

US Supreme Court upholds Biden administration's claim of unrestricted power to separate families

John Burton
21 June 2024

By a 6-3 vote Friday, the reactionary Supreme Court majority upheld the Biden administration's challenge to a lower court ruling that would require the State Department to give an explanation when denying a visa to the bona fide spouse of a US citizen.

The decision in *Department of State v. Muñoz* dramatically undermines the right of US citizens to marry non-citizen spouses. In a statement issued following the decision, attorney Eric Lee, who represented plaintiff Sandra Muñoz before the Supreme Court in April, wrote that "the Supreme Court has thrown another shovel of dirt on the coffin of American democracy."

"The opinion's rationale—that fundamental rights do not exist unless enumerated textually in the constitution—poses an imminent threat to the right to marriage, to privacy, to vote, to contraception, and much more," Lee continued. "The opinion ominously relies on the explicitly racist policy of Chinese Exclusion and on the National Origins Quota Acts to justify its absurd conclusion that a citizen's right to marriage does not include the right to live with their spouse."

Lee called the decision, "a milestone attack on the right to marriage, the rights of immigrants, and the Due Process Clause." The Due Process Clause, part of amendments to the US Constitution ratified in the wake of the Civil War, is the foundation for the legal framework under which many basic freedoms are recognized under US law, including the rights to bodily integrity, sexuality, and privacy.

Luis Asencio-Cordero entered the United States from El Salvador in 2005 without papers. In 2010, following a two-year relationship, he and Sandra Muñoz, a prominent Los Angeles workers' rights attorney, married and had a child together. Three years later, they began the process of resolving Asencio-Cordero's immigration status through State Department channels that promised a pathway to documented, permanent residency.

The State Department agreed that their marriage was bona fide, and Asencio-Cordero otherwise met the basic requirements for a provisional waiver of his unlawful status, a prerequisite for acquiring a green card, or legal status as a non-citizen. As instructed by the State Department, the couple traveled to El Salvador in the spring of 2015 for what they thought would be a routine interview in the US consulate. Instead, Asencio-Cordero was summarily denied a visa for re-admission to the United States

in an order that simply cited a statute that references the possibility that in the future Asencio-Cordero might engage in "unlawful activities."

The couple was shocked. Acencio-Cordero has no criminal record in El Salvador nor during his decade in the United States. The couple and their child have been compelled to live separately ever since the visa denial.

While foreign nationals have no constitutional right to enter the United States from abroad, once in the United States they are entitled to due process before deportation to their country of origin. Instructing Acencio-Cordero to submit to a consular interview in El Salvador—which he and his wife assumed was a pro forma step in the ongoing process that would lead to his permanent residency in the United States—stripped him of the legal right to challenge his exclusion.

To challenge the consular decision, Muñoz filed suit on the ground that the forced separation of her family deprived her of the constitutional right to live with her husband and to raise their daughter together. After almost two years of litigation, the State Department for the first time stated that the visa was denied because of Asencio-Cordero's alleged participation in the MS-13 criminal gang based on tattoos depicting the Virgin of Guadalupe, psychiatrist Sigmund Freud, smiling and frowning theatrical masks, dice and cards, and a tribal pattern. Muñoz's expert witness explained the obvious, that none was related to MS-13 or to any other street gang or criminal enterprise.

After losing in the trial court, Muñoz appealed to the Ninth Circuit, which agreed that that the initial denial of a visa for her husband without any explanation violated her constitutional right to live with her spouse without due process and ordered the case remanded. Rather than accept that ruling, however, Biden administration lawyers petitioned the Supreme Court for review.

From the outset, the Biden administration lawyers directed their arguments at the Supreme Court's dominant far-right bloc, asserting that the anti-democratic doctrine of "consular nonreviewability" of visa denials was necessary for "national security," and that Muñoz and her child should move to El Salvador if the family wanted to stay together.

As Muñoz's attorney, Eric Lee, explained during the Supreme Court's oral arguments last April, "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.”

Justice Amy Coney Barrett wrote for the right-wing majority, affirming the Biden administration’s position on the most anti-democratic ground presented, that “a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country” because no such right is “enumerated” in the Constitution, nor is it “deeply rooted in this Nation’s history and tradition.”

