Case No. S271265

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
Appeal from the Hon. Scott J. Nord Judge Pro Temp., Case No. 19AVPB00310

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF KIDS IN NEED OF DEFENSE (KIND) IN SUPPORT OF PETITIONER; PROPOSED *AMICUS CURIAE* BRIEF OF KIDS IN NEED OF DEFENSE (KIND) IN SUPPORT OF PETITIONER

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF KIDS IN NEED OF DEFENSE (KIND) IN SUPPORT OF PETITIONER

Pursuant to California Rules of Court, rule 8.520(f), Latham & Watkins LLP requests leave to file the attached amicus curiae brief on behalf of Kids in Need of Defense ("KIND") in support of Petitioner S.H.R.'s efforts to overturn the lower court's decision to deny findings related to Special Immigrant Juvenile Status ("SIJS").

KIND is a national nonprofit organization providing free legal services to immigrant children who reach the United States unaccompanied by or separated from a parent or legal guardian, and who face removal proceedings in immigration court. Two of KIND's ten field offices are located in California, serving children in the areas of Los Angeles, San Francisco, and Fresno. Since 2009, KIND has received referrals for over 29,000 children from 78 countries, serving children in partnership with over 700 law firms, corporations, law schools, and bar associations. KIND also advocates for laws, policies, and practices to enhance protections for unaccompanied immigrant children in the United States, promotes protection of children in countries of origin and transit countries, and works to address the root causes of child migration from Central America.

SIJS is a protective status available under federal law to children under 21 who have been abused, neglected, abandoned, or similarly maltreated, and who must demonstrate their eligibility by obtaining certain judicial determinations from a

state juvenile court. Since the start of 2016, over 4,200 children represented by KIND staff or pro bono attorneys have been granted SIJS by the United States Citizenship and Immigration Services ("USCIS"). In these cases, state juvenile courts issued the predicate findings on the basis of a range of circumstances, including the death of a parent, physical or sexual abuse in the home, lack of access to education or medical care, or inadequate care and supervision.

KIND seeks leave to file the accompanying brief to provide the Court with its expertise gained through its advocacy in SIJS cases in California and in other states, and through its broader mission of ensuring protection for unaccompanied children in the United States. KIND regularly participates as amicus in state and federal courts and before the federal immigration agencies. In California, KIND has been a nongovernmental organization co-sponsor of California legislation addressing child welfare and safety needs, supporting the passage of bills such as AB 1140 (Rivas) in 2021. KIND regularly provides feedback, updates, advocacy, and training to the Judicial Council of California, state court staff and judges, and state legislators and policymakers about California state law matters relating to SIJS. KIND also participates in several statewide and local SIJS working groups for advocates, and contributes to guidance, manuals, and training materials for practitioners and state court judges.

KIND has no interest in or connection to either party in this case. No party or party's counsel authorized the attached amicus curiae brief in whole or in part. Other than KIND, no

person or entity, including any party or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Because KIND believes the accompanying brief would assist the Court in its resolution of the important issues raised by Petitioner's appeal, it respectfully requests this Court's leave to file the attached amicus brief.

Dated: March 21, 2022

Respectfully Submitted,

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PROPOSED *AMICUS CURIAE* BRIEF OF KIDS IN NEED OF DEFENSE (KIND) IN SUPPORT OF PETITIONER

INTRODUCTION

Amicus curiae Kids in Need of Defense ("KIND") submits this brief to provide recommendations on the application of legal standards and other important considerations for California courts when making findings as to abandonment, neglect, and the non-viability of reunification, as contemplated by the federal framework for Special Immigrant Juvenile Status ("SIJS"), 8 U.S.C. § 1101(a)(27)(J). SIJS is a protective status available under federal law to children under 21 who have been abused, neglected, abandoned, or similarly maltreated, and who must demonstrate their eligibility by obtaining certain judicial determinations from a state juvenile court. The Court of Appeal's decision in *S.H.R. v. Rivas* injects uncertainty into the standards and deliberative processes used in the SIJS context, even though California superior courts have relied on these tools for decades in making determinations with respect to child welfare and custody. If the opinion is affirmed, the likely result will be denials of numerous meritorious requests for SIJS findings, thereby foreclosing access to immigration relief to children who rightfully qualify, and denying these vulnerable children safety, stability, and permanency.

This brief addresses three findings of the Court of Appeal that must be reversed. First, the court endorsed a narrow definition of abandonment that requires parental intent to sever the parent-child relationship. But this conception of

abandonment derives from proceedings for the termination of parental rights, a result that is not required when SIJS findings are made. Instead, the Court should instruct lower courts to apply the standards set forth in California Welfare & Institutions Code section 300(g), Family Code section 3402(a), and related case law, providing that a child is abandoned if "left without any provision for support." Such standards more closely align with the state court's role in the SIJS process—"to identify abused, neglected or abandoned [noncitizen] children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country." (*Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1025.)

Second, the analysis of parental neglect below invites California courts to discount parental conduct that is contrary to safety and welfare provisions in the State's Labor and Education Codes. Further, the court appears to propose grafting an additional step onto neglect analysis, suggesting that even after finding that parental conduct constitutes neglect of the child, the finding may be withheld if a judge deems that parent's neglect reasonable under the circumstances. This Court should decline both invitations.

Third, under the Court of Appeal's analysis of whether parental reunification is viable, other calculations displaced the primacy of the child's well-being and best interests. The court viewed the child's departure from a situation of inadequate care and protection as a matter of choice, instead of considering the history of the parents' conduct and its cumulative effects. This

Court should join other high courts in calling for consideration of the history of the parent-child relationship when assessing the viability of reunification.

I. LEGAL FRAMEWORK

Congress created SIJS to provide protection from deportation and a pathway to lawful permanent residency for qualifying immigrant children whose reunification with one or both parents is not viable because of abuse, neglect, abandonment, or a similar reason; and whose return to their country of origin would not be in their best interests. (*See* 8 U.S.C. §§ 1101(a)(27)(J); 1153(b)(4).)

