No._____

IN THE
SUPREME COURT OF THE UNITED STATES

Julian Javier Pimienta Dominguez,
Petitioner

vs.

Maria del Carmen Rendon Quijada,
Respondent

On Petition for a Writ of Certiorari
to the Arizona Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal law precludes the holder of a TD nonimmigrant visa from establishing domicile in Arizona.

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PETITION FOR WRIT OF CERTIORARI

Julian Javier Pimienta Dominguez petitions for a writ of certiorari to review the judgment of the Arizona Supreme Court.

OPINIONS BELOW

The decision of the Arizona Supreme Court (Pet. App. 1a) has case caption No. CV-23-0160-PR, and judgment was entered on June 18, 2024. Citation to an official reporter is not yet available. The decision of the Arizona Court of Appeals (Pet. App. 2a) is reported at 532 P.3d 1165 (2023), and judgment was entered June 15, 2023. The decision of the Arizona Superior Court (Pet. App. 3a) is unreported, and judgment was entered on October 21, 2021.

JURISDICTION

The judgment of the Arizona Supreme Court was entered on June 18, 2024. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

United States Constitution, Article VI, Clause 2 states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any

> Thing in the Constitution or Laws of any State to the contrary notwithstanding.

8 U.S.C. § 1184(e)(1) provides in pertinent part:

> 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 provisions of Section D of Annex 16-A of the USMCA…shall be treated as if seeking classification or classifiable, as a nonimmigrant under section 1101(a)(15) of this title…

8 U.S.C. § 1101(a)(15) provides in pertinent part:

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens-
> …
> (B) an alien…having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or for pleasure;

8 C.F.R. § 214.6(b) provides, in pertinent part:

> …Temporary Entry, as defined in the USMCA, means 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…

A.R.S. § 25-312(A)(1) provides:

> Dissolution of Marriage; findings necessary…
> …That one of the parties, at the time the action was commenced, was domiciled in this state…and that…the domicile…has been maintained for ninety days before filing the petition for dissolution of marriage.

STATEMENT OF THE CASE

This case concerns the Constitution's Supremacy Clause and the preemption of state law. Under Arizona law, one of the parties to a dissolution of marriage action must be domiciled in Arizona for at least ninety (90) days prior to filing the petition. *See* A.R.S. § 25-312(A)(1). Domicile under Arizona law requires "(1) physical presence, and (2) an intent to abandon the former domicile and remain here for an indefinite period of time; a new domicile comes into being when the two elements coexist." See *DeWitt v. McFarland*, 112 Ariz. 33, 34 (1975) (quoting *Heater v. Heater*, 155 A.2d 523, 524 (D.C. 1959)). Respondent filed a petition for dissolution of marriage claiming to be domiciled in Arizona. Arizona law requires Respondent intend to abandon her former domicile and reside indefinitely in Arizona to establish domicile. Unless Respondent meets this requirement, Arizona law does not permit the adjudication of her divorce action.

Respondent is a citizen of Mexico who entered the United States with TD visa issued under 8 U.S.C. § 1184(e)(1). Pet. App. 1a, pg 1. TD visa holders are "nonimmigrants" who "have a residence in a foreign country which they have no intention of abandoning and who are visiting the United States temporarily for business or for pleasure." 8 U.S.C. § 1101(a)(15)(B). It is physically impossible for Respondent to be domiciled in Arizona and comply with the terms of her TD visa. In *Gades v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992),* this Court said that state law

is preempted when it is impossible to comply with both federal and state law. The Arizona Supreme Court reasoned otherwise, finding that this was not a case of impossibility preemption. Pet. App. 1a, pg. 15.

The issue of conflict preemption of state law was first raised by Petitioner by filing a Motion to Dismiss on June 23, 2022, in Arizona Superior Court. Pet. App. 3a, pg. 72. The Motion argued that Respondent's claim to be domiciled in Arizona is irreconcilable with the conditions of her nonimmigrant TD visa. This Court previously found that Congress precluded certain aliens from establishing domicile in the United States through 8 U.S.C. § 1101(a)(15). *Toll v. Moreno*, 458 U.S. 1, 14 (1982); *Elkins v. Moreno*, 435 U.S. 647, 665 (1978). Federal law classifies TD visa holders, like Respondent, as nonimmigrants under 8 U.S.C. § 1101(a)(15). The Motion to Dismiss argued that Respondent was precluded from establishing domicile in Arizona.

