No. S271265

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GUARDIANSHIP OF S.H.R.

S.H.R.,

Petitioner and Appellant,
v.

JESUS RIVAS et al.,

Real Parties in Interest.

APPLICATION BY NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER AND APPELLANT; PROPOSED BRIEF

After a Decision by the Court of Appeal
Second Appellate District, Division One,
No. B308440

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APPLICATION TO FILE BRIEF OF AMICI CURIAE

Pursuant to California Rules of Court, rule 8.520(f), National Immigrant Women's Advocacy Project (NIWAP) hereby applies for permission to file a brief in this case as amicus curiae in support of Petitioner and Appellant. A copy of the proposed brief is attached to this application.

NIWAP is a nonprofit training, technical assistance, and public policy advocacy organization. NIWAP develops, reforms, and promotes the implementation and use of laws and policies that improve legal rights, services, and assistance to immigrant women and children who are victims of child abuse and neglect, child abandonment, domestic violence, sexual assault, stalking, human trafficking, and other crimes. In furtherance of its mission, NIWAP worked closely with Congress to draft important legislation for the protection of abused immigrant women and children. For example, NIWAP's Director worked with Congress to draft the immigration protections included in the Violence Against Women Act (the original legislation as well as the 2000, 2005, and 2013 amendments) and in the Trafficking Victims Protection and Reauthorization Act (the original legislation and the 2008 amendments). These statutes expanded protections for Special Immigrant Juvenile status (SIJ) eligible immigrant children, and NIWAP worked with the U.S. Citizenship and Immigration Services to fully implement SIJ protections.

As a national resource center, NIWAP offers technical assistance and training at the federal, state, and local levels to assist a wide range

of professionals who work with immigrant child victims of crime, abuse, neglect, and abandonment. NIWAP has a particular focus on and expertise in training state court judges and family lawyers on immigration law issues that arise in state family court cases in order to promote access to justice and fair outcomes from state courts for immigrant children, crime victims, and families. NIWAP provides direct technical assistance, training, and legal research publications (e.g., the State Justice Institute funded Special Immigrant Juvenile Status Bench Book: A National Guide to Best Practices for Judges and Courts (2018)[1]) for state family and juvenile court judges and attorneys in state court cases involving immigrant children and parents. NIWAP also provides training for immigration judges, Board judges and staff, state court judges, police, sheriffs, prosecutors, Department of Homeland Security adjudication and enforcement staff, and other professionals.

NIWAP's proposed amicus curiae brief will assist the Court in deciding this matter. NIWAP's amicus brief presents additional arguments and authorities, and emphasizes why state courts need clear and correct guidance in fulfilling their factfinding function.

[1] <SIJS Bench Book (Full Manual) - NIWAP Web Library (american.edu)>.

No party, counsel for a party, or any person or entity other than amicus curiae and its counsel has made a monetary contribution intended to fund the preparation or submission of the brief, and no party or counsel for a party has authored this brief in whole or in part.

Dated: March 21, 2022 MANATT, PHELPS & PHILLIPS, LLP

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NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

STATUTES

REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

PROPOSED BRIEF OF AMICI CURIAE

I. INTRODUCTION AND INTEREST OF AMICI

Amicus curiae National Immigrant Women's Advocacy Project (NIWAP) agrees with and supports the arguments presented in the Opening Brief on the Merits (OBOM) submitted on behalf of Petitioner S.H.R. (Saul). NIWAP's brief emphasizes the importance of giving clear guidance to state juvenile and appellate courts regarding how they are to carry out the limited function that Congress established for them in the process of determining a child's eligibility for protection as a Special Immigrant Juvenile (SIJ). The Opinion in this case misunderstood the role of a state court, resulting in a precedential decision that creates an appellate conflict, will engender considerable confusion in trial courts as to the standards to apply, and ultimately will be harmful to the children that Congress sought to protect.

Even in the few months since the Opinion issued, California courts have noted that this case creates a conflict in California law and uncertainty as to which line of authority to follow. (See, e.g., *In re Scarlett V.* (2021) 72 Cal.App.5th 495, 501-502 [recognizing the conflict created by this case regarding the standard of proof for SIJ findings but holding that the trial court erred under either standard].)

SIJ status is a special immigration protection that Congress enacted in 1990 to "provide humanitarian protection for

abused, neglected, or abandoned child immigrants" who are in the United States without lawful status. (USCIS[2] Policy Manual, vol. 6, part J, ch. 1, <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1>.) As with the subject of immigration generally, the federal government has exclusive jurisdiction with respect to granting SIJ classification. Whether a child ultimately qualifies for SIJ status is a federal determination made by USCIS.

In crafting the federal statutory scheme for SIJ protections, Congress chose to vest a key role in state courts. (8 U.S.C. § 1101(27)(J); *In re Scarlett V.*, 72 Cal.App.5th at 500.) The threshold for SIJ eligibility is a set of specific factual findings rendered by a *state court* under *state law*. SIJ eligibility depends in large part on determinations about the child's situation, implicating matters that are uniquely the province of state courts, such as child welfare, the best interests of the child, parent/child relationships, and dependency and custody adjudications.[3] Congress understood that state juvenile courts, not the federal immigration agency, are most familiar with the laws of their state that address and redress child welfare and

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[2] "USCIS" is the U.S. Citizenship and Immigration Services.

[3] See *B.F. v. Superior Court* (2012) 207 Cal.App.4th 621, 627 (the federal SIJ statute "specifically delegates determinations of dependency, eligibility for long-term foster care, and the best interest of the child to state juvenile courts [and] *generally relies* on state courts, acting in their usual course") (emphasis in original; citation omitted).

protection of children and how these state laws can be applied in the best interests of the child.