As a prerequisite to petitioning federal immigration authorities for SIJS, a child must obtain a state juvenile court order establishing that: (1) the juvenile is dependent on a juvenile court or placed under the custody of the state or a court-appointed individual or entity; (2) reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and (3) it is not in the juvenile's best interest to return to his or her previous country or parents' previous country. (8 U.S.C. § 1101(a)(27)(J)(i), (ii).) As explained in U.S. Citizenship and Immigration Service ("USCIS") guidance and recognized by California courts, these findings are to be "made under state law." (*See* 6 USCIS Policy Manual at 3:A:1; *see also, e.g.*, Code Civ. Proc. § 155(b)(1)(B)–(C); *O.C. v. Superior Ct.* (2019) 44 Cal.App.5th 76, 83, *as modified* (Jan. 8, 2020) [noting that "[t]hese findings must be made with reference to California law"].) Within this structure, federal authorities

retain the role of adjudicating immigration benefits and refer to the state courts, with their expertise in the arenas of child welfare and family law, for the underlying findings that support eligibility.

Thus, the SIJS statute contemplates that courts in each state will evaluate the child's request for the predicate SIJS findings based on each state's laws, and that the federal agency will look to the state court order to obtain the information needed to determine whether to confer SIJS classification. (*See H.S.P. v. J.K.* (2015) 121 A.3d 849, 860 [state court findings "ensure that USCIS will have sufficient information to apply [the federal SIJS definition] as it sees fit when a juvenile subsequently submits the [juvenile court]'s order to USCIS in support of an application for SIJ status."].)

While this court is not bound by decisions of its sister state courts, California courts have recognized that "[i]t is well settled that decisions of sister state courts are particularly persuasive when those decisions construe similar statutes or a uniform act." (*San Jose Crane & Rigging, Inc. v. Lexington Ins.* Co. (1991) 227 Cal.App.3d 1314, 1321.) Accordingly, this Court's analysis may be informed by considering how other state courts have applied state standards and frameworks in response to requests for the predicate orders envisioned by the SIJS statute.

California Code of Civil Procedure Section 155(a)(1) codifies California state courts' role in making SIJS findings. Specifically, Section 155 grants California superior courts "jurisdiction under California law to make judicial

determinations regarding the custody and care of children within the meaning of the federal [SIJS framework]." SIJS findings "may be made at any point in a proceeding regardless of the division of the superior court or type of proceeding." (Cal. Code Civ. Proc. § 155(a)(2).)

Requests for SIJS findings come before the California courts through the same vehicles used to address the needs of any child in the state who needs relief from abuse, neglect, abandonment, or similar circumstances. Therefore the relevant standards and definitions pertaining to findings of abandonment, neglect, and the non-viability of reunification of a child and parent from California child welfare and family law are the relevant standards and definitions in the context of a request for SIJS findings.

II. THE SUPREME COURT SHOULD CLARIFY THAT A CHILD IS ABANDONED WHEN LEFT WITHOUT PROVISION FOR CARE OR SUPPORT, IRRESPECTIVE OF PARENTAL INTENT.

A finding that reunification is not viable due to abandonment satisfies one requirement for SIJS eligibility. Establishing SIJS eligibility does not require termination of parental rights. Thus, there is no reason for California to require a showing of parental intent to sever for a finding of abandonment when considering a request for SIJS findings—as the Appellate Court below in *S.H.R.* required. By requiring such a showing, the Appellate Court in *S.H.R* imposed a heightened threshold for finding abandonment in California that is not required under any California statutory definitions of

abandonment except in the unique context of terminating parental rights. Accordingly, the Supreme Court should reject the lower court's holding and instead announce that abandonment as described in Family Code Section 3402(a) and Welfare & Institutions Code Section 300(g), and the cases applying them, is the standard more appropriately applied to a request for SIJS findings.

A. California Courts Are Not Required To Evaluate Parental Intent To Make A Finding Of Abandonment In The SIJS Context.

The Appellate Court in *S.H.R.* applied the following definition of abandonment: "an actual desertion, ***accompanied with an intention to entirely sever***, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same." (*Guardianship of S.H.R.*, (2021) 68 Cal.App.5th 563, 572 [emphasis added] [citing *In re Guardianship of Rutherford* (Ct. App. 1961) 188 Cal.App.2d 202, 206 (declining to terminate parental rights of birth mother who rescinded adoption agreement)].) The Appellate Court's reliance on this definition of abandonment, however, was misplaced.

Rutherford involved a controversy between prospective adoptive parents and a birth mother fighting to keep her child after refusing to sign a written consent to the adoption. The court observed that under adoption laws, "temporary acquiescence in the progress of an adoption proceeding . . . would have no finality until a written consent to adoption was signed as prescribed by law." (*Rutherford*, *supra*, 188 Cal.App.2d at 208.) This measure acted to protect biological parents like the mother

in *Rutherford* from an unknowing waiver or renunciation of parental rights.

The history of the *Rutherford* definition of abandonment confirms that it should only apply in the limited context of terminating parental rights. The court in *Rutherford* drew on the century-old case of *In re Snowball's Estate*. There, the court addressed an attempt to terminate a mother's parental rights, where the only evidence of abandonment was that she had been temporarily absent from her children's lives for several periods of time. (*In re Snowball's Est.* (1909) 156 Cal. 240, 244). The court in *Snowball* looked to an even earlier Georgia Supreme Court case that construed abandonment under Georgia's penal code as requiring "an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation, and throw off all obligations growing out of the same." (*Snowball*, *supra*, 156 Cal. at 244 [citing to *Gay v. State* (1898) 105 Ga. 570, 599].) Accordingly, both cases upon which the definition of abandonment in *Rutherford* are based involve circumstances under which a heightened definition of abandonment makes sense—in the termination of parental rights, and in criminal proceedings.

