Judicial Review of Visa Decisions After the Supreme Court's Decision in *Department of State v. Muñoz*

Practice Advisory
January 15, 2025

I. Introduction[1]

In *Department of State v. Muñoz*, 602 U.S. 899 (2024), the U.S. Supreme Court concluded that a U.S. citizen and her noncitizen spouse had no access to judicial review of a consular officer's denial of an immigrant visa. The Court held that a U.S. citizen has no substantive due process right—no "fundamental liberty interest"—in her spouse's admission to the United States. *Id*. at 909. But practitioners should not view *Muñoz* as the end of efforts to hold consular officers to account. To place the decision in context, this practice advisory provides an overview of the judicially-created consular nonreviewability doctrine, the lawsuit's path to the Supreme Court, and the decision itself. The practice advisory then addresses potential causes of action that remain viable after *Muñoz*. These potential claims cover a range of scenarios where visas are denied, such as constitutional claims by U.S. citizens that differ from Ms. Muñoz's and when the denial is dictated by another agency, and challenges to agency delay in visa adjudication, to which the doctrine should not apply.

II. Overview

A. Consular Nonreviewability Doctrine

The consular nonreviewability doctrine is a judicially-created doctrine based upon deference to the plenary power of Congress to create immigration laws and its attendant power to delegate to the Executive the power to enforce such laws. *See Baan Rao Thai Rest. v. Pompeo*, 985 F.3d 1020, 1024 (D.C. Cir. 2021). Applying the doctrine, courts have found that it bars judicial review over visa determinations by consular officers. *Id*. When applicable, the doctrine bars relief, not jurisdiction. *Muñoz*, 602 U.S. at 908 n.4 (consular nonreviewability doctrine is not jurisdictional); *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (denying that "the Government's

---

[1] Copyright © 2025 American Immigration Council (Council), International Refugee Assistance Project (IRAP), and Consular Accountability Project (CAP). Click here for information on reprinting this advisory. This practice advisory is intended for authorized legal counsel and is not a substitute for independent legal advice supplied by legal counsel familiar with a client's case. The authors of this advisory are Leslie K. Dellon, Council, Melissa Keaney, IRAP, and Eric Lee, Diamante Law Group, APLC and CAP. The authors thank Michelle Lapointe, Council, and Deepa Alagesan, IRAP, for their assistance in editing this advisory.

power in this area [of immigration] is never subject to judicial review," but "only to limited judicial review").

In *Muñoz*, the Supreme Court addressed the doctrine, beginning with a review of decisions which the Court considered to be its longstanding acceptance of the primacy of the "political departments" in the admission and exclusion of foreign nationals. 602 U.S. at 907-08. The Court stressed that judicial review was available only when "expressly authorized by law." *Id*. at 908 (citations omitted). The Court then concluded: "The Immigration and Nationality Act (INA) does not authorize judicial review of a consular officer's denial of a visa; thus as a rule, the federal courts cannot review those decisions. This principle is known as the doctrine of consular nonreviewability." *Id*. (footnote omitted)

B. *Kleindienst v. Mandel:* Creation of the "Facially Legitimate and Bona Fide Reason" Standard

In *Kleindienst v. Mandel*, a consular officer denied Mr. Mandel's visa application based upon inadmissibility for communist activity, and the Attorney General exercised discretion to deny a waiver that the Department of State recommended. 408 U.S. 753, 756-59 (1972). (While a consular officer's decision is technically a refusal, this practice advisory uses "denial" interchangeably as the courts do.) Mr. Mandel, a professional journalist and author of a Marxist economic work, had applied for a visa after being invited to the United States by university professors, among others, to lecture and participate in conferences. *Id*. at 757. Mr. Mandel had previously received a visa despite a finding of inadmissibility for communist activity after the Attorney General granted a waiver to speak at several universities. *Id*. at 756, 758. However, the INS notified Mr. Mandel's attorney that the Attorney General denied the waiver because Mr. Mandel's activities "went far beyond the stated purposes" of the prior visit and were a "flagrant abuse" of "opportunities . . . to express his views." *Id*. at 759.

Mr. Mandel and some of the U.S. university professors who invited him to speak or expected to engage with him at various events challenged the inadmissibility and waiver statutes on their face and as applied. *Id*. at 760. They contended, among other claims, that the statutes violated the First and Fifth Amendment rights of the professors and their application to Mr. Mandel was arbitrary and capricious. *Id*. The Court framed the question before it as the "narrow issue" of whether the U.S. university professors had a First Amendment right to hear, speak with, and debate Mr. Mandel, which would require the Attorney General to waive his inadmissibility. *Id*. at 762. The Court then held that when the government official's decision is based on "a facially legitimate and bona fide reason," courts will not look behind the decision nor balance the government's interest against the asserted First Amendment interest. *Id*. at 770. The Court expressly left open the question of what grounds may be available to challenge a decision "for which no justification whatsoever is advanced." *Id*.

C. *Kerry v. Din*: A "Stepping Stone" to *Muñoz*

Ms. Din, the U.S. citizen spouse of a noncitizen whose immigrant visa application was denied, claimed she was deprived of the fundamental constitutional right to live with her husband in the United States without due process of law. *Kerry v. Din*, 576 U.S. 86, 88 (2015). The Court did

not address the consular nonreviewability doctrine and framed the issues as (1) whether the U.S. citizen spouse had a constitutionally-protected interest, and, if so (2), whether she received due process. *Id*. at 90.[2]

Three justices decided the U.S. citizen spouse had no constitutionally-protected liberty interest and to the extent she received any explanation for the denial, it was more process than she was due. *Id*. at 101. Justice Kennedy, with Justice Alito concurred in the judgment, and concluded that the notice the applicant received satisfied due process and therefore declined to reach the issue of whether a protected interest exists. *Id*. at 102. Justice Kennedy found the "reasoning and holding" in *Mandel* to "control." *Id*. at 103. Justice Kennedy concluded that the government's stated reasons for denying the visa satisfied "*Mandel*'s 'facially legitimate and bona fide' standard." *Id*. at 104.

