Supreme Court of California
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IN THE SUPREME COURT OF CALIFORNIA

GUARDIANSHIP OF S.H.R.

S.H.R.,
Petitioner and Appellant,

v.

JESUS RIVAS et al.,
Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B308440

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUES PRESENTED

1. The Legislature has given superior courts jurisdiction to make predicate findings that allow undocumented children to apply to the federal government for "special immigrant juvenile" (SIJ) status, which, in turn, provides a pathway to permanent residency. When a petitioner asks a superior court to make SIJ findings, the Legislature has directed that "[i]f . . . there is evidence to support those findings, . . . the court shall issue the order." (Code Civ. Proc., § 155, subd. (b)(1) (§ 155).) Did the Court of Appeal err in expressly disagreeing with *O.C. v. Superior Court* (2019) 44 Cal.App.5th 76, 83 (*O.C.*), which said the statute means that, "if substantial evidence supports the requested SIJ findings, the issuance of the findings is mandatory"?

2. Did the superior court err in ruling it could not make the SIJ finding that "reunification of the child with . . . the child's parents was . . . not . . . viable because of . . . neglect" (§ 155, subd. (b)(1)(B)) where the court considered the neglect—in this case, forced labor of a minor, starting at 10 years old, to support himself and his family—to be due to the family's poverty?

3. Did petitioner make a sufficient showing of entitlement to SIJ findings under section 155?

INTRODUCTION

Every year, thousands of vulnerable undocumented children petition California's superior courts for findings allowing them to seek "special immigrant juvenile" status from the federal government, a status that creates a pathway to permanent residency. Federal law requires a *state* court to first make factual findings that "reunification with 1 or both of the [child's] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (8 U.S.C. § 1101(a)(27)(J)(i)) and that "it would not be in the [child's] best interest to be returned to the [child's] or parent's previous country of nationality or country of last habitual residence" (8 U.S.C. § 1101(a)(27)(J)(ii)). (See *Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1012–1013 (*Bianka M.*).)

The Court of Appeal affirmed the denial of the SIJ-findings petition of the child in this case, S.H.R. (Saul).[1] The published decision raises issues of importance for all immigrant children seeking SIJ findings in California.

The first issue for review, and one about which the Court of Appeal's opinion creates an open conflict, is a fundamental one: What standard has California's Legislature provided for courts to review SIJ-findings petitions? Code of Civil Procedure section 155, subdivision (b)(1), states that, "[i]f . . . there is evidence to

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[1] Although Saul arrived in California as a 16 year old, he is now 19. For SIJ purposes, Saul is a child because both federal and California law consider SIJ applicants under 21 to be children. (8 U.S.C. § 1101(b)(1); Prob. Code, § 1510.1, subd. (d).)

support [SIJ] findings, . . . the court shall issue the order" making the findings.

In *O.C.*, *supra*, 44 Cal.App.5th at p. 83, one Court of Appeal said the statutory language means, "if substantial evidence supports the requested SIJ findings, the issuance of the findings is mandatory." The Court of Appeal here, on the other hand, expressly disagreed with *O.C.* (typed opn. 12–13), holding that the child has the burden of proof "by a preponderance of the evidence" and that, on appeal from the denial of a SIJ petition, the child must show an "entitle[ment] to the requested findings as a matter of law" (typed opn. 15).

As we explain, the *O.C.* interpretation more accurately reflects the Legislature's intent. Regardless, the evidentiary standard is a threshold issue affecting all SIJ petitions in California and leaving the law on the issue unsettled, as it is now, is not an acceptable option.

Another important issue—one that has not been addressed in any published appellate case—was framed by the superior court: it said Saul's petition for SIJ findings "only raises one issue for the Court to decide. Does the poverty of the family, which resulted in Saul being required to leaving [*sic*] school and begin working at an early age, qualify as 'neglect' or 'abuse' under California Code of Civil Procedure, Section 155." (AA 162 ["AA" page references are to the writ petition exhibits filed in the Court of Appeal that the court allowed to be refiled as the appellant's appendix].) It then concluded that " 'poverty alone' is not a basis for judicial, neglect-based intrusion." (AA 168.)

Although this issue has not been discussed in a published opinion, it is of sufficient importance and widespread effect to justify the court's resolution. The lower courts' actions in the present case provide a good vehicle for this court to resolve a pure issue of law.

Adoption of the "poverty alone" rule to disregard neglect when SIJ findings are sought is improper. The rule comes from matters in which termination of parental rights may be sought and is based on the principle that the state should not remove children from their homes based on conditions of poverty, but should take steps to assist the family. However, SIJ findings do not terminate any parental rights, and the superior court here, when asked to make SIJ findings, had no authority to order assistance in California, let alone in a foreign country.

Neglect of a child is always a basis for action, whether a family is rich or poor. When asked to make SIJ findings, the court's necessary action is " 'simply to identify' " the neglected children so that they can apply to the federal government for SIJ status. (*Bianka M.*, *supra*, 5 Cal.5th at p. 1025.)

