Supreme Court Case No. S271265

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

En Banc

Guardianship of S.H.R.

S.H.R.

Petitioner and Appellant,

vs.

JESUS RIVAS et al.

Real Parties in Interest.

After A Decision By The California Court Of Appeal Second Appellate District, Division One,
Case No. B308440

Appeal From Los Angeles County Superior Court
Honorable Scott J. Nord, Judge Pro Tempore
Case No. 19AVPB00310

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS BRIEF OF *BET TZEDEK* IN SUPPORT OF PETITIONER

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Under California Rules of Court, rule 8.520(f), Bet Tzedek respectfully requests permission to file the attached *amicus curiae* brief in support of Petitioner, S.H.R.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

Amicus Bet Tzedek has a clear and significant interest in this case and the important issues it presents. Since 1974, Bet Tzedek (Hebrew for "House of Justice") has advocated for low-income and vulnerable individuals across California. Consistent with this mission, Bet Tzedek provides free legal assistance in a wide variety of practice areas to eligible low-income residents of Southern California, regardless of their racial, religious, or ethnic background. Among other things, Bet Tzedek represents clients seeking the appointment of a legal guardian and, where applicable, in obtaining the predicate findings related to Special Immigrant Juvenile Status ("SIJS"). In addition to providing direct representation to hundreds of unaccompanied immigrant youth (and assisting in the filing of, on average over 150 applications for SIJ findings each year in California courts), Bet Tzedek provides California attorneys with training, mentoring, and technical assistance on the probate legal guardianship process and SIJS law to increase the capacity and quality of legal services committed to the population eligible for SIJS.

In light of its mission and work, *amicus* is intimately familiar with the extraordinary challenges young people aged 18–20 have faced in getting predicate SIJ findings in California courts despite the availability of SIJS under federal law to all eligible young people under the age of 21. To remedy some of these challenges, amicus supported and co-sponsored Assembly Bill 900 ("AB 900") (Levine), which provided crucial protection for immigrant youth in California by extending the jurisdiction of California probate courts to young persons aged 18–20, and aligning state and federal law. This legislation was essential to help meet the needs of a population of youth who have endured significant trauma, affording them a responsible advocate who is more accustomed to civil society here in California and thus invaluable in the youth's quest for safety, stability, and permanency—and providing them a path to predicate SIJ findings otherwise denied to them.

Amicus believes that the Superior Court and appellate panel of the Second District Court of Appeal in *Guardianship of S.H.R.* misinterpreted the way California courts must adjudicate

SIJ findings under section 155 of the Code of Civil Procedure in crucial respects that, if affirmed by this Court, will seriously impair the ability of vulnerable youth to obtain SIJ findings in California. As a champion of undocumented youth in California, *amicus* is concerned that such errors—if uncorrected—could have devastating consequences on children *amicus* actively serves on a daily basis—and in particular on youth aged 18–20, who the Legislature has expressly acknowledged can be uniquely vulnerable and in need of the protection SIJS affords. (See Stats. 2015, ch. 694, § 1, subd. (a)(6) [finding that an avenue for SIJS relief for these children "is particularly necessary in light of the vulnerability of this class of unaccompanied youth …."].)

Accordingly, *amicus* respectfully requests that this Court accept and file the attached *amicus* brief, which identifies several of these crucial errors, and seeks to provide the Court useful information, argument, and authority to inform its analysis of those issues and illuminate the consequences of affirming the Court of Appeal's incorrect and unduly restrictive understanding of SIJS.

DATED: March 21, 2022 MUNGER, TOLLES & OLSON LLP

By: /s/ *J. Max Rosen*

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AMICUS CURIAE BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Bet Tzedek has extensive experience helping vulnerable children in California seek Special Immigrant Juvenile ("SIJ") findings from California courts—findings that allow those children to escape from the neglect, abuse, and abandonment they experienced in their countries of origin. *Amicus* regularly works with 150 or more children a year to seek such SIJ findings, including, currently, over 400 such children over the age of 18 who have fled devastating family situations. *Amicus* co-sponsored Assembly Bill 900 ("AB 900") (Levine), a statute that provided crucial protection for immigrant youth by extending the jurisdiction of California probate courts to young persons aged 18–20, thus ensuring California courts can meet the needs of a population of vulnerable youth who have endured significant trauma and desperately need the protection Special Immigrant Juvenile Status ("SIJS") can provide.

Because of *amicus*'s extensive experience, *amicus* is acutely aware of the profound significance this Court's resolution of this case will have to the well-being of these children. *Amicus*

respectfully submits that the Superior Court and Court of Appeal decisions in this case endorse several legal positions that—if not firmly rejected by this Court—could result in the denial of numerous meritorious applications for SIJ findings by vulnerable children in California, including from unaccompanied youth aged 18–20 whom the California Legislature has expressly sought to protect. (See Stats. 2015, ch. 694, § 1, subd. (a)(6).)

In this brief, *amicus* highlights three legal issues implicated in this case that are especially significant and, if not properly resolved, could have far-reaching consequences for unaccompanied youth.