Therefore, under the SIJ statute, a request to a state court to render the findings underlying a SIJ petition is the first step for a child seeking SIJ status. (*O.C. v. Superior Court* (2020) 44 Cal.App.5th 76, 79 [a state court's SIJ findings are a "necessary first step under the federal immigration law"].) It is critical that California superior courts with jurisdiction to make SIJ findings—as well as the appellate courts that review their decisions—have clear and consistent rules for handling requests to make SIJ findings. Without guidance as to how to make the threshold factual findings in a way that comports with the federal and state laws, there is a real danger that state courts will misunderstand their role. This can lead courts to decline to make findings to which a child is entitled, precluding the child's opportunity to seek SIJ protection. Such misunderstanding is evident in the Court of Appeal's Opinion and superior court's underlying order in this case. For instance, the Court of Appeal applied an unduly burdensome standard of proof and standard of review, and drew conflicting inferences from Saul's unrebutted testimony to speculate about the intentions of Saul's parents, which is irrelevant to SIJ findings.

Any confusion or lack of understanding among California's superior and reviewing courts jeopardizes the ability of a child who is otherwise eligible for SIJ immigration relief to apply for

the protection Congress created. "A juvenile court's failure to include the findings relevant to SIJ status 'effectively terminates the application for legal permanent residence, clearly affecting a substantial right' of the child." (*In re Danely C.* (Tenn. Ct. App. Nov. 29, 2017) 2017 WL 5901022, at *8 [quoting *E.C.D. v. P.D.R.D.* (Ala. Civ. App. 2012) 114 So.3d 33, 36].) Studies show that the benefits to a child—and to the child's community—of obtaining lawful permanent resident status are manifest. For instance, obtaining LPR status for children resulted in a 125 percent decrease in disciplinary problems and an 80 percent decrease in aggression; substantial increases in educational achievement, including improved school grades (175 percent), graduating from high school (62 percent), and obtaining a Bachelor's degree (575 percent); and similar substantial improvements in sleep quality, nutrition, communication, interacting with adults and friends, and participation in after-school activities.[4]

In contrast, children who lack permanent status disproportionately experience problems in physical and mental health and access to health care, reduced educational opportunities, difficulties in acclimating, discrimination, and

[4] See NIWAP, Transforming Lives: How the VAWA Self-Petition and U Visa Change the Lives of Survivors and Their Children After Employment Authorization and Legal Immigration Status (June 8, 2021), <https://niwaplibrary.wcl.american.edu/pubs/transforming-lives-final-report>.

continued fear of deportation to the home country from which they fled.[5] In addition, a population of unaccompanied children without legal status strains the foster care system and the legal system.[6]

NIWAP's work involves expending substantial time and resources to train state courts all over the country, including conducting 170 judicial trainings for over 9,700 judges and court staff over the past decade. A key focus of these trainings is helping judges understand that issuing the SIJ findings required for eligibility is in the best interest of an immigrant child any time the state court makes a custody, guardianship, dependency, placement, or delinquency determination. NIWAP's experience in training state courts sensitizes it to the danger of bad precedent on the subject of SIJ findings.

As discussed in the OBOM and below, the approach taken in the Opinion is unsupported and legally incorrect. This Court should establish clear rules for superior and reviewing courts in

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[5] See, e.g., Immigration Psychology Working Group, Vulnerable But Not Broken (2018), pp. 18-19, 42-57, <*Vulnerable-But-Not-Broken.pdf (american.edu)>; The End SIJS Backlog Coalition & The Door, Any Day They Could Deport Me (Nov. 2021), p. 15, <*Any+Day+They+Could+Deport+Me-+Over+44,000+Immigrant+Children+Trapped+in+the+SIJS+Backlog+(FULL+REPORT).pdf (squarespace.com)> ("Any Day"); Kids in Need of Defense, Left in Limbo: Why Special Immigrant Juveniles Need Employment Authorization, pp. 2-3, <*SIJS-EAD-Brief-1.10.21-FINAL.pdf (supportkind.org)>.

[6] Any Day, *supra*, pp. 6, 27-37.

California that are consistent and not in conflict with the SIJ statute, legislative history, and federal immigration regulations and policies.

II. STATE COURTS HAVE AN IMPORTANT BUT CIRCUMSCRIBED FACTFINDING ROLE IN THE SIJ STATUTORY SCHEME.

A. A state court's role is solely to make threshold findings; ultimate determinations of SIJ eligibility remain with the federal agency.

State courts play an indispensable role in the SIJ petition process. (8 U.S.C. § 1101(27)(J); *Scarlett V.*, 72 Cal.App.5th at 500.) However, that role is limited: state courts *only* make the predicate findings under state law that are required for SIJ eligibility. Where a state court oversteps that boundary, it impermissibly intrudes into the exclusively federal realm of immigration law. It is essential that superior courts understand the constraints on their ability to influence the ultimate outcome of a child's request for SIJ status.

"[A] child is eligible for SIJ status if: (1) the child is a dependent of a juvenile court, in the custody of a state agency by court order, or in the custody of an individual or entity appointed by the court; (2) the child cannot reunify with one or both parents due to abuse, neglect, abandonment, or a similar basis found under state law; and (3) it is not in the child's best interest to return to his or her home country or the home country of his or her parents. Under federal immigration regulations, *each of*

these findings is to be made in the course of state court proceedings." (*Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1013 [emphasis added; citations and footnotes omitted].)[7] In 2014, the California Legislature enacted Code of Civil Procedure section 155 to confirm certain California courts' jurisdiction to make these findings:

> A superior court has jurisdiction under California law to make judicial determinations regarding the custody and care of children within the meaning of the federal Immigration and Nationality Act (8 U.S.C. Sec. 1101 et seq. and 8 C.F.R. Sec. 204.11), which includes, but is not limited to, the juvenile, probate, and family court divisions of the superior court. These courts have jurisdiction to make the factual findings necessary to enable a child to petition the United States Citizenship and Immigration Services for classification as a special immigrant juvenile pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code.

(Code Civ. Proc., § 155, subd. (a)(1).)

The state court's findings are a required *predicate* for a child to petition USCIS for SIJ status—a "necessary first step under the federal immigration law." (*O.C.*, 44 Cal.App.5th at 79.) As such, "[t]he failure to issue the SIJ findings under state law prejudices [a child's] ability to seek SIJ status from USCIS.

