ARIZONA SUPREME COURT

Supreme Court No. CV-23-0160 PR
Court of Appeals Division Two Case No. 2 CA-CV 2022-0174-FC
Pima County Superior Court Case No. D 2022-1319

MARIA DEL CARMEN RENDON QUIJADA,

Petitioner/Appellant,

v.

JULIAN JAVIER PIMIENTA DOMINGUEZ,

Respondent/Appellee

BRIEF *AMICUS CURIAE* OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENT/APPELLEE

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IDENTITY AND INTEREST OF AMICUS CURIAE

IRLI is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed amicus curiae briefs in a wide variety of cases, including: *Wash. All. of Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); and *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016). In this appeal, IRLI is interested in a holding rejecting the mistaken presupposition of the court below that, in federal immigration law, an illegal alien can obtain lawful status—as is necessary to establish domicile—merely by applying for lawful status.

No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Petitioner/Appellant is an alien who entered the country legally, but has overstayed and violated the terms of her visa and remains in the United States unlawfully. Despite her status as an illegal alien, Petitioner/Appellant seeks to establish domicile in the state of Arizona in order to obtain a divorce from Respondent/Appellee. The court below misapplied federal immigration law to find that because Petitioner/Appellant began the process for seeking legal status before

filing for divorce, the terms of her original visa no longer applied. That argument contains the seeds of its own destruction; if one is seeking legal status, one does not have it, and if one does not have legal status, one cannot form the intent to remain needed to establish domicile in Arizona.

The Immigration and Nationality Act and its implementing regulations are clear that aliens who enter the United States on temporary visas cannot form a legally cognizable intent to remain. Instead, they are bound by the terms of the visa they were granted, and must restart the visa process if seeking to remain permanently in the United States. Additionally, aliens who are unlawfully present are generally considered inadmissible and deportable, conditions that also preclude them from forming a legally cognizable intent to remain. For these reasons, Petitioner/Appellant cannot establish domicile in Arizona and her underlying petition for divorce should be dismissed.

ARGUMENT

Courts have long-recognized "Congress' plenary power over immigration." *Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018) (citation omitted). *See also Fiallo v. Bell*. 430 U.S. 787, 792 (1977) ("Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.") (citation and quotation marks omitted); *United States v. Valezuela-Bernal*, 458 U.S. 858, 864 (1982) ("The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government."). Congress exercised this power by enacting the Immigration and Nationality Act ("INA"), "a

comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents." *Elkins v. Moreno*, 435 U.S. 647, 664 (1978).

Interpretation of the provisions of the INA, as "with any question of statutory interpretation, . . . begins with the plain language of the statute. It is well established that, when the statutory language is plain, we must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). *See also King v. Burwell*, 576 U.S. 473, 486 (2015) ("If the statutory language is plain, we must enforce it according to its terms."); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) ("It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (citation and quotation marks omitted); *Ardestani v. INS*, 502 U.S. 129 (1991) ("The starting point in statutory interpretation is the language [of the statute] itself."). Accordingly, "[w]here the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation." *United States v. Pub. Utils. Com.*, 345 U.S. 295, 315 (1953).

The court below misapplied these principles when it found that Petitioner/Appellant could form a legally cognizable intent to remain. Such a finding contradicts the plain language of the temporary visa she was admitted on, and also the language of the INA's inadmissibility provision that categorizes unlawfully present aliens, such as those who overstay the terms of their visa, as inadmissible and removable.

I. NONIMMIGRANTS ON TN/TD VISAS CANNOT HAVE A LEGALLY COGNIZABLE INTENT TO REMAIN IN THE UNITED STATES.

In the INA,

> Congress has specified categories of aliens who may not be admitted to the United States. *See* 8 U.S.C. § 1182. Unlawful entry and reentry into the country are federal offenses. §§ 1325, 1326. Once here, aliens are required to register with the Federal Government and to carry proof of status on their person. *See* §§ 1301-1306 Failure to do so is a federal misdemeanor. §§ 1304(e), 1306(a).

