No. 13-1402

In the Supreme Court of the United States

JOHN F. KERRY,
SECRETARY OF STATE, ET AL.,
Petitioners,

v.

FAUZIA DIN,
Respondent.

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

BRIEF OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Amici address the following question:

Whether the likelihood of error in the resolution of visa applications by consular officers warrants the provision of at least limited judicial review of such decisions.

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INTEREST OF THE *AMICI CURIAE*

Amicus National Immigrant Justice Center (NIJC) is a non-profit agency that represents immigrants and asylum-seekers. Together with over 1000 attorneys who co-counsel with NIJC on a pro bono basis, NIJC represents thousands of immigrants and asylum-seekers annually. NIJC has represented several clients who have been alleged to fall within the terrorism bar, including one client denied a visa to unite with his U.S. citizen wife. NIJC also represents hundreds of other individuals seeking visas or admission to the United States who are affected by the lack of effective review over consular decisions.[1]

Amicus American Immigration Lawyers Association (AILA) is a national organization comprised of more than 13,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a pro bono basis.

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[1] Pursuant to Rule 37.6 of the rules of this Court, *amici* affirm that no counsel for a party authorized this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to this filing have been submitted to the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent and other *amici* show that respondent has a constitutionally protected interest in seeking unification with her spouse in this country. Assuming that to be so, the inquiry that determines whether procedural safeguards must be provided to prevent the wrongful deprivation of that right is familiar: the Court must "consider the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993). See also *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 530 (2004); *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

In undertaking this balance, the government focuses entirely on *its* side of the equation, addressing in some detail its interest in precluding what it describes as "judicial second-guessing of decisions made by consular officers abroad relating to aliens' qualifications for admission to the United States" (U.S. Br. 34), including "national-security and foreign-policy interests." *Id.* at 46. See *id.* at 46-51. We do not minimize the significance of those concerns. But "[i]t is beyond question that substantial interests lie on both sides of the scale in this case" (*Hamdi*, 542 U.S. at 529); there are profoundly important interests in marital and family integrity, described by respondent and other *amici* but ignored by the government, on the private side of the balance. In these circumstances, the risk of error and the value of procedural safeguards take on decisive importance: "The *Mathews* calculus * * * contemplates a judicious bal-

ancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest * * * and the 'probable value, if any, of additional or substitute procedural safeguards.'" *Ibid.* (quoting *Mathews*, 424 U.S. at 335).

That consideration is our focus in this brief. Although the government has nothing at all to say on the point, there is in fact no doubt that consular officials frequently make dispositive errors, both legal and factual in nature, when resolving visa applications. It could hardly be otherwise. Many of the governing statutory provisions are vague and broad; resolving visa applications may require consular officials (often non-attorneys) to make complex legal decisions; and decisions must be made without the structural advantages that help courts decide matters correctly. That these officials—however competent and well intentioned they may be—often err cannot be gainsaid: such errors have been well documented, as has been the reality that judicial review can provide a valuable and essential check on official mistakes that can have shattering consequences on the lives of visa applicants and their families in this country. In particular:

1. Although this case arises in the context of an unspecified allegation of some kind of support for terrorism, the rule sought by the government would govern admissibility decisions generally. Yet the necessity and value of judicial review of admissibility decisions is demonstrated by the longstanding history of federal judicial review of the admissibility of aliens already present in the United States. Courts frequently review such admissibility decisions for legal error, and then identify and correct errors committed by immigration authorities. Reviews have

found that a variety of considerations, including simple misunderstandings, language deficiencies, inadequate training, the complex nature of immigration law, and occasional instances of personal prejudice, lead government officials to make mistakes—mistakes that courts sometimes label "glaring."

Moreover, courts often find that even knowledgeable immigration officials err (in the domestic context) when applying exactly the same substantive legal standards that govern the review of visa applications. The experience of judicial review in these contexts shows that courts are well equipped to address the governing legal and factual questions—and suggests that it makes no sense for a question that *is* subject to judicial review when it arises in an affirmative application for an immigration benefit filed within the United States, or defensively in a removal setting, *not* to be subject to such review when it arises in the context of a visa denial. In these circumstances, the balance of interests militates strongly in favor of judicial review of the denial of visa applications by consular officers.

2. The governing statutory terms are written in vague and convoluted terms and have been implemented by the Departments of State and Homeland Security in a haphazard manner that makes excessively broad and inconsistent application inevitable. A person may be denied admission to the United States for having engaged in "terrorist activity" or being a member of a "terrorist organization." "Terrorist activity" may include essentially any act of violence that is not undertaken for personal monetary gain, while "engag[ing] in terrorist activity" includes providing "material support" to a terrorist organization. A terrorist organization, meanwhile, may in-

clude any group of two or more people, whether organized or not, that engages in, or has a subgroup that engages in, "terrorist activity." *Any* individual government adjudicator may determine on a case-by-case basis that even an unorganized group of two or more people is a terrorist organization, and the government does not publish a complete list of the organizations it has placed in that category.

