Ms. Muñoz therefore filed a family-based immigrant visa petition on her husband's behalf. The Department of Homeland Security approved the petition and granted Mr. Ascencio-Cordero an inadmissibility waiver. The last step in the visa application process was for Mr. Ascencio-Cordero to travel from his home in the United States back to El Salvador to be interviewed in person by an officer at the U.S. Consulate.

After the interview, the consular officer denied Mr. Ascencio-Cordero's visa application. The only rationale offered for the denial was a citation to 8 U.S.C. § 1182(a)(3)(A)(ii), a catch-all provision that renders inadmissible non-citizens who the consular officer believes will participate in "unlawful activity" in the United States. Mr. Ascencio-Cordero has never been charged with any crime in any country.

The first question presented in this case is whether the visa denial impinges on Ms. Muñoz's constitutionally protected interests. Assuming that the answer to that question is yes, this brief addresses the second question: whether the consular officer's mere provision of that statutory citation provides Ms. Muñoz with due process. Well-established constitutional principles supply the answer: The process afforded to Ms. Muñoz was inadequate.

The Constitution prohibits the government from depriving a U.S. citizen of a liberty interest without due process of law. Thus, a person in jeopardy of

serious loss must be given notice of the case against him and an opportunity to meet it. This Court has therefore consistently recognized that when the government adjudicates the rights of an individual, it must offer a statement that would permit that individual to understand why the government acted as it did, so that the individual may decide whether—and how—to challenge that action.

This principle operates straightforwardly in the context of visa denials. When a visa denial affects the liberty interest of a U.S. citizen, courts may ask whether the government provided a facially legitimate and bona fide reason for the denial. If the government has not provided such a reason—or if the citizen otherwise can make an affirmative showing that the denial was made in bad faith—courts can step in to protect the citizen's constitutional rights. If, however, the government gives so little information about the basis for its denial that a citizen cannot understand the basis for the denial (and therefore cannot meaningfully contest that denial), it falls short of its due process obligations. The Constitution requires that the government provide, at minimum, enough information about the basis for a denial that a citizen can evaluate the reason, including whether it was bona fide or given in bad faith. That obligation is satisfied when a consular officer offers either a factual basis for the decision or a sufficiently specific statutory subsection that effectively conveys the same information.

ARGUMENT

I. Due process generally requires that the government provide a statement of reasons supporting the denial of an important right.

Over 150 years of this Court's precedent establishes the "central meaning" of procedural due process: "'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1863)). "It is equally fundamental" that the right to notice and a hearing "must be granted at a meaningful time and in a meaningful manner." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (quoting *Fuentes*, 407 U.S. at 80). No matter the context, "[t]hese essential constitutional promises may not be eroded." *Id.*

One critical aspect of these constitutional entitlements is the provision of a statement of reasons supporting an adverse determination that provides the individual with enough information to understand why the government acted as it did. *See Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970); Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1280–81 (1975). This requirement is a "fundamental" component of procedural due process. *See* Friendly, 123 U. Pa. L. Rev. at 1280.

As a practical matter, the provision of reasons in support of an adverse government determination is necessary to make any opportunity to contest that determination meaningful. "An elementary and fundamental requirement" of a meaningful hearing is "notice reasonably calculated" to afford interested parties "an opportunity to present their objections."

Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950). And "when notice is a person's due, process which is a mere gesture is not due process." *Id*. at 315. This Court has therefore held, in a variety of contexts, that the government must provide a statement of reasons that affords "notice of the factual basis" justifying a deprivation. *Wilkinson v. Austin*, 545 U.S. 209, 225–26 (2005) ("Requiring [prison] officials to provide a brief summary of the factual basis for [maximum-security] classification review and allowing the inmate a rebuttal opportunity safeguards against the inmate's being mistaken for another or singled out for insufficient reason."); *see Hamdi*, 542 U.S. at 533 (holding that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979) (holding that due process requires a parole board to inform a parole applicant "in what respects he falls short of qualifying for parole").