The superior court further erred in refusing to find it would not be in Saul's best interest to be returned to his home country of El Salvador. Saul's parents did not provide him with financial support, instead relying on his contributions, including forcing him to do dangerous agricultural work starting when he was 10 and then to quit school in the ninth grade. Saul also faced repeated serious threats of deadly violence if he did not join a gang or pay a "gang tax."

In addressing the "best interest[s]" issue, the superior court acknowledged that "the United States offers Saul greater benefits than those available in El Salvador" and that "there are hardships [Saul] will face in his native country (alleged gang issues)," but the court offered the assurance that "El Salvador also produces doctors, lawyers, and other professionals who have been able to avoid these pitfalls." (AA 170.) Simply because substantial—indeed, life-threatening—obstacles might be overcome does not mean that requiring Saul to confront those obstacles is in Saul's best interest, nor does it mean that those who were able to succeed faced the same individual impediments to progress as did Saul.

Review is needed to resolve an acknowledged conflict among published opinions, settle an important issue regarding the "poverty alone" rule, and determine that Saul is entitled to the SIJ findings he has been seeking.

STATEMENT OF THE CASE

A. After years of lack of support, a prematurely terminated education, and threats of gang violence, 16-year-old Saul travels to the United States from El Salvador.

In August 2018, when he was 16 years old, Saul arrived in the United States—undocumented—from El Salvador, his home country. (AA 20, 56.) For over five months, he lived in a Texas shelter operated by the federal Office of Refugee Resettlement (AA 20), a shelter described as a "former Walmart that has been converted into a shelter for approximately 1,500 boys ages 10 to 17." (Romo & Rose, *Administration Cuts Education And Legal*

Services For Unaccompanied Minors (June 5, 2019) NPR <https://www.npr.org/2019/06/05/730082911/administration-cuts-education-and-legal-services-for-unaccompanied-minors> [as of Oct. 1, 2021].)

After his release from the shelter in January 2019, Saul lived in Palmdale with Jesus Rivas, who is the husband of a cousin of Saul's mother. (AA 20, 56.) In the declaration supporting his December 2019 petition for SIJ findings, Saul said, "I feel happy and cared for under my cousin Jesus' care. He ensures that I have shelter, food, and that I continue my education." (AA 59.) Rivas has also provided Saul with health care. (AA 56.) Saul added, "I want to remain in [Rivas's] care and graduate from high school. My only responsibility for the first time is focusing on my education." (AA 59.)

As intimated by his "for the first time" statement, Saul's security with Rivas contrasts with his prior life in El Salvador. Saul explained in his declaration:

- In El Salvador, he lived with his parents, a grandfather, and five siblings. (AA 56.)

- Saul's parents did not support him financially. Instead, they relied on him and his two older sisters to provide necessities for him and his family. (AA 56.) When he worked in the fields as a young boy, Saul said, "My grandfather would give me money for my labor which I would use to buy things I needed such as food, clothes, and shoes." (*Ibid.*) Later, he said, "I used half of the money I made at the car wash to buy food for my parents, grandfather, and younger siblings." (AA 58.)

- Saul's field work started when he was just 10 years old, and lasted until he was 15. Under the hot sun for six to seven hours every day, he collected fruits and vegetables. Saul said the work left him "completely exhausted." (AA 56.)

- Saul was threatened with gang violence three different times, beginning when he was a ninth grader. (AA 57.) He described in detail those incidents, during which, he said, "gang members threatened to kill me and my family if I refused to join their gang." (*Ibid.*) He added, "I was really afraid and felt like my parents could not protect me." (AA 58.) Although Saul's father reported the first two incidents (which occurred a few weeks apart) to the police, the police did nothing, and his parents did nothing to follow up. (AA 57.) Saul said, "The police cannot protect me either." (AA 58.)

- Because of the gang threats, Saul said, "My parents made me stop going to school and start working. This meant I would not be able to graduate from high school, as much as I wanted to." (AA 57; see AA 58 ["I could not go to school in El Salvador and I was forced to work"].)

- Saul began working at a car wash. (AA 57.) But the threats continued at his job, where a gang member told him he "would disappear" if he did not pay a "gang tax." (AA 58.)

- At this point, Saul said, "I lived in constant fear that the gang members would return to my work and kidnap or kill me. The gang members have killed many young people in my

neighborhood. I know of three different people who were killed by gang members." (AA 58.)

- Saul told his parents he wanted to leave El Salvador, "because [he] did not feel safe," but they said it was too dangerous to go and "insisted [he] stay." (AA 58.)

- Saul "did not want to risk losing [his] life," so, to "protect [him]self," he saved money and, without telling his parents, he left El Salvador in June 2018. (AA 58.)

B. The superior court denies Saul's petition for Special Juvenile Immigrant findings and the Court of Appeal affirms in a published opinion.

