No. 19-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal immigration law recognizes "special immigrant juvenile" or "SIJ" status, the holders of which are eligible for an immigrant visa and permanent residency in the United States. The status was created to protect abused, neglected, and abandoned children by allowing them to stay in care arrangements in the United States that serve their best interests, instead of facing deportation back to their previous circumstances.

To be eligible for SIJ status, a juvenile must obtain certain findings: that she is dependent on a state juvenile court or on a care arrangement created by such a court; that reunification with her parents is not viable due to abuse, neglect, abandonment, or a similar basis; and that it would not be in her best interest to be returned to her previous country of nationality or of last habitual residence. *See* 8 U.S.C. § 1101(a)(27)(J). SIJ status is unusual in that these findings are only made by state courts—not federal ones. Only once a juvenile obtains the predicate findings from a state court can she submit a petition to the Secretary of Homeland Security for SIJ status.

The question presented, which has divided state courts, is:

Whether federal law requires state courts of competent jurisdiction to make predicate findings for special immigrant juvenile status determinations upon request.

RELATED PROCEEDINGS

Commonwealth of Kentucky, Cabinet for Health and Family Services v. N.B.D., No. 2018-SC-000592-DGE (Ky. June 13, 2019)

N.B.D. v. Cabinet for Health and Family Services; N.M.D.J., a minor child; R.D.; and F.J., No. 2018-CA-000494-ME (Ky. Ct. App. Nov. 2, 2018)

In the Interest of Nelida Maribel Diaz Juarez, Nos. 17-J-00422 & 17-J-0422-001 (Ky. Campbell Fam. Ct. Feb. 1, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nelida Maribel Diaz Juarez and Nalberta Bravo Diaz respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Kentucky.

OPINIONS BELOW

The Supreme Court of Kentucky's opinion (Pet. App. 1a-21a) is reported at 577 S.W.3d 73. The Kentucky Court of Appeals' opinion (Pet. App. 22a-39a) is unreported. The Campbell Family Court's opinion (Pet. App. 40a-45a) is unreported.

JURISDICTION

The Supreme Court of Kentucky rendered its decision on June 13, 2019. Justice Sotomayor granted two timely applications to extend the time to file this petition, first to October 11, 2019 and then to November 8, 2019. App. No. 19A247. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

The relevant section of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(27)(J), provides that:

> (27) The term "special immigrant" means—
>
> * * *
>
> (J) an immigrant who is present in the United States—
>
> (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an

agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose 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;

(ii) for whom it has been determined in administrative or judicial proceedings 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; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

8 U.S.C. § 1101(a)(27)(J).

STATEMENT OF THE CASE

I. Legal Background

Congress created special immigrant juvenile (SIJ) status in the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, "to provide humanitarian protection for abused, neglected, or abandoned child immigrants." U.S. Citizenship & Immigration Servs. (USCIS), *Policy Manual*, vol. 6, pt. J, ch. 1 (*USCIS Policy Manual*).[1] Effectively, this visa status allows an eligible juvenile to obtain permanent legal residency in the United States, instead of facing deportation back to a family situation that would not be in the child's best interests. Today, SIJ status is widely sought and granted. The most recent government data, released on September 17, 2019, show that in three quarters of Fiscal Year 2019, 15,119 applications for SIJ status were received, and 14,326 were granted. Over the previous three years (2016-18), the government received 63,652 applications, and granted 31,157.[2]

The requirements for SIJ status are set forth in the INA, 8 U.S.C. § 1101 *et seq.*, and its implementing regulations. The statute provides that a child seeking SIJ status must have been "declared dependent on a juvenile court located in the United States" or committed to a custody arrangement by such a court. 8 U.S.C.

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[1] https://www.uscis.gov/policy-manual (current as of Oct. 29, 2019).

[2] *See* USCIS, *Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year, Quarter and Case* (2019), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I360_sij_performancedata_fy2019_qtr3.pdf.

§ 1101(a)(27)(J)(i). The statute further provides that it must have been "determined in administrative or judicial proceedings" 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 "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." *Id*. § 1101(a)(27)(J)(i)-(ii).

The implementing regulation fleshes out these requirements, explaining that in order to be eligible for SIJ status, an alien must be under 21 years of age, unmarried, and obtain the necessary findings (dependency, no viable reunification, and best interest) from a juvenile court or administrative proceeding authorized by a juvenile court. 8 C.F.R. § 204.11(c).[3] Consistent with these requirements, the regulation provides that any petition for SIJ status must include both an order of a juvenile court finding the child to be dependent upon the court, as well as:

> Evidence of a determination made in judicial or administrative proceedings by a court or agency recognized by the juvenile court and authorized by law to make such decisions, that it would not be in the beneficiary's best

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[3] The regulation also mentions that the alien must be deemed eligible for long-term foster care, but that portion of the regulation was superseded by statute in 2008. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; *USCIS Policy Manual* vol. 6, pt. J, ch. 2 n.9 (explaining that the statutory amendment "replaced the need for a juvenile court to deem a juvenile eligible for long-term foster care with a requirement that the juvenile court find reunification with one or both parents not viable").

