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

OPENING BRIEF ON THE MERITS

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OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

The petition for review stated these issues:

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

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

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

INTRODUCTION

S.H.R. (Saul) appealed after the superior court denied his petition for findings that would allow him to seek "special immigrant juvenile" status from the federal government. This court granted review of the Court of Appeal's decision affirming the denial. Saul is entitled to the findings he requested.

SIJ status creates a pathway to permanent resident status for vulnerable undocumented immigrants under 21 years old. (8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(1) (2021).) Before that status can be granted, however, federal law requires that a *state* court have found "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (8 U.S.C. § 1101(a)(27)(J)(i)) and "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence" (8 U.S.C. § 1101(a)(27)(J)(ii)).[1]

Importantly, the "abuse, neglect, or abandonment" prong of the analysis is determined "under State law" (8 U.S.C. § 1101(a)(27)(J)(i)), not the law of the child's home country. The question for a court when evaluating evidence supporting a

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

SIJ-findings petition thus becomes in essence, is this an acceptable way for a child in California to be treated by their parents?

In Saul's case, the answer should have been a clear "no," based on the evidence that, in Saul's home country of El Salvador, his parents made him do dangerous and debilitating agricultural work starting when he was 10, they forced him to quit school in the ninth grade, and they did not financially support him, instead requiring Saul to support himself.

The superior court reached the contrary result by applying an inapposite rule. Relying on law from dependency cases, the court said the petition "only raises one issue," that being, "Does the poverty of the family, which resulted in Saul being required to leaving [*sic*] school and begin working at an early age, qualify as 'neglect' or 'abuse.' " (AA 162.) The court then concluded that " 'poverty alone' is not a basis for judicial, neglect-based intrusion." (AA 168.)

The Court of Appeal (wrongly) declined to rule whether this was error, but the superior court's reliance on the "poverty alone" rule was misplaced. It comes from cases in which the state seeks to terminate parental rights and is based on the principle that social services should be provided to impoverished parents, rather than just having their children taken away and their rights terminated. But SIJ findings do not terminate any parental rights, nor do they confer authority to order social services in California, let alone in a foreign country.

It is thus no surprise other states' courts have rejected applying termination-of-parental-rights law to SIJ-findings proceedings: "because SIJ findings do not result in the termination of parental rights, the consideration of whether a parent has abandoned a child such that reunification is not viable is broader than the consideration of whether a parent's abandonment of a child warrants termination of the parent's parental rights." (*Lopez v. Serbellon Portillo* (Nev. 2020) 469 P.3d 181, 184–185 (*Lopez*).)

The superior court also erred in refusing to find it would not be in Saul's best interest to return to El Salvador. The court acknowledged "the United States offers Saul greater benefits than those available in El Salvador" (AA 170) and, because Saul had been threatened with lethal gang violence in his home country, it is "probably true" that "it would be safer for [Saul] in the United States" (AA 88). It also said "there are hardships [Saul] will face in his native country (alleged gang issues)," but the court assured that "El Salvador also produces doctors, lawyers, and other professionals who have been able to avoid these pitfalls." (AA 170.) Just because substantial—indeed, life-threatening—obstacles might be overcome by some does not mean requiring Saul to confront those obstacles is in his best interest, or even feasible given his circumstances.

As we also explain, California's Legislature has established a favorable standard for petitions seeking SIJ findings. Section 155, subdivision (b)(1), says that, "[i]f . . . there is evidence to support [SIJ] findings, . . . the court shall issue the order" making

the findings. One Court of Appeal interpreted the language as saying, "if substantial evidence supports the requested SIJ findings, the issuance of the findings is mandatory." (*O.C.*, *supra*, 44 Cal.App.5th at p. 83.) The Court of Appeal in this case disagreed, but a "substantial evidence" standard of review for the superior courts best fits the Legislature's intent.

Regardless of the standard of review that applied in the superior court, however, Saul's evidence established his right to SIJ findings. And the importance of securing those findings cannot be overstated: "the question of a possible return to one's country of origin and the implications of such a move on a child's best interests, as well as the viability of reunification with a parent in that country, are not abstract questions. They will be 'the reality of [these] children's lives' absent a successful application for SIJ status." (*Kitoko v. Salomao* (Vt. 2019) 215 A.3d 698, 708 (*Kitoko*).)

This court should reverse the Court of Appeal's judgment and direct that court to order the superior court to grant Saul the relief he is seeking.

STATEMENT OF THE CASE[2]

A. After years of forced manual labor starting at age 10, lack of financial support, a prematurely terminated education, and threats of gang violence, 16-year-old Saul travels to the United States from El Salvador.

In August 2018, when he was 16 years old, Saul arrived in the United States—undocumented—from El Salvador, his home country. (AA 20, 56, 58.) For over five months, he lived in a Texas shelter operated by the federal Office of Refugee Resettlement (AA 20), a shelter described as a "former Walmart that has been converted into a shelter for approximately 1,500 boys ages 10 to 17." (Romo & Rose, *Administration Cuts Education And Legal Services For Unaccompanied Minors*, NPR (June 5, 2019) <https://www.npr.org/2019/06/05/730082911/administration-cuts-education-and-legal-services-for-unaccompanied-minors> [as of Jan. 18, 2022].)

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

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[2] This statement of the case includes some facts not mentioned in the Court of Appeal's opinion. Saul filed a rehearing petition in that court regarding omissions of facts. (See Cal. Rules of Court, rule 8.500(c)(2).)

responsibility for the first time is focusing on my education." (AA 59.)

As intimated by his "for the first time" statement, Saul's security under Rivas's protection was in contrast to his prior life in El Salvador, where he lived with his parents, a grandfather, and five siblings. (AA 56.)

Starting when he was just 10 years old and continuing until he was 15, Saul's parents sent him into the fields in the summer to work for his grandfather. (AA 56; {AA 130.) A social worker said that Saul described to her "an unsafe working environment that [is] parallel to child abuse and neglect." (AA 130.)}[3]

Under the hot sun for six to seven hours every day {or longer (AA 130)}, Saul said the work left him "completely

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[3] At a hearing on Saul's petition, the superior court stated it was inclined to deny the petition, but allowed Saul's counsel to submit supplemental briefing and "whatever additional documents you want." (AA 90–91.) Included with his supplemental brief as an exhibit was a social worker's six-page psychological evaluation, signed under penalty of perjury. (AA 129–135.) Among other things, the report detailed the social worker's interview with Saul, during which he related additional details about his childhood.

The Court of Appeal declined to consider the evaluation because, the court said, the evaluation "was not authenticated or introduced into evidence." (*Guardianship of S.H.R.* (2021) 68 Cal.App.5th 563, 572, fn. 3 (*S.H.R.*).)

As explained, *post*, the evaluation should be considered. However, because that point could be contested and for the court's convenience, evidence discussed in this brief that is found in the evaluation is {in curly brackets}.

exhausted" (AA 56) {and dehydrated, causing him to shake and experience shortness of breath (AA 130, 132). He also suffered serious sunburns multiple times that made his skin peel and that were difficult to heal due to continued sun exposure. (AA 130.)}

{In the field, Saul used a machete to cut grass and corn. (AA 130.) There was no running water, nor was there a restroom, just a hole in the ground. (*Ibid*.) He was exposed unprotected to pesticides and chemicals, and to snakes, scorpions, chinch bugs, and bees. (*Ibid*.) Many times, insect bites caused painful welts that took three days to heal if he did not rest. (*Ibid*.)}

{Saul's parents sent their young son to work despite being aware of the safety risks. (AA 130.)}

The summertime field work allowed Saul to continue his education, but that ended in the ninth grade when his parents made him quit school and work fulltime. (AA 57.) He said, "This meant I would not be able to graduate from high school, as much as I wanted to." (AA 57; see AA 58 ["I could not go to school in El Salvador and I was forced to work"].) {Further, Saul reported " 'feeling sad and depressed' " because he was " 'obligated to work at an early age.' " (AA 130.)}

{According to Saul, " 'Education was never big in my family for the males, work was a priority. My sisters had the opportunity to go to school and graduate from high school.' " (AA 130.)}

Saul worked because his parents did not support him financially. Instead, they relied on him and his two older sisters

to provide necessities for himself and his family. (AA 56.) Saul said that when he worked in the fields as a young boy, "My grandfather would give me money for my labor which I would use to buy things I needed such as food, clothes, and shoes." (*Ibid*.) Later, when he was working at a car wash, he used earnings "to buy food for [his] parents, grandfather, and younger siblings." (AA 58; {see AA 130 [Saul " 'had to start working' " at age 10 because he " 'had to help financially to buy food for the family' "]; *ibid*. [when he was 14, Saul did construction work for a couple of months because he needed to financially assist his family]}.)