In September 2019, Saul petitioned the superior court to appoint Rivas as his guardian. (AA 11–13.) Saul's parents both consented to the guardianship, as did Rivas. (AA 27, 70; see also AA 67–69 [consents by grandfather, grandmother, and two sisters].)

Saul filed his petition for SIJ findings in December. (AA 52.) It included a declaration stating the facts set forth above. (AA 56–60.)

At a hearing, the court first said it would deny the petition for SIJ findings but then acceded to the request by Saul's attorney for additional briefing. (AA 89–90.)

During the hearing, the court said its negative view of the SIJ petition was based on Saul and his family's indigent circumstances in El Salvador: "Where they lived, their poverty breeds two things: a need for family members, including

children, to help, and in those kind[s] of environments can lead to violence. But being poor or living in [an] impoverished country is not a basis to grant a SIJS [findings] petition. . . . [P]overty in and of itself is not a basis for the granting of a SIJS [findings] petition." (AA 87.)

After Saul filed his supplemental brief (AA 102), the court denied his petition for SIJ findings (AA 162, 170). It also denied the guardianship petition as moot (AA 170), even though it had earlier granted the guardianship petition and appointed Rivas as Saul's guardian (AA 92, 96, 99–101).

In its statement of decision, the court said the SIJ petition "only raises one issue for the Court to decide. Does the poverty of the family, which resulted in Saul being required to leaving [*sic*] school and begin working at an early age, qualify as 'neglect' or 'abuse' under California Code of Civil Procedure, Section 155." (AA 162.) It later concluded, " 'poverty alone' " is not a basis for judicial, neglect-based intrusion: '[I]ndigency, by itself, does not make one an unfit parent.' " (AA 168.)

The court also declined to find that it would not be in Saul's best interest to be returned to El Salvador. In doing so, the court acknowledged that "the United States offers Saul greater benefits than those available in El Salvador" and that "there are hardships [Saul] will face in his native country (alleged gang issues)," but the court offered the assurance that "El Salvador also produces doctors, lawyers, and other professionals who have

been able to avoid these pitfalls." (AA 170.)[2]

Saul filed both a writ petition and a notice of appeal, because the appealability of the superior court's order was unclear.[3] The Court of Appeal affirmed in a published opinion. (Appens. A and B.)

LEGAL ARGUMENT

I. The Court of Appeal's opinion creates a consequential conflict about the evidentiary standard for superior courts in ruling on petitions for Special Immigrant Juvenile findings.

A. Which evidentiary standard applies is a crucial threshold issue that affects all petitions for SIJ findings.

Two of the most frequent reasons that this court grants review are "[w]hen necessary to secure uniformity of decision" and "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) This case qualifies under both categories. The Court of Appeal decision expressly disagrees with another published appellate opinion about an issue that is critical to

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[2] The Court of Appeal's opinion does not discuss these aspects of the superior court's statement of decision. (See typed opn. 12, fn. 8.) Saul called the omissions to the appellate court's attention in a rehearing petition, to no avail.

[3] After recognizing appellate opinions have differed on the matter, the Court of Appeal held the order is appealable. (Typed opn. 9–10.) We agree, which is why we do not raise that procedural question as a separate issue for review. However, in addition to resolving the issues presented, this court can use the present case to settle the appealability question.

thousands of children seeking the protection of California courts and the federal government.

Federal law protects vulnerable undocumented immigrants[4] who are under 21 years old by providing a procedure for them to attain SIJ status that creates a pathway to make them permanent United States residents. (8 U.S.C. § 1101(a)(27)(J), (b)(1); 8 U.S.C. § 1232(d)(6); 8 C.F.R. § 204.11(c)(1) (2021); see *Bianka M.*, *supra*, 5 Cal.5th at pp. 1012–1013.) Although federal officials determine whether a child should be granted SIJ status, state courts play an indispensable role in the process.

Before the federal government can approve SIJ status, a state court must first, as relevant here, "place[ ] [the child] under the custody of . . . an individual" appointed by the court (8 U.S.C. § 1101(a)(27)(J)(i)) and make two findings: (1) "reunification with 1 or both of the [child's] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (*ibid.*), and (2) "it would not be in the [child's] best interest to be returned to the [child's] or parent's previous country of nationality or country of last habitual residence"

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[4] This court has "use[d] the term 'undocumented immigrant' to refer to a non-United States citizen who is in the United States but who lacks the immigration status required by federal law to be lawfully present in this country and who has not been admitted on a temporary basis as a nonimmigrant." (*In re Garcia* (2014) 58 Cal.4th 440, 446, fn. 1; see also Stats. 2021, ch. 296, § 1 [The Legislature has acted to "remove the dehumanizing term 'alien' from all California code sections"].)

(§ 1101(a)(27)(J)(ii)). (See *Bianka M.*, *supra*, 5 Cal.5th at p. 1013.)