> interest to be returned to the country of nationality or last habitual residence of the beneficiary or of his or her parent or parents.

Id. § 204.11(d)(2)(iii). A "juvenile court" is "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." *Id*. § 204.11(a).

The upshot of these requirements is that it is impossible to obtain SIJ status without first obtaining the required predicate findings from a state court of competent jurisdiction, *i.e.*, a juvenile court.

The requirement to obtain findings from a state court is unusual. Congress adopted it to leverage state courts' competence in evaluating the family situations and best interests of children—a topic that state courts address all the time, but federal immigration judges do not. For that reason, the federal government "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 abuse, neglect, or abandonment." *USCIS Policy Manual*, vol. 6, pt. J, ch. 2. However, obtaining predicate findings does not guarantee that a child will obtain SIJ status. Instead, the status is a discretionary determination informed by the findings and subject to the availability of visas. *See* 8 U.S.C. §§ 1101(a)(27)(J)(iii), 1153(b)(4). Once a child obtains SIJ status, she can also petition for a green card and legal permanent residency. *See id.* § 1255(h).

II. Factual and Procedural Background

1. Petitioner Nelida Maribel Diaz Juarez was born in Guatemala but currently resides in Kentucky. While visiting family in Mexico, Nelida (then pregnant) and her boyfriend, Marvin Bravo, were abducted by a gang, threatened, ransomed, and told not to return to Guatemala. Pet. App. 2a-3a, 24a, 40a-41a. They came instead to the United States, where immigration authorities placed Nelida with one of her cousins. *Id*. at 4a, 24a, 41a. But Nelida's cousin refused to support her and her young daughter (who was born in the State), and so Nelida came to Kentucky to live with Marvin and his mother, petitioner Nalberta Bravo Diaz. There, Nelida had a second child. *Id*. at 24a-25a, 41a.

Nalberta filed a dependency petition on Nelida's behalf in the Commonwealth of Kentucky's Campbell Family Court, which qualifies as a "juvenile court" under the SIJ regulations. The petition sought an adjudication that Nelida was a dependent minor so that she could remain in Nalberta's custody. Respondent, the Cabinet for Health and Family Services, agreed to Nelida's temporary placement with Nalberta while the matter was adjudicated. Pet. App. 41a. At the conclusion, the family court adjudicated Nelida dependent, finding that she was an unaccompanied minor without a legal custodian present to provide supervision or shelter. *Id*. at 40a-41a.

Prior to the disposition of Nelida's case, her counsel moved for a continuance to prepare expert testimony regarding the dangers of returning to Guatemala and the effect that such a forced return would have on Nelida. This testimony was to be offered for

the purpose of obtaining findings that would make Nelida eligible for SIJ status. Pet. App. 41a-43a.

2. The family court denied the continuance and refused to permit the expert testimony. It determined that "the child is dependent and that the present custodial arrangements are appropriate to serve the best interests of the child," and decided that conditions in Guatemala were not relevant to that decision. Pet. App. 44a.

In response to the argument that "there is a mandate under federal law that this Court make" SIJ findings, the court concluded that "[n]o specific directive of such could be found in the applicable federal statutes," and further mused that this factfinding process was "better left to the federal government," and that requiring state courts "to make findings necessary for federal immigration cases would seem to violate anti-commandeering doctrine." Pet. App. 44a. The court thus adopted the recommendation to leave Nelida in Nalberta's care without making SIJ findings. *Id*. at 45a.

3. A divided panel of the Kentucky Court of Appeals reversed. The intermediate appellate court determined that making SIJ findings was within the province of family courts under state law because family courts have unique competence in assessing the best interests of the child. Pet. App. 28a-29a. It rejected the argument that this was tantamount to commandeering. *Id*. at 33a-34a. In the process, the court cited precedents from multiple States holding that state courts are required to make SIJ findings upon request. *Id.* at 31a-32a.

4. The Kentucky Supreme Court reversed the intermediate appellate court. It acknowledged that Nelida "as an unaccompanied minor child, whose parents are believed to be residents of Guatemala, is a dependent child and is entitled to the protection and care of the Commonwealth of Kentucky." Pet. App. 11a. The court further recognized that "[s]ome state courts have held that their jurisdiction was sufficient [to make SIJ findings for such minors] without the legislature enacting more specific statutes addressing SIJ classification findings." *Id*. at 11a & n.5 (citing as examples decisions from Indiana, Massachusetts, Florida, Minnesota, New Jersey, and Georgia).

