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 *AMICI CURIAE* FORMER CONSULAR OFFICERS IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

As former consular officers with decades of experience working for the Department of State, *Amici* Bushra A. Malik, Robert A. Mautino, Stephen R. Pattison, William R. Rosner, Peter van Buren, and Micah Watson have extensive expertise in visa application processing and in exercising discretion to fulfill that task.[1] Aside from work at Foggy Bottom headquarters in Washington, D.C., *Amici*'s postings abroad include Accra, Ghana; Bangkok, Thailand; Beirut, Lebanon; Berlin, Germany; Brussels, Belgium; Bucharest, Romania; Colombo, Sri Lanka; Guadalajara, Mexico; Helsinki, Finland; Hong Kong, People's Republic of China; London, United Kingdom; Osaka, Japan; Rotterdam, The Netherlands; Seoul, South Korea; Taipei, Taiwan; Tijuana, Mexico; and Tokyo, Japan.

Consular officers are defined in relevant part by the Immigration and Nationality Act as "any consular, diplomatic, or other officer or employee of the United States designated . . . for the purpose of issuing immigrant or nonimmigrant visas." 8 U.S.C. § 1101(a)(9). During their public service, *Amici* were collectively responsible for assessing tens of thousands

[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

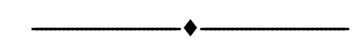
of visa applications, as line consular officers and in supervisory capacities. Now, as then, they are interested in maximizing the accuracy and fairness of weighty decisions about whom to admit to the United States, particularly when U.S. citizens' family reunification is at stake. They submit this brief to clarify the role that consular officers and other government actors play in the current visa-security system when evaluating visa applications that may implicate national security.

SUMMARY OF ARGUMENT

Certain visa application denials, particularly those based on information originating from agencies other than the Department of State, can be qualitatively different from denials based on consular discretion. Although the end result looks the same – "Visa Denied" – denials based on database and watchlist information maintained in the United States by the Department of Homeland Security, the FBI, and other agencies, bear little resemblance to the traditional exercise of consular discretion because the specific information which requires the consular officer to deny these visas is usually not available for him or her to evaluate. Real decision-making in these cases has in effect been ceded to the database and watchlisting process, in which government agents other than consular officers affix a label (*e.g.*, "known or suspected terrorist") that is then used as a proxy for consular judgment.

As a consequence, visa denials that rely on database and watchlist information frequently involve no consular discretion and are compelled by conclusory statements for which the underlying basis is unseen and unevaluated by a consular officer. Actions taken by the consular officer who adjudicated Mr. Berashk's visa provide a good example of this paradox, as the consular officer's initial prediction of the visa's speedy approval was made without awareness of what appears to be derogatory information about Mr. Berashk contained in a database. Consuls do not run mandatory name-checks on applicants until after their visa interviews are completed and an applicant is found to be eligible, otherwise, for visa issuance. The discovery of derogatory information against Mr. Berashk appears to have arisen from a database, not from the visa interview. Shielding the denial of his visa from judicial review, would, therefore, erroneously cloak database and watchlist entries in the garb of consular discretion.

Judicial review should be available for visa applications denied on grounds extending beyond consular discretion, with appropriate restrictions to prevent release of classified information. Judicial review is especially appropriate when a U.S. citizen's family unity is at stake.



ARGUMENT

I. Petitioners' description of consular visa processing must be supplemented to reflect the changed nature of modern visa security, which requires visa denials based on database and watchlist "hits" without genuine consular evaluation.

Petitioners' brief presents an anachronistic picture of consular visa processing, arguing against "revisiting decisions about whether aliens who appear before consular officers at *far-off posts* satisfy the conditions Congress has decreed." Petitioners' Brief, 15 (emphasis added); *see also id.* at 34 (opposing "judicial second-guessing of decisions *made by consular officers abroad*") (emphasis added), 40 (describing Congress "vest[ing] consular officers with the authority to make *final determinations*" about admission (emphasis added)). This role description, while extremely familiar to *Amici* – capturing, for example, how they routinely evaluated particular categories of visa applicants for impermissible "immigrant intent" under 8 U.S.C. § 1184(b) – fails to acknowledge that many visa denials no longer result from the exercise of consular discretion as traditionally envisioned. Instead, many visa denials occur because officials at other agencies make judgments based on information available exclusively to them, which consular officers – who themselves had no investigative role or authority to challenge that evidence – are unable to contest.

