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US Supreme Court's Anti-Immigrant Ruling

Dissenting justices accused the majority of issuing an unnecessarily broad ruling that could be used to strike down the right to same-sex marriage, writes Marjorie Cohn.



James Earle Fraser's "Contemplation of Justice" statue outside U.S. Supreme Court. (Matt H. Wade, CC BY-SA 3.0, Wikimedia Commons)

In a 6-3 ruling, the reactionary majority of the Supreme Court placed the right to marriage equality squarely on the chopping block. The court held that U.S. citizens have no constitutional right to have their noncitizen spouses enter the United States, so the government doesn't have to give a reason for excluding them.

Sonia Sotomayor, joined by Elena Kagan and Ketanji Brown Jackson, noted in dissent that “there is no question that excluding a citizen’s spouse burdens her right to marriage, and that burden requires the Government to provide at least a factual basis for its decision.”

They accused the majority of issuing an unnecessarily broad ruling that could be used to strike down the right to same-sex marriage. “The burden will fall most heavily on same-sex couples and others who lack the ability, for legal or financial reasons, to make a home in the noncitizen spouse’s country of origin,” Sotomayor wrote.

U.S. citizen Sandra Muñoz, a celebrated workers’ rights lawyer from Los Angeles, and her Salvadoran husband Luis Asencio-Cordero had lived together for five years in the United States when the government told her that he could no longer reenter the U.S.

Although Asencio-Cordero had no criminal record, a consular officer made an unsupported assertion that he planned to engage in “unlawful activity.” Muñoz claims that the government burdened her fundamental right to marriage and thus owed her an explanation of the factual basis for excluding her husband from the U.S.

“The Court’s decision ignores both constitutional principles and basic human decency,” Erwin Chemerinsky, dean of Berkeley Law School and one of Muñoz’s attorneys, told *Truthout*. “The Supreme Court long has recognized the right to marry as fundamental, but robs the right of meaning by saying for the first time that it does not include the right to be with one’s spouse.”

And, Chemerinsky said, “it is cruel for the Court to reject a right of spouses to be together, especially where a visa was denied in an arbitrary and unfounded manner.”

Muñoz married Asencio-Cordero in 2010 and they have a child together. She filed a visa application for her husband in 2015, but since he had entered the U.S. without documents, Asencio-Cordero had to leave the U.S., return to El Salvador, and apply for a U.S. visa from there.

After several interviews, a U.S. consular officer in San Salvador denied his visa, citing a provision that makes a noncitizen inadmissible to the U.S. when the officer knows or has “reasonable ground to believe” that they seek to enter the United States to engage in “unlawful activity.” But the officer provided no evidence to support that belief. “[U]nlawful activity’ could mean anything from jaywalking to murder,” Sotomayor noted.

Under the doctrine of consular non-reviewability, the officer’s decision is final and not reviewable in federal court except when the visa denial allegedly burdens the constitutional rights of a U.S. citizen.

Ninth Circuit Ruled for Muñoz & Asencio-Cordero

But the Ninth Circuit U.S. Court of Appeals did review the case and in 2022, found that Muñoz, as a U.S. citizen, had a constitutionally protected liberty interest in her husband’s visa application. Thus, the Ninth Circuit said, the Due Process Clause required the State Department to provide Muñoz with a “facially legitimate and bona fide reason” for denying her husband’s visa.

It was only after Muñoz and Asencio-Cordero filed their federal lawsuit that the government finally came forward with an explanation for the denial of his application three years before.

The government asserted that he was a member of MS-13, a transnational criminal gang, because of his tattoos, an interview and a background check which included “confidential law enforcement information.” Asencio-Cordero denied he was a member of MS-13 and said he had gotten the tattoos as a teenager.

An expert wrote in a letter to the State Department on behalf of Muñoz and Asencio-Cordero that none of the tattoos were “related to any gang or criminal organization in the United States or elsewhere.”



East entrance to Truman Building, headquarters of the U.S. State Department. (Ctac, CC BY-SA 3.0, Wikimedia Commons)

The Supreme Court reversed the Ninth Circuit and held that a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the U.S. Just as the right-wing majority in *Dobbs. v. Jackson Women’s Health Organization* held that there is no unenumerated constitutional right to abortion, in Muñoz the court likewise found that the right to bring a noncitizen spouse to the U.S. is not “deeply rooted in this Nation’s history and tradition.”

But, Sotomayor wrote, “The right to marry is fundamental as a matter of history and tradition,” citing the court’s landmark 2015 ruling in *Obergefell v. Hodges*, which legalized same-sex marriage.

Sotomayor’s Dissent

“The constitutional right to marriage is not so flimsy,” Sotomayor wrote of the majority’s decision. “The Government cannot banish a U.S. citizen’s spouse and give only a bare statutory citation as an excuse” without a factual basis for her husband’s exclusion from the U.S. warned, “The majority’s failure to respect the right to marriage in this country consigns U.S. citizens to rely on the fickle grace of other countries’ immigration laws to vindicate one of the ‘basic civil rights of man’ and live alongside their spouses,” noting that, “Same-sex couples may be forced to relocate to countries that do not recognize same-sex marriage, or even those that criminalize homosexuality.”

The dissent took aim at the court’s refusal to honor its promise in *Dobbs* “that eradication of the right to abortion ‘does not undermine ... in any way’ other entrenched substantive due process rights such as ‘the right to marry,’ ‘the right to reside with relatives,’ and ‘the right to make decisions about the education of one’s children.’”

Thus, charged Sotomayor, “the Court fails at the first pass” in *Muñoz*.



Sotomayor speaking at Arizona State University in Tempe in 2017. (Gage Skidmore, Flickr, CC BY-SA 2.0)

Once the government revealed why it had denied Asencio-Cordero’s visa, that should have ended the matter, Sotomayor wrote. But instead “the majority swings for the fences,” departs from the court’s precedent about the fundamental right to marriage, “and gravely undervalues the right to marriage in the immigration context.”

She chided the court for deciding that the right to marry and live with one’s spouse is not a constitutional right. “[T]he majority today chooses a broad holding on marriage over a narrow one on procedure.”

The court could have determined that the State Department's belated basis for denying Asencio-Cordero's visa was sufficient, without reaching the constitutional issue, Sotomayor noted.

Hypocrisy of the Biden Administration

For nearly 10 years, Muñoz has been unable to live with her husband, who remains in El Salvador.

This case reached the Supreme Court because the Biden administration appealed the Ninth Circuit's ruling. Ironically, Biden's win in Muñoz came three days after he announced his "Keep Families Together" program to "ensure that U.S. citizens with noncitizen spouses and children can keep their families together."

The new policy, contained in an executive order, will give 500,000 people who have resided in the U.S. for 10 years or more a pathway to citizenship and allow them to remain in the U.S. while they pursue legal immigration status.

In rolling out his new program, Biden said it was the right thing to do. "From the current process, undocumented spouses of U.S. citizens must go back to their home country ... to obtain long-term legal status. They have to leave their families in America, with no assurance they'll be allowed back in."

Biden's executive order was announced just two weeks after he drastically reduced access to asylum for people who cross the U.S.-Mexico border without documents.

Marjorie Cohn is professor emerita at Thomas Jefferson School of Law, dean of the People's Academy of International Law and past president of the National Lawyers Guild. She sits on the national advisory boards of Assange Defense and Veterans For Peace. A member of the bureau of the International Association of Democratic Lawyers, she is the U.S. representative to the continental advisory council of the Association of American Jurists. Her books include *Drones and Targeted Killing: Legal, Moral and Geopolitical Issues*.

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