As a consequence, visa applicants may not know that they were associated with groups that a consular officer deemed to be terrorist organizations, and will have no way to challenge such a determination, or seek an exemption therefrom—even though the lack of clarity in the controlling terms and the unstructured nature of the government's decision-making process make occasional errors likely. And the problem is particularly acute when the visa applicant comes from a jurisdiction where conflict is endemic and governmental authority uncertain.

The utility of review of visa denials by consular officers is demonstrated by the review that is now available of the same legal issues when they arise in the removal context. In the latter setting, the terrorism admissibility bar has frequently been alleged in error. Agency officials may err in determining that particular entities are terrorist organizations, and they may err in finding that particular non-citizens engaged in terrorist activities. *Amici* offer a host of examples to illustrate this point. Absent at least limited judicial review, manifest injustice inevitably will result—particularly in circumstances, like those in this case, where a consular official explains the denial of a visa application by offering only a bald citation to a broad and multi-faceted statutory provision.

ARGUMENT

The government's submission minimizes, or disregards entirely, considerations that should be central to the Court's analysis. It would be anomalous *not* to allow judicial review of visa decisions that affect the substantial rights of U.S. citizens. And the demonstrated frequency of errors committed by consular officers and other government officials in the admissibility context shows beyond dispute the need for such review. The discussion below addresses these points in turn.

I. Consular Decisions, Like Other Agency Decisions, Should Be Reviewed For Legal, Procedural, And Factual Error.

The general statutory background that governs here is described by respondents. Briefly, under the Immigration and Nationality Act (INA), a noncitizen generally may not be admitted to the United States without having been issued a visa by a consular officer in the Department of State. 8 U.S.C. §§ 1181(a), 1201(a)(1). The statute provides that the officer is to deny a visa when "it appears to the consular officer" that "such alien is ineligible to receive a visa * * * under section 1182 of this title, or any other provision of law," or if "the consular officer knows or has reason to believe" that the noncitizen is ineligible." 8 U.S.C. § 1201(g). This consular determination must be made within the bounds prescribed by law: "[t]he term 'reason to believe' * * * shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa." 22 C.F.R. § 40.6.

This case involves a consular officer's invocation of the INA's "terrorist-related inadmissibility grounds" (TRIG), which were intended to bar terrorists and their supporters from entering the United States. But the government's argument goes much further: it contends not only that judicial review of TRIG determinations made abroad is barred, but also that the Court should countenance a sweeping exclusion of *all* consular decisions from judicial review. This Court, however, has never held that consular decisions may be completely shielded from judicial review, and such a holding would not conform to modern principles of administrative law. *Amici* address TRIG-specific issues below, but submit that the holding urged by the government would sweep in a host of legal and procedural issues that are well within the institutional competence of federal courts to resolve—and that they *do* routinely resolve where the non-citizen is present in the United States.

A. Judicial review involving individuals abroad is not categorically precluded by the Court's case law.

At the outset, judicial review is not precluded merely because the visa applicant has not made an entry into the United States. Even as to noncitizens considered legally to be outside our borders, broad judicial review over questions of law has been permitted for a century via habeas corpus. *Gegiow* v. *Uhl*, 239 U.S. 3, 9-10 (1915). In addition, although the Administrative Procedures Act (APA) was displaced by statute as to review of removal orders (*Foti* v. *INS*, 375 U.S. 217, 225-226 (1963))—such orders are now reviewed under the Hobbs Act—the APA continues to govern challenges to other immigration-related orders. See, *e.g.*, *Williams* v. *Sec'y, U.S. Dep't*

of Homeland Sec., 741 F.3d 1228, 1231 (11th Cir. 2014) (Adjustment of Status); *Neang Chea Taing* v. *Napolitano*, 567 F.3d 19, 22 (1st Cir. 2009) (visa petition); *Ayanbadejo* v. *Chertoff*, 517 F.3d 273, 277-278 (5th Cir. 2008) (per curiam) (same). Indeed, this Court has permitted APA review of immigration-related decisions affecting individuals abroad, at least as to an individual claiming U.S. citizenship. *Rusk* v. *Cort*, 369 U.S. 367, 379-80 (1962) ("the Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions * * * in the absence of clear and convincing evidence that Congress so intended") (citing *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); *Brownell* v. *We Shung*, 352 U. S. 180 (1956)). It is not obvious why the U.S. citizen in this case should not occupy a similar legal position to that of the U.S. citizen in *Cort*.

