IMMIGRATION LAW — CONSULAR NONREVIEWABILITY — D.C. CIRCUIT DEFERS TO CONSULATE'S VISA DENIAL. — *Colindres v. United States Department of State*, 71 F.4th 1018 (D.C. Cir. 2023).

The refrain that noncitizen entrants to the United States ought to have taken *legal* routes available to them often betrays an underlying assumption that there *are* such paths.[1] This assumption belies the reality that, for many, these paths have largely been "barricaded or removed."[2] Recently, in *Colindres v. United States Department of State*,[3] the D.C. Circuit upheld a consular officer's decision to deny a visa to Edvin A. Colindres Juarez, a father and spouse to U.S. citizens. It did so on the basis of a "crimmigration"[4] statute — without reference to any criminal charges or convictions — under the doctrine of consular nonreviewability.[5] This doctrine, which severely limits judicial oversight over consular visa decisions,[6] perversely disincentivizes noncitizens from seeking legal pathways to status. In addition to analyzing precedent, the D.C. Circuit chose to offer defenses for the doctrine of consular nonreviewability rather than highlight its policy flaws. In doing so, the D.C. Circuit missed an important opportunity to fuel political dialogue on the scope of the doctrine, the precise question that the Supreme Court now faces in *Department of State v. Muñoz*.[7]

Nearly thirty years ago, Edvin A. Colindres Juarez, a Guatemalan citizen, entered the United States "without inspection."[8] Since then, he has married a U.S. citizen, Kristen H. Colindres, with whom he had a daughter in 2008.[9] In March 2015, Mrs. Colindres began the process of obtaining a green card for her husband and regularizing his status by

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[1] *See* Naomi Ishisaka, *Why Don't More Immigrants Arrive Legally? For Many, The Doors Are Barricaded.*, SEATTLE TIMES (Dec. 9, 2019, 6:19 AM), https://www.seattletimes.com/seattle-news/why-dont-more-immigrants-arrive-legally-for-many-the-doors-are-barricaded [https://perma.cc/YHE8-2DMP] ("The perception seems to be that there are two entry doors to the U.S.: one legal, the other illegal — and migrants just incomprehensibly choose the illegal door due to laziness, lack of respect for U.S. laws or desire to do harm.").

[2] *Id.*

[3] 71 F.4th 1018 (D.C. Cir. 2023).

[4] Crimmigration refers to "[t]he criminalization of immigration law." Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006). For a broad account of how criminal law and immigration law intersect, see generally Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007).

[5] *Colindres*, 71 F.4th at 1020–21.

[6] *See generally* Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113 (2010).

[7] Muñoz v. U.S. Dep't of State, 50 F.4th 906, 908–09 (9th Cir. 2022), *cert. granted in part*, 144 S. Ct. 679 (2024).

[8] Colindres v. U.S. Dep't of State, 575 F. Supp. 3d 121, 126–27 (D.D.C. 2021) (quoting Complaint for Declaratory and Injunctive Relief ¶ 4, *Colindres*, 575 F. Supp. 3d 121 (No. 21-cv-348) [hereinafter Complaint]).

[9] *Id.*

filing Form I-130,[10] the first step in the immigration process for eligible relatives of U.S citizens.[11] The form was approved later that year.[12] The typical next step would have been to pursue "adjustment of status" to that of a lawful permanent resident (LPR).[13] However, those physically present in the United States without having been admitted "following inspection by an immigration officer,"[14] like Colindres Juarez, are typically ineligible to apply for adjustment of status and must leave the country to reenter lawfully.[15] But Colindres Juarez's prior time without status in the country made him "inadmissible" and thus unable to obtain a visa for lawful reentry.[16] An application filed with Form I-601A, however, allows a noncitizen to get around this ground of inadmissibility.[17] It lets certain eligible noncitizens "request a provisional waiver of the unlawful presence grounds of inadmissibility . . . before departing the United States to appear at a U.S. Embassy or Consulate for an immigrant visa interview."[18] Thus, Colindres Juarez filed Form I-601A and, after biometrics and background checks, his application was approved in 2019.[19] Colindres Juarez then traveled to Guatemala to apply for a visa, which would give him authorization to enter the United States lawfully[20] — finally allowing him to become an LPR.