First, the Superior Court and Court of Appeal erroneously imposed an unduly rigorous evidentiary burden on petitioner S.H.R. that has no basis in Code of Civil Procedure section 155 and that this Court should reject. (See *Guardianship of S.H.R.* (2021) 68 Cal.App.5th 563, 569 (*Guardianship of S.H.R.*).) That is the case regardless of whether this Court adopts the "substantial evidence" approach of *O.C. v. Superior Court* (2019) 44 Cal.App.5th 76, 83 (*O.C.*), or a preponderance of the evidence

standard as urged by the Answering Brief. As the D.C. Court of Appeal explained in *B.R.L.F. v. Sarceno Zuniga* (D.C. 2019) 200 A.3d 770, 776–77 (*B.R.L.F.*), even under a preponderance standard, a superior court adjudicating a petition for SIJ findings should consider the profound obstacles an unaccompanied youth faces in marshalling evidence in support of those findings, as well as the grave consequences to the child of an erroneous denial of that petition—namely, the possibility the child will be deported and sent back to an environment where she faced abuse, abandonment, or neglect. Given these considerations, "all the relevant factors must be understood in the light most favorable to determinations of neglect and abandonment, with an eye to the practicalities of the situation without excessive adherence to standards and interpretations that might normally apply in strictly local contexts." (*Id.* at p. 777.) Neither the Court of Appeal nor the Superior Court adhered to these principles, regardless of what evidentiary burden they nominally placed on S.H.R.—and this Court should reverse on that basis alone. (See *id.* at pp. 776–77 [applying a preponderance of the evidence

standard (although noting that federal law required no specific evidentiary burden for state court SIJ findings) but still reversing the superior court for applying too onerous a standard in reviewing the evidence in support of the petition].)

Second, the lower courts erred in assessing the "reunification" prong of the Section 155 analysis. The Court of Appeal's decision may well be read to suggest that even if an 18-year old SIJS applicant was clearly neglected or abused for years at a young age, she must show she will face neglect or abuse upon return to her country of origin in order to establish that reunification would not be "viable." (See *Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 581.) In the Court of Appeal's view, S.H.R. could not make that showing because, although he may have been neglected or abused by being forced to perform years of exhausting child labor, he is now 18 and his parents could reasonably expect him to work. (See *id.*)

This analysis of the reunification prong is fundamentally wrong, and could have profoundly negative consequences for 18–20 year olds who come to the United States after years of

neglect, abandonment, or abuse. The Court of Appeal's analysis misapprehends the question presented under Section 155(b)(1)(B)—which is whether reunification is not "viable" because of *past* neglect, abandonment, or abuse, *not* whether a now-18-year-old petitioner can prove that she will endure *future* abuse or neglect on return to her home country—nor whether the same neglect or abuse would have been improper if first experienced over the age of majority. (See, e.g., *J.U. v. J.C.P.C.* (D.C. 2018) 176 A.3d 136, 140 (*J.U.*); *id.* at p. 143 [inquiry for neglect or abandonment requires examining the "entire history of the relationship between the minor and the parent"]; *E.P.L. v. J.L-A.* (D.C. 2018) 190 A.3d 1002, 1006–1007 (*E.P.L.*) [viability of reunification inquiry "calls for a realistic look at the facts on the ground and a focus on the parent's past conduct"].) Further, the Court of Appeal's analysis flouts the Legislature's finding that 18 to 20 year olds who were abused, neglected or abandoned as children are similarly situated to their *younger* counterparts when seeking SIJ findings, and should not be viewed as traditional "adults" in light of that neglect, abandonment, or

abuse. (Stats. 2015, ch. 694, § 1, subd. (a)(6).) Under the proper standard, petitioners like S.H.R., who faced years of neglect, abuse, or abandonment in their countries of origin, should not be forced to return to the same parents who neglected, abused, or abandoned them merely because they turned 18 prior to petitioning for SIJ findings.

Third, although it is not crucial to the disposition of this case, the panel's dicta indicating that "abandonment" requires a showing that a parent "intended to abandon" a petitioner (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 563) is erroneous, and creates a significant risk—already apparent from *amici*'s experience in multiple superior court proceedings in the wake of the Court of Appeal's decision—that meritorious applications for SIJ findings will be rejected if this Court does not clarify the standard. In fact, numerous California statutes addressing abandonment—for example, Family Code section 3402, subdivision (a), Welfare & Institutions Code section 300, subdivision (g), and Family Code section 7822—make clear that, although intent can be relevant to a finding of

abandonment in certain contexts, it is not a universal requirement. This Court should clarify as much—or at a minimum make clear that it is not endorsing the Court of Appeal's view that intent is required for a finding of abandonment when a petitioner seeks SIJ findings on that basis.

If not corrected, each of these erroneous legal rules could result in the deportation of countless youth, not because their SIJS applications lacked merit, but because a California court applied too onerous an evidentiary standard or imposed barriers to SIJ findings that are inconsistent with the letter and spirit of SIJS. For these reasons and those set forth below, *amicus curiae* respectfully submits that this Court should correct these rulings and reverse the decision of the Court of Appeal.