D. How *Muñoz* Reached the Supreme Court

1. Facts

Sandra Muñoz, a U.S. citizen, submitted a petition for a spousal visa for her husband, Luis Asencio-Cordero. USCIS approved that petition and a provisional waiver of the unlawful presence he had accrued in the United States, and he applied for an immigrant visa in San Salvador. 602 U.S. at 904-05; *id*. at 927 (Sotomayor, J., dissenting). With USCIS' waiver, a consular officer could have issued the immigrant visa if the officer did not find any other ground of inadmissibility. *See id*. at 925 (Sotomayor, J., dissenting). After several interviews, the consular officer denied the visa in December 2015. *Id*. at 905. The officer cited 8 U.S.C. § 1182(a)(3)(A)(ii), which renders an individual inadmissible 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." *Id*. After unsuccessfully attempting to obtain a reason for the denial, the couple filed their lawsuit in January 2017. *Muñoz v. U.S. Dep't of State*, 526 F. Supp. 3d 709, 712 (C.D. Cal. 2021). Only after the couple filed their lawsuit, during the discovery process, did the government explain that the consular officer decided Mr. Asencio-Cordero was inadmissible because the government believed he was an MS-13 gang member. 602 U.S. at 906.

2. The District Court Decision in *Muñoz*

The district court granted summary judgment for the government. *Muñoz*, 526 F. Supp. 3d at 713. The district court's analysis followed Ninth Circuit precedent in *Bustamante v. Mukasey,*

---

[2] As with *Muñoz*, *Din* reached the Supreme Court from the Ninth Circuit. The appellate court concluded that the U.S. citizen spouse had "a protected liberty interest in marriage" and that the consular officer's citation of the inadmissibility ground for "terrorist activities" was not a "facially legitimate" reason for the visa denial. *Din v. Kerry*, 718 F.3d 856, 860-62 (9th Cir. 2013). As to the protected liberty interest, the Ninth Circuit followed precedent in *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008), which held that a U.S. citizen has a liberty interest in marriage that entitles her to procedural due process as to the denial of her spouse's visa application. *Din*, 718 F.3d at 861, 868 (citing *Bustamante*, 531 F.3d at 1061-62). *See infra* § II.D.3.

531 F.3d 1059 (9th Cir. 2008).[3] In *Bustamante*, the Ninth Circuit accepted the U.S. citizen's assertion that she had a "protected liberty interest in her marriage" giving her a right to "constitutionally adequate procedures" for her noncitizen spouse's visa adjudication. 531 F.3d at 1062. The court decided that when "[p]resented with a procedural due process claim by a U.S. citizen" as to the visa adjudication, limited judicial review is available as provided in *Mandel*. *Id*. The Ninth Circuit then affirmed dismissal because the consular officer had provided a "facially legitimate and bona fide reason" for the visa denial. *Id*. at 1062-63.

Applying *Bustamante*, the district court first accepted that Ms. Muñoz had a protected liberty interest. *Muñoz*, 526 F. Supp. 3d at 719. The court then concluded that Ms. Muñoz had received sufficient process per *Mandel* and the consular nonreviewability doctrine barred further review. *Id*. at 722-23 & n.16. The court decided that the visa denial was "facially legitimate" because the information the government provided during the lawsuit provided "at least a facial connection" to the consular officer's citation of 8 U.S.C. § 1182(a)(3)(A)(ii). *Id*.at 720-21. Since the plaintiffs could not affirmatively show bad faith, the court concluded that the consular officer had provided a "bona fide reason" for the visa denial. *Id*.at 721-23.[4]

3. The Ninth Circuit Decision in *Muñoz*

Based on *Bustamante*, the Ninth Circuit also accepted that Ms. Muñoz had a protected liberty interest and instead focused on whether she had received due process. The court viewed the denial of Mr. Asencio-Cordero's immigrant visa as a "*direct* restraint" on Ms. Muñoz's liberty interests because her enjoyment of the fundamental liberty interest in marriage was conditioned on the sacrifice of her liberty interest in residing in the United States. *Muñoz v. U.S. Dep't of State*, 50 F.4th 906, 916 (9th Cir. 2022) (emphasis in original). However, the court reversed on the question of whether Ms. Muñoz had received sufficient process. *Id*. at 923-24. The Ninth Circuit concluded that the text of 8 U.S.C. § 1182(a)(3)(A)(ii) was too general to provide a "discrete factual predicate." *Id*. at 917. The Ninth Circuit agreed with the district court's determination that the government provided a "facially legitimate" reason after it had provided factual information sufficient to create "at least a facial connection" to the cited inadmissibility statute. *Id*. at 917-20. However, the Ninth Circuit determined that Ms. Muñoz's due process rights were still abridged because timeliness is also a "core" due process requirement, and the government had not provided the factual connection until nearly three years after the initial denial notice. *Id*. at 920-21. The court concluded that the government could not invoke the consular nonreviewability doctrine because the delay itself violated due process notice

---

[3] The Ninth Circuit concluded in *Cardenas v. United States* that Justice Kennedy's concurrence was the controlling opinion in *Din*. 826 F.3d 1164, 1171-72 (9th Cir. 2016). Since Justice Kennedy's concurrence assumed that the U.S. citizen spouse had a protected liberty interest, *Din* did not decide the question, so *Bustamante* remained binding in the Ninth Circuit. *See Muñoz*, 526 F. Supp. 3d at 718-19 & n.8.