Due process generally requires a statement of reasons because, when the government fails to explain the basis for a denial, an individual "likely would be unable to marshal evidence and prepare his case" contesting that determination, Friendly, 123 U. Pa. L. Rev. at 1280–81, thereby forcing him to "play[] against a stacked deck," *Gray Panthers v. Schweiker*, 652 F.2d 146, 172 (D.C. Cir. 1980). A meaningful statement of reasons is thus a crucial hedge against a termination of rights or benefits "resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases."

Goldberg, 397 U.S. at 268. Indeed, this Court has observed that notice of the factual basis on which a deprivation rests is one of "the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Wilkinson*, 545 U.S. at 226.

Crucially, the Court has recognized that the opportunity to be heard is not meaningful unless a statement of reasons is sufficiently detailed as to afford a "reasonable opportunity to prepare" for a hearing. *In re Gault*, 387 U.S. 1, 33 (1967); *Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991) ("In a variety of contexts, our cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn."); *Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.").

When the government does not provide adequate information to understand the basis for its actions, an individual "cannot know *whether* a challenge to an agency's action is warranted, much less formulate an effective challenge." *Kapps v. Wing*, 404 F.3d 105, 123–24 (2d Cir. 2005). In *Gray Panthers*, for example, a notice denying Medicare reimbursement was constitutionally insufficient because it did not specify whether the medical treatment at issue was deemed unnecessary or whether the charges were deemed unreasonable. 652 F.2d at 167. Consequently, patients were "not adequately informed by the 'notices'

whether their doctors were allegedly more expensive than others in the locality, or were charging them more than other patients, or whether or why the treatments were deemed unnecessary." *Id.* at 168. The failure to provide a rationale meant that "a claimant [was] reduced to guessing what evidence can or should be submitted in response and driven to responding to every possible argument against denial at the risk of missing the critical one altogether." *Id.* at 168–69. As the court explained, "[u]nless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose and resembles more a scene from Kafka than a constitutional process." *Id.* at 168; *see also Ortiz v. Eichler*, 794 F.2d 889, 892–93 (3d Cir. 1986) (holding that a "formidable array of case law" supports the conclusion that "notices [which] failed to explain the reason for [the agency's] action or to present calculations justifying that action" are constitutionally deficient); *Dilda v. Quern*, 612 F.2d 1055, 1057 (7th Cir. 1980) (per curiam) (holding notice did not meet due process requirements because, "[t]hough it states the ultimate reason for the reduction or cancellation of benefits, the notice fails to provide the recipient with a breakdown of income and allowable deductions" such that "recipients could determine the accuracy of the computations").

This Court's repeated recognition of the importance of providing a sufficiently detailed statement of reasons in support of an adverse determination speaks to a core "conviction underlying our Bill of Rights": "Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights.… That a conclusion satisfies one's private conscience does not attest its reliability." *Joint Anti-*

Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring).

A statement of reasons serves an important democratic function as well, by preserving both the *reality* of fair procedure and the *perception* that the government acts in a fair and even-handed manner. "In a society like ours, which operates on the assumption of and relies for its continued stability on respect for our institutions and voluntary compliance with the dictates of the law, it is crucial that its members perceive that their rights and interests are taken seriously and thoughtfully by the officials who are deciding their claims." *Gray Panthers*, 652 F.2d at 162–63; *cf. Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021) ("If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.")

Providing a statement of reasons in support of an adverse determination is a procedural minimum to assure an adversely affected party that—though they may be unsatisfied with the government's ultimate determination—their claim was handled with appropriate care. "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). And as Justice Frankfurter observed, no "better way [has] been found" than providing meaningful notice and an opportunity to be heard "for generating the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 172 (Frankfurter, J., concurring); *see id.* at 172 n.19 ("In a government like ours, entirely popular, care should be

taken in every part of the system, not only to do right, but to satisfy the community that right is done." (quoting 5 *The Writings and Speeches of Daniel Webster* 163)).

II. The government must provide a statement of reasons supporting the decision to deny a visa where such denial infringes upon the important interest of a U.S. citizen.

Applied to the context of visa denials that impact the rights of a U.S. citizen, the due process principles discussed above require a consular official to provide either notice of the factual basis for an exclusion determination adequate to enable the citizen to understand the reason and provide for the possibility of meaningful judicial review, or a sufficiently specific statutory subsection that would effectively convey the same information.