ARGUMENT

I. The Evidentiary Burden Endorsed By the Panel Ignores the Real-World Challenges SIJS Applicants Face

Both the Petitioner's briefs and the Answering Brief on the Merits devote significant attention to the precise evidentiary standard applied under Section 155, focusing on the language in the decision below—which held that an applicant must prove

entitlement to SIJ findings by "a preponderance of the evidence" (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 569)—and the differing language articulated by the Fourth District in *O.C.*, *supra*, 44 Cal.App.5th at p. 83, identifying a "substantial evidence" burden. *Amicus* submits that the Fourth District's standard captures more accurately the intent of Section 155 and, indeed, SIJS itself. But even if this Court were persuaded to endorse a preponderance standard, this Court should reject the rigorous and scrutinizing approach the lower courts in this case took to reviewing S.H.R.'s evidence in support of his petition for SIJ findings. The Court should instead clarify that superior courts applying even a preponderance standard to adjudicate petitions for SIJ findings should do so in a manner that acknowledges the significant evidentiary hurdles that SIJS applicants face, and accordingly resolves all doubts in favor of granting such findings.

Precisely such a standard has been cogently and thoughtfully articulated by the D.C. Court of Appeal. In *B.R.L.F.*, the D.C. Court of Appeal first held that, absent

legislative specification to the contrary (which Petitioner correctly argues Section 155 provides here in California), trial courts in D.C. "generally apply the preponderance standard," and thus held that that standard applies to applications for SIJ findings in D.C. (*B.R.L.F.*, *supra*, 200 A.3d at pp. 775–76 (quoting *In re J.O.* (D.C. 2018) 176 A.3d 144, 153).) Nonetheless, the court *reversed* the trial court's denial of the petitioner's application for SIJ findings, reasoning that because of the unique challenges an application for such findings presents—namely, the difficulties the applicant faces in proving entitlement to those findings and the profound and unacceptable consequences of an erroneous denial—courts should assess "all the relevant factors . . . in the light most favorable to determinations of neglect and abandonment, with an eye to the practicalities of the situation without excessive adherence to standards and interpretations that might normally apply in strictly local contexts." (*B.L.R.F.*, *supra*, 200 A.3d at p. 777 (first quoting *In re Dany G.* (Md.Ct.App. 2015) 223 Md.App. 707, 117 A.3d 650, 655; second quoting *In re J.A.* (Md.Ct.Spec.App., Oct. 30, 2017, No. 03-

C-16-009938) 2017 WL 4876779, at *4 (*In re J.A.*) (footnotes omitted)). The full language is instructive:

> We have previously noted the difficulties that [adjudicating an application for SIJ findings] imposes upon a state judge. Such proceedings, as in this case, are normally unopposed and involve factual questions in the home country thousands of miles away. Furthermore, the state court is asked to make the determination in a context quite foreign to its normal responsibilities—indeed, to make a determination informed by the realization that, when refusing to make the findings required for SIJ status, the court's decision is, in effect, a negative immigration decision.
>
> Accordingly, when determining whether a petitioner has established a prima facie case, the trial court must recognize that Congress to some extent has put its proverbial thumb on the scale favoring SIJS status. "The purpose of the law is to permit abused, neglected, or abandoned children to remain in this country." And, in establishing the requirements for SIJS status, Congress knew that there would be proof problems, *i.e.,* "that those seeking the status would have limited abilities to corroborate testimony with additional evidence." For that reason, a trial court's imposition of "insurmountable evidentiary burdens of production or persuasion" on an SIJ petitioner would be "inconsistent with the intent of the Congress."

(*Id.* at pp. 776–77.)

In a concurrence, Judge Easterly further explained that trial courts should ordinarily make decisions "favorable to the SIJS petitioner" in "close cases." (*Id.* at p. 781 (Easterly, A.J.,

concurring).) If they fail to do so, she warned, they might "impose narrow formulations of neglect and abandonment at odds with the ultimate judgments that federal immigration authorities would make if an SIJS petition had been approved for their consideration." (*Ibid.*)

This approach contrasts powerfully with that taken by the Superior Court and Court of Appeal in this case, whatever the nominal evidentiary burden. Faced with the typical situation in which the application for SIJ findings was "unopposed and involve[d] factual questions in the home country thousands of miles away" (*id.* at p. 776 (Maj. Op.)), the Superior Court drew inference after inference against S.H.R. It found that "*nothing* in S.H.R.'s Petition or Declaration supports any finding that he was abandoned in any respect," even though multiple facts in his declaration—including that he was taken out of school and forced to work at an early age—supported a finding that S.H.R.'s parents left him without provision for support, which constitutes

abandonment under express language of the Family Code.[2] (Ruling at p. 167, emphasis added.) Similarly, in finding there was no neglect, the Superior Court credited certain facts, such as S.H.R.'s parents contacting the police about the gang harassment, over other facts that evinced his parents' failure to adequately protect and support him. (Ruling at p. 168.)