At the Arizona Superior Court, Respondent argued that she was no longer subject to the restrictions of her TD visa because she overstayed her visa before filing her petition for dissolution of marriage. Pet. App. 3a, pg. 75. The Arizona Superior Court rejected this argument, finding that expiration of the visa did not grant Respondent a right to become domiciled in Arizona. *Id* at 76. The Motion to Dismiss was granted by the trial court. The pertinent findings from the trial court are stated here:

Arizona Superior Court's Findings

"Domicile is primarily a creature of state law, but federal immigration laws impose outer limits on a state's freedom to define it." *Park v. Barr*, 946. F.3d 1096 (9th Cir. 2020), citing *Toll v. Moreno*, 458 U.S. 1, 10-14 (1982). The United States Court of Appeals, Ninth Circuit has addressed situations such as the one presented here. As the Ninth Circuit discusses, individuals who enter the United States on TN and TD visas enter with the express condition that they do not intend to establish permanent residence in the United States. *Carlson v. Reed*, 249 F.3d at 880-81. Such individuals are therefore "precluded . . . from establishing domicile in the United States." Id. Furthermore, even if individuals who entered on TN or TD visas establish a subjective intent to remain in the United States, they then violate the conditions under which they entered the United States, and they still lack the legal capacity to establish domicile within a state of the United States. (Pet. App. 3a, pgs. 76-77).

…Therefore, the Court is bound by the Ninth Circuit precedent discussed above and must find that Petitioner, despite her actions showing subjective intent to remain in Arizona, is precluded from establishing residency and domicile. Consequently, this

> Court lacks jurisdiction over the parties to enter a Decree of Dissolution of Marriage." (*Id*).

The Arizona Court of Appeals reversed, determining that the Ninth Circuit precedent was inapplicable and that Respondent could change her mind regardless of the terms of her visa. The pertinent findings from the Arizona Court of Appeals are stated here:

> Arizona Court of Appeals
>
> "Although *Park* and *Carlson* are not on point, we must still address whether the federal law governing TN and TD visas would preempt a conclusion that holders of such visas can be domiciled in Arizona as a matter of state law while seeking an immigrant visa or permanent residency. We conclude that it would not. Federal laws are presumed not to preempt state laws. *Conklin v. Medtronic, Inc.*, 245 Ariz. 501, ¶ 8 (2018). The relevant federal law looks to the visa holder's intent upon admission to the United States and renewal of the visa. *See, e.g.*, 8 U.S.C. § 1184(e)(1) (allowing noncitizens to be "admitted" under relevant regulations); 8 C.F.R. § 214.6(b) (defining "temporary entry" as lacking "intent to establish permanent residence"). Nothing in that law precludes visa holders from entering the United States without an

> intent to remain, then changing that intent and seeking an immigrant visa or permanent residency later, including through the adjustment-of-status process recognized in *Elkins*." (Pet. App. 2a, pgs. 64-65)

The Arizona Supreme Court found additional reasons to reach the same conclusion:

> Arizona Supreme Court
>
> "Given the presumption against preemption, the absence of express preemption, and the fact that exercising jurisdiction here would not interfere with federal immigration objectives, we will construe the law as best we can to avoid a finding of impossibility. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (providing that state family law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden" (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966))). Here, as in *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), federal and state statutes "do not impose directly conflicting duties . . . as they would, for example, if the federal law said, 'you must sell insurance,' while the state law said, 'you may not.'" *Id.* at 31. (Pet. App. 3a, ¶ 27).

The Arizona Superior Court recognized and applied doctrine of "impossibility preemption" by applying Ninth Circuit precedent. The Arizona Court of Appeals and the Arizona Supreme Court declared that they are not bound by the Ninth Circuit and reasoned away the irreconcilable conflict between Respondent's TD visa and her claim to be domiciled in Arizona. As a consequence, the law was "construed" to avoid application of the plain language of the Supremacy Clause. *See* U.S. Const. art. VI, § 1, cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and *the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (emphasis added).

As shown below, the Arizona Supreme Court's preemption analysis conflicts with relevant decisions of both this Court and the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

I. A state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States court of appeals.

The Ninth Circuit has held that federal immigration law controls whether the holder of a non-immigrant visa can be domiciled in a State. In *Park v. Barr*, 946 F.3d 1096 (9th Cir. 2020) the Ninth Circuit addressed the ability of a B-2 visa holder to be domiciled in the state of California for family court proceedings. The court examined the conditions imposed by Congress on B-2 visa holders, which include maintaining a residence in their country of citizenship with no intention of abandoning it." *Id* at 1099 (citing 8 U.S.C. § 1101(a)(15)(B)). The Ninth Circuit concluded: "…Congress has not permitted B-2 nonimmigrants to lawfully form a subjective intent to remain in the United States; such an intent would inescapably conflict with Congress's definition of the nonimmigrant classification." *Id.* The California state law required domicile in California, but the federal law prevented the nonimmigrant from forming domiciliary intent. The outcome was dictated by the B-2 nonimmigrant visa requirements—which are the same as the TD visa requirements—both nonimmigrant visas that allow temporary entry only.

