CONSULAR NONREVIEWABILITY AFTER *DEPARTMENT OF STATE V. MUÑOZ*: REQUIRING FACTUAL AND TIMELY EXPLANATIONS FOR VISA DENIALS

*Jake Stuebner**

The visa application process is laden with discretion and reinforced by consular nonreviewability—an extensive form of judicial deference. Until recently, courts recognized a small exception to consular nonreviewability. Under this exception, courts engaged in limited review of a consular officer's decision when visa denials implicated the fundamental rights of U.S. citizens.

The Court curtailed this exception in United States Department of State v. Muñoz*, anointing consular officers with nearly complete power over visa decisions. This deference jeopardizes the integrity and fairness of the immigration system, leaving visa applicants and their U.S. citizen sponsors at the mercy of consular officers. This not only fosters an arbitrary visa system but also conflicts with broader immigration system and administrative law trends.*

This Note traces the accidental history of consular nonreviewability—from its racially motivated origins to its full-fledged indoctrination in Muñoz. *This Note proposes an amendment to the Immigration and Nationality Act: Consular officers should be required to provide factual and timely explanations for visa denials. Such a requirement would inject greater fairness into the visa application process and better align it with broader immigration law—without sacrificing the values underpinning consular nonreviewability.*

INTRODUCTION 2414
I. THE ORIGINS OF CONSULAR NONREVIEWABILITY 2419
A. Delegation of Congress's Plenary Power to Consular Officers 2419
1. Scope of the Plenary Power 2419
2. Delegation of the Plenary Power 2422
3. Height (and Decline?) of the Plenary Power 2425
B. The Visa Process, Consular Nonreviewability, and the *Mandel* Exception 2428

* J.D. Candidate 2025, Columbia Law School. The author would like to thank Professor Jessica Bulman-Pozen, Professor Thomas P. Schmidt, Professor Philip Hamburger, Jonathan Gliboff, and Walter Lloyd, Jr. for their feedback and guidance. The author is grateful to the *Columbia Law Review* team for selecting this Note and for their helpful edits. Finally, this author thanks Ellie Smith for her unwavering support and frequent reminders to focus on the human struggles underlying every legal dispute.

1. The Visa Process 2428
2. Consular Nonreviewability's Limited Exception 2430
C. Applying *Mandel* to Spousal Unity Cases 2431
II. CONSULAR NONREVIEWABILITY'S BRIEF DECLINE AND RAPID RESURGENCE 2433
A. The Spousal Unity Circuit Split After *Din* 2433
1. The D.C. Circuit Applies Consular Nonreviewability 2433
2. The Ninth Circuit Holds that Consular Nonreviewability Does Not Apply 2434
B. The Supreme Court Reverses the Ninth Circuit 2436
1. No Fundamental Interest in a U.S. Citizen Spouse's Visa Adjudication 2436
2. The End of the *Mandel* Exception 2439
C. Implications of Unchecked Consular Authority After *Muñoz*. 2440
1. Fairness and Integrity of the Visa System 2440
2. Inconsistency With Immigration and Administrative Law .. 2442
III. THE FUTURE OF CONSULAR NONREVIEWABILITY 2446
A. Benefits of Requiring a Factual and Timely Explanation for Visa Denials 2447
1. Thoughtful Decisionmaking 2448
2. Consistency With Administrative and Immigration Law 2449
B. Vindicating the Interests Underpinning Consular Nonreviewability 2451
1. National Security Concerns 2451
2. Consular and Judicial Efficiency 2452
3. Immigration Exceptionalism 2454
CONCLUSION 2455

INTRODUCTION

In 1995, fourteen-year-old Edvin Colindres Juarez, a Guatemalan citizen, crossed the United States border without inspection.[1] He lived in New York with his family for a few years before moving to Florida, where he worked for a pool-finishing company.[2] In 2006, he married Kristen, a U.S. citizen; two years later, the couple welcomed a daughter.[3] Mr. Colindres built a life in the United States, all the while lacking

1. See Final Opening Brief of Appellants at 1, Colindres v. U.S. Dep't of State, 71 F.4th 1018 (D.C. Cir. 2023) (No. 22-5009), 2023 WL 1816861 [hereinafter *Colindres*, Brief of Appellants].

2. Id. at 4.

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

documentation to be legally in the country.[4] To stabilize his precarious foundation, he hoped to secure a visa and fix his immigration status.[5] People "unlawfully present" are ordinarily not issued visas,[6] but the Attorney General waived this prohibition as applied to Mr. Colindres in 2015, finding that the Colindres family would face extreme hardship without Mr. Colindres in the United States.[7] In June 2019, Mr. Colindres traveled to Guatemala to complete the final step of the visa process: an interview with a consular officer.[8] He packed lightly, expecting a quick trip.[9]

He was wrong. After multiple interviews, a clean criminal record check, and almost a year's delay, a consular officer denied Mr. Colindres's application.[10] The officer claimed that "'there [was] reason to believe' that he was 'a member of a known criminal organization.'"[11] The embassy provided no evidence to support this assertion,[12] leaving Mr. Colindres to speculate how the officer could believe he was "seek[ing] to enter the United States to engage . . . in . . . unlawful activity"[13] when he had a clean criminal record and had been peacefully living in the United States for

---

4. See *Colindres*, 71 F.4th at 1020 (noting that Mr. Colindres "did not have permission to live or work in the United States").

5. Id.

6. See Unlawful Presence and Inadmissibility, USCIS, https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility [https://perma.cc/97C3-MG6P] (last updated June 24, 2022) (summarizing standards for the admissibility of noncitizens who have accrued unlawful presence). This policy is currently in flux: On June 18, 2024, President Joe Biden announced a new policy permitting undocumented spouses of U.S. citizens who have been living in the United States for more than ten years to apply for lawful permanent residence status without leaving the country. See Press Release, White House, Fact Sheet: President Biden Announces New Actions to Keep Families Together (June 18, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/06/18/fact-sheet-president-biden-announces-new-actions-to-keep-families-together/ [https://perma.cc/4GQ4-SVQ4]. It seems likely that this policy will be reversed in the upcoming Trump Administration. See Camilo Montoya-Galvez, Judge Declares Biden Immigration Program for Spouses of U.S. Citizens Illegal, CBS News (Nov. 8, 2024), https://www.cbsnews.com/news/judge-declares-biden-immigration-program-for-spouses-of-u-s-citizens-illegal/ [https://perma.cc/9ZRC-SRAR] (predicting that "the Keeping Families Together program is likely to be in the crosshairs of the incoming administration of Trump").

7. *Colindres*, 71 F.4th at 1020 (noting that the Attorney General has this authority under 8 U.S.C. § 1182(a)(9)(B)(v) (2018)).

8. Id.

9. *Colindres*, Brief of Appellants, supra note 1, at 1.

10. *Colindres*, 71 F.4th at 1020.

11. Id. (alteration in original) (quoting Joint Appendix at 242–43, *Colindres*, 71 F.4th 1018 (No. 22-5009)).

12. Petition for a Writ of Certiorari at 6, Colindres v. U.S. Dep't of State, 144 S. Ct. 2716 (No. 23-348), 2023 WL 6517286 [hereinafter *Colindres* Petition].

13. 8 U.S.C. § 1182(a)(3)(A)(ii).

twenty-four years.[14] The officer's reasoning did not matter: When Mr. and Mrs. Colindres appealed the visa denial, the court dismissed the case for failure to state a claim, holding that the consular nonreviewability doctrine barred review of the officer's decision.[15] Mr. Colindres voluntarily trusted the immigration system to adjust his status. In response, the U.S. government labeled him a criminal and banned him from his home of more than two decades.[16]

Mr. Colindres's story highlights the immense, unchecked power of consular officers over the visa process.[17] Immigration to the United States almost always requires a visa,[18] and consular officers determine who is eligible to receive one.[19] Consular officers churn through hundreds of applicants in a day, making "judgement call[s]" after minutes-long interviews.[20] In such a pressure-packed environment with limited information, bias creeps in and mistakes are inevitable.[21] At its worst, this discretion enables consular officers to exploit their positions for personal gain or to promote racist ideologies.[22] But even in ordinary applications, the discretion still creates arbitrary results. Visa acceptance rates vary widely by officer and location.[23] The unfortunate reality of the visa process

---

14. *Colindres* Petition, supra note 12; see also Gabriela Baca, Comment, Visa Denied: Why Courts Should Review a Consular Officer's Denial of a U.S.-Citizen Family Member's Visa, 64 Am. U. L. Rev. 591, 596 (2015) ("Without any formal recourse, the [parties] are left wondering why the consular officer denied the application despite USCIS's approval . . . .").

15. Colindres v. U.S. Dep't of State, 575 F. Supp. 3d 121, 126 (D.D.C. 2021); see also *Colindres*, 71 F.4th at 1019–20. Consular nonreviewability is a new doctrine—at least as recognized in the Supreme Court. See Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (labeling consular nonreviewability a "doctrine" for the first time). Using the term "doctrine" leads to consequences, invoking a "religious overtone." See Allison Orr Larsen, Becoming a Doctrine, 76 Fla. L. Rev. 1, 18, 52 (2024) ("Doctrinizing a concept, in other words, will change it, compress it, and simplify it."). To avoid overstating consular nonreviewability's permanence, this Note refers to it simply as "consular nonreviewability."

16. See *Colindres*, Brief of Appellants, supra note 1, at 4–6 (describing how Mr. Colindres's attempt to obtain lawful immigration status forced him to leave the United States).

17. See infra section II.C.1.

18. See 8 U.S.C. § 1181 (carving out small exceptions for "returning resident immigrants" and people "admitted as refugees").

19. See id. § 1101(a)(16).

20. Christopher Richardson, Opinion, Visa Officers Aren't Racist—They're Just Enforcing the Law, Wash. Post (Feb. 21, 2019), https://www.washingtonpost.com/opinions/2019/02/22/visa-officers-arent-racist-theyre-just-enforcing-law/ (on file with the *Columbia Law Review*).

21. See James A.R. Nafziger, Review of Visa Denials by Consular Officers, 66 Wash. L. Rev. 1, 54 (1991) ("[A]ny exercise of discretion is potentially fallible."); see also Donald S. Dobkin, Challenging the Doctrine of Consular Nonreviewability in Immigration Cases, 24 Geo. Immigr. L.J. 113, 119 (2010) ("Racial discrimination can easily work its way into consular decisions because many of those decisions rely upon subjective factors.").

22. See infra note 251 and accompanying text.

23. See Nafziger, supra note 21, at 69 (describing the variation in acceptance rates at a particular consulate and between posts).

is that Mr. Colindres's rejection was likely influenced more by the officer adjudicating his application than the merits of his case.[24]

Notwithstanding the potential for error, visa denials are almost impossible to challenge in court.[25] When reviewing visa decisions, courts apply consular nonreviewability—an extensive form of deference originating from the racially motivated *Chinese Exclusion Case* of 1889.[26] Under consular nonreviewability, judges do not second-guess consular visa decisions. Historically, there has been a small exception when a decision "allegedly burdens the constitutional rights of a U.S. citizen."[27] Even then, the courts limit its review to only consider whether the consular officer gave a "facially legitimate and bona fide reason" for the denial.[28]

Despite an increase in judicial scrutiny over other areas of immigration law[29] and broader antideference and antidelegation trends,[30]

24. See David Lindsey, Delegated Diplomacy: How Ambassadors Establish Trust in International Relations 34–37 (2023) ("[T]he cumulative exercise of visa discretion is one of the largest influences on global migration patterns.").

25. See Eric Lee & Sabrina Damast, Why Everyone Should Care About the "Doctrine of Consular Nonreviewability", AILA Blog: Think Immigr. (Nov. 22, 2022), https://thinkimmigration.org/blog/2022/11/22/why-everyone-should-care-about-the-doctrine-of-consular-nonreviewability/ [https://perma.cc/7FAU-R5N5] (highlighting *Muñoz* as the first federal court decision to find a consular officer's explanation inadequate).

26. See infra section I.A.1.

27. U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1821 (2024) (internal quotation marks omitted) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018)); see also Kleindienst v. Mandel, 408 U.S. 753, 768–70 (1972) (articulating this exception).

28. *Muñoz*, 144 S. Ct. at 1821 (internal quotation marks omitted) (quoting Kerry v. Din, 576 U.S. 86, 103–04 (2015) (Kennedy, J., concurring in the judgment)).

29. See Kevin R. Johnson, Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism, 68 Okla. L. Rev. 57, 62 (2015) [hereinafter Johnson, Immigration in the Supreme Court] ("[I]mmigration matters regularly comprise a bread-and-butter part of [the Supreme Court's] docket."); Catherine Y. Kim, Plenary Power in the Modern Administrative State, 96 N.C. L. Rev. 77, 88 (2017) (highlighting that the Supreme Court "has granted certiorari in at least one immigration case every term since 2009 and vacated a government immigration decision roughly every other year"); cf. Karla McKanders, Deconstructing Invisible Walls: Sotomayor's Dissents in an Era of Immigration Exceptionalism, 27 Wm. & Mary J. Race, Gender & Soc. Just. 95, 96 (2020) (describing the "many different theories accounting for the proliferation of immigration cases on the Supreme Court's docket").

30. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024) (overruling *Chevron* deference); Gundy v. United States, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting) ("The legislative cannot transfer the power of making laws to any other hands . . . ." (internal quotation marks omitted) (quoting John Locke, The Second Treatise of Government and a Letter Concerning Toleration § 141 (1947))); Michigan v. Env't Prot. Agency, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) ("Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies." (citing U.S. Const. art. III, § 1)); Thomas W. Merrill, Response, *Chevron*'s Ghost Rides Again, 103 B.U. L. Rev. 1717, 1729–34 (2023) (outlining constitutional objections to *Chevron* deference).

consular nonreviewability remains robust.[31] In fact, days before overturning *Chevron* deference,[32] the Court expanded the discretion of consular officers over visa decisions.[33] In *United States Department of State v. Muñoz*, the Court reversed a successful visa denial challenge[34] and curtailed consular nonreviewability's already limited exception.[35]

The *Muñoz* decision has enormous implications both for the families involved in the visa process[36] and the prevalence of judicial review in immigration law.[37] Every year, hundreds of thousands of people rely on the spousal visa process to establish lawful permanent resident status in the United States.[38] For people like Mr. Colindres, who are denied a visa based on a mere citation to a catch-all statutory provision, judicial review makes the ultimate difference.[39] And given broader trends in immigration and administrative law, it is worth questioning the logic of empowering unelected administrative officials with such unchecked authority.[40]

This Note discusses the future of consular nonreviewability after *Muñoz* and its implications for the immigration system. Part I provides a history of consular nonreviewability, explaining its theoretical foundation, legal development, and application to spousal unity cases. Part II introduces the Ninth Circuit's short-lived *Muñoz* exception, discusses how the Supreme Court struck it down, and describes the consequences of this decision for the visa system and broader administrative law. Recognizing the practical impossibility of judicial review, Part III charts a path forward. By requiring consular officers to provide factual and timely explanations for visa denials, Congress can inject greater fairness into the visa

31. See *Muñoz*, 144 S. Ct. at 1820 ("The Judicial Branch has no role to play 'unless expressly authorized by law.' . . . This principle is known as the doctrine of consular nonreviewability." (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950))); see also Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (mentioning "the doctrine of consular nonreviewability" for the first time in a Supreme Court opinion).