Similarly, in parallel to the definition of abandonment featured in *Rutherford*, only two California statutes impose a heightened standard for a finding of abandonment—unsurprisingly, in the context of terminating parental rights or criminal proceedings. Family Code section 7822—which defines the circumstances under which a proceeding to free a juvenile

from parental custody and control may be brought—imposes a requirement of parental intent, providing in part that a child may be found abandoned if "[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 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." (*See, e.g.*, Family Code § 7822(a)(2).) And in defining criminal abandonment and neglect of a child, Penal Code section 270 imposes a requirement of willfulness. But the same considerations warranting an intent-based definition of abandonment in the criminal or parental-rights contexts are not found in all child-welfare proceedings, and are not implicated in a request for SIJS findings. The reason is apparent—a heightened intent standard for finding abandonment is appropriate in a criminal proceeding, which implicates Constitutional rights with respect to burden of proof and the liberty of the accused, or in a proceeding seeking termination of parental rights, which implicates the fundamental right of parents to raise their children. (*Troxel v. Granville* (2000) 530 U.S. 57, 65 ["[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."].) A showing of intent to abandon or willfulness is therefore not necessary or required under any other California statutory definition of abandonment *except* in the context of terminating parental rights or in criminal proceedings.

Establishing eligibility for SIJS neither requires, nor results in, the permanent termination of parental rights. (*See* 6 USCIS Policy Manual at 2.C.2 ["[A]ctual termination of parental rights is not required."].) Just this month, the Department of Homeland Security codified this principle when it finalized amended SIJS regulations, stating, "[*c*]*onsistent with longstanding practice and policy*, DHS agrees that termination of parental rights is not required for SIJ[S] eligibility and has incorporated this clarification in the final rule." (Dep't of Homeland Security, USCIS, *Final Rule Announcement* (March 8, 2022), federalregister.gov/d/2022-04698 [citing new 8 CFR 204.11(c)(1)(ii), effective Apr. 7, 2022] [emphasis added].) This Court has also concluded that the termination of parental rights is unnecessary in the SIJS context. (*Bianka M. v. Superior Ct.* (2018) 5 Cal.5th 1004, 1021-22.) Accordingly, the heightened requirement of a parental intent to sever parental relations, while necessary when a California court is considering the termination of parental rights or criminal culpability, is unnecessary when a California court is considering whether to grant a motion for SIJS findings. Imposing this unnecessary requirement would inevitably lead to unwarranted denials of SIJS findings.

For example, a parental intent requirement could obscure the analysis of cases in which a child is an orphan whose parents did not intend to abandon the child but have effectively left the child without care or support. Focusing on parental intent also invites questions as to the child's intent, as when the Court of

Appeals in *S.H.R.* contended that there can be no abandonment if a child ostensibly chose to leave the home. (*S.H.R.*, *supra*, 68 Cal.App.5th at 577.) This line of reasoning will lead to the denial of SIJS findings in instances where intolerable conduct by a parent leads a child to flee for safety or seek out other means of support, situations that should properly be viewed as a form of abandonment.[1]

B. Other States' High Courts Interpreting the SIJS Statute Have Endorsed The Use Of Definitions Of Abandonment That Omit A Parental Intent Requirement.

Unnecessary inquiry into parental intent would not only drive unwarranted denials of SIJS relief, but would also make California an outlier among states who have considered whether an intent-based definition used in connection with terminating parental rights is appropriate in the SIJS context.

It is instructive to consider decisions of other jurisdictions that have directly addressed this question. While no two states' definitions of abandonment are exactly alike, the fact that sister courts are deciding what standard should control when making SIJS determinations creates commonality. (*See San Jose Crane & Rigging, Inc. v. Lexington Ins.* Co. (1991) 227 Cal.App.3d 1314, 1321 ["[I]t is well settled that decisions of sister state courts are

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[1] To the extent that state courts may inquire into the motivation behind a child's departure due to questions of whether a parent can benefit from the child's acquisition of status, the INA provides that a child accorded SIJS cannot petition for immigration status for his or her parent. 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

particularly persuasive when those decisions construe similar statutes or a uniform act."].)

In *J.U. v. J.C.P.C.* (D.C. 2018) 176 A.3d 136, the District of Columbia Court of Appeals (the highest court for that jurisdiction) reversed and remanded a decision denying SIJS findings, based in part on the trial court's abandonment analysis. There, the trial court had applied a definition of abandonment drawn from the context of termination of parental rights. (*Id.* at 140-41.) The Court of Appeals found this to be too demanding a standard for "determining whether reunification was not viable due to abandonment." (*Id.* at 142.) The court reasoned that in the SIJS context, "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, i.e., the workability or practicability of a forced reunification of parent with minor, if the minor were to be returned to the home country." (*Id.* at 141.)

A few months later, the District of Columbia Court of Appeals again reversed and remanded a trial court's order denying a motion for SIJS findings. (*Benitez v. Doe* (D.C. 2018) 193 A.3d 134) The Court of Appeal followed the above holding in *J.U. v. J.C.P.C.*, adding that it is not "necessary to prove that the parent . . . intended to abandon the child." (*Id.* at 137-38.) Furthermore, the Court instructed lower courts to bear in mind the circumstances of children in the SIJS context, stating that "Congress established the requirements for SIJS knowing that

those seeking the status would have limited abilities to corroborate testimony with additional evidence." (*Id.* at 139.)

Similarly, in *Romero v. Perez*, (Md. 2019) 205 A.3d 903, Maryland's highest court stated that the "exacting inquiry" appropriate in a termination of parental rights hearing "has no place in an uncontested SIJ status proceeding." (*Id.* at 917.) The Maryland Court of Appeals approvingly cited to and quoted from the District of Columbia decisions above. (*Id.* at 912-13 [citing *J.U. v. J.C.P.C.*, *supra*, 176 A.3d at 141].) The court further emphasized that courts should not "impose insurmountable evidentiary burdens on SIJ[S] petitioners." (*Id.* at 915.)