[4] In applying a good faith standard to whether the reason was "bona fide," the district court followed *Cardenas*, which adopted Justice Kennedy's discussion in *Din* that "[a]bsent an affirmative showing of bad faith," courts should not "look behind" the reason. *Cardenas*, 826 F.3d at 1170-71 (quoting *Din*, 576 U.S. at 105 (Kennedy, J. concurring)).

requirements. *Id*. at 923-24. The Ninth Circuit vacated the district court dismissal and remanded for the court to consider the merits of the plaintiffs' claims. *Id*. at 924.

4. Questions Before the Supreme Court

The Supreme Court granted the government's writ of certiorari and accepted two questions for review:

- Whether a consular officer's refusal of a visa to a U.S. citizen's noncitizen spouse impinges upon a constitutionally protected interest of the citizen.
- Whether, assuming that such a constitutional interest exists, notifying a visa applicant that he was deemed inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii) suffices to provide any process that is due.

III. The Supreme Court Decision in *Muñoz*

The Court held that a U.S. citizen "does not have a fundamental liberty interest in her noncitizen spouse being admitted to the [United States]." 602 U.S. at 909.[5] As discussed *supra*, the Court first accepted that the consular nonreviewability doctrine generally would bar judicial review of the consular officer's decision, but also did not foreclose the possibility of some form of review if a visa denial implicated the constitutional rights of a U.S. citizen. *Id*. at 909, 918. The Court returned to the question unresolved in *Din*, which the Court characterized as whether a U.S. citizen has "a fundamental right to bring her noncitizen spouse to the United States." *Id*.

To support its holding, the Court reached back to a two-step substantive due process test formulated in *Washington v. Glucksberg*, 521 U.S. 702 (1997), to determine if Ms. Muñoz had a constitutionally protected interest. *Muñoz*, 602 U.S. at 910. The two steps are: (1) a "careful description of the asserted fundamental liberty interest," and (2) a determination of whether the interest is "deeply rooted in this Nation's history and tradition." *Id.* (quoting *Glucksberg*, 521 U.S. at 720-21). However, the Court never resolved the first step,[6] and decided that Ms. Muñoz could not meet the second. *Id.* at 911.[7] The Court cited examples of Congress subjecting

---

[5] Justice Barrett wrote the majority opinion, joined by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh. Justice Gorsuch wrote an opinion concurring in the judgment. Justice Sotomayor wrote a dissenting opinion, joined by Justices Kagan and Jackson.

[6] The Court described Ms. Muñoz's interest as a right to marriage that includes a right to have her noncitizen spouse "enter (and remain in) the United States." *Id*. The Court then queried whether the right might be a "substantive due process right that gets only procedural due process protection." *Id*. at 911. This would be a new hybrid, as the government can only restrict a substantive due process right with "narrowly tailored means that serve a compelling state interest." *Id*. at 910. But this query is only *dicta*, as the Court concluded it "need not decide whether such a category exists." *Id*. at 911. Instead, the Court found no substantive due process right by applying only the second step of the *Glucksberg* analysis.

[7] In *Obergefell v. Hodges*, the Court rejected the *Glucksberg* standard's requirement that the right in question be defined "with central reference to specific historical practices" when it

spousal immigration to restrictions, including grounds of inadmissibility. *See id*. at 912-14. The Court construed these examples as demonstrating that spousal immigration is not "a matter of right." *Id.* at 914.[8]

After deciding that Ms. Muñoz had no fundamental liberty interest, the Court added *dicta* about the parameters of *Mandel*. The Court described the professors' claims in *Mandel* as "directly depriv[ing] them of their First Amendment rights" when Mr. Mandel was denied a visa and a waiver of inadmissibility—and not procedural due process claims. *Id*. at 918. According to the Court, the "facially legitimate and bona fide reason" standard avoided "a difficult question of statutory interpretation; it had nothing to do with procedural due process." *Id*. The Court emphasized that *Mandel* provided no support for a claim that a U.S. citizen had a procedural due process right in a noncitizen spouse's visa application. *Id*. at 918-19. But the Court's *dicta* leaves open the possibility that if a citizen could demonstrate that a visa denial directly deprived them of a constitutional interest, then judicial review would be available pursuant to the *Mandel* standard. *See id*.

Since the Court held that Ms. Muñoz did not have a constitutionally-protected interest, it never applied the *Mandel* standard and never examined whether the reason for the visa denial was facially legitimate and bona fide. As discussed *infra* §§ IV.A-B, even after *Muñoz,* practitioners may have cases where a constitutionally-protected interest could be asserted for which judicial review, although limited, would be available based on *Mandel*.

IV. Potential Challenges to Visa Adjudications Still Available Post-Muñoz

Since *Muñoz* held only that a U.S. citizen spouse lacked a "fundamental liberty interest in her noncitizen spouse being admitted to the country," causes of action grounded in violations of other sources of law may still be available. Several alternatives are presented for practitioners' consideration. [9]

---

held that same-sex couples had a fundamental right to marry and their liberty interest was burdened by a state law that did not recognize their union. 576 U.S. 644, 671 (2015). In *Obergefell*, the Court found that in cases involving the right to marry, defining that right more specifically with reference to which marriages were historically permitted was inconsistent with determining what the fundamental right to marriage encompasses. *Id*. at 671-72, 675. However, *Obergefell* did not address any immigration-related rights flowing from marriage.

[8] Justice Gorsuch in his concurrence (*id*. at 920), and Justice Sotomayor for the dissenters (*id*. at 921), agreed that the Court could have avoided the constitutional issue by assuming that a fundamental right existed and deciding whether Ms. Muñoz had received due process.