32. See *Loper Bright Enters.*, 144 S. Ct. at 2265 (rejecting *Chevron* deference).

33. See *Muñoz*, 144 S. Ct. at 1821, 1826 (holding "that a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country" and noting that "*Mandel* does *not* hold that citizens have procedural due process rights in the visa proceedings of others").

34. See Muñoz v. U.S. Dep't of State, 50 F.4th 906, 923–24 (9th Cir. 2022) (holding "that the government did not meet the notice requirements of due process"), rev'd, 144 S. Ct. 1812 (2024).

35. *Muñoz*, 144 S. Ct. at 1826 (curtailing the scope of the *Mandel* exception).

36. See *Colindres* Petition, supra note 12, at 39 ("The Colindres Family is in dire straits.").

37. See *Muñoz*, 144 S. Ct. at 1819 ("Visa denials are insulated from judicial review by the doctrine of consular nonreviewability.").

38. See infra note 132 and accompanying text.

39. See Merrill, supra note 30, at 1726 ("[T]hese various exercises in deference to the conclusions of others are often critical to whether the rights of individuals are sustained or denied.").

40. See Harry N. Rosenfield, Consular Non-Reviewability: A Case Study in Administrative Absolutism, 41 ABA J. 1109, 1110 (1955) (describing consular nonreviewability as an "anomaly in American jurisprudence").

application process and better align consular nonreviewability with broader immigration and administrative law—while respecting national security concerns, consular and judicial efficiency, and immigration exceptionalism.

I. THE ORIGINS OF CONSULAR NONREVIEWABILITY

Navigating the United States immigration process is notoriously difficult.[41] Yet, the consular officer's approval is an especially prominent pain point.[42] Not only are consular decisions highly subjective, but they are also nearly impossible to challenge under consular nonreviewability, which states that courts ordinarily will not "look behind" a decision.[43] Section I.A outlines Congress's immigration plenary power and how it was delegated to consular officers over time. After tracing this history, section I.B explains the mechanics of today's visa process and introduces the *Mandel* exception to consular nonreviewability. Finally, section I.C describes the application of this exception to spousal unity cases, which ultimately led to the Court's grant of certiorari in *Muñoz*.

A. *Delegation of Congress's Plenary Power to Consular Officers*

1. *Scope of the Plenary Power.* — Consular nonreviewability is rooted in the legislature's immigration plenary power—Congress's absolute authority "to make policies and rules for [the] exclusion of" noncitizens.[44] In fact, case law is clear that "[o]ver no conceivable subject is the legislative power of Congress more complete than it is" on the decision to admit or

41. See Emily C. Callan & JohnPaul Callan, The Guards May Still Guard Themselves: An Analysis of How *Kerry v. Din* Further Entrenches the Doctrine of Consular Nonreviewability, 44 Cap. U. L. Rev. 303, 306 (2016) ("[I]mmigration procedures stand as some of the most administratively burdensome applications in the body of U.S. law."); Nasim Emamdjomeh, Comment, Walking Through the U.S. Immigration System and Its Missing Right to Counsel, 59 Hous. L. Rev. 673, 677 (2022) (noting that "the U.S. immigration system is incredibly complex and confusing"); see also Steven Rattner & Maureen White, Opinion, How to Fix America's Immigration Crisis, N.Y. Times (Jan. 9, 2024), https://www.nytimes.com/interactive/2024/01/09/opinion/immigration-in-one-chart.html (on file with the *Columbia Law Review*) (describing "an underfunded immigration apparatus that is swaddled in bureaucracy, complicated beyond imagination").

42. See, e.g., Gerald L. Neuman, Discretionary Deportation, 20 Geo. Immigr. L.J. 611, 617–18 (2006) ("The arbitrariness of consuls is proverbial. Immigration lawyers generally prefer the Scylla of the adjustment of status process, despite its discretionary character, to the Charybdis of the consul.").

43. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

44. Id. at 769; see also Kerry v. Din, 576 U.S. 86, 103 (2015) (Kennedy, J., concurring) (arguing that "[t]he reasoning and holding of *Mandel* control" (citing *Mandel*, 408 U.S. at 753)); Kit Johnson, *Chae Chan Ping* at 125: An Introduction, 68 Okla. L. Rev. 3, 3–4 (2015) (defining plenary power as the idea that "any law passed by Congress with respect to immigration, even those that would be unconstitutional if applied to citizens, is not subject to judicial challenge"); Plenary, Merriam-Webster, https://www.merriam-webster.com/dictionary/plenary [https://perma.cc/RPR9-DYM3] (last visited Aug. 18, 2024) (defining plenary as "absolute" or "unqualified").

deny immigrants.[45] The plenary power is closely linked to immigration exceptionalism—the idea that "government action that would be unacceptable if applied to citizens" is permissible over noncitizens.[46] The Constitution assigns the power over immigration to the legislative branch via the Naturalization Clause, which specifies that "the Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization."[47] The Constitutional Convention incorporated this text without recorded controversy, perhaps suggesting that the Framers perceived the regulation of immigration as an obvious legislative task.[48]

The strength of the immigration plenary power comes from its philosophical and practical rationales. Philosophically, the immigration plenary power is rooted in what it means to be a nation.[49] Stemming from "ancient principles of the international law of nation-states,"[50] "[t]he power to admit or exclude is a sovereign prerogative."[51] Indeed, the ability to "regulate the flow of non-citizens entering the country . . . is an inherent power of any sovereign nation."[52] This idea traces as far back as the Roman Empire and "received recognition during the Constitutional Convention."[53] Practically, a strong immigration power helps maintain a

---

45. *Mandel*, 408 U.S. at 766 (internal quotation marks omitted) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

46. See David S. Rubenstein & Pratheepan Gulasekaram, Immigration Exceptionalism, 111 Nw. U. L. Rev. 583, 584–85 (2017); see also Peter H. Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 1 (1984) ("Immigration has long been a maverick, a wild card, in our public law.").

47. U.S. Const. art. I, § 8, cl. 4; see Leon Wildes, Review of Visa Denials: The American Consul as 20th Century Absolute Monarch, 26 San Diego L. Rev. 887, 891 (1989) ("Congress's enumerated powers over foreign commerce, naturalization, and war powers, supplemented by the 'necessary and proper' clause, were first cited by the Court in 1892 as the sources of the implied congressional power . . . .").

48. See James E. Pfander & Theresa R. Wardon, Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency, 96 Va. L. Rev. 359, 385–86 (2010) ("The Convention did not take any special notice of the provision at that time but simply submitted it to the Committee of Detail . . . .").

49. See Kim, supra note 29, at 126 (noting that the immigration plenary power is crucial to "democratic self-determination").

50. *Mandel*, 408 U.S. at 765; see also Saavedra Bruno v. Albright, 197 F.3d 1153, 1158 n.4 (D.C. Cir. 1999) (citing Edwin M. Borchard, Diplomatic Protection of Citizens Abroad or the Law of International Claims 33, 44–48 (1915)).

51. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (internal quotation marks omitted) (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)).

52. Shawn E. Fields, The Unreviewable Executive? National Security and the Limits of Plenary Power, 84 Tenn. L. Rev. 731, 737 (2017); see also Schuck, supra note 46, at 1 (noting that "a country's power to decide unilaterally who may enter its domain . . . has been regarded as an essential precondition of its independence and sovereignty").

53. *Saavedra Bruno*, 197 F.3d at 1158; see also 4 The Writings of James Madison 150 (Gaillard Hunt ed., 1903) (quoting Gouverneur Morris as saying during the Convention that "every Society from a great nation down to a club has the right of declaring the conditions on which new members should be admitted").

consistent approach to foreign affairs and national security.[54] To promote uniform policymaking, the government must "speak with one voice."[55] Vesting exclusive control over immigration with Congress, therefore, permits the United States to maintain a consistent approach to foreign relations.[56]

The plenary power lay mostly dormant during the United States's first century because "Congress did not meaningfully restrict immigration . . . until the 1880s."[57] After Congress passed a series of acts excluding and expelling Chinese laborers, the Supreme Court considered the scope of Congress's immigration power in *Chae Chan Ping v. United States* (*The Chinese Exclusion Case*).[58] In upholding the restrictive acts, the Court leaned on the logic of the plenary power, reasoning that "[j]urisdiction over its own territory . . . is an incident of every independent nation. . . . If it could not exclude [noncitizens] it would be to that extent subject to the control of another power."[59] Therefore, the ability to enter the United States "is held at the will of the government, revocable at any time, at its pleasure."[60] Crucially for the development of consular nonreviewability, the Court concluded that evaluations of Congress's immigration decisions "are not questions for judicial determination" because "the political department of our government . . . is alone competent to act upon the subject."[61] Thus, the Court concluded that Congress has absolute authority

---

54. See Fields, supra note 52, at 733–34 (explaining that the immigration plenary power is justified by the "recognition of the linkage between foreign affairs and national security . . . and immigration controls"); Kim, supra note 29, at 127 (highlighting the "need for a uniform policy toward foreign nations").

55. Kim, supra note 29, at 127; see also David A. Martin, Why Immigration's Plenary Power Doctrine Endures, 68 Okla. L. Rev. 29, 37 (2015) (identifying federalism as a justification for the immigration plenary power and noting the "requirement that the nation speak with one voice on the world stage" as opposed to individual state voices).

56. See Kim, supra note 29, at 127; see also Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018) (internal quotation marks omitted) (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)) (reasoning that immigration decisions "may implicate relations with foreign powers or involve classifications defined in the light of changing political and economic circumstances"); *Saavedra Bruno*, 197 F.3d at 1159 ("[T]he power to exclude [noncitizens] [is] . . . 'necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers . . . .'" (quoting Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889))).

57. Kim, supra note 29, at 95 n.85 (citing Gerald L. Neuman, The Lost Century of American Immigration Law (1776–1875), 93 Colum. L. Rev. 1833, 1834–35 (1993)); see also U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1823 (2024) (explaining that "[t]he United States had relatively open borders until the late 19th century"); Wildes, supra note 47, at 890 (noting that "Congress's first effort to restrict immigration" came in 1862 via a law "prohibiting the importation of [Chinese] slave labor").

58. 130 U.S. at 582.

59. Id. at 603–04.

60. Id. at 609.

61. Id.

over immigration matters that, when exercised, is not subject to judicial interference.[62]

Because it upheld racist immigration policies, *The Chinese Exclusion Case* is highly criticized and "commonly analogized to other 'anti-canon' cases like *Plessy v. Ferguson*."[63] Unlike *Plessy*, however, *The Chinese Exclusion Case* remains extremely influential, especially as a defense of consular nonreviewability.[64]

2. *Delegation of the Plenary Power.* — Understanding the plenary power's continued role in consular decisions requires exploring how this power was delegated from Congress to the executive branch and then from the executive branch to consular officers. *The Chinese Exclusion Case* placed the immigration plenary power with Congress, emphasizing that decisions the government makes "through its *legislative department* . . . [are] conclusive upon the judiciary."[65] Four years after *The Chinese Exclusion Case*, the Court "held that Congress had the power to delegate its immigration powers . . . and . . . much of its immunity from judicial scrutiny" to the Executive branch.[66]

In *Nishimura Ekiu v. United States*, the Court explained that Congress could delegate investigation and factfinding on immigration matters to either the courts or to executive officers.[67] If Congress assigned these duties to executive officers, courts could not intervene unless directed to

---

62. Id.; see also Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) ("It is not within the province of the judiciary to [reverse immigration decisions] . . . in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government.").

63. See Fields, supra note 52, at 739 (footnote omitted); see also Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. Rev. 1, 12 (1998) (concluding that the plenary power "has been so thoroughly undermined by its creation to service white supremacy, changes in international law, and changes in the Court's understanding of judicial review, that there is virtually nothing left of the foundational cases"); Michael Scaperlanda, Scalia's Short Reply to 125 Years of Plenary Power, 68 Okla. L. Rev. 119, 121 & n.10 (2015) (arguing that *The Chinese Exclusion Case* was a "misinterpretation of the 'ancient principles of international law of the nation-states'" (quoting Fiallo v. Bell, 430 U.S. 787, 797 (1977))); Peter J. Spiro, Opinion, Trump's Anti-Muslim Plan Is Awful. And Constitutional., N.Y. Times (Dec. 8, 2015), https://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html (on file with the *Columbia Law Review*) ("Unlike other bygone constitutional curiosities that offend our contemporary sensibilities, the Chinese Exclusion case has never been overturned.").

64. See, e.g., Muñoz v. U.S. Dep't of State, 73 F.4th 769, 775 (9th Cir. 2023) (declining to hear en banc) (Bumatay, J., dissenting), rev'd, 144 S. Ct. 1812 (2024); Baan Rao Thai Rest. v. Pompeo, 985 F.3d 1020, 1026 (D.C. Cir. 2021) (same).

65. *The Chinese Exclusion Case*, 130 U.S. at 606 (emphasis added); see also Kim, supra note 29, at 94 (noting that the immigration plenary power "was identified as a power belonging to Congress" in *The Chinese Exclusion Case*).

66. Wildes, supra note 47, at 892.

67. 142 U.S. at 660; see also Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (affirming that regulations established by Congress could "be executed by the executive authority").

by Congress.[68] When Congress delegated authority to the executive branch, the executive branch inherited the "powers expressly conferred by [C]ongress."[69] The Court reasoned that executive decisions made under this authority "are due process of law."[70] *Nishimura Ekiu* extended the immigration plenary power to administrative officials executing Congress's directions.[71]

Still, *Nishimura Ekiu*'s deference was limited—especially compared to what courts afford consular officers today.[72] During the late 1800s, "immigration officials . . . enjoyed only limited statutory authority," and "Congress was understood to make all substantive rules."[73] Yet, after the Court extended judicial deference to executive and administrative officials making immigration decisions, the jurisprudence was primed for a "historical accident" that led to unchecked consular authority.[74]

In 1917, World War I security concerns prompted the United States to institute its first visa requirement.[75] President Woodrow Wilson issued an executive order instructing consular officers to verify United States passports and issue visas.[76] The consular officer's role remained purely advisory; the authority to decide if a noncitizen would be admitted "rest[ed] with the immigration authorities in the United States."[77] Consular officers were only responsible for providing "due warning" when

68. *Nishimura Ekiu*, 142 U.S. at 660 ("[N]o other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence . . . .").

69. Id.

70. Id.

71. See Kim, supra note 29, at 94 (stating that in rejecting *Nishimura*'s challenge of "the *agency's* conclusion . . . , the Supreme Court extended the plenary power doctrine to immunize the administrative finding").

72. Compare id. at 95, with infra section II.C.1.

73. Kim, supra note 29, at 95.

74. Rosenfield, supra note 40, at 1181.

75. See Wildes, supra note 47, at 892; see also General Instructions from the Acting Secretary of State to the Diplomatic and Consular Officers (July 26, 1917), *in* Papers Relating to the Foreign Relations of the United States, 1918, Supplement 2, The World War 794 (Joseph V. Fuller & Tyler Dennett eds., 1933) [hereinafter Joint Order] ("For the proper defense of the United States in the present war it is imperative that complete information be furnished . . . in order that it may be possible to control travel and prevent the admission of those whose attitude might be inimical and whose presence might constitute a danger.").