The court found more persuasive, however, precedents from Missouri and Virginia, which came out the other way. Pet. App. 4a-7a. Thus, the Kentucky Supreme Court 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." *Id*. at 9a. Considering those duties, the court concluded that "courts of Kentucky are not required to make additional findings related to SIJ classification unless the court first determines that the evidence to be gleaned from such a supplemental hearing is relevant to the child's best interests." *Id*. at 11a. That would only happen, the court believed, "where such a placement of the child back to the country where he or she was abused, neglected or abandoned is being considered by the state court." *Id*. at 12a. In that circumstance, "the courts of Kentucky are empowered . . . to make additional findings to determine whether it would be in the child's best interest to return to his or her native country." *Ibid*. But, the court held, this was not such a case—even though the

family court had determined that it was in Nelida's best interests to remain in Kentucky. Instead, the supreme court held, "the proper place for such expert evidence in this case is not in any state court, but in federal immigration court." *Ibid*.

Chief Judge Minton dissented "from the majority's holding that our trial courts are not required to engage in [special immigrant juvenile status (SIJS)] factfinding." Pet. App. 13a. That holding signaled "reluctance on the part of our state courts in Kentucky to engage fully in the collaborative process established by federal law to protect the welfare of undocumented immigrant children," and subverted "the overarching duty of our courts to guard the best interests of all children who come before us." *Ibid.*

The Chief Judge explained under this Court's precedents, "federal law is as much the law of the several States as are the laws passed by their legislature." Pet. App. 13a (quoting *Haywood v. Drown*, 556 U.S. 729, 734 (2009)). He contrasted the Kentucky Supreme Court's view with that of jurisdictions "that require their state courts to engage in SIJS factfinding whenever an undocumented immigrant child is before them . . . even in the absence of a state statutory mandate to do so," noting that those jurisdictions "recognize the collaborative responsibility of their state courts to engage in SIJS factfinding." *Id.* at 13a-14a & n.8 (citing as examples cases from New Jersey, Minnesota, and Massachusetts, and noting the cases previously cited by the majority on the other side of the split).

In Chief Judge Minton's view, the federal government had "charged, but not mandated, state courts with making certain findings pertaining to an undocumented child's SIJS." Pet. App. 15a. It was critical

that the courts make those findings because otherwise, "undocumented immigrant children in Kentucky will be unable to proceed with an application for SIJS and may possibly face deportation. It is not an exaggeration to say that that child's immigration status hangs in the balance." *Ibid*. (quotation marks omitted).

Chief Judge Minton concluded by explaining that requiring state courts to make SIJ findings was the only way to ensure that courts actually were acting in the best interests of children. Otherwise, what happened in this case could occur: the court could decide that it was in the child's best interests to remain in Kentucky, but refuse to make findings that would allow the child to "petition the federal government for SIJS to prevent deportation." Pet. App. 19a. He concluded by arguing that "[t]o ensure compliance with the judiciary's duty to dispose of juvenile cases according to the child's best interest and to ensure that Kentucky does not shirk its duty in cooperative federalism, I would require Kentucky's courts always to engage in SIJS factfinding when an undocumented immigrant child is before the court in an action involving a custodial arrangement." *Ibid*.

5. Shortly after the final disposition in state court, and before Nelida's eighteenth birthday, she moved with her daughter and her son (both born in America) into an independent living facility after a domestic violence incident involving Marvin. The facility is operated by a charity called All God's Children, which provides services and education to teenage mothers and their children. Nelida has been receiving counseling, attending high school, and caring for her children.

Although she left Nalberta's home, Nelida remains in the custody of the Kentucky Cabinet for Health and Family Services. Kentucky law permits minors to remain committed to the custody of the Cabinet past their eighteenth birthdays for the purposes of obtaining services that would allow them to transition to life as independent adults by the time they turn 21. *See* Pet. App. 47a; Ky. Rev. Stat. Ann. § 610.110(6) (providing that "the court may authorize an extension of commitment up to age twenty-one (21) for the purpose of permitting the . . . cabinet, as appropriate, to assist the child in establishing independent living arrangements if a return to the child's home is not in his or her best interest"). In this case, the Cabinet recommended to the family court that Nelida remain committed, and the court incorporated the Cabinet's recommendation as a court order. *See* Pet. App. 48a-49a. Thus, Nelida remains in the custody of the Cabinet and dependent on the family court, with her next review to occur on January 8, 2020. *Id*. at 49a. Nelida intends to remain committed to the custody of the Cabinet until she turns 21. This matters for present purposes because it means that the family court—which still must adjudicate her position according to her best interests—retains jurisdiction to make SIJ findings on her behalf.

6. This petition followed.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because state courts are divided over whether federal law requires them to make SIJ findings. That split is untenable because SIJ classification is federal law, and its availability should accordingly be as uniform as possible across the country. The issue is also indisputably important. Tens of thousands of children have sought SIJ status, and the number of unaccompanied children coming into the country recently has spiked. It is crucial that children, their guardians, their counsel, and state courts have clear guidance about when SIJ findings will issue. This case presents an ideal vehicle to provide that guidance.

I. State Courts Are Split Over Whether Federal Law Requires Them to Make Predicate Findings for Special Immigrant Juvenile Status.