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[7] Under the law as articulated in a Final Rule promulgated by the Department of Homeland Security (DHS) on March 8, 2022 (effective April 7, 2022), a "juvenile court" is "a court located in the United States that has jurisdiction under State law to make judicial determinations about the dependency and/or custody and care of juveniles." (Special Immigrant Juvenile Petitions (Mar. 8, 2022) 87 Fed. Reg. 13066, 13069 ("Final Rule").)

Without [SIJ] compliant findings, 'no youth can apply for [SIJ status].'" (*Id.* at 85 (citation omitted); see also *Bianka M.*, 5 Cal.5th at 1022-1023 ["[A child] has no way to obtain a state court finding on the matters relevant to an application for SIJ status, as section 155 of the Code of Civil Procedure entitles [a child] to do, other than to ask the state court for the finding. There is no available alternative forum that could provide the relief [the child] seeks."].)

For this reason, it is essential that state courts understand what they are being asked to do, and also to understand their *limited* role in the process. A state court's role is *only* to make the statutory findings necessary for a child to petition USCIS for SIJ status, if those findings are supported by the evidence in accordance with the laws of the particular state. (See *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 344 ["The [federal] statute commits to a juvenile court *only the limited, factfinding role* of identifying abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned to their home country."] [emphasis added]; *id.* at 348 ["state juvenile courts are charged with making a *preliminary* determination of the child's dependency and his or her best interests, which is a *prerequisite* to an application to adjust status as a special immigrant juvenile"] [quoting *In re Mario S.* (N.Y. Fam. Ct. 2012) 954 N.Y.S. 2d 843, 849] [emphasis added].) By federal regulation, a juvenile court order with the

predicate state-law findings is a "document[] which must be submitted in support of the petition" for SIJ status. (8 C.F.R. § 204.11(d).)

In contrast, it is the federal immigration authorities (USCIS), not the state court, that will ultimately decide the child's SIJ eligibility. Thus, a state court must not impose additional criteria on top of the findings for which it is responsible or judge whether a particular child is an appropriate candidate for SIJ status. (See *Bianka M.*, 5 Cal.4th at 1025 ["Regardless of whether USCIS chooses, as a policy matter, to employ additional criteria in evaluating applications for SIJ status, we agree with the Courts of Appeal that '[a] state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country.'"] [citation omitted].) "State courts play *no role* in the final determination of SIJ status or, ultimately, permanent residency or citizenship, which are federal questions." (*Leslie H.*, 224 Cal.App.4th at 350-351 [reversing juvenile court order denying SIJ findings where the court found that the child "'broke the law,' and 'rewarding' her illegal conduct might motivate other undocumented alien children to commit offenses to gain eligibility for SIJ status"] [emphasis added].) "[T]hese are matters for immigration authorities to evaluate." (*Ibid.*)

State courts in other jurisdictions have recognized their limited role in the SIJ scheme. (See *Simbaina v. Bunay* (Md. Ct. Spec. App. 2015) 109 A.3d 191, 197-198 ["The federal statute directs the circuit court to enter factual findings that are advisory to a federal agency determination"]; *In re L.F.O.C.* (Mich. Ct. App. 2017) 901 N.W.2d 906, 912 ["[T]he federal statute [¶] implements a two-step process in which a state court makes predicate factual findings—soundly within its traditional concern for child welfare—relative to a juvenile's eligibility. The juvenile then presents the family court's factual findings to USCIS, which engages in a much broader inquiry than state courts, and makes the ultimate decision as to whether or not the juvenile's application for SIJ status should be granted."] [quoting *H.S.P. v. J.K.* (N.J. 2015) 121 A.3d 849, 859]; *Hernandez-Lemus v. Arias-Diaz* (Mass. 2018) 100 N.E.3d 321, 323 ["[T]he [state] judge's sole function is to make the special findings, and to do so in a fashion that does not limit Federal authorities in determining the merits of the juvenile's application for SIJ status."] [citation omitted].)

In its 2022 Final Rule, DHS reiterated the separate roles for the federal and state governments contemplated by the SIJ statutory scheme. "Specifically, . . . 8 U.S.C. 1101(a)(27)(J)[] sets clear parameters for the extent of State versus Federal involvement in the SIJ process . . . . Neither the proposed rule nor this final rule modifies the extent of State involvement." (Final Rule, 87 Fed. Reg. at 13076.) "[T]he role of DHS is to

adjudicate SIJ petitions to determine eligibility for SIJ classification and adjustment of status as prescribed by the INA—a field in which the States have no role. . . . On the other hand, under this rule DHS has no role in making dependency or custodial determinations or granting relief from abuse, neglect, or abandonment, or a similar basis under State law, which is a field properly reserved to the States." (*Id.* at 13077; see also *id.* at 13086 ["The role of DHS is fundamentally different from that of the juvenile court. The juvenile court makes child welfare-related determinations under State law. USCIS determines if a child meets the statutory requirements for SIJ classification under Federal immigration law."].) "Whether a State court order submitted to DHS establishes a petitioner's eligibility for SIJ classification is a question of Federal law and lies within the sole jurisdiction of DHS." (*Id.* at 13081.)

B. The legislative and regulatory history demonstrates congressional and agency intent that SIJ eligibility depends in part on state court findings.