76. Exec. Order No. 2619, *in* Papers Relating to the Foreign Relations of the United States, 1918, Supplement 2, The World War 791–92 (Joseph V. Fuller & Tyler Dennett eds., 1933); see also Joint Order, supra note 76, at 796 (mandating that "[e]ach passport of [a noncitizen] must be visaed by an American consul").

77. Joint Order, supra note 75, at 795; see also Saavedra Bruno v. Albright, 197 F.3d 1153, 1156 (D.C. Cir. 1999) (explaining that consuls initially played an advisory role in the visa process, "leaving the determination of excludability to immigration officers at the port of entry").

a prospective entrant was "liable to be excluded" under immigration laws, but they had "no power to exclude a prospective immigrant."[78]

After the war, the government lifted many security measures,[79] but the visa requirement remained—perhaps because it was financially lucrative.[80] In 1921, Congress's appropriation of diplomatic and consular services expressly mentioned "requiring passports and vis[a]s,"[81] even though Congress had never before "require[d] these documents."[82] Three years later, with the Immigration Act of 1924, Congress statutorily codified the visa requirement for the first time.[83]

In addition to codifying the visa requirement, the Immigration Act of 1924 elevated the role of consular officers in the visa process.[84] Whereas officers had played a limited, advisory role before the Act, consular officers under the new scheme had "responsibility for determining the admissibility" of immigrants.[85] Congress made this change to solve a problem that had emerged in the immigration process: Because consular officers could only refuse visas for a narrow range of reasons,[86] there were "large numbers of foreigners making the arduous trip to the United States only to be detained at the border and then excluded."[87] In response, Congress "transferr[ed] the responsibility for determining . . . admissibility . . . from the Secretary of State to consular officers."[88] In less than ten years, the visa requirement emerged and settled into the domain of consular officers.

---

78. Joint Order, supra note 75, at 794.

79. See Administrative Timeline of the Department of State 1920–1929, Off. Historian, https://history.state.gov/departmenthistory/timeline/1920-1929 [https://perma.cc/8S9X-APKN] (last visited Aug. 18, 2024) (describing a March 3, 1921, "Joint Resolution terminating various wartime emergency laws . . . [and] travel restrictions imposed during World War I").

80. See Wildes, supra note 47, at 893 (arguing that "the visa requirement would have been phased out . . . were it not for the fact that a fee of one dollar was then being charged").

81. Expenses, Passport Control Act, ch. 113, 41 Stat. 1217 (1921) (repealed 1952).

82. Wildes, supra note 47, at 894 ("Despite the fact that the 1918 Act did not mention passports or visas, let alone require these documents, the 1921 Act extending it did.").

83. Immigration Act of 1924, sec. 2, 43 Stat. 153 (codified at 8 U.S.C. § 202 (2018)); see also Rosenfield, supra note 40, at 1109 (noting that the visa requirement "was written into the basic immigration law in 1924"); Wildes, supra note 47, at 894 ("The requirement that [noncitizens] seeking admission to the United States possess visas issued by United States consular officers first made its permanent entry on the statute books with the Immigration Act of 1924.").

84. See Saavedra Bruno v. Albright, 197 F.3d 1153, 1156–57 (D.C. Cir. 1999).

85. 3 Green Haywood Hackworth, Digest of International Law 742 (1942). For a detailed account of this development, see generally id. at 741–50. The only reasons a consular officer could refuse a visa were if immigration quotas had been reached or the applicant fit within one of the conditions specified in the 1918 Act. Id. at 741.

86. See 3 Hackworth, supra note 85, at 741–50.

87. *Saavedra Bruno*, 197 F.3d at 1156.

88. Id.

Shortly after Congress delegated visa decisionmaking to consular officers, applicants began challenging consular authority.[89] Courts largely adopted and extended the immigration plenary power when interpreting the consular officer's role.[90] In 1926, a noncitizen seeking to visit her children in New York City protested the visa requirement.[91] The Second Circuit denied Ms. London's challenge, holding that the visa requirement was valid.[92] The court continued, rejecting Ms. London's argument that providing a visa was a "ministerial act, which the consul was bound to perform."[93] Instead, the Second Circuit found that because the visa process required "some determination of fact[,] . . . [w]hether the consul has acted reasonably . . . [was] beyond the jurisdiction of the court."[94] As a result, consular officers received the judicial acquiescence characteristic of the immigration plenary power.[95]

3. *Height (and Decline?) of the Plenary Power.* — In the 1950s, the Supreme Court decided two cases, *United States ex rel. Knauff v. Shaughnessy*[96] and *Shaughnessy v. United States ex rel. Mezei*,[97] that represent the height of the immigration plenary power.[98] *Knauff* began as a love story: Ellen and Kurt Knauff met and married while they were working as civilian employees of the United States in Germany.[99] Although he was a United States citizen, she was not.[100] Unfortunately for the couple, when she tried to enter the United States, immigration officers "recommended

89. See United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929); United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927).

90. See Baca, supra note 14, at 596 ("[C]onsular nonreviewability[] is deeply rooted in the legislative and the executive branches' plenary power over immigration matters.").

91. *London*, 22 F.2d at 289. The preceding District Court opinion provides a bit more context: Ms. London came with three other visitors who had similarly had their visas denied, in an attempt to "present[] a test case" to the visa requirement and consular decision process. United States ex rel. Johanson v. Phelps, 14 F.2d 679, 679, 681 (D. Vt. 1926).

92. *London*, 22 F.2d at 290.

93. Id.; see also Wildes, supra note 47, at 895 (labeling this language "clearly dicta" and noting that the court's only citation was 3 Moore's Digest 996, "more a work on diplomatic history than what would be considered a law book today").

94. *London*, 22 F.2d at 290.

95. Id.; see also United States ex rel. Ulrich v. Kellogg, 30 F.2d 984, 986 (D.C. Cir. 1929) (holding that "the authority to issue a visa is committed to 'consular' officers"). But see Wildes, supra note 47, at 897 (explaining that *Kellogg* "actually review[ed] and uph[eld] the substantive merits of the consul's determination to deny the visa").

96. 338 U.S. 537 (1950), superseded by statute, 66 Stat. 279, 280, as recognized in Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1980 (2020).

97. 345 U.S. 206 (1953), superseded by statute, 66 Stat. 279, 280, as recognized in *Thuraissigiam*, 140 S. Ct. 1959.

98. Kim, supra note 29, at 87 ("By the 1950s . . . the plenary power principles extended so far as to sustain even the prolonged and potentially permanent detention of noncitizens without hearing.").

99. *Knauff*, 338 U.S. at 539.

100. Id.

that she be permanently excluded."[101] Reviewing this decision, the Supreme Court affirmed that the United States could exclude Mrs. Knauff solely based on the Attorney General's finding.[102] The Court reasoned that a prospective immigrant "may not [seek admission] under any claim of right" because admission "is a privilege granted . . . only upon such terms as the United States shall prescribe."[103] The Court referenced the plenary power, citing *Nishimura Ekiu* and explaining that "exclusion . . . is a fundamental act of sovereignty."[104] Because immigration is a privilege, prospective immigrants cannot challenge the procedures outlined by Congress.[105] These "procedure[s] . . . [are] due process as far as [the noncitizen] . . . is concerned."[106]

In *Mezei*, the Court went further, holding that Congress could permissibly detain a noncitizen indefinitely without a hearing.[107] When Mr. Mezei attempted to enter the United States, immigration officers "temporarily excluded" him.[108] After confidential information revealed that Mr. Mezei was a security risk, the Attorney General decided to exclude him permanently from the country.[109] When no other country welcomed him, he remained in detention.[110] The Court declined to review the Attorney General's decision, concluding that a "respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."[111] *Mezei* and *Knauff* characterize the apex of the immigration plenary power: By denying noncitizens any entitlement to enter the country, the Court foreclosed judicial review of their mistreatment.[112]

These cases also defended the delegation of the plenary power to the executive branch.[113] *Knauff* began with the reasoning articulated in

---

101. Id.

102. Id. at 547.

103. Id. at 542.

104. Id. (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)).

105. Id. at 544.

106. Id.

107. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 214–15 (1953) (concluding that "the Attorney General may lawfully exclude respondent without a hearing as authorized by" Congress); see also Kim, supra note 29, at 87 (noting that *Mezei* affirmed "prolonged and potentially permanent detention" of noncitizens).

108. *Mezei*, 345 U.S. at 208.

109. Id.

110. Id. at 209 ("In short, respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in."); see also Kim, supra note 29, at 87 ("Because no other country was willing to repatriate him, Mezei was placed in detention . . . .").

111. *Mezei*, 345 U.S. at 216 (citing Harisiades v. Shaughnessy, 342 U.S. 580, 590–91 (1952)).

112. See Kim, supra note 29, at 87 ("By the 1950s . . . the plenary power principles extended so far as to sustain even the prolonged and potentially permanent detention of noncitizens without hearing.").

113. See *Mezei*, 345 U.S. at 210–11 n.7 ("That delegation of authority has been upheld."); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950).

Nishimura Ekiu: Given that the executive had been properly delegated authority to carry out immigration procedures, "[t]he action of the executive officer . . . [was] final and conclusive"—just as it would be if Congress were the actor.[114] The Court expanded upon this logic, reasoning that the executive branch's right to exclude noncitizens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[115] Because the executive branch was acting with this dual authority, there was limited room for judicial scrutiny.[116]

In the years since *Knauff* and *Mezei*, the importance of the immigration plenary power has arguably waned.[117] "Today, federal courts routinely exercise close scrutiny over immigration decisions, often without mentioning plenary power at all."[118] Scholars point to different phenomena to explain this decline. One theory "attribute[s] [the decline] to broader public law developments expanding the scope of constitutionally protected individual rights."[119] Since *Mathews v. Eldridge* established a "flexible" due process,[120] courts have extended procedural protections in immigration matters.[121] Another theory posits that the

---

114. *Knauff*, 338 U.S. at 543 (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892)).

115. Id. at 542.

116. See Josh Blackman, Five Unanswered Questions From *Trump v. Hawaii*, 51 Case W. Rsrv. J. Int'l L. 139, 150 (2019) ("[B]ecause the President is acting with a combination of his own inherent powers, combined with the co-extensive powers delegated from Congress, judicial scrutiny is at a minimum."). Ironically, Justice Robert Jackson—who developed the tripartite framework for analyzing executive power that Blackman referenced—dissented in *Knauff*. He objected not to "the constitutional power of Congress to authorize immigration authorities" to make decisions but to the "abrupt and brutal exclusion of the wife of an American citizen without a hearing." *Knauff*, 338 U.S. at 550 (Jackson, J., dissenting). His dissent raised a question that remained unanswered until *United States Department of State v. Muñoz*: Do United States citizens have a due process right to live in the United States with their spouse? See 144 S. Ct. 1812, 1822–23 (2024) (holding that there is no protected liberty interest in spousal unity).

117. See Johnson, Immigration in the Supreme Court, supra note 29, at 61 ("[T]he trend . . . suggests that the plenary power doctrine . . . is once again heading toward its ultimate demise.").

118. Kim, supra note 29, at 87–88.

119. Id. at 79; see also McKanders, supra note 29, at 97 (highlighting how immigration jurisprudence "privilege[s] borders over our most sacred legal commitments—fundamental rights under the constitution and adherence to rule of law" (emphasis omitted)); Rubenstein & Gulasekaram, supra note 46, at 651–54 (suggesting a holistic approach to immigration exceptionalism).

120. 424 U.S. 319, 334 (1976) (internal quotation marks omitted) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

121. See Joseph Landau, Due Process and the Non-Citizen: A Revolution Reconsidered, 47 Conn. L. Rev. 879, 882 (2015) ("[T]he '*Mathews*ization' of immigration . . . is laying a new foundation of constitutional due process that has produced, and will likely continue to produce, greater and more concrete protections . . . ."); see also T. Alexander Aleinikoff, Detaining Plenary Power: The Meaning and Impact of *Zadvydas v. Davis*, 16 Geo. Immigr. L.J. 365, 366 (2002) (highlighting Justice Stephen Breyer's statement "that Congress'

plenary power's decline is driven by delegation concerns: While courts have continued "to defer to the immigration decisions of Congress and the President," they have "den[ied] such deference to lower-level administrative officials."[122] This theory is consistent with the rising fear of administrative agencies and the corresponding movement revitalizing the nondelegation doctrine.[123]

Despite talk of its demise, the plenary power remains stalwart in at least one aspect of immigration law: consular visa decisionmaking.[124] Cases that have been heavily criticized,[125] such as *The Chinese Exclusion Case*[126] and *Knauff*,[127] continue to sway consular nonreviewability jurisprudence.[128]

B. *The Visa Process, Consular Nonreviewability, and the* Mandel *Exception*

1. *The Visa Process.* — Immigrating to the United States and obtaining lawful permanent resident status almost always requires navigating the visa process.[129] The State Department issues both nonimmigrant visas (for

---

immigration power 'is subject to important constitutional limitations'" and pondering its significance (quoting Zadvydas v. Davis, 533 U.S. 678, 695 (2001))); Chin, supra note 63, at 54–56 ("The plenary power of today is different from the plenary power of the Gilded Age."); Peter L. Markowitz, Deportation is Different, 13 U. Pa. J. Const. L. 1299, 1301 (2011) (highlighting how *Padilla v. Kentucky* offered a "modern, more refined, and ultimately more persuasive understanding of deportation [that] will allow courts to . . . plot a course for the more robust judicial protection of the rights of immigrants").

122. Kim, supra note 29, at 125.

123. Compare Gundy v. United States, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting) ("The legislative cannot transfer the power of making laws to any other hands . . . ." (internal quotation marks omitted) (quoting Locke, supra note 30, § 141)), with Kim, supra note 29, at 96 ("The Immigration and Nationality Act . . . delegates exceedingly broad authority to develop policies governing the admission, detention, and deportation of noncitizens to a vast and sprawling immigration bureaucracy . . . .").

124. See, e.g., Kerry v. Din, 576 U.S. 86, 86 (2015) (highlighting the "particular force" of the plenary power in upholding the consular officer's decision); see also Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (noting that because "'[t]he power to admit or exclude [noncitizens] is a sovereign prerogative' . . . the Constitution gives 'the political departments of the government' plenary authority to decide which [noncitizens] to admit" (first quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982); then quoting Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892))); Kleindienst v. Mandel, 408 U.S 753, 769–70 (1972) (affirming that the "plenary congressional power to make policies and rules for exclusion of [noncitizens] has long been firmly established").

125. See supra note 63 and accompanying text.

126. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

127. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

128. See, e.g., U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1820 (2024) ("The Judicial Branch has no role to play 'unless expressly authorized by law.' . . . [A]s a rule, the federal courts cannot review [visa] decisions. This principle is known as the doctrine of consular nonreviewability." (footnote omitted) (quoting *Knauff*, 338 U.S. at 543)); Baan Rao Thai Rest. v. Pompeo, 985 F.3d 1020, 1026 (D.C. Cir. 2021) ("[C]onsular reviewability is no procedural matter. . . . Accordingly, it is 'a power to be exercised exclusively by the political branches of government' . . . ." (quoting *The Chinese Exclusion Case*, 130 U.S. at 609)).

