No. 19-638

IN THE

Supreme Court of the United States

NELIDA MARIBEL DIAZ JUAREZ AND
NALBERTA BRAVO DIAZ,

Petitioners,

v.

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

Teresa Cunningham
CUNNINGHAM & ASSOC.
2600 Burlington Pike
Suite 340
Burlington, KY 41005

Tejinder Singh
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda MD, 20814
(202) 362-0636
tsingh@goldsteinrussell.com

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REPLY BRIEF FOR PETITIONERS

Respondent offers two arguments against certiorari, neither of which is compelling.

First, respondent argues that the decision below rests on an independent and adequate state ground because the lower court held that its own state statutes do not require it to make the Special Immigrant Juvenile (SIJ) findings described in 8 U.S.C. § 1101(a)(27)(J).

This argument misconstrues what it means for a state-law ground to be "independent and adequate." In this case, the state supreme court below first determined that "[n]othing contained in the Immigration and Nationality Act directs a state court to take any additional steps beyond carrying out their duties under state law." Pet. App. 9a. It was only because the court determined that federal law did not itself require the family court to make SIJ findings that it then asked whether state law required that result. Had the state supreme court decided the federal question (which is the question presented) the other way, it would not have even reached the state-law question. The proffered state-law ground is therefore not "adequate" to support the judgment below, and it does not undermine this Court's ability to reach the question presented. To put it another way, the lower court did not hold that *even if* federal law requires state courts to make SIJ predicate findings, some feature of state law would preclude the courts from doing so in this case. And respondent does not make that argument either.

Respondent also mischaracterizes the cases in the split as based on interpretations of state statutes. As

the petition showed, the highest courts in three States have concluded that *federal law* requires them to make SIJ findings—as have intermediate appellate courts in six other States. Pet. 12-16. If those States are correct, then States like Kentucky, Missouri, Vermont, and Virginia that merely permit (as opposed to require) their courts to make SIJ findings are violating federal law.

Second, respondent argues that this case does not present an "important issue of federal law." BIO 5 (capitalization altered). But respondent does not actually contest the importance of the question presented. It does not dispute that an unprecedented number of unaccompanied minors have entered the United States in recent years. *See* Pet. 21. It does not dispute that tens of thousands of SIJ petitions are filed annually. *See id*. at 22. Nor does it dispute that minor children, their caregivers, their counsel, and state courts all need to know the answer to the question presented if the SIJ program is to function. *See id.* at 22-24.

Instead of disputing the importance of the question presented, respondent makes merits arguments. It contends that petitioners' rule is contrary to the text of the statute and to guidance from U.S. Citizenship and Immigration Services (USCIS), and it argues that petitioners' attempt to obtain SIJ findings is improper because Nelida was in removal proceedings. BIO 5-7.

None of these arguments, even if valid, weigh against certiorari. Given the importance of the question presented and the acknowledged and entrenched split among state courts, this Court should take up the question no matter who is right about the merits.

Respondent's merits arguments are also unpersuasive. It argues that the statute does not include an explicit command to state courts to make predicate SIJ findings—but does not explain why such a command is necessary when, as here, the only way to get SIJ findings is from state courts. It is clear that Congress intended for state courts to make the findings—and it is implausible that Congress anticipated that States could refuse to do so. In this circumstance, the only reasonable way to read the statute is as a requirement for state courts to issue predicate findings upon request. *See, e.g.*, *Guardianship of Penate*, 76 N.E.3d 960, 966 (Mass. 2017) ("Because this fact-finding role is integral to the SIJ process, the Probate and Family Court judge may not decline to make special findings if requested by an immigrant child under § 1101(a)(27)(J)."); *H.S.P. v. J.K.*, 121 A.3d 849, 860 (N.J. 2015) (holding that making the findings "is the role Congress envisioned for the juvenile courts of the fifty states, and that is the process that should be followed"). Any other reading would be flatly inconsistent with Congress's purpose in creating a federal SIJ program.

Respondent argues next that USCIS has issued guidance indicating that the agency does not require state courts to do anything other than what is already required by state law. BIO 5-7. The guidance respondent cites does not discuss the statutory language or scheme in any detail. But even assuming that USCIS would interpret the statute not to require state courts of competent jurisdiction to make SIJ findings, the Court should reject that interpretation for the reasons given above. All available evidence suggests that Congress entrusted state courts to issue SIJ predicate

findings because it understood that they have superior expertise in child welfare issues. On the other hand, there is no evidence that Congress intended for States to exercise categorical veto power over whether juveniles in their jurisdiction could seek federal SIJ status based on naked determinations that the requested findings are "unnecessary." Pet. App. 11a.

