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BAD TIMING ALBERTO: BIA HAS CONFIRMED THAT SAME SEX SPOUSES CAN GET IMMIGRATION BENEFITS AFTER UNITED STATES V. WINDSOR

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By Gary Endelman and Cyrus D. Mehta

Former Attorney General Alberto Gonzales, along with an immigration attorney, David Strange, published an Op Ed in the New York Times entitled What the Court Didn't Say on July 17, 2013. They muddy the waters by contending that despite the recent Supreme Court decision in *United States v. Windsor,* 133 S. Ct. 2675 (2013) which struck down section 3 of the Defense of Marriage Act (DOMA) as unconstitutional, it is not clear whether same sex spouses may be entitled to immigration benefits as Congress always intended spouses to be of the opposite sex under the Immigration and Nationality Act (INA). For those who do not know, Mr. Gonzales was the Attorney General who authorized the infamous torture memos during the Bush administration. His essay too involves tortured reasoning as we shall see.

What the Op Ed does not tell us is the dramatic extent to which DOMA was an aberration, a break from the long-standing American tradition that the regulation of marriage belonged to the states:

> *The durational residency requirement under attack in this case is a part of Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact. In Barber v. Barber, 21 How. 582, 584 (1859), the Court said: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . . ." In Pennoyer v. Neff, 95 U. S. 714, 734-735*

> *(1878), the Court said: "The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved," and the same view was reaffirmed in Simms v. Simms,175 U. S. 162, 167 (1899)*

Sosna v. Iowa, 419 U.S. 393, 404 (1975)

From this perspective, it is DOMA that stands out as a radical departure from well-established jurisprudence and its judicial invalidation as a prudent exercise in constitutional restoration. Ambiguity over the immigration impact flowing from DOMA's demise, contrary to what Gonzales contends, is not created by *Windsor's* unremarkable reaffirmation of the Congressional power to disallow any immigration benefit from marriage fraud. This issue was not before the Court. The question of the moment was not whether Congress could define the scope of marriage as part of its plenary power over immigration, something which all acknowledge, but whether DOMA was a constitutionally permissible manifestation of such authority. We now know that it was not.

Ironically, the publication of the essay coincided with the issuance of *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013) by the Board of Immigration Appeals on the same day, which held that *United States v. Windsor* was applicable to non-citizen same sex spouses seeking immigration benefits. Even before *Windsor* and *Zeleniak*, there had been hints of a thaw in the way that federal authorities thought about same sex marriage. In *Matter of Dorman*, 25 I& N Dec. 485 (A.G. 2011), Attorney General Holder vacated the BIA's removal order so that it could consider whether, absent DOMA, a same sex spouse could create the kind of familial relationship to sustain remedial relief through cancellation of removal.

Matter of Zeleniak affirms the long held view that the marriage must be legally valid in In *Zeleniak* the same sex marriage was valid under the laws of Vermont. As with the *Windsor* decision itself, *Zeleniak* marked not the breaking of new ground but a long overdue return to orthodox principles that the BIA had repeatedly embraced:

> *Therefore, the validity of a marriage for immigration purposes is generally governed by the law of the place of celebration of the*

> *marriage... Matter of Luna, 18 I&N Dec. 385 (BIA 1983); Matter of Bautista, 16 I&N Dec. 602 BIA 1978); Matter of Arenas, 15 I&N Dec. 174 BIA 1975); Matter of P-, 4 I&N Dec. 610 (BIA, Acting A.G. 1952)*

Matter of Hosseinian 19 I&N Dec. 453, 455 (BIA 1987); See also *In re Gamero*, 14 I&N Dec. 674 (BIA 1974)

The next question in *Zeleniak* was whether the restrictions in section 3 of DOMA were applicable, which prior to *United States v. Windsor* they were. Section 3 of DOMA provided:

> *In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the work "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.*

On June 26, 2013, while the appeal in *Zeleniak* was still pending at the BIA, the Supreme Court in *US v. Windsor* struck down section 3 of DOMA. The following passage of the Supreme Court decision, also cited in *Zeleniak*, is worth noting:

> *The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages.*

US v. Windsor at 2693

As a result of the repeal of the section 3 DOMA impediment, the BIA in *Matter of Zelenaik* held that since the marriage was valid under the laws of the state where it was celebrated, it would be recognized for immigration purposes. The BIA remanded to the USCIS to determine whether the marriage was bona fide, which was the sole remaining issue. The ruling is applicable to various provisions of the

INA, including sections 101(a)(15)(K) (fiancé and fiancée visas), 203 and 204 (immigrant visa petitions), 207 and 208 (refugee and asylee derivative status), 212 (inadmissibility and waivers of inadmissibility), 237 (removability and waivers of removability), 240A (cancellation of removal), and 245 (adjustment of status).