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

The threats continued at his car wash job after he left school. At the car wash, a gang member told him he "would disappear" if he did not pay a "gang tax." (AA 57–58.) Saul explained, "I lived in constant fear that the gang members would return to my work and kidnap or kill me. The gang members have killed many young people in my neighborhood. I know of

three different people who were killed by gang members." (AA 58; {see AA 131}.)

{Gang violence remains a real threat to Saul's safety if he were forced to return to his home country: " 'If I were to return to El Salvador I would have a target on me. When you return from the Unites States, the gangs think you have money and they start harassing and threating [*sic*] you. If I were to try to move to a different city I run the risk of being approached by an opposing gang and being hurt.' " (AA 131; see AA 133 [" 'If I return to El Salvador there is a possibility I might end up dead' "].)}

Saul told his parents he wanted to leave El Salvador "because [he] did not feel safe," but they "insisted [he] stay." (AA 58.) They said it was too dangerous to go. (*Ibid*.) Contrary to his parents' direction, Saul saved money and, without telling them, he left El Salvador in June 2018. (*Ibid*.) He did so to "protect [him]self" because he "did not want to risk losing [his] life" (*ibid*.) {and because he felt a lack of support from his parents (AA 131)}.

{A social worker has diagnosed Saul with "psychological symptoms of Mild Depression and Posttraumatic Stress Disorder (PTSD)," noting that he suffers from "persistent and excessive worry, disturbed sleep, and isolation/avoidance." (AA 131.) She identified the "traumatic events" underlying the PTSD as including Saul's "being force[d] to work at the age of ten, being exposed to environment elements that often caused injury, and his life being threatened by local gang members." (AA 132.)}

{The social worker also reported that Saul "spoke of feeling anger towards his parents due to their expectation for him to work at an early age and limiting his educational opportunities." (AA 132.)}

{Additionally, speaking "as a mandated reporter" (see Pen. Code, § 11165.7, subd. (a)(21)), the social worker said, "if [Saul] would have been in the United States and experience[d] some of the same traumatic events he suffered in El Salvador[,] [t]his would have been classified as child abuse resulting in the local Child Protective Service agency becoming involved to ensure the safety of [Saul]. It would be neglect on behalf of the parents as they knowingly exposed him to hazardous environmental elements and forced him into child labor to help the family financially." (AA 134.)}

{The social worker also stated in her report that Saul "is clear that his quality of life would decline if he were to return to El Salvador permanently. He believes that the lack of employment, increase in violence, lack of protection from the local authorities, would increase symptoms of Depression and possibly exasperate [*sic*] his symptoms of PTSD." (AA 134.)}

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

In September 2019, when he was 17, Saul petitioned the superior court to appoint Rivas as his guardian. (AA 11–13.) Saul's parents both consented to the guardianship, as did Rivas.

(AA 27, 70; see also AA 67–69 [consents by grandfather, grandmother, and two sisters].)

Saul filed his petition for SIJ findings in December, the day after he turned 18. (AA 52.) It claimed neglect and abandonment by his parents made reunification not viable (AA 53), and it included a declaration stating many of the facts set forth above (AA 56–60).

At a hearing, the court first said it would deny the petition for SIJ findings but then acceded to the request by Saul's attorney for additional briefing. (AA 89–90; see *ante*, fn. 3.)

During the hearing, the court said its negative view of the SIJ petition was based on Saul and his family's indigent circumstances in El Salvador: "Where they lived, their poverty breeds two things; a need for family members, including children, to help, and in those kind[s] of environments can lead to violence. But being poor or living in [an] impoverished country is not a basis to grant a SIJS [findings] petition. . . . [P]overty in and of itself is not a basis for the granting of a SIJS [findings] petition." (AA 87.)

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

In its statement of decision, the court said the SIJ petition "only raises one issue for the Court to decide. Does the poverty of the family, which resulted in Saul being required to leaving [*sic*]

school and begin working at an early age, qualify as 'neglect' or 'abuse' under California Code of Civil Procedure, Section 155." (AA 162.) It later concluded, " 'poverty alone' " is not a basis for judicial, neglect-based intrusion: '[I]ndigency, by itself, does not make one an unfit parent.' " (AA 168.)

The court also declined to find that it would not be in Saul's best interest to be returned to El Salvador. In doing so, the court acknowledged that "the United States offers Saul greater benefits than those available in El Salvador" and that "there are hardships [Saul] will face in his native country (alleged gang issues)," but the court offered the assurance that "El Salvador also produces doctors, lawyers, and other professionals who have been able to avoid these pitfalls." (AA 170.)

Saul filed both a writ petition and a notice of appeal, because the appealability of the superior court's order was unclear.[4] The Court of Appeal affirmed.

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[4] After recognizing appellate opinions have differed on the matter, the Court of Appeal held the order is appealable. (*S.H.R.*, *supra*, 68 Cal.App.5th at pp. 573–574.) We agree.

LEGAL ARGUMENT

I. A superior court should make Special Immigrant Juvenile (SIJ) findings if substantial evidence supports them.

A. The Legislature requires superior courts to make SIJ findings "[i]f . . . there is evidence to support those findings."

Federal law protects vulnerable undocumented immigrants who are under 21 years old by providing a procedure for them to attain SIJ status that creates a pathway to make them permanent United States residents. (8 U.S.C. § 1101(a)(27)(J), (b)(1); 8 U.S.C. § 1232(d)(6); 8 C.F.R. § 204.11(c)(1) (2021); see *Bianka M. v. Superior Court* (2018) 5 Cal.5th 1004, 1012–1013 (*Bianka M.*).) Although federal officials determine whether a child should be granted SIJ status, state courts play an indispensable role in the process.

Before the federal government can approve SIJ status, a state court must first, as relevant here, "place[ ] [the child] under the custody of . . . an individual" appointed by the court (8 U.S.C. § 1101(a)(27)(J)(i)) and make two findings: (1) "reunification with 1 or both of the [child's] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" (*ibid.*), and (2) "it would not be in the [child's] best interest to be returned to the [child's] or parent's previous country of nationality or country of last habitual residence" (8 U.S.C. § 1101(a)(27)(J)(ii)). (See *Bianka M.*, *supra*, 5 Cal.5th at p. 1013.)

California's Legislature acted to ensure the state's courts meet their responsibilities to SIJ eligible children. Section 155,

subdivision (a)(1), confirms that superior courts have jurisdiction to make the "judicial determinations" and the "factual findings necessary to enable a child to petition the United States Citizenship and Immigration Services for classification as a special immigrant juvenile." (See *Bianka M.*, *supra*, 5 Cal.5th at p. 1013.)

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

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

The Court of Appeal in this case, however, expressly disagreed with *O.C.* (*S.H.R.*, *supra*, 68 Cal.App.5th at pp. 575–576.) Instead, the court concluded that a petitioner for SIJ findings had the burden "to prove by a preponderance of the evidence" the facts supporting those findings. (*Id.* at p. 576.) The court also held that, on appeal from an adverse superior court ruling, the petitioner must show an "entitle[ment] to the requested findings as a matter of law." (*Ibid.*)

As we show later, the superior court should have granted Saul's petition whether or not section 155 provides for a substantial evidence standard of review. (See *In re Scarlett V.* (2021) 72 Cal.App.5th 495, 502 ["The juvenile court here erred under either interpretation of section 155"].) We now explain, however, why the substantial evidence standard is the best effectuation of the Legislature's intent.