The federal SIJ statute's provision for a threshold factfinding role for state courts evolved through Congress's recognition of state courts' expertise in applying state laws involving the best interests of the child in decisions involving child custody, placement, and child welfare. When Congress created the SIJ classification in 1990 to provide humanitarian relief from immigration restrictions for certain children in the

U.S. without status, SIJ eligibility required that the child have been "declared *dependent on a juvenile court* located in the United States and . . . deemed eligible *by that court* for long-term foster care, and . . . it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality . . . ." (Pub. L. No. 101-649 § 153, 104 Stat. 4978 (1990) [amending 8 U.S.C. § 1101] [emphasis added].) Thus, since its origin, the SIJ statute provided a role for state courts. As DHS recently noted, "[t]he best interest determination . . . is a determination made by a State court or relevant administrative body, such as a State child welfare agency, regarding the best interest of the child." (Final Rule, 87 Fed. Reg. at 13081.)[8]

Eligibility for long-term foster care necessarily meant that the child could not be safely placed with *either* parent. This requirement was inconsistent with the laws of many states that encourage courts to award custody to the protective non-abusive parent, which serves the best interest of children.[9] "If the

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[8] "The best interest determination is one of the key determinations for establishing eligibility for SIJ classification and the only one that has not changed throughout the history of the SIJ program." (Final Rule, 87 Fed. Reg. at 13081.)

[9] Every state has a state statute or case law providing that courts should consider evidence and history of a parent's child abuse and/or domestic abuse in making custody determinations. (See NIWAP et al., Special Immigrant Juvenile Status Bench Book: A National Guide to Best Practices for Judges and Courts (March 31, 2018), Appendix Q, <Appendix 22-1 Memorandum Format (american.edu)>.)

family's circumstances are clear and it is appropriate, every effort should be made to keep the children in the care of the nonoffending parent." (H. Lien Bragg, Child Protection in Families Experiencing Domestic Violence, U.S. Dep't of Health and Hum. Servs., Admin. For Child. & Fams. 35 (2003), <https://www.childwelfare.gov/pubpdfs/domesticviolence.pdf> [issuing guiding principles for child protective services workers recognizing that offering protection to domestic violence victims enhances protection for children and has the benefit in domestic violence cases of keeping children with their non-abusive parent].) "[T]he ability of a court to exercise its authority to place a child in the custody of a non-offending parent is . . . a matter of State law." (Final Rule, 87 Fed. Reg. at 13080.)

In 2008, Congress amended the SIJ statute as part of the Trafficking Victims Protection and Reauthorization Act (TVPRA). (See Pub. L. No. 110-457 § 235(d), 122 Stat. 5044 (2008).) "In [the TVPRA], Congress explicitly removed the requirement that immigrant juveniles seeking SIJ status must be 'deemed eligible by [a juvenile] court for long-term foster care due to abuse, neglect, or abandonment.' Congress replaced that requirement with the condition that the immigrant seeking SIJ status could not be 'reunifi[ed] with 1 or both of [her] parents . . . due to abuse, neglect, abandonment, or a similar basis found under state law.'" (*J.L. v. Cissna* (N.D. Cal. 2019) 374 F.Supp.3d 855, 865-866 [citation omitted]; see also USCIS Policy Manual, vol. 6, part J,

ch. 1, <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1>.) Congress also changed the requirement that the child have been declared dependent on the court, expanding it to include children whom a juvenile court has placed under the custody of a person or entity appointed by a state or juvenile court (which could include the non-abusive parent or a guardian). The amended statute thus permits a child to apply for SIJ status while living with the non-abusive parent.[10]

By amending the statute to base SIJ eligibility on abuse, abandonment, neglect, or similar basis by *one or both* parents, and on the viability of reunification with one or both parents, the TVPRA 2008 amendment promoted consistency with State courts' efforts to issue orders that promote safety and healing from trauma as a crucial step in promoting the best interests of children. These amendments vested in state courts the authority to apply their state law definitions of child neglect, abuse, and abandonment to the facts of the harm that was perpetrated by a parent against the immigrant child without regard to where that harm took place. The amendments also reflect Congress's

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[10] DHS explained in its 2022 Final Rule that "termination of parental rights is not required for SIJ eligibility . . . . The idea that children should not grow up in the foster care system has led to changes in Federal law . . . . The SIJ program has evolved along with child welfare law to include children for whom reunification with one or both parents is not viable because of abuse, neglect, abandonment, or a similar basis under State law." (Final Rule, 87 Fed. Reg. at 13080.)

recognition that state-law definitions of these terms may vary. The federal law also recognized that in some states there are laws that provide a "similar basis" for protecting children from maltreatment that could form the basis for SIJ eligibility in addition to the enumerated laws.

The SIJ statutory and regulatory scheme also has evolved to expand the definition of state courts qualified to make SIJ findings. Implementing regulations promulgated in 1993 defined a "juvenile court" as "a court located in the United States having jurisdiction under State law to make judicial determinations about the *custody and care* of juveniles." (Former 8 C.F.R. § 101.6(a) (1993) [emphasis added]; see also 8 C.F.R. § 204.11(a).) However, the Final Rule issued by DHS in March 2022 amends the definition of "juvenile court" to "a court located in the United States that has jurisdiction under State law to make judicial determinations about the *dependency and/or custody and care* of juveniles." (Final Rule, 87 Fed. Reg. at 13069 [emphasis added].) DHS explained: "The names and titles of State courts that may act in the capacity of a juvenile court to make the types of determinations required to establish eligibility for SIJ classification may vary State to State. A court by a particular name may have such authority in one State, but not in another." (Final Rule, 87 Fed. Reg. at 13077.)

As this history demonstrates, Congress and DHS have acted to affirm the role of state courts in an immigrant child's

application for SIJ status—yet that role remains limited to making predicate findings.

III. A STATE COURT MUST MAKE SIJ FINDINGS UNDER APPLICABLE STATE LAW.

A. State law governs the state court's findings.

When making findings of fact, a state court is required to apply state law. The very reason that the fact-finding function is vested in state courts is that state courts are familiar with their states' child welfare, best interests, and related laws and are experienced in applying those laws. "The SIJ statute affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests." (*Leslie H.*, 224 Cal.App.4th at 348 [quoting *Mario S.*, 954 N.Y.S.2d at 852-853]; see also *Romero v. Perez* (Md. 2019) 205 A.3d 903, 916 ["determining the viability of reunification . . . is a question that lies within the expertise of the juvenile court, applying relevant State law"] [quoting Special Immigrant Juvenile Petitions (Sept. 6, 2011) 76 Fed. Reg. 54978, 58980 ("Proposed Rule")].)