129. See 8 U.S.C. § 1181 (2018) (carving out small exceptions for "returning resident immigrants" and people "admitted as refugees").

people seeking to enter the United States temporarily) and immigrant visas (for those hoping to establish permanent residence).[130] The majority of immigrant visas are bifurcated into two categories: employment based and family sponsored.[131] In 2022, of over a million people receiving lawful permanent residence status, roughly forty percent did so as immediate relatives of U.S. citizens.[132] These numbers represent the successful few: those who successfully navigated the complex and lengthy application process.[133] As Mr. Colindres's story showcases, many people are not so lucky.[134]

The final hurdle to securing a visa is a consular interview.[135] The consular officer has three options: "approve the visa, request more information from the applicant, or deny the visa."[136] When denying an application, the officer has a statutory duty to cite the legal provision that made the applicant ineligible—except when the reason is a terrorism or national security concern.[137] Section 1182 enumerates criteria that disqualify an applicant from admission.[138] Some of these provisions are specific; section 1182(a)(6)(E), for example, bars people who have "encouraged, induced, assisted, abetted, or aided [others] . . . to enter the United States in violation of law."[139] Other criteria are broad, catch-all clauses—such as the provision that disqualified Mr. Colindres ("enter[ing] . . . to engage solely, principally, or incidentally in . . . any other unlawful activity").[140]

After a visa is denied, the applicant has limited recourse. Under State Department regulations, supervisory officers review all denials.[141] To the

130. Directory of Visa Categories, Bureau Consular Affs., https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html [https://perma.cc/AHE2-FQSN] (last visited Aug. 16, 2024).

131. Id.

132. See Off. of Homeland Sec. Stats., DHS, 2022 Yearbook of Immigration Statistics 18 tbl.6 (2023), https://ohss.dhs.gov/sites/default/files/2024-03/2023_0818_plcy_yearbook_immigration_statistics_fy2022.pdf [https://perma.cc/WL3D-HKXJ] (showing that 238,632 people secured status based on a U.S. citizen spouse in 2022).

133. See Baca, supra note 14, at 599–601 (outlining the process of securing a visa).

134. See supra notes 10–16 and accompanying text.

135. See 8 U.S.C. § 1101(a)(16) (2018); see also Baca, supra note 14, at 601 ("The interview with a consular officer is the last step in the series of administrative procedures.").

136. Baca, supra note 14, at 601.

137. 8 U.S.C. § 1182(b)(1) (stating that when denying a visa application, "the officer shall provide the [noncitizen] with a timely written notice that (A) states the determination, and (B) lists the specific provision or provisions of law under which the [noncitizen] is inadmissible"); id. § 1182(b)(3) (stating that this duty does not apply to cases involving terrorism or national security).

138. Id. § 1182(a).

139. Id. § 1182(a)(6)(E).

140. Id. § 1182(a)(3)(A)–(a)(3)(A)(ii); see also *Colindres* Petition, supra note 12, at 6.

141. Baca, supra note 14, at 602.

extent "these procedures actually occur,"[142] they are obscured from the applicant.[143] Even if applicants somehow discovered noncompliance, they would have no ability to challenge it because the review requirement is only a State Department policy and is not legally binding.[144] An applicant is entitled to present evidence disputing the consular officer's finding within one year of the denial,[145] but, given the subjectivity and limited visibility into visa decisions, applicants—such as Mr. Colindres—can only speculate as to what could change the officer's mind.[146] Applicants rely on the mercy of their consular officer's discretion.

2. *Consular Nonreviewability's Limited Exception.* — Given the sizeable influence wielded by consular officers, their almost complete immunity from judicial review is surprising.[147] Under consular nonreviewability, courts rarely "look behind" an officer's decision.[148] For the past fifty years, courts have recognized one small exception.[149]

In *Kleindienst v. Mandel*, the Court faced the question of whether visa decisions could be reviewed when they allegedly violated the rights of American citizens.[150] Ernest Mandel was a Belgian journalist and a self-described "revolutionary Marxist."[151] Several universities and conferences invited him to speak, but as a communist, he could not obtain a visa.[152] U.S. citizen professors claimed that the visa denial violated their First Amendment rights because they were "prevent[ed] . . . from hearing and meeting with Mandel in person."[153] The Court affirmed what it had said in

---

142. Id.; see also U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1831 (2024) (Sotomayor, J., dissenting) ("Supervisors are required by the State Department to review a certain percentage of visa denials but often fail to do so."); Callan & Callan, supra note 41, at 313 (noting that "officers are not following the U.S. Department of State's Foreign Affairs Manual").

143. The applicant is not involved in the supervisory review process. See U.S. Dep't of State, 9 Foreign Affairs Manual 504.11-3(A)(2)(a) (2023) [hereinafter Foreign Affairs Manual] (establishing standard procedures of review that do not involve the applicant).

144. See id. ("The CFR does not mandate reviewing . . . refusals, but CA considers that to be a prudent practice and leaves to supervisors' discretion . . . ."); see also Baca, supra note 14, at 602 n.41 (questioning whether a "court would find a document like this legally binding").

145. Baca, supra note 14, at 603 ("[T]he State Department will consider any new evidence . . . within one year of the visa denial.").

146. *Colindres* Petition, supra note 12, at 6; see also Baca, supra note 14, at 603 (explaining that submitting additional evidence "is possible only when the applicant knows the basis for the denial").

147. See, e.g., Wildes, supra note 47, at 888 (lamenting consular nonreviewability as "one of the major outrages of the American immigration system").

148. Kleindienst v. Mandel, 408 U.S 753, 770 (1972).

149. See Baca, supra note 14, at 608 ("Despite longstanding adherence to consular nonreviewability, in 1972, the Supreme Court in *Mandel* first recognized that a denial of a visa waiver might sometimes merit limited judicial review.").

150. *Mandel*, 408 U.S. at 754.

151. Id. at 756 (internal quotation marks omitted) (quoting Ernest Mandel, Revolutionary Strategy in the Imperialist Countries (1969)).

152. Id. at 757–60.

153. Id. at 760.

Knauff: "[A]s an unadmitted and nonresident [noncitizen], [Mandel] had no constitutional right of entry."[154] The Court reiterated the "plenary congressional power to make policies and rules for exclusion" and noted that the power had been "delegated conditional[ly] . . . to the Executive."[155] The Court concluded that when a decision is made for "a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against" other rights.[156] Although the Court affirmed Mandel's denial, the decision birthed a narrow exception: A visa denial that "allegedly burdens the constitutional rights of a U.S. citizen" can be reviewed, but the review is limited to whether the administrator gave a "'facially legitimate and bona fide' reason."[157]

C. *Applying* Mandel *to Spousal Unity Cases*

Although *Mandel* established a carve-out to consular nonreviewability, the Court provided slim guidance on when it applied.[158] One area in which litigation ensued was whether a noncitizen's visa denial could implicate their spouse's fundamental rights.[159] Over the next forty years, a circuit split developed on the topic.[160]

In 2015, the Supreme Court granted certiorari to address whether a noncitizen's visa denial burdened their spouse's liberty interests.[161] Fauzia Din, a U.S. citizen, sued the government for denying the visa of her Afghan husband, Kanishka Berashk.[162] Mr. Berashk's consular officer cited a

---

154. Id. at 762.

155. Id. at 769–70.

156. Id. at 770.

157. Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) (quoting *Mandel*, 408 U.S. at 769); see also Allen v. Milas, 896 F.3d 1094, 1105 (9th Cir. 2018) ("Rejecting Mandel's request for an 'arbitrary and capricious' standard of review, the Court recognized an exception to the rule of consular nonreviewability for review of constitutional claims." (citing *Mandel*, 408 U.S. at 760)); cf. Callan & Callan, supra note 41, at 312 (noting that the *Mandel* exception exists "only because *later* courts have attributed an exception").

158. See Baca, supra note 14, at 611 ("The Court neither limited nor elaborated on what other rights would trigger review.").

159. See, e.g., Burrafato v. U.S. Dep't of State, 523 F.2d 554, 555 (2d Cir. 1975).

160. Compare id. (rejecting plaintiff's claim that her husband's visa denial violated her fundamental rights), Udugampola v. Jacobs, 795 F. Supp. 2d 96, 105 (D.D.C. 2011) ("Courts have repeatedly held that these constitutional rights are not implicated when one spouse is removed or denied entry into the United States . . . ." (citing Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958))), and Hermina Sague v. United States, 416 F. Supp. 217, 220 (D.P.R. 1976) (finding that "there is no constitutional right of a citizen spouse, who voluntarily chooses to marry [a noncitizen] outside the jurisdiction of the United States, to have her [noncitizen] spouse enter the United States"), with Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008) (claiming that "[f]reedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause"). For a thorough account of these cases, consider Baca, supra note 14, at 611–16.

161. Kerry v. Din, 576 U.S. 86, 90 (2015).

162. Id. at 88.

statute for his inadmissibility "but provided no further explanation."[163] The statute, 8 U.S.C. § 1182(a)(3)(B), bars people who have "engaged in a terrorist activity" or have some connection to terrorism from receiving visas.[164] The Ninth Circuit recognized that Din had a protected liberty interest in Mr. Berashk's visa decision and held that the consular officer's citation did not constitute a "facially legitimate ground for denying Berashk's visa."[165] The Supreme Court granted certiorari to consider "whether the denial of Berashk's visa application deprived Din of" her liberty interests[166] and if so, "whether the reasons given by the Government satisf[ied] *Mandel*'s 'facially legitimate and bona fide' standard."[167]

The Court failed to reach a majority.[168] Justice Antonin Scalia, joined by two other justices, held that citizens have no "constitutional right to live in the United States with [their] spouse."[169] Justice Anthony Kennedy, joined by Justice Samuel Alito, concurred in the judgment, resolving the case on narrower grounds.[170] Justice Kennedy reasoned that, assuming that there was a protected interest in spousal unity, the consular officer's citation had satisfied due process because it "specifie[d] discrete factual predicates."[171] Without a clear holding, the spousal-unity circuit split persisted unresolved.[172]

---

163. Id. at 90.

164. 8 U.S.C. § 1182(a)(3)(B) (2018). Mr. Berashk previously worked a civil service position within the Taliban-controlled Afghanistan government. *Din*, 576 U.S. at 88.

165. Din v. Kerry, 718 F.3d 856, 863 (9th Cir. 2013).

166. *Din*, 576 U.S. at 90.

167. Id. at 104 (Kennedy, J., concurring in the judgment).

168. Id. at 88 (plurality opinion).

169. Id.

170. Id. at 102 (Kennedy, J., concurring in the judgment) ("Today's disposition should not be interpreted as deciding whether a citizen has a protected liberty interest in the visa application of her [noncitizen] spouse. The Court need not decide that issue . . . .").

171. Id. at 105.

172. The *Din* Court also avoided opining on consular nonreviewability. See Kate Aschenbrenner Rodriguez, Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence, 86 U. Cin. L. Rev. 215, 227–28 (2018). Despite briefing by each side on the issue, "[n]one of the Court's opinions . . . argued strongly in favor of [consular nonreviewability]." Id. at 227; see also Brief for the Petitioners at 15, *Din*, 576 U.S. 86 (No. 13-1402), 2014 WL 6706838 (contending that judicial review cannot "be reconciled with the deeply rooted doctrine of consular nonreviewability"). In fact, a majority of the justices "were engaged in some level of review." Aschenbrenner Rodriguez, supra, at 227. The Supreme Court did not explicitly mention consular nonreviewability until 2018, when it adjudicated *Trump v. Hawaii*. 138 S. Ct. 2392 (2018).

II. CONSULAR NONREVIEWABILITY'S BRIEF DECLINE AND RAPID RESURGENCE

Following *Din*, disagreement continued among circuit courts on whether U.S. citizens had a protected interest in spousal unity.[173] This circuit split led to the Supreme Court's grant of certiorari in *United States Department of State v. Muñoz* to reconsider the question presented in *Din*.[174] Section II.A compares two post-*Din* circuit court decisions arising out of the D.C. and Ninth Circuits. Section II.B examines the *Muñoz* Supreme Court decision, explaining its implications for spousal unity and the *Mandel* exception. Section II.C concludes by highlighting the consequences of the *Muñoz* decision, arguing that unfettered consular discretion jeopardizes the fairness and integrity of the immigration system and is inconsistent with broader immigration and administrative law.

A. *The Spousal Unity Circuit Split After* Din

1. *The D.C. Circuit Applies Consular Nonreviewability.* — After a consular officer denied Mr. Colindres's visa application by citing to a vague statute, the Colindres family searched for answers.[175] In 2023, the D.C. Circuit heard their case.[176] The court first addressed whether Mrs. Colindres had a protected interest in her husband's visa application.[177] Citing "Congress's 'long practice of regulating spousal immigration,'" the D.C. Circuit concluded that "citizens have no fundamental right to live in America with their spouses."[178] Put simply, the court determined that there is no protected liberty interest in spousal unity.

But even if Mrs. Colindres had such an interest, the court concluded that her claim would still fail because the consular officer had provided a "facially legitimate and bona fide reason."[179] The D.C. Circuit explained that "[t]o survive judicial review, the Government need only cite a statute listing a factual basis for denying a visa."[180] The consular officer found that Mr. Colindres was ineligible under § 1182(a)(3)(A)(ii), which declares people "seek[ing] to enter the United States to engage [in] . . . any other unlawful activity" inadmissible for a visa.[181] The D.C. Circuit conceded that this statute did not "specify the type of lawbreaking that will trigger a visa

---

173. Compare Colindres v. U.S. Dep't of State, 71 F.4th 1018, 1022–23 (D.C. Cir. 2023) (finding no protected interest), with Muñoz v. U.S. Dep't of State, 50 F.4th 906, 918, 921 (9th Cir. 2022), rev'd, 144 S. Ct. 1812 (2024) (recognizing a protected interest).

174. See U.S. Dep't of State v. Muñoz, 144 S. Ct. 679 (2024) (mem.).

175. See supra notes 1–16 and accompanying text.

176. See *Colindres*, 71 F.4th 1018.

177. Id. at 1021–24.

178. Id. at 1023 (quoting Kerry v. Din, 576 U.S. 86, 95 (2015)).

179. Id. at 1024 (internal quotation marks omitted) (quoting Kleindienst v. Mandel, 408 U.S 753, 770 (1972)).

180. Id. at 1020.

181. 8 U.S.C. § 1182(a)(3)(A)(ii) (2018).

denial" but concluded that citing the statute still provided the denied applicant and his spouse with adequate notice.[182]

The court relied on Justice Kennedy's concurrence in *Din* to reach its determination.[183] In particular, the court deemed the terrorism statute in *Din* to be analogous to the "any other unlawful activity" statute.[184] The court reasoned that, like the terrorism statute, § 1182(a)(3)(A)(ii) "specifies a factual predicate for denying a visa"—namely, "seek[ing] to enter the United States to engage . . . [in] unlawful activity."[185] Given that both this phrase and the terrorism provision were "written in the same general terms," the court determined that Kennedy's analysis should control.[186] Finding a factual basis for the denial, the court ruled against the Colindres family.[187]

2. *The Ninth Circuit Holds that Consular Nonreviewability Does Not Apply.* — Faced with similar facts,[188] the Ninth Circuit arrived at different conclusions in *Muñoz v. U.S. Dep't of State.*[189] In 2005, Luis Asencio-Cordero, an El Salvadorean citizen, immigrated to the United States without documentation.[190] Five years later, he married Sandra Muñoz, a U.S. citizen with whom he has a child.[191] Mrs. Muñoz "filed an immigrant-relative petition" for Mr. Asencio-Cordero "which was approved along with an inadmissibility waiver."[192] When Mr. Asencio-Cordero returned to El Salvador to obtain his visa, the consular officer denied his application, believing that Mr. Asencio-Cordero was "seek[ing] to enter the United States to engage solely, principally, or incidentally in . . . unlawful activity."[193] Just like Mr. Colindres, Mr. Asencio-Cordero believes that the consular officer denied his visa because of his tattoos.[194] Mrs. Muñoz sued to challenge the decision, claiming she was entitled to a factual basis for her husband's denial.[195] The Central District of California granted

182. *Colindres*, 71 F.4th at 1024 (quoting Muñoz v. U.S. Dep't of State, 50 F.4th 906, 917 (9th Cir. 2022)).