In *Lopez v. Serbellon Portillo*, (Nev. 2020) 469 P.3d 181, the Nevada Supreme Court also rejected the use of the definition of abandonment applied in the termination of parental rights, stating that "the SIJ[S] findings do not require as high a burden of abandonment because the reunification prong only requires that reunification is not viable, instead of not possible."[2] (*Id.* at 183.) There, the court further stated that

> [w]hile the district court may look to definitions of abandonment that apply in other contexts, we caution district courts to remember that because SIJS 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

[2] The finding that reunification with one or both of the child's parents is not viable is discussed in more detail *infra*, Part IV, but because reunification is assessed in light of abuse, neglect, abandonment, or a similar basis, the two concepts are often discussed in tandem.

> broader than the consideration of whether a parent's abandonment of a child warrants termination of the parent's parental rights. (*Id.* at 185)

California should join these courts in eschewing abandonment definitions that incorporate intent, rather than taking a contrary outlier position.[3] California's child welfare law and family law offer definitions of abandonment that do not require intent, and use of those tests would be consistent with SIJS policy guidance and the opinions of courts in sister states.

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[3] Amicus has identified only one published decision reaching a contrary result, issued in 2010 by a New Jersey trial court that relied in part on an intent-based abandonment standard drawn from the termination of parental rights context in denying a motion for SIJS findings. (*D.C. v. A.B.C.* (N.J. 2010) 8 A.3d 260, 264.) Subsequently, a sister court in New Jersey published a decision acknowledging the standard stated in the termination of parental rights statute, but applying a family law provision that does not contain an intent element. (*In re Minor Child. of J.E.* (N.J. 2013) 74 A.3d 1013, 1020-21, *overruled on other grounds by H.S.P. v. J.K.*, 87 A.3d 255, 266, *rev'd*, (N.J. 2015) 121 A.3d 849.) Courts in other states have reached results consistent with *J.U. v. J.C.P.C.* (*See In re Est. of Nina L. ex rel. Howerton* (Ill. 2015) 41 N.E.3d 930, 936 [noting that a court asked to make SIJS predicate findings need not discern a parent's motivation in abandoning the child]; *In re Erick M.* (Nev. 2012) 820 N.W.2d 639, 647 ["[w]hether an absent parent's parental rights should be terminated is not a factor for obtaining SIJ status"]; *Kitoko v. Salomao* (Vt. 2019) 215 A.3d 698, 708 [same].)

C. California Law Already Recognizes Several Definitions Of Abandonment That Do Not Require A Finding Of Parental Intent And Are The Most Appropriate For Application In The SIJS Context.

Multiple California statutes elaborate on the concept of abandonment. (*See*, *e.g.*, Family Code § 7822, Family Code § 3402(a), Welfare & Institutions Code § 300(g), and Penal Code § 270.) As discussed *supra*, Part II.A, the heightened abandonment standard found in Family Code section 7822 is appropriate because it applies in proceedings for the termination of parental rights. And Penal Code section 270 defines abandonment for purposes of criminal proceedings, making a higher bar appropriate. However, in the SIJS context those fundamental liberty interests are not implicated, so courts should look to California's other abandonment standards that emphasize child welfare over parental intent.

California's Family Code section 3402(a) and Welfare and Institution's Code section 300(g) both offer courts flexibility to provide children with relief from abuse, neglect, abandonment, or similar hardships, consistent with the purpose of the SIJS statute. And both statutes allow for California's courts to determine whether court intervention is warranted based on grounds of abuse, neglect, abandonment, or similar bases. Accordingly, these definitions are consistent with the courts' aims in dependency and custody proceedings, and would better promote the purposes of SIJS than would a definition derived from the termination of parental rights context (and adopted by the Appellate Court in *S.H.R.*) or used in criminal proceedings.

Thus, abandonment as described in sections 3402(a) and 300(g) is the most appropriate standard for making SIJS findings on abandonment.

Family Code Section 3402(a)

Family Code section 3402(a) provides that:

> "Abandoned" means left without provision for reasonable and necessary care or supervision. (Fam. Code § 3402(a).)

Section 3402(a) is part of California's version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), adopted in 1999 and codified in Family Code section 3400 *et seq.* (Fam. Code, §§ 3400-3465, added by Stats. 1999, ch. 867, § 3.) UCCJEA "is the exclusive method of determining the proper forum in custody disputes involving other jurisdictions and governs juvenile dependency proceedings." (*In re R.L.* (2016) 4 Cal.App.5th 125, 136.) Among other circumstances, it may be invoked when a child is alleged to have been abandoned. (*See In re Jorge G.* (2008) 164 Cal.App.4th 125, 132-33 [finding that a child was abandoned by his incarcerated parents under UCCJEA because they could not care for him and, absent court intervention, the child "could be left without any source of protection"].)

This Court has previously recognized the appropriateness of the use of section 3402(a)'s abandonment definition in considering a request for SIJS findings. (*See Bianka M.*, *supra*, 5 Cal.5th at 1015.) The answering brief also acknowledges that section 3402(a) is an appropriate definition, but couples section 3402(a) with the additional element of parental intent to sever

that the Appellate Court adopted from parental termination cases and Family Code section 7822(a). (Answering Brief on the Merits at 53 [ABOM].) As already explained *supra*, Part II.A, this additional element is unnecessary in the SIJS context, and hinders the court's child-protection purpose.

Welfare and Institutions Code Section 300(g)

California Welfare and Institutions Code section 300(g) is also well-suited to requests for SIJS findings. Section 300(g) provides that a child may be found abandoned if any of the following four situations has occurred:

> *The child has been left without any provision for support*; physical custody of the child has been voluntarily surrendered pursuant to [Health and Safety Code provisions]; the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child; or a relative or other adult custodian with whom the child resides or has been left is unwilling or unable to provide care or support for the child, the whereabouts of the parent are unknown, and reasonable efforts to locate the parent have been unsuccessful. (Welf. & Inst. Code § 300(g) [emphasis added].)

Motions for SIJS findings will most frequently fall under the first clause, but the Court of Appeal in *In re E.A.*, (2018) 24 Cal.App.5th 648, explained that "[t]he plain meaning of 'any' in the context of section 300(g) is that dependency jurisdiction may exist if 'any' of the four separate criteria stated in subdivision (g) of that statute are found to exist." (*Id.* at 661.)

