ARIZONA SUPREME COURT

MARIA DEL CARMEN RENDON QUIJADA, Petitioner/Appellant, v. JULIAN JAVIER PIMIENTA DOMINGUEZ, Respondent/Appellee.	Court of Appeals Division Two No. 2 CA-CV 2022-0174-FC Pima County Superior Court Case No. D 2022-1319 **APPELLEE'S PETITION FOR REVIEW**

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INTRODUCTION

The interpretation of Congressional intent is a solemn undertaking. It is imperative that this Court give a fair reading to the federal statutes and regulations that govern TD visas. Here, the Arizona Court of Appeals deviated from long held principles of statutory interpretation, even *stare decisis* itself, to reach a conclusion that allows the Appellant ("Rendon") to proceed with a dissolution of marriage action in Superior Court.

Here, the Arizona domestic relations law requires Rendon be domiciled in Arizona before filing a petition for dissolution of marriage. However, the federal law governing Rendon's TD visa precludes her from relocating permanently to the United States. By reason of the Supremacy Clause, U.S. Const. art. VI, cl. 2, federal law prevails.

The trial court dismissed Rendon's petition for dissolution of marriage, concluding that Rendon was precluded by law from relocating to the United States permanently and from establishing domicile. The Arizona Court of Appeals vacated this determination. *See* Attached Opinion. At the time of trial on the Appellee's ("Pimienta") Motion to Dismiss, Rendon's status was that of a TD visa holder whose visa had expired.

This Opinion nullifies the conditions that Congress imposes on a broad swath of non-immigrant visa holders. According to the Arizona Court of Appeals, Congress itself has provided an avenue by which nonimmigrants in the U.S. under 8 U.S.C. § 1184(e)(1) can disclaim the conditions of their visas upon entry to the United States. *See* Opinion ¶ 30. This reading violates a foundational canon of statutory construction—the "presumption against ineffectiveness."

This is a case of first impression in Arizona and a pure issue of law. The outcome here will affect many other cases, both pending and planned. This Court should grant review.

ISSUES PRESENTED FOR REVIEW

1. Did the panel err by holding that federal law does not preempt Arizona from allowing Rendon to establish domicile under Arizona law?
2. Did the Court of Appeals err in finding that 8 U.S.C. § 1184(e)(1) permits a TD visa holder to change her domiciliary intent upon entering the United States?
3. Did the Court of Appeals err finding *Elkins v. Moreno*, 435 U.S. 647 (1978) permits TD visa holders to nullify the conditions of their visas by seeking a visa that could lead to permanent residence?

STATEMENT OF MATERIAL FACTS

1. Rendon and Pimienta are Mexican citizens married in Mexico in 1999. [ROA 43 ep 2].

2. Rendon and Pimienta came to the United States in 2007 on visas created under the temporary worker provisions of the North American Free Trade Agreement [ROA 43 ep 2].

3. The visa obtained by Rendon upon entry to the United States is known as a TD visa; the TD visa is for dependents of TN visa holders. TN visas are granted to workers from Mexico who are sponsored by a United States employer [ROA 43 ep 2].

4, Both TD and TN visa holders are required to declare an intent to remain domiciled in their country of origin to receive and renew their visas [ROA 43 ep 2].

5. A TD visa holder is not permitted to renew their visa without the sponsorship of a TN visa holder. [ROA 43 ep 2].

6. Rendon expressly stated in her TD visa applications over the course of more than a dozen years that she did not intend to remain in the United States and instead intended to return to Mexico. [ROA 43 ep 3].

7. Rendon's TD visa was renewed for the last time on March 29, 2018; the visa expired on March 28, 2020 [ROA 43 ep 2].

8. Pimienta and Rendon separated and decided to divorce in October 2020 [ROA 43 ep 2; Tr. 8/2/22 ep 19:6-9].

9. Pimienta filed a dissolution of marriage action in Mexico on November 27, 2020. [Tr. 8/2/22 ep 22: 1-6].

10. In December 2020, at Rendon's request, Rendon's sister filed a petition for alien relative with the United States Citizenship and Immigration Service (USCIS), listing Rendon as the intended beneficiary. [Tr. 8/2/22 ep 24: 2-15; Trial exhibit 11].

11. In January 2021 USCIS sent a notice that it had received the petition for alien relative submitted by Rendon's sister. At the top of the notice it says in bold print: "This notice does not grant any immigration status or benefits. [Tr. 8/2/22 ep 28: 5-10; Trial exhibit 9].

12. Rendon challenged the jurisdiction of the Mexican court over the dissolution of marriage action, asserting that she was domiciled in the United States, not in Mexico. [Tr. 8/2/22 ep 26:3-20; Trial exhibit 15]. The Mexican court dismissed the dissolution of marriage action in on July 11, 2022. [ROA 43 ep 3]

13. On May 11, 2022, Rendon filed the Petition for Dissolution in this case, asserting she was domiciled in Arizona [ROA 3 ep 1].

14. On June 23, 2022, Pimienta filed a Motion to Dismiss the Petition for Dissolution for lack of subject matter jurisdiction due to Rendon's legal inability to assert domicile. [ROA 17]

15. At the time of the evidentiary hearing on Pimienta's Motion to Dismiss, Rendon's immigration status had not changed from that of a TD visa holder on an expired visa. [Tr. 8/2/22 ep 24:6-11]

16. On October 21, 2022 the trial court dismissed Rendon's Petition for Dissolution, finding that she is precluded by law from establishing domicile in Arizona. [ROA 43 ep 4]

REASONS THE PETITION SHOULD BE GRANTED

Incorrectly Decided Issue of Law

Notwithstanding Rendon's allegation that she began seeking a visa that could lead to permanent residence before filing the Petition for Dissolution, she does not meet the subjective intent requirement for domicile under Arizona law. To establish domicile, one must intend to abandon the former domicile and remain here for an indefinite period of time. *Dewitt v. McFarland*, 112 Ariz. 33, 34 (1975). However, at present, Rendon is precluded by law from relocating permanently to the United States.