Moreover, precisely the same questions that arise in the consular context are subject to litigation in cases arising domestically in removal proceedings or actions in district court. It would be anomalous to render an agency error irremediable, leaving a U.S. citizen family member without recourse, simply because the process occurs abroad. Nothing in the APA or the INA supports such a result.

B. Review of agency decisions regarding admissibility illustrates federal-court competence to resolve those issues and the importance of that authority.

In fact, inadmissibility issues frequently arise in removal proceedings, where they have generated a substantial body of case law. For instance, one ground of inadmissibility—which often affects eligibility for relief from removal—is the commission of a

crime of "moral turpitude." 8 U.S.C. § 1227(a)(2)(A). Determining whether a given offense qualifies as such a crime may require application of an ambiguous definition and resolution of complex legal and factual questions. See Brian C. Harms, *Redefining "Crimes of Moral Turpitude: A Proposal to Congress"*, 15 Geo. Immigr. L.J. 259 (2001). Federal courts have been reviewing moral turpitude issues for over a century. *See*, *e.g.*, *United States ex rel. Mylius* v. *Uhl*, 210 F. 860, 863 (2d Cir. 1914).

Courts frequently find that immigration authorities, immigration judges, and the BIA made serious errors in their application of the moral turpitude standard: For a non-exhaustive list of recent cases where a court of appeals reversed the BIA or immigration judge's determination as to whether a noncitizen had committed a crime of moral turpitude, see *Mejia* v. *Holder*, 756 F.3d 64 (1st Cir. 2014); *Mahn* v. *Att'y Gen. of U.S.,* 767 F.3d 170 (3d Cir. 2014); *Castrijon-Garcia* v. *Holder*, 704 F.3d 1205 (9th Cir. 2013); *Prudencio* v. *Holder*, 669 F.3d 472 (4th Cir. 2012); *Robles-Urrea* v. *Holder*, 678 F.3d 702 (9th Cir. 2012); *Nunez* v. *Holder*, 594 F.3d 1124 (9th Cir. 2010); *Saavedra-Figueroa* v. *Holder*, 625 F.3d 621, (9th Cir. 2010); *Jean-Louis* v. *Att'y Gen. of U.S.*, 582 F.3d 462 (3d Cir. 2009); *Saqr* v. *Holder*, 580 F.3d 414 (6th Cir. 2009); *Galeana-Mendoza* v. *Gonzales*, 465 F.3d 1054 (9th Cir. 2006); *Partyka* v. *Att'y Gen. of U.S.*, 417 F.3d 408 (3d Cir. 2005); *Fernandez-Ruiz* v. *Gonzales*, 468 F.3d 1159 (9th Cir. 2006); *Reyes-Morales* v. *Gonzales* 435 F.3d 937 (8th Cir. 2006); *Gill* v. *INS*, 420 F.3d 82 (2d. Cir, 2005); *Hernandez Martinez* v. *Ashcroft*, 343 F.3d 1075 (9th Cir. 2003).

Exactly the same questions arise when a consular officer determines whether to issue a visa, as the

same "crime involving moral turpitude" standard serves as a bar in that context. See 8 U.S.C. § 1182-(a)(2)(A)(i). Yet under the government's theory of this case, if two adjudicators make the same legal error regarding the same offense, the legal error made abroad is insulated from all review. This makes no sense: the federal courts are just as capable of adjudicating the legal claims of those two individuals, and the fact that one claim arises abroad does not affect the substance of the claim in any respect.

This is not unique to the turpitude context. A host of admissibility issues come before the federal courts,[2] all of which also may arise in the consular context, since the same admissibility statute applies in both cases. In this setting, the "strong presumption in favor of judicial review of administrative action" (*INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001)) is reinforced by the longstanding reviewability of the same legal issues for individuals in substantially the same constitutional posture as family-based visa applicants at consulates abroad.

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[2] *E.g.*, *Sandoval* v. *Holder*, 641 F.3d 982, 986-989 (8th Cir. 2011) (considering application of permanent inadmissibility ground at 8 U.S.C. § 1182(a)(6)(C)(II) to a minor); *Husic* v. *Holder*, No. 14-607, 2015 WL 106359, at *5 (2d Cir. Jan. 8, 2015) (joining seven other circuits in rejecting the Board's decision in *In re Koljenovic*, 25 I. & N. Dec. 219 (B.I.A.2010), as to the admissibility waiver at 8 U.S.C. § 1182(h)); *Ortiz-Bouchet* v. *U.S. Att'y Gen.*, 714 F.3d 1353, 1356-1357 (11th Cir. 2013) (per curiam) (finding error in agency admissibility determinations under 8 U.S.C. §§ 1182(a)(6)(C)(i), 1182(a)-(9)(B)).

