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 Writ Of Certiorari
To The Supreme Court Of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

8 U.S.C.S. §1101 outlines the definitions for federal immigration law and includes thirteen (13) unique definitions of a "special immigrant" under 8 U.S.C.S. §1101(a)(27)(a)-(m). Specific to this action is the definition of 8 U.S.C.S. §1101(a)(27)(j) which qualifies an illegal immigrant to be a "special immigrant" if said person is physically present in the United States and:

> (i) who has been declared dependent on a 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 . . .

The Question presented is whether the definition in 8 U.S.C.S. §1101(a)(27)(j) *requires* state family or juvenile courts, *regardless of their jurisdictional and various state law restraints*, to make specific findings in concert with the aforementioned definition language when a juvenile immigrant has been declared dependent, committed to or placed under custody of a State.

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STATEMENT OF THE CASE

Nelida Maribel Diaz Juarez ("N.M.D.J." or "Nelida"), originally from Guatemala, came to the United States from Mexico illegally in 2017 after allegedly being abducted by a gang, threatened and ransomed. After a brief stay in Arizona, she moved to Kentucky to live with Nalberta Bravo Diaz ("N.B.D." or "Nalberta") who is the mother of Nelida's then current paramour, Marvin Bravo.

Nalberta subsequently filed a Dependency Neglect Abuse Petition on Nelida's behalf in the Campbell County Kentucky Family Court which has jurisdiction to hear such petitions under Ky. Rev. Stat. 610.010. Temporary custody of Nelida was placed with Nalberta, at Nalberta's request. After a hearing, the Family Court found that Nelida was dependent because there was no legal custodian present.

At the disposition stage, the Family Court adopted the recommendations of the Kentucky Cabinet for Health and Family Services dispositional report and custody remained with Nalberta. Simultaneously, the Family Court also declined to make additional findings matching the language of 8 U.S.C.S. §1101(a)(27)(j) as requested by Nalberta's private counsel. The Family Court reasoned that such a hearing and findings was "unnecessary where the Court has found that the child is dependent and that the present custodial arrangements are appropriate to serve the best interests of the child." *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 79 (Ky. 2019). In short, the Family Court determined that such

findings were not relevant to the jurisdictional mandate of resolving the dependency, neglect and abuse issues before the Family Court. *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 75 (Ky. 2019).

Nalberta, the custodian, through counsel, appealed the decision to the Kentucky Court of Appeals naming all the parties, including Nelida, as respondents. *See N.B.D. v. Cabinet for Health and Family Services*, No. 2018-CA-00494-ME (Ky. Ct. App. Nov. 2, 2018). The Court of Appeals reversed the Family Court decision regarding the 8 U.S.C.S. §1101(a)(27)(j) findings. *Id.* The Kentucky Supreme Court then took discretionary review and affirmed the Family Court's determination. *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 74 (Ky. 2019). The Kentucky Supreme Court agreed with precedent from Missouri and Virginia, finding 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." *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 75-77 (Ky. 2019). The Kentucky Supreme Court went on to hold 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." *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 78 (Ky. 2019).

Respondent further notes that Nelida, although listed as a petitioner in the instant matter, was not listed as a party before the Kentucky Supreme Court and as a Respondent, not a Petitioner like the

custodian Nalberta, on the initial appeal to the Kentucky Court of Appeals. Pet. at ii. Moreover, neither in the Family Court or on appeal has Nelida been represented by anyone other than a Court appointed Guardian Ad Litem. Lastly, it should be noted that since the initial disposition of this matter, custody has changed to the Commonwealth of Kentucky and Nelida no longer resides with Nalberta (due to violence in home). Pet. at 11.

REASONS TO DENY THE PETITION

Review on writ of certiorari is a matter of judicial discretion and should be granted only for compelling reasons. Sup. Ct. R. 10. Certiorari should be denied in this instance as there are no compelling reasons to grant review.

I. Decision of Kentucky Supreme Court Rests on Independent and Adequate State Law Grounds.

First and foremost, the Kentucky Supreme Court issued its decision based on the Family Court's statutory jurisdiction and authority to hear cases under Ky. Rev. Stat. 23A.100(2)(c) and Ky. Rev. Stat. 620. *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 78 (Ky. 2019). As it relates to the Kentucky Family Court's jurisdiction under state law, this Honorable Court has no jurisdiction to review decisions based on state law. 28 U.S.C.S. §1257, *see e.g.*, *Williams v. Kaiser*, 323 U.S. 471,

477-78 (1945); *M'Bride v. Lessee of Hoey*, 36 U.S. 167, 172 (1937).