California's courts have long recognized that "[d]ependency proceedings must . . . safeguard parents' rights to raise their own children whenever this can be done without prejudice to the welfare of the child." (*In re Aaron S.* (1991) 228 Cal.App.3d 202, 211 [finding section 300(g) did not warrant dependency jurisdiction over the child of an incarcerated father].) Section 300(g) serves that aim while promoting both the state's interest in ensuring the welfare of California's children and the purpose behind the SIJS statute—to provide stability and security to eligible immigrant children through permanent immigration status.

The answering brief contends that S.H.R. would not qualify for abandonment under section 300(g) because another family member cared for him and he thus was never left without provisions for support. (Answering Brief on the Merits at 54 [hereinafter "ABOM"].) However, California courts have made clear that a child may still be found to be abandoned by parents under Section 300(g) even where another family member provides support for the child, so long as one of the four criteria articulated in Section 300(g) has been met. (*In re E.A.* (2018) 24 Cal.App.5th 648, 662.) In other words, the Appellate Court recognized that dependency jurisdiction may exist if "any" of the four separate criteria stated in subdivision (g) of that statute are found to exist. (*Id.* at 661.)

Accordingly, sections 3402(a), 300(g) and the cases interpreting them provide appropriate guidance for adjudicating motions for SIJS findings.

* * *

A definition of abandonment that incorporates parental intent runs contrary to the intended purpose of the SIJS framework, and has been rejected by multiple state supreme courts. This Court should instruct California courts that the definition of abandonment used in *S.H.R.* is not a viable option in making SIJS findings and instead, instruct lower courts to use the definitions in Family Code section 3402(a) or California Welfare & Institutions Code section 300(g), which do *not* require a finding of parental intent.

III. UNDER CALIFORNIA LAW, "NEGLECT" ENCOMPASSES A RANGE OF PARENTAL CONDUCT OR INACTION, WHICH MUST BE CONSIDERED CUMULATIVELY

When neglect is alleged in connection with a request for SIJS findings, courts must apply the broad definitions of neglect supplied by California law. Where neglect is indicated, courts must not second-guess that finding based on rationalizations for the parent's conduct or projections about the child's current and future circumstances.

A. Neglect may be found in a range of defined circumstances, including parental failure to adequately supervise, protect, or provide for a child.

California law describes neglect in several ways, through criminal and civil statutes and decisions. A parent owes their child a duty "to exercise reasonable care, supervision, protection, and control." (Pen. Code, § 272(a)(2).) The Penal Code defines neglect as a parent's "negligent treatment or [ ] maltreatment of

a child . . . under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person." (Pen. Code, § 11165.2.)

In the dependency context neglect "need not amount to criminal negligence." (*See In re Ethan C.* (2012) 54 Cal.4th 610, 637 [holding Welf. and Inst. § 300(f) does not require criminal negligence, which "refers to 'a higher degree of negligence than is required to establish negligent default on a mere civil issue.'" (citation omitted)].)

The Legislature has given California courts jurisdiction to adjudge a child dependent on the court in a range of circumstances including those defined as abuse or neglect. (Welf. & Inst. Code § 300(j).) California's dependency system "is focused on providing 'maximum safety and protection for children' who are currently being abused or neglected or who are at risk of that harm." (*In re R.T.* (2017) 3 Cal.5th 622, 636.) In addition, a declaration of court dependency (or alternatively, a custody placement) may satisfy one of the eligibility requirements for SIJS. (*See* 8 U.S.C. § 1101(a)(27)(J)(i).) Thus, a court providing for the protection and safety of a noncitizen child under section 300 due to neglect (or abuse) may issue orders containing the findings that may allow the child to establish eligibility for SIJS.

Without explicitly differentiating conduct constituting neglect from conduct that may rise to the level of abuse, the

dependency statute supplies multiple provisions defining abuse or neglect, including the following:[4]

- "the failure or inability of the child's parent[5] . . . to adequately supervise or protect the child"[6] (Welf. & Inst. Code § 300(b)(1));
- a parent's "willful or negligent failure" either to "protect the child from the custodian with whom the child has been left" or "to provide the child with adequate food, clothing, shelter, or medical treatment"; (*Ibid*);
- a parent's "inability to provide regular care for the child" due to mental illness, developmental disability, or substance abuse (*Ibid*);
- a parent's failure or inability to protect a child from being sexually trafficked (§ 300(b)(2));
- the failure of a parent, who "knew or reasonably should have known" of a danger to the child of either sexual abuse or an act of cruelty, to "adequately protect" a child from same (§§ 300(d), (i)).

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[4] *See* Welf. & Inst. Code, § 300(j).

[5] While section 300 addresses the conduct of both parents and legal guardians, this discussion focuses on parental conduct, as is relevant in motions for SIJS findings.

[6] The Court of Appeal below focused on this definition of neglect, *S.H.R.*, *supra*, 68 Cal.App.5th at 578, and this Court has also recognized this formulation as a neglect definition, *In re R.T.*, *supra*, 3 Cal.5th at 629.

Under this broad set of provisions, a parent's action, or failure or inability to act, may give rise to a finding of neglect in a range of circumstances.[7]

California decisions likewise reflect the variety of circumstances that may ground a finding of neglect. In some of the examples that follow, parental fault, culpability, or intent to harm the child is present, but this is not a requirement for neglect. For instance, this Court has agreed with the conclusion that "there is ample evidence of neglect, i.e., failure to adequately supervise or protect" where a minor's mother, who had history of substance abuse, "simply 'was not there' for him much of the time." (*In re R.T.*, *supra*, 3 Cal.5th at 628-29 [discussing the application of section 300(b)(1) in *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824].)[8]

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[7] While section 300 and the cases interpreting it help to define neglect, the absence or presence of dependency jurisdiction under section 300 does not automatically signify an absence or presence of neglect, in that dependency jurisdiction may be triggered by abuse or any of the circumstances described in the statute. The statute also specifies further requirements for dependency jurisdiction, such as harm or a substantial risk of harm to the child. (*See generally In re R.T.*, *supra*, 3 Cal.5th at 629-30 [enumerating statutory predicates for dependency jurisdiction and distinguishing among elements such as negligent conduct, intentional or willful conduct, or an absence of culpability].)