State courts are openly divided over whether federal law requires state juvenile courts to make SIJ predicate findings. From a survey of state appellate decisions, at least nine states hold that federal law requires their courts to issue SIJ findings. In at least six other states, courts routinely make the findings—but not all of them hold that the findings are required, and it is not clear whether the ones that treat the findings as mandatory believe they are applying federal, as opposed to state, law. And on the other side, four states clearly hold that federal law does not require courts to make SIJ findings.

1. At least nine states hold that federal law requires juvenile courts to make SIJ findings. Specifically, the highest courts in Maryland, Massachusetts,

and New Jersey, as well as intermediate appellate courts in Alabama, Georgia, Indiana, Michigan, Minnesota, and Tennessee, have all held that federal law requires trial courts in those jurisdictions to make SIJ findings upon request.

The Court of Appeals of Maryland held that "when a party requests SIJ status findings in his or her pleadings, the circuit court *must* undertake the fact-finding process (hear testimony and receive evidence) and issue independent factual findings regarding the minor's eligibility for SIJ status." *Romero v. Perez*, 205 A.3d 903, 908 (Md. 2019) (quotation marks omitted). The precedent cited by the Court of Appeals makes clear that it is the "federal statute" that "directs the circuit court to enter factual findings." *Simbaina v. Bunay*, 109 A.3d 191, 197 (Md. Ct. Spec. App. 2015).

The Supreme Judicial Court of Massachusetts concluded in *Guardianship of Penate*, 76 N.E.3d 960, 963 (Mass. 2017), "that on a motion for special findings, the judge shall make such findings without regard to the ultimate merits or purpose of the juvenile's application." The court elaborated that "[b]ecause 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 966.

Similarly, in *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015), the Supreme Court of New Jersey held that "Family Part courts faced with a request for an SIJ predicate order should make factual findings with regard to each of the requirements listed in 8 C.F.R. § 204.11." The court explained that "[t]his approach will provide USCIS with sufficient information to enable it to determine whether SIJ status should be

granted or denied, in accordance with the statutory interpretation of the SIJ provision applied by that agency." *Ibid*. The court elaborated that this "is the role Congress envisioned for the juvenile courts of the fifty states, and that is the process that should be followed by the Family Part." *Id*. at 860. Courts in New Jersey have dutifully followed this decision to hold that SIJ findings are required by federal law whenever requested. *See A.E.C. v. P.S.C.*, 179 A.3d 424, 425 (N.J. Super. Ct. App. Div. 2018); *O.Y.P.C. v. J.C.P.*, 126 A.3d 349, 353 (N.J. Super. Ct. App. Div. 2015).

Several intermediate appellate courts also have concluded that courts are required to issue SIJ findings upon request. One oft-cited decision is *In re J.J.X.C.*, 734 S.E.2d 120, 123-24 (Ga. Ct. App. 2012), holding that state juvenile courts are "charged with making the factual inquiry relevant to SIJ status when an unmarried, resident alien child is found to be dependent on the court." The court cited favorably to out-of-state precedent holding "that a juvenile court errs by failing to consider a request for SIJ findings." *Id*. at 124. And it reversed a trial court decision that was unclear about whether the court was refusing to make the findings on the merits, or simply declining to decide the question, holding that "where a state juvenile court is charged with addressing an issue relevant only to federal immigration law, we cannot affirm without some positive indication that the court actually addressed the issue." *Ibid*.

Relying on *J.J.X.C.*, the Court of Civil Appeals of Alabama held that a trial court was required to make SIJ findings; indeed, without them, its judgment in the case could not be deemed final. *See E.C.D. v. P.D.R.D.*, 114 So. 3d 33, 35-36 (Ala. Civ. App. 2012).

Also relying on *J.J.X.C.*, courts in Indiana have likewise recognized that "the SIJ statute and accompanying regulations commit . . . specific and limited issues to state juvenile courts," and required courts to make the findings upon request. *In re Guardianship of Luis*, 114 N.E.3d 855, 858 (Ind. Ct. App. 2018) (quotation marks omitted) (alteration in original); *In re Paternity of Mendoza Bonilla*, 127 N.E.3d 1181, 1184-85 (Ind. Ct. App. 2019). Just last week, the Court of Appeals of Indiana reiterated that "trial courts in this situation are *required* to consider and make [SIJ predicate] findings." *In re Guardianship of Avila Luis*, -- N.E.3d ---, 2019 WL 5657382, at *4 (Ind. Ct. App. Nov. 1, 2019). In that case, the trial court refused to make findings after the court of appeals instructed it to do so. The appellate court responded to the trial court's intransigence by requiring it to make verbatim findings in the child's favor. *See id.* at *5. On the way, the court explained that "[w]hile it is ultimately for the federal government to determine whether [the child] may remain in the United States, it was incumbent upon the trial court to make SIJ findings, including a best interests determination. Here, it refused to do so, which was erroneous." *Ibid*.

