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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and its implementing regulations, certain juvenile aliens may petition United States Citizenship and Immigration Services (USCIS) for "special immigrant juvenile [(SIJ)] status." 8 U.S.C. 1101(a)(27)(J); see 8 C.F.R. 204.11. To be eligible, the alien must have been declared dependent on a state juvenile court, or have been legally committed to, or placed under the custody of, a state agency or person appointed by a juvenile court. 8 U.S.C. 1101(a)(27)(J)(i). The INA also requires the alien to show that the state juvenile court made certain specific factual findings: (i) that "reunification" with one or both parents "is not viable due to abuse, neglect, abandonment, or a similar basis found under State law"; and (ii) that it would not be in the alien's "best interest" to be returned to his or her country of nationality or last habitual residence. 8 U.S.C. 1101(a)(27)(J)(i) and (ii). If the alien is eligible and USCIS consents to his or her petition for SIJ status, then the alien may subsequently apply for lawful permanent resident status in the United States when an immigrant visa becomes available. See 8 U.S.C. 1255(a) and (h). The question presented is:

Whether federal law mandates state juvenile courts to make the factual findings that are relevant to an SIJ petition whenever a juvenile alien requests them.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. Legal Background

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines certain classes of "'special immigrant[s],'" one of which is "special immigrant juvenile[s]" (SIJs). 8 U.S.C. 1101(a)(27)(J). The INA provides that an alien who meets the statutory criteria for SIJ classification, and who is granted that classification by the Department of Homeland Security (DHS), see *ibid.*, will have an opportunity to apply for lawful permanent resident status in the United States when an immigrant visa becomes available. See 8 U.S.C. 1255(a)

and (h). A component agency of DHS, United States Citizenship and Immigration Services (USCIS), has implemented the INA's SIJ provision by regulation at 8 C.F.R. 204.11. And USCIS has provided additional guidance in its *Policy Manual* at Volume 6, Part J (May 20, 2020). See https://go.usa.gov/xvjUd.[1]

1. Congress created the SIJ classification in 1990 "to provide humanitarian protection for abused, neglected, or abandoned child immigrants eligible for long-term foster care" in the United States. *Policy Manual* 6.J.1.A; see Immigration Act of 1990, Pub. L. No. 101-649, Title I, Subtitle D, § 153(a), 104 Stat. 5005-5006. Congress has since revised the SIJ program in various ways, including by removing the requirement that the juvenile alien have been found eligible for long-term foster care. See *Policy Manual* 6.J.1 (describing major legislative amendments related to SIJ status).

Today, in order to obtain SIJ classification, a juvenile alien must be physically present in the United States and file a petition with USCIS. See 8 U.S.C. 1101(a)(27)(J); 8 C.F.R. 204.11(b); *Policy Manual* 6.J.2.A. The alien bears the burden to establish by a preponderance of the evidence that he or she satisfies all of the statutory and regulatory requirements for SIJ classification, see 8 U.S.C. 1361, and, per Congress's 1998 amendment to the INA, USCIS must "consent[] to the grant of special immigrant juvenile status" in each case, 8 U.S.C. 1101(a)(27)(J)(iii); see Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, Title I, § 113, 111 Stat. 2460-2461. The alien petitioner must

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[1] The *Policy Manual* binds USCIS's adjudicators, describes USCIS's understanding of the INA and implementing regulations, and provides useful information to the public, but it is not binding on the public.

be under 21 years of age and unmarried at the time the petition is filed with USCIS. 8 C.F.R. 204.11(c); *Policy Manual* 6.J.2.B & nn.2 and 4. The alien must also have been "declared dependent on a juvenile court located in the United States," or else "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." 8 U.S.C. 1101(a)(27)(J)(i). 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." 8 C.F.R. 204.11(a).

In addition, an alien petitioning USCIS for SIJ classification must show that the state juvenile court or administrative entity that adjudicated his or her case made two specific factual findings: (i) 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 (ii) "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)(i) and (ii); see *Policy Manual* 6.J.2.C and 6.J.3.

