IN THE SUPREME COURT OF THE STATE OF NEVADA

AHED SAID SENJAB, Appellant, v. MOHAMAD ABULHAKIM ALHULAIBI, Respondent.	Supreme Court No.: 81515 District Court Case No.: D-20-606093-D

BRIEF OF *AMICUS CURIAE*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, INC. IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE JUDGMENT BELOW

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I. IDENTITY AND INTEREST OF THE NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, INC.

The National Immigrant Women's Advocacy Project, Inc. ("NIWAP")[1] is a non-profit advocacy organization that develops, reforms, and promotes the implementation and use of laws and policies that improve rights, services, and assistance to immigrant women and children who are victims of domestic violence and other crimes. NIWAP's Director worked with Congress to draft the immigration protections included in the original and amended Violence Against Women Act ("VAWA"), among other legislation. This case involves interpreting provisions of the Immigration and Nationality Act ("INA") and directly implicates the safety of visa-holding and immigrant women and children.[2] The lower court's ruling prevents a battered wife and her child from accessing this country's courts and obtaining protection from an abusive spouse and father. The order could have far-reaching, dangerous consequences for all visa-holding and immigrant women and children.

NIWAP files this brief under NRAP 29 concurrently with a motion for leave under NRAP 29(a) because Respondent's counsel does not consent to the filing.

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[1] The Legal Aid Center of Southern Nevada, Inc. and K&L Gates LLP represent NIWAP pro bono in furtherance of their interest in providing pro bono legal representation to individuals and organizations that cannot afford attorneys.

[2] Appellant holds a visa under 8 U.S.C. § 1101(a)(15)(F)(ii), which the INA defines as a "nonimmigrant alien." She will be referred to herein as a "visa-holder."

II. ARGUMENT

The INA does not broadly preempt state family law and Congress did not intend the INA to prevent a visa-holder from establishing residency for purposes of obtaining a divorce. The lower court's contrary conclusions were reached in error with troubling and dangerous results. The flawed decision resulted from the court's misinterpretation of *Park v. Barr*, 946 F.3d 1096 (9th Cir. 2020) ("*Park*") and of 8 U.S.C. § 1101(a)(15)(F)(ii). *Park* did not hold that federal immigration law preempts state residency requirements for divorce jurisdiction, and the Ninth Circuit's ruling does not prevent the court from exercising jurisdiction over Appellant's divorce complaint. Congress has never evinced an intent to broadly preempt this area of state law. The lower court's ruling conflicts with Supreme Court precedent, Nevada case law, and federal and state interests, and violates Appellant's due process rights.

Instead of dismissing the complaint, the lower court should have permitted Appellant to show that she established residency in the state to confer jurisdiction under N.R.S. 125.020(e). The result of the lower court's misreading of *Park* and 8 U.S.C. § 1101(a)(15)(F)(ii) is that a battered spouse and her young child are left at the mercy of an abusive husband with no access to the court's protections. This directly contradicts the federal government's interest in preventing violence against women and children, and conflicts with the state's goals of adjudicating family law

matters and protecting society's health, safety and welfare, particularly its most vulnerable members. The Order should be reversed for the reasons set forth below and in Appellant's Fast Track Statement.

A. The Lower Court Erroneously Interpreted *Park*

The lower court dismissed the Appellant's divorce complaint for lack of subject matter jurisdiction.[3] N.R.S. 125.020(e) gives the district court jurisdiction over divorce complaints "[i]f plaintiff resided 6 weeks in the State before suit was brought." The lower court found that Appellant, an F-2 visa holder, could not establish residency on the grounds that she could not "lawfully form [the] subjective intent to remain in the United States" because "F-2 visa[-holder]s are required to maintain a residence in their country of citizenship with no intention of abandoning it."[4] This was wrong.

The lower court acknowledged that its ruling was a significant departure from established law since, "pursuant to state law, undocumented immigrants who physically live in Nevada have been able to access Nevada courts to obtain a divorce so long as they have been physically present in Nevada, and…they establish a subjective intention to make Nevada their home."[5] This change was based on the

[3] Findings of Fact, Conclusions of Law, Decision and Order ("Order"), ¶19.

[4] *Id.* at ¶¶1-3, 7-10, 13-19.