183. Id. at 1024–25.

184. Id. at 1020 ("And that provision is written in the same general terms as the provision at issue here.").

185. Id. at 1024 (quoting 8 U.S.C. § 1182(a)(3)(A)(ii)).

186. Id. at 1024–25.

187. Id. at 1025 ("The Colindreses' challenge thus fails on the merits.").

188. Compare infra notes 190–195 and accompanying text, with supra notes 1–16 and accompanying text.

189. 50 F.4th 906 (9th Cir. 2022), rev'd, 144 S. Ct. 1812 (2024).

190. Id. at 910.

191. Id.

192. Id.

193. Id. (quoting 8 U.S.C. § 1182(a)(3)(A)(ii) (2018)).

194. See U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1819 (2024) (recognizing that Mr. Asencio-Cordero's consular officer "conclud[ed] that his tattoos signified gang membership"); see also *Muñoz*, 50 F.4th at 911 ("He has no criminal history and is not a gang member.").

195. *Muñoz*, 50 F.4th at 911.

summary judgment for the government, finding that the consular officer provided a "facially legitimate and bona fide reason" for denying Asencio-Cordero's visa.[196]

The Ninth Circuit reversed. The court first determined that Muñoz had a protected liberty interest in the visa application of her husband.[197] Having established that a U.S. citizen's fundamental rights were at stake, the court proceeded to consider "whether the government provided a 'facially legitimate and bona fide reason'" for the visa denial.[198] The Ninth Circuit agreed with the D.C. Circuit that a consular officer must have "specif[ied] discrete factual predicates."[199] However, the court did not think a mere citation to the "other unlawful activity" statute satisfied due process in the case.[200]

In reaching this conclusion, the Ninth Circuit also relied on Justice Kennedy's *Din* analysis.[201] The court read his opinion as a testament to the importance of providing factual notice.[202] Although the terrorism provision at issue in *Din* may have granted sufficient notice, the "other unlawful activity" statute at issue in *Muñoz* did not.[203] Still, the court determined that the State Department had provided Mrs. Muñoz with a factual basis for the denial because law enforcement believed that Mr. Asencio-Cordero belonged to MS-13.[204] This holding, however, did not end the case.[205]

---

196. Muñoz v. U.S. Dep't of State, 526 F. Supp. 3d 709, 719 (C.D. Cal. 2021) (internal quotation marks omitted) (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

197. *Muñoz*, 50 F.4th at 915–16.

198. Id. at 916.

199. Id. at 909 (internal quotation marks omitted) (quoting Khachatryan v. Blinken, 4 F.4th 841, 851 (9th Cir. 2021)). Specifically, the court explained that to meet the "facially legitimate and bona fide" standard, the officer must cite "a valid statute of inadmissibility," which either "specified discrete factual predicates" or there must have been "a fact in the record that provides at least a facial connection to the statutory ground of inadmissibility." Id. (internal quotation marks omitted) (quoting *Khachatryan*, 4 F.4th at 851).

200. See id. at 917–18 (remarking that Section 1182(a)(3)(A)(ii) "does not specify the type of lawbreaking that will trigger a visa denial" and that "a consular officer's belief that an applicant seeks to enter the United States for general . . . lawbreaking is not a 'discrete' factual predicate").

201. See id. (concluding that the government "misread[]" Justice Kennedy's opinion concurring in the judgment in *Din*).

202. See id. at 918 ("Indeed, it was critical in both *Din* and *Mandel* that the government identified the factual basis for the denial . . . .").

203. See id. at 917–18 ("But the government's argument misreads *Din*, where the statutory citation to § 1182(a)(3)(B) was deemed sufficient *because* that statute contains discrete factual predicates.").

204. Id. at 918 (internal quotation marks omitted).

205. See id. at 920 (considering appellants' argument "that the government's failure to provide them with 'the specific factual basis of the denial *at the time of the denial*'" rendered the notice "insufficient to satisfy the 'facially legitimate and bona fide reason' requirement").

Instead, the court reasoned that the substance and timing of visa denial explanations are closely linked.[206] The purpose of requiring a factual basis—according to Justice Kennedy's *Din* concurrence—is to enable an applicant to "mount a challenge to [the] visa denial."[207] Without receiving the reason for the denial in a timely manner, "[s]uch a challenge is impossible."[208] In *Muñoz*, because the government "waited almost three years" to provide it and "did so only when prompted by judicial proceedings," the notice was inadequate.[209] Thus, consular nonreviewability did not bar Mrs. Muñoz's challenge; it was subject to judicial review.[210] Enter the *Muñoz* requirement.

B. *The Supreme Court Reverses the Ninth Circuit*

The Ninth Circuit *Muñoz* decision expanded the scope of the *Mandel* exception, holding that when "the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest."[211] The Supreme Court granted certiorari to consider (1) whether a U.S. citizen has a fundamental interest in their spouse's visa adjudication and, (2) if so, what a consular officer must provide to satisfy the "facially legitimate and bona fide reason" standard.[212] The Court held that a U.S. citizen does not have a fundamental interest in their spouse's visa adjudication, closing the door on both the newly christened *Muñoz* requirement and the decades-old *Mandel* exception.[213]

1. *No Fundamental Interest in a U.S. Citizen Spouse's Visa Adjudication.* — Writing for the majority, Justice Amy Coney Barrett began by discussing

---

206. See id. at 921 ("[W]here the adjudication of a non-citizen's visa application implicates the constitutional rights of a citizen, due process requires that the government provide the citizen with timely and adequate notice of a decision that will deprive the citizen of that interest.").

207. Id. (alteration in original) (quoting Kerry v. Din, 576 U.S. 86, 105 (2015) (Kennedy, J., concurring in the judgment)).

208. Id. As to what qualifies as reasonable timeliness, *Muñoz* did not establish a concrete standard but did suggest that it should be "informed by the 30-day period in which visa denials must be submitted for internal review and the 1-year period in which reconsideration is available upon the submission of additional evidence." Id. at 923.

209. Id. at 920.

210. Id. at 924 ("This failure [to provide timely notice] means that the government is not entitled to invoke consular nonreviewability to shield its visa decision from judicial review. The district court may 'look behind' the government's decision." (quoting Kleindienst v. Mandel, 408 U.S. 753, 771 (1972))).

211. Id. at 921.

212. U.S. Dep't of State v. Muñoz, 144 S. Ct. 679 (2024); Petition for a Writ of Certiorari at I, U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812 (2024) (No. 23-334), 2023 WL 6390749 [hereinafter Muñoz Petition].

213. See *Muñoz*, 144 S. Ct. at 1826 ("Lest there be any doubt, *Mandel* does *not* hold that citizens have procedural due process rights in the visa proceedings of others.").

the immigration plenary power.[214] She stressed that "[f]or more than a century, [the] Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute.'"[215] She recognized that "Congress may delegate to executive officials the discretionary authority to admit noncitizens" and that "[w]hen it does so, the action of an executive officer . . . 'is final and conclusive.'"[216] Under the "doctrine of consular nonreviewability," "the federal courts cannot review those decisions."[217]

The Court noted that Mrs. Muñoz's asserted right—"to live with her spouse in her country of citizenship"—has only been recognized by the Ninth Circuit and has been rejected by several other circuits.[218] The Court

---

214. See id. at 1820 (examining the history of consular nonreviewability).

215. Id. (internal quotation marks omitted) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018)).

216. Id. (quoting United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950)).

217. Id. In *Trump v. Hawaii*, the Court "assume[d] without deciding that plaintiffs' statutory claims [were] reviewable." 138 S. Ct. at 2407. While *Trump v. Hawaii* did not address whether consular nonreviewability applied, *Muñoz* concluded that courts could not review claims. See *Muñoz*, 144 S. Ct. at 1820 ("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."). The Court arrived at this conclusion using a negative inference. Id. In *Loper Bright Enterprises v. Raimondo*, the Court cautioned against presumptions that fail to "approximate reality." 144 S. Ct. 2244, 2265 (2024) ("In neither case does an ambiguity necessarily reflect a congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question.").

218. *Muñoz*, 144 S. Ct. at 1821 ("The Ninth Circuit is the only Court of Appeals to have embraced this asserted right—every other Circuit to consider the issue has rejected it."). While true, this statement obscures the high volume of immigration litigation handled by the Ninth Circuit. Justice Barrett correctly asserts that the Ninth Circuit sits alone in recognizing this right, but she ignores the fact that almost a quarter of district court cases and nearly forty percent of appellate cases discussing consular nonreviewability are adjudicated in the Ninth Circuit. See Search Results, Westlaw, https://1.next.westlaw.com (In the search bar, enter: "advanced: ("consular nonreviewability" "consular non-reviewability" "consular absolutism")") (last visited Nov. 11, 2024).

	DISTRICT COURT		COURT OF APPEALS		TOTAL	
	Cases	%	Cases	%	Cases	%
D.C.	121	28.9%	7	11.1%	128	26.6%
First	18	4.3%	1	1.6%	19	3.9%
Second	69	16.5%	5	7.9%	74	15.4%
Third	14	3.3%	2	3.2%	16	3.3%
Fourth	19	4.5%	6	9.5%	25	5.2%
Fifth	17	4.1%	1	1.6%	18	3.7%
Sixth	9	2.1%	2	3.2%	11	2.3%
Seventh	22	5.3%	8	12.7%	30	6.2%
Eighth	8	1.9%	0	0.0%	8	1.7%
Ninth	102	24.3%	25	39.7%	127	26.3%
Tenth	3	0.7%	1	1.6%	4	0.8%
Eleventh	17	4.1%	5	7.9%	22	4.6%

reversed the Ninth Circuit's approach, holding that no such right existed and that Mrs. Muñoz had failed to establish that "the right to bring a noncitizen spouse to the United States is 'deeply rooted in this Nation's history and tradition.'"[219]

Several justices disagreed with the majority's broad holding. Justice Neil Gorsuch authored a separate opinion, explaining that the Court should have avoided "the constitutional questions presented by the government" because "[w]hether or not Mrs. Muñoz had a constitutional right to the information she wanted, the government gave it to her."[220] The dissenting justices agreed with Justice Gorsuch that the "majority could have resolved this case on narrow grounds."[221]

The dissent also objected to the majority's holding that Mr. Asencio-Cordero's visa denial did not burden a fundamental right. Justice Sonia Sotomayor would have held that U.S. citizens' fundamental rights are implicated by their noncitizens visa denials.[222] To reach this conclusion, she characterized the implicated interest more generally than the majority: The case concerned Mrs. Muñoz's "right to marry,"[223] not her right "to live with her spouse in her country of citizenship."[224] The majority, Sotomayor claimed, "makes the same fatal error it made in *Dobbs*: requiring too 'careful [a] description of the asserted fundamental liberty interest.'"[225] Likewise, Sotomayor rejected the notion that the fundamental right was vindicated because Mrs. Muñoz and Mr. Asencio-Cordero could live together in El Salvador.[226] She feared that the "majority's holding will also extend to those couples who, like the Lovings

TOTAL	419	100%	63	100%	482	100%

219. *Muñoz*, 144 S. Ct. at 1822–23 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). There has been significant commentary on whether there is a fundamental interest in spousal unity. See generally Callan & Callan, supra note 41 (rejecting consular nonreviewability and lamenting the Court's missed opportunity to repudiate it in Kerry v. Din, 576 U.S. 86, 105 (2015)); Desirée C. Schmitt, The Doctrine of Consular Nonreviewability in the Travel Ban Cases: *Kerry v. Din* Revisited, 33 Geo. Immigr. L.J. 55 (2019) (applying the reasoning of *Din* to the travel ban cases); Baca, supra note 14 (arguing that liberty interests in marriage and cohabitation entitle U.S. citizen spouses to judicial review).

220. *Muñoz*, 144 S. Ct. at 1827 (Gorsuch, J., concurring in the judgment).

221. Id. at 1828 (Sotomayor, J., dissenting) (criticizing the majority for "choos[ing] a broad holding on marriage over a narrow one on procedure").

222. Id. at 1827 (noting that "[t]he right to marry is fundamental as a matter of history and tradition" (internal quotation marks omitted) (quoting Obergefell v. Hodges, 576 U.S. 644, 671 (2015))).

223. Id.

224. Id. at 1821 (majority opinion).

225. Id. at 1834 (Sotomayor, J., dissenting) (alteration in original) (quoting id. at 1822 (majority opinion)) (critiquing the Court's analysis in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022)).

226. Id. at 1835 ("This Court has never required that plaintiffs be fully prevented from exercising their right to marriage before invoking it.").

and the Obergefells, depend on American law for their marriages' validity."[227]

2. *The End of the* Mandel *Exception.* — The Court could have stopped after concluding that Mrs. Muñoz lacked a fundamental interest, but it continued to address the viability of the *Mandel* exception.[228] Justice Barrett first summarized the *Mandel* exception: The Court has "assumed that a narrow exception to [consular nonreviewability] exists 'when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.'"[229]

She continued to clarify *Mandel*'s holding, explaining that its discussion of a "'facially legitimate and bona fide reason' . . . was the justification for avoiding a difficult question of statutory interpretation [and] had nothing to do with procedural due process."[230] The professors in *Mandel* argued that "the denial of Mandel's visa directly deprived them of their First Amendment rights, *not* that their First Amendment rights entitled them to procedural protections in Mandel's visa application process."[231] Because "a procedural due process claim was not even before the Court," *Mandel* did "not hold that a citizen's independent constitutional right . . . gives that citizen a procedural due process right to a 'facially legitimate and bona fide reason' for why someone else's visa was denied."[232] Thus, the *Mandel* exception, long wrestled with by circuit courts,[233] apparently is inconsequential.