USCIS has explained that, when an alien is in proceedings before a state juvenile court, the potential for the alien to petition USCIS later for SIJ classification should not significantly affect how the juvenile court conducts its proceedings under state law. "Juvenile courts do not have the authority to make decisions on" whether an alien child should ultimately be "remov[ed] or deport[ed] * * * to another country"; only federal authorities can make that decision. *Policy Manual* 6.J.2.C.3. At the same time, "nothing" in USCIS's guidance "should be construed as instructing juvenile courts

on how to apply their own state law," and USCIS interprets the INA to mean that "[j]uvenile courts should follow their state laws on issues such as when to exercise their authority, evidentiary standards, and due process." *Id.* at 6.J.3.A.1. Thus, when a state juvenile court considers whether a juvenile alien cannot be reunited with one or both parents due to abuse, neglect, abandonment, or a similar state-law basis, the juvenile court should make that determination by applying "the relevant state child welfare laws." *Id.* at 6.J.2.C.2. And similarly, when a state juvenile court considers the best interests of a juvenile alien, it should "make an individualized assessment and consider the factors that it normally takes into account when making best interest determinations." *Id.* at 6.J.2.C.3. In USCIS's view, the INA "does not require the [state juvenile] court to conduct any analysis other than what is required under state law." *Ibid.* From the beginning of the SIJ program, the Executive Branch has sought to avoid "unnecessary infringement[s] upon the juvenile court system's ability to make determinations regarding its own jurisdictional issues." 58 Fed. Reg. 42,843, 42,848 (Aug. 12, 1993).

A juvenile alien petitioning for SIJ status must submit the juvenile court's order or orders along with the petition to USCIS, 8 C.F.R. 204.11(d)(2), and must "provide evidence that there is a reasonable factual basis for each of" the juvenile court's findings, *Policy Manual* 6.J.2.C (footnote omitted). In determining whether to consent to SIJ status for a juvenile alien petitioner, "USCIS generally defers to the [state juvenile] court on matters of state law and does not go behind the juvenile court order to reweigh evidence and make independent determinations about the best interest of the juvenile

and abuse, neglect, abandonment, or a similar basis under state law." *Id.* at 6.J.2. But USCIS does ensure, as part of its consent review, that the proceedings in juvenile court were sought primarily for the purpose of obtaining protection from abuse, neglect, abandonment, or a similar basis under state law, "and not primarily to obtain an immigration benefit." *Id.* at 6.J.2.D; see H.R. Conf. Rep. No. 405, 105th Cong., 1st Sess. 130 (1997) (Conference Report).

2. If an alien has an approved petition for SIJ classification, the INA permits that alien to apply to adjust his or her status to that of a lawful permanent resident, if "the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence." 8 U.S.C. 1255(a); see 8 U.S.C. 1255(h). In addition to satisfying the eligibility requirements, an alien with an approved SIJ petition must wait to apply for adjustment of status until "an immigrant visa is immediately available to him at the time his application is filed." 8 U.S.C. 1255(a). The INA sets aside 7.1% of the annual allocation of immigrant visas for "special immigrants," of whom special immigrant juveniles are one category. 8 U.S.C. 1153(b)(4); see 8 U.S.C. 1101(a)(27)(J).

Immigrant visas become available to SIJs in chronological order based on the date of the alien's petition for SIJ classification. See Bureau of Consular Affairs, U.S. Dep't of State, *Employment-Based Immigrant Visas*, https://go.usa.gov/xvkPz. For applicants from certain nationalities with a high demand for immigrant visas, including Guatemala (the nationality of the alien petitioner in this case), the alien may need to wait multiple years for an immigrant visa to become available before the alien can apply for adjustment of status to that of a

lawful permanent resident. See *ibid.*; Bureau of Consular Affairs, U.S. Dep't of State, *Visa Bulletin: Immigrant Numbers for May 2020*, No. 41, Vol. X (Apr. 6, 2020) (as of May 2020, aliens from Guatemala must have petitioned USCIS for SIJ classification before August 15, 2016 to be eligible to apply for adjustment of status), https://go.usa.gov/xvsNj.