[9] While outside the scope of this practice advisory, a purely procedural due process claim may survive *Muñoz*. *See* Michael C. Dorf, *The Twisted Career of the term "Liberty Interest" Gets Twistier Still in Dep't of State v. Muñoz*, Dorf on Law (June 25, 2024), https://www.dorfonlaw.org/2024/06/the-twisted-career-of-term-liberty.html.

A. Constitutional claims pursuant to *Mandel* (how *Mandel* survives *Muñoz*)

Practitioners may want to explore whether a U.S. citizen has experienced a violation of a constitutional right due to a visa denial. However, as discussed *infra* § IV.B, the utility of this cause of action will depend on whether the U.S. citizen will be able to demonstrate that the consular officer's decision did not meet the "facially legitimate and bona fide reason" standard from *Mandel.*

The *Muñoz* decision supports this possibility with its treatment of *Mandel*. While affirming that *Mandel* remains good law, the Court explained that "the 'facially legitimate and bona fide reason' in *Mandel* . . . had nothing to do with procedural due process. Indeed, a procedural due process claim was not even before the Court." 602 U.S. at 918. The Court's rejection of *Mandel* as support for a procedural due process claim leaves open a constitutional claim that fits within the *Mandel* parameters.

In *Mandel*, *supra* § II.B, the professors asserted that their First Amendment rights must limit the Attorney General's waiver decision. 408 U.S. at 768. When discussing *Mandel's* "facially legitimate and bona fide reason" test, the *Muñoz* Court explained that its purpose is to protect courts from having to balance the weight of the constitutional violation against the government's interest.[10] The test is triggered when a U.S. citizen *alleges* that one of their constitutional rights has been burdened by the visa denial: "We have assumed that a narrow exception to this bar exists 'when the denial of a visa *allegedly* burdens the constitutional rights of a U. S. citizen.'" 609 U.S. at 908 (emphasis added) (quoting *Trump v. Hawaii*, 585 U. S. 667, 703 (2018)).[11]

Muñoz did not overrule *Mandel* and refused to hold (as the government had argued) that a U.S. citizen can never challenge a visa denial. Thus, the *Muñoz* Court left open the argument that where a U.S. citizen asserts that *their* constitutional rights are implicated by the visa denial, they have a right to a facially legitimate and bona fide reason.[12]

---

[10] The Court had warned in *Mandel* that requiring the judiciary to determine the weight of a First Amendment violation would be "dangerous" and "undesirab[le]" because courts would be "making that determination on the basis of factors such as the size of the audience or the probity of the speaker's ideas . . . ." 408 U.S. at 769.

[11] In the years following *Mandel*, several district courts and courts of appeals held that in cases implicating the First Amendment, visas may not be denied based solely on free speech. E.g., *Adams v. Baker*, 909 F.2d 643, 648-650 (1st Cir. 1990) (considering First Amendment interests and the *Mandel* standard in the context of whether a statutory waiver of inadmissibility was available); *Allende v. Shultz*, 845 F.2d 1111, 1121 (1st Cir. 1988) (same); *Abourezk v. Reagan*, 592 F. Supp. 880, 887 (D.D.C. 1984), *vacated on other grounds*, 785 F.2d 1043 (D.C. Cir 1986); *Harvard Law School Forum v. Shultz*, 633 F. Supp. 525, 531 (D. Mass 1986), *vacated on other grounds,* 852 F.2d 563 (1st Cir. 1986).

[12] In a separate decision authored by Justice Barrett five days after *Muñoz*, the Court clarified that it "recognized a First Amendment right to receive information and ideas" in *Mandel*, and that the professor-plaintiffs there had "a concrete, specific connection to the speaker." *Murthy v. Missouri*, 603 U.S. 43, 46 (2024). Schools, universities, spouses, relatives,

B. Bad faith to demonstrate that a consular officer's decision is not "facially legitimate and bona fide"

As discussed *supra* § IV.A., U.S. citizens may be able to obtain judicial review if they demonstrate that a visa denial directly violated their constitutional rights. But *Mandel* limits this review, as a court may not look behind a consular officer's "facially legitimate and bona fide reason" for the visa denial. 408 U.S. at 770. As discussed *infra*, if the consular officer acted in bad faith, then the reason would not be bona fide and further review may be available.

The Supreme Court has repeatedly declined to adopt the government's assertion that consular officers may deny a visa for no reason or any reason at all. *See Muñoz*, 602 U.S. at 918 (quoting *Mandel*, 408 U.S. at 770). On the contrary, the Court has held that statutes which define grounds of exclusion/inadmissibility also prohibit denials that are not based on statutorily enumerated grounds. *See Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (Holmes, J.) ("The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases.").

Therefore, a visa decision based on no evidence should not satisfy the "facially legitimate and bona fide reason" test. However, the framing of this type of claim will depend on the statutory ground of inadmissibility. In *Din*, Justice Kennedy concluded that a citation to a statutory provision that contains "discrete factual predicates" satisfies the "facially legitimate and bona fide reason" test. 576 U.S. at 105 (Kennedy, J., concurring).[13] Consistent with Justice Kennedy's reasoning, a consular officer's citation to an inadmissibility provision with "discrete factual predicates" will be sufficient—unless as discussed below, a plaintiff can affirmatively demonstrate bad faith. In *Muñoz*, the inadmissibility ground was § 1182(a)(3)(A)(ii)'s "any other unlawful activity" provision, but the majority reached its decision without applying the "facially legitimate and bona fide reason" test (finding instead no constitutionally recognized interest).