A. We start with the uncontroversial proposition, first articulated in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), that when a U.S. citizen possesses a liberty interest in a non-citizen's visa application, courts may review a denial decision for indicia of legitimacy and good faith.[2] Normally, when assessing the constitutional necessity of a particular procedure, courts balance the "private interest" at stake, "the risk of an erroneous deprivation" in the absence of the procedure, and the government's interest in not providing the procedure. *Mathews v. Eldridge*, 424

[2] This brief takes *Mandel* as its starting point. Nonetheless, in situations like this one, where a statute permits denial only if there is reason to believe that the individual is inadmissible and where such a denial infringes on the rights of a U.S. citizen spouse, courts can and should exercise greater scrutiny than the floor set by *Mandel*. *See* Resp. Br. 34–37.

U.S. 319, 335 (1976). In the context of visa denials, however, this Court has often replaced that balancing assessment with a narrower scope of review in which the judiciary "'will neither look behind'" the decision to deny a visa "'nor test it by balancing its justification' against the asserted constitutional interests of U.S. citizens," *Trump v. Hawaii*, 585 U.S. 667, 703 (2018) (quoting *Mandel*, 408 U.S. at 770), so long as the government provides a "facially legitimate and bona fide reason" for exclusion, *id.* Judicial review for facial legitimacy and good faith means that the authority of the political branches is substantial, but not unlimited. Courts retain "judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion" of individuals seeking to come to the United States. *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977).

The Court's decisions recognize that the Constitution—at a minimum—demands the availability of a judicial forum to protect U.S. citizens from arbitrary deprivations of important rights in individualized visa adjudications. If, for example, a consular officer mistakenly makes a determination based on information contained in another applicant's file or relies on a database that contains information that was entered incorrectly by another agency, judicial review for facial legitimacy ensures that human error does not stand in the way of family unification. *See* Br. of Former Consular Officers as Amici Curiae 23–26, *Kerry v. Din*, 576 U.S. 86 (2015) (explaining that because interagency databases have, in many cases, "displaced the traditional role of consular officers in visa adjudications" and errors in those databases can be "impervious to attempts to purge them," judicial review is an "essential

protection to prevent visa denials based on erroneous information"). Judicial review also protects against deprivations made in bad faith, such as, for example, a consular officer's decision to exclude a non-citizen from this country because she harbors animus toward interracial couples.

This opportunity to be heard before a judicial forum, although circumscribed, is rendered meaningless where the applicant is not provided a statement of reasons for the denial that is sufficiently specific to afford her the chance to "marshal the facts" to challenge the facial legitimacy and good faith of the decision. *See Wolff v. McDonnell*, 418 U.S. 539, 564 (1974). In other words, due process requires that the government offer either a factual basis for a denial decision or a sufficiently specific statutory subsection meaningfully to apprise the citizen of the basis for the decision.

B. Section 1182(a)(3)(A)(ii) of Title 8 is a catch-all provision that renders inadmissible a non-citizen whom a consular officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in … any other unlawful activity" beyond that enumerated in the statute. Citation to that breathtakingly broad provision is insufficient to supply an understanding of the basis for the denial adequate to determine whether it is legitimate and bona fide, and is thus adequate to challenge the denial. The government acknowledges that section 1182(a)(3)(A)(ii) contains no specific factual predicates that specify the type of unlawful activity that will trigger a denial decision. *See* Pet. App. 19a (observing that, before the Ninth Circuit, the government "wisely abandoned" the argument otherwise). And there is likewise no dispute