Colindres Juarez waited for "[n]early a year" in Guatemala while the consulate considered his visa application, which it ultimately denied.[21] As part of the process, Colindres Juarez complied with a request to submit his Guatemalan criminal record, which "came back clean," and attended multiple interviews.[22] Yet the adjudicating officer ultimately determined that he was inadmissible under 8 U.S.C. § 1182(a)(3)(A)(ii),[23] which categorizes as inadmissible noncitizens "who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage . . . in . . . any . . . unlawful

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[10] *Id.*

[11] *Id.*; *see I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 5, 2024), https://www.uscis.gov/i-130 [https://perma.cc/P8ZY-VSNN].

[12] *Colindres*, 575 F. Supp. 3d at 127.

[13] *See Adjustment of Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 27, 2022), https://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-of-status [https://perma.cc/94H9-B7RP].

[14] 8 C.F.R. § 245.1(b)(3) (2023).

[15] *See* AM. IMMIGR. COUNCIL, WHY DON'T IMMIGRANTS APPLY FOR CITIZENSHIP? THERE IS NO LINE FOR MANY UNDOCUMENTED IMMIGRANTS 1–2 (Oct. 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/why_dont_immigrants_apply_for_citizenship_0.pdf [https://perma.cc/9XXC-KKDU].

[16] 8 U.S.C. § 1182(a)(6)(A)(i), (9)(B); *Colindres*, 71 F.4th at 1020.

[17] *See Colindres*, 71 F.4th at 1020.

[18] *I-601A, Application for Provisional Unlawful Presence Waiver*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 30, 2024), https://www.uscis.gov/i-601a [https://perma.cc/T5SU-FBQ9].

[19] Colindres v. U.S. Dep't of State, 575 F. Supp. 3d 121, 127 (D.D.C. 2021).

[20] *Colindres*, 71 F.4th at 1020.

[21] *Id.*

[22] *Id.*

[23] *Id.*

activity."[24] The officer asserted that "there [was] reason to believe" Colindres Juarez was "a member of a known criminal organization."[25] Subsequently, the couple, as co-plaintiffs, sued the U.S. Department of State in the U.S. District Court for the District of Columbia in February 2021, seeking declaratory relief against the visa denial and injunctive relief directing the government to issue a visa to Colindres Juarez.[26]

Judge Harvey granted the government's motion to dismiss the complaint.[27] The government argued that the Colindreses failed to plausibly allege constitutional violations, thus prohibiting judicial review under the doctrine of consular nonreviewability, and that the government had regardless satisfied the limited judicial review standard for such claims.[28] Further, the government contended that the Colindreses' statutory claims failed and that § 1182(a)(3)(A)(ii) was not unconstitutionally vague.[29] Despite expressing skepticism at the government's heavy reliance on *Boutilier v. INS*[30] to support its argument,[31] the court ruled against the Colindreses' unconstitutional vagueness argument.[32] The court then turned to the issue of consular nonreviewability.[33] Judge Harvey noted that the doctrine immunizes consular officials' visa decisions from judicial review unless either the visa decision "burdens [a] *citizen's* constitutional rights," in which case limited review is permitted, or a statute explicitly permits review.[34] First, the court held that the decision burdened none of Mrs. Colindres's asserted constitutional rights, as the relevant U.S. citizen.[35] Second, the court held that neither the Immigration and Nationality Act[36] (INA) nor the Administrative

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[24] 8 U.S.C. § 1182(a)(3)(A)(ii).

[25] *Colindres*, 71 F.4th at 1020 (alteration in original) (quoting Joint Appendix to Briefs at JA-243, *Colindres*, 71 F.4th 1018 (No. 22-5009)). Colindres Juarez appealed to the embassy for reconsideration, but the embassy's Immigrant Visa Chief affirmed the original denial. *Id.*

[26] Complaint, *supra* note 8, at 1, 21.

[27] Colindres v. U.S. Dep't of State, 575 F. Supp. 3d 121, 126 (D.D.C. 2021).

[28] *Id.* at 128.

[29] *Id.*

[30] 387 U.S. 118 (1967).

[31] *Colindres*, 575 F. Supp. 3d at 129–30. *Boutilier* held that Congress's "plenary power to make rules for the admission of" noncitizens foreclosed a constitutional fair warning challenge to a provision intended to exclude gay noncitizens from the country. 387 U.S. at 118–19, 123. Judge Harvey highlighted that *Boutilier* had licensed "the most blatant discrimination." *Colindres*, 575 F. Supp. 3d at 129 (quoting Tineo v. Att'y Gen., 937 F.3d 200, 216 (3d Cir. 2019)).