The federal SIJ statute makes the application of state law explicit, specifying the factual findings to be made under "state law" and relying on state law to determine which state courts have jurisdiction to make those findings. (See 8 U.S.C. § 1101(a)(27)(J)(i); see also 154 Cong. Rec. H10888-01, H10898, 2008 WL 5169865 [amending 8 U.S.C. § 1101(a)(27)(J)(i)].) State

law governs multiple determinations under the federal statute, including (i) the determination of which of the state's judicial proceedings involve judges fulfilling child welfare and custody roles, such that the court falls within the federal SIJ statute's definition of "juvenile court"; (ii) the determination whether a juvenile court has declared a child dependent on the court or has legally committed or placed the child in the custody of a state agency/department or a court-appointed individual or entity; (iii) the determination that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law," and (iv) the determination of whether it would be in the child's best interests to be returned to the home country. (8 U.S.C. § 1101(27)(J).)

In its recently issued Final Rule, DHS reaffirmed the primacy of state law in the fact-finding function. For instance, "DHS recognize[d] that there is no uniform definition for 'dependency,' and the final rule continues to give deference to State courts on their determinations of custody or dependency under State law." (Final Rule, 87 Fed. Reg. at 13079.) And "DHS reaffirm[ed] that the juvenile court must make this determination [that parental reunification is not viable] based on applicable State laws." (*Ibid.*) It further said that "[n]othing in this part should be construed as altering the standards for best interest determinations that juvenile court judges routinely apply

under relevant State law." (*Id.* at 13069.)

The USCIS Policy Manual also recognizes that states must apply their own laws in evaluating the viability of parental reunification. (See USCIS Policy Manual, vol. 6, part J, ch. 2.C, <https://www.uscis.gov/policy-manual/volume-6-part-j> ["Parental Reunification – Declares, under the state child welfare law, that the petitioner cannot reunify with one or both of the petitioner's parents due to abuse, neglect, abandonment, or a similar basis under state law"].) "USCIS generally defers to the court on matters of state law and does not go behind the juvenile court order to reweigh evidence and make independent determinations about the best interest of the juvenile and abuse, neglect, abandonment, or a similar basis under state law." (*Id.*, ch. 2.)

The primacy of state law in these determinations also is reflected in the fact that Congress and DHS have recognized that differences in state laws have caused inconsistency, and in some cases have responded to eliminate that inconsistency. (See Special Immigrant Status (Aug. 12, 1993) 58 Fed. Reg. 42843-01, 42846 [regulation noting that "[d]espite commenters' concerns about confusion caused by differences between the laws of the various states, the Service believes that certain inequities caused by variations in state law are unavoidable in determining eligibility . . . . Juvenile court issues are under the jurisdiction of the states and therefore dependent upon state statutes.

However, in order to minimize confusion caused by dissimilar state laws, the Service has removed the requirement that the beneficiary be a juvenile under state law and replaced it with a requirement that the beneficiary be under twenty-one years of age"].) In other instances, DHS has simply accepted that varying state laws will lead to inconsistent findings. (See, e.g., Final Rule, 87 Fed. Reg. at 13082 ["the standards for making best interest determinations may vary from State to State"][11]; *id.* at 13080 ["DHS . . . notes that definitions of concepts such as abuse, neglect, or abandonment may vary from State to State"][12]; *ibid.* ["DHS . . . declines to incorporate the request that the reunification determination applies to both birth parents and adoptive parents because the parental reunification determination must be made under State law, and it is ultimately a matter of State law who constitutes a legal parent."]; *id.* at 13081 ["The relevant SIJ statutory language does not define abuse, neglect, or abandonment. Because the determination of parental maltreatment is a matter of State law,

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[11] State laws involving the best interest of the child are summarized at <https://niwaplibrary.wcl.american.edu/best-interest-of-the-child>.

[12] These state laws are collected at <https://niwaplibrary.wcl.american.edu/pubs/appendix-k-state-law-definitions-of-child-abuse-chart>, <https://niwaplibrary.wcl.american.edu/pubs/appendix-m-state-law-definitions-of-child-neglect-chart>, and <https://niwaplibrary.wcl.american.edu/pubs/appendix-l-abandonment-of-children-statutes-definitions>.

and the definitions of abuse, neglect, and abandonment vary from State to State, creating a standardized process or modified categorical approach would undermine Congress's instruction concerning the State's role in these determinations."].)

The state statute, Code Civ. Proc. § 155, subd. (b)(1)(B), also is explicit that the state court must find facts under state law: "[R]eunification . . . was determined not to be viable because of abuse, neglect, abandonment, or a similar basis pursuant to California law." (See also *O.C.*, 44 Cal.App.5th at 83 ["These findings [under section 155] must be made with reference to California law."].)

The case law from jurisdictions across the country is in accord. (*B.R.L.F. v. Sarceno Zuniga* (D.C. 2019) 200 A.3d 770, 777 [applying District of Columbia law]; *Lopez v. Serbellon Portillo* (Nev. 2020) 469 P.3d 181, 183 [applying Nevada law]; *Matter of Guardianship of Xitumul* (Ind. Ct. App. 2019) 137 N.E.3d 945, 954 [applying Indiana law]; *In re Danely C.*, 2017 WL 5901022, at *8 [remanding to trial court with instructions to apply Tennessee law]; *Simbaina*, 109 A.3d at 200 ["The federal statute places no restriction on what is an appropriate proceeding or how these SIJ factual findings should be made. . . . Any relevant limitations will arise from State law."].)

In making the necessary findings under state law, it also should be clear that the law of the child's home country is irrelevant for purposes of determining whether reunification is

not viable with one or both parents due to abuse, abandonment, or neglect. (See *H.S.P.*, 121 A.3d at 859 ["In performing its closely circumscribed task of making specified predicate factual findings, we conclude that the Family Part is required to apply New Jersey law, and not that of a foreign nation."]; *Romero*, 205 A.3d at 916 ["[S]tate courts should not apply 'a hybrid of the law of a single American state superimposed on the living conditions of another country . . . .'"] [citation omitted].) "[I]f Congress had intended to 'require knowledge of living conditions in other countries, surely federal immigration judges[, who deal with such matters regularly,'] would have been a far more appropriate selection." (*Id.* at 917 [citation omitted].)