As a description of today's system of visa application processing after the Homeland Security Act of

2002, the traditional picture is outdated because it omits the broad power of actors outside the Department of State's consular corps to control the outcome of visa applications. Point II below describes in detail the database infrastructure underpinning current visa security. Before reaching those particulars, this section addresses the statutory framework that altered how responsibilities for visa decision-making are divided between the Department of State (DOS) and the Department of Homeland Security (DHS).

Prior to the Homeland Security Act, consular officers were the lead actors in visa adjudication. *See* Stephen R. Viña, Cong. Research Serv., RL31997, *Authority to Enforce the Immigration and Nationality Act (INA) in the Wake of the Homeland Security Act: Legal Issues* 1 n.2 (2003) ("The Secretary of State, the State Department, and the diplomatic and consular officers therein had primary authority for interpreting and implementing [INA] provisions on issuing visas overseas, as well as having a role in implementing certain provisions that implicated sensitive foreign policy concerns."). Under the new statutory regime, however, "all authorities to . . . administer, and enforce the provisions of [the Immigration and Nationality] Act and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas" are now "vested exclusively" with the Secretary of Homeland Security, 6 U.S.C. § 236(b)(1). The Secretary of State's residual role has been preserved only for individual visa

"refusal[s] necessary or advisable in the foreign policy or security interests of the United States," 6 U.S.C. § 236(c)(1), as well as for particular foreign policy provisions of the INA. *See* 6 U.S.C. § 236(c)(2) (retaining Secretary of State's extant authorities, *e.g.*, determinations under 8 U.S.C. § 1182(a)(3)(C)(i) that an applicant's admission poses "potentially serious adverse foreign policy consequences for the United States").[2]

Ultimate authority to control the vast majority of visa denials therefore no longer rests with consular officers, who are employees of the Department of State. Rather, it is the Secretary of Homeland Security who is vested with the broad "authority to refuse visas in accordance with law." 6 U.S.C. § 236(b)(1). DHS's authority to deny a visa "is exercised through the Secretary of State," *id.*, and in practice through consular officers at posts abroad, but an applicant's visa denial often has little or nothing to do with the discretion conferred on consular officers by Congress.

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[2] For further elaboration of the post-Homeland Security Act division of authorities, see National Immigration Project of the National Lawyers Guild, *Statutes Related to Visa Eligibility* (Jan. 6, 2015), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Visa_Statutes_Chart.pdf; and National Immigration Project of the National Lawyers Guild, *Visa-Related Activity Chart* (Jan. 6, 2015), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Visa-Related_Activity_Chart.pdf.

In order to implement their dual responsibilities, DOS and DHS signed a memorandum of understanding (MOU) in 2003. *See Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002* 11 (Sept. 28, 2003), *available at* http://www.law.yale.edu/documents/pdf/News_&_Events/ADOS_DHS_MOU_re_HSA.pdf; Ruth Ellen Wasem, Cong. Research Serv., R43589, *Immigration: Visa Security Policies* 17-18 (2014). The MOU clarifies that "the Secretary of Homeland Security's authority to direct refusal or revocation of a visa may be delegated only to DHS headquarters staff," adding that "[i]f the Secretary of Homeland Security decides . . . to refuse a visa . . . [he or she] shall request the Secretary of State to instruct the relevant consular officer to refuse the visa. . . ." MOU, *supra*, at 8.

The MOU underpins today's changed nature of visa-application processing by, *inter alia*, implementing the Homeland Security Act's provision for assigning DHS personnel to diplomatic posts. *See* Homeland Security Act of 2002, P.L. 107-296, § 428(e), 116 Stat. 2135, 2189-90. Today, there are 20 DHS Visa Security Units (VSUs) abroad. *See* Dep't of Homeland Security, Office of Inspector General, *The DHS Visa Security Program* 3 (2014). One of these VSUs is in Islamabad, Pakistan, where Mr. Berashk was interviewed and told to expect his visa in two to six weeks. *See* Wasem, *supra*, at 13. DHS intends to expand its U.S.-based Pre-Adjudicated Threat Recognition and Intelligence Operations Team (PATRIOT), which "currently

screens visa applicants from the 20 VSU posts . . . to screen applications for all 225 visa-issuing posts." DHS Visa Security, *supra*, at 8, 26. The very name of this DHS unit – dedicated to "pre-adjudicated" threats – reveals the shift away from traditional consular decision-making that the new statutory regime accomplished.