Arizona v. United States, 567 U.S. 387, 395-96 (2012). Congress also specified that aliens be classified into two groups: immigrants and nonimmigrants. 8 U.S.C. § 1101(a)(15); *Toll v. Moreno*, 458 U.S. 1, 13 (1982). Several categories of nonimmigrants exist, and such persons are often "precluded . . . from establishing domicile in the United States." *Toll*, 458 U.S. at 14. *See also Elkins*, 435 U.S. at 665 ("Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States.").

Certain nonimmigrant visas were created using another part of the federal government's broad authority over immigration: the power to form relationships and enter treaties with foreign countries. *Phong Doan v. INS*, 78 F. Supp. 2d 1101, 1107 (S.D. Cal. 2000) ("The Constitution grants to the legislative and executive branches of government the powers to declare and wage war, to conclude peace, to make treaties, and to maintain diplomatic relations with other sovereignties, *see* U.S. Const. art. I, § 8, art. II, § 2[.]"). One such treaty is the U.S.-Mexico-Canada-

Agreement ("USMCA"), which was entered into in 2020 as an update to the previously enacted North American Free Trade Agreement ("NAFTA"). Dep't of Commerce, International Trade Administration, *United States-Mexico-Canada Agreement*,

https://www.trade.gov/usmca#:~:text=United%20States%2DMexico%2DCanada%20Agreement,economic%20growth%20in%20North%20America (last visited Dec. 5, 2023). Under this agreement, certain workers from Mexico and Canada are deemed nonimmigrants and granted visas, known as TN visas, for temporary admission to the U.S. 8 U.S.C. § 1184(e). Nonimmigrants on a TN visa may sponsor a TD visa for their spouse and any dependent children. *Id*. The terms of these visas reflect the complex negotiations between the U.S., Canada, and Mexico, and may not be changed by the states.

The INA provision regarding these visas directly addresses the USMCA, and reflects that such visas are issued to comply with the terms of the treaty. It provides:

> An alien who is a citizen of Canada or Mexico, and the spouse and children of any such alien if accompanying or following to join such alien, who seeks to enter the United States under and pursuant to the . . . USMCA . . . to engage in business activities at a professional level as provided . . . may be admitted for such purpose under regulations of the Attorney General promulgated after consultation with the Secretaries of State and Labor. For purposes of this Act, including issuance of entry documents . . . such alien shall be treated as if seeking classification, or classifiable as, a nonimmigrant under section 101(a)(15).

8 U.S.C. § 1184(e). "Congress . . . clearly stated its intention that aliens seeking admission under the NAFTA . . . should be classified as nonimmigrants. Regulations promulgated pursuant to the NAFTA, while allowing [aliens] the opportunity to renew their TN visas, . . . also require the applicant to have the intent to remain in the country only temporarily." *Estate of Jack ex rel. Blair v. United States*, 54 Fed. Cl. 590, 598 (2002).

The applicable regulations define "temporary entry" as "entry without the intent to establish permanent residence. The alien must satisfy the inspecting immigration officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence." 8 C.F.R. § 214.6. Thus, by definition, the TN/TD visa unambiguously provides *temporary* admission and requires nonimmigrants to declare their intention to return to their country of origin. These regulations "insure that at the expiration of such time or upon failure to maintain the status under which [s]he was admitted, . . . [the] alien will depart from the United States." 8 U.S.C. § 1184(a)(1). This statutory language clearly reflects that the agreement made between the U.S., Canada, and Mexico was to facilitate the temporary admission of certain workers and their families until such time as their employment is complete and they return to their country of origin. *Jes Solar Co. v. Matinee Energy, Inc.*, No. CV 12-626 TUC DCB, 2015 U.S. Dist. LEXIS 178475, at *26 (D. Ariz. Mar. 30, 2015) ("In the Ninth Circuit a TN/TD (Treaty NAFTA/Treaty Dependent) visa holder does not have the legal capacity to possess the requisite intent to establish domicile[.]").

