No. 19-638

IN THE

Supreme Court of the United States

N.B.D., PETITIONER

v.

KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

This brief responds to the *amicus* brief of the United States, filed May 21, 2020. The government does not dispute that the question presented is of surpassing importance to tens of thousands of immigrant children, to the states, and to federal immigration policy (Pet. 21-24)—and it does not deny that this case is an ideal vehicle to resolve the question (*id*. at 24-25). Instead, the government believes that certiorari should be denied because the split is unclear, and because the decision below was correct on the merits. U.S. Br. 9-10. These arguments are unpersuasive.

I. There Is an Undeniable Split About Whether Federal Law Requires State Courts to Make Special Immigrant Juvenile Predicate Findings.

State courts of last resort disagree about whether federal law, specifically 8 U.S.C. § 1101(a)(27)(J) and its implementing regulation, require state courts to make special immigrant juvenile (SIJ) predicate findings. As the petition explained, courts of last resort in Maryland, Massachusetts, and New Jersey have held—in conflict with the decision below and decisions in three other states courts—that the answer is "yes," and intermediate appellate courts in at least six other states agree. The government contends, however, that it is not clear whether the courts requiring SIJ predicate findings rest their decisions on federal as opposed to state law. U.S. Br. 10.

The clearest counterexample comes from Maryland. In *Simbaina v. Bunay*, 109 A.3d 191 (Md. Ct. Spec. App. 2015), the Maryland Court of Special Appeals held that "[t]he federal [SIJ] statute directs the

circuit court to enter factual findings that are advisory to a federal agency determination." *Id*. at 197. The court described this as a "federal directive to State courts to make SIJ findings" and noted that "the SIJ statute imposes a rather extraordinary duty on a State court." *Id*. at 197-98.

The court's holding necessarily rested on federal law because the court was concerned that if the Maryland legislature had directed the state's courts to make SIJ findings, that duty could have violated Article 8 of the Declaration of Rights of the Maryland Constitution by requiring the courts to "perform a 'nonjudicial function.'" *Simbaina*, 109 A.3d at at 197. The court avoided that State constitutional-law problem by holding that "*because federal law imposes the duty to make SIJ findings on a Maryland court*, any claim of impermissible imposition of nonjudicial duties or of a State separation of powers violation would be trumped by the Supremacy Clause of the U.S. Constitution, Article VI, and the similar federal supremacy obligation found in Article 2 of our own Declaration of Rights." *Id*. at 198 (emphasis added).

The government glosses over *Simbaina*, describing it as "a decision of the Maryland intermediate appellate court finding that a juvenile alien's request for SIJ findings had been adequate under Maryland's jurisdictional rules and pleading standards." U.S. Br. 20. The government acknowledges, as it must, that *Simbaina* has been "cited with approval" by the Maryland Court of Appeals. *Ibid*. But the government's description elides *Simbaina*'s analysis about why the federal mandate obviated the state separation-of-powers issue, as well as the fact that when the state's highest court cited *Simbaina* with approval, it stated that it

was "satisfied with [*Simbaina*'s separation of powers] analysis." *Romero v. Perez*, 205 A.3d 903, 907 n.10 (Md. 2019). Thus, Maryland's court of last resort has held that federal law requires SIJ findings.

The Supreme Judicial Court of Massachusetts, in *Guardianship of Penate*, 76 N.E.3d 268 (Mass. 2017), said this about state courts:

> The State court's role is solely to make the special findings of fact necessary to the USCIS's legal determination of the immigrant child's entitlement to SIJ status. 8 U.S.C. § 1101(a)(27)(J)(iii). Congress delegated this task to State courts because it recognized the distinct expertise State courts possess in the area of child welfare and abuse, which makes them best equipped to shoulder the responsibility to perform a best interest analysis and to make factual determinations about child welfare for purposes of SIJ eligibility.
>
> 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).

Id. at 274-75 (quotation marks and citation omitted). There are four unambiguous signals that the obligation to make SIJ predicate findings is federal in nature. First, the court cited the federal statute when describing the state court's role. Second, the court stated that Congress—not the state legislature—delegated this role to the state court. Third, the reason states are *required* to make the findings is because the findings

are integral to the federal SIJ process—and not any state policy. Finally, there is no citation to any state law anywhere in the description of state courts' obligation.

The New Jersey Supreme Court's decision in *H.S.P. v. J.K.*, 121 A3d 849 (N.J. 2015), is similar. After conducting a lengthy review of the history of the SIJ statute, the court made it clear that the reason state courts must make the findings is to fulfill "the role Congress envisioned for the juvenile courts of the fifty states." *Id*. at 860. No parallel state law obligation to make findings was mentioned.