B. A preponderance of the evidence burden of proof does not preclude a substantial evidence standard of review.

It is important to note at the outset a foundational error in the Court of Appeal's reasoning. That court juxtaposed substantial evidence with preponderance of the evidence, finding them mutually exclusive: "we reject S.H.R.'s argument that he needed merely to produce 'substantial evidence' that could support the required findings, and hold that he was required to prove by a preponderance of the evidence the existence of the facts specified in section 155." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 576.) That conclusion is a non sequitur.

"Preponderance of the evidence" is a *burden of proof*. (Evid. Code, §§ 115, 502.) "Substantial evidence," on the other hand, is a *standard of review*. Burdens of proof and standards of review are different things, and one does not negate the other. That point is illustrated by *Conservatorship of O.B.* (2020) 9 Cal.5th 989 (*O.B.*), where this court explained how a substantial evidence review works *in conjunction with*, instead of *taking the place of*, the applicable burden of proof. (See *id.* at pp. 995 ["appellate

review of the sufficiency of the evidence in support of a finding requiring clear and convincing proof must account for the level of confidence this standard demands"], 1010, fn. 7 [disapproving "Court of Appeal decisions that have described the clear and convincing standard as disappearing on appeal"].)

A preponderance of the evidence burden of proof can coexist with a substantial evidence standard of review. Indeed, they should do so in SIJ-finding cases.

When section 155 says SIJ findings are to be made "[i]f . . . there is evidence to support" them, it is specifying a standard of review for the superior court. It does not affect the child's burden of proving the necessary facts by a preponderance of the evidence. Rather, the issue is how a superior court should assess whether the child has satisfied that burden. The superior court should determine whether the child's evidence is legally sufficient—e.g., reasonable, credible, and of solid value—to establish by a preponderance of the evidence the facts needed to support SIJ findings.

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

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

Section 155's plain language itself is a strong indicator that *O.C.*'s holding was right. (See *Smith*, *supra*, 11 Cal.5th at p. 190

[“ ‘ “ ‘ “We first examine the statutory language, giving it a plain and commonsense meaning” ’ ” ’ ”].) The statute provides that “the court *shall* issue the order” making SIJ findings “[*i*]*f* . . . *there is evidence* to support those findings.” (Emphasis added.)

“Ordinarily, the term ‘shall’ is interpreted as mandatory and not permissive.” (*People v. Standish* (2006) 38 Cal.4th 858, 869.) Although regarding a different issue, this court in *Bianka M.* highlighted the compulsory language of section 155, saying the statute “has made clear that a superior court ‘shall’ issue an order containing SIJ findings if there is evidence to support them.” (*Bianka M.*, *supra*, 5 Cal.5th at p. 1025; see *id*. at pp. 1013 [“The statute further provides that superior courts ‘shall issue the order’ if ‘there is evidence to support [SIJ] findings’ ”], 1024 [section 155 “make[s] clear that a court *must* issue findings relevant to SIJ status, if factually supported” (emphasis added)]; see also Legis. Counsel’s Dig., Sen. Bill No. 873 (2013–2014 Reg. Sess.) [bill enacting section 155 “would *require* the superior court to make an order containing the necessary findings . . . if there is evidence to support those findings” (emphasis added)].) All indications are that the Legislature intended “shall” to have its ordinary, mandatory meaning.

If there is a mandatory duty to make SIJ findings, the duty is triggered “[i]f . . . there is evidence to support those findings” (§ 155, subd. (b)(1)). This phrasing indicates the Legislature’s intention to require only a minimum amount of legally significant evidence.

"If . . . there is evidence" sets a low bar. It is meant to favor the child petitioner. If the Legislature did not intend courts to be deferential to the child's evidence, it would have used neutral language, such as, "If an order is requested from the superior court making the necessary findings regarding special immigrant juvenile status pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code, *the court may make* the following findings:" (Modified language italicized.)

At the same time, however, the Legislature did not want courts to forego their analytic duties. Requiring "evidence to support" the findings indicates there must be *substantial* evidence, not just vague, conclusory, or untrustworthy assertions. Evidence does not "support" a finding unless it is substantial. For example, a child simply stating, "I was neglected," without substantiation, or a declaration stating clearly improbable facts, would be insufficient.

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

There is good reason to believe the Legislature intended a substantial evidence standard. It has repeatedly removed obstacles undocumented children might face in seeking the findings necessary to apply for SIJ status.

Of particular relevance in the present case is the rule the Legislature enacted—and later strengthened—to reduce the evidentiary burden in SIJ-findings proceedings. In apparent recognition of the difficulties a child could face in documenting abuse, neglect, or abandonment occurring in a foreign country,

section 155, subdivision (b)(1), from the start provided that the evidence to support findings "may consist of, but is not limited to, a declaration by the child who is the subject of the petition." (Stats. 2014, ch. 685, § 1.) To remove any doubt, the Legislature amended the statute in 2016 to its present phrasing that the evidence can "consist *solely* of, but is not limited to," the child's declaration. (Stats. 2016, ch. 25, § 1, emphasis added.)

Further, the Legislature has given broad jurisdiction to the superior courts to make SIJ findings, and to do so "at any point in a proceeding." (§ 155, subd. (a)(1), (2).) It has made it off limits for a court to consider or comment on a child's motivations in seeking SIJ findings. (§ 155, subd. (b)(2); see *Bianka M.*, *supra*, 5 Cal.5th at p. 1024.) And it has acted to ensure that children between 18 and 21 years old can have a guardian appointed, a necessary prerequisite to SIJ status. (Prob. Code, § 1510.1; see Stats. 2015, ch. 694, § 1 [legislative findings].)

A committee report said language in the 2016 bill "clarifies . . . [¶] . . . [¶] [t]hat *it is in the best interest of the child for a superior court to issue the SIJS factual findings if requested and supported by evidence*." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1603 (2015–2016 Reg. Sess.) as amended June 13, 2016, p. 6, emphasis added.) It also related that section 155 had been enacted two years earlier "*to strengthen protections for immigrant children* by making it clear that all California courts have jurisdiction to make Special Immigrant Juvenile Status (SIJS) findings." (*Ibid.*, emphasis added.)

Given the Legislature's history of, at every turn, easing the procedural path of undocumented children who are requesting SIJ findings, section 155, subdivision (b)(1), should be given its plain and commonsense meaning of requiring no more than substantial evidence to mandate those findings. (See *Presbyterian Camp and Conference Centers, Inc. v. Superior Court* (Dec. 27, 2021, S259850) __ Cal.5th __ [2021 WL 6111380, at p. *10] ["Statutes should be interpreted to be 'consistent with legislative purpose and not evasive thereof' "].)

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

Besides conflating the burden of proof with the standard of review, discussed *ante*, the Court of Appeal's analysis includes other incorrect conclusions.

The appellate court held a substantial evidence standard of review "is inconsistent with the trial court's factfinding task under section 155" because a determination that there is substantial evidence "is not a factual finding at all." (*S.H.R.*, *supra*, 68 Cal.App.5th at pp. 575–576.) Not so.

A superior court's conclusion about whether a child's evidence is substantial is a factual finding. The court is evaluating the quality of the evidence. "Substantial evidence is not any evidence—it must be reasonable in nature, credible, and of solid value." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51; see *O.B.*, *supra*, 9 Cal.5th at p. 1006.) An assessment of the reasonableness, credibility, and value of evidence is an inherently factual determination, albeit one that is circumscribed by design. An example of the absence of fact

finding would be if the Legislature required every petition be granted regardless of the evidence's quality.

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

The Court of Appeal also said "a substantial evidence standard would not satisfy the federal requirement that the state court actually find the required facts." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 576.) This is wrong and does not provide a proper reason for disregarding a substantial evidence standard.