In cases where the government has either cited a statute that contains discrete factual predicates (like the terrorism grounds) or where it has provided sufficient facts to be "facially legitimate," plaintiffs can still seek to overturn visa denials where they can establish with "sufficient particularity" that the consular officer's decision was made in bad faith and thus not "bona fide." *See Din*, 576 U.S. at 105 (Kennedy, J., concurring) ("*Mandel* instructs us not to look behind" the

---

and employers therefore likely also can establish a sufficiently concrete and specific connection to a visa applicant to trigger the "facially legitimate and bona fide reason" test on First Amendment grounds.

[13] Justice Kennedy considered multiple factors to determine that the denial of Din's husband's visa under 8 U.S.C. 1182(a)(3)(B) (terrorism grounds) satisfied the "facially legitimate and bona fide reason" test: (a) the determination was based on "specific statutory factors" which contained "discrete factual predicates," *id.* at 104-05; (b) the government has particularly sensitive needs in the terrorism context, *id*. at 106; (c) Din admitted facts that provided a "facial connection" to terrorist activity, *id*. at 105, and (d) while Din sought to know the specific subpart of the terrorism ground at issue, 8 U.S.C. §1182(b)(3) says the agency need not provide such specificity. *Id*. at 105-06.

decision absent "an affirmative showing of bad faith" that is "plausibly alleged with sufficiently particularity.").

The Ninth Circuit has elaborated this test in *Khachatryan v. Blinken*, when a U.S. citizen claimed his constitutional rights were violated by a consular officer's denial of his father's visa application. 4 F.4th 841, 850 (9th Cir. 2021). The U.S. citizen included detailed allegations that the consular officer acted in bad faith when he concluded that USCIS had found the citizen had engaged in marriage fraud. *Id*. at 853-54. The Ninth Circuit concluded that although it is insufficient to allege the consular officer's information is incorrect, "that does not mean that the objective unreasonableness of a stated reason for a visa denial is irrelevant, particularly at the pleading stage." *Id.* at 852-53. The Ninth Circuit ruled, "[t]he unreasonableness of a consular officer's actions thus remains a factor to consider in assessing whether the plaintiff has pleaded facts with sufficient particularity to give rise to a plausible inference of subjective bad faith." *Id*. at 853.[14] Likewise, in *Morfin v. Tillerson*, Judge Easterbrook indicated that a plaintiff challenging a visa denial under 1182(a)(2)(C) (trafficking controlled substances) could establish bad faith "if [she] had presented strong evidence of innocence that the consular officer refused to consider." 851 F.3d 710, 713-14 (7th Cir. 2017).[15] These rulings hold the door open to future challenges to consular decisions based on refusal to consider evidence and underscore the importance of establishing a written record at the consulate.

C. *Accardi* challenges where the government does not follow its own regulations

Practitioners may be able to develop a cause of action based on a consular officer's failure to follow agency regulations when denying a visa. This strategy is founded on the *Accardi* doctrine. In *U.S. ex rel. Accardi v. Shaughnessy*, the Court reversed the summary denial of a habeas corpus petition because the district court did not consider the noncitizen's allegation that the Board of Immigration Appeals failed to comply with regulations establishing a process for the Board's exercise of discretion. 347 U.S. 260, 267-68 (1954). The Court emphasized that "we are not here reviewing and reversing the manner in which discretion was exercised." *Id*. at 268. This distinction is critical since the government will assert that a court cannot review a consular officer's exercise of discretion because of the consular nonreviewability doctrine.

---

[14] The Ninth Circuit held that the U.S. citizen son "carried his substantial burden to plead sufficient facts with particularity to raise a plausible inference of subjective bad faith" by the consular officer who denied his father's immigrant visa. *Id*. at 855. However, the court affirmed the dismissal of the lawsuit, holding that an adult citizen son did not have "a constitutionally protected liberty interest . . . in the Government's decision whether to admit" his noncitizen parent to the United States. *Id*. at 862. As discussed *supra*, a U.S. citizen would need to demonstrate injury to their own constitutional interest, such as a First Amendment claim, to proceed with a bad faith claim.

[15] The court noted that appellants presented no claim that would demonstrate the consular officer's decision was not "facially legitimate and bona fide" and affirmed dismissal. *Id*. at 714-15. *See also Yafai v. Pompeo*, 912 F.3d 1018, 1022 (7th Cir. 2019) (a consular officer's request for additional documents and willingness to reconsider after submission is inconsistent with an allegation that the officer acted in bad faith).

One possible scenario is a record demonstrating that a consular officer never considered substantial evidence submitted within one year after a visa denial that the inadmissibility ground does not apply to the applicant. Consider constructing an argument from the interplay between 22 C.F.R. §§ 40.6 and 42.81(e). A consular officer must grant admission to individuals who are not subject to a ground of inadmissibility: "A visa can be refused only upon a ground specifically set out in the law or implementing regulations." 22 C.F.R. § 40.6. The applicant has the burden of proof to establish eligibility but the consular officer must consider "any evidence submitted indicating that the ground" for a prior visa refusal "may no longer exist." *Id*. If an immigrant visa applicant, within one year from the visa refusal date "adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered." 22 C.F.R. § 42.81(e). A consular officer who receives timely-submitted exculpatory evidence but refuses to consider it has failed to follow these regulations. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."). Practitioners also may consider arguing that the consular officer's failure to comply is judged by the "reasonable person" standard. Section 40.6 states: "The term 'reason to believe', as used in [8 U.S.C. § 1201(g)] shall be considered to require a determination based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible to receive a visa as provided in the INA and as implemented by the regulations." Section 1201(g) says "reason to believe that such [noncitizen] is ineligible to receive a visa . . . under section 1182 of this title, or any other provision of law . . . ." 8 U.S.C. § 1201(g)(3).

