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

NELIDA MARIBEL DIAZ JUAREZ'S MOTION FOR LEAVE TO INTERVENE AS PETITIONER

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MOTION FOR LEAVE TO INTERVENE AS PETITIONER

Nelida Maribel Diaz Juarez respectfully moves for leave to intervene as a petitioner in this case. The petition asks whether federal law requires a state court to issue findings that would permit an immigrant to apply for Special Immigrant Juvenile (SIJ) status under 8 U.S.C. § 1101(a)(27)(J). Pet. i. This question has divided state courts of last resort, and is important to thousands of juveniles who may seek SIJ status, to the States, and to federal immigration law. It is also an issue of tremendous personal importance to movant Nelida, who is personally seeking SIJ predicate findings so that she can petition for SIJ status and remain in this country with her two infant children.

In the brief in opposition, the Cabinet for Health and Family Services makes two factual observations. First, it notes that Nelida was not named in the caption of the decision below. BIO 2. Second, it notes that petitioner Nalberta Bravo Diaz, who was named in the caption below, no longer has custody over Nelida because custody was transferred to respondent itself. *Id*. at 3.

Respondent does not make any arguments based on these observations. It does not contend, for example, that they give rise to a vehicle problem that would prevent this Court from deciding the question presented. The reply brief for petitioners explains why, in petitioners' view, no such problem exists that this Court would have to raise *sua sponte*. *See* Cert. Reply Br. 5-8. However, petitioners recognize that the Court sometimes takes a risk-averse approach to issues that might prevent it from adjudicating the merits of a question presented. Accordingly, this motion *assumes*

that respondent's factual observations would give rise to a vehicle problem, and provides a simple, risk-free solution to any such problem, which is to permit Nelida to intervene as a petitioner. Granting this motion would eliminate any doubt about whether a proper party is before this Court, clearing the path to the merits.

As explained in greater detail below, this is also an especially compelling case for intervention. This case is about Nelida's ability to obtain immigration status, and so her personal stake in the controversy is more concrete and acute than anybody else's. Moreover, to the extent vehicle problems exist, they are narrow, technical, and largely attributable to respondent. For example, Nelida was a party to this case, named in the captions, in the trial and intermediate appellate courts, and respondent conceded that she was properly before the court of appeals. She was not listed in the state supreme court caption because respondent itself failed to list her in its motion seeking the state supreme court's discretionary review. Nevertheless, the state supreme court adjudicated Nelida's substantive rights by affirming the trial court's decision.

Nelida also had no reason to attempt to intervene earlier, because neither respondent nor the courts below suggested any problem with Nalberta acting in Nelida's interests. In fact, respondent affirmatively waived any objection to Nalberta's standing, and urged the state supreme court to decide this case on the merits with Nalberta as the appellee. And as a matter of fact, Nalberta did represent Nelida's interests, even after formal custody was transferred from Nalberta to respondent. If there was any issue with that, then respondent—either in its capacity as Nelida's new custodian, in its capacity as a litigant, or in its role as a government

agency upholding the public interest—should have raised the issue and sought the appointment of an adequate substitute to represent Nelida's interests. If that failure on respondent's part has created a vehicle problem, the only just result at this time is to allow Nelida to cure the problem by advocating for herself. On the other hand, it would be manifestly unjust to give respondent a litigation windfall by denying the petition on this ground.

On December 20, 2019, counsel for movant sought consent for this motion from counsel for respondent. On December 22, counsel for respondent replied that he had not had the opportunity to engage in the necessary research to consent at this time. Movant does not know whether respondent intends to file a response.

STATEMENT

This action began when Nalberta was seeking custody of Nelida, who had come to the United States without her family. The case was captioned "In the Interest of: Nelida Maribel Diaz Juarez, a minor." Pet. App. 40a. Nelida was a party in the proceedings. *Ibid*. On December 20, 2017, the family court found that Nelida was dependent as she was "an unaccompanied minor in the United States and did not have a legal custodian present to provide supervision and shelter." *Id*. at 40a-41a. Interim custody was granted to Nalberta. *Id*. at 41a. Nalberta's attorney also requested that the family court make SIJ predicate findings on Nelida's behalf. *See ibid.* On February 1, 2018, the family court issued an order granting custody over Nelida to Nalberta, but refusing to issue the SIJ predicate findings. *Id*. at 45a.

Nalberta appealed, naming Nelida among the appellees. *See* Pet. App. 22a. But Nalberta and Nelida were not adverse. Instead, Nalberta's counsel represented Nelida's interests on appeal, arguing that the family court was required to make SIJ predicate findings on her behalf. On October 5, 2018 (with a corrected opinion issued on November 2, 2018), the court of appeals agreed and reversed. *See id.* at 22a, 28a.

While those proceedings were pending, in August 2018, custody over Nelida was transferred from Nalberta to the Cabinet for Health and Family Services (respondent here) after a domestic violence incident involving Nalberta's son. *See* Pet. App. 48a. Accordingly, Nelida and her two young children have been living at a facility called "All God's Children" that provides services for young mothers seeking to learn to live independently. *See id.* at 47a. The Cabinet did not argue that the change in Nelida's custody status had any effect on the court's ability to consider the pending appeal, or on Nalberta's ability to litigate the appeal. Nor, as Nelida's new custodian, did the Cabinet seek to substitute itself or anybody else for Nalberta in the pending case.