Respondent also disparages these proceedings as an "attempt to circumvent the immigration process" because otherwise Nelida might be removed from the country. BIO 7. But pursuing SIJ status is *part of the immigration process*. Petitioners are not trying to circumvent it; they are trying to avail themselves of it. To do that, Nelida must first obtain predicate findings from a state court—which is why it is actually the lower courts in this case that have "circumvented" federal law.

To the extent respondent is arguing that Nelida's request for predicate findings should be denied because she is ineligible for SIJ status, that argument also does not weigh against certiorari because it is irrelevant to the state court's decision to issue predicate findings. USCIS is the only entity that has the power and the responsibility to make ultimate status determinations, and it is well-settled that state courts cannot refuse to make SIJ findings because they believe that USCIS will rule one way or the other on a petition for SIJ status. *See, e.g.*, *Guardianship of Penate*, 76 N.E.3d at 963 (holding, consistent with the United States' position, that state courts must make SIJ predicate findings, and must not refuse to do so because they predict that USCIS would deny SIJ status). Independently, respondent is wrong to argue that these proceedings are improperly motivated. As the lower

courts recognized, Nelida is genuinely dependent, and therefore properly under the jurisdiction of the family court. *See* Pet. App. 11a, 40a.

Finally, respondent does not make an argument about this, but in its Statement of the Case it notes that petitioner Nelida no longer lives with petitioner Nalberta, who was the appellee in the Supreme Court of Kentucky. Respondent also observes that Nelida was named as an appellee in the state intermediate appellate court, but not in the state supreme court. BIO 2-3.

Respondent's description is incomplete. With respect to Nalberta, it is true that Nelida left her custody to move into an independent living facility under respondent's custody. That happened in August 2018, before the appeal to the Supreme Court of Kentucky. But at that time, respondent did not suggest that the change in Nelida's custody status inhibited Nalberta's ability to act as a party in this case. Instead, it filed a "motion for discretionary review" seeking the state supreme court's review of the court of appeals' decision, which named *only* Nalberta as a respondent, even though Nelida had also been a party in the court of appeals and should have been named as an additional respondent. *See* Ky. R. Civ. P. 76.20(3), (5), (9)(b) (explaining how motions for discretionary review work). Thus, to the extent Nelida was not named in the state supreme court, that is because respondent failed to name her in its motion, notwithstanding her acute personal interest in the outcome of the appeal.

After oral argument in the Supreme Court of Kentucky, the parties filed supplemental briefs to address questions posed by the court. One question was whether Nalberta's notice of appeal had properly

made Nelida a party to the appellate proceedings. On this point, respondent argued that the "Notice of Appeal properly brought the child before the Court of Appeals as the notice specifically names the child and a copy of the notice was mailed to the child's guardian ad litem." Resp. Supp. Br. 2 (Ky. May 24, 2019). The court had also asked whether Nalberta had standing to raise issues regarding SIJ findings and to appeal on that issue. In Kentucky, standing, as opposed to subject-matter jurisdiction, can be waived by failure to raise it. *See Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010). To ensure that its appeal would be decided, respondent stated that "the defense of standing has not been raised specifically in any pleading or brief and therefore should be considered waived" in this case. Resp. Supp. Br. 3. Respondent also argued that the case might have become "technically moot" based on the change of custody, but it urged the Supreme Court of Kentucky to hold that the case fell within the exception to mootness for cases that are "capable of repetition, yet evading review." *Id*. at 5. Respondent argued that it was important to reach the merits to provide "assistance to all family court's [sic] through the issuance of an opinion on the merits." *Id*. at 6.