II. Inadmissibility Grounds, Including Those Related To Terrorism, Are Susceptible To Erroneous Application.

As we have shown, the courts are competent to, and frequently do, address the sorts of issues that arise in the consular visa application process. And as we show below, the need for such review is acute: errors occur frequently in this context, and judicial oversight is vital in correcting the wrongful denial of a visa, preventing the unjust and permanent separation of applicants from their U.S. citizen families.

A. Consular officers frequently err.

As a general matter, institutional considerations make some number of consular errors inevitable. Due to limited time and resources, simple misunderstandings, language deficiencies, inadequate training, and the complicated nature of immigration law, consular officers commit factual and legal errors every day. Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 Geo. Immigr. L.J. 113 (2010); see James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash. L. Rev. 1, 16-17 (1991). Many personal factors—including tenure of service, individual background, and career objectives—influence a consular officer's exercise of discretion during visa determinations, as reflected by dramatic differences in the rates of visa denial by different officers. Kim Anderson & David Gifford, *Consular Discretion in the Immigrant Visa-Issuing Process,* 16 San Diego L. Rev. 87 (1978). And although we do not question the dedication and good faith of most consular officers, the unfortunate reality is that some have relied on racial

and economic stereotyping when denying visas;[3] other have used openly racist criteria in rendering visa decisions;[4] and still others have simply failed to follow instructions. Indeed, an extensive study "concluded that most consuls did not follow the guidelines for visa adjudication set forth in the State Department's Foreign Affairs Manual." Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 How. L.J. 237, 255 (1994).

The proposition that some judicial review in the consular context would find and correct errors made by consular officers is not a matter of speculation; courts make such findings every day in closely related settings. For instance, in circumstances where domestic immigration authorities have sought the assistance of consular officials in vetting asylum claims, courts of appeals have determined, with some regularity, that consular submissions were "glaringly deficient" (*Banat* v. *Holder*, 557 F.3d 886, 893 (8th Cir. 2009)), "markedly insufficient" (*Anim* v. *Mukasey*, 535 F.3d 243, 257 (4th Cir. 2008)), "insufficiently detailed" (*Lin* v. *Dep't of Justice*, 459 F.3d 255, 270 (2d Cir. 2006)), "highly unreliable" (*Alexandrov* v. *Gonzales*, 442 F.3d 395, 405 (6th Cir. 2006)),

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[3] Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Am. L. 295, 343 n.279 (2002).

[4] *Olsen* v. *Albright*, 990 F. Supp. 31 (D.D.C. 1997) (discussing the case of a consular officer who was fired for refusing to follow the consulate's racial visa eligibility policies). See also Charles J. Ogletree, Jr., *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. Rev. 755, 762 (2000) (discussing how some consular offices have used openly racist criteria in visa decisions).

and "troubling" and "untrustworthy" (*Ezeagwuna* v. *Ashcroft*, 325 F.3d 396, 408, 411 (3d Cir. 2003)).

Courts also repeatedly have corrected instances where consular officials failed to follow legally mandated procedures. For example, in lawsuits challenging visa denials, subject matter jurisdiction exists to allow an applicant to seek a writ of mandamus to compel adjudication of an unreasonably delayed visa application. See *Ahmed* v. *DHS*, 328 F.3d 383, 388 (7th Cir. 2003); *Iddir* v. *INS*, 301 F.3d 492, 500 (7th Cir. 2002). In one such instance, a visa applicant waited for more than eight years before the court compelled the U.S. consulate to act on the pending application, holding that an eight-year delay on the part of consular officials was unreasonable. *Patel* v. *Reno,* 134 F.3d 929, 933 (9th Cir. 1997). See also, *e.g.*, *Singh* v. *Clinton*, 618 F.3d 1085, 1091-1092 (9th Cir. 2010) (finding failure to provide required notice of termination of a visa registration).

B. Government agencies often err in making terrorism determinations.

The general need for some judicial review of consular decisions is applicable, as well, in the context of terrorism-related decisions. Consular officers do not have unbounded discretion when acting on visa applications. As relevant here, the terrorism-related inadmissibility grounds are set by specific statutory terms. And because these terms are in significant respects confusing and indefinite, occasional error in their application can be expected.

1. The statutory definition of "terrorist activity" and "terrorist group" is broad and convoluted.

As noted, this case involves a consular officer's invocation of the INA's TRIG bar, which was intended to bar terrorists and their supporters from entering the United States. Section 1182 requires the exclusion of any person who, among other things, has engaged in "terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(I). "Terrorist activity" is, in the experience of *amici*, most commonly applied to individuals found to have provided "material support" to a terrorist organization. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). A "terrorist organization," in turn, is defined to include not only organizations formally designated as such by the Secretary of State (see 8 U.S.C. § 1182(a)(3)(B)(vi)(I), (II)), but also any "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in [§ 1182(a)(3)(B)(iv)]." 8 U.S.C. § 1182(a)(3)(B)(vi)(III). And the terrorist label is triggered by, among other things, "[t]he use of any * * * explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b). See *Khan* v. *Holder*, 584 F.3d 773, 777 (9th Cir. 2009).