DHS describes VSU staff as "perform[ing] visa security activities, which aim to complement the DOS visa screening process with law enforcement resources *not available to consular officers*." Wasem, *supra*, at 13 (emphasis added). VSU personnel are authorized, "as deemed appropriate by the Secretary of Homeland Security, [to] provide the rating and/or reviewing officer with input relevant to the evaluation of a consular officer [for mandatory] consideration in preparing the annual employee evaluation report." MOU, *supra*, at 13.

The MOU anticipated disagreements between DOS and DHS officials regarding visa denials:

> A DHS employee assigned to an overseas post and performing section 428(e) [visa security] functions may recommend to the chief of the consular section or the most senior supervisory consular officer present that a visa be refused or revoked. If the chief of section or supervisory consular officer does not agree that the visa should be refused or revoked, the post will initiate a request for a security or other advisory opinion [SAO] and the DHS

> employee will be consulted in its preparation.

MOU, *supra*, at 11; *cf.* U.S. Gov't Accountability Office, GAO-11-315, *DHS's Visa Security Program* [VSP] *Needs to Improve Performance Evaluation and Better Address Visa Risk Worldwide* 15 (2011) ("VSP and consular interaction has been difficult at some posts, and ICE [Immigration and Customs Enforcement] has provided limited guidance for such interaction."). *Amici* were keenly aware during their service that questioning the national-security basis provided by other agencies for visa denials would not be well received either by those agencies or their own superiors in the Department of State.

The process described in the MOU requires consular officers to refer "selected visa cases for greater review by intelligence and law enforcement agencies." Wasem, *supra*, at 10. These Security Advisory Opinions (SAOs) place further constraints on consular decision-making, involving the FBI and other counterterrorism agencies, as described below. The MOU provides that "[c]ases in which a third agency to which such an SAO request is referred believes that denial of a visa is appropriate and DOS believes the information is legally insufficient will be *referred to the Secretary of Homeland Security to decide* whether the facts support denial of the visa in accordance with law." MOU, *supra*, at 7 (emphasis added). In such cases, whatever discretion the consular officer might wish to exercise is countermanded, and the officer ultimately issues a decision

that may not be based on his or her independent judgment. Consular officers are not law enforcement officials or equipped to investigate and evaluate all adverse data that may be included in databases or watchlists by other agencies. Consuls do, however, on occasion encounter cases where the rationale for a security-based denial does not seem rational or persuasive.

In short, only by omitting the new reality of visa decision-making can Petitioners assert that judicial review in cases like this one challenges whether "the *consular officer* reached an erroneous decision," Petitioners' Brief, 53 (emphasis added). In fact, that decision often is the product of information the consular officer has never seen, much less exercised discretion in evaluating, as the next section illustrates through a real-life example. When evaluating judicial reviewability in terms of "the exercise of the consular officer's responsibilities," *id.*, therefore, the Court is faced with a much more diffuse set of information inputs – and final authority reassigned by the Homeland Security Act to DHS – than the traditional picture of consular visa processing Petitioners convey.

II. Judicial review is a necessary safety-valve for visa denials relying on databases and watchlists that are compiled with variable reliability by multiple agencies, several of which have no authority over visa decisions.

Computers have revolutionized how information is stored and used. This now-obvious point obscures a subtler shift worked by the information revolution. Decisions once made by consular officers "at far-off posts," Petitioners' Brief, 15, based on their independent evaluation and judgment, now increasingly rely on databases and watchlists maintained by distant officials based in the United States. The underlying standards used to compile these lists frequently remain unknown to the end-user, who nonetheless relies on their imposed labels. When a consular officer abroad denies a visa because the applicant's name appears in a watchlist curated in Washington, D.C. by DHS, the FBI, or a third agency, such watchlist "hits" substitute for independent consular decision-making. Even databases run by the State Department are infused with information vetted (and labeled with threat designations) by outside officials neither trained nor authorized to make visa decisions.

The perception among consular officers like *Amici* is that serious questioning by a consul of national-security-based visa-denial information provided by another agency is essentially futile. Indeed, the State Department instructs that where a

DHS-generated basis for inadmissibility is discovered in the Consular Lookout and Support System (CLASS), the consular officer "must assume that the finding was correct" and, except in cases involving nonpermanent ineligibilities, "should not look behind a definitive DHS finding or re-adjudicate the alien's eligibility with respect to the provision." U.S. Dep't of State Cable, 05-State-066722, *Processing Cases with CLASS Hits* ¶¶7-8 (Apr. 12, 2005), published on AILA InfoNet at Doc. No. 05052060; 9 Foreign Affairs Manual (FAM) 40.6 N.3.2.