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

<https://www.uscis.gov/book/export/html/68600> [as of January 19, 2022] (USCIS Policy Manual) ["USCIS generally defers to the court on matters of state law and does not go behind the juvenile court order to reweigh evidence and make independent determinations"].) Finally, if the standard the Legislature adopted does not satisfy federal requirements, that initially is a determination for the federal system to make, and, if change is necessary, it is for the Legislature, not the state courts, to revise the standard.

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

II. The Court of Appeal was wrong in requiring Saul to show his entitlement to SIJ findings as a matter of law.

The Court of Appeal adopted an appellate standard of review under which "[w]hen . . . 'the party who had the burden of proof in the [trial] court contends the court erred in making findings against [him], "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." ' " (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 574.) This was unsound for two separate reasons.

First, the evidence Saul presented was undisputed, and "the application of law to undisputed facts ordinarily presents a

legal question that is reviewed de novo" (*Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898, 912; see *O.C.*, *supra*, 44 Cal.App.5th at p. 82 [in a SIJ-findings case, "[o]ur analysis involves the application of law to undisputed facts; accordingly, our review is de novo"]). De novo review is thus appropriate here.

Second, giving deference to a superior court's findings is inappropriate when, as here, the findings are based on erroneous law. (See *Martinez v. Vaziri* (2016) 246 Cal.App.4th 373, 386 [" '[a] discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order' "]; *Dyer v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 161, 174 ["Where the trial court decides the case by employing an incorrect legal analysis, reversal is required regardless of whether substantial evidence supports the judgment"].)

Saul argued, as we explain below, that, among other things, the superior court improperly grounded its refusal to make SIJ findings on the "poverty alone" rule applicable in parental-rights-termination cases. The Court of Appeal did not address the argument. Instead, citing *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18–19, the court said, "We review the court's order, . . . not its reasoning, and may affirm the order if it is correct on any theory of applicable law." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 575, fn. 8.) But the principle stated in *D'Amico* applies only when the lower court's ruling or decision

is " 'itself correct in law' " (*D'Amico*, at p. 19) and here the superior court's ruling was not legally correct.

III. The lower courts applied inappropriate law in reviewing the evidence for purposes of making SIJ findings.

A. The "poverty alone" rule should not prevent SIJ findings for mistreated children who lived in poverty.

The superior court framed the legal question in the present case this way: Saul's petition for SIJ findings "only raises one issue for the Court to decide. Does the poverty of the family, which resulted in Saul being required to leaving [*sic*] school and begin working at an early age, qualify as 'neglect' or 'abuse' under California Code of Civil Procedure, Section 155." (AA 162.) The court then justified not making SIJ findings by stating the law is "clear that 'poverty alone' is not a basis for judicial, neglect-based intrusion: '[I]ndigency, by itself, does not make one an unfit parent.' " (AA 168; see *ibid.* [stating parents' requiring Saul to "leave school and start working to help support himself and the family" is not neglect because, "in actuality, each of these complaints arises from the same root cause—namely, their poverty"].)

The Court of Appeal did not expressly rule on the propriety of the superior court's approach, but its opinion was parallel. The opinion said the superior court could "reasonably infer that, *because his parents were impoverished*, allowing [Saul] to earn money by helping his grandfather in the fields during summers was, under the circumstances, a reasonable parental decision

that enabled the family to provide for [Saul] without interfering with his education." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 578.)

Applying the "poverty alone" rule to withhold SIJ findings, as the superior court did, confuses two different functions: identifying abuse, neglect, or abandonment experienced by the child, and determining what action should be taken in response to those perils after they have been identified.

The "poverty alone" rule comes from cases seeking termination of parental rights. (See, e.g., the cases on which the superior court relied (AA 168): *In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1205 and *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 772.) In that context, the rule may come into play only after a social worker, peace officer, or probation officer has taken a child away from a parent or parents because of alleged harm or potential harm to the child and is applied during various judicial proceedings to determine whether the child should be further detained or made a dependent of the court. (See generally *In re Ethan C.* (2012) 54 Cal.4th 610, 623–626; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 247–250; Welf. & Inst. Code, §§ 305, 306, 307, 315, 319, 325, 355, 360, 366.21, 366.26.)

The rule instructs, "where family bonds are strained by the incidents of poverty, the [social services] department must take steps to assist the family, not simply remove the child and leave the parent on their own to resolve their condition and recover their children." (*In re S.S.* (2020) 55 Cal.App.5th 355, 374; see *ibid.* [" ' "The legislative scheme contemplates immediate and

intensive support services to reunify a family where a dependency disposition removes a child from parental custody" ' "]; regarding provision of services generally, see Welf. & Inst. Code, §§ 319, 361.5.)

A child's petition for SIJ findings leads to a very different type of decision. An order making SIJ findings does not terminate parental rights. Nor does the rationale of the "poverty alone" rule comport with the purpose of SIJ-findings determinations.

First, parental rights are not at stake when a court decides whether to make SIJ findings. The court recognized this in *Bianka M.*, *supra*, 5 Cal.5th at pages 1021–1022, when it stated, "Bianka has . . . simply asked the court to make a finding of fact: that reunification with her alleged father is not viable because of abandonment. *Standing alone, that factual finding carries with it no necessary implications about [her father's] parental rights or responsibilities* beyond what his nonparticipation in the litigation has already demonstrated." (Emphasis added; see *id.* at p. 1022 ["Any decision issued in [the father's] absence could not bind him in any event"].) Indeed, that was one of the reasons this court held a superior court may make SIJ findings without joining the petitioner's parents as parties. (*Bianka M.*, at pp. 1020–1023.)

Other states' courts have emphasized the difference between parental-rights-termination cases and proceedings for SIJ findings. (*Lopez*, *supra*, 469 P.3d at pp. 184–185 ["because SIJ findings do not result in the termination of parental rights, the consideration of whether a parent has abandoned a child such

that reunification is not viable is broader than the consideration of whether a parent's abandonment of a child warrants termination of the parent's parental rights"]; *Romero v. Perez* (Md. 2019) 205 A.3d 903, 912–913 (*Romero*) [SIJ "proceedings do *not* involve any termination of parental rights; they merely entail judicial fact finding about the viability of a forced reunification between a parent and a child"]; *Kitoko*, *supra*, 215 A.3d at p. 708 ["the requested finding would not amount to a termination of father's parental rights"]; *J.U. v. J.C.P.C.* (D.C. 2018) 176 A.3d 136, 141 (*J.U.*) ["the concept of abandonment is being considered not to deprive a parent of custody or to terminate parental rights but rather to assess the impact of the history of the parent's past conduct on the viability . . . of a forced reunification"].)

Nor does the federal government consider a termination of parental rights necessary to establish the nonviability of reunification that is a prerequisite to SIJ status. (USCIS Policy Manual, *supra*, vol. 6, pt. J, ch. 2, § C.2.) Significantly, although SIJ status at one time was predicated on the child being eligible for long-term foster care, Congress eliminated that requirement more than 10 years ago. (See *Bianka M.*, *supra*, 5 Cal.5th at pp. 1012–1013.)

The superior court's task here was to determine whether Saul's reunification with his parents in El Salvador was "not viable due to abuse, neglect, abandonment, or a similar basis found under State law." (8 U.S.C. § 1101(a)(27)(J)(i); see § 155, subd. (b)(1)(B).) It was not asked to terminate his parents' rights, which "is a uniquely serious step — one widely recognized as

ranking 'among the most severe forms of state action' " (*In re A.R.* (2021) 11 Cal.5th 234, 245).

Second, and equally important, the "poverty alone" rule's sine qua non—the provision of services to ameliorate the poverty—is inapplicable to a request for SIJ findings. Making SIJ-findings does not grant a court authority to order services. Even in a related dependency case, if a child's parents live in another country, the poverty and its effects are generally not curable by any services a California court can order. Thus the principle in termination cases that poverty alone is insufficient would not apply because the companion services would be unavailable. (Cf. Welf. & Inst. Code, § 361.5, subd. (e) [limited services might be ordered for deported parents].)[5]

When a social worker initiates a dependency case and parental rights are on the line, a finding that abuse, neglect, or abandonment is being caused by "poverty alone" triggers a responsibility to provide services as an alternative to child removal or to assist with reunification. By contrast, " '[a] state court's role in the SIJ process is . . . simply to identify abused, neglected, or abandoned [undocumented] children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country.' " (*Bianka M.*, *supra*, 5 Cal.5th at p. 1025.)