So far as these undesignated terrorist organizations are concerned, the INA does not specify which government agency may categorize a group as terrorist in nature. *Khalfallah* v. *Holder*, No. 3:11-cv-414, 2011 WL 4839103, at *1 n.1 (N.D. Tex. Sep. 9, 2011). Nor does the statute detail either the process by which an agency should make such a finding or the

specific findings that must be made. *Ibid.* Such groups accordingly may be labeled "terrorist" on a "case-by-case basis" under designations that "arise and change over time," and such labels "may apply to individuals and activities not commonly thought to be associated with terrorism." USCIS, Terrorism-Related Inadmissibility Grounds, perma.cc/5HMJ-EP48. Thus, "[a]ny government adjudicator, such as a DHS asylum or refugee officer, a Service Center adjudicator, or an immigration judge, can determine on a case-by-case basis that a group" qualifies as a terrorist organization. Anwen Hughes, et al., *Combating the Terrorism Bars Before DHS and the Courts*, Immigration Practice Pointers 452 (2010-11). See 9 Foreign Affairs Manual 40.32 n2.8(a)(3) (State Department's Foreign Affairs Manual gives consular officers "a key role in determining whether an entity is an undesignated terrorist organization"). And compounding the uncertainty and indefinite nature of these designations, the government does not publish a list of "undesignated" terrorist organizations.

Against this background of loose statutory language and ad hoc government decision-making, it is unsurprising that the government's interpretation of "terrorist" and "terrorist organization" has become untethered both from those terms' common usage and the sense of the statutory text. The Department of Homeland Security has applied terms such as "terrorist organization" and "material" in a manner that sweeps in conduct that "no reasonable person would consider material support or terrorism." S. Hrg. 110-753, Hearing Before the Subcomm. on Human Rights and the Law of the Comm. on the Judiciary, The "Material Support" Bar: Denying Refuge to the Persecuted, 110th Cong., 1st Sess., 2 (Sept. 19, 2007) (statement of Sen. Durbin). Thus, as we show

below (at 19-24), the government has applied the bar to persons who, for example, were the victims of extortion by criminal groups, or who taught in a school that operated in an area administered by what the government characterized as a terrorist regime. As might be expected, the danger of such anomalous treatment is particularly acute when the applicant comes from an area where government authority is lax and armed conflict commonplace.[5]

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[5] Notably, the government's interpretation of terrorist organizations does not "distinguish between genuine terrorists and legitimate resistance groups." Hearing Before the House Subcomm. on Africa, Global, Human Rights and Int'l Ops., Comm. on Int'l Rel., Current Issues in U.S. Refugee Protection and Resettlement, 109th Cong., 2d Sess. 12 (May 10, 2006) (Rep. Smith). Although the government does not publish a full list of organizations determined to qualify as a terrorist organization, Human Rights First has compiled a partial list that includes: all Iraqi groups that fought against Saddam Hussein; all U.S.-supported Afghan groups that fought the Soviet invasion in the 1980s; opposition parties in Sudan that were forced to flee that country after the 1989 military coup; South Sudanese armed opposition movements that are now the ruling party of South Sudan; virtually all Ethiopian and Eritrean political parties; every group to have fought the military junta in Burma that was not exempted by specific legislation; any Iranian opposition group that used armed force after the 1979 Iranian revolution; and the MDC, the principal opposition group in Zimbabwe. These groups are not considered terrorist organizations by the U.S. government in any other context. Human Rights First, *Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States* 4-5 (2009). This broad agency approach to the identification of terrorist organizations has led to the anomalous result that persons who served alongside U.S. soldiers or fought in U.S.-supported armed rebellions against totalitarian regimes may be treated as terrorists. See, *e.g.*, Ishaan

Against this background, it is not surprising that even DHS officials recognize that the material support bar has the "potential to sweep too broadly and to prevent us from providing immigration benefits to those who are deserving of them." S. Hrg. 110-753, at 7 (statement of Paul Rosenzweig, Deputy Ass. Sec'y for Policy, U.S. Dep't of Homeland Security); see also *In re S-K*, 23 I. & N. Dec. 936, 948 (B.I.A. 2006) (Osuna, J., concurring), *aff'd in part, vacated in part*, 24 I. & N. Dec. 475 (B.I.A. 2008).