The Court of Appeal, in turn, acknowledged that the trial court faced close evidentiary questions and nonetheless chose to resolve them against S.H.R.—a choice the Court of Appeal erroneously found acceptable and that does not remotely place a "thumb on the scale" favoring the applicant. (*B.L.R.F.*, *supra*, 200 A.3d at pp. 776–77.) Specifically, the Court of Appeal reasoned that "[e]ven if a court could reasonably infer parental neglect from such evidence, the court could also reasonably infer that, because his parents were impoverished, allowing S.H.R. to earn money by helping his grandfather in the fields during summers was, under the circumstances, a reasonable parental decision

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[2] See Family Code § 3402(a) ["'Abandoned' means left without provision for reasonable and necessary care or supervision."]).

that enabled the family to provide for S.H.R. without interfering with his education." (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 578.) This analysis demonstrates the opposite of the standard adopted by the D.C. Court of Appeal: instead of deciding in S.H.R.'s favor where the evidence presented, at a minimum, two possible inferences (in favor of or against the petitioner), the Court of Appeal affirmed the superior court's choice to rule *against* S.H.R. That is obviously not viewing the evidence "in the light most favorable to determinations of neglect and abandonment." (*B.L.R.F.*, *supra*, 200 A.3d at p. 777.) The Court of Appeal even acknowledged that the Superior Court had effectively acted as the adverse party in S.H.R.'s case, stating that "nothing in S.H.R.'s declaration" expressly rebutted the particular inferences the court chose to draw against S.H.R. (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at pp. 581–82)—illustrating the problem that when a petition for SIJ findings is "unopposed" a court may feel compelled to step into precisely that adversarial role (*B.R.L.F.*, *supra*, 200 A.3d at p. 776 (Maj. Op.); compare *id.* at pp. 780–81 (Easterly, A.J., concurring) [identifying

a gap in the evidentiary record and noting that the trial court erred in drawing inferences against the applicant when faced with that gap].)

Stated simply, under the D.C. Court of Appeals' standard, the Second District would have been obligated to reverse the trial court's fact-finding here. The question for this Court is not solely, then, whether this Court endorses the Second District or the Fourth District's evidentiary standard (or neither). Even if the Court were to adopt a preponderance standard, it should instruct superior courts to look at the evidence "in the light most favorable to determinations of neglect and abandonment, with an eye to the practicalities of the situation …." (*B.L.R.F.*, *supra*, 200 A.3d at p. 777). Adoption of that vital principle requires reversal.

To be clear, it is not just decisions by other state courts that support a more lenient standard to adjudicating petitions for SIJ findings. The rigorous standard applied by the lower courts in this case is also wholly inconsistent with Section 155 and the equitable considerations it reflects because it, *first*, ignores the practical limitations applicants face in marshalling evidence and,

second, disregards the grave consequences of erroneously denying an application for SIJ findings.

A. The Court of Appeal's Approach Is Inconsistent With The Evidentiary Framework The Legislature Created in Section 155

First, the rigorous standard applied by the lower courts in this case is wholly inconsistent with Section 155 and its recognition that a petitioner for SIJ findings need support that application "solely" with a declaration. (Code Civ. Proc., § 155, subd. (b)(1).)

As D.C. and Maryland courts have observed, in creating SIJS, "Congress knew that there would be proof problems, *i.e.*, 'that those seeking the status would have limited abilities to corroborate testimony with additional evidence.'" (*B.R.L.F.*, *supra*, 200 A.3d at pp. 776–77 [quoting *In re J.A.*, *supra*, 2017 WL 4876779, at p. *4].) Such problems are obvious and inevitable. As *amicus* well understands, SIJS applicants are, by definition, children who have traveled hundreds or thousands of miles after being abandoned, abused, or neglected in their countries of origin. Many are poor, do not speak English, or are

unrepresented by counsel.[3] Many such children cannot get an adult to offer evidence to corroborate their requested findings—or the adults with evidence are the same ones who abused, abandoned or neglected them. (See, e.g., *B.R.L.F.*, *supra*, 200 A.3d at p. 780 (Easterly, A.J., concurring ["[the applicant's] mother did not respond to appellee's petition, let alone testify at the hearing, and thus a remand for further findings as to her motivation, straightforward or mixed, could result only in speculation"]).) Every additional evidentiary hurdle placed in a child's path increases the likelihood that she will fail to prove entitlement to findings she desperately needs.

The California legislature recognized this problem in adopting Code of Civil Procedure section 155, stating that superior courts "shall" grant SIJ findings whenever "there is evidence" to support them. (Code Civ. Proc., § 155, subd. (b)(1).) The legislature expressly allowed the evidence in support of SIJ

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[3] Although organizations like Bet Tzedek and the numerous *amici* in this case who have written to urge reversal endeavor to provide these children representation, certainly the law cannot assume it will always be available.

findings to "consist solely of . . . a declaration by the child who is the subject of the petition," even specifically adding the word "solely" by amendment in 2016. (*Ibid.*)

In other words, the legislature has repeatedly amended Section 155 to embrace a modest evidentiary burden for petitions for SIJ findings, precisely to ensure that the "practicalities of the situation" are considered—i.e. the limitations a child seeking SIJ findings necessarily faces in providing evidence to support her petition. (*B.L.R.F.*, *supra*, 200 A.3d at pp. 776–77.)