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[5] If "poverty alone" is the cause of an undocumented child being declared dependent, and the child's parents live in California, services might be available in a dependency matter to attempt to make reunification viable, but that would be due to the underlying dependency proceedings, not the SIJ findings.

Here, according to the courts below, a child who is a victim of abuse, neglect, or abandonment is nonetheless not entitled to SIJ findings if the harm reasonably can be connected to their poverty, despite the absence of mitigating services. That should not be the law.

This court has held a showing of parental fault is not always necessary even when seeking superior court dependency jurisdiction over a child. (*In re R.T.* (2017) 3 Cal.5th 622, 624 [harm or risk of harm to child from parent's failure or inability to adequately supervise or protect the child can be established "without a finding that a parent is at fault or blameworthy"]; see *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1128 ["a finding of parental unfitness . . . is not an invariable constitutional requirement when parental rights are terminated"].)

Parental fault should thus certainly not be required for SIJ findings, which have no legal effect on parental rights. Rather, the focus should be on the harm suffered by the child. Whether or not neglect was intentional, its impact on the child is the same.

If reunification is not viable because an undocumented child has been abused, neglected, or abandoned, the cause of the harm—whether it be parental fault or something else—should be of no concern. The superior court's charge is to evaluate a child's adverse conditions, not to judge the parents.

B. The lower courts erroneously based their rulings in part on the belief that Saul "is no longer a minor."

Saul filed his petition for SIJ findings the day after he turned 18. (AA 52.) The superior court's ruling said, "All of the facts alleged by Saul have dealt with issues that arose while he was a minor. However, he is no longer a minor. As such, the Court cannot conclude that those issues will continue to exist." (AA 169–170; see AA 164 ["Saul, when he first arrived in the United States, was a minor but he is now 19 years old [*sic*: 18 years old]"].) Similarly, the Court of Appeal said it was disregarding the history of Saul's parents' failure to support him in part because of a lack of evidence "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." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 582; see *id*. at p. 581, fn. 13 [reunification is "[a]rguably" not possible because Saul "is, generally, not a minor under the law of either California or El Salvador," but "[w]e will assume arguendo that S.H.R.'s age is not per se an impediment to reunification for purposes of the SIJ law"].)

These analyses disregard federal and state law.

Specifically, Congress has directed that for federal SIJ purposes, Saul is considered a child until he turns 21. (8 U.S.C. § 1101(b)(1); see 8 C.F.R. § 204.11(c)(1) (2021).)

California's Legislature has recognized this and acted to eliminate obstacles to obtaining SIJ findings for those under 21. (Prob. Code, § 1510.1, subd. (d); Stats. 2015, ch. 694, § 1(a)(2).) It has also specifically declared that "many unaccompanied

immigrant youth between 18 and 21 years of age face circumstances identical to those faced by their younger counterparts." (Stats. 2015, ch. 694, § 1(a)(5); see *id.*, § 1(a)(6) [noting "the vulnerability of this class of unaccompanied youth"].)

When ruling on SIJ-findings petitions, courts should not treat children over 18 differently than children under 18. The distinctions in that regard made by the lower courts here were impermissible in light of clear Congressional and California legislative intent.

C. California law, not the law of the child's home country, governs.

In its statement of decision, the superior court suggested it was applying California law, not El Salvador standards. (AA 168.) But that was not reflected at a hearing on Saul's petition. (See, e.g., AA 87 [The court stated, "Where they lived, their poverty breeds two things; a need for family members, including children, to help, and in those kind of environments can lead to violence. But being poor or living in [an] impoverished country is not a basis to grant a SIJS petition."], 90 [Saul "lives in an agrarian or agriculture society, and they need him to work and to put food on the table"].)

In any event, California law provides the appropriate guidelines. Both federal and state law establish that the propriety of SIJ findings is to be determined according to the law that the state court is accustomed to applying—that of the forum state—not the standards of the child's home country.

Section 1101(a)(27)(J)(i) of title 8 of the United States Code requires a declaration that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found *under State law*." (Emphasis added.) Similarly, section 155, subdivision (b)(1)(B) describes one SIJ finding as being that "reunification of the child with one or both of the child's parents was determined not to be viable because of abuse, neglect, abandonment, or a similar basis *pursuant to California law*." (Emphasis added.)

Courts in California and other states read these statutes according to their plain language. For example, the *O.C.* court explained that SIJ findings "must be made with reference to California law." (*O.C.*, *supra*, 44 Cal.App.5th at p. 83.) And as the court noted in *In re Israel O.* (2015) 233 Cal.App.4th 279, 284, " ' " 'The SIJ statute affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests.' " ' "

Other states' case law is even more direct. The New Jersey Supreme Court expressly held that the federal SIJ statute "requires New Jersey courts to apply New Jersey law, and not that of an [undocumented child's] home country, when determining whether a juvenile has been abused, neglected, or abandoned." (*H.S.P. v. J.K.* (N.J. 2015) 121 A.3d 849, 859.)

The rule is the same in Maryland. That state's high court directed, "In rendering SIJ status findings, . . . 'trial judges are to determine whether the child would be considered abused,

neglected, or abandoned under Maryland law without regard to where the child lived' when the mistreatment occurred." (*Romero*, *supra*, 205 A.3d at p. 916.) The court quoted *In re Dany G.* (Md.Ct.Spec.App. 2015) 117 A.3d 650, 657 (*Dany G.*), which explained that, "[i]f Congress's intention was to require knowledge of living conditions in other countries, surely federal immigration judges would have been a far more appropriate selection" to make the predicate findings, rather than "state judges [who] have great expertise in applying these familiar juvenile and family law concepts."

The *Dany G.* court further said, "most importantly, we think that our view is far more consistent with the humanitarian purpose of the federal law. [Citations.] We will not voluntarily select a standard that *automatically* sends a child back to wretched conditions that our state has found to be abusive, neglectful, or to constitute abandonment solely because those conditions are considered acceptable in the child's home country." (*Dany G.*, *supra*, 117 A.3d at p. 657.)

If the lower courts here had before them a California child with a history similar to Saul's, it is difficult to imagine they would overlook significant breaches of California law. Once again, the courts applied the wrong law in reaching their conclusions.

D. The superior court erroneously suggested its role was to determine whether Saul was entitled to SIJ status instead of whether to make findings allowing him to apply for that status.

The very beginning of the superior court's ruling suggested a misunderstanding of its role in the SIJ process. The statement of decision is titled, "Petition for Special Immigrant Juvenile *Status*." (AA 162, emphasis added, boldface omitted; see also AA 89 [at a hearing, the court stated it was "going to deny his status [*sic*] for special immigrant juvenile *status*" (emphasis added)].)

Saul's petition was one for SIJ *findings*, not SIJ *status*. (AA 52.) State courts do not decide eligibility for SIJ status. Only the federal government does that, *after* a state court has made the necessary preliminary SIJ findings. (See *C.J.L.G. v. Barr* (9th Cir. 2019) 923 F.3d 622, 626 ["After obtaining a state court order, the child must obtain the consent of the Secretary of Homeland Security to the granting of SIJ status"].)

This court previously has recognized that a young person's entitlement to SIJ status is solely a federal concern and is of no relevance to a state court's decision whether to make the necessary preliminary findings. Thus, the court explained, " '[a] state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction . . . .' " (*Bianka M.*, *supra*, 5 Cal.5th at p. 1025.)