2. TRIG determinations may be legally or factually flawed.

In this context of limited disclosure, individualized administrative decision-making, and the factual setting of a war-torn and lawless environment, it would be remarkable if errors did not occur in application of the TRIG bar. And in fact, TRIG decisions about admissibility sometimes are plainly contrary to congressional intent, wholly unreasonable, or clearly erroneous as a factual matter. Because the current application of the TRIG bar is so susceptible to error, oversight is necessary—and will produce fairer results for applicants and their relatives who are U.S. citizens.

In the discussion below, we describe the application of the TRIG bar by government officials outside the consular visa application process, in contexts such as asylum and removal. But precisely the same

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Tharoor, *A U.S.-designated Terrorist Group is Saving Yazidis and Battling the Islamic State*, Wash. Post, Aug. 11, 2014, perma.cc/S9QC-EL6Z; *Oryakhil* v. *DHS*, No. 13-cv-01738, Dkt. 31 (N.D. Ill. Nov. 15, 2013) (asylee found by DHS to have triggered terrorism bar by supporting the Northern Alliance against the Taliban), following *Oryakhil* v. *Mukasey*, 528 F.3d 993 (7th Cir. 2008)).

substantive legal standards govern in all of these settings—and the frequency of legal and factual error in one context leaves no doubt that such errors also occur, and could be corrected by judicial review, in the others.

To begin with, although "[d]eference to the political [b]ranches is at its zenith in matters of national security and foreign affairs" (see U.S. Br. 42, citing *Wayte* v. *United States*, 470 U.S. 598, 611-612 (1985)), the fact remains that there are governing legal standards that establish when the TRIG bar does, and does not, apply. And executive discretion, however desirable it may be in certain contexts as a matter of policy, extends "only as far as the statutory authority conferred by Congress"; "[i]t is the duty of the courts * * * to say where those statutory and constitutional boundaries lie." *Abourezk* v. *Reagan*, 785 F.2d 1043, 1061-1062 (D.C. Cir. 1986) (Ginsburg, J.) (remanding for a more "informed decision" by the district court on whether the State Department had exceeded its statutory authority); see also *Am. Acad. of Religion* v. *Napolitano*, 573 F.3d 115, 126 (2d Cir. 2009) (observing that a plenary-power standard does not preclude ensuring that officials have "properly construed and applied" the statutes at issue). That need to introduce a modicum of process and oversight is pressing here.

First, one potential source of error is that an entity with which the applicant was somehow associated may have been improperly categorized as a terrorist organization. For example, for treatment as an undesignated terrorist organization to be appropriate, at least two questions must be addressed: (1) whether the organization is "a group of two or more individuals"; and (2) whether it engages in terrorist

activities. See 8 U.S.C. § 1182(a)(3)(B)(vi)(III). The answer to the first of these questions will sometimes be unclear, given the statute's failure to define the ambiguous word "group." And the answer to the second often will be doubtful. Indeed, some courts have identified designation as a "terrorist organization" where the assertion of "terrorist activities" was wholly unsupported.

In one case, the government's terrorist group designation rested on evidence that one member of the group had committed violent acts. See *Singh* v. *Wiles*, 747 F. Supp. 2d 1223, 1231-1232 (W.D. Wash. 2010). After the court reviewed the record, however, it became clear that the violent individual had acted either alone or with third-party support—and had, in any case, died before the *applicant's* association with the group began. *Id.* at 1232 ("The court's review of the administrative record and the relevant statutory framework leaves it convinced that there is no rational connection between the facts disclosed in the record and USCIS's determination that Damdami Taksal was a terrorist organization while Mr. Singh permitted its members to sleep at his temple.") There was, in short, no defensible reason either to assign terrorist group status to the group in question or to exclude the applicant on a TRIG basis. Accordingly, some terrorist designations, like the one challenged in *Singh*, may ultimately prove to be without any reasonable factual underpinnings at all.

Second, the non-citizen's actions may not in fact have supported the group. A non-citizen may be excluded if the government finds that he or she "engage[d] in terrorist activity," defined to include providing "material support" for that group. 8 U.S.C.

§ 1182(a)(3)(B)(iv)(VI).[6] But as with the terrorist group designations, the finding of material support is rife with opportunities for agency mistakes and misunderstandings. Under the government's current haphazard approach, almost any act could conceivably be construed as "material support"—even acts that no reasonable and impartial observer would characterize as supportive of terrorism.

The asylum application filed by Mohamed Daneshvar illustrates how even minimally intrusive judicial oversight can uncover error and overreach in the "material support" context. The BIA denied Daneshvar's asylum application, in part because the Board deemed him inadmissible for allegedly having solicited others in Iran to join the Mujahedin-e Khalq Organization (MEK), a terrorist group. *Daneshvar* v. *Ashcroft*, 355 F.3d 615, 619-621 (6th Cir. 2004). Daneshvar's involvement with MEK, however, was limited to selling the group's newspapers, at the age of sixteen, and he had discontinued his association with the group upon discovering its turn to violence. *Id.* at 619-620.