Justice Sotomayor disagreed with the majority's discussion of *Mandel*.[234] By "not[ing] that 'the Attorney General did inform Mandel's counsel of the reason for refusing him a waiver,'" *Mandel* established a "minimal requirement."[235] This requirement "ensures that courts do not unduly intrude on 'the Government's sovereign authority to set the terms governing the admission and exclusion of noncitizens,' while also ensuring that the Government does not arbitrarily burden citizens' constitutional rights."[236] Justice Sotomayor criticized the majority for rejecting the *Mandel* test—which the "Court has repeatedly relied on . . . in the immigration context."[237] Justice Sotomayor summed up her disagreement by stating, "[T]here is no question that excluding a citizen's

227. Id.
228. Id. at 1821 (majority opinion) (discussing the *Mandel* exception).
229. Id. (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018)).
230. Id. at 1826.
231. Id. at 1827.
232. Id. at 1826–27.
233. See supra notes 158–160 and accompanying text.
234. See *Muñoz*, 144 S. Ct. at 1836–39 (2024) (Sotomayor, J., dissenting).
235. Id. at 1836–37 (quoting Kleindienst v. Mandel, 408 U.S 753, 769 (1972)).
236. Id. at 1837 (quoting id. at 1816 (majority opinion)).
237. Id. at 1837.

spouse burdens her right to marriage, and that burden requires the Government to provide at least a factual basis for its decision."[238]

Regardless of the dissent's objections, after *Muñoz*, couples such as Mrs. Muñoz and Mr. Asencio-Cordero and the Colindreses have no judicial recourse when a consular officer denies their visa applications without explanation.

C. *Implications of Unchecked Consular Authority After* Muñoz

In holding that a spouse's fundamental rights are not burdened by her spouse's visa denial, *Muñoz* bolstered consular nonreviewability. And by curtailing the *Mandel* exception, the Court granted consular officers unmitigated deference. This broad deference impacts the many immigrants applying for visas and conflicts with trends in immigration and administrative law.[239]

1. *Fairness and Integrity of the Visa System.* — Every year hundreds of thousands of people apply for visas, requiring interviews with consular officers.[240] Over these visa decision, consular officers wield almost absolute discretion.[241] This discretion invites inconsistent procedures and unconscious bias.[242] Faced with subjective decisions and broad statutes, consular officers adopt their own procedures for reviewing visa decisions.[243] Officers—like all humans—have inherent biases that lead them to favor some applicants over others.[244] These different procedures and biases lead to "widely disparate decisions."[245] For example, "[d]uring a sample day at one post in Mexico," the visa acceptance rate ranged by officer from twenty-two to sixty percent.[246] In addition to varying among officers at the same posts, acceptance rates differ dramatically between

238. Id. at 1829.

239. See infra sections II.C.1–.2.

240. See supra note 132.

241. See supra Part I (discussing the current process and the *Mandel* exception).

242. See infra notes 250–256 and accompanying text.

243. See Lindsey, supra note 24, at 34–37 ("[C]onsular officers take markedly different approaches to their work."); see also Kim R. Anderson & David A. Gifford, Consular Discretion in the Immigrant Visa-Issuing Process, 16 San Diego L. Rev. 87, 88 (1978) ("Differing values and influences can cause individual law-enforcers to reach widely disparate decisions. This disparity leads to nonuniform, unpredictable application of the law.").

244. See Callan & Callan, supra note 41, at 312 ("[T]hey are using racially and ethnically motivated prejudice to deny visa applications."); Lindsey, supra note 24, at 37 (describing how "laziness and snap stereotyping" led to the admission of a known terrorist).

245. Anderson & Gifford, supra note 243, at 88; see also Richardson, supra note 20 (noting that he "left the Foreign Service" because it "is a predominantly white institution . . . tasked with making judgments about predominantly brown and poor applicants").

246. Nafziger, supra note 21, at 68.

posts.[247] These variations are not a consequence of inadequate training;[248] rather, they reflect the reality that "any exercise of discretion is potentially fallible."[249]

The discrepancies in visa acceptance rates are the result of the system's design and not the consular officers' fault[250]—though occasionally, consular officers have exploited their positions for personal gain.[251] The system is stressful, designed to churn through a plethora of applicants.[252] Strained for finances and resources, "[m]any consulates . . . cannot devote much time and expert judgment to a single applicant."[253] As a former officer describes, after a "five-minute interview (and sometimes less), an officer must make a judgment call on the applicant's story. Interviews are conducted through bulletproof glass, often in a language other than English."[254] These decisions are tough, and officers often must deny people who lack a valid legal basis for a visa even after they share heart-wrenching stories.[255] After each interview, "[o]fficers have no time to decompress," because the next applicant is waiting for review.[256]

---

247. Within Mexico, for example, acceptance rates ranged from 84.1% in Mexico City to 59.4% in Guadalajara. Across countries, this effect was even more pronounced, spanning from 48.4% in Warsaw, Poland to 99.7% in Naha, Japan. Id.

248. Id. at 53 ("Consular officers are well trained . . . possess[ing] high levels of competence and morale."); see also U.S. Dep't of State, Foreign Service Officer and Specialist Attributes, https://careers.state.gov/career-paths/foreign-service/dimensions/ [https://perma.cc/GW6P-WUNS] (last updated Sept. 2023). But see Rosenfield, supra note 40, at 1112 (noting that in 1955 "only 3 per cent of our visa-issuing officers ha[d] law degrees and only 1 per cent of them were practicing lawyers").

249. Nafziger, supra note 21, at 54.

250. Still, consular officers are quick to be blamed when mistakes are made. See Richardson, supra note 20.

251. See, e.g., Press Release, United States Attorney's Office: District of Columbia, DOJ, U.S. Consulate Official Pleads Guilty to Receiving More Than $3 Million in Bribes in Exchange for Visas-Scheme Allegedly Generated More Than $9 Million in Bribes (Nov. 6, 2013), https://www.justice.gov/usao-dc/pr/us-consulate-official-pleads-guilty-receiving-more-3-million-bribes-exchange-visas-scheme [https://perma.cc/M8L4-AH2V] (noting that a consular officer "pled guilty . . . to conspiracy, bribery, and money laundering charges in a scheme in which he accepted more than $3 million to process visas for non-immigrants seeking entry to the United States"); see also Charles J. Ogletree, Jr., America's Schizophrenic Immigration Policy: Race, Class, and Reason, 41 Immigr. & Nat'y L. Rev. 755, 763 (2000) (describing how "some consular officers openly admitted to using racial criteria").

252. See Richardson, supra note 20 ("Consular officers . . . are expected to interview as many as 120 people in a day seeking to enter the United States."); see also Nafziger, supra note 21, at 69 (exhibiting how on a sample day at a consulate post, five officers reviewed a total of 630 visa applications).

253. Nafziger, supra note 21, at 54.

254. See Richardson, supra note 20.

255. See id. ("[T]here are many categories of visas, but sympathy visas and 'feel good story' visas are not among them.").

256. Id.

Increasingly, consular officers rely on law enforcement databases to make determinations—especially to screen for "unlawful activity."[257] These databases are problematic because they are updated infrequently and often contain errors.[258] To make matters worse, consular officers avoid questioning database results because of pressure from law enforcement, limited data transparency, and fear of inadvertently admitting a dangerous person to the country.[259]

The combination of tremendous discretion, inadequate resources, and overreliance on databases yields arbitrary visa decisions.[260] This arbitrariness has dramatic effects—both for the individual applicant and on global migration patterns.[261] At the individual level, visa denials impact the lives of countless noncitizens such as Mr. Colindres, who was denied the ability to continue to live with his family because of an officer's determination that he was a criminal.[262] These arbitrary decisions erode faith in the immigration system; as migrants perceive the system as unfair, it will increasingly lose its legitimacy.[263] On a macro level, "the cumulative exercise of visa discretion is one of the largest influences on global migration patterns."[264] As one former consular officer surmised, "[p]erhaps being a consular officer is far too much power for one individual."[265]

2. *Inconsistency With Immigration and Administrative Law.*— The discretion afforded consular officers not only fosters an arbitrary visa

---

257. Brief of Amici Curiae Former Consular Officers in Support of Respondent at 23, Kerry v. Din, 576 U.S. 86 (2015) (No. 13–1402), 2015 WL 294670 ("[D]atabases and watchlists have in some regular instances displaced the traditional role of consular officers in visa adjudications.").

258. Id. at 24 (explaining that "errors reverberate through the watchlisting system undetected or, worse, impervious to attempts to purge them").

259. See id. at 9–10 (noting that "questioning the national-security basis . . . would not be well received" and that the "decision often is the product of information the consular officer has never seen"); see also Richardson, supra note 20 ("[C]onsular officers . . . are often the first blamed when a visa is denied.").

260. See Callan & Callan, supra note 41, at 312 (noting that "according to numerous sources, consular officers *are* making erroneous and arbitrary decisions"); supra notes 250–259 and accompanying text.

261. See Lindsey, supra note 24, at 34–37 ("[T]he cumulative exercise of visa discretion is one of the largest influences on global migration patterns. Even a single visa officer operating in a systematic fashion can skew the structure of international movement.").

262. Colindres v. U.S. Dep't of State, 71 F.4th 1018, 1020 (D.C. Cir. 2023).

263. See, e.g., Marcela Valdes, Why Can't We Stop Unauthorized Immigration? Because It Works., N.Y. Times Mag. (Oct. 1, 2023), https://www.nytimes.com/2023/10/01/magazine/economy-illegal-immigration.html (on file with the *Columbia Law Review*) (last updated Oct. 5, 2023) ("[T]rying the legal immigration system as an alternative to immigrating illegally is like playing Powerball as an alternative to saving for retirement." (internal quotation marks omitted) (quoting David J. Bier)).

264. Lindsey, supra note 24, at 34–37; see also Kim, supra note 29, at 101 ("[T]he power to promulgate national immigration policy is increasingly exercised less by Congress, and more by the officials populating our nation's administrative agencies.").

265. See Richardson, supra note 20.

system but also contradicts the broader immigration system. While the State Department governs consular processing, the Department of Homeland Security (DHS) presides over asylum applications and removal proceedings.[266] Due process protections constrain the DHS, but consular processing is a free-for-all.[267]

Although "DHS officers and consular officers make admission determinations under the same substantive laws, in reality, a noncitizen seeking admission via consular processing faces a far higher risk of arbitrary denial with far less opportunity for review than a noncitizen seeking admission from DHS."[268] Put simply, noncitizens have fewer due process rights when they voluntarily attempt to establish status than when they face removal or apply for asylum.[269]

The adjustment-of-status process provides a helpful analogy.[270] When a noncitizen is "denied adjustment of status," they "must receive notice and the reasons for a denial."[271] The noncitizen has the opportunity to "renew his application in removal proceedings before an immigration

---

266. See U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1830 (2024) (Sotomayor, J., dissenting) (noting that "[c]onsular officers fall under the State Department, see [8 U.S.C.] § 1104(a), not DHS, which oversees USCIS, see 6 U.S.C. § 271(a)").

267. Id. ("DHS officers are constrained by a framework of required process that does not apply to consular processing.").

268. Id. (citation omitted).

269. See id. at 1831 ("When the Government requires one spouse to leave the country to apply for immigration status based on his marriage, it therefore asks him to give up the process he would receive in the United States and subject himself to the black box of consular processing."); see also Judulang v. Holder, 565 U.S. 42, 45 (2011) (finding that the "Board of Immigration Appeals' (BIA or Board) policy for deciding when resident [noncitizens]" could apply for discretionary "relief from deportation" was "arbitrary and capricious"); Wilson v. Garland, No. 22-1060, 2024 WL 2237686, at *1–2 (9th Cir. May 17, 2024) (reviewing the immigration judge and BIA official's decisions denying asylum and withholding removal); Kim, supra note 29, at 106–08 ("The Supreme Court has been particularly active in employing administrative law rules to exercise review over, and ultimately circumscribe, agency discretion to deport legal permanent residents with criminal convictions . . . ."). When considering these appeals, courts "review for substantial evidence the BIA's determination that a petitioner has failed to establish eligibility for asylum or withholding of removal." Sharma v. Garland, 9 F.4th 1052, 1060 (9th Cir. 2021). The standard is "highly deferential," with the court "grant[ing] a petition only if the petitioner shows that the evidence '*compels* the conclusion' that the BIA's decision was incorrect." Id. (internal quotation marks omitted) (first quoting Pedro-Mateo v. Immigr. & Naturalization Serv., 224 F.3d 1147, 1150 (9th Cir. 2014); then quoting He v. Holder, 749 F.3d 792, 795 (9th Cir. 2014)).

270. "Adjustment of status is the process that [a noncitizen] can use to apply for lawful permanent resident status . . . without having to return to [their] home country to complete visa processing." Adjustment of Status, USCIS, https://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-of-status [https://perma.cc/63FG-7HQF] (last visited Aug. 29, 2024).

271. *Muñoz*, 144 S. Ct. at 1830 (Sotomayor, J., dissenting). Noncitizens are not entitled to judicial review of adjustment of status discretionary decisions. See Patel v. Garland, 142 S. Ct. 1614, 1627 (2022) (noting that "[f]ederal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings" regarding adjustment of status).

court, where DHS must present any evidence against him in adversarial proceedings."[272] If the noncitizen loses in these proceedings, they "can petition for review to the Board of Immigration Appeals (BIA), and, ultimately, a federal court of appeals."[273] Noncitizens are entitled to these procedural due process rights even when they have been convicted of a crime.[274]

Against the backdrop of immigration law, the lack of review for consular officers is surprising.[275] Immigration statutes contain language limiting judicial review of asylum and deportation decisions but not regarding judicial review of consular officers.[276] Strangely, noncitizens who have lived in the United States for years—people such as Mr. Asencio-Cordero and Mr. Colindres—have fewer rights when they pursue a visa voluntarily than if they were deported.[277]

In addition to the due process rights of noncitizens in the United States, courts routinely weigh in on matters of immigration policy.[278] Consider Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). The Southern District of Texas issued an injunction, blocking the DAPA program.[279] After the Fifth Circuit

---

272. *Muñoz*, 144 S. Ct. at 1830–31 (citations omitted).

273. Id. at 1831 (citations omitted).

274. Nasrallah v. Barr, 140 S. Ct. 1683, 1688 (2020) (holding that "in a case involving a noncitizen who committed a crime" enumerated in statute, "the court of appeals should review factual challenges to the [Convention Against Torture] order deferentially"); see also Landon v. Plasencia, 459 U.S. 21, 32 (1982) (extending due process to a permanent resident); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) ("[O]nce [a noncitizen] lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution . . . . Such rights include those protected by . . . the Fifth Amendment[] and by the due process clause of the Fourteenth Amendment." (internal quotation marks omitted) (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring))).

275. See Neuman, supra note 42, at 617–18 (explaining that "[t]he arbitrariness of consuls is proverbial").

276. See 8 U.S.C. §§ 1158(a)(3), 1158(b)(2)(D), 1252(a)(2) (2018) (denying jurisdiction to reviewing courts). The only provision that could arguably refer to judicial review for consular officers is 6 U.S.C. § 236(f) (2018) ("Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa.").

277. *Muñoz*, 144 S. Ct. at 1831 (Sotomayor, J., dissenting) ("When the Government requires one spouse to leave the country to apply for immigration status based on his marriage, it therefore asks him to give up the process he would receive in the United States and subject himself to the black box of consular processing.").