[32] *Colindres*, 575 F. Supp. 3d at 130. The court did so for two reasons. First, the court faulted the plaintiffs for not responding to the argument in their opposition, thus forfeiting the claim. *Id.* Second, the court determined that the plaintiffs' argument failed on the merits. *Id.* at 130–31 (quoting, inter alia, United States v. Singhal, 876 F. Supp. 2d 82, 98 (D.D.C. 2012)).

[33] *Id.* at 131.

[34] *Id.* at 131–32 (emphasis added) (quoting Baan Rao Thai Rest. v. Pompeo, 985 F.3d 1020, 1024–25 (D.C. Cir. 2021)).

[35] *Id.* at 133 (due process); *id.* at 135–36 (equal protection); *id.* at 138–39 (First Amendment).

[36] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

Procedure Act[37] (APA) expressly afforded judicial review.[38] The plaintiffs subsequently appealed to the D.C. Circuit.[39]

Judge Walker,[40] writing for the court, affirmed the district court decision.[41] He began by noting that immigration law implicates "hard policy choices" involving the country's relationship with "foreign powers" as well as "political and economic circumstances."[42] The opinion then turned to two issues. First, the court held that the visa denial did not burden Mrs. Colindres's constitutional rights, as the constitutional right to marriage "does not include the right to live in America with one's spouse."[43] Second, the D.C. Circuit held that even if judicial review of the visa denial were not barred by consular nonreviewability, the government met its burden under the "deferential" judicial review of the constitutional-rights exception.[44] *Kleindienst v. Mandel*[45] gave rise to the constitutional exception,[46] but the Supreme Court there held that the government need only provide "a facially legitimate and bona fide reason" for denying entry.[47] As such, the officer was required only to cite a statute that "specifies discrete factual predicates the consular officer must find" for a denial to have met this burden.[48] Alternatively, the government could have disclosed what facts motivated its denial.[49] Judge Walker held that the first of these applied, contrary to the Ninth Circuit's holding in *Muñoz*.[50] Finally, the Court rejected the plaintiffs' arguments that the denial was in bad faith, which would have sufficiently shown a decision was not "bona fide," and held that the Colindreses had already forfeited their remaining arguments.[51]

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[37] 5 U.S.C. §§ 551–559, 701–706.

[38] *Colindres*, 575 F. Supp. 3d at 139–40 (citing, inter alia, Saavedra Bruno v. Albright, 197 F.3d 1153, 1158–59 (1999)).

[39] *Colindres*, 71 F.4th at 1019.

[40] Judge Walker was joined by Senior Judge Randolph.

[41] *Colindres*, 71 F.4th at 1020.

[42] *Id.* at 1021 (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018)).

[43] *Id.* According to the court, the government has not included spousal exceptions in its historical practice of regulating immigration, thus "the Colindreses [could] not show that the Government's visa denial burdened Mrs. Colindres's fundamental rights," and "their suit [did] not fall within the constitutional-rights exception to the consular-nonreviewability doctrine." *Id.* at 1023 (citing Baan Rao Thai Rest. v. Pompeo, 985 F.3d 1020, 1024–25 (D.C. Cir. 2021)).

[44] *Id.* at 1024 (quoting Trump v. Hawaii, 138 S. Ct. at 2419).

[45] 408 U.S. 753 (1972).

[46] *Id.* at 768–70; *see* Dobkin, *supra* note 6, at 122, 130.

[47] *Mandel*, 408 U.S. at 770; *see also Colindres*, 71 F.4th at 1024 (quoting *Mandel*, 408 U.S. at 770).

[48] *Colindres*, 71 F.4th at 1024 (quoting Kerry v. Din, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring in the judgment)).

[49] *Id.* (quoting *Din*, 576 U.S. at 105 (Kennedy, J., concurring in the judgment)).

[50] *Compare id.* ("8 U.S.C. § 1182(a)(3)(A)(ii) . . . specifies a factual predicate . . . ."), *with* Muñoz v. U.S. Dep't of State, 50 F.4th 906, 917 (9th Cir. 2022) ("8 U.S.C. § 1182(a)(3)(A)(ii) does not specify the type of lawbreaking that will trigger a visa denial, and a consular officer's belief that an applicant seeks to enter the United States for general (including incidental) lawbreaking is not a 'discrete' factual predicate."), *cert. granted in part*, 144 S. Ct. 679 (2024).

[51] *Colindres*, 71 F.4th at 1025.