When considering whether courts should review "why the consular officer decided that [a particular inadmissibility] provision was applicable," Petitioners' Brief, 52, it is therefore vital to understand *where* "information in the government's hands," *id.*, originated, and to keep in mind that the consular officer himself or herself may well have no idea of the information's content or reliability.

Consular officers have access to the biometric and biographic Consular Consolidated Database (CCD), which contains more than 143 million visa application records; in 2012, the database also included more than 109 million photographs which are used for facial recognition. *Eleven Years Later: Preventing Terrorists from Coming to America*: *Hearing Before the Subcomm. on Border and Maritime Security of the H. Comm. on Homeland Security*, 112th Cong. 31-32 (2012) (statement of Edward J. Ramotowski, Deputy Assistant Secretary of State for Visas). This database links with others controlled by

DHS and the FBI that are created for purposes other than visa processing.[3] DOS also uses CLASS, reported in 2012 to contain more than 42.5 million records, *see* Wasem, *supra*, at 9, including those of 27 million persons found ineligible for visas or against whom potentially derogatory information exists. Ramotowski, *Eleven Years Later*, *supra*, at 31. "Almost 70 percent of CLASS records come from other agencies, including information from the FBI, DHS, DEA, and intelligence from other agencies." *Id.*

A second layer of visa security, mentioned above in the context of VSU personnel, is provided by DHS databases to which consular officers do *not* have access. A third layer comes into play when a case is screened for terrorism-related inadmissibility purposes. Starting in June 2013, interagency counterterrorism screening applies to *all* visa applicants. *See Border Security Oversight, Part III: Border Crossing Cards and B1/B2 Visas: Hearing Before the Subcomm.*

[3] "[D]atabases linked with the CCD include DHS's Automated Biometric Identification System (IDENT) and the Federal Bureau of Investigation (FBI) Integrated Automated Fingerprint Identification System (IAFIS) results, and supporting documents. In addition to performing biometric checks of the fingerprints for all visa applicants, DOS uses facial recognition technology to screen visa applicants against a watchlist of photos of known and suspected terrorists obtained from the Terrorist Screening Center (TSC), as well as the entire gallery of visa applicant photos contained in the CCD. The CCD also links to the DHS's Traveler Enforcement Compliance System (TECS), a substantial database of law enforcement and border inspection information. . . ." Wasem, *supra*, at 6.

on National Security of the H. Comm. on Oversight and Government Reform, 113th Cong. 43 (2013) (statement of Edward J. Ramotowski, Deputy Assistant Secretary of State for Visa Services). In 2009, the time period relevant to Mr. Berashk's case, select cases referred for a Security Advisory Opinion (SAO) received specialized screening, drawing on the federal government's terrorism databases and watchlists.

The creation of such databases, and the dispersion of authority that they hide, began more than a decade *after* the era of consul-centered decision-making that the Petitioners describe, *see* Petitioners' Brief, 15; *see also id.* at 34, 40, and that the Court considered in *Kleindienst v. Mandel*, 408 U.S. 753 (1972). The first terrorist watchlist was designed by a State Department employee in 1987. It was a set of 3 x 5 notecards kept in a shoebox, which quickly grew into a computerized system called TIPOFF, the direct progenitor of CLASS. *See* Jeffrey Kahn, MRS. SHIPLEY'S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS 10 (2013). As computer technology advanced, databases and watchlists proliferated. *Id*. at 135.

All of these systems suffered from the unwillingness of stove-piped federal agencies to share information. TIPOFF relied mainly on State Department sources for its biographical and derogatory information; other agencies' contributions were thin.[4] The

[4] Thomas R. Eldridge, et al., *9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks upon the*

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9/11 Commission criticized this "culture of agencies feeling they owned the information they gathered," and recommended reforms "to bring the major national security institutions into the information revolution." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* 417-18 (2004).

As a result, two new agencies were created to centralize control of information. One, the National Counterterrorism Center (NCTC), was designed "to merge and analyze all threat information in a single location." 149 Cong. Rec. 2033, 2035-36 (Jan. 28, 2003) (State of the Union Address of President George W. Bush). The second, the Terrorist Screening Center (TSC), was created to make, control, and distribute to other agencies the terrorist watchlists constructed from that information. Kahn, *supra*, at 149.