The Arizona Supreme Court criticized and deviated from the Ninth Circuit's preemption analysis in *Park*:

> Technically, *Park* does not apply here as it distinguished the California Court of Appeal's decision in *Dick*, in part, on the grounds that the latter dealt (as here) with a marriage dissolution statute. *Id.* at 1100. Regardless, we are not obliged to follow Ninth Circuit precedent. *See Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 532–33 ¶¶ 8–9 (2003). *Park* failed to engage in any meaningful preemption analysis, simply concluding that state law was displaced by federal law with which the court deemed it to conflict. 946 F.3d at 1100." (Pet. App. 1a, ¶ 33).

This criticism for failing "to engage in any meaningful preemption analysis" is unwarranted. This Court should clarify that any preemption analysis ends upon finding that it is impossible for a private party to comply with both federal and state law. Engaging in additional analysis undermines the plain language of the Supremacy Clause. *See* U.S. Const. art. VI, § 1, cl. 2.

The decision below also squarely conflicts with *Carlson v. Reed,* 249 F.3d 876, 880-81 (9th Cir. 2001), wherein the Ninth Circuit addressed the legal capacity of a TD visa holder to assert she was domiciled in the State of California. The court determined that TD visa holders do not have the capacity to be domiciled in California under federal

immigration law, following this Court's analysis in *Toll v. Moreno*, 458 U.S. 1 (1982). *Id* at 879. The court also held that a TD visa holder could not escape the conditions of her visa by simply violating her visa conditions. *Id* at 881. In the decision below, the Arizona Supreme Court found that federal immigration law does not prohibit state courts from granting divorces to those whose TD visas have expired—granting a benefit to Respondent for violating her visa conditions. Pet. App. 1a, pg. 22.

This Court should grant certiorari to resolve the conflict between the Arizona Supreme Court and the Ninth Circuit regarding the preemptive effect of federal immigration law in state court proceedings.

II. A state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

The Arizona Supreme Court avoided application of this Court's impossibility preemption doctrine by citing cited the "presumption against preemption" and "the fact that exercising jurisdiction here would not interfere with federal immigration objectives. Pet. App. 1a, pg. 15. This rationale conflicts with relevant decisions of this Court regarding the permissible scope of a conflict preemption analysis.

FEDERAL IMMIGRATION OBJECTIVES

As stated in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963): "A holding of federal exclusion of state law is inescapable and

requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility…" Here, it is unquestionably impossible for Respondent to comply with the federal law governing TD visas and be legally domiciled in Arizona. The State law would require Respondent to declare an intent to abandon her former domicile and remain in Arizona indefinitely. The Federal law prohibits Respondent from intending to abandon her former domicile as she is here only "temporarily." In this instance, it is improper to speculate about the "objectives" underlying federal immigration law. The limited inquiry proposed in *Florida Lime* is the only inquiry required by the facts of this case.

The problem is illustrated by the critique the Arizona Supreme Court levied against the Ninth Circuit's decision in *Park*, that there was: "no meaningful preemption analysis, simply concluding that state law was displaced by federal law with which the court deemed it to conflict." (Pet. App. 1a, pg. 20). The critique is error because the Ninth Circuit's limited inquiry is consistent with *Florida Lime.* The conflict preemption inquiry should be limited in scope where there is an irreconcilable conflict between the application of a state law and federal immigration law. The federal immigration law prevails.

PRESUMPTION AGAINST PREEMPTION

In *United States v. Locke*, 529 U.S. 89, 108 (2000), this Court recognized an exception to the presumption against preemption in cases involving

subjects in which the federal government has historically had a significant regulatory presence. The statute governing TD nonimmigrant visa holders was made pursuant to a negotiated treaty between the United States, Canada, and Mexico under an express, enumerated delegation of authority under the Constitution. *See* U.S. Const. art. I, § 8, cl. 3–4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization" and "[t]o regulate Commerce with foreign Nations."); 8 U.S.C. §§ 1184(e)(1), -1101(a)(15)(B); *see also* 8 C.F.R. § 214.6. The federal government has historically had significant regulatory presence over the subject of immigration, and the presumption against preemption should not apply in this case.

Finally, the presumption against preemption is readily overcome if state law would require something federal law prohibits. *See* ANTONIN SCALIA AND BRYAN A, GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 290 (2012). Congress prohibits 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). In this case, Arizona law requires a TD visa holder to prove what federal law prohibits—a subjective intent to reside indefinitely in Arizona. *See* A.R.S. § 25-312(A)(1). Consequently, the presumption against preemption is readily overcome under the facts of this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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