California's Legislature has acted to facilitate the state's courts in meeting their SIJ responsibilities. Section 155, subdivision (a)(1), gives superior courts jurisdiction to make the "judicial determinations" and the "factual findings necessary to enable a child to petition the United States Citizenship and Immigration Services for classification as a special immigrant juvenile." (See *Bianka M.*, *supra*, 5 Cal.5th at p. 1013.)

The Legislature has also directed that, in ruling on a petition for SIJ findings, "[*i*]*f . . . there is evidence to support those findings*, which may consist solely of, but is not limited to, a declaration by the child who is the subject of the petition, *the court shall issue the order*" making the findings. (§ 155, subd. (b)(1), emphases added.) The Court of Appeal opinion in this case creates a conflict regarding how to interpret that statutory language.

The Fourth District, Division Three previously stated, "if substantial evidence supports the requested SIJ findings, the issuance of the findings is mandatory." (*O.C.*, *supra*, 44 Cal.App.5th at p. 83.)

The Court of Appeal in this case, however, expressly disagreed with, and declined to follow, *O.C.* (typed opn. 12–13), asserting that "nothing in the statute's text or its legislative history" supports *O.C.*'s statement (typed opn. 13). Instead, the court concluded that a petitioner for SIJ findings had the burden "to prove by a preponderance of the evidence" the facts

supporting those findings. (Typed opn. 15.) The court also held that, because of this preponderance standard, on appeal from an adverse superior court ruling, the petitioner must show an "entitle[ment] to the requested findings as a matter of law." (*Ibid*.)

The effect in this case of the different standards is dramatic. For example, consider the court's treatment of just some of Saul's evidence of neglect—starting as a 10 year old, he was put to work harvesting in hot fields for many hours a day, work that left him "completely exhausted." (AA 56.)

The appellate opinion found the evidence insufficient to establish "neglect as a matter of law" because, "[e]ven if a court could reasonably infer parental neglect . . . , the court could also reasonably infer that, because his parents were impoverished, allowing [Saul] to earn money by helping his grandfather in the fields during summers was, under the circumstances, a reasonable parental decision." (Typed opn. 17–18.)

The result would be the opposite under *O.C.* Putting aside that parental poverty should not allow a court to ignore the neglect of a child (another important issue for review, discussed *post*), disregarding a reasonable inference of neglect is incompatible with the "substantial evidence" standard stated by the *O.C.* court. A reasonable inference *is* substantial evidence. (See, e.g., *In re R.T.* (2017) 3 Cal.5th 622, 633 (*In re R.T.*) [to see if substantial evidence supports findings, " 'we draw all reasonable inferences from the evidence' "].)

The difference in outcomes between a court following *O.C.* and one following the present opinion is likely to be replicated in many California proceedings for SIJ findings. Thus, this court's intervention is necessary to resolve the conflict about how superior courts should review SIJ-findings petitions and also, by extension, how appellate courts should review denials of those petitions. Indeed, frequent disparate results are very likely unless this court steps in.

B. The *O.C.* court's "substantial evidence" interpretation is the proper reading of the Legislature's intent.

1. The statutory language supports a "substantial evidence" standard.

The *O.C.* court's is the better interpretation of what the Legislature intended when it enacted section 155. (See *Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190 (*Smith*) [" ' " ' "[o]ur fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose" ' " ' "].)

Section 155's plain language itself is a strong indicator that *O.C.*'s holding was right. (See *Smith*, *supra*, 11 Cal.5th at p. 190 [" ' " ' "We first examine the statutory language, giving it a plain and commonsense meaning" ' " ' "].) The statute provides that "the court *shall* issue the order" making SIJ findings "[*i*]*f* . . . *there is evidence* to support those findings." (Emphases added.)

"Ordinarily, the term 'shall' is interpreted as mandatory and not permissive." (*People v. Standish* (2006) 38 Cal.4th 858, 869.) Although regarding a different issue, this court in *Bianka M.* highlighted the compulsory language of section 155, saying

the statute "has made clear that a superior court 'shall' issue an order containing SIJ findings if there is evidence to support them." (*Bianka M.*, *supra*, 5 Cal.5th at p. 1025; see *id*. at p. 1013 ["The statute further provides that superior courts 'shall issue the order' if 'there is evidence to support [SIJ] findings' "]; see also Legis. Counsel's Dig., Sen. Bill No. 873, Stats. 2014, ch. 685 (2013–2014 Reg. Sess.) [bill enacting section 155 "would *require* the superior court to make an order containing the necessary findings . . . if there is evidence to support those findings" (emphasis added)].) All indications are that the Legislature intended "shall" to have its ordinary, mandatory meaning.

If there is a mandatory duty to make SIJ findings, the duty is triggered "[i]f . . . there is evidence to support those findings." Literally, this could mean the existence of *any* evidence. That might be too broad an interpretation; for example, a child simply stating, "I was neglected," without substantiation, might alone be insufficient. But using "[i]f . . . there is evidence" indicates the Legislature's intention to require only a minimum amount of legally significant evidence, setting a bar that is lower than the preponderance standard applicable in other contexts. At the same time, the statutory phrase "evidence to support" indicates that the petitioner must provide *substantial* evidence, not just vague or conclusory assertions.