The TSC is a component of the FBI, staffed by employees from many different agencies who operate under FBI leadership. *Id.* at 148; U.S. Dep't of Justice, Office of the Inspector General, *Audit of the Federal Bureau of Investigation's Management of Terrorist Watchlist Nominations* 29 n.62 (Mar. 2014).

United States 80 (2004) ("In 2001, the CIA provided 1,527 source documents to TIPOFF; the State Department, 2,013; the INS, 173. The FBI, during this same year, provided 63 documents to TIPOFF – fewer than were obtained from the public media, and about the same number as were provided by the Australian Intelligence Agency (52).").

Unlike the NCTC, the TSC operates solely under the authority of presidential directives.[5] It does not provide direct administrative access or remedies to individuals. Kahn, *supra*, at 189.[6]

The TSC assembles and curates the Terrorist Screening Database (TSDB), an unclassified but law-enforcement-sensitive database that is comprised of terrorist-related information submitted primarily by the NCTC and the FBI. Information in the TSDB is what the TSC uses to create and supply watchlists for other federal agencies, such as the No Fly List (Transportation Security Administration (TSA)) and CLASS. The TSC also coordinates interaction between agencies using its watchlists and the original information sources used to compose them. The TSDB thus sits at the center of what one district court

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[5] *See* Homeland Security Presidential Directive/HSPD-11 § 2 (Aug. 21, 2008) ("The Terrorist Screening Center (TSC), which was established and is administered by the Attorney General pursuant to [Homeland Security Presidential Directive] 6, enables Government officials to check individuals against a consolidated Terrorist Screening Center Database."). The NCTC, by contrast, was established by Executive Order No. 13,354, 69 Fed. Reg. 53589 (Sept. 1, 2004), and later authorized by statute. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 1021, 118 Stat. 3638, 3672-75.

[6] *See also* Declaration of Christopher M. Piehota at 15 n.11, *Latif v. Holder*, No. 10-cv-00750-BR (D. Or. Nov. 17, 2010), ECF No. 44 ("The TSC does not accept redress inquiries directly from the public, nor does it respond directly to redress inquiries."). Mr. Piehota is currently director of the Terrorist Screening Center; at the time of his declaration, he was Deputy Director for Operations.

called the government's "web of interlocking watchlists." *Ibrahim v. DHS*, No. 06-cv-00545-WHA, 2014 WL 1493561, at *7 (N.D. Cal. Jan. 14, 2014).

The criteria for inclusion in the TSDB are rudimentary: "at least a partial name (e.g., given name, surname, or both) and at least one additional piece of identifying information (e.g., date of birth)," and some "evidence of a nexus to terrorism." U.S. Dep't of Justice, Office of the Inspector General, *Follow-up Audit of the Terrorist Screening Center* 3 n.23 (2007). What constitutes such a nexus is minimally defined. As one TSC director apprised auditors, "to err on the side of caution, individuals with any degree of a terrorism nexus were included" in the TSDB if the minimum necessary biographical data were available. U.S. Dep't of Justice, Office of the Inspector General, *Review of the Terrorist Screening Center* viii (2005). A later TSC director oversaw the development of a standard for inclusion, adapting the "reasonable suspicion" standard from *Terry v. Ohio*, 392 U.S. 1 (1968). DOJ OIG Report (Mar. 2014), *supra*, at 3, 7.[7] Notably, however, this standard is itself subject to secret exception. *Ibrahim*, 2014 WL 1493561, at *12.

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[7] *See also* Kahn, *supra*, at 158 (citing author's interview with TSC Director Timothy J. Healy and TSC General Counsel Jacqueline F. Brown (Dec. 4, 2009)), 302 n.10 (quoting from FBI Memorandum, *Counterterrorism Program Guidance Watchlisting Administrative and Operational Guidance* (Dec. 21, 2010)).

As a result, the TSDB is enormous. In 2009, the TSDB contained the names of roughly 400,000 people.[8] It is certainly much larger now.[9]

Government oversight agencies have repeatedly found fault with TSDB's maintenance. The FBI Inspector General's most recent report concluded that the FBI "maintained redundant and inefficient processes which hampered its ability to process watchlist actions in a more timely manner," including failures to ensure that subjects of closed investigations are removed from the TSDB. *See* DOJ OIG Report (Mar. 2014), *supra*, at 33. These findings followed previous audits that identified "significant weaknesses with the FBI's management of the terrorist watchlist." *Id.* at 34.