[8] While this Court in *R.T.* agreed with the neglect determination made by the *Rocco* court, it held that dependency jurisdiction might lie under section 300 even in the absence of a finding of parental neglect or other culpability, and therefore abrogated the *Rocco* holding that "neglectful conduct" was an "element" of jurisdiction under § 300(b)(1)). (*supra*, 3 Cal.5th at 629.) A requirement postulated in the *Rocco* decision that future harm be

Exposing a child to domestic violence may constitute neglect, including where the child is not the intended target of the violence. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194, *review denied*, *abrogated on other grounds* ["It is clear to this court that domestic violence in the same household where children are living is neglect; it is a failure to protect [children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it."]; *In re Nathan E.*, 61 Cal.App.5th 114, 122-24, (2021), *reh'g denied* (Mar. 12, 2021), *review denied* (June 9, 2021).) Further, neglect has been found in a parent's breach of ordinary care, such as driving without securing an 18-month-old in a safety seat or allowing a three-year-old to leave the home unsupervised. (*In re Ethan C.* (2012) 54 Cal.4th 610, 637 [parent's neglect caused a child's death]; *In re Mia Z.* (2016) 246 Cal.App.4th 883, 891-92 ["In actuality, Mother's neglect was that she allowed her three-year-old child to walk away unattended from the family home, thus exposing her to dangers of all kinds."].) And neglect justified dependency jurisdiction where a parent stored a loaded gun accessible to a child. (*In re Yolanda L.* (2017) 7 Cal.App.5th 987, 993.)

In construing provisions of section 300, this Court has stated that "'neglect' has a commonly understood meaning that is not confined to particularly gross, reckless, or blameworthy carelessness." (*In re Ethan C.* (2012) 54 Cal.4th 610, 627-28.) In

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identified to ground section 300 jurisdiction was later superseded by statute. (*See In re J.K.* (2009) 174 Cal.App.4th 1426, 1436.)

Ethan C., the Court surveyed dictionary definitions of "neglect," including "to fail to attend to sufficiently or properly: not give proper attention or care to" and "failure to give proper attention, supervision, or necessities, esp. to a child, to such an extent that harm results or is likely to result." (*Id.* [quotations and italics omitted] [finding no basis in the statute's multiple subdivisions to infer that "neglect" as used in § 300(f) requires criminal culpability].)

Parents have duties as providers, and when they delegate those duties to their children, that conduct falls within the statute's description of neglect as "willful or negligent failure…to provide the child with adequate food, clothing, shelter, or medical treatment." (Welf. & Inst. Code § 300(b)(1), (j).) This is especially so where, as in S.H.R.'s case, a child must work to fund basic necessities, and does so at risk to the child's safety and at the expense of the child's education. Within its abandonment discussion, the Answering Brief adopts a 'no harm, no foul' approach to this issue, emphasizing that here, the needs of the child and his family "were consistently met" by older siblings and "by [S.H.R.]'s own work." (ABOM at 54.) The Answering Brief urges that the child's parents "[n]ever failed to make arrangements for his care," *ibid*, but overlooks that those arrangements entailed pulling the child from school and relying on him to source his own food, clothing, and necessities. Not only do these circumstances constitute abandonment, as discussed in Section II, but along with the parent's failure or inability to

protect their child, they support a finding of neglect under section 300 and the cases construing it.

B. Conduct contrary to protections for minors in California's Education and Labor Codes must receive significant weight in neglect analysis.

The Court of Appeal found that a violation of California's Labor Code does not necessarily constitute neglect by the child's parents. (*S.H.R.*, *supra*, 68 Cal.App.5th at 578.) But to the extent that standards in the Labor Code, and equally the Education Code, address the safety and well-being of children, it would be incongruous for California courts to give slight weight to conduct contrary to those protective measures when evaluating parental compliance with standards for child treatment. (*Ramos v. Cty. of Madera* (1971) 4 Cal.3d 685, 696 ["The child labor laws, strictly regulating the conditions under which minors may work, are clearly designed to protect minors against the risk of injuries generally associated with child labor, such as overwork and exposure to dangerous, immoral, or unhealthful conditions."].) Further, research links child labor with negative outcomes including "poor growth, malnutrition, higher incidence of infectious and system-specific diseases, behavioral and emotional disorders, and decreased coping efficacy." (Abdalla Ibrahim et al., *Child Labor and Health: A Systematic Literature Review of the Impacts of Child Labor on Child's Health in Low- and Middle-Income Countries* (2019) 41 J. Pub. Health 18.)

The Labor Code forecloses certain hazardous forms of employment to minors based on age.

The Labor Code specifies tasks which may not be performed by minors below a specified age. For instance, manufacturing employment is limited for minors under 16, (Lab. Code § 1290), and certain worksites and occupations are closed to minors under 16, including where poisonous liquids or gases are used, or jobs dangerous "to life or limb" or injurious to health, (Lab. Code § 1294). The Code prohibits certain tasks relating to operating, cleaning, or running machinery for minors under 16, (Lab. Code § 1292, 1293), with further restrictions for those under age 12, (Lab. Code § 1293.1). Particularly relevant here, minors under 12 may not work in, or even accompany an employed parent to, an "agricultural zone of danger," which includes being "in or about unprotected chemicals." (Lab. Code, § 1293.1.) As these provisions illustrate, a Labor Code violation can be powerful evidence of the existence of certain forms of neglect.

Labor and Education Codes mandate school attendance, and regulate working age and hours for minors.