Moreover, "[t]his Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decisions." *Harris v. Reed*, 489 U.S. 255, 260 (1989) (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 2010 (1935); *Murdock v. City of Memphis*, 20 Wall. 590, 635-36 (1875)). In this case, the judgment of the Kentucky Supreme Court is clearly independent and adequate as it is based wholly on the statutory jurisdictional constraints of the family court.

Although Petitioner argues there is a split amongst state courts, such an argument is disingenuous. ***In no case has a State or Appellate Court forbade a family or juvenile court from making findings congruent with 8 U.S.C.S. §1101(a)(27)(j).*** The only difference is whether a state law or state court ruling (with varying reasoning) *requires* said findings to be made upon request of a party. As Petitioner outlined, several states require such findings as part of the jurisdiction and authority of their courts, either through rulings of the respective Appellate Courts or by legislative direction. Pet. at 12-18. To argue that some states leave it to their respective family or juvenile courts to determine whether such findings are necessary on a case-by-case basis versus other states which have blanket requirement to make such findings is not a genuine split amongst state courts.

Simply put, an individual state court's adoption of procedural requirements is not binding on a sister state and is not proper subject matter for federal review.

II. Injecting Non-Existent Requirements into the Definitions Section of a Federal Statute Is Not an Important Issue of Federal Law.

In this case and contrary to the plain language of the statute, Petitioner is asking this Honorable Court to expand a definition to not only create an immigration status, but to inject a non-existent requirement for all state family and juvenile courts to make certain findings so that illegal immigrants can make application for this specific immigration status. *See e.g.*, *Canales v. Torres Orellana*, 800 S.E.2d 208, 217 (Va. Ct. App. 2017) ("SIJ statute does not request, much less order, state courts to make specific, separate SIJ findings; rather it allows the appropriate federal entities to consider a state court's findings of fact, as recorded in a judgment order rendered under state law, when determining whether an immigrant meets the SIJ criteria.").

Not only is Petitioner's position contrary to the plain language of the statute, it runs afoul of United States Customs and Immigration Services (USCIS) guidance and policies which states that: ***"There is nothing in USCIS guidance that should be construed as instructing juvenile courts on how to apply their own state law."*** USCIS Policy Manual, Vol. 6, Part J, ch. 3 (A)(1). The policies go on to further

state that "USCIS must review the juvenile court order to conclude that the request for SIJ classification is bona fide, which means that the juvenile court order was sought to obtain relief from abuse, neglect, abandonment, or a similar basis under state law, and ***not primarily or solely to obtain an immigration benefit***" as suspected by the Kentucky Supreme Court. *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 77, 79 (Ky. 2019) (citing USCIS Policy Manual, Vol. 6, Part J, ch. 2 (D)(5), 2017 WL 443003) (emphasis added). Even more interesting is that USCIS guidance clarifies that orders that do not make findings tailored to meet the 8 U.S.C.S. §1101(a)(27)(j) definition specifically are acceptable:

> The court's determination that a particular custodial placement is the best alternative available to the petitioner in the United States does not necessarily establish that being returned to the petitioner's (or petitioner's parents') country of nationality or last habitual residence would not be in the child's best interest. However, if for example the court places the child with a person in the United States pursuant to state law governing the juvenile court dependency or custody proceedings, and the order includes facts reflecting that the caregiver has provided a loving home, bonded with the child, and is the best person available to provide for the child, this would likely constitute a qualifying best interest finding with a sufficient factual basis to warrant USCIS consent. The analysis would not change even if the chosen caregiver is a

> parent. USCIS defers to the juvenile court in making this determination and as such does not require the court to conduct any analysis other than what is required under state law.

USCIS Policy Manual, Vol. 6, Part J, ch. 2 (C)(3). As evidenced by plain reading and USCIS guidance, the Federal Government is not requiring action by state courts but simply taking the findings made by state family and juvenile courts into consideration for special immigrant status. Nevertheless, as 8 U.S.C.S. §1101(a)(27)(j) emanates from federal law, it should be left to the U.S. Congress to amend the law if it deems the issue important and desires a different outcome.

Additionally, no important issue of federal law exists when, as in this case, this original family court petition and all appeals are just a persistent attempt to circumvent the immigration process as the Kentucky Supreme Court observed:

> . . . N.B.D. acknowledges in her initial petition that N was in removal proceedings with DHS and the child's testimony confirms that she and M. ran from the Arizona home where they had been placed by immigration authorities, ***there are also grave concerns about the use of the juvenile process by N.B.D. to circumvent federal immigration law.***

Commonwealth v. N.B.D., 577 S.W.3d 73, 79 (Ky. 2019) (emphasis added) (internal citations omitted).

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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