The Court of Appeal's decision in this case—including, but not limited to, its embrace of a "preponderance" standard—has no grounding in the text of Section 155 or the approach it requires, for a simple reason: Under the Court of Appeal's standard, no petitioner could ever risk submitting only a declaration, even though Section 155 expressly authorizes her to do so. A declaration will rarely anticipate every question the court may have or ensure that adverse inferences cannot be drawn. Indeed, how could it? Putting aside the difficulty a child would face in anticipating every potential factual question the court might

have, a child cannot necessarily declare to her parent's motivations or other facts that would merit a hearsay objection in an ordinary civil case. (Cf. *B.R.L.F.*, *supra*, 200 A.3d at pp. 776–77.)

The effect of the Court of Appeal's decision, then, is clear: Petitioners will be forced to submit additional evidence beyond their declaration, *if they even can*. Petitioners will also have to request a hearing at which they may be required at a tender age to relive their trauma in court.

This case illustrates the point. As noted, the Court of Appeal observed that "nothing in [S.H.R.'s] declaration" rebutted the inferences the Superior Court, or the panel, chose to draw—a scenario that is not remotely surprising when the only evidence a petitioner submits is her own declaration. (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 581.) That is the opposite of what the California legislature intended when it allowed SIJS petitioners to submit "solely" their own declaration in support of their application.

If not corrected, the rigorous evidentiary standard adopted by the panel will ensure that many SIJS petitioners simply will not be able to establish their entitlement to findings. Illustrating the point, the evidentiary standard was outcome-determinative in this case. As noted, the panel acknowledged that certain statements in S.H.R.'s declaration could support a finding of neglect—but also might support an inference of the absence of neglect. (See, e.g., *Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 578.) Clearly, "there [was] evidence" in the declaration in favor of SIJ findings, or the question would not have been close. (See Code Civ. Proc., § 155 subd. (b)(1).)

B. **A Lesser Evidentiary Burden Is Appropriate Because the Consequences of an Erroneous Denial are Grave**

The Court of Appeal's rigorous evidentiary standard is also problematic because it fails to consider the implications of erroneously denying a meritorious petition for SIJ findings. In short, there is very little risk associated with a false positive, but the consequences of a false negative finding are catastrophic.

As an initial matter, *amicus* has no reason to believe that children who are not genuinely entitled to SIJ findings because of abuse, abandonment, or neglect routinely seek them in California's courts—that has not remotely been *amicus*'s experience. Nevertheless, it is also the case that the societal consequences of a superior court's erroneously *granting* petitions for SIJ findings—to the degree that were to occur—are limited: the risk is that a non-citizen child is allowed to remain and, in all probability, become a contributing member of society. By contrast, an erroneous denial of an application for SIJ findings will result in the deportation of a child who was in fact abandoned, abused, or neglected in her country of origin. (See, e.g., *O.C.*, *supra*, 44 Cal.App.5th at p. 85 ["The failure to issue the SIJ findings under state law prejudices O.C.'s ability to seek SIJ status from USCIS."]; *J.U.*, *supra*, 176 A.3d at p. 139, fn. 6 ["While the ultimate decision for SIJ status is with the federal government, it might be observed that the refusal by a juvenile court to make a requisite finding can have the effect of leaving

the minor open to deportation, thus making it a significant decision in itself."].) That is a grave consequence indeed.

The Court of Appeal, and the Answering Brief, suggest that USCIS might deny California-based SIJS applications if the substantial evidence standard urged by Petitioner were adopted—and indeed, that is the only equitable argument presented for a higher evidentiary burden. (See Answering Br. at p. 36; *Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 816 [holding that "a substantial evidence standard would not satisfy the federal requirement"].) Even if this argument were correct, it does not justify affirming the Court of Appeal's scrutinizing approach, and at most counsels for the preponderance standard articulated by the D.C. Court of Appeal.

Regardless, neither the Court of Appeal nor the Answering Brief provides any basis to believe USCIS will deny any SIJS application on the basis of this speculative concern—or that USCIS legally could do so. USCIS's policy manual is clear that the state court—not the federal government—is responsible for determining whether a SIJS petitioner was abused, neglected or

abandoned, and that USCIS defers to the state court's determination. (*C.J.L.G. v. Barr* (9th Cir. 2019) (en banc) 923 F.3d 622, 626 [citing Policy Manual].) USCIS may deny relief only "if it determines that the state court order had no *reasonable* factual basis"—and that requirement would clearly be met if the superior court found substantial evidence to support SIJ findings. (*Ibid.*, italics added.) The D.C. Court of Appeal's approach is again illustrative: although the court ultimately adopted a preponderance of the evidence standard, it did so only after noting that "[t]he SIJS statute does not announce a federal standard of proof, and '[t]here is nothing in' [USCIS] guidance that should be construed as instructing juvenile courts on how to apply their own state law." (*B.R.L.F.*, *supra*, 200 A.3d at pp. 775–76 (internal quotation marks omitted.))