In this case, the superior court appeared to erroneously consider the law of El Salvador in adjudicating Saul's request for SIJ findings by making observations and assumptions about poverty, family relationships, and violence in El Salvador. (See OBOM, at 42.) However, the only question for the state court is whether the facts of what occurred to the child would meet the abuse, abandonment, neglect, or similar standards under California law. (See *O.C.*, 44 Cal.App.5th at 83.) In other words, the court must ask whether the conduct would have been neglect, abuse, abandonment, or the equivalent had the conduct taken place in California and been judged by California laws and standards. (See OBOM, p. 21 [noting statement of social worker that "if [Saul] would have been in the United States and

experience[d] some of the same traumatic events he suffered in El Salvador[,] this would have been classified as child abuse resulting in the local Child Protective Service agency becoming involved to ensure the safety of [Saul]."].)[13] A state court that does not limit its focus to its own state law, as occurred here, commits error.

B. State courts have leeway and flexibility to determine whether the facts of a particular child's case meet state-law standards.

In applying state law, the state court must look at whether the facts of the case meet the standards of the particular state's child-protective and custody laws. The Court of Appeal's Opinion here reviewed the facts of Saul's case under several state laws defining abandonment or neglect, but failed to consider "similar" bases under other state laws as independent grounds supporting SIJ findings. (See, e.g., *Guardianship of S.H.R.* (2021) 68 Cal.App.5th 563, 578-579 [acknowledging that Saul's field work and removal from school may have been prohibited under California law but concluding it was not neglect "under any of the foregoing definitions as a matter of law"].)

1. **Best interest of the child.**

In California, as in many states, factual determinations regarding child welfare should focus on promoting the best

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[13] The Court of Appeal erroneously refused to consider the social worker's evaluation. (See OBOM, pp. 48-51.)

interests of the child. The Opinion here did not even use the phrase other than when quoting the statute or Saul's petition. "[I]t is the public policy of this state to ensure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children." (Fam. Code, § 3020, subd. (a); see also Fam. Code, § 3011, subd. (a) ["In making a determination of the best interests of the child . . . , the court shall, among any other factors it finds relevant and consistent with Section 3020, consider all of the following: (1) The health, safety, and welfare of the child. (2)(A) A history of abuse by one parent or any other person seeking custody . . ."]; Prob. Code, § 1514, subd. (e) ["in appointing a guardian of the estate: (1) The court is to be guided by what appears to be in the best interest of the proposed ward, taking into account . . . the proposed guardian's concern for and interest in the welfare of the proposed ward."]; *Bianka M.*, 5 Cal.5th at 1020 ["Determinations about the custody of children are to be made based on a determination of the child's best interests."].)

The same standard governs in multiple other states as well. (See *H.S.P.*, 121 A.3d at 855 ["The court found that . . . it was not in the children's best interests to return to El Salvador because their grandmother was incapable of caring for them and there were no other family members able to assume that role."];

B.R.L.F., 200 A.3d at 773 ["We agree with the trial court's findings that . . . it would not be in B.E.L.S.'s 'best interest to be returned' to Guatemala."]; *Kitoko v. Salomao* (Vt. 2019) 215 A.3d 698, 709-710 ["we conclude that the role of our state courts in the SIJ process is to continue making decisions that serve children's best interests. This includes making SIJ findings where requested if doing so promotes a child's best interests."].)

2. **Abuse/neglect/abandonment/similar basis.**

In making SIJ findings, the federal and state statutes require courts to apply state laws that define abuse, neglect, abandonment—or any "similar basis under state law"—to the particular facts of the case. These alternatives give state courts leeway to act in the best interest of the child even where the facts might not meet the technical definitions of neglect, abuse, or abandonment under the laws of the state. (See *Romero*, 205 A.3d at 914-915 ["'abuse,' 'neglect,' and 'abandonment' should be interpreted broadly when evaluating whether the totality of the circumstances indicates that the minor's reunification with a parent is not viable, i.e., workable or practical, due to prior mistreatment"].)

In the new Final Rule, DHS makes that leeway explicit. In the preamble to the *proposed* regulation, DHS explained "[i]f a juvenile court order includes a finding that reunification with one or both parents is not viable under State law [due to a similar basis], the petitioner must establish that this State law basis is

similar to a finding of abuse, neglect, or abandonment" and that "[t]he nature and elements of the State law must be similar to the nature and elements of abuse, abandonment, or neglect." (Proposed Rule, 76 Fed. Reg. at 54981.) However, "DHS received numerous comments requesting further clarification and expressing concern that such a requirement of equivalency could result in ineligibility determinations for vulnerable children found by a juvenile court to be subjected to parental maltreatment. In response to these comments, DHS provides in the final rule that the petitioner can provide evidence of a similar basis through the juvenile court's determination as to how the basis is legally similar to abuse, neglect, or abandonment under State law; or other relevant evidence that establishes the juvenile court made a judicial determination that the legal basis is similar to abuse, neglect, or abandonment under State law." (Final Rule, 87 Fed. Reg. at 13070, 8 C.F.R. § 204.11(d)(4) (effective Apr. 2022).)

Multiple California laws can provide a legal basis for a finding that reunification is not viable due to neglect, abuse, abandonment, or similar basis under state law, showing the range of ways in which the laws protect children—not only the handful cited in the Opinion here. (See Immigrant Legal Resource Center, Practice Advisory: Guidance for SIJS State Court Predicate Orders in California (June 2021), pp. 3-4, <https://www.ilrc.org/sites/default/files/resources/guidance_sijs_p

redicate_ca_orders_combined_final_2021.pdf> (Practice Advisory).)