Chief Judge Srinivasan concurred in part and in the judgement.[52] He agreed on the ultimate disposition, as well as the forfeiture and bad faith analyses.[53] However, the Chief Judge noted that he would not have resolved the merits of the constitutional question.[54] Furthermore, he disagreed with the majority's decision to create a circuit split by holding that § 1182(a)(3)(A)(ii) contained a discrete factual predicate when the Ninth Circuit held otherwise[55] — arguing that the government had met its burden anyway since it disclosed its motivating facts.[56]

Faced with plaintiffs seeking a constitutional exception to *Mandel*'s consular deference, courts have very often reached progovernment dispositions, only disagreeing at the margins about the doctrine's strictures.[57] The Seventh Circuit has even described consular nonreviewability as "mak[ing] it impossible, or nearly so, for plaintiffs to challenge [a] visa denial."[58] This regime has a glaring defect as a matter of policy, however, as it perversely disincentivizes people similarly situated to Colindres Juarez from seeking proactive compliance with immigration law. In other contexts, courts have used their discretion in *how* they write opinions to highlight these kinds of problems — and in doing so, they have moved political discourse. The *Colindres* majority chose to offer unqualified justifications for the doctrine at a very high level of generality instead.[59] As the Supreme Court has taken up the task of considering the scope of consular nonreviewability in *Muñoz*,[60] it is regrettable that the *Colindres* court chose to uplift these general defenses rather than highlight the practical reality that the doctrine has severe policy shortcomings, when doing so would have sparked valuable discourse in the leadup to *Muñoz*.

The consular process fundamentally disincentivizes compliance by failing to provide visa applicants with some of the basic procedural protections noncitizens may be entitled to in removal proceedings. If the § 1182(a)(3)(A)(ii) inadmissibility category denying entry was used against Colindres Juarez in a removal proceeding, he might have been afforded substantively better processes for overcoming it in three

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52 *Id.* at 1026 (Srinivasan, C.J., concurring in part and in the judgment).

53 *Id.*

54 *Id.* at 1026–27. He noted that the D.C. Circuit had not reexamined that issue in over sixty years and that the analysis might have changed in light of *Trump v. Hawaii*. *See id.* at 1026.

55 *Id.* at 1028.

56 Namely, the fact that the government "had 'reason to believe [Mr. Colindres Juarez] is a member of a known criminal organization.'" *Id.* (alteration in original) (quoting Complaint, *supra* note 8, ¶ 37).

57 *See, e.g.*, Matushkina v. Nielsen, 877 F.3d 289, 291, 294–95 (7th Cir. 2017); Nusantara Found. Inc. v. U.S. Dep't of State, 486 F. Supp. 3d 737, 742–44 (S.D.N.Y. 2020); Sesay v. United States, 984 F.3d 312, 316–17 (4th Cir. 2021). *But see* Muñoz v. U.S. Dep't of State, 50 F.4th 906, 923–24 (9th Cir. 2022), *cert. granted in part*, 144 S. Ct. 679 (2024).

58 *Matushkina*, 877 F.3d at 291.

59 *See Colindres*, 71 F.4th at 1021 (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2418–19 (2018)).

60 *Muñoz*, 144 S. Ct. 679 (granting certiorari).

ways.[61] First, he would have been entitled to a hearing — complete with the ability to present evidence, cross-examine witnesses, and have a comprehensive record of the proceeding.[62] Second, he would have had the option to appeal to the Board of Immigration Appeals, which has jurisdiction to review an immigration judge's decision in a removal case.[63] Third, noncitizens in removal proceedings are entitled to forms of relief not available in consular processing, including discretionary cancellation of removal under 8 U.S.C. § 1229b(b), which authorizes the Attorney General to "cancel removal" *and* "adjust . . . the status" of an inadmissible noncitizen to that of a LPR.[64] The lack of such mechanisms constraining consulate discretion, coupled with heavy restrictions on post hoc judicial review, means that "[i]f a consular or immigration officer is motivated by any form of bias, it seems unlikely that the victim of bias can overcome the adverse decision."[65] It is understandable, then, why an undocumented person may rather test their luck with the inhumane but comparatively robust procedures of removal proceedings than *choose* to assume the risk attached to consular visa processing.[66]

Moreover, the doctrine's perverse incentives make optimizing immigration enforcement more difficult. Professor Peter Markowitz suggests that the immigration regime would benefit from moving away from its focus on punitive enforcement mechanisms.[67] Markowitz, analogizing to the Internal Revenue Service's history, notes how shifts "toward compliance assistance" can yield more optimal enforcement scaling.[68] But "compliance assistance" programs merely share information on