Moreover, as noted in *Bianka M.*, *supra*, 5 Cal.5th at page 1024, the Legislature has codified a related principle limiting the relevant factors to be considered, providing in section 155,

subdivision (b)(2): "The asserted, purported, or perceived motivation of the child seeking classification as a special immigrant juvenile shall not be admissible in making the findings under this section." (See *Bianka M.*, at p. 1025 ["A child's immigration-related motivations for seeking state court findings bear no necessary relationship to his or her need for relief from a parent's abuse, neglect, or abandonment"].)

IV. This court should decide Saul is entitled to SIJ findings.

A. Congress and the Legislature have provided a broad standard to allow courts flexibility in protecting vulnerable undocumented children.

The superior court concluded it could not find "that Saul *cannot* be reunited with one or both parents because of abuse, abuse [*sic*], abandonment, neglect, or other similar basis under state law." (AA 169, emphasis added; see AA 86, 89 [stating at a hearing that one SIJ requirement is that Saul "*cannot* be reunited with one or both of his parents" (emphasis added)].) The court set the bar too high.

Saul did not need to show that he "cannot" be reunited with his parents. Rather, the statutory test is whether reunification is "not viable." (8 U.S.C. § 1101(a)(27)(J)(i); Code Civ. Proc., § 155, subd. (b)(1)(B).)[6]

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[6] In a different context, this court several times paraphrased the rule as requiring that the child "cannot" reunify with their parents (*Bianka M.*, *supra*, 5 Cal.5th at pp. 1013, 1014, 1021, 1025), but at another time said the test is whether reunification is "not viable" (*id.* at p. 1021). Suffice it to say that the issue of

The difference is significant. California cases and statutes have not established a SIJ-specific standard, but other states' courts, recognizing the difference, have done so, and it is an appropriate and salutary standard that should be applied here.

Maryland's high court held that in SIJ cases in its state, "the terms 'abuse,' 'neglect,' and 'abandonment' should be interpreted broadly when evaluating whether the totality of the circumstances indicates that the minor's reunification with a parent is not viable, i.e., workable or practical, due to prior mistreatment." (*Romero*, *supra*, 205 A.3d at pp. 914–915; see *id.* at p. 917 [criticizing lower court for conducting "an exacting inquiry [that] is appropriate in a Termination of Parental Rights hearing, [but] has no place in an uncontested SIJ status proceeding"].) That principle, the court reasoned, "furthers Congress's intent in creating SIJ status [citation] and is consistent with Maryland's public policy of protecting children." (*Id.* at p. 915.)

Another court has similarly stated, "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." (*B.R.L.F.*, *supra*, 200 A.3d at p. 777.)

The *Romero* court further explained, "In applying this standard [of comprehensive interpretation], [trial] courts should

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whether the standard is impossibility or unviability of reunification was not then before the court.

consider factors such as (1) the lifelong history of the child's relationship with the parent (i.e., is there credible evidence of past mistreatment); (2) the effects that forced reunification might have on the child (i.e., would it impact the child's health, education, or welfare); and (3) the realistic facts on the ground in the child's home country (i.e., would the child be exposed to danger or harm) . . . . This is not an all-encompassing list. Trial courts may consider other factors based on the evidence and testimony before the court, but such factors must relate to the ultimate inquiry of whether reunification is viable." (*Romero*, *supra*, 205 A.3d at p. 915 [expanding on *J.U.*, *supra*, 176 A.3d at pp. 140, 143].) Other courts have followed Maryland's lead. (*Lopez*, *supra*, 469 P.3d at pp. 184–185; *Kitoko*, *supra*, 215 A.3d at p. 708.) This common sense approach, that comports with the overall statutory scheme, should guide California courts as well.

B. The social worker's evaluation should be considered in reviewing the evidence.

Saul's declaration, standing alone, established his entitlement to SIJ findings. However, he also submitted a social worker's detailed evaluation that underscores why Saul meets the statutory standard. (AA 129–135.)

The Court of Appeal said it would not consider the evaluation "[b]ecause it was not authenticated or introduced into evidence." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 572, fn. 3; see *ante*, fn. 3.) The evaluation should not have been ignored.

The superior court never suggested that there was a problem with the evaluation or that it was not being considered.

Thus, Saul did not have an opportunity to address or cure any evidentiary deficiencies (by, for instance, submitting a declaration from the social worker authenticating her evaluation). Moreover, there is no serious doubt that the evaluation is what it purports to be.

When granting leave to submit further briefing, the superior court told Saul's counsel to "file whatever additional documents you want." (AA 91.) The evaluation was signed under penalty of perjury (AA 135), was attached to the permitted supplemental brief as an exhibit (AA 128), and was repeatedly referenced in the brief (AA 104–105, 119, 121).

In the 26 days between the filing of the supplemental brief and the superior court's ruling, the court did not inform Saul the evaluation might be inadmissible because of purported evidentiary flaws. When it did rule, the court, in its statement of decision, acknowledged that the supplemental brief had been filed and, because the ruling did not mention the evaluation one way or the other, it did not say the evaluation was not being considered. (AA 162–163.) Having been invited, filed, and never rejected for any reason, the evaluation was part of the record before the court when it made its ruling.

The first and only objection to the evaluation arose sua sponte in the Court of Appeal's opinion. But the court's action came too late to disqualify the evaluation from consideration. Evidentiary objections must be timely and specific, and that rule "has long been held to bar belated claims that documentary evidence was inadequately authenticated." (*Seibert v. City of San*

Jose (2016) 247 Cal.App.4th 1027, 1057–1058.) Importantly, "[a]pplication of this rule is most appropriate where it appears that a timely objection would have permitted the proponent of the challenged evidence to cure the deficiency." (*Id*. at p. 1058.) Saul never had a chance to cure any purported deficiency.

In addition, " 'a writing can be authenticated by circumstantial evidence and by its contents.' " (*Hart v. Keenan Properties, Inc.* (2020) 9 Cal.5th 442, 450; see *StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 244 [where counsel told court they would present information about client's finances to the court and promptly did so, this was "all the authentication that is required"]; *People v. Gibson* (2001) 90 Cal.App.4th 371, 383 ["Circumstantial evidence, content and location are all valid means of authentication"].) The evaluation's contents and the circumstances of its presentation to the superior court should more than qualify as valid authentication.

Finally, if there were any doubt as to the evaluation's admissibility, it should be resolved in Saul's favor because of the nature of the present proceeding. Section 155 demonstrates the Legislature's intent to eliminate procedural and evidentiary obstacles for children seeking SIJ findings. (See *In re I.C.* (2018) 4 Cal.5th 869, 884 [discussing this court's " 'special evidentiary rules for dependency hearings' "].) The report bolstered Saul's

own declaration, which itself amply supported the making of the necessary findings.[7]

C. The evidence supported a finding that reunification was not viable due to neglect or abandonment.

Saul's evidence should be evaluated under a substantial evidence standard of review and de novo. Even under less favorable standards, however, he has established an entitlement to SIJ findings.

Saul presented strong evidence that "reunification" with his parents "is not viable due to . . . neglect [or] abandonment" (8 U.S.C. § 1101(a)(27)(J)(i); see § 155, subd. (b)(1)(B)). This is especially so when "neglect" and "abandonment" are "interpreted broadly," and when the analysis is "whether the totality of the circumstances indicates that the minor's reunification with a parent is not viable, i.e., workable or practical, due to prior mistreatment." (*Romero*, *supra*, 205 A.3d at pp. 914–915.)

There are several categories of this evidence, any one of which alone is sufficient to require the SIJ finding of the nonviability of reunification because of neglect or abandonment.

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[7] Most child SIJ petitioners do not have the resources to obtain a professional's evaluation. The Legislature implicitly recognized this when it provided that the evidence in support of SIJ findings "may consist *solely of*, but is not limited to, a declaration by the child who is the subject of the petition." (§ 155, subd. (b)(1), emphasis added.)