The government also disputes the salience of the decisions of six intermediate appellate courts that have required state courts to make SIJ findings. These decisions were discussed in the petition (at 14-16), and there is no need to rehash them in detail here. Suffice it to say that they contain clear indicia that federal law obligates state courts to issue SIJ predicate findings. *See, e.g.*, *In re J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012) (holding that state juvenile courts are "charged with addressing an issue relevant *only to federal immigration law*") (emphasis added).

II. Federal Law Obligates State Courts to Make Findings on the SIJ Predicate Questions.

Petitioners' rule—which is that state juvenile courts of competent jurisdiction must consider requests for SIJ findings on the merits and make the findings in every case in which they are warranted—aligns perfectly with Congress's objectives in creating the SIJ program. Under petitioners' rule, every deserving child has a fair chance to apply for SIJ status,

no matter where they live. On the other hand, no undeserving person will receive SIJ status: children who are not entitled to the predicate findings will not get them on the merits, and children who are otherwise ineligible will be denied by USCIS. Our rule accordingly helps everybody Congress sought to help, and nobody that Congress did not seek to help.

The government's rule is quite different. The government argues that a juvenile court may decline to make SIJ predicate findings for "reasons that are permitted by state law." U.S. Br. 10. Under this rule, a state court can refuse to make SIJ predicate findings for reasons that have nothing to do with Congress's objectives. And under this rule, a significant number of children who factually qualify for SIJ status—and who are the intended beneficiaries of the federal SIJ program—will be unable to even apply for it because juvenile courts in states like Kentucky will simply refuse to make the predicate findings.

Actually, the picture under the government's rule is even more bleak because states can also presumably enact laws limiting their courts' ability to make SIJ findings. For example, any state could codify the Kentucky Supreme Court's holding in this case, and apply that standard to limit the availability of SIJ findings.

To illustrate why that is a bad rule, we highlight two significant flaws in the Kentucky Supreme Court's opinion. First, the decision is internally incoherent. The Kentucky courts found that it would be in petitioner Nelida's best interests to remain in Kentucky, but refused to make the findings that would protect her from deportation out of Kentucky. Pet. App. 11a-12a, 44a. As the dissent pointed out, this makes no sense because deportation would be "directly contrary

to the trial court's finding that placement of the child in the care of an individual or entity within the U.S. is in the child's best interest." Pet. App. 19a (Minton, C.J., dissenting). The majority did not even address this argument in its opinion—probably because there is no reasonable answer.

Second, the decision below evidences a misunderstanding of, or perhaps hostility to, federal law. The court stated that evidence about whether Nelida should be returned to Guatemala should be presented "not in any state court, but in federal immigration court." Pet. App. 12a. That is wrong because under the SIJ statute, *only* state tribunals can make SIJ predicate findings; federal immigration courts cannot. The court further stated that it had "grave concerns about the use of the juvenile process . . . to circumvent federal immigration law." *Ibid*. But circumvention is a question for the federal government, as the government itself argued in *Penate*, *supra*. *See* Brief for the United States, 2016 WL 7661052, at *15-16 (Dec. 28, 2016) (arguing that USCIS "alone is charged with determining whether the INA's requirements for SIJ status are met or if the alien minor is seeking a state court order solely to secure an immigration benefit"). Thus, the Kentucky family court, and then the state supreme court, refused to perform the function Congress contemplated for a state court, and also encroached on the federal government's role in the SIJ process and undermined Nelida's ability to avail herself of that process.

To be sure, the correctness of the Kentucky Supreme Court's decision as a matter of state law is not before this Court. But what *is* before this Court is whether Congress intended to allow states to adopt

such flawed reasoning to deny SIJ applicants a fair chance at receiving a federal humanitarian benefit. The government does not even attempt to explain what could have motivated Congress to take that approach—and we cannot conceive of a rationale for it.

Nevertheless, the government argues that Congress merely intended to empower state courts to make SIJ predicate findings—not to require them to do so. In support of that counterintuitive position, the government makes a few arguments—none of which are persuasive.

First, it argues that as a textual matter, the statute does not expressly impose a federal mandate on state courts, but instead speaks in the passive voice about immigrants who have obtained the requisite findings. U.S. Br. 10-11. This was addressed in the petition (at 28) and the reply (at 3-4). While Congress could have been more explicit in issuing a command, the necessary implication of the requirements Congress imposed is that state courts must adjudicate the SIJ predicate question on the merits. That is so because there is no other way for a child to obtain the requisite findings, and so there is no way for the statute to achieve its purpose unless state courts are required to issue them in appropriate cases.