For example, California laws articulating standards or factors that support a finding of "neglect" include:

- Child Abuse and Neglect Reporting Act, Penal Code, § 11165.2 defines "neglect" as "the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare." It further defines "severe neglect" to include "those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, . . . including the intentional failure to provide adequate food, clothing, shelter, or medical care." (Penal Code, § 11165.2, subd, (a).) "General neglect" is "the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred." (*Id.*, subd. (b).)

- Family Code, section 7823 permits a proceeding to declare a child free from custody or control of one or both parents if "[t]he child has been neglected or cruelly treated by either or both parents." (*Id.*, subd. (a)(1).)[14]

[14] There also are a range of California laws governing "abuse" and "abandonment." (See Practice Advisory, *supra*, pp. 3, 4.)

But in addition, there are multiple California laws that would provide a "similar basis" for finding reunification with one or both parents not to be viable, including:

- Welf. & Inst. Code, § 300 identifies factors for state courts to consider in determining whether to declare a child a dependent of the court, including:
  - Subdivision (b)(1): "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of the child's parent or guardian to adequately supervise or protect the child, . . . or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment . . . ."
  - Subdivision (c): "The child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care."
  - Subdivision (g): "The child has been left without any provision for support."
- Penal Code, § 270 criminalizes a parent's failure to "furnish necessary clothing, food, shelter or medical attendance,

or other remedial care for his or her child."

- Family Code, § 3041 provides that a court may grant custody to a non-parent over a parent's objection if it finds that placement with a parent would be detrimental to the child.
- Labor Code, § 1294 provides that "[n]o minor under the age of 16 years shall be employed or permitted to work in any capacity: . . . (h) In any occupation dangerous to the life or limb, or injurious to the health or morals of the minor."
- Labor Code, § 1293.1 provides that "no minor under the age of 12 years may be employed or permitted to work, or accompany or be permitted to accompany an employed parent or guardian, in an agricultural zone of danger. As used in this section, 'agricultural zone of danger' means any or all of the following: (1) On or about moving equipment. (2) In or about unprotected chemicals. (3) In or about any unprotected water hazard."
- Educ. Code, § 48200 provides "[e]ach person between the ages of 6 and 18 years not exempted . . . is subject to compulsory full-time education."

Based on the above laws, the predicate SIJ findings easily should have been found. Saul's parents failed to provide for him, as they required him—as a child—to work and to spend his earnings for his own necessities and to provide food for his family; they failed to protect him from threats from gangs, causing him to be afraid for his life; and they prohibited him from

attending school. (*S.H.R.*, 68 Cal.App.5th at 570-572; see *Romero*, 205 A.3d at 917 [holding that forced labor of a child met the Maryland definition of neglect and also violated state child labor laws].) There can be little question that Saul's experience violated a host of California child protection laws, regardless of the intentions of the parents or the difficult circumstances they were facing.

As in *Romero*, the court here "conducted a narrow analysis of whether [the parents were] neglectful in a technical sense." (*Romero*, 205 A.3d at 917.) As the statute permits a state court to make SIJ findings based on state laws with a "similar basis" to abandonment, abuse, or neglect, it was not necessary that the other state law itself constitute neglect as defined in statutes that explicitly address neglect. (See *S.H.R.*, 68 Cal.App.5th at 578-579.)

Rather than apply any of the numerous "similar" state laws noted above, the courts in this case relied on a markedly *dissimilar* state law that does not translate to the SIJ context because its focus is the termination of parental rights, not the protection of and the best interest of the child. (See, e.g., *Romero*, 205 A.3d at 917 [the "exacting inquiry" into negligence performed by the juvenile court would be appropriate in a hearing on whether to terminate parental rights but "has no place in an uncontested SIJ status proceeding"].) The superior court in this case refused to find that Saul had suffered abuse or neglect,

relying on the rule that "poverty alone" is not a basis for a court to intrude into the parent/child relationship on the grounds of neglect. But the "poverty alone" rule exists in the termination context "because the overriding interest of the dependency laws is to maintain and support the family unit. Thus, where family bonds are strained by the incidents of poverty, the department must take steps to assist the family, not simply remove the child and leave the parent on their own to resolve their condition and recover their children." (*In re S.S.* (2020) 55 Cal.App.5th 355, 374 [citation omitted].)

The termination of parental rights is a severe action that divests a parent of all rights and privileges regarding the child. But SIJ findings do not terminate parental rights and termination of parental rights is not required for SIJ findings to be issued. It makes no sense to apply a state law focused on preserving the family unit and assisting parents (which, when it is possible to do so, is in the child's best interest) in a manner that denies to immigrant children the findings that are in their best interest and are a required prerequisite to filing for the SIJ protections that Congress provided.

Because SIJ findings are focused on the best interest of the child, and not on whether the parental relationship should be terminated, the circumstances and intentions of the parents are beside the point. If a child experiences neglect, abuse, abandonment, or the equivalent (as defined by California laws) as

a result of the poverty of his parents or the circumstances in his or her home country, that child is entitled to SIJ factual findings. There is no rule that exempts a neglected or abused child from qualifying for SIJ findings just because the court believed (as here) that his parents were trying the best they could under the circumstances.

IV. A STATE COURT "SHALL" ISSUE SIJ FINDINGS IF "THERE IS EVIDENCE TO SUPPORT" THEM.

Code of Civil Procedure, section 155, subdivision (b)(1) states: "If an order is requested from the superior court making the necessary findings regarding special immigrant juvenile status . . . and *there is evidence to support those findings*, . . . the court *shall* issue the order . . . ." (Emphasis added.) The term "shall" is interpreted as mandatory. (*People v. Standish* (2006) 38 Cal.4th 858, 869.) Thus, "if substantial evidence supports the requested SIJ findings, the issuance of the findings is mandatory." (*O.C.*, 44 Cal.App.5th at 83.) "Substantial evidence" means evidence 'of ponderable legal significance,'" that is "reasonable in nature, credible, and of solid value." (*Shafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1260 [citations omitted].)