The Sixth Circuit enumerated several problems with the government's application of the "material support bar" to Daneshvar: MEK had not yet been designated a terrorist group at the time of Daneshvar's actions; the Board had not considered Daneshvar's testimony that he knew nothing of MEK's vi-

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[6] The statute specifically mentions, as examples of material support, providing "a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

olent activities; and there was no evidence that Daneshvar himself had engaged in any terrorist acts. 355 F.3d at 628. "We would be hard-pressed," concluded the Sixth Circuit, "to classify any minor who sold newspapers for an organization that supported an armed revolt against a tyrannical monarch as a terrorist. To impute such political sophistication to a teenager * * * would amount to a manifest injustice."[7] *Ibid.* The Board's "factual and legal mistakes" were so significant as to overcome the court's default presumption of deference. *Id.* at 628-629.

There are numerous additional examples of similarly flawed TRIG findings that, on closer examination after an adversarial presentation, were corrected either on review or by the agency itself. These include[8]:

- The applicant, a doctor in the Democratic Republic of Congo who was beaten and whose wife was tortured and raped by government officials, was denied asylum on the ground that he made contributions and therefore provided material support to the Bundu Dia Kongo (BDK), characterized as a terrorist organization. But on review of the evidence and on hearing the applicant's tes-

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[7] As some of the examples described below illustrate, political and social revolutions often give rise to organizations like MEK, whose precise political and ideological commitments—and propensity for violent acts of terrorism—are not always clear from the outset of their existence.

[8] In light of the need for confidentiality in asylum proceedings and the sensitivity of allegations (even if unsupported) regarding terrorism, names and other identifying material are not included in the following examples. Specific information regarding the cases discussed is available from counsel for *amici*.

timony, the immigration judge and the BIA both concluded that, at the time the applicant made his contributions, he did not know and could not reasonably have known that the BDK engaged in violent acts. L--x--x--, Axxx-xxx-464 (B.I.A. Sept. 23, 2013) (unpublished).

- USCIS applied the material support bar to an applicant because he taught civilians in a school administered by the Eritrean People's Liberation Front (EPLF), which DHS treated as a terrorist organization. The immigration judge found that "teaching general education to civilians," including "subjects such as language, mathematics and science"—at a school "largely funded by international NGOs and government agencies, including the Red Cross, Oxfam, and USAID"—"does not constitute the type of 'support' contemplated by Congress." The judge also found that any support the applicant did provide the EPLF was not material and that, in any event, the applicant "did not know, and should not reasonably have known, that the EPLF was a terrorist organization."

- USCIS issued notices that the applicant, an individual of Palestinian descent, was inadmissible because the English translation of his handwritten Arabic asylum application indicated that he was associated with the Popular Front for the Liberation of Palestine (PFLP), a terrorist organization. But evidence submitted by the applicant showed that the applicant had never supported or been affiliated with the PFLP and that the USCIS's contrary assertion was the product of a translation error; the asylum application in fact said "community group" and made no reference to the PFLP at all. In response to this evidence,

USCIS approved the application for adjustment of status.

- DHS sought to deny permanent residence status to and to remove Abdul Hamid on material support grounds. After Hamid presented evidence and expert witness testimony that he had made payments, under threat of death, to a group of mercenary "thugs" in Pakistan, which the U.S. government had subsequently linked to a larger network of violent terrorists, the immigration judge rejected the government's submission and granted Hamid's application for permanent residence. Benach Ragland LLP, *BR–Client of the Month–September 2014*, perma.cc/E3D7-YDDN.

- Asserting the material support bar, DHS opposed the asylum application of a Pakistani citizen who, at the age of sixteen, had joined a group that advanced the rights of Pakistanis of Indian descent. In a decision affirmed by the BIA, the immigration judge rejected the government's position and held the applicant eligible for asylum, noting that the applicant credibly testified "that he has never known a member of [the groups with which he was associated] to suggest or encourage harming others and that he would have immediately renounced his membership if he had learned that either organization used violence to advance its agenda." Based on this and other evidence, the judge determined that the applicant "should not reasonably have known that [the organizations] were terrorist organizations."

- DHS opposed the asylum application of K-P- on material support grounds. After multiple hearings and extensive briefing, the immigration judge found that K-P- had provided money and

jewelry to armed guerillas in Nepal on threat of death, and that she was the victim of a crime rather than a supporter of terrorism.