B. The Present Controversy

1. This case arises from a juvenile dependency petition filed in the Commonwealth of Kentucky's Campbell County Family Court on behalf of Nelida Maribel Diaz Juarez, a juvenile alien born in Guatemala in 2001. See Pet. App. 2a-3a.[2] The dependency petition was originally filed in 2017 by Nalberta Bravo Diaz, a Kentucky resident who is the mother of Nelida's then-boyfriend Marvin, and the grandmother of Nelida's children. See *ibid.*

The dependency petition alleged that Nelida and Marvin entered the United States across the southern border in 2016 after having left Guatemala for vacation in Mexico, where they were kidnapped and ransomed for $3000. Pet. App. 2a-3a, 24a, 41a. After crossing the border, they were detained by immigration authorities, who placed Nelida in the custody of a cousin in Arizona, pending removal proceedings. *Ibid.* According to the petition, that cousin refused to support Nelida and her young child, so Nelida and Marvin left Arizona and went to Kentucky to live with Nalberta. *Ibid.* The petition also alleged that Nelida is afraid to return to Guatemala. *Ibid.*

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[2] This Court granted Nelida's motion to intervene as a petitioner. For clarity, this brief uses the same naming convention for the parties as the petition for a writ of certiorari.

When the depedency petition was filed, the family court placed Nelida in the temporary custody of Nalberta and ordered the respondent in this Court, the Kentucky Cabinet for Health and Family Services, to become involved in the case. Pet. App. 3a. After an adjudication hearing in December 2017, the family court found that Nelida was dependent under Kentucky law because she was a minor with no legal custodian to provide her with supervision or shelter, and the court set a "disposition" hearing for January 2018. *Id.* at 40a-41a.

A few days before the January disposition hearing, Nalberta's counsel filed a motion to continue the case on the ground that she wanted to present expert testimony regarding the dangers to Nelida if she returned to Guatemala. Pet. App. 41a. Counsel explained that she wanted to present that testimony in support of a request to the family court to make the findings described in 8 U.S.C. 1101(a)(27)(J) that would be necessary for Nelida to petition USCIS for SIJ classification—*i.e.*, that reunification with one or both of Nelida's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and that it would not be in Nelida's best interest to be returned to Guatemala. Pet. App. 41a-42a.

After hearing argument, the family court denied the requested continuance and adopted respondent's recommendation that Nelida remain in Nalberta's custody. Pet. App. 40a-45a. The family court's order explained that it "did not feel that conditions in the child's nation of origin were relevant" because it had already decided that Nelida would "stay in the United States with Nalberta." *Id.* at 43a. The court further stated that, having determined "that the child is dependent and that the present custodial arrangements are appropriate to

serve the best interests of the child," nothing in Kentucky law required the court to undertake additional factfinding related to SIJ classification, and the court expressed some doubt about its jurisdiction and capacity to make those findings. *Id.* at 43a-44a.[3]

2. Nalberta appealed the family court's decision declining to make the findings that are relevant to a potential SIJ petition. A divided panel of the Kentucky Court of Appeals reversed, holding that Kentucky's family courts have jurisdiction to make those findings and that the family court in this case should have made findings on those issues. Pet. App. 22a-35a.

3. The Supreme Court of Kentucky reversed in a divided decision. Pet. App. 1-21a.

The Kentucky Supreme Court first held that federal law does not *require* a state court to make the findings that are relevant to SIJ classification whenever an alien requests them. Pet. App. 4a-10a. The court observed that "[n]othing contained in the [INA] directs a state court to take any additional steps beyond carrying out [its] duties under state law," and that USCIS directs state courts "only to follow state laws as to when to exercise their authority." *Id.* at 9a-10a (citing *Policy Manual* 6.J.2 and 6.J.3).

The Kentucky Supreme Court then held that, as a matter of state law, Kentucky family courts handling juvenile cases "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." Pet. App. 12a. But the court also held "that the courts of Kentucky are not required to make additional findings related to SIJ classification unless the court first

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[3] Nelida subsequently left Nalberta's home, but she remains in respondent's custody. Pet. 10-11.

determines that the evidence to be gleaned from such a supplemental hearing is relevant to the child's best interests." *Id.* at 11a. In the circumstances of this case, the Kentucky Supreme Court affirmed the family court's conclusion that additional SIJ findings were "unnecessary" because the family court had decided to place Nelida in Nalberta's custody in the United States, and this was not an instance where the family court was considering "placement of the child back into the country where * * * she was abused, neglected or abandoned." *Id.* at 11a-12a.