The Court of Appeals of Michigan held that "a state juvenile court has authority to issue factual findings pertinent to a juvenile's SIJ status." *In re L.F.O.C.*, 901 N.W.2d 906, 911 (Mich. Ct. App. 2017); *see also id.* at 913 ("Because the trial court qualifies as a juvenile court under the federal definition, it possesses the authority to issue predicate factual findings pertinent to the issue of SIJ status in this case."). The court then went further, citing heavily to the decisions

above to conclude that the trial court had erred by refusing to issue SIJ findings. *See ibid.*

The Court of Appeals of Minnesota held that "the SIJS statute contemplates entry of the requisite findings whenever juvenile courts have jurisdiction under state law to determine the care and custody of minors." *In re Welfare of D.A.M.*, 2012 WL 6097225, at *5 (Minn. Ct. App. Dec. 10, 2012); *see also In re Guardianship of Guaman*, 879 N.W.2d 668, 672-73 (Minn. Ct. App. 2016) (citing out-of-state decisions holding that "state district courts are required to consider a request for SIJ findings and, if supported by the record, to make SIJ findings in juvenile and other matters involving unmarried immigrants under the age of 21," and holding that "the probate court abused its discretion by declining to consider appellant's request for SIJ findings" when the record supported them).

Appellate courts in Tennessee have held that "[t]he state juvenile court must make specific findings of fact regarding the child's eligibility for SIJ status." *In re Domingo C.L.*, 2017 WL 3769419, at *4 (Tenn. Ct. App. Aug. 30, 2017). In *Domingo C.L.*, the court concluded that because a petition for appointment of a guardian "properly contained a request seeking a finding regarding whether it is in the Minor's best interest to be returned to Guatemala," and because the trial court had jurisdiction to make the finding, it was required to do so. *Id*. at *7; *see also In re Danely C.*, 2017 WL 5901022, at *8 (Tenn. Ct. App. Nov. 29, 2017) (directing trial court "to enter a predicate order adjudicating" the SIJ findings). These courts cite heavily to precedents from Maryland, which hold that federal law requires the findings.

2. In some states, it is unclear whether courts believe that federal law requires them to make the requisite findings. In New York, for example, appellate courts routinely either require the family court to make SIJ findings, or make the findings themselves—and often cite federal law when doing so. *See, e.g.*, *In re Antowa McD.*, 856 N.Y.S.2d 576, 577 (App. Div. 2008); *Trudy-Ann W. v. Joan W.*, 901 N.Y.S.2d 296, 299 (App. Div. 2010); *Cecilia M.P.S. v. Santos H.*, 983 N.Y.S.2d 840, 841 (App. Div. 2014). But petitioners have not located a New York case clearly holding that federal law, as opposed to state law, requires courts to make SIJ findings.[4]

Some states have enacted statutes requiring courts to make SIJ findings, at least in certain proceedings. These include California, Cal Civ. Proc. Code § 155(b) (requiring courts to issue SIJ findings upon request if there is evidence to support them); Connecticut, Conn. Gen. Stat. Ann. § 45a-608n(b) (requiring probate court to make findings in guardianship proceedings upon request); and Nevada, Nev. Rev. Stat. Ann. § 3.2203(4) (requiring courts to make the findings when "the court determines that there is evidence to support the findings"). The existence of these statutes suggests—but does not establish—that these states do

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[4] In 2008, New York amended its statute regarding guardianship to permit juveniles above the age of 18 but under the age of 21 to have guardians appointed. *See* N.Y. Fam. Ct. Act § 661(a). The purpose of this amendment was to enable New York residents to seek SIJ status, which is available until juveniles turn 21. But New York does not have a statute requiring its courts to make SIJ findings.

not believe that federal law requires SIJ findings upon request.[5]

Some states have statutes providing that their courts have jurisdiction to make SIJ predicate findings, but not expressly requiring the courts to do so. For example, Nebraska's statute provides for jurisdiction, and its courts have long made the findings, but case law does not establish whether that duty stems from federal law. *See* Neb. Rev. Stat. Ann. § 43-1238; *In re Guardianship of Carlos D.*, 915 N.W.2d 581, 588 (Neb. 2018) (explaining that "making findings for SIJ status purposes has long been accepted by the Nebraska courts, and § 43-1238(b), as amended, codifies this practice").[6]

Florida's statute requires its own child-care agencies to petition for SIJ findings when juveniles are eligible. Fla. Stat. Ann. § 39.5075(4). But no statute requires courts to enter such findings upon request.

In all these states (as well as others not listed), it is an open question whether federal law requires states to make the required findings.

3. The Kentucky Supreme Court acknowledged that it was departing from the approaches cited above by expressly holding that courts in Kentucky are not required to make SIJ findings, and by affirming the family court's refusal to make the findings in this case.

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[5] In Nevada, the state supreme court held, in an unpublished decision, that federal law does not require SIJ findings. *Ramirez v. Menjivar*, 432 P.3d 745, 2018 WL 6829010, at*4 (Nev. 2018).

[6] Maryland and Virginia have similar statutes, and their courts have reached opposite results about whether the findings are required.

In support, the supreme court cited precedent from appellate courts in Virginia and Missouri. The Supreme Court of Vermont has subsequently agreed that federal law does not require state courts to make SIJ findings.