[5] *Id.* at ¶6; *see, e.g.*, *Boisen v. Boisen*, 85 Nev. 122, 124 (1969) ("It is well-settled that (b)oth residence and intent…[are] factual matters for the court's

court's erroneous conclusions that *Park* "held that federal law…preempted state law" in this area and that *Park*'s holding "bars nonimmigrants [in]…the United States on a visa…from establishing the subjective intent that is required to give [the] court subject matter jurisdiction to grant a divorce."[6] Both conclusions are inaccurate.

The plaintiff in *Park* was a lapsed B-2 tourist visa-holder who obtained a divorce from the Korean consulate, married a United States citizen, and applied for naturalization.[7] Her application was denied on the grounds that her foreign divorce was invalid under California law because her first husband and she were California

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determination….") (quotations omitted). This approach is consistent with that of numerous other states. *See, e.g.*, *Williams v. Williams*, 328 F. Supp. 1380, 1383-85 (D.V.I. 1971) (there is "no reason to erect from the immigration laws an insuperable barrier of 'constructive' intent in divorce litigation that cannot be overcome…by proof of…actual intent"); *Weber v. Weber,* 929 So.2d 1165, 1168 (Fla. Dist. Ct. App. 2006) (non-immigration status does not bar individual's right to establish residency for purposes of obtaining dissolution of marriage in that state); *Padron v. Padron*, 281 Ga. 646, 646 (2007) ("A person's immigration status does not, as a matter of law, preclude that person from establishing residency for purposes of obtaining a dissolution of marriage."); *Salvatierra v. Calderon*, 836 So.2d 149, 154 (La. Ct. App. 2002) ("Non-immigrant[s]…issued temporary visas…are not precluded from establishing a domicile within a state…to maintain a divorce action"); *Das v. Das,* 254 N.J. Super. 194, 200 (Ch. Div. 1992) ("The determination of a party's domicile...must be resolved in accordance with state decisional law."); *Bustamante v. Bustamante,* 645 P.2d 40, 42 (Utah 1982) ("Even if the plaintiff's professed intention to establish…residency is inconsistent with the terms of her right of entry into the United States, she is not thereby disqualified from becoming a domiciliary for divorce purposes").

[6] Order, ¶7.

[7] *Park*, 946 F.3d at 1098.

domiciliaries when the divorce decree was executed.[8] The district court affirmed the denial. The Ninth Circuit reversed the decision and found that B-2 visa holders must have "no intention of abandoning" their country of citizenship and, therefore, Park was precluded from establishing "domiciliary intent."[9] As a result, her divorce was valid and she could petition for naturalization.[10] Appellant's situation is factually and legally distinguishable from *Park*. The lower court's reliance on the ruling was misplaced and its expansive interpretation of the Ninth Circuit's order was erroneous.

Appellant is an F-2 visa-holder. The lower court concluded that F-1 and F-2 visa-holders "are required to maintain a residence in their country of citizenship with no intention of abandoning it," thus equating Appellant's situation to that in *Park*.[11] This is inaccurate. Although F-1 visas, like B-2 visas, require one to have "no intention of abandoning" one's foreign country,[12] there is no mention of intent or maintaining foreign residence in the law governing F-2 visas. Instead, F-2 visa-holders must merely be "the alien spouse and minor children of any alien described

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[8] California does not recognize foreign divorce when both parties are California domiciliaries. *Id.* at 1097.

[9] *Id.* at 1099.

[10] *Id.* at 1089-1100.

[11] Order, ¶13.

[12] 8 U.S.C. § 1101(a)(15)(F)(i).

in clause (i) if accompanying or following to join such an alien."[13] Therefore, federal law does not preclude F-2 visa holders from forming a subjective intent to remain in the United States for purposes of establishing residency under N.R.S. 125.020(e).

Further, *Park* interpreted the meaning of "domicile" under California law, not "residence."[14] Here, the lower court asserted that the two terms are interchangeable, but the Ninth Circuit expressly stated in *Park* that that is inaccurate.[15] This is why the Ninth Circuit concluded that *Park* did not overturn *In re Marriage of Dick*, 15 Cal. App. 4th 144 (1993).[16] *In re Marriage of Dick* held that "'nonimmigrant status does not preclude a finding of residence under California law for purposes of obtaining a dissolution of marriage.'"[17] If *In re Marriage of Dick* remains good law after *Park*, *Park* does not preclude Appellant from establishing residency for purposes of filing for divorce.