Chief Justice Minton dissented. Pet. App. 13a-20a. He agreed with the majority's view of federal law, reasoning that "the federal government has charged, but not mandated, state courts with making certain findings pertaining to" SIJ classification. *Id.* at 15a. But the dissent argued that Kentucky law "require[s] Kentucky's courts always to engage in [SIJ] factfinding when an undocumented immigrant child is before the court in an action involving a custodial arrangement," in order to fulfill the family court's state-law duty to determine the child's best interests. *Id.* at 19a.

DISCUSSION

In the view of the United States, the Kentucky Supreme Court correctly held that federal law does not require a state juvenile court to make the findings that are relevant to SIJ classification whenever a juvenile court is requested to do so. State juvenile courts resolve child-custody cases by applying state law, which determines those courts' jurisdiction, procedural and evidentiary rules, and substantive legal standards. Nothing in 8 U.S.C. 1101(a)(27)(J) mandates that state courts alter their handling of juvenile proceedings. Moreover, there is no clear conflict among state courts of last resort on

the question presented that would warrant this Court's review. The three decisions of States' highest courts cited by petitioners do not clearly hold that juvenile courts are required by *federal* law to make SIJ findings in every case. The petition for a writ of certiorari should therefore be denied.

A. The Decision Below Correctly Interpreted The INA

1. The Kentucky Supreme Court correctly held that the INA does not compel a state juvenile court to make the findings that are relevant to SIJ classification whenever an alien requests them, if the juvenile court declines to make those findings for reasons that are permitted by state law.

a. Section 1101(a)(27)(J) defines a "special immigrant juvenile" and sets forth the requirements that an alien must meet to be eligible to seek that classification from USCIS. 8 U.S.C. 1101(a)(27)(J). The statute provides that, before the alien can petition USCIS, he or she must have gone through a proceeding before a state juvenile court (or an appropriate administrative entity), and must have received a particular kind of order and particular factual findings. See *ibid.* But as the Kentucky Supreme Court correctly observed, "[n]othing" in the statutory text "directs a state court to take any additional steps beyond carrying out [its] duties under state law." Pet. App. 9a.

Rather than impose a federal mandate, the INA's SIJ provision expressly contemplates that juvenile courts will apply the substantive law of their State to determine whether an alien appearing before them was subjected to "abuse, neglect, abandonment, or a similar basis *found under State law*." 8 U.S.C. 1101(a)(27)(J)(i) (emphasis added). Congress's decision to incorporate juvenile courts' application of state-law substantive

standards indicates that Congress did not simultaneously preempt the state procedural standards that govern juvenile courts' exercise of their authority—including the discretion that some States afford their juvenile courts to decline to reach certain issues—especially in the absence of any textual indication of such a preemptive intent.

Furthermore, Section 1101(a)(27)(J) is phrased in the passive voice, referring to an alien "who has been declared dependent on a juvenile court," "whose reunification with" one or both parents "is not viable," and "for whom it has been determined" that it would not be in the alien's best interest to be returned. 8 U.S.C. 1101(a)(27)(J)(i) and (ii). That structure makes sense if Congress expected state juvenile courts to conduct proceedings involving aliens by applying their usual procedures. But the formulation of Section 1101(a)(27)(J) would be an odd way to *mandate* state courts to make certain findings in aid of a federal immigration program.