that the provision incorporates prospective violations of both state and federal criminal law. *See* State Department Foreign Affairs Manual, 9 FAM 302.5-4(A) (2024). The provision therefore would allow a consular officer to render inadmissible individuals whom the officer believes might engage in an enormously wide range of conduct in the United States, including serious crimes related to the applicant's suspected gang affiliation,[3] and far less serious conduct such as blocking traffic as part of a peaceful protest,[4] or working for a healthcare practitioner who is licensed to prescribe medical marijuana, *see* 9 FAM 302.5-4(A). Indeed, the statutory text would seem to allow a consular officer to conclude that widespread non-criminal violations of law—such as jaywalking or driving above the speed limit—could justify a decision to deny a visa. And because the statute looks not to an applicant's past conduct but rather to what the "consular officer … knows, or has reasonable ground to believe" may happen in the future, an absence of any specificity as to how the consular officer arrived at her belief, or what that belief *is* at even the most general level, means that—absent a statement of reasons—there is no thesis for applicants or their U.S. citizen spouses to attempt to disprove. *See* 8 U.S.C. § 1182(a)(3)(A)(ii).

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[3] *E.g.*, *Cardenas v. United States*, 826 F.3d 1164, 1172 (9th Cir. 2016) (excluding non-citizen based on belief that he was a "gang associate" with ties to the Sureno gang).

[4] *See* Katherine A. Brady, et al., California Criminal Law Procedure and Practice, *Representing the Noncitizen Criminal Defendant*, § 48.26 (4th ed. 1998), https://tinyurl.com/yc8mbyz5 (noting that the catch-all provision could be used to exclude non-citizens who are arrested for participation in political demonstrations or similar activity).

In sum, a citizen who is told that her spouse's visa was denied based on the catch-all provision, with no further explanation, cannot have any basis for assessing whether the denial is even arguably facially legitimate, let alone for marshalling evidence to rebut it. *See, e.g.*, *Moralez v. Blinken*, No. 1:21-CV-05726, 2021 WL 5356081, at *1 (D.N.J. Nov. 17, 2021) (noting that plaintiffs were "dumbfounded" by a rejection which cited only the catch-all provision, but nevertheless denying relief).

The facts of this case are illustrative: Because Mr. Ascencio-Cordero had no criminal record, he and Ms. Muñoz speculated that the consular officer inferred based on his tattoos that he was a gang member. Pet. App. 7a. "[R]educed to guessing what evidence c[ould] or should be submitted in response" to the exclusion determination, *Gray Panthers*, 652 F.2d at 168, they offered testimony from a gang expert that none of Mr. Ascencio-Cordero's tattoos—which depict images of Our Lady of Guadalupe, Sigmund Freud, theatrical masks, and a "tribal" pattern, Resp. Opp. 1–2, 1 n.2—were related to any criminal organization. Pet. App. 6a–7a. That guess was apparently incorrect: The government reviewed the expert's testimony and determined that it did not provide any "new information or reason to question" its exclusion determination, J.A. 39, so Ms. Muñoz and Mr. Ascencio-Cordero were left without a clue as to how to evaluate or challenge the basis of denial.[5] "Obviously,

[5] Years later, the government provided a factual basis for its ineligibility finding, Pet. App. 13a, by then—as the court below concluded—too late to permit meaningful review of the exclusion decision, Pet. App. 27a–33a (determining that, because of this delay, the government was not entitled to shield its decision from

(*Footnote continued*)

when a notice requires its target to guess among several possible bases for adverse government action, it has not served [its] fundamental purposes." *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 599 (D.C. Cir. 1993), *as amended on denial of reh'g* (Mar. 26, 1993).

The procedural due process problems with the government's position extend well beyond this case: How is a U.S. citizen to seek meaningful judicial review when it is unknowable whether the "unlawful activity" of which her spouse is suspected is drug trafficking, burglary, shoplifting, or any other crime? How would she be able to assess—let alone challenge—whether the decision was made based on legitimate suspected intent to engage in "unlawful activity" at all, and not based on the consular officer's inadvertent error or even the officer's constitutionally proscribed animus? And without knowing any of these things, how can she meaningfully rebut the conclusion?

The government provides no answers. It argues only that Congress determined in 8 U.S.C. § 1182(b)(3) that "a consular officer need not provide an explanation when denying a visa on a security-related ground," Pet'r Br. 31—a contention that ignores the Executive's independent obligation to comply with the Constitution. After all, the Executive's discretion over the admission and exclusion of aliens "is not boundless"; in making those discretionary determinations, the Executive "may not transgress constitutional limitations." *Abourezk v. Reagan*, 785

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judicial review and the district court may, on remand, "look behind" the government's denial decision and consider the merits of Ms. Muñoz and Mr. Ascencio-Cordero's claims).