Finally, the Ninth Circuit did not hold that "federal law has preempted state law" in this area.[18] Instead, the Ninth Circuit merely recognized the "preeminent

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[13] 8 U.S.C. § 1101(a)(15)(F)(ii).

[14] *Park*, 946 F.3d at 1100.

[15] *Id.* ("USCIS and the district court erred in interpreting 'domicile'…in line with …'residence.'").

[16] *Id.* at 1098-1100.

[17] *Id.* at 1099-1100 (quoting *In re Marriage of Dick*, 15 Cal. App. 4th at 154).

[18] *See* Order, ¶7.

role of the Federal Government with respect to the regulation of aliens within our borders."[19] Were *Park* to broadly preempt state law in this area, it would have overruled *In re Marriage of Dick*. Further, it would conflict with Supreme Court precedent and, as discussed below, violate Appellant's due process rights by denying her access to divorce court for reasons unrelated to divorce policy.[20] The ruling in *Park* did not preclude the plaintiff from filing for divorce, as it would here, and, thus, did not have constitutional implications. Instead, the ruling ensured that state law did not bar the plaintiff's ability to apply for naturalization, which is clearly a regulation of immigration squarely under federal authority.[21]

As discussed below, Congress has never intended to occupy the field of family law and prevent all visa-holders from filing for divorce, and Nevada's Dissolution of Marriage statute[22] does not conflict with federal immigration law. Here, the lower court's ruling does not serve to preserve the federal government's authority over

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[19] *Park*, 946 F.3d at 1100.

[20] *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) ("[T]he Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."); *Boddie v. Conn.*, 401 U.S. 371, 376-77, 381-82 (1971) (excluding litigants from divorce courts for reasons unrelated to divorce policy violates the Due Process Clause).

[21] *DeCanas v. Bica*, 424 U.S. 351, 354-55 (1976) *superseded by statute on other grounds* (explaining that the "[p]ower to regulate immigration is unquestionably exclusively a federal power").

[22] N.R.S. 125, *et seq*.

immigration. Instead, it strips the state's authority over family law matters and over public health and safety and denies Appellant important Constitutional rights.

This Court should reverse the lower court's erroneous reading of *Park* so that Appellant, a battered spouse, and her child, a witness to his mother's trauma, can access the courts and escape Respondent's abuse. The lower court's reliance on *Park* to rewrite 8 U.S.C. § 1101(a)(15)(F)(ii) and find broad federal preemption is reversible error.

B. Federal Law Does Not Broadly Preempt State Residency Requirements for Family Court Jurisdiction

Federal law preempts state law only if Congress exercises its power of preemption "expressly" or if preemption can be "implied" because "state law is in an area fully occupied by federal regulation or…it conflicts with federal law."[23] Preemption is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[24] Here there is no preemption and the lower court's conclusion that federal law preempts residency requirements for access to family courts for all visa-holders was wrong.

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[23] *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016).

[24] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

First, 8 U.S.C. § 1101(a)(15)(F)(ii), and the rest of the INA, do not explicitly preempt a state's residency requirements for purposes of accessing family courts and filing divorce complaints.[25]

Second, the lower court's conclusion that preemption can be implied from the INA's requirement that F-2 visa holders must not intend to abandon their foreign residencies was incorrect. As mentioned above, 8 U.S.C. § 1101(a)(15)(F)(ii) does not contain a residency element. Congress injected an "intent not to abandon" requirement in numerous sections of the INA, including those sections governing F-1 and F-3 visas, as well as B, H, J, M-1, and O-2 visas.[26] "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[27]

Third, preemption cannot be implied because family law and the protection of vulnerable members of society are not areas "fully occupied by federal regulation" and Nevada's Dissolution of Marriage statute does not conflict with the INA or any

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[25] In fact, residency for purposes of giving the lower court jurisdiction over divorce proceedings requires physical presence and intent to stay for some period of time. *See Boisen*, 85 Nev. at 124. This is distinct from the "lawfully admitted…permanent residence" requirement found in the INA, which is defined as a "**lawfully accorded**…**privilege of residing permanently** in the United States as an immigrant…." *See* 8 U.S.C. § 1101(a)(20).