2. Context and legislative history support a "substantial evidence" standard.

There is good reason to believe the Legislature intended a substantial evidence standard rather than a preponderance

standard. It has repeatedly removed obstacles undocumented children might face in seeking the findings necessary to apply for SIJ status.

Of particular relevance in the present case is the rule the Legislature enacted—and later strengthened—to reduce the evidentiary burden in SIJ-findings proceedings. When originally enacted, section 155, subdivision (b)(1), provided that the evidence to support findings "may consist of, but is not limited to, a declaration by the child who is the subject of the petition." (Stats. 2014, ch. 685, § 1.) In 2016, the Legislature amended the statute to its present phrasing that the evidence can "consist *solely* of, but is not limited to," the child's declaration. (Emphasis added; see Stats. 2016, ch. 25, § 1.)

The Legislature has also given broad jurisdiction to the superior courts—not just the courts' juvenile divisions—to make SIJ findings, and to do so "at any point in a proceeding." (§ 155, subd. (a)(1), (2).) It has made it off limits for a court to consider or comment on a child's motivations in seeking SIJ findings. (§ 155, subd. (b)(2); see *Bianka M.*, *supra*, 5 Cal.5th at p. 1024.) It has additionally acted to ensure that children between 18 and 21 years old can have a guardian appointed, a necessary prerequisite to SIJ status. (Prob. Code, § 1510.1; see Stats. 2015, ch. 694, § 1 [legislative findings].)

A committee report said language in the 2016 bill "clarifies . . . [¶] . . . [¶] [t]hat *it is in the best interest of the child for a superior court to issue the SIJS factual findings if requested and supported by evidence*." (Sen. Rules Com., Off. of Sen. Floor

Analyses, 3d reading analysis of Assem. Bill No. 1603 (2015–2016 Reg. Sess.) as amended June 13, 2016, p. 6, emphasis added.) It also related that section 155 had been enacted two years earlier "*to strengthen protections for immigrant children* by making it clear that all California courts have jurisdiction to make Special Immigrant Juvenile Status (SIJS) findings." (*Ibid.*, emphasis added.)

Given the Legislature's history of, at every turn, easing the path of undocumented children who are requesting SIJ findings, section 155, subdivision (b)(1), should be given its plain and commonsense meaning of requiring no more than substantial evidence to mandate those findings.

3. The Court of Appeal's interpretation is flawed.

The Court of Appeal here held a substantial evidence standard of review "is inconsistent with the trial court's factfinding task under section 155" because a determination that there is substantial evidence "is not a factual finding at all." (Typed opn. 13–14.) This court should disagree.

A superior court's conclusion about whether a child's evidence is substantial *is* a factual finding. The court is evaluating the quality of the evidence. "Substantial evidence is not any evidence—it must be reasonable in nature, credible, and of solid value." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51.) An assessment of the reasonableness, credibility, and value of evidence is an inherently factual determination. An example of the absence of fact finding would

be if the Legislature required every petition be granted regardless of the supporting evidence, or lack thereof.

In section 155, the Legislature has not eliminated superior court factfinding, but it has established a standard for the court to use to review evidence that is weighted in favor of the child seeking SIJ findings. There is nothing unique about legislatively weighted factfinding. (See, e.g., Gov. Code, § 830.6 [public entity's design immunity established if, among other things, "the trial or appellate court determines that there is any substantial evidence" of the design's reasonableness]; Stats. 2021, ch. 721, § 1 [amending Penal Code section 1385 to provide, "the court shall consider and afford great weight to evidence offered by the defendant to prove" various mitigating circumstances in deciding whether to dismiss an enhancement].)

The Court of Appeal also said "a substantial evidence standard would not satisfy the federal requirement that the state court actually find the required facts." (Typed opn. 14.) This is wrong and, in any event, is not a proper reason for disagreeing with *O.C.*

First, again, a determination that a child's evidence is substantial *is* an actual finding of the required facts. Second, Congress has delegated to the individual states the task of making the necessary findings and must have known that different states could employ different standards for making the findings. (See U.S. Citizenship and Immigration Services, Dept. of Homeland Security, USCIS Policy Manual (2021) Eligibility Requirements, vol. 6, pt. J, ch. 2,

https://www.uscis.gov/book/export/html/68600 [as of Oct. 4, 2021] (USCIS Policy Manual) ["USCIS 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"].) Finally, if the standard the Legislature adopted does not satisfy federal requirements, it is for the Legislature, not the courts to revise the standard.

One jurisdiction's appellate court said that "Congress to some extent has put its proverbial thumb on the scale favoring SIJS status." (*B.R.L.F. v. Sarceno Zuniga* (D.C. 2019) 200 A.3d 770, 776.) California's Legislature has similarly favored children applying for SIJ findings, including providing a substantial evidence standard of review.