Reyes v. Cissna (4th Cir. 2018) 737 F.App'x 140, 146 (*Reyes*), the *only* case the Answering Brief can identify in which the federal government rejected SIJS because of a purportedly inadequate state-court determination, only proves the point. That case does not suggest USCIS will (let alone may legally)

deny SIJS applications because a state adopted a particular standard of proof. In *Reyes*, the state court "never made any 'specific factual findings regarding the basis for finding abuse, neglect, or abandonment'" *at all*. (*Id.* at p. 144.) In fact, the state court had not even *received* any evidence to support its findings—the only evidentiary support was in the petitioner's affidavits, which were sent only to USCIS. (*Ibid.*) In contrast, under the standard contemplated by Section 155, the court still must make specific factual conclusions setting forth the evidence in the petitioner's declaration that supports the court's determination of abuse, abandonment or neglect. (Code Civ. Proc., § 155, subd. (b)(2).) *Reyes,* therefore, in no way suggests that USCIS will peer into a California state court's fact-finding process—in fact, it says the opposite. (737 F.App'x at p. 146 [noting that USCIS "'relies on the expertise of the juvenile court' to make its consent determination"].)

II. The Panel's Viability Analysis Will Jeopardize the Ability of 18–20 Year Olds to Successfully Apply for SIJ Findings

The Second District's decision is also profoundly flawed in its approach to the vital determination superior courts must make, under Section 155, subdivision (b)(1)(B), whether "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." The Court of Appeal's approach to that inquiry risks fundamentally undermining the ability of eligible 18–20-year-olds to get SIJ findings from California courts, in sharp contravention of the Legislature's intent in passing AB 900.

Understanding the Court of Appeal's error, and how it will affect the petitions of countless 18–20-year olds, requires first carefully parsing the Court of Appeal's reasoning—which superior courts have already begun to do across the state and will continue to do if the decision is affirmed. For purposes of its inquiry, the Court of Appeal assumed that S.H.R. had suffered neglect as a child when, from ages 10–15, he endured five years

of child labor under exhausting conditions that plainly violated California law. (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 581; Opening Br. at pp. 17–18 [detailing these facts].) Nonetheless, the panel held that "even if" taking S.H.R. out of school constituted neglect when S.H.R. was 10–15, that "would not render reunification with his parents unworkable *now*." (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 582, italics added.) And that was so in part because S.H.R. is now 18, and thus no longer "need[s] the [same] level of support" and can lawfully contribute to the family's income. (*Ibid.*) In other words: because the same conduct that constituted neglect when S.H.R. was 10 might *not* constitute neglect should he return to El Salvador, the Court of Appeal believed S.H.R. did not prove the non-viability of reunification with his parents.

Defending this approach, the Answering Brief spends significant time addressing a question this Court need not answer: precisely what conduct constitutes neglect, abuse, or abandonment for an 18-year old in a foreign country who experiences that conduct for the first time as an 18-year old.

(Answering Br. at pp. 63–64 ["leaving an 18-year-old (or even a younger teen) at home alone is typical in California, and nobody would call it neglect"].) But that is not the right question, and the Answering Brief's focus on it only illustrates the Court of Appeal's similar error. The true question is whether the effects of the years of neglect S.H.R. experienced before turning 18 (when he endured clear neglect, abuse, or abandonment) render reunification non-viable—not whether a hypothetical 18-year old could claim that their parent's failure to provide financial support alone qualifies them for SIJS now.

That is so for two interlocking reasons, which together illuminate the Court of Appeal's error. *First*, the question under Section 155(b)(1)(B) is *not* whether, should a child return to her home country, she will in the future face neglect, abuse or abandonment; it is, as other states' courts have explained, "whether reunification … is not 'viable' due to [the earlier neglect, abandonment, or abuse]." (*J.U.*, *supra*, 176 A.3d at p. 140; *id.* at p. 143.) That inquiry is not primarily forward-looking; instead, it "calls for a realistic look at the facts on the

ground and a focus on the parent's past conduct"—i.e., a focus on the concrete, non-hypothetical neglect, abandonment, or abuse that led a child to travel hundreds of miles to the United States. (*E.P.L.*, *supra*, 190 A.3d at pp. 1006–1007; see also *J.U.*, *supra*, 176 A.3d at pp. 140, 143 [inquiry calls for "consideration of the entire history of the relationship between the minor and the parent"]; accord *Kitoko v. Salomao* (Vt. 2019) 215 A.3d 698, 708 [court must "assess the impact of the history of the parent's past conduct on the viability, i.e., the workability or practicability of a forced reunification"].)

The panel purported to apply this standard, but did not actually do so. Instead, the panel's analysis focused solely on whether S.H.R.'s parents would *today* insist he work in the fields or take him out of school without assessing whether those past actions might affect S.H.R. and make it impracticable for him to now be reunited with parents who neglected him for the better part of a decade. (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at pp. 581–582 ["Indeed, the fact that he stopped working in the fields when he was 15 years old and subsequently worked at a car

wash indicates that his parents would not insist that he work as a farm laborer again."]; cf. *J.U.*, *supra*, 176 A.3d at p. 143 ["At bottom, what is at issue here is not 'reunification' with the father but rather initial 'unification' itself. . . . abandonment is judged by the lifelong history of C.J.P.U. with his father and the bearing of that history on the prospects if C.J.P.U. were to be returned to the immediate custody of the father in the home country."].) Framing the question properly requires reversal of the Court of Appeal decision.