278. See Johnson, Immigration in the Supreme Court, supra note 29, at 62 (finding that "immigration matters regularly comprise a bread-and-butter part of [the Supreme Court's] docket"); see also Kim, supra note 29, at 88 (noting that the Supreme Court "has granted certiorari in at least one immigration case every term since 2009 and vacated a government immigration decision roughly every other year"); cf. McKanders, supra note 29, at 96 (describing the "many different theories accounting for the proliferation of immigration cases on the Supreme Court's docket").

279. Texas v. United States, 809 F.3d 134, 150 (5th Cir. 2015), aff'd, 579 U.S. 547 (2016) (4-4 decision) ("The [district] court temporarily enjoined DAPA's implementation

affirmed,[280] the Supreme Court granted certiorari.[281] Not only did the Court agree to hear the case, it also asked the parties to brief an additional question.[282] Admittedly, addressing a constitutional question is different than reviewing a factual determination. Even still, the fact that the Court hears questions regarding national immigration policy undermines the common refrain supporting consular nonreviewability—that immigration matters are best left to the political branches.[283]

DAPA is just one of many instances in which courts have weighed in on immigration policy decisions.[284] Other examples include the Supreme Court's application of rational basis review to President Donald Trump's travel ban[285] and the Eastern District of Texas's recent imposition of an administrative stay on President Joe Biden's Keeping Families Together plan.[286] When evaluating these decisions, courts exude deference to the President or executive agencies.[287] But even rational basis review is more stringent than the complete nonreviewability granted to consular officers.

This complete deference is also inconsistent with current administrative law trends. Days after upholding consular nonreviewability and curtailing its already limited exception, the Court overturned *Chevron*

---

after determining that Texas had shown a substantial likelihood of success on its claim that the program must undergo notice and comment." (citing Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015))).

280. Id. at 187–88 (holding that "[t]he public interest easily favors an injunction").

281. See United States v. Texas, 577 U.S. 1101 (2016).

282. Id. ("In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: 'Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.'").

283. See, e.g., U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1820 (2024) (explaining that "this Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control" (internal quotation marks omitted) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2402 (2018))).

284. See infra notes 285 and 286 and accompanying text.

285. *Trump*, 138 S. Ct. at 2420 ("For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review.").

286. See Texas v. U.S. Dep't of Homeland Sec., No. 6:24-cv-00306, LEXIS 153604, at *6–7 (E.D. Tex. Aug. 26, 2024) (determining plaintiffs' claims to be "substantial" and worthy of "closer consideration"); Miriam Jordan, Hamed Aleaziz & Serge F. Kovaleski, Judge Pauses Biden Administration Program that Aids Undocumented Spouses, N.Y. Times (Aug. 26, 2024), https://nytimes.com/2024/08/26/us/undocumented-spouses-biden-administration.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb (on file with the *Columbia Law Review*) (summarizing the state plaintiffs' claims and the consequences of the administrative stay). President Biden's immigration policies have been subject to challenges from both sides of the aisle. See, e.g., Press Release, ACLU, Immigrants' Rights Groups Sue Biden Administration Over New Anti-Asylum Rule (June 12, 2024), https://www.aclu.org/press-releases/immigrants-rights-groups-sue-biden-administration-over-new-anti-asylum-rule [https://perma.cc/NV3F-4MYB] (describing lawsuits against President Biden's asylum rule).

287. See, e.g., *Trump*, 138 S. Ct. at 2420 (applying rational basis review to former President Trump's travel ban).

deference in *Loper Bright Enterprises v. Raimondo*.[288] While acknowledging that "exercising independent judgment is consistent with the 'respect' historically given to Executive Branch interpretations," the Court critiqued *Chevron* deference for "demand[ing] that courts mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time."[289] The Court recognized that courts, not agencies, have "special competence in resolving statutory ambiguities."[290] The question of whether an individual seeks entry to the United States to engage in unlawful activity involves both factual and legal inquiries.[291] Even still, consular officers are permitted to decide for themselves what constitutes "unlawful activity."[292]

In *Loper Bright*, the Court rejected various rationales for deference, including respecting agencies' "subject matter expertise," promoting "uniform construction of federal law," and preferencing the "policymaking" judgment of "political actors."[293] The Court concluded that "none of these considerations justifies *Chevron*'s sweeping presumption of congressional intent."[294] As the Supreme Court continues to question broad delegations and extensive grants of discretion,[295] consular nonreviewability's robust deference is an anomaly.[296]

III. THE FUTURE OF CONSULAR NONREVIEWABILITY

With the curtailing of the *Mandel* exception, consular visa decisions are more protected than ever. Options for judicial review are now practically foreclosed,[297] so the baton passes to Congress. This Part

---

288. 144 S. Ct. 2244, 2265 (2024).

289. Id (quoting Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)).

290. Id. at 2266.

291. As Justice Sotomayor explained, "'[U]nlawful activity' could mean anything from jaywalking to murder." U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1832 (2024) (Sotomayor, J., dissenting) (alteration in original).

292. Id.

293. *Loper Bright Enters.*, 144 S. Ct. at 2266.

294. Id. at 2266–67. The Court further noted that the "better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statues, with due respect for the views of the Executive Branch." Id. at 2267.

295. See supra note 30.

296. Consider, for example, how far the visa power has been delegated: Congress delegated the plenary power to the executive, who delegated it to consular officers, who have now—in some cases—delegated it to other agencies (through deference to law enforcement databases). See supra notes 257–260.

297. *Muñoz* clarified that *Mandel* did not articulate a procedural due process right to an explanation in consular visa denials. 144 S. Ct. at 1827 ("Whatever else it may stand for, *Mandel* does not hold that a citizen's independent constitutional right . . . gives that citizen a procedural due process right to a 'facially legitimate and bona fide reason' for why someone else's visa was denied."). Plaintiffs can likely still challenge delays in consular processing if a final decision has not been made. See Baygan v. Blinken, No. 23-2840 (JDB), 2024 WL 3723714, at *8 (D.D.C. Aug. 8, 2024) (noting that the Supreme Court "said

suggests an amendment to the Immigration and Nationality Act, modeled after the short-lived *Muñoz* requirement adopted by the Ninth Circuit. Section III.A explains why requiring a factual and timely explanation for visa denials would inject greater fairness into the visa process and better align consular processing with immigration and administrative law. After explaining the benefits of an amendment, section III.B argues that such a requirement would not undermine the values that support consular nonreviewability: national security concerns, consular and judicial efficiency, and immigration exceptionalism.

A. *Benefits of Requiring a Factual and Timely Explanation for Visa Denials*

To protect the interests of United States citizens such as Mrs. Colindres and Mrs. Muñoz,[298] Congress should amend the Immigration and Nationality Act to require consular officers to provide factual and timely explanations for *all* visa denials.[299] In the vast majority of cases, this would require nothing of consular officers because most applicants are denied under states with distinct factual predicates.[300] When consular officers fail to offer such an explanation, their decisions should be subject to judicial review. Imposing this requirement would have benefits both for

---

nothing about whether courts are precluded from reviewing the delay related to processing visa applications").

If *Mandel*'s exception to consular nonreviewability permits a substantive due process claim, it is unclear what substantive right would qualify. In dicta, *Muñoz* rejected a substantive claim based on a right to spousal unity. Id. at 1827 (noting that such an argument "cannot succeed . . . because the asserted right is not a longstanding and 'deeply rooted' tradition in this country" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

The *Mandel* exception may still exist in the First Amendment context. Under the *Mandel* line of cases, courts have assumed that a plaintiff is entitled to a factually legitimate and bona fide reason when their First Amendment rights are infringed. See Baca, supra note 14, at 611–13 (describing cases). A U.S. citizen could, therefore, argue that their freedom of expression is violated by the denial of a visa to their spouse. Justice Alito alluded this possibility in a hypothetical during oral arguments. See Oral Argument at 22:22, *Muñoz*, 144 S. Ct. 1812 (No. 23-334), https://www.oyez.org/cases/2023/23-334 (on file with the *Columbia Law Review*). To be successful, a plaintiff would need to establish that a visa denial "directly deprived them of their First Amendment rights." *Muñoz*, 144 S. Ct. at 1827.

298. While the Supreme Court has expressly explained that a U.S. citizen does not have a substantive due process interest in their spouse's visa adjudication, see supra section II.B.1, there is no question that a spouse has an interest in a nonlegal sense.

299. This Note is not the first to call on Congress to solve the problems posed by consular nonreviewability. See, e.g., Callan & Callan, supra note 41, at 322–23 (arguing that "[c]ongressional action is clearly necessary to not only open the door to judicial review but also to craft fair and just procedures"). Practically, such an amendment may be unlikely because of congressional inaction on immigration matters. See id. at 321 ("In the United States, the prospect of congressional action on this issue is extremely unlikely."). But if Congress chooses to act, it should require consular officers to provide factual and timely explanations for their visa denials to address the problems posed by consular nonreviewability, see supra sections II.C.1–.2.

300. See infra notes 344–346 and accompanying text.

the fairness of consular processing and the consistency of the visa system within immigration and administrative law.

1. *Thoughtful Decisionmaking.* — Requiring a factual and timely explanation for visa denials would address the criticism that the consular visa process produces arbitrary—and sometimes erroneous—results in two ways.[301] First, requiring officers to provide a factual explanation when denying visas encourages more thoughtful decisions.[302] Rather than relying on "snap stereotyping,"[303] consular officers would have to explain their logic, knowing that unsupported determinations might be reviewed by courts.[304] Justice Sotomayor acknowledged that consular officers sometimes make poor decisions.[305] She cited to an amicus brief filed on behalf of former consular officers who warned that "lack of accountability, coupled with deficient information and inconsistent training, means decisions often 'rely on stereotypes or tropes,' even 'bias or bad faith.'"[306] While bias would inevitably still affect visa decisions, requiring officers to provide a brief explanation would encourage thoughtful reflection.

Second, an explanation requirement introduces a limited, but meaningful, opportunity for review when mistakes do happen. Although many people found ineligible can offer additional evidence to overcome the finding, people who are denied under vague statutes without explanation do not know where to start.[307] The Ninth Circuit explained that it is impossible to make a challenge "if the petitioner is not timely provided with the reason for the denial."[308] While most people would resolve their grievances through the consular office,[309] judicial review would provide an opportunity to compel disclosure of the reasons for a

---

301. See supra section II.C.

302. See Callan & Callan, supra note 41, at 320 ("[P]ermitting judicial review will likely result in fewer unfair decisions from consular officers . . . .").

303. Lindsey, supra note 24, at 37.

304. See Callan & Callan, supra note 41, at 320–21 (quoting Dobkin, supra note 21, at 121) (noting that "the mere prospect of review . . . encourages the initial decision-maker to examine cases more carefully").

305. U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1831 (2024) (Sotomayor, J., dissenting).

306. Id. (quoting Brief of Amici Curiae Former Consular Officers in Support of Respondent at 8, *Muñoz*, 144 S. Ct. 1812 (No. 23-334), 2024 WL 1420959).

307. See Muñoz v. U.S. Dep't of State, 50 F.4th 906, 922 (9th Cir. 2022) (stating that the U.S. citizen's "ability to vindicate her liberty interest . . . depends on *timely* and adequate notice of the reasons underlying the initial denial"), rev'd, 144 S. Ct. 1812 (2024); see also Baca, supra note 14, at 603 (noting that challenging a consular officer's decision "is possible only when the applicant knows the basis for the denial and knows how to produce evidence to refute the government's evidence").

308. *Muñoz*, 50 F.4th at 921; see also Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (identifying timely notice as a crucial element of due process).

309. See Callan & Callan, supra note 41, at 320 ("By . . . holding officers accountable . . . the majority of denied applicants will not feel the need to resort to the court system because they know the officer handed down the decision with full knowledge that she could be required to explain the decision in a court of law.").

visa denial.[310] Requiring a factual and timely explanation from consular officers would promote more thoughtful decisions and provide mechanisms for review, increasing the legitimacy of the consular visa process.[311]

This analysis is consistent with patterns in immigration data. In 2023, consular officers made over three million ineligibility findings, with roughly 263,000 coming from immigrant visa-related services.[312] Many people overcame these determinations by providing additional information or applying again—in fact, almost eighty-five percent of these ineligibility findings were overcome.[313] This high rate of reversal shows that consular officers are often wrong and highlights the importance of providing applicants an opportunity to correct consular decisions.[314] Still, not all denied applicants have the chance to correct mistakes. For example, of the forty-two people in 2023 who were deemed ineligible under the "other unlawful activity" provision, no one successfully overcame the finding.[315] This is a testament to what the Ninth Circuit articulated in *Muñoz*: It is nearly impossible to mount a meaningful challenge to a determination when one does not know why that determination was made.[316]

2. *Consistency With Administrative and Immigration Law.* — A factual and timely explanation requirement would also alleviate the second criticism of the current visa process: that consular nonreviewability is incongruent

---

310. This is what happened in the *Muñoz* case. See *Muñoz*, 144 S. Ct. at 1828 (Sotomayor, J., dissenting) (explaining that "after protracted litigation, the Government finally explained that it denied Muñoz's husband a visa because of its belief that he had connections to the gang MS–13").

311. See Callan & Callan, supra note 41, at 319 (noting that "no other governmental actions are protected from all meaningful review").

312. U.S. Dep't of State, Report of the Visa Office 2023: Table XIX: Immigrant and Nonimmigrant Visa Ineligibilities 3 (2023), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2023AnnualReport/FY2023_AR_TableXIX.pdf [https://perma.cc/438N-PKZA] [hereinafter 2023 Immigrant and Nonimmigrant Visa Ineligibilities] (indicating that in 2023 there were 3,125,820 nonimmigrant ineligibility findings and 263,212 ineligibility findings from immigrant visa applications). The data has some limitations. For example, an individual can be recorded multiple times under different denial codes. Additionally, the count of "Ineligibility Overcome" includes people who were refused in previous years. However, the data clearly shows the high hurdle faced by the "other unlawful activity" determination.

313. See id. (noting that applicants overcame 221,198 of 263,212 ineligibility determinations for visa-related services).

314. See supra note 260 and accompanying text.

315. 2023 Immigrant and Nonimmigrant Visa Ineligibilities, supra note 312, at 1. This is consistent with the 2022 data. See U.S. Dep't of State, Report of the Visa Office 2022: Table XIX: Immigrant and Nonimmigrant Visa Ineligibilities 1 (2022), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2022AnnualReport/FY22_TableXIX_vF.pdf [https://perma.cc/R8FM-GRZB] (showing that of fifty-one people, zero overcame the finding).

316. Muñoz v. U.S. Dep't of State, 50 F.4th 906, 922 (9th Cir. 2022) ("Such a challenge is impossible if the petitioner is not provided with the reason for the denial."), rev'd, 144 S. Ct. 1812 (2024).

with broader trends in immigration and administrative law.[317] For one, the *Muñoz* requirement better aligns the judicial review of the consular visa process with the scrutiny of other areas of immigration law—such as adjustment of status, asylum, and removal.[318] The Supreme Court has noted that "[noncitizens] receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[319] It is odd to provide due process rights for a noncitizen in removal proceedings but not for a person who has been living in the United States for years—such as Mr. Colindres[320]—who voluntarily attempts to secure a visa through the designated processes.[321]

Mandating a factual and timely explanation for visa denials would also bring consular nonreviewability within the orbit of broader administrative law. *Loper Bright* warned against "courts mechanically afford[ing] *binding* deference to agency interpretations."[322] Although consular officers' factual determinations deserve deference, the judiciary is the proper channel for questions of law.[323] A limited explanation requirement would also address delegation concerns.[324] Consider how far the visa power has been delegated: Congress delegated the plenary power to the executive, who delegated it to consular officers, who have now—in some cases—delegated it to other agencies (through deference to law enforcement databases).[325] Limiting consular nonreviewability to cases in which

---

317. See Callan & Callan, supra note 41, at 319–20 ("[J]udges 'have been unable to point to any evidence . . . to support an exemption from the usual rules that govern judicial review of administrative decisions.'" (second alteration in original) (quoting Dobkin, supra note 21, at 117) (misquotation)).