II. Whether poverty can preclude SIJ findings is an important issue meriting this court's attention.

The superior court framed the legal question in the present case this way: Saul's petition for SIJ findings "only raises one issue for the Court to decide. Does the poverty of the family, which resulted in Saul being required to leaving [*sic*] school and begin working at an early age, qualify as 'neglect' or 'abuse' under California Code of Civil Procedure, Section 155." (AA 162.) The court then concluded the law is "clear that 'poverty alone' is not a basis for judicial, neglect-based intrusion: '[I]ndigency, by itself, does not make one an unfit parent.' " (AA 168.)

The Court of Appeal did not expressly rule on the propriety of the superior court's approach to this issue, but its opinion is congruent. The opinion says the superior court could "reasonably

infer that, *because his parents were impoverished*, allowing [Saul] to earn money by helping his grandfather in the fields during summers was, under the circumstances, a reasonable parental decision that enabled the family to provide for [Saul] without interfering with his education." (Typed opinion 17–18, emphasis added.)

The applicability of the "poverty alone" rule to petitions for SIJ findings has yet to be decided in a published opinion.[5] The superior court cited decisions arising in a different context—the termination of parental rights. (AA 168, citing *In re G.S.R.* (2008) 159 Cal.App.4th 1202 (*G.S.R.*) and *David B. v. Superior Court* (2004) 123 Cal.App.4th 768.)

Although not addressed in a published SIJ opinion, the applicability of the "poverty alone" rule is a recurring issue.

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[5] The Court of Appeal offered this rationale for not addressing our argument that the superior court's reliance on the "poverty alone" rule was error: "We review the court's order, . . ., not its reasoning, and may affirm the order if it is correct on any theory of applicable law." (Typed opn. 12, fn. 8.) It also states Saul could prevail on appeal only if the evidence " ' "compels a finding in [his] favor . . . as a matter of law." ' " (Typed opn. 11.) The use of a deferential standard of appellate review regardless of a legally faulty basis for the factfinder's decision is fundamentally wrong and contrary to well-settled principles. (See, e.g., *Martinez v. Vaziri* (2016) 246 Cal.App.4th 373, 386 [" '[a] discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order' "]; *Dyer v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 161, 174 ["Where the trial court decides the case by employing an incorrect legal analysis, reversal is required regardless of whether substantial evidence supports the judgment"].)

Indeed, the superior court copied its conclusion about the "poverty alone" rule directly from an unpublished SIJ opinion. (Compare AA 168 with *Guardianship of Melgar* (Nov. 25, 2019, B293130) 2019 WL 6270520, p. *4 [nonpub. opn.].)

The issue is also an important one. Importing the "poverty alone" rule from parental-rights-termination cases into SIJ-findings proceedings like the present one will disadvantage many children like Saul. And it is wrong to do so, for two reasons: the rule's rationale does not fit the purpose of SIJ findings and an order making SIJ findings does not terminate parental rights.

The basis for the "poverty alone" rule is that, "where family bonds are strained by the incidents of poverty, the [social services] department must take steps to assist the family, not simply remove the child and leave the parent on their own to resolve their condition and recover their children." (*In re S.S.* (2020) 55 Cal.App.5th 355, 374; see *ibid.* [" ' "The legislative scheme contemplates immediate and intensive support services to reunify a family where a dependency disposition removes a child from parental custody" ' "].) Thus, "California courts have repeatedly found social services must actively seek to assist a parent suffering from poverty in obtaining adequate housing and that trial courts may not terminate reunification services or parental rights if they have failed to do so." (*Ibid.*)

In a SIJ petition proceeding such as this one, however, no social services department is involved at all, and a superior court has no authority to order family support services, especially services to be provided in another country. Thus, the "poverty

alone" rule, which is a salutary one in parental-rights-termination cases because it supports the policy of reunification where possible, offers no benefits and can cause only harm to children like Saul who seek SIJ findings in their guardianship proceedings.

Nor should parental rights or fault be of concern in making SIJ findings. The proper focus is the effect on the child.

Parents have substantial due process rights "[b]efore the state may sever [their] rights in [their] natural child." (*G.S.R.*, *supra*, 159 Cal.App.4th at p. 1210.) Those rights do not always require a finding of parental fault, however. (See *In re R.T.*, *supra*, 3 Cal.5th 622 [statute authorizes dependency jurisdiction without finding a parent at fault for failure or inability to supervise or protect child]; *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1128 ["a finding of parental unfitness . . . is not an invariable constitutional requirement when parental rights are terminated"].)

In any event, a petition for SIJ findings does not involve the termination of parental rights.

The United States Citizenship and Immigration Service says that termination of parental rights is not necessary to establish the non-viability of reunification in SIJ cases. (USCIS Policy Manual, *supra*, vol. 6, pt. J, ch. 2, § C.2.) And case law similarly explains that SIJ findings are divorced from proceedings to terminate parental rights.