Second, and relatedly, the panel ignored the relevance of past neglect by treating S.H.R. as if he was simply an 18-year old "adult," notwithstanding his prior treatment. Specifically, the panel noted that "there is nothing in his declaration to indicate that he, 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." (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at p. 582.) This analysis ignores the effect of past neglect: it treats S.H.R., an 18-year old who experienced years of neglect *before* turning 18, identically to an 18-year old who did not experience any such

trauma. And yet in enacting AB 900, the Legislature specifically emphasized the psychological impacts of past neglect on 18 to 20 year old petitioners, noting that they remain vulnerable and need "a custodial relationship with a responsible adult as they adjust to a new cultural context, language, and education system, and recover from the trauma of abuse, neglect, or abandonment" (Stats. 2015, ch. 694, § 1, subd. (a)(6).) The Legislature also found that as a result of past abuse, neglect, or abandonment, "many unaccompanied immigrant youth between 18 and 21 years of age face circumstances identical to those faced by their younger counterparts." (Stats. 2015, ch. 694, § 1, subd. (a)(5).)

To treat a child who experiences neglect for years *before* turning 18 exactly the same as an ordinary 18-year old who has never experienced that trauma contravenes the obvious intent of the Legislature. And this case illustrates that concern: S.H.R. worked for five years in exhausting and, in the panel's own estimation, potentially illegal conditions; was pulled out of school in ninth grade; and fled to the United States when his parents were repeatedly unable to protect him from gang violence.

Precisely because of this history of neglect, his cousin now "provid[es] him with shelter, food, and healthcare," and "ensures" that he "continue his education." (Opening Br. at p. 61 [citations cleaned up].) All of this progress would be jeopardized if S.H.R. is forced to return to El Salvador. To view him as merely an "adult," notwithstanding the years of neglect and abuse he experienced, would be to render AB 900 a dead letter.

The Court of Appeal's approach to the viability of reunification analysis is thus incorrect—and this Court should hold as much. Crucially, however, that standard is not only wrong, but also unworkable. The Court of Appeal's approach to the reunification prong forces courts to focus on future hypotheticals, rather than on concrete evidence of past neglect, abuse, or abandonment that led the child to come to the United States—rendering it a difficult and inherently speculative inquiry. And the Court of Appeal's approach places inordinate importance on the age at which a child applies for SIJ findings—an arbitrary fact that has no relevance under California or federal law and would create absurd and inequitable results. For

example, had S.H.R. been able to file a petition for SIJ findings right when he arrived in the United States at the age of 16, the Court of Appeal's reasoning would fall apart. Unfortunately for him, he spent over five months in a shelter operated by the federal Office of Refugee Resettlement. (See Opening Br. at p. 16.) As a result of that delay—a circumstance *amicus* has seen time and again—S.H.R. filed his petition for SIJ findings at the age of 18 instead, a fact the Court of Appeal viewed as dispositive to its analysis of the viability of reunification now. Surely it cannot be that such a delay transforms the merits of his application—fundamentally altering how the court views the years of neglect S.H.R. experienced. That is not—and should not be—the law.

III. The Court of Appeal's Dicta That Abandonment Requires Intent Is Wrong, And This Court Should Reject It

Finally, the Court of Appeal briefly, and incorrectly, suggested that S.H.R. could not prove abandonment because there was no "evidence that either [of his] parent[s] ever deserted *or intended to* abandon S.H.R." (*Guardianship of S.H.R.*, *supra*,

68 Cal.App.5th at p. 577, italics added.) It is not clear precisely what the Court of Appeal intended to suggest with this sentence: it could be read as a narrow (albeit incorrect) statement about the facts of *Guardianship of S.H.R.* itself, or as a broad suggestion that, to prove abandonment under Section 155 (and California law), a child must always show that a parent *intended* to abandon her.

Were this Court simply to conclude S.H.R. showed his parents *neglected* him, there might be no need to parse this dicta. Nevertheless, *Amicus* calls attention to this statement not because the Court would ordinarily need to address it, but because it has created a ripple effect in superior courts across the state. In the short period of time since the Second District published *Guardianship of S.H.R.*, *amicus* is aware of multiple judges who have asked about the significance of the Second District's analysis of the intent requirement for abandonment in contexts far afield of the facts of *Guardianship of S.H.R.*, including cases where one or both of the petitioner's parents are deceased. In other words, the Court of Appeal's single sentence of

ill-considered dicta may yet have (and has already had) wide-ranging consequences.

Amicus thus urges this Court to, at a minimum, clarify that any decision in this case (affirming or reversing the Court of Appeal) does not endorse the position that intent to abandon by a parent is in all cases necessary for a showing of abandonment under California law and/or Section 155. There is no question that abandonment does not require, in all cases, an intent to abandon on the part of a parent. (See Opening Br. at pp. 54-55.) The California code affirms as much in at least three separate provisions: Family Code section 3402, subdivision (a), Welfare & Institutions Code section 300, subdivision (g), and Family Code section 7822.

First, Family Code section 3402, subdivision (a) defines abandonment simply as follows: "'Abandoned' means left without provision for reasonable and necessary care or supervision." There is no reference to the parent's intent, nor any requirement that the parents acted willfully (i.e., with a culpable mens rea).