Rendon is a Mexican citizen who has invoked 8 U.S.C. § 1184(e)(1) as the basis for her current presence in the United States. This statute provides that persons seeking entry pursuant to the temporary worker provisions of the United States Mexico Canada Agreement (formerly NAFTA) are classifiable as nonimmigrants under 8 U.S.C. § 1101(a)(15) and admissible only under the applicable regulations of the Attorney General. *Id.* The purpose of the Attorney General's regulations are to "insure" that any person admitted as a nonimmigrant departs from the United States upon the expiration of the time established by the Attorney General or upon failure to maintain the status under which they were admitted. 8 U.S.C. § 1184(a).

With this purpose in mind, the regulation governing TD visas, 8. C.F.R. § 214, requires that the TD visa holder affirm that they will depart upon completion of a

specific work assignment. *See* Opinion ¶ 13. While TD visas may be renewed, the renewal implies a reaffirmation of the intent to predictably depart the United States. [ROA 43 ep 3]. Incredibly, the Court of Appeals held that "*Nothing in the law precludes visa holders from entering the United States without an intent to remain, then changing that intent and seeking an immigration visa or permanent residency later, including through the adjustment-of-status process recognized in Elkins.*" Opinion ¶ 24.

This holding is contrary to controlling United States Supreme Court precedent. Our highest Court has cited the statute that defines Rendon's immigration status, 8 U.S.C. § 1101(a)(15), as an example of a statute by which "*Congress has precluded the covered alien from establishing domicile in the United States.*" *Toll v. Moreno*, 458 U.S. 1, 14. The Court has referred to 8 U.S.C. § 1101(a)(15) as a statute in which Congress "expressly conditioned admission on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States." *Elkins v. Moreno*, 435 U.S. 647, 665 (1978). The latter decision has been misinterpreted by the Arizona Court of Appeals.

The Opinion cites *Elkins* for the proposition that holders of visas premised on an intent not to seek domicile can legally change their intent by "seeking an adjustment of status upon arrival in the United States. *See* Opinion ¶¶ 18, 20. This argument is premised on the following language from *Elkins:*

> *By including restrictions on the intent in the definition of some nonimmigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States was to immigrate permanently. Moreover, since a nonimmigrant alien who does not maintain the conditions attached to his status can be deported…it is also clear that Congress intended that, in the absence of an adjustment of status, nonimmigrants in restricted classes who sought to establish domicile would be deported. Id.* 665-666.

Syntactically, this means that Congress has created a class of certain nonimmigrants who, once inside the United States, cannot lawfully seek to establish domicile here. It means that a nonimmigrant within this category is deportable if she seeks to establish domicile in violation of her visa conditions. It is not susceptible to the construction given by the Arizona Court of Appeals, that the existence of the federal government's discretion to adjust the status of a nonimmigrant implies those same persons can seek to establish domicile here. *See* Opinion ¶ 20. This ignores a fundamental canon of statutory construction: the presumption against ineffectiveness.

It would be inconsistent to conclude that Congress sought to preclude nonimmigrants who comply with federal immigration law from the benefits that flow from state domiciliary status while permitting nonimmigrants who violate their

visa conditions to share in them. Rendon violated her visa conditions by not departing on March 28, 2020; Rendon again violated her visa conditions by seeking to establish domicile. This is a clear violation of the terms and conditions proscribed by the Attorney General.

Preemption Analysis

The Opinion fails to apply both prongs of the Supremacy Clause conflict preemption analysis. Conflict preemption occurs where compliance with federal and state law is impossible ("impossibility preemption") or where state law poses an obstacle to federal objectives ("obstacle preemption"). *See Gades v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 98 (1992). The Arizona Court of Appeals ignored impossibility preemption.

The application of this test to the facts is straightforward. Congress precluded TD visa holders from lawfully forming a subjective intent to reside indefinitely in the United States. *See* 8 U.S.C. § 1184(e); 8. C.F.R. § 214.6(b). However, A.R.S. § 25-312 requires that Arizona domicile be established. It is impossible for a TD visa holder to comply with her visa and also comply with A.R.S. § 25-312.

Also, allowing Rendon to establish an Arizona domicile would impede Congress's purposes and objectives. The purpose behind the Attorney General's regulation of nonimmigrants is to ensure that they comply with the conditions of their visas and depart upon expiration of the same. *See* 8 U.S.C. § 1184(a). If a State

starts to provide a TD visa holder benefits tied to in-state domiciliary status, that works against Congress's stated purpose; the same can be said for the provision of benefits to a person present on an expired TD visa.

Statewide Importance

Resolution of this case will affect many other cases, both pending and planned. There will be a potential increase in litigation if all nonimmigrants identified in 8 U.S.C. § 1101(a)(15) are allowed to seek domicile in the United States. This goes beyond the scope of domestic relations disputes—and puts this State in the position of making immigration policy.

CONCLUSION

The Court should grant this petition for review.

Respectfully submitted,

/s/ *Luke E. Brown* 6/23/2023
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