California minors between the ages of six and 18 are required to attend school, with narrow exceptions. (Educ. Code § 48200.) The failure of a parent, guardian, or responsible person to assure a minor's school attendance is an infraction, Educ. Code, § 48293, and may justify court intervention, including declaring the minor a ward of the juvenile court. (*See In re Shinn* (1961) 195 Cal.App.2d 683 [children's habitual truancy warranted juvenile court proceedings and establishing wardship];

Welf. & Inst. Code § 601(b) [habitual truancy as a basis for juvenile court jurisdiction].)

Work permits are limited to children age 12 and over (Educ. Code § 49111.) The Labor and Education Codes together limit the number of hours children may work on school days, according to age. (Educ. Code § 49112; Labor Code § 1391.) Parents or guardians who violate these hour restrictions may be fined or even jailed. (Labor Code § 1391.) The age-dependent regulation of school attendance and working hours traces a connection to child welfare and development. As one court acknowledged, "[f]ailing to attend school regularly not only deprives the children of an education, but also of the social interaction and 'peer relationships necessary for normal growth and development.'" (*In re Janet T.* (2001) 93 Cal.App.4th 377, 388-89 [finding deprivation of schooling "needed immediate correction," although jurisdictional predicate for dependency was not met as risk was not "substantial risk of serious physical harm or illness"].)

When the Court of Appeal in *In re Yolanda* (discussed *supra*) considered the nexus between neglect and gun access, in the absence of California precedent on point, the court reasoned by analogy, and found further support in decisions of other states' courts. (7 Cal.5th at 995-96 [reviewing New York, Ohio, and Florida cases that held unsafe gun storage to be a form of child neglect].) Similarly, this Court may consider a holding by Maryland's highest court, applying a neglect definition comparable to California's to facts strikingly similar to those

alleged here. (*Romero v. Perez*, *supra*, 205 A.3d at 910 [vacating lower court decisions and ordering issuance of SIJS findings].) The court in *Romero* cited Maryland's statutory definition of neglect, which entails leaving a child unattended, or other failure of a parent to give proper care and attention to a child in circumstances indicating harm to the child's health or welfare, or substantial risk thereof—a standard not less demanding than California's. (*Id.* at 917.) Both S.H.R.'s case and the Maryland petition concerned parents who had not provided for the child's basic necessities, instead requiring the child from age 10 to do strenuous agricultural work. (*Id.* at 910, 917.) Both boys described exposure to hazards at work, differing as a matter of detail: S.H.R. was exposed to sunburns, insect bites, and pesticides on the job, while the child in *Romero* endured a wrist injury and poisonous snakes. (*Id.* at 917.) And in each case, working hours interfered with or interrupted the child's education. (*Ibid.*)

In finding that such child labor constituted neglect, the Maryland Court of Appeals held it error to conclude that because the child "worked for his mother and still managed to attend school, no 'Maryland standards' were violated." (*Ibid.*) Given the analogous facts and the similarity of the principles applied, the *Romero* case is powerful argument for California to affirm neglect standards that encompass ill treatment such as compelling inappropriate work at the expense of a basic education.

Another similar case arose in New York, where the court concluded that a mother neglected her child by failing to meet his

educational needs. (*Matter of Dennis X.G.D.V.* (2018) 158 A.D.3d 712, 714-15.) The child was expelled from one school for excessive tardiness. (*Ibid.*) In addition, after the child was assaulted by gang members on his way to school, the mother did not arrange for alternative transportation to school, instead choosing to keep him home. (*Ibid.*) The court further found that the mother neglected her child by leaving him home alone at night, despite the gang presence in their area. (*Ibid.*) Like New York, California should recognize that parent's failure to meet a child's educational needs or to properly supervise the child constitutes neglect.

C. Findings Of Neglect Must Not Be Negated Through A "Reasonableness" Exception

Whether a child has been neglected does not hinge on whether the parental actions or omissions that led to inadequate care were "reasonable," as the Court of Appeal implied. (*See S.H.R.*, *supra*, 68 Cal.App.5th at 578-579.)

Despite recognizing the prohibitions of the California Education Code, the Court of Appeal here reasoned that "whether a decision to pull the child from school constitutes neglect must take into consideration the circumstances surrounding that decision." (*Id.* at 578.) The decision below suggests that *even if* a court infers neglect from the evidence, it should consider whether the neglectful conduct "was, under the circumstances, a reasonable parental decision." (*Ibid.*) But California courts have not created an exception from neglect for "a reasonable parental decision" when a parent fails or is unable to adequately care or

provide for a child. The court in *In re R.T.* expressly rejected the use of such a "moral standpoint" in analyzing whether a parent can provide a child with "proper care and supervision." (*In re R.T.*, *supra*, 3 Cal.5th at 633.) Instead, courts must consider the impact of inadequate care on the child, centered on the child's physical and emotional well-being. (*See* Welf. & Inst. Code § 300.2 ["[T]he purpose of the provisions of this chapter relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm."].) It would defeat the purpose of maximum safety if courts excuse parental acts or inabilities that result in unsafe conditions, inadequate access to necessities, and interrupted education on the basis of "reasonableness" or for want of identifying another option. Neglect analysis instead asks whether a child received adequate supervision, protection, or care.

IV. ASSESSING THE VIABILITY REUNIFICATION WITH A PARENT REQUIRES CONSIDERATION OF THE HISTORY OF THE PARENT-CHILD RELATIONSHIP

A pre-requisite to petitioning USCIS for SIJS is a juvenile court finding that due to abuse, abandonment, neglect, or a similar basis, the child's reunification with one or both parents "is not viable." (8 U.S.C. § 1101(a)(27)(J).) The analysis of this issue below was flawed in several respects, implying that a finding of non-viability is unwarranted unless the same harms of

the past are likely to recur. And the Court of Appeal seems to conclude that reunification *is* viable if a child's age and present circumstances make the child better able to tolerate parental unfitness. By holding that the facts here establish that parental reunification is not viable, the Court would offer needed guidance on the appropriate scope of the reunification inquiry.