Second, Welfare & Institutions Code section 300, which specifies when children may be adjudged a dependent of the Court, echoes Family Code § 3402 in providing that a dependency order can issue if "[t]he child has been left without any provision for support." (*Id.*, § 300, subd. (g).); cf. *Sara M. v. Superior Court* (2005) 36 Cal.4th 998 (*Sara M.*) [referring to section 300 as codifying an abandonment inquiry].)[4] While section 300, subdivision (g) does not expressly use the word abandonment, it

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[4] In *Sara M.*, *supra*, 36 Cal.4th 998, this Court suggested that, although the word abandonment does not appear in Section 300, subdivision (g), that code provision is effectively addressing an adjudication of abandonment. In that case, this Court addressed the circumstances under which a superior court may schedule a hearing to terminate reunification services pursuant to Welf. & Inst. Code § 366.21. The mother argued (and the Court of Appeal had held) that this can be done only if there had been a "prior adjudication of abandonment . . . under section 300, subdivision (g)." (*Sara M.*, *supra*, 36 Cal.4th at p. 1011.)

Discussing a legislative report on which the mother relied, this Court reversed, explaining: "The author of the report may simply have considered allowing six months to pass without contacting or visiting a child to constitute a form of abandonment. . . . '[A] parent can abandon a child whether that parent's whereabouts is known or unknown. Either way, the effect on the child is the same.'" (*Id.* at p. 1016, [quoting Seiser et al., Cal. Juvenile Courts Practice and Procedure (2005 ed.) § 2.152[4][c], pp. 2–293].)

makes clear that the same conduct defined as abandonment under Family Code § 3402 can be severe enough to require judicial intervention absent any requirement of parental intent, and thus informs the meaning of that Family Code section and the word "abandoned" defined within it. Like section 3402, section 300, sudbivision (g) makes no reference to the parent's intent, much less any requirement of willfulness.

Third, Family Code section 7822 again repudiates the Court of Appeal's suggestion in this case that a parent must "intend[] to abandon" a child for conduct to rise to the level of abandonment. (*Guardianship of S.H.R.*, *supra*, 68 Cal.App.5th at pp. 816–17.) This code section provides that "a proceeding under this part" (i.e., a proceeding to have "a minor child declared free from the custody and control of either or both parents," see Family Code § 7802) "may be brought *if any* of the following occur":

> (1) The child has been left without provision for the child's identification by the child's parent or parents.
>
> (2) The child has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the

> child's support, or without communication from the parent or parents, *with the intent on the part of the parent or parents to abandon the child.*
>
> (3) One parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, *with the intent on the part of the parent to abandon the child.*

(Family Code, § 7822, subd. (a), italics added.) This language is telling: the sub-parts generally show that some forms of abandonment (including when a child is left without identification) do not require an inquiry into parental intent, whereas others do.

The case cited by the Court of Appeal to support its passing dicta, *In re Guardianship of Rutherford* (1961) 188 Cal.App.2d 202, 206 (*Rutherford*), does not in fact support the proposition that S.H.R. had to produce evidence his parents "intended to abandon" him. That case arose under former Probate Code section 1409, a provision addressing termination of parental rights—a context in which intent to abandon is relevant and often disputed. Unlike the statutes at issue here, Probate Code section 1409 also expressly allowed termination only when a parent "knowingly or wilfully abandons or, having the ability so

to do, fails to maintain his minor child." (See *Rutherford*, *supra*, 188 Cal.App.2d at p. 273.) And, in any event, it was repealed in 1979. (*Conservatorship of Coffey* (1986) 186 Cal.App.3d 1431, 1440 fn. 4 [citing Stats. 1979, ch. 726, p. 2335, § 3, operative Jan. 1, 1981].)

As the parental rights termination context makes clear, a parent's intent to abandon a child *may* be relevant in certain contexts. (See, e.g., Family Code, § 7822, subd. (a)(2) [where a finding of abandonment is based on the fact that "[t]he child has been left by both parents or the sole parent in the care and custody of another person for a period of six months," intent may be relevant to ask whether the parent intends to abandon the child—or by contrast, intends to reunite with the child.].) But it is clear that abandonment may—and often does—happen irrespective of the parent's intent, resulting in profound and devastating consequences to a child. This Court should repudiate the Court of Appeal's confusing dicta to the contrary, lest trial courts rely on it to deny meritorious applications for SIJ findings across the state.

CONCLUSION

Each of the above three issues—if erroneously decided—could jeopardize the petitions of numerous unaccompanied youth who come to California, and its courts, for the protection SIJS was designed to provide. *Amicus* respectfully asks that this Court correct these errors in the Superior Court and Court of Appeal's decisions, and supports the Petitioner's request for relief.

DATED: March 21, 2022 MUNGER, TOLLES & OLSON LLP

By: /s/ *J. Max Rosen*

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204, subd. (c)(1), I hereby certify that, according to the word count feature of the software used, this Brief contains 7,613 words, exclusive of materials not required to be counted under California Rules of Court, rule 8.520, subd. (c)(3) on the word count of the computer program used to prepare this brief.

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Guardianship of S.H.R.
Court of Appeal Case No.: B308440
California Supreme Court Case No.: S271265

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, 27th Floor, San Francisco, CA 94105.

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Executed on March 21, 2022, at San Francisco, California.

Mark Roberts

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STATE OF CALIFORNIA
Supreme Court of California

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3/21/2022

Date

/s/J. Max Rosen

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