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[61] This counterfactual does not demonstrate procedural sanctity in removal proceedings. An individual who has not been lawfully admitted into the United States would be subject to mandatory detention and have no universal right to counsel during removal. 8 U.S.C. § 1226(c)(1); *see id.* § 1362. Commentators have aptly critiqued the removal-detention system for its unfairness and inhumanity. *See, e.g.*, Zachary Manfredi & Joseph Meyers, *Isolated and Unreachable: Contesting Unconstitutional Restrictions on Communication in Immigration Detention*, 95 N.Y.U. L. REV. 130, 139–40 (2020). Still, when it comes to defending a charge of inadmissibility, removal provides substantively better procedural protections to noncitizens than the consular system provides.

[62] 8 U.S.C. § 1229a(a)(1), (b)(4).

[63] 8 C.F.R. § 1003.1(b) (2023).

[64] 8 U.S.C. § 1229b(b)(1).

[65] Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?,"* 7 J. GENDER RACE & JUST. 315, 341 (2003). This near-universal deference is part of what makes immigration law "a constitutional oddity." Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1985). For a broader account of immigration law's exceptional character, see generally David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017).

[66] Certainly, there are good reasons for due process to be stronger for those physically in the country than at borders and embassies. *See* Diana G. Li, Note, *Due Process in Removal Proceedings After* Thuraissigiam, 74 STAN. L. REV. 793, 803–10, 826–34, 849–50 (2022). This does not undercut the notion, however, that the doctrine's inoculation of consulate procedures with a high risk of arbitrariness feeds into immigration law's failure to make compliance pathways desirable.

[67] *See* Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J.F. 130, 138–41 (2019).

[68] *See id.* at 138–39.

pathways to compliance.[69] And no amount of information can make that pathway less uncertain and fraught with risk for undocumented people. Put differently, compliance assistance programs yield little benefit if pathways to compliance are fundamentally undesirable.

Judges, while exercising discretion in *how* they write opinions, have pointed out flaws like these in the standing doctrine, even as they continue to defer to precedent, thus moving political discourse on those issues. In the crimmigration context, Judge Owens's emphatic critique of the "crimes involving moral turpitude" (CIMTs) removal ground while concurring in *Orellana v. Barr*[70] is a prime example.[71] Outside of immigration law, Judge Reeves's powerful opinion urging the Supreme Court to overturn qualified immunity while granting the defendant officer's motion to dismiss in *Jamison v. McClendon*[72] is another striking instance.[73] These opinions sparked both critique and praise,[74] indicating that they fueled valuable political discourse on live legal issues.

As consular nonreviewability's scope is a live issue at the Supreme Court, the time is ripe to spark similar dialogue on whether its role in making immigration "so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role" is justified.[75] As Judges Owens and Reeves demonstrated, highlighting a doctrine's shortcomings in an opinion — even if it does not change the disposition of the case — can do exactly that. Although the district court voiced some sympathy for the plaintiffs'

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[69] *See, e.g.*, *Compliance Assistance and Voluntary Programs for Federal Facilities*, EPA (Oct. 5, 2023), https://www.epa.gov/enforcement/compliance-assistance-and-voluntary-programs-federal-facilities [https://perma.cc/F8FA-A3FN] (enumerating as compliance assistance programs "workshops, conferences, round tables, training courses, webinars, and publications"); *Compliance Assistance*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/compliance-assistance [https://perma.cc/GH5Z-WBJ6] (defining "compliance assistance" as "easy-to-access information on how to comply with federal employment laws").

[70] 967 F.3d 927 (9th Cir. 2020).

[71] *See id.* at 940 (Owens, J., concurring) (referring to CIMTs as "dumb, dumb, dumb," but nevertheless joining the majority "because it correctly applies the law as it now stands" and "duty sometimes demands the dumb thing").

[72] 476 F. Supp. 3d 386 (S.D. Miss. 2020).

[73] *See id.* at 418–24.

[74] *See, e.g.*, Andrew R. Arthur, *Are Grounds of Removability "Dumb, Dumb, Dumb"?*, CTR. FOR IMMIGR. STUD. (July 31, 2020), https://cis.org/Arthur/Are-Grounds-Removability-Dumb-Dumb-Dumb [https://perma.cc/M399-9BKY] (critiquing Judge Owens's opinion); April Rodriguez, *Lower Courts Agree — It's Time to End Qualified Immunity*, ACLU (Sept. 10, 2020), https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity [https://perma.cc/MX5F-9KBR] (highlighting and echoing Judge Reeves's sentiments).