In *Bianka M.*, this court found unconvincing lower court concerns that SIJ findings would be equivalent to a parentage

determination. The court explained, "Bianka has . . . simply asked the court to make a finding of fact: that reunification with her alleged father is not viable because of abandonment. *Standing alone, that factual finding carries with it no necessary implications about [her father's] parental rights or responsibilities* beyond what his nonparticipation in the litigation has already demonstrated." (*Bianka M.*, *supra*, 5 Cal.5th at pp. 1021–1022, emphasis added.) The court added that "[a]ny decision issued in [the father's] absence could not bind him in any event." (*Id.* at p. 1022.)

Courts in other states have specifically held that parental-rights-termination rules are too strict for SIJ cases. Their reasoning is compelling.

The Nevada Supreme Court remanded a case to a trial court that had used too exacting a standard in refusing to make SIJ findings. (*Lopez v. Serbellon Portillo* (Nev. 2020) 469 P.3d 181 (*Lopez*).) The court "caution[ed] [trial] courts to remember that because SIJ findings do not result in the termination of parental rights, the consideration of whether a parent has abandoned a child such that reunification is not viable is broader than the consideration of whether a parent's abandonment of a child warrants termination of the parent's parental rights." (*Id.* at pp. 184–185.)

Nevada's Supreme Court is not alone in so holding. (*Romero v. Perez* (Md. 2019) 205 A.3d 903, 912–914 (*Romero*) [SIJ "proceedings do *not* involve any termination of parental rights; they merely entail judicial fact finding about the viability of a

forced reunification between a parent and a child"]; *Kitoko v. Salomao* (Vt. 2019) 215 A.3d 698, 708 (*Kitoko*) ["the requested finding would not amount to a termination of father's parental rights"]; *J.U. v. J.C.P.C.* (D.C. 2018) 176 A.3d 136, 141, 142 [finding "the trial court applied too demanding a standard of both 'viability' and 'abandonment' " in SIJ case where "the concept of abandonment is being considered not to deprive a parent of custody or to terminate parental rights but rather to assess the impact of the history of the parent's past conduct on the viability . . . of a forced reunification"].)

Because SIJ findings themselves do not terminate parental rights, the focus should be on the harm suffered by the child. Whether or not neglect was intentional, its impact on the child is the same. (Cf. *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876, 881 ["The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause"], superseded by Cal. Const., art. I, § 7, subd. (a).)

According to the superior court here, and to courts employing like reasoning, circumstances that would otherwise constitute parental neglect do not allow for a SIJ finding of neglect if the child's family is poor. (See AA 168 [parents' requiring Saul to "leave school and start working" is not neglect because, "in actuality, each of these complaints arises from the same root cause—namely, their poverty"].) That should not be the law.

If reunification is not viable because a child has been neglected or abandoned by his or her parents, the underlying circumstances—whether they be ignorance, poverty, parental malice, or something else—should be of no concern. As this court has said, " '[a] state court's role in the SIJ process is . . . simply to identify abused, neglected, or abandoned alien children under its jurisdiction.' " (*Bianka M.*, *supra*, 5 Cal.5th at p. 1025.) The superior court's charge is to evaluate a child's adverse conditions, not to prosecute his or her parents.

III. This court should rule that Saul is entitled to SIJ findings.

If this court grants review, it should also decide whether section 155 requires the superior court to make the SIJ findings Saul has requested. The record in the case provides a good vehicle for this court to model how such a resolution should be made.

Illustrating how to properly apply section 155 would provide valuable guidance to the superior courts. There is a paucity of California case law determining what evidence establishes that "reunification of the child with one or both of the child's parents [is] not . . . viable because of abuse, neglect, abandonment, or a similar basis pursuant to California law" and that "it is not in the best interest of the child to be returned to the child's, or his or her parent's, previous country of nationality or country of last habitual residence." (§ 155, subd. (b)(1)(B), (C).) Also, a decision remanding this matter to the lower courts for further substantive proceedings could compromise Saul's ability

to apply to the federal government for SIJ status because his application must be made before he turns 21.

In merits briefing, we will explain in more detail why Saul's evidence entitles him to SIJ findings. That conclusion will be straightforward once this court applies the correct legal standard. We provide a summary now.

The evidence should be viewed as Maryland's high court did in *Romero*, *supra*, 205 A.3d 903: "the terms 'abuse,' 'neglect,' and 'abandonment' should be interpreted broadly when evaluating whether the totality of the circumstances indicates that the minor's reunification with a parent is not viable, i.e., workable or practical, due to prior mistreatment." (*Id*. at pp. 914–915.) The court further explained, "[i]n applying this standard, [trial] courts should consider factors such as (1) the lifelong history of the child's relationship with the parent (i.e., is there credible evidence of past mistreatment); (2) the effects that forced reunification might have on the child (i.e., would it impact the child's health, education, or welfare); and (3) the realistic facts on the ground in the child's home country (i.e., would the child be exposed to danger or harm." (*Id*. at p. 915; accord, *Lopez*, *supra*, 469 P.3d at pp. 184–185; *Kitoko*, *supra*, 215 A.3d at pp. 708–709.)