In *Canales v. Torres Orellana*, 800 S.E.2d 208, 217 (Va. Ct. App. 2017) (en banc), the Court of Appeals of Virginia held, in a decision that has been partially overturned by statute,[7] that the state "General Assembly has not authorized the courts of the Commonwealth to hear petitions for SIJ findings as an independent matter, and thus, no such power exists." The court determined that its conclusion was "entirely consistent with federal law" because, in its view, "[n]othing in the relevant federal statutory scheme can fairly be read as an attempt by Congress to convey jurisdiction to state courts to actively participate in immigration and naturalization decisions." *Ibid*. In the Virginia court's view, the SIJ statute "only lists certain factors which, *if* established in state court proceedings, permit a juvenile immigrant to petition [the federal government] for SIJ status—8 U.S.C. § 1101(a)(27)(J) does not *require* that the state court make such findings or convey jurisdiction upon them to do so." *Ibid*.

The Court of Appeals of Missouri agreed with the Virginia appellate court in *de Rubio v. Rubio Herrera*, 541 S.W.3d 564 (Mo. Ct. App. 2017). There, the court held that "just because Mother asked for the special

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[7] The Virginia legislature partially overturned this decision by enacting Va. Code Ann. § 16.1-241(A1), which creates jurisdiction to make SIJ findings. However, that statutory provision does not require courts to make the findings, and so that part of *Canales* stands.

findings for SIJ purposes does not mean that the court *had* to make those particular findings." *Id*. at 572. The court determined that Missouri courts are permitted to make findings that would be relevant to SIJ determinations—but that this authority "arises neither from federal law or regulation, nor from the request of a litigant, but solely from that judicial officer's obligation to act in the best interest of that child." *Id*. at 573.

In a recent decision, the Supreme Court of Vermont acknowledged the split in authority and concluded that courts in Vermont have the authority—but not the duty—to make SIJ findings. *See Kitoko v. Salomao*, 215 A.3d 698, 706 (Vt. 2019). Thus, the court explained that "[s]tates have responded to the SIJ law in various ways," and noted that "[n]umerous state courts have held that their juvenile courts have a duty to make SIJ findings described in the federal statute, despite the lack of any state law explicitly permitting or requiring them to do so." *Id*. at 704 (quotation marks omitted). But the court refused to "go so far as other states that always require their courts to make such findings when requested." *Id*. at 707. Instead, courts in Vermont have the authority to make SIJ findings, and "generally should" when it would be in the best interests of the children. *Ibid*. The court was emphatic that this "holding does not flow from any purported federal command." *Ibid*.

4. These decisions show a clear split among state courts. Had petitioners' request for SIJ findings been made in one of the States in which the findings are required, the findings would have been made. It makes little sense that Nelida was unable to receive the findings because she resides in Kentucky, when if she lived just north, in Indiana, or just south, in Tennessee (or

in any of at least seven other States), the findings would have issued as a matter of course under controlling interpretations of federal law. The split makes a hash of federal immigration law, and warrants this Court's immediate attention.

It is also highly unlikely that this split will abate without this Court's intervention. Multiple courts, including the lower courts in this case, have acknowledged the conflict and deepened it. Absent a definitive statement from this Court, state courts will remain divided over whether federal law requires them to issue SIJ findings to dependent children.

II. The Question Presented Is Important to Tens of Thousands of Immigrant Children, to the States, and to Federal Immigration Policy.

Certiorari should be granted because the question presented is critically important to tens of thousands of immigrant children, as well as to States attempting to care for these children, and to the federal government, which has a substantial interest in the SIJ program.

Unaccompanied children are entering the United States in record numbers. This last year, immigration authorities apprehended 76,020 minors entering the United States without their parents—a 52-percent increase over the previous fiscal year. Paulina Villegas, *Detentions of Child Migrants at the U.S. Border Surges to Record Levels*, N.Y. Times (Oct. 29, 2019), https://www.nytimes.com/2019/10/29/world/americas/unaccompanied-minors-border-crossing.html. And of course, that is only the number actually appre-

hended; the total is likely much higher. Ongoing humanitarian and economic crises in Central America make it unlikely that these numbers will significantly decline. And while not all of these children will seek SIJ status, a great many will want to do so. The data cited in the Statement of the Case, *supra*, shows that 63,652 petitions for SIJ status have been submitted over the last three years alone.

These children (and their legal representatives) deserve clarity about their prospects for obtaining SIJ status—and knowing the likelihood of obtaining predicate findings is a critical piece of that puzzle. If the availability of SIJ findings will vary significantly by State, then children and their caretakers should act accordingly; they may even wish to relocate before seeking the findings. On the other hand, if the availability of these federally required findings is essentially uniform, the decision calculus may be different.

The question presented is also important to the States. As the cases in the split demonstrate, courts would benefit from clear guidance about the role federal law plays. In the status quo, family courts (like the court here) frequently misunderstand the SIJ process and decline to make findings. If federal law mandates SIJ findings, then courts will know what they have to do in every case. If it does not, then courts will know that they must look to state law to determine when the findings are appropriate—and Congress and state legislatures will know that they may have to take action to ensure that SIJ status remains available.