While *Zeleniak* has clearly interpreted“spouse” to mean someone of the same sex or opposite sex, so long as the marriage was valid in the place where it was celebrated, Gonzales and Strange still argue that there is sufficient legal ambiguity in the definition of spouse in the INA.

They cite a 1982 case, *Adams v. Howerton,* 673 F.2d 1036 (9th Cir. 1982) where the United States Court of Appeals for the Ninth Circuit held that Congress only intended to define a citizen’s spouse as a person of the opposite sex in the INA. It is worth noting the genesis of that case: the marriage petition was denied by the then Immigration and Naturalization Service on the ground that " have failed to establish that a bona fide marital relationship can exist between two faggots." Whatever reliance that Gonzales and Strange may have placed in *Adams v. Howerton*, it may no longer have any force after *Zeleniak* since *Zeleniak* has overruled *Adams v. Howerton*.

How can a lowly decision of the BIA overrule a decision of the lofty Ninth Circuit Court of Appeals? Under the oft-quoted Chevron doctrine that the Supreme Court announced in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.,* 467 US 837(1984), federal courts will pay deference to the regulatory interpretation of the agency charged with executing the laws of the United States when there is ambiguity in the statute. The courts will intrude only when the agency’s interpretation is manifestly irrational or clearly erroneous. Similarly, the Supreme Court in *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 US 967 (2005),while affirming *Chevron*, held that, if there is an ambiguous statute requiring agency deference under *Chevron*, the agency’s understanding will also trump a judicial exegesis of the same statute.

Congress had delegated to the legacy INS, and now to the DHS (and to the EOIR), the authority to unpack the meaning of the INA. Nowhere in this foundation statute do we find any definition of “spouse” though INA Section 101(b) defines both “parent” and “child”.The possibility exists that this is no accident. Under the doctrine of *expressio unius est exclusio alterius (the expression of one thing is*

the exclusion of all else), one logical inference from this conspicuous omission is that Congress did not feel the imposition of a statutory definition was central to its regulation of immigration law or policy, preferring instead to leave it to those federal agencies charged with its administration to interpret what a "spouse" properly meant. That is precisely what the BIA in *Zeleniak* has done. Rather than seeking to prolong indecision when no reason for it exists, which is the purpose and consequence of the Gonzales and Strong position, the swift and sure response by USCIS to the end of DOMA reflects a deference to the Constitution that Attorney General Gonzales would do well to emulate. As a professor of constitutional law, doubtless Attorney General Gonzales knows full well that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong…" *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 395 (1969).

Thus, under *Brand X*, the BIA's interpretation of spouse in the INA, which is undoubtedly ambiguous, has been interpreted to mean a spouse of the same or the opposite sex in *Zeleniak.* Whatever doubts *Adams v. Howerton* may have caused with respect to the definition of spouse in the immigration context, and further sowed by Gonzales and Strong, they have been laid to rest by the agency's interpretation of "spouse" in *Zeleniak*.

Even if Gonzales and Strong could not have foreseen *Zeleniak* spoiling their show on the day their Op Ed was published in the New York Times, they ought to have known that the immigration agency has always recognized the validity of the marriage based on where it is celebrated. But for DOMA's impediment, whether the marriage was been same sex or opposite sex spouses, the marriage would have been recognized. Thus in *Matter of Lovo*, 23 I&N Dec. 746 (BIA 2005), decided long after *Adam v. Howerton,* so long as North Carolina recognized the marriage between a male citizen and a post-operative transsexual female, the marriage would be considered valid under immigration law and section 3 of DOMA would no longer be an impediment.

While Congress has enormous powers over immigrants, and can determine that even a valid marriage has to be a bona fide marriage and not be entered into solely to gain an immigration benefit, it cannot pass laws that our patently unconstitutional – even if those affected are immigrants. Secretary Napolitano recognized this soon after *Windsor* found section 3 of DOMA unconstitutional by

announcing: “I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.” Brand X has also done a great hatchet job by allowing the BIA to forever demolish *Adams v. Howerton.*

America’s immigration laws have often been a window into our national psyche. The national origins quota of 1924 flowed directly from the widespread disillusionment with World War I and rising concerns over the dangers of foreign radical thought. The myriad ideological grounds of exclusion strewn throughout the McCarran-Walter Act of 1952 were eloquent if silent testimony to the tensions of the early Cold War. The Immigration Act of 1965 which abolished the national origins quota and opened up America to global migration was part and parcel of the civil rights crusade of the Great Society. Just the same way, the judicial emasculation of DOMA supported by the ready cooperation of the BIA, Attorney General Holder and Secretary Napolitano did not happen in a vacuum but, rather, emerged out of a societal sea change on marriage equality that has finally found legal expression. This is as is it should be for the meaning of America has always changed as Americans themselves have changed. The great American poet of the anti-slavery movement James Russell Lowell once famously remarked that “Once to every man and nation comes the moment to decide.” Mr. Attorney General, when it comes to the cause of marriage equality, America has made its decision.

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