Practitioners will need to consider whether the law in the jurisdiction where they plan to file suit will support an Administrative Procedure Act (APA) action based on the *Accardi* doctrine. For example, in the Ninth Circuit potential support may be found in *Singh v. Clinton*, where the court concluded that DOS could be ordered to reinstate an immigrant registration because the agency failed to comply with the notice requirement in 8 U.S.C. § 1153(g). 618 F.3d 1085, 1088 (9th Cir. 2010). *See also Allen v. Milas*, 896 F.3d 1094, 1108 (9th Cir. 2018) (distinguishing *Singh* from Mr. Allen's claim, which the court categorized as a challenge to a visa denial decision subject to the consular nonreviewability doctrine). However, in *Pak v. Biden*, the Seventh Circuit concluded that the consular nonreviewability doctrine barred review because the discretionary decision to deny immigrant visas could not be separated from claims that the government violated the INA and agency regulations when it systematically foreclosed consideration of an inadmissibility exception. 91 F.4th 896, 901 (7th Cir. 2024).

If the APA is not a viable option for an *Accardi* claim, practitioners may be able to ground the *Accardi* claim as a procedural due process violation or a "stand-alone" cause of action. *See C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 226 (D.D.C. 2020) ("But agency regulations do not create *substantive* due process rights. *Accardi* is rooted instead in notions of *procedural* due process."); *Tapp v. Wash. Metro. Area Transit Auth.*, 306 F. Supp. 3d 383, 393 n.8 (D.D.C. 2016) (an *Accardi* claim "is a distinct cause of action that differs from a claim brought under the Fifth Amendment's due process clause"). A consular officer's failure to follow regulations, as in the scenario discussed above, conflicts with basic principles of fundamental fairness. "The *Accardi* doctrine is premised on fundamental notions of fair play underlying the concept of due process." *Montilla v. Immigr. & Naturalization Serv.*, 926 F.2d 162, 167 (2d Cir. 1991).

D. Visa refusals dictated by another agency

Practitioners who have evidence that the visa refusal at issue was decided by an official other than the consular officer may be able to survive a motion to dismiss by arguing that the consular nonreviewability doctrine should not apply to shield the decision. At least one district court has explored this argument and posited that the doctrine attaches only to "'a consular official's decision to issue or withhold a visa,' not to the decisions of non-consular officials and certainly not to DHS." *Am. Acad. of Religion v. Chertoff*, 463 F. Supp. 2d 400, 418 (S.D.N.Y. 2006) (citations omitted). Note that the court never reached the question of whether the consular nonreviewability doctrine barred review because the visa applicant had not yet received a decision on the application. *Id*. at 418, 421. In a subsequent decision, after a consular officer denied the visa, the court reasoned that it was still "not apparent that the doctrine of consular nonreviewability should apply with full force" given that "the decision to deny the visa was not made solely by consular officials." *Am. Acad. of Religion v. Chertoff*, No. 06 CV 588 (PAC), 2007 WL 4527504, at *2, *10 (S.D.N.Y. Dec. 20, 2007), *vacated and remanded on other grounds*, *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 122, 138 (2d Cir. 2009).[16]

In making this argument, it may be helpful to distinguish cases holding that a consular officer may properly rely on information from another agency in issuing a refusal notice and that such decisions are still shielded from judicial review by the consular nonreviewability doctrine. *See, e.g.*, *Bustamante v. Mukasey*, 531 F.3d 1059, 1163 (9th Cir. 2008) (applying doctrine where consular officer relied upon information from the Drug Enforcement Agency (DEA) that the visa applicant was a drug trafficker, but noting that outcome could have been different if the plaintiff had alleged that the transfer of information between the DEA and consular officer never took place). Contrast *Bustamante* and other cases, where the consular officer made an independent decision after considering information from another agency with a visa applicant's case record, against cases that more clearly establish the consular officer was merely effectuating the decision of another agency. For example, even in *Am. Acad. of Religion v. Chertoff*, the record before the court clearly established that the consular officer had ultimately been the one to deny the visa; the consular officer submitted an affidavit that specified the ineligibility finding was based on information known to the consular officer because of his interview of the visa applicant, the contents of a Security Advisory Opinion report, and information provided to the consular officer from officials in Washington D.C. 2007 WL 4527504, at *2. Where the consular officer acts on nothing more than the demands of another agency, particularly if that agency does not have authority to adjudicate visa applications,[17] practitioners may be able to distinguish their cases.

---

[16] The Second Circuit concluded that the record was insufficient to determine whether the consular officer had confronted the applicant with the claim that the applicant knew he had given funds to a group that would provide "material support" to a terrorist organization. 573 F.3d at 133. The Second Circuit reasoned that without confrontation, the applicant would be unaware of the need to submit additional information to overcome inadmissibility by demonstrating by "clear and convincing evidence" that he lacked the requisite knowledge. *Id*.

[17] In general, only a consular officer has congressionally-delegated authority to adjudicate a visa application. *See* 8 U.S.C. § 1201(a). The only statutory exceptions to this general rule allow for the Secretary of State to direct a consular officer to refuse a visa if "such refusal" is

But see Amiri v. Sec'y, Dep't of Homeland Sec., 818 F. App'x 523, 528 (6th Cir. 2020) (rejecting argument that doctrine should not apply where it was alleged the visa denial was not a consular officer decision because it was based on the fact that the visa applicant appeared in a DHS database).