"[B]ecause admission into the United States for TN/TD nonimmigrant aliens is expressly conditioned on an intent not to establish permanent residence here, it is evident that Congress has precluded such aliens from establishing domicile in the United States." *Carlson v. Reed*, 249 F.3d 876, 880 (9th Cir. 2001). Any "*subjective* intent to reside permanently in [the U.S.] . . . would violate . . . TN/TD federal immigration status[]" making such alien's "continued presence in this country . . . illegal." *Id*. (citing *Elkins*, 435 U.S. at 666; 8 C.F.R. § 214.1. *See also Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993) ("If petitioner complied with the terms of his temporary work visa, then he could not have had the intent necessary to establish a domicile in this country. On the other hand, if he did plan to make the United States his domicile, then he violated the conditions of his visa and his intent was not lawful. Under either scenario, petitioner could not establish lawful domicile in the United States while in this country on a nonimmigrant, temporary worker visa."). By its plain language, the statute contemplates that aliens admitted on TN/TD visas will only remain in the U.S for a finite amount of time as nonimmigrants, not permanently. Accordingly, it is not possible for an alien present on a TN/TD visa to form the legally cognizable intent to remain necessary to establish state domicile.

II. THE TERMS OF A VISA APPLY EVEN AFTER AN ALIEN BECOMES INADMISSIBLE FOR VIOLATING THOSE TERMS.

Congress defined nonimmigrant visa statutes and their requirements, 8 U.S.C. § 1101(a)(15), and the Department of Homeland Security ("DHS") implements regulations setting the conditions of lawful entry for these visa categories, 8 U.S.C.

§ 1184(a). In turn, nonimmigrants are expected to maintain lawful status in their visa category by conforming to the terms of lawful entry—both statutory and regulatory. 8 U.S.C. §§ 1184(a), 1227. The statutory requirements of each nonimmigrant category are applicable throughout an alien's stay in the United States. *See, e.g., Toll*, 458 U.S. at 14 n.20; *Elkins*, 435 U.S. at 665-66; *Akbarin v. Immigration & Naturalization Serv.*, 669 F.2d 839, 840 (1st Cir. 1982); *Graham*, 998 F.2d at 196; *Touray v. United States AG*, 546 F. App'x 907, 912 (11th Cir. 2013).

Accordingly, an alien granted temporary admission under the USMCA must abide by the conditions of the TN/TD visa. Petitioner/Appellant's visa required that she maintain lawful presence and an intention to return to her country of origin. "An alien who was admitted as a nonimmigrant is removable if he fails 'to maintain the nonimmigrant status in which the alien was admitted . . . or to comply with the conditions of any such status . . . ." *Touray*, 546 F. App'x at 912 (citing 8 U.S.C. § 1227(a)(1)(C)(i)). Petitioner/Appellant has failed both requirements. First, she has failed to maintain her nonimmigrant status. Petitioner/Appellant was admitted as a dependent spouse on a TD nonimmigrant visa. ROA 43 ep 2. Her visa expired in 2020 and she has remained in the United States unlawfully since that time. *Id*. As such, she is an inadmissible alien. 8 U.S.C. § 1182(a)(6). Second, she has failed to comply with the continuing terms of her nonimmigrant status by seeking permanent admission to the United States despite her having reaffirmed her intent eventually to return to Mexico several times over more than a decade. ROA 43 ep 3. If, moreover, Petitioner/Appellant was dishonest about her intent during these visa renewals, she

violated the terms of her visa then and is inadmissible. 8 U.S.C. §§ 1182, 1184(e); 8 C.F.R. § 214.6.

Despite the requirement that Petitioner/Appellant abide by the terms of her visa, the court below refused to apply them, finding instead that because she overstayed that visa and remained unlawfully, the terms of her initial entry were no longer applicable. In other words, the court below permitted Petitioner/Appellant to benefit from violating the terms of her visa and granted her the right to establish domicile in the state of Arizona.