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[8] U.S. Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices* 1 n.40 (2009); *Five Years After the Intelligence Reform and Terrorism Prevention Act: Stopping Terrorist Travel: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. 12 (2009) (statement of Timothy J. Healy, Director, Terrorist Screening Center).

[9] Neither the TSC nor the DOJ Office of the Inspector General has released a more recent statistic. However, the National Counterterrorism Center that maintains the TIDE system (from which most TSDB records are obtained) recently noted: "As of December 2013, TIDE contained about 1.1 million persons, most containing multiple minor spelling variations of their names." NCTC, Terrorist Identities Datamart Environment Factsheet (Aug. 1, 2014), *available at* http://www.nctc.gov/docs/tidefactsheet_aug12014.pdf.

The Inspector General concluded that "the FBI is unable to ensure that all individuals that were nominated to the watchlist are appropriately removed when cases are closed." *Id.* at 56. Previous audits also found high rates of error.[10]

These problems were all on display in *Ibrahim v. DHS*.[11] *Ibrahim* is the first, and so far only, bench trial concerning terrorist watchlists.[12] In January 2014, the court ordered substantial remedial measures for all U.S. terrorist watchlists to correct their erroneous inclusion of Rahinah Ibrahim. The government did not appeal the district court's judgment for the plaintiff, Dr. Ibrahim.

Dr. Ibrahim, a Malaysian national, lawfully entered the United States in 1983 to study architecture. She married, gave birth to a daughter, and after a decade back in Malaysia was completing doctoral

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[10] A DOJ Inspector General report issued in May 2009 concluded that "78 percent of the sampled investigations were not processed within FBI guidelines. In 67 percent of the cases reviewed the case agent failed to modify the watchlist record when required by policy, and in 8 percent of the cases reviewed the FBI failed to remove subjects from the watchlist as required by policy. In 72 percent of closed cases the FBI failed to remove the subject in a timely manner." *Id.* at 87 (summarizing report).

[11] Undersigned counsel Jeffrey Kahn testified as an expert witness for the plaintiff in this case.

[12] Other cases have proceeded based on stipulations agreed between the parties concerning factual allegations. Consequently, no other court has made findings of fact concerning allegations raised in complaints about terrorist watchlists. *See*, *e.g.*, *Latif v. Holder*, 969 F. Supp. 2d 1293, 1298 n.3 (D. Or. 2013).

work at Stanford University in 2005 when she attempted to travel to an international academic conference. After arriving with her fourteen-year-old daughter at a San Francisco airport check-in counter, and requesting a wheelchair, she was arrested, handcuffed, and transported to an airport jail. *Ibrahim*, 2014 WL 6609111, at *6. Although allowed to travel the next day, Dr. Ibrahim learned a few months later that her student visa had been revoked. *Id.* at *7.

The direct cause of what the district court described as "the humiliation, cuffing, and incarceration of an innocent and incapacitated air traveler," *id*. at *16, was an FBI agent. Agent Kelley nominated Dr. Ibrahim to the TSDB and to several terrorist watchlists about a month before they met at an interview he requested. *Id.* at *5, *6. Dr. Ibrahim's nomination to these watchlists happened, Agent Kelley admitted, because he incorrectly completed a form used for watchlist nominations. *Id.* at *5. The district court described the agent's mistake as the "bureaucratic analogy to a surgeon amputating the wrong digit." *Id*. at *16.

As a result, Dr. Ibrahim's name began to ricochet across various terrorism watchlists in "Kafkaesque on-off-on-list treatment." *Id.* at *18. This despite the fact, conceded by the government, that Dr. Ibrahim is not and was not a threat to U.S. national security. *Id.* at *5, *19. The district court concluded that "suspicious adverse effects continued to haunt Dr. Ibrahim in 2005 and 2006, even though the government

claims to have learned of and corrected the mistake." *Id.* at *17.

Dr. Ibrahim received no explanation for these actions; as noted, the TSC does not accept or respond to public inquiries.[13] Although Dr. Ibrahim's name was removed from the No Fly List shortly after her arrest, her name remained on the TSDB, from which it was added to the CLASS watchlist. *Id.* at *10.

Following Dr. Ibrahim's erroneous watchlist nomination, her F-1 student visa was revoked. Although the certificate of revocation noted that "information has come to light" indicating Dr. Ibrahim's possible ineligibility for her visa, *id.* at *10, the trial record did not identify what that could be. Instead, two e-mail exchanges revealed how the FBI agent's mistake ended up as the basis for revoking Dr. Ibrahim's visa; the consular officials responsible for handling her case neither contacted him nor knew why he nominated Dr. Ibrahim to the TSDB. Instead, the consular officials accepted the conclusion made by unknown TSC employees (who processed the unknown FBI agent's nomination), as a proxy for their own decision-making.