On the contrary, the Cabinet filed a motion for discretionary review (the state analog to a petition for a writ of certiorari) with the Supreme Court of Kentucky, asking the court to reverse the court of appeals' holding that Nelida was entitled to SIJ predicate findings. In its motion, for reasons we do not know, the Cabinet listed only Nalberta, and not Nelida, as the respondent. Accordingly, the caption in the state supreme court after the motion was granted listed only Nalberta as an appellee. *See* Pet. App. 1a; *see also* Ky. R. Civ. P. 76.20(3), (7), (9)(b) (providing that a motion for discretionary review shall "designate the parties as Movant(s) and Respondent(s),"

identifying all of them along with their counsel, and shall be "served on the other parties and on the clerk of court whose decision is sought to be reviewed," and that if such a motion is granted, the movant will be regarded as the appellant and the respondent the appellee). In the state supreme court, as below, Nalberta's counsel argued for Nelida's right to SIJ predicate findings.

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, e.g.*, *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 acknowledged 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.

The Supreme Court of Kentucky did reach the merits. It held that Nelida was properly deemed dependent, but also that neither federal nor state law required the family court to issue the findings. *See* Pet. App. 9a, 11a-12a.

Nalberta and Nelida jointly filed a petition for a writ of certiorari seeking review of the Supreme Court of Kentucky's decision. In the Statement of the Case in the brief in opposition, the Cabinet observed that Nelida "was not listed as a party before the Kentucky Supreme Court," and that "custody has changed to the Commonwealth of Kentucky and Nelida no longer resides with Nalberta." BIO 2-3. The Cabinet did not base any arguments on these factual assertions, and for the reasons explained in the reply brief for petitioners (at 5-8), there is no vehicle problem that the Court would have to consider *sua sponte*. Indeed, Nelida believes that she is already a proper petitioner in this case. This motion is filed protectively in case the Court has any doubts about that.

REASONS FOR GRANTING THE MOTION

This Court has "recognized that the interests of justice demand or justify" intervention in unusual cases. Stephen M. Shapiro et al., *Supreme Court Practice* 6-62 (11th ed. 2019); *see also BNSF Ry. Co. v. EEOC*, 140 S. Ct. 109 (2019) (granting motion for individual employee, who had not been a party below, but whose interests were at stake, to intervene as a respondent at the certiorari stage). This is such a case.

1. There is no statute or rule that governs intervention in this Court, but the Court's cases have pointed to the standard in Federal Rule of Civil Procedure 24 as helpful guidance. *See Auto Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965); *cf. Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) (citing Fed. R. Civ. P. 21, which governs the addition of parties).[1] Rule 24(a) authorizes intervention as of right upon a timely motion by a party who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Nelida meets that standard.

Nelida plainly has an interest—indeed, the strongest interest—in "the subject of the action," which is whether she is entitled to SIJ predicate findings. The clearest evidence is that the caption of the case in the family court was: "In the Interest of: Nelida Maribel Diaz Juarez, a minor." Pet. App. 40a. Nelida was also concededly a party to this case in the family court and the court of appeals—and respondent affirmatively argued below that Nelida was properly before that court. The fact that Nelida was not put on the caption in the state supreme court does not diminish her interest in the slightest. On the contrary, the decision below holds that the family court was correct to refuse to issue SIJ predicate findings for Nelida, and unless that decision is reversed, she will not get them. As the leading treatise explains, "[i]t surely

[1] To the extent the Court would consider state-law standards for intervention relevant in cases arising from state courts, Kentucky Rules of Civil Procedure 24.01-.24.03 are substantively identical to the federal counterpart.

is sufficient . . . if the judgment will have a binding effect on the would-be intervenor." 7C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1908.1 (3d ed.).[2]

On the assumptions underlying this motion, Nelida's interest also is not being adequately represented by any other parties. This motion assumes that because Nalberta is no longer Nelida's custodian, she no longer has the ability to represent Nelida's interests, and also lacks the necessary personal interest to continue prosecuting this appeal on her own.[3] Nelida's formal custodian at this time is the Cabinet, *i.e.*, the respondent in this case—which has taken the position that Nelida is not entitled to SIJ findings, and the Cabinet therefore clearly cannot be expected to represent Nelida's interests before this Court. And there are no other potential parties in the case who could advocate for Nelida. Thus, on the assumptions underlying this motion, Nelida's interests are not being adequately represented.

Nelida's motion is also timely. Rule 24(a)'s timeliness requirement is not a rigid rule based on "the point to which the suit has progressed," but a flexible standard that must be applied in light of "all the circumstances." *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). The critical question is whether this motion was filed "promptly" upon discovering that Nelida's interests "would no longer be protected." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977); *see NAACP*, 413 U.S. at 367

[2] *A fortiori*, Nelida has Article III standing to pursue review in this Court. *See ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989).