Forced dangerous child labor

Saul was forced into dangerous manual labor beginning when he was a child of 10. He worked full days in the hot fields, {using a machete, suffering serious sunburn, dehydration}, and exhaustion, and {being exposed to pesticides, snakes, scorpions, and harmful insects—all without running water or toilet facilities}. (AA 56; {AA pp. 130, 132}.) {Saul's injuries from sunburn and bug bites were slow to heal. (AA 130.) And Saul's parents sent him to work despite knowing of the safety risks. (*Ibid.*)}

A child can be declared a dependent of a California juvenile court if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of the child's parent or guardian to adequately supervise or protect the child." (Welf. & Inst. Code, § 300, subd. (b)(1).) Similarly, the Penal Code defines "neglect" as "the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare 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.)

For years, Saul suffered and risked serious physical harm against which his parents continuously and knowingly failed to protect him. In general, California law—the applicable standard here—bans children under 16 from working "[i]n any occupation dangerous to the life or limb, or injurious to the health or morals of the minor." (Lab. Code, § 1294, subd. (h); see *People v. Lara*

(1967) 67 Cal.2d 365, 379 ["labor law . . . provides a detailed statutory scheme for the protection of minors in employment"].) Further, some of the specific conditions Saul endured are themselves independently illegal, like exposure to pesticides (see Lab. Code, § 1293.1, subd. (a)(2) [prohibiting agricultural employment of anyone under 12 "[i]n or about unprotected chemicals"]) and working in fields without toilet and handwashing facilities (see 29 C.F.R. § 1928.110(c)(2) [federal field sanitation standard]; Lab. Code, § 6712, subd. (a)(1) [incorporating federal standard].)

In *Ramos v. County of Madera* (1971) 4 Cal.3d 685, 696, this court found that an "injury allegedly suffered by an 11-year-old [boy], who turned pale, vomited, and was forced to rest for the remainder of the afternoon [during a grape harvest], was exactly the kind of injury sought to be avoided by the child labor laws." Certainly, the harm and threatened harm Saul suffered starting at an even younger age and continuing for years constitute "neglect" for SIJ-finding purposes.

In the SIJ context in particular, the Maryland *Romero* court found that nonviability of reunification requiring a SIJ finding was established by forced labor under dangerous conditions by a child beginning at the age of 10. (*Romero*, *supra*, 205 A.3d at pp. 910, 917.) The court held the mother's action in forcing the child into this dangerous activity satisfied Maryland's statutory definition of "neglect" (*id.* at p. 917), which is much like California's definition. In *Dany G., supra,* 117 A.3d at page 659, the court observed "if a child worked 8 hours a day, 6 days a week

in Maryland under dangerous conditions, a finding of neglect would surely follow," a conclusion approvingly cited in *Romero* (*Romero*, at p. 917).

The Court of Appeal in this case concluded Saul's evidence did not establish neglect because, first, it would not consider the evidence in the social worker's evaluation, and, second, it determined that the superior court could have "reasonably infer[red]" that having Saul work was "a reasonable parental decision" since "his parents were impoverished." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 578 & fn. 10.)

As explained, *ante*, however, neither the social worker's evaluation should be ignored nor does poverty negate neglect in a SIJ-finding proceeding. Saul's declaration alone explained that, beginning as a 10-year-old, he was forced to work under a hot sun for six to seven hours every day, which left him "completely exhausted." (AA 56.) Whether the parents are rich or poor, that is no way to treat a young child. Doing so establishes neglect under California law.

Lack of support

Saul's parents did not financially support him. Rather, it was the other way around. (AA 56, 58.)

A child can be made a dependent of the juvenile court if "[t]he child has been left without any provision for support." (Welf. & Inst. Code, § 300, subd. (g).) The Uniform Child Custody Jurisdiction and Enforcement Act defines "abandoned" as meaning "left without provision for reasonable and necessary care or supervision." (Fam. Code, § 3402, subd. (a); see Fam.

Code, § 3424, subd. (a) [giving California court "temporary emergency jurisdiction" of an "abandoned" child present in the state].)

Saul's declaration established that his circumstances fit these statutory standards. His parents failed to provide him with reasonable and necessary care. Instead, he was required to provide for himself . . . and for his family. Again, as explained, whether these parental failures occurred in circumstances of poverty is not relevant in a SIJ-findings proceeding.

The Court of Appeal's observation that Saul "does not state that his parents had ever left him without provision for his care or supervision" (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 577) is perplexing. Saul's declaration said his mother did not work, his father had been unemployed for a couple of years, and, "My family depends mostly on my older sisters and I [*sic*] to provide money." (AA 56.) He also said he used some of his earnings "to buy food for my parents, grandfather, and younger siblings." (AA 58.) That is a strong showing of a lack of parental support.

The appellate court also concluded there was no "evidence that either parent ever deserted or intended to abandon S.H.R." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 577.) Such evidence is not necessary to show a lack of support. (See *D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, 1128–1129 ["willful" abandonment not necessary to show "child has been left without any provision for support" under Welf. & Inst. Code, § 300, subd. (g)].)

Forced abandonment of education

Saul's parents forced him to leave school in the ninth grade to work. (AA 57–58; {see AA 130}.) The superior court was simply incorrect when it said at a hearing, "I have no evidence that [Saul's parents] denied him any . . . education." (AA 88.)

Under California law, what Saul's parents did was illegal. The Compulsory Education Law provides, with exceptions not relevant here, "Each person between the ages of 6 and 18 years . . . is subject to compulsory full-time education." (Ed. Code, § 48200.) Parents who do not comply with the law are "guilty of an infraction." (Ed. Code, § 48293, subd. (a).)

This court has said, "Courts have long recognized the importance of education to both the individual and to society," and compulsory education laws are "a legitimate means of achieving that objective." (*In re James D.* (1987) 43 Cal.3d 903, 915.) A parent's failure to ensure school attendance is "very serious," "very detrimental" to children, and a circumstance in "need[ ] of immediate correction." (*In re Janet T.* (2001) 93 Cal.App.4th 377, 388.) It might not be a ground to require removal of children from their parents in a dependency case (*id.* at pp. 388–389), but removal and termination of parental rights were not at issue here.

The Court of Appeal stated that the decision to prematurely end Saul's education "appears to have been the most reasonable and prudent action to take" because Saul was threatened with gang violence at school. (*S.H.R.*, *supra*, 68

Cal.App.5th at p. 579.) That inference is insufficient to preclude a neglect finding.

First, it is not at all clear that the parents' action was solely for protective purposes. It is uncontradicted that Saul's leaving school did not stop the threats. The threats continued at his work (AA 58 [e.g., "They found me at school, then at work"]; {AA 131}) and his parents did not make Saul stop working or return him to school. Instead, for him, they valued his work over his schooling. {Saul specifically said, "[e]ducation was never big in my family for the males, work was a priority," which is consistent with the conduct he described. (AA 130.)}

Second, it is doubtful that California law—which is what applies here—allows a termination of education and avoidance of the Compulsory Education Law because of gang threats. Parents can seek alternatives to physical attendance at "public full-time day school" (Ed. Code, § 48200), such as independent study (Ed. Code, § 51745), home schooling (see *Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1099 ["home schools may constitute private schools," students of which are exempt under Ed. Code, § 48222 from the "public full-time day school" requirement]), or instruction by "a [credentialed] private tutor or other person" (Ed. Code, § 48224).

Neglect and abandonment made reunification unviable

The Court of Appeal further held that, even if Saul did establish parental neglect in the past, SIJ findings are inappropriate because he "presented no evidence . . . to support a finding that reunification with his parents is not presently viable

'because of' such neglect." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 581, quoting § 155, subd. (b)(1)(B).) That is both factually inaccurate and too cramped a view of the law in SIJ-findings cases.

A history of past abuse, neglect, or abandonment is essential in assessing the current viability of reunification. As shown, in broadly interpreting "abuse," "neglect," and "abandonment" in SIJ-findings cases, the *Romero* court said that one important factor to consider is "the lifelong history of the child's relationship with the parent (i.e., is there credible evidence of past mistreatment)." (*Romero*, *supra*, 205 A.3d at p. 915; accord, *Lopez*, *supra*, 469 P.3d at pp. 184–185; see *Kitoko*, *supra*, 215 A.3d at p. 708 [courts "assess the impact of the history of the parent's past conduct on the viability . . . of a forced reunification"]; *J.U.*, *supra*, 176 A.3d at p. 140 [request for SIJ findings "calls for a realistic look at . . . the entire history of the relationship between the minor and the parent in the foreign country"].)