The legislative history provides further support for the Kentucky Supreme Court's interpretation of federal law. When Congress amended the INA to require the federal Executive Branch's consent for an alien juvenile to acquire SIJ classification, p. 2, *supra*, the Conference Report stated that Congress sought "to limit the beneficiaries of [the SIJ] provision to those juveniles for whom it was created" by excluding aliens who "sought" a dependency order or "determination of the alien's best interest * * * primarily for the purpose of obtaining" lawful permanent resident status, "rather than for the purpose of obtaining relief from abuse or neglect." Conference Report 130. That description suggests that Congress intended that juvenile courts would handle aliens' cases the same way those courts would handle

similar cases not involving aliens—including by applying the procedural standards that govern what a juvenile court will or may decide, and when.

b. For all of those reasons, USCIS, which has responsibility for implementing the SIJ provision, has long interpreted the INA to not "require" a state juvenile court "to conduct any analysis other than what is required under state law." *Policy Manual* 6.J.2.C.3. Instead, in USCIS's view, Congress contemplated that juvenile courts will "follow their state laws on issues such as when to exercise their authority, evidentiary standards, and due process," just as juvenile courts do in cases that do not involve potential SIJ petitioners. *Id.* at 6.J.3.A.1.

By permitting juvenile aliens who receive particular kinds of orders and findings from state courts to petition USCIS for SIJ classification, but not *mandating* juvenile courts to make those findings, Congress established a cooperative system that recognizes the different spheres of responsibility and distinctive expertise of state juvenile adjudicators and federal immigration authorities. On the one hand, DHS has responsibility for implementing and enforcing federal immigration law and, through USCIS, determining whether to approve petitions for SIJ classification and applications for adjustment of status. Thus, a juvenile court cannot force USCIS to accept its conclusions—USCIS must "consent[]" to SIJ status in each case, 8 U.S.C. 1101(a)(27)(J)(iii)—and state juvenile courts "do not have the authority" to decide whether a juvenile alien should ultimately be removed from the United States. *Policy Manual* 6.J.2.C.3. On the other hand, determinations about the reunification of children with their parents, and the best interests of dependent children,

are ordinarily within the expertise and responsibility of juvenile courts applying state law. See *In re Burrus*, 136 U.S. 586, 593-594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."). Accordingly, when a juvenile court with jurisdiction makes the SIJ findings, USCIS "generally defers" to the juvenile court on those "matters of state law" and does not "reweigh evidence." *Policy Manual* 6.J.2. And at the same time, USCIS does not attempt to "instruct[] juvenile courts on how to apply their own state law." *Id.* at 6.J.3.A.1.

USCIS's interpretation of Section 1101(a)(27)(J) is consistent with its interpretation of other INA provisions that attach immigration consequences to a determination made by a state judicial or executive officer. For example, a state family court's recognition of an alien's marriage, divorce, or legal separation—or adoption or legal custody of a child—can all trigger immigration consequences in certain circumstances. See, *e.g.*, 8 U.S.C. 1101(b)(1)(E)-(G) and (c)(1); 8 U.S.C. 1431 (2020); 8 C.F.R. 204.2(a)(1) and (2). In those contexts, too, USCIS generally expects state courts to handle family-law proceedings involving aliens as they would handle other similar proceedings involving non-aliens. See, *e.g.*, *Perdomo* v. *U.S. Att'y Gen.*, 512 Fed. Appx. 961, 962-963 (11th Cir. 2013) (per curiam) (Florida court's declaration in annulment proceeding that alien "was 'never married,' as a legal matter," was conclusive in alien's federal immigration proceeding) (citation omitted); *Morgan* v. *Attorney Gen.*, 432 F.3d 226, 234 (3d Cir. 2005) (alien could not demonstrate "legal separation" for purposes of federal immigration law because Pennsylvania recognizes separation "only by a divorce

secured through a judicial order," which had not occurred in the alien's case).

Furthermore, USCIS's interpretation of the SIJ provision accords with its interpretation of another INA provision that enables an alien to petition for "U" nonimmigrant status (often referred to as a "U visa") if she has been the victim of certain crimes in the United States and a state prosecutor or other official certifies that the alien has been, is being, or may be helpful in an investigation or prosecution of that crime. See 8 U.S.C. 1101(a)(15)(U); 8 U.S.C. 1184(p); 8 C.F.R. 214.14. USCIS interprets that provision the same way it interprets the SIJ provision: an alien's ability to apply for a U visa is conditioned on obtaining the requisite certification from a state official, but the statute provides an *opportunity* for the official to make the certification, not a mandate; whether to make the certification is within the state official's discretion. See USCIS, *Instructions for Supplement B, U Nonimmigrant Status Certification* (Apr. 24, 2019) ("The decision whether" to certify the alien for U nonimmigrant status "is at the discretion of the certifying agency."), https://go.usa.gov/xvUw8.[4]