[26] *See* 8 U.S.C. §§ 1101(a)(15)(B), (F)(i), F(iii), (H), (J), (M)(i), (O)(ii).

[27] *Russello v. U.S.,* 464 U.S. 16, 23 (1983) (citation omitted).

other federal law. The "[p]ower to regulate immigration is unquestionably exclusively a federal power."[28] However, the Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration," and thus preempted.[29] Merely because "aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[30] Even if a law has "effects in the area of immigration", where the "text of the laws regulate for the health and safety of the people" there is only preemption if Congress' "intent to preempt the challenged state statute is clear and manifest."[31] Determining whether there was implicit preemption must be done with "the presumption that in fields of traditional state regulation the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."[32]

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[28] *DeCanas*, 424 U.S. at 354-55 (citations omitted).

[29] *Id.* at 355 (citations omitted).

[30] *Id.* *DeCanas* dealt with state regulations of the employment of undocumented immigrants and was superseded by a later federal statute directed toward the employment of undocumented immigrants. *Kansas v. Garcia*, 140 S. Ct. 791, 797 (2020). There is no corresponding federal legislation directed toward residency requirements for access to state family courts.

[31] *Puente Arizona*, 821 F.3d at 1104 (quotations omitted).

[32] *Roach v. Mail Handlers Ben. Plan*, 298 F.3d 847, 850 (9th Cir. 2002) (quotations omitted).

Moreover, the Court must consider the well-established principle that "the states…have some authority to deal with aliens in a manner that mirrors federal objectives and furthers a legitimate state goal."[33]

In this case, Congress has not evinced an intent to preempt the State's authority over a visa-holder's divorce and her and her child's welfare.[34] Further, permitting the district court to exercise jurisdiction over this divorce complaint mirrors federal objectives, including decreasing violence against women and protecting abused foreign spouses and children living in the United States.[35] Moreover, allowing the state court to adjudicate visa-holders' divorce complaints

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[33] *Tarango v. State Indus. Ins. Sys.*, 117 Nev. 444, 448-49 (2001) (quotations omitted). This Court in *Tarango* found that a state law, to the extent it permitted employment of undocumented workers, would conflict with federal law prohibiting such employment. *Tarango*, 117 Nev. at 450.

[34] *See* INA; 8 U.S.C. §§ 1101(a)(15)(F)(ii); *Dimalanta v. Dimalanta*, Nos. CV 80-0278A, CV 81-0018A, 1983 WL 30222, at *2 (D. Guam Mar. 4, 1983)("A non-immigrant alien is congressionally precluded from establishing domicile only in the sense of being ineligible for naturalization.").

[35] *See e.g.,* INA §§ 204 (a)(1)(A)(iii)-(vii) and (B)(ii)-(v) (authorizing spouses and children subjected to battering or extreme cruelty by their United States citizen or lawful permanent resident spouses or parents to self-petition for legal immigration status without their abuser's knowledge, permission or assistance); INA § 101(a)(15)(U) (giving immigrant spouses and children abused in the United States an independent path to legal immigration status); INA §101(a)(27)(J) (giving abused immigrant children the ability to gain protection under the Special Immigrant Juvenile Status program).

furthers state goals relating to regulating marriage and divorce and protecting the health, safety and welfare of victims, families and society.[36]

"[T]he question of who qualifies as a local…resident for purposes of divorce jurisdiction is a question of local law to which a person's federal immigration status has little if any relevance."[37] This Court has recognized the state's important role in protecting children and their parents when it noted that "[a] district court may exercise temporary emergency jurisdiction to protect a child who is physically present in Nevada if … it is necessary in an emergency to protect the child because