Barrett describes how “the United States had relatively open borders until the late 19th century,” but Congress, starting with the Page Act of 1875 prohibiting the immigration of Chinese women, began imposing restrictions “that provided no exceptions for spouses.” The citation of this notoriously racist anti-immigrant law in Barrett’s opinion exposes the thoroughly reactionary and menacing content of the Supreme Court’s decision.

Justice Sonia Sotomayor dissented, joined by the other two moderates, Elena Kagan and Ketanji Brown Jackson. Sotomayor began with a citation to *Obergefell v. Hodges*, the 2015 ruling that constitutionally protects same-sex marriages, quoting: “The right to marry is fundamental as a matter of history and tradition.”

Sotomayor derided the majority’s decision, which makes no mention of *Obergefell*, or for that matter *Loving v. Virginia*, the case that overturned prohibitions against interracial marriages. “Muñoz’s right to marry, live with, and raise children alongside her husband,” Sotomayor wrote, “entitles her to nothing when the Government excludes him from the country.”

“The constitutional right to marriage is not so flimsy,” Sotomayor wrote, that the State Department should be allowed to “banish a U. S. citizen’s spouse and give only a bare statutory citation as an excuse.”

Ironically, the Biden administration’s victory in Muñoz comes three days after it cynically announced a “Keep Families Together” initiative supposedly aimed at “keeping couples together when they are married, where one spouse is a citizen and the other is undocumented.”

In his statement yesterday, Lee pointed out that Biden had said at the White House on June 18 that requiring people to leave the US for a consular interview is the type of “problem that makes our immigration system unfair, unjust.” Biden went on to state that eliminating the requirement of the consular interviews is “a better way” because “it doesn’t tear families apart.” Lee responded by asking, “Why did the administration appeal this case to the Supreme Court and argue the exact opposite positions?”

Lee denounced the Biden administration’s threadbare attempts to posture as an ally and defender of the rights of immigrants in the 2024 US elections. “Make no mistake,” Lee continued, “responsibility for the anti-democratic ripple effects that will follow falls not only on the Court, but also on the Biden administration, which petitioned for review after Sandra Muñoz and her husband prevailed at the Ninth Circuit and pressed forward with this case, all while claiming that it values family unity in the immigration context.”

Socialist Equality Party candidate for US president Joseph Kishore denounced the decision in a statement released on social media:

The gang of corrupt fascists that control the court have denied the right of Sandra Muñoz and her husband, Luis Asencio-Cordero, to be reunited. I was proud to be the only presidential candidate to sign the petition demanding #BringLuisHome2024.

In its decision, authored by Trump-appointee and arch-Catholic defender of “the sanctity of the family” Amy Coney Barrett, the Court argued that fundamental rights, including the right to marriage, do not exist unless they are specifically enumerated in the Constitution. This sets the stage for a massive assault on the core democratic rights of the entire working class. It was the Biden administration, however, that appealed a lower court ruling favorable to Muñoz. It took the case to the Supreme Court knowing that it could rely on the right-wing justices to back its position that the government did not have to provide any evidence whatsoever in refusing Luis reentry into the US.

The Democrats always argue that it is necessary to vote for them in every election because of the importance of Supreme Court appointments. But the Muñoz case demonstrates that the Democrats rely on the fascist judges to back their joint attack on democratic rights. The Democrats and Republicans represent two reactionary factions of the capitalist oligarchy, bent on the escalation of war, the intensification of exploitation, and the destruction of democratic rights. I call on all workers to support the demand to #BringLuisHome and to defend the rights of all immigrants, as part of the fight for the international unity of the working class.

The decision is one of seven issued Thursday and Friday as the Supreme Court clears its docket in advance of the summer recess, which traditionally begins before the Fourth of July holiday. Sixteen cases remain to be decided, presumably within the next week, including the following:

- Donald Trump’s claim for blanket immunity from prosecution for crimes committed while president;
- Whether January 6 insurrectionists can be charged with obstructing an official proceeding, namely the counting of the electoral votes by Congress;
- Whether cities can jail their unhoused for the “crime” of sleeping in public;
- Whether state laws can prohibit hospital emergency rooms from performing abortions during medical emergencies;
- Three cases that threaten to undermine the power of federal agencies to regulate businesses; and
- Three cases involving the regulation of free speech on the internet.



To contact the WSW and the Socialist Equality Party visit:

wsws.org/contact