c. The INA's SIJ provision is materially dissimilar to other federal statutes that require state courts to follow federal law in certain family law proceedings. For example, the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901 *et seq.*, provides that, "[i]n any involuntary proceeding in a State court" involving the foster care placement of, or termination of parental rights to, an Indian child, the child's parents and Indian tribe "shall" have certain procedural rights, and "[n]o" foster

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[4] Under 8 C.F.R. 103.2(a)(1), an immigration "form's instructions are hereby incorporated into the regulations requiring its submission."

care placement or termination of parental rights "may be ordered in such proceeding" without a "determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses," that continued custody by the parent "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. 1912(a)-(f); see *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637, 643 (2013) (describing other requirements imposed by ICWA on state courts). The International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (22 U.S.C. 9001 *et seq.*), implements the Hague Convention on the Civil Aspects of International Child Abduction, *done* Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, by creating a right to "commenc[e] a civil action by filing a petition" for return of a child abducted to the United States, establishing "concurrent" jurisdiction over such a petition in state or federal court, and specifying the procedures and standards that a state or federal court "shall" use to adjudicate such a petition. 22 U.S.C. 9003; see, *e.g.*, 22 U.S.C. 9001(a)(4) (providing that children wrongfully removed "are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies"); 22 U.S.C. 9003(e) (allocating burdens of proof); see also *Abbott* v. *Abbott*, 560 U.S. 1, 8-9 (2010).

Those federal statutes directly establish federal rights enforceable in state court proceedings. But Section 1101(a)(27)(J) does not create a cause of action, and it imposes no similarly clear direction to state juvenile courts to apply federal standards. Cf. *Testa* v. *Katt*, 330 U.S. 386, 392-393 (1947) (holding that state courts may not discriminate against federal law by refusing, based on state public policy, to enforce a federal cause of action as to which Congress authorized concurrent

jurisdiction between state and federal courts). Indeed, as explained above, rather than create a new right that is enforceable in state or federal court, the INA's SIJ provision operates on the basis of a juvenile court's adjudications under *state law*. See pp. 10-12, *supra*.[5]

2. Petitioners contend that state juvenile courts are required by federal law to make SIJ findings whenever they are requested to do so and their jurisdiction is competent under state law. Petitioners' arguments are unpersuasive.

a. Petitioners principally contend (Pet. 26, 28) that "state juvenile courts must make predicate findings when asked" because "the SIJ system could not function otherwise," given that the findings "are an essential prerequisite to SIJ status." But USCIS has informed this Office that it has not experienced systematic hostility to courts making SIJ findings during the 30 years since Congress created the program, despite USCIS having consistently stated in guidance that it does not understand the INA to impose a mandate on juvenile

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[5] The United States takes no position in this brief on whether the Kentucky Supreme Court correctly determined, as a matter of state law, that Kentucky family courts have discretion to decline to make SIJ findings and that the family court in this case gave appropriate reasons for declining to make those findings. Respondent is incorrect in contending (Br. in Opp. 3-5), however, that the Kentucky Supreme Court's judgment rests on an adequate and independent state-law ground. The court's construction of Kentucky law prompted the federal-law question that is presented by the petition for a writ of certiorari, which is whether the family court had a federally imposed duty to make the findings that would be relevant to SIJ classification when it was requested to do so, notwithstanding the discretion that is afforded to the family court by state law. In the United States' view, the Kentucky Supreme Court correctly answered that question in the negative.

courts. Indeed, USCIS has informed this Office that, in the last three fiscal years, it granted 3585 SIJ petitions from aliens who live in Kentucky and the few other States (Virginia, Missouri, and Vermont) in which appellate courts have held that juvenile courts are not always required to make SIJ findings.[6] So decisions like the Kentucky Supreme Court's here have not significantly interfered with the success of the SIJ program.