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[13] Complaints about the No Fly List through the DHS TRIP (Traveler Redress Inquiry Program) do not go directly to the TSC, but to DHS. It is unclear how many traveler complaints are forwarded from DHS to TSC, but this forwarding occurs only for positive matches to watchlists created by TSC for use by DHS component agencies (such as the No Fly List created for TSA). *See* Kahn, *supra*, at 191-92.

The first e-mail was sent the day after Dr. Ibrahim's arrest. Officials in the coordination division of the State Department's visa office discussed their frustration with a "stack of pending revocations" that included Dr. Ibrahim's:

> I have a stack of pending revocations that are based on VGTO [the FBI's Violent Gang and Terrorist Organization office] entries. These revocations contain virtually no derogatory information. After a *long* and frustrating game of phone tag with INR [the Department of State's Bureau of Intelligence and Research], TSC, and Steve Naugle of the FBI's VGTO office, finally we're going to revoke them.
>
> Per my conversation with Steve, there is no practical way to determine what the basis of the investigation is for these applicants. The only way to do it would be to contact the case agent for each case individually to determine what the basis of the investigation is. Since we don't have the time to do that (and, in my experience, case agents don't call you back promptly, if at all), we will accept that the opening of an investigation itself is a prima facie indicator of potential ineligibility under 3(B) [Immigration and Nationality Act, Section 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B)].

Id. at *10 (emphasis in original).

The second e-mail, dated a month later, was sent by an employee in the State Department's visa office

coordination division to the chief of the consular section of the U.S. embassy in Malaysia:

> The short version is that [Dr. Ibrahim's] visa was revoked because there is law enforcement interest in her as a potential terrorist. This is sufficient to prudentially revoke a visa but doesn't constitute a finding of ineligibility. The idea is to revoke first and resolve the issues later in the context of a new visa application. . . . My guess based on past experience is that she's probably issuable. However, there's no way to be sure without putting her through the interagency process. I'll gin up the revocation.

Id. at *11.

The "law enforcement interest" was Agent Kelley's incorrect nomination form. Once entered into the watchlisting system, Dr. Ibrahim's name was snared by the "web of interlocking watchlists." *Id.* at *7. This continued despite the submission, a year later, of a request by an unidentified government agent that her name be "Remove[d] From ALL Watchlisting Supported Systems (For terrorist subjects: due to closure of case AND no nexus to terrorism)." *Id.* at *11.

Ibrahim exposes two problems with databases and watchlisting that directly affect visa decisions.

First, databases and watchlists have in some regular instances displaced the traditional role of consular officers in visa adjudications. A single FBI

agent submitting a wrongly completed watchlist-nomination form led to Dr. Ibrahim's addition to the No Fly List and the revocation of her student visa. DOS consular officials deferred entirely to watchlists created by officials from another agency based on information from an inaccessible FBI agent. In *Amici*'s experience, this example typifies the post-Homeland Security Act era. The FBI's information sources were unknown to the consular officials responsible for communicating a final visa determination to Dr. Ibrahim.

Second, errors reverberate through the watchlisting system undetected or, worse, impervious to attempts to purge them. As the district court in *Ibrahim* commented: "Once derogatory information is posted to the TSDB, it can propagate extensively through the government's interlocking complex of databases, like a bad credit report that will never go away." *Id.* at *16. With specific reference to CLASS, the court added that "bad information may remain there and may linger on there" even if the original entry in the TSDB is corrected or changed. *Id.* at *17. DOS maintains its files, linked to past and present CLASS entries, "until the applicant reaches age ninety and has no visa application within the past ten years." *Id.* at *10.

Judicial review is therefore an essential protection to prevent visa denials based on erroneous information. The mistake in Dr. Ibrahim's case went undetected until disclosed in a deposition ordered by the district court, over government opposition, three

months before trial. *See* Omnibus Order on Pending Motions at 14, *Ibrahim v. DHS*, No. 06-cv-00545-WHA (N.D. Cal. Aug. 23, 2013), ECF No. 532; Defendants' Opposition to Plaintiff's Motion for Continuance [Redacted] at 2, *id.* (Aug. 7, 2013), ECF No. 520. Her case – nearly eight years of litigation – revealed what others refused visas lack the resources and perseverance to expose: the inherent weaknesses and flaws in the new visa-security system. None of the remedial audits or other mechanisms for self-correction undertaken by the TSC and its customer agencies uncovered the error on which so many official actions were based.