[75] Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984); *see also* Rubenstein & Gulasekaram, *supra* note 65, at 653–54 ("[T]he lack of judicial reasons for the extant patchwork of mainstream and exceptional doctrines is . . . an undertheorized phenomenon that courts may be best positioned to fix." *Id.* at 653.).

position,[76] which the circuit court echoed,[77] the *Colindres* majority still chose to invoke a vague and perfunctory reference to "hard policy choices" and "America's relationship with 'foreign powers'" instead of grappling with the doctrine's human and policy impacts.[78] While a larger critique of this foreign policy argument is outside the scope of this comment,[79] the argument's force and relevance are not as immediately clear as the court's brief gesture would indicate. It is regrettable, then, that the majority chose to provide this rote recap of consular nonreviewability's grounding with no mention of its faults when doing otherwise could have fueled public dialogue in the leadup to *Muñoz*.

Insofar as the American public finds it important that noncitizens take legal pathways to status in this country, making those pathways accessible is critical. That is a burden for Congress, to be sure,[80] but *Colindres* highlights the judicial and executive branches' roles in this too. While taking the only proactive compliance pathway the law makes available to them, the plaintiffs were impeded at the last stage by an executive official's decision that the judiciary refused to review, leaving Colindres Juarez effectively self-deported.[81] As it considers the scope of *Mandel* in *Muñoz*, the Roberts Court should seriously contemplate whether the justifications for consular nonreviewability warrant its highly restrictive parameters when weighed against its shortcomings.

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[76] *See* Colindres v. U.S. Dep't of State, 575 F. Supp. 3d 121, 126 (D.D.C. 2021) ("The Court does not take lightly the allegations of hardship that a consular official's decision to deny Colindres Juarez a visa has worked upon Plaintiffs and their child.").

[77] *See Colindres*, 71 F.4th at 1020 (quoting *Colindres*, 575 F. Supp. 3d at 126). Of course, the level to which a particular noncitizen or their family provokes sympathy can be a harmful basis for assessing what they are owed as a matter of procedural or substantive justice. *Cf.* Jean Guerrero, Opinion, *Stop Dividing Immigrants into the "Good" vs. the "Bad." They All Deserve Due Process*, L.A. TIMES (Mar. 10, 2022, 3:05 AM), https://www.latimes.com/opinion/story/2022-03-10/column-legal-counsel-immigration [https://perma.cc/M4ET-A9RZ] ("Dividing immigrants between 'good' and 'bad' compounds the damage of discrimination in vulnerable communities."). But public figures continue to invoke the platonic ideal of lawful immigrants. *See* Jim Acosta & Stephen Collinson, *Obama: "You Can Come Out of the Shadows*," CNN (Nov. 21, 2014, 10:50 AM), https://edition.cnn.com/2014/11/20/politics/obama-immigration-speech/index.html [https://perma.cc/QUZ9-HTJB] ("[President Obama] said they will go after 'felons, not families. Criminals, not children. Gang members, not a [m]om who's working hard to provide for her kids.'"). Therefore, pointing out the system's shortcomings for individuals who *do* meet the description carries rhetorical force.

[78] *See Colindres*, 71 F.4th at 1021 (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018)).

[79] For such a critique, see generally Legomsky, *supra* note 65. Although Professor Stephen Legomsky largely focuses on the "plenary power" doctrine, *see id.*, consular nonreviewability is merely plenary power's "first cousin," Kevin Johnson, *Argument Preview: The Doctrine of Consular Non-Reviewability — Historical Relic or Good Law?*, SCOTUSBLOG (Feb. 18, 2015, 9:55 AM), https://www.scotusblog.com/2015/02/argument-preview-the-doctrine-of-consular-non-reviewability-historical-relic-or-good-law [https://perma.cc/FT2D-NWL7].

[80] *See* Press Release, Am. Immigr. Council, Congress Must Pass a Permanent Solution and Expand Protections for Dreamers as Ruling Attempts to End the DACA Program (Sept. 14, 2023), https://www.americanimmigrationcouncil.org/news/congress-must-pass-permanent-solution-and-expand-protections-dreamers-ruling-attempts-end-daca [https://perma.cc/6YKC-AZFJ].

[81] *See* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1882–83, 1887 (2019).