Contrary to petitioners' suggestion (Pet. 26-29), the decision below does not show that Kentucky's family law violates the Supremacy Clause by frustrating Congress's purposes. See, *e.g.*, *Arizona* v. *United States*, 567 U.S. 387, 399-400 (2012). The statutory text and legislative history of the SIJ provision indicate that Congress created an opportunity for aliens to request a juvenile court to make the findings that are relevant to SIJ classification; the text and history do not suggest that Congress went further and imposed a *mandatory obligation* on state courts to make SIJ findings whenever they are requested to do so, thereby "preempt[ing]" (Pet. 26) existing state laws that permit some discretion for juvenile courts in the administration of custody proceedings. See pp. 10-12, *supra*. The Kentucky Supreme Court made clear in this case that Kentucky's family courts are "empowered" to make the findings relevant to SIJ classification, Pet. App. 12a, so Kentucky has not imposed an obstacle to Congress's purposes.

b. Petitioners also seek support for their position (Pet. 22-24) in an amicus curiae brief filed by the United States at the invitation of the Supreme Judicial Court

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[6] USCIS cannot be certain that every one of these aliens went through juvenile court proceedings in the same State where they live, but it is likely that most of them did.

of Massachusetts in *Massachusetts Department of Revenue ex rel. Guzman* v. *Lopez*, No. 12184, 2016 WL 7661052 (Dec. 28, 2016), decided *sub nom. Guardianship of Penate*, 76 N.E.3d 960 (Mass. 2017). That case presented the question whether a state juvenile court could refuse to make the findings that are relevant to an SIJ petition because the court believed that the alien would ultimately not be eligible for SIJ classification based on its interpretation of federal immigration law. See *id.* at *1. The government argued that the answer is "no," because "[b]y endeavoring to determine whether [the juvenile alien] would be eligible for SIJ status under federal law rather than solely making state-law child welfare determinations, the juvenile court stepped outside its role and into one properly reserved for" USCIS. *Id.* at *1-*2. The Massachusetts high court agreed in that case, holding that, "on a motion for [SIJ] findings, the judge shall make such findings without regard to the ultimate merits or purpose of the juvenile's application" for SIJ classification. *Penate*, 76 N.E.3d at 963.

The United States' amicus brief in *Penate* does not support petitioners here on the distinct question of federal law that is presented by this case. The government argued in *Penate* that "[t]he relevant INA provisions and framework as a whole make clear that state juvenile courts are merely to determine an alien child's dependence or custody, potential for parental reunification, and best-interests based on state law principles—*as the courts would for any child appearing before them*." 2016 WL 7661052, at *12 (emphasis added); see *id.* at *11 (arguing that state juvenile courts should "adher[e] to their state-law-centric role in the SIJ process"). The government reiterated USCIS's position that federal

law "does not require the juvenile court to conduct any analysis other than as required under state law." *Id.* at *10 n.5. The United States thus endorsed the States' authority to determine the course and conduct of juvenile proceedings in their courts. That authority means that, when a juvenile court has an appropriate reason under state law for declining to make SIJ findings—as the Kentucky Supreme Court found in this case—federal law does not *require* the juvenile court to alter the conduct of its proceeding to make SIJ findings.

B. This Court's Review Is Not Warranted

Contrary to petitioners' contention (Pet. 12-21), there is no clear division among States' highest courts on the question presented that might warrant this Court's review.

1. Petitioners identify (Pet. 12-14) three decisions of States' highest courts that purportedly disagree with the Kentucky Supreme Court's interpretation of federal law. But those other courts did not clearly hold that their juvenile courts have an obligation to make SIJ findings under *federal* law notwithstanding state law, and thus none of them directly addressed the question presented here.