The use today of numerous databases and watchlists for visa decisions explains why the DHS Inspector General described interagency security vetting as leading to decisions often dictated to DOS, rather than made using consular discretion: "After conducting their review, *the respective agencies inform DOS whether the applicant is eligible for a visa*." DHS Visa Security, *supra*, at 7 (emphasis added). This is a world apart from the traditional exercise of consular discretion.

Indeed, there is no reasonable opportunity for consular officers to exercise consular discretion once a barrier to visa approval is erected by another agency. Denials occur regardless of whether the consular officer is completely in the dark about the rationale (and regardless of whether the consular officer might possess or become aware of information that might mitigate or disprove inadmissibility, or

could contribute to a fruitful line of inquiry to reach that conclusion). In fact, DHS decisions in the U.S., based on TSC watchlists, on occasion override the judgment of consular officers at far-off posts. Judicial review for mistakes is imperative to ensure that modern technology-driven visa processing does not sweep aside American values of fairness and accuracy, shattering family unity.

III. The Court should hold that judicial review of visa denials is available where there was no actual, legitimate exercise of consular discretion.

As then-Circuit Judge Ginsburg underscored, "[t]he Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986). The Court of Appeals in this case correctly required the government to provide more information regarding Mr. Berashk's visa denial, in order to ensure that the denial was lawful.

While the exercise of consular discretion should ordinarily receive appropriate deference, *cf. Kleindienst*, 408 U.S. 753, judicial review should be available to examine claims that a visa applicant was

incorrectly deemed inadmissible using information beyond the purview of properly exercised consular discretion. Drawing the line in this fashion would greatly restrict the number of cases brought to federal court. Contrary to the Petitioners' concern that all 112,405 visa applications denied under 8 U.S.C. § 1182(a) in fiscal year 2013 would end up being reviewed, *see* Petitioners' Brief, 31 n.10, DOS statistics indicate that visa denials susceptible to searching judicial review would constitute a far smaller subset. For example, only 28 immigrant-visa refusals under 8 U.S.C. § 1182(a)(3)(B) – the ground used to exclude Mr. Berashk – were issued during fiscal year 2013.[14] In each of those cases, if the inadmissibility ground(s) could be overcome there is a statutory right for the applicant to be issued an immigrant visa.

In this case, Ms. Din deserves a judicial accounting of whether a specific statutory ground of inadmissibility was properly applied to deny Mr. Berashk's immigrant-visa application. This is particularly so because, as the government recognizes, "numerous

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[14] U.S. Dep't of State, *Immigrant and Nonimmigrant Visa Ineligibilities: Fiscal Year 2013*, *available at* http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXX.pdf. None of the 28 ineligibility findings for immigrant visas is listed as having been overcome. There were also 591 non-immigrant visa ineligibility findings based on 8 U.S.C. § 1182(a)(3)(B) in fiscal year 2013, 352 of which were overcome. This may indicate a high error rate in the initial findings which are then corrected, to some extent through a waiver process available to certain non-immigrants (but not to immigrants) under 8 U.S.C. § 1182(d)(3)(B)(i).

provisions of the INA reflect a concern for promoting family unity among U.S. citizens and their undocumented families." Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 43, *Texas v. United States*, No. 14-CV-254 (S.D. Tex. Dec. 24, 2014), ECF No. 38 (citing *INS v. Errico*, 385 U.S. 214 (1966), and giving as an example 8 U.S.C. § 1151(b)(2)(A)(i) (placing no limits on number of immigrant visas available for parents of U.S. citizens older than 21)).

The mission of consular officers officially includes "[h]elping U.S. citizens with family reunification." U.S. Dep't of State, *Career Tracks for Foreign Service Officers*, *available at* http://careers.state.gov/work/foreign-service/officer/career-tracks. Moreover, given the serious delays that loss of a priority date cause for many immigrant-visa applications, careful review of denials that are not based on the actual, legitimate exercise of consular discretion is all the more necessary to ensure family unity for U.S. citizens in qualifying cases. *Amici* believe that visa decisions issued by consular officers, the bread and butter of our long careers, have consequences of a magnitude that warrants judicial error-correction in an appropriate subset of cases. For these reasons *Amici* respectfully request that this Court preserve reviewability of those visa denials.

CONCLUSION

Amici respectfully urge the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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