A. Past Maltreatment or Its Ongoing Effects May Make Reunification Non-Viable.

In assessing the viability of reunification, courts are not limited to projections about the likelihood of future harm. Courts should consider the history that gave rise to a finding of abuse, abandonment, neglect, or a similar basis; as well as the present-day effects of that history. (*See e.g.*, *In re T.V.* (2013) 217 Cal.App.4th 126, 133 [when determining "whether circumstances at the time of the hearing subject the minor to the [statutorily] defined risk of harm, the court may nevertheless consider past events when determining whether a child presently needs the juvenile court's protection. . . . A parent's past conduct is a good predictor of future behavior."] [citations omitted].)

Research shows that victims of childhood neglect are at increased risk of long-term psychological, biological, and social harms. (*See, e.g.*, Anne Petersen *et al.*, eds., *Consequences of Child Abuse and Neglect*, *in* New Directions in Child Abuse and Neglect Research (2014) 111, 112-13 ["Children who have experienced abuse and neglect are therefore at increased risk for a number of problematic developmental, health, and mental health outcomes . . . . As adults, these children continue to show

increased risk for psychiatric disorders, substance use, serious medical illnesses, and lower economic productivity."]; Michael D. De Bellis, *The Psychobiology of Neglect* (2005) 10 Child Maltreatment 150 [noting the association of child neglect with adverse psychological and educational consequences, and possible connections to adverse brain development].)

Courts should therefore consider that in the aftermath of maltreatment or inadequate care, consequences may include persistent physical or psychological effects on the child, lasting strain on the parent-child relationship, or disruptive effects on a child's development, prolonging a child's vulnerability to further harm.

"Concern for the minor's welfare necessarily requires the court to consider all the information available." (*In re Hadley B.* (2007) 148 Cal.App.4th 1041, 1047 [holding it was error to exclude from consideration allegations that occurred outside the forum county or were previously litigated].) California should therefore join other states in holding that the reunification analysis for SIJS purposes entails consideration of the "entire history of the relationship between the minor and the parent." (*J.U. v. J.C.P.C.*, *supra*, 176 A.3d at 140; *see also Lopez v. Serbellon Portillo, supra*, 469 P.3d at 184; *Kitoko v. Salomao*, *supra*, 215 A.3d at 708; *Romero v. Perez*, supra, 205 A.3d at 915.)

Analysis in the courts below rested in part on an inference that the same harms complained of were not likely to recur. (*See S.H.R.*, *supra*, 68 Cal.App.5th at 572 [explaining that "the Court cannot conclude that those issues will continue to exist" and thus

finding a lack of evidence "that his parents would attempt to compel him to resume [farm] work"].) But a finding that like harms will recur in the future must not be deemed essential for a non-viability finding. (*Eddie E. v. Superior Ct.* (2015) 234 Cal.App.4th 319, 332-33 [denying relief where a child's inability to reunify with mother was due to her death "would be a particularly parsimonious reading of the statute."].) In some cases, a court may find a risk that reunification would expose the child to other potential harms that had been avoided by separation from the parent. (*See, e.g., In re Scarlett V.* (2021) 72 Cal.App.5th 495, 503 [juvenile court found that the father's denials concerning domestic violence that he perpetrated against the mother reflected danger to the child's safety and well-being "if she were returned to her father's custody"].) Likewise, reunification may be non-viable if past harm was particularly egregious, as the Answering Brief notes, (ABOM at 64), or if it would be detrimental to a child thriving in present circumstances.

B. A Change in the Child's Age or Capacities Does Not Preclude a Finding that Reunification is Not Viable.

A finding that reunification is not viable must not be withheld based on supposition that the child's current age would lessen the impact of the parents' alleged conduct. Under the rationale offered by the Court of Appeal, even where a finding of neglect is made, the "childhood experience" of neglect does not make reunification unworkable. The court instead found that, after the passage of time, it was not shown that the child "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." (*S.H.R.*, *supra*, 68 Cal.App.5th at 582.)

This reasoning invites the conclusion that reunification may be deemed viable based not on reason to believe that parental misconduct or deficiency has been corrected, but owing to a child's continuing growth or development – that is, later-acquired maturity, perspective, coping mechanisms, or life skills that would allow the child to better adapt to adverse conditions. (*Ibid* ["[E]ven if his parents' decision constituted neglect at that time, the decision would not render reunification with his parents unworkable now"].) But that is contrary to this Court's teachings: "Whether it was [teenager]'s misbehavior and disobedience, or mother's inability to supervise or protect [teenager] that initiated this cyclical pattern of conflict, does not matter here. The basis for [dependency] jurisdiction . . . is whether the child is at 'substantial risk' of serious physical harm or illness." (*In re R.T.*, *supra*, 3 Cal.5th at 634.) This standard must inform the SIJS viability of reunification standard, considering the design of the program to protect children who seek the status up to age 21 and then extend protection through their adult lives. This Court should clarify that the Court of Appeal's reasoning that a child could generally "age out" from neglect is not a permissible basis for withholding a finding that reunification is not viable.

CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeal's decision and hold that California's courts should apply Family Code section 3402 and Welfare and Institutions Code section 300(g) when analyzing whether a child has been abandoned within the context of SIJS determinations, making parental intent to abandon irrelevant. The Court should restore clarity to neglect analysis in the SIJS context by restoring a primary focus on harm to the child, not on potential rationalizations for past parental conduct. Further, the Court should instruct that analysis of the viability of reunification must be based on the history of the relationship and not on projections of the child's current ability to avoid or withstand similar harms. In doing so, the Court can provide lower courts with clear standards on the application of California law in the SIJS context to appropriately satisfy the objectives of the SIJS statute while also maintaining consistency with interpretations of the SIJS requirements employed in sister states.

Dated: March 21, 2022

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of the Court 8.520(c), I certify that, according to theword-count feature in Microsoft Word, this *Amicus Curiae* Brief contains 7,802 words,including footnotes, but excluding the application and the content identified in rule 8.520(c)(3).

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Executed on March 21, 2022, at Walnut Creek, California.

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Supreme Court of California

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Date

/s/Katharine White

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Yates, Chris (161273)

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