

In Supreme Court arguments, Biden administration demands unrestricted power to separate families “without judicial oversight”

Tom Carter
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The US Supreme Court heard arguments on Tuesday in the important case of Sandra Muñoz, a US citizen who has been unable to live with her husband Luis Asencio-Cordero for nearly nine years as a result of the arbitrary decision by a US consular official to deny him a visa in 2015.

During the hearing, the Biden administration took the position that Muñoz had no right whatsoever to challenge the denial of her husband’s visa, and that she did not even have a right to be provided with any specific reason why. The Biden administration’s representative pitched his arguments to the Supreme Court’s far-right majority to adopt a far-reaching interpretation of the so-called “doctrine of consular nonreviewability,” even over the hesitations of the court’s nominally “liberal” minority.

Muñoz, a workers’ rights attorney in Los Angeles, met her husband in 2008 at a friend’s wedding and married him in 2010. In 2013, she initiated the process of obtaining him a visa on the basis of her citizenship and their marriage. After living together in Los Angeles for years, they were separated when a consular official at the US embassy in El Salvador denied him a visa in 2015, refusing to state the reason why and leaving him stranded there.

Immigration officials in the Obama administration, the Trump administration and the Biden administration all took identical positions, refusing to allow Muñoz and her husband to live together in the US.

The Ninth Circuit Court of Appeals ultimately ruled in 2022 that it violated Muñoz’s rights for the government to refuse to state a reason why her husband’s visa was being denied, besides a citation to a broad government statute referencing “unlawful activity.” The Ninth Circuit also ruled that the government’s later efforts to justify its decision by (falsely) claiming that Asencio-Cordero was a member of a gang were too late and violated her right to procedural due process, since those allegations were provided to Muñoz years after the deadline had passed for the couple to contest them.

However, the Biden administration refused to accept the Ninth Circuit’s decision, appealing to the Supreme Court, which agreed

to hear the case, in hopes that the court’s far-right majority would overturn the Ninth Circuit’s decision in favor of Muñoz.

The “doctrine of consular nonreviewability,” argued the Biden administration’s Deputy Solicitor General Curtis E. Gannon in the Supreme Court Tuesday, “prevents a non-citizen outside the United States from challenging a decision to deny a visa and also prevents a third party [Muñoz, his wife] from attacking that decision.”

The doctrine, according to Gannon, “protects the political branch’s ability to protect the nation’s borders and decide who is going to be admitted to the United States without judicial oversight for cases involving foreign citizens who are outside the United States.” In other words, the Biden administration’s position is that if an immigration official denies a visa to the spouse of a US citizen, that person should have no legal recourse (“judicial oversight”) for that decision whatsoever.

Early in the arguments, justice Sonia Sotomayor challenged the Biden administration’s position that Muñoz does not have a fundamental “liberty interest” in her marriage, pointing to nearly a century and a half of Supreme Court precedent. Sotomayor also asked about a scenario where a consular official denies someone a visa based on “misidentification,” and it turns out that “he’s not John Doe; he’s John Smith Doe, which is another person.”

The Biden administration’s attorney responded that a case challenging the decision of a consular official should simply not be permitted at all. While the Biden administration’s authoritarian position was treated skeptically by the Supreme Court’s “liberal” minority, it generally encountered a warmer reception on the court’s far-right wing.

The reactionary and infamously corrupt justice Clarence Thomas asked Gannon whether the position advanced by the Biden administration is “simply a doctrine that prevents all judicial review of these decisions,” to which Gannon replied, “yes.”

Christian fundamentalist justice Amy Coney Barrett, who was appointed by Donald Trump, asked Gannon whether his position was that Muñoz “doesn’t have a fundamental right in having her spouse live with her in the United States.” Gannon replied, “That is our front-line position, I agree.”

Sotomayor, for her part, continued to challenge Gannon. “As I see the question my way,” she said, Muñoz “has a liberty interest in her marriage” and an “interest in knowing why and an opportunity to oppose it if there is an opposition that can be had.” Sotomayor later added that Muñoz has a “right to live with him on the ground that you don’t have a statutory basis to exclude him.”

In response, Gannon continued to insist that the government did not have to even provide a reason for the denial beyond the citation to a statute generally referencing “unlawful activity.”