Second, the government argues that the SIJ statute contemplates that states will apply their own substantive law to determine whether reunification with a parent is not viable due to abuse, neglect, abandonment or a similar basis "found under State law." U.S. Br. 10 (quotation marks omitted). The government leaps from this premise to the conclusion that Congress also intended to allow states to avoid deciding SIJ questions at all. This is a stretch. First, the phrase

"or a similar basis found under State law" is meant to broaden the scope of permissible findings that an immigrant child can seek beyond the categories of abuse, neglect, and abandonment—not to allow states to narrow the inquiry. Second, even accepting the premise that the states will apply their own substantive law of abuse, neglect, and abandonment when making this predicate finding, it does not follow that states have *carte blanche* to refuse to make the finding even when that state-law substantive standard is met. The better reading is the opposite, *i.e.*, that when, under state law, an immigrant child can show that she has been abused, neglected, abandoned, or similar, she will receive the requisite finding from a state court.

The government argues next that the legislative history supports its interpretation by stating that the SIJ program was intended to benefit children who are actually abused, neglected, or abandoned—and not merely those who initiated dependency proceedings in order to obtain an immigration benefit. U.S. Br. 11-12. This argument ought to go the other way because the government's rule would permit state courts to decline to make SIJ findings even for children who are genuinely abused, neglected, or abandoned if, for example, the state court determines that it need not consider the viability of parental reunification to adjudicate custody, or that it need not consider the virtues of a custodial arrangement in the child's country of nationality. Petitioners' rule is the only one that ensures that every one of Congress's intended beneficiaries has a fair chance to apply for SIJ status. Moreover, our rule does not permit anybody to exploit the process because USCIS retains the ability to deny petitions for status if it determines that they are not bona fide.

The government next attempts to draw an analogy between SIJ predicate findings and other state-law determinations that have immigration consequences. For example, it observes that marriage, divorce, separation, and adoption are all determined under state law, but carry immigration consequences. U.S. Br. 13. But this is irrelevant to the SIJ program, which does not merely attach immigration consequences to an existing state-court order, but instead requires a child who wishes to seek the status to obtain specific findings—and these findings have no purpose other than supporting an application for SIJ status. Most clearly, the third finding, "that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence," 8 U.S.C. § 1101(a)(27)(J)(ii)—is not the sort of finding that a state juvenile court ordinarily would make because state courts typically adjudicate whether it makes sense for a child to reside in a particular *home*, not an entire *country*.[*]

The government also compares SIJ status to the U visa program, which grants status to individuals who assist law enforcement investigations of certain crimes. U.S. Br. 14. Under this program, the immigration benefit is only available if a responsible law enforcement official certifies, in his discretion, that the alien has been helpful, is being helpful, or is likely to

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[*] USCIS has taken the position that a state court does not make the required finding when, as here, it determines that "a particular custodial placement is the best alternative available to the petitioner in the United States." USCIS, *Policy Manual* 6.J.2 (May 21, 2020). That is apparently insufficient because it does not rule out the possibility that another arrangement in another country (that the court did not even consider) might be better.

be helpful in a criminal investigation. The government argues that SIJ status works the same way. But there is no evidence that Congress intended for the two programs to confer similar discretion, and there are good reasons for the U visa program to involve greater discretion than the SIJ program. Specifically, the U visa is designed, in significant part, to assist law enforcement, and so it makes sense that law enforcement officials have broad discretion to decide whether an alien has been helpful to an investigation. The SIJ program, by contrast, is not designed to assist states or state courts; it is designed solely to help children. Accordingly, there is no reason for state courts to have discretion to deny SIJ findings to children who qualify for them on the merits.

The government also argues that the Kentucky Supreme Court's decision does not create an obstacle to Congress's objectives. *See* U.S. Br. 16-17. In support, the government argues that in the last three fiscal years, USCIS has granted 3585 petitions from applicants who live in the four states in which courts are not required to make SIJ findings. This opaque statistic is unhelpful. It does not reveal whether the SIJ predicate findings were rendered before or after the judicial decisions holding that such findings are optional. It does not reveal the number of children who would have been eligible for SIJ status who were unable to apply because courts refused to issue predicate findings. And it does not allow us to compare the number of applications granted in these states to the number granted in states that treat predicate findings as mandatory.

To the extent the government is using this figure simply to illustrate that the SIJ program has not collapsed altogether in these four states, its argument misses the point in two ways. First, we are not saying that the government's rule will actually cause the SIJ program to implode. We are saying that any interpretation of the SIJ statute that incorporates such a potential self-destruct mechanism cannot be correct. Second, to the extent outcomes are relevant, we do not have to show that *nobody* from these states is receiving SIJ status in order to establish that state-court intransigence poses an obstacle to Congress's objectives. It is enough to show that some deserving children are being denied a chance to apply based on the whims of the juvenile court judge to whom their case is assigned, as opposed to the merits of their situation. That level of arbitrariness is fundamentally incompatible with Congress's objective of creating a humanitarian benefit for abused, neglected, and abandoned children, and is therefore preempted. This very case proves that this problem is not hypothetical. Nelida should have received the predicate findings, but the Kentucky courts simply refused to issue them.

None of the government's other merits arguments are persuasive. At a minimum, none justify denying certiorari in light of the clear split among state courts of last resort about an important question of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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