Where the case record points to a DHS finding that mandates the visa denial, practitioners may want to consider suing only DHS. In *Ranjan v. U.S. Dep't of Homeland Sec*., an applicant maintained that she was injured by DHS' finding that the applicant was inadmissible under 8 U.S.C. § 1182(a)(6)(C)(i) (seeking to procure or procuring an immigration benefit by fraud or willful misrepresentation of a material fact). No. 23-2453 (LLA), 2024 WL 3835355, at *2 (D.D.C. Aug. 15, 2024). The nonimmigrant visa applicant sued DHS and its director for failing to follow its regulatory procedures before finding her inadmissible. *Id*. The requested relief included vacating or setting aside the inadmissibility finding. *Id.* With the inadmissibility finding removed, a consular officer would be able to make their own eligibility determination the next time the plaintiff applied for a visa. As the court noted, plaintiff's injury existed separate from any past or future visa denial. *Id*. at *6. In denying the government's motion to dismiss, the court stated: "DHS has offered nothing to suggest that the inadmissibility finding was made by a *consular* officer—and there is therefore no reason to believe that consular nonreviewability attaches." *Id*. at *7 (emphasis in original).

When the visa decision is made by someone other than a consular officer, one cause of action to consider is an APA claim for agency action in excess of statutory authority pursuant to 5 U.S.C. § 706(2)(C). Two ultra vires acts occur in this situation: 1) the consular officer lacks authority to transfer the visa decision to another agency and 2) the other agency lacks authority to adjudicate a visa. *See* 8 U.S.C. § 1201(g). Practitioners also may consider including a non-statutory ultra vires cause of action, as judicial review of agency action in excess of statutory authority is not limited to the APA. *See Washington v. U.S. Dep't of Homeland Sec.*, 598 F. Supp. 3d 1051, 1067 (E.D. Wash. 2020) (non-statutory review of allegedly ultra vires agency action is for determining whether the agency acted without authority). *Cf. City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) ("[W]hen [agencies] act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.").

E. Challenges to agency visa adjudication delays

Muñoz should not impact how courts approach lawsuits challenging delays in adjudicating visa applications. If a court accepts the premise that the relief sought is to remedy the lack of a decision, then the consular nonreviewability doctrine would not apply. A delay claim requires a plaintiff to demonstrate that the government official has a nondiscretionary duty to act. *E.g.*, *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099 (D.C. Cir. 2003).

Several decisions construe 8 U.S.C. § 1202(b) as imposing a non-discretionary duty on a consular officer to complete the processing of an immigrant visa application, with any step short

---

"necessary or advisable in the foreign policy or security interests of the United States," 6 U.S.C. § 236(c)(1), and the Secretary of Homeland Security to "refuse visas in accordance with law," 6 U.S.C. § 236(b)(1).

of a final decision subject to review as to the reasonableness of the delay. *E.g.*, *Igal v. U.S. Consulate Gen.*, No. 2:23-cv-4160, 2024 WL 2882653, at *4, 6 (S.D. Ohio June 7, 2024) (and cases cited therein). This includes applications placed in administrative processing, *infra* § IV.F, or when no interview has been scheduled, *e.g.*, *Russell v. Blinken*, No. 23-cv-520-jdp, 2024 WL 1908814, at *3 (W.D. Wis. May 1, 2024).

The APA also provides practitioners with a potential cause of action for unreasonable delay. *See* 5 U.S.C. § 555(b).[18] Success may depend on whether a court considers the phrase "each agency shall proceed to conclude a matter presented to it" as imposing a non-discretionary duty to act on a visa application. Decisions that find a non-discretionary duty will consider whether the delay is unreasonable, often applying the "TRAC" factors from *Telecommc'ns. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). *E.g.*, *Iqbal v. Blinken*, No. 2-23-cv-01299-KJM-KJN, 2023 WL 7418353, at *7-8 (E.D. Cal. Nov. 9, 2023) (clear non-discretionary duty and unreasonable delay sufficiently pled to defeat motion to dismiss); *Ramirez v. Blinken*, 594 F. Supp. 3d 76, 89-91 (D.D.C. 2022) (at motion to dismiss stage, TRAC factors weighed in plaintiffs' favor as to delay from failure to follow agency "triage scheme" for visa processing).[19] *See also Mashpee Wampanoag Tribal Council*, 336 F.3d at 1099 (Section 555(b) "imposes a general but nondiscretionary duty upon an administrative agency" to decide "'within a reasonable time.'").[20] Other decisions construe the phrase as "merely restat[ing] a principle of good administration." *E.g.*, *Niknam v. U.S. Dep't of State*, No. 23-cv-01380-PAB-SBP, 2024 WL 709636, at *4 (D. Colo. Feb. 21, 2024) (quoting *Ali v. U.S. Dep't of State,* 676 F. Supp. 3d 460, 470 (E.D.N.C. 2023)).

Some courts consider delay to be a consular action indistinguishable from a visa denial and thus barred from review by the consular nonreviewability doctrine. *E.g.*, *Motahari v. Blinken*, No. 23 Civ. 7608 (LGS), 2024 WL 3185886, at *2 (S.D.N.Y. June 26, 2024). In jurisdictions where there may be negative district court decisions but no binding appellate decision as to the viability of delay actions, practitioners should consider including favorable authority from other jurisdictions and demonstrating why the court should find in favor of review.

---

[18] The statute provides: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b).

[19] Two federal courts of appeals have concluded that unreasonable delay claims generally should not be resolved at the motion to dismiss stage because they are "necessarily fact dependent." *Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 451 (6th Cir. 2022); *Gonzalez v. Cuccinelli*, 985 F.3d 357, 375 (4th Cir. 2021) (both considering unreasonable delay claims against USCIS in determining eligibility for placement on the U visa "wait list"). At the motion to dismiss stage, practitioners should consider arguing in the alternative: (1) the TRAC factors should not be applied at this stage; and (2) if applied, the TRAC factors weigh in plaintiff's favor. Practitioners would need to include sufficient information in the complaint to be able to demonstrate to the court how the plaintiff meets a majority of the TRAC factors.