In petitioners' view, respondent's observations do not pose an obstacle to reaching the merits. Nelida was listed as a party in the captions for the trial and appellate courts. *See* Pet. App. 22a (listing "N.M.D.J., a minor child"); *id*. at 40a (naming Nelida)). Moreover, respondent acknowledged that she was properly a party before the court of appeals. Accordingly, Nelida should have been listed as a party in the state supreme court, and it was only due to the captioning of respondent's motion that she was not. More fundamentally,

Nelida's personal stake in this controversy could not be clearer. The proceedings below—including the state supreme court proceeding—were about Nelida's personal right to SIJ predicate findings. The state supreme court adjudicated Nelida's rights, determining that she "is a dependent child and is entitled to the protection and care of the Commonwealth of Kentucky," but also determining that a hearing for SIJ findings was "unnecessary where the Court has found that the child is dependent and that the present custodial arrangements are appropriate to serve the best interests of the child." *Id.* at 11a-12a (quotation marks omitted). Unless that decision is reversed, Nelida will not receive SIJ predicate findings. As the dissent recognized, that result "is directly contrary to the trial court's finding that placement of [Nelida] in the care of an individual or entity within the U.S. is in the child's best interest." *Id*. at 19a. The Court should accordingly disregard the caption in the state supreme court and recognize that, as a matter of substance, Nelida was a party to the decision below, and is therefore properly a petitioner before this Court.[1]

As for Nalberta, she was listed on the caption of the decision below, and the state supreme court entered judgment on the merits against her. She also has a personal interest in this case in that if Nelida is deported, Nelida and her children (Nalberta's grandchildren) will leave the country. Although Nalberta's for-

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[1] Unlike the statute providing certiorari jurisdiction in federal cases, the statute providing certiorari jurisdiction over state court decisions does not expressly require that the petition be filed by a "party." *Compare* 28 U.S.C. § 1254(1), *with* 28 U.S.C. § 1257(a).

mal status as Nelida's custodian ended, she has faithfully represented Nelida's interests, and remains willing and able to advocate for Nelida's right to SIJ findings. Moreover, when custody was transferred away from Nalberta, it was transferred to respondent (the Cabinet)—which did not object to Nalberta's continued participation in this case as an advocate for Nelida, or suggest a substitute. Indeed, respondent affirmatively waived any objection to Nalberta continuing to litigate, and argued that even if the case was "technically moot," it fell within the established exception to mootness for matters that are capable of repetition, yet evading review. Resp. Supp. Br. 3, 5-6. That argument was correct, and petitioners are not aware of any law that would prevent Nalberta from continuing this action as a petitioner.

It is telling that respondent does not make any vehicle arguments based on its observations. It does not argue, for example, that either Nalberta or Nelida is ineligible to petition for this Court's review. It does not argue that Nalberta lacks capacity under state law to be the named party in a case about Nelida's interests. And it does not contend that the case has become moot (it surely has not, since Nelida's interest in obtaining the findings is as strong as ever, and respondent does not dispute that because Nelida remains under the jurisdiction of the family court, a court could still issue them for her, *see* Pet. 11).[2] There is no reason for this

[2] Kentucky courts also recognize a "public interest" exception to mootness. *See Morgan v. Getter*, 441 S.W.3d 94, 102 (Ky. 2014) (recognizing an exception to mootness when "(1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and

Court *sua sponte* to consider these issues to manufacture a vehicle problem.

To the extent the Court has concerns about whether petitioners are properly here, there is an easy way to put those to rest. Out of an abundance of caution, contemporaneously with this reply, petitioner Nelida has filed a motion for leave to intervene in this Court. Nelida has Article III standing to challenge the decision denying her SIJ findings because it has injured her, *see, e.g.*, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989), and she is otherwise the ideal litigant to pursue the question presented, as she is the person in this case with the most concrete interest in the outcome.

Consequently, if Nelida's status as a party is currently in doubt, the Court can grant her motion and resolve that doubt. *See Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) (granting motion to add plaintiffs to head off questions about standing). By doing so, it can also avoid any issues surrounding Nalberta's standing or capacity to continue. *See Horne v. Flores*, 557 U.S. 433, 445 (2009) (reaching the merits because at least one petitioner had standing); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (same). The motion may not be necessary; if the Court agrees that there is no vehicle problem, it can simply grant the petition. But if the Court believes that there may be a vehicle problem, it should

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(3) there is a likelihood of future recurrence of the question.") (quotation marks omitted).

dispel that cloud by granting the motion and the petition so that it can decide an important question of federal law that has divided state courts of last resort.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Teresa Cunningham
CUNNINGHAM & ASSOC.
2600 Burlington Pike
Suite 340
Burlington, KY 41005

Tejinder Singh
Counsel of Record
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda MD, 20814
(202) 362-0636
tsingh@goldsteinrussell.com

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