Beginning when he was a small child, Saul's parents did not financially support him. Rather, it was the other way around. From the time he started working in the fields at age 10, Saul used his earnings to buy food and clothes for himself and

food for his family members. (AA 56, 58.) This lack of support is a classic indicator of neglect and abandonment.

Saul's parents forced him to leave school in the ninth grade to work. (AA 57–58.) California's Compulsory Education Law provides, with exceptions not relevant here, "Each person between the ages of 6 and 18 years . . . is subject to compulsory full-time education." (Ed. Code, § 48200; see *In re James D.* (1987) 43 Cal.3d 903, 915 ["Courts have long recognized the importance of education to both the individual and to society," and compulsory education laws are "a legitimate means of achieving that objective"].) Parents who do not comply with the law are "guilty of an infraction." (Ed. Code, § 48293, subd. (a).)

Saul was forced into dangerous manual labor beginning when he was a 10 year old. He worked full days in the hot fields, leaving him "completely exhausted." (AA 56.)

All of this history demonstrates that forced reunification is not viable.

The Court of Appeal said there is no evidence that Saul, "*as an adult*, would need the level of support for a child or that he would be unable to contribute to the family's income." (Typed opn. 24, emphasis added.) Similarly, the superior court based its ruling in part on the fact that Saul "is no longer a minor." (AA 169.) This disregards federal and state law on an issue of substantial importance to many petitioners for SIJ findings.

According to Congress, for SIJ purposes, Saul is a child until he turns 21. (8 U.S.C. § 1101(b)(1).) The Legislature has recognized this. (Prob. Code, § 1510.1, subd. (d); Stats. 2015,

ch. 694, § 1(a)(2).) It has also specifically declared that "many unaccompanied immigrant youth between 18 and 21 years of age face circumstances identical to those faced by their younger counterparts." (*Id.*, § 1(a)(5).) Thus, evidence of Saul's circumstances before he left El Salvador as a 16 year old remains important and cannot be ignored.

The evidence also established that returning to El Salvador would not be in Saul's best interest. (See 8 U.S.C. § 1101(a)(27)(J)(ii); § 155, subd. (b)(1)(C)). Indeed, the superior court's refusal to so find is inexplicable.

In El Salvador, Saul faced—and would again face on returning—life-threatening gang violence. (AA 57–58.) Even the superior court acknowledged it is "probably true" that "it would be safer for [Saul] in the United States." (AA 88.)

Saul's petition for SIJ findings further demonstrated that his education would suffer if he were to be deported. In El Salvador, he was forced to quit school, and, he said, "This meant I would not be able to graduate from high school, as much as I wanted to." (AA 57; see AA 58 ["I could not go to school in El Salvador and I was forced to work"].) In California, however, Saul said that his guardian "ensures that . . . I continue my education" and "[m]y only responsibility for the first time is focusing on my education." (AA 59; see *ibid.* [Saul wants to "graduate from high school" in California].)

Additionally, unlike in El Salvador, where his parents did not financially support him, Saul said that his guardian was providing him with shelter, food, and health care. (AA 56, 59.)

Despite all this, and even while allowing that "the United States offers Saul greater benefits than those available in El Salvador" (AA 170), the superior court declined to find that a return to El Salvador was not in Saul's best interest.

The court downplayed the serious threats to Saul's life, calling them "*alleged* gang *issues*" and "alleged *requests* to join the gangs (which he resisted)." (AA 170, emphases added.) The superior court also said, "while there are hardships [Saul] will face in his native country (alleged gang issues), El Salvador also produces doctors, lawyers, and other professionals who have been able to avoid these pitfalls." (*Ibid*.)

The court failed to give Saul's affidavit proper deference as the Legislature requires by dismissively referring to his statements regarding threats as allegations. In addition, although the trial court might be correct that "doctors, lawyers, and other professionals . . . have been able to avoid these pitfalls," it failed to give weight to the evidence that Saul had already been detrimentally affected by those pitfalls, thus rendering him a candidate for SIJ relief.

In any event, the court did not—and cannot—explain how facing those "hardships" and "pitfalls," even with a possibility of overcoming them, is in Saul's best interests when Saul's evidence showed he would not have to face them at all in California.

CONCLUSION

For the reasons explained above, this court should grant review and reverse the Court of Appeal's judgment.

October 12, 2021

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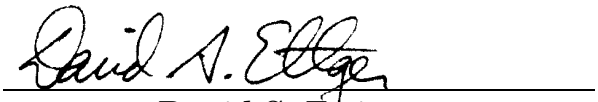
By: 
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

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Dated: October 12, 2021

David S. Ettinger