[20] However, as discussed *infra* n.21, practitioners filing lawsuits in the federal district court for the District of Columbia should consider carefully whether 5 U.S.C. § 555(b) may still be asserted when a consular officer has placed a visa application in administrative processing. *See Hemmat v. Blinken*, No. 23-2085 (TSC), 2024 WL 4210658, at *4 (D.D.C. Sept. 17, 2024).

F. Challenges to visa refusals pursuant to INA § 221(g) as agency adjudication delays

As explained above, the doctrine of consular nonreviewability may limit a court's review of consular officer decisions to grant or deny a visa application. But not every consular officer decision is a decision to grant or deny a visa and in the case of a visa refusal under INA § 221(g), numerous courts have held such refusals are not final and thus not subject to the doctrine's limitation on judicial review. *See Nine Iraqi Allies v. Kerry*, 168 F. Supp. 3d 268, 289, 292 (D.D.C. 2016) (noting that "[b]y consigning applicants to 'administrative processing,' the Government endeavored to enjoy the benefits of consular nonreviewability . . . without having to report to Congress that it has denied the SIV applications . . ." and concluding that plaintiffs' 221(g) refusals were not final visa refusals and thus the doctrine of consular nonreviewability does not apply).

As the *Nine Iraqi Allies* court concluded, a notice that a visa application has been "refused" under 221(g) merely signals that a visa application must undergo post-interview administrative processing, and thus numerous courts have held that 221(g) refusal notices are not subject to the consular nonreviewability doctrine. *See, e.g., Al-Gharawy v. U.S. Dep't of Homeland Sec.,* 617 F. Supp. 3d 1, 17 (D.D.C. 2021) (concluding that the 221(g) refusals meant the government has "not reached a final decision with respect to Plaintiffs' visa applications, and, thus, the consular nonreviewability doctrine does not bar judicial review of Plaintiffs' claims"); *Daneshvarkashkooli v. Blinken,* No. 1:23-CV-1225 (RJL), 2024 WL 1254075, at *2 (D.D.C. Mar. 25, 2024) (same); *Taherian v. Blinken*, No. SACV-23-01927 (CJC), 2024 WL 1652625, at *3-4 (C.D. Cal. Jan. 16, 2024) (same); *Anid Infosoft LLC v. Blinken*, No. 1:22-CV-4721 (TWT), 2023 WL 7312488, at *5 (N.D. Ga. Nov. 3, 2023) (same).

A minority of courts have accepted the government's position that a § 221(g) notice is a visa refusal that the doctrine bars from judicial review. *See Sadeghi v. U.S. Dep't of State*, No. 1:24-cv-449 (TNM), 2024 WL 3338854, at *2 (D.D.C. July 9, 2024) (§ 221(g) notice is a visa decision, thus judicial review is barred by the consular nonreviewability doctrine per *Muñoz*); *OC Modeling, LLC v. Pompeo*, No. CV-20-1687, 2020 WL 7263278, at *3 (C.D. Cal. Oct. 7, 2020) (consular nonreviewability doctrine applies because the consular officer made a decision when he issued a § 221(g) refusal).[21]

[21] While outside the scope of this Practice Advisory, practitioners who file lawsuits challenging administrative processing delays in the federal district court for the District of Columbia should be prepared to address why the court should not apply *Karimova v. Abate*, No. 23-5178, 2024 WL 3517852 (D.C. Cir. July 24, 2024) (per curiam). There, the visa applicant claimed unreasonable delay after her application had been pending in administrative processing for nearly one year after interview. *Id*. at *2. The applicant maintained that 8 U.S.C. § 555(b) imposed a duty on the consular officer to act within a reasonable time. *Id*. The *Karimova* panel did not decide whether the consular nonreviewability doctrine barred review of a delay action. *Id*. at *5-6. However, the court concluded (1) Section 555(b) did not impose a nondiscretionary duty on the consular officer either to issue or refuse the visa without utilizing administrative

IV. Conclusion

While the Supreme Court rejected judicial review for Ms. Muñoz, it did not hold that visa denials are unreviewable. Practitioners are encouraged to utilize the *Mandel* framework to challenge denials that lack a "facially legitimate and bona fide" reason. Practitioners also are encouraged to identify circumstances where the consular officer is merely implementing a denial imposed by another agency and push back against rote invocations of the doctrine by the government and the tendency by some judges to accept such mischaracterizations. Through litigation, immigration practitioners may be able to limit in meaningful ways the parameters of the consular nonreviewability doctrine.

processing, and (2) the INA § 221(g) notice was a decision by the consular officer (final refusal). *Id*. at *4. As an unpublished decision, *Karimova* is not binding precedent, and some subsequent district court decisions have avoided addressing its conclusions while others have rejected them. *Compare Asadi v. Blinken*, No. 1:23-CV-1953 (RC), 2024 WL 3835409, at *4-6 (D.D.C., Aug. 15, 2024) (while *Karimova* "casts some doubt" on decisions that an INA § 221(g) notice is not a final refusal, the court assumes review is available but decides the delay is not unreasonable) *with Hajizadeh v. Blinken*, No. 1:23-CV-1766 (LLA), 2024 WL 3638336, at *3 & n.3 (D.D.C. Aug. 2, 2024) (declining to follow *Karimova* and agreeing with the "majority view" in D.D.C. that a § 221(g) notice is not a final decision and a consular officer has a duty to complete visa adjudication within a reasonable time).