[3] If that assumption is wrong, then there is no vehicle problem and certiorari should be granted even if this motion is denied.

(prospective intervenors were required to act once it became "obvious that there was a strong likelihood" that the United States would cease to represent their interests). In this case, the motion is prompt because until the brief in opposition was filed six days ago on December 17, 2019, respondent never argued or suggested that Nalberta was an inadequate representative for Nelida in this case. In fact, respondent named Nalberta as the sole respondent for its motion seeking review in the state supreme court, and it affirmatively waived any objection to her standing to litigate these issues. For her part, Nalberta advocated diligently for Nelida's interests. Even after her custody of Nelida was terminated, Nalberta pursued the appeal. Moreover, given respondent's concession that Nelida had been properly before the lower courts, Nelida believed that she could herself petition as a party. Thus, Nelida had no reason to seek intervention before now.

Accordingly, under Rule 24, Nelida would be entitled to intervention as of right. This Court should grant this motion for that reason.

2. This Court has also added parties to a case for practical reasons, *i.e.*, to head off questions about standing or capacity to maintain an action so that the Court could reach the merits. In *Mullaney*, the petitioner questioned the respondent union's standing for the first time before this Court. 342 U.S. at 416. The respondent moved for leave to add two of its individual members to address that issue. Relying on Rule 21 of the Federal Rules of Civil Procedure, which permits courts to add parties to actions, the Court granted the motion to "put[] the principal, the real party in interest, in the position of his avowed agent." *Id*. at 417. The Court recognized that "[t]he

addition of these two parties plaintiff can in no wise embarrass the defendant" or otherwise cause prejudice. *Ibid*. The Court also recognized that "[t]o dismiss the present petition and require the new plaintiffs to start over . . . would entail needless waste and runs counter to effective judicial administration—the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below." *Ibid*.

All of these considerations support Nelida's motion here. Indeed, this case is stronger than *Mullaney* because respondents did not merely silently concur in Nalberta's standing to litigate below—they affirmatively waived any challenge, and they are not asserting one now. Moreover, here, as in *Mullaney*, granting Nelida's motion would merely place her in the position of her avowed agent. And as in *Mullaney*, granting the motion would not prejudice respondent in any way. On the other hand, denying the petition because of a putative vehicle problem would not only create tremendous waste, but would put Nelida at risk of never being able to obtain SIJ findings before she turns 21 years old, which would make her permanently ineligible to seek SIJ status. It would also leave an important federal question unresolved until another case works its way through the state appellate court systems.

Consequently, if the Court is inclined to grant certiorari, but is considering denying the petition because of concern about Nalberta's ability to act as petitioner after the change in custody, or about whether Nelida is properly a party due to her omission from the case caption below, this motion can put those concerns to rest. By allowing Nelida to intervene, the Court would ensure that the litigant with the most at

stake is also the one pressing her entitlement to relief. It would also clear a path to the merits of this case because as long as one party is properly before the Court, other parties' standing issues do not matter.

3. Finally, the equities weigh heavily in favor of allowing intervention on the facts of this case. As noted above, Nelida was a named party to the case in the trial court, and Nalberta's counsel named Nelida as a party to the case in the court of appeals. Despite respondent's concession that Nelida was a party in the court of appeals, it failed to name Nelida in its motion for discretionary review in the state supreme court. Given how clearly adverse respondent's motion was to Nelida's interests, it should have named her as an opposing party, and served the papers on her. *See* Ky. R. Civ. P. 76.20(3), (7) (describing the naming and service obligations for motions for discretionary review). But because respondent did not name Nelida in its motion, Nelida was left off the caption in the state supreme court.

Moreover, by this point in time, custody of Nelida had already been transferred from Nalberta to respondent. Thus, if respondent thought that the change in custody meant that Nalberta was not a proper representative for Nelida, it should not have named her as the sole respondent in its motion for discretionary review. Instead, as Nelida's custodian, as a litigant before the state supreme courts, and as a government entity pursuing the public interest, it should have ensured that a proper substitute was appointed to represent Nelida's interests adequately. But respondent did not do that. Instead, respondent told the Supreme Court of Kentucky that it had waived any objection to Nalberta's standing, and it argued that the court should decide the case

on the merits to provide important guidance to family courts. Having urged the lower courts to decide the merits when it was attempting to appeal an adverse judgment, respondent should not now be able to evade this Court's review by kicking up dust about a potential justiciability problem.

To be clear, we are not arguing that respondent acted in bad faith. In all likelihood, respondent believed that Nalberta was an adequate representative, and perhaps therefore believed that it did not have to name Nelida in the motion for discretionary review. But if those beliefs are now deemed to be questionable or erroneous, respondent should not reap a windfall via denial of the petition for a writ of certiorari. Instead, the just result would be to allow Nelida to pursue her own interests in this Court.

CONCLUSION

For the foregoing reasons, if the Court determines that Nelida is not already a party to the proceedings, it should grant her leave to intervene as a petitioner.

Respectfully submitted,

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