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[36] *See e.g.*, *U.S. v. Morrison*, 529 U.S. 598, 616-19 (2000) (declining to interpret Commerce Clause in a way that could lead to Congress regulating "family law and other areas of traditional state regulation"); *Boddie*, 401 U.S. at 376 ("As this Court…has recognized, marriage involves interests of basic importance in our society" and "[i]t is not surprising, then, that the States have seen fit to oversee many aspects of that institution.") (citations omitted)); *Retail Prop. Trust v. Un. B'hood of Carpenters and Joiners of Am.*, 768 F.3d 938, 951 (9th Cir. 2014) (federal statute did not "displace those areas where the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons") (quotations omitted)); *Williams*, 328 F. Supp. at 1383 ("The enforcement of immigration laws properly remains with those to whom it is entrusted by law and does not need in aid of enforcement the judicially created civil disability of exclusion from divorce courts. There is no rational ground for intermingling these two distinct areas of law−immigration and divorce."); *Abid v. Abid*, 133 Nev. 770, 774 (2017) (the state has an "overwhelming interest in promoting and protecting the best interests of its children"); *Clark Cnty. Dist. Atty, Juvenile Div. v. Eighth Judicial Dist. Court ex. rel. Cnty. of Clark,* 123 Nev. 337, 346 (2007) ("[T]he child's best interest necessarily is the main consideration for the district court when exercising its discretion concerning placement").

[37] *Dimalanta*, 1983 WL 30222, at *2 (finding Superior Court had subject matter jurisdiction of visa-holder's divorce petition).

the child, or … parent of the child, is subjected to or threatened with mistreatment or abuse."[38] Before filing for divorce, Appellant secured an order of protection against the Respondent and was seeking custody of her child in connection with the divorce.[39] Therefore, here, the state's goals are not abstract, but tangible and with potentially devastating consequences should the state abandon its role as society's, and the Appellant's and her son's, protector.

There is no explicit or implicit preemption here. The lower court's finding of broad preemption to preclude it from exercising jurisdiction over Appellant's divorce complaint was erroneous and should be reversed.

C. Dismissing Appellant's Divorce Complaint for Lack of Subject Matter Jurisdiction Violates Her Due Process Rights

"[T]he Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."[40] Plaintiffs in divorce proceedings are akin to "defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of a defendant called upon to defend his

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[38] *In re Guardianship of N.M.*, No. 64694, 2015 WL 2092205, at *2 (Nev. Apr. 29, 2015) (quotations omitted).

[39] Order, pp. 2-3.

[40] *Logan*, 455 U.S. at 429.

interests in court."[41] Due process, thus, requires that "at a minimum,…absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[42] Here, no such countervailing state interest exists or has been articulated in this case. In fact, prior to this ruling, it was well-established that state law permitted non-citizens "who physically live in Nevada…to access Nevada courts to obtain a divorce so long as they have been physically present in Nevada, and…they establish a subjective intention to make Nevada their home."[43] Further, as discussed above, both federal and state interests support allowing Appellant to establish residency in the state to confer jurisdiction under N.R.S. 125.020(e). Therefore, excluding Appellant from district court was improper and violated her due process rights.[44]

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[41] *Boddie*, 401 U.S. at 376-77.

[42] *Id.* at 378.

[43] Order, at ¶6; *see, e.g.*, *Boisen*, 85 Nev. at 124.

[44] *Williams*, 328 F. Supp. at 1383-85 (excluding litigants from divorce courts for reasons unrelated to divorce policy violates the Due Process Clause); *see Boddie*, 401 U.S. at 376-77, 381-82 (same); *Dimalanta*, 1983 WL 30222, at *3 (same).

III. CONCLUSION

Federal immigration law does not preempt state residency jurisdiction in divorce cases. The lower court's conclusion that *Park* held that there was such preemption was erroneous, contradicts the plain language of the INA and well-established law, violates Appellant's due process rights, and could have dangerous, far-reaching, and unintended consequences. The Court should overturn the lower court's Order and Appellant should be permitted to establish subjective residency intent to give the district court jurisdiction over her divorce complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14 point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 29(e) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,553 (MUST BE 3,633 OR UNDER -- 1/2 of 7,267 words) words.

3. I further certify that I have read this Brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including NRAP 28(e)(1), which requires every assertion in the brief regarding matters in record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: September 25, 2020

CERTIFICATE OF SERVICE

I hereby certify that this **Brief of Amicus Curiae** was filed electronically with the Nevada Supreme Court on the 25th day of September, 2020. Electronic Service of the **Brief of Amicus Curiae** shall be made in accordance with the Master Service List as follows:

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