318. See supra section II.C.2.

319. United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

320. Colindres v. U.S. Dep't of State, 71 F.4th 1018, 1020 (D.C. Cir. 2023).

321. See supra section II.C.2.

322. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

323. As a further reason for providing reasonable notice, consider that courts have explained that agencies that make decisions without notice are not entitled to deference in other areas of law. See Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 437 F.3d 75, 77 (D.C. Cir. 2006) ("[Courts] owe no deference to [an agency's] purported expertise because we cannot discern it."); see also Fox v. Clinton, 684 F.3d 67, 75 (D.C. Cir. 2012) (finding that agency action was not entitled to deference when its explanation "lacks any coherence").

324. Recent Supreme Court administrative law jurisprudence and constitutional law scholarship exemplify these delegation concerns. See, e.g., Loper Bright Enters., 144 S. Ct. at 2265 (rejecting *Chevron* deference); Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) ("The legislative cannot transfer the power of making laws to any other hands . . . ." (internal quotation marks omitted) (quoting Locke, supra note 30, at § 141)); Michigan v. Env't Prot. Agency, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) ("Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies." (citing U.S. Const. art. III, § 1)); Merrill, supra note 30, at 1729–34 (outlining constitutional objections to *Chevron* deference).

325. See supra section I.A.2.

consular officers provide factual and timely explanations would permit courts to police the extensive delegation of the visa power.[326]

B. *Vindicating the Interests Underpinning Consular Nonreviewability*

Amending the INA to require consular officers to provide a factual and timely explanation for their visa denials would not undermine national security concerns, consular or judicial efficiency, or immigration exceptionalism.

1. *National Security Concerns.* — Proponents of consular nonreviewability argue that, to maintain national security, the government cannot be required to provide reasons for its denials.[327] This argument is rooted in the historical language of the plenary power, specifically that denying a visa is the government's sovereign prerogative.[328] In restricting immigration, the government might be relying on confidential information.[329] Forcing consular officers to provide an explanation for visa denials would jeopardize national security by interfering with intelligence efforts and ongoing investigations.[330]

This argument is both empirically and logically problematic. Empirically, the data show that immigration cases rarely "implicate national security or foreign affairs."[331] Just "thirteen of every hundred

326. See Brief of Amici Curiae Law School Professors in Support of Respondent at 29, Kerry v. Din, 576 U.S. 86 (2015) (No. 13–1402), 2015 WL 272368 (arguing that "the court has an obligation to ensure that the agency is acting within the scope of Congress' authority").

327. See Muñoz v. U.S. Dep't of State, 73 F.4th 769, 783 (9th Cir. 2023) (declining to hear en banc) (Bumatay, J., dissenting) ("Respect for the government's interest in protecting our security should give us more pause before inventing new due process regimes."), rev'd, 144 S. Ct. 1812 (2024).

328. See Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) ("[T]he power to admit or exclude [noncitizens] is a sovereign prerogative." (internal quotation marks omitted) (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982))); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty . . . cannot be granted away or restrained on behalf of any one.").

329. Muñoz v. U.S. Dep't of State, 50 F.4th 906, 926 (9th Cir. 2022) (Lee, J., dissenting) (noting that the government should not have to provide evidence to support a visa denial because it "may be relying on confidential information derived from, say, a covert operation . . . or perhaps it is acting based on a secret diplomatic initiative"), rev'd, 144 S. Ct. 1812; see also *Muñoz*, 144 S. Ct. at 1824 (referencing a visa denial "based on 'information of a confidential nature, the disclosure of which would be prejudicial to the public interest'" (quoting United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537, 541 (1952))).

330. See *Muñoz*, 144 S. Ct. at 1825 (describing the power to exclude or expel noncitizens as "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers" (internal quotation marks omitted) (quoting Kleindienst v. Mandel, 408 U.S. 753, 765 (1972))).

331. See Anthony J. DeMattee, Matthew J. Lindsay & Hallie Ludsin, An Unreasonable Presumption: The National Security/Foreign Affairs Nexus in Immigration Law, 88 Brook. L. Rev. 747, 751–52 (2023) (showing that only 0.013% of removal cases involve national security or foreign affairs issues).

thousand immigration cases . . . implicate national security or foreign affairs," suggesting that "the basic warrant for extraordinary judicial deference in immigration cases . . . is demonstrably false."[332] Allowing a small minority of cases "to dictate the standard of judicial review" for the vast majority is bad policy.[333] A better solution would be to adopt "the same substantive, judicially enforceable norms that apply" when the government intends "to detain a criminal suspect or mentally ill person."[334] Undoubtedly, these cases occasionally touch upon concerns of national security, but even with an explanation requirement, the government "retain[s] broad latitude" to balance its interests.[335]

Furthermore, adopting broad judicial deference towards consular officers based on a small minority of cases that touch upon national security issues presents a "dangerous" slippery slope.[336] In today's geopolitical landscape, "literally everything can be construed as touching upon national security," so this argument "write[s] the government a blank check."[337]

The Court has recognized this risk and has not embraced the argument that national security concerns should overwhelm individual liberty interests in other areas of law.[338] This logic applies with even more force when consular officers—not the President or Congress—are making decisions.

2. *Consular and Judicial Efficiency*. — On a more practical matter, skeptics point out that a factual-and-timely requirement is logistically

---

332. Id. at 751.

333. Id.

334. Id.

335. Id.; see also Brief of the American Civil Liberties Union as Amici Curiae in Support of Respondent at 27, Kerry v. Din, 576 U.S. 86 (2015) (No. 13-1402), 2015 WL 294680 [hereinafter ACLU Brief as Amici Curiae] (noting that "the federal courts have a diversity of tools to ensure that the government's legitimate secrets are not disseminated inappropriately"); see also Webster v. Doe, 486 U.S. 592, 604 (1988) ("[T]he District Court has the latitude to control any discovery process . . . against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.").

336. See Schmitt, supra note 219, at 88–89 (explaining that this deference "would mean the end of judicial review in cases where the government acts under a pretext of national security").

337. Id.

338. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004) ("We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns."); Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

problematic.[339] Consulates review hundreds of applications per day.[340] Perhaps instituting an additional requirement would add undue stress on the process.[341] But complying with such a requirement would not be unduly burdensome given the internal records already kept.[342] When a visa is refused, applicants can present "further evidence" within a year "to overcome the ground of ineligibility on which the refusal was based."[343] In addition to this external review, the Foreign Affairs Manual outlines a mandatory internal supervisory review process.[344] To comply with these reviews, officers are undoubtedly recording their rationales for denying visas. Thus, the factual and timely explanation requirement would only require consulate officers to share upon request that which they are already recording internally. Moreover, most applicants are denied under statutory provisions with factual predicates that would not require further explanation. In 2022 and 2023, for instance, consular officers only denied forty-two and fifty-one applicants respectively under the broad catch-all category of "any other unlawful activity."[345] But perhaps the best evidence that a factual-and-timely requirement would not be prohibitively inefficient comes from former consular officers who filed an amicus brief in support of Mrs. Muñoz and Mr. Asencio-Cordero in *Muñoz* arguing that "judicial oversight is . . . needed."[346]

---

339. The *Muñoz* Ninth Circuit dissenters also critiqued the muddiness of the "reasonable timeliness" standard. Muñoz v. U.S. Dep't of State, 50 F.4th 906, 927 (9th Cir. 2022) (Lee, J., dissenting), rev'd, 144 S. Ct. 1812 (2024). Considering the prevalence of reasonableness standards in the law and the direction provided by the majority opinion, this argument is unconvincing.

340. See Nafziger, supra note 21, at 69 (exhibiting how on a sample day at a consulate post, five officers reviewed a total of 630 visa applications); Richardson, supra note 20 ("During what amounts to a five-minute interview (and sometimes less), an officer must make a judgment call on the applicant's story.").

341. But see ACLU Brief as Amici Curiae, supra note 335, at 22 ("History suggests that the more significant danger is not that judicial review under *Mandel* will lead to a flood of new lawsuits, but that the absence of review will lead to unauthorized but unexamined visa denials that abridge the constitutional rights of U.S. citizens.").

342. See *Muñoz*, 50 F.4th at 922 (describing the current process and timeline under which an applicant may overcome an initial denial).

343. 22 C.F.R. § 42.81(e) (2024).

344. Foreign Affairs Manual, supra note 143, at 504.11-3(A)(2)(b).

345. See supra note 315 and accompanying text.

346. Brief of Amici Curiae for Former Consular Officers in Support of Respondents, supra note 306, at 3–4 (decrying the fact that the "overwhelming majority of visa adjudications involve the exercise of individual consular officers' wide discretion"); see also Brief of Amici Curiae Former Consular Officers in Support of Respondent, supra note 257, at 3 (arguing for judicial review because "visa denials that rely on database and watchlist information frequently involve no consular discretion and are compelled by conclusory statements").

Defenders of consular nonreviewability also fear a floodgate of litigation.[347] This argument is misplaced for two reasons. First, because "filing a lawsuit in federal court is an expensive and time-consuming process," "only a very small number of denied applicants would take advantage of the judicial remedy."[348] Given the high rate of applicants overcoming ineligibility findings at the consulate,[349] review would be limited to the small number of people denied for vague reasons who also have connections to U.S. citizens. Second, "permitting judicial review will likely result in fewer unfair decisions from consular officers, thereby further decreasing the need and demand for judicial review."[350] This has proved true in several "European countries [that] allow judicial review . . . . [T]heir court systems have not come to a grinding halt."[351]

3. *Immigration Exceptionalism.* — In addition, opponents of an exception to consular nonreviewability contend that because immigration is a "privilege," due process protections are not applicable.[352] Although there may not be a constitutional entitlement to due process, Congress can still choose to legislate such a requirement.[353] In today's global world, extending limited due process rights to immigrants seeking visas might be beneficial. The world is increasingly global, and immigrants represent a significant force of the United States economy.[354] Many people applying for visas—like Mr. Colindres—are already living in the United States or at least already have some connection to the country.[355] Given the role

347. See Callan & Callan, supra note 41, at 320 (stating that "supporters . . . argue against these proposals, citing fears that allowing lawsuits would open the gates and flood federal court dockets").

348. Id.

349. See supra note 313 and accompanying text (highlighting that roughly eighty-five percent of ineligibility findings were overcome for immigration-visa-related services).

350. Callan & Callan, supra note 41, at 320.

351. Dobkin, supra note 21, at 121.

352. See United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542, 544 (1950) (explaining that "procedure[s] . . . [are] due process as far as [the noncitizen] denied entry is concerned"). This notion of immigration exceptionalism—the idea that special doctrines within immigration "enable government action that would be unacceptable if applied to citizens"—departs from the reality that courts are already wading into immigration matters. See Rubenstein & Gulasekaram, supra note 46, at 584–85; supra notes 267–287 and accompanying text.

353. U.S. Dep't of State v. Muñoz, 144 S. Ct. 1812, 1825 (2024) ("To be sure, Congress can use its authority over immigration to prioritize the unity of the immigrant family. . . . But the Constitution does not *require* this result . . . .").

354. Immigrants make up a large part of the U.S. economy: "Immigrants in the United States make up approximately 1-in-7 residents, 1-in-6 workers and create about 1-in-4 of new businesses." Joint Econ. Comm., 117th Cong., Immigrants Are Vital to the U.S. Economy 1 (2021), https://www.jec.senate.gov/public/index.cfm/democrats/2021/4/immigrants-are-vital-to-the-u-s-economy [https://perma.cc/NX44-A7ET].

355. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (explaining that "[noncitizens] receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); Landon v. Plasencia, 459 U.S. 21, 32 (1982) (noting that "once a[] [noncitizen]

immigrants play in the economy and society, it is crucial to incentivize a legitimate means for entry.[356] When they are denied a meaningful chance at immigrate, people will not stop attempting to enter the United States; rather, they will circumvent the system through extralegal methods.[357] Immigration exceptionalism—like national security and efficiency concerns—fails to foreclose adoption of a factual-and-timely requirement.

CONCLUSION

Mr. Colindres immigrated from Central America, building a life and family within the United States.[358] To protect the roots he established, he chose to engage in the visa process, voluntarily conceding his undocumented status.[359] His application was seamless—albeit slow—until its final stage. After leaving the country for final approval, a consular officer abruptly denied his visa, leaving him marooned in a country he had not lived in for years.[360] Now, the Colindres family is in "dire straits."[361] His story will not be the last. With the *Muñoz* decision denying judicial review to families like the Colindreses, the visa process remains risky, arbitrary, and anomalous.

Personal stories like that of Mr. Colindres illustrate the debate over whether consular nonreviewability remains viable in today's jurisprudence. Consular nonreviewability is inconsistent with broader immigration and administrative trends.[362] Most importantly, it precludes families from being together.[363] The short-lived Ninth Circuit's *Muñoz*

---

gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly"); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–97 n.5 (1953) ("The [noncitizen], to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity within our society." (quoting Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950))); Ibrahim v. Dep't of Homeland Sec., 62 F. Supp. 3d 909, 912 (N.D. Cal. 2014) (stating that the plaintiff had "such a connection" because of ties to the United States); see also Diana G. Li, Note, Due Process in Removal Proceedings After *Thuraissigiam*, 74 Stan. L. Rev. 793, 797, 826 (2022) (arguing that the *Thuraissigiam* decision "should be limited to its narrow facts" and "physical entry is the touchstone for determining whether someone has procedural due process rights"). But see Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982–83 (2020) (concluding that an asylum seeker does not have due process rights because he had not "effected an entry" and therefore he had "only those rights regarding admission that Congress has provided by statute").

356. See Philip Hamburger, Beyond Protection, 109 Colum. L. Rev. 1823, 1970 (2009) (arguing that immigrants should receive protection when "the government acquiesces in their remaining within the United States").

357. See, e.g., Valdes, supra note 263.

358. Colindres v. U.S. Dep't of State, 71 F.4th 1018, 1020 (D.C. Cir. 2023).

359. Id.

360. Id.

361. *Colindres* Petition, supra note 12, at 39.

362. See supra section II.B.2.

363. See *Colindres* Petition, supra note 12, at 38 (describing "a prolonged and potentially endless separation of a close-knit and loving family").

factual-and-timely requirement offers a template for congressional action—injecting fairness, consistency, and humanity into the visa process while protecting the core values motivating consular nonreviewability.[364] The Supreme Court may have rejected the Ninth Circuit's *Muñoz* requirement, but Congress can revive it by instructing consular officers to provide a factual and timely explanation for all visa denials.

---

364. See supra Part III.