This was error. Aliens cannot escape the boundaries of their visa by violating the terms of that visa. In fact, the Ninth Circuit has repeatedly rejected the argument that aliens "who violate the conditions of their visa . . . are no longer subject to the statutes that preclude them from establishing a lawful subjective intent to remain in the country." *Woul Soo Park v. Barr*, 946 F.3d 1096, 1099 (9th Cir. 2020) (citing *Carlson v. Reed*, 249 F.3d 876, 880-81 (9th Cir. 2001); *Von Kennel Gaudin v. Remis*, 379 F.3d 631, 638 (9th Cir. 2004)). It would be counter to the plain terms of the INA and the USMCA to allow TD/TN visa holders to avoid the bar on domiciliary intent by simply overstaying their visa. As the Ninth Circuit explained:

> 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. By restricting the domiciliary intent of B-2 nonimmigrants, Congress did not merely seek to restrict them from establishing a domicile for a temporary period, after which they could establish domicile simply by violating the

> terms of their entry and staying in the country unlawfully. Rather, "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." *Elkins*, 435 U.S. at 665. The Supreme Court found it similarly "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.* at 666. We hold that Park, as a nonimmigrant who entered the United States pursuant to 8 U.S.C. § 1101(a)(15)(B) and unlawfully overstayed her visa—like those in lawful B-2 status, *see Von Kennel Gaudin* [*v. Remis*], 379 F.3d [631,] 637 [(9th Cir. 2004)]—was precluded from establishing domiciliary intent to remain in the United States.

Woul Soo Park, 946 F.3d at 1099.

Furthermore, Congress made clear that "[a]ny alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted . . . or to comply with the conditions of any such status, is deportable." 8 U.S.C. § 1227(a)(1)(C)(i). "Indeed, courts have validated deportation of aliens for violating the terms of their visa." *Estate of Jack ex rel. Blair v. United States*, 54 Fed. Cl. 590, 598 (2002). Accordingly, because Petitioner failed to maintain the status under which she was admitted, she is unlawfully present and cannot legally form the intent to remain needed to establish domicile in Arizona. 8 U.S.C. § 1227(a)(1)(C)(i). *See also Lok v. Immigration & Naturalization Serv.*, 681 F.2d 107, 109-10 (2d Cir. 1982) ("As a seaman who had overstayed . . . Lok was in the United States illegally. He could not establish lawful domicile."); *Alvarado v. United States*, Civil Action No. 16-5028, 2017 U.S. Dist. LEXIS 80894, at *11-12

(D.N.J. May 25, 2017) (explaining that "lawful *presence* is all that is required" to establish domicile); *Flores v. United States*, 108 F. Supp. 3d 126, 131 (E.D.N.Y. 2015) (explaining "that domicile can be established by an intent to remain that is legal under immigration laws."). Because Petitioner/Appellant could not form an intent to remain under her TD visa, she similarly could not form one once she became unlawfully present at the expiration of that visa.

The court below thus erred in finding that because Petitioner/Appellant's visa had expired and she was seeking admission in another manner she was no longer subject to the bar on domiciliary intent of her TD visa. While it is true that Petitioner/Appellant's sister had filed an I-130 Petition for Alien Relative prior to the filing of the present divorce proceedings, Petitioner/Appellant's unlawful presence in this country was not thereby altered.

In fact, it would not have helped Petitioner/Appellant even if the I-130 had been granted by the time the proceedings below were commenced. *See* U.S. Citizenship and Immigration Service ("USCIS"), Petition for Alien Relative, https://www.uscis.gov/i-130#:~:text=Submitting%20Form%20I%2D130%2C%20Petition,any%20immigration%20status%20or%20benefit ("The filing or approval of this petition does not give your relative any immigration status or benefit."). If, at that point, Petitioner/Appellant remained in the country, she would still be unlawfully present and unable to form the intent to remain needed for domicile in Arizona. Furthermore, though she then could apply for adjustment of status, she could only do so outside of the country, *id*. ("If your relative is already in the United States but is not eligible

to get their Green Card . . . they may apply for an immigrant visa with the U.S. Department of State *at the embassy or consulate in their country*.") (emphasis added); *Dominguez v. United States Dep't of State*, No. CV 19-5327 PSG (SSx), 2020 U.S. Dist. LEXIS 157070, at *7-8 (C.D. Cal. May 22, 2020) (explaining that an "alien beneficiary must appear for an in-person interview with the consular officer abroad"), where she would be unable to establish the physical presence element of domicile. For this reason, too, the lower court's reliance on the Petition for Alien Relative is misplaced.

CONCLUSION

For the foregoing reasons, the decision of the Arizona Court of Appeals should be REVERSED.

Dated: December 13, 2023

Respectfully Submitted,

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