The Court of Appeal's approach apparently is to presume that bygones are bygones and to require the immigrant child to affirmatively disprove the presumption. For example, the opinion says the "alleged failure to provide [Saul] with financial support while he lived in El Salvador, even if it constituted neglect, does not prove that reunification is not currently viable" because Saul "does not indicate that his parents' financial situation renders reunification unworkable as a matter of law." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 582.)

This puts too large a burden on children seeking SIJ findings, requiring them to proffer evidence of current conditions in a different country, one in which they no longer reside. Moreover, Saul's evidence demonstrated that his parents had continuously relied on him for financial support for the family, starting at age 10, and by withdrawing him from school to work. There was no reason to assume that it would be any different if he were to return. In section 155, the Legislature intended to lower evidentiary barriers, not to increase them.

To be consistent with the ameliorative intent of federal and state SIJ law, rather than presuming bygones are bygones, and have no bearing on what to expect, a court would do better to assume "The past is never dead. It's not even past" (Faulkner, Requiem for a Nun (1951) p. 92) or "What's past is prologue" (Shakespeare, The Tempest, act II, scene I). In other words, if there is a history of abuse, neglect, or abandonment, the presumption should be that the past mistreatment makes reunification not viable, and only evidence of a reason to assume that there will be a break from the past can rebut this presumption.

In any event, Saul did provide evidence that "the lifelong history" of his relationship with his parents continues to negatively affect him and makes reunification not viable, "i.e., workable or practical, due to prior mistreatment" (*Romero*, *supra*, 205 A.3d at pp. 914–915). {The social worker reported that, during her interview with Saul, he spoke of currently "feeling anger towards his parents due to their expectation for him to

work at an early age and limiting his educational opportunities." (AA 132.) Further, she diagnosed Saul as now having PTSD symptoms caused in part by "being force[d] to work at the age of ten" and "being exposed to environment elements that often caused injury." (*Ibid.*)}

Although no more than substantial evidence should be required, the evidence here is overwhelming that Saul's reunification with his parents is not viable because of neglect and abandonment.

D. The evidence supported a finding that it would not be in Saul's best interest to be returned to El Salvador.

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

In the guardianship context, the first factor a court must consider in determining the best interests of a child is "[t]he health, safety, and welfare of the child." (Fam. Code, § 3011, subd. (a)(1); see Prob. Code, § 1514, subd. (b)(1); Fam. Code, § 3020, subd. (b).) Similarly, the federal government has said that, although "the standards for making best interest determinations may vary between states, . . . [t]he child's safety and well-being are typically the paramount concern." (USCIS Manual, *supra*, vol. 6, pt. J, ch. 2, C.3.)

It is clear that Saul's health, safety, and welfare will suffer significantly by a forced return to El Salvador.

In El Salvador, Saul faced—and would again face on returning—life-threatening gang violence. (AA 57-58; {AA 131}.) The superior court even acknowledged it is "probably true" that "it would be safer for [Saul] in the United States." (AA 88.)

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

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

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

The court downplayed the serious threats to Saul's life. The court called them "*alleged* gang *issues*" and "alleged *requests* to join the gangs (which he resisted)." (AA 170, emphasis added.) The "issues" were not "alleged"; they were established by

uncontradicted evidence, leaving the court's watered-down characterizations without support.

The superior court also said, "while there are hardships [Saul] will face in his native country (alleged gang issues), El Salvador also produces doctors, lawyers, and other professionals who have been able to avoid these pitfalls." (AA 170.) First, these are "anecdotal impressions, untethered to any evidence in this case" that should be disregarded. (*Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 352; see *Eddie E. v. Superior Court* (2015) 234 Cal.App.4th 319, 333.) More important, the court did not—and cannot—explain how facing those "hardships" and "pitfalls," even with a possibility of overcoming them, is in Saul's best interests.

The court further stated it could not conclude that the "issues" Saul encountered before he turned 18 "will continue to exist" now that he "is no longer a minor," and stated, "he is no longer reliant on her [*sic*] parents for a permanent, safe, stable, and loving environment." (AA 169–170.) This confuses the viability-of-reunification prong of the SIJ analysis with the best-interest prong. Also, it ignores that federal and California law both provide that, for SIJ purposes, Saul is considered a child until he turns 21. The best-interest question is broader than whether Saul's parents are responsible for providing him with a positive environment. It is whether his return to El Salvador generally is in his best interest.

Finally, the court said that Saul "speaks the language" in El Salvador, he "lived there for almost his entire life," and "[h]e

has both his parents, siblings, and grandfather still residing there." (AA 170.) While he still has relatives in El Salvador, his two older sisters live in San Francisco, California (AA 16), Spanish is widely spoken in California, and, as demonstrated, there is strong evidence that reunification with Saul's parents is not viable. But putting that aside, even if these are positive factors for returning to El Salvador, they do not outweigh the detriments to Saul's safety and well-being that would accompany his deportation.

If, as the superior court said, it is "probably true" that "it would be safer for [Saul] in the United States" (AA 88) and "the United States offers Saul greater benefits than those available in El Salvador" (AA 170), it cannot be in Saul's best interests to return to El Salvador.

The ruling suggests the superior court disregarded its statutory mandate " 'simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country' " and instead impermissibly focused on " 'determin[ing] worthy candidates for citizenship' " (*Bianka M.*, *supra*, 5 Cal.5th at p. 1025).

E. The superior court's guardianship appointment should be reinstated.

One SIJ status requirement is that the child must have "been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State,

or an individual or entity appointed by a State or juvenile court located in the United States." (8 U.S.C. § 1101(a)(27)(J)(i); see *Eddie E. v. Superior Court* (2013) 223 Cal.App.4th 622, 628 [dependency on a juvenile court "is not the only manner in which petitioner could satisfy the first part of . . . section 1101(a)(27)(J)(i)"].)

The superior court here appointed a guardian for Saul. (AA 92, 96, 99–101.) However, when it denied Saul's SIJ petition two months later, the court also said it was "den[ying] the Guardianship application as moot." (AA 170.) The Court of Appeal agreed the guardianship petition was moot. (*S.H.R.*, *supra*, 68 Cal.App.5th at pp. 582–583.)

The court did not give any notice that it was reconsidering its original guardianship ruling nor did it say it was doing so. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108 [if a court "might want to reconsider [a prior interim] ruling on its own motion . . . it should inform the parties of this concern, solicit briefing, and hold a hearing"].) But because the court should have made the requested SIJ findings, there was no reason to reconsider the guardianship appointment order.

This court should thus direct the superior court to confirm its earlier order granting Saul's petition for appointment of a guardian.

CONCLUSION

Both the superior court and the Court of Appeal made substantial errors in their rulings in this case. A remand to either of those courts for reconsideration in light of this court's correction of those errors would be proper. But it is unnecessary and it could jeopardize Saul's ability to timely apply to the federal government for SIJ status before his 21st birthday in December.

This court thus can and should reverse the Court of Appeal's judgment and direct the Court of Appeal to order the superior court to (re)appoint a guardian for Saul and to make the findings specified in section 155, subdivision (b)(1).

January 28, 2022

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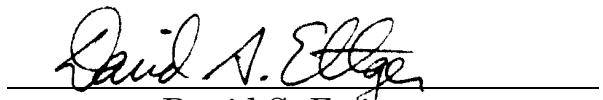
By: 
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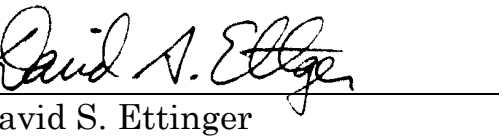

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Guardianship of S.H.R.
Court of Appeal Case No.: B308440
California Supreme Court Case No.: S271265

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/s/David Ettinger

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