Finally, the question presented is important to federal immigration policy. In the Supreme Judicial Court of Massachusetts, the federal government filed an amicus curiae brief addressing whether a state

court could decline to make SIJ findings based on its belief that the child would not be eligible for SIJ status under federal law. The government argued that the answer was "no." In the course of making that argument, and urging state courts to make the predicate findings without attempting to determine whether SIJ status would ultimately be granted, the government explained, in language that is worth block-quoting:

> The importance of state juvenile courts understanding and adhering to their state-law-centric role in the SIJ process is critical both to children's ability to petition for SIJ status and to USCIS's ability to determine whether the statutory requirements are met such that it may consent to the grant of SIJ status. Not only is this important for [the child in this case], but it is particularly important for operation of the SIJ process writ large, especially in light of the dramatic increase in SIJ applications in recent years. The potential for erroneous denial of SIJ predicate findings by state juvenile courts may obstruct the filing of a historically larger number of applications for SIJ status.
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> * * *
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> The United States therefore respectfully requests that this Court issue a decision clarifying that juvenile courts asked to make special findings are limited to state-law child welfare determinations, and should not, as part of that analysis, or as a basis to not undertake that analysis in the first place, preview whether an alien minor may actually be eligible for SIJ status, or interpret SIJ eligibility

> requirements, a task assigned exclusively to USCIS by Congress under the INA. Correcting the juvenile court's misunderstanding of its role in the SIJ process will also ensure that abused, neglected, and abandoned alien children applying for SIJ status do not have their applications denied due to a lack of necessary, predicate findings by state courts.

Brief of the United States, *Mass. Dep't of Rev. v. Lopez*, No. SJC-12184, 2016 WL 7661052, at *11-12, *17-18 (Mass. Dec. 28, 2016) (footnote and citations omitted). In that case, the Supreme Judicial Court held that federal law requires courts to make SIJS findings. *See Guardianship of Penate*, 76 N.E.3d at 963. All of the concerns the United States highlighted are heightened now, as the number of SIJ applications has soared in recent years.

III. This Case Presents an Ideal Vehicle to Resolve the Question Presented.

This case is an ideal vehicle to resolve the question presented, as it is a pure question of law that was dispositive below. It is undisputed that Nelida is under 21 years of age and unmarried, as required by the SIJ regulation. *See* 8 C.F.R. § 204.11(c). It is also clear that she is dependent on a juvenile court, as she remains committed by order of the family court to the Cabinet—and the family court retains jurisdiction to reevaluate her status in accordance with her best interests. Thus, the only thing she needs in order to apply for SIJ status is a court order finding that her reunification with one or more of her parents is not viable, and that a return to Guatemala would not be in her best interests. The family court has refused to issue

those findings, and a decision of this Court holding that the family court was required to make the findings would resolve Nelida's case.

It is also important that this Court address the question now. As the number of minors seeking SIJ status increases, more and more children face the risk that juvenile courts, unfamiliar with or hostile to the statutory scheme, will misunderstand their obligations vis-à-vis SIJ findings. Every year of delay means that thousands of children will be exposed to inconsistent and potentially unfair legal rulings. There also is no guarantee that any of those children—the vast majority of which are indigent or close to it—will have the resources or time to work through the appellate process and seek this Court's review. Accordingly, the Court should take this opportunity to clarify the law.

IV. The Decision Below Should Be Reversed on the Merits.

Finally, certiorari should be granted because the decision below was incorrect insofar as it held that federal law does not require juvenile courts to make SIJ predicate findings in cases like this one. In light of the split in authority and the importance of the question presented, an extended merits discussion is unnecessary. But a few points jump out.

1. There can be no doubt that the SIJ statute contemplates that juvenile courts will make predicate findings for dependent children: such findings are an essential prerequisite to SIJ status, and they can only be issued by state court. Thus, in SIJ status, Congress created "a unique hybrid procedure that directs the collaboration of state and federal systems." *H.S.P.*, 121 A.3d at 857 (quotation marks omitted). State courts

adjudicate child welfare issues (dependency, the viability of reunification, and the child's best interests), and federal authorities rely on those adjudications to make decisions about immigration status. By entrusting child welfare decisions to state courts, "[t]he SIJ statute affirms the institutional competence of state courts as the appropriate forum for" those determinations. *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 265 (C.D. Cal. 2008). That is why the federal government "does not go behind the juvenile court order to reweigh evidence and make independent determinations about abuse, neglect, or abandonment." *USCIS Policy Manual*, vol. 6, pt. J, ch. 2.

A necessary corollary to that division of labor is that state juvenile courts must make predicate findings when asked. Indeed, the SIJ system could not function otherwise. Consider a hypothetical: A State enacts a statute making it impossible for children to obtain predicate findings—for example by categorically prohibiting its juvenile courts from opining on whether or not any arrangement other than the child's current custodial arrangement is in the child's best interest (which would foreclose a finding that a return to a foreign country is not in the child's best interest), or simply by providing that state courts will not make SIJ predicate findings. In this hypothetical, no children in the State would be able to obtain SIJ status.