In *Romero* v. *Perez*, 205 A.3d 903 (2019), the Court of Appeals of Maryland held that, "when a party requests SIJ status findings," the trial court "*must* undertake the fact-finding process" and issue findings. *Id.* at 908. But the court did not clearly attribute that obligation to federal law, and it appears the court was interpreting Maryland law. In the immediately preceding paragraph, the court discussed a state statute that gives Maryland family courts jurisdiction to make SIJ findings. *Id.* at 907-908 (citing Md. Code Ann., Fam. Law

§ 1-201(b)(10) (LexisNexis Supp. 2016)). And in a footnote to its holding, the court identified differences in the "jurisdiction" of state juvenile courts "to hear SIJ petitions as an 'independent matter.'" *Id.* at 908 n.14 (citation omitted). The court also cited with approval, *id.* at 908, 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, see *Simbaina* v. *Bunay*, 109 A.3d 191, 197-202 (Md. Ct. Spec. App. 2015).

In *H.S.P.* v. *J.K.*, 121 A.3d 849 (2015), the Supreme Court of New Jersey "instruct[ed]" New Jersey family courts to make SIJ findings, "[i]n an effort to ensure that factual findings issued by New Jersey courts provide USCIS with the necessary information to determine whether a given alien satisfies the eligibility criteria for SIJ status." *Id.* at 860; see *id.* at 852. But the court did not say that it was applying a perceived federal mandate, as opposed to directing the manner in which lower courts should exercise their authority under state law.

In *Penate*, *supra*, the Massachusetts Supreme Judicial Court held that a state juvenile court may not "decline to make special findings based on an assessment of the likely merits of the movant's application for SIJ status or on the movant's motivation for seeking SIJ status." 76 N.E.3d at 962-963; see *id.* at 966. That case did not present the question whether federal law would require a Massachusetts juvenile court to make the requested findings in a circumstance where the juvenile court gave a reason for declining to do so that was permissible under state law.

2. Petitioners additionally cite (Pet. 14-16) six decisions of intermediate state appellate courts that purportedly conflict with the decision below in this case. Intermediate state court decisions generally do not provide a basis for a writ of certiorari. See Sup. Ct. R. 10(b) (certiorari is appropriate where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort"). Two of those decisions are unpublished. And in any event, those decisions also do not demonstrate a clear conflict on the question presented.

Three of petitioners' cited intermediate state appellate decisions reversed juvenile courts' mistaken view of their own authority. See *In re L.F.O.C.*, 901 N.W.2d 906, 913 (Mich. Ct. App. 2017) (the juvenile court "erred to the extent that it concluded that it lacked authority to issue" SIJ findings); *In re Welfare of D.A.M.*, No. A12-427, 2012 WL 6097225, at *2, *5 (Minn. Ct. App. Dec. 10, 2012) (the juvenile court erred by finding it could not make SIJ findings because the request had been made "in a delinquency proceeding rather than a child-protection or termination-of-parental-rights proceeding"); *In re Domingo C.L.*, No. M2016-2383, 2017 WL 3769419, at *2, *7 (Tenn. Ct. App. Aug. 30, 2017) (the juvenile court "erred in finding it lacked jurisdiction to make" SIJ findings). A state court's conclusion that an inferior court has authority to make SIJ findings is not the same as a determination that federal law mandates those findings.

The remaining intermediate state appellate decisions addressed juvenile court orders that—unlike the Kentucky family court here—either entirely declined to discuss the alien's request for SIJ findings or else reached an incorrect decision on the merits. Although

those decisions indicated that the juvenile court was required to address the requested SIJ findings, they did not expressly state that the INA's SIJ provision imposes such a duty. See *In re J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012) (observing that the juvenile court did not "state a basis for declining to make the SIJ findings nor did it state that it had considered the SIJ findings and rejected them"); *E.C.D.* v. *P.D.R.D.*, 114 So. 3d 33, 36 (Ala. Civ. App. 2012) (the court could not "determine whether the absence of the SIJ-status findings in the juvenile court's judgment was an implied denial or simply an oversight"); *In re Guardianship of Luis*, 114 N.E.3d 855, 859 (Ind. Ct. App. 2018) (the juvenile court erred when it did not "state a basis for declining to make SIJ findings" or "state that it had considered the SIJ findings and rejected them"); *In re Guardianship of Avila Luis*, 134 N.E.3d 1070, 1075-1076 (Ind. Ct. App. 2019) (holding, following a remand, that the juvenile court's existing factual findings established that the alien satisfied the SIJ prerequisites).

In sum, there is no clear division of authority that would justify further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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