- In *FH-T* v. *Holder*, 723 F.3d 833 (7th Cir. 2013), cert. denied, 135 S. Ct. 55 (2014), the applicant, a citizen of Eritrea, was denied asylum on the ground that he provided material support to the EPLF, an organization that he joined when he was approximately fifteen years old and sought to leave after two days, but for which he was forced to work in a noncombat role for a period of many years. The court of appeals declined to address for failure to exhaust the applicant's argument that he was unaware that the EPLF—which was fighting a lengthy war with Ethiopia—was engaging in unlawful violence, but noted that, had the argument been properly exhausted, "our finding may well have been different." 723 F.3d at 841.

C. None of these legal flaws would be discoverable if the government offers no intelligible explanation for the visa denial.

As these examples show, errors demonstrably and inevitably are made in the TRIG context. But none of the errors discussed above would have been either brought to light or corrected absent (i) at least some limited disclosure of the TRIG rationale beyond the mere citation of the statutory section deemed relevant by the government; (ii) an opportunity for the applicant to address the government's reasoning and evidence; and (iii) the availability of review by an impartial magistrate—all of which the government would categorically withhold in the circumstances of this case.

In fact, these examples provide graphic support for the proposition that insufficient process creates an acute risk of "erroneous deprivation of a citizen's liberty"—particularly in contexts where, as here, mistakes are relatively common. *Hamdi*, 542 U.S. at 530. After all, a fundamental requirement of due process is that a person faced with the deprivation of liberty or property be offered the opportunity to hear and address the evidence against them. See, *e.g.*, *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970) (discussing the constitutional importance of the "opportunity to be heard * * * at a meaningful time and in a meaningful manner"). Even when the judicial role is limited and deferential, as it may be in the national security context, judicial oversight and the fundamentals of due process remain critical. See *Hamdi*, 542 U.S. at 530. Especially when the government provides no reason for an exclusion decision aside from a bare citation to a statute like Section 1182(a)(3)(B)—a capacious and multifaceted provision—denial of all other process leaves applicants with no means to assess and challenge the government's resolution of the important legal questions discussed in this section.

The Ninth Circuit, below, properly took note of this problem. The government, the court observed, had provided "no factual allegations that would allow us to determine if the specific subsection of § 1182(a)(3)(B) was properly applied." Pet. App. 9a. In previous cases, the government had presented an intelligible reason for exclusion and used the statute to "g[i]ve the reason legitimacy." *Id.* at 10a. In contrast, the record in this case is "void" of any such facially legitimate reasons. *Id.* at 11a (citing *Bustamante* v. *Mukasey*, 531 F.3d 1059, 1060-1063 (9th Cir. 2008), and *Adams* v. *Baker*, 909 F.2d 643, 649

(1st Cir. 1990)). Moreover, some subsections of the statute confer an explicit right to attempt to present exculpatory evidence; citing the entire statute as the reason for exclusion effectively erases this right. *Id.* at 863. Proper application of the balance required by due process principles precludes such a result.[9]

In sum, the type and frequency of errors that may be made in the visa application process—coupled with the courts' historic and effective role in correcting such errors—demonstrate the necessity of ju-

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[9] The government relies heavily on *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950) and *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). But the government's uncritical citation to those cases (which were not litigated by U.S. citizens) omits important facts about each. After a public outcry (and, in Knauff's case, a stay of removal issued by Justice Jackson), both Knauff and Mezei were granted hearings before the immigration courts. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Kauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 955-964 (1995). Indeed, Knauff prevailed in her case: the BIA found the allegations against her unsupported and ordered her admitted to the United Stats for permanent residence—a finding later approved by the Attorney General. *Ibid.* And one of the two witnesses against Mezei was a professional witness who had presented perjured testimony in other cases. See *Communist Party* v. *Subversive Activities Control Bd.*, 351 U.S. 115, 124 (1956). Although Mezei did not ultimately prevail before the BIA, the BIA did find that he played only a minor role, and he was ultimately released from detention on immigration parole. Weisselberg, 143 U. Pa. L. Rev. at 983-984.

Both *Knauff* and *Mezei* are, of course, binding unless overruled by the Court—but the government now invites their expansion to a wholly different context. The history of those two cases—demonstrating the injustice that secret agency proceedings frequently entail—should give the Court pause before accepting that invitation.

dicial review over consular visa determinations in cases like this one. Experience shows that "'the risk of an erroneous deprivation' of the private interest" in the absence of any judicial process is exceedingly high, as is "the 'probable value'" of even limited judicial review. *Hamdi*, 542 U.S. at 529. In these circumstances, "judicious balancing of these concerns" mandates the availability of judicial review. *Ibid.*

Congress responded to these concerns many decades ago when it enacted the APA, which codifies a presumption of reviewability of agency actions. No statute precludes that review here, and the presumption of reviewability is only strengthened by the fundamental familial rights implicated by family-based visa denials. What the Constitution would require and fundamental fairness would enjoin has already been decreed by Congress. The Court should give effect to that determination here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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