F.2d 1043, 1061 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987). And "[i]t is the duty of the courts, in cases properly before them, to say where those … constitutional boundaries lie." *Id.*

Moreover, the government's contention that it need not offer a statement of reasons supporting denial of a visa application beyond a citation to the catch-all statute is inconsistent with this Court's decisions on consular officer reviewability. As the court below correctly noted, both this Court's opinion in *Mandel* and Justice Kennedy's concurrence in *Kerry v. Din*, 576 U.S. 86 (2015), found it "critical … that the government identified the factual basis for the denial." Pet. App. 21a. *See Mandel*, 408 U.S. at 769 (declining to reach the government's argument that no reason was required, where the government's disclosure of the specific reason for refusing a waiver—namely, that the applicant had abused visas in the past—satisfied due process).

In *Din*, the relevant statute rendered ineligible visa applicants who have "engaged in a terrorist activity," a term that is defined as including specific acts like highjacking, hostage-taking, violent attacks on certain political figures, assassinations, and use of certain categories of weapons such as biological or nuclear devices. 8 U.S.C. § 1182(a)(3)(B). Justice Kennedy, concurring in the judgment and writing on behalf of himself and one other Justice, concluded that a visa denial satisfied due process where it cited to the terrorist-activity bar because that statute articulated discrete factual predicates. The concurrence highlighted that the consular officer's determination that the applicant's husband was ineligible for a visa was "controlled by *specific* statutory factors" and that the statute under which he was excluded

"establish[ed] *specific* criteria for determining terrorism-related inadmissibility" that created a "bona fide *factual* basis" for denial. *Din*, 576 U.S. at 104–05 (Kennedy, J., concurring in the judgment) (emphases added).

Here, the government objects to reliance on these phrases, stating that this Court has cautioned against "treating judicial opinions as if they were statutes." Pet'r Br. 36 (quoting *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting)). But the *Din* concurrence is plainly focused on the text of the terrorist-activity statute and plainly found important that the text gave specific criteria that afforded Din notice as to why her husband's visa was denied. *Din*, 576 U.S. at 104 (Kennedy, J., concurring in the judgment) (emphasizing that the statute articulates specific criteria). The terrorist-activity bar, although it may be triggered by a range of conduct, is not so broad as to leave a visa applicant completely rudderless in contesting exclusion on that basis. Thus, to the extent that this Court is persuaded by the reasoning in the *Din* concurrence, its conclusion is consistent with the requirement that, where the statute upon which an exclusion decision is based does not offer specific factual predicates, a consular officer must provide a statement of reasons sufficient to afford the applicant the opportunity to challenge the facial legitimacy and good faith of the decision.

Moreover, *Din* arose in and reflects the particular concerns of the national security context. *Id.* (noting that deference to the Executive's exclusion determinations has "particular force in the area of national security"). As this Court has explained, the national security context is sui generis: "For one, '[j]udicial inquiry into the national-security realm

raises concerns for the separation of powers' by intruding on the President's constitutional responsibilities in the area of foreign affairs. For another, 'when it comes to collecting evidence and drawing inferences' on questions of national security, 'the lack of competence on the part of the courts is marked.'" *Trump v. Hawaii*, 585 U.S. at 704 (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 142 (2017) (internal quotation marks omitted), and *Holder v. Humanitarian L. Project*, 561 U.S. 1, 34, (2010)). No such separation-of-powers or judicial competency concerns exist when it comes to judicial review of the catch-all provision. And, contrary to the government's assertion otherwise, if the government sought to support its exclusion determination with sensitive information, it already has a regulatory framework in place to ameliorate any threat posed by disclosure of that information. *See* Resp. Br. 39–40 (explaining that the government routinely—and per its own regulations—provides a statement of reasons when it finds a person located *within* the United States inadmissible under the catch-all provision); 8 C.F.R. § 103.2(b)(16).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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