“Congress has specifically said that we don’t have to give a reason at all if this is the reason for the denial,” Gannon said. Replying to a question from Justice Ketanji Brown Jackson, Gannon repeated that “there is no liberty interest in getting your spouse admitted into the United States, notwithstanding immigration law restrictions.”

Attorney Eric Lee, who represented Muñoz before the Supreme Court, forcefully challenged and exposed the Biden administration’s position. “Over eight years ago, the government violated Sandra Muñoz’s right to procedural due process by denying her husband’s visa without providing a reason why,” Lee said.

“A mere citation to a broad statute that encompasses ‘any other unlawful activity’ forced Ms. Muñoz to guess at the reason for the denial,” Lee continued. This puts people in a “Kafkaesque” position where “the regulations say, well, sure, you have the opportunity to overcome the denial, but we’re not going to tell you why.”

“Ms. Muñoz has a constitutional liberty interest in living with her husband,” Lee argued, pointing to *Loving v. Virginia* (1967), the decision upholding the right of couples to marry and live in the state of their choosing, overturning racist laws that prohibited interracial marriage.

In a sharp exchange with Chief Justice John Roberts, Lee insisted that “the position that the government has put Ms. Muñoz in is that she’s been permanently separated from the man that she loves for eight years without having any basis, any chance when there was an opportunity to respond under the regulations, to try and convince them that they made a mistake.”

Roberts replied that Muñoz has “not been permanently separated from the man that she loves” because her husband is merely “not allowed to be admitted into the United States,” implying that she should join him in El Salvador.

Lee shot back that this presented Muñoz with an unfair choice between forfeiting either her husband’s presence or her life in the US: “El Salvador is under martial law. The State Department warns American citizens not to travel there. And Ms. Muñoz was born and raised in this country. She has a successful law practice here.”

Lee also ridiculed the government’s allegation that Asencio-Cordero’s tattoos, including one of Our Lady of Guadalupe and one of Sigmund Freud, indicated that he was a member of the international criminal organization MS-13. “Maybe MS-13 doesn’t like psychoanalysts,” Lee said.

Notably, the Supreme Court arguments Tuesday repeatedly referenced a case involving Ernest Mandel, the leader of the Pabloite United Secretariat of the Fourth International following

his break with Trotskyism and the Fourth International in 1953. In 1972, the Supreme Court decided that Mandel could not be denied a visa to speak in the US unless the government gave a “facially legitimate and bona fide reason” why. The decision in that case helped shape the so-called “doctrine of consular nonreviewability.”

The Muñoz case is one of the most significant immigration cases in recent decades in the US. A total of 35 members of Congress filed a brief in support of Muñoz, as did the American Civil Liberties Union (ACLU) and the US Conference of Catholic Bishops. The case also sparked anger and concern across Latin America.

Speaking to the *World Socialist Web Site* in January, Muñoz said she was “heartbroken, confused, and frustrated” by the government’s stubborn refusal to grant her husband a visa. “I knew and I know my husband. He was not going to engage in unlawful activity—whatever in the world that meant. I didn’t know how to disprove it except to point to our lives. My husband didn’t have a criminal history. I didn’t have a criminal history. ... It was just unfathomable that the US government had come to a conclusion that was completely unsupported by the facts and by our histories.”

In a video statement published before the hearing, Socialist Equality Party presidential candidate Joseph Kishore said that the case raised “fundamental questions of due process and democratic rights.”

“The Socialist Equality Party insists that Sandra Muñoz and Luis Asencio-Cordero must be reunited and allowed to live in the United States,” Kishore continued. “We defend the right of workers to live and work where they choose. We denounce the anti-immigrant chauvinism of both the Democrats and Republicans, and we call on workers all over the globe to unite regardless of nationality, immigration status, race, or any other category, to fight for equality and to fight for socialism.”

“Regardless of what the Supreme Court ultimately decides, what has happened to Sandra Muñoz is a terrible injustice,” Eric Lee said after the hearing. “The position of the Biden administration, like the Trump and Obama administrations before it, is that US immigration officials, on their own say-so, have the power to unilaterally separate a family, they don’t even have to give you a reason why, and there is nothing you can do to challenge it. This legal framework corresponds to a police state, not a democracy.”

Despite the significance of the case, the media coverage of the Muñoz case in the US was notably muted yesterday, with wall-to-wall coverage continuing of Trump’s criminal “hush money” trial in New York instead. Following yesterday’s arguments, the Supreme Court is expected to issue a decision in the coming weeks.



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