The Opinion in this case imposed higher evidentiary burdens on Saul than the law requires or allows. The Court of Appeal adopted a preponderance of the evidence burden of proof, as well as a standard of appellate review that required Saul to

prove he was entitled to the requested findings *as a matter of law*. Other appellate decisions—with which the Court of Appeal here disagreed—make clear that a court errs if it ignores its mandatory duty to make SIJ findings where "there is evidence to support those findings." (See *O.C.*, 44 Cal.App.5th at 83; see also *In re Israel O.* (2015) 233 Cal.App.4th 279, 284-285 [holding that juvenile court erred in declining to make requested SIJ status findings: "A superior court with jurisdiction to make child custody determinations under California law 'has the authority and duty to make [SIJ status] findings' if the evidence before it supports those findings."); *Scarlett V.*, 72 Cal.App.5th at 502 [reversing superior court order refusing to make predicate findings on ground that they were "discretionary"; "the juvenile court, at a minimum, had to consider the evidence submitted by Scarlett and make a finding whether the evidence supported her requested SIJ findings . . . ; if the evidence supported the findings, the court's duty to enter an order with the findings was mandatory, not discretionary"].)

As such, the applicant has a low evidentiary burden. Because the purpose of the statute is to offer humanitarian immigration relief to vulnerable children, "Congress to some extent has put its proverbial thumb on the scale favoring SIJS status." (*B.R.L.F.*, 200 A.3d at 776.) For instance, the Legislature amended section 155 in 2016 to clarify that evidence to support SIJ findings may "consist solely of" the child's

declaration. (Stats. 2016, ch. 25, § 1)[15]; thus, the child's declaration alone is sufficient evidence to support the findings. (Code Civ. Proc., § 155, subd. (b)(1); see also *Bianka M.*, 5 Cal.5th at 1013.)

It is not necessary—or proper—for a court to decide that proffered, *uncontested* evidence is insufficient to support the findings or to speculate about conflicting inferences that might be supported by the evidence—as the court did here when drawing inferences about Saul's parents' good intentions and purported justifications for their actions due to their circumstances. In *Scarlett V.*, 72 Cal.App.5th at 502, the Court of Appeal held the juvenile court erred in not making SIJ findings "because Scarlett provided evidence that was uncontradicted and unimpeached and that left no room for a contrary judicial determination." In *Leslie H.*, 224 Cal.App.4th at 350, the court reversed where "the juvenile court considered each of the SIJ criteria, but declined on misplaced policy considerations to make the necessary factual findings, despite ample, uncontroverted evidence supporting the findings." In *Romero*, 205 A.3d at 910-911, the court reversed a lower court that reviewed the uncontested evidence and found it was "50/50" as to whether there was neglect, and that it could not

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[15] A Committee Report on the 2016 bill "clarifies . . . [t]hat it is in the best interest of the child for a superior court to issue the SIJS factual findings if requested and supported by evidence." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1603 (2015–2016 Reg. Sess.) as amended June 13, 2016, at 6.)

make a finding "at that level of evidence."

Of course, "trial judges should not abdicate their responsibility as fact finders; judges should assess witness credibility and discredit evidence when warranted." (*Romero*, 205 A.3d at 915.) "But they must do so with caution because 'creation of contrary evidence [often] rests on surmise[,]' particularly in uncontested cases. . . . Moreover, all evidence in SIJ status cases is 'made under penalty of perjury and would appear to have some presumptive validity.'" (*Ibid.* [citation omitted].) Thus, when the facts are "unrefuted," findings should issue. (*Id.* at 917.) A court cannot weigh the evidence and speculate about reasonable contrary inferences, as the courts did here.

Saul submitted an uncontested and unrefuted declaration attesting to the facts supporting his request for SIJ findings. (*S.H.R*, 68 Cal.App.5th at 570.) Saul also submitted a psychological evaluation, which the court did not consider because it was not authenticated or introduced below. (*Id.* at 572, fn.3.) The court never found his testimony lacking in credibility, and there was no argument that the court should draw inferences contrary to those asserted by Saul. Thus, his evidence constituted substantial evidence on which to base SIJ findings. (See *id.* at 576 [observing that the substantial evidence standard "does not ask what proposed facts are more likely than not to be the true facts"] [citation omitted].) This Court should

clarify the law and prevent further confusion among trial court and appellate court judges by confirming that the evidentiary burden on an applicant for SIJ is low and that an evidentiary presentation such as the one Saul made here is sufficient to support the issuance of findings by a state court.

In this case, by ignoring a panoply of state laws that support the conclusion that Saul met the required standard, by applying a state law that does not apply, and by improperly elevating the standard of proof required, the court put its proverbial thumb on the scale of justice, so as to disfavor making the SIJ findings to which Saul was entitled—directly contrary to congressional intent. (Cf. *B.R.L.F.*, 200 A.3d at 776 ["Congress to some extent has put its proverbial thumb on the scale *favoring* SIJS status."] [emphasis added].)

V. CONCLUSION

The Opinion creates bad law and poor precedent for California's superior courts and appellate courts and conflicts with other decisions. It should be reversed, with a decision stating clear guidelines for California courts and directions for

the superior court to apply the proper analysis to make the requested SIJ findings.

Dated: March 21, 2022 MANATT, PHELPS & PHILLIPS, LLP

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c) and (f), I certify that this Proposed Brief of Amici Curiae contains 8,384 words, not including the Application, table of contents, table of authorities, the caption page, or this Certification page.

Dated: March 21, 2022 MANATT, PHELPS & PHILLIPS, LLP

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PROOF OF SERVICE

I, **Bess Hubbard**, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of 18 years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 2049 Century Park East, Suite 1700, Los Angeles, California 90067. On **March 21, 2022**, I served the within:

APPLICATION BY NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER AND APPELLANT; PROPOSED BRIEF

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☒ **(BY ELECTRONIC SERVICE)** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via the Court's Electronic Filing System (EFS) operated by TrueFiling.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **March 21, 2022**, at Los Angeles, California.

s/ Bess Hubbard
BESS HUBBARD

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