Such a state statute would be preempted because it would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta*, 569 U.S. 483, 490 (2013) (quotation marks omitted); *Simbaina*, 109 A.3d at 198 (holding that any objection to making the findings based on state law separation of powers principles

would be preempted); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) ("[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.") (quotation marks omitted). The purpose and objective of the SIJ program is to provide an avenue to legal immigration status for eligible juveniles. There is only one path to that relief, and it goes through state courts. If a State blocked that path, that would impose an insurmountable obstacle to Congress's purpose and objective in violation of the Supremacy Clause.

It follows that state courts cannot do on a case-by-case basis what federal law would prevent them from doing categorically. But that is essentially what happened here: the family court declined to make findings because it determined that those findings were not relevant to its determination that remaining in Kentucky was in Nelida's best interests. The Kentucky Supreme Court affirmed that decision, holding that a hearing regarding whether returning Nelida to Guatemala was in her best interests 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." Pet. App. 11a-12a (quotation marks omitted). The only situation in which the Kentucky Supreme Court determined it would be appropriate to make the findings is when the state court is actively considering "a placement of the child back into the country where he or she was abused, neglected or abandoned." *Id*. at 12a. Like the hypothetical statute described above, that holding

poses an obstacle to the accomplishment of the purposes and objectives of Congress.

2. Courts that have rejected the federal requirement to make SIJ findings have noted that the eligibility requirements for SIJ status appear in the definition section of the statute, and have reasoned that a definition should not be construed as a requirement. That is an overly simplistic approach to statutory interpretation. While Congress can exercise its authority directly and bluntly, that is not the only way to legislate. In many implied preemption cases, Congress does not circumscribe state authority and create uniformity explicitly, but instead by implication from the legislation it enacts.

The SIJ statute and its implementing regulation are clear in providing that only the States can make predicate findings for the children in their jurisdiction. It is equally clear that these findings are an essential prerequisite to SIJ status. The implication of that allocation of responsibility is therefore equally clear: state courts cannot refuse to make the findings. Otherwise, the federal statute would be gutted.

Independently, the requirement to obtain predicate findings does not only appear in a definition. It also appears in the statement of eligibility criteria, and in the description of required documents, both contained in the implementing regulation. *See* 8 C.F.R. § 204.11(c), (d).

3. Some courts, including the family court in this case, have gestured at concerns about commandeering. But this Court's precedents have never recognized an anti-commandeering claim directed at state courts, as opposed to legislatures or agencies. Instead, as this

Court explained, even though "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them," this "sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *New York v. United States*, 505 U.S. 144, 178-79 (1992); *Jinks v. Richland County*, 538 U.S. 456, 464-65 (2003) (holding that federal statute requiring state courts to toll their statutes of limitations was not unconstitutional); *Printz v. United States*, 521 U.S. 898, 907 (1997) ("[T]he Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.") (emphasis omitted); *FERC v. Mississippi*, 456 U.S. 742, 762 (1982) (recognizing that "the Federal Government has some power to enlist . . . the judiciary . . . to further federal ends"); *Testa v. Katt*, 330 U.S. 386, 393 (1947) ("[T]he policy of the federal Act is the prevailing policy in every state. . . [A] state court cannot refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.") (quotation marks omitted); *cf. Brackeen v. Bernhardt*, 937 F.3d 406, 430-31 (5th Cir. 2019) (holding that the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*, does not violate the anti-commandeering doctrine insofar as it compels state judges to enforce its requirements in their child custody proceedings).

Arguments about commandeering are also unpersuasive because Congress's power over immigration is plenary and enshrined in the Constitution itself, such that it preempts state law that conflicts with federal policy—either because that law pursues different

ends, or the same ends through different means. *See Arizona v. United States*, 567 U.S. 387, 394-95 (2012). Thus, when Congress vests immigration responsibilities in the states, it makes sense that states are obligated to fulfill that role, without running afoul of the Tenth Amendment.

Moreover, interpreting the SIJ statute to require state courts to make predicate findings does not implicate the reasons for adhering to the anti-commandeering doctrine that this Court highlighted in *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018). It does not threaten liberty because predicate findings can only *increase* individual liberty by providing their recipients with more options for where and how to live. It does not blur the lines of political accountability because it is plain that the SIJ program is a federal immigration status, and it is plain that all responsibility for the program rests with Congress and the executive branch. On the other side of the coin, there is no reason to allow a state government, even with full political accountability, to stymie federal policy. Finally, requiring states to make predicate findings would not shift the cost of regulations onto the States because SIJ status is not a regulatory program, and because it costs very little for the States to make the required findings: all they have to do is make the sort of findings that they ordinarily make anyway.

For these reasons and others, the Supreme Court of Kentucky was wrong to hold that federal law does not require juvenile courts to make the predicate findings for